THE UNHAPPY HISTORY OF CIVIL RIGHTS LEGISLATION

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The enforcement by federal legislation of the constitutional rights of individuals is a story written largely in terms of confusion, distortion and frustration. Seldom, if ever, have the power and the purposes of legislation been rendered so impotent. Indeed, this story constitutes one of the saddest chapters in the historic struggle to effectuate the American ideal of freedom and equality for all.

Act I—The Legislative Prelude

Congressional implementation of the constitutional promises of freedom encompasses but a brief span of nine years, 1866 to 1875. Prior to that period the Constitution protected fundamental personal rights only against infringement by the federal government. This protection, embodied primarily in the first ten amendments, was not designed to be a sword or a shield against infringement either by the states or by individuals. And it was a protection essentially negative in character, permitting individuals to assert their rights only as a defense to some sort of governmental action. Such limited guarantees reflected the early fears of a powerful central government and the early reliance on the states as the protectors of the individual's rights and liberties.

The Civil War and its aftermath, however, wrought great changes in the constitutional framework of civil rights. The victory of the northern armies meant the effective end of slavery as a legalized institution. The slavery debate, which had so long embroiled the halls of Congress, receded into nothingness. In its place came a vigorous controversy over the federalist or nationalist tendencies of the abolitionists as they moved to consolidate their victory. This great controversy resulted in three new constitutional amendments and five congressional statutes supplementary thereto, all of which went beyond the immediate problems created by the emancipation of the Negro and caused a most profound shift in the status of the federal government relative to the civil rights of all inhabitants. The abolitionists and the Republican party reacted violently to the feeling of anti-federalism which had so long marked this area of human freedom. The states' rights doctrine suffered a complete albeit temporary eclipse. The national government no longer was viewed as the prime threat to civil liberties. Rather it

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was looked upon as the defender of the individual from assaults on his freedom stemming from state or private action. The nationalistic implications of the abolitionist movement came to their full fruition.

The first episode in this constitutional upheaval was the adoption and ratification of the Thirteenth Amendment, ratification occurring on December 18, 1865.¹ This amendment abolished both slavery and involuntary servitude throughout the nation and gave Congress the power to make its provisions effective by appropriate legislation. Here for the first time was a constitutional command respecting individual freedom which was not confined in its reach to the federal government. It was also directed to the states. And, most significantly, it was directed to private individuals. As the Supreme Court noted, this amendment was “not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”²

The opponents of the Thirteenth Amendment attacked it as an unjustifiable invasion of the rights of the states and an undue extension of the power of the federal government. Indeed, it was argued that the amendment was so drastic in this respect as to destroy the federal character of the government and to be inconsistent with the whole spirit of the Constitution.³ These opponents assumed, as did the proponents, that the amendment was of a sweeping nature, that it went beyond the outlawry of personal bondage and guaranteed the emancipated Negro certain minimum rights, and that Congress would be enabled to safeguard and protect those rights by legislation. The guaranteed rights

¹ But see Hamilton, “The Legislative and Judicial History of the Thirteenth Amendment,” 9 Nat. Bar J. 26 at 47-48 (1951), contending that December 9 rather than December 18, 1865, is the correct date of ratification.

² Civil Rights Cases, 109 U.S. 3 at 20, 3 S.Ct. 18 (1883). It has also been pointed out that: “The Amendment nullified two parts of the Constitution: the fugitive slave and the three-fifths provisions. The former (Article IV, Section 2) provided for the rendition of ‘any person held to service or labor’ who should flee to another state. The much controverted fugitive slave act of 1850 had been repealed in 1864. The three-fifths provision (Article 1, Section 2), one of the famous compromises of 1787, stated that in apportioning direct taxes and representation in the House of Representatives the respective numbers should include three-fifths of all ‘other persons,’ that is, slaves. Thus a consequence of the Amendment was an increase in the southern representation by about twenty seats. This prospect worried the Republicans, quickened their interest in Negro suffrage, and produced the section in the Fourteenth Amendment penalizing by a reduction in representation any state denying suffrage to Negores.” Hamilton, “The Legislative and Judicial History of the Thirteenth Amendment,” 9 Nat. Bar J. 26 at 56 (1951). See, in general, Tenbroek, “The Thirteenth Amendment to the Constitution of the United States—Consummation to Abolition and Key to the Fourteenth Amendment,” 39 Calif. L. Rev. 171 (1951).

