“No White Man Could Be Punished:” How the Supreme Court Promoted White Supremacy and Racial Violence in the Late Nineteenth Century

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“Lynch law, violence, and murder have gone on...and without the least show of federal interference or popular rebuke,” Frederick Douglass exclaimed in 1889. “There have also been the usual number of outrages committed against the civil rights of colored citizens on highways and byways, by land and by water; and the courts of the country, under the decision of the Supreme Court of the United States.”

Douglass was speaking at a particularly grim time for black Americans. By the late 1880s in the United States, racial violence toward black Americans was at its peak. This was the period in which mobs of white people perpetrated lynchings against hundreds of black Americans; in the year 1889 alone, there were at least one hundred and seventy lynchings. By the same time, the United States Supreme Court had already ruled on several decisions that were detrimental for black civil rights and legal protections. While they experienced horrific violence at the hands of whites, by the late nineteenth-century, black Americans could not look to the courts for protection from such violence. In this period, the Supreme Court was no ally to black people, particularly when cases for black civil rights conflicted with the Court’s ideological leanings.

Plenty of historians and legal scholars have studied the Supreme Court’s rulings on civil rights. The narrative surrounding the Supreme Court’s rulings on the civil rights of black Americans tends to follow a linear progression, from the infamous Dred Scott v. Sandford (1857), then Plessy v. Ferguson (1896), to the celebrated Brown v. Board of Education (1954).

Chief Justice Roger Taney delivered the majority opinion of Dred Scott, ruling that enslaved

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2 By civil rights, I mean the legal protections that comprise citizenship that facilitates one’s participation in society, such as the right to vote.
people were not citizens under the law and could not sue in Court. *Plessy v. Ferguson* (1896) established the legal justification for segregation and Jim Crow, in “separate but equal.” In the mid-twentieth century, *Brown v. Board of Education* (1954), marked the end of legal segregation with its proclamation that “separate was inherently unequal.” In all of these Supreme Court opinions, the justices considered questions of racial equality and civil rights in relationship to the tenets of the U.S. Constitution. Although sometimes arising from obscure legal issues, these kinds of Supreme Court cases put forth broad ideas and proclamations about equality, individual liberty, and race. Formally, these Supreme Court decisions largely functioned by establishing legal precedent, providing instruction to lower courts on how to interpret similar kinds of cases and rule accordingly. However, this thesis will posit that as the ultimate arbiter of the meaning of equality under the law, the Supreme Court affected people’s everyday lives in more visceral ways. Focusing on two particular cases from the late nineteenth century, *U.S. v. Cruikshank* (1876), and the *Civil Rights Cases* (1883), I will argue that the Supreme Court promoted white supremacy and racial violence.

In *Cruikshank*, the Supreme Court freed a group of white supremacists whom a lower court had found guilty of massacring over a hundred and fifty freedpeople in the wake of a contested state election. The Supreme Court not only acquitted the killers, but also limited the federal government’s power to prosecute and prevent such violence. Rather than acknowledge the violence of white supremacy that had allowed southern whites to viciously overthrow Republican state governments during Reconstruction, the Supreme Court chose to ignore the danger of such violence. By allowing Redemptionist brutality to stand, the Supreme Court aided

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and endorsed southern white attempts to reinforce white supremacy through murder. The Supreme Court was fully aware of these kinds of racist, violent campaigns in the South that left hundreds of freedpeople dead. It made a conscious decision to ignore them.

At the end of the Civil War, there was a dramatic reimagining of the American constitution with the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, the so-called Reconstruction Amendments. The result of decades of organizing by radical abolitionists to amend the Constitution to reflect its original broad promises of equality, the Reconstruction Amendments freed black people from enslavement, and contained language promoting racial equality, and protecting black civil and political rights. The Reconstruction Amendments also called for Congress to enforce their provisions from state encroachment, thus increasing the power of the federal government relative to the states, to protect the newly adopted constitutional rights of freedpeople. The Reconstruction Amendments, and particularly the Fourteenth Amendment, provided the legal framework through which the Supreme Court adjudicated cases that concerned racial inequality and the rights of freedpeople in the post-Civil-War era.

Although the Reconstruction Amendments contained egalitarian language, and were meant to protect freedpeople, the courts would be the decisive voice in establishing the meanings of the amendments in practice. Because the Supreme Court had the power to interpret the

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4 “Redemption” marked southern white Democrats’ attempts to reclaim political power from Republicans who had been elected during the federal occupation of the South during Reconstruction in the 1870s. Redemption included forceful coups and overthrows of local governments, and not just the election of Democrats to local office. Redemption was fundamentally about restoring white supremacy in government. Gregory P. Downs, Declarations of Dependence: The Long Reconstruction of Popular Politics in the South, 1861-1908, (University of North Carolina Press, 2011) p. 131.

meaning of the law, it was perfectly within the authority of the Court to limit the applicability of the Reconstruction Amendments in line with the views of the individual justices. Legal thinkers have written endlessly about “judicial activism,” in which Supreme Court Justices allegedly rule based on their own views in a way that goes beyond public opinion (Brown v. Board has often been regarded as an example). However, this thesis will posit that in the late nineteenth century, judicial activism included inaction, where the Supreme Court made an active choice to uphold the status quo when the word of the law itself—through the Reconstruction Amendments—provided for radical change.

In this period, when the practical meanings of the Reconstruction Amendments were still in formation, the interpretative authority of the Supreme Court was crucial. In their language, the Reconstruction Amendments were about protecting newly emancipated people and promoting their legal equality and civil rights. But the rights and equality guaranteed in the Reconstruction Amendments did not automatically materialize for freedpeople with the Amendments’ ratification. In the post-Civil War South, in which white supremacists violently silenced the ability of freedpeople to participate in politics and any state attempts to realize racial equality, these Amendments required rigorous enforcement by the federal government. And government enforcement of the Reconstruction Amendments could not and did not happen if the Supreme Court ruled that such enforcement measures were unconstitutional, based on its members’ particular interpretations.

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Between 1874 and 1888, several important cases that presented questions of the power of the Reconstruction Amendments came to the Supreme Court. This was the period of the Court led by Chief Justice Morrison R. Waite. Another notable member of the Waite Court, whose views and opinions were particularly important during this era, was Justice Joseph P. Bradley. Historians have regarded Bradley as the intellectual center of the Waite Court whose views defined the dominant constitutional interpretations of this era. Bradley’s ideas were particularly significant in the two cases that I will discuss, *U.S. v. Cruikshank* and the *Civil Rights Cases*, in which he outlined the interpretive framework that many other justices would use for all cases concerning the Fourteenth Amendment.

The Waite Court was responsible for a number of decisions between 1874 and 1888 that circumscribed the power of the Reconstruction Amendments to protect the rights of black citizens, from issues of criminal justice to civil rights. All of the members of the Waite Court were white Republican men who were largely moderate. Each justice had his own view on race relations, and what the role of the law should be in facilitating racial equality based on the Constitution, if any. Moreover, in the late-nineteenth century, liberalism was the prominent political framework through which these justices evaluated the law, which meant that they sought to protect individual liberty and limit what they saw as unnecessary government intervention. Popular among many white male intellectuals at the time, liberalism contained language about equality and liberty, but in practice, was premised on a degree of inequality for people who were not white men. Liberalism and other personal ideologies heavily informed the

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8 Howard, 21.
10 Young-Welke, 22.
various decisions made by the Court. In the wake of Reconstruction and the departure of federal oversight in the South, these decisions would have immense ramifications for the civil rights and livelihoods of black Americans. Two of those decisions included *U.S. v. Cruikshank* (1876) and the *Civil Rights Cases* (1883).

*Cruikshank* arose from the prosecution and subsequent appeals of several white men who were charged for the massacre of at least one hundred black Americans in Colfax, Louisiana in 1873. This violent massacre epitomized politically motivated violence during Reconstruction perpetrated by white supremacists, who were enraged by the rise of black political power under federally-occupied Reconstruction governments. When this case reached the Supreme Court in April 1876, the Court set the perpetrators free. With Chief Justice Waite delivering the majority opinion, the Court held that the Reconstruction Amendments could not provide a basis for the federal power utilized by the Enforcement Acts—specifically, that the fourteenth amendment could only be used to remedy state action, and not the actions of individuals. Informed by liberalism, this idea came to be known as “state action doctrine.” State action doctrine was the idea that the courts could only apply the Fourteenth Amendment to regulate state laws. Under state action doctrine, individual action, such as acts of violence, were outside of the amendment’s regulatory power. Therefore, the federal government could not prosecute individuals, like those who committed the Colfax massacre, for violating the right of the black freedpeople they killed.

*Cruikshank* and its legal precedent carried consequences for black Americans. Before *Cruikshank*, the Enforcement Acts yielded hundreds of convictions of perpetrators of racist acts of violence. This decision left the prosecution of racist violence to states and localities, who
historically had not aggressively punished whites for crimes against black Americans, particularly in the South. *Cruikshank* revealed the incongruity between Waite Court’s priorities of upholding liberalism and states’ rights, and the reality of rampant white supremacist violence in the South. The Waite Court’s insistence that it was the responsibility of states to adjudicate this violence and protect freedpeople’s rights neglected this reality. *Cruikshank* resulted from a racist massacre aimed at removing black politicians from office and putting white supremacists in their place. How did the Supreme Court imagine that states and localities would prevent this violence and promote freedpeople’s rights when violence enabled state leaders to come to power? When historians and legal scholars have written about this era of the Supreme Court, there is more emphasis on the purely legal narrative and the intellectual history of the ideas circulating through the Court. I argue that these ideas, like state action doctrine, cannot be separated from the broader context in which they were operating, which in this case, was racial violence.

The members of the Waite Court understood the danger of white supremacist violence and its role in politics. In *US v. Cruikshank*, they decided to ignore it. Moreover, the decision signaled to the nation at large that the highest court in the land would let acts of white supremacist murder could go unpunished. For white men across the country who used violence as a means for advancing white supremacy, this decision functioned as encouragement for their actions.

Legal scholars have noted that Americans have regarded Supreme Court decisions as more legitimate if they reflected broader national sentiments, and for that reason, the Supreme
Court has rarely diverged too far from popular opinion. With the introduction of the Reconstruction Amendments, the post-Reconstruction judicial period was marked by increased constitutional uncertainty. It was in this legal context of wanting to reside within the status quo—as defined by white, moderate men—that the Waite Court ruled on Cruikshank. In practice, the status quo included white supremacy and the violent means by which white supremacists furthered their aims, particularly in the South. If “judicial understandings of the Constitution will resonate within a broader community that shares those basic understandings,” as one legal scholar writes, then in its allowance of racial violence, Cruikshank resonated most with white men who disliked the growing power of the federal government during Reconstruction, as well as groups of white men who sought to attack and murder black Americans.

Another case decided by the Waite Court was the Civil Rights Cases, which struck down the 1875 Civil Rights Act. Building upon Cruikshank’s elaboration of state action doctrine as the framework through which to interpret the power of the Fourteenth Amendment, the Waite Court ruled that the Civil Rights Act’s proclamation that businesses and places of public accommodation could not discriminate based on race was an unlawful control of private behavior. Writing the majority opinion, Justice Bradley ruled that the Fourteenth Amendment held no authority to prevent racial discrimination, unless it was acting upon a discriminatory state law. The Civil Rights Cases provoked an extensive press response, even more so than the more famous Plessy v. Ferguson a decade later. As many white people across the country

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extolled Bradley’s ruling, black Americans across the country protested, including Frederick Douglass, who led thousands of people to converge on Washington to protest the decision.\textsuperscript{12} Widespread white approval of the \textit{Civil Rights} decision reveals the dissipation of concern for black lives and rights in mainstream (white) politics. Through protest, they articulated and decried the power the Court possessed to shape and endanger the lives of millions of black Americans. To many black Americans, the consequences of the Supreme Court’s decision were dire, and represented an abandonment of the federal government’s protections for black Americans after the Civil War.\textsuperscript{13}

In the decade after the \textit{Civil Rights Cases}, racial violence reached its peak. There were between 870 and 910 lynchings between 1884 and 1993 alone.\textsuperscript{14} Black activists like Ida B. Wells-Barnett and Frederick Douglass who protested the horrors and injustices of lynchings also protested the role of the Supreme Court in marking black Americans as outside the protection of the law, without civil rights. When the Court announced these rulings, and this kind of violence was plaguing their lives, black activists linked the exacerbation of racial brutality and the decisions of the Waite Court. It was shortly after the Supreme Court ruled that white men could not be prosecuted under federal law for violating a black person’s rights through murder, and after it ruled that federal law could not prevent white people and white business from discriminating against black people, that white people assaulted and killed many black Americans. This violence and murder was glaringly visible to members of the Waite Court, but

\textsuperscript{12} Howard, 132.


\textsuperscript{14} Ida B. Wells-Barnett reported 878 lynchings, and the Tuskegee Institute reported 909 lynchings; Ida B. Wells-Barnet, \textit{On Lynching}, (Amherst: Humanity Books, 1892), p. 21; Lynching Statistics By Year,” University of Missouri-Kansas City School of Law, Reprinted from the Archives at Tuskegee Institute.
they chose to disregard it in their approaches to cases dealing with protections for freedpeople based on the Reconstruction Amendments. When violence toward black Americans increased exponentially after the Court announced these decisions, it was because the final check against such violence was removed by the Court.

While Reconstruction-era federal protections for black Americans had provided some check on white supremacist brutality earlier in the late 1860s and 1870s, in this era there was no federal inhibition on such violence, because the Supreme Court had declared such forms of federal power unconstitutional. In doing so, the Court essentially eliminated all federal protections for freedpeople. White supremacists began to retake southern states one by one, and the Supreme Court did nothing. The Waite Court essentially argued that the only way that the Supreme Court could have intervened, was if a state had an explicit statute that called for racial violence—yet that was not how racial violence occurred. Moreover, through its decisions that sanctioned the racist, heinous actions of white men, the Waite Supreme Court contributed to the normalization of racial terrorism. These decisions thus operated not only in their immediate, legal meanings, but in the way that they produced and circulated norms of white supremacy and violence.

In their opinions, Justice Bradley and Chief Justice Waite did not explicitly instruct white people to murder black Americans. Yet the ideas in their decisions implicitly legitimized and authorized such white supremacist terrorism. When white men set out to harass, assault, and kill black Americans, as they did in large numbers in this period, in many places, they knew that they would face little to no consequences for their actions. Where did that sense of untouchability and
infallibility come from? I will argue that one source of such white supremacist impunity was the Supreme Court.

This thesis will borrow from legal historians and scholars who analyze the impact of the law on people’s everyday lives. Legal historian Barbara Young-Welke analyzes the relationship between nineteenth century law and the demarcation of legal personhood and citizenship along lines of race, gender and ability. She argues that although law was not the only way that people constituted individual identities, law was one way: “Law constructs, that is, lends consequence to elements of individual identity—race, sex, age, ability, religion, birth status and place of birth, marital status, and so on.” In turn, through the meanings associated with these characteristics, the law articulates “the ability to both substantively participate in society and to have a corresponding legal status as someone who can participate in society.”

For black Americans who lived in the nineteenth century, law certainly affected their lives, and the degree to which they could participate in the social and political landscape of the country. John Howard is another legal scholar who explores the intersection of the law and identity, in his study of the Supreme Court and the trajectory of civil rights between Reconstruction and the civil rights movement. Howard traces how the Supreme Court had a significant role in shaping race and rights in America by affirming particular racial values, such as white supremacy, which led to major consequences in further crystallizing racial hierarchies. In my study of the law, I will borrow from these legal scholars and others who have emphasized the relationship between the law and its social context, as well as the law’s ability to carry social meaning and influence social behavior.

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15 Young-Welke, 4.
16 Howard, 7-8.
While there are the aforementioned legal studies that also invoke social history, I hope to add to this discourse by focusing specifically on the relationship between Supreme Court decisions and violence. Thinking about the Supreme Court and its rulings in conjunction with social and political histories of Reconstruction and Redemption allows for a broader understanding of the forces that influenced the politics and violence in this period. The Supreme Court’s rulings affected people’s everyday lives, and in turn was affected by people’s everyday actions. Steven Hahn, Stephen Kantrowitz, and Gregory Downs provide analyses of mob violence and politics during and after Reconstruction, showing how southern whites routinely used violence as a means of asserting white hegemony over politics and suppressing growing black political participation. In the first chapter, I am in conversation with these historians to contextualize the story of the 1873 Colfax Massacre as a part of Reconstruction-era white supremacist terrorism aimed at disenfranchising freedpeople. Leanna Keith’s work also heavily influences the first chapter, as the central book on the Colfax Massacre itself and the federal trials that followed, eventually leading to *U.S. v. Cruikshank*. I tell this story to fully explain the kind of racialized brutality and death that preceded this Supreme Court decision. I also show how freedpeople exercised political power and sought to realize equality despite the threat of violence, and the ways in which the federal government attempted to prevent such violence.

Where the first chapter is an analysis of localized actions of white supremacists and black political actors, the second chapter is a close look at the Supreme Court, analyzing the ideas and individual justices behind the *U.S. v. Cruikshank* decision. Relying upon Young-Welke and Howard, in this chapter I explore how ideas of liberalism and white supremacy interacted with one another in Justice Bradley’s formulation of the legal arguments of *Cruikshank*, specifically,
in state action doctrine.\textsuperscript{17} The final chapter explores the consequences of \textit{Cruikshank} in the form of continued abrogation of black rights with the \textit{Civil Rights Cases}, and increased racial terrorism in the forms of lynching and mob violence. I engage studies of lynching in the late nineteenth century from Terence Finnegan and Gregory Downs, in addition to leaning heavily on Ida B. Wells’ own detailed analysis of lynching.

In the late nineteenth century, white mobs lynched hundreds of black Americans in the legal environment set by the Waite Court, in which no white man could be punished— for refusing a black person entry to a movie theater, for preventing a black person from voting, or for killing a black person in cold blood. Many scholars have written about the horrors of lynchings and racial massacres in this period, and how local officials often stood by and watched, or even participated. This thesis will show that symbolically, the members of the Supreme Court did as well. When we abhor the appalling bloodshed that black Americans faced at this time, we should consider how the Supreme Court not only turned a blind eye to such violence but actively enabled it.

