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Roger Paul Peters

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CIVIL RIGHTS AND STATE NON-ACTION

*Roger Paul Peters***Introduction*

The failure of the states, taken as a whole, to insure and protect the civil rights¹ of everyone equally, from the earliest days to the present, is an accepted fact. Perhaps the pattern was established by the State of Virginia during the days of the Articles of Confederation. After enacting an elaborate Bill of Rights, this state proceeded to 1) suspend sitting of the courts, 2) twice appoint a dictator, 3) limit the right to vote otherwise than as provided, 4) enact ex post facto legislation, 5) attain a man of high treason, and 6) declare a man's life forfeited without trial.²

More recently, governors of certain states, meeting the particular civil-rights problem of integration, have asserted that there is no higher law than that established by the "majority" (a numerical majority or a numerical minority with a majority of the power?). If the majority want to deny the civil rights of a minority, it is the duty of the governor, by their definition, to effectuate this desire, as if it were the supreme law of the land. Such an approach contradicts a basic principle of our form of government, that there exists a law slightly higher than the desires of the majority. This approach in the states is not new. Concerning the state governments under the Articles of Confederation, Madison concluded: "[M]easures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."³

* Professor of Constitutional Law, Notre Dame Law School, LL.B. New York University. Member of the New York and United States Supreme Court Bars.

¹ It is not the purpose herein to define the civil rights of the individual. An interesting list is contained in the Convention of North Carolina, Declaration of Rights (1788), *THE FEDERALIST* 646 (Ford ed. 1898).

² *THE FEDERALIST* No. 10, at 55 (Ford ed. 1898) (Madison). Activities such as these led Madison to conclude that the operation of state governments under the Articles of Confederation was responsible "for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights. . . ." *Id.* at 55-56.

³ *Id.* at 55.

In comparison with the federal government, the states, again taken as a whole, are more susceptible to corruption on all levels, more likely to heed the wishes of the majority in disregard of law, less able to enforce their laws, and less able to rise above self-interest. We have for a long time by-passed the state governments in favor of the federal government for reasons just such as these. The adoption of the Constitution was such a by-passing. Similarly, and more recently, we have the Mann Act,⁴ the Lindbergh Kidnapping Act,⁵ and the Interstate Transportation of Stolen Vehicles Act,⁶ as examples of a turning to the federal government because of the state's failure to provide desired results. Furthermore, today the federal government rather than the state government is expected to control overlords of organized crime.

These by-passings of the states in favor of the federal government establish a pattern which is perhaps descriptive of what the relationship between the state and federal governments should be. If the end to be achieved by government is within the capabilities of the states, responsibility for achieving that end should remain with them. But when a state fails or refuses to fulfill this responsibility, it devolves upon the federal government either to force the state to fulfill its responsibility or to achieve the particular end itself.

That the securing of civil rights is an end to be achieved by government, was early recognized in the Declaration of Independence. It is within the capabilities of the states to achieve this end, but if a state fails or refuses to fulfill this responsibility, it devolves upon the federal government to either force the state to secure the civil rights of the individual or to secure these rights itself. Only by such a system as this would the civil rights of an individual be completely secured as far as possible under our system of government.

Congressional civil rights legislation of some sort is a certainty. The continuous failure of the states to secure the civil rights of individuals will eventually result in a complete turning to the federal government for a solution. This immediately raises serious constitutional problems if Congress is to produce an effective solution. Do *Barron v. Baltimore*,⁷ the *Slaughter-House Cases*,⁸ and the *Civil Rights Cases*⁹ correctly define the basic limitations of congressional action, or does our Constitution establish the type of system described previously? These are the questions to be explored in this article.

I. BARRON V. BALTIMORE

Legal protection — the maintenance of a certain degree of order in the community — was enjoyed by inhabitants of the thirteen colonies that became the original United States of America. Dissatisfaction with oppressive measures on the part of the legally constituted authorities, with King and

⁴ 18 U.S.C. § 2421 (1952).

⁵ 18 U.S.C. § 1201 (1952).

⁶ 18 U.S.C. § 2312 (1952).

⁷ 32 U.S. (7 Pet.) 153 (1833).

⁸ 83 U.S. (16 Wall.) 36 (1872).

⁹ 109 U.S. 3 (1883).

Parliament at the summit, led to the demand for independence, the successful Revolution, the establishment of the United States, and the more perfect union of 1787-89. Having won freedom from tyranny, the people of the new nation were determined not to suffer the new national government to develop into an instrument for curtailing dearly bought liberty. To that end, a Bill of Rights was adopted almost contemporaneously with the new Constitution. It seems to have been the general belief at the time of the adoption of the Bill of Rights that such safeguards were necessary primarily as a warning to, or a restraint on, Congress and the national government with little, if any, concern being felt about the necessity or desirability of having similar restraints expressed in the national Constitution with respect to the state governments. There appears to have been a pervading sentiment that the people of each state could readily see to it that the government of the states be kept in check. Such protection for the inhabitants of each state against their local government as was felt to be necessary had already been provided for in Article I, section 10 of the Constitution. These are the provisions prohibiting ex post facto laws, bills of attainder, laws impairing the obligation of contracts, and forbidding duties on imports and exports.

Such in brief is the orthodox view of the position of constitutional guarantees of fundamental human rights. This view received the approval of the Supreme Court in 1833 when *Barron v. Baltimore*¹⁰ was decided. The Court held that action by a municipality was not governed by that provision of the fifth amendment which forbids the taking of property for public use without just compensation. The great Chief Justice, speaking for the Court, stated that the first eight amendments, the Bill of Rights we hear so much about, do not apply to the States or their instrumentalities. The Court has never departed from this view. No matter how often the Court has revised and even overruled previous doctrines and decisions this marvelous holding has ever remained a fixed star in the constitutional firmament. The soundness of the holding on the basis of reason and authority has been widely accepted. Reason in this connection embraces traditional political theories concerning the role of the states in the Union as well as construction of the language of the Constitution, particularly Article I, section 10, which expressly refers to the states, and the first eight amendments which do not. Authority embraces a history of the adoption of the amendments. Yet doubts about the soundness of *Barron v. Baltimore* persist.¹¹ Even at this late date the holding seems incredible to many until they are shown the report of the case. To the vast majority of Americans the holding is unknown. After having had the eulogies of the Bill of Rights dinned in their ears by orators, pundits, lawyers, bar association committees, and the like, they would be amazed to discover that this wonderful Bill of Rights does not apply to their state governments.

The people of Alaska have been lately celebrating their great good fortune in having been admitted as a state of the Union. Henceforth, the voter in Alaska or Hawaii (presumably soon to be admitted) can vote for

10 32 U.S. (7 Pet.) 153 (1833).

11 2 CROSSKEY, POLITICS AND THE CONSTITUTION 1056-82 (1953).

senators and representatives, he can vote for a governor and for the presidential electors. Politicians throughout the United States will now have to take Alaskans and Hawaiians into account in their calculations about measures in Congress as well as about presidential elections. Alaska and Hawaii will be guaranteed a republican form of government. Their legislatures will be restrained by Article I, section 10 of the Constitution. All sorts of benefits will accrue — but no longer will their legislatures be restrained by the Bill of Rights in the United States Constitution. If Alaskans and Hawaiians want a Bill of Rights, they will have to do what state citizens before them have done — see to it that there is a Bill of Rights in the state constitution and get it observed if they can.

Our American Bill of Rights was adopted long before the parliamentary reform of 1832 in England when rotten boroughs were abolished. The gerrymander, however, appeared early in our history and conditions in some of our states today approach the rotten borough system of abuses. Georgia is most notorious in this respect.¹² The up-state and down-state inequities in New York and Illinois are well known. The failure of Indiana to redistrict by its own legislature, in contemptuous disregard of the state constitution, has recently been brought to public notice.

Contrary to the expectations of the old Jeffersonians, representatives from rural areas have tended in recent times to show little regard for human rights. Whatever the causes may be, the fact remains that the individual human being — without regard to his station in life — has discovered again and again that he is more apt to receive decent equality of treatment from federal officers than from local functionaries.¹³ Local tyrannies are exercised. Powerful men at the local level find their power ineffective on the broader national plane.

Barron v. Baltimore ruled that the rights specified in the first eight amendments are guaranteed only against federal action. The first amendment, of course, in terms forbids only action by Congress, but the other amendments are not in terms so limited. The teaching of *Barron v. Baltimore* is that since the words "no state shall" or similar words do not appear in the amendments, protection on the state level is not guaranteed by the amendments. This doctrine is a product of strict construction and not one in the interest of freedom of individual persons.¹⁴ Every man, woman and child in every state with a

¹² *South v. Peters*, 339 U.S. 276 (1950). See also *Magraw v. Donovan*, 163 F. Supp. 184 (D.C. Minn. 1958).

¹³ Mr. Justice Jackson apparently felt differently.

Courts can protect the innocent against [illegal searches and seizures] only indirectly and through the medium of excluding evidence. . . . Federal courts have used this method of enforcement of the [Fourth] Amendment, . . . although many state courts do not. This inconsistency does not disturb me, for local excesses or invasions of liberty are more amenable to political correction . . . [A]ny really dangerous threat to the general liberties of the people can only come from [the federal government]. (Emphasis added.)

Brinegar v. United States, 338 U.S. 160, 181 (1949) (dissenting opinion).

¹⁴ Mr. Justice Frankfurter in speaking of the fifth amendment privilege against self-incrimination stated: "This constitutional protection must not be interpreted in a hostile or niggardly spirit." *Ullmann v. United States*, 350 U.S. 422, 426 (1955). Contrast the language in *Ullmann* typically used in referring to federal infringement of individual rights with the language of Mr. Justice Jackson in note 13, *supra*, where only state infringement was involved.

republican form of government is left at the mercy of the governing group in the state insofar as the Bill of Rights is concerned.