³ See, for example, the remarks of Rep. Fernando Wood, Democrat of New York, Cong. Globe, 38th Cong., 1st sess., p. 2941 (1864).
were thought to include equality before the law, protection in life and person, and free opportunity to live, work and move about. And the slavery to be abolished by the amendment was to include the incidents of the system which impaired and destroyed the civil rights of white persons. White citizens residing in the South and sympathizing with the Negro or the North were to be freed of the kidnapping, imprisoning, mobbing and murdering which the slavery system had spawned.

Thus, in the eyes of its supporters and opponents, the Thirteenth Amendment was the final step in the long campaign to end slavery and all its incidents. Not only were the Negro and his white friends to be protected in their privileges and civil liberties but the federal government was to be the effective means for achieving and perpetuating those ends through appropriate legislation.

But the need for legislative appendages to the Thirteenth Amendment became almost immediately apparent. Something more than the idealistic words of the amendment was essential. Widespread atrocities against the free Negroes and their white friends continued in the South. Most southern legislatures enacted Black Codes, the many restrictions of which resulted in forcing Negroes to work for their former masters or other white men. The Negro in effect remained a slave in all but the constitutional sense. By virtue of these codes, he was "socially an outcast, industrially a serf, legally a separate and oppressed class."

The Reconstruction politicians became aroused at this resurgence of the Dred Scott philosophy, a philosophy which declared that Negroes were not citizens of the United States and had no rights which the white man was bound to respect. The 39th Congress, convening in December 1865, witnessed a variety of proposals, all designed to strike down the offensive Black Codes. The preceding Congress had established the Freedmen's Bureau to guard the general welfare and interests of former slaves; some of the proposals looked toward a strengthening of the bureau, which had proved weak and ineffective. But the

5 Id. at 149-150.
8 See Dred Scott v. Sanford, 60 U.S. 393 (1856).
Republican program for the new Congress was broader in its civil rights conception than these various proposals. It went beyond a mere nullification of the Black Codes and a buttressing of the bureau. It was a program rooted in the new Thirteenth Amendment and was made applicable to all people, though immediately and primarily of aid to the freedmen. The time had come to exercise the congressional power to effectuate the amendment, with all its broad aspirations, by appropriate legislation.

The heart of this legislative program was a civil rights bill and a proposed amendment to the Freedmen's Bureau Act. These two bills represented the efforts of the amendment's framers, acting almost simultaneously with its ratification, to implement the intentions of the amendment. These two proposals were essentially the same, seeking to effectuate the amendment by protecting the civil rights and immunities of all people directly through the federal government. Section 1 of the civil rights bill and section 7 of the Freedmen's Bureau bill had identical lists of the civil rights to be guaranteed by the national government:

1. The right to make and enforce contracts;
2. The right to buy, sell and own realty and personalty;
3. The right to sue, be parties and give evidence; and
4. The right to full and equal benefit of all laws and proceedings for the security of persons and property.

Neither bill was designed exclusively for the benefit of Negroes. The Freedmen's Bureau bill extended the services of the bureau in protecting these rights to “refugees and freedmen in all parts of the United States,” while the civil rights bill covered “the inhabitants of any state or territory of the United States.” Moreover, both state action and state inaction fell within the ambit of these bills. And so did private, individual action. The evidence before Congress at this time was replete with instances of private individuals committing outrages and atrocities on freedmen and their white sympathizers.

Together, these bills effectively nationalized the civil rights of all inhabitants of the United States, white or colored. They culminated the abolitionist concept of the federal government as the protector of the essential principles of liberty. But then a strange thing happened.

The opponents of these bills, the same persons who had opposed adop-
tion of the Thirteenth Amendment on the assumption that it incorpo-
rated the broad abolitionist doctrines, grounded their attack on a strict
construction of the amendment. In their revised view, the amendment
did no more than eliminate the relationship of master and slave; hence
the bills, in revolutionizing the federal-state relationship as to civil
rights, were unauthorized by the Thirteenth Amendment or by any
other provision of the Constitution.11

Those favoring the two proposals, of course, were consistent in
their broad interpretation of the Thirteenth Amendment. The rights
specified in these bills were said to be merely those guaranteed by the
Amendment—the natural rights of man as set forth in the Declaration
of Independence and the privileges and immunities of citizens flowing
from the comity clause of the Constitution (art. IV, sec. 2). They
argued that the opposite of slavery is freedom, that the Thirteenth
Amendment established that freedom by abolishing slavery, and that
the freedom so established consisted of the rights which had been
denied the slaves and which were now spelled out in the two bills.
And to them the concept of equal protection of the laws, which was so
prominent in their philosophy and in their framing of the proposals,
meant an affirmative, full protection of all the laws rather than a mere
comparative equality.12

