Reconstruction and the Federal Courts: The Civil Rights Act of 1875

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In 1875 the Congress of the United States effected a radical change in the prevailing federal system. In that year it not only passed the most extensive civil rights act in the nation's history, but also removed from the state courts and bestowed upon the federal tribunals exclusive jurisdiction over its enforcement. The legislation marked Congress's final effort to settle the turbulent, unfinished business of the Reconstruction period; it was its last attempt in that period to secure civil rights for Negroes. For a decade Congress had searched for the means to secure these freedoms, but the apparent weakness of the previous legislation, the effective resistance of the South, and finally, the growing apathy and occasional hostility of the North, convinced many lawmakers that only a positive extension of federal authority could make the rights of black Americans inviolable. Granting exclusive jurisdiction to federal courts on all cases arising under the Civil Rights Act of 1875 was virtually a new experiment in the use of federal power. Why Congress came, in 1875, to use this power, constitutes one of the most interesting aspects of Reconstruction history.

The Civil Rights Bill had a five-year history in Congress before it became law. Charles Sumner of Massachusetts introduced the measure on May 13, 1870 as a supplement to the Civil Rights Act of 1866. The new legislation, he explained, was designed 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 and State."[1] The bill, more extensive than any previous civil rights measure,

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[1] *Congressional Globe,* 41 Cong., 2d Sess., 3434. *The Globe* does not give the exact text of the bill.

was the culmination of its author's career-long dedication to the Negro's welfare. The Massachusetts abolitionist, in fact, had insisted from the beginning that equal rights in public schools and accommodations must be the very essence of the Reconstruction program.

The history of Reconstruction to 1870 helped determine the character of the Civil Rights Act. At the end of the Civil War in 1865 the United States confronted two imposing problems: the restoring of the rebel states to the Union and the securing of the rights of the former slaves. These two vital concerns were irrevocably entwined. As Carl Schurz indicated, "[T]he Union could . . . not consent, either in point of honor, or of sound policy, to the restoration of the late rebel States . . . so long as that restoration was reasonably certain to put the freedom of the emancipated slaves . . . into serious jeopardy."[2] The Radical Reconstruction program, through the Act of 1875, represented Congress's judgment as to what legislation was necessary to reunite the nation and at the same time protect its newest citizens. The Thirteenth Amendment abolishing slavery was the first response, followed by the Civil Rights Act of 1866.

This measure, the project of Lyman Trumbull of Illinois, is an important indication that Congress at this time did not consider extensive federal interference necessary for the success of Reconstruction. After declaring that Negroes were United States citizens, the bill granted to all citizens the right "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 guaranteed equal protection of the laws.[3] These provisions, Trumbull insisted, constituted all that was necessary to abolish slavery and to secure freedom to all people in the United States.[4]

Trumbull's Civil Rights Act also gave to the circuit and district courts of the United States jurisdiction of all cases "affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the provisions of the act." The court clause is crucial because it indicates that Congress was not yet willing or did not deem it necessary to upset the prevailing federal system. The provision did not give the federal courts local jurisdiction, but only stipulated, in effect, that states relin-

[2] Carl Schurz, *The Reminiscences of Carl Schurz* (3 vols.; New York, 1908), III, 220-221.

[3] *U. S. Statutes at Large,* XIV, 27-29.

[4] Horace White, *The Life of Lyman Trumbull* (New York, 1913), 265-66.

quished their jurisdiction where state laws denied Negroes access to their courts. Conversely, the bill assured that a state could still maintain its jurisdiction simply by eliminating discriminatory legislation respecting the use of its courts.

And for this reason the law was in fact a weak measure. In several Southern states, new governments had already removed older laws which prevented testimony in courts by "persons of color" against whites. Measures appeared in Mississippi, Alabama, Florida, Tennessee, and Georgia giving specific assurances of the rights of all persons to sue and to testify in state tribunals. Texas followed the pattern later in November 1866, and South Carolina in 1868. By the statutory guarantees, these states were able to retain jurisdiction over civil rights; removal to federal courts was precluded. With the later appearance of Democratic governments in the South, this situation became a dangerous obstacle to the civil rights movement.[5]

With this development lawmakers soon recognized that a radical change in federal-state relationships was necessary to guarantee blacks equal rights. Congress passed the 1866 act over the veto of President Johnson, who was emerging as a major opponent of the Republican Reconstruction program. Encouraged by the veto, the Southern states threw up their own roadblocks. The appearance of the Black Codes recalled the still recent picture of a violent, rebellious South, raising again the concern of Northerners for Negroes' well-being. And as Carl Schurz remarked, "Even men of a comparatively conservative and cautious disposition admitted that strong remedies were necessary to avert the threatening danger, and they soon turned to the most drastic as the best."[6]

The Fourteenth Amendment was one product of this concern.

