THE EVOLUTION OF THE CIVIL RIGHTS MOVEMENT:

1866-1883

APPROVED:

Major Professor

Minor Professor

Director of the Department of History

Dean of the Graduate School

THE EVOLUTION OF THE CIVIL RIGHTS MOVEMENT: 1866-1883

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By

Linda M. Clark, B. A.
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CHAPTER I

THE CIVIL RIGHTS ACT OF 1866

In American life one of the persisting problems to emerge from the civil war and reconstruction eras was the question of civil rights, especially as they pertained to the Negroes just released from the bonds of slavery. During the period between 1865 and 1875 the Republican Party controlled Congress and, in the surge of reform which followed Lee's surrender at Appomattox, undertook to initiate direct and positive legislation for the benefit and the protection of the Negro in his newly acquired status as a free man and as an American citizen.[1] Bearing the expansive title, "An Act to Protect All Persons in the United States in Their Civil Rights and Furnish the Means of Their Vindication,"[2] the first of these measures, the Civil Rights Act of 1866, received Congressional approbation in March, 1866, but did not become operative until the following April when the Republican majority repassed it over President Andrew Johnson's veto.

An understanding of the development of the bill from its beginnings in the Senate to its culmination in April necessitates

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[1]Chase C. Mooney, Civil Rights: Retrospects and Prospects (Washington, D. C., 1961), p. 7.

[2]Milton R. Konvitz, A Century of Civil Rights (New York, 1961), p. 48.

a few brief statements concerning the condition of the nation and the relations between the President and Congress. A Democrat who succeeded to the Presidency upon Lincoln's assassination after having been elected Vice-President on the Union ticket in 1864, Johnson found himself the head of a Republican Administration whose congressional members were determined to have a voice in Southern reconstruction. Why did the Radical Republicans, such men as Thaddeus Stevens of Pennsylvania, the bitter and sarcastic leader in the House, and the more idealistic Senator Charles Sumner of Massachusetts, along with some of the more moderate Republicans, believe the Johnson program to be unsatisfactory? Apparently the manner in which the South implemented the President's plan became a major factor in Congressional disapproval; step by step, the Southern states contributed ". . . to a malaise which . . . undermine[d] the North's initial disposition to support, experimentally, presidential reconstruction."[3]

Following the Confederate surrender at Appomattox in April, 1865, the South was utterly defeated and its submission complete. During the summer of 1865 when Congress was not in session, the Southern states eagerly accepted Johnson's reconstruction plan, which held out the promise of lenient treatment with no wide-scale reprisals. Following presidential guidelines, conventions adopted constitutions repealing secession ordinances, abolishing

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[3]Eric L. McKitrick, Andrew Johnson and Reconstruction (Chicago, 1960), p. 10.

slavery, and repudiating the rebel debt of the state. After the conventions finished their work, Southerners elected state officers and members of Congress. By the end of 1865, relatively satisfied with the South's compliance with his program, Johnson announced that all the former Confederate States, Texas excluded, were entitled to their Congressional representation.[4]

The majority of Northerners could not agree with Johnson. The South had antagonized them by quibbling over such fine points as repealing rather than nullifying secession and acknowledging that slavery had been destroyed by force instead of simply abolishing it. Mississippi went further and refused to ratify the Thirteenth Amendment. No Southern state considered suffrage for the Negro.[5]

However annoying these might be, two other developments in the South became the real focus for Northern bitterness. One involved the Black Codes adopted by the legislatures to set forth ". . . Southern intentions toward the masses of newly freed Negroes; the other had to do with the character of the men being elected to public office in the Southern states."[6]

In the opinion of a leading historian, "most Southern whites, although willing to concede the end of slavery even to the point of voting for the adoption of the Thirteenth Amendment, were convinced that laws should be speedily enacted to curb

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[4] Ibid., pp. 8-9.

[5] Ibid., pp. 9-10.

[6] Ibid., p. 10.

the Negroes and to insure their role as a laboring force in the South."[7] Consequently, to them, ". . . the Black Codes were a realistic approach to a great social problem. . . ." They provided a ". . . solution for the problem of the Negro laborer and . . . [a] substitute for slavery as a white supremacy device."[8] To put these ideas and desires of their people into practical operation, Southern legislatures in 1865 proceeded to adopt Black Codes granting certain rights to Negroes but also placing numerous restrictions on them.

Qualifying provisions usually accompanied the rights granted to Negroes by the Black Codes. In Mississippi the right to own property was limited to towns and cities. Making a binding contract with a white man required that the contract be in writing and that it be witnessed by a white man. A Negro could now sue or be sued in state courts, but in these and other legal matters, his testimony against a white person invariably had little or no value. Although the Black Codes legalized marriages between Negroes, they generally forbade marriages between the races and prescribed heavy penalties for those performing such services.[9]

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[7]John Hope Franklin, From Slavery to Freedom: A History of Negro Americans (New York, 1969), p. 303.

[8]T. Harry Williams, Richard N. Current, and Frank Freidel, A History of the United States, 2 vols. (New York, 1966), II, 16.

[9]Ibid., p. 16. See also Franklin, From Slavery to Freedom, p. 303; Edward McPherson, The Political History of the United States of America during the Period of Reconstruction (Washington, 1871), p. 29; Charles Sumner, The Works of Charles Sumner, 15 vols. (Boston, 1883), X, 95.

In their desire to retain the Negro as a cheap and convenient source of labor and to keep him in an inferior social position, the Southern states restricted his activities in many different ways. In some areas, the Black Codes opened only certain occupations to Negroes. The South Carolina statute, a prime example of this type of restriction, provided that Negroes ". . . could not engage in any vocation except husbandry (agricultural labor) and domestic service."[10] Numerous other restrictions placed on the Southern Negro by the Black Codes Franklin sums up as follows:

> Vagrancy laws imposed heavy penalties that were designed to force all Negroes to work whether they wanted to or not. The control of the Negro permitted to white employers was about as great as that which slaveholders had exercised. If a Negro quit his job, he could be arrested and imprisoned for breach of contract. . . . Numerous fines were imposed for seditious speeches, insulting gestures or acts, absence from work, violating curfew, and the possession of firearms.[11]

To the South, the Black Codes presented an answer to the havoc wrought on their social and economic systems by the Civil War; to the horrified North, they appeared to herald a return to slavery. Representative James G. Blaine, Republican from Maine, expressed the sentiments of many Northerners when he said, "These laws were framed with malignant cunning so as not to be limited in specific form of words to the negro race, but they were exclusively confined to that race in their execution."[12]

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[10]Williams, A History of the United States, II, 16.

[11]Franklin, From Slavery to Freedom, p. 303. For specific penalties, see McPherson, Political History, pp. 29, 30, 33, 39.

[12]James G. Blaine, Twenty Years of Congress: From Lincoln

These Black Codes were very similar to the slave codes they were intended to replace. Generally Northern opinion demanded that some action be taken to prevent the reenslavement of the Negroes of the South. This desire to protect the freedmen in their new-found position crystallized in the Civil Rights Act of 1866.

In addition to the Black Codes, the character of the men elected as state officials and Congressional representatives by the so-called "loyal" states served as a factor in hardening Northern bitterness and convincing Congress that it should actively participate in Southern reconstruction. Men formerly prominent in the Confederacy dominated the state governments; those elected to Congress also came within this category. Many who arrived in Washington for the opening of the Thirty-Ninth Congress, December, 1865, had served in either the Confederate civil government or the Confederate military, one of the most notable examples being Alexander H. Stephens, former Vice-President of the Confederate States of America and now a Senator from Georgia.

Northern reaction to events in the South during the previous summer and fall expressed itself clearly with the opening session of Congress. Congress refused the Southern Congressmen seats in their respective houses. Following the exclusion of the representatives of the Johnson governments, Congress

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to Garfield with a Review of the Events which Led to the Political Revolution of 1860, 2 vols. (Norwich, Connecticut, 1886), II, 97.

established a Joint Committee of Fifteen to study the problem of reconstruction and make recommendations, while leaving the Southern states waiting for readmission.[13]

After taking the above-mentioned steps, Congress turned to a consideration of its foremost problem,

> . . . what to do with the freedmen, 'the everlasting, inevitable Negro.' . . . Loosened not only from the legal but the economic ties which fixed their places in society and their part in production, many of them wandered aimlessly about the countryside or huddled near northern army camps and in philanthropic centers, the victims alike of continued white oppression and of their own long past of slavery, the former bondsmen constituted a vast relief and welfare problem as well as a problem of legal protection. . . .[14]

Republicans agreed that the care of the Negro race was a national responsibility. Thaddeus Stevens of Pennsylvania expressed their sentiments in a speech delivered in the House of Representatives, December 5, 1865.

> We have . . . turned or are about to turn loose four million slaves without a hut to shelter them or a cent in their pockets. The diabolical laws of slavery have prevented them from acquiring an education, understanding the commonest laws of contract, or of managing the ordinary business of life. This Congress is bound to look after them until they can take care of themselves.[15]

On December 18, 1865, approximately two weeks after the opening of the session, Congress declared the ratification of the Thirteenth Amendment abolishing slavery throughout the

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[13]McKitrick, Andrew Johnson and Reconstruction, p. 11.

[14]Jacobus ten Broek, The Antislavery Origins of the Fourteenth Amendment (Los Angeles, 1951), pp. 156-157.

[15]Congressional Globe, 39th Congress, 1st Session, I, 74.

United States. As reports poured in from the Southern states describing the operation of the Black Codes and individual outrages upon Negroes, it became evident that action must be taken to protect the newly emancipated freedmen because "to leave them with their shackles broken off, unprotected, in a new and undefined position, would have been a sin against them only surpassed in enormity by the original crime of their enslavement."[16]

Returning from the Christmas holidays, Republicans in Congress prepared to consider legislation that would insure ". . . a firmer degree of federal political control in the South and for strengthening the position of the masses of colored freedmen."[17] Senator Lyman Trumbull, moderate Republican from Illinois, sponsored concurrently the Freedmen's Bureau Bill and the Civil Rights Bill, both of which ". . . were to wipe out the last vestiges of slavery in state law codes and customary practices, and to provide equality in the protection citizens received from the laws."[18]

Although Section 1 of the Civil Rights Bill and Section 7 of the Freedmen's Bureau Bill contained almost identical lists of the civil rights protected by the national government, ". . . —the agents of the bureau in the one case, the federal

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[16]William H. Barnes, History of the Thirty-Ninth Congress of the United States (Indianapolis, 1867), p. 188.

[17]McKitrick, Andrew Johnson and Reconstruction, p. 11.

[18]Harold M. Hyman, editor, The Radical Republicans and Reconstruction, 1861-1870 (New York, 1967), p. 309.

courts in the other . . .,"[19] the Civil Rights Bill presented a much more sweeping measure. Its operation was not confined to the former slaveholding states, ". . . but bore directly upon some of the free States where the Negro had always been deprived of certain rights fully guaranteed to the white man."[20] Congressional debates soon made it evident that

> . . . whereas the Freedmen's Bureau Bill . . . aimed at conditions in the states that had attempted to secede, and thus could invoke constitutional powers arising from the rebellion, the Civil Rights Bill operated throughout the country and . . . had to find its authority in constitutional principles of general application.[21]

Lyman Trumbull, Chairman of the Senate Committee on the Judiciary, introduced the Civil Rights Bill (S.R. No. 61) on January 5, 1866. It was referred to the Committee on the Judiciary after being read twice by title. On January 11, 1866, acting for the Committee, Trumbull reported the bill back for a third reading in its entirety[22] with the statement that ". . . he regarded it as the most important measure proposed for the consideration of the Senate since the Thirteenth Amendment."[23]

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[19]Broek, Antislavery Origins, p. 160.

[20]Blaine, Twenty Years of Congress, II, 173.

[21]Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," Stanford Law Review, II (December, 1949), 8.

[22]Congressional Globe, 39th Congress, 1st Session, I, 129, 184, 211-212.

[23]James Ford Rhodes, History of the United States from the Compromise of 1850 to the Final Restoration of Home Rule at the

> Trumbull's . . . bill spelled out for the first time certain civil rights of American citizens that race must not measure. . . . Trumbull desired national provision for equality of an American status in all matters before local, state, and national laws. Thus in making and enforcing contracts; in being parties to suits and offering testimonies in courts; in handling questions of property transfer by purchase, lease, rental or inheritance; and in suffering the penalties of laws as well as the protections, make the penalty the same on all classes of the people for the same offense; . . . .[24]

Following the reading and the adoption of a few verbal amendments, the Senate postponed consideration of the Bill until January 29, 1866.

From January 29, 1866, when the Senate began consideration of the Civil Rights Bill until its final enactment in April, 1866, arguments as to the merits of the proposition ran the full gamut, several of which are still being heard in some areas of the nation today. The major debates in both houses of Congress revolved around certain issues, namely, constitutionality, states rights, Black Codes, and Negro equality.

During the Congressional debates, the question of the measure's constitutionality proved to be one of the most widely discussed areas. For justification of the act, the proponents of the bill relied chiefly upon the second section of the Thirteenth Amendment giving Congress authority to enforce the abolition of slavery by appropriate legislation. Senator Trumbull, in defending his bill, declared that Congress was justified in

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South in 1877, 8 vols. (New York, 1910), V, 580. Hereafter cited as Rhodes, History.

[24]Hyman, Radical Republicans and Reconstruction, p. 309.

passing such an act, ". . . for, being invested by the Constitution with the power of abolishing slavery by appropriate legislation, it had . . . power to abolish laws [Black Codes] which deprive a freedman of his rights, and so practically reduce him to Slavery."[25] In attacking the Black Codes of the South, he also pointed to the Thirteenth Amendment as justifying this proposed corrective legislation;

> . . . I take that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude, which, by the Constitution is prohibited.[26]

Other Congressmen followed Trumbull's lead in employing the Thirteenth Amendment to uphold their claims of constitutionality. According to Representative M. Russell Thayer of Pennsylvania, the Civil Rights Act carried out and guaranteed the reality of the Thirteenth Amendment and thus prevented it ". . . from remaining a dead letter upon the constitutional page of this Country."[27] Representative James Wilson, Republican from Iowa, justified the bill in a speech on March 1, 1866;

> The end is legitimate, because it is defined in the Constitution itself. The end is the maintenance of freedom to the citizen. . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. Anything which protects him in the possession of these rights insures him against reduction to slavery. This

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[25] Harper's New Monthly Magazine, XXXII (March, 1866), 532.

[26] Congressional Globe, 39th Congress, 1st Session, I, 474.

[27] Congressional Globe, 39th Congress, 1st Session, II, 1151.

settles the appropriateness of the measure, and settles its constitutionality.[28]

Supporters of the Civil Rights Act also pointed to the constitutional provision granting Congress the power to establish uniform rules of naturalization (Art. I, Sec. 8, Cl. 4) as further evidence of the legality of the measure. Trumbull emphasized the idea that the constitutional authority to declare who might become citizens enabled Congress to pass this act declaring all persons born in the United States to be citizens of the same.[29] Ably supporting Trumbull's view, Representative Burton C. Cook of Illinois referred to previous acts of Congress by which such diverse groups as the Stockbridge Indians of Connecticut and the Mexican residents of Texas were made United States citizens.[30] According to Henry J. Raymond of New York, the aforementioned power allowed Congress ". . . to introduce into citizenship those who are now excluded from it, whether native or alien."[31]

In opposing the Civil Rights Act on the question of constitutionality, the Democrats and some Conservative Republicans switched to a very restrictive interpretation of the Thirteenth Amendment. Whereas, a year earlier, in the debate on the

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[28]Ibid., 1118. For similar ideas, see Congressional Globe, 39th Congress, 1st Session, I, 503, 570; Congressional Globe, 39th Congress, 1st Session, II, 1124.

[29]Congressional Globe, 39th Congress, 1st Session, I, 475.

[30]Ibid., II, 1124.

[31]Ibid., 1266. See also, ibid., 1117.

amendment itself, they railed against Negro elevation and equality which its passage would bring, the opposition now maintained that the amendment ended slavery and nothing more.[32] Perhaps the words of Democratic Senator Garret Davis of Kentucky express best the viewpoint of the opposition. According to him, the Thirteenth Amendment

> . . . simply . . . [abolished] the legal servitude of one man to another; it . . . severed all connection between the slave and the master. . . . It simply . . . destroyed the legal subjection of the slave to the master. That was its sole object. It never was contended for until these times of fanaticism and of unreasoning philanthropy for the negro, that it ever had any other result heretofore.[33]

On the subject of naturalization, the opponents of the bill denied the constitutional authority of Congress to confer citizenship on Negroes or any other group within the United States. Here again, Garrett Davis voiced the feeling of the minority in Congress when he stated

> . . . that a negro cannot be made a citizen by Congress; he cannot be made a citizen by any naturalization laws, because the naturalization laws apply to foreigners alone. No man can shake the legal truth of that position. They apply to foreigners alone; and a negro, an Indian, or any other person born within the United States, not being a foreigner, cannot be . . . made citizens by the uniform rule established by Congress under the Constitution, and there is no other rule.[34]

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[32]Broek, Antislavery Origins, pp. 164-165.

[33]Congressional Globe, 39th Congress, 1st Session, I, 577. See also, Ibid., 477, 499; Congressional Globe, 39th Congress, 1st Session, II, 1268.

[34]Congressional Globe, 39th Congress, 1st Session, I, 598. See also, ibid., 497, 528.

Another reason for opposition to the Civil Rights Bill on constitutional grounds was the very persistent and vehement cry that it violated the reserved rights of the states guaranteed in the Tenth Amendment to the Constitution. According to the Democratic Representative from New Jersey, Andrew J. Rogers, "this act of legislation would destroy the foundations of the Government as they were laid out and established by our fathers, who reserved to the states certain privileges and immunities which ought sacredly to be preserved to them."[35] In the opinion of Anthony Thornton, Democrat from Illinois, the civil rights measure provided ". . . a stepping-stone to a centralization of the Government and the overthrow of local powers of the States."[36] Senator Willard Saulsbury of Delaware condemned the bill as ". . . the last act to convert a Federal Government with limited and well-defined powers into an absolute, consolidated despotism. . . ." At one point in his speech he burst out with ". . . stop, stop! the mangled, bleeding body of the Constitution of your country lies in your path; you are treading upon its bleeding body when you pass these laws [Freedmen's Bureau and Civil Rights Act]."[37]

The Republican spokesmen for the bill denied the opposition's allegation that their proposed law violated the rights

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[35] Congressional Globe, 39th Congress, 1st Session, II, 1121.

[36] Congressional Globe, 39th Congress, 1st Session, II, 1157.

[37] Congressional Globe, 39th Congress, 1st Session, I, 481, 478. For similar views, see ibid., 499, 595, 601, 603-604;

of the individual states, and asserted that only those states discriminating against certain groups in the enjoyment of their civil rights needed to be apprehensive at all: Lyman Trumbull pointed out that the proposed law would ". . . have no operation in any State where the laws . . . were equal, where all persons. . .[had] the same civil rights without regard to color or race."[38] According to Senator Jacob M. Howard of Michigan, an ". . . invasion of the legitimate rights of the States . . . ." did not exist in the bill which contemplated nothing more than giving ". . . to persons who . . .[were] of different races or colors the same civil rights."[39]

That a desire to obliterate the Black Codes moved many Republicans to work for passage of the Civil Rights Act became apparent in the course of debate. Supporters, such as Senator Henry Wilson of Massachusetts, denounced the Black Codes and called for Congressional approval of the bill in the following terms:

> This measure is called for, because these reconstructed Legislatures [Mississippi, Alabama, South Carolina, Virginia, Louisiana], in defiance of the rights of the freedmen, and the will of the nation, embodied in the amendment to the Constitution, have enacted laws nearly as iniquitous as the old slave codes that darkened the legislation of other days. The needs of . . . four million colored men imperatively call for its enactment.

Congressional Globe, 39th Congress, 1st Session, II, 1268, 1291; New York Times, February 3, 1866, p. 1.

[38] Congressional Globe, 39th Congress, 1st Session, I, 476.

[39] Ibid., 504.

The Constitution authorizes and the national will demands it.[40]

Representative John Broomall of Pennsylvania argued that the men in the South who had remained loyal to the Union during the civil war had to be protected from such harsh treatment as the Black Codes and some unrepentant rebels inflicted upon them; if the nation withdrew its protection from such allies, said Broomall, it ". . . could neither hope for the approval of mankind nor the blessing of heaven."[41] Although they desired to protect loyal citizens, the proponents of the measure said they had no inclination to deprive any person of his rights; according to James F. Wilson, Iowa Republican, he ". . . would not . . . deprive a white man of a single right to which he is entitled. I would merely enforce justice for all men. . . ."[42]

In minimizing the difficulties of the colored race brought about by the operation of the Black Codes, the opposition relied upon the old argument that the Negro's only true friend was his former master who understood his ways and who, if left alone, would work with him to find a satisfactory solution to the problems created by emancipation. This sentiment expressed itself best in the words of Democrat Charles A. Eldridge of Wisconsin:

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[40] Barnes, Thirty-Ninth Congress, p. 215. For similar opinions, see Congressional Globe, 39th Congress, 1st Session, I, 474, 475, 504; Ibid., II, 1123, 1160.

[41] Congressional Globe, 39th Congress, 1st Session, II, 1265.

[42] Ibid., 1118.

> . . . I believe that the people who have held the freedmen slaves will treat them with more kindness, with more leniency, than those of the North who make such loud professions of love and affection for them. . . . They know their nature; they know their wants; they know their habits; they have been brought up together, and have none of the prejudices and unkind feelings which many in the North would have toward them.[43]

Later in his remarks, Eldridge decried the idea of Southern hostility toward the Negro; as far as he could ascertain,

> . . . they do not blame the negro for anything that has happened. As a general thing, he was faithful to them and their interests until the Army reached the place and took him from them. He . . . supported their wives and children in the absence of the husbands and fathers in the armies of the South. He has done for them what no one else could have done. They recognize his general good feeling toward them, and are inclined to reciprocate. . . .[44]

On the matter of equality, the opponents of the Civil Rights Act argued that the Negro was an inferior being; and that, whereas the supporters of the measure hailed it as upholding equal rights for all, it actually made a decided distinction in favor of the Negro race. Andrew J. Rogers, New Jersey Democrat, announced that the passage of the bill would enable Negroes to be elected to high offices, even that of President. If such inferior persons were elected, he feared this would lead to a degrading of the government.[45] Senator Garrett Davis of Kentucky, champion of the belief in a white man's government, declared that never ". . . was such partial,

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[43] Ibid., 1156.

[44] Ibid.

[45] Ibid., 1122.

unjust, iniquitous legislation devised for the white man who achieved all this good for his country. . . . But the negro and his insane friends bring up now for the first time such monstrous legislation."[46]

The defenders of the bill denied the idea of Negro inferiority as well as the criticism that the Civil Rights Act created race distinctions. In his remarks, William Windom of Minnesota emphasized that Rogers, far from believing in the inferiority of the Negro, must surely believe in his superiority else how can he conclude that ". . . four millions of them [Negroes] can elect a President of their own race against the wishes of thirty millions of ours. . . ?"[47] Trumbull refuted the second portion of the opposition's argument by stating that the bill was designed only to secure equal rights for all citizens and that it proposed to ". . . protect. . . a white man just as much as a black man. . . ."[48]

In addition to the major issues previously mentioned, two other items occupied the attention of Congress during the course of debate on the Civil Rights Act. The first dealt with the question of suffrage, the second with the manner in which the act was to be enforced.

Throughout the weeks of debate on the proposal for the extension of civil rights, the opposition professed the fear that

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[46] Congressional Globe, 39th Congress, 1st Session, I, 599.

[47] Congressional Globe, 39th Congress, 1st Session, II, 1158.

[48] Ibid., I, 599.

hidden somewhere in the bill was a guarantee of Negro suffrage, a right which they maintained belonged exclusively to the state. In all probability because their own constituents and many of the Congressmen themselves had not yet accepted the idea that the Negro should vote, those favoring the Civil Rights Act sought to ease this fear by declaring that suffrage was a political right, whereas the bill dealt only with civil rights.[49] According to Windom of Minnesota, the Civil Rights Act did

> . . . not . . . confer the privileges of voting, for that is a political right, . . . not included in the bill. . . . It merely provide[d] safeguards to shield them [freedmen] from wrong and outrage, and to protect them in the enjoyment of that lowest right of human nature, the right to exist.[50]

To those who opposed the Civil Rights Act, one of its most galling features was that the machinery for enforcing it derived from the Fugitive Slave Act of 1850. Members of the opposition, Senator Thomas A. Hendricks leading the attack, chided the Republicans for adopting the features of an act they had denounced for years; particularly distasteful was that provision which allowed marshals to summon any person to assist them in executing the law. By way of an answer, proponents of the bill gloated over having turned the tables on the enemies of the Negro;[51]

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[49] Ibid., II, 1156-1157, 1121, 1116, 1151.