\textsuperscript{17} Although Chief Justice Morrison Waite delivered the majority opinion, Bradley was responsible for the circuit court appeal that outlined all of the central holdings of Waite’s later opinion. Ibid, 98.
Forty-one years after the bloody events of Easter Sunday, 1873, the *Colfax Chronicle* published an article titled “A History of the Colfax Riot: Facts Gathered from Eye Witnesses Correcting the Misstatements that it was a Massacre of Innocent Negroes by Whites Without Cause or Any Reasonable Grounds of Justification." In the article, the writer, assuredly a white man from Colfax, did not deny that whites murdered scores of black people, but condemned the characterization of the 1873 killings as a massacre. The *Colfax Chronicle* insisted that it was crucial to challenge the “innocence” of the black victims and investigate their role in instigating
a ‘riot.’ The vilification of the massacre’s victims and fighters was necessary to correct the “injustice done to a majority of whites who took part in that unfortunate conflict,” who had been judged as murderers.¹ This newspaper was not concerned with disputing the existence of the murders. It was concerned with disputing the innocence of the black victims, and how this episode of violence had been remembered.

The murders of black freedmen by white men in Colfax marked the “bloodiest single act of carnage during all of Reconstruction.”² The Colfax Massacre was just one instance of racist violence that grew across the South during Reconstruction and thereafter. Colfax remains a critical site in studying the explosion of racial terrorism, because the Easter Sunday massacre resulted in the 1876 Supreme Court case, *US v. Cruikshank*. *Cruikshank* was a defining case in the judicial interpretation and enforcement of the Reconstruction Amendments and had a tremendous impact on black Americans who saw the Thirteenth, Fourteenth, and Fifteenth amendments as crucial to the protection of their rights and livelihoods.

The Reconstruction Amendments were part of an effort by the federal government, led by radical Republicans, to legislate freedpeople into the American polity after emancipation. Two years after Abraham Lincoln issued the Emancipation Proclamation during the Civil War to free enslaved people in the Confederate states, the ratification of the Thirteenth Amendment ended slavery in the United States in 1865.³ In 1868, The Fourteenth Amendment established citizenship and legal equality as fundamental law: it declared that all people born in the United States were citizens; states could not deprive citizens of the “privileges and immunities” of

³ U.S Constitution, Amendment XIII.
citizenship; deprive anyone of “life, liberty, or property” without due process of law; nor deny any person “the equal protection of the laws.” The Fifteenth Amendment enfranchised freedpeople, proclaiming that neither the federal government nor the states could prevent citizens from voting based on race or previous condition of enslavement. Together, these amendments passed during Reconstruction provided the constitutional framework for the citizenship, legal equality, and political rights of black freedpeople.

Freedpeople zealously took the opportunity presented by the federal government’s legal pronouncement of their civil and political rights. After centuries of slavery and its legal support from the federal government, black Americans were legally citizens who were entitled to equal protection of the law, could legally vote, and hold political office—this was a historic moment for the evolution of black civil and political rights. Hundreds of black freedpeople were elected to political office, ranging from local magistrate to Congressional representative. During Reconstruction, egalitarian ideas were circulating through federal measures of legal equality such as the Thirteenth, Fourteenth, and Fifteenth Amendments, and their concurrent legislation including the Enforcement Acts. In this context, black Americans made meaning out of the Reconstruction Amendments, articulating their visions of legal and political equality in a variety of ways.

Yet black Americans’ exercise of their constitutional rights did not go unimpeded, as southern white men sought to restore the white supremacist order from slavery in the face of emancipation. White supremacist violence, carried out by groups such as the Ku Klux Klan, endangered the lives of thousands of freedpeople. It also threatened to undercut the political

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4 U.S Constitution, Amendment XIV.
5 U.S Constitution, Amendment XV.
gains made by freedpeople, as white supremacists sought to establish total white Democratic control of politics. In Colfax, several freedmen had come to hold political office, enraging the resident white supremacists. The brutality of the Colfax Massacre epitomized southern white men’s attempt to regain political domination through violence, at a time when many black Americans were claiming and exercising a newfound formal political power in the South.

Radical Republicans in Congress were concerned about the rise in racial terrorism, not only for the threats against freedpeople’s lives but the threat it posed to Republican political control. With these dual motivations, Congress passed a series of legislation titled the Enforcement Acts, aimed at abating white supremacist violence and protecting freedpeople’s constitutional rights as guaranteed by the recent Reconstruction Amendments. But these legislative measures were not always successful.

Preceding the Supreme Court decision in *Cruikshank*, the criminal trials of the Colfax Massacre’s perpetrators under the Enforcement Acts signified the challenges of the federal government’s efforts to adjudicate and suppress racist violence in the South. Before the Supreme Court weighed in, there were convictions of some of the murderers, but not of all of the white men who were involved. There was much at stake in the culmination of these trials: firstly, the fate of white supremacist murderers who posed a physical threat to hundreds of freedpeople; in addition, the trials would be a test of the viability of the Enforcement Acts and the federal government’s attempt to curtail racial terrorism. Lastly, Reconstruction brought about an opportunity for freedpeople to exercise political power that racist violence silenced. The inability of the federal government to effectively prosecute white supremacist violence would suppress black political participation and the kinds of gains for legal equality that black Americans
achieved during Reconstruction. The Colfax Massacre and its subsequent trials thus represented a threat to the political process of producing equality undertaken by black freedpeople during Reconstruction.

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Congressional Reconstruction presented newfound opportunities for freedpeople to access political power. The Military Reconstruction Acts placed Confederate states under military occupation, and set the conditions under which Confederate states could be readmitted to the Union: including ratification of the Fourteenth Amendment, new state constitutional conventions, and the enfranchisement of freedmen. The Reconstruction Acts reshaped Southern political governance by enfranchising freedmen and diminishing the monopoly of political power held by white men. Freedpeople were active in politics in this era in a variety of ways, from showing up to vote in record numbers, forming and joining political organizations such as the Union League, forming militias, and participating in state constitutional conventions.

These constitutional conventions that took place between 1866 and 1868 were arenas in which freedmen directly influenced the restructuring of power in their states, often comprising at least one-half of the delegates if not more. At these conventions, freedmen inscribed civil and political rights for freedpeople into the fundamental law of the state. In doing so, black delegates were reconstructing the political and civil life of the state to eradicate racial exclusion and

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8 Hahn, 153, 177, 203.
democratize participation in governance, to further the interests of all its citizens.⁹ Freedmen directly participated in the political reordering of their states, articulating the formal ways in which notions of legal racial equality would be produced.

The growth of black political power was particularly visible in rural areas in which the number of black freedpeople outnumbered whites. These districts had formerly been extensions of large plantations, in which wealthy slaveholders held complete political dominion. In these towns, black men were elected as magistrates, county commissioners, sheriffs, state and even national representatives.¹⁰ There were nearly eight hundred freedmen who served on state legislatures, and well over a thousand appointments or elections of freedmen to local office—eighty percent of which were in rural towns. Black ascension to municipal political power in rural areas replaced the “petty sovereignties” of slaveholders, upending centuries of white control over local affairs, such as criminal justice, taxes, and schooling.¹¹ To southern whites, black emancipation represented an upheaval of the racial social order from slavery. But the existence of freedmen in government was even more mutinous, regarded by Southern whites as “an act of rebellion.”¹² No longer did white slaveowning men have a monopoly on political power. Black Americans were not only legally free, they were also directly taking part in governance, exercising formal political power through legislation and even exerting force through state militias and police. White people in these rural areas were infuriated by the rise of

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⁹ Ibid, 209.
¹⁰ Ibid, 218.
¹¹ Hahn says it’s impossible to say with certainty how many local elections/appointments of freedmen there were, positing there were at least 1,100 but could have been up to 1,500. Ibid, 219, 220.
freedpeople’s political power as a revolt against the antebellum political order and sought to restore it through means that were familiar to them: violence.

During Reconstruction, southern white Democrats used violence to try to preserve the white supremacist order that black Republicans upended. Attempts to drive Republicans from state houses and Congress were part of “Redemption,” in which white Democrats sought to restore the white supremacist political order after the Civil War.\(^\text{13}\) Black participation in governance represented a mutinous inversion of white supremacist political power. As a result, white supremacist organizations such as the Ku Klux Klan emerged to terrorize black freedpeople and some white Republicans, targeting all those who sought to democratize political, social, and economic life. Klan violence was present wherever there was significant Republican support—and especially where there were large black Republican constituencies.\(^\text{14}\) Recruiting from many former Confederate soldiers, the Ku Klux Klan grew quickly across the South between later 1867 and 1868 as a violent response to the mass political mobilization of freedpeople. The Klan perpetrated violence against local black and Republican leaders, intimidated Republican voters, burned black churches and schools, and harassed black freedpeople who displayed any kind of political, social, or economic autonomy.\(^\text{15}\) Some freedpeople looked to the Freedmen’s Bureau, the federal agency that provided services for freedpeople during Reconstruction, for protection. But it was ill-equipped to stop the burgeoning white terrorism.\(^\text{16}\)


\(^\text{15}\) Hahn, 268, 272.

Freedpeople did seek protection from the federal government. There was a petition by a group of freedpeople in Kentucky addressed “To the senate and house of representatives assembled,” requesting protection from widespread racist violence. The petition described more than one hundred acts of violence between the fall of 1867 to April 1871, including the burnings of black schoolhouses, as well as numerous instances of beatings, whippings, and murders.17 A prominent black newspaper editor from Florida called for greater governmental protection from the Republican government for freedpeople, writing that freedpeople “have been led into slaughter pens and left to be murdered by an infuriated mob of violent men...resulting sometimes in the loss of their own lives and the starvation of their families...if continued, [it]cannot but impoverish and ruin the colored population for all time to come.18 Klan terrorism was vast and brutal, leaving many black families and communities vulnerable at a time when the federal government professed to be in support of the expansion of the rights of black freedpeople. White supremacist violence was a fundamental threat to freedpeople’s lives, but also the kinds of power and autonomy for which they were striving, including political power.

The ubiquity of white terrorism exhibited the centrality of violence in political life during Reconstruction and the beginnings of Jim Crow. Speaking about Klan violence during Reconstruction and the 1898 Wilmington massacre, respectively, several historians have used the same words to say that political power came from “the barrel of a gun.”19 Southern white men used violence as an attempt to quash black participation in and reassert white ownership of

politics. The characterization of black political participation as a revolt or rebellion was the justification for the violence southern whites perpetrated upon black communities.

Klan members and nightriders sought to restore white Democratic control across the South by terrorizing black voters who they presumed would be voting for Republicans, and thus represented a threat to the white supremacist political order. Freedpeople were, of course, incentivized to vote for Republicans: it was the party that led the war against the South and passed the Constitutional Amendments that emancipated them. In a letter to radical Republican Charles Sumner, several freedpeople from Georgia recounted their experiences with Klan violence that targeted them because of their political affiliations. A man named George Smith from Ellaville recounted the following:

Before the election of Grant, large bodies of men were riding about the country in the night for more than a month...They gave out word that they would whip every Radical in the country that intended to vote for Grant, and did whip all they could get hold of. They sent word to me that I was one of the leaders of the Grant club, and they would whip me. Nearly all the Radicals in the neighborhood lay in the woods every night for two weeks before election. The Kuklux would go to the houses of all that belonged to the Grant club, call them to the door, throw a blanket over them and carry them off and whip them, and try and make them promise to vote for Seymour and Blair.20

The 1868 election of Ulysses Grant saw targeted white violence toward black people to prevent them from voting. Nevertheless, up to 400,000 black Americans voted for Grant in the 1868 election.21 black freedpeople thus became a crucial new Republican voter base, and black enfranchisement was a way in which Republicans could ensure their hold over the national

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21 Howard, 16.
government. 22 White racist violence threatened the lives of millions of black Americans during Reconstruction but it also represented a threat to Republicans’ political power.

The anti-Republican component of white terrorist activity in the South alarmed Republican leaders who eventually decided to take Congressional action by way of the Enforcement Acts. The Enforcement Act of 1870, the Enforcement Act 1871, and the Ku Klux Klan Act comprised the set of Enforcement Acts, all of which aimed to dismantle white terrorism and support black voting. The 1870 Enforcement Act made it a felony for people to prevent others from voting on account of race or previous condition of servitude, essentially providing for the enforcement of the guarantees of the Fifteenth Amendment. The 1870 Act also criminalized the conspiracy of two or more people to threaten or injure anyone to prevent them from exercising their constitutional rights and privileges as guaranteed by the Fourteenth Amendment. Under the 1870 Act, the President had the power to use the national guard and federal marshals to prosecute violations. The 1871 Enforcement Act contained increased fines and prison sentences for the same offenses. The 1871 Ku Klux Klan Act moved the prosecutions of violations under the Enforcement Act to federal jurisdiction, requiring the use of federal courts. The Klan Act also prevented two or more people from obstructing law enforcement using intimidation or violence, and prohibited terroristic threats against public officials and other acts of force meant to deny citizens “due and equal protection of the law.”23

22 Hahn, 264.
In effect, the Enforcement Acts required federal prosecution of offenses that would be qualified as hate crimes in contemporary terms: racially motivated acts meant to intimidate others and prevent them from exercising their rights. The Republican Congress who passed this legislation was particularly concerned with freedpeople’s right to vote: Republican Senator John Sherman emphasized the need to pass “some law” to enforce the Fifteenth Amendment. The constitutional basis for the Enforcement Acts and their enlargement of federal power into what was previously reserved as within the jurisdiction of the states—criminal prosecution of violence—were the Fourteenth and Fifteenth Amendments. Under the Enforcement Acts, states’ inability to protect freedpeople against acts of racist violence, meant to prevent black people from exercising their Fourteenth and Fifteenth Amendment rights, was enough to activate federal intervention. The passage of the Enforcement Acts had dual motivations among Republican Congressmen: curtailing racist violence and safeguarding the black voter base.

What effect did the Enforcement Acts actually have in reducing acts of racist violence? It is hard to say. Some historians have regarded the Enforcement Acts as successful and “an effective instrument for breaking up the Klan and reducing the volume of terror,” and “appear to have broken the back of the Klan’s operation.” There were successful federal prosecutions of Klansmen and other white terrorists; in the five years after their passage, three thousand cases were brought under the Enforcement Acts, resulting in hundreds of convictions, largely in the Carolinas, Mississippi, and Alabama. Seven hundred men were convicted in Mississippi alone, and a few hundred in North Carolina as well. With the backing of federal law enforcement in

25 Howard, 86.
26 Ibid, 65; Hahn, 286.
27 Howard, 66, Hahn 286.
the Justice Department and the National Guard, the Enforcement Acts were able to criminalize white supremacist violence and imprison many of those responsible. However, the 1872 Colfax Massacre and its aftermath revealed the difficulties in the Enforcement Acts’ ability to effectively prevent racist violence and protect the rights of black Americans.

In Colfax, the seat of the Grant Parish, there had been growing black radical Republican mobilization leading up to the 1872 election. Colfax had a slight black majority, and from the beginning of Reconstruction there were many freedmen active in politics. William Ward, a prominent black state militia captain, was one such example. Ward had been frustrated with the moderate and conservative Republican appointments to office in Louisiana who had not prioritized the interests of freedpeople, such as economic justice and civil rights provisions. Ward was part of the leadership for a local Republican organization that pressed for more radical candidates.\textsuperscript{28} As captain of the local militia, Ward led the search—with his all-black militia—for the murderers of one of his white allies to be tried under the Enforcement Acts. In response, the white Republican Governor of Louisiana ordered Ward to disband his militia, but Ward refused, and further mobilized support for the black Republican ticket in the 1872 election.\textsuperscript{29} Ward was one of many black freedmen who took the political opportunities presented for freedpeople during Reconstruction and furthered a vision of political equality that would not simply be dictated by white Republican leadership.

Several black Republicans had ascended to power in this Louisiana town, exercising the political rights that marked important gains for freedpeople during Reconstruction.\textsuperscript{30} Many of its

\textsuperscript{28} New Orleans Republican, September 13, 1871.
\textsuperscript{29} Hahn, 293. No one ended up being brought to trial for the murder of Ward’s ally, Delos White, though several arrests were made, Sipress, 311.
Republican political appointees for the 1872 election were black radicals, such as the sheriff Dan Shaw and William Ward, who ran for state representative. This demonstration of radical black political power further infuriated white Democrats in Colfax. White men in Colfax consequently began a campaign of harassment and violence toward black Republicans.\textsuperscript{31}

Despite the existence of the Enforcement Acts, the 1872 gubernatorial election in Louisiana was fraught with tension and violence as the white supremacist countermovement attempted to challenge any threat to white Democratic control. The election process was so marked by fraud and violence that one Congressman remarked that “the ballot boxes in Louisiana are reeking with fraud and red with blood.”\textsuperscript{32} The election board subsequently split up, as one declared Democratic candidate John McEnery the winner, and the other proclaimed Republican William Kellogg the winner. To settle the bitter partisan conflict, a federal judge declared Republican William Pitt Kellogg the rightful governor. Although Kellogg had been declared the legal winner of the election, McEnery made his own appointments for local offices in the state. Louisiana whites attempted to nullify the results of the election, refusing to accept Republican victory.\textsuperscript{33} Colfax had opposing political appointments as local Republicans and Democrats attempted to claim power, heightening tension in the town.

