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**WHEN THE RULE OF LAW BREAKS DOWN:  
IMPLICATIONS OF THE 1866 MEMPHIS MASSACRE FOR  
THE PASSAGE OF THE FOURTEENTH AMENDMENT**

**HON. BERNICE BOUIE DONALD\***

ABSTRACT

*Scholars typically discuss the rule of law as an abstract concept, rather than a practical reality susceptible to failure. The Memphis Massacre of 1866 provides a valuable case study in the failure of foundational principles of the rule of law. After the Civil War, in Memphis, Tennessee, there was a massive influx of former slaves, coterminous with the State stripping former Confederates of their right to hold office. In May 1866, racial terror enfolded the city, and for three days police and local officials led a massacre of dozens of African-American men, women, and children. The city was set ablaze, resulting in mass burning of homes, schools, churches, and businesses; and rapes, beatings, and robberies of African Americans. The Memphis Massacre was one of many race riots that occurred in the Reconstruction South, precipitated in part by the radical developments intended to promote equal citizenship following the Civil War, the resistance of white southerners, and change in the social order. Yet, the local response wholly failed to provide any criminal or civil remedies to the victims of the massacre. In fact, no local action was ever taken to bring those responsible to justice for the heinous acts committed. The perpetrators of racial violence themselves believed that their actions were enforcing the rule of law—fueled by a perception that the new freedoms and economic liberty of freedmen were contrary to the Constitution.*

*In considering the rule of law, this Article utilizes the Memphis Massacre as a case study to examine how individuals interpret, understand, and abide by the substantive application of formal law and procedure. The Article places the Massacre in context with other race riots—both in the same period and decades after. What was the substantive rule of law? Was it the notions of racial inferiority or white racial supremacy perpetuated by white citizens? Or was it the ideals of equality that informed the passage of the Fourteenth Amendment? Turning to the passage of the Fourteenth Amendment, this Article evaluates how*

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*positive developments in constitutional protections cannot prevent racial terror where individuals do not adhere to the underlying ideals of fundamental equality among persons. Considering the at-times success and at-times failure of the Fourteenth Amendment to protect equal rights among citizens, the formal and procedural law cannot be self-executing, but requires the individual—and the State—to guarantee the equality of citizenship.*

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## INTRODUCTION

In the immediate aftermath of the Civil War, Memphis was a tinderbox, a powder keg, filled with the explosive ingredients of race, class, and violence. The African-American population “had more than quadrupled during the war.”<sup>1</sup> Prior to the Civil War, the free population of African Americans in Memphis was 193,<sup>2</sup> and the total slave population in Memphis was 3,170—with 16,268 slaves in Shelby County combined.<sup>3</sup> The total population was approximately forty-eight thousand.<sup>4</sup> Freedmen moved into all corners of Memphis society—at the Freedmen’s Bureau schools and hospitals and as Union soldiers stationed at Fort Pickering.<sup>5</sup> Newly freed slaves had migrated to Memphis from surrounding Arkansas and Mississippi plantations and fields seeking a better life.<sup>6</sup> Filled with the hope and promise of freedom from the yoke of slavery for themselves and their families, yet sometimes devoid of meaningful skills and laboring under the southern norms of black inferiority, the so inevitable occurred: a riot based on racial hatred.

Today’s newspapers and television headlines bear a constant reference to “the rule of law.”<sup>7</sup> It has become a catch-phrase, almost, a throwaway line to describe an aspirational state of equipoise. This assumes that there is some shared definition of the “rule of law.” Now, as always, in the minds of different people, “rule of law” means different things. People view “rule of law” through the filtered lenses of time, place, self, and position.<sup>8</sup> For minority groups hoping for the equal protection of law, their deeply held, and often unstated, beliefs are that

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<sup>1</sup> ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 262 (Harper Perennial rev. ed. 2014) (1988).

<sup>2</sup> Nicholas Joseph Kovach, *The African American Experience in the City of Memphis, 1860-1870*, at 10, 91 app. 1 (May 2012) (unpublished M.A. thesis, University of Memphis) (on file with *Boston University Law Review*).

<sup>3</sup> *Id.* at 91-92, apps. 1-2 (showing free population statistics in Memphis and slave population statistics in Memphis and Shelby County generally before the Civil War).

<sup>4</sup> *See infra* text accompanying notes 58-63, for a discussion of the population numbers in Memphis.

<sup>5</sup> FONER, *supra* note 1, at 261-62 (describing as “roots of tension” signs of change in Memphis related to African-American population growth during the Civil War).

<sup>6</sup> *Id.*

<sup>7</sup> *See, e.g.*, Adam Freedman, *President Obama’s Deep Contempt for the Rule of Law*, FOX NEWS (Feb. 5, 2013), <http://www.foxnews.com/opinion/2013/02/05/president-obamas-deep-contempt-for-rule-law.html> (referencing rule of law in politics); *Rule of Law*, HUFFINGTON POST, <https://www.huffingtonpost.com/topic/rule-of-law> [<https://perma.cc/46UK-LJLP>] (last visited Nov. 7, 2018) (providing newsfeed on topic of rule of law).

<sup>8</sup> *See Rule of Law: History*, DEMOCRACY WEB, <http://www.democracyweb.org/rule-of-law-history> [<https://perma.cc/DY4K-9B83>] (last visited Nov. 7, 2018) (examining meaning of rule of law in different milieux).

the rule of law is synonymous with the rule of the majority.<sup>9</sup> While our nation has a past that bears the stains of slavery, the Civil War, and the dehumanization and oppression of African Americans and other racial and ethnic groups, today we like to believe that we have achieved fundamental equality as enshrined in our laws. But surveys on trust and confidence in the justice systems hint at a different story.<sup>10</sup> For persons of color, those may or may not be shared beliefs. Statistically, African Americans today overwhelmingly believe that they will not be the beneficiaries of fair and equal treatment in courts, whether civil or criminal.<sup>11</sup> Similarly, persons of Hispanic ethnicity report only a slightly higher level of confidence in the justice and fairness of our justice system.<sup>12</sup> Advocates for criminal justice reform work to change “a system of criminal justice that continues to treat people better if they are rich and guilty than if they are poor and innocent.”<sup>13</sup>

This Article will explore the multiple meanings of the phrase “rule of law.” For in the white community, the “rule of law” meant a return to the norms of black inferiority, while in the African-American community, the “rule of law” meant something radically different—something drawn from the promise of the Declaration of Independence that all people are created equal. What are the metrics by which we measure rule of law? Through a case study of the 1866 Memphis Massacre, this Article will explore what happens when “rule of law” breaks down. When there is a breakdown, who does the law protect? Who does it benefit? Is there a historical genesis for many of the barriers to justice that are prevalent today? Finally, where do we go from here?

## I. THE MULTIPLE MEANINGS OF THE RULE OF LAW

This Article intervenes in three important questions. First, it makes a jurisprudential intervention into the meaning of the rule of law, a topic on which there has been contest about meaning for centuries. Second, it seeks to intervene

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<sup>9</sup> See, e.g., *Race, Trust, and Police Legitimacy*, NAT’L INST. OF JUST. (July 14, 2016), <https://nij.gov/topics/law-enforcement/legitimacy/pages/welcome.aspx> [<https://perma.cc/EMR6-S27Z>].

<sup>10</sup> See *id.* (“Minorities frequently report that the police disproportionately single them out because of their race or ethnicity”).

<sup>11</sup> See generally NAZGOL GHANDNOOSH, *THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 2014*, <http://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf> [<https://perma.cc/SZL3-GR7D>] (discussing race-based attitudes toward criminal justice system).

<sup>12</sup> See MARK HUGO LOPEZ & GRETCHEN LIVINGSTON, PEW RESEARCH CTR., *HISPANICS AND THE CRIMINAL JUSTICE SYSTEM: LOW CONFIDENCE, HIGH EXPOSURE*, at i (2009), [https://www.prisonlegalnews.org/media/publications/pew\\_hispanic\\_center\\_hispanics\\_and\\_the\\_criminal\\_justice\\_system\\_2009.pdf](https://www.prisonlegalnews.org/media/publications/pew_hispanic_center_hispanics_and_the_criminal_justice_system_2009.pdf) [<https://perma.cc/86DE-7GU5>] (showing slightly higher confidence among Hispanics than non-Hispanic people of color that police will not use excessive force).

<sup>13</sup> BRYAN STEVENSON, *JUST MERCY* 313 (2014).

into the various meanings of the rule of law for those in the South in the wake of the Civil War, when former Confederates spoke of the Constitution and “rule of law” as a return to principles of white control akin to those before the Civil War. Finally, and most importantly, it seeks to show how one grotesque and significant episode of violence against African Americans impelled the case for the Fourteenth Amendment forward in Congress.

In 1866, what was the rule of law? What is the rule of law today? Reviewing the history of this intangible idea, its application, and its academic interpretation enables analysis of the rule of law’s practical meaning and effect. There is no universal agreement on any of these concepts, and there are flaws in considering the modern-day understanding of the idea in the context of a historical event. Nonetheless, the intangible rule of law remains a captivating and nuanced lens through which to consider race riots in the Reconstruction South.

#### A. *Defining the Rule of Law: A General Overview*

Settling on one definition of the “rule of law” seems an impossible endeavor, and many agree that the rule of law is an “essentially contested concept.”<sup>14</sup> Nevertheless, the term’s imprecision has not hindered its popularity.<sup>15</sup> Academics and international organizations from America and abroad regard the rule of law as a worthy ideal<sup>16</sup>—so much so, that it has been the subject of myriad

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<sup>14</sup> Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791 (1989) (describing rule of law as “deeply ambiguous, a contested concept”); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 151-64 (2002) (famously arguing rule of law is “an essentially contested concept”); see also Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1932 (2011) (noting challenge in making rule-of-law arguments given varying conceptions of rule of law); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1 (1997) (describing rule of law as “much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before”); Frank Lovett, *A Positivist Account of the Rule of Law*, 27 LAW & SOC. INQUIRY 41, 41 (2002) (“[D]escriptive accounts of the Rule of Law remain strikingly vague and imprecise.”).

<sup>15</sup> See, e.g., *Rule of Law News & Events*, AM. BAR ASS’N, [https://www.americanbar.org/advocacy/rule\\_of\\_law/newsroom\\_events.html](https://www.americanbar.org/advocacy/rule_of_law/newsroom_events.html) [https://perma.cc/2J43-86LH] (last visited Nov. 7, 2018) (tracking current rule of law news and developments).

<sup>16</sup> See, e.g., G.A. Res. 67/1, at 1 (Sept. 12, 2012) (highlighting rule of law as central global issue); Thomas Carothers, *Rule of Law Temptations*, 33 FLETCHER F. OF WORLD AFF. 49, 49, 51 (2009) (“The degree of apparent international consensus on the value and importance of the rule of law is striking.”); James L. Gibson, *Changes in American Veneration for the Rule of Law*, 56 DEPAUL L. REV. 593, 604-07 (2007) (showing, through surveys and empirical data, that United States, as compared to other nations, has strong support toward rule of law).

research and reform initiatives.<sup>17</sup> While a universal definition has been attempted, no single precise meaning exists.<sup>18</sup>

One early jurist who popularized the phrase “rule of law,” A.V. Dicey, describes the rule of law as embodying three ideals: (1) that the law should prevail over arbitrariness and discretionary power; (2) that the law ought to apply equally to all, including government officials; and (3) that constitutional law as drawn by judicial decisions is tantamount to fundamental law.<sup>19</sup> Another, more modern attempt to define the rule of law comes from the World Justice Project, which proclaims that the rule of law encompasses four universal principles: (1) the government as well as private actors are accountable under the law; (2) the laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property, and certain core human rights; (3) the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; and (4) justice is timely delivered by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.<sup>20</sup>

Similarly, the Center for Law and Military Operations defines the rule of law as a principle of governance in which “all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and

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<sup>17</sup> See, e.g., U.S. GEN. ACCOUNTING OFF., GAO-NSIAD-99-158, FOREIGN ASSISTANCE: RULE OF LAW FUNDING WORLDWIDE FOR FISCAL YEARS 1993-98, at 3 (1999) (noting that U.S. government spent at least nine hundred seventy million dollars on rule of law assistance during fiscal years 1993-98); Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 WORLD BANK RES. OBSERVER 117, 117-36 (1999) (explaining how Global Governance Group of World Bank links rule of law to its mission of improving worldwide governance); *Rule of Law Publications & Assessments*, AM. BAR ASS’N, [https://www.americanbar.org/advocacy/rule\\_of\\_law/publications.html](https://www.americanbar.org/advocacy/rule_of_law/publications.html) [<https://perma.cc/QW45-UCC4>] (last visited Nov. 7, 2018) (“[O]ffering analytical tools and publications, including legislative assessments and concept papers.”).

<sup>18</sup> See, e.g., INT’L COMM’N OF JURISTS, THE DYNAMIC ASPECTS OF THE RULE OF LAW IN THE MODERN AGE 17 (1965) (defining rule of law as “principles, institutions and procedures” that “lawyers in different countries of the world, [sic] often having . . . varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man”); RULE OF LAW DIVISION, U.S. AGENCY FOR INT’L DEV., GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 5 (Eve Epstein ed., 2008) (asserting that rule of law “usually refers to a state in which citizens, corporations and the state itself obey the law, and the laws are derived from a democratic consensus”).

<sup>19</sup> See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 110-21 (Liberty Fund reprinted 1982) (1885).

<sup>20</sup> *What Is the Rule of Law?*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/about-us/overview/what-rule-law> [<https://perma.cc/V8VY-9ZEU>] (last visited Nov. 7, 2018) (defining rule of law as consisting of four universal principles: accountability, just laws, open government, and accessible and impartial dispute resolution).

which are consistent with international human rights norms.”<sup>21</sup> According to the Center, the rule of law “requires . . . measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>22</sup>

Each of these definitions reflect common themes, but contain different emphases. And of course, many of these definitions developed from principles from more modern times. Section B will highlight some of the more notable themes that surface in rule-of-law scholarship, with the purpose of accomplishing a clearer understanding of what the rule of law is. This will enable a retrospective analysis of the breakdown of the rule of law in the Reconstruction South, using the Memphis Massacre as a primary case study.

#### B. “A Government of Laws, Not of Men”

Many credit Aristotle for developing one of the most famous conceptions of the rule of law.<sup>23</sup> Aristotle opined that “he who bids the law rule may be deemed to bid God and Reason alone rule,” but that “he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men.”<sup>24</sup> Since then, the idea that it is better to have a “government of laws, not of men” has become a definitive expression of what the rule of law represents, including in early American history.<sup>25</sup>

What is so special about a government of laws? Aristotle, for one, seemingly implies that even the “best of men” are prone to corruption when given power, and therefore they require the best of laws to steer that power toward “Reason.”<sup>26</sup>

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<sup>21</sup> THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY CTR. FOR LAW AND MILITARY OPERATIONS, RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES 3 (Helen Bowman, Tim Child & Bo Bohlke eds., 6th ed. 2015), [http://loc.gov/tr/frd/Military\\_Law/pdf/rule-of-law\\_2015.pdf](http://loc.gov/tr/frd/Military_Law/pdf/rule-of-law_2015.pdf) [<https://perma.cc/B4SS-JJKU>] (citation omitted) (noting that this definition is based in part on United Nations’ definition of rule of law).

<sup>22</sup> *Id.* at 147 (noting lack of consensus on “rule of law” definition and highlighting United Nations’ definition).

<sup>23</sup> *See, e.g.*, Waldron, *supra* note 14, at 141 (acknowledging Aristotle as “founder of our Rule-of-Law tradition”).

<sup>24</sup> ARISTOTLE, *The Politics*, in THE POLITICS AND THE CONSTITUTION OF ATHENS 11, 88 (Stephen Everson ed., Cambridge Univ. Press rev. student ed. 1996) (n.d.).

<sup>25</sup> *See* DAVID HUME, *Of Civil Liberty*, in ESSAYS: MORAL, POLITICAL, AND LITERARY 87, 94 (Eugene F. Miller ed., Liberty Classics 1987) (1777) (“It may now be affirmed of civilized monarchies, what was formerly said in praise of republics alone, *that they are a government of Laws, not of Men.*”); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”).

<sup>26</sup> ARISTOTLE, *supra* note 24, at 88 (noting that “law is reason unaffected by desire”).

Others add that the existence of concrete, verifiable rules makes governmental decision-making more predictable and, therefore, less arbitrary.<sup>27</sup> The result is what Lon Fuller, a renowned legal philosopher, called a “bond of reciprocity”: a social contract between government and citizens that equally constrains both to observe the law.<sup>28</sup> In other words, when the right laws are in place and everyone knows what they are, these laws direct the steps of the ruler and the ruled alike toward right conduct, yielding an orderly society.

As lovely as this idea sounds, how can there be such a thing as a government not of men? After all, men (and more recently, women) are the ones who create, enact, execute, and interpret laws. Perhaps the idea of a “government of laws, not of men” is not about eliminating the human factor altogether—rather, the phrase describes a relationship between laws and people, one where the former constrains and empowers the latter in specific ways. This relationship depends on what role a person plays in society: that of governor, governed, or judge.

For example, the rule of law is often associated with restricting government power in order to protect the freedom of the people.<sup>29</sup> This link between the rule of law and individual liberty is one reason why the rule of law is also often linked to liberal democracy<sup>30</sup> and separation of powers<sup>31</sup> in Anglo-American scholarship. It may even be said that government accountability is a fundamental

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<sup>27</sup> See RONALD A. CASS, *THE RULE OF LAW IN AMERICA*, at xi (2001) (“In a fundamentally just society, the rule of law serves to channel decision making in attractive ways, to make decisions more predictable, and to increase the prospects for fair administration of public power.”).

<sup>28</sup> LON FULLER, *THE MORALITY OF LAW* 39-40 (New Haven: Yale Univ. Press rev. ed. 1969) (1964).

<sup>29</sup> See, e.g., DICEY, *supra* note 19, at 176 (associating rule of law with “security given under the English constitution to the rights of individuals”); MICHAEL OAKESHOTT, *The Rule of Law*, in *ON HISTORY: AND OTHER ESSAYS* 119 (Liberty Fund 1999) (1983) (stating that rule of law is often used to describe or distinguish modern states, but “[m]ore often, it appears as a description of what a state might perhaps become, or what some people would prefer it to be”); Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 *SUP. CT. ECON. REV.* 1, 5 (2003) (“The rule of law is therefore inherently a classical liberal concept that presupposes the need and desirability to constrain governmental actors and maximize the sphere of liberty for private ordering . . .”). See generally, F.A. HAYEK, *THE ROAD TO SERFDOM* (1944) (warning that empowering State over individual leads to loss of freedom and tyranny).

<sup>30</sup> See, e.g., Thomas Carothers, *The Rule-of-Law Revival*, in *PROMOTING THE RULE OF LAW ABROAD* 3, 4 (Thomas Carothers ed., 2006) (“The rule of law makes possible individual rights, which are at the core of democracy.”); Jean Hampton, *Democracy and the Rule of Law*, in *THE RULE OF LAW* 13, 13 (Ian Shapiro ed., 1994) (expounding that ideals of democracy and rule of law are connected).

<sup>31</sup> See, e.g., *THE FEDERALIST NOS. 47-48, 51* (James Madison) (discussing separation of powers as necessary for preservation of rule of law). See generally MONTESQUIEU, *THE SPIRIT OF LAWS* (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., Cambridge Univ. Press 1989) (1748) (discussing separation of powers as best means of preserving political liberty).

principle of the rule of law.<sup>32</sup> Some scholars, such as Dicey, associated the rule of law both with upholding “rights-based liberalism” and with scrutinizing government action through judicial review.<sup>33</sup> Although Dicey is not the only scholar to emphasize the judiciary as an instrumental element of the rule of law,<sup>34</sup> others caution that judges are just as likely as any other governmental figure to bring about the very “rule by men” that the rule of law is supposed to replace.<sup>35</sup>

In short, one can understand the rule of law in terms of the relationship between human society and the rules it follows. The rule of law engages both the rules of society and the way individuals and entities respond to those rules. We turn next to the formal, procedural, and substantive dimensions of the rule of law.

### C. *Formal, Procedural, and Substantive Rule of Law*

There are three recognized conceptions of the rule of law: formal, procedural, and substantive.<sup>36</sup> The first two conceptions are often grouped together—formal rule of law refers to the form that rules take, while procedural rule of law refers to mechanisms and safeguards for advancing the aims these rules serve.<sup>37</sup> Lon Fuller believed that immorality and justice are less likely to be a problem in society when governments abide by the correct formal and procedural

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<sup>32</sup> See, e.g., HAGUE INST. FOR THE INTERNATIONALISATION OF LAW, EXTENSIVE REPORT ON THE FIRST HILL LAW OF THE FUTURE CONFERENCE 17 (2007) (“At its most basic, the rule of law has been held to mean simply that the government is required to act in accordance with valid law.”); Daniel B. Rodriguez, Matthew D. McCubbins & Barry R. Weingast, *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1457 (2010) (“It is said that where the rule of law is absent, we cannot govern the governors, and thus we are subject to official prerogative, which may be arbitrary, capricious, and brutal.”).

<sup>33</sup> See Fallon, *supra* note 14, at 1 (citation omitted) (acknowledging Dicey as providing “perhaps the most famous exposition” of rule of law within Anglo-American tradition, associating rule of law “with rights-based liberalism and judicial review of governmental action”).

<sup>34</sup> See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) (explaining that one of federal judiciary’s functions is to keep legislature “within the limits assigned to their authority”).

<sup>35</sup> See, e.g., Rodriguez, McCubbins & Weingast, *supra* note 32, at 1481-82 (discussing how internal and external pressures threaten judicial impartiality and create worry of judges ruling “on the basis of ‘men,’ not ‘law’”); Waldron, *supra* note 14, at 142-43, 147-48 (discussing “perennial” concern about judicial legislation).

<sup>36</sup> See Bar-Siman-Tov, *supra* note 14, at 1932.

<sup>37</sup> See *id.* (describing formal rule of law as stressing formal requirements, such as “generality, publicity, consistency, [and] prospectivity,” and procedural rule of law as emphasizing “procedural requirements and safeguards in the creation and application of legal norms”).

principles.<sup>38</sup> Fuller famously described eight formal values of what he called “the inner morality of law,” which dictate that rules must be: general, made public, prospective, clear, consistent, practical, constant, and congruent to the actions of those administering them.<sup>39</sup> Joseph Raz, a noted proceduralist, emphasized similar values, placing a particular emphasis on generality<sup>40</sup> and stressing the importance of an independent judiciary to maintaining the rule of law.<sup>41</sup>

Taken together, the Fuller-Raz philosophy posits a social order where the laws are accessible, clear, and consistent, which in turn makes them predictable. Through this predictability, the rule of law protects the public from arbitrary government: rather than falling subject to rulers who make up the law as they go along, the public can rely on a set of established, well-promulgated rules to guide its conduct.<sup>42</sup> The natural consequence of this is an ordered (and perhaps more moral) society. Moreover, it logically follows that if the laws are to be accessible to all, then legal procedures and institutions should be as well, which is why the presence of an impartial judiciary is a core value of procedural rule of law.<sup>43</sup>

While some scholars focus on form and procedure, others insist that the rule of law has a substantive aspect as well—one that addresses the normative and moral ends that formal-procedural rule of law protects.<sup>44</sup> What those substantive, universal values are is more divisive. John Locke’s *Two Treatises of Government* established the American ideal that private property is a main

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<sup>38</sup> See Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 630-72 (1958) (describing social fidelity to law as flowing from governmental adherence to “inner morality of law”).

