

AMERICAN CONSTITUTIONALISM  
VOLUME II: RIGHTS AND LIBERTIES  
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Supplementary Material

Chapter 6: The Civil War and Reconstruction—Equality/Race/Implementing the Fourteenth Amendment

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**Congressional Debate over the Enforcement Act of 1871<sup>1</sup>**

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*The Enforcement Act of 1871 was part of a series of measures intended to protect persons of color in the South from private violence. Unlike such federal laws as the Civil Rights Act of 1866, which prohibited certain state laws, the Enforcement Act of 1871 and other similar measures passed in the early 1870s targeted private white supremacist organizations, most notably the Ku Klux Klan. Initially the act seemed successful. Prosecutions brought under the Enforcement Act severely weakened the Klan in South Carolina. The Supreme Court, however, in a series of cases, most notably *United States v. Cruikshank* (1875) and *United States v. Reese* (1876) substantially narrowed federal power under the Fourteenth Amendment to punish private persons who murdered and committed other acts of violence against persons of color.*

*The Republican Party splintered when debating the Enforcement Act of 1871. Consider in particular, the position of Senator Lyman Trumbull, who had been a prominent proponent of both the Proposed Freedman's Bureau Act and the Civil Rights Act of 1866. Did Trumbull abandon his egalitarian commitments or did the debate over the Enforcement Act demonstrate the limits of his egalitarian commitments? Why did the Enforcement Acts splinter the Republican Party in ways previous Reconstruction measures did not?*

SENATOR LYMAN TRUMBULL (Republican, Illinois)

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I am sorry that while a bill of so much importance is under consideration the Senate is so thin, and should give so little attention to the principles which are involved in it; principles which go to the foundations of the Government; principles which, if carried out, may change the character of the Government. Whether it may be best to change the character of the Government is a very serious question for the consideration of the American people. It should not be lightly done. Whether we have done so in the amendments which have been made to the Constitution of the United States since the war, is a question that deserves and should receive serious consideration, before, by legislation, we adopt a policy that virtually does make such a change.

Mr. President, the Government of the United States was formed for national and general purposes and not for the protection of the individual in his personal rights of person and property. The rights of individuals were life, when the Constitution was formed, to the protection of the States. It was thought by the men who made the Government that personal liberty could be more safely left to the protection of the local authorities of the States than be conferred upon the General Government. Hence, when the Constitution of the United States was formed, it was formed for general purposes, for the purpose of establishing a nation with national authority, authority to make war, to conclude peace, to make treaties, to regulate commerce between the States and with foreign Governments, and to do various things of a national character; but the protection of the individual citizen was left to the States, except that there is a clause in the Constitution of the United States which declares that the citizens of each State shall

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<sup>1</sup> *Congressional Globe*, 42nd Cong. 1st Sess. (1871), 575–82.

be entitled to all the privileges and immunities of citizens of the several States. That was a provision of national character, too.

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The protection which the Government affords to American citizens under the Constitution as it was originally formed is precisely the protection it affords to American citizens under the Constitution as it now exists. The fourteenth amendment has not extended the rights and privileges of citizenship one iota. They are right where they always were. The citizen of the United States was to be defended against foreign aggression, as against foreign nations, in all his rights of a national character, under the old Constitution. The fourteenth amendment has not defined what the privileges and immunities of citizenship are. . . .

SENATOR MATTHEW CARPENTER (Republican, Wisconsin)

. . . The Senator says the colored man born in Massachusetts was a citizen of the United States under the old Constitution. If he moved from Massachusetts into South Carolina he did not carry with him the rights of citizenship of the State of Massachusetts, and the Constitution in South Carolina only protected him in the rights which belonged to a colored citizen of that State. If these rights which we are now speaking of are the rights of an American citizen, apart from the citizenship of the State, and they were protected by the old Constitution, then, whatever the privileges and immunities were, they would have been the same in South Carolina as they were in Massachusetts; and yet we all know that every privilege that can be assigned to a man—the right to be a party in court, the right to be a witness—all these privileges where are personal, and which pertain to every free man everywhere, were denied to that citizen just as soon as he got into South Carolina, and the Constitution of the United States did not reach him and did not profess to reach him. It simply said to South Carolina, “You shall give this colored man coming from Massachusetts just as much right as you give the colored men of South Carolina.” The Constitution now says to South Carolina, “You shall no longer enforce a law that abridges the privileges and immunities of any citizen.”

