STRENGTHENING THE WEAK STATE

Politicizing the American State's "Weakness" on Racial Violence

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Abstract

This essay charts the development of the American state during the era when Southern lynchings prevailed. Contrary to the standard interpretation that depicts the American state as having lacked the administrative and legal capacity to protect the lives of Southern Blacks, it is a more pluralist conception of state weakness for which I argue, one that characterizes the American state's behavior regarding racial violence as the deliberate, calculated act of an active state choosing not to act. The state had always possessed legal authority to prosecute lynch mobs, but the key determinant was garnering the political will to enforce the law. Examples gleaned from the Ulysses S. Grant, Franklin Roosevelt (FDR), and Lyndon Johnson (LBJ) administrations illustrate the American government's political vacillation between acting and not acting. Examinations of two Supreme Court cases in 1966 highlight the political nature of federal rights enforcement. In light of the 1966 Supreme Court decisions in *United States v. Price* and *United States v. Guest*, the Court appears never to have repudiated or stripped the federal government of all of its authority to engage in combating racial violence. Even though the Court clearly signaled during Reconstruction that it was not going to uphold claims of rights violations of Blacks in the South, it did so without ever making a substantive decision on whether it could. Sections 241 and 242 of Title 18 of the United States Code were, in effect, placed into suspended animation; it was only when there was a political will to reengage with federal rights enforcement that the Court resuscitated these laws. In the parlance of the weak state thesis, the American state did not lose its capacity to combat racial violence; rather it simply chose not to engage.

Keywords: Racial Violence, Weak State, Federal Rights Enforcement, Lynching, *United States v. Price*, *United States v. Guest*

The liberal state has always been as strong as the political and social situation and the interests of society demanded.

—Franz Neumann, *The Democratic and the Authoritarian State* (1957, p. 22)

Du Bois Review, 9:2 (2012) 457–480.

doi:10.1017/S1742058X12000306

INTRODUCTION

The American state is "steeped in paradox and contradiction" (Skowronek 2009, p. 332). Nowhere is this more evident than in its troubled relationship to race, especially racial violence. Shortly after the national state emancipated Blacks from the arbitrary power of slave masters, Blacks became subject to the arbitrary power of lynch mobs. It might be argued that there is no contradiction here, but simply a practical limit: the state lacked the administrative and political capacity to protect the lives of Southern Blacks. Such an assessment, however, not only fails to grasp the political dynamics underpinning racial violence, but also operates with an insufficiently theorized conception of state weakness. The standard interpretation of the American state's relationship to racial violence needs to be revamped. I argue for a more pluralist conception of state weakness. A differentiation can be made between states that are compelled to be weak and states that choose to be weak. The former presumes incapacity; the latter presumes autonomy.

This analytic distinction between different kinds of state weakness is especially illuminating for the study of lynchings—extrajudicial, illegal acts that cannot continue indefinitely without either tacit permission—the *choice* to be weak—or inability to enforce the law—*administrative* weakness (Brundage 1993; Chadbourn 1933; Cutler 1969; Dray 2002; Ginzburg 1988; McGovern 1992; National Association for the Advancement of Colored People 1969; Raper 1933; Shay 1938; Tolnay and Beck, 1995; Waldrep 2002; Waldrep 2006; Wells-Barnett, 2002). Weakness in this one particular aspect runs counter to other developments that depict the state as growing stronger over time. Disentangling the different capacities of the state not only presumes a disaggregation of what constitutes a state but also what constitutes weakness. Examining the different aspects of statehood and weakness reveals an interdependency among them. By couching weakness as a legal principle of federalism, the federal government was also able to relinquish responsibility while nonetheless maintaining authority. Weakness with respect to lynchings thus enabled the national state to pursue and strengthen other aspects of the state. By contextualizing inaction in a form of legalese, it undergirded inaction to the extent that it would take another revolutionary moment that was analogous to the period following the Civil War in order to reactivate federal rights enforcement.

This essay seeks to examine how the federal government manipulated different aspects of the state to embed and obscure its complicity with White supremacy. In so doing, it attempts to intervene more broadly in the debates about American state development and weak state theory (Johnson 2007; King 1995; King and Tuck, 2007; King and Lieberman, 2009a; King and Lieberman, 2009b; Novak 2008). First, I sketch the basics of weak state theory, considering how it has been applied to the development of the postbellum American state in general and to the historical problem of racial violence specifically. With the theoretical frameworks in place, it then becomes possible to analyze the political and legal history surrounding the strange career of federal rights enforcement regarding racial violence. Then, I analyze the federal government's initial response to racial violence under the Grant administration and document how the state was administratively capable of—but eventually withdrew from—the enforcement of Blacks' right to life free from racial violence. The following section shifts to the FDR era, during which attempts to create an antilynching bill were defeated, revealing the political calculus that continued to impede rights enforcement and how this political problem was concealed by Roosevelt's claim that a new antilynching law was needed to engage in federal rights enforcement. I then examine the politics of the Lyndon B. Johnson administration

and show that the state had always possessed legal authority to prosecute lynch mobs, and that what was crucial was revitalization of the political will to enforce the law. In sum, I argue that the relevant "weakness" that permitted the existence of lynching for nearly eighty years was not a matter of administrative capacity or state resources, but rather political choice and self-restraint by political officials and representatives.[1]

WEAK STATE AND RACIAL VIOLENCE

Weak state is a relative term that tends to be contrasted with a strong society or a strong state (Skocpol 1985). According to Joel Migdal (1988), author of the landmark book on weak states, the relative strength of the state is measured by "the ability of state leaders to use the agencies of the state to get people in the society to do what they want them to do" (p. xiii). A weak state, then, is characterized by a "disjuncture between the state's rules of the game, as its leaders sought to establish the whole society as a single juridical whole and the actual operative dictates of behavior in society" (p. 261). This disjuncture is often characterized as operating against the intentions of the state.

Political historian William Novak (2008) notes the once prevailing view that the American state was weak:

> [T]he phrase "the American state" is seen as something of an oxymoron in a land of alleged "anti-statism" and "statelessness." When acknowledged at all, the American version of a state is viewed as something not quite fully formed—something less, something laggard, something underdeveloped compared to the mature governmental regimes that dominate modern European history (p. 754).

This claim for statelessness has recently been refuted across various aspects of the American state (Dobbin and Sutton, 1998; Frymer 2003; Frymer 2004; Hacker 2002; Johnson 2007; King and Lieberman, 2009a; King and Lieberman, 2009b; King and Stears, 2009; Lieberman 2002; Novak 2008; Skocpol 1985; Skowronek 1982; Skrentny 2006). Even though conventional accounts of the stateless nature of the American state have been widely discredited, it has nevertheless persisted in accounts regarding racial violence. At first blush, an analysis of the state's relationship to racial violence, especially lynching, seems to confirm conventional approaches that emphasize its weak capacity and legal fragmentation. The Tuskegee Institute documented 4629 victims of lynching between 1883 and 1966.[2] Their findings report that Blacks made up 86% of those lynched in the South.[3] Most of these lynchings failed to elicit any formal investigation. As Dray (2002) writes, in the few instances which elicited formal investigations, the conclusion was oftentimes "death at the hands of persons unknown" (p. ix).