Professor Crosskey has pointed out, to the disgust of the orthodox, that the Bill of Rights by its terms specifies standards of governmental action and that the failure to observe them was believed to be a great evil.¹⁵ It was so at the time of the adoption of the amendments, probably almost universally. It is so believed by many today with regard to most of the standards specified therein. If violations of the standards are grave evils and forbidden to the national government, why are not violations by local and state governments equally grave?¹⁶ Crosskey points out that the language of the first amendment that "Congress shall make no law respecting an establishment or religion," means what it says and only what it says. Congress may not legislate on this matter at all, but the states may. The first amendment is clearly addressed to congressional powers only. The remaining language of the amendment, "or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances," also, Crosskey explains, clearly forbids Congress to prohibit the free exercise of religion, but does not forbid the states to do so. The same can be said about freedom of speech, that is, Congress may not abridge it, but the states may. And so forth. But, and here is the matter that is frequently overlooked, Congress is not forbidden to *protect* the free exercise of religion, the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the government for a redress of grievances. Indeed, Congress should be able to control the states in these matters without in any way violating the Bill of Rights. Congressional legislation could be held to be authorized by a combination of the Bill of Rights and the "necessary and proper" clause of Article I, section 8 of the Constitution.

It should be noted that *Barron v. Baltimore* came down in 1833, long after the adoption of the Bill of Rights, in an era when elements disruptive of the Union were increasing in virulence. In the succeeding generation those same elements brought on our bitter Civil War. Crosskey indicates several statements of judges and commentators on the Constitution which make clear that many believed (as the unlearned today no doubt still believe) that the Bill of Rights, except the first amendment, applied to the states.¹⁷ It is also worthy of note that a provision guaranteeing trial by jury in criminal cases is contained in Article III of the Constitution, relating to the judicial powers of the United States. Why was this guarantee repeated in the Bill of Rights, Article VI? It can readily be seen that the repetition of this provision might well be interpreted as having a wider application in the Bill of Rights, namely, to the states as well as to the federal courts.

¹⁵ Madison referred to these rights as the "great rights of mankind to be secured under this constitution," not simply federal rights. SMITH AND MURPHY, *LIBERTY AND JUSTICE* 81(1958) (Madison's Speech to Congress, June 8, 1789).

¹⁶ 2 CROSSKEY, *op. cit. supra* note 11, at 1056-82.

¹⁷ *Id.* at 1076.

Recently the futility of further investigation into the matters discussed in this article has been alluded to by a judicious writer on the right to counsel.¹⁸ It is submitted, that even though little that is new or important is likely to be discovered by further investigation, it seems salutary to remind the bar and inform the public that the great pillars of constitutional law discussed herein are not altogether worthy of unstinted praise and approbation and may soon be ripe for being distinguished into the constitutional limbo of *Lochner v. New York*,¹⁹ *Allgeyer v. Louisiana*,²⁰ the *Child Labor Tax Case*,²¹ or even into the pit of oblivion of *Plessy v. Ferguson*,²² *Dred Scott v. Sandford*,²³ the great income tax case²⁴ and the like.

II. THE SLAUGHTER-HOUSE CASES

A discussion of the *Slaughter-House Cases*²⁵ is undertaken here for the purpose of examining the concept of state action as a limitation on the power of Congress. In this case, decided in 1872, the Supreme Court was being called upon for the first time to give judicial construction to the fourteenth amendment which had been ratified in 1868. The issue before the Court was whether the legislature of Louisiana had the constitutional power to create an exclusive franchise in one corporation to maintain the slaughter house facilities for all butchering in the city of New Orleans. The plaintiffs objected to such action on the grounds that the sanitation reasons advanced in justification were a pretense for creating a state-favored monopoly which would violate the natural rights of butchers to pursue their profession. Such rights, it was contended, were privileges and immunities of federal citizenship, which could not now be abridged by state law because of the adoption of the fourteenth amendment. In a five-four decision, the Court rejected this argument by holding that privileges and immunities of federal citizenship was a separate category from privileges and immunities of state citizenship. Each class encompassed only those rights which were in fundamental relationship to the modifier "federal" or "state." Pursuit of a profession was within a citizen's state rights, not federal; therefore, any abridgement of this right by the state would not be an abridgement of the privileges and immunities of national citizenship. National citizenship protected things in the nature of freedom to travel among the states,²⁶ rights to petition the federal government, protection on the high seas, habeas corpus and other enumerated rights.

The dissents asserted²⁷ that the privileges and immunities of federal citizenship was a much broader category, including within it the funda-

18 Rackow, *The Right to Counsel — Time for Recognition under the Due Process Clause*, 10 W. RES. L. REV. 216, n.2 (1959).

19 198 U.S. 45 (1905).

20 165 U.S. 578 (1897).

21 259 U.S. 20 (1922).

22 163 U.S. 537 (1896).

23 60 U.S. (19 How.) 393 (1857).

24 *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895).

25 83 U.S. (16 Wall.) 36 (1872).

26 *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867), had been decided prior to the fourteenth amendment and had struck down a state law attempting to charge travelers for the privilege of passing through the state because it would interfere with the rights of the federal government.

27 83 U.S. (16 Wall.) 36 at 83, 111, 124 (1872).

mental rights of state citizens in their relation to state governments. The right of a state citizen not to have the state abridge his fundamental rights against the state was of itself a privilege and immunity of federal citizenship. The right to follow one's profession freely without the state interference of favoritism to special groups was such a right and therefore could not be abridged by state law.

These, then, were the first views taken of the privileges and immunities of national citizenship by the Supreme Court. And though the majority view became firmly established as a fundamental canon from which the vast store of fourteenth-amendment jurisprudence flows, some persist to question the validity of the decision, notably Justice Black.²⁸ The case has become identified with the issue of whether the fourteenth amendment "incorporates" the first eight amendments, and an examination of the views of Professor Fairman against those of Professor Crosskey on this question²⁹ gives some idea of the conflicting theories of history that may be applied in an historical evaluation of the *Slaughter-House* decision.

Some of the salient issues with which this controversy is concerned reveal the tremendous scope and importance of the *Slaughter-House* decision in our constitutional history. The question of whether the Framers of the first eight amendments originally intended that the rights contained in these amendments should be protected against infringement by only the national government and not the states is the beginning of the controversy. To Fairman, the decision in *Barron v. Baltimore* enunciates the true constitutional will of the people. Consequently, the legislative history of the fourteenth amendment is to be interpreted in this light. Crosskey, on the other hand, concludes that the decision in *Barron v. Baltimore* was incorrect. He further concludes that the most obvious intent shown in the legislative history of the fourteenth amendment was an intent to do away with *Barron v. Baltimore*.

In light of these two interpretations of history, it is relatively simple, then, to see the two opposing definitions that could be given to the privileges and immunities clause. The words of the original draftsman speaking of the fourteenth amendment have this to say:

[T]he proposed amendment does not impose upon any state of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the letter of the Constitution.³⁰

Allowing Fairman to project his own psychological satisfaction with the prior constitutional history into this speaker, the resulting statement says the fourteenth amendment is a truism, as the court did indeed interpret it. Allowing Crosskey to interject his dissatisfaction, the statement becomes an obvious attempt to overthrow *Barron v. Baltimore*.

28 See dissent in *Adamson v. California*, 332 U.S. 46, 71 (1947), and more recently, citing that dissent, *Bartkus v. Illinois*, 359 U.S. 121, 150 (1959) (dissenting opinion).

29 Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949); Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); and Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954).

30 CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1865-66).

The period subsequent to the adoption of the fourteenth amendment by Congress again provides the battleground for their opposing inferences. Fairman asserts that the failure of states to consider that many of their procedures were then in conflict with the first eight amendments, and the failure of lawyers to assert such arguments in court,³¹ are clear indications that the clause was not intended to have such a broad effect, whereas Crosskey discounts these instances as oversights of negligible importance when balanced against the view expressed by the contemporary Congress in its passage of the civil rights legislation.

Fairman has on his side the tremendous weight of judicial history subsequent to the *Slaughter-House Cases*, which has always re-affirmed its holding, while Crosskey's position finds its strength in the inference that the privileges and immunities clause, if the heart of the fourteenth amendment, certainly was intended to have a greater effect than the cipher to which it was reduced. The controversy here outlined, however, takes place wholly within the area of what is protected against positive state action, since the clause is prefaced "No state shall make or enforce any law. . . ." Part of the question becomes moot since the subsequent enlargement of the due process clause to include "fundamental personal rights and liberties"³² has resulted in the inclusion of much of what the dissenters in the *Slaughter-House Cases* would include as things "which of right belong to citizens of all free governments"³³ in the privileges and immunities clause.

As to the concept of state action, however, the *Slaughter-House Cases* remain relevant in two respects: 1) Insofar as it made the due process and equal protection clauses of the fourteenth amendment bear the burden of what was intended to be covered by the privileges and immunities clause, the decision destroyed any vitality the equal protection clause might have had by contrast with a "proper" interpretation of the privileges and immunities clause. 2) This decision implied some basic assumptions that were later to become dogmatic in the subsequent cases defining the limitations of congressional power over civil rights.

Relevant to the second point are the statements by Mr. Justice Miller in the *Slaughter-House Cases* implying that any other interpretation of the privileges and immunities than his interpretation, would grant Congress complete control over state legislation. Thus, he asks:

[W]as it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the

³¹ See note 95 *infra*.

³² "For present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

³³ 83 U.S. (16 Wall.) at 97.

