CONGRESSIONAL POWER UNDER THE FOURTEENTH AMENDMENT—THE ORIGINAL UNDERSTANDING OF SECTION FIVE

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None of the many debates on the original intentions of the framers of the fourteenth amendment can have quite the interest of the one in the House of Representatives in 1871, about five years after the amendment was drafted. The debaters included some of the framers of the amendment, including John Bingham, the man sometimes called the "James Madison of the Fourteenth Amendment" for his role in drafting it. This debate on the original intention of the amendment was prompted by a bill to control the Ku Klux Klan in the South. The bill asserted congressional power to reach private conduct under section five of the fourteenth amendment, which declares that "Congress shall have the power to enforce by appropriate legislation the provisions of this article." The Supreme Court was later to hold that Congress lacked such power, in a series of decisions culminating in the *Civil Rights Cases*.[1] Much of the debate on the bill concerned the scope of congressional power.

The 1871 debate, so far as it was concerned with the historical issue of original intent, turned on the relation between an earlier proposed amendment by Bingham, and the formula finally adopted. The earlier draft, introduced in both Houses of Congress in February 1866 by the Joint Committee on Reconstruction, provided that

> [t]he Congress shall have power to make all laws which shall be necessary and proper to secure to citizens of each state all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Where the February draft directly empowers Congress, the final

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1. Civil Rights Cases, 109 U.S. 3 (1883); *see also* United States v. Harris, 106 U.S. 629 (1883); United States v. Cruikshank, 92 U.S. (2 Otto) 542 (1876); United States v. Reese, 92 U.S. (2 Otto) 214 (1876). *Cf. also* United States v. Guest, 383 U.S. 745 (1966), especially the opinions of Justices Clark and Brennan.

version contained a series of limitations on the states. This difference, not surprisingly, attracted the most attention in the 1871 debates.

Two opposing positions on the relation between the drafts emerged in the 1871 debates, each held by men involved in the adoption of the amendment. John F. Farnsworth, a Republican of Illinois, took the position that the final version was a complete repudiation of the February draft; whereas the February draft might well support the KKK Bill, the amendment as adopted could not: "The first section of the Amendment requires no legislation; 'it is a law unto itself'; and the Courts can execute it. . . . It is very clear to my mind that the only 'legislation' we can do is to 'enforce' the provisions of the Constitution upon the laws of the state."[2]

Bingham disagreed. Not only did the postwar amendments provide, in Bingham's view, power to pass the KKK Bill, but he went so far as to say of the relation between the earlier and later versions of the amendment:

> The gentleman [Farnsworth] says that amendment differs from the amendment reported by me in February; differs from the provision introduced and written by me, now in the fourteenth article of amendments. It differs in this: that it is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition.[3]

The vast literature on the original intent of the fourteenth amendment has failed to resolve this dispute. Some scholars side with Bingham,[4] others with Farnsworth. Most of these opinions were based on cursory examination of the evidence, however. Nobody has yet explained just why the February draft was changed and what this change means for congressional power under the amendment.[5] To answer these questions, this article will survey the

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2. CONG. GLOBE, 42nd Cong., 1st Sess., H. P. app. 117 (1871). This can be found in THE RECONSTRUCTION AMENDMENT DEBATES (A. Avins ed. 1967) [hereinafter cited as Avins].

3. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 83 (1871), *reprinted in* Avins, at 509.

4. H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 65, 217 (1908). J. TEN BROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 200-205, (1951), takes essentially the same position. *See also* R. HARRIS, THE QUEST FOR EQUALITY 34-53 (1960).

5. It will be inconvenient to present here the grounds for dissatisfaction with the existing studies, but I will do so in the text as appropriate. Notice might now be taken, however, of the work of Alfred Avins, especially *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967), which probably comes closer in scope to the present study than any of the other literature. I shall disagree strongly with the conclusions of Avins's study. One of the chief reasons for this disagreement is Avins's ignoring the speech, quoted above, in which Bingham claims the final draft encompasses all and more than did the February draft. *Id.* at 338-46. He makes the

evidence from 1866 and 1871.

I. THE 1866 DEBATES

On February 26, Bingham introduced his draft for an amendment on behalf of the Joint Committee on Reconstruction. After a debate spread over the next two days, Roscoe Conkling, Republican of New York, member of the Joint Committee, rose to move that the draft amendment be postponed. Conkling's motion carried by a vote of 110-37 (with 36 not voting). That was the last either House of Congress saw of that particular draft amendment. The Joint Committee on Reconstruction soon began work once more on a draft amendment which resulted in section one of the fourteenth amendment as it now stands.

In 1871, Farnsworth and his supporters relied heavily on this vote to postpone the February draft. Here is Farnsworth:

> What was the fate of that amendment? . . . But few speeches were made on it, and nearly all of them against it. . . .
>
> But then, by the concerted action of the Republicans, it was given its quietus by a postponement for two months, where it slept the sleep that knows no waking. . . .
>
> And thus ended the attempt to give to Congress the power which is claimed for it by this bill.[6]

James Garfield, Republican of Ohio, a little later in the debate, said much the same thing.[7] Both Farnsworth and Garfield suggest then that the shift to the "No state shall . . ." language was prompted by the virtual rejection of the language directly empowering congressional action.

In reply, Bingham called attention to another motion, which Farnsworth and Garfield had mentioned only in passing:

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same omission in his *"State Action" and the Fourteenth Amendment*, 17 MERCER L. REV. 352, 355-56 (1966). My conclusions as to the proper scope of congressional power under the amendment will be very similar to those of R. HARRIS, *supra* note 4, at 43, but I shall arrive there by a quite different, and I think, better paved route. Harris's conclusions were taken over by Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L. J. 1353 (1964). Frantz argues that the Supreme Court in the line of cases leading up to the *Civil Rights Cases* actually adopted what I will call in the text the state failure doctrine, a conclusion which I believe to be mistaken; but the doctrine Frantz attributes to the Court is much the same as the one I argue to be the original understanding.

6. CONG. GLOBE, 42nd Cong., 1st Sess. H.P. app. 115 (1871), *reprinted in* Avins, at 506.

7. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 151 (1871), *reprinted in* Avins, at 527. *Cf.* J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 90 (1956). A great weakness of ten Broek's account is that he ignores this vote to postpone. J. TEN BROEK, *supra* note 4, at 202-03. He writes as though there was merely "a shift" in the language of the amendment, without at all bringing out the fact that this vote preceded and to some extent caused the shift.

> That amendment [the February draft] never was rejected by the House or Senate. A motion was made to lay it on the table, which was a test vote on the merits of it, and the motion failed—only forty-one votes for the motion, and one hundred and ten against it. I consented to and voted for the motion to postpone it till the second Tuesday of April. Afterward, in the Joint Committee on Reconstruction, I introduced this amendment, in the precise form, as I have stated, in which it was reported, and as it now stands in the Constitution of my country.[8]

In effect then, one side took the motion to table as the "test vote on its merits" while the other side focused on the vote to postpone. I shall argue that the actual voting, and the events leading up to the voting, support Bingham's interpretation, at least so far as he claims that the vote to postpone was not tantamount to a rejection of his draft, and therefore was not an authoritative statement on the extent of congressional legislative powers.

A. THE VOTE TO TABLE

The vote on the motion to table failed by a very large margin, as Bingham said. He did not mention, however—Garfield remedied the omission immediately—that the motion to table was made by Charles Eldridge, a Wisconsin Democrat, and that "[o]f course the majority did not allow it to be laid on the table on motion of a member of the opposite party."[9]

TABLE I: PARTY VOTE ON FEBRUARY DRAFT[10]

	% Republicans Supporting*	% Democrats Supporting
Vote to Table (Feb. 28, 1866)	2.8	96.8
Vote to Postpone (Feb. 28, 1866)	95.3	6.7

*The percentages are of those actually voting on the measure.

8. CONG. GLOBE, 42nd Cong. 1st Sess. H. P. app. 83 (1871), *reprinted in* Avins, at 509. Most of those scholars who agree with Farnsworth also tend to ignore this vote. *Cf.* Avins, *"State Action" and the Fourteenth Amendment*, *supra* note 5, at 355.

9. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 151. (1871), *reprinted in* Avins, at 527. (Garfield).

10. I have used the following principles in classifying the Representatives by party:

(1) All Congressmen listed as Republican for this session of Congress in the *Congressional Quarterly's Members of Congress 1789-1970* have been counted as Republicans.

(3) All Congressmen listed as Union Republicans (five in all) have also been counted as Republicans.

(3) Two Congressmen listed as Radical Republicans have likewise been counted as Republicans. These two and also the five Union Republicans voted as Republicans, that is, voted for Schuyler Colfax, in the election for Speaker of the House.

