
PARCHMENT RIGHTS

*Franita Tolson**

INTRODUCTION

Like many places in central Louisiana, Grant Parish became a haven for oil and gas prospecting in the late 1890s. Once speculators discovered the rich reserves, they hoped the new industry would displace the plantation economy that had been lucrative for only a few farmers in the post-Civil War era. In 1899, prospectors dug an eleven-hundred-foot shaft, finding not oil but the bones of African Americans¹ murdered twenty-six years earlier at Colfax, Louisiana, by white supremacists who had wrested control of the Grant Parish government from the Republicans.²

The Colfax Massacre — one of the bloodiest mass-casualty episodes of the Reconstruction era³ — is emblematic of the murder and assault of thousands of black voters across the South. During Reconstruction, there were thousands of lynchings; black state legislators were assaulted and/or murdered; and numerous jurisdictions experienced violent and deadly race riots.⁴ Like Colfax two decades earlier, the biracial government in Wilmington, North Carolina, would also be forced from power in 1898 by white supremacists,⁵ a grim finale to a century punctuated by racially and politically motivated violence.

Notably, the violence occurred at a time of substantial progress in civil and political rights for African Americans, at least on paper. The Civil Rights Act of 1866, the Fourteenth and Fifteenth Amendments, and the Enforcement Acts of 1870 and 1871, as well as a number of other federal laws, were designed to ensure that African Americans had the same civil and political rights as white people. But it was also true that in Colfax, Wilmington, and other places across the South, black people lost these rights at gunpoint, forced to relinquish power to white mobs who questioned elections in which they had come out on the losing side.

* Vice Dean for Faculty and Academic Affairs and George T. and Harriet E. Pflieger Professor of Law, USC Gould School of Law. I am grateful to the editors of the *Harvard Law Review* for their terrific work on this Essay.

¹ LEEANNA KEITH, *THE COLFAX MASSACRE* xi–xii (2008).

² CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* 21 (2008).

³ *Id.*

⁴ EQUAL JUSTICE INITIATIVE, *RECONSTRUCTION IN AMERICA* 7, 31, 56–78 (2020), <https://eji.org/reconstruction-in-america-rev-111521> [<https://perma.cc/PVN9-N5GY>].

⁵ See LERAE UMFLEET, *1898 WILMINGTON RACE RIOT COMM'N, 1898 WILMINGTON RACE RIOT REPORT* 156 (2006), <https://digital.ncdcr.gov/digital/collection/p249901coll22/id/5842> [<https://perma.cc/F2ZQ-296G>].

Fast forward over a century later. For months prior to the 2020 election, President Donald Trump alleged that the election was rigged, that mail-in voting was a recipe for fraud, and that any outcome in which he did not emerge as the victor was illegitimate.⁶ After a decisive loss in November 2020, President Trump urged his supporters to reject the election outcome in a fiery speech on January 6, 2021, just as Congress was set to count the electoral votes and declare Joe Biden the President of the United States.⁷ Referring to the people in the crowd as “patriots” and telling them to “show strength,” President Trump urged them to “walk down to the Capitol” and “demand that Congress do the right thing and only count the electors who have been lawfully slated.”⁸ Shortly thereafter, thousands of people stormed the Capitol building, seeking to disrupt Congress as it carried out its constitutional obligations.⁹

The fact that many Americans were shocked at the January 6 insurrection illustrates that we, as a society, have not come to terms with our history, a history in which political rights have often succumbed to false allegations of election illegitimacy and horrible acts of violence. Part I of this Essay details the Colfax Massacre, illustrating how a disputed election can quickly devolve into the loss of democracy at gunpoint. *United States v. Cruikshank*,¹⁰ which arose from the tragic events in Grant Parish, is a key moment in which the Supreme Court undermined congressional protection of the formerly enslaved and emboldened white supremacists.

