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Congressional control of federal court jurisdiction and the effect on protection of civil rights

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CONGRESSIONAL CONTROL OF FEDERAL COURT JURISDICTION
AND THE EFFECT ON PROTECTION OF CIVIL RIGHTS

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ABSTRACT

CONGRESSIONAL CONTROL OF FEDERAL COURT JURISDICTION
AND THE EFFECT ON PROTECTION OF CIVIL RIGHTS

CHRISTOPHER H. MEAKIN

The years immediately following the end of the American Civil War proved to be the high water mark in the nationalist spirit that provided for the direct federal protection of civil rights. This period was short, and as Southern patience outlasted Northern zeal, the federal government abandoned its efforts to actively enforce the spirit of the Reconstruction amendments. Even though during Reconstruction Congress greatly expanded the jurisdiction of the federal court system, the grants of jurisdiction did not help protect civil rights. Most of the statutes were civil in nature, requiring a litigant to hire a lawyer. Prospective plaintiffs in civil rights cases were unable to shoulder the expense of a civil rights lawsuits so early use of the statutes was by corporations seeking to escape state regulation. Local lawyers willing to try civil rights cases faced an immense hurdle since the statutes were codified and broken up, legal journals de-emphasized these cases, and local pressure injured the attorneys' practices.
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The years immediately following the end of the American Civil War proved to be a high water mark in the nationalist spirit that provided for the federal protection of the rights of United States citizens. The smoldering rubble of the once proud Confederacy represented an opportunity, a passage, for the federal government to step through and actively secure its place as the final word on civil liberty. Hesitation caused the opportunity to be missed, and, sadly, it took almost a century for another chance.

From a legal viewpoint, Appomattox did not end the conflict between the North and the South. Defeated Confederates tried to resurrect and once again realize their former lifestyles by constructing a legal environment that deprived the new Freedmen of their recently obtained equal constitutional status. Only a strong federal presence could have kept this trend in check, in a battle that has been described as an inversion of a Clausewitz maxim: "A continuation of war by other means."\(^1\) The optimism that led to the passage of federal legislation aimed at preserving the amorphous concept of "rights of an American" did not spill into the next decade, and the non-enforcement by the federal government and members of the local legal communities in the 1870s all but repealed the legislation from the previous decade. Early theorists blame an intimidated federal judiciary for the federal retreat but more recent analysis successfully refutes this contention.\(^2\)


From the first Reconstruction to the second, the Reconstruction amendments and the legislation passed pursuant to their grant of power initially were utilized as effective tools. Then they were pushed from the limelight by narrow interpretation and a greater concern for commercial matters, only to be rediscovered and used during the second Reconstruction. This theme of creation, hibernation, and resurgence was used by Robert L. Kohl to discuss protection from housing discrimination in, "The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co." Kohl compares the 1866 Act to the work of English artist Aubrey Beardsly, which "enjoyed early recognition, suffered thereafter a long period of obscurity, and was discovered anew by a later generation." Unlike a renewed appreciation of a neglected form of art, a litigant is taking an expensive gamble when he frames his suit in terms of a disfavored or little used (i.e. little understood) cause of action. Summary dismissal of the case at the trial court and intermediate levels of appellate review is generally guaranteed, thereby leaving only the long odds of United States Supreme Court review and vindication.

When faced with a set of alternatives for providing for the rights of Freedmen, which in turn protected the rights of all citizens since all men were now equal in the eyes of the Constitution, Congress could have chosen from a set of programs that ranged from a strong federal legal and military


4 Ibid.
presence, to the simple creation of private rights of action allowing individuals to protect their own rights. During the span of Reconstruction all of these were used to some extent. Initially, Congress chose from the more active end of the scale in the form of the Freedmen's Bureau. The Bureau, however, suffered two major drawbacks: it required direct federal supervision to operate and was viewed by Conservatives as prolonging the War. The paradoxical argument even was made that the effect of this federal presence bred resentment and further crime, and that only elimination of this Northern meddling in strictly Southern local affairs would bring peace.

The ability of the Bureau to obtain writs of habeas corpus, and thus secure fair trials for Blacks might have been a contributing factor to the rise of mob jurisprudence: lynching. Albion Tourgee's novel, A Fool's Errand illustrates this point with the depiction of a "trial" and conviction of three Negroes for the murder of a White. Not only was the alleged victim alive, but he had been injured when he and his compatriots were attempting to bushwhack and horsewhip a Unionist lawyer who had been too vocal with his views.

When the evidence was concluded, the magistrate remarked that he would have to commit the prisoners; and a murmur ran through the crowd to the effect that a better and cheaper way would be to string them up to a tree.

'If you send them to jail,' said one, 'the damned Bureau will turn them out!'

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The period of an active federal initiative was short. By 1868, the statutory authority of the Freedmen's Bureau had lapsed and most of the former Confederate States had returned to the Union. The return of local civil government limited alternatives for the protection of civil rights to the conventional civil and criminal judicial processes. Created in 1870, the United States Department of Justice was quickly forced by budgetary and political pressures to retreat from aggressive prosecution of all civil rights violators to a policy of targeting only the leaders of the most atrocious acts of violence. Limited federal protection continued until the middle of the decade when the federal government unceremoniously passed the baton of enforcement to the local legal communities. Passage of the burden from the federal government to the local legal entities proved to be an abandonment of the Freedmen and Southern Republicans. The self-help statutes did not fulfill their promise. Only a few attorneys could withstand the legal difficulty and local hostility of bringing civil rights lawsuits. As an illustration, between 1871 and 1920, the federal courts decided only twenty-one actions brought under the Ku Klux Klan Act of 1871, the civil cousin to the Civil Rights Act of 1866. This prompted one commentator to quip, that before the second Reconstruction in the 1960s, the "work of the federal courts had as much importance in the life of the average American citizen as did the poetry of Algernon Swinburne." In direct contrast with the dearth of federal civil rights lawsuits in the late 1800s, by 1983, out of the 87,935 private federal

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8 Kaczorowski, 79.
question cases filed, 26,753 (approximately 30%) were based on one or more of the civil rights statutes.\textsuperscript{10}

In years immediately following the passage of the fourteenth amendment in 1868, a nullification of the acts passed pursuant to the amendment's grant of power took place. Judicial interpretation narrowed the "privileges and immunities" of a United States citizen almost beyond detection and the "state action" limitations in the statutes exculpated all but the most overtly state-fostered forms of discrimination. There direct federal protection of civil rights lay, almost moribund, until the 1960s\textsuperscript{11}

\begin{flushright}
\textsuperscript{10} Webster v. City of Houston, 735 F.2d 838, 848 n. 24 (5th Cir. 1984) (Williams, J. dissenting).
\end{flushright}
CONGRESS AND FEDERAL COURT JURISDICTION

From their creation the lower federal courts have been courts of limited jurisdiction. Article III, section 1 of the United States Constitution places the "judicial Power of the United States" in the hands of "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Taken literally the wording of this section suggests a very limited federal judiciary. If Congress chose never to create lower federal courts, or a later Congress eliminated the jurisdiction of earlier created lower federal courts, everything not in the original jurisdiction of the Supreme Court would have to be litigated in state court or not at all.

Any concern for a complete lack of a federal forum was quickly pushed aside by the Judiciary Act of 1789, 1 Stat. 73. This Act established a lower federal court system consisting of 13 district courts, roughly one per state. A limited number of appeals from these district courts were allowed to a second tier of circuit courts. The Act also divided the country into three circuits with each circuit presided over by a panel of two Supreme Court justices and a judge from one of the districts of the circuit. The circuit court was to meet twice a year in the various districts comprising the circuit.12 In practice, these lower courts divided original jurisdiction, with the circuit courts hearing the diversity cases13 and the district courts receiving the admiralty cases.

13 A suit by a citizen of one state against a citizen of another state. The framers were concerned about local prejudice adversely affecting the non-citizen litigant's ability to obtain a fair trial in state court.
The Supreme Court's business consisted of cases that fell within its original jurisdiction, as stated by the Constitution, and cases on appeal from the federal and state systems. This arrangement allowed federal law eventually to be interpreted and spoken by a single voice. If no appeal from state supreme courts to a single supreme tribunal existed, the interpretation of federal law conceivably could be different in each state as dictated by its own court system.

The 1789 law has been called "a bundle of compromises [that] certainly did not reflect the Federalists' complete views of national judicial power."\textsuperscript{14} While the law conferred some amount of diversity jurisdiction it lacked a very important ingredient: federal courts were not given original cognizance of all suits involving a question arising under the Constitution or laws of the United States.\textsuperscript{15} From the first Judiciary Act of 1789 until 1875, federal courts have only heard questions of federal law when they were on appeal from state court decisions or when the federal questions were involved in a case that was before the federal court due to a diversity of citizenship of the the litigants.

From this first Act the federal courts' jurisdiction enlarged steadily on an as-needed basis. No grand scheme existed for the growth of the federal judiciary. The courts simply proved to be a convenient cubbyhole for politically sensitive issues. In 1833 South Carolina made it a criminal offense for federal customs officials to collect duties within the borders of the state. To counteract this measure Congress allowed for removal of these cases along with a writ of habeas corpus, which transferred both the case and the defendant into a more sympathetic federal circuit court. This jurisdictional

\textsuperscript{14} Kutler, 144.
\textsuperscript{15} Federal question jurisdiction.
enlargement caused an uproar by Southern Democrats who bemoaned the
intrusion of federal judicial authority into an area of traditional state
sovereignty.

As an interesting contrast, in 1855 Southerners enthusiastically supported
a bill providing for removal of cases to federal court to counteract the
lackluster enforcement of the fugitive slave laws in the Northern state courts.
During the Civil War and Reconstruction, Congress consistently increased
the jurisdiction of lower federal courts to protect federal officials in the
performance of their duties.

