PRIVATE ENFORCEMENT OF CONSTITUTIONAL GUARANTEES IN THE KU KLUX ACT OF 1871

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ABSTRACT

When violations of constitutional guarantees are difficult to detect and enforce, Congress may be attracted to solutions which allow aggrieved individuals to bring their own actions to enforce the law, bypassing the need for federal enforcement efforts. While aggrieved individuals may be well-positioned to identify the constitutional harms perpetrated against them, it is much less clear that they have the resources and incentives necessary to advocate on their own behalf. The Ku Klux Act of 1871 demonstrates one such case. While members of Congress thought granting a private right of action would open the floodgates for protection of the new constitutional rights created by the Fourteenth Amendment, in fact, the vast majority of enforcement efforts were necessarily taken on by federal officials. It was not until much later that enterprising public interest lawyers revived the private enforcement regime, but in service to goals quite distant from the intentions of the framers of the Ku Klux Act. This development shows the weakness of private enforcement regimes in the absence of other support structures for litigation.

KEYWORDS: *Private Enforcement, Legal Claiming, Ku Klux Act of 1871, Enforcement Act of 1871, 42 U.S.C. §1983, Lynching, Voting Rights*

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FOLLOWING THE PASSAGE of the Fourteenth Amendment, promises of civil rights were challenged by terrorism of the Ku Klux Klan in the Reconstruction South. While the Amendment was aimed at state discrimination against freed slaves, the Ku Klux Klan largely operated with impunity in Southern states unwilling to punish their violent tactics. Reconstruction supporters feared that the inability of the federal government to end and prevent terror in the South would embolden segregationists and secessionists.[2]

Fear that the federal government would not have sufficient reach to stem the tide of violence led Congress to adopt a first of its kind "private enforcement regime" in which victims of racial violence and conspiracy were authorized to bring lawsuits in federal courts in order to enforce constitutional guarantees in the Ku Klux Act of 1871. Recent political science literature has explored the purpose and efficacy of statutorily created private rights of action, finding that courts and litigation can be sources of effective enforcement, especially in the face of executive-legislative conflict.[3] A close look at the first private enforcement regime in the Ku Klux Act challenges both of these findings.

While prevailing views of private enforcement regimes have suggested that Congress will favor them in an effort to insulate policy from Presidential power, the Ku Klux Act shows that Congress did not view private litigation as a substitute for executive action. And despite speculation by congressional opponents of a flood of enforcement litigation that would be produced by the new enforcement provision, scholars have agreed that the Ku Klux Act was mostly ineffective at producing private litigation. Instead, the reach of federal executive power was the most important factor in combating racial violence in the South.[4] I argue here that the lack of enforcement incentives led to the absence of private enforcement. Only after support structures for litigation were developed did constitutional litigation grow out of the Act, driven by entrepreneurial public interest attorneys who pushed past the boundaries of the framers intent. In the remainder of this short note, I recount the congressional motivations for the inclusion of a private enforcement regime in the Ku Klux Act of 1871. Next, I argue that the statutory structure that emerged from

2. Eric Foner, *Reconstruction: America's Unfinished Revolution*, (New York: Harper & Row: 1988), 454-455.

3. Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85," *American Political Science Review* 97, no. 3 (2003):483–499; Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton, NJ: Princeton University Press, 2010).

4. Foner, 457.

Congress produced a legal environment in which private litigants lacked the necessary motivations to bring suit during Reconstruction. Lastly, I describe how entrepreneurial actors, with a different set of incentives, revived the act, albeit in a limited manner.

