RECONSTRUCTION COURTS AND RIGHTS ENFORCEMENT: EXAMINING AN ENIGMATIC JURISPRUDENCE*

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This article traces the history and development of federal case law on rights enforcement during the Reconstruction era. It begins by examining certain natural-law concepts that were often implicitly relied on by nineteenth-century jurists but are sometimes overlooked by modern observers, including the secured/created rights framework. From there, this article assesses the Supreme Court's landmark decision in United States v. Cruikshank *and seeks to demonstrate that it is the linchpin of the Court's Reconstruction-era rights-enforcement jurisprudence. This article posits that the constitutional reasoning in* Cruikshank*, applied to the then-new Fourteenth and Fifteenth Amendments, was the product of an anti-Reconstruction Court's uncertainty about how long the Reconstruction movement would last. In so doing, this article seeks to demonstrate that the Reconstruction movement was at a political inflection point and that the Court attempted to use its influence to steer the federal government away from comprehensive rights enforcement in the South. As we will see,* Cruikshank *severely limited opportunities for rights enforcement generally but made the right to vote in national elections the simplest right for federal prosecutors to enforce. This article examines why voting rights, rather than civil or social rights, were given more robust protection and concludes that it was an opportunistic and calculated decision by the Court rather than the product of straightforward constitutional reasoning.*

This article concludes by examining the subsequent Supreme Court decisions that gradually dismantled the rights-enforcement edifice erected in Cruikshank. In so doing, this article will demonstrate

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that the development and dismantlement of these new constitutional-rights-enforcement doctrines was a non-linear product of contingency and opportunism. In the end, what remains is a conflicted jurisprudence that was at times transparently molded in response to contemporaneous political exigencies.

INTRODUCTION

The Reconstruction Amendments so radically transformed the United States Constitution that their ratification has been characterized as a "second founding" of the country.[1] The Reconstruction movement, conventionally dated from 1865 to 1877, was an attempt to rebuild the South and integrate formerly enslaved persons into mainstream society in the years following the Civil War.[2] A key component of Reconstruction was the passage of the Reconstruction Amendments—including the Thirteenth, Fourteenth, and Fifteenth Amendments—from

1. *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

2. *See generally* David P. Currie, *The Reconstruction Congress,* 75 U. CHI. L. REV. 383 (2008).

which "a new definition of American citizenship" emerged that transferred the primary obligation to define and protect individual rights from the states to the federal government.[3] These constitutional changes recalibrated the concept of national citizenship by tying the nation together through a more comprehensive understanding of individual rights.[4] This reconceptualization was intended to "reconstruct" the South, and the country, after the Civil War.[5]

The Reconstruction Amendments provoked lobbying for competing visions of the scope and extent of national rights.[6] The "Radical Republican" faction in Congress supported an expansive view of federal rights enforcement, but the Republican Party did not speak with one voice on this issue.[7] Centrist Republican respect for the traditional authority of state and local governments complicated the Republican view of rights enforcement.[8] Meanwhile, Reconstruction was met with widespread violence and terrorism from Southern Democrats against Black citizens and their Republican supporters.[9] Thus, the Supreme Court's treatment of the Reconstruction Amendments carried enormous political stakes that would shape the legal landscape of the nation moving forward.

The post-Civil War legal rights framework gradually emerged over the course of the late nineteenth century, well beyond the traditional "end date" of Reconstruction in 1877.[10] This article will trace the development of the rights framework as it existed during Reconstruction and in the years thereafter. In so doing, this article will

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3. FONER, *supra* note 1, at 7–8.

4. It was also designed to fuel westward expansion. *See* LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 91 (2015).

5. *Id.* at 13.

6. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 229 (1988).

7. *Id.*

8. *See id.* at 253.

9. *See id.* at 425.

10. Dating the end of Reconstruction is a matter of historical debate. The conventional view is that Reconstruction definitively ended in 1877. *See, e.g.,* C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 245 (1951). Other historians argue the definitive end of Reconstruction did not occur until the early twentieth century. *See, e.g.,* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 2 (2011). This article will examine the Supreme Court's rights-enforcement jurisprudence through the end of the nineteenth century and into the twentieth to grasp the nature of federal rights enforcement more fully at that time without endorsing any particular end date for Reconstruction.

complicate the conventional view that the Court's jurisprudence was designed to destroy the Reconstruction movement by making federal rights enforcement impossible.[11] As we will see, the Court's jurisprudence did gradually diminish opportunities for federal rights enforcement, but this article seeks to inject additional nuance into the understanding of this jurisprudential period. Indeed, the primary aim of this piece is to demonstrate that the Court's Reconstruction-era rights-enforcement jurisprudence was not the product of ordinary constitutional reasoning or a straightforward attempt to sabotage Reconstruction. Instead, the Court's Reconstruction-era rights-enforcement jurisprudence emerged in a non-linear fashion informed by contingency, judicial policy preferences, opportunism, and the Court's use of malleable extraconstitutional jurisprudential schemas. The occasional inclusion of inconsistent holdings in this body of law reflects a judiciary uncertain about the fate of the Reconstruction project and the Court's weighing of ephemeral concerns that modern observers may overlook.

With these goals in mind, this article proceeds in three parts. In Part I, we will consider the typologies of rights relied on by Reconstruction-era courts. These include the overarching categories of "secured" and "created" rights and the "civil," "political," and "social" rights subgroups. The chief aim of this analysis is to provide the necessary framework to understand the intricacies of the Court's rights-enforcement jurisprudence.[12]

In Part II, this article conceives of *United States v. Cruikshank* (1875) as the focal point of the Reconstruction Court's rights-enforcement jurisprudence.[13] *Cruikshank* is a Reconstruction-era case centered around the federal prosecution of white supremacists for murder and other civil rights violations.[14] Building off important work done by Professor Pamela Brandwein and others, this article will survey

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11. *See, e.g.*, Jack M. Beermann, *Crisis? Whose Crisis?*, 61 WM. & MARY L. REV. 931, 961 (2020) (noting that "the message seemed simply to be that the Supreme Court was hostile to any antidiscrimination legislation—whether state or federal").

12. *See* BRANDWEIN, *supra* note 10, at 95.

13. The *Cruickshank* decision was first handed down by Justice Joseph Bradley as he was riding circuit and was thereafter affirmed by the entire Supreme Court in a decision issued by Justice Morrison Waite. United States v. Cruikshank, 25 F. Cas. 707 (C.C.D. La. 1874), *aff'd*, 92 U.S. 542, 23 L. Ed. 588 (1875). Justice Bradley's circuit court opinion is arguably more important than Justice Waite's Supreme Court opinion.

14. *Cruikshank*, 25 F. Cas. at 707.

the technical blueprint that *Cruikshank* provided for federal prosecutors to craft indictments for rights violations.[15] This analysis will proceed by examining the standard set by the Court for crafting indictments for both Fifteenth Amendment and Equal Protection violations. This article interprets the Court's jurisprudence in *Cruikshank* as designed to prominently signal judicial opposition to Reconstruction without fully frustrating the project.

Part IV considers the Supreme Court jurisprudence that operationalized the *Cruikshank* opinion and argues that the Court aimed to center federal rights enforcement exclusively on voting rights. This article will argue that the Court steered federal prosecutions toward national voting rights violations as opposed to other individual rights violations because a federal rights enforcement regime centered on national voting rights best served the justices' policy preferences. This piece concludes by highlighting the Court's disjointed retreat from its prior qualified support of voting rights enforcement and the Reconstruction project at the end of the nineteenth century.

I. TYPOLOGIES OF RIGHTS

Skepticism of federal rights enforcement, partially justified by federalism concerns, was common even before the Fourteenth Amendment asserted federal authority to "create a new definition of citizenship."[16] These concerns prompted the judiciary to seek out limiting principles for federal rights enforcement, resulting in two distinct rights schemas that informed whether the federal government had enforcement jurisdiction.[17] These categories are the secured/created rights framework and the civil/political/social rights trifurcation.[18] These models are essential to understanding the Court's development of its federal voting rights-enforcement jurisprudence.

15. *See, e.g.*, BRANDWEIN, *supra* note 10, at 93.
16. FONER, *supra* note 1, at 86.
17. BRANDWEIN, *supra* note 10, at 95.
18. *See generally* Prigg v. Pennsylvania, 41 U.S. 539 (1842).

A. *Secured/Created Rights Framework and Federal Corrective Power*

Nineteenth-century jurists commonly understood individual rights as being "secured" or "created."[19] A "secured" right is a right "not derived from the grants of the [C]onstitution, but from those inherited privileges which belong to every citizen, as his birthright, or from that body of natural rights which are recognized and regarded as sacred in all free governments."[20] One way jurists understood whether a right was a "secured" right was by asking whether a person would have that right irrespective of whether the federal Constitution existed.[21] For example, the freedoms to contract, choose one's employment, and access a court of law were considered "secured rights."[22] Under this framework, "secured" rights must first be adjudicated by the state, with the federal government acting in an exclusively corrective capacity if the state itself committed the violation or wholly failed to protect the right.[23]

In contrast, a "created" right is a positive enactment of a new right by the Constitution or federal law to which citizens would not otherwise be entitled but for the positive enactment of the law.[24] As we will see, "created rights" is a broad category, including rights as disparate as equal access to public accommodations and the return of "fugitive" slaves.[25] Congress possesses plenary authority over created rights because Congress can "make all laws necessary and proper for carrying into execution" positive enactments of rights.[26]

This rights duality was prominently articulated in an antebellum Supreme Court case, *Prigg v. Pennsylvania* (1842).[27] In *Prigg*, the

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19. The terminology "secured" and "created" is used by Professor Brandwein. She points out that secured rights are sometimes referred to as "declared, recognized, or guaranteed" rights, and created rights may be labeled "conferred, granted, or given" rights. BRANDWEIN, *supra* note 10, at 27 n.64.

20. *Cruikshank*, 25 F. Cas. at 714.

21. *Id.*

22. FONER, *supra* note 6, at 244; Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27 (1866).

23. *See* EDWARDS, *supra* note 4, at 107–08.

24. *See Cruikshank*, 25 F. Cas. at 712.

25. The Civil Rights Cases, 109 U.S. 3, 26 (1883); Prigg v. Pennsylvania, 41 U.S. 539, 539 (1842).

26. *Cruikshank,* 25 F. Cas. at 709.

27. *Prigg*, 41 U.S. at 539.

