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THE CIVIL RIGHTS ACT AND THE *CIVIL RIGHTS CASES*: CONGRESS, COURT, AND CONSTITUTION

*Earl M. Maltz**

I. INTRODUCTION

By any standard, the Supreme Court's decision in the *Civil Rights Cases*[1] ranks as a watershed in American constitutional history. The decision — holding certain aspects of the Civil Rights Act of 1875 unconstitutional — is typically cited as establishing the principle that Section 1 of the Fourteenth Amendment does not constrain private individuals, but instead imposes constitutional restraints only on gov-

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1. 109 U.S. 3 (1883).

ernmental action.[2] Although frequently criticized,[3] this principle remains one of the cornerstones of modern constitutional jurisprudence.[4]

Commentators' evaluations of the *Civil Rights Cases* have differed widely. For example, scholars such as Arthur Kinoy, Richard Kluger, and Harold M. Hyman and William M. Wiecek view the case as one of the most important in a series of decisions that effectively undermined the promise of the Reconstruction Amendments and abandoned the freed slaves to the mercies of their former masters.[5] In contrast, Michael Les Benedict, Laurence Frantz, and Alan R. Madry view the decision somewhat more sympathetically.[6]

Despite their ideological differences, the works of these commentators share important methodological similarities. The Civil Rights Act itself is viewed as simple background for the Court's opinion; little discussion is devoted to the legislative history of the Act. Similarly, the *Civil Rights Cases* are generally treated as if they were the Court's only pronouncement on the constitutionality of the Act. The commen-

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2. *E.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1693 (2d ed. 1988). As Tribe notes, the *Civil Rights Cases* were actually not the first to allude to a requirement of state action. *Id.* at 1693 n.2.

3. *E.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985) (arguing that the state action doctrine should be abandoned); Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221 (arguing that the current state action doctrine should be replaced with a balancing approach).

4. *E.g.*, San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (holding that the First Amendment does not limit private action); Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (holding that a self-help repossession statute does not violate the Constitution).

5. HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 497-500 (1982); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 65, 66 (1976); Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 396-414 (1967).

6. Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 75-76 (arguing that the decision in the *Civil Rights Cases* implies the existence of a federally guaranteed right of access to common carriers and public accommodations); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1379-81 (1964) (arguing that the decision in the *Civil Rights Cases* did not bar Congress from reaching private action under some circumstances); Alan R. Madry, *State Action and the Obligation of the States to Prevent Private Harm: The Rehnquist Transformation and the Betrayal of Fundamental Commitments*, 65 S. CAL. L. REV. 781, 786-95 (1992) (arguing that the decision in the *Civil Rights Cases* recognizes a state obligation to protect fundamental rights).

tators' works provide context by referring to competing legal theories, other decisions giving narrow interpretations to civil rights statutes, and the *Slaughter-House Cases*,[7] where the Court rejected a constitutional challenge that did not involve racial issues.

This article attempts to bring a different perspective to the discussion of the *Civil Rights Cases*. This article places the *Civil Rights Cases* within their temporal and legal context by examining the constitutional underpinnings of the Civil Rights Act, the legislative debate over the Act, and the judicial treatment of the Act prior to the *Civil Rights Cases*. The article will begin by briefly discussing the factors that influenced the shaping of the Reconstruction Amendments — the constitutional provisions that provided the only arguable source of authority for the Civil Rights Act. The article will then discuss the debates surrounding the passage of the Civil Rights Act, concluding that in some respects the Act went substantially beyond the original understanding of the Amendments. Finally, the article will turn to an examination of the Supreme Court's response, arguing that *taken as a whole*, the Court's treatment of the Civil Rights Act reflected a moderate vision of the Reconstruction Amendments.

II. CONGRESSIONAL ACTION IN THE EARLY RECONSTRUCTION ERA

In the early Reconstruction era, the scope of congressional action to protect the rights of freed slaves was circumscribed by a variety of factors.[8] One difficulty was that the Republican commitment to the core concept of racial equality was somewhat limited, at least by late twentieth-century standards. Admittedly, Republican attitudes on this issue had evolved considerably since the antebellum era; for example, by the late 1860s most Republicans believed that blacks should be granted not only natural rights, but also citizenship[9] and the right to

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7. 83 U.S. (16 Wall.) 36 (1873).

8. *See* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 29-157 (1990) (discussing the factors which influenced congressional action on civil rights in the early Reconstruction era); *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (arguing the original understanding of the scope of the Fourteenth Amendment was very narrow); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988) (arguing that understanding of scope was intermediate); JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951) (arguing that the Fourteenth Amendment embodied radical, neo-abolitionist concepts).

9. MALTZ, *supra* note 8, at 7-8.

vote.[10] At the same time, however, Republicans consistently denied the charge that they were attempting to mandate "social equality" for blacks and whites.[11] Nonetheless, this charge remained a potent weapon in the Democratic political arsenal.[12]

In addition, nationwide action on civil rights inevitably raised problems of federalism. Despite their rejection of the doctrine of state sovereignty, most Reconstruction Republicans remained committed to the notion of a federal government of limited powers, with states retaining the authority to regulate most matters. Thus, for example, *The Nation*, a centrist Republican weekly, described the "Lessons of War" in the following terms "[O]ur institutions of local freedom are but so many roots to feed and strengthen our common nationality . . . a nation thus vitalized . . . cannot be compressed into a centralized power even under the stupendous weight of war. [The watchword is] sovereignty without centralization."[13] Another example of Republican reluctance to expand federal power is shown by the opposition of influential Senator James W. Grimes of Iowa to a proposal for federal action to prevent the spread of cholera. He stated:

> During the prevalence of the [Civil War] we drew to ourselves here as the Federal Government authority which had been considered doubtful by all and denied by many of the statesmen of this country. That time, it seems to me, has ceased and ought to cease. Let us go back to the original condition of things, and allow the States to take care of themselves as they have been in the habit of taking care of themselves.[14]

Finally, whatever their personal views, Republicans were forced to consider the political repercussions of their actions. Critical swing voters were often less advanced on racial issues than most Republicans. Thus, overambitious civil rights proposals could give credence

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10. *Id.* at 8-12.

11. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 3437 (1866) (remarks of Sen. Willey); *id.* at 1159 (remarks of Rep. Windom).

12. *E.g.*, *id.* at 3214-15 (remarks of Rep. Niblack); *id.* at 2538 (remarks of Rep. Rogers).

13. THE NATION, July 13, 1865, at 39.

14. CONG. GLOBE, 39th Cong., 1st Sess. 2446 (1866); *see also* HAROLD M. HYMAN, A MORE PERFECT UNION 300-01, 393-96 (1973); *The President's Manifest*, HARPER'S WEEKLY, Nov. 10, 1866, at 706 (discussing a letter, which addressed federalism, written by Mr. O.H. Browning, Secretary of the Interior); Carl Schurz, *Open Letter from Carl Schurz to William Fessenden*, CINCINNATI COMMERCIAL, May 18, 1866, at 2; SPRINGFIELD REPUBLICAN, Apr. 5, 1866, at 4.

to the persistent Democratic charges that Republicans were in favor of "negro equality"[15] and the centralization of power in the hands of the federal government.[16] These Democratic charges could easily redound to the detriment of Republicans in closely fought political campaigns.

