Snubbed Landmark: Why *United States v. Cruikshank* (1876) Belongs at the Heart of the American Constitutional Canon

*James Gray Pope**

United States v. Cruikshank *(1876) is an unacknowledged landmark of American constitutional jurisprudence.* Cruikshank*, not the far more famous* Civil Rights Cases*, limited the Fourteenth Amendment to protect only against state action;* Cruikshank*, not the notorious* Slaughter-House Cases*, narrowed the Privileges or Immunities Clause of the Fourteenth Amendment to exclude rights enumerated in the Bill of Rights;* Cruikshank*, not the canonical* Washington v. Davis*, announced that the Fourteenth Amendment's Equal Protection Clause protected only against provably intentional race discrimination; and* Cruikshank*, not the* Civil Rights Cases *or* City of Boerne v. Flores*, first excepted the Fourteenth Amendment from the general principle that Congress enjoys discretion to select the means of implementing its constitutional powers. Historically, if the argument of this Article holds true,* Cruikshank *played a crucial role in terminating Reconstruction and launching the one-party, segregationist regime of "Jim Crow" that prevailed in the South until the 1960s. The circuit court opinion of Justice Joseph Bradley unleashed the second and decisive phase of Reconstruction-era terrorism, while the ruling of the full Court ensured its successful culmination in the "redemption" of the black-majority states.*

Despite its enormous jurisprudential and historical importance, however, Cruikshank *has been omitted from the mainstream narrative and pedagogical canon of constitutional law. The results have been obfuscation and distortion. Unlike the* Civil Rights Cases*,* Slaughter-House*,* Davis*, and* City of Boerne *— from which students learn the principles actually announced in* Cruikshank *—* Cruikshank *lays bare the true origin of those principles in affirmative judicial intervention immunizing overtly racist terrorism against effective law enforcement. By contrast,* Plessy v. Ferguson*, the legal profession's chosen focus for*

* Professor of Law and Sidney Reitman Scholar, Rutgers University School of Law. My intellectual debts on this project go back to my dissertation defense, when Hendrik Hartog, seconded by Daniel Rodgers and Keith Whittington, forcefully steered me toward the problem of race and class. Peter Kellman provided essential advice on the overall approach. Jim Atleson, Bill Fletcher Jr., Eric Foner, Barry Friedman, Alan Hyde, John Leubsdorf, Ken Matheny, Richard Davies Parker, Richard H. Pildes, Dorothy E. Roberts, Ahmed White, Rick Valelly, and Rebecca Zietlow provided invaluable criticisms and suggestions on previous drafts. Pamela Brandwein and Michael Klarman went far beyond the call of duty to point out numerous weaknesses in the argument. The Article also benefitted from critical comments at the second annual Alan Dawley Memorial Lecture at the College of New Jersey in 2011, the 2011 Cornell Law Faculty Colloquium, the 2013 Rutgers-Newark Law Faculty Colloquium, the 2011 West Virginia Law Faculty Colloquium, the ClassCrits V Conference at the University of Wisconsin Law School, the 2012 How Class Works Conference at SUNY Stony Brook, the 2009 LatCrit XIV Conference at American University in Washington, D.C., and the 2013 Law and Society Association International Meeting in Boston. Paul Axel-Lute, Susan Lyons, and Caroline Young of the Rutgers-Newark Law Library provided indispensible assistance navigating the rapidly changing research landscape to find sources. Last but by no means least, many thanks to the editors of the *Harvard Civil Rights-Civil Liberties Law Review* and especially to Ethan Prall for contributions ranging from meticulous cite checking to big-picture substantive suggestions.

confession and atonement, merely let stand the legal product of a white supremacist state government that owed its existence to Cruikshank. *With* Cruikshank *safely off stage, American law students are treated to a happy tale of progress from* Plessy *to* Brown *starring the Supreme Court as the primary protector of civil rights — a role that, ironically, the Court carved out for itself by truncating Congress's civil rights powers in* Cruikshank. *Add* Cruikshank*, and the entire narrative shifts in ways that upset time-honored notions in the dimensions of federalism, separation of powers, popular constitutionalism, and class.*

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Introduction

Between 1867 and 1876, white supremacists waged a bloody campaign to nullify the constitutional rights of black Americans and their allies in the states of the former Confederacy. The stakes were high. African Americans made up a majority of the population in Mississippi, South Carolina, and Louisiana; more than 40% in Alabama, Florida, Georgia, and Virginia; and more than a quarter in Arkansas, North Carolina, Tennessee, and Texas.[1]

[1] U.S. Census Bureau, Table A-18. Race for the United States, Regions, Divisions, and States: 1870 (2002), *available at*, http://www.census.gov/population/www/documentation/twps0056/tabA-18.pdf (last visited Apr. 2, 2014), *archived at* http://perma.cc/N2UM-5WMU [hereinafter Census Table A-18].

Under peaceful conditions, it was not uncommon for black voter turnout to reach 80% and even 90%.[2] If black Americans were permitted to exercise their new constitutional rights to speak, assemble, and vote, they would enjoy majority control in three states as well as a swath of counties and localities across the rural south. The Ku Klux Klan and its various successors, including White Leagues and rifle clubs, sought to prevent this outcome by destroying the capacity of African Americans to exercise their rights and defend their communities. They targeted all forms of black power, including economic (assertive laborers and successful farmers and entrepreneurs), informational (schoolteachers and individuals who knew and asserted their rights), and paramilitary (leaders of militias and self-defense societies, as well as armed individuals who stood up to intimidation). In this context, elections "registered not so much the balances of public opinion as the results of paramilitary battles for position."[3] Congress responded vigorously with enforcement legislation making it a crime for any person to join a conspiracy to deprive any citizen of rights guaranteed under the U.S. Constitution or laws.[4]

During this period, the Supreme Court pronounced judgment on the merits of one case involving paramilitary conflict, *United States v. Cruikshank*[5] (1876). *Cruikshank* grew out of a pitched battle between black Republicans and white supremacist Democrats. After a dispute over the 1872 election results in majority-black Grant Parish, Louisiana, armed Republicans occupied the Parish courthouse at Colfax. By Easter Sunday, 1873, about 150 black defenders were positioned behind an arc of shallow earthworks. A force of white Democrats, about twice as numerous and far better armed, surrounded the Republican positions. After a three-hour battle, the Democrats prevailed and took a number of prisoners.[6] Some hours later, a contingent of whites led by William Cruikshank murdered most of the prisoners, probably between twenty-eight and thirty-eight.[7] U.S. Attorney James Beckwith brought charges under the Enforcement Act of 1870.[8] At each stage of the proceedings, the government was met with determined resistance, including beatings and murders of potential witnesses and a con-

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[2] Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 291, 314 (1988); Steven Hahn, A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration 198, 205 (2003).

[3] Hahn, *supra* note 2, at 289; Richard M. Valelly, The Two Reconstructions: The Struggle for Black Enfranchisement 96 (2004).

[4] Enforcement Act of 1870, ch. 114, 16 Stat. 141 (1870); Enforcement (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13 (1871).

[5] 92 U.S. 542 (1876).

[6] James K. Hogue, Uncivil War: Five New Orleans Street Battles and the Rise and Fall of Radical Reconstruction 109–12 (2006); LeeAnna Keith, The Colfax Massacre: The Untold Story of Black Power, White Terror, and the Death of Reconstruction 101–03 (2008); Charles Lane, The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction 96–103 (2008).

[7] Lane, *supra* note 6, at 266.

[8] Enforcement Act of 1870, ch. 114, 16 Stat. 141.

certed effort to shield suspects so effective that — despite the use of an ironclad riverboat and a force of soldiers — only nine of the ninety-eight men initially indicted could be located and arrested.[9] Prosecutors, grand jurors, and petit jurors all risked their lives to participate, and one witness was nearly killed in a retaliatory knife attack.[10] Black witnesses, corroborated by an undercover white Secret Service agent who had gathered accounts from white participants, testified that the perpetrators had taunted their victims with racial epithets while cutting and shooting them to death.[11] The jury, which included nine whites, one person of color, and two persons of uncertain racial identity, acquitted six of the defendants but convicted the remaining three of conspiracy to interfere with the constitutional rights of two black Republicans.[12] Supreme Court intervention came early, as Justice Joseph P. Bradley, riding circuit, issued an opinion in June of 1874 overturning the convictions.[13] Two years later, the full Court upheld Bradley's ruling, embracing his reasoning on all but one of the central points.[14]

Jurisprudentially, *Cruikshank* may well have been the single most important civil rights ruling ever issued by the United States Supreme Court. It was *Cruikshank*, not the far more famous *Civil Rights Cases*,[15] that first limited the Fourteenth Amendment to protect only against specifically identified state violations, and not directly against private action.[16] As Justice Bradley observed, writing for the full Court in *The Civil Rights Cases*, there had already been a "quite full discussion" of the state action issue in *Cruikshank*.[17] And it was *Cruikshank*, not the notorious *Slaughter-House Cases*,[18] that resolved whether the Privileges or Immunities Clause of the Fourteenth Amendment protected the rights enumerated in the Bill of Rights.[19] Many influential leaders, including Bradley and various members of Congress, read *Slaughter-House* to hold that although the Fourteenth Amendment did not incorporate unenumerated rights, it did include "rights mentioned in the constitution."[20] *Cruikshank* also announced the principle that the Fourteenth

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[9] *See* LANE, *supra* note 6, at 126, 153, 159.

[10] *Id.* at 136, 147–53, 188; KEITH, *supra* note 6, at 114–15, 119, 124–25, 128–31, 138.

[11] LANE, *supra* note 6, at 112.

[12] *See id.* at 186, 194, 203.

[13] United States v. Cruikshank, 25 F. Cas. 707, 708 (Bradley, Circuit Justice, C.C.D. La. 1874) (No. 14,897).

[14] United States v. Cruikshank, 92 U.S. 542, 559 (1876).

[15] 109 U.S. 3, 13, 19 (1883).

[16] *Cruikshank*, 92 U.S. at 554.

[17] *The Civil Rights Cases*, 109 U.S. at 12.

[18] 83 U.S. 36, 80 (1873).

[19] Robert C. Palmer, *The Parameters of Constitutional Reconstruction:* Slaughter-House*,* Cruikshank*, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 762 (1984). *Compare Cruikshank*, 92 U.S. at 552, 553–54, *with The Slaughter-House Cases*, 83 U.S. at 80.

[20] United States v. Cruikshank, 25 F. Cas. 707, 714 (Bradley, Circuit Justice, C.C.D. La. 1874) (No. 14,897); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1116–23 (2000); *The Grant Parish Case: Fourth Day*, NEW ORLEANS DAILY PICAYUNE, May 22, 1874, at 8 (reporting that "Justice Bradley thought

Amendment's Equal Protection Clause and the Fifteenth Amendment's ban on racial exclusions from voting protected African Americans only against provably intentional race discrimination.[21] Finally, *Cruikshank* first excepted the Fourteenth Amendment from the general principle, announced in *McCulloch v. Maryland*,[22] that Congress enjoys discretion to select the means of implementing its constitutional powers.[23] Judged by its jurisprudential impact, then, *Cruikshank* belongs at the center of our pedagogical canon.[24]

The same conclusion follows from *Cruikshank*'s impact on the ground. Considered together, the circuit court and Supreme Court rulings provide — if the argument presented below holds true — a dramatic demonstration of the judiciary's capacity to alter the course of political development.[25] Justice Bradley's circuit court opinion disrupted the federal enforcement effort and unleashed a coordinated campaign of paramilitary terrorism that ousted numerous county-level Republican officials and made possible the "redemption" of Alabama and Mississippi. The full Court's ruling rendered Bradley's judgment permanent, terminated day-to-day civil rights enforcement, and left open only the possibility of enforcing voting rights at election time — not enough to prevent white supremacists from regaining control of the black-majority states.

Despite its enormous jurisprudential and historical importance, however, *Cruikshank* receives sparse attention in mainstream constitutional law texts.[26] Students learn about the Reconstruction Amendments through a va-

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that the decision of the Supreme Court in the Slaughter-House case merely meant that the rights claimed in that case were not rights mentioned in the constitution, and that the only rights that the fourteenth amendment affected were those therein mentioned."). For additional discussion and documentation, see *infra* note 239.

[21] 92 U.S. at 554–55.

[22] 17 U.S. 316, 357 (1819).

[23] 92 U.S. at 551–57.

[24] On the pedagogical canon of constitutional law, see Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998). Although the full case is not made here, it is possible that *Cruikshank* should be relegated to the "anticanon," the subset of canonical decisions that are treated as negative precedents. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011). The present Article, then, may be situated in an emerging literature challenging the current makeup of the canon and proposing changes. For a pioneering example that influenced this Article, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000) (proposing that *Giles v. Harris*, 189 U.S. 475 (1903), belongs in the canon).

[25] *See infra* notes 329–31 and accompanying text.

[26] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (3d ed. 2009) (*Cruikshank* not excerpted or discussed); JESSE H. CHOPER, RICHARD H. FALLON, JR., YALE KAMISAR & STEVEN H. SHIFFRIN, CONSTITUTIONAL LAW: CASES — COMMENTS — QUESTIONS (11th ed. 2011) (not excerpted or discussed); DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 189–90 (4th ed. 2009) (mentioned in note on Second Amendment); CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES (3d ed. 2009) (not excerpted or discussed); MICHAEL STOKES PAULSEN, STEVEN G. CALABRESI, MICHAEL W. MCCONNELL & SAMUEL L. BRAY, THE CONSTITUTION OF THE UNITED STATES (2010) (not excerpted or discussed); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES (10th ed. 2012) (not excerpted or discussed); GEOFFREY R. STONE, LOUIS M. SEIDMAN,

riety of chronologically and factually scattered cases, none of which arose out of the decisive paramilitary conflict. They encounter the state action requirement in *The Civil Rights Cases*, decided in 1883 — six years after white supremacists had regained control of the Deep South including all three black-majority states. They learn about the narrowing of the Privileges or Immunities Clause from *The Slaughter-House Cases*, in which the Fourteenth Amendment was invoked not by African Americans or their allies, but by members of a whites-only fraternity of butchers challenging a health law enacted by the racially integrated Reconstruction legislature of Louisiana.[27] This case is an odd choice to serve as the leading teaching vehicle on the issue not only because it did not resolve the crucial question of incorporation, but also because the Court repeatedly stressed that the case did not involve the "one pervading purpose" of the Reconstruction Amendments, to protect the formerly enslaved people,[28] thus leaving students to wonder what the Court would have done in a case that did implicate that purpose. *Washington v. Davis*,[29] decided a century after *Cruikshank*, introduces students to the requirement of proving racial intention.[30] By that time, the country was in the midst of a Second Reconstruction, made necessary by the failure of the first. Finally, either *The Civil Rights Cases* or *City of Boerne v. Flores*,[31] involving a Catholic Bishop's religious freedom challenge to a local zoning ordinance, appear as the first cases cutting back on Congress's discretion to choose the means of enforcing the Reconstruction Amendments.

Unlike *The Civil Rights Cases*, *Slaughter-House Cases*, *Davis*, and *City of Boerne* — from which law students learn the principles actually conceived in *Cruikshank* — *Cruikshank* lays bare the true origin of those doctrines in judicial intervention immunizing overtly racist terrorism against effective law enforcement. By contrast, *Plessy v. Ferguson*,[32] the legal profession's chosen focus for confession and atonement, merely let stand the legal product of a white supremacist state government, a government that

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CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW 454 (6th ed. 2009) (one paragraph in note); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 370 (17th ed. 2010) (mentioned in single sentence); JONATHAN D. VARAT, WILLIAM COHEN & VIKRAM DAVID AMAR, CONSTITUTIONAL LAW: CASES AND MATERIALS 548, 1253, 1264 (13th ed. 2009) (briefly mentioned in three notes). *Cruikshank* gets somewhat more attention in two historically oriented casebooks. *See* PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, REVA B. SIEGEL & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 334–35 (5th ed. 2006) (discussed in lengthy paragraph following *Slaughter-House*); 1 MICHAEL KENT CURTIS, J. WILSON PARKER, DAVISON M. DOUGLAS, PAUL FINKELMAN & WILLIAM G. ROSS, CONSTITUTIONAL LAW IN CONTEXT 707–08 (2011) (two-page discussion in note following *Slaughter-House*).

[27] RONALD M. LABBE & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 46–47, 97 (abr. ed. 2005).

[28] The Slaughter-House Cases, 83 U.S. 36, 67–68, 71–72, 81 (1873).

[29] 426 U.S. 229 (1976).

[30] *See id.* at 241.

[31] 521 U.S. 507 (1997).

[32] 163 U.S. 537 (1896).

owed its existence to *Cruikshank*.[33] With *Cruikshank* safely off stage, students are treated to a happy tale of progress from *Plessy* to *Brown v. Board of Education*[34] starring the Supreme Court as the primary protector of civil rights — a role that, ironically, the Court carved out for itself by truncating Congress's civil rights powers in *Cruikshank*.[35] No wonder that, as Barry Friedman has suggested, present-day "[c]onstitutional doctrine poorly understands Reconstruction."[36]

Insert *Cruikshank* into the story, and the entire narrative shifts in ways that confound time-honored notions. In the dimension of federalism, for example, our mainstream story has long featured the conflict between national power and states' rights. The Supreme Court appears as a protector of state authority *against* national power in *The Slaughter-House Cases* and *The Civil Rights Cases*. Add *Cruikshank*, and those decisions slide to the periphery. It turns out that four of the most important interpretive issues raised by the Reconstruction Amendments were resolved in a case involving the exercise of national power *in support of* state governments struggling for survival against paramilitary insurrection. The *Cruikshank* rulings protected "state" jurisdiction only in the sense that, as argued by former Confederates and President Andrew Johnson, state authority was properly grounded not on the citizenry defined in the Fourteenth Amendment, but on the pre–Civil War (white) "people" of the state.[37] With regard to the three majority-black states, this reality was painfully apparent and could not have been overlooked in the Justices' consideration of the issues. Far from protecting the rights of constitutionally sanctioned states, the Court blocked the national government from assisting official state governments in the preservation of law and order. With *Cruikshank* placed center stage, the jurisprudence of the Reconstruction-era Court appears less remarkable for its particular stance on issues of federalism than for its wholehearted embrace of the white supremacist claim that states' rights, and not the very existence of legally constituted state governments, posed the central constitutional question at stake during Reconstruction.

In the dimension of separation of powers, our received narrative spotlights the Supreme Court as protector of civil rights against the elected branches, a role in which it sometimes shines (*Strauder v. West Virginia*[38]

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[33] *Plessy*, 163 U.S. at 538, and *United States v. Cruikshank*, 92 U.S. 542, 544 (1876), both arose out of events in Louisiana.

[34] 347 U.S. 483 (1954).

[35] For a more realistic analysis of the relative roles of Congress and the courts, see REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS (2006); see also Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986) (critiquing celebratory narrative).

[36] Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too)*, 5 U. PA. J. CONST. L. 1201, 1207 (2009).

[37] *See infra* notes 58–60 and accompanying text.

[38] 100 U.S. 303 (1879).

and *Brown*) and sometimes fails (*Plessy* and *Korematsu v. United States*[39]). Add *Cruikshank*, however, and these cases fade in relative importance. It turns out that the Court might have exerted its greatest influence on constitutional rights not by *protecting* rights against the elected branches, but by *stripping* rights of legislative and executive protection. Had Bradley and the full Court upheld the convictions in *Cruikshank*, the system of Jim Crow that gave rise to *Plessy* and *Brown* might never have existed.

Further, in the dimension of popular constitutionalism, most of the race-related cases in our pedagogical canon and mainstream narrative feature people of color as victims petitioning courts for official protection against race discrimination. The enforcement of civil rights, it would seem, hinged primarily on the actions of (white) judges and officials. Add *Cruikshank*, and we begin to glimpse the reality that African Americans, like other subjugated groups, carried the main burden of asserting and defending their own rights.[40] Once freed from slavery, black Americans speedily organized a "parallel politics" grounded on newly created political, labor, religious, and paramilitary organizations.[41] Especially in black-majority areas, these organizations, not federal law enforcers, provided the first line of defense against white supremacist terrorists who — in turn — justified their actions by invoking a popular constitutionalist vision of (white) popular sovereignty. In effect, federal forces acted as peacekeepers in a land torn by constitutional conflict.[42] United States marshals, prosecutors, courts, and troops were essential to the enforcement effort, but mainly to provide the modicum of law and order necessary for African Americans and their allies to exercise basic rights without risking assault, torture, or death.

Finally, along the dimensions of race and class, our mainstream narrative races the working class white and declasses the black race. In *The Slaughter-House Cases*, we see white butchers asserting the right to practice their trade. In *The Civil Rights Cases*, on the other hand, we see apparently prosperous African Americans seeking equal access to public accommodations including the Grand Opera House of New York and the "dress circle" of a San Francisco theater.[43] Subsequent cases continue this pattern, featuring white workers[44] and casting African Americans in the middle-class or nonclassed roles of juror, railroad passenger, home buyer, law student, and pupil.[45] Cases involving black laborers are ignored or marginal-

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[39] 323 U.S. 214 (1944).

[40] *See, e.g.*, Jack M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2336 (1997).

[41] HAHN, *supra* note 2, at 230–34; JULIE SAVILLE, THE WORK OF RECONSTRUCTION: FROM SLAVE TO WAGE LABORER IN SOUTH CAROLINA 1860–1870, at 169 (1994); VALELLY, *supra* note 3, at 36–41.

[42] HOGUE, *supra* note 6, at 86.

[43] The Civil Rights Cases, 109 U.S. 3, 4 (1883).

[44] *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (bakers); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (steel workers).