Court reasoned that Congress could directly enforce the constitutional right to the return of "fugitive" slaves and punish private individuals who interfered with this right.[28] The *Prigg* Court explained that "the national government, in the absence of all positive provisions to the contrary, is bound . . . to carry into effect all the rights and duties imposed upon it by the [C]onstitution."[29] Indeed, because the right of a slave owner to the return of their "fugitive" slaves is a created right that would not exist apart from the ratification of the Constitution, the primary mode of enforcement was federal.[30] Thus, the rationale for plenary federal enforcement in *Prigg* "was explicitly based on the type of right at issue."[31] *Prigg* demonstrates that nineteenth-century jurists sought to root enforcement jurisdiction in the character of the right implicated in the case.

Reconstruction-era legislation relied on the dichotomy of created and secured rights.[32] For example, Section 6 of the Enforcement Act of 1870 prohibited conspiracies to "hinder . . . enjoyment of any right or privilege *granted or secured* . . . by the Constitution or laws of the United States."[33] As we will see, the *Cruikshank* Court relied heavily on this dichotomy. To Reconstruction courts, *Prigg* stood for the proposition that "Congress has the power to enforce, by appropriate legislation, every right and privilege given or guaranteed by the Constitution."[34] Reconstruction courts also looked to the so-called "Enforcement Clauses" of the Fourteenth and Fifteenth Amendments, which empowered Congress to enact "appropriate legislation" enforcing those Amendments.[35] When Reconstruction courts considered congressional legislation passed under the Reconstruction Amendments, the dichotomy of secured and created rights operated in the background of what, to them, constituted "appropriate legislation" as contemplated in the Enforcement Clauses.[36] Legislation that did not map onto the

28. *Id.* at 541.
29. *Id.* at 616.
30. *Id.* at 570.
31. BRANDWEIN, *supra* note 10, at 37.
32. *See* Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140 (1870).
33. *Id.* (emphasis added).
34. United States v. Cruikshank, 25 F. Cas. 707, 710 (C.C.D. La. 1874).
35. U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.
36. *See, e.g.*, United States v. Hall, 26 F. Cas. 79, 81 (C.C. Ala. 1871) (explaining it is "appropriate legislation" where the federal government steps in to enforce rights after a state fails to do so because "any other doctrine . . . would leave constitutional rights guarded only by the protection which each state might choose to extend them").

secured-and-created-rights framework could not be "appropriate" in the eyes of Reconstruction-era courts.[37]

Many political actors were unwilling to give the federal government primary enforcement authority over rights sourced from "nature."[38] These distinctions in the character of rights informed the Civil Rights Act of 1866, which protected those rights that were considered most fundamental to the concept of citizenship, such as the right to enter into contracts or bring a lawsuit.[39] The effect of the Civil Rights Act of 1866 was to confer "secured rights" onto a new class of persons: former slaves.[40]

Because it implicated secured rather than created rights, the Civil Rights Act of 1866 was meant to be enforced by the states, with the federal government gaining enforcement jurisdiction only after the states failed to provide an adequate remedy.[41] This interpretation is congruent with the limited grants of authority Congress received in Article I, Section 8 compared to the plenary police power that states exercise.[42] This formulation is diametrically opposed to the modern state-action doctrine, which holds that the Equal Protection and Due Process Clauses of the Fourteenth Amendment—and the protections of the Bill of Rights as incorporated by the Fourteenth Amendment—are only enforceable to correct actions that are fairly attributable to the state

37. There is considerable tension between the Reconstruction Court's conception of "appropriate legislation" and the principle of high deference to Congress announced in *McCulloch v. Maryland*. Nevertheless, the Court's interpretation of "appropriate legislation"—which included the secured-and-created-rights framework operating in the background—prevailed during the Reconstruction era.

38. *See* FONER, *supra* note 6, at 257–58.

39. Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27.

40. *See id*. (enforcing the applicability of widely accepted natural rights to all Americans, regardless of race).

41. There is debate among historians as to whether the dichotomy of secured/created rights was desired by the drafters of Reconstruction legislation or was retroactively imposed by the judiciary. *See* Robert Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: A Moral Anomaly*, 73 FORDHAM L. REV. 154 (2004) (arguing that Congress expected to have plenary enforcement of secured rights); MICHAEL LES BENEDICT, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction, in* PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA 3, 3–22 (2006) (arguing that Congress expected its authority to enforce these rights to be corrective only). Regardless, some degree of federal enforcement was expected.

42. U.S. CONST. art. I, § 8 (outlining the scope of federal legislative power, including the power to levy and collect taxes, regulate commerce, declare war, and create inferior courts).

itself, as opposed to purely private conduct that the state fails to punish.[43]

The Civil Rights Act of 1866 clarified that when a state actor violated one of the rights covered by the Act, or if state remedies are unavailable to remedy violations of the secured rights listed in the Act, the violation then gained the "color of law . . . or custom," making it subject to federal prosecution.[44] This rule is applied even if the initial offense was carried out by a private individual.[45]

In light of the secured-and-created-rights framework, it is evident that rights-enforcement litigation often depended on whether the federal government had plenary or corrective authority to enforce rights.[46] When surveying the totality of the jurisprudence engaging with this framework, it becomes clear that the distinction is often illusory. Indeed, the Court's treatment of this rights framework has been inconsistent and arguably contingent on contemporaneous judicial policy preferences.[47]

A key example that captures the ideas of federal corrective power over secured rights and the general fluidity of the secured/created rights framework is the South Carolina Ku Klux Klan Trials of 1870–71.[48] At the time, the constitutional rights conferred in the Reconstruction Amendments were largely untested in the courts, and federal prosecutors hoped to "stretch the limits of the state action concept" and nationalize the Bill of Rights through the Fourteenth Amendment.[49] *United States v. Petersburg Judges of Election* (1874)

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43. *See, e.g.*, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Lugar v. Edmondson Oil Co., 457 U.S. 922, 927 (1982).

44. Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27*; see also* BRANDWEIN, *supra* note 10, at 13 (arguing that the concept of a state-neglect predicate before federal enforcement jurisdiction over secured rights tracks the "master principle of the founding generation" that unequal administration of the law by the states unfairly confers advantages and disadvantages to particular factions).

45. While the concept of "color of law" today requires state agents to jointly participate in the wrongdoing, Reconstruction-era courts offered a more expansive construction in which individual race-based wrongs against civil rights gain the color of law if state authorities fail to remedy the wrong. BRANDWEIN, *supra* note 10, at 162; *see also infra* Part IB (discussing the *Civil Rights Cases*).

46. *See* Pamela Brandwein, *A Lost Jurisprudence of the Reconstruction Amendments*, 41 J. SUP. CT. HIST. 329, 332 (2016).

47. *See infra* Part IIB.

48. *See generally* LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS 1871–1872 (2004).

49. *Id.* at 122.

represents one such effort from federal prosecutors during the Ku Klux Klan Trials.[50]

Federal prosecutors charged the defendant in *Petersburg Judges of Election* under the Fifteenth Amendment with race-based interference with voting.[51] With the secured-and-created-rights framework operating in the background, the court noted that it is "appropriate legislation" for the federal government to punish individuals who wrongfully obstruct the free exercise to vote based on race because the state did not first remedy the violation.[52] This is because, to the *Petersburg* court, the freedom from race-based interference with voting is a secured right to be adjudicated first by the state. This case confirms that state officials "who failed to protect Black rights were involved in a kind of state action that could be punished by the federal government."[53]

Petersburg was an early formulation of the role of corrective federal power over secured rights.[54] As we will see, the nature of Fifteenth Amendment prosecutions will change substantially by the time of *Cruikshank*. The right to freedom from race-based interference with voting will shift in judicial treatment from a secured right as seen in *Petersburg* to become a created right in *Cruikshank*, causing Fifteenth Amendment cases to be subject to plenary Congressional enforcement.[55] The transition in judicial treatment of the Fifteenth Amendment from a secured right to a created right is reflective of the instability of this rights construct. It further indicates how the broad scope and sheer newness of the rights conferred by the Reconstruction Amendments permitted an almost unprecedented degree of judicial malleability and formulation. Still, this case is important as an early articulation of the federal corrective-enforcement scheme over secured rights.[56]

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

51. *Id*.

52. *Id.* at 510.

53. WILLIAMS, *supra* note 48, at 72.

54. *See generally Petersburg Judges of Election*, 27 F. Cas. at 509.

55. United States v. Cruikshank, 25 F. Cas. 707, 712 (C.C.D. La. 1874).

56. *See also* United States v. Rhodes, 27 F. Cas. 785, 787 (C.C.D. Ky. 1866) (upholding federal indictment under the Civil Rights Act of 1866 after Kentucky failed to punish white criminals who tried to prevent a Black person from testifying);, United States v. Hall, 26 F. Cas. 79, 81 (C.C. Ala. 1871) (holding that Congress has the power "to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation").

The *Slaughter-House Cases* (1873)—the landmark series of Supreme Court cases interpreting the Privileges or Immunities Clause of the Fourteenth Amendment—further complicated the paradigm of corrective federal power.[57] In these cases, the Court declined to find that the Privileges or Immunities Clause incorporated the Bill of Rights.[58] These cases considerably narrowed the potency of federal corrective power by limiting the scope of civil rights to those listed in the Civil Rights Act of 1866.[59] As we will see in *Cruikshank*, the Court later constructed its voting rights edifice around these limitations.[60]

B. *The Civil/Political/Social Trifurcation of Rights*

In addition to categorizing rights as "secured" or "created," the Court also developed subcategories of individual rights in the form of "civil," "political," and "social" rights.[61] Civil rights constitute the "essence of freedom" and were generally considered secured rights.[62] They include the freedom to contract, control one's employment, and access a court of law.[63] The Civil Rights Act of 1866, which was based on the Thirteenth Amendment, guaranteed these fundamental, secured rights for former slaves.[64] The Act was passed under the rationale that withholding these rights would render emancipation meaningless.[65] Most Republicans agreed on the importance of civil rights for Black Americans, and political actors frequently invoked the distinctions between civil rights, political rights, and social rights when explaining their political positions.[66]

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57. Slaughter-House Cases, 83 U.S. 36, 55 (1872) (interpreting U.S. CONST. amend. XIV, § 1).

58. *Id.* at 74.

59. FONER, *supra* note 1, at 135; *The Slaughter-House Cases*, 83 U.S. at 96–97; BRANDWEIN, *supra* note 10, at 57.

60. *See Cruikshank*, 25 F. Cas. at 711–15.