States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction . . . would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. . . . But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; . . . the argument [that such was not the intent] has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.³⁴

It would seem that Mr. Justice Miller's argument, and that of Mr. Fairman, are founded in reasoning that because the privileges and immunities clause was poorly drafted to allow for two extremely divergent views as to its meaning, the Court should choose that interpretation most consistent with the existing state-federal structure. However, if we examine the results of subsequent judicial history under the fourteenth amendment and observe the great supervisory power of the Supreme Court that has subsequently developed over state legislatures through the medium of due process, and if we assume further that such was the intent of the framers of the fourteenth amendment, then the intent we discover in retrospect today is certainly at odds with much of what Mr. Justice Miller concluded could not be the intent without further clarity.

First, his assumption that if a broad meaning were given to the privileges and immunities clause, the Supreme Court would then have the "authority to nullify such [state legislation] as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment"³⁵ is spurious in its import that as a result, a natural law-laissez faire system of rights would be frozen into the Constitution under which state legislatures could make no new laws nor change old ones.³⁶ For in reflecting on the Supreme Court's ability to collapse generalities under the force of social pressures,³⁷ the privileges and immunities "in their nature, fundamental; which belong of right to citizens of all free governments"³⁸ could have been made to give way before the future surge of social legislation just as easily as "the fundamental rights and liberties protected by the due process clause."³⁹

Secondly, Mr. Justice Miller's repugnance to the general idea of the Supreme Court as a "perpetual censor upon all legislation of the states" has not proved to be an inherited characteristic of his judicial descendants in

³⁴ *Id.* at 77-78.

³⁵ *Id.* at 78.

³⁶ See FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890, at 180-81 (1939), setting forth opposing counsels' views on the affect of a broad interpretation of privileges and immunities.

³⁷ *E.g.*, *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), holding that a mortgage moratorium law did not impair the obligation of contracts.

³⁸ *Corfield v. Coryell*, 6 Fed. Cas. 546, 551 (No. 3,230) (C.C. E.D. Pa. 1823).

³⁹ *Gidlow v. New York*, 268 U.S. 652, 666 (1925).

terms of the power they have seen fit to wield over state legislation, except when judicial humility prompts them to refrain from scrutinizing too closely.

Thirdly, his concept of what is within the state legislative power "in their most ordinary and usual functions" as against the scope of the federal legislative power, has undergone a tremendous displacement of power through other clauses of the constitution, most notably taxation⁴⁰ and commerce,⁴¹ bringing with it new concepts of concurrent state-federal legislative jurisdiction unknown in 1872.⁴²

If we were allowed to give Mr. Justice Miller an insight retrospectively into what the dormant "intent" of the whole Constitution would come to mean as to the proper balance between state and federal power, would he be equally as willing today to say in affirming his argument for a narrow construction of privileges and immunities that:

The argument we admit is not always the most conclusive which is drawn from consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; . . . when in fact [the effect] radically changes the whole theory of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.⁴³

Such an analysis may be an argument for, or an argument against, or no argument at all that the *Slaughter-House Cases* were wrong in their inception since it is a dubious method of constitutional jurisprudence to reconstruct the framers' intent in history by imputing to them knowledge of what later courts would declare the whole intent of the Constitution to have been. But it is significant insofar as Mr. Justice Miller did not refer to the legislative history of the fourteenth amendment to find this intention but relied squarely upon his interpretation of what the federal-state structure was in making a choice between two definitions. For the resulting definition of privileges and immunities based upon the state-federal structure, should then be subject to as much change as the state-federal relationship has undergone. The anomaly remains, that in construing the Constitution as a living, organic whole, the privileges and immunities clause has been discarded as lifeless, when in reality, even without saying *Slaughter-House* was wrong, there should be principles of life remaining which are as yet undeveloped.⁴⁴

⁴⁰ E.g., *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937) (sustaining the Social Security Act of 1935).

⁴¹ E.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (sustaining the Agricultural Adjustment Act).

⁴² E.g., *Compare United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533 (1944), with *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946), where after the Court held the business of insurance to be interstate commerce, Congress successfully ceded its power to the states.

⁴³ 83 U.S. (16 Wall.) at 78.

⁴⁴ In this connection, it is interesting to note the comment of Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1346-47 (1952), concerning the possible application of § 241 of the Civil Rights Act (making it a crime to interfere with a citizen's exercise of his privileges and immunities) to interference with rights created under various pieces of federal legislation. See KONVITZ, *THE CONSTITUTION AND CIVIL RIGHTS* 44-45 (1947).

The fact that the state-federal structure has changed and grown in complexity is also directly relevant to the concept of state action that the *Slaughter-House Cases* engendered. First of all, the contentions in the case represented two polar extremes, with no indication being made that there was in fact a great middle ground of decision both as to the Supreme Court's power of review and the legislative power of Congress. For instance, none of the justices saw fit to hold that the right to pursue one's profession without unreasonable interference from the state was a privilege or immunity of national citizenship but that in this particular case, there was no abridgement because the legislation was not arbitrary or unreasonable. Yet today under substantive due process, the right is recognized even though the legislation is upheld.⁴⁵

There was an assumption by the majority, implied by its projection of the consequences that must necessarily flow from a broad interpretation of privileges and immunities that future Supreme Courts would be unable to make evaluative distinctions as to what was and what was not fundamental between the citizen and his state government. This assumption, as we have seen before, has been proved inaccurate as to the power of the Court by the subsequent development of substantive due process and the greater protection of civil as opposed to economic liberties.

But there was also an assumption that as to the legislative power of Congress in the enforcement clause, the necessary result of broad privileges and immunities would be complete control of state legislatures in all respects. Again, the assumption failed to recognize that future Supreme Courts would have the ability and the duty to draw the line on Congress between what was fundamental to the spirit of the fourteenth amendment in the concept of civil rights as against the large area of legislative subject matter which could properly remain indifferent to that spirit and therefore be left a matter of local concern. Why should "privileges and immunities of national citizenship" be any less subject to progressive evaluative definition than "due process of law"? The conclusion of the majority that it should not be capable of such interpretation denied the ability of the Supreme Court to use its own common sense to avoid those same consequences which were thought to be so "serious, far-reaching and pervading" as to call for no other conclusion than that it had just made.

In this context, the attempts at civil rights legislation by Congress were to fight for their existence and find their annihilation. The assumptions had been laid. All that was necessary now was to follow them out. Privileges and immunities of national citizenship did not include any relationships of the individual to his state government because this would allow complete congressional power over all things ordinarily subject to state legislative power. Acts of individuals against other individuals are ordinarily subject to state legislation and, therefore, they could not be subject matter of federal legislation. Without recognizing that Congress had itself made the evaluative distinction as to the actual constitutional limits of its power in state legislative

⁴⁵ Compare *Lochner v. New York*, 198 U.S. 45 (1905), with *Nebbia v. New York*, 291 U.S. 502 (1934).

areas, the Supreme Court blindly followed the assumptions of the *Slaughter-House* decision into the abyss of the *Civil Rights Cases*.

III. THE CIVIL RIGHTS CASES

In a series of cases⁴⁶ culminating with the *Civil Rights Cases*,⁴⁷ the Supreme Court of the United States frustrated in large measure the intention of the framers of the fourteenth amendment to provide the federal government with legislative power extending to private interference with civil rights.⁴⁸ This was accomplished by the concept "state action," or more precisely, "positive state action."⁴⁹ Simply stated, state action includes state legislation and the acts of state officials and quasi-officials done under color of state law.⁵⁰

State action proved from the beginning to be a difficult concept to apply, and the courts have been continually called upon to define its limits. Their efforts, particularly of late, have resulted in charges that they are disintegrating the strict and conventional interpretation of the fourteenth amendment.⁵¹

At the present time state action stands as a barrier to effective judicial interpretation and effective legislative implementation of the fourteenth amendment because it prevents both Congress and the federal courts from reaching individual action when, in their judgment, the situation might otherwise warrant such extension of the federal power. Such a situation exists when private individuals interfere with civil rights and the states choose to "sit on their hands" and permit such interference.

The present situation in one limited area of civil rights — school desegregation — illustrates the effect of the concept of state action on the United States Congress. Five years have elapsed since the Supreme Court declared school segregation on the basis of race unconstitutional,⁵² and as

⁴⁶ *United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1875); *Virginia v. Rives*, 100 U.S. (10 Otto) 313 (1879); *Ex parte Virginia*, 100 U.S. (10 Otto) 339 (1879); *United States v. Harris*, 106 U.S. (16 Otto) 629 (1882).

⁴⁷ 109 U.S. 3 (1883).

⁴⁸ Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1339-40 (1952). That this was the intent of the framers, see FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 262-63, 277 (1908); Cohen, *The Screws Case: Federal Protection of Negro Rights*, 46 COLUM. L. REV. 94, 105 (1946); Barnett, *What is "State" Action under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?* 24 ORE. L. REV. 227-28 232 (1945); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 163-64 (1950). The vast majority of the witnesses before the congressional committee which framed the fourteenth amendment complained of private and not state action. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 267-68 (1914).

⁴⁹ Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L. Q. 375-76 (1958).

⁵⁰ *Id.* at 375. See generally *State Action*, 1 RACE REL. L. REP. 613 (1956).

⁵¹ Morse, *Policy and the Fourteenth Amendment: A New Semantics*, 27 FORDHAM L. REV. 187 (1958). See also Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 SO. CAL. L. REV. 208 (1957); Note, *The Disintegration of a Concept—State Action Under the 14th and 15th Amendments*, 96 U. PA. L. REV. 402 (1948). The courts, however, have a defender. Manning, *State Responsibility Under the Fourteenth Amendment; An Adherence to Tradition*, 27 FORDHAM L. REV. 201 (1958).