But the lesson here is not only about the corrosive effects of fake claims and violence on democracy. There is also a lesson here for the current Supreme Court. As Part II shows, *Cruikshank* is also a window into the inequities of the Supreme Court’s rights-based jurisprudence, foreshadowing current caselaw in which some rights are afforded more protection than others. In *Cruikshank*, the Court disregarded the right to vote and right to bear arms of the black victims in Grant Parish, rendering their rights mere parchment barriers in the face of white violence. Similarly, the Roberts Court has elevated specious claims of voter

⁶ See, e.g., Jim Rutenberg, Nick Corasaniti & Alan Feuer, *Trump’s Fraud Claims Died in Court, But the Myth of Stolen Elections Lives On*, N.Y. TIMES (Oct. 11, 2021), <https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html> [<https://perma.cc/7AHB-NXAP>]; Stephanie Saul & Reid J. Epstein, *Trump Is Pushing a False Argument on Vote-by-Mail Fraud. Here Are the Facts.*, N.Y. TIMES (Sept. 28, 2020), <https://www.nytimes.com/article/mail-in-voting-explained.html> [<https://perma.cc/3ENH-PPT2>].

⁷ Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [<https://perma.cc/949J-NBBV>].

⁸ *Id.*

⁹ Deirdre Walsh, *Congress’ Electoral Count to Resume After Violent Protests Halt Process*, NPR (Jan. 6, 2021, 8:00 AM), <https://www.npr.org/sections/congress-electoral-college-tally-live-updates/2021/01/06/953443833/congress-electoral-college-tally-promises-more-acrimony-than-ceremony> [<https://perma.cc/V8DY-97PK>].

¹⁰ 92 U.S. 542 (1876).

fraud over robust protection of the right to vote, even in the face of the January 6 Capitol insurrection, which, like Colfax, was also about challenging election outcomes with violence. The Court's actions have relegated the right to vote — which has often stood in the gap between democracy and anarchy — to a guarantee not worth the paper it is written on.

I. THE COLFAX MASSACRE: WHEN DEMOCRACY MEETS MOB VIOLENCE

In the early 1870s, American politics — and, by implication, the Reconstruction project — were in crisis. In 1872, the Liberal Republican National Convention in Cincinnati nominated Horace Greeley for President, an effort comprised mostly of Republicans and Democrats who opposed the Grant Administration's corruption and the continuation of Reconstruction policies.¹¹ Four years after the ratification of the Fifteenth Amendment, the Democratic Party took control of the House of Representatives for the first time since before the Civil War.¹²

This political flux was also evident at the state level, with Louisiana becoming a poster child for political dysfunction amidst what had initially been great promise. The push by Republicans during the 1868 Louisiana Constitutional Convention created a majority-black electorate in the state.¹³ In the April 1868 elections, the new electorate approved the new constitution and elected Republicans of all stripes — black, white, mixed race — to the governorship and the State Legislature.¹⁴ Henry Warmoth, an Illinois native who had migrated to Louisiana after the war, assumed the governorship, but most symbolic of this new chapter in Louisiana politics is the fact that the Lieutenant Governor was mixed race and a former slave.¹⁵

But New Orleans and Shreveport, where such coalitions were possible with federal oversight, were far different places than rural Louisiana. The racial egalitarianism of the new state government did not translate to the local level, where the Ku Klux Klan and Knights of the White Camellia — counting among their ranks an estimated half of all white men in southern Louisiana — actively worked to keep black people

¹¹ James M. McPherson, *Grant or Greeley? The Abolitionist Dilemma in the Election of 1872*, 71 *AM. HIST. REV.* 43, 50–52 (1965).

¹² Nicolas Barreyre, *The Politics of Economic Crises: The Panic of 1873, the End of Reconstruction, and the Realignment of American Politics*, 10 *J. GILDED AGE & PROGRESSIVE ERA* 403, 418 (2011).

¹³ Henry C. Dethloff & Robert R. Jones, *Race Relations in Louisiana, 1877–98*, 9 *LA. HIST.* 301, 306 (1968).

¹⁴ LANE, *supra* note 2, at 38.

¹⁵ *Id.*

away from the polls.¹⁶ By the fall 1868 elections, African American turnout in some parishes diminished to almost zero.¹⁷

Republicans in some local areas found creative ways to insulate black political power from insurgent white supremacists. Calhoun's Landing, home to Willie Calhoun (a former slaveowner turned Republican state legislator), became one such safe haven for African Americans and their Republican allies in rural Louisiana.¹⁸ In 1869, the State Legislature created Grant Parish out of Calhoun's family land, so named in honor of President Ulysses S. Grant, with its county seat in Colfax, so named after Vice President Schuyler Colfax.¹⁹ Grant Parish had a majority-black electorate, with black people serving in official roles, including justice of the peace and constable.²⁰