<sup>39</sup> FULLER, *supra* note 28, at 30-46.

<sup>40</sup> JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW 210, 213 (Oxford Univ. Press 1979) (1977) (“It is one of the important principles of the [rule of law] that *the making of particular laws should be guided by open and relatively stable general rules.*”).

<sup>41</sup> *Id.* at 214, 216-17 (describing independent judiciary as vital to law’s ability to guide its subjects and thus vital to preserving rule of law).

<sup>42</sup> See *id.* at 216-20 (explaining how predictability of laws makes law more capable of providing effective guidance and protects against arbitrary government); see also JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 135-37 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689) (stating that laws must be “established,” “declared,” and known to all to preserve social order and protect against arbitrary power).

<sup>43</sup> See Jeremy Waldron, *The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2016 ed.), <https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/> [<https://perma.cc/2L38-BYHA>] (“[L]egal institutions and their procedures should be available to ordinary people to uphold their rights, settle their disputes, and protect them against abuses of public and private power. All of this in turn requires the independence of the judiciary, [and] the accountability of government officials . . .”).

<sup>44</sup> See, e.g., Rodriguez, McCubbins & Weingast, *supra* note 32, at 1458 (“[A]ny sound definition of the rule of law must explicitly incorporate substantive values.”).

substantive value of the rule of law.<sup>45</sup> Others identify civil rights, human rights, and justice as the rule of law's ultimate end.<sup>46</sup> But both Raz and Fuller argued that the rule of law is essentially indifferent to these substantive values.<sup>47</sup> Those who disagree with this view are quick to underscore historical events where procedural rule of law was in place but injustice still resulted because the substantive rule of law was absent.<sup>48</sup> For example, in a direct response to Raz, British Judge Thomas Bingham advocated a "thick" substantive conception of the rule of law, arguing that a government which persecutes its people "cannot . . . be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp . . . is the subject of detailed laws duly enacted and scrupulously observed."<sup>49</sup> Put differently, it is possible for governments to execute unjust laws that are still clear, consistent, accessible, and equally applied, but such governments cannot be said to be following the rule of law. Slavery and "Jim Crow" laws are prime examples of this concept—legal forms of dehumanizing African Americans.<sup>50</sup>

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<sup>45</sup> LOCKE, *supra* note 42, at § 138 (asserting that "[t]he Supreme Power cannot take from any Man any part of his Property without his own consent" and that any law permitting this is unsound); *see also* Ronald A. Cass, *Property Rights Systems and the Rule of Law*, in THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS 222, 222 (2004) ("A critical aspect of the commitment to the rule of law is the definition and protection of property rights . . .").

<sup>46</sup> *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948) ("[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . ."); RONALD DWORKIN, A MATTER OF PRINCIPLE 11-12 (1985) (supporting rights-based conception of the rule of law that "does not distinguish . . . between the rule of law and substantive justice"); RULE OF LAW DIVISION, *supra* note 18, at 5 (citation omitted) (stating that "U.S. State Department's website . . . describes rule of law as protecting 'fundamental political, social, and economic rights'").

<sup>47</sup> *See* FULLER, *supra* note 28, at 153 (arguing that inner morality of law is "indifferent toward substantive aims of law"); RAZ, *supra* note 40, at 228 (asserting that "rule of law is just one of the virtues the law should possess").

<sup>48</sup> *See* Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, WORLD JUSTICE PROJECT, RULE OF LAW INDEX 9 (2011), [https://worldjusticeproject.org/sites/default/files/documents/WJP\\_Rule\\_of\\_Law\\_Index\\_2011\\_Report.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP_Rule_of_Law_Index_2011_Report.pdf) [<https://perma.cc/2ECK-WK8A>] (recalling apartheid in South Africa, noting that "officers and agents were accountable in accordance with the laws; the laws were clear; publicized, and stable, and were upheld by law enforcement officials and judges" but that "[w]hat was missing was the substantive component of the rule of law"); *see also* HAYEK, *supra* note 29, at 82 ("It may well be that Hitler has obtained his unlimited powers in a strictly constitutional manner . . . [b]ut who would suggest for that reason that the Rule of Law still prevails in [Nazi] Germany?").

<sup>49</sup> THOMAS BINGHAM, THE RULE OF LAW 67 (2010).

<sup>50</sup> *See* Gerald J. Postema, *Law's Ethos: Reflections on a Public Practice of Illegality*, 90 B.U. L. REV. 1847, 1852-53 (2010) ("The experience of Jim Crow teaches a rather different lesson: Law can do its job of constraining abuse of power only if there exists a wider culture, or, as Aristotle insisted, *ethos* of the rule of law.").

Substantive rule of law carries a strong appeal given its focus on justice and respect for individual rights. Conversely, one challenge of recognizing the substantive dimension of the rule of law is that not everyone agrees on what this substance should be. Liberty, equality, and justice may be some obvious choices, but even a perfect consensus on what each of those terms mean remains impossible. At any rate, who should decide which substantive values the rule of law ought to protect? How is this impacted by gender inequality, racial caste, socio-economic caste, and pluralism generally? Moreover, which of these values should people prioritize when they come into conflict?

There are neither easy answers to these questions nor an easy way to resolve the debate between strict proceduralists and those who support the “thick”<sup>51</sup> substantive conception of the rule of law. In fact, I would argue that the concept of a shared definition of “rule of law” is unsettled. At minimum, these perspectives on the different dimensions of the rule of law shed light on the challenge of fulfilling the classic goal of a “government of laws, not of men.”<sup>52</sup> It is from this perspective that we may analyze the experiences of freedmen in the Reconstruction-era South. How does a strict proceduralist address governmental leaders acting outside the formal law with impunity? Can the procedural rules of law enacted in the Thirteenth and Fourteenth Amendments stand for justice where the substantive law fails?

#### D. *Applying the Theoretical Rule of Law*

While this Article will revisit the definition of “rule of law” in later sections, there are certain characteristics of the rule of law that at least merit attention from the outset. One such characteristic is its imprecision: the rule of law means different things to different people, to different cultures, at different times, and within different academic traditions.<sup>53</sup> Perhaps this imprecision is a positive quality, one that allows the rule of law to evolve as notions of procedural fairness and substantive justice evolve. Certainly, the events analyzed herein alone show some evolution. Conversely, the rule of law’s malleability also leaves room for people (or governments) to mold its content and purpose to suit their own political or ideological advantage, which could yield dangerous consequences when societal values evolve for the worse.<sup>54</sup> In any event, tensions continue to rise over what the rule of law is or ought to be, which in turn may lead some to write it off as a mere legal fiction.

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<sup>51</sup> See *id.* at 1852 (noting tension between “moral thinness” of formalism and proponents of “more robust substantive principles”).

<sup>52</sup> See, e.g., HUME, *supra* note 25, at 94 (famously stating classic goal).

<sup>53</sup> See, e.g., *Rule of Law: History*, *supra* note 8 (examining different meanings of rule of law in different cultures throughout history).

<sup>54</sup> See Rodriguez, McCubbins & Weingast, *supra* note 32, at 1458 (“Rule of law is an attractive ideal, but its attractiveness may stem mainly from its imprecision, which allows each of us to project our own sense of the ideal government onto the phrase ‘rule of law.’”).

The idea of having a “government of laws, not of men” raises questions in a pluralistic society about whose interests the rule of law serves and whose interests it keeps in check. It also carries significant implications for how the roles of the legislature, the judiciary, law enforcement, and the ordinary citizen factor into how the rule of law plays out in practice. As for the formal, procedural, and substantive dimensions of the rule of law, perhaps the best approach would be to acknowledge the ways in which all three influence how people conceive of the rule of law.<sup>55</sup> In 1866, the theoretical understanding of the rule of law had not yet evolved to its modern meaning; but the universal principles that underlie the formal, procedural, and substantive understandings of the rule of law can nonetheless be explained through a disruptive historical event. There are failures from every aspect of the rule of law: formal failures when police and government officials explicitly or implicitly participate in racial violence; procedural failures where there is no redress available for murder, arson, or rape; and, most of all, substantive failures in that any notions of equality, justice, redressability of loss—or even property rights—do not apply to an entire group of people. The rule of law at a moment in time and place reflexively becomes a weapon of oppression and emasculation based on the denominators of race and caste. This Article turns next to the context of the Memphis Massacre to examine and explore questions and challenges to help make sense of how and why the rule of law broke down to the point that unhinged violence went unchecked—and how this breakdown provided the impetus for the passage of the Fourteenth Amendment.

## II. MEMPHIS BEFORE THE MASSACRE: HISTORICAL CONTEXTS

April 30, 1866 was, in many respects, a day like any other. A Monday, the start of another work week in Memphis, the chief inland port city of the U.S. South. We now know April 30th was the last day before a three-day rampage of mass murder, rape, assault, arson, and armed robbery by whites that would cut a horrific swath through the city’s African-American population. What sort of calm, peace, and order existed on the eve of the most dreadful moment in the city’s history? Before the outbreak of massive lawlessness, what sort of rule of law stood guard over the city’s inhabitants?<sup>56</sup> As will become readily apparent,

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<sup>55</sup> After all, conceptions of the rule of law incorporate both formal-procedural and substantive elements. See, e.g., U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) (“The rule of law . . . refers to a principle of governance in which all persons, institutions and entities . . . are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”).

<sup>56</sup> The events of May 1-3, 1866 are also known as the Memphis Riot, the Memphis Riots, and the Memphis Race Riot. Popularly, they have also been referred to as the Irish Riot. Because the victims of the events were primarily one group, African Americans, this Article will refer to the events as the “Memphis Massacre.” See H.R. REP. NO. 39-101, at 5 (1866)

Memphis before the riot was a city at peace only in the most formal, technical sense. In truth, the community was severely divided and marked by multiple layers of violence.

The Memphis Massacre (the “Massacre”) was a violent, lurid, appalling series of events that unfolded over a roughly three-day period at the beginning of May 1866.<sup>57</sup> The context for the Massacre is extraordinarily complex. Memphis was a growing, relatively new city with a lengthier Union occupation than its sister cities. Section A will offer a brief introduction to the deep divisions and tensions that marked the historical context of Memphis preceding the Massacre.

#### A. *New City*

In 1866, Memphis was a new community, founded only forty-seven years prior.<sup>58</sup> Shelby County was created by the state legislature in November 1819 and began to function as a municipal government in May 1820.<sup>59</sup> The population in 1840 had only reached the modest figure of 1,799 persons, which would grow to 8,841 a decade later, and then boom to 22,623 by 1860.<sup>60</sup> The latter figure seems modest from today’s vantage point; but in a community that stretched just a few blocks east from the river, with unpaved streets and low-level wooden structures, the rapid pace of change and growth was explosive. Indeed, the typical witness before the U.S. House of Representatives’ Select Committee on the Memphis Riots and Massacres (“the House Select Committee”) that forms the extraordinary documentary core for the events of May 1866, reported having been in the city for only three to five years.<sup>61</sup> So new was the city, and so dramatic its growth in relative terms, that one could speak of a Civil War veteran who had been in Memphis only eight or ten years as an “an old citizen of this place.”<sup>62</sup>

The growth of the population during the war and its immediate aftermath turned out to be even more explosive. Though there would not be another census for four years, on the eve of the Massacre the city was commonly estimated to

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(noting what was called “riot” was in reality a massacre); GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* 5 (1984) (describing 1866 riot as Memphis Race Riot); MARY CHURCH TERRELL, *A COLORED WOMAN IN A WHITE WORLD* 7 (1940) (referring to “Irish Riot” in Memphis).

<sup>57</sup> See Joseph Patrick Doyle, “The Worst Behaved City in the Union” *The Impact of the Memphis Riots on Reconstruction Politics* 44-45 (2008) (unpublished B.A. Honors Thesis, Rhodes College) (on file with the Rhodes College Honors Papers) (describing unfolding of Memphis Riots on May 1, 1866).

<sup>58</sup> JOHN E. HARKINS, *METROPOLIS OF THE AMERICAN NILE: AN ILLUSTRATED HISTORY OF MEMPHIS & SHELBY COUNTY* 35 (1982).

<sup>59</sup> *Id.* at 35 (chronicling creation and boundary lines of Memphis and Shelby County).

<sup>60</sup> See GERALD M. CAPERS, JR., *THE BIOGRAPHY OF A RIVER TOWN: MEMPHIS, ITS HEROIC AGE* 79 (Tulane Univ. Press 1966) (1939) (indicating Memphis’s population growth from 1840-1860).

<sup>61</sup> See generally H.R. REP. NO. 39-101.

<sup>62</sup> *Id.* at 198 (testimony of W.G. McElvaine).

have some 35,000 to 40,000 inhabitants.<sup>63</sup> Recently freed slaves came to the city in particularly large numbers, drawn to the seeming safety of the U.S. Army's presence and the hopes awakened by an economy that "[n]ext to New Orleans, seemed to be doing the heaviest business of any Southern city[;] . . . [its] streets . . . filled with drays, and the levee . . . crowded with freight."<sup>64</sup> In what was already a city of newcomers, the War and its aftermath added tens of thousands of newcomers. If the estimates were close to accurate, Memphis's population nearly doubled in size in about five years.<sup>65</sup> That factor alone, even without a war and its accompanying human tragedy and political tumult, would put any city on edge. Adding in the tensions and strife of civil war made the air even more volatile.

B. *The Civil War and Union Occupation*

Undoubtedly the most important piece of historical context for this study is the national catastrophe that was the Civil War and its aftershocks. On the eve of the Massacre, the fires of the Civil War were still smoldering. The War formally ended just one year prior: General Robert E. Lee had surrendered at the Appomattox (Virginia) Court House on April 9, 1865; and just a few days later, on April 14, came the assassination of President Abraham Lincoln and the accession of the unlikely Andrew Johnson, a Democrat and a Unionist from East Tennessee, to the White House.<sup>66</sup>

The Civil War saw some 620,000 soldiers killed and over one million casualties suffered<sup>67</sup> in a population of the United States of just over thirty-one million.<sup>68</sup> The conflict took its toll on the country as a whole but cut most deeply in the South, where most of the War's battles were fought, and which had only

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<sup>63</sup> See STEPHEN V. ASH, *A MASSACRE IN MEMPHIS: THE RACE RIOT THAT SHOOK THE NATION ONE YEAR AFTER THE CIVIL WAR* 7 (2013).

<sup>64</sup> WHITELAW REID, *AFTER THE WAR: A SOUTHERN TOUR, MAY 1, 1865 TO MAY 1, 1866*, at 426 (1965) (highlighting prospering business and economic growth in Memphis after the Civil War).

<sup>65</sup> See ASH, *supra* note 63, at 7 (describing uncertainty of estimates for the population of Memphis after the Civil War).

<sup>66</sup> See *id.* at 16, 36 (describing political developments of April 1865); Doyle, *supra* note 57, at 77 (providing timeline of events between 1862 and 1868).

<sup>67</sup> *Civil War Casualties*, AMERICAN BATTLEFIELD TRUST, <https://www.civilwar.org/learn/articles/civil-war-casualties> [<https://perma.cc/2KZU-Z3VB>] (last visited Nov. 7, 2018) (recounting cost of the Civil War in regards to those killed, wounded, captured, or missing).

<sup>68</sup> U.S. BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, pt. 1, tbl.A 6–8, at 8 (1975), <https://www.census.gov/history/pdf/histstats-colonial-1970.pdf> [<https://perma.cc/DDB9-USAV>] (reporting annual population estimates in United States between 1790 and 1970). An idea of the cataclysmic scale of the violence wrought by the Civil War can be glimpsed by considering that, given the current population of the United States (at 326 million, just over ten times that on the eve of the Civil War), the deaths of some 620,000 soldiers in the Civil War would be equivalent to 6.4 million dead today.

around one-half the population of the North.<sup>69</sup> The War settled a few big things: secession was defeated; the Union exerted its economic, military, and finally, political mastery; and slavery was at an end.<sup>70</sup> But almost everything else was uncertain and bitterly contested. On what terms the former Confederate states would be readmitted to the Union, and, at the individual level, on what terms would those who had given their loyalty and aid to the Confederacy be allowed again to exercise the vote and other rights of citizens, were unknowns.<sup>71</sup> Perhaps most importantly, and most difficult of all, on what terms would the freedmen and women, having made the legal transition from property to person, be part of society—would they enjoy the full fruits of citizenship and equality, making real the ideals enshrined in the Declaration of Independence?<sup>72</sup> The existing procedural and formal rules of law had yet to answer these questions.<sup>73</sup>

The War formally ended in Memphis three years earlier when Union naval forces captured the city on June 6, 1862, following a brief naval battle.<sup>74</sup> Thus, Memphis was under Union occupation for the final three-fourths of the duration of the Civil War, and, in significant respects, it remained a Union-occupied city in spring 1866. Tennessee was a southern, slaveholding state, and a state that had seceded and joined the Confederacy.<sup>75</sup> But Memphis itself was formally part of the Confederacy for only a single year, from the ratification of the Tennessee Ordinance of Secession on June 8, 1861,<sup>76</sup> to the city's capture on June 6, 1862.<sup>77</sup> For Memphis, most of the Civil War unfolded under Union occupation and military rule. The strategic importance of the city can be inferred by the names of some of the men who served as ranking U.S. Army officers there—the federal garrison in Memphis was under the command of Brigadier General Ulysses S.

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<sup>69</sup> See *Civil War Casualties*, *supra* note 67 (noting that Southerners could not match numerical strength of North leading to significantly greater casualties).

<sup>70</sup> See ASH, *supra* note 63, at 33 (describing post-war developments in Memphis).

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* at 38.

<sup>73</sup> See ASH, *supra* note 63, at 23-25 (discussing continued quell of education, roundups of African Americans as “vagrants,” and other suppression of African Americans in Memphis); *id.* at 68-89 (discussing existing status quo for freedmen in Memphis).

<sup>74</sup> See John Bordelon, “Rebels to the Core”: Memphians Under William T. Sherman 8 (2005) (unpublished student paper, Rhodes College) (on file with the Rhodes Institute for Regional Studies) (recounting destruction of Memphis's last line of defense by Union fleet).

<sup>75</sup> A.E. Keir Nash, *In re Radical Interpretations of American Law: The Relation of Law and History*, 82 MICH. L. REV. 274, 308 (1983).

<sup>76</sup> See *Ordinances of Secession of the 13 Confederate States of America*, THE CIVIL WAR HOME PAGE, [http://www.civil-war.net/pages/ordinances\\_secession.asp](http://www.civil-war.net/pages/ordinances_secession.asp) [<https://perma.cc/GS/Z6-USME>] (last visited Nov. 7, 2018) (noting approval of Tennessee Ordinance of Secession on June 8, 1861).

<sup>77</sup> See ASH, *supra* note 63, at 33 (noting federal forces ended Memphis's confederate period).

Grant briefly in the summer of 1862, and, later that summer, Major General William T. Sherman took over the position.<sup>78</sup>

If Memphis was a de facto part of the Union, it was so without any widely-shared enthusiasm from its white citizens—to say the least. It is anecdotal, but striking, that in 1866, merely four U.S. flags were reported flying over the city of Memphis.<sup>79</sup> After the War, national politics contributed to a strengthening of Confederate sympathies in the city. The presidency was now in the hands of an East Tennessee Unionist, Andrew Johnson, a lifelong Democrat who had been elected as Lincoln's running mate on the National Union ticket, the label the Republicans chose for the 1864 presidential election.<sup>80</sup> Johnson's markedly-lenient policy towards former Confederate officers and leaders, including the wholesale handing out of pardons and vetoes of the Freedmen's Bureau Act in February 1866 and the Civil Rights Act in March, were widely thought to cheer and embolden the Rebel faction in Memphis and elsewhere.<sup>81</sup> On April 2, 1866, Johnson pointedly issued Proclamation No. 153 declaring the "insurrection . . . is at an end."<sup>82</sup>

Indeed, the sting and humiliation of defeat among Confederates at the end of the War had transformed a year later into a different, defiant attitude. Grant may have had Memphis in mind when he said in a newspaper interview three weeks after the Massacre that those parts of the South that were spared war were the

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<sup>78</sup> See Bordelon, *supra* note 74, at 10-12 (discussing various Union commanders in charge of Memphis and their attempts to unite city).

<sup>79</sup> The flags flew over the headquarters of Major General George Stoneman, the ranking Army officer in the city; the Freedmen's Bureau office; the post office; and the print shop of the *Memphis Post*, the leading Republican newspaper. ASH, *supra* note 63, at 47. Ira Stanbrough, owner of a cotton mill, testified to the Select Committee regarding the Union flag: "I see one on the post office, but I don't see one anywhere else, and I would no more think of raising a United States flag on my mill than I would of putting a match to my property to burn it all up. If I were to do so I know it would be destroyed." H.R. REP. NO. 39-101, at 244 (1866).

<sup>80</sup> See ASH, *supra* note 63, at 47 (discussing Andrew Johnson's reputation and path to White House).

<sup>81</sup> See *id.* at 44 (noting anti-Radical editorials in Memphis conservative newspapers lauding Johnson as defender of states' rights).

<sup>82</sup> RONALD C. WHITE, *AMERICAN ULYSSES: A LIFE OF ULYSSES S. GRANT* 431 (2016) (addressing Johnson's actions one year after Appomattox to indicate changing landscape in the South); see also Andrew Johnson, *Proclamation No. 153: Declaring the Insurrection in Certain Southern States to Be at an End*, LIBR. OF CONGRESS (April 2, 1866), <https://www.loc.gov/resource/rbpe.23600100/> [<https://perma.cc/VS83-VWKL>] (recounting President Johnson's proclamation and declaration "that the insurrection which heretofore existed in the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida is at an end . . .").

most intransigent, particularly after a year of Johnson's highly conciliatory policy towards the ex-Confederates.<sup>83</sup>

The Union Army may have occupied Memphis, but the Confederacy remained a constant presence there. Confederate General Nathan Bedford Forrest knew the streets and alleys of Memphis well—he had built himself a fortune rising to the top of the slave-trading business during the antebellum years.<sup>84</sup> Throughout much of the War, operating out of his nearby base in northern Mississippi and deploying guerrilla tactics, Forrest conducted stealthy incursions into the city almost at will, including one spectacular raid in August 1864.<sup>85</sup> Forrest and the Confederacy were a spectral but very real presence in the city. More prosaic activity to benefit the Rebel forces also occurred, including widespread smuggling of goods.<sup>86</sup> Over twelve million dollars worth of goods were reported to have flowed out of Memphis to aid Confederate forces during the first year of the occupation.<sup>87</sup> It was not only the political ties or loyalty to the Confederacy that drove its presence in the occupied city, it was also the unknown: life without slavery in the South.

