Legal History

The Supreme Court Gets It Wrong (Again): The Civil Rights Cases

By C. Evan Stewart

By 1875, the federal government's efforts to compel the Southern States that fought the Civil War to grant former slaves even a modicum of "life, liberty, and the pursuit of happiness" were coming to a disastrous conclusion. Mainly because of Southern whites' intransigence (and widespread acts of terrorism against African-Americans who sought to live as free men, vote, etc.), and partly because of weariness on the part of the Northern population, the Reconstruction Era was on its last legs. In a final legislative gasp at doing something, Congressman Benjamin Butler (a/k/a "Beast Butler" – his nickname stemming from his oversight of New Orleans during the Civil War) introduced the Civil Rights Act of 1875.

The Origins and Passage of the Civil Rights Act

Butler's legislative proposal had its direct antecedent in the civil rights legislation first offered by Massachusetts Senator Charles Sumner in 1870. Initially designed to "protect all citizens in their civil and legal rights" across every conceivable aspect of civilian life, Sumner's bill went nowhere. In successive congressional sessions, the re-introduced legislation got watered down – ultimately eliminating all references to schools, churches, cemeteries, etc. – leaving protection only for places of "public accommodation." Notwithstanding, the legislation remained bottled up in Congress; and Sumner died in March of 1874.

The congressional election of 1874 was a historic disaster for the Republican party – in some part because it was a referendum on Sumner's proposed bill. Returning to a lame-duck session of Congress in December 1974 were 100 Republican Congressmen (including Butler) who had been defeated at the polls – the entire House at that time had only 273 members. Apparently with many legislators now not fearing their constituents' wrath, the public accommodation law moved toward passage, also in large part thanks to parliamentary maneuvering in the House by Speaker James G. Blaine and Congressman (and future President) James A. Garfield.

The bill passed the House on February 4, 1875 (by a 162-100 vote) and the Senate on February 27th (by a 38-26 vote). President U. S. Grant signed the legislation into law on March 1. The new law, on the one hand, represented (in the words of historian Eric Foner) "an unprecedented exercise of national authority, and breached traditional federalist principles more fully than any previous Reconstruction legislation." At the same time, however, it also was an example of the Republican Party's loss of appetite for governmental interference in and control of the day-to-day oversight of Southern affairs: enforcement of the law would primarily be in the hands of former slaves seeking redress in federal court.

Public Accommodation and the Supreme Court

As historian John Hope Franklin has written, the Civil Rights Act of 1875 did not amount to much in practice. Public opinion (in both sections of the country) was opposed to the law, and there were not that many court cases brought. Nonetheless, by the early 1880s, five separate cases did make their way up to the U.S. Supreme Court. Challenging hotels, theaters, and railroads for discriminatory treatment, the five cases (*U.S. v Stanley*; *U.S. v. Ryan*; *U.S. v. Nichols*; *U.S. v. Singleton*; and *Robinson v. Memphis & Charleston Railroad*) were consolidated together as the *Civil Rights Cases*, 109 U.S. 3 (1883).

Writing for the Court's majority was Justice Joseph P. Bradley. This was significant because, although he dissented from the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) (the Privileges and Immunities Clause of the 14th Amendment was held to protect only federal citizenship rights, not those relating to state citizenship), Bradley had firsthand judicial experience with the Colfax massacre of 1873 (what historian Eric Foner has described as "the bloodiest single act of carnage in

all of Reconstruction" – 60 African-Americans were killed at a political rally in Louisiana by a white mob). Presiding at a second trial of the accused conspirators as a federal circuit judge for the Fifth Circuit, Bradley dismissed the convictions, ruling (among other things) that the charges violated the state action doctrine and failed to prove a racial motive for the slaughter. On appeal to the Supreme Court as *United States v. Cruickshank*, 92 U.S. 542 (1876), the Court affirmed Bradley's dismissal, holding that the Enforcement Act of 1870 (the Congressional statute utilized to prosecute) applied (via the 14th Amendment) only to state action and not to acts of private individuals (the Court also ruled that the First and Second Amendments did not apply to the acts of state governments or individuals). This decision opened the door in the South to heightened terrorism that suppressed black voting, forced Republicans from office, and ultimately put in place solid Democratic state legislatures. (*See* Bennette Kramer's "The Origins of Jim Crow," *Federal Bar Council News* (November 2020).)