In response to the threats posed by white Democrats in March 1873 Kellogg’s appointees and a hundred other black men decided to occupy the Colfax courthouse. Word had spread by the end of March that local Klan leader, James Hadnot, had been gathering men to attack Colfax and take the courthouse.\textsuperscript{34} Black political leaders and other freedpeople then went to the

\textsuperscript{31} Barnes et. al, 332.
\textsuperscript{32} 5 Cong. Record, 44th Cong., 2nd Sess. 384 (1876).
\textsuperscript{33} Barnes et. al, 331.
\textsuperscript{34} Sipress, 317.
courthouse to defend it from the white Democrats whom they feared would take it over to institute their own local government.\(^{35}\) Hundreds of more freedpeople gathered at the courthouse for protection, but only about eighty of them were armed. Ward wrote to a neighboring Parish minister for help, pleading "Our people are in trouble and I ask you in the name of Liberty and our Children's rights, come to our assistance as many as will and can and that feels that we are citizens."\(^{36}\) Ward invoked the egalitarian spirit of Reconstruction and proclaimed the equal citizenship of freedpeople to ask other white Republicans for help, but no other help arrived. Fear and the need for self-defense motivated Colfax’s black citizens to take refuge in the courthouse. One of the survivors of the massacre, Levi Nelson, said the black defenders “assembled at the courthouse because they were too frightened to remain home,” as “they had been told they would be hurt.”\(^{37}\)

Meanwhile, the Democratic appointee for sheriff, Christopher Columbus Nash, gathered hundreds of white people to create a paramilitary white supremacist force to reclaim the courthouse. All of these white men were Confederate veterans and/or members of white supremacist organizations such as the White Knights of Camelia, the White League, and the Ku Klux Klan. The white supremacist faction became increasingly militaristic, ultimately acquiring cannons. Both sides exchanged gunfire in early April, but there were no fatalities. Shortly thereafter, representatives from both sides subsequently met to discuss peace negotiations. They


\(^{36}\) William Ward letter to Reverend Jacob Johnson, April 5th 1873, in *United States v. C.C Nash et.al; Sipress, 319.*

broke down when a member of the white faction killed Jesse McKinney, a black bystander, on the other side of town.\textsuperscript{38}

On Easter Sunday, April 13th, 1873, Nash and his quasi-army demanded the defenders of the courthouse to surrender. The men inside refused, maintaining their right to defend their political rights and their livelihoods. The white men opened fire. White cannon-fire claimed the massacre’s first victim, Adam Kimball.\textsuperscript{39} The black defenders of the courthouse attempted to fire at strategic targets on the white side but did not kill many. At one point, the whites forced a black man they had taken prisoner to set the courthouse on fire, killing many inside and forcing a few dozen to run outside to be taken prisoner as well.\textsuperscript{40} One of the survivors detailed this horrific arson: “when the cannon went off we were all skeered, and huddled into the building like a herd of sheep. Then the burning roof began to fall on us, and every one was praying and shrieking and singing and calling on God to have mercy. The flesh of those furtherest from the door began to roast. I could smell it.”\textsuperscript{41} Some of the defenders survived the fire, but Nash and the other white men ultimately executed all of the black men they had taken prisoner from the courthouse.

The white men of Colfax committed murder because the black people of Colfax had dared to challenge white authority. At the beginning of Reconstruction, the federal government had emancipated and enfranchised all black Americans, who exercised political participation in a variety of ways, upending centuries of a white monopoly on politics and governance. In Colfax and elsewhere, black freedpeople did not just win elections and hold political office; they used armed defense to protect their Constitutional political rights.\textsuperscript{42} The white massacre of black

\textsuperscript{38} Keith, 96-98.
\textsuperscript{39} Ibid, 100.
\textsuperscript{40} Ibid, 102.
\textsuperscript{41} “Statement of a Negro Wounded at the Massacre,” \textit{Nebraska Advertiser}, May 12, 1873.
\textsuperscript{42} Hahn, 175.
political leaders and other freedpeople exemplified how, for whites, black articulation of politics—including armed self-defense—constituted an insurrection that called for violent suppression. By claiming and then defending their political power, black people in Colfax had acted in opposition to white domination of the social order and political life. To these white supremacists, this was a fatal mistake.

Behavior these white men deemed irredeemable included isolated or even imagined shows of black power. One white man told Etienne Elzie, a black man who ultimately survived the massacre, “In 1870, you knocked me off a bale of cotton,” right before the slaughter of the prisoners.43 Another survivor, Levi Nelson, recounted that the white men subsequently “took the colored men around the corner of a coffeehouse and shot them; there were thirty-seven prisoners there with me; the white men said they had a good mess of beeves and would have a good time of it.”44 There was no doubt that this was a racist, terroristic massacre. The white attackers murdered all of the black defenders of the Colfax courthouse because their political participation and subsequent self-defense challenged the racial order.

The white perpetrators of this horrific massacre carried out the most violent episode of racial terrorism during Reconstruction. Historians estimate seventy to one hundred and sixty-five victims of the Colfax Massacre, but the actual total could be greater. 45 As the Colfax Chronicle illuminated decades after, the white murderers did not try to hide how many people they killed. They were proud. A day after the massacre, white men encouraged people to look at the unburied bodies and harassed black women whose husbands had been murdered. One white man bragged

43 Keith, 104.
45 Keith, 109.
to a black woman who had been widowed, “Go to town, if you want to see a mess of dead beeeves.” As a fulfillment of the violence of white supremacy, white men in Colfax were proud of what they had done. White supremacist celebration of racist violence permeated the streets of Colfax and beyond as local white newspapers wrote about the killings.

In their press responses, Southern whites used the Colfax Massacre to construct a triumphalistic narrative of dominance over “riotous” black men. A few days after the massacre, the *Louisiana Democrat* portrayed the black defenders of the Colfax courthouse as “full masters and possessors of everything in Colfax,” acting “without law or the shadow of authority.” Ironically, in defending the mass murder by white men that violated not only local but federal law, Louisiana whites cited the lawlessness of the black victims and survivors of the massacre. The black men were thus “opponents of law and order,” who “from the start, have been arrogant, dictatorial and disposed to hunt down the white man.” As such, in murdering over a hundred black people the white men of Colfax had acted in “pure self-defense” of their homes and their families. The *Louisiana Democrat* characterized the massacre as a necessary suppression of violent black people to maintain law and order. This association of black freedpeople with lawlessness was a common trope in white supremacy, one that ironically sanctified racist violence as an act of juridical peacekeeping. After emancipation, white supremacists regarded black freedom as criminal in and of itself, which was a central idea held by the white men defending the Colfax massacre. As black freedom was criminal, black political participation

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46 Ibid, 110.
48 In the context of post-emancipation Baltimore, Adam Malka wrote that “black freedom begat criminality,” which was an idea that whites used to justify the mass incarceration of black Americans. But this idea is applicable to Colfax whites’ views of the ‘lawlessness’ of black freedpeople. Adam Malka, *The Men of Mobtown: Policing Baltimore in the Age of Slavery and Emancipation*, (Chapel Hill: University of North Carolina Press 2018), p. 220.
and self-defense amounted to a “slave revolt” that all white men had a duty to put down. In the view of southern whites, black Americans’ innate violence and disregard for the law justified their subjection to violence.

Colfax whites also conceived of the massacre as a result of an inevitable race war brought upon by black freedpeople. The *Louisiana Democrat* claimed the massacre, or ‘riot,’ was “simply.. a ‘war of races,’ wholly inaugurated and forced on by the negroes.” This violent episode was fundamentally a result of racial animosity, supposedly instigated by black Americans. In an article a few weeks later, the same newspaper declared that “The deep seated hate and unalignity of the negro toward the white man...has forced the whole matter to a point.”

For the white men of Colfax, there was undeniable, innate racial hatred that precipitated the massacre—but it was primarily the hatred of black people toward white people. Implicit in Colfax whites’ insistence upon a race war and deep-seated racial hatred as the cause of the massacre was the incompatibility of black emancipation with the Southern white way of life. Nash declared in *The Ouachita Telegraph* that his central role in the massacre had a reasonable explanation: “Depend upon it, the white population here had to meet the issue made by the riotous negroes and give them a severe check, or leave the country. Nothing else was left to do.”

Nash justified horrific violence as a necessary last resort to control the black people of Colfax. This idea followed the white supremacist logic that without slavery, black freedpeople were fundamentally anarchic and incapable of living with whites. In turn, white people had the

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obligation to keep black people in check through violence meant as a form of social control. The Colfax Massacre was thus a fulfillment of the violent logic of white supremacy and the presumed incompatibility of black freedpeople and (white) law and order.

As an act of racist violence, the Colfax Massacre activated the Enforcement Acts and federal jurisdiction of the criminal case. Theodore W. DeKlyne, a Republican from Philadelphia, was the colonel from the state militia sent by Governor Kellogg to investigate the massacre. His report was central to the Justice Department’s prosecution of the attackers. Coming to the scene on April 15, 1873, two days after the massacre, DeKlyne counted seventy-one dead bodies but believed there were likely additional victims. Colfax whites despised the carpetbaggers who were helping build a case against the massacre’s perpetrators, seeing them as “hunting up the men who tried to sustain law and insure peace.” Despite local white opposition to the investigation, Deklyne’s report included all of the heinous details of the massacre. The report was given to the assigned federal prosecutor, Assistant United States Attorney General James R. Beckwith. On June 16th, Beckwith brought indictments against ninety-seven men who committed the massacre to a federal grand jury on multiple counts of violating the Enforcement Acts through a conspiracy to deprive black freedpeople of their rights and murder.

White resistance to the prosecution of the massacre’s perpetrators was such that only nine men stood trial out of the original ninety-seven in February 1874, which was an increase from the seven that were arraigned in December. White communities across Louisiana hid the other perpetrators or helped them flee the state. As a result, Leanna Keith writes, “officials in

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54 “The Colfax Riot,”The Louisiana Democrat, April 16, 1873.
55 Keith, 111, 131.
Washington somberly pondered retreat” as they confronted “massive resistance in Central Louisiana, where households, communities, and church congregations successfully shielded the suspects.” The inability of the Attorney General’s office to prosecute the other eighty-eight attackers also reflected the hesitation of the federal government to take on the might of white supremacy in the South.

Violence and intimidation surrounded the investigation and the earlier grand jury proceedings. A white supremacist campaign of violence and intimidation followed the trial, targeting the prosecution’s 140 witnesses, an overwhelming majority of whom were black. On April 22nd, 1873, J.G.P. Hooe and George R. Marsh, two of the indicted attackers, assaulted a black man, “drawing a dirk and a revolver...accus[ing] him of testifying against them, and then knocked him down and beat him brutally.” Although this man who was attacked was likely uninvolved in the trial, testifying in court against the lead perpetrators of a racist massacre who had widespread support across the state was incredibly dangerous. The black men and women who witnessed the massacre displayed tremendous courage in giving crucial testimony against the white men who either literally tried to kill them, or wanted to.

Despite continuous threats of violence, Nelson and many other black residents of Colfax testified not only to the extent of the atrocities, but to exactly which white men committed which acts. Nelson testified that he “knew some of the white men at the cannon; John Green was at it; Bill Irwin was there: Bill Cruikshank and his brother also: this one was there: they kept up the fight all day; they told us to stack our arms and they wouldn’t hurt us, and for us to march out.

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57 Keith, 131-132, 118.
59 Keith, 115.
Shack White held up a white leaf, and asked them not to kill him; Irwin shot him down.” Nelson also identified twenty other white men present who participated in the massacre, most of whom were not standing trial. Among black witnesses’ testimony, the clear racist motives of the white attackers were abundantly clear: one witness testified that one white man said: “he did not come 400 miles to kill niggers for nothing.” Another witness, Alabama Mitchell, went on to identify George Scarborough as the man who gave the final order to murder the black men who had already been taken prisoner by the whites. In testifying against the perpetrators of the massacre despite threats and intimidation, black witnesses from Colfax openly and legally challenged the white supremacy that had threatened their lives.\(^6\)

AUSA Beckwith mounted a case with thirty-two criminal counts against the nine perpetrators in federal circuit court, following the Enforcement Acts. The first sixteen counts charged the defendants with conspiracy to violate various constitutional rights of the black victims. The rest of the counts charged the perpetrators with murder undertaken to pursue these conspiracies.\(^6\) Beckwith identified two victims of the massacre, Republican activist Alexander Tillman and Levi Nelson (although Nelson was ultimately found to be alive and testified at the trial). Beckwith charged that the nine defendants had conspired to murder and deprive Nelson and Tillman of their constitutional rights. The rights guaranteed to Tillman and Nelson came from the First Amendment right to assembly; the Second Amendment right to bear arms; the fourteenth amendment right to due process and equal protection under the law, and the Fifteenth amendment right to vote. In committing this massacre, the perpetrators had conspired to prevent black citizens from exercising these rights and punished them for doing so by murdering them,

\(^6\) New Orleans Republican, Feb 28 1874.
\(^6\) Barnes et. al, 335.
thus violating the Enforcement Acts. Beckwith’s arguments posited the federal government as
the central force tasked with protecting constitutional rights. By way of the massacre, the state of
Louisiana had failed to protect the rights of black freedmen in Colfax and it was up to the federal
government, through the Enforcement Acts, to remedy this infringement of rights and punish the
individuals responsible. The constitutional questions in this case surrounded the viability of the
Enforcement Acts and the power of the federal government to supersede that of the states when it
came to the criminal prosecution of racially motivated crimes. 62

Beckwith had voluminous evidence, but blunders in the prosecution—such as identifying
a victim who was, in fact, alive—combined with the vast resources of the defense failed to prove
to all of the members of the white jury that the nine white men were guilty of the thirty-two
criminal counts with which they were charged. Beckwith’s identification of Levi Nelson as one
of two listed victims did not help the prosecution’s case when he appeared to testify, alive.
However, Nelson did give effective testimony about the violence perpetrated by Nash and other
white men.63 At the same time, the defense received tremendous support from white
communities across Louisiana, and raised enough money to gather hundreds of witnesses, paying
them as much as a hundred dollars a day. The hurdles Beckwith faced were compounded by an
all-white jury, who would not be quick to convict nine white men for crimes committed against
black men. The jury failed to reach unanimity on all of the counts for each defendant, and a
mistrial was declared on March 16th, 1874.64

62 Keith, 132-133.
63 New Orleans Republican, Feb 28 1874.
64 The jury acquitted one defendant in the first trial, but did not reach unanimity on the remaining eight.
Keith, 130, 136.
The retrial began on May 18th, but this trial was markedly different as an important guest came to sit on the proceedings: Supreme Court Justice Joseph Bradley. During this era Supreme Court Justices went to “ride the circuit” to oversee judicial proceedings in the South, but in this case, the defense had explicitly invited Justice Bradley to consider a constitutional issue. While Beckwith filed the same charges against the same defendants, in this second trial, the defense filed a motion in arrest of judgement to challenge the constitutionality of the Enforcement Acts. Overseeing the Louisiana courtroom of federal district Judge William Woods, Bradley agreed to consider the motion in an appeal if there were convictions of the defendants. It is no surprise then, as Keith notes, that the “presence of Justice Bradley encouraged and even emboldened partisans of the defense.” In this second trial, Bradley’s attendance seemed to shift the weight toward the defense even more.

Beckwith essentially made the same arguments with the same witnesses that he used in the first trial. In his opinion on the appeal of the second trial, Bradley would later focus on how prosecution’s arguments focused on the murder and conspiracy perpetrated by the defendants, but not their specific intention to deprive black Americans of their constitutional rights. Although the black witnesses testified about the racially-motivated violence they saw, Beckwith did not focus on arguments of racial motivation. He did not directly link racism, and specifically the actions and tactics of white supremacist organizations, to the massacre. Looking at the language used by the perpetrators as recited through witness testimony, it is obvious that the defendants had racist motivations. The challenge inherent to proving a direct link between blatant racism

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65 Howard, 97.
66 Keith, 142.
and the massacre would prove crucial in the judgements Justice Bradley would gather from this trial, and officially make in the Supreme Court’s later ruling on the case.67

On June 10th, at the end of the second trial, the jury was convinced of at least part of the prosecution’s arguments, despite the challenges Beckwith faced. The jury convicted J.P. Hadnot, Bill Irwin, and Bill Cruikshank of sixteen conspiracy counts, but acquitted all of the defendants of murder charges. That Cruikshank helped organize the murder of the prisoners and Hadnot and Irwin never denied being present at the massacre proved to be enough for the jury to vote to convict the three of them. The convicted men faced a decade in prison, while the five men acquitted had to pay 5,000 dollar fines under the terms of the Enforcement Acts.68 Federal prosecution of the massacre under the Enforcement Acts yielded convictions of white men who perpetrated heinous racist violence against black Americans. But there were only three convictions, out of the likely hundreds of people who had participated in the attacks.

Beckwith was furious and disheartened, convinced that the main reason behind the lack of convictions was the white resistance and violence surrounding the trial, which made it impossible to have a jury “with courage enough to

67 Ibid, 140.
convict under any pressure of proof.”⁶⁹ As such, the culmination of the criminal trials of the Colfax Massacre reflected the limitations of the Enforcement Acts in mitigating racist violence in the South: local white resistance to prosecution of racist violence, all-white juries, and legal difficulty in showing white supremacist motivations.⁷⁰

The Enforcements Acts were not a permanent safeguard against racial terrorism. With the withdrawal of federal troops from the South in the Compromise of 1877, the federal government not only reduced its main enforcement arm, it also signaled its unwillingness to devote its power to protect the rights and livelihoods of freedpeople. The 1877 compromise signaled the end of Reconstruction and many measures of federal protection for freedpeople.⁷¹ Republicans in the federal government were no longer operating in a post-Civil War haste to protect and enfranchise black freedpeople. The Enforcement Acts were still in place, but they lost their enforcement, leading southern white men to continue violently terrorizing black communities.⁷²

A day before the verdict was announced, thirty white men from Colfax decided that they would act in accordance with the verdict they predicted and believed was rightful. These white men took two black men from a local jail, A.B. and Tom Norris, and hanged them. ⁷³ Racist violence remained the way in which white men sought to control and punish black freedpeople as perceived threats against law and order. The federal government’s attempt to penalize such

⁶⁹ J. R. Beckwith to George H. Williams, June 25 , 1874 , Source Chronological Files: Letters Received by the Attorney General, 1870 – 1884, cited in Keith, 143.
⁷⁰ The Supreme Court only ruled that all-white juries violated the equal protection clause in 1880, in Strauder v. West Virginia, 100 U.S. 303 (1880).
⁷² Hahn, 288.
racial terrorism was significant, but people interpreted government actions and court proceedings in their own ways. One of those ways was violence. After the two criminal trials from the Colfax Massacre, white men continued to commit such acts of violence.

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Once the verdict for the second Colfax Massacre trial was announced, the defense immediately filed an appeal, maintaining that the Enforcement Acts were unconstitutional. Bradley carried the appeal on his way back to Washington, along with the fate of millions of black Americans whom his decision would affect.
Over a decade before Joseph P. Bradley was involved in the *Cruikshank* case as a Supreme Court Justice, he ran for Congress on a platform of preserving the Union and the authority of the Constitution. To Bradley, ending the institution of slavery was not of primary concern. Calling for continued support of the Union’s war efforts, Bradley confessed, “I do not
say this because I hate the southern people or their institutions. I do not care a straw about their institutions, comparatively.” To that effect, Bradley did not know if he “would have issued the emancipation proclamation” if he had been president. In the midst of a bloody war over the fate of slavery, this soon-to-be Supreme Court Justice vocalized his ambivalence toward this institution of violent, racialized enslavement of people of African descent. When he was appointed to the Supreme Court in 1869 as a renowned legal thinker and practitioner, he brought this indifference to the plight of black Americans under violent, racist regimes to the highest court in the land.