When we consider not only slavery as an institution, but as an entrenched belief in the *natural superiority* of white over black and the naturalness of white supremacy, the stubborn continuity of Confederate racial attitudes is unsurprising. After all, Confederate Vice President Alexander Stephens' famous *Great Cornerstone Speech* held up white racial superiority, and not just slavery, as the fundamental reason for secession: "Our new Government is founded upon exactly the opposite ideas [to the equality of races]; its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and moral condition."<sup>88</sup> The Mississippi Declaration of Secession gave pride of place to slavery as the first and, really, only cause for its secession from the union: "[o]ur position is thoroughly identified with the institution of slavery—the greatest material interest of the world. Its labor supplies . . . the largest and most important portions of commerce of the earth."<sup>89</sup>

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<sup>83</sup> See BROOKS D. SIMPSON, *LET US HAVE PEACE: ULYSSES S. GRANT AND THE POLITICS OF WAR AND RECONSTRUCTION* 137 (1991).

<sup>84</sup> See JACK HURST, *NATHAN BEDFORD FORREST: A BIOGRAPHY* 33-67 (1993) (describing Forrest's business in slave trade, real estate transactions, and participation in Memphis politics).

<sup>85</sup> HARKINS, *supra* note 58, at 77, 80-81 (elaborating on Forrest's August 1864 attack on Memphis).

<sup>86</sup> *Id.* at 78.

<sup>87</sup> *Id.* (estimating thirty million dollars worth of supplies were provided to Confederates before July 1864).

<sup>88</sup> Alexander H. Stephens, *Great Cornerstone Speech* (Mar. 21, 1861), in 17 *ORATIONS: FROM HOMER TO WILLIAM MCKINLEY* 7213, 7214 (Mayo W. Hazeltine ed., 1902).

<sup>89</sup> *A DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF THE STATE OF MISSISSIPPI FROM THE FEDERAL UNION* (1861).

C. *A Divided South: Reconstruction*

The attitude of white racial superiority pervaded the South and remained a source of conflict between the realities of society and the formal rule of law. The contrasting visions of the Ku Klux Klan (founded in 1866) and other white supremacy organizations with the Republican-led government were cognitively a battle between whose actions were truly upholding the rule of law. Many white Southerners perceived the expansion of endemic racial violence in reaction to Reconstruction policies as attempts to preserve the status quo.<sup>90</sup> New members to the Ku Klux Klan declared loyalty to the “old” or “original” constitution, believing that equal rights for African Americans violated the founding principles of the country.<sup>91</sup>

The emboldened belief that white supremacy was supported by the Constitution was not unique to Klan members—it pervaded the country. The Supreme Court in *Dred Scott v. Sandford*<sup>92</sup> confirmed, after reviewing the history of race in the United States, that the notion “all men are created equal” applied only to white men.<sup>93</sup> The prevailing idea remained that southern secessionists were those loyal to the protection of the rule of law and the Constitution.<sup>94</sup> Under these ideals in the Reconstruction South, white supremacist groups “aimed to reverse the interlocking changes sweeping over the South during Reconstruction: to destroy the Republican party’s infrastructure, undermine the Reconstruction state, reestablish control of the black labor force, and restore racial subordination in every aspect of Southern life.”<sup>95</sup>

It was not only the belief in racial superiority, but also the threat of African-American political and economic power that influenced the tactics suppressing equal rights. Whites believed “blacks were unfit to vote and southern whites were determined to prevent them from long exercising that privilege.”<sup>96</sup> As the

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<sup>90</sup> RABLE, *supra* note 56, at 5; *see* FONER, *supra* note 1, at 225 (discussing exercise of violence as attempt to restore labor control to whites); Jared E. Goldstein, *The Klan’s Constitution 1* (Feb. 26, 2018) (unpublished manuscript) (on file with Roger Williams University School of Law), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3130161](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130161) [<https://perma.cc/JP94-JJQ7>] (describing Klan’s mission as being in defense of U.S. Constitution).

<sup>91</sup> Goldstein, *supra* note 90, at 11-13 (noting that Klan members supported Constitution before it had been “debased through the adoption of the Reconstruction Amendments”).

<sup>92</sup> 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

<sup>93</sup> *Id.* at 403.

<sup>94</sup> Goldstein, *supra* note 90, at 18 (noting “the South had remained true to the original meaning of the U.S. Constitution, while the North had betrayed the nation’s founding principles”).

<sup>95</sup> FONER, *supra* note 1, at 426 (describing Klan’s efforts to affect power relations throughout South).

<sup>96</sup> Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521, 524 (1989) (noting Radical Republicans’ futile efforts in seeking civil and political rights for

Klan developed, it was seen as a military force that enforced the rule of the Democratic party and the restoration of white political and economic power.<sup>97</sup> Although the Memphis Massacre is seen as somewhat anachronistic to other race riots at the time because it was not a direct response to the exercise of political or economic power of freedmen, the underlying belief that the perpetrators of violence were protectors of the rule of law reigned true.<sup>98</sup>

#### D. *Clashes in Memphis*

Tennessee was also the one former Confederate state to escape the harshest aspects of Reconstruction rule and would later be the first to ratify the Fourteenth Amendment, assuring its early reincorporation into the Union.<sup>99</sup> Interestingly, and somewhat uniquely, Irish immigrants overwhelmingly dominated Memphis's civilian municipal government.<sup>100</sup> It is on this fact that historians distinguish the Memphis Massacre from other riots, as the mob was predominantly Irish rather than Confederate sympathizers. Mary Church Terrell, daughter of the freedman Robert Reed Church,<sup>101</sup> briefly alludes to the Massacre in her 1940 memoir.<sup>102</sup> There, she states: "Shortly after the Civil War what is commonly called 'the Irish Riot' occurred in Memphis. During that disturbance my father was shot in the back of his head at his place of business and left there for dead."<sup>103</sup> Representative George Shanklin of Kentucky was insistent on characterizing the Massacre—or "the riotous proceedings"—as the work of the

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African Americans); see Michael W. Fitzgerald, *Ex-Slaveholders and the Ku Klux Klan: Exploring the Motivations of Terrorist Violence*, in *AFTER SLAVERY: RACE, LABOR, AND CITIZENSHIP IN THE RECONSTRUCTION SOUTH* 152-53 (Bruce F. Baker & Brian Kelly eds., 2013) (finding Klan's goals to be preserving slavery's legacy and aftershocks of the Civil War, suppressing African-American social behavior and crime, engaging in self-defense in race war; and expressing political grievances).

<sup>97</sup> See FONER, *supra* note 1, at 425 (describing Ku Klux Klan's pervasive impact even without organized structure).

<sup>98</sup> See RABLE, *supra* note 56, at 42 (finding Memphis Massacre to be more reflective of upheaval and disorder involved with post-war hostilities towards urban African Americans in 20th century than white supremacist and voter-suppression-driven contemporaneous riots).

<sup>99</sup> HARKINS, *supra* note 58, at 83 (noting Tennessee's quick reentry to Union).

<sup>100</sup> See H.R. REP. NO. 39-101, at 23 (1866).

<sup>101</sup> Robert Church became an enormously successful entrepreneur and one of the wealthiest African Americans in the United States—widely characterized as "one of the first black millionaires." Morgan Beckford, *Memphis Black History: Millionaire Robert Church Rebuilds Memphis After the Yellow Fever Epidemic*, HIGH GROUND NEWS (Feb. 22, 2017), <http://www.highgroundnews.com/features/MemphisBlackHistoryRobertChurch.aspx> [<https://perma.cc/EM4B-QM36>] (highlighting Robert Church's experience during Memphis Massacre and his dedication to rebuilding Memphis).

<sup>102</sup> See MARY CHURCH TERRELL, *A COLORED WOMAN IN A WHITE WORLD* 7 (1940).

<sup>103</sup> *Id.*

Irish rabble.<sup>104</sup> He encouraged sympathetic witnesses to characterize the “old citizens” as beyond reproach, uninvolved in the mob violence and enjoying kind-hearted relationships with African Americans.<sup>105</sup>

The Irish’s prominent roles in Memphis can be explained through the position of Confederate sympathizers, who were more commonly the perpetrators of racial violence in other mob outbursts across the country. In 1865, Tennessee Governor William Brownlow and his Republican allies in the General Assembly passed the Tennessee Disenfranchisement Act, which politically crippled Confederate sympathizers throughout the state.<sup>106</sup> The Act exacerbated the social strife in Memphis by disenfranchising the elite, white-ruling class and empowering the poorer Irish immigrants in the city who were characterized as maintaining a special disdain for the colored race.<sup>107</sup> Without the ability of Confederate sympathizers to run for office, Memphis’s political and judicial positions of power were retained predominantly by Irish immigrants.<sup>108</sup> By 1866, “[t]he city government was utterly and completely Irish in nearly all its branches” including the mayor, the recorder, nine out of sixteen of the city council, almost all of the fire department, and 163 out of 180 police officers.<sup>109</sup>

At the same time, there was also an important “Rebel” component of the population: people who had been active in the rebellion or sympathetic supporters. As described, the Confederacy maintained a cultural and political influence over Memphis despite its early Union occupation. There was an important white Unionist faction too: Southerners and Tennesseans who had been against secession but were Democrats. There were also white Republicans, of whom a large majority were non-Tennesseans and, indeed, non-Southerners.

Another faction of life in Memphis in 1866 was the role of the Freedmen’s Bureau. The Freedmen’s Bureau, created by Congress to navigate the transition of freedmen from slavery to citizenship, contained the only systems of

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<sup>104</sup> H.R. REP. NO. 39-101, at 27, 41 (creating distinction between prominent citizens and Irish city officials engaged in Massacre).

<sup>105</sup> Discrimination towards Irishmen is evident from the House Committee Report on the Massacre, which described the Irish as men of “the most unworthy and disreputable character.” *Id.* at 23, 43 (describing completely Irish police force as “monsters in crime, iniquity, and cruelty . . .”; in contrast to other white Tennesseans as “kind, liberal, and just”); see ASH, *supra* note 63, at 191 (noting perceived rivalry between Irish and African Americans).

<sup>106</sup> Doyle, *supra* note 57, at 44-45.

<sup>107</sup> See H.R. REP. NO. 39-101, at 41-42 (explaining implications of placing political power in hands of more inferior class of society).

<sup>108</sup> See Doyle, *supra* note 57, at 44-45 (highlighting vast gains in political power by Irish residents in Memphis during this period).

<sup>109</sup> *Id.* at 23; see also H.R. REP. NO. 39-101, at 23 (“The city government was utterly and completely Irish in nearly all its branches: the mayor was an Irishman; the recorder was an Irishman; nine out of sixteen of the city council were Irish; and out of one-hundred and eighty members of the police force, one hundred and sixty-three were Irish, and all the members of the police committee were Irish. The fire department was nearly all Irish.”).

jurisprudence accessible to African Americans, who could not testify in local courts.<sup>110</sup> Yet, these courts lacked much outside respect, and there was no jury of one's peers to resolve disputes of the newly freed slaves.<sup>111</sup> One scholar describes white Tennesseans' reaction to the Freedmen Bureau's existence as "rang[ing] from a grudging acceptance . . . to total rejection and denial of its constitutional and moral right to exist."<sup>112</sup> In addition to the courts, the Freedmen's Bureau operated schools, hospitals, and the Freedmen's Savings and Trust Company Bank, all of which were located in or near the neighborhood where the massacre occurred.<sup>113</sup> The courts operated by the Freedmen's Bureau did not supplant the state court system, nor courts established by municipal ordinances.<sup>114</sup>

The continued presence of Union military occupation and the operation of the Freedmen's Bureau were galling to many white Memphians. Even more so was the presence along the city's southern reaches of African-American soldiers who formed the 3rd U.S. Colored Heavy Artillery. The Artillery was formed in Memphis in June 1863 and served as the garrison force at Fort Pickering.<sup>115</sup> To see African Americans wearing the uniform and insignia of their country's military, and—even more importantly—bearing arms in that service, was for many white Memphians the most dramatic emblem of what the Civil War had wrought. In many it evoked feelings of hostility and fear that African Americans would see themselves as equal to whites. On April 30, 1866, the day before the Massacre broke out, these black soldiers were scheduled to muster out of the Army, turn in their weapons, and (even if not immediately) collect their pay.<sup>116</sup> Tony Cherry testified to the House Select Committee that the soldiers at Fort Pickering "had been mustered out, but had not been paid, and were allowed to go down into the city whenever we pleased . . . and they were scattered all around town."<sup>117</sup> Blue uniforms, and indeed blue clothing in general, would unfortunately make many individuals the targets of mob violence during the Massacre. Frank Williams testified that he heard members of the mob "say they

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<sup>110</sup> See Paul David Phillips, *White Reaction to the Freedmen's Bureau in Tennessee*, 25 TENN. HIST. Q. 50, 50 (1966) (describing establishment of Freedmen's Bureau in serving as guardian of four million recently freed blacks).

<sup>111</sup> See *Id.* at 53 (citation omitted) (describing the Bureau courts as "irresponsible.").

<sup>112</sup> *Id.* at 50 (highlighting widespread lack of acceptance among Southern whites for Freedmen's Bureau).

<sup>113</sup> Altina L. Waller, *Community, Class and Race in the Memphis Riot of 1866*, 18 J. SOC. HIST. 233, 235 (1984); Doyle, *supra* note 57, at 2 (suggesting growth of African-American community in Memphis).

<sup>114</sup> Andrew Johnson, *The Freedman's Bureau, and the Problem of Equal Rights*, 44 J.S. HIST. 399, 402 (1978).

<sup>115</sup> See ASH, *supra* note 63, at 76 (describing composition and origin of Artillery).

<sup>116</sup> See H.R. REP. NO. 39-101, at 184 (1866) (testimony of Tony Cherry)

<sup>117</sup> *Id.*

would kill every damned [negro] who had blue clothes on. I knew that I was a soldier and had blue clothes on, and I made haste to get to my quarters.”<sup>118</sup>

As the Report on the Massacre later described, “[t]he mob[] . . . proceeded with the deliberation to commission of crimes and perpetration of horrors which can scarcely find a parallel in the history of civilized or barbarous people, and must inspire the most profound emotions of horror among all civilized people.”<sup>119</sup> The Memphis political system was seen as “corrupt and impotent.”<sup>120</sup> The judge of the Recorder’s Court has been described as one of many “outright racist demons” in control of Memphis’s city government.<sup>121</sup> Citizens were encouraged to arm themselves, and it is unsurprising that there were outbursts of violence perpetrated by the very men who led the City.<sup>122</sup>

Indeed, a clash between some of the soldiers at Fort Pickering and Memphis policemen was a major detonate of the violence of the first three days in May 1866.<sup>123</sup> Dr. J.N. Sharp, acting assistant surgeon connected with the Freedmen’s Bureau, testified about the brutality that police officers inflicted upon African Americans in the city prior to the Massacre: for “the slightest offence, and instead of taking the [men] quietly to the lock-up, as officers should, I have seen them beat [them] senseless and throw [them] into a cart.”<sup>124</sup> He recounted a specific incident he observed the week before the Massacre wherein the police brutalized an African-American soldier who had just left Fort Pickering. Though the soldier had done nothing wrong, the police engaged him, dragged him down the road, and struck him several times (at least once in the back of the head) before they arrested him.<sup>125</sup> Other African-American soldiers conveyed to Dr. Sharp for the first time that this type of behavior by the police would meet resistance moving forward.<sup>126</sup> Dr. Sharp explained that this scenario played out again one week later, catalyzing the Massacre.<sup>127</sup>

This case illustrates how law enforcement in Memphis turned to legal process (such as arrests) to maintain order and white supremacy. This is one vision of what the rule of law meant, and it helps explain why the Massacre could be seen as upholding the law. Thus, a few days before the Massacre, there occurred an incident of apparent police brutality towards an African-American soldier, or an individual otherwise connected with Fort Pickering, in which police committed

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<sup>118</sup> *Id.* at 179.

<sup>119</sup> *Id.* at 5.

<sup>120</sup> Doyle, *supra* note 57, at 32.

<sup>121</sup> *Id.*

<sup>122</sup> See H.R. REP. NO. 39-101, at 9 (noting that many men became policemen “for nothing else than to get a chance to arm themselves”).

<sup>123</sup> Doyle, *supra* note 57, at 3-4.

<sup>124</sup> H.R. REP. NO. 39-101, at 156 (“When the police arrested a colored man they were generally very brutal towards him.”).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

unprovoked violence without evident fear of legal accountability or other adverse consequences. However, just as striking as the police violence, and perhaps a good deal more surprising, is the collective self-assertion of the soldiers in the face of municipal armed power—another deep impact of the Civil War.

E. *The Eve of the Massacre*

The rule of law in Memphis as it existed immediately prior to the Massacre was fractured and volatile.<sup>128</sup> Memphis was truly, and deeply, a divided city.<sup>129</sup> John Marshall, who was shot in the Massacre and lived to tell the tale, testified to the House Select Committee on the Massacre that he “stood and looked through the cracks while they were dragging a man out of the house . . . and a white man shot him right in his mouth.”<sup>130</sup> Another man then “kicked him over, and shot him again. Said he, ‘God damn you, you will never be free again.’”<sup>131</sup> The violence of the first three days of May 1866 in the southern reaches of Memphis was not just about tensions between mainly Irish working-class whites and black freedmen, though those so often-remarked tensions were real and clearly the primary cause of the Massacre.<sup>132</sup> The violence also had a political meaning, one clear to its authors, as well as to its targets at the time.<sup>133</sup> For many Memphians, the violence of the Massacre was seen as *restoring* the rule of law, or the rule of white supremacy and black subjugation. From the perspective of the perpetrators of the violence; Republican rule; disenfranchisement of Rebels; military occupation by the Union Army, including African Americans in uniform; the operation of the Freedmen’s Bureau—these things appeared to be trampling on everything sacred to the former norms of the South.<sup>134</sup> It represented a frontal attempt at racial parity which was antithetical to southern majority norms. After all, this was less than a decade after Chief Justice Roger

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<sup>128</sup> See *id.* at 30 (“All the testimony shows that it was impossible for a colored man in Memphis to get justice against a white man.”).

<sup>129</sup> See *id.* at 6 (noting “animosity existing between the Irish population of Memphis, which embraces nearly all the numbers of the city government, and the [African American] population” around time of Massacre).

<sup>130</sup> *Id.* at 180.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 6 (finding that “[t]he causes which led to the riot . . . was [sic] the animosity existing between the Irish population . . . and the [African American] population”); Waller, *supra* note 113, at 233 (arguing that “[t]here was more to this riot than tensions produced by post-war dislocation”).

<sup>133</sup> See H.R. REP. NO. 39-101, at 9 (noting long standing plans for riots and unsuccessful efforts to incite African Americans into violence).

<sup>134</sup> See *id.* at 5 (describing mob’s “feelings of the most deadly hatred to [African Americans], and particularly those who wore the uniform of the republic . . .”); Waller, *supra* note 113, at 233 (arguing that rioters in Memphis “were acting from a tradition in which collective violence was a semi-legitimate and ritualized expression of indignation over threats to the integrity of their community”).

Taney in *Dred Scott* struck a blow against personhood for blacks while stating that a black man had “no rights which the white man was bound to respect,”<sup>135</sup> thus affirming that blacks had no reasonable expectation of the rule of law. These personal ideas of what justice and law should be show the diversion between the formal and procedural rule of law and its substantive meaning to individuals.

The record is replete with threats against Yankees and great hostility towards Republicans—Radical Republicans in particular—and towards their preferred newspapers.<sup>136</sup> Merely treating black men as equals could earn a white man the severest consequences. W.G. McElvane testified to the circumstances around the shooting of a white man in the recent past: “I understood he made the remark that this negro was as good as any white man; and being asked to repeat it, he did, and was killed on the spot.”<sup>137</sup>

If “war is politics continued by other means,” then “peacetime in Memphis”—and elsewhere in the country, particularly the South—could be understood as the Civil War continued by other means.<sup>138</sup> Many Memphians, established or new, harbored deep resentments or outright hostility towards various instances of constituted authority whether national, state, or municipal. A Memphis policeman, apparently responding to calls of a public disturbance and attempting to disperse a crowd of African Americans congregated in the street on May 1, 1866 as the rioting began, reportedly told them: “Your old father, Abe Lincoln, is dead and damned.”<sup>139</sup> This phrase, reported more than once by those who later testified to the House Select Committee sums up the attitude of many of those who perpetrated the Massacre: opposed senses of order and of legitimate authority. For Rebels, to the extent that there was rule of law with equality before the law and accountability regardless of persons (or races), that represented a travesty, a trampling and rape of the rule of law.<sup>140</sup> The symbols of that trampling were many: old “dead and damned” Abe Lincoln, General Sherman, the Freedmen’s Bureau, the Union Army occupation of Memphis, and most bitterly, Fort Pickering and the 3rd United States Colored Heavy Artillery. The sight of men, whose degradation and legal and social inferiority were the “cornerstone” of the Confederacy, bearing their country’s arms represented to many the breakdown and trampling of the rule of law—and the surge of violence

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<sup>135</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (holding that African Americans were not citizens of United States), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>136</sup> See H.R. REP. NO. 39-101, at 29.

<sup>137</sup> *Id.* at 198.

<sup>138</sup> SIMPSON, *supra* note 83, at xv (arguing that in light of Clausewitz’s famous maxim, Grant understood Reconstruction as continuation of the Civil War through politics).

<sup>139</sup> H.R. REP. NO. 39-101, at 182 (testimony of Tony Cherry).

<sup>140</sup> *Id.* at 33 (noting that “civil-rights bill . . . is treated as a dead letter” by people in Memphis).

represented its restoration.<sup>141</sup> With the drastic changes in the law in the South, the rule of law had yet to stabilize. The clash of conflicting visions of law, justice, and social order lay at the heart of the tragedy that was the Memphis Massacre and, in its aftermath, the failure of accountability and the rule of law.