All of these half-steps culminated with the Jurisdiction and Removal Act
of 1875. Passed in the final days of the forty-third Congress, just as the
Republicans yielded control of the House of Representatives to the
Democrats, this Act provided original jurisdiction to federal courts of all cases
asserting rights under the Constitution, laws or treaties of the United States.
These cases could also be removed from state court without regard to the
citizenship of the parties. These changes were said to push the limits of
federal jurisdiction to the point envisioned by the framers.16

Why was there such concern to have a federal court as the original
tribunal if all cases could have their federal elements reviewed and
ultimately decided by the U. S. Supreme Court? One answer might be that
state judges, generally, are elected and susceptible to the sway of the majority,
and a few too many rulings in favor of an oppressed minority, more than
likely, would be occupational suicide. The federal court system is staffed by
what are known as Article III judges. An Article III judge is appointed for life
and has a salary that is protected from Congressional tinkering.17 The system

16 Frankfurter and Landis, 11.
17 Article III, section 1 states:
was created this way so a federal judge can make decisions outside of the political arena where state judges work. One writer summarized this point, ". . . [during Reconstruction] it appeared distressingly clear that elected state judges lacked will and ways to withstand popular pressures, however distasteful, issued by conventions and legislatures." 18 In addition, the trial court is the fact-finder. On appeal a jury finding cannot be disturbed unless it is manifestly unjust. 19

During Reconstruction, the courts were seen as an inexpensive receptacle of a variety of political hot potatoes: "constitutional issues . . . become subsidiary to the desire to crack down on crime or bring administrative agencies under control . . . . Because constitutional issues often present the most difficult value conflicts in society, it is tempting for members [of Congress] to sidestep these issues and leave them to the courts, the ultimate nay-sayers." 20 The majority of Republicans saw the federal court system as an attractive alternative to wholesale displacement of state law by Congressional legislation of local matters. "A century ago congress men were states' men. Many were lawyers and veterans of practice in state court. All were tied closely to their states' parties, treasuries, and voters." 21 Consequently, they

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

18 Hyman, 230.
19 The VII th amendment states: ". . . no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."
21 Hyman, 238.
viewed any increase in the availability of a federal forum without an increase in substantive rights as a direct slap at the state courts.

Before the Civil War, Republicans tacitly supported state court impairment of national law enforcement. Northern state judges openly thwarted the fugitive slave laws by their rulings, including the use of the writ of habeas corpus. By the end of the war, Republican patience with the state judiciary's aberrational approach to federal law enforcement had worn thin. In both the Border states and the South, state judges impeded the Union war effort by charging national officers with violations of state law and issuing contempt citations against them.

From a commercial viewpoint, shortly after the war Congress enacted a national bankruptcy law, which brought the centralization of the federal court system to the incongruity and inconsistency of the various state court procedures for individual and corporate insolvency. The availability of a federal forum created some certainty for out-of-state investors. Certainty would bring Northern capital to the expanding West and the rebuilding South. In addition, Congress created an entirely new court, the United States Court of Claims, to hear claims against the federal government.22

From a civil rights standpoint, Congress extended the habeas corpus powers of the federal courts on an ad hoc basis, and, through a series of acts ending with the Jurisdiction and Removal Act of 1875, Congress pushed federal question jurisdiction and removal measures to their constitutional seams. Removal from state to federal court was the first responsibility of civil rights protection dropped on the federal court system's doorstep. Initially, removal was used to save federal officials who faced state prosecution for

22 Wieck, 333.
enforcing federal law; but as the war ended, this was extended to Freedmen. Even later, lawyers defending corporations tried to use these provisions to escape hostile state Granger juries. Corporations using civil rights statutes was not a legal usurpation of a right intended for Freedmen. By 1875 the political climate was not that of 1866 and most of the debate on removal provisions of the Jurisdiction and Removal Act of 1875 centered around traveling salesmen and the problems associated with substituted service of process of out-of-state defendants.23 Service of process is the procedure by which a defendant receives the citation, or notice of a legal proceeding instituted against him. Substituted service is how a plaintiff constructively notifies a defendant who can not be found within the jurisdiction of a particular court. Normally corporations licensed to do business in a state can be served with citation by serving the Secretary of State for the particular state.

Even without a master blueprint, a strong centralized federal court system emerged from modest beginnings. With all of the political racket created by each measure enlarging the jurisdiction of the federal courts, the Jurisdiction and Removal Act of 1875 caused only a small commotion even though the Act far eclipsed any previous measure.

23 2 Cong. Rec. 4979-83(1874).
THE JURISDICTION AND REMOVAL ACT OF 1875

In 1875, Congress passed the Jurisdiction and Removal Act which stretched the boundaries of federal jurisdiction to the limits imposed by Article III, section 2 of the United States Constitution. This Act allowed any suit to be brought originally in federal court, or removed from state court to federal court, if the plaintiff asserted rights under the Constitution, laws, or treaties of the United States.

The bill was originally introduced by Representative Luke P. Poland, a Republican from Vermont, who had only planned on clarifying the Removal Acts of 1866 and 1867. The Supreme Court's decision in The Sewing Machine Cases, 18 U.S. (Wall.) 553 (1873), upholding the traditional requirement of complete diversity of citizenship on either side of the case was also a rationale for the bill's introduction. Representative Poland intended for his bill to authorize an out-of-state defendant to remove his cause even though other defendants resided in the forum state.

On May 27, 1874 Representative Poland introduced a report from the United States House Committee on the Judiciary on House bill Number 3511. This bill would eventually become the Jurisdiction and Removal Act of 1875.

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24 Article III, section 2 states:

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases a’jecting Ambassadors, other public Ministers and Counsuls;--to all Cases of admiralty and maritime Jurisdiction;-- to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-- between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects.
In its final form the Act completely changed the function of the federal court system, raising the courts from "restrictive tribunals of fair dealing between citizens of different states . . . [to] the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." The motivation for such a sweeping change in federal court jurisdiction at this particular time is far from clear. In fact, at the same time a great deal of arguments were being advanced for a more restrictive role for the federal court system. For example, some opponents of expanded jurisdiction noted the huge backlog of cases on the dockets of all federal courts and decried federal intrusion into the traditional powers of the states. Representative Clarkson Potter of New York, in the House debates of the 1875 Act, characterized the Act as a revolution in what had been the judicial practice of the country, but a revolution without a cause.

Even as late as 1875 federal jurisdiction was still generally controlled by the first Judiciary Act of 1789. The 1789 Act conferred jurisdiction to the federal courts in a limited number of areas mainly dealing with commerce and diversity of citizenship cases. Jurisdiction of the federal court had also been expanded from time to time to limited areas to support specific goals.

The bill Representative Poland reported on in 1874 was a fraction of what eventually made it out of the House. The bill enlarged jurisdiction to allow for removal of suits filed in state court by the defendant only if the the matter in dispute was in excess of $500 dollars, and if at least one of the defendants was a citizen of a state other than the forum state. Previously a defendant could remove the entire case only if all of the defendants were citizens of a state other than the forum state, what is known as complete diversity. In the

25 Frankfurter and Landis, 65.
process of litigation the plaintiff chooses the forum in which to bring the suit and can limit or extinguish the removal possibilities by whom are named as party defendants. Before 1875, a plaintiff could eliminate defendant's ability to remove a law suit by naming a citizen of the forum state as a defendant, even if the percentage of liability of the citizen defendant was infinitesimal in relation to the non-citizen defendants.

During the House debates on the 1875 Act, Representative Horace Mayard of Tennessee suggested an illustrative hypothetical case. If an individual wished to sue a non-citizen owner of a piece of land in a state and have the suit stay in state court, all he needed to do was to join the citizen tenant in possession of the land. Under this scenario, even though the suit was really one between a non-citizen landowner and a citizen third party, the joining of a citizen with a proportionally small interest in the suit frustrated the non-citizen landlord from having a theoretically neutral trial court at the federal level. Representative Poland responded that this hypothetical case was exactly what the Act should curtail. Previously, the Removal Act of 1866 had made a little headway in this area, only allowing removal of separable parts of a lawsuit as it pertained to the non-citizen defendant. Then the suit would be divided and tried in two different locations, possibly with incongruous results.

Representative Potter countered that jurisdictional games can be played on both sides of a lawsuit, and under this bill a suit for foreclosure on a piece of real estate in which all holders of a fee or a contingent interest, for example lien holders, must be joined, may end up with as many as thirty or forty defendants. Furthermore, any one of the defendants, no matter how remote their interest in the land, could drag the whole matter to federal court. Most lawyers across the country were much more familiar with state court practice
and did not readily embrace the emerging federal system's idiosyncrasies. Potter emphasized this point by discussing the attendant hardships of all of the parties and their attorneys having to go, perhaps across the state, to federal court "to a jurisdiction with which they are not acquainted, and under a practice which is strange to their attorney."\textsuperscript{27}

The hypothetical examples of abuse of the system hurled by the Congressmen were merely an introduction to the arguments on the constitutionality of this increase of diversity jurisdiction. Representative Poland used a popular litigation trick and tried to steal the opposition's thunder by outlining both his and the other side's views on the constitutionality of this legislation. Poland spoke for the side that interpreted Article III's grant of diversity jurisdiction in suits "between citizens of different States" broadly so that complete diversity of the parties was not required.\textsuperscript{28} Poland intimated, but did not state expressly, that he had personal contact with the Justices of the Supreme Court, and they agreed with Poland's interpretation.\textsuperscript{29} He also spoke of another benefit of the bill. Section 2 provided that any plea for removal must be done at time of original appearance. This was the original way, stated in the First Judiciary Act, but later acts changed this to any time before trial. The modification made a great deal of sense because if a defendant felt he would be prejudiced by defense of the suit in state court, he would probably know that at the time of the filing of the suit or shortly thereafter. Consequently, this restriction would limit the practice of a defendant running his case in state court, until he felt he might lose, then dodging to federal court any time before the state trial.

\textsuperscript{27} Ibid.
\textsuperscript{28} U. S. Const. art. III, sec. 1.
\textsuperscript{29} Cong. Rec. 43 Cong., 1st Sess., (1874), 4302.
The other side of the constitutionality of this bill was advocated by Ebenezer Rockwell Hoar of Massachusetts. He felt the Constitution's grant of diversity jurisdiction to citizens of different states mandated the complete diversity of the parties. Hoar was the most proper advocate for this position, since the year before he had convinced the U.S. Supreme Court that the Removal Act of 1867 did not destroy the need for complete diversity. The Sewing Machine Cases, 18 U. S. (Wall.) 553 (1873). In that case the Court skirted the issue of the constitutionality of interpreting Article III as Poland proposed and found that Congress had not intended such a broad grant of jurisdiction in the Removal Act of 1867. Poland knew Hoar was a formidable adversary and tried to limit the time available to Hoar before he yielded the floor. The following exchange was typical of the jockeying for position that took place:

**Mr. E.R. Hoar.** I would like to make a statement.

**Mr. Poland.** For how long?

**Mr. E.R. Hoar.** Until I get through- I cannot tell. I do not wish to make a bargain with the gentleman from Vermont. If He does not wish me to allow me to address the House on a legal point-

**Mr Poland.** My friend is the last man in the world I would be discourteous to, if to anybody; but there are many gentlemen on the judiciary committee who wish to make reports.\(^30\)

Hoar was steadfastly convinced of his interpretation of Article III and of the unconstitutionality of the bill. He beseeched the members of the House to remember their oath to defend the Constitution while at the same time he chided Poland for his alleged insight of the Supreme Court. Hoar's main

\(^{30}\) Ibid.
argument lay in the wording of the first Judiciary Act, which is almost identical to that of Article III, section 1 of the U.S. Constitution except that the first Judiciary Act uses the phase "suits between citizens of different states", while the Constitution states "controversies between citizens of different states." The Supreme Court had previously held the first Judiciary Act required complete diversity. Thus the issue was clearly highlighted: Was the First Judiciary Act the limit of jurisdiction, or was there a grant of federal jurisdiction still latent in Article III? Hoar felt that the Removal Act of 1866 which allowed for the removal of part of a suit as it applies to the non-citizen defendant was as far as the Article III chain reached.