⁵² *Brown v. Board of Educ.*, 347 U. S. 483 (1954).

yet Congress has enacted no legislation which would assist the courts in enforcing this decree. However,

We sense, indeed, a crying need for the flexibility of the political process as distinguished from the relative rigidity of the judicial process, and we can deplore the fact that Supreme Court in the Civil Rights Cases of 1883 relieved the congressional conscience by freeing it of major responsibility. Perhaps more relevant to the public need at the time of the Brown decision would have been the overruling of the Civil Rights decision rather than of *Plessy v. Ferguson* with its "separate but equal" doctrine. But the Supreme Court of today has no means of overruling the Civil Rights decision unless Congress goes in the face of that decision and enacts a statute in violation of it. This, we currently see, Congress is most reluctant to do.⁵³

Thus as the federal judiciary continues to go it alone in the area of school desegregation it is paying for the "sin" of their predecessors over fifty years ago — the *Civil Rights Cases*.

The Civil Rights label itself raises a major problem of definition — what are civil rights? Which rights should be protected by government? Yet rather than being concerned with this problem, the United States is still pre-occupied with the lesser problem of devising a system commensurate with federalism which will *effectively* protect that which is predetermined a civil right of an individual. If such a system were established by the fourteenth amendment, and the Supreme Court had been willing to recognize it, the United States could have proceeded to the definitional problem involved in civil rights. But by not recognizing the system established in the fourteenth amendment for federal protection of civil rights, our dual sovereignty form of government, which should provide a double guarantee of civil rights to the individual, has been permitted to become itself an instrument for the denial of civil rights.

Effective protection of civil rights occurs when a forum exists in which interference with a civil right either by the state or an individual is rectified. This may be illustrated as follows. Assuming freedom of speech to be a civil right, if John Doe rents a hall and announces that he is going to give a speech on the evils of smoking, and another individual who happens to be a cigarette salesman informs him that if he gives this speech he will suffer certain economic and physical injuries, there has been an interference with John Doe's freedom of speech. (There may also be an interference with his right to be free from threats of violence, but this is a right distinct from his right of freedom of speech and his remedy for one is not necessarily the remedy for the other.) John Doe's right of freedom of speech is effectively protected if the state 1) provides laws which make it a crime and/or a tort for one person to interfere with another's freedom of speech and 2) *actually* administers, enforces, and construes these laws so that the individual who interfered with John Doe's civil right is convicted of a crime and/or assessed with damages, subject of course to the vicissitudes of the judicial process. The failure of a state to provide an effective remedy to rectify an interference with the civil

53 SWISHER, THE SUPREME COURT IN MODERN ROLE 160 (1958).

rights of an individual is termed, in the context of this article, *state non-action*.⁵⁴

By reason of the *Civil Rights Cases* Congress is powerless under the fourteenth amendment in the face of state non-action. Congress cannot order the state legislature to enact laws which provide remedies for interference with civil rights. Thus, when a state has provided no effective remedy, Congress must deal directly with offenders and offenses, but this the *Civil Rights Cases* taught us Congress may not do. In the context of our illustration above, if the state has not provided John Doe with a remedy against the individual who interferes with his right of freedom of speech, Congress is precluded from declaring such interference a crime or a tort and providing for adjudication in a federal court.

Because the *Civil Rights Cases* prevent Congress from overcoming the effects of state non-action, this decision will be put to close scrutiny in an effort to determine the soundness of the Court's reasoning and assumptions. Then, the theory of state non-action will be more fully developed in an effort to determine what congressional legislation today would be "appropriate legislation" under the fourteenth amendment.

The Supreme Court of the United States must of necessity take into consideration things other than what are normally termed judicial precedents. As precedents, decisions founded in policy are frequently the most unsound precedents of the Court because they remain in existence long after the considerations of policy upon which they were based are proved invalid or cease to exist. The *Civil Rights Cases* was a policy decision, as a reading of the decision will demonstrate. At the end of the rather long and repetitious opinion, Justice Bradley wrote:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or man, are to be protected in the ordinary modes by which other men's rights are protected.⁵⁵

This strange platitude indicates that the decision was merely a "judicial ratification of the conviction widely held among white people that enough time had been spent in getting protection for the former slaves and that they must find some way of getting along without special attention."⁵⁶

Time has proven the invalidity of the Court's policy determination that the Negroes as a race were ready to fend for themselves. However, the fiction of this determination even at the time it was made can be readily seen by contrasting Justice Bradley's statement above with one made by Justice Strong

⁵⁴ A distinction will be made here between state non-action and state inaction. State inaction is the failure of officials of the executive and judicial branches of the state government to act in a particular situation for the protection of the rights of an individual when under a duty to act under existing state laws. State non-action will refer to the failure of the state legislatures to enact legislation to provide effective remedies against individuals' interference with civil rights.

⁵⁵ *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

⁵⁶ SWISHER, *op. cit. supra* note 53, at 152.

less than three years earlier. In *Strauder v. West Virginia*⁵⁷ Justice Strong wrote:

At the time when [the Thirteenth, Fourteenth, and Fifteenth Amendments] were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that, in some States, laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves.⁵⁸

Thus in the fifteen years which had elapsed since the ratification of the fourteenth amendment, and the less than three years since Justice Strong wrote his opinion in *Strauder*, the "abject and ignorant" colored race whose "training had left them mere children" had closed the gap between themselves and the "superior intelligence" of the white race despite the fact that continued efforts had been made during this period "to perpetuate the distinction that had before existed." Therefore, "the protection which a wise government extends to those who are unable to protect themselves" was no longer needed.

By "repealing" most of the existing civil rights legislation, a short time before its probable repeal by Democratic majorities in Congress, the Court returned the protection of the civil rights of the Negro race and all future minority groups to the "ordinary modes by which other men's rights are protected."⁵⁹ The Court, speaking through Justice Bradley, had something to say about these "ordinary modes" of protection also.

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right. He will only render himself amen-

57 100 U.S. (10 Otto) 303 (1880).

58 *Id.* at 306.

59 Civil Rights Cases, 109 U.S. 3, 25 (1883).

able to satisfaction or punishment; and amenable therefore to the laws of the State where the wrongful acts are committed.

....

Innkeepers and public carriers, by the laws of all the States as far as we are aware, are bound to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.⁶⁰ (Emphasis added.)

The above quotation illustrates a fictional presumption the Court is too often wont to make — the sufficiency of state processes.⁶¹ This is a determination that is properly made by Congress after long and careful investigation of not only whether laws exist, but also whether they are enforced. Justice Bradley presumed that any interference by one individual with the civil rights of another in any state in the union may “be vindicated by resort to the laws of the State for redress.” He further presumed that a person who interferes with the civil rights of another, no matter in which state such interference occurs, is simply “amenable to satisfaction or punishment . . . [under] . . . the laws of the State where the wrongful acts are committed.” No indication is made to show that every state had civil rights legislation (which they did not),⁶² to say nothing of the question of enforcing ordinary criminal and tort actions. Justice Bradley assumed that the objective of the congressional enactment being struck down — equal facilities in inns and public conveyances for people of all races — was being accomplished “by the laws of all the States as far as [members of the Court] are aware.” Again, there was no indication of the extent of the “awareness” of the Court.

It is unnecessary to demonstrate the invalidity both in 1883 and today of these presumptions indulged in by Justice Bradley. Congress undoubtedly determined in 1875 that individuals were being denied equal facilities in restaurants, inns, and public conveyances, and that such denials were not being rectified by state processes. Presuming as correct all the Court’s assumptions as to the sufficiency of state processes in 1883 to accomplish the objective of the law in question, they would only be grounds for congressional repeal of the law, rather than for the Court’s determination that Congress did not have the power of enactment.

Thus far we have seen two presumptive fictions used by the Court in the *Civil Rights Cases* — the readiness of the Negro race to fend for itself and the sufficiency of state processes to protect civil rights. But these two assumptions are most likely only excuses for the Court’s narrow construction of the fourteenth amendment, rather than the basis for that construction. Narrow construction of the Constitution when the power of Congress is concerned and broad construction when the power of the Court is concerned is

⁶⁰ *Id.* at 17, 25.

⁶¹ *E.g.*, *Betts v. Brady*, 316 U.S. 455 (1942); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Screws v. United States*, 325 U.S. 91 (1945) (dissenting opinion of Justice Roberts).

⁶² Between 1865 and 1883 there was comparatively little legislation in the Northern, Eastern and Western states as to civil rights. Massachusetts, Delaware, Kansas, Montana, and New York were the only states outside of the South having any civil rights legislation in 1883. Such legislation could be found in the South at this time only in Louisiana, Arkansas, Tennessee, Florida and North Carolina. Stephenson, *Race Distinctions in American Law*, 43 AM. L. REV. 547, 555-63 (1909). See SWISHER, *op. cit. supra* note 53, at 148-62.

an almost traditional aspect of our jurisprudence.⁶³ This, coupled with the general feeling of dissatisfaction with the congressional role in the Reconstruction, is probably the real basis for the decision of the majority. In view of congressional excesses during Reconstruction, the Court's interest in curtailing rather than extending the power of Congress is understandable. But by belatedly locking the barn in 1883, the Court denied the power to all succeeding Congresses and effectively removed civil rights from the political process. Thus, the changing sentiment of the people in regard to civil rights has found only limited expression through the courts. Correctly used, the power the framers of the fourteenth amendment intended to confer upon Congress would have allowed for full expression of these sentiments as well as have provided the flexibility needed to meet changing situations.⁶⁴ The error of the Court's action in denying a power to Congress because of a past abuse of power might be readily conceded by the present Court when it reflects that the same sort of reasoning is being used by those who urge curbing the Court because of more recently alleged abuses.