[50] Ibid., 1158.

[51] Claude G. Bowers, The Tragic Era: Revolution after Lincoln (Boston, 1962), p. 108. See also Congressional Globe, 39th Congress, 1st Session, I, 601, 604.

in the opinion of Henry S. Lane of Indiana

> All these provisions were odious and disgraceful . . . when applied in the interest of slavery . . . . But here the purpose is changed. These provisions are in the interest of the freemen and of freedom, and what was odious in the one case becomes highly meritorious in the other. It is an instance of poetic justice and of apt retribution that God has caused the wrath of man to praise Him.[52]

On February 2, 1866, following exhausting hours of debate on five successive days and the addition of a few rather inconsequential amendments, the Senate, voting along party lines, approved the Civil Rights Act by a vote of thirty-three to twelve. Republicans cast all the votes in favor of the measure; three Republicans—Edgar Cowan of Pennsylvania, Daniel S. Norton of Minnesota, and Peter C. Van Winkle of West Virginia—joined forces with the Democrats, who voted unanimously against the bill.[53]

Having received notification of the Senate's passage of the Civil Rights Act on the second of February, the House, February 5, referred the measure to the Committee on the Judiciary. Here it remained until called up for House consideration, March 1, 1866. On that date Chairman James F. Wilson reported the bill with several verbal amendments, perhaps the most notable being the insertion of the word "citizens" for "inhabitants" throughout the measure; the House readily adopted these

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[52] Congressional Globe, 39th Congress, 1st Session, I, 602.

[53] Ibid., 606-607. For state and party affiliations of members of the Thirty-Ninth Congress, see Blaine, Twenty Years of Congress, II, 118-121.

amendments. Finally, the House passed the Civil Rights Act with amendments on March 13, 1866.[54]

Just as had happened in the Senate, the vote followed party lines. Republicans were responsible for all of the one hundred and eleven votes cast in favor of the bill; of the thirty-eight votes against passage, thirty-four came from the Democratic side of the House. One Democrat, Francis C. LeBlond of Ohio, became so perturbed with the passage of the Civil Rights Act that he moved to amend its title so as to make it read, "'A Bill to abrogate the rights and break down the judicial system of the States.'"[55] Needless to say, the Speaker quickly called him to order and proceeded to notify the Senate of the passage of the bill with amendments.

On March 15, 1866, the Senate considered the amendments added to the law by the House of Representatives. After a futile effort by Garrett Davis to delay action, the Senate concurred in the House amendments.[56] The matter then passed into the hands of the President.

In its intent, the Civil Rights Act of 1866 was ". . . one of the most far-reaching in Congressional history."[57] By far the most important section of the bill was the initial one, in

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[54] Congressional Globe, 39th Congress, 1st Session, II, 1367.

[55] Ibid., 1367.

[56] Ibid., 1413-1416.

[57] Konvitz, A Century of Civil Rights, p. 48.

which Congress sought to specify for the first time who were citizens of the United States. In language similar to that of the soon to be approved Fourteenth Amendment, Congress declared ". . . That all persons born in the United States and are not subject to any foreign power, excluding Indians not taxed, are . . . citizens of the United States." The first section then set forth the rights and obligations to be enjoyed by such citizens. All citizens regardless of race, color, or previous condition of servitude would be able

> to make and enforce contracts, to sue, be parties, and give evidence to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[58]

The act then provided that persons violating the first section by depriving a citizen of any of the rights granted therein would be subject to civil and criminal penalties in the federal courts. Persons convicted of violating the law were deemed guilty of misdemeanors and were subject to fines not to exceed one thousand dollars or imprisonment not to exceed one year, or both, the exact punishment being left to the discretion of the courts. The law gave federal district courts jurisdiction over all offenses committed in violation of the act and allowed defendants being tried in state courts for

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[58] U. S. Statutes at Large, XIV, Part I, 27 (1866).

offenses against the act to transfer their case to the nearest federal court.[59]

The act instructed district attorneys, marshals, commissioners appointed by circuit or territorial courts, agents of the Freedmen's Bureau, and any other officers authorized by the President to proceed against all persons violating the law. Persons who obstructed such officers in the performance of their duties were subject, upon conviction, to fines not to exceed one thousand dollars and imprisonment for not more than six months. The act also established the fees to be received by the officers designated and provided that they be paid out of the United States Treasury.[60]

The Civil Rights Act empowered the President to direct federal judges, marshals, and district attorneys to move from place to place in their respective districts in order to provide a more rapid enforcement of the law. If needed to prevent violations of the law, he could use the army and naval forces of the United States. All cases arising under the act could be appealed to the Supreme Court.[61]

With Congressional approval an accomplished fact, the nation now turned its eyes toward the President and eagerly awaited his action on the Civil Rights Act. Would Johnson veto the bill and thus complete the alienation of the party

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[59] Ibid.

[60] Ibid., pp. 28-29.

[61] Ibid., p. 29.

which had elected him to office, or would he sign the bill and attempt to effect a reconciliation?

At the moment Johnson's political fortunes were in a precarious position. On February 19, 1866, Johnson had vetoed the Freedmen's Bureau Bill, claiming that it was unconstitutional. This action came without warning and shocked many Republicans, particularly Lyman Trumbull, the sponsor of the measure. A moderate Republican who had consistently supported the President, Trumbull had designed the bill to provide a middle course acceptable to both Johnson and the Radicals; he had discussed the bill thoroughly with Johnson and assumed that he approved of it. Therefore, when the President used his veto power and Congress failed to re-enact the bill, many moderates began to wonder if he could be trusted on other matters, especially those dealing with reconstruction.[62]

On Washington's Birthday, the breach between Johnson and the Republican Party immeasurably widened with his impromptu speech to a crowd of serenaders who had gathered outside the White House. With passionate words the President proclaimed the terrible indignities inflicted on him by the Radicals and denounced several as traitors who were destroying his reconstruction policy.[63] When called upon to be more specific, Johnson replied,

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[62]McKitrick, Andrew Johnson and Reconstruction, p. 12.

[63]Ibid., pp. 12, 292.

> The gentleman calls for three names. I am talking to my friends and fellow citizens here. Suppose I should name to you those whom I look upon as being opposed to the fundamental principles of this government, and as now laboring to destroy them. I say Thaddeus Stevens, of Pennsylvania; I say Charles Sumner, of Massachusetts; I say Wendell Phillips, of Massachusetts.[64]

By this action, "the President not only embittered the radical leaders mentioned, and their friends and supporters, but caused the more conservative elements to distrust him."[65]

By the middle of March, the more moderate Republicans, such men as Trumbull of Illinois, John Sherman of Ohio, and William Pitt Fessenden of Maine, having recovered somewhat from the February debacle, ". . . were negotiating for a reconciliation with Johnson on the basis of the Civil Rights Bill."[66] They along with most Republicans urged Johnson to sign the bill and thus restore peace and harmony between the executive and legislative branches.

By letter and visit Republicans urged Johnson to sign the Civil Rights Act and to do so quickly. Writing from New York, Henry Ward Beecher expressed the hope that Johnson would sign the bill because it was desirable and would ". . . in a great degree, frustrate the influence of those who have sought to produce the impression that you have proved untrue to the

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[64]McPherson, The Political History, p. 61.

[65]Theodore Burton, John Sherman (New York, 1906), p. 156.

[66]James M. McPherson, The Struggle for Equality: Abolitionists and the Negro in the Civil War and Reconstruction (Princeton, 1964), p. 350.

cause of liberty and loyalty."[67] Governor Jacob D. Cox of Ohio wrote, ". . . it you can find it in accordance with your sense of duty to sign this bill, it will with our western people make you pretty fully master of the situation. . . ."[68] During an interview with Johnson, Governor Oliver P. Morton of Indiana warned the President that unless he signed the bill ". . . they could not meet again in political fellowship."[69]

Negroes were not silent on a law which held out so much promise for a safer and happier existence. The loyal colored men of Maryland petitioned Johnson to sign the measure which could alleviate the suffering of the Negro race in their state. If he signed the bill, they would ". . . promise him . . . the silent it may be, but still heartfelt affection of all our people."[70]

On the other hand, Johnson was pressed by the Democrats and the more conservative Republicans to veto the measure. George D. Morgan, Democrat of Ohio, ". . . sent the proceedings of a pro-Johnson meeting and the message: 'We are looking for another veto.'"[71] Francis P. Blair, Sr., denounced the bill,

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[67]Henry Ward Beecher to Johnson, March 17, 1866, Johnson Papers.

[68]Jacob D. Cox to Johnson, March 22, 1866, Johnson Papers.

[69]William Dudley Foulke, Life of Oliver P. Morton: Including His Important Speeches, 2 vols. (Indianapolis, 1899), I, 467.

[70]Petition from the Loyal Colored Men of Maryland to Johnson, March 17, 1866, Johnson Papers.

[71]Lawanda and John H. Cox, Politics, Principle, and Prejudice, 1865-1866 (New York, 1963), p. 195.

because under it ". . . the states would be able to make 'no distinction between white & Black,' a result he considered disastrous."[72] Republican Edgar Cowan sent the following letter: "Don't hesitate for a moment to veto the 'Civil Rights Bill'! . . . [but] be careful to put it distinctly on a question of power—not of policy. . . ."[73]

In discussing with his Cabinet the advisability of vetoing the Civil Rights Act, Johnson found that every Cabinet member with the exception of Gideon Welles, Secretary of the Navy, favored his signing the bill. Welles objected to ". . . the whole design, purpose, and scope of the bill, that it was mischievous and subversive." Although Secretary of State William Seward and War Secretary Edwin Stanton objected to portions of the bill, they urged its approval on the President because of the political situation. The remaining Cabinet members made few remarks but hoped he would decide to sign it into law.[74]

Johnson delivered his veto on March 27, 1866, thus rejecting the attempts by moderate Republicans to accomplish a reconciliation. By his action, Johnson ". . . most decidedly lost his chance of rehabilitating himself with his party, and leading it in the work of Reconstruction."[75]

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[72] Ibid.

[73] Edgar Cowan to Johnson, March 23, 1866, Johnson Papers.

[74] Gideon Welles, Diary of Gideon Welles: Secretary of the Navy under Lincoln and Johnson, 3 vols. (New York, 1911), II, 463-464.

[75] John W. Burgess, Reconstruction and the Constitution, 1866-1876 (New York, 1902), p. 72.

In his message, Johnson objected to making Negroes citizens of the United States when eleven of the thirty-six states were unrepresented in Congress. According to him, the first section discriminated against the intelligent and worthy foreigner in favor of the ignorant Negro; perhaps, said Johnson, the Negro should be required to go through a probationary period before receiving citizenship. He objected to the extension of federal power under the terms of the act; if Congress could end state laws against the Negro in legal matters, nothing could prevent it from extending the power to legalize interracial marriages or guaranteeing Negroes the right to vote. The bill gave the federal courts jurisdiction, thus discriminating against state courts. The Constitution did not justify such sweeping powers as were included in the law. He objected strongly to the number of officers authorized to enforce the law. Johnson also denounced the power given the President whereby he could order United States Courts to move from place to place to facilitate justice and could use the military forces of the country to execute the law. Besides objecting to specific sections, he considered the whole bill to be outside the spirit and scope of the Constitution. In his words, the Civil Rights Act established

> for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race. In fact, the distinction of race and color is by the bill made to operate in favor of the colored race and against the white race. They interfere with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens, or between

> inhabitants of the same State—an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of States.[76]

Despite presidential opposition, the passage of the Civil Rights Act of 1866 was hailed by many as a worthy accomplishment. The Nation believed it to be the most important bill ever considered by Congress and declared it ". . . the first attempt which the nation . . . [had] made to put the theory of human rights on which it . . . professed to be based into practice . . . ."[77] In a similar vein, Harper's Weekly labeled the act "a Magna Charta" overthrowing all state legislation hostile to the establishment of equal civil rights.[78] In a speech to the Union League Club of New York, June 23, 1866, John Jay hailed the civil rights legislation ". . . as the last great victory in the war against slavery."[79]

In contrast, the Presidential veto received vigorous condemnation in communications of the period. On April 5, 1866, The Nation attacked the veto message as being ". . . amongst the most discreditable of our state papers. . . ." whose ". . . dishonest evasions and unworthy clap-trap. . . ." arouse only

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[76] James D. Richardson, editor, A Compilation of the Messages and Papers of the Presidents, 1789-1897, 10 vols. (Washington, 1899), VI, 405-413.

[77] The Nation, II (March 22, 1866), 353.

[78] Harper's Weekly, X (March 31, 1866), 194.

[79] Hyman, The Radical Republicans and Reconstruction, p. 318.

contempt.[80] Harper's Weekly characterized Johnson's ". . . objection to the bill as special legislation . . . a manifest misapprehension." It would be universal in its application.[81] In writing to his brother William, John Sherman of Ohio denounced Johnson as ". . . insincere; he has deceived and misled his best friends. I know he led many to believe he would agree to the Civil Rights Bill. . . ."[82]

In contrast to the instances of public opinion cited above, the New York Times followed the exact opposite course in regard to the bill and the veto of it. It criticized the passage of the act for being a step toward centralization and the destruction of the states.[83] Following announcement of the Presidential veto, the paper praised Johnson's statesmen-like qualities and his well-reasoned arguments which would capture the attention of all thinking men.[84]

The President's veto message reached the Senate March 27, 1866. On that date, the Senators were in a state of intense excitement. The Senate body revealed the intensity of feeling by the not very creditable means with which they unseated

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[80] The Nation, II (April 5, 1866), 417.

[81] "The Civil Rights Bill," Harper's Weekly, X (April 14, 1866), 226.

[82] John Sherman to William T. Sherman, July 8, 1866, Rachel Thorndike, ed., The Sherman Letters: Correspondence Between General Senator Sherman from 1837 to 1891 (New York, 1894), p.276.

[83] New York Times, March 26, 1866, p. 4.

[84] Ibid., March 28, 1866, p. 4.

John P. Stockton, Democratic Senator from New Jersey, in order to guarantee the necessary two-thirds Republican majority required to override the Civil Rights veto.[85]

Senate debate on the question of upholding or overriding the veto opened April 4, 1866, with Lyman Trumbull's long and detailed analysis of Johnson's objections to the bill. During the next two days Senators debated the issue, using many of the same arguments heard in the original debates on the measure. On April 6, 1866, the Senate overrode the veto by a single-vote margin; thirty-three Republicans voted for the bill; ten Democrats and five Republicans voted against it.[86]

On April 9, 1866, upon receiving notice of the Senate's repassage of the Civil Rights Act, the House of Representatives, refusing to allow debate, proceeded to pass the bill over the Presidential veto. The proposition received the support of one hundred and twenty-two Republicans; of the forty-one votes cast against the measure, thirty-two came from Democrats and nine from Republicans.[87]

Congress soon received words of praise for having overridden the veto, ". . . the first time such a thing had ever been done with a major piece of legislation."[88] The day

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[85]For a detailed account of Republican maneuvering to unseat Stockton, see McKitrick, Andrew Johnson and Reconstruction, pp. 319-323.

[86]Congressional Globe, 39th Congress, 1st Session, II, 1755-1809.

[87]Ibid., p. 1861.

[88]McKitrick, Andrew Johnson and Reconstruction, p. 323.

following Congressional reenactment of the Civil Rights measure, a letter arrived from the Methodist Episcopal Conference commending them for passing a bill which ". . . sends a thrill of delight through the loyal heart of the nation. . . ."[89] A few days later, the colored citizens of Chicago expressed their pleasure in the following manner:

> Loving our whole country with a devotion second to that of no other similar number of the American people—always her loyal children—it is yet but now that we are enabled to realize the brightness of the coming dawn of liberty's matin hour.[90]

Even though Congress had passed the Civil Rights Act over President Johnson's veto, many individuals, Republicans included, still doubted the constitutionality of the measure. This question became a moot point with the adoption of the Fourteenth Amendment in 1868, which incorporated the important features of the Civil Rights Act of 1866.

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[89]"Communication from the New York East Annual Conference of the Methodist Episcopal Church, Expressive of Thanks for the passage of the Civil Rights Bill, &c.," House Miscellaneous Documents, 39th Congress, 1st Session, No. 93, p. 2.

[90]"Address of the Colored Citizens of Chicago to the Congress of the United States," House Miscellaneous Documents, 39th Congress, 1st Session, No. 109, p. 3.

CHAPTER II

THE FOURTEENTH AND FIFTEENTH AMENDMENTS

The Fourteenth Amendment to the Constitution, granting Negroes citizenship and promising them equal protection of the laws, and the Fifteenth Amendment, granting them the right to vote, represent ". . . two of the most momentous enactments of the reconstruction years. . . ."[1] They grew in part out of Republican idealism. In all probability, ". . . these amendments could not have been adopted under any other circumstances, or at any other time, before or since. . . ."[2]

Leading eventually to the formulation of the Fourteenth Amendment, a conviction developed during the summer and fall of 1865 that positive action on behalf of the Negro was needed. This found more open expression as the nation watched the unfolding of Andrew Johnson's rather lenient reconstruction policy. Public opinion in the North demanded that something be done for the protection of the Negro; in response to this demand, the Republican Party sought to strike a suitable balance on certain key issues: Negro suffrage, Southern representation, the rebel debt, and disfranchisement of former rebels.[3]

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[1]Kenneth M. Stampp, The Era of Reconstruction, 1865-1877 (New York, 1965), p. 12.

[2]Ibid.

[3]McKitrick, Andrew Johnson and Reconstruction, p. 332.

Of these issues, from which developed the Fourteenth Amendment, the question of Negro suffrage represented by far the most important one. When it became evident that Northern public opinion would not tolerate the direct enfranchisement of the Negro, Republicans turned toward accomplishing the same end indirectly by changing the basis of representation; because, if the Southern states were readmitted under the old system with the three-fifths compromise no longer operative, they would gain several additional representatives whether the Negro could vote or not, and thus weaken the Republican Party's power in Congress. Numerous Republicans presented the danger of the assumption of the rebel debt and the repudiation of the Union debt as evidence in favor of their suffrage or representation proposals. Apparently the sentiment for the disfranchisement of a limited number of ex-Confederates also suited these purposes.[4]

When the Thirty-Ninth Congress assembled for its first session in December, 1865, both the House and Senate were almost overwhelmed by the introduction of countless amendments purporting to remedy the major problems of the country. The principal purposes of these various proposals may be summed up by John G. Whittier's greeting "To the Thirty-Ninth Congress":

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[4] Joseph B. James, The Framing of the Fourteenth Amendment (Urbana, Illinois, 1956), p. 33. See also, John W. Burgess, Reconstruction and the Constitution, 1866-1876 (New York, 1902), pp. 73-74.

Make all men peers before the law
Take hands from off the negro's throat,
Give black and white an equal vote.[5]

After the creation of the Joint Committee on Reconstruction on December 13, 1865,[6] the majority of these propositions were turned over to it for the Committee's consideration and its recommendation of a suitable amendment to the Constitution.

Before consideration of the Committee on Reconstruction's recommendations, a word must be said in regard to the relation of the Civil Rights Act of 1866 to the development of the Fourteenth Amendment. During the opening months of 1866 both the Senate bill and the proposed amendment occupied the attention of Congress; but, whereas the amendment encountered difficulties and was finally lost in the Senate, the Civil Rights Act became law on April 9, 1866, after its repassage over President Johnson's veto. In the debate on the Civil Rights Act many who favored the ideas set forth in the act doubted its constitutionality and expressed the fear that it would be overturned by the decisions of the courts or be repealed by a later Congress. This fear spurred the Republicans in Congress to greater activity and led to the adoption of the Fourteenth Amendment, which guaranteed the rights provided for by the Civil Rights Act.[7]

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[5]James, The Framing of the Fourteenth Amendment, p. 46, citing Nation, I (December 7, 1865), 714.

[6]Ibid., p. 41.

[7]W.E.B. DuBois, Black Reconstruction: An Essay Toward a History of the Part which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880 (New York, 1935), p. 281. See also, Stampp, The Era of Reconstruction, p. 136; Konvitz, A Century of Civil Rights, p. 56.

The Joint Committee on Reconstruction, which turned to the serious matter of recommending an amendment acceptable to the majority in January, 1866, included a very diverse group of individuals. The House named a number of extremists, but the Senate excluded its most notorious radicals, chief among them being Charles Sumner of Massachusetts. Allowed six members, the Senate appointed five Republicans and one lone Democrat, Reverdy Johnson of Maryland. Senator William Pitt Fessenden, conservative Republican from Maine, became chairman of the Committee and tended to exercise a restraining influence on some of its more radical members. Accorded eight committee members, the House of Representatives selected six Republicans and two Democrats; included among the eight were such men as Thaddeus Stevens, seventy-three and a thorough-going Radical, and John A. Bingham of Ohio, soon to be the chief architect of the Fourteenth Amendment's first section.[8]

Following an extended discussion of the many suggested amendments by a five-member subcommittee, the Joint Committee on Reconstruction met January 20, 1866, and listened as Stevens presented alternate proposals. The first, favored by Fessenden, based a state's representation on the number of citizens and prohibited any discrimination in political or civil rights or privileges because of race, creed, or color.[9] The second

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[8]James, The Framing of the Fourteenth Amendment, pp. 41-46.

[9]Charles A. Jellison, Fessenden of Maine: Civil War Senator (Syracuse, 1962), pp. 203-204.

provided that ". . . if any portion of the people should be excluded by reason of race or color, every individual of that race or color would be excluded from the basis of apportionment."[10] The committee had to choose between direct suffrage or indirect pressure to that end. On Stevens' motion, the Committee of Fifteen adopted the second proposition by a vote of eleven to three.[11]

On Monday, January 22, 1866, Fessenden in the Senate and Stevens in the House introduced from the Committee on Reconstruction and recommended as a practical measure the passage of the following resolution:

> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed: Provided, That whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation.[12]

The Senate declined to consider the measure at once, but the House took it up immediately largely owing to pressure from Stevens to pass it and send it to the states before their legislatures adjourned.

During debate in the House, it became apparent that many Republicans as well as Democrats opposed the amendment offered them by the Reconstruction Committee. The two main criticisms

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[10]Blaine, Twenty Years of Congress, II, 195.

[11]James, The Framing of the Fourteenth Amendment, pp. 58-59.

[12]Congressional Globe, 39th Congress, 1st Session, I, 337, 351.

set forth by the opponents of the measure were that it allowed qualifications other than race or color to disfranchise the Negroes, and violated state rights.

The major argument made by Republican opponents revolved around the charge that Southern States could establish voting qualifications other than race and color, and thus disfranchise the Negro without losing representatives in Congress. A state could impose property or educational requirements for voting.[13] According to Samuel Shellabarger of Ohio, a state could prevent Negro suffrage by enacting a law disfranchising those who had been slaves or whose ancestors had been slaves ("Grandfather Clause").[14] By using these and other disqualifying tests, in the words of Jehu Baker of Illinois, a state could ". . . still . . . [strengthen] her aristocratic power in the Government by the full count of her disfranchised people, provided only she steers clear of a test based on race or color."[15]

Republican supporters of the amendment generally agreed that such qualifications as the above could legally be made by a state without the loss of representation. However, since disfranchisement on the basis of race and color, the two main methods of keeping the Negroes away from the polls, were eliminated by it, the rest of the problems foreseen by opponents could be safely left to future legislation. In defending it,

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[13] Ibid., 376, 383.

[14] Ibid., 406.