MOTIVATIONS FOR PASSAGE OF THE KU KLUX ACT

The first extension of a private right of action appears to have been the Ku Klux Act of 1871 (often referred to as the Third Enforcement Act, the Enforcement Act of 1871, or the Civil Rights Act of 1871, and today is often simply referred to as Section 1983 after its present location in the United States Federal Code at 42 U.S.C. §1983). Of a different mold from other private enforcement statutes in this early period, the Ku Klux Act was more radical in its objectives. Rather than extending presently existing and well-defined rights to private litigants, the 1871 Act grappled with the enforcement of the Civil War Amendments in states of the former Confederacy where freed slaves were aggressively terrorized by the Ku Klux Klan, often with the encouragement and complicity of local authorities.[5]

Recently, political scientists have argued that the main benefit to legislators of authorizing private litigation is that it keeps enforcement power from accruing solely and excessively to the President. In particular, Sean Farhang has claimed that concerns of Congress about over- and under-enforcement by chief executives drive them to adopt litigation that can operate independently of the President.[6] The development of the private enforcement regime in the Ku Klux Act, however, is inconsistent with this explanation. Private enforcement instead was a solution to the intransigence of Southern states, with private prosecution correcting for the absence of state action.

In authorizing such lawsuits, Congress reprised a common law practice of private prosecution that had fallen into disuse, but, by inscribing the private action in federal law, fundamentally altered its purpose. As a number of scholars have noted, private prosecutions of crimes were common practice beginning in colonial America and extending into the 19th century.[7] Individuals would regularly seek redress

5. *Congressional Globe*. 1871. 42nd Cong., 1st sess., vol. 44 pt. 1-2.

6. Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton, NJ: Princeton University Press, 2010).

7. This practice was an extension of English law, which required victims to initiate criminal trials in order to prevent government harassment or to facilitate vengeance. See Michael T. McCormack "The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law" *Suffolk University*

for violent crimes by private cases, but this system of prosecution was on the decline as early as the 17th century as states shifted to professional, public prosecutions. The shift to public prosecutions was rapid, leaving behind private prosecutions as an uncommon historical vestige by the Reconstruction Era. As early as the 1850s, several states banned their use, and the practice was criticized by some state high courts because of the possibility that the practice was unjust to defendants.[8] Therefore, congressional creation of a new private right of action diverged from the trajectory of public prosecutions. Congress ratified the use of private enforcement to solve a uniquely intractable problem while simultaneously redirecting suits to more impartial tribunals. The shift to public prosecutions was intended to promote a more just legal process, but the revival of private enforcement by Congress acknowledged that private power could be used to correct for bias in systems of public law enforcement.

Bias in enforcement indeed appeared to drive the creation of statutory private enforcement in the Ku Klux Act, but, in contrast with executive conflict theories of private enforcement, the initial impetus for the inclusion of a private enforcement regime in the Ku Klux Act does not appear to have been the result of concerns over non-enforcement by the federal executive branch, but instead by the Southern states. Legislators noted the institutional weaknesses of Southern courts in dealing with the Southern outrages. Judge Thomas Settle of the North Carolina Supreme Court testified to Congress indicating why Southern courts were incapable of dealing with racial violence:

> I suppose any candid man in North Carolina would tell you it is impossible for the civil authorities, however vigilant they may be, to punish those who perpetrate these outrages. The defect lies not so much with the courts as with the juries. You cannot get a conviction [. . . because] it was the duty and obligation of members of [a] secret organization [the Ku Klux Klan] to put themselves in the way to be summoned as jurors, to acquit the accused, or to have themselves summoned as witnesses to prove an alibi. This they swore to [. . .] Of course it must be so, for there has not been a single instance of conviction in the State.[9]

Congress, in turn, sought to open the federal courts, in hopes that those courts would be less subject to undue influence by the Ku Klux Klan. While it was not the

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Law Review 37 (2004): 497; John D. Bessler "The Public Interest and the Unconstitutionality of Private Prosecutors." Arkansas Law Review 47, no. 3 (1994): 511–602.

8. Bessler, "The Public Interest and the Unconstitutionality of Private Prosecutors." See also, O'Neill, Michael Edmund. "Private Vengeance and the Public Good." *University of Pennsylvania Journal of Constitutional Law* 12 (2009): 659.

9. *Congressional Globe*, 320.

private enforcement provisions that inspired the most ire from Southern representatives and senators, they lodged their objections nonetheless.

