

**Congress and Civil Rights:  
The Demise of Reconstruction, 1871-1877**

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During the Reconstruction Era in American politics, Congress took the lead in fashioning policy to address questions left unanswered at the end of the Civil War. More specifically, congressional Republicans found themselves responsible for establishing new political and social arrangements in the former Confederate states of the American South. During Reconstruction's early years (1865-1871), Republicans spearheaded a series of landmark laws. By the early 1870s however, facing a resurgent Democratic Party and economic crisis, much of the energy powering the GOP dissipated. In this paper, we explore the political contestation over civil rights legislation during the waning years of Reconstruction. Our analysis focuses on the remaining Enforcement Acts, the Civil Rights Act of 1875 and the general amnesty law allowing ex-Confederates to reintegrate into American politics. Through an examination of the debates and votes on these bills, we make clear how and why the "noble experiment" that was Reconstruction came to an end.

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## Introduction

The dozen years after the conclusion of the Civil War – typically known as the Reconstruction Era in American Politics – were revolutionary in their political aims and ambitions. Designed by the Republican Party and implemented by Congress, Reconstruction policies established new political and social arrangements in the former-Confederate states of the American South. As a consequence of the bills enacted by Congress, blacks (the majority of whom were ex-slaves) finally found themselves with the same civil and political rights as their white neighbors. Moreover, Reconstruction established a foundation for the development of a Southern wing of the Republican Party, thereby making the GOP (for the first time in its history) a true interregional party.

The guiding policies of Reconstruction were adopted during a critical period of time – in the first six years (three congresses) after the Civil War – during which Republican Party held supermajorities in both chambers of Congress. They put this numerical strength to work by successfully wresting control of policymaking authority from President Andrew Johnson in order to adopt a series of landmark laws (Civil Rights Act of 1866, several Reconstruction Acts, and three Enforcement Acts) and constitutional amendments (14th and 15th Amendments).<sup>1</sup> Reconstruction policy and a GOP beachhead in the South were thus constructed over the objections of the president, and during a time when the Democrats were institutionally and electorally weak. At no other time in American history has a congressional party worked its will in quite such a fashion and context.

That said, the underlying dynamics of Republican Party success were more complex than a simple “supermajority works its will” story might imply. The GOP faced significant internal

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<sup>1</sup> See Jeffery A. Jenkins and Justin Peck, “Congress and Civil Rights: The Early Reconstruction Era, 1865-1871,” paper presented at the 2016 annual meeting of the Southern Political Science Association, San Juan, PR.

divisions over how quickly and ambitiously to pursue Southern Reconstruction. Radicals argued for change that would truly upend Southern society by elevating blacks to the equal of whites in all domains and respects, while severely punishing the former white governing population. Radicals also called for new federal powers that, if implemented, would dissolve traditional notions of constitutional federalism. Moderates on the other hand argued for significant change – political and civil equality for blacks – but without meaningful disqualification of white voters. They aimed for the prompt reconstitution of Southern state governments and an expeditious national reunion. They also contested radical plans calling for federal intrusion into state functions. Moderates eventually won out, and a truly “Radical Reconstruction” never occurred. Nevertheless, a moderate-led Reconstruction was still a jarring experience for many white Southerners, and a revolution in civil and voting rights for blacks was achieved.

The Democratic Party would not, of course, remain forever weak. While the Republicans could exploit Copperhead-ism (North) and treason (South) as rhetorical devices, the Democrats turned their calls for a “return to normalcy” and for the abandonment of war-related debates into potent political attacks. They were also the political beneficiaries of a serious economic depression, which took hold in late-1873. Finally, they were able to exploit various advantages, like the growing immigrant populations in Northern cities and general white animosity against Carpetbag and Scalawag Republican governments (which relied almost exclusively on the newly enfranchised black voting population) in the South. These natural advantages could be enhanced with electoral fraud (illegal voting) in the North and violence and intimidation (of black voters) in the South.

As a result, even as the GOP was erecting its Reconstruction policy, it faced internal questions of how far to go and when to stop, as well as a Democratic Party that was intent on

reasserting itself on the national stage. By the early 1870s, the Republicans saw their seat shares in Congress decline – the 1870 midterms left the party with less than a supermajority in the upcoming 42nd Congress – while internal disagreements over continued Reconstruction policy grew louder and more frequent.

In the following sections, we explore how the Republican Party dealt with these conflicting pressures, and how the political lives of blacks in the South were subsequently affected. Our analysis focuses on the three Congresses in session between 1871 and 1877: the 42nd (1871-73), 43rd (1873-75), and 44th (1875-77) Congresses. These would turn out to be the final three Reconstruction Congresses, as intra-GOP divisions and external pressures – a Northern public tired of further action on behalf of the Freedmen, a national panic and resulting economic depression, and a relentless Democratic Party especially in the South – brought the Republicans’ “Noble Experiment” to an end. And with that end came considerable uncertainty about whether the rights of black Americans would be protected.

In detailing the civil-rights related initiatives during this time, we examine the congressional proceedings, individual roll-call votes, and eventual legislative outcomes. To guide the analysis, we break the remainder of the paper into 3 main sections, each of which focuses on particular policy or legislation: (1) the completion of the Enforcement Acts, which were first initiated in 1870; (2) the passage of the Civil Rights Act of 1875, along with the removal of office-holding disqualifications for ex-Confederates (otherwise known as “general amnesty”), after a lengthy legislative struggle; and (3) the failure of a new Enforcement bill in 1875.

## **Enforcement Legislation: 1871-72**

When the 42nd Congress convened on March 4, 1871, immediately after the conclusion of the lame-duck session of the 41st Congress, the chamber's first major order of business was the adoption of a new Enforcement Act.<sup>2</sup> Such an Act was necessary, many believed, based on electoral conditions surrounding the 1870 midterms, wherein the Democrats scored major victories, both North and South.

In the North, Democratic victories were centered in urban areas of Pennsylvania and New York. In the South, violence and intimidation of black voters by organized paramilitary groups (notably, the Ku Klux Klan) allowed the Democrats to make significant inroads in Alabama, Florida, Georgia, North Carolina, and Texas. At the national level, these Democratic victories meant an additional 30 House seats and 2 Senate seats in the 42nd Congress; and the House result meant the Republicans would no longer possess a supermajority for the first time since the start of the Reconstruction Era.

Republicans, fearful of seeing their influence slip away, wasted little time in articulating a response. In February 1871, in the waning days of the 41st Congress, they pushed through a Third Enforcement Act, built around reducing electoral fraud in the voting and registration processes. This Act was explicitly designed to address the problems the party faced in urban areas (principally in the North).<sup>3</sup> The lame-duck session expired before the GOP could effectively address its parallel issue – in the South. Thus, the Republicans would have to meet

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<sup>2</sup> This would be the final Congress that officially convened in an “extra” session beginning on March 4, following its election and immediately after the adjournment of the preceding Congress, per the Act of January 22, 1867, which mandated such a meeting. The Act was adopted in order to prevent President Johnson from dictating when Congress would convene outside of its regular (“long” and “short”) sessions, and thus prevent Johnson from having a direct hand in determining Reconstruction policy.

<sup>3</sup> The provisions of the Third Enforcement Act covered cities of 20,000 or more inhabitants.

this challenge with a somewhat smaller majority in the 42nd Congress – and, as time would tell, without the intra-party unity they had enjoyed on enforcement legislation to that point.

### The Fourth Enforcement Act

The legislation that would become the Fourth Enforcement Act (or Ku Klux Klan Act of 1871) would be polarizing for the Republican Party. All party members were concerned with the violence perpetrated against black voters in the South, but a serious division of opinion emerged about what the appropriate response should be. Radicals believed more extreme action was necessary, and that the president should be provided with significant new power – such as suspending the writ of *habeas corpus*, if necessary – in order to bring the instigators of unlawful activity, principally members of the Ku Klux Klan, to justice. Only through such extreme action, went the Radical thinking, would free and fair elections be possible in the South. In short, the Radicals were determined to use – and expand – federal power in order to protect black voters and the GOP’s position in the South.

Moderates, on the other hand, were considerably more reluctant to proceed in such a way. In their minds, the proposed Radical solution would threaten the federal/state balance in the Nation and, relatedly and more generally, be of dubious constitutionality. It would also leave the GOP open to campaign claims of “federal overreach” by the Democrats in advance of the 1872 elections. Finally, some moderate voices within the Republican Party – those who would eventually become involved in the Liberal Republican movement – believed that Congress had done enough to provide blacks with civil and political protections and given the president all the enforcement power that he required (in the First Enforcement Act of 1870) to intervene in Southern elections (should he see the need). For these liberal Republicans, the burden was now squarely on the “enlightened” men of the post-war South; that is, they believed that moderate

white Southern business and political leaders needed to step up and both denounce the Klan (and like-minded vigilantes) and require that state and federal laws be faithfully executed. To the extent that Congress should produce any new legislation, these liberal Republicans felt that it should be directed toward removing the office-holding disabilities inherent in Section 3 of the 14th Amendment (i.e., passage of a General Amnesty Law); this would, in their minds, create a better white leadership stock in the South, which would indirectly hasten order and generate respect for law.<sup>4</sup>

The GOP division would explode publically, beginning on March 15, 1871. During the House debate that day, Benjamin Butler (R-MA) sought to introduce – and have the chamber adopt – new enforcement legislation that would greatly expand federal power in pursuit of protecting black voting rights. As Allen Trelease notes: “[Butler’s] measure would empower the President to suspend habeas corpus and to remove state officials when there was reason to doubt the validity of their election; United States marshals were also given the power to purge disloyal members from federal juries.”<sup>5</sup> Such legislation had been discussed in a GOP caucus the previous night, at which point Butler had attempted to bind members in support of the policy.<sup>6</sup> Moderates refused to go along, however, and led by John Peters (R-ME) sought to “kick the can” on Southern voting enforcement through the appointment of a new select committee to investigate the execution of laws and the condition of the citizenry. Such committee would report back in December, at the start of the first regular session. The floor vote on Peters’

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<sup>4</sup> The *Chicago Tribune*, an organ for liberal Republicanism by this time, voiced this argument succinctly: “Congress, by its legislation, keeps the best-informed, the most experienced and influential class of rebels, politically disfranchised, and, thereby, excludes the very men who are most deeply interested in the re-establishment of peace and order.” See *Chicago Tribune*, March 17, 1871, p. 2.

<sup>5</sup> Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* (Baton Rouge: Louisiana State University Press, 1971), 387.

<sup>6</sup> See *Chicago Tribune*, March 16, 1871, p. 1.

resolution would be an initial test case on the Radical/moderate power struggle – which the moderates (with the help of the Democrats) won.<sup>7</sup>

Butler was incensed. On March 16, he took to the floor and railed against the “trick” that was sprung on him and those who sought to protect black voters and the party’s Reconstruction achievements, and castigated those Republicans who conspired against the caucus bond and joined with the Democrats. Peters and Henry Dawes (R-MA) engaged Butler on the limitation of the caucus bond (which they viewed as pertaining merely to organizational matters) and the degree to which honest policy opposition – which they and others made Butler aware of repeatedly – constituted a “trick.” Eventually, Speaker Blaine left the speaker’s chair and took to the floor to counter Butler’s many accusations, and in so doing “denounce his insolence.”<sup>8</sup>

For a time, amid this intra-Republican squabbling, it appeared that the moderate strategy would hold – and that the House would adjourn the extra session in very short order. At that point, President Grant got involved.<sup>9</sup> On March 23, he met with several GOP leaders from both chambers and requested a new enforcement law, along the lines of what Butler had designed; he noted that he had for some time desired new power to combat terrorism in the South (especially in South Carolina, where Klan activity was especially heavy), but was concerned that an explicit request for such power would make him appear “despotic.” Citing the existing moderate opposition, the Republicans leaders replied that they could not rally support for a new enforcement law without an explicit request from Grant, and that the time for him to act was now – as Klan terror would only ramp up as the 1872 election approached, and adopting such a

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<sup>7</sup> For these proceedings, see *Congressional Globe*, 42nd Congress, 1st session (March 15, 1871), 115-17.

<sup>8</sup> For these proceedings, see *Congressional Globe*, 42nd Congress, 1st session (March 16, 1871), 123-26.

<sup>9</sup> The details of Grant’s involvement and meeting with GOP leaders are discussed in Trelease, *White Terror*, 387-88. Trelease bases his account in part on the recollections of George F. Hoar, *Autobiography of Seventy Years*, Volume I (New York: Charles Scribner’s Sons, 1906), 204-06. Note that Grant had written earlier to Speaker James Blaine, in a letter dated March 9, asking him to make addressing the deteriorating condition in the South the priority in the special session. See *Grant Papers*, vol. 21, 218-19.

measure would only become harder as it appeared more politically (i.e., electorally) motivated. The worst scenario, according to Rep. George Frisbie Hoar (R-MA), would be if no new power was granted and Grant was forced to put down Klan activity by use of (potentially) illegal means.

Grant sought to avoid Hoar's worst-case scenario and immediately penned a message to Congress. Grant's communication, which was read in both chambers that same day, stated:

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectively secure life, liberty, and property, and the enforcement of law in all parts of the United States. It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the end of the next session of Congress. There is no other subject upon which I would recommend legislation during the present session.<sup>10</sup>

Grant's communication had the desired effect, jumpstarting Republican congressional efforts. Rep. Samuel Shellabarger (R-OH) immediately moved that a nine-member House select committee be appointed on the president's message to recommend appropriate legislation, and after some debate and vocal Democratic opposition, his motion was agreed to.<sup>11</sup>

Five days later, on March 28, Shellabarger, representing the select committee, reported a bill to the House.<sup>12</sup> That bill, comprised of five sections and designed to enforce the provisions

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<sup>10</sup> *Congressional Globe*, 42nd Congress, 1st session (March 23, 1871), 236, 244.

<sup>11</sup> *Congressional Globe*, 42nd Congress, 1st session (March 23, 1871), 244-49. The committee was Shallabarger Benjamin Butler (R-MA), Glenni Scofield (R-PA), Henry Dawes (R-MA), Austin Blair (R-MI), Charles Thomas (R-NC), George Morgan (D-OH), Michael Kerr (D-IN), and Washington Whitthorne (D-TN).

<sup>12</sup> *Congressional Globe*, 42nd Congress, 1st session (March 28, 1871), 317. Excellent legislative histories of the Fourth Enforcement Act can be found in Everette Swinney, *Suppressing the Ku Klux Klan: The Enforcement of the Reconstruction Amendments, 1870-1877* (PhD Dissertation, University of Texas at Austin, 1966), 154-79; Alfred Avins, "The Ku Klux Klan Act of 1871: Some Reflect Light on State Action and the Fourteenth Amendment," *Saint Louis University Law Journal* 11 (1967): 331-81; Robert John Kaczorowski, *The Nationalization of Civil Rights: Constitutional Theory and Practice in a Racist Society, 1866-1883* (PhD Dissertation, University of Minnesota,

of the Fourteenth Amendment, provided a right of action in federal court for infringement of constitutional rights that occurred at the state level (section one); punished intra-state conspiracies (involving two or more persons) that resulted in felonious (murder, manslaughter, robbery, assault and batter, etc.) violations of constitutional rights (section two); provided the president with the authority to intervene with federal military force in cases in which (a) citizens' constitutional rights were violated within a state, (b) state authorities were unable or unwilling to protect those rights, and (c) such authorities did not seek assistance from the federal government to protect the equal protection of the laws (section three); and allowed the president to declare martial law and suspend the writ of *habeas corpus* when conspiracies overwhelmed a state's ability to protect its citizens, or if state authorities were complicit in the conspiracy, such that a rebellion against the federal government was deemed to have commenced (section four). These enforcement provisions were also temporary in nature, and would expire in just over a year (on June 1, 1872).

Overall, as Alfred Avins notes, "the bill was designed to remedy state denials of equal protection by direct federal intervention against *individuals*" (emphasis added).<sup>13</sup> That is, Shallabarger (and his allies) understood that rights violations throughout the South were often due to actions taken by private individuals (citizens) – most recently and disturbingly by members of the Ku Klux Klan – rather than a result of direct state action, and thus took a broad reading/interpretation of the national authority over civil rights and citizenship provided in the Fourteenth Amendment.

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1971), 161-209; Marilyn R. Walter, "The Ku Klux Klan Act and the State Action Requirement of the Fourteenth Amendment," *Temple Law Quarterly* 58 (1985): 3-64.