[45] Brown v. Bd. of Educ., 347 U.S. 483 (1954) (pupil); Sweatt v. Painter, 339 U.S. 629 (1950) (law student); Shelley v. Kraemer, 334 U.S. 1 (1948) (home buyer); Plessy v. Ferguson,

ized.[46] *Cruikshank*, on the other hand, exemplifies the reality that throughout American history, the overwhelming majority of African Americans have belonged to the laboring classes. In William Forbath's memorable phrase, a "tangled knot of race and class lies . . . at the heart" of our constitutional history.[47] Nowhere is this clearer than in the period of Reconstruction. Over the past several decades, numerous historians have presented evidence that the struggle to enforce the Reconstruction Amendments was decided at the intersection of race and class.[48] "It is impossible to separate the question of color from the question of labor," explained one contemporary newspaper account highlighted by historian Eric Foner, "for the reason that the majority of the laborers . . . throughout the Southern States are colored people, and nearly all the colored people are at present laborers."[49] Joseph Bradley, the central legal figure in our story, expressed a similar view: "It must be remembered that the lands all belong to the whites, and they alone have the capital to improve them and put up buildings and sugar mills on them — and that the labor [is] all performed by the negroes."[50] In such a context, the race question could not be separated from issues of class and labor control.

Part I of this Article covers the period from 1865 to 1873. It argues that the proponents of Reconstruction faced a daunting but not impossible task, namely preserving a sufficient level of law and order to enable formerly enslaved African Americans to exercise and defend their rights in the politi-

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163 U.S. 537 (1896) (railroad passenger); Strauder v. West Virginia, 100 U.S. 303 (1880) (juror).

[46] *See, e.g.*, Pollock v. Williams, 322 U.S. 4 (1944) (agricultural laborers); Bailey v. Alabama, 219 U.S. 219 (1911) (agricultural laborers); Hodges v. United States, 203 U.S. 1 (1906) (sawmill workers).

[47] William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 7 (1999). Forbath, whose account centers on the twentieth century, mentions *Cruikshank* as one of a number of cases in which the Supreme Court "lent its sanction to the reconstituted caste system of the South." *Id.* at 51; *see also* RISA GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007) (recounting the twentieth-century struggle for civil rights in the dimension of class as well as race).

[48] *See, e.g.*, FONER, *supra* note 2, at xxv–xxvii; HAHN, *supra* note 2, at 9–10; ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 85 (2009); SUSAN EVA O'DONOVAN, BECOMING FREE IN THE COTTON SOUTH 268–70 (2007); HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST–CIVIL WAR NORTH, 1865–1901, at 82, 113, 224 (2001); SAVILLE, *supra* note 41, at 2–4; Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989); Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697 (2012).

[49] FONER, *supra* note 2, at xxvi; *see also* BRUCE LEVINE, CONFEDERATE EMANCIPATION: SOUTHERN PLANS TO FREE AND ARM SLAVES DURING THE CIVIL WAR 101 (2006) (quoting Confederate intellectual's observation that after emancipation, negroes "having no land, [had to] labor for the landowner"); O'DONOVAN, *supra* note 48, at 268 (reporting that Georgia planters "bluntly and repeatedly" described their goal as restoring "capital's reign over labor"); RICHARDSON, *supra* note 48, at 113–18, 195–97 (documenting widespread contemporary perceptions that Reconstruction involved overlapping issues of race and class).

[50] Letter from Joseph P. Bradley to Carry Bradley (Apr. 30, 1867) (on file with the New Jersey Historical Society, MG 26, box 3, Joseph P. Bradley Papers, New Jersey Historical Society, Newark, N.J.).

cal process. White supremacists launched a ferocious campaign of terrorism during this period, but southern state governments, Congress, federal prosecutors, and southern juries responded effectively. Lower courts made this success possible by interpreting the Reconstruction Amendments broadly. Unfortunately, as recounted in Part II, first Justice Bradley and then the full Supreme Court disrupted this dynamic in *Cruikshank*, which imposed strict limitations on the enforcement of civil and political rights at a moment when the political and paramilitary struggle hung in the balance. Judging from the private and public writings of Justice Bradley, considerations of class and, in particular, of labor control were important in shaping the outcome.

Though largely missing from the professional culture of law, *Cruikshank* has long been a subject of debate among historians. Part III addresses controversies and counterarguments concerning the seriousness of *Cruikshank*'s constraints on enforcement, the extent of its causal contribution to the demise of Reconstruction, and the merits of the Court's performance. The Conclusion offers a brief summary and some speculations on implications for present-day jurisprudence.

I. Black Constitutionalism, White Terror, and the Lower Courts, 1865–1873

Between 1861 and 1865, more than four million black Americans emerged from chattel slavery and plunged, willingly or not, into a struggle over the practical meaning of freedom.[51] Like the more familiar civil rights movement of the twentieth century, the movement that they created claimed basic freedoms including the rights to vote, serve on juries, and enjoy equal access to public accommodations. Unlike the twentieth-century movement, however, the nineteenth-century version did not fit the model of an "insular minority" in need of counter-majoritarian protection. To the contrary, black Americans constituted a majority of the population in three southern states and a string of counties stretching from Virginia to Texas.[52] They provided the main southern constituency for the Republican Party, which had emerged from the Civil War as the United States' dominant political party. Accordingly, their movement adopted a strategy (detailed in section I.A below) far different from that of its successor in the dimensions of both separation of powers and federalism. Where the more recent movement turned to the judiciary for relief from hostile legislation, the earlier one relied primarily on the elected branches. And where the twentieth-century movement called upon the federal government to displace state authority in the field of civil rights, the nineteenth-century movement sought more limited federal intervention to establish rights sufficient to enable black Americans to protect themselves in state politics. White supremacists responded with terror (recounted in

[51] Foner, *supra* note 2, at 77–82.
[52] *Id.* at 127; Census Table A-18, *supra* note 1.

section I.B), bringing on a conflict not primarily between state and federal authority, as in the twentieth century, but between white paramilitary insurgents and Republican-controlled state governments backed by federal power. In this struggle, black Americans asked the courts to serve a function that — in other eras — they have performed with dispatch: assisting in the preservation of official law and order. As related in section I.C, the lower federal courts rose to the occasion. They, unlike Justice Bradley and the full Court in *Cruikshank*, interpreted and applied the Reconstruction Amendments broadly. Their rulings made it possible for a combination of black self-defense efforts, state militia campaigns, federal prosecutions, and limited federal military intervention to terminate the white supremacists' first campaign of terror.

A. We Ask for No Expensive Aid from Military Forces

In June of 1865, about two months after General Robert E. Lee surrendered the main Confederate field army, a pamphlet appeared entitled *Equal Suffrage. Address from the Colored Citizens of Norfolk, Va., to the People of the United States*.[53] Where today we tend to think of civil rights conflicting with "states' rights," the *Address* proposed a strategy for Reconstruction that placed the former in service to the latter:

> [W]e ask for no expensive aid from military forces, stationed throughout the South, overbearing State action, and rendering our government republican only in name; give us the suffrage, and you may rely upon us to secure justice for ourselves, and all Union men, and to keep the State forever in the Union. . . . It cannot be that you contemplate with satisfaction a prolonged military occupation of the southern States, and yet, without the existence of a larger loyal constituency than, at present, exists in these States, a military occupation will be absolutely necessary, to protect the white Union men of the South, as well as ourselves . . . .[54]

Instead of displacing state authority, the federal government would reconstitute state electorates so that the state governments themselves could protect "the white Union men of the South, as well as ourselves." This approach centered attention not primarily on the relation between federal and state authority, but on the nature of state authority. Two weeks before the colored citizens of Norfolk assembled, President Andrew Johnson had issued a proclamation on that issue. Johnson appointed a provisional governor for the formerly rebel state of North Carolina and directed that, in order

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[53] EQUAL SUFFRAGE. ADDRESS FROM THE COLORED CITIZENS OF NORFOLK, VA., TO THE PEOPLE OF THE UNITED STATES (1865) [hereinafter NORFOLK ADDRESS], *reprinted in* 1 PROCEEDINGS OF THE BLACK NATIONAL AND STATE CONVENTIONS, 1865–1900, at 83–103 (Philip S. Foner & George E. Walker eds., 1986) [hereinafter BLACK CONVENTIONS].

[54] *Id.* at 85.

to establish "a republican form of government" as mandated by Article IV, Section 4 of the Constitution, he should organize a state constitutional convention composed of delegates loyal to the Union. These delegates, Johnson specified, would be selected by voters meeting the state's prewar qualifications, which excluded people of color from the franchise.[55] To the colored citizens of Norfolk, this policy — which set the pattern for all of the rebel states — violated the Constitution: "all the State laws imposing disabilities upon colored people on the ground of color, 'being but a creation of slavery, and passed for its maintenance and perpetuation, are part and parcel of the system and must follow its fate.'"[56] With slavery abolished, people of color were "entitled to a full participation in all the benefits that the Constitution was ordained to confer" including "the inestimable blessings of 'a republican form of government.'"[57]

The clash between black constitutionalists and President Johnson deepened ominously in February 1866, when Johnson received a delegation from the Colored National Convention then under way in Washington. Delegation Chair George Downing opened by requesting that the Thirteenth Amendment, ratified two months previously, be "enforced with appropriate legislation," specifically an extension of voting rights to African Americans.[58] Johnson responded with a theoretical justification for his policy of exclusion. Government power was "derived from the people," he argued. Once constituted, a political community could not be altered in composition except by its own consent. With regard to a community that had chosen to exclude people of color, "is it proper to force upon this community, without their consent, the elective franchise, without regard to color, making it universal?"[59] Chairman Downing pointedly suggested that Johnson apply his theory of consent "to South Carolina, for instance, where a majority of the inhabitants are colored." But Johnson was unfazed: "Suppose you go to South Carolina; suppose you go to Ohio. That doesn't change the principle

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[55] Proclamation No. 38, 13 Stat. 760 (May 29, 1865).

[56] NORFOLK ADDRESS, *supra* note 53, at 87. On the roots of this view, see William M. Wiecek, *Emancipation and Civic Status*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 78, 80–83 (Alexander Tsesis ed., 2010).

[57] NORFOLK ADDRESS, *supra* note 53, at 86. A national convention of "Colored Men" later elaborated: "[W]e should determine and insist upon it that a 'republican form of government' is one deriving its just powers from the consent of the governed — one in which taxation is the correlative of the right to be represented therein." PROCEEDINGS OF THE NATIONAL CONVENTION OF THE COLORED MEN OF AMERICA (1869), *reprinted in* BLACK CONVENTIONS, *supra* note 53, at 344, 376; *see also* FONER, *supra* note 2, at 118 (recounting 1866 call of Tennessee black convention for a "republican form of government" including the rights of blacks to vote, bear arms, and educate their children). The black delegates' expansive conception of the republican government clause built on the ideas of Senator Charles Sumner. *See* Charles Sumner, *Our Domestic Relations: Power of Congress over the Rebel States*, ATLANTIC MONTHLY, Oct. 1863, at 507–29; *see also* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 194–98 (1972).

[58] BLACK CONVENTIONS, *supra* note 53, at 214.

[59] *Id.* at 217.

at all." Evidently, Johnson believed either that the initial definition of a political community was beyond question or that excluding people of color met some criterion of legitimacy. In either case, he made clear the ultimate method by which a "people" — whether it constituted a majority or minority of the inhabitants — might defend its privileges. While purporting to regret the prospect, he predicted that black suffrage would provoke whites into a race war and observed that "especially is this the case when you force it upon a people without their consent."[60]

Thirteen months later, Congress enacted the Military Reconstruction Act over Johnson's veto, repudiating his state governments and calling upon the southern male electorate of all races to elect delegates to state constitutional conventions.[61] The resulting conventions decreed manhood suffrage without regard to race or economic status.[62] In the space of a year, Congress and the state constitutional conventions had created "the first biracial democratic public sphere in world history."[63]

The fate of this noble experiment would hinge, first and foremost, on the preservation of law and order. Though numerically weak in the North and West (less than 2%), black Americans constituted an enormous voting bloc in the South (about 36%), including outright majorities in Louisiana, Mississippi, and South Carolina.[64] They wasted no time demonstrating that, under peaceful conditions, they could protect their interests through the political process. No sooner had black suffrage arrived than the Union League, a wartime loyalist association and Republican organizing center, launched a vigorous campaign to register voters and form League branches across the South.[65] The response was so enthusiastic that, by the end of 1867, it seemed that most black men had not only registered to vote, but also enrolled in a League branch or similar association.[66] Initially created for electoral purposes, these organizations quickly adapted to the reality of a day-to-day struggle against planter domination in all spheres of life. They mobilized for political action, drilled for self-defense, conducted rituals to strengthen solidarity, and led or assisted laborers in contract bargaining and strikes.[67] Within a matter of months, the freed people developed a full-

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[60] *Id.*

[61] Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429.

[62] KEYSSAR, *supra* note 48, at 73.

[63] VALELLY, *supra* note 3, at 73.

[64] CENSUS TABLE A-18, *supra* note 1.

[65] FONER, *supra* note 2, at 281–84; VALELLY, *supra* note 3, at 38–41.

[66] FONER, *supra* note 2, at 283; HAHN, *supra* note 2, at 181–82; *see also* MICHAEL W. FITZGERALD, THE UNION LEAGUE MOVEMENT IN THE DEEP SOUTH: POLITICS AND AGRICULTURAL CHANGE DURING RECONSTRUCTION 14 (1989) ("Within a matter of weeks, the Union League had become the organizational nucleus of a massive movement.").

[67] FITZGERALD, *supra* note 66; MICHAEL GOLDFIELD, THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS 21–22 (1997); HAHN, *supra* note 2, at 174–86; DAVID MONTGOMERY, CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY 121–24 (1993); SAVILLE, *supra* note 41, at 179–88.

fledged "parallel politics" grounded on mutually reinforcing networks of political, labor, and religious organizations.[68] Consistent with President Johnson's thinly veiled threat of race war, however, white supremacists were already targeting black leaders, their families, and white allies for intimidation, torture, and death.

B. A Fearful Reign of Terror

Judging from present-day constitutional law casebooks, the main civil rights issues of the decades following the Civil War centered — like those of the 1950s and 1960s — on race discrimination in access to government and public accommodations.[69] In the rural counties that were home to most African Americans, however, the very existence of official law and order was at stake, and civil rights were matters of life and death. Black men and women risked beatings, flogging, and death for failing to show proper respect, defying white commands, or simply being near a white man who felt an urge to demonstrate dominance. The Texas Freedmen's Bureau listed as "reasons" for murders of blacks by whites such offenses as "using insolent language," failing "to remove his hat," refusing to call the perpetrator "master," and "crying" after the perpetrator had whipped his mother.[70] Of the five hundred whites charged with murdering blacks in that state between 1865 and 1866, none was convicted.[71] After an extensive investigation, General Philip Sheridan concluded that between the end of the war and 1875, some 2141 African Americans had been killed by whites in Louisiana, with the perpetrators escaping punishment in every case.[72] Louisiana and Texas were the worst states, but reports of routine, unprovoked white-on-black violence poured in from across the former Confederacy.[73]

Former slave owners channeled racial violence to serve class interests. They accepted the abolition of chattel slavery, narrowly defined as a formal legal relation, but moved decisively to regain mastery over their newly assertive laborers.[74] The freed slaves' "feeling of security and independence,"

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[68] HAHN, *supra* note 2, at 230–34; SAVILLE, *supra* note 41, at 169; VALELLY, *supra* note 3, at 36–41.

[69] As noted above, casebooks ignore or give cursory treatment to *Cruikshank*, while highlighting discrimination cases like *Strauder v. West Virginia* and *The Civil Rights Cases*. *See supra* text accompanying notes 26, 38–39. This undoubtedly reflects the fact that, as Kenneth Mack has observed, *Brown v. Board of Education* and its progeny "cast a long shadow" over the legal history of civil rights, distorting earlier developments to fit the liberal legal model of *Brown*. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 258 (2005).

[70] FONER, *supra* note 2, at 120 (quoting Freedmen's Bureau records).

[71] ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 52 (2004).

[72] NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 11 (2006).

[73] FONER, *supra* note 2, at 119–23; LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 274–80 (1979).

[74] ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 104–06 (1980); SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS

explained one planter, "has to be eradicated."[75] The planters' effort to reestablish labor control intersected with a cross-class movement of whites, grounded on a core constituency of Confederate veterans, that was determined to preserve the order of white supremacy.[76] Thousands of veterans joined the Ku Klux Klan and other secret societies, which modeled their structure and activities on the prewar slave patrols.[77] Although yeoman farmers and laborers filled the ranks, the "very best citizens" selected the targets and often rode on the raids.[78]

Beginning in 1867, these societies conducted a campaign of terror against all sources of black power. Although critics tarred this campaign as "lawless," it was in fact inspired and shaped by law. Like the freed people, the former slave masters read and interpreted the Constitution for themselves. The Ku Klux Klan, the Knights of the White Camelia, and the White Leagues proclaimed their stand for "constitutional liberty" and the "constitutional rights of the South."[79] White supremacists condemned civil rights laws, public education, and other measures intended to benefit blacks and poor whites as unconstitutional "class legislation."[80] Like the old slave patrols, the societies enforced norms of black subordination that traced back to colonial statutes. Slaves had been required to provide labor on the master's terms; the societies whipped or murdered blacks who dared to resist planter authority or to compete successfully with whites in the economy.[81] Slaves

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205 (2003); GERALD D. JAYNES, BRANCHES WITHOUT ROOTS: GENESIS OF THE BLACK WORKING CLASS IN THE AMERICAN SOUTH, 1862–1882, at 314 (1986); PETER KOLCHIN, FIRST FREEDOM: THE RESPONSES OF ALABAMA'S BLACKS TO EMANCIPATION AND RECONSTRUCTION 36 (2008); LEVINE, *supra* note 49, at 160, 162; LITWACK, *supra* note 73, at 34, 393–99; JAMES L. ROARK, MASTERS WITHOUT SLAVES: SOUTHERN PLANTERS IN THE CIVIL WAR AND RECONSTRUCTION 141–42 (1977); HANNAH ROSEN, TERROR IN THE HEART OF FREEDOM: CITIZENSHIP, SEXUAL VIOLENCE, AND THE MEANING OF RACE IN THE POSTEMANCIPATION SOUTH 84–87 (2009).

[75] LITWACK, *supra* note 73, at 434.

[76] HAHN, *supra* note 2, at 268–69; HOGUE, *supra* note 6, at 14; VALELLY, *supra* note 3, at 91–92.

[77] FONER, *supra* note 2, at 431–34; HAHN, *supra* note 2, at 268–69; LANE, *supra* note 6, at 39–40; ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION, at xlv, xlvii (1971).

[78] FONER, *supra* note 2, at 432–33; HAHN, *supra* note 2, at 303; TRELEASE, *supra* note 77, at 77, 83, 96, 98, 108, 130, 140, 189, 201, 234, 243, 266, 296, 332.

[79] THE REVISED AND AMENDED PRESCRIPT OF THE ORDER OF THE * * * [KU KLUX KLAN] 19 (1868); *see also* CONSTITUTION AND RITUAL OF THE KNIGHTS OF THE WHITE CAMELIA (1869), *reprinted in* DOCUMENTARY HISTORY OF RECONSTRUCTION 349, 349, 352 (Walter L. Fleming ed., 1906); CONSTITUTION OF THE CRESCENT CITY WHITE LEAGUE, *reprinted in* DOCUMENTARY HISTORY OF RECONSTRUCTION, *supra*, at 358.

[80] Michael Les Benedict, *The Problem of Constitutionalism and Constitutional Liberty in the Reconstruction South*, *in* AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 225, 234–35, 237 (Kermit L. Hall & James W. Ely, Jr. eds., 1989).

[81] *See* FONER, *supra* note 2, at 121, 428–29; HAHN, *supra* note 2, at 275–80; O'DONOVAN, *supra* note 48, at 217–18; GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 97 (2007); TRELEASE, *supra* note 77, at 35, 101, 275, 288, 360; Barry Crouch, *A Spirit of Lawlessness: White Violence; Texas Blacks, 1865–1868*, 18 J. SOC. HIST. 217, 222 (1984). For a review of documentary evidence on the use of violence and threats of violence in the labor contracting process, see Motion for Leave

had been prohibited from learning to read and write; the societies burned the freed people's new schools and terrorized their teachers.[82] Slaves and free blacks had been excluded from the franchise; the societies blocked blacks from voting, punished those who nevertheless succeeded, and — following the lead of John Wilkes Booth — attacked and assassinated Republican office holders and grassroots leaders.[83] Slaves had been prohibited from gathering without permission; the societies broke up unauthorized assemblies whenever possible.[84] Slaves had been permitted to conduct religious services only under white pastors; the societies burned black churches and attacked their ministers.[85] It had been a crime for slaves to lift a hand in self-defense; the societies were particularly outraged when blacks dared to defend themselves against white abuses.[86] They confiscated African Americans' guns and ransacked their homes for weapons and booty.[87] Unlike the patrols, however, the societies did not refrain from exercising the de facto privileges, formerly enjoyed only by slave owners, of raping and killing their victims.[88] Such actions would have violated the property rights of white slave owners under slavery, but not white employers under the system of wage labor.[89]

To counter this pervasive violence, black southerners organized for self-defense. Union League branches, labor associations, political clubs, and other organizations drilled, marched, and posted sentinels. Freed people formed unofficial militias led by "captains" and "lieutenants," a number of whom had served in the Union Army.[90] Through this "quasi-militarization

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to File Amicus Curiae Brief & Brief of Historians at 7–14, CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008) (No. 06-1431).