Poland replied that while Hoar had not convinced the U.S. Supreme Court of his position he had undoubtedly during the course of the litigation convinced himself. Interestingly, not a month before these debates Poland had argued and won a case before the U. S. Supreme Court where they reaffirmed their construction of Article III as they had interpreted it in the Sewing Machine Cases. Knapp v. Railroad Co., 20 U. S. (Wall. )117 (1873). Poland's less condescending argument was that Hoar had confused the first Judiciary Act with the Supreme Court's interpretation of the Constitution. The former being easily amendable or even repealable in comparison to the latter.

The dispute over the constitutionality of the bill was the main spring of the House debate. The issue of why this bill should have been passed was virtually ignored. In fact, Poland twice stated that he was not quite convinced as to the necessity of the Act. No Representative tried to rebut the argument that the federal judiciary was too backlogged with work and that a defendant could circumvent the states' judicial processes and get his case into federal court where it may take several years to resolve thereby denying the plaintiff
speedy justice.

There were only to passing references to slavery. First was Hoar's argument, "I can see that in some of the States which participated in the late rebellion where some classes of citizens claim they do not have justice done them in states courts . . . ." But, he went on to say that if this was the case, it was a temporary situation and did not require the broad-brush approach of this Act.31 The second reference was more tenuous. Poland stated that he originally voted against the bill in committee but gentleman from states other than New England convinced him otherwise.32

After the debates, the House voted to strike the first section of House bill 3511, which contained the removal provisions, and passed the bill as a minor amendment to The Jurisdiction Act of 1867.

From the House, the bill went to the Senate where a large transformation occurred. The wounded removal bill that had left the House was reported out of the Senate Committee on the Judiciary as a bill that not only featured the removal provisions the Representatives had eliminated but broadened them to allow a plaintiff to remove. Also, in its first sentence the Senate version greatly increased the federal question jurisdiction of the federal courts to previously unprecedented dimensions:

That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and arising under the Constitution or laws of the United States, or treaties made or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between

31 Ibid., p. 4303.
32 Ibid., p. 4301.
The bill also contained a provision making it a federal crime for any clerk of a state court who did not turn over the record of the case to the federal circuit court punishable by one year in prison, a $1000 dollar fine, or both. If a plaintiff or defendant improperly or collusively joined additional parties in a suit to manufacture federal jurisdiction, the suit would be remanded back to state court and the costs of the federal detour taxed against the offending party. The last section of the Senate bill repealed all previous acts of Congress that pertained to the jurisdiction of the federal courts, including the first Judiciary Act.

After the bill was read, Senator Allen Thurman of Ohio was first to object. However, his objection was not about the constitutionality or the wisdom of this federal expansion, but in regard to section 11 of the bill that allowed substitute service of process on out-of-state defendants by serving any agent the defendant might have in the state. The bill did not define agent, leaving the loose common law definitions to handle the task. Senator Thurman and Senator Bainbridge Wadleigh of New Hampshire were concerned that a plaintiff could conspire with an agent so that the agent would not forward the citation to his out-of-state principal, and the plaintiff would easily receive a judgment by default. Senator Wadleigh voiced his concern about the growing practice of the mercantile houses who sent out traveling salesmen. He felt a suit could arise from a product sold in a state by a corporation with no other contact with that state, and after taking a moment to cast aspersions on the character of traveling salesmen, he expressed concern on the susceptibility of

33 Cong. Rec. 43 Cong., 1st Sess., (1874), 4979.
these salesmen to bribes. The Senator did not bother to state against which assets the plaintiff could levy against. Today this practice is checked by the fact that an out-of-state judgment must be brought to the defendant's home state and filed with the courts there for enforcement. The function of the local court is to review the notice on the defendant, not retry the facts of the case.

Once again only remote constitutional concern was expressed, also by Senator Wadleigh and it concerned the First Amendment. The Senator asserted that newspapers all over the country, worried about libel suits being brought in the federal court in Washington, D. C., would not publish stories critical of the party in power. Most newspapers maintained reporters (agents) in Washington who could be served, and the libel action would be tried in Washington where the jury would be made up of members of the party in power. This explosive concern failed to carry the day, and the proposed amendment to exclude libel suits from the bill did not pass.

In further debate, Senator Bayard of Delaware conceded the constitutionality of the Act but praised the wisdom of the first Judiciary Act. Senator Matthew Carpenter of Wisconsin, the Senate bill's author and principal spokesman, responded by citing the concurring opinion of Justice Story in Martin v. Hunter's Lessee, 1 U. S. (Wheat.) 304, 328 (1816) (which he mistakenly cited as Cohens v. Virginia) in which Justice Story opined that the failing of the legislature in not granting the full scope of the power in Article III contravened the spirit of the Constitution.

The bill passed the Senate by a vote of 33 to 22 and was referred to a conference committee to hammer out a compromise between the House and Senate bills which scarcely resembled each other. Senators Carpenter and

34 Ibid., p. 4983.
Thurman were named as the Senate managers to the conference committee, and Representatives Luke Poland, Lyman Tremain of New York, and Charles Eldredge of Wisconsin came from the House.

The bill that emerged from the conference committee was basically the Senate bill, with the disputed section 11 on substituted service and some other minor sections missing. The bill was passed by Congress and signed by the President on March 3, 1875.

Stanley I. Kutler discusses this Act in his book, *Judicial Power and Reconstruction Politics*. Kutler states that the Act was meant to do more than strengthen civil rights litigation in the former states of the Confederacy. He feels that the political muscle of the railroads led to the passage of this bill. If a railroad company is sued in a remote state court, a practice known as "being hometowned," then the removal provisions would allow the railroad to remove the case to federal court, which would be located in a large city. Kutler also states that this Act exhibits the Republicans' positive view of the federal judiciary and their awareness of the potential of the courts to further the party's political and economic aims.

Harold Hyman, in *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution*, discusses the previous points and touches on the new entrance of the federal government into the police powers and the new ability of the litigant who could afford court costs to forum shop. The practice of looking at the past decisions from your choice of tribunals and choosing the one most likely to rule in your favor.

Harry N. Scheiber in his essay "Federalism, the Southern Regional Economy and Public Policy Since 1865"36, discusses later attacks on the

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Jurisdiction and Removal Act of 1875. For example, Representative David Culbertson of Texas introduced a bill in 1880 to limit the jurisdiction created by the 1875 Act. Culbertson and other southern supporters felt that the balance of power between state and federal government had been tipped too far in favor of the federal courts. Between 1880 and 1887 the Culbertson bill was passed by the House four times but the Senate never concurred.

Southern states should not of opposed this type of broad federal jurisdiction because without the ability to remove law suits filed against them in southern state courts, northern corporations would have been less likely to invest their capital in the south.

Thus the jurisdiction of federal courts has expanded and the federal courts have since been used as the primary tribunal for civil rights cases. Oddly enough, the proceedings surrounding the passage of the Act focused more on commercial concerns than on civil rights.
CONGRESS AND THE SUPREME COURT

In recent years, the works of William Wiecek\textsuperscript{37} and Stanley Kutler\textsuperscript{38} have corrected the assertions of earlier writers\textsuperscript{39} who believed that during the post Civil War Reconstruction Period the federal judiciary bowed to will of Congress. The myth states that after the Supreme Court decision in \textit{Ex Parte Milligan}, 71 U. S. (Wall.) 2 (1866), declaring illegal the use of "martial law" in areas where the civil courts were open, the Radical Republicans became enraged and began laboring to restrict federal courts' jurisdiction in an effort to protect the Reconstruction acts. This interpretation is not supported by the evidence. While the Supreme Court is a political institution, it is not as susceptible to the various swings of ideology that influence the executive and legislative branches of government. Justices do not have to worry about re-election and impeachment is rare. Also overlooked by the early writers is that most of the bills introduced in Congress to limit the Supreme Court's jurisdiction were, at best, of questionable constitutional character. A more careful look at both the Supreme Court decisions and the actions of Congress during Reconstruction reveals the greatest grant of federal jurisdiction in the history of the United States, but a grant that was left largely unused when it was needed the most, during Reconstruction.

For any court, jurisdiction is the ignition key. Without jurisdiction to hear cases a court is nothing more than the various ornaments. With

jurisdiction to decide a case or controversy, the synergism of the component parts of a court is profound. In the case of the United States Supreme Court, jurisdiction allows that tribunal to become the ultimate instrument for defining and protecting an American's rights under the Constitution and enforcing the laws of the United States.

Federal judges cannot grant themselves jurisdiction. The Constitution of the United States delegates to Congress the authority to expand and restrict the types of cases the courts shall hear. The lower federal courts existence and docket is completely controlled by Congress. The Supreme Court has a constitutional mandate of original jurisdiction outside the reach of Congress, but these cases make up only a small portion of the Court's business. The majority of the Court's work consists of cases on appeal from within the federal court system and cases on appeal from a state's highest court on a constitutional or federal law question. The appellate jurisdiction of the Supreme Court is subject to "such Exceptions, and under such Regulations as Congress shall make."40 In theory, Congress can cripple the federal judiciary by eliminating jurisdiction.

Before the Civil War, the business of the federal courts was governed by the Judiciary Act of 1789 and the cut and paste amendments that from time to time were passed. By 1876 the federal judiciary had reached its pinnacle in latent ability to review the legislation of Congress and the actions of state government. Just by observing the growth of the presence of the federal courts in American life seems to confirm the arguments of the later writers, such as Wieck and Kutler.