(4) Three of the four Congressmen—all from Missouri—who were listed as Radicals,

Table I shows that the vote was indeed a party vote, approximately ninety-seven percent of the voting Democrats favoring the motion, while only about three percent of the voting Republicans favored it. It is note quite true, however, that, as Farnsworth said in 1871, "every Republican, I believe, [voted] against laying it on the table by a general understanding; Mr. Conkling, Mr. Hale, Mr. Davis, and Mr. Hotchkiss with the rest."[11] The men named by Farnsworth were those Republicans who, according to Farnsworth, had spoken against the February draft during the earlier debate on February 26-28, 1866. Their vote on the motion to table surely could not be interpreted as a favorable vote on the merits of the draft amendment.

Farnsworth was somewhat mistaken, however, about the vote: neither all the Republicans, nor even all those individuals mentioned by him, opposed the Democrat Eldridge's motion. Indeed, six Republican and Union Party members voted, contrary to their party position, for the motion to table. Table II identifies, with two exceptions which are explained in Appendix I, this group of Republicans and Unionists who supported the Democratic motion. They have been called the "opponents test case bloc," since they broke party lines to vote on the merits.

Those included in the "opponents test case bloc" supported the amendment in its final form while opposing the earlier form. For these six, at least, perhaps the difference between the two versions was real and sufficed to overcome their earlier opposition.[12] There is reason to doubt that two of the six, Phelps and Hale, were affected by the change of language. Phelps consistently opposed the Civil Rights Act of 1866, suggesting that his final vote for the fourteenth amendment was not prompted by personal sympathy for its

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have also been counted as Republicans. The fourth Radical, Noell, has not been included among the Republicans, for he did not vote with that party on the election for Speaker.

(5) All Democrats so-called were counted as Democrats.

(6) The one Union Democrat also was counted as a Democrat. He voted for James Brooks, the Democratic candidate for Speaker.

(7) All Congressmen listed simply as Union or Union War (six) have not been counted for either party.

(8) The one Radical not included with the Republicans, and the three Whigs, and one Conservative have not been included with either party. Helpful statements on the political party situation at the time of the 39th Congress are M. BENEDICT, A COMPROMISE OF PRINCIPLE (1974), and G. MAYER, THE REPUBLICAN PARTY 1854-1966 (2d ed. 1967).

11. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 115 (1871), *reprinted in* Avins, at 506. Davis of New York was actually of the Union Party, but his voting behavior, with the exception of this case, generally followed Republican patterns.

12. For a somewhat contrary interpretation, see H. FLACK, *supra* note 4, at 83. His interpretation, however, is based on a rather strained reading of remarks by Bingham and Rogers during debate on the final draft.

TABLE II: OPPONENTS "TEST CASE" BLOC: 14TH AMENDMENT VOTES

	I.	II.	III.	IV.
**Hale (Rep., N.Y.)	Yea	Not Voting	Yea	Yea
Kuykendall (Rep., Ill.)	Yea	Yea	Yea	Yea
Davis (Union, N.Y.)	Yea	Yea	Yea	Nay
Marvin (Union, N.Y.)	Yea	Not Voting	Yea	Yea
**Phelps (Union War, Md.)	Yea	Nay	Yea	Yea
*Rollins (Rep., N.H.)	Not Voting	Yes	Not Voting	Yea

*See Appendix I
**Questionable case - see text

Vote I - vote on motion to table February draft
Vote II - vote (final) on House version of 14th Amendment
Vote III - vote (final) on Senate version of 14th Amendment (with citizenship clause added and changes in sections 2-4)
Vote IV - vote on motion to postpone, February 28, 1866

aims.[13] During the debate on the Civil Rights Act of 1876, Hale claimed to have opposed the fourteenth amendment.[14] As we shall see below, he explicitly denied in 1875 that the February draft and the final draft differed.

Small as our test case bloc may be, its existence is of great importance. Contrary to Farnsworth's suggestion in 1871, the test bloc and the pro-Eldridge Democrats included almost everybody who opposed the February draft in word or deed. Of the four Republican-Union Congressmen mentioned by Farnsworth—Conkling, Hale, Davis, and Hotchkiss—Hale and Davis did in fact vote to table the draft; as we shall see later, Hotchkiss's position is far too complex to be characterized as opposition to the principle of the February draft. It is difficult to call him an opponent who buried his opposition in a party vote. That leaves Conkling then as the

13. Compare roll calls of March 9, March 13, and April 7, 1866.

14. His abstention from the roll-call on the final House version of the amendment (Vote II in Table II) was apparently meant as opposition to the amendment, but he perhaps misremembered his vote on the final Senate version (Vote III in Table II). If we are to credit his 1875 statement at all, we must take his final support of the amendment not as an expression of his personal support, and thus not as a comment on the difference between it and the February draft, but a concession to political necessity, party pressure, or some such thing. CONG. GLOBE, 43rd Cong., 2nd Sess. H. P. 979 (1875), *reprinted in* Avins, at 722.

only clear case of someone who opposed the February draft and yet who did not support the attempt to table it, presumably for party reasons.

Notwithstanding the party character of the vote on the motion to table, then, the evidence suggests that it was taken to be a "test vote on the merits," for, with one exception, all the clear opponents to the draft joined in the attempt to table it. But since at least Conkling, and perhaps some other opponents, did not support the motion to table, we cannot go so far as Bingham did and hold it to have been an unambiguous test vote on the merits. Still, Farnsworth and Garfield were clearly wrong to dismiss it as merely a party matter without any evidentiary value whatever.

B. The Vote to Postpone

As Bingham considered the motion to table as the real test vote, so Garfield and Farnsworth considered the vote to postpone. And just as the party character of the division on the first motion detracted from its quality as a test vote, the party character of the second vote does the same. For the vote on the motion to postpone, as Table I indicates, was also very much a party vote, ninety-five percent of the voting Republicans favoring it, and ninety-three percent of the Democrats opposing it.

Before we attempt to interpret the significance of the mainstream party vote, let us look once more at those who deviated from party voting patterns.

Only five Republicans voted against both their party's motion to and the previous motion to table. Table III contains these five. For reasons explained in Appendix II, the table also includes two of the three Republicans who, after voting on the motion to table, did not vote on the motion to postpone. The seven Republicans who failed to vote with the majority of their party can be seen as a bloc who viewed the motion to postpone as a test vote on the merits, and used the opportunity to express their support for the draft.

One small group of Republican and Union Congressmen fairly clearly supported the February draft. Another small group fairly clearly opposed the February draft. But, alas, less is known about the views of the great mass of Republican-Union Party members who in February voted down Eldridge's motion to table, carried Conkling's motion to postpone, and later supplied the decisive votes for the final draft of the fourteenth amendment. Some inferences about this large group are supportable, however. On the vote to postpone, everybody, without exception and including Bingham himself, who had spoken for the draft, joined in the vote to post-

TABLE III: SUPPORTERS TEST CASE BLOC: 14TH AMENDMENT VOTES

	I.	II.	III.	IV.
Julian (Rep., Ind.)*	Nay	Not Voting	Yea	Yea
Raymond (Rep., N.Y.)*	Nay	Not Voting	Yea	Yea
Newell (Rep., N.Y.)	Nay	Nay	Yea	Yea
Sloan (Rep., N.J.)	Nay	Nay	Not Voting	Yea
Williams (Rep., Pa.)	Nay	Nay	Yea	Yea
S. Wilson (Rep., Pa.)	Nay	Nay	Yea	Yea
Windom (Rep., Minn.)	Nay	Nay	Yea	Not Voting

*See Appendix II

Vote I - vote on motion to table February draft, February 28, 1866
Vote II - vote on motion to postpone February draft, February 28, 1866
Vote III - final vote on House version of the 14th Amendment
Vote IV - final vote on Senate version of 14th Amendment (with citizenship clause added)

TABLE IV: FATE OF THE VOTES FAVORING THE MOTION TO TABLE IN THE LATER VOTE ON THE MOTION TO POSTPONE

	Support Postponement	Oppose Postponement	Not Vote
Number	5	31	3
% of Original Supporters	13	79	8
		(total favoring tabling - 39)	

pone. There is thus no evidence that support for postponement in itself signified opposition to the draft.

Whatever the great body of Republican-Union votes did mean, it surely was not the universal understanding that, as Farnsworth and Garfield suggest, the vote to postpone was equivalent to consigning the February draft to the "sleep that knows no waking." As Table IV reveals, the greatest number of those who signified their opposition to the draft on the first vote did not vote in favor of the motion to postpone. They do not seem to have viewed the post-

ponement as equivalent to the rejection they desired. And the opponents of the draft, chiefly the Democrats, surely would not have hesitated to consign the draft to oblivion merely because it had been moved by a Republican. The more plausible interpretation is that the Democrats did not see postponement as equivalent to rejection at all, but as just that—the postponement, but continued life, of a piece of legislation they opposed.

The evidence supplied by the roll calls is supported by what was said in the debates. Conkling, in making his motion, emphasized that agreement to his motion was not tantamount to rejection. He began his speech as follows:

> I have not sought the floor for the purpose of discussing the merits of this amendment. It was introduced several weeks ago and considered in the committee of fifteen. At that time and always I felt constrained to withhold from it my support as one of the committee, and when the consent of the committee was given to its being reported I did not concur in the report. So much I deem it fair and right to say.[15]

Why is it "fair and right to say"? If he meant Congress to understand the postponement as a rejection, why would he introduce his own opposition in this way? He did so because he did not wish the House to understand it as an effort to reject the draft. He spoke openly of his own position to dispel any such suspicion. The conclusion of his speech corroborates this directly.