[82] FITZGERALD, *supra* note 66, at 106–07; HADDEN, *supra* note 74, at 106; HAHN, *supra* note 2, at 282–83; EVERETTE SWINNEY, SUPPRESSING THE KU KLUX KLAN: THE ENFORCEMENT OF THE RECONSTRUCTION AMENDMENTS 1870–1877, at 252–53 (1987); TRELEASE, *supra* note 77, at 84, 86, 128–29, 138, 177, 185, 202, 206, 228, 238, 252, 261, 276, 293–95, 316, 319, 321, 329, 337.

[83] Reports of voter intimidation and punishment permeate the sources. White supremacists often attempted to force blacks to vote Democratic, sometimes issuing formal protection papers to those who complied. RABLE, *supra* note 81, at 119; TRELEASE, *supra* note 77, at 130–31, 137–38, 150, 175–76, 228–29, 239, 241, 302, 321. On terrorism directed at Republican office holders, see FONER, *supra* note 2, at 426–28; RABLE, *supra* note 81, at 88, 96; and TRELEASE, *supra* note 77, at 35, 55, 76, 83, 95, 102, 116, 122, 128, 141, 149–50, 154, 177, 190, 194, 203–04, 205, 213, 231–32, 235, 239, 243, 245, 252, 262, 271, 277, 303–04, 306, 310, 311, 312, 319, 321–23.

[84] HADDEN, *supra* note 74, at 108–09, 211.

[85] TRELEASE, *supra* note 77, at 124, 131, 261, 265, 293, 307, 313, 329, 341, 365.

[86] *Id.* at 25, 31, 32–34, 38, 128–29, 178, 289, 292, 302.

[87] HADDEN, *supra* note 74, at 106, 206–07, 211–12; TRELEASE, *supra* note 77, at 29, 35, 118, 122, 129, 139, 149, 150–51, 251, 263, 282, 337; LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS 1871–1872, at 29 (1996).

[88] On murder, see *supra* notes 70–73 and accompanying text. On rape, see FONER, *supra* note 2, at 430–31; HADDEN, *supra* note 74, at 215–16; ROSEN, *supra* note 74, at 8–9; and WILLIAMS, *supra* note 87, at 35–36.

[89] SWINNEY, *supra* note 82, at 39.

[90] FITZGERALD, *supra* note 66, at 38, 66–68, 153–54; HAHN, *supra* note 2, at 175; O'DONOVAN, *supra* note 48, at 228–29, 258–59; SAVILLE, *supra* note 41, at 172.

of organizational and work life," black southerners "reminded each other of the risks they faced while offering protection in their numbers, warning systems, and weapons of self-defense."[91] They proceeded on the assumption that any exercise of black rights might be construed by whites as a provocation warranting violence. On Election Day 1867, for example, "black voters made their preparations well in advance and arrived at the polls in groups, at a predetermined hour, sometimes armed or marching in military fashion, always ready to impress white and black onlookers with their numbers, solidarity, and resolve."[92] In most cities, Union League branches and other Republican organizations, sometimes backed by federal troops, neutralized the white supremacist societies.[93] Outside the cities, according to historian Steven Hahn, white violence was rare in areas where blacks outnumbered whites by two to one or more, and — elsewhere — numerical weakness could be offset by "political experience and armed strength."[94] Consistent with the strategy advanced in the *Norfolk Address*, southern state governments intervened to defend blacks and their white allies. Republican governors in Tennessee, Arkansas, and Texas responded effectively with militias composed mostly of African Americans and white loyalists from mountain areas.[95] In Louisiana, hundreds of Confederate veterans swore an oath to respect the civil rights of all men regardless of color and joined the biracial state militia commanded by former Confederate General James Longstreet.[96] In some of the hardscrabble rural counties, where large plantations were few and poor white farmers were not in the habit of deferring to planters, a critical mass of whites joined with blacks to maintain law and order.[97]

In much of the rural South, however, violence went unchecked. By 1871, outgoing President Isaac Myers of the Colored National Labor Union reported that "in some localities, it is impossible to reach the colored laborers except you are steel-plated against the Ku-Klux bullets" and despaired of organizing black workers under this "fearful reign of terror."[98]

C. Anti-Klan Enforcement in the Lower Courts

Congress responded with the Enforcement Act of 1870, which made it a crime for any person to join in a conspiracy to deprive any person of rights "secured" by the U.S. Constitution or laws.[99] U.S. attorneys aggressively prosecuted violators in a number of states and, despite widespread intimida-

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[91] HAHN, *supra* note 2, at 174–75.
[92] *Id.* at 205; SAVILLE, *supra* note 41, at 173–74.
[93] FITZGERALD, *supra* note 66, at 194; HAHN, *supra* note 2, at 282–83.
[94] HAHN, *supra* note 2, at 282.
[95] *Id.* at 283–85; HOGUE, *supra* note 6, at 68.
[96] HOGUE, *supra* note 6, at 89.
[97] TRELEASE, *supra* note 77, at 38–39.
[98] PHILIP S. FONER, ORGANIZED LABOR AND THE BLACK WORKER, 1619–1973, at 39 (1974).
[99] Enforcement Act of 1870, ch. 114, §§ 2–6, 16 Stat. 140, 140–41.

tion of witnesses and jurors, southern juries of varying racial compositions convicted a substantial number of defendants.[100]

Lower federal courts upheld most of these prosecutions. In the process, they developed solutions to the doctrinal problems posed by the Reconstruction Amendments that — unlike those of Bradley and the full Court in *Cruikshank* — permitted effective enforcement to go forward. The key holdings centered less on the merits of the state action issue (on which most scholarship has focused, perhaps because of the issue's relevance to present-day controversies) than on the question of deference to Congress concerning what constituted "appropriate" legislation under the Reconstruction Amendments' enforcement clauses.[101] By the time of the Klan cases, this question had been addressed extensively in disputes over the Civil Rights Act of 1866, which provided that citizens "of every race and color" were to enjoy a broad range of civil rights on the same basis as "white citizens."[102] President Andrew Johnson had vetoed the Act, reasoning that it was not "appropriate" legislation to enforce the Thirteenth Amendment. In Johnson's view, Congress could legislate only in response to an actual or imminent violation of the Amendment's prohibitory clause. Because slavery had "been abolished" and it was not "likely there will be any attempts to revive it," Congress had acted prematurely.[103] Congress promptly overturned Johnson's veto by an overwhelming margin, and Justice Noah Swayne, riding circuit, upheld the Act in *United States v. Rhodes*.[104] The term "appropriate," Swayne accurately recounted, had been drawn from *McCulloch v. Maryland*.[105] And in *McCulloch*, Chief Justice Marshall had written that it would "tread upon legislative ground" for the judiciary to inquire into the "degree of necessity" of legislation enacted by Congress to carry out constitutional purposes.[106] Furthermore, continued Swayne, now quoting Justice Joseph Story's influential treatise, Congress

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[100] *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876, at 99 (1985); SWINNEY, *supra* note 82, at 235, 263; TRELEASE, *supra* note 77, at 399–413; WILLIAMS, *supra* note 87, at 38, 122–23.

[101] U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

[102] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

[103] *Veto of the Civil Rights Bill, Andrew Johnson, March 27, 1866*, TEACHINGAMERICANHISTORY.ORG, http://teachingamericanhistory.org/library/document/veto-of-the-civil-rights-bill/ (last visited Mar. 8, 2014), *archived at* http://perma.cc/9RMX-UPQQ. Johnson continued: "If, however, any such attempt shall be made, it will then become the duty of the General Government to exercise any and all incidental powers necessary and proper to maintain inviolate this great law of freedom." *Id.*

[104] 27 F. Cas. 785, 791–94 (Swayne, Circuit Justice, C.C.D. Ky. 1866) (No. 16,151). This holding was later approved by the full Court in *United States v. Harris*, 106 U.S. 629, 640 (1882) (dictum).

[105] *Rhodes*, 27 F. Cas. at 791, 793; ZIETLOW, *supra* note 35, at 54; Jack M. Balkin, *The Reconstruction Powers*, 85 N.Y.U. L. REV. 1801, 1810–11 n.34 (2010).

[106] *Rhodes*, 27 F. Cas. at 791 (quoting McCulloch v. Maryland, 17 U.S. 316 (1819)).

> must have a wide discretion as to the choice of means; and the only limitation upon the discretion would seem to be that the means are appropriate to the end; and this must admit of considerable latitude, for the relation between the action and the end, as has been justly remarked, is not always so direct and palpable as to strike the eye of every observer.[107]

Under this principle, the Civil Rights Act fell within Congress's power not because the prohibited practices — the denial of specified civil rights enjoyed by white people such as the right to testify in court — fell within the definition of slavery or involuntary servitude, but because, without the Act's protections, "the worst effects of slavery might speedily follow."[108]

Applying this approach, federal circuit and district courts gave Congress wide latitude to reach private action under the Fourteenth and Fifteenth Amendments. In *United States v. Hall*,[109] the first reported decision to apply the Enforcement Act of 1870, the circuit court upheld the indictments of Klan members for violating the rights of four black men to freedom of speech and assembly.[110] Circuit Judge and future Supreme Court Justice William B. Woods felt "safe" in including the freedoms of speech and assembly among the "privileges or immunities" protected by the Fourteenth Amendment because they were "expressly secured to the people" in the Bill of Rights.[111] Furthermore, the Amendment prohibited states from denying to any person equal protection of the laws, and "[d]enying includes inaction as well as action." In the event of "state inaction" in protecting fundamental rights, Congress had the power to pass laws that would "operate directly" on private individuals.[112] Woods did not require any allegations of state inaction in the particular case. Instead, he announced a broad rule of deference to Congress: "The extent to which congress shall exercise this power must depend on its discretion in view of the circumstances of each case."[113] In *United States v. Crosby*,[114] another circuit court upheld the indictments of Klan members for violating the right of a black man to vote.[115] Like Woods

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[107] *Id.* at 792 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 432 (1833)).

[108] *Id.* at 794.

[109] 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).

[110] *See id.* at 82. The opinion did not mention the Klan or the race of the victims; for the factual context, an armed attack on a Republican campaign rally in Eutaw, Alabama, see FONER, *supra* note 2, at 427; and Melinda Meek Hennessey, *Political Terrorism in the Black Belt: The Eutaw Riot*, 33 ALA. REV. 35, 44–48 (1980).

[111] *Hall*, 26 F. Cas. at 81.

[112] *Id.*; PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 48 (2011).

[113] *Hall*, 26 F. Cas. at 81.

[114] 25 F. Cas. 701, 704–05 (C.C.S.C. 1871) (No. 14,893).

[115] *Id.* Here again, the opinion did not mention the Klan or the race of the victim; for the factual context, see KACZOROWSKI, *supra* note 100, at 98–99. It is sometimes said that *Crosby* rejected the claim that the Privileges or Immunities Clause incorporated the Bill of Rights. However, the indictment charged only one violation of an enumerated right, the right to be free

in *Hall*, Circuit Judge Hugh L. Bond did not require allegations of state action or inaction in the case at bar. Instead, he deferred to Congress, which "may have thought that legislation most likely to secure the end in view which punished the individual citizen who acted by virtue of a state law or upon his individual responsibility."[116] Echoing *McCulloch v. Maryland*, Bond explained: "If the act be within the scope of the amendment, and in the line of its purpose, congress is the sole judge of its appropriateness."[117]

Lower courts also refrained from requiring proof of racial motivation in cases involving civil rights violations. In *Crosby*, for example, the first count alleged simply that the defendants had conspired to violate the Enforcement Act of 1870 by hindering male citizens "of African descent" who were "qualified to vote . . . , from exercising the right and privilege of voting."[118] Klan attorneys Senator Reverdy Johnson and former U.S. Attorney General Henry Stanbery, among the most eminent lawyers of their time, objected to this count on six separate grounds but did not challenge the failure to allege a racial motivation.[119] Circuit Judge Bond explained in a later case that the prosecution need not charge racial motivation under the Fourteenth or Fifteenth Amendments because "where experience has shown the obstruction of voters on account of race and color cannot be, in the judgment of congress, otherwise prevented, it is appropriate legislation to provide by statute that no such obstruction shall take place at all."[120] Although the district court judges were more closely integrated with local elites, all but two of the eleven involved in enforcement cases upheld the constitutionality of the Enforcement Acts and joined the circuit judges in presiding over numerous convictions including 49 in North Carolina, 154 in South Carolina, and 597 in northern Mississippi, the main centers of Klan activity between 1868 and 1871.[121]

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from unreasonable searches and seizures. *Crosby*, 25 F. Cas at 704. Given that there was no allegation of state action, this conclusion could have reflected either an understanding that the Fourth Amendment covered only "searches and seizures" conducted by government and not by private individuals (in which case the court was not rejecting incorporation), or that the Privileges or Immunities Clause did not incorporate the Bill of Rights.

[116] *Crosby*, 25 F. Cas. at 704.

[117] *Id.*; *cf.* McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

[118] Proceedings in the Ku Klux Trials at Columbia, S.C., in the United States Circuit Court, November Term, 1871, at 826, 833 (1872) [hereinafter Klan Trial Proceedings].

[119] *Crosby*, 25 F. Cas. at 703–04.

[120] United States v. Petersburg Judges of Election, 27 F. Cas. 506, 509 (C.C.E.D. Va. 1874) (No. 16,036). The reference to voters might seem to limit the statement to the Fifteenth Amendment, but Bonds stated the issue as follows: "The question then is whether or not there is constitutional power in congress to protect a citizen of the United States, qua citizen, in the exercise of the elective franchise, either by force of the fourteenth or fifteenth amendment of the constitution." *Id.* at 507.

[121] Kaczorowski, *supra* note 100, at 56, 99, 106–07; Swinney, *supra* note 82, at 235, 263. The larger figure for Mississippi reflected Judge Robert A. Hill's policy of lenient punishment, which made possible numerous in-court confessions. *Id.* at 263, 267–68.

By 1872, Frederick Douglass could observe with satisfaction that the "scourging and slaughter of our people have so far ceased."[122] Despite the tiny proportion of perpetrators actually imprisoned, the federal government, together with southern witnesses and juries, had reestablished a degree of law and order in most of the South.[123] The election of 1872, the most peaceful of the Reconstruction era, saw Republican victories across the South, including the recovery of the Alabama governorship, the only time that democracy was restored in a state that had been "redeemed" by the Democracy.[124] After the election, it appeared that African Americans might be able to exercise their constitutional rights without risking torture and death. At this juncture, however, the Justices of the United States Supreme Court intervened.

II. The Supreme Court and the Abrogation of Law and Order, 1874–1877

Before the Civil War, the Supreme Court had embraced a broad, purposive approach toward Congress's power to enforce individual rights. The Court upheld the Fugitive Slave Act of 1793 in the leading case of *Prigg v. Pennsylvania*.[125] The Act was grounded on the so-called Fugitive Slave Clause, which provided that fugitives from labor "shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[126] Justice Joseph Story, writing for the Court, determined that this clause "manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave" to the return of his human property.[127] The clause did not, however, mention Congress or governmental powers, and it was located outside Article I, where the powers of Congress were listed. Nevertheless, the Court implied a power to legislate. Justice Story defended this result in purposive terms.

> If by one mode of interpretation the right must become shadowy and unsubstantial, and without any remedial power adequate to the end; and by another mode it will attain its just end and secure its manifest purpose; it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail.[128]

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[122] Lane, *supra* note 6, at 5.

[123] David Chalmers, Hooded Americanism: The History of the Ku Klux Klan 19 (1987); Foner, *supra* note 2, at 458–59; Hahn, *supra* note 2, at 286; Swinney, *supra* note 82, at 235; Trelease, *supra* note 77, at 415; Xi Wang, The Trial of Democracy: Black Suffrage and Northern Republicans, 1860–1910, at 100 (1997); Williams, *supra* note 87, at 112.

[124] Foner, *supra* note 2, at 508.

[125] 41 U.S. 539, 626 (1842).

[126] U.S. Const. art. IV, §2, cl. 3.

[127] *Prigg*, 41 U.S. at 612.

[128] *Id.*

Applying that approach, he catalogued the practical difficulties entailed in hunting down fugitives without the aid of legislation, and concluded that the Constitution, having endowed the slave master with the right to recover his escaped slave, must also have authorized Congress to make that right effective through legislation.[129]

After the war, Republican leaders in Congress cited *Prigg* for the proposition that Congress enjoyed sweeping authority to enforce the rights of freed people and their allies. "I cannot yield up the weapons which slavery has placed in our hands now that they may be wielded in the holy cause of liberty and just government," declared Representative James Wilson of Iowa, floor manager of the 1866 Civil Rights bill.[130] "We will turn the artillery of slavery upon itself."[131] Indeed, it appeared that Congress had not only re-aimed the artillery of slavery, but also upgraded it. While the power of Congress to protect slaveholders' rights, recognized in *Prigg*, had rested on mere implication, Congress had included express grants of power in each of the Reconstruction Amendments. Moreover, while *Prigg* had implied only a power to address private violations of the slaveholders' rights, Congress appeared to have dispensed with that limitation by mentioning states explicitly in the Fourteenth and Fifteenth Amendments.[132]

Prigg's broad concept of Congress's power to enforce rights was not applied, however, in any Reconstruction-era Supreme Court opinion involving black rights save one. In *Hall v. De Cuir*,[133] Justice Clifford cited *Prigg* to justify striking down, on federal preemption grounds, a Louisiana state law that gave people of color the right to ride in the same steamboat cabin as whites.[134] The Justices, not Congress, aimed the artillery of slavery. First Justice Bradley and then the full Court fired their most devastating salvos in *United States v. Cruikshank*.

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[129] *Id.* at 610–12, 616.

[130] CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).

[131] *Id.*; *see also* Robert J. Kaczorowski, *The Enduring Legacy of the Thirteenth Amendment*, *in* THE PROMISES OF LIBERTY, *supra* note 56, at 300, 308–09. For other quotations, see Robert Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: A Moral Anomaly*, 73 FORDHAM L. REV. 153, 206–09 (2004).

[132] *Prigg*, 41 U.S. at 622; Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1357–58 (1964) (suggesting that, in view of *Prigg*'s holding that "the mere recognition of a right in the federal Constitution gives Congress power to protect it from interference by private acts" but not "to exercise any control over a state's officers and agencies," it is easier to understand how the Framers — who enacted no fewer than three statutes enforcing the Fourteenth and Fifteenth amendments against private individuals — would believe that the Amendments granted powers "which would extend not only to private acts, but *even* to state action" (internal quotation marks omitted)).

[133] 95 U.S. 485 (1878).

[134] *Id.* at 499 (Clifford, J., concurring).

A. Justice Bradley's Circuit Court Opinion in Cruikshank

As related above, *Cruikshank* arose out of majority-black Grant Parish, Louisiana. Although the election of 1872 had been relatively orderly, local Democrats were able to rig the count, claim a victory, and occupy the courthouse. Uncowed, the Republicans seized the courthouse and organized a mostly black "posse" to defend it.[135] This was a period of relative calm in most of the South, brought on by the initial success of Enforcement Act prosecutions. But to the white supremacists of Grant Parish, the Republicans' assertive, mixed-race action constituted an intolerable provocation. Both sides built up their forces and, after a pitched battle on Easter Sunday, 1873, the Democrats burned the courthouse and massacred some thirty to fifty black prisoners.[136] A mostly white jury convicted three defendants of violating section 6 of the Enforcement Act of 1870 by conspiring to interfere with the rights of two black Republicans to assemble peaceably, to bear arms, to enjoy life and liberty unless deprived thereof by due process of law, to enjoy the equal benefit of all laws, and to vote.[137] Justice Joseph P. Bradley, riding circuit in New Orleans, joined Circuit Judge William B. Woods on the bench during trial. On June 27, 1874, Bradley announced his opinion overturning the convictions. Judge Woods disagreed, splitting the court and ensuring Supreme Court review.

Considered in context, Bradley's ruling arguably surpasses that of the full Court in historical importance. It came at a time when the forces favoring and opposing Reconstruction were closely balanced. Because Bradley had recently conferred with his fellow Justices in Washington, his opinion was widely viewed as a harbinger of the full Court's ruling.[138] Its impact, both in the law books and on the ground, bears out Pamela Brandwein's claim that it "is an unrecognized milestone in American constitutional development" the significance of which "cannot be overstated."[139] Even after the Court announced its own opinion in 1876, Bradley's would sometimes be cited in preference, including by the Court itself.[140]

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[135] LANE, *supra* note 6, at 65–66, 70.

[136] *See supra* text accompanying notes 6–11 .

[137] United States v. Cruikshank, 92 U.S. 542, 548 (1876); LANE, *supra* note 6, at 194.

[138] BRANDWEIN, *supra* note 112, at 93; KACZOROWSKI, *supra* note 100, at 151; *Town Talk*, NEW ORLEANS DAILY PICAYUNE, June 28, 1874, at 1 (commenting that "this ruling of Justice Bradley, bearing as it does an earnest of the Supreme Court's future action — for Justice Bradley returned to Washington while considering the case" confirmed the view that "Woods was unduly prejudiced against the prisoners").

[139] BRANDWEIN, *supra* note 112, at 16, 25, 93.

[140] *Id*. at 93. Bradley was widely recognized as the Court's intellectual leader. *See* JOHN BRAEMAN, BEFORE THE CIVIL RIGHTS REVOLUTION: THE OLD COURT AND INDIVIDUAL RIGHTS 64 (1988); BRANDWEIN, *supra* note 112, at 6–7. Chief Justice Waite, who wrote the full Court's opinion in *Cruikshank*, commented two years later in connection with another case: "I will take the credit, and you shall do the work, as usual." C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 299 (1963).