[15] Ibid., 385.

a member of the Joint Committee on Reconstruction, Roscoe Conkling of New York, carefully pointed out this fact.[16]

The other major criticism of the proposed resolution came chiefly from Democrats, who denounced it as a violation of the reserved rights of the states by attempting to force Negro suffrage upon the Southern states. Andrew J. Rogers of New Jersey, a member of the Joint Committee and one of the measure's most vocal critics, announced that ". . . the inevitable result of the passage would be to induce every State in the Union to adopt unqualified negro suffrage, so as not to deprive them of the great and inestimable right of representation for that class of population. . . ." in Congress.[17] Lawrence S. Trimble of Kentucky expanded the above idea by urging that Northerners transport Southern Negroes to their states and then grant them the vote.[18] Defenders simply declared that the states were free to do as they wished in regard to suffrage for their citizens; they knew the consequences of their actions.[19]

On January 31, 1866, after days of debate the resolution passed the House of Representatives by a vote of one hundred twenty to forty-six, the only change from the original being the omission of the words "and direct taxes." On that date the Senate received the proposed amendment and proceeded to subject it to even harsher criticism than that given it in the House. Finally, March 9, 1866, by a vote of twenty-five to

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[16] Ibid., 358.

[17] Ibid., 354.

[18] Ibid., 388.

[19] Ibid., 358-359.

twenty-two, the measure received a majority, but not the necessary two-thirds needed to pass it.[20]

The measure met defeat in the Senate largely because of the determined opposition of Charles Sumner of Massachusetts. In addition to the arguments advanced in the House against the proposed amendment, Sumner and a number of other senators pointed to the great moral wrong which would be done to the Negro by the proposed enactment. In long and elaborate speeches Sumner pointed out that it was a moral duty to grant equal rights to all and wrong to compromise on principle by offering to the former slaveowner such an unworthy and easily evaded bribe as increased Congressional representation in return for granting Negro suffrage.[21] Sumner asserted that

> . . . the same necessity, which insisted first upon Emancipation, and then upon arming the slaves, insists with the same unanswerable force upon the admission of the freedman to complete equality before the law, so that there shall be no ban of color in court-room or at the ballot-box, and government shall be fixed on its only rightful foundation, the consent of the governed.[22]

Republican Edgar Cowan of Pennsylvania argued the moral wrong of the proposition in this statement.

> This Committee proposes in this Amendment to sell out four million (radical count) negroes to the bad people of those States forever and ever. In consideration of what? I am asked. O shame, where is thy blush? I answer, in dust and ashes, for about sixteen members

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[20] Ibid., 538, 1289.

[21] Sumner, Works, X, 134, 121-122.

[22] Ibid., 129.

> of Congress. Has there ever been before, Sir, in the history of this or any other country, such a stupendous sale of negroes as that? Never! never! It is saying to the Southern States, You may have these millions of human beings, whom we love so dearly, and about whom we have said so much, and for whom we have done so much—you may do with them as you please in the way of legislative discrimination, if you will only agree not to count them at the next census. . . ; waive your right to sixteen members of Congress, and the great compromise is sealed, the long agony is over, the nation's dead are avenged, the nation's tears are dried, and the nation's politics are relieved of the Negro.[23]

Defending the proposal, Fessenden bitterly attacked Sumner's position and argued that the issue was not what was most desirable, but what could pass. This appeal did not convince enough senators to vote for it, so the measure failed and the Committee on Reconstruction had to take up its work again and arrive at a new recommendation.[24]

During Senate consideration of the proposed constitutional amendment, Thaddeus Stevens, February 20, 1866, introduced in the House a concurrent resolution proposing the means by which Southern states should be admitted back into the Union. The resolution would give Congress the power to declare when states were entitled to representation. After some discussion the proposal passed the House by a vote of one hundred nine to eighteen. The Senate considered the measure until March 2, when it extended approval by a vote of twenty-nine to eighteen, thus giving Congress, independent of the Executive, the power to act

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[23] Ibid., 242-243.

[24] James, The Framing of the Fourteenth Amendment, p. 68.

upon the question of representation.[25]

Also during this period, John A. Bingham proposed on February 26 an amendment to allow Congress to pass laws for the protection of the civil rights of all individuals within the United States. His proposition met with such opposition that its consideration was postponed until April; eventually, greatly modified, it would reappear as the first section of the Fourteenth Amendment.[26]

Throughout March and most of April the Joint Committee on Reconstruction considered and rejected countless measures. Just as the committee members and the public reached the point of despair, Robert Dale Owen, son of the famous English socialist pioneer and a reformer in his own right, arrived in Washington with an omnibus plan which seemed to cover all the major points at issue. This plan eventually reached Thaddeus Stevens, who presented Owen's proposition to the Committee on April 21.[27]

The Owen plan consisted of a five-point amendment to the Constitution. Section One provided for the protection of civil rights. The second section declared that impartial suffrage should exist in all states after July 4, 1876. The third section declared a state's representation to be reduced if it discriminated in the matter of suffrage on the basis of race,

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[25]Barnes, Thirty-Ninth Congress, pp. 417-432.

[26]Ibid., pp. 434-435.

[27]James, The Framing of the Fourteenth Amendment, p. 100.

color, or previous condition of servitude before July 4, 1876. Section Four forbade the payment of the rebel debt or compensation for emancipated slaves. The last section provided for Congressional enforcement of the previous sections.[28]

The Committee of Fifteen approved the Owen plan on April 21, 1866, but did not immediately present it to Congress. This delay proved fatal. By the time an amendment was introduced in Congress, it bore little, if any, resemblance to Owen's original plan. What had happened? According to Stevens, the delay had been to allow Fessenden, who was ill with varioloid, to recover before presenting it to Congress; during this wait, said Stevens, many Congressmen protested that the provisions were too extreme, particularly the one relating to suffrage. So, in all likelihood, the changes made in the Owen plan reflected compromises made in an attempt to satisfy conflicting interests within the Republican Party and the Committee itself.[29]

On Monday, April 30, 1866, Thaddeus Stevens in the House and William Pitt Fessenden in the Senate presented the Reconstruction Committee's plan. Like Owen's, the proposed amendment consisted of five sections. The first section prohibited the states from abridging the rights of citizens and depriving any person of life, liberty, or property without due process of law, or denying to any one the equal protection of the laws.

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[28]DuBois, Black Reconstruction, pp. 301-302.

[29]Jellison, Fessenden of Maine, pp. 207-208. See also, McKitrick, Andrew Johnson and Reconstruction, p. 347.

The second provided for a proportionate reduction of representation in the House of Representatives if a state denied the franchise to any of its male citizens twenty-one or over. Section three excluded all persons who had voluntarily supported the Confederacy from voting for representatives in Congress and for electors for President and Vice-President until July 4, 1870. According to the fourth section, neither the federal government nor any state could assume the rebel debt or compensate any person for the loss of slaves. The final section provided for Congressional enforcement of the foregoing provisions.[30]

Two bills accompanied the proposed amendment when it came before Congress on April 30. Upon ratification of the amendment by a state, one promised the readmission of its members to Congress providing they could qualify by taking the required oaths. The other declared high ex-officials of the Confederacy, both civil and military, ineligible for offices under the United States. Neither of these received the approval of Congress.[31]

Finally out of the Committee of Fifteen, the amendment now had to run the gauntlet of Congressional debate. Under the careful management of Thaddeus Stevens, it took only three days after discussion began to push the proposal through the House of Representatives. The debates were characterized by a lack of enthusiasm on the part of House members.

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[30] Congressional Globe, 39th Congress, 1st Session, III, 2286.

[31] Ibid.

Relatively little opposition to the measure materialized in the House. As a group the Democrats raised once more the cry of state rights and denounced the proposal as a measure designed to perpetuate the Republican Party in power. Andrew J. Rogers of New Jersey ably reflected the Democratic Party's attitude that the amendment was a violation of the reserved rights of the states when he said, ". . . it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States. . . ."[32] On the second charge William E. Finck of Ohio expressed his party's sentiments that "stripped of all disguises, this measure. . . [was] a mere scheme to deny representation to eleven States, to prevent indefinitely a complete restoration of the Union, and perpetuate the power of a sectional and dangerous party."[33]

Republican supporter of the proposition, John A. Bingham denied that it violated state rights, saying,

> the amendment took from no state any right that ever pertained to it. No state ever had the right. . . to deny to any free man the equal protection of the laws or to abridge the privileges or immunities of any citizens of the Republic, although many of them have assumed and exercised the power. . . .[34]

In regard to the second criticism, the Republicans did not bother to refute the charge that it was a partisan matter.

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[32] Congressional Globe, 39th Congress, 1st Session, III, 2538. For a similar view, see ibid., 2530.

[33] Congressional Globe, 39th Congress, 1st Session, III, 2461. For similar views, see ibid., 2466, 2500, 2506.

[34] Broek, Antislavery Origins, p. 212.

Those Republicans who objected to the disfranchisement provided in the third section generally agreed that the remainder of the proposals were satisfactory. They hurled numerous criticisms at the third section. It endangered the ratification of the amendment because the South would never accept the disfranchisement of its most prominent citizens.[35] The proposal was inexpedient; according to M. Russell Thayer of Pennsylvania, ". . . it . . . [looked] . . . like offering to the people of the States lately in rebellion peace and restoration with one hand, while you snatch[ed] it from them with the other."[36] It would renew the bloody strife of civil war.[37]

On the other hand, many Republicans objected to the disfranchisement section because it did not go far enough. Numerous Republicans believed that some penalty was needed to convince the South that treason was odious.[38] Some, like Ephraim R. Eckley of Ohio, advocated the disfranchisement of the rebels forever, not just until 1870.[39] Thaddeus Stevens declared that without this section the whole measure was worthless, yet he felt it was too lenient. He expressed his condemnation of and support for the measure in the following statement made May 8,1866.

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[35] Congressional Globe, 39th Congress, 1st Session, III, 2510, 2540, 2543.

[36] Ibid., 2465.

[37] Ibid., 2465, 2463.

[38] Ibid., 2499, 2509, 2511.

[39] Ibid., 2535.

> . . . I never dreamed that all punishment would be dispensed with in human society. Anarchy, treason, and violence would reign triumphant. Here is the mildest of all punishments ever inflicted on traitors. . . . In my judgment we do not sufficiently protect the loyal men of the rebel states from the vindictive persecutions of their victorious rebel neighbors. Still I will move no amendment, nor vote for any, lest the whole fabric should tumble to pieces. . . .[40]

Late in the afternoon, March 10, 1866, Stevens moved the previous question. He refused to allow the issue to be divided; thus, those who disliked the third section had no opportunity to vote against it. The passage of the measure was accomplished by strict party discipline. When the vote of one hundred twenty-eight to thirty-seven was announced, wild applause burst from the floor and galleries.[41]

The Senate delayed consideration of the amendment until May 23. On that date, the Radical Senator from Michigan, Jacob M. Howard, acting for Fessenden, who was again ill, presented the proposition and prepared to guide it through the Senate.[42] In the course of debate, the audience in the galleries heard again the same basic arguments that it was a party measure, a violation of state rights, and an effort to force Negro suffrage upon the South. As in the House, debate centered on the disfranchisement section, which had little or no support; but unlike the House, the Senate determined to make such changes in the

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[40] Hyman, Radical Republicans and Reconstruction, p. 325.

[41] Congressional Globe, 39th Congress, 1st Session, III, 2545.

[42] Ibid., 2764.

amendment as it thought needed.[43]

For six days after the beginning of debates on May 23, the Republicans sought to reach agreement upon necessary changes. After two unsuccessful caucus meetings, they appointed a five-member committee, composed of William P. Fessenden and the other Republican members of the Committee of Fifteen, to set down basic changes which would reflect the consensus of Republican opinion. From this committee emerged a report ready for presentation to the Senate, May 29, 1866.[44]

The motion of Reverdy Johnson, Democratic Senator from Maryland, to strike out the third section carried unanimously, the vote being forty-three to zero. Following this action, Jacob Howard proceeded to present the caucus committee's recommendations. They included a definition of citizenship similar to that of the Civil Rights Act of 1866 to be added to the first section. Essentially, the committee favored New Hampshire Senator Daniel Clark's substitute for the now eliminated third section; this provided for the disqualification of those persons who had taken an oath to uphold the Constitution and then had supported the rebellion, from holding federal offices. Such disabilities could be removed by a two-thirds vote of Congress. The final change called for the guarantee

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[43] McKitrick, Andrew Johnson and Reconstruction, p. 353.

[44] Ibid.

of the Union debt to be added to the fourth section.[45]

After a prolonged discussion and the addition of a few minor changes, such as Oregon Senator George H. Williams' revision of the language of the second section dealing with representation simply to clarify the meaning, the Senate passed the amendment on June 8, 1866, by a party vote of thirty-three to eleven.[46] Only four Republicans—Edgar Cowan of Pennsylvania, James R. Doolittle of Wisconsin, Daniel S. Norton of Minnesota, and Peter C. Van Winkle of West Virginia—voted against the measure.[47] On June 13 the House concurred in the Senate amendments with a vote of one hundred twenty to thirty-two; here, too, the division fell according to party, the Republicans supporting and the Democrats opposing the measure.[48]

Although rather lukewarm, public reaction to the Fourteenth Amendment made itself known. Most people recognized the amendment ". . . for what it actually was—a compromise that commanded no overwhelmingly fervent support from any particular viewpoint."[49] Most Republicans, including those who were pro-Johnson, believed they could unite behind the amendment as a campaign platform in the fall elections. Writing to Chief Justice Salmon P. Chase, Associate Justice Stephen J. Field

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[45] Congressional Globe, 39th Congress, 1st Session, III, 2869.

[46] Congressional Globe, 39th Congress, 1st Session, IV, 3041-3042.

[47] Cox, Politics, Principles, and Prejudice, pp. 227-228.

[48] Congressional Globe, 39th Congress, 1st Session, IV, 3149.

[49] McKitrick, Andrew Johnson and Reconstruction, p. 355.

commended the proposal as being what was needed, saying ". . . we members of the [Republican] Union party can cordially unite in its support. If the President withholds his approval he will sever all connections with the Union party."[50] Even though supporting it as the best measure obtainable, most did not praise it in such elaborate terms as did the New York Presbyterian minister, George L. Prentiss, in the following statement.

> This Amendment speaks for itself and requires no interpreter. It is well entitled to the place in our American Magna Charta [Constitution] . . . . The more it is pondered, the more will it commend itself to the reason and conscience of the Nation as an eminently wise, just, and magnanimous basis for the settlement of the questions arising out of the rebellion. It is, surely, the very embodiment of national leniency and moderation, containing nothing vindictive, nothing harsh, even. Indeed, the only plausible ground of complaint against it is its extreme mildness.[51]

Many could agree with Prentiss that the amendment was weighted on the moderate side. The Nation observed

> . . . that it marks a great advance in public morality, a great increase in the influence of religious feeling on political action, that a victorious people should offer to a prostrate enemy, who had hissed out hate and contumely to the very hour of his overthrow, terms of peace and union which bind him to nothing but to do justice and love mercy.[52]

Other people believed that ratification would bring about the

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[50]Hyman, Radical Republicans and Reconstruction, p. 343.

[51]Ibid., p. 354.

[52]The Nation, III (September 27, 1866), 250. For similar views, New York Times, October 5, 1866, p. 4 and ibid., January 4, 1867, p. 4.

final restoration of the Southern states.[53]

The proposed amendment also received criticism. In regard to this opposition, ". . . the curious result was that humanitarian spokesmen who were not really Negrophile but were color-blind in attitude denounced the amendment because it failed to guarantee votes to Negroes."[54] Charles Sumner argued that ". . . without a provision for Negro suffrage the Amendment was as bad as the leg of mutton served to Samuel Johnson at dinner, 'ill-fed, ill-killed, ill-kept, and ill-dressed.'"[55] In spite of this attitude, however, he, along with Thaddeus Stevens, supported it as the best measure obtainable. George B. Cheever denounced this attitude and stated that it was ". . . better to lose a thousand such amendments than accept the curse with them."[56] Cheever further asserted that the Fourteenth was "an Amendment not to protect rights, but to take them away . . . [and which] ought to carry the certainty of its own defeat in its very nature."[57]

What was the South's reaction? When Secretary of State William Seward sent the Fourteenth Amendment to the states for ratification, June 16, 1866, most of the Southern states had

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[53]New York Times, October 1, 1866, p. 4. See also, ibid., November 9, 1866, p. 4 and ibid., January 4, 1867, p. 4.

[54]Hyman, Radical Republicans and Reconstruction, p. 328.

[55]John Hope Franklin, Reconstruction After the Civil War (Chicago, 1961), p. 62.

[56]Hyman, Radical Republicans and Reconstruction, p. 337.

[57]Ibid., p. 342.

already complied with the terms of presidential reconstruction and had elected their own officials; they had also heard Andrew Johnson champion their eligibility for readmission to the Union without further requirements. Now the Fourteenth Amendment struck another blow to state rights, but if it ". . . had been proposed as an additional but final condition of admission to Congress, the reaction might easily have been acceptance, though not approved."[58] However, Southern political leaders feared that ". . . the Amendment signified the Constitution's Sumter not its Appomattox. . . .,"[59] the beginning of still further conditions to be imposed on the South by Radical Republicans. With this thought in mind, the Southern states looked to the President for a sign either favoring or rejecting the proposal.

The whole nation watched eagerly for President Johnson's reaction to the proposal of Congress. In a message to the House and Senate, June 22, 1866, Johnson made it clear that he stood completely opposed to the amendment. In this manner he removed the last hope for compromise between himself and Congress over an appropriate reconstruction policy. He expressed his continued opposition to any constitutional change while eleven states were unrepresented in Congress. In Johnson's opinion, Seward's action in submitting the proposition to the states was purely ministerial and did not commit ". . . the

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[58] Joseph B. James, "Southern Reaction to the Proposal of the Fourteenth Amendment," The Journal of Southern History XXII (November, 1956), 477-478.

[59] Hyman, Radical Republicans and Reconstruction, p. 328.

Executive to an approval or a recommendation of the amendment to the State Legislatures or to the people." Furthermore,

> . . . a proper appreciation of the letter and spirit of the Constitution, as well as of the interests of national order, harmony, and union, and a due deference for an enlightened public judgment may at this time well suggest a doubt whether any amendment to the Constitution ought to be proposed by Congress and pressed upon the legislatures of the several States for final decision until after the admission of such loyal and Representatives of the now unrepresented States as have been or as may hereafter be chosen in conformity with the Constitution and laws of the United States.[60]

Johnson's ". . . open opposition, with vocal support from his Northern supporters, encouraged the [Southern] hope that the Republican party would be weakened and perhaps overthrown in the autumn elections."[61] Excluding Tennessee, who ratified the Amendment on July 12, and Texas, who rejected it on October 13, 1866, the South decided to rely on Johnson's support and delay action on the Fourteenth Amendment until after the Congressional elections.[62]

The elections of 1866 centered on one issue, namely ". . . the immediate and unqualified readmission of the Southern states to congressional representation. . . ." In the campaign the Republican Party vigorously fought against its own President; and, in turn, Andrew Johnson waged an intensely personal battle

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[60] Congressional Globe, 39th Congress, 1st Session, IV, 3349. See also, Richardson, Messages and Papers, VI, 391-392.

[61] W. R. Brock, An American Crisis: Congress and Reconstruction, 1865-1867 (New York, 1963), p. 148.

[62] McPherson, Political History, p. 194.

against his party. In effect, a victory for the Democratic opposition would constitute a victory for Johnson.[63]

The President and his supporters, including such conservative Republicans as James Doolittle of Wisconsin and Edgar Cowan of Pennsylvania, urged the immediate admission of the Southern states with no qualifying conditions. This meant the end of reconstruction. No requirement, such as ratification of the Fourteenth Amendment, could be imposed upon the South without its voluntary cooperation, and such seemed unlikely to be forthcoming.

The stand taken by Johnson and his supporters during the campaign had appeared as early as April 18, 1866, when the National Union Executive Committee drew up a platform which embodied the idea of unqualified admission and which received Johnson's hearty endorsement. A few months later, in August, 1866, the National Union Convention met at Philadelphia. It sought to solidly unite the President's Southern and Northern proponents by adopting a program calling for the prompt restoration of the states and the election of Congressional representatives who would support the President's reconstruction policy.[64]

During the campaign the Republicans presented the Fourteenth Amendment "as a necessary limitation to be placed on the South to safeguard the Union." Although the admission of Tennessee

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[63]McKitrick, Andrew Johnson and Reconstruction, p. 421.

[64]Ibid., pp. 399-400, 410-417.

after ratification left the implication that similar action by other states would result in their restoration to the Union, speakers usually refused to state definitely that such would be the case. They generally described the amendment as a condition of reconstruction, but not necessarily the final one.[65]

Three major aspects of the campaign contributed most to the deterioration of Johnson's position and led to the defeat of his supporters at the polls. The first of these, the New Orleans riot of July 30, which resulted in death or injury to approximately two hundred Negroes and white Unionists, appeared to many Northerners as devastating proof of the failure of Johnson's reconstruction policy. Secondly, in his "Swing Around the Circle," Johnson immeasurably lowered the prestige of the Presidency by bitterly denouncing his enemies and descending at times to undignified and often vulgar altercations with individuals in the crowds. Finally, the radical element came to dominate the channels of communication and convinced Northerners that Johnson's program was wrong for the nation.[66]

Johnson and his friends went down to disastrous defeat in the elections of 1866. Republicans carried every "Union" state by huge majorities, with the exception of Kentucky, Maryland, and Delaware. They obtained more than a two-thirds majority in both houses of Congress, thus enabling them to overrule each

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[65]James, The Framing of the Fourteenth Amendment, pp. 167, 172-173.

[66]McKitrick, Andrew Johnson and Reconstruction, pp. 421-442.

and every presidential veto that might be forthcoming. The Republicans also carried state elections in a similar sweep.[67]

Despite the election returns, the Southern states proceeded to reject the Fourteenth Amendment. In his address to the second session of the Thirty-Ninth Congress, December, 1866, Johnson criticized Congressional refusal to admit the Southern states to representation. This strengthened the South's determination to continue their policy of rejecting the amendment. During the last quarter of 1866, Texas, South Carolina, Georgia, Florida, North Carolina, Arkansas, and Alabama rejected the Fourteenth Amendment; Virginia, Louisiana, and Mississippi followed suit in January and February of 1867. The rejection of the measure by the former slave states of Kentucky, Delaware, and Maryland also heartened Southern resistance.[68]

The rejection of the Fourteenth Amendment by ten of the eleven former Confederate states cut the ground from under Congressional moderates and gave the radicals a new lease on life. The Congressional majority began to formulate a more comprehensive policy toward the South, one which would include the Fourteenth Amendment. The result was the Reconstruction Act of March 2, 1867, which was passed over Johnson's veto.

The First Reconstruction Act established military rule in the South. The ten Southern states were divided into five

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[67]Burgess, Reconstruction and the Constitution, pp. 421-442.

[68]Franklin, Reconstruction After the Civil War, p. 67. See also, Konvitz, A Century of Civil Rights, pp. 51-52.

military districts, each under the command of a general officer. The act specified that a state must ratify the Fourteenth Amendment and adopt a constitution providing for universal Negro suffrage in order to gain readmission to the Union. Those whom the Fourteenth Amendment had disqualified for officeholding could not vote for, or serve as, delegates to the constitutional conventions; neither could they vote for, or hold, any state office.[69]

By July 21, 1868, the reconstructed governments of Arkansas, Florida, North Carolina, Louisiana, South Carolina, Alabama, and Georgia had ratified the Fourteenth Amendment, thereby providing the needed three-fourths majority. On that date Congress passed a joint resolution declaring it to be part of the Constitution. Secretary of State Seward, July 28, 1868, issued a proclamation on the various ratifications and withdrawals of ratification and certifying that the amendment was now valid.[70]

The Fourteenth Amendment could be classified as revolutionary in nature. It defined citizenship, made the Negro a citizen, gave him equal civil rights, and conferred suffrage on him indirectly by penalizing a state which did not allow him to vote.[71] Probably the framers of the amendment and

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[69]McKitrick, Andrew Johnson and Reconstruction, p. 484.

[70]J. G. Randall and David Donald, The Civil War and Reconstruction (Boston, 1961), pp. 634-635. See also, Konvitz, A Century of Civil Rights, pp. 52-53.

