Introduction

Melvin I. Urofsky

Last winter the Society lost one of its best friends with the death of Justice Antonin Scalia. Justice Scalia hosted a large number of the Society's programs in the Courtroom, and I personally recall how much fun he had presiding over the re-enactments of some of the great cases to have come before the Court. Moreover, he made it a point that all of us involved should have a good time as well.

This issue carries two tributes to Justice Scalia. One is from his long-time jurisprudential opponent, Justice Ruth Bader Ginsburg. Despite their differences, the two were close friends from the time they both sat on the Court of Appeals for the District of Columbia. Part of their bond was a shared love of opera, and they both considered it a great old time when invited to sing in the chorus of one production of the Washington Opera. They also appeared to take a great deal of pleasure out of an opera written about the two of them.

Over the years Justice Scalia, who served on the Court from 1986 to 2016, had many clerks, and when I run into one occasionally, they are unanimous in affirming his kindness to them, his graciousness, and at the same time a demand for very high-quality work. Kannon Shanmugam, who is now a partner at Williams & Connolly, clerked for the Justice in the October 1999 Term, and writes about his experience.

This issue contains the article versions of the talks given in last year's Leon Silverman Lectures, on the general subject of Reconstruction after the Civil War. Justice Anthony Kennedy, in introducing Michael Ross, noted that Reconstruction is a mystery to most. It is an era that is "very important to understand in order to get a sense of who we are, and what our law is, and how we got to . . . this point in history." Michael Ross is professor of history at the University of Maryland, and a member of the Board of Editors for this *Journal.* In his article he tries to do what Justice Kennedy says is so important, namely understanding Reconstruction for the impact it had on the country, on the Court, and also on the meaning of the Civil War.

While historians of the Constitution have always recognized the importance of the *Slaughter-House Cases*, in the last few years there has been increased attention paid not

only to its impact—especially the dissent of Mr. Justice Field—but also to the case and the politics surrounding it. Randy E. Barnett, the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center, looks at how the case can be interpreted as a matter of public health, a case of public corruption, and most recently, as a narrative of race.

One of the great legacies of Reconstruction, and one that is still vitally important to current jurisprudence, is the Fourteenth Amendment. While today we are primarily concerned with its Due Process and Equal Protection Clauses, in the 1860s the Amendment embodied the Republican plan for Reconstruction. Faced with a sure veto from Andrew Johnson if it tried to enact the plan statutorily, the Republican majority in Congress felt unsure whether Johnson might be right, that it had no constitutional authority to pass such legislation. So they drafted the amendment, and made it a requirement that, before any of the Confederate states could be admitted back into the Union, they had to ratify it. Laura Edwards, the Peabody Family Professor of History in Trinity College at Duke University, shows how the amendment had an immediate effect. It not only opened the court system to the freed slaves, but affected northern judicial systems as well.

When did Reconstruction end? The view accepted by most historians is 1877, when the "Compromise" gave contested Southern Electoral College votes to Rutherford B. Hayes in exchange for the end of military occupation of the former rebellious states. By this view, the Republican Party essentially abandoned the freedmen to the Southern states, and within a few years the institutions of Jim Crow appeared throughout the former Confederacy. In the last fifteen years, however, a number of scholars have challenged that conventional view, and not least among them is Pamela Brandwein, professor of political science at the University of Michigan. She argues in her article that the Republican Party did not abandon blacks in 1877, but that the party, through its control of the presidency, maintained a principled and pragmatic effort to protect black rights, especially voting rights, into the 1890s.

In writing a textbook on America's constitutional history, I noticed that, in the early years of the Republic, the Contract Clause played an oversized role in the Supreme Court's agenda, and then by the 1870s, Contract Clause cases almost disappear. The usual interpretation is that defenders of property rights found a far more powerful and malleable tool in the Fourteenth Amendment's Due Process Clause. While it is true that Contract Cases declined, the reason is far more complex.

I learned that complexity when the University of Kansas Press asked me to review a manuscript by Jim Ely on the Contract Clause. I have known Jim, who is Milton R. Underwood Professor of Law Emeritus at Vanderbilt, for many years; as I have said more than once, the band of legal and constitutional scholars is fairly close knit. At one time or another we all read manuscripts from our colleagues, and they read ours. It was, as I expected, a very good work, and I asked Jim if he could carve an article out that we could publish in the *Journal*. As it turned out, the section he chose, on the Contract Clause during the Civil War and Reconstruction, fit in with the Silverman Lectures, and so we are running it with them.

Last, but certainly not least, is the Judicial Bookshelf, along with another appreciation of the late Justice Scalia from Grier Stephenson, the Charles A. Dana Professor of Government at Franklin & Marshall College. Grier has been doing a great job on the Bookshelf for many years, and we hope he will continue to do so for many more to come.

As always, a rich and varied feast. Enjoy!

Remembrance of Antonin Scalia

RUTH BADER GINSBURG

Justice Scalia, in his preface to the libretto for the comic opera *Scalia/Ginsburg*, described as the peak of his days on the bench an evening in 2002 at the Opera Ball, held at the British Ambassador's Residence. There, he joined two Washington National Opera tenors at the piano for a medley of songs. He called it the famous Three Tenors performance. He was, indeed, a convivial, exuberant performer. It was my great good fortune to have known him as working colleague and dear friend.

In my treasure trove of memories, an early June morning, 1996. I was about to leave the Court to attend the Second Circuit Judicial Conference at Lake George. Justice Scalia entered, opinion draft in hand. Tossing a sheaf of pages onto my desk, he said: "Ruth, this is the penultimate draft of my dissent in the *Virginia Military Institute* case. It's not yet in shape to circulate to the Court, but I want to give you as much time as I can to answer it." On the plane to Albany, I read the dissent. It was a zinger, taking me to task on things large and small. Among the disdainful footnotes: "The Court refers to the University of Virginia at Charlottesville. There is no University of Virginia at Charlottesville, there is only *the* University of Virginia." Thinking about fitting responses consumed my weekend, but I was glad to have the extra days to adjust the Court's opinion. My final draft was much improved thanks to Justice Scalia's searing criticism.

Indeed, whenever I wrote for the Court and received a Scalia dissent, the majority opinion ultimately released was notably better than my initial circulation. Justice Scalia homed in on the soft spots, and gave me just the stimulation I needed to write a more persuasive account of the Court's decision.

Another indelible memory, the day the Court decided *Bush v. Gore*, December 12, 2000, I was in Chambers, exhausted after the marathon: review granted Saturday, briefs filed Sunday, oral argument Monday, opinions completed and released Tuesday. No surprise, Justice Scalia and I were on opposite sides. The Court did the right thing, he had no doubt. I strongly disagreed and explained why in a dissenting opinion. Around 9:00 p.m. the telephone, my direct line, rang. It was Justice Scalia. He didn't say "get over it." Instead, he asked, "Ruth, why are you still at the Court? Go home and take a hot bath." Good advice I promptly followed.

Justice Ginsburg and Justice Scalia enjoyed celebrating their March birthdays together. They were photographed with their respective birthday cakes in the Natalie Cornell Rehnquist Dining Room in 2008.

Among my favorite Scalia stories, when President Bill Clinton was mulling over his first nomination to the Supreme Court, Justice Scalia was asked: "If you were stranded on a desert island with your new Court colleague, who would you prefer, Larry Tribe or Mario Cuomo?" Scalia answered quickly and distinctly: "Ruth Bader Ginsburg." Within days, the President chose me.

I recall, too, a dark day for me, confined in a hospital in Heraklion, Crete, in the summer of 1999, the beginning of my bout with colorectal cancer. Justice Scalia's was the first outside call I received. "Ruth," he said, "Get well," and "let me know if there is anything I can do to help."

Justice Scalia was a man of many talents, a jurist of captivating brilliance, high spirits, and quick wit, possessed of a rare talent for making even the most somber judge smile. The press wrote of his "energetic fervor," "astringent intellect," "peppery prose," "acumen" and "affability."

Not so well known, he was a discerning shopper. In Agra, India, together in 1994, our driver took us to his friend's carpet shop. One rug after another was tossed onto the floor, leaving me without a clue which to choose. Nino pointed to one he thought his wife Maureen would like for their beach house in North Carolina. I picked the same design, in a different color. It has worn very well.

Once asked how we could be friends, given our disagreement on lots of things, Justice Scalia answered: "I attack ideas. I don't attack people. Some very good people have some very bad ideas. And if you can't separate the two, you gotta get another day job. You don't want to be a judge. At least not a judge on a multi-member panel." Example in point, from his first days on the Court, Justice Scalia was fond of Justice Brennan, as Justice Brennan was of him.

I miss the challenges and the laughter he provoked, his pungent, eminently quotable opinions, so clearly stated that his words rarely slipped from the reader's grasp, the

Both passionate about opera, Justice Ginsburg and Justice Scalia appeared as extras in period costume for a Washington Opera Company production of *Ariadne auf Naxos* in 1994. At right is Rachel Gettler, who sang the role of Ariadne.

roses he brought me on my birthday, the chance to appear with him once more as supernumeraries at the opera. The Court is a paler place without him.

Toward the end of the opera *Scalia/Ginsburg*, tenor Scalia and soprano Ginsburg sing a duet: "We are different, we are one." Yes, different in our interpretation of written texts, but one in our respect and affection for each other and, above all, our reverence for the Constitution and the Court.

Editor's Note: Justice Ginsburg delivered this tribute in opening remarks at the Second Circuit Judicial Conference on May 26, 2016, in Saratoga Springs, New York.

Justice Scalia: A Personal Remembrance

KANNON K. SHANMUGAM

Justice Scalia was the towering legal figure of his generation. He would have laid claim to being the greatest Justice of the century, but for the quirk of the calendar that his career on the Court neatly straddled two. As it stands, he was undoubtedly one of the most influential Associate Justices in the Court's history, setting the terms of the debate on the modern-day Court for the two most important judicial tasks: interpreting the Constitution and interpreting statutes.

For those of us who had the privilege of serving as Justice Scalia's law clerks, however, it is hard to separate the jurisprudential loss from the personal. The relationship between law clerk and Justice is a special one, forged in the crucible of a year together in Chambers and then matured over the ensuing years of mentorship and friendship. And the relationship between the "clerkerati" (as the Justice called his clerks) and "The Boss" (as his clerks called him) was a particularly close one. While the Justice had a large family—nine children and, at last count, thirty-six grandchildren—he always had time for his extended family of 135 law clerks. Perhaps for that reason, Justice Scalia's death felt, and still feels, like the loss of a particularly beloved family member.

So when I reflect on Justice Scalia, I think not so much about his extraordinary jurisprudence as about his extraordinary personal qualities. Justice Scalia was devoted above all to his family and to his faith. He was also an utterly charming person who lived life to the fullest. Spending time with Justice Scalia was like being in the presence of a one-man party. It was impossible to come away from an encounter with the Justice without feeling energized.

I first met Justice Scalia in the fall of 1998. At the time, I was clerking for J. Michael Luttig, then a judge on the Court of Appeals for the Fourth Circuit and himself a former Scalia clerk. I was sitting at my desk in Richmond when I received a call from Justice Scalia's secretary asking if I could be available for an interview two days later. That made for a frantic next two days, when I attempted to read every opinion the Justice had ever written—which, even back then, was quite a few.

In the end, I got the job. I wish I could say that it was because I benefited from all of that pre-interview cramming, or because Justice Scalia recognized in me a scintilla of kindred brilliance. But in fact, I am pretty sure I was the beneficiary of a most unusual preference. I had studied the classics in college and then in graduate school. As Justice Scalia all but admitted many years later, he simply thought it would be fun to have a Latin major in Chambers. After all, the Justice was the only son of a professor of Romance languages, and he received a Jesuit education of which Latin was naturally a big part. So I have my choice of college major to thank for the privilege of serving as Justice Scalia's law clerk.

Shortly before I started my clerkship in 1999, *Washingtonian* magazine published a story that ranked Supreme Court clerkships from the most desirable to the least. The magazine ranked the Scalia clerkship as the best, describing life in the Scalia Chambers as "like an Italian street fight."[1] While I have never been in an Italian street fight, the description seems entirely apt. After oral argument, Justice Scalia would call his clerks into his office and conduct a no-holds-barred debate until he decided which way he would vote. Needless to say, those debates were an exhilarating and often intimidating experience, particularly for a fledgling lawyer fresh out of law school.

Perhaps the best part of clerking for Justice Scalia, however, was working with him on opinions. There have been many great writers in the Court's history, but none better than Justice Scalia. One of my favorite clerkship memories involved a dissenting opinion on a significant question of constitutional law. My co-clerk had been tasked with preparing the draft, and he had labored over it for weeks before giving it to the Justice. Days went by, and the Justice had his door closed, as was his wont when working on a particularly tricky opinion. Finally, at five o'clock on Friday afternoon, the door swung open, and the Justice trundled out of his office with a sheaf of papers in his hand. With an impish grin, the Justice walked up to my co-clerk's desk, slammed down the papers, and said, "And that's why they pay me the big bucks!" Without another word, he wheeled around and walked out. The sheaf of papers was, of course, the revised version of the opinion. And, of course, it was brilliant. While they didn't pay him the big bucks, Justice Scalia's writing was worth every penny.

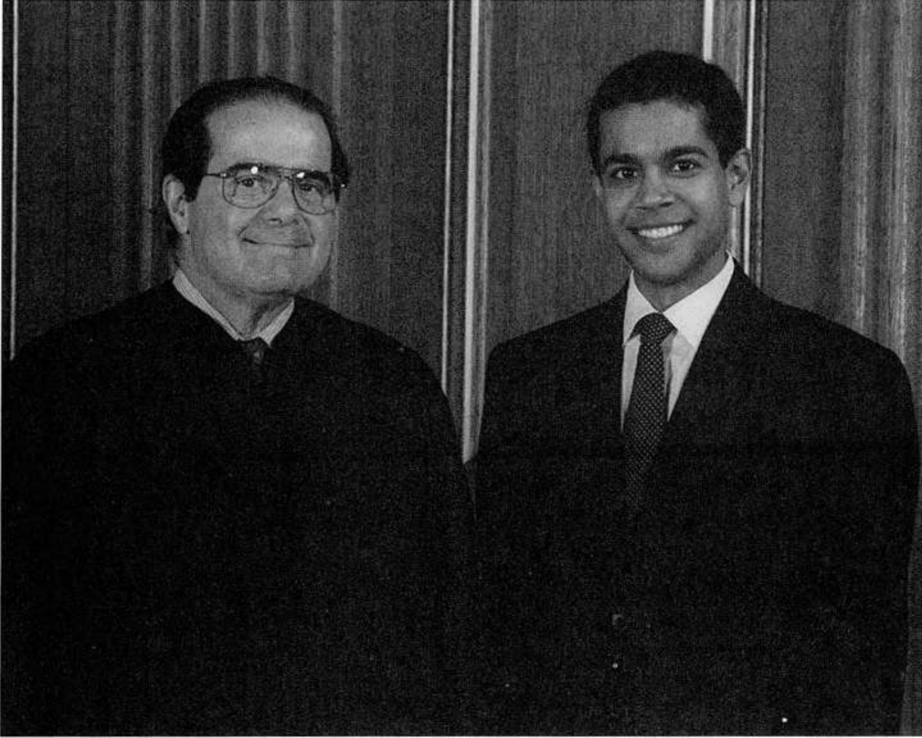
Justice Scalia could turn a phrase like no other Justice—whether in English or in another language. In particular, I recall one case involving trademark law. As was the usual practice, I prepared the first draft of the opinion. As was also the usual practice, the Justice returned a revised version a few days later that bore no resemblance to the original draft but was a thousand times better. One of the trickier aspects of the case was addressing an earlier Supreme Court decision involving a similar claim of protection for a product's design. In the revised draft, Justice Scalia distinguished the decision on the ground that it had involved not product design, but rather product packaging or else "some *tertium quid*."[2] While I had those two classics degrees, I had never heard that phrase before. As it turns out, however, the phrase was exactly on point: literally a "third thing," or the amalgam of two others. When Justice Scalia circulated the draft opinion to the rest of the Court, law clerks in other Chambers immediately teased me about the Latinism. But as was usually the case, the credit was entirely Justice Scalia's.