But returning from the area of policy, the incorrectness of the considerations underlying the Court's decision in the *Civil Rights Cases* means nothing if the Court nevertheless correctly construed the language of the fourteenth amendment. The Court dismissed the first sentence of the amendment as merely "declaring who shall be citizens of the United States." Justice Harlan objected to this eclectic reading of the amendment and found that the first sentence was positive, granting and creating both state and federal citizenship, and entitling Congress to insure to everyone all the rights of citizenship.⁶⁵ The invalidity of the majority's interpretation of the amendment can be shown, however, without attempting to settle the dispute with Mr. Justice Harlan in dissent. Speaking for the majority in the *Civil Rights Cases*, Justice Bradley wrote:

It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and a broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the law.⁶⁶

It is necessary for the reader at this point to have before him an exact text of the portion of section one of the fourteenth amendment under discussion and of section five.

Article XIV

Sec. 1. . . . No State shall *make* or *enforce* any law which shall abridge the privileges or immunities of citizens of the United States;

⁶³ Compare *Kansas v. Colorado*, 206 U.S. 46 (1906), with *In re Debs*, 158 U.S. 564 (1895). A notable exception is Congress's power under the commerce clause. After the traditionally narrow construction, *United States v. E.C. Knight*, 156 U.S. 1 (1895), the Court ultimately went to the other extreme, *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁶⁴ See SWISHER, *op. cit. supra* note 53, at 148-60.

⁶⁵ *Civil Rights Cases*, 109 U.S. 3, 43-52 (1883) (dissenting opinion of Justice Harlan).

⁶⁶ *Id.* at 11.

nor shall any State *deprive* any person of life, liberty, or property without due process of law; nor *deny* to any person within its jurisdiction the equal *protection* of the laws.

....

Sec. 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article. (Emphasis added.)

Justice Bradley, by the statements just quoted, rewrote section one so that it now reads in effect:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State [make or enforce any law so as to] deprive any person of life, liberty, or property without due process of law; nor [make or enforce any law so as to] deny to any person within its jurisdiction the equal protection of the laws.

If it is doubted that Justice Bradley read the first section in this manner, re-examine the excerpt of the opinion quoted above where he said:

It nullifies and makes void all state legislation, and state action of every kind which impairs . . . privileges and immunities, injures . . . without due process of law, or which denies . . . equal protection. . . .⁶⁷

If this is what the framers meant they would have anticipated Justice Bradley and written:

No state shall make or enforce any law which shall abridge . . . , deprive . . . , or deny . . .

But this they did not do. What they did do was (1) prohibit the states from abridging the privileges and immunities of citizens of the United States, designating with positive language (" . . . make or enforce . . . ") the method by which abridgment must occur in order to fall within the prohibition; (2) prohibit the state from depriving any person of life, liberty, and property without due process of law, saying nothing about the method by which deprivation must occur in order to come within the prohibition; (3) prohibit the states from denying any person the equal protection of the laws, again without designating how the prohibited denial must come about.⁶⁸

The obvious question at this point is: May a state deprive a person of due process of law and deny him the equal protection of the laws other than by making or enforcing a law? The equally obvious answer is: Yes, by not making or enforcing a law when under a duty to do so.

IV. STATE NON-ACTION

It is helpful to review briefly the development up to this point. The validity of the decision which made necessary a fourteenth amendment, *Barron v. Baltimore*, was questioned in Section I. In Section II, the *Slaughter-*

⁶⁷ *Ibid.*

⁶⁸ The complete separation of the second and third clauses from the first clause is obvious to the casual reader. The last two clauses are set off from the first clause by a semi-colon. The subject of the first clause ("no State") is repeated but changed ("any State"). The recipient of the protection in the first clause ("citizens") is changed and the number of recipients is increased ("any person"). Lastly, while the first clause is limited to those laws which involve privileges and immunities of citizens of the United States, the last two clauses extend to all laws no matter what their subject matter. The second and third clauses express distinct concepts of their own, borrowing nothing from the first clause, particularly not the words "make and enforce."

House Cases, the Court's first pronouncement on the fourteenth amendment, was considered primarily to show that the *a priori* rejection of broad congressional power in its reasoning set the stage for the decision in the *Civil Rights Cases*. This last-mentioned decision was considered in Section III in order to demonstrate the fragile assumptions of the majority and the considerations of policy which dictated such an extreme denial of congressional power. As a secondary point, the effect of this decision on the protection of civil rights in our dual-sovereignty form of government was briefly examined. In the present section, state non-action, the key to a correct determination of the extent of congressional power under the fourteenth amendment, will be first traced in the legislative history of the civil rights laws enacted between 1868-1875. Secondly, state non-action will be examined in light of judicial developments since the decision in the *Civil Rights Cases* as well as in the judicial history prior to this decision. Ultimately, it is hoped that the question raised by section five of the fourteenth amendment, namely, just what is "appropriate legislation," will be answered.

A. *Legislative History of State Non-Action*

The first real efforts to enact laws for the enforcement of the provisions of the fourteenth and fifteenth amendments occurred during the Second Session of the Forty-First Congress and resulted in the Act of May 31, 1870.⁶⁹ A bill was introduced in the Senate by Senator Edmunds for the enforcement of the fifteenth amendment, but was amended by Senator Seward for the purpose of enforcing the third section of the fourteenth amendment and for securing to all persons the equal protection of the laws. During the debates on this bill, Senator Pool of North Carolina surveyed the problem of state non-action and asserted that Congress had the power to overcome the non-action of a state by legislating directly against individual action. Senator Pool defined the word "deny" as used in both the fourteenth and fifteenth amendments as including both acts of omission and commission by the states. According to him, a state was capable of denying civil rights by omission, that is, by a failure to prevent its own citizens from depriving any of their fellow citizens of the rights secured by the amendments, but the States were now prohibited from such denial. The possibility of denial by omission gave Congress the power to reach individual action because Congress had no power to legislate against the states.⁷⁰

On the 23rd of March, 1871, after the House of Representatives had determined to adjourn without having passed any bills for the enforcement of the amendments, a message was received from President Grant recommending that such legislation be enacted. Congressman Shellabarger, who had been in Congress when the fourteenth amendment was proposed, reported a bill in the House five days later to the special session which had re-

⁶⁹ 16 Stat. 140. This statute re-enacted the Civil Rights Act of 1866, Act of April 9, 1866, 14 Stat. 27, which raised the constitutional questions leading to the proposal of the fourteenth and fifteenth amendments. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 19-40, 94-95 (1908).

⁷⁰ CONG. GLOBE, 41st Cong., 2d Sess. 3611-13 (1870) (Senator Pool, N.C.).

sulted from President Grant's message.⁷¹ Section three of the proposed bill is of particular interest for our purposes because it was aimed directly at state non-action. This section provided:

That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States. . . .⁷²

This bill, including the third section, was passed by the House, after nine days of debate. Of the one hundred eighteen voting for the bill, fifteen had been members of Congress when the fourteenth amendment was proposed. Two others who also had been members at that time were absent, but they were probably in favor of the bill.⁷³

Even more important than the adoption of the bill with a section aimed directly at state non-action, are the remarks made during the debates which preceded its adoption. (It must be remembered that this was the first effort by Congress to enforce primarily the provisions of the first section of the fourteenth amendment.)

Congressman Hoar of Massachusetts pointed out that it had sometimes been suggested that the fourteenth amendment was aimed at only unlawful acts by state authorities. He urged, however, that the equal protection clause was evidence that this was not the case since it would have been unnecessary if that were all that had been intended. He then indicated that the refusal on the part of the state officials to extend the protection provided for by the first section, for example, if juries as a rule refused to do justice where the rights of a particular class of citizens were concerned *and the state afforded no remedy*, was as much a denial of equal protection of the laws as if the state had enacted a statute that no verdict should be rendered in favor of that class of citizens.⁷⁴

Representative Garfield, also a member of Congress when the fourteenth amendment was proposed, maintained that the equal protection of laws clause was the most valuable clause in section one. He stated that if state laws were just and equal on their face, but were not enforced either by reason of the neglect or refusal of state authorities, Congress was empowered by the equal protection clause to provide for the doing of justice to those who were thus denied equal protection of the laws.⁷⁵

Congressmen Colburn and Wilson of Indiana held similar views on the power of Congress to rectify the effects of state non-action. Mr. Colburn,

⁷¹ FLACK, *op. cit. supra* note 69, at 226-28.

⁷² Act of April 20, 1871, 17 Stat. 13.

⁷³ FLACK, *op. cit. supra* note 69, at 244-45.

⁷⁴ CONG. GLOBE, 42d Cong., 1st Sess. 334 (1871).

⁷⁵ *Id.* at app. 149-54.

in answer to those who were maintaining that Congress had no power until a state had actually abridged the privileges of citizens, stated that affirmative action or legislation on the part of the state was not necessary to authorize congressional action, since the failure of the state to see to it that every one was protected in his rights was just as flagrant as a positive denial of protection.⁷⁶ Representative Wilson felt that the equal protection clause should be read as saying in effect that "no State shall fail or refuse to provide for the equal protection of the laws to all persons within its jurisdiction." According to him, both the failure of a state to enact proper laws as well as the failure of a state to enforce existing laws constituted a denial of equal protection. When such was the case Congress possessed the power to enact laws to secure equal protection.⁷⁷

Congressman Bingham, the man who drafted the second sentence of section one of the fourteenth amendment, including the equal protection clause, made a long and significant address during the debate on the bill.⁷⁸ At one point in his remarks, Representative Bingham stated that under the Constitution as recently amended, Congress had the power to provide against the denial of rights by the states whether the states accomplished this denial by acts of omission or of commission. He said that citizens were being deprived of property without compensation, denied trial by jury, restricted in the freedom of speech and of the press, and that no remedies existed by which such interference with the rights of citizens could be rectified.⁷⁹

While these remarks on the power of Congress to overcome the effects of the state non-action were being made in the House, a similar approach developed in the Senate. On April 4, 1871, Senator Morton of Indiana declared that the last clause of section one made a failure to secure the equal protection of the laws the same as a denial of equal protection. It was unimportant whether this failure was willful or merely the result of inability. Senator Morton felt that the last clause read in effect that every person in the United States shall be entitled to the equal protection of the laws. Because Congress could enact legislation applicable only to individuals and not the states directly, this was the only method available to secure equal protection where it was being denied by a failure of the state to act.⁸⁰

⁷⁶ CONG. GLOBE, 42d Cong., 1st Sess. 459 (1871).