### III. THREE DAYS IN MAY 1866<sup>142</sup>

This Article cannot cover the intricacies of the violence that occurred in Memphis in the spring of 1866, but an overview of the events provides sufficient context to consider the role of the rule of law. Despite some local efforts to minimize the atrocities that occurred, this event quickly became nationally known as “the Memphis Massacre.”<sup>143</sup>

#### A. April 30

In the months following the passage of the Tennessee Disenfranchisement Act in 1865, there were a series of brutal encounters between Irish police and African-American Memphians.<sup>144</sup> These clashes between public officials and soldiers were symbolic of the broader issues in Memphis society.<sup>145</sup> One such encounter occurred on April 30.<sup>146</sup> A group of four policemen met three or four African-American soldiers in uniform on Causey Street, leading to pistols and knives being drawn and an exchanging of words.<sup>147</sup> The fracas left one African-American man “considerably injured” after he was struck with a pistol.<sup>148</sup> As the Majority report<sup>149</sup> finds:

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<sup>141</sup> *See id.* (noting that men in Memphis “seem inspired with as deadly hatred against the government as ever, and are guilty of the same incitation to violence, persecution, and oppression . . . that they were towards the men who were well disposed toward the Union men in 1861”).

<sup>142</sup> I detail here only a small portion of the events in May 1866, taken mostly from the House Select Committee hearings and reports, in addition to Professor Stephen V. Ash’s book. History is indebted to Professor Ash for his comprehensive history of the Memphis Massacre, the first and only of its kind. *See generally* ASH, *supra* note 63 (providing book-length study of the Massacre).

<sup>143</sup> *See* Doyle, *supra* note 57, at 30 (“The newspapers’ distinction between describing the event as a ‘massacre’ or a ‘riot’ illustrates the white elites’ desire to downplay the seriousness and the racial tension.”).

<sup>144</sup> *See id.* at 3 (noting that African Americans and Irish police “skirmished throughout the fall of 1865 and the spring of 1866”).

<sup>145</sup> *See id.* at 2-3 (describing tension between growing African-American population and increasingly powerful Irish).

<sup>146</sup> *Id.* at 3 (“The day prior, on April 30, . . . [a] group of three or four black soliders brawled with four Irish police officers.”).

<sup>147</sup> H.R. REP. NO. 39-101, at 64 (1866).

<sup>148</sup> *Id.*

<sup>149</sup> *See infra* text accompanying note 290 for a description of the Majority report.

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The affair of Monday afternoon, April 30, between some policemen and discharged negro soldiers, cannot be considered as the commencement of the riot; but as indicating a state of feeling which led to the violence of the afternoon of the next day, and which was only a repetition on a larger scale of what had happened before.<sup>150</sup>

This event itself was not unique to the time, and the men went on their way. But the built-up agitation is often cited as the sparkplug to the riot.<sup>151</sup>

B. *May 1*

The next day, May 1, about one-hundred African-American soldiers from the Union Army gathered on South Street.<sup>152</sup> Although it is unclear why the crowd gathered on that particular day, it is clear that the soldiers had been recently discharged and were awaiting payment for their military service.<sup>153</sup> During this period of time, soldiers allegedly “would leave [Fort Pickering] in large numbers, and wander about in those parts of [Memphis] usually inhabited by colored people, congregating in saloons, and indulging, more or less, in drinking.”<sup>154</sup>

The gathering of African-American soldiers on May 1 was described as “riotous and disorderly, and fully justified the interposition of the civil authorities.”<sup>155</sup> When police arrived, harsh words were exchanged.<sup>156</sup> Some African-American soldiers fired gunshots into the air.<sup>157</sup> Irish police, thinking that they were the targets of gunfire, began shooting into the crowd and the soldiers returned fire.<sup>158</sup> Ultimately, one white police officer and one white fireman were killed—interestingly, one from friendly fire and the other possibly

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<sup>150</sup> *Id.* at 6.

<sup>151</sup> See ASH, *supra* note 63, at 95 (discussing how quickly overnight word of scuffle passed through Memphis).

<sup>152</sup> H.R. REP. NO. 39-101, at 7.

<sup>153</sup> *Id.* at 6-7 (noting that soldiers “were detained for some time after they were discharged waiting to be paid off” and “appeared to have been on a ‘regular spree’” on May 1).

<sup>154</sup> *Id.* at 6.

<sup>155</sup> *Id.* at 7. As an aside, this description of African-American men, as detailed in the House Select Committee report, may very well be a complete misrepresentation. The perpetual idea that African Americans were vagrant or disorderly when left to their own devices is a historical trope that survived throughout historical documentation of this period. This idea was intended to perpetuate a narrative that simplified and demonized African Americans as needing oversight by whites. See ASH, *supra* note 63, at 194-95 (noting common belief that Radical reconstruction was “mistake based on the ‘fallacy’ that blacks were capable of exercising freedom responsibly”).

<sup>156</sup> H.R. REP. NO. 39-101, at 7 (describing comments made by policeman and chants from soldiers).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

from a self-inflicted wound.<sup>159</sup> The police retreated to obtain reinforcements, led by city recorder John C. Creighton.<sup>160</sup> When the police returned, the number of African-American soldiers had increased dramatically and the fighting continued, with hundreds of armed white men engaging in the confrontation.<sup>161</sup> Creighton and Shelby County Sheriff T.M. Winters approached General Stoneman to deploy federal troops to suppress the soldiers, which Stoneman initially declined.<sup>162</sup> Creighton returned to give a speech to the crowd, inciting the crowd to “clean every [negro] son of a bitch out of town.”<sup>163</sup> Despite the two deaths of white men being the focus of much coverage, there were many more deaths at the hands of the police.<sup>164</sup>

After the riots spread and Stoneman received further communications eliciting federal troop support for the mob, he initially granted Captain Allyn broad authority to respond and later instructed him to ensure the colored soldiers were disarmed.<sup>165</sup> At nightfall, however, the soldiers returned to Fort Pickering.<sup>166</sup> “When the [soldiers] went back into the fort the riotous

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<sup>159</sup> *Id.* at 7-8 (finding that fireman “was killed by one of his own friends” and noting conflicting opinions of three doctors, two of which suggested policeman might have shot himself).

<sup>160</sup> ASH, *supra* note 63, at 96-100; see H.R. REP. NO. 39-101, at 7 (noting that “police returned with re-enforcements”).

<sup>161</sup> H.R. REP. NO. 39-101, at 7 (noting that “colored soliders had also increased their numbers”); ASH, *supra* note 63, at 100-02 (describing movement of “many hundreds” of white citizens in mob).

<sup>162</sup> ASH, *supra* note 63, at 103.

<sup>163</sup> H.R. REP. NO. 39-101, at 256. It is this speech that the Freedmen’s Bureau Report attributes “in a great measure the continuance of the disturbances.” T.W. Gilbreth, *The Freedmen’s Bureau Report on the Memphis Race Riots of 1866* (May 22, 1866), <http://teachingamericanhistory.org/library/document/the-freedmens-bureau-report-on-the-memphis-race-riots-of-1866/> [https://perma.cc/2HZA-53YJ] [hereinafter “*Freedmen’s Bureau Report*”]. Creighton enticed the crowd to “go ahead and kill every damned one of the [negro] race and burn up the cradle.” *Id.*

<sup>164</sup> See H.R. REP. NO. 39-101, at 8 (“Dr. [J.N.] Sharp says that at this time he saw the policemen firing and shooting every negro they met. He saw one negro being chased and thirty shots fired at him; saw policemen shooting at him and beating him with their pistols and clubs. He saw another negro lying on the ground who had been shot through the shoulder, and heard that a number of citizens shot him, making the remark that every one of them (negroes) would be killed. At this very period of time also there was a negro killed on the Bayou bridge by a policeman, and two others also appeared to have been killed at this time; that on the return of the crowd to town they made an indiscriminate charge on men, women, and children.”).

<sup>165</sup> See *id.* at 246 (testimony of captain A.W. Allyn); ASH, *supra* note 63, at 122-24 (noting that Stoneman “grants the captain broad authority” but later “direct[s] him to . . . have Colonel Kappner disarm any of the former soldiers”).

<sup>166</sup> H.R. REP. NO. 39-101, at 7 (“[T]he . . . soldiers went directly to the fort, and were not out again during the night.”).

proceedings were at an end, as far as they were concerned.”<sup>167</sup> Despite the ceasefire, the police continued to gather reinforcements.<sup>168</sup> Around 10:00 p.m., they returned in even greater numbers and, finding “nobody on the streets and nothing to oppose them[,] . . . [the police-led mob] commenced an indiscriminate robbing, burning and murdering [of African-American communities]” that lasted throughout the night and continued the next day.<sup>169</sup> Despite the fact that the African-American soldiers were in the fort, “where the assistance of the military could have been had in securing the prompt arrest of every man concerned in the riotous proceedings,” the police force strengthened its numbers, becoming a mob, and “commenced an indiscriminate robbery, burning, and slaughter.”<sup>170</sup>

### C. May 2

Despite the hopes of some, the evening of May 1 was not the end of the deadly riot in Memphis. African Americans attempted to seek refuge from the Freedmen’s Bureau, but to no avail.<sup>171</sup> The Bureau had no troops and no way to protect them from the riots.<sup>172</sup> The newspapers fanned the flames of racial conflagration.<sup>173</sup> By 9:00 a.m. on May 2, Sheriff Winters was allegedly told that there was a mob of armed black men emerging from Fort Pickering, and in response a mob of white armed men began to fill the streets.<sup>174</sup> The mob was led by Sheriff Winters and Attorney General Wallace—the very men whose jobs it was to keep peace and enforce the rule of law for all persons in Memphis.<sup>175</sup>

The mob commenced burning down buildings and churches and committing murder and rape. A black woman, Frances Thompson, after serving a group of seven policemen dinner, was raped by at least four of them and beaten so badly that she was in bed for days.<sup>176</sup> Thompson was a former slave who used crutches

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<sup>167</sup> *Id.* at 7.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 8.

<sup>171</sup> ASH, *supra* note 63, at 130-31 (noting that African Americans came to Freedmen’s Bureau “pleading for protection”).

<sup>172</sup> *See id.* at 131 (noting that superintendent of Freedmen’s Bureau “has not a single armed soldier at his command”).

<sup>173</sup> *See id.* at 132. For more details on the role of the press in agitation surrounding the Massacre, see Marius Carriere, *An Irresponsible Press: Memphis Newspapers and the 1866 Riot*, 60 TENN. HIST. Q. 1, 2-15 (2001).

<sup>174</sup> ASH, *supra* note 63, at 132 (“Sheriff Winters is told at nine o’clock that armed black men have emerged from the fort . . . The downtown streets begin filling with excited white men, some carrying weapons.”); *see* H.R. REP. NO. 39-101, at 11.

<sup>175</sup> *See* H.R. REP. NO. 39-101, at 11 (“The police and the posse, under Sheriff Winters and Attorney General Wallace, . . . were guilty of violence, murders, burnings, and robberies.”).

<sup>176</sup> *Id.* at 196 (testimony of Frances Thompson). Other detailed accounts of rape include that of Harriet Armor, Rebecca Ann Bloom, Lucy Smith, and Lucy Tibbs. *See id.* at 14-16.

after having cancer in her foot.<sup>177</sup> Seven men, including two policemen, came to her home the evening of May 2 and, after they demanded dinner, Thompson made some biscuits and coffee.<sup>178</sup> After supper, the men said they “wanted some woman to sleep with.”<sup>179</sup> Thompson and a sixteen-year-old girl who lived with her, Lucy Smith, told them they “were not that sort of women, and they must go,” to which the men responded, “that didn’t make a damned bit of difference.”<sup>180</sup> When Smith attempted to escape, she was knocked down and choked.<sup>181</sup> The men threatened to shoot them and set the house ablaze if they did not “let them have their way.”<sup>182</sup> Thompson was violated by four men, after which they took all her clothes, money, and belongings.<sup>183</sup> After Thompson, Smith was seized and choked to such an extent that she could not talk for two weeks.<sup>184</sup> She was then also brutally raped without any regard for her life.<sup>185</sup>

Mayor Park insisted to Captain Allyn that the violence was all out of his jurisdiction because it was south of the city limits, and in the hands of Sheriff Winters—one of the leaders of the mob violence.<sup>186</sup> As the violence continued, the disarmed African-American soldiers were unable to offer any counterattack while houses burned down and men, women, and children were murdered.<sup>187</sup> On the evening of May 2, sixteen-year-old African-American girl Rachel Hatcher attempted to go into the burning house of a neighbor to try and rescue her, and in her act of heroism, she was shot dead by the mob and her body allowed to burn.<sup>188</sup> The mob continued unabated to burn churches, schools, and a storehouse used for supplies for freedmen.<sup>189</sup> Those responsible for enforcing the law abdicated the “rule of law” and joined in the lawlessness that struck terror in the hearts of the newly-freed slaves, while also resulting in rape, robbery, murder, confiscation, and destruction of property. It sent the clear message that African Americans did not come within the orbit of the rule of law.

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<sup>177</sup> *Id.* at 196.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 196-97.

<sup>184</sup> *Id.*

<sup>185</sup> This account comes directly from the testimony of Thompson and Smith, including as summarized by the Majority report. *See id.* at 13-14, 196-97 (reporting Majority’s conclusions and testimony of Frances Thompson and Lucy Smith).

<sup>186</sup> ASH, *supra* note 63, at 135.

<sup>187</sup> *Id.* at 124 (noting “there is not a living black person to be seen on the streets”).

<sup>188</sup> H.R. REP. NO. 39-101, at 16.

<sup>189</sup> *Id.* at 20-21.

D. *May 3*

On the morning of May 3, General Stoneman forbade the organization or assembly of any group of persons, armed or unarmed.<sup>190</sup> Reinforcements were called from Nashville and despite scattered incidents of violence, the Massacre ended by Friday morning, May 4.<sup>191</sup> Troops patrolled the city and Stoneman indicated his intent to investigate the Massacre.<sup>192</sup> This short narrative only briefly describes the atrocities that occurred in Memphis in Spring 1866. Ultimately, approximately forty-six African Americans were killed, seventy-five wounded, five women reported being raped, and upwards of one hundred structures were robbed and/or burned, including four churches and twelve schoolhouses.<sup>193</sup> The Massacre resulted in about \$130,000 in property damage.<sup>194</sup> No arrests were ever made.<sup>195</sup>

E. *Local Response*

On May 5, 1866, General Stoneman established a four-man commission to investigate the riot for its cause, damage, and a full account of the events.<sup>196</sup> Stoneman told Major General George H. Thomas that he believed the Rebel newspapers had little influence and there were many prominent people among the rioters.<sup>197</sup> Stoneman's commission, along with one by the Freedmen's Bureau, commenced early investigations and demanded a response from the City.<sup>198</sup> Despite these requests, no prosecution of any member of the mob ever occurred.<sup>199</sup> There was little else done on the local level.<sup>200</sup>

Fueling the narrative of the local response were the newspapers.<sup>201</sup> However, even the local "Rebel" newspapers were unable to characterize the African-

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<sup>190</sup> Doyle, *supra* note 57, at 4.

<sup>191</sup> ASH, *supra* note 63, at 163.

<sup>192</sup> *Id.* ("Summoning Runkle to his headquarters, he told him that he intended to appoint a military commission to investigate the rioting . . .").

<sup>193</sup> H.R. REP. NO. 39-101, at 36.

<sup>194</sup> *Id.* (showing table of property damage incurred).

<sup>195</sup> Waller, *supra* note 113, at 234.

<sup>196</sup> ASH, *supra* note 63, at 166.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 165-66.

<sup>199</sup> *Id.* at 176 (discussing lack of legal action, including arrests and indictments, taken against rioters).

<sup>200</sup> *Freedmen's Bureau Report*, *supra* note 163 ("The Hon. John Park, Mayor of Memphis, seemed to have lost entire control of his subordinates and either through lack of inclination and sympathy with the mob, or on utter want of capacity, completely failed to suppress the riot and preserve the peace of the city. . . . Since the riot no official notice has been taken of the occurrence either by the Mayor or the Board of Aldermen, neither have the City Courts taken cognizance of the numerous crimes committed.").

<sup>201</sup> For a full discussion of the "incendiary" local press, see generally Carriere, *supra* note 173. The *Evening Argus*, a local paper considered the "mouthpiece of the Confederate

American men as the main perpetrators of violence, although the narrative remained that the violence was provoked.<sup>202</sup> The *Public Ledger* even went so far as to suggest the Massacre would lead African Americans towards a renewed respect for the law.<sup>203</sup> Despite the overwhelming testimony and evidence of the Massacre being perpetrated mercilessly by the police force, the local response perpetuated the myth that freedmen sparked the events and conflict. The *Avalanche*, another Rebel newspaper, noted that the white man would not be ruled by the black man.<sup>204</sup>

#### IV. VIOLENCE IN THE RECONSTRUCTION ERA

In addition to the case study evaluated here in Memphis, race riots were emblematic in the immediate post-Civil War and Reconstruction Era (1865–77) prior to the passage of the Fourteenth Amendment and continued thereafter.<sup>205</sup> These riots were violent, destructive, oppressive, and resulted in large losses of African-American lives.<sup>206</sup> The riots sent the unmistakable message that the North may have won the war, but it did not win the hearts and minds of the white ruling class that clung to white supremacy and black inferiority.<sup>207</sup> White southerners refused to abandon their “property interest” in black lives, the Thirteenth Amendment notwithstanding.<sup>208</sup> Disenfranchisement of former Confederates, the rising populations of educated, wealthy African Americans, and the disturbance of the old status quo resulted in tensions between whites and freed African Americans across the South.<sup>209</sup> The number of race riots declined somewhat after 1870, but they grew in intensity and violence.<sup>210</sup> Another correlation between the riots was that many of them took place around elections and involved voter disenfranchisement, which was not the case in Memphis.<sup>211</sup>

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element,” described the “Great Riot” as a “War of Races,” with headlines like “South Memphis for Two Hours at the Mercy of an Infuriated Negro Mob.” *Id.* at 5-6. The *Argus* depicted the riot as one where “Negroes and Bad White Men Wholly to Blame.” *Id.*

<sup>202</sup> ASH, *supra* note 63, at 171.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> See Melinda Meek Hennessey, *Racial Violence During Reconstruction: The 1876 Riots in Charleston and Cainhoy*, 86 S.C. HIST. MAG. 100, 100 (1965) (listing several major race riots that occurred during Reconstruction).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* (“[R]eports of continued riots and Klan violence led finally in 1870 and 1871 to the passage of the Enforcement Acts.”).

<sup>208</sup> *Id.*

<sup>209</sup> *See id.*

<sup>210</sup> *Id.* (stating that riots declined after 1870 but a riot in Colfax, Louisiana in 1873 was particularly large and violent).

<sup>211</sup> *See id.* (observing overwhelming political nature of riots given that fifty-five percent of riots began with attempt by whites to break up African-American political meeting or prevent African Americans from voting).

The determination of whites to prevent African Americans from participating in the political process resulted in violent outbreaks and resulting massacres.<sup>212</sup> Despite these efforts, African Americans continued to fight back, fighting for both the substantive and procedural safeguards to uphold their newly gained rights.<sup>213</sup>

The riots analyzed in this Section were selected for several reasons. The closeness of the riots in the nature or timeframe to the Memphis Massacre was an important factor. Further, those that explained the causes of the riots, if they were politically or economically motivated, also played a role in the selection. Ultimately, these riots illustrate a violent time in the nation's history, when African Americans had to assert their right to freedom over the course of many years after the Civil War, notwithstanding the rule of law. Eventually, these efforts led to the passage of the Fourteenth Amendment. But for generations of African Americans, it was a long, bloody, and hard-fought struggle to get there. We view these annals of history against the backdrop of majoritarian rule of law.

A. *The New Orleans Riot, 1866*

As the Civil War ended, returning former Confederates acquired positions of power in Louisiana, ousting those loyal to the Union who had held political offices during the War.<sup>214</sup> Realizing that black suffrage would be one of the only ways to curb the "conservative tide," Unionists decided to enfranchise African-American males.<sup>215</sup> At the time, New Orleans had the "largest, the wealthiest, and the best-educated community" of freed African Americans in the country.<sup>216</sup> In April of 1864, Nathaniel P. Banks, a skillful politician from Massachusetts and a military commander of the Department of the Gulf, set up a convention to draft Louisiana's new constitution.<sup>217</sup> In the new version of the state constitution, slavery was abolished, but black suffrage was left to the legislature to decide.<sup>218</sup> In the fall of 1865, Louisiana's legislature passed laws to reinstate "the oppressive Black Code<sup>219</sup> that had been used before the war to control" the

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<sup>212</sup> *Id.* at 101 ("Blacks . . . resisted, as long as possible, white economic sanctions and violence aimed at driving them either into the Democratic fold or simply away from the polls together.").

<sup>213</sup> *Id.*

<sup>214</sup> JESSE G. HOLLANDSWORTH, AN ABSOLUTE MASSACRE THE NEW ORLEANS RACE RIOT OF JULY 30, 1866, at 1 (2001).

<sup>215</sup> *Id.* at 2 ("But when former Confederates seized the reins of government, some Unionists realized that black suffrage was the one tactic they might use to stem the conservative tide.").

<sup>216</sup> *Id.* at 10.

<sup>217</sup> *Id.* at 17, 19.

<sup>218</sup> *Id.* at 24 (stating that new constitution abolished slavery but contained significant loophole providing that legislature shall have power to extend suffrage to African Americans).

<sup>219</sup> For a definition of the "Black Code" see Donald E. Reynolds, *The New Orleans Riot of 1866, Reconsidered*, 5 J. LA. HIST. ASS'N 5, 6 n.4 (1964) ("The Black Codes consisted of

state's slave population.<sup>220</sup> When the conservative legislature convened in 1866, it declined to consider the issue of black suffrage.<sup>221</sup> Refusing to give up, members of the constitutional convention used tools of the legislature—a motion to adjourn the convention—that allowed the legislative body to reconvene at a later date.<sup>222</sup>

On July 30, 1866, the convention reconvened at the Mechanics' Institute.<sup>223</sup> Their purpose was “to draft a new state constitution that would enfranchise blacks and disenfranchise former rebels and then submit the new constitution for ratification by the people of Louisiana.”<sup>224</sup> Whites were frustrated at these reconvention efforts.<sup>225</sup> The Civil War “could not be refought, [and] many white Louisianans made up for their helplessness by violence against the freedmen, and against those Northerners . . .”<sup>226</sup> Despite the fact that most whites in Louisiana believed that reconvening was illegal and the equivalent to “organizing a coup d'état,”<sup>227</sup> General Absalom Baird, the local authority from the Union Army, refused to arrest the convention attendees on the grounds of unlawful assembly,<sup>228</sup> stating that arresting the men would be a “violation of their rights.”<sup>229</sup> Thereafter, the leader of the anti-conventionists, Lieutenant Governor Albert Voorhies contacted President Johnson.<sup>230</sup> Upon hearing about the convention, President Johnson assured Voorhies that he was behind them, and that he would “order the army to stand clear” in case a riot broke out.<sup>231</sup> As the session was taking place, whites began to gather around the building.<sup>232</sup> At the same time, a group of African-American convention supporters arrived and tried to push their way through the large crowd of whites.<sup>233</sup> The crowd grew to

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local and state laws designed to discipline and make profitable the newly freed Negro, who in many cases felt that freedom from slavery also meant freedom from work. In order to ensure themselves an adequate labor supply, the planters, dominating both the legislature and the parish police juries, enacted laws which reduced the freedman to a position of virtual peonage.”).