Over the course of a year with Justice Scalia, I could take credit only for one word. I worked with the Justice on a case involving the False Claims Act, the federal statute prohibiting the presentation of fraudulent claims to the government. In the course of our work on that opinion, I drafted a footnote making the point that the False Claims Act "was intended to cover all types of *fraud*," but "was [not] intended to cover all types of

Justice Antonin Scalia with his wife, Maureen, and nine children, shortly after being appointed by Ronald Reagan to the Supreme Court in 1986.

fraudsters." Shortly after I gave the Justice that draft, he summoned me to his office. "Kannon," he said, "I don't think 'fraudster' is a word." Sure enough, we consulted the second edition of *Webster's New International Dictionary*—the Justice's dictionary of choice—and "fraudster" was not in it. Flush with the overweening confidence of youth, I left the Justice's office and went upstairs to the Supreme Court library, searching for a dictionary—any dictionary—that contained the word. After I finally found one, I returned to the Justice's office and showed it to him. He read it and smiled. "But look at this," he said. And after the definition of the word "fraudster" was the disclaimer, "*Chiefly British*." Perhaps to indulge his overeager law clerk, the Justice nevertheless left the word in the opinion.[3] That was the first appearance of "fraudster" in the *United States Reports*, and probably my principal contribution to the Court's work as a law clerk. I am delighted to report it is starting to catch on.[4]

My year as a clerk for Justice Scalia profoundly shaped the way I think about the law and the way I practice it. In particular, I observed two important qualities of Justice Scalia's during the clerkship. The first was that Justice Scalia was not afraid to change his mind when he realized he had been wrong. That may sound like an odd thing to say about a Justice with famously strong views about the appropriate methods of deciding cases. Even for someone with such a well-delineated approach, however, there were sometimes hard cases. I was assigned to one case that proved to be particularly challenging. The Justice debated the case with the clerks for hours both before and after oral argument, then initially voted in favor of the petitioners. But after the authors of the



The author (pictured) clerked for Justice Scalia during the 1999-2000 Term and has since argued eighteen cases before the Court.

majority and dissenting opinions circulated their respective drafts, the Justice called me into his office and said that he thought the dissent had the better of the arguments after all. After calling the author of the majority opinion as a courtesy, he changed his vote and sided with the respondents instead.

The second quality was that Justice Scalia was every bit as diligent as he was brilliant. The Justice cared just as much about getting the lower-profile cases right as the higher-profile ones—and he was peerless in his attention to detail. For example, the Justice had a practice known as "booking." After completing an opinion but shortly before releasing it, the Justice would have the Supreme Court library pull every single source cited in the opinion. The library would assemble those sources on carts and bring them down to the Justice's office. The Justice would then sit down with the law clerk assigned to the case and walk through the opinion, line by line, to make sure that every citation was punctiliously accurate. Often, the act of checking the sources would cause the Justice to come up with additional points to be included in the opinion, or to tweak the opinion to get it exactly right. It was a wonderful learning experience to sit with the Justice and "book" an opinion—even if, at times, it felt like the legal equivalent of a dissertation defense. I vividly remember working on one opinion that contained a number of citations of old English authorities. We spent two days going through that opinion, attempting to decipher English law books that used f's in place of s's. The practice of "booking" is one that I have since adopted in my own practice—one of the many ways in which the clerkship experience has shaped me, now almost two decades later.

I am often asked what it was like, as a former Scalia clerk, to argue in front of the Justice. I can attest that he treated his former

law clerks exactly as he treated any other advocate. If anything, I think he felt he could be tougher on his former clerks, by virtue of the fact that he had already been tough on us over the course of an entire year. One example immediately comes to mind. When I was serving in the Justice Department, I argued a case involving Section 5 of the Voting Rights Act of 1965.[5] We appeared as a friend of the Court, siding with the plaintiff in an action against the State of Alabama. We were arguing that Alabama had to obtain approval from the Justice Department before implementing a decision of the Alabama Supreme Court invalidating a state law. During the plaintiff's argument, it quickly became clear that our position was an unattractive one to a large group of Justices—a group that included Justice Scalia. I was three sentences into my argument when Justice Scalia shot forward in his chair and asked me, "Do you have any problem with the republican form of government provision of the Constitution?" Realizing that it might make news if the Justice Department took issue with a clause of the Constitution, I squeaked, "Absolutely not." Unfortunately, the rest of the argument went downhill from there.

As I said at the outset, the relationship between a law clerk and a Justice continues to develop in the years that follow the clerkship. And one of the most moving moments in my life involved Justice Scalia, though it had nothing to do with the clerkship or with oral argument. I met my wife, a native Londoner, while I was studying in Britain before law school. We dated long distance throughout the clerkship; the Justice got to know her well during the year, and we later got engaged on the steps of the Supreme Court building. After she moved to the United States for good and we got married, Justice Scalia graciously administered the ceremonial oath of citizenship at the Court. While he was doing so, I remember thinking to myself what a great country this is, where a Supreme Court Justice who was the son of Italian immigrants administers the oath of citizenship to a British immigrant who had married the son of Indian immigrants. There have been few moments in my life when I have been moved to tears, but that was one of them. My wife and I will forever cherish that memory.

In the immediate aftermath of Justice Scalia's passing, I was touched by the many messages of sympathy from friends and colleagues—some of whom would have agreed with few of Justice Scalia's opinions, but nevertheless reached out to voice their appreciation of the Justice. One email I received from a friend in Canada perfectly captured how I felt. He wrote: "I am very sorry about the loss of Justice Scalia. He was a great justice, and I know that you will miss his company." The loss from Justice Scalia's death, to the Court and to the Nation, is a profound one. But what I miss most about the Justice is indeed his company. Antonin Scalia was an extraordinary Justice, but an even more extraordinary person—in the words of one of his biographers, an American original. We shall not see his like again.

ENDNOTES

[1] Kim Eisler, *Clerks Rate Supremes as Bosses*, Washingtonian, Oct. 1998, at 18.

[2] *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 215 (2000).

[3] *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 781 n.10 (2000).

[4] *See Loughrin v. United States*, 134 S. Ct. 2384, 2387 (2014) (Kagan, J.) (eleven times); *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1062 (2014) (Breyer, J.) (nine); *id.* at 1072 (Kennedy, J., dissenting) (nineteen!).

[5] *See Riley v. Kennedy*, 553 U.S. 406 (2008).

The Contract Clause during the Civil War and Reconstruction

JAMES W. ELY JR.

The Civil War and Reconstruction was a pivotal era in American history. Many scholars have probed the legal issues emanating from the sectional conflict.[1] They have, however, given little attention to the important role of the Contract Clause in constitutional law during this crucial period.[2] Yet the era produced a torrent of Contract Clause litigation. Many of these disputes grew directly out of the war and its impact on the defeated states of the Confederacy. Attempts by Southern legislators to deal with post-war conditions, such as emancipation and widespread indebtedness, were also a fertile source of laws challenged as violations of the Contract Clause.

High Standing of Contracting in American Society

During the mid-nineteenth century, leading commentators extolled the importance of contract as the foundation of modern society. The English jurist Henry Sumner Maine articulated this view when he famously observed in 1861 that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[3] To Maine, the triumph of contract constituted a step away from a fixed hierarchical system in which one's place was determined by birth and status and toward a society in which relationships were governed by agreements between individuals. Maine found a receptive audience in the United States, as many political thinkers linked voluntary exchange with individual freedom and social progress. In 1867 the influential editor E.L. Godkin, for example, maintained that "the tendency, both of legislation and of usage, in modern times," is "to submit our social relations more and more to the dominion of contract simply."[4] In line with these sentiments, Congress included the right "to make and enforce contracts" among the rights accorded former slaves in

the Civil Rights Act of 1866.[5] Historian Amy Dru Stanley has pointed out: "In postbellum America contract was above all a metaphor of freedom."[6] This powerful intellectual current reinforced the vital position of the Contract Clause and the need for contractual stability.

In addition to this libertarian premise, it was recognized that contracts represented a significant amount of wealth and played a vital role in the economy. "A very large proportion of the property of civilized men," Chief Justice Salmon P. Chase remarked in 1870, "exists in the form of contracts."[7] The Supreme Court of Appeals of Virginia emphasized that the faithful performance of agreements was essential for ensuring prosperity. "The inviolability of contracts, public and private," it maintained, "is the foundation of all social progress, and the corner-stone of all the forms of civilized society, wherever an enlightened jurisprudence prevails."[8]

Both jurists and legislators affirmed the central place of the Contract Clause in the constitutional order. In 1867, for example, the Supreme Court of South Carolina declared that the Contract Clauses in both federal and state constitutions "form the ultimate basis on which reposes the confidence that is itself the support of all credit, and the security of the whole fabric of social prosperity."[9] Similarly, Chase pictured the clause as "that most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice . . . ."[10] A year later a congressional measure creating a new government for the District of Columbia contained a contract clause.[11] States admitted to the Union during these years, such as Nevada in 1864 and Nebraska in 1867, included a provision safeguarding contracts in their state constitutions.

Given the prevailing mindset, it was not surprising that the Supreme Court continued to insist that the question of whether a contract existed was one for the Court to determine. "If it were not so," Justice Samuel F. Miller exclaimed, "the constitutional provision could always be evaded by the State courts giving such construction to the contract, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional State legislation."[12]

Nonetheless, scholars and judges were also aware that the Contract Clause had given rise to sharp controversies. Discussing the Contract Clause, the prominent constitutional scholar Thomas M. Cooley insisted in 1868 that "since its adoption no clause which the Constitution contains has been more prolific of litigation, or given rise to more animated and at times angry controversy."[13] The elusive distinction between contractual rights and the remedy available for the enforcement of contracts was a continued source of confusion, and one commentator termed the distinction "arbitrary and unnecessary."[14] Despite frequent praise for the Contract Clause, there were persistent misgivings about the reach of the provision and its potential to curb state legislative authority.

Confederacy

So widely shared was the conviction that agreements should be honored that the Constitution of the Confederacy, notwithstanding its affirmation of state sovereignty, contained a clause barring the states from abridging contracts.[15] In sync with the United States Constitution, the Confederate framers were prepared to curb state authority over contracts. Indeed, in one respect the Confederate Constitution moved beyond the contractual protection in the United States Constitution. The Confederates empowered Congress to enact bankruptcy laws but provided that "no law of Congress shall discharge any debt contracted before the passage of the same."[16] Consequently, the Confederate Congress could not retroactively grant bankruptcy relief to debtors.

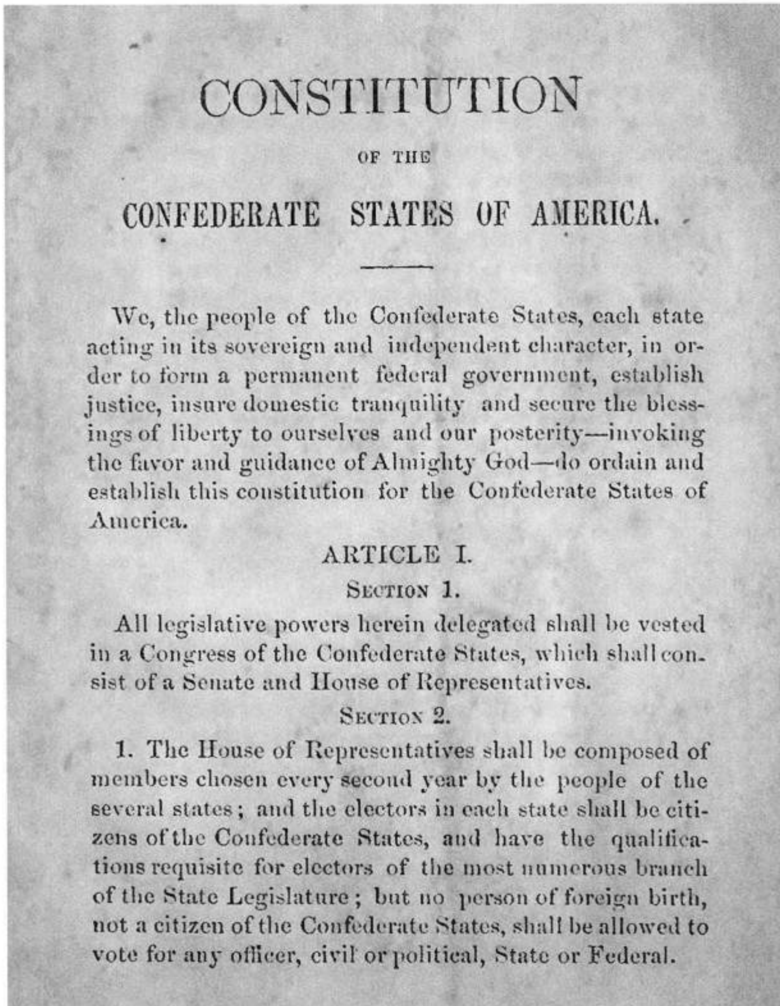
During its brief existence, the Confederacy never established a Supreme Court but state courts were not hesitant to invalidate laws interfering with the enforcement of debts. In 1861 the Supreme Court of North Carolina struck down a state law forbidding the issuance of executions and the sales of property under existing executions. It reasoned that this measure ran afoul of the Contract Clause in the Confederate Constitution.[17] Likewise the Supreme Court of Arkansas voided a statute delaying all lawsuits until after ratification of peace between the Confederacy and the United States.[18] It determined that this indefinite delay in effect destroyed the remedy for enforcing contracts and thus ran afoul of the contract clause in the Arkansas Constitution. Nor was the Court impressed with the contention that under wartime circumstances the general welfare of the state would be served by a continuance of lawsuits.