<sup>13</sup> Avins, "The Ku Klux Klan Act of 1871," 333.

Shallabarger's bill was controversial, and led to a debate that spanned nine days (March 28 through April 6) and generated remarks by over eighty representatives.<sup>14</sup> Michael Kerr (D-MD) initiated the Democratic critique by arguing that the bill – especially section two – was an unconstitutional attempt to federalize police power, and that the states possessed exclusive jurisdiction to make criminal code. Other Democrats followed Kerr, leveling charges against the despotic attempts by the Republicans to usurp state power. Many Republicans, including George Hoar (MA), Aaron Perry (OH), David Lowe (KS), and Henry Dawes (MA), spoke at length in support of the constitutionality of the bill.

A number of moderate Republicans, however, raised concerns. John Farnsworth (R-IL) opposed centralization arguments, made by Hoar and others, and took the position that the federal government only had the power to step in when states took unjust actions to infringe upon rights – not when states (or state officials) failed to act. John Hawley (R-IL) agreed with Kerr that Congress did not possess the authority to establish a general criminal code, and called for the second section of the bill to be revised such that it would focus on punishment for those who would limit the exercise of constitutional rights (like the right to vote or hold federal office). James Garfield (R-OH) took a similar position to Hawley, arguing that section two of the bill needed to be rewritten, to move it away from suggesting the national government would assume original jurisdiction over the rights of persons and property – which he believed was the domain of the states – and toward a position that limited congressional action to instances in which a state denied equal protection to its citizens by failing to protect their individual rights.

Given the concerns raised by the moderate Republicans, Shellabarger regrouped and offered a substitute amendment on April 5, which replaced sections two, three, and four of his

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<sup>14</sup> Swinney, *Suppressing the Ku Klux Klan*, 156.

original bill.<sup>15</sup> The principle change was to reword section two, so as to eliminate any language that suggested a federal criminal code and “confine the authority of [the] law to the prevention of deprivations which shall attack the equality of rights of American citizens.”<sup>16</sup> In addition, sections three and four were broadened to include references to “United States” instead of merely to “a State,” such that the stakes for “obstructions of the laws” or “defiance of authority” were raised. Finally, the provision in section four that authorized the declaration of martial law was eliminated, leaving only the grant of power to the president to suspend the writ of *habeas corpus*.

The following day, March 6, the House took up Shellabarger’s substitute. Farnsworth offered an amendment to strike out that portion of the third section that provided the president with the authority to direct voluntary enlistments of state militias, in lieu of using the Army. Farnsworth held that the provision would do little more than “enlarge the regular Army,” which he objected to.<sup>17</sup> His amendment passed, 116-86, with the support of 24 Republicans and all Democrats (90) who voted.<sup>18</sup> (Vote results appear in Table 1.) Jacob Ambler (R-OH) then offered an amendment to strike out that portion of section four that would have granted the president the power to suspend the writ of *habeas corpus* to protect the public safety and overthrow a rebellion. Ambler offered no justification for his amendment, but presumably felt that section four represented a federal overreach. Eight other Republicans voted with Ambler in support of his amendment, along with all but one Democrat, but it ultimately failed, 100-105, as the bulk of the GOP held firm behind the provision.<sup>19</sup> Eugene Hale (R-ME) followed with an amendment to add a new section to Shallabarger’s bill, one that would work to prevent the Klan

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<sup>15</sup> *Congressional Globe*, 42nd Congress, 1st session (April 5, 1871), 477-78.

<sup>16</sup> *Congressional Globe*, 42nd Congress, 1st session (April 5, 1871), 478. Shellabarger’s rewording of section two was based on a proposed amendment offered by Burton Cooke (R-IL) the prior day.

<sup>17</sup> *Congressional Globe*, 42nd Congress, 1st session (April 6, 1871), 514.

<sup>18</sup> *Congressional Globe*, 42nd Congress, 1st session (April 6, 1871), 515.

<sup>19</sup> *Congressional Globe*, 42nd Congress, 1st session (April 6, 1871), 519-20.

from dominating juries and thwarting justice. Hale's amendment would require all grand and petit jurors to take an oath in open court that they had never been involved, directly or indirectly, in a combination or conspiracy to deprive their fellow citizens of their rights, and that those found to have provided false oaths would be charged with perjury. Hale's amendment, which would also eliminate the earlier "ironclad" test oath during the Civil War, was agreed to 103-74, on a division vote.<sup>20</sup>

Holman then moved an amendment that would have gutted Shellabarger's bill by striking out section three, thereby eliminating the president's ability to use military force to put down insurrection and guarantee equal protection of the laws. Not surprisingly, Holman's amendment failed, 91-115, as all but one Republican successfully opposed all Democrats.<sup>21</sup> At that point, Shellabarger's substitute amendment, as amended, was agreed to, and the amended bill was finally put a to vote – and it passed 118-91, with all Republicans supporting and all Democrats opposing the measure.<sup>22</sup> The amended bill was then sent on to the Senate Judiciary Committee. The Republicans in the House had thus done their part in producing a new Enforcement Act to counter Klan violence in the South. Now, it was up to the South to follow suit.

On April 11, Sen. George Edmonds (R-VT), the Chair of the Judiciary Committee, reported out H.R. 320, Shellabarger's amended House bill.<sup>23</sup> The Judiciary Committee made a number of amendments to the House bill, but most were viewed as minor modifications. Debate, which stretched over the next several days, followed many of the same themes as in the House proceedings. Lyman Trumbull (R-IL) appreciated Shellabarger's rewriting of section two, such that it no longer appeared to be an attempt to create a federal criminal code, but cautioned that

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<sup>20</sup> *Congressional Globe*, 42nd Congress, 1st session (April 6, 1871), 521. John Shanks (R-IN) called for the yeas and nays, but only one member voted in the affirmative – well short of the one-fifth needed.

<sup>21</sup> *Congressional Globe*, 42nd Congress, 1st session (April 6, 1871), 521-22.

<sup>22</sup> *Congressional Globe*, 42nd Congress, 1st session (April 6, 1871), 521-22.

<sup>23</sup> *Congressional Globe*, 42nd Congress, 1st session (April 11, 1871), 566.

Congress did not (in his view) possess the power to intervene against conspiracies to obstruct justice in state courts. In essence, Trumbull was willing to support federalization of authority only up to a point.<sup>24</sup> Allen Thurman (D-OH) spoke for the Democrats in supporting Trumbull's reservations, arguing that Congress had no authority to punish conspiracies by individuals, which he asserted was wholly the domain of the states. Carl Schurz (LR-MO) then enunciated a position that would characterize Liberal Republicanism, arguing that federal enforcement was not the remedy for Southern problems; that while accounts from the region were clearly distressing, the Southern people should be responsible for determining solutions, and not Congress.

Voting in the Senate commenced on April 14. A number of minor GOP clarifying amendments were agreed to, while several Democratic amendments – meant to weaken the bill – were defeated. In the end, three major complications emerged. The first was agreeing on a termination date for the grant of authority to the president to suspend the writ of *habeas corpus* (section four). The Shallabarger bill established an end date of June 1, 1872, roughly the end of the next regular session. Oliver Morton (R-IN) offered an amendment that would have extended the termination date to March 4, 1873, the end of the 42nd Congress – which Thurman wryly observed would not be “until after the next presidential election.”<sup>25</sup> And while Morton's measure had considerable Republican support (23 votes), a majority of the GOP (27) took a more cautious approach and joined with all Democrats to defeat the amendment. A follow-up vote on the Judiciary Committee's proposed amendment, to replace “June 1, 1872” with “the end of the

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<sup>24</sup> Indeed, Trumbull would later move an amendment to strike out section four (the *habeas corpus* section) entirely, a measure that was defeated 21-43. *Congressional Globe*, 42nd Congress, 1st session (April 14, 1871), 705.

<sup>25</sup> *Congressional Globe*, 42nd Congress, 1st session (April 14, 1871), 703-04.

next regular session of Congress,” was successful; this mild rewording allowed for the possibility that the next regular session might extend beyond June 1.<sup>26</sup>

Next, John Sherman (R-OH) proposed an amendment to add a new section to the bill. Sherman’s amendment would allow citizens who incurred property damage in the course of having their civil rights violated during a riot to hold the relevant county, city, or parish liable and to recover compensation in federal court. Sherman’s amendment was based on a provision in the earlier Butler bill, and sought “to force local government to provide adequate policy protection.”<sup>27</sup> Sherman’s amendment passed 39-25, with ten of 48 Republicans – those with growing concerns about federal overreach – joining with all Democrats in opposition.<sup>28</sup>

Finally, an amendment initially raised by Thomas Osborne (R-FL) in the Committee of the Whole, and renewed on the floor by Oliver Morton, was considered, which would strike out the provision in Rep. Hale’s juror section repealing a 1862 Act that required a loyalty test-oath for persons serving on federal juries. As Swinney notes, “Many Republicans as well as Democrats felt that the repeal [of the Civil War-era “ironclad” oath] was needed as a means of expediting judicial proceedings and improving the caliber of southern juries.” In effect, the repeal provision in Hale’s section would allow a much greater proportion of white Southerners – those who were in some manner “Confederates” – to participate on Reconstruction-era juries. Osborne, Morton, and others sought instead to maintain a more punitive approach toward the ex-Confederates. And this “Radical” position won out, as the Osborne amendment passed 34-25.<sup>29</sup> And similar to the Sherman amendment, ten Republicans – of the more moderate persuasion –

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<sup>26</sup> The regular (long) session of the previous (41st) Congress, for example, did not end until July 15.

<sup>27</sup> Swinney, *Suppressing the Ku Klux Klan*, 159. Sherman also held that his provision was “copied from the law of England that has been in force for six hundred years,” an assertion that Thurman disputed. *Congressional Globe*, 42nd Congress, 1st session (April 14, 1871), 705.

<sup>28</sup> *Congressional Globe*, 42nd Congress, 1st session (April 14, 1871), 705.

<sup>29</sup> *Congressional Globe*, 42nd Congress, 1st session (April 14, 1871), 708.

defected.

The amending activity having been completed, the Senate then turned to a final vote on the bill. And H.R. 320, as amended, passed 45-19.<sup>30</sup> In the end, only four Republicans voted in opposition.<sup>31</sup> The amended bill was then sent back to the House.

The next day, April 15, Shallabarger moved to take up the Senate-amended bill. Continuing to move forward on H.R. 320 would not be easy, however. The House refused to concur in three of the Senate amendments: (1) the Judiciary Committee amendment to extend the *habeas corpus* provision to the end of the next regular session (and thus supported maintaining June 1, 1872 as the termination date); (2) the Sherman amendment (and thus supported limiting court damages against cities, counties, and parishes); and (3) the Osborne amendment (and thus supported keeping the provision that would repeal the ironclad-oath law from 1862). In the first case, a large majority of Republicans (84 of 98) supported concurrence, but were outvoted by the combination of GOP dissenters and a near-unified Democratic coalition; in the second case, a division vote of 12-114 suggested that the Republicans were unified behind non-concurrence; and in the third case, the Republicans were divided, but a small majority (51 of 95) joined with all Democrats to vote against concurrence.<sup>32</sup> (Votes appear in Table 2.) Shallabarger then moved that a conference committee be created to iron out the chamber differences, which was agreed to.<sup>33</sup>

Two days later, on April 17, the Senate received the decision of the House on H.R. 320. George Edmunds insisted upon the Senate amendments that the House rejected, while supporting

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<sup>30</sup> *Congressional Globe*, 42nd Congress, 1st session (April 14, 1871), 709.

<sup>31</sup> These four were Lyman Trumbull (IL), Thomas Tipton (NE), Joshua Hill (GA), and Thomas Robertson (SC).

<sup>32</sup> *Congressional Globe*, 42nd Congress, 1st session (April 15, 1871), 724-25. Note that Shallabarger, when presenting the Senate-amended bill, advocated for not concurring in the Sherman and Osborne amendments. See *Congressional Globe*, 42nd Congress, 1st session (April 15, 1871), 723.

<sup>33</sup> The conference committee would consist of Shallabarger, Glenni Scofield (R-PA), and Michael Kerr (D-IN) from the House and Edmunds, Sherman, and John Stevenson (D-NY) from the Senate. See *Congressional Globe*, 42nd Congress, 1st session (April 15, 1871), 725; (April 17, 1871), 728.

the House's call for a conference committee. Edmunds got his wish, as the Senate considered a motion to recede from its amendments and rejected it, 17-33, with 33 of 38 Republicans backing Edmunds. If a new Enforcement Act were to be adopted, it would be up to a conference committee to get it done.

The following day, April 18, Edmunds presented the conference committee's bill. It was a compromise between the positions of the two chambers: (1) the "end of the next regular session" termination date for the *habeas corpus* provision was maintained (favoring the Senate bill); (2) preemptory juror challenges on grounds of disloyalty was eliminated (thus striking out only the first part of the 1862 Act in the fifth provision, which was a compromise between the two chamber bills); and (3) suits for property damages must first be brought against the individuals responsible (i.e., the rioters) – and two months must elapse – before the municipality in question could be targeted (which was a compromise between the two chambers).<sup>34</sup> A lively debate then followed regarding the constitutionality of the new Sherman provision, and whether the federal government could impose liability on local levels of government. Finally, a vote was taken that evening on the conference report, and it passed 32-16, with 32 of 34 Republicans voting in favor.<sup>35</sup>

In the House, on April 18, Shellabarger also presented the conference committee's bill. He noted the three compromise features of the bill, paying special note to the revised Sherman amendment.<sup>36</sup> In doing so, he intuited that the revised Sherman amendment might be the sticking point in successfully navigating the chamber – especially given the lopsided nature of the original Sherman amendment's rejection. And Shellabarger was correct, as the chief

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<sup>34</sup> *Congressional Globe*, 42nd Congress, 1st session (April 18, 1871), 751-55.

<sup>35</sup> *Congressional Globe*, 42nd Congress, 1st session (April 18, 1871), 779. The two Republican dissenters were William Sprague (RI) and Reuben Fenton (NY).

<sup>36</sup> *Congressional Globe*, 42nd Congress, 1st session (April 18, 1871), 750-52.

complaint against the amendment in the Senate – that the federal government could not impose liability on local levels of government (which were agents of the states) – was raised not just by Democrats, like Michael Kerr (IN), but by Republicans, like Charles Willard (VT), Luke Poland (VT), Austin Blair (MI), John Bingham (OH), and John Farnsworth (IL), as well. A vote was taken the following day. And while a significant majority of Republicans – 73 in all – were persuaded to support the revised Sherman amendment, a small number of GOP members (28) joined with all Democrats to vote down the conference bill, 74-106.<sup>37</sup>

Divided and exhausted though they were on the new Enforcement legislation, the Republicans marshaled their forces yet again. The House called for a new conference committee, and the Senate, after insisting upon its amendment, agreed.<sup>38</sup> A new conference bill, with a revised Sherman amendment that reduced the scope of liability, was proposed later that same day. As Luke Poland noted, in presenting the new conference bill, “the section imposing liability upon towns and counties must go out or we should fail to agree.”<sup>39</sup> At the same time, he and his conference brethren wanted to make it clear that liability needed to be significant to be a reasonable deterrent, so culpability was expanded. As Poland stated:

The substance of [the new Sherman amendment section] is that any person who has knowledge of any of the offenses named, any of the wrongs already described, any of the conspiracies indicated in the second section are about to be committed, it shall be within his duty to use all reasonable diligence within his power to prevent it; and if he fails to do so, so much damage as is occasioned to anybody in consequence of his failure, for so much he shall be responsible in an action.<sup>40</sup>

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<sup>37</sup> *Congressional Globe*, 42nd Congress, 1st session (April 19, 1871), 800-01.

<sup>38</sup> *Congressional Globe*, 42nd Congress, 1st session (April 19, 1871), 801, 810. Members of this second conference committee included Shallabarger, Luke Poland (R-VT), and Washington Whitthorne (D-TN) from the House and Edmunds, Matthew Carpenter (R-WI), and Allen Thurman (D-OH) from the Senate.

<sup>39</sup> *Congressional Globe*, 42nd Congress, 1st session (April 19, 1871), 804.

<sup>40</sup> *Congressional Globe*, 42nd Congress, 1st session (April 19, 1871), 804.