This progress was short-lived, however. In 1870, Governor Warmoth replaced the parish's judge, William B. Phillips, and its sheriff, Delos White, with conservative Republicans who sympathized with ex-Confederates.²¹ The dissension in the parish came to a boil in September 1871, when a mob of white vigilantes, which included the new sheriff, Alfred Shelby, and his deputy, Christopher Columbus Nash, set fire to Phillips and White's home, murdering White as he fled the burning building.²² Governor Warmoth proved to be more foe than friend to Republicans in Grant Parish, impeding the federal investigation into White's death and preventing the state militia from rounding up white supremacists who continued to commit outrages against black and white Republicans.²³

The upheaval in Grant Parish, contrary to its initial promise, was a microcosm of a larger political struggle between Governor Warmoth and the Republicans who opposed his policies — the so-called "Custom House" faction, so named because their control of the New Orleans custom house gave them substantial control over revenue and patronage.²⁴ To oppose Governor Warmoth, Custom House Republicans paired with Democrats to elect an anti-Warmoth Republican as Speaker of the Louisiana House in January 1872.²⁵ Governor Warmoth attempted to bribe legislators to change their votes, leading four state legislators

¹⁶ *Id.* at 38–40.

¹⁷ *See id.* at 41.

¹⁸ *Id.* at 35, 38.

¹⁹ *Id.* at 42–43; *see also* Thomas Howell, *Finding the Line: The Origin of Grant Parish and the Recent Dispute over Its Boundary*, 51 *LA. HIST.* 215, 216, 220 (2010).

²⁰ LANE, *supra* note 2, 42, 45; *see also* Howell, *supra* note 19, at 223.

²¹ *See* LANE, *supra* note 2, at 47.

²² ROBERT M. GOLDMAN, *RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK* 44–45 (2001).

²³ LANE, *supra* note 2, at 56–59.

²⁴ *Id.* at 52.

²⁵ *Id.* at 60–61.

aligned with the Custom House to file a criminal complaint against the Governor and a number of his legislative allies for violating state and federal election laws.²⁶

Following Governor Warmoth's arrest, his conflict with the Custom House faction escalated.²⁷ In the gubernatorial election later that year, the Custom House Republicans threw their support behind the pro-Grant candidate, William Pitt Kellogg, while Governor Warmoth aligned himself with Democrats to support the 1872 gubernatorial campaign of white supremacist John McEnery.²⁸ Following the election, which was marked by widespread fraud, both sides claimed victory; technically, with help from the ballot tampering that took place in parishes across the state, McEnery had more votes than Kellogg.²⁹ In addition, Warmoth, as Governor, controlled the election machinery in the state.³⁰ The Warmoth-controlled State Returning Board, tasked with certifying all elections in the state, certified McEnery as the winner.³¹ Nonetheless, both McEnery and Kellogg proceeded as if they each were the lawful executive of the state, creating competing election boards to verify their respective elections and filling state and local vacancies with their supporters.³²

In December 1872, Custom House Republicans impeached Governor Warmoth³³ for his role in the voting irregularities and fraud in the election.³⁴ Governor Warmoth's term ended in January 1873, before his

²⁶ *Id.*

²⁷ *Id.* at 61.

²⁸ *Id.* at 63–64.

²⁹ Senator Oliver P. Morton, History of the Troubles in the Pelican State — Terrible Massacres by the Ku-Klux and White Leaguers, Speech in Indianapolis (Sept. 18, 1874), *in* N.Y. TIMES, Sept. 23, 1874 (“The Democratic Party went into that election in 1872 relying wholly and entirely on fraud for their success . . . Gov. Warmoth . . . succeeded in bringing in returns, many of them forged and altered in New-Orleans, showing that John D. McEnery, the Democratic candidate for Governor, was elected over Kellogg.”); S.M. Booth, Letter to the Editor, CHI. DAILY TRIB., Dec. 16, 1872, at 3 (“No one disputes that the Greeley Electoral and the McEnery State tickets had the most votes. But the plea is, that, if those who were not allowed to register had been registered, and had voted, as it is claimed they would, for the Administration ticket, it would have been elected.”).