⁷⁷ *Id.* at 481-83.

⁷⁸ In this speech Representative Bingham carefully explained the meaning of sections one and five of the fourteenth amendment as understood by himself and the other framers of the amendment at the time of its proposal. In his conservative statement on the intent of the framers of the fourteenth amendment, Mr. Fairman intimates that Congressman Bingham's speech of 1871 is no evidence of the intent of the framers; and implies that perhaps in 1871, he was attempting to perpetrate a fraud on the country. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 137 (1949). It is difficult to understand why the statements of the man who drafted all except the first sentence of section one, expressed in Congress during the first real effort to enact legislation for the enforcement of that section, are not evidence of the meaning the framers intended the amendment to have while Mr. Fairman's opinions formulated over ninety years later are evidence of that intent. See also Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 89-91 (1954).

⁷⁹ CONG. GLOBE, 42d Cong., 1st Sess., app. 83-85 (1871). Congressman Bingham expressed similar views when the first section of the fourteenth amendment was before the House. FLACK, *op. cit.* *supra* note 69, at 79.

⁸⁰ CONG. GLOBE, 42d Cong., 1st Sess., app. 251 (1871).

The end result of the debates in Congress during the special session of the spring of 1871 was the Act of April 20, 1871.⁸¹ Portions of this act were held unconstitutional in *United States v. Harris*,⁸² which was one of the decisions leading up to the *Civil Rights Cases*.

During the debates preceding the enactment of the Act of March 1, 1875,⁸³ the first two sections of which were held unconstitutional in the *Civil Rights Cases*, the power of Congress to reach individual action when faced with state non-action was again recognized. Mr. Lawrence of Ohio, a member of Congress when the fourteenth amendment was proposed, made an important address. After quoting the first section of the fourteenth amendment, he continued: "The object of this provision is to make all men equal before the law. If a State permits inequality in rights to be created or meted out by citizens or corporations enjoying its protection it denies the equal protection of the laws. What the State permits by its sanction, having the power to prohibit, it does in effect itself."⁸⁴ Mr. Lawrence asserted that the word "deny" included omission as well as commission. To him the state which failed to enforce or secure equal rights was just as reprehensible as the state which actively denied those rights, for the failure to secure protection was in itself a denial. He further declared that the bills, the debates of which we have just considered, proceeded upon that idea that if a state omitted or neglected to secure the enforcement of equal rights, it denied the equal protection of the laws.⁸⁵

It is not asserted that the laws enacted in 1870, 1871 and 1875 to overcome the effects of state non-action were necessarily appropriate to accomplish that end. It is asserted, however, that it was intention of the framers of the fourteenth amendment that Congress have the power to provide remedies for interference with civil rights when no remedies exist under state law. This is readily discernible from the remarks of men who were in Congress when the fourteenth amendment was proposed, who were instrumental in its becoming a part of the Constitution, and who even wrote the very words which conferred this power.

In the *Civil Rights Cases*, the majority refused to adopt this interpretation of the framers of the equal protection clause, but Justice Bradley in writing the opinion could not help but adopt some of the phraseology of this interpretation.

The wrongful act of an individual, *unsupported by any authority*, is simply a private wrong . . . ; an invasion of the rights of the injured party, it is true . . . ; but *if not sanctioned in some way by the state*, or not done under state authority, his rights remain in force.⁸⁶
(Emphasis added.)

The interpretation the Supreme Court did adopt in the *Civil Rights Cases* was that of the minority which opposed the fourteenth amendment and op-

⁸¹ 17 Stat. 13.

⁸² 106 (16 Otto) U.S. 629 (1882).

⁸³ 18 Stat. 335.

⁸⁴ 2 CONG. REC. 412 (1874).

⁸⁵ *Ibid.*

⁸⁶ The *Civil Rights Cases*, 109 U.S. 3, 17 (1883).

posed the legislation enacted to enforce its provisions. It is a fairly safe assumption that whatever the amendment was intended to mean, it certainly was not intended to mean that which its opponents said it meant.

B. *Judicial History of State Non-Action*

Oddly enough the judicial history of state non-action begins with two Justices of the Supreme Court of the United States who both wrote the opinion for the majority in decisions which led up to the *Civil Rights Cases* — Justice Woods and Justice Strong.⁸⁷ Justice Woods also has the dubious honor of having voted with the majority in this last-mentioned decision.

Justice Strong was appointed to the Supreme Court in 1870 and resigned in 1880.⁸⁸ Assigned to the Third Circuit, in 1873 he wrote in *United States v. Given*:⁸⁹

[The thirteenth, fourteenth and fifteenth] Amendments have left nothing to the comity of the states affecting the subject of their provisions. They manifestly intended to secure the right guaranteed by them against any infringement from any quarter. Not only were the rights given — the right of liberty, the right of citizenship, and the right to participate with others in voting . . . but power was expressly conferred upon congress to enforce the articles conferring the rights.⁹⁰ (Emphasis added.)

Given involved a refusal by a state official to collect poll taxes from Negroes. No sanction existed under state law for this refusal. In upholding the indictment of the state official for infringing rights under the fifteenth amendment, Justice Strong said:

It is, I think, an exploded heresy that the national government cannot reach all individuals in the states. . . . But when state laws have imposed duties upon persons, whether officers or not, the performance or non-performance of which affects rights under the federal government, . . . I have no doubt that Congress may make the non-performance of those duties an offense against the United States, and may punish it accordingly. . . . Undoubtedly, an act or an omission to act may be an offense both against the state law and the laws of the United States. *Any other doctrine would place the national government entirely within the power of the states and would leave constitutional rights guarded only by the protection which each state might choose to extend to them.*⁹¹ (Emphasis added.)

⁸⁷ Justice Woods wrote the opinion in *United States v. Harris*, 106 U.S. (16 Otto) 629 (1882). Justice Strong wrote the opinions in *Ex parte Virginia*, 100 U.S. (10 Otto) 339 (1879); *Virginia v. Rives*, 100 U.S. (10 Otto) 313 (1879).

⁸⁸ Biographical Notes, 30 Fed. Cas. 1396 (1897). Upon Justice Strong's resignation in 1880, popular opinion demanded that the "proper South" be represented on the Court. Accordingly, Justice Woods—"an ardent Republican," native of Ohio and former Union general who participated in Sherman's march to the sea — was appointed. 20 MALONE, *DICTIONARY OF AMERICAN BIOGRAPHY* 505-06 (1936).

⁸⁹ 25 Fed. Cas. 1324 (No. 15,210) (C.C.D. Del. 1873).

⁹⁰ 25 Fed. Cas. 1324, 1326 (No. 15,210) (C.C.D. Del. 1873).

⁹¹ *Id.* at 1328. See also opinion of Bradford, J. in the same case, 25 Fed. Cas. 1328, 1329 (No. 15,211) (C.C.D. Del. 1873):

If by indifference, refusal to pass such laws as harmonize with and aid in making available and secure to all citizens the right to vote, and by neglecting to punish the officers of its own state for a violation of their duty in affording to the citizens the prerequisites to voting, a practical denial and abridgement of that right are effected, congress, in my judgement, has full power under the fifteenth amendment to remove this evil, and to select such means as it may deem appropriate legislation.

Seven years later in *Ex parte Virginia*,⁹² Justice Strong wrote:

We have said the prohibitions of the 14th Amendment are addressed to the States. They are: "No *State* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws." They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the the State, or of the officers or agents by whom its powers are exerted deny to any person within its jurisdiction the equal protection of the law.⁹³

Justice Strong, by his dictum in *Ex parte Virginia*, indicating that the prohibitions of the fourteenth amendment are limited to the positive acts of state officials, is ready to close the concept of the rights protected by that amendment, and to leave to the comity of the states the corrections of private injustices of one group of citizens to another. Despite his opinion in *Given* as to the meaning of the amendments, the states are to be allowed to choose whether or not they will act in any given area to secure individual rights, and until they do, there are no constitutional rights in its citizens. Thus, Congress is denied the power to overcome state non-action, a power it apparently had when *United States v. Given* was decided.

Justice Woods was appointed to the Supreme Court in 1880 after having served as a judge in the Fifth Circuit for eleven years.⁹⁴ While a circuit judge in 1871 he wrote in *United States v. Hall*,⁹⁵ to the effect that the fourteenth amendment prohibited state non-action as well as state action. The defendants, private individuals, had been indicted for violating Section Six of the Civil Rights Act of 1870⁹⁶ by conspiring and banding together with intent to hinder the complainants in their exercise of their right of freedom of speech and peaceful assemblage. After holding that these rights were privileges and immunities of citizens of the United States,⁹⁷ Judge Woods wrote:

We find that congress is forbidden to impair [freedom of speech and assemblage] by the first amendment, and the states are forbidden to im-

⁹² 100 U.S. (10 Otto) 339 (1879).

⁹³ *Id.* at 346-47.

⁹⁴ Biographical Notes, 30 Fed. Cas. 1403 (1897).

⁹⁵ 26 Fed. Cas. 79 (No. 15,282) (C.C.S.D. Ala. 1871). In this decision Judge Woods held that "the right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the Constitution of the United States, are the privileges and immunities of citizens of the United States. . . ." *Id.* at 82. Mr. Fairman, in finding that amendments I-VIII are not the privileges and immunities of citizens of the United States, makes no mention of this decision, but maintains that "if the theory that the new privileges and immunities clause incorporated amendments I-VIII found no recognition in the . . . courts, it is not surprising that the contemporary Supreme Court knew nothing of it either." Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 132 (1949). Mr. Justice Frankfurter recently said: "The relevant historical materials have been canvassed by this Court and by legal scholars. [Citing Fairman]. These materials demonstrate conclusively that Congress and the [state legislatures] did not contemplate that the Fourteenth Amendment was not a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions on the State." *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959).