Easily obscured by the complexities of federalism, the national government is often portrayed as helpless to rein in the vicissitudes of lynch mobs. Many analysts have argued that the federal government was hindered in combating lynchings because it lacked the legal authority and institutional capacity (Gillette 1979; Raper 1933;Wang 1997). Generally, political authorities, particularly on the federal level, are considered to have played a minor role in the regulation, administration, and eventual decline of lynchings.[4] Although many political authorities expressed sympathy with lynchers, they made sure to never explicitly approve and/or endorse the practice of lynching. In certain cases, political authorities, particularly local law enforcement, were heavily involved—often by abstaining from enforcing the law, but sometimes by joining the lynch mobs. In most instances, however, it was uncivil forces that decided to take the law into their own hands (Ayers 1992; Sydnor 1940;

Tolnay and Beck, 1995). These accounts presume that the state's failure to enforce the law was due to incapacity, rather than to a decision about where, when, and how to exercise its power.

The characterization of the American state as weak in regards to racial violence is illusory; recent research has focused on the federal government's collusion in the maintenance of racism. (Belknap 1987; Kaczorowski 1985; Katznelson 2005; King 1995; King and Tuck, 2007; King et al., 2009; Massey and Denton, 1993; Patler 2004; Weiss 1969).[5] But it is important to distinguish the various facets of racism. Take, for instance, segregation and racial violence. Segregation was explicitly and legally sanctioned; lynchings were not (*Plessy v. Ferguson* 1896). It is one thing to mandate separate schools and public facilities for Blacks; it is altogether something else to sanction the murder and torture of Blacks. As Federal Circuit Judge Halmer H. Emmons states in his 1875 Charge to Grand Jury-Civil Rights Act, "I have but small sympathy for the right of the negro to see . . . the ballet dance" but protection from pillage and murder was a "more precious and beneficent privilege" (Brandwein 2011, p. 61). Unlike segregation that was mostly delegated to the respective states to regulate and was couched in liberal terms, the federal government never completely relinquished the authority to combat racial violence nor provided a coherent, consistent answer as to why it did not intervene.

Whereas segregation has been thoroughly examined, racial violence has not. Harry Scheiber's theory of federalism is an apt example. Scheiber (1980) categorizes federalism in five stages: 1) dual federalism from 1789 to 1861; 2) transitional centralization from 1861 to 1890; 3) accelerated centralization from 1890 to 1933; 4) cooperative federalism from the New Deal to World War II; and 5) creative federalism since the end of World War II. Scheiber is, however, quick to note an exception to this schematization: "A residue of dual federalism from the antebellum era was evident in the area of civil rights, as Southern blacks were left virtually [alone] against private coercion, state action, and often terrifying violence" (p. 680). Although Scheiber acknowledges the American state's mishandling of race, he does not attempt to make it cohere to his general schematization. This strategy of separating out race from his overall framework is not atypical. According to Desmond King and Robert Lieberman (2009b), "Many leading works of scholarship on core institutions of the American state overlook how race shaped their content and policy effects. This deficiency is one reason for singling out the racist dimension of the American state" (p. 314).

Part of the difficulty in ascertaining the federal government's compliance with racial violence is schematizing negligence. In comparing South African apartheid and Jim Crow segregation, political scientist Anthony Marx (1998) observed the distinctively American pattern of an "active" withdrawal:

> Rather than exert its authority, the [United States] *acted by withdrawal*, consolidating its authority as best it could by avoiding further conflict . . . Segregation was enforced by mob rule, to which the federal government turned a blind eye. *Guarantees of equality were unenforced*, whereas in South Africa no such guarantees existed and the state acted with force and impunity (p. 13).

Picking up on Marx's concept of acting by withdrawal, Desmond King and Stephen Tuck (2007) specifically point out the "deliberate inaction" of Congress and the Republican Party:

> Congressional behavior was marked by several decades of deliberate action and deliberate inaction—in response to the rising tide of white supremacy across the

> country. . . By choosing not to act, the [Republican] party fanned Southern exclusions and gave added legitimacy to mistreatment and racism in the North and West (pp. 240, 244).

To act by withdrawal can at times be obscured because it is nonaction.

As noted above, this nonaction was oftentimes mistakenly couched in terms of weakness. If the federal government had in fact relinquished to the states complete authority to combat racial violence, then it would have had to pass new legislation for the federal government to re-engage. But it had not. When the federal government wanted to combat racial violence, it simply resurrected old laws that were rarely used. Thus, the unwillingness of political actors to act has been mischaracterized as weakness when it in fact represents an explicit response by the state to the question of "whether one will have access to political and legal protection and recognition or will be excluded from it" (Ali 2011, p. 5). Robert Dahl (1956) eloquently describes how this exclusion is related to racial violence:

> Suppose that x is existing policy, and y is an alternative to it requiring governmental action, e.g., x is a policy of non-interference by the federal government in lynching cases and y is legislation requiring the federal government to intervene. . . If no governmental action is taken, then in fact x is government policy" (p. 41).

Dahl (1956) purposefully describes it as a "policy of non-interference" (p. 41) in order to emphasize the explicit choice not to act. The active policy of nonenforcement was more of a political agreement mired in comity than a legal principle of incapacity. The federal government never abdicated its sovereign authority. As quoted in the records of the U.S. House Committee on the Judiciary (1956), U.S. Attorney Herbert Brownell declares, "whenever mob violence is involved, that certainly comes within the federal authority" (p. 23). President Dwight D. Eisenhower further expounds on Brownell's point:

> [W]hen a State refuses to utilize its police powers to protect against mobs persons who are peaceably exercising their rights, the oath of office of the President requires that he take action to give that protection. Failure to act in such a case would be tantamount to acquiescence in anarchy and dissolution of the union (1996, p. 463).

But for the first half of the twentieth century, the federal government did in fact fail to act; it is in the concealment of that failure that sovereignty is found.

The weak state narrative was not simply an academic misnomer; it was also a rhetorical ploy used by political actors to obfuscate their responsibility and accountability.[6] Many expressed concerns regarding racial violence. From 1882 to 1968, nearly two hundred antilynching bills were introduced in Congress. Not one made it to a floor vote in the Senate. President Woodrow Wilson ([1918] 2002) begged the men and women of the United States "to make an end of this disgraceful evil [of lynching]," but to no avail (p. 271).[7] Concerns regarding racial violence sporadically existed throughout the country; the political will necessary for reengagement did not. Although it is beyond the scope of this article to examine the complexities of mustering the political will to engage in racial violence, what is important to note is that although some might have been sympathetic to combating racial violence, few were nonetheless willing to do what was politically necessary to effectuate reengage-

ment. Individual antipathies were not enough to overcome the institutionally embedded nature of racism that constrained possibilities of change via ordinary legislation and/or political action.[8] Subsequently, many excused their ineffectiveness in legalese terms of incapacity.[9] By couching political inaction in terms of jurisprudential restrictions in a federalist system, political officials successfully mischaracterized what actually was a political arrangement made by politicians as a matter of states' rights that was to be resolved by the courts. Disentangling the political nature of federal inaction from the legal principle of federalism provides the conceptual pivot by which we can distinguish the (in)actions of sovereignty from actual challenges to that sovereignty. Collapsing the political into the legal provided a way for the federal government to evade responsibility without actually abdicating its authority. This places the law—namely the Civil Rights Act of 1866 and the Enforcement Act of 1870—as the independent variable and the political will to engage in federal rights enforcement as the dependent variable. In other words, in matters regarding racial violence, the law stayed constant; it was the political will to enforce the law that varied.[10]

I will illustrate this subtle differentiation between being passively incapacitated and being deliberately inactive by resituating the American state's relationship to racial violence in wider political terms. Although many posit the Supreme Court as having impeded the federal government's ability to quell racial violence, after extensive research into three historical eras, I conclude that government inaction was due less to the disabling nature of legal prohibitions on state action than to the political will not to act. Primarily blaming the Court for government inaction not only mischaracterizes what actually happened but also relieves political authorities of their culpability. By resituating state inaction in more political terms, the weakness of the American state with regard to racial violence is more accurately characterized as a calculated decision of an active state choosing not to act.