SENATOR TRUMBULL

The Senator is entirely mistaken. This Constitution says no such thing as that a State shall not abridge the privileges of any citizen. It speaks of citizens of the United States, and you have not advanced one step in the argument unless you can define what the privileges and immunities of citizens of the United States are. If the Senator from Wisconsin had honored me with his attention when I commenced, he would have observed that I stated at the commencement that this national government was not formed for the purpose of protecting the individual in his rights of person and of property.

SENATOR CARPENTER

That is what I understand to be the very change wrought by the fourteenth amendment. It is now put in that aspect and does protect them.

SENATOR TRUMBULL

Then it would be an annihilation entirely of the States. Such is not the fourteenth amendment. The States were, and are now, the depositaries of the rights of the individual against encroachment.

SENATOR CARPENTER

And that Constitution forbids them to deny them, and authorizes Congress to legislate so as to carry that prohibition into execution.

SENATOR TRUMBULL

If the Constitution had said that the privileges and immunities of citizens of the United States had embraced all the rights of persons and property belonging to an individual, then the Senator would be right; but it says no such thing. In my judgment, the fourteenth amendment has not changed an iota of the Constitution, as it was originally framed, in that respect. . . .

The difference between the Senator from Wisconsin and myself is, as to what are the privileges and immunities of citizens of the United States. I insist that the privileges and immunities belonging to citizens of the United States as such are of a national character, and such that the nation is bound to protect, whether the citizen be in foreign lands, or in any of the States of the Union. The Government of the United States protects the citizens of the United States to the same extent in Carolina or Massachusetts as it protects him in Portugal or in England. National citizenship is one thing, and State citizenship another; and before this constitution amendment was adopted the same obligation, in my judgment, rested upon the Government of the United States to protect citizens of the United States as now.

...

SENATOR CARPENTER

I think there is one of the fundamental, one of the great, the tremendous revolutions effected in our Government by [the fourteenth amendment]. It gives Congress affirmative power to protect the rights of the citizen, whereas before no such right was given to save the citizen from violations of any of his rights by State Legislatures, and the only remedy was a judicial one when the case arose.

SENATOR TRUMBULL

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[I]n regard to all the rights secured by the fourteenth amendment, however extended, in time of peace, the courts are established to vindicate them, and they can be vindicated in no other way. Sir, the judicial tribunals of the country are the places to which the citizen resorts for protection of his person and his property in every case in a free Government.

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Show me that it is necessary to exercise any power belonging to the Government of the United States in order to maintain its authority and I am ready to put it forth. But, sir, I am not willing to undertake to enter the States for the purpose of punishing individual offenses against their authority committed by one citizen against another. We, in my judgment, have no constitutional authority to do that. When this Government was formed, the general rights of persons and property were left to be protected by the States, and there they are left to-day. . . . I have no objection now to a law which shall protect a person . . . against inequality of legislation in any of the States of the Union [or] against any laws that deprive him of life, liberty, or property except by the judgment of his peers or the law of the land. I am ready to pass appropriate legislation on that subject; and I understand that this bill as it passed the House of Representatives was framed on this principle. As originally introduced, it went to the extent of punishing offenses against the States; and there was objection to it on the part of some of the most thoughtful minds in the House of Representatives. Those provisions were changed, and as the bill passed the House of Representatives, it was understood by the members of that body to go no further than to protect the persons in the rights which were guaranteed to them by the Constitution and laws of the United States, and it did not undertake to furnish redress for wrongs done by one person upon another in any of the States of the Union in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery committed on another in a State.

...

