THE CIVIL RIGHTS BILL OF 1866

By

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CONTENTS

PREFACE

So closely blended with the fundamental principles of our federal system of government are the provisions of the Civil Rights Bill, that to grasp its true meaning and purpose, it is necessary to analyze the legislation which preceded and followed its adoption; causes which led to such legislation, and to the proposal and adoption of the Fourteenth Amendment to the Constitution of the United States. The legislation preceding the adoption of the Civil Rights Bill, will indicate the objects Congress was striving to obtain, or the evils for which a remedy was being sought; while the legislation which follows its adoption terminates in the important and comprehensive provisions of the Fourteenth Amendment to the Constitution.

The debates in Congress on the Bill of Rights should offer us sufficient data from which we may fairly estimate what Congress intended to accomplish, namely, the distribution of justice by destroying discrimination against the Negro in southern states; the establishment of equality before the law, and the nullification of every state law that conflicted with the enlarged provisions of the Constitution.

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CHAPTER I

THE NORTH AND THE SOUTH AFTER THE CIVIL WAR

When Andrew Johnson succeeded to the presidential office, Confederate armies, somewhat broken but still capable of offering resistance, were retarding Sherman's victorious march. Measures for disbanding the former became necessary when southern leaders, recognizing the hopelessness of continuing resistance, made overtures looking to an armistice which took place, and to the surrender which subsequently followed. It became urgent to discontinue the enlistment of men in the loyal states, to economize expenses, and to muster out of service as expeditiously as possible the grand army of Union volunteers.

The skill to which years of experience had brought the machinery of the War Department enabled the majority of the Union army to return without delay to their homes, where they could discard the character of soldiers and melt insensibly into the civil population to resume the pursuits of peace. However, relations with France were somewhat strained and due to a series of unfriendly acts with Great Britain a war was not improbable. The public finances, too, required attention. To provide a revenue adequate to the extraordinary demands of the time was beginning to tax the resources of the Government.[1]

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1. Charles H. McCarthy, Lincoln's Plan of Reconstruction, 408.

The political theories of the South had been put to the test of the sword and were now discredited. Two problems were settled beyond dispute: the Negro was free; and the Union was preserved. Thus the Republican Party, preeminently the Union Party, found itself in full control of every branch of the federal government, and its rule must be established and perpetuated. To the mind of the North, the Democratic party could not be entrusted with any part of the solution of the problems of reconstruction. Though slavery and state sovereignty were no longer at issue, there were many problems pressing for solution. The territory formerly occupied by the seceding states must be reorganized and under certain conditions, readmitted to the Union; provisions had to be made for ways and means for liquidating the vast war debt incurred on both sides, by both, governments and by the individual States. Above all else loomed the Negro problem. Five million whites and three and a half millions blacks were to live together. What system of laws could southern conventions and legislatures frame that would make it possible for them to accomplish that which Thomas Jefferson had declared impossible? Two dangers confronted them. One was, the armed bands of Negroes headed by returning Negro soldiers. The other chief danger was that idleness among the Negroes would lead to crime.

The South was in a state of utter exhaustion. They protracted their struggle against the federal authority until

all hope of successful resistance had ceased, and they laid down their arms because there was no longer any power to use them.

The loss of life in the Confederate army had been large, while many suffered from wounds, and from diseases, and from hardships of camp and prison. These men, many of them unable to work, came home to find almost complete economic ruin. The people were impoverished. Nearly all business was destroyed and the farms were wrecked. There was no money in circulation, the banks were generally broken; there was no credit system, most of the commercial agencies were inoperative or suspended. Private debts incurred in a period of great prosperity prior to 1861, and unpaid at the beginning of the war were still unpaid, and the property on which most of these debts were contracted, no longer existed. The railroads and other means of transportation, as well as factories and other industries were generally destroyed. Agriculture, the main means of support in the South, was demoralized by the need of work animals and because of the disorganized labor.

To add to the general confusion, the country was flooded with adventurers from the North, camp followers of the Union armies and others who rushed to the South as soon as the war was over. These men imbued with the prejudices and passions which existed in the North during the war, incited the negroes against their recent masters and offered themselves as their

friends and advisers in their new condition of freedom. In many instances the property of private individuals was seized and claimed as abandoned property (under the Freedmen's Bureau Law) and taken possession of for the use of the United States. This property was assigned for the use of the negroes who had left their homes and work. The new advisers generally tried to impress upon the negroes that the southern people were aiming to reestablish slavery, and that the United States Government would give each able-bodied negro man at least forty acres and a mule.[2]

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2. Stephen D. Lee, The South Since the War, XII, 272.

Already in the Union for the purpose of taxation, but still out of it politically, the people of the late Confederate states were at once to assume their full share of the debt of nearly three billion dollars contracted in subjugating them; they were to pay also their share of the pensions to the Union soldiers, and the money thus drained from the southern people to be expended in the North during the next thirty-five years was to be far more than equal to all the expenses of the southern state governments, including school funds and interest on state debts.[3]

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3. H. A. Herbert, "The Conditions of the Reconstruction Problem," The Atlantic Monthly, vol. 87, 146.

Besides the dark economic outlook, the southern people

were without power to frame a government except with the sanction of those who had been successful in war. Many of the late Confederate states were threatened with anarchy, because in those commonwealths, authority had been extinguished and no organization existed which the administration could recognize as state governments. The political reconstruction in four of the states, it is true, had commenced under Lincoln's direction, but their good faith was strongly suspected.

The assassination of President Lincoln had removed from the political scene the only man capable of holding Northern radicals in check. Sumner, Stevens, and Wade were making plans for the introduction of Negro suffrage into the South. In the North only six states allowed the Negro to vote, but the radicals felt, none the less, that justice required the immediate enfranchisement of the millions of freedmen in the South. Thus began the nightmare of reconstruction, a carnival of pillage, corruption, and bribery, with the leading whites deprived of the ballot in many states and the ignorant and illiterate negroes led by unscrupulous carpetbaggers and scalawags in control. In Florida, Alabama, Louisiana, Arkansas, and the Carolinas the negroes and their allies were absolute masters of the situation. In Georgia, Mississippi, and Tennessee their grip was somewhat less firm, while in Texas and Virginia they accomplished comparatively little.[4]

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4. Virginius Dabney, Liberalism in the South, 154.

CHAPTER II

RECONSTRUCTION PLANS

Lincoln's convictions concerning slavery and the nature of the Union had not changed since his debates with Douglas in 1858. He believed the United States to be "an indestructible union of indestructible states." As President of the United States he loathed the idea of righting one wrong at the cost of another, and no principle of the federal constitution was more deeply implanted than the right of each state to control its own constitution. Concerning slavery, Lincoln had his own solution. He would have instituted a program of gradual emancipation with compensation to the masters and the removal of the freedmen to Liberia or Latin America.

The President had given the question of reconstruction continuous consideration from the very outbreak of the war. He believed that there existed in every one of the seceded states a large group of loyal citizens through whom he could work. The details of his plan, he embodied in a "Proclamation of Amnesty and Reconstruction" issued on December 8, 1863. This document offered pardon, with restoration of all rights to property except as to slaves, to all except former Confederate civil and diplomatic officers, men who had resigned Federal civil and military positions to serve the

Confederacy, and officers above the rank of colonel in the army and lieutenant in the navy of the Confederacy, provided they would subscribe to an oath of allegiance and accept the recent laws and proclamations respecting slavery. When a number equal to ten per cent of the votes cast in each state in the election of 1860 had thus pledged their loyalty to the Union, state governments might be organized with executive recognition. Lincoln made it clear, however, that he had no authority over the readmission of senators and representatives to Congress. He stated further that he had no objections to any measures adopted by the states in relation to the freed people as a "laboring, landless, and homeless class."[1]

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1. James D. Richardson, Messages and Papers of the Presidents, VI, 213 ff.

When the President issued his proclamation, many of the republican leaders in Congress were claiming for that body exclusive jurisdiction over the question of reconstruction. The claim of the President that he could aid the people to organize governments for themselves, seemed a challange. Congress debated at length and in July, 1864, passed by a small majority in each house, the Wade-Davis Bill "to guarantee to certain States whose Governments have been usurped or overthrown a Republican form of government." This authorized the establishment of civil government as soon as

half the citizens had taken the oath of loyalty to the Union. It specifically denied participation in voting and office-holding to those who had held state and national offices under the Confederacy or who fought voluntarily with its armed forces. The state constitutions were to be so amended as to abolish slavery, disfranchise the higher civil and military officials, and repudiate all debts incurred in behalf of the Confederacy.[2]

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2. Ibid., VI, 223 ff.

So fundamental was the difference between the Executive and the Congress on this matter that a deadlock resulted between the two branches of the government. By a pocket veto the President prevented the Wade-Davis Bill from becoming law. On July 8, he issued a proclamation announcing that while he was unprepared to approve the bill, he was nevertheless "satisfied with the system for restoration contained in the bill as one very proper plan for the loyal people of any State choosing to adopt it." He stood ready to give Executive aid "to any such people so soon as the military resistance to the United States shall have been suppressed in any such State and the people thereof shall have sufficiently returned to their obedience to the Constitution and the laws of the United States, in which cases military governors will be appointed with directions to proceed

according to the bill."[3]

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3. Ibid., VI, 222.

Lincoln's pocket veto of the Wade-Davis Bill and his statement of opposition to the Congressional plan of reconstruction, provoked a vindictive attack on the President and his reconstruction policy by the sponsors of the bill, Senator Benjamin Wade and Congressman Henry Winter Davis.[4]

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4. The Wade-Davis Manifesto, August 5, 1864. E. McPherson, ed., Political History of the Rebellion, 332 ff.

The President was accused of playing politics. By his proclamation on the Wade-Davis Bill the President had signified his readiness to give effect to a proposal--a bill that never became law--and he left the Southern people with two alternatives: they might take his plan, which involved no disfranchisement of their leading citizens, or that of Congress which involved that and other distasteful features.

At this time the President, the majority in Congress, and the people of the country did not favor general Negro suffrage, although the radical leaders strenuously supported it. The nearest Lincoln came to recommending the vote for the negro was in a latter to Governor Hahn of Louisiana in March, 1864: "I barely suggest, for your private consideration, whether some of the colored people may not be let in,

as for instance, the very intelligent, and especially those who have fought gallantly in our ranks. They would probably help, in some trying time to come, to keep the jewel of liberty within the family of freedom. But this is only a suggestion, not to the public, but to you alone."[5] The

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5. Walter L. Fleming, The Sequel to Appomattox, 66-67.

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letter to Governor Hahn indicated that Lincoln favored the idea of having the states make certain exceptions with respect to the Negro, but the letter chiefly showed that the President thought that it would be an unwarrantable interference with the rights of the states to do more than make a private suggestion about the matter.

Lincoln received the news of Lee's surrender on Sunday, April 9, 1865. The popular excitement over the victory was such that crowds gathered on Monday before the Executive Mansion several times during the day, and called out the President for speeches. Twice he responded by coming to the window and saying a few words, which, however, indicated that his mind was occupied with work. As briefly as he could he excused himself, but promised that on the following evening he would be prepared to say something.

Accordingly on April 11th, Lincoln made his last public address which was almost entirely devoted to a discussion of the question of reconstruction as recommended in his various

official documents, and as practically tried in Louisiana. The question whether the seceded states were in the Union or out of it he dismissed as a "pernicious abstraction," "good for nothing at all." "We all agree," he said, "that the . . . States . . . are out of their proper practical relation with the Union, and that the sole object of the government . . . is to again get them into that proper practical relation." As to the denial of the vote to colored men he said that he would have preferred enfranchising the "very intelligent" and the Negro soldiers.[6] In conclusion Lincoln

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6. John G. Nicolay and John Hay, Abraham Lincoln, IX, 457-463.

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stated that no inflexible plan could be prescribed because of the peculiarities of each state.