PRESIDENT GRANT'S ADMINISTRATION: GOING FROM STRONG TO WEAK

When the federal government wanted to stop racial violence in the South, it could and did.[11] Between 1870 and 1872, the American state was active and effective in curbing racial violence in the South (Foner 1988; Kaczorowski 1985; Swinney 1987; Trelease 1971). When the Department of Justice was first established in 1870, it was proactively committed to quelling racial violence. U.S. Attorney General Amos Akerman was firmly committed to extinguishing the Ku Klux Klan.[12] On July 6, 1871, he issued a circular regarding the Enforcement Act of 1870, in which he stated that the statute "makes it your special duty to initiate proceedings against all violators of the act."[13] This task was seen by many as impossible due to a host of reasons, including budgetary constraints,[14] difficulties in securing evidence (Foner 1988), lack of a detective force,[15] local resistance,[16] fear of witnesses to testify,[17] corruption,[18] and the highly talented defense lawyers that many Southern defendants were able to obtain.[19] The Department of Justice under Akerman was nonetheless central to curbing violence in the South in general and taking down the Ku Klux Klan in particular. Prosecution of Klansmen began in earnest in 1871.[20] In South Carolina, as reported in Trelease (1971), 600 suspected Klansmen were arrested, leading to 390 indictments, as indicated in Kaczorowski (1985). As Davis (1914) writes, in Mississippi, 640 suspected Klansmen were arrested, leading to 200 indictments. In North Carolina, there were 763 indictments that resulted in twenty-four convictions and

twenty-three guilty pleas.[21] Alabama brought 130 indictments against suspected Klansmen (Trelease 1971). In 1871, there were at least 190 criminal persecutions under the Enforcement Acts leading to at least 108 convictions.[22] In 1872, Gillette (1979) reported 603 criminal prosecutions that led to 448 convictions.[23]

Some have interpreted these numbers as indicating the federal government's incapacity to adequately deal with the Klan, since the number of indictments per the number of arrests is relatively low (Bensel 1990; Gillette 1979). In the best-case scenario, the rate of indictments to arrests was barely one to two. For example, in Mississippi and South Carolina, 1240 arrests led to only 590 indictments. If one compares the number arrested to the number actually convicted, the rate is even lower. For example, Kaczorowski (1985) notes that in South Carolina, U.S. Attorney Daniel Corbin had a 33% conviction rate, 26% acquittal rate, and 41% *nolle prosequi* rate.[24] For tried cases, Corbin's conviction rate dropped to 12%, and his acquittal rate skyrocketed to 88%. Because of this low rate of convictions, Akerman thought the Ku Klux Klan was "too much even for the United States to undertake to inflict adequate penalties through the courts" (Kaczorowski 1985, p. 74).

Low acquittal and conviction rates, however, do not necessarily mean the federal government was unable to dismantle the Klan. For example, Brigadier General Alfred Terry's (1871) letter to the Secretary of War declared:

> [The Ku Klux Klan] is spread over so very large an extent of country that it is manifestly impossible to deal with it efficiently throughout all the states in which it exists at one and the same time. . . Fortunately, it is not necessary, as I think, to attack the organization at every point. If in a single state it could be suppressed, and in that state exemplary punishment meted out to some of the most prominent criminals, I think that a fatal blow would be given everywhere.

Legal historian Robert Kaczorowski (1985) confirms the effectiveness of Brigadier General Terry's strategy as set forth in this letter:

> At the beginning of 1872, federal officers felt that they were on the verge of destroying the Klan. They also were heartened by the sharp curtailment of violence that had resulted from their efforts. The fear of prosecution not only restored peace, but it also motivated Klansmen to confess their crimes in the hopes of gaining leniency (p. 76).

There was also the military to consider. Even though President Grant was reluctant to use the power granted to him by the Ku Klux Act of 1871 to suspend the writ of habeas corpus, he did dispatch federal troops to troubled areas in the South. Military historian James Sefton (1967) notes:

> [I]n 1870 alone, more than 200 expeditions of federal troops were sent out at the request of state and federal civil authorities. In 1871, 160 operations were reported, not including those in South Carolina to suppress the Klan (p. 228).

The essential factor in breaking up the Klan thus was the federal government's resolve to declare war even though the war was waged rather inefficiently (Kaczorowski 1985).

Throughout the South, there were reports that confirmed the federal government's success in curbing violence in general and stopping the Klan in particular. Legal historian Robert Kaczorowski chronicled the various reports: U.S. Attorney John

Minnis reported that in Alabama the federal court "was demoralizing and carrying terror to these lawless K.K. Klans;" U.S. Attorney Daniel Corbin believed that in South Carolina "only the prosecution of the leaders [of the Ku Klux Klan] was necessary to restore peace and order to the state;" and federal circuit court judge Hugh Lennox Bond wrote that "we have broken up the Ku Klux in North Carolina (p. 77)." Allen Trelease (1971), author of the preeminent book about the Ku Klux Klan, reports that in Florida, "violence virtually ended by the end of 1871," while in Alabama "Klan violence ground almost to a halt" (p. 410). Major Merrill, who played a pivotal role in reducing the Klan in South Carolina, reported that "the testimony is unanimous—the result was total suppression of the Ku Klux Klan" (Swinney 1987, p. 235). In Tennessee, the birthplace of the Klan, Swinney found that "the years of 1870 to 1873 were relatively free of Klan-type outrages" (p. 286). Swinney even goes so far as to suggest that the enforcement acts were less vigorously prosecuted after 1874 because "the major objective which had occasioned their passage—the dissolution of the Ku Klux Klan—had been achieved" (p. 318). In a study of Grant's Southern policy, historian Edwin Woolley (1964) writes:

> The result of the demonstration of force and determination in South Carolina, and of the vigorous arrest and prosecution of offenders elsewhere throughout the South, was that Kukluxism was practically extinct within a year (p. 184).

Although the federal government's "war" against the Klan was conducted with limited resources and stopped short of doing complete justice to the past, these findings appear to indicate that it was nonetheless strong enough to dismantle the Ku Klux Klan.

Unfortunately, the political will to dismantle the Klan quickly diminished. In the 1874 midterm elections, Democrats gained ninety-four seats in the House, thereby giving them a 62% majority. Democrats also gained nine seats in the Senate. Republicans lost ninety-six seats in the House and one seat in the Senate. Democrats also won nineteen out of twenty-five gubernatorial races. Historian William Gillette (1979) called the Republican defeat in 1874 "the greatest upset in national politics since 1854. It was the first catastrophe in the Republican Party's twenty-year history and inaugurated an extraordinary shift in power" (p. 246). *The Tribune Almanac* remarked that "the election is not merely a victory but a revolution" (Foner 1988, p. 523). The Louisville *Courier-Journal* ran as its headline, "Busted. The Radical Machine Gone to Smash" (Gillette 1979, p. 248). Governor Ames of Mississippi perhaps summed it up the best: "[A] revolution has taken place—by force of arms—and a race are disfranchised—they are to be returned to a condition of serfdom—an era of second slavery" (Ames and Ames, 1957, p. 216).

