Chase Court and Fundamental Rights: A Watershed in American Constitutionalism, The

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Three weeks before he died in May 1873, the frail and ailing Salmon P. Chase joined three of his brethren in dissent in one of the most important cases ever decided by the United States Supreme Court, the Slaughter-House Cases. This decision was a watershed in United States constitutional history for several reasons. Doctrinally, it represented a rejection of the virtually unanimous decisions of the lower federal courts upholding the constitutionality of revolutionary federal civil rights laws enacted in the aftermath of the Civil War. Institutionally, it was an example of extraordinary judicial activism in overriding the legislative will of Congress. Politically, it abolished the constitutional theory on which the Justice Department depended in its enforcement of the fundamental rights of Americans in the South during Reconstruction. The Court thus provided legal sanction for the Grant administration’s retreat in 1873 from its civil rights enforcement efforts. The Court’s decision annulled a revolution in American constitutionalism.
I would like to tell you why I think these generalizations about *Slaughter-House* are accurate. I will briefly discuss the legislative background of the case, focusing on the history of the Civil Rights Act of 1866 for what it tells us about the framers' understanding of the Fourteenth Amendment. I will then discuss the valiant efforts of federal lawyers and judges to enforce the fundamental rights of Americans under these and other statutory and constitutional provisions up to 1873. I will then discuss the Chase Court's decisions. This will provide the context for, and, hopefully, make more clear the significance of the *Slaughter-House* Cases.

The Fourteenth Amendment confers citizenship on all Americans and protects their privileges and immunities and rights to due process and equal protection of the law. In my view, the framers of the Fourteenth Amendment intended to revolutionize the constitutional structure of the nation in 1866 by making more explicit the delegation of constitutional authority to secure the status and fundamental rights of citizens they believed the Thirteenth Amendment conferred on Congress. The framers defined the freedom the Thirteenth Amendment secures as the status and rights of free men, which they equated to the status and rights of citizenship. They believed that the Thirteenth Amendment delegated to Congress constitutional authority to enforce the fundamental rights of American citizens.

In enacting the Civil Rights Act of 1866 in the same session of Congress, the framers of the Fourteenth Amendment intentionally exercised plenary legislative authority under the Thir-

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6. Cong. Globe, 39th Cong., 1st Sess. 474, 476, 527-28, 573-74, 600, 1756, 1780-81 (1866) [hereafter Cong. Globe] (Sen. Trumbull); id. at 602, 741 (Sen. Lane); id. at 1255 (Sen. Wilson); id. appendix at 101 (Sen. Yates); id. at 1124 (Rep. Cook); id. at 1151 (Rep. Thayer); id. at 1156-57 (Rep. Thornton); id. appendix at 158 (Rep. Delano). This was the understanding of contemporaries outside of Congress. See Kaczorowski, *Revolutionary Constitutionalism*, supra note 3, at 899 n.156.

7. Cong. Globe, supra note 6, at 474, 605 (Sen. Trumbull); id. at 503-04 (Sen. Howard); id. at 570 (Sen. Morrill); id. at 602 (Sen. Lane); id. at 768 (Sen. Johnson); id. at 1118 (Rep. Wilson); id. at 1124 (Rep. Cook); id. at 1152 (Rep. Thayer); id. at 1159 (Rep. Windom).

teenth Amendment to secure the civil rights of all Americans as the fundamental rights of United States citizenship, not simply the rights of African-Americans. Thus, Senator Lyman Trumbull of Illinois, the chairman of the Senate Judiciary Committee and author of the Civil Rights Act, explained that the rights of United States citizenship that the bill was intended to secure "are those inherent, fundamental rights which belong to free citizens as free men in all countries ..."[9] "[C]itizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect," declared Congressman James Wilson of Iowa, House floor manager of the Civil Rights Act of 1866.[10] Relying on Chief Justice John Marshall's opinion in *McCulloch v. Maryland*, Wilson continued, "possession of these rights by the citizen raises by necessary implication the [plenary] power in Congress to protect them."[11] From this perspective, section one of the Fourteenth Amendment can be understood as making more explicit the Thirteenth Amendment's delegation of plenary authority to secure citizens' rights.[12]

The Civil Rights Act of 1866 thus conferred citizenship on all Americans. It also conferred on all United States citizens certain fundamental rights specified in section one. In other words, the citizen possessed these rights independent of state law. Thus, Senator Trumbull declared:

To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union.[13]

He emphasized the point when he admonished "that the federal government has authority to make every inhabitant of [any state] a citizen, and clothe him with the authority to inherit and buy real estate, and the [states] cannot help it."[14] Congressman Lawr-

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9. CONG. GLOBE, supra note 6, at 1757.
10. Id. at 1118.
11. Id. at 1119. Regarding the framers' intention to secure the rights of all Americans, see Kaczorowski, *Revolutionary Constitutionalism*, supra note 3, at 895-99.
12. I have developed this argument in the articles cited supra note 3.
13. CONG. GLOBE, supra note 6, at 1757 (emphasis added).
14. Id. at 500.
ence made the same point in the House: "There are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him."  

However, the statute contemplated concurrent state jurisdiction over, and the continuation of the states' essential role in securing these rights. The framers' desire to preserve concurrent state jurisdiction over civil rights led to confusion among some twentieth-century scholars over the essential scope and nature of the statute. Section one guarantees that all United States citizens shall enjoy the enumerated rights and immunities as white citizens enjoyed them. It thus prohibited the states from discriminating on the basis of race or politics in regulating the exercise of these rights. The framers intended the states to retain the authority they had previously exercised in regulating the enjoyment and the exercise of civil rights in other respects. Section one of the Civil Rights Act thus conferred citizenship and some of the rights of United States citizenship in a way that permitted the states concurrent authority to regulate in a racially and politically impartial manner the exercise of these rights. Even the most radical Republicans never intended to abolish the states. Nor did any Republicans wish to supplant the states in administering ordinary civil and criminal justice. They merely sought to supplant the state with the federal administration of justice in those situations when citizens were unable to enforce their rights or redress rights violations within state and local legal process. The framers envisioned a federal system of civil rights enforcement in which the states would exercise their traditional jurisdiction over ordinary civil and criminal process, and but that citizens would turn to federal legal process when they were unable to enforce their rights within the states.  

The reasons that explain why the framers retained concurrent state jurisdiction over national rights reveals their commitment to dual sovereignty, albeit a radically changed version, and the

15. Id. at 1833.  
17. The framers intended to protect white Unionists, Republicans, and federal officers in the South from civil rights violations attributable to political animus owing to their loyalty to the Union and to the causes of the Republican party. See, Kaczorowski, Enforcement Provisions, supra note 3, at 589 n.115; Kaczorowski, Revolutionary Constitutionalism, supra note 3, at 897 n.153.  
18. Id. and Kaczorowski, To Begin the Nation Anew, supra note 3, at 56-57.
limits of their commitment to equal rights. If the Civil Rights Act had made a blanket grant of the specified rights to all citizens, the grant would have voided state laws regulating the manner in which they were enjoyed and exercised. State regulations based on sex, marital status, age, and mental disability, which the framers considered reasonable and legitimate discriminations, would have been abolished if the statute had conferred the right unconditionally.\footnote{19}{See, e.g., Cong. Globe, supra note 6, at 1835-36 (Rep. Lawrence); Kaczorowski, Enforcement Provisions, supra note 3, at 573.} The framers wanted to avoid this result. They succeeded in retaining concurrent state authority over civil rights by providing that all citizens shall have the same enumerated rights "as [are] enjoyed by white citizens."\footnote{20}{Id. at n.38.}

Nevertheless, the Civil Rights Act also provided for the enforcement of civil rights directly in the federal courts. Because they understood that Congress could enforce federal rights only through the federal courts and other national institutions, the framers provided an alternative system of civil and criminal justice to those of the states when individuals could not enforce or were denied their civil rights in the state courts.\footnote{21}{Cong. Globe, supra note 6, at 1294 (Sen. Wilson) (quoting Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 615-16 (1842). See Kaczorowski, Enforcement Provisions, supra note 3, at 568-69, 581-82 for a fuller discussion of these points.} Conferring jurisdiction on the federal courts to enforce fundamental rights was required not only by nineteenth-century legal theories of constitutional law and federalism, it was dictated by the fact that the states were failing to secure these rights and were actually infringing them. Thus, after asserting that civil rights were federally secured rights of United States citizens, Congressman Wilson proclaimed: "The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy."\footnote{22}{Cong. Globe, supra note 6, at 1294.} If a citizen was unable to enforce his rights through a state's legal process, he queried,

[H]ave we no power to make him secure in his priceless possessions? When such a case is presented can we not provide a remedy? Who will doubt it? Must we wait for the perpetration of the wrong before acting? Who will affirm this? The power is with us to provide the necessary protective remedies.\footnote{23}{Id.}
If Congress could not provide the remedies, Wilson wanted to know, then "from whom shall they come? From the source interfering with the right? Not at all. They must be provided by the government of the United States, whose duty is to protect the citizen in return for the allegiance he owes to the Government."24

Moreover, the framers expressly stated their intention to bypass state law enforcement institutions by enforcing citizens' fundamental rights and providing remedies for civil rights violations in and through the federal courts whenever citizens could not enforce their civil rights in the state courts or through state legal process.25 This intention could not have been stated more clearly than it was by Congressman Thayer when he said that the Civil Rights Act provided for the enforcement of citizens' fundamental rights through the quiet, dignified, firm, and constitutional forms of judicial procedure. The bill seeks to enforce these rights in the same manner and with the same sanctions under and by which other laws of the United States are enforced. It imposes duties upon the judicial tribunals of the country which require the enforcement of these rights. It provides for the administration of laws for the enforcement of these rights.26

Further evidence of this point is the fact that many of the enforcement provisions of the Civil Rights Act of 1866 were taken from the Fugitive Slave Act of 1850, a statute enacted by Congress to provide for the rendition of fugitive slaves through national institutions, including the federal courts, after the Supreme Court had decided that Congress did not have the authority to require state officers and state courts to enforce federal rights and duties, but that it could enforce them only through federal courts and only with federal officers.27 Thus, opponents of the Civil Rights Bill strenuously objected that this statute would transfer all civil suits to the federal courts. "Every little petty case of a civil character in which from ten cents to thousands of dollars are involved" would be absorbed by the federal

24. Id. at 1118.
25. See, e.g., id. at 1118, 1294.
26. Id. at 1153. See also id. at 479 (Sen. Saulsbury); id. at 598-99 (Sen. Davis); id. at 601 (Sen. Hendricks); id. at 1271 (Rep. Kerr); id. at (Cong. Bingham).
courts, complained Senator Saulsbury. Opponents similarly warned that the states’ whole criminal codes would be taken over and administered by the federal courts.