³⁰ See Althea D. Pitre, *The Collapse of the Warmoth Regime, 1870–72*, 6 LA. HIST. 161, 177 n.70 (1965) (discussing an 1870 election bill that gave Warmoth, as Governor, the “authority to appoint the state and parish registrars” and create “a returning board before which the governor was required to lay all of the election returns”).

³¹ *Id.* at 181.

³² *Id.* at 181–85.

³³ Charles L. Dufour, *The Age of Warmoth*, 6 LA. HIST. 335, 362 (1965).

³⁴ See Morton, *supra* note 29 (“It is a matter of proof taken before the committee at Washington, and is proven on the record by numerous witnesses, that the Democratic politicians of Louisiana made a coalition with Warmoth upon the express understanding and estimate that the control of the machinery of the election was equal to 20,000 votes. They believed that through him they could carry the State; without him they knew they could not do it.”). For thirty-six days prior to Kellogg assuming office, Warmoth's Lieutenant Governor — P.B.S. Pinchback — was recognized by the Grant Administration as Louisiana's Governor, and as such, the first black governor in the country.

impeachment trial could take place,³⁵ and McEnery, with the support of an armed militia, was installed as Governor.³⁶ Viewing McEnery's administration as illegitimate, President Grant sent troops to New Orleans.³⁷ Kellogg's administration would be on shaky ground for its entire duration, surviving an attempted coup by McEnery's militia in 1874 that included an angry mob storming the statehouse and briefly controlling state government until President Grant's troops restored order.³⁸

Grant Parish did not escape similar controversy. Locals produced their own fusion ticket of conservative Republicans and Democrats, with one of Delos White's accused murderers — Christopher Columbus Nash — as their candidate for sheriff.³⁹ The 1872 election in the parish, much like those in parishes across the state, was punctuated by voter fraud and the massive disenfranchisement of black voters.⁴⁰ Fusionist candidates for governor, sheriff, and judge claimed victory, despite the fact that registered black and mixed-race voters in the parish outnumbered whites.⁴¹

Prior to President Grant's military intervention, Governor Kellogg tried to cut a deal with the Grant Parish Fusionists to bolster his political position, not realizing that some of their candidates were accused criminals: Nash, in particular, was an accused murderer and had committed election fraud.⁴² Once Governor Kellogg realized his error, he refused to appoint Nash as sheriff but was willing to compromise on other offices, an offer that the Fusionists soundly rejected amid promises that Grant Parish would erupt in bloodshed.⁴³ Governor Kellogg had previously commissioned R.C. Register, a Republican, as parish sheriff and Daniel Shaw, another Republican, as parish judge.⁴⁴

Sheriff-elect Register and Judge-elect Shaw sought to establish themselves as the only legitimate government by taking control of the Grant Parish Courthouse, the parish's center of government, and swearing in Republican officeholders.⁴⁵ The Fusionists decided to retake the courthouse, arguing that they were (contrary to all facts) the only

Gov. Pinckney Benton Stewart Pinchback, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governor/pinckney-benton-stewart-pinchback> [<https://perma.cc/VD5L-TUW5>].

³⁵ Dufour, *supra* note 33, at 363.

³⁶ LANE, *supra* note 2, at 13.

³⁷ President Ulysses S. Grant, Message Regarding Intervention in Louisiana (Jan. 13, 1875), <https://millercenter.org/the-presidency/presidential-speeches/january-13-1875-message-regarding-intervention-louisiana> [<https://perma.cc/2X88-8UCR>].

³⁸ KEITH, *supra* note 1, at 149–50.

³⁹ LANE, *supra* note 2, at 51, 71.

⁴⁰ *Id.* at 65–66.

⁴¹ *Id.* at 66.

⁴² *Id.* at 69.

⁴³ *Id.*

⁴⁴ *Id.* at 69–70.