However, the Confederate attitude toward violation of contracts was decidedly mixed. In 1861 the Confederate Congress enacted a sweeping sequestration law directed at "alien enemies," that is to say, citizens of states loyal to the Union. It purported to confiscate property of such "alien enemies" and to sequester debts owed by a Confederate citizen to a citizen of a loyal state. All Confederate citizens were under a legal duty to inform the government of any property owned by Unionists and any debts owed to Northerners of which they were aware. Debtors were compelled to pay their debts to a receiver of the Confederate government, with the payment acting as a discharge of the obligation. Confederate officials pursed an aggressive course regarding confiscation. Sequestration posed an especially serious problem for Southern business interests, because they had complex credit relationships and commonly owed debts to Northerners.[19]

The validity of the sequestration act was questioned in *Williams v. Bruffy* (1877).[20] The plaintiffs, residents of Pennsylvania, sold goods to George Bruffy of Virginia in March 1861. After the war they brought suit against Bruffy's estate to recover the unpaid debt. The defendant estate raised the sequestration act as a defense, asserting that the estate was discharged from the debt by virtue of a payment to a Confederate receiver in 1862. Speaking for the Supreme Court, Justice Stephen J. Field ruled that legislation of the Confederate Congress had no validity whatsoever. Treating the sequestration measure as a law given sanction by Virginia, Field declared that the Contract Clause bars states from passing laws impairing agreements and "equally prohibits a State from *enforcing* as a law an enactment of that character, from whatever source originating." He added that "the debtors cannot claim release from liability to their creditors by reason of coerced payment of equivalent sums to an unlawful combination."[21] It followed that all sequestered debts paid by Southerners to the Confederate government were still due to their Northern creditors.

Another group of cases addressed the legal status of contracts executed in Southern states during the Civil War calling for payment in Confederate currency. Confederate notes were the principal currency within the Southern states, and numerous contracts were made with reference to them. In *Thorington v. Smith* (1869) the Supreme Court held that such contracts in the ordinary course of business, and not in aid of the rebellion, could be enforced in federal court "to the extent of their just obligation." It further declared that the party to be paid in Confederate dollars could recover "their actual value at the time and place of the contract, in lawful money of the United States."[22] The Court recognized that Confederate money had some speculative value during the war, but insisted that it was not identical in value to United States dollars.

A number of Southern states in the postwar period took a more categorical position, enacting laws that sought to void contracts



CONSTITUTION

OF THE

CONFEDERATE STATES OF AMERICA.

We, the people of the Confederate States, each state acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquility and secure the blessings of liberty to ourselves and our posterity—invoking the favor and guidance of Almighty God—do ordain and establish this constitution for the Confederate States of America.

ARTICLE I.

SECTION 1.

All legislative powers herein delegated shall be vested in a Congress of the Confederate States, which shall consist of a Senate and House of Representatives.

SECTION 2.

1. The House of Representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall be citizens of the Confederate States, and have the qualifications requisite for electors of the most numerous branch of the State Legislature; but no person of foreign birth, not a citizen of the Confederate States, shall be allowed to vote for any officer, civil or political, State or Federal.

Although the Confederate Constitution contained a contract clause, the Confederate Congress enacted a sweeping sequestration law directed at the property of citizens of states loyal to the Union. Confederate citizens who owed debts to Northerners were compelled to pay them to a receiver of the Confederate government. In 1877 the Supreme Court ruled, however, that all debts due by Southerners to their Northern creditors were still valid.

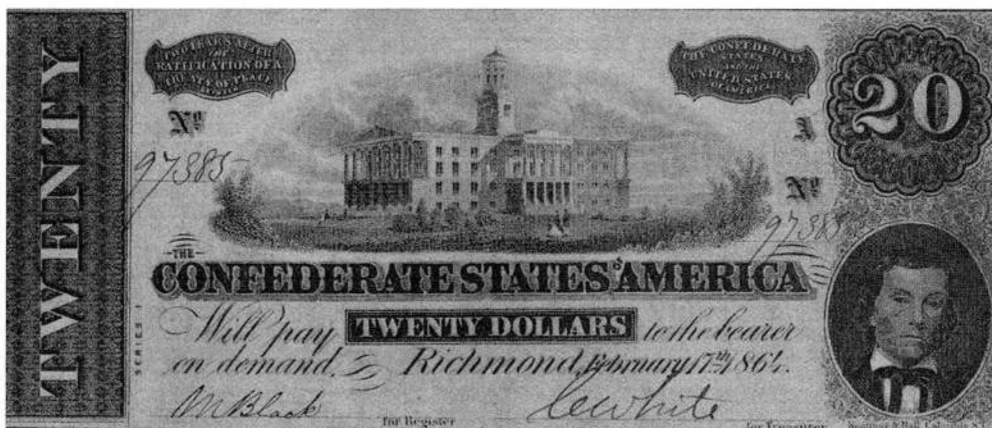
payable in Confederate currency. Unlike most state laws challenged as violative of the Contract Clause, which turned upon the question of whether an alteration of the available remedy impaired the obligation of contract, these statutes purported to nullify an entire species of contracts. Not surprisingly, both state and federal courts looked askance at such laws. Pointing out that as a practical matter contracting parties were compelled to use Confederate currency as a medium of exchange, the Supreme Court of Alabama in 1870 declared that a state law giving either party an option to rescind contracts not payable in United States currency violated the Contract Clause.[23] This decision anticipated the ruling of the Supreme Court in *Delmas v. Insurance Company* (1872).[24] At issue was a provision of the Louisiana Constitution, adopted after the contract in dispute was made, that rendered all contracts payable in Confederate notes or money void.

Justice Miller, speaking for the Court, declared that the contract was validly executed and thus within the shelter of the Contract Clause. He stressed that an agreement, valid when made, could not be retroactively impaired, and that "any judgment of a State court resting on such enactment of a State constitution, after the date of the contract" must be reversed.[25] Miller distinguished the instant case from situations in which state courts struck down contracts on the ground of a public policy existing when the contract was executed.

Nor would the Supreme Court allow states to alter the rules governing recovery under contracts for payment in Confederate notes. As the Civil War progressed and Southern hopes faded, Confederate currency suffered a severe depreciation in value. In the post-war era Southern lawmakers were concerned that it was difficult to scale the value of Confederate currency and felt that a more equitable method of determining value of the consideration would be to ascertain the value of the items purchased. An 1866 North Carolina law, for instance, authorized a jury to consider the value of the property purchased and to "determine the value of the said contract in present currency." Warning that legislation allowing a jury to place its own value on contracts "would create an insecurity in business transactions which would be intolerable," the Supreme Court, in an opinion by Justice Field, found the statute to violate the Contract Clause.[26] The state, he maintained, interfered with the terms of the contract by giving another value to the contract than that stipulated by the parties. In a similar case, the Court invoked the Contract Clause to strike down an 1867 Virginia statute providing that in disputes growing out of land sales a trial court or jury could look to the "fair value" of the land instead of the contract terms specifying payment in Confederate money. It explained that the statutory rule "was nothing less than substituting for the contract of the parties a new and different one."[27]

Slave Purchase Contracts

The abolition of slavery triggered a bitter controversy over the enforceability of contracts for the purchase of slave property.[28] Many former slave owners were heavily in debt and resisted payment of promissory



As the Civil War progressed and Southern hopes faded, Confederate currency suffered a severe depreciation in value. In the post-war era Southern lawmakers were concerned that it was difficult to scale the value of Confederate currency and felt that a more equitable method would be to ascertain the value of the items purchased. However, the Supreme Court ruled that states could not alter the rules governing recovery under contracts for payment in Confederate notes.

notes given for slaves prior to emancipation. Pointing to principles of commercial law, they argued that there was a failure of consideration that rendered such contracts unenforceable. This defense was flatly rejected by Southern courts. The Supreme Court of Florida, for example, ruled in 1867 that slave purchase agreements were legal when made, and that the seller was not responsible for the subsequent change in the legal status of slaves.[29]

However, the controversy over slave purchase agreements soon entered a new phase that raised Contract Clause issues. During 1867-1868, six Southern constitutional conventions (Alabama, Arkansas, Florida, Georgia, Louisiana, and South Carolina) adopted provisions to bar the enforcement of such contracts. The delegates supporting a ban harbored different objectives. Some favored the provision as a form of debt relief for planters who would bear the loss if slave contracts were enforced. In effect, refusal to enforce the promissory notes shifted the loss arising from emancipation to sellers rather than buyers. Other delegates found the enforcement of debts to buy slaves to be morally repugnant. Since, in their view, slavery never legally existed under natural law, it followed that slave contracts were illegitimate and not entitled to any judicial sanction.[30] Of course, any measure declaring certain prior contracts void would trigger Contract Clause scrutiny.

The debate over these constitutional provisions posed a number of interrelated questions. Was a slave purchase agreement, lawful when made, rendered unlawful through a change in public policy? Did these state constitutional provisions entail a retrospective judgment about the legitimacy of slave property? Should slave contracts be treated as ordinary commercial transactions and thus fall within the purview of the Contract Clause?

Several state supreme courts promptly ruled that the constitutional provisions prohibiting enforcement of slave contracts ran afoul of the Contract Clause. Citing the *Thorington* decision upholding the validity of contracts for payment in Confederate money, the Supreme Court of Alabama held that slave property was a valid consideration when the contract was made and that the constitutional ordinance destroyed such contracts in contravention of the Contract Clause.[31] Reaching the same conclusion, the Supreme Court of South Carolina emphatically declared: "Slaves, in South Carolina, when this contract was made, were the legitimate subjects of sale and purchase." It lectured that one cannot "view the events of the past by the reflected light of the present day."[32]

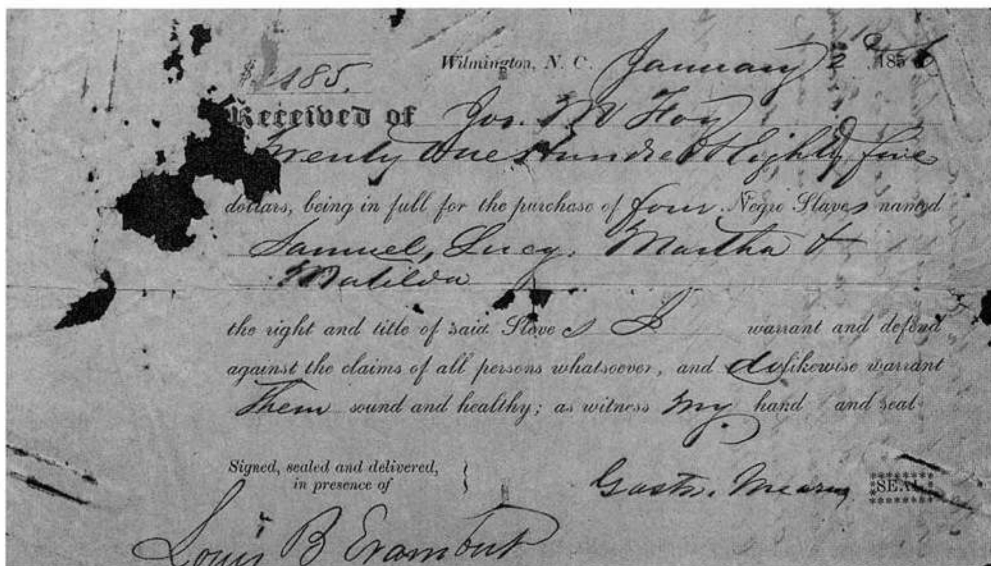
Not all courts took that position. By sustaining the state constitutional bans, they set the stage for review by the U.S. Supreme Court. In a problematic opinion, the Supreme Court of Georgia upheld a provision in the 1868 Georgia Constitution declaring that no state court could take jurisdiction of a lawsuit to enforce slave contracts and denied that the provision violated the Contract Clause. It asserted that the slave contract provision had been part of a constitution "dictated by Congress, as the representative of the conqueror" and merely "accepted" by the people of the state.[33] Under this analysis, the prohibition was imposed by Congress in the process of restoring Georgia to the Union. Georgia itself had not impaired any contract. Since the Contract Clause did not pertain to acts of Congress, the contested prohibition was beyond the reach of that clause.

The only federal court to refuse to honor a slave purchase agreement advanced different and more challenging arguments to sustain the state ban on enforcement. The United States Circuit Court for Arkansas invoked natural law as a basis to withhold enforcement of a debt for the purchase of slaves. It also upheld the provision of the Arkansas Constitution declaring such arrangements "null and void" and contended that the Thirteenth and Fourteenth

Amendments necessarily limited the Contract Clause with respect to contracts that presumed the existence of slavery. The court maintained that the Contract Clause was never intended to restrict state authority over the institution of slavery. It reasoned that recognizing a right of action on a note for slaves would inhibit the abolition of slavery.[34] The problem with this analysis, however, was that creditors were seeking to collect a debt, not to affirm the continuance of slavery as an institution. Thus, the relevance of the Thirteenth Amendment was unclear.

In a pair of 1872 opinions by Justice Noah Swayne, the Supreme Court settled this controversy, ruling that states could not bar the collection of debts for the purchase of slaves. In *White v. Hart,* Justice Swayne made short shrift of the arguments advanced by the Georgia court.[35] He insisted that Georgia had never been out of the Union despite attempted secession and remained subject to constitutional restrictions on state authority. Swayne dismissed as "clearly unsound" the notion that the 1868 Georgia Constitution had been dictated by Congress and did not represent an action by the state. Treating the contract at issue as valid when made, he found that the Georgia provision on slave contracts impaired the obligation of contract by removing all remedy. "When the contract here in question was entered into," Swayne explained, "ample remedies existed. All were taken away by the proviso in the new constitution. Not a vestige was left. Every means of enforcement was denied, and this denial if valid involved the annihilation of the contract."[36]

In *Osborn v. Nicholson,* Swayne similarly concluded that the language in the Arkansas Constitution voiding all agreements for the purchase or sale of slaves constituted an unconstitutional abridgement of contracts lawful when made.[37] Unimpressed with speculation about natural law, he pointed out that slavery had long been recognized in the United States and that the Thirteenth Amendment was adopted after the rights



$2185

Wilmington, N. C. January 2 1856

Received of Jos. M. Foy
Twenty One Hundred & Eighty five
dollars, being in full for the purchase of Four Negro Slaves named
Samuel, Lucy, Martha &
Matilda
the right and title of said Slave I warrant and defend
against the claims of all persons whatsoever, and do likewise warrant
Them sound and healthy; as witness my hand and seal

Signed, sealed and delivered, in presence of
Louis B Erambert

Gasto. Means SEAL

The abolition of slavery triggered a bitter controversy over the enforceability of contracts for the purchase of slave property. In a pair of 1872 opinions by Justice Noah Swayne, the Supreme Court ruled that states could not bar the collection of debts for the purchase of slaves. Above is an 1856 receipt for North Carolina plantation owner Joseph Mumford Foy's purchase of four slaves: Samuel, Lucy, Martha, and Matilda. He spent about $704 on average per person and owned fifty-nine enslaved persons in 1860 (most of whom he had inherited).

under the purchase contract had become vested. "We cannot regard [the slave purchase contract]," Swayne observed, "as differing in its legal efficacy from any other unexecuted contract to pay money made upon a sufficient consideration at the same time and place." He tellingly added, "Neither the rights nor the interests of those of the colored race lately in bondage are affected by the conclusions we have reached."[38]

Chief Justice Chase, long an anti-slavery advocate, dissented alone in both *White* and *Osborne*. In declining health, he penned only a brief outline of his views. Chase contended that slave purchase contracts were "against sound morals and natural justice" and that state laws supporting slavery were annulled by the Thirteenth Amendment. He maintained, without explanation, that state laws barring suits on such agreements did not run afoul of the Contract Clause. Chase's unspoken premise appeared to be that enforcement of debts for slaves implied the legitimacy of slavery.