The impact of both political concerns and the ideology of federalism was apparent in the discussions that led to the adoption of the Fourteenth and Fifteenth Amendments. Throughout the debates over Section 1 of the Fourteenth Amendment, John A. Bingham, the author of Section 1, steadfastly maintained that his proposal would not unduly disrupt the established pattern of federal/state relations. For example, while advocating a model of "'centralized government, decentralized administration,'"[17] he stated:

> [T]he care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated [instead] an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution.[18]

Despite Bingham's assurances, an early draft of Section 1 of the Fourteenth Amendment was tabled largely because of fears that granting Congress the power to guarantee "all persons . . . equal protection in the rights of life, liberty and property" would vest undue power in the federal government.[19] Apparently in response to these concerns, the version ultimately adopted constitutionalized only a right to "equal protection of the laws" — a concept which, in nineteenth-century legal thought, connoted only a right to have access to legal protection for

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15. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866) (statement of Rep. Rogers); *id.* at 541 (remarks of Rep. Dawson).

16. *Id.* at 182-83 (remarks of Sen. Davis).

17. *Id.* at 1292 (remarks of Sen. Bingham).

18. *Id.*

19. MALTZ, *supra* note 8, at 52-60.

rights otherwise established by natural or positive law.[20] Similarly, in 1866 a ban on racial discrimination in voting was rejected by the Joint Committee on Reconstruction because, in the words of the official committee report:

> Doubts were entertained whether Congress had power . . . to prescribe the qualifications of voters in a State, or could act directly on the subject. It was doubtful, in the opinion of your committee, whether the States would consent to surrender a power they had always exercised, and to which they were attached. As the best if not the only method of surmounting the difficulty, and as eminently just and proper in itself, your committee came to the conclusion that political power should be possessed in all the States exactly in proportion as the right of suffrage should be granted, without distinction of color or race. This it was thought would leave the whole question with the people of each State, holding out to all the advantage of increased political power as an inducement to allow all to participate in its exercise.[21]

Additionally, federalism-related concerns were one consideration in limiting the Fifteenth Amendment to discrimination based on race, rather than including a ban on discrimination based on other factors such as property ownership and education.[22]

Conservative Republicans were thus largely successful in forcing abandonment of language that they believed would give undue scope to the Reconstruction Amendments. For these victories to be truly meaningful, however, conservatives would also have to control the paradigms of constitutional interpretation to be adopted. In this regard, the most important issue was the scope of congressional power to enforce the amendments. Conservatives such as Lyman Trumbull pressed for an interpretation of the enforcement clauses under which Congress would have power to protect only certain, narrowly defined classes of rights.[23] They argued that "there is a constitutional and sound theory of state rights, not to be trampled out, but sacredly maintained and preserved as the true guarantee of both individual

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20. Earl M. Maltz, *The Concept of Equal Protection of the Laws — A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985).

21. JOINT COMMITTEE ON RECONSTRUCTION, 39TH CONG., 1ST SESS., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION XIII (1866).

22. *See* MALTZ, *supra* note 8, at 149.

23. *Id.* at 133-34.

liberty and national unity."[24] By contrast, other Republicans took a sharply different view, citing not only the Thirteenth and Fourteenth Amendments, but also the Guarantee Clause as sources of authority for sweeping federal action.[25]

In the late 1860s, the key battleground was the issue of voting rights. By 1869, most Republicans agreed on the need to ban all racial discrimination in the suffrage.[26] Since it did not require state approval, a statute outlawing such discrimination would have been the simplest solution. Senator Sumner and his allies pressed hard for this approach.[27] On the other hand, members of the Trumbull camp insisted that a constitutional amendment was necessary.[28] Ultimately, the latter view prevailed; rejecting the statutes offered by Sumner and George S. Boutwell,[29] Congress adopted the Fifteenth Amendment, which explicitly constitutionalized the ban on racially discriminatory voting requirements. Thus, the decision to proceed by constitutional amendment rather than by statute was a victory for more conservative Republicans.

However, this victory did not end the struggle over the proper paradigm of constitutional interpretation. As Reconstruction moved into its later phases, the more radical elements of the party continued to press for sweeping civil rights legislation and to justify such legislation by reference to a broad vision of federal power. Conversely, conservative Republicans continued to strongly resist what they viewed as unduly expansive conceptions of congressional authority. The congressional dispute over these conflicting paradigms came to a climax in the political struggle over what was to become the Civil Rights Act of 1875.[30]

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24. SPRINGFIELD REPUBLICAN, Nov. 14, 1867, at 2. Other sources taking a similar view are cited in MALTZ, *supra* note 8, at 133-34.

25. MALTZ, *supra* note 8, at 132, 147.

26. *Id.* at 142-44.

27. *E.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 1001 (1869) (remarks of Sen. Edmunds); *id.* at 904 (remarks of Sen. Sumner); *id.* at 561 (remarks of Rep. Boutwell).

28. *E.g.*, *id.* at 1033 (remarks of Sen. Fessenden).

29. *Id.* at 1041 (Sumner proposal). The House of Representatives never formally voted on the Boutwell proposal.

30. For a general discussion of the complex manuevering over civil rights legislation in the late Reconstruction era, see CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, PART TWO 156-84 (1987); WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879, at 190-91, 197-98, 202-10, 259-75 (1979); Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966); Alfred H. Kelly, *The Congressional Controversy over School Segregation,*

III. THE ADOPTION OF THE CIVIL RIGHTS BILL OF 1875

The ratification of the Fourteenth Amendment expanded the power of the federal government over issues of racial discrimination. The precise scope of the new authority was, however, unclear. Characteristically, Sumner pressed for measures that would test the limits of federal power.[31] Beginning in 1869, he repeatedly introduced bills that would have barred racial segregation by common carriers, innkeepers, owners of theaters, churches, public schools, and in juries.[32]

The extensive discussions of the Sumner proposal reflected the wide divergence of congressional opinion over the scope of federal power under the Fourteenth Amendment during the early 1870s. Democrats generally contended that Congress could not constitutionally reach any of the activities that would be regulated by the civil rights proviso[33] — a position bolstered in 1873 by the decision in the *Slaughter-House Cases*.[34] The Democrats were joined in their total opposition to Sumner by a handful of very conservative Republicans such as Joshua Hill of Georgia,[35] Orris S. Ferry of Connecticut,[36] and Thomas W. Tipton of Nebraska.[37] Conversely, many Republicans were willing to support the entire Sumner initiative.[38] The balance of power was held by a group of swing voters — Republicans who supported some but not all of the Sumner proposal. Not surprisingly, the outcome of the struggle was determined by a complex interaction between political and doctrinal concerns.

A. *The Amnesty Bills of 1871 and 1872*

Sumner's measure first reached the Senate floor in 1871 as a proposed amendment to the Amnesty Bill of 1871. The maneuvering surrounding the proposal reflected the complicated crosscurrents that swirled around civil rights measures generally — crosscurrents that were exacerbated by a deep political schism within the Republican

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1867-1875, 64 AM. HIST. REV. 537 (1959); Bertram Wyatt-Brown, *The Civil Rights Act of 1875*, 18 W. POL. Q. 763 (1965).

31. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 904 (1869).
32. *Id.*
33. *E.g.*, CONG. GLOBE, 42d Cong., 2d Sess. app. at 25-29 (1872) (remarks of Sen. Thurman).
34. 83 U.S. (16 Wall.) 36 (1873); *see infra* notes 120-31 and accompanying text.
35. CONG. GLOBE, 42d Cong., 2d Sess. 241-43 (1871) (remarks of Mr. Hill).
36. *Id.* at 892-94 (remarks of Mr. Ferry).
37. *Id.* at 914 (remarks of Mr. Tipton).
38. *E.g.*, *id.* at 843-45 (remarks of Sen. Sherman); *id.* at 524-25 (remarks of Sen. Morton).

party.[39] The Amnesty Bill was intended to remove political disabilities imposed upon many ex-Confederates by Section 3 of the Fourteenth Amendment.[40] Section 3 provided that the disabilities could be removed by a two-thirds vote in both Houses of Congress.[41] For some Republican opponents of the Amnesty Bill, the introduction of Sumner's proposal was actually part of a complex scheme designed to defeat the Bill. These Republicans knew that Sumner's proposal was extremely repugnant to many senators who otherwise favored amnesty in principle. They hoped that if the two proposals were coupled together, some of those who would otherwise favor amnesty would vote against the Bill as a whole.[42]

Despite efforts by conservative Republicans to remove some of the Bill's most controversial provisions, senators were at first forced to vote on the Sumner provision as a whole. Vice President Schuyler Colfax broke a 28-28 tie by voting in favor of the provision, and it was duly added to the Amnesty Bill.[43] Because this addition made it unpalatable to many Democrats and conservative Republicans, the overall Bill failed to gain the two-thirds majority necessary for passage.[44]

The approach of the presidential elections of 1872 changed the political dynamic governing the amnesty issue; virtually all Republicans became anxious to remove the disabilities imposed on Southerners by Section 3.[45] This change had an important impact on the debate over Sumner's civil rights initiative. Republicans and Democrats agreed that a civil rights bill could be voted upon separately from the amnesty proposal.[46] Matthew H. Carpenter of Wisconsin immediately moved to amend the Bill to delete references to schools and juries, but leave the prohibitions on discrimination by common carriers, inns, and places of amusement intact.[47] Carpenter's amendment was adopted on a 22-20 vote, with eight conservative Republicans joining fourteen

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39. *See generally* Patrick W. Riddleberger, *The Break in the Radical Ranks: Liberals vs. Stalwarts in the Election of 1872*, 44 J. NEGRO HIST. 136 (1959) (analyzing the division within the Republican Party).

40. FAIRMAN, *supra* note 30, at 158-59.

41. U.S. CONST. amend. XIV, § 3.

42. CONG. GLOBE, 42d Cong., 2d Sess. 3260 (1872) (statement of Sen. Logan); Kelly, *supra* note 30, at 547.

43. CONG. GLOBE, 42d Cong., 2d Sess. 919 (1872).

44. *Id.* at 928-29.

45. Kelly, *supra* note 30, at 550; Wyatt-Brown, *supra* note 30, at 768-69.

46. FAIRMAN, *supra* note 30, at 167.

47. CONG. GLOBE, 42d Cong., 2d Sess. 3730 (1872).

Democrats to provide the narrow margin on victory.[48] Many radical Republicans were bitter over this turn of events; George E. Spencer of Alabama, for example, declared that "[a]s this is only a partial civil rights bill, I cannot vote for it, and I hope [that] all the real genuine friends of civil rights will do the same thing."[49] Despite Spencer's plea, most Senate Republicans took a different view, and the amended Bill passed by a vote of 28-14.[50] All of the maneuvering came to naught, however, as the session concluded without time for action on civil rights by the House of Representatives.

B. *Congressional Action in 1874 and 1875*

Sumner's death in 1874 did not end efforts to obtain passage of additional federal civil rights legislation. A bill along the lines of his original proposal was introduced in both houses of Congress and extensively debated in the Senate in 1874. Once again, a complicated political struggle ensued, with the result paralleling that of 1872. While the Senate adopted a strong civil rights bill,[51] the House of Representatives failed to act and the bill died.[52] The fate of the bill was influenced by the fear that passage would be a political liability in the upcoming elections of 1874.[53]

Those elections proved to be a disaster for the Republican party, which lost control of the House of Representatives and a number of seats in the Senate as well. This defeat dramatically changed the political dynamic when Congress reconvened in a lame duck session in 1874. Freed from the fear of immediate political retribution and recognizing that the session would be the final opportunity to pass civil rights legislation, Republicans in both houses finally succeeded in passing a civil rights bill.[54] The bill required states to allow blacks on juries and prohibited segregation by common carriers, inns, and places of amusement.[55] It did not, however, reach schools, cemeteries, or churches.[56] President Grant signed the bill, and it became the Civil Rights Act of 1875.

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48. *Id.* at 3735.
49. *Id.* at 3736.
50. *Id.*
51. 2 CONG. REC. 4175 (1874).
52. FAIRMAN, *supra* note 30, at 179.
53. GILLETTE, *supra* note 30, at 202-07.
54. 3 CONG. REC. 1870 (1875) (Senate); *id.* at 1011 (House of Representatives).
55. *See* Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).
56. *See id.*

1. The Rejected Provisions: Churches, Cemeteries, and Public Schools

Like all parts of Sumner's civil rights bill, the provisions relating to churches, cemeteries, and public schools were attacked by some as beyond the scope of the powers granted to Congress by the Constitution.[57] In addition, however, some Republicans opposed these provisions on other grounds as well. For example, the ban on segregation by churches was attacked as inconsistent with the concept of religious liberty; moreover, some contended that the proposal would allow Southern whites to harass blacks who chose to organize their own churches.[58] These arguments convinced not only swing voters such as Senator Carpenter of Wisconsin[59] but also Senators Frederick T. Frelinghuysen of New Jersey [60] and Henry B. Anthony of Rhode Island,[61] both of whom generally gave strong support to the Sumner initiative.[62]

The dynamic surrounding the prohibition on school segregation was more complex. Education of free blacks was a high priority for most Republicans. Indeed, this concern predated the adoption of the Fourteenth Amendment. For example, even before the Civil War, John A. Bingham, the author of Section 1, had included "the right to know" among the privileges and immunities of citizenship.[63] Although the Boston schools had been desegregating after a long legal and political struggle,[64] this concern was most commonly translated into efforts to obtain education for blacks in a segregated setting.

The 1860 debate over the District of Columbia schools is typical of such efforts. As initially proposed, the bill before the Senate would have simply provided that the city authorities could impose a property tax to benefit the public schools in the District and that the federal government would provide matching funds up to $25,000 per year.[65]

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57. *E.g.*, 3 CONG. REC. 948 (1875) (remarks of Rep. Finck); 2 CONG. REC. app. at 315 (1874) (remarks of Sen. Merrimon); *id.* at 421 (remarks of Rep. Herndon).

58. CONG. GLOBE, 42d Cong., 2d Sess. 759 (1872) (remarks of Sen. Carpenter).

59. *Id.*

60. *Id.*

61. *Id.* at 821.

62. *See, e.g.*, Avins, *supra* note 30, at 881 (regarding Frelinghuysen's willingness to defend the constitutionality of the main part of Sumner's proposal); CONG. GLOBE, 42d Cong., 2d Sess. 821 (1872) (remarks of Henry B. Anthony in support of Sumner's principle).

63. CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859).

64. *See generally* J. Morgan Kousser, *"The Supremacy of Equal Rights": The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 NW. U. L. REV. 941 (1988) (describing the struggle in detail).

65. CONG. GLOBE, 36th Cong., 1st Sess. 1677 (1860).

Republicans pressed for an amendment which would have required the city government to use at least part of the funds raised to educate blacks as well as whites, arguing that "taxing [blacks] for the exclusive benefit of the white children . . . would be a kind of legal robbery."[66] No mention was made, however, of requiring the schools to be integrated; the object was only to have *some* schools provided for blacks.

Republicans also expressed concern for the education of the freed slaves in the Reconstruction context. For example, in Lincoln's 1863 "Proclamation of Amnesty and Reconstruction," he suggested that the ex-Confederate states should "provide for [the] education" of the freed slaves.[67] Similarly, in 1865 the *Springfield Republican* declared that "[w]e can only be secured against future rebellions by the universal education of the people. . . . Let us have an educated common people in the South . . . and we are safe."[68] The conservative *New York Times* also editorialized that the education of the freedmen should be a high priority.[69] The same themes were reflected in the debates leading to the adoption of the Fourteenth Amendment.