[5] *Laws of Mississippi,* 1865 (n.p., n.d.), 83; *Acts of Alabama* (Montgomery, 1866), 98; *Florida Acts and Resolutions* (Tallahassee, 1866), 37; *Georgia Acts, 1865-66* (Milledgeville, Ga., 1866), 239; *Public Statutes of Tennessee Since 1858* . . . (Nashville, 1872), 263; *Laws of Texas, 1861-1866* (Austin, 1898), 131; *The Constitution of South Carolina* . . . (Columbia, 1868), 4. The remarks of Senator William Stewart, Nevada Republican, indicate how Congress, at this early date in the Reconstruction period, was taking a conscientiously conservative approach toward the problems it faced. Said Stewart: "[W]hen I reflect how very easy it is for the States to avoid the operation of this [Civil Rights] bill . . . entirely, I think that it is robbed of its coercive features, and I think no one has any reason to complain because Congress has exercised a power which it must be conceded it has, when it has exercised it in a manner which leaves it so easy for the States to avoid the operation of this bill. If passed to-day, it has no operation in the State of Georgia, . . . And if all the southern States will follow this noble example, this civil rights bill . . . will be simply a nullity . . . it will not exist." (*Cong. Globe,* 39 Cong., 1st Sess., April 5, 1866, 1785).

[6] Schurz, *Reminiscences,* III, 231.

Proclaimed July 28, 1868, the amendment, reaffirming the citizenship provisions of the Civil Rights Act, placed all the rights of United States citizens beyond the interference of the states. Congress demanded acceptance of the amendment as a prerequisite to readmission into the Union.

That acceptance was not forthcoming. Southern legislatures contemptuously defied the amendment, heightening the concerns of the Radical Republicans, who, emboldened by election victories in 1868, again sought stronger guarantees for the blacks. Many Republicans now believed that the key to equality was the voting right, and the passage of the Fifteenth Amendment, finally secured on May 30, 1870, marked the next effort by Congress to assure it.

The three "Enforcement Acts" which followed this amendment showed Congress's determination to enact legislation with teeth. The first of these laws, passed May 31, 1870, forbade any interference with the exercise of the voting right and gave to the federal courts, "exclusively of the courts of the several states, cognizance of all crimes and offenses committed against the provisions of this act. . . ."[7] This court provision was stronger than that of the 1866 Civil Rights Act for it categorically eliminated all jurisdiction of the state courts whether or not discriminatory statutes restricted their availability to Negroes.[8]

Sumner introduced his Civil Rights Bill as an amendment to the Civil Rights Act of 1866. The first version of the later bill, in fact, even preserved the court provisions of the earlier one, granting federal jurisdiction to federal courts only where state laws restricted use of state courts by Negroes. Thus in 1870 Sumner did not judge it necessary to demand exclusive jurisdiction of the federal courts; by 1875, however, the supporters of civil rights were finding it imperative to do so.[9] The political developments of these intervening years suggest why Congress was ready to make this change in the federal system.

[7] *U. S. Statutes at Large,* XVI, 140-146.

[8] It is difficult to determine whether this court clause constituted a radical change in the federal system, or whether Congress was conscious that it was making such a change. The use of the federal courts to enforce a specific amendment to the Constitution, as this bill was intended to do—it was entitled "Act to Enforce the Fifteenth Amendment"—does not seem so extreme a measure as the use of federal courts to counteract the wrongs of one private citizen against another, as in the Civil Rights Act of 1875.