At his last cabinet meeting, held April 14, 1865, Lincoln outlined his policy. Regardless of the hostile attitude of Congress, he proposed to go ahead with his program. No executions or persecutions were to take place, and the former rebels were to be welcomed back into the Union and to be treated as "fellow citizens." It was well that Congress had adjourned, he said, for "we shall reanimate the States" before it "reassembles" in December.[7] Unfortunately, how-

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7. James F. Rhodes, History of the United States Since the Compromise of 1850, VI, 541.

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ever, this magnanimous policy was terminated by the

assassination of the President on the very night of this cabinet meeting.

On May 29th, forty-four days after he had become President of the United States, Andrew Johnson issued his reconstruction proclamation. He declared: "To the end . . . that the authority of the government of the United States may be restored and that peace, order and freedom be established, I, Andrew Johnson, President of the United States, do . . . hereby grant to all persons who have . . . participated in the existing rebellion, amnesty and pardon with restoration of all rights of property except as to slaves . . . ." From the benefits of this amnesty and pardon, fourteen classes were excepted. The thirteenth excluded those who had "voluntarily participated in said rebellion and the estimated value of whose taxable property is over $20,000." With this exception Johnson's proclamation in every essential and in much of its actual language was the same as that which Lincoln had issued on December 8th, 1863. For those thus excluded, however, he declared "that special application may be made to the President for pardon by any person belonging to the excepted classes, and such clemency will be liberally extended as may be consistent with the facts of the case and the peace and dignity of the United States.[8]

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8. Richardson, op. cit., VI, 310 ff.

Johnson found full authority for his proclamation within his

constitutional power to grant "reprieves and pardons"[9] and

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9. United States Constitution, Art. II, Sec. 2.

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in acts of Congress previously passed.

Assuming office in April, Johnson faced a long recess of Congress, and in the months of April to December, when Congress would convene in regular session, he was free to act without congressional "interference." The steps taken in 1865 under the President's direction covered the whole process of state remaking; and by December every one of the seceded states except Texas had fulfilled the President's requirements, had elected Federal representatives and senators (most of whom had arrived in Washington), and stood ready for recognition. Seeking to steal a march on Congress, and to confront them with a fait accompli on the assembling of Congress, he found instead antagonism so solidified that his whole program was set aside.

The Republican leaders were dissatisfied with the presidential plan of reconstruction because an oath of loyalty from so small a portion of the former voters did not give a sufficient guarantee of loyal sentiment of the people of the state when restored to its former relations with the Union. They predicted that the war time leaders would reassert their leadership after restoration had been completed and they wished to exact "penalties for the past and pledges for the

future."[10]

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10. Homer C. Hockett, The Constitutional History of the United States, II, 327.

As early as February, 1862, Charles Sumner advanced what came to be known as the "State Suicide Theory." He believed that a state resisting the union committed treason, forfeited its constitutional rights, and destroyed itself as effectively as if it committed suicide. If the state no longer existed, the people living in what had been its borders were entirely under the national authority, and Congress might dictate the terms on which the state could be restored. Congress should punish the "rebels" by abolishing slavery and granting full civil and political rights to the negroes, by drastic punishment for the ex-Confederate leaders, and the choice of loyal persons for local, state, and national offices.[11]

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11. Resolution offered by Charles Sumner, United States Senate, February 11, 1862. Cong. Globe, 37th Cong., 2 sess., 736-737.

Thaddeus Stevens, leader of the House of Representatives, and more severe toward the South than Senator Sumner, believed also that the states had ceased to exist; but he considered them conquered provinces, as truly as if the war had been against a foreign power. They were, therefore,

entirely in the hands of the conqueror, and Congress might do what it would with the people and the territory concerned. He thought that the South, having rejected the Constitution, had no right to claim its protection. Like Sumner, he advocated suffrage for the freedmen.[12]

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12. Speech of January 22, 1864, in the House of Representatives, Cong. Globe, 38th Cong., 1st sess., 317-319; speech of December 18, 1865, Cong. Globe, 39th Cong., 1st sess., 72.

As the congressional leaders considered these views, they found objections. To allow easy restoration of the states, as was implied in the presidential proclamations of amnesty, would imperil the fruits of the war. On the other hand, to recognize the state-suicide or the conquered-province theory implied a relinquishment of the powers of the states, and a strengthening of the power of the national government to which a large part of Congress would not consent. In this dilemma many found another course of action expressed in the "forfeited-Rights Theory" proposed by Governor John A. Andrew of Massachusetts. He felt that the South had merely forfeited its rights in the Union and after proper amends had been made, all such rights could be restored. No state had been, or could ever be out of the Union. The Southern States were still parts of the nation but by their acts had forfeited some of their rights.

Andrews would not bar the leaders of the Confederacy from further political participation.[13]

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13. Walter L. Fleming, The Sequel to Appomattox, 61-62.

CHAPTER III

EMANCIPATION

The institution of slavery, closely associated with the causation of the war, became the subject of swift-changing policy on many fronts while the struggle progressed. That the North was fighting the war to suppress slavery in the South was disclaimed by many leaders in the Washington government. Lincoln made such a disclaimer in his inaugural of 1861. Referring to Southern apprehension on this point he said: "There has never been any reasonable cause for such apprehension. Indeed, the most ample evidence to the contrary has all the while existed . . . . It is found in nearly all the published speeches of him who now addresses you. I do but quote from one of those speeches when I declare that 'I have no purpose, directly, or indirectly, to interfere with the institution of slavery in the States where it exists.'"[1] In announcing this policy of hands off

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1. Richardson, op. cit., VI, 5 ff.

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as to slavery in the States, Lincoln was acting in harmony with the program of his party, for the Republican platform of 1860 declared that "the maintenance inviolate of the rights of the States, and especially the right of each State to . . . control its own domestic institutions . . .

exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend . . . ."[2] Congress uttered a similar disclaimer in the

2. Henry S. Commager, Documents of American History, 364.

Crittenden resolution (July 22, 1861) in which it was announced that Congress would not interfere with slavery in the states and the District of Columbia.[3]

3. E. McPherson, Political History of the Great Rebellion, 64-65.

With such declarations the war began. It was not long, however, before the fact of war over an extended front with a slaveholding region inevitably forced upon the Union government certain practical problems touching slavery and the colored people. One of these was the problem of fugitive slaves finding their way within Union lines. The manner in which the events of war threatened to wrest the slavery problem from Lincoln's hand was illustrated by the action of General Fremont, who published on August 30, 1861, a proclamation instituting martial law throughout the state of Missouri and proclaiming as to all persons resisting the United States that their property was confiscated and their "slaves . . . declared freemen."[4] Lincoln promptly ordered

4. F. Moore, ed., The Rebellion Record, III, 33; see also A. Nevin, Fremont, ch. XXX-XXXI.

Fremont to show leniency as to martial law, allowing no man to be shot without the President's consent, and to modify the order for confiscation and emancipation so as to conform to existing law.[5] Lincoln's policy of not permitting mili-

5. The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, series 1, vol. III, 469-470.

tary commanders to force his hand in the matter of emancipation was again illustrated in May, 1862, when he overruled an order of General David Hunter freeing "persons in . . . Georgia, Florida, and South Carolina - heretofore held as slaves . . . ."[6]

6. Richardson, op. cit., VIII, 3292-3293.

While the President was thus embarrassed by the slavery question, Congress was nibbling at the problem in its own way. In the Confiscation Act of August 6, 1861, it was provided that when slaves were engaged in hostile military service, all owners' claims to the labor of such slaves were forfeited.[7] While the law was vague as to the manner of

7. U. S. Stat. at Large, XII, 319.

forfeiture, yet it marked a step in the early development of

legislative policy touching emancipation. The second Confiscation Act of July 17, 1862, provided that, if anyone committed treason, his slaves were free; as to all persons supporting the "rebellion" it proclaimed that their slaves should be "forever free of their servitude, and not again held as slaves." The delivery of fugitive slaves was prohibited, unless to a loyal owner, and slaves of "rebel" owners coming within Union lines were declared free.[8]

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8. U. S. Stat. at Large, XII, 589; see also Joint Resolution No. 63 enacted the same day, ibid., 627.

Slave-soldiers of enemy ownership, together with their families, were freed by the Militia Act of July 17, 1862.[9]

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9. U. S. Stat. at Large, XII, 597.

Later in the war freedom was also extended to slave-soldiers of "loyal owners" with bounties to the owners.[10] By the

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10. Act of February 24, 1864. U. S. Stat. at Large, XIII, 11.

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act of March 13, 1862, Congress prohibited the use of the military power for the return of fugitive slaves finding their way within Union lines.[11]

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11. U. S. Stat. at Large, XII, 354.

Still other emancipatory measures were passed by Congress. On April 16, 1862, slavery in the District of Columbia was abolished, with compensation to the owners.[12]

12. U. S. Stat. at Large, XII, 376-378.

Another act provided for emancipation in the territories, without compensation.[13]

13. Act of June 19, 1862. U. S. Stat. at Large, XII, 432.

Meanwhile the reverses before Richmond and the formidable power of the Confederacy made Lincoln earnest in his convictions that something must be done in the line of a new policy. Since the slaves were growing the food for the Confederate soldiers and served as laborers in the army service, the President had "about come to the conclusion that it was a military necessity absolutely essential for the slavation of the nation, that he must free the slaves or be ourselves subdued."[14] On July 13, 1862, he opened the subject of

14. James F. Rhodes, op. cit., IV, 69.

emancipation to Seward and Welles. The next day, he asked the Senate and the House to pass a bill authorizing him to pay for slaves in any State that should lawfully abolish

slavery. Congress adjourned three days later without considering any such bill.[15]

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15. Ibid., IV, 70-71.

On July 22, Lincoln read to his cabinet, to the surprise of all, probably, except Seward and Welles, a proclamation of emancipation which he purposed to issue. In it he said that he intended to recommend to Congress, at its next meeting, the adoption of a compensation law. He repeated that the object of the war was the restoration of the Union; "and as a fit and necessary military measure for effecting this object," he declared that on January 1, 1863, all slaves within States wherein the constitutional authority of the United States was not recognized should be thenceforward and forever free. All of the cabinet except Blair gave the policy proposed a full or qualified support. Seward suggested delay, saying in substance: "Mr. President, I approve of the proclamation, but I question the expediency of its issue at this juncture. The depression of the public mind, consequent upon our repeated reverses, is so great that I fear the effect of so important a step. It may be viewed as the last measure of an exhausted government, a cry for help . . . . I suggest, sir, that you postpone its issue until you can give it to the country supported by military success, instead of issuing it, as would be the case

now, upon the greatest disasters of the war."[16] The

16. Nicolay and Hay, op. cit., VI, 125 ff; James F. Rhodes, op. cit., IV, 71-72.

wisdom of Seward's objection struck him with force and he "put the draft of the proclamation aside, waiting for a victory." The secret of this conference was well kept.

The battle of Antietam, September 17, 1862, furnished Lincoln the victory he was waiting for to issue his proclamation of emancipation. On September 22, he read to his Cabinet a second draft of the proclamation. After some modifications this was issued as a preliminary proclamation. On January 1, 1863, he issued the definitive proclamation designating the states and parts of states which were still in rebellion. All persons held as slaves within the designated areas were henceforth free and their freedom would be recognized and maintained by "the Executive Government of the United States, including the military and naval authorities." He then enjoined "upon the people declared to be free to abstain from all violence, unless in necessary self-defense" and recommended that "they labor faithfully for reasonable wages." He further declared that those persons "of suitable condition" would be received in the armed service of the United States "to garrison forts, stations, and other places." In closing he said he believed this act to be one "of justice,

warranted by the Constitution upon military necessity."[17]

17. U. S. Stat. at Large, XII, 1268-1269.

One should note, however, the exceptions in the proclamation itself. The whole state of Tennessee was omitted; none of the Union slave states was included; and there were important exceptions as to portions of Virginia and Louisiana, those being the portions within Union military lines. In fact freedom was decreed only in regions then under Confederate control. "He had proclaimed emancipation," declared the New York World, only where he has notoriously no power to execute it."[18]

18. J. G. Randall, The Civil War and Reconstruction, 491.

Lincoln's action stimulated the emancipation movement among the loyal groups in the various states. In June, 1863, a convention in Missouri, provided for gradual emancipation, but changed its plan to immediate liberation in January, 1865.[19] A convention in Mississippi in 1864

19. Ibid., 508.

declared that slavery should no longer exist in the state and that the ordinance of secession of January, 1861, was null and void. On August 15, a day after the convention

assembled, President Lincoln sent a telegram to the provisional governor urging the delegates to extend the franchise to all negroes who could read and write and to all who owned real estate of a value not less than two hundred and fifty dollars. They did not see fit, however, to accept the recommendation, thus missing an opportunity to set an example for other states.[20]

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20. James F. Rhodes, op. cit., VI, 20.