The controversy of the Ku Klux Act was not so much in its private enforcement regime, but in its extension of federal power overall, and especially executive power. Few mentions were made directly to the extension of judicial power, but the truism that private rights of action would lead to increased use of litigation, to the detriment of defendants, was expressed often. Opponents cited procedural concerns of litigation in federal courts rather than substantive concerns. Representative Henry D. McHenry (D-KY), for example, complained that

> The Federal Government has but two or three courts in any State, and in some only one. The contests among citizens under this provision will be numerous, and it is a tyranny to drag people hundreds of miles from their homes to have their cases tried before courts where the expense of litigation will be ruinous to them, instead of having them heard before their State courts, and where the facts will be determined by a jury of the vicinage.[10]

Mostly, opponents of the private right of action sought to maintain the power of local courts to deal with lynching and terrorism against black populations in the South, arguing, as did Representative Thomas Swann (D-MD), that "this law ignores the State tribunals as unworthy to be trusted, and confers jurisdiction upon the district and circuit courts of the United States, with and subject to the same right of appeal, review upon error and other remedies provided in like cases. . . ." Other members characterized damage awards for private actions as redundant ("The second section of this bill is but a provision for the punishment of crimes known to the common law and are punished by the laws and the tribunals of every state"[11]) and yet unprecedented ("To say the least of it, it is a strange; unusual, and hitherto unknown proceeding, and if acted upon will be productive of expense and annoyance without any compensation whatever"[12]). Still, trials for lynching in Southern local courts were exceedingly rare, and convictions nonexistent.[13]

In fact, insulation of the President was a concern for some members of Congress. *The Baltimore Sun* reported, "A substitute is now in course of preparation which meets with the approbation of the Southern republicans, proposing. . . . That any

10. Ibid, 429.

11. Ibid, 395.

12. Ibid, 337.

13. Ibid, 181.

State officer whose duty it is to afford equal protection to citizens shall, when he refuses or wrongfully neglects to do so, be liable in damages,"[14] suggesting that private enforcement would be used in place of more robust Presidential authority. While these Southern Republicans sought to restrict the power of the President, ultimately they were only successful in achieving the additional enforcement mechanism of private litigation, while the President retained the ability to employ militias in order to suppress "unlawful combinations" of Ku Klux groups (An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes 1871). Members expressed less concern about executive enforcement (though Democrats objected to executive enforcement features that were included anyway), and were more focused on practical and constitutional considerations. While radical Republicans favored all provisions of the bill, moderate Republicans were concerned that certain provisions were outside the bounds of what was allowed by the Fourteenth Amendment. Moreover, the *New York Tribune* reported that opposition to increased Presidential power for the enforcement of the Fourteenth Amendment was driven substantially by constitutional concerns. Though the sincerity and complexity of constitutional argument in Congress may be questioned,[15] the newspaper reported:

> The result has been two different interpretations of the meaning of the Amendment among Republicans. One party . . . maintain[s] that by virtue of this [the Fourteenth] Amendment, the United State Government is brought directly home to the citizens as never before, and it is bound to protect him in person and property, and in all his rights of citizenship . . . if the State Courts and laws do not afford him protection. The other party . . . believe[s] that the duty of protecting the lives and property of citizens, and to make and executive laws for that purpose devolves upon the State as fully as ever, with only this modification—the laws must be equal, affecting all classes alike. . . .[16]

With the central debates focusing on these issues for most Republicans, little distinction was drawn between the extension of courts and executive power, at least

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14. "More About the Ku-Klux Legislation—The Republicans Consulting." 1871. *The Baltimore Sun* April 4, 1871.

15. See, *e.g.*, J. Mitchell Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System*, (Durham, NC: Duke University Press Books, 2004).