Justice Bradley was one member of the Waite Supreme Court, named for Chief Justice Morrison R. Waite, who led the Court between 1874 and 1888. Although Waite was the Chief Justice and author of the Supreme Court’s *US v. Cruikshank* opinion, Bradley was the main intellectual powerhouse of the Waite Court. All of the Justices of the Waite Court were Republicans, and none were from the South. The Waite Court as a whole was dedicated to upholding liberal individualism and maintaining balanced federalism, wherein the federal government did not overstep its power. While other Justices such as Samuel Freeman Miller were influential in other cases such as *The Slaughterhouse Cases*, Justice Bradley was the driving intellectual force behind the *Cruikshank* decision, authoring an earlier appeal opinion in

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2 John R. Howard wrote that although Morrison R. Waite was the Chief Justice in this era, “in the pivotal cases going to the reach and meaning of the reformist amendments and laws of the postwar period it was really the ‘Bradley Court.’” John R. Howard, *The Shifting Wind: The Supreme Court and Civil Rights from Reconstruction to Brown*, (New York: State University of New York Press. 1999), p. 78.

1874 that presented all of the central arguments that Waite would make in the official decision of the Supreme Court in 1876.

In his writings and pre-*Cruikshank* legal opinions, Justice Bradley articulated liberal ideas of individualism and limited government that anticipated his and the rest of the Court’s adoption of state action doctrine. Bradley was a staunch liberal, meaning he believed in individual liberty in which the government—particularly the federal government—had no business intervening. He believed the federal government had little responsibility and authority to regulate the private actions of individuals. As such, Bradley advocated state action doctrine. State action doctrine was the legal framework that the Supreme Court at this time espoused to interpret the Fourteenth Amendment. Under state action doctrine, the Fourteenth Amendment could only be used by the federal government to regulate the actions of states, and not those of individuals. Bradley and the Waite Court thus approached the constitutional questions of the Enforcement Acts brought by the Colfax massacre and the *Cruikshank* case using this logic of state action doctrine.

Some historians have seen the Supreme Court’s elaboration of state action doctrine in the 1870s as indicative of the federal government’s retreat from Reconstruction. When the Supreme Court ruled on *Cruikshank* in 1876, the Grant Administration had already rolled back support for civil rights enforcement through reduced funding to the Justice Department’s Enforcement Acts efforts, thus weakening the protection of black civil rights. Grant’s reduction of funding for the Justice Department reflected the waning support of northern white Republicans for Reconstruction, and apprehension toward increased power of the federal government over that of states. Decreased northern white support for Reconstruction’s federal civil rights protection, as
well as Grant’s cutbacks to Justice Department funding, likely informed the Supreme Court Justices’ adoption of state action doctrine—after all, they too were all northern white Republicans. Some legal historians have argued that the political context of this period affected the kinds of interpretations of the Reconstruction Amendments put forth by the Supreme Court: in this context, state action doctrine reflected mainstream Republican views that saw the federal government as overstepping its power toward the end of Reconstruction. To the Supreme Court Justices such as Bradley who put forth state action doctrine, the Enforcement Acts were a prime example of the federal government attempting to get involved in state affairs and interfere with individual liberty, even if it was to protect freedpeople’s rights and livelihoods.  

The Waite Court’s usage of state action doctrine in cases relating to black Americans’ rights and livelihoods demonstrated the relationship between white supremacy and nineteenth century liberalism. Under this kind of liberalism, these Supreme Court Justices did not want to regulate the actions of individuals—when those individuals were white men. Nullifying Congressional measures that promoted racial equality, as the Waite Court did, amounted to tacit approval of white supremacy. State action doctrine was an idea that sanctioned the freedom of white men to do whatever they pleased, even if that included horrific acts of violence toward black Americans.

Ultimately, the Waite Court sided with the defendants in *Cruikshank* and nullified their convictions. Although the central holding surrounded technical issues of vagueness in the criminal case, Waite wrote an extended majority opinion, echoing all of the earlier sentiments of Justice Bradley. He upheld state action doctrine and circumscribed the applicability of the

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Fourteenth Amendment. *US v. Cruikshank* struck down parts of the Enforcement Acts, holding that the federal government could not punish individuals for violations of the Fourteenth Amendment—state action doctrine dictated that only states could be guilty of violating the Amendment. *US v. Cruikshank* thus weakened the power of the federal government to prosecute racist violence.

The *Cruikshank* decision carried consequences for black Americans in the immediate debilitation of the Enforcement Acts. Prosecutions under the Enforcement Acts greatly decreased after *Cruikshank* at the same time that there was increased proliferation of racial terrorism. In their freeing of white supremacist murderers, the Supreme Court signaled to the larger American public through *Cruikshank* that white men could murder black Americans with impunity. And in the absence of federal prosecution for racial violence, state governments, particularly in the South, would not fill that prosecutorial void; the lack of state response to mass racial terrorism was the main reason for which Republicans passed the federal Enforcement Acts in the first place. Beyond its immediate, legal repercussions, the *Cruikshank* decision carried broader meanings about legal racial equality and the place of white supremacist violence in the lives of black Americans.

Law and legal decisions have the ability to construct important meanings in people’s lives, and *US v. Cruikshank* is a prime example. Borrowing from historian Barbara Young-Welke, this chapter will engage the ways in which “law has operated as an authoritative discourse,” and the ways that it “fundamentally shapes individual identity and rights, relationships among individuals, and the relationship of the individual to the state.”[^5] Law does

not only operate in court decisions and statute books, though it might originate there. Law and its meanings circulate through the discourses of everyday people. Although this chapter will focus on the legal ideas surrounding *US v. Cruikshank*, those ideas were formed by individual people, like Supreme Court Justice Joseph Bradley, and affected the lives of individual people, such as the black residents of Colfax, Louisiana. This thesis is about the role of the law in endangering black lives; part of that exploration is investigating the ways in which white supremacy and liberalism coalesced in the legal thought of Supreme Court Justices. Thus this chapter is primarily about legal doctrine and the Supreme Court, but it is part of my larger project to unearth how the Supreme Court’s rulings affected the everyday lives of black Americans.

In *Cruikshank*, the Supreme Court made a ruling not just on the specific case resulting from the Colfax Massacre, but about what kinds of equality and protection black Americans could claim under the auspices of the Reconstruction Amendments. Though it proclaimed equal protection under the law, what did the Fourteenth Amendment mean in practice when it came to ensuring legal equality for black Americans? And if the Supreme Court vacated convictions for a racist massacre, and struck down federal protections against racial terrorism, what did that signify about their acceptance of these kinds of acts of violence? Young-Welke points to the centrality of the relationship between law and violence in reinforcing social hierarchies. In turn, I argue that in *US v. Cruikshank*, the Supreme Court promoted racist violence through the release of white supremacist murderers, the nullification of the Enforcement Acts, and the larger ideas communicated to Americans at large about legal equality and protection for black Americans.

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6 Young-Welke writes “violence, sanctioned by law, legitimated by law, sanitized by law, and rendered unadressable by its victims through law was central in the daily lives of racialized others, women, and disabled persons.” Young-Welke, *Law and the Borders of Belonging*, 82.
On July 3rd, 1874, Bradley delivered his opinion on the *Cruikshank* circuit court appeal. He sent the opinion to Assistant United States Attorney James Beckwith, the defense counsel, the federal district Judge William B. Woods, as well as many other Southern district judges whom he wanted to instruct on how to interpret the Enforcement Acts before the Supreme Court ruled on them. Although Bradley was not the author of the majority opinion in the Supreme Court case, his appeal opinion would inform all of the essential ideas in the Supreme Court ruling authored by Chief Justice Waite. 7

Bradley granted the defense’s motion in arrest of judgement, which vacated the convictions until the Supreme Court made its ruling. Precipitating the Supreme Court’s ruling, Bradley’s opinion in favor of the defense’s motion claimed the convictions under the Enforcement Act were unconstitutional. Bradley’s main objections to the convictions of Hadnot, Irwin, and Cruikshank were largely technical, as he cited Beckwith’s failure to explicitly mention racism as a motivation in the indictments of the attackers. Counts in Beckwith’s indictments that did not state race as a motivation were struck down by Bradley because of their “vagueness and generality.” 8

Bradley’s nitpicking of Beckwith’s language in the indictments demonstrated the Justice’s narrow legal thinking. For example, Bradley cites the fourth count as one that was too

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7 Howard, 98.
vague and sweeping: “conspiracy to deprive certain colored citizens of African descent, of the free exercise and enjoyment of the right and privilege to the full and equal benefit of all laws and proceedings for the security of persons and property which is enjoyed by the white citizens.” This count essentially charged the defendants with conspiring to deprive the black victims of the massacre of the rights, privileges, and equal protection of the laws to secure personhood and property as guaranteed by the Fourteenth Amendment, and enforced in the language of the Enforcement Acts. Bradley questioned the legitimacy of this count because it did not explicitly say that the defendants committed this conspiracy because of their race, which Bradley saw as essential to prove a crime under the Enforcement Acts. The Justice concurred that the racial motivation of the massacre could be inferred because all of the victims were black, but he still argued “it ought not to have been left to inference; it should have been alleged. On this ground, therefore, I think this count is defective and cannot be sustained.” According to Bradley, racial motivation in this massacre had to be explicitly laid out in particular language that Beckwith did not use. The “general and sweeping” language that Beckwith used in the indictments to convict the perpetrators did not “amount to the averment of a criminal act.” Thus Bradley struck down several of the criminal conspiracy counts under which the three defendants were convicted because of this technical vagueness, and failure to show racial motivation in the way that Bradley thought was necessary.

Because Bradley did not see the explicit racial motivation in the massacre, he classified the Colfax Massacre as a kind of “ordinary murder” that fell under state jurisdiction. Even though he has attended the second criminal trial of the massacre, which included testimony from

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9 United States v. Cruikshank, 715.
survivors who vividly described the racist brutality that they witnessed, Bradley did not see this massacre as racially motivated, at least in a legal sense. Congress had no power to prosecute the perpetrators of the massacre, having no authority “to pass laws for the punishment of ordinary crimes and offenses against persons of the colored race.”10 Just because all of the victims of the massacre were black, it did not constitute racist conspiracy punishable under the Enforcement Acts. Therefore, the criminal trials of the massacre fell under state jurisdiction. Congress and the Department of Justice had no place in this prosecution. Although Bradley did not see this massacre as racial, he did engage ideas of race war in his opinion, similar to those expressed by white supremacists after the massacre in the previous chapter: He held that “The war of race...by private outrage or intimidation” was subject to federal jurisdiction.11 Whatever he thought race war meant, he did not see that present in the Colfax Massacre. To Bradley, the violence of this massacre was simple mass murder, devoid of any association to racism and conspiracy to deprive black Americans of their rights.12

Bradley went on to challenge the constitutionality of the Enforcement Acts themselves under the Fourteenth Amendment in accordance with state action doctrine. His central qualm with the Acts were that they were “operating directly on the conduct of individuals, and taking the place of ordinary state legislation; and that there is no constitutional authority for such an act, inasmuch as the state laws furnish adequate remedy for the alleged wrongs committed.”13 Bradley opposed the Acts’ regulation of individual behavior, such as mass murder, that belonged

10 Ibid, 712.
11 Ibid, 714.
12 Regarding the counts alleging that the massacre’s perpetrators conspired to prevent black people in Colfax from voting, Bradley also saw the same lack of evidence for racial motivation. While the Fifteenth Amendment calls for Congressional action to remedy the denial of one’s right to vote because of race, Bradley did not see that as an explicit issue in this case. Ibid, 714.
13 Ibid, 709.
under state and local authority. The state did not commit these heinous acts of violence.
Individual white supremacists did. In prosecuting the actions of individuals, and not targeting
any action taken by states, the Enforcement Acts did not withstand scrutiny under the Fourteenth
Amendment, whose object Bradley considered was to remedy unconstitutional state action.
Bradley asserted that the Fourteenth Amendment was “a guaranty of protection against the acts
of the state government itself. It is a guaranty against the exertion of arbitrary and tyrannical
power on the part of the government and legislature of the state, not a guaranty against the
commission of individual offenses.”14 The actions of individuals that constituted the Colfax
Massacre thus fell outside of the powers of federal protection enshrined in the Fourteenth
Amendment.

Upon receiving Bradley’s opinion, AUSA Beckwith was shocked and angry at what he
saw as a grave mistake in jurisprudence. Firstly, Beckwith was aghast that Bradley had vacated
the convictions of three white supremacist mass murderers because of technical errors in the
language of the indictments.15 It seemed blatantly obvious to him that this was a racially
motivated massacre. Secondly, Beckwith saw Bradley’s opinion and its circulation throughout
the South as a direct invitation to white supremacist violence, writing that “The White League as
an armed organization never would have existed but for his opinion.”16 Beckwith directly linked
Bradley’s opinion to the proliferation of violent white supremacist groups. In calling for the
nullification of the trial’s convictions, Beckwith saw Bradley’s opinion as sanctioning the kind of

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14 Ibid, 711.
15 Charles Lane, The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of
16 James R. Beckwith letter, October 27th, 1874 in Charles Fairman, Reconstruction and Reunion
racial terrorism that characterized the Colfax Massacre. In this way, the lead prosecutor of the Colfax Massacre’s perpetrators saw a Supreme Court Justice’s legal ideas as capable of changing people’s lives—namely, through violence.

Justice Bradley’s ideas about the applicability of the Fourteenth Amendment and legal equality utilized in his *Cruikshank* circuit court opinion were informed by his long-held liberal beliefs. In his papers edited by his son, Bradley wrote an essay titled, “Equality.” In this essay, Bradley stressed the importance of political equality and representative democracy from America’s founding ideals, in contrast to a form of equality that he saw as superfluous: social equality.17 Social equality, in which people of different races could equally participate in public society, to Bradley, was “the least possible of all meanings that could be attached to” the equality from Declaration of Independence; “Men will choose their own company in whatever state of society you may choose to place them. This is the last vestige of liberty with which they are willing to part, and any state of society which forbids a man this privilege, I shall neither contend for nor against.”18 Bradley believed people should be able to choose how they conducted their public, social lives and that social equality was an unfair mandate, antithetical to liberty itself: if white people did not want to socialize with people of color in public establishments, then that was within their liberty to do so, he believed. Bradley’s distaste for social equality reflected common liberal values, in which individual liberty was paramount. Social equality, if it were legislated by the government, would be a violation of individual liberty because it would infringe upon the personal choices of individual citizens. Under liberalism, the government would have a

limited role, and certainly would not promote social equality. Bradley situated his distaste for social equality in liberal terms of individual freedom, obfuscating how white supremacy was central to the liberalism he was espousing. He did not believe in social equality not just because he valued individual liberty, but because he fundamentally did not believe that all people were equal.

One can also glean Bradley’s strong belief in liberalism from his opposition to economic equality. He rejected the possibility that Americans should have an “equalization of wealth,” which he thought would produce “listlessness,” and make people “indolent.” Using language common to American liberalism that prized self-ownership, Bradley believed that individuals should provide for themselves and not receive support from others, or the government.

His liberal view of equality also appeared colorblind. Bradley claimed “We have no orders of society. No privileged classes.” If some people were more fortunate or richer than others, to Bradley that still did not mean there was systemic inequality. Bradley’s hesitation to see fundamental, structural inequality influenced his interpretation of court cases concerning racial discrimination. Based on these ideas, Bradley saw racial discrimination—as such acts of racial terrorism—as the private behavior of individuals, out of the scope of governmental regulation and guarantees of equality. For Bradley, legal equality meant adhering to liberal notions of individual liberty and limited government, and providing the bare minimum of a kind of political equality. Nothing more.

Bradley’s liberal beliefs and aversion to social equality provides context for his narrow interpretation of the Reconstruction Amendments and the Enforcement Acts in his circuit court

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19 Ibid, 91.
20 Ibid, 93.
opinion. Bradley saw the Enforcement Acts’ application of the Reconstruction Amendments—namely, the Fourteenth Amendment—as too broad and sweeping, attempting to regulate the actions of individuals instead of their proper use, which he saw as simply restricting state legislation. For Bradley, the Enforcement Acts were an expansion of the federal government’s power that violated the rights of individuals, as well as that of states.

The Fourteenth Amendment, especially with its clause calling for equal protection under the law, presented a dilemma for Justice Bradley, who did not believe that the government should do much in the way of legislating equality. Liberalism presumed a degree of inequality and did not provide for a basis for mitigating it.21 Thus when presented with the Cruikshank case, and the defense’s challenge to the constitutionality of the Enforcement Acts, Bradley wrote an opinion that limited the powers of the Fourteenth Amendment to guarantee legal equality and protection for its citizens.

Bradley seldom mentioned race in his papers, but as a Supreme Court Justice, he heard many cases that concerned racial discrimination that further formulated his ideas about legal equality as enshrined by the Constitution. Bradley was not uniformly opposed to federal protections for black freedpeople, as he asserted the constitutionality of the Civil Rights Act of 1866 in the 1872 case Blyew v. United States. In Blyew, the Supreme Court ruled that the new Civil Rights Act did not provide for a black witness’ right to testify against a white man in court, which Kentucky state law prohibited.22 Dissenting, Bradley saw this ruling as a violation of the

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21 Young-Welke, 22.
22 An Act to Protect All Persons in the United States in their Civil Rights and Liberties, and Furnish the Means of their Vindication, 14 Stat. 27 (1866); Blyew v. United States, 80 U.S. 581 (1872). Blyew surrounded the federal prosecution of white men who had murdered an elderly black woman, which two black men witnessed. Because Kentucky law prevented the two black men from testifying, and was thus a violation of the Civil Rights Act of 1866, the case was moved to federal court. The Supreme Court said this change in jurisdiction was unconstitutional because of language specificity, wherein witnesses to a crime did not qualify as those “affected” by
Thirteenth Amendment, of which the Civil Rights Act of 1866 was a necessary enforcement measure: The result of this decision for black witnesses was “to brand them with a badge of slavery… to expose them to wanton insults and fiendish assaults… to leave their lives, their families, and their property unprotected by law.” Unlike the Fourteenth Amendment, which he saw as negative or prohibitive, Bradley saw the Thirteenth Amendment as affirmative, requiring positive action by the federal government to end the enslavement of black people. He saw the Civil Rights Act of 1866, and in particular its protections for the political and legal rights of freedpeople, as crucial to the realization of emancipation. However, he saw the guarantees of the Fourteenth and Fifteenth Amendments differently. Bradley did not see the Enforcement Acts as a necessary measure for the enforcement of these amendments.