In effect, the conference bill was creating a “statutory tort,” requiring anyone who knew about Klan activities to come forward or incur liability.<sup>41</sup> Thus, local citizens who weren’t affiliated with the Klan risked being sued for damages for Klan activities. The onus was thus placed on individuals rather than counties and town. This shifting of responsibility did the trick, by eliminating the concerns of those Republicans who held that the former Sherman amendment was an excessive (and unconstitutional) federal overreach. The second conference bill passed 93-74, with all Republicans voting in favor and all Democrats voting in opposition.<sup>42</sup>

Edmunds presented the second conference bill in the Senate, and followed Poland in his argument. He claimed that by expanding the scope of the liability *within the citizenry* of the area in which the outrages take place, the bill made those with knowledge of the crimes “accessories” in the activities themselves. In this way, the new conference bill possessed “teeth,” while at the same time avoiding the constitutional issues that stymied a successful resolution to that point.<sup>43</sup> Sherman himself bemoaned the measure, believing that his earlier amendment would be more effective, but recognized the politics of the situation. And the Senate plowed ahead and passed the second conference bill, 36-13, with 36 of the 38 Republicans voting in favor.<sup>44</sup> President Grant signed the bill the next day, March 20, and Congress adjourned shortly thereafter.<sup>45</sup> A fourth Enforcement Act was now law.

As Swinney notes, the heart of the new seven-section law was the second section: “Together with section six of the First Enforcement Act, [the second section of the Fourth Enforcement Act] created a new federal crime – conspiracy to deprive of civil rights – and

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<sup>41</sup> Avins, “The Ku Klux Klan Act of 1871,” 374.

<sup>42</sup> *Congressional Globe*, 42nd Congress, 1st session (April 19, 1871), 808.

<sup>43</sup> *Congressional Globe*, 42nd Congress, 1st session (April 19, 1871), 820-21

<sup>44</sup> *Congressional Globe*, 42nd Congress, 1st session (April 19, 1871), 831. The two Republican dissenters were Joshua Hill (GA) and Thomas Robertson (SC).

<sup>45</sup> *Congressional Globe*, 42nd Congress, 1st session (April 20, 1871), 838, 42.

thereby brought the basic rights of American citizenship under the protection of the general government.”<sup>46</sup> Sections three and four were direct enforcement provisions, which provided the president with new authority to suppress domestic disturbances that deprived citizens of equal protection and allowed him (for a limited period of time) to suspend the writ of *habeas corpus* if necessary.

And Grant would not be shy about using this new authority. Initially, he sought the white South’s voluntary compliance, issuing a proclamation that called on citizens to obey the law and stated that he would only invoke his new powers to protect “citizens of every race and color” in the enjoyment of their constitutional rights.<sup>47</sup> As Allan Trelease contends: “Doubtless [Grant] hoped... that the mere existence of the law would scare the Ku Klux into desisting; in which case he would let bygones be bygones.”<sup>48</sup> Through late-spring and early-summer 1871, however, cabinet officials planned for the worst, and went to work building an administrative apparatus to collect evidence for future prosecutions against Klan leaders and their minions. Through the summer months, following outbreaks of Klan violence in Mississippi and North Carolina, a number of arrests were made that resulted in a fair number of convictions. But it wasn’t until the administration turned its collective attention to South Carolina that the controversial stipulations of the Fourth Enforcement Act came into play.

South Carolina was the hub of Klan-based terror. Recurring incidents of Klan violence were relayed to the president in August, and after a full cabinet meeting, Grant sent Attorney General Amos Akerman to the Palmetto State to investigate. After an extensive investigation of the situation on the ground, Akerman concluded that the normal legal process would not be an adequate remedy. The Klan’s reach was too pervasive, and mass arrests would be necessary to

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<sup>46</sup> Swinney, *Suppressing the Ku Klux Klan*, 162.

<sup>47</sup> Presidential Proclamation, May 3, 1871, *Grant Papers*, vol. 21, 336-37.

<sup>48</sup> Trelease, *White Terror*, 391.

cripple the organization and restore democratic order. Akerman recommended military action and the suspension of the writ of *habeas corpus* in the most troubled areas.<sup>49</sup> Grant obliged, and on October 12, he called for the end of “unlawful combinations and conspiracies” and demanded that the Klansmen disperse and surrender their arms and disguises. Five days later, after most Klan members ignored the president, Grant suspended the writ of *habeas corpus* in nine upland counties and sent three companies of soldiers to South Carolina to assist the federal marshals in discharging their duties.<sup>50</sup>

Hundreds of arrests of Klansmen then followed, and an estimated two thousand were driven from the state. Later in 1871 and into 1872, those arrested were prosecuted in federal courts, in trials that took on national prominence. The Great South Carolina Ku Klux Klan Trials revealed the full extent of federal power in the protection of the rights of black citizens.<sup>51</sup> Moreover, the concerted federal attack on the Klan in South Carolina was replicated in neighboring southern states; while the writ of *habeas corpus* was not again suspended, the enforcement momentum was not to be denied. In sum, thanks to the Fourth Enforcement Act and the active efforts of the president, the number of criminal cases tripled between 1871 and 1872; and in 1872, the conviction rate in enforcement cases in the South approached 90 percent.<sup>52</sup> As a result, as Jean Edward Smith notes, “Grant’s willingness to bring the full legal and military authority of the government to bear had broken the Klan’s back and produced a dramatic decline in violence throughout the South.”<sup>53</sup>

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<sup>49</sup> Wang, *The Trial of Democracy*, 96-97; Trelease, *White Terror*, 401-02.

<sup>50</sup> Presidential Proclamation, October 17, 1871, *Grant Papers*, vol. 22, 176-78.

<sup>51</sup> See Lou Falkner Williams, *The Great South Carolina Ku Klux Klan Trials, 1871-1872* (Athens: University of Georgia Press, 1996).

<sup>52</sup> Wang, *Trial of Democracy*, 300.

<sup>53</sup> Jean Edward Smith, *Grant* (New York: Simon and Schuster, 2001), 547.

Thus, while congressional Republicans struggled to adopt the Fourth Enforcement Act, once in place and supported by the president, it did the job. Race-based violence was reduced significantly, and the rights of black citizens in the South were protected (at least for a time). Despite these evident successes, the divisions within the Republican Party on the proper scope of federal power in pursuit of civil rights still existed. And these divisions would be on full display once again in the second session of the 42nd Congress.

### The Fifth Enforcement Act

The fifth and final Enforcement Act would be considered, and eventually, passed in late-spring of 1872. The Fifth Enforcement Act (or Amendatory Enforcement Act, as it was known) would be supplemental to the First Enforcement Act (of May 31, 1870), and sought to strengthen election supervision by extending the powers that were provided to federal officers under the Second and Third Enforcement Acts. Its path to eventual success was perhaps the most difficult of the five Acts.

The initial legislation that would ultimately become the Fifth Enforcement Act was introduced by William Kellogg (R-LA) on March 11, 1872.<sup>54</sup> The Senate took up the bill (S. 791) on May 9, and discussion opened the following day.<sup>55</sup> The bill stated that circuit court judges would have the power, upon the request of two citizens, to appoint election supervisors in every local precinct; these supervisors would watch the polls and count ballots. The bill also stipulated that federal marshals for each district would have the power, upon the request of two citizens, to appoint deputy marshals to assist the election supervisors, to keep the peace, and to make arrests if necessary. These stipulations had been part of enforcement legislation before, but only for cities with 20,000 or more inhabitants. Thus, Kellogg sought to ensure that elections in

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<sup>54</sup> *Congressional Globe*, 42nd Congress, 2nd session (March 11, 1872), 1558

<sup>55</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 9, 1872), 3270; (May 10, 1872), 3288.

rural errors – with an eye specifically toward the South – would have the same safeguards as elections in more densely populated areas. As Oliver Morton (R-IN) stated: “The object of the bill is to simply secure a fair and honest election, to give nobody the advantage.”<sup>56</sup>

On May 11, voting commenced on S. 791 and spanned three days. The Democrats offered a variety of amendments to scuttle the bill, many of which would have limited army involvement and procedures for keeping the peace. The Republicans, perhaps feeling smug, adopted an amendment requiring an oath of loyalty to the U.S. Constitution, which would be required before a citizen could vote. The only potential pitfall occurred on March 14, when Lyman Trumbull (R-IL) attempted to attach a general amnesty amendment, which would have “removed all political disabilities imposed by Section 3 of the Fourteenth Amendment, except for certain classes of persons specified in the act itself.”<sup>57</sup> The desire to reintegrate white Southerners into the body politic, by allowing them to hold political office, had grown in popularity, as advocates of liberal Republicanism saw this as a way to stabilize the Southern political system. That is, per this view, a “better class” of whites, once in office, would reestablish order and eliminate the violence and irregularities in Southern elections and daily life more generally.

Prior to the vote on Trumbull’s amendment, Morton gained the floor and stated: “I hope this amendment will be voted down. If it is adopted, the effect will be to defeat this bill, upon which we have been engaged some two or three days, and which I think it is very important to pass.” More to the point, he went on to note that any amnesty bill, per the provisions of the Fourteenth Amendment, would require a 2/3 vote in each chamber to pass; thus, adopting the

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<sup>56</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 10, 1872), 3289.

<sup>57</sup> James A. Rawley, “The General Amnesty Act of 1872: A Note,” *The Mississippi Valley Historical Review* 47 (1960): 480-84. General Amnesty was adopted as a separate (stand-alone) act on May 21. The provisions removed office-holding disabilities from all white Southerners, except for a few hundred.

amnesty amendment (by a simple majority) would in all likelihood kill the new enforcement bill.<sup>58</sup> Several other Republicans made similar arguments, while Trumbull held his ground. Eventually, a vote on the amendment was had, and it failed 22-33, as only 7 of 40 Republicans defected and supported the amnesty provision.<sup>59</sup> The Senate then proceeded to vote on S. 791, as amended, and it passed 36-17.<sup>60</sup> (Votes appear in Table 3.)

Republicans in the House sought to maintain the momentum behind the new enforcement legislation. On May 28, John Bingham (R-NY) moved to suspend the rules, take S. 791 (as amended via a substitute by the Judiciary Committee) from the Speaker's table, and pass it. A short but heated exchange then occurred on the floor. James Beck (D-KY) objected to the substitute being read, saying "We do not want an army at the polls to superintend the holding of elections," to which Bingham replied "We propose that the Ku Klux army shall not go to the polls." The House then voted on the bill, and while a positive majority was in favor, 115-87, it fell short of the 2/3 necessary to suspend the rules.<sup>61</sup> All 113 Republicans who cast a vote supported the measure. The House tried a second time three days later, on May 31, and fell short again – this time the vote was 101-95 (with five Republican defections), so suspension failed by a larger amount.<sup>62</sup>

Rather than accept defeat, Kellogg took a different tack. On June 7, 1872, he moved to attach his enforcement bill as an amendment to the House civil appropriations bill (H.R. 2705).<sup>63</sup> Democrats cried foul, but the Presiding Officer, Henry Anthony (R-RI), considered the amendment to be in order (germane) and his fellow Republicans largely agreed – an appeal from

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<sup>58</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 14, 1872), 3418.

<sup>59</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 14, 1872), 3421.

<sup>60</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 14, 1872), 3431. Four Republicans – Trumbull, William Sprague (RI), Morgan Hamilton (TX) and James Alcorn (MS) – defected, along with Karl Schurz (LR-MO), and voted with the Democrats.

<sup>61</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 28, 1872), 3934.

<sup>62</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 31, 1872), 4103.

<sup>63</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 7, 1872), 4361-62.

the decision of the chair was tabled, 28-22, with 28 of 35 Republicans backing the Presiding Officer.<sup>64</sup> (Votes appear in Table 4.) The Democrats then laid down a dilatory gauntlet – with 16 motions to adjourn and one motion to postpone indefinitely – which the Republicans defeated. Finally, Kellogg’s amendment was considered, and it passed, 31-12, with 31 of 33 Republicans voting in favor.<sup>65</sup> The Senate then moved to pass H.R. 2705, with the Kellogg amendment attached, on a 32-10 vote, with 32 of 33 Republicans issuing their support.<sup>66</sup> Cole moved that the Senate insist on its amendments, and that a conference committee be requested in advance of the bill being considered by the House; his motion was agreed to.

H.R. 2705 then moved on to the House. Throughout the day on June 8, the Republicans sought to suspend the rules, nonconcur in the Senate amendments, and agree to the Senate’s request for a conference. But they were unable to secure the 2/3 necessary for suspension, and the Democrats were trying to force the Republicans’ hand with multiple motions to adjourn and recess. Eventually, James Garfield (R-OH) and Speaker Pro Tempore Henry Dawes (R-MA) created some procedural confusion around various points of order, such that Dawes asked “Shall the decision of the Chair stand as the judgment of the House?” Amid the confusion, Democrats were unsure how to respond, to which Dawes announced “The question being put ... the result of the vote by sound that the judgment of the Chair was sustained.” And, by that ruling, Dawes held that Garfield’s move to suspend the rules and pass his resolution (to nonconcur in the Senate amendments, and agree to the Senate’s request for a conference) was agreed to. Charles

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<sup>64</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 7, 1872), 4365.

<sup>65</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 7, 1872), 4393. The two Republican dissenters were William Sprague (RI) and Hamilton (TX). This was a vote in the Committee of the Whole. When the amended bill was reported back to the Senate as amended, Henry Cooper (D-TN) asked that the Kellogg amendment be concurred in – which elicited a 32-11 vote, with 32 of 34 Republicans voting to concur. The two Republican dissenters were Sprague and Reuben Fenton (NY). *Congressional Globe*, 42nd Congress, 2nd session (June 7, 1872), 4398.

<sup>66</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 7, 1872), 4398. The lone Republican dissenter was Reuben Fenton (NY).

Eldredge (R-WI) immediately asked for a division vote, but several members responded “Too late.”<sup>67</sup>

Thus, a conference committee went to work.<sup>68</sup> A first conference report was rejected by the House, 99-79, as a minority of Republicans – led by William Kelley (R-PA) – expressed their discomfort with the way the enforcement legislation was being moved; that is, as an amendment to an appropriations bill and “by virtue of parliamentary law and of the usages of this House.”<sup>69</sup> The bill was thus recommitted, and the committee went back to work. Finally, a second conference report was produced.<sup>70</sup> And as William Niblack, the Democratic member on the committee, announced gleefully: “[it] was a mere skeleton of that which came to us from the Senate in the first place.”<sup>71</sup> Election supervisors could still be appointed by circuit judges, but only upon the written request of ten citizens (not two, per the Senate bill); election supervisors and deputy marshals needed to be qualified voters in the parish in which they were appointed, and were to receive no compensation (except in cities with 20,000 or more inhabitants); no additional assistant or deputy marshals were to be appointed, except as provided by law; and finally (and most importantly) federal marshals had no power to make arrests and election supervisors had no power to challenge certificates of election (except in cities with 20,000 or more inhabitants). If short, Sen. Kellogg had tried to extend the earlier enforcement provisions to rural areas; the conference committee, through its deliberations and amending activity, reestablished that those enforcement provisions were *only* operable in cities with 20,000 or more inhabitants.

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<sup>67</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 8, 1872), 4435.

<sup>68</sup> The conference committee was comprised of Cornelius Cole (R-CA), George Edmunds (R-VT), and John Stevenson (D-KY) from the Senate and James Garfield (R-OH), Frank Palmer (R-IA), and William Niblack (D-IN) from the House. *Congressional Globe*, 42nd Congress, 2nd session (June 7, 1872), 4398; (June 8, 1872), 4436.

<sup>69</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 8, 1872), 4438, 4442-43.

<sup>70</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 8, 1872), 4453.

<sup>71</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 8, 1872), 4455.

James Garfield, speaking as chief House manager on the committee, sheepishly agreed that federal officers would be little more than “witnesses” at the polls, but perhaps by their mere presence could provide “a moral challenge.”<sup>72</sup> Garfield’s assertions notwithstanding, all understood that Kellogg’s original bill had been gutted. Moreover, as George Edmunds suggested in the Senate debate, the elimination of supervisory power was “a means of [Republicans in the House] composing their difficulties.”<sup>73</sup> And, after the House debate concluded, the elimination of those intra-GOP differences was apparent, as the conference report was agreed to, 102-79, with only one of 102 Republicans defecting.<sup>74</sup>

On June 10, the Senate took up the conference report. Republican senators were resigned to the ineffectual enforcement provisions. Edmunds, speaking for the conference committee, noted that they “were forced to assent with a view to getting to an end.” Kellogg was silent, while Thurman announced that he did not wish to debate the report further, and called for the yeas and nays.<sup>75</sup> The Senate then proceeded to concur in the report, 39-17, with five of 44 Republicans dissenting.<sup>76</sup> President Grant then signed the report, and the Fifth Enforcement Act was law.