The convention in South Carolina met September 13, 1864, and repealed the ordinance of secession and declared that "the slaves in South Carolina having been emancipated by the action of the United States authorities," slavery should never be reestablished.[21] A convention in Alabama likewise

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21. Ibid., 21.

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abolished slavery, nullified the ordinance of secession and repudiated all of her war debts.[22] The convention in North

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22. Ibid.

Carolina declared that "the said supposed ordinance of secession is now and at all times hath been null and void." After an animated discussion and the exertion of pressure from

Washington, repudiated her war debt.[23] Georgia unanimously

23. Ibid.

repealed her ordinance of secession and abolished slavery. By a close vote the war debt was repudiated.[24] Tennessee

24. Ibid., 22.

abolished slavery in 1865.[25] Maryland adopted an anti-

25. J. G. Randall, op. cit., 507.

slavery constitution, October 10, 1864. Similar constitutions were adopted by Arkansas, Louisiana, and Missouri.[26]

26. James K. Hosmer, Outcome of the Civil War, 1863-1865, 223.

Under the brightening prospects, military and political, the more constructive spirits in Congress took up anew the suspended question of slavery. The President's reference to the subject in his annual message December 8, 1863, was brief. He merely stated that action for emancipation in the several states not included in the Emancipation Proclamation was encouraging, and that while he did not wish to repeat in detail what he had so earnestly urged heretofore he assured

them that his general views and feelings remained unchanged.[27]

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27. J. G. Nicolay and J. Hay, op. cit., X, 73.

On December 14, 1863, J. M. Ashley, a Republican Representative from Ohio, and James F. Wilson, a Republican Representative from Iowa, introduced the former a bill and the latter a joint resolution to propose to the several states an amendment to the Constitution prohibiting slavery throughout the United States. Both propositions were referred to the judiciary committee, of which Mr. Wilson was chairman; but before he made any report on the subject it had been brought before the Senate, where its discussion attracted public attention.[28]

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28. Ibid., 74.

Senator John B. Henderson introduced into the Senate on January 11, 1864, a joint resolution proposing an amendment to the Constitution that slavery shall not exist in the United States. The resolution went to the judiciary committee, apparently without being treated as a matter of pressing importance. Nearly a month had elapsed when Charles Sumner also introduced a Joint Resolution, proposing an amendment that "everywhere within the limits of the United States, and of each State or Territory thereof, all persons

are equal before the law, so that no person can hold another as a slave." Two days later Lyman Trumbull, chairman of the judiciary committee, reported back a substitute which differed in the phraseology of both Henderson and Sumner:

ARTICLE XIII

> Section 1. Neither slavery nor involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.[29]

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29. Ibid., 75-76.

Trumbull formally opened the debate on the subject on March 28 in an elaborate speech. The discussion was continued from time to time until April 8. As the Republicans had almost complete control of the Senate, their speeches, though eloquent, seemed to indicate a foregone conclusion. Since it was the first example of the use of the amending process to accomplish a specific reform on a nation-wide scale, outside what may be called the strictly constitutional function of determining the composition and functions of government. There were grave doubts as to such use of the Constitution. Some felt that domestic institutions were so thoroughly a matter of state jurisdiction that a change such as the proposed thirteenth amendment should be resisted

as a revolutionary alteration of the basic American federal system. There was also considerable doubt whether the national Constitution could be legally amended during the Civil War; and in this doubt Senator Trumbull himself, when discussing another matter, had shared. The Senate, however, adopted the amendment (April 8, 1864) by a vote of 38 to 6.[30]

30. Cong. Globe, 38th Cong., 1 sess., 1490; J. G. Nicolay and Hay, op. cit., X, 76; J. G. Randall, op. cit., 508. Not only was the whole Republican strength, thirty-six votes, cast in its favor, but two Democrats, Reverdy Johnson of Maryland and James W. Nesmith of Oregon, also voted for it, giving more than the two-thirds required by the Constitution.

When the joint resolution was presented to the House there was such a formidable party strength arrayed against it as to foreshadow its defeat. There were one hundred and two Republicans, seventy-five Democrats, and nine from the border States, leaving but little chance of obtaining the two-thirds majority vote in favor of the measure. Nevertheless there was sufficient Republican strength to secure its discussion. The speeches in opposition all came from Democrats; the speeches in its favor all came from Republicans, except one. Upon the final question of its passage (June 15, 1864) the vote stood: yeas, ninety-three; nays, sixty-five; absent or not voting, twenty-three. Of those voting in favor of the Resolution eighty-seven were Republicans and four were Democrats. Those voting against it were all Democrats.[31]

31. Cong. Globe, 38th Cong., 1 sess., 2995.

When the National Republican Convention met in Baltimore, June 7, 1864, the two most vital thoughts which animated its members were the renomination of Lincoln and the success of the constitutional amendment. The new dogma of political faith was to be found in the third resolution of the platform. Since slavery was the cause and constituted the strength of the rebellion, justice and the national safety demand its complete extirpation from the Republic by an amendment to the Constitution, "to be made by the people."[32]

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32. Nicolay and Hay, op. cit., X, 79-80.

This and other declarations of the platform of the Republic party gained an overwhelming victory--a popular majority of 411,281, an electoral majority of 191, and a House of Representatives of 138 Unionists to 35 Democrats.[33] In

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33. Ibid.

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view of this result the President was able to take up the question with confidence and in his message to Congress, December 6, 1864, he urged upon the members whose terms were about to expire the propriety of at once carrying into effect the clearly expressed popular will. Said he:

> At the last session of Congress a proposed amendment of the Constitution, abolishing slavery throughout the United

> States, passed the Senate, but failed, for lack of the requisite two-thirds vote, in the House of Representatives. Although the present is the same Congress, and nearly the same members, and without questioning the wisdom of patriotism of those who stood in opposition, I venture to recommend the reconsideration and passage of the measure at the present session. . . . It is not claimed that the election has imposed a duty on Members to change their views or their votes any further than, as an additional element to be considered, their judgment may be affected by it. It is the voice of the people, now for the first time heard upon the question. In a great National crisis like ours unanimity of action among those seeking a common end is very desirable--almost indispensable.[34]

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34. Ibid., 80-81.

On January 6, 1865, Ashley called up the constitutional amendment for reconsideration. As at the previous session, the Republicans all favored, while the Democrats mostly opposed it. Thirteen Democrats, however, joined the four who had supported the amendment at the first session. The issue was decided on January 31, 1865. The final vote showed, yeas, 119; nays, 56; not voting, 8.[35]

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35. Cong. Globe, 38th Cong., 1 sess., 531; Nicolay and Hay, op. cit., X, 83-85.

Widely divergent views were expressed by able constitutional lawyers in both branches of Congress as to what would constitute a valid ratification of the Thirteenth Amendment.

Of the thirty-six states in 1865, three-fourths of which were necessary for ratification, more than one-fourth (eleven) had been seceded states of the Confederacy, while two of the Union states, Delaware and Kentucky, refused to ratify. It was thus necessary to include some of the seceded states in order to obtain ratification. Therefore, some contended that ratification by three-fourths of the loyal states would be sufficient, others that three-fourths of all the states, whether loyal or insurrectionary, would be necessary. On December 18, 1865, Secretary of State Seward proclaimed officially that the legislatures of twenty-seven states constituting three-fourths of the thirty-six states of the Union, had ratified the amendment, and that it had become valid as a part of the Constitution of the United States. It should be noted that Virginia, Louisiana, Tennessee, and Arkansas, whose reconstruction had been effected under Lincoln's authority, were among the twenty-seven states. That the Southern states should be considered competent to ratify the Thirteenth Amendment, and yet be rejected by Congress and not considered States in the Union, is but one of the many anomalies of reconstruction.[36]

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36. Nicolay and Hay, op. cit., X, 88-89; J. G. Randall, op. cit., 508-509.

CHAPTER IV

THE FREEDMEN

The necessity of direct aid for the freedmen was something that could not easily be overlooked. The power of the national government had been used to free the slaves; hence the Negroes, now that they were free, had become in a sense the wards of the nation. The freedmen themselves were by no means unaware of this obligation. Just as their masters had cared for them in the past, so now they expected the national government to look after them. That Congress was ready to accept such responsibility, at least for a time, was shown by the passage on March 3, 1865, of an act creating the Freedmen's Bureau. This organization, which was to last for a year after the close of the war, was to be set up in the War Department under a commissioner appointed by the President, and an assistant commissioner for each of the insurrectionary states. It was authorized to distribute "such issues of provisions, clothing, and fuel" as might be necessary to relieve the "destitute and suffering refugees and freedmen and their wives and children." It had also the right to take over any land within the designated states that had been abandoned by its owners or confiscated by the United States, and to distribute it in tracts of forty acres or less, on a three-year rental basis, to "loyal refugees

and freedmen."[1]

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1. U. S. Stat. at Large, XIII, 507 ff.

Under the leadership of General Oliver O. Howard, the able commander of the army in Tennessee, the Freedmen's Bureau went promptly to work. Its agents soon penetrated to every portion of the South, and were kept busy, for a time, distributing the bare necessities of life to hundreds of thousands of needy, white as well as black. In the social readjustment in the South, as well as in the shaping of public opinion in the North, the Freedmen's Bureau assumed a conspicuous place. Among its diversified functions it gave medical assistance to more than a million people; it established hospitals and dispensaries; it allotted abandoned land and land purchased for that purpose to freedmen; it supervised the building and operation of schools; it exercised jurisdiction over questions of dispute between whites and blacks; and it took cognizance of all questions affecting the labor of freedmen.[2]

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2. Paul S. Pierce, The Freedmen's Bureau is the best historical study of this subject.

Among the chief activities of the Bureau was the administration of justice in cases concerning negroes. In order to safeguard the rights of the negroes the Bureau was

given authority to establish courts of its own and to supervise the action of state courts in cases to which freedmen were parties. The majority of the assistant commissioners made no attempt to let the state courts handle negro cases but were accustomed to bring all such cases before the Bureau or the provost courts of the army. In Alabama, quite early, and later in North Carolina, Mississippi, and Georgia, the wiser assistant commissioners arranged for the state courts to handle freedmen's cases with the understanding that discriminating laws were to be suspended. The Bureau courts were informal affairs, consisting usually of one or two administrative officers. There was no jury. There were no rules of procedure, no accepted body of law, and no appeal beyond the assistant commissioner. In state courts accepted by the Bureau the proceedings in negro cases were conducted in the same manner as for the whites.[3]

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3. Walter L. Fleming, op. cit., 107, 110-111.

The intense dislike which the Southern whites manifested for the Freedmen's Bureau was due in general to their resentment of control by Northerners and negroes. Among the concrete causes of Southern hostility was the attitude of some of the higher officials and many of the lower ones toward the white people. They assumed that the whites were unwilling to accord fair treatment to the negroes in the matter of wages,

schools, and especially justice. The Bureau courts were frequently conducted in an "illegal and oppressive manner," with decided partiality for the colored people, "without regard to justice." For this reason they were suspended for a time in Louisiana and Georgia and cases were then sent before military courts. Men of the highest character were dragged before the Bureau tribunals upon frivolous complaints, were lectured, abused, and arbitrarily fined or otherwise punished. The jurisdiction of the Bureau courts weakened the civil courts and their frequent interference in trivial matters was not conducive to a return to normal conditions.[4]

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4. Ibid., 112-114.