The Civil Rights Act, therefore, established a federal system of civil and criminal justice that supplanted those of the states whenever Americans could not enforce or were denied their civil rights in state courts. The framers authorized federal courts to replace state courts, and to try civil and criminal cases that were otherwise within the jurisdiction of the state courts, whenever individuals could not enforce their rights in or were denied their rights by state courts and legal process. Such persons could bring their causes into federal court either by originating the action in the federal court or by removal from a state court.

Although the enforcement of civil rights under the Civil Rights Act of 1866 in the federal courts during the administration of President Andrew Johnson was relatively quiescent, two cases, one civil and the other criminal, demonstrate the extraordinary expansion of federal jurisdiction over citizens’ rights intended by its framers. The first case was decided by the Chief Justice whom we honor today while he sat as circuit justice in the United States Circuit Court at Baltimore, Maryland. The case, In re Turner, involved a private apprenticeship indenture between a black girl and her former master. The suit challenged the legality of the indenture under the Civil Rights Act of 1866 on the grounds that it did not afford the girl the financial and educational benefits to which white apprentices were entitled under the Maryland indenture statute. Chief Justice Chase upheld the constitutionality of the Civil Rights Act under the Thirteenth Amendment which, he declared, “establishes freedom as the constitutional right of all persons in the United States.” He ruled that the indenture contract was void under the Civil Rights Act because it failed, as required in section one, to give the black girl the

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28. Cong. Globe, supra note 6, at 479. See also id. at 598-99 (Sen. Davis).
29. Id. at 479 (Sen. Saulsbury); id. at 601 (Sen. Hendricks); id. at 1271 (Rep. Kerr).
32. Id. at 339.
"full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 33

Chief Justice Chase's decision in *Turner* is significant for several reasons. First, it demonstrates the potential reach of the federal courts into the state administration of civil justice. Chase affirmed federal jurisdiction in a case that was essentially a contract dispute between two private parties. 34

The *Turner* decision is also important for the insight it offers into contemporaries' understanding of the right to the equal protection of the law. The provision of the Civil Rights Act that conferred jurisdiction on the federal court to decide this contract dispute was that clause of section one that guarantees citizens the equal protection of the laws for the security of persons and property. The party who violated Turner's equal protection right in this case was not the state, but Turner's former master, a private party. 35 The instrument that violated Turner's right was not a state statute, but the private apprenticeship contract. Thus, the right to the equal protection of the law, a right which today we understand exclusively as a right one has against the government to be treated in the same manner as similarly situated people, was also understood by nineteenth-century Americans as a private right one possessed in relation to other private individuals.

More broadly, this case offers an interesting insight into Americans' understanding of constitutional rights enforcement in the nineteenth century. They conceived of constitutional rights essentially as private rights that individuals enjoyed against other private individuals, which they enforced through private litigation

33. Id.
34. This application of federal jurisdiction is parallel to that invoked by freedmen's bureau agents who tried to enforce labor contracts between black field hands and white landholders who refused to honor the terms of their agreements. If black workers were unable to enforce their contract rights in the local courts, they were permitted to bring their actions into the federal courts by the explicit provisions of section three of the Civil Rights Act of 1866. See, Kaczorowski, *Enforcement Provisions*, supra note 3, at 580-81 for a discussion of the relationship between the military's and freedmen's bureau's enforcement of individual rights and the enforcement provisions of the Civil Rights Act of 1866. The *Turner* decision, therefore, legitimized the legal actions federal officers undertook to enforce the freedmen's private and civil rights.
35. Private parties were also criminally prosecuted under the Enforcement Act of 1870 for violating individuals' rights to equal protection of the law. See *supra* notes 21, 22 and related text.
against defendants who were private parties rather than public officers. The framers of the Fourteenth Amendment legislated within a legal framework that barred the kind of legal action against state officials to remove legal disabilities unconstitutionally imposed by state law that we, today, have come to regard as commonplace. The framers, guided by nineteenth-century rules of dual federalism, state sovereign immunity, and equitable relief, would not have thought in terms of civil suits against a state to enjoin the enforcement of discriminatory state action as a remedy for the enforcement of constitutionally-secured rights.

Moreover, the notion of public rights enforced through public lawsuits brought against governmental agencies and officials on behalf of aggrieved groups did not exist in the nineteenth century. The model of rights-enforcement that the framers had in mind was a civil suit between private parties, not an action by an aggrieved individual or class against the state. It is not surprising, therefore, that suits against state officers for injunctive relief were relatively rare until the end of the nineteenth century. Injunctive relief against state officials was given very scant attention in nineteenth-century legal treatises on injunctions and the law of equity, usually no more than a paragraph with citations to only a few cases. Moreover, treatise writers appeared unfamiliar with the rules regarding civil actions against state officials, for they reported them in an imprecise manner. It was not until the 1890s that treatises gave more than passing attention to the subject.

Consequently, even an individual whose civil rights were allegedly infringed by a state officer acting under color of law would sue the state officer as a private party; he would not sue the state. Thus, the butchers sued the state-chartered corporation

36. This point is developed in Kaczorowski, Enforcement Provisions, supra note 3, at 574-86.
37. See Kaczorowski, Enforcement Provisions, supra note 3, at 574-86 for a more detailed discussion. See also supra text accompanying note 26.
38. See, e.g., WILLIAM W. KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 3, 599-600 (1871); 1 ABBOT’S UNITED STATES PRACTICE 222-23 (1871); JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 163 (6th ed. 1873) and id. at 180 n.4, 260 (13th ed. 1886); and THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 116-19 (1880).
rather than the state in the *Slaughter-House Cases.* The important point is that the judicial creation of the state action doctrine in the 1870s limited the scope of the Fourteenth Amendment in a manner unanticipated by its framers.

The other noteworthy civil rights case was a criminal prosecution brought right here in Kentucky. The federal legal officers in Kentucky presented a striking exception to the lethargy that characterized federal officers elsewhere during the Johnson administration. The United States Attorney at Louisville, Benjamin Helm Bristow, assisted by another Louisville attorney by the name of John Marshall Harlan, conscientiously prosecuted crimes in federal court under section three of the Civil Rights Act of 1866 that were offenses against the criminal statutes of Kentucky. Bristow brought prosecutions directly into federal court without even testing the state courts because black Kentuckians were barred by state law from testifying in civil and criminal cases in which a white person was a party.

The most detailed federal judicial examination of the constitutionality of the Civil Rights Act of 1866 was made in 1867 by Justice Noah H. Swayne, as circuit justice, in a prosecution brought by Bristow against three whites charged with robbing the home of a black family in Nelson County. In this case, *United States v. Rhodes,* Justice Swayne upheld the constitutionality of the Civil Rights Act of 1866 in an opinion in which he affirmed the congressional Republicans' interpretation of the

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40. For other examples of private lawsuits to enforce fundamental rights, see *In re Turner,* 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247) (suit by apprentice against master for release from apprenticeship contract that violated her right to the equal protection of the laws); *United States v. Buntin,* 10 F. 730 (C.C.S.D. Ohio 1882) (civil suit and prosecution of public school teacher for excluding black child from public school). See also *Cooley,* supra note 38, at 118 (although state may not be sued, state-chartered corporation may be sued even when state is primary stockholder).


42. *Kaczorowski,* JUDICIAL INTERPRETATION, supra note 2, at 52.

43. Id. at 9.

44. 27 F. Cas. 785 (C.C. Ky. 1866) (No. 16,151).
Thirteenth Amendment as securing to all Americans the status and fundamental rights of citizenship and as conferring on Congress plenary authority to enforce civil rights. Justice Swayne interpreted the Thirteenth Amendment as conferring upon all Americans, not just the former slaves, the status and rights of citizenship. He reasoned to this conclusion under the same reasoning as the framers of the Civil Rights Act. The amendment secured to all Americans the status and rights of free inhabitants, which he equated to the status and rights of citizenship. Consequently, in abolishing slavery, the Thirteenth Amendment secured to all Americans the status and rights of citizenship. Therefore, "the provision in the act of Congress conferring citizenship was unnecessary, and is inoperative," he concluded. In interpreting the Thirteenth Amendment as a constitutional guarantee of the status and natural rights of citizenship, Swayne had "no doubt of the constitutionality of the act in all its provisions," since it was enacted to implement the Amendment’s guarantee of liberty.

Every federal judge who was presented with a challenge to the constitutionality of the Civil Rights Act of 1866 upheld it. Most state appellate courts upheld its constitutionality as well under the theory of citizenship affirmed by its framers. Even states rights-oriented judges acknowledged the revolutionary constitutional theory reflected in the statute in refusing to accept its legitimacy.

This excursion into the history of the Civil Rights Act of 1866 is intended to give a fuller understanding of the framing of the Fourteenth Amendment and of the Chase Court’s initial interpretation of the Fourteenth Amendment in the Slaughter-House Cases. Congress enacted additional civil rights enforcement statutes after the ratification of the Fourteenth and Fifteenth

45. Id. at 789.
46. Id.
47. Id. at 794.
48. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 1-12; Kaczorowski, Revolutionary Constitutionalism, supra note 3, at 902-03; Kaczorowski, To Begin the Nation Anew, supra note 3, at 56-62.
49. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 5-7; Kaczorowski, Revolutionary Constitutionalism, supra note 3, at 903.
50. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 5-7; Kaczorowski, Revolutionary Constitutionalism, supra note 3, at 907-909.
Amendments, which are also part of the background. These statutes provided for the enforcement of fundamental rights directly in the federal courts.

Two are of particular interest here. The Enforcement Act of May 31, 1870 was primarily directed at protecting citizens' rights to vote in local, state, and federal elections. The second statute was the Ku Klux Klan Act of April 20, 1871. This statute was intended to enforce the Fourteenth Amendment and therefore focused on protecting the fundamental rights of citizens, other than political rights, including their right to the equal protection of the law. It defined as federal crimes terrorist activities, such as those in which the Klan was engaged to prevent citizens from exercising their fundamental rights.

Even more than the Civil Rights Act of 1866, the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871 enormously expanded federal criminal jurisdiction over the enforcement of

51. Enforcement Act of 1870, 114 Stat. 141 (1870). It also criminalized election fraud and bribery. In addition, the 1870 statute made it a federal crime to prevent citizens from voting and from exercising their other constitutionally secured rights through the use of violence, "bribery, threats, or threats of depriving such person of employment or occupation, or of ejecting such person from rented house, lands, or other property, or by threats of refusing to renew leases or contracts of labor." Id. at § 5. Finally, it criminalized actions that injured, oppressed, threatened, or intimidated "any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same." Id. at § 6. Criminal penalties ranged from fines of from $500 to $5,000 and imprisonment of from one month to ten years, depending upon the crime. The 1870 statute re-enacted the Civil Rights Act of 1866, presumably to ensure its constitutionality after the recent ratification of the Fourteenth Amendment.