Xi Wang sums up the result of the Fifth Enforcement Act, as well as the state of Republican politics vis-à-vis civil rights policy more generally:

The enforcement rider in the Civil Appropriations Act of June 10, 1872, was virtually powerless and ineffective. It was, in fact, a retreat from the previous enforcement laws. More important, it was the product of the growing divergence between the still radical Senate and the already moderate and conservative House

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<sup>72</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 8, 1872), 4454.

<sup>73</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 10, 1872), 4495.

<sup>74</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 8, 1872), 4456.

<sup>75</sup> Kellogg in fact announced that his colleague, Wilson, was absent, but would have voted “yea” if he were present. He had nothing to say, however, about the substance of the committee report. *Congressional Globe*, 42nd Congress, 2nd session (June 10, 1872), 4495.

<sup>76</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 10, 1872), 4495. The five GOP dissenters were William Sprague (RI), Morgan Hamilton (TX), Thomas Tipton (NE), Reuben Fenton (NY), and Lyman Trumbull (IL).

Republicans on the issue of black suffrage. For Republicans, unity on black suffrage was becoming more and more a thing of the past.<sup>77</sup>

And as GOP unity on black suffrage frayed, and various objections to additional congressional action grew, the Fifth Enforcement Act would in fact be the *last* statutory success for those who sought to protect the voting rights of African Americans. Moderate Republicans had growing qualms about ramping up centralized federal authority as an appropriate remedy, while liberal (and eventually Liberal) Republicans increasingly saw the entire enterprise of federal rights protection as both unworkable and misguided.

Still, Radical Republicans would continue to seek new enforcement measures. Indeed, at the same time that Congress was deliberating on the legislation that would eventually result in the (toothless) Fifth Enforcement Act, it was considering a bill that would extend section four of the Fourth Enforcement Act – granting the president the authority to suspend the writ of *habeas corpus* – for an *additional* session of Congress. And while some could point to a symbolic victory in the passage of the Fifth Enforcement Act, the divisions within the GOP would allow no victory of any sort to be achieved on section-four extension.

#### The Failed Extension of Section Four of the Fourth Enforcement Act

The politics surrounding the extension of section four of the Fourth Enforcement Act began on February 19, 1872, when Sen. John Scott (R-PA), representing the Joint Select Committee upon the Condition of the Late Insurrectionary States, issued a report based on testimony taken on the ground in South Carolina.<sup>78</sup> Speaking for the majority on the committee, Scott felt that that “parts of the southern States ... [were still] infested with the Ku Klux troubles,”

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<sup>77</sup> Xi Wang, *The Trial of Democracy: Black Suffrage and Northern Republicans, 1860-1910* (Athens: University of Georgia Press, 1997), 89.

<sup>78</sup> *Congressional Globe*, 42nd Congress, 2nd session (February 19, 1872), 1109. Scott noted that testimony was also taken from locales in Georgia, Florida, Mississippi, and Alabama, which would be compiled and serve as the subject of a future report.

and recommended that the authority of the president to suspend the writ of *habeas corpus* be extended until the end of the next session of Congress. This recommendation was embodied in a new bill, S. 656, which was ordered to be printed and placed on the Senate calendar.<sup>79</sup>

The bill was finally called up on May 16, 1872, and discussions began the following day.<sup>80</sup> Scott identified Klan activities in 99 counties across six states (North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Florida) – constituting 2,909 outrages and resulting in 526 homicides – and argued that granting the president the authority to suspend the writ of *habeas corpus* had been the only effective tool thus far in breaking up the organization. He went on to state: “I believe that if the power is kept in the hands of the President this violence will not be renewed. I believe if it is not kept there, no other power will be strong enough to repress a recurrence of the same violence that has been enacted henceforth.”<sup>81</sup> Daniel Pratt (R-IN), another member of the committee, then seconded Scott’s recommendation, arguing that it was “prudent” to extend section four so as to preserve public safety and insure the protection of rights.<sup>82</sup>

But Republicans were not of one mind on the extension. On May 21, James Alcorn (R-MS) stated that, in his view, the condition in Mississippi “was one of repose,” and thus did not see any need to extend the president’s section-four authority for another session. Indeed, Alcorn argued that Congress should “not attempt to do everything by legislation” and asserted instead that the people in Mississippi be allowed to sort out – on their own – any future problems that

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<sup>79</sup> *Congressional Globe*, 42nd Congress, 2nd session (February 19, 1872), 1109-111.

<sup>80</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 16, 1872), 3551; (May 17, 1872), 3579.

<sup>81</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 17, 1872), 3584, 3586. Scott made the same points – perhaps more forcefully – a bit earlier in his remarks: “Withdraw from the President of the United States the power to suspend the writ of habeas corpus in those States where this organization exists, and no man can answer for the scenes that will follow and the retaliation that may ensue. Keep it there, and the very existence of power will render its exercise unnecessary.”

<sup>82</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 17, 1872), 3587.

occurred in the state.<sup>83</sup> Morgan Hamilton (R-TX) – soon to become a Liberal Republican – then followed, noting that a successful extension would allow the president’s suspension authority to continue in force until *after* the November election. He went on to suggest that if the extension were adopted, “the President will be placed ... in a position of extreme delicacy and embarrassment.” Specifically, local Republicans might stir up trouble in areas near election time, in order to have the military be brought in. This would be done as a way to “nullify the election where the majority is likely to adverse [to the GOP].”<sup>84</sup> Democrats latched onto this same conspiracy argument. William Hamilton (D-MD) was forthright in this regard, calling the measure nothing more than “A bill to provide for the reelection of President Grant.”<sup>85</sup>

After some additional debate – whereby Democrats and Republicans jostled on the constitutionality of the measure – the yeas and nays were called, and S. 656 passed 28-15, with 28 of 30 Republicans voting in support.<sup>86</sup> (Vote results appear in Table 5.) The bill, passed without amendment, was then sent to the House.

On May 28, 1872, Rep. Luke Poland (R-VT) moved that the rules be suspended so that S. 656 could be taken from the Speaker’s chair and passed. The yeas and nays were called, and the question failed, 94-108, with 22 of 116 Republicans voting with all the Democrats in opposition.<sup>87</sup> Thus, the vote fell well short of the 2/3 necessary to suspend the rules. However, this was not the whole story. After the vote, Poland gained the floor and made the following remarks:

I desire to say, in connection with the bill just voted upon, that the same bill was reported to the House and the Senate respectively by the joint select Committee

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<sup>83</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 21, 1872), 3704.

<sup>84</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 21, 1872), 3707.

<sup>85</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 21, 1872), 3719.

<sup>86</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 21, 1872), 3727. The Republican dissenters were James Alcorn (MS) and William Sprague (RI).

<sup>87</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 28, 1872), 3931.

on the Condition of the late Insurrectionary States. That bill having passed the Senate, I felt it my duty to call it to the attention of the House and have a vote upon it. Our committee having leave to report at any time, had a majority voted in favor of the bill upon the vote just taken, I should immediately have offered the bill that was reported by the committee to the House, which is identical with the Senate bill. But inasmuch as this vote has disclosed that a majority of this House are opposed to the bill, I shall not offer the House bill until I have further instructions from the committee to do so.<sup>88</sup>

In effect, Poland stated that he used the rules-suspension vote as a litmus test, and if a majority (but not 2/3) voted in favor, he would have used his committee's privileged status to report the bill directly to the floor. That is, suspension of the rules would not have been necessary, and passage of the bill would therefore have been by (simple) majority vote. And since the Senate bill was adopted *without amendment*, the path to a successful law would have been fairly straightforward.

But a majority was *not* in favor of the bill, as a number of Republicans both North and South followed the likes of James Garfield (OH), Charles Willard (VT), Austin Blair (MI), and John Farnsworth (IL) to break with the GOP's pro-extension majority. Given that Poland's remarks followed the vote itself, the Republicans tried again on June 7. Once again, the question was on suspending the rules and passing the bill – and it failed, 56-89.<sup>89</sup> This time, in falling short of the 2/3 requirement and failing again to garner a simple majority, fourteen of 70 Republicans defected and joined the Democrats in opposition. And 95 House members did not cast a vote at all. While there was no debate around either House vote, the same moderate and liberal concerns within the GOP – questioning the constitutionality of the measure, opposing the increased centralization of federal power, and rejecting the efficacy of Congress engineering decisions in local areas – likely explains the patterns of defections.

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<sup>88</sup> *Congressional Globe*, 42nd Congress, 2nd session (May 28, 1872), 3931.

<sup>89</sup> *Congressional Globe*, 42nd Congress, 2nd session (June 7, 1872), 4323.

Thus, with the defeat of the section-four extension of the Fourth Enforcement Act, the pro-black rights forces within the GOP suffered their first explicit defeat. Previous civil- and voting-rights measures were amended (or, in the case of the Fifth Enforcement Act, largely gutted), to be sure, but statutes were always enacted. By late-spring 1872, a turning point seemed to be reached: a largely symbolic victory (Fifth Enforcement Act) was followed by an outright loss (section-four extension). This was driven mostly by GOP divisions within the House; there, the Republicans lacked a 2/3 majority, and a sizeable group of moderates and liberals within the party stymied any meaningful changes that sought to move policy in a more Radical direction. These disagreements were both ideological and political in nature. True differences of opinion existed on the big questions of the day, like how far should the federal government go to protect and preserve black rights?<sup>90</sup> And these differences also had electoral roots, as members of Congress had to be cognizant of how constituents back home felt about the ongoing political drama in the South. As the 1872 presidential election approached, many felt that the Liberal Republican movement, whether ultimately successful or not, had tapped into a set of genuine feelings in the United States, that is, that Reconstruction policy had eaten up too much of the nation's time, resources, and attention, and that a path for moving beyond it had to be found.<sup>91</sup>

### **The Election of 1872, Liberal Republicanism, and the Panic of 1873**

In mid-spring 1872 the politics of the nation was confused and unsettled. Long-standing members of the Republican Party, disappointed by President Grant, bolted to form a rival organization. Dubbing themselves the "Liberal Republicans," many were intellectuals and "self-

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<sup>90</sup> On this point, see Wang, *The Trial of Democracy*, 90.

<sup>91</sup> Wang, *The Trial of Democracy*, 104-05; David Herbert Donald, Jean Harvey Baker, and Michael F. Holt, *The Civil War and Reconstruction* (New York: Norton, 2001), 619.

styled “best men” committed to clean and limited government, an end to tariffs, and a return to the gold standard.<sup>92</sup> Liberal Republicans also clamored for an end to the more “radical” aspects of Reconstruction pushed by some within the GOP. Having moved into the Liberal Republican camp by 1871, Carl Schurz gave voice to those seeking sectional reconciliation when he called for general amnesty for ex-confederates. Such a move, he claimed, would “tend to disarm the feeling of alienation caused in the south by the results of the war.”<sup>93</sup> Democrats recognized in the “Liberal” movement an opportunity to “demonstrate that their party had, at last, come to terms with the results of the Civil War.”<sup>94</sup> Testifying to the fluidity of politics in 1872, many in the party of Dixie seriously considered joining into an alliance with those who had helped to write and pass pivotal Reconstruction laws. Anti-Grant sentiment was a potent binding agent.

In May 1872 the Liberal Republicans met in Cincinnati and nominated newspaperman Horace Greeley for president. The choice of a boisterous New Yorker with questionable commitment to the reform causes central to Liberal Republicanism, and spotty political credentials, did not go over well with many in the new party. Writing to Senator Lyman Trumbull – himself a Liberal Republican – one participant at the Cincinnati convention condemned Greeley’s embrace of “quacks, charlatans, ignoramuses, and sentimentalists.” Carl Schurz, meanwhile, argued that Greeley’s nomination had destroyed Liberal Republicanism’s “higher moral character” and he begged Greeley to withdraw from the race.<sup>95</sup> Greeley refused. Moreover, Greeley’s view that it was time to end Reconstruction and “clasp hands across

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<sup>92</sup> Foner, *Reconstruction*, 488.

<sup>93</sup> Schurz quoted in Robert W. Burg, “Amnesty, Civil Rights, and the Meaning of Liberal Republicanism, 1862-1872,” *American Nineteenth Century History* 4 (Fall 2003): 43.

<sup>94</sup> Foner, *Reconstruction*, 505.

<sup>95</sup> Foner, *Reconstruction*, 503.

the bloody chasm”” generated support from Democrats.<sup>96</sup> In July 1872 the Democratic Party joined with the Liberal Republicans and endorsed Greeley’s nomination.

The Liberal Republican movement highlighted significant political tensions within the Republican Party, but generated very little political momentum of its own. In the fall, Greeley made speech after speech calling for an end to Reconstruction and a restoration of “local self government” to southern states. Republicans, meanwhile, “waved the bloody shirt” and condemned Greeley for providing cover to the brutal tactics of the KKK. Despite the racially charged political atmosphere, elections in the fall of 1872 went off with minimal violence. When the votes were counted, Grant was reelected in a landslide: he won almost 56 percent all votes cast and 286 out of 352 electoral votes. In the House of Representatives the GOP also expanded its majority, winning an additional 64 seats to result in a 203-89 advantage. While Republicans lost 2 seats in the Senate, they retained an overwhelming 54-19 majority.

The Republican victory in 1872 was impressive but any sense of optimism about the future was short lived. Only one year later – in the winter of 1873 – the nation’s largest banks collapsed amid a series of railroad bankruptcies and a credit crunch. As American financial institutions seized up, panic spread across the country. Surging unemployment destroyed the livelihood of workers in the country’s major urban centers, the price of agricultural products collapsed along with the value of land, and violent conflicts between workers and their bosses occurred in multiple cities. Viewed as a whole, “the sixty-five months following the Panic of 1873 remains the longest period of uninterrupted economic contraction in American history.”<sup>97</sup> As the party in power, Republicans were blamed for the economic hardships now plaguing the country. Making matters worse the GOP for Republicans were widely publicized investigations

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<sup>96</sup> Greeley quoted in Foner, *Reconstruction*, 503-504.

<sup>97</sup> Foner, *Reconstruction*, 513.

into official corruption. The “Credit Mobilier” scandal of 1872-1873, for example, cost Vice President Colfax his spot on the ticket in 1872 and did significant damage to Grant’s allies in Congress.<sup>98</sup>

For the Republican Party, 1874 was a politically disastrous year. With the nation gripped by economic crisis, the fall midterm elections resulted in overwhelming Democratic Party victories. In the Senate, Republicans lost 9 seats. While they retained a fourteen-seat advantage, the party’s long-term political prospects did not look bright. In the House of Representatives, however, the GOP lost a staggering 93 seats. As a consequence, their more than 100 seat advantage was lost as the Democrats now held a majority of more than 70 seats. According to Foner, the election of 1874 represents the “greatest reversal of partisan alignments in the entire nineteenth century”<sup>99</sup>

It was during this period of tumult and crisis that Republicans took up the last two civil rights measures of the Reconstruction era: a civil rights bill first introduced by Senator Charles Sumner (R-MA) in 1872, and yet another Enforcement bill backed by House Radicals. Sumner’s measure captures his historic commitment to the “radical” promise of Reconstruction. His measure aimed to provide federal penalties for racial discrimination practiced in most areas of public life. Most importantly, his was the first legislative effort to outlaw segregated schools. The 1875 Enforcement bill illustrates a similar commitment to federal protections for black citizens insofar as it aimed to protect the lives, property, and voting rights of those who remained so vulnerable throughout the South. While a significantly weakened version of Sumner’s bill would become law during the lame duck session following the 1874 election (after Sumner

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<sup>98</sup> “The King of Frauds: How the Credit Mobilier Bought Its Way Through Congress,” *New York Sun*, September 4, 1872: 1.

<sup>99</sup> Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863-1877* (New York: Harper and Row, 1988): 523.

himself had died) the 1875 Enforcement bill died in Congress. In this way, both bills signal the end of the Reconstruction and the ominous beginning of the “Redemption” era.