It was around this time that President Grant reversed his stance on quelling racial violence in the South. After suffering a barrage of criticisms for his decision to send in federal troops after the Colfax Massacre,[25] President Ulysses S. Grant declared, "I am tired of this nonsense. . . This nursing of monstrosities has nearly exhausted the life of the party. I am done with them, and they will have to take care of themselves" (*New York Herald*, 1874). There is no inkling here that he was forced to acquiesce; rather it was a politically calculated choice made for the sake of the party to which he belonged. Grant subsequently forced Amos Akerman to resign as head of the Justice Department and appointed increasingly conservative attorneys general in his stead.[26]

It is important to note that the political will to stop racial violence in the South did not simply disappear; rather, it was bargained away. In the presidential election of

1876, there was a dispute over the electoral results between the Republican candidate Rutherford B. Hayes and Democratic candidate Samuel J. Tilden. In order to resolve the dispute, a deal was reached, commonly referred to as the Compromise of 1877. Hayes would become President in exchange for withdrawing all federal troops in the South, effectively "abandoning the cause of the Negro" (Woodward 1951, p. 8). What is otherwise known as the "Bargain of 1877" presumes that Hayes did not necessarily have to abandon the cause of stopping racial violence. How could he have bargained away a power he did not have? He used the threat of continuing federal intervention as a bargaining chip that the Democratic Party was all too willing to accept. The fact that the Republican Party used "abandoning the cause of the Negro" as a bargaining chip and the Democratic Party accepted this chip suggests not only that the American state could have continued to quell racial violence in the South, but also that the abandonment was more a result of political calculus than any inherent incapacity of the American state.[27]

Rather than simply showing that the American state was weak, a fine-grained analysis reveals that this unraveling toward weakness emerged from a position of strength. The American state was strong and then became weak through a process of bargaining amongst political actors rather than by a mere capitulation to societal actors or Supreme Court decisions.

FDR AND LBJ ADMINISTRATIONS: FROM WEAK TO STRONG

After Reconstruction, the federal government was seen as having essentially been stripped of its legal authority to quell racial violence in the South. Beginning with *The Slaughter-House Cases* in 1873 and followed up by *United States v. Cruikshank* (1876), *United States v. Harris* (1883), and the *Civil Rights Cases* (1883), many regarded the Supreme Court as having "instituted a judicial coup d'etat" by completely annulling newly passed legislation that provided for the federal rights enforcement for Blacks (Gressman 1951, p. 1337). Thus, in order for the American state to reengage in combating racial violence in the South, the American state would have to reconstitute the legal capacity to do so. This became an issue during the Franklin Roosevelt administration, when new legislation addressing racial violence came to the forefront. But in fact, reconstituting the legal capacity was unnecessary (Benedict 1978; Brandwein 2007; Brandwein 2011; Goldstein 2007; Labbé and Lurie, 2003; Ross 2003). No new law was needed for the federal government to engage in stopping racial violence. Only the political will, an underlying alliance of political interests, was lacking.[28] An analysis of antilynching politics under the Lyndon Johnson administration will illustrate this point. Moreover, it will show how the key issues were political—especially the political conditions under which the state was willing to engage in rights enforcement.[29] This analysis moves between Supreme Court cases and political events in order to illuminate the limits of the classic variant of the weak state thesis that claims it was the lack of legal authority that constrained the state in quelling racial violence.

Although no new law was needed, efforts were nonetheless made to establish new legislation. Unfortunately, they were constantly stymied. In 1922, even though the Dyer antilynching bill passed the House, Southern Senators were able to prevent it from ever coming to a vote in the Senate (Ferrell 1986; Zangrando 1980). But it was not just the actions of Southerners that impeded legislation. In 1935, when the Wagner-Costigan antilynching bill was being filibustered by the Senate, President Franklin Delano Roosevelt told National Association for the Advancement of Col-

ored People (NAACP) Secretary Walter White, "The Southerners by reason of the seniority rule in Congress are chairmen or occupy strategic places on most of the Senate and House committees. If I come out for the antilynching bill now, they will block every bill I ask Congress to pass to keep America from collapsing" (Elliff 1987, p. 68). Roosevelt only went as far as the southern Democrats would permit. Evidence of Roosevelt's dealings with the southern Democrats regarding New Deal legislation bore this out. When New Deal legislation was being proposed, Southern Democrats were inclined to support the redress of existing patterns of economic distribution in the direction of more equality, but that support came to a quick halt when issues regarding the labor market and race relations began to be conjoined. Cognizant of this, FDR was thus careful to construct legislation accordingly. FDR's reluctance to engage with reconstituting the American state's ability to stop racial violence was akin to the "Bargain of 1877" in that it did not depend on the capacity of the American state to engage as it hinged on the desire of political agents to do nothing. (Katznelson et al., 1993; Lieberman 1998).

Later events reveal that FDR did not need any new antilynching legislation to act; blaming Southern congressmen was simply an excuse for his inaction. This emphasis on the political nature of Roosevelt's nonengagement is perhaps best illustrated by the Supreme Court's reversal in 1966. The Court during Reconstruction was thought to have stripped the American state of its power, leaving the American state weak in terms of its capacity to combat racial violence in the South. Had that been the case, then the American state would have needed by some measure to have regained its capacity in the form of new legislation, such as the Dyer antilynching bill or the Wagner-Costigan bill.[30] But this did not occur. Rather, starting in the mid-1960s, federal prosecutors simply decided to resurrect extant laws, namely the Civil Rights Act of 1866 and the Enforcement Act of 1870 (Rotnem 1942; *Screws v. United States* 1945; *United States v. Guest* 1966; *United States v. Price* 1966). The fact that essential federal laws could somehow go in and out of fashion in the span of approximately seventy years is not indicative of any particular characteristic of American federalism per se; it reveals, rather, the choice of a sovereign state to enforce—or not to enforce—its own laws.

On May 21, 1940, the Department of Justice affirmed that it was possible to prosecute violent perpetrators with already existing legislation. There were two laws on the books that could be used: Sections 241 and 242 of Title 18 of the United States Code. Section 241 was taken verbatim from the Enforcement Act of 1870, which Amos Akerman used to prosecute the Klan; Section 242 was taken from the Civil Rights Act of 1866. A circular issued to United States Attorneys on May 21, 1940, contained a memo from Assistant Attorney General O. John Rogge stating that Section 241 was available for prosecution of private persons who conspired to violate a limited class of civil rights. This limited class of civil rights explicitly included a "federal right not to be lynched." The memorandum went on to say:

> There appears to be no case foreclosing this interpretation. . . Nevertheless, since such prosecution may arouse antagonism on States' rights grounds, for jury reasons and perhaps also as a matter of constitutional law it should not be resorted to except in cases of flagrant and persistent breakdown of local law enforcement either in general or with respect to a particular type of cases.[31]

According to the Justice Department, it was not the lack of legal capacity or authority that prevented the federal government from curbing racial violence. Rather, the government was constrained by the belief that federal intervention "may arouse

antagonism"—an antagonism so firmly embedded politically and so feared that avoidance of it brought the federal policy of nonintervention to such a degree of consistency, stability, and rigidity that it achieved a lawlike status. The Justice Department's grafting the political onto the legal in this manner made reactivating the law appear to be a usurpation of the law. In so doing, it entrenched the active policy of nonenforcement that much more. Because federal rights enforcement had become mischaracterized as a legal puzzle in need of resolving instead of a political failure that needed to be rectified, reactivating federal rights enforcement became an act of extraordinary will. It necessitated a crisis of sorts, one not seen since Reconstruction.

