ARTICLE

THE POSSE COMITATUS ACT OF 1878 AND THE END OF RECONSTRUCTION

ANDREW BUTTARO*

* Andrew Buttaro is an associate at Locke Lord, LLP in Dallas, Texas. He previously served as a law clerk for the Supreme Court of Texas and a member of the legal team of a presidential campaign. He received his law degree and a master's in legal history from the University of Virginia in 2012.

INTRODUCTION

Writing of Reconstruction seventy years after Appomattox, the great African-American leader W.E.B. Du Bois concluded, "The slave went free; stood a brief moment in the sun; then moved back again toward slavery."[1] The story of that "brief moment" has been retold frequently over the years.[2] Some chroniclers depict it as a tragically missed opportunity to remake a society desperately in need of remaking, while others view it as a flawed endeavor doomed from the start; and as with all historical episodes, there are innumerable perspectives between these two poles.[3] What is nearly indisputable is that by 1877, federal Reconstruction had ceased to exist in any meaningful sense.[4] The Freedman's Bureau was gutted, the Republican Party receded into sheer irrelevancy below the Mason–Dixon Line, and the federal troops that had formed the vanguard of Reconstruction retreated to their barracks.[5] It is on this last point that this Article focuses.

It is remarkable that for all the ink spilled in examining Reconstruction, relatively few studies address the central role of the Union Army in enforcing postwar federal policy.[6] Even fewer studies discuss the Posse Comitatus Act.[7] Passed in 1878, after the election of President Rutherford B. Hayes and the Compromise of 1877, the Posse Comitatus Act was the Democratic Congress's *coup de grace* to military Reconstruction.[8] The crux

1. W.E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA 30 (1935).

2. *Id.* at 711–15 (recounting triumphs and tragedies of Reconstruction).

3. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, at xix–xxvii (1988) (contrasting traditional Dunning School scholarship, sympathetic to obstructionist Southerners and critical of Reconstruction efforts, with more recent interpretations detailing some successful aspects of the endeavor).

4. *See* JAMES P. SHENTON, THE RECONSTRUCTION: A DOCUMENTARY HISTORY OF THE SOUTH AFTER THE WAR 223 (1963) ("Reconstruction in the formal sense ended in 1877.").

5. *See* FONER, *supra* note 3, at 582 (outlining measures taken by the Hayes administration essentially ending Reconstruction in the South).

6. DAVID DONALD, THE POLITICS OF RECONSTRUCTION, at xi (1965) ("A study of the Federal Army in the postwar South is badly wanted . . . .").

7. *Id.* (observing a lack of studies on the military's role during Reconstruction).

8. STEPHEN YOUNG, THE POSSE COMITATUS ACT OF 1878: A DOCUMENTARY HISTORY, at xv (2003) (contending the Posse Comitatus Act was a direct reaction to the overuse of military forces in response to civil disturbances).

of the statute forbade the military from engaging in civil law enforcement.[9] Emboldened by both its numerical strength and a weakening Republican commitment to a forceful federal presence in the former Confederacy, the Democratic majority hoped the Act would prevent the military from reprising its role as the enforcer of the Reconstruction amendments and federal laws designed to protect the civil rights of emancipated blacks.[10]

This Article examines the background and passage of this long-neglected legislation. First, the common law origins of the *posse comitatus* are recounted to provide a jurisprudential background to illuminate the 1878 statute. This expansive history figured prominently in the legislative debates and therefore, the conceptual development of the *posse comitatus* is important to understanding arguments for and against the eventual bill.[11] Second, the Article offers an abbreviated history of military Reconstruction, focusing on the aspects most galling to Southern (and some Northern) Democrats. It is demonstrated that the lived experience of military occupation and law enforcement helped spur passage of the Act. Third, the congressional debate over the Posse Comitatus Act in the late spring and early summer of 1878 is closely scrutinized. The legislative clash over the Act offers an insightful window into the politics and ideology swirling around military Reconstruction, yet this debate has rarely, if ever, been given close attention.[12] The admittedly ambitious goal of this Article is to rectify this situation by providing an understanding of the intellectual motivations for a frequently misperceived—and a misconceived—Act. Finally, the Article closes with a brief summation of the legacy of the Posse Comitatus Act, as well as a description of its effect on Reconstruction. The overarching argument of this Article is that although the Posse Comitatus Act is often portrayed as a noble effort by civilian authorities to rein in a reckless military, in reality it was passed to legislatively end Reconstruction and stymie the constitutional progress of the era.

9. *Id.* (noting the "bill . . . contained language expressly prohibiting the use of the army as a *posse comitatus*").

10. *Id.* ("The Posse Comitatus Act of 1878 was enacted as a direct response to the increasing use of the military for civilian purposes . . . .").

11. *See* Mark P. Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era*, 36 CARDOZO L. REV. 119, 135, 138–39 (2014) (discussing the legislative debate surrounding passage of the Posse Comitatus Act).

12. *See id.* at 122 ("[T]he PCA is best seen as a product of a unique period of American history caught in the maelstrom of Reconstruction Era politics.").

I. A BRIEF HISTORY OF THE *POSSE COMITATUS*

A. *Historical Origins and Antecedents*

The *posse comitatus* has a lengthy, if not always venerable, history in the common law.[13] The term translates from the Latin for the "power of the county," and first arose in English law in 1411 with an act authorizing the sheriffs to call upon the "poair de Counte" to arrest rioters.[14] Conceptually, however, the *posse comitatus* predates this entrance into the common law lexicon and can be linked to the Assize of Arms promulgated by Henry II in 1181.[15] The Assize of Arms required every free Englishman to pledge his service to the king, and to this end, required a citizen to maintain proper war instruments in his panoply.[16] The statute thus allowed the monarch to form an army not just of those vassals who owed the king service out of feudal obligation, but from the larger populace bound by the Assize of Arms.[17] This latter force was known as the *jurata ad arma*.[18]

Henry III solidified the role of the *jurata ad arma* with a series of ordinances, the most prominent of which was the Statute of Winchester in 1285.[19] These ordinances required that citizens pursue outlaws upon the "hue and cry" and dictated that the malefactor should be turned over to the sheriff upon capture.[20] This deference to the sheriff's authority was

13. *See id.* at 139 ("The PCA addressed, in part, the concern that federal troops were being called into service as a '*posse comitatus*' in a somewhat arbitrary manner by local government.") Black's Law Dictionary defines the *posse comitatus* as "[a] group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations." *Posse Comitatus*, BLACK'S LAW DICTIONARY (10th ed. 2014).

14. The Riot Act of 1411, 13 Hen. 4, c.7 (Eng.); *see also* Brian Porto, Annotation, *Construction and Application of Posse Comitatus Act (18 U.S.C.A. § 1385), and Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Execute Laws*, 141 A.L.R. Fed. 271, § 2(a) (1997) (stating the term *posse comitatus* translates to "power of the country").

15. *See* David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 3 (1971) ("Henry II, in the year 1181, issued the Assize of Arms.").

16. *See* Assize of Arms, 1181, 27 Hen. 2, art. 3 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 85 (Carl Stephenson & Frederick George Marcham eds. & trans., 1937) (requiring those loyal to the King to maintain a supply of arms).

17. *See* Engdahl, *supra* note 15, at 3 (suggesting that the Assize of Arms enabled all untenured subjects to assist with law enforcement by requiring readily available weaponry).

18. *See id.* at 4 ("[T]he *jurata ad arma*[] [was] the force of men sworn to arms under the Assize of Arms.").

19. Statute of Winchester, 1285, 13 Edw. 1, stat. c. 3 (Eng.); *see also* Engdahl, *supra* note 15, at 4 (surveying the history of the *jurata ad arma*).

20. Statute of Winchester, 1285, 13 Edw. 1, stat. 2, c. 3 (Eng.); *see also* Engdahl, *supra* note 15, at 4 (identifying the duty under the *jurata ad arma* to keep domestic peace by responding to the hue and cry).

designed to avoid the frequently barbarous summary justice meted out to persons captured by the *jurata ad arma*.[21] For instance, a 1252 ordinance bound the sheriff to maintain the suspect's health until his case was adjudged "by the law of the land."[22]

Although a clear separation of military and civil authority did not emerge until the end of the fourteenth century, signs of the eventual cleavage were apparent much earlier.[23] The *jurata ad arma* came to be governed differently depending upon whether it was being employed to make war or quell domestic disturbances.[24] When acting domestically, it came to be known by its now-familiar moniker of the *posse comitatus*.[25] This sharpening civil–military distinction gained additional momentum in the wake of the military tribunals that Edward II ordered in 1322 against noblemen suspected of anti-regime conspiracy.[26] These show trials soon came to be derided as monarchial overreach.[27] Parliament annulled the capital sentences of the convicted in 1327, after the accession of Edward III, relying in part on a chapter of Magna Carta proclaiming, "No free man shall be . . . imprisoned . . . or in any way ruined . . . except by the lawful judgment of his peers or by the law of the land."[28] After Henry IV took the scepter in 1399, however, some of these embryonic common law safeguards eroded.[29] For instance, a 1411 statute designed to suppress rebellions authorized Star Chamber proceedings in the event that suspects

21. *See* Engdahl, *supra* note 15, at 4 ("[T]he sheriff was bound to keep the suspect in good health until his case had been decided.").

22. *Id.* (citing WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FRIST 364 (H.W.C. Davis ed., 9th ed. 1913) (providing the Latin phrase)).

23. *See id.* at 5 (indicating the divide between military and civilian law enforcement had grown more defined by the end of the fourteenth century).

24. *See id.* at 6–7 (illustrating different consequences arising out of use of the *posse comitatus*).

25. *See id.* at 7–8 (analyzing the shift in the use of the *jurata ad arma* in both military and civilian instances to solely using the *jurata ad arma* to quell civilian disturbances).

26. *See* MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 41 (1987) ("[T]he King and divers Lords proceeded to give Sentence of Death against him."); *see also* Engdahl, *supra* note 15, at 5 (describing Edward II's use of military justice to punish enemies as excessive).

27. *See* Engdahl, *supra* note 15, at 6 (discussing Parliament's response to Edward II's military actions).

28. Magna Carta, cl. 39 (1225), *reprinted & translated in*, J.C. HOLT, MAGNA CARTA app. 12, at 461 (2d ed. 1992); *see also* Engdahl, *supra* note 15, at 6 (identifying chapter 39 of Magna Carta as a grounds for annulling these death sentences).

29. *See* Engdahl, *supra* note 15, at 8 ("In the first year of . . . rule, Henry's Parliament expanded the jurisdiction of the Court of the Constable and Marshal to include appeals of felony for acts done outside the realm.").

were not prosecuted within a month of the disturbance.[30]

B. *The English Revolution and the Evolution of the Posse Comitatus*

The tension between rights guaranteed by Magna Carta and the continued use of an established *posse comitatus* in the fifteenth and sixteenth centuries was not resolved until the English Revolution in the seventeenth century.[31] Indeed, the issue contributed to the conflict.[32] Although the Statute of Winchester (and thus, the statutory basis of the *jurata ad arma*) was repealed in 1623, Charles I stubbornly persisted in employing martial force across the realm.[33] Yet the Revolution's dramatic conclusion seemed to decapitate not only Charles I but also the peacetime domestic use of martial law he had so visibly endorsed.[34] By the time of the Restoration of Charles II in 1660, Lord Hale of the King's Bench felt confident enough to proclaim that deviations by the government from the strictures of civilian law were justified, if at all, only in a time of war and "when the king's courts are open, it is a time of peace in judgment of law."[35] Thus, the last vestiges of the feudal military structure were essentially dismantled by the time of the Restoration.[36]

Restoration jurisprudence also laid the foundation for the modern understanding of the *posse comitatus*.[37] In 1662, the Parliament passed a new militia law (filling the void left by the earlier repeal of the Statute of Winchester) that authorized the militia to suppress "Insurrection, Rebellion or Invasion," a more onerous standard than that of mere civil disturbances.[38] Historically, the militia and the *posse comitatus* constituted the same body, but the Restoration changed both the lay and legal

30. *See id.* (noting the reversion to royal prerogatives in the administration of justice).

31. *See id.* at 13–14 ("Controversy over control of the militia . . . was the precipitating cause of the great civil wars which began in August, 1642.").

32. *See id.* at 14 (discussing causes of the English Revolution).

33. *See id.* (referring to the intransigent character of Charles I and his continued use of military forces in civil matters).

34. *See id.* (contrasting the actions of Charles I with those undertaken by his successors).

35. 1 MATTHEW HALE ET AL., HISTORIA PLACITORUM CORONAE, THE HISTORY OF THE PLEAS OF THE CROWN 346 (Phila., Robert H. Small, 1st Am. ed. 1847) (1736); Engdahl, *supra* note 15, at 14 (referring to the intransigent character of Charles I and his continued use of military forces in civil matters).

36. *See* Engdahl, *supra* note 15, at 16 ("[B]y the close of the 17th century English law was firmly committed to the principle that the government must deal with its subjects pursuant to the ordinary law.").

37. *See* YOUNG, *supra* note 8, at xiii (acknowledging the influence of Restoration legal thinking on subsequent definitions of the *posse comitatus*).

38. Engdahl, *supra* note 15, at 15.

understanding.[39] The Restoration framework separated the *posse comitatus* (which would now be constrained by due process requirements and used only to address civil disorders) from the militia (which would now be deployed only in the event of an actual insurrection or rebellion).[40] The raising of standing armies by both Charles II and James II led to a backlash, and the Bill of Rights promulgated after the Glorious Revolution of 1688 was enacted partly to address this lingering issue.[41] The Bill of Rights prohibited the maintaining of a standing army in a time of peace and proscribed the monarch from unilaterally declaring martial law.[42] The net effect of all these changes was that by the end of the seventeenth century, the role of the *posse comitatus* had been substantially clarified—it was to operate within the parameters of civil law, and it was distinct from a militia.[43]

This new understanding was exemplified by the regal response to the riots following the accession of King George I.[44] Undoubtedly recalling the lethal price Charles I had paid for imposing martial law to counter domestic disturbances, George instead backed the Riot Act of 1714, which outlined procedural steps to suppress disturbances.[45] In practice, civil authorities would arrive at the scene of the commotion and instruct the crowd to disperse (i.e., the idiomatic "reading of the riot act"), and any remaining malefactors would face felony prosecution in common law courts.[46] If the local officials required assistance in quelling the fracas, they were authorized to summon a *posse comitatus* of "all his Majesty's Subjects of Age and Ability."[47] Notably, nothing in the statute suggested

39. *See id.* ("[E]xperience of decades without a statutorily based militia . . . seems to have led to a separation of these institutions in popular and legal understanding.").

40. *See id.* ("[T]he *posse* should deal with riots and civil disorders . . . [and] the militia should be used only in the event of actual insurrection, rebellion, or invasion.").

41. *See id.* at 16 (claiming actions to maintain standing armies by the two kings led to "English law [being] firmly committed to the principle that the government must deal with its subjects pursuant to the ordinary law").

42. *See id.* ("The Bill of Rights of 1689 . . . declared the keeping of a standing army . . . to be against the law . . . .").

43. *See id.* (summarizing the outcome of decades of conflict between the monarchy and the people over the use of the military for civilian affairs).

44. *See id.* ("George I was more respectful of his subjects' dislikes of assaults on their liberties by military force.").

45. *See id.* at 16–17 (listing several elements of the Riot Act of 1714).