61. *See* RICHARD PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 156–57 (1999) (describing this conception of rights as a "shell game" because rights moved fluidly between the categories based on whether legislators and judges wanted to confer those rights on Blacks).

62. FONER, *supra* note 6, at 244.

63. Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27 (1866).

64. *Id.*

65. BRANDWEIN, *supra* note 10, at 71.

66. *See, e.g.,* PAUL M. ANGLE, ED., CREATED EQUAL? THE COMPLETE LINCOLN–DOUGLAS DEBATES OF 1858, 117 (1958) (quoting President Lincoln as stating, "I have no purpose to introduce political and social equality between the white and Black races . . . But

Political rights, especially the rights to vote and hold office, were considered privileges at the time of passage of the Civil Rights Act of 1866.[67] In the eyes of many contemporaneous commenters, conferring rights on Black Americans was meant to ensure they could become free and independent laborers.[68] Thus, the right to vote was not initially viewed as essential, but Southern violence would soon convince centrist Republicans that Black male suffrage was necessary for Black independence.[69] As we will see, one of the critical maneuvers of this jurisprudential period was to gradually eliminate the distinction between civil and political rights as Black male suffrage became an "essential attribute of autonomous citizenship in a competitive society."[70] Black political rights became the focal point of the Court's rights-enforcement edifice erected in *Cruikshank*.[71]

Black social rights were resisted heavily by most white Americans at this time.[72] Social rights essentially amount to equal access to public accommodations, education, and intermarriage.[73] Centrist Republicans and Democrats "used the social rights category to delimit a sphere where racial caste was maintained."[74] Black civil and political rights gained mainstream support among white Republicans in part because it was believed these rights would allow Black citizens to "assume responsibility for their own fate."[75] In contrast, white opposition to social rights for Black Americans was rooted in the fear of

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in the right to eat the bread which his own hand earns, [Black Americans] are the equal of every living man.").

67. FONER, *supra* note 1, at 60.

68. *Id.* at 244; CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (during debates on the Civil Rights Bill, one congressman stated that the scope of the bill should be to "secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce payment for their wages, and the means of holding and enjoying the proceeds of their toil").

69. BRANDWEIN, supra note 10, at 71.

70. FONER, *supra* note 6, at 277. Importantly, the right to vote was not considered an automatic privilege of every United States citizen. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (declining to find that women have a constitutional right to vote on the grounds that citizenship is not coextensive with voting rights).

71. United States v. Cruikshank, 25 F. Cas. 707, 712 (C.C.D. La. 1874).

72. BRANDWEIN, *supra* note 10, at 72.

73. *See, e.g.*, WILLIAMS, *supra* note 48, at 51 (quoting Judge Hugh L. Bond, author of *Petersburg Judges of Elections*, as stating that "[t]o make a man equal before the law does not necessarily make it obligatory for me to eat, sleep, or drink with him.").

74. BRANDWEIN, *supra* note 10, at 72; *see also* State v. Gibson, 36 Ind. 389 (1871) (recasting marriage as a quasi-public institution as a workaround for the fact that a contract theory of marriage would invalidate anti-miscegenation laws under the Civil Rights Act of 1866).

75. FONER, *supra* note 6, at 277.

"forced association," triggering anxieties about the "loss of white purity."[76] White opposition to an integrated, multiracial democracy persisted throughout the Reconstruction period.[77] The legal basis for this opposition was provided in the *Civil Rights Cases*.[78]

In the *Civil Rights Cases* (1883), the Supreme Court struck down much of the Civil Rights Act of 1875 as unconstitutional.[79] The Civil Rights Act of 1875, passed just after the death of prominent abolitionist Senator Charles Sumner of Massachusetts,[80] guaranteed public-accommodation rights for Black Americans.[81] It was passed to honor Senator Sumner but on the belief its provisions would not be enforced.[82] Indeed, by the time the Supreme Court heard constitutional challenges to the Act in 1883, the Act had already become "a dead letter."[83]

The *Civil Rights Cases* exist at the intersection of the secured-and-created-rights framework and the civil/political/social rights framework. The conventional view is that the *Civil Rights Cases* invalidated the public-accommodations provisions of the Civil Rights Act of 1875 because the state-action doctrine precluded federal rights enforcement against purely private conduct, such as discrimination in public accommodations.[84] According to that view, the Civil Rights Act of 1875 fell outside the purview of the Reconstruction Amendments regardless of whether the states applied neutral laws unevenly or failed to furnish a remedy when rights were violated.[85] Scholars who reach this conclusion as to the significance of the *Civil Rights Cases* may trace

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76. BRANDWEIN, *supra* note 10, at 72.

77. *See, e.g.*, JAMES ALEX BAGGETT, THE SCALAWAGS: SOUTHERN DISSENTERS IN THE CIVIL WAR AND RECONSTRUCTION (2003).

78. *See* The Civil Rights Cases, 109 U.S. 3, 26 (1883). Note that these decisions were issued after *Cruikshank* and after the conventionally dated end of Reconstruction of 1877 but are essential to understanding the legal framework for rights enforcement in the Reconstruction era.

79. *Id.*

80. ELIAS NASON, LIFE & TIMES OF CHARLES SUMNER: HIS BOYHOOD, EDUCATION, & PUBLIC CAREER (1874).

81. The Civil Rights Act of 1875, 18 Stat. 335 (1875).

82. *See* BRANDWEIN, *supra* note 10, at 67.

83. FONER, *supra* note 6, at 556.

84. *See, e.g.*, Hala Ayoub, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. UNIV. L. REV. 893, 894–95 (1984) (arguing the conventional view that the *Civil Rights Cases* announced the modern conception of the state-action doctrine).

85. *Id*.

a linear development of the modern state-action doctrine, originating with this line of cases.

In the *Civil Rights Cases*, the Court considered Section 2 of the Civil Rights Act of 1875, which states that the Act's provisions apply whenever a deprivation "under color of any law" is committed.[86] Justice Bradley's majority opinion explained that an action taken by a private individual transforms into one "under color of law" within the meaning of Section 2 when the private individual is "protected in these wrongful acts by some shield of State law or State authority."[87] Moreover, Justice Bradley determined that the federal government's jurisdiction to enforce the public-accommodations provisions of the Act was "corrective in character."[88] Thus, the *Civil Rights Cases* "articulated the understanding that individual wrongs may or may not have state authority" because of the role of federal corrective power.[89]

As noted previously, a key component of federal corrective power is that a state's failure to remedy a rights violation committed by a private actor transforms the violation into one committed under color of law, which then grants the federal government corrective-enforcement jurisdiction.[90] Thus, the conventional proposition that the *Civil Rights Cases* mean that the federal government can never reach private individuals who commit rights violations conflicts with the notion of federal corrective power displayed in *Petersburg*.[91] Professor Brandwein has thoroughly explained how later observers "have missed the extent to which the Court viewed non-enforcement of neutral laws as a rights denial and preserved federal power to reach private individuals as a remedy."[92]

The Civil Rights Act of 1875 was struck down in the *Civil Rights Cases* not because the Act targeted purely private conduct but because the Court believed that the Act made Black Americans the "special favorite of the laws."[93] The Court's primary concern was that under the Civil Rights Act of 1875, white citizens could be freely

86. The Civil Rights Act of 1875, 18 Stat. 335 (1875).
87. The Civil Rights Cases, 109 U.S. 3, 17 (1883)
88. *Id.* at 15.
89. BRANDWEIN, *supra* note 10, at 168.
90. *See, e.g.*, EDWARDS, supra note 4, at 167.
91. *See* United States v. Petersburg Judges of Election, 27 F. Cas. 506, 510 (C.C.E.D. Va. 1874); *The Civil Rights Cases*, 109 U.S. at 15.
92. BRANDWEIN, *supra* note 10, at 166.
93. *The Civil Rights Cases*, 109 U.S. at 25.

discriminated against in public accommodations, but Black citizens could not be.[94] Further, the Court did not view social rights as helpful for carrying out the goal of Black independence from white society.[95] Thus, the Act could not be "appropriate legislation" under any of the Reconstruction Amendments.[96] This notion disrupts conventional linear treatment that the state-action doctrine has been given—often thought to originate in the *Civil Rights Cases*.[97] The Court appears to have stopped short of expounding the modern state-action doctrine, apparently restrained by the need to craft its jurisprudence around the preexisting notions of secured/created rights and federal corrective power.[98]

II. *UNITED STATES V. CRUIKSHANK* AND THE MALLEABILITY OF NEW RIGHTS

United States v. Cruikshank (1875) is "largely ignored in the legal-professional literature," but it remains the "subject of controversy among historians."[99] In short, *Cruikshank* was a case about the mass murder of Black citizens by white supremacists.[100] The Court used the *Cruikshank* decision to establish a blueprint for federal prosecutors to enforce rights under the Reconstruction Amendments.[101] This section will survey the facts of *Cruikshank* and dissect the two key areas of federal rights enforcement touched on in the opinion: voting rights and Equal Protection.[102] As we will see, *Cruikshank* established an

94. *Id.* at 57.

95. *Id.* at 22, 25.

96. *Id.* at 20.

97. *See, e.g.*, Ayoub, *supra* note 84, at 894–95; Robert Cottrol, *The Civil Rights Cases*, *in* OXFORD COMPANION TO THE SUPREME COURT 174 (Kermit Hall ed., 2005).

98. *See* BRANDWEIN, *supra* note 10, at 7; RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 105 (Benjamin I. Page ed., 1st ed. 2004).

99. James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank (1876) *Belongs at the Heart of the American Constitutional Law Canon*, 49 Harv. C.R.-C.L. L. Rev. 385, 427 (June 1, 2014); *see also* SAMUEL ISSACHAROFF, PAMELA KARLAN, RICHARD PILDES, NATHANIEL PERSILY & FRANITA TOLSON, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 43 (5th ed. 2016) (characterizing *Cruikshank* as "eviscerating various federal protections for Black voting rights"); FONER, *supra* note 6, at 531 (writing that *Cruikshank* "beamed a green light to acts of terror where local officials either could not or would not enforce the law"); BRANDWEIN, *supra* note 10, at 17 (arguing that *Cruikshank* "signaled a voting rights jurisprudence in a shorthand that Republican administrations understood and later acted upon").