16. "XLIID Congress—In Session: Continuation of the Ku Klux Debate in the House—The Democrats Driven Out by a Colored Orator—Congress Expected to Adjourn about the Middle of the Month." 1871. *New York Tribune* April 3, 1871.

when compared to the extension of federal power more generally. Representative McHenry emphasized a similar point, stating that the bill,

> . . . vests in the Federal courts jurisdiction to determine the individual rights of citizens of the same State; a jurisdiction which of right belongs only to the State tribunals, and to rob them of it by the power of the Federal Government is an infraction of the Constitution so flagrant that the people will hold to a strict accountability those men and that party who perpetrate the outrage. . . . No power is given Congress to enforce upon the citizen a punishment or penalty for the wrong and delinquency of a State. It is for the States to enforce this provision by abstaining from the enactment of such laws as conflict with it, and the courts to protect the citizen by upholding and regarding the higher law of the Constitution. Because the State is forbidden to pass such laws it does not follow that Congress has the right to enforce this provision in the States.[17]

Congress sought to pass some of the responsibility for enforcement of the Fourteenth Amendment to individuals who were harmed by state action. This private right of action extended to lawsuits against the Ku Klux Klan, insofar as the Klan exerted power over state officials in the conduct of their duties. The reason for the private right of action was not to insulate the President or because of a logroll with moderates—the President, in fact, would retain significant enforcement powers in the 1871 Act. Instead, it was a recognition that fair trials were elusive for black defendants in the South. Senator John Pool, a Republican from North Carolina, argued that the need for enforcement of state lynching laws in the federal courts was the widespread conspiracy against their enforcement.

> It requires not only judges, but sheriffs and jurors, to secure punishment in the courts. It is shown in the testimony reported by the majority of the committee that in several of the counties the sheriffs and the deputy sheriffs are members of the Ku Klux organization. The juries in North Carolina are not selected at the will of the sheriffs, as was intimated. If they were, the juries in the Ku Klux counties, where the sheriffs belong to the order, would be unanimously Ku Klux in all probability. . . . [I]t is said, why not remove the cases to some other county? For the simple reason that you cannot remove the trial of an indictment until some indictment is found. The grand jury is the great trouble in the way of prosecuting

17. *Congressional Globe*, 429.

> these men. . . . If a bill should pass a grand jury, and there should be a conviction by a petit jury and a sentence, then the criminal is in no danger, for he is sure to be rescued from prison. . . .[18]

With these types of conspiracies and the threat of physical violence, however, it was impractical for black plaintiffs to bring civil cases in federal court where criminal charges were unsuccessful. In fact, the provision would fail to produce any litigation of any import until the 1950s and 1960s, as I explore further below.[19] Congressional testimony indicates that those objecting to the enforcement of anti-lynching laws also objected to the inclusion of private enforcement provisions in the bill, mostly on objection to any federal intrusions in the South. Rep. James B. Beck (D-KY) argued that,

> Scarcely less frightful or less fatal to liberty are the provisions of the first and second sections, which undertake to transfer to the Federal courts all mere questions of personal difficulty or personal rights between citizens of the same State [. . .] Enact these provisions, and local State government is at an end; the States may as well make bonfires of their statutes-books and barracks of their court-houses, for their laws will be a mockery and their courts a farce.[20]

The objections to the private enforcement regime attacked both its wisdom and constitutionality. Southern objections denied that the Fourteenth Amendment conferred sufficient power to Congress to create such an expansive role for the U.S. courts. Rep. Beck continued:

> The smallest modicum of common sense would seem to me sufficient to enable any member to see the insane folly of conferring such jurisdiction on the Federal courts, even if the power to do so existed. With only one Federal court in some of our largest States, how could justice be administered, often five hundred miles from the venue, "without sale, denial, or delay?" What conqueror even, either in ancient or modern times, ever destroyed the local tribunals and laws of their provinces?[21]

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18. *Congressional Globe*, 172.

19. Love, Jean C. 1979. "Damages: A Remedy for the Violation of Constitutional Rights." *California Law Review* pp. 1242–1285; Niles, John G. 1966. "Civil Actions for Damages Under the Federal Civil Rights Statutes." *Tex. L. Rev.* 45:1015.

20. *Congressional Globe*, 352.