46. *See id.* at 16 ("The Riot Act provided that in the event of a riot the mayor, sheriff, or other civil magistrate should go to the scene and read aloud a proclamation ordering the crowd to disperse.").

47. Riot Act of 1714, 1 Geo. 1, stat. 2, c. 5 (Eng.); *see also* Engdahl, *supra* note 15, at 17 (identifying who was eligible to serve in a *posse comitatus*).

that enlisted soldiers could be used to combat a domestic disorder.[48] William Blackstone endorsed this emerging consensus in his magisterial *Commentaries on the Laws of England*, recognizing the need to remove the military from civil law enforcement while acknowledging the necessity of a *posse comitatus* for "keeping the peace and pursuing felons."[49]

C. *The Posse Comitatus and the American Experience*

The anti-militaristic principles canonized by Blackstone were reflected in the American colonies many decades before his writings.[50] Many colonial charters restricted the use of troops to instances of actual rebellion or insurrection, and violation of these due process principles contributed to the colonial anger in the years preceding the American Revolution.[51] The most egregious incident was the infamous Boston Massacre of 1770, when British regulars, deployed and quartered in the Massachusetts city to act as a police force, fired upon and killed five colonial rioters.[52] The memory of this and other incidents of royal military law enforcement led the founding generation to ensconce strong due process principles into the national Constitution (and many state constitutions as well).[53]

The specific concern with military enforcement of domestic law was animated by a more general fear of standing armies held by many colonists in the Revolutionary era.[54] Richard Kohn, a professor of military history, has posited that during the Founding era "no principle of government was more widely understood or more completely accepted. . . than the danger of a standing army in peacetime."[55] There was considerable debate among the Founders, however, regarding the degree of danger such an

48. *See* Engdahl, *supra* note 15, at 17 (noting the Riot Act lacks language authorizing military troops to serve in the *posse comitatus*).

49. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 332 (Oxford Clarendon Press, rpt. 1992) (1765).

50. *See* CHARLES DOYLE, CONG. RESEARCH SERV., RL95964, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 1 (2000) ("Americans have a tradition . . . that rebels against military involvement in civilian affairs.").

51. *See id.* at 5 (stating " the Declaration of Independence listed among our grievances against Great Britain that the King had" quartered troops and elevated military over civil justice); *see also* Engdahl, *supra* note 15, at 18 ("The earliest American colonial charters . . . contained a provision for military defense against invasion by outsiders . . . .").

52. *See* Engdahl, *supra* note 15, at 24–25 (detailing the events of the Boston Massacre).

53. *See id.* at 28 (recollecting colonial opposition to military involvement in civil affairs).

54. *See* RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA 2 (1975) (quoting Samuel Adams's warning of the dangers posed by a standing army).

55. *Id.*

army posed.[56] Alexander Hamilton, for one, called for the creation of a federal army to preserve national security.[57] "Few persons," he wrote, "will be so visionary as seriously to contend that military forces ought not to be raised to quell a rebellion or resist an invasion."[58] Argument over the extent to which the Founders were opposed to standing armies was a recurring topic in the debate over the Posse Comitatus Act in 1878.[59]

Yet, there was a competing strain in the early American experience that indicates that this generalized concern with the perils posed by a standing army did not necessarily extend to an equivalent fear of a *posse comitatus* consisting of able-bodied citizens.[60] To the contrary, serving in a *posse comitatus* was a routine feature of civic life in the decades following the American Revolution.[61] "In antebellum America, as in pre-industrial England, it was commonplace to witness civilians accompanying sheriffs and justices, scouring the countryside in search of scoundrels, scalawags, and other law-breakers," one author wrote of the period.[62] "These civilians were the *posse comitatus*, or uncompensated, temporarily deputized citizens assisting law enforcement officers."[63] Service in the *posse comitatus* was considered a duty of law-abiding citizens, and the posse itself was understood to be crucial to the public welfare.[64] The comments of a diverse range of writers testify to the ubiquity of the *posse comitatus* in American life. The jurist Edward Livingston described Americans as assisting sheriffs' possess due to "ties of property, of family, of love of country and of liberty."[65] Alexis de Tocqueville, a perspicacious observer of early United States social and political life, wrote that Americans had a fervid "interest in . . . arresting the guilty man," partly due to civic obligations like the *posse comitatus*.[66] Henry David Thoreau testified to the

56. *See* Engdahl, *supra* note 15, at 40 ("The hazard and utility of a standing army were as hotly discussed in the ratification debates as they had been in the Convention itself.").

57. *See id.* at 40–41 (contending Alexander Hamilton supported a federal army).

58. THE FEDERALIST NO. 26 (Alexander Hamilton).

59. Nevitt, *supra* note 11, at 138 ("Unfortunately, the [F]ramers' early legitimate concerns regarding a large standing army cloaked the true purpose of this racially motivated act.").

60. Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 LAW & HIST. REV. 1, 2 (2008) ("Americans heeded the call to serve in local *posses*.").

61. *See id.* (noting the quotidian nature of the *posse comitatus* in antebellum America).

62. *Id.*

63. *Id.*

64. *See id.* (arguing that the *posse comitatus* was a routine civic obligation).

65. EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE STATE OF LOUISIANA 209 (1991).

66. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 95–96 (J.P. Mayer ed., George Lawrence trans., Harper Perennial Modern Classics 2006) (1835).

omnipresence of the *posse comitatus* by lamenting that those who "serve the state . . . with their bodies" in a posse were "commonly esteemed good citizens."[67] The message was clear: while many early Americans may have had reservations regarding standing armies, they nonetheless willingly assisted law enforcement officers through the use of the *posse comitatus*.[68]

The judiciary supported this view of service in the *posse comitatus* as a civic duty.[69] In *Coyles v. Hurtin*,[70] Chancellor James Kent rebuked a citizen who declined to assist a *posse comitatus* by stating, "every man is bound to be aiding and assisting, upon order or summons . . . and is punishable, if he refuses."[71] Kent argued that such severity was necessitated by the far-flung geography and limited government of the United States, which left officials unable to "be actually present in every place where power might be wanting."[72] Denying sheriffs the use of the *posse comitatus* would mean, in practical terms, "great inconvenience and danger to the administration of justice."[73] Pennsylvania's highest court ruled similarly in 1840, stating that "[a]cquiescence in the laws is the duty of every citizen; and in a government of laws, such as ours emphatically is, it is the duty of every citizen to aid in their execution."[74] The *posse comitatus* figured prominently in this role.[75] Although born as a royal prerogative, the practice evolved into a feature of democratic civic life when transplanted into the American context.[76]

D. *The Gordon Riots and Mansfield's Doctrine*

One of the most significant developments in the history of the *posse comitatus* came, once again, from the other side of the Atlantic, this time in the aftermath of the Gordon Riots in London.[77] In June 1780, a

67. Rao, *supra* note 60, at 2.

68. *See id.* at 3 (noting that, by and large, Americans willingly assisted when called upon by local law enforcement).

69. *See* Coyles v. Hurtin, 10 Johns. 85, 88 (N.Y. Sup. Ct. 1813) (acknowledging if the power of the citizenry was not at the sheriff's disposal, then "it would be attended with great inconvenience and danger to the administration of justice").

70. Coyles v. Hurtin, 10 Johns. 85 (N.Y. Sup. Ct. 1813).

71. *Id.* at 88.

72. *Id.*

73. *Id.*

74. Comfort v. Commonwealth, 5 Whart. 437, 440 (Pa. 1840).

75. *See id.* (suggesting the *posse comitatus* is an important aspect in the administration of justice).

76. *See id.* (asserting the law regarding the *posse comitatus* "has been long well settled").

77. *See* ANTHONY BABINGTON, MILITARY INTERVENTION IN BRITAIN: FROM THE GORDON RIOTS TO THE GIBRALTAR INCIDENT 21 (1990) (arguing the Gordon Riots were a catalyst in changing the conception of the *posse comitatus*).

Protestant mob goaded by Lord George Gordon of Scotland advanced on London to protest the government's increasingly tolerant attitude toward Catholics.[78] The gathering quickly devolved into violence, and a mob of as many as 60,000 streamed into the city, its size audibly apparent to Parliament.[79] Lord Chief Justice Mansfield, knowing that few constables were available to protect government officials, encouraged his peers to call forth a *posse comitatus*.[80] Rather than heed this advice, a cowed Parliament adjourned.[81] Two days later, the mob went berserk, torching buildings and homes throughout the city, including Lord Mansfield's residence.[82] The violence was only extinguished when military troops were summoned into action by the king.[83]

When a somber Parliament later convened, Lord Mansfield delivered a reportedly extemporaneous speech setting out a doctrine that would come to bear his name.[84] Mansfield began by denying that the king had resorted to the proscribed royal prerogative by declaring martial law.[85] With the ashes likely still burning on his prized library, Mansfield unhesitatingly declared the idea is false "that we are living under a military government, or that . . . since the commencement of the riots . . . that any part of the laws or the constitution are either suspended or have been dispensed with."[86] He then pivoted to a realist line of argument, no doubt warmly received by the chastened ministers, that the city would have been left "a

78. *See* Engdahl, *supra* note 15, at 31 ("In . . . 1780, Lord George Gordon of Scotland excited a group of extremist Protestants against the posture of religious toleration taken by the government.").

79. *See id.* ("[A] crowd of perhaps 60,000, marched carrying their petition across the London Bridge.").

80. *See id.* ("Lord Chief Justice Mansfield, being advised that only six constables were at hand, urged his peers that word should be sent for justices of the peace or other officials to muster the *posse comitatus*.").

81. *See id.* ("Instead, both houses of Parliament adjourned.").

82. *See id.* ("[The mob] moved through the streets with destructive violence, at last turning their fury against the dwelling of that arch-symbol of the despised toleration, Lord Chief Justice Mansfield himself.").

83. *See* BABINGTON, *supra* note 77, at 26–27 (stating that after the military's intervention "the riots had lost all purpose and cohesion"). For those of a more literary bent, see generally CHARLES DICKENS, BARNABY RUDGE (Bos., Dana Estes & Co. 1867) (discussing the Gordon Riots in considerable detail).

84. *See* Engdahl, *supra* note 15, at 33 (noting Lord Mansfield's speech became a hallmark of English and American jurisprudence).

85. *See id.* (paraphrasing the first few lines of Lord Mansfield's speech, which denied that the king had declared martial law).

86. 21 THE PARLIAMENTARY HISTORY OF ENGLAND 696 (W. Cobbett ed., London, T.C. Hansard 1814); *see also* Engdahl, *supra* note 15, at 33 (noting Lord Mansfield's rejection of the conclusion that a military government was in place).

heap of rubbish" if not for the intervention of the troops.[87] But the core of his address was the notion that while suppressing the riots, the troops were acting not as a military force per se, but rather as a civilian *posse comitatus*—a tradition as old as the common law itself.[88] "The military have been called in—and very wisely called in—not as *soldiers*, but as *citizens*. No matter whether their coats be red or brown, they were employed, not to subvert, but to preserve, the laws and constitution which we all prize so highly."[89] This statement came to be immortalized as the Mansfield Doctrine.

The Mansfield Doctrine had a central role in the antebellum debates regarding the Fugitive Slave Law.[90] Until then, due process and the Mansfield Doctrine had coexisted rather harmoniously.[91] But as with so many other issues in the crucible of the 1850s, the doctrine became a flashpoint in the run-up to the Civil War.[92] The proximate cause for the reexamination came when a United States marshal sought federal reimbursement for a *posse comitatus* he had summoned to enforce the bitterly contentious Fugitive Slave Law.[93] In responding to the request, Attorney General Caleb Cushing (serving President Franklin Pierce, a vocal proponent of slave renditions) erased the legal fiction espoused by Mansfield and declared that a *posse comitatus* could consist of soldiers acting purely in their military capacity.[94] Citing the English jurist, Cushing argued, "The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any [way] affect

87. Engdahl, *supra* note 15, at 33.

88. *See id.* at 34 ("His Majesty, and those who have advised him (I repeat it), have acted in strict conformity to the common law.").

89. *Id.*

90. *See* DOYLE, *supra* note 50, at 7 (recognizing "Congress specifically authorized recourse to the *posse comitatus*" for enforcing the Fugitive Slave Law).

91. *See* Engdahl, *supra* note 15, at 43 (showing how the due process clause "inherently implied subjection of the military to civilian power").

92. *See* DOYLE, *supra* note 50, at 7 (identifying how the *posse comitatus* was used in the years before the Civil War).

93. *See id.* (explaining the use of the *Posse Comitatus* in the enforcement of the Fugitive Slave Law). For background on the Fugitive Slave Law and the use of the *posse comitatus* to effect slave rendition, see generally ALBERT J. VON FRANK, THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON'S BOSTON (1998) (recounting the trial of escaped Virginia slave, Anthony Burns), ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1984) (exploring cases in which judges were bound to follow laws regarding slavery that they found to be morally wrong), and LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957) (analyzing Chief Justice Shaw's opinions).

94. *See* Engdahl, *supra* note 15, at 50–51 (quoting Extradition of Fugitives from Serv., 6 Op. Att'y Gen. 466, 473 (1854)); *see also* YOUNG, *supra* note 8, at xiv–xv (responding to a claim by a federal marshal seeking reimbursement for expenses related to his raising of a *posse comitatus*).

their legal character. They are still the *posse comitatus*."[95] In the Reconstruction period following the Civil War, this doctrine was relied upon in dramatic fashion.[96]

II. THE UNION ARMY AND RECONSTRUCTION

A. *Overview of Military Reconstruction*

The history of Reconstruction is complex and conflicting, and a comprehensive recitation of it would be beyond the ken of this writing. Instead, this work examines those incidents and aspects of Reconstruction most pertinent to the enactment of the Posse Comitatus Act. First, the troop deployments across the South after the war are scrutinized. These soldiers served both to maintain peace and enforce the civil rights legislation passed in the postbellum era.[97] Although the total number of troops stationed in the South was not very high on a per capita basis, it nonetheless was sufficiently large to antagonize white Southerners, and federal forces fostered a sense of collective grievance among them (particularly because many battalions included black troops).[98] Second, the Reconstruction history of Louisiana is summarized to show both the promise and the pitfalls of military law enforcement. Specific incidents that generated hostility to military Reconstruction are detailed; these events had a dramatic effect on backers of the Posse Comitatus Act. Third, a more general analysis of Reconstruction in the 1870s is offered, and it is shown that military Reconstruction was undercut by a combination of the army's relative weakness and the Democratic resurgence in the 1874 midterm elections. In this vein, the passage of the Civil Rights Act of 1875, often seen as the high water mark of radical success, actually backfired, as it roused Southerners to redouble their efforts to attain "home rule." Finally, the Compromise of 1877 is examined, and the popular mythology surrounding it is separated from the more unsavory legislative reality.

95. Extradition of Fugitives from Serv., 6 Op. Att'y Gen. 466, 473 (1854).

96. *See generally* FONER, *supra* note 3 (providing a scrupulously researched history of the American rebuilding in the wake of the Civil War); WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION (1979) (analyzing the military pullback from Reconstruction during the 1870s).

97. *See* GILLETTE, *supra* note 96, at 27 (describing the use of soldiers during Reconstruction).

98. *See* FONER, *supra* note 3, at 80 (recounting examples of white anger stemming from the presence of black troops); *see also* JAMES E. SEFTON, UNITED STATES ARMY AND RECONSTRUCTION 262 (1967) (offering data on troop numbers and placement in the South).