<sup>220</sup> HOLLANDSWORTH, *supra* note 214, at 2.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275, 1310 (2013).

<sup>225</sup> Joe Gray Taylor, *New Orleans and Reconstruction*, 9 J. LA. HIST. ASS'N 189, 194 (1968).

<sup>226</sup> *Id.*

<sup>227</sup> HOLLANDSWORTH, *supra* note 214, at 37.

<sup>228</sup> *See* Lash, *supra* note 224, at 1311.

<sup>229</sup> HOLLANDSWORTH, *supra* note 214, at 63.

<sup>230</sup> Lash, *supra* note 224, at 1311.

<sup>231</sup> HOLLANDSWORTH, *supra* note 214, at 48.

<sup>232</sup> *Id.* at 3.

<sup>233</sup> *Id.*

three to five hundred men, and after the two groups exchanged words, shots were fired, and within minutes, a riot broke out.<sup>234</sup>

The police and a large group of white civilians proceeded to surround a group of African-American men outside the hall.<sup>235</sup> The African-American men urged the police not to shoot, pleading “[d]on’t fire, take us prisoners, but don’t fire.”<sup>236</sup> The white police and civilians descended on the convention hall, encouraged that President Johnson would not interfere.<sup>237</sup> Local police engaged in an “absolute massacre,” attacking the convention hall and shooting down delegates as they attempted to flee, despite the delegates raising a white flag.<sup>238</sup> As the police continued their assault, the white crowds grew angrier and more violent, and eventually out of control.<sup>239</sup> Men rushed into gun stores to purchase more guns.<sup>240</sup> The army intervened later that afternoon, by which point at least forty-eight men were dead and two hundred were wounded.<sup>241</sup> Three white radical Republicans and one white rioter were also killed.<sup>242</sup> On August 2, Judge Edmund Abell gathered members of the grand jury to investigate the nature and cause of the riot.<sup>243</sup> Witness testimony from the Mayor, Governor Voorhies, policemen, and white citizens all placed the blame on the African-American men.<sup>244</sup> The grand jury’s report also blamed the convention delegates for inciting the violence.<sup>245</sup> In the surrounding context of other race riots, the New Orleans riot “increased the perception in the North that white southerners were determined to unleash a reign of terror on the recently emancipated slaves.”<sup>246</sup>

The most immediate political consequence of the New Orleans riot of 1866 was the riot’s impact on the election of 1866.<sup>247</sup> According to one author, “[a]part from the election itself, the New Orleans riot was one of the most heavily covered events of 1866 (the coverage of the two often intertwined).”<sup>248</sup> While President Johnson rallied to the defense of the attackers, Republicans

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<sup>234</sup> *Id.* at 3, 50.

<sup>235</sup> *Id.* at 108.

<sup>236</sup> *Id.* at 110.

<sup>237</sup> *Id.* at 94.

<sup>238</sup> Lash, *supra* note 224, at 1311-12.

<sup>239</sup> HOLLANDSWORTH, *supra* note 214, at 118.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 3.

<sup>242</sup> CARYN COSSÉ BELL, *REVOLUTION, ROMANTICISM, AND THE AFRO-CREOLE PROTEST TRADITION IN LOUISIANA, 1718-1868*, at 262 (1997).

<sup>243</sup> HOLLANDSWORTH, *supra* note 214, at 145.

<sup>244</sup> *See id.* at 145-46 (stating that twenty-nine white witnesses all testified that African-American men had started riot).

<sup>245</sup> *See id.* at 146.

<sup>246</sup> *Id.* at 148.

<sup>247</sup> Lash, *supra* note 224, at 1312-24 (describing Republican momentum created by New Orleans riot during elections of 1866).

<sup>248</sup> *Id.* at 1312.

standing for election across the country pointed to the riot as proof for the need of a radical reconstruction policy.<sup>249</sup> Voters sided with the latter; on November 6, the American people elected 144 Republicans to the U.S. House of Representatives as well as every Republican candidate running in a contested gubernatorial race.<sup>250</sup> Finally, the Republicans took control of every state legislature north of the Mason-Dixon line.<sup>251</sup>

The Republican Party relied upon their momentum in the 1866 midterm elections to continue advocating for state ratification of the Fourteenth Amendment.<sup>252</sup> Specifically, Republicans framed the New Orleans riot as State deprivation of individuals' freedom of speech and assembly.<sup>253</sup> Kurt Lash argues that Republican reliance on the New Orleans riot to support ratification is evidence that the Privileges and Immunities Clause was originally understood as an "incorporation" of the enumerated rights in the first eight amendments to the U.S. Constitution.<sup>254</sup>

One scholar observed that the New Orleans riot had a much greater national impact than did the Memphis Massacre, primarily because "the New Orleans conflagration took place in July . . . on the eve of a critical congressional election campaign. Also, the Memphis outbreak had little ostensible connection with politics. Memphis exploded because of demography, economics, and deep social conflict rather than for political reasons."<sup>255</sup> The New Orleans riot, on the other hand, could easily be characterized as a violation of individuals' political rights to free speech and assembly, and it was so characterized by national politicians and media outlets at the time.<sup>256</sup> To the extent that this is true, the New Orleans riot could have had a greater impact on the original public understanding of the Fourteenth Amendment. Only a few months after the Memphis Massacre, the New Orleans Massacre extended federal interest in the atrocities against freedmen in the South.<sup>257</sup> "Memphis and New Orleans!' quickly became a rallying cry in the momentous battle over the nation's reconstruction."<sup>258</sup>

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<sup>249</sup> See *id.* at 1312-24.

<sup>250</sup> *Id.* at 1324.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 1325 ("[S]upporters of the Republic Congress continued to stress the need to protect the enumerated constitutional rights of American citizens against abridgment by the states.").

<sup>253</sup> *Id.* at 1280-82, 1325.

<sup>254</sup> *Id.* at 1332-33 (asserting bipartisan public consensus in 1866 that ratification of Fourteenth Amendment would mean incorporation of constitutionally enumerated rights).

<sup>255</sup> RABLE, *supra* note 56, at 41-42. *But see* Doyle, *supra* note 57, at 72-73 (arguing that Memphis Massacre was just as "politically relevant" as New Orleans riot).

<sup>256</sup> See Lash, *supra* note 224, at 1312-24 (summarizing media coverage and Republican campaigns in summer 1866).

<sup>257</sup> See *id.* at 1279-80 (characterizing "massacre of freedmen" as national scandal).

<sup>258</sup> ASH, *supra* note 63, at 185.

B. *Pulaski, Tennessee Riot, 1867*

In 1865, the Ku Klux Klan was formed in Pulaski, Tennessee, which is in central Tennessee, around 200 miles from Memphis.<sup>259</sup> The organization was originally founded as a social club, but evolved into a terrorist organization.<sup>260</sup> In the light of the race riots in New Orleans and Memphis, the organization grew.<sup>261</sup> By 1868, its violent agenda became evident; Klan members used “brutal violence to intimidate Republican voters” ahead of the presidential elections to be held that year.<sup>262</sup> In Pulaski itself, a riot broke out in the summer of 1867.<sup>263</sup> Like in Memphis, historians tend to link its outbreak to a single incident—a feud between a white man, Calvin Lamberth, and an African-American man, Calvin Carter.<sup>264</sup> Carter had allegedly threatened to whip an African-American woman by the name of Lucy Reynolds if he caught her going to Lamberth’s house.<sup>265</sup> Reynolds informed Lamberth about the threats Carter had made, and Lamberth went out with a stick in his hand to find Carter, but was unsuccessful.<sup>266</sup> In the afternoon, Lamberth and his friends stood outside Carter’s grocery store with pistols.<sup>267</sup> Carter’s acquaintance, Whitlock Fields, went to warn Carter, but was shot by Lamberth.<sup>268</sup> Following this shooting, an estimated eighteen white men armed themselves and gathered outside Carter’s store.<sup>269</sup> The African Americans inside the store tried to defend themselves.<sup>270</sup> At one point, Police Chief Malone brokered a ceasefire: the white men promised to back away if the African Americans quieted down.<sup>271</sup> The African-American men huddled together under Malone’s advice, and the white men rushed towards the store, shooting six men.<sup>272</sup> Two African-American men were killed, including Calvin Carter, and four were injured as a result of the riot.<sup>273</sup> No white men were injured or killed.<sup>274</sup>

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<sup>259</sup> See WGBH, *Grant, Reconstruction and the KKK*, PBS.ORG, <http://www.pbs.org/wgbh/americanexperience/features/grant-kkk/> [<https://perma.cc/9ZDP-7QV2>] (last visited Nov. 7, 2018) (describing founding of Ku Klux Klan).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> Letter from Michael Walsh, Sub Assistant Comm’r, Tenn., to W.P. Carlin, Assistant Comm’r, Tenn. (Jan. 11, 1868) (on file with National Archives and Records Administration).

<sup>264</sup> *Id.* (summarizing Michael Walsh’s investigation of riot in Pulaski, beginning with feud between Lamberth and Carter).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* (listing names of victims of Pulaski riot, along with names of shooters).

<sup>274</sup> *Id.*

Walsh concluded that the white men's readiness and preparedness could "only be done by an organization well matured and drilled"—the Ku Klux Klan.<sup>275</sup>

Although the Pulaski riot was on a much smaller scale than Memphis or New Orleans, its connection to the Klu Klux Klan makes it significant here. The inability for the constable's ceasefire to govern over the inner workings of the Klan signify a breakdown of the formal rule of law. The Klan was creating its own rule of law in the South.

#### V. THE MASSACRE AFTERMATH: THE RULE OF LAW, THE FEDERAL RESPONSE, AND THE FOURTEENTH AMENDMENT

The riots discussed gained national attention and meanwhile, the victims were unable to secure any relief from the existing laws. Congress was amid debates on the content and passage of the Fourteenth Amendment.<sup>276</sup> Contemporaneously, the House Select Committee began investigating the Memphis Massacre—including the failures of local officials and existing legal remedies.<sup>277</sup> From this investigation, and the reports that followed, this Article now analyzes how the Massacre and the federal response thereto precipitated the Fourteenth Amendment's passage, altering the state of the rule of law. It was the violence and disastrous response from President Johnson that spurred the need to require states to equally protect the rights of all.<sup>278</sup> Both the Memphis Massacre and New Orleans riot were a "living lesson" on the necessity of the Amendment—violence that led only to the expansion of protection from such violence.<sup>279</sup>

#### A. *Federal Response to the Massacre*

##### 1. Committee Reports

On May 10, 1866, just days after the Massacre, the U.S. House of Representatives continued their debate on whether to propose the Fourteenth Amendment for ratification by the states.<sup>280</sup> During their discussion of Section

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<sup>275</sup> *Id.*

<sup>276</sup> See Lash, *supra* note 224, at 1284-88.

<sup>277</sup> See generally H.R. REP. NO. 39-101 (1866).

<sup>278</sup> See KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 197 (2014) (citing Memphis and New Orleans riots as catalyst for passage of Fourteenth Amendment).

<sup>279</sup> *Id.* at 200-03 (describing violence in Memphis and New Orleans as "outrage . . . committed under the Constitution").

<sup>280</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866) (statement of Rep. Stevens).

3 of the proposed Amendment,<sup>281</sup> an impassioned Republican Representative, Thaddeus Stevens, alluded to the Massacre.<sup>282</sup>

Days later, on May 14, Representative Stevens successfully motioned for the House to create a special committee consisting of three representatives—two Republicans and one Democrat<sup>283</sup>—to travel to Memphis “to inquire into the origin, progress, and termination of the riotous proceedings; the names of parties engaged in it; the acts of atrocity perpetrated; the number of killed and wounded, and the amount and character of the property destroyed . . .”<sup>284</sup> The members of the House Select Committee arrived in Memphis on May 22 and spent two weeks interviewing 170 witnesses.<sup>285</sup> On June 6 they departed for Washington, D.C.<sup>286</sup>

After the Committee returned to Washington, D.C., but before they published their comprehensive report, on June 13, the House voted to officially propose the Fourteenth Amendment for ratification.<sup>287</sup> Although the Committee’s report had not been officially published, one author notes that the Memphis Massacre “had developed into a national news story” due, in part, to sketches of the violence published in national media outlets like New York City’s *Harper’s Weekly*.<sup>288</sup> Although these news reports were “sensationalized to some degree,” they were “still critically important to the ongoing dialogue about southern Reconstruction.”<sup>289</sup>

By July 18, the Committee had compiled a full report with the results of their investigation.<sup>290</sup> The committee’s report included: (1) a thirty-six-page “Majority report” prepared by the two Republican members of the committee;<sup>291</sup>

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<sup>281</sup> At the time, Section 3 would have stripped Confederate-sympathizers of the right to vote in elections for the U.S. House of Representatives and for the President. This Section did not appear in the final Amendment; instead, it was amended to merely prohibit these individuals from holding office. *Id.*; Doyle, *supra* note 57, at 75 (stating Section 3’s final effect on those involved in rebellion against Union).

<sup>282</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866) (“Let not these friends of secession sing to me their siren song of peace and good will until they can stop my ears to the screams and groans of the dying victims at Memphis. . . . Tell me Tennessee or any other State is loyal of whom such things are proved!”).

<sup>283</sup> *See id.* at 2572.

<sup>284</sup> H.R. REP. NO. 39-101, at 1 (1866).

<sup>285</sup> *Id.* (explaining the House Select Committee’s process of interviewing and compiling report).

<sup>286</sup> *Id.* at 49.

<sup>287</sup> *See* CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866).

<sup>288</sup> Doyle, *supra* note 57, at 55.

<sup>289</sup> *Id.*

<sup>290</sup> H.R. REP. NO. 39-101, at 1.

<sup>291</sup> *Id.* at 1-36 (providing detailed account of events in Memphis, including numerous testimonies).

(2) an eight-page “Minority report” prepared by their Democratic colleague;<sup>292</sup> (3) a five-page “Journal” of the committee’s proceedings in Memphis;<sup>293</sup> and (4) a 352-page compilation of testimony gathered during the investigation.<sup>294</sup>

The Majority report summarized the committee’s factual findings (which this Article relies on) and provided an overview of the collected testimony. On the other hand, the Minority report emphasized the aggressive nature of the initial gathering of African-American soldiers. It further argued that the social instability in Memphis was largely the consequence of the Tennessee Disenfranchisement Act, which stripped authority away from the virtuous, gentlemen class and empowered the loyal, but “inferior” (and equally prejudiced) Irish working class.<sup>295</sup> The five-page journal merely details the precise dates that the committee interviewed particular witnesses during their trip to Memphis.<sup>296</sup> Finally, the 352-page collection of testimony represents the committee’s most relevant interviews with eyewitnesses, and is a unique and unparalleled tool for understanding the events.<sup>297</sup> After extensive debate in the House of Representatives, that body voted to publish and publicly circulate a thousand copies of the committee report including the 352 pages of collected testimony and ten thousand copies of the report without the collected testimony.<sup>298</sup>

a. *The Select Committee’s Report: The Republican Majority’s Account*

When evaluating the Majority report, the first clear distinction from the Minority account is the Majority’s characterization of the government and law enforcement. An introduction to the key players and a distinct narrative of the rule of law and its breakdown emerges throughout the report, based on the characterizations provided by the Majority and its findings of where the “blame” laid. This characterization includes the African-American community as sharing in the blame in the early stages of the riots, however.<sup>299</sup> It states that their “behavior was riotous and disorderly, and fully justified the interposition of civil authorities.”<sup>300</sup> Nevertheless, the Majority report does not assign the black soldiers or the black community at large the principal blame for the riots the way

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<sup>292</sup> *Id.* at 37-44 (outlining alternative accounts of events in Memphis, blaming violence on African-American soldiers).

<sup>293</sup> *Id.* at 45-49.

<sup>294</sup> *Id.* at 50-394.

<sup>295</sup> *Id.* at 42 (“In the policy of disfranchising a large part of the better classes of society may be found one and a prominent cause of the sad and cruel tragedy of Memphis.”).

<sup>296</sup> *Id.* at 45-49.

<sup>297</sup> *Id.* at 50-394.

<sup>298</sup> Doyle, *supra* note 57, at 60.

<sup>299</sup> *Id.* at 6-7 (establishing disorderly gathering of African-American soldiers as initial cause of violence).

<sup>300</sup> H.R. REP. NO. 39-101, at 7 (recounting events leading to first clash between police and African American soldiers).

that the Minority report does.<sup>301</sup> On the contrary, the Majority describes the initial arrest as “without cause,” and from there continually applauds the character of the black soldiers.<sup>302</sup> Insisting that “nothing could be more . . . malicious” than suggesting that the African-American community or the Freedmen’s Bureau’s teachings were to blame for the riots, the Majority report contrasts with the local press.<sup>303</sup> Put simply, the Majority concludes “the negroes had nothing to do with it after the first day, except to be killed and abused.”<sup>304</sup> The account admires the “character” displayed by black troops amidst the trying circumstances without any access to arms.<sup>305</sup>

On the other hand, the Republican Majority describes the police as racist and loathsome at worst, incompetent at best.<sup>306</sup> Interestingly (and ironically given the Majority’s disdain for prejudice), much of the Majority’s scorn toward the police stems from the latter’s Irish background.<sup>307</sup> The Majority details the incompetence of police leadership in keeping the peace and quelling the violence, including Shelby County Sheriff Winters and Chief of Police Garrett.<sup>308</sup> On multiple occasions, the Majority report explicitly blames the police force and its leadership for escalating the violence.<sup>309</sup> In the process, the Majority characterizes the police as a barbaric, “bloodthirsty” lot that indiscriminately shot any black person who crossed their path.<sup>310</sup> Describing the leadership in the mob of Attorney General Wallace, the Majority stated: “[n]o language of denunciation is too severe to characterize the conduct of a high officer of the law in thus lending himself to become a leader of a bloodthirsty mob in the work of a massacre, incendiarism, and robbery.”<sup>311</sup>

Criticisms of the breakdown of the law include those directed at government officials for their failure to restore peace and order amidst the riots. The Majority lamented General Stoneman’s delays sending federal troops to quell the violence and implied his failure to recognize the seriousness of the situation contributed to the length of the Massacre.<sup>312</sup> The Majority’s focus on the failures of the formal legal order in Memphis confirms a conclusion that the established

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<sup>301</sup> Compare *id.* at 34 (describing massacre as “mature deliberation to murder and destroy the colored people”), with *id.* at 39 (describing African-American soldiers as “aggressors”).

<sup>302</sup> *Id.* at 7 (asserting initial violence caused by police aggression).

<sup>303</sup> *Id.* at 5.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 31-32.

<sup>306</sup> *Id.* at 34.

<sup>307</sup> *Id.* at 9 (“The policemen . . . were nothing more than a set of lawless thieves; the whole city government was Irish, and was of about the same character.”).

<sup>308</sup> *Id.* at 11, 24-25.

<sup>309</sup> *Id.* at 24-25, 33-34.

<sup>310</sup> *Id.* at 6-9, 25 (“Many of the officers of the law connected with the mob were identified as being conspicuous as leaders in the riotous proceedings . . .”).

<sup>311</sup> *Id.* at 12.

<sup>312</sup> See *id.* at 2-3, 27-28.

processes were unable to quell a massive upswell of racial violence—one where the civic and judicial leaders whose jobs it was to protect citizens were those leading the charge.

The failures of the procedural/formal rule of law lend a question: would the substantive rule of law cure the failures? Much of the account that the Congressional Republicans give of the Memphis Massacre employs language of “injustice” and a lack of respect for the “rights” of African Americans, all the while blatantly characterizing the police’s involvement as barbaric acts of racism and prejudice.<sup>313</sup> The Majority outlines the failures of the civil authorities in Memphis:

The fact that . . . not a single step had been taken to *vindicate the law* by the civil authorities, is considered to be one of the most alarming signs of the times. That no effort should have been made by the civil authorities to bring to *justice* the perpetrators . . . is a burning and lasting disgrace to the officers of the law, and a blot on the American name.<sup>314</sup>

It was the inability for there to be any justice for African Americans against whites, even in a scenario as violent and well-documented as the Massacre, that fueled the Majority’s contempt. As described earlier in this Article, notions of “justice” and protection of “rights” are the province of substantive rule of law.<sup>315</sup> Here, we begin to see the Majority developing a clear theme: that when the law—and those who are expected to enforce it—sanctions injustice, the rule of law is not serving its proper purpose. Accordingly, it seems that the Majority is lamenting the absence of substantive rule of law. This in turn makes it that much more revealing that the proposed solution to this absence was the Fourteenth Amendment. In other words, because neither the government nor law enforcement can be trusted to act justly, the cure must come in the form of a *just law*, thus echoing the classic ideal of having a “government of *Laws*, not of *Men*.”<sup>316</sup> The Majority not only decried the Memphis Massacre as racist violence, but it also repeatedly expressed dismay at the fact that it was government-sanctioned violence.<sup>317</sup> Perhaps, then, part of the rule of law’s breakdown in Memphis is attributable to its failure to place a check on arbitrary government power, a goal often attributed to the rule of law.<sup>318</sup>

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<sup>313</sup> *Id.* at 33 (“The hopes based upon this law that the colored people might find protection under it are likely to prove delusive . . .”).

<sup>314</sup> *Id.* at 27 (emphasis added).

<sup>315</sup> See *supra* Section I.C (discussing distinction between substantive and procedural law).

<sup>316</sup> HUME, *supra* note 25, at 94.

<sup>317</sup> See H.R. REP. NO. 39-101, at 5, 11, 20, 34 (“The mob, finding itself under the protection and guidance of official authority . . .”).

<sup>318</sup> See Zywicki, *supra* note 29, at 4-11 (discussing role of rule of law in constraining governmental actors).

Some scholars and international organizations attribute failures of procedural rule of law to its divorce from the rule of law's more substantive dimension.<sup>319</sup> Similarly, the Republicans also note the failures of procedural rule of law, for they pointed out repeatedly that no tribunal would hear the victims' grievances or prosecute the guilty parties because: a) doing so would involve prosecuting white men for crimes against black persons, which courts (and their juries) were reluctant to do at that time, and b) Memphis had *no laws* in place to protect the rights of African Americans.<sup>320</sup> The Minority report also notes the lack of recourse African Americans have in the court system, but it does not place nearly as much emphasis on this point as the Republicans do in theirs.<sup>321</sup> Even the one place where redress was available for blacks—the Freedmen's Bureau courts—lacked the power to provide any retribution after the Massacre.<sup>322</sup>

The lack of a response to the perpetrators of the Massacre was not new in Memphis. The Majority recounted a murder by a policeman named Maloney several months before the Committee's arrival: "[t]he officer in command at Memphis[] . . . knowing full well that Maloney would not be punished through the civil tribunals, had him tried by a military commission, by which he was found guilty and sentenced to imprisonment in Nashville."<sup>323</sup> General Stoneman testified that he "did not believe the perpetrators of the outrages during the Memphis riots would ever be punished unless the strong arm of the federal government was made use of for that purpose."<sup>324</sup>

Judge William Hunter's testimony is particularly telling. After explaining that his court had exclusive jurisdiction over the wrongs committed in Memphis, he expressed doubt that any of the African-American victims would find justice through the courts and believed that the white police responsible for the atrocities were not likely to be penalized through the court system either.<sup>325</sup> Judge Hunter also discussed the different "classes" of people, indicating that juries consisted of men of "the ignorant portion of [Memphis's] population" and,

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<sup>319</sup> See, e.g., FULLER, *supra* note 28, at 644-48 (suggesting that even where there are clear laws in place that are being enforced, failures of substantive law can still lead to the most unjust societies).