Jurisprudentially, Bradley's opinion provided the first clear indication that the Supreme Court would adopt a highly critical approach toward legislation enforcing the Reconstruction Amendments. It prefigured the full Court's ruling in establishing three enormously important doctrines that continue to constrain civil rights enforcement today: the state action doctrine, the requirement of proving intentional discrimination, and the withholding of deference to Congress on the choice of "appropriate" means to enforce the Reconstruction Amendments.[141] Bradley began with a discussion of Justice Story's opinion in *Prigg v. Pennsylvania*.[142] In *Prigg*, as noted above, the Court had held that Congress possessed an implied power to enforce the right of slaveholders to the return of their human property. In *Cruikshank*, by contrast, there was no need to imply powers to enforce the rights of freed slaves, because those powers were expressly granted in the enforcement clauses of the Reconstruction Amendments. Nevertheless, Bradley quoted at length Story's response to the objection that the Constitution contained no grant of power to enforce the Fugitive Slave Clause:

> Stripped of its artificial and technical structure, the argument comes to this, that, although rights are exclusively secured by, or duties are exclusively imposed upon, the national government, yet, unless the power to enforce these rights or to execute these duties can be found among the express powers of legislation enumerated in the constitution, they remain without any means of giving them effect by any act of congress, and they must operate solely proprio vigore, however defective may be their operation; nay, even although in a practical sense, they may become a nullity from the want of a proper remedy to enforce them, or to provide against their violation. If this be the true interpretation of the constitution, it must, in a great measure, fail to attain many of its avowed and positive objects as a security of rights and a recognition of duties.[143]

At first glance, this passage might appear to support an expansive view of congressional power. Story had "[s]tripped" away considerations of "artificial and technical" doctrine to ensure that the enforcement of slaveholders' rights would not be rendered "defective," or the rights reduced to a "nullity." Had Bradley chosen, he could have applied this purposive approach to the freed people's rights guaranteed by the Reconstruction Amendments.[144] Only one year before, the Supreme Court had emphasized that

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[141] United States v. Cruikshank, 25 F. Cas. 707, 713–15 (Bradley, Circuit Justice, C.C.D. La. 1874) (No. 14,897).

[142] *Id.* at 710.

[143] *Id.* (quoting Prigg v. Pennsylvania, 41 U.S. 539, 618 (1842)).

[144] Justice Noah Swayne had taken this approach in *United States v. Rhodes*, 27 F. Cas. 785, 793 (Swayne, Circuit Justice, C.C.D. Ky. 1866) (No. 16,151), citing *Prigg* for the principle that constitutional provisions should be interpreted "to give to the words of each just such

"the one pervading purpose" of the Amendments was "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[145] Further, the Court had set forth the general principle that

> in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.[146]

As Justice Swayne and Circuit Judges Woods and Bond had shown, the texts of the amendments provided ample room for Congress to fulfill that purpose.[147]

But Bradley chose to ignore the purposes of the Reconstruction Amendments. Instead, he drew from Story's opinion the principle that the method of enforcing a constitutional right "will depend upon the character of the right conferred."[148] Because the rights of assembly, of bearing arms, and of due process were all — unlike the slaveholders' rights in *Prigg* — natural rights originally protected by the states, they called for a different method of enforcement. The Fourteenth Amendment prohibited only the states and not private individuals from denying these rights, observed Bradley — on that point in accord with Circuit Judges Woods and Bond.[149] But where Woods and Bond had deferred to Congress's determination that regulating private action was "appropriate" under the circumstances, Bradley seized on the term "enforce" and read it to require that Congress respond only to specific state violations. He overturned the counts alleging interference with the rights of assembly, of bearing arms, and of due process on the ground that they failed to allege any state violation of those rights. In words that recalled President Andrew Johnson's explanation for vetoing the Civil Rights Act of 1866, he declared: "Power to enforce the amendment is all that is given to congress. If the amendment is not violated, it has no power over the subject."[150] Despite the sensational and well-known collapse of state enforcement, documented in voluminous congressional testimony,[151]

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operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed." *Id.* (quoting *Prigg*, 41 U.S. at 610–11).

[145] The Slaughter-House Cases, 83 U.S. 36, 71 (1873).

[146] *Id.* at 72.

[147] *See supra* notes 104–120 and accompanying text.

[148] *Cruikshank*, 25 F. Cas. at 710.

[149] *Id.* at 710–11, 714–15.

[150] *Id.* at 714–15. Bradley repeated this explanation in *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

[151] *See* 42D CONG, REP. OF THE JOINT SELECT COMMITTEE TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES (Comm. Print 1872). Although assembled in the midst of partisan strife, the material contained in this report is highly regarded by historians. TRELEASE, *supra* note 77, at 392, 394.

Bradley chose not to consider the possibility that legislation prohibiting private interference might be "appropriate" under the amendments. In Justice Story's terminology, it might be said that Bradley accepted the defendants' "artificial and technical" state action argument without considering whether it would render enforcement "defective" or reduce the freed people's rights to a "nullity."[152]

Where Story had stressed effective rights enforcement, Bradley evinced a strong concern for state autonomy. If Congress were permitted to reach private action, he worried, it might enact a comprehensive federal "system of municipal law for the security of person and property."[153] As discussed below, this fear was not entirely without a logical basis.[154] It is noteworthy, however, that Bradley invoked state autonomy to justify overturning federal actions that, far from interfering with southern state governments, bolstered their authority against paramilitary insurgents.[155] The federal and state governments were aligned on the same side of a struggle to preserve law and order, normally a cardinal judicial concern. The *Cruikshank* case itself well illustrates this alignment; the State of Louisiana had secured 140 indictments only to drop the cases after a crowd of armed defendants and supporters threatened its prosecutor with death.[156] In the name of state autonomy, then, Bradley blocked the federal government from assisting state governments in the preservation of their own authority. To Bradley, apparently, the actual and immediate threat of paramilitary insurrection paled beside the hypothetical possibility of future congressional intrusions on state autonomy.

As for the counts charging conspiracy to deprive African Americans of rights enjoyed by white citizens, Bradley faulted the prosecution for failing to allege that the defendants had acted "with a design" to harm their victims "on account of their race, color, or previous condition of servitude."[157] Where Circuit Judge Bond had deferred to "the judgment of congress" that interference with rights "on account of race and color" could not be prevented without dispensing with proof of racial motivation, Bradley showed no concern either for Congress's judgment or for the practicalities of enforcement.[158] Instead, he again fretted that Congress might enact "an entire body of municipal law," this time adding that such law would be "for the protection and benefit of a particular class of the community,"[159] a charge

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[152] Prigg v. Pennsylvania, 41 U.S. 539, 618 (1842); *cf.* The Civil Rights Cases, 109 U.S. 3, 26, 28–30 (1883) (Harlan, J., dissenting) (discussing *Prigg*'s purposive approach to congressional power at length, and opining that "I cannot resist the conclusion that the substance and spirit of the recent amendments of the constitution have been sacrificed by a subtle and ingenious verbal criticism").

[153] *Cruikshank*, 25 F. Cas. at 711.

[154] *See infra* text accompanying note 163.

[155] *See supra* text accompanying notes 95–99.

[156] LANE, *supra* note 6, at 142–43.

[157] *Cruikshank*, 25 F. Cas. at 715.

[158] United States v. Petersburg Judges of Election, 27 F. Cas. 506, 509–10 (C.C.E.D. Va. 1874) (No. 16,036).

[159] *Cruikshank*, 25 F. Cas. at 714.

that echoed white supremacists' allegations of "class legislation" and prefigured his later characterization of African Americans as "special favorite[s] of the law."[160] He acknowledged that the indictment arguably satisfied the requirement anyway, as racial motivation "may be inferred from the allegation that the persons injured were of the African race, and that the intent was to deprive them of the exercise and enjoyment of the rights enjoyed by white citizens," but nevertheless insisted upon technical exactitude.[161] Federalism and due process also prevailed on the counts charging interference with the right to vote. Here again, despite the abundant evidence of race hatred presented at trial, Bradley chose to announce and enforce a pleading requirement of specifying racial motivation.[162]

Bradley's concern about the theoretical slippery slope toward federal intrusions into state "municipal law" was not without a basis. Section 6 of the Enforcement Act could have been read to criminalize almost any conspiracy by any persons to interfere with virtually any right of any other person.[163] Circuit Judges Woods and Bond had avoided this problem by holding simply that the defendants' actions were reachable by Congress. They felt no necessity to demarcate the outer limits either of the Enforcement Act or of Congress's authority, probably because their cases — like *Cruikshank* — involved painfully obvious state failures to enforce black rights in situations where the salience of race was undoubted. Boundaries could be drawn later, in a case that arguably involved overreaching. Bradley, on the other hand, found it necessary not only to mark a new, tight boundary, but also to enforce it retroactively on a state of facts that arguably fell within that boundary. The point is not that Bradley was technically wrong, and Woods and Bond correct. It is, rather, that Bradley reached out to narrow the Amendments and release the perpetrators on the basis of concerns not raised on the facts of the case, and in a context where the very existence of official law and order was at stake.

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[160] The Civil Rights Cases, 109 U.S. 3, 25 (1883) (Bradley, J.). On the charge of class legislation, see *supra* note 80.

[161] *Cruikshank*, 25 F. Cas. at 715. Bradley also objected to the vagueness of these counts, which charged that the defendants had aimed "to prevent and hinder them in the free exercise and enjoyment of their several and respective right and privilege to the full and equal benefit of all laws and proceedings then and there enacted" without specifying any particular laws or proceedings. *Id.* Here, Bradley was not innovating. In *United States v. Crosby*, 25 F. Cas. 701, 704 (C.C.S.C. 1871) (No. 14,893), for example, the defense had objected that a similar count had "not averred what were the laws, Federal or State, of the protection of which [the victim] was so deprived." KLAN TRIAL PROCEEDINGS, *supra* note 118, at 834 (ninth count). Judge Bond joined in striking this count for vagueness. *Crosby*, 25 F. Cas. at 704.

[162] *Cruikshank*, 25 F. Cas. at 715. On the evidence of race hatred presented at trial, see LANE, *supra* note 6, at 105–06.

[163] KACZOROWSKI, *supra* note 100, at 94. Section 6 made it a felony to conspire "to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same." Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140, 141.

To be sure, not all of Bradley's pronouncements were unfavorable to enforcement. In dictum, he exempted the Fifteenth Amendment from any requirement of state action or neglect, an opening that was later exploited (albeit rarely) by federal prosecutors.[164] Moreover, his concept of state neglect might have allowed more room for enforcement than does the present-day doctrine of state action, a possibility never tested by Congress or prosecutors on behalf of African Americans.[165] His discussion of the Thirteenth Amendment strongly affirmed that it empowered Congress to reach private action, but he then narrowed the scope of the Amendment to cover only private action motivated by race.[166] Interestingly, Bradley also affirmed — notwithstanding the recently issued *Slaughter-House Cases* — that the Privileges or Immunities Clause of the Fourteenth Amendment incorporated rights that were enumerated in the Constitution, including the rights to assemble peaceably and to bear arms (a view that would soon be rejected by the full Court in *Cruikshank*).[167] These dicta holding out the theoretical possibility of future enforcement did nothing, however, to blunt the force of the holdings in emboldening white supremacists, discouraging prosecutors, or demoralizing Republicans across the South. In the words of legal historian Robert Kaczorowski, the "nuances of Bradley's constitutional analysis were not clearly understood by contemporaries, but the end result certainly was."[168]

B. The Impact of Justice Bradley's Ruling on the Ground

Immediately after Bradley's ruling, federal officials predicted that it would unleash white supremacists to resume their campaign of violence across the South, and they were soon proven correct.[169] Whites celebrated in Colfax by holding a mass meeting, riding out in the night, and slitting the throat of Frank Foster, a black man who happened to be walking along the road. Two days later, Christopher Columbus Nash, the first named defendant in the *Cruikshank* indictment, led an armed force to a nearby town and ejected five Republican officials from office.[170] In August, a crowd of whites that reportedly included Nash marched to the Republican stronghold of Coushatta and murdered three leading African Americans, torturing one to death in front of a crowd. The next day, armed white supremacists executed six white Republican office holders, one of whom had warned that

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[164] *Cruikshank*, 25 F. Cas. at 713; BRANDWEIN, *supra* note 112, at 100; Frantz, *supra* note 132, at 1369–70.

[165] *Cruikshank*, 25 F. Cas. at 709–10, 714; BRANDWEIN, *supra* note 112, at 153.

[166] *Cruikshank*, 25 F. Cas. at 711–12.

[167] *Id.* at 714–15 ("Grant that this prohibition now prevents the states from interfering with the right to assemble, as being one of such privileges and immunities . . . .").

[168] KACZOROWSKI, *supra* note 100, at 155.

[169] *Id.* at 151, 155.

[170] KEITH, *supra* note 6, at 148–49; LANE, *supra* note 6, at 215; LEMANN, *supra* note 72, at 25.

resistance would be futile "thanks to Justice Bradley."[171] Coushatta marked the first time that white supremacists had staged a massacre of their own race.[172] Within two months of Bradley's ruling, the incidence of terrorism had already risen so sharply "that contemporary observers described the mayhem as a new phase in the South's rebellion against national authority begun in 1861."[173]

This new phase differed qualitatively from the previous round of violence. Bradley's ruling had come at a crucial juncture for the white supremacist movement. Its first campaign of violence, characterized by widespread vigilantism conducted mainly at night and in disguise, had been brought to an end by strong enforcement legislation and a series of moderately successful prosecutions.[174] The Battle of Colfax Courthouse inspired the idea for a second campaign, in which night riding would be replaced with daytime, undisguised paramilitary action to eliminate centers of black organization and Republican political power.[175] Pending a ruling in *Cruikshank*, however, the legal consequences of such tactics remained unclear and the period of relative peace continued. Bradley's ruling opened the floodgates. White supremacists now believed that they could act with impunity.[176] In the three black-majority states, where the Democrats had been divided between moderates and "straight-out" militants, Bradley's ruling tipped the balance toward the straight-outs.[177] During the three months following the ruling, White Leagues ousted Republican officials from twelve Louisiana parishes.[178] Democratic Party leaders launched a campaign of terrorist assaults on Republican-controlled towns and cities across the South including, most

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[171] KEITH, *supra* note 6, at 149; LANE, *supra* note 6, at 218; LEMANN, *supra* note 72, at 76; TED TUNNELL, CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM, AND RACE IN LOUISIANA 1862–1877, at 199 (1984).

[172] LANE, *supra* note 6, at 218.

[173] HAHN, *supra* note 2, at 295–97; KACZOROWSKI, *supra* note 100, at 155.

[174] *See supra* notes 122–23 and accompanying text.

[175] *See* HOGUE, *supra* note 6, at 115–16; JAMES K. HOGUE, THE 1873 BATTLE OF COLFAX: PARAMILITARISM AND COUNTERREVOLUTION IN LOUISIANA (2006), *available at* http://warhistorian.org/mershon/hogue-colfax.pdf, *archived at* http://perma.cc/8V59-UUAZ. On the distinctiveness of the new phase of violence, see also MICHAEL PERMAN, THE ROAD TO REDEMPTION: SOUTHERN POLITICS, 1869–1879, at 169–70 (1984); and RABLE, *supra* note 81, at 132.

[176] *See* KACZOROWSKI, *supra* note 100, at 155–56 (recounting that Bradley's "*Cruikshank* ruling was widely publicized as a decisive blow to national civil rights enforcement authority," that "Democratic Conservatives became increasingly confident that the permanent elimination of Enforcement Act prosecutions was at hand," and that violence "exploded in the wake of Bradley's decisions"); LANE, *supra* note 6, at 212–13 (reporting that the white supremacist press hailed Bradley's ruling as "effectively suspend[ing] federal law enforcement in Louisiana and the rest of the Deep South, so that white men could now resist Negro abuses without interference"); VALELLY, *supra* note 3, at 114–15 (observing that Bradley's "circuit opinion touched off a disastrous reversal of the fragile southern peace that the administration had earlier secured," that conservatives read the opinion as "an unmistakable signal of a deliberate shift in national policy," and that the "United States Attorney for Louisiana correctly thought that the price of Bradley's fateful ruling would be 'five hundred lives' in the fall election campaign").

[177] *See* VALELLY, *supra* note 3, at 115.

[178] HOGUE, *supra* note 6, at 198.

spectacularly, New Orleans, Louisiana (September 14, 1874), Eufaula, Alabama (November 3, 1874), Vicksburg, Mississippi (December 7, 1874 and September 2, 1875), Yazoo City, Mississippi (September 1, 1875), Clinton, Mississippi (September 5, 1875), Friar's Point, Mississippi (October 2, 1875), and Hamburg and Ellenton, South Carolina (July 4 and September 16, 1876).[179] At the same time, the Democrats forthrightly called for a "white man's government," disapproved Klan-style violence, and characterized the paramilitary actions as self-defense. These tactics helped the Democratic Party to regain control of Alabama (47% black) in 1874 and Mississippi (more than 50% black) in 1875.[180] "White supremacists had," concludes historian James Hogue, "at last discovered the mix of paramilitary action and racialized politics that just might jettison Reconstruction . . . across the entire South."[181]

As expected, Bradley's ruling decisively disrupted federal enforcement efforts. U.S. Attorney General George Williams directed *Cruikshank* prosecutor James Beckwith to take no action on cases raising similar issues and ordered an end to Enforcement Act prosecutions in Tennessee "until it is known whether the Supreme Court will hold them to be constitutional or otherwise."[182] In Mississippi, where White League units murdered some three hundred African Americans during the six months following Bradley's ruling, the enforcement effort — previously among the most vigorous in the South — petered out as the Department of Justice dropped 179 pending prosecutions.[183] The U.S. Attorney for Mississippi complained that the new surge in terrorism made it "impossible to get the witnesses, *who have personal knowledge of the facts*, to tell the truth . . . for fear of their lives, or for considerations of policy, protection of personal friends, accomplishment of political and party purposes,"[184] and U.S. District Judge Robert A. Hill instructed him to cease prosecuting until the Supreme Court ruling.[185] Even the stalwart Judge Woods, whose Circuit extended across the deep South from Texas to Georgia and Florida, decided to cease trying "cases which

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[179] *See* HOGUE, *supra* note 6, at 127–28; LEMANN, *supra* note 72, at 108–10, 111–18, 139–42; PERMAN, *supra* note 175, at 170; RABLE, *supra* note 81, at 116–17, 154–56; SWINNEY, *supra* note 82, at 319–20; VALELLY, *supra* note 3, at 115.

[180] RABLE, *supra* note 81, at 114–18; SWINNEY, *supra* note 82, at 319.

[181] HOGUE, *supra* note 6, at 115.

[182] *See* KACZOROWSKI, *supra* note 100, at 158 (quoting Letter from George Williams to W. W. Murray (May 4, 1875), *microformed on* M701, Reel 5, Instruction Book E, at 443–44 (Gen. Recs. of the Dep't of Justice, U.S. Nat'l Archives)) (internal quotation marks omitted). Confronted with the spectacular wave of terrorism immediately following Bradley's ruling, Williams did issue a circular in September 1874 calling for vigorous enforcement, but that policy was quickly aborted. *Id.* at 156, 158.

[183] LANE, *supra* note 6, at 243.

[184] MAGRATH, *supra* note 140, at 125 (quoting Letter from Henry B. Whitfield, Dist. Att'y, to Edwards Pierrepont (Nov. 6, 1875) (on file with Chronological File (Mississippi), U.S. Nat'l Archives)); *see also* Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870–1890*, 53 J. S. HIST. 421, 432–35 (1987) (describing difficulties with witnesses and intimidation).

[185] KACZOROWSKI, *supra* note 100, at 158.

raise the questions now before the Supreme Court until the Court lets us have its opinion."[186] Rates of conviction in southern civil rights prosecutions fell from 36–49% in 1871–1873 to less than 10% after 1874.[187] During the two years between Bradley's ruling and that of the full Court — a period of ferocious terrorism — only a handful of civil rights violations were successfully prosecuted.[188] As summarized by Louisiana Governor William Pitt Kellogg, Bradley's order had effectively "establish[ed] the principle that hereafter no white man could be punished for killing a negro."[189]

C. Justice Bradley and the "Normal Condition" of Southern Labor

Given his leading role, the question inevitably arises as to why Bradley — a loyal Republican — chose to cut back so sharply on the authority of his colleagues in Congress and the executive branch. In a recent and important book, Pamela Brandwein has proposed that the answer may be found in principled considerations of constitutional doctrine. She argues that the dismissal of the indictments in *Cruikshank*, as explained in Bradley's opinion and that of the full Court, was "comprehensible within a doctrinal framework" and not "a way of disallowing punishment for a massacre."[190]

Brandwein's careful and illuminating analysis of Bradley's doctrinal choices does not, however, support this conclusion. Instead, we see Bradley alternately applying and eliding various doctrinal principles as he moves from issue to issue. Starting with the constitutional text, both the Fourteenth and Fifteenth Amendments contain language that could be read to support a judicially enforceable requirement of state action ("No state shall" in the Fourteenth, and "denied or abridged . . . by any State" in the Fifteenth).[191] But Bradley chose to follow this language with regard to the Fourteenth but not the Fifteenth.[192] To explain this apparent inconsistency, he pointed to the

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[186] Letter from Judge William B. Woods to Justice Joseph P. Bradley (Dec. 28, 1874) (on file with the New Jersey Historical Society, MG 26, box 3, Joseph P. Bradley Papers, New Jersey Historical Society, Newark, N.J.).

[187] SWINNEY, *supra* note 82, at 317.

[188] KACZOROWSKI, *supra* note 100, at 157; VALELLY, *supra* note 3, at 116.

[189] KEITH, *supra* note 6, at 147 (quoting H. SELECT COMM. ON THE CONDITION OF THE SOUTH, 81ST CONG., REP. ON THE CONDITION OF THE SOUTH 246 (Comm. Print 1875) (testimony of William Pitt Kellogg)) (internal quotation marks omitted).

[190] BRANDWEIN, *supra* note 112, at 119–20. For other defenses of Bradley's opinion, see HERMAN BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA 137 (1978); CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864–88, PART II, at 266–69 (1987).