[71]E. Merton Coulter, The South During Reconstruction,

the states that ratified it never intended it to outlaw state-enforced segregation. Later, however, the broad and vague terms of the measure allowed the Supreme Court ". . . to discover new meaning in the loose phrase 'equal protection of the laws.'"[72]

A second lasting accomplishment of the reconstruction era was the addition of the Fifteenth Amendment to the United States Constitution. From the first, the real passion of the radicals had been Negro suffrage, ". . . their key weapon in reconstructing the former Confederate States. Here was a legal and non-violent means of control which could be dressed in appealing moral clothes."[73] The question of whether or how best to secure Negro suffrage became a topic for debate as early as 1864 and with shifting emphasis remained the central concern until the ratification in 1870 of the Fifteenth Amendment granting that right.[74]

Negro suffrage received endorsement from several varied sources in 1865. After a fact-finding tour of the South for President Johnson, Carl Schurz reported that the Negro's right

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1865-1877 (Baton Rouge, 1947), Vol. VIII of A History of the South, edited by Wendell Holmes Stephenson and E. Merton Coulter (10 vols.), p. 42.

[72]Stampp, The Era of Reconstruction, p. 139.

[73]Leslie H. Fishel, Jr., "Northern Prejudice and Negro Suffrage, 1865-1870," The Journal of Negro History, XXXIX (January, 1954), 11.

[74]William Gillette, The Right to Vote: Politics and Passage of the Fifteenth Amendment (Baltimore, 1965), p. 21.

to vote should be guaranteed; the ballot would provide ". . . the best protection [for the Negro] against oppressive class-legislation, as well as against individual persecution. . . ."[75] Andrew Johnson endorsed qualified Negro suffrage in a letter to Governor W. L. Sharkey of Mississippi; he urged that the vote be given to those who could read and write and who owned property worth at least two hundred and fifty dollars. This, he said, would foil the radicals ". . . in their attempt to keep the southern States from renewing their relations to the Union by not accepting their senators and representatives."[76] Even some Southerners expressed no opposition to Negro suffrage. For example, Wade Hampton's brother stated that giving the vote to former slaves ". . . would only be multiplying the power of the old and natural leaders of Southern politics."[77]

At the close of the Civil War, therefore, the advocates of racial equality urged the adoption of universal manhood suffrage. Northern opposition served as the principal stumbling-block to the direct establishment of Negro suffrage throughout the nation. Before 1865 only six Northern states—Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and New York—permitted Negroes to vote.[78] In 1865 the states of Connecticut,

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[75]Walter L. Fleming, Documentary History of Reconstruction: Political, Military, Social, Religious, Educational and Industrial, 1865 to the Present Time, 2 vols. (Cleveland, 1907), I, 96.

[76]McPherson, Political History, pp. 19-20.

[77]Fleming, Documentary History of Reconstruction, I, 95.

[78]Leslie H. Fishel, Jr., "The Negro in Northern Politics, 1870-1900," The Mississippi Valley Historical Review, XLII (December, 1955), 468.

Wisconsin, Michigan, and Minnesota rejected the Negro's bid for the ballot. The North sought to confine Negro suffrage to the Southern states.[79]

Congress endeavored to get around Northern opposition by approaching the question of Negro enfranchisement indirectly through the Fourteenth Amendment. The second section of that measure represented a modest step toward Negro suffrage by providing for the reduction of representation in the House of Representatives in proportion to those denied the right to vote. Expressing the opinion of many toward this compromise, Representative George W. Julian of Indiana declared it a "'. . . wanton betrayal of justice and humanity.'" According to Julian, "'. . . the Negro . . . was finally indebted for the franchise to the desperate madness of his enemies in rejecting the dishonorable proposition of his friends.'"[80]

With the rejection of the Fourteenth Amendment, Congress took steps in 1866 and 1867 to guarantee Negro suffrage wherever it had the power to do so. By February, 1867, Congress had enfranchised the Negro in the District of Columbia and in all federal territories. The following month the First Reconstruction Act sought to force enfranchisement of the Negro in the South by requiring the Southern states to write a guarantee of Negro suffrage into their constitutions.[81] In June, 1868,

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[79]Fishel, "Northern Prejudice and Negro Suffrage, 1865-1870," 14.

[80]Stampp, The Era of Reconstruction, p. 142.

[81]Gillette, The Right to Vote, pp. 31-32.

seven of the Southern states were admitted to representation ". . . upon the fundamental condition that the constitutions of none of them should ever be altered as to deprive the enfranchised negroes of the right to vote."[82]

The trend toward Negro suffrage suffered a setback in the 1867 elections. The Republicans stressed the issue of Negro suffrage in the North and received a tremendous defeat. They lost the governorships and control of the legislatures in Connecticut, Maine, and California. At the same time, the Democrats made spectacular gains, securing the legislatures of Ohio and New Jersey, all state offices in Pennsylvania, and a few seats in Congress by special election. Kansas, Ohio, and Minnesota rejected referendums on Negro suffrage. The losses sustained by the Republicans were hailed as a repudiation of the extension of Negro suffrage to include the North.[83]

After their defeat in the 1867 elections, Republican politicians tried to skirt the Northern suffrage issue. This tendency to equivocate became very evident in the adoption of the suffrage plank at the Chicago Convention, May 20-21, 1868. In it the Republicans promised that Congress would guarantee equal suffrage in the South, but they left the same question in the North to the decision of the state governments.[84]

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[82]John Mabry Mathews, Legislative and Judicial History of the Fifteenth Amendment (Baltimore, 1909), p. 18.

[83]Gillette, The Right to Vote, pp. 32-33.

[84]William A. Dunning, Essays on the Civil War and Reconstruction and Related Topics (New York, 1931), p. 227. For a

In the election of 1868 the Republican candidate for President, Ulysses S. Grant, won a plurality of only 300,000 votes. The Southern Negro vote of 450,000 proved indispensable to the Republican popular majority. Despite the overall Republican victory, the Democrats made gains in the House and recruited some 50,000 Negro voters in the South.[85] Realizing that Congressional control of the South was nearing its end, Republican leaders resolved that the Republican victory of 1868

> . . . should lead to the incorporation of impartial suffrage in the Constitution of the United States. The evasive and discreditable position in regard to suffrage, taken by the National Republican Convention. . . , was keenly felt and appreciated by the members of the party when subjected to popular discussion. There was something so obviously unfair and unmanly in the proposition to impose negro suffrage on the Southern States by National power, and at the same time to leave the Northern States free to decide the question for themselves, that the Republicans became heartily ashamed of it long before the political canvass had closed. When Congress assembled . . . it was resolved that suffrage as between the races, should by organic law be made impartial in all the States of the Union—North as well as South.[86]

When the Fortieth Congress assembled for its third and final session, December, 1868, representatives introduced immediately eleven amendments dealing with suffrage, seven in the House and four in the Senate. All except one were referred to the appropriate Judiciary Committee for consideration.[87]

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justification of the Republican position, see Adams Sherman Hill, "The Chicago Convention," North American Review, CVII (July, 1868), 175.

[85]Gillette, The Right to Vote, pp. 40-43.

[86]Blaine, Twenty Years of Congress, II, 412-413.

[87]DuBois, Black Reconstruction, pp. 377-378.

On January 11, 1869, George S. Boutwell of Massachusetts reported the following amendment (H. R. No. 402) from the House Judiciary Committee.

> Section 1. The Right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of the race, color, or previous condition of slavery of any citizen or class of citizens of the United States.
>
> Section 2. The Congress shall have power to enforce by proper legislation the provisions of this article.[88]

Serious discussion on the proposed amendment did not begin until January 23, 1869. On that date Boutwell took the floor to defend his proposition. He asserted that this was the "last . . . of a series of great measures growing out of the rebellion, and necessary for the reorganization and pacification of the country, with which the Republican party to a large extent . . . [had] been charged."[89] In a similar vein, Hamilton Ward of New York said,

> It will be the capstone in the great temple of American freedom. It will be the consummation of our great work. It will secure to us the fruits of the war. It will settle the controversies between the races. It will stop the controversies of the North and the South on that subject. It will bring the country back to peace, which all the interests of the country demand.[90]

The Democratic opposition again brought forth the charge of unconstitutionality; the proposed amendment violated the reserved rights of the states. The words of Thomas L. Jones

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[88] Congressional Globe, 40th Congress, 3rd Session, I, 286.

[89] Ibid., 555.

[90] Ibid., 724. For similar views, see ibid., 692, 694 and ibid., III, appendix, pp. 92, 103.

of Kentucky expressed the sentiments of most Democrats. He urged his fellow representatives to ". . . guard with unceasing vigilance as the vestal flame of our liberties the reserved rights of the States and of the people."[91]

Answering the charge leveled by Democrats, William D. Kelley of Pennsylvania upheld the constitutional right of Congress to regulate suffrage and denied that the amendment infringed upon state rights. He asserted, "The regulation of suffrage is left primarily to the States. If they regulate it according to the principles of justice then their action stands; but if not, Congress is required to exercise its supervisory power."[92]

The House of Representatives passed the Boutwell amendment on January 30, 1869, by a vote of one hundred fifty to forty-two. Thirty-one members did not vote. Of the forty-two negative votes, thirty-eight came from Democrats. The four Republicans who voted against the measure included John A. Bingham of Ohio, Jehu Baker of Illinois, Isaac R. Hawkins of Tennessee, and Daniel Polsley of West Virginia.[93]

While the House members debated Boutwell's plan, senators considered the amendment (S.R. No. 8) introduced by William M. Stewart, a moderate Republican from Nevada. Stewart's proposal of January 28, 1869, stipulated that "the right of citizens of the United States to vote and hold office shall not

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[91] Ibid., I, 724. See also, ibid., 687, 697.

[92] Ibid., 722.

[93] Ibid., 745.

be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude."[94] The Senate debated the issue three days without reaching an agreement. With the passage of the Boutwell amendment by the House, the Senate dropped Stewart's plan and proceeded to consider the House proposal.[95]

Democrats denounced the proposition because the Republicans were scrapping their 1868 suffrage plank which had promised to leave the Northern states free to regulate suffrage as they saw fit. According to them, the radical schemers were not trying to impose suffrage upon the North in order to gain that section's Negro vote. The remaining Democratic arguments against the proposed amendment centered on the recurrent themes of state rights and Negro inferiority. The opponents of the measure again reiterated that suffrage was a matter for the states and not the federal government. In their opinion, the Negro was inferior mentally and morally as well as physically and was, therefore, incapable of voting intelligently. These arguments received little attention since there were only a dozen Democrats in the Senate.[96]

Republican disagreement presented a much graver problem since it could prevent the passage of the proposed amendment. In the eyes of many Republicans the amendment did not go far

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[95]Gillette, The Right to Vote, p. 55.

[96]Congressional Globe, 40th Congress, 3rd Session, II, 904, 910, 9850989, 996. See also, ibid., III, appendix, pp. 151, 158, 163, 168-169.

enough; it removed from the state only the power to disfranchise on grounds of race or color. Since the proposal failed to state exactly who should vote, Alabama Senator Willard Warner concluded that

> the animus of this amendment is a desire to protect and enfranchise the colored citizens of the country; yet, under it and without any violation of its letter or spirit, nine tenths of them might be prevented from voting and holding office by the requirement on the part of the States or of the United States of an intelligence or property qualification.[97]

Reflecting the views of many Northern Republicans, Oliver P. Morton of Indiana agreed that the amendment did not go far enough. He declared that it tacitly conceded to states the right to disfranchise Negroes with literacy or property qualifications. Southern states could use these or similar means to exclude the Negroes from voting and thus defeat the amendment's purpose. In order to prevent evasion of the amendment in this manner, Morton proposed that Congress adopt explicit and uniform qualifications for federal elections and elections for state legislatures.[98]

On February 8, 1869, the introduction of a substitute for the pending amendment by Michigan's radical Republican Jacob Howard brought the debate to one of its most critical periods. His proposal sought to specify African suffrage: "Citizens of the United States of African descent shall have the same right to vote and hold office in States and Territories as other

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[97] Ibid., II, 862.

[98] Ibid., 862-863.

citizens, electors of the most numerous branch of their respective Legislatures." Diverse reasons motivated the supporters of Howard's amendment. Such veteran antislavery and radical Republicans as Benjamin Wade of Ohio and Charles Sumner of Massachusetts wished to strengthen the amendment. Senators such as Cornelius Cole of California and Henry W. Corbett of Oregon supported the measure because they wished to withhold suffrage from naturalized citizens of Irish and Chinese descent. The amendment was rejected, with sixteen senators voting for it and thirty-five against.[99]

Stewart, the Senate manager of the proposed amendment, pressed for a final vote. On February 8 and 9 debate consumed thirty-two hours in a consecutive session with only two short recesses. During the course of this extended session ". . . twenty-four roll calls were taken, thirty propositions presented, and seventeen amendments to the pending Boutwell amendment acted upon."[100]

By a vote of thirty-one to twenty-seven the Senate agreed to replace the Boutwell amendment with that offered by Henry Wilson of Massachusetts. Wilson's sweeping proposition stated: "No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or religious creed."

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[99]Ibid., 1008-1012.

[100]Gillette, The Right to Vote, p. 56.

Within minutes of this victory, the radicals also approved Morton's measure to reform the electoral college so as to make the choice of the electors the same as that of the voters. Designated as the Fifteenth and Sixteenth amendments respectively, both measures passed with the necessary two-thirds majority, the vote being thirty-nine in the affirmative and sixteen in the negative.[101]

Now began a period of frustration and fear for those who hoped for the passage of any suffrage amendment. On February 15, 1869, the House refused to concur in the Senate amendments to H.R. No. 402 and asked for a conference committee. Instead of agreeing to a conference, the Senate, February 17, receded from its amendments, rejected the Boutwell amendment, and passed Senator Stewart's original proposition (S.R. No. 8). The House added an amendment by John A. Bingham banning, in addition to race, color, or previous condition of servitude, nativity, property, and creed as tests of suffrage. The Senate rejected this proposal. It then called for a conference committee and the House agreed to it.[102]

The conference committee appointed February 23, 1869, consisted of six members. It included Senators William M. Stewart, Roscoe Conkling, and George F. Edmunds and Representatives George S. Boutwell, John A. Bingham, and John A.

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[101] Congressional Globe, 40th Congress, 3rd Session, II, 1040-1044.

[102] Ibid., 1212, 1295, 1318, 1329, 1428, 1481.

Logan. This committee drew up a proposed Fifteenth Amendment which read as follows:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> The Congress shall have the power to enforce this article by appropriate legislation.

The House accepted the committee report on February 25, 1869, by a vote of one hundred forty-four to forty-four; no Democrat favored it and only three Republicans opposed it. On February 26, 1869, the Senate approved the conference proposal by a partisan vote of thirty-nine to thirteen.[103]

In contrast to Andrew Johnson's vigorous denunciation of the Fourteenth Amendment, recently elected President Ulysses S. Grant urged the quick ratification of the Fifteenth Amendment. He made his position clear in his First Inaugural Address, March 4, 1869. He said,

> The question of suffrage is one which is likely to agitate the public so long as a portion of the citizens of the nation are excluded from its privileges in any State. It seems to me very desirable that this question should be settled now, and I entertain the hope and express the desire that it may be by the ratification of the fifteenth article of amendment to the Constitution.[104]

The Fifteenth Amendment received praise in papers, resolutions, and speeches. According to The Nation, the last thing to be done for the Negro was the passage of the Fifteenth Amendment in order to ". . . establish on paper the principle

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[103] Ibid., 1470, 1481; ibid., III, 1563-1564, 1641.

[104] Richardson, Messages and Papers, VII, 8.

that his right to vote shall not be taken away from him by State restrictions, and that neither an aristocracy of color, nor of race . . . shall enslave him."[105] At its annual convention, May, 1869, the American Anti-Slavery Society resolved

> . . . that the Fifteenth Amendment was 'the capstone and completion of our movement; the fulfillment of our pledge to the Negro race; since it secures to them equal political rights with the white race, or, if any single right be doubtful, places them in such circumstances that they can easily achieve it.'[106]

Wendell Phillips expressed the belief that the Fifteenth Amendment secured equal rights for the Negro. In his words,

> . . . the law recognizes them [rights], and the whole power of the nation is pledged to the negro's protection in the exercise of them. He holds at last his sufficient shield in his own hands. . . . Thwarted at one moment, bullied or starved at another, the voter, if true to himself, always conquers and dictates his own fate and position in the end.[107]

Opponents of ratification also expressed themselves. Gideon Welles denounced the amendment because it gave ". . . suffrage to negroes and fools . . . in total disregard of the rights of the States. . . ."[108] In the New York Times a reader commented that the Fifteenth Amendment would force the states to extend suffrage to the pagan Chinese and Hindus.[109] The National Woman's Suffrage Association adopted a resolution of

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[105] The Nation, VIII (February 18, 1869), 124.

[106] McPherson, The Struggle for Equality, p. 427.

[107] Hyman, Radical Republicans and Reconstruction, pp. 496-497.

[108] Welles, Diary, III, 524.

[109] New York Times, March 25, 1869, p. 4.

Susan B. Anthony which declared,

> . . . we repudiate the Fifteenth Amendment, because by its passage in Congress the Republican Party proposes to substitute an aristocracy race, the most odious distinction in citizenship that has yet been proposed since nations had an existence.[110]

Apparently little impressed with the Fifteenth Amendment, Henry B. Adams expressed the following rather reserved opinion of it in the North American Review:

> Apart from the general doubt whether it is advisable to insert in the Constitution such special provisions, there is little in the 15th Amendment to which we can fairly object. The dogma that suffrage is a national right, and not a trust, is by implication denied. The "right" to hold office, as well as to vote, is not asserted. Education and even property qualifications by state law are not excluded. We know little of legal ingenuity, if it is not found that this Amendment is of small practical value. Its sting and its danger rest in the possible abuse of the power granted to Congress by the second section to enforce the article by such legislation as it may deem appropriate.[111]

Certified to the thirty-seven states on February 27, 1869, the Fifteenth Amendment needed the approval of twenty-eight of these in order to become part of the Constitution. The rejection of the amendment by Delaware, Maryland, Kentucky, Tennessee, California, and Oregon threatened to defeat the amendment unless the ten Southern states gave their approval.[112]

Under the control of radical Republican regimes, the Southern states, Georgia excepted, ratified the amendment with

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[110] Ibid., June 4, 1869, p. 4.

[111] Henry Brooks Adams, "The Session," North American Review, CVIII (April, 1869), 613.

[112] Mathews, Legislative and Judicial History, pp. 57-68.

rather substantial majorities. To virtually insure the future of the amendment, Congress, April, 1869, at the instigation of Oliver P. Morton, had made adoption of the Fifteenth Amendment a prerequisite for the readmission of Virginia, Mississippi, and Texas to full rights within the Union.[113] Virginia, Mississippi, and Texas complied with this demand and were readmitted in January, February, and March, 1870, respectively.[114]

In the struggle for ratification and in the history of reconstruction, Georgia presented a special case. Georgia had been readmitted to the Union on June 25, 1868, after ratifying the Fourteenth Amendment. In March, 1869, Congress refused to seat her Congressmen because the state legislature had expelled legally elected Negroes from its membership and had rejected the Fifteenth Amendment. As time progressed, it appeared evident that ratification by Georgia would be needed to secure the three-fourths majority. Hence, on December 22, 1869, Congress instructed Georgia to reconvene her legislature with the Negro members and ratify the Fifteenth Amendment. Georgia eventually complied and on June 24, 1870, she was readmitted to the Union for a second time.[115]

Hamilton Fish, Secretary of State, proclaimed the official ratification of the Fifteenth Amendment on March 30, 1870.[116]

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[113]Foulke, Life of Oliver P. Morton, II, 120.

[114]Burgess, Reconstruction and the Constitution, pp. 228-230.

[115]Ibid., pp. 235-243.

[116]Mathews, Legislative and Judicial History, p. 74.

That same day Grant sent a message to Congress announcing the approval of the Fifteenth Amendment. In it he characterized the new addition to the Constitution as ". . . a measure of grander importance than any other one act of the kind from the foundation of our free Government to the present day."[117]

Two additions to the Constitution serve as the bright and lasting achievements of the era of reconstruction. The Fourteenth and Fifteenth Amendments, which, in all probability,

> . . . could have been adopted only under the conditions of radical reconstruction, make the blunders of that era, tragic though they were, dwindle into insignificance. For if it was worth four years of civil war to save the Union, it was worth a few years of radical reconstruction to give the American Negro the ultimate promise of equal civil and political rights.[118]

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[117]Richardson, Messages and Papers, VII, 56.

[118]Stampp, The Era of Reconstruction, p. 215.

CHAPTER III

THE ENFORCEMENT ACTS, 1870-1871

As evidenced by the passage of the Civil Rights Act of 1866 and the Fourteenth and Fifteenth Amendments, Congress had a passion for enacting measures that would insure the Negro full and equal rights with the white population. According to one historian, "never in the history of any people was there such an obsessive concern with the establishment of fundamental rights for a minority which, until then, had had no rights at all."[1] When it became clear that Negro rights, particularly the right to vote, were not being respected in the South, Congress enacted in 1870 and 1871 a series of three measures designed to protect the Negro's newly-won political and civil rights.

These federal Enforcement Acts represented the Grant administration's response to the South's challenge to the Congressional reconstruction program. This program, begun in earnest in March, 1867, and completed by the summer of 1870, showed signs of collapse even before it was perfected. The election of 1868 demonstrated the tenuous nature of Republican supremacy. Andrew Johnson's amnesty proclamations of September 7 and December 25, 1868, restoring the franchise to most former

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[1]Konvitz, A Century of Civil Rights, p. 60.

Confederates, only made matters worse. The radicals were still further discouraged by Democratic victories at the polls in Virginia, North Carolina, and Georgia in 1869 and 1870. However, ". . . most alarming of all was the way in which the Ku Klux Klan and other extralegal bodies were, by violence and intimidation, preventing the Negroes from voting."[2]

The Ku Klux Klan originated at Pulaski, Tennessee, in 1866. To provide an outlet for their unoccupied energies, a number of young ex-Confederate soldiers devised the scheme of disguising themselves and playing practical jokes on the Negroes in the area. They soon discovered the potentiality for using the organization as a means of disciplining freedmen and of regaining white supremacy. The Ku Klux Klan spread into other states. It grew so rapidly that in 1867 members of the Klans from various states met in Nashville and established "The Invisible Empire of the South," with Nathan B. Forrest as the Grand Wizard. Terrorism became the order of the day in many parts of the South. As the organization became more and more violent, Forrest and other leaders repudiated its methods and gradually withdrew from it. The Ku Klux Klan was officially disbanded in 1869, but it did not die.[3]

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[2]Everette Swinney, "Enforcing the Fifteenth Amendment, 1870-1877," The Journal of Southern History, XXVIII (May, 1962), 202. Similar to the Ku Klux Klan but operating on a smaller scale were such groups as the Knights of the White Camelia, the Constitutional Union Guards, the Pale Faces, the Council of Safety, and the '76 Association. Franklin, From Slavery to Freedom, p. 327.

[3]Burgess, Reconstruction and the Constitution, p. 250. See also, Harvey Wish, editor, Reconstruction in the South,

Complaints of Ku Klux Klan atrocities throughout the South were a constant source of pressure on Congressional leaders. According to The Nation, four disguised men seized a colored man who had come to Columbus, Mississippi, to collect a debt, ". . . carried him to the woods, offered him gross indignities, and then cut off his ears."[4] On another occasion, the Klan visited Hampton Parker, a South Carolina sharecropper, took his gun, and gave him forty or fifty blows with branches taken from nearby peach trees.[5] Murders as well as whippings occurred frequently. In one of the worst of these cases, the Klan shot and killed a Negro man and then set fire to his house, burning up two of his children along with him.[6] Many Negroes hid in woods or swamps for days or weeks at a time to escape mistreatment at the hands of Klan members.[7]

Negro women and children also suffered at the hands of the Ku Klux Klan. Caroline Benson described her ordeal in this manner: "They had a show of us all there; they had us all lying in the road, Mary Brown, Mary Neal, and my next youngest daughter.

1865-1877: First-Hand Accounts of the American Southland After the Civil War, By Northerners and Southerners (New York, 1965), p. 153; and Kenneth Stampp, The Era of Reconstruction, pp. 199-200.

[4]The Nation, III (July 5, 1866), 3.

[5]Report of the Joint Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States (Washington, 1872), IV, 598. Hereafter cited as Ku Klux Report. For similar accounts, see ibid., III, 520-521; ibid., V, 1564-1565.

[6]Ibid., XII, 793-794.

[7]Ibid., III, 521; ibid., VI, 69.