⁹⁶ Act of May 31, 1870, 16 Stat. 140. This section was the forerunner of 18 U.S.C. § 242 (1952).

⁹⁷ Though such a view was rejected by the holding in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), these rights later became fundamental liberties of *persons* protected by substantive due process. *Cf. Gitlow v. New York*, 268 U.S. 652 (1925).

pair them by the fourteenth amendment. Can they not, then, be said to be completely secured? They are expressly recognized, and both congress and the states are forbidden to abridge them. Before the fourteenth amendment, congress could not impair them, but the states might. Since the fourteenth amendment, the bulwarks about these rights have been strengthened, and now the states are positively inhibited from impairing or abridging them, and so far as the provisions of the organic law can secure them they are completely and absolutely secured. The next clause of the fourteenth amendment reads: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws." Then follows an express grant of power to the federal government. . . . *From these provisions it follows clearly, as it seems to us, that congress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly and insufficient state legislation,*⁹⁸ *for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws. Therefore, to guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the amendment gives congress the power to enforce its provisions by appropriate legislation. And as it would be unseemly for congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures. The extent to which congress shall exercise this power must depend on its discretion in view of the circumstance of each case.*⁹⁹ (Emphasis added.)

Eleven years later and then an Associate Justice of the United States Supreme Court, Justice Woods in *United States v. Harris*¹⁰⁰ wrote:

The purpose and effect of . . . the Fourteenth Amendment . . . were clearly defined by Mr. Justice Bradley in the case of *United States v. Cruikshank* . . . as follows: "It is a guaranty of protection the acts of the State government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the State, not a guaranty against the commission of individual offenses; and the power of Congress, whether express or implied, to legislate for the enforcement of such a guaranty does not extend to the passage of laws for the suppression of crime within the states."¹⁰¹

⁹⁸ Thus, Congress could enact such laws as would prohibit all interference with the freedoms of speech and assemblage whether by state or individuals. This is in accord with Crosskey's explanation that the restriction on Congress to make no law abridging the freedoms of speech and assemblage does not mean that Congress can make no law protecting those freedoms, such as a law prohibiting the states or individuals from interfering with them. 2 CROSSKEY, POLITICS AND THE CONSTITUTION 1057 (1953). See text at footnotes 16-17 *supra*.

⁹⁹ *United States v. Hall*, 26 Fed. Cas. 79, 81-82 (No. 15,282) (C.C.S.D. Ala. 1871).

¹⁰⁰ 106 U.S. (16 Otto) 629 (1882).

¹⁰¹ *Id.* at 638.

ognized that "the equality of rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there."¹⁰⁶ What the fourteenth amendment was intended to do was to make this affirmative duty of the states to protect civil rights an enforceable one. The last clause of section one provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause is equivalent to the principle of republicanism just stated — every republican government is in duty bound to protect all its citizens in the enjoyment of equality of rights if it is within its power to do so.¹⁰⁷ The last clause of section one does not read "nor deny to any person within its jurisdiction the equal *operation* of the laws." The word "protection" is used instead of the word "operation." Equal protection includes, but is not limited to, equal operation. However, it seems that all that present constitutional doctrine requires is equal operation of the laws. But the word "protection" implies a positive duty to act and it is by reason of this word as well as the principle of republicanism that the states are under an enforceable duty to affirmatively secure civil rights.

Stated briefly, the argument interpreting the fourteenth amendment as granting Congress the power to overcome state non-action is as follows: The states are under a duty to make and enforce laws which provide an individual with an effective remedial process for interference with his civil rights. The states violate this duty when, through non-action, they fail to provide such a remedy. This failure is a denial of equal protection of the laws.

In the *Civil Rights Cases* the Court, by holding that a state could only violate the fourteenth amendment by positive action, precluded any argument based on the failure of a state to act when under a duty to do so. The illogic of holding that the states could only violate the fourteenth amendment by positive action became readily apparent, however, as soon as the Court found a particular duty upon the states. The development of the "separate but equal" doctrine furnishes an illustration. A state is under no duty to provide a law school, but when it does provide a law school solely for white students and refuses a Negro admittance, it comes under a duty to provide equal facilities for the Negro. Failure to provide him with equal facilities, while at the same time refusing him admittance to the white school, became a violation of the fourteenth amendment.¹⁰⁸

The next step for the courts was to find that whenever a state official was under a particular duty to act for the protection of a right, and he failed

¹⁰⁶ *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 555 (1875).

¹⁰⁷ Under international law, a foreign nation is injured "when a state, through its officers or duly authorized agents, acts directly against the subject of a foreign state, in violation of international law [or] when a state acts indirectly, by failing to secure adequate remedies to strangers injured by individuals within their jurisdiction." DAVIS, *ELEMENTS OF INTERNATIONAL LAW* 95 (1900). Thus while the duty to act affirmatively for the protection of rights is recognized in international law it is not now recognized in our constitutional law.

¹⁰⁸ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); cf. *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151 (1914).

It has been asserted that Justice Woods' decision in *United States v. Harris* cannot be reconciled with his decision in *United States v. Hall*.¹⁰² However, the inconsistency is less apparent when Justice Woods in *Harris* ceased quoting Justice Bradley and spoke in his own words:

When the State has been guilty of no violation of [the fourteenth amendment's] provisions; when it has not made or enforced any law abridging . . . privileges or immunities . . .; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person . . . equal protection of the law; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.¹⁰³ (Emphasis added.)

But what if on the contrary the laws of the state do not protect the rights of all persons because the state refuses to enact laws which provide for a remedy for interference with a particular right because it knows that only a minority group which the majority wishes to discriminate against will avail themselves of this remedy?

The portion of Justice Woods opinion in *United States v. Hall* quoted previously¹⁰⁴ serves as an adequate statement of the argument in favor of congressional power under the fourteenth amendment capable of overcoming state non-action. The real thrust of this argument is that "the citizen of the United States is entitled to the enactment of the laws for protection of his fundamental rights, as well as the enforcement of such laws."¹⁰⁵

The intention of the framers of the fourteenth amendment as set out above and reflected in the lower court decisions of Justices Strong and Woods, is that when a state fails to protect civil rights the federal government may extend that protection. The logical assertion to be made against this position is that the fourteenth amendment places no affirmative duty on the states to act for the protection of civil rights. It is unnecessary for the fourteenth amendment to place such a duty upon the states because it exists notwithstanding the fourteenth amendment. The Supreme Court has rec-

¹⁰² Powe v. United States, 109 F.2d 147, 150 (5th Cir. 1940). In addition to the fact that the *Slaughter-House Cases* were decided in the interim, two feasible explanations of this inconsistency are available. First, that Justice Woods "better" grasped the intent of the framers of the fourteenth amendment at the time of the decision in *Harris*. However, this is unlikely, in that having lived through the period of ratification his conclusions on this point in *Hall* better express his own as distinguished from the Court's opinion. Furthermore, in deciding *Hall* he was not faced with the policy considerations which influenced the decision of the Supreme Court, particularly that of the *Civil Rights Cases* where he voted with the majority. The second explanation is that in adopting the interpretation of the fourteenth amendment that the Democratic minority had been continuously urging on Congress (See FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 210-77(1908)), Justice Woods was giving vent to his partisan political leanings which had been repressed during the Civil War and the period of his lower court judgeship. Although Democratic speaker of the House of the General Assembly of Ohio in 1857, minority leader of the Democrats two years later and "bitterly opposed to President Lincoln," Justice Woods became an "ardent Republican" after the war, actively participating in the reconstruction government. Republican presidents appointed him first to the circuit court of appeals and then to the Supreme Court. 20 MALONE, DICTIONARY OF AMERICAN BIOGRAPHY 505-06 (1936).

¹⁰³ *United States v. Harris*, 106 U.S. (16 Otto) 629, 639 (1882).

¹⁰⁴ Text at notes 95-97 *supra*.

¹⁰⁵ *United States v. Hall*, 26 Fed. Cas. 79, 81 (No. 15,282) (C.C.S.D. Ala. 1871).

to act, this also would constitute a violation of the fourteenth amendment. Three circuit court decisions illustrate this development of the law.

In *Catlette v. United States*,¹⁰⁹ a police officer was under a duty to protect people from mob violence. He abandoned his duty and walked away, allowing a mob to assault a group of Jehovah's Witnesses. In upholding his conviction of a violation of 18 U.S.C. § 52¹¹⁰ and ultimately the fourteenth amendment, the court said:

It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The Supreme Court, however, has already taken the position that culpable official state inaction may also constitute a denial of equal protection.¹¹¹

In *Picking v. Pennsylvania R.R.*,¹¹² a justice of the peace was under a duty to grant a hearing before a person was extradited from the state. He refused to grant a hearing to the plaintiff. In deciding that the plaintiff had a cause of action under the Federal Civil Rights Act¹¹³ against the justice of the peace, Judge Biggs wrote:

If these allegations be proved it may be concluded that the refusal of the justice to act as required by law may have deprived the plaintiffs of their liberty without due process of the law in violation of the Fourteenth Amendment. . . . The refusal of a state officer to perform a duty imposed on him by the law of his state because he has conspired with others in a conscious design to deprive a person of civil rights in legal effect may be the equivalent of action taken "under the color" of the law of the state.¹¹⁴

In *Lynch v. United States*,¹¹⁵ police officers were under a duty to protect prisoners from mob violence. After arresting some Negroes, the police officers made no effort to protect them from a Ku Klux Klan mob. In upholding their conviction under 18 U.S.C. § 242 (1952), the court held:

There was a time when the denial of equal protection of the laws was confined to affirmative acts, but the law now is that culpable official inaction may also constitute a denial of equal protection.¹¹⁶

In light of the judicial development since the *Civil Rights Cases*, the following general principle may be stated. When a state is under a duty to act to protect the rights of an individual, but fails to do so, the individual has been denied equal protection of the laws.