[191] U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1.

[192] Bradley stated categorically that when "acknowledged rights and privileges of the citizen, which form a part of his political inheritance derived from the mother country . . . are secured in the constitution of the United States only by a declaration that the state or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the constitution, but that the constitution only guaranties that they shall not be impaired by the state, or the United States, as the case may be." United States v. Cruikshank, 25 F. Cas. 707, 710 (Bradley, Circuit Justice, C.C.D. La. 1874) (No. 14,897). Yet,

distinction between "natural rights," which preexisted the Constitution and were to be enforced by the states in the first instance, and rights "created" by the U.S. Constitution that might go unenforced if the federal government lacked power to enforce them directly.[193] Unlike the Fourteenth Amendment, he wrote, the Fifteenth conferred "a positive right which did not exist before," namely the right to be free from racial discrimination in exercising the preexisting right to vote, and therefore could be enforced by the federal government directly.[194] Brandwein acknowledges that Bradley thus "dispensed with the text" of the Fifteenth Amendment but argues that the distinction between "created" rights and preexisting rights provided a rationale that "had integrity and was used in a consistent manner across different cases."[195] Unfortunately for this claim, however, Bradley proceeded to ignore that distinction altogether in his discussion of the Thirteenth Amendment, which protected preexisting, natural rights of personal liberty and therefore appeared to call for a state action requirement under his theory. There, he turned instead to the text of the Amendment, which contained no prohibition directed at the states.[196] After frankly exposing this difficulty, Brandwein concludes that Bradley's thinking was unstable and aptly observes that "instability is a feature of Bradley's jurisprudence."[197]

We have yet to consider, however, the single most important manifestation of this instability, namely Bradley's selective deference to Congress. Throughout most of his opinion, he accorded Congress no deference whatever, reading the Amendments legalistically and implicitly claiming exclusive judicial authority to interpret and apply them. With regard to the Fifteenth Amendment, however, Bradley rediscovered his respect for Congress as a co-equal branch of government. Having announced that the Amendment was exempt from any requirement of state action or neglect, he explained:

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he found in the Fifteenth Amendment a newly created right that could be enforced against private individuals. *Id.* at 714–15; BRANDWEIN, *supra* note 112, at 99.

[193] *Cruikshank*, 25 F. Cas. at 709–10, 714; BRANDWEIN, *supra* note 112, at 93, 95.

[194] *Cruikshank*, 25 F. Cas. at 712–13; BRANDWEIN, *supra* note 112, at 99.

[195] BRANDWEIN, *supra* note 112, at 100.

[196] *Cruikshank*, 25 F. Cas. at 711; BRANDWEIN, *supra* note 112, at 102. It should also be noted that Bradley did not apply the distinction consistently to the Fourteenth and Fifteenth Amendments. If, as he wrote with regard to the Fifteenth, the enactment of a protection against discrimination in the exercise of a preexisting right constituted a newly "created" right, then the Equal Protection Clause of the Fourteenth, which conferred protection against discrimination in the exercise of preexisting natural rights and state-created positive rights, would also appear to create a new right. According to Bradley, the Fifteenth Amendment did "not confer the right to vote." Instead, it conferred only "a right not to be excluded from voting by reason of race, color or previous condition of servitude, and this is all the right that congress can enforce." 25 F. Cas. at 712. If that were enough to constitute a "created" right for purposes of reaching private action under the Fifteenth Amendment, then it would seem to be enough for purposes of the Fourteenth as well. By interpreting the Equal Protection Clause to protect *only* against intentional race discrimination, Bradley made clear its equivalence with the Fifteenth Amendment on this score. *Id.* at 715.

[197] BRANDWEIN, *supra* note 112, at 102.

> Such was the opinion of congress itself in passing the law at a time when many of its members were the same who had consulted upon the original form of the amendment in proposing it to the states. And as such a construction of the amendment is admissible, and the question is one at least of grave doubt, it would be assuming a great deal for this court to decide the law, to the extent indicated, unconstitutional.[198]

This same reasoning, if applied to the Fourteenth Amendment, would have led Bradley to refrain from requiring proof of state action or neglect in the particular case. This requirement conflicted with section 6 of the Enforcement Act of 1870 and section 2 of the Ku Klux Klan Act of 1871, which criminalized private conspiracies with no mention of state action or neglect.[199] During the legislative debates, the question of state action was raised, and proponents of each Act maintained that Congress was empowered to reach private individuals under both the Fourteenth and Fifteenth Amendments if state enforcement failed.[200] Because state enforcement had clearly failed, it was "appropriate" for Congress to act.[201] Representative and future President James A. Garfield argued that the Ku Klux Klan bill should be amended to require a showing of state inaction, but the bill passed overwhelmingly without any such amendment.[202] In short, the "opinion of congress itself in passing the law" was no less clear with regard to the Fourteenth Amendment than to the Fifteenth: Congress could reach private action if, in its view, state enforcement had failed.[203]

At various points in his opinion, then, Bradley based his legal conclusions on diametrically opposite choices to honor or disregard the constitutional text, to follow or ignore the natural/positive rights distinction, and to accord or withhold deference from Congress. At this level of inconsistency, doctrinal considerations cannot explain his conclusions.

This returns us to the question of why Bradley ruled as he did. Rarely do historical materials shed much light on such puzzles, but Bradley — who

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[198] *Cruikshank*, 25 F. Cas. at 713.

[199] Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 141; Enforcement (Ku Klux Klan) Act of 1871, ch. 22, § 2, 17 Stat. 13.

[200] Senator John Pool, who authored section 6 of the Enforcement Act of 1870, consistently maintained this view. *See* CONG. GLOBE, 41st Cong., 2d Sess. 3613 (1871); CONG. GLOBE, 42d Cong., 1st Sess. 609 (1871). For citations to the similar views of other members of Congress, see BRANDWEIN, *supra* note 112, at 40–41.

[201] BRANDWEIN, *supra* note 112, at 40–41 (*quoting* Rep. Coburn).

[202] Garfield was referring to violations of the equal protection guarantee of the Fourteenth Amendment. CONG. GLOBE, 42d Cong., 1st Sess. 153 app. (1871).

[203] Although the Fourteenth Amendment was proposed in June 1866, and the Fifteenth Amendment not until February 1869, Bradley's observation that the Enforcement Act of 1870 was passed "at a time when many of [Congress's] members were the same who had consulted upon the original form of the amendment in proposing it to the states," *Cruikshank*, 25 F. Cas. at 713, applies to a large majority of those who proposed the Fourteenth as well as the Fifteenth. *Compare* CONG. GLOBE, 39th Cong., 1st Sess. 1–2 (1866), *with* CONG. GLOBE, 41st Cong., 1st Sess. 1–2 (1870). *See also* Frantz, *supra* note 132, at 1357.

had run for Congress and actively intervened on related issues — left an unusually revealing set of relevant writings. Although these writings do not yield definitive answers on Bradley's intentions, they do establish that the holdings and dicta in his *Cruikshank* opinion were compatible with his long-held views on class and race and, in particular, on the problem of labor control. Prefiguring some present-day historians, Bradley viewed slaveholders not as a distinct class of precapitalist aristocrats, but as businessmen who happened to employ slave as opposed to wage labor.[204] Before the war, he argued that any North-South compromise consistent with "justice" must both protect the right of slaveholders to "emigrate with their property" to the territories of the United States (an unsubtle implication that justice was served in *Dred Scott v. Sandford*) and compensate slaveholders whose human property escaped and was not returned. "No business man," he asserted, "can say that these are not the dictates of justice, as between the parties."[205] Here, Bradley stressed the commonality of interest and outlook among all businessmen, slave owners and employers of wage labor alike, thereby repudiating the more widespread Republican view that slave owners constituted a degenerate aristocracy that prospered not from entrepreneurial initiative and industry, but from the forced labor of others.[206] In an attempt to head off civil war, he drafted and forcefully advocated a thirteenth amendment to the Constitution that would have permanently established slavery in U.S. territories below a specified parallel and prohibited it above.[207] Even after Lincoln proposed his Emancipation Proclamation, Bradley opposed immediate abolition on the ground that it would be economically "disastrous to the Southern States," and insisted that the implementation of gradual emancipation "must be left to the Southern people themselves."[208]

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[204] *See, e.g.*, JAMES OAKES, THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS 180–89 (1983).

[205] JOSEPH P. BRADLEY, MISCELLANEOUS WRITINGS OF THE LATE HON. JOSEPH P. BRADLEY 98 (Charles Bradley ed., 1902) [hereinafter MISCELLANEOUS WRITINGS].

[206] On the Republican viewpoint, see ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 40, 46–51 (1970).

[207] MISCELLANEOUS WRITINGS, *supra* note 205, at 99; The Political Expressions of Joseph P. Bradley, Compiled from Speeches, and Articles Written By Him 1 (1862) (on file with the New Jersey Historical Society); Ruth Ann Whiteside, Justice Joseph Bradley and the Reconstruction Amendments 74–76 (1981) (unpublished Ph.D. dissertation, Rice University) (on file with Rice University digital scholarship archive). States formed below the line would have been permitted, however, to abolish those conditions twenty years after their admission to the Union. MISCELLANEOUS WRITINGS, *supra* note 205, at 99.

[208] Letter from Joseph P. Bradley to Gentlemen of the German Committee 3, 7 (Oct. 24, 1862) (on file with the New Jersey Historical Society). In the same letter, Bradley claimed always to have considered slavery "a great evil," but in a speech two days earlier to an audience less inclined to oppose slavery than the German Committee, he had declared that he did not "hate the Southern people or their institutions," and that he did "not care a straw about their institutions, comparatively." *Id.* at 1; Joseph P. Bradley, Speech at the Union Administration Meeting, Held in Newark (Oct. 22, 1862), *in* MISCELLANEOUS WRITINGS, *supra* note 205, at 134; *see also* LANE, *supra* note 6, at 191–92 (supplying additional evidence that Bradley "seems never to have been troubled by slavery").

After slavery was nevertheless terminated by a Thirteenth Amendment very different from his own, Bradley continued to view the problem of black labor from the point of view of his combined planter-business class. In an 1867 letter to his daughter, written from New Orleans before his appointment to the Court, he penned a highly revealing disquisition on the problem of labor control in the South. He began by admiring the superior productivity of southern soil, thanks to which the planters had "rolled in wealth" prior to the war.[209] Now, however, southern labor had been "broken up at a blow," and the results appeared to vindicate Bradley's concern about the dire consequences of immediate abolition, which Northerners had "not fully appreciated":

> You can easily see how the equilibrium of labor on the plantations is destroyed. Negroes that never had the right of going where they chose, find themselves invested with that right; and off they go — to see the cities or other parishes — their vagrancy only limited by their means of locomotion. How shall the planter keep them on the plantation? How shall he secure their services at times when a few days inattention to the crop results in the loss of it?[210]

One might expect a supporter of free labor to answer that, given the lush fertility of the southern soil, the planter could solve this problem by the simple expedient of offering wages high enough to secure the necessary labor. Bradley, however, mocked this solution as the "ready answer of the little informed." How so? Apparently, because wages set at urban levels would "ruin" the planters, and the negroes might insist on urban wages.[211] Why would the negroes insist upon wages higher than the planters could pay? "The people here, say that the Freedman's Bureau is an engine of mischief; that it teaches the negroes to be discontented; gives them false notions; and utterly incapacitates them from labor." Bradley concluded: "This is the great question of the day — how to restore the labor of the Southern States to a normal condition."[212] Evidently, slavery — whatever its faults — had kept labor in a "normal condition" that entailed contentedly supplying services at low cost. Bradley's fears appeared to be confirmed three days later, when he reported from a paddle-wheeler steaming up the Mississippi: "Passed many sugar plantations in ruins — the hands having departed."[213] Bradley was not wrong to report that field workers were withholding labor, but he either missed or did not care that their purpose was precisely to defeat the planters' attempt to restore as much as possible of the "normal condi-

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[209] Letter from Joseph P. Bradley to Carry Bradley 3 (Apr. 30, 1867) (on file with the New Jersey Historical Society).

[210] *Id.* at 5–6.

[211] *Id.* at 6–7.

[212] *Id.* at 7.

[213] Diary of Joseph P. Bradley (May 3, 1867) (on file with the New Jersey Historical Society).

tion" of slave labor, including imperious supervision, toil from sunrise to sunset, and pervasive control of nonworking as well as working life.[214] Bradley's views on the labor question thus accommodated and — in some respects — mirrored those of the planters, who refused to accept the proposition that black Americans could be induced to work by wages alone, and departed sharply from those of his party's leaders in Congress, who were then embroiled in a struggle to protect the ex-slaves' freedom of labor.[215]

Such was the thinking of Bradley seven years before he issued what was arguably the single most important judicial opinion concerning Reconstruction. Whether his views changed in the interim the record does not disclose, but they prefigured in important respects the indictment of Reconstruction that the Democrats would use to win over conservative and, eventually, moderate Republicans. Having discovered that a critique based solely on race had limited appeal, the Democrats added one based on class, namely that the great majority of ex-slaves were lazy, malcontented laborers who eschewed hard work and sought instead to confiscate the property of productive citizens, either by staging strikes or by electing demagogues who would enact taxes.[216] Many northern Republicans, who nursed identical complaints about white laborers, could sympathize with southern planters on this score.[217] Although Bradley's writings do not address strikes or taxes in particular, they do suggest a similarly negative view of laborers, black and white. The system of "pure democracy" must, he opined in 1877, be avoided because "the vote of one Louisiana negro, or of one New York rough . . . might wholly turn the scale."[218] Laborers fell into "the great mass of mankind" that was "*incapable of enjoying*" the finer things in life, he suggested in an undated essay on "Equality," because they lacked "your refined emotions, your generous feeling, your whole aspirations."[219] Thus, when the Founders affirmed that "all men are created equal," they most certainly did not mean to "introduce the cobbler into the most elegant drawing room to take a cup of tea with the gayest belle of the town" or "to debate with grave Senators on the affairs of State."[220]

To Bradley, distinctions of race and class tended to track one another. He drew the race line not between whites and people of color, but between Anglo-Saxons and others. "[O]f all races of people," he opined, "none has ever appeared better fitted and calculated in all its essential characteristics for advancing the case of Human freedom and political liberty than the An-

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[214] FONER, *supra* note 2, at 139–40, 170–71; O'DONOVAN, *supra* note 48, at 130–34; SAVILLE, *supra* note 41, at 112–14.

[215] FONER, *supra* note 74, at 104; O'DONOVAN, *supra* note 48, at 214–15; RICHARDSON, *supra* note 48, at 19; VanderVelde, *supra* note 48, at 484–85.

[216] RICHARDSON, *supra* note 48, at 55–61.

[217] *Id.* at 61–63, 89, 109, 113–20.

[218] Joseph Bradley, *Electoral Commission*, *in* MISCELLANEOUS WRITINGS, *supra* note 205, at 217.

[219] Joseph Bradley, *Equality*, *in* MISCELLANEOUS WRITINGS, *supra* note 205, at 90–91.

[220] *Id.* at 90–92.

glo-Saxon, Anglo-American race."[221] Bradley approved New York State's legislative districting plan, which gave disproportional representation to rural constituencies, as "wise" because it would prevent the "Irish vote" of New York City from controlling the state.[222] He worried that immigration would "result in the spread of effete races," and that some immigrants were — here echoing his opinion of laborers — "incapable of the higher aspirations of the human soul."[223] In Bradley's view, then, the "negro," the "field hand," the "laborer," the "cobbler," the "New York rough," and the "New York Irish" appropriately occupied a subordinate position in society. Only in the political sphere was each entitled to a degree of equality, and even then, only at the moment of voting.[224]

Bradley's *Cruikshank* opinion was well calculated to implement this narrow concept of equality. The holdings and result emboldened white supremacists to enforce black subservience in day-to-day economic and social interactions, while the dicta deferring to Congress on voting rights preserved the possibility of temporary national enforcement at election time, enabling the Republican Party to harvest black votes. In Grant Parish, for example, Bradley's ruling shifted the balance of power so decisively that, even with U.S. troops on hand and the likely perpetrators arraigned in court, not a single person would step forward to be the complaining party in the murder of Frank Foster.[225] But in the national election of 1876, when the Republican Party was fighting to retain its hold on the Presidency, the Grant administration sent in troops and the Party reaped "nearly as high a percentage . . . as the percentage of African Americans of voting age in the parish."[226] Several years later, when black laborers managed to stage a strike for higher wages, white planters threatened another massacre and the strikers surrendered.[227] Unfortunately for black Americans, the struggle for civil rights was waged on a daily basis in all localities using all forms of power, not just at election time in key districts using voting power.

One curious mystery remains to be discussed. In the foregoing account, I have contrasted the expansive approach of Circuit Judge Woods's opinion in *United States v. Hall* to the narrowing approach of Bradley's subsequent circuit court opinion in *Cruikshank*. Yet, Bradley himself supplied much of the key language in Woods's opinion. While deliberating on *Hall*, Woods had written Bradley to ask — as Bradley recounted — whether it would be possible to prosecute "the breakup of a peaceful political meeting by riot and murder when committed simply for that purpose, without any definite

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[221] Whiteside, *supra* note 207, at 72–73 (quoting speech delivered July 4, 1860).

[222] Joseph Bradley, *Electoral Commission*, *in* MISCELLANEOUS WRITINGS, *supra* note 205, at 219.

[223] Joseph P. Bradley, Annual Address Before the New Jersey State Agricultural Society (Oct. 2, 1868) (transcript on file with the New Jersey Historical Society).

[224] Joseph Bradley, *Equality*, *in* MISCELLANEOUS WRITINGS, *supra* note 205, at 91–92.

[225] LANE, *supra* note 6, at 216.

[226] BRANDWEIN, *supra* note 112, at 128.

[227] TUNNELL, *supra* note 171, at 56.

intent to prevent the exercise of the right of suffrage."[228] Bradley answered yes, that private individuals could be prosecuted for interfering with the right of assembly. The absence of state action did not prevent the prosecution because the Fourteenth Amendment "prohibits the states from denying . . . equal protection of the laws," and "[d]enying includes inaction as well as action."[229] As Congress "cannot compel the activity of state officials, the only appropriate legislation" would be "that which will operate directly on offenders."[230] Furthermore, the "extent to which Congress shall exercise this power must depend on its discretion in view of the circumstances for each case."[231] If, as I have suggested, Bradley's views on the "normal condition of southern labor" influenced his narrow approach to the Fourteenth Amendment in *Cruikshank*, then what explains his expansive advice to Woods?

It might be relevant that Bradley's famous letter to Woods was not the first in which he offered advice on *Hall*. Woods had initially requested assistance more than two months earlier, and Bradley had responded consistently with his eventual approach in *Cruikshank*. The perpetrators could be prosecuted, he wrote then, but only if they had acted "for the purpose of preventing persons from exercising the right of suffrage, to whom it is secured by the 15th Amendment,"[232] which, in Bradley's view, reached private action. The "mere firing into a political meeting," on the other hand, would be "only a private, municipal offence" because no state had "made any law by virtue of which this outrage was committed."[233] It was at this point that Woods, evidently not satisfied with Bradley's answer, repeated his question notwithstanding that it had already been answered, this time specifying that the perpetrators acted "without any definite intent to prevent the exercise of the right of suffrage." Only then did Bradley, perhaps reminded of his Republican loyalties, provide Woods with a rationale for upholding the prosecutions.[234] We might surmise that Bradley would have preferred to draw the line as he did in his first letter, which was consistent with his circuit court opinion in *Cruikshank*, but that Woods's pointed persistence and the facts of *Hall*, which involved a deadly assault on a Republican campaign rally, induced him to go further and protect political party assemblies per se. Then, the question is: why did he renege in *Cruikshank*? Here, the evidence runs dry. Maybe he could not discover a way to distinguish electoral campaign

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[228] Letter from Justice Joseph P. Bradley to Judge William B. Woods (Mar. 12, 1871) (on file with the New Jersey Historical Society).

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] Letter from Justice Joseph P. Bradley to Judge William B. Woods (Jan. 3, 1871) (on file with the New Jersey Historical Society).

[233] *Id.*

[234] Letter from Justice Joseph P. Bradley to Judge William B. Woods, *supra* note 228. At the beginning of this letter, Bradley specified that he was replying to Woods's letter of February 7th ("your letter of 7th ulto," ulto being an abbreviation of "ultimo").

assemblies like the one in *Hall* from assemblies that intervened more generally in local political and economic power relations, as in *Cruikshank*. Or perhaps he realized that he had let Woods nudge him further than he wanted to go. Whatever his thoughts, the end result was a hard line between the right to vote and other rights — a line that, intentionally or not, sacrificed Republican Party assemblies and made possible the resubjugation of southern labor.

D. The Supreme Court and the Betrayal of Reconstruction

On March 27, 1876, the Supreme Court upheld Bradley's ruling, according Congress no deference on the choice of "appropriate" means of enforcement and issuing landmark holdings on state action, the requirement of proving racial motivation, and the question whether the Fourteenth Amendment applied the Bill of Rights to the states.[235] Chief Justice Waite wrote for the Court. At a time when many newspapers were denying the existence of white supremacist terror, Waite followed Bradley in refraining from reporting the underlying facts of the massacre.[236] On the issues of state action and racial motivation, he relied on Bradley's reasoning. The indictments could not be supported by the Equal Protection or Due Process Clauses because the Fourteenth Amendment "add[ed] nothing to the rights of one citizen as against another."[237] Furthermore, the prosecution's failure to specify racial intent placed the indictments outside the reach of the Fifteenth Amendment, as well as the Equal Protection Clause of the Fourteenth. "We may suspect that race was the cause of the hostility," observed Waite in what was surely an understatement, "but it is not so averred."[238] Waite did depart from Bradley's reasoning on one important point, closing off an avenue for enforcement that Bradley had left open. For the first time, the Court held that rights guaranteed in the Bill of Rights (here, the right to assemble peaceably and the right to bear arms) were not among the privileges or immunities of national citizenship and thus could not be reached by Congress under the Fourteenth Amendment.[239]

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[235] United States v. Cruikshank, 92 U.S. 542 (1876).