The negroes at the close of the war were not slaves or serfs, nor were they citizens. What was to be done with them and for them? The Southern answer to this question may be found in the "Black Codes" which were enacted by the state governments set up by President Johnson. The views of the North may be discerned in part in the organization and administration of the Freedmen's Bureau. The two sections saw the same problem from different angles and their proposed solutions were of necessity opposed in principle and in practice.

It was the desire of the South to fit the freedmen into the new social order by frankly recognizing his inferiority

to the whites. The masses of slaves were ignorant, poor, lacking in the sagacity which their new status demanded, and in many cases intoxicated by the opportunity to be "free as a bird," "free as a fool." Vagrancy and lack of responsibility among many of the negroes proved a trying factor. Carl Schurz described their crowing around the military posts, their carousals, their religious paroxisms, and their straying from the plantations "just at the time when their labor was most needed to secure the crops of the season."[5]

5. Carl Schurz, Reminiscences, III, 175.

Many became vagabonds, wandering from camp to camp and becoming unmanageable. They manifested a tendency to congregate in cities and towns. In Alabama, for example, such counties as Mobile, Montgomery, and Dallas (containing the city of Selma) showed marked increase in the black population, with proportionate decrease in the rural counties.[6] Leaving

6. Appleton's Annual Cyclopedia, 1866, 12-13.

home without resources, unused to any notion of labor contracts, the freedmen were tossed about, suffering heavy mortality, and in some cases committing serious crimes.

The "Black Codes" varied in harshness: those of Georgia, for example, were notably lenient; those of Louisiana, South

Carolina and Mississippi severe. Since it is impossible to summarize the laws for all the states, South Carolina and Mississippi will be taken as examples. In 1865, the legislature of Mississippi passed a number of acts which have become known as the Mississippi "Black Code." One of these was an act to regulate the relation of master and apprentice, as it related to freedmen, free negroes, and mulattoes. The act made it the duty of the civil officers to report to the probate courts of their respective counties, semi-annually, all negroes, under eighteen years of age who were orphans, or who were without means of support, and the court was required to apprentice them. Masters were empowered to inflict moderate punishment for misbehavior. They were entitled to judicial remedy for recovery of run away apprentices, and it was made a penal offence to entice or persuade apprentices to run away.[7]

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7. James W. Garner, Reconstruction in Mississippi, 113.

An act to prevent vagrancy provided that all freedmen in the state over the age of eighteen years, found on the second Monday of January, 1866, or thereafter, with no lawful employment or business, or found unlawfully assembling themselves together either in the day or night time, together with all white persons so assembling with them on terms of equality were to be deemed vagrants, and upon conviction should be fined in case of a negro, not exceeding $50, and

in case of a white man, not exceeding $200, and in addition, be imprisoned, at the discretion of the court, not exceeding ten days for the negro, and six months for the white man. Jurisdiction was conferred on all justices of the peace, mayors, and aldermen to try offenders against the law without a jury. Upon the failure of the convicted party, if a negro, to pay within five days the fine imposed upon him, the sheriff was to hire him out for a sum equal to the amount of the fine. If the negro could not be hired out, he was to be treated as a pauper. It was made the duty of the Board of Police in every county to levy a poll-tax not exceeding $1 on each negro between the age of eighteen and sixty, the sum to constitute a freedmen's pauper fund to be expended exclusively for the colored poor. Failure to pay the tax was to be deemed evidence of vagrancy, and it was made the duty of the sheriff to arrest the offender and hire him out for the amount of the tax plus the costs.[8]

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8. Ibid., 114.

An act to confer civil rights on the freedmen gave them the right to sue and be sued, to implead and be impleaded in all the courts of law and equity of the state, to acquire and hold personal property and dispose of it as white persons, but it was expressly provided that they could not rent or lease land except in incorporated towns or cities where the corporate authorities were empowered to control the privilege.

They were given the right to marry in the same manner, and under the same regulations as white persons, provided that the clerk should keep a separate record of their marriages. All negroes who had cohabited together, as husband and wife, were to be held as legally married, and their issue as legitimate. Intermarriage between whites and negroes was punishable by life imprisonment in the penitentiary. The right to testify in the courts was granted freedmen, but only in cases in which they were a party, either as plaintiff or defendant, and in all cases their testimony was to be made subject to the rules of the common law as to competency and credibility.

All contracts with freedmen, for labor for a longer period of time than one month, were required to be made in writing. Civil officers were required to arrest freedmen who should run away from their contracts, and carry them back to the place of employment. Attempts to persuade freedmen to quit the service of their employers were punishable by a heavy fine. Another act prohibited them from carrying firearms, dirks, or knives. For disturbing the peace by engaging in riots, practicing cruelty to animals, making seditious speeches, using insulting language or gestures, or for exercising the functions of a minister without a license from a regularly organized church, a fine of not less than ten or more than a hundred dollars was imposed, and the offender was liable to imprisonment not exceeding thirty days.

The legislature reenacted all the penal and criminal laws applying to slaves, except so far as the mode and manner of trial and punishment had been altered by law.[9]

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9. Ibid., 115-116.

At its special session of September, 1865, the South Carolina legislature enacted its "black code" designed to regulate the status of the freedmen. "Persons of color" were defined as those individuals possessing more than one-eighth negro blood. Other persons were deemed white. Colored persons were to be allowed to acquire property, sue and be sued, receive the protection of the law in person and property, and testify in cases in which they were involved, and enter into marriage contracts. Their children were given the status of legitimacy. Owners of plantations were not to be allowed to evict colored persons from their property prior to January 1, 1867. They were to be supported by their relations or by fines and poll taxes imposed on the able-bodied of their race.

On the other hand a series of restrictions attempted to assign colored persons to a position of inferiority. Intermarriage between the races was prohibited. Unless license to do so, no colored person was to be allowed to follow any employment--on his own account--except that of farmer or servant. Those licensed to engage in other employments were required to prove their fitness and to pay an annual tax

ranging from ten to one hundred dollars. Under no circumstances were colored persons to engage in the manufacture or sale of liquors. Colored persons entering the state were to be required to give bonds guaranteeing their good behavior. Capital punishment was provided for colored persons guilty of wilful homicide, raising an insurrection, stealing a horse, a mule, or baled cotton, and house-breaking. For crimes not demanding death, they might be confined at hard labor, whipped, or transported. Colored persons were not to sell farm produce without a written permit, were not to be members of the militia, keep any weapon, or hire to another person when already engaged.

Regulations regarding labor contracts were prescribed. Colored servants must work from sun to sun with reasonable intervals for meals, be quiet at night, and not leave the premises without the master's permission. They could be discharged for cause and have their wages forfeited when departing from the service of their masters. Contracts for labor were enforceable through appropriate penalties by public magistrates. The servants, on the other hand, were given certain rights. Their wages and period of service must be specified in writing, and they were protected against "unreasonable" tasks, Sunday and night work, and inadequate food.

The master was required to teach the apprentice a trade, furnish wholesome food, and if there was an approved school

within convenient distance, send him there at least weeks in every year after he became ten years of age. At the expiration of his term of service, the apprentice was to receive from his master as much as sixty dollars.

A special court was to be created in each district to administer the law in respect to persons of color. The petit juries of these courts were to consist of only six men. Public order was to be secured by the organization of militia regiments.[10]

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10. Francis B. Simkins and Robert H. Woody, South Carolina During Reconstruction, 48-51.

The definition of civil rights, of access to the courts, and of criminal liability, constituted an important feature of the "Black Codes." In all States the freedman was given his day in court, and in cases relating to negroes his testimony was accepted; in six States he might testify in any case. From the Southern point of view none of this legislation was regarded as a restriction of negro rights but as a white extension to the negro of rights never before possessed. But the great fault of the southern law-makers was the fact that, when legislating as a conquered people, they failed adequately to consider and be guided by the prejudices of their conquerors. Sagacious Southerners warned the legislators that some of their acts would produce a dangerous

effect in the North.[11]

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11. James W. Garner, Reconstruction in Mississippi, 116; W. L. Fleming, Civil War and Reconstruction in Alabama, 378.

The "Black Codes" aroused violent opposition in the North. "We tell the white men of Mississippi," said the Chicago Tribune, December 1, 1865, "that the men of the North will convert the State of Mississippi into a frog pond before they will allow any such laws to disgrace one foot of soil in which the bones of our soldiers sleep and over which the flag of freedom waves."[12]

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12. Paul L. Haworth, Reconstruction and Union, 17.

Had the South assisted in a skillful and adequate publicity, much disastrous misunderstanding might have been avoided. The North knew as little of the South as the South did of the North. Able newspaper correspondents like Sidney Andrews of the Boston Advertiser and the Chicago Tribune, who opposed President Johnson's policies, Thomas W. Knox of the New York Herald, Whitelaw Reid, who wrote for several papers and tried cotton planting in Louisiana, and John T. Trowbridge, New England author and journalist, were dispatched southwards. Chief of the President's investigators were General Carl Schurz, German revolutionist, Federal soldier,

and soon to be radical Republican, who held harsh views of the Southern people; and there were besides General Grant, Harvey M. Watterson, Kentucky Democrat and Unionist; Benjamin C. Truman, New England journalist and soldier, whose long report was perhaps the best of all, and Chief Justice Chase, who was thinking mainly of "How soon can the negro vote?"[13]

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13. W. L. Fleming, The Sequel to Appomattox, 27-28.

Few in the South realized the importance of supplying the North with correct information about actual conditions.

On December 19, 1865, in response to a request for information two reports were sent by President Johnson to the Senate: one was General Grant's which was thereafter frequently appealed to by the supporters of Johnson and the other was Carl Schurz's, an important document for those who opposed the President's policy. After a three-months tour in South Carolina, Georgia, Alabama, Mississippi and Louisiana, Carl Schurz wrote: "the generosity and toleration shown by the Government . . . has facilitated the re-establishment of the forms of civil government and led many of those who had been active in the rebellion to take part in the act of bringing back the States to the constitutional relations . . . There is at present no danger of another insurrection against the authority of the United States on a large scale." But when Schurz discussed "the moral value of these results" he

furnished food for the Republicans who believed that more rigorous conditions than those imposed by the President should be exacted from the late Confederate States. "Treason does, under existing circumstances, not appear odious in the South," he wrote. "The people are not impressed with any sense of its criminality. And there is yet among the southern people an utter absence of national feeling." Their submission and loyalty "springs from necessity and calculation." "Although they regret the abolition of slavery they certainly do not intend to re-establish it in its old form. . . . But while accepting the 'abolition of slavery' they think that some species of serfdom, peonage, or other form of compulsory labor is not slavery and may be introduced without a violation of their pledge. Although formally admitting negro testimony they think that negro testimony will be taken practically for what they themselves consider it 'worth'." For their protection Schurz thought "the extension of the franchise to the colored people" necessary; and as the masses at the South were "strongly opposed to colored suffrage," the only manner in which they could be induced to grant it was to make it "a condition precedent to readmission."[14]

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14. Sen. Ex. Doc. No. 2, 39th Cong., 1 sess. 13, 35, 43, 44.

To counteract the influence of Schurz's report, Johnson sent with it a brief report by General Grant of impressions

gained on a short tour through some of the Southern states in November, 1865. Grant's ideas went wholly to support the President's policy. "I am satisfied," he wrote, "that the mass of thinking men of the South accept the present situation of affairs in good faith. . . . Slavery and the right of a State to secede, they regard as having been settled forever by the highest tribunal, arms, that man can resort to." Leading men not only accept the decision as final but believe it "a fortunate one for the whole country. . . . The citizens of the Southern States are anxious to return to self-government within the Union as soon as possible; while reconstructing they want and require protection from the Government; they are in earnest in wishing to do what is required by the Government, not humiliating to them as citizens, and if such a course was pointed out they would pursue it in good faith."[15]

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15. Cong. Globe, 39th Cong., 1st sess., 78.