⁴⁵ *Id.* at 70.

legitimate government of Grant Parish.⁴⁶ Amid threats of violence, white Republican leaders went to New Orleans to plead for military assistance in Colfax, leaving the courthouse guarded by a predominantly black (and poorly armed) militia with very little military experience.⁴⁷

On Easter Sunday, April 13, 1873, a white mob — armed with rifles and small cannons — attacked the courthouse.⁴⁸ With its limited arsenal, the black militia returned gunfire but was forced to surrender after two hours.⁴⁹ As dozens of unarmed black men came out of the courthouse, amid baseless assurances of safe passage, the white mob systematically chased down and murdered them.⁵⁰ The mob set fire to the courthouse and shot the remaining men who emerged, unarmed, from the building.⁵¹ Those black men taken as prisoners of war also found themselves at the other end of a shotgun.⁵² In all, the white mob murdered somewhere between 50 and 150 black men at the Grant Parish Courthouse in Colfax that day.⁵³

The Department of Justice indicted ninety-eight white men under the Enforcement Act of 1870, arguing that they had, among other things, conspired to deprive the murder victims of their rights to vote, petition the government, and bear arms.⁵⁴ Three defendants were convicted,⁵⁵ but in *Cruikshank* the Supreme Court invalidated the indictments, finding that the defendants had not violated the victims' constitutional rights.⁵⁶ First, the Court acknowledged that the victims had the right to petition the government, but the indictment did not allege that the defendants had conspired to prevent a meeting that had been assembled for this purpose.⁵⁷ Further, to the claim that the disenfranchisement was racially motivated, triggering the protections of the Fifteenth Amendment, the Court argued that there was no claim that the denial

⁴⁶ See *id.* at 66.

⁴⁷ *Id.* at 86, 93.

⁴⁸ *Id.* at 90, 96.

⁴⁹ *Id.* at 97–102.

⁵⁰ *Id.* at 101–03.

⁵¹ *Id.* at 100–02.

⁵² *Id.* at 104–07.

⁵³ The number of dead is disputed. Compare ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 589 (1988) (estimating 50 deaths), with Danny Lewis, *The 1873 Colfax Massacre Crippled the Reconstruction Era*, SMITHSONIAN MAG. (Apr. 13, 2016), <https://www.smithsonianmag.com/smart-news/1873-colfax-massacre-crippled-reconstruction-180958746> [<https://perma.cc/VE8N-5VR9>] (estimating 60 to 150 dead).

⁵⁴ LANE, *supra* note 2, at 12, 123–25.

⁵⁵ *Louisiana Affairs: The Conviction of the Grant Parish Prisoners*, N.Y. TIMES, June 19, 1874. Notably, much of the press coverage painted the black defenders of the Colfax Courthouse as the aggressors and instigators of the massacre. *Id.*

⁵⁶ *United States v. Cruikshank*, 92 U.S. 542, 559 (1875).

⁵⁷ *Id.* at 552–53.

of voting rights was race based.⁵⁸ Put simply, inartful drafting was more offensive to the Court than the rights violations.

Second, the Court found that neither the right to bear arms nor the right to vote are rights granted by the Constitution;⁵⁹ instead, the Second Amendment declares only that “it shall not be infringed by Congress.”⁶⁰ Earlier cases in which individuals were convicted for denying the rights of African Americans were implicitly based on the assumption that the Fourteenth Amendment had nationalized the Bill of Rights, constraining both the states and the federal government.⁶¹ The *Slaughter-House Cases*,⁶² which interpreted the Privileges or Immunities Clause to protect only a few rights incidental to national citizenship, called this assumption into question;⁶³ *Cruikshank* rejected it outright.

Third, the Court reaffirmed the principle that the Fourteenth Amendment applied only to state action, and not to the actions of private individuals; thus, private individuals could not deprive a fellow citizen of life, liberty, or property without due process in violation of the Fourteenth Amendment.⁶⁴

The Court’s approach only further encouraged the horrific actions of defendants like Christopher Columbus Nash, whose crimes were extensive and committed, in some cases, under color of state law.⁶⁵ The Court’s abdication of its responsibilities is best captured by a sign erected at the site of the Colfax Massacre in 1951:

On this site occurred the Colfax Riot in which three white men and 150 negroes were slain. This event on April 13, 1873 marked the end of carpetbag misrule in the South.⁶⁶

This sign is a chilling reminder not only that democracy dies in the face of violence, but also that lack of accountability means that the truth that emerges from the battle often favors the aggressor.

⁵⁸ *Id.* at 555–56 (noting that the Constitution has not “conferred the right of suffrage upon anyone,” *id.* at 555).

⁵⁹ *Id.* at 553, 555.

⁶⁰ *Id.* at 553.