Another Supreme Court decision that informed Bradley’s 1874 Cruikshank opinion and his interpretation of the Fourteenth Amendment was the Slaughterhouse Cases. The first Supreme Court ruling on the Fourteenth Amendment, Slaughterhouse ironically had nothing to do with the rights of freedpeople, stemming from a challenge to a Louisiana state monopoly on slaughterhouse companies. The Court ruled in Slaughterhouse that the monopoly was constitutional because the Fourteenth Amendment’s equal protection clause was designed to protect the rights of freedpeople from racially-discriminatory state laws, and not disaffected butchers. Additionally, the Supreme Court severely limited the applicability of the Fourteenth Amendment’s privileges and immunities clause to areas of federal jurisdiction, such as ports. It limited the applicability of the due process clause to solely criminal procedure rights as well. In

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24 United States v. Cruikshank, 712.
these limited interpretations of the provisions of the Amendment, the Court majority rejected the renegotiation of federal power that would favor national citizenship over that of states. Overall, Slaughterhouse established an incredibly narrow interpretation of Amendment as precedent.25

Bradley dissented from the Slaughterhouse majority opinion, but only to argue that the Fourteenth Amendment, was not in fact, only meant for freedpeople. In his dissent, he further illuminated his race-neutral view of legal equality: “They [persons of the African race] may have been the primary cause of the amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed.”26 Bradley did not see the Fourteenth Amendment as specifically providing for the protection of black freedpeople, and did not agree with the Court’s ruling as such. Here again we see Bradley’s hesitation to give credence to systemic, racial inequality like that the Fourteenth Amendment was designed to ameliorate. Wary of any significant enlargement of federal power, Bradley further went on to indicate in his dissent his view that limited Congressional action was required to enforce the Fourteenth Amendment. Bradley claimed, “Very little, if any, legislation on the part of Congress would be required to carry the amendment into effect.”27 When radical Republicans in Congress did pass legislation to enforce the Fourteenth Amendment, such as the Enforcement Acts, Bradley thus approached their constitutionality with this narrow view of the Amendment and apprehension for increased federal power. Although presented as a positive guarantee of freedom, Bradley’s liberal articulation of state action doctrine represented an endorsement of white supremacy, and the


26 Slaughter-House Cases, 83 U.S. 38 (1873), (Joseph P. Bradley, Dissenting).

27 Ibid.
untouchability of the individual actions of white men. It follows from Bradley’s view that few federal laws, if any, could be constitutionally sound when they sought to govern the actions of white men.

After Bradley granted the appeal for *Cruikshank* and sent out his opinion enunciating his ideas about the limited applicability of the Reconstruction Amendments, AUSA Beckwith and the defense team awaited the decision of the Supreme Court. Yet no one was more eager for the decision of the Court than Bradley himself. In a letter to his friend, New Jersey Senator Frederick Frelinghuysen, Bradley wrote “My own mind is rather in the condition of seeking the truth, than that of dogmatically laying down opinions. And I am very glad that the Louisiana Case can be brought before the Supreme Court, and receive the deliberate and well-considered judgement of the whole Court.”  

Although he sought the judgement on this case of the rest of his fellow Justices, it was Bradley’s opinion and his legal ideas, more than anything else, that would dictate the Supreme Court’s decision.

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After deliberating for a year, the U.S. Supreme Court led by Chief Justice Waite delivered their unanimous opinion in *United States v. Cruikshank* on March 27th, 1876. At stake in the Supreme Court’s decision was the fate of three white supremacist who had committed mass murder, as well as the freedom of all black Americans from racist violence. Even more

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fundamentally, the decision would carry meanings about what equality under the Constitution meant in practice, according to the highest court in the land. 29

Although Chief Justice Waite wrote the majority opinion, it echoed Bradley’s earlier appeal opinion in all of its major holdings. The Court agreed with Bradley, ruling that the three defendants would go free, thereby reversing the convictions for conspiracy decided by the jury in Louisiana circuit court. Waite reiterated Bradley’s assertions that the counts in Beckwith’s indictments were “too vague and general” and the defendants’ convictions were therefore void. And there was no proof in the case, according to Waite, that “it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.” Despite the graphic testimony of black witnesses and survivors of the massacre, Waite did not see racist murder or infringement of rights that was explicit and intentional enough to warrant conviction under the Enforcement Acts. 30

Moving beyond the individual convictions of the defendants, the Waite Court rendered judgements on the Enforcement Acts and the Fourteenth Amendment themselves. The Court chose to make a sweeping ruling on these larger constitutional issues, despite its holding that this case was largely deficient because of drafting errors in the original indictments. In the opinion, Waite again echoed Bradley in his use of state action doctrine to challenge the constitutionality of the Enforcement Acts under the Fourteenth Amendment: The federal government could not regulate the behavior of individuals under the Amendment, only that of states. Waite wrote:

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws; but it adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any

29 Howard, 66.
encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more.\(^3\)

According to the Waite Court, the Fourteenth Amendment did not provide citizens with any protection from other individuals. Only states could violate the Fourteenth Amendment. In enforcing the Fourteenth Amendment, the federal government could thus only restrict state action and not that of individuals. Individual action that fell outside of the federal government’s Fourteenth Amendment power included the kind of brutal violence perpetrated by white men in the Colfax Massacre. The Waite Court did not see this kind of private violence as guilty of denying equal protection of the laws or due process to freedpeople.\(^3\) Using this logic, section six of the 1870 Enforcement Act was unconstitutional because it sought to punish individuals for conspiring to violate the “free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution.”\(^3\) Under *Cruikshank*, individuals could not be guilty of violating the constitutional rights of others.\(^3\)

State action doctrine constituted a legal theory that envisioned a limited federal government and elevated the sovereignty of states. In *Cruikshank*, the Waite Court put forth a view that the federal government had little responsibility in protecting the Fourteenth Amendment rights of individuals; that was up to the states. States had sovereignty when it came

\(^{31}\) Ibid, 543.
\(^{33}\) § Six, Enforcement Act of 1870, 16 Stat. 140.
to everyday rights protection. However, just because the protection of constitutional rights was the responsibility of the states did not mean that states would actively protect those rights. Congress passed the Enforcement Acts in 1870 in order to provide federal legislation to defend the rights of freedpeople against the assaults by local whites, and state governments. As the story of the Colfax Massacre reveals, local and state governments, particularly in the South, allowed for the violent suppression of black rights. By relegating rights protection as a sole responsibility of the states and not the federal government, the Waite Court tacitly approved of efforts by white men to deprive black Americans of their constitutional rights, whether that be through discriminatory state laws or violence.

Resembling Bradley’s earlier sentiments in his Slaughterhouse dissent, Waite articulated a circumscribed role of the federal government in enforcing the Fourteenth Amendment. It had no obligation to do anything but restrict state action. In effect, state action doctrine as utilized by Waite in Cruikshank marked an effort to take responsibility and power away from the federal government to protect the rights of freedpeople.

Through its weakening of the Fourteenth Amendment’s power, state action doctrine was clearly antithetical to the project of the Reconstruction Amendments as voiced by radical Republicans and freedpeople who supported their passage. These individuals publicly argued for

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35 The opinion reads, “Sovereignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the States.” United States v. Cruikshank, (1876), 542.

36 After emancipation, many southern states enacted Black Codes, racial laws enacted after emancipation that limited the rights of freedpeople in ways reminiscent of the legal restrictions of enslaved people. Black Codes in the South included the denial of the right to bear arms, the right to assembly, the right to participate in civil or criminal court proceedings, and the right to travel. They also included vagrancy laws that effectively forced freedpeople into sharecropping and other forms of coerced labor. Black Codes were an example of the way in which state governments disenfranchised and discriminated against black Americans. Radical or Congressional Reconstruction was a way Congress sought to restrict the ability of state governments to enact such discrimination. See generally Douglas Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II, (New York: Anchor Books, 2009); Eric Foner, Nothing but Freedom: Emancipation and its Legacy, (Baton Rouge: Louisiana State University Press, 1983).
the passage of the Reconstruction Amendments as an affirmative constitutional basis for racial
equality, and not just particular restrictions on state laws. Before the civil war, abolitionists
began the movement to redefine the constitution to include freedpeople as citizens with equal
rights, as guaranteed by the federal government. Drawing on this constitutional abolitionist
legacy, during the Congressional debates on the Fourteenth Amendment in May 1866, Senator
Jacob Howard, a member of the Joint Committee on Reconstruction, plainly stated that the equal
protection clause was the means by which to “protect the black man in his fundamental rights as
a citizen with the same shield which it throws over the white man.” Further, radical Republican
Senator Charles Sumner argued that the equal protection clause was a recognition that “the
protection of colored persons in civil rights is essential to complete the abolition of slavery.”
The circumscribed view of the Fourteenth Amendment held by Justice Waite and Justice Bradley
was in complete opposition to the architects of the Amendment, who saw it as a radical
guarantee of legal racial equality.

A decade after Cruikshank, Frederick Douglass decried what he saw as the courts’
betrayal of the obvious purpose of the Fourteenth Amendment: he said the Fourteenth
Amendment “was plainly intended to secure equal rights to all citizens of the United States,
without regard to race or color, and Congress was authorized to carry out this provision by
appropriate legislation.” Amid continued Supreme Court decisions that utilized state action
doctrine to strike down civil rights measures and safeguards for black Americans, Douglass

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39 Charles Sumner, “The Equal Rights of All: The Great Guaranty and Present Necessity for the Sake of
40 Frederick Douglass. Three Addresses on the Relations Sustaining Between the White and Colored People
sought to remind the nation of the intention of the Amendment in providing equal rights to black Americans. State action doctrine was thus a betrayal of what people like Douglass saw as the essence of the Fourteenth Amendment. The idea of state action was a way for the liberal, white Justices of the Waite Court to reconcile the radical potential of the Reconstruction Amendments with their distaste for increased federal power to protect freedpeople.

In a culmination of the court processes stemming from the Colfax Massacre, the Waite Court enshrined state action doctrine as the legal framework through which to interpret the Fourteenth Amendment. It was significant that the Court reified this legal idea in this case, as the specific individual action that the Court relegated to outside of federal control was coordinated mass murder. In the opinion, Chief Justice Waite wrote for many pages about state and individual action, yet did not address the specificity of violence in the case. There was no discussion of the horrific Colfax massacre, although the hundreds of pages of witness testimony from the original trials clearly detailed the violence. Waite’s refusal to center the violence of the massacre and the witness testimony represented a blow to the efforts by the black residents of Colfax to get justice for the massacre’s victims. The New Orleans Bulletin reported how AUSA Beckwith was dismayed by the decision, especially because of the black witnesses whose testimony was integral to his case: the “bloody phrases of his speech to the jury come back to taunt him about what he didn’t accomplish.” The absence of any discussion of violence in the Cruikshank opinion constituted a silencing of the black voices who testified to the atrocities of the Colfax massacre and the centrality of racial violence in the lives of black Americans.

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41 Lane, 246.
42 New Orleans Bulletin, March 30th, 1876.
When Waite did address violence in his opinion, it was to say that race was not explicitly shown as a motivation. Moreover, his opinion did not recognize that states themselves could be complicit in violence, and thus have a role in perpetuating it. The absence of specific consideration for the role of violence in the decision reflected the Court’s tacit acceptance of violence as a facet of everyday life for black Americans—and it was just another example of individual action that the federal government had no business regulating. This failure to discuss violence and the systemic forms of racial terrorism that surrounded this case also indicated the Waite Court’s commitment to reducing the power of the federal government, as pursuant to the kind of liberalism embodied by Justice Bradley. Although the Waite Court framed state action doctrine in *Cruikshank* as a simple issue of states’ rights, this legal doctrine was inextricably linked to racist violence, because that is what precipitated this case.

Americans looked to the Supreme Court in the wake of this decision for guidance on how to interpret the Reconstruction Amendments. One of the issues at stake in the Supreme Court’s ruling on the constitutionality of the Enforcement Acts was the meaning and applicability of the Fourteenth Amendment. One newspaper wrote that the Enforcement Acts were “all based on the same idea of the paramount power conferred upon Congress by the late constitutional amendments,” which was why the “interest with which the decision of the Supreme Court has been awaited on all sides, and the anxiety experienced in consequence of the long delay of the court in announcing its opinion.”43 The Supreme Court’s interpretation of the Reconstruction Amendments, including the Fourteenth, was of great national interest at the time. More importantly, the Court’s interpretation of the Fourteenth Amendment would establish precedent

that had profound effects on the black Americans’ access to legal protection in the late
nineteenth century.

The Waite Court’s narrow interpretations of the Fourteenth Amendment in *Cruikshank*

further circumscribed constitutional authority to both take away the rights of black Americans in
successive cases, and provided sanction for racist violence.\(^{44}\) The legal climate surrounding state
action doctrine created by the Court in this case was conducive to the violence perpetrated by
white supremacists, who had little to no likelihood of facing legal consequences after
*Cruikshank*. White supremacists who sought to commit violence and restrict the civil and
political rights of black Americans found a favorable legal environment with the Waite Court’s
ruling in *Cruikshank*.\(^{45}\)

Some historians have regarded *US v. Cruikshank* as a signal that affirmed violent white
supremacy because the federal government no longer had the constitutional authority to
prosecute violence like that of the Colfax Massacre. Of growing white supremacist paramilitary
mobilization, one historian said “what could have been a red or yellow light in the face of
paramilitarism turned into a green one.”\(^{46}\) Another historian regarded *Cruikshank* as sending a
“clear message” that there would no federal support to counteract the violence from growing
white supremacist organizations.\(^{47}\) The nullification of the Enforcement Acts by the Waite Court
signified to the nation as a whole that racially motivated acts of violence committed against
black Americans would not be prevented or punished by the federal government. White
supremacists took this signal as a green light for violence. Louisiana Governor William Pitt

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\(^{44}\) Young-Welke, 142.

\(^{45}\) Barnes et al., 341.

\(^{46}\) Steven Hahh, *A Nation Under Our Feet: Black Political Struggles in the Rural South, from Slavery to

\(^{47}\) Barnes et al., 336.
Kellogg, whose election set off the events of the Colfax Massacre, echoed this sentiment himself, declaring that the *Cruikshank* decision “was regarded as establishing the principle that hereafter no white man could be punished for killing a negro.”

Kellogg was largely correct. The Enforcement Acts, while not universally successful, had helped to reduce episodes of racial terrorism in certain places. After *Cruikshank*, however, there was a dramatic decrease in cases brought under the Enforcement Acts, which made them seem increasingly irrelevant, although the Supreme Court had not technically struck all of them down. One northern newspaper reported that “the opinion nowhere gives expression upon the constitutionality of the enforcement act itself.” Yet, “that in all cases which are likely to arise under the act, the Court can do no less if an appeal is taken to it than to dismiss them, as it has the two cases in point. Practically this makes the enforcement act a dead letter.” Although the Supreme Court did not dismantle the entirety of the Enforcement Acts, the Court set an example to the rest of the country by sidelining the power of the Enforcement Acts to prosecute those responsible for the Colfax Massacre. If, according to the Supreme Court, the Justice Department could not prosecute the white men responsible for the deaths of hundreds of freedpeople in a politically-motivated massacre under the Enforcement Acts, then who could it prosecute? The virtual nullification of the Enforcement Acts meant that acts of racist violence automatically fell under state and local jurisdiction, where they were less likely to see any prosecution at all,

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48 William Pitt Kellogg testimony in House Select Committee on the Condition of the South, “*Report of the Select Committee on that Portion of the President's Message Relating to the Condition of the South,*” 43rd Cong., Report No. 261, p. 246.
49 Hahn, 295.
particularly in the South. Overall, *Cruikshank* decreased the prosecution of racially motivated acts of violence like the Colfax Massacre.51

The decline of prosecutions under the Enforcement Acts after *Cruikshank* demonstrated the importance of how the law—the Supreme Court’s decision—yielded direct consequences on people’s lived experiences. Chief Justice Waite wrote thousands of words explaining the Supreme Court’s decision to overturn the convictions of the Colfax Massacre’s defendants and nullify parts of the Enforcement Acts. But people interpreted the Supreme Court’s decision in their own ways. U.S. attorneys decided not to prosecute more cases under the Enforcement Acts. White people in Louisiana interpreted the decision as legal ammunition to further their racist aims: Governor Kellogg testified that he had read an article in a Louisiana newspaper that said the black man’s “daily bread was in the hands of white people and that if they chose they could starve him.”52 To white people in Louisiana, the Supreme Court had validated their desire for violent racist control and repression.

It appears that at least one of the Justices considered what the Supreme Court was communicating to people through its decision in *Cruikshank*: an affirmation of white supremacy. After *Cruikshank*, Circuit Judge Hugh Bond taunted Chief Justice Waite for making a “Dred” decision, referring to the infamous *Dred Scott* case: “I have been afraid to come and see you since that ‘Dred’ decision of the enforcement case.” In response, Waite wrote, “Sorry for the “Dred,” but to my mind there was no escape.”53 Waite admitted that the Court had made a

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51 Barnes et al., 339.
52 Kellogg testimony in “Condition of the South,” 248.
53 Hugh L. Bond to Morrison R. Waite, April 4th, 1876, *Morrison R. Waite Papers*, Lane 247. In *Dred Scott v. Sandford* 60 U.S. 393 (1857), the Supreme Court ruled that nationally, enslaved black people were not citizens; they were property. Howard, 12.
decision akin to *Dred Scott*: overwhelmingly racist, and likely regrettable.\(^{54}\) In recognizing that *Cruikshank* was a *Dred*-like decision, the Chief Justice conceded to the potential of this decision to have dangerous implications for black Americans.

All of the Justices were aware of the relative success of the Enforcement Acts in ameliorating racial violence, and the growing danger of white supremacist terrorism. The members of the Waite Court, particularly Bradley and Waite, were aware of the context of the *Cruikshank* decision and the violent consequences it would unleash.\(^{55}\) The gravity of the decision’s consequences did not outweigh what the Justices saw as constitutional necessity. Bradley and the rest of the Waite Court were more willing to sacrifice black lives to racist violence than entertain any challenge to liberalism.