Thus the question was fairly before Congress and the country. The main body of Republican senators and representatives may be looked upon as the jury with Johnson the advocate on one side and Stevens and Sumner on the other. James F. Rhodes believes that from all the evidence it is impossible to resist the conclusion that from the assembling of Congress in December, 1865 to the veto of the Freedmen's Bureau Bill

on February 19, 1866 the majority of Republican senators and representatives were nearer to the President's view than to that of Sumner or of Stevens.[16]

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16. James F. Rhodes, History of the United States, VI, 39.

A caucus of the Republican members of the House was held on December 2, 1865. Thaddeus Stevens, by tacit consent, assumed the leadership and submitted the following plan to the caucus: (1) to claim the whole question of reconstruction as the exclusive business of Congress; (2) to regard the steps that had already been taken by the President for the restoration of the Confederate States as only provisional, and, therefore, subject to revision or reversal by Congress; (3) each House to forego the exercise of its function of judging of the election and qualifications of its own members in case of those elected by the Southern States. This plan was accepted without objection. The caucus also directed the clerk of the House to omit from the roll all members from the Southern States and ordered that a joint resolution for the appointment of a joint committee of fifteen be introduced. This committee was "to inquire into the conditions of the States which formed the so-called Confederate States of America, and report whether they or any of them are entitled to be represented in either House of Congress," and providing that "until such report be made and acted upon by Congress

no member from such States be received into either House."[17]

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17. D. M. DeWitt, The Trial and Impeachment of Andrew Johnson, 27-28; H. E. Flack, Adoption of the Fourteenth Amendment, 11-12.

Congress assembled in December, 1865 and on January 5, 1866, Senator Lyman Trumbull introduced a bill to enlarge the powers of the Freedmen's Bureau. It will be remembered that the first Freedmen's Bureau Bill had been enacted March 3, 1865, and was to expire one year after the termination of hostilities. The new bill was referred to the Judiciary Committee of the Senate, of which Trumbull was chairman, from which it was reported back six days later. The bill, as reported from the committee by Trumbull, consisted of eight sections, the seventh and eighth of which are important to us. The seventh section declared it to be the duty of the President to extend military protection and jurisdiction over all cases where any of the civil rights or immunities belonging to white persons are refused or denied, in consequences of local law, customs, or prejudice, because of race, color, or previous condition of servitude, or where different punishments or penalties are inflicted than are prescribed for white persons committing like offenses. Civil rights or immunities included the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, sell, hold and convey real and personal property, and to have the full

and equal benefit of all laws and proceedings for the security of person and estate.

The eighth section made it a misdemeanor, punishable by a fine of $1000, or imprisonment for one year, or both, for any one to deprive another of any of the rights enumerated in the preceding section because of race, color, or previous condition of servitude. These two sections of the bill were only to apply to those States or districts in which the ordinary course of judicial proceedings had been interrupted by the war. The officers and agents of the Bureau were to hear and determine all offenses committed against the provisions of this section, as well as all cases where there was discrimination because of race or color, under such rules and regulations as the President, through the War Department, might prescribe.[18]

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18. Cong. Globe, 39th Cong., 1st sess., 209-210.

There was considerable doubt as to its constitutionality. Besides providing for military courts, the bill took from the States matters which the States and local communities had up to that time entirely controlled, for never before had the Federal Government interfered or attempted to interfere with the rights of the States to determine who should be qualified to make and enforce contracts, sue and be sued, give testimony, inherit, etc.

Thomas A. Hendricks of Indiana contended that the laws

of Indiana, which did not permit negroes to acquire real estate, make contracts, or to intermarry with whites, would virtually be annulled by the bill, since they were civil rights. He also regarded the right to sit on a jury as a civil right.[19] Trumbull replied that the provisions of the

19. Ibid., 318.

bill which would interfere with the laws of Indiana could have no operation there, since the ordinary course of judicial proceedings had not been interrupted. He denied that the bill interfered with the laws against the amalgamation of the races, since they equally forbade the white man to marry a negro. He further declared that it was incumbent upon Congress to secure this protection if the State would not. He also stated that while the Freedmen's Bureau Bill was to be temporary, the Civil Rights Bill, which was then before Congress, was intended to be permanent and to extend to all parts of the country.[20]

20. Ibid., 321-323.

Senator Henry Wilson, of Massachusetts, pointed to the fact that the laws of many of the Southern States were inconsistent with freedom, and that the Civil Rights Bill was to annul the black codes and put all under the protection of

equal laws.[21] Senator Garrett Davis, of Kentucky, also

21. Ibid., 340.

held that the bill was unconstitutional in that it invested the bureau with judicial powers, these powers to be exercised by army officers, and that it deprived the citizen of his right to trial by jury in civil cases contrary to the Seventh Amendment to the Constitution.[22]

22. Ibid., 415-419; also 399-400.

The bill was passed in the Senate, January 25, 1866, by a vote of 37 to 10, the vote being strictly partisan. Every Republican voted for it and every Democrat against it. There were three absentees when the vote was taken.[23]

23. Ibid., 421.

The bill was then sent to the House where it was debated at considerable length. J. L. Dawson, of Pennsylvania, in opposing the bill, stated that he regarded the privileges or rights secured by the Fourth, Fifth and Sixth Amendments as the birthright of every American. He asserted that the Radicals held that both races were equal, socially and politically, and that this involved the same rights and privileges at

hotels, in railway cars, in churches, in schools, the same right to hold office, to sit on juries, to vote, to preside over courts, etc.[24] While this interpretation probably

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24. Ibid., 541.

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could not be given to the bill itself, it shows what some of the minority thought and felt to be the inevitable result of the doctrines enunciated by the radical leaders.

M. C. Kerr, of Indiana, and S. M. Marshall, of Illinois, were of the opinion that the Thirteenth Amendment did not authorize the bill. Marshall asserted that if the bill were carried out, it would be in the power of the Federal Government to establish military tribunals in every State where there was discrimination against negroes. He regarded the right to sit on juries, to marry, and to vote as civil rights which could not be denied because of race or color.[25] S. W.

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25. Ibid., 623, 628-629.

Moulton held that the right to sit on juries and the right to marry were not civil rights. A. Thornton of the same State thought otherwise.[26]

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26. Ibid., 632.

The bill passed the House February 6, 1866, by a vote

of 136 to 33--only one Republican (from Missouri) voting in the negative.[27]

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27. Ibid., 688.

On February 19, the President returned the bill to the Senate with a veto message. He thought it not only inconsistent with the public welfare and unconstitutional in certain provisions, but also obnoxious in that it did not define the civil rights and immunities to be secured to the freedmen by it. Among other things he declared:

> I share with Congress the strongest desire to secure to the freedmen the full enjoyment of their freedom and property, and their entire independence and equality in making contracts for their labor; but the bill before me contains provisions which in my opinion, are not warranted by the Constitution, and are not well suited to accomplish the end in view. . . . In those eleven States, the bill subjects any white person who may be charged with depriving a freedman of 'any civil rights or immunities belonging to white persons' to imprisonment, or fine, or both, without, however, defining the 'civil rights and immunities' which are thus to be secured to the freedmen by military law. . . .
>
> The trials, having their origin under this bill are to take place without the intervention of a jury, and without any fixed rules of law or evidence. The rules on which offenses are to be heard and determined by the numerous agents are such rules and regulations as the President, through the War Department shall prescribe.

> No previous presentment is required, nor any indictment charging the commission of a crime against the laws; but the trial must proceed on charges and specifications. The punishment will be--not what the law declares, but such as a court-martial may think proper; and from these arbitrary tribunals there lies no appeal, no writ of error to any of the courts in which the Constitution of the United States vests exclusively the judicial power of the country."

This system of military jurisdiction, he said, could not be reconciled with the Fifth and Sixth Amendments to the Constitution of the United States.[28]

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28. James D. Richardson, Messages and Papers of the Presidents, VI, 398.

Garrett Davis and Lyman Trumbull were the only two Senators who spoke on the veto. Davis, in supporting the veto, declared that the intermarriage of the races, commingling in hotels, theatres, steamboats, and other civil rights and privileges, had always been denied the free negroes, until Massachusetts had recently granted them.[29] Trumbull spoke

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29. Cong. Globe, 39th Cong., 1st sess., 936.

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at length in opposition to the veto, but never denied or questioned the contention of Davis.

The veto was sustained February 20, the vote being 30 to

18 in favor of the bill, not two-thirds. Eight Republicans joined the Democrats in support of the President. Two Senators were absent.[30]

30. Ibid., 943.

The veto of this bill inaugurated the open warfare between the Radicals and President Johnson. On July 16, a supplementary Freedmen's Bureau Act was passed over the President's veto.[31] His second veto was so strong, however, that

31. Richardson, op. cit., VIII, 3620-3624.

party discipline was necessary to keep it from being sustained, as it could not have been sustained on its merits. So bitter was the fight against the President at the time both Houses passed the bill over the veto on the same day that it was received, without debate in the House and with two speeches in the Senate. "It required potent persuasion," wrote James G. Blaine, "reinforced by the severest party discipline, to prevent a serious break in both Houses against the bill."[32]

32. James G. Blaine, Twenty Years of Congress, II, 171.

CHAPTER V

THE CIVIL RIGHTS BILL IN CONGRESS

On January 5, 1866, the same day that Lyman Trumbull introduced the Freedmen's Bureau Bill in the Senate, he also introduced a bill "to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication."[1] The first section of the Civil Rights Bill

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1. Cong. Globe, 39th Cong., 1st sess., 211, 474 et seq.

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was almost identical with section 14 of the Freedman's Bureau Bill as finally adopted. The first section was in fact the basis of the whole bill, the other sections merely providing the machinery for its enforcement.

Section one declared that there shall be "no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same 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 to full and equal benefits of all laws and

proceedings for the security of persons and property, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." It was subsequently added (January 19) that all persons born in the United States, and not subject to any foreign power, Indians not taxed being excluded, were citizens of the United States. The purpose of this clause was to make it clear that negroes were citizens of the United States, and so avoid the consequences of the Dred Scott decision. This is the only notable difference between the provisions of this section of the Civil Rights Bill and those of the Freedmen's Bureau Bill.

Other sections of the bill provided that any person who under any law, statute, or regulation of any kind should attempt to violate the provisions of the act would be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year. Very stringent provisions were made, and a whole framework of administration devised, by which the rights conferred under the act could be enforced through "the judicial power of the United States." The district attorneys, marshals, deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, the officers and agents of the Freedmen's Bureau, and every other officer who was sufficiently empowered by the President of the United States were, by the act, specially authorized and required, at the

expense of the United States, to institute proceedings against every person who should violate its provisions, and "cause him or them to be arrested and imprisoned for trial at such court of the United States or territorial court as, by the act, has cognizance of the case."

On January 11, Senator Trumbull reported from the Senate Judiciary Committee his Civil Rights Bill, giving a clear exposition of its provisions.[2] Consideration of the

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2. Cong. Globe, 39th Cong., 1st sess., 474-476.

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bill began on January 20, on an amendment proposed by Trumbull which declared persons native to the United States, excluding Indians not taxed, "citizens," and there should be no discrimination in civil rights or immunities among the inhabitants of any state or territory on account of race, color, or previous condition of slavery. The question was not merely whether this provision was just, but whether Congress had power under the Constitution to pass laws for the ordinary administration of justice in the states. On this point Trumbull said:

> Under the constitutional amendment which we have now adopted, and which declares that slavery shall no longer exist, and which authorizes Congress by appropriate legislation to carry this provision into effect, I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view,

> secure freedom to all people in the United States. The various state laws to which I have referred,--and there are many others--although they do not make a man an absolute slave, yet deprive him of the rights of a freeman; and it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins, but a law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman. A law that does not allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void.[3]

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3. Ibid., 475.