<sup>320</sup> See H.R. REP. NO. 39-101, at 75 (finding black citizens had remote chance of receiving remedies from judicial system).

<sup>321</sup> See *id.* at 42-43 ("It may be alleged that the people of Memphis had failed, by public expression, to condemn the outrages and acts of cruelty perpetrated by the mob, to take any steps to bring to punishment the perpetrators of these unlawful acts.").

<sup>322</sup> See *id.* at 5, 238-239 (statement of Judge Barbour Lewis) (discussing "admirably managed" Memphis Freeman's Bureau and lack of lawful remedies for those effected by mob violence).

<sup>323</sup> *Id.* at 30.

<sup>324</sup> *Id.* at 28.

<sup>325</sup> See *id.* at 75 (stating black citizens have "remote" chance of receiving justice because "[t]here is another class, from whom most of our juries are made up, that would be utterly incapable of doing justice, and enforcing the law with anything like impartiality. . . . They have all sympathized with, or been engaged in the late rebellion").

therefore, were less likely to see that justice would be met.<sup>326</sup> Recall that procedural rule of law emphasizes values such as fair trial procedures, due process, and judicial independence.<sup>327</sup>

Assuming that jury impartiality belongs on that list of values (which would be a safe assumption), Judge Hunter's testimony could be a case in point that a government of laws is preferable to a government of men: that is, there are no guarantees that the individual players making up the judiciary will be "the best of men," which necessitates having the "best of laws" in place. On the other hand, this testimony also suggests that the rule of law's effectiveness directly depends on the character of the men who sway the system. One example—John Creighton, the Recorder, had killed a man six months prior to the congressional interviews, but was released by Judge Hunter when the killing was found to be a justifiable homicide.<sup>328</sup>

The Majority report implies that the absence of *substantive* rule of law and the inadequacy of *procedural* rule of law led to the overall breakdown of the rule of law during the Massacre, and, eventually, the solution to mending the rule of law is to cure its *procedural* defects through an improved emphasis on the rule of law's *substantive* purposes. The Minority report took a different perspective.

b. *The Select Committee Report: The Democratic Minority's Account*

Unlike the Majority report, the Democratic Minority report placed the blame upon the "population" of Memphis for the breakdown of the rule of law.<sup>329</sup> Without holding the police or government officials completely blameless, the report largely blames the African-American community for initiating the violence which led to the Massacre.<sup>330</sup> In doing so, the Minority report implies that the police committed terrible acts against African Americans only because the latter provoked the former, who were simply acting as peacekeepers.<sup>331</sup> In some instances, the report even excuses the white rioters' behavior, focusing instead on the problems with disenfranchising the former confederate persons—concluding that "the franchise law of the State of Tennessee has operated most injuriously to the preservation of order and peace and the security of society in

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<sup>326</sup> *Id.* at 75.

<sup>327</sup> *See* RAZ, *supra* note 40, at 216-18 (discussing various facets of procedural rule of law).

<sup>328</sup> *See* H.R. REP. NO. 39-101, at 198.

<sup>329</sup> *See id.* at 41.

<sup>330</sup> *Id.* at 39-41 ("The police officers having conducted themselves with a commendable prudence and firmness in the discharge of their official duty, it is to be greatly regretted that they did not afterwards continue in the same line of conduct. Had they done so, the city of Memphis would have been spared the scenes of savage cruelty . . .").

<sup>331</sup> *See id.* at 38-41 ("[T]here can be but one conclusion or opinion, and that is that the colored soldiers were the aggressors and commenced the fight with the officers of the law in the discharge of their official duty . . .").

the city of Memphis.”<sup>332</sup> The assignment of principal blame thus was laid on the disenfranchisement of the “superior businessmen” of Memphis because members of the “inferior classes” voted for incompetent government officials incapable of handling the massacre.<sup>333</sup> In this sense, the Minority report places the blame on the voting citizens of Memphis—implying that there was no breakdown in the rule of law, only enforcement of the peace.

## 2. Breakdown of the Rule of Law: Common Themes Between the Two Reports

Both the Majority and the Minority reports convey palpable disgust toward the Irishmen involved in the Massacre, especially the Majority report.<sup>334</sup> In short, both reports attributed the Massacre to the acts and omissions of certain categories of people, the only difference being the people they chose to blame more. Further, not only do both reports lament the incompetency of the Government in quelling the riots, but they also blame the people who voted these incompetent government officials into power. Both reports imply that the people comprising the voting population are “inferior,” either in terms of class, political affiliation, or ethnic background—namely the Irish.<sup>335</sup> Even the corruption of Creighton was blamed on the Irish by the Majority.<sup>336</sup>

The blame for racial animosity also shifted to an Irish versus African-American rhetoric in the Minority report:

In the policy of disfranchising a large part of the better classes of society may be found one and a prominent cause of the sad and cruel tragedy of Memphis. Another and perhaps not less active cause of the Memphis riot is to be found in the antagonistic interest and feelings of hostility that exist between the laboring classes of foreign population and the negro race.<sup>337</sup>

One takeaway from this common strain underscored in both reports is that having a “government of laws” is not enough, for the rule of law’s effectiveness also rests on having *the right kind of men*—electing *the right kind of men* to uphold the law. To the authors of the Majority report, the men who oversaw upholding the law were the catalyst to its breakdown and limited any attempt to quell the violence. For example, the report points to General Stoneman originally holding off on sending troops because he trusted the citizens to sort it

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<sup>332</sup> *Id.* at 41-42. This theme arises in the Majority report as well, albeit to a lesser extent. *See id.* at 28-29.

<sup>333</sup> *See id.* at 42-43.

<sup>334</sup> This, again, is interesting given the Majority’s progressive moral stance against prejudice towards African Americans.

<sup>335</sup> *See* H.R. REP. NO. 39-101, at 6, 9, 30, 41-42, 297.

<sup>336</sup> *Id.* at 24 (“[Creighton] had only been elected by the votes of the Irish, who managed, through perjury or otherwise, to become registered voters.”).

<sup>337</sup> *Id.* at 42.

out amongst themselves.<sup>338</sup> Yet, a later letter by Stoneman demanded information and assurances that the “rights and privileges of the colored population of this city and its surroundings shall be respected and protected.”<sup>339</sup>

Notably, the Majority applauds General Stoneman’s assertion that the people of Memphis will be “governed” if they cannot govern themselves.<sup>340</sup> Again, this harkens back to the classic assertion that the reason why we need a government is because men are inherently corruptible and therefore cannot be trusted to govern themselves without chaos ensuing.<sup>341</sup> But this assertion that men must be governed begs the question: governed by what, or by whom? The answer we find in rule of law scholarship is “laws.”

The philosophers and academics who have pondered the rule of law often wrestle with the concept of “a government of laws, not of men.” Here, the Congressional reports seem to contradict this conception of the rule of law, suggesting instead that the rule of law’s effectiveness depends on the character of both those who govern and the governed: that is, the rule of law requires having “the right kind of men” enforcing the laws and voting for the law-enforcers. This theme raises a troubling question: can the rule of law ever be perfected if people are always going to be imperfect? Here, the Majority report implies that the rule of law broke down in Memphis because “the people” could not govern themselves. Additionally, the ones who were supposed to govern them were either incompetent, or they were the ones sanctioning or participating in the violence against the African-American community and its sympathizers. However, the blame ultimately circles back to “the people” for voting in the government officials who share responsibility for the Massacre’s escalation. In sum, the Majority report raises a dilemma, namely that the rule of law cannot protect the people from arbitrary abuses of government power if the people cannot protect themselves from it. The parting question that this dilemma raises is this: how does one reconcile this dilemma with the Republican Majority’s narrative, in which the solution for a flawed “government of *men*” is to ratify better *law*, one that restores substantive rule of law?

#### B. *Passage of the Fourteenth Amendment*

Ironically, just four days after the Committee submitted its report to the House, Congress voted to readmit the state of Tennessee into the Union.<sup>342</sup>

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<sup>338</sup> See *id.* at 3-4 (indicating General Stoneman would not interfere until “it had been fully demonstrated to him that the public safety imperatively required it”).

<sup>339</sup> *Id.* at 4 (“I have to assure you . . . the people of Memphis, that if they cannot govern themselves as a law-abiding and Christian community, they will be governed, and that hereafter it will be my duty and privilege to see that there are no more riotous proceedings or conduct, either on the part of whites or blacks, or city authorities.”).

<sup>340</sup> *Id.* at 4 (“The committee desire to say that, in their judgment, General Stoneman is deserving of the highest commendation for his prompt and determined action . . .”).

<sup>341</sup> See ARISTOTLE, *supra* note 24, at 88 (mentioning men have “element of the beast”).

<sup>342</sup> See Doyle, *supra* note 57, at 76.

Under the state's post-war Republican governor, Tennessee quickly aligned itself with the Republican approach to Reconstruction as advocated by the most radical members of the House in Congress.<sup>343</sup> As previously mentioned, the state's General Assembly had already disenfranchised citizens who had participated in the rebellion.<sup>344</sup> Additionally, just two weeks after the Memphis Massacre, the Tennessee General Assembly passed the "Metropolitan Police Act," which essentially stripped authority from the local police forces of Davidson (Nashville), Shelby (Memphis), and Hamilton (Chattanooga) Counties and replaced them with commissioners appointed by the governor.<sup>345</sup> Although the law had some defects,<sup>346</sup> it apparently had some positive effect. Even Representative Stevens issued a half-hearted retraction:

I do not pretend that [Tennessee] is loyal. I believe this day that two thirds of her people are rank and cure cruel rebels. But her statesmen have been wise and vigilant enough to form a constitution which bridles licentious traitors and secures the State government to the true men. And she has an Executive fit to ride upon the whirlwind . . . [S]he has two or three men in her delegation who would have saved Sodom.<sup>347</sup>

The Memphis Massacre had an impact far beyond Tennessee. Scholars have taken a variety of approaches to analyzing the potential impact of the Memphis Massacre on the congressional proposal and state ratification of the Fourteenth Amendment. For example, while some scholars believe the Massacre is probative of the original meaning of the Privileges and Immunities Clause, others have analyzed the Massacre with an eye towards understanding the Due Process and Equal Protection Clauses.<sup>348</sup> From all perspectives, given the timing and the riots across the South, it was clear that the existing rule of law provided little protection to freedmen. The Fourteenth Amendment was aimed to be the

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<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 2.

<sup>345</sup> *Id.* at 48.

<sup>346</sup> See *Meeting of the Legislature—No Quorum in House—The Constitutional Amendment—Brownlow on Political Justice—Metropolitan Bill Defective*, PUB. LEDGER (Memphis), July 9, 1866, at 2, <http://chroniclingamerica.loc.gov/lccn/sn85033673/1866-07-09/ed-1/seq-2/> [<http://perma.cc/NXS3-K4GY>] (finding Police Act defective because of "want of adequate remedy in case of the refusal of the County Court to lay and collect the necessary revenue [sic] to defray expenses of the police, and power of evil disposed persons in combination to arrest operations of the commissioners by injunctions and wanton litigations").

<sup>347</sup> Thaddeus Stevens, Speech on Readmission of States (July 28, 1866), in 2 THE SELECTED PAPERS OF THADEUS STEVENS 174, 178 (Beverly W. Palmer & Holly B. Ochoa eds., 1998).

<sup>348</sup> See, e.g., Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 569-70 (1991) (arguing massacres inform Due Process and Equal Protection clauses); Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 447-48 (2009) (arguing massacres are probative of original meaning of Privileges and Immunities Clause).

answer to these issues. In considering the Massacre's impact on the Fourteenth Amendment, we turn to scholarship focused on two particular areas: 1) the Privileges and Immunities Clause and 2) the Due Process and Equal Protection Clauses.

### 1. Privileges and Immunities Clause

Scholar Kurt Lash discusses the Fourteenth Amendment as being “a matter of life and death in the southern states” after the Memphis Massacre and New Orleans riot.<sup>349</sup> It was the “feckless” response from President Johnson that heightened concern that there would be no enforcement of the Thirteenth Amendment in the South.<sup>350</sup> Lash argues that the Memphis Massacre is evidence that the Privileges and Immunities Clause of the Fourteenth Amendment originally protected individuals against State infringement of enumerated constitutional rights, such as the freedom of speech and assembly.<sup>351</sup> Specifically, Lash points to the fact that on July 4, 1866, just two months after the Memphis Massacre, Southern loyalists issued a call for a convention in Philadelphia to advocate for political reform.<sup>352</sup> The call to action, which was “[w]idely published in newspapers throughout the South and North, . . . emphasized both the failure of the southern states and the [Johnson] Administration to protect the constitutional rights of citizens of the United States . . . .”<sup>353</sup> This perspective outlines a belief that it was the formal rule of law that failed in Memphis in the spring of 1866.

Considering that argument, the Fourteenth Amendment can be seen as the answer to a failure of the federal government to enforce the citizenship rights recently received by freedmen. Thus, the Fourteenth Amendment's passage would cure the defects that allowed the rampages in Memphis and New Orleans and other cities to occur. Lash's argument is based in the language of the Privileges and Immunities Clause—which enforces upon states the burden to give all citizens equal rights under the law.<sup>354</sup> On the other hand, Professor Bret Boyce has offered a critique of Lash's view of the Privileges and Immunities Clause.<sup>355</sup> According to Boyce, the Memphis Massacre did not occur because of the “‘making’ or ‘enforcing’ of laws abridging the privileges and immunities of

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<sup>349</sup> Lash, *supra* note 224, at 1279-80.

<sup>350</sup> *Id.* at 1280.

<sup>351</sup> *See id.* at 1307-13 (detailing Republican's push for “rights of speech, press, assembly, and due process”). Lash rejects the label of “incorporation,” primarily because “what we are after has nothing to do with incorporated texts from 1787. Our search is for the public understanding of texts added to the Constitution in 1868.” Lash, *supra* note 348, at 447-48.

<sup>352</sup> Lash, *supra* note 224, at 1308.

<sup>353</sup> *Id.*

<sup>354</sup> *See* U.S. CONST. amend. XIV, § 1.

<sup>355</sup> *See* Bret Boyce, *The Magic Mirror of “Original Meaning”: Recent Approaches to the Fourteenth Amendment*, 66 ME. L. REV. 29, 62 (2013) (“Unfortunately, the implications of this history are far more ambiguous than Lash maintains.”).

the citizens of the United States.”<sup>356</sup> No state law or city ordinance was in any way remotely relevant to the riot.<sup>357</sup> Viewing the Memphis Massacre from Boyce’s perspective, it was the substantive rule of law—the law of men—that caused the Massacre to occur. Boyce argues that the Massacre was not “based on any legal authority,” and therefore cannot be defined as a failure of the procedural rule of law.<sup>358</sup>

If the Fourteenth Amendment had been widely understood to make *all* of the guarantees of the first eight amendments of the federal Constitution applicable to the states, one would certainly have expected discussion of that fact, especially when it would have required changes in existing practices in criminal and civil procedure.<sup>359</sup> Despite this, Lash’s argument retains much validity when considering the Memphis Massacre from a modern perspective. While Boyce is correct that there were no formal rules of law that enabled the Massacres to occur, Boyce fails to address the lack of procedural safeguards in Memphis and New Orleans that led to the breakdown of the legal order. There did not need to be laws permitting the Memphis Massacre to occur for there to be a breakdown in the rule of law—one where the existing laws had no method of enforcement. Nonetheless, Boyce’s perspective is significant for considering the substantive aspect of the Massacre’s impact through the Due Process and Equal Protection Clauses.

## 2. Due Process & Equal Protection Clauses

In considering the impact and influence of the Memphis Massacre on the passage of the Fourteenth Amendment, Boyce joins several other scholars in maintaining that the Massacre is “better understood as [a] deprivation[] of life, liberty and property without due process of law and [a] gross breach[] of the duty to provide equal protection of the law.”<sup>360</sup> Implicit in Boyce’s analysis—and explicit in the writings of other scholars—is the contention that the Fourteenth Amendment not only prohibits *state* action that infringes individual rights but also imposes an affirmative duty on the state *to protect* individuals from violations of their rights by *private* actors.<sup>361</sup> The rationale behind this

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<sup>356</sup> *Id.*

<sup>357</sup> *See id.* (finding no legal authority supported massacres).

<sup>358</sup> *Id.* (arguing the massacres are better understood as “deprivations of life, liberty and property without due process of law and gross breaches of the duty to provide equal protection of the law”).

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *See* Heyman, *supra* note 348, at 569-70 (“The congressional response to the Memphis riot . . . confirms that the Framers understood the duty of protection to include protection against private violence.”); Susan S. Kuo, *Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence*, 79 *IND. L.J.* 177, 198-200 (2004) (arguing Republican responses to the Memphis Massacre indicate affirmative duty to protect under the Fourteenth Amendment).

theory is that race riots like the Memphis Massacre represented a failure of state and local governments to protect individuals from private violence. Because these riots were so well publicized, these scholars believe that the Fourteenth Amendment was ratified with the understanding that the Amendment would ensure that incidents like the Memphis Massacre would never happen again.

It is at least possible to read the Majority report to support this expansive interpretation of the Due Process and Equal Protection Clauses. The Report certainly condemns Memphis city officials for their inability (or unwillingness) to prevent the Massacre or to punish its perpetrators. For instance, the House Select Committee found that Mayor John Park was “utterly unequal to the occasion, either from sympathy with the mob, or on account of drunkenness . . . . [He] certainly did nothing to suppress the riot . . . .”<sup>362</sup> Similarly, Sheriff Winters, according to the Committee, “permitted bad and lawless men to impose themselves upon him as a posse . . . .”<sup>363</sup> Although Sheriff Winters himself was sober throughout the riots, the men he gathered to restore peace to the streets of Memphis “were ‘ragamuffins’ and boys, armed with shotguns and the like, and all appeared to be drunk . . . .”<sup>364</sup> The Chief of Police “seemed to be doing all he could to protect the colored people from the assaults and violence of his brutal policemen.”<sup>365</sup> However, even he “seem[ed] entirely to have lost control of his force, and . . . made but feeble attempts to regain it.”<sup>366</sup> Finally, the Committee found after a month since the conclusion of the riots, “no effort [had] been made by the civil authorities to bring to justice the perpetrators of these stupendous and multiplied outrages . . . .”<sup>367</sup> Even worse, many witnesses testified that it would be impossible to convict any of the guilty parties in a local court.<sup>368</sup> It was these injustices that spurred action in Congress to push the progress of the passage of the Fourteenth Amendment.

Although the previous instances of apathy and incompetence support the notion that the House Select Committee was implicitly advocating a congressional response that protected individuals from private violence, the

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<sup>362</sup> H.R. REP. NO. 39-101, at 23 (1866).

<sup>363</sup> *Id.* at 24.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 25.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 27. This seems to be an overstatement. The Tennessee General Assembly did assume control over the Memphis police force when it passed the Metropolitan Police Act on May 14, two weeks after the Massacre. Doyle, *supra* note 57, at 48. Testimony in the Committee Report indicates that perhaps the Act did not take effect until mid- to late-June. See, e.g., H.R. REP. NO. 39-101 at 60, 238-39, 310. Perhaps this is how the Majority Report was able to make this assertion. *Id.* at 239 (statement of Judge Barbour Lewis) (“[T]he State government may possibly protect by its franchise law, and by the metropolitan police bill, which go into effect in a month, the citizens even in the event of the withdrawal of the Union Troops.”).

<sup>368</sup> *Id.* at 27 (“Judge Hunter . . . says that the chances of convicting white men for outrages upon negroes would be very remote.”).

Majority report can also be read more narrowly, as not supporting such protections. For example, the Report consistently emphasizes the fact that the Memphis Massacre was largely initiated and perpetrated by *state* actors. According to the House Committee, the riots had the “sanction of official authority[] . . .”<sup>369</sup> Indeed, “the chosen guardians of the public peace, the sworn executors of the law for the protection of the lives, liberty, and property of the people, and the reliance of the weak and defenceless [sic] in time of danger, were found the foremost in the work of murder and pillage . . .”<sup>370</sup> This focus puts the emphasis on both the affirmative acts and failures of officials in perpetrating the violence of the Massacre.

Among these state actors were the Tennessee Attorney General and the Recorder of Memphis, Judge Creighton, both of whom actively led groups of men during the riots.<sup>371</sup> Of the Attorney General, the House Committee said: “No language of denunciation is too severe to characterize the conduct of a high officer of the law in thus lending himself to become a leader of a bloodthirsty mob in the work of massacre, incendiarism, and robbery.”<sup>372</sup> Judge Creighton served as the Recorder of the city’s court—a man whose job it was to enforce adherence to the rule of law.<sup>373</sup> Yet, according to the Committee Report, he was the “ringleader” of the Massacre.<sup>374</sup> He is said to have encouraged the mob to commit the atrocities, shouting on one occasion, “Boys, I want you to go ahead and kill the last damned one of the [negro] race, and burn up the cradle, God damn them. They are very free, indeed, but, God damn them, we will kill and drive the last one of them out of the city.”<sup>375</sup> When you consider that a public official, such as Creighton, was able to be a public leader in the Massacre, it is easy to infer that a purpose of the Fourteenth Amendment was certainly to protect individuals from actions of officials.

When viewed in this light, if the Memphis Massacre had any effect on the passage of the Fourteenth Amendment, it was surely to reinforce the national commitment to curbing *State* violations of individual rights; it did not suggest that the public expected states to protect individuals from all *private* violence, as shown by the continued violent riots across the South after its passage. Regardless of a view of whether the Committee’s influence on the Fourteenth Amendment was regarding private or public action in the first place, the protections put in place were certainly aimed at remediating the harms caused by events such as the Memphis Massacre—whether it be to prevent such lawlessness or to provide remedies for racial violence. The Fourteenth Amendment fulfilled some restoration of the formal/procedural rule of law,

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<sup>369</sup> *Id.* at 34.

<sup>370</sup> *Id.* at 34.

<sup>371</sup> *See id.* at 11, 23.

<sup>372</sup> *Id.* at 12.