There were other responses to *Cruikshank* that recalled the infamy of *Dred Scott*. The *New Orleans Republican* expressed dismay toward the Waite Court’s decision:

> The wishes of the people, as embodied in the reconstruction laws, are set aside as of no weight when compared to the mechanical views of nine careful old gentleman, whose province it is to decide disputed points under the law…[this decision] may precipitate a catastrophe and suggest the necessity for prompt and energetic action, as in the case of the Dred Scott decision.\(^{56}\)

This Republican newspaper regarded *Cruikshank* as an unpopular, tyrannical decision that betrayed the will of the people who had supported Reconstruction. Although many whites regarded this decision as a victory for individual liberty and white domination, many radical Republicans and black Americans were outraged and appalled. In its degradation of the Enforcement Acts and limited interpretation of the Fourteenth Amendment, *Cruikshank*


\(^{55}\) Howard, 100.

\(^{56}\) “Popular Opinion and the Enforcement Acts,” *New Orleans Republican*, April 8 1876.
represented a threat to the security of black Americans’ livelihoods and rights, much like *Dred Scott* did two decades earlier. Nine white men on the Supreme Court, led by one in particular, decided that three white supremacist perpetrators of a horrific massacre should go free, signaling that similar acts of racial violence would go unpunished. For black Americans, the consequences of *US v. Cruikshank* would be dire.
“A Heavy Calamity:” The Waite Court’s Diminution of Black Civil Rights and the Rise in Racial Violence

“Racism, specifically, is the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death.”- Ruth Wilson Gilmore

In 1892, anti-lynching activist Ida B. Wells-Barnett wrote that Southern white people “are wedded to any method however revolting...for the subjugation of the... race.” She continued: “They have cheated him out of his ballot, deprived him of civil rights and redress therefor in the civil courts, robbed him of the fruits of his labor, and are still murdering, burning and lynching him. The result is a growing disregard of human life.”1 The deprivation of constitutional rights and heightened violence were twin experiences for black Americans in this period, whose lives the law refused to protect.

In the two decades after Cruikshank, racial violence skyrocketed. Wells-Barnett reported that from 1864 to 1894, white men murdered over ten thousand black Americans. Forms of racial violence varied from coordinated massacres such as the 1873 Colfax Massacre, to mob lynchings and murders of individual black Americans. In the early twentieth century, the Tuskegee Institute began gathering data on lynchings, ultimately recording 4,743 lynchings between 1883 and 1966; in recent years, the civil rights organization Equal Justice Initiative recorded a total of 4,384 “racial terror lynchings.”2 Historians and social scientists have agreed that the number of

lynnings resides in this four-to-five thousand range—at least. Between 1884 and 1893, Wells-Barnett reported that there were 878 lynchings of black Americans, while the Tuskegee institute reported 909 lynchings in the same period. Part of why it is difficult to ascertain how many lynching victims there were is because in many places lynching occurred so often and so visibly without much interest from local officials, that they were not recorded. Ida B. Wells-Barnett herself cited ten thousand murders of black Americans between 1864 and 1894, including acts of racial violence such as massacres and lynchings. Whatever the exact numbers were, there was an epidemic of racial violence in this period, permitted and upheld by the law.

US v. Cruikshank ruled that federal law could not hold white men accountable for murdering black Americans. Through its enunciation of state action doctrine, Cruikshank established the constitutional standard by which the Supreme Court would strike down almost all Congressional protections for black Americans, including the Enforcements Acts and the 1875 Civil Rights Act. In 1883, the Waite Court made another ruling that diminished the constitutional rights of black Americans: the Civil Rights Cases, which struck down the Civil Rights Act of 1875. Incidentally, 1883 was the same year that many studies on the numbers of lynchings often begin. In the Civil Rights decision, the Waite Court ruled that the law could not prevent white people from discriminating against black Americans in public spaces. Together, Cruikshank and the Civil Rights Cases sanctioned the violent racial terrorism that sustained white supremacy

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3 Wells-Barnett, I; This study reported 1,622 total lynchings in this period, with lynchings of white people comprising the difference, “Lynching Statistics By Year,” University of Missouri-Kansas City School of Law, Reprinted from the Archives at Tuskegee Institute, http://law2.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html.
across the nation by turning a blind eye to the numerous acts of violence that individual states refused to prosecute.

Despite the Supreme Court’s rulings in this period proclaiming that the courts would not provide protection for black citizens, the *Civil Rights Cases* was still a testament to black activists’ assertions for civil rights. When white train conductors, theater managers, and business owners refused to grant entry on account of race, black Americans sued them in court, demanding that the nondiscrimination provisions of the 1875 Civil Rights Act be rigorously enforced. Integral to black legal efforts to assert racial equality in the 1880s was a belief that the courts could still be a site of hope and protection for black Americans, even though the Waite Court had already made rulings that were detrimental to black rights. When a collection of these lawsuits arrived at the desk of Justice Bradley, he wrote the majority opinion that reinforced the Court’s liberal position and support for state action doctrine. The Court held that the 1875 Civil Rights Act was another unlawful attempt by the federal government to legislate the actions of individuals when it only had the authority to regulate state laws. The *Civil Rights Cases* thus marked the Waite Court’s continued pursuit of state action doctrine as a means to deprive black Americans of their Fourteenth Amendment rights to equality, thus leaving them vulnerable to uninhibited discrimination by white people. After the *Civil Rights* decision was announced, there were vast and varied responses to the decision across the country. Black activists predicted that the decision would threaten the lives of black Americans.

After *Cruikshank* and the *Civil Rights Cases*, white people gained newfound liberty to murder black Americans with the tacit approval of the Supreme Court. Legislation like the

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Enforcement Acts and even the Civil Rights Act of 1875 had provided some measure of restriction on white people’s racist and violent actions. Without any of these Acts in place, because of the Waite Court’s rulings, black Americans became more vulnerable than before. In addition to the nullification of Congressional protections for black Americans, these two decisions normalized acts of racial violence and discrimination by letting them go unchecked, without any legal consequences. To demonstrate “the absolute impunity with which the white man dares to kill a Negro,” Wells-Barnett reported that in the ten thousand racist murders that she found, that there were only three convictions of white men for their crimes.⁵

How exactly did the decisions of the Waite Court promote racial violence? What is the relationship between law and everyday actions, such as violence? When white people committed acts of violence against black Americans in the late nineteenth century, they did not do so with explicit instruction from the Supreme Court—but they knew that acts of racial violence were normal and would go unpunished. Law establishes norms, and norms inform everyday life. Everyday life and the law thus constitute and support one another.⁶ The Waite Court’s decisions held and promoted particular ideas about state and federal power, the Fourteenth Amendment, and racial equality under the law. Those ideas included the federal government’s unwillingness to protect black people, and the disposability of black lives. In other words, the Waite Court’s decisions in US v. Cruikshank and the Civil Rights Cases took away the federal government’s promise to protect the civil rights of black Americans, who the Court marked as outside of the realm of the law’s protection. Frederick Douglass thought similarly, as he decried how people

⁵ Wells-Barnet, 34.
regarded black Americans as “outside of the law, outside of society.”\textsuperscript{7} The Waite Court’s declaration that it was not the government’s role to protect the lives and civil rights of black Americans made black lives vulnerable. The law, as adjudicated through the decisions of the late nineteenth century Supreme Court, thus enshrined ideas and produced norms that translated to physical experiences of exclusion and violence.

The Waite Court did not proclaim to be sanctioning violence; it simply relegated the power to protect black people to the states. But in practice, the Court’s defense of states’ rights and advocacy of state action doctrine actively maintained white supremacy. Justice Bradley and Chief Justice Waite did not say explicitly that there would be \textit{no} consequences for white people who publicly discriminated or perpetrated violence against black Americans. They did say, however, that it was not the responsibility of the federal government to protect black Americans from violence and rights violations; it was up to the states to deliver such consequences. But during the 1880s and 1890s, southern state governments did not make any such effort to defend black Americans. Rather, state governments were unable or unwilling to prosecute racial violence and safeguard black rights—they had no motivation to do so. After the end of Reconstruction in the late 1870s, state governments that had been under Republican control during the height of Reconstruction were violently overthrown by white Democrats who sought to restore the white supremacist monopoly on political power as was the case during slavery.\textsuperscript{8} These white Democrats had no interest in protecting black lives, and certainly no interest in protecting black rights, which could threaten the white supremacist monopoly on state power.

\textsuperscript{7} Frederick Douglass, \textit{Why is the Negro Lynched?} Duke University. Rare Book, Manuscript, and Special Collections Library, and Adam Matthew Digital (Firm). Bridgwater: Reprinted by John Whitby and Sons, (1895), p. 3.

The absence of any federal check on racial terrorism was thus equivalent to having no check at all.

As demonstrated by the brutality of the Colfax Massacre, white Democrats used violence to acquire and preserve political power in the states. The members of the Waite Court understood this reality—Bradley himself witnessed the trial following the Colfax Massacre, and listened to the testimonies of black survivors who detailed the atrocities committed by white men in the pursuit of white supremacy. He also saw how local efforts to hold the perpetrators of the massacre responsible were largely futile. Without federal enforcement, white Democratic southern state governments had no motivation to shield black Americans from the threats of racial terrorism or discrimination. By nullifying the Enforcement Acts and the possibility for any federal measures to protect black Americans, the Waite Court tacitly supported the ascension of white supremacist power through violence.9

This chapter will discuss the twofold consequences of Cruikshank and the Waite Court’s advancement of state action doctrine: the continuation of rights infringement for black Americans in Civil Rights Cases, and the rise of mass racial violence. The first section will examine the Civil Rights Cases as an effort by black activists to pursue a far-reaching idea of social equality, while Justice Bradley and the Supreme Court did everything in their power to limit what racial equality meant in the eyes of the law. The second section will discuss the increase in racial terrorism and lynching in the decade after the Civil Rights Cases. The descriptions of violence will remain broad, as I aim to show not only how white supremacist violence was escalating in this period, but also how people like Ida B. Wells and Frederick

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9 By the 1890s, the failure of a federal bill to regulate elections combined with the Supreme Court’s abrogation of black rights, caused the expulsion of the majority of black Americans from formal politics in the South, Downs, 131-2.
Douglass related these episodes of violence to the law. I rely upon the work of Ida B. Wells to talk about lynching and other incidents of racial terrorism, acknowledging the importance of her anti-lynching activism and how she linked the rise of lynching to other social, political, and economic phenomenon of the time.

As a whole, this thesis posits that although we cannot solely look to the law to explain people’s behavior, the law carries meaning that affects people’s lives. The law put forth by the Waite Court carried white supremacist norms and meanings. In this chapter, I argue that the ideas circulated by the Supreme Court in *Cruikshank* and then the *Civil Rights Cases* advanced white supremacy, and specifically the impunity with which white men could perpetrate racial discrimination, violence, and murder. The Waite Court envisioned a liberal paradise for individual rights, wherein the government could not regulate the actions of individuals. Yet the consequences of the Court’s decisions had the opposite effect for a whole population across the country, whose lives were marred by rights infringement and violence. Under the authority of the highest court in the land, white men violated black people’s civil and political rights and committed heinous acts of brutality.

**The Degradation of Black Rights in The Civil Rights Cases**

Senator Charles Sumner introduced a new Civil Rights Act on May 13th, 1870, during the same session in which Congress was discussing and passing the Enforcement Acts. Arguing that the Act’s passage was fundamental to legislating racial equality, Sumner proclaimed: “when this bill shall become law, as I hope it will very soon, I know nothing further to be done in the
way of legislation for the security of equal rights in this Republic.” Such was the bold,
ambitious vision for this bill.

The proposed Civil Rights Act was a broad mandate of social equality. The bill
proclaimed that citizens “of every race and color, regardless of any previous condition of
servitude,” had the right to “full and equal enjoyment of the accommodations, advantages,
facilities, and privileges of inns, public conveyances on land or water, theaters, and other places
of public amusement.” Individuals and businesses that denied people access to these kinds of
public accommodations would have to pay restitution or face imprisonment. The bill also
established the right for aggrieved individuals to sue those who denied them access to public
accommodations in civil court. Going beyond the criminal and legal rights awarded to black
Americans by the Civil Rights Act of 1866, such as the right to sit on a jury, this Civil Rights Act
sought to include black Americans into the public, social fabric of the nation.

While Congress eventually passed the Civil Rights Act in 1875, it was not without its
racist opponents, who saw the bill’s declaration of broad social equality as unnatural and
unnecessary. In a drafted letter to federal judge William B. Wood (the same judge who oversaw
the early Colfax Massacre trials), Justice Bradley shared his thoughts on the bill while it was still
going through Congress:

It can never be endured that the white shall be compelled to lodge and eat and sit with the
negro. The latter can have his freedom and all legal and essential privileges without that.
The antipathy of races cannot be crushed and annihilated by legal enactment. The
constitutional amendments were never intended to aim at such an impossibility...does

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10 This was a new Civil Rights Act, separate from the 1866 Civil Rights Act. Cong. Globe, 41st Cong., 2nd Sess. 3434 (1870).
11 An Act to Protect all Citizens in Their Civil and Legal Rights, 18 Stat. 335 (1875).
12 Civil Rights Act of 1875, 18 Stat. 335.
13 An Act to Protect All Persons in the United States in their Civil Rights and Liberties, and Furnish the Means of their Vindication, 14 Stat. 27 (1866).
freedom of the black require the slavery of the whites? An enforced fellowship would be that.\textsuperscript{14}

As discussed in the previous chapter, Bradley’s devout liberalism and racism informed one another, particularly when considering social equality. Bradley conceded that black Americans deserved some rights, but for him, those did not include equal access to public and social spaces. Making his blatant racism even more evident, Bradley believed mandatory social equality among the races was so egregious that it was akin to slavery. Other white politicians held similar views. Arguing against the Act when it still had yet to be passed, Representative John Harris from Virginia said: “I saw there is not one gentleman upon the floor who can honestly say he really believes that the colored man is created his equal.” In response, Representative Alonzo Ransier, one of the first black men elected to Congress, responded, “I can.”\textsuperscript{15}

Ransier’s fight for the passage of the Civil Rights Act was a testament to the kind of black and Republicans activism that animated and enabled the passage of the bill. Ransier and other black Americans across the nation would not settle for the idea of equality held by white men like Justice Bradley. Unsatisfied with the limited guarantees of the 1866 Civil Rights Act, black communities across the country fought for measures to ensure social dignity and equality. As urban leisure culture expanded across the country in this period, so did calls by black Americans for equal participation in the same amusements, such as theaters, skating rinks, and public pools. Organizing for antidiscrimination laws was integral to black activists, for whom access to spaces of leisure and amusement represented an affirmation of full citizenship and a


\textsuperscript{15} 2 Cong. Record, 43rd Cong., 1st Sess. 376 (1874).
fulfillment of the promises of equality under the Fourteenth Amendment. When Sumner’s Civil Rights Act was passed in 1875, it was a victory for a fuller vision for black citizenship and racial equality that included social dignity.

Although the Waite Court’s Cruikshank ruling extremely weakened the possibility of black Americans receiving much protection from the courts, black Americans across the country sued for their rights in court pursuant to the Civil Rights Act of 1875. Unsurprisingly, many white people refused to abide by the Civil Rights Act and continued to refuse black Americans entry to public spaces, transportation, and businesses. The Civil Rights Cases (1883) was a collection of five suits brought by black Americans against different white businesses for violating the Civil Rights Act, which the Supreme Court combined into one ruling. Bird Gee and W.H.R. Agee sued white innkeepers for being denied lodging; William Davis and George Taylor sued the managers of two theaters for being denied entry; and Sallie Robinson sued a railroad company for being denied admission to the ladies car of a train.

These five activists initiated test cases knowing that the Supreme Court would ultimately decide how the Civil Rights Act would impact everyday lives of black Americans. John R. Howard writes that the actions of the black activists who sued for their rights in the Civil Rights Cases “reflected a deep belief in the integrity of the system, a belief that the law meant what it said, and that an affirmation of equal rights for blacks could be derived from the Constitution as interpreted by the Supreme Court.” Black Americans thus refused to accept the Waite Court’s...
proclamation that the Constitution did not empower the courts to protect black people from discrimination. When William Davis refused to leave the theater, and a policeman attempted to remove him, Davis protested that “perhaps the managers did not admit colored people to the house, but the laws of the country did admit them, and he would try to have them enforced.”

Davis was one of many black activists who believed in their constitutional right to equality and confronted the federal government to uphold those rights. But as *Cruikshank* showed, the Waite Court did not side with many black Americans in their struggle for legal equality.

The Supreme Court struck down the Civil Rights Act of 1875 in 1883, as an additional declaration to the nation after *Cruikshank* that black Americans could not look to the law for protection from racial discrimination. Writing for the majority opinion, Justice Bradley invoked state action doctrine to say that Congress could not outlaw racial discrimination in places of public accommodation or amusement under the auspices of the Fourteenth Amendment. Reiterating the *Cruikshank* ruling, Bradley insisted that only states, and not individuals (or individual businesses) could be guilty of violating a citizen’s Fourteenth Amendment rights.  

Bradley wrote that “the wrongful act of an individual, unsupported by any such authority, is simply a private wrong...if not sanctioned in some way by the State.” Consistent with his deeply held belief in individual liberty— for white men—Bradley marked the discriminatory, racist actions of ordinary white people as exempt from Congressional regulation. Moreover, Bradley failed to consider in his opinion the ways in which the interests of state governments and white supremacists converged. White men who prevented black Americans from enjoying spaces

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of public amusement necessarily supported the triumph of white supremacy, of which violence was always a part. State governments run by white Democrats sought the same goal.

In his *Civil Rights Cases* opinion, Bradley built upon *Cruikshank*'s endorsement of racial violence. He wrote that an individual “may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right.” Bradley’s language, which ignored the important ways that the absence of state law was itself a sanction by local government of racial terrorism, was purposeful—he pointed out the kinds of racial and political violence that white people had subjected black Americans to since the beginning of Reconstruction. It was the kind of brutality that precipitated *Cruikshank*. In a case not explicitly dealing with the issue of racial violence, Bradley went out of his way to say in his opinion that the kinds of racial discrimination that were immune to Fourteenth Amendment restrictions included violence. Yet again, Bradley defended racial terrorism as a form of discrimination that the federal government had no power to regulate unless it was somehow related to state action or authority. Whereas Chief Justice Waite’s opinion failed to consider the specific issue of horrific racial violence that was pertinent to *Cruikshank*, Justice Bradley chose to address and sanction racial violence in a case that originated from a man being denied entry to an opera house.