Following the leadership of President Johnson, the Senate overcame the longest filibuster in its history—fifty-seven days—to pass the Civil Rights Act of 1964, with the explicit acknowledgment that federal troops would be used to quell racial violence in the South. On November 27, 1963, President Johnson stated in his first televised address as Chief Executive: "We have talked long enough in the country about equal rights. We have talked one hundred years or more. It is now time to write the next chapter—and to write it in the books of law" (p. 9). Johnson even warned his former mentor, Senator Richard Russell: "Dick, you've got to get out of my way. I'm going to run over you. I don't intend to cavil or compromise. I don't want to hurt you, but don't stand in my way" (Oreskes 1989).[32] It was only after LBJ's stated intention "to write it in the books of law" that the Supreme Court did in effect return to the law.[33] In what legal scholar Burt Neuborne (2011) has termed "a judicial version of Reconstruction" (p. 69), he characterizes the dramatic reversal of the Warren Court as understandable only as operating within "an implied emergency" (p. 95) wherein the Court's decisions "reflect pragmatic responses to the moral crises over race relations that gripped the nation in the aftermath of World War II" (p. 95).[34]

In *United States v. Price* (1966) and *United States v. Guest* (1966), the Supreme Court upheld federal rights enforcement in quelling racial violence. Even though the Court's decisions in these cases differed markedly from its previous decisions, they were nonetheless based on laws that had existed since Reconstruction. By refusing to grapple with these inconsistencies, the Court's decisions in *Guest* and *Price* are mired in questions that point to the political nature of federal rights enforcement for Blacks. Unfortunately, these questions were not even acknowledged, let alone answered. By turning a blind eye to what was going on beneath the surface, the Court appeared to be trying to maintain some degree of legal consistency within the politically inconsistent world of federal rights enforcement.

On June 21, 1964, three Mississippi law enforcement officials and fifteen private individuals conspired and murdered three civil rights workers—Michael Schwerner, James Chaney, and Andrew Goodman. The conspiracy involved releasing the victims from jail at night, intercepting, assaulting, and killing them, then disposing of their bodies. The U.S. District Court sustained the substantive counts against the three law enforcement officials but dismissed the indictments against the fifteen private individuals. The case was then appealed to the Supreme Court, where, in *United States v. Price* (1966), the Court reversed the dismissals against the fifteen private individuals. The key to the decision was what constituted actions "under color of law." Supreme Court Justice Abe Fortas delivered the opinion of the Court, concluding that "to act under color of law does not require that the accused be an officer of the State. It was enough that he was a willful participant in joint activity with the State or its agents" (*United States v. Price*, 383 U.S. 787, 794). Fortas goes on to argue for a broad interpretation of section 241: "It is hardly conceivable that Congress intended 241 to apply only to a narrow and relatively unimportant cat-

egory of rights" (*United States v. Price*, 383 U.S. 787, 806). Without delving into more recent applications and interpretations of 241, Fortas notes how "Section 241 was left essentially unchanged [from its original formulation] and neither in the 1874 revision nor in any subsequent re-enactment has there been the slightest indication of congressional intent to narrow or limit the original broad scope of 241" (*United States v. Price*, 383 U.S. 787, 803). This then raises a question: if section 241 was originally broad in scope and had gone unchanged through the years, then why had it been interpreted so narrowly for so long? Why had the Court finally acted against private individuals when it had failed to do so in previous cases? Unfortunately, the Court never addressed these questions in *Price*.

Price was a watershed moment, according to legal historian Derrick Bell (2008), because it "abandoned past doubts as to the constitutionality of section 241 and 242" (p. 380). There had been some cases, most notably *United States v. Williams* (1951), that cast some suspicion. In *Williams*, four members of the Supreme Court—Frankfurter, Minton, Jackson, and Black—took the position that rights associated with the Fourteenth Amendment were not within the purview of section 241. But this was the dissenting opinion in *Williams*, and could not be regarded as establishing a binding precedent. However, it was enough to raise doubts. *Price* quashed these doubts.

On July 3, 1964, Herbert Guest, Joseph Howard Sims, Cecil Williams Myers, and James Lackey shot and killed Lemuel Penn, a Black citizen. On September 4, an all-White jury acquitted two of the Klansmen, Joseph Howard Sims and Cecil Myers, of any wrongdoing. The case then went to District Court; six private individuals were indicted under 18 U.S.C. 241 for conspiring to deprive Penn of the free exercise and enjoyment of rights secured to him by the Constitution and laws of the United States. These indictments were dismissed. The Department of Justice subsequently appealed the decision and the case went to the Supreme Court. In *United States v. Guest* (1966), the Supreme Court reversed the District Court ruling.

Unraveling exactly why the Supreme Court reversed the District Court ruling is confusing partly because four opinions were given in this case. Justice Stewart delivered the opinion of the Court; Justice Clark, with Justices Black and Fortas joining, provided a concurring opinion; Justice Harlan provided an opinion that concurred with parts and dissented in parts; and Justice Brennan, with the Chief Justice and Justice Douglas joining, also provided an opinion that concurred with parts and dissented in other parts. Such a plurality is indicative not only of how contentious the case was, but also how unsettled the law was.

Although Justice Stewart's opinion is not the most succinct, by serving as the opinion of the Court, its function is not to clarify as much as it is to situate.[35] Rather than treating this case as an anomaly or as one overturning previous decisions, Justice Stewart clearly viewed this decision as being in accordance with the Court's previous decisions. Historian Michal Belknap (1987) makes this argument: "Rather than frontally assaulting the Court's past construction, they endeavored to square their argument with the traditional interpretation" (p. 176). From the outset of his opinion in *United States v. Guest* (1966), Stewart states the cases that might at first appear to be in direct contradiction to the Court's decision, including *United States v. Cruikshank* (1876), *United States v. Harris* (1883), and the *Civil Rights Cases* (1883) and declares that "it [the Court's view in these past cases] remains the Court's view today" (*United States v. Guest*, 383 U.S. 745, 755). Right from the outset, Justice Stewart is thus maintaining a degree of constitutional continuity for a case that seemingly overturns past decisions.

Stewart continues, "[T]his is not to say, however that the involvement of the State need be either exclusive or direct" (*United States v. Guest*, 383 U.S. 745, 755). Thus Stewart found a way to bypass these earlier decisions rather than confront them. He accomplished this by lowering the threshold for what constitutes state action. He found it enough for the participation of the state to be "peripheral, or its action . . . only one of several co-operative" (*United States v. Guest*, 383 U.S. 745, 755). But even this formulation was unnecessary since in Stewart's words, "this case requires no determination of the threshold level that state action must attain . . . allegation of state involvement is sufficient" (*United States v. Guest*, 383 U.S. 745, 755). Stewart goes on to refer to a minority opinion in *Bell v. Maryland* (1964) that stated that "a private businessman's invocation of state police and judicial action to carry out his own policy of racial discrimination was sufficient" (*United States v. Guest*, 383 U.S. 745, 755). Stewart's reference to the opinion of Justices Douglas and Goldberg in *Bell* is puzzling for two reasons: first, it implies a highly questionable and unique conception of state action that does not take into account state actors at all; and second, it is derived from a minority opinion with which three members of the Court strongly disagreed and on which three expressed no opinion. Law Professor Alfred Avins (1966) argues this point: "The United States Supreme Court has turned history inside out . . . the Guest case is so wide of the mark that it would be necessary to burn all the Congressional Globes in the nation to support it" (p. 381).