> There are, Mr. Speaker, I know, a number of gentlemen upon the one side and the other of this question who wish further time to consider it, if not to discuss it, and I therefore intend, without any hostility to the gentleman who has it in charge, but at least, I think, by his *quasi* consent, to make a motion to postpone.

Thus, he made every effort to insure that his motion not be seen as opposition on the merits.

C. WHY, THEN, THE POSTPONEMENT?

When we attempt to explain the postponement we must take into account the other business before the House at the time. On the very day the decision to postpone was taken, Thaddeus Stevens had interjected to call the House's attention to some pressing business.

> I am reminded that several of our employees get no pay because we have not passed the appropriation bill. If it will be agreeable to the gentleman to make his remarks a few days hence, I will move we now proceed to consideration of one of the appropriations bills.[16]

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15. CONG. GLOBE, 39th Cong., 1st Sess. H. P. 1094 (1866), *reprinted in* Avins, at 160.
16. *Id.*

Stevens's motion was not immediately accepted, but following the postponement of Bingham's draft amendment the House did turn to the pressing appropriation bill. And there was another, even more pressing piece of business about to come before the House. On February 2, the Senate had passed the Civil Rights Bill, and that bill was scheduled to come to the House floor on March 1. That President Johnson had just successfully vetoed the Freedman's Bureau Bill no doubt lent some sense of urgency to enacting some actual legislation to protect the freedmen. To some extent, then, we might attribute the postponement to the House's need to get on with very pressing business.

Other constitutional amendments, most of which were later incorporated into the fourteenth amendment itself, were also pending. Joseph James suggests that some Congressmen felt that the general principles of the February draft, later section one of the amendment, ought to wait on the provisions regarding representation, at that time up for consideration in the Senate.[17] As is well known, there was an importance and urgency attributed to questions of representation and to related, more immediately political measures.

Conkling's comments on the desirability of postponement suggest yet another explanation for that action—recall his reference to "the gentlemen . . . who wish further time to consider it." In the light of the frequently noted confusions about the meaning of the amendment among its supporters[18] and the less often-noted but equally confused understandings among its opponents, some time to "consider" more carefully the meaning of the draft must have appeared very attractive.

But the draft was not only subject to a certain variety of interpretation; it was also controversial. Contrary to Farnsworth's 1871 assertion that nearly all the speakers were against the February draft, the record shows a fairly even split in the main speeches. The neat pattern of four Republican supporters, four Republican-Union opponents, and two Democrats clearly indicates a prearranged schedule.

Table V shows the position taken by each Congressman who spoke on the February draft as he announced himself, together with his final position on the fourteenth amendment. The table includes

17. J. JAMES, *supra* note 7, at 86-87, 189.

18. *Cf.* C. FAIRMAN, RECONSTRUCTION AND REUNION 1276-80 (1971); and Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 26-29 (1949) (comments on Higby especially and even Bingham).

TABLE V: SPEAKERS IN THE DEBATE ON THE FEBRUARY DRAFT

Speaker	Position on Feb. Draft	Position on Final 14th Amendment
Bingham (Rep., Ohio)	favors	favors
Higby (Rep., Cal.)	favors	favors
Kelley (Rep., Pa.)	favors	favors
Price (Rep., Iowa)	favors	favors
Hotchkiss (Rep., N.Y.)	opposes	favors
Conkling (Rep., N.Y.)	opposes	favors
Davis (Union, N.Y.)	opposes	favors
Hale (Rep., N.Y.)	opposes	??????
Rogers (Dem., N.J.)	opposes	opposes
Niblack (Dem., Ind.)	opposes	opposes

only those who actually spoke on the bill and not those who merely interjected comments from the floor. (A partial exception to this is Conkling, who did not, as was indicated before, actually rise to address himself to the merits of the draft. Had the other more casual speakers been included, the number of those who favored the draft would be increased.) No matter how the speakers are tallied, however, Farnsworth's claim that "nearly all" were against it cannot be sustained.[19]

If Farnsworth's "nearly all" did not oppose the draft, still the Republican opposition was substantial enough to cause some hesitation. At the least, the opposition could have dragged out the debate. At the most, the opposition could have combined with the Democrats to secure the one-third plus one that would suffice to kill a constitutional amendment. That of course would have been a great defeat for the Republican leadership and for the Joint Committee.[20] Between these two extremes, but also unappealing to the

19. See note 14 for the explanation for Hale's being listed as questionable on the fourteenth amendment. Conkling, on the basis of evidence to be brought out later, ought perhaps to be listed as questionable also. It is interesting to note, as Table V reveals, the degree to which Republican and Union opposition to the February draft is centered in the New York delegation. *Cf.* M. BENEDICT, *supra* note 10, at 1-9, on the influence of Secretary of State Seward in the New York delegation.

20. It is very difficult to estimate whether the opposition to the February draft could ever have defeated it. The best we can do, perhaps, is to arrive at a plausible maximum minimum vote that could be rallied against the February draft. Of the 184 members of the House of Representatives, five never voted on any fourteenth amendment roll-call. We con-

Republican Party, would be the passage of the amendment at the price of destroying thereby the remarkable party unity the Republicans had displayed to that time. Given the political position of the congressional Republican Party—already at odds with the President, soon to be at greater odds with him; and requiring steady two-thirds majorities both for amendments and to override possible vetoes—maintenance of voting cohesion was crucial.[21]

D. WHY, THEN, THE SHIFT IN LANGUAGE?

The opposition, doubts, or hesitations about the February draft were sufficient to lead the party to pause. Thus the postponement. Were they sufficient to require a new amendment? That is the key question. Consider Bingham's own explanation in 1871 for the changes he made:

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sider them nonparticipants in our hypothetical vote also. Thirty-six of the thirty-nine Democrats, plus thirteen of the Republicans or of one of the smaller parties voted against the fourteenth amendment in some form (not counting the vote on the motion to postpone as a vote against the amendment). To these we can add Conkling and Hotchkiss, the two Republicans who indicated their opposition to the February draft, but never voted against the fourteenth amendment in any form. That gives a total of 51 who opposed at least one form of the amendment. This hypothetical "minimum" opposition would not have been nearly sufficient to defeat the February draft, however, for 130 remain who never opposed the amendment in any form. That is, the draft would have had an easy two-thirds majority, 128-51-5. Of course, this proves very little other than the negative proposition that we do not know from the evidence that the February draft could have been beaten. We do not know, of course, from this tally, that it could have passed, for we do not know how many of those 128 might also have opposed the February draft. It would have taken only nine more opponents from that group to deny it the needed two-thirds majority.

The evidence certainly is not sufficient to justify James in his claims that the postponement was due to the opposition's being strong enough to defeat the draft (for which claim he brings forward hardly any evidence whatever besides the debates preceding the postponement) and that the postponement was generally seen to be the death of the draft (for which claim he brings forward only some scattered newspaper testimony). J. JAMES, *supra* note 7, at 86, 189. On the other hand, however, ten Broek in his vision of continuity between the February and final versions, fails to give any weight to Congress's postponement of the February draft in the light of the opposition to it. Flack is in some ways the most adequate on the postponement, but he seems to accept the position later taken by Farnsworth (see infra) that if the two drafts meant to grant the same extent of Congressional power, then the change of form must have been mainly an attempt to deceive someone. *Cf.* FLACK, *supra* note 9, at 65, 69, 80. When such a charge was raised in 1871, Bingham strongly denied it. Apart from what the charge may or may not have meant as applied to Bingham himself, Flack's treatment of the issue does not deal with what Congress, or the House, as a body may have understood itself to be doing. That is, although Bingham may have fooled them into adopting a form of language which to him meant the same thing as another form of language, what is it the Congressmen who were fooled believed the difference between the two forms of language to be? I shall show below, moreover, that Flack's treatment of the congressional power issue was too crude to catch the nuances of the situation, and that one need have recourse to nothing so gross as the deception theory to make sense of the change in the language, the opposition to the original form, and Bingham's insistence that the final version gave up nothing of the February draft's intended power.

21. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 84 (1871), *reprinted in* Avins, at 510.