They had us all stripped there, and laughed and made great sport . . . . You never saw such ill-behaved men."[8] For supposedly not working hard enough, Jane Surratt received forty lashes with sticks bigger than her thumbs; her son and daughter were beaten for the same offense.[9] John Childers' ten-year-old daughter died after being severely beaten by her employer; the man escaped punishment because witnesses were afraid to testify.[10]

Negroes were not the only ones visited by the Ku Klux Klan. White men sometimes suffered at their hands for associating with Negroes and giving them aid and advice. Usually the Klan whipped such men and ordered them to leave the country; to remain after a warning meant further punishment or perhaps even death.[11] Less fortunate than most was Sheriff Mat Deason of Atlanta, Georgia. The Klan placed five bulletholes in his forehead and then mashed in his head with a club because he lived with a colored woman as his common-law wife.[12]

According to most reports, the Ku Klux Klan was organized to promote a political objective through the use of intimidation, force, bribery at the polls, ostracism in business and society, arson, and even murder. To members of the secret order, "depriving the Negro of political equality became . . . a holy

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[8] Ibid., VI, 387.

[9] Ibid., III, 524.

[10] Ibid., X, 1722-1724.

[11] Ibid., III, 296-297; ibid., VI, 545-546.

[12] Ibid., VI, 359.

crusade in which a noble end justified any means."[13] Victims of the Klan, both black and white, characterized it as a Democratic organization designed to destroy the Republican party in the South. Mississippi Negro William Coleman knew the reason for his beating; he said, ". . . what it was done for was because I was a radical, and I didn't deny my profession anywhere . . . ."[14] Most Negroes believed that they would be in danger if they voted the Republican ticket, whereas voting Democratic would assure their personal safety.[15] James M. Justice of North Carolina expressed the opinion of many white Republicans in the South when he stated,

> I do not say that all democrats are Ku-Klux, but I do say that all the Ku-Klux are democrats. . . . . I do not believe they would have organized it for an instant as a secret Klan, except to further the interest of the democratic party.[16]

Even a few members of the Klan asserted that its purpose was to remove any obstacle to the success of the Democratic Party.[17] Perhaps Harper's Weekly summed up Republican opinion best in the following editorial:

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[13]Franklin, From Slavery to Freedom, p. 327.

[14]Wish, Reconstruction in the South, p. 165. See also, Ku Klux Report, II, 95-96; ibid., V, 1407-1408; ibid., VII, 615, 955; ibid., IX, 1017, 1019.

[15]Ibid., XIII, 48-49.

[16]Ibid., II, 160. See also, ibid., III, 42-44, 52; ibid., VI, 66-68; ibid., X, 1650-1653, 1738-1739; ibid., XI, 286; ibid., XIII, 267; Wish, Reconstruction in the South, pp. 172-173.

[17]Ku Klux Report, XIII, 156. See also, ibid., II, 236; ibid., XI, 230.

> The significant fact in all this lawlessness and terror is that it is chiefly political. The masked blow of the Ku-Klux always falls upon some loyal man, black or white, and always upon a Republican. Democrats are unharmed. It is not a terror for those who attempted to destroy the government during the war, but for those who sustained it. The conclusion is irresistible that it is an organization of Democrats. This fact is made still more unquestionable by the denials and sneers of Northern Democrats. They call it rawhead and bloody-bones, a bugaboo of scared radicals, and a device invented to authorize military coercion of Democratic districts. But if every victim in the Southern States who is taken from his home and scourged, or mangled, or murdered were a Democrat instead of a Republican, how the land would ring with the cry that a radical Administration abandoned innocent citizens to the tender mercies of savages![18]

Victims of "Ku-Kluxing" and their sympathizers contended that the civil authorities of the states were either unable or disinclined to take action to suppress Klan activities. According to James H. Bones of Alabama, the civil authorities ". . . said they could not give me any assistance, that if they [Ku Klux Klan] were determined to kill me I would have to submit." Numerous letters and resolutions expressing similar sentiments urged Congress to enact measures for the protection of the life and property of loyal citizens.[19]

Comments from Ku Klux Klan adherents were heard much less frequently. However, when either members or supporters spoke out, they denied that the Klan was primarily a political

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[18] Harper's Weekly, XV (November 4, 1871), 1026. See also, ibid., XV (April 1, 1871), 282; The Nation, VI (April 9, 1868), 302; ibid., XII (March 16, 1871), 170.

[19] "Outrages by Ku-Klux Klan," House Miscellaneous Documents, 40th Congress, 3rd Session, No. 23, p. 1. See also, "Resolution in the Senate," Senate Miscellaneous Documents, 41st Congress, 2nd Session, No. 36, p. 1; Ku Klux Report, II, 102; ibid., IV, 623.

organization devised to prevent individuals, particularly Negroes, from voting the Republican ticket. In the opinion of many members, including John B. Gordon, it constituted ". . . an organization, a brotherhood of the property holders, the peaceable, law-abiding citizens . . . for self protection."[20] The desire for protection had been brought about chiefly by the activities of Northern-sponsored Union Leagues which stirred up the Negroes, making them insolent and dangerous to the Southern white community.[21] If the Negroes had been left alone by outsiders, so the argument ran, they would have been content to follow the leadership of their white superiors and no Ku Klux organization would have been needed.[22] Klan supporters also maintained that they prevented no Republican, either black or white, from voting. On the contrary, the Union Leagues frightened away from the polls those Negroes who desired to vote Democratic.[23] The Ku Klux Klan characterized the highly publicized outrages as the work of individuals who adopted the regalia of the Klan to cloak their misdeeds.[24] As far as the Klan was concerned, the laws in the states were being enforced and no outside interference was needed or wanted.[25]

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[20] Ku Klux Report, I, 452. See also, ibid., 449; ibid., II, 321; ibid., V, 1457; ibid., VII, 766; ibid., X, 1805.

[21] Ina W. Van Noppen, The South: A Documentary History (New York, 1958), p. 351.

[22] Ku Klux Report, XI, 195.

[23] Ibid., IV, 1228. See also, ibid., VI, 179, 236-237, 248; ibid., VIII, 228, 247, 283; ibid., XIII, 237.

[24] Ibid., IX, 649.

[25] Ibid., VIII, 320, 264.

After hearing countless tales of violence in the South, the Republican majority in Congress decided that federal legislation should be enacted to suppress the activities of the Ku Klux Klan and similar organizations and accordingly introduced legislation for that purpose in February, 1870. In the debates which followed the Democrats directed their efforts toward moderating the proposed law; they had no hope of defeating it. The Republicans had the votes, and, for them, the law appeared necessary if the Republican Party were to retain its control in the South.[26]

On February 21, 1870, Representative John A. Bingham of Ohio introduced a bill (H.R. No. 1293) ". . . to enforce the right of citizens of the United States to vote in the several States of this Union who have hitherto been denied that right, on account of race, color, or previous condition of servitude. . . ." The Speaker of the House referred the bill to the Committee on the Judiciary. Two weeks later, March 9, Indiana Democrat Michael C. Kerr reported a substitute which was ordered printed and then recommitted to the Judiciary Committee. Bingham reported the substitute to the House on May 16, and recommended its immediate passage. Under his guidance, the First Enforcement Act passed the House without discussion by a party vote of one hundred thirty-one to forty-four with fifty-three not voting.[27]

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[26] William Watson Davis, "The Federal Enforcement Acts," Studies in Southern History and Politics: Inscribed to William A. Dunning (New York, 1914), p. 206.

[27] Congressional Globe, 41st Congress, 2nd Session, II, 1459, 1812; ibid., IV, 3503-3504.

During this same period, Senator George F. Edmunds of Vermont introduced a bill to enforce the Fifteenth Amendment (S.R. No. 810) on April 19. On April 25, acting for the Committee on the Judiciary, William M. Stewart of Nevada reported a substitute for Edmunds' bill. When the House bill reached the Senate on May 17, the upper legislative body, having the Stewart substitute under consideration, tabled the House measure. As no agreement appeared likely on the Senate proposal, Ohio's John Sherman recommended that the Senate consider the House bill since essentially the same points were covered by it. This the Senate voted to do on May 18, 1870. That same day Stewart, who believed that the House bill was too lenient, moved to substitute his measure for the entire House proposition. From this point debate began in earnest.[28]

The Republicans in Congress sought to justify the proposed legislation through the following arguments. They emphasized the violent disregard for law and order which existed in the South. The Republicans declared that state governments were incapable of protecting life and property. Congress, argued the advocates of the force bill, had the right and duty to protect all individuals whose constitutional rights were threatened.[29] In the words of George E. Spencer of Alabama, "nothing but the most stringent of all laws and regulations . . . [would] check this era of bloodshed and dethrone this dynasty of the knife

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[28] Ibid., III, 2808; ibid., IV, 2942, 3514, 3518, 3558, 3561.

[29] Ibid., 3568, 3611-3613, 3668-3670.

and bullet."[30]

Although they relied upon the above-mentioned arguments, the Republicans depended most upon their assertion that the Fifteenth Amendment gave Congress the constitutional authority to enact such legislation. Oliver P. Morton of Indiana best expressed Republican sentiment as to the intent of the amendment. He said, "It is that the colored man, so far as voting is concerned, shall be placed upon the same level and footing with the white man, and that Congress shall have the power to secure to him that right."[31] In upholding the legality of the force bill, Carl Schurz of Missouri admitted that the reconstruction amendments were revolutionary; then he asserted that ". . . the Constitution of the United States has been changed in some most essential points; that change does amount to a great revolution, and this bill is one of its legitimate children."[32]

In the debates the Democrats made no serious attempt to discount the Republican claim of rampant lawlessness in the South. They minimized the extent of the lawlessness and declared that it could be handled easily by the state governments.[33] Democratic opponents of the measure denied that the Constitution granted Congress the power to enact such a sweeping law. They interpreted the Fifteenth Amendment as a limitation not upon

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[30] Ibid., 3669.

[31] Ibid., 3670.

[32] Carl Schurz, Speeches, Correspondence and Political Papers of Carl Schurz, 1852-1906, edited and selected by Frederic Bancroft, 6 vols. (New York, 1913), I, 487.

[33] Davis, "The Federal Enforcement Acts," p. 209.

individuals or upon a group of individuals acting as a mob, but as a limitation upon the United States and upon the states. Senator Allen G. Thurman of Ohio declared that ". . . no stretch of ingenuity . . . [could] extend it one hair's breadth further."[34] Legislation such as that contemplated was unnecessary since any state constitution or law which discriminated against a citizen on account of race, color, or previous condition of servitude automatically fell within the prohibition of the Fifteenth Amendment and became null and void.[35]

The First Enforcement Act in much of its final form passed the Senate after a strenuous all-night session, May 20-21, 1870. The sun was shining as Senator Thurman rose for a final useless attack on the bill. He said,

> I see Senators here who have gone to their homes and had a comfortable rest, while others of us have sat up through the weary hours of the night. I see other Senators here who have quietly slept on sofas while amendment after amendment has been made to this bill, and only aroused from their slumbers when there was a division of the Senate or when their presence was necessary in order to make a quorum. I do not believe there is a Senator here who will stand up and on his honor declare that he knows what this bill is. And yet we are asked here and now to vote on this question; we are asked to pass this bill—such a bill as never was passed or thought of being passed since this Government has had an existence.[36]

Despite Thurman's last minute stand, the bill of twenty-one sections passed easily with a partisan vote of forty-three to eight.[37]

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[34] Congressional Globe, 41st Congress, 2nd Session, IV, 3661. See also, ibid., 3481 and ibid., VII, appendix, pp. 353, 357.

[35] Ibid., IV, 3568, 3667.

[36] Ibid., 3688.

[37] Ibid., 3690.

Upon Bingham's recommendation, the House on May 23 rejected the Senate amendments and asked for a conference committee. The committee included John A. Bingham of Ohio, Noah Davis of New York, and Democrat Michael C. Kerr of Indiana for the House, and William Stewart of Nevada, George F. Edmunds of Vermont, and Democrat John P. Stockton of New Jersey for the Senate. After sundry meetings, the conference committee added three more drastic sections to the bill. On May 23 Stewart reported to the Senate; after a few brief words of opposition from the Democrats, the upper house accepted the report by a vote of forty-eight to eleven. The following day Bingham reported to the House, and on May 27 the House approved the conference proposal by a vote of one hundred thirty-three to fifty-eight. With the President's signature, the First Enforcement Act became law on May 31.[38]

The First Enforcement Act, entitled "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes," began simply with the declaration that all citizens otherwise qualified to vote whould be entitled to do so ". . . without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State, or Territory, or under its authority, to the contrary not withstanding." Following this statement, the act provided that election officials were to allow all persons an equal opportunity to meet

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[38] Ibid., 3705, 3726, 3752-3753; V, 3809, 3853-3854, 3884, 3959.

the prerequisites for voting without regard to the aforesaid distinctions. Failure to do this would be termed a misdemeanor; persons convicted of such a violation were subject to a fine of not less than five hundred dollars or imprisonment for not less than one month nor more than one year, the exact punishment being left to the discretion of the courts.[39]

Section three of the law provided that when a person offered to perform the prerequisites necessary for voting qualification and was prevented from doing so by the official in charge, his offer to perform would be deemed the performance. Such a person would be entitled to vote by presenting an affidavit describing his offer at the polls. Election officials who refused to accept votes under such circumstances had to forfeit five hundred dollars to the aggrieved party, pay any court costs, and were subject to fine and imprisonment.[40]

The act provided in sections four through seven for the punishment of individuals or combinations of individuals who sought to deprive a person of his suffrage rights. Section four made it unlawful to use force, intimidation, bribery, or other means to prevent a person from qualifying to vote, whereas the fifth section declared it illegal to prevent a person from voting by means of bribery or threats. Both offenses were classed as misdemeanors and carried with them the same penalties prescribed in sections two and three. The sixth section was

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[39] U. S. Statutes at Large, XVI, Part II, 140 (1870).

[40] Ibid., pp. 140-141.

aimed specifically at the Ku Klux Klan; two or more persons who banded together and went in disguise upon the highway with the intent to deprive another of his constitutional rights would be considered guilty of a felony. Persons convicted under this section were subject to a fine not to exceed five thousand dollars, imprisonment not to exceed ten years, and disqualification from holding federal office. Section seven allowed the states to punish those who committed other crimes while in the act of violating the two previous sections.[41]

The Enforcement Act of May 31, 1870, re-enacted the Civil Rights Act of 1866. Sections eight through thirteen were borrowed almost verbatim from that federal statute. These sections provided the federal executive and judicial machinery for carrying into effect the substantive provisions of the act. The law instructed district attorneys, marshals, commissioners appointed by circuit or territorial courts, and any other officers appointed by the President to proceed against all persons violating the statute. Persons who obstructed said officers in the performance of their duties were subject upon conviction to fines not to exceed one thousand dollars and imprisonment for not more than six months. The act established the fees to be received by the officials and provided that they be paid out of the United States Treasury. It also empowered the President to use the army and naval forces of the United States to enforce the law.[42]

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[41] Ibid., p. 141.

[42] Ibid., pp. 142-143.

The act further provided that district attorneys should bring court action to secure the removal of those persons holding office in violation of the third section of the Fourteenth Amendment. Those who knowingly held such offices were subject upon conviction to a fine of not more than one thousand dollars and imprisonment for not more than one year. Those who practiced fraud in Congressional elections, prevented any qualified elector from voting, or induced election officials to accept illegal votes were liable to a five hundred dollar fine and a prison term not to exceed three years. Similar penalties were provided for the unlawful registration of voters, the knowing acceptance of illegal votes, and the fraudulent certification of election results.[43]

The final section of the law allowed any person who was defeated or deprived of election to office, except a presidential elector, a representative or delegate in Congress, or a member of a state legislature, to bring suit to recover such office. The case had to be based on the exclusion of votes because of the race, color, or previous condition of servitude of the elector. The circuit and district courts of the United States were to have concurrent jurisdiction with the state courts in deciding such matters.[44]

In the eyes of its creators, the Enforcement Act of 1870 proved to be largely ineffective. Authorities made arrests under the act, but obtained few convictions in the courts. In

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[43] Ibid., pp. 143-146. [44] Ibid., p. 146.

fact, disorders throughout the South appeared to increase rather than decrease. The Ku Klux Klan continued to work by threat and violence. Its open defiance of the law was particularly noticeable during the 1870 elections. For example, in Alabama Klan ". . . members paraded in full regalia, despite the Alabama law, the new federal statute, and the Grand Wizard's dissolution order of the previous spring."[45] Republicans sustained heavy losses in the elections. Their majority in the House of Representatives dropped from ninety-seven to thirty-five; the Democrats gained control of the state governments of North Carolina and Alabama. These losses only caused the radicals to work harder to maintain their control. The result of Republican efforts was the Second Enforcement Act of February 28, 1871.[46]

Republicans arrived in Washington for the third session of the Fortieth Congress determined to strengthen its legislation of the previous year. To that end, January 9, 1871, Representative John C. Churchill of New York introduced a bill (H.R. No. 2634) to amend the act of May 31, 1870; this new proposal provided for a much closer supervision of election procedures. After being read twice, the bill was referred to the House Committee on the Judiciary. Following a delay of several weeks, John A. Bingham finally reported the bill from

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[45] Franklin, Reconstruction After the Civil War, p. 165. See also, William A. Dunning, Essays, p. 358.

[46] William A. Dunning, Reconstruction, Political and Economic: 1865-1877 (New York, 1907), p. 186.

the Judiciary Committee, and on February 15 a brief debate ensued.[47]

The arguments heard on both sides were essentially the same as in the debates on the earlier measure. According to the Republicans, since the Southern states had not protected their citizens from violence and assured them the right to vote, federal action was necessary to prevent the violation of the rights of any citizen through election frauds perpetrated by any election official.[48] In addition to the Fourteenth and Fifteenth Amendments, the Republicans pointed to the fourth section of Article One of the Constitution as justification for the measure. William Lawrence of Ohio stated that ". . . the power to make regulations as to the 'times, places, and manner' of holding elections for Representatives in Congress . . . [carried] with it the right to define penal offenses against the exercise of the elective franchise."[49]

The Democrats based their futile opposition to the measure upon the arguments that it was both inexpedient and unconstitutional. To them, the proposed legislation was demanded by no existing conditions of the country. In the opinion of George Woodward of Pennsylvania, it represented simply

> . . . a bill to obstruct suffrage, to deliver the ballot-boxes of the States into the hands of the pimps, spies,

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[47] Congressional Globe, 41st Congress, 3rd Session, I, 378; ibid., II, 888, 893, 1001, 1191, 1270.

[48] Ibid., 1275-1276, 1280, 1284.

[49] Ibid., 1276. See also, ibid., 1284.

> and paid rogues of the Republican party; a bill . . . to prevent the Democratic citizens from enjoying a free and fair ballot.[50]

Wisconsin's Charles A. Eldridge ably expressed the feeling of most Democrats when he made the following statement.

> It is absolutely atrocious. It has no warrant in the Constitution, and no precedent unless it be in the act to which this is amendatory . . . . . original as it is hideous and revolting. It has not the merit of one redeeming provision or quality. It will bind the several States hand and foot, and deliver them over to the Federal Government subjugated and helpless, the mere tools and slaves of Congress. . . . . The existence of the States and all their institutions can only be in the name; they cannot act or move except by the permission and will of the Federal power.[51]

Voting along party lines on February 15, the House of Representatives passed the bill by a vote of one hundred forty-four to sixty-four. The House then referred the proposal to the Senate for its consideration. That body, the day following House approval, sent the proposition to the Senate Judiciary Committee, from which Roscoe Conkling of New York reported it favorably on February 20. After a tiring all-night session, February 23-24, during which the debates covered basically the same arguments as those presented in the House, the Senate approved the measure with thirty-nine voting for the act and ten against it. The Second Enforcement Act became official on February 28, 1871.[52]

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[50] Ibid., III, appendix, p. 124.

[51] Ibid., II, 1271. For similar views, see ibid., 1273, 1278; ibid., III, appendix, p. 127.

[52] Ibid., II, 1285, 1264, 1290, 1416, 1604; ibid., III, 1655, 1677, 1723.

According to one historian, the Second Enforcement Act revealed

> . . . a detailed and cunningly drawn instrument of nineteen sections devoted . . . to regulating minutely the registration of voters and the conduct of the Congressional elections, through an elaborate system of Federal registration commissioners, election supervisors, marshals, and circuit judges. As the Congressional and state elections and many local elections occurred at the same time, the national government assumed practical control of the whole registration and electoral procedure.[53]

Initially the measure inserted an amendment to section twenty of the act of May 31, 1870. This section made it a crime for any person to fraudulently register to vote or to prevent another from registering by ". . . force, threat, menace, intimidation, bribery, reward, . . . or other unlawful means . . . ." It also prohibited election officials from knowingly accepting false registrations or refusing legitimate ones. Persons convicted of violating this part of the act were subject to a fine not exceeding five hundred dollars and imprisonment not exceeding three years.[54]

Upon written request from two persons, the election law authorized a federal circuit judge to appoint two supervisors of elections for each voting precinct in cities having at least twenty thousand inhabitants. These appointees were required to belong to different political parties and to be able to read and write English. These officials were to scrutinize carefully the registration and election procedures in order to

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[53]Davis, "The Federal Enforcement Acts," pp. 216-217.

[54]U. S. Statutes at Large, XVI, Part III, 433 (1871).

assure the fair treatment of all citizens. They kept a list of registered voters, counted ballots, and certified election results. Any attempt to hinder a supervisor in the performance of his duty was to be reported to the chief supervisor of the judicial district. He would investigate the matter and send a written report to the clerk of the House of Representatives.[55]

The statute allowed federal marshals to appoint special deputies when requested to do so by two citizens in their districts. The marshals and their deputies were expected to keep the peace at registration and polling places and to aid and protect the election supervisors. They were also authorized to summon a posse comitatus to assist them in upholding the law. Persons who hindered the supervisors or the marshals in the performance of their duties were subject upon conviction to imprisonment for not more than thirty days and a fine of not more than one hundred dollars; they also had to pay all court costs. Marshals or supervisors who failed to discharge their duties were removed from office. In addition, they became liable for prison terms ranging from six months to one year and fines ranging from two hundred to five hundred dollars.[56]

The remaining sections of the Second Enforcement Act dealt with diverse matters. It set forth in minute detail the various types of clerical work to be done by the chief supervisors of elections and the fees they were to receive for each. The act

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[55] Ibid., pp. 433-436.

[56] Ibid., pp. 436-437.

established the salaries of election supervisors and marshals at five dollars per day, not exceeding ten days. Cases arising under the terms of this statute could be transferred from state courts to federal circuit courts upon the petition of the defendant. The incongruous section eighteen repealed sections five and six of the 1870 amendment to the naturalization laws. The last section of the act provided that all votes in Congressional elections had to be by written or printed ballots.[57]

Before the law of February 28 could be tested, the new Forty-Second Congress convened, and sentiment appeared ". . . favorable to a much more vigorous effort to sustain the new governments in the South." Reports of fresh outrages had reached the attention of President Grant. News of numerous crimes and riots in South Carolina proved particularly disturbing. These and other accounts of violence throughout the Southern states ". . . confirmed his growing conviction that life and property were insecure and that the carrying of the mails and the collection of revenue were being endangered." On March 23, 1871, Grant sent a special message to Congress. In it he expressed the belief that the states were powerless to deal with the problem and that he was uncertain as to whether or not his own powers were sufficient to cope with such emergencies. Therefore, he urged Congress to enact legislation which could aid him in enforcing the law.[58]

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[57] Ibid., pp. 438-440.

[58] Franklin, Reconstruction After the Civil War, pp. 166-167. See also, Edwin C. Woolley, "Grant's Southern Policy," Studies

Congress responded to Grant's appeal by drawing up the Third Enforcement Act, better known as the Ku Klux Act. Representative Samuel Shellabarger of Ohio introduced this measure to enforce the Fourteenth Amendment from a select House committee on March 28, 1871. The bill met with bitter opposition in the House, and the debate which followed Shellabarger's opening statement proved acrimonious in the extreme.[59]

Republican supporters of the bill maintained that some such legislation was necessary in order to protect the lives and property of loyal citizens in the South from the outrages of the Ku Klux Klan. In the opinion of Michigan's William L. Stroughton, the Ku Klux Klan represented a ". . . treasonable conspiracy against the lives, persons, and property of Union citizens . . . not less dangerous . . . to American liberty than that which inaugurated the horrors of the rebellion."[60] In justifying the proposed law, he asserted that the Klan was an ". . . extraordinary combination to commit crime, and . . . [required] extraordinary legislation for its suppression."[61] Proponents of the measure characterized the secret order as a tool used by the Democratic Party to regain control of the Southern state governments. Ellis H. Roberts of New York put

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in Southern History and Politics: Inscribed to William A. Dunning (New York, 1914), p. 182; and Burgess, Reconstruction and the Constitution, p. 257.