100. United States v. Cruikshank, 25 F. Cas. 707, 708 (C.C.D. La. 1874).

101. *Id.*

102. *Id. at* 711–12.

enforcement edifice rooted in the judicial conception of the nature of rights at that time.[103] This section aims to complicate a linear view of rights enforcement during this period by emphasizing the role that political uncertainty played in shaping this line of jurisprudence. The *Cruikshank* decision was issued at a time when the forces supporting and opposing Reconstruction were evenly matched.[104] The following section suggests that the Court erected an enforcement mechanism that allowed for flexibility as to the level of permissible federal support for Reconstruction but ultimately established several procedural hurdles that would thwart Reconstruction efforts in accordance with the justices' policy preferences. The *Cruikshank* voting rights-enforcement edifice is steeped in the secured/created rights dichotomy and was heavily influenced by white resistance to Black social rights.[105]

One key aspect of this analysis is that the rights-enforcement edifice erected in *Cruikshank* resulted in federal rights enforcement primarily being directed towards protecting national elections as opposed to protecting civil or social rights.[106] This article posits that *Cruikshank* and its progeny directed federal rights enforcement to focus on national elections as opposed to other forms of rights enforcement in order to limit, but not eliminate, federal involvement in the daily lives of Black Americans. This decision helped ensure that Black social rights never gained traction in the interim between *Cruikshank* and the formal rejection of Black social rights in *Plessy v. Ferguson* (1896).[107]

This section concludes by assessing the judicial policy rationale informing the *Cruikshank* decision. As we will see, the contemporaneous political concerns of the justices and their opinions about "the character of the right conferred" greatly influenced the decision.[108] This article contends that *Cruikshank* was a messy amalgamation designed primarily to serve the immediate interests and desires of the Court amidst great political and social uncertainty and

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103. *See, e.g.*, *id.* at 715.

104. Jeff Strickland, "*The Whole State Is On Fire": Criminal Justice and the End of Reconstruction in Upcountry South Carolina*, 13 CRIME, HISTOIRE & SOCIÉTÉS [CRIME, HIST. & SOCIETIES] 89, 89–117 (2009) (documenting Southern resistance to Reconstruction); Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867) (authorizing military occupation of the South to enforce Reconstruction).

105. *See Cruikshank*, 25 F. Cas. at 711–12.

106. *See id.*

107. Plessy v. Ferguson, 163 U.S. 537 (1896).

108. *Cruikshank*, 25 F. Cas. at 710.

was not necessarily designed to sabotage all efforts at Reconstruction. However, this section will also highlight the key role that *Cruikshank* played in ultimately unravelling the Reconstruction project.

A. *Contextualizing* Cruikshank

Cruikshank arose "from a massacre of Black Republicans in the courthouse of Colfax, Louisiana by white Democrats disputing the result of the 1872 election in Grand Parish."[109] The "Colfax Massacre"—carried out by the Ku Klux Klan on Easter Sunday 1873—was an attempt to overturn the Louisiana gubernatorial election of 1872.[110] It resulted in the deaths of between sixty-two and eighty-one Black citizens, making it the deadliest racial massacre of the entire Reconstruction period.[111] Despite seeking indictments against ninety-seven men, federal prosecutors only won three convictions, including of William Cruikshank.[112] Justice Bradley vacated the three convictions in an influential circuit court opinion that was later adopted by the Supreme Court.[113]

The Colfax Massacre was arguably the most egregious example, but violent attacks were committed by white supremacists in the South on a regular basis during Reconstruction.[114] In the 1870s, white Southerners opposed to Reconstruction known as "redeemers" engaged in "comprehensive effort[s]" to undo Reconstruction and reassert *de jure* discrimination.[115] Spearheading these efforts to end Reconstruction was the Ku Klux Klan, which functioned as a "counterrevolutionary terror" group that "serve[d] the interests of the Democratic party."[116]

The Klan commonly engaged in widespread acts of violence in service of restoring "racial subordination in every aspect of Southern

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109. Martha T. McCluskey, *Facing the Ghost of* Cruikshank *in Constitutional Law*, 65 J. OF LEGAL EDUC. 278, 280 (2015). The horrific details of the massacre are described in TED TUNNELL, CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM, AND RACE IN LOUISIANA, 1862–1877 173, 218 (1984).

110. CHARLES LANE, THE DAY FREEDOM DIED 265–66 (2008).

111. *Id.*; FONER, *supra* note 6, at 437.

112. BRANDWEIN, *supra* note 10, at 87.

113. *See Cruikshank*, 25 F. Cas. at 707; FONER, *supra* note 6.

114. LANE, *supra* note 110, at 265–66; FONER, *supra* note 6, at 423.

115. FONER, *supra* note 6, at 423.

116. *Id.*

life."[117] To oppose these efforts, Congressional Republicans secured the passage of the Fifteenth Amendment in 1870.[118] Later that same year, Congress passed the Enforcement Act, which provided the federal government with authority to prosecute conspiracies meant to deprive citizens of their constitutional rights.[119] Additionally, Congress passed the Ku Klux Klan Act in 1871, which the federal government used to suspend *habeas corpus* against suspected Klan members.[120]

Some historians perceive *Cruikshank* as closing off the theory articulated in *Petersburg* that a state failure to correct a private constitutional violation transforms the violation into one occurring under color of law.[121] This understanding of *Cruikshank* is the conventional view, and it is consistent with the conventional view of the *Civil Rights Cases*, which are thought to have placed private individuals outside the reach of the Reconstruction Amendments.[122] Other historians perceive *Cruikshank* as articulating a voting rights-enforcement mechanism that "became the basis for later successful prosecutions brought by the federal government."[123] This article offers a qualified endorsement of the latter theory. *Cruikshank* provided a road map for federal rights enforcement, but the Court announced its opinion in a manner that was designed to limit, without eliminating, federal rights enforcement in the South.

There was nothing in the substantive legal issues of the case that required the *Cruikshank* Court to outline its rights-enforcement theories in its decision.[124] Nevertheless, the Court announced three distinct approaches for federal prosecutors to consider when drafting

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117. *Id.*; *see also* Ray Granade, *Violence: An Instrument of Policy in Reconstruction Alabama*, 30 ALA. HIST. Q. 181, 182–83 (1968).

118. *Landmark Legislation: The Fifteenth Amendment*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/senate-and-constitution/15th-amendment.htm#:~:text=Ratified%20February%203%2C%201870%2C%20the,many%20former%20confederate%20states%20took (last visited March 31, 2025).

119. Enforcement Act, ch. 114, 16 Stat. 140 (1870).

120. Julie Silverbrook, *The Ku Klux Klan and Violence at the Polls*, BILL OF RIGHTS INST. (Mar. 6, 2020), https://billofrightsinstitute.org/essays/the-ku-klux-klan-and-violence-at-the-polls. Much of the Ku Klux Klan Act as amended is codified at 42 U.S.C. §§ 1983, 1985–1986.

121. *See, e.g.,* WILLIAMS, *supra* note 48, at 267 (arguing *Cruikshank* signified that a state's failure to protect its citizens "could not be construed as a reason for the federal government to intervene").

122. *See, e.g.*, Ayoub, *supra* note 84, at 895.

123. BRANDWEIN, *supra* note 10, at 88.

124. *Id.* at 93.

indictments for national and state election-interference cases as well as general Equal Protection claims.[125] The following sections will assess these avenues for rights enforcement and argue that the *Cruikshank* rights-enforcement scheme was designed to dissuade further federal intervention into securing Black civil and social rights while preserving federal rights enforcement for Black voting rights. This article conceptualizes *Cruikshank* as an anti-Reconstruction Court's response to uncertainty about whether the political branches would continue to pursue the Reconstruction project in the latter half of the 1870s and into the 1880s. The *Cruikshank* framework was designed to greatly diminish federal presence in the South but keep voting rights prosecutions available should the political branches insist on pursuing them.[126]

B. *The* Cruikshank *Federal Rights-Enforcement Scheme*

The *Cruikshank* indictments were crafted under Section 6 of the Enforcement Act of 1870.[127] This section gave the federal government authority to effectuate the Enforcement Act's provisions whenever citizens conspired to deprive other citizens of constitutional rights.[128] In *Cruikshank*, the government advanced Fifteenth Amendment and Equal Protection claims as the legal bases to punish the participants in the Colfax massacre.[129]

1. Fifteenth Amendment Claims Under *Cruikshank*

In determining whether a remedial act of Congress constituted "appropriate legislation" under the Reconstruction amendments, Justice Bradley's circuit-court opinion relied heavily on the secured/created rights dichotomy, ultimately locating the Fifteenth Amendment as a created right.[130] Citing to *Prigg*, Justice Bradley confirmed that

125. United States v. Cruikshank, 25 F. Cas. 707, 711–15 (C.C.D. La. 1874).

126. *See generally* BRANDWEIN, *supra* note 10 (arguing that *Cruikshank* announced a coherent rights-enforcement framework).

127. *Cruikshank*, 25 F. Cas at 715.

128. Enforcement Act of 1870, ch. 114, 16 Stat. 141 (1870).

129. *Cruikshank*, 25 F. Cas. at 715; Pope, *supra* note 99, at 407; *see* BRANDWEIN, *supra* note 10, at 93 (explaining that Justice Bradley went out of his way to widely publicize his circuit opinion in the media).

130. *Cruikshank*, 25 F. Cas. at 710.

enforcement of a constitutional right "depend[s] upon the character of the right conferred."[131] Justice Bradley began his constitutional analysis with Section 1 of the Fifteenth Amendment, which prohibits both federal and state governments from engaging in race-based infringements on voting rights.

Based on a plain reading of the Fifteenth Amendment, Justice Bradley admitted that it seemed that "Congress had no duty to perform until the state has violated its provisions."[132] Nevertheless, he concluded that the Fifteenth Amendment "confers a positive right which did not exist before."[133] Justice Bradley explicitly grappled with the secured/created rights framework and concluded that the right to freedom from race-based interference with voting granted by the Fifteenth Amendment is a created right.[134] Based on this finding, Justice Bradley posited that the federal government "undoubtedly" has the power to "directly enforce the right and punish individuals for its violations."[135] Thus, despite the plain text of the amendment prohibiting only states from committing race-based interferences with voting rights, Justice Bradley announced that it is "appropriate legislation" within the meaning of the Enforcement Clause for Congress to directly provide a remedy for Fifteenth Amendment violations against private individuals.[136]

There was a "political dimension" to reading the Fifteenth Amendment as a created right as opposed to an extension of a secured right.[137] In coming to this conclusion, Justice Bradley implicitly disagreed with the *Petersburg* court, which viewed the Fifteenth Amendment as an enactment of a secured right.[138] If Justice Bradley had read the Fifteenth Amendment to extend a secured right, federal

131. *Id*.
132. *Id.* at 712.
133. *Id.*
134. *Id.*
135. *Id.* at 713.
136. *Id.;* U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); BRANDWEIN, *supra* note 10, at 99 (explaining that Justice Bradley, in contending that Congress could directly enforce the Fifteenth Amendment against private individuals, "dispensed with the text" of the amendment, which itself contains the language "no state shall" engage in race-based voting interference).
137. BRANDWEIN, *supra* note 10, at 100.
138. United States v. Petersburg Judges of Election, 27 F. Cas. 506, 510 (C.C.E.D. Va. 1874).

enforcement power would have been exclusively corrective.[139] This reading likely would have been more consistent with the plain meaning of the text of the Fifteenth Amendment.