⁶¹ See *United States v. Hall*, 26 F. Cas. 79, 80–82 (C.C.S.D. Ala. 1871) (No. 15,282) (sustaining an indictment following the racially and politically motivated killing of black men in Eutaw, Alabama, based on the argument that the Privileges or Immunities Clause incorporated the Bill of Rights).

⁶² 83 U.S. (16 Wall.) 36 (1873).

⁶³ *Id.* at 77–78.

⁶⁴ *Cruikshank*, 92 U.S. at 553–54.

⁶⁵ KEITH, *supra* note 1, at 149.

⁶⁶ *Id.* at xii.

II. THE LEGACY OF COLFAX: THE RIGHT TO VOTE AS MERE PARCHMENT RIGHT

The legacy of Colfax and *Cruikshank* endures in modern times. The Roberts Court has hampered Congress's ability to protect the constitutional rights of racial minorities in the face of both political dysfunction at the state level and angry white mobs seeking to vindicate illegitimate electoral wins through violence. In *Cruikshank*, the Court held that Congress can protect individuals from private violence with respect to a limited number of rights (not the Second Amendment), in limited circumstances (if the abridgment is on the basis of race or to petition the government), and only if the indictment is precise. Like the *Cruikshank* Court, the Roberts Court has also used hyperformalism to create a hierarchy of rights that Congress can protect in only limited circumstances. Yet the facts of *Cruikshank*, and the Colfax Massacre upon which it was predicated, illustrate that there was no adequate state law alternative in which black voters could have sought vindication of their rights, especially where a number of gubernatorially appointed parish officials — for example, Sheriff Shelby and Deputy Sheriff Nash — were guilty of crimes spanning election fraud, arson, and murder.

Similarly, the Roberts Court has restricted federal options for voting rights plaintiffs despite the fact that voter suppression and political violence are again becoming mainstream. In *Rucho v. Common Cause*,⁶⁷ for example, the Court held that partisan gerrymandering claims were nonjusticiable political questions despite evidence that these gerrymanders rendered meaningless the votes of those in the opposition party.⁶⁸ Now, litigants are forced to rely on state court litigation and state constitutional amendment to address partisan gerrymandering, a strategy that has had limited success.⁶⁹

The Court has also gutted key provisions of the Voting Rights Act of 1965⁷⁰ (VRA), undermining federal protection of the fundamental right to vote. In *Shelby County v. Holder*,⁷¹ the Court invalidated the coverage formula of section 4(b) of the Act, which required jurisdictions with a history of race-based discrimination in voting to preclear all changes to their election laws with the federal government.⁷² The Court found

⁶⁷ 139 S. Ct. 2484 (2019).

⁶⁸ See *id.* at 2491–93, 2506–07.

⁶⁹ See Reid Wilson, *State Courts Become Battlegrounds in Redistricting Fights*, THE HILL (Jan. 14, 2022, 6:00 AM), <https://thehill.com/homenews/state-watch/589646-state-courts-become-battlegrounds-in-redistricting-fights> [<https://perma.cc/RS42-MF9W>]; Annie Lo, *Citizen and Legislative Efforts to Reform Redistricting in 2018*, BRENNAN CTR. FOR JUST. (Nov. 7, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/citizen-and-legislative-efforts-reform-redistricting-2018> [<https://perma.cc/2EL8-XNMQ>].

⁷⁰ Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301).

⁷¹ 570 U.S. 529 (2013).

⁷² *Id.* at 557.

that this provision unduly infringed on the states' sovereign authority over elections, considering federal oversight no longer justifiable given the parity in voter turnout between white and nonwhite voters.⁷³

In recent cases, the Roberts Court has frequently emphasized the historic role of states in overseeing our system of elections. In *Brnovich v. Democratic National Committee*,⁷⁴ for example, the Court held that two Arizona voting laws — one that prohibited ballot collection by anyone other than election officials and close family members, and another that required ballots cast anywhere other than an assigned precinct be discarded — did not violate section 2 of the VRA.⁷⁵ The Court made this finding despite conclusive evidence that both restrictions disproportionately disenfranchised voters of color relative to white voters. Instead, the Court argued that a broader interpretation of section 2 would “bring about a wholesale transfer of the authority to set voting rules from the States to the federal courts.”⁷⁶ One cannot escape the parallel between *Brnovich* and *Cruikshank* as the latter Court also pushed back against an expanded federal presence in areas traditionally regulated by the state, reminding citizens of their “voluntar[y] submi[ssion]” to each respective government and to “demand protection from each within its own jurisdiction.”⁷⁷