He was candid enough, however, to state, without being questioned, that the bill might be assailed on the ground that it gave to the Federal Government powers which properly belonged to the States, though he did not think it open to that objection, since it would have no operation in any State where the laws were equal.

In answer to the query of what was meant by the term "civil rights," he replied that the first section of the bill defined it, and that it did not undertake to confer any political rights. It seems evident, however, that the term "civil rights" was meant to include more than the specific rights enumerated in the first section of the bill, for Trumbull had, a few minutes before, declared that the right to travel, to teach, to preach, etc., were rights which

belonged to all, and that the bill was to secure them to all.

Senator Willard Saulsbury, of Delaware, took a decided stand against the whole measure, contending that it was not only unconstitutional, but that it was subversive of the true theory of the Federal system. He declared that the Thirteenth Amendment of the Constitution had given no power to Congress to confer upon free negroes rights and privileges which had not been conceded to them by the states where they resided. He said that in Maryland about one-half of the colored population was free before the Thirteenth Amendment was adopted, that in Delaware the free negroes largely outnumbered the slaves, and that in Kentucky the free negroes were a large part of the population. All that the Thirteenth Amendment did was to put the slave population on the same footing on which the free negroes already stood. Congress had no power to legislate on the status of free negroes in the several States before the Civil War. But the powers of Congress in this respect had not been enlarged by anything in the Thirteenth Amendment. That amendment had merely said that the condition of slavery--the condition in which one man belongs to another, which gives that other the right to appropriate the profits of his labor to his own use and to control his person--should no longer exist. Those who voted for the amendment might have contemplated a larger exercise of power by Congress than mere emancipation, but they did

not avow it on the floor of the Senate when the measure was pending. In his opinion suffrage was a civil right and would, therefore, be conferred on negroes by the bill. The bill, if enacted into law, would deprive the States of their police power, and would nullify the laws of his State which forbade negroes to keep fire-arms or ammunition. The right to keep and bear arms is recognized in the national Constitution, but only to the extent of saying that the Federal Government could not deny the right, and not at all limiting the power of the States to determine who might exercise that right.[4]

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4. Ibid., 476-478.

Senator Peter G. Van Winkle, a Unionist, of West Virginia, thought that the scope of the bill was wider than its framers realized. He contended that negroes were not citizens of the United States and could not be made such by act of Congress, or by anything short of constitutional amendment. He was opposed to the introduction of inferior races into the ranks of citizenship, but if the Constitution should be amended so as to introduce negroes, Indians, Chinese, and other alien races to citizenship, he would endeavor to do his duty toward them by recognizing them as citizens in every respect. He contended further that the Amendment abolishing slavery was not intended to revolutionize the laws of the States, nor

was it pretended that it did more than sever the bonds that bound the slave to his former master.[5]

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5. Ibid., 497.

Senator Edgar Cowan, Republican, of Pennsylvania, held that the second clause of the Thirteenth Amendment of the Constitution was limited to the breaking of the bond by which the negro slave was held to his master. It was not intended to revolutionize all of the laws of the various states. But, he said, the bill under consideration would not only repeal statutes of Pennsylvania, but would subject the judges of her courts to criminal prosecution, for enforcing her own laws. He asserted that he was willing to vote for an amendment to the Constitution giving Congress the power to secure to all men of every race, color, and condition their natural rights to life, liberty, and property. He concluded by arguing that Congress ought not to enact laws affecting the Southern States so radically, when they were not represented in Congress.[6]

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6. Ibid., 499-500.

Senator Jacob M. Howard, of Michigan, supported the bill in a forceful speech from the humanitarian point of view, but did not dwell upon the constitutional question, except to affirm that he, as a member of the Judiciary Committee

which had reported the Thirteenth Amendment, had intended, by the second clause thereof, to empower Congress to enact such measures as the pending Civil Rights Bill. He said that the members of the Judiciary Committee easily foresaw what efforts would be made by the Southern States to deprive the freedmen of their rights and privileges, and that it was the purpose of the Amendment to give Congress the power to forestall or annul those efforts.[7]

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7. Ibid., 503.

Reverdy Johnson, of Maryland, who was probably the best constitutional lawyer in the 39th Congress, believed that the bill was unconstitutional. He thought that it would nullify state laws against miscegenation, though he did not think the framers of it intended to do this. He suggested that the bill should be made so plain as to obviate this difficulty.[8]

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8. Ibid., 505.

Garrett Davis, of Kentucky, seemed to think that, if the bill became law, suffrage would be conferred on the negroes, that miscegenation could not be prohibited by state law, and that a despotic central government would be created. He characterized the bill as "outrageous," "unconstitutional," "iniquitous," "most monstrous," and "abominable." He contended that negroes could not be made citizens of the

United States under the power granted to Congress to pass naturalization laws, since naturalization applied only to foreigners. Negroes born in this country were not foreigners.[9]

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9. Ibid., 595-599.

Lot M. Morill, of Maine, spoke in favor of the bill. He thought that the bill was important as a definition. "It defines him (the negro) to be a man and only a man in American politics and in American law; it puts him on the plane of manhood; it brings him within the pale of the Constitution."[10]

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10. Ibid., 571.

James Guthrie, of Kentucky, said that the bill under consideration attempted to repeal state laws and to enact new laws for them, the enforcement of which was put in new hands. He denied that the people had intended by the Thirteenth Amendment to turn over the state governments and subject them to the dominion of Congress.[11]

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11. Ibid., 600-601

John B. Henderson, of Missouri, said it would not

necessarily follow that State laws would be abrogated, since the States would still have the power to declare who were competent to make contracts, etc., just as they did in regard to minors.[12] He seems to have been in error here,

12. Ibid., 572-574.

for in the same section of the bill it was stated that the right to make contracts, to buy, to sell, etc., could not be denied because of race or color. There might be educational or age requirements, but such requirements would have to apply to all.

Some of the Senators from California, Oregon, Minnesota and other Western States, wanted the first clause so amended as not to make Indians citizens, saying that the state laws which made it an indictable offense for a white man to sell arms or ammunition or intoxicating liquors to Indians, would be nullified, since it could properly be held that the Indians, if declared to be citizens, would have the same right to buy, sell, and use that kind of property as any other citizen.[13]

13. Ibid., 526, 572-573.

Before the final vote was taken, Senator Saulsbury offered an amendment inserting the words "except the right

to vote in the States" after the words "civil rights." He contended that suffrage was a civil right. The amendment was rejected, however, by a vote of 39 to 7.[14]

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14. Ibid., 606.

The bill was passed by the Senate, February 2, 1866, by a vote of 33 to 12, five being absent. Among the negative votes were those of three Republicans, Cowan, Van Winkle, and Norton.[15]

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15. Ibid., 607.

The bill immediately went to the House, and on March 1 that body proceeded to consider it without reference to the Judiciary Committee. James F. Wilson, of Iowa, chairman of that committee, said they had considered it informally, and in order to save time it was brought up for action at once. It was not the object of the bill, he said, to establish new rights, but to protect and enforce those which already belonged to every citizen. It did not mean that all citizens should have the right to sit on juries, or that their children should attend the same schools, for these were not civil rights or immunities. He regarded civil rights as synonymous with natural rights. As to the clause declaring who should be citizens of the United States, he said that

this was but declaratory of what was already the law, holding that all free persons born in the United States were citizens thereof.[16]

16. Ibid., 1115-1118.

A. J. Rogers, of New Jersey, opposed the whole measure. If Congress had the power to interfere with the state laws, regulating schools and marriage, it equally had the power, he contended, to confer the elective franchise.[17]

17. Ibid., 1120-1123.

M. Russell Thayer, of Pennsylvania, made an able speech in its favor. He declared that the bill could not be construed to confer suffrage, suffrage being a political, and not a civil, right, and that the enumeration of the rights to be secured precluded the possibility of extending the meaning of the general words beyond the particulars enumerated. The first clause of the Civil Rights Bill only reiterated what was already law, he contended, and that if this was not the case, that Congress had the power, under the naturalization clause of the Constitution, to declare who were citizens.[18]

18. Ibid., 1151-1153.

Charles A. Eldridge, of Wisconsin, presented the objections entertained by the Democrats to such legislation. Among other things, he said, that the bill not only proposed to regulate the police and municipal affairs of the States, but that it attempted to prostrate the judiciary of the States, and that it was designed to accumulate and centralize power in the Federal Government.[19]

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19. Ibid., 1154-1155.

John A. Bingham, of Ohio, delivered one of the most significant speeches made on the bill. He was one of the Radical leaders and a member of the Reconstruction Committee. He spoke only thirty minutes, but within that short time made one of the strongest speeches against the bill. His objections were based on constitutional grounds. He did not, like many Radicals, permit his partisanship to control his judgment and action when it came to a question of constitutional power. He was earnestly desirous of accomplishing the objects aimed at by the bill, but thought that it transcended the Federal jurisdiction, since the questions about which it undertook to legislate were left by the Constitution entirely with the States. He also took the position that the term "civil right" was very comprehensive and that it embraced every right that pertained to a citizen as such, including political rights. He thought the evils which the

bill sought to remedy should be remedied by a constitutional amendment expressly prohibiting the States from such an abuse of power, and not by an arbitrary assumption of power by Congress.[20]

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20. Ibid., 1290-1292.

The Civil Rights Bill was debated exhaustively by other prominent members of the House to the number of forty in all. The final vote on the passage of the bill, March 13, was 111 to 38. Six Republicans--Bingham, Latham, Phelps, W. H. Randall, Rousseau, and Smith--voted with the Democrats against the passage of the bill. All of these, except Bingham, were from the border states of Kentucky, West Virginia, and Maryland, where there was a considerable number of negroes.[21]

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21. Ibid., 1367.

The amendments made in the House were concurred in by the Senate without division on March 15.[22] The bill was then

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22. Ibid., 1416.

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sent to President Andrew Johnson.

CHAPTER VI

PRESIDENT JOHNSON'S VETO

The Civil Rights Bill reached the President on March 18, and nine days later, March 27, he sent to the Senate a message regretting that it contained provisions which he could not approve. "I am therefore constrained," he said, to return it to the Senate, in which it originated, with my objections to its becoming a law." He vetoed it on grounds of inexpediency and unconstitutionality. His arguments were substantially the same as those of Senators Saulsbury and Cowan.[1]

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1. Four members of the cabinet, three of whom were lawyers, opposed the projected veto. (Stanton, Harlan, Dennison, Speed); Seward, McCulloch and Welles sustained the President. James F. Rhodes, op. cit., VI, 68.

He objected to the measure because it conferred citizenship on the negroes when eleven out of thirty-six States were unrepresented and attempted to fix by Federal law "a perfect equality of the white and black races in every State in the Union, over the vast field of State jurisdiction covered by the enumerated rights. In no one of these can any State ever exercise the power of discrimination between the different races. In the exercise of state policy over matters exclusively affecting the people of each State, it has

frequently been thought expedient to discriminate between the two races. By the statutes of some of the States, northern as well as southern, it is enacted, for instance, that no white person shall intermarry with a negro or mulatto." He stated that he did not believe that the bill would annul state laws in regard to marriage, but that if Congress had the power to provide that there should be no discrimination in the matters enumerated in the bill, then it could pass a law repealing the laws of the States in regard to marriage.

The President also stated that by the first section the Chinese of the Pacific States, Indians subject to taxation, the people called gypsies, as well as the entire race designated as black--people of color, negroes, mulattoes, and persons of African blood--"are made citizens of the United States." He did not believe that this class possessed "the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States." He thought that the bill proposed "to discriminate against large numbers of intelligent, worthy, and patriotic foreigners, in favor of the negro, to whom, after long years of bondage, the avenues of freedom and intelligence have now been suddenly opened." He said:

> It is proposed by a single legislative enactment to confer the rights of citizens upon all persons of African descent born within the extended limits of the United States, while persons of foreign birth who make our land their home must undergo a probation of five

> years, and can then only become citizens of the United States upon the proof that they are of good moral character, attached to the principles of the Constitution of the United States, and well disposed toward the good character and happiness of the same."