53. For example, it provided that any person "shall be deemed guilty of a high crime" who was convicted for engaging in conspiracies to commit, and for actually committing, the following actions: for resisting federal authority and the execution of any federal law; for injuring federal legal officers to prevent them from performing their federal duties; for threatening or injuring federal jurors on account of any presentment, indictment, or verdict; for depriving or conspiring to deprive any person or any class of persons of the equal protection of the laws, or of equal privileges and immunities; for preventing the authorities of any state from securing to all persons within the state the equal protection of the laws; for defeating the due course of justice within the state; and for preventing any voter from expressing his support for any candidate for federal office. 22 Stat. 13, § 2. It also conferred a civil cause of action in law and equity against "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State," shall deprive "any person" of "any rights, privileges, or immunities secured by the Constitution of the United States." 22 Stat. 13, § 1 (codified in 42 U.S.C. § 1983). It also empowered the President to declare martial law and to suspend habeas corpus under certain conditions. 22 Stat. 14-15, §§ 3-4.
citizens' fundamental rights. These statutes were enacted to meet the increasingly virulent Southern resistance to Reconstruction as Republicans captured control of Southern state governments after 1867.\textsuperscript{54} White supremacist groups such as the Ku Klux Klan emerged as paramilitary wings of the Democratic Conservative parties of the South. Their political purposes were to unseat Republican officeholders, to return political power and offices to white supremacists, and to disenfranchise Southern blacks.

The paramilitary structure of the Ku Klux Klan and other terrorist groups enabled them to intimidate black and white Republicans. With membership rolls numbering in the thousands in some counties, the Klan paralyzed local government. In York County, South Carolina, for example, some 1,500 to 2,000 suspects were said to have escaped military arrest in 1872, even though federal authorities had succeeded in arresting hundreds of others.\textsuperscript{55} The administration of criminal justice collapsed in sections of the South, their populations victimized by bands of criminals who brutalized them with impunity. In short, these groups were in armed rebellion against the United States.\textsuperscript{56}

The Grant administration initially threw its full support behind the vigorous prosecution of Klansmen under the 1870 and 1871 statutes.\textsuperscript{57} Literally hundreds of defendants were prosecuted and convicted of violating citizens' fundamental rights, such as the First Amendment guarantees of freedom of speech and of assembly, the Second Amendment right to bear arms, the Fourteenth Amendment right to the equal protection of the laws, and the right to life itself. Federal judges generally upheld the constitutionality of the 1870 and 1871 statutes and federal jurisdiction in these cases.\textsuperscript{58} That even disapproving judges upheld these statutes evinces how broadly contemporaries interpreted the Recon-


\textsuperscript{55} Kaczorowski, Judicial Interpretation, supra note 2, at 55.

\textsuperscript{56} Id.; Otis A. Singletary, Negro Militia and Reconstruction (1963).

\textsuperscript{57} The history of the efforts of the Department of Justice to enforce civil rights during Reconstruction is recounted in Kaczorowski, Judicial Interpretation, supra note 2, at 49-134.

\textsuperscript{58} Id. at 72.
struction amendments and Congress' authority to enforce citizens' fundamental rights.

In many areas of the South, the federal administration of criminal justice was the only justice available. Even though the magnitude of the lawlessness was so great that it overwhelmed the limited resources of federal legal officers, they were remarkably successful in bringing criminals to justice.\(^5\) Indeed, federal legal process succeeded in destroying the Ku Klux Klan and almost eliminated terrorism in the early 1870s, at least temporarily.\(^6\) Peace depended upon the continued vigorous prosecution of terrorists.\(^6\) Despite the pleadings of federal lawyers in the South, the Grant administration began to curtail prosecutions toward the end of 1872. By the summer of 1873, the Justice Department abandoned efforts to enforce civil rights in the South in the hope that clemency and appeasement would preserve the peace.\(^6\) President Grant's decision also reflected growing sentiment in the North that called for the federal government to stop interfering in Southern affairs and to make peace with the South.\(^6\)

It was just as Northern opinion was becoming unfavorable to federal civil rights enforcement and the Grant administration was curtailing its efforts to enforce citizens' civil and political rights that the Chase Court interpreted the scope of the national government's authority to enforce citizens' fundamental rights under the Reconstruction amendments and civil rights statutes.\(^6\) The first case it decided, *Blyew and Kennard v. United States,*\(^6\) arose here in Kentucky and tested the constitutionality of federal criminal prosecutions under the Civil Rights Act of 1866. The petitioners were two white men who had been tried and convicted in the United States District Court at Louisville for the mutilation

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59. *Id.* at 87-113.
60. *Id.* at 93-94.
61. *Id.* at 94-95.
62. *Id.* at 108-12.
63. *Id.* at 112-13. The best history of the Grant administration's Southern policy is WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879 (1979).
64. Letter from Amos Ackerman to B. Conley (Dec. 28, 1871), 1 LETTERBOOKS 272-77, AMOS T. ACKERMAN PAPERS, Alderman Library, University of Virginia.
and ax murder of a black woman in Lewis County. Judge Bland Ballard sentenced them to death. It is noteworthy that this case had been removed from the state courts by United States marshalls while the defendants were in state custody awaiting trial.

Defense counsel challenged the federal court's jurisdiction, arguing that the crime for which his clients had been tried, the crime of murder, was an offense against the laws of Kentucky, not those of the United States. He insisted, therefore, that the federal prosecution of offenses against the state's criminal code was an unconstitutional usurpation of the state's exclusive jurisdiction over its system of criminal justice.

Judge Ballard turned back the challenge and upheld federal jurisdiction. His reasoning affirmed the congressional Republican theory of the Thirteenth Amendment and citizenship which Justice Swayne had earlier adopted in the Rhodes case. Acknowledging that Congress had not enacted a criminal code which made offenses such as murder federal crimes, Ballard nonetheless concluded that Congress could authorize the federal courts to try and punish violations of civil rights, such as the right to life, according to the laws of the states in which the violations occurred.

Alarmed by what it saw as a revolutionary centralization of judicial power, the Kentucky legislature, on the recommendation of the governor, appropriated funds to hire the best available lawyers to challenge the constitutionality of the Civil Rights Act of 1866 to the Supreme Court. The attorneys it chose included one of the foremost lawyers of the day, President James Buchanan's attorney general, Jeremiah S. Black, and the locally prominent Isaac Caldwell.


67. The lower court decision is not reported. The proceedings were recorded in the LOUISVILLE COURIER-JOURNAL, Nov. 29, 1868, at 4; MAYSVILLE BULLETIN, n.d., reprinted in LOUISVILLE COURIER-JOURNAL, Dec. 19, 1868, at 1. See, KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 136.

68. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 136.

69. Id. at 137.
In their arguments to the Chase Court in February 1871, Black and Caldwell urged the Court to strike down the Civil Rights Act of 1866. They insisted that the statute was unconstitutional because it attempted to secure civil rights by conferring primary criminal jurisdiction on the federal courts to try offenses against the criminal statutes of the state. Thus elaborating the arguments that had been made in the court below, they insisted that, if Congress had the constitutional authority to enact this statute, then it had the authority to supplant the states in any matter "touching civil and political rights." 70

Defense counsel also made a technical argument from the statute’s language in section three that became the basis of the Court’s decision. Section three confers jurisdiction on the federal courts “over all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts ... the rights secured to them by the first section of this act.” Black and Caldwell argued that the only parties affected by a criminal prosecution are the government and the defendant. Therefore, the Civil Rights Act did not confer jurisdiction over this and similar cases even where the black victim of, and the black witnesses to, a crime were denied the right to testify in a state court, a right secured by section one of the Civil Rights Act of 1866, because they were not parties to the criminal “cause”. This point was supported by United States v. Ortega,71 which held that a criminal prosecution was a “case” that affected only the government and the defendant.

This argument was first raised in United States v. Rhodes.72 Justice Swayne rejected this reading of section three by distinguishing the language in the statute, “cause”, from the language used in Ortega, “case”, and holding that Ortega did not apply to the Civil Rights Act which refers to “the origin or foundation of a thing, as of a suit or action; a ground of action,” not to a specific case itself.73 Swayne concluded that the victims of a crime are parties affected by the prosecution of the perpetrators within

70. Brief for Appellants at 9, Blyew, 80 U.S. (13 Wall.) 581. Defense counsel argued that the Thirteenth Amendment did not delegate any civil rights enforcement authority to Congress, for it merely abolished slavery.
71. 24 U.S. (11 Wheat.) 467 (1826).
72. 27 F. Cas. 785 (C.C. Ky. 1866) (No. 16,151).
73. Id. at 786-87.
the meaning of the Civil Rights Act of 1866. Therefore, the federal court had jurisdiction to try white defendants for crimes committed against black victims. As we shall see, the Supreme Court took a different view.

In a remarkable coincidence, the government’s advocate was none other than the former United States Attorney at Louisville, Benjamin Helm Bristow. He had been appointed to the position of solicitor general while the Blyew case was pending before the Supreme Court. Bristow contended that the states could no longer claim exclusive jurisdiction over violations of their criminal codes, for, in enacting the Civil Rights Act of 1866, “Congress made the common law and state statutes the law of the United States” in those civil and criminal causes in which citizens were unable to enforce their rights in the state courts. If Congress possessed the constitutional authority to confer on the federal courts concurrent jurisdiction over civil and criminal causes on the theory that fundamental rights were constitutionally secured rights of American citizens, as Bristow argued, then Congress did indeed possess the authority, “to be exercised at will,” to supplant the states in all matters relating to civil and criminal matters as Black and Caldwell argued.

Opposing counsel had presented for the first time to the United States Supreme Court the central questions of constitutional interpretation relating to citizenship and federal jurisdiction over citizens’ fundamental rights under the Civil Rights Act of 1866. The Chase Court deliberated for more than one year. Unfortunately, the Chief Justice was too ill to participate in the oral arguments and in the Court’s deliberations.