The difference in treatment of the Fifteenth Amendment in *Petersburg* and *Cruikshank* is a key example of the malleability of the nineteenth-century rights construct. At the time of *Cruikshank*, the Reconstruction Amendments were brand new and expansive in scope.[140] Justice Bradley's interpretation of the Fifteenth Amendment as allowing for direct federal enforcement against private individuals was likely designed to aid efforts to build the Republican Party in the South.[141] This was not an inevitable, neutral reading of the Fifteenth Amendment, and the *Petersburg* court had already interpreted it differently. Nevertheless, the Court did not make unsupported, sweeping pronouncements in favor of its own policy preferences.[142] Instead, these judicial preferences were couched in a careful and nuanced, albeit unstable and ultimately pretextual, doctrinal framework.

Despite finding direct federal enforcement of the Fifteenth Amendment to be appropriate, Justice Bradley nevertheless vacated the indictments on the basis that they failed to allege that the right to vote was denied on account of race.[143] Here, Justice Bradley showed "no concern either for Congress's judgment or for the practicalities of enforcement."[144] Justice Bradley acknowledged a racial motive could easily be inferred based on the circumstances of the massacre, but he nevertheless "insisted on technical exactitude."[145]

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139. *See, e.g.*, EDWARDS, *supra* note 4, at 107–08.

140. *See generally* FONER, *supra* note 1. The Reconstruction Amendments were ratified between 1865–1870, and Justice Bradley's *Cruickshank* opinion was issued in 1874.

141. These efforts to aid the Republican Party in the South were bolstered by Justice Bradley's dicta in his circuit court opinion that suggested Congress had direct enforcement power over all national elections because of Article I, Section 4. *Cruikshank*, 25 F. Cas. at 712. The Court will make this clearer in future cases, discussed *infra* part II.

142. *See generally, Cruikshank*, 25 F. Cas. at 707.

143. *Id*. at 715.

144. Pope, *supra* note 99, at 410. *But see* BRANDWEIN, *supra* note 10, at 152 (arguing that the racial predicate Justice Bradley required for a valid Fifteenth Amendment complaint "did not appear onerous").

145. Pope, *supra* note 99, at 411.

2. Equal Protection Claims Under *Cruikshank*

Justice Bradley also found fault with the Equal Protection counts.[146] Justice Bradley required a racial motivation to be pleaded to supply the federal government with direct enforcement power over Equal Protection claims.[147] By requiring a racial motive, Justice Bradley implicitly racialized the Equal Protection Clause and put claims for political rights violations out of its reach.[148] This was done with no textual warrant within the Fourteenth Amendment and with little deference to Congress as to what constituted "appropriate legislation" within the meaning of the Enforcement Clause.[149]

Justice Bradley also dismissed the Equal Protection counts because they alleged violations of secured rights, over which Congress may only provide corrective remedies.[150] Finding that the indictments did not adequately allege that the violations occurred under color of law, Justice Bradley explained that all "ordinary crimes," such as murders and assaults, are generally adjudicated in state court, but if the state fails to act then an "ordinary crime" may also become a denial of Equal Protection cognizable in federal court.[151] In finding that federal enforcement was contingent on the state first failing to rectify an Equal Protection violation, Justice Bradley confirmed the longstanding notion that the federal government retained purely corrective power over secured rights.[152] The federal government's power to directly enforce rights protected by the Equal Protection Clause—such as those granted in the Civil Rights Act of 1866—did not extend to "ordinary crimes" committed by non-state actors.[153] Only if the state denied an adequate remedy to a class of persons for these types of rights could the federal government step in to directly enforce the right.[154]

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146. *Cruikshank*, 25 F. Cas. at 715.
147. *Id.*
148. BRANDWEIN, *supra* note 10, at 120.
149. U.S. CONST. amend. XIV.
150. *Cruikshank*, 25 F. Cas. at 715.
151. *Id.* at 711–12.
152. EDWARDS, *supra* note 4, at 107; Prigg v. Pennsylvania, 41 U.S. 539, 657 (1842).
153. Justice Bradley considered and rejected a Thirteenth Amendment rationale for these counts on the grounds that the Thirteenth Amendment also requires a racial motive and does not apply to ordinary crimes. EDWARDS, *supra* note 4, at 101.
154. BRANDWEIN, *supra* note 10, at 13.

Cruikshank thus erected two hurdles that federal prosecutors must satisfy before bringing an Equal Protection count of the type seen in *Cruikshank*. First, because *Cruikshank* interpreted the Equal Protection Clause as a secured right, federal prosecutors must demonstrate either that a state actor committed the constitutional violation or that the state had an opportunity to redress a private wrong and failed to do so.[155] Second, the indictment must allege that the Equal Protection violation was committed with a racial motivation.[156]

Some historians have argued that these pleading requirements were "not onerous."[157] Others claim that Justice Bradley's opinion "left open a wide range of possible standards for proving state neglect and racial intent."[158] Regardless of the onerousness of the pleading requirements, the decision was designed to signal the Court's wavering commitment to Reconstruction. Justice Bradley's nuanced blueprint for federal rights enforcement was likely muted by the fact that the case released notorious Klan members on technical grounds.[159]

Justice Bradley's dicta holding out the theoretical possibility of future enforcement did little to blunt the force of the *Cruikshank* decision on the ground.[160] Within months of Justice Bradley's ruling, racial violence and terrorism from white supremacists reached levels comparable to those at the outset of the Civil War in 1861.[161] *Cruikshank* "embolden[ed] white supremacists, discourag[ed] prosecutors, and demoraliz[ed] Republicans across the South."[162] Indeed, the doctrinal nuances of Justice Bradley's constitutional analysis, rooted in the character of the right at issue, were not "clearly understood by contemporaries, but the end result certainly was."[163]

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155. *Cruikshank*, 25 F. Cas. at 709–10, 713.

156. *Id.* at 712 ("To constitute an offense, therefore, of which Congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude. Otherwise, it is a case exclusively within the jurisdiction of the state and its courts.").

157. BRANDWEIN, *supra* note 10, at 107.

158. Pope, *supra* note 99, at 429.

159. *Id.* at 429–30.

160. *Id.*

161. *Id.* at 413.

162. *Id.* at 412.

163. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876 150 (1985).

C. *The* Cruikshank *Rights Framework and Judicial Policy Preferences*

As discussed above, *Cruikshank* came at an inflection point for the Reconstruction project, and the Court offered a muddled rights-enforcement scheme designed to minimize but not eliminate federal intervention in the South. Without acknowledging it, *Cruikshank* failed to apply the principle—announced in *McCulloch v. Maryland*—that Congress has discretion in choosing what means to utilize when implementing constitutional provisions.[164] In so doing, the Court steered the federal government to enforce voting rights only, ensuring diminished federal involvement in the daily lives of Black Americans in the South.

In choosing to tunnel rights enforcement to voting rights, *Cruikshank* made rights enforcement more palatable to wavering moderate Republicans in the North.[165] *Cruikshank* came in the wake of the Panic of 1873, a financial crisis that brought the American economy to a "wrenching halt" during the 1870s.[166] The economic downturn deflated Republican zeal to carry out the expensive Reconstruction project.[167] The Panic of 1873 is often seen as resulting in Democrats capturing the House of Representatives in 1874 and otherwise frustrating the political ambitions of national Republicans.[168]

The judiciary was thus faced with the increasingly realistic prospect that an anti-Reconstruction Democrat would take the presidency and discard all the Court's pronouncements in favor of federal rights enforcement.[169] Another possibility was that the Republicans would retain the presidency but greatly deemphasize federal rights enforcement in the South.[170] Rights enforcement was expensive and becoming unpopular as the economic downturn worsened.[171] This article posits that contemporaneous concerns regarding the expense of rights enforcement amid the economic depression informed the Court's constitutional reasoning to center

164. Pope, *supra* note 99, at 424; McCulloch v Maryland, 17 U.S. 316, 388 (1819).
165. FONER, *supra* note 6, at 523.
166. *Id*. at 512.
167. BRANDWEIN, *supra* note 10, at 117.
168. FONER, *supra* note 6, at 523.
169. *Id.*
170. *Id.*
171. *Id.*

federal rights enforcement on voting rights. Enforcing national voting rights, as opposed to other forms of rights, generally requires only biannual attention from the federal government. Thus, enforcing national voting rights was likely more cost-effective for the Justice Department than enforcing other rights.[172]

Another key component informing the Court's rights-enforcement edifice was Justice Bradley's sympathy toward former slaveholders.[173] Justice Bradley "viewed slaveholders not as a distinct class of pre-capitalist aristocrats, but as businessmen who happened to employ slave as opposed to wage labor."[174] Justice Bradley saw a need for class solidarity between northern business interests and the Southern planter elite.[175] To Justice Bradley, a key problem facing the nation in the 1870s was the need to "restore Southern labor to a normal condition" of cost-controlled manual labor.[176]

In light of his concerns about newly freed Black laborers disrupting the Southern economy, Justice Bradley's rationale for the *Cruikshank* federal rights-enforcement apparatus makes sense.[177] In this way, Justice Bradley prefigured the corporate takeover of the Republican Party, which was completed by the 1890s.[178] *Cruikshank* can be understood as articulating a means of potentially vigorous rights enforcement designed to be as unintrusive as possible to the prevailing social order.

These considerations also shed light on the Court's decision to require the thresholds of state inaction and racial intent to be met at the time of indictment for Equal Protection violations.[179] The *Cruikshank* rights-enforcement edifice was designed to discourage federal intervention into the daily lives of Black Americans in the South. The prohibition on applying the Equal Protection Clause to "ordinary

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172. *Id.* at 603 (documenting how the economic challenges of the 1870s undermined centrist white support for Reconstruction).