[236] On the press reportage, see RICHARDSON, *supra* note 48, at 68–69, 107–08, 142–43.

[237] *Cruikshank*, 92 U.S. at 554.

[238] *Id.* at 556.

[239] *Id.* at 552–53. On Bradley's view, see *supra* notes 20, 167, and accompanying text. *The Slaughter-House Cases*, announced the day after the Battle of Colfax Courthouse, had narrowed the scope of the Privileges or Immunities Clause, but left open the possibility that it might encompass rights, like the rights to bear arms and to assemble peaceably, that were enumerated in the Constitution. The white plaintiffs had not claimed any right mentioned in the Bill of Rights, and Justice Miller's opinion for the Court contained only the following sentence on the issue: "The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution." 83 U.S. 36, 79 (1873). This sentence, which has been aptly described as "cryptic," could be read as implying that rights explicitly guaranteed in the Constitution, including the Bill of Rights, were rights of federal citizenship protected by the Fourteenth

In a context of mass terrorism, Waite neglected to mention the value of effective law enforcement, instead choosing to deliver a multipage discourse on the potential tension between national power and state autonomy. His discussion remained entirely on the plane of abstract theory, resolutely refraining from mentioning the well-known fact that, in *Cruikshank* and other Enforcement Act cases, national power had been exerted *in support* of state governments under circumstances where the alternative to national intervention was not state autonomy, but paramilitary insurrection.[240] Waite rejected the view, famously asserted and applied in *Cooley v. Board of Wardens*,[241] that national and state powers could overlap, with national power prevailing in the event of conflict. To Waite, "there need be no conflict between" the two levels of government, because the "powers which one possesses, the other does not."[242] Having ascertained that the powers to protect the right of assembly and the right to bear arms had originally been committed to the states and had "never been *surrendered* to the United States," then ipso facto, they could not be among the "privileges or immunities" guaranteed by the Fourteenth Amendment.[243] Similarly, the duty to protect the "equality of the rights of citizens" had been "originally assumed by the States; and it still remains there."[244] The Fourteenth Amendment empowered the national government only "to see that the States do not deny the right."[245] Following Bradley, Waite did exempt the Fifteenth Amendment from this limitation on the ground that it established "a new constitutional right" that had never been committed to the states, namely the right to be free from race discrimination in voting.[246]

Finally, *Cruikshank* silently declined to apply the principle, announced in *McCulloch v. Maryland*, that Congress enjoyed a degree of discretion in selecting among possible means of implementing constitutional provisions. The word "appropriate," which had loomed large both in congressional debates and in lower court opinions, did not appear in Chief Justice Waite's

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Amendment. McDonald v. City of Chicago, 130 S. Ct. 3020, 3060 (2010) (Thomas, J., concurring in part and concurring in the judgment); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1258 (1992); Wildenthal, *supra* note 20, at 1099. Moreover, *Slaughter-House* could be distinguished from *Cruikshank* on the ground that its facts did not implicate the constitutional purpose to protect the former slaves, a distinction invited by the *Slaughter-House* majority opinion's strongly worded references to that purpose. 83 U.S. at 71–72, 81. Accordingly, members of Congress continued to believe that the clause protected the rights enumerated in the Bill of Rights after *Slaughter-House*. EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION 100 (2003); Wildenthal, *supra* note 20, at 1116–24.

[240] *See* 92 U.S. at 549–51; AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 123 (1995) (commenting that the "bloody proof that there was no law and no lawful government with enforcement power in Louisiana in 1873 was not relevant to the Court").

[241] 53 U.S. 299 (1824).

[242] 92 U.S. at 550. *Contra Cooley*, 53 U.S. at 318–20.

[243] 92 U.S. at 552–53 (emphasis added).

[244] *Id.* at 554–55.

[245] *Id.*

[246] The quotation is from Waite's opinion for the Court in *United States v. Reese*, 92 U.S 214, 218 (1876), issued the same day as *Cruikshank*.

opinion for the Court.[247] Instead, Waite treated Congress's enforcement powers as if they were coterminous with the scope of the Amendments' prohibitory clauses. Like Bradley, and in contrast to Circuit Judges Woods and Bond, the Court accorded Congress no deference on the questions whether it might be "appropriate" to regulate private action where state enforcement had failed, or to refrain from requiring proof of intentional discrimination where such a requirement would render enforcement ineffective.[248] President Andrew Johnson's veto of the 1866 Civil Rights Act had been overturned by Congress, but his narrow view of the Reconstruction powers prevailed.[249] Not until the 1960s would the Court concede to Congress a measure of discretion in enforcing the Amendments, and even that would soon be sharply curtailed.[250]

Another theory of President Johnson's also triumphed, this one concerning the legitimacy of white resistance to black political participation. At his meeting with the "colored" delegation in 1866, Johnson had advanced a theory of popular sovereignty according to which an integrated electorate could not be forced on the "people" of the South without their consent.[251] Neither Bradley in the circuit court nor Waite in the Supreme Court explained why they chose to ignore the threat to state jurisdiction posed by the white supremacist insurrection, but their choices effectively implemented Johnson's theory that the white people of each southern state, whether in the majority or minority, rightfully held a veto over black inclusion. The "state" jurisdiction that Bradley and Waite defended against federal encroachment was not that of the official state governments constituted by the full citizenry defined in the Fourteenth Amendment, but that of the sovereign people of the South defined by Johnson and the paramilitary insurgents. It was in this sense of the word "state" that later commentators would praise Waite for terminating the "radical plan to protect the Negro by subjection of the states."[252]

In the words of historian Eric Foner, *Cruikshank* beamed a "green light to acts of terror where local officials either could not or would not enforce

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[247] On the views of lower courts and members of Congress, see *supra* notes 104–07, 112–17, 200–01, and accompanying text.

[248] *See* 92 U.S. at 554–56. On Woods and Bond, see *supra* text accompanying notes 112–117.

[249] On Johnson's view, see *supra* note 103 and accompanying text.

[250] On the rise of deference and its constriction, see *City of Boerne v. Flores*, 521 U.S. 507 (1997) (limiting deference on Fourteenth Amendment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–40 (1968) (supporting deference in enforcing Thirteenth Amendment); *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966) (supporting deference in enforcing Fourteenth Amendment); and Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

[251] *See supra* text accompanying notes 59–60.

[252] BRUCE R. TRIMBLE, CHIEF JUSTICE WAITE: DEFENDER OF THE PUBLIC INTEREST 174 (1938).

the law, a description that applied to most of the South."[253] Three months after the ruling, on July 4, 1876, the Democrats brought their paramilitary strategy to South Carolina, where the black majority exceeded 60%. Rifle clubs converged on the Republican stronghold of Hamburg, defeated an all-black contingent of the state militia, and murdered five prisoners after the battle.[254] During a subsequent series of paramilitary attacks in majority-black Barnwell County, white supremacists assassinated a black Republican state representative in full view of passengers on a train.[255] Rifle clubs systematically disrupted Republican campaign meetings, rode through Republican towns shooting guns, and openly called for the murder of Republican leaders.[256] As the election approached, Attorney General Alphonso Taft issued a circular ordering U.S. Marshals to protect voters in "the free exercise of the elective franchise," and, on October 17, President Grant committed federal troops.[257] By that time, however, the Democrats had established dominance in too many localities. Using a combination of terrorism and election fraud, they managed to prevail in the initial counts from every southern state. The Republican-controlled state electoral boards in Louisiana, South Carolina, and Florida invalidated the returns from their states, bringing on the controversy that would eventually result in the "Great Compromise" of 1877.[258] The Democrats accepted Hayes as President, and Hayes withdrew the federal troops guarding the Louisiana and South Carolina state houses, leaving the Democrats free to stage bloodless coups against the last two Reconstruction governments.[259] After 1877, the struggle continued, but in a greatly altered landscape. African Americans had lost the capacity to exercise and defend their rights in most of the South most of the time.[260] Tellingly, the remaining areas of black voting strength were to be found in states where African Americans composed a relatively small

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[253] FONER, *supra* note 2, at 531; *see also* WANG, *supra* note 123, at 130 (observing that federal enforcement declined in the immediate aftermath of *Cruikshank* and *Reese*). For additional citations on this point, see *infra* note 265.

[254] LEMANN, *supra* note 72, at 172–73; PERMAN, *supra* note 175, at 170.

[255] LEMANN, *supra* note 72, at 174; Mark M. Smith, *"All Is Not Quiet in Our Hellish County": Facts, Fiction, Politics and Race — The Ellenton Riot of 1876*, S.C. HIST. MAG., Apr. 1994, at 142.

[256] RABLE, *supra* note 81, at 171–74.

[257] RABLE, *supra* note 81, at 175; *The Southern Elections*, N.Y. TIMES, Sept. 5, 1876, at 2 (reprinting text of Taft's letter of instructions to U.S. Marshals). .

[258] FONER, *supra* note 2, at 574–76, 581; RABLE, *supra* note 81, at 166–83.

[259] HOGUE, *supra* note 6, at 175–76. Bradley played a major role in these events as the pivotal member of the Electoral Commission that ruled on the disputed election returns. *See* Whiteside, *supra* note 207, at 244–54.

[260] The federal government did not abandon all efforts to enforce black rights, but those efforts were reduced to "the (intermittent) protection of black voting rights." BRANDWEIN, *supra* note 112, at 153; *see also* BELZ, *supra* note 190, at 133–34. As the planters had understood, control over local and state government, not black voting in national elections, was the key to restoring dominance over black laborers. LEVINE, *supra* note 49, at 162.

proportion of the population, and therefore posed little threat to white supremacy.[261]

III. Controversy and Counterarguments About *Cruikshank*

Largely ignored in the legal-professional literature, *Cruikshank* has long been a subject of controversy among historians. Charles Warren, leading historian of the Supreme Court in the early 1900s, opined that *Cruikshank* and *United States v. Reese*[262] (a voting rights case announced the same day) rendered the Enforcement Acts "almost wholly ineffective to protect the negro."[263] To Warren, this result was "most fortunate" because it consigned "the burden and duty of protecting the negro to the States, to whom they properly belonged."[264] As the Civil Rights Movement gained momentum, historians increasingly rejected Warren's positive spin, with most coming to agree with Judge A. Leon Higginbotham Jr. that *Cruikshank* "nullified the dramatic impact the recent constitutional amendments and federal laws were supposed to have on civil rights enforcement" and conveyed the "undiluted message to hoodlums and other vigilante groups . . . that they would be free to keep African Americans 'in their place.'"[265]

No sooner did this revisionist view coalesce, however, than it came under fire for oversimplifying a complex reality in ways that unfairly blamed the Court. Led by Michael Les Benedict, the critics acknowledged that the results in *Cruikshank* and other cases "still shock the researcher," but advanced three claims in a qualified defense of the Court. First, they directed attention away from the results and toward judicial language indicating that, if properly crafted, future indictments and statutes would have been upheld: "In fact, although the Justices found fault with indictments and ruled Reconstruction legislation unconstitutional for excessive breadth, they made clear

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[261] *See* Valelly, *supra* note 3, at 56 (listing Arkansas, North Carolina, Tennessee, Texas, and Virginia as the states in which black turnout remained high and a relatively large proportion of black votes were actually counted for the candidates chosen).

[262] 92 U.S 214 (1876).

[263] 3 Charles Warren, The Supreme Court and United States History 326 (1923). As more recent scholarship has shown, *Reese* did not, in fact, foreclose voting rights enforcement. *See infra* notes 332–33 and accompanying text.

[264] Warren, *supra* note 263, at 330. Only a few pioneers, most of them African American, dissented from this view at the time. *See, e.g.*, W.E.B. Du Bois, Black Reconstruction in America 1860–1880, at 690–91 (1935).

[265] A. Leon Higginbotham Jr., Shades of Freedom: Racial Politics and Presumptions in the American Legal Process 89 (1996); *see also* Donald G. Nieman, Promises to Keep: African-Americans and the Constitutional Order, 1776 to the Present 96 (1991) ("[*Cruikshank*] left blacks largely at the mercy of their white neighbors."); Tunnell, *supra* note 171, at 193 ("[*Cruikshank*] reduced the Fourteenth Amendment and the Force Acts to meaningless verbiage as far as the civil rights of Negroes were concerned."). For numerous additional citations, see Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 Mich. L. Rev. 2341, 2350 n.54, 2351 n.59 (2003). Charles Lane's recent book, *The Day That Freedom Died*, fleshes out this view with a detailed and vivid narrative of the origins, resolution, and aftermath of the case in context. Lane, *supra* note 6.

that with the exception of a few of the *Civil Rights Cases,* every single prosecution brought before them could have been sustained by an appropriate national law."[266] Second, they contended that the demise of Reconstruction was brought about by factors other than judicial decisions, for example, the financial panic of 1873.[267] Finally, they argued that in light of widely accepted nineteenth-century ideas about federalism, "what is remarkable is the degree to which the Court sustained national authority to protect rights rather than the degree to which they restricted it," and — in any case — decisions following *Cruikshank* belied any judicial abandonment of black rights.[268] This Part discusses each of these claims in order.

A. Cruikshank*'s Constraints on Enforcement*

How serious were the legal constraints imposed by *Cruikshank* on the enforcement effort? Here, the critics make their greatest contributions. They show that *Cruikshank* left open more possibilities for enforcement than the revisionists had acknowledged, especially concerning the right to vote. Bradley went out of his way to exempt the Fifteenth Amendment from any state action requirement, and the full Court did not disturb that conclusion. Both rulings did impose a requirement of proving racial intent, but they left open the possibility of avoiding it in cases involving federal elections by relying upon the national government's inherent power to protect its own election process under Article I, Section 4.[269] When Attorney General Taft ordered voting rights enforcement at election time in 1876, for example, he distinguished *Cruikshank* on the ground that it did "not concern [f]ederal elections."[270] As for the Fourteenth Amendment, Brandwein shows that Bradley required only "state neglect," not state action, to establish a violation.[271] Less persuasively (if the argument below holds true), she contends that Bradley chose a "lower evidentiary threshold" for proving racial intent than was eventually adopted by the Court in *Washington v. Davis*.[272] Thus, the *Cruikshank* rulings left open "broad possibilities for the protection of black physical safety."[273] Instead of foreclosing future prosecutions, she

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[266] Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 63; *see also* FAIRMAN, *supra* note 190, at 285–88; Katz, *supra* note 265, at 2348.

[267] BRANDWEIN, *supra* note 112, at 8–9, 54.

[268] Benedict, *supra* note 266, at 62–63, 74.

[269] BRANDWEIN, *supra* note 112, at 93. These possibilities were later made explicit in *Ex Parte Siebold*, 100 U.S. 371, 384–87 (1879); and *Ex Parte Yarbrough*, 110 U.S. 651, 657–67 (1884).

[270] BRANDWEIN, *supra* note 112, at 130–32; *The Southern Elections*, N.Y. TIMES, Sept. 5, 1876, at 2.

[271] BRANDWEIN, *supra* note 112, at 98.

[272] *Id.* at 107–08.

[273] *Id.* at 3.

claims, the *Cruikshank* rulings merely required prosecutors to follow Bradley's "clear instructions for drawing future indictments."[274]

As an example, Brandwein offers *United States v. Blackburn*[275] (October 1874), in which the prosecutor "drew the indictment properly, implementing the rules laid down by Justice Bradley," and was rewarded with a jury instruction permitting the conviction of private actors for violations of the equal protection guarantee, namely assaulting black citizens with the goal of preventing them from obtaining an education.[276] District Judge Arnold Krekel directed the jurors that they could convict if the defendants had attacked their victims "because they were colored" (the racial intent requirement), and if the "officers of the law" had "willfully failed to employ the means provided by law to ferret out and bring to trial the offenders, because of the victims being colored" (the state neglect requirement).[277]

Brandwein's book makes numerous important contributions, many of which are indispensable to the present Article. Here, however, she seriously understates *Cruikshank*'s legal impact. Far from offering "clear instructions for drawing future indictments," Bradley's opinion left open a wide range of possible standards for proving state neglect and racial intent. Unfortunately for black southerners and their white allies, judges — including Judge Krekel in *Blackburn* — responded by imposing requirements that prosecutors could not satisfy in the overwhelming majority of terrorism cases, among them *Cruikshank* itself. Further, Bradley held that section 6 of the Enforcement Act was unconstitutional, raising the possibility that no prosecutions could be brought until the full Court overturned that holding or Congress amended the Act. Two years later, the full Court affirmed all of Bradley's requirements, removing only the obstacle of uncertainty about section 6.

1. Proof of State Neglect.

Bradley failed to specify what might constitute sufficient proof of state neglect, and judges filled the gap by imposing onerous requirements. It is extremely unlikely, for example, that prosecutors could have satisfied the standard specified by Judge Krekel in *Blackburn* in any prosecution arising out of a Republican-controlled state or locality — precisely the areas targeted by white supremacist paramilitaries after Bradley's ruling. In *Cruikshank* itself, for example, state officers most emphatically had *not* "willfully failed to employ the means provided by law to ferret out and bring to trial the offenders, *because of the victims being colored*," as required by Judge Krekel.[278] To the contrary, they had indicted numerous defendants, calling off the prosecution only after the state attorney was threatened by an

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[274] *Id.* at 106.
[275] 24 F. Cas. 1158 (W.D. Mo. 1874) (No. 14,603).
[276] BRANDWEIN, *supra* note 112, at 108.
[277] *Blackburn*, 24 F. Cas. at 1158, 1159; BRANDWEIN, *supra* note 112, at 108–09.
[278] *Blackburn*, 24 F. Cas. at 1159.

armed mob.[279] In Republican-controlled jurisdictions — which, at the time of Bradley's ruling, included Alabama, Arkansas, Florida, and the three black-majority states — the problem was not official hostility toward African Americans, but white supremacist disruption of state and local law enforcement. As Democratic newspapers crowed, the fact of official Republican incumbency appeared to negate any inference of discriminatory state neglect.[280] Not coincidentally, virtually all of the major paramilitary battles and so-called "riots" consisted of white supremacist attacks on Republican-controlled areas.[281] Once the Democrats had "redeemed" a state and staffed its militia with white supremacists, they had little need for unofficial terrorism. In short, *Blackburn*'s version of state neglect did not allow for the prosecution of paramilitaries in the most important areas of contention.

Brandwein also points to a grand jury charge issued by Judge Bland Ballard of the District of Kentucky in October of 1874. She quotes Ballard approving federal government intervention to give the inhabitants of a state "equal protection; that is, to afford to those inhabitants to which the State gives the least protection the same protection it gives to those whom it protects the most."[282] As she points out, this language appears to indicate the "court's acceptance of the concept of state neglect."[283] As in *Blackburn*, however, the Judge's version of state neglect effectively insulated the most important terrorist attacks against prosecution. Here, the text immediately preceding and following the quoted language limited federal power to cases in which "a State, *in its law or its judicial tribunals*, denies to some persons within its jurisdiction protection it accords to others," and concluded: "But where neither *the State laws nor the State courts* make any distinction in the protection which they give the inhabitants of a State, when *the State laws and the State courts* give the same protection to all, there is no ground for congressional legislation."[284] This text excluded law enforcement, as opposed to legislation or judicial proceedings, from the scope of state action or neglect. And in virtually all of the Enforcement Act terrorism cases, including *Cruikshank*, the problem lay precisely in failures of law enforcement, not

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[279] *See* LANE, *supra* note 6, at 142–43.

[280] *See, e.g.*, *Strides Toward Despotism*, NASHVILLE UNION & AM., Oct. 14, 1874, at 2. This newspaper cited Bradley's ruling for the proposition that section 6 of the Enforcement Act was "not supported by the Constitution," and quoted the *Mobile Register* concerning Enforcement Act prosecutions in Alabama: "The county in which these murders were committed lies in a State whose Governor is a Republican . . . and who was himself a Federal officer; in a population where the juries may be composed of negroes, and where the processes of courts have never been interfered with. The State of Alabama and the county of Sumter are able, willing, and ready to investigate and punish these murders." *Id.*

[281] *See supra* text accompanying notes 178–79 (listing major confrontations).

[282] BRANDWEIN, *supra* note 112, at 110.

[283] *Id.*

[284] *The Enforcement Laws*, GRANGE ADVANCE, Oct. 28, 1874, at 4 (emphasis added); *see also The Kentucky KuKlux*, N.Y. TIMES, Oct. 24, 1874, at 1.

in state legislation or court proceedings.[285] Even without Ballard's ruling, it would have been extremely difficult to prove racial discrimination in the highly discretionary area of law enforcement (almost certainly impossible when the relevant officials were Republicans), but the ruling purported to eliminate even the possibility of trying.

2. Proof of Racial Intent.

Bradley also failed to specify what proof would suffice to establish that defendants had acted "on account of" their victims' race, a requirement that — according to his ruling — affected prosecutions under all three Reconstruction Amendments.[286] Circuit Judge Halmer Emmons read Bradley to require proof that the perpetrators acted "*solely* on account of" race.[287] Similarly but less clearly, District Judge Krekel specified that the jury must find "that *the* object in the conspiracy was against the persons named in the indictment, or some one or more of them, as a class, and because of their being colored citizens."[288] Chief Justice Waite, riding circuit in 1877, endorsed Emmons's view in no uncertain terms. In *United States v. Butler*, he instructed the jurors that in order to convict white paramilitaries charged with killing a black man and thereby interfering with his Fifteenth Amendment rights, they must find "that the object of the defendants in their unlawful combination was to interfere with his right and privilege of voting on account of his race or color, *without regard to his political belief or association*."[289]

Read to require that race be the sole — or even predominant — motivation, Bradley's standard posed a serious if not fatal problem for prosecutors.