The Court announced its decision on April 1, 1872. It avoided resolving the difficult questions relating to the national govern-

74. See, Kaczorowski, Judicial Interpretation, supra note 2, at 11-13.
75. Brief for Appellee at 24, Blyew, 80 U.S. (13 Wall.) 581.
76. Frederick J. Blue, Salmon P. Chase: A Life in Politics 313 (1987). In 1869, Chase was impeded with a “general nervous disorder” and irregular heartbeat. Id. In the summer of 1870, Chase suffered a serious stroke that left him paralyzed on his right side and with a partial speech loss. He suffered two additional minor strokes in the fall of 1870. Although Chase’s health improved, Professor Blue reports that in the spring of 1871, “[f]riends found him frail and aging, and a few even failed to recognize him.” Id. at 315. He was convalescing under the care of his daughter in Narragansett, Rhode Island when the Blyew case was argued in 1871. Id. at 313-15. Although he resumed his duties on the Court in the fall of 1871, he did not participate in the Court’s Blyew decision. Id. at 318.
ment's constitutional authority to enforce the fundamental rights of its citizens. The Court decided the case instead on a technical interpretation of the statute's language regarding jurisdiction in section three, which confers jurisdiction on the federal courts of all "causes, civil and criminal" "affecting persons who are denied, or cannot enforce in the [state] courts ... any of the rights secured to them by the first section of the act." The district court and the Department of Justice claimed jurisdiction on the ground that black victims and witnesses of crimes committed by white assailants were denied their right to testify by the laws of Kentucky, a right secured to them by the Civil Rights Act of 1866.

The Court rejected the government's and the lower federal court's interpretation of the Civil Rights Act on this jurisdictional point. It instead adopted that of defense counsel. The Court held that the statute did not confer jurisdiction on federal courts to try criminal prosecutions of white defendants for crimes against black victims in which the testimony of black witnesses was inadmissible under state law. The Court reasoned that the only parties affected by a criminal cause are the government and the defendant. Consequently, "witnesses in a criminal prosecution are not persons affected by the cause." If federal jurisdiction could be asserted merely by claiming that potential witnesses and even victims of crimes were prevented from giving evidence because of their race or color, the Court reasoned, "there is no cause either civil or criminal of which those courts may not at the option of either party take jurisdiction." Federal courts could try any case, civil or criminal, even those involving only white parties, "whenever it was alleged that a citizen of the African race was or might be an important witness." The Court refused to believe that Congress had intended such a result. It sharply curtailed federal criminal jurisdiction, holding that section three conferred jurisdiction on the federal courts only in those criminal cases involving black defendants who were "denied in the State courts any of the rights mentioned and assured to them in the first section of the act."

77. Blyew, 80 U.S. (13 Wall.) at 590-91.
78. Id. at 595.
79. Id. at 592.
80. Id.
81. Id. at 581, 592-93.
The majority evoked a stinging dissent from Justice Joseph P. Bradley. He was joined by Justice Noah H. Swayne, who had earlier adopted the government's interpretation of federal jurisdiction sitting as circuit justice in the Rhodes case. Bradley chided the majority for subjecting black Americans to "wanton insults and fiendish assaults" that would render "their lives, their families, and their property unprotected by law." He warned that the Court's decision would invite "vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case." As circuit justice for states of the Deep South, Bradley had direct experience with these conditions and knew what he was talking about. The Court's decision very well could have had this effect because it eliminated the only criminal justice blacks in states like Kentucky could expect to receive.

The federal district court judge whose ruling the Supreme Court reversed, Judge Bland Ballard, also reacted bitterly. "Blessed are they who expect little for they shall not be disappointed," he wrote sarcastically to Solicitor General Bristow. "[I]f Congress meant what the Court say they meant is not all of their legislation which relates to the negro a mockery?" he queried. Referring to other enforcement provisions of the 1866 statute, Judge Ballard hypothesized:

Think of the President using the army & navy not to capture the desperado who has committed numberless outrages on the negro & who sleeps secure under State laws, but to arrest the poor

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82. Bradley admonished the majority for adopting a "view of the [Civil Rights Act of 1866] too narrow, too technical, and too forgetful of the liberal objects it had in view." Id. at 599 (Bradley, J., dissenting). Those liberal objectives were to give the federal courts jurisdiction and to provide a remedy whenever "the State refuses to give one, where the mischief consists in inaction or refusal to act, or refusal to give requisite relief." Id. at 597. Thus, he insisted that, "if the State should refuse to allow a freedman to sue in its courts, thereby denying him judicial relief, or should fail to provide laws for the punishment of white persons guilty of criminal acts against his person or property, thereby denying him judicial redress, there can be no doubt that the case would come within the scope of the [Civil Rights Act]." Id. Such causes affect not only the specific victims of such crimes, but the whole class of persons to whom she belongs, he insisted. Id. at 598.
83. Id. at 599.
84. Id.
85. Letter from G. C. Wharton to Judge H. H. Emmons (Apr. 9, 1872), HALMER H. EMMONS PAPERS, Burton Historical Collection (box 1, folder 6), Detroit Public Library; KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 142.
negro & drag him before the United States to be there tried &
punished with high ceremony!!

Not only did the Court's ruling in Blyew eliminate the govern-
ment's authority to prosecute whites who committed crimes
against blacks, it prompted the government to release previously
convicted defendants from prison.

Notwithstanding the devastating impact of the Court's decision
on the criminal jurisdiction of the federal courts, Black and
Caldwell failed in their central mission: to persuade the Chase
Court to declare the Civil Rights Act of 1866 unconstitutional.
Moreover, the Court concluded that the statute was intended to
give black Americans remedies in the federal courts in cases in
which they could not enforce their "personal, relative, or property
rights" in the courts of the states. In addition, because the Court
upheld federal jurisdiction in criminal cases in which black de-
fendants could not enforce their rights in the state courts, its
decision could be interpreted as having affirmed the government's
broader and more significant argument regarding congressional
authority to enforce personal rights by incorporating state com-
mon and statutory law into the Civil Rights Act of 1866. Thus,
John Marshall Harlan speculated that Black and Caldwell would
receive lower fees than they expected, because "the Democracy
are [not] at all jubilant over the result."

In April 1872, the Supreme Court managed to avoid deciding
the most politically explosive issues of American constitutional-
ism since the Civil War. A few weeks earlier it had dismissed
on narrow procedural grounds a case that Attorney General Amos
T. Akerman and United States Attorney for South Carolina,
Daniel T. Corbin, had agreed with defense counsel to send to the
Supreme Court to test the constitutionality of the government's

86. Letter from Judge Ballard to B. H. Bristow (Apr. 3, 1872), BENJAMIN H. BRISTOW
PAPERS (container 2) [hereinafter BRISTOW PAPERS], Library of Congress [hereinafter LC].
87. Solicitor General Bristow ordered their release to avoid civil suits against federal
legal officers for false imprisonment. All of the criminal defendants who had been
convicted in the federal court at Louisville under the Civil Rights Act of 1866 were
released and their sentences were set aside. Letter from G. C. Wharton to B. H. Bristow
(Apr. 19, 1872), BRISTOW PAPERS, LC; KACZOROWSKI, JUDICIAL INTERPRETATION, supra note
2, at 142.
88. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 141.
89. Letter from J. M. Harlan to B. H. Bristow (Apr. 15, 1872), BRISTOW PAPERS, LC
(container 2).
criminal prosecutions of the Klan under the Enforcement Act of 1870. This case came out of South Carolina, the state in which Ku Klux Klan terrorism was the most virulent and the most pervasive in 1871. The Klan actually controlled several counties in the northwestern portion of the state. South Carolina Democratic Conservatives established a public fund to defend the Klan and to challenge the constitutionality of the Justice Department’s efforts to enforce and protect citizens’ civil and political rights. They retained as defense counsel two of the most eminent lawyers of the day, Henry Stanbery, who had served as United States attorney general under President Andrew Johnson, and Senator Reverdy Johnson of Maryland, who was reputed to be the Senate’s leading constitutional lawyer. The government’s case was argued by the recently-appointed attorney general, George H. Williams, and he was assisted by Assistant Attorney General C. H. Hill.

The facts in the test case are clear and simple. The white defendants, acting out of racial and political animus, had raided the house of a black leader, robbed him of his weapons, and lynched him. The lead defendant was James William Avery. Avery was Grand Cyclops of the Ku Klux Klan in York County, South Carolina, and a prosperous merchant there. The case, United States v. Avery, presented a similar issue under the 1870

90. United States v. Avery, 80 U.S. (13 Wall.) 251 (1872); PROCEEDINGS IN THE KU KLUX TRIALS, AT COLUMBIA, S.C. IN THE UNITED STATES CIRCUIT COURT, NOVEMBER TERM, 1871, at 111, 139-45 (1872).
91. The local authorities were completely overwhelmed and unable to maintain law and order. The United States attorney in South Carolina reported to the attorney general that not a single successful prosecution of Ku Klux Klan outrages was brought under state law in the state courts. Letter from D. T. Corbin to G. Williams (Feb. 20, 1872), ATTORNEY GENERAL’S PAPERS, Series 947, Record Group 60, National Archives [hereinafter ATTORNEY GENERAL’S PAPERS]. South Carolina was the only state in which President Grant was forced to suspend the writ of habeas corpus under the Ku Klux Klan Act of 1871. The United States attorney in South Carolina brought more prosecutions than federal attorneys in any other state. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 88-91. He indicted literally hundreds of defendants in 1871.
92. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 88, 124.
93. According to the Lawyer’s Edition, the defense team of Stanbery and Johnson was joined by a third lawyer, David Dudley Field, who was as experienced and as eminent as they. Field, of course, was also the brother of one of the justices before whom they argued the case, Justice Stephen J. Field. However, the official reporter identifies only Stanbery and Johnson as the defendant’s attorneys.
94. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 122.
95. Id. at 129.
statute that was raised in Blyew under the 1866 statute: whether the federal court had jurisdiction to try the defendants for murder in order to determine the punishment that should be applied for their violation of citizens' fundamental rights. However, it raised another issue as well: whether the Second Amendment right to keep and bear arms is a right "granted and secured by the Constitution of the United States, so as to support the ... indictment, and render the offense therein charged cognizable in [federal] court."96

The Avery case was certified to the Supreme Court in December 1871. It was argued over two days, March 19 and 20, 1872.97 Chief Justice Chase, who had resumed his place on the Court, announced the Court's decision the next day in a terse and cryptic statement: "A majority of the court are of opinion that the case must be ruled by United States v. Rosenburgh, and the case be DISMISSED FOR WANT OF JURISDICTION."98 However, the Chief Justice evidently wanted to decide Avery on the merits, because he disagreed with the majority's decision.99 This suggests

96. United States v. Avery, 80 U.S. (13 Wall.) 251 (1872); Kaczorowski, Judicial Interpretation, supra note 2, at 129 n.24. The official report of the case differs from the Lawyer's Edition regarding the questions presented for decision. The Lawyer's Edition identifies the two questions, whereas the official reporter identifies only the first, regarding federal jurisdiction to try a case of murder. Compare Avery, 80 U.S. 252, and Avery, 20 L. Ed. 610.