[9] The question of judicial authority and the exact role of the courts, both state and federal, was still an unsettled one. Especially, it is imperative to bear in mind that the federal courts were merely subsidiary courts. The Judiciary Act of 1789 had granted to them jurisdiction only on admiralty cases and on cases involving disputes between citizens of different states. It had not provided for original federal jurisdiction for cases arising under national law. The Recon-

The first challenge to civil rights was the movement for amnesty, or the removal of all political disabilities against Southerners under the Fourteenth Amendment. The legislators who were concerned for the black man immediately perceived that restoration of the Southern states severely weakened his chances for equality. Sumner saw the danger, and, after Trumbull's Judiciary Committee twice rejected his bill, tied it as an amendment to an amnesty measure pending in the Senate late in 1871. Sumner was not unsympathetic to amnesty so long as Congress assured rights of Negroes as a precondition. "Be just before you are generous," he insisted.[10] His strategy, for the moment, prevailed. The amendment passed, making the amnesty measure a sufficiently bitter pill to cause enough Senators to vote against and defeat it.[11]

But later in May 1872, more political legerdemain reversed the tables on Sumner. He was out of the Senate, ill, when both an amnesty bill from the House and his own Civil Rights Bill, hastily taken up on motion of Matthew Carpenter of Wisconsin, were under debate. Carpenter moved an amendment virtually emasculating the latter bill by removing the clauses on schools, churches, juries, and cemeteries. After an all-night session, he secured passage at 8 a.m., just before the angry Sumner arrived to blast the Senate for its treachery. Sumner then joined with Senator Nye of Nevada to cast the only two votes against the amnesty bill.[12] To the friends of the black man, prospects were growing dim.

Nevertheless, while Carpenter and the Senate reduced civil rights, at the same time they provided for stronger enforcement. Specifically, Carpenter included in the new act a court jurisdiction measure that was clearly stronger than Sumner's. Now the Civil Rights Act stated "that the offenses under this act, and actions to recover damages may be prosecuted before any territorial, district, or circuit court of the United States having jurisdiction of crimes where the offense was charged to have been committed." Thus the accessibility of federal judiciary power

struction measures granting jurisdiction to federal courts therefore mark a major new and increased use of federal authority. See Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judiciary System* (New York, 1927), 64; Mitchell Wendell, *Relations Between the Federal and State Courts* (New York, 1949), 28; James H. Chadburn and A. Leo Levin, "Original Jurisdiction of Federal Questions," *University of Pennsylvania Law Review*, XC (April 1942), 638-42.

[10] *Cong. Globe*, 42 Cong., 2d Sess., Jan. 30, 1872, 698.

[11] *Ibid.*, Feb. 9, 1872, 928-929.

[12] *Ibid.*, May 21, 1872, 3730-43.

depended no longer upon actual demonstration of legal discrimination in state courts; the new clauses made the federal courts alternatively available to anyone seeking redress under the act.[13] The new title which Carpenter gave the act indicates that he was conscious of the significance of the court provision, for the Civil Rights Bill now bore the inscription, "A bill to declare and enforce the civil rights of citizens of the United States."

Public opinion further conspired against blacks. Racial attitudes, particularly notions of Anglo-Saxon superiority, had long been prominent in American thinking. These views generally constituted a form of racial nationalism which pointed to liberty and democratic government as the special heritage of a distinct Anglo-Saxon tradition. This form of racism differed from the new pseudo-scientific racism popularized after Darwin's *Origin of the Species* in 1859. Most Americans probably continued to believe in the assimilative nature of the American experience or even in the nation's "manifest destiny" to expand the influence of her culture.

But the same strain in popular thought caused genuine doubts about the Reconstruction policies of the Republicans. Thus Edwin Godkin, formerly a strong supporter of Reconstruction and editor of *The Nation*, decried the follies of civil rights legislation. Severely denouncing the "Enforcement Acts," *The Nation* lamented: ". . . it has taken the most gifted races in the world from four to five centuries to traverse the space in social progress through which the Republican party with its frantic law-making has been trying to project the colored man in two Presidential terms."[14] Godkin spoke for many white Americans, Northern and Southern, who considered the solution to the racial question not one of legislation but of gradual absorption of the black man, over an indefinite period of time, into the cultural patterns of white America.[15]

The mood of the North also indicated that even in that section the bill would receive a cool welcome. The North was growing tired of the crusade for the Negro. As a political record of the period, the messages and papers of President Grant indicate that civil rights was not even an issue, for this matter received

[13] Carpenter may have made a skillful maneuver here, for the bill, rushed through the Senate after its all-night session, received no comments with respect to the new court provision.

[14] *The Nation*, XX (Feb. 4, 1875), 73.