B. *The Rise of "Bayonet Rule"*

Reconstruction was largely a presidential prerogative in the months following the end of the Civil War, but President Andrew Johnson's ineptitude and appeasement of recalcitrant ex-Confederates spurred Congress to take the reins on Southern policy.[99] To this end, the First Reconstruction Act was passed on March 2, 1867; the legislation imposed temporary army occupation in the South, imposed restrictions on voting and office-holding on former Confederates, granted suffrage to blacks, and mandated ratification of the then-pending Fourteenth Amendment.[100] In expanding rights to the emancipated slaves, Northern Republicans were often acting as much out of political calculation as altruism.[101] Simply put, black suffrage was the most powerful check to a "Democratic resurgence in the South."[102] "Negro suffrage is the hinge of the whole Republican policy," bluntly surmised the Democratic *New York World*, "it is what they most value in the Reconstruction laws; it is the vital breath of the party."[103] A Republican journalist corroborated this view, writing privately that "the Republican [P]arty is going to the devil," but it could "be saved by the *blacks*."[104] The South, predictably, generally loathed the idea of black voting and placed formidable roadblocks in its path.[105] The solution to this quagmire arrived in the *deus ex machina* of federal enforcement.[106] In practice, this often meant military action.[107]

President Ulysses S. Grant succeeded the isolated and disgraced Johnson in 1869 and backed many federal measures designed to protect black voters in the former Confederacy, including the Fifteenth Amendment, the Enforcement Act of May 31, 1870, and the Enforcement Act of April 20, 1871 (more commonly known as the Ku Klux Klan

99. *See* GILLETTE, *supra* note 96, at 5–6 (explaining how Congress wrested control from President Johnson during the early Reconstruction period); *see also* FONER, *supra* note 3, at 216 (discussing Johnson's Reconstruction policy which favored, "control of local affairs by individual states, white supremacy, and the quick resumption of the South's place within the Union").

100. *See* DONALD, *supra* note 6, at 53–54 (recounting the history of the Reconstruction Act of March 2, 1867).

101. *See* GILLETTE, *supra* note 96, at 6 (explaining the Republican political strategy during Reconstruction as it related to Southern black enfranchisement).

102. *Id.* (discussing how Republicans acknowledged the political benefits of black suffrage).

103. *Id.* (quoting N.Y. WORLD, Oct. 14, 1867).

104. *Id.*

105. *See id.* at 25 (showing the South's "determination and ability to disfranchise blacks by various means").

106. *See id.* (describing Grant's efforts to enforce the Fifteenth Amendment).

107. *See id.* (noting "everything turned upon the exercise of the right to vote, for the effectiveness of the ballot depended on its maintenance and its use, which in turn depended upon federal enforcement").

Act).[108] The first Enforcement Act was a comprehensive law outlawing voter intimidation in all local, state, and federal elections and granting federal jurisdiction over cases arising from its violation (a vital provision given the prosecutorial stonewalling and jury nullification endemic to the postwar South).[109] The Klan Act effectively banned the Klan and other terror groups that operated "to deprive citizens of their civil and political rights."[110] Unsurprisingly, the acts engendered passionate opposition.[111] Kentucky Representative William Arthur, for instance, darkly warned that "under the pretext of protecting the people, the people [were] being enslaved; under the pretext of establishing order, liberty [was] being overthrown."[112]

Given this resistance, steadfast enforcement was an absolute necessity, and much of the responsibility for ensuring compliance fell upon the army.[113] Although Southern Democrats spoke ad nauseum of federal laws being enforced at the prick of bayonets, in reality there was not nearly enough of a troop presence in the former Confederacy to effectively enforce the law.[114] Military appropriations were cut dramatically after the war ended, troop levels decreased, and much of what remained of the army—including its crack cavalry units—were sent west to quell nascent conflicts with Native Americans.[115] Moreover, many of those soldiers who remained billeted in the South griped about their newfound peacekeeping and law enforcement assignments.[116] One Union soldier deployed in North Carolina rued "this most disagreeable duty of being used in dirty work for political purposes."[117] General William Sherman commiserated, deploring that "we subject our soldiers to dangers worse than an ordinary battle."[118] Still, despite the complaints on both sides, in truth the military had the worst of both worlds: there were far too few troops to deter crime, but far too many troops for white Southerners to

108. *See id.* (explaining Grant's "sweeping declarations of federal support to ensure that Negroes could vote freely").

109. *See id.* (demonstrating the power and reach of the Enforcement Act of May 31, 1870).

110. *Id.* at 26.

111. *See* GILLETTE, *supra* note 96, at 26 (describing the political opposition the acts generated).

112. CONG. GLOBE, 42nd Cong., 1st Sess., 364 (1871).

113. *See* GILLETTE, *supra* note 96, at 27 (discussing the military's law enforcement role during Reconstruction).

114. *See* SEFTON, *supra* note 98, at 262 (containing an appendix with data on troop numbers and placement).

115. *See id.* (containing an appendix with data on troop numbers and placement).

116. *See* GILLETTE, *supra* note 96, at 35 (describing the sentiment of the army).

117. *Id.*

118. *Id.*

tolerate.[119]

The relatively diminutive federal presence irritated many white Southerners in part because it was perceived as almost wholly political.[120] And in truth, the GOP frequently saw political value in cracking down on obstinate former Confederates. This union of justice and self-interest would be a defining characteristic of Republican policy throughout Reconstruction.[121] Klan terrorism justifiably aroused anger in many Northerners, and combating it allowed the Republicans to temporarily patch over the deep divisions between radicals and moderates within their own ranks.[122] While governor of Ohio, Rutherford B. Hayes acknowledged as much in a letter thanking a Republican senator for a speech attacking Klan violence:

> It will do us great good. You have hit the nail on the head. Nothing unites and harmonizes the Republican Party like the conviction that Democratic victories strengthen the reactionary and brutal tendencies of the late rebel States. It is altogether the most effective thing that has lately been done.[123]

William Gillette, one of the most trenchant observers of the federal presence in the postwar South, acknowledged this political reality: "The ultimate weapon for enforcing the federal will in the South was the use of troops—that is, threatening to deploy them, merely mobilizing them, or employing them in some concerted action."[124] Given how frequently the

119. *Id.* Gillette writes:

> The actual number of troops in each state was generally negligible; only twice did it, in a given [S]outhern state, exceed a thousand. Outside of Texas, where regional garrisons were mainly preoccupied with patrolling the frontier, there were only six thousand troops in the South in 1869, or roughly half of the total in 1868. After the number of troops was further reduced by two thousand in 1870 and by another thousand in 1872, the total remained roughly stationary at thirty-four hundred. By October 1876, there were about three thousand troops left in the South, one half of the number in 1869, whereas in the nation as a whole the total had been reduced by only one fourth. In response to a rise in violence during the congressional campaigns of 1874, the number of garrisons were ordered to be increased by a third in the South; but since the number of soldiers actually stationed in the region was not increased, the existing allotment of troops was spread even thinner.

Id.

120. *See id.* ("The truth was stark: there simply was no federal force large enough to give heart to black Republicans or to bridle [S]outhern white violence . . . . But there were just enough troops to antagonize [S]outhern whites and add to their sense of common grievance.").

121. *See id.* at 46 (noting that enforcing Reconstruction laws could entail political benefits).

122. *See id.* ("[T]he Klan issue was useful in keeping the faction-ridden Republican party together.").

123. *Id.* (quoting a letter written from Rutherford Hayes to John Sherman).

124. *Id.* at 79.

South attempted to circumvent federal policies, there were ample opportunities for government intervention—and for Republicans, there were ample incentives to intervene.[125]

The fact that the occupying force included many black troops was particularly galling to many Southerners.[126] Given the intellectual constraints of the era, how could it not be? By their very presence, the black enlisted men—whose ranks included former slaves—contradicted the racial infantilizing that had been a hallmark of pro-slavery thought before the war.[127] As the *New York World* observed, black soldiers also served as "apostles of black equality," preaching to the manumitted slaves concepts of land ownership, civil law, and political equality.[128] They were often summoned to settle plantation disputes, an exceptionally bitter pill for many whites to swallow.[129] One former Confederate veteran, writing of such a confrontation, confessed, "It is very hard . . . to see a white man taken under guard by one of those black scoundrels."[130] Black troops played an active role throughout Reconstruction and assisted in the building of schools, churches and orphanages, and even organized political gatherings.[131]

Due both to their visibility and the unique resentment they instilled in many whites, black soldiers were frequently—and tragically—the targets of abuse and opprobrium.[132] The backlash could be trivial, as in the case of a North Carolina planter who complained petulantly to an army officer that a black soldier had "bowed to me and said good morning," a violation of the contemporary understanding that blacks should not address whites unless whites addressed them first.[133] It could also be far more serious, and in some cases led to bodily harm or death. In Virginia, a group of former Confederates beat a black veteran merely because he expressed pride in having served in the Union Army.[134] Blacks across the South took heed. "As one of the disenfranchised race," said a Louisiana citizen,

125. *See id.* at 46 (acknowledging the Republican Party's interest in intervention).

126. *See* FONER, *supra* note 3, at 80 ("The presence of black troops among the occupying Union army reinforced the freedmen's assertiveness and inspired constant complaint on the part of whites.").

127. *See id.* (detailing the jobs undertaken by black troops).

128. *Id.*

129. *See id.* ("They intervened in plantation disputes and sometimes arrested whites.").

130. *Id.*

131. *See id.* (describing the role black troops played throughout Reconstruction).

132. *See id.* at 120 ("[W]hites became examples of 'insolence' and 'insubordination' in the case of blacks.").

133. *Id.*

134. *See id.* (recounting the backlash against blacks during Reconstruction).

"I would say to every colored soldier, 'Bring your gun home.'"[135]

C. *The Trial of Louisiana*

The state that best exemplified the challenges of military Reconstruction—and the one that received the most prolonged attention during debate over the Posse Comitatus Act—was Louisiana.[136] Events in the state also demonstrate the extent to which political considerations drove federal policy and troop deployments.[137] Although prototypical of Reconstruction generally, Louisiana was an outlier from its Southern brethren in some respects.[138] By a narrow margin, it was a black-majority state, although there was a sharp divide between rural blacks (and whites, for that matter) and the more educated and sophisticated denizens of cosmopolitan New Orleans.[139] The booming port of New Orleans also distinguished the state and in the economically depressed climate, the patronage it offered was fiercely contested.[140] Politically, the Republican Party was split between radical and liberal factions, with the radical faction generally receiving support from the Grant administration.[141]

An early crisis in the state demonstrated how federal troops could be buffeted by the political whirlwind of Reconstruction.[142] It began in August 1871 as an intra-party struggle between the radical faction, often referred to by the surname of one of its leaders, Senator William Pitt Kellogg, and a more conservative Republican faction headed by Governor Henry Warmoth.[143] Although initially resistant, the Grant administration eventually deployed troops to protect the Kellogg faction.[144] On August 9th, the radicals held a party meeting in the customhouse, the crown jewel of the city.[145] Protected by 150 federal troops, conservative opponents

135. *Id.*

136. *See* GILLETTE, *supra* note 96, at 104 (highlighting the difficulties faced by Louisiana during Reconstruction).

137. *See id.* (describing how "Louisiana's population, wealth, power, and influence" was of political significance).

138. *See id.* (arguing the demographics of Louisiana intensified political pressure).

139. *See id.* at 105 (dissecting the differences within the black population in Louisiana).

140. *See* FONER, *supra* note 3, at 548 (indicating the divisive status of politics in Louisiana was exacerbated by economic conditions).

141. *See* GILLETTE, *supra* note 96, at 105 (stating Grant generally supported the radical Republicans).

142. *See generally id.* (describing an August 1871 crisis that enveloped federal troops).

143. *See id.* at 106 (identifying the first Louisiana crisis that began in August 1871, as "a fight for power between the statehouse and the customhouse").

144. *See generally id.* (recalling Grant's hesitancy to deploy troops to protect the Kellogg party).

145. *See id.* at 107 (identifying the customhouse as the location for the Republican meeting).

were denied entry, a restriction that many observers both North and South found troubling.[146] Reflecting the haphazard nature of his administration's Louisiana policy as much as the difficulty of the situation on the ground, Grant confessed to a reporter that "the muddle down there is almost beyond my fathoming."[147] The trouble persisted into January 1872, when the two factions formed dueling governments.[148] Warmoth's forces refused to relinquish the statehouse, forcing Kellogg's customhouse crew to hold court in a downtown saloon.[149] When the Kellogg faction tried to take the statehouse by force, Grant ordered the army to disperse the mob; although he had initially pledged non-interference, "the army had virtually kept the Warmoth forces in political control as the established government, since possession virtually guaranteed title."[150]

The military played an even more outsized role when the November 1872 election again brought old antipathies to the fore.[151] The Democrats nominated John McEnery for governor, while the Republicans backed the irrepressible Senator Kellogg.[152] The vote totals were disputed and both sides claimed victory.[153] The Republicans, arguing that election laws had been violated given that as many as 10,000 blacks had been disenfranchised, brought their case before a friendly federal circuit court judge, Edward Durell.[154] Durell invalidated the results that had previously been certified by the conservative electoral board and on December 5, 1872, ordered a federal marshal to take control of the statehouse and admit only the Kellogg legislators.[155] Flanked by more

146. *See id.* ("150 soldiers with loaded muskets and two Gatling guns stood guard, while deputy marshals denied opponents admission to the meeting and thousands of people milled around outside.").

147. *See id.* (quoting N.Y. HERALD, Aug. 22, 1871).

148. *See id.* at 108 (describing the continuous conflict between the two factions as they formed clashing governments).

149. *See id.* ("Governor Warmoth's faction held the state house with support of local police . . . and the customhouse faction withdrew to a barroom of the Gem Saloon.").

150. *Id.*

151. *See* GILLETTE, *supra* note 96, at 109–10 (describing the military's role leading up to the November 1872 election).

152. *See* FONER, *supra* note 3, at 550 (identifying William P. Kellogg as the Republican candidate and John McEnery as the Democratic candidate).

153. *See id.* (stating both candidates claimed the governorship after a much-disputed election).

154. *See* GILLETTE, *supra* note 96, at 111 (noting the Republican Party's reliance on a sympathetic federal court to declare "a violation of the federal election enforcement law because 10,000 blacks had allegedly been denied the ballot on election day").

155. *See id.* ("[F]ederal circuit court Judge Edward H. Durell . . . recognized the Republican board as the only legitimate one, handing Republicans governorship and the legislature . . . . Durell issued an order from his home for Marshal Packard to take possession of the statehouse and to admit only authorized members of the Kellogg legislature—those who had been certified by the Republican

than one hundred federal troops, the Kellogg legislature summarily established a quorum, impeached Governor Warmoth, and declared Kellogg the winner of the gubernatorial contest.[156] Grant again weighed in, privately bemoaning that the whole affair was a "miserable scramble" while publicly asserting impartiality.[157] In reality, he backed the Kellogg legislature implicitly by refusing to withdraw the troops from the statehouse.[158] With Northern opinion growing critical, however, Grant refused to take the decisive step of breaking up the Warmoth cohort that was acting as a self-proclaimed government-in-exile.[159]

The uncertainty generated by this ambivalence was to have frightful consequences and as usual, there were not enough troops to prevent bloodshed.[160] Civil disorder emanated out from the capital into the bayou, and political violence directed at Republicans—especially black Republicans—was as merciless as it was ubiquitous.[161] The worst incident occurred in April 1873 in Colfax, a Red River town in the northern part of the state.[162] Blacks affiliated with the Kellogg forces, claiming victory in the 1872 election, seized the local courthouse.[163] Vicious fighting left seventy-one blacks and two whites dead.[164] Many of the slain were shot as they fled the torched courthouse.[165] The Democratic backers of McEnery were briefly triumphant, but federal troops soon arrived to restore order.[166]

Grant's floundering Reconstruction policy in Louisiana placed the troop

board.").