Even after the Fourteenth Amendment was adopted, however, Republicans remained deeply divided over the issue of school desegregation. Radicals repeatedly pressed for a requirement that District of Columbia schools be desegregated, but their efforts were consistently rebuffed by the Republican majority, despite the irrelevance of federalism-related concerns in that context.[70] Thus, it is not surprising that a measure mandating nationwide school desegregation should split the party as well. While radicals strongly supported this requirement,[71] other party members demurred. For example, Republican Senator James L. Alcorn of Mississippi forthrightly declared his preference for separate but equal schools, arguing that what he described as "racial mixing" should be required only where no separate school for blacks existed.[72] Similarly, Senator Timothy O. Howe of Wisconsin declared that "I do not agree . . . that it [is] necessary to mingle [the races] . . . in the schoolhouses, in order that they might there unlearn this prejudice which separates one color from the other."[73] Other Re-

66. *Id.* at 1681.
67. THE COLLECTED WORKS OF ABRAHAM LINCOLN 53, 55 (Roy P. Basler ed., 1953).
68. SPRINGFIELD REPUBLICAN, July 7, 1865, at 2.
69. N.Y. TIMES, May 5, 1865, at 4.
70. Kelly, *supra* note 30, at 545-46.
71. *E.g.*, 3 CONG. REC. 999-1000 (1875) (remarks of Rep. Burrows); 2 CONG. REC. 1314 (1874) (remarks of Rep. Ransier); GILLETTE, *supra* note 30, at 263-64.
72. 2 CONG. REC., app. at 305 (1874).
73. *Id.* at 4151.

publicans expressed fears that a requirement of desegregation would undermine support for the concept of public education generally.[74] Finally, from a purely political perspective, advocacy of school integration was particularly dangerous.[75]

Seeking to address these concerns, some Republicans advocated a proposal that would have required equal educational facilities, but explicitly allowed the maintenance of separate schools.[76] This proposal, however, was unacceptable to pro-integration Republicans.[77] Unable to agree among themselves and facing solid Democratic opposition, Republicans simply dropped all reference to schools from the final version of the Civil Rights Bill.

2. Common Carriers and Inns

The ban on segregation by common carriers attracted the widest support from Republicans. Indeed, even Republicans who opposed the basic idea of new civil rights legislation appeared to concede that Congress had constitutional authority to pass such a provision. For example, although arguing that the regulation of common carriers unnecessarily duplicated existing state laws, Senators Ferry and Tipton raised no direct constitutional objection to this portion of Sumner's proposal.[78] Similarly, while attacking the constitutionality of virtually all of the other provisions of the Civil Rights Bill, Lot W. Morrill of Maine declared that he agreed that Congress had power to regulate common carriers.[79] Senator Lyman Trumbull apparently took the same view.[80]

Given the relative unanimity on this issue, one might have expected to find clear support for regulation of common carriers in the legislative history of the Fourteenth Amendment. In fact, the record on this point is somewhat ambiguous. The record does establish that by the mid-1860s, Republicans were generally committed to the view that racial segregation by common carriers should be illegal. As early as

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74. *E.g.*, 3 CONG. REC. 1002 (1875) (remarks of Rep. Phelps); 2 CONG. REC. 4168 (1874) (remarks of Sen. Stewart).

75. GILLETTE, *supra* note 30, at 206.

76. *E.g.*, 2 CONG. REC. 4167 (1874) (amendment of Sen. Sargent).

77. *See, e.g., id.* (26 Republicans voted to defeat Sargent's amendment).

78. *See* CONG. GLOBE, 42d Cong., 2d Sess. 892 (1872) (remarks of Sen. Ferry); *id.* at 914 (remarks of Sen. Tipton).

79. *Id.* app. at 4 (remarks of Sen. Morrill).

80. *See id.* at 901 (remarks of Sen. Trumbull).

1855, a New York State court had held that, under the common law, carriers had no legal right to distinguish between passengers on the basis of race.[81] Moreover, even before the adoption of the Fourteenth Amendment, the national Republican Party had taken a similar position; due largely to the persistence of Sumner, by 1865 the Republican-dominated Congress had barred such segregation in the District of Columbia.[82]

The willingness of Congress to take early action on this issue reflected the special legal status of common carriers. Just as it is under current law, the position of common carriers in the middle and late nineteenth century was quite different from private businesses generally.[83] The basis of this difference was the view that while a common carrier may be private in form, it performs a public function and thus for many purposes should be considered an arm of the state.[84] This concept, often invoked in eminent domain cases, was universally accepted during the nineteenth century. Thus, for example, Justice Nelson noted in *New Jersey Steam Navigation Co. v. Merchants' Bank* that a common carrier "is in the exercise of a sort of public office, and has public duties to perform."[85] The Supreme Judicial Court of Massachusetts was more expansive in *Worcester v. Western Rail Road*, arguing that:

> [T]he establishment of [a railroad] is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, . . . a public easement. . . . It is true, that the real and personal property, necessary to the establishment and management of the rail road [sic], is vested in the corporation; but it is in trust for the public.[86]

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81. *See* Earl M. Maltz, *"Separate But Equal" and the Law of Common Carriers in the Era of the Fourteenth Amendment*, 17 RUTGERS L.J. 553, 555 (1986).

82. *See generally* Maltz, *supra* note 81 (describing the struggle over segregation of common carriers in the District of Columbia).

83. *See, e.g.*, Worcester v. Western R.R., 45 Mass. (4 Met.) 564, 566 (1842).

84. *See, e.g., id.*

85. 47 U.S. (6 How.) 344, 382 (1848).

86. *Worcester*, 45 Mass. (4 Met.) at 566; *see also* The Civil Rights Cases, 109 U.S. 3, 37-39 (1883) (Harlan, J., dissenting); ROBERT HUTCHINSON, A TREATISE ON THE LAW OF CARRIERS 38 n.1 (Floyd R. Mechem ed., 2d ed., Chicago, Callaghan & Co. 1891).

While not completely vitiating the idea that common carriers were private property, this difference in status led to the imposition of special obligations on the operators of such instrumentalities. While private parties generally were free to refuse to contract with whomever they pleased, a common carrier was "bound to take [one wishing passage] as a passenger on board, if [the common carrier] had suitable accommodations, and there was no reasonable objection to the character or conduct of the [passenger]."[87]

The quasi-public status of common carriers provides only a partial explanation for the congressional willingness to act on this issue. As already noted,[88] purely public institutions such as the schools were routinely segregated in the mid-nineteenth century, and the courts refused to interfere. However, unlike public education, whose availability was often described as a matter of governmental grace, the right to use common carriers was at times linked to the right to travel — a right described by a variety of contemporary commentators as one of the most fundamental of all rights.[89] The argument was not that segregation was *per se* wrong; rather, the basic contention was that to bar any person from access to any common carrier without reasonable cause deprived that person of a portion of his fundamental right to travel. *Derry v. Lowry*,[90] an early decision condemning racial segregation by common carriers, captured the essence of this argument:

> [Street railroads] are chartered for the accommodation of the community generally, and to this end the uses of the public highway of the city along and over which every person, without distinction of age or sex, or nationality or color has a right to a free and unobstructed passage is to the extent defined in the several acts of incorporation given to these companies for the construction of their roads. But these grants by the Legislature were not intended to divert the highways of the city from the purpose for which they were established; to some extent they changed the *mode* of transit over said highway; but the object of the grant was in aid of this common right of passage upon and over the streets of

87. Jencks v. Coleman, 13 F. Cas. 442, 443 (C.C.D.R.I. 1835) (No. 7,258) (Story, J.)

88. *See supra* text accompanying notes 70-77.

89. *See, e.g.*, Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230); 2 WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES 134 (St. George Tucker ed., Philadelphia, William Y. Birch & Abraham Small 1803).

90. 6 Philadelphia Rep. 30 (Pa. Ct. Common Pleas 1865).