[15] The question of racial attitudes in the United States in the mid-nineteenth century is most important and certainly difficult to present concisely. For elaboration of the argument made here, see John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (New York, 1966), 3-11.

virtually no attention from him.[16] Other issues were capturing the headlines. The beginning stages of the farmers' movement in the West, monopolies and Credit Mobilier, railroads, labor unions, and the panic of 1873: these stories caught the public eye. And a new criticism of the Civil Rights Bill accompanied this shift of attention. The *New York Times*, after denouncing the bill for its "doubtful constitutionality" and its "unprecedented use of powers," stated: "We do not believe that it is possible to administer its provisions effectively in any community where public opinion is strongly opposed to it. . . ." *The Nation* labeled the measure a "harmless bill."[17] Thus the question of enforcement loomed all the more important.

Charles Sumner died on March 11, 1874. Probably he had entrusted the Civil Rights Bill to Senator Frederick Frelinghuysen of New Jersey, a member of the Judiciary Committee and, since his hard fight for the impeachment of President Johnson, an important figure in the Reconstruction program. Frelinghuysen again modified the bill, making it the strongest civil rights measure yet to appear. He restored to the legislation nearly all the institutions originally included by Sumner, but, going one step further, Frelinghuysen inserted a new jurisdiction provision, which read: "That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of the provisions of this act. . . ."[18]

Frelinghuysen's provision marked the third different prescription for the use of federal courts that appeared in the course of the Civil Rights Bill's progress through Congress. Each new provision was stronger than the preceding. Now federal courts had "exclusive" jurisdiction over all civil rights cases, removing the possibility, which still existed under Carpenter's earlier provision, that state officials might, by whatever means, succeed in entering proceedings in a state court and retaining suits there. State courts, under the new proposal, would have no legal access to civil rights cases arising under the national law.

The Civil Rights Bill eventually passed with this, the strongest court provision, incorporated in it. The extension of the authority of the federal courts under this act far exceeded that granted by the Enforcement Acts, two of which covered interference with

[16] James Richardson, *A Compilation of the Messages and the Papers of the Presidents of the United States* (New York, 1897), VII, 153 et seq.

[17] *New York Times*, Jan. 28, 1875; Feb. 6, 1875; *The Nation*, XX (March 4, 1875), 141.

[18] *Cong. Record*, 43 Cong., 1st Sess., April 29, 1874, 1874.

the voting right only, and were designed to enforce specific constitutional amendments.[19] Opponents maintained that the wrongs covered by the bill were merely the wrongs of one private individual or group against another and therefore not subject to federal interference in any way. But for the supporters of civil rights the resort to the federal courts was a well-conceived and practical means to combat the growing opposition to the Reconstruction program.

The Enforcement Acts of the early 1870s were the first to call for recourse to federal courts for prosecution of offenses. To this extent, these acts were an experiment, but if successful might serve as a useful guideline for subsequent Reconstruction programs. By the time of their enactment the South was militant. The violence and intimidation of Negroes waged by the Ku Klux Klan and other extralegal bodies posed a powerful threat to the free exercise of Negro rights. Furthermore, the South was consolidating its political strength, as Democratic victories in Virginia, North Carolina, and Georgia in 1869 and 1870 demonstrated. Therefore, in the hope of reducing the effect of local pressures against enforcement, Congress reserved to the federal courts the exclusive jurisdiction.

Vigorous enforcement during the first four years produced some encouraging results and suggested that the prescriptions for federal jurisdiction were useful. The Reports of the Attorney General for 1870-74 indicated that in spite of vigorous resistance in the South, the government was succeeding in enforcing the acts. It won 74% of its cases under the Enforcement Acts in 1870, 41% in 1871, 49% in 1872, and 36% in 1873.[20] Moreover, in the face of state officials' efforts in the South to arrest federal deputy marshalls and election supervisors, access to federal courts was offering an effective counteraction and seemed to be a factor in the initial success of the legislation.[21] Congressmen, contemplating the darkening outlook for civil rights in 1875, at least had reason to hope that exclusive use of federal courts might aid in enforcing the legislation.

[19] But notice that the "Act to Enforce the Fourteenth Amendment," passed April 20, 1871, which brought within its provisions a high number of potential cases, did not give exclusive jurisdiction to the federal courts, but allowed for recourse to these courts only under the weaker stipulations of the 1866 Civil Rights Act. *U. S. Statutes at Large*, XVII, 13.