> But, says the gentleman [Farnsworth] to me, why did you change the amendment of February, 1866? Sir, I sat at the feet of one who, though departed this life, still lives among us in his immortal spirit, and still speaks to us from the reports of the highest judicial tribunal on earth, which he so long adorned as the Chief Justice of the Supreme Court of the United States . . . that great man, John Marshall . . . in the hope that by his guidance, the amendment might be so framed that in all the hereafter, it might be accepted by the historian of the American Constitution and her Magna Charta "as the keystone of American liberty."
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> . . . .
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> In reëxamining that case of Barron [v. Baltimore], Mr. Speaker, after my struggle in the House in February, 1866, to which the gentleman has alluded, I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: "Had the framers of these amendments intended them to be limitations on the powers of the state governments they would have imitated the framers of the original Constitution, and have expressed that intention." Barron vs. The Mayor, & c., 7 Peters, 250.
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> Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said "no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;" imitating their example, and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment as it stands in the Constitution . . . .
>
> I hope the gentleman now knows why I changed the form of the amendment of February, 1866.[22]

Bingham admits here that his experience with the February draft was a "struggle"; the opposition aroused by the draft was a factor in his rethinking the amendment. Bingham's own position on the meaning and significance of the change contains two apparently divergent views. The first we have already quoted: the final version contains all and more than the February draft did; it legitimates legislation, such as that proposed in the KKK Bill, regulating private individuals. This is the proposition, of course, that Farnsworth and Garfield were most eager to deny.[23]

The other aspect of Bingham's account emerges most clearly in his quotation from Chief Justice Marshall in *Barron v. Baltimore*: "had the framers of these amendments intended them to be limitations on the powers of the state governments they would have imitated the framers of the original Constitution, and have expressed that intention." That can only mean that Bingham originally intended his first draft to be such a limitation on the states. Bingham's claim that the second draft expanded on the first would mean, then, that both were intended to limit the states, and that the second does so more effectively. Whether speaking of the draft which directly grants Congress the power to secure equal protec-

22. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 84 (1871), *reprinted in* Avins, at 509-10.

23. CONG. GLOBE, 39th Cong., 1st Sess. H. P. 1034 (1866), *reprinted in* Avins, at 150.

tion, and privileges and immunities, or of the draft which prohibits the states from abridging or denying these things, Bingham's emphasis was the same: congressional power to correct and penalize forbidden state action.

The February draft did not aptly convey Bingham's own intention. This, I believe, is the burden of the very important interjection by Hotchkiss just before the vote on Conkling's motion to postpone.

> I have no doubt that I desire to secure every privilege and every right to every citizen in the United States that the gentleman who reports this resolution desires to secure. As I understand it, *his object* in offering this resolution and proposing this amendment *is to provide that no state shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another. If this amendment secured that, I should vote very cheerfully for it today*; but as I do not regard it as permanently securing those rights, I shall vote to postpone its consideration until there can be a further conference between the friends of the measure, and we can devise some means whereby we shall secure those rights beyond a question.

Thus, Hotchkiss objected that the amendment did not adequately secure what it aimed to secure. Although he too had some remarks about what he saw to be an overabundance of congressional power, which we shall wish to discuss a bit later, the thrust of his remarks is somewhat different:

> Constitutions should have their provisions so plain [Hotchkiss continues] that it will be unnecessary for courts to give construction to them; they should be so plain that the common mind can understand them.
> . . .[T]he right should be incorporated into the Constitution. It should be a constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation. But this amendment proposes to leave it to the caprice of Congress; and your legislation upon the subject would depend upon the political majority of Congress, and not upon two-thirds of Congress and three-fourths of the States.
>
> . . . .
>
> Place these guarantees in the Constitution in such a way that they cannot be stripped from us by accident, and I will go with the gentleman.
>
> . . .
>
> I think the gentleman from Ohio [Mr. Bingham] is not sufficiently radical in his views upon this subject. I think he is a conservative. [Laughter][24]

Hotchkiss proceeded to make a suggestion, the bearing of which was certainly not lost on Bingham.

> Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as a part of the organic law of the land. . . .
>
> Let us have a little time to compare our views upon this subject, and agree upon an amendment that shall secure beyond question what the gentleman desires to secure. It is with that view, and no other, that I shall vote to postpone this

24. *See* CONG. GLOBE, 39th Cong., 1st Sess. H. P. 1095 (1866), *reprinted in* Avins, at 160 (emphasis supplied).

subject for the present.[25]

This brief speech by Hotchkiss is, I believe, of capital importance in the history of the framing of section one of the fourteenth amendment. It greatly influenced Bingham in his next drafting attempts, for it was surely with this speech in mind that he reread Marshall's opinion in *Barron* and was struck, as never before, by Marshall's dictum about the proper way to draft constitutional limitations. Hotchkiss's speech surely had a great influence in Congress, also, helping those who did not oppose Bingham's draft to join in the vote for postponement by showing that the draft could be strengthened. No doubt the Democrats' opposition to the postponement can be traced to this same thought.

To understand even better the importance of this interjection, we might step back a bit to consider the situation in Congress when the February draft was reported to the House floor. The single most important fact was the pending Civil Rights Bill, itself aimed at overturning the so-called "Black Codes" established in the Southern states immediately after the war. Farnsworth, in 1871, expressed a very common view:

> Why, sir, we all know, and especially those of us who were members of Congress at that time, that the reason for the adoption of this amendment, was because of the partial, discriminating, and unjust legislation of those states under governments set up by Andrew Johnson, by which they were punishing and oppressing one class of men under different laws from another class.[26]

Many scholars, notably Charles Fairman, concur with Farnsworth that the amendment was meant chiefly as the constitutional equivalent of the Civil Rights Bill.[27] This is an overstatement. Nonetheless, the Civil Rights Bill and the circumstances to which it was directed were very much in the minds of Congressmen as they considered the fourteenth amendment. The Civil Rights Bill was aimed at specific state and local governmental enactments, declaring these void so far as they discriminated on the basis of race or previous condition of servitude, and setting penalties against those who "under color of any law, statute, ordinance, regulation, or custom," had deprived another person of any of the civil rights enumerated in the bill. The bill is thus clearly a "state action bill."[28]

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25. CONG. GLOBE, 39th Cong., 1st Sess. H. P. app. 116 (1866), *reprinted in* Avins, at 160.

26. Fairman, *supra* note 18, at 137.

27. *But see* Jones v. Mayer, 392 U.S. 409 (1968), and its progeny. *Cf.* the dissent in that case by Justice Harlan, and the off-court reviews of the evidence by C. FAIRMAN, *supra* note 18, and Caspar, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89.

28. CONG. GLOBE, 39th Cong., 1st Sess. H. P. app. 115 (1866), *reprinted in* Avins, at 506. *Cf.* H. FLACK, *supra* note 4.

Bingham's draft, though providing authority for congressional legislation, did not directly supply authority for the kind of action Congress wanted to take, nor did it, as Hotchkiss pointed out, directly forbid the states from doing that which Congress thought the states ought not to do. Instead, it authorized, in its language if not its intention, a kind of legislation that neither Congress nor Bingham was contemplating. Thus the mixed congressional reaction to Bingham's draft, a reaction that brought together the Democrats and some of the Republicans in common fear of the implications of this amendment. By showing exactly where Bingham's draft failed to secure its ends beyond the control of changeable congressional majorities, Hotchkiss pointed to a common ground on which the Republican Party could stand and outlined the principles later embodied in the amendment in its final form, which passed both House and Senate with very little difficulty. Bingham is usually given, as he deserves, the great credit for the amendment, but Hotchkiss is the great unrecognized hero. In any case, it was Hotchkiss who took whatever sting there otherwise might have been from Conkling's motion to postpone, and who therefore insured that Conkling's motion would *not* be a test vote on the merits of the February draft.

Thus, the February draft was itself intended to be chiefly a "state action" amendment and did not contemplate "consolidated government" with Congress taking over the mass of functions to that point carried on by the states. Why, then, did Bingham claim in 1871 that the amendment authorized Congress to regulate private conduct?

The first possibility, of course, is that Bingham was lying, either in 1871 when he claimed the broadest range for congressional power, or in 1866 when he spoke continually of reaching state action. He was accused, in effect, of both. Farnsworth wondered if Bingham "put [the amendment] in different form to deceive somebody."[29] And Garfield objected to Bingham's reconstruction of the

29. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 151 (1871), *reprinted in* Avins, at 527. Actually, the immediate context for Garfield's remark is Bingham's objection to Garfield's claim that Thaddeus Stevens, in introducing the fourteenth amendment to the House, was referring to article one when he said that "[t]his proposition is not all that the committee desired." Bingham countered that this remark applied to other parts of the fourteenth amendment. In fact Stevens's comment cannot with certainty be attributed to any part of the amendment, but the context supports Bingham very strongly, for after making that remark he goes on to complain of the fact that the original provisions dealing with representation and with the Southern war debt, reported by the committee, were, to his deep chagrin, defeated in the Senate, and the ones reported in the final draft not as much to the committee's liking. On the other hand, in speaking of section one he makes no complaints whatever. *Cf.* CONG. GLOBE, 39th Cong., 1st Sess. H. P. 2459 (1866), *reprinted in* Avins, at 212; J. TEN BROEK, *supra* note 4, at 201. Avins, *supra* note 5, at 347, claims that Garfield "refutes" Bingham's

events of 1866 with the remark that Bingham "can make but he cannot unmake history."[30] Do Bingham's explanations of 1866 and 1871 tally?