156. *See id.* (explaining the actions taken by the Kellogg legislature during a federally protected convention).

157. *See id.* at 112 (quoting N.Y. HERALD, Dec. 12, 1872) (recalling Grant's characterization of the events in Louisiana as a "miserable scramble" and declaration of neutrality between the two political sides).

158. *See id.* at 113 (recalling Grant continued to protect the Kellogg faction ensconced at the statehouse).

159. *See id.* (explaining Grant's disinclination to break up the McEnery regime by allowing conservatives to remain an organized faction).

160. *See id.* (noting Grant's indecision and "trying to keep the peace had in no way eliminated the causes of unrest").

161. *See id.* at 115 (highlighting the statewide violence that erupted between the races).

162. *See id.* (identifying the slaughter at Colfax as one of the worst atrocities of the era).

163. *See id.* ("The blacks, representing the Kellogg forces, seized the courthouse in late March . . . .").

164. *See* GILLETTE, *supra* note 96, at 115 (tallying the number of resulting casualties).

165. *See* HANS L. TREFOUSSE, HISTORICAL DICTIONARY OF RECONSTRUCTION 48 (1991) (describing how "[a] posse of some two hundred whites" shot blacks fleeing from the torched courthouse).

166. *See* GILLETTE, *supra* note 96, at 115 (acknowledging "McEnery's forces were temporarily triumphant until federal troops arrived and restored order").

issue in the national spotlight.[167] In an address to Congress on December 7, 1874, the President squarely addressed the controversy over the military's increasing law enforcement role in the South.[168] Recognizing that federal intervention was increasingly unpopular, he suggested that he would like to see it end and hoped that new federal action in the South would be unnecessary.[169] Grant adopted a posture of equanimity, explaining that when members of his party would no longer "magnify wrongs and outrages" and Democrats would cease to "belittle them or justify them," federal intervention would cease.[170] He laid the ultimate blame for the continued troop presence squarely at the feet of white Southern obstructionists, however, saying that only when peace was established and black rights were respected could federal involvement come to a close.[171]

Grant's words were soon overtaken by events on the ground as the military again became ensnared in a national controversy.[172] On January 4, 1875, the anti-Kellogg forces staged a coup, kidnapping Republican legislators and swearing in a Democratic majority.[173] At the orders of Governor Kellogg and the combustible General Philip H. Sheridan, Colonel Philippe R. de Trobriand reinstated the ousted legislators, spurring the coup's supporters to walk out in protest.[174] Sheridan gloated in the immediate aftermath of the incident, proclaiming—in reference to the White League terrorists—the "Dog is dead."[175] He also urged that the White League "banditti" be tried by military tribunal and punished for inciting such lawlessness.[176] Secretary of War William Belknap fanned the

167. *See id.* at 106 (concluding Grant's Reconstruction policy in Louisiana turned the nation's attention to the presence of federal troops).

168. *See id.* at 122 (stating Grant "expressed his distaste for any new federal action in the South").

169. *See id.* (noting Grant's public address where he discussed the unpopularity of federal intervention in the South and his hope that it would eventually be unwarranted).

170. *Id.*

171. *See id.* (relaying Grant's pledge that federal involvement in Southern affairs would continue until peace was established and blacks were treated fairly).

172. *See id.* at 123 (retelling the kidnapping of three Republican legislators by anti-Kellogg forces that led to the establishment of a Democratic majority).

173. *See id.* (noting the events that took place in order to forcibly assure a Democratic majority).

174. *See id.* at 122 (recapping how General Phillip H. Sheridan and Colonel Philippe R. de Trobriand assisted the Republicans in expelling the Democrats in order to restore their overthrown legislature). In fact, Colonel Philippe R. de Trobriand first appeared at the behest of Democrats who sought military assistance to calm the indignant Republicans. With the crowd apparently pacified, Trobriand left. A couple hours later, however, the Republicans returned, this time with new orders from Governor Kellogg and General Sheridan. *Id.* at 123.

175. *Id.*

176. *See* GILLETTE, *supra* note 96, at 124 (recalling Sherman's belief that the leaders of the

fire with his dispatches backing Sheridan, replying to the General that "[t]he President and all of us have full confidence and thoroughly approve your course."[177] One historian labels the issue as the "most explosive" of Grant's entire presidency: "The purge, along with the well-publicized telegrams, infuriated a majority of people North and South and crystallized public feeling more than any other event of [R]econstruction."[178] In its wake came a flood of states' rights resolutions condemning Washington for overreaching.[179]

Some vigorously defended Sheridan and the administration, viewing the incident as a proxy for the larger debate on the use of the military for law enforcement.[180] For instance, the *St. Paul Daily Press* mocked hypocritical Democrats who decried the use of force when the military intervened, but whose own violence necessitated such intervention.[181] The *Chicago Inter Ocean*, a prominent radical newspaper, praised Sheridan's muscular remarks: "At such times one clear-cut, ringing, decisive sentence, having the clank of a saber and the ring of a carbine behind, is worth whole volumes of argument and entreaty."[182] The paper strongly backed the use of the military as a law enforcement mechanism.[183] Warning against succumbing to "the hobgoblin of military despotism," the paper described the army as "not the ally of tyranny but liberty; it has never sought to deprive the people of the ballot, but to make good their enfranchisement."[184]

Supporters were outnumbered and out-shouted by critics, however, with many detractors lambasting the incident as the natural consequence of using the army as a de facto *posse comitatus*.[185] The staunchly

White League must "be tried by military tribunal and be punished for fomenting disorder").

177. Letter from William Belknap to Philip Sheridan (Jan. 6, 1875), *in* EDWARD MCPHERSON, HANDBOOK OF POLITICS FOR 1876, at 29, 29 (Wash., Solomons & Chapman, 6th ed. 1876).

178. GILLETTE, *supra* note 96, at 124.

179. *See id.* (recognizing numerous states' rights resolutions that resulted from expulsion).

180. *See id.* at 125 (identifying loyal backers of Sheridan who agreed the war had ended too soon, and it was now time to finish the job).

181. *Id.*

182. *Alleged Military Usurpation*, INTER OCEAN, Jan. 12, 1875, at 4.

183. *See* GILLETTE, *supra* note 96, at 124–25 ("Defending the role of the army as the ally not of tyranny but of liberty, the paper pointed out that the military action did not deprive the people of the ballot but, rather, tried to make good their enfranchisement. However, if the government and the people were unwilling to use the army for this purpose, it claimed, then there was little hope for reconstruction.").

184. *Alleged Military Usurpation*, *supra* note 182, at 4.

185. *See* GILLETTE, *supra* note 96, at 125 ("But denunciation, not defense, was the dominant response, reflecting outrage over use of the army, pent up frustration with regard to the [S]outhern problem, and a profound reaction against reconstruction.").

Democratic New Orleans *Daily Picayune* argued the purge was the inevitable outgrowth of a state government that having been "brought forth by bayonets, nursed by bayonets, pricked into animation and infused with life by bayonets, it now finds itself unable to perform the most ordinary functions without their aid."[186] The paper bemoaned the "prevailing monotony" of military involvement in elections and lamented that the whole matter was an "infamous and humiliating spectacle."[187] Grant even faced unease within his own administration, with some internally advocating a military pullback in response to the criticism.[188]

In four meetings in early January 1875, Grant's cabinet struggled with the future implications of using the army as a *posse comitatus*.[189] Attorney General George H. Williams advocated an aggressive policy, expressly justifying the army's role in Louisiana by describing it as a posse operating to restore peace.[190] Grant initially adopted this characterization of the army but realizing Williams was far in front of the rest of the cabinet, retreated to a more conciliatory course.[191] In a January 13th message to the Senate, the President took an apologetic tone that avoided a categorical defense of the military on *posse comitatus* grounds.[192] At the same time, Grant noted the many instances of white terror in the state and reminded everyone that the federal troops did not act unilaterally—they had been asked by the governor to intervene.[193] In short, Grant's address was a strategic parry—"an artful dodge"—designed to foist the issue on Congress.[194]

Legislators found the Louisiana saga no easier to deal with, and ultimately agreed on an accommodation devised by the moderate Republican Senator William Wheeler to extract the military from further

186. *See id.* (quoting *Second Capture of the State House*, THE DAILY PICAYUNE, Jan. 4, 1875, at 22).

187. *Second Capture of the State House*, THE DAILY PICAYUNE, Jan. 4, 1875, at 22.

188. *See* GILLETTE, *supra* note 96, at 127 (describing how some members of Grant's cabinet were dismayed by his decision to maintain federal forces in Louisiana).

189. *See id.* at 128 (identifying the dates and subject matter of the cabinet meetings during early January).

190. *See id.* at 127 (acknowledging Williams's desire to keep the army in place as a means of maintaining the peace).

191. *See id.* at 128–29 (noting Grant's retreat from his initial position as a result of the cabinet's concern for "the emotional explosiveness, the political repercussions, and the constitutional implications of the situation").

192. *See id.* at 129 (recounting Grant's January 13th message to the Senate, in which he acknowledged problems with the federal presence in the South).

193. *See generally* JAMES D. RICHARDSON, 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS (James D. Richardson ed., Wash., Congress 1899).

194. GILLETTE, *supra* note 96, at 127.

involvement.[195] The Wheeler Compromise, as it became known, reinstated the Democrats who had been expelled from the lower state chamber, recognized the Louisiana Senate as Republican, and called for an end to the gubernatorial dispute (thus leaving Kellogg in control).[196] The agreement was breached within days when Democrats, hoping to gain both houses, unseated additional Republican members.[197] Northern Republicans, hardly wanting to repeat the earlier imbroglio, largely ignored the development.[198] And with that, military Reconstruction essentially settled into a holding pattern in the state.[199] Louisiana, one of Grant's most intractable problems, shows how the military could achieve limited gains in enforcing Reconstruction laws but also how its presence could trigger a bitter backlash—a bitterness that would still be apparent when Congress took up debate on the Posse Comitatus Act.[200]

D. *Gradual Withdrawal and the Civil Rights Act of 1875*

As the Louisiana saga shows, military force had severe shortcomings in advancing policy ends. For starters, there were not enough troops to effectively enforce the Reconstruction laws.[201] Moreover, as the Kellogg fiasco demonstrates, military assistance often served to isolate Republican politicians and prevent them from gaining grassroots support.[202] "Fitful interference of military force," as Senator Carl Schurz put it, proved self-defeating, serving only to further inflame Southern passions against military intervention, which in turn sparked new conflagrations that

195. *See id.* at 132 ("[A] compromise was painfully worked out by William A. Wheeler, the moderate Republican representative from upstate New York. In early March, following a bitter struggle and acrimonious debate, the House endorsed the Wheeler compromise, a plan for Louisiana that was meant to achieve stability and to bring federal intervention there to an end.").

196. *See* TREFOUSSE, *supra* note 165, at 137 (summarizing the details of the Wheeler compromise, which allowed the Kellogg faction to remain in power but returned the lower house of the Legislature back to the Democrats).

197. *See* GILLETTE, *supra* note 96, at 132 (describing the Democrats' breach of the agreement by unseating additional Republican members in an attempt to get a majority in both houses).

198. *See id.* ("Violations of the compromise during 1875 were glossed over by [N]orthern Republican newspapers in a desperate search for tranquility and an escape from reconstruction.").

199. *See generally id.* (acknowledging that the military subsequently refrained from active involvement in Reconstruction in Louisiana).

200. *See generally id.* (examining how the military presence could be a double-edged sword).

201. *See id.* at 171 ("Overwhelming federal force was necessary to enforce law and to command obedience. Yet such force as could only be supplied by the army was often not immediately available in a particular location, nor was it generally available throughout the South.").

202. *See id.* ("[R]epeated reliance upon federal force for political survival only served to isolate Republican regimes that could neither govern nor win on their own.").

required additional intervention.[203] Even General Sherman became fatalistic, acknowledging "outside help sooner or later must cease, for our army is ridiculously small, in case of actual collision. It is only the Memory of our War Power that operates on the Rebel Element now."[204] Given that the Union Army was relying on myth as much as might, Sherman anticipated that the Southern Democrats would eventually be restored, as they "have the votes, the will, and *will* in the End prevail. Delay only gives them sympathy Elsewhere."[205]

Many Southerners agreed with their erstwhile enemy that it was only a matter of time until they returned to power.[206] Speaking of black office-holding, an offense even worse than black enfranchisement or soldiering to the ex-Confederates, one Southerner wrote that "this unnatural condition of affairs may be produced for [a while] by bayonets and bribes but it cannot last. The Almighty never intended the white man to be in subjection to the African and he never will be."[207] The association of undesirable racial changes with the Union Army is noteworthy, and the conflation exposes part of the motivation for the later passage of the Posse Comitatus Act.

The 1874 congressional elections seemed to validate the view that the end of Reconstruction was near. Once again, federal troops were tasked with enforcing the nation's election laws and once again, Democrats denounced the practice as military electioneering. Gillette pellucidly explains the marriage of political expediency and justice:

> Stationing troops and posting special deputy marshals and election commissioners to prevent persecution and bloodshed where blacks were concentrated had indicated an intelligent anticipation of Democratic terrorism; but the Democrats had been right in asserting that the federal presence in a particular district would promote Republican chances at the polls.[208]

Despite this federal presence, the midterm elections in 1874 were a resounding victory for the Democrats; modern presidential parlance may justifiably label the result a "shellacking" or a "thumping."[209] The

203. 3 FREDERIC BANCROFT, SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 141 (1913); *see also* GILLETTE, *supra* note 96, at 171 (arguing the frequent use of the military only hastened the pace of the retreat from Reconstruction).

204. GILLETTE, *supra* note 96, at 172.

205. *Id.*

206. *See id.* (describing Southern Republican distaste for Grant's administration).

207. *Id.* at 193.

208. *Id.* at 231.

209. *See* Peter Baker & Carl Hulse, *Deep Rifts Divide Obama and Republicans*, N.Y. TIMES (Nov. 3,

Democrats gained a sixty-seat edge in the House and—given their success in statewide elections—weakened the GOP Senate by electing either Democrats or independent Republicans, leaving the party with a moderated majority.[210] Many Southerners were ebullient in the wake of the elections.[211] The *Richmond Enquirer*, in an editorial entitled "Call Home Your Troops," gloated, "There is no longer the shadow of an excuse for a single soldier in the South."[212] Predicting immediate withdrawals of Union forces, the paper ominously added: "We advise you to do this in time for if they are kept here until the Democracy gets a chance at them there won't be a soldier left to form a unit for the army."[213] The militant tone of the *Enquirer* and the Southern press reminded one exasperated New Hampshire publication of "the swagger of the Richmond papers in 1864."[214]

In the short term, paradoxically, the election results buoyed the Republican radicals. A civil rights bill with far-reaching provisions for integrating public accommodations received renewed interest, partly because Republicans feared the advent of a Democratic legislature would lead to the undoing of many Reconstruction laws and partly because, with the election behind them, many officials felt liberated from their constituents' moderating rebuke.[215] Ultimately, a watered-down version of the bill (the original had been proposed by the late Massachusetts Senator Charles Sumner, a leading radical) was passed.[216] Although its gains proved illusory, the existence of what Senator Schurz called yet

2010), http://www.nytimes.com/2010/11/04/us/politics/04elect.html (quoting President Obama's description of the 2010 Democratic loss in the House and Senate); *see also* Sheryl Gay Stolberg & Jim Rutenberg, *Rumsfeld Resigns; Bush Vows to 'Find Common Ground'*, N.Y. TIMES (Nov. 9, 2006), http://www.nytimes.com/2006/11/09/us/politics/09elect.html ("With Democrats having recaptured the House and control of the Senate[,] depending on the outcome of a single unsettled contest in Virginia, Mr. Bush . . . portrayed the results as a cumulative 'thumping' of Republicans.").