The federal and state cases requiring the payment of debts for the purchase of slaves after emancipation initially seem dubious to modern eyes. Two observations are in order. First, it bears emphasis that, as the Supreme Court pointed out, the rights of newly freed slaves were not at issue. Instead, the typical litigation involved a lawsuit by a seller of slaves against a purchaser for recovery of an unpaid debt. The moral distinction between those parties was thin, and therefore courts may have felt that it was inappropriate for state legislators to interfere with how the contracts allocated the risk of loss. Second, the fact that courts would invoke the Contract Clause in such a sharply contested area as sales of slaves attests to the significance of the provision in the constitutional order of the mid-nineteenth century.

Legal Tender Cases

Most of the Contract Clause litigation emanating from the Civil War pertained to the brief existence of the Confederacy. However, steps by Congress to finance the unprecedented expenditures caused by the Civil War gave rise to the *Legal Tender Cases*, which implicated the Contract Clause.[39] On the eve of the Civil War, legal tender for the satisfaction of debts was gold or silver coin. As a practical matter, commercial activity was largely transacted through state bank notes convertible into coin upon demand. With the outbreak of hostilities, however, gold was generally withdrawn from circulation. In 1862 Congress issued new notes, popularly known as greenbacks because of their color, which were not redeemable in gold or silver coin. Further, the new notes were declared to be "lawful money and a legal tender in payment of all debts, public and private, within the United States." During the debates over the Legal Tender Act, questions were raised about the constitutional authority of Congress to compel persons to accept the new currency. Nonetheless, more than $4 million of greenbacks were issued and remained in circulation after the war. Recall that abuse of paper money and legal tender laws by the states in the post-Revolutionary years had been a factor in the adoption of the Contract Clause by the constitutional convention. Chase, as Secretary of the Treasury, was a champion of hard money, but he reluctantly endorsed the issuance of greenbacks as a temporary expedient.[40] Greenback dollars rapidly depreciated in value as compared to gold, reflecting the runaway inflation of the war years. As might be expected, creditors resisted payment of contractual debts in greenbacks. This laid the foundation for lawsuits challenging the payment of debts denominated in dollars with greenbacks instead of gold or silver coin.

The first Supreme Court decision addressing the constitutionality of the legal tender provision was *Hepburn v. Griswold* (1870).[41] At issue was an action to recover on a promissory note executed before enactment of the 1862 legal tender law. The creditor

refused a tender of payment in greenbacks and insisted upon specie. Speaking for four Justices,[42] Chase, now Chief Justice, found that the act altered the terms of the contract by making greenbacks legal payment for debt instead of gold and silver coin, which were the only legal tender when the contract was executed.[43] Holding that the Legal Tender Act was unconstitutional with respect to debts incurred before its enactment, Chase struggled to formulate a persuasive rationale for his ruling. He recognized that the Contract Clause did not by its terms apply to the federal government, yet he nonetheless maintained that the provision implicitly inhibited national power. Chase declared:

> But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.[44]

Reliance on an amorphous "spirit" of the Contract Clause was problematic and hinted at an extension of the clause to congressional legislation. As a practical matter, *Hepburn* applied only to pre-1862 debts, many of which had already been satisfied, but the ruling increased the burden of discharging any such remaining obligations.

Speaking for the three dissenters, Justice Miller conceded that the Legal Tender Act impaired the obligation of contracts made before its enactment. He stressed that the constitutional bar against such laws did not apply to Congress. Instead, Miller pointed out that the Constitution gave Congress authority to enact a uniform system of bankruptcy, "the essence of which is to discharge debtors from the obligation of their contracts."[45] He found no constitutional infirmity with the Legal Tender Act, a measure that he saw as necessary to provide a circulating currency and finance the war effort.[46]

Despite the outcome in *Hepburn*, Miller's views regarding the Legal Tender Act ultimately prevailed. On the very day that the Supreme Court announced its decision in the case, President Ulysses S. Grant nominated two candidates to fill vacant seats on the Court. Both were expected to sustain the validity of the act. Miller pushed to reopen the issue of legal tender before the revamped Court. In *Knox v. Lee* (1871) the justices by a vote of five-to-four overturned *Hepburn* and upheld the constitutionality of the Legal Tender Act with respect to the payment of past obligations.[47] Under these circumstances, the overruling of *Hepburn* triggered a bitter controversy over alleged political influence compromising judicial independence. However, the concern here is with the Court's assessment of the Contract Clause. Newly appointed Justice William Strong, writing for the majority, warned against the financial instability that would result if the Legal Tender Act was deemed invalid. Strong denied that the Legal Tender Act impaired prior contracts because the contractual obligation was to pay in whatever currency the law recognized as lawful money at the time of payment. He also asserted that Congress was free to impair contracts, stressing that with bankruptcy laws it could authorize the obliteration of contracts entirely. Strong broadly added that "contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate governmental authority."[48] Such a capacious reading of governmental power to alter contracts would potentially point toward a

weakening of the protection afforded by the Contract Clause.

The four dissenters authored three opinions. Chase adhered to his earlier position that the Legal Tender Act was "inconsistent with the spirit of the Constitution in that it impairs the obligation of contracts."[49] He insisted that Congress could only discharge the obligation of contracts through its bankruptcy power. There was, Chase argued, no general power in Congress to interfere with agreements. Field agreed with Chase that the Legal Tender Act impaired the obligation of contracts executed before its enactment. He expansively defined the notion of contractual impairment:

> A law which changes the terms of the contract, either in time or mode of performance, or imposes new conditions, or dispenses with those expressed, or authorizes for its satisfaction something different from provided, is a law which impairs its obligation, for such a law relieves the parties from the moral duty of performing the original stipulation of the contract, and it prevents their legal enforcement.

Field reasoned that, aside from the special exception for a bankruptcy system, Congress possessed no unlimited authority to impair contracts. Emphasizing the bitter post-Revolutionary experience with paper money and tender laws, he expressed doubt that the framers intended to "vest in the new government created by them this dangerous and despotic power, which they were unwilling should remain with the States, and thus widen the possible sphere of its influence."[50]

In a sense the *Legal Tender Cases* did not directly involve the Contract Clause because the issue pertained to congressional, not state, legislation. Yet the various opinions made reference to the provision, and at least four Justices were prepared to apply principles derived from the Contract Clause to actions of the federal government. Still, the upshot of the *Legal Tender Cases* was to affirm that the prohibition of the clause was confined to the states, leaving Congress free to interfere with contracts as circumstances might dictate. Left uncertain was the extent to which Congress could repudiate its own undertakings, an important question but one beyond the scope of the Contract Clause.[51]

Debt Relief in the Post-Civil War South

The states of the former Confederacy were economically devastated by the Civil War. The huge loss of life and widespread physical destruction caused by the conflict, combined with abolition of slave property and thus the unsettling transformation of the labor market, contributed to the general economic distress. Property values plummeted. "The destruction wrought by the war and the sudden act of emancipation," Morton Keller has aptly observed, "had catastrophic effects on southern property values."[52] The transportation network was near collapse. Individuals from all segments of society found themselves encumbered with mountainous debt. "The whole South is now bankrupt," a planter's wife complained.[53]

In response to these unhappy conditions, Southern lawmakers initiated a fresh round of measures to stay the collection of debts, delay foreclosures, and facilitate the redemption of land from tax delinquency sales. Other stay laws remained in effect from the war years. Many states also increased the exemption of personal property from the reach of creditors.[54] In March 1866, for instance, the Georgia legislature adopted a law suspending the sale of property under execution on any contract made before June 1865. The act recited a litany of problems affecting the state, including occupation by hostile forces, destruction of crops, repudiation of Confederate and state debt, and the loss of capital invested in slave property.[55] Seeking to justify the stay laws, one Georgia judge

explained that "the people demanded time to enable them to recuperate their wasted estates, so as to enable them to meet their liabilities, without being deprived of the little remnant which had escaped the vicissitudes of the war."[56] Three points warrant emphasis. First, there was in part a sectional dimension behind the enactment of stay laws. Some of the impetus was to avoid repaying pre-war loans to Northern merchants. Second, the stay laws enacted by Southern legislature were reminiscent of similar legislation passed by many states in the wake of the Revolution. Third, although prevailing public opinion clamored for debt relief laws, there was an undercurrent of opposition. Critics charged that stay laws undermined the availability of credit.

Not surprisingly, these stay laws were attacked as violations of the Contract Clause. Counsel defending stay laws invoked the economic distress of the region,[57] and commonly argued that legislatures retained authority to modify contractual remedies. Although the details of the stay laws differed, Southern courts proved receptive to constitutional challenges regarding application of such measures to antecedent agreements. Courts in Alabama,[58] Georgia,[59] Mississippi,[60] North Carolina,[61] South Carolina,[62] Tennessee,[63] Texas,[64] and Virginia[65] struck down stay laws as in effect destroying the remedy and thereby impairing the rights secured by the contract. A number of courts pointed out that the stay laws violated the contract clauses in both federal and state constitutions, likely a step to soothe local sensibilities.[66] Several also sought to explain the negative implications of stay laws for reviving the state's economy. The Court of Errors of South Carolina, for example, warned against "unwise and unjust measures of relief" adopted under urgent pressure, and characterized the contract clauses in federal and state constitutions as forming "the ultimate basis on which reposes the confidence that is itself the support of all credit, and the security of the whole fabric of social prosperity."[67] Clearly Southern courts were unimpressed with pleas of financial hardship as a justification for stay laws that interfered with the collection of debts or foreclosure of mortgages.

Courts also frowned upon other legislative obstacles to the enforcement of contractual obligations. Georgia was especially imaginative in this regard. The Georgia Constitution of 1868 declared all contracts made in support of the Confederacy to be void, a proposition consistent with the Supreme Court's view. It further provided that when the defendant swore that he had reason to believe that a contract was used for this purpose, the plaintiff then had to prove that the contract, and any instruments of debt made in connection with the contract, had not been used for such an illegal purpose. The United States Circuit Court for Georgia reasoned that this requirement "imposes upon the plaintiff an impossibility, and is tantamount to destroying the contract on the simple oath of the defendant."[68] The court readily concluded that the constitutional provision ran afoul of the Contract Clause. In the same vein, an 1870 Georgia act mandated that, before bringing suit in a state court to collect a debt based on a contract executed before June of 1865, a claimant must have paid all taxes chargeable for each year upon such contract. Speaking for the Supreme Court, Justice Swayne pointed out that the statute retrospectively imposed a penalty for non-payment of taxes. "The purpose of the act was plainly not to collect back taxes," he stated, "but to bar the debt and discharge the debtor." Although he acknowledge that states could change remedies, Swayne made clear that the parties must be left with a substantial means of enforcement. "A clearer case of a law impairing the obligation of a contract, within the meaning of the Constitution," he declared, "can hardly occur."[69]

Most debt relief laws took the form of changing the available remedies, either by postponing the time of payment or hampering

access to the judicial system. Legislators less frequently sought to vary the substantive terms of agreements. Still, occasional state laws altered the duties of the parties under an antecedent contract. In 1873 Virginia lawmakers empowered juries and judges in actions to recover money under contracts made before April 1865 to abate interest for the period of the Civil War. The Court of Appeals of Virginia determined that interest on a principal sum was a legal incident of the debt and that the legislature could not confer upon juries and judges the authority to remit interest. The mere existence of war, it maintained, neither abrogated debts nor halted the running of interest. Since the law at issue altered the rights of the parties existing at the time the contract was entered, the measure impaired the obligation of contract in violation of both the United States and Virginia Constitutions.[70]

Homestead Exemptions

The enlargement of homestead exemptions in the post-bellum Southern states was a particularly controversial form of debt relief.[71] Starting with Texas in 1839, by the time of the Civil War, most states in the region had enacted homestead laws that exempted a family residence from the reach of creditors. Although details of the homestead laws differed, such measures typically exempted family residences from execution up to a certain acreage or monetary amount and required the consent of a spouse to sell the property. The purpose was to promote homeownership and shelter families from destitution in a volatile market. Of course, the homestead law necessarily curbed the rights of creditors. There was renewed interest in homestead exemptions after the war as planters and yeoman farmers sought to prevent losing their land to creditors. Accordingly, Southern lawmakers took a number of steps to strengthen homestead protection. Most states in the region placed homestead provisions in their constitutions. In addition, lawmakers greatly expanded the extent of the homestead exemption. A Georgia lawyer complained that "in most of the Southern States the homesteads and exemptions are so exorbitant and extravagant, that there are but few cases in which any property of the debtor is left, out of which creditors can procure their money."[72] The most contested move, however, was the application of the homestead exemption to debts contracted before the effective date of these measures. Unhappy that the security on which they had relied was being eliminated, creditors mounted a series of challenges, arguing that retroactive application of the enlarged exemptions constituted an unconstitutional impairment of their contracts.