### **The Civil Rights Act of 1875**

Writing for the *Atlantic Monthly* at the height of the Reconstruction era, Carl Schurz exclaimed, “our civil war was a great political and social revolution [...] the United States has entered upon a new era in her development.”<sup>100</sup> During the three Congresses held between 1865 and 1871, “radical” Republican lawmakers worked furiously to enact legal statutes to make permanent this revolution. As we detail here and in a previous work, however, not all Republicans accepted Schurz’s assessment. The compromises required to enact the landmark laws passed in the years following the war set the stage for future fights over the implementation, enforcement, and breadth of reconstruction era policy.<sup>101</sup> These debates also exacerbated continuing conflict within the GOP between radicals who believed that the war had expanded and “nationalized” a new set of rights, and moderates who remained committed to constitutional federalism.

The Civil Rights Act of 1866, for example, reflects this tension. This law, enacted over President Andrew Johnson’s veto, aimed to define “in legislative terms the essence of freedom.”<sup>102</sup> More specifically, it guaranteed all citizens the right to “make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal benefit, and to full and equal benefit of all laws and proceedings for the security of person and property.”<sup>103</sup> To enforce these protections, the bill allowed those denied their rights to pursue damages in federal rather than state courts.

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<sup>100</sup> Carl Schurz, “The True Problem,” *The Atlantic Monthly*, March 1867: 371.

<sup>101</sup> Jenkins and Peck, “Congress and Civil Rights: The Early Reconstruction Era.”

<sup>102</sup> *Congressional Globe*, 39th Congress, 1st Session (January 12, 1866), 211.

<sup>103</sup> A general summary of the bill can be found here: *Congressional Globe*, 39th Congress, 1st Session (January 12, 1866), 211-212.

Senator Lyman Trumbull (R-IL) wrote the Civil Rights Act of 1866, and then led the effort to see it enacted. As one of the Senate's moderates, and chairman of the Senate Judiciary Committee, Trumbull weighed protecting the rights of freedmen against moderate skepticism toward broad grants of authority to the federal government. The legislation he crafted allowed freedmen to sue for their rights in federal court, but only if a plaintiff could demonstrate that state laws explicitly failed to guarantee equal protection. As Trumbull himself argued, the Civil Rights Act of 1866 would "have no operation in any state where all persons have the same civil rights without regard to color or race."<sup>104</sup> State legislators could prevent the law from taking effect, in other words, as long as state laws were formally "color-blind." The explicit rights this bill set out to protect were also limited to economic and legal transactions. The Civil Rights Act of 1866 would implement a revolution of any kind.

For Trumbull to win over more radical members of the Republican Party, however, he found himself forced to include the more ambiguous language ensuring freedmen "full and equal benefit of all laws." Only four years later, radical Republican Senator Charles Sumner (R-MA) took advantage of this provision in an effort to protect the civil rights of black citizens. On May 13, 1870, Sumner took the floor of the Senate to introduce S. 916, a bill "supplementary" to the Civil Rights Act of 1866. Sumner's proposal aimed to "secure equal rights in railroads, steamboats, public conveyances, hotels, licensed theaters, houses of public entertainment, common schools, and institutions of learning authorized by law, church institutions, and cemetery associations incorporated by national or State authority; also on juries in courts, national and State."<sup>105</sup> Sumner's "supplementary" legislation, in other words, aimed to counteract the move toward Jim Crow.

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<sup>104</sup> *Congressional Globe*, 39th Congress, 1st Session (January 29, 1866), 476.

<sup>105</sup> *Congressional Globe*, 41st Congress, 2nd Session (May 13, 1870), 3434.

As Democrats successfully “redeemed” states throughout the south and the border regions, they worked furiously to protect a system of white supremacy. Kentucky legally prohibited its black residents from testifying in court; and legislators in Delaware empowered those who owned “hotels, theaters, and common carriers to refuse admission to persons ‘offensive’ to other customers.”<sup>106</sup> Furthermore, as historian James McPherson documents, black officeholders throughout the South were regularly prevented from purchasing first class tickets on trains and steamboats. Moreover, even if they did purchase tickets, they were frequently prevented from taking their seats. The owner of a steamboat even refused to serve dinner to Fredrick Douglass and his companions on a government-sponsored trip to Santo Domingo.<sup>107</sup>

Widespread commitment to separate facilities for black and white residents also applied to the country’s nascent public school system. Legislators in Tennessee incorporated a provision requiring racial separation of students into its newly drafted state constitution. Soon thereafter, Delaware, Kentucky, and Maryland enacted laws mandating separation while simultaneously taxing newly freed residents to pay for “black only” school facilities.<sup>108</sup> While a handful of northern states officially outlawed school segregation, this commitment to integration was not widespread.<sup>109</sup> Unsurprisingly, schools catering to black children were “usually inferior to white schools in physical equipment, length of term, and quality of teaching.”<sup>110</sup> Sumner condemned the practice in strikingly modern language. Separate facilities, he claimed, could “not fail to have

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<sup>106</sup> Foner, *Reconstruction*, 422.

<sup>107</sup> James McPherson, “Abolitionists and the Civil Rights Act of 1875,” *The Journal of American History* 52 (December 1965): 496.

<sup>108</sup> Foner, *Reconstruction*, 422.

<sup>109</sup> Between 1867 and 1874 the state legislatures and/or courts in Rhode Island, Michigan, Connecticut, Iowan, Minnesota, and Kansas outlawed school segregation. McPherson, “Abolitionists and the Civil Rights Act of 1875,” 498.

<sup>110</sup> McPherson, “Abolitionists and the Civil Rights Act of 1875,” 499.

a depressing effect on the mind of colored children, fostering the idea in them and others that they are not as good as other children.”<sup>111</sup>

While Sumner stridently opposed legal segregation, the enforcement mechanism built into his legislation was far from revolutionary. Similar to the Civil Rights Act of 1866, S. 916 made lawsuits the primary mechanism for the protection of the rights he laid out, thereby turning to the federal courts as a mechanism for enforcement. Citizens believing that their rights had been violated were encouraged to report instances of discrimination to federal officials working within the states. These officials were then expected to pursue charges against the *individuals* responsible for violating the provisions of his law. Anybody found guilty of denying these rights would pay a fine and/or spend up to one year in prison.<sup>112</sup>

Even though Sumner’s plan for enforcing the legal protections written into S. 916 mirrored the language of Trumbull’s “moderate” 1866 bill, his commitment to equal access was much more progressive. Reflecting Carl Schurz’s declaration of a constitutional revolution, Sumner and likeminded radicals in the Senate offered a novel constitutional justification for this bill. For them, the 14th Amendment empowered the federal government to wield “police powers” within the states for the purpose of protecting citizen rights.<sup>113</sup> In the words of Representative John Bingham (R-OH), the Civil War amendments afforded Congress the power to “protect by national law the privileges and immunities of all citizens of the Republican and the inborn rights of every person within its jurisdiction.”<sup>114</sup> Stated differently, Republican Party “radicals”

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<sup>111</sup> Sumner quoted in Bertram Wyatt Brown, “The Civil Rights Act of 1875,” *The Western Political Quarterly* 18 (December 1965): 763-764.

<sup>112</sup> For more on enforcement, see: John Hope Franklin, “The Enforcement of the Civil Rights Act of 1875,” *Prologue Magazine* 6 (Winter 1974): 225-235.

<sup>113</sup> S.G.F. Spackman, “American Federalism and the Civil Rights Act of 1875,” *Journal of American Studies* 10 (December 1976): 318.

<sup>114</sup> *Congressional Globe*, 39th Congress, 1st Session (May 9, 1866), 2500.

believed that the constitutional changes ushered in by the 14th Amendment, specifically, made “state citizenship derivative of national citizenship” rather than the other way around.<sup>115</sup>

Sumner went even further. When discussing S. 916 he proclaimed a “new rule of interpretation for the Constitution, according to which, in every clause and every line and every word, it is to be interpreted uniformly for human rights.”<sup>116</sup> In defense of those human rights, any “legal institution, anything created or regulated by law [...] must be opened equally to all without distinction of color.” From the radical perspective, laws regulating hotels, public conveyances, schools, churches, juries, and even cemeteries must be enforced in ways that brought them into accordance with the rights guaranteed to all citizens by the Civil War amendments and the subsequent civil rights acts. Discrimination perpetrated by “individuals as well as states” must be punished.<sup>117</sup>

Opposition to Sumner’s proposal from within the Republican Party centered on two basic ideas: doubts about congressional power to regulate state-based entities, as well as the radical interpretation of the “rights” afforded to freedmen. Senator Lot Morrill (R-ME) – one senator generally sympathetic to Sumner’s goals – gave voice to those with constitutional qualms about the bill. From his perspective, the 14th Amendment added “nothing in the way of legislative authority or legislative power to the Congress of the United States.”<sup>118</sup> Accordingly, he argued, it would be constitutionally invalid for Congress to assert new police powers over institutions traditionally regulated by state governments. Echoing Morrill, Senator Orris Ferry (R-CT) warned that by accepting Sumner’s argument, Congress would be “giving to the federal government complete legislative authority over every interest affecting the life, liberty, and

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<sup>115</sup> Spackman, “American Federalism,” 320.

<sup>116</sup> *Congressional Globe*, 42nd Congress, 2nd Session (January 31, 1872), 727.

<sup>117</sup> For a detailed discussion of Sumner’s attitude toward the Constitution see: Ronald B. Jager, “Charles Sumner, the Constitution, and the Civil Rights Act of 1875,” *The New England Quarterly* 42 (September 1969): 350-372.

<sup>118</sup> *Congressional Globe*, 42nd Congress, 2nd Session (January 25, 1872), Appendix 2.

property of every citizen.” Radical proposals would leave “to the state legislatures absolutely nothing.”<sup>119</sup> In this way, moderate Republicans who had not abandoned the party’s traditional commitment to a strict separation between federal and state authority aimed to thwart Sumner’s “grandiose and far-reaching claims in favour [sic] of national power.”<sup>120</sup>

Lyman Trumbull, meanwhile, gave voice to those who opposed the new “rights” identified by Sumner and his allies. From Trumbull’s perspective, S. 916 addressed itself to “social” rather than to “civil” rights. Civil rights included “the right to go and come; the right to enforce contracts; the right to convey property – those general rights that belong to mankind everywhere; and not a privilege that is conferred by a corporation, as a college for example.”<sup>121</sup> S. 916 instead aimed to “force the colored people and white people into mutual contact.”<sup>122</sup> There existed no reason to believe that citizens retained the “right” to travel in integrated train cars or attend integrated schools. As long as those states prescribing separate facilities for black and white citizens were “the same,” he went on, “then nobody has a right to complain.”<sup>123</sup> Here we see Trumbull giving voice to the doctrine of “separate but equal” twenty-four years before the Supreme Court’s infamous *Plessy v. Ferguson* decision. Trumbull did not echo the explicit racism voiced by many Democrats, but his argument did offer political cover to those members of Congress who refused to acknowledge that “the Negro in all this is equal of the white man.”<sup>124</sup>

Trumbull’s determined opposition to Sumner’s proposal helped to keep it from even coming up for debate. The Judiciary Committee failed to report the bill in 1870 and again in 1871. As a consequence, the Senate did not begin debate on Sumner’s proposal until 1872. That

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<sup>119</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 8, 1872), 893.

<sup>120</sup> Spackman, “American Federalism,” 316.

<sup>121</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 8, 1872), 3191.

<sup>122</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 8, 1872), 3189.

<sup>123</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 8, 1872), 3190.

<sup>124</sup> *Congressional Globe*, 43rd Congress, 1st Session (January 5, 1874), 376.

year, Sumner adopted a new strategy: he moved it as an amendment to a pending bill aiming to give amnesty to ex-Confederates. By adopting this approach, Sumner began a new round of acrimonious substantive and procedural debate.

### Amnesty and Civil Rights

When Congress opened debate over the proposed 14th Amendment, members confronted some of the most significant questions left unanswered by the war. These included: (1) how and to what extent should the federal government intervene in the states in order to guarantee civil rights to ex-slaves?; (2) how and to what extent should the rules governing apportionment and representation change to reflect the end of the infamous “three-fifths” compromise?; (3) how and to what extent should ex-confederates be banned from voting and/or office-holding?; (4) should freedmen be immediately afforded the right to vote?; (5) what should be done to deal with the financial debt incurred during the war? We detail the political battles waged inside Congress to address these questions in a different paper.<sup>125</sup>

For present purposes it is important to note that section 3 of the 14th Amendment – the so-called “Disability Clause” – made the following stipulation:

No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

For Republicans concerned that the country was growing weary over battles over Reconstruction policy, over-turning the disability clause stood out as an easy way to end sectional rivalry. For

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<sup>125</sup> Jeffery A. Jenkins and Justin Peck, “Congress and Civil Rights: The Early Reconstruction Era, 1865-1871,” Paper Prepared for Presentation at the 2016 Annual Meeting of the Midwest Political Science Association, Chicago, IL.

President Grant, a vote to cancel section 3 also seemed a good defense against the political attacks launched by the Liberal Republicans.

In January 1872, House Republicans took a step toward amnesty when they passed H.R. 380, “a bill for the removal of legal and political disabilities imposed under the third section” of the 14th Amendment. Introduced by Eugene Hale (R-ME), this amnesty provision passed 171-31 with 79 House Republicans voting yes, and 31 voting no.<sup>126</sup> Senate action on amnesty was stymied, however, when Sumner introduced his civil rights bill as amendment to the House-passed amnesty measure. Senate Republicans rightly understood that amnesty proposal would never win the necessary support of two-thirds of voting members if it included Sumner’s proposal. Yet Sumner would not relent. Calling attention to the Judiciary Committee’s opposition to his bill, Sumner portrayed this legislative strategy as his only opportunity to force a vote on the measure.<sup>127</sup>

The Senate did not begin formal debate on H.R. 380 until February 5, 1872. That day, Senator Thomas Robertson (R-SC) moved to table Sumner’s bill and begin debate on a different amnesty proposal. His motion failed 20-33 (See Table 6).<sup>128</sup> Having failed to prevent debate on Sumner’s proposal, Senator Matthew Carpenter (R-WI) took the floor to introduce an amendment to weaken its provisions. Carpenter’s amendment would have: (1) deleted the language mandating equal access to juries and churches; (2) stipulated that equal access be guaranteed only in those institutions “supported by taxation or endowment for public use;” (3) deleted the provision allowing victims of discrimination to pursue financial damages from the

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<sup>126</sup> *Congressional Globe*, 42nd Congress, 2nd Session (January 15, 1872), 398-399.

<sup>127</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 5, 1872), 822.

<sup>128</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 5, 1872), 818.

individuals responsible; (4) deleted the provision empowering victims of discrimination to move their trials to federal courts.<sup>129</sup>

Sumner immediately condemned Carpenter's proposal. "At the eleventh hour," he exclaimed, "the Senator from Wisconsin comes forward with a substitute which is [...] an emasculated synonym of the original measure [...] feeble where the original is strong, incomplete where the original is ample, and without machinery for its enforcement, while the original is well-supplied and most effective."<sup>130</sup> Carpenter replied by claiming that for Sumner, "the dish of civil rights [...] is tasteless unless it be flavored with some unconstitutional ingredient." In the end, a coalition of Sumner allies and Democrats who opposed all civil rights legislation helped to defeat Carpenter's amendment by a vote of 35-17.<sup>131</sup> When Carpenter later worked to remove language affording black citizens the right to serve as jurors, this amendment also failed. Yet his proposal nearly split Senate Republicans, thereby demonstrating moderate support for a largely symbolic approach to civil rights (See Table 1).<sup>132</sup>

The Senate moved next to an amendment offered by John Sherman (R-OH) aiming to narrow the range of laws susceptible to the equal protection provisions of Sumner's bill. This amendment also failed (with Sumner and his allies voting against), by a vote of 25-34 (See Table 6).<sup>133</sup> Sumner and his allies did, however, fail to prevent the Senate from adopting language offered by Fredrick Frelinghuysen which excised the language regulating churches. According to Frelinghuysen, Sumner's effort to force churches to open their doors to black citizens

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<sup>129</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 5, 1872), 818-821.

<sup>130</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 5, 1872), 822.

<sup>131</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 7, 1872), 871.

<sup>132</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 8, 1872), 901.