In the words of Senator Trumbull, the principal draftsman of the
Thirteenth Amendment and the civil rights bill, under that amend-
ment "Congress is bound to see that freedom is in fact secured to
every person throughout the land; he must be fully protected in all
his rights of person and property; and any legislation or any public
sentiment which deprived any human being in the land of those great
rights of liberty will be in defiance of the Constitution; and if the states
and local authorities, by legislation or otherwise, deny those rights, it is
incumbent on us to see that they are secured."13

11 Id. at 164-165.
12 Fairman and Morrison, "Does the Fourteenth Amendment Incorporate the Bill of
13 CONG. GLOBE, 39th Cong., 1st sess., p. 77 (1866). Senator Lane stated: "They
[the Negroes] are free by the constitutional amendment lately enacted and entitled to all
the privileges and immunities of other free citizens of the United States. It is made your
especial duty by the second section of that amendment, by appropriate legislation, to carry
out that emancipation. If that second section were not embraced in the amendment at all
your duty would be as strong, the duty would be paramount, to protect them in all rights
as free and manumitted people. I do not consider that the second section of that amend-
ment does anything but declare what is the duty of Congress, after having passed such
amendment to the Constitution of the United States, to secure them in all their rights and
The civil rights bill became the Act of April 9, 1866, being enacted over the veto of President Johnson. It wrote into law that persons born in the United States and not subject to any foreign power were citizens of the United States, thereby overruling the *Dred Scott* decision. It further provided that such citizens, without regard to color, were entitled in every state and territory to the same right to contract, sue, give evidence, and take, hold and convey property, and to the equal benefit of all laws for the security of person and property, as was enjoyed by white citizens; and any person who under color of law caused any such civil right to be denied would be guilty of a federal offense.

The Thirteenth Amendment also provided the basis for another important though less controversial statute, the Anti-peonage Act of March 2, 1867. This law "resulted from practices found to prevail in the Territory of New Mexico and inherited from the days of Spanish rule, but went beyond the particular evil involved and prohibited the holding of anyone in involuntary servitude anywhere in the United States. This is still a living law, used to eliminate the various indirect methods by which many persons of low economic status in many of the states have been forced to labor for a particular employer against their will." The validity of this statute has never been in serious question and it has on occasion been used in conjunction with the Thirteenth Amendment to strike down offending state laws.

Litigation under the Civil Rights Act of 1866 found most courts willing to accept its constitutionality, although there were a few decisions to the contrary. But the doubts raised by the congressional opponents had a telling effect and many of the advocates of nationalization of civil rights felt none too secure Constitution-wise. Moreover, some of these advocates concluded that the rights secured by the 1866 privileges... What are the objects sought to be accomplished by this bill? That these freedmen shall be secured in the possession of all the rights, privileges, and immunities of free men; in other words, that we shall give effect to the proclamation of emancipation and to the constitutional amendment." Cong. Globe, 39th Cong., 1st sess., p. 602 (1866).
act should be placed beyond the possibility of repeal by any later Congress. They felt that the centralizing of civil rights authority in the federal government should be made a permanent part of our constitutional way of life rather than remain dependent upon the fluctuating discretion of succeeding Congresses.\textsuperscript{20}

These doubts as to the adequacy of the Thirteenth Amendment and the 1866 act became so acute that it was soon deemed advisable to recast the provisions in a more detailed mold of a new constitutional amendment. Such was the motivating factor that led to the birth of the Fourteenth Amendment. Its proponents, fresh from the legislative battles of the Thirteenth Amendment, the 1866 Civil Rights Act and the Freedmen's Bureau bill, desired to solidify their intentions. They wished, by virtue of a new constitutional provision, to make certain that civil rights would be truly nationalized, that the federal government would inject itself into this realm that had hitherto been exclusively reserved to the states, and that all individuals would be protected in the full and equal enjoyment of the rights of person and property. More specifically, the provisions and implications of the 1866 act were meant to be incorporated into the Fourteenth Amendment.