21. Ibid.

Yet, Republicans denied the veracity of the claims made by Southern Democrats. Not only was it apparent to most Republicans that the Fourteenth Amendment substantially expanded the role of federal power, it was also apparent that constitutional arguments were little more than window dressing to the South's desire to maintain white supremacy. According to Rep. William D. Kelley (R-PA), while the targets were changing, the goals of Southern legislators remained the same:

> The argument presented by the Democrats on this bill, except the suggestions of the gentleman from Tennessee, which I now leave, is to me an old and familiar one [. . .] [T]o those of us who have been here for the last ten years it is an old song, threadbare, and sadly monotonous. Its burden is the want of constitutional power. [. . .] But, sir, I may remind you each of the constitutional amendments has been met with the same absurd suggestion, that the Constitution could not be so amended; that it was not in the power of Congress and three fourths of the States, or of all the people of the States, so long as one citizen should dissent, to constitutionally adopt such amendments to the Constitution as these. [. . .] [S]hould [the Democratic Party] achieve the ascendency, it will endeavor, by force or otherwise, "stamping out," I think, is the expression, to repeal or nullify the thirteenth, fourteenth, and fifteenth amendments to the Constitution.[22]

Even in the face of these supposed constitutional obstacles, and while the expansion of the jurisdiction of federal court power would necessarily and by design be at the expense of the power of Southern state courts, Southern Republicans supported the private provisions, but also ultimately supported a bill with substantial executive powers, demonstrating that their concerns about Southern intransigence trumped any fear of executive overreach. Rather than a compromise provision, private rights of action appeared to be aimed at granting victims access to legal remedies in the face of state intransigence, *in addition to* robust executive enforcement power.

BARRIERS TO PRIVATE ENFORCEMENT OF CIVIL RIGHTS CLAIMS

While private enforcement provisions may on face have a "democratizing" effect on constitutional promises by providing more access to plaintiffs, the fact remains that claims under private enforcement regimes are substantially limited by the legal,

22. Ibid, 339.

political, and institutional environments faced by the plaintiffs. Private plaintiffs in the civil rights arena face substantial barriers to making constitutional claims. In addition to the chilling effect that violence itself likely had on claiming behavior, civil rights claimants in the South were poorly situated to bring civil actions in federal courts. This was in substantial part due to the lack of private incentives available to successful plaintiffs.

Private enforcement provisions place the burden on individuals to protect their own rights, a task that is both onerous and uncertain. The costs can be significant. For a person who experiences racial violence to bring a lawsuit, a number of sequential steps have to be taken. Law and society scholars have noted that even in the presence of "perceived injurious experiences," those experiences must be "transformed" in order to become lawsuit.[23] Felstiner, Abel, and Sarat (1980) argue that individuals must recognize injuries by "naming" them as such before "blaming" the responsible party, and "claiming" restitution of some kind against that party. This barrier is far from trivial in a legal system in which half of grievances are never translated into claims[24] and few victims of discrimination receive a satisfactory resolution of their claims.[25] It is not enough to entice victims with the potential for compensation. As Bumiller (1987) argues, victims fail to make legal claims less because of the lack of legal rights and remedies, and more often because the process for making legal claims is unfamiliar. Perhaps more importantly, formal legal claims threaten to "disrupt the delicate balance of power between themselves and their opponents."[26] While Bumiller is focused primarily on modern employment and housing claims, surely the same imbalances of power were operating in the case of racial violence as well. Moreover, the experience of racial violence in the South—and the lack of remedies experienced under the state legal systems—would have been unlikely to inspire confidence that courts of law were reliable forums for curbing white supremacist violence.

That is not to say, however, that successful claiming under the Ku Klux Act was impossible—only that the conditions did not exist during the Reconstruction period and for many years to follow. For private enforcement to be successful, there

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23. William L. F. Felstiner, Richard L. Abel, and Austin Sarat. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . ." *Law & Society Review* 15, no. 3/4 (1980): 631.

24. As defined by Felstiner, et al., "The Emergence and Transformation of Disputes."

25. Kristin Bumiller, "Victims in the Shadow of the Law: A Critique of the Model of Legal Protection," *Signs: Journal of Women in Culture and Society* 12, no. 3 (1987): 421-39.