One of the early writers on constitutional development to argue a case for

judicial impotence during Reconstruction was Charles Warren. In *The Supreme Court in United States History*[^41] Warren looked for support to the reaction of the newspapers of the day to the replacement of Justice Curtis with Nathan Clifford. The *New York Tribune* stated: "thus the process of deterioration goes on, and the Supreme Court has gradually become a mere party machine, to do the bidding of the dominant faction and to supply places to reward party hacks."[^42]

The reputation of the Supreme Court was also attacked after its decision in *Dred Scott v. Sanford*, 60 U. S. (19 How.) 393 (1857). Warren quoted liberally from the Congressional debates of the time. Senator Seward stated that *Dred Scott* was a dummy suit manufactured by President Buchanan and the slavery interests for their own purpose, that the case was a "mock debate," Seward further stated that Buchanan and Chief Justice Taney had acted in collusion to cheat the country, and that the decision was the result of a political bargain between the Court and the President, who "alike forgot that judicial usurpation [of power of another branch of the government] is more odious and intolerable, than any other among the manifold practices of tyranny."[^43] Senator Wade called the Supreme Court "the most concentrated, irresponsible despotism on God's earth."[^44] Warren used these quotes to support his assertion that the general public had lost confidence in the federal judiciary and demanded a change.

By 1858, members of Congress were considering restricting the jurisdiction of the Supreme Court in an effort to legislate later verdicts.

[^42]: Ibid., p. 45.
[^43]: Ibid., p. 47.
[^44]: Ibid., p. 48.
Senator Seward stated, "whether the Court recedes or not [from its decision in Dred Scott], we shall reorganize the court, and thus reform its political sentiments and practices, and bring them into harmony with the Constitution and the laws of nature."45

Warren also looked at the proposed legislation aimed at the federal courts, the worst of which being blatantly unconstitutional, the best being unable to drum up enough support to make it out of committee. A bill to limit the terms of federal judges was introduced three times by Senator Benjamin Tappin of Ohio and once by Senator Sidney Breese of Illinois. However, a limited term for federal judges would doubtfully remedy the problem of the judiciary acting in too political a manner. Arguably the opposite might occur, as judges campaigned through their opinions for a renewed term or other jobs.

Senator George Pugh and Representative Philemon Bliss, both from Ohio, each introduced bills in 1858 to repeal the 25th section of the Judiciary Act of 1789 which grants the Supreme Court jurisdiction to issue writs of error to state courts. This is the process by which the federal government enforces its right to supreme interpretation of the Constitution. Both bills failed to be acted upon by Congress. The ability of the Supreme Court to review state court interpretation of the United States Constitution is paramount to our system of federalism. This type of oversight allows the Constitution to mean the same in every state.

By far the most provocative piece of legislation concerning the courts was introduced in the House in 1868 and provided that in any case involving the validity of a law of Congress, two-thirds of the Justices must concur in any

45 Ibid.
opinion holding the law unconstitutional. This move was seen by many as the Radical Republicans taking one step too far.

Representative Samuel S. Marshall of Illinois defended the court, stating: "it is a confession of guilt on the part of the majority. They feel and know in their hearts that their legislation will not bear investigation by a legal tribunal, made up now principally of members of their own party placed there by their own favored President." This measure passed the House by a vote of one hundred and sixteen to thirty-nine. The Senate never reported the bill out of committee. Warren took this opportunity to sarcastically ask the question: what if the Supreme Court decides to declare a two-thirds law unconstitutional by a two-thirds vote? That question is relatively elementary when compared to the dilemma caused by the Supreme Court overruling such a statute by a bare majority.

The answer seems the same for any constitutional question of a Congressional act reducing or placing any specific restrictions on federal jurisdiction. If Congress violates the principles of due process, or any other constitutionally guaranteed right, in depriving the litigants of a forum for their case to be heard, that act will have to fall.

Another angle from which to view a two-thirds requirement as unconstitutional is that it places a heavier burden on one side of the litigation and thereby violates an American's right to equal protection. If Congress simply withdraws jurisdiction from the Supreme Court, that is a neutral act. The judgment of the lower court will stand, and neither side will have an

46 Bowers, 171.
47 Warren, 189.
appellate remedy. Congress cannot decide who will win at the trial court level, helping to assure that a Congressional withdrawal of jurisdiction will not alter the results of specific cases.

A two-thirds requirement is an act of decision and cannot imagined to be neutral. On its face it would place a higher burden on an unpopular political minority not in power in the legislature. This can be seen as similar to a legislative rule that requires an unpopular ethnic or religious minority to convince two-thirds of the justices, or even all of the justices, to obtain a favorable verdict.

A two-thirds rule of decision is different from the burdens of proof or legal presumptions set for certain types of cases that arguably make the fight uneven. In a criminal case, the state must prove its case beyond a reasonable doubt (no other reasonable alternative exists). This requirement differs from the civil case where the plaintiff only has to meet the burden of persuasion (my alternative is more believable than his). The state does have a higher burden of proof, but this is due to the magnitude of the rights of the defendant involved, and the state only has to convince a majority of justices that the burden has been met.

The same holds true for legal presumptions. When arguing the unconstitutionality of a particular law, the legislature is awarded a presumption of constitutionality at the onset that must be rebutted by the opposing party; but once again, the opposition has to convince only a simple majority of the Court. A constitutional way to obtain a two-thirds rule of decision for the Supreme Court would be for Congress simply to reduce to size of the Supreme Court to three Justices.
In *The History of the United States*, James F. Rhodes supported his position of a cowed federal judiciary by quoting Congressional speeches, some of which speak of impeachment of the Justices. The most outrageous quote is from Representative John Bingham: "[I]f the Supreme Court purposes to intervene wrongfully to defeat the will of Congress, let us sweep away at once their appellate jurisdiction in all cases; still further if the Court by virtue of its original jurisdiction usurps power to decide political questions and defy a free peoples will, we may . . . defy judicial usurpation by the abolition of the tribunal itself."  

The most popular piece of evidence that the early writers used to support their assertion of a intimidated federal judiciary during the reconstruction era was *Ex Parte McCord*, 74 U.S. (7 Wall.) 506 (1869). McCord was a civilian who was arrested and tried by a military commission in Mississippi under the authority of one of the first Reconstruction acts. He petitioned for a writ of habeas corpus in the federal circuit court, and after an adverse decision, appealed to the United States Supreme Court. The statute McCord appealed under was the Habeas Corpus Act of 1867, which broadened the Supreme Court's ability to hear appeals from a denial of writs of habeas corpus. Ironically, this Act, designed to help enforce Reconstruction measures by allowing federal officials charged with state law crimes to remove, was being used to challenge them.

After the case was argued, but before an opinion was handed down, Congress repealed, over a Presidential veto, the jurisdiction of the Supreme Court to hear McCord's case. Then, the Supreme Court dismissed the suit.

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50 Ibid., p.13.
for want of jurisdiction. Looking at the withdrawal of jurisdiction as a neutral act, except in McCardle's case, this is not a way for Congress to legislate verdicts. The repeal of Supreme Court jurisdiction simply allowed the lower court's decision stand. Consequently, another lower court could, in a case similar to McCardle's, grant a writ of habeas corpus, leaving the government without an avenue for appeal. It is also important to read McCardle for the repeal of simply appellate jurisdiction. McCardle did not affect the Court's certiorari jurisdiction in these types of cases. Ex Parte Yerger, 75 U. S. (8 Wall.) 85 (1868)(allowing Supreme Court review of a case similar to McCardle by a writ of certiorari).

The assertions by the early writers that the federal judiciary was so intimidated by the threats of the Radical Republicans to strip the courts of jurisdiction that the courts offered no resistance to unconstitutional laws is not supported by the evidence. This is especially true when viewed in light of the Congressional grants of jurisdiction to the federal courts at this time. The federal judiciary will always have to live with adverse criticism when ruling against the will of the majority in protecting the rights of an unpopular minority. In a nutshell, that is why the federal court, the non-democratic component of our democratic system, exists.

A great deal of mythology exists about Congressional anger at the U. S. Supreme Court for its ventures into the political arena and Congressional efforts to cripple the High Court to prevent any further excesses. To be sure, the Dred Scott decision cost the Court some prestige. Charles Evans Hughes characterized it "a self-inflicted wound." 51 Professor Kutler explains away the

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myths, in a distinction between anger at the court as an *institution* and anger at particular *decisions*. It is also true that numerous bills in Congress were introduced to hamstring the Court, and past historians have given these events great weight. Between 1802 and 1959 Congressmen introduced 165 anti-Supreme Court bills and of this total twenty-two came in the 1858 - 1869 period, more than any other comparable span of years. Senator John P. Hale of New Hampshire offered a resolution instructing the Judiciary Committee to look into the "expediency and propriety of abolishing the present Supreme Court." In addition, bills were introduced to change the number of Justices to as high as fifteen and low as seven.

The Congressmen had difficulty with the fact that a simple majority of justices could undo a measure that passed two houses of Congress containing over one hundred and sixty lawyers. New requirements on the number of Justices voting in favor of unconstitutionality in cases challenging Congressional acts were introduced, raising the simple majority to two-thirds or even unanimity.

When looking at these plans in hindsight, remember that a great deal of this legislation was a crude attempt at protecting pet legislative schemes, and that these drives fell short, not because of any action or inaction on the part of the Supreme Court, but because of the failure to secure a legislative consensus on any attempt to injure the *institution* of the Supreme Court.

52 Kutler, 7.
54 Kutler, 13.
55 Ibid., p. 74.
EX PARTE McCARDLE

The decision of the U. S. Supreme Court in the case of *Ex Parte McCardle*, 7 U. S. (Wall.) 506 (1868), is often cited when discussion arises concerning Congressional power to limit Supreme Court jurisdiction. The Court in *McCardle* affirmed the Congressional grant of power over the federal courts in article III section 2 of the United States Constitution and dismissed a case for want of jurisdiction after Congress repealed the specific grant of jurisdiction that had enabled the Court to hear the case initially. In recent years, this has become ammunition for critics of the federal judiciary when the federal courts have ruled on controversial topics such as abortion, busing, and prayer in public schools.

*McCardle* has also been used as evidence to support the theory of an intimidated federal court system during Reconstruction, but recent works have used *McCardle* coupled with *Ex Parte Yerger*, to support the position of a determined federal judiciary in support of civil rights during Reconstruction.