[59] Congressional Globe, 42nd Congress, 1st Session, I, 317.

[60] Ibid., 320. See also, ibid., 369-370, 392-394.

[61] Ibid., 322.

into words what many Republicans believed when he declared that ". . . one rule never fails: the victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans."[62] Most, however, did not go so far as George C. McKee of Mississippi in offering a solution for the South's problems; his policy was short and to the point: ". . . amnesty for every rebel and hanging for every Ku Klux."[63]

In addition to directing attacks at the Ku Klux Klan and the Democratic Party, the Republicans emphasized the constitutionality of the measure. Most relied upon the first and fifth sections of the Fourteenth Amendment to prove their point. Samuel Shellabarger contended that "the making of them [Negroes] United States citizens and authorizing Congress by appropriate law to protect that citizenship gave Congress power to legislate directly for enforcement of such rights as are fundamental elements of citizenship."[64] According to the adherents of the proposition, the Constitution required the federal government to guarantee to each state a republican form of government. Such did not exist where a state was either unable or unwilling to protect the rights of its citizens. Thus, maintained Robert B. Elliott of South Carolina, state

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[62] Ibid., 413. See also, ibid., 395, 437, 442, 460, 511-512.

[63] Ibid., 426.

[64] Ibid., II, appendix, p. 69. See also, ibid., I, 367-368, 375, 477, 482.

neglect in protecting its citizens against domestic violence made federal action mandatory.[65]

The Democratic opposition denied the necessity for such an unjust measure, one ". . . 'conceived in sin, born in iniquity.'"[66] Although admitting that violence existed in the South, the Democrats hastened to assert that crime occurred everywhere and that there was no more disorder in the South than in the North.[67] They denounced Republican accounts of Ku Klux Klan atrocities as "manufactured falsehoods" against the people of the South.[68] Opponents of the bill accused the Republicans of being responsible for much of the trouble in the South. Many contended, as did Kentucky's Boyd Winchester, that ". . . if lawlessness . . . [existed] it . . . [resulted] from the government set over them; it . . . [was] the legitimate offspring of reconstruction."[69] Another representative from Kentucky, James B. Beck, characterized the Republican allegations as a maneuver

> . . . to divert the minds of the people from the grave charges of iniquity of all sorts in the management of affairs which we have made against you and proved against you. It is a flank movement to excite the people by the cry of murder, Ku Klux &c., when the people are thinking of calling you to account for your plunder, extravagance, corruption, nepotism, class legislation, banks, tariffs, bonds, railroad swindles, and everything of that sort that lie at the door of and is being conclusively proved upon the dominant party.[70]

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[65] Ibid., I, 389. See also, ibid., 333, 448.

[66] Ibid., 417. [67] Ibid., 336-337, 416. [68] Ibid., 330.

[69] Ibid., 421. See also, ibid., 354, 362, 376, 379, 452-453.

[70] Ibid., 355.

The Democrats castigated the proposal as being unconstitutional and a violation of state rights. They directed their most stringent criticism at section three, which allowed the President to use the military and naval forces of the United States to suppress domestic violence, and section four, which authorized him to suspend the writ of habeas corpus whenever he deemed it necessary for the public safety. In the opinion of the opposition, both sections granted the Chief Executive too much power. It was also alleged that the third section violated the fourth section of Article Four of the Constitution. In defense of this position, John M. Bright of Tennessee declared:

> . . . [the] Constitution does not permit the Federal Government to lift the sword against the people of a State without the consent of the State, on the call of the Legislature, or of the Governor if the Legislature be not in session; and, then, when the insurrection or rebellion is suppressed the Constitutional power is exhausted. The guarantee in behalf of a republican form of government interposes a limit upon the military power, and prohibits the usurpation of the government of the State. There can be no such thing as the conquest of a State under the Constitution of the United States.[71]

The fourth section of the bill violated that portion of the Constitution (Art. I, Sec. 9, Cl. 2) which authorized Congress to suspend the writ of habeas corpus in cases of rebellion. No rebellion existed, and even if it did, Congress had no legal right to delegate its legislative function to the President.[72]

On April 6, 1871, the House of Representatives approved

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[71] Ibid., 419. See also, ibid., 331 and ibid., II, appendix, p. 49.

[72] Ibid., I, 352, 367, 373, 411, 430.

the Ku Klux Act by a partisan vote of one hundred eighteen to ninety-one. The following day the Senate referred the measure to the Committee on the Judiciary. This committee reported it with amendments on April 10. The Senate considered the bill for the next four days. During that time, Senators on both sides reiterated the arguments heard in the course of the House debates and added numerous amendments to the House bill. Of these, the proposal of Ohio's John Sherman proved to be the most controversial. It allowed individuals who suffered physical injuries or property damages at the hands of a mob to bring suit in the federal courts against the municipal, county, or parish governments in order to attain compensation. Finally on April 14 the Senate passed the amended House bill by a vote of forty-five to nineteen.[73]

Voting separately on each Senate amendment, the House refused to accept the bill as it stood and on April 15 called for a conference committee to solve the differences between the two houses. The committee included Representatives Samuel Shellabarger of Ohio, G. W. Scofield of Pennsylvania, and Michael C. Kerr of Indiana and Senators George F. Edmunds of Vermont, John Sherman of Ohio, and John W. Stevenson of Kentucky. The Senate quickly approved the report submitted to it on April 18. However, on April 19, the House rejected the committee's proposal because it still contained the Sherman amendment.

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[73] Ibid., 522, 523-524, 538; ibid., II, 663, 704-705, 709.

Shellabarger then asked for a second conference committee.[74]

The House of Representatives named Shellabarger, Luke P. Poland of Vermont, and Washington C. Whitthorne of Tennessee to the new committee; the Senate appointed Edmunds, Matthew H. Carpenter of Wisconsin, and Allen G. Thurman of Ohio. On April 20 the committee reported another compromise measure, one which did not include the Sherman amendment. The House voted ninety-three to seventy-four to accept the proposal. Sixty-three representatives refused to vote. By a partisan majority of thirty-six to thirteen, the Senate agreed to the bill as reported from the conference committee. Thus, with the passage of the Ku Klux Act on April 20, 1871, the federal enforcement policy stood complete as far as statutes were concerned.[75]

The Ku Klux Act, entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," provided that any person, acting under any state law or custom, who deprived another of his constitutional rights would be liable for damages to the injured party. It directed the aggrieved party to seek such redress by bringing suit in the district or circuit courts of the United States.[76]

In the second section the measure set forth at great

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[74] Ibid., II, 724-725, 727-728, 779, 800-801.

[75] Ibid., 801-802, 804, 808, 831.

[76] U. S. Statutes at Large, XVII, Part I, 13 (1871).

length the actions of two or more individuals which would constitute violations of the law. It prohibited the conspiracy of two or more persons to oppose by force the authority of the federal government or to hinder in any way the execution of federal laws. The act made it unlawful to prevent a person from holding a federal office, to force said officer to leave the state, or to injure him as he performed his duty. Aiming directly at the Ku Klux Klan, the statute forbade persons to move about in disguise on the public highways or on the premises of another for the purpose of depriving any person or group of persons of the equal protection of the laws. Persons could not conspire to prevent state authorities from protecting the rights of citizens. Neither could they lawfully prevent a qualified voter from casting his ballot for presidential elector or Congressional representative. These offenses were classed as high crimes. Persons convicted of such violations in United States district, circuit, or territorial courts were subject to fines ranging in amount from five hundred to five thousand dollars and to prison terms extending in length from six months to six years. This section also authorized the person deprived of his rights by such group to bring suit for damages in the proper United States district or circuit court.[77]

The law of April 20, 1871, then declared a state to be guilty of denying equal protection of the laws when it either

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[77] Ibid., pp. 13-14.

could not or would not protect the constitutional rights of its citizens from the illegal attacks of conspirators. In such cases, it empowered the President to suppress insurrection, domestic violence, or conspiracies by whatever methods he considered necessary, even to the extent of using the military forces of the United States to restore order. The statute deemed an area to be in rebellion against the United States government when combinations became so numerous and powerful as to defy the state authorities and the federal authorities within the state or when state authorities acted in complicity with such groups so as to make the conviction of offenders and the preservation of the public safety impracticable. If necessary to overthrow such a rebellion, the President could suspend the writ of habeas corpus.[78]

The statute prohibited persons suspected of acting in complicity with any conspiracy from serving as jurors in cases arising under the provisions of the act. All jurors serving in said cases had to take a stringent oath to the effect that they had never been a member of the Ku Klux Klan or any other lawless combination. The law further provided that "persons having knowledge of conspiracies could be held responsible for injuries done if they made no effort to prevent the conspirators from carrying out their designs."[79] If the injured party died, his relatives could sue for damages not to exceed five thousand

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[78] Ibid., pp. 14-15.

[79] Franklin, Reconstruction After the Civil War, p. 168.

dollars.[80]

Public reaction to the Ku Klux Act tended to be unfavorable. On April 6, 1871, commenting on the proposal before Congress, the editor of The Nation agreed with the Evening Post that the country was

> . . . about to witness . . . a desperate attempt on the part of a large number of political adventurers and corrupt speculators, by working on the humanitarian feelings of the Northern people, to prevent the restoration of peace and order by natural processes, and to protract the period of violence, arbitrary rule, and disregard of forms through which they had risen into notoriety and made money.[81]

Two weeks later, noting the passage of the measure, The Nation declared that "never in the political history of the country has so direct a blow been aimed, under color of legal authority, at the supremacy of the Constitution, or a precedent been established so dangerous to free institutions."[82]

In contrast to the public condemnation of the measure, President Grant wholeheartedly endorsed it. In a proclamation issued May 3, 1871, he called attention to the passage of this ". . . law of extreme importance." Asserting that the law applied to all parts of the United States, Grant asked the people to suppress all lawless groups ". . . by their own voluntary efforts through the agency of local laws and to maintain the

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[80] U. S. Statutes at Large, XVII, Part I, 15 (1871).

[81] The Nation, XII (April 6, 1871), 229.

[82] "The Force Bill," The Nation, XII (April 20, 1871), 269. For a similar view, see "The Ku-Klux Bill," Harper's Weekly, XV (April 15, 1871), 330.

rights of all citizens of the United States and to secure to all such citizens the equal protection of the laws." Although he expressed his reluctance to use the wide powers granted him, the President warned that the executive would enforce the law if local governments failed to do so.[83]

In enforcing the Ku Klux Act, Grant suspended the writ of habeas corpus in only one instance, that of South Carolina. Grant's attention focused on this state, where for almost a year the lawless elements had virtually reigned supreme. Statements from the Congressional investigating committee describing outrages in South Carolina, together with the reports of United States Attorney General A. T. Akerman and Colonel Lewis Merrill, an army officer sent to York County, convinced Grant that the state authorities could not maintain law and order.[84] Accordingly, on October 12, 1871, he proclaimed that a condition of terror and lawlessness existed in the counties of Spartanburg, York, Marion, Chester, Laurens, Newberry, Fairfield, Lancaster, and Chesterfield and commanded all persons involved in conspiracies against the law to disperse. Five days later, contending that the insurgents had not dispersed and were, therefore, in rebellion against United States authority, the President

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[83]Richardson, Messages and Papers, VII, 134-135.

[84]Francis B. Simkins, "The Ku Klux Klan in South Carolina, 1868-1871," The Journal of Negro History, XII (October, 1927), 640-641. See also, Herbert Shapiro, "The Ku Klux Klan during Reconstruction: The South Carolina Episode," The Journal of Negro History, XLIX (January, 1964), 44-46; Ellis P. Oberholtzer, A History of the United States Since the Civil War, 5 vols. (New York, 1937), II, 379-380, 388.

suspended the writ of habeas corpus in those nine counties.[85]

Preceding and following the President's suspension of the writ of habeas corpus in South Carolina, federal marshals and United States troops moved about the South arresting persons for violating the Enforcement Acts. Most of those arrested were charged with violating the conspiracy section (section six) of the 1870 law. During 1871 trials were held in Mississippi, South Carolina, and North Carolina. Of two hundred arrested and tried at Oxford, Mississippi, in June, 1871, none were convicted.[86] In South Carolina the trials before the federal district court at Greenville resulted in the conviction of only one person out of the twenty-three indicted. The circuit court at Columbia tried five hundred and one individuals but obtained only five convictions. However, fifty others confessed to belonging to the Klan. The fifty-five men received prison terms ranging from three months to five years.[87] The trials at Raleigh brought similar results. Despite the seemingly negligible results of such trials, the Ku Klux Klan became

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[85]Richardson, Messages and Papers, VII, 136-137. By mistake Marion County was included instead of Union. On November 3, 1871, Grant revoked the suspension of the writ of habeas corpus in Marion and on November 10 suspended the writ in Union County. Ibid., pp. 139, 141.

[86]Davis, "The Federal Enforcement Acts," pp. 217-218. For a different interpretation, see Swinney, "Enforcing the Fifteenth Amendment, 1870-1877," p. 205. He feels that Davis and other historians have given a distorted picture of the government's success in the cases brought under the Enforcement Acts.

[87]Simkins, "The Ku Klux Klan in South Carolina, 1868-1871," pp. 642-643.

practically extinct within a year after the adoption of the last enforcement measure as a consequence ". . . of the demonstration of force and determination in South Carolina . . . and of the vigorous arrest and prosecution of offenders elsewhere throughout the South."[88]

Within a few years the enforcement policy of the government ground to a halt by reason of a number of adverse Supreme Court decisions, principally those in the cases of United States v. Reese et Al. and United States v. Harris. The first of these cases, United States v. Reese et Al., began in 1873 with the arrest of Reese and two other election judges of Lexington, Kentucky, for violating sections three and four of the First Enforcement Act. According to the indictment, they had refused to receive and count the vote of William Garner, a citizen of African descent. The case was sent to the Supreme Court on a certificate of division from the federal circuit court in Kentucky. The Supreme Court adopted a narrow interpretation of the Fifteenth Amendment and in October, 1875, declared sections three and four of the 1870 law unconstitutional.[89] Speaking for the majority, Chief Justice Morrison W. Waite argued,

> The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States . . . from giving preference, in this particular, to one citizen of the United States

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[88]Woolley, "Grant's Southern Policy," p. 184.

[89]United States v. Reese et Al., 92 U. S., 214-215 (1875).

> over another on account of race, color, or previous condition of servitude.[90]

The Court further stated that Congress could

> . . . legislate only to prevent official discrimination by the states or the United States but not to prevent obstructions and discriminations generally, as it had done in the First Enforcement Act. Technically, just two sections of the act were declared unconstitutional, but the whole law had been brought under a shadow.[91]

In the second case, United States v. Harris, the Supreme Court declared the second section of the Ku Klux Act of April 20, 1871, unconstitutional.[92] The case came before the Court on certificate of division from the United States Circuit Court for the Western District of Tennessee. The Supreme Court heard the complaint that in 1876 R. G. Harris and nineteen others had taken some Negroes from law officers and mistreated them, thus violating the Ku Klux Act, which prohibited combinations designed to deprive citizens of their legal rights.[93] Seven years after the case originated, Justice Woods delivered the Court's

> . . . opinion that the constitutional power of Congress extended only to cases where States have acted in such a manner as to deprive citizens of their rights. If individuals, on the contrary, conspire to take away these rights, relief must be sought at the hands of the state government. As the great purpose of the Ku Klux Act had been to combat precisely such individual

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[90] Ibid., 217.

[91] Swinney, "Enforcing the Fifteenth Amendment, 1870-1877," p. 209.

[92] United States v. Harris, 106 U. S., 644 (1883).

[93] Ibid., 629-632.

combinations, it appeared that the Court had, at a blow, demolished the law.[94]

Although the Enforcement Acts of 1870 and 1871 worked fairly well for three or four years, implementation always proved difficult. Shortages of troops, money, and court facilities hampered law enforcement officials from the beginning. These three laws became virtually dead letters after 1874 as a result of court decisions and Congressional legislation.[95] In addition to those sections declared unconstitutional by the Supreme Court, Congress repealed all but seven of the forty-nine sections of the three statutes on February 8, 1894.[96] In conclusion, the government's enforcement program collapsed because of Northern indifference and Southern irreconcilability. The South's desire for white supremacy proved a much stronger force than that for Republican supremacy. Unwilling to risk a violent conflict between the races, the North allowed the Southern states to assume control of their own affairs, which necessarily meant that the Negro population would be relegated to an inferior position in Southern society. Even though the enforcement policy came to naught, its failure cannot be interpreted as meaning that the program was unjust nor that its inefficacy constituted a boon to the nation.

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[94]Charles Ramsdell Lingley and Allen Richard Foley, Since the Civil War (New York, 1935), p. 26.

[95]Swinney, "Enforcing the Fifteenth Amendment, 1870-1877," p. 218.

[96]Konvitz, A Century of Civil Rights, p. 66.

CHAPTER IV

THE CIVIL RIGHTS ACT OF 1875

Principally the work of Charles Sumner, Senator from Massachusetts, the Civil Rights Act of 1875 ". . . was the first federal attempt to deal directly with social segregation and discrimination by the states or by private enterprises established to serve the public."[1] It marked the highest point in the attempts of old-line, idealistic Republicans to achieve a final end to all discrimination.

Despite the passage of the laws and amendments described previously, Negroes throughout the United States still lacked many basic rights, especially those relating to equal treatment in the use of public accommodations and in service on juries. As introduced by Senator Charles Sumner, May 13, 1870, the supplementary civil rights bill proposed

> . . . to secure equal rights in railroads, steamboats, public conveyances, hotels, licensed theaters, houses of public entertainment, common schools, and institutions of learning, authorized by law, church institutions, and cemetery associations incorporated by national or State authority; also on juries in courts, national or State.[2]

The Civil Rights Act of 1875 marked the culmination of the

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[1]Stampp, The Era of Reconstruction, p. 140.

[2]Congressional Globe, 41st Congress, 2nd Session, IV, 3434. The bill introduced by Sumner was a supplement to the Civil Rights Act of April 9, 1866.

efforts to guarantee equal rights for all citizens, particularly Negroes, during the last portion of the nineteenth century and cannot be understood without a knowledge of the endeavors of Sumner who made its passage the dominant purpose of the last years of his life.

The whole political career of Charles Sumner, idealist and reformer, was dominated by his desire for equal rights for all mankind. In Boston as early as 1849, he defended the right of Negroes to attend white schools; segregation of the two races violated the principle of equality before the law and the tenets of Christianity. On other occasions, he secured the passage of a law enabling Negroes to appear as witnesses in the courts of Washington, D. C., and forced the Washington and Alexandria railroad to adopt a charter prohibiting discrimination against Negroes. Sumner also appears to have drawn up the bill which eventually became the Thirteenth Amendment.[3] In the first four years of the seventies, the Senator from Massachusetts sought to bring his battle for social and political equality to a successful conclusion with the passage of a civil rights act outlawing all forms of racial discrimination as being violations of the Fourteenth Amendment.[4]

From Sumner's letters and speeches one can obtain a clear picture of his views on equality along with his reasons for

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[3] L. E. Murphy, "The Civil Rights Act of 1875," The Journal of Negro History, XII (April, 1927), 112.

[4] Ibid. See also, Stampp, p. 139.

desiring additional civil rights legislation. In Sumner's opinion, a republican form of government could not exist, ". . . until Equality before the Law . . . [was] completely established, —at the ballot-box, —in the court-house, —in the public school, —in the public hotel, —and in the public conveyances . . . ."[5] "Equality [could] . . . not . . . [be] found in any pretended equivalent, but only in equality; in other words, there must be no discrimination on account of color."[6] Conditions in the United States necessitated the passage of his supplementary civil rights bill, because it just

> . . . is not enough to provide separate accommodations for colored citizens even if in all respects as good as those of other persons. . . . The discrimination is an insult and a hindrance, and a bar, which not only destroys comfort and prevents equality, but weakens all other rights. The right to vote will have new security when your equal rights in public conveyances, hotels, and common schools, . . . [are] at last established. . . .[7]

Of all the rights guaranteed by the proposed civil rights bill, perhaps the most important, according to Sumner, was the provision that schools must be open to all without regard to color.[8] Equality in education prepared one for equality in all other areas of life: All must insist, therefore, on

> . . . equality, side by side with the alphabet. It is in vain to teach equality if you do not practice it.

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[5]Sumner, Works, XIV, 310.

[6]Ibid., p. 317. See also, New York Times, October 26, 1871, p. 5.

[7]Fleming, Documentary History of Reconstruction, II, 293. See also, Sumner, Works, XIV, 317.

[8]New York Times, July 4, 1873, p. 5.

> It is in vain to recite the great words of the Declaration of Independence if you do not make them a living reality. What is lesson without example? As all are equal at the ballot-box, so must all be equal at the common school.[9]

Because of his vigorous championship of equal civil rights for all, Charles Sumner received the admiration of countless numbers of colored persons throughout the country. He carried on an active correspondence with the Negro population, offering them advice on methods of improving their position in American society. Sumner urged them to insist upon equal rights at all times. In matters where a law existed, they should insist upon its enforcement; where there was none, they should demand the enactment of appropriate legislation.[10] If the Negroes attempted to help themselves, then politicians, such as he, would come to their aid and strive to correct existing wrongs. Beyond this, Sumner pleaded that the Negroes should help elect honest representatives to government positions; by doing this they would bring honor to themselves and to their cause.[11]

From the time of his introduction of the civil rights bill in 1870 until his death in 1874, Charles Sumner labored diligently to secure his bill's enactment into law. As far as he was concerned, it was one of the most important measures ever presented in Congress. In a letter to Henry W. Longfellow,

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[9]Fleming, Documentary History of Reconstruction, II, 293. See also, Sumner, Works, XIV, 318.

[10]Fleming, Documentary History of Reconstruction, II, 292. See also, Sumner, Works, XIV, 316.

[11]New York Times, May 13, 1872, p. 5.

dated February 25, 1872, Sumner, hopeful of the bill's passage in the Senate, stated, "It will be the capstone of my work. Then, perhaps, I had better withdraw, and leave to others this laborious life."[12] Destiny decreed, however, that Sumner should not witness the passage of the law he had cherished and labored over for so many years. To the very day of his death, March 11, 1874, his thoughts dwelt almost constantly on the need for equal civil rights; and he died, entreating his friends, "'You must take care of the civil-rights bill, —my bill, the civil-rights bill, —don't let it fail!'"[13] A brief survey of the bill's course through Congress, 1870 to 1874, emphasizes the obstacles placed in the path of Sumner's persistent efforts to pass it.

After introducing his supplementary civil rights bill and urging its immediate consideration on May 13, 1870, Senator Sumner encountered difficulty in getting the bill to the floor of the Senate for debate. The bill was ordered printed and sent to the Committee on the Judiciary following its first and second readings.[14] Toward the close of the session on July 7, Lyman Trumbull, Chairman of the Judiciary Committee, reported the bill adversely and recommended an indefinite

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[12]Edward L. Pierce, editor, Memoir and Letters of Charles Sumner, 4 vols. (Boston, 1894), IV, 502.

[13]Ibid., IV, 598. See also, New York Times, March 12, 1874, p. 1; and Henry, The Story of Reconstruction, p. 509.

[14]Congressional Globe, 41st Congress, 2nd Session, IV, 3434. See also, Sumner, Works, XIV, 357.

postponement; this was done.[15] Undeterred by this temporary hindrance, Sumner again introduced his bill on January 20, 1871, and saw it referred to the Committee on the Judiciary.[16] This committee reported the bill adversely but placed it on the calendar at Sumner's suggestion. Sumner failed, however, to obtain Senate consideration of his measure in this or the following session of Congress.[17] Not until two years after the introduction of his civil rights bill was it brought up for discussion.[18]

With the opening of the Second Session of the Forty-Second Congress in December, 1871, Sumner ". . . began in earnest the last great struggle of his life to secure the protection of equal rights by national statute."[19] Determined to press his case, the Massachusetts Senator seized his opportunity on December 20, 1871, as the Senate began consideration on a House bill for the removal of legal and political disabilities imposed on former Confederates by the third section of the Fourteenth Amendment.[20] Sumner moved his civil rights bill as an amendment to this amnesty bill, urging the

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[15] Congressional Globe, 41st Congress, 2nd Session, VI, 5314.