[20] Everett Swinney, "Enforcing the Fifteenth Amendment, 1870-1877," *Journal of Southern History*, XXVIII (May 1962), 202-03, 205.

[21] *Ibid.*, 210; William Watson Davis, "The Federal Enforcement Acts," in *Studies in Southern History and Politics*, ed. William Archibald Dunning (New York, 1914), 211.

A ruling from a federal court in June 1874 indicated precisely why it was necessary to abandon the earlier, weaker jurisdiction provisions of the 1866 Civil Rights Act. In 1874 a Negro in Texas brought suit in a federal court to prosecute a violation of this act. Justice Bradley, presiding over the federal circuit court, denied the removal from the state court. Mere belief or suspicion of local prejudice, Bradley asserted, was not sufficient grounds for depriving the state court of jurisdiction. So long as the state laws themselves were impartial, there was insufficient evidence to indicate actual bias, and the states might retain jurisdiction.[22] This ruling denoted an important distinction between the 1866 and the 1875 legislation, demonstrating how a state could, by a mere change in the letter of the law, retain its jurisdiction over civil rights cases. The measure by Frelinghuysen, giving exclusive jurisdiction to federal courts, effectively removed state control.[23]

The immediate circumstances under which Congress passed the Civil Rights Act point to another possible answer why the strong court provision found its way into the final enactment. Very likely the Senate passed the Civil Rights Act as a memorial to Charles Sumner. It is difficult to explain otherwise why opposition in the House was so much stronger. Benjamin Butler of Massachusetts had taken charge of the civil rights legislation in the lower chamber. He tried in December 1873 to get his own civil rights bill on the floor, but was unsuccessful.[24] On June 20, 1874, when the Senate bill reached the House, he agreed to have it referred to his Judiciary Committee.[25] The Democrats plagued Butler from then until February when they engaged in a massive filibuster to delay action. Meanwhile, in November 1874, the Republicans suffered a devastating defeat in the national elections. Democrats captured large Northern states and Butler's own seat in the House. The Republicans, who had enjoyed a majority of 92 in the lower chamber, now faced the prospect of minority status with a 60-man deficit.[26]

To the supporters of civil rights, one fact was clear: the

[22] *Texas v. Gaines*, Federal Case No. 13, 847, Circuit Court, W. D. Texas (June 1874), 869-871.

[23] Unfortunately, it is impossible to determine what cognizance, if any, Congress took of this ruling, or of the Attorney General's reports on the Enforcement Acts. Congressmen usually debated the Civil Rights Bill in terms of lofty constitutional principles, the nature of the Fourteenth Amendment, and the powers of the federal government, and seldom directed attention to the question of enforcement.

[24] *Cong. Record*, 43 Cong., 1st Sess., 318.

[25] *Ibid.*, 5328-29.

[26] William Archibald Dunning, *Reconstruction: Political and Economic, 1865-1877* (New York, 1907), 250-251; U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1957* (Washington, 1960), 691.

43rd Congress would be their last opportunity to fulfill the promise of Reconstruction. They had been conscious of the shifting political opinion which culminated in the November tidal wave, and in spite of it, had legislated increasingly stronger measures, expanding federal authority for the protection of the Negro. That tendency continued, for on January 27 Butler reported the House bill from his Judiciary Committee with a new court provision calling for exclusive federal court jurisdiction.[27] Significantly, 90 of the 162 Representatives who voted for the Civil Rights Bill were "lame ducks" at the time.[28] Already defeated, they were, in short, no longer responsible to their constituents, and no matter how strong a civil rights measure they might enact, the political system had already done the most it could in retaliation. As this Congressional session drew to a close in the early months of 1875, passage of a strong civil rights law was a primary project for those legislators who knew that these efforts were the last they could make for the black man.[29] The hopes of the Democrats lay in talking the bill to death.