A look at McCardle’s appeal gives insight into figures involved in the case. For Lyman Trumbull this case seemed to signal the beginning of the end. For the rest of his career in public life he was criticized after his participation in this case. Trumbull was accused of using his position in Congress to affect a judicial result and for the large fee he accepted from the government. For Trumbull’s co-counsel, Matthew Hale Carpenter, *McCardle* was a spring board to higher aspirations. After the decision, Carpenter attained a reputation as one of the most successful United States constitutional lawyers in the country. He was twice elected to the United States Senate and participated in numerous cases before the United States Supreme Court.
Trumbull and *McCordle*

On November 13, 1867 General E. O. C. Ord, brevet Major-General commanding the Fourth Military District, ordered the arrest of William H. McCordle. McCordle was the editor of the *Vicksburg Times* and published articles calling the local military commander a despot and attacked the U.S. Congress. The charges against the prisoner were four-fold: (1) disturbance of the public peace; (2) inciting to insurrection, disorder, and violence; (3) libel; (4) impeding reconstruction. McCordle was confined to a military prison. This act, while seemingly minor on its face, touched off a spark that came close to invalidating the reconstruction of the South. This case is also notable for the cast of characters that were brought into the legal fight. One of the most notable was Senator Lyman Trumbull of Illinois. Trumbull was to argue the Government's position before the U. S. Supreme Court, a job, which in hind-sight, might not have been in his best interest to take, not that his courtroom performance was wanting. On the contrary, he effectively won the case, but because he accepted $10,000 dollars to take this and another case and arguably used his position in the Senate to legislate a verdict he might not have obtained judicially.

From his confinement in a military prison, McCordle applied to the Circuit Court for the Southern District of Mississippi for a writ of habeas corpus. On February 5, 1867, Congress empowered the federal courts to grant habeas corpus to persons restrained in violation of the Constitution, treaty or federal law, with appeal to the Supreme Court. McCordle's writ was granted

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\footnote{56 *Ex Parte McCordle*, 6 U. S. (Wall.) 318, 320 (1867).}
and a hearing was ordered. General Ord and General Alvin G. C. Gillem, brevet Major-General commanding the Sub-District of Mississippi, relinquished the prisoner to the federal marshal of the court who released McCordle on $1000 dollars bail and a promise to submit to the judgment of the court. After a hearing, the circuit court denied McCordle his writ, and he was remanded back to the federal military authorities. From that adverse judgment McCordle appealed to the U. S. Supreme Court challenging the constitutionality of the Reconstruction acts under which he was held.

At the same time, President Andrew Johnson decided to rid himself of Edwin Stanton, the Secretary of War. Johnson replaced Stanton with U. S. Grant as Secretary of War ad interim. One of the first problems facing the new Secretary was who would represent the government in the petition for appeal by McCordle since the Attorney General, Henry Stansbury, had already advised the president that the Reconstruction acts were illegal, and refused to appear in this case.57

Grant offered the job to Senator Lyman Trumbull. To Grant, Trumbull seemed the logical choice. The senator was an experienced constitutional lawyer and more importantly Trumbull had framed the very laws that were to be called into question. Trumbull accepted without hesitation.58 From this point the situation took another turn. The United States Senate refused to concur in the firing of Stanton under the Tenure of Office Act. Grant relinquished command back to Stanton, but this did not affect Trumbull's retention as legal counsel.

Trumbull's litigation strategy was quite simple; keep the Court away from

58idbid.
the constitutional merits of the case. From his vantage point, if the Court denied jurisdiction it would be as if the Court upheld the Reconstruction acts. The first step in this strategy was to argue that the Supreme Court should dismiss the case for lack of jurisdiction. The jurisdictional point was argued before the Supreme Court on January 31 and February 7 of 1868. On January 31, Trumbull argued alone, but on the latter date Trumbull enlisted the aid of James Hughes and Matthew Hale Carpenter. Carpenter was a Senator from Wisconsin and a member of the Senate Judiciary Committee who brought a great deal of constitutional litigation experience to the government's trial team.59 The arguments for the Government were (1) Unless Congress granted appellate jurisdiction to the Supreme Court none existed. (2) Congress, in section 2 of the Act of February 5th 1867, specifically exempted ". . . any person . . . held in custody of the military authorities of the United States charged with any military offense."60

McCardle was represented before the Supreme Court by W. L. Sharkey who, until October of 1865, had been Provisional Governor of Mississippi, and Jeremiah Sullivan Black of Pennsylvania. Black had been President Buchanan's Secretary of State and honed his legal skills as U. S. Attorney General.61

Sharkey's argument was also straight-forward: the exception for persons being held in military custody for military offenses did not apply since the offenses McCardle was charged with were all civil in nature: "By putting the district under military rule they did not become military offenses any more

59 Ralph J. Roske, His Own Counsel: The Life and Times of Lyman Trumbull (Reno: University of Nevada Press, 1979), 141
60 6 U.S. (Wall.) at 320.
61 Roske, 42.
than they would have been ecclesiastical offenses if the district had been put under the government of a body of clergy."62 The Court, speaking through Chief Justice Chase, sided with Sharkey and the case was scheduled for oral argument on the constitutional merits.

Oral arguments on the merits of McCordle's appeal were heard on March 2, 3, 4, and 9. Black argued for the appellant on the first two days and relentlessly attacked the Reconstruction acts as violative of the Constitution.63 The brief for the Respondent was authored by Carpenter and supported the acts as constitutional measures by Congress necessary to restore the Union. Trumbull rose to argue on March 4th and once again attacked the the Supreme Court's ability to hear the appeal as a matter of statutory construction. Then, Carpenter vigorously argued the constitutional questions for two and one half hours and in a letter to his wife modestly critiqued his performance, "I am praised nearly to death. I had half the Senate for an audience . . . . I shook them [the Court], I rattled their dry bones." One account states that when Carpenter finished, Secretary of War Stanton, with tears in his eyes exclaimed fervently; "Carpenter, you have saved us."64 In the midst of the government's argument, the impeachment trial of Andrew Johnson began, and Chief Justice Chase left the bench on March 5th to preside over the Senate trial. On March 9th the arguments concluded, and the Court took the case under advisement.

Even before the Supreme Court entertained the appeal, Trumbull was playing the ace up his sleeve. In a January of 1868 speech, Trumbull warned

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62 6 U.S. (Wall.) at 323.
63 Ex Parte McCordle, 7 U.S. (Wall.) 506, 508 (1868).
the Supreme Court to leave Reconstruction alone and on February 17, 1868 he introduced a bill that would exclude federal court jurisdiction in cases such as *McCordle*. The bill defined Reconstruction as a political question outside the scope of judicial review. Trumbull pushed the bill through the Senate Committee on the Judiciary, but it dropped from sight when Conservatives threatened to filibuster until the Supreme Court ruled on McCordle's case. With his frontal assault repelled, Trumbull searched for a more stealth way to reduce jurisdiction. The weapon that was chosen was an inconspicuous bill that was to change procedure in revenue cases. An amendment was tacked on that bill which repealed the section of the Habeas Corpus Act of February 5, 1867 that granted the Supreme Court appellate jurisdiction in habeas corpus cases. The bill was railroaded through the House and Senate in one day, March 13, 1868. Trumbull, despite his participation in litigation that was directly affected by the bill, voted for it.

Although in the middle of his impeachment trial, Andrew Johnson vetoed the bill and sent a powerful message to the Senate chastising them for their attempted intrusion into the judicial branch of government. By this time the game was out in the open and debate on overriding the veto exposed the measure's purpose.

In the Senate, Trumbull attempted to argue that there were no cases pending before the Supreme Court under the Habeas Corpus Act of February 5, 1867. This contention somewhat refuted Matthew Carpenter's depiction of a large Senate audience to his performance at the Supreme Court. Trumbull stated that the bill to limit jurisdiction was not a very important matter and at all events "the liberties of the people had been pretty well preserved for three quarters of a century without the Act of 1867 in any of its provisions; and all securities that were ever afforded within the last year are left just as they
always have been."65

To Trumbull's disingenuous argument, Senator James Doolittle of Wisconsin replied that if there were no cases pending before the Supreme Court why did the bill have specific provisions for repeal in all pending cases. The bill withstood the debate and passed over the veto on March 26th in the House and March 27th in the Senate. Trumbull once again voted for the bill.

The Court now faced the question of whether Congress had the power to abolish the right to adjudicate pending cases. The Court decided over the objection of Justices Greer and Field to hold the case over for reargument next term. On April 12, 1869, the parties once again appeared before the high court. For the appellant, W. L. Sharkey severely criticized the repealing act of Congress:

Its language is general, but as was universally known, its purpose was specific. If Congress had specifically enacted 'that the Supreme Court of the United States shall never publically give judgment in the case of McCordal, already argued, and on which we anticipate it will soon deliver judgment, contrary to the views of the majority in Congress, of what it ought to decide; its purpose to interfere specifically with and prevent judgment in this very case would not have been more real or, as a fact, universally known.'66

Trumbull replied that "the assumption that the Act of March 1868 was aimed specifically at this case, is gratuitous and unwarrantable. Certainly the language of the Act embraces all cases in all time; and its effect is just as broad as its language."67

The Justices came to a unanimous agreement that the jurisdiction to hear

65 Ibid., p. 200.
66 7 U.S. (Wall.) at 510.
67 7 U.S. (Wall.) at 512.
the case had been destroyed, and the Chief Justice delivered the opinion of the Court: "Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist the only function remaining to the Court is that of announcing the fact and dismissing the cause." 68

Trumbull submitted his bill for his services to the War Department and received $3000 dollars initially and $7000 dollars later. While financially lucrative, the matter of the excessive fee became a political liability that he could not shake. Opponents stated the fee was a bribe for Trumbull's vote for acquittal in Johnson's impeachment trial. Trumbull countered that criticism with the fact that the War Department was in the hands of Johnson's enemies at the time of his initial employment. Trumbull could never effectively counter the charge that he had used his position in the Senate to aid his case as an advocate. His actions in McCrady again surfaced for scrutiny in 1880 when he ran for the Governorship of Illinois on the Democratic ticket and the Illinois Republican Committee published leaflets questioning Trumbull's actions in McCrady.

Trumbull accomplished both the narrow and the broad goals of the War Department in this lawsuit. In the instant case, the judgment of the circuit court was left to stand with McCrady in custody. In a larger sense, this case, as with most major litigation, became much larger than solving the immediate dispute of the parties before the court. Trumbull accomplished the larger goal that grew from this and kept the Court from scrutinizing the constitutionality of the Reconstruction acts.