Famously, Bradley went on to express in his *Civil Rights Cases* opinion that he believed black Americans had received enough help from the government and should receive no more. He wrote:

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23 Ibid, 18.
When a man has emerged from slavery, and by the aid of beneficiant legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected. 24

Bradley was annoyed with continued black legal efforts to expand their vision of freedom, such as when people like Sallie Robinson and William Davis sued for their right to enter public spaces without discrimination. 25 With the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as the 1866 Civil Rights Act, Bradley believed that black Americans had received enough protection; the 1875 Civil Rights Act amounted to ‘special’ treatment. Bradley’s view of the 1875 Act as extraneous to black Americans’ freedom reveals his indifference to black lives. He only was supportive of efforts to expand black citizenship and freedom when it did not interfere greatly with white men’s individual liberties, such as the 1866 Act’s provision granting black Americans the right to give evidence in court. 26 Although white people were able to enter whichever business or public accommodation they wanted, Bradley did not believe black Americans deserved that same right, nor did they need it as a realization of their constitutional rights to freedom and equality under the Reconstruction Amendments. There was no question that this decision was another that reaffirmed white supremacy, and the dominance of one race over another.

There was one lone dissenter on the Waite Court who objected to the constitutional logic of the Civil Rights decision. John Marshall Harlan criticized the grounds of the majority opinion, which he saw as “entirely too narrow and artificial.” Through the adoption of state action

24 The Civil Rights Cases, 31.
26 Civil Rights Act of 1866, 14 Stat. 27, §1.
doctrine, the Reconstruction Amendments “have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law.”

For Harlan, the restricted interpretation of the Fourteenth Amendment in the Civil Rights decision amounted to a betrayal of the Amendment’s clear meaning: to secure and protect the rights of freedpeople as citizens.

Harlan’s dissent also challenged the inescapability of state action doctrine as the primary means of interpreting the Fourteenth Amendment; he saw state action doctrine, “the assumption that this amendment consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions,” as “unauthorized by its language.”

Instead, as stated by its fifth section, Harlan saw the Fourteenth Amendment as requiring positive action by the federal government to enforce the Amendment’s provisions of citizenship and equal rights for black Americans, opposing the rest of the Court’s view of the Amendment as negative, only acting to restrict states.

Rejecting state action doctrine, Justice Harlan’s dissent demonstrated that even within the Waite Court, Bradley’s majority opinion did not represent a clear, inevitable interpretation of the Fourteenth Amendment. Rather, Bradley and the other members of the Waite Court chose to apply a damaging and myopic interpretation of the Amendment that served to deprive black Americans of their fundamental rights. Harlan held in his dissent that under the Fourteenth Amendment, “no State, nor the officers of any State, nor any corporation or individual wielding

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28 Ibid, 55; Harlan’s idea of the meaning of the Fourteenth Amendment resembled that of Charles Sumner and Frederick Douglass as discussed in the previous chapter, which saw the Amendment as a measure to secure universal citizenship and legal racial equality for freedpeople; Charles Sumner, “The Equal Rights of All: The Great Guaranty and Present Necessity for the Sake of Security, and to Maintain a Republican Government,” p. 26; Frederick Douglass. Three Addresses on the Relations Subsisting Between the White and Colored People of the United States. (Washington, DC: Gibson Brothers Press. 1886), p. 39.
29 The Civil Rights Cases, (Harlan, Dissenting), 46.
30 Ibid, 47; The fifth and final section of the Fourteenth Amendment reads: “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article,” U.S Constitution, Amendment XIV, §5.
power under state authority for the public benefit or the public convenience, can…discriminate against freemen or citizens, in those rights, because of their race.” No one else on the Court agreed.

The Civil Rights Cases ruling held grave implications for black Americans’ everyday lives. Nullifying their right to enter and enjoy the spaces they wanted, the Civil Rights decision prevented black Americans from living public, social lives without discrimination and violence.31 The vision of social equality sought by black people like William Davis would not stand, at least under the protected legal authority of the Supreme Court. The Supreme Court greatly restricted the meaning of the Fourteenth Amendment and legal racial equality. Historians regard the Civil Rights Cases as an end to a period of the federal government’s attempting to enforce the provisions of the Fourteenth Amendment and promote black rights.32 If the Civil Rights Act of 1875 was, as Charles Sumner imagined, a final fulfillment of equal rights, then the Supreme Court’s invalidation of the Act was detrimental to black Americans’ everyday lives, as well for larger meaning of racial equality under the law

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While many white people across the country celebrated the Civil Rights decision as a victory, it sparked protests among black communities, who expressed profound anger and

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31 Howard, 124.
anguish.\textsuperscript{33} The \textit{Civil Rights Cases} provoked more reaction, in the press and on the streets, than \textit{Plessy v. Ferguson} did a decade later.\textsuperscript{34} Black Bostonians decried the Court’s ruling as tyrannical and unjust; editors of the black newspaper the \textit{Boston Hub} argued that the Court had “amputated the arm extended by the Republic to defend its most defenseless citizens.”\textsuperscript{35} Although the \textit{Civil Rights Cases} was a result of black legal activism, the Waite Court’s decision served to disillusion black Americans about the power of the courts to protect their rights and livelihoods.\textsuperscript{36} In response to the \textit{Civil Rights} decision, Frederick Douglass and other black activists led more than two thousand people to Washington Hall in the capital for protest. Douglass gave a speech denouncing the Waite Court and the impact its decision would have on black Americans.\textsuperscript{37}

In his speech, Douglass centered the Supreme Court as an important arbiter of the meaning of freedom, whose regressive rulings had the power to endanger the lives of millions of black Americans. Douglass said that far in the future, “when men shall wish to inform themselves as the real state of liberty” in the United States, they will “read the decision declaring the Civil Rights Bill unconstitutional.”\textsuperscript{38} For Douglass and the thousands of others who protested with him, this decision was significant as a representation of the degradation of

\textsuperscript{33} Many saw the decision as a validation of the end of Reconstruction and the federal government’s protection measures for black Americans, Michael J. Horan, “Political Economy and Sociological Theory as Influences upon Judicial Policy-Making: The Civil Rights Cases of 1883,” \textit{The American Journal of Legal History} 16, no. 1, (1972), p. 72. doi:10.2307/844812; Howard, 131; \textit{The New York Times} wrote that in Atlanta, the decision was received “with the wildest enthusiasm,” “The Civil Rights Decision,” \textit{The New York Times}, October 15th, 1883; A retired judge from the Iowa State Supreme Court wrote in a St. Louis newspaper, “All Hail to a Court that Dares to Inflexibly Stand by the Constitution;” “The Civil Rights Case: The True Import of the Decision As it Appears to an Old Jurist,” \textit{The St. Louis Missouri Republican}, November 15th, 1883; \textit{The Sentinel} approved of this decision as it affirmed that a black man’s “proper place is with his own kind,” and prevented black Americans from receiving any “social entitlements.” “Two Races—Common Law,” \textit{The Sentinel}, October 27th, 1883.

\textsuperscript{34} Howard, 132.

\textsuperscript{35} \textit{The Boston Hub}, n.d., cited in Bergeson-Lockwood, 77.

\textsuperscript{36} Bergeson-Lockwood, 77.

\textsuperscript{37} Douglass, Frederick, \textit{Proceedings of the Civil Rights Mass-Meeting held at Lincoln Hall, October 22, 1883. Speeches of Hon. Frederick Douglass and Robert G. Ingersoll}, (Washington D.C: C.P. Farrell, 1883), np

freedom for black Americans. As a glaringly racist decision, Douglass pointed out the “vulgar prejudice” that affected “the members of that Court” in its decision.\(^{39}\) Black Americans saw the Civil Rights decision for what it was: a mandate of white supremacy, as adjudicated by a group of racist white men. In his strongest words, Douglass went on to say that:

> This decision has inflicted a heavy calamity upon seven millions of the people of this country, and left them naked and defenceless against the action of a malignant, vulgar, and pitiless prejudice. It presents the United States before the world as a Nation utterly destitute of power to protect the rights of its own citizens upon its own soil...it cannot protect them against the most palpable violation of the rights of human nature, rights to secure which, governments are established.\(^{40}\)

The invalidation of the Civil Rights Act amounted to a catastrophic denial of rights for black Americans. Douglass’ language evoked the vulnerability that he predicted black Americans would experience as a result of the ruling. Justice Bradley believed, as did many other white people at the time, that the Civil Rights Act was tangential to black freedom, and black Americans would enjoy the full benefits of citizenship without it. Douglass vehemently rejected Bradley’s view, arguing that the Civil Rights decision would directly endanger black Americans’ rights and livelihoods. Bradley’s declaration that the federal government could not prevent white people from discriminating against black Americans amounted to a seal of approval for rampant, violent racism—Douglass and other black activists recognized the racism behind Bradley’s words and protested the ways in which this decision actively preserved white supremacy. After Cruikshank, the Civil Rights Cases was another indication to the nation at large that black lives were undeserving of protection or dignity and thus were disposable. It was no coincidence that in the decade after this decision, racial violence escalated.

\(^{39}\) Ibid, np.  
\(^{40}\) Ibid, np.
The Growth of Racial Violence After the *Civil Rights Cases*

In her seminal 1892 report on lynchings in the late nineteenth century, Ida B. Wells-Barnett wrote about the rise of racial violence across the South in the 1880s and 1890s, in addition to discussions of the law. Wells-Barnett wrote briefly about the *Civil Rights* decision, writing: “One by one the Southern states have legally disfranchised the Afro-American, and since the repeal of the Civil Rights Bill nearly every Southern State has passed separate car laws with a penalty against their infringement...All this while [there have been] butcheries of black men.”\(^{41}\) She correlated the diminution of black civil rights with increased white supremacist murders. Although Wells-Barnett gave great detail on the horrific violence that white people perpetrated against black Americans, she also chose to point out the consequences of racist laws.

The law could not protect black lives, she argued, because “White men passed the law, and white judges and juries would pass upon the suits against the law, and render judgement in line with their prejudices.”\(^{42}\) Wells-Barnett believed that black Americans could not look to the law for security because prejudiced white men—like Justice Joseph Bradley—served as the law’s primary authors, interpreters, and enforcers. *Cruikshank* and the *Civil Rights Cases* were only two out of a myriad of regressive Supreme Court Decisions from this era. By the 1890s the Supreme Court had invalidated most if not all of the Reconstruction-era protections for black Americans, and chipped away at the meaning of the Fourteenth Amendment such that Frederick Douglass’ and Charles Sumner’s vision of equal rights became a distant abstraction. For

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\(^{41}\) Wells-Barnett, 16.

\(^{42}\) Ibid, 26.
Wells-Barnett and other black Americans at this time, in the words of Young-Welke, “the idea of law offering protection of property, life, or even dignity rang hollow.”

Although the civil and political rights guaranteed by the Reconstruction Amendments became inaccessible for many black Americans, many black people still made meaningful attempts to exercise those rights. The Fifteenth Amendment’s guarantee of black enfranchisement that allowed for William Ward to be elected to political office in Colfax in 1872 became nearly void in many Southern communities. In the 1880s and 1890s, “The government which had made the Negro a citizen found itself unable to protect him. It gave him the right to vote, but denied him the protection which should have maintained that right.” The promise of full citizenship, equal protection under the law, and the right to vote seemed like lofty guarantees when the government could not protect black people from being murdered by white supremacists for exercising those rights, or showing any kind of challenge to white authority. Despite the threat of intimidation, violence, and murder, many black Americans still attempted to assert their right to vote. Wells-Barnett wrote: “the Negro clung to his right of franchise with a heroism which would have wrung admiration from the hearts of savages. He believed that in that small white ballot there was a subtle something which stood for manhood as well as citizenship, and thousands of brave black men went to their graves, exemplifying the one by dying for the other.”

The 1880s were an era of heightened black activism, as black Americans refused to accept the racial submission that white men were attempting to establish through discrimination,

43 Young-Welke, 85.
44 Downs, 131.
45 Wells-Barnett, 35.
46 Ibid, 35.
legal or otherwise. The activism undertaken by people like William Davis that led to the Civil Rights Cases could provoke violent retaliation in the form of lynching, particularly (but not exclusively) in southern rural communities. Historians have regarded lynching and other forms of racial violence during and after this period as a ‘counterattack,’ to such black activism.47 Widespread white participation in and defense of lynchings of black Americans was consistent with white animosity toward black rights. One historian wrote that the spectacle of lynching reflected “a culture of whiteness that was predicated upon the violent repudiation of black equality.”48 Similarly, Wells-Barnett argued that the cause was “the well-known opposition growing out of slavery to the progress of the race. This is crystalized in the oft-repeated slogan: ‘This is a white man’s country and the white man must rule.’”49

Black Americans at the time perceived lynchings as a white response to the expansion of their rights and political activism, which threatened white domination.50 Ida B. Wells-Barnett and other black activists further understood that lynchings represented the lengths to which white men would go in using violence to reclaim power. This was the story of white resistance to the rise of black political power during Reconstruction, and it remained so through the end of the nineteenth century as the federal government retreated from the South and permitted the return of white supremacist Democrats to political office. Earlier Congressional hearings on Ku Klux Klan violence and the passage of the Enforcement Acts in the 1870s reflected the federal government’s awareness of not only the prevalence of racial violence but also its effect on politics. Although less overtly political, white lynchings of black Americans and some white

47 Many black Americans remained involved in politics through the 1880s, voting for and electing Republicans—some of whom were black, Downs, 131; Hahn, 9.
48 Finnegan, 3.
49 Wells-Barnett, 16.
50 Finnegan, 101.
Republicans in the 1880s and 1890s was in part a continuation of earlier attempts by the Klan and white vigilantes to reinforce white political hegemony through collective murder.  

Lynching was thus a heinous way in which white men sought to control and repress black communities after the end of Reconstruction. Among historians, there is debate about the reasons for and forces behind lynchings, with disagreements about the weight of social, political, or economic factors. While one cannot say that the Supreme Court’s rulings in Cruikshank and the Civil Rights Cases were the sole cause of the rise of lynchings, the decisions gutted Reconstruction era-protections for black Americans’ rights and lives, while consecrating the inviolability of white men’s actions, even if those actions included blatant murder. The white people in lynch mobs knew that there would be no consequences for torturing and murdering black Americans. After Cruikshank, the Supreme Court nullified the possibility of federal prosecutions of such violence, seeing the prevention of racial violence as within the power of local law enforcement.

Yet the frequency of lynchings in this period revealed that in many communities, local justice was defined by lynch mobs and not the courts. The state, in the form of local law enforcement, did not effectively prevent white supremacist mob violence. As Frederick Douglass wrote, “the action of courts and juries is entirely too slow for the impetuosity of the people’s justice. When the black man is accused, the mob takes the law into its own hands.” Black Americans understood that the formal agents of the law and the court system would not

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53 Downs, 162.
prevent angry white people from perpetrating violence—and that was if those agents of the law were not themselves involved in the violence, as they often were. In those cases, the line between the state and the mob was blurred. The members of the Waite Court knew this. The decisions of the Waite Court to roll back federal protections for black Americans from violence were especially insidious because they operated from a false reality in which local law enforcement prevented racial violence. It did no such thing.

While white men murdered black Americans who expressed any kind of independence or defiance, white men also lynched black men for perceived crimes against white people. It is clear that lynchings vastly increased in the mid-1880s to 1890s; that lynch mobs varied in size but always performed their acts of torture and murder in public, with little to no fear of criminal punishment; that the victims were mostly young black men, and that the crimes white men accused them of were more often theft or assault than sexual crimes. As Wells-Barnett shows, however, the nature of lynchings varied, and white mobs utilized “all manners of accusations...to the case of the boy Will Lewis who was hanged at Tullahoma, Tenn., last year for being drunk and ‘sassy’ to white folks.” Fundamentally, lynching was thus a means by which white people attempted to exert control and over black Americans through violence and terror.

There were innumerable examples of lynchings and other acts of violence against black Americans between the mid-1880s and 1890s, and while it is not necessary nor the task of this thesis to detail every act of racial brutality, it is important to shed light on the kinds of abhorrent violence that was a fact of everyday life for many black Americans. Wells-Barnett recounted the

56 Hahn, 426.
57 Wells-Barnett, 16-17.
58 Downs, 162.
following episode of a lynching in Nashville in 1892: “Eph. Grizzard, who had only been charged with rape upon a white woman, had been taken from the jail, with Governor Buchanan and the police and militia standing by,” and lynched in “broad daylight” by a white mob. Wells-Barnett remarked, “A naked, bloody example of the blood thirstiness of the nineteenth century civilization of the Athens of the South!”

A mob of white people in Tennessee subjected Ephraim Gizzard to revolting and vicious torture. Under the watchful eyes of the governor and law enforcement, he endured an atrocity. The lynching of Gizzard was characteristic of lynchings at the time because of its spectacle and social acceptance; his lynching was overseen and thus authorized by government representatives and community leaders in a public place. There were no consequences, legal or otherwise, for the people who lynched Gizzard. This display of bloody barbarism reinforced racial subordination by demonstrating that white men could publicly attack black people when and how they wanted, and would face no legal or social punishment. Although state officials stood by and watched the lynching of Ephraim Gizzard, their inaction did not constitute the kind of state action that would merit federal intervention, according to the Waite Court. Even though state officials often stood by during mob lynchings and even participated in the violence, without a local law permitting and encouraging this violence, the Supreme Court had no grounds to intervene. The Court’s logic revealed how white supremacists at the highest levels of government contorted their thinking to preserve the status quo.

Reverend Peter Thomas Stanford, a black minister and activist, recounted the 1886 lynching of a black domestic worker in Jackson, Tennessee. Eliza Woods suffered a

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horrific lynching “in the public court-house square, without protest of any kind being made. No trial was held, neither was anyone arrested for the murder; the inhabitants, officials of the law included, looked upon the matter quite complacently.” The Jackson mob’s murder of Woods was similar to that which Ephraim Gizzard experienced: it was vicious, public, and witnessed by local law enforcement. The white people who lynched Woods had nothing to hide, nor any fear of criminal punishment, such that they committed a blatant murder under the watchful eyes of law enforcement. The unabashed visibility of this lynching, combined with the immobilization—or complacency—of law enforcement, demonstrated how normalized this kind of racial violence was.