<sup>133</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 8, 1872), 896.

represented a “dangerous infringement” on the first amendment. His proposal passed 29-24 (See Table 7).<sup>134</sup>

The final three amendments to Sumner’s proposal, offered by Senators Cornelius Cole (R-CA) and Henry Corbett (R-OR) aimed to exclude Chinese immigrants “from the operation of the naturalization laws.”<sup>135</sup> Stated differently, Cole and Corbett worked to ensure that newly naturalized immigrants from China would not be empowered to avail themselves of the civil rights protections written into Sumner’s bill. Each of these amendments failed in lopsided votes (See Table 7).<sup>136</sup>

After nearly one week of voting on changes to Sumner’s original amendment, the Senate finally moved to consider the underlying measure. In a last ditch effort to convince members to oppose Sumner’s approach, Thomas Robertson once again took the floor to proclaim his support for Sumner’s proposal *and* his belief that it would not be right to attach civil rights language to the amnesty bill. “After this [amnesty] bill shall become a law by the two-thirds vote which it requires,” he explained “then let us set aside every other measure and pass a law giving equal rights to the humblest individuals in the community.”<sup>137</sup> Not persuaded by Robertson’s appeal, 28 Republicans voted to support Sumner’s amendment while 16 voted against. With universal Democratic Party opposition to the amendment, the Senate deadlocked in a 28-28 vote. Vice President Schuyler Colfax cast the tie-breaking vote in favor of the Sumner. It was thus added to H.R. 380.<sup>138</sup> When the underlying amnesty bill came up for a vote later on February 9, however,

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<sup>134</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 8, 1872), 899.

<sup>135</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 9, 1872), 909.

<sup>136</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 9, 1872), 909-910; 918.

<sup>137</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 9, 1872), 919.

<sup>138</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 9, 1872), 919.

opposition from the Democrats prevented it from winning support from the necessary two-thirds of the chamber.<sup>139</sup> As a consequence, both amnesty and civil rights were defeated (See Table 8).

The Senate did not take up civil rights or amnesty again for two months. Yet in May 1872, the Senate tried to pass H.R. 1050 – an amnesty proposal identical to H.R. 380. On the first day of debate, Sumner once again took the floor to announce that he planned to “strike out all after the enacting clause and insert what is generally known as the civil rights bill.”<sup>140</sup> Sumner was willing to once again risk failure on both issues in order to pursue civil rights.

Moderate, pro-amnesty Republicans were incensed and intended to put up a fight. Senator Orris Ferry (R-CT) engaged in the GOP’s first line of attack against Sumner’s proposal. Ferry raised a point of order questioning whether the rules allowed senators to attach legislation requiring a majority vote (Sumner’s bill) to legislation requiring a supermajority (amnesty).<sup>141</sup> Lyman Trumbull came immediately to Ferry’s defense, arguing that the “reason why [Sumner’s amendment] is out of order [...] is because by the Constitution of the United States the matter pending must be passed by a different vote from that which is proposed by the amendment.” He went on to call it “absurd” to “put two things together which can be passed by different votes.”<sup>142</sup> Following a heated back and forth over the parliamentary validity of Sumner’s bill, Vice President Colfax – exercising his prerogative as chair – sided with Sumner. The Senate would once again be forced to confront amnesty and civil rights simultaneously.

Unable to defeat Sumner’s bill through invocations of parliamentary rules, moderate Republican opponents of the bill resorted to their usual strategy: they attempted to weaken the bill through the amendment process. Accordingly, on May 9 the Senate began voting on a series

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<sup>139</sup> *Congressional Globe*, 42nd Congress, 2nd Session (February 9, 1872), 929.

<sup>140</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 8, 1872), 3181.

<sup>141</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 8, 1872), 3181

<sup>142</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 8, 1872), 3182-3183.

of amendments designed to make the bill more palatable to those who held more traditional views of constitutional federalism. The first, offered by Orris Ferry, aimed to excise from the bill all language mandating that black citizens be granted equal access to local schools.<sup>143</sup> Urging the Senate to adopt this amendment, Ferry offered a warning that would prove relevant nearly 75 years later: southerners, he claimed, would close public schools before integrating them. To adopt Sumner's proposal was to therefore put at risk the entire public school system in the south (and beyond). Ferry's amendment won support from all Democrats and 13 of 39 voting Republicans, but still failed 25-26.<sup>144</sup> Next came an amendment from Francis Blair (D-MO) that would require localities to vote on the question of whether to integrate schools. Blair's amendment also won support from some members of the GOP, but it also failed (23-30).<sup>145</sup> Support for these amendments from significant numbers of Senate Republicans highlights the party's skittishness on the issue of school integration (See Table 9). Next, Thomas Carpenter (R-WI) once again tried to remove the bill's language guaranteeing black citizens the right to serve on juries. Once again, his amendment failed (16-33).<sup>146</sup>

As amendment after amendment went down to defeat, Lyman Trumbull grew increasingly frustrated. Taking the floor, he declared that the "whole country and the whole world" believed Sumner's true aim to be the defeat of the House-passed amnesty proposal.<sup>147</sup> Trumbull then moved to amend Sumner's amendment by striking out all of the equal protection language, and all of its enforcement mechanisms. This move won the support of 17 out of 46 Republicans, and all Democrats, but the final tally was a 29-29 deadlock. Once again, Schuyler Colfax was called in to decide the issue, and once again he voted with Sumner (against

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<sup>143</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 9, 1872), 3257.

<sup>144</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 9, 1872), 3258.

<sup>145</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 9, 1872), 3262.

<sup>146</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 9, 1872), 3263.

<sup>147</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 9, 1872), 3263.

Trumbull.)<sup>148</sup> Immediately thereafter, Colfax voted against Sumner and his allies in yet another deadlocked vote. In this case, the Senate approved language proposed by George Vickers (D-MO) outlawing discrimination *only* in cemeteries and “benevolent institutions” that are “incorporated by national [rather than state and national] authority.”<sup>149</sup>

To conclude voting for the day, the Senate considered two final moves from Sumner. First, he tried to substitute his civil rights language for the original amnesty proposal. In so doing, Sumner aimed to force the House to cast a vote on civil rights alone before it could dispense with amnesty. This strategy failed in a close, 27-28 vote. Once this approach failed, Sumner moved to attach the civil rights bill to the amnesty bill. Here Sumner was successful as Colfax once again provided the tie-breaking vote.<sup>150</sup> Replicating February’s result, however, the House never had a chance to address either issue. When the amended amnesty proposal came up for a final vote in the Senate, it failed to win the necessary supermajority. As long as Sumner held his seat, amnesty appeared to be dead (See Table 10).

As the spring of 1872 drew to a close, Republicans faced a significant political dilemma: they had not passed an amnesty bill or a civil rights bill and Congress was scheduled to adjourn in June. Once they left Washington, members would not meet again until after the November election. Moreover, only days before the failed Senate vote on amnesty, Liberal Republicans met in Cincinnati to nominate Horace Greeley for president.<sup>151</sup> Intra-party discord was so widespread that even the pro-Republican *New York Times* ran an editorial titled, “Does the Country Need the Republican Party?”<sup>152</sup> The editors insisted that the answer was “yes,” but the salience of the question attests to the political problems facing President Grant and his co-partisans in Congress.

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<sup>148</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 9, 1872), 3265.

<sup>149</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 9, 1872), 3267.

<sup>150</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 9, 1872), 3268.

<sup>151</sup> “Greeley’s Nomination: Press Comments on the Result of Cincinnati,” *New York Times*, May 6, 1872: 5.

<sup>152</sup> “Does the Country Need the Republican Party,” *New York Times*, May 8, 1872: 4.

In fact, moderate Republicans were so desperate to settle the amnesty question that they put illness in use in pursuit of the cause.

During the last full week of May, Senator Sumner grew ill and was forced to be out of the chamber for a period of time. He was away from the Senate in the early hours of a session that ran for nearly twenty-four hours straight. From May 21-22 members primarily concerned themselves with legislation unrelated to civil rights or amnesty. But just before 6:00 a.m. on the 22<sup>nd</sup>, Matthew Carpenter (R-WI) took the floor and called on the Senate to renew debate on Sumner's civil rights proposal.<sup>153</sup> Carpenter's aim was not to see the bill passed. Instead, he introduced an amendment to Sumner's proposal striking out the provisions guaranteeing equal access to schools and juries. Carpenter's decision met with some substantive opposition, as well as the claim that would be "unfair and unjust to take a vote on this bill during the absence of the Senator from Massachusetts." Yet with barely a quorum present, the Carpenter amendment passed by two votes (20-22).<sup>154</sup> Shortly thereafter, Carpenter offered the now weakened civil rights proposal as a stand-alone measure to be granted an up-or-down vote, instead of an amendment to the House-passed amnesty bill. Carpenter's bill passed 27-14 with Sumner still absent from the chamber (See Table 11).<sup>155</sup>

Shortly after the "Carpenter" bill passed, Sumner arrived. "I understand that in my absence and without any notice to me from any quarter the Senate have adopted an emasculated civil rights bill," he proclaimed.<sup>156</sup> Sumner then called for a vote on adding his original proposal to the amnesty bill in the form of an amendment. This time he lost in a lop-sided, 29-13 vote. Overwhelming Republican opposition to Sumner's last-ditch effort demonstrates that

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<sup>153</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 21, 1872), 3734.

<sup>154</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 21, 1872), 3734-3735.

<sup>155</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 21, 1872), 3734-3736.

<sup>156</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 21, 1872), 3737.

Republicans had grown weary of the delays, and had chosen to sacrifice the civil rights bill in order to ensure that amnesty would pass before the election. Once the Senate defeated Sumner's amendment, members immediately moved to a vote on amnesty. It passed 38-2 with only Sumner and James Nye (R-NV) voting "no" (See Table 11).<sup>157</sup> Amnesty legislation would now move to the White House for Grant's approval while the Senate-passed civil rights bill would die in the House of Representatives. Sumner would not live to see his bill brought back up for discussion or enactment.

#### The Civil Rights Act of 1875: Final Passage

Between the middle of 1872 and early 1874 Sumner's health continued to decline. As a consequence, he was unable to advocate for the Supplementary Civil Rights act with the same intensity that motivated his previous efforts. Yet he did reintroduce the bill in December 1873 only to see it once again referred to the Judiciary Committee and ignored.<sup>158</sup> By March 1874, Sumner was near death and was no closer to seeing the bill enacted. Despite his infirmity, however, he reportedly told Henry Wilson – Grant's second-term vice president – "if my works were completed and my Civil Rights bill passed, no visitor could enter that door that would be more welcome than death."<sup>159</sup> Unfortunately for Sumner death arrived first. But in April-May the Senate once again took up debate on the bill.

With Sumner dead Fredrick Frelinghuysen introduced an amended version of Sumner's proposal on April 14, 1874 (absent the provisions related to churches).<sup>160</sup> The Senate began debating S. 1 two weeks later when Frelinghuysen took the floor to reintroduce his provisions. On the defensive against those who claimed that the bill tried to legislate "social equality," he

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<sup>157</sup> *Congressional Globe*, 42nd Congress, 2nd Session (May 21, 1872), 3738.

<sup>158</sup> *Congressional Record*, 43rd Congress, 1st Session (December 2, 1873), 2.

<sup>159</sup> Quoted in Brown, "The Civil Rights Act," 769-770.

<sup>160</sup> *Congressional Record*, 43rd Congress, 1st Session (April 14, 1874), 3053.

immediately stipulated that such equality was “not an element of citizenship. The law which regulates that is found only in the tastes and affinities of the mind; its law is the arbitrary, uncontrolled human will.”<sup>161</sup> Instead, S. 1 aimed to ensure that black and white citizens equal access to “inns, places of amusement, and public conveyances” because such institutions “bear [...] intimate relation to the public” and therefore must be open to all; cemeteries because they are supported by general tax revenues; and schools because “we know that if we establish separate schools for colored people, those schools will be inferior to those for whites.”<sup>162</sup>

Votes on S. 1 began approximately one month later, and opponents of the bill once again tried to weaken it. An amendment offered by Allen Thurman (D-OH) tried – and failed – to reduce to \$500 the penalty for those convicted of denying equal access.<sup>163</sup> Aaron Sargent (R-CA) offered two school related amendments. The first would have changed the bill to allow states to provide “separate” facilities as long as they could demonstrate that black schools and white schools received equal funding. The second would have narrowed the range of institutions to which the law applied. Both failed to win substantial support and both died.<sup>164</sup> George Boutwell (D-MA) also offered an amendment to allow separate school facilities as long as schools received private funds.<sup>165</sup> His proposal also failed. While the Sargent and Boutwell amendments won support from a handful of Republicans, neither won enough support to pass (See Table 12).

Democrat John Gordon (GA) followed Sargent and Boutwell with an amendment trying to eliminate the school provision entirely. His amendment won support from all Senate Democrats and one Republican. It failed.<sup>166</sup> Next up was James Alcorn (R-MS) who tried to

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<sup>161</sup> *Congressional Record*, 43rd Congress, 1st Session (April 29, 1874), 3451.

<sup>162</sup> *Congressional Record*, 43rd Congress, 1st Session (April 29, 1874), 3452.

<sup>163</sup> *Congressional Record*, 43rd Congress, 1st Session (May 22, 1874), 4167.

<sup>164</sup> *Congressional Record*, 43rd Congress, 1st Session (May 22, 1874), 4167; 4171.

<sup>165</sup> *Congressional Record*, 43rd Congress, 1st Session (May 22, 1874), 4169.

<sup>166</sup> *Congressional Record*, 43rd Congress, 1st Session (May 22, 1874), 4170.

broaden the bill's aims by extending its provision to colleges and primary schools. Seen as a "killer amendment," Alcorn's proposal went down in a lopsided 37-9 vote.<sup>167</sup> Finally, William Hamilton (D-MO) tried to excise the provision affording black citizens the right serve as jurors. This amendment also failed.<sup>168</sup> When at last the Senate voted on final passage, only two Republicans voted "no," and S. 1 passed (See Table 13).<sup>169</sup>

The historian Bertram Wyatt-Brown attributes enactment of Sumner's bill to a widespread feeling of "contrite sentimentalism" generated by his death.<sup>170</sup> This feeling seems not to have moved through the House of Representatives because, once again, the bill died on the Speaker's desk without so much as a vote or a committee referral. On May 25, three days after it passed the Senate, Representative Benjamin Butler (R-MA) tried to suspend House rules and refer the bill to the Judiciary Committee "with the right to report it to the House at any time." House procedure stipulated that a super majority was required to implement a rules change like the one Butler was attempting. He failed to win a rules change that day, and again on June 8.<sup>171</sup> Just over two weeks later Congress adjourned for the summer and to prepare for the 1874 midterm elections. It would take an electoral disaster to motivate the Republicans to pass Sumner's bill.

When Congress reconvened for the lame duck session in December 1874, the civil rights bill made a surprising reappearance. Democrats in the House were making use of the same dilatory tactics that prevent debate on S. 1 in June 1874 in order to keep the GOP from passing legislation deemed vital to its electoral prospects in 1876. The Republicans lame duck agenda

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<sup>167</sup> *Congressional Record*, 43rd Congress, 1st Session (May 22, 1874), 4171.

<sup>168</sup> *Congressional Record*, 43rd Congress, 1st Session (May 22, 1874), 4175.

<sup>169</sup> *Congressional Record*, 43rd Congress, 1st Session (May 22, 1874), 4176.

<sup>170</sup> Brown, "The Civil Rights Act," 770.

<sup>171</sup> *Congressional Record*, 43rd Congress, 1st Session (May 25, 1874), 4242; *Congressional Record*, 43rd Congress, 1st Session (June 8, 1874), 4691.

included money to subsidize railroad construction, a new enforcement bill, and a two-year appropriation for the army. Democrats, meanwhile, were putting to effective use a rule allowing them to call for time-consuming roll call votes to “fix a day for adjournment.”<sup>172</sup> For reasons that are still unknown, Representative Butler decided to make the civil rights bill a “stalking horse” for a rules change that would allow the GOP to act on these other agenda items.<sup>173</sup> In order to secure the votes required to bring moderate House Republicans on board, however, Butler had to excise the clause mandating equal access to schools and replace it with language permitting “separate but equal” facilities.<sup>174</sup>

On February 1, 1875, after dozens of votes on the GOP’s effort to amend the rules and limit dilatory motions, Butler finally got his supermajority.<sup>175</sup> Three days later the House began debate on the civil rights measure. The first amendment to the bill offered by Representative Stephen Kellogg (R-CT) excised all of the bill’s school-related language. It passed 128-48, with overwhelming GOP support.<sup>176</sup> When Representative John Cessna (R-PA) offered the full Senate bill (with the school language) as a substitute, his effort failed 113-148.<sup>177</sup> Soon thereafter, the House passed the weakened civil rights bill 162-100 (See Table 14).<sup>178</sup>

The House-passed version of Sumner’s proposal came up in the Senate on February 27, 1875. After failed votes on three minor amendments, the Senate consented to the House bill in a

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<sup>172</sup> Speaker James G. Blaine explains the Democrat’s strategy here: *Congressional Record*, 43rd Congress, 2nd Session (January 27, 1875), 786.