97. The United States Attorney urged Attorney General Akerman to secure an early hearing. Letter from D. Corbin to Amos Akerman (Dec. 22, 1871), Series 947, ATTORNEY GENERAL'S PAPERS. Apparently, Akerman complied. Letter from Amos Akerman to D. Corbin (Jan. 2, 1872), Series M701 (vol. C, at 131), ATTORNEY GENERAL'S PAPERS.


99. The Lawyer's Edition report of Chase's opinion in this case contains a disapproving sentence that is omitted from the official report: "I am unable to concur in that opinion [of the majority of the Court], but the case must be dismissed." Avery, 20 L. Ed. at 611 (emphasis in original). The Rosenburgh case, which the majority thought mandated dismissal, was decided in 1868. It held that the Supreme Court did not have jurisdiction to decide a motion to quash an indictment certified on a division of opinion whether the indictment was sufficient "upon a true interpretation of the act under which the indictment was made." United States v. Rosenburgh, 74 U.S. (7 Wall.) 580. However, Avery presented a different question, namely, whether Congress constitutionally could confer jurisdiction upon the federal courts to try criminal offenses, such as murder, and criminal violations of fundamental rights, such as the Second Amendment right to keep and bear arms. One could argue that these questions regarding the court's jurisdiction are different from those regarding the correct interpretation of a statute to determine if it supports an indictment and should be decided before the defendants are put through the ordeal and expense of a criminal trial. Apparently, Chief Justice Chase thought so, since he disagreed
that he alone on the Court was willing to confront directly the constitutional issues raised in the Ku Klux Klan prosecutions, for, as in *Blyew*, the Court disposed of *Avery* on technical jurisdictional grounds.

The Court's dismissal of *Avery* for want of jurisdiction without deciding it on the merits reflected a change in policy of the new attorney general. When the case was certified to the Chase Court in December 1871, United States Attorney, Daniel Corbin, and United States Attorney General, Amos Akerman, asked the Court for expedited review, which the Court evidently granted. However, before the case was argued in March 1872, George Williams replaced Akerman as Attorney General. In his argument, Williams urged the Court to do what it did: dismiss for want of jurisdiction. In contrast to Akerman, Williams manifested curious indifference to bringing a test case to the Supreme Court. Just three weeks before they argued *Avery* in the Supreme Court, Williams disingenuously asserted in a letter to Senator Reverdy Johnson that he did not "perceive that the questions presented in [the Ku Klux Klan trials in South Carolina] are of such pressing public importance as to require immediate decision." Williams apparently wanted to avoid the risk of the Court eliminating the Justice Department's authority to pursue its policy of rights enforcement.

Thus, the *Avery* case and similar cases involving Klan trials in the South were politically explosive cases for the Chase Court to decide, because they directly challenged the constitutionality of the Justice Department's rights enforcement policies. Regardless of how the Court ruled, it could expect fierce condemnation from substantial portions of the American public. The Court might slip out of this no-win situation if it had a case that raised the central constitutional issues in the Klan prosecutions but did

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with the result in *Avery*, according to the Lawyer's Edition. *Avery*, 20 L.Ed. at 611. Unfortunately, Chase did not explain why he refused to go along in the latter decision. It is significant that Chase thought *Rosenburgh* did not apply to *Avery*, because he wrote the opinion in *Rosenburgh*.

100. It appears that the Justice Department changed its mind about the desirability of the Supreme Court's resolution of these constitutional questions. Subsequent attempts to get the Supreme Court to decide the issues raised in the South Carolina Ku Klux Klan prosecutions also failed despite persistent efforts of defense counsel to get a final resolution.

101. Letter from George H. Williams to Reverdy Johnson (Feb. 29, 1872), Series M699 (reel 14, vol. I, at 258-59), ATTORNEY GENERAL'S PAPERS.
not involve the political groups and interests in those cases. The Court heard oral arguments in just such a case just weeks before it decided Avery and Blyew.

I am referring, of course, to the Slaughter-House Cases. The petitioners were white butchers who claimed that a state-created corporate monopoly deprived them of their fundamental rights under the Thirteenth and Fourteenth Amendments, including their fundamental right to labor. Consequently, their claims offered the Chase Court the opportunity to interpret these amendments and to determine the extent to which they protected citizens' fundamental rights. This was the central constitutional question presented in the Justice Department's prosecution of the Ku Klux Klan in the federal courts under the 1870 and 1871 statutes.

The facts of the Slaughter-House Cases are straightforward. The Republican-controlled Louisiana legislature created a slaughterhouse corporation in 1869 and conferred on it the exclusive privilege of carrying on the business of slaughtering animals for human consumption. The statute permitted existing butchers and slaughterhouses to continue their operations, but they had to remove their businesses to the premises of the corporation and to pay it a fee for the privilege. This ostensible health measure applied to three parishes comprising over eleven hundred square miles and two to three hundred thousand people. It put many butchers out of business. Compounding the perceived injustice to the unemployed butchers was the fact that the process that led to its enactment was riddled with blatant corruption, bribery, graft, and economic self-interest. To the butchers and other members of the affected communities, including the Conservative Democratic press of New Orleans, this regulation was not a health and sanitation measure at all. Rather, they saw it as an infamous example of pork-barrel legislation that conferred monopolistic privileges on an interest group favored by the corrupt Republican-controlled Louisiana legislature.

Thus, the parties and facts of this case could not be farther removed from the government's prosecution of Klansmen. Moreover, the Court did not have to interpret the scope of the

103. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 144.
Reconstruction amendments to decide the *Slaughter-House Cases*. Indeed, the majority decided the legal question of the monopoly's constitutionality without reference to the Reconstruction amendments. Consequently, its interpretation of the Fourteenth Amendment was dicta. When one considers that the Court had disposed of the typical Klan-type cases on narrow technical grounds without deciding the central constitutional issues they presented, its decision to do so in *Slaughter-House* when it did not have to suggests the Court's case selection was a masterful political strategy devised by some members of the Chase Court to decide politically explosive legal questions in a relatively nonpolitical way. The Court did decide the exceedingly controversial constitutional issues relating to the national enforcement of fundamental rights in a case that removed the Court from the political context that made their resolution so urgent and so controversial.

Furthermore, the interests in these cases and their relationship to the Reconstruction amendments confused the political impact of the Court's decision. For example, the litigation created a severe meat shortage in New Orleans, and the aroused public, already opposed to the Republican party-inspired monopoly, strongly favored the butchers. When the case filed by the butchers was heard in the federal court at New Orleans, the newly appointed circuit justice, Joseph P. Bradley, and circuit judge, William B. Woods, ruled in favor of the butchers. In an opinion written by Justice Bradley, they held that the Fourteenth Amendment secured the fundamental rights of citizenship, and concluded that "[T]here is no more sacred right of [United States] citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor." Characterizing the corporation as an odious monopoly, Bradley declared, "we feel compelled to decide

104. *Id.* at 145. The litigation became very complicated as the various parties brought different suits in different local courts around New Orleans with contradictory decisions. The butchers also filed an action in the United States Circuit Court at New Orleans. Charles Fairman ably recounts this history. 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864-88, at 1320-63 (1971).
106. *Id.* at 652-53.
that the act in question is a violation of one of the fundamental privileges of the citizen . . . .”

Bradley's interpretation of the Fourteenth Amendment complemented and supported those of the lower court judges who upheld the constitutionality of the government's civil rights enforcement prosecutions. It affirmed the broad nationalist theory of the amendment associated with the Republican party in Congress and with the Department of Justice in the Ku Klux Klan prosecutions and implicitly rejected the limited view of the amendment identified as the "Democratic" states rights interpretation of the Constitution. Nonetheless, the Democratic Conservative press praised the decision and Bradley's opinion. The New Orleans Daily Picayune, for example, stated that the decision dispelled the public's suspicion of these federal judges from the North. It lauded them for their integrity and impartial administration of the law, "for their learning, intelligence, courteous official manner, and regard for law." On the other hand, the Republican New Orleans Times caustically criticized Bradley and Woods for stretching federal authority beyond accepted judicial limits to "a vast and indefinite extension of the power and authority of the judicial department of the Government." The reactions of these partisan newspapers would have been just the reverse if the proponent of the constitutional interpretation the court adopted had been the government instead of white butchers, and if the government were asserting it in criminal prosecutions against Ku Klux Klan defendants rather than a monopolistic corporation.

107. Id. at 654.
108. See, e.g., United States v. Hall, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282); United States v. Crosby, 25 F. Cas. 701 (C.C.S.C. 1871) (No. 14,893); United States v. Given, 25 F. Cas. 1324 (C.C. Del. 1873) (No. 15,210 and 15,211). For a discussion of these and other cases, see KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 1-25.
109. NEW ORLEANS DAILY PICAYUNE, June 7, 1870, at 4; id., June 8, 1870, at 4; id., June 20, 1870, at 6.
110. 6 FAIRMAN, supra note 104, at 1335-36 (quoting the New Orleans Times).
111. The only New Orleans newspaper that acknowledged the implications of the circuit court's decision for the federal government's enforcement of the civil rights of black Americans was the New Orleans Bee. Recognizing its potential importance for the rights of black Americans, the editor of this black newspaper described Bradley's opinion as "one of the most luminous expositions of American constitutional law." He compared it favorably to the opinions of Chief Justice John Marshall and Justice Joseph Story: Not even these great jurists, the editor wrote, "ever uttered grander principles than did Justice Bradley yesterday." Reprinted in 1 ALB. L.J. 11 (1870).
The confused relationship of the *Slaughter-House Cases* to the politics of civil rights enforcement was reflected in the litigants' attorneys and the constitutional theories they argued before the United States Supreme Court. The butchers were represented by John Archibald Campbell, a former justice of the United States Supreme Court who resigned his seat when Alabama, his native state, seceded in 1861. This states rights Southerner essentially adopted the Republican party's theory of constitutionalism when he tried to persuade the Supreme Court in February 1872 that the Constitution, as amended by the Reconstruction amendments, secured the fundamental rights of all citizens and conferred plenary authority on the national government to enforce and protect these rights. Counsel for the slaughterhouse corporation included a Republican United States Senator, Matthew Hale Carpenter, and a local Radical Republican, Thomas J. Durant. Although they did not rebut this theory, their arguments emphasized state rights, a view associated with the Democratic party. They argued that the Louisiana statute was a legitimate exercise of the state's police power. However the Court decided this case, the political fallout conceivably could be neutralized since political partisans favored in the *Slaughter-House Cases* the constitutional positions of the opposite side in the Ku Klux Klan cases.