He further stated that it was an invasion by Federal authority of the rights of the States; it had no warrant in the Constitution and was contrary to all precedents. He said:

> In all our history . . . no such system as that contemplated by the details of this bill has ever before been proposed or adopted. They establish for the security of the colored race safeguards which go definitely 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 and against the white race. They interfere with the municipal regulations 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 barriers which preserve the rights of the States. It is another step, or rather stride, to centralization and the concentration of all legislative power in the National Government."

The bill would frustrate the adjustment between capital and the new labor. He said on this point:

> The white race and the black race have hitherto lived in the South in the relation of master and slave--capital owning labor. Now suddenly, the relation is changed, and,

> as to the ownership, capital and labor are divorced. In this new relation, one being necessary to the other, there will be a new adjustment, which both are deeply interested in making harmonious. ... This bill frustrates this adjustment. It intervenes between capital and labor and attempts to settle questions of political economy through the agency of numerous officials, whose interest it will be to foment discord between the two races, ...

Speaking of the general effect of the bill, he declared that

> the tendency of the bill must be to resuscitate rebellion and to arrest the progress of those influences which are more closely thrown around the States--the bond of union and peace.

Finally he indicated that he "will cheerfully cooperate with in any measure that may be necessary for the protection of the civil rights of the freedmen, as well as those of all other clases of persons throughout the United States, by judicial process, under equal and impartial laws, in conformity with the provisions of the Federal Constitution."[2]

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2. For the text of President Johnson's veto message see Richardson, Messages and Papers, VI, 405-413.

When, on March 27, Johnson's veto reached the Senate, the Radicals were imbued with one single purpose: to corral and hold the votes to override it. Haste they knew would aid them. Wright of New Jersey was still away. His absence,

combined with Morill's breach of faith, had enabled them to unseat John Stockton, of New Jersey.[3] Dixon of Connecticut

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3. For an account of the unseating of John Stockton and its importance see Howard K. Beale, The Critical Year, 88-92; Horace White, The Life of Lyman Trumbull, 261-265. Senator Stockton was a Democrat who was unseated for partisan reasons.

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was seriously ill. The votes of Wright and Dixon, if cast, would be against the Radicals. Time might enable these absentees to come,--therefore no delay![4]

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4. David M. DeWitt, The Impeachment and Trial of Andrew Johnson, 77-83.

On April 4, Trumbull replied to the veto message in a speech of great power which occupies five pages of the Congressional Globe.[5] He took up and answered the President's

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5. 1755-1761.

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objections seriatim. He said that he had endeavored to meet the President's wishes in the preparation of both the bills, and had called upon him twice and had given him copies of them before they were introduced and asked his cooperation in order to make them satisfactory. In short, he had done everything possible to avoid a conflict between the executive and legislative branches of the Government, and since he had

been assured that the President's aims, like his own, were in the direction of peace and concord, he was amazed when they were vetoed.

He argued that the citizen has a counter-claim upon the Government for the comprehensive claim which the Government has upon the citizen. On this point he said:

> It cannot be that we have constituted a government which is all-powerful to command the obedience of the citizen but has no power to afford him protection. Tell it not, sir, . . . that the Government, in defence of which the son and the husband fell, the father lost his sight, and the others were maimed and crippled, had the right to call these persons to its defence but now has no power to protect the survivors or their friends in any rights whatever in the States. Such, sir, is not the meaning of our Constitution; such is not the meaning of American citizenship. Allegiance and protection are reciprocal rights.

The argument appears, however, to be somewhat specious. He concluded his speech with a brief reference to the constitutional objection to the bill saying:

> If the bill now before us, which goes no further than to secure civil rights to the freedmen, cannot be passed, then the constitutional amendment proclaiming freedom to all the inhabitants of the land is a cheat and delusion.

Trumbull was followed the next day by Reverdy Johnson who made an able speech in support of the veto, holding that if Congress could legislate for the black, it could for the white,

thereby destroying the reserved rights of the States. The first section of the bill, in his opinion, struck at the legislative authority of the States; the second section struck at their judicial departments, and thus prostrated the States at the footstool of the Federal power.[6]

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6. Cong. Globe, 39th Cong., 1st sess., 1775.

Senator Cowan said that he was quite willing that all the people of the United States should enjoy the rights conferred by this bill, but its provisions were exceedingly dangerous. The grammatical structure of a portion of the bill was such as to enable a corrupt, or prejudiced judge to take advantage of it in order to widen the jurisdiction of the United States courts and thus take in all the business which had heretofore occupied the State courts.[7]

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7. Ibid., 1781-1785.

During the debate on April 5 an unusual incident showed the temper which had been engendered in the Senate by the veto and the debate on it. Late in the evening, Trumbull intimated his purpose or willingness to have the vote taken if there was no further debate. Cowan suggested that an hour be agreed upon to take the vote the next day, since two Senators, Wright and Dixon, were very sick and could not with

safety come out at night. Senators Guthrie, Hendricks, and others strongly insisted upon the point of courtesy. Senator Benjamin F. Wade, of Ohio, spoke very bitterly in reply:

> If the President of the United States can by a veto compel Congress to submit to his dictation he is an emperor and a despot. Because I believe the great question of Congressional power and authority is at stake here I yield to no importunities on the other side. . . . I will not yield to these appeals of comity . . . but I will tell the President and everybody else that if God Almighty has stricken a member of this body so that he cannot be here to uphold the dictation of a despot, I thank Him for it and I will take every advantage of it I can.[8]

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8. Ibid., 1785.

Senator McDougall of California rebuked him with deserving severity. An adjournment was taken by a vote of 33 to 12, but only until the next day.[9]

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9. Ibid., 1786.

Doubt and uncertainty attended the vote in the Senate. Could the necessary two-thirds, which had failed the Republicans for the Freedmen's Bureau Bill, be secured? Cowan, Dixon, Doolittle, Norton, and Van Winkle could be counted on by the President. Morgan was inclined to be friendly to the administration. Stockton, of New Jersey, a Democrat who had voted against the bill, had been unseated. It is rather

significant that his case was not finally disposed of until it was definitely known that the Civil Rights Bill had been vetoed. Wright his colleague, also a Democrat, was ill at his home. Dixon, who also opposed the bill, was ill. Foot of Vermont died and the governor of that State at once filled the vacancy by the appointment of George F. Edmunds who on April 5 took his seat in the Senate.

The final vote was 33 to 15.[10] The Radicals had two

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10. Ibid., 1809.

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more than the required two-thirds. Wright of New Jersey at the peril of his life was brought into the Senate chamber[11]

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11. Gideon Welles, Diary, II, 477.

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and voted to sustain the President. But his vote without that of his colleague Stockton was without avail. Dixon, of Connecticut, was the only Senator not voting. Had Stockton retained his seat, with the vote of Dixon, the bill would not have been passed. Thaddeus Stevens and others had made strenuous efforts to have Stockton's place filled for there was fear among the Radicals that the veto might be sustained.

No debate was permitted in the House, the bill passing that body on April 9 by a vote of 122 to 41. Thirty-four Democrats and seven Unionists voted against the bill.[12]

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12. Cong. Globe, 39th Cong., 1st sess., 1861.

We may conclude, then, that many of the ablest men in Congress, including strong men in the Republican party like Doolittle, Cowan, Raymond, and Bingham, thought that Congress was going beyond its power in passing the Civil Rights Bill. All those who opposed the bill, not only took the position that it was unconstitutional, but most of them thought it unwise and inexpedient. Many even of those who supported it admitted that it undertook to regulate affairs that had been uniformly regarded as belonging exclusively to the States. The passage of the bill over the President's veto was indeed a momentous event, not only because it rendered the breach between him and Congress complete but also for the reason that it opened a new chapter in constitutional practice. Since Washington there had been many vetoes but never until now had Congress passed over the President's veto a measure of importance; and this measure was one over which feeling in Congress and the country had been wrought up to the highest tension.[13] It must be admitted, also,

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13. One unimportant bill was passed over Tyler's veto, five over Pierce's. The case under Tyler has historical importance as being the first action of the kind. Those of Pierce's were vetoes of bills for the improvement of rivers. Rhodes, op. cit., VI, 71n.

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that President Johnson was within his constitutional right in vetoing the bills without previously consulting anybody in Congress.

Section one is the basis of the whole bill. It defines citizenship as follows:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.

and enumerates the rights and obligations of citizens:

> Such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, 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.

The other provisions of the Act contain the necessary machinery to give effect to what are declared to be the rights of all persons in the first section. Section two provides that the penalty for depriving any person of any right protected by this act, by reason of race or color, shall be a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court. Section three declares that the district and circuit courts of the United States shall have

jurisdiction of offences under the Act. Section four authorizes district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States and the officers and agents of the Freedmen's Bureau to institute proceedings against all violating the Act. Section nine empowers the President to employ the land or naval forces of the United States, or of the militia, to prevent the violation and enforce the due execution of the law. Section ten provides that a final appeal may be taken to the Supreme Court of the United States upon all questions of law arising in any cause under the provisions of the Civil Rights Act.[14]

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14. U. S. Stat. at Large, XIV, 27-29.

CHAPTER VII

THE CIVIL RIGHTS ACT IN THE COURTS

The question whether the Civil Rights Act of 1866 was or was not constitutional never came squarely before the Supreme Court on a test case. The Act came before the Circuit Court of the United States twice, soon after it was enacted, and in both instances was held to be constitutional. The first case was that of United States v. Rhodes, Seventh Circuit, District of Kentucky, 1866, decided by Justice Noah H. Swayne. On May 1, 1866, the home of Nancy Talbot, a negress, was entered by white men named Rhodes for the purpose of robbery. She was not allowed to testify against them in the Kentucky Courts. The Federal Judge had jurisdiction over the Civil Rights Act. The Act was pronounced constitutional in all its provisions, and held to be an appropriate method of exercising the power conferred on Congress by the Thirteenth Amendment.[1] The

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1. U. S. v. Rhodes, 27 Fed. Cas. No. 16151 (1866), 785-794.

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other case was the Matter of Turner, Fourth Circuit, Maryland, 1867, before Chief Justice Salmon P. Chase. This case was submitted to the court without argument. The Chief Justice decided that the act was constitutional and that it applied to all conditions prohibited by it, whether originating in transactions before, or since, its enactment.[2] If either of

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2. Matter of Turner, 24 Fed. Cas. No. 14247 (1867), 337-340.

these cases had been taken to the Supreme Court on appeal, at that time, the Civil Rights Act would doubtless have been upheld by it.

The first suit under the Act in a state court was in Indiana. Barnes, a negro, sued Browning, a hotel proprietor, for wages, and the plea offered by Browning was that Barnes was not entitled to sue in the courts of Indiana, since he had come into the State contrary to the Constitution of the State. There was a provision in the Indiana Constitution which prohibited negro immigration and declared null and void any contracts made with such persons. There was also a law to enforce this provision which was to the effect that no negro coming into the State could make or enforce contracts. Barnes claimed that the Indiana law and Constitution in that respect were void because they were in conflict with the Thirteenth Amendment and were void under the first section of the Civil Rights Act. In this case the State Circuit Court held the Act constitutional.[3] Another case very

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3. Horace E. Flack, The Adoption of the Fourteenth Amendment, 47-48.