68 7 U.S. (Wall.) at 514.
Carpenter and McCordle

Matthew Carpenter's performance in the important litigation of the Reconstruction period inspired contemporaries to dub him the "Webster of the West." He shaped the process of Reconstruction, not so much by participation in the legislature, but by participation in the important judicial tests of the products of the legislature including: Ex Parte Garland, Ex Parte McCordle, and The Slaughterhouse Cases. Without a doubt, Carpenter was one of the great advocates of his generation. He even observed this fact himself: "I have been called a bad politician, a bad man, a bad almost everything, but never, so far as I know, a bad lawyer."69

The fact that Carpenter's fame is not equal to that of Daniel Webster's is because Carpenter's efforts cannot be linked to any one cause. He was not loyal to a movement or a particular constitutional interpretation but to his client, expounding whatever popular principles of the time to further his client's interests. His talents as an orator were spread out over numerous inconsistent and contradictory causes. "He was essentially a man of brilliant words rather than memorable deeds; and unfortunately for his fame, the spoken word is fleeting."70

With the end of the Civil War came a flood of litigation on monumental principles such as separation of power between the branches of government, the nature of the "Union", and the constitutionality of the efforts to rebuild the South. This created a demand for lawyers with specialties other than criminal or commercial law and a grasp of procedure in the emerging federal

70 Ibid.
Carpenter entered this world through the case of *Ex Parte Garland*, 4 U. S. (Wall.) 277 (1867), one of the "test-oath" cases. This case involved the constitutionality of the Act of January 24, 1865. That Act kept Southern lawyers from practicing in federal courts until they swore they had never voluntarily borne arms against the United States or given aid or counsel to persons engaged in armed hostility thereto. Augustus Garland was one of these disbarred lawyers. He had been admitted to the bar of the U. S. Supreme Court in 1860 but subsequently served in the Confederate Army. Garland took his appeal to be readmitted to the Supreme Court bar to the Supreme Court itself. Garland filed his case, *pro se*, but was assisted by Reverdy Johnson and Carpenter. Carpenter authored the brief for Garland. When the Supreme Court rendered the Act that disbarred Garland unconstitutional, the majority opinion, written by Justice Field, was couched in language similar to that used in Carpenter's brief.\(^{71}\)

Carpenter's work on the *Garland* case was important for two reasons. First, Carpenter was to become friends with Reverdy Johnson, another great advocate of the time, and from this point Johnson would serve as a mentor to Carpenter. Secondly, the attention Carpenter received from *Garland* was instrumental in landing the job on *McCordle*.

Carpenter's biographer, E. Bruce Thompson, states that Carpenter's work on *McCordle* "re-saved" the Union, for if the Supreme Court had declared the Reconstruction acts unconstitutional, the South would have gained judicially what it could not accomplish on the battlefield. This overstates the case but *McCordle* did present such difficult questions as: the validity of military

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government in peace-time, the status of the seceded States, and the division of power between the three branches of government.

The lead counsel for the case, Lyman Trumbull, brought Carpenter from Wisconsin and Carpenter immediately began work on the brief. Secretary of War Stanton welcomed Carpenter to Washington and gave him an office four doors down from Stanton's private quarters. When Carpenter had completed the brief, Stanton ordered a thousand copies printed and distributed.

Carpenter's brief was broken down into six main arguments. First, he stated that Mississippi had no state government entitled to be recognized by the United States as a "State" of the Union; and this fact was and could only be determined by the political branches of the government. Carpenter extolled the "revert to territorial status" principal and meandered around the terms "State" and "Union" in their political and constitutional sense, as opposed to their geographic sense. The political definition of "State" could only be determined by the political branches, and in this instance Congress was the proper branch to define the parameters of Reconstruction, and "... the President has no duty to perform, in regard to Reconstruction, but to execute the laws of Congress."72 He stated further it was immaterial to look at the qualifications for readmission to the Union set by the President by proclamation since "[t]he President had no more power to impose just than unjust conditions."73

His second point was that the decision of the political branches that Mississippi was without state government was binding and conclusive on the Court whether the Justices agreed or not. Herein lay the separation of powers

72 Thompson, 256.
73 Ibid.
argument. Carpenter stated that if political determinations by the political branches were appealable to another branch, then that branch would emerge supreme. "This is despotism, as Louis XVI, his nobility and people learned, wading in blood."74 Carpenter had a flare for the dramatic and summarized this argument in just such a manner. "[A]ll the clamor out of doors to the effect that the rights of our people are not safe in the hands of Congress, and can only be protected by an appeal to this Court, rests upon a doctrine which, proclaimed at Monticello, would make one dead democrat turn in his coffin."

His third and forth points were related and stated that it was the right and the duty of Congress to aid the loyal people of Mississippi in their effort to establish a republican state government, under the U. S. Constitution that grants Congress the power to "Guarantee a republican form of government." Carpenter argued that in executing this constitutional mandate Congress was to be the exclusive judge of the necessary means in individual cases; "[s]uch right would spring from the necessities of the case, form the nature of things, from the absolute impossibility of executing federal laws in that great community turned loose a prey to anarchy and crime." In support of this position Carpenter cited cases all the way back to McCulloch v. Maryland, 4 U.S. (Wheat.) 316 ("[i]t is a right incidental to the power, and conductive to its beneficial exercise.").

Carpenter's fifth point and what he perceived his tallest mountain to scale was that the Reconstruction Act of 1867 violated no provision of the Constitution. The question for decision was honed to a fine point to avoid far reaching dicta. "The precise question, and the only one before the Court, is whether the act is unconstitutional, in authorizing a trial of the appellant

74 Ibid., p.260.
before a military tribunal, for a breach of peace. No other question arises upon
this record." (emphasis in original). To win this point Carpenter would have
to tip-toe around the recently saved scalp of a similar rabble-rouser in the
form of the recent precedent, Ex Parte Milligan. Even then Milligan was being
cited for the proposition that when civil processes are available to bring
criminals to justice, military courts will be ineffectual in this regard.
Carpenter's distinguishing of Milligan was forceful, systematic, and
persuasive. (1) Indiana was in the Union. Mississippi was out. (2) Indiana had
a state government. Mississippi had none. (3) Congress had passed no law
authorizing the trial of Milligan by military tribunal for inciting rebellion.
Congress has passed a law authorizing such trial of McCordle for breach of
peace. (4) The offense Milligan was charged with was triable in the United
States courts of Indiana. The offense charged against McCordle was not triable
in the United States court of Mississippi. "What possible application can the
decision or the opinion in that case have upon this?" 75

The cornerstone of the argument was that no civil authority rising to the
level of state government existed in Mississippi until Congress says so and to
this:

McCordle says: '... I am entitled to all the benefits of a civil
government before you can establish one. I am entitled to a jury
trial before a court can be created to impanel one. Or, failing in
that, from the impossibility of the case, I am entitled to murder
my neighbor, or burn his house, or counsel resistance to federal
authority in act of creating a state government. 76

Carpenter displayed why he had such a great reputation as an advocate
when he summarized the above argument in the following language.

75 Ibid., p. 284.
76 Ibid., p. 286.
If McCordle is released from prison by this writ, this law and logic will be established by the Court. This Court, to sustain McCordle's case, must meet and take the responsibility of saying that if the people of a state destroy their government, that, even after the United States enters upon the task of reconstructing a new state government, but before the necessary measures can ripen into consummation, and the newly created state government can be organized to enter upon its duties, no murders can be imprisoned, no crime punished; and that if Congress attempts to protect the people of such state by military supervision, ad interim, the courts of the United States will interfere and release the prisoners held in military custody.

The final point of the brief for the United States Government was essentially that the surrender at Appomattox did not bring an end to the war, and that in 1868 the Civil War was still being fought. Congress had not said otherwise: "Inasmuch as Congress entered upon the prosecution of War against the South in 1861, this Court is and will be judicially bound to recognize war still existing, until Congress shall declare it to be terminated; and that the acts in question may be defended as an exercise of belligerent rights."77 This was Carpenter's fallback position. If the Court held that the Reconstruction acts were indeed unconstitutional, the argument here is that people in Mississippi have no constitutional rights since they seceded from the house of the Union and left their constitutional protections at the door.

Carpenter's brief and oral argument proved unnecessary when Congress stripped the Supreme Court of the power to decide these questions, in this case. Oddly enough, Carpenter's fame emerged from a case that was, not only, not decided, but advanced the cause of Reconstruction. His fame was later solidified in the Slaughterhouse Cases, where he obtained a very narrow construction of the fourteenth amendment and crippled federal reconstruction of the South.

77 Ibid., p. 294.
UNCERTAINTY IN THE LAW

The law of the land is not spoken so much by the United States Supreme Court as by the local federal district courts who rule on cases that are never appealed. As the Supreme Court chose cases that only touched the major legal issues of the day in a tangential fashion, it was able to avoid public uproar, but in so doing, it left questionable precedent for the lower courts. In choosing a case from Indiana, *Ex Parte Milligan*, to invalidate trials of civilians by military tribunals when the local civil courts were functioning, the Court left open confusion for Freedmen's Bureau tribunals in the South. Before a test case could be formulated to rule directly on the question of these courts, President Johnson ordered Bureau head, General Howard, to end the practice of the military trying civilians.

The case that emasculated the fourteenth amendment and practically sent the Freedmen in the Deep South back to slavery had nothing to do with the protection of civil rights for black citizens. The *Slaughterhouse Cases* dealt with white butchers in New Orleans and the decision went virtually unnoticed. The decision was not readily understood, and an argument has been asserted that the Court consciously choose that case to state its view on national civil rights in a way to resolve an immensely political issue in a palatable manner.

The deception was complete when lower federal courts attempted to use *Slaughterhouse*. Some courts ignored it in the the cases of Freedmen, and some courts used the decision to hold the Ku Klux Klan Act, now 42 U. S. C. section 1983, unconstitutional.78

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78 Kaczorowski, 174-75.
Local Legal Environment

a. Federalism

For a better understanding of the times, one must view federalism through the eyes of a 1870 lawyer. Pre-Civil War thought pictured the nation and the state as two separate governments. The nation's sovereignty extended mainly to matters concerning the whole and its interaction with the rest of the known world, while the internal workings of the whole, or police powers, fell under the state government's wing. This notion of duality was heavily buttressed by the traditional ideas of the states as the centers of political and economic life.79

At first blush, the Reconstruction amendments could be viewed as a radical shift to a position where the federal government was interposed between a citizen and his state, but the move was more moderate. The traditional police powers were left with the states, with the new federal judicial forum serving as a case-by-case reviewer to see that the states properly and equally administered their own brand of justice.80

In line with contemporary federalism, the fourteenth amendment granted no new substantive civil rights. The states were still free to define their own obligations to their citizens and provide for redress of any infringement. The federal government was allowed to interpose only when local justice was dispensed in an unequal fashion. However, not just any unequal distribution was subject to federal vindication. The deprivation must

79 Note, "Development- Section 1983" 90 Harv. L. Rev. 1135, 1138 (1977); H. Hyman, 7-10.
80 Note, Development- Section 1983, 1142.
have risen to a federal constitutional magnitude. This moderate shift of federalism begs the question of who could bear the burden of a civil rights lawsuit.

b. Education

Another factor adding to the ignorance or neglect of the civil rights statutes was the curriculum of the contemporary law school. As an example, consider the class taught during the 1872-1873 academic year at Harvard Law School by former United States Supreme Court Justice, Benjamin Curtis, on jurisdiction, practice, and jurisprudence of the federal courts. Curtis spoke extemporaneously, "making use of his very strong memory, which never failed him in the statement of principles or the citation of authorities." The lectures were recorded "verbatim" and published as "a useful handbook for practitioners of any standing." The volume was uniquely titled Jurisdiction, Practice and Peculiar Jurisprudence of the Courts of the United States. 81

The section devoted to the statutes passed to secure civil rights takes up hardly a page and while it can not be called erroneous, it is very limiting in its scope.