[16] Congressional Globe, 41st Congress, 3rd Session, I, 619.

[17] Ibid., II, 1263. See also, Sumner, Works, XIV, 358.

[18] Murphy, "The Civil Rights Law of 1875," p. 110.

[19] Moorfield Storey, Charles Sumner (Boston, 1900), p. 402.

[20] Paul H. Buck, The Road to Reunion, 1865-1900 (Boston, 1937), p. 125. See also, Sumner, Works, XIV, 358.

members to

> . . . be just before we are generous. . . . I do insist always upon justice; and now that it is proposed that we should be generous to those who were engaged in the rebellion, I insist upon justice to the colored race everywhere throughout this land. . . .[21]

Shortly after Sumner made his proposal, a colloquy occurred between himself and Joshua Hill of Georgia. Senator Hill championed the "separate but equal" doctrine which became the generally accepted basis for race relations until the 1954 Supreme Court decision called for an end to segregated schools. The Senator from Georgia thought ". . . that distinct accommodations in public conveyances, inns, and schools, if equally good, were all that the colored race could ask."[22] Equality for all in every aspect of American life, the same basic argument used by Sumner for years, echoed through the Senate chamber in reply to Hill.

During the weeks of debate which followed, Sumner fought for his amendment to the amnesty bill. No argument could persuade him to alter his position. Relying on arguments appealing to moral convictions rather than dealing with constitutional questions raised by the other members, Sumner made approval of his amendment a condition of amnesty.[23] According to him, "the disabilities of colored people, loyal and long-suffering,

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[21] Congressional Globe, 42nd Congress, 2nd Session, I, 240. See also, "Mr. Sumner's Civil Rights Bill," Harper's Weekly, XVIII (April 11, 1874), 310.

[22] Storey, p. 403.

[23] Ibid., p. 404.

should be removed before the disabilities of former Rebels; or at least the two removals should go hand in hand."[24] On this he was emphatic: "I here declare from my seat that I am for amnesty, provided it can be associated with the equal rights for the colored race; but if not so associated, then, so help me God, I am against it."[25]

The union of the civil rights and amnesty issues into one measure virtually insured the defeat of both. Sumner's civil rights amendment to the amnesty bill passed on February 9, 1872, with Vice-President Schuyler Colfax casting the deciding vote. When the vote was then taken on the amended amnesty bill, however, it failed, lacking the required two-thirds majority.[26] In May, 1872, as a new House amnesty bill came before the Senate, Sumner tried first to substitute his civil rights bill for it; and, when this failed, he successfully added it to the amnesty bill. Just as before, the combined measures failed to pass.[27] Determined to pass the amnesty bill, the Senate took advantage of Sumner's absence on May 21 to separate the issues and to enact a civil rights bill without the school and jury clauses in it. This bill was sent to the House over strong protests from Sumner, but was defeated in that body. With the

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[24]Sumner, Works, XV, 69.

[25]Ibid., XIV, 470. See also, Congressional Globe, 42nd Congress, 2nd Session, V, 3738; and New York Times, January 16, 1872, p. 2.

[26]Congressional Globe, 42nd Congress, 2nd Session, II, 919, 929.

[27]Ibid., IV, 3268, 3270.

civil rights issue eliminated, the amnesty bill easily passed the Senate and became law.[28]

For over a year the fight for the civil rights bill languished due to Sumner's frequent absence because of illness. In December, 1873, Sumner, having recovered enough to attend Senate sessions, renewed the struggle; taking advantage of the fact that the House had failed to pass the civil rights bill sent it by the Senate, he introduced another substantially the same as his original measure.[29] On January 27, 1874, Sumner made his last appeal for the passage of his civil rights measure.

> Sir, my desire, the darling desire, if I may say so, of my soul, at this moment, is to close forever this great question, so that it shall never again intrude into these chambers, —so that hereafter in all our legislation there shall be no such words as "black" or "white," but that we shall speak only of citizens and of men.[30]

Death prevented Sumner from achieving this desire. To others fell the task of completing his work; in 1875, a year after Sumner's death, Congress did enact a civil rights measure, but one different than that envisioned by Sumner.

How did public opinion influence the attitude of Congress toward the civil rights bill over which it struggled for five years, 1870 to 1875? This is a question deserving of consideration before tracing the final steps in the passage of the bill during 1874 and 1875. Public opinion asserted itself

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[28] Ibid., V, 3733.

[29] Murphy, "The Civil Rights Law of 1875," p. 116.

[30] Sumner, Works, XV, 310. See also, Archibald H. Grimke, The Life of Charles Sumner (New York, 1892), p. 401 and Storey, Charles Sumner, p. 427.

through petitions from private individuals and groups as well as from state legislatures and through the newspapers and magazines of the period. Of those who made known their views, the majority favored the passage of additional legislation for the protection of civil rights. Even the President of the United States, Ulysses S. Grant, suggested, in his State of the Union message, December 1, 1873, that Congress consider ". . . the enactment of a law to better secure the civil rights which freedom should secure, but has not effectively secured, to the enfranchised slave."[31]

Many of the petitions pouring into Congress were from colored citizens urging that Congress end every discrimination which existed against them throughout the country. The Negroes emphasized the fact that they were second-class citizens, being ". . . denied that legal recognition accorded upon reasonable conditions to those of foreign birth."[32] Almost every petition demanded or pleaded for the adoption of a civil rights law which would fully protect the Negroes in all rights, but particularly in regard to the use of public accommodations and to jury service.[33] According to the colored population and

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[31]Richardson, Messages and Papers, VII, 255.

[32]"Resolutions Adopted at a Public Meeting Held in Washington City, January 5, 1872," Senate Miscellaneous Documents, 42nd Congress, 2nd Session, No. 29, p. 1. Hereafter cited as "Resolutions Adopted," Senate Misc. Doc., No. 29.

[33]"Memorial of Colored Citizens," House Miscellaneous Documents, 42nd Congress, 3rd Session, No. 58, pp. 2, 3. Hereafter cited as "Memorial of Colored Citizens," House Misc. Doc., No. 58. For the same idea, see also, Congressional Record, 43rd

their champions, they only asked that they be given "'. . . equal public privileges, and that the social question be allowed to regulate itself without the interference of the law of any State. . . . . We desire social rights as far as they are affected by law.'"[34]

Congress, under the Constitution, had not only the authority to enact legislation guaranteeing equal rights, but a duty to do so.[35] In a memorial sent to the members of the Forty-Second Congress, the Negroes made the following pronouncement: "The Government must either obliterate its declaration, abolish its Constitution, be stamped as a fraud, or see that its humblest citizen is protected in equality before the law."[36]

Of all the demands set forth in the various petitions, two, schools and jury service, received the greatest specific attention. Negroes believed the first of these to be a necessity if they were ever to gain their proper place in American society. At a public meeting in Washington, colored citizens issued this statement: ". . . we maintain that the highest good of the people demands that both classes be educated

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Congress, 1st Session, I, 50, 568; and "Resolutions Adopted," Senate Misc. Doc., No. 29, p. 3.

[34]Congressional Globe, 42nd Congress, 2nd Session, I, 245. See also, Harper's Weekly, XVIII (September 26, 1874), 790.

[35]"Memorial of National Convention of Colored Persons," House Miscellaneous Documents, 43rd Congress, 1st Session, No. 44, p. 1. Hereafter cited as "Memorial of National Convention," House Misc. Doc., No. 44.

[36]"Memorial of Colored Citizens," House Misc. Doc., No. 58, p. 1.

together. . . . it is a fortunate thing for the country that he esteems as above all price the equal and impartial enjoyment of common school privileges."[37] They deemed it the responsibility of Congress to see that schools supported by taxation of all citizens were opened to the colored race, so that they could get a proper training in the fundamental principles on which the government of the United States was based.[38]

In matters pertaining to jury trials and jury service, Negroes denounced the discrimination inflicted in this area by many states because of their race and color. Although trial by an impartial jury was guaranteed by the Constitution to all, many states denied this right to Negroes. Hence, it was contended that Congress should enforce this constitutional right by appropriate legislation.[39] Since a fair and impartial trial required that members of their own race serve on juries, the colored population petitioned Congress to provide that no person could be disqualified from jury service because of race, color, or previous condition of servitude.[40] The colored people of Montgomery, Alabama, even went so far as to recommend that Negroes should compose one half of the membership of all

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[37]"Memorial of Colored Citizens," House Misc. Doc., No. 58, p. 1.

[38]"Memorial of National Convention," House Misc. Doc., No. 44, p. 2.

[39]Ibid., p. 3. See also, "Memorial of Colored Citizens," House Misc. Doc., No. 58, p. 2.

[40]"Resolutions Adopted," Senate Misc. Doc., No. 29, pp. 3, 4.

juries in cases involving members of their own race.[41]

The public, in many of the petitions as well as in contemporary articles, looked upon the passage of Sumner's civil rights bill as a moral obligation of the Republican Party. This act would complete the work of the Republicans in the area of political and civil equality by removing the last vestige of discrimination existing in the nation.[42] According to one group, the ". . . mission of the Republican Party . . . [would] not be accomplished till full measure of rights and privileges be accorded to the colored Americans . . . ."[43] The Negro citizens of Atlanta, Georgia, desired the passage of a civil rights bill and claimed it as a right owed them ". . . as members of the republican party, and more particularly as citizens of the United States."[44]

In addition to the petitions from private individuals and groups, Congress received petitions from the legislatures of several southern states requesting the passage of Sumner's civil rights bill.[45] Unless a bill was adopted, the legislature

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[41]"Message from the President of the United States, transmitting a memorial of a convention of colored citizens assembled in the city of Montgomery, Alabama, December 2, 1874," House Executive Documents, 43rd Congress, 2nd Session, No. 46, p. 7.

[42]Harper's Weekly, XVIII (April 11, 1874), 310. See also, "The Civil Rights Bill," Harper's Weekly, XVIII (June 13, 1874), 490.

[43]"Resolutions Adopted," Senate Misc. Doc., No. 29, p. 3.

[44]Congressional Record, 43rd Congress, 1st Session, II, 1135.

[45]"Resolution of the Legislature of Louisiana asking Congress to adopt the supplementary civil rights bill," House

of Mississippi believed that a caste system, one whose highest standard of virtue was the color of a man's skin, would develop and demoralize the entire state.[46] The South Carolina legislature urged the adoption of the measure declaring that race antagonism would vanish when every citizen was granted equality before the law.[47] Arkansas' legislature stated that the bill should pass because

> . . . all experience and observation shows that the whole American people have never failed to acquiesce in any law which had its foundations in the unselfish nature of a common humanity, and although contrary to all common law, perverse customs, however primitive and colossal, have yielded to direct statute with impunity.[48]

Public opposition to the proposed civil rights bill, although much less vocal, made itself known. The Virginia legislature protested Congress's consideration of the civil rights bill, arguing that it was a violation of the Fourteenth Amendment, an infringement on the powers of the states,

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Miscellaneous Documents, 42nd Congress, 2nd Session, No. 104, p. 1. See also, "Resolutions of the Legislature of South Carolina," House Miscellaneous Documents, 43rd Congress, 1st Session, No. 25, p. 1; and "Resolutions of the Legislature of South Carolina in favor of the supplemental Civil Rights Bill," Senate Miscellaneous Documents, 42nd Congress, 2nd Session, No. 46, p. 1.

[46]"Petition of Members of the Senate and House of Representatives of Mississippi praying that a law be enacted similar to the bill known as the 'Sumner Amendment to the general amnesty bill,'" Senate Miscellaneous Documents, 42nd Congress, 2nd Session, No. 139.

[47]"Resolution of the Legislature of South Carolina," House Miscellaneous Documents, 43rd Congress, 1st Session, No. 111, p. 1.

[48]"Memorial of the Legislature of Arkansas," Senate Miscellaneous Documents, 43rd Congress, 1st Session, No. 24, p. 1.

sectional in nature, and harmful to both races.[49] Harper's Weekly reported that many Democrats had revived the specter of numerous interracial marriages if the civil rights bill passed; this became a basic argument against granting equal rights to Negroes. The same periodical reported that a number of Republicans opposed the bill because enforced integration would destroy the existing system of public education.[50] In opposing the civil rights bill, The Nation advanced the arguments that the bill was unconstitutional and a violation of the rights of the states.[51]

In the spring of 1874, as public opinion continued to make itself heard, Congress turned once again to a consideration of the civil rights bill after a temporary delay occasioned by Sumner's death. In the months to come, the debate on this bill, just as in the case of Sumner's earlier ones, ran the gamut of arguments heard down to the present time.[52] The arguments revolved around certain major issues, namely, Negro equality, common schools, constitutionality, and states' rights.

On the matter of equality, the proponents of the bill, in

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[49]"Resolutions of the Legislature of Virginia re-affirming the third resolution of the Conservative Platform of 1873, and protesting against the passage of the civil-rights bill now pending in the Congress of the United States," House Miscellaneous Documents, 43rd Congress, 1st Session, No. 60, p. 2.

[50]"The Civil Rights Bill," Harper's Weekly, XVIII (June 13, 1874), 490. See also, Bowers, The Tragic Era, p. 419.

[51]"The Civil Rights Bill," The Nation, XIX (September 17, 1874), 180, 181. See also, The Nation, XX (March 4, 1875), 141.

[52]Stampp, The Era of Reconstruction, p. 139.

justifying their cause, referred to the statement in the Declaration of Independence that all men are created equal; the civil rights bill was to secure equality for the white people as well as for the colored race.[53] Senator Daniel Pratt of Indiana made the following statement on behalf of racial equality, May 20, 1874:

> I believe . . . that all men are created equal. I believe in a still older teaching—that God is no respecter of persons, and that he made of one blood all nations of men to dwell on the face of the earth; . . . . I believe that government is instituted for all, and . . . should shed its blessings upon all alike. I believe that the colored race of this country differ in nothing but their color and lineage from the white race except in so far as their natures have been dwarfed by slavery.[54]

Opponents of the bill argued that the black man could never be the equal of the white man. According to A. S. Merrimon, Senator from North Carolina, ". . . the white people are the more intelligent race and they are better qualified to administer the law or power."[55] Representative Thomas Whitehead of Virginia upheld the idea that the Negro longing for equality would never be satisfied

> . . . because the Almighty has given him what he cannot get rid of—a black skin. Did you ever see one who believed in black angels? Did you ever hear of one who wanted a black doll-baby? You have not the power to make them white, and he never will be satisfied short of that. . . . . His condition cannot be altered, and the best thing we can do is what we propose to do in our State—educate him, and take care of him, and

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[53] New York Times, April 30, 1874, p. 2.

[54] Congressional Record, 43rd Congress, 1st Session, V, 4081.

[55] Congressional Record, 43rd Congress, 2nd Session, III, 1796.

do the best we can with him.[56]

Another reason for opposition to the establishment of Negro equality was the fear that contact between the two races would inevitably lead to interracial marriages. The civil rights bill attempted to establish social equality by proposing ". . . to enforce familiarity, association, companionship between the white and colored people of this country."[57] In answer to this charge, Benjamin Butler of Massachusetts declared that social equality already existed in the South. To prove his point, Butler read a Mississippi statute legalizing the children of James Anderson and said: ". . . if there is any greater social equality than that, to have one man become the father of seven children by six different colored women, I do not know what an exhibition of social equality is."[57] In actual fact the bill provided equal protection before the law for all men regardless of race or color.[59]

One of the most discussed provisions of the civil rights bill was that which provided for free common schools. Opponents of the measure charged that passage of the bill would destroy the existing school system in the South. Senator Lewis V. Bogy of Missouri warned that the white children would not

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[56] Ibid., II, 953.

[57] Congressional Record, 43rd Congress, 1st Session, V, 4157. See also, ibid., VI, appendix, p. 237.

[58] Congressional Record, 43rd Congress, 2nd Session, II, 1006.

[59] Ibid., III, 1793.

be allowed to attend integrated schools; those of the wealthier class would be educated in private schools, but the poor whites and Negroes would receive no education.[60] Others, such as Senators John W. Johnston and James B. Sener, both from Virginia, argued that their state's system of separate but equal schools worked to the advantage of both races; this would end if the civil rights bill became a law.[61]

Those favoring free schools open to all argued that a system of separate schools tended to deepen race prejudice as well as double school expenses, whereas in mixed schools the doctrine of human equality could be taught and thus assure the continuance of republican institutions.[62] Representative Joseph H. Rainey, Negro from South Carolina, presented the views of many of his people when he said:

> We desire this bill that we may train them [children] intelligently and respectably, that they may . . . be useful citizens in their day and time. We ask you, then, to give us ever facility, that we may educate our sons and daughters as they should be.[63]

One of the strongest arguments against passage of the civil rights bill was that it was unconstitutional. The main

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[60] Congressional Record, 43rd Congress, 1st Session, VI, appendix, p. 321. See also, ibid., V, 4145 and Congressional Record, 43rd Congress, 2nd Session, III, appendix, p. 119.

[61] Congressional Record, 43rd Congress, 1st Session, V, 4115. See also, Congressional Record, 43rd Congress, 2nd Session, II, 978.

[62] Congressional Record, 43rd Congress, 2nd Session, II, 999. See also, New York Times, May 22, 1874, pp. 2, 3.

[63] Congressional Record, 43rd Congress, 2nd Session, II, 959.

basis of this argument was the decision of the Supreme Court in the New Orleans Slaughterhouse cases upholding the rights of states to manage their own internal affairs.[64] William E. Finck of Ohio protested that the Fourteenth Amendment prohibited the States from doing only certain specific things; it did not give Congress the power to regulate the local affairs of citizens within the states.[65]

In answer to the charge of unconstitutionality, Senator Henry R. Pease of Mississippi presented the case for the legality of the bill, stating that

> . . . the thirteenth, fourteenth, and fifteenth amendments to the Constitution have provided a new policy in this Government, a policy that defines, recognizes, and protects the rights, the privileges, and the immunities of American citizenship, and has given to Congress the power and the right to legislate for their protection in those several rights and privileges.[66]

Congress had the duty and the right to prevent any state from depriving any citizen of rights conferred on him by the United States.[67]

Opponents of the bill revived the issue of states' rights during the course of the debates. Senator James K. Kelly of Oregon had only one objection to the measure; this was his belief that it signified an invasion of the rights reserved to

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[64] New York Times, January 6, 1874, p. 1. See also, "The Civil Rights Bill," The Nation, XIX (September 17, 1874), 181.

[65] Congressional Record, 43rd Congress, 2nd Session, II, 947.

[66] Congressional Record, 43rd Congress, 1st Session, V, 4153.

[67] Harper's Weekly, XVIII (January 10, 1874), 27.

the states by the Constitution. He evinced the argument that if this first encroachment upon the powers of the state were allowed, there would be no limit to the jurisdiction of the federal government.[68] Senator Bogy of Missouri vigorously denounced the civil rights bill ". . . because of its tendency to political consolidation. It . . . [meant] the destruction of State governments and the consolidation of all power at Washington, the capital of the Republic."[69]

Throughout 1874, while members of the House and Senate debated the issues mentioned above, a close observer could see that the Republicans were determined to enact a civil rights law of some type. After several weeks of debate following the death of Charles Sumner in March, 1874, the Senate passed on May 22 a bill substituted by Frederick Frelinghuysen of the Committee of the Judiciary by a strict party vote; this contained essentially the same provisions as the Sumner bill with the exception of a few technical changes.[70] The House did not consider the bill before the close of the session.

The Congressional elections of November, 1874, resulted in the defeat of numerous Republicans and assured a Democratic majority in the House by March 4, 1875. The defeated Republicans,

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[68] Congressional Record, 43rd Congress, 1st Session, V, 4164.

[69] Congressional Record, 43rd Congress, 1st Session, VI, appendix, p. 322. See also, Congressional Record, 43rd Congress, 2nd Session, III, appendix, pp. 103, 113, 119.

[70] Congressional Record, 43rd Congress, 1st Session, IV, 3053. See also, ibid., V, 4176 and George H. Haynes, Charles Sumner (Philadelphia, 1909), p. 429.

led by Ben Butler of Massachusetts, arrived for the lame duck session of Congress, which began in December, 1874, determined to pass a civil rights bill before the Democrats took control.[71]

On February 3, 1875, Butler reported a substitute bill covering the same items as the Senate bill with the additional proviso that states could provide separate but equal school facilities if they so desired.[72] Representative Stephen W. Kellogg of Connecticut moved an amendment striking out the entire section covering common schools, public institutions of learning and benevolence, and national agricultural colleges; the House passed it on February 4, 1875.[73]

The same day that Kellogg's amendment passed saw the passage of the civil rights bill. On February 6, 1875, the bill was sent to the Senate, which began consideration of it on February 25, 1875.[74] Three weeks after the bill's passage by the House, the Senate gave its approval, February 27, 1875. President Grant signed the bill into law on March 1, 1875.[75]

The Civil Rights Act of 1875 was pushed through both the House and Senate by the Republicans on a strict party vote

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[71] H. L. Trefousse, Ben Butler: The South Called Him Beast! (New York, 1957), p. 230.

[72] Sumner, Works, XV, 313-314.

[73] Congressional Record, 43rd Congress, 2nd Session, II, 939, 1010.

[74] Ibid., 1011, 1024, 1786.

[75] Congressional Record, 43rd Congress, 2nd Session, III, 1870, 2013.

before the Democrats took over as the majority party in the House on March 4, 1875. Proof of this statement is found by observing the division on the votes cast, first in the House of Representatives and then in the Senate.

The Civil Rights Act of 1875 passed the House by a vote of one hundred and sixty-two to ninety-nine, with twenty-eight not voting.[76] Of the representatives voting for the measure only one out of the one hundred and sixty-two was a Democrat; the remainder were Republicans. Eighty-six Democrats voted against the bill as did ten Republicans and three Conservatives. Of the twenty-eight abstaining, twenty-two were Republicans and six were Democrats.

The same pattern held true for the voting in the Senate. Of the thirty-eight affirmative votes cast, all were made by Republicans. Nineteen Democrats and seven Republicans voted against the measure, while seven Republicans, one Democrat, and one Conservative abstained.[77] The Civil Rights Act of 1875 was the last major piece of legislation enacted by the Republican Party during the period of Reconstruction.

The Civil Rights Act of 1875 was one of the more sweeping measures enacted by Congress for the protection of civil liberties. The preamble with which the act opened is noteworthy for its echo of some phrases of the Declaration of Independence.

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[76] Ibid., II, 1011.

[77] Ibid., III, 1870. For the membership and party affiliation of the Forty-Third Congress, consult Biographical Directory of the American Congress (Washington, 1961), passim.

It stated:

> Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of the government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law . . . .[78]

Following this pronouncement, the first section provided that all persons within the United States were entitled to the full and equal enjoyment of inns, public conveyances, and places of amusement, regardless of race, color, or previous condition of servitude. Conspicuous by its absence was Sumner's school provision. These rights were subject only to the limitations established by law.[79]

The Civil Rights Act then provided that any person who violated the first section by denying any citizen the equal enjoyment of the accommodations or facilities listed therein would be subject to criminal and civil penalties in the federal courts. Persons convicted of violating the law were subject to fines varying from a minimum of five hundred to a maximum of one thousand dollars, or to imprisonment for not less than thirty days nor more than one year. It allowed the aggrieved person to seek either a common law remedy or that provided by state statute in the state courts. Cases in violation of the law might also be prosecuted in the territorial, district, or

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[78] U. S. Statutes at Large, XVIII, Part III, 335 (1875).