210. Until the passage of the Seventeenth Amendment provided for direct election of senators, they were appointed by state legislatures. *See* U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . ."); Timothy E. Flanigan, *Whether A State May Elect Its United States Senators from Single-Member Districts Rather Than At-Large*, *in* 16 U.S. OP. OFF. LEGAL COUNSEL 132, 132 (1992) ("The history of the Seventeenth Amendment confirms that Senators are to be selected by the people of the whole State.").

211. *See* GILLETTE, *supra* note 96, at 248 (describing the celebratory reaction after the election from some quarters of the South).

212. *See id.* (quoting RICHMOND ENQUIRER, Nov. 26, 1874).

213. *The Trail of the Serpent*, INDEPENDENT STATESMAN, Nov. 26, 1874, at 66.

214. *Id.*

215. *See* GILLETTE, *supra* note 96, at 260 (acknowledging the political realities motivating passage of the neglected civil rights legislation).

216. *See id.* (describing the bill's amendments before it was signed into law on March 1, 1875).

"another law still strengthening the military grip upon the South" reinvigorated Democrats looking to decisively end military Reconstruction.[217] As with so many events of Reconstruction, the victory was largely pyrrhic—it merely strengthened white Southern antipathy toward perceived military rule without significantly altering the reality on the ground.

E. *The Compromise of 1877*

The presidential campaign of 1876, dominated by the twin issues of political corruption and Reconstruction policy, was one of the closest in history.[218] The Republican candidate, Rutherford B. Hayes, and the Democratic challenger, Samuel Tilden, both claimed victory in the contest.[219] In dispute were electoral returns from the three Southern states under Republican control: Louisiana, Florida, and South Carolina.[220] The deadlock was only resolved by the eight-to-seven vote of an election commission composed of members of the House, Senate, and Supreme Court.[221] In the aftermath of the election, President Hayes ordered federal troops back to their barracks in what many later considered the fundamental exchange of the Compromise of 1877.[222]

217. *Id.* at 282.

218. *See generally* MICHAEL BELLESILES, 1877: AMERICA'S YEAR OF LIVING VIOLENTLY (2010) (placing the election contest in the larger political context); KEITH IAN POLAKOFF, THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION (1973) (questioning Woodward's emphasis on economics in the Compromise of 1877 and contending instead that the parties were badly divided on key ideological questions); WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004) (offering a popular account of the election).

219. *See generally* Michael Les Benedict, *Southern Democrats in the Crisis of 1876–1877: A Reconsideration of Reunion and Reaction*, 46 J. S. HIST. 489 (1980) (labeling the election of 1876 as disputed between the Republican candidate, Rutherford B. Hayes, and Democratic candidate, Samuel Tilden).

220. *See id* at 497 (identifying Florida, Louisiana, and South Carolina as the sources of the electoral crisis).

221. *See id.* at 511 (acknowledging the eight-to-seven Republican majority on the electoral commission).

222. The Compromise of 1877 is best explained by C. Vann Woodward, who argues that the South acquiesced to the election of Hayes in exchange for (1) withdrawal of federal troops from the three disputed states; (2) a promise of a financial subsidy for construction of the Texas and Pacific Railroad; (3) the appointment of a Southerner as Postmaster General; (4) the assurance of federal financial aid in the rebuilding of the South; and (5) an understanding that the South would handle racial affairs on its own. See generally C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951) for further discussion of the Compromise of 1877. Some, however, have denied the existence of such a compromise. *Compare* Allan Peskin, *Was There a Compromise of 1877?*, 60 J.AM. HIST. 63, 65 (1973) (arguing a bargain in which none of the key terms are met is not a bargain at all), *with* C. Vann Woodward, *Yes, There Was a Compromise of 1877*, 60 J.AM. HIST. 215, 215–19 (1973) (rebutting Peskin's revisionist scholarship).

In truth, the federal military withdrawal was likely inevitable given the Southern backlash to the troop presence (especially in Louisiana) and waning Northern support. "We must get rid of the Southern question," wrote one Massachusetts newspaper just weeks before the presidential contest, and many in the region seemed weary of Southern problems.[223] Indeed, the 1876 Republican platform, with "a strong note of reconciliation," seemed to pave the way for a pullback.[224] Hayes's inaugural echoed this theme, hinting that he would abandon the remaining Southern Republican governments in favor of local autonomy.[225] Once ensconced in office, Hayes did just that. In May 1877, Hayes and many in the North ignored a "brutal massacre of white Republicans in Mississippi," showing no inclination to again deploy troops.[226] Yet two months later, Hayes readily used military force to break a labor strike.[227] The dichotomy demonstrated that the issue was not with federal troops being used to enforce laws; it was with federal troops enforcing laws designed to protect blacks and their Republican allies in the South. Former President Grant noted this inconsistency in a remarkably candid private letter:

> During my two terms of office the whole Democratic press, and the morbidly honest and "reformatory" portion of the Republican press, thought it horrible to keep U.S. troops stationed in the Southern States, and when they were called upon to protect the lives of negroes—as much citizens under the Constitution as if their skins were white—the country was scarcely large enough to hold the sound of indignation belched forth by them for some years. Now, however, there is no hesitation about exhausting the whole power of the government to suppress a strike on the slightest intimation that danger threatens.[228]

Grant, with striking incisiveness, identified a motif that would dominate

223. GILLETTE, *supra* note 96, at 301 (referencing discussion of Southern problems in the *Springfield Republican*).

224. *See id.* at 304 (quoting Frederick Douglass at the Republican National Convention of 1876, where he implored the Party not to retreat from Reconstruction in a plaintive speech: "You say you have emancipated us. You have: and I thank you for it. You say you have enfranchised us. You have; and I thank you for it. But what is your emancipation?—what is your enfranchisement? What does it all amount to, if the black man, after having been made free by the letter of your law, is unable to exercise that freedom, and, having been freed from the slaveholder's lash, he is to be subject to the slaveholder's shot-gun?").

225. *See* RICHARDSON, *supra* note 193 at 442–43 (stating "only a local government which recognizes and maintains inviolate the rights of all is a true self-government").

226. *See* GILLETTE, *supra* note 96, at 347 (suggesting a growing Northern reluctance to re-engage with Southern problems).

227. *See id.* at 347–48 (comparing Hayes's response to the massacre and labor riot).

228. *See id.* at 348 (quoting a letter from Ulysses Grant to Daniel Ammen on August 28, 1877).

the congressional debate over the Posse Comitatus Act; namely, the use of anti-militaristic principles as a smokescreen to disguise the real aim of thwarting Reconstruction.[229]

III. THE CONGRESSIONAL DEBATE

A. *Introduction*

The Posse Comitatus Act prohibited the military from enforcing domestic laws and was designed to sound the death knell of military Reconstruction.[230] Attached to a general appropriations bill, the Posse Comitatus Act outlined both civil and criminal penalties for its violation.[231] A few preliminary points should be made before wading into the debates.

First, the congressional debates commanded considerable attention from civic-minded Americans at the time of argument.[232] While floor statements from today's representatives are typically delivered to empty galleries and published into unread oblivion, legislative debates in the Reconstruction era were widely disseminated and closely observed.[233] "Urban and even rural newspapers published long excerpts from the *Congressional Globe*, [and] after 1873[,] the *Congressional Record*," writes Michael Benedict, a scholar of the period.[234] Thus, the statements scrutinized below are not arid remarks divorced from popular opinion.[235] On the contrary, they both reflected public sentiment and actively attempted to shape it.[236]

Second, and more substantially, the Reconstruction debates were undergirded by larger jurisprudential concepts, and legal classicism reigned supreme among contemporary legal thinkers.[237] Classicism, which historian William Wiecek defines as similar to formalism but more

229. *See id.* (alleging the real issue with the Posse Comitatus Act was not the use of military force but who it was protecting).

230. *See* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 168 (2004) (stating the clear limits on the Act for domestic use).

231. *See* 7 CONG. REC. 3578 (1878) [hereinafter *Congressional Debate*] (introducing the military appropriations bill containing the Posse Comitatus Act).

232. *See* MICHAEL LES BENEDICT, PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA, at xii (2006) (declaring the high level of citizen involvement).

233. *See id.* (showing the extraordinary interest in the legislative debates).

234. *Id.*

235. *See id.* (concluding the public was heavily involved).

236. *See id.* (implying the political purpose animating the speeches).

237. WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT 41 (1998).

expansive, "consisted of beliefs shared by most middle-class contemporaries about liberty, power, human nature, rights, and republican government."[238] The philosophy traced its lineage to the Revolutionary period and before, and was "intertwined with some of our most fundamental normative republican commitments," argues Wiecek.[239] "Its legitimating function traced back to the republic's beginnings, and was derived from republican 'foundational principles' concerning the nature of government and the social order."[240] Therefore, "lawyers could invoke it as 'normative history' to sanction policy positions that were implicit in legal doctrines."[241] This last sentence is central to understanding the way in which venerable legal concepts were employed to ground policy prescriptions like the Posse Comitatus Act.

Classicism reached its nineteenth century zenith during the Reconstruction era.[242] Few other periods so readily demonstrate the wisdom of Alexis de Tocqueville's immortal observation that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[243] In the 1870s, the line separating law and politics was infinitesimally thin, yet politicians still paid heed to the classical notion, canonical among the judiciary, that the law was an autonomous entity.[244] "In the generation after the Civil War, classical legal thought emerged and attained its greatest authority," reports Wiecek.[245] Legal historian Bruce Ackerman has similarly argued that Reconstruction represented a "constitutional moment" in which thought leaders were particularly disposed to constitutionalize political issues.[246] In Ackerman's telling, the postbellum period was a "self-conscious act of constitutional creation that rivaled the Founding Federalists' in . . . scope and depth."[247]

The third preliminary point is that the 1870s were marked by inflamed partisanship.[248] Decrying political division has become a hackneyed

238. *Id.* at 3.

239. *Id.* at 14.

240. *Id.*

241. *Id.* at 14–15.

242. *See id.* at 15 (identifying the influence and apotheosis of classicism).

243. *Id.* at 41 (quoting de Tocqueville's comment regarding the overlap of American political and legal culture).

244. *See id.* at 13 ("They regarded their system as self-contained . . . keeping itself going along by an endogenous capability of activating itself.").

245. *Id.* at 64.

246. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 51 (1991).

247. *Id.* at 44.

248. BENEDICT, *supra* note 232, at 49 (stressing the strength of partisan politics during the

cliché in modern times but during Reconstruction, bitter inter-party (and often intra-party) conflict was a way of life.[249] Benedict describes the febrile atmosphere.[250] "The constitutional politics of the Reconstruction era took place in an intensely partisan environment that was quite different from what most Americans have experienced in our lifetimes," he writes.[251] Not only was the nation deeply riven along party lines, but the parties were as ideologically differentiated as they have ever been. Benedict observes that the public was "convinced that the Democratic and Republican parties stood for radically different principles and that the future of American society was at stake in the nation's political contests."[252] A speech made by Henry Ward Beecher illustrates the fervor with which contemporaries viewed the political process.[253] "We are in the favored hour," exhorted the famed preacher, "and if you have great principles to make known, this is the time to advance those principles."[254] It was in this fevered milieu that the Congress took up debate on the Posse Comitatus Act.

B. *Kimmel Sets the Stage for the Democrats*

The opening salvo in the congressional battle over the Posse Comitatus Act was sounded on May 20, 1878 in the House.[255] Representative William Kimmel of Maryland, introducing the bill, told the chamber that as "the highest patriotism demands the wisest precautionary measures," it was necessary to curtail the use of the military in law enforcement.[256] Kimmel's remarks are worth considerable examination because they constitute one of the most sustained cases for the Posse Comitatus Act and as such, his speech illustrates many of the central arguments in its

1870s).

249. *See generally* John Harwood, *The Old Partisan Divide in U.S. Politics*, N.Y. TIMES (June 9, 2008), http://www.nytimes.com/2008/06/09/world/americas/09iht-divide.4.13581494.html (highlighting political division in elections).

250. *See* BENEDICT, *supra* note 232, at 47 (noting "[o]nly recently have Americans become anywhere near as deeply polarized politically as they were in the mid-nineteenth century").

251. *Id.*

252. *Id.* at 48–49.

253. *See id.* at ix ("His audience . . . knew that they were living through a revolution.").

254. *Id.*

255. *See Congressional Debate*, *supra* note 231, at 3579 (introducing the military appropriations bill containing the Posse Comitatus Act).

256. *Id.*; *see* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 1383 (2d Sess. 2005) [hereinafter *Biographical Directory*] (providing a brief history of the political career of William Kimmel).

favor.[257] His speech was wide-ranging and often repetitive, and it mixed weighty constitutional considerations and discussions of ancient jurisprudence with base invective and petty politicking (despite his avowal to approach the issue "without partisan bias").[258]

Kimmel opened his address as many American politicians have before and since: He aligned his political position with that of the Founders.[259] Averring that standing armies were a "constant dread" of James Madison, George Mason, John Randolph, and even Alexander Hamilton ("the aristocrat and centralizationist of the Constitution"), he quoted at length from the *Federalist Papers* and other founding documents to marshal supporting evidence.[260] Kimmel reached back even further to bolster his case, finding in the histories of Rome and England manifold examples of the despotism wrought by permanent military forces.[261] Returning to the American experience, Kimmel discussed how the constitutional arrangement aimed to countervail the potential for this despotism to take root.[262] The contention that congressional war power is contained in Clauses 11 through 14 in Article I, Section 8 of the Constitution is straightforward; indeed, it was "too plain for argument."[263] It is in the next two clauses, however, that the Framers made arrangements for another authority "separate and distinct from the war power."[264] This is the power of organizing and calling forth the militia.[265] Kimmel argued:

> In these two clauses is conferred the power to execute the laws of the Union, suppress insurrections, and repel invasions, and the means for exercising this power. These two powers are as distinct as are the means to be employed for the exercise of them, the Army for the defense against external foes, the militia for the suppression of internal resistance, the army to be created by Congress, because war is a subject of national jurisdiction only; the militia to be created jointly by Congress and the State, because the execution of the laws of the Union and the suppression of insurrections may involve questions of disputed jurisdiction. By these provisions the people were to be protected from interference by such army as Congress might

257. *See generally Congressional Debate*, *supra* note 231, at 3581–82 (highlighting Kimmel's true sentiments when discussing the bill).

258. *See id.* at 3579 (dissecting Kimmel's speech on the Posse Comitatus Act).