It was also evident from the start that the framers of the Fourteenth Amendment had in mind more than the outlawing of state action which abused civil rights. The amendment sprang from the efforts of the congressional Joint Committee on Reconstruction.\textsuperscript{21} This committee studied the various suggestions made as to wording the new provision and also held formal hearings on the conditions then existing in the South. These hearings were significant in that they revealed that most of the abuses still being suffered by the Negro were at the hands of individual white persons rather than state governments or those acting under color of state law. Such private invasions of civil liberties were testified to by the vast majority of the 125 witnesses appearing before the committee.\textsuperscript{22} These hearings further demonstrated that the Negro was not alone in his tribulations; white persons who had supported the Union cause or who were bold enough to advocate civil rights for the

\textsuperscript{20} Tenbroek, The Antislavery Origins of the Fourteenth Amendment 183-185 (1951).

\textsuperscript{21} For the full story of the legislative developments and debates leading to the adoption of the Fourteenth Amendment, see Flack, The Adoption of the Fourteenth Amendment (1908); Warsoff, Equality and the Law (1938); James, Framing of the Fourteenth Amendment (1939); Fairman and Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5 (1949). See also Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction (1914).

\textsuperscript{22} Warsoff, Equality and the Law 109-110 (1938).
Negro were also the victims of terrorism in the South. These factors were thus clearly in the minds of the committee members when they drafted the all-important first section of the Fourteenth Amendment. The demonstrated fact that violations of civil rights were primarily the product of individual rather than state action made it unreasonable for the committee to limit the scope of the amendment to state action. In fact, the committee’s report, recommending “such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic,” made plain the universal scope of the amendment. The subsequent debates in Congress implicitly assumed that individual action, not just state action, was covered by the amendment.

The various proposals for wording the Fourteenth Amendment ran from a simple prohibition of discrimination in state or national laws on account of race or color to a granting of power to Congress to secure to all persons “full protection in the enjoyment of life, liberty, and property.” The contrast here was between a flat constitutional prohibition and a broad grant of power to Congress. But the basic idea of equal or full protection of the laws was present in all proposals. The final draft, as presented to the states for ratification, was something of a compromise. It contained both a constitutional prohibition and an allocation of power to Congress. The first section contained but eighty words, all of them designed to give national protection to persons or citizens in their natural rights:

“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. 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; nor deny to any person within its jurisdiction the equal protection of the laws.”

This section was intended to be read in connection with the fifth section of the amendment, which gave Congress the power to enforce the amendment “by appropriate legislation.”

The remarks in Congress concerning the first section, while meager, revealed the consistently broad intentions of the amendment’s support-

23 See Flack, The Adoption of the Fourteenth Amendment 72 (1908).
24 Report of the Joint Committee on Reconstruction, p. xxi (1866).
25 The various forms of the proposed amendment are set forth by Tenbroeck, The Antislavery Origins of the Fourteenth Amendment 187-190 (1951).
ers. The early drafts had been in a more positive form in which Congress was directly authorized to secure to all persons the equal protection of the laws and to all citizens their privileges and immunities. Repeated statements on the floor of Congress revealed that this form of the equal protection clause related to the obligation of government to protect men in their natural rights and that such protection, when supplied, must be equal to all. But the final draft was much more negative in form. The prohibitions were made primarily on the states, with power being granted Congress to make such prohibitions effective by appropriate legislation. Just what was the purpose of this shift?

Congressional speakers made plain that section 1 of the final draft was designed to make certain that the Civil Rights Act of 1866 was constitutionally valid, a proposition which naturally drew forth the old charge that an undue amount of power was being concentrated in the federal government. But more than this was essential to the promoters of nationalized civil rights. Some future Congress might repeal the 1866 act and leave these rights shorn of federal protection. To eliminate that possibility required that the provisions of the act in some way be inserted into the new amendment itself. To do that entailed

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26 This form of the proposed amendment was said to give “the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress by its enactment when necessary to give to a citizen of the United States, in whatever state he may be, those privileges and immunities which are guaranteed to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever state he may be that protection to his property which is extended to the other citizens of the state.” Statement of Rep. Woodbridge, Cong. Globe, 39th Cong., 1st sess., p. 1088 (1866).

27 Rep. Eliot stated: “I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred. I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question.” Cong. Globe, 39th Cong., 1st sess., p. 2511 (1866).

28 See statement of Rep. Garfield, 39th Cong., 1st sess., p. 2462 (1866): “The civil rights bill is now a part of the law of the land. But every gentleman knows that it will cease to be a part of the law whenever the sad moment arrives when that gentleman’s party [the Democratic] comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here.”
more than a simple grant of power to Congress to secure civil rights, which was what the early drafts of the amendment had done. So an outright prohibition was framed. Since Congress was already prohibited by other sections of the Constitution from encroaching upon these rights, the new prohibition was addressed to the states, combined with a grant of enforcement power to Congress. Such a prohibition was believed to be effective as to individual action, for if the state did not act to curb or punish the individual violators there would be state inaction of the type comprehended by the amendment, and Congress could then provide adequate remedies.