<sup>173</sup> McPherson, “Abolitionists and the Civil Rights Act of 1875,” 508; Alfred H. Kelly, “The Congressional Controversy Over School Segregation, 1867-1875,” *American Historical Review* 64 (April 1959): 558-563.

<sup>174</sup> Kelly, “Congressional Controversy Over School Segregation,” 558.

<sup>175</sup> *Congressional Record*, 43rd Congress, 2nd Session (February 1, 1875), 901-902; For an examination of the procedural changes made between January-February 1875 see: Sarah A. Binder, *Minority Rights, Majority Rule: Partisanship and the Development of Congress* (New York: Cambridge University Press, 1997), 112-122.

<sup>176</sup> *Congressional Record*, 43rd Congress, 2nd Session (February 4, 1875), 1010. No roll call vote was held on this amendment.

<sup>177</sup> *Congressional Record*, 43rd Congress, 2nd Session (February 4, 1875), 1011.

<sup>178</sup> *Congressional Record*, 43rd Congress, 2nd Session (February 4, 1875), 1011.

38-26 vote (See Table 13).<sup>179</sup> As *Harper's Weekly* noted, however, the Republicans “struck at the principle of the whole Republican policy of Reconstruction” in order to ensure enactment.<sup>180</sup> Echoing *Harpers*, historian Alfred Kelly declares that in “actual practice the new law proved to have little meaning.”<sup>181</sup>

### **The Enforcement Bill of 1875**

Once the House Republicans were able to secure a version of Sumner's civil rights bill, they turned their attention to other matters related to the southern states. One such matter was the construction of new enforcement legislation.<sup>182</sup> Violence toward and intimidation of black voters had ramped up considerably throughout the South in late-1874 and early-1875, especially in Alabama, Arkansas, Louisiana, and Mississippi (the latter three still under Republican control). Southern Republicans appealed to Congress and the president for assistance, both in terms of maintaining GOP control as well as with an eye toward securing electoral majorities for the Republican presidential standard bearer in 1876.

House Republicans were split on the subject of new enforcement legislation. Earlier efforts in 1870 and 1871, which were deemed necessary at the time to fulfill the promise of civil and political equality for blacks in the South, were long past. The most recent enforcement efforts in 1872 – the emasculated enforcement rider in the civil appropriations bill, and the failure to extend the *habeas corpus* provision in the Ku Klux Klan Act – were the new status quo. Stated differently, federal enforcement of civil rights was increasingly difficult to justify for many Republicans; some had qualms about expanding federal authority (and weakening state

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<sup>179</sup> *Congressional Record*, 43rd Congress, 2nd Session (February 27, 1875), 1867-1868, 1870.

<sup>180</sup> Quoted in Kelly, “Congressional Controversy Over School Segregation,” 562.

<sup>181</sup> Kelly, “Congressional Controversy Over School Segregation,” 562.

<sup>182</sup> Short legislative histories of the enforcement bill of 1875 are found in William Gillette, *Retreat from Reconstruction, 1869-1879* (Baton Rouge: Louisiana State University Press, 1979), 280-99; Xi Wang, *The Trial of Democracy*, 114-19.

and local power, as a result), others felt that maintaining social order in southern states through military force was an unworkable strategy, while still others thought that the South was a lost cause for the party, and that Republicans should be cutting their losses and protecting their electoral interests in the North.

While Republican dissidents had grown in numbers, a significant portion of the party was still in favor of propping up the GOP governments that still existed in the South. President Grant, in particular, sought new enforcement legislation in order to have the legal cover to push back against any new disturbances or disorder that might arise in the South. Grant made his preferences clear in his annual message to Congress in December 1874, and in subsequent speeches in January and February 1875.<sup>183</sup>

As a result, with time running out in the lame-duck session and knowing that the Democrats would shortly have majority control of the House, the Radical Republicans marshaled their forces. In early February, they pushed their moderate brethren in an almost daily party caucus, until a party measure was produced on February 13.<sup>184</sup> Five days later, on February 18, Rep. John Coburn (R-IN), representing the select committee investigating affairs in Alabama, reported the bill (H.R. 4745) to the full House and asked that it be printed.<sup>185</sup> H.R. 4745, which was intended “to provide against the invasion of States, to prevent the subversion of their authority, and to maintain the security of elections,” contained thirteen sections. Sections one and two elaborated strict penalties on those crossing state lines or conspiring internally to overthrow duly-elected state governments; section three outlawed firearms at polling places; section four punished election officials for refusing to accept the ballots of registered voters;

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<sup>183</sup> Gillette, *Retreat from Reconstruction*, 281; Brooks D. Simpson, *The Reconstruction Presidents* (Lawrence: University Press of Kansas, 1998), 180.

<sup>184</sup> Gillette, *Retreat from Reconstruction*, 284.

<sup>185</sup> *Congressional Record*, 43rd Congress, 2nd session (February 18, 1875), 1453.

section five made it a crime to steal or destroy ballot boxes; section six imposed the death penalty on those who killed someone in the course of crimes related to sections one through five; section seven made the district courts the jurisdictional authority on all matters related to the statute; sections eight and nine provided for election supervisors and deputy marshals in all voting precincts, with all powers and authority that similar officers possessed in cities with 20,000 or more inhabitants; section ten provided for the counting of ballots and delivery of election certificates in federal elections; sections eleven and twelve forbade officer compensation stipulated procedures for keeping election records; and section thirteen provided the president with the power to suspend the writ of *habeas corpus* in a state, in order to put down armed combinations and/or rebellion.

H.R. 4745 was thus an ambitious bill, as the Radicals sought to make the most of the GOP's remaining unified-government influence. It engaged recent problems, like white insurgents organizing and traveling across state boundaries to stir up racial animosities and create electoral havoc. It also reached back and attempted to implement policy from the past. Section thirteen was of course a direct extension of the *habeas corpus* provision in the Fourth Enforcement Act (Ku Klux Klan Act), but without an explicit end-date.<sup>186</sup> And sections eight and nine were a reprisal of Sen. William Kellogg's (R-LA) failed 1872 bill (S. 792), which attempted to counter electoral fraud in the South by extending the power and authority of federal officers (election supervisors and marshals) to rural areas.

As the House readied for debate, it became increasingly clear that H.R. 4745, as constituted, might be too "radical" to secure a majority of the House. Thus, various elements within the GOP sought amendments that might broaden the bill's appeal. When the bill was

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<sup>186</sup> Recall that a similar attempt – for a single session – had been tried (unsuccessfully) once before, in 1872.

formally read on March 24, four amendments were offered.<sup>187</sup> Benjamin Butler (R-MA) sought to amend section thirteen, so as to restrict coverage to districts that the president deemed “insurrectionary,” while adding a new fourteenth amendment that would provide a definitive end-date two years into the future (at the end of the 44th Congress, and therefore after the presidential election of 1876). Butler’s amendment was meant to allay fears that the president might use his newfound power to enter Democratically-controlled states, rather than the few GOP states left in the South, while providing an explicit expiration of the law’s provisions. John Hawley (R-IL) sought to streamline section thirteen and extend its provision only to the next regular session of Congress (thus creating an expiration date sometime in summer of 1876, prior to the presidential election). Joseph Cannon (R-IL) moved to eliminate section thirteen entirely, while E. R. Hoar (R-MA) sought to strike out sections one, two, and four.

Democrats successfully delayed action on H.R. 4745, by raising points of order and offering motions to adjourn, until March 26, when a spirited debate occurred. Coburn started and held the floor for a considerable time, drawing extensively from recent reports of investigatory committees that recounted violence toward blacks and conspiracies by white southerners to commit electoral fraud to benefit Democratic candidates. Charles Albright (R-PA), James Biery (R-PA), and Charles Hays (R-AL) supported Coburn at length, the latter also reading various investigatory testimony into the record. However, Republican opposition also emerged. For example, George Willard (R-MI) favored “a different course” and spoke favorably about encouraging “home rule.”<sup>188</sup> And Joseph Hawley (R-CT), who had supported federal enforcement legislation to that point, announced that he would “part company” with the Radicals,

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<sup>187</sup> *Congressional Record*, 43rd Congress, 2nd session (February 24, 1875), 1751.

<sup>188</sup> *Congressional Record*, 43rd Congress, 2nd session (February 26, 1875), 1839.

as he felt that “the existing laws on the statute-book are strong enough for the preservation of all the rights guaranteed by the Federal government.”<sup>189</sup>

Debate continued the next day, February 27, with comments by several other members, including Butler, Cannon, and Hoar, who argued for their amendments (Hawley having dropped his). The Butler amendment was considered, and it passed 164-99, with only 15 of 178 Republicans disagreeing.<sup>190</sup> Section thirteen was thus revised, and a fourteenth section was added to the bill. The Cannon amendment was then considered, which if passed would strike out section thirteen (as amended by the Butler amendment). It failed 121-130, with 38 of 156 Republicans voting in favor.<sup>191</sup> Finally, the Hoar amendment was considered, which if passed would strike out sections one, two, and four. It too failed 119-126, with 40 of 164 Republicans voting in favor.<sup>192</sup> Butler had seemingly found the right modification of H.R. 4745; at the same time, GOP support for the Cannon and Hoar amendments suggested a diversity of opinion as to what could be acceptable. Thus, the successful passage of the Butler-amended H.R. 4745 was far from certain. After some dilatory tactics on the part of the Democrats, H.R. 4745, as amended, was considered – and it passed, 135-114.<sup>193</sup> Overall, 32 of 166 Republicans defected, including prominent party leaders like James Garfield (OH), George F. Hoar (MA), and Henry Dawes (MA).

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<sup>189</sup> *Congressional Record*, 43rd Congress, 2nd session (February 26, 1875), 1853. Hawley went on to enunciate a position in keeping with the Liberal Republican movement/perspective:

There is a social, and educational, and more reconstruction of the South needed that will never come from any legislative halls, State or national; it must be the growth of time, of education, and Christianity. We cannot perfect that reconstruction through statutes, if we had all the powers of the State Legislature and of Congress combined. We cannot put justice, liberty, and equality into the hearts of the people by statutes alone.

<sup>190</sup> *Congressional Record*, 43rd Congress, 2nd session (February 27, 1875), 1935.

<sup>191</sup> *Congressional Record*, 43rd Congress, 2nd session (February 27, 1875), 1929.

<sup>192</sup> *Congressional Record*, 43rd Congress, 2nd session (February 27, 1875), 1933.

<sup>193</sup> *Congressional Record*, 43rd Congress, 2nd session (February 27, 1875), 1935.

Thus, the Radicals were successful in pushing through a new enforcement bill. Little time was left in the lame-duck session, however, so immediate action on the part of the Senate was needed to move the bill to enactment. H.R. 4745, as amended, was brought up on March 1, and was read a first time – amid almost constant dilatory behavior on the part of the Democrats.<sup>194</sup> The following day, March 2, the bill was read a second time, again over constant and loud Democratic objections. Thomas Bayard (D-DE) announced that he would “object to the further reading of the bill.”<sup>195</sup> And he got his wish, as other business consumed the remainder of the Senate’s time before the session came to a close. Senate Republicans lacked the time and will to push forward; the Democrats clearly showcased their resistance, and thus any such investment by GOP senators would have come at the cost of valuable (and dwindling) agenda time. H.R. 4745 thus died a quiet death.

For many Republicans, seeing the new enforcement bill fail actually produced a sigh of relief. The concern was that, on the party’s Southern policy, the horse was out of the barn – and trying to rein it in once again would have potentially devastating effects on the GOP’s fortunes in the *North*. Speaker James Blaine (R-ME), looking ahead to the 1876 elections, expressed these sentiments to black Republican representative John R. Lynch (R-MS):

In my judgment, if that bill had become a law the defeat of the Republican party throughout the country would have been a foregone conclusion. We could not have saved the South even if the bill had passed, but its passage would have lost us the North. . . . In my opinion, it was better to lose the South and save the North, than try through legislation to save the South, and thus lose both North and South.<sup>196</sup>

While perhaps not the modal view within the GOP, Blaine’s position was shared by a significant number of Republicans. Both James Garfield (R-OH) and John Kasson (R-

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<sup>194</sup> *Congressional Record*, 43rd Congress, 2nd session (March 1, 1875), 1939-40.

<sup>195</sup> *Congressional Record*, 43rd Congress, 2nd session (March 2, 1875), 2035.

<sup>196</sup> Quoted in Simpson, *The Reconstruction Presidents*, 181; see also John R. Lynch, *The Facts of Reconstruction* (New York: Neale Publishing Co., 1913), 135.

IA) voiced similar concerns, and powerful party figures outside of Congress, like Joseph Medill, the editor of the *Chicago Tribune*, did so as well.<sup>197</sup>

With the expiration of the 43rd Congress, on March 3, 1875, Republican-led Reconstruction initiatives had effectively come to an end. Senate Republicans, still comprising a chamber majority, made some appeals in 1875 and 1876 to support the continued voting rights of blacks in the South, but these efforts were wholly symbolic. With the Democrats firmly in control of the House in the 44th Congress, an effective veto on further policy change was squarely in place.

The 44th Congress also played a role in the presidential election of 1876, which pitted two reform-minded governors – Republican Rutherford B. Hayes of Ohio and Democrat Samuel Tilden of New York – against one another. With momentum on their side, the Democrats set their sights on capturing the White House and perhaps wresting full control of the federal government from the GOP.<sup>198</sup> And when all votes were cast, the result appeared to favor Tilden. But the electoral votes of three yet-to-be-redeemed Southern states (Florida, Louisiana, and South Carolina) were called into question,<sup>199</sup> with ballot fraud at the heart of the dispute, and the winner of these states would determine the election. And the Republicans still controlled the state canvassing board in all three states.

In time, the GOP-controlled canvassing boards threw out enough Democratic votes (based on fraudulent ballot design) to award the electoral votes of Florida, Louisiana, and South Carolina to Hayes. With these electoral votes in hand, Hayes had a one-vote majority. Democrats cried foul, and rival political actors in the three Southern states moved to certify

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<sup>197</sup> Gillette, *Retreat from Reconstruction*, 288-89.

<sup>198</sup> See Keith Ian Polakoff, *The Politics of Inertia: The Election of 1876 and the End of Reconstruction* (Baton Rouge: Louisiana State University Press, 1973); Michael F. Holt, *By One Vote: The Disputed Presidential Election of 1876* (Lawrence: University Press of Kansas, 2008).

<sup>199</sup> One electoral vote in Oregon was contested as well.

results that would award the disputed electoral votes to Tilden. To settle the crisis, Congress set up a 15-member Electoral Commission to investigate and render a decision – with the eventual outcome favoring Hayes on an 8-7 vote.

Underlying the dispute-settlement process was a range of backdoor politicking, which culminated in the (presumed) Compromise of 1877.<sup>200</sup> The negotiations underlying the compromise were secret, but ultimately the Democrats agreed to give up their leverage – for example, the Democratically-controlled House needed to validate the Electoral Commission’s decision, and the minority Democrats in the Senate could have pursued a filibuster – and acquiesce to Hayes’s election, in exchange for assurances from the Republicans that (among other things) they would no longer use the army to prop up GOP governments in the three remaining un-redeemed states – and instead allow “home rule” to operate.<sup>201</sup> Subsequent behavior by Grant (who withdrew the army in Florida in January 1877, when a new Democratic governor took office) and Hayes (who, once inaugurated, refused to support the entrenched but under-fire Republican governors in Louisiana and South Carolina, and directed the army guarding the statehouses back to their barracks – thus nudging the Republican governors into giving up their office claims and stepping aside) was consistent with GOP leaders keeping up their end of the deal.