Stewart's opinion, which served as the opinion of the Court, was the most conservative, with the rest of the justices taking a more radical, broad interpretation of the federal government's authority with regard to rights enforcement. Unfortunately, none of the justices who provided a more radical reading of federal rights enforcement made an attempt to synthesize it with past court decisions. In fact, Justice Brennan—who wrote a separate opinion in which he concurred in part and dissented in part, and was joined by Chief Justice Warren and Justice Douglas—explicitly rejected one of the cases mentioned by Justice Stewart: "The majority of the Court today rejects the interpretation of [section] 5 [of the Fourteenth Amendment] given in the Civil Rights Cases" (*United States v. Guest*, 383 U.S. 745, 783). But if that were the case, then why have Justice Stewart provide the opinion of the Court wherein he clearly states that the stance taken in the Civil Rights Cases "remains the Court's view today" (*United States v. Guest*, 383 U.S. 745, 755)? Why did Brennan bury his statement on the last page? Is it possible that Brennan is right and that the majority of the Court did in fact reject the past Court decisions, but did not want this to be the official view of the Court? Might one of the reasons be that if it had rejected these precedents, then the Court would have had subsequently to explain why it had maintained such a narrow interpretation of Section 5 for approximately eighty years? Like the four dissenting opinions in *Williams*, the concurring opinions in *Guest* were duly noted but not necessarily to be taken as binding precedent. For whatever reason, it was important for the Court *not* to formally institute what it believed to be true. Formally, the Court in *Guest*, as articulated by Stewart, continued to be in lockstep with the Court's decisions in previous cases.

If in fact it was the case that Section 5 remained broad in nature this whole time, then there is a need to revisit the Court cases at the end of Reconstruction. After Reconstruction, when the federal government provided White Southerners the autonomy to manage racial affairs in the South, the Supreme Court showed through its decisions in cases including *Slaughter-House Cases* (1873), *Cruikshank* (1876), *Harris* (1883), and the *Civil Rights Cases* (1883), that it was going to rule negatively on issues relating to federal rights enforcement for Blacks in the South.[36] But in light of the

rulings in *Price* and *Guest*, the Court appeared never to have repudiated the federal government's authority to engage in combating racial violence. Rather, the Court apparently tended to dispose of cases such as *Slaughter-House Cases*, *Cruikshank*, *Harris*, and the *Civil Rights Cases* in a manner similar to the way in which the Court disposed of disenfranchisement challenges—"on some technical or subsidiary point, leaving the merits of the real issue untouched" (Mangum 1940, p. 400). In other words, even though the Court clearly signaled in these Reconstruction cases that it was not going to uphold claims of rights violations of Blacks in the South, it did so without ever making a substantive decision on Sections 241 and 242. Looking at these cases with the Court's decisions in *Guest* and *Price*, one must conclude that sections 241 and 242 were in effect placed into suspended animation; it was only when the political will to reengage with federal rights enforcement grew strong that the Court resuscitated Sections 241 and 242. In the parlance of the weak state thesis, the American state did not lose its capacity to combat racial violence; it simply chose not to engage.

These Supreme Court decisions illustrate that the federal government had never relinquished its sovereign authority. The federal government relieved itself of any culpability for what happened under its sovereign eye while simultaneously reserving to itself sovereign authority. The Supreme Court deliberately stopped short of absolving the federal government of total jurisdiction; if and when federal officials wanted to intervene, they could. Because the bounding was self-imposed, the federal government could not only unbind itself whenever it wanted, but it could also set the line of where its jurisdiction started and stopped.

Considering Congress during Reconstruction had passed sufficient laws to quell racial violence, it would seem to be the case that presidential leadership—ranging from Grant's vacillation to Roosevelt's acquiescence and Johnson's steadfastness—was the primary determinant for the reactivation of federal rights enforcement for Blacks. According to political philosopher and legal jurist Carl Schmitt, the onus on presidential leadership is appropriate considering the exceptional nature of federal rights enforcement for Blacks. Schmitt (1985) writes, "Sovereign is he who decides the exception" (p. 5). In this case, it is the president, whose duties as defined in Article II, Section 3 of the U.S. Constitution (1788) include taking "care that the laws be faithfully executed," who decides when the exception of federal rights enforcement for Blacks is activated.[37]

This is not meant to suggest that racial violence was rare. The quotidian nature of racial violence was anything but exceptional. What was exceptional however was when that racial violence transcended its own banality and was elevated to the level of crisis. Attorney General Amos Akerman understood this. Akerman (1871) considered that the actions of the Klan "amounted to war, and cannot be effectually crushed on any other theory." Akerman (1869) believed that "unless the people become used to the exercise of these powers now, while the national spirit is still warm with the glow of the late war . . . the 'state rights' spirit may grow troublesome again." So, too, did the Civil Rights activists of the 1960s understand. Historian Clayborne Carson (1981) states that one of the significant legacies of the freedom rides was their ability to "provoke a crisis that would attract international publicity and compel federal intervention" and instill in the participants "a moralistic sense of personal commitment that made them intolerant of political expediency" (p. 37). Legal historian Michael Klarman (2004) also noted that:

> to transform northern opinion, then, southern civil rights leaders concluded that they had to provoke violence against themselves, especially in settings that were

> likely to attract national media attention. Direct-action protest would probably incite brutal repression, and if the conflict lasted long enough, the national media would pay attention and so would the nation (p. 429).

Whether it was taking advantage of the crisis that had befallen the nation—as was the case following the Civil War—or creating a crisis that the nation needed to confront—as in the case of the Civil Rights Movement—each surmised the importance of a crisis to impress upon the president as sovereign authority that the exception of federal protection for Blacks was in fact needed.[38]

It was the sense of a crisis spurred on by the Civil Rights Movement and advanced by President Johnson that allowed the Supreme Court to "push the reset button" (Neuborne 2011, p. 82). During this tumultuous period, Justices voiced concerns about "issuing unenforceable orders" and how they might "bring the court into contempt and the judicial process into discredit" (Klarman 2004, p. 310). They were also nevertheless cognizant, according to legal historian Michael Klarman (2004), that there was a "conversion of an emerging national consensus into a constitutional command" (p. 310).[39] When the Johnson administration forced Archibald Cox to step down as solicitor general and replaced him with Thurgood Marshall to argue the government's case in *Price* and *Guest*—an affirmation that when the "law of the land" was violated, "appropriate action" would follow—it was abundantly clear that the White House wanted to reactivate federal rights enforcement (White 1965). In a 1966 memorandum to his colleagues regarding the *Guest* case, Justice Brennan made note of the "urgent needs of the times."[40] It was this context which allowed the Court to render a decision that even sympathetic analysts have considered "nothing short of revolutionary" (Belknap 1982, p. 468).

CONCLUSION: DISTINGUISHING WEAKNESS AS AUTONOMY FROM WEAKNESS AS INCAPACITY

A weak state denotes a sense of incapacity, specifically in terms of resource scarcity or lack of authority. But the aforementioned examples of engagement and non-engagement do not mesh well with these characterizations of the weak state.[41] Against Migdal's (1988) definition of a weak state as one unable to get people in the society to do what the state wants them to do, I have endeavored to distinguish a second conception of a weak state in which the state chooses not to engage society at all. The former presumes incapacity; the latter presumes autonomy. The federal government from 1870 to 1872 and again in 1966 illustrated its capacity to act while the Grant and FDR periods evidenced the government's choosing not to act. Thus "weakness" is a concept that should be disaggregated. It can refer to a relative scarcity of resources or lack of power, but it can *also* be seen as an explicit policy decision. To borrow the words of legal theorist Franz Neumann (1957), the federal government was "as strong as the political and social situation and the interests of society demanded" (p. 22). Even though it did not have to be weak, the United States wanted to continue being weak. It pursued a policy of weakness by choice. In other words, the United States made itself actively weak in regards to a particular set of activities. We might say the most important issue here was not the *state* weakness of the new Union but the *political* weakness of groups favorably disposed to enforcing rights for Blacks. By no means am I trying to dismiss the complex nature of political decision-making or minimize the tremendous pressure on political officials to address the concerns of its constituents, but it is nevertheless important to situate the polit-

ical calculus not to intervene politically. The national state withdrew from prosecuting lynch mobs not because it did not have the wherewithal; rather, it withdrew in order to pursue other political ends. As Desmond King and Stephen Tuck (2007) argue, through deliberate inaction "federal officials did not just acquiesce in the Southern counter-revolution but promoted a nationwide order of white supremacy" (p. 214).