The first sentence of the amendment, making all persons born or naturalized in the United States "citizens of the United States and of the State wherein they reside," was added in the final stages of the amendment's development and was drawn from the 1866 act. It was feared that without such a definition of citizenship there might be an effort some day to take away from the Negro the protection of the amendment by declaring him not to be a citizen, as the Dred Scott decision had done. And so the definition was added. National citizenship was thereby made primary and independent, while state citizenship was relegated to a secondary, derivative status. Such a concept of a paramount national citizenship to which fundamental rights adhered had been the basis of the 1866 act and had been implicit in the whole movement to nationalize civil rights. It was the necessary premise of all the remainder of the first section of the amendment, especially the privileges and immunities clause. The latter clause, forbidding the states from abridging the privileges or immunities of citizens of the United States, has real meaning only against a background of national citizenship accompanied by the basic rights of the individual. The promoters of the Fourteenth Amendment were not interested in prohibiting the states from interfering with the narrow, technical relationships of a citizen to the federal government. They were desirous of precluding the states from impinging upon the rights to life, liberty and the pursuit of happiness. And they thought of those rights as necessarily belonging to national citizenship, rights which they labelled privileges and immunities.

In light of subsequent developments, it is unfortunate that the framers of the amendment did not give a more definite indication as

28 See Flack, The Adoption of the Fourteenth Amendment 83-84, 88-90 (1908); Frantz, "Enforcement of the Fourteenth Amendment," 9 Lawyers Guild Rev. 122 at 123 (1949).

to the privileges and immunities which were intended to be placed under the protective umbrella of the federal government. The phrase "privileges or immunities" referred plainly enough, in the framers' minds, to the fundamental rights of man, enumerated at least in part in the provisions of the 1866 act. They felt that the Declaration of Independence and the Constitution itself had made self-evident the great rights which attached to those in allegiance to the federal government. And they knew that as long ago as 1823 the phrase "privileges and immunities of citizens," as used in article IV, section 2, of the Constitution had been judicially interpreted to include all fundamental rights. Moreover, they may have feared that to enumerate the rights once again in the Fourteenth Amendment was not only redundant but might close the list and prevent subsequent recognition and protection of additional rights.

In any event, it was the privileges and immunities clause which the framers regarded as the core of section 1 of the amendment. The equal protection and due process clauses were treated by them as of secondary importance, as appendages to the protection afforded the privileges and immunities or the fundamental rights of national citizenship. Those clauses simply meant that in guaranteeing the basic human rights covered by the privileges and immunities clause, the federal government was to see to it that these rights were recognized and effectuated by the states on an equal basis and that any necessary deprivation of those rights by the states was in accordance with basic principles of procedural due process.

Such was the intended nature of the Fourteenth Amendment upon its ratification on July 28, 1868. Less than two years later, on March 30, 1870, the Fifteenth Amendment was ratified. This constitutional addition stated 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," with power being given Congress to enforce the amendment by appropriate legislation.

Congress then made several bold efforts to enforce the Fourteenth and Fifteenth Amendments "by appropriate legislation." On May 31, 1870, a new Civil Rights Act was passed. This statute reenacted the 1866 act under the belief that whatever doubts may have previously


32 16 Stat. L. 140. On February 28, 1871, an amendment to the 1870 act was adopted, making a variety of additions. 16 Stat. L. 433.
 existed as to constitutional validity were now removed by the Fourteenth Amendment. It also added criminal penalties for depriving anyone of the rights enumerated in the earlier law. In addition, the 1870 act made elaborate provisions to effectuate the right of free suffrage without distinction as to race, color or previous condition of servitude. Criminal sanctions were attached to any interference with an inhabitant's right to qualify as a voter, to register or to vote. A conspiracy section was added, punishing as a felony conspiracies to violate the statute or to injure, oppress, threaten or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States.

On April 20, 1871, Congress passed another statute "to enforce the provisions of the Fourteenth Amendment to the Constitution."\(^{33}\) Known as the Ku Klux Klan Act, this statute was the indignant reaction of Congress to conditions in the southern states wherein the Klan and other lawless elements were rendering life and property insecure. Both civil and criminal penalties were established for the deprivation of rights under color of law. The pith of the act was section 2, making it an offense to "conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose . . . of depriving any person or any class of persons of the equal protection of the laws, or equal privileges or immunities under the laws." If state authorities were unable or unwilling to prevent the deprivation of a constitutional right, and violence resulted, the President was empowered to take appropriate measures to suppress the violence. Moreover, the person whose civil rights were injured was given a civil cause of action against the officer who should have but did not protect him, a provision which was specifically directed against lynching and other forms of mob violence.