259. *See id.* (utilizing statements made by the Founders to bolster his argument).

260. *Id.* at 3579, 3583, 3728.

261. *See id.* at 3579 (illustrating the dread of standing armies by citing examples from colonial times).

262. *See id.* (reiterating Kimmel's fears and thoughts on standing armies).

263. *Id.* at 3581.

264. *Id.*

265. *See id.* (reaffirming congressional war power).

> maintain. By this cautious adjustment of these balances did the [F]athers not only provide against intervention by the standing army, if such should exist, in the internal government of the country, but they also provided that the General Government should, by organizing, arming, and disciplining the militia, supply to the States the uniform means of resisting its own aggressions.[266]

To Kimmel, this careful distinction between the army and the militia power was illustrated by President George Washington's two-step process in suppressing the Whiskey Rebellion.[267] When citizens of Western Pennsylvania resisted paying a tax on spirits in 1794, Washington first issued a proclamation demanding compliance.[268] When that failed in its desired end, the President called forth the militia of Pennsylvania and that of neighboring states to execute the laws, relying on the Militia Act of 1792.[269] Once the disturbance was stifled, Congress passed a commendation celebrating Washington and the militiamen.[270] Kimmel leaned heavily on this document as proof positive that Congress was endorsing the specific constitutional approach of Washington (although given the fairly boilerplate language of the document, it is equally plausible Congress intended it to be little more than a routine congratulatory message).[271]

Kimmel's argument that standing armies were feared by many members of the founding generation is not meritless, however.[272] As Wiecek notes, legal classicists of the era—like Kimmel, at least in regards to the *posse comitatus* issue—had an intellectual kinship with Revolutionary ideology.[273] "Classicism arose from the original eighteenth[] century constitutional foundations and derived its legitimating power from them," he writes.[274] One element of this eighteenth century ideology was an abiding "fear of governmental power as a threat to individual liberty."[275] Of all the tenets of the constitutional order espoused during the Reconstruction debates,

266. *Id.*

267. *Congressional Debate*, *supra* note 231, at 3581 (noting, before Washington resorted to force, he first "issued his proclamation commanding the insurgents to disperse").

268. *See id.* (noting Washington's response to the resistance).

269. *See id.* (relying on the militia to suppress the insurrection).

270. *See id.* (thanking "the militia who rallied around the standard of the laws, and bore illustrious testimony to the value of the Constitution").

271. *See id.* (identifying Kimmel's reliance on the proclamation to bolster his argument).

272. *See id.* at 3579 (highlighting the fear and distrust people had for standing armies).

273. *See* WIECEK, *supra* note 237, at 19 ("From the American Revolution, classical legal thought derived some defining elements of American constitutionalism . . . .").

274. *Id.*

275. *See id.* (identifying numerous elements of classical legal thought).

this was one of the most pervasive. In some states—Virginia, for one—constitutions even had prohibitions on standing armies.[276] The Founders were not intellectually homogenous, and this distaste was not universally shared. But Kimmel's argument that it was a feature of the Revolutionary period has some historical grounding.[277]

Returning to his speech, Kimmel saw a frightening contrast between this limited use of the militia and the more common deployment of federal army regulars in his own day.[278] "The standing Army as now employed is violative of the Constitution and of the law, which directs the manner of the employment of it," he argued, pointing to instances of the army suppressing strikes, executing local laws, collecting revenue, and arresting criminals at the behest of sheriffs and governors (i.e., acting as a *posse comitatus*).[279] This, warned Kimmel, was a dangerous arrogation of executive power:

> If this may be done in one district may it not be done in all the districts? If so, and the interest of a President demands, may he not use this power for his own purpose? May he not by this means subject every reluctant commander to the order of any political miscreant he may choose to make an assistant collector of revenue, until the whole Army is under his control, and then provoke the resistance he seeks for the employment of force and in the name of order substitute his will for law?[280]

Ultimately, there would be "a despotism sanctioned by law" if the army were to continue to be used as a *posse comitatus*.[281] Kimmel's accusations of military tyranny were certain to strike a political chord on both sides of the Mason–Dixon.[282] While it remained true that Southern flouting of federal law often served to unify Northerners (as noted previously), by Grant's second term it was also the case that many Northerners were deeply uneasy with the federal presence in the South and conceded that elements of it were heavy-handed.[283] "Northerners by the early 1870s increasingly accepted Democratic portraits of Republicans as 'despotic'

276. *See id.* at 25 (exemplifying the constitutional restriction on standing armies).

277. *See Congressional Debate*, *supra* note 231, at 3581 (indicating the fear of standing armies in the Revolutionary period).

278. *See id.* (implying the standing army had not been used for intended purposes).

279. *Id.*

280. *Id.* at 3582.

281. *Id.*

282. *See id.* (expanding on Kimmel's argument regarding the tyranny of a standing army).

283. *See* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 83 (1999) (suggesting the North was tired of the federal occupation).

and 'corrupt,'" wrote Pamela Brandwein in her history of the Supreme Court during the Reconstruction era.[284] "The Northern white populace began to view federal protection of civil rights as a partisan issue intended to buttress flagging Republican strength, and they began to withdraw support for army occupation in the South."[285] In short, Kimmel and his allies were winning the public relations battle by the time of the congressional debate over the Posse Comitatus Act.

Kimmel attacked the jurisprudential underpinnings that allowed the Union troops to serve as a *posse comitatus*.[286] The practice was justified as permissible pursuant to Section 788 of the Revised Statutes, which essentially codified Section 9 of the Militia Act of 1792.[287] Section 788 provided, "marshals and their deputies shall have in each State the same powers in executing the laws of the United Sates that the sheriffs and their deputies may have, by law, in executing the laws thereof."[288] That may be, observed Kimmel, but while the local sheriff unquestionably has "the power to summon the *posse comitatus*," he supposed that few "will attempt to maintain that a sheriff has the right to summon the Army of the United States to serve as a posse."[289] Thus, "[i]f the sheriff cannot, how can the marshal? The authority is exactly the same."[290] Whereas the Washington administration properly called forth the militia to suppress insurrection, the current "attempt to clothe the marshals, the lowest officers of the United States courts, with authority to use a standing army as a *posse comitatus*" was a constitutional travesty.[291]

Kimmel traced this error to the Mansfield Doctrine as enunciated by Attorney General Cushing.[292] He attacked Mansfield's argument that troops might serve in a *posse comitatus* because in that capacity they acted not as regulars, but civilians.[293] He pointed out that the doctrine stemmed from a speech Mansfield gave as a statesman after the wreckage

284. *Id.*

285. *Id.*

286. *See id.* (conveying Kimmel's argument that a standing army is not a *posse comitatus*).

287. *See Congressional Debate*, *supra* note 231, at 3582 (explaining the statutes applying to the government's response to the Whiskey Rebellion).

288. U.S. REV. STAT. § 788 (1903). *See generally* Vladeck, *supra* note 230, at 156–69 (providing a superlative history of the militia acts preceding the Posse Comitatus Act).

289. *Congressional Debate*, *supra* note 231, at 3582.

290. *Id.*

291. *Id.*

292. *See id.* (tracing the history of support for the *posse comitatus* to Lord Mansfield).

293. *See id.* ("This attempt to clothe the marshals, the lowest officers of the United States courts, with authority to use a standing army as a *posse comitatus* had its origin in an opinion of Mr. Attorney-General Cushing.").

of the Gordon Riots, not as a judicial opinion issued from the bench.[294] Moreover, Kimmel suggested Mansfield was so blinded by rage and despair at the rioters' torching of his home and vaunted library that he was grasping desperately for any quasi-legal justification that would support military suppression of the violence.[295] Finally, he suggested the Gordon Riots were so severe as to qualify as an insurrection; indeed, the eponymous ringleader of the riots, Lord George Gordon, was tried as a traitor and was saved only "by the influence of a strong family and the plea of a weak brain."[296] Because the Gordon Riots occurred only several years before the adoption of the United States Constitution, Kimmel conjectured that the fracas "may have been one of the uses of a standing army against which the [F]athers sought to provide when they indicated that a standing army, if it existed, was to be used only for defense in war, and the militia for the execution of the laws in peace."[297] It should be noted that Kimmel submitted no evidence of this influence on the Philadelphia Convention, and it seems equally likely that the violence wrought by the Gordon rioters concerned the Founders as much as the use of the military to suppress the lawlessness.[298]

Kimmel also attacked a report by President Hayes's Secretary of War, George McCrary, which strongly backed the troop deployments.[299] McCrary urged a reconsideration of the army's traditional role, analogizing its position vis-à-vis the United States to that of a police force to a city, "and the one is quite as necessary as the other."[300] McCrary continued:

> Our [F]athers who framed the Constitution, and who were not without experience on this point, doubted the wisdom of relying upon the militia and so provided for the employment of the [f]ederal troops for this purpose. If this seemed necessary to them in the early period of our history, when our population was largely rural, and the spectacle seldom or never witnessed of large masses of men idle, suffering, and desperate, how much more

294. *See id.* ("His sole authority is Lord Mansfield, not as a judge, but as a statesman; not his decision on the bench, but from a debate in the House of Lords on the Gordon riots, when nearly eighty years had impaired his understanding . . . .").

295. *See id.* (suggesting a lack of actual legal support for the Act).

296. *Id.*

297. *Id.*

298. *See id.* at 3588 ("Our Constitution was framed exactly with a view of providing for a standing army, so that the General Government should not be compelled to depend altogether at all times and in all emergencies upon State militia alone.").

299. *See Congressional Debate*, *supra* note 231, at 3582 (interpreting McCrary's approval of troop deployments as being contrary to the American spirit).

300. GEORGE MCCRARY, 1 REPORT OF THE SECRETARY OF WAR, at v (Wash., Gov't Printing Office 1877).

> necessary is the same thing now? As our country increases in population and wealth, and as great cities become numerous, it must be clearly seen that there may be great danger of uprisings of large masses of people for the redress of grievances, real or fancied; and it is a well-known fact that such uprisings enlist in a greater or less degree the sympathies of the communities in which they occur.[301]

Kimmel evinced horror at what he considered a dangerous and unconstitutional principle, although he claimed it was entirely fitting coming from a cabinet member "of an administration distinguished for its peculiar disregard of the interests of the people."[302] Continuing with ad hominem attacks familiar to any political observer living in the post-*Bush v. Gore*[303] era, he feigned appreciation of "this Secretary of this non-elected President, this war minister of the crown, for this bold attempt to justify the unconstitutional means by which his master was enabled to usurp the place he holds," for Kimmel saw in the remarks a bald lust for power normally disguised by advocates of military force.[304]

In fairness to Kimmel, he also attacked the use of the military to break labor strikes, an intellectual consistency not shared by all backers of the Posse Comitatus Act (recall Grant's cutting epistolary observation on this subject in the previous section).[305] Indeed, many who professed disgust at the military's enforcement of civil law in the South quickly shed their apprehensions when the army's target became labor unrest.[306] In the penultimate paragraph of his address, however, Kimmel let slip just how radically restrictive his conception of military power was. "I know we cannot hope to do more now than to assist at the reduction of the Army, and, at the passage of the amendment I offer, to restrain the Army so that it may not be used as a *posse comitatus* without even the color of law," Kimmel admitted, but he hoped at the next session Congress "may obviate all necessity for any but a very small standing Army by the passage of a law to organize, arm, and discipline the militia to be used to execute the laws of the Union and suppress insurrection as was intended by 'our [F]athers

301. *Id.* at v–vi.

302. *Congressional Debate*, *supra* note 231, at 3582–83.

303. Bush v. Gore, 531 U.S. 98 (2000).

304. *Congressional Debate*, *supra* note 231, at 3583.

305. *See id.* ("I proclaim that not only did 'our [F]athers who framed the Constitution' not intend that the standing Army, if it existed, should be used for the execution of the laws of the Union and the suppression of insurrection, but that they did intend it should not be used for that purpose . . . .").

306. *See* GILLETTE, *supra* note 96, at 347–48 (noting that while Americans rejected the military's presence following a massacre, they eagerly sought the military's intervention when violence ensued between the state militia and railroad strikers).

who framed the Constitution.'"[307]

In the same closing, Kimmel also displayed the bizarre inverted victim complex demonstrated by many Southern Democrats during Reconstruction.[308] He accused the Union Army of having "riveted the chains which the people drug along in lengthening disgrace" and in a truly puzzling aside, accused the army of preferring "bullets to ballots."[309] Given the surfeit of well-documented instances of black voters being turned away, beaten, and shot while trying to exercise the elective franchise, this statement seems the work of either an exceptionally oleaginous political salesman or a strikingly misinformed one.[310]

C. *The Republican Response*

Herman Leon Humphrey, a Republican representative from Wisconsin, provided the immediate counter to Kimmel.[311] Although his remarks were not nearly as comprehensive as Kimmel's, and hence will not be examined in as much detail, they too serve to illustrate some of the key arguments in the debate over the Posse Comitatus Act.

Humphrey began by boldly challenging the idea "that a standing army is a menace to the liberties of the people."[312] To that end, he traced the rise of the standing army throughout history, covering much of the same ground as Kimmel while predictably reaching different conclusions.[313] Humphrey noted it was a "well known matter of history that the first standing army" in English history came with "the reign of William and

307. *Congressional Debate*, *supra* note 231, at 3586. Throughout his speech, Kimmel caustically recited McCrary's comment regarding "our [F]athers who framed the Constitution," mocking the cabinet officer for presuming to be following the Founders' wishes. *Id.*

308. *See id.* (listing grievances stemming from the military's use against the people).

309. *Id.*

310. *See* KEVIN J. COLEMAN, CONG. RESEARCH SERV., R43626, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 6 (2015) ("Blacks, Republicans, and sometimes poor whites were the target of intimidation and violence across the South, particularly during the election season."); *see also id.* at 8. ("Disenfranchisement schemes[, which were created to prevent blacks from voting,] included poll taxes, literacy tests, and grandfather and old soldier clauses . . . .").

311. *See Biographical Directory*, *supra* note 256, at 1299 (describing the career of Herman L. Humphrey, "a Representative from Wisconsin . . . [who was] elected as a Republican to the Forty-fifth, Forty-sixth, and Forty-seventh Congresses").

312. *Congressional Debate*, *supra* note 231, at 3587.

313. *See id.* ("It is also a well known fact of history, that prior to that time the very small standing army which was organized in the time of Charles I was never recognized as a standing army, but . . . the national militia [eventually] fell into ridicule, and a standing army became the rule in England . . . . So long as the citizen of the Republic feels within his breast the love of country and the determination to do his duty honestly and fearlessly, we need never apprehend that an Army . . . is dangerous to our liberties.").