26. Ibid, 438.

must be additional political support for legal claiming—claims do not occur in a vacuum. At each step, the legal and political environment will affect the ability and inclination of a potential plaintiff to seek a lawsuit. That environment begins with the statute itself. Direct litigation incentives, like the availability of attorney's fees and damage multipliers directly affect the private benefits that accrue to plaintiffs. This has been acknowledged by scholars; Farhang focuses on statutory *incentives* to bring suits, rather than private enforcement regimes themselves.[27] Robert C. Lieberman similarly gives attention to the ways in which weak bureaucracies are able to transform their agendas to support private litigation. Focusing in particular on employment discrimination policy, scholars have argued that in the absence of strong enforcement powers at the Equal Employment Opportunity Commission (EEOC), bureaucratic effectiveness "depended heavily on its ability to persuade rather than coerce."[28] Statutory and bureaucratic incentives, however, are not necessarily sufficient to change the behavior of plaintiffs in a policy area that is not conducive to private claiming. Indeed, Lieberman notes that the EEOC depended significantly on outside political actors to enforce employment discrimination policy. In this vein, Paul Frymer has argued that friendly judges were essential to the success of employment discrimination plaintiffs, bolstering the benefits to legal claiming through the construction of favorable doctrine and through creative enforcement procedures.[29] In related work, I demonstrate that these effects exist across a number of policy areas, and that political partisanship of executive and judicial actors plays an important role in the amount of litigation that takes place under private enforcement statutes.[30]

Therefore, under the right circumstances, there may exist support structures that can encourage litigation under private enforcement regimes—changes to the political and institutional environment can make claiming easier for potential plaintiffs. Though support structures for litigation were absent for nearly a century following the passage of the Ku Klux Act, political interest groups developed

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27. Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton, NJ: Princeton University Press, 2010).

28. Robert C. Lieberman, *Shaping Race Policy: The United States in Comparative Perspective* (Princeton, NJ: Princeton University Press, 2005), 163.

29. Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85," *American Political Science Review* 97, no. 3 (2003):483–499.

30. Paul J. Gardner, "Mobilizing Litigants: Private Enforcement of Public Laws" (Ph.D. diss., Princeton University, 2015).

strategies that made the private enforcement provisions of the Act more useful in the mid-twentieth century. I now explore how this shift occurred in the case of the Ku Klux Act, more than 80 years following its enactment.

VOTING RIGHTS AND SECTION 1983

Private enforcement of the Ku Klux Act (now better known as 42 U.S.C. §1983) reemerged in the late 1950s and 1960s, primarily due to the efforts of enterprising lawyers at the National Association for the Advancement of Colored People. Where earlier plaintiffs had statutory authority to bring their claims but lacked incentives and organizational structure, civil rights groups faced the opposite problem in challenging discriminatory voting laws. These groups sought to end disenfranchisement of black voters, but lacked the statutory tools necessary to make successful claims in court. In 1957, Congress adopted the first Civil Rights Act since Reconstruction, which was primarily focused on guaranteeing voting rights. Voting rights were a priority for civil rights groups and measures to uphold voting rights generally faced less opposition in Congress than other civil rights statutes, at least on the surface. Despite its limited nature (and echoing the 1871 debates), the 1957 bill faced significant opposition from Southern senators, who claimed that the provisions of the bill would allow the Attorney General sweeping powers to implement civil rights solutions in the South. As in the Ku Klux Act debates, legislators argued that executive action would be abused, and that civil rights legislation would lead to military occupations of the South.