The capstone of the congressional civil rights program came on March 1, 1875, with the adoption of "An act to protect all citizens in their civil and legal rights."\(^{34}\) The preamble stated that it was essential to just government that "we recognize the equality of all men before the law, and hold that it is the duty of government in all its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political," and that it was "the appropriate object of legislation to enact great fundamental


\(^{34}\) 18 Stat. L. 335.
principles into law." Section 1 of the new law required all inns, public conveyances, theaters, and other places of public amusement to open their accommodations and privileges to "all persons within the jurisdiction of the United States," subject only to legal conditions applicable alike to citizens of every race and color, regardless of any previous condition of servitude. Section 2 made a violation of this provision a misdemeanor and gave the injured person the right to recover a $500 penalty for each offense. Federal courts were given exclusive jurisdiction over cases arising under this statute, with all cases being reviewable by the Supreme Court regardless of the sum of money involved.

Here was the most penetrating of all the civil rights statutes. It was confirmatory of the principles which motivated the adoption of the Thirteenth and Fourteenth Amendments. The Thirteenth Amendment, it will be recalled, was designed to do more than illegalize personal bondage. The intention was also to remove the badges and incidents of slavery and involuntary servitude. Freedom from slavery meant freedom to exercise civil rights without discrimination based upon race or previous condition of servitude. The 1875 statute was molded so as to effectuate that principle where discrimination was practiced by individuals in the exercise of public or quasi-public functions. Public conveyances, inns, theaters and other places of public amusement fell into the public or quasi-public category by their very nature and by virtue of the various governmental controls traditionally exercised over them. To be deprived of their services because of race or previous condition of servitude was truly thought to be a badge of slavery which could be eradicated. The 1875 law was also framed in accordance with the idealistic formula of the Fourteenth Amendment. Negroes were undeniably citizens of the United States and of the states wherein they resided by virtue of the first sentence of that amendment. Hence they were entitled to all the fundamental rights which national citizenship was thought to entail. And they were also entitled to the benefits of the comity clause (art. IV, sec. 2), providing that "the citizens of each state shall be entitled to all the privileges and immunities

35 "... the essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances and theatres; but that such enjoyment shall not be subject to conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. The effect of the statute ... is, that colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and vice versa." Civil Rights Cases, 109 U.S. 3 at 27, 3 S.Ct. 18 (1883).
of citizens in the several states.” Viewed either as national citizens or state citizens, Negroes possessed the right to be free from race discrimination with respect to civil rights enjoyed by white citizens. And Congress had power, given it by the fifth section of the amendment, to enforce that right. The 1875 act was an exercise of that power.

Such were the congressional efforts from 1866 to 1875 to make secure the constitutional ideals of freedom and equality for all. Never before or since has there been so much important federal legislation regarding civil rights. The changes made by this series of enactments and constitutional additions were of a most significant nature, altering substantially the balance between state and federal power. Civil rights were conceived of as inherent ingredients of national citizenship and as such were entitled to federal protection. And that protection was to be accorded in an affirmative fashion. Congress made what “was probably the first attempt in the history of mankind to destroy the branches of slavery after its root had been destroyed.” The federal government was given effective weapons to combat and defend against all who would deprive inhabitants of the United States of their rights to be free of inequalities and distinctions based on race, color and previous condition of servitude. These weapons were usable against both private individuals and those acting under color of state law.

As stated in Justice Swayne’s dissent in the Slaughterhouse Cases, the Thirteenth, Fourteenth and Fifteenth Amendments, in the light of their true purposes, “are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven. Fairly construed, these amendments may be said to rise to the dignity of a new Magna Charta.”

**Act II—The Judicial Coup d’Etat**

But even before 1875, when Congress finished building this comprehensive structure of nationalized civil rights, corrosive elements were fast at work, elements which were eventually to leave the structure in ruins. The builders, fired with the combined zeal of the abolitionist movement, the post-war hatreds and the Reconstruction politics, had unfortunately left gaping structural weaknesses in their handiwork.

35a KoNvITz, THE CoNSTiTUTIoN AND CiViL RiGThS (1947).
36 16 Wall. (83 U.S.) 36 at 125 (1873).