173. Pope, *supra* note 99, at 418.

174. *Id.*; JAMES OAKES, THE RULING RACE: A HISTORY OF AMERICAN SLAVEOWNERS 180–89 (1983).

175. *See* Pope, *supra* note 99, at 420.

176. *See id.* at 419 (citing Letter from Joseph P. Bradley to Carry Bradley 3 (Apr. 30, 1867) (on file with the New Jersey Historical Society)).

177. *See id.*; *see generally* United States v. Cruikshank, 25 F. Cas. 707, 710–15 (C.C.D. La. 1874). ``

178. BRANDWEIN, *supra* note 10, at 184; *see generally* NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904 (1985).

179. *Cruikshank*, 25 F. Cas. at 710–12.

crimes" is designed to limit the extent of federal resistance against the reassertion of labor control by the planter elite in the South.[180] Regardless of how onerous the pleading requirements for demonstrating racial motivation and a lack of state remedy were meant to be, courts typically imposed requirements prosecutors failed to meet "in the overwhelming majority of cases, including *Cruikshank* itself."[181]

In contrast to Equal Protection prosecutions, prosecutions based on the Fifteenth Amendment did not require a preliminary showing that the state committed or failed to correct a violation because the *Cruikshank* Court determined that it was a created right.[182] Considering the limited resources the federal government was willing to devote to rights enforcement after the Panic of 1873, the lowered standard for bringing indictments under the Fifteenth Amendment as compared to the Equal Protection Clause proved attractive to federal prosecutors.[183] In the 1870s, it was "clear that the protection of the [B]lack electorate and the success of the Republican Party were so dependent on each other that it is impossible to separate them."[184] Elections were decided by razor-thin margins, prompting increased reliance on Fifteenth Amendment prosecutions to secure additional Black votes, which at the time were overwhelmingly cast for the Republican candidates.[185]

At this inflection point in the history of Reconstruction, *Cruikshank* reflects a judiciary hedging its bets. Republican support for Reconstruction was wavering, and it was unclear whether the party would continue to expend the costs of rights enforcement.[186] Further, Justice Bradley's concerns about labor control in the South spawned sympathies towards the partially displaced Southern planter elite.[187]

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180. *But see* BRANDWEIN, *supra* note 10, at 152 (arguing that the state-neglect and racial-predicate showings are not onerous for federal prosecutors to make). *See also Charge to Grand Jury—Civil Rights Act*, 30 F. Cas 1005, 1007 (C.C.W.D. Tenn. 1875) (No. 18,260) (instructing the jury that a racial motive is well-pleaded only with proof the perpetrators acted "solely on account of race").

181. Pope, *supra* note 99, at 429.

182. *Cruikshank*, 25 F. Cas. at 712.

183. *See id at* 713 (setting a lower barrier to prosecution for Fifteenth Amendment claims as opposed to Equal Protection claims, as Fifteenth Amendment claims do not first require a showing that the state failed to act).

184. WILLIAMS, *supra* note 48, at 23.

185. *See* BRANDWEIN, *supra* note 10, at 141–42.

186. FONER, *supra* note 6, at 556.

187. Pope, *supra* note 99, at 419–20.

The *Cruikshank* rights-enforcement scheme threaded the needle of these concerns. On the one hand, it left open the possibility of federal rights enforcement for a hypothetical Republican faction to continue to pursue should popular support for Reconstruction rejuvenate.[188] On the other hand, the rights-enforcement scheme itself prompted confusion for both Republicans and Democrats.[189] This sense of confusion directly contributed to less rights enforcement, as prosecutors were reluctant to pursue cases that they were unsure they could win.[190]

The practical outcome of releasing notorious Klan members was a signal to the Radical Republican faction dedicated to rights enforcement that they did not have an ally in the Court. It also opened a renewed push for what Justice Bradley referred to as the "normal condition" for Southern labor, which was antithetical to wage labor and aligned with northern business interests.[191] A federal government willing to, at least in theory, protect Black voting rights but not the Black lives who were killed in the Colfax massacre is an odd incongruity.[192] This policy choice is best explained by the centrist Republican desire to obtain votes in the South without upending the prevailing social order.

The *Cruikshank* rights-enforcement edifice served opponents of multiracial democracy in America but perhaps not in the way conventionally imagined. Because *Cruikshank* helped remove perennial federal involvement in the daily lives of Black Americans, Black social rights were never on the table.[193] The convergence of civil and political rights in the Court's jurisprudence during this time never occurred with social rights, in part because of the restraints placed on the federal government's ability to prosecute "ordinary crimes."[194] Unsurprisingly, the Court formally closed off the constitutional pathways to

188. *See generally Cruikshank*, 25 F. Cas. at 710–15 (explaining how federal prosecutors should craft indictments under the Fourteenth and Fifteenth Amendments).

189. *See* BRANDWEIN, *supra* note 10, at 130–31.

190. *See* Pope, *supra* note 99, at 415 (demonstrating that rates of conviction in southern civil rights prosecutions fell from 36–49% in 1871–1873 to less than 10% after 1874).

191. *Id.* at 419–20.

192. *See* FONER, *supra* note 1, at 129–30, 132–34 (documenting how Black political rights, unlike Black civil rights, were not initially considered essential).

193. *Id*.

194. United States v. Cruikshank, 25 F. Cas. 707, 711–12 (C.C.D. La. 1874).

enforcement of Black social rights in the *Civil Rights Cases* and *Plessy*, which occurred in the years after *Cruikshank*. [195]

III. FEDERAL RIGHTS ENFORCEMENT AFTER *CRUIKSHANK*

So far, we have established that *Cruikshank* provided a somewhat coherent doctrinal federal rights-enforcement framework rooted in a nineteenth-century conception of the typology of rights.[196] The *Cruikshank* rights-enforcement edifice was in tension with the text of the Reconstruction Amendments, their demonstrable legislative purpose, and prior judicial interpretations of Congressional power.[197] Nevertheless, the Court overlooked these inconsistencies due to its desire to judicially curate a federal rights-enforcement regime in the South.[198]

Part IV of this article explores the aftermath of *Cruikshank,* arguing that the Supreme Court continued to incentivize federal prosecutors to target voting rights infringements over other rights violations. The Court's most notable contribution to that end pertains to Article I, Section 4 of the Constitution—the "times, places, and manner" clause.[199] As we will see, this jurisprudence was designed to reinforce the ability of the federal government to protect federal elections.[200]

The Supreme Court committed to this theory of federal enforcement of voting rights during the 1870s and 1880s.[201] However, the Court would unravel even the limited rights-enforcement blueprint that it articulated in *Cruikshank* during the 1890s and early 1900s.[202] The dismantlement of the *Cruikshank* voting rights edifice was carried

195. The Civil Rights Cases, 109 U.S. 3, 24–26 (1883); *Plessy*, 163 U.S. at 542–44.

196. *See generally Cruikshank*, 25 F. Cas. at 710–15 (outlining the requirements of a federal enforcement scheme).

197. *See, e.g.*, BRANDWEIN, *supra* note 10, at 120.

198. *Id.* at 118.

199. U.S. CONST. art. I, § 4.

200. BRANDWEIN, *supra* note 10, at 143.

201. *See generally* Ex parte Siebold, 100 U.S. 371, 390–91, 25 L. Ed. 717 (1879); *see also* United States v. Butler, 25 Fed. Cas. 213, 226 (No. 14,700) (C.C.D.S.C. 1877) (issued by the federal Circuit Court for the District of South Carolina).

202. *See, e.g.*, James v. Bowman, 190 U.S. 127 (1903).

out in a complex series of cases that leaves a murky legacy for the Court's Reconstruction-era rights-enforcement jurisprudence.[203]

A. *The Court Operationalizes Article I, Section 4*

In the years following *Cruikshank*, the Court funneled voting rights infringements into two buckets: one resting on Article I, Section 4 for national elections; and the other on the Fifteenth Amendment for state and local elections.[204] Critically, neither of these paths of rights enforcement contained a state-action requirement because both emanated from created rights.[205] As we will see, the lack of a state-action requirement greatly enhanced their desirability as bases for rights enforcement for federal prosecutors as compared to Equal Protection claims.[206]

United States v. Butler (1877), a circuit court opinion written by Chief Justice Morrison Waite, neatly implemented the voting rights-enforcement scheme announced in *Cruikshank* and also operationalized Article I, Section 4 to permit federal oversight of national elections.[207] The *Butler* case arose in Ellenton, South Carolina, when a white mob sought to disrupt the presidential election of 1876.[208] The mob killed dozens in another example of violent white supremacy in the South.[209] The five-count indictment proceeded under Article I, Section 4 and the Fifteenth Amendment.[210] A racial motive was alleged only in the counts rooted in the Fifteenth Amendment, as *Cruikshank* required.[211]

The *Butler* court approved the federal indictment, demonstrating that the voting rights-enforcement theory announced in *Cruikshank* provided a sufficient theoretical basis for federal prosecutors to bring cases.[212] Nevertheless, even with clear evidence of the mob's guilt, the

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203. *See, e.g.*, *Siebold*, 100 U.S. at 371; *Butler*, 25 Fed. Cas. at 213; *James*, 190 U.S. at 127.

204. *Siebold*, 100 U.S. at 383; United States v. Cruikshank, 25 F. Cas. 707, 712–13 (C.C.D. La. 1874).

205. *See generally Cruikshank*, 25 F. Cas. at 710–15 (describing the federal enforcement scheme in the context of created rights).

206. *Id.* at 713.

207. *Butler*, 25 Fed. Cas. at 224.

208. *Id.* at 221.

209. BRANDWEIN, *supra* note 10, at 145.

210. *Id.*; *Butler*, 25 Fed. Cas. at 223–24.

211. BRANDWEIN, *supra* note 10, at 146.

212. *Butler*, 25 F. Cas. at 226.

jury deadlocked.[213] Despite the result at trial, *Butler* shows that the *Cruikshank* blueprint made federal prosecutions under the Fifteenth Amendment theoretically possible even if actual convictions remained elusive.