Thus, by late April 1877, the entire ex-Confederate South was “redeemed” by Southern Democrats, and the Republicans’ ambitious policy of Reconstruction had effectively come to an

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<sup>200</sup> The standard account of the Compromise of 1877 is C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (Boston: Little, Brown, 1951). Whether the Hayes camp and Southern Democrats settled on a true quid pro quo arrangement (such that it could be considered a “compromise”) is discussed in Polakoff, *The Politics of Inertia*; Allen Peskin, “Was There a Compromise of 1877?” *Journal of American History* 60 (1973): 63-75; C. Vann Woodward, “Yes, There Was a Compromise of 1877.” *Journal of American History* 60 (1973): 215-23; Michael Les Benedict, “Southern Democrats in the Crisis of 1876-1877: A Reconsideration of *Reunion and Reaction*,” *Journal of Southern History* 64 (1980): 489-524.

<sup>201</sup> Both Grant and Hayes also demanded that blacks’ rights be respected in the new Democratically controlled governments, and received assurances of compliance.

end. National Republicans would continue to hold out (some) hope for a viable Southern wing for the better part of the next two decades, but little would be achieved subsequently to make that a reality.

### **Conclusion**

In the decade between 1865-1875, Congress led the country through Reconstruction. More specifically, it fell to Republicans in Congress – sometimes with the support of the president and sometimes over his objections – to determine how the country would settle a series of difficult political questions left unanswered after Lee’s surrender at Appomattox. During these difficult years, the GOP successfully passed the 14th and 15th Amendments, the Civil Rights Acts of 1866 and 1875, Military Reconstruction legislation, and five Enforcement Acts. Viewed together, these bills meaningfully altered the political status of the freedmen and, for a time, bolstered the federal government’s authority to guarantee civil rights to all Americans.

At the same time, the political conservatism of many *within* the Republican Party limited the impact of what might otherwise have been revolutionary changes to the political system. As we have argued here and elsewhere, Republicans in Congress repeatedly found themselves in conflict with one another over the shape of Reconstruction policy. Radicals like Senator Charles Sumner worked diligently to dissolve the “traditional” division between federal and state power. The legislation he introduced put the federal government in charge of responsibilities traditionally maintained by those at the state and local level. Moderates like Senator Lyman Trumbull, on the other hand, proved unwilling see their more conservative notions of federalism thrown overboard in the all-out pursuit of “human rights.” By the end of this pivotal decade, as the country continued to suffer from a dramatic economic depression, much of the energy driving the radical policy changes had dissipated. Republicans had suffered a dramatic political

defeat in the 1874 elections; Democrats seemed poised for a political comeback; and the party of Lincoln increasingly came to believe that the country had tired of Civil War era debates.

Reconstruction as a “political process,” argue Donald, Baker, and Holt, “was already finished as a political process” by the 1876 presidential election.<sup>202</sup> We see some evidence for their claim in the outcome of the debate over the Civil Rights Act of 1875 and the Enforcement Bill of 1875. Where the former offered merely symbolic protections to black citizens, the latter never even became law. More ominously, as Republican support for meaningful civil rights protections weakened, Democrats in ex-Confederate states began a committed effort to roll back what protections did exist. The backlash against congressional reconstruction also took root in the Supreme Court. In the (in)famous *Slaughterhouse* cases of 1873, a majority of the court effectively narrowed the application of 14th Amendment protections. The Court built on this ruling 10 years later in the *Civil Rights Cases* (1883), wherein a majority declared the 1875 civil rights bill unconstitutional. In short, “redemption” and the rise of Jim Crow were motivated by Republican successes *and* Republican weakness. Their effects would be felt for nearly one hundred years as black citizens would find themselves plunged back into a state of near slavery until the mid-20th century.

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<sup>202</sup> Donald, Baker, Holt, *The Civil War and Reconstruction*, 633.

## Appendix: Vote Tables

**Table 1: Initial Votes on Fourth Enforcement Act, 42nd Congress**

### House

Party	To Amend H.R. 320 (Farnsworth)		To Amend H.R. 320 (Ambler)		To Amend H.R. 320 (Holman)		To Pass H.R. 320	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	60	0	59	1	60	0	0	61
Southern Democrat	30	0	30	0	30	0	0	30
Republican	24	85	9	104	1	113	115	0
Lib Republican	2	0	2	0	0	1	2	0
Ind Republican	0	1	0	0	0	1	1	0
<b>Total</b>	<b>116</b>	<b>86</b>	<b>100</b>	<b>105</b>	<b>91</b>	<b>115</b>	<b>118</b>	<b>91</b>

*Source: Congressional Globe, 42nd Congress, 1st Session, (April 6, 1871): 515; (April 6, 1871): 519-20; (April 6, 1871): 521-22; (April 6, 1871): 522.*

### Senate

Party	To Amend H.R. 320 (Morton)		To Amend H.R. 320 (Sherman)		To Amend H.R. 320 (Osborne)		To Pass H.R. 320	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	0	10	0	10	0	10	0	10
Southern Democrat	0	4	0	4	0	4	0	4
Republican	23	27	38	10	34	10	45	4
Lib Republican	0	1	0	1	0	1	0	1
<b>Total</b>	<b>23</b>	<b>42</b>	<b>38</b>	<b>25</b>	<b>34</b>	<b>25</b>	<b>45</b>	<b>19</b>

*Source: Congressional Globe, 42nd Congress, 3rd Session, (April 14, 1871): 704; (April 14, 1871): 705; (April 14, 1871): 708; (April 14, 1871): 709.*

**Table 2: Adjudicating Differences on Fourth Enforcement Act, 42nd Congress**

House

Party	To Concur in Jud. Com. Amendment to H.R. 320		To Concur in Sherman Amendment to H.R. 320		To Adopt Conference Report on H.R. 320		To Adopt Conference Report on H.R. 320	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	0	48	0	49	0	48	0	46
Southern Democrat	1	29	0	30	0	28	0	27
Republican	84	14	44	51	73	28	92	0
Lib Republican	0	2	0	2	0	2	0	1
Ind Republican	1	0	1	0	1	0	1	0
Total	86	93	45	132	74	106	93	74

Source: *Congressional Globe*, 42nd Congress, 1st Session, (April 15, 1871): 724-25; (April 15, 1871): 725; (April 19, 1871): 800-01; (April 19, 1871): 808.

Senate

Party	To Recede from Amendments to H.R. 320		To Agree to Conference Report on H.R. 320		To Concur in Conference Report on H.R. 320	
	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	7	0	0	9	0	8
Southern Democrat	4	0	0	4	0	3
Republican	5	33	32	2	36	2
Lib Republican	1	0	0	1	0	0
Total	17	33	32	16	36	13

Source: *Congressional Globe*, 42nd Congress, 1st Session, (April 17, 1871): 728; (April 18, 1869): 779; (April 19, 1871): 831.

**Table 3: Fifth Enforcement Act, First Attempt, 42nd Congress**

Party	<u>Senate</u> Amnesty Amendment (Trumbull)		<u>Senate</u> To Pass S. 791		<u>House</u> To Suspend the Rules and Pass S. 791		<u>House</u> To Suspend the Rules and Pass S. 791	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	8	0	0	7	1	52	0	53
Southern Democrat	6	0	0	6	0	34	0	35
Republican	7	33	36	4	113	0	101	5
Lib Republican	1	0	0	0	1	1	0	2
Total	22	33	36	17	115	87	101	95

Source: *Congressional Globe*, 42nd Congress, 2nd Session, (May 14, 1872): 3421; (May 14, 1872): 3431; (May 28, 1872): 3934; (May 31, 1872): 4103.

**Table 4: Fifth Enforcement Act, Second Attempt, 42nd Congress**

Senate

Party	To Table Appeal from Decision of the Chair, H.R. 2705		To Amend H.R. 2705 (Kellogg)		To Pass H.R. 2705		To Concur in Conference Report on H.R. 2705	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	0	9	0	6	0	5	0	8
Southern Democrat	0	5	0	4	0	4	0	4
Republican	28	7	31	2	32	1	39	5
Lib Republican	0	1	0	0	0	0	0	0
<b>Total</b>	<b>28</b>	<b>22</b>	<b>31</b>	<b>12</b>	<b>32</b>	<b>10</b>	<b>39</b>	<b>17</b>

Source: *Congressional Globe*, 42nd Congress, 2nd Session, (June 7, 1872): 4365; (June 7, 1872): 4393; (June 7, 1872): 4398; (June 10, 1872): 4495.

House

Party	To Recommit H.R. 2705 to Conference Committee		To Agree to the Conference Report on H.R. 2705	
	Yea	Nay	Yea	Nay
Northern Democrat	44	0	0	44
Southern Democrat	33	0	0	33
Republican	20	79	101	1
Lib Republican	2	0	1	1
<b>Total</b>	<b>99</b>	<b>79</b>	<b>102</b>	<b>79</b>

Source: *Congressional Globe*, 42nd Congress, 1st Session, (June 8, 1871): 4442-43; (June 8, 1872): 4456.

**Table 5: Failure to Extend the *Habeas Corpus* Provision (Section Four) of the Fourth Enforcement Act, 42nd Congress**

	<u>Senate</u> To Pass S. 656		<u>House</u> To Suspend the Rules and Pass S. 656		<u>House</u> To Suspend the Rules and Pass S. 656	
	Yea	Nay	Yea	Nay	Yea	Nay
Party						
Northern Democrat	0	9	0	51	0	43
Southern Democrat	0	4	0	33	0	30
Republican	28	2	94	22	56	14
Lib Republican	0	0	0	2	0	2
Total	28	15	94	108	56	89

Source: *Congressional Globe*, 42nd Congress, 2nd Session, (May 21, 1872): 3727; (May 28, 1872): 3931; (June 7, 1872): 4323.

**Table 6: Initial Votes on the Civil Rights Act of 1875, 42nd Congress**

Senate

	To Table Sumner Amendment (Robertson)		To Adopt Carpenter Amendment		To Adopt Carpenter Amendment re. jurors		To Adopt Sherman Amendment	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Party								
Northern Democrat	6	0	0	7	2	3	7	0
Southern Democrat	4	0	0	4	2	2	4	0
Republican	9	33	17	23	8	36	14	33
Lib Republican	1	0	0	1	0	1	0	1
Total	20	33	17	35	12	42	25	34

Source: *Congressional Globe*, 42nd Congress, 2nd Session, (February 5, 1872), 818; (February 7, 1872), 871; (February 8, 1872): 901; (February 8, 1872), 896.

**Table 7: Initial Votes on the Civil Rights Act of 1875, 42nd Congress (Continued)**

Senate

Party	To Adopt Frelinghuysen Amendment (Churches)		To Adopt Cole Amendment		To Adopt Cole Amendment (2)		To Adopt Corbett Amendment	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	1	5	0	7	1	6	1	5
Southern Democrat	1	3	0	4	0	4	0	4
Republican	27	15	15	22	14	23	12	22
Lib Republican	0	1	0	1	0	1	0	1
Total	29	24	15	34	15	34	13	32

Source: *Congressional Globe*, 42nd Congress, 2nd Session, (February 8, 1872), 899; (February 9, 1872), 909; (February 8, 1872): 901; (February 9, 1872), 909-910; 918.

**Table 8: Initial Votes on the Civil Rights Act of 1875, 42nd Congress (Continued)**

Senate

Party	To Amend H.R. 380 (Sumner Amendment)		To Adopt H.R. 380	
	Yea	Nay	Yea	Nay
Northern Democrat	0	7	0	7
Southern Democrat	0	4	0	4
Republican	28	16	33	8
Lib Republican	0	1	0	0
Total	28	28	33	19

Source: *Congressional Globe*, 42nd Congress, 2nd Session, (February 9, 1872), 919; (February 9, 1872), 929.

**Table 9: Round Two Votes on the Civil Rights Act of 1875, 42nd Congress**

Senate

Party	To Adopt Ferry Amendment		To Adopt Blair Amendment		To Adopt Carpenter Amendment		To Adopt Trumbull Amendment	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	7	0	7	0	7	0	7	0
Southern Democrat	5	0	5	0	3	2	5	0
Republican	13	26	11	30	6	31	17	29
Lib Republican	0	0	0	0	0	0	0	0
Total	25	26	23	30	16	33	29	29

Source: *Congressional Globe*, 42nd Congress, 2nd Session, (May 9, 1872), 3257; (May 9, 1872), 3262; (May 9, 1872): 3263; (May 9, 1872),3265.

**Table 10: Round Two Votes on the Civil Rights Act of 1875, 42nd Congress (Continued)**

Senate

Party	To Adopt Vickers Amendment		To Adopt Sumner Substitute		To Adopt Sumner Amendment		To Adopt H.R. 1050	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	6	0	0	6	0	6	0	8
Southern Democrat	5	0	0	5	0	5	0	5
Republican	10	21	27	17	28	17	32	9
Lib Republican	0	0	0	0	0	0	0	0
Total	21	21	27	28	28	28	32	22

Source: *Congressional Globe*, 42nd Congress, 2nd Session, (May 9, 1872), 3267; (May 9, 1872), 3268; (May 9, 1872): 3268; (May 9, 1872), 3269.

**Table 11: Round Three Votes on the Civil Rights Act of 1875, 42nd Congress**

Senate

Party	To Adopt Carpenter Amendment		To Pass Amended Civil Rights Act		To Adopt Sumner Amendment		To Adopt H.R. 2761	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	9	0	0	9	0	9	9	0
Southern Democrat	4	0	0	5	0	6	6	0
Republican	9	20	27	0	13	14	23	2
Lib Republican	0	0	0	0	0	0	0	0
Total	22	20	27	14	13	29	38	2

Source: *Congressional Globe*, 42nd Congress, 2nd Session, (May 22, 1872), 3734-3735; (May 22, 1872), 3734-3736; (May 21, 1872), 3738.

**Table 12: Votes on the Civil Rights Act of 1875, 43rd Congress**

Senate

Party	To Adopt Thurman Amendment		To Adopt Sargent Amendment		To Adopt Boutwell Amendment		To Adopt Gordon Amendment	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	7	0	7	0	0	7	7	0
Southern Democrat	6	0	6	0	0	6	6	0
Republican	0	32	8	26	5	29	1	30
Lib Republican	0	0	0	0	0	0	0	0
Total	13	32	22	26	5	42	14	30

Source: *Congressional Globe*, 43rd Congress, 1st Session, (May 22, 1874), 4167; (May 22, 1872), 4167-4168; (May 24, 1874), 4170-4171.

**Table 13: Votes on the Civil Rights Act of 1875, 43rd Congress (Continued)**

Senate

Party	To Adopt Alcorn Amendment		To Adopt Hamilton Amendment		To Pass S. 1		To Pass H.R. 796	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	0	7	7	0	0	7	0	11
Southern Democrat	0	6	6	0	0	6	0	8
Republican	9	24	2	28	29	3	38	2
Lib Republican	0	0	0	0	0	0	0	5
<b>Total</b>	<b>9</b>	<b>37</b>	<b>15</b>	<b>28</b>	<b>29</b>	<b>16</b>	<b>38</b>	<b>26</b>

Source: *Congressional Globe*, 43rd Congress, 1st Session, (May 22, 1874), 4171; (May 22, 1872), 4175; (May 24, 1874), 4176; 2nd Session (February 27, 1875), 1870.

**Table 14: Votes on the Civil Rights Act of 1875, 43rd Congress**

House of Representatives

Party	To Adopt Cessna Amendment		To Pass H.R. 796	
	Yea	Nay	Yea	Nay
Northern Democrat	0	46	0	46
Southern Democrat	0	37	0	38
Republican	113	60	161	12
Lib Republican	0	3	1	2
Ind. Democrat	0	1	0	1
Ind. Republican	0	1	0	1
<b>Total</b>	<b>113</b>	<b>148</b>	<b>162</b>	<b>100</b>

Source: *Congressional Globe*, 43rd Congress, 2nd Session, (February 4, 1875), 1011; (February 4, 1875), 1011.

**Table 15: Enforcement Bill of 1875, 43rd Congress**

House

Party	To Amend H.R. 4745 (Butler)		To Amend H.R. 2705 (Cannon)		To Amend H.R. 2705 (Hoar)		To Pass H.R. 4745	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Northern Democrat	0	44	43	0	40	1	0	43
Southern Democrat	0	36	37	0	35	0	0	36
Republican	163	15	38	128	40	124	134	32
Lib Republican	0	3	2	1	2	1	1	2
Ind Democrat	0	1	1	0	1	0	0	1
Ind Republican	1	0	0	0	1	0	0	0
Total	164	99	121	130	119	126	135	114

Source: *Congressional Record*, 43rd Congress, 2nd Session, (February 27, 1875): 1929; (February 27, 1875): 1930; (February 27, 1875): 1933; (February 27, 1875): 1935.