The actual language of the February draft, of course, does go well beyond state action. Whatever Bingham may have had in mind, he spoke in terms of congressional powers. The opponents of the amendment, the Democrats Rogers and Niblack, the Republican Hale, all pointed out that the language of the draft would countenance broad congressional action, action tending toward "consolidation" and so on. Bingham never denied these claims. That was not the way he conceived the amendment working in practice, but he seems to concede that in principle such a result is open under the amendment. Late in the debates on the February draft, Hale, no doubt acting out of a sense of frustration at the gap he and others perceived between what the amendment said and the kind of legislation Bingham anticipated under it, asked Bingham point blank, "whether in his opinion this proposed amendment to the Constitution does not confer upon Congress a general power of legislation for the purpose of securing to all persons in the several states protection of life, liberty and property, subject only to the qualification that the protection shall be equal," to which Bingham straightforwardly answered: "I believe it does in regard to life and liberty and property." So, even in 1866 Bingham conceived of the amendment as allowing Congress to reach private action.

The key to Bingham's seemingly contradictory claims is his frequent repetition of Tocqueville's description of the American system as "centralized government, decentralized administration." Although those "words of the most distinguished man who was ever sent hither from the Old World to make a personal observation of the workings of our institutions" are often on his lips, it was in 1871, when defending the most far-reaching legislation yet contemplated under the amendment, that Bingham gave his fullest explication of Tocqueville's phrase.

> Do gentlemen say that by so legislating we would strike down the rights of the State? God forbid. I believe our dual system of government essential to our national existence. That Constitution which Washington so aptly said made us one people, is essential to our nationality and essential to the protection of the rights of all the people at home and abroad. The State governments are also essential to the local administration of the law, which makes it omnipresent, visible to every man

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denial that Stevens was referring to section one in his comment. The "refutation," however, consists entirely of Avins's quotation of Garfield's assertion that Stevens "did indeed speak specially of this very section."

30. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 151 (1871), *reprinted in* Avins, at 527.

> within the vast extent of the Republic, in every place, whether by the wayside or by the fireside, restraining him by its terrors from the wrong, and protecting him by its power, in the right.
>
> . . . .
>
> The nation cannot be without that Constitution which made us "one people"; the nation cannot be without the State governments to localize and enforce the rights of the people under the Constitution. No right reserved by the Constitution to the States should be impaired, no right vested by it in the Government of the United States, or in any Department or officer thereof, should be challenged or violated. "Centralized power, decentralized administration," expresses the whole philosophy of the American system.[31]

This is a far cry from the "official theory of federalism."[32] What makes America a nation, and a great nation, according to Bingham, is the declaration within its Constitution of the great rights of man. The standards for action within the regime are national standards, and always were, even before the fourteenth amendment. Yet those standards depended for their vitality in practice only on the goodwill and honor of the states, for the original Constitution neither forbade the states from violating them, nor armed Congress with power to secure them.

> I am perfectly confident that that grant of power [to enforce by congressional legislation these great principles] would have been there but for the fact that its insertion in the Constitution would have been utterly incompatible with the existence of slavery in any State; for although slaves might not have been admitted to be citizens they must have been admitted to be persons. [Thus the benefits of article IV, section 2, dealing with the privileges and immunities of citizens might have been denied them, but the due process clause of the fifth amendment, declaring the right of all persons to "life, liberty, and property" would have applied even to slaves.] That is the only reason why it was not there. There was a fetter upon the conscience of the nation; the people could not put it there and permit slavery in any State thereafter.[33]

That omission, that one flaw in the original Constitution was, according to Bingham, crucial:

> Nothing can be plainer to thoughtful men than that if the grant of power had been originally conferred upon the Congress of the nation, and legislation had been upon your statute-books to enforce these requirements of the Constitution in every State, that rebellion, which has scarred and blasted the land, would have been an impossibility.[34]

Now that slavery is dashed, Bingham saw the opportunity to "com-

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31. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 84-85 (1871), *reprinted in* Avins, at 510-11.

32. On the "official theory," see Diamond, *What the Framers Meant by Federalism*, and Jaffa, *"Partly Federal, Partly National": On the Political Theory of the Civil War*, in A NATION OF STATES (R. Goldwin ed. 1974); and Zuckert, *Federalism and the Constitution*, in REVIEW OF POLITICS (forthcoming).

33. CONG. GLOBE, 39th Cong., 1st Sess. H. P. 1090 (1866), *reprinted in* Avins, at 158.

34. CONG. GLOBE, 39th Cong., 1st Sess. H. P. 1034 (1866), *reprinted in* Avins, at 150.

plete" the American Constitution by supplying that one want which, on slavery's account, it lacked.

That completion required the effective nationalization of those principles upon which the unity of the nation rested. Bingham did not, however, believe that the national power must supplant the states in their ordinary custody of these national principles. The states need not cease making the laws that secure and regulate the privileges and immunities of citizens, the life, liberty, and property of persons. The states, then, although retaining the primary care for all these matters, yet are to be subject to the national standards as defined in the Constitution and applied by courts and Congress.

Bingham's real drafting problem was to hit upon a formula which would capture this complex and difficult conception, a formula that would at once impose those national principles and standards on the states in no uncertain terms, and confer on the national authorities power to make those standards good if the states failed to discharge their initial responsibilities properly. Bingham's February draft failed to convey the thought that the constitutional prescription was that the states retain their original, or first instance powers. The final draft, helped along by Hotchkiss and John Marshall, conveyed his intention far better.

Both drafts, then, were intended to remedy state failure. Thus it is easy to see how Bingham could both speak in terms of state action throughout the debate on both drafts, and also assert that both drafts authorized congressional legislation going beyond state action. The final draft conveys Bingham's idea far better. Under the amendment as adopted, as well as under the February draft, congressional remedial action may extend into the realm where the states themselves ordinarily operate. Congressional laws may, to some extent, supplant or supplement state laws in areas within the ordinary responsibility of the states, when the states have defaulted in their duties.

We can now answer the second of our two questions: how does the state failure doctrine, entailing as it does congressional legislative powers to act directly on individuals if necessary, follow from the state action language of the fourteenth amendment? Two fairly simple textual arguments were frequently made during the KKK debates, which reveal the inadequacy of a limited state action interpretation. First, the states are forbidden from abridging the privileges or immunities of citizens of the United States. The amendment not only negatively forbids state interference with those privileges and immunities, but it positively affirms that privileges and immunities inhere in United States citizenship. The states may

not abridge those privileges and immunities, but who may act to secure, define, and safeguard them? Surely that government to whose citizenship they are incidents. Even in the absence of section five Congress would have implied power to act on their behalf, but section five makes that power quite explicit. Even the majority in the *Slaughterhouse Cases*, while drastically narrowing the privileges and immunities attributed to United States as opposed to state citizenship, insisted that whatever privileges or immunities are incident to United States citizenship are thereby within the scope of congressional legislation.[35]

The second textual support for the state failure, as opposed to a state action, reading of the amendment is the equal protection clause. That clause prohibits states from denying to persons within their jurisdiction the protection, the equal protection, of the laws. A state may deny protection either by direct legislative action or by failure of state executive agencies to supply effective protection. Republican Senator Pool succinctly explained this theory of equal protection in the 1871 Ku Klux Klan debates:

> The protection of the laws can hardly be denied except by failure to execute them. While the laws are executed their protection is necessarily afforded. . . . The right to personal liberty or personal security can be protected only by the execution of the laws upon those who violate such rights. A failure to punish the offender is not only to deny to the person injured the protection of the laws, but to deprive him, in effect, of the rights, themselves.[36]

The equal protection clause then forbids the states from failing to supply protection. The main manifestation of such state failure and therefore of violation of the equal protection clause would be the

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35. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 77-78 (1872):

> Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned [i.e., mainly those "fundamental rights" recited by Justice Washington in *Cofield v. Coryell*], from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was 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 States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects.

The major premise of the Court's argument here is just what we have maintained in the text: whatever the privileges and immunities of United States citizenship are, they are subject, by virtue of their inhering in U.S. citizenship, to congressional legislative control. The Court, for reasons that need not detain us here, was eager to restrict the range of national privileges and immunities, and thereby restrict congressional power, but it never denies a positive congressional power over these national privileges and immunities.

36. CONG. GLOBE, 42nd Cong., 1st Sess. S.P. 608 (1871), *reprinted in* Avins, at 552.

unpunished invasion of the rights of some private citizens by other private citizens.

By section five Congress is authorized to enforce the provisions of the amendment, including, presumably, section one's equal protection guarantee. Now what form would congressional enforcement of that guarantee take? In the simplest case, of course, it could require state officials to do their duty in supplying equal protection of the laws. But Congress could go further. The evil which the equal protection clause forbids is, in the final analysis, the private violation of rights. The congressional power to enforce the equal protection clause, that is, to remedy the evil which the clause forbids, must extend to supplying the protection the state failed to provide. Section five gives Congress the power to enforce the rights affirmed in section one, which means in this context, the power to act against those private persons whose systematic and unpunished violations of the rights of others violate the guarantee to equal protection of the laws.