> the city; it was to render travel more easy and convenient to those to whom the right belonged, and this right is a common right; it belongs equally to the rich and to the poor, to the black man as much as to the white man.[91]

This view clearly informed Republican action on the issue.

However, extension of the prohibition on segregation to common carriers operating in the states faced greater doctrinal and political obstacles than action limited solely to the District of Columbia. As always, attempts to pass a statute with nationwide applicability raised federalism-related problems. Moreover, even when the issue was limited to the District of Columbia, Democrats seized on the desegregation of streetcars as an example of Republican efforts to grant free blacks social equality[92] — a politically potent charge that Republicans vehemently denied.[93] Attempts to mandate nationwide application of the anti-discrimination principle would raise the profile of the issue dramatically, creating further political opportunities for Democrats and problems for Republicans. The influence of these factors became clear during the consideration of the Civil Rights Act of 1866.

The language of the Act did not specifically address the right of blacks to use common carriers. It did, however, guarantee more generally that "citizens of every race and color . . . shall have the same right to make and enforce contracts . . . as white citizens."[94] The application of this provision to segregation by common carriers was a matter of considerable debate.

Democrats claimed that the Act would prohibit segregation by common carriers, and made this claim a centerpiece for their arguments against passage. The overblown rhetoric of Democratic Senator Garrett Davis of Kentucky exemplifies the allegations of the opposition on this point:

> On ships and steamboats the most comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections; on railroads, national, local, and street, not only seats, but whole cars

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91. *Id.* at 31.
92. CONG. GLOBE, 38th Cong., 1st Sess. 839 (1865) (remarks of Sen. Hendricks).
93. *Id.* (remarks of Sen. Harlan).
94. *Id.* 39th Cong., 1st Sess. 474 (remarks of Sen. Trumbull).

> are assigned to white persons to the exclusion of negroes and mullatoes. All these discriminations . . . [t]his bill proposes to break down. . . .[95]

Republican supporters of the Civil Rights Act seem to have been split on the issue. The *Germantown Telegraph*, for example, believed that the Act guaranteed blacks the right to go on public conveyances.[96] Other Republican newspapers took a different view, however. The discussions of the issue in the *Cincinnati Commercial* — a newspaper on the conservative edge of the Republican mainstream — provide the most dramatic illustration. Initially the *Commercial* expressed grave doubts about the Civil Rights Act, fearing that it might be interpreted to require the opening of "hotels, churches and theaters without distinction on the basis of color."[97] Within a month, however, the editors of the *Commercial* abandoned their objections, having been assured by supporters of the Bill including "influential members" of the Ohio delegation that the prohibitions would not apply to Ohio at all; instead, the Bill's provisions would affect only those states which had Black Codes.[98] In other words, having noted the existence of private discriminatory customs and decrying federal efforts to abolish those customs, the *Commercial* supported the Civil Rights Act after being assured that it would have no effect on the right of common carriers to segregate their facilities. The *Philadelphia North American* expressed a similar understanding, asserting that the rights protected by the Act did not include the right to "go to any car, coach, hotel, church [or] public place."[99]

Despite this contrary evidence, the regulation of common carriers could be justified under even the narrow, conservative paradigm of constitutional interpretation. As already noted, the framers of the Fourteenth Amendment operated in the context of a legal culture that established the freedom to travel on common carriers as a basic civil right.[100] Given this background, it is certainly plausible to read the Privileges and Immunities Clause as placing this right under the protection of federal law, and Section 5 as providing Congress with the

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95. *Id.* app. at 183 (1866); *see also id.* at 1268 (remarks of Rep. Kerr).

96. GERMANTOWN TELEGRAPH, Apr. 4, 1866, at 3.

97. CINCINNATI COM., Mar. 30, 1866, at 4; *see also id.* Apr. 30, 1866, at 2 (column of "Mack").

98. *Id.* Apr. 16, 1866, at 4; *id.* Apr. 21, 1866, at 4.

99. PHILA. N. AM., Apr. 10, 1866, at 2.

100. *See supra* text accompanying notes 88-91.

power to legislate in this area. Thus, it should not be surprising that most conservative Republicans conceded the constitutionality (if not the expediency) of this aspect of the Sumner proposal.

Analogous arguments supported the constitutionality of the regulation of innkeepers. At common law, the obligations of common carriers and innkeepers to serve the general public were much the same.[101] Therefore, it would be logical to assume that the Fourteenth Amendment would have a similar impact on both groups. With respect to places of public amusement and juries, however, proponents of the Civil Rights Bill faced far more serious constitutional obstacles.

3. Places of Public Amusement

The common law duties of owners of theaters and other places of public amusement were far less onerous than those which were imposed on common carriers and innkeepers. As Senator Ferry pointed out, the former were not required to sell tickets to all members of the public; instead, the only obligation of the owners was to provide appropriate service for those to whom they *chose* to sell tickets.[102] Thus, the right of entrance to a theater could hardly be deemed a basic civil right.

Supporters of the provision did not dispute Senator Ferry's characterization of the common law position of theater owners. Nonetheless, they asserted that the Fourteenth Amendment authorized the proposed regulation. Senator Alcorn made the most sweeping argument, contending that because blacks might be called upon to protect the property of the theater owner from mob assaults, they were also entitled to be admitted to the theater.[103] This argument had extremely radical implications for federal power; indeed, it would have justified congressional action to prohibit *all* discrimination by private parties. Undoubtedly, cognizant of this difficulty, supporters such as Senators Alcorn and Sumner more often made a narrower claim, contending that because theaters and places of public amusement were licensed by the state, they should be considered the equivalent of common carriers and public inns.[104]

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101. Bell v. Maryland, 378 U.S. 226, 298 (1964).

102. CONG. GLOBE, 42d Cong., 2d Sess. 892 (1872).

103. 2 CONG. REC. app. at 305 (1874).

104. *See id.* app. at 305-06 (remarks of Sen. Alcorn); CONG. GLOBE, 42d Cong., 2d Sess. 383 (1872) (remarks of Sen. Sumner).

Even this narrower argument implied that Congress had authority under the Fourteenth Amendment to regulate a relatively broad class of activities. As such, it was inconsistent with at least the spirit of the conservative paradigm of constitutional interpretation. At the same time, with the exception of fragmentary newspaper accounts dealing with the Civil Rights Act of 1866, one cannot point to any clear evidence that the framers specifically considered and rejected the possibility that the Fourteenth Amendment would grant Congress authority over places of public amusement. By contrast, the case against the provision of the Sumner bill dealing with juries is much stronger.

4. Jury Service

The provision of the Civil Rights Bill prohibiting the exclusion of blacks from juries generated more substantial opposition from Republicans than the regulation of common carriers, inns, and places of public amusement. This opposition was not generally based on the view that juries should not include blacks; instead, Republican opponents argued that Congress lacked authority to regulate state practice in this area. The analysis of Senator Matthew W. Carpenter is particularly noteworthy. In 1872, Senator Carpenter supported much of the Sumner proposal, including the provisions dealing with common carriers, places of public amusement, cemeteries, and public schools. Moreover, he declared that "[i]f we had the power to pass it I should vote for [allowing blacks on juries] in a moment."[105] Nonetheless, Senator Carpenter sought to delete the reference to jury discrimination from the Bill, arguing that the Fourteenth Amendment did not grant Congress the power to pass such a law.[106]

Senator Carpenter could cite strong historical support for his view of congressional power on this issue. Admittedly, the debates over the Fourteenth Amendment itself did not refer specifically to the right to serve on juries. As already noted, however, the framers repeatedly and explicitly asserted that Section 1 did not limit the right of state governments to impose racial restrictions on the right to vote.[107] This assertion in turn implied that the right to hold office was also unprotected by the Fourteenth Amendment. As the evolution of the Fif-