The Congressional debates on the court provisions of the Civil Rights Bill are revealing. They indicate both that Congressmen were often confused on the issue, uncertain of the virgin territory they were exploring, but at the same time aware that the resort to the federal courts was producing a major change in the federal system. Each of the three legislators responsible for the stronger federal jurisdiction measures spoke on the subject. With respect to enforcement of Reconstruction legislation, Senator Carpenter insisted that ". . . we cannot vest any power for that purpose in the States or in the State courts, or in any officers of the State governments. We must exercise our power through our own instrumentalities . . . we must legislate, and then commit the enforcement of our laws to the Federal tribunals, not to the States."[30]

Senator Frelinghuysen, responsible for the first provision for exclusive federal jurisdiction, argued that the state courts and legislatures were beyond the control of the federal government, and were therefore unreliable enforcement agencies. This situation rendered it imperative that a person violated in his civil rights have "an original action in our Federal courts, so that

[27] *Cong. Record*, 43 Cong., 2d Sess., 938.

[28] D. E. Murphy, "The Civil Rights Law of 1875," *Journal of Negro History*, XII (1927), 123-24.

[29] *The Nation* also anticipated this fact. "[W]ith the close of the Forty-third Congress," it stated, "the history of the United States will pass out of the region of the Civil War." XX (March 11, 1875), 164.

[30] *Cong. Globe*, 42 Cong., 2d Sess., Feb. 8, 1872, 897.

by injunction or by the recovery of damages he could have relief against the party who under color of [state] law is guilty of infringing his rights."[31]

Representative Butler stated most explicitly the reasons for recourse to the federal courts. "[W]e hear that in certain portions of our country . . . the judges of the local courts have to run away by night in order to save their lives from assassination, and we do not think that a judge so situated is in a proper condition to judge between a man who has nothing but his civil rights and the men who refuse him those rights. Therefore we put the case in the United States courts where the man is likely to get justice. . . ."[32] Butler, in fact, had argued that the compelling reason for the Civil Rights Bill was the failure of the states themselves to guarantee the Negro's rights, thereby making it the "imperative duty" of the federal government to legislate.[33]

To some Congressmen, this unprecedented use of federal courts threatened a virtual destruction of the federal system. Senator James Kelly, Oregon Democrat, warned that ". . . if this measure be constitutional, then so far as the United States courts assume that jurisdiction, so far are the States deprived of it; and thus it becomes an utter destruction of State rights to that extent."[34] Democratic Senator William Stevenson of Kentucky saw the same consequence: "If . . . the Federal Government shall, through the United States courts, coerce social equality between the races in public schools, in hotels, in theaters, in railways, . . . then all local self-government is at an end, and the people of the several States are the mere slaves of the Federal Government."[35]

Not only Congressmen were giving serious consideration to the proposed alterations in the federal system. *The Nation*, considering what constituted appropriate legislation under the Fourteenth Amendment, admitted that Congress might clothe the federal courts with ample jurisdiction for cases which arise under local laws defiant of specific constitutional prohibitions. But it was reluctant, even in 1871, when still friendly to the Reconstruction programs, to grant extensive jurisdiction to federal

[31] *Cong. Record*, 43 Cong., 1st Sess., April 29, 1874, 3454.

[32] *Ibid.*, 43 Cong., 2d Sess., Feb. 3, 1875, 940.

[33] *Ibid.*, 43 Cong., 1st Sess., Jan. 7, 1874, 456.

[34] *Cong. Globe*, 42 Cong., 2d Sess., Feb. 8, 1872, 894. Kelly in fact stated that "it is because of this infraction of State rights; it is because it takes away the privileges that the States have had from time immemorial; it is because it confers these rights upon a distant tribunal, that I oppose the proposition before the Senate." *Ibid.*, 895.

[35] *Ibid.*, 42 Cong., 2d Sess., Feb. 9, 1872, 913.

courts. "In no case," it editorialized, "can Congress confer upon the national courts jurisdiction over criminal acts of violence done by one or more persons acting singly or in concert against the private civil rights of life, liberty, person, and property, which belong to all citizens alike."[36]

In early 1875 the delaying tactics of the Democrats were proving effective. Not until February 3, in the waning weeks of the 43rd Congress, was Butler able to bring the House bill onto the floor for discussion. However, Republican Stephen Kellogg of Connecticut introduced an amendment replacing the school clause with a weaker stipulation allowing separate, equal schools for the races. A huge majority endorsed the change.[37] Efforts to get the stronger Senate bill to the floor were unsuccessful and the civil rights advocates finally had to settle for a bill, passed 162-99, without the school, church, and cemetery clauses. The Senate proponents had little choice but to accept the House bill. All 38 Senators voting for it were Republicans, while seven from that party joined 19 Democrats in opposing it.[38] President Grant affixed his signature on March 1, 1875.