[79] Ibid., p. 336.

circuit courts of the United States.[80]

The fourth section of the Civil Rights Act of 1875 provided that no person, otherwise qualified, could be disqualified for grand or petit jury service, in federal or state courts, because of race, color, or previous condition of servitude. Persons found guilty of violating this section of the law might be fined up to five thousand dollars.[81]

Eight years after its enactment, the Civil Rights Act of 1875 became virtually a dead letter by reason of the Supreme Court's decision in the Civil Rights Cases of 1883 which declared the first two sections of the law unconstitutional. Despite the Court's decision, this great effort to foster complete social equality between the races would be vindicated years later with the passage of the Civil Rights Act of 1964, an act much broader in scope than that of 1875 but very similar in its aim of providing equal rights for all citizens in all areas of American life. Title II of the 1964 law provides essentially the same guarantees as the first section of the Civil Rights Act of 1875 did; in addition, Title IV provides for desegregation of public education, something for which Sumner and others had fought unsuccessfully.[82]

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[80] Ibid.

[81] Ibid.

[82] U. S. Statutes at Large, LXXVIII, 243-244, 246-247 (1965).

CHAPTER V

THE CIVIL RIGHTS CASES OF 1883

In its adoption of sweeping civil rights legislation between 1866 and 1875, Congress

> . . . created a new concept of equality: that in the absence of slavery, no man should be subject to the incidents of slavery; that where the reality or substance of slavery is gone, its visible form or appearance should not be seen. The legislation was probably the first attempt in the history of mankind to destroy the branches of slavery after its roots had been demolished.[1]

In cases arising under such Congressional legislation, the Supreme Court tended to be conservative and restrictive in the verdicts it handed down. This proved particularly true of its decision in the Civil Rights Cases of 1883, one which ". . . completed the virtual nullification of the Reconstruction era legislation designed to give equality to the Negro."[2]

Since the Civil Rights Cases involved the constitutionality of the Civil Rights Act of 1875 which prohibited discrimination in public accommodations, brief consideration must be given to the swift reaction to the law. In Alexandria, Virginia, and other places throughout the nation, ". . . the colored people . . . announced . . . that they would profit to the utmost by

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[1]Konvitz, A Century of Civil Rights, p. 102.

[2]Albert P. Blaustein and Robert L. Zangrando, editors, Civil Rights and the American Negro: A Documentary History (New York, 1968), p. 268.

the privileges which they . . . [had] a right to claim under the new law."[3] In Louisville, two Negroes gained admittance to the dress circle of McCauley's Theatre and watched the performance without incident. For the first time Negroes received service at the bar of Washington's Willard Hotel. A Negro was seated at McVicker's Theatre in Chicago, thus breaking the color line in that city.[4]

Despite such above-mentioned successes, Negroes, on many more occasions, were refused the equal use of public accommodations as prescribed by "Sumner's Law." Some of the best hotels and restaurants in Richmond, Virginia, ejected Negroes who requested service. Tavern owners often threatened them with violence when they attempted to drink in saloons frequented by whites. In a number of barber shops in Richmond and in Washington, D. C., Negro barbers refused to wait on men of their own race.[5]

In addition to outright refusal of service, businessmen found ways of observing the letter of the law while violating its intent. Several Chattanooga hotels turned in their licenses and became private boardinghouses catering to white customers only.[6] The New York Times described one ingenious method of evasion in the following editorial:

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[3]New York Times, March 6, 1875, p. 4.

[4]Alan F. Westin, "Ride-in!," American Heritage, XIII (August, 1962), 59.

[5]New York Times, March 6, 1875, p. 4.

[6]Westin, "Ride-in!," p. 59.

> The keepers of bar-rooms are adopting every kind of device to evade the law. Many of them in Virginia have posted in their saloons the announcement that hereafter they will charge $5 for a drink, but will make a liberal discount to friends. Of course, only white men are allowed the discount, and the negroes, knowing they will be charged the price advertised, do not enter the saloons.[7]

Throughout the country persons filed suits challenging refusals to obey the Civil Rights Act of 1875. During the late 1870's and early 1880's, approximately one hundred cases were heard in United States district courts. In Pennsylvania, Texas, Maryland, and Kentucky district judges upheld the Civil Rights Act and found for the Negro plaintiffs. Federal judges in North Carolina and New Jersey ruled the law unconstitutional. Federal district courts in Tennessee, New York, Missouri, California, and Kansas referred the question to federal circuit judges. These judges divided on the issue and certified the matter to the Supreme Court.[8]

The Supreme Court did not hasten to make its ruling in regard to the legality of the Civil Rights Act of 1875. Although two test cases reached the Court in 1876 and another in 1877, the justices simply placed them on their docket. In 1880 three additional cases were filed, but not until 1882 did the Solicitor General present a brief defending the constitutionality of the law. Still another year passed before the Supreme Court finally announced its Civil Rights Cases decision in the six separate test suits.[9]

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[7] New York Times, March 7, 1875, p. 6.

[8] Westin, "Ride-in!", p. 59.

[9] Ibid., pp. 59-60.

Of the six suits involved in the Civil Rights Cases ruling, the most celebrated involved William R. Davis, Jr., the twenty-six year old business agent of the Progressive-Republican, a Negro weekly published in New York City. On November 22, 1879, Davis determined to see Edwin Booth perform Victor Hugo's Ruy Blas at the Grand Opera House's Saturday matinee. At ten o'clock Saturday morning his girl friend, described by the press as an almost white octoroon, purchased two reserved seat tickets. When the couple arrived at the theater that afternoon, Samuel Singleton, the doorkeeper, announced that their tickets were no good. Instead of accepting the refund offered by Singleton, Davis paid a young white boy standing near the theater ten cents to purchase two more tickets. Upon being presented the new tickets, Singleton allowed the lady to pass but again refused to accept Davis' ticket. When Davis would not move out of the theater entrance, Singleton summoned a policeman who escorted Davis off the premises.[10]

On November 24 Davis filed a criminal complaint, and on December 9 Singleton was indicted for violating Davis' rights as guaranteed by the Civil Rights Act of 1875. The trial began on January 14, 1880, with Singleton's counsel arguing that the law was unconstitutional. It, he asserted, violated ". . . 'the right of the State of New York to provide the means under which citizens of the state have the power to control and protect their rights in respect to their private property.'" The

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[10]Ibid., p. 60.

assistant United States attorney maintained that this idea of state rights had been superseded years earlier. To his mind, it was unthinkable ". . . that 'the United States could not extend to one citizen of New York a right which the State itself gave to others of its citizens—the right of admission to places of public amusement.'" The presiding judge referred the case to the federal circuit court for New York. The two judges of the circuit court, Samuel Blatchford and William Choate, arrived at different conclusions and certified the case to the Supreme Court.[11]

When Davis' case, entitled United States v. Singleton, reached the Supreme Court in 1880, four similar prosecutions under the 1875 law were already on the docket. The first of these cases, United States v. Stanley, concerned the indictment that in 1875 Murray Stanley, owner of a hotel in Topeka, Kansas, had refused to serve a meal to Bird Gee, a Negro. The charge that Samuel Nichols refused in 1876 to allow a Negro named W. H. R. Agee to stay in his hotel, the Nichols House in Jefferson City, Missouri, formed the basis of the case in United States v. Nichols. In United States v. Ryan, the doorkeeper of Maguire's Theater in San Francisco, Michael Ryan, had refused a seat in the dress circle to a Negro named George M. Tyler. The fourth case, United States v. Hamilton, involved the complaint that a conductor on the Nashville, Chattanooga, and St. Louis Railroad, James Hamilton, had prevented a Negro

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[11] Ibid.

woman from entering the ladies' car even though she possessed a first-class ticket.[12]

The last of the cases considered by the Court, Richard A. Robinson and Sallie J. Robinson v. Memphis and Charleston Railroad Company, involved a different set of circumstances. On May 22, 1879, a twenty-eight year old Negro, Sallie Robinson, purchased two first-class tickets for a trip from Grand Junction, Tennessee, to Lynchburg, Virginia. When she and her nephew, Joseph Robinson, described as being "of light complexion, light hair, and light blue eyes," boarded the train and started to enter the parlor car, Conductor C. W. Reagin pushed Mrs. Robinson into the smoker. After completing the trip, the Robinson family filed suit against the railroad to recover the five-hundred-dollar penalty guaranteed by the 1875 law.[13]

Both parties assumed the validity of the Civil Rights Act of 1875 for the purposes of the trial. The Robinsons' counsel contended that the conductor's action was based solely on race and therefore constituted a violation of the law. The railroad maintained that Reagin's deed did not come under the statute. Defending his conduct, Reagin testified that he thought Mrs. Robinson to be an improper woman traveling with a white man for illicit purposes. If the belief that Mrs. Robinson

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[12] Ibid., pp. 60-61. The Hamilton case was denied review on a procedural point; the Court declared it could not ". . . take cognizance of a division of opinion between the Judges of a Circuit Court upon a motion to quash an indictment." United States v. Hamilton, 109 U. S., 857 (1883).

[13] Westin, "Ride-in!," p. 61.

was a prostitute formed the conductor's real reason for excluding her from the car, stated the presiding judge in his charge to the jury, the railroad was not liable since the exclusion was not because of race. The jury decided for the railroad. The Robinsons appealed to the Circuit Court of the Western District of Tennessee, which certified the case to the Supreme Court.[14]

Such were the cases to which the Supreme Court finally turned its attention in 1882. Solicitor General Samuel F. Phillips presented the government's case in a learned and eloquent brief upholding the legality of the Civil Rights Act of 1875. He reviewed the preceding cases involving civil rights, described the history of the Thirteenth and Fourteenth Amendments, and stressed the right of all citizens to equal access to all public accommodations. According to Phillips, Congress could enact the law under the Thirteenth Amendment since racial discriminations ". . . were incidents and badges of servitude." In this regard, the government's case

> . . . rested on the proposition that all free men, as such, were possessed of all rights and privileges inherent in a state of freedom. The Thirteenth Amendment had conferred freedom on Negroes and vested Congress with power to enforce that article by appropriate legislation; the Civil Rights Act was appropriate to that end.[15]

The Fourteenth Amendment also upheld the statute in question. The Solicitor General pointed out that

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[14] Ibid. See also, Civil Rights Cases, 109 U. S., 838 (1883).

[15] Loren Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro (New York, 1966), p. 138.

> Congress . . . as the primary organ for the implementation of those rights [guaranteed by the Fourteenth Amendment] had the duty and responsibility of choosing the methods by which those rights were to be vindicated where the states had failed to provide complete equality before the law.[16]

Finally, Phillips declared that Congress could prohibit discriminations against persons who sought admission to an inn or theater and were denied such because of race, color, or previous condition of servitude. Inns, he argued, were instrumentalities of commerce and thus subject to Congressional regulation. Being licensed by the state, theaters, as well as inns, were subject to regulation because of the public nature of the businesses.[17]

Of the defendants in the cases under consideration, only those involved in the Tennessee railroad case employed private counsel and they were opposed by two attorneys for the plaintiffs. Addressing the Court, William M. Randolph and Fillmore Beall, the attorneys for the Robinsons, contended that the Civil Rights Act of 1875 was constitutional because of the Fourteenth Amendment, because Congress had the power to regulate commerce between the states (Art. I, Sec. 8, Cl. 3), and because every citizen was entitled to the privileges and immunities of citizens in all the states (Art. IV, Sec. 2). Taken in association with the "Elastic Clause" (Art. I, Sec. 8, Cl. 18) which allows Congress to make all necessary and proper laws to carry

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[16] Ibid.

[17] Civil Rights Cases, 109 U. S., 837 (1883).

out the powers delegated to it, these provisions left no doubt as to the legality of the measure. The attorneys for the Memphis and Charleston Railroad, W. Y. C. Humes and D. H. Poston, maintained that their case did not fall under the 1875 statute and so refused to argue the constitutional question.[18] None of the defendants in the criminal cases bothered to be represented; they thought the Supreme Court would take their side.[19]

The Supreme Court, presided over by Chief Justice Morrison R. Waite, appeared at a glance to be one which would be favorably inclined toward the Civil Rights Act of 1875. All were Republicans except Justice Stephen J. Field, a Democrat appointed by Abraham Lincoln. All except John Marshall Harlan of Kentucky had established their careers in the western and northern states. All had supported the Union during the Civil War, and none displayed any hostility to the Negro as a class.[20]

Yet on October 15, 1883, the leading intellect of the Court, Joseph P. Bradley, speaking for the majority, declared the first two sections of the Civil Rights Act of 1875 unconstitutional and void.[21] In his opinion Bradley stated that the purpose of the statute was

> . . . to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters and

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[18] Ibid., pp. 837-838.

[19] Miller, The Petitioners, pp. 137-138.

[20] Westin, "Ride-in!," p. 61.

[21] Civil Rights Cases, 109 U. S., 844 (1883).

> other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have and those who have not been slaves.[22]

Announcing that authority to enact such a law must be found in the Thirteenth and Fourteenth Amendments, Bradley proceeded to discuss the two amendments and to demonstrate why they did not justify the passage of such a measure as the Civil Rights Act.[23]

Turning first to a consideration of the Fourteenth Amendment, Bradley emphasized the fact that the first section of the amendment ". . . forbade states, not individuals, to deny equal rights to Negroes."[24] The fifth section allowed Congress to safeguard the rights covered by the Fourteenth Amendment ". . . only against action by agencies of state government and not against action by private persons."[25] While Congress could adopt legislation to nullify state action harmful to the rights of citizens, "such legislation . . . [could not] properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication." Under the Fourteenth Amendment, Congress could adopt only corrective, not general, legislation, and this only against state action.[26]

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[22] Ibid., 839.

[23] Ibid.

[24] Coulter, The South During Reconstruction, p. 366.

[25] Robert K. Carr, Federal Protection of Civil Rights: Quest for a Sword (New York, 1947), p. 42.

[26] Civil Rights Cases, 109 U. S., 840.

The Court then said that the Civil Rights Act established rules for the conduct of individuals and provided for the enforcement of such rules without referring to supposed state action. If the law were appropriate for enforcing the prohibitions of the Fourteenth Amendment, what, asked the Court, could stop Congress from enacting ". . . a code of laws for the enforcement and vindication of all rights of life, liberty and property?" The law, continued Bradley, was repugnant to the Tenth Amendment, which reserved the powers not delegated to the United States to the people and the states.[27]

In regard to the civil rights guaranteed by the Constitution, Bradley held that ". . . the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings . . .," constituted ". . . a private wrong, or a crime of that individual." The aggrieved party would have to look to the laws of the state for redress, not to those of Congress.[28] Thus, the Civil Rights Act had no sanction under the Fourteenth Amendment because ". . . it was intended not as a restraint on state action but only on individual action."[29]

Unlike the Fourteenth Amendment, the Thirteenth was not a limitation on state action only. According to Bradley, it authorized Congress to pass legislation directed against individuals

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[27] Ibid.

[28] Ibid., 841.

[29] Konvitz, A Century of Civil Rights, p. 105.

who imposed slavery or involuntary servitude upon another.[30] The inseparable incidents of slavery outlawed by the Thirteenth Amendment included ". . . compulsory work; restraint of movements; disability to hold property, make contracts, have standing in courts, act as a witness against a white person; and to be subject to severer punishments than those imposed upon white persons."[31] The Court held that a "Negro's inability to enter an inn, a public carrier, or a place of amusement because an individual operator refused to admit him . . . [was] not a badge of slavery."[32] It further maintained that

> it would be running the slavery argument into the ground, to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.[33]

Therefore, stated Bradley, the Civil Rights Act of 1875 could not be upheld as an appropriate means of enforcing the Thirteenth Amendment.

Toward the close of his argument, Justice Bradley announced the majority opinion in regard to future Congressional legislation for the protection of the Negro. He said:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable

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[30] Civil Rights Cases, 109 U. S., 842-843.

[31] Konvitz, A Century of Civil Rights, pp. 119-120.

[32] Morroe Berger, Equality by Statute: Legal Controls over Group Discrimination (New York, 1952), p. 48.

[33] Civil Rights Cases, 109 U. S., 844.

> concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected.[34]

Of the nine justices on the Supreme Court, only John Marshall Harlan disagreed with the decision of the majority. By 1883 this former slaveowner had become one of the most uncompromising defenders of the Negro. He believed firmly ". . . that any relaxation of federal protection of the rights of Negroes would encourage the 'white irreconcilables' first to acts of discrimination and then to violence, which would destroy all hope of accommodation between the races." With this in mind, he spent the next several weeks drawing up a vigorous dissenting opinion.[35]

Justice Harlan began his dissent with the remark that the majority of the Court proceeded

> . . . upon grounds entirely too narrow and artificial. I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. . . . . Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish . . . and which they supposed they had accomplished by changes in their fundamental law.[36]

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[34] Ibid.

[35] Westin, "Ride-in!," p. 63.

[36] Civil Rights Cases, 109 U. S., 844.

The Thirteenth Amendment, Harlan contended, involved more than exemption from actual slavery. Under the enforcement section of that amendment, Congress had the power by direct legislation to eradicate the burdens and disabilities which constituted the badges of slavery and servitude. Harlan said:

> I do not contend that the 13th Amendment invests Congress with authority . . . to define and regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several States. But I hold that since slavery . . . was the moving or principal cause of the adoption of that Amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them because of their race, in respect of such civil rights as belong to freemen of other races.

Congress could enact measures to protect Negroes against deprivation ". . . <u>because of their race</u>, of any civil rights granted to other freemen in the same state . . . ." Such legislation would operate not only upon state officers but also upon ". . . such individuals and corporations as . . . [exercised] public functions and . . . [wielded] power and authority under the State."[37]

The dissenter then considered what legal rights the Negro possessed in regard to public conveyances, inns, and places of public amusement. According to Harlan, railroads were established by state authority for public purposes and were, therefore, subject to regulation for the public benefit. The same observations held true for inns. The law gave the innkeeper special privileges, and, in return, charged him with certain

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[37] <u>Ibid</u>., 847-848.

duties, one of these being to make no discrimination in his guests because of their race or color. Since places of public amusement operated under direct license of the law, the operators of such establishments exercised a quasi-public office with public duties to perform. Harlan maintained that discrimination practiced by corporations or individuals in the exercise of their public or quasi-public functions was a symbol of slavery which Congress could prevent under the Thirteenth Amendment.[38]

Harlan declared that the chief purpose of the Fourteenth Amendment had been to grant national and state citizenship to the Negro, thus reversing the precedent set in the Dred Scott decision. The grant of state citizenship by the nation meant, at the very least,

> . . . exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same State . . . unless the recent Amendments be splendid baubles, thrown out to delude those who deserved fair and generous treatment at the hands of the Nation.[39]

The final section of the amendment authorized Congress to enact appropriate legislation to uphold that affirmative grant and to enforce the section prohibiting any state action which might deny equality or liberty.[40]

The dissenting justice agreed that the Fourteenth Amendment was directed only against state actions. Even under such

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[38] Ibid., 848-851.

[39] Ibid., 852.

[40] Westin, "Ride-in!," p. 64.

conditions, Harlan said, the Civil Rights Act of 1875 was constitutional; it was a well established fact that

> . . . railroad corporations, keepers of inns and managers of places of public amusement . . . [were] agents or instrumentalities of the States, because they . . . [were] charged with duties to the public, and . . . [were] amenable, in respect of their duties and functions, to government regulation.[41]

Finally, Harlan attacked the other justices for their unwillingness to uphold the public-conveyance section of the law under the power of Congress to regulate interstate trips; he reminded his colleagues that this was exactly the question involved in Mrs. Robinson's case against the railroad company.[42]

In his closing remarks, Harlan denied Bradley's contention that Negroes had been made special favorites of the law. The one underlying purpose of the 1875 law had been to enable the Negro to take the rank of mere citizen as accorded him by the Fourteenth Amendment. Harlan concluded:

> Today, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination. If the Constitutional Amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be in this Republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant.[43]

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[41] Civil Rights Cases, 109 U. S., 855.

[42] Ibid., 856.

[43] Ibid.

News of the Supreme Court's decision brought quick response. During the performance of Haverley's Minstrels at the Atlanta Opera House on October 15, 1883, one of the players interrupted the show to announce the Court's ruling. The next day one of the newspapers reported that the entire orchestra and dress circle audience greeted the announcement with cheers as the Negroes in the balcony sat in stunned silence.[44] Bishop Turner of the African Methodist Church in New York City expressed the view of many of his race when he declared that the majority decision would bring upon the nation ". . . 'the hisses of man, the curse of God, and the ridicule of all ages . . . .'"[45] In an editorial the Independent supported the decision stating that

> . . . though 'several leading colored men have expressed great indignation and disappointment, the Court is clearly right. The question as to the class of rights involved belongs exclusively to the States. There is the proper place to look for a remedy against the abuse of these rights.'[46]

The New York Times considered the Civil Rights Cases ruling to be of little importance; on October 16, 1883, the editor wrote:

> The decision is not likely to have considerable practical effect, for the reason that the Act of 1875 has never been enforced. Spasmodic efforts have been made to give it effect, and occasional contests have been made in the courts, but the general practice of railroads, hotels,

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[44] Westin, "Ride-in!," p. 62.

[45] New York Times, November 9, 1883, p. 4.

[46] Independent, October 25, 1883, cited in Charles Warren, The Supreme Court in United States History, 3 vols. (Boston, 1926), II, 614.

> and theatres has remained unchanged and has depended mainly on the prevailing sentiment of the communities in which they are located.[47]

In the period between 1866 and 1875 Congress sought to destroy every racial distinction that enjoyed any form of legal support. Congress acted upon the assumption that not only had the economic institution of slavery come to an end, but that all the badges and incidents of slavery must also be obliterated. The legislative branch of the national government ". . . sought to transform the image of the Negro, first from a slave to a freedman and then from a freedman to a freeman. The law was to become totally color-blind." The Negro was to enjoy the full and equal benefit of the law and equal justice. Congress intended that "from the civil and political standpoint, no racial distinctions were to be recognized or tolerated in governmental or public acts."[48]

To achieve these purposes, Congress enacted the Civil Rights Acts of 1866 and 1875, the Reconstruction Acts, and the Enforcement Acts, and secured the ratification of three amendments to the Constitution. This legislative and constitutional program stands as a monument to faith in human equality. The history of these legal efforts

> to wipe out the incidents and badges of slavery, as well as its roots, and to bring the four million freed Negroes into full membership in the human family, where they could enjoy and suffer the condition of being human

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[47] New York Times, October 16, 1883, p. 4.

[48] Konvitz, A Century of Civil Rights, pp. 63-64.

> equally with white persons, belongs among the noblest pages of mankind.[49]

As did the men who signed the Declaration of Independence, the Northern Republicans had partisan and economic motives and sought power. However true, these facts fail to detract in any measure from the justice of their acts.[50]

The Supreme Court decision in the Civil Rights Cases brought to a halt these efforts to promote complete social equality between the races. The Court's ruling accomplished two things. First, it destroyed the slight advances in the integration of public facilities which had been brought about by federal guarantee, private enlightenment, and Negro protest. Second, and more important, the decision produced a profound and immediate effect on state and national politics as they related to the Negro. By refusing to recognize Congress' power ". . . to protect the Negro's right to equal treatment, the Supreme Court wiped the issue of civil rights from the Republican party's agenda of national responsibility." At the same time, many Southern politicians resorted to anti-Negro politics as a means of gaining power and began to ". . . rally the 'poor whites' to the banner of segregation."[51] Perhaps, many of the problems facing the nation today in regard to civil rights for the Negro would never have developed if the legislation of the

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[49] Ibid., pp. 64-65.

[50] Ibid.

[51] Westin, "Ride-in!," p. 64.

Reconstruction period, particularly the Civil Rights Act of 1875, had been upheld by the Supreme Court and enforced by the government.

Nevertheless, the groundwork had been laid by the Thirteenth, Fourteenth, and Fifteenth Amendments, particularly the latter two, for the renewal of the campaign for equal rights in the twentieth century. Despite the denial of federal protection by Congress and the Supreme Court, which reduced the Negro again to an inferior position in society by the end of the 1800's, Americans were not long allowed to forget that these amendments now formed a part of the Constitution. Although Negroes could be denied equal rights by subterfuge, by coercion, or by such spurious legalisms as the grandfather clauses, it no longer remained possible to deny them these rights directly by law. Though, in effect, violating the supreme law of the land, for a time, one method of denial proved as effective as the other. Yet the idea of equality endured as a force for reform, haunting and troubling the nation's conscience. Starting with the Supreme Court's 1954 decision outlawing segregation in public schools and Congress' passage of a new Civil Rights Act in 1957, changes were introduced to begin fulfillment of the promise of equal civil and political rights which had been held out to the Negro during reconstruction.

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