105. *Id.* at 820.
106. *Id.* at 820-21.
107. *See supra* text accompanying notes 18-21.

teenth Amendment would soon demonstrate, federal prohibitions on racial qualifications for office were in fact more controversial than similar prohibitions of state voter qualifications.[108]

Further, in the mid-1860s Republicans typically described jury service as analogous to office-holding, rather than an ordinary civil right or one of the "privileges and immunities" necessarily associated with citizenship. For example, taking this view in 1864, Republican Senator James Harlan of Iowa distinguished the right to serve on a jury from the right to testify, declaring that the right to serve on a jury was not a natural right, but one of the political rights "that arise under the law by the common consent of the whole."[109] In the thirty-ninth Congress, an analogous understanding of the nature of jury service was expressed by other mainstream Republicans, including Senator William Pitt Fessenden of Maine, the Chairman of the Joint Committee on Reconstruction that produced the Fourteenth Amendment.[110] Similarly, responding to the doubts expressed by some conservative Republicans,[111] Representative James F. Wilson of Iowa, the floor manager of the Civil Rights Bill of 1866, repeatedly denied that any portion of the Bill — including the right to "equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens" — required states to allow blacks to serve on juries.[112]

When Congress turned directly to the constitutional protection of political rights in 1869, the problem of jury service was once again generally ignored. A substantial part of the debate, however, focused on the question of whether the Fifteenth Amendment should also include explicit protection for the right to hold office. If such language had been adopted, it would have arguably provided a firm basis for a federal statute that would have required states to allow blacks on juries. Protection for the right to hold office was deleted from the Amendment, however. Thus, as Radical Henry Wilson observed with dismay, the final version of the Fifteenth Amendment, which ulti-

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108. MALTZ, *supra* note 8, at 151-55.

109. CONG. GLOBE, 38th Cong., 1st Sess. 840 (1864) (remarks of Sen. Harlan).

110. CONG. GLOBE, 39th Cong., 1st Sess. 704 (1866); *see also id.* at 1832 (remarks of Rep. Lawrence) (describing the right to sit on juries as a political right); *id.* app. at 305 (remarks of Rep. Miller) (stating that the right to sit on juries remains in the hands of the states).

111. *Id.* app. at 156-57 (remarks of Rep. Delano).

112. *Id.* at 1117, 1294-95, app. at 157.

mately became law, left states free to exclude blacks from jury service.[113]

In short, the historical case against the constitutionality of the jury service provision rested on two assumptions: First, the Fourteenth Amendment did not protect political rights. Second, the framers considered jury service a political right. During the 1870s, both assumptions were controversial among Republicans;[114] however, in the debate over the Civil Rights Act, supporters of the jury provision directly challenged only the latter. They made a variety of related but different arguments. At times, Sumner's supporters contended that the right to serve on a jury was itself one of the privileges and immunities of citizenship, analogizing it to the right to testify.[115] More often, however, they asserted that the exclusion of blacks from juries violated the rights of black defendants to a trial by their peers.[116] Given the clearly expressed views of the framers on the jury issue, both of these arguments necessarily implied that Section 5 granted Congress the power to make an independent determination of the need to protect certain rights — a point made explicitly by some supporters of the jury provision.[117] Thus, the adoption of the jury provision was also in effect a rejection of the conservative paradigm of constitutional interpretation that had constrained the actions of Congress in the 1860s.

The waning of this paradigm's influence can be attributed in part to an evolution in the basic ideology of the mainstream Republican Party. A change in the arithmetic relating to civil rights was also critical, however. In the earlier period, civil rights measures could become law only if they had the support of two-thirds of the members of each house of Congress. For constitutional amendments, such a super-majority is mandated by the Constitution itself;[118] the same de-

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113. *Id.*, 40th Cong., 3d Sess. 1296 (1869). The complex maneuvering surrounding the drafting of the Fifteenth Amendment is described in detail in WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965); *see also* MALTZ, *supra* note 8, at 142-56.

114. *Compare* H.R. REP. NO. 22, 41st Cong., 3d Sess., pt. 1, at 3 (1871) (concluding that the Fourteenth Amendment does not give Congress authority to pass law giving vote to women) *with id.* pt. 2, at 17 (dissenting views of Rep. Loughridge, arguing that the right to vote is covered by the Privileges and Immunities Clause of the Fourteenth Amendment).

115. *See, e.g.*, CONG. GLOBE, 42d Cong., 2d Sess. 900 (1872) (remarks of Sen. Edmunds); *id.* at 820 (remarks of Sen. Morton).

116. *See, e.g., id.* at 847 (remarks of Sen. Morton); *id.* at 845 (remarks of Sen. Sherman).

117. *See, e.g., id.*, 3 CONG. REC. 948 (1875) (remarks of Rep. Hale).

118. U.S. CONST. art. V.

gree of support was required to override the vetoes of Andrew Johnson, who was President during the immediate post-Civil War period and was firmly opposed to all federal civil rights legislation. In order to obtain the necessary majorities, civil rights measures during this period had to be tailored to the views of the most conservative mainstream Republicans.

The situation changed dramatically when Grant took office as President in 1869. No longer faced with the threat of a veto, Republicans could pass whatever civil rights measures that could muster simple majorities in both houses. Thus, they were able to pass the Civil Rights Act of 1875 despite the objections of conservatives such as Carpenter, Ferry, and Tipton.[119]

In any event, the passage of the Civil Rights Act did not end the debate over the power of Congress. As soon as efforts were made to enforce the Act, its constitutionality was challenged in court. The judicial response to this challenge reflected a quite different attitude toward the structure of American federalism than that evinced by Congress.

IV. THE RESPONSE OF THE SUPREME COURT

A. *Prelude*: The Slaughter-House Cases

The discussions surrounding the drafting of the Fourteenth Amendment and the Civil Rights Act of 1875 formed only a part of the background against which the Supreme Court considered the constitutionality of the statute. The early decisions interpreting the Amendment also were an essential element in that background. The most important of these early decisions came in the *Slaughter-House Cases*.[120] In the *Slaughter-House Cases*, the Court considered a Louisiana statute that granted a monopoly on landing, keeping, and slaughtering livestock to a state-chartered corporation.[121] The statute was challenged by a group of independent butchers who alleged that the statute violated rights guaranteed to them by the Thirteenth and Fourteenth Amendments.[122] With four Justices dissenting,[123] the Court rejected this challenge.

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119. 3 CONG. REC. 1870 (1875).

120. 83 U.S. (16 Wall.) 36 (1873).

121. *See id.* at 38-43.

122. *Id.* at 66.

123. *Id.* at 83-111 (Field, J., dissenting, with whom Chief Justice Chase, Justice Swayne, and Justice Bradley concurred); *id.* at 111-24 (Bradley, J., dissenting); *id.* at 124-31 (Swayne, J., dissenting).

Speaking for the majority, Justice Samuel F. Miller began his analysis of the constitutional issues by emphasizing the relationship between the Reconstruction Amendments and the status of the freed slaves.[124] While conceding that only the Fifteenth Amendment spoke explicitly in terms of race,[125] he also noted that

> no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[126]

In the *Slaughter-House Cases*, this emphasis on racial discrimination worked against the constitutional challenge; at the same time, however, it provided at least inferential support for the view of federal power underlying the Civil Rights Act of 1875. Other aspects of the opinion, by contrast, signaled potential problems for the Civil Rights Act. Justice Miller's opinion focused primarily on the Privileges and Immunities Clause,[127] considered at the time to be the most important provision of Section 1 of the Fourteenth Amendment.[128] He began with a close reading of the text of Section 1, noting that it differentiated between state and national citizenship, and that the Privileges and Immunities Clause by its terms protected only those rights incident to national citizenship.[129] Justice Miller then argued that most rights were incident to state citizenship, and therefore were outside the ambit of Section 1.[130] He defended this reading in large measure by referring to principles of federalism, asserting that

> we do not see in [the Reconstruction] Amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government,

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124. *See id.* at 66-72.
125. *Id.* at 71-72.
126. *Id.* at 71.
127. *Id.* at 74-80.
128. MALTZ, *supra* note 8, at 106.
129. *Slaughter-House*, 83 U.S. at 74-75.
130. *Id.* at 75-80.