The Supreme Court heard oral argument in the *Slaughter-House Cases* in January and February of 1872. It took the Court a year to render its decision. By a five-to-four margin, the Court upheld the constitutionality of the Louisiana statute and the corporation it established. Justice Samuel F. Miller spoke for the five-man majority. It ruled that the Louisiana statute did not establish an illegal monopoly and did not violate the butchers' right to labor. On the contrary, it was a legitimate and effica-

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114. The first argument occurred in January 1872, but one Justice was absent and the Justices were divided. The case was reargued before the full Court on February 4, 1872, just weeks before it heard and decided *Avery* and two months prior to its decision in *Blyew*.

cious exercise of the most important power pertaining to state government, the power to protect "the lives, limbs, health, comfort, and quiet of all persons, and ... of all property within the State.""\(^{116}\) Quoting one of the most eminent state supreme court justices of his era, Isaac F. Redfield of Vermont, Miller elaborated the significance of the states' police power:

"[P]ersons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."\(^{117}\)

The majority apparently regarded the states' police power as the most important of all governmental powers, for on this power, they declared, depends

the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.\(^{118}\)

Moreover, the state's exercise of its police power was constitutional even when it indirectly intruded on the powers delegated to Congress, such as the commerce power.\(^{119}\) Expressly affirming the state's power to charter corporations, even when their charters conferred on them "exclusive privileges—privileges which it is said constitute a monopoly,"\(^{120}\) the Court concluded that the Louisiana statute, and the corporation it established, was a legitimate, an appropriate, an effectual, and a constitutional exercise of the state's police power. The emphasis Miller placed on the police power suggests that the majority's major concern was its preservation.

\(^{116}\) Id. at 62 (quoting Thorpe v. Rutland & Burlington R.R. Co., 27 Vt. 139, 149 (1854)).

\(^{117}\) Id. Significantly, the Vermont case from which this statement was quoted involved the power of the state to regulate railroad corporations chartered by the state, and the extent to which the state can alter or repeal their charters and impose duties on them for the protection of the public. This suggests the majority's primary concern in Slaughter-House: how would their decision affect the police power of the states generally, and this power relating to the regulation of the slaughtering of animals, a power Miller described as "among the most necessary and frequent exercises of this [police] power." Id. at 63.

\(^{118}\) Id. at 62.

\(^{119}\) Id. at 63. Miller here cited New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); License Tax Cases, 72 U.S. (5 Wall.) 462 (1866).

\(^{120}\) Slaughter-House Cases, 83 U.S. (16 Wall.) at 64.
Having decided the legal question presented in these cases, the majority did not have to decide whether the Thirteenth and Fourteenth Amendments secured citizens' fundamental rights, such as the right to labor. Moreover, it did not matter whether the right to labor was a constitutionally secured right. Even if it were, this constitutional guarantee would not have prevented Louisiana from enacting this scheme of regulating the slaughtering of animals, according to Miller's analysis of the state's police power.

Yet, Miller went on to interpret the meaning and scope of the Thirteenth and Fourteenth Amendments. "No questions so far-reaching and pervading in their consequences . . .," Miller opined, "have been before this court during the official life of any of its present members."121 Although he characterized the Thirteenth Amendment as a "declaration of the personal freedom of all the human race,"122 Miller interpreted its scope narrowly, as a guarantee against slavery.123

However, Miller's most important comments were directed to section one of the Fourteenth Amendment. They are well-known for their effect: the emasculation of its Privileges or Immunities Clause. Miller interpreted the amendment as recognizing dual citizenship, state and national, and different bodies of rights that pertain to each. His conception of the rights of state citizenship reflected his understanding of the state police power. The rights of state citizenship are "those rights which are fundamental," and they "[embrace] nearly every civil right for the establishment and protection of which organized government is instituted."124 Moreover, the states had exclusive jurisdiction over these fundamental rights.125

To preserve the states' police powers, the majority rejected the theory that United States citizens possessed fundamental rights as such. For, like the Democratic opponents of civil rights enforcement, Miller warned that if the Constitution secured fundamental rights as rights of United States citizenship, Congress would have complete legislative authority over these rights. He

121. Id. at 67.
122. Id. at 69.
123. Id.
124. Id. at 76.
125. Id. at 78. States were free to grant or establish whatever rights they chose, and to limit, qualify, or restrict their exercise free of any interference by the national government.
feared that this power would subject the states to the control of Congress and would destroy local government. The majority refused to accept such a dangerous theory. They concluded that the Fourteenth Amendment leaves to the states the security and protection of citizens' personal and fundamental rights. The rights of United States citizenship which the Fourteenth Amendment's Privileges or Immunities Clause secures are a few relatively unimportant rights.

Miller's analysis completely ignored the Civil Rights Act of 1866, which conferred substantive civil rights on American citizens, as such, and jurisdiction on the federal courts to enforce them. He could not consider the statute, because it represented the radical changes in "the relations of the State and Federal governments to each other and of both these governments to the people" that the majority sought to avoid. Most scholars agree that the framers of the Fourteenth Amendment understood its first section to be identical in scope and objectives to those of the Civil Rights Act of 1866, which they enacted over a presidential veto within weeks of adopting the proposed amendment.

126. Miller stated:
For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all subjects. . . . Such a construction . . . would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.

Id.

127. Miller identified some of these rights: the right to assemble and to petition the national government; access to its seaports and navigable waterways, administrative offices and courts; the protection of the national government when on the high seas and in foreign lands; the right of interstate travel; the rights secured to American citizens in foreign treaties; the right to become a citizen of the state of one's residence with the same rights as other state citizens enjoy. He also included the rights secured by the other clauses of the Fourteenth Amendment and by the Thirteenth and Fifteenth Amendments. Id. at 79-80. For a novel textual critique of Miller's interpretation of the Fourteenth Amendment's Privileges or Immunities Clause which connects this clause with its equivalent in the Northwest Ordinance, see John J. Gibbons, Intentionalism, History, and Legitimacy, 140 U. Pa. L. Rev. 613, 629-38 (1991).


129. See, e.g., Akhil R. Amar, The Bill of Rights and the Fourteenth Amendment 1193, 1244-46 (1992); Raoul Berger, Government By Judiciary: The Transformation of the Fourteenth Amendment 22-51 (1977); Charles Fairman, Does the Fourteenth Amend-
The framers knowingly incorporated the statute into the Fourteenth Amendment to obviate the possibility of the statute's repeal by a future Congress and to settle any doubts that might exist over the statute's constitutionality. Drafted and proposed by the very same session of Congress, the Fourteenth Amendment must have been intended by its framers to delegate to Congress at least as much constitutional authority to secure the fundamental rights of citizens as they had just exercised in the Civil Rights Act of 1866, especially since one of their purposes in adopting the Fourteenth Amendment was to ensure the constitutionality of the statute. Moreover, the framers of the Fourteenth Amendment must have intended the statutory scheme of rights enforcement they had just enacted with the Civil Rights Act of 1866 as the minimum scheme of fundamental rights enforcement under the Fourteenth Amendment. The Court has never resolved conflicting interpretations of the Fourteenth Amendment and the Civil Rights Act of 1866.

It is understandable, therefore, that opponents of national civil rights enforcement objected to the proposed Fourteenth Amendment on essentially the same ground on which they opposed the Civil Rights Act of 1866. They warned that the amendment would radically change American federalism by conferring upon Congress the authority to supplant state administration of civil and criminal justice. The Fourteenth Amendment delegated to Congress power that would produce a revolution worse than the Civil War, opponents complained, because the amendment would transfer all state authority over citizens' fundamental rights from the states to the national government, producing irreconcilable conflicts in federal-state jurisdiction. They had earlier in the debates opposed the Civil Rights Bill because it supplanted the state administration of civil and criminal justice and transferred authority over citizens' fundamental rights from the states to the national government. It is significant that supporters acknowl-

130. Kaczorowski, Revolutionary Constitutionalism, supra note 3, at 910-11.
131. CONG. GLOBE, supra note 6, at 1063-64 (Rep. Hale); id. at 1063-87 (Rep. Davis); id. at 2500 (Rep. Shanklin); id. at 2538 (Rep. Rogers); id. at 3147 (Rep. Harding); id. at 2987 (Sen. Cowan).
132. See supra notes 29-30 and accompanying text.
edged these revolutionary changes in American federalism, although they denied any intention of destroying the states and absorbing their authority over ordinary civil and criminal process.\textsuperscript{133} It is precisely these acknowledged revolutionary changes in American constitutionalism that the Supreme Court rejected in the \textit{Slaughter-House Cases}.\textsuperscript{134}

Having emasculated the Privileges or Immunities Clause, Miller went on to consider whether the Louisiana statute violated the butchers' Fourteenth Amendment rights to due process and equal protection of the law. Miller curtly concluded that it did not. He disposed of the due process claim with the conclusory assertion that the Louisiana statute did not deprive the butchers of any property rights.\textsuperscript{135} Miller disposed of the equal protection claim by limiting the Equal Protection Clause to a guarantee against racially discriminatory state statutes, and virtually only such statutes that discriminated against blacks.\textsuperscript{136} Completely ignoring the enforcement of the civil rights statutes of 1870 and 1871 by the Department of Justice and the federal courts against terrorists charged with depriving citizens of their fundamental rights under the Fourteenth Amendment, including their right to the equal protection of the laws, Miller concluded that the Court “doubt[s] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.”\textsuperscript{137} Thus was created the state action interpretation of the Fourteenth Amendment.