In marked contrast to their treatment of stay laws, Southern courts were generally sympathetic to the purpose behind the enlarged homestead exemptions. They tended to brush aside Contract Clause arguments and to uphold the application of homestead laws to antecedent debts. In so doing, Southern judges developed three themes that guided their opinions. First, they gave considerable weight to the depressed economic plight of the region. In 1869, Chief Judge Joseph E. Brown of Georgia emphasized "the general wreck of the fortunes and destruction of rights, caused by the war" and depicted homestead laws "as a means of equalizing losses to some extent, and of retaining and inviting population, by securing to each family a home, free of old liens."[73]

Second, courts often compared protection of homes to longstanding exemptions of items of personal property. They maintained that both federal and state courts had approved statutes granting immunity from antecedent debts to a debtor's personal property necessary for subsistence or for carrying on a trade. Noting the state's long history of retrospectively exempting farming and mechanical tools, certain farm animals,

and household furniture from execution, the North Carolina Supreme Court concluded: "If the Legislature can exempt personal property, it is not pretended that it may not in like manner exempt real estate—a homestead."[74]

Third, courts commonly insisted that the homestead laws simply amounted to a modification of the remedy to enforce contracts and were therefore well within the scope of legislative power. The exemption of real and personal property from levy, it was argued, did not impair the contract but only afforded relief to an impoverished populace. The Supreme Court of Georgia, for example, explained that the state constitutional provision establishing a homestead "is only a regulation of the remedy, and is not an impairing of any right, express or implied, secured to creditors then existing by their ordinary contracts."[75] Judicial opinions upholding the application of homestead exemptions to antecedent debts invariably invoked Chief Justice Roger B. Taney's dictum in *Bronson v. Kinzie* (1843) that a state could modify remedies based on "its own views of policy and humanity."[76] Thus, the Supreme Court of North Carolina declared in 1873 that the state's homestead laws were grounded upon "'policy and humanity'; and they do not impair, but are paramount to debts."[77]

To strengthen the contention that homestead exemptions pertained solely to the remedy, as distinct from rights under the contract itself, a number of Southern courts compared homestead laws to the abolition to imprisonment for debt.[78] The movement to end confinement for debt was a major reform of the mid-nineteenth century. Even though this change in the law eliminated a potentially efficacious remedy available to creditors, the Supreme Court had sustained it with respect to contracts made before the abolition was adopted.[79] Southern courts maintained that if states could eliminate imprisonment for debt without running afoul of the Contract Clause, then surely they could make homestead exemptions apply retroactively to pre-existing contracts.

Although the prevailing stance among Southern jurists was to treat homestead and exemption laws favorably, not all judges spoke with the same voice. Some contended that application of enlarged homestead exemptions to antecedent debts unconstitutionally despoiled the contractual rights of creditors and encouraged fraud. In a dissenting opinion, Judge Hiram Walker of Georgia insisted that Taney's remarks about state exemption laws pertained only to future contracts. He declared that the homestead exemption, as applied to agreements made before its adoption, violated the Contract Clause. Nor was Walker impressed with the emphasis upon economic hardship emanating from the Civil War. Summoning the experience of the framers, he pointedly observed:

> But it has been said that a great necessity existed, growing out of the results of the war, which would justify and sanction the violation of these great fundamental principles of government and constitutional law. Those who make this assertion should always remember that both creditor and debtor were equal sufferers by the calamities of the war. The framers of the Federal Constitution had just emerged from a seven years' war, and well knew the evils which resulted therefrom, and the general demoralization of society, in regard to performing their contracts. If we may believe the contemporary expounders of that Constitution, one of the main objects of those who framed it was to provide against and prevent the very state of things which is now attempted to be carried into effect by a majority of this Court.[80]

In addition to scattered dissents, the Supreme Court of Appeals of Virginia, in *The Homestead Cases* (1872), struck down a homestead measure applicable to prior

debts.[81] It was the only Southern court to do so in advance of decisions by the U.S. Supreme Court, and thus the opinion warrants careful consideration. The Virginia court questioned the distinction between laws that abridged contractual rights and those that purported to operate only on the remedy. "Nothing can be more material to the obligation," it explained, "than the means of enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation ..." The Virginia court took the position that any law that eliminated a remedy that a creditor had at the time the agreement was made constituted an impairment of contract in direct violation of the Constitution. It brushed aside the dictum of Chief Justice Taney upon which other Southern judges had heavily relied. The court maintained that Taney's remarks had been taken out of context, and that in fact Taney had ruled that a retrospective alteration of remedy could impair contracts. It pointed out that, in the past, the Virginia legislature had always adopted exemption laws prospectively. If the legislature had sole discretion over the amount of homestead exemptions, it continued, then lawmakers would be empowered to wipe out every debt by withdrawing property from levy.

Turning to the practical consequences of the Virginia homestead law, the court expressed concern that the measure would exempt the property of ninety percent of debtors in the state from the reach of creditors, in effect cancelling their obligations. Indeed, it speculated that potential homestead exemptions exceeded the value of all the real property in the state. Nor was the Virginia court impressed with arguments of counsel that sought to array creditors against debtors. Rejecting any class distinctions among citizens of the state, it lectured: "But the truth is, there is no such thing as a 'debtor class and a creditor class' among the people of the State ... In the great majority of cases, every man is both a creditor and a debtor ..."[82] The court concluded by acknowledging the financial hardships that many were suffering, but insisted that this was no reason to disregard contractual obligations.

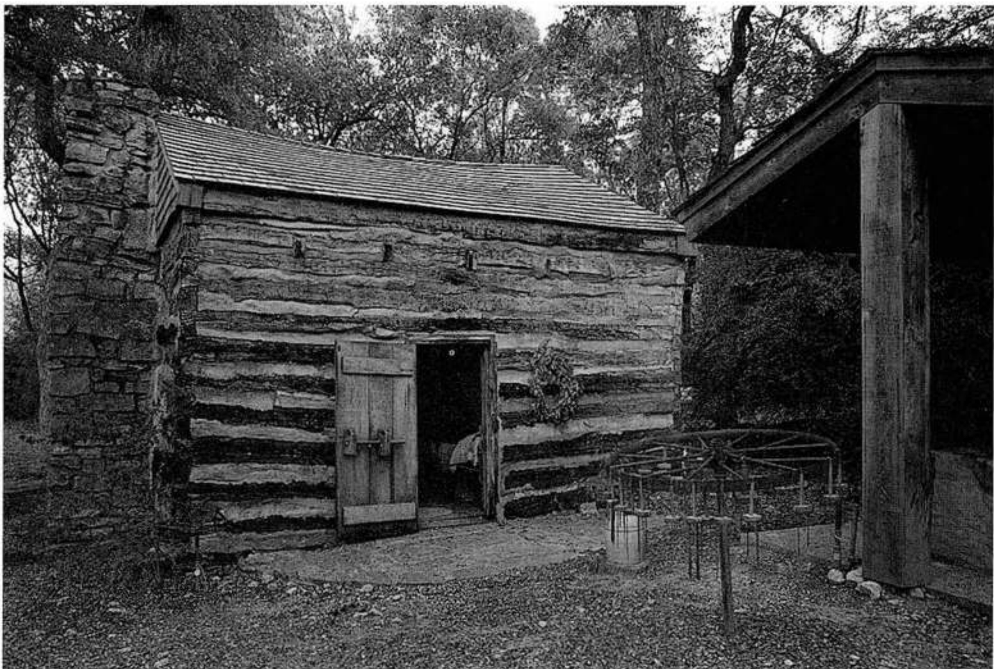
Despite frequent litigation at the state level, the validity of the enlarged and retroactive homestead exemptions did not reach the Supreme Court until 1873. In *Gunn v. Barry,* Justice Swayne, speaking for a unanimous Bench, invalidated Georgia's constitutional provision on homesteads in so far as it applied to antecedent debts. Noting "the greatly increased magnitude" of the exemptions in the state constitution over previous law, Swayne stressed that the measure "does not merely impair, it annihilates the remedy. There is none left."[83] He ruled that remedies for the enforcement of agreements existing at the time the contract was entered were part of the obligation, and that a state could alter them only if there was no impairment of a substantive right. It followed that the Georgia homestead provision impaired the obligation of antecedent contracts, and infringed the Contract Clause.

Following *Gunn*, most Southern courts acquiesced in that decision. The Supreme Court of Mississippi, for example, reversed an earlier decision and determined that an 1865 statute that greatly enlarged the exemption for both personal property and homesteads would be void if applied to prior debts. It pictured the Contract Clause as "founded on the motive of shielding the people in their persons and property from the effect of legislation arising in passion and impulse, caused by unusual emergencies, to which communities, like individuals, are exposed."[84] The court avoided a condemnation of the 1865 act under the Contract Clause by finding that the measure was applicable only to after-acquired liabilities.

On the other hand, the Supreme Court of North Carolina sought to distinguish that state's homestead provision from the invalid Georgia measure. It pointed out that the 1868 North Carolina Constitution actually reduced

the amount of homestead exemption previously available, apparently thinking that the magnitude of the exemption rather than its retrospective application was the decisive factor in *Gunn*.[85] This ruling set the stage for a second homestead decision by the U.S. Supreme Court. In *Edwards v. Kearsey* (1878), the Court, in another opinion by Justice Swayne, held that the North Carolina provision also ran afoul of the Contract Clause.[86] Emphasizing that the obligation of contract encompassed the means of enforcement, he compared the homestead exemption to clearly unconstitutional stay laws. "No community can have any higher public interest," Swayne intoned, "than in the faithful performance of contracts and the honest administration of justice." He maintained that any subsequent law that so affected the remedy as to lessen the value of a contract was barred by the Constitution. Two Justices, who concurred in the finding that the North Carolina homestead provision was invalid, were nonetheless bothered by the potential sweep of Swayne's opinion. Seeing room for "humane legislation" that exempted necessary items of personal property without violating the Contract Clause, they claimed that the extent of the challenged homestead exemption was so excessive as to impair the creditor's remedy.[87]

With the second decision by the Supreme Court, the question of retroactive application of homestead exemptions by the states to debts contracted before enactment of such laws was put to rest as a matter of constitutional law. Several observations are in order. First, the Supreme Court, unlike the Southern state courts, made no mention of the financial hardships in the region, thus implicitly rejecting economic emergency as a justification for abridging contracts.



Faced with economic collapse, Southern lawmakers initiated measures to stay the collection of debts, delay foreclosures, and facilitate the redemption of land from tax delinquency sales. Most controversially, they enlarged homestead exemptions to shelter families from destitution in a volatile market (above is a homestead near Fort Worth). The Supreme Court ruled that these exemptions violated the Contract Clause, implicitly rejecting economic emergency as a justification for abridging contracts.

Instead, it stressed the purpose of the Contract Clause and the significance of contractual stability for society at large. Second, given the Supreme Court's firm attitude, one might ponder what Southern legislators and judges achieved by passing and sustaining these homestead laws. In fact, they gained partial success. The homestead laws provided protection to landowners for the limited time between passage and subsequent nullification by the Supreme Court. As Charles Warren aptly concluded, the homestead laws, even if eventually overturned, "largely achieved their purpose of giving temporary protection to the debtor and the conservation of his property from forced sale, during the interval between the enactment of the law and its invalidation by the Court."[88] Even short-term relief gave Southern landowners an opportunity to regain their economic footing. Since the laws reflected the dominant public sentiment to preserve existing property relationships for as long as possible, there was no political downside to passing homestead legislation. Creditors, on the other hand, found the experience frustrating. Notwithstanding eventual victory in the Supreme Court, in practice they received belated and inadequate protection for their interests from the Contract Clause.[89]

Conclusion

By the end of the Reconstruction Era in 1876, the Contract Clause remained one of the most litigated provisions of the Constitution and was frequently applied by both federal and state courts in a wide variety of cases. The Supreme Court steadfastly invoked the provision to strike down state debt relief laws that infringed contractual rights. Indeed, the decade of the 1870s constituted a high water mark for the significance of the Contract Clause in constitutional history. Thereafter the clause would gradually decline in importance as the Supreme Court recognized a number of exceptions to the protection afforded contracts by the provision. Moreover, the emergence of the Due Process Clause of the Fourteenth Amendment as a shield for economic rights in the late nineteenth century would in time partially eclipse the Contract Clause. Still, the Contract Clause figured prominently in resolving legal issues relating to the Civil War and Reconstruction.

Author's Note: This article is drawn from my book, **The Contract Clause: A Constitutional History** (Lawrence: University Press of Kansas, 2016).

ENDNOTES

[1] *See, e.g.*, Laura F. Edwards, **A Legal History of the Civil War and Reconstruction: A Nation of Rights** (Cambridge: Cambridge University Press, 2015); Harold M. Hyman, A More Perfect Union; **The Impact of the Civil War and Reconstruction on the Constitution** (New York: Alfred A. Knopf, 1973); **James G. Randall, Constitutional Problems under Lincoln**, rev. ed. (Gloucester, Mass.: Peter Smith, 1963).

[2] U.S. Const. art 1, sec. 10 provides in part: "No state shall ... pass any ... Law impairing the obligation of Contracts . . . ."

[3] Henry Sumner Maine, **Ancient Law** (First American edition, New York: Charles Scribner, 1864), p. 165. He added that "the society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract."

[4] E.L. Godkin, "The Labor Crisis," *105 North American Review* 177, 183 (1867).

[5] Civil Rights Act of 1866, ch. 31, sec. 1, 14 Stat. 27.

[6] Amy Dru Stanley, **From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation** (Cambridge: Cambridge University Press, 1998), p. 2.

[7] *Hepburn v. Griswold*, 75 U.S. 603, 624 (1870).

[8] *The Homestead Cases*, 63 Va. 266, 301 (1872).

[9] *Wood v. Wood*, 48 S.C.L. 148, 150 (1867).

[10] *Hepburn v. Griswold*, 75 U.S. at 623.

[11] An Act to provide a Government for the District of Columbia, Feb. 21, 1871, sec. 20, 16 Stat. 419.

[12] *Delmas v. Insurance Company*, 81 U.S. 661, 668 (1872).

[13] Thomas M. Cooley, **A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union** (New York, 1868), p. 273.

[14] R. Hutchinson, "Laws Impairing the Obligation of Contracts," *Southern Law Review* 1 (1875), 401, 424

("The obligation of a contract can certainly be as effectively impaired or destroyed by interference with the remedy as by the most direct legislation to that end.")

[15] Confederate Const. of 1861, art. I, sec.10, cl. 1.

[16] *Id.*, at art. I, sec. 8, cl. 4.

[17] *Barnes v. Barnes*, 53 N.C. 366, 369-71 (1861) (noting that the Confederate Constitution "in this respect" was "the same" as the United States Constitution).

[18] *Burt v. Williams*, 24 Ark. 91 (1863).

[19] *See* Daniel W. Hamilton, **The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy** (Chicago: University of Chicago Press, 2007); Brian R. Dirck, "Prosperity's Blush: Civil Liberties, Property Rights, and Property Confiscation in the Confederacy," *Civil War History* 48 (2002), 237.

[20] 96 U.S. 176 (1877).

[21] *Id.* at 184, 187.

[22] *Thorington v. Smith*, 75 U.S. 1, 11-12, 14 (1869).

[23] *Roach, Administrator v. Gunter*, 44 Ala. 209 (1870).

[24] 81 U.S. 661 (1872).

[25] *Id.* at 667-69.

[26] *Wilmington and Weston Railroad Company v. King, Executor*, 91 U.S. 3, 5 (1875).

[27] *Effinger v. Kenny*, 115 U.S. 566, 574-75 (1885).

[28] For a fine discussion of this issue, *see* Andrew Kull, "The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves," *Chicago-Kent Law Review* 70 (1994), 493.