I do not think it would be worth while for me to go into details concerning these acts, but merely to say that they relate to this fourteenth amendment, and give you a reference to them, so that, if you should have occasion, you can turn to them without difficulty... (citations of civil rights acts up to the Ku Klux Klan Act of 1871] All these relate to crimes and offenses which are created by those statutes in order to protect the right of Freedmen to vote, as well as their personal safety. 82

Clearly, the civil rights statutes, by their very terms, were meant to protect

81 Benjamin Curtis, Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States (Boston: Little Brown & Co., 1880)
82 Ibid., p. 185-186 (emphasis supplied).
more than just voting rights and personal safety.

c. The Environment

Southern defiance of the United States Constitution, as amended, was no less than remarkable. Southern Democrats braced a unified front against the federal legislation securing civil rights. This resolve outlasted Northern patience. The Southern attitude toward federal protection of voting rights can best be illustrated by the words of Linton Stephens of Georgia made to a United States Election Commissioner during a hearing on an alleged violation.

I am accused under the Enforcement Act of Congress. My first position is that this whole act is not a law, but a mere legal nullity. It was passed with the professed object of carrying into effect what are called the 14th and 15th Amendments to the Constitution . . . and depend on their validity for its own. These so-called amendments are . . . not true amendments of that sacred instrument. They are nothing but usurpations and nullities, having no validity themselves and therefore incapable of imparting any to the enforcement Act or to any other act whatsoever. 83

During Reconstruction most of America still lived in rural areas, and most lawyers' practices were largely made up of state law cases in the state court system. In 1871, Attorney General Ackerman correctly characterized victims of civil rights violations as almost helpless, describing them as "for the most part, poor and ignorant men, who do not know how to put the law in motion, or who have some well-grounded apprehension of danger to themselves from attempts to enforce it." 84

The work of the Klan was even harder to prosecute since it was usually

84 Kaczorowski, 84.
carried out by White gangs composed of some of the leading members of the community against poor black country people. When these cases did come to trial large legal defense funds were raised, and such notable constitutional lawyers as Senator Reverdy Johnson and former Attorney General Henry Stansbury were hired.\textsuperscript{85} To the average civil practitioner this type of plaintiff's work looked easy to avoid.\textsuperscript{86}

When faced with the priority of putting food on the table, many Blacks chose to refrain from exercising their new rights in the face of a shot gun or the cost of a federal lawsuit. While the criminal statutes were still on the books, by the middle of the 1870s, the federal government was out of the business of civil rights enforcement and private law suits remained as effectively the sole remedy. This gave a grim answer to the question of what were the rights of citizenship? - Sadly, it depended on how much you could afford.

For most local lawyers during this time the federal courts were a new

\textsuperscript{85} Ibid., p. 82.

\textsuperscript{86} Plaintiffs in civil rights cases have never offered local practitioners lucrative or career furthering work. Even today civil rights plaintiff's work is not considered desirable. In fact, the "undesirability" of these cases is a factor to be considered by the Court when awarding attorney's fees in Title VII cases. "Civil rights attorneys face hardships in their communities because of their desire to help the civil rights litigant. . . . Oftentimes his decision to help eradicate discrimination is not pleasantly received by the Community or his contemporaries. This can have an economic impact on his practice which can be considered by the Court. Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714, 719 (5th Cir. 1974); see also, N. A. A. C. P. v. Button, 371 U. S. 415, 443, 83 S. Ct. 328, 343, 9 L. Ed. 2d 405 (1963), "Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; The problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation. . . . We realize that an NAACP lawyer must derive personal satisfaction from participation in litigation on behalf of negro rights, else he would hardly be inclined to participate at the risk of financial sacrifice." 371 U. S. at 443-44, 83 S. Ct. at 343.
creature. Only a handful had specialized federal practices except for the Congressmen who had a lucrative federal appellate practice or those who worked in such exclusively federal areas as admiralty. Federal courts met infrequently, for short periods of time, in few locations, and federal dockets always had a serious backlog. A lawyer who wished to try a civil rights lawsuit in federal court would have to secure witnesses who could leave their homes and travel usually long distances. Even if they were willing to testify, witnesses and victims, usually working class or not so fortunate, could ill afford the journey or the time away from work. Even if those obstacles were overcome, complainants and witnesses often returned home to violent retaliation. 87

Local lawyers, willing to take these types of cases, were faced with a de-emphasis of civil rights enforcement or a complete absence of practical tips from the contemporary bar journals and law reviews. An article in the January of 1870 issue of the American Law Register entitled "The Removal of Causes From State to Federal Courts" contained a conclusion that listed "these complex provisions . . . in order of their practical importance to petitioners;" thereafter, eleven types of cases proper for removal are noted, with actions "derived from the Civil Rights bill [1866] or Freedmen's Bureau Act" coming in at number ten.

An article in the Central Law Journal from October 20, 1876 discusses, with an unmasked hostility to federal jurisdiction, a conflict of jurisdiction case from Wisconsin. "Unfortunately many things in the administration are tending towards centralization . . . . The integrity of the Union has been tried. The integrity of the states is on trial. Much rests on the moderation and

87 Ibid., p. 58.
forbearance of the federal courts: as much as perhaps on the firmness of the state courts refusing to abdicate state authority in state matters, to the assumption of federal jurisdiction." That theme was echoed in an 1897 Harvard Law Review which discussed federal/state judicial power, arguing for localism, in the following terms: "states which differ as essentially in origin, customs, and local needs of their people as do Massachusetts, Virginia, Louisiana, and California, ought not to be required to conform themselves to the same forms of legal procedure, nor the same rate of and direction of legal development; nor should legal development be hampered by the necessity of securing federal action for each progressive step."

If all of the aforementioned was not enough to discourage any prospective civil rights practitioner, just finding the new federal statutes proved to be a chore. Before 1873, eighty years of the nation's laws were kept in an uncodified and unindexed heap. After codification in 1873, the civil rights statutes ended up listed under separate and unrelated titles.88 Any assistance codification provided to local practitioners was minimal. Attorney General Biddle stated that the break up of the statutes by codification "effectively concealed the whole scheme for the protection of rights established by the three amendments and the five acts. . . "89 One would have to know exactly what he was looking for and where to find it.

When deciding from among alternatives for guaranteeing constitutional rights, Congressmen were extremely concerned with the federal court system

88 Hyman, 537-38.
taking from the states much of their traditional business. This respect for state’s rights proved to be the end for federal protection of citizen’s rights. The local lawyers could not fill the vacuum left by the retreat of the federal government.
The ratification of the thirteenth amendment in late 1865 abolished slavery and involuntary servitude. On its face this measure simply ended the property rights of one human in the services of another human. This was only a small portion of the picture. The terminated rights were that of the master over the slave. Formally a slave, as chattel, could be mortgaged, assigned, licensed, inherited, devised, or sold. A body of law existed as to the expressed and implied warranties arising from a sale of a slave. These rights evaporated upon the passage of the thirteenth amendment.90

What remained behind were the legal disabilities imposed on the former slave by his prior status as property. Not being a person he had no civil liberties of his own. He could not own other chattel or real property, nor could he sue or be sued. A slave could not be a party to a contract and since marriage was a contract, he was not allowed to legally marry.91

Section 1 of the thirteenth amendment destroyed the masters rights but did not affect the slaves disabilities. Section 2 of the amendment granted Congress the power to enforce section 1 and should be read as a constitutional base for Congress to attack the disabilities. Under this constitutional grant the Civil Rights Act of 1866 was passed and the United States Department of Justice was given the responsibility for federal enforcement of civil rights.

In the earliest days of the Justice Department, the United States Attorneys and their deputies had no easier of a task than the local civil rights attorneys, even with the backing of the federal government. Early historians have looked at low conviction rates from selected areas, and dates after 1874, and

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90 Kohl, 275.
91 Ibid.
come to the conclusion that convictions were rare because the enforcement acts were unfair.\textsuperscript{92} It is true that after 1874 conviction rates never consistently passed the 10% mark, but in 1870 the government won 74% of its enforcement cases.\textsuperscript{93}

By 1874, the window for the federal government to enter and change the legal system in the South was almost closed as the federal government relaxed its emphasis on civil rights. In 1874 Attorney General George Williams wrote, "the Government has reason to believe that its general intentions in prosecuting these offenses . . . have been accomplished . . . and there are good grounds for hoping that it will not return."\textsuperscript{94} This left the United States Attorneys in the field with little support for pushing civil rights enforcement. The year 1874 was pivotal, the knowledge of Slaughterhouse was emerging and criminal enforcement program efforts were almost brought to a standstill in anticipation of a ruling from the Supreme Court on the constitutionality of the enforcement act in the cases of Reese and Cruikshank.

Federal protection efforts often faced violent opposition from the local populace. In theory, federal marshals had the power to call out the possee comitatus, but few bystanders would join in and face the social pressure of hunting for one of their own. In the 1860s federal troops were usually available for police duty, but by 1874 many of the troops were moved to the West. Also in 1874 the Democrats had gained control of the House and the appropriations for troops and the Justice Department in the South were cut.

\textsuperscript{92} William A Dunning, \textit{Reconstruction, Political, and Economic, 1865-1877} (New York, 1907), 271; E. Merton Coulter, \textit{The South During Reconstruction, 1865-1877} (Baton Rouge, 1947), 171.
\textsuperscript{93} Swinney, 205.
\textsuperscript{94} Ibid., p.206.
The red tape involved in requesting troops only made this extreme worthwhile under the most violent circumstances. As an illustration, in 1875 District Attorney Gabriel C. Wharton of Kentucky made an urgent request for troops and received the following reply: "not a case yet for United States Soldiers . . . send written report." Wharton expressed his exasperation in his reply: "When there is a case for federal troops in this state there is not time for a written report. The Ku-Klux never fire on United States soldiers, but they do not hesitate to shoot . . . Marshals whenever the opportunity is presented."\(^{95}\)

In Mississippi the number of federal troops stationed in the state roughly correlated with the number of Enforcement Act cases. In 1872 there were 559 soldiers stationed in the state. By 1874, there were forty six soldiers to cover the entire state. That number dropped to zero by 1877 and the years thereafter.\(^ {96}\) Government attorneys also faced problems with people on their side of the lawsuit. Victims and witnesses were just too scared to testify.