The duty of the states to act positively to protect the fundamental rights of all individuals has already been recognized.¹¹⁷ The failure of the states by non-action to protect these rights is a violation of this duty, and in accord with the principle just stated, should be a denial of equal protection of the laws. By reason of section five of the fourteenth amendment, Congress

¹⁰⁹ 132 F.2d 909 (4th Cir. 1951).

¹¹⁰ The former version of 18 U.S.C. § 242 (1952).

¹¹¹ *Catlette v. United States*, 132 F.2d 902, 907 (4th Cir. 1943).

¹¹² 151 F.2d 240 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947).

¹¹³ Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, 42 U.S.C. § 1983 (1952). See the debates in Congress when this law was enacted, Text at notes 72-78, *supra*, which supports the reasoning of Judge Biggs.

¹¹⁴ *Picking v. Pennsylvania R.R.*, 151 F.2d 240, 250 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947).

¹¹⁵ 189 F.2d 476 (5th Cir.), *cert. denied*, 342 U.S. 831 (1951).

¹¹⁶ *Id.* at 479.

¹¹⁷ Text at note 106, *supra*.

is empowered to enact whatever legislation is appropriate to enforce the prohibition on the states not to deny anyone the equal protection of the laws.

Justice Bradley in the *Civil Rights Cases* was correct in characterizing the laws Congress may enact pursuant to section five as corrective legislation.¹¹⁸ He was incorrect, however, in asserting that in no situation could such corrective legislation operate directly on individual action. Congress should be able to provide an individual with a remedy against another individual for interfering with his civil rights when such legislation is also corrective legislation.

Against state action, and by this is meant positive state acts, once Congress implements the constitutional power of the federal judiciary with general jurisdiction over constitutional questions, the prohibitions of section one of the fourteenth amendment become self-executing on the federal level. By providing such jurisdiction Congress has just about exhausted its power to enact appropriate legislation to enforce the amendment against state action. However, this may not provide an effective remedy in all cases where an individual is deprived of his civil rights by reason of the acts of a state official. For example, if a person is convicted of a crime through a confession obtained by third-degree methods, the general jurisdiction of the federal judiciary over constitutional questions provides him with an effective remedy because he can obtain reversal of the conviction upon appeal. But, if a person's civil rights are simply interfered with by the act of a state official and no conviction of a crime results, the general jurisdiction of the federal judiciary provides him no relief. To insure the person in this situation an effective remedy, Congress may appropriately provide that such acts of the state official constitute a crime and/or a tort, and also provide for preventive relief upon the instigation of either the aggrieved person or the Attorney General of the United States. The remedy of criminal prosecution and tort liability should be discreetly granted according to requirements of wilfulness and direct infringement. Thus it would be inappropriate for Congress to provide such relief against legislators enacting laws in violation of the civil rights of an individual, whereas it would be appropriate to provide such relief against local police officers violating the civil rights of an individual.

State inaction is the failure of a state official of the executive or judicial branches of government to act in a particular situation for the protection of the rights of the individual when under a duty to do so under existing state law. State inaction is the equivalent of state action, as was developed in *Catlette, Picking and Lynch*. All legislation by Congress which would be appropriate to enforce the fourteenth amendment against state action is also appropriate against state inaction. But in some instances of state inaction where the individual is harmed by other individuals, the only fully effective remedy is not to grant a remedy against the state official alone, but also to substitute a federal remedy against the individual, equivalent to the remedy he has been denied by the inaction of the state official. For example, it might be provided that where a state prosecutor has willfully failed to prosecute a

¹¹⁸ *Civil Rights Cases*, 109 U.S. 3, 11-14 (1883).

criminal action, the complainant be allowed to instigate a suit in the federal court similar to the one he has been denied in the state. Such appropriate legislation would here be operating against individuals, but only through the element of state inaction.

State non-action is the failure of the state legislature to provide effective remedies against individuals who interfere with the civil rights of other individuals. Congress cannot compel state legislatures to enact laws. Thus, in the face of state non-action, Congress is left no other course but to provide legislation which operates directly on offenders and offenses and provides remedies the state legislature should have provided. Consequently, Congress may provide that the interference of one individual with the rights of another individual constitutes a crime and/or a tort and further provide for preventive relief upon the instigation of the federal government or the injured person. Thus it is seen that the only appropriate congressional legislation corrective of state non-action is that which was expressly prohibited by the *Civil Rights Cases* — legislation operating on private individuals.

It must be remembered that Congress deals with fifty states and not necessarily all will be guilty of non-action in regard to the particular right Congress deems it necessary to protect by federal legislation. On this point a complaint Justice Bradley voiced in the *Civil Rights Cases* against the legislation therein involved is pertinent:

It applies equally in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as those which arise in States that may have violated the prohibitions of the amendment.¹¹⁹

Appropriate congressional legislation against state non-action, therefore, would be inapplicable in states not guilty of non-action. How this may be accomplished is left to the skill of the draftsman, but some suggestions are offered here. Presuming that freedom of speech is a civil right of an individual, and Congress deems it necessary to enact legislation to overcome state non-action in regard to this right, legislation could be enacted by Congress making it a crime for one individual to interfere with another individual's freedom of speech, conferring jurisdiction of the crime on the courts of any state not having an adequate remedy of its own for such interference. The state courts would make the initial determination as to whether an adequate remedy existed under state law, and this determination would be made subject to review by the Supreme Court. Failure through refusal of the executive and judicial officials of the state government to enforce the federal law or their own remedy would be state inaction. Congress could provide that such action or inaction is a crime and/or a tort and provide for adjudication in a federal court pursuant to their admitted power to legislate against state action and inaction as developed above.

A more feasible suggestion would be legislation making it a crime for an individual to interfere with another individual's freedom of speech, conferring jurisdiction of the crime on the federal courts when no adequate

¹¹⁹ *Id.* at 14.

remedy for such interference exists under state law. Here a federal court would determine the question of the adequacy of the state remedy, including its effectiveness. If an effective remedy exists, the federal courts would have no jurisdiction and the complainant would have to pursue his state remedy. The refusal of the state prosecutor to initiate state proceedings would constitute state inaction and Congress could provide a federal remedy against the prosecutor in such a situation.

At the present time the power in Congress to enact all the legislation deemed appropriate against state action, and to some degree against inaction, exists. Congressional power to enact effective legislation against inaction and individual interference with civil rights remains to be recognized. It is maintained that Congress has this power to overcome state non-action by reason of the equal protection clause of the fourteenth amendment. This is seen from the meaning of this clause as understood by the framers when they enacted enforcement legislation, from circuit court decisions prior to the *Civil Rights Cases*, from judicial developments subsequent to the *Civil Rights Cases*, and from the plain meaning of the words "deny" and "protection" as used in the amendment.

The legislation which would be appropriate for Congress to enact against state non-action is commensurate with the principles of federalism. Any state may retain its sovereignty over any civil right and completely exclude the federal remedy for interference with that right by simply providing an adequate and effective remedy of its own.¹²⁰

Such an interpretation of the fourteenth amendment would result in an effective system commensurate with our dual sovereignty form of government for the protection of any right predetermined a civil right. This then leaves us with the definitional problem, which was avoided at the beginning of this article and to which we can only allude^{*} at this point. Civil rights of the individual could be characterized as the "unalienable rights" of the Declaration of Independence, the "inalienable rights of the people" of the North Carolina Convention of 1788,¹²¹ and the "great rights of mankind" developed in Madison's Speech to Congress in 1789.¹²² More particularly, the civil rights of an individual are at least those minimum protections mentioned in Amendments I-VIII of the Constitution.

Conclusion

That the individual is endowed with fundamental rights was generally recognized at the beginning of our history as an independent nation. That governments are instituted among men to secure these rights was proclaimed to mankind. The federal and state governments were instituted for this purpose. These governments, whether before or after the forming of a more perfect Union were not considered as creating these fundamental rights or dis-

¹²⁰ For an example of a state providing at least some remedy for interference with a civil right, see *Lebel v. Swincicki*, 93 N.W.2d 281 (Mich. 1958).

¹²¹ Convention of North Carolina, Declaration of Rights (1788), *THE FEDERALIST* 646 (Ford ed. 1898).

¹²² SMITH AND MURPHY, *LIBERTY AND JUSTICE* 181 (1958).

tributing them as a majority of the people might see fit. Until *Barron v. Baltimore* was decided, it was still possible to hope that the fundamental rights of mankind were secure by process of law from oppression throughout the length and breadth of the the United States. *Barron v. Baltimore* made the protection of fundamental rights solely a matter of process of law in each state unless the federal government itself was oppressive. Oppressive laws of certain states led to the adoption of the fourteenth amendment, which by its terms re-instated the securing of fundamental human rights throughout the United States and authorized congressional legislation to carry out its great purposes. As has been shown, the Supreme Court in the *Slaughter-House Cases* nullified the significance of the privileges and immunities clause of the amendment and in the *Civil Rights Cases* further restricted the scope of Congressional action. The scrutiny of these cases previously made in this article has, it is submitted, indicated that the limitations on the national protection of fundamental rights need not in the future prevail when Congress has under consideration what has come to be known as civil rights legislation. This consideration is fortified by the demands now made in many quarters that the fundamental rights of the individual must receive protection not only at the national level but even in international law.