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[285] *See, e.g.*, United States v. Blackburn, 24 F. Cas. 1158, 1158 (W.D. Mo. 1874) (No. 14,603) (discussed *infra* section III.A.2); United States v. Hall, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282) (discussed *supra* section I.C); United States v. Crosby, 25 F. Cas. 701, 704 (C.C.S.C. 1871) (No. 14,893) (discussed *supra* section I.C).

[286] United States v. Cruikshank, 25 F. Cas. 707, 712 (Bradley, Circuit Justice, C.C.D. La. 1874) (No. 14,897) (Thirteenth Amendment); *id.* at 715 (Equal Protection Clause of the Fourteenth Amendment); *id.* at 713 (Fifteenth Amendment).

[287] Charge to Grand Jury — Civil Rights Act, 30 F. Cas. 1005, 1007 (C.C.W.D. Tenn. 1875) (No. 18,260) (emphasis added).

[288] *Blackburn*, 24 F. Cas. at 1159 (emphasis added). As described by Judge Krekel, the "offenses charged consist in the conspiring together, for *the* purpose of depriving colored citizens, as a class, of equal protection of the laws, and of equal privileges and immunities, to which they are entitled." *Id.* (emphasis added). Note that although this formulation allowed for the deprivation of certain rights to be part of the purpose, the sole criterion for selecting *the victims* was their membership in the class of "colored citizens." *Id.* Krekel also stated that the perpetrators must have acted "with the intent to solely affect the colored persons named in the indictment, as a class, and on account of their color." *Id.* He elaborated that direct proof was not required, and that the necessary intent could be established using a wide range of evidence including acts "such as entering the houses of colored persons only, while on their nightly, illegal, and criminal errands; talk such as, 'We will give you a touch of the civil rights bill'; [and] notices such as indicate hostility to colored schools," all of which would "more or less tend to lead you to proper conclusion in reference to their object, design and intention." *Id.*

[289] 25 F. Cas. 213, 224 (Waite, Circuit Justice, C.C.D.S.C. 1877) (No. 14,700) (emphasis added).

Organized white supremacists selected their victims on account of politics as well as race. They targeted Republican rallies, leaders, and activists. Although black Republicans suffered more, numerous white Republicans also faced violence. And although non-Republican blacks experienced considerable day-to-day brutality, Democratic paramilitaries singled out black Republicans while touting their friendship with black Democrats.[290] Under these circumstances, prosecutors would have found it difficult, if not impossible, to prove that race outweighed politics in the minds of Democratic paramilitaries. No wonder U.S. Attorney L.C. Northrop of South Carolina complained that if the "red shirts break up meetings by violence, there is no remedy, unless it can be proved to have been done on account of race &c, which cant [sic] be proved . . . ."[291] Likewise in *Cruikshank*, evidence of racial hostility abounded, but the perpetrators had mobilized for a political reason, namely to counter the Republicans' seizure of Colfax Courthouse.[292] At the time they decided to attack, moreover, the defending force included three white Republicans.[293] No doubt the standard could have been satisfied in some cases, for example where roaming riders singled out random black victims, but organized terrorists generally targeted the leaders and members of the various political, paramilitary, and other organizations that sustained independent black and Republican politics.[294]

3. The Constitutionality of Section 6.

Bradley's extensive constitutional reasoning, most of which was set apart from his analysis of the indictments, could have been read either (1) to invalidate section 6 altogether because it failed to specify requirements of race discrimination and state neglect, or (2) to narrow the scope of section 6 by reading in those requirements.[295] (Section 6 criminalized conspiracies to interfere with "any citizen" in the exercise of "any right or privilege granted or secured to him by the Constitution or laws of the United States," and thus

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[290] On the targeting of white Republicans, see, for example, TRELEASE, *supra* note 77, at 149, 201–02, 252, 262, 269, 277, 287, 289–90, 303–04. On Democrats' efforts to recruit black support and grant of "protection papers" to black Democrats, see, for example, *id.* at 137, 175–76; and RABLE, *supra* note 81, at 169–70.

[291] MAGRATH, *supra* note 140, at 133.

[292] On the evidence of racial hostility, see LANE, *supra* note 6, at 105–06.

[293] After the Democrats issued their final ultimatum, the black defenders excused two of the three whites, perhaps in consideration of their advanced age; the third — a traveling salesman from New York — slipped away. LANE, *supra* note 6, at 94–96.

[294] HOGUE, *supra* note 175, at 7–8; *see also supra* text accompanying note 83.

[295] Apparently, even Bradley himself was confused about this issue. At oral argument before the full Court, he hypothesized a law that criminalized some activity within and some beyond the power of Congress, and asked whether "when a law is so framed that one part is constitutional and the other unconstitutional, and the two are so blended as to be inseparable, can you hold one part constitutional and the other part unconstitutional?" Attorney General Williams replied that "the law could be enforced as to those offenses which it is admitted are within the legitimate power of Congress to provide for," the approach eventually adopted by the full Court. *The Enforcement Acts*, N.Y. TIMES, Apr. 3, 1875, at 2.

incorporated constitutional law — including, arguably, the intent and state neglect requirements — into the definition of the offense.[296]) The second reading left open the possibility for prosecutors to craft indictments meeting *Cruikshank*'s requirements, but the first required congressional action to correct the constitutional flaws in the statute. Two years later, the full Supreme Court would choose the second approach,[297] but Bradley appeared to adopt the first at the end of his opinion. "The fifteenth amendment relates only to discriminations on account of race, color and previous condition of servitude," he wrote, but section 6 "is not confined to cases of discrimination" and thus "is not supported by the constitution."[298] Although the quoted passage referred only to the Fifteenth Amendment, the same logic applied to the counts supported by the Thirteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment, which, according to Bradley, likewise reached only actions taken "on account of" race.[299] On the other hand, Bradley repeatedly objected to deficiencies in the framing of the indictment, implying that they could be corrected in a subsequent indictment and leaving prosecutors to puzzle out how to do so when section 6 was "not supported by the constitution."[300]

Not only was Bradley's opinion thus riddled with ambiguities, but, as shown above, his general approach — ignoring the purpose of the Reconstruction Amendments, elevating technicalities over practical considerations, according Congress no deference in the choice of "appropriate" means, and failing even to consider the value of preserving law and order — gave little reason for hope that they would be resolved in favor of enforcement.[301] The onerous requirements imposed by Judges Krekel, Ballard, Emmons, and Chief Justice Waite (riding circuit) were not compelled by the letter of Bradley's opinion, but they certainly reflected its spirit.

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[296] Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 141.

[297] The Court framed the issue as whether "the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress." United States v. Cruikshank, 92 U.S. 542, 549 (1876).

[298] United States v. Cruikshank, 25 F. Cas. 707, 715 (Bradley, Circuit Justice, C.C.D. La. 1874) (No. 14,897).

[299] *Id.* at 712 (Thirteenth Amendment); *id.* at 715 (Equal Protection Clause of the Fourteenth Amendment). If section 6 lacked the intent element required by all three Amendments, then it would seem that it was "not supported by the constitution" as to prosecutions brought under all three, not just the Fifteenth. *Id.* at 715.

[300] *Id.* at 712.

[301] On these elements of Bradley's approach, see *supra* text accompanying notes 148–53, 158.

B. Cruikshank*'s Causal Contribution to the Demise of Reconstruction*

To what extent did the *Cruikshank* rulings contribute causally to the demise of Reconstruction? To date, scholars[302] have focused on four questions: (1) How seriously did Bradley's ruling damage the enforcement effort? (2) Did Bradley's ruling trigger the second wave of white terrorism? (3) If Bradley's ruling and that of the full Court had come out the other way, what would have changed? (4) Did the full Court leave open opportunities for voting rights enforcement sufficient to enable the federal government to preserve the possibility of black political participation?

1. Impact of Bradley's Ruling on the Enforcement Effort.

Bradley announced his ruling on June 27, 1874. The number of enforcement cases resolved in the South dropped from 1148 in 1873 to 890 in 1874, and thence to 216 and 108 in 1875 and 1876. More importantly, the number (and percentage) of convictions fell from 466 (40%) in 1873 to 97 (11%) in 1874, and thence to 16 (7%) and 2 (2%) in 1875 and 1876.[303] Brandwein suggests that the decline of enforcement resulted largely from the financial panic of September 1873, which triggered discontent with Republican leadership and enabled the Democrats to win control of the House in the 1874 midterm elections. The panic thus "constricted government spending and made spending in the South politically risky."[304] It is possible that these developments contributed to the magnitude of the decline. Resource constraints, however, posed a relatively constant problem after 1872, when the first wave of terrorism was brought to a halt. Federal troop levels in the South — the most visible and expensive source of contention — remained stable from 1873 through 1875.[305] By contrast, Bradley's ruling exerted an immediate, direct, and observable effect. As recounted above, prosecutors and judges across the South abruptly ceased or cut back sharply on enforce-

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[302] Pamela Brandwein has provided the most complete and focused account, and thus receives most of the attention here. In turn, she relies partly on what she calls "the new political history," which consists of works by Charles W. Calhoun, Richard M. Valelly, Xi Wang, and Robert M. Goldman. *See* BRANDWEIN, *supra* note 112, at 7–8; CHARLES W. CALHOUN, CONCEIVING A NEW REPUBLIC: THE REPUBLICAN PARTY AND THE SOUTHERN QUESTION, 1869–1900 (2006); ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN *Reese* and *Cruikshank* (2001); VALELLY, *supra* note 3; WANG, *supra* note 123. The present Article also relies heavily on some of those works, including especially those of Valelly and Wang.

[303] WANG, *supra* note 123, at 300.

[304] BRANDWEIN, *supra* note 112, at 8–9, 54.

[305] SWINNEY, *supra* note 82, at 190 (reporting the total number of troops in the states of the former Confederacy other than Texas as 3524 in 1873, 3443 in 1874, 3661 in 1875, and 3082 in 1876); VALELLY, *supra* note 3, at 95 (reporting figures for Texas as 3944 in 1872, 4271 in 1874, and 3042 in 1876).

ment, explaining their actions in terms of legal difficulties flowing from Bradley's opinion.[306]

2. *Role of Bradley's Ruling in Triggering the Second Terrorist Offensive.*

Brandwein also argues that the panic of 1873, not Bradley's ruling, triggered the resurgence of terrorism in 1874.[307] No doubt it contributed; with the Republicans on the political defensive, the Democrats likely perceived less danger of an energetic federal response. The evidence suggests, however, that Bradley's ruling precipitated a decisive tipping point.[308] In the spring of 1874, white supremacists closely monitored the *Cruikshank* trial. Their newspapers called openly for the creation of paramilitary units to remove Republican officials from office, but the norm of law and order held.[309] On June 27, nine months after the financial panic, Bradley's ruling abruptly upset the equilibrium. Democratic newspapers heralded the end of enforcement, and a "wildfire blaze" of paramilitary activity swept Louisiana, leading to the ouster of Republican officials from no fewer than twelve parishes.[310] The timing of these ejections bears out the perception of contemporary observers that Bradley had triggered the surge in terror.[311] As recounted above, it was not long before Democratic paramilitaries, emboldened by their Louisiana victories, spread the offensive to other Republican-controlled states, contributing to the "redemption" of Alabama in 1874 and Mississippi in 1875.[312]

3. *Counterfactual: Likely Results of Bradley and the Full Court Upholding the Convictions.*

In some accounts, it appears that there was very little that the Justices — or anyone else — could have done to change the outcome. The sociologist William Graham Sumner, for example, depicted antiracist "stateways" as in conflict with racist "folkways" and concluded that "stateways cannot

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[306] *See supra* text accompanying notes 182–86.

[307] BRANDWEIN, *supra* note 112, at 112.

[308] On the theory of tipping points, see Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 912 (1996). A social norm, for example of obedience to official law, may come under pressure yet retain its hold on the overwhelming majority of people until some event undermines its perceived legitimacy or enforceability, leading to a cascade of defections over a short period of time.

[309] HOGUE, *supra* note 6, at 124–26; LANE, *supra* note 6, at 217; RICHARDSON, *supra* note 48, at 107–08.

[310] HOGUE, *supra* note 6, at 124, 126–28, 198; RABLE, *supra* note 81, at 133; *see supra* notes 169–73, 176–79, and accompanying text.

[311] For quotations from contemporary observers, see *supra* text accompanying notes 169, 171, 189.

[312] *See supra* text accompanying notes 179–81.

change folkways."[313] Justice Oliver Wendell Holmes similarly complained that because the "great mass of the white population" in Alabama was determined to prevent black people from voting, there was nothing the Supreme Court could do.[314] Reacting privately to the passage of the Civil Rights Act of 1875, Justice Bradley himself likewise opined that the "antipathy of race cannot be crushed and annihilated by legal enactment."[315] There was no need, however, to eradicate racism by legal enactment. Official law enforcers faced the less daunting task of inducing whites to respect basic norms of criminal law. Given a modicum of law and order, black southerners were capable of defending their own rights.[316]

In assessing the impact of *Cruikshank*, it must be remembered that the alternative to invalidating the convictions was not an absence of judicial action, but judicial action *upholding* the convictions. What would have happened if Justice Bradley and, later, the full Supreme Court had chosen that course? On the Democratic side, the convictions could have shone a "red or yellow light in the face of paramilitarism."[317] Terrorism thrived on de facto immunity from official punishment; secret society members and sympathizers sheltered perpetrators from arrest, intimidated witnesses and officials, swore false alibis *en masse*, and funded lavish legal defenses.[318] When these tactics failed, white solidarity often cracked as leaders fled, most rank-and-filers lay low, and some violated their sacred oaths of silence to inform on compatriots.[319] Even modest enforcement successes could have tipped the balance against white solidarity and in favor of official law and order.[320] *Cruikshank*, in particular, would likely have had a major impact both because of its high profile and because it was one of the rare enforcement cases in which a leading white supremacist planter had been brought to justice.[321] A decision upholding the convictions would have tested the commitment of white supremacist cadres. These were people who, during the first terrorist offensive, had cloaked their activities behind masks and darkness. Now, they were called upon to join publicly acknowledged paramilitary units and engage in daylight campaigns of violence on a scale that could not be hid-

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[313] *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 88 (1955) (quoting WILLIAM GRAHAM SUMNER, FOLKWAYS (1907)). To Sumner, the demise of Reconstruction was "the proof that legislation cannot make mores." WILLIAM GRAHAM SUMNER, *supra*, at 77.

[314] Giles v. Harris, 189 U.S. 475, 488 (1903).

[315] LANE, *supra* note 6, at 253.

[316] *See supra* text accompanying notes 66–68, 90–97, 123–24.

[317] HAHN, *supra* note 2, at 295.

[318] SWINNEY, *supra* note 82, at 266; TRELEASE, *supra* note 77, at 146–47, 201, 204, 307, 386.

[319] SWINNEY, *supra* note 82, at 231–32; TRELEASE, *supra* note 77, at 404; WILLIAMS, *supra* note 87, at 47.

[320] TRELEASE, *supra* note 77, at 146–48, 219–20, 236–37; WILLIAMS, *supra* note 87, at 93–94. Chaos theory, applied to social norms, suggests that allegiance to competing norms may shift rapidly as the defections from a declining norm reach a decisive "tipping point." *See, e.g.*, Sunstein, *supra* note 308.

[321] *See* LANE, *supra* note 6, at 55–56.

den.[322] Having held back pending Bradley's ruling, it seems improbable that they would have greeted an adverse judgment by courting prosecution. Instead, whatever considerations had hitherto given them pause would now be augmented by the ruling of a Supreme Court Justice, apparently issued after consultation with his brethren, affirming the criminality of paramilitary violence and validating the federal enforcement effort. Where Bradley's actual ruling tipped the balance in favor of the militant Democrats' one-party solution,[323] perhaps a reverse ruling would have accomplished the opposite, affirming the moderate Democrats' strategy of competing with the Republicans using relatively peaceful forms of political and economic power.

On the Republican side, a ruling upholding the convictions would have vindicated Republicans and federal officials in their resistance to terrorism. As explained by political scientist Richard M. Valelly, the fate of Reconstruction hinged importantly on "jurisprudence-building."[324] Early decisions could either reinforce or disrupt the efforts of the Republicans' biracial coalition to institutionalize black political participation.[325] Justice Swayne in *Rhodes* and Circuit Judge Woods in *Hall* had shown the way, making it possible for the coalition to suppress the first round of terrorism. But Bradley's ruling brought the process to an abrupt halt. Had he upheld the convictions, more decisions like *Rhodes* and *Hall* might have followed. Instead of symbolizing White League invincibility in the field and at the bar of justice, the battle of Colfax Courthouse could have reverberated as an inspiring act of black resistance against criminal terrorism. Illustrating this possibility, *Frank Leslie's Illustrated Newspaper* ran on its cover a full-page engraving of determined black fighters valiantly holding off the redeemer horde.[326]

By the time of the full Court's decision in 1876, the terrorist offensive unleashed by Bradley's ruling had already inflicted grievous damage on black organization, and the Democratic Party had won control of the House of Representatives. During debates over a new enforcement bill in 1875, a number of Republicans had prefigured William Graham Sumner and Oliver Wendell Holmes in adjudging the cause of black rights hopeless barring a "social, and educational, and moral reconstruction of the South . . . that will never come from any legislative halls."[327] The Democrats had gone far to-

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[322] *See* HOGUE, *supra* note 175, at 7 (observing that "[u]nlike vigilante action, little about paramilitary action was covert," that "[p]aramilitary leaders were invariably well-known local leaders" whose "identities were generally known in public," and that "they usually sought rather than shunned exposure in local media"); PERMAN, *supra* note 175, at 170; RABLE, *supra* note 81, at 132.

[323] VALELLY, *supra* note 3, at 115.

[324] *Id.* at 99.

[325] *See id.* at 73.

[326] KEITH, *supra* note 6, at 94–95 (reprinting engraving). *Frank Leslie's Illustrated Weekly* was one of the United States' leading weeklies.

[327] WANG, *supra* note 123, at 116 (quoting onetime radical Joseph R. Hawley and reporting that a "distinctive feature of the Republican opposition" to enforcement legislation in 1875 "was the growing tendency to interpret southern schemes against black suffrage as a social

ward establishing the inevitability of white supremacy by breaking the official governments' monopoly on the means of violence.[328] Nevertheless, a full Court ruling overturning Bradley and affirming the convictions might have made a significant difference. The Republicans retained the Presidency and firm control of the Senate, and they had no incentive to abandon enforcement on their own. African Americans continued to provide the Party with an enormous, rock-solid bloc of support in the South, and the states of South Carolina, Louisiana, and Florida remained in Republican hands. Black southerners continued to combat terrorism and engage in political action wherever possible. A favorable Supreme Court ruling would, at a stroke, have affirmed the existence and criminality of terrorism, endowed the enforcement effort with constitutional legitimacy, and given the Republicans a badly needed victory after a string of defeats. It seems unlikely that, in the face of such a ruling, the Democrats would have launched the campaign of terror that produced massacres at Hamburg and Ellenton, and laid the basis for Democratic victories in the initial election returns from the black majority states.

Did the *Cruikshank* rulings exert a countermajoritarian influence? Bradley's circuit court ruling was, under political scientist Robert Dahl's criterion, a countermajoritarian decision — one that nullified a statute enacted within the previous four years, "where the presumption is, that is to say, that the lawmaking majority is not necessarily a dead one."[329] In June 1874, when Bradley ruled, the Republicans had already been weakened by the financial panic of 1873, but continued to control both Houses of Congress and the Presidency. Bradley thus derailed the enforcement effort at a time when the Democrats could only dream of accomplishing that result through the political process. The full Court's decision, on the other hand, fell outside Dahl's measure. By this time, most white Americans, Republicans as well as Democrats, had tired of Reconstruction.[330] Nevertheless, it did deliver to the Democrats a victory that they could not have achieved through political action. Not only did the Republicans retain control of the Presidency and the Senate, but they also demonstrated their ability to conduct a substantial enforcement campaign in the face of Democratic resistance during the election campaign of 1876. It seems likely that they would have encountered considerably more success had the Court cleared away the legal obstacles erected

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wrong and to dissuade the party from engaging further in passing legislation that was powerless to correct social wrongs").

[328] I am indebted to Richard Valelly for suggesting this formulation. On the relation between paramilitary success and the Northern will to fight, see HOGUE, *supra* note 175, at 28.

[329] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 287 (1957).

[330] BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 145 (2009). Accordingly, the press reaction to *Cruikshank* was generally positive or mildly critical, with only a few, militantly Republican newspapers expressing outrage. MAGRATH, *supra* note 140, at 129–30.

by Bradley. In sum, the circuit court and Supreme Court rulings, considered together, appear to provide strong evidence for the thesis that the judiciary can exert independent influence on important constitutional and political outcomes.[331]

4. *The Significance of* Cruikshank*'s Openings for Voting Rights Enforcement.*

There remains the claim, advanced by Brandwein and others, that instead of terminating national enforcement altogether, the *Cruikshank* rulings merely redirected it away from a general defense of civil rights and toward limited protection of voting rights only, a strategy summed up in the phrase a "free ballot and a fair count."[332] Contrary to some previous accounts, *United States v. Reese* did not close off this strategy.[333] (Accordingly, *Reese* plays little role in the account presented here.) In theory, this claim holds for federal and mixed federal-state elections, which could be protected under the doctrine, loosely grounded on Article I, Section 4, that the federal government enjoys the inherent power to protect its own elections free from any requirement of proving racial intent.[334] The Supreme Court did not, however, make this clear until *Ex Parte Siebold*[335] (1879) and *Ex Parte Yarbrough*[336] (1884), decided after the Democrats had terminated the reconstruction of southern society by staging coups in the last two Republican-controlled states.[337] Before that, only Attorney General Taft seems to have grasped the full potential of the theory, deploying it to justify enforcement efforts during the 1876 election campaign — too little too late.[338] As for purely state elections, the inherent power theory did not apply. As of 1875, when the Democrats regained control of majority-black Mississippi in a purely state election, Bradley's ruling in *Cruikshank* arguably foreclosed enforcement because section 6 lacked a racial intent limitation as required by the Fifteenth Amendment and thus was "not supported by the constitution."[339] Two months before the election, U.S. Attorney W.W. Dedrick

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[331] On the thesis of judicial potency, see Richard H. Pildes, *Is the Supreme Court a "Majoritarian Institution"?*, 2010 SUP. CT. REV. 103 (2010). For a critique of the claim that the Supreme Court follows the national consensus, see Justin Driver, *The Consensus Constitution*, 89 Tex. L. Rev. 755 (2011).