In *Ex parte Siebold* (1879), an opinion written by Justice Bradley, the Court "insisted on a national police power" to protect the right to vote in federal elections.[214] *Ex parte Siebold* was a case involving white poll workers who stuffed ballot boxes to rig an 1878 Congressional election.[215] The Court authorized plenary federal enforcement of national voting rights on Article I, Section 4 grounds without requiring a racial predicate or a showing of state action.[216]

In the early 1880s, the possibilities for federal voting rights enforcement reached their zenith.[217] By that time, the Court had provided a theoretical basis for the federal government to bring voting rights prosecutions that was somewhat coherent.[218] And prosecutors did not have to first allege a deprivation on account of race before bringing charges of interference with a federal election under Article I, Section 4.[219] *Butler* and *Siebold* demonstrate that prosecutors at least occasionally used the Court's voting rights enforcement theories to craft indictments.[220]

Despite the favorable treatment that voting rights enforcement received from the Court, the South became solidified as a Democratic Party stronghold.[221] Thus, from the perspective of national Republicans, there was little reason to persist in federal voting rights prosecutions.[222] Accordingly, the Court foreclosed many of the possibilities of rights

213. BRANDWEIN, *supra* note 10, at 147.

214. *Id.* at 148.

215. Ex parte Siebold, 100 U.S. 371, 378 (1879).

216. *Id.* at 395.

217. J. Morgan Kousser, *Voting Rights Act and the Two Reconstructions*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 135, 141 (Bernard Grofman & Chandler Davidson eds., 1992) (documenting that two thirds of adult Black men voted in the Presidential election of 1880 and over half of Black men voted in Southern gubernatorial races during the 1890s).

218. United States v. Butler, 25 Fed. Cas. 213, 226 (C.C.D.S.C. 1877).

219. *See id.* at 225–26.

220. Some historians argue federal prosecutors sought to enforce voting rights violations for political reasons, not because enforcing them is easier. *See, e.g.*, BRANDWEIN, *supra* note 10, at 151–52.

221. *See, e.g.*, DEWEY W. GRANTHAM, THE LIFE AND DEATH OF THE SOLID SOUTH: A POLITICAL HISTORY 24–25 (1992).

222. *See id.* at 10.

enforcement in the South entirely in the early years of the twentieth century.[223] This article emphasizes that the judicial abandonment of rights enforcement was not linear. Indeed, rights-friendly pronouncements from the judiciary persisted in some areas and receded in others.

B. *Later Courts Unravel the* Cruickshank *Rights Schema*

To the extent the Supreme Court preserved a plausible avenue of federal rights enforcement in *Cruikshank*, the Court mostly abandoned this framework in the ensuing decades.[224] In short, the Republican Party gave up on the South.[225] The Republican Party devoted its political capital to promoting corporate business interests rather than Reconstruction.[226] Large corporations, buoyed by the completion of a national railroad and telegraph lines, asserted full control over the Republican Party.[227] Democrats successfully repealed most voting rights laws by 1894, in large part because Republicans did not attempt to stop them.[228] The Democrats established one-party rule in the South and enforced it through "unprecedented" violence.[229]

Judicial abandonment of the Reconstruction project was piecemeal, targeting social, political, and then, civil rights.[230] The Court dealt a devastating blow to what remained of the concept of social rights when it approved of *de jure* segregation in *Plessy v. Ferguson* (1896).[231] Dealing explicitly with the civil/political/social trifurcation of rights, the *Plessy* Court concluded that the Fourteenth Amendment "could not have been intended . . . to enforce social, as distinguished from political, equality."[232] In the *Civil Rights Cases*, the Court had denied a remedy for private discrimination in public accommodations on the grounds that the Constitution did not protect "social rights"; now, the Court

223. *See, e.g.*, Plessy v Ferguson, 163 U.S .537, 542–46 (1896).

224. *See, e.g.*, *id.*; *James*, 190 U.S. at 136–39.

225. BRANDWEIN, *supra* note 10, at 184.

226. As discussed *infra* part I, Justice Bradley in some ways prefigured this Republican Party realignment towards business in his concern for labor control in the South.

227. LAMOREAUX, *supra* note 178, at 159–60.

228. BRANDWEIN, *supra* note 10, at 184–85.

229. *Id.* at 185 (documenting the rise in lynching rates during the 1890s).

230. *See, e.g.*, Plessy v Ferguson, 163 U.S .537, 542–46 (1896).; James v. Bowman, 190 U.S. 127, 136–39 (1903).

231. *Plessy*, 163 U.S. at 550–52.

232. *Id.* at 544.

legitimized *de jure* segregation in *Plessy*.[233] The critical move of *Plessy*, building on the *Civil Rights Cases*, was formally rendering the boundary between civil/political rights and social rights "impermeable."[234] This impermeability became a fully institutionalized feature of post-Reconstruction American society in the wake of *Plessy*.[235]

As we have seen, *Cruikshank* and its progeny ensured that support for social rights for Black Americans could never gain a foothold.[236] The possibility of such social rights was a threat to the concept of white purity, a concept buttressed by the rise of social Darwinism in the 1890s.[237] In *Plessy*, the Court gave its blessing to a formal and rigid racial caste system designed to eliminate any possibility of social rights for Black Americans.[238]

The process of reasserting *de jure* white supremacy in the South culminated in the 1890s and early 1900s, when every former Confederate state held new constitutional conventions with the express goal of reducing voting rights.[239] In *Giles v. Harris* (1903), the

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233. BRANDWEIN, *supra* note 10, at 187.

234. *Id.* (citing *Plessy*, 163 U.S. at 551–52).

235. *Id.*

236. This article argues that by limiting federal involvement in rights enforcement in the South, the moderate Republican faction prevented their great fear of broad support for Black social rights from coming to fruition. For additional discussion of how consistent federal involvement can transform state and local attitudes, *see* THE FEDERALIST No. 27 (Alexander Hamilton) ("[T]he more the operations of the national authority are intermingled in the ordinary exercise of government, the more the citizens are accustomed to meet with it in the common occurrences of their political life; the more it is familiarized to their sight and to their feelings; the further it enters into those objects which touch the most sensible cords, and put in motion the most active springs of the human heart; the greater will be the probability that it will conciliate the respect and attachment of the community . . . . A government continually at a distance and out of sight, can hardly be expected to interest the sensations of the people. The inference is, that the authority of the Union, and the affections of the citizens towards it, will be strengthened rather than weakened by its extension to what are called matters of internal concern…").

237. "Social Darwinism" refers to "the theory that human groups and races are subject to the same laws of natural selection as Charles Darwin perceived in plants and animals in nature." Social Darwinism, ENCYCLOPEDIA BRITANNICA (last updated Aug. 18, 2024), https://www.britannica.com/topic/Social-Darwinism (last visited March 31, 2025).

238. *See, e.g.*, Plessy v Ferguson, 163 U.S .537, 542–46 (1896).

239. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONSTITUTIONAL COMMENTARY 295, 297, 301 (2000) (arguing that widespread constitutional disenfranchisement in the South "cast disenfranchisement into the most endurable and symbolically significant legal form"). Indeed, the powerful disenfranchising effect of the new constitutions can be seen in Louisiana, the site of the Colfax massacre. In 1896 there were 130,334 Black voters on the registration rolls. By 1900, two years after the

Supreme Court tacitly sanctioned these new state constitutions by announcing it would not supervise state elections, even if race-based voting rights violations were alleged.[240] In *Giles*, Black plaintiffs sued under the Fourteenth and Fifteenth Amendments to invalidate certain sections of the new Alabama Constitution that permitted Alabama election officials to remove the names of Black citizens from voter registration lists.[241] Writing for the Court, Justice Oliver Wendell Holmes explained that the enormous opposition to Black voting rights from white citizens prevented the Court from responding to the violations.[242] Justice Holmes explained that a remedy for a "great political wrong, if done, as alleged, by the people of a state and the state itself, must be given to them by the legislative and political department of the government."[243] Justice Holmes further explained that the Court was justified in its non-responsiveness because if the Court agreed that Alabama's voter rolls were unlawful, "how can we make the Court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?"[244]

Giles overturned a key component of *Cruikshank*.[245] Under *Cruikshank*, complaints under the Fifteenth Amendment that validly assert a race-based voting rights violation in state elections are federally enforceable.[246] Fearing any ruling to the contrary would go unenforced by the political branches, Justice Holmes dispensed with this aspect of the *Cruikshank* rights-enforcement theory and directed the plaintiffs to seek a remedy from the legislature.[247]

Giles permitted the virtual elimination of Black citizens from political participation in the South.[248] *Giles* was the culmination of "several years of self-conscious construction and organized

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ratification of the new state Constitution, there were only 5320. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 237 (1988).

240. *See generally* Giles v. Harris, 189 U.S. 475 (1903).

241. *Id*.

242. *Id.* at 488.

243. *Id.*

244. *Id.* at 486; Pildes, *supra* note 239, at 306 (arguing it is "unlikely" Holmes genuinely believed this).

245. *Compare Giles*, 189 U.S. at 486, *with* United States v. Cruikshank, 25 F. Cas. 707, 710–15 (C.C.D. La. 1874).`

246. *Cruikshank*, 25 F. Cas. at 710–15.

247. *Giles*, 189 U.S. at 486.

248. Pildes, *supra* note 240, at 306.

mobilization of a militarized white supremacy . . . to enable white 'redemption' of the South."[249] *Giles* was the bargain the Court made with the militant white supremacists in the South and disinterested Republican business interests in the North. The Court washed its hands of whatever doctrinal commitment to voting rights it had made in *Cruikshank* and *Ex Parte Siebold* for fear of having any pro-rights-enforcement proclamations going unheeded.[250] The role of judicial decision-making under uncertainty, especially in a period of such volatility and violence, looms large.[251]

In 1905, two years after *Giles*, Congress had the opportunity to act on the Court's delegation of responsibility for the enforcement of voting rights in the South.[252] The result of the 1902 House election for South Carolina's Seventh District was disputed.[253] The losing candidate, Alexander D. Dantzler, complained that the prevailing candidate, Asbury Francis Lever, was illegitimate because the state's new constitution disenfranchised thousands of potential Black voters.[254] Rather than act on the express delegation that the Court extended to Congress to resolve these types of claims in *Giles*, the House Committee on Elections confirmed Lever's victory and declined to opine on Dantzler's constitutional claim on the grounds that such claims are the province of the judiciary.[255] Here, the Court and Congress rendered responsibility for voting rights enforcement an unhittable moving target, freely shifting to any branch of government other than the one currently being petitioned for it.