Thanks in no small part to this judicial deference to state authority over elections, many states have crafted election rules that seek to ensure that their electorates are more white and more affluent. It is indisputable that in many jurisdictions formerly covered by section 5 of the VRA, minority voters face unique challenges in casting ballots because jurisdictions reduced polling places, gerrymandered legislative districts, and enacted other laws making voting more difficult.⁷⁸ In 2020, this already-vulnerable population had to confront efforts by some election administrators and Trump officials to toss out and/or discredit their votes in Detroit, Philadelphia, Atlanta, and Milwaukee, based on specious claims of fraud, as a means of delegitimizing President Biden's victory in those states.⁷⁹

⁷³ See *id.* at 551.

⁷⁴ 141 S. Ct. 2321 (2021).

⁷⁵ *Id.* at 2343–44.

⁷⁶ *Id.* at 2343; see also *Shelby County*, 570 U.S. at 545 (“[The Voting Rights] Act authorizes federal intrusion into sensitive areas of state and local policymaking . . . and represents an extraordinary departure from the traditional course of relations between the States and the Federal Government.” (citations omitted)).

⁷⁷ *United States v. Cruikshank*, 92 U.S. 542, 551 (1875).

⁷⁸ NAACP LEGAL DEFENSE FUND, *DEMOCRACY DIMINISHED* 7, 29, 40 (2021), https://www.naacpldf.org/wp-content/uploads/LDF_01192021_DemocracyDiminished-4b_06.24.21v2.pdf [<https://perma.cc/9NYZ-E783>].

⁷⁹ Juana Summers, *Trump Push to Invalidate Votes in Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020, 6:26 AM), <https://www.npr.org/2020/11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group> [<https://perma.cc/JF2R-WCLH>].

President Trump's incessant efforts to undermine the 2020 election results led many of his supporters to storm the Capitol on January 6 to stop Congress from completing its constitutional obligation to count the electoral votes, reminiscent of the white mob that had stormed the courthouse at Colfax to prevent the duly elected parish government and its black supporters from taking power. The parallels between these two unfortunate episodes do not stop here. Across Louisiana, black voters were thwarted from voting by threats of violence and intimidation, an outcome that many feared would come to pass in 2020 as President Trump encouraged his supporters to enlist as poll watchers.⁸⁰ Like Governor Warmoth, who had used his control over Louisiana's election machinery to influence the outcome of the 1872 gubernatorial election, President Trump also attempted to leverage his authority to alter the 2020 presidential election. In a now-famous phone call, President Trump demanded that Governor Brian Kemp of Georgia "find" 11,780 more votes to overturn the election in the state.⁸¹ Indeed, Trump acolytes and 2020 election deniers are running as candidates to be secretaries of state in a number of races across the country, harkening back to a time in which state officials were instrumental in casting doubt on election outcomes.⁸²

Like white insurgents at Colfax, the January 6 mob included police officers, state officials, and other prominent individuals who were motivated by an ideology that defines a free and fair election to be one in which their side emerges as the winner; any other outcome is unacceptable.⁸³ The January 6 insurrection attempted to halt the certification of

see Christina A. Cassidy, *AP Review Finds Far Too Little Vote Fraud to Tip 2020 Election to Trump*, PBS NEWSHOUR (Dec. 14, 2021, 4:00 PM), <https://www.pbs.org/newshour/politics/ap-review-finds-far-too-little-vote-fraud-to-tip-2020-election-to-trump> [<https://perma.cc/9T5E-KSK2>]; see also *Trump Lawyer's Memo on Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021, 8:20 AM), <https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html> [<https://perma.cc/5QHP-UDEY>]; Paul Egan, *GOP Members of Wayne County Board of Canvassers Say They Want to Rescind Votes to Certify*, DETROIT FREE PRESS (Nov. 19 2020, 6:48 PM), <https://www.freep.com/story/news/politics/elections/2020/11/19/wayne-county-board-of-canvassers-monica-palmer-william-hartmann/3775242001> [<https://perma.cc/43WG-NVFF>].