> including the regulation of civil rights, the rights of person and of property, was essential to the perfect working of our complex form of government.[131]

Obviously, Justice Miller's state-centered view of the impact of the Reconstruction Amendments on American federalism was inconsistent with the view taken by the supporters of the Civil Rights Act. If extended to racial discrimination cases, it would have led to the invalidation of the entire Act. When the Court first dealt directly with the Act, however, its analysis was dominated by different factors.

B. *Discrimination in Jury Selection*: Ex Parte Virginia *and* Strauder v. West Virginia

Ex Parte Virginia[132] — the 1879 case in which the Supreme Court dealt with the first challenge to the constitutionality of the Civil Rights Act — has been virtually ignored by scholarly commentators. *Ex Parte Virginia* dealt with a petition for a writ of habeas corpus from a state judge who had been indicted for allegedly violating the Civil Rights Act by systematically excluding blacks from jury lists that he had prepared.[133] The case raised two analytically distinct problems of federal-state relations. The first was the substantive question of whether the federal government could constitutionally require the states to allow blacks to serve on juries.[134] The second was the institutional question of whether federal law could punish a state official for performance of the duties required of him by state law.[135]

Essentially restating the position taken by Democrats and conservative Republicans in Congress, Justice Stephen Field, in his dissent, delivered a sharply worded attack on the constitutionality of the Civil Rights Act.[136] In part, Justice Field's opinion was based upon the view that the principles of American federalism barred direct federal legislative coercion of state officials performing official functions under any circumstances.[137] Justice Field declared that "[n]othing . . . could have a greater tendency to destroy the independence and autonomy of the

131. *Id.* at 82.
132. 100 U.S. 339 (1879).
133. *Id.* at 340.
134. *Id.* at 345-46.
135. *Id.* at 346-49.
136. *Id.* at 349-70 (Field, J., dissenting).
137. *Id.* at 358-60.

States; reduce them to a humiliating and degrading dependence upon the central government; engender constant irritation; and destroy that domestic tranquility which it was one of the objects of the Constitution to insure."[138]

Justice Field's primary focus, however, was on the claim that the federal government lacked authority to prescribe the qualifications for jurors in state proceedings. After first describing the principle that the federal government is one of enumerated powers,[139] he declared that

> if we look into the Constitution, we shall not find a single word, from its opening to its concluding line, nor in any of the amendments in force before the close of the civil war, nor . . . in those subsequently adopted, which authorizes any interference by Congress with the states in the administration of their governments, and the enforcement of their laws with respect to any matter over which jurisdiction was not surrendered to the United States,[140]

and that "[t]o every State, . . . there must be, with reference to the subjects over which it has jurisdiction, absolute freedom from all external interference in the exercise of its legislative, judicial, and executive authority."[141]

Justice Field then turned specifically to the contention that the Fourteenth Amendment had significantly modified this principle. The essence of his argument was that "a change so radical in the relation between the federal and state authorities, as would justify legislation interfering with the independent action of the different departments of the State governments, in all matters over which the States retain jurisdiction, was never contemplated by the [Reconstruction] amendments."[142] Drawing on the distinction between civil and political rights, he argued that the right to serve on juries was a political right, and

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138. *Id.* at 358. In making this argument, Justice Field relied on Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860), and The Collector v. Day, 78 U.S. (11 Wall.) 113 (1870). In *Dennison*, the Court held that the federal government lacked the power to order a governor to perform his constitutionally mandated duty to extradite a fugitive from another state. *Dennison*, 65 U.S. (24 How.) at 107. In *Day*, the Court held that the principle of state autonomy barred federal taxation of the salary of a state judicial official. *Day*, 78 U.S. (11 Wall.) at 128.

139. *Ex Parte Virginia*, 100 U.S. 339, 353-57 (1879) (Field, J., dissenting).

140. *Id.* at 357.

141. *Id.* at 362.

142. *Id.*

that while the Fourteenth Amendment guaranteed civil rights to all persons, "[it] left to the States to determine to whom the possession of political powers should be intrusted."[143] Justice Field ended his opinion by noting that the Equal Protection Clause — after the decision in the *Slaughter-House Cases*, the only plausible source of authority for the Civil Rights Act — applied to both aliens and citizens, and then pointed out that the same line of reasoning which supported the result in *Ex Parte Virginia* would also seem to require states to allow aliens to serve on juries.[144]

Justice Field, however, was able to gain the support of only fellow Democrat Nathan Clifford.[145] The seven Republicans on the Court took a quite different view of the impact of the Fourteenth Amendment on the federal structure. Justice William Strong was their spokesman. In *Ex Parte Virginia* itself, Justice Strong's opinion focused primarily on the nationalizing impact of the Fourteenth Amendment. He asserted that the Reconstruction Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress,"[146] and that enforcement of the rights guaranteed by the amendments "is no invasion of state sovereignty."[147] While conceding generally that "the selection of jurors for her courts and the administration of her laws belong to each State,"[148] Justice Strong found justification for the Civil Rights Act of 1875 in the flip side of American federalism — the principle that "in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power."[149] Turning to the institutional concern with federal coercion of state officials, Justice Strong contended:

> A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws.[150]

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143. *Id.* at 368.
144. *Id.* at 368-69.
145. *See id.* at 370.
146. *Id.* at 345.
147. *Id.* at 346.
148. *Id.*
149. *Id.*
150. *Id.* at 347.

He concluded, therefore, that Congress must have authority to provide penalties for those officials who violate the principles of the Fourteenth Amendment.[151]

Justice Strong dealt more specifically with the status of juries under the Fourteenth Amendment in the companion case of *Strauder v. West Virginia*.[152] *Strauder* arose from a murder trial that took place in 1874.[153] Thus, it did not directly implicate the 1875 Act itself. Instead, it dealt with a statute derived from the Civil Rights Acts of 1866 and 1870, which provided for removal of state court actions to federal court by defendants who would be denied or could not enforce rights secured by a "law providing for . . . equal rights."[154] In the trial Strauder, a West Virginia black man, was accused of murder.[155] When the case went to trial in a West Virginia state court, Strauder was tried by an all-white jury, because under West Virginia state law, only whites were allowed to serve on juries.[156] Strauder claimed that the exclusion of blacks from juries was inconsistent with both the Civil Rights Act of 1866 and the Fourteenth Amendment, and that he was therefore entitled to the benefit of the federal removal provision.[157] The state court denied his motion, and Strauder was convicted of murder.[158] He argued that the state court's refusal to remove the case to federal court vitiated his conviction.[159]

Holding that the case should have been removed, Justice Strong's reasoning tracked the arguments of the supporters of the Civil Rights Act of 1875. He contended:

> The very fact that [black] people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors . . . is practically a brand upon them, affixed by the law, an assertion of their inferior-

151. *Id.* at 348. *Ex Parte Virginia* is also discussed in Nelson, *supra* note 8, at 183-185.

152. 100 U.S. 303 (1879). *Strauder* is discussed in some detail in Benno C. Schmidt, Jr., *Juries, Jurisdiction and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1414-33 (1983).

153. *Strauder*, 100 U.S. at 304.

154. *Id.* at 311.

155. *Id.* at 304.

156. *See id.* at 304-05.

157. *Id.*

158. *Id.* at 304.