It was through this governmental policy of weakness that the American state was able to get stronger in other aspects of governance. With regards to military and American state building, Ira Katznelson (2002) notes "how a putatively weak state in fact can be very capable" (p. 85). In this regard, weakness is not necessarily something to be avoided; rather it can also be something to aspire to. In relation to racial violence, the American state deliberately pursued a policy of weakness. Weakness in this one particular aspect of statehood enabled it to pursue and strengthen other aspects of statehood.

In his pathbreaking study of political development, Stephen Skowronek (1982) demonstrates the expansion of national administrative capacities in areas like the civil service, the army, and economic regulation. Unfortunately, there is no mention of race. Although he identifies markedly racialized events such as Reconstruction and Dred Scott as playing a pivotal role in his account of American state building, he treats these episodes in such a way as to strip them of racial content, and thus fails to analyze the roles of race and racism in the development of those capacities he observes. I raise this not to criticize his claim that the American state became strong in the areas he analyzed but rather to point out the interconnected role of weakness and strength. If we can conceptually distinguish two kinds of weakness, we can see how weakness as autonomy helps to understand or reinterpret the role of race relations in the overall history of state development. Instead of seeing race as simply a factor or as essentially constitutive at all moments, we can see race relations as dynamically interconnected with other aspects of state development. The development of national administrative capacities, or strengthening of the state in key areas, was reinforced by withdrawal from rights enforcement for Blacks, or a voluntary weakening of the state in other areas. By expanding the concept of weakness to include notions of active withdrawal, we can thus supplement Skowronek's (1982) account of American state building with the American state's relationship to race. In so doing, we can reintroduce a political perspective on the development of the state, rather than see it simply as the expansion or contraction of various capacities. As we have seen, it was the political strength of proponents of racial violence, not the administrative or legal weakness of the state, that was most centrally responsible for the active withdrawal of the state from its essential role as rights-enforcer.

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NOTES

1. In referring to political choice, I do not mean to attribute the federal government's repeated failure to combat racial violence as an explicit policy preference of a unitary actor. Rather it was the result of the collective inertia of many actors who did not intervene.
2. This number is most likely a woeful underestimation (Waldrep 2000; Jean 2005).
3. There is a common misperception that lynchings were exclusively a Southern phenomenon. This misperception is partly due to the political agenda of the data-collecting organizations like the NAACP and the Tuskegee Institute to focus primarily on the

South, thereby undercounting other areas. For example, William D. Carrigan and Clive Webb (2003) state that "The files at Tuskegee Institute contain the most comprehensive account of lynching victims in the United States, but they only refer to the lynching of fifty Mexicans in the states of Arizona, California, New Mexico and Texas. Our own research has revealed a total of 216 victims during the same time period" (p. 412). For more information regarding the debate on the definition and number of lynchings, see Waldrep 2000; Gonzales-Day 2006; Pfaelzer 2007; and Waldrep 2006. Although my focus on the South might be construed as reinforcing the already strong Southern bias in much of the existing literature on lynching, I am not trying to suggest that lynchings were a strictly Southern Black phenomena. Historian Gonzales-Day (2006) rightly argues "that lynching has long been thought of in terms of black and white racial categories and [thus] has contributed to the general absence of information on cases involving other nonwhite communities, and it has ultimately served to lock blacks and whites in a false binary of race" (p. 13). Even though lynchings were occurring nationwide, there were regional variations as to how they were carried out, legitimated, and eventually phased out. My goal in focusing on lynchings in the South is to historicize and schematize the federal government's accommodation of extralegal justice. Whereas extralegal justice was a nationwide phenomenon, I will argue that the federal government's response to racial violence in the South was unique. As W. Fitzhugh Brundage (1993), a leading expert on lynching, states, "Lynching, like slavery and segregation, was not unique to the South, but it assumed proportions and a significance there that were without parallel elsewhere" (p. 3).

4. Christopher Waldrep (2006) goes so far as even to say that the "political process failed. . . . Mob law rendered [the decisions made by the Supreme Court] meaningless" (p. xix).
5. Desmond King and Robert Lieberman (2009a) state, "race is most commonly associated with state weakness through its effects on such processes as regional differentiation, class formation, and welfare state building; that is, these processes were fundamentally shaped by racial priorities" (p. 578).
6. Michal Belknap (1987) reiterated this point: "The department [of Justice] and the White House commonly insisted that limitations on federal jurisdiction kept the national government from doing more to combat anti–civil rights violence" (p. 39).
7. In a speech made on July 16, 1918, President Woodrow Wilson stated, "I therefore very earnestly and solemnly *beg* the governors of all the States, the law officers of every community, and, above all, the men and women of every community in the United States . . . to cooperate—not passively merely, but actively and watchfully—to make an end of this disgraceful evil" (p. 271).
8. In the case of lynchings, American political institutions undergirded Southern extremism to the extent that it rendered ordinary attempts at curbing racial violence mute and necessitated an act of extraordinary will. In an unpublished article entitled, "Bringing the Insurgency Back In: Civil War, Reconstruction and the Rise of Southern Extremism, 1865–1867" (forthcoming), I argue that Southern extremism embedded itself in such a way as to enable it to benefit from the politics of drift. In so doing, the choice not to combat Southern extremism became equated with collusion with Southern extremism.
9. This lack of political will can directly be traced back to what political scientist Richard Valelly (2004) noted were "the ways American political institutions rewarded–or failed to reward–coalition-making and thus shaped its follow-on processes" (p. x).
10. In juxtaposing the political and the legal, I am by no means suggesting that garnering the political will for federal rights enforcement was easy. Rather, my point is that the political difficulties surrounding federal rights enforcement must be seen primarily as political issues to be resolved rather than legal issues to be overcome. For an in-depth analysis of the political difficulties surrounding federal rights enforcement, see Valelly (2004).
11. For a survey of the violence befalling Blacks following the Civil War, see Foner (1988); Lemann (2006); and Kinshasa (2006).
12. Akerman's desire to prosecute the atrocities associated with the Ku Klux Klan went beyond simply restoring electoral order. Historian William McFeely (1982) argues that "perhaps no attorney general since his tenure—and the list of those who followed him is a long one that includes Ramsey Clark in the 1960s—has been more vigorous in the prosecution of cases designed to protect the lives and rights of black Americans" (p. 395).
13. "Circular Relative to the Enforcement of the Fourteenth Amendment," July 6, 1871, Circulars of the Attorneys General, Record Group 60, National Archives.