Mary."[314] The collection of soldiers raised by Charles I "was never recognized as a standing army," argued Humphrey, and indeed "was nothing more than the trained bands or militia of the nation."[315] The reason a standing army did not exist for many centuries of English history is that "under the feudal tenure it could not exist."[316] The feudal system relied on obligations of "vassalage and service to the monarch," but these duties were limited in duration.[317] Thus, the vassal could not be impressed into service for very long—typically, no more than ninety days, according to Humphrey.[318] With the demise of the feudal system and its attendant obligations, however, "the idea of a standing army sprang into existence," for now regular troops could instead be raised and remunerated for their service.[319] The subsequent history of England "shows conclusively . . . the largest liberty and pure freedom are compatible with the existence of a standing army."[320] Eventually, the militia fell into disuse in England for the same reason it became disfavored in America: regular troops are better trained, better disciplined, and more reliable.[321]

Humphrey rebutted the notion that the Founders feared a standing army. In fact, the opposite was likely true. The Wisconsin Republican proclaimed, "if our Constitution contemplated anything it contemplated a standing Army," because "one, in fact, existed under the [A]rticles of [C]onfederation."[322] With centuries of English history to guide the Founders, "[o]ur Constitution was framed exactly with a view of providing for a standing army, so that the General Government should not be compelled to depend altogether at all times and in all emergencies upon State militia alone. We have recognized that fact for the last century."[323] In a stinging riposte to Southern Democrats and their allies (e.g., Kimmel), Humphrey said, "We have never yet known the liberty of a single citizen invaded" by the standing army.[324]

Humphrey concluded by making a straightforward functionalist

314. *Id.*

315. *Id.*

316. *Id.*

317. *See id.* (illustrating the impracticability of a standing army under the feudal system).

318. *See id.* (addressing the time limitation imposed on vassalage under the feudal system).

319. *Id.*

320. *Id.*

321. *See id.* ("[T]he national militia fell into disuse[] . . . . [because it was] proven that regular troops were much more effectual, and their duties more respected, than the State militia.").

322. *Congressional Debate*, *supra* note 231, at 3588.

323. *Id.*

324. *Id.*

argument that a rigid states' rights position in favor of the local militia would emasculate the federal government.[325] He said in summation:

> I have called attention to these historical facts for the purpose of showing that one of our dangers may be that in guarding too closely the rights of the States, as distinguished from the rights of the central Government, and by too narrow a construction of our Constitution we may fasten upon ourselves as a Republic, a modern feudalism more dangerous to the people of these United States than any benefit that can possibly flow to the individual citizen of a State. If we insist upon reducing our Army until in fact nothing shall remain but the militia in the States, we shall then have placed ourselves in the position of claiming to exist as a Union of States with no central power to exert itself when the whole of this Republic shall be menaced by a foreign foe.[326]

Humphrey also denied that constituents wished to curtail use of the army or reduce its size.[327] Summarizing the petitions heard by the current Congress, Humphrey recalled that all requested regular troops to help contain domestic violence, while "not one has been found asking for a reduction of the Army."[328]

D. *The House Concludes Debate*

When debate resumed on May 27th in the House, a week after the opening speeches of Kimmel and Humphrey, the representatives expanded on some of the earlier points and introduced some novel observations as the discussion grew more acrimonious.[329] The increasingly bitter tone was clarifying in a sense, as it served to cut through much of the rhetorical fog surrounding the measure to reveal the real issue at stake: The fate of voting rights in the Southern States.[330]

Eugene Hale, a Republican representative from Maine, was the first to broach the suffrage issue.[331] Hale found it simply "amazing" that such a

325. *See id.* (arguing a reduction in size of the standing army would potentially expose the United States to foreign threats).

326. *Id.*

327. *See id.* at 3589 ("[W]ithin the last year more than one 'sovereign State' has called for help, has petitioned the central Government for regular troops because she was unable to restrain domestic violence within her borders.").

328. *Id.* at 3588.

329. *See id.* at 3583 (questioning the integrity of a standing army used to thwart the will of the people as expressed through the electoral processes).

330. *See id.* at 3847 (claiming the proposed amendment would not obstruct the protection of citizens' voting rights).

331. *See Biographical Directory*, *supra* note 256, at 1172 (describing the career of Eugene Hale, "a Representative and a Senator from Maine[,] . . . [who was] elected as a Republican to the Forty-first

measure was being considered at the insistence of Democrats when many state officials in their own party—"its own chieftains"—were requesting troops to suppress violence within their borders.[332] Presaging a theme that would figure prominently in the Senate debate, Hale blasted the Posse Comitatus Act as unnecessary legislation that was "not needed . . . in the least; it [was] not called for."[333] The reason why soldiers had been deployed across the South, Hale pointedly noted, was because "men in both political parties [had] requested the intervention of the General Government because they believed that violence in some way or other was impending and that the Federal arm should be interposed to arrest it, and that suffrage should be free."[334] Regardless of the political party of the occupant of the White House, that executive had a responsibility to "see to it that there [were] fair elections," and the Posse Comitatus Act would dramatically circumscribe the government's ability to do so.[335]

In rejoinder, Representative James Proctor Knott painted a much different picture of the situation on the ground. Knott, who later became a law school dean in his home state of Kentucky, risibly claimed, "There is no danger that this amendment, if enacted, will interfere with the protection of any citizen in the exercise of the elective franchise."[336] (Regrettably, the transcript does not describe the legislator's countenance, but it is hard to believe this could have been uttered with a straight face.) Regardless of Knott's credulity, his allies made a more direct assault on the use of troops.[337] Representative Milton Southard, an Ohio Democrat, lambasted the departed Grant administration for exploiting the *posse comitatus* as a device to control voters.[338] After reading a letter to federal marshals from Grant's attorney general, Southard opined: "Not only were these marshals instructed to use the *posse comitatus* of the military of the United States that happened to be in the particular locality," but the President and leading cabinet members "saw to it that a *posse comitatus* was provided in all these localities where they desired it, in order that it might

and to the four succeeding Congresses").

332. *See Congressional Debate*, *supra* note 231, at 3847 ("We have been in the habit of seeing democratic governors, when the spirit of violence was abroad, . . . sending to the President of the United States for troops to put down and suppress violence.").

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *See id.* at 3850 (arguing the executive branch abused its power by "sending the military into . . . districts with the view of having them used by the marshals of elections").

338. *See id.* (asserting it was not an abuse of power to use federal troops for electoral purposes).

thereafter be called out by these marshals."[339]

Many critics of the army's role in supervising elections found ample ammunition in the history of Reconstruction in Louisiana.[340] A Democratic representative from that state, John Ellis, concurred with Southard's more general criticisms and applied them to events in New Orleans.[341] "With the experience of this Government of the last eight years, I cannot conceive how [anyone] who is really in favor of the Constitution of his country and the institutions that we all so love can be opposed to this amendment," lamented an ostensibly quizzical Ellis.[342] (Given that Ellis was a former captain in the Confederate Army who had spent two years in a Union prisoner-of-war camp, an uncharitable critic may be skeptical of Ellis's professed fidelity to the Constitution.)[343] Nevertheless, Ellis pushed on, hoping to educate his colleagues about events in his home state.[344] "It may not . . . be known to gentlemen on the other side, but it is known to me and to every [S]outhern member on this floor, that the greatest abuses have been permitted under the pretext of employing the Army of the United States as a *posse comitatus* for the enforcement of the law."[345]

Two incidents in Louisiana were paramount in Ellis's mind, and both involved improper meddling with the democratic process "under the pretext . . . of the law."[346] First, Ellis pointed to the events of December 5, 1872, when "troops occupied the capital of the state and absolutely impaneled a legislature," and declared the election winners (this was the "miserable scramble" decried by Grant, during which Kellogg forces

339. *Id.*

340. *See id.* (portraying the use of federal troops in Louisiana as improper and done for political purposes).

341. *See id.* at 3850–51 (describing the abusive use of federal troops in New Orleans for the purpose of controlling an electoral outcome); *see also Biographical Directory*, *supra* note 256, at 1014 (giving a brief history of John Ellis's military and political career).

342. *Congressional Debate*, *supra* note 231, at 3850.

343. *Biographical Directory*, *supra* note 256, at 1014 (describing the career of Ellis, "a Representative from Louisiana . . . [who] joined the Confederate [A]rmy . . . and was promoted to captain . . . when he was captured and held as a prisoner of war . . . until the end of the war").

344. *See Congressional Debate*, *supra* note 231, at 3850 (listing events occurring from 1872 to 1875 where federal troops were improperly used to directly influence elections in Louisiana).

345. *Id.*

346. *See id.* (summarizing the events of December 5, 1872, where troops "impaneled a Legislature, declared who was elected, declared who was not elected, and permitted no one to pass to the halls of the representatives of the people unless he bore the badge of the United States marshal," and January 5, 1875, where an employee of the Army "in obedience to the orders which he had received, . . . invaded a [s]tate capital" and "thrust out" elected representatives).

impeached Governor Warmoth).[347] Second, there were the events of January 1875, when Colonel Philippe de Trobriand ejected Democrats staging a legislative coup.[348] Ellis described this as when "a usurper thrust out the chosen representatives of the people and thrust in those whom that usurper would have there," sneering that as "a Frenchman" de Trobriand probably "learned his ideas of our Constitution from the howls of the revolution in his own country."[349] Coming years after the matters discussed, Ellis's remarks demonstrate how formative the Louisiana experience was on the Southern mind.[350]

The remainder of the House debate devolved into a partisan fracas that allowed the legal façade to slip and revealed the real import of the bill. The grave constitutional principles that had been bandied about in earlier discussions were largely subsumed by allegations of bad faith and party interest.[351] Representative Mark Dunnell, a former Union colonel and a Republican from Minnesota, sharply attacked the notion that "the Army in its use during the late presidential election changed the result of that election; in other words, that wherever there was a squad of federal soldiers[,] a different result was reached from what it would have been if the federal troops had not been present."[352] Dunnell, who served on the committee that traveled to Florida to investigate the disputed vote total there, boldly stated, "I insist it is not in evidence that the presence of the troops at any point aided in the election of President Hayes or increased by a single vote the [R]epublican vote in any precinct in this country."[353] Dunnell's claim was as implausible as Knott's remark that the Posse Comitatus Act would have no effect on voting in the South; his argument would have been stronger had he conceded that although the presence of

347. *Id.*

348. *See id.* (summarizing the events of January 5, 1875, where de Trobriand "went into the legislative halls where the representatives of the people were sitting, and upon the *ipse dixit* of a usurper thrust out the chosen representatives of the people and thrust in those whom that usurper would have there; and all under the pretext of the enforcement of the law").

349. *Id.*

350. *See id.* ("With the experiences of this Government for the last eight years, I cannot conceive how [anyone] who is really in favor of the Constitution of his country and the institutions that we all so love can be opposed to this amendment . . . . [I]t is known to me and to every [S]outhern member on this floor[] that the greatest abuses have been permitted under the pretext of employing the Army of the United States as a *posse comitatus* for the enforcement of the law.").

351. *See id.* at 3851 (expressing the Republican argument that Democrats misrepresented the effect of the *posse comitatus* on elections in the South after the Civil War).

352. *Id.*; *see also Biographical Directory*, *supra* note 256, at 990 (providing a biography for Representative Dunnell).

353. *Congressional Debate*, *supra* note 231, at 3851; *see also* TREFOUSSE, *supra* note 165, at 68 (discussing congressional attempts to resolve a number of disputed elections in the late 1800s).

Union troops helped secure Republican votes, this was only because Republicans—especially black Republicans—were being systematically prevented from voting by fraud and violence.[354]

Even Virginia Representative Auburn Pridemore, a Democrat, admonished his colleagues to cease invoking the disputed election of 1876 and the Louisiana miasma.[355] "I would be gratified if in discussing these matters some gentlemen on this floor would address themselves to the amendment without continually and upon every occasion bringing in the troops in Louisiana and the late presidential election," he pleaded.[356] Essentially, to borrow Justice Antonin Scalia's phase about a disputed presidential election 124 years later, Pridemore told his fellow Democrats to "get over it" and focus on the real issue of the bill.[357] To him, the more serious concern was the risk that the Posse Comitatus Act would breed insubordination among the enlisted men by instituting penalties for soldiers in violation of it.[358]

The bill clearly exposed the party cleavages in Congress. Republicans viewed the bill, in the words of Representative Mills Gardner, as "purely partisan and offered for the purpose only of subserving party ends," knowing full well that without federal protection Southern Republicans—the majority of whom were black—would be prevented from casting ballots.[359] Democrats viewed the bill as a necessary precondition for their party to return to electoral supremacy in the region and saw it as an essential corrective for abuses both real and imagined. These fault lines only deepened when the bill moved to the Senate.

E. *The Senate Joins Debate*

The debate in the other chamber of Congress was at once more vituperative and profound.[360] Charges of partisanship still redounded when the Senate took up debate on June 7, 1878, but the Mansfield Doctrine also figured more prominently in the deliberations. James G.

354. *See* DU BOIS, *supra* note 1, at 371 (indicating the changing voting demographics of the South).

355. *Congressional Debate*, *supra* note 231, at 3847.

356. *Id.*

357. *See Justice Scalia on the Record*, CBSNEWS.COM, http://www.cbsnews.com/news/justice-scalia-on-the-record/3/ (last visited Nov. 25, 2015) (dismissing the question of whether the Supreme Court's decision on the Bush versus Gore presidential election was politically motivated).

358. *See Congressional Debate*, *supra* note 231, at 3847 (expressing concern that the Posse Comitatus Act could foster insubordination in the military).

359. *Id.* at 3851.

360. *See id.* at 4240–42, 4246 (showing the partisan animosity over the use of the military as a *posse comitatus* during Reconstruction).

Blaine and George Edmunds largely led the Republican case in the Senate, whereas Augustus Merrimon and Benjamin Hill did likewise for the Democrats.[361] Republicans expanded on many of the procedural arguments from the House, arguing that the bill was unnecessary and improper. William Windom of Minnesota led this charge, labeling the Posse Comitatus Act "utterly useless legislation . . . [and] a very foolish expression that can do no good but may do harm."[362] Senator Edmunds also attacked the packaging of the bill, saying that the proscription on the use of the military as a *posse comitatus* "has no business in an appropriation bill[;] . . . it has no business here [anymore] than the reorganization of the Army has."[363]

After these preliminary thrusts, however, the debate turned to the substantive issues surrounding the use of the military as a *posse comitatus*, during which an interesting inversion took place. Many Republicans were supporting use of the military as a *posse comitatus* even though their party forebears had protested against that very concept when the issue was enforcement of the Fugitive Slave Law in the antebellum period. Many Democrats underwent a similar evolution, reversing their previously staunch support for military enforcement of domestic laws now that there were different laws in question.[364] Senator Aaron Sargent, Republican of California, pledged consistency on this count.[365] "I never have believed that the doctrine enunciated by Caleb Cushing in the Burns case was the law, that a marshal had a right to take soldiers outside of their organization, from the command of their officers, and use them as a *posse comitatus*," he said. "I believe in that case the doctrine was invoked in behalf of slavery. I always have thought it was a wrong enunciation; and I am not now disposed to use that opinion or any such doctrine for any other purpose, although I might approve the purpose."[366]

361. *See id.* (showing the arguments for and against the Posse Comitatus Act primarily between Democrats Blaine and Edmunds and Republicans Hill and Merrimon); *see also* TREFOUSSE, *supra* note 165, at 19–20 (summarizing the successful political career of Blaine, of Maine, who would go on to be the Republican nominee for president in 1884 and serve as Secretary of State in the administrations of James Garfield and Benjamin Harrison).

362. *Congressional Debate*, *supra* note 231, at 4240.

363. *Id.* at 4241.

364. *See* CHARLES DOYLE & JENNIFER K. ELSEA, CONG. RESEARCH SERV., R42659 THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 17–18 (2012) (comparing the reversal in Republican and Democratic views on the use of the military as a *posse comitatus* from the era of the fugitive slave laws to the post-Civil War era).

365. *See Biographical Directory*, *supra* note 256, at 1864 (providing a brief history of the career of Aaron Sargent).