159. *Id.* at 305.

> ity, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[160]

Justice Strong also asserted that the statute denied equal protection to black defendants themselves, contending:

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former.[161]

The *Ex Parte Virginia/Strauder* analysis showed a willingness to substantially modify traditional notions of state autonomy in cases of racial discrimination. Admittedly, the decision did not go as far as it might have under other circumstances; armed with the holding that jury discrimination was proscribed by Section 1, the *Ex Parte Virginia* Court was able to avoid the difficult question of whether Congress had authority under Section 5 to outlaw modes of racial discrimination that were *not* so proscribed.[162] Nonetheless, Justice Strong's majority opinion clearly altered the balance of federalism in important ways. First, as Justice Field's dissent demonstrated, the simple holding that the Fourteenth Amendment forbade states to exclude blacks from juries was itself a substantial intrusion on state autonomy.[163] Moreover, by upholding the criminal penalties against state officials, the Court upheld the power of Congress to intrude deeply into the structure of state governments to enforce the strictures imposed by Section 1.[164] Neither of these holdings is consistent with the view that the Waite Court was irrevocably shackled to antebellum notions of state-federal relations in its interpretations of the Fourteenth Amendment.[165]

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160. *Id.* at 308.

161. *Id.* at 309.

162. *See Ex Parte Virginia*, 100 U.S. at 345.

163. *Id.* at 357-70 (Field, J., dissenting).

164. *Id.* at 369-70.

165. Virginia v. Rives, 100 U.S. 313 (1879), decided the same day as *Strauder* and *Ex Parte Virginia*, is not to the contrary. In *Rives*, the Court held that the removal statute could not be invoked in a case where the state statute governing jury selection was race-neutral, but a judicial official purposefully excluded blacks from a jury. *Id.* at 319. Although clearly draining the removal statute of much of its practical force in the jury selection context, this holding had little relevance to constitutional theory. First, the *Rives* Court expressly declined to hold that

C. *The* Civil Rights Cases[166]

The Court's approach to the Civil Rights Act took a dramatically different turn in the *Civil Rights Cases*.[167] Decided in 1883, these cases arose from criminal charges against the owners of two hotels and two theaters, respectively, and a civil action against a railroad company.[168] In each case, the gravamen of the allegations was that a patron had been discriminated against on the basis of race.[169]

In dealing with the *Civil Rights Cases*, Justice John Marshall Harlan adopted the basic position taken by the majority of Republicans in Congress.[170] He contended that the right of access to both common carriers and inns was fundamental[171] and accepted Sumner's argument that the authority of Congress under the Fourteenth Amendment also extended to places of public amusement.[172] Justice Harlan, however, stood alone; the other Justices on the Court concluded that the Constitution did not grant Congress the power to directly prohibit discrimination in any of these facilities.[173]

Speaking for the Court, Justice Joseph P. Bradley treated the owners of the facilities as indistinguishable from other private parties.[174] Beginning from this premise, Justice Bradley concluded that Congress lacked authority to act directly against the owners of the facilities.[175] In part, this conclusion rested on a formal argument about the nature of rights themselves:

> [C]ivil rights, such as are guarantied by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings.

Congress lacked constitutional authority to provide for removal in this situation. *Id.* Moreover, it explicitly noted that the offending official would be criminally liable under the Civil Rights Act of 1875. *Id.* at 321. Thus, whatever its merits as a matter of statutory interpretation, *Rives* clearly did not modify the constitutional structure that underlay *Strauder* and *Ex Parte Virginia*.

166. The background of the *Civil Rights Cases* and the reaction to the Court's decision are discussed in detail in FAIRMAN, *supra* note 30, at 550-88.

167. 109 U.S. 3 (1883).

168. *Id.* at 4-5.

169. *Id.*

170. *See id.* at 26-62 (Harlan, J., dissenting).

171. *Id.* at 39 (contending that the right of access to common carriers is fundamental); *id.* at 40-41 (contending that the right of access to inns is fundamental).

172. *Id.* at 41-43.

173. *Id.* at 25.

174. *See id.* at 4-26.

175. *Id.* at 25.

> The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true . . . but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress.[176]

He bolstered his argument with an appeal to the concept of federalism, contending that a contrary position would allow Congress to "establish a code of municipal law regulative of all private rights between man and man in society. It would be to make congress take the place of the state legislatures and to supersede them."[177]

As Alan Madry and Michael Les Benedict have pointed out, the majority's analysis is less conservative than sometimes portrayed. First, the opinion presupposed a state duty to protect the fundamental rights of blacks.[178] Moreover, the decision did not completely foreclose the federal government from protecting the rights described in the Civil Rights Act of 1875. After noting that all states currently protected those rights, Justice Bradley relied on the enforcement provision of the Thirteenth Amendment to suggest that Congress could constitutionally require state officials to continue that protection and punish those officials who failed to do so.[179] Nonetheless, the tone of the *Civil Rights Cases* majority opinion is clearly quite different than those in the jury cases; rather than emphasizing the nationalizing impact of the Reconstruction Amendments, Justice Bradley focused on the continuity of the concept of state autonomy in the federal system.

One factor which may have influenced this shift is the change in the makeup of the Court itself. Three members of the *Ex Parte Virginia/Strauder* majority left the Court between 1879 and 1883,[180] and their replacements were all members of the *Civil Rights Cases*' majority.[181] This explanation, however, does not explain the votes of Justice

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176. *Id.* at 17.

177. *Id.* at 13.

178. *See* Madry, *supra* note 6, at 786-95.

179. *See The Civil Rights Cases*, 109 U.S. at 24-25; Benedict, *supra* note 6, at 75-76.

180. The three members of the *Ex Parte Virginia/Strauder* majority who retired were Noah H. Swayne, William Strong, and Ward Hunt. *See* GERALD GUNTHER, CONSTITUTIONAL LAW app. B, at 3 (11th ed. 1985).

181. The three replacements were Samuel Blatchford, William B. Woods, and T. Stanley Matthews. *See id.*

Bradley, Chief Justice Morrison R. Waite, and Justice Samuel F. Miller, all of whom apparently felt comfortable in joining both majority opinions.

In dealing with the Civil Rights Act, these Justices (and the Court as an institution) embraced portions of both the conservative and radical paradigms of constitutional interpretation. They accepted the conservative view that the state governments would retain primary responsibility for protecting the rights of citizens. Within that structure, however, the jury cases demonstrate that Justice Bradley and like-minded Justices vested Congress with relatively broad authority to define those instances in which racial discrimination was unacceptable, and to proceed vigorously against state officials who refused to enforce the congressional mandates. Thus, taken as a whole, the Court's treatment of the Civil Rights Act was quite moderate.

V. CONCLUSION

The Court's analysis of the constitutionality of the Civil Rights Act reflects the dynamic, dialectical process that often governs the development of constitutional doctrine.[182] The process was set in motion by the drafting of the Reconstruction Amendments themselves — a process dominated by the advocates of the conservative paradigm of constitutional analysis. In the drafting of the Act itself, a more radical approach emerged triumphant. Finally, in *Ex Parte Virginia* and the *Civil Rights Cases*, the Court took a middle position, creating a synthesis that drew on both strands of thought.

Of course, some elements of this synthesis — most notably the denial of direct federal power over common carriers and innkeepers — were quite conservative indeed. Nonetheless, overall the Court's theory is plausible, although admittedly not inevitable. In short, those who characterize the *Civil Rights Cases* Court as a reactionary institution, single-mindedly concerned with resurrecting the structure of antebellum federalism have vastly overstated their case.

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182. The idea that constitutional decisions are part of a dialogue among the various branches of government is a common theme in the work of constitutional theorists. *E.g.*, MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 113 (1982) (citing ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF JUSTICE 91 (1970)).