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similar to this one was decided by the Supreme Court of Indiana. Smith, a negro, sued Moody to collect a promissory note. The same plea was set up in this case as in the other. The Supreme Court held that the Civil Rights Act had nullified the provision of the Indiana Constitution prohibiting

negroes from coming into the State or making contracts. This was probably the first decision of the highest court in any State in which the Civil Rights Act was involved.[4]

4. Ibid., 48.

The Chief Justice of the Court of Appeals of Maryland held the Act constitutional in a case in which a negro had been introduced as a witness. The State's Attorney was greatly surprised at this, saying that there was no authority for it, but it was claimed that the Civil Rights Bill had given it. In another Maryland case, one Somers assaulted a negro and was brought before a justice of the peace. His counsel held that the negro could not testify, but the justice held that the state law had been abrogated by the Civil Rights Bill. The opinion of the justice was upheld by the court, saying that the bill was constitutional in regard to the right to testify.[5]

5. Ibid., 48-49.

Judge Thomas, of the Circuit Court of Virginia, in a case before him at Alexandria, declared that the Civil Rights Bill was unconstitutional and that negro evidence could not be admitted, since the state law forbade it in civil cases in which white men alone were parties. In his opinion Congress did not have the power to impair the right of the

States to decide what classes of persons were competent to testify in their Courts.[6] Judge Gilpin, Chief Justice of

6. Ibid., 49.

Delaware, held that the Civil Rights Bill was void and inoperative in so far as it assumed to regulate the rules of evidence, etc., of state courts.[7] Chief Justice Hardy, of

7. Ibid., 50.

Alabama, declared that the bill was unconstitutional, confirming the sentence of a lower court which had convicted a negro for carrying fire-arms contrary to state law.[8] Judge

8. Ibid., 51.

Harberson, of Kentucky, held the bill unconstitutional, as did also the city judge of Louisville in the same State.[9]

9. Ibid.

Several arrests were made for refusing to receive negro testimony. Judge Thomas, who refused to receive negro testimony at Alexandria, was arrested and taken to Richmond, where he was released on his own recognizance in the sum of $1,000

to appear at the November term of the Court. Judge Magruder, of Maryland, was several times arrested for a similar offence. Judge Abell, of Louisiana, was arrested, being charged with having "wickedly, wilfully, and with malice aforethought" declared the Civil Rights Bill unconstitutional. In his decision, he had declared that the Act aimed to strike down the independence of the States, to sap the foundation of Republican Government, to override the laws of the States, and to obliterate every trace of the independence of the state judiciaries.[10]

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10. Ibid., 50-51.

There were likewise many incidents in which attempts were made by negroes to enjoy the same privileges accorded to white persons. About two weeks after the bill had passed Congress, two so-called freedmen, in order to see whether the bill had really benefited them in a practical way, went to a sleeper and demanded accommodations as a train was about to leave Washington for New York. The demand was refused them at the request of the other passengers (all said to be New Englanders), who threatened to leave the car if the negroes were admitted. The negroes thereupon threatened prosecution under the Civil Rights Bill and took their departure. Similar incidents occurred in Baltimore at an earlier date. A negro asserted the right to ride in a railway car among the other

passengers, and when compelled to go to the front platform where colored persons were allowed to ride, noted the number of the car, probably to bring suit, and departed.

Another negro, James Williams, appeared at the ticket office of a theatre, and asked for a ticket, which was of course refused. Another negro went to a public house and asked for a drink, and on the refusal of the proprietor to sell him the liquor, went away to file complaint at the station, claiming that "as a citizen he was entitled to the same privileges as white men." Before the middle of May the Baltimore & Ohio Railroad Company had a suit pending against it for refusing to sell a negro a first-class ticket. Towards the last of April, the negroes of New York began to "feel their civil rights"--four or five going into a fashionable restaurant, sitting down among white ladies and gentlemen, and appealing to the Civil Rights Bill to protect them from ejectment.[11]

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11. Ibid., 46-47.

The editor of the National Intelligencer thought that if the bill was constitutional, it would be difficult to see how negroes could be debarred, except at the risk of a suit, from going into hotels, theatres, restaurants, billiard rooms, or any licensed house where white men have a legal

right to accommodations.[12]

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12. Ibid., 46.

The Civil Court of Detroit, Michigan, decided, September, 1866, that negroes could not be prevented from enjoying any privilege they chose and could pay for. The case before the court was brought by a negro for the refusal of the doorkeeper to admit him and his companions to the main body of the theatre--they being directed to the gallery. The United States Commissioner, at Mobile, Alabama, decided June 26, 1867, that the railway company of that city could not prevent negroes from riding in the same cars with white persons, since to do so was in violation of the law, evidently referring to the Civil Rights Bill.

Mayor Horton, also of Mobile, an appointee of the military authorities, banished a negro boy from the city, this not being possible in regard to white people. He was indicted, tried, and found guilty for violation of the Civil Rights Bill. There was much rejoicing that the "trap made to catch the Southerners had first gobbled up a yankee official."[13]

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13. Ibid., 52-53.

From these instances, it would seem that the belief prevailed generally--north, east, west and south--especially

among the negroes, that the Civil Rights Act gave the colored people the same rights and privileges as white men as regards travel, schools, theaters, churches, and the ordinary rights which may be legally demanded. There also seems to have been a less general belief that it also permitted the intermarriage of the races.[14]

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14. Ibid., 51-52, 54.

From this Civil Rights Act, there evolved a measure which ultimately took shape as the Fourteenth Amendment to the Federal Constitution. As it then stood the Constitution, in the bill of rights, prohibited Congress from interfering with fundamental rights of civil liberty (freedom of speech, jury trial, etc.); but these constitutional provisions offered no Federal limitations upon the states in such matters. As announced by its framers, the first purpose of the new amendment, therefore, was to create a Federal constitutional prohibition upon the states which would prevent them from denying equal protection of the laws to the millions of new-made citizens. Moreover, the President's veto of the Civil Rights Act created considerable doubt as to the constitutionality of the Act so it was decided to make it a part of the Constitution. Accordingly the Reconstruction Committee drafted an amendment which was approved by Congress in June, 1866, and passed on to the states for ratification. It was

not until July 20, 1868, however, that it was declared ratified by Secretary of State Seward.

The first section of the Fourteenth Amendment includes the important provisions which had been embodied in the Civil Rights Act. The comparison may be illustrated as follows:

Civil Rights Act	Fourteenth Amendment
Definition of citizenship:	
All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.	All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.
Rights and Obligations of Citizens:	
Such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, 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	No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.
Equal Protection of the Laws:	
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,	nor deny to any person within its jurisdiction the equal protection of the laws.

pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

It became apparent in due time that the provisions of the Fourteenth Amendment would not result in the enfranchisement of the negroes, by the southern states; or rather that when left to themselves they would promptly disfranchise them. To put the enjoyment of the right of suffrage by the freedmen beyond the power of the States, therefore, a new amendment was drawn up and passed by Congress. This fifteenth amendment declared that "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." An additional section gave Congress power to enforce the article by appropriate legislation.

The States from the beginning of the government until the ratification of these two amendments (Fourteenth and Fifteenth) were the guardians of the personal liberty of their own citizens, and they were free to decide for themselves the character and extent of that liberty. True, the Federal Constitution had placed a few explicit prohibitions upon the authority of the States in dealing with their own citizens, but nothing could have seemed more visionary in 1787, than to dream of charging the national government with defense of personal liberty against encroachment by the States. The

Fourteenth and Fifteenth Amendments called upon the central government to protect the citizens of a State against the State itself.

BIBLIOGRAPHY

Primary Sources

Blaine, James G., Twenty Years of Congress: from Lincoln to Garfield, Norwich, Connecticut, Henry Bill, 1884-1886. 2 v.
This work contains a full account of debates and events concerning the Civil Rights Act, the Fourteenth and Fifteenth Amendment.

Commanger, Henry S., (ed.), Documents of American History, New York, Crofts, 1938.
A collection of important primary source materials.

Congressional Globe, 1863-1866.

The Federal Cases Comprising Cases Argued and Determined in the Circuit and District Courts of the United States, St. Paul, West Publishing Company, 1894-1898. 30v. with a Digest.
The primary source for the federal cases in the circuit and district courts.

McPherson, Edward, Political History of the United States During the Great Rebellion, New York, Appleton, 1864.
A record of the legislation and political history of the United States, 1861-1864. An excellent source by the clerk of the House of Representatives.

McPherson, Edward, Political History of the United States During the Period of Reconstruction, 1865-1870, Washington, D. C., Philip and Solomons, 1871.

Moore, Frank (ed.), The Rebellion Record: A Diary of American Events, with Documents, Narratives, Illustrative Incidents, Poetry, etc. (12v., 1862-1868).

Nicolay, John G., and Hay, John, Abraham Lincoln: a History, New York, Century, 1890. 10v.

Richardson, James D., (Ed.), A Compilation of the Messages and Papers of the Presidents, 1789-1897, New York, Bureau of National Literature, 1897. 10v.

Schurz, Carl, The Reminiscences of Carl Schurz, New York, Doubleday, 1909. 2v.

Senate Executive Doc. No. 2, 39th Cong., 1st sess., Vol. I. Transmitting information concerning the States of the Union lately in rebellion, accompanied with a report from Carl Schurz on the States of South Carolina, Georgia, Alabama, Mississippi, and Louisiana; also a report of Lieutenant-General Grant upon the condition of things in said States.

United States Statutes at Large.

The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies. 128v. (1880-1901).
A publication of monumental proportions by the United States government. Arranged in four series.

Welles, Gideon, Diary of Gideon Welles, (ed. by John T. Morse), Boston, Houghton Mifflin, 1911. 3v.

Secondary Sources

Appleton's American Annual Cyclopedia, 1861-1903, New York, Appleton, 1862-1903.

Beale, Howard K., The Critical Year, New York, Harcourt, Brace, 1930.
This book, based on prodigious research, is an intensive study of the conflict between Johnson and the Radical leaders Ben Wade, Thaddeus Stevens, Charles Sumner and their followers.

Dabney, Virginius, Liberalism in the South, Chapel Hill, University of North Carolina Press, 1932.
A cultural history of the South from a liberal point of view.

DeWitt, David M., The Impeachment and Trial of Andrew Johnson, New York, Macmillan, 1903.

Dunning, William A., Reconstruction Political and Economic, New York, Harper, 1907.
An excellent discussion of southern sentiments toward the radical plans of reconstruction.

Flack, Horace E., The Adoption of the Fourteenth Amendment, Baltimore, Johns Hopkins Press, 1908.
A scholarly digest of the debates and events on the Civil Rights Act and the cases arising under it.

Fleming, Walter L., Civil War and Reconstruction in Alabama, New York, Columbia University Press, 1905.
The author's aim is to trace the course of civil war and reconstruction in his native State, particularly in its political and social aspects.

Fleming, Walter L., The Sequel to Appomattox, New Haven, Yale University Press, 1921. This volume contributes much to a fair understanding of the conditions among the whites and blacks and the reasons for the different organizations designed to protect them.

Garner, James W., Reconstruction in Mississippi, New York, Macmillan, 1901.
Important reference for the Mississippi "Black Code."

Haworth, Paul L., Reconstruction and Union, New York, Henry Holt, 1912. No. 39 in the "Home University Library" and contains a condensed account of reconstruction and union following the Civil War.

Herbert, Hilary A., "The Conditions of the Reconstruction Problem," Atlantic Monthly, 87: 146-157.

Hockett, Homer C., The Constitution History of the United States, New York, Macmillan, 1939. 2v.

Hosmer, James K., Outcome of the Civil War, 1863-1865, New York, Harper, 1907.

McCarthy, Charles, Lincoln's Plan of Reconstruction, New York, McClure, 1901.

Nevins, Allan, Fremont: Pathmarker of the West, New York, Appleton, Century, 1939.

Pierce, Paul S., The Freedmen's Bureau, Iowa City, State University of Iowa, 1904.
An excellent account of the work of the Bureau, its organization, educational work, relief, and legal activities.

Randall, J. G., The Civil War and Reconstruction, New York, D. C. Heath, 1937.
The best single volume history of the period.

Rhodes, James F., History of the United States from the Compromise of 1850, New York, Macmillan, 1920. 8v.
Considered the best general history of the period.

Simkins, Francis B., and Woody, Robert H., South Carolina During Reconstruction, Chapel Hill, University of North Carolina Press, 1932.
Indispensable for a study of the "Black Codes" in South Carolina.

White, Horace, The Life of Lyman Trumbull, New York, Houghton Mifflin, 1913.
The letters and excerpts of speeches included are an important contribution to source material. Unfortunately there are no footnotes.