14. Stephen Cresswell (1991) notes that "the courts ran out of money with alarming regularity" (p. 5).
15. Cresswell (1991) notes that during this period the Department of Justice had no Bureau of Investigation: "violations of federal law were discovered only by citizen's complaint, or perhaps when a marshal read of an apparent violation in the local newspaper" (p. 15).
16. Kaczorowski (1985) notes that "legal officers were reluctant to involve themselves in such situations, particularly when the very existence of the Klan and its crimes was so vehemently denied by the Southern press and politicians" (p. 65).
17. Kaczorowski (1985) notes that "victims frequently were unwilling to bring charges or to testify against their assailants" (p. 65).
18. Cresswell (1991) notes that the second head of the justice department, George Williams, "borrowed Justice Department funds to meet household expenses" (p. 8).
19. For example, in *United States v. Blyew* (1872), Blyew was defended by Jeremiah Black, former attorney general to President Buchanan and former Chief Justice of the Pennsylvania Supreme Court.
20. Kaczorowski (1985) notes that in 1870 only forty-three cases were prosecuted under the 1870 Enforcement Act. In 1871, 271 cases were prosecuted. That equates to a 630% increase (p. 70).
21. *Testimony taken by the Joint Select Committee to Inquire into the Conditions of Affairs in the Late Insurrectionary States*: *North Carolina*, 1872, p. 415.
22. 190 is a very conservative number. This is the number Gillette (1979) reports (p. 44). Xi Wang (1997) reports 206 cases (p. 300). Neither Gillette nor Wang includes Tennessee as part of the South. This is highly suspicious considering not only that the Ku Klux Klan started in Tennessee, but that Tennessee had 171 prosecutions in 1870 alone.
23. Again, this number does not include Tennessee.
24. It is important to note, however, that many cases were carried over into 1872.
25. In his May 22, 1873 Proclamation, President Grant (2000) states that "it is provided in the laws of the United States that in all cases of insurrection in any State, or of obstruction to the laws thereof, it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive when the legislature can not be convened, to call forth the militia of any other State or States . . . he shall forthwith by proclamation command such insurgents to disperse and retire" (p. 122). He subsequently sent two companies of federal troops into Grant Parish. The military findings are located at the following: "The Use of the Army in Certain of the Southern States," *Congressional Globe*, 44th Cong., 2d Sess., Ex. Doc. No 30, p. 436 (1875). In a recent book chronicling the Colfax Massacre, Charles Lane (2008) writes: "In Boston, a crowd at Faneuil Hall repudiated the army's actions in Louisiana. The Ohio and Pennsylvania legislatures condemned the alleged invasion of their Louisiana counterpart. Senator Carl Schurz of Missouri, who had joined the Liberal Republicans in 1872, gave a speech suggesting that Congress itself might be the next legislature invaded" (p. 227).
26. Although no explicit reason was given, there is evidence to suggest that it was a scandal involving the railroad industry that forced him to resign.
27. Some have contended that 1891 marked the end of Reconstruction, with the failure of Congress to pass the Lodge-Hoar elections bill. In either case, it was the political abandonment by the Republican Party of federal rights enforcement for Blacks that led to the end of Reconstruction (Brandwein 2011; Calhoun 2006; Valelly 2007).
28. Pamela Brandwein (2011) elaborately illustrates how "innovations in legal education, practiced by well-respected experts, helped hide the older legal context of the 1870s and 1880s—a context that gave greater support to Black civil and political rights" (p. 213).
29. In many respects, this account of political calculus is meant to supplement Richard Valelly's (2004) work on the political conditions necessary for biracial coalition-making. Although Valelly emphasizes the significant role that political leaders and the federal judiciary played in maintaining and altering biracial coalition making, he does not sufficiently explore the relationship between the branches. This lack is somewhat understandable considering the discrepancy between the numerous accounts of the nuanced differences and challenges facing the Reconstruction Congress and the rather one-dimensional accounts of the Court at that time; recent research, such as Pamela Brandwein's (2011) book *Rethinking the Judicial Settlement of Reconstruction*, has begun to rectify the discrepancy.

30. Congress made several attempts at passing antilynching legislation. Perhaps the most famous instance was when Representative L.C. Dyer, a Republican Congressmen from Missouri, proposed what became known as the Dyer antilynching bill. Although this bill passed the House in 1922, like every other antilynching bill, it did not pass the Senate. Southern Democrats effectively formed a filibuster that prevented passage of any antilynching legislation. For more information on Congressional attempts at passing antilynching legislation in general and the Dyer bill in particular, please see Zangrando (1980) and Ferrell (1986).
31. "Federal Criminal Jurisdiction Over Violations of Civil Liberties," Memo accompanying Circular No. 3356 (Supplement No. 1), O. John Rogge, Assistant Attorney General, To All United States Attorneys, May 21, 1940, reprinted in Belknap (1991).
32. In a meeting with civil rights advocates, LBJ reiterated his determination: "We are not going to have anything else hit the Senate floor until this bill is passed" (Rauh 1964). In addition to passing strong civil rights legislation, President Johnson also was proactive in regards to federal rights enforcement. After the violent events that occurred in Selma, Alabama in March 1964, Lyndon Johnson (1971) told Alabama Governor George Wallace, "he would not hesitate one moment to send in federal troops" (p. 163). LBJ followed up this strong wording in his speech to Congress, "the time for waiting is gone. . . Their cause must be our cause too. It is not just Negroes, but it is all of us, who must overcome the crippling legacy of bigotry and injustice. And we shall overcome" (Johnson 1965).
33. This view of the Court is in line with the work done by Robert Dahl (1957), Gerald Rosenberg (1991), and Michael Klarman (2004) that generally regards the Supreme Court as mostly operating in accordance with democratic pressures.
34. Richard Valelly (2004) describes the "second Reconstruction" in the 1960s as "a thorough revolution in political equality and race relations" (p. ix). For further information, see Kato (Forthcoming) for my article entitled "The Tragic Legality of Racial Violence: Reconstruction, Race, and Emergency."
35. Michal R. Belknap asserts that Stewart's opinion "evaded reality and rested on wishful thinking" (1982, p. 488).
36. Eugene Gressman (1951) stated that starting with *Slaughter-House*, the Supreme Court enacted a "judicial coup d'etat against Reconstruction" (p. 1337). Political scientist Richard Valelly (2004) notes how "the entire arc of jurisprudence-building was influenced by the *Slaughterhouse Cases*" (p. 112). Legal historian Robert Kaczorowski (1985) writes, "The Supreme Court selected the *Slaughter-House Cases* as the instrument for its interpretation of national civil rights enforcement authority. . . Justice Miller's opinion overturned the growing body of judicial interpretations of the impact of the Thirteenth and Fourteenth Amendments upon American constitutionalism as fixing sovereignty in the nation and as establishing the primacy of national citizenship and the concomitant national authority to secure the civil rights of American citizens. . . [The significance of Miller's decision lies] more in the Court's reversal of the constitutional developments in the nation's courts" (pp. 116–123).
37. By no means should my focus on the federal government in general and the president in particular be taken as an attempt to exaggerate the government's role in stopping lynchings nor minimize the role of nonstate actors, such as the NAACP or Ida B. Wells, in reducing lynchings. Nor should it be mistaken as a causal mechanism to explain the variations of lynchings across states. There is already abundant literature examining the impact of antilynching organizations, case studies of lynchings in particular states, and attempts at formulating causal explanations for lynchings. This article neither attempts nor claims to provide an in-depth analysis of lynchings; it simply examines the federal government's persistent allowance for and eventual reengagement with lynchings.
38. In my article titled, "The Tragic Legality of Racial Violence: Reconstruction, Race and Emergency" (Forthcoming), I illustrate how the federal government schematized federal rights enforcement as an emergency, making combating racism during normal times a much more formidable task.
39. Michal Belknap (1982) states that "Southerners, concerned about the breakdown of law and order in their communities, had accepted, and became willing to act upon, the responsibility for protecting Blacks" (p. 521).
40. Memorandum from William J. Brennan, Jr. to the Conference, Re: No 65 *United States v. Guest*, Feburary 4, 1966, Box A187, Folder 9, Clark Case File 65. Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin.

41. Desmond King and Stephen Tuck (2007) make a similar argument in stating that characterizing the United States as weak pays "insufficient attention to the racial dimensions of government policy from the 1880s which contributed to the spread of segregation across the nation" (p. 236).

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