⁸⁰ See W.J. Hennigan & Vera Bergengruen, *Trump's Calls for an "Army" of Poll Watchers Are Renewing Fears of Voter Intimidation*, TIME (Oct. 22, 2020, 6:00 AM), <https://time.com/5902731/trump-poll-watchers> [<https://perma.cc/69AR-HU4R>].

⁸¹ Andy Sullivan & Michael Martina, *In Recorded Call, Trump Pressures Georgia Official to "Find" Votes to Overturn Election*, REUTERS (Jan. 3, 2021, 2:40 PM), <https://www.reuters.com/article/us-usa-election-trump/in-recorded-call-trump-pressures-georgia-official-to-find-votes-to-overturn-election-idUSKBN2980MG> [<https://perma.cc/7HCG-CGG7>].

⁸² Amber Phillips, *How Trump-Backed Secretary of State Candidates Would Change Elections in the United States*, WASH. POST (Dec. 1, 2021, 6:00 AM), <https://www.washingtonpost.com/politics/2021/12/01/how-trump-backed-secretary-state-candidates-would-change-elections-america/> [<https://perma.cc/YU6R-BVJ8>].

⁸³ See Devin Dwyer et al., *Cops' Role in Jan. 6 Attack Divides Virginia Town with Ties to Confederacy*, ABC NEWS (Jan. 4, 2022, 5:00 AM), <https://abcnews.go.com/politics/cops-role-jan-attack-divides-virginia-town-ties/story?id=81860602> [<https://perma.cc/TY4Y-DMU6>]; *West Virginia*

President Biden's victory, with rioters constructing gallows and shouting, "Hang Mike Pence"⁸⁴ — mirroring the actions of a mob over a century earlier, who had stormed the Louisiana statehouse to displace, and possibly kill, Governor Kellogg to install a new government.

In the wake of this violence, some states have passed new voting restrictions, despite the historic turnout in 2020 and the fact that all objective evidence points to the 2020 election as being a free and fair contest. For example, Georgia's new voting law — SB 202 — imposes more-stringent requirements to cast an absentee ballot and limits access to drop boxes; both were mechanisms that thousands of minorities used to cast ballots last year.⁸⁵ Comparatively, the law extends early in-person voting, which many white, mostly Republican voters across the country preferred in 2020.⁸⁶

The manipulation of electoral rules to burden minorities, on the front end, and the effort to invalidate their votes as fraudulent, on the back end, fuel narratives that elections are not free and fair when people of color participate in numbers that make a difference in the outcome. The resulting violence is then justified as an appropriate response to a stolen election, and the enemies of democracy — be it in Colfax 1873 or Washington, D.C., 2021 — are venerated as patriots.

CONCLUSION

As states and private individuals seek to undermine fundamental rights through suppression and violence, judicial intervention to protect our democracy is key. Otherwise, our rights become mere parchment barriers, subject to invalidation by political minorities as was true almost 150 years ago and remains true today. In thinking through questions of democratic legitimacy and the scope of political rights, one cannot divorce them from the broader political context in which they exist. Ultimately, judicial abdication of rights enforcement leaves these rights subject to the whims of violent mobs.

Lawmaker, Charged After Filming Himself Storming U.S. Capitol, Resigns, CBS NEWS (Jan. 9, 2021, 4:09 PM), <https://www.cbsnews.com/news/derrick-evans-resigns-west-virginia-lawmaker-charged-after-filming-himself-storming-us-capitol> [<https://perma.cc/S74A-7L4W>].

⁸⁴ *Video Shows Capitol "Mob Calling for the Death of the Vice President," Plaskett Says*, PBS NEWSHOUR (Feb. 10, 2021, 6:20 PM), <https://www.pbs.org/newshour/politics/watch-video-shows-capitol-mob-calling-for-the-death-of-the-vice-president-plaskett-says> [<https://perma.cc/M6JA-2NKG>].

⁸⁵ Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, N.Y. TIMES (Aug. 18, 2021), <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html> [<https://perma.cc/XQ2H-RF5L>]; see also Eric Bradner, *The New Texas Voting Law Includes These 7 Major Changes*, CNN (Sept. 8, 2021, 7:34 AM), <https://www.cnn.com/2021/09/07/politics/what-texas-voting-bill-does/index.html> [<https://perma.cc/Z7LH-4ASP>].

⁸⁶ Corasaniti & Epstein, *supra* note 85.