Since Garfield has appeared thus far as a witness against the broader interpretation of congressional power under the amendment, it is only proper to refer to him here as a witness on behalf of the theory of equal protection just propounded. In the following passage Garfield not only corroborates the state failure reading of the amendment, but also indicates the true grounds for his disagreement with Bingham:

> [T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first section empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection.
>
> Now if the second section of the pending bill can be so amended that it shall clearly define this offense, as I have described it, and shall employ no terms which assert the power of Congress to take jurisdiction of the subject *until* such denial be clearly made, and shall not in any way assume the original jurisdiction of the rights of private persons and of property within the states—with these conditions clearly expressed in the section, I shall give it my hearty support. These limitations will not impair the efficiency of the section [i.e., they change absolutely nothing in the operation of the law, but change only its stated rationale], but will remove the serious objections that are entertained by many gentlemen to the section as it now stands.[37]

The real brunt of his opposition in 1871 was the use to which some were putting the privileges and immunities clause. When Garfield insisted so much on an equal protection rather than a privileges and immunities rationale for the proposed legislation, he was attempting

37. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. 153 (1871), *reprinted in* Avins, at 529.

to maintain the remedial and secondary character of the congressional power.

E. THE CHANGERS

The state failure interpretation of the amendment must confront some important, arguably contrary, evidence. The February draft did arouse explicit opposition from a group of men who feared its threat of overbearing congressional power, but who supported the final draft of the amendment.[38] This group has figured prominently in previous attempts to assess the meaning of the shift from the February to the final versions of the amendment. Garfield, for example, in 1871, "pointed out that no Republican opposed the revised draft on the same grounds that the original draft was opposed, namely giving Congress too much power."[39] A natural conclusion might be, then, that at least these men saw the two versions as differing significantly enough to overcome their objections to the February draft.[40]

We looked earlier at Hotchkiss's objections to the February draft on the grounds of its "weakness." We must now look to his complaints about its strength. In addition to testing our conclusions about congressional power, this will help us further to appreciate Hotchkiss's key role in the deliberations.

> I understand the amendment as now proposed by its terms to authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty and property. I am unwilling that Congress shall have any such power.

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38. This group includes those who have been identified as the "Opponents Test Case Vote Bloc," Table II *supra*, plus Hotchkiss and Conkling, who identified themselves as opponents of the February draft in the debate on it.

39. Avins, *The Ku Klux Klan Act*, *supra* note 5, at 347. This point, which perhaps needs to be slightly modified in the light of Hale's later testimony on his own stance towards the final version, seems to speak strongly against ten Broek's historical argument purporting to show that the federalism-inspired objections to the February draft had no impact on the final draft: "The destruction of the federal system certainly was pressed as an objection to the final, so-called negative form." He then cites various Congressmen who objected to the final draft on these grounds: "Since the amendment was adopted in the teeth of this criticism, might we not as reasonably conclude, if we are to give weight to the procedural record, that the amendment was intended to do the very thing objected to?" But the federalism objections to the final version were not raised by the Republicans who had had such objections to the February draft, but only by Democrats who, it is fairly clear, would have been prepared to object to even a thoroughly state-action amendment as working the destruction of the federal system. The continued Democratic opposition to the amendment seems far less significant than the fact that the Republicans, Hale perhaps excepted, ceased opposing it.

40. *Cf.* H. FLACK, *supra* note 4, at 83: the votes of Hale, Conkling, and Davis "may be explained by saying that the first section did not attempt to confer as much power as did the resolution which they opposed." Flack himself does not accept this hypothetical explanation, being of the opinion that both drafts confer plenary authority on Congress. He then more or less throws up his hands over the meaning of their actions.

> Now, I desire that the very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override. Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him.[41]

Hotchkiss's position, then, cannot be taken, as some have done, as a straightforward objection to congressional power to reach private action.[42] It is the power to pass uniform, primary legislation he opposes and not legislation reaching private action in itself. Davis of New York took much the same position as Hotchkiss. His main complaint against the February draft was that it "in terms" is "a grant for original legislation in Congress."[43]

Hale of New York was the only other "changer" opposing the February draft who spoke enough during the debates for his thought to emerge with any clarity. As opposed to Davis and Hotchkiss, Hale's entire opposition to the February draft and its principle of congressional legislative power is very clear. The following exchange between him and Thaddeus Stevens is instructive:

> Hale: I submit that it is in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, . . . may be repealed or abolished, and the law of Congress established instead.
>
> Stevens: Does the gentleman mean to say that, under this provision, Congress could interfere in any case where the legislation of a State was equal, impartial to all? Or is it not simply to provide that, where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality? Does this proposition mean anything more than that?
>
> Hale: In my judgment it does go much further than the remarks of the gentleman would imply; but even if it goes no further than that . . . it is still open to the same objection, that it proposes an entire departure from the theory of the Federal Government in meddling with these matters of State jurisdiction.[44]

Now that answer of Hale's is an objection not merely to the February draft, but also, it would seem, to the fourteenth amendment as adopted, and to the Civil Rights Bill of 1866. Hale's comment in 1875, that he had opposed the adoption of the fourteenth amendment, not just the February draft, makes perfect sense in conjunction with this reply to Stevens, even if his voting record does not perfectly accord with his later statement. His ultimate vote in favor of the Senate version of the amendment ought probably to be seen as accession to party pressure or other political concerns.[45] It was

41. CONG. GLOBE, 39th Cong., 1st Sess. H. P. 1095 (1866), *reprinted in* Avins, at 160.
42. *E.g.*, Fairman, *supra* note 18, at 37.
43. CONG. GLOBE, 39th Cong., 1st Sess. H. P. 1087 (1866), *reprinted in* Avins, at 156.
44. CONG. GLOBE, 39th Cong., 1st Sess. H. P. 1063 (1866), *reprinted in* Avins, at 153.
45. *Cf.* M. BENEDICT, *supra* note 10, at 185-89.

clear to all that the fourteenth amendment was to be the leading element of the Republican platform in the upcoming congressional elections, and therefore a Northern Republican who had opposed the amendment would not stand well at election time.[46] Hale's ultimate vote for the amendment, after his opposition to the February draft, signifies nothing as to any substantial difference of meaning between the two drafts on the federalism issue.[47]

Conkling also expressed his opposition to the February draft and then supported the amendment in its final form. Since he spoke very little, his actions are hard to interpret, but there is good reason to believe that he stood on the amendment much as Hale did. The evidence from the journal of the Joint Committee, of which Conkling was a member, shows that Conkling had opposed Bingham's drafts all along, even after they were recast into the "no state shall" form; and that he finally gave Bingham his support only towards the very end of the Committee's deliberations, when it was well assured that Bingham's draft would be part of the proposed amendment, and then, in the House, when it was clear that the amendment would pass easily.[48] The support Conkling gave to the final draft may well have been of the same character as that of Hale, and thus may signify nothing whatever as to his being more satisfied with the final draft than with the February draft.[49]

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46. *Cf.* J. JAMES, *supra* note 7, at 181; G. MAYER, *supra* note 10.

47. Here is his full statement in 1875:

> it was my fortune, standing alone in my party, to oppose the fourteenth amendment by my vote and by my voice, upon the ground, which seemed to me to be one I could not forsake, that it *did* change the constitutional powers of legislation of Congress, that it changed the theory of our government, and introduced a range of legislation by Congress utterly lacking in the old Constitution or in any previous amendments to it except the thirteenth.
>
> . . . .
>
> I ask any lawyer on this floor to tell me where he finds authority to say that under those provisions Congress is limited to legislation to correct the action of States, to provide a tribunal which may review such action, and not for legislation in the first instance to remedy the great evil against which the amendment proposes to guard.

CONG. GLOBE, 43rd Cong., 2nd Sess. H.P. 979 (1875), *reprinted in* Avins, at 722-23. It is very clear then that Hale did not believe the shift in language to mean what Farnsworth took it to mean. He goes even further in the power he sees in the amendment than those who originally supported it did. Hale then cannot be taken as evidence that the change in form of the amendment was intended to meet objections of the pro-federalism forces.

48. H. FLACK, *supra* note 4, at 55-139; J. JAMES, *supra* note 7, at 107-15.

49. Table II identified four other Republican and Union Party possible opponents of the February draft—Kuykendall, Rollins, Marvin, and Phelps—all of whom eventually supported the final amendment at least once. None of the four spoke or in any other way made clear the meaning of his action. Whether any of these four fit into the Hotchkiss-Davis pattern of support for the final version when the remedial character of congressional legislative power was more clearly expressed, or the Hale-Conkling pattern of continued opposition in principle but support for other reasons, or a third pattern of real perceived differences between the two versions, is more than the evidence allows us to say. But it is important to emphasize that the last alternative is only one of three possibilities and that it appears that at

The substance of my position on the original intention for congressional power under the fourteenth amendment is now before the reader. What remains is to look at the later 1871 debates for corroborative evidence. What follows, then, is chiefly of evidentiary value, and while it may help to clarify some fine points of constitutional theory, it does not essentially change the argument.