[29] *Walker v. Gatlin*, 12 Fla. 9, 16-17 (1867). See also *Hand v. Armstrong*, 34 Ga. 232 (1866) (affirming enforceability of slave purchase agreements).

[30] Kull, "The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves," 522-24.

[31] *McElvain v. Mudd*, 44 Ala. 48, 60-63 (1870).

[32] *Calhoun v. Calhoun*, 2 S.C. 283, 307 (1871).

[33] *Shorter v. Cobb*, 39 Ga. 285, 304 (1869).

[34] *Osborn v. Nicholson*, 18 Fed. Cases 846, 854-55 (C.C. E.D. Ark. 1870). Judge Henry C. Caldwell amplified his thinking in *Buckner v. Street*, 4 Fed. Cases 578, 583 (C.C. E.D. Ark. 1871) (arguing that a contract to purchase a slave was not entitled to more protection than property in a slave, and depicting slave purchase agreements as by their nature "inherently vicious and contrary to sound morals and natural justice and right, and to the fundamental policy of the government").

[35] 80 U.S. 646 (1872).

[36] *Id.* at 649, 654.

[37] 80 U.S. 654 (1872).

[38] *Id.* at 663.

[39] For the background of the dispute over the *Legal Tender Cases*, *see* Kenneth W. Dam. "The Legal Tender Cases," 1981 *Supreme Court Review* 367; Charles Fairman, **Reconstruction and Reunion, 1864-88** (New York: Macmillan Company, 1971), 677-775; Paul D. Moreno, " 'The Legitimate Object of Government': Constitutional Problems of Civil War-Era Republican Policy," in Paul D. Moreno and Johnathan O'Neill, eds., **Constitutionalism in the Approach and Aftermath of the Civil War** (New York: Fordham University Press, 2013), 168-73. *See also*, Irwin Unger, **The Greenback Era: A Social and Political History of American Finance, 1865-1879** (Princeton: Princeton University Press, 1964), 172-78.

[40] John Niven, **Salmon P. Chase: A Biography** (New York: Oxford University Press, 1995), p. 439 (noting that Chase "had always opposed in principle any governmental reliance on paper currency that had no specie basis").

[41] 75 U.S. 603 (1870). The Supreme Court had previously determined that the legal tender act did not apply to contracts that stipulated by their express terms for payment in gold coin. *Bronson v. Rodes*, 74 U.S. 229 (1868) (Chase, C.J.). *See also Trebilcock v. Wilson,* 79 U.S. 687 (1871) (Field, J.).

[42] Justice Robert C. Grier concurred in the result, making a majority of five. Grier resigned before the opinion was announced.

[43] For Chase's role in the *Legal Tender Cases*, *see* Niven, **Salmon P. Chase**, pp. 438-40.

[44] *Hepburn*, at 623. Chase also concluded that the legal tender act constituted a deprivation of property without due process in contravention of the Fifth Amendment, raising issues beyond the scope of this article.

[45] *Hepburn*, at 637.

[46] For Miller's opinion in *Hepburn*, see Michael A. Ross, **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era** (Baton Rouge, La.: Louisiana State University Press, 2003), 177-83.

[47] 79 U.S. 457 (1871).

[48] *Id.* at 551. For sharp criticism of Strong's opinion in *Knox*, *see* Richard H. Timberlake, **Constitutional Money: A Review of the Supreme Court's Monetary Decisions** (Cambridge: Cambridge University Press, 2013), 98-105.

[49] *Knox*, at 580.

[50] *Id.* at 661, 668.

[51] In his dissent in *Knox* Field charged that the majority opinion opened the door for Congress to repudiate its own promise to repay borrowed money in gold. *Id.* at 674.

[52] Morton Keller, **Affairs of State: Public Life in Late Nineteenth America** (Cambridge, Mass.: Harvard University Press, 1977), p. 199.

[53] As quoted in Eric Foner, **Reconstruction: America's Unfinished Revolution, 1863-1877** (New York: Harper & Row, 1988), p. 326. *See also* R.H. Woody, "Some Aspects of the Economic Condition of South Carolina After the Civil War," *North Carolina Historical Review* 7 (1930), 345.

[54] Elizabeth Lee Thompson, **Reconstruction of Southern Debtors: Bankruptcy after the Civil War** (Athens,

Ga.: University of Georgia Press, 2004), p. 26 ("A vast array of personal property was also exempt, particularly types of property that would benefit farmers or professionals"). *See also* Mark Wahlgren Summers, **The Ordeal of the Reunion: A New History of Reconstruction** (Chapel Hill, N.C.: University of North Carolina Press, 2014), pp. 131-32.

[55] An Act for the Relief of the People of Georgia . . . , Title XXXII No. 255, Public Laws of Georgia, March 6, 1866.

[56] *Aycock v. Martin*, 37 Ga. 124, 171 (1867) (Walker, J., dissenting).

[57] *E.g., Jones v. McMahan*, 30 Tex. 719, 735 (1868) ("We have been apprized by the defendant's counsel of the pecuniary situation of the people of this state, and that there is a real necessity for the stay law.").

[58] *Ex Parte Pollard*, 40 Ala. 77 (1866); *Ashurst v. Phillips' Executors*, 43 Ala. 158 (1869).

[59] *Aycock v. Martin*, 37 Ga. 124 (1867).

[60] *Coffman v. Bank of Kentucky*, 40 Miss. 29 (1866).

[61] *Jacobs v. Smallwood*, 63 N.C. 112 (1869); *Johnson v. Winslow*, 64 N.C. 27 (1870).

[62] *State v. Carew*, 47 S.C.L. 498 (1866); *Wood v. Wood*, *48* S.C.L. 148 (1867).

[63] *Webster & Mann v. Rose*, 53 Tenn. 93 (1871).

[64] *The Sequestration Cases*, 30 Tex. 688 (1868); *Jones v. McMahan & Gilbert*, 30 Tex. 719 (1868).

[65] *Taylor v. Stearns*, 59 Va. 244 (1868).

[66] *See, e.g., Aycock v. Martin*, 37 Ga. 124, 138 (1867); *Coffman v. Bank of Mississippi*, 40 Miss. 29, 36 (1866); *Webster & Mann v. Rose*, 53 Tenn. 93, 102-103 (1871).

[67] *Wood v. Wood*, at 150.

[68] *Marsh v. Burroughs*, 16 Fed. Cases 800, 804 (Cir. Ct. S.D. Ga. 1871).

[69] *Walker v. Whitehead*, 83 U.S. 314, 317-318 (1873). Justice Joseph P. Bradley anticipated this result in an earlier circuit court opinion. See *Lathrop v. Brown*, 14 Fed. Cases 1178 (Cir Ct. S.D. Ga. 1871) (asserting that the Georgia law imposed "onerous" conditions, and declaring: "Restrictions on the remedy which materially affect a contract tend as much to impair its validity as laws passed to abrogate it").

[70] *Roberts v. Cocke*, 69 Va. 207 (1877).

[71] For the background on homestead laws and the post-Civil War contract clause challenges, *see* James W. Ely Jr., "Homestead Exemption and Southern Legal Culture," in Sally E. Hadden and Patricia Hagler Minter, eds., **Signposts: New Directions in Southern Legal History** (Athens, Ga.: University of Georgia Press, 2013), pp. 289-314.

[72] J.H. Thomas, "Homestead and Exemption Laws of the Southern States, II," *American Law Register* 19 (1871), 149.

[73] *Hardeman v. Downer*, 39 Ga. 425, 440 (1869) (Brown, C.J., concurring).

[74] *Hill v. Kessler*, 63 N.C. 437, 445 (1869).

[75] *Hardeman v. Downer*, 39 Ga. 425, 440 (1869).

[76] 42 U.S. 311, 315 (1843). For state court opinions citing the Taney dictum, *see Stephenson v. Osborne*, 41 Miss. 119, 128 (1866); *In re Kennedy*, 2 S.C. 216, 221, 224 (1869); *Hill v. Kessler*, 63 N.C. 437, 443 (1869). Cooley also took the position that increased state exemption laws could be made applicable to prior contracts. Cooley, **A Treatise on the Constitutional Limitations**, p. 287.

[77] *Garrett v. Cheshire*, 69 N.C. 396, 405 (1873).

[78] *Stephenson v. Osborne*, 41 Miss. 119, 130 (1866); *Hardeman v. Downer*, 39 Ga. 425, 429 (1869).

[79] *Mason v. Haile*, 25 U. S. 370 (1827).

[80] *Hardeman v. Downer*, 39 Ga. 425, 464-65 (1869) (Walker, J., dissenting). *See also Hill v. Kessler*, 63 N.C. 437, 448-51 (1869) (Pearson, C.J., dissenting) (claiming that homestead law had the effect of exempting all property of debtors in nine of ten cases, thus depriving the creditor of any means of enforcing contracts).

[81] 63 Va. 266 (1872).

[82] *Id.* at 288, 299.

[83] *Gunn v. Barry*, 82 U.S. 610, 622 (1872).

[84] *Lessley v. Phipps*, 49 Miss. 790, 799 (1874).

[85] *Garrett v. Cheshire*, 69 N.C. 247 (1873); *Edwards v. Kearsey*, 75 N.C. 294 (1876).

[86] 96 U.S. 595, 603 (1878).

[87] *Id.* at 608-11. Justice John Marshall Harlan dissented without opinion.

[88] Charles Warren, **Bankruptcy in United States History** (Cambridge, Mass.: Harvard University Press, 1935), p. 150.

[89] In view of these meager practical results, creditors, especially in the Northern states, pushed for a bankruptcy system that would establish national norms for the recovery of debts. In 1867 Congress enacted another short-lived bankruptcy law. This measure, however, not only recognized state homestead laws, but was amended to permit retroactive application of such laws to prior debts. Congress, of course, was not bound by the contract clause and under its bankruptcy power could impair antecedent contracts. Dismayed, creditors saw the 1867 bankruptcy law as a failure, and called for its repeal. Congress repealed the act in 1878, once again leaving the state debt relief systems in force. *See* Peter J. Coleman, **Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy**, 1607-1900 (Madison, Wis.: State Historical Society of Wisconsin, 1974), pp. 25-26; Warren, **Bankruptcy in United States History**, pp. 105-27.

The Supreme Court, Reconstruction, and the Meaning of the Civil War

MICHAEL A. ROSS

Americans know a lot about the Civil War. Books on the war, its causes, the battles, and the home front are some of the bestselling works in American publishing. Civil War roundtables meet in cities large and small. Millions of visitors tour the war's battlefields each year. And historical reenactors recreate with remarkable authenticity the pitched fighting that took place at Gettysburg, Shiloh, and other hallowed sites. Far fewer people, however, are knowledgeable about what happened once the fighting stopped. As Justice Anthony Kennedy noted as he introduced the Supreme Court Historical Society's 2015 lecture series on the Court during the Reconstruction Era, Reconstruction is something of a mystery for most people. Perhaps, he suggested, this is because the era was so complex. "Reconstruction," he noted, "has many, many threads." And yet it is an era, he continued, that is "very important to understand in order to get a sense of who we are, and what our law is, and how we got to . . . this point in our history."[1]

Justice Kennedy was right. Understanding Reconstruction, and the role the Supreme Court played in the era, is essential for understanding U.S. Constitutional History and the society we live in today. Reconstruction is also essential to our understanding of the Civil War itself, because it was during Reconstruction that the war's meaning was defined. The Civil War, after all, did not end with a peace treaty. There was no treaty signed on the deck of a battleship like at the end of World War II. Although Confederate General Robert E. Lee's surrender to Union General Ulysses S. Grant at Appomattox is often viewed as the symbolic end of the conflict, Grant and Lee did not bargain over the big questions. The two men would almost certainly have disagreed about why the war was fought and what its consequences should be. At Appomattox, Grant told Lee that his men could simply stack their arms and go home. In the months (and years) following Lee's surrender, disputes about the war's

meaning and consequences continued to roil the nation. This article is intended as a short, general introduction to those events and the critical role the Supreme Court played in mediating the meaning of the war.[2]

As the Civil War came to a close in April 1865, over seven hundred thousand Americans lay dead. More Americans died in the Civil War than in all of the other wars the United States has fought in its history combined. Hundreds of thousands of men who survived the war were missing limbs or suffering from other debilitating physical and psychological injuries. Much of the South, moreover, lay in ruins, its cities burned and its infrastructure destroyed. Economic historians estimate that the war cost $6.6 billion in 1860s dollars—a staggering sum. If, for example, the nation's leaders in 1860 had decided not to fight a civil war and to spend $6.6 billion dollars another way, the federal government could have purchased the freedom of all four million slaves in the South, given a forty-acre farm to each slave family, and still had $3.5 billion left over to pay reparations for a century of lost wages.[3]

What, Americans wondered in Spring 1865, would all of these extraordinary costs and sacrifices be for? What would the meaning of the Civil War be? What would be the status of the former Confederate States? What would happen to the leaders of the rebellion like Jefferson Davis and Robert E. Lee? And, most importantly, what would freedom mean to the four million formerly enslaved people in the South?

The views of President Lincoln and most members of the Republican Party had evolved during the war. While at the outset they saw the war as a conflict to save the

After the Civil War, Charleston (pictured), like much of the South, lay in ruins and its infrastructure destroyed. Economic historians estimate that the war cost $6.6 billion in 1860s dollars and that if the federal government had chosen not to go to war but to purchase the freedom of all four million slaves in the South, and given a forty-acre farm to each slave family, the nation still would have had $3.5 billion dollars left over to pay reparations for a century of lost wages.