[332] GOLDMAN, *supra* note 302, at 117–18; *see also* BRANDWEIN, *supra* note 112, at 151–53; WANG, *supra* note 123, at 212.

[333] BRANDWEIN, *supra* note 112, at 153; Benedict, *supra* note 266, at 72–74.

[334] *See supra* note 269 and accompanying text. Article I, Section 4 provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

[335] 100 U.S. 371, 395 (1879).

[336] 110 U.S. 651, 667 (1884).

[337] *Yarbrough*, 110 U.S. at 667; *Siebold*, 100 U.S. at 395.

[338] *See supra* text accompanying notes 257–58, 270.

[339] United States v. Cruikshank, 25 F. Cas. 707, 715 (Bradley, Circuit Justice, C.C.D. La. 1874) (No. 14,897).

warned that "Mississippi was in a condition of more thorough and effective armed insurrection" than during the Civil War, but District Judge Hill directed him to refrain from prosecuting because of the recent federal court rulings.[340]

Far more importantly, voting rights enforcement by itself could not prevent the resubjugation of African Americans. As recent historical work makes clear, the struggle for civil rights was waged on a quotidian basis using all forms of power, not just at election time using voting power. African Americans and their allies depended upon networks of mutually reinforcing power centers including political clubs, official and unofficial militias, labor associations, churches spreading the "radical gospel," and black-owned newspapers.[341] Once black organization had been destroyed or suppressed, election-time enforcement had little effect. When the Democrats regained control of Alabama in the election of 1874, for example, election day itself was "reasonably peaceful" in most of the state, but only because the wave of terrorism triggered by Bradley's *Cruikshank* ruling had already induced many Republicans to decide that "it was not worth risking their lives to cast a ballot."[342] Granted, black organization did not suddenly or entirely disappear after 1877. Black southerners continued to resist white supremacy in cities, some border and upper South states, and a few scattered rural districts with overwhelming black majorities.[343] Nevertheless, with Democrats in control of state government and black organization suppressed in most rural areas, there was nothing to prevent election rigging and terrorist violence.[344] When the *Cruikshank* rulings terminated day-to-day civil

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[340] KACZOROWSKI, *supra* note 100, at 158.

[341] DAVID MONTGOMERY, CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY 121–24 (1993); VALELLY, *supra* note 3, at 36–41; *see also supra* notes 65–68, 90–97, and accompanying text.

[342] RABLE, *supra* note 81, at 114–19 (quotations at 117, 118). The same pattern was repeated in Mississippi, where "[e]lection day was relatively quiet," but only because systematic intimidation and violence (including ousters of Republican officials modeled on "the tactics of the Louisiana White Leaguers") had already suppressed Republican capabilities to the point that the Democrats were able to stage uncontested shows of force near the polls. *Id.* at 158–61 (quotation at 159). Federal troops could be effective if deployed in significant numbers near polling places in majority-black communities, as at Grant Parish in 1876, but there were never enough troops to perform this front-line function in more than a small proportion of communities, much less in the countryside where the overwhelming majority of African Americans resided. For troop numbers, see *supra* note 305. In the crucial state of Louisiana, by 1871 "there were fewer than seven hundred U.S. troops . . . , a smaller garrison than the army routinely kept in the state before the Civil War." HOGUE, *supra* note 6, at 87.

[343] VALELLY, *supra* note 3, at 60.

[344] *See id.* at 50–56. Over the period from 1880–1890, black voter turnout was driven below 50% in the three black-majority states of Louisiana, Mississippi, and South Carolina, and more than half of the black votes were fraudulently counted for Democrats in Alabama, Georgia, and South Carolina. *Id.* Only in Texas and upper-South states, where blacks constituted a smaller proportion of the population and therefore less of a threat to white supremacists, did more than 50% of blacks vote, and more than 50% of those voters have their votes counted correctly. *Id.*

rights enforcement, then, they opened the door to "redemption" and facilitated its eventual consummation in the legal regime of Jim Crow.

None of this is to deny that the Justices' intervention was but one of a number of factors leading to the collapse of Reconstruction and the triumph of white supremacy. Throughout Reconstruction, southern Republicans were plagued with infighting, and after the financial panic of 1873, northern support for enforcement declined.[345] Nevertheless, it does appear that Justice Bradley's ruling decisively interrupted enforcement and triggered the second terrorist offensive at a moment when a fragile peace hung in the balance, and that the full Court's ruling cleared the way for the campaign of fraud and violence that led to the "redemption" of the last two Republican-controlled states.

C. Assessing the Performance of Bradley and the Full Court

Leaving aside the causal effects of the rulings, how should we assess the Justices' performance? According to Michael Les Benedict, Justice Bradley and the full Court were merely implementing principles of federalism embraced by all but the radical Republicans.[346] The issue of federalism did not, however, exist in a vacuum. Actual state governments, constituted on the basis of the citizenry defined in the Fourteenth Amendment, were locked in struggle with paramilitary insurgents, claiming to enforce their states' right to be free from federal enforcement. Under these circumstances, *Cruikshank* might be less notable for its particular concept of federalism than for its tacit acceptance of the Democratic claim that paramilitary insurrection either did not exist or posed no serious problem in the South. By contrast, Republican leaders typically framed the issue as one of effective law enforcement first and federalism a distant second. Six months after Bradley's ruling, for example, President Grant charged that white supremacists were engaged in systematic criminal resistance to lawful authority:

> Bands of men, masked and armed, made their appearance; White Leagues and other societies were formed; large quantities of arms and ammunition were imported and distributed to these organizations; military drills, with menacing demonstrations, were held, and with all these murders enough were committed to spread terror among those whose political action was to be suppressed, if possible, by these intolerant and criminal proceedings . . . .[347]

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[345] *See id.* at 88–92 (summarizing the literature).

[346] Benedict, *supra* note 266, at 62–63.

[347] Ulysses S. Grant, *Sixth Annual Message* (Dec. 7, 1874), UNIV. OF VA. MILLER CENTER, http://millercenter.org/president/speeches/detail/3745 (last visited Mar. 21, 2014), *archived at* http://perma.cc/DZ95-NYGC.

Grant reported on his enforcement efforts and acknowledged that "[c]omplaints are made of this interference by Federal authority."[348] In terms reminiscent of *Prigg* and in sharp contrast to *Cruikshank*, however, he argued that without federal intervention, constitutional rights would be nullified. "[I]f said [Fifteenth] amendment and [Enforcement] act do not provide for such interference under the circumstances as above stated, then they are without meaning, force, or effect, and the whole scheme of colored enfranchisement is worse than mockery and little better than a crime."[349] In a context of violent insurrection, Grant prioritized the institutionalization of black rights and the normalization of two-party competition over the preservation of "state" autonomy. "Treat the negro as a citizen and a voter, as he is and must remain, and soon parties will be divided, not on the color line, but on principle," he declared. "Then we shall have no complaint of sectional interference."[350] During the 1876 election campaign, *Harper's Weekly* expressed this thinking in visual form, depicting a black man mourning fatal raids by "white liners" on schools, work shops, and homes with the caption: "IS *THIS* A REPUBLICAN FORM OF GOVERNMENT? IS *THIS* PROTECTING LIFE, LIBERTY, OR PROPERTY? IS *THIS* THE EQUAL PROTECTION OF THE LAWS?"[351]

Similar views animated the enforcement effort. To U.S. Attorney General and former Confederate Amos Akerman, the Ku Klux Klan was a criminal gang openly challenging the rule of law. "These combinations amount to war," he declared, "and cannot be effectually crushed on any other theory."[352] U.S. Attorney Thomas Walton, a Confederate veteran, vigorously prosecuted white terrorists in Mississippi because the Democratic Party had become the party of violence.[353] Republican circuit court Judges Woods and Bond worked this concern into their decisions, according Congress wide deference to reach private action in light of the practical exigencies of enforcement.[354] By contrast, neither Bradley's nor Waite's *Cruikshank* opinions expressed any concern whatever about either the practicalities of rights enforcement or the preservation of law and order. Their solicitude for theoretical state autonomy rings hollow alongside their silence concerning the ongoing violent insurrection against actual state authority.

It has also been argued that decisions subsequent to *Cruikshank* indicate considerable judicial solicitude for black rights. In *Ex Parte Siebold* and *Ex Parte Yarbrough*, as noted above, the Court held that Congress possessed the inherent power to protect the federal election process against

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[348] *Id.*
[349] *Id.*
[350] *Id*.
[351] HARPER'S WEEKLY, Sept. 2, 1876, at 712, *reprinted in* WANG, *supra* note 123, at 180.
[352] FONER, *supra* note 2, at 457 (citing various sources); *see also* WANG, *supra* note 123, at 96.
[353] Cresswell, *supra* note 184, at 427.
[354] *See supra* notes 109–17 and accompanying text.

fraud and violence without any requirements of state action or racial intent.[355] Moreover, in *United States v. Butler*, Chief Justice Waite (riding circuit) and Circuit Judge Bond upheld indictments against white paramilitaries under both the inherent power theory and the Fifteenth Amendment.[356] The report of *Butler*, decided only one month after the Democratic coups in Louisiana and South Carolina, included a lengthy statement of facts detailing murders and abuse of black Republicans during and after the Ellenton "riot."[357] As Brandwein points out, the inclusion of such facts was "politically charged," and — combined with the results — "sent a clear message to the Hayes administration."[358]

If *Siebold*, *Yarbrough*, and *Butler* jibed with the pre-1877 jurisprudence, then they might provide evidence of the Justices' agenda before as well as after that crucial year. It seems more accurate, however, to say that those decisions broke sharply from the past, "displaying a judicial and political temper radically different from that of *Reese* and *Cruikshank*."[359] In *Siebold*, for example, Justice Bradley rejected the theory of mutually exclusive federal and state powers that had been used only four years earlier in *Cruikshank* to justify the state action requirement and nonincorporation of the Bill of Rights. Where Waite had maintained that the "powers which one [level of government] possesses, the other does not," Bradley cited *Cooley* for the proposition that the states and the federal government possessed "concurrent jurisdiction" to regulate some subject matters.[360] Accordingly, he held, the authority of states over certain elections did not preclude Congress from regulating the same elections.[361] On the way to this conclusion, Bradley — whose circuit court opinion in *Cruikshank* had repeatedly deployed the specter of Congress usurping state jurisdiction with "an entire body of municipal law" — now chastised unnamed persons for regarding the federal government "as a hostile organization, opposed to the proper sovereignty and dignity of the State governments."[362] Justice Miller's opinion for the Court in *Yarbrough* departed even more sharply from the pre-1877 decisions. Concerns about white supremacist combinations prone to "lawless violence" and the resulting need for effective law enforcement —

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[355] *See supra* notes 334–36 and accompanying text.

[356] 25 F. Cas. 213, 224 (Waite, Circuit Justice, C.C.D. S.C. 1877) (No. 14,700).

[357] *Id.* at 217–23.

[358] BRANDWEIN, *supra* note 112, at 146.

[359] WANG, *supra* note 123, at 209. Brandwein suggests that the doctrine of *Siebold* and *Yarbrough* was present in "coded" form in *Cruikshank*, BRANDWEIN, *supra* note 112, at 153, but statements so obscure as to require decoding cannot count for much in a context of paramilitary insurrection where prosecutors lacked resources and risked social and physical retaliation.

[360] *Compare* United States v. Cruikshank, 92 U.S. 542, 550 (1876), *with* Ex Parte Siebold, 100 U.S. 371, 385, 392 (1879).

[361] *Siebold*, 100 U.S. at 385–86.

[362] *Compare* United States v. Cruikshank, 25 F. Cas. 707, 714 (Bradley, Circuit Justice, C.C.D. La. 1874) (No. 14,897), *with Siebold*, 100 U.S. at 394.

entirely absent from the *Cruikshank* opinions — now found eloquent expression:

> If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.[363]

In a dizzying departure from the clause-bound reasoning of *Cruikshank*, Miller leaped into doctrinal free fall: "[I]t is a waste of time to seek for specific sources of the power to pass these laws."[364] Finally, given that *Butler* and *Yarbrough* demonstrated the judiciary's capacity to deliver a clear message against terrorism, the question arises: why did Waite, Bradley, and the other Justices refrain from doing so until after the Democrats had completed their conquest of the Republican-controlled states?

This brings us back to one of the critics' most important contributions. They point out that, instead of blocking national enforcement altogether, *Cruikshank* diverted it away from general civil rights and toward voting rights only.[365] In section II.C above, I suggested that Bradley might have initiated this shift to accomplish the dual objectives of solving the planters' problem of labor control and preserving the national Republican Party's opportunity to reap black votes. Similar concerns might help to explain the sudden shift in the Court's attitude from *Cruikshank* and *Reese* in 1876 to *Butler*, *Siebold*, and *Yarbrough* in 1877, 1880, and 1884. With the planters restored to power on the ground, and southern labor partially returned to its "normal condition" of subordination, perhaps the Justices felt freer to protect the national Republican Party's interest in gathering black votes. In any case, it seems unlikely that their sudden embrace of official law and order after the "redemption" of the last black-majority states was unrelated to the fact that the white elite was safely back in control.

Finally, it should be noted that the Supreme Court's performance contrasted starkly with that of other legal actors. U.S. Attorneys diligently investigated and prosecuted perpetrators despite scarce resources. Most lower courts interpreted the Amendments broadly and deferred to Congress on the

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[363] Ex Parte Yarbrough, 110 U.S. 651, 667 (1884).

[364] *Id.* at 666.

[365] BRANDWEIN, *supra* note 112, at 151–53. Similarly, Leslie Friedman Goldstein has argued that the Justices were trying "to channel Reconstruction: training it to grow in certain directions rather than others." Leslie Friedman Goldstein, *Constitutional Approach: The Second Amendment, the* Slaughter-House Cases *(1873), and* United States v. Cruikshank *(1876)*, 1 ALB. GOV'T L. REV. 365, 369 (2008).

choice of means to enforce them. Witnesses and jurors of all colors braved retaliatory violence to testify and deliver verdicts.[366] But the Justices of the Supreme Court, who enjoyed physical security and jobs protected by life tenure, chose to interpret the Amendments narrowly, to ignore the judgment of Congress, and to apply their formidable legal talents to the project of finding technical flaws in the prosecutions. Black Americans had asked only for the modicum of protection necessary to enable their own self-defense. Thanks largely to the Supreme Court, they asked in vain.

Conclusion

Until the 1960s, the judicial view of Reconstruction mirrored that of the Dunning School, since discredited among historians as a "'white supremacist narrative . . . masquerading as proper history.'"[367] Claude Bowers, E. Merton Coulter, and other Dunning School historians attributed the tragedy of Reconstruction to black suffrage, not white terrorism.[368] Echoing this view, the Supreme Court opined that the Enforcement Act of 1871 had been "passed by a partisan vote in a highly inflamed atmosphere" with "defects" that were soon "realized when its execution brought about a severe reaction."[369] *Cruikshank* served as an unproblematic precedent for decisions narrowing federal civil rights authority.[370] During Earl Warren's tenure as Chief Justice, the Court ceased citing Dunning School historians, but left standing many of the precedents that they had celebrated, including *Cruikshank*.[371]

During the 138 years since *Cruikshank*, only two Justices have authored opinions disapproving the decision: Thurgood Marshall and Clarence Thomas. Writing in 1978, Justice Marshall listed *Cruikshank* among a set of cases that, through "'narrow and ingenious'" reasoning, "sharply curtailed"

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[366] *See supra* section I.C.

[367] Foner, *supra* note 2, at 1594 (quoting Bruce E. Baker, What Reconstruction Meant: Historical Memory in the American South 46 (2007)).

[368] *Id.* at xxix–xx.

[369] Collins v. Hardyman, 341 U.S. 651, 657 (1951); Foner, *supra* note 2, at 1595.

[370] *See, e.g.*, *Collins*, 341 U.S. at 657–58; Screws v. United States, 325 U.S. 91, 109 (1945).

[371] Foner, *supra* note 2, at 1596–97; *see, e.g.*, Carpenters v. Scott, 463 U.S. 825, 831 (1983) (quoting *Cruikshank*'s holding that the Equal Protection Clause of the Fourteenth Amendment "'does not . . . add anything to the rights which one citizen has under the Constitution against another'"); Mobile v. Bolden, 446 U.S. 55, 61 (1980) (citing *Cruikshank* for the proposition that "the Fifteenth Amendment . . . imposes but one limitation on the powers of the States," namely forbidding "them to discriminate against Negroes in matters having to do with voting"); *see also* McDonald v. City of Chicago, 130 S. Ct. 2020, 3030–31 (2010) (citing *Cruikshank* for the proposition that the Second Amendment right to bear arms was not incorporated against the states through the Privileges or Immunities Clause of the Fourteenth Amendment, and noting that it did not mention and therefore did not foreclose the possibility of incorporating that right through the Due Process Clause); United States v. Morrison, 529 U.S. 598, 622 (2000) (quoting *Cruikshank*'s holding that the Due Process Clause of the Fourteenth Amendment "adds nothing to the rights of one citizen as against another").

the civil rights of black Americans.[372] Four years ago, Justice Thomas went much further. "*Cruikshank*," he declared, "is not a precedent entitled to any respect."[373] In part, this followed from what Thomas viewed as *Cruikshank*'s flawed holding that the Privileges or Immunities Clause did not incorporate the Bill of Rights. But the Justice went beyond interpretive issues, opining that "the consequences of *Cruikshank* warrant mention as well."[374] Among these was the unleashing of white terrorists, who "raped, murdered, lynched, and robbed as a means of intimidating" their opponents.[375] In sharp contrast to the *Cruikshank* Court itself, Thomas took a purposive approach to the Fourteenth Amendment, stressing the value of effective civil rights enforcement:

> *Cruikshank*'s holding that blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them into peonage, an effective return to slavery.[376]

This passage hints at the potentially transformative impact of incorporating *Cruikshank* into the mainstream legal-professional narrative of constitutional law. Having lost respect for *Cruikshank*, Thomas — who had joined in affirming the state action requirement in *United States v. Morrison* — now appeared to chafe at the failure of civil rights enforcement against "private violence."[377] And, although he mentioned that private terrorists often enjoyed "the assistance of local governments," he then proceeded to highlight the battle and massacre at Hamburg, South Carolina, where the local government was controlled by black Republicans, and the perpetrators were members of private rifle clubs.[378] The same purposive concern for effective civil rights enforcement that tends to undercut *Cruikshank*'s holding on the Privileges or Immunities Clause would seem to invite skepticism about its explicit and implicit holdings on state action, intentional race discrimination, and nondeference to Congress.

Present-day consequences aside, *Cruikshank* belongs at the center of our constitutional narrative and pedagogical canon. Not only did it initiate four of the most important present-day limitations on the scope of the Re-

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[372] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 391 (1978) (Marshall, J., concurring in part and dissenting in part) (quoting C. Vann Woodward in the first quotation).

[373] *McDonald*, 130 S. Ct. at 3086 (Thomas, J., concurring in the judgment).

[374] *Id.*

[375] *Id.* at 3087.

[376] *Id.*

[377] *McDonald*, 130 S. Ct. at 3087 (Thomas, J., concurring); United States v. Morrison, 529 U.S. 598, 625–26 (2000).

[378] *McDonald*, 130 S. Ct. at 3087 (Thomas, J., concurring); HAHN, *supra* note 2, at 305–07.

construction Amendments, but it did so — unlike the current vehicles for teaching those doctrines — on a dramatic set of facts involving the core purpose of the Amendments: protecting black civil freedom. Moreover, *Cruikshank* exerted an enormous impact on the ground. The circuit court opinion of Justice Joseph Bradley unleashed the second and decisive phase of Reconstruction-era white terrorism, while the ruling of the full Court ensured its successful culmination in the white supremacist "redemption" of the majority-black states. Although *Cruikshank* left open the possibility of targeted voting rights enforcement around election time, it terminated the day-to-day federal enforcement of civil rights, effectively ending the effort to reconstruct southern society.

Were *Cruikshank* added to the canon, our legal-professional narrative of Reconstruction and Jim Crow might shift in important ways. Where once we stressed the conflict between national power and "state" autonomy, we might now spotlight the struggle of official legal authority — national and state — against paramilitary insurrection. And where we previously emphasized the application of judicial review to racist legislation, we might now consider whether the Court has not exerted more influence by nullifying civil rights legislation. Furthermore, instead of imagining that the federal government carried the main burden of protecting black civil rights, as before, we might acknowledge that African Americans themselves provided the first line of defense against one-party "white man's government" in the South, asking only the modicum of federal assistance necessary to maintain law and order. And finally, where our received canon severed race from class, declassing African Americans and race-ing the working class white, we might begin to grapple with the fact that the struggle for civil rights entwined issues of race and class, with the problem of labor control looming large.