At the outset of the *Civil Rights* opinion, Bradley declared that "[i]t is obvious that the primary and important question in all the cases is the constitutionality of the law, for if the law is unconstitutional, none of the prosecutions can stand." After an extensive discussion, he ruled that the Civil Rights Act of 1875 was indeed "unconstitutional and void." In Butler's view (on behalf of himself and seven other Justices), the 13th Amendment "simply abolished slavery"; and the 14th Amendment only "prohibited the States" from depriving citizens of due process or equal protection. Nothing gave Congress the authority to govern the conduct (discriminatory or otherwise) of individuals: "Can the act of a mere individual, the owner of an inn, . . . refusing an accommodation, be justly regarded as imposing a badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State and presumably subject to redress by these laws until the contrary appears? . . . [W]e are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude. . . . It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to guests he will entertain . . . or deal with in other matters of intercourse or business." Former slaves, Bradley reasoned, had achieved the "rank of mere citizens"; they were not entitled "to be the special favorite of the laws." And since "[m]ere discriminations on account of race or color were not regarded as badges of slavery [by free African-Americans before the Civil War]," there was no reason to view them as "badges" now.

Just as the foregoing language prefigures/foreshadows the Court's even more odious ruling in *Plessy v. Ferguson*, 163 U.S. 537 (1896) (*see* "Another *Awful* Decision by the U.S. Supreme Court," *Federal Bar Council Quarterly* (August 2016)), as in *Plessy* the single dissent came from Justice John Marshall Harlan, the only Southerner on the Court and a former slaveholder (Bradley was from New Jersey).

Harlan began his dissent by observing "that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism." In his view, the Court had "departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted."

According to Harlan, the 13th and 14th Amendments gave Congress the authority to enact laws to protect people from deprivations "on account of their race, of any civil rights enjoyed by other freemen." With respect to the state action argument, Harlan demonstrated that, by the Court's own jurisprudence, railroads, theaters, and inns operated under the color of state law. With the Court ignoring those decisions and rejecting the usual "broad and liberal connection" given to constitutional provisions, that left "the civil rights under discussion [of African-Americans] practically at the mercy of corporations and individuals wielding power under public authority." Harlan concluded presciently: "Today it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time it may be some other race that will fall under the ban."

Postscripts

- The *Civil Rights Cases* fed the fire started by *Cruikshank* and soon the Southern States had codified a system of economic and social discrimination that

the Supreme Court officially blessed in *Plessy*. Amazingly, the Court's *Civil Rights* ruling has never been overturned, and its analysis on the reach of the 14th Amendment was re-affirmed in *United States v. Morrison*, 529 U.S. 598 (2000). While the Civil Rights Act of 1964 banned discrimination in public accommodations, it was found to be constitutional because the law was based upon the Commerce Clause. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

- The starting point for anyone wanting to know more about the Reconstruction Era is Professor Foner's magisterial work: "Reconstruction: America's Unfinished Revolution (1863 - 1877)" (Harper & Row 1988). Professor Franklin's article on the Civil Rights Act is: "The Enforcement of the Civil Rights Act of 1875" *Prologue Magazine* (Winter 1974).
- Besides his role in effectively nullifying the 14th Amendment (at least in the 19th and early 20th centuries) (the Ku Klux Klan and the Knights of the White Camelia publicly thanked Justice Bradley for his jurisprudential work), Bradley is best known to history as the deciding vote in the 1876 Electoral Commission that voted (8-7) to rule that Rutherford B. Hayes had won the disputed presidential election over Samuel J. Tilden.