II. THE 1871 DEBATES

The 1871 debates on the Ku Klux Klan Act provoked statements and votes on congressional power from many of the original framers besides Bingham, Farnsworth, and Garfield. Of course, we must be cautious in what we infer from those later debates. Men misremember their deeds, much less their thoughts, of five years before; or they change their minds. Or they have a motive for not remembering accurately. But if the 1871 evidence is uniform in its testimony, and if this harmonizes well with what is otherwise known of 1866—it is fairly unlikely that so many men should all misremember or distort the past in the same way, after all—then we can, I think, take that testimony as corroborative and strengthening our independently derived knowledge.

The situation in which the Ku Klux Klan Act was prepared was almost perfect, as the situation in 1866 was not, for bringing out the implications in the fourteenth amendment for congressional power. The evil with which Congress was concerned was violence and intimidation by private individuals whom the states either would not or could not control. Even in the milder form finally adopted, the bill had provisions aimed at any "two or more persons within any State or Territory of the United States."[50] Here was a clear case of Congress attempting to reach the actions of private individuals, actions which before the Constitution was amended would most assuredly have been held to be within the exclusive domain of State authorities.

A. THE VOTE ON THE KKK ACT

In 1871, twenty-eight of those who had been in the House during the thirty-ninth Congress still sat in either the House or the Senate. Accepting the KKK Act as a test vote on the intentions of the framers of the fourteenth amendment on the question of congressional power, let us see how these twenty-eight voted in 1871.

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most four Congressmen followed that pattern, and none ever openly spoke for that position. So for them as we can reliably say anything about our group of "changers," they not only do not shake the state failure interpretation, but actually add more support to it.

50. 17 Stat. 13 (1871).

TABLE VI: THE "CONTINUERS":* POSITION ON THE KKK ACT AND FOURTEENTH AMENDMENT

	Vote on KKK Bill**		
	Yea	Nay	No Vote
Supporters of Fourteenth Amendment	19	0	3
Opponents of Fourteenth Amendment	0	6	0

* Five of the twenty-eight "continuers" were in the Senate in 1871. (Ferry, Windom, Patterson, Conkling, Morrill.) The other twenty-three remained in the House of Representatives.

** For those in the House, the roll-call used to establish position on the KKK Bill is that on the final House version of the bill, April 6, 1871. Likewise, for those in the Senate, the roll-call on the Senate version before conference has been used, April 14, 1871. In both Houses, later roll-calls are a bit confused by the interjection of the issue of the Senate-passed but House-opposed Sherman Amendment. This amendment is irrelevant to our present concern.

TABLE VII: THE "CONTINUERS": PARTY VOTE ON THE KKK ACT

	Yea	Nay	No Vote
Republicans	19	0	3
Democrats	0	6	0

Tables VI and VII show the pattern of the 1871 vote, both with respect to previous positions on the fourteenth amendment, and to political party. All voting Congressmen who had voted for the amendment also voted for the bill, including Farnsworth and Garfield. Also among the nineteen Republicans supporting the bill was Roscoe Conkling. If the vote on the bill was a "test vote," five years later, on what the Congress of 1866 had meant, the result supported Bingham's readings of those events, rather than Farnsworth's.

But Farnsworth's presence, and perhaps Conkling's, in the KKK majority raises doubts about whether the KKK Act, as voted on, represented a "test vote." The Farnsworth-Bingham-Garfield debates which we have already discussed were provoked by an earlier version of the bill, the second section of which provided:

> That if two or more persons shall, within the limits of any State, band or conspire together to do any act in violation of the rights, privileges, or immunities of another person, which, being *committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force*

> *constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny . . . .*[51]

In light of constitutional misgivings about this formulation, the language of the bill as adopted was substituted. The question that arises is whether the change obviates the value of the bill as a "test vote." Recently Alfred Avins has argued that this was precisely the case.

B. THE AVINS THEORY

Avins identifies four clear positions that emerged in the 1871 debates on congressional power. Two of these are of special relevance. He describes one theory as follows:

> If a state denies by affirmative action or omission the equal protection of the laws, whether the denial or failure is due to the action or inaction of the legislature, executive, or courts, and thus fails to protect persons in their constitutional rights, Congress may substitute directly federal protection for the state protection withheld.

Avins identifies this as "the original theory of [the] bill."[52] This theory is very close to what we have argued to be the actual intention of the amendment, but is expressed a bit too narrowly as simply an equal protection theory. The theory of the amendment defended here is broader and more general, applying to all the clauses of the amendment and expressing a general theory of federal relations, "national government, decentralized administration."

Avins argues that this theory was rejected in the final bill and replaced by another theory of Congress's power. According to this second theory, Congress is not altogether precluded from reaching the actions of private individuals, but can do so only under extremely limited circumstances:

> Congress may also punish a private person or conspiracy. When engaged in preventing a state officer from performing his constitutional duty of affording equal protection either by violence or threats thereof against the state officer, or by inducing him in some other way not to afford equal protection, such as through a conspiracy with him.

The state action requirement under this theory is breached to the rather small extent that it is

> on the same basis as punishing a combination to deter a federal revenue collector from collecting revenue by violence or by bribery or conspiracy. . . . The constitutional theory was that Congress could punish individuals who thwarted officials from performing a federally-imposed duty.

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51. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 68-69 (1871), *reprinted in* Avins, at 493-94 (emphasis supplied.)

52. Avins, *The Ku Klux Klan Act*, *supra* note 5, at 377.

This theory, according to Avins, was the one "ultimately embodied in the bill," and was the theory which had the support of most of those involved in the drafting of the fourteenth amendment.[53] He concludes, therefore, that if the 1871 proceedings cast any "reflected light" on the original intention, the theory he identifies as that of the Ku Klux Klan Act is also that of section five.[54]

The text of the bill does not support Avins's theory. Section two of the act as adopted does make it unlawful for

> two or more persons [to] . . . conspire . . . for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, . . . or to injure any person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws . . . each and every person so offending shall be guilty of. . . .[55]

But in addition to acting against those who interfere with the "constituted authorities," the law also provides against conspiracies "for the purpose, either directly or indirectly, of depriving any person or class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws." This provision goes altogether beyond what Avins identifies as the theory of the law; indeed, it goes at least as far as the theory Avins claims was rejected, and perhaps further than any remedial theory of congressional action under section five. The very sweeping language of this section would later contribute to its difficulties in the Supreme Court.[56]

A close examination of the debates also fails to support Avins. Seven Republicans, including Samuel Shellabarger of Ohio, the sponsor of the original bill, and Burton Cook of Illinois, the chief draftsman of the amended bill, spoke on the bill in its amended form. The theory of the bill ought to emerge most clearly in these

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53. *Id.* at 377-78.

54. Avins apparently pressed this argument on the Supreme Court in United States v. Guest, 383 U.S. 745 (1966), and United States v. Price, 383 U.S. 787 (1966), where it was rejected. But it can hardly be said that the Court met the argument or presented either a very clear statement of the position it was adopting instead, or any very compelling grounds in defense of its position.

55. 17 Stat. 13 (1871).

56. Avins, strangely I think, admits at the end of his article that "although the theory ultimately adopted was that the violence would have to direct its force against a public official to deter him or prevent him from affording protection, the statutory language did not make this clear, but instead proscribed conspiracies to deny protection generally." Avins, *The Ku Klux Klan Act, supra* note 5, at 379. Indeed it did—and not only did it speak in such general language, it used that general language in addition to the more specific language directed to conspiracies against public officials. It is difficult then to see, as Avins does, "vagueness of language" as the reason for this quite general statutory language. *Id.* But Avins believes he knows from the debates what the theory, as opposed to the language, of the bill really is. So we must see if the "theory," as stated in debate, supports Avins's position.

speeches. Shellabarger, in introducing Cook's amendments to the bill, described "the object of the amendment" as follows:

> The object of the amendment is, as interpreted by its friends who brought it before the House, so far as I understand it, to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens: that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.[57]

The change Shellabarger saw in the bill concerns the scope or character of the right to be protected by national legislation. The new version of the bill attempted to avoid some of the seemingly extreme implications of the earlier bill by affirming that it is not the rights and the privileges and immunities as such that are sought to be protected, but equality of rights and equality of privileges and immunities. This new language conveyed somewhat better than the old the relatively limited aim that inspired the legislation. Shellabarger, then, in introducing the bill, provided no support for Avins's reading of the bill's theory.

Nor did the next Republican speaker, Jeremiah Wilson of Indiana, support it any better. As Avins himself concedes, Wilson "made a sweeping assertion that Congress could enforce the Constitution against conspirators," and believed that was what the bill attempted to do.[58] Cook of Illinois spoke after Wilson, and since he was the draftsman of the amendment, Avins rightly lays great emphasis on his exposition. According to Avins,

> Cook's amendment, in his own view, which Shellabarger adopted, punished only conspiracies to obstruct state officials in performing their constitutional duty of affording all persons equal protection. It did not punish conspiracies to commit crimes against individuals, even if such crimes were motivated by a desire to deprive them of equal protection.[59]

Cook opened his explanation by stating that Congress has the power "to protect and enforce every right secured to American citizens by the Constitution of the United States," but this power does not include the "right to punish an assault and battery when committed by two or more persons within a State." A Democratic opponent of the bill inquired why, under Cook's theory of congressional power, Congress could not reach assault and battery and other crimes against person and property, to which Cook replied:

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57. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. 478 (1871), *reprinted in* Avins, at 536.
58. Avins, *The Ku Klux Klan Act*, *supra* note 5, at 351-52.
59. *Id.* at 353.