In addition to delegating responsibility for voting rights enforcement to Congress, the Court further unraveled *Cruikshank*'s

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249. *Id.* at 301.

250. *Id.* at 307 (arguing that the Republican party, led by President William McKinley, was focused on maximizing material prosperity through northern business ventures in the South and did not want that pursuit deterred by a focus on Black rights). The historian William A. Dunning, who was the leading authority on Reconstruction during the first half of the twentieth century, argued that U.S. foreign policy interests in the Philippines, Puerto Rico, and Cuba were best served through widespread legal acknowledgement of the "fact of racial inequality." William A. Dunning, *The Undoing of Reconstruction*, LXXXVIII ATLANTIC MONTHLY 437, 449 (Oct. 1901).

251. *See* BRANDWEIN, *supra* note 10, at 187.

252. *See* H.R. Rep. No. 58-1740 (1904).

253. *Id*. at 1.

254. *Id*. at 2.

255. *Id.* at 3; Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—and Beyond*, 57 MISS. L.J. 591, 638–39 (1987).

Fifteenth Amendment rights-enforcement avenue in *James v. Bowman* (1903).[256] In *James*, the Court considered an indictment charging two white men with intimidating Black voters in the 1898 Kentucky Congressional election.[257] *James* overruled *Cruikshank*'s finding that Fifteenth Amendment challenges did not require a state-action showing.[258] In doing so, *James* revived the interpretation of the Fifteenth Amendment made by the *Petersburg* court in 1874.[259] After *James*, prosecutions under the Fifteenth Amendment required state action and racial predicates, dispensing completely with the Court's analysis in *Cruikshank*.[260] Some historians have argued that *James*—not the *Civil Rights Cases*—may be the true genesis of the modern conception of the state-action doctrine.[261] The *James* Court operated with a modern conception of the state-action doctrine and retroactively cited the *Civil Rights Cases* and even *Cruikshank* for approval.[262] As discussed previously, *Cruikshank* and the *Civil Rights Cases* were operating under an earlier conception of the state-action doctrine, and the *James* Court, writing decades later, imposed its understanding of the state-action doctrine onto these prior decisions.[263]

Finally, in *Hodges v. United States* (1906), the Court took an axe to the core of the Civil Rights Act of 1866, which had guaranteed Black Americans basic rights of citizenship, such as the right to enter into contracts and file lawsuits.[264] The *Hodges* Court considered the

256. James v. Bowman, 190 U.S. 127, 127 (1903).

257. *Id.*

258. *James* "presents an internally contradictory use of the state action cases" because it simultaneously resurrects the 'no state shall' language from the text of the Fifteenth Amendment and additionally relies on the indictment's failure to specify a racial motive. This second rationale suggests the presence of a state-failure-to-remedy carve-out, which gets glossed over in the decision in favor of adhering to the "no-state-shall" language of the Amendment. BRANDWEIN, *supra* note 10, at 189.

259. *See* United States v. Petersburg Judges of Election, 27 F. Cas. 506, 509 (C.C.E.D. Va. 1874).

260. *James*, 190 U.S. at 136.

261. *See, e.g.,* Ellen D. Katz, *Enforcing the Fifteenth Amendment, in* OXFORD HANDBOOKS IN LAW 7 (M. Tushnet et al. eds., 2015) (arguing that after *James*, the "theory of a special federal power to ensure the proper functioning of the state political process was gone").

262. *James*, 190 U.S. at 136.

263. *See generally* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 13 (1999) (demonstrating how subjective narrative construction, such as the *James* Court's retroactive revision of the nature of state action, can turn into opaque "institutional memory").

264. Hodges v. United States, 203 U.S. 1 (1906).

indictments of a white mob that threatened Black laborers into leaving their place of employment.[265] The indictments were made under the Thirteenth Amendment and alleged that the Black workers were denied their rights to contract and work as free laborers in violation of the Civil Rights Act of 1866.[266] In dismissing the indictments, the Court narrowly defined a Thirteenth Amendment violation as the "state of entire subjugation of one person to the will of another."[267] Thus, disrupting the freedom of contract would no longer be considered among the "badges and incidents" of slavery.[268] The Civil Rights Act of 1866 would therefore be essentially powerless to protect Black citizens from interference with their basic civil rights.

It was not a coincidence that Black political participation began to decline in the 1890s.[269] The decline corresponds predictably to judicial pronouncements in *Plessy* and *Giles* that were oppositional to Black rights.[270] This decline can be tracked empirically, as seen in the steep decrease in Black citizens on voter rolls after the ratification of the new state constitutions.[271] Nevertheless, the Court's abandonment of its prior rights-enforcement theories did not always unfold in a linear fashion.

Guinn v. United States (1915) serves as an example of the non-linear nature of the judicial abandonment of federal rights enforcement.[272] In *Guinn*, the Court struck down Oklahoma's use of the "grandfather clause," which extended the right to vote only to those

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265. *Id.* at 1.

266. *Id.* at 20 (Harlan, J., dissenting).

267. *Id.* at 17. The original conception of the Thirteenth Amendment included the rights conferred in the Civil Rights Act. To hold otherwise would render emancipation meaningless. *See* FONER, *supra* note 6, at 244.

268. The Court forced this result by limiting the possible legal bases of the Civil Rights Act of 1866 exclusively to the Thirteenth Amendment. If the Court had interpreted the Thirteenth Amendment to include contract rights, it would have resulted in a national police power over contract rights, which the Court was unwilling to accept. Pamela Karlan, *Contracting the Thirteenth Amendment:* Hodges v. United States, 85 B.U. L. REV. 783, 784–85 (2005) (drawing parallels between the Court's hands-off approach to contract rights in *Hodges* and *Lochner v. New York*); *see* BRANDWEIN, *supra* note 10, at 191.

269. VALELLY, *supra* note 98, at 134–39 (documenting how voter rolls dropped precipitously in southern states during the 1880s and 1890s as Black voters were systematically disenfranchised).

270. Plessy v Ferguson, 163 U.S. 537, 551 (1896); Giles v. Harris, 189 U.S. 475. 486 (1903).

271. *See* FRANKLIN & MOSS, *supra* note 239, at 237; VALELLY, *supra* note 98, at 134–39.

272. Guinn v. United States, 238 U.S. 347 (1915).

whose grandfathers had been eligible to vote.[273] Justice Holmes joined the unanimous majority in this decision, which is in some tension with his opinion in *Giles*.[274] While *Giles* stood for the proposition of judicial apathy to the violation of Black voting rights, it contained nothing doctrinally that could prevent a subsequent Court from issuing an opinion like *Guinn*.[275] Thus, *Guinn* complicates a linear narrative of definitive judicial abandonment.[276] *Giles* and *Guinn* reveal a Court more concerned with satisfying contemporaneous political exigencies than constructing a doctrinally stable rights-enforcement jurisprudence.[277]

CONCLUSION

"Rarely has a community invested so many hopes in politics as did Blacks during Radical Reconstruction."[278] This article has sought to understand the Court's rights-enforcement jurisprudence as it existed during the Reconstruction period. Irrespective of the practical effect on the ground, this article has argued that the *Cruikshank* decision presented an articulable theory of rights enforcement, rooted uneasily in nineteenth-century concepts of the character of rights.[279] In seeking out the rationale of decision-makers such as Justice Bradley, an evolved and technical jurisprudence can be traced. This rationale demonstrates the judiciary's desire to adapt to changing circumstances during an acutely volatile political period.

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273. *Id.* at 358 (proclaiming such provisions "repugnant to the provisions of the Fifteenth Amendment").

274. *Id.*

275. *See* Pildes, *supra* note 239, at 298 (arguing that *Guinn* is distinct from *Giles* because in *Guinn* the Court could simply invalidate the grandfather-clause provisions without needing to continuously monitor the registration process, which it would have needed to do had it ruled the other way in *Giles*).

276. *See supra* Part IIC (arguing that *Cruikshank* was, in part, a judiciary hedging its bets as to what the political branches were going to do next about Reconstruction, placing a thumb on the scale against it but nevertheless keeping an avenue open if the political branches ultimately wanted to see it through); Pildes, *supra* note 239, at 298 (arguing that the *Guinn* Court felt comfortable making the rights-friendly pronouncement in part because it was supported by the President at the time—a clear example of a contemporaneous political exigency affecting the development of caselaw).

277. Pildes, *supra* note 239, at 298.

278. FONER, *supra* note 6, at 291.

279. *See generally* United States v. Cruikshank, 25 F. Cas. 707, 710–15 (C.C.D. La. 1874).

These constitutional structures are further shaped by decision-makers who are attending to their own interests and theories. A key example is the outsized influence the judiciary conferred on voting rights claims compared to Equal Protection claims.[280] In the realm of voting rights enforcement during Reconstruction and its aftermath, the structure of the law was set partly to meet the contemporaneous policy goal of building the Republican Party in the South during Reconstruction.[281] The way this voting rights structure was established, and quickly toppled, is highly informative of how constitutional reasoning might be shaped by uncertain and rapidly changing circumstances. It indicates that doctrinal frameworks can be strikingly malleable, especially when a court is dealing with relatively new and expansive laws.

This article emphasized how uncertainty about the political future of Reconstruction influenced the jurisprudence of the era. The contemporaneous concerns of the authors of Reconstruction-era opinions—such as for labor control in the South, the state of the economy, and the results of mid-term and presidential elections during the 1870s and 1880s—seem to have greatly influenced the Court's constitutional reasoning.

The general tendency to treat this highly nuanced and contingent body of jurisprudence as an undisguised and linear attempt to undermine Reconstruction has produced a tremendous amount of misunderstanding.[282] This misunderstanding is not costless. Narratives formed decades later about bodies of jurisprudence can justify themselves through reading those narratives anachronistically onto earlier periods and jurists. This likely occurred when the *James* (1903) Court expressly read its modern formulation of the state-action doctrine retroactively onto *Cruikshank* (1875) and the *Civil Rights Cases* (1883) in a way that likely would have been alien at the time those earlier opinions were issued.[283] Accordingly, this article has centered its discussion of Reconstruction-era jurisprudence on what the decision-makers understood at the time and how these decisions were received by federal prosecutors in their pursuit of rights enforcement.

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280. *Id.* (finding that the federal government could directly enforce Fifteenth Amendment claims but only had corrective power over Equal Protection claims).

281. *See, e.g.*, *supra* part II.

282. BRANDWEIN, *supra* note 10, at 1.

283. James v. Bowman, 190 U.S. 127, 136–38 (1903).