366. *Congressional Debate*, *supra* note 231, at 4241.

Blaine eloquently rebutted this premise, however, noting, "[a] good instrumentality may be used for a bad end. That is very common in the world." He added that in enforcing the Fugitive Slave Law, "the marshal had just as much right to call in the army as he had to call in the Senator from California and myself." Blaine then strongly endorsed the Mansfield Doctrine, even echoing the language from Lord Mansfield's speech:

> And, if the Senator will pardon me, the point does not come there. If the law was to be enforced and the marshal had the right to call in the *posse comitatus* to enforce it, had a right to nab me or any other citizen or any other bystander to help enforce it, then he had the same right to call in everybody else, whether he wore [a] uniform or citizen's clothes.[367]

Sargent was not persuaded. Voicing the classic argument against use of the military as a *posse comitatus*, he argued, "the men of the Army are to be commanded by their own officers and have their own organization; and in that respect they differ from other citizens. The *posse comitatus* is made up of citizens distinct from the Army." Sargent went on to say that erasing that distinction "was the error of that original opinion, and I am not disposed to insist on that error now."[368]

Benjamin Hill took up this point, arguing Blaine's interpretation erased the distinction between civil and military power. "It never was lawful, it never will be lawful, to employ the Army as a *posse comitatus* until you destroy the distinction between the civil power and the military power in this country," thundered the Georgian. "If I may use a sort of paradoxical term I would say that the *posse comitatus* might be considered as the military arm of the civil power; that the purpose of the military when called out in such a case is to do that which the civil power cannot do in its character as a civil power." Thus, "[t]he *posse comitatus* belongs to the civil power and not to the military."[369] Vermont's George Edmunds disagreed sharply on this point, proposing a hypothetical: if a local sheriff was justified in summoning a *posse comitatus*, and if General William Sherman happened to be standing idly by with the rest of his staff, the sheriff would be within his rights to impress the men into service. Senator William A. Wallace of Pennsylvania engaged on this issue, and in the ensuing colloquy each proposed variations on the original hypothetical.[370] Essentially, the

367. *Id.*

368. *Id.*

369. *Id.* at 4246.

370. *See Biographical Directory*, *supra* note 256, at 2108 (providing a brief history on the career of William Wallace); *see also Congressional Debate*, *supra* note 231, at 4246 (following Edmunds, Wallace offers a similar hypothetical).

debate turned on the legal nicety of whether the soldier was acting as a civilian or as a soldier (the same fine point introduced by Mansfield decades earlier). Edmunds and most of his fellow Republicans believed that a soldier *qua* soldier was permitted—indeed, obligated—to serve in a *posse comitatus*, and if the soldiers happened to be members of an artillery regiment that could bring more power to bear than the average citizen, the sheriff might gain a legitimate windfall. Wallace and many Democrats believed soldiers could only be enlisted into a *posse comitatus*, if ever, when they abandoned the trappings of soldiery. For instance, while Senator Hill allowed that, "Nobody has said that because a man is a soldier he has ceased to be a citizen;" he and Wallace would find the use of military artillery by a *posse comitatus* an unforgivable blurring of civil and military law.[371]

Hill set out the proper steps for use of the military in enforcing law, expanding on the two-step process Kimmel outlined in the House debate. First, a court issues its order and if resisted, a sheriff may assist in its enforcement.[372] If the sheriff is unable to enforce the law, he may summon a *posse comitatus*—his "right arm," according to Hill—to overwhelm the opposition.[373] If this fails, then it is likely that the situation is tantamount to an insurrection, and henceforth the army may enter to restore order. In short, suggested Hill, "let the military arm put down the insurrection, put down the violence, put down the opposition, and let the civil officers come forward and execute his process."[374] With that, the Senate concluded debate.

F. *The Act and Its Legacy*

With a Democratic majority in the House and a deeply divided Republican caucus in the Senate, the legislation passed by considerable margins on June 15, 1878.[375] The final amendment to the appropriations bill—known as the Posse Comitatus Act—read:

> From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a *posse comitatus* or otherwise under the pretext or for the purpose of executing the laws, except in such cases

371. *Congressional Debate*, *supra* note 231, at 4246.

372. *Id.* at 4247.

373. *Id.*

374. *Id.*

375. *See id.* at 4647, 4286 (noting that the Posse Comitatus Act was passed with substantial support; the Senate tally was 39 in favor and 22 against, with 15 abstentions). The House tally was 154 in favor and 58 against, with 78 abstentions. *Id.*

> and under such circumstances as such employment of said forces may be expressly authorized by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section; and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $10,000 or imprisonment not exceeding two years, or both such fine and imprisonment.[376]

Since passage, the text of the Act has essentially remained unchanged, undergoing only minor modifications over the years.[377] In 1956, the Air Force was added to the Act.[378] In the 1980s, with the War on Drugs taking on an increasingly aggressive cast, Congress made allowances to the Act to enable military hardware and personnel to assist with drug interdiction and border control.[379] And in the wake of Hurricane Katrina, an amendment sponsored by Virginia Senator John Warner authorized military intervention in the event of "natural disaster, epidemic, or other serious public health emergency."[380] Interestingly, however, this expansion was repealed within a year.[381]

Although the precise future of the Posse Comitatus Act necessarily remains unknown, this much seems clear: the Act is here to stay. In all

376. *Id.* at 3845.

377. *See* DOYLE & ELSEA, *supra* note 364, at 26–28 (listing the various exceptions to the Posse Comitatus Act, revealing that few of its material terms have changed over the years).

378. Act of Aug. 10, 1956, ch. 1041, § 18(a), 70A Stat. 626 (1956) (codified at 18 U.S.C. § 1385 (2012)). This statute also moved the Posse Comitatus Act from Title 10 (Armed Forces) of the United States Code to its current location in Title 18 (Crimes and Criminal Procedure) of the United States Code.

379. *See* Peter M. Sanchez, *The "Drug War": The U.S. Military and National Security*, 34 A.F. L. REV. 109, 122 (1991) ("Owing to the emerging national consensus on the drug problem, Congress as early as 1981 became increasingly aware that drastic action was needed against the illegal drug industry . . . . The action came in the form of amending the Posse Comitatus Act by explicitly allowing and directing the military to provide assistance to law enforcement agencies."); *see also* Tom A. Gizzo & Tama S. Monoson, *A Call to Arms: The Posse Comitatus Act and the Use of the Military in the Struggle Against International Terrorism*, 15 PACE INT'L L. REV. 149, 155 (2003) ("The Posse Comitatus Act is currently used to prevent generalized military involvement in domestic law enforcement, but the prohibitions have eroded due to challenges, such as excessive drug trafficking, to modern law enforcement.").

380. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1076, 120 Stat. 2083, 2404 (2006) (allowing for the use of the Armed Forces in emergency situations).

381. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1068, 122 Stat. 325 (2008) (codified at 10 U.S.C. § 333 (2012)) (repealing the year-old law that allowed for the use of Armed Forces in major public emergencies); *see generally* Timothy E. Steigelman, Note, *New Model for Disaster Relief: A Solution to the Posse Comitatus Conundrum*, 57 NAVAL L. REV. 105 (2009) (offering an excellent overview of the passage and repeal of the Warner Amendment).

likelihood, past will be prologue, and legislative exceptions will be carved out and qualifications added as circumstances suggest. In the wake of civil disturbances like that which occurred in Ferguson, Missouri, one might expect renewed calls to unshackle the military to permit it to perform domestic law enforcement functions.[382] There appears to be little appetite for such a revision, however. If anything, contemporary public sentiment tends to tilt the other way, with voices across the political spectrum critical of police forces portrayed as overly militarized.[383] Some have even suggested the status quo may actually be politically desirable, as the Posse Comitatus Act offers elected leaders a convenient scapegoat for feckless crisis management (although in truth, this contention is largely unsupported).[384]

Like the general always fighting the last war, the Posse Comitatus Act will probably continue to be revised according to its perceived deficiencies relative to the most recent crisis—whether that be a natural disaster, civil unrest, drug trafficking, border enforcement, counter-terrorism, or whatever else. At the same time, however, it is unlikely that the Act ever will be repealed wholesale, even in the face of a genuine crisis. Even if—as this Article has argued—the invocations by the Act's proponents of anti-militaristic traditions were largely propagandistic attempts to put a principled gloss on the sordid realpolitik of Reconstruction, the public marketing has inarguably been effective.[385] While not quite canonical, the

382. *See* Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES, (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html?_r=0 (reporting on the chaos that transpired after the fatal shooting of an unarmed teen by a police officer in Ferguson, Missouri).

383. *See, e.g.*, Matt Apuzzo & Michael S. Schmidt, *In Washington, Second Thoughts on Arming Police*, N.Y. TIMES (Aug. 23, 2014), http://www.nytimes.com/2014/08/24/us/in-washington-second-thoughts-on-arming-police.html ("The White House review and congressional interest come at a time when many liberal Democrats and libertarian-minded Republicans have joined forces in calling for an end to national security policies that they see as infringing on civil rights."); *see also* Carl Hulse, *Unlikely Cause Unites the Left and the Right: Justice Reform*, N.Y. TIMES (Feb. 18, 2015), http://www.nytimes.com/2015/02/19/us/politics/unlikely-cause-unites-the-left-and-the-right-justice-reform.html ("With the huge costs to the public of an expanding 2.2 million-person prison population drawing interest from the right and the conviction that the system is unfair and incarcerating too many drug and nonviolent offenders driving those on the left, the new coalition is the most recent example of ideological opposites joining together.").

384. *See* Candidus Dougherty, *While the Government Fiddled Around, the Big Easy Drowned: How the Posse Comitatus Act Became the Government's Alibi for the Hurricane Katrina Disaster*, 29 N. ILL. U. L. REV. 117, 147 (2008) ("The government has used the Posse Comitatus Act as a smokescreen for its failures to the American people during the Katrina disaster. We must reject the government's excuse for the misrepresentation that it is.").

385. Perhaps unsurprisingly, competing views of the Posse Comitatus Act have persisted in scholarly comment on the legislation. Some commentators view the Act as outmoded and

Act bestrides a longstanding ideological debate on the proper role of the military and in the absence of an existential threat to the nation, there would be little reason or political will for repeal. Despite its troubled birth, the Posse Comitatus Act has risen to a relatively high station. It will remain on the statute books.

CONCLUSION

Considering how fervently the Posse Comitatus Act was debated prior to passage, it is striking how quickly it seemed to fade from public view. Many leading histories and military treatises make little-to-no mention of the legislation, and when the Republican Party again had a congressional majority, there appears to have been no serious effort made to overturn the Act.[386] The reasons for this are not entirely clear, but the relative obscurity of the Posse Comitatus Act is best understood as a byproduct of the general weariness of Reconstruction by the end of the 1870s and an attendant lack of interest in re-fighting the battles of that era.

dangerously restrictive of the military. *See, e.g.*, Nevitt, *supra* note 11, at 174–75 ("More than two hundred years following the signing of the Declaration of Independence and the Constitution, our nation's 'greatest blessing'—the Navy—remains constrained by fundamental misunderstandings regarding the Framers' fears of a standing army and a Reconstruction Era statute that emerged out of misplaced Southern fears associated with an 'occupying' federal army. This lacks a sound basis in the Framer's underlying fears regarding a standing army and the historical context during the [Posse Comitatus Act]'s passage. At present, the legal authority for the Navy to engage in civilian law enforcement operations is unnecessarily restrictive and prohibitive in the face of real threats."). Others view the Act as a valuable civil liberties safeguard. *See, e.g.*, Cadman Robb Kiker III, *From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission*, 71 WASH. & LEE L. REV. ONLINE 282, 293–298 (2015) ("Therefore, now is the time for action; be it legislation, litigation, or a shift in policy, an effective solution to this threat to liberty must be found. A glimmer of hope in the litigation context has recently surfaced in a judicial strengthening of the long-neglected [Posse Comitatus Act]."). Unfortunately, some in the latter camp adopt the confused rhetoric of the 1870s debates, positing that military enforcement of domestic laws axiomatically leads to civil liberties violations—a perversion of the reality of Reconstruction, as this Article has indicated. *See, e.g.*, Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward A Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 441 (2003) (stating flatly, "Whether the military is enforcing the law in Boston in 1770, Florida in 1878, or Hawaii in 1942, the liberty interests of the people have suffered."); *see also id.* at 430 (proposing a new act to "affirm the founding principles of limitations on the military and to reflect an understanding that the military is not always the best answer for a particular security challenge"). With respect to the latter contention, whether the military was the "best answer" to the problem of Reconstruction is somewhat beside the point—it was the *only* answer, given the resources available at the time.

386. *See, e.g.*, ROLLIN A. IVES, A TREATISE ON MILITARY LAW AND THE JURISDICTION, CONSTITUTION, AND PROCEDURE OF MILITARY COURTS (N.Y.C., D. Van Nostrand, 2nd ed. 1881) (failing to mention the Act in an otherwise voluminous work); *see also* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 867 (Legal Classics Library 1988) (noting only the Posse Comitatus Act, arising "out of a temporary political antagonism" has "proved a serious embarrassment to the efficient execution of the process of the U.S. courts on the Western frontier").

Why did the Posse Comitatus Act come to pass? As the preceding argues, it was enacted almost wholly in response to the military's central role in enforcing laws, especially election laws, across the postwar South. This fostered a sense of collective grievance among white Southerners, who saw such intervention as little more than jackbooted Northern oppression. Many white Southerners had not reconciled to the sweeping political, social, and constitutional changes that came with the end of the Civil War and as the most conspicuous enabler of these cultural shifts, the military was frequently in the crosshairs of Democratic legislators. Once it was finished as an occupying force, social changes could be thwarted, the Democratic Party could return to power, and "home rule" could be restored. The crucial predicate to achieving this was gaining the necessary political clout and by 1878, with the Republican waving of the bloody shirt becoming less and less effective, the Democrats had attained it. There was also a marked intensity gap between the two sides. Northern Democrats and most Republicans had grown exhausted of funding and defending Reconstruction, whereas white Southerners living through it passionately dedicated themselves toward reducing military intermeddling. Such background illuminates the meaning behind Kimmel's opening comment, uttered when introducing the Posse Comitatus Act, that "this is a time most auspicious for considering such measures."[387] It certainly was.

Writing roughly a month after his inauguration, Hayes expressed satisfaction in the decision to draw down federal forces in the Southern States. "I now hope for peace, and what is equally important, security and prosperity for the colored people," he confided in his diary.[388] With pledges of compliance from leading citizens of the South, he was sanguine "that the Thirteenth, Fourteenth, and Fifteenth Amendments shall be faithfully observed; that the colored people shall have equal rights to labor, education, and the privileges of citizenship. I am confident this is a good work. Time will tell . . . ."[389] Time did render its inescapable judgment, and the verdict sadly shows that such optimism was deeply misplaced. Without the soldiery to enforce Reconstruction policy, the "brief moment in the sun" remembered by Du Bois was ominously eclipsed by the dark shadow of Jim Crow.[390] The Posse Comitatus Act stands as the

387. *Congressional Debate*, *supra* note 231, at 3579.

388. GLENN M. LINDEN, VOICES FROM THE RECONSTRUCTION YEARS, 1865–1877, at 316 (1999).

389. *Id.*

390. DU BOIS, *supra* note 1, at 371. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (2nd ed. 1966) (providing a history of Jim Crow in the South).

legislative coda to the tragedy of military Reconstruction.