The Chief Justice, along with Justices Bradley and Swayne, joined a lengthy dissenting opinion written by Justice Field. The dissenters agreed with the majority that these cases presented a question “of the gravest importance, not merely to the parties here, but to the whole country.”\textsuperscript{138} It “is nothing less than ... whether the recent amendments to the Federal Constitution

\begin{itemize}
  \item \textsuperscript{133} \textit{Cong. Globe, supra} note 6, at 1065-67 (Rep. Higby); \textit{id.} at 1066 (Rep. Price); \textit{id.} at 2534-35 (Rep. Eckley); \textit{id.} at 2942 (Sen. Howard); \textit{id.} at 2961 (Sen. Poland).
  \item \textsuperscript{134} \textit{Slaughter-House Cases}, 83 U.S. (16 Wall.) 36, 78 (1873).
  \item \textsuperscript{135} \textit{id.} at 81.
  \item \textsuperscript{136} “It is so clearly a provision for [negroes] and that emergency [created by the Southern black codes], that a strong case would be necessary for its application to any other,” Miller opined. \textit{id.}
  \item \textsuperscript{137} \textit{id.}
  \item \textsuperscript{138} \textit{id.} at 89 (Field, J. dissenting).
\end{itemize}
protect the citizens of the United States against the deprivation of their common rights by State legislation."\textsuperscript{139} Consistent with the congressional Republican supporters of civil rights enforcement and the decisions of lower federal court judges, the dissenters insisted that the Thirteenth and the Fourteenth Amendments did afford Americans this protection. Field wrote that the Thirteenth Amendment was "intended to make every one born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life ...."\textsuperscript{140} An individual who did not enjoy the right "to pursue certain callings," as others enjoyed, Field reasoned, "certainly would not possess the liberties nor enjoy the privileges of a freeman."\textsuperscript{141} Having earlier shown that the Louisiana statute created an illegal monopoly because it conferred on the corporation an exclusive privilege to exercise an individual right, the "right to pursue one of the ordinary trades or callings of life,"\textsuperscript{142} Field also concluded

\textsuperscript{139} Id.
\textsuperscript{140} Id. at 90.
\textsuperscript{141} Id. Field's discussion of the theory of the Thirteenth Amendment shows that his interpretation corresponds to that of congressional Republicans in 1866 and of lower federal court judges prior to Slaughter-House; that is, that the Thirteenth Amendment secured the rights of free men or citizens. However, his elaboration of the manner in which the facts of this case fit within the protective guarantees of the Thirteenth Amendment contain the seeds of Justice Bradley's "badges of servitude" interpretation of the amendment in the Civil Rights Cases, 109 U.S. 3 (1883). Field's discussion of the Civil Rights Act of 1866 also reflects this ambiguous interpretation of the Thirteenth Amendment. He explained that the statute conferred citizenship on all Americans and secured to them enumerated rights "upon the theory that citizens of the United States as such were entitled to the rights and privileges enumerated," and laws that deny citizens equality in these rights subjected them to involuntary servitude in violation of the Thirteenth Amendment. \textit{Id.} at 91. He went on to explain that the Louisiana statute required every butcher and every person who had animals to sell within three parishes, an area "exceeding one thousand one hundred square miles, and embracing over two hundred thousand people," to go to the slaughterhouse and there carry on their trade or business and pay it tribute. \textit{Id.} at 92. These "prohibitions imposed by this act upon butchers and dealers in cattle" are "odious" "oppressions [which] cannot be applied to a free man ... except in violation of his rights." \textit{Id.} at 92-93.

\textsuperscript{142} \textit{Id.} at 88-89. Field's lengthy opinion was based on three conclusions of law. First, the Louisiana statute was not a legitimate exercise of the state's police power. \textit{Id.} at 88-89 (Field, J. dissenting). He characterized the health and sanitation objectives of the statute as a shallow pretence for the grant of "exclusive privileges" to the corporation. Whereas the state legitimately could restrict slaughterhouses to a specific area outside urban centers in the interests of health and sanitation, it could not legitimately or constitutionally confer an exclusive "right to pursue one of the ordinary trades or callings of life, which is a right appertaining soley to the individual." He insisted that, if the exclusive privileges in this case were constitutional, "there is no monopoly, in the most
that the statute was unconstitutional because it deprived the butchers of this fundamental right which is secured by the Thirteenth Amendment.

However, Field did not base his objections to the Louisiana statute on the Thirteenth Amendment because, in his opinion, the Fourteenth Amendment covered the case. Field forcefully concluded that the statute violated the Fourteenth Amendment which was "intended by the Congress which framed it and the States which adopted it" to "protect the citizens of the United States against the deprivation of their common rights by State legislation." The critical predicate of Field's understanding of the amendment was the nature of United States citizenship which it conferred. "A citizen of a State is now only a citizen of the United States residing in that State." It is by virtue of his United States citizenship conferred by the Fourteenth Amendment, Field reasoned, that he now possesses and enjoys the fundamental rights of free men. "[T]he fundamental rights, privileges, and immunities which belong to [the individual] as a free man and a free citizen," Field declared, "now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State." Field explained that "They do not derive their existence from [state] legislation, and cannot be destroyed by its power." Although he recognized concurrent

odious form, which may not be upheld." Field thus distinguished exclusive grants for ferries, bridges, and turnpikes whose franchises are of a public character "appertaining to government," and are legitimate. Id. at 88 (Field, J. dissenting).

This conclusion leads to the second: the statute created an illegal monopoly. Reasoning from English history, English common law, and recent American judicial authorities, Field asserted that all exclusive privileges conferred by government on an individual or a corporation to engage in any lawful trade or business were monopolies and void as restraints on freedom and liberty. Because the Louisiana statute conferred on the corporation the exclusive privilege to carry on the slaughterhouse business it restrained the butcher's freedom and liberty. Id. at 84-89 (Field, J. dissenting).

This conclusion leads directly to Field's third: that this illegal monopoly was also unconstitutional because it infringes constitutionally secured rights of American citizens. It is this aspect of Field's opinion that I analyze in the text.

143. Id. at 89 (Field, J. dissenting).
144. Id.
146. Id. at 95 (Field, J. dissenting). Field's interpretation of the Fourteenth Amendment echoed the views of its Congressional framers. Field took his definition of the privileges and immunities of United States citizenship from the very authority that Miller cited in defining the rights of state citizenship: Justice Bushrod Washington's circuit court opinion in Corfield v. Coryell, 6 F. Cas. 546 (C.C.N.J. 1823) (No. 3,230). Field declared that they
state jurisdiction over citizen's fundamental rights, Field concluded that "[t]he fourteenth amendment [sic] places them under the guardianship of the National authority."147 Field characterized the right to labor as "one of the most sacred and imprescriptible rights of man..."148 Therefore, the Louisiana statute which conferred on the corporation the exclusive privilege to carry on the slaughterhouse business restrained the butchers' freedom

"are those which of right belong to the citizens of all free governments." Slaughter-House Cases, 83 U.S. (16 Wall.) at 97 (Field, J. dissenting). He thus characterized the Fourteenth Amendment as "intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes." Id. at 105 (Field, J. dissenting). Thus, the Fourteenth Amendment places these rights under the protection of the national government. This interpretation of Field's dissent parallels those of Charles W. McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897, 61 J. AM. HIST. 970 (1975); and HAMILTON, THE PATH OF DUE PROCESS OF LAW, THE CONSTITUTION RECONSIDERED 167 (C. Read ed., rev. ed. 1968). It is on this critical point that this analysis of Field's dissent differs from that of William Nelson. Nelson characterizes Field's conception of the Fourteenth Amendment's protective guarantees as "narrow because it held that not all rights, but only fundamental rights, such as the right to engage in the common occupations, are within the ambit of section one and thus subject to federal judicial control." NELSON, supra note 128, at 158. Nelson then reduces this "narrow" protection even further to "only one right against governmental infringement—the right to equality." Id. at 161. This analysis disagrees with Nelson's because, according to Field's analysis, a citizen possessed fundamental rights independent of the states because they "now belong to him as a citizen of the United States." Slaughter-House Cases, 83 U.S. (16 Wall.) at 95 (Field, J. dissenting). Field made this point explicitly when he declared that these fundamental rights "do not derive their existence from [state] legislation, and cannot be destroyed by its power." Id. at 95-96. For Field, as for Bradley and Swayne, the Thirteenth and Fourteenth Amendments secured the rights themselves, not merely a right to equal protection. Therefore, under Field's analysis a state could not abolish its citizens' right to pursue a common calling because this right was secured to them under the Thirteenth and Fourteenth Amendments. Moreover, this theory of constitutionally secured rights enlarged Congress' authority over the states' police power, because Congress could virtually supplant the states in their regulation of citizens' personal rights since they were rights of United States citizenship as such. Consequently, this analysis also disagrees with Nelson's conclusion that Bradley's and Swayne's interpretation of the Fourteenth Amendment differed significantly from Field's.


Field observed that the exercise and enjoyment of these fundamental rights "are always more or less affected by the condition and the local institutions of the State, or city, or town where [the citizen] resides." Id. at 95. Although the state may regulate all such pursuits, professions, and avocations in the interest of health, order, and prosperity, "the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations." Id. at 110.

148. Id. Quoting Justice Bradley's circuit court opinion with approval, Field asserted that "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor." Id. at 106 (Field, J. dissenting) (quoting Live-Stock Dealers, 15 F. Cas. 649, 652 (C.C. La. 1870) (No. 8,408).
and liberty and violated their constitutionally-secured right to labor.

Although Bradley joined Field's opinion, he added one of his own, analyzing the case essentially in the same way that Field did. Bradley's opinion is noteworthy because of its attack on the majority opinion's failure to interpret the Reconstruction amendments within their historical context. The majority's views of citizenship and citizens' rights "evince a very narrow and insufficient estimate of constitutional history and the rights of men," Bradley complained.

Referring to Klan terrorism with which, as circuit justice for Southern states, he was well acquainted, Bradley admonished, "We shall be a happier nation, and a more prosperous one than we now are, when the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to" the rights of United States citizenship.

Swayne's dissent emphasized the revolutionary nature of the Reconstruction amendments. They are nothing less than "a new

149. Bradley's analysis differed from Field's in one essential respect: the meaning of the Comity Clause and citizens' rights before the adoption of the Fourteenth Amendment. Whereas Field expressed the view that the privileges and immunities secured by the Comity Clause were rights of state citizenship and that the Comity Clause guaranteed to citizens of other states an equality in those rights which the state extended to its own citizens, Bradley understood these rights to be the fundamental rights of citizenship which the individual possessed both as a United States citizen and as a citizen of the state of his residence. Slaughter-House Cases, 83 U.S. (16 Wall.) at 121 (Bradley, J. dissenting). But Bradley and Field expressed the same understanding of the nature of citizenship and citizens' rights which the Fourteenth Amendment defined and secured. However, Bradley also made more explicit how the monopoly violated the butchers' Fourteenth Amendment due process rights to liberty and property and their Fourteenth Amendment right to the equal protection of the laws. He also addressed the fears Miller expressed regarding the effects this interpretation of the Fourteenth Amendment would have on Congress' power to interfere with the internal affairs of the states and the expanded dockets of the federal courts. Disagreeing with the majority as to the seriousness of these problems, Bradley declared:

The great question is, What is the true construction of the amendment? When once we find that, we shall find the means of giving it effect. The argument from inconvenience ought not to have a very controlling influence in questions of this sort. The National will and National interest are of far greater importance.

Id. at 124.