<sup>373</sup> *See id.* at 23.

<sup>374</sup> *See id.*

<sup>375</sup> *Id.* at 23-24.

providing equal protection of the law to create a more “just” society. What remained to be seen is whether its practical, substantive impact could provide protections to freedmen in the South and throughout the United States. Would the Fourteenth Amendment protect minorities from the acts of private parties?

## VI. THE VIOLENCE CONTINUES

If the breakdown of the rule of law inspired the Fourteenth Amendment, its passage did not prevent a recurrence of increased racial violence. Looking at a few select time periods after its passage, this Part evaluates the continued need for a substantive rule of law where the procedural rule of law fails to guide the country.

### A. *Colfax*

Merely a few years after the passage of the Fourteenth Amendment, the Colfax Massacre may have been the most brutal of all race related events of the Reconstruction Era.<sup>376</sup> Historians disagree regarding the number of African-American deaths, many executed after surrendering, but most believe the total to be between eighty and one-hundred-fifty.<sup>377</sup> Despite the best efforts of many white Democrats to prevent African Americans from voting, Republican William Pitt Kellogg nevertheless won the Louisiana Election of 1872.<sup>378</sup> On March 25, 1873, after struggling for months, elected Republican officials were finally able to seize control of the courthouse in Grant Parish, Louisiana and take their oaths.<sup>379</sup> African Americans were called to gather to protect the courthouse while many whites, including Klansmen, former confederate soldiers, and white paramilitary groups, converged on the courthouse.<sup>380</sup> Varying degrees of skirmishes broke out, but eventually the Democratic forces outside of the courthouse grew too strong and the Republicans inside the courthouse

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<sup>376</sup> See FONER, *supra* note 1, at 437 (describing Colfax massacre as “bloodiest single instance of racial carnage in the Reconstruction era . . .”). Interestingly, Colfax lies somewhat geographically between New Orleans and Memphis.

<sup>377</sup> See Danny Lewis, *The 1873 Colfax Massacre Crippled the Reconstruction Era*, SMITHSONIAN.COM (Apr. 13, 2016), <https://www.smithsonianmag.com/smart-news/1873-colfax-massacre-crippled-reconstruction-180958746/> [<https://perma.cc/MCP9-ML5P>] (reporting number of deaths of African Americans to be between sixty and one hundred fifty); Xan White, *Remembering the Colfax Massacre*, CONST. ACCOUNTABILITY CTR. (April 13, 2010), <https://www.theconstitution.org/blog/remembering-the-colfax-massacre/> [<http://perma.cc/JU7W-MMAL>] (“Estimates vary widely, but it appears that at least 80 black Americans were killed that day . . .”).

<sup>378</sup> See Bill Decker I, *Colfax Riot or Massacre: A Brutal Defining Moment*, LEGAL NEWS (Apr. 11, 2013), <http://www.legalnews.com/detroit/1374797/> [<http://perma.cc/7BTY-EN2X>].

<sup>379</sup> CHARLES LANE, *THE DAY FREEDOM DIED 70* (2008); Decker I, *supra* note 378.

<sup>380</sup> LANE, *supra* note 379, at 75-84.

surrendered.<sup>381</sup> Most of the African Americans were brutally executed, either attempting to flee or after they had already surrendered.<sup>382</sup>

In *United States v. Cruikshank*,<sup>383</sup> three of the ninety-seven white perpetrators who had originally been indicted for the massacre were tried, not for murder, but for violation of the Enforcement Act.<sup>384</sup> The defendants challenged their indictments under Section 6 of the Enforcement Act of 1870.<sup>385</sup> The Enforcement Act of 1870 provides in pertinent part:

That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony . . . .<sup>386</sup>

Importantly, the defendants challenged their convictions by arguing that the Fourteenth Amendment was limited in scope as it was restrained to prohibitions on state action, not individual action.<sup>387</sup> The defendants were relieved of wrongdoing when the Court held that the Fourteenth Amendment did not permit the federal government to prosecute individuals for the racially motivated violation of the fundamental rights of others.<sup>388</sup> Examining the Enforcement Act of 1870, the Fourteenth Amendment, and the Fifteenth Amendment, the Court determined that the indictments of those responsible for the Massacre were defective for various reasons, and, therefore, they overturned the convictions and ordered the lower court to discharge the defendants.<sup>389</sup>

The Court stated the issue of the case succinctly: “[t]o bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or

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<sup>381</sup> See Lewis, *supra* note 377 (“After firing a cannon on the militiamen inside the courthouse on April 13, the two forces fired at each other until the black defenders were forced to surrender.”).

<sup>382</sup> *Id.* (reporting that after Republicans surrendered, many African-American men were shot or hanged to death).

<sup>383</sup> 92 U.S. 542 (1875).

<sup>384</sup> See *id.* at 544-45 (stating that three men were convicted of sixteen counts under Enforcement Act all of whom then appealed their convictions); Lewis, *supra* note 377 (noting that ninety-seven “white mob” members were originally indicted under Enforcement Act).

<sup>385</sup> *Cruikshank*, 92 U.S. at 546.

<sup>386</sup> Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 141.

<sup>387</sup> *Cruikshank*, 92 U.S. at 546.

<sup>388</sup> See *id.* at 554-55 (“The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of the law; but this adds nothing to the rights of one citizen as against another.”).

<sup>389</sup> See *id.* at 548-59.

secured by the constitution or laws of the United States.”<sup>390</sup> Because the indictment alleged various violations of rights and privileges, the Court began with a discussion and analysis of the roles of the federal and state governments and ultimately determined that the federal government’s role is limited and that the rights guaranteed under the Constitution are similarly limited.<sup>391</sup> The Court wrote that while the federal government’s powers are not limited “in degree,” its “powers are limited in number.”<sup>392</sup> The Court further described the powers of the federal government as “endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view,” but “can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.”<sup>393</sup> Before turning to the actual indictment, the Court concluded its discussion of the role of the federal and state governments stating that “[t]he government of the United States is one of delegated powers alone.”<sup>394</sup>

Next, the Court turned to the specific allegations of the indictment and whether the rights and privileges that were violated fell within the federal government’s powers of enforcement.<sup>395</sup> Beginning by analyzing the allegations that the defendants had prevented the victims from peaceably assembling, the Court stated:

The first amendment to the Constitution prohibits Congress from abridging “the right of the people to assemble and to petition the government for a redress of grievances.” This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.<sup>396</sup>

Next, examining the allegations that the defendants had violated the victims’ rights to bear arms for a lawful purpose, the Court likewise dismissed the breadth of the Second Amendment.<sup>397</sup> The Court stated, “The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.”<sup>398</sup>

Turning to the allegations that the defendants had deprived the victims of their lives and liberty without due process and had also prevented the victims from enjoying the equal benefits of the law, the Court examined the impact of the

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<sup>390</sup> *Id.* at 549.

<sup>391</sup> *See id.* at 550-51 (“The government of the United States is one of delegated powers alone. . . . No rights can be acquired under the constitution of laws of the United States, except such as the government of the United States has the authority to grant or secure.”).

<sup>392</sup> *Id.* at 550.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 551.

<sup>395</sup> *See id.* at 551-56.

<sup>396</sup> *Id.* at 552.

<sup>397</sup> *See id.* at 553.

<sup>398</sup> *Id.*

Fourteenth Amendment and likewise concluded that it was very narrow in scope.<sup>399</sup> Speaking of the due process clause in the Fourteenth Amendment, the Court wrote, “The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another.”<sup>400</sup> The Court also addressed the Equal Protection Clause in the Fourteenth Amendment and dismissed it in similar fashion.<sup>401</sup>

Next, examining the allegations against the defendants that they had abridged the right and privilege of African Americans to vote, the Court examined the extent of the protections under the Fifteenth Amendment and, once again, found them limited in scope.<sup>402</sup>

Ultimately, the Court determined that the United States had failed to properly allege that the defendants’ intent was to prevent the victims from voting “on account of their race,” and thus, the allegations were defective.<sup>403</sup> This limitation on the Fourteenth Amendment seriously reduced the scope of the redressability for the race riots that helped spur its passage. This interpretation is proceduralist in its nature—that the state is the actor that creates equality and justice—not individuals. Without an enforcement mechanism against private action, the Fourteenth Amendment now had limited impact on the substantive aspects of the rule of law or how individuals would comply or interpret its meaning.

#### B. *Elaine*

The story of racial violence—permitted by local officials even when they were not committing it—continued well after the adoption of the Fourteenth Amendment. In fact, one important part of the Fourteenth Amendment’s story is the decades-long struggle to recognize the promise of the Equal Protection Clause.<sup>404</sup> For, while the Fourteenth Amendment and other procedural protections gave some new rights and protections to African Americans, the

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<sup>399</sup> *See id.* at 553-54.

<sup>400</sup> *Id.* at 554.

<sup>401</sup> *See id.* at 554-55 (“The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add any thing to the rights which one citizen has under the Constitution against another.”).

<sup>402</sup> *See id.* at 555-56 (“[T]he right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, &c. [sic], is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.”).

<sup>403</sup> *Id.* at 556.

<sup>404</sup> *See* Francine Uenuma, *The Massacre of Black Sharecroppers That Led the Supreme Court to Curb the Racial Disparities of the Justice System*, SMITHSONIAN.COM (Apr. 13, 2016), <https://www.smithsonianmag.com/history/death-hundreds-elaine-massacre-led-supreme-court-take-major-step-toward-equal-justice-african-americans-180969863/> [http://perma.cc/9TL6-FETP].

substantive attitudes of the public continued to restrain any consequences for continued racial terror.<sup>405</sup> We turn to the legal response of select later riots. Decades after the Fourteenth Amendment's passage, as African-American veterans returned from World War I, they were faced with continued racial violence.<sup>406</sup> One prominent example is the 1919 race riot, or perhaps more aptly named, massacre, in Elaine, Arkansas.<sup>407</sup> The violence in Elaine claimed the lives of numerous African Americans and resulted in the arrest and prosecution of those who had been potential victims of the massacre, rather than those who had perpetrated the massacre.<sup>408</sup> Ultimately, some of these arrests and prosecutions were challenged in two different cases, one that made it as far as the Arkansas Supreme Court and another that made it all the way to the Supreme Court of the United States.<sup>409</sup> All those convictions challenged were ultimately overturned.

Elaine and much of the state, was fraught with racial tension and other issues of race in the aftermath of World War I.<sup>410</sup> Elaine is located in eastern Arkansas, approximately seventy-five miles from Memphis, Tennessee, and was more than seventy percent African American in 1920, a year after the massacre.<sup>411</sup> While many of the African Americans in Elaine were sharecroppers, World War I had created new opportunities for African Americans in the lumber industry, and higher wages gave some African Americans disposable income that they could use to bypass the local commissaries and shop in nearby Helena.<sup>412</sup> For instance, Ed Ware, who would later be arrested and prosecuted after the massacre, owned 120 acres of land and a Ford automobile, which he used to drive to Helena.<sup>413</sup> This type of success and advancement occurred throughout Arkansas and was met with racial violence, including at least five known lynchings that occurred in Arkansas prior to the Elaine massacre in 1919.<sup>414</sup>

African-American advancement was perceived as an obvious threat to whites, and whites reacted by stealing or threatening to steal crops and other possessions

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<sup>405</sup> See Nan Elizabeth Woodruff, *The New Negro in the American Congo: World War I and the Elaine, Arkansas Massacre of 1919*, in *TIME LONGER THAN ROPE* 150, 151 (Charles M. Payne & Adam Green eds., 2003).

<sup>406</sup> See *id.* at 150.

<sup>407</sup> See *id.*

<sup>408</sup> See Grif Stockley, *Elaine Massacre*, *THE ENCYCLOPEDIA OF ARKANSAS HISTORY & CULTURE* (July 17, 2018), <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?search=1&entryID=1102#> [<http://perma.cc/ZDJ3-LKJH>].

<sup>409</sup> See *id.*

<sup>410</sup> See Woodruff, *supra* note 405, at 150.

<sup>411</sup> See *id.* at 159, n.42 (citing B. BOREN MCCOOL, *UNION, REACTION, AND RIOT: A BIOGRAPHY OF A RURAL RIOT 1-2* (Bureau of Soc. Research, Memphis State Univ. 1970)).

<sup>412</sup> *Id.* at 159.

<sup>413</sup> See *id.* (citing IDA WELLS BARNETT, *THE ARKANSAS RACE RIOT 13-18* (1920)).

<sup>414</sup> *Id.* at 158.

from African Americans.<sup>415</sup> In an effort to combat this threat from whites, some local African Americans hired an attorney—U.S. Bratton—while others began organizing with the Progressive Farmers and Household Union of America.<sup>416</sup> Looking back on the atmosphere in Elaine and the surrounding area, one white planter later wrote:

Ours was a primitive and pioneer country where racial hatred was close to the surface. Here we had a tinderbox to be set off by the slightest spark. One reason for this was the numerical imbalance. The colored men outnumbered the whites by at least ten to one. White men, with their families on their minds, were constantly alert for the first signs of what they considered danger to their women and children. And the Negroes knew this. If they got out of line, they realized that there would be no compromise with sudden death.<sup>417</sup>

In this atmosphere, on September 30, 1919, an estimated 120 to 200 black men, women, and children met at a local church to discuss hiring Bratton to represent them.<sup>418</sup>

This meeting was met with racial violence that ultimately devolved into a full-scale massacre. According to those present, at around eleven in the evening, “at least five cars of armed white men drove up in front of the church and began firing into the building, killing some of the attendants.”<sup>419</sup> African-American attendees fired back in self-defense, and a white agent of the Missouri Pacific Railroad was killed in the crossfire.<sup>420</sup> One of the men who had accompanied the white men to the church fled and phoned the sheriff in Helena to say that the white agent of the railroad had been killed by African Americans.<sup>421</sup> Meanwhile, the African Americans fled as well.<sup>422</sup> Whites in the area began forming posses and burned the church to the ground.<sup>423</sup>

The local whites were joined by men from the surrounding area, including those from cities in Mississippi and Tennessee. Between five hundred and one thousand white men descended on Elaine to terrorize its African-American residents.<sup>424</sup> An unsigned article from *The Crisis*<sup>425</sup> described the aftermath of the incident at the church:

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<sup>415</sup> See *id.* at 159-60.

<sup>416</sup> *Id.* at 160.

<sup>417</sup> GERARD B. LAMBERT, ALL OUT OF STEP: A PERSONAL CHRONICLE 74 (1956).

<sup>418</sup> Woodruff, *supra* note 405, at 162.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> Stockley, *supra* note 408.

<sup>425</sup> *The Crisis* is the official publication of the National Association for the Advancement of Colored People (“NAACP”), founded in 1910 by W.E.B. DeBois. THE CRISIS MAGAZINE,

Anyhow, the hue and cry was raised. “Negro uprising,” “Negro insurrection,” etc., was sent broadcast. The white planters called their gangs together and a big “[negro] hunt” began. They rushed their women and children to Helena by auto and train. Train loads and auto loads of white men, armed to the teeth, came from Marianna and Forrest City, Ark., Memphis, Tenn., and Clarksdale, Miss. Rifles and ammunition were rushed in. The woods were scoured, Negro homes shot into, Negroes who did know any trouble was brewing were shot and killed on the highways.<sup>426</sup>

At some point the next day, the Phillips County Sheriff, Frank F. Kitchens, had his own posse of three hundred men,<sup>427</sup> who onlookers saw shooting, beating, killing, and burning African Americans.<sup>428</sup> The mayor of Elaine wired the governor of Arkansas about a potential “negro revolt,” and eventually, 583 federal troops were dispatched to Elaine, including a machine gun battalion.<sup>429</sup> Many African Americans hid in the woods until the federal troops arrived.<sup>430</sup> The violence went on for three days until the white mob was quelled.<sup>431</sup>

Although the aftermath is uncertain, *The Crisis* explained the results as:

[F]ive white men and between twenty-five and fifty Negroes were killed in the riots . . . . Sixty-six men have been tried and convicted—twelve sentenced to death[] . . . . The trials averaged from five to ten minutes each; no witnesses for the defense were called; no Negroes were on the juries[] . . . .<sup>432</sup>

*The Crisis* estimated between only twenty-five and fifty African-American casualties, but the *New York Times* has recently estimated that 237 African Americans were killed in 1919 during the Elaine massacre, based on data provided by the Equal Justice Initiative.<sup>433</sup> Twelve of the alleged African-American rioters were tortured, including being whipped and shocked in an

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<https://www.thecrisismagazine.com> [<https://perma.cc/KE2B-2M37>] (last visited Nov. 7, 2018).

<sup>426</sup> *The Real Causes of Two Race Riots*, THE CRISIS: A RECORD OF THE DARKER RACES, Dec. 1919, at 58, <https://library.brown.edu/pdfs/1296048572546875.pdf> [<https://perma.cc/J3SL-B6NE>].

<sup>427</sup> See Woodruff, *supra* note 405, at 163 (citing B. BOREN MCCOOL, UNION, REACTION, AND RIOT: A BIOGRAPHY OF A RURAL RIOT 26 (1970)) (“Moore saw ‘300 more white people coming on with guns, shooting, killing men, women, and children.’”).

<sup>428</sup> *Id.* at 163 (citing IDA B. WELLS-BARNETT, THE ARKANSAS RACE RIOT 11-18 (1920)).

<sup>429</sup> *Id.* at 162-63.

<sup>430</sup> *Id.* at 163 (“Moore quickly gathered all the women and children that he could and hid in the woods until federal troops arrived the next morning.”).

<sup>431</sup> *Id.*

<sup>432</sup> *The Real Causes of Two Race Riots*, *supra* note 426, at 60.

<sup>433</sup> See *Map of 73 Years of Lynchings*, N.Y. TIMES (Feb. 9, 2015), <https://www.nytimes.com/interactive/2015/02/10/us/map-of-73-years-of-lynching.html>.

electric chair, to secure confessions.<sup>434</sup> Many of the white jurors in the cases against the alleged African-American rioters were also participants in the “rebellion.”<sup>435</sup>

Many of the convictions of African Americans were challenged and eventually overturned. Six of the black men convicted of murder—Alf Banks, Joe Fox, Albert Giles, John Martin, Ed Ware, and Will Wordlow—had their convictions overturned the first time their cases were heard by the Supreme Court of Arkansas.<sup>436</sup> The court overturned the convictions on technical grounds as the white jury had failed to state the degree of murder in their verdict, which was required under Arkansas law at the time, and the court remanded for a new trial.<sup>437</sup> The six black men were convicted of murder in the first degree during their second trial.<sup>438</sup> They challenged the conviction on several grounds. First, the defendants argued that the case should have been removed to federal court due to the fact that the jury was exclusively white.<sup>439</sup>

On that issue, the court held:

The court did not err in refusing to move the causes to the federal court. There is nothing in our Constitution or statutes, or in the interpretation thereof by this court, to show that jurors of the African race are excluded from jury service in this state solely on account of their color. There has been no interpretation of our Constitution and laws by this court to show that in advance of a trial negroes could not enforce in the judicial tribunals of this state all the rights belonging to them in common with their fellow citizens of the white race. Such is not the law nor the public policy of this state or in any portion of it. The fact, therefore, that negroes had been excluded because of their race from previous grand juries and the grand jury which indicted the defendants, even if such were the fact, would not authorize a removal of the causes to the federal court.<sup>440</sup>

Next, the six men challenged their convictions based on the trial court’s refusal to allow for a change of venue despite “the affidavits of four negro men” testifying that they did not believe the defendants could receive a fair trial in

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<sup>434</sup> Woodruff, *supra* note 405, at 165 (citing RICHARD C. CORTNER, A MOB INTENT ON DEATH: THE NAACP AND THE ARKANSAS RIOT CASES 15-18 (1988)).

<sup>435</sup> *Id.*

<sup>436</sup> *See* Banks v. State, 219 S.W. 1015, 1017 (Ark. 1920) (“It therefore follows that the judgment must be reversed and the cause remanded for a new trial.”).

<sup>437</sup> *Id.* (“The statute expressly requires the jury to ascertain the degree in all cases of murder. . . . It therefore follows that the judgment must be reversed and the cause remanded for a new trial.”).

<sup>438</sup> *See* Ware v. State, 225 S.W. 626, 627 (Ark. 1920).

<sup>439</sup> *Id.* (“[T]he grand and petit juries were made up exclusively of white men; that negroes were excluded from the juries solely on account of their color; that this was pursuant to a custom and practice which had been sanctioned by the circuit and Supreme Courts, by which the defendant was deprived of his right under the Constitution and laws of the United States.”).

<sup>440</sup> *Id.* at 628 (internal citations omitted).

Phillips County and an inflammatory article in a Helena newspaper.<sup>441</sup> A majority of the court, analyzing the issue under an abuse of discretion standard, found “that the lower court did not abuse its discretion in holding that the affiants who signed the supporting affidavits were not credible persons in the sense of the statute, and therefore did not err in denying the petitions for a change of venue”; however, the author of the opinion disagreed and believed that the defendants “were entitled to a change of venue.”<sup>442</sup>

Finally, the defendants successfully argued that their second convictions should also be overturned because the trial court had refused to hear evidence on their motions to quash the indictment based on the facts that “the grand jury that indicted them was composed wholly of white men, negroes being excluded therefrom solely because of their race.”<sup>443</sup>

The defendants also asked that the jury commissioners be called to testify to the matters contained in the motion.<sup>444</sup> The trial court refused to hear evidence and overruled the motions.<sup>445</sup> The court determined that the motions “presented federal questions which are controlled by the decisions of the Supreme Court of the United States.”<sup>446</sup> In relying on Supreme Court precedent, the court stated, “We cannot escape the conclusion, therefore, that the court erred in refusing to hear evidence upon appellants’ motions and in overruling such motions without hearing the evidence.”<sup>447</sup> The court held “that under the decisions of the Supreme Court of the United States, above, the discrimination of the jury commissioners against the colored race in the selection of the petit jury, by which negroes were excluded from that jury solely on account of their color, rendered that selection illegal . . . .”<sup>448</sup>

The court remanded the case for a new trial,<sup>449</sup> and the case was eventually transferred to another court where the state refused to try the cases for several terms.<sup>450</sup> The defendants moved for discharge of the cases each time because the state had not brought the case to trial.<sup>451</sup> The Arkansas Supreme Court, relying

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<sup>441</sup> *See id.* at 627.

<sup>442</sup> *Id.* at 628-29.

<sup>443</sup> *Id.* at 627-28.

<sup>444</sup> *Id.* at 628.

<sup>445</sup> *Id.*

<sup>446</sup> *Id.* at 629.

<sup>447</sup> *Id.* at 630.

<sup>448</sup> *Id.* at 631 (“That sort of discrimination in the selection of both grand and petit juries is in contravention of the Fourteenth Amendment to the Constitution of the United States, and the Civil Rights Act of March 1, 1875. A majority of the court is of the opinion that the trial court erred in refusing to hear evidence on the motions to set aside the regular panel of the petit jury and erred in overruling such motions without hearing the evidence. The above errors must cause a reversal in all the cases.”) (internal citation omitted).