Union and popular government, by 1863 it had become a war to end slavery and give the nation, in Lincoln's words, "a new birth of freedom." As the war concluded in Spring 1865, Lincoln was implementing a plan for Reconstruction that included passage of the Thirteenth Amendment permanently abolishing slavery and the creation of the Freedmen's Bureau, a temporary federal agency run by the War Department charged with easing the former slaves' transition to freedom. He also proposed giving some African-American men (those who fought in the Union ranks and those he called "very intelligent") the right to vote. Although Lincoln probably would not have supported Radical Republicans' desire for widespread land redistribution in the South, his post-war vision for implementing a free labor system included providing schools for the freedmen and protection for African Americans' persons, property, and basic civil rights. With a Union army of occupation in place, the Old South was going to be remade and the North was going to introduce their free labor ideas and new attitudes. But one week after Lee's surrender, John Wilkes Booth assassinated Lincoln at Ford's Theater and a long, often chaotic, struggle to define the war's meaning began among the new President Andrew Johnson, the Republicans in Congress, and ultimately the Justices of the Supreme Court.[4]

Upon taking power, Andrew Johnson tried to set Reconstruction policy all by himself and thereby define unilaterally the meaning of the war. He was only in office for one month when he announced a sweeping Reconstruction plan. Back in 1864, the Republicans had selected Johnson, a Democrat, as Lincoln's Vice-Presidential running mate in order to show national unity and secure votes in the border states. Johnson, a Tennessee Unionist, was the only U.S. Senator from a seceded state who had remained in the Senate rather than resign and join the Confederacy. And as Vice President, Johnson had talked tough about the need to punish the South. In June 1864, he said: "Treason must be made odious, and the traitors must be punished and impoverished, their great plantations must be seized, and divided into small farms, and sold to honest, industrious men."[5]

In May 1865, however, now *President* Johnson announced a Reconstruction policy so lenient toward the South that it soon left his Republican supporters flabbergasted. He offered sweeping amnesty to most former Confederates. Most ex-Confederates had only to swear an oath of *renewed* allegiance and they would be allowed back into the Union just as if nothing had happened. The only exceptions to this policy were high-ranking civil, military, and judicial officers of the Confederacy, war criminals, and individuals who before the war had held more than $20,000 in taxable property (the planter class). To regain their citizenship, planters and confederate leaders would have to appeal to Johnson for a personal pardon. But those pardons Johnson granted liberally—first by the dozens, then the hundreds, then the thousands. In the Spring and Summer of 1865, pardon seekers choked the anterooms of the White House, as Johnson quickly granted over 7,000 pardons, leaving only a handful of Confederate leaders and planters disfranchised.[6]

As for the former slaves, Johnson's policies offered them little except a constricted freedom. No African-American men, even the 180,000 who fought in the Union ranks, would receive the right to vote. "This is a country for white men," Johnson reportedly wrote Missouri's provisional governor in 1865. "And by God, as long as I am president, it shall be a government for white men." That summer, Johnson allowed white Southerners to hold elections that resulted in the election of state legislatures filled with ex-Confederates, who immediately began passing the infamous Black Codes—laws designed to recreate as much of the antebellum racial and economic order as possible.[7]

The various Black Codes banned African Americans from serving on juries, marrying or socializing with white people, owning firearms, buying alcohol, meeting in groups of six or more after sundown, and using insulting gestures or language toward whites. The Black Codes required black citizens in rural areas to sign labor contracts with employers each January and to honor those contracts or face severe criminal penalties. If black workers could not provide written proof of employment for the coming year, they could be fined for vagrancy and sentenced to involuntary plantation labor. Once a black person signed a labor contract, he or she could be jailed for "bad work," "leaving home without permission," or "impudence, swearing, or indecent language to or in the presence of the employer, his family, or agent." Other clauses authorized state officials to place black minors from poor families under white employers' control. Disgusted Northerners regarded the Black Codes as a return to slavery.[8]

Southern courts established by Johnson's state governments also proved racist, obstructionist, and oblivious to Northerners' outrage. Southern judges and law enforcement officials zealously enforced the Black Codes while winking and nodding at ex-rebels who committed violent crimes against African Americans and white Unionists. State courts forbade testimony by black witnesses, making crimes against African Americans nearly impossible to prove. When the Freedmen's Bureau and the Union army responded to these inequities by creating special courts and military commissions where black people could receive justice, state officials charged bureau and army personnel with civil and criminal offenses for interfering with the Black Codes.[9]

Johnson's policies allowed many white Southerners to breathe a sigh of relief. This isn't going to be too bad, they thought. Ex-Confederates were back in power and slavery was ended, but much of the old racial and labor order was restored, and they appeared to have an ally in the White House. Then Johnson even allowed the South to hold federal elections in which Southern voters elected Congressional delegations that included ten Confederate generals, nine Confederate congressmen, and the one-time vice president of the Confederacy Alexander Stephens.[10]

Because Congress had just adjourned in March 1865 when the war came to a close, Andrew Johnson had been left alone at the helm for eight of the most critical months in U.S. history. Even though Congressional Republicans would eventually override most of Johnson's Reconstruction policies, the damage had already been done. Johnson's actions emboldened ex-Confederates who had been expecting the worst. Many white Southerners now vowed to obstruct by both legal and extralegal means any Congressional effort to reconstruct the South.[11]

When the Congress finally reassembled in December 1865, officials refused to seat Stephens and the other politicians whom Johnson had allowed Southerners to elect to the U.S. House and Senate. Citing the Article One, Section Five authority the Constitution gives to each house of Congress to be the judge of the elections, returns, and qualifications of their own members, Congress told the South that the Republican-controlled Congress, not the President, would decide when the South could rejoin the national government. And, after investigations by a Joint Committee on Reconstruction in early 1866 determined that the situation in the South was appalling, that white Southerners had not renounced secession, that there was no justice for the former slaves, and that the lives of black leaders and Northern men were not secure, a titanic struggle between the Republicans in Congress and President Johnson over the fate of Reconstruction—and by extension the meaning of the Civil War—ensued.[12]

In June 1866, over a year after the war ended, Congressional Republicans offered

President Andrew Johnson allowed white Southerners to hold elections in the summer of 1865 that resulted in the election of state legislatures filled with ex-Confederates who immediately began passing the infamous Black Codes—laws designed to recreate as much of the antebellum racial and economic order as possible. The various Black Codes banned African Americans from serving on juries, marrying or socializing with white people, owning firearms, buying alcohol, meeting in groups of six or more after sundown, and using insulting gestures or language toward whites. The Black Codes also required black citizens in rural areas to sign labor contracts with employers each January and to honor those contracts or face severe criminal penalties. This 1876 illustration shows a black man in Florida being sold to pay off a fine.

their terms of surrender to the South in the form of the Fourteenth Amendment. Before the South could elect officials to Congress, the Southern states would have to ratify an amendment that among other things barred the leaders of the former Confederacy from holding federal office, penalized states that did not allow all men the right to vote, and repudiated the Southern war debt. The Amendment also included the famous language of Section One that provided that all persons born or naturalized in the United States were citizens of the United States. Section One also barred states from abridging the privileges or immunities of citizens of the United States or depriving any person of due process of law or the equal protection of the laws. There would be no more Black Codes.[13]

This was Congress's peace treaty for the South: accept these terms, ratify this amendment, and the Southern states could once again be equal partners in the national government. But the white South, spurred on by President Johnson, refused. One by one, through the late fall and early winter of 1866, ten Southern legislatures repudiated the Fourteenth Amendment by overwhelming margins. The only Southern state that initially ratified the amendment was Tennessee. Exasperated, Republicans in Congress decided to begin the process of Reconstruction from scratch and, as one Congressman said, turn back the

clock to "the point where Grant left off the work, at Appomattox Court-House."[14]

In 1867, Congress, over Johnson's veto, passed the Military Reconstruction Act. The Act declared Johnson's provisional state governments illegal and placed the former Confederate states (except Tennessee) under military control. With the military's guidance and protection, federal registrars in each state enrolled African-American men and loyal whites to vote for delegates to state conventions tasked with drawing up new state constitutions that would protect African Americans' rights including equal male suffrage. New state governments elected under these new constitutions would be required to ratify the Fourteenth Amendment.[15] Congress claimed authority to pass the acts on the theory that the Southern states were still in the "grasp of war" and subject to Congress's war powers, or in the alternative, that by rebelling those states had reverted to a territorial status and also thus were under Congressional control.[16]

In 1867-68, biracial state conventions drew up new state constitutions that promised a new social and political order for the South. Louisiana's Constitution of 1868, for example, desegregated education, prohibited racial discrimination in public places, and included a Bill of Rights—the first in Louisiana's history—that voided the Black Codes, outlawed slavery, and guaranteed trial by jury, the right to peaceful assembly, and freedom of religion and the press.[17]

Many Southern whites, egged on by President Johnson, condemned the constitutional conventions as a farce, vowed to resist the new order that included black office holders, and organized around the rallying cry "that the 'white man's flag' shall be upheld."[18]

Southern intransigence helped Radical Republicans in Congress convince Republican Moderates that the only way to truly reconstruct the rebel states was with permanent, constitutionally protected, black suffrage. In 1869, Congress passed and sent to the states for ratification the Fifteenth Amendment, which made it unconstitutional for a state or the United States to deny anyone, North or South, the right to vote based on race, color, or previous condition of servitude. Republicans also unsuccessfully tried to impeach and remove President Johnson, an effort that failed by one vote in the Senate.[19]

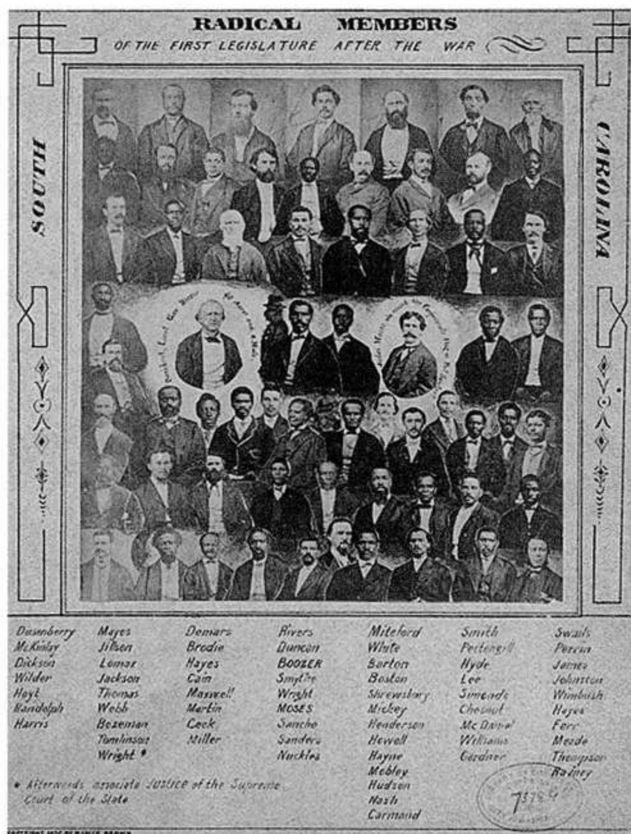
For a time, there was a remarkable, even revolutionary, moment in the South—"Radical Reconstruction," as it came to be known—where African-American men voted; served as judges, jurors, and in state militias; and held federal and state offices. Here was a much more fulsome meaning for the Civil War: the Union reunited, slavery ended, political representation for African-American men, and state laws like the Black Codes permanently abolished. In his Gettysburg Address, Lincoln had vowed that the nation would finally live up to its founding creed that "all men are created equal." During Radical Reconstruction, at least for a time, it appeared Congress might make good on Lincoln's pledge. Between 1868 and 1877, over 1,500 African Americans held political office, including seats in both houses of Congress. In Mississippi, voters elected a black man, Hiram Revels, to fill Jefferson Davis's old seat in the U.S. Senate. Some Southern cities integrated their schools and police forces. In New Orleans, the first black detectives in U.S. history solved high-profile crimes.[20]

But Radical Reconstruction was a fragile revolution. In many states, the Republican-led, biracial state governments survived only with the protection of federal troops. Across the South, reactionary violence by paramilitary groups like the Knights of the White Camellia, the White League, and the Ku Klux Klan presaged what might happen on a massive scale if federal soldiers went home. At the same time, few Northerners wanted the military patrolling of the American South as an army of occupation for very long. As Ulysses S. Grant recalled after his Presidency, "The trouble about military rule in the

South was that our people did not like it." Most Northern Republicans wanted African Americans in the South to be treated fairly, but they also wanted a return to normalcy and, as much as possible, to have the old system of federalism restored.[21]

In the end, Congressional Republicans placed their confidence in what they believed were the transformative powers of the Thirteenth, Fourteenth, and Fifteenth Amendments. Republicans hoped that, with the right to vote, African Americans would soon be able to protect themselves and to defend their own rights without the aid of the federal army. They believed that white politicians hoping to gain election would have to campaign for black votes and, as a result, give the black men and women a fair deal. And if somehow a reactionary white majority gained control of a Southern state legislature and tried to reinstitute laws like the Black Codes, African Americans could turn to Congress, the federal courts, and the Thirteenth, Fourteenth and Fifteenth Amendments for help.[22]

Placing so much responsibility for the fate of Reconstruction on the Reconstruction Amendments eventually gave the federal courts, and the Supreme Court in particular, a central role in defining the meaning of the Civil War. Because the Reconstruction Amendments served as the North's terms of capitulation to the defeated South, the judicial interpretation of the language of those amendments became extremely significant.



During Radical Reconstruction, roughly 1868 to 1877, over 1,500 African Americans held political office, including seats in both houses of Congress. Yet Republican-led, biracial state governments survived only with the protection of federal troops in South Carolina and other states. Above is a photomontage of the sixty-three members of the South Carolina legislature in 1867 showing a black majority: it was distributed throughout the state by opponents of Radical Reconstruction.

As the Supreme Court interpreted the Fourteenth Amendment's broad Section One language in particular, the Justices would shape the parameters of black freedom and, by extension, the meaning of the war.