The Civil Rights Act was the last of the Reconstruction legislation. But public attention, focused on the struggles in Congress, failed to notice at the time an inconspicuous piece of legislation which reached the President's desk and received his approval only two days after he signed the Civil Rights Act. If the public and political observers at the time took no cognizance of this measure, historians have scarcely compensated for their inattention. Nevertheless, this obscure act considerably illuminates the role which Congress assigned the federal courts in Reconstruction. Specifically, by the Act of March 3, 1875, Congress, for the first time, empowered the federal courts to take complete jurisdiction of cases arising under the Constitution and laws of the United States.[39]

The timing of this legislation is not mere coincidence. It meant, in the first place, that whatever doubts existed about the authority of Congress to delegate jurisdiction to the federal courts were now dispelled. It thus clarified and legally sanctioned one important aspect of the Reconstruction legislation. Heretofore, the national courts had no clear authority over federal legislation;

[36] *The Nation*, XII (May 18, 1871), 336.

[37] *Cong. Record*, 43 Cong., 2d Sess., 939.

[38] *Ibid.*, Feb. 4, 1875, 1011; Feb. 27, 1875, 1870.

[39] *U. S. Statutes at Large*, XVIII, 470. "An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes."

now it was possible, beyond legal doubts, to make these tribunals formidable safeguards of the rights of United States citizens. As Felix Frankfurter and James M. Landis wrote: "In the Act of March 3, 1875, Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States. . . . This development in the federal judiciary, which in the retrospect seems revolutionary, received hardly a contemporary comment."[40]

An important question concerns the extent to which Congressmen understood the implications of this act for Reconstruction. As was true of the final Civil Rights Bill, it was hurried through the House and Senate as the 43rd Congress drew rapidly to a close. The *Congressional Record* yields almost no indication of Congress's motivation, and two observers have suggested that it was "sneak legislation."[41] That presumption, moreover, is reinforced by the fact that in the next Congress bills designed to repeal the new power of the federal courts appeared in the House, now under Democratic control.[42] Both the coincidence and similarity of the two pieces of legislation strongly suggest that the jurisdiction measure was also a response to the remaining problems of the Reconstruction period.

The 1875 Jurisdiction Act offers an illuminating footnote to this entire period. One consequence of the act was a flood of new business for the federal courts. Justice under the Reconstruction legislation, for this and other reasons, was therefore painfully slow. While Congress wisely turned to the federal courts as reliable agencies, its failure to expand the courts and the number of court officials actually weakened the enforcement provisions. The national legislature was at least aware of the problems by 1876 when it passed an act strengthening the federal courts and providing for more speedy review.[43] Nevertheless, the "Annual Reports of the Attorney General," which give no attention to enforcements under the Civil Rights Act until 1880, show 138 prosecutions still pending, and a large number "discontinued" that year. The Reports list no convictions for 1880,

[40] Frankfurter and Landis, *Supreme Court*, 68.

[41] Chaffetz and Levin, "Original Jurisdiction," 643.

[42] Frankfurter and Landis, *Supreme Court*, 88.

[43] Ibid., 71; Swisher, "Fifteenth Amendment," 318; Davis, "Enforcement Acts," 217.

only one for 1881, and none for 1882.[44] The Supreme Court of the United States itself was overrun with cases, 1315 awaiting review in 1884.[45] The high tribunal in fact did not rule on the act until 1883 when, in the *Civil Rights Cases*, it declared the legislation unconstitutional. Not for a long time thereafter would the subject of civil rights claim widespread public attention.

The Civil War had left unsolved as many problems as it answered. To an extraordinary degree, the perplexities and demands of Reconstruction forced Congress to invoke the authority of the federal government. But justice in a democracy is seldom wielded by bayonets, and while Congress groped, with uncertainty and yet with determination, for permanent, but constitutional solutions, it turned increasingly to the federal courts as the answer to a national dilemma.

[44] *Senate Executive Documents*, 47 Cong., 1st Sess., I, No. 4, 22-25; *House Exec. Doc.*, 47 Cong., 2d Sess., XIV, No. 8, 22-25; *House Exec. Doc.*, 48 Cong., 1st Sess., XIII, No. 8, 44-47.

[45] Frankfurter and Landis, *Supreme Court*, 86.