Northern newspapers’ depiction of the lynching of Eliza Woods demonstrated the extent to which white people regarded lynchings as commonplace. The New York Times was not concerned about the facts of the perceived crime in Woods’ lynching, devoting two sentences to say that Eliza Woods was “hanged,” and that “She poisoned her employer, Mrs. Jessie Woolen.” The way in which the Times reported this lynching testified to the indifference with which people even beyond the South regarded lynchings. This northern newspaper was not concerned with disputing the alleged crime that led a white mob to lynch Eliza Woods—it did not even use the word alleged. The Times reported this lynching in a way that framed Eliza Woods as a criminal who was receiving her due punishment. As this newspaper article shows, for many white people, lynchings of black Americans were normal and justified by perceived black criminality. White people were also able to normalize lynching because in effect it was not a

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crime; it was the natural fulfillment of law and order. Such was one of the effects of *Cruikshank* and the decisions of the Waite Court: the normalization, through legal sanction, of extralegal racial violence and white supremacy. ⁶²

*Cruikshank* nullified efforts by federal law enforcement to prosecute racial violence; it was no coincidence that in the period after *Cruikshank*, local law enforcement officials engaged in no such prosecution. While *Cruikshank* did not technically prevent local and state governments from prosecuting lynchings and other forms of racial violence, black Americans understood they would receive no protection nor see any arrests made for the white people who murdered black people. The era of (some) prosecutions of racial violence that occurred under the Enforcement Acts during Reconstruction was over. And although individual white mobs did not murder with the explicit consent of the Waite Court, they knew that their acts of violence would not invite any consequences. The lack of legal consequences or repudiation of any kind for gross acts of racial violence emanated from the Waite Court’s decisions to let white supremacist mass murder stand unpunished.

One black newspaper in Kansas explained this idea, writing that “The sentiment at present in the South is not to punish lynchers. Men cannot be found who will serve on juries for such purposes. If they do they always bring in the stereotypes verdict, not guilty, and then would vote gold medals to those who led the mobs.”⁶³ There was widespread understanding that white people who lynched black people would not be prosecuted, and if they were, then they were never convicted. Therefore it was futile to expect that local law enforcement would take any action against lynchers or white supremacist terrorists. Local law was administered and enforced

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⁶² Finnegan, 102.
by white supremacists. Additionally, most white lawyers who emerged as prominent figures in southern society after Reconstruction supported lynching, demonstrating how those who were supposed to represent the rule of law endorsed extralegal violence toward black Americans.64 This was unsurprising, as white men in power sought to maintain and extend their power that could be threatened by black Americans who attempted to exert autonomy and exercise their rights. It was in the interest of white governors, legislators, lawyers, and police officers to let white mobs repress and kill black people.

In addition to lynching individual black Americans, white men continued to commit massacres of black Americans in this period, often in response to perceived—or real—threats to white political power. The Ku Klux Klan and other white supremacist groups remained involved in racial violence toward the end of the century, as exemplified by their role in massacres of black Americans in Hamburg and Ellerton, South Carolina; Copiah Country, Mississippi; and Lafayette Parish, Louisiana.65 Wells-Barnett wrote that “the Ku Klux Klan, the Regulators, and the lawless mobs” carried out “a long, gory campaign; the blood chills and the heart almost loses faith in Christianity when one thinks of Yazoo, Hamburg, Edgefield, Copiah, and the countless massacres of defenseless Negroes, whose only crime was the attempt to exercise their right to vote.”66 In those places, white people massacred black Americans who exercised their right to vote, and especially those who defended that right through formal, armed resistance. 67 Wells-Barnett argued that massacres of black Americans, particularly when they were politically

65 Wells-Barnett, 16.
66 Ibid, 34.
motivated, constituted a recognition that “The southern white man would not consider that the Negro had any right which a white man was bound to respect.” The diminution of black civil and political rights in the 1880s signaled that white men could violently suppress any show of black political power without repercussion—in the same way that white men in Colfax did in 1872.

In 1898, white men in Wilmington, North Carolina, perpetrated a massacre against black Americans of the city in an attempt to reestablish white political control—similar to what Columbus Nash and his army did in Colfax over two decades earlier. The kind of Reconstruction-era politically motivated massacres returned with the broad normalization of racial violence in the post-Cruikshank era. After the Colfax Massacre, there was an effort, albeit limited, by the federal government to bring the perpetrators to justice under the Enforcement Acts. After Cruikshank, there was not even potential for a check on individual and mass acts of racial violence.

Beginning in 1894, white Democrats in Wilmington advanced a campaign of racist harassment and intimidation in order to unseat and break up the interracial Republican coalition that held the state governorship, the legislature, and other local offices in Wilmington. Many Black North Carolinians held elected office, even twenty years after the end of Reconstruction. This show of black political power was unacceptable to Wilmington’s white democrats, who sought total white political control by any means necessary. White men in Wilmington sought to wipe out decades of black activism and efforts to assert dignity. In 1898, violence as a mode of

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68 Wells-Barnett, 35.
70 Cecelski and Tyson, “Introduction,” 8.
brutal racial suppression was commonplace; one of the ringleaders of the massacre, Alfred Waddell, had no qualms declaring “We will never surrender to a ragged raffle of negroes, even if we have to choke the current of the Cape Fear with carcasses.”

Passionate defense of lynching from a prominent white woman contributed to inciting this massacre. Rebecca Latimer Felton was the first woman elected to the Senate, and a prominent woman in the South, who also actively and vociferously supported lynching. In August 1897, Felton made a speech calling for increased lynchings of black men to protect white women’s virtue. She claimed, “if it needs lynching to protect woman’s dearest possession from the ravening human beasts--then I say lynch, a thousand times a week if necessary.” Felton’s direct call for white men to lynch black men was reprinted and repeated in the press across the South, at the same time, lynchings were at their peak. In response to Felton’s speech, Alexander Manly, the editor of a prominent black newspaper in Wilmington, challenged Felton’s violent white supremacist views in an August 1898 editorial. Manly also argued that plenty of white women sought out romantic relations with black men, “until the woman's infatuation, or the man's boldness, bring attention to them, and the man is lynched for rape.” Manly’s speech enraged Wilmington’s white Democrats, who would go on to use it as a centerpiece in their white supremacist campaign to overthrow the Republican-coalition led government. Such were the lengths that white people would go to defend lynching.

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72 “Woman on the Farm,” speech by Rebecca Latimer Felton to the Georgia Agricultural Society, August 11, 1897.
74 Whites, “Love, Hate, Rape and Lynching,” 144.
Two days after election day in November 1898, Waddell and his army of white Democrats massacred black Americans in Wilmington, as a way of punishing and sending a message to black voters and political officials who sought to claim political power in Wilmington.\textsuperscript{75} The first place in which the white vigilantes struck was Manly’s newspaper, burning it to the ground. White men shot at black residents of Wilmington and burned their houses and businesses, outgunning those who sought to defend themselves and their homes. Waddell and his white army claimed power, forcing out all black officials and exiling them, along with other prominent black professionals. Historians believe that white mobs killed between fifteen and twenty black Americans, but the exact number is unknown. White insurgents forced many black Americans to leave the city at gunpoint, and many others fled in fear; in the next month, fourteen hundred black Wilmington residents left the city. White vigilantes in Wilmington murdered or banished the city’s entire black population, with no consequences for those responsible for the massacre.\textsuperscript{76} Violence and terror as a means of furthering white supremacy ruled the day, echoing the result of the Colfax massacre in \textit{Cruikshank}.

As in Colfax, many white people regarded the Wilmington Massacre as a “riot,” showing the continuation of the racist trope of black riotousness and criminality through the end of the nineteenth century. The threat of “race riots” was a justification that whites used for the violent repression of black Americans. Writing about the massacres that white people characterized as ‘riots,’ Wells-Barnett noticed with sarcasm that “It was always a remarkable feature in these insurrections and riots that only Negroes were killed during the rioting, and that all white men

\textsuperscript{75} Cecelski and Tyson, “Introduction,” 2.
\textsuperscript{76} Historians have confirmed that there were at least fourteen victims, while Waddell boasted that there were “about twenty,” ibid, 2.
escaped unharmed.”\textsuperscript{77} Such was the case in Wilmington. White men claimed to participate in these “riots” to restore law and order, a principle which they regarded as firmly at odds with the rebellion that was the fact of black men in power.\textsuperscript{78} Once he violently claimed the mayoral office, Alfred Waddell wrote an article for \textit{Collier’s Weekly}, proclaiming the massacre he led to be a “race riot,” in which his league of white men established order in a city that had governed by unruly black men and their treacherous white allies. In fact, Waddell claimed, “There has not been a single illegal act committed in the change of government.”\textsuperscript{79} That which Waddell and his co-conspirators defined as legal was not consistent with the official law, which would have relegated their actions— mass murder and the overthrow of a local government— glaringly illegal. Yet Waddell’s white supremacist insurrection was consistent with the principles of the Waite Supreme Court, which rendered black lives expendable and white men’s actions untouchable.

The Wilmington Massacre marked a rebirth of Reconstruction-era attempts by white Democrats to seize power through force and violence. Republican-run state governments made efforts to ensure rights for black Americans. When those governments were violently overthrown by white supremacists, like in Wilmington, the federal government did nothing to stand in their way. Chief Justice Waite ruled in \textit{Cruikshank} that the federal government had no obligation to protect individuals from rights violations, and that whatever kinds of rights violations happened within the states were outside of the federal government’s responsibility. In doing so, he cemented the Supreme Court’s role in contributing to the end of the project of Reconstruction in

\textsuperscript{77} Wells-Barnett, 34.
\textsuperscript{79} “The Story of the Wilmington, N.C., Race Riots,” \textit{Collier’s Weekly}, November 26, 1898.
establishing governments that protected people’s rights. The violent death of governmental protection for constitutional rights for black Americans, and the deaths of black Americans themselves, was thus enabled and supported by the Supreme Court.

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“There is, as we all know, a perfect epidemic of mob law and persecution now prevailing in the South, and the indications of a speedy end are not hopeful,” wrote Frederick Douglass in 1894, shortly before his death in 1895. Contemporary historians and people like Ida B. Wells-Barnett and Frederick Douglass referred to “lynch law” or “mob law” as the extralegal assertions of justice by white lynch mobs. The language of lynch law connotes legality with lynching. White people who participated in or approved of mob lynchings of black Americans similarly regarded themselves as agents of the law, with one Indiana newspaper referring to a lynch mob as “Judge Lynch.”

While historians have emphasized the extralegal character of lynch mobs, which is assuredly accurate, looking at the proclamations of what the law and legality meant to the Supreme Court in this period reveals that there was coherence between racist mob violence and the law. Historians have regarded the rise in racial violence in the 1880s and 1890s as part of the white response to growing black activism and affirmation of black rights. So did Ida B.

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80 Frederick Douglass, *Why is the Negro Lynched?*, p. 3.
82 Hahn, 9; White men who engaged in extralegal violence did so because it was a rejection of the law that had furnished black Americans with political and civil rights, Finnegan, 2.
Wells-Barnett, who said the “race issue in lynch law,” could be “explained by the well-known opposition growing out of slavery to the progress of the race...The South resented giving the Afro-American his freedom, the ballot box and the Civil Rights Law.”\(^{83}\) However, by 1883, the Supreme Court had struck down the 1875 Civil Rights Act. By then, the Waite Court had nullified many constitutionally protected rights for black Americans, such as the right to vote without retaliatory violence from whites under the Enforcement Acts, and the right to equal treatment in public spaces under the Civil Rights Act of 1875. If lynch mobs sought to invalidate the same rights of black Americans that the Court effectively did invalidate, then how did late nineteenth century lynch mobs perform the legal work of the Supreme Court? Or, in other words, although they were acting illegally, how did lynch mobs obey the interpretation of the law as laid out by the highest court in the land?

In 1891, one future U.S. senator affirmed the legality of lynching and commended the mob murder of Mose Best. He wrote that the lynching was “‘justified by public sentiment, if not by law’” because the “rage” of white citizens called for them to take the “‘law into their own hands’” and execute “justice.”\(^{84}\) Many white Americans did not regard lynching as illegal, in fact some of them thought it was necessitated by the law. This understanding of lynching as within the realm of acceptable and necessary legal punishment was echoed and supported by the logic of the Waite Court. In \textit{U.S. v. Cruikshank} and the \textit{Civil Rights Cases}, the Waite Court struck down Congressional measures meant to protect the lives and constitutional rights of black Americans under state action doctrine. In the eyes of Justice Bradley and Chief Justice Morrison Waite, the law could not protect black Americans from being discriminated against in public

\(^{83}\) Wells-Barnett, 16.  
\(^{84}\) Downs, 162.
spaces, or massacred in the street. As the principal arbiter of the meaning of the law, the Waite Court communicated to the nation that black Americans had very few rights protected by the law and that black lives did not matter. Under the authority of the Supreme Court, white men had the freedom to discriminate against, violate the rights of, and murder black Americans with little to no fear of consequences. As Adam Malka writes, “it seemed as if a white man could do almost anything he wanted to a black person under the cover of law…[They] could act beyond the law. They could act at times as if they embodied the law.”

There was a reason mobs of white men committed acts of racist violence in broad daylight, in town squares, with local government officials and law enforcement watching: they perceived their violence as perfectly legal, so there was nothing to hide. Although the Supreme Court represented the rule of law, in this period, it acted to remove the legal barriers for the reassertion of lynch mobs as the purveyors of local justice. If lynch mobs and leaders of racist massacres like Alfred Waddell sought to commit violence against and abrogate the rights of black Americans, then they acted in accordance with the decisions of the Waite Court.

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Conclusion

In the late nineteenth century, the Supreme Court permitted and endorsed racial violence. Countless black Americans lost their lives to the unrestricted actions of white supremacists in part because the Supreme Court chose to ignore such violence, and chose to ignore calls by black Americans themselves for protection from the federal government. The Court’s chosen nugatory interpretations of the Reconstruction Amendments further allowed white supremacists in state governments across the country to enact racist state laws that suppressed the rights of people of color and continued to endanger their lives. The potential for a radical reimagining of American citizenship and equality was thwarted by the Supreme Court’s rulings. Instead, the Supreme Court allowed for the rise of Jim Crow, widespread racial disenfranchisement, and social repression.¹

By narrowly interpreting the text of the Fourteenth Amendment, the Waite Court paved the way for the Supreme Court to rule in favor of inequality through the twentieth century. Black Americans, Native Americans, Asian immigrants and Asian-Americans, disabled people, women, the laboring poor, and all other marginalized groups saw their rights increasingly diminished by the Supreme Court and their lives made more vulnerable.² Not until 1954, when the Warren Court ruled on Brown v. Board of Education, did black Americans see a Court decisively act to protect their rights. However, Brown’s legacy is contested, and the site of much historical scholarship disputing both its efficacy and intent in ameliorating racial discrimination and segregation. Several historians have claimed that Brown was more of a foreign policy

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² Young-Welke, 143.
decision designed to improve America’s image in the midst of the Cold War than one designed to promote racial justice. ³ Other historians have argued that Brown’s impact lay more with the conservative backlash it provoked than initiating school desegregation.⁴ Brown is one of the most famous cases in the history of the Supreme Court, and often celebrated as such. Yet its legacy does not reflect its impact on the everyday reality for most black Americans, many of whom saw little school desegregation in the era after Brown. Arguably, the Warren Court followed in the Waite Court’s legacy of maintaining the status quo.⁵

The Waite Court’s interpretations of the Fourteenth Amendment still linger to this day, manifesting in conservative rulings permitting discrimination by individuals and businesses, and gutting racially progressive policies like affirmative action. In recent years, the Supreme Court has been hesitant to decisively strike down the rulings and interpretations of the Waite Court. The Civil Rights Cases technically remains good law, particularly with its division between state and private discrimination.⁶ Since the 1980’s the Supreme Court has often echoed Justice Bradley, wanting to see the law in race-neutral terms and preventing efforts by Congress and the President to promote racial equality. Central to the Waite Court’s rulings in Cruikshank and the

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⁵ Bell, 123, 193.

Civil Rights Cases was purposeful neglect of the broader context of the decisions, in which black Americans faced flagrant racial discrimination and violence. Inherent to recent conservative Supreme Court decisions is a similar intentional denial of racist reality, and racist history.

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In this moment, the global Coronavirus pandemic has claimed the lives of over forty-thousand Americans, and has been particularly lethal in communities of color, especially among black communities.7 According to a Reuters report, compared to any other group in America, black Americans are most likely to die from Coronavirus.8 The public health crisis of the Coronavirus has shown that racism kills. As scholar Keeanga-Yamahatta Taylor writes, “Racism in the shadow of American slavery has diminished almost all of the life chances of African-Americans.”9 Black Americans are statistically poorer, more underemployed, and subject to worse housing and health care because of racism; and therefore are more likely to die from Coronavirus. 10

Various pundits as well as academics have placed the blame on the federal government under President Donald Trump, who failed to act quickly and urgently to contain the virus. Although responses to the virus have been different in various states, it is certain that the federal

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9 Taylor, 2.
10 Ibid, 2.
government’s ineptitude has played a role in American deaths. And because the virus is more fatal for black people, the federal government is effectively, yet again, letting black people die. Government action, or rather, inaction, continues to lead to mass death, as it did in the late nineteenth century with the plague of white supremacist violence. Obviously a pandemic is not the same as racial terrorism. Yet the lack of vigilant government response to prevent mass death in both contexts is similar.

Perhaps we will see a case reach the Supreme Court that challenges the federal government’s policies toward the Coronavirus, that has the potential to change policy to make all Americans safer. Civil rights groups could claim that federal policy on the Coronavirus violated the Fourteenth Amendment in its racist effects; or that current housing and healthcare policies are inherently discriminatory and violate the Fourteenth Amendment. But given the conservative makeup of the current court, that seems unlikely. Furthermore, since the early limited interpretations of the Fourteenth Amendment made by the Waite Court, the courts have not used Amendment in such radical egalitarian ways. As the history of Cruikshank and the Civil Rights Cases show, the Supreme Court has not acted to protect black lives. It seems unlikely that it will do so now.
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