I do not believe . . . the Congress of the United States has a right to pass a general criminal code for the States of the Union, and I am sure if he does maintain that they have the right to do it, he would think it impolitic to exercise that power. I do not suppose there is a single person on this floor who would

be in favor of Congress passing a law punishing larceny, assault, and battery, and all sorts of crime in the different States of the Union, and taking control of all the contracts made between individuals, because that would be destructive at once of the State governments. The only use of governments, the only purpose for which they are instituted, is to protect persons in their rights of person and property. That is all any one of us wants; and if the Federal Government takes to itself the entire protection of the individual in his rights of person and property, what is the need of the State governments? It would be a change in our form of government, and an unwise one, in my judgment, because I believe that the rights of the people, the liberties of the people, the rights of the individual are safest among the people themselves, and not in a central Government extending over a vast region of country. I think the nearer you can bring the administration of justice between man and man to the people themselves, the safer the people will be in their rights of person and property.

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SENATOR TIMOTHY HOWE (Republican, Wisconsin)

[M]y reason for supporting [the thirteenth amendment] was that I thought the national authority was absolutely necessary to protect the rights of the colored man; and it was for that reason that I supported the reconstruction acts, as well as the thirteenth amendment, and it was for that reason that I supported the fourteenth amendment and the fifteenth amendment, because proofs had shown that the rights of individuals were not protected at all by such State governments as they had in certain States of the Union.

...

SENATOR HENRY WILSON (Republican, Massachusetts)

... [Senator Trumbull] has asserted as a principle that life, liberty, and property are safer under the State authorities than under the authority of the United States. Now I wish to ask him if he really believes that during the present century life, liberty, or property has been as safe under State legislation and State action as under the Federal Government?

SENATOR TRUMBULL

Why, Mr. President, most assuredly I do, and if the Senator from Massachusetts will reflect a moment he will agree with me. If the Federal Government had had the power in 1856 it would have established slavery in Massachusetts and all throughout the United States, and so it would at any time down to 1860 almost.

SENATOR WILSON

It may be that the Federal Government would not have given in all our history protection to life, liberty, and property if it had had the power; but there has not been an hour in this century in the United States when life, liberty, or property was safe in several of the States of the Union for any man.

SENATOR TRUMBULL

Mr. President, life, liberty, and property would not have been very safe in Massachusetts if the Federal Government had had power. Does the Senator from Massachusetts suppose at the time the fugitive slave law was being enforced through Massachusetts that if the Congress of the United States had had power to put a stopper on his mouth they would have let him advocate the rights of the slave? Why, sir, he would have been treated worse than the border ruffians treated the free-State men in Kansas. Toombs would have called the roll of his slaves under Bunker Hill in fact if Congress had had power to establish slavery there.

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... [T]his section . . . declares that in all cases where domestic violence in any State obstructs the impartial course of justice—that means in the State—and the constituted authorities of such State shall from any cause fail in protection of the people in such rights, in shall be lawful for the President to employ the land and naval forces of the United States for the purpose of putting down such domestic violence.

Why, Mr. President, can that be possible? Is it nor our duty to endeavor first to enforce the law through the civil tribunals of the country? Are you going to call upon the Army and Navy of the United States to put down domestic violence, because the impartial administration of justice is interfered with, or obstructed, in a particular locality when the United States courts are open? . . .

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When there is a conspiracy that obstructs the laws of the United States so that persons cannot have the rights to which they are entitled under the Constitution of the United States, we have a right then, when the courts cannot afford the requisite protection, to call for the military assistance; but as the bill is altered, it provides for giving this assistance to put down domestic violence in any locality in a State whenever the impartial administrative of justice is interfered with.

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I would not authorize the suspension of the privileges of the writ of habeas corpus by the President in such cases as are here provided for. I do not think there is any necessity for it, and I think it is setting a dangerous precedent. The great writ of habeas corpus ought not be suspended except in the most urgent cases. . . .

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... [T]his section . . . authorizes the suspension of the writ of habeas corpus. When? Not when a rebellion exists; not when an invasion is made. Those are the words of the Constitution. . . .

. . . When the men who made the Constitution of the United States used the word “rebellion” they mean by the term war against the Government. What does this section propose? It proposes to suspend the writ in cases of unlawful combinations doing what? Making war? No sir; they are combinations armed and powerful enough “to be able by violence” to do certain things, but they need not do anything. They would include combinations in a remote town in the State of Iowa, if you please, formed by the women of the village for the purpose of preventing the opening of a liquor shop. . . .

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