150. Id. at 113 (Bradley, J. dissenting).

151. Id. Bradley also characterized the Louisiana statute as "one of those arbitrary and unjust laws made in the interest of a few scheming individuals, by which some of the Southern States have, within the past few years, been so deplorably oppressed and impoverished." Id. at 120. He added, "It seems to me strange that it can be viewed in any other light." Id.
Magna Charta," Swayne declared, for they secure to every person within the United States the fundamental rights to life, liberty, and property, which include the right to labor. 152 Reflecting the nationalizing impact of the period, Swayne declared that "[W]ithout such authority any government claiming to be national is glaringly defective." 153 Moreover, Swayne insisted that the framers of these amendments intended to confer this power on the national government. 154

In what today seems ironic, Swayne admonished the majority for taking liberties with their construction of the Thirteenth and Fourteenth Amendments, a criticism levied in recent years by narrow-construction originalists against liberals who seek to interpret the Fourteenth Amendment in broad ways to reach liberal results. Swayne invoked what today we would characterize as an originalist and narrow-constructionist argument on behalf of a broad construction of constitutionally-secured rights in opposition to the majority's narrow construction, an interpretation of the Fourteenth Amendment that many today would characterize as nonoriginalist and noninterpretavist. 155 Swayne chided the majority that "[T]his court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it." 156

Swayne added some ominous remarks that reflected his experience as circuit justice for Kentucky and other states that were plagued with Ku Klux Klan-type terrorism. He repeated the need for national guarantees against oppression. "But this arm of our jurisdiction," Swayne lamented, "is, in these cases, stricken down by the judgment just given." 157 Acknowledging the dissenters' fears concerning the impact of the Court's decision on the affairs of the Southern states, he concluded: "I earnestly hope that the

152. Id. at 125 (Swayne, J. dissenting).
153. Id. at 129 (Swayne, J. dissenting).
154. Id.
155. Nonoriginalism is fairly self-explanatory. "Noninterpretavism" is a counterintuitive, technical term that constitutional theorists use to describe that view of constitutional interpretation that is not limited to the text or to the intent and understanding of the framers. See Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. REV. 204 (1980); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).
156. Slaughter-House Cases, 83 U.S. (16 Wall.) at 129 (Swayne, J. dissenting).
157. Id.
consequences to follow may prove less serious and far-reaching than the minority fear they will be."\(^{158}\)

The statements made in the majority and dissenting opinions strongly suggest that the justices understood that the Court's decision in the *Slaughter-House Cases* emasculated the power of the national government to protect and enforce the fundamental rights of United States citizens against terrorism in the South.\(^{159}\) Miller blamed his opinion and the intrigue of Bradley and Swayne for being passed over to replace Chase as chief justice.\(^{160}\)

To a limited extent, the press recognized the consequences of the *Slaughter-House* decision for the administration's civil rights enforcement policies. The *Chicago Tribune* called the decision a needed check "upon the determination of the Administration to enforce its policy and to maintain its power, even at the expense of the constitutional prerogatives of the States."\(^{161}\) The *New York World* speculated that the Court was restrained in its decision because of "their consciousness that they were running counter to the impetuous hostility of the Republican Party to the constitutional rights of the States."\(^{162}\) The editor of the *American Law Review* satirized the decision's impact upon Grant's Southern policy with the observation,

> that, while the executive department keeps Casey in New Orleans, and sends its soldiers to regulate the internal politics of Louisiana, the judicial department remits to the people of the State, to its

\(^{158}\) *Id.* at 130 (Swayne, J. dissenting).

\(^{159}\) I am referring here not only to Swayne's comments quoted in the text, but also to Miller's characterization of the questions before the Court, the references Bradley and Swayne made to conditions in the South that accounted for the framing and ratification of the Thirteenth and Fourteenth Amendments, the nature of the interpretations and analyses these dissenters expressed which tracked so closely opinions they wrote as circuit justices, and the fifteen months it took for the Court to decide the case.

\(^{160}\) Letter from Justice Sam. F. Miller to Justice David Davis (Sept. 7, 1873) (file 110), DAVID DAVIS PAPERS, Chicago Historical Society. This "will not be the first time that the best and most beneficial public act of a man's life has stood in the way of his political advancement," Miller wrote to Davis. He complained that the position of chief justice had "always been the reward of political, I may say [sic] partisan services." Disclaiming partisanship in the *Slaughter-House* Cases, Miller condescendingly suggested that "it is perhaps looking for too much to expect Grant with these examples before him, to look alone to the voice of the profession or to the qualifications of the nominee."

\(^{161}\) 2 *CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY* 544 (1937) (quoting the *Chicago Tribune*).

\(^{162}\) *Id.* at 545 (quoting the *New York World*).
courts and legislature, the custody of the privileges and immunities of its citizens.\textsuperscript{163}

However, press reaction to \textit{Slaughter-House} generally did not discuss its impact on President Grant's Southern policy.\textsuperscript{164} Newspaper commentary supports the view of contemporaneous constitutional expert, M. F. Taylor, that the public did not fully understand the import of the decision in this regard.\textsuperscript{165} Thus, the Court's apparent strategy of interpreting the Fourteenth Amendment in a politically neutral case to avoid strong political reaction, if not retaliation, seems to have worked.

Moreover, by 1873, the people of the Northern states had shifted their attention from Reconstruction to the problems associated with industrialization and urbanization. Even many who had earlier supported the cause of civil rights desired an end to Reconstruction in order to grapple more effectively with the problems of economic development, particularly the need to regulate growing concentrations of economic power by business entities that were acquiring monopolistic and oligopolistic control of markets. For example, the \textit{Chicago Tribune}, an avid supporter of civil rights protection in 1866, strongly supported the majority's decision in \textit{Slaughter-House}, because it understood the decision as a vindication of the states' power to control monopolies. Ironically, the Supreme Court's sanction of state-conferred special privileges to process meat for human consumption in Louisiana implicitly affirmed the states' power to regulate monopolies in Northern states such as Illinois.\textsuperscript{166} \textit{The Nation}, having earlier expressed fears regarding the \textit{Slaughter-House Case}'s impact upon the viability of private franchises, such as railroads, canals, and patents, hailed the Supreme Court's decision as preserving "al-

\textsuperscript{163} 7 AM. L. REV. 732 (1873). The "Casey" to whom the editor referred was James F. Casey, President Grant's brother-in-law, who was serving as the Collector of the Port of New Orleans and was associated with the Kellogg-Packard wing of the Republican party in Louisiana at the time \textit{Slaughter-House} was decided.

\textsuperscript{164} For newspaper reaction, see KACZOROWSKI, JUDICIAL INTERPRETATION, \textit{supra} note 2, at 170 n.58.

\textsuperscript{165} M. F. Taylor, \textit{The Slaughterhouse Cases}, 3 So. L. REV. 476, 477 (1874).

\textsuperscript{166} CHI. TRIB., Apr. 19, 1873. For the Tribune's editorial policies regarding civil rights enforcement in 1866, see, CHI. TRIB., Jan. 12, 1866, at 2; id., Jan. 17, 1866, at 2; id., Feb. 5, 1866, at 2; id., Apr. 30, 1866, at 2; id., May 1, 1866, at 2; id., May 19, 1866, at 2; id., May 31, 1866, at 2; id., June 6, 1866.
most every franchise in the United States" and vindicating the states' power to charter corporations. The primary contemporaneous importance of Slaughter-House, then, was not that it curtailed national civil rights enforcement authority. Rather, it was that the Court affirmed the state's police power.

Many of the North's spokesmen and leaders chose to revivify state rights at the expense of national enforcement of citizens' rights. For example, like the Chicago Tribune, The Nation in 1866 had been a strong supporter of national civil rights enforcement. Again like the Chicago Tribune, in 1873 it condemned the butchers' interpretation of the Fourteenth Amendment as bringing citizens' civil rights within the protection of the national government. This "monstrous conclusion," the editor admonished, "would put an end to federal government, do away with state courts, laws and constitutions, and throw pretty much the entire business of the country into the hands of Congress and the officials of the United States." He congratulated the Supreme Court for "recovering from the War fever, and ... [for] abandon[ing] sentimental canons of [constitutional] construction."

Apparently, a majority of the Chase Court made the same choice in the Slaughter-House Cases. Their decision, however, represents one of the most blatant examples of judicial legislation in the Court's history. It was also one of the most important decisions in the Court's history, for it nullified a revolution in American constitutionalism that the congressional framers of the Fourteenth Amendment intended, and the Department of Justice and federal courts implemented, to enforce citizens' fundamental rights involving Bill of Rights guarantees. The consequences of these choices were a series of decisions through the remainder of the nineteenth century that further curtailed the constitutional and statutory authority of the national government to enforce

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167. 16 THE NATION 280 (Apr. 24, 1873). See also, 11 id. 361 (Dec. 1, 1870).
168. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 159-66.
169. 1 THE NATION 711 (Dec. 7, 1865); 2 id. 262 (Mar. 1, 1866); 2 id. 122 (Apr. 5, 1866);
    2 id. 744 (June 12, 1866).
170. 16 id. 280 (Apr. 24, 1873).
171. Id. Commenting approvingly that the majority's decision was a desperately needed check on the centralization of power in the national government which cut deeply into the power of the states, the Chicago Tribune's editor happily reported that the decision held that the national government "had no power to interfere with municipal relations, however unjust in themselves, or with previously-existing states rights." CHI. TRIB., Apr. 19, 1873, at 4.
citizens’ rights. The end result was the legalization of American apartheid.

One wonders, though, what this history would have been if Chief Justice Chase had retained some of his earlier vigor. Would the result have been different? Would he have been able to persuade one justice to transform the dissenters into the majority? He may very well have succeeded. Just weeks before the Court announced its decision in *Slaughter-House*, Justice William Strong issued an opinion as circuit justice for Delaware in which he, and the district court judge, Edward Bradford, ruled that the Reconstruction amendments affirmatively secured the fundamental rights of citizens. Strong’s opinion in this circuit court case would have placed him with the dissenters in *Slaughter-House*. We do not know how and why he changed his understanding of the Reconstruction amendments. Had a healthy Chase been able to hold him with the dissenters, American legal and constitutional history very likely would have been very different.

172. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874); *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Reese*, 92 U.S. 214 (1875); *Virginia v. Rives*, 100 U.S. 313 (1880); *United States v. Harris*, 106 U.S. 629 (1882); *Pace v. Alabama*, 106 U.S. 583 (1882); *Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1896). The Court did not completely eliminate the national government’s power to enforce citizens’ rights. See, *Ex parte Siebold*, 100 U.S. 371 (1879); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880); *Ex parte Clarke*, 100 U.S. 399 (1880); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Yick Wo v. Hopkins*, 118 U.S. 351 (1886); *Ex parte Logan*, 144 U.S. 263 (1892). However, it described that role by defining the national government’s power to enforce citizens’ rights as limited to racially discriminatory state action. See, e.g., *Cruikshank*, *Reese*, and *Strauder v. West Virginia*, 100 U.S. 303 (1880).