<sup>449</sup> *Id.* at 632.

<sup>450</sup> *See* *Ware v. State*, 252 S.W. 934, 934 (Ark. 1923).

<sup>451</sup> *Id.*

on the application of the right to a speedy trial found in the Arkansas Bill of Rights and an Arkansas statute, directed the sheriff of Lee county to discharge the defendants from custody.<sup>452</sup>

Meanwhile, five other African-American men were also tried and convicted for murder, but their convictions were overturned by the Supreme Court in *Moore v. Dempsey*.<sup>453</sup> The defendants in *Moore* argued that they “were hurried to conviction under the pressure of a mob without any regard for their rights and without according to them due process of law.”<sup>454</sup> Thus, the defendants relied in part on the Fourteenth Amendment’s protections. In reviewing the allegations, the court examined several facts, which were undisputed allegations and affidavits, to determine if the trial was ruled by mob law: “The Committee [of Seven]’s own statement was that the reason that the people refrained from mob violence was ‘that this Committee gave our citizens their solemn promise that the law would be carried out.’”<sup>455</sup>

As described below, the circumstances of the defendants’ trial lacked any semblance of due process:

On November 3 the petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury—blacks being systematically excluded from both grand and petit juries. The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a jurymen or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no jurymen could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.<sup>456</sup>

The averments as to the prejudice by which the trial was environed have some corroboration in appeals made to the Governor, about a year later, earnestly urging him not to interfere with the execution of the petitioners. One came from

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<sup>452</sup> *Id.* at 940 (“The law applicable to the facts must be declared, else the appellants will be deprived of the right to a speedy trial, which the framers of our Constitution and the framers of this statute purposed that every person charged with a public offense should have. That every such person has such right under Constitutions and statutes similar to ours is, so far, proclaimed by the authorities with one voice.”).

<sup>453</sup> 261 U.S. 86, 92 (1923).

<sup>454</sup> *Id.* at 87.

<sup>455</sup> *Id.* at 89 (internal citations omitted).

<sup>456</sup> *Id.* at 89-90.

five members of the Committee of Seven, and stated in addition to what has been quoted heretofore that “all our citizens are of the opinion that the law should take its course.”<sup>457</sup> Another from a part of the American Legion protests against a contemplated commutation of the sentence of four of the petitioners and repeats that a “solemn promise was given by the leading citizens of the community that if the guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld.”<sup>458</sup> The Court announced the previously established rule that a trial dominated by a mob “is a departure from due process of law”<sup>459</sup> and, while it did not ultimately rule on the issue, the Court remanded it to the district court and explained that “it appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed.”<sup>460</sup> The defendants were ultimately released.<sup>461</sup>

C. *Tulsa*<sup>462</sup>

Like many cities in the United States, Tulsa, Oklahoma featured a stringently segregated population. Shortly after achieving statehood in 1907, Oklahoma passed Jim Crow laws to disenfranchise its African-American citizens. The Ku Klux Klan was growing steadily in the region, and by one estimate, 3,200 of the city’s 72,000 inhabitants were members of the organization.<sup>463</sup> Much of the city’s African-American population lived in the Greenwood District, dubbed as “Black Wall Street,” the community has been described as “a mini Beverly Hills” and “the golden door of the Black community during the early 1900s.”<sup>464</sup> Much of this wealth came from the discovery of oil by Native Americans and African Americans on previously “worthless” land.<sup>465</sup>

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<sup>457</sup> *Id.* at 90.

<sup>458</sup> *Id.* at 89-90 (internal citations omitted).

<sup>459</sup> *Id.* at 91.

<sup>460</sup> *Id.* at 92.

<sup>461</sup> Woodruff, *supra* note 405, at 167.

<sup>462</sup> I am grateful to my advisor, Professor Alfred Brophy, for his guidance and his academic work on the Tulsa Riot. *See generally* ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, RECONCILIATION (2002).

<sup>463</sup> CHARLES C. ALEXANDER, KU KLUX KLAN IN THE SOUTHWEST 49 (1965); S. Matthew DeSpain, *Tulsa, Oklahoma*, ENCLYLOPEDIA OF THE GREAT PLAINS (David J. Wishart ed., 2011), <http://plainshumanities.unl.edu/encyclopedia/doc/egp.ct.052> [<https://perma.cc/EZ6V-4WPP>].

<sup>464</sup> *See What Happened to Black Wall Street on June 1, 1921?*, S.F. BAY VIEW (Feb. 9, 2011), <http://sfbayview.com/2011/02/what-happened-to-black-wall-street-on-june-1-1921/> [<https://perma.cc/BD99-ZN2T>].

<sup>465</sup> *See* Allison Keyes, *A Long-Lost Manuscript Contains a Searing Eyewitness Account of the Tulsa Race Massacre of 1921*, SMITHSONIAN MAG. (May 27, 2016), <https://www.smithsonianmag.com/smithsonian-institution/long-lost-manuscript-contains-searing-eyewitness-account-tulsa-race-massacre-1921-180959251/> [[https://perma.cc/M8DW -NDFD](https://perma.cc/M8DW-NDFD)].

An African-American man was accused of sexually assaulting a white woman and brought to Tulsa city jail.<sup>466</sup> The woman never pressed charges and there is no evidence suggesting an assault took place.<sup>467</sup> After reading of the events in the newspaper, a white mob gathered outside the courthouse, to which Rowland had been moved, to lynch him.<sup>468</sup> African Americans gathered to try to help the Sheriff defend Rowland, and at some point that evening shots were fired and violence erupted.<sup>469</sup> The African-American side was overwhelmed by daybreak on June 1,<sup>470</sup> and the white mob committed a number of atrocities, even commissioning planes leftover from World War I to provide fire from above.<sup>471</sup> The National Guard was called in and eventually quelled the white mob by the afternoon of June 1, but neglected to arrest anyone other than African-American residents.<sup>472</sup> The riot has been described as supported by a coalition with the city's government.<sup>473</sup> After the government declared martial law, all African-American residents of Tulsa were imprisoned—more than six thousand people.<sup>474</sup>

Estimates vary between nine and fifty white deaths and twenty-one and three hundred African-American deaths, as well as the burning of over 1,200 homes and over two million dollars' worth of real and personal property damages.<sup>475</sup> The entire commercial area of Greenwood was destroyed, including nearly two-hundred businesses, the only hospital, a school, and several churches.<sup>476</sup> There was no prosecution of any of the white mob members for their actions.<sup>477</sup> Many black residents spent the next winter in tents as they worked to rebuild what they had lost.<sup>478</sup> While the papers laid some blame on the “br[a]ke down” of governmental agencies in Tulsa, some also pointed to the “favorability” of the

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<sup>466</sup> See *Nab Negro for Attacking White Girl*, TULSA TRIB. (May 31, 1921), [http://www.tulsa-world.com/archives/nab-negro-for-attacking-girl-in-an-elevator/article\\_758e0217-1077-5282-bdb9-4eef81f8e12d.html](http://www.tulsa-world.com/archives/nab-negro-for-attacking-girl-in-an-elevator/article_758e0217-1077-5282-bdb9-4eef81f8e12d.html) [https://perma.cc/26S4-Y4AQ].

<sup>467</sup> See *Tulsa Race Riot*, OKLAHOMA COMMISSION 57 (Feb. 28, 2001), <http://www.ok-history.org/research/forms/freport.pdf> [https://perma.cc/GVH3-D7S9].

<sup>468</sup> *Id.* at 59-62.

<sup>469</sup> *Id.* at 63.

<sup>470</sup> *Id.* at 63-64.

<sup>471</sup> Keyes, *supra* note 465.

<sup>472</sup> *Id.* at 10.

<sup>473</sup> *Id.*

<sup>474</sup> *Id.*

<sup>475</sup> See H.R. REP. NO. 112-1278, pt. 1, at 5 (2011) (describing history of Tulsa race riot).

<sup>476</sup> See Alvin C. Krupnick, *NAACP Photographs of Race Riots in Columbia, Tenn., Los Angeles, Calif., and Tulsa, Okla.*, LIB. OF CONGRESS (1921-1946), <https://www.loc.gov/item/95516152/> [https://perma.cc/S5X8-6TX4].

<sup>477</sup> See BROPHY, *supra* note 462, at 74-76, 138 (“The Tulsa legal system did virtually nothing to enforce [the] law . . . despite the destruction that left perhaps 150 people dead and thousands homeless, that had humiliated thousands and destroyed their life savings, that had torn up the fabric of the community, the legal system failed to bring justice.”).

<sup>478</sup> *Id.* at 26.

law toward African Americans.<sup>479</sup> One scholar describes the attitude taken at the time to be that, “[o]nly through acceptance of white justice could there be racial harmony.”<sup>480</sup>

Meanwhile, photos and postcards of the riot—including ones of burning bodies—were used to spread white supremacy propaganda throughout the South.<sup>481</sup>

For many years the Tulsa race riot practically disappeared from view. “For decades afterwards, Oklahoma newspapers rarely mentioned the riot, the state’s historical establishment essentially ignored it, and entire generations of Oklahoma school children were taught little or nothing about what had happened.”<sup>482</sup> Despite the length of time after the passage of the Fourteenth Amendment, the Tulsa massacre very much parallels the Memphis Massacre, including its occurrence with little contemporary retribution. Like Memphis, the massacre has been described as “mob rule” in which the city forces were compliant.<sup>483</sup> The Tulsa Race Riot Commission was established in 1997 to study the atrocities involved and prepare a historical account of the riot.<sup>484</sup> Following the results in 2001, the Commission had a number of ideas for restitution to compensate the survivors of the riot and the entire African-American community in Tulsa<sup>485</sup>:

1. The direct payment of reparations to survivors of the Tulsa Race Riot;
2. The direct payment of reparations to descendants of the victims and of the survivors of the Tulsa Race Riot;
3. The establishment of a scholarship fund available to students affected by the Tulsa Race Riot;
4. The establishment of an economic development enterprise zone in the historic area of the Greenwood District; and
5. The creation of a memorial for the reburial of any human remains.<sup>486</sup>

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<sup>479</sup> *Id.* at 72.

<sup>480</sup> *Id.* (citing *Order Replaces Chaos in Camp*, TULSA WORLD, June 3, 1921, at 8).

<sup>481</sup> See Keyes, *supra* note 465 (explaining use of violence for racist propaganda).

<sup>482</sup> *Tulsa Race Riot*, *supra* note 467, at 24.

<sup>483</sup> See Calvin Schermerhorn, *Civil-Rights Laws Don’t Always Stop Racism*, THE ATLANTIC (May 8, 2016), <https://www.theatlantic.com/politics/archive/2016/05/the-memphis-massacre-of-1866-and-black-voter-suppression-today/481737/>.

<sup>484</sup> *Tulsa Race Riot*, *supra* note 467, at 1.

<sup>485</sup> See BROPHY, *supra* note 462, at 103-19 (using case of Tulsa Riots in considering broader idea of “the case for reparations.”).

<sup>486</sup> *Reparations for the 1921 Tulsa, OK Race Riot*, UNITARIAN UNIVERSALIST ASS’N <http://www.uua.org/action/statements/reparations-1921-tulsa-ok-race-riot> [<https://perma.cc/HFV2-7KEV>] (last visited Nov. 7, 2018).

In the end, the Oklahoma state legislature only provided more than three-hundred college scholarships for descendants of residents of Greenwood, a memorial, and contributions to economic development.<sup>487</sup>

After the report, prominent attorney Johnnie Cochran and Harvard law professor Charles, J. Ogletree, Jr. unsuccessfully led a legal team representing five survivors of the riot in search of compensation to the community.<sup>488</sup> The Tulsa reparations case was one of many around the country seeking reparations, but was highly visible. Rather than seeking redress from businesses, the suit against Tulsa was “an attempt to open a broad legal assault that would hold governments financially responsible for the harms done, in this case, the city of Tulsa and city officials, including the chief of police.”<sup>489</sup> Tulsa represented yet another breakdown in the rule of law, and further exposed a lack of redress in the face of such a breakdown. The claim was barred by the statute of limitations and the appeal filed to Congress to extend the statute of limitations for the case has never gotten out of the Judiciary Committee.<sup>490</sup>

## VII. THE WAY FORWARD

One hundred and fifty years later, the Fourteenth Amendment continues to be a tool to shape and enforce the rule of law. But its historical genesis provides both avenues and barriers to justice. The Memphis Massacre was just one piece in shaping its passage, and along the way, interpretations of the Fourteenth Amendment by jurists and legal scholars have given new meaning to the rule of law and notions of equal citizenship. Where is the Fourteenth Amendment now? And how should it be viewed moving forward considering the events that brought its passage? As one scholar has discussed, at what level of abstraction should we view the Fourteenth Amendment—“as protecting former slaves, protecting blacks, protecting racial minorities, protecting all ‘discrete and insular’ minorities, or protecting *everyone* in society from unjust discrimination?”<sup>491</sup>

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<sup>487</sup> Greenwood Area Redevelopment Authority Act, 74 OKL. STAT. § 8221(2018); *see also* CONF. COMMITTEE SUBSTITUTE FOR ENGROSSED H. BILL NO. 1178, 48 Leg., 1st Sess., at § 16 (2001).

<sup>488</sup> *See* Alexander v. Oklahoma, 382 F.3d 1206, 1211-13 (10th Cir. 2004).

<sup>489</sup> Lyle Denniston, *Tulsa Race Riot Case to the Court*, SUP. CT. U.S. BLOG (Mar. 6, 2005), <http://www.scotusblog.com/2005/03/tulsa-race-riot-case-to-the-court/> [<https://perma.cc/Q32A-F6C2>].

<sup>490</sup> *H.R. 1995 Tulsa-Greenwood Race Riot Claims Accountability Act Of 2007, Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. Of the Judiciary*, 110th Cong. 8-10 (2007).

<sup>491</sup> Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 93 (1988) (emphasis added).

The Fourteenth Amendment has been expanded through and entrenched in the fundamental values of due process and equal protection.<sup>492</sup> At the same time, the Privileges and Immunities Clause has been essentially dead since *The Slaughter-House Cases*,<sup>493</sup> which, along with *Plessy v. Ferguson*,<sup>494</sup> laid the groundwork for Jim Crow laws to continue to systematically oppress persons of color.<sup>495</sup> With the perspective that the rule of law is to protect the individual from the State's political overreach, the Court has constrained the Fourteenth Amendment's guarantee of equal protection as not always applying to affirmative steps by state actors to "eradicate the effects of racism."<sup>496</sup> Originalist interpretations of the Fourteenth Amendment have also limited its application, but to impose only the historical impasse in 1868 would limit the Fourteenth Amendment to protecting only African-American males.<sup>497</sup>

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<sup>492</sup> See generally, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (applying strict scrutiny and holding anti-miscegenation laws forbidding interracial marriage violated Due Process and Equal Protection Clauses); *Mapp v. Ohio*, 367 U.S. 653 (1961) (invoking Fourteenth Amendment's privacy protections in holding that evidence from unlawful search is inadmissible at trial); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896), and finding that segregation of schools based on race is inherently unequal); *Gitlow v. New York*, 268 U.S. 652 (1925) (applying Bill of Rights to states through Due Process Clause).

<sup>493</sup> 83 U.S. (16 Wall.) 36 (1873); see, e.g., *Saenz v. Roe*, 526 U.S. 489, 427-28 (1999) (Thomas, J. dissenting) (noting that the majority's reliance on Privileges and Immunities Clause is "quite a surprise" because *Slaughter-House* cases "sapped the Clause of any meaning").

<sup>494</sup> 163 U.S. 537 (1896).

<sup>495</sup> See Judge Lynn Adelman, *The Glorious Jurisprudence of Thurgood Marshall*, HARV. L. & POLICY R. 113, 119-20 (2013) ("[W]ithin fifteen years of the ratification of the Fourteenth Amendment, 'a hostile judiciary' had largely 'suppressed' the idea of equal citizenship."). Other problematic interpretations of the Fourteenth Amendment's equal protection clause include *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-92 (1989) (plurality opinion) (finding "generalized assertions" of past discrimination does not justify racial quotas for public contracts) and *United States v. Morrison*, 529 U.S. 598, 619-20 (2000) (finding that enforcement mechanism of Fourteenth Amendment did not provide Congress with authority to enact civil remedy provision of Violence Against Women Act).

<sup>496</sup> Robin West, *Reimagining Justice*, 14 YALE J.L. & FEMINISM 333, 336 (2002); see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 255 (1995) (applying strict scrutiny to race-based classifications intended to remedy past injury); *id.* at 255 (Stevens, J., dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States. This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities.").

<sup>497</sup> See Chemerinsky, *supra* note 491, at 92 (condemning originalist approach to Fourteenth Amendment).

In 1954, in *Brown v. Board of Education*,<sup>498</sup> the Court found that it could not “turn the clock back to 1868 when the [Fourteenth] Amendment was adopted,” to consider whether school segregation was prohibited by the Equal Protection Clause, but that it “must consider public education in the light of its full development and its present place in American life throughout the nation.”<sup>499</sup> Despite the limitations placed on the Amendment’s application, the Court has progressed with history and applied the Amendment as protecting more insular minorities seeking protection of the law.<sup>500</sup> It is this application of the procedural provisions of the Amendment to the substantive values of modern society that will revive the radical idea of equal citizenship—necessary to address current issues that continue to divide this country among the lines of race and class.

To be effective, the rule of law requires fair-minded, courageous persons to give it meaning. During the one hundred fifty-year continuum of the Fourteenth Amendment, there are countless examples of courageous judges that have given depth to the rule of law, working to make real the notions of equal rights, equal justice, and equal opportunity. Historically, champions such as Justices Hugo Black, John Marshall Harlan, Thurgood Marshall, Potter Stewart, Earl Warren, and Judges Frank M. Johnson, Constance Baker Motley, Elbert Tuttle, J. Skelly Wright, to name a few, have been living examples of these notions. It is the work of these champions that counter the shameful legacies of individuals such as Chief Justice Taney, who, in *Dred Scott* proclaimed that an African-American man “had no rights which the white man was bound to respect.”<sup>501</sup>

The rule of law must continue to change with the norms of an evolving society. There has been tremendous progress on the issues of race and class. But challenges remain in the procedural and substantive protections that continue to give rise to economic inequality and racial and ethnic pluralism. The rights and protections of the Fourteenth Amendment serve as a great leveler amongst states, moving us closer to the ideal of *E Pluribus Unum*<sup>502</sup> and a shared concept of the rule of law. The Fourteenth Amendment may yet be the answer to questions of

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<sup>498</sup> 347 U.S. 483 (1954).

<sup>499</sup> *Id.* at 492-93; *see id.* at 494 (“The impact [of segregation] is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”).

<sup>500</sup> *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that Fourteenth Amendment requires recognition and licensure of same-sex marriages by all states).

<sup>501</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

<sup>502</sup> The motto of the United States meaning “out of many, one.” BUREAU OF PUBLIC AFFAIRS, THE GREAT SEAL OF THE UNITED STATES 2 (2003), <https://www.state.gov/documents/organization/27807.pdf> [<https://perma.cc/8EG9-RD47>]. Interestingly enough, this phrase has itself become somewhat controversial in the divisive nature of the current political climate. *See* David Niose, “*E Pluribus Unum*” Becomes Controversial, PSYCHOLOGY TODAY (Mar. 13, 2011), <https://www.psychologytoday.com/blog/our-humanity-naturally/201103/e-pluribus-unum-becomes-controversial> [<https://perma.cc/6ZAD-PQ5C>].

equality in access to the protections of the law amongst the disenfranchised and underserved.<sup>503</sup>

#### CONCLUSION

Three, maybe four, important conclusions emerge from this intensive study of the Memphis Massacre. First, there are wildly differing visions of what the rule of law means theoretically. While some interpret it as following the statute law or the orders of judges—even when they were grossly unfair—there is another strain of thought that interprets the rule of law more in line with timeless principles of equal treatment. Second, in practice we see differing visions of the rule of law. Those principles clashed in practice in Memphis in 1866 when some in power demanded obedience from the African-American community. That obedience meant that they had to follow the dictates of law enforcement officers and that they had to behave with obsequious manners. At the same time, the African American community envisioned rule of law differently—that they would be protected from mob violence. Third, the Memphis Massacre—and other episodes of violence—inspired action towards the Fourteenth Amendment. And, finally, that the process of implementing the promises of the Fourteenth Amendment saw decades of continued violence. The process of implementing the rule of law is not a single on/off decision. The passage of the Fourteenth Amendment was not the end. It was an important step towards the rule of law. It was, as President Obama wrote in the context of the Constitution, part of a conversation and part of the Democratic mission.<sup>504</sup> And that is what we see with the Fourteenth Amendment, which was born in the belief that the Constitution needed to further protect African Americans, that each generation must struggle to define and implement its promises.

The connections between these race riots—particularly the timing of the Memphis Massacre—exude the interaction between the formal/procedural theoretical approaches to the rule of law and the substantive. Even though the formal law was somewhat new and changing in Memphis, it had no meaning in a town where a man could be shot for equating an African-American man's life to that of a white man. From a formal lens, the equality of humanity was rising yet there was not much more freedom for the victims of these riots than before.

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<sup>503</sup> See, e.g., James M. Durant, *Equal Protection: Access to Justice and Fairness in the American Criminal Justice System?*, 8 DEPAUL J. FOR SOC. JUST. 175, 184 (“Not surprisingly, we have and will continue to witness maturation in the application of the 14th Amendment. The unfortunate truth of the matter is that these questions and others will continue to haunt the halls of justice as we interpret the true meaning of fairness and equal access to justice, for all Americans.”).

<sup>504</sup> See BARACK OBAMA, *THE AUDACITY OF HOPE* 92 (2006) (“[O]ur democracy [is] not as a house to be built, but as a conversation to be had.”); see also JAMES T. KLOPPENBERG, *READING OBAMA: DREAMS, HOPE, AND THE AMERICAN POLITICAL TRADITION* 153-54 (2012) (discussing Obama's constitutional vision in *Audacity of Hope* as part of conversation among American people).

While the Fourteenth Amendment increased the protections provided by the federal laws in America, it remained a challenge that the substantive rule of law in the South did not have the same respect for equality. The rule of law cannot exist without both a procedural aspect—clear laws that are regularly enforced—and a substantive element—laws that promote equality, fairness, and justice. The Fourteenth Amendment provided a solution to the first issue: an enforcement mechanism for the substantive rights guaranteed to African Americans. The substantive element, however, falls upon the individual enforcers. Without individuals—particularly those in government—dedicated to the meaning of the Fourteenth Amendment, giving a substantive dimension to the protections guaranteed to all citizens, the moral end of the rule of law will not exist. This is an emphatic statement of a universal truth—laws are not self-executing!