> The reason is that the Constitution of the United States recognizes these rights as being enforced and protected by the State authorities. [Note that he does not say exclusively, however.] It recognizes in one event the right of the United States to interfere and protect the citizen in person and property, when, by unlawful combinations too strong for the State authorities to put down or subdue, the citizen is deprived of his rights.[60]

This exposition is indeed a rather clear statement of the theory of the fourteenth amendment, as described above, and which, according to Avins, was rejected in the bill.

Ulysses Mercur of Pennsylvania, one of the carryover Congressmen from 1866, was the next Republican speaker. He was, Avins concedes, a defender of the equal protection theory supposedly rejected by the House.[61] Charles Willard, who was not in Congress in 1866, is nonetheless awarded special prominence by Avins. He claimed to have supplied the original draft on which the amended bill was based, and was one of the few who stated clearly that he considered the original bill unconstitutional but the amended bill constitutional. Willard's objection to the original bill derived from his belief that in it Congress claimed "original jurisdiction of all offenses against life, property, or person, although such offenses might be committed within the limits of a State."[62] The new bill, by contrast, and here is the source of Shellabarger's comments, avoids this extraordinarily broad and unconstitutional claim.

> By providing that the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States law a denial of that equality.[63]

Indeed this is a more restricted claim than that which, according to Willard, the original bill raised. But it is not restricted in the way Avins claims.

The last two speakers before the vote on the bill supply the only support in the entire set of debates for Avins's position: even their statements were ambiguous. Horatio Burchard, like Willard, very strongly of the opinion that the revised bill cured the constitutional defects of the original, explained the superiority of the new draft as follows.

> That amendment [to the bill] obviates in a great measure the objections and the

60. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. 485 (1871), *reprinted in* Avins, at 538.

61. Avins, *The Ku Klux Klan Act, supra* note 5, at 353-54, 377.

62. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 188 (1871), *reprinted in* Avins, at 540.

63. *Id.*

> doubtful construction as to the extent of jurisdiction for the punishment of crimes intended by the bill. It is not denial of protection, but of equality of protection which constitutes the offense against the United States. The conspiracies it seeks to punish are those designed to prevent the equal and impartial administration of justice. These are essentially different from combinations and conspiracies to resist the execution of ordinary process. They must be aimed to prevent the enjoyment of equal civil rights.

In this, Burchard's exposition is perhaps identical to Willard's, but he concludes in a way that comes very close to Avins's position.

> The gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equality of protection. It is with this view that this legislation is competent. . . . If the refusal of a State officer, acting for the State, to accord equality of civil rights renders him amenable to punishment for the offense under United States law, conspirators who attempt to prevent such officers from performing such duty are also clearly liable.[64]

The possible ambiguity that appears between the first part of Burchard's remarks and the second is reflective perhaps of a deeper ambiguity inherent in the theory that what Congress may punish is "the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional rights to equality of protection." The ambiguity appears when one asks how a conspiracy, which we might for the sake of convenience call a conspiracy against (or with) state officials differs from a conspiracy against a citizen. From one point of view, the difference is great. A state official either would have to be part of the conspiracy, or his actions, his failure to supply equal protection, would have to be demonstrably affected by threats or actions taken by the private conspirators on or against him. Avins seems to be defending this view of the matter.

But from another point of view, "the unlawful attempt to prevent a state through its officers, etc." might make the conspiracy against the state officials quite indistinguishable from the conspiracy against the citizen. Could it not be said to be an *ipso facto* conspiracy against the state's supplying equal protection to conspire to deprive citizens of equal rights? After all, any criminal conspiracy normally encompasses an intent to avoid the interference of the law with its operations. On this view point, the theory that Avins claims was rejected—the state failure theory—and the theory he claims was accepted are identical in effect, although differing somewhat in the constitutional reasoning which supports them. Burchard probably had something like this in mind. If not, it is

64. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 315 (1871), *reprinted in* Avins, at 546.

difficult to see how he defended the bill as actually drafted. Whatever interpretation of Burchard's theory may be correct, it was sufficiently idiosyncratic that it cannot be taken as indicative of the congressional understanding either of the theory of the KKK Bill, or of section five of the fourteenth amendment.[65]

Surprisingly, Avins cites both Bingham and Garfield as prominent among those who supported his conspiracy theory of the fourteenth amendment.[66] Avins's treatment of Bingham is altogether remarkable. In an article which concludes with the observation that the Supreme Court in the *Guest* case improperly "resurrected the rejected first draft of the Bingham amendment from its grave and enshrined it in all of its glory into the fourteenth amendment" Avins inexplicably fails to mention Bingham's claim that the amendment as adopted went as far as the earlier draft had done in empowering Congress. In considering Bingham's position, one must consider further that he spoke in favor of the earlier Shellabarger draft, of which he expressed no constitutional doubts whatever. He says, quite explicitly, that the post-war amendments "do, in my judgment, vest in Congress a power to protect the rights of citizens against States, and individuals in States." The KKK Bill is an instance of the power to provide "against the denial of rights by states, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people." "Who dare say," Bingham asks, "now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States, and by States, or combinations of persons?"[67]

Avins says of Garfield that he

> observed that Congress had the power to enforce the amendment under the fifth section by making it a penal offense for any person, whether official or private to invade the rights of citizens or by violence, threats or intimidation to deprive him of his rights, as a part of that general power vested in Congress to punish the violators of its laws.

But of this very broad position, Avins says, "In other words, a private criminal who interferes with the state in giving equal protection would be, in his view, punishable by federal authority." Those are "other words" indeed.

Examination of Avins's views on the KKK Act confirms the

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65. Poland, who spoke after Burchard, is the only other representative who seems to agree with Burchard's theory, and in his explication there is the same ambiguity as in Burchard's own.

66. Avins, *The Ku Klux Klan Act*, *supra* note 5, at 378.

67. CONG. GLOBE, 42nd Cong., 1st Sess. H. P. app. 85 (1871), *reprinted in* Avins, at 511.

propriety of taking the vote on the KKK Act as in some sense a "test vote" on the congressional understanding of the meaning of the shift in the language of the fourteenth amendment from the February draft to the final draft. The bill as adopted, the theory of the bill as presented by its advocates, and the statements and votes of those who were part of the thirty-ninth Congress all support the state failure theory of congressional power under the fourteenth amendment.

But neither the thirty-ninth Congress which drafted the amendment nor the forty-second Congress which reaffirmed the original understanding of the amendment had the last word. Shortly after the 1871 debates, the Supreme Court began its attack on the fourteenth amendment as originally understood. The Court rejected, preeminently, the doctrine of congressional power meant to be embodied in section five, and substituted for it the state action doctrine. What the Court did was partly due to difficulties inherent in the state failure doctrine. But those difficulties and the Court's subsequent reshaping of the fourteenth amendment constitute another long story.

APPENDIX I

Rollins of New Hampshire has been included in the "opponents test-case bloc" even though he did not vote for Eldridge's motion, but abstained. He has been classified as a member of the bloc, however, because he is the only Republican who abstained on this vote but voted immediately after on Conkling's motion to postpone. That suggests that he used his abstention, in the face of his party's position on the motion, to signal his disapproval of the February draft.

One Republican who voted for the Eldridge motion has been omitted from the bloc. That is Lowell Rousseau of Kentucky, a Republican in name only, who supported the Democratic position on all votes relating to the fourteenth amendment. His opposition to the February draft, like that of the Democrats, cannot be differentiated from general opposition to the amendment in any form. It therefore is no help to us in trying to understand the significance of the shift in language from the February draft to the final version.[68]

APPENDIX II

As Table III shows, Julian and Raymond did not vote on the motion to postpone, contrary to their party's position, after having voted against the motion to table. Lowell Rousseau also abstained from the vote on the motion to postpone, but since he had previously favored the motion to table, his abstention on the second vote clearly meant something different from the others. As with Rollins in the "opponents test-case bloc," we feel justified in attributing some significance to the abstentions of Julian and Raymond. They (and Rousseau) were the only Congressmen who voted on one of the two roll-call votes and did not vote on the other. All the other abstainers—there were over thirty on each roll-call—abstained on both. With the exception of one Representative, whose views were announced by a colleague, we are unable to attribute reliably any views to this larger group of abstainers. But to attribute significance to the abstentions of those who voted on one motion and not the other, especially when we have later fourteenth amendment votes as corroborative evidence, does not seem improper.

68. On Rousseau's general political position, see M. BENEDICT, *supra* note 10, at 184, 349, 354.