It's Not About Federalism #18: The Colfax Massacre

Regular readers will know that the Supreme Court's states'-rights bloc has been striking down federal statutes—particularly civil rights laws—at a record pace. But it's fair to say that the general public hasn't caught on yet. Why have decisions striking down parts of the Americans with Disabilities Act, the Violence Against Women Act (VAWA), the Age Discrimination in Employment Act, and the Religious Freedom Restoration Act continued to slip beneath the public's consciousness?

Partly, we suspect, because Americans don't know about an earlier Court's antipathy to federal civil rights legislation. If today's Court tried to resurrect *Plessy v. Ferguson*—a case in which the Court *failed* to strike down a racist state law—the outcry would be deafening. But when the Court revives equally squalid 19th-century precedents that *did* strike down congressional civil rights laws, hardly anyone notices.

As our modest contribution to refreshing historical memory, we draw your attention to a forgotten event that happened on this very date in 1873—Easter Sunday—in Colfax, Louisiana. A white mob massacred more than 100 blacks who had gathered at the Grant Parish courthouse to defend a Republican government elected with black support.

The federal government prosecuted the murderers, just as it would step in a century later when southern state courts refused to protect civil rights activists. But unlike the federal courts of the 1950s and 1960s, the Reconstruction-era Supreme Court set the Colfax murderers free in a case called *United States v. Cruikshank*.

The Court said Congress had no power to punish racist violence by private citizens, thereby licensing decades of Klan terrorism. Republicans gave up on their attempt to enfranchise southern blacks, knowing that the cause was hopeless without federal enforcement power. Federal troops were withdrawn from the South following the disputed election of 1876, just a year after *Cruikshank*. It would be almost a century before blacks could again vote in significant numbers in most of the South.

What makes *Cruikshank* especially pernicious is that the post-Civil War amendments to the Constitution—the 13th, 14th, and 15th Amendments—explicitly gave Congress the authority to defend civil rights through legislation precisely because the country did not trust courts to do the job.

Ironically, the Radical Republicans modeled Congress's new power to protect blacks' civil rights on the power Congress had enjoyed before the war to protect slaveholders' "property" rights. The Court had infuriated abolitionists with the infamous *Prigg* case of 1842 (another one we've since forgotten), holding that Congress could forbid northern states from giving a hearing to blacks who claimed to be free when southerners seized them and asserted they were runaway slaves. Congress, defending individual "property" rights in the Fugitive Slave Act, could not only trump (northern) states' rights; the Court also said Congress could punish private individuals who interfered with slaveholders' pursuit of escaped "property."

The Radical Republicans drew two lessons from *Prigg*: first, they didn't trust judges; second, they saw that a Congress armed with the power to override states' rights and regulate

private conduct could overcome southern resistance to emancipation, just as the prewar Congress had used a similar power to undercut northern resistance to slavery.

Justice Harlan—most famous today for his stirring dissent in *Plessy*—recounted this history in his equally passionate dissent from *The Civil Rights Cases*, an 1883 decision holding that Congress had no power to prohibit private discrimination by innkeepers and other businesses. Indeed, Harlan pointed out, the 1787 Constitution stated only that slaveholders had a right to recover fugitive slaves from free states; Congress had the power to enforce that right only because the Court had inferred it. But the postwar amendments *explicitly* gave Congress the power to enforce individual rights. Harlan bitterly concluded:

This court has uniformly held that the national government has the power, whether expressly given or not, to secure and protect rights conferred or guarantied by the constitution. . . . That doctrine ought not now to be abandoned, when the inquiry is not as to an implied power to protect the master's rights, but what may congress do, under powers expressly granted, for the protection of freedom

Jim Crow was finally defeated with the assistance of federal legislation like the Civil Rights Act of 1964 and the Voting Rights Act of 1965, upheld by the Warren Court as legitimate exercises of federal power. *Cruikshank* and *The Civil Rights cases* were dead—or so it seemed until the Rehnquist Court rediscovered states' rights.

In the 1990s, Congress found that states were not protecting women from violence, just as states in the 1870s failed to protect blacks from the Klan. Congress therefore overwhelmingly (unanimously in the House) passed VAWA, giving victims of sex-based violent crimes the right to sue their attackers in federal court. But the states'-rights bloc said Congress had no power to pass this part of VAWA, throwing out a case brought by a Virginia Tech student who said she had been gang-raped by football players and let down by state authorities who did little to investigate or punish the rapists. (Students of "new federalism" will recognize this case as *United States v. Morrison*).

And what did Chief Justice Rehnquist's majority opinion cite as precedent for nullifying a congressional civil rights law? *Cruikshank*, *The Civil Rights Cases*, and one other Reconstruction-era decision. Imagine if the Court announced that "separate but equal" segregation was again permissible, citing *Plessy* as authority. If the Court eventually upholds the government's detention policies in the War on Terror, it surely won't cite *Korematsu*. But *Cruikshank* is somehow respectable once again.

If America remembered even the most basic facts about Reconstruction, Chief Justice Rehnquist could never have justified the majority's reliance on *Cruikshank* and *The Civil Rights Cases* with this ludicrous claim:

The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time [who] obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

Yes, but what of the Members of *Congress* who *wrote* the Fourteenth Amendment and then passed the civil rights laws that the Court struck down? Were they not "familiar[] with the events surrounding the adoption of the Fourteenth Amendment?" Two Justices from *The Civil Rights Cases* majority were still around for *Plessy*. They both voted to uphold segregation. Are these really the men we should look to for an understanding of the Equal Protection Clause?

(Perhaps Chief Justice Rehnquist thinks so; after all, as a law clerk when *Brown v. Board of Education* was argued, he wrote a memorandum arguing that *Plessy* had been correctly decided. But most of us would go with the views of Justice Harlan, the dissenter in *Plessy*—and in *The Civil Rights Cases*.)

If it weren't so deadly serious, the claim that the 19th-century Court deserves special deference would be a bad joke. But we have forgotten the incalculable damage wrought by that Court, and today's "new federalists" can cite some of the most repugnant episodes in our constitutional history because no one calls them to account.

Remembering the Colfax Massacre on its anniversary is a step toward restoring an accurate history of Reconstruction and reminding us that the Supreme Court abetted racist violence decades before it authorized legal segregation. The Jim Crow South surely remembered the meaning of Colfax and *Cruikshank*, as evidenced by a monument the State of Louisiana erected in 1950:

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

The memorial over the three whites' graves is even more to the point:

Erected to the Memory of the Heroes Who Fell in the Colfax Riot Fighting for White Supremacy, April 13, 1873.

After Jim Crow was defeated, Colfax was forgotten. It's time to start remembering.

It's not about federalism; it's about collective amnesia

On the Internet:

Richard Rubin, "The Colfax Riot," *The Atlantic* (July/August 2003): http://www.theatlantic.com/issues/2003/07/rubin.htm

United States v. Cruikshank: http://laws.findlaw.com/us/92/542.html (more readable, edited text: http://www.agh-attorneys.com/4_us_v_cruikshank.htm)

The Civil Rights Cases: http://laws.findlaw.com/us/109/3.html

United States v. Morrison: http://laws.findlaw.com/us/529/598.html