U. S. attorneys often had as much trouble summoning witnesses as they did apprehending the alleged wrongdoer. One marshal in Mississippi stated: "The witnesses were all colored, and I had to hunt them up and take them as it were by force with me, their fears of personal harm deterring them from coming at will."\(^ {97}\) These fears were well founded as numerous cases of violent reprisal for testimony have been documented. By far the trickiest scheme was to arrest Blacks who testified in federal court for perjury violations under state law. While the government could sue for a writ of

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\(^{95}\) Ibid., p.211.


\(^{97}\) Ibid., p. 434.
habeas corpus, more often than not the the district attorneys were directed just to defend the witness in state court.98

Federal judges also hindered civil rights protection. Some refused to impose severe punishment. Judge Robert Hill, who served on the federal bench in northern Mississippi from 1866 to 1892, felt that the certainty of punishment was a bigger deterrent than the severity. A typical Judge Hill punishment was a $25 fine and the posting of a $1000 peace bond. After 1874 Judge Hill never imposed a prison term in an election case.

EARLY LITIGATION UNDER THE CIVIL RIGHTS ACT OF 1871

In the ten years immediately following the Civil War, the United States Congress passed a number of laws to help secure civil rights. The major Acts were passed, with federal protection of civil rights as their stated motive, in 1866, 1871, and 1875. A few commentators have used these pieces of legislation as evidence of an expanded federal presence in the life of the average American through the new availability of the federal court system as a forum for redress of civil rights violations.99 This does does not necessarily present an accurate picture; the true test of whether the federal court system emerged as an effective tool of civil rights enforcement during Reconstruction is not how many laws were passed creating federal causes of action or federal forums, but how many individuals used these laws to protect their rights. A tool that goes unused can not be considered a tool at all.

As an example consider the Civil Rights Act of 1871.100 This Act created a federal claim of relief to enforce the guarantees of the fourteenth amendment.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action in law, suit in equity, or other proceeding for redress.

A look at who first used section 1983 and what rights they were seeking to protect shows that a very small number of cases were actually tried under the statute and, for the most part, the litigants were not former slaves seeking to enforce thirteenth or fourteenth amendment guarantees, but corporations protecting property rights from state regulation. From 1871 to 1920, the federal courts decided, with published opinion, only twenty-one section 1983 actions, with nine of the cases reaching the Supreme Court.101

This Act basically lay dormant until 1961 when the U. S. Supreme Court decided the landmark case of Monroe v. Pape, 365 U. S. 167 (1961). The importance of Monroe lies in the majority's construction of the statute's key phrase, "under color of" State law to include those offenses committed without express state authorization. This interpretation allowed a plaintiff to bring a federal cause of action against a state official regardless of a state's willingness or ability to redress the violation. Before Monroe, the constitutional violation had to be based on an action authorized by the state which was, in most cases, difficult to prove.

Justice Frankfurter, the lone dissenter in Monroe, argued: "we cannot expect to create an effective means of protection for human liberties by torturing an 1871 statute to meet the problems of 1960."102 Justice Frankfurter failed to recognize that the problems of 1871 and 1960 bore a striking similarity to one and another. The facts of Monroe evidenced a constitutional violation that was exactly the motivation for the 1871 Act, racial violence in the form of police brutality.

A quick way to measure the "flood" of cases after Monroe is to check

102 Monroe, 365 U.S. 167, 243-244 (Frankfurter, J. dissenting).
Shepard's United States Citations for a list of cases citing the statute. In the thirty years prior to Monroe, Shepard's listed only three columns of citations. From 1961 to 1984 the list had increased to over 200 columns. 103

From the outset the 1871 Civil Rights Act was plagued with jurisdictional problems. When the act was passed Congress had yet to confer unlimited federal question jurisdiction on the lower federal courts. That did not come about until the Judiciary Act of 1875, and that law required a minimum dollar amount in controversy before federal question jurisdiction could be invoked. 104 A minimal jurisdictional amount can seriously block causes of action as a plaintiff is forced to put a dollar amount on intangible civil rights concepts.

42 U. S. C. section 1983 is not a jurisdictional statute, but when it was enacted it contained a jurisdictional provision that created lower federal court jurisdiction for deprivations of rights secured by equal rights legislation. 105 Jurisdictionally, a section 1983 cause of action may be brought under section 1 of the 1871 statute or the Judiciary Act of 1875. A problem occurred if a plaintiff could not meet the requisite dollar amount for federal question jurisdiction, he had to rely on section 1 of the 1871 statute. Section 1, due to a discrepancy in its language, would only provide jurisdiction for a deprivation of a federal statutory right. The cause of action provision of section 1983 creates a federal cause of action for injury to rights secured under "the

103 Zagrans, 503.
Constitution and laws" of the United States but the jurisdictional section only
provides a federal forum to vindicate rights secured under the Constitution
and "any act of Congress providing for equal rights." The Supreme Court has
held this difference to mean section 1 applies only to equal rights statutes.\textsuperscript{106}
Therefore, before the minimum jurisdictional dollar amount of the general
federal question statute was eliminated in 1980, any claim brought under the
Civil Rights Act of 1871 that was not based on an equal rights statute and that
did not meet the jurisdictional limit was limited exclusively to state court.

A look at the first cases brought under section 1983 from 1871 to 1875, after
which a new Civil Rights Act and Judiciary Act was passed, provides a
startling picture of parties who litigated claims under the statute and the ways
courts cut back on the statute's effectiveness by denying jurisdiction. In the
first reported case under section 1983 the plaintiff was not a former slave but a
corporation. \textit{Northwestern Fertilizing Co. v. Hyde Park}, 18 F. Cas. 393 (Cir. N.
D. Ill. 1873). In \textit{Northwestern Fertilizing} a corporation filed a bill in equity in
federal circuit court to restrain the town of Hyde Park from passing
ordinances that restricted Northwestern's manufacture of fertilizer within
the city limits. Northwestern had established a plant twelve miles south of
the city of Hyde Park and manufactured fertilizer out of the remains of
animals slaughtered in Chicago. The town grew and eventually incorporated
the area where the plant was located, declared the plant a nuisance, and
passed regulations aimed at halting the operation of the plant. Northwestern
filed suit in federal court under the Civil Rights Act of 1871 and its
jurisdictional counterpart alleging an infringement of the rights privileges
and immunities of the shareholders who made up the the corporation. The

town moved to dismiss due to a want of jurisdiction alleging that a corporation was not a "person" as defined by the statute. The circuit court denied this jurisdictional challenge and held that the statute did include corporations in its use of the term "person."

Oddly enough, the opinion made no reference to the fact that this suit was brought against a municipality which traditionally had sovereign immunity and was held to be immune from suits under section 1983 until 1978.107 Contemporaneously to this federal action a Hyde Park property owner, John Gaughan, filed suit in state court to restrain the manufacture of fertilizer. Northwestern petitioned for removal of the state suit and the case was consolidated with Northwestern Fertilizing Co v. Hyde Park. In Gaughan v. Northwestern Fertilizing Co., 10 F. Cas. 91 (Cir. N. D. Ill. 1873), Gaughan moved for a dismissal of the federal case based on a want of jurisdiction. Northwestern countered arguing that since the case came within the courts original jurisdiction it could be removed based on the language of the statute: "Other remedies provided in like cases in such courts and the other remedial laws of the United States which are in their nature applicable in such cases."

The court did not agree with Northwestern's construction of the statute allowing for removal and held that "they [Congress] did not intend by this general language to authorize the removal of a case from state to federal court." Both cases were remanded to state court and Northwestern lost on the merits at the trial level and on appeal to the Illinois Supreme Court.

Another case brought under section 1983 in the period from 1871 to 1875 was filed by a railroad company. It too was an attempt to remove a state court case. The State of Illinois brought a criminal action against the Chicago and

Alton Railroad Company for violation of the state's anti-price discrimination statute. The Railroad Company filed a removal petition in federal court claiming that the state statute deprived it of its rights, privileges, and immunities secured by the fourteenth amendment. *Illinois v. Chicago & A. R.R. Co.*, 12 F. Cas. 1197 (Cir. S. D. Ill. 1874). The attorney for the Railroad, Corydon Beckwith, had previously served as the attorney for Northwestern Fertilizing Company. The circuit court judge who authored the opinion in *Northwestern Fertilizing*, Judge Drummond, also wrote the opinion in this case. The result was also the same; the court ordered the case remanded to state court. The opinions in these two cases are similar, stating the railroad did present a case that was clearly within the scope of the federal court's original jurisdiction but the language of the statute was not specific as to removal of cases, therefore, use of this avenue would not be allowed. The railroad appealed this decision to the U. S. Supreme Court which dismissed the appeal on a technical procedural ground stating that mandamus, not appeal, was the proper method to ask for appellate review. By the time the attorneys for the railroad corrected their transgression the jurisdictional problem had been been mooted by the Judiciary Act of 1875.

The Civil Rights Act of 1871 was a grand plan for the protection of the individual's constitutional rights from encroachment by state officials or ones acting under the badge of state authority. Obviously, the decision of the U. S. Supreme Court in the *Slaughterhouse Cases*, 16 U.S. (Wall.) 36 (1873), which severely limited the rights which the fourteenth amendment could guarantee, also limited the use of section 1983, the enforcement provision of the amendment. The fact that the Act had only civil penalties required a litigant to hire a lawyer to obtain the protection.

One can not look at the statutes passed by Congress without looking at
how these statutes were received by the courts before deciding whether the federal courts truly emerged as an effective tool of civil rights enforcement during Reconstruction. A group of lawyers calling themselves the Brotherhood of Liberty published a book in 1889 detailing civil rights statutes and cases interpreting the laws. Their assessment of the fourteenth amendment was that "judicial construction has so impaired the *lex scripta* that, although the letter may remain, the heart has been eaten out."108 While the period of Reconstruction was a time of growth for the federal legal institutions, the remedies they were willing and able to provide never measured up to the original promise and history was required to repeat itself almost a century later.

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