These concerns, however, as in the case of the Ku Klux Act, were not prophetic, and the Civil Rights Act of 1957 was only weakly welcomed by civil rights groups who viewed the legislation as overly incremental and insufficient to address the needs of African Americans in their efforts to gain meaningful voting rights. This weakness was not limited to the 1957 law. Early voting rights legislation in the 1957, 1960, and 1964 versions of the Civil Right Act was largely unsuccessful in leading to the registration of substantial numbers of black voters,[31] in part due to the weakness of their enforcement procedures, at least in the view of civil rights advocates. The Civil Rights Act of 1957 provided that "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by

31. Charles S. Bullock and Ronald Keith Gaddie, *The Triumph of Voting Rights in the South* (Norman, OK: University of Oklahoma Press, 2009); Chandler Davidson, "The Voting Rights Act: A Brief History," in *Controversies in Minority Voting: The Voting Rights Act in Perspective*, ed. Bernard Grofman and Chandler Davidson (Washington, D.C.: The Brookings Institution, 1992): 7–34.

any person: [. . .] To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote",[32] and civil rights groups made some early use of those provisions. But the 1957 act was less useful to civil rights groups who instead revived the Ku Klux Act's enforcement provision, now referred to as Section 1983. The provision was more useful to groups because it had been interpreted to allow for the collection of damage awards (while the Civil Rights Act of 1957 did not allow for the collection of damage awards) in no small part due to the efforts of litigation by groups.[33] This meant that voting rights litigation under Section 1983 had an important feature that efforts to dampen criminal conspiracies in the Reconstruction South did not—committed and organized plaintiffs organizations.[34]

Still, the amount of litigation generated under Section 1983 was not substantial. When the Voting Rights Act of 1965 was reauthorized in 1975, civil rights interest groups lobbied for *automatic* awards of attorney's fees to mitigate the cost of the suits for public interest lawyers. Testifying before Congress, Armand Derfner of the Lawyers' Committee for Civil Rights Under Law stated,

> The Reconstruction Congress provided for attorneys' fees in voting rights cases under sections 2, 3, and 4 of the Civil Rights Act of 1865, and courts today frequently award fees in voting rights cases under the private attorney general theory but it would be useful for Congress to provide such fees automatically, as in equal employment cases, to those who prevail in claims arising under any portion of the Voting Rights Act.[35]

Even with interest group support structures in place, there needs to exist sufficient monetary awards to maintain private litigation supporting constitutional protections.

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32. "Civil Rights Act of 1957," *Congressional Record*, 85th Cong., 1st sess., 1957.

33. "Damage Awards for Constitutional Torts: A Reconsideration After *Carey v. Piphus*." *Harvard Law Review* 93 (1980).

34. See Paul J. Gardner, "Motivating Litigants to Enforce Public Goods: Evidence from Employment, Housing, and Voting Discrimination Policy," in *The Rights Revolution Revisited*, ed. Linda Dodd (New York: Cambridge University Press), *forthcoming*.

35. "Hearings of the Subcommittee on Constitutional Rights," *Congressional Record*, 94th Cong., 1st sess., 1975, 644.

CONCLUSION

This case study examines the operation of the private enforcement regime in the Ku Klux Act of 1871, but, more importantly, it is a study highlighting the problem of "democratizing" constitutionalism. Opening the federal courts to aggrieved individuals who otherwise lack political or legal remedies may appear to be a simple and effective solution, but that is not necessarily the case. While opening the courts to private actors can create access for aggrieved individuals who might otherwise lack access to remedies, we must consider the likelihood that the targeted plaintiffs will be situated to successfully use those private rights of action. Furthermore, when support structures are developed to bolster private litigation, interest group actors will bring ideological priorities to the enforcement of statutes that were not necessarily intended by the drafters of the legislation. The private enforcement provisions of the Ku Klux Act remained dormant for decades until enterprising interest groups transformed the statute, with the help of courts, to meet their immediate political needs.

More broadly, the study of private enforcement regimes in public law and political science seems a positive development insofar as it broadens the scope of political science research on law and courts beyond the study of judicial behavior and doctrinal developments in the appeals courts. The recognition that the institutional rules and environments of courts can importantly structure outcomes while still involving key actors like Congress and interest groups is important for understanding the full scope of the impact that law and courts has on politics and society. The consequence, however, may be that putting constitutional guarantees in the hands of individuals may not have a substantially democratizing effect, instead inviting familiar political actors into the legal arena, while placing the burdens of enforcement on aggrieved individuals.

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