With so much at stake, some Radical Republicans worried that the Supreme Court might use the opportunity to undo the gains that had been made. Even though Justices appointed by President Lincoln now dominated the Court, animosity against the tribunal lingered from the Taney Era and the *Dred Scott* decision. In 1866, the Court's ruling in *Ex Parte Milligan* raised new warning flags when the Court overturned a military tribunal's wartime conviction of Lambdin P. Milligan, a member of a secret, pro-Confederate paramilitary organization in Indiana who plotted in 1863-64 to seize weapons from federal arsenals and use them to free and arm Confederate prisoners-of-war in Illinois, Indiana, and Ohio. Lawyers for Milligan argued that he should never have been tried in a military court even though his plot had received Confederate funding, because the civilian courts in Indiana were open during the war and Milligan was not a Confederate soldier. The Justices unanimously agreed that Milligan should be freed, but they were divided as to the reason why. Five Justices joined an opinion by Justice David Davis that concluded that civilians should never be tried by military tribunals "where the courts are open and their process unobstructed."[23]

Although Davis's opinion has been hailed by some as a great victory for civil liberties, four Justices filed a separate opinion that reflected that *Milligan* was as much about Reconstruction politics as it was about timeless principles. Because the Southern courts created by President Johnson's state governments in 1865 proved to be biased against African Americans and loyal whites in the South, the Freedmen's Bureau, as noted earlier, had established alternative tribunals where African Americans could seek justice. But because the Bureau was run by the War Department, Republicans feared a ruling for Milligan would lead white Southerners to challenge the legitimacy of the Freedmen's Bureau courts by claiming they were, in effect, military tribunals operating in states where the civilian courts were open. In a minority opinion, written by Chief Justice Salmon P. Chase, for himself and Justices Samuel F. Miller, Noah Swayne, and James Moore Wayne, the dissenters sharply disagreed with the majority's conclusion that, short of an actual enemy invasion, Congress could never authorize military trials of civilians. There were, instead, Chase wrote, instances where civilian officials were in "active sympathy with the rebels, and courts their most efficient allies." Chase did not refer explicitly to the situation in the Reconstruction South, but everyone knew Southern courts were his target. The minority Justices agreed that Milligan should be freed, but for technical procedural reasons, that is, the military court in Milligan's case violated the Habeas Corpus Act of 1863, which required an indictment by a civilian grand jury before a military tribunal could proceed.[24]

The threat the majority opinion in *Milligan* posed to the Republicans' Reconstruction policies was clear. "The Indiana decision operates to deprive the freedmen in the late rebel states, whose laws grievously outrage them, of the protection of the freedmen's courts," *Harper's Weekly* lamented. The *Indianapolis Journal* predicted that *Milligan* was "clearly a forerunner of other decisions looking to a defeat of Republican ascendancy and a restoration of Southern domination."[25]

When the Court followed *Milligan* with two decisions declaring unconstitutional the oaths of past and future loyalty to the United States that many cities, states, and the federal government required of individuals who wanted to vote, hold office, or occupy professional positions (the so-called "test

oaths"), fears multiplied that an anti-Reconstruction majority led by Justice Stephen J. Field, a Democrat who opposed Military Reconstruction, would return the court to the bad old days of *Dred Scott*.[26] Republican editors and politicians took this threat so seriously that they issued threats of their own against the Supreme Court. Some called for Congress to pack the Bench. "By increasing or diminishing the number of judges, the court may be reconstructed in conformity with the supreme decisions of the war," the *New York Herald* brayed. House Republicans actually passed both a court-packing bill and a bill that would require a two-thirds majority of the Justices for the Supreme Court to declare unconstitutional a law passed by Congress. Congressman John Bingham went even further by warning that if the Justices further obstructed Reconstruction, he would introduce a constitutional amendment to abolish the Court entirely.[27]

Republicans' anti-Court invectives subsided after the Court, in a series of decisions, appeared to back down. In 1867, the Court rejected constitutional challenges to the Military Reconstruction Act brought by the Governors of Mississippi and Georgia. And in 1869, the Court acquiesced when Congress thwarted a pending challenge to military tribunals by rescinding the Court's appellate habeas corpus jurisdiction.[28]

Just as the tension between Congress and the Court abated, new litigation began percolating in New Orleans that would move the Court back to the center of the struggle over the fate of Reconstruction. In the Crescent City, John Archibald Campbell, a former United States Supreme Court Justice who had resigned from the Court to join the Confederacy, launched an all-out legal campaign designed to thwart Louisiana's Reconstruction government. While some white Southerners turned to violence to fight the new order, a cohort of reactionary lawyers turned to briefs rather than bullets in the effort to destroy the biracial governments in the South.[29]

The legal fight launched by Campbell and other attorneys in Louisiana targeted state laws like the one passed by the Republican-dominated state legislature that made it a criminal offense to deny African Americans entry to hotels, steamboats, railroad cars, barrooms, and other public places. Campbell's "rule or ruin" legal campaign also included litigation designed to obstruct needed economic development and sanitation projects. Because the state and city were financially strapped, the Republican legislature had turned to private capital to fund some internal improvements. The most famous of those, given the litigation that followed, was the legislature's decision to authorize a *private* corporation to build a state-of-the art slaughterhouse across the river from New Orleans in which all of the city's butchers were legally obligated to do their slaughtering. The slaughterhouse law, designed as a health measure, reflected the longstanding desire of New Orleans's citizens that the abattoirs be moved outside the city limits. Based on similar laws that had worked in New York, Philadelphia, and other cities, the slaughterhouse law was part of a plan by the biracial legislature to win over voters by modernizing the state. And, although Democrats railed against it, the technique of giving an exclusive franchise to a private company was both common in American history and supported by legal precedent. Yet, in his effort to discredit any and all Republican legislation, Justice Campbell vigorously challenged the law in numerous suits, portraying the slaughterhouse corporation as the corrupt venture of carpetbaggers and their black lackeys. The ex-Confederate press soon picked up the cry, and the butchers' defense became a celebrated cause.[30]

Campbell's most inventive legal strategy was turning the broad language of the newly ratified Fourteenth Amendment against the biracial, Republican-controlled legislature. Although the amendment's framers had intended that it protect the freedmen and

women from racist white governments in the South, in Campbell's hands the language of equal protection, privileges and immunities, and due process became weapons with which to attack Republican legislation. He argued, for example, that a Louisiana law requiring integrated seating in theaters denied New Orleans theater owners the right to run their businesses unfettered by government intrusion, a right Campbell now claimed was protected from supposedly tyrannical state laws by the Fourteenth Amendment's privileges or immunities clause. In the *Slaughter-House* litigation, Campbell took a similar approach, arguing that the slaughterhouse law violated the butchers' natural right to pursue an occupation and that the Fourteenth Amendment's Privileges or Immunities Clause now protected individuals from state laws that infringed upon that alleged natural right.[31]

Democratic editors applauded Campbell's ingenious use of a hated amendment. He was, they said, using the Fourteenth Amendment as one would swallow one poison "as an antidote to another." Previously, the *Daily Picayune* remarked, the Fourteenth Amendment

> was looked upon as one of the aggressive measures of the enemies of this section and enacted ... in the exclusive interest of the freedman or carpetbagger ... But this is an era of extraordinary events, and we find a law regarded as odious and tyrannical, both in its inception and enactment, now invoked to shelter the ... population of the chief city of the South from being trodden under foot.[32]

When the *Slaughter-House Cases* reached the Supreme Court in 1873, Campbell's strategy forced the Supreme Court to grapple with the meaning of the Civil War. As noted earlier, Republicans placed great faith in the power of the Reconstruction Amendments to create and protect a new social, political, and economic order in the South—a new order that would validate the costs and sacrifices of the late conflict.

Campbell's arguments on behalf of the butchers forced the question of whether dual federalism survived the Civil War. Campbell's assertion that the natural right to pursue an occupation was one of the "privileges or immunities" national citizenship now protected from state action by the Fourteenth Amendment left the Court little choice but to choose a side in the debate.

In *Slaughter-House*, the Court was being asked to interpret the broad language of Section One of the Fourteenth Amendment for the first time. In so doing, the Court would weigh competing views of what the Civil War's impact had been on America's political institutions. Some Radical Republicans believed that the war and the Reconstruction Amendments had reordered society, centralized power in the federal government, and given Congress sweeping power to protect individuals' civil, social, and political rights. Many moderate and conservative Republicans, in contrast, believed that the old system of federalism had survived the war and that states rather than the federal government still should be the primary guarantors and arbiters of rights. With new, progressive state constitutions in place across the South, and with black men voting and holding office, the states could now generally be trusted to protect individuals' freedoms. The Reconstruction Amendments, moderate Republicans believed, only gave the federal government *corrective* powers. If white supremacists once again gained the upper hand in state legislatures or state judiciaries, Congress and federal judges could step in to prevent the return of the Black Codes, overturn biased laws, and undo and punish due process or voting rights violations.[33]

Today, many scholars argue that Fourteenth Amendment's framers intended that the "privileges or immunities" clause incorporate the first eight amendments to the

This commemorative print was issued following the enactment in March 1870 of the Fifteenth Amendment, which made it unconstitutional for a state or the United States to deny anyone the right to vote based on race, color, or previous condition of servitude. The central image shows a celebratory parade in Baltimore. In the top center are three black leaders: Martin Robinson Delany, author and the first black major in the U.S. Army; Frederick Douglass, abolitionist and U.S. marshal for the District of Columbia; and Mississippi senator Hiram Rhoades Revels (who was elected to Jefferson Davis's old seat). At the sides are (left, top to bottom) a young man reading the Emancipation Proclamation, three men with Masonic sashes and banners ("We Unite in the Bonds of Fellowship with the Whole Human Race"), an open Bible ("Our Charter of Rights"), and a bust portrait of Abraham Lincoln. In the lower left corner is a classroom scene in a black school, labeled "Education Will Prove the Equality of the Races." In the lower right corner a pastor preaches to his congregation, with the motto "The Holy Ordinances of Religion Are Free" below. To the right of the central scene are (top to bottom): two free blacks who "till our own fields", a black officer commanding his troops ("We Will Protect Our Country as It Defends Our Rights"), a bust portrait of John Brown, and a man reading to his family ("Freedom Unites the Family Circle"). The bottom row shows three more scenes (left to right): a wedding ceremony ("Liberty Protects the Marriage Alter"), a black man voting ("The Ballot Box Is Open To Us"), and Senator Revels in the House of Representatives ("Our Representative Sits in the National Legislature").

Constitution (the Bill of Rights) against state governments. College history students are often surprised to learn that, before the Civil War, the Bill of Rights protected individuals only against the federal government. For protection of rights like the freedom of speech against laws and actions of one's state government, individuals had to look to their state constitutions. Many historians argue that at least two of the framers of the Fourteenth Amendment—Republican Congressman John Bingham of Ohio (author of most of Section One) and Senator Jacob Howard of Michigan (the floor manager of the amendment in the Senate)—intended for the privileges or immunities of national citizenship to include the rights protected by the federal Bill of Rights and perhaps natural rights like "the right to pursue an occupation."[34]

Bingham and Howard, some historians argue, recognized that if ex-Confederates ever regained control of Southern state legislatures as they had under President Johnson, the freedmen and Republicans of

both races would need the protections of the Bill of Rights (and perhaps natural rights) to shield them from discriminatory laws and practices, and that they therefore intended for the Privileges or Immunities Clause to reorder the old system of federalism. Other scholars argue, however, that the record is not so clear; that Bingham and Howard and other Republicans never made the case for incorporation forthrightly in Congress, in state ratifying conventions, or in the press; and had they meant to usher in such a dramatic shift in the federalist system, they would have used the unambiguous language of the rest of the Fourteenth Amendment, Sections 2 through 4, which they note are very detailed and specific. Section One could have said, for example, that the rights contained in the first eight amendments to the Constitution were hereby protected from infringement by state governments.[35]

The Justices were well aware of how much was at stake in *Slaughter-House*. "We do not conceal from ourselves the great responsibility which this duty devolves upon us," Justice Miller wrote in the majority opinion.

> No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, of the several States to each other, and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members.[36]

Justice Miller and the Court's majority saw danger in Campbell's propositions. If the Court interpreted the Privileges or Immunities Clause to include economic rights for white butchers, virtually any state law regulating the economy would now be subject to challenge in federal court. It would, Miller wrote, make the federal courts the perpetual censors of all state legislation. Instead, in his majority opinion in *Slaughter-House*, Miller, a former doctor who knew the need for health regulations like the slaughterhouse law, interpreted the clause narrowly and provided a short although not necessarily exclusive list of rights the majority believed constituted the privileges or immunities of national citizenship, such as the right to peaceably assemble and petition for redress of grievances, and the privilege of the writ of habeas corpus. Miller's list did not include economic rights or, as some had hoped, those contained in the Bill of Rights. The Court, Miller wrote, was not willing to undo federalism, and radically change "the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people ... *in the absence of language which expresses such a purpose too clearly to admit of doubt*."[37]

Many critics of Justice Miller's opinion in *Slaughter-House* suggest that the decision was a deliberate attempt by the Justices to undermine Reconstruction and the power of the Fourteenth Amendment and to constrict African Americans' freedom and the Civil War's meaning. The Court, critics say, purposefully aided a retreat from Reconstruction, the restoration of white supremacy, and the creation of a racial caste system in the South. As one legal historian famously lamented in the 1960s, "the only thing slaughtered in the Slaughterhouse cases was the right of the Negro to equality."[38]

Other historians, however, note that, by upholding the slaughterhouse law and preserving "dual federalism," Justice Miller and the Court's majority sided with Louisiana's biracial Reconstruction legislature, not against it, and they attempted to prevent the Fourteenth Amendment from becoming a tool of obstructionists like Campbell and of white plaintiffs and corporate interests opposed to state police powers and economic regulations. The majority opinion in

Slaughter-House, moreover, is filled with ringing language about the meaning of the Civil War and the purposes of the Civil War Amendments that emphasize the need to protect African Americans' rights.[39]

The Civil War, Miller explained, was caused by the question of whether slavery would be allowed to expand into the West, and it then became a war to end slavery itself as a result of "the bitterness and force of the conflict." "When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel," Miller wrote. "And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by the thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose."[40]

President Johnson, Miller continued, misread the meaning of the war when he sanctioned the return of ex-Confederates to power in all-white state governments that placed the freedmen "at the mercy of bad men." The Black Codes, Miller charged, "imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." Something had to be done, Miller implied, or the Civil War—a war that had become a war for freedom—might still be lost. "These circumstances . . . forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that, by the thirteenth article of amendment, they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so

"Worse than Slavery" was the caption of this Thomas Nast cartoon condemning white supremacist violence. *Harper's Weekly* published it in 1874.

much," Miller wrote. "They accordingly passed through Congress the proposition for the fourteenth amendment . . . "[41]

Miller's history of the causes and changing purpose of the Civil War was spot on. Unlike the historians of the "Lost Cause" and the "Dunning School" who later wrote into the nation's textbooks a revisionist history that claimed the war was fought over "state's rights," Miller and the Court's majority, having just lived through the events, knew why the war was fought and when and why the war became a war for freedom.[42] The same can be said for Miller's powerful assessment of the ideological origins of the Reconstruction Amendments. "We repeat, then," Miller summarized:

> in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, . . . and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

Miller did not claim that the Fourteenth Amendment only protected the former slaves, but he insisted that the amendment must be interpreted with the spirit of its "pervading purpose" in mind. And that spirit did not include protecting white butchers from needed state health regulations.[43]

Pamela Brandwein, a political scientist, has argued that many legal historians have misunderstood the rulings of the Waite Court during the Reconstruction Era (and its immediate aftermath) and conflated those decisions with those of the more racist and reactionary Fuller Court (1888-1910) that decided *Plessy v. Ferguson*. Brandwein maintains that modern scholars have too often read the Supreme Court's decisions backwards from *Plessy v. Ferguson* and by so doing have missed significant avenues the Waite Court left open for federal protection of African Americans' rights in the South. She offers convincing evidence that the Court in the 1870s and 1880s provided the federal government broad authority to protect black and white voters in national elections from intimidation, violence, and fraud perpetrated by either private citizens or state officers. Federal officials could also intervene in local affairs if state governments purposefully or negligently failed to protect African Americans' due process, contract, or property rights.[44]

This is not to say that the Waite Court's Justices were full racial egalitarians. They were Republican moderates who believed meaningful freedom for African Americans included voting rights for men and core civil rights such as due process, safety of person and property, and the right to contract for all. It did not include "social rights" such as the right to eat in a restaurant next to white people or to drink in the saloon of one's choice.

The limits to the Justices' racial worldview was starkly revealed in the *Civil Rights Cases*. In 1875, as it became clear that Military Reconstruction might not last, a lame duck Republican-controlled Congress passed a civil rights act in the waning days before they ceded power to the Democrats. The great abolitionist Senator Charles Sumner, the key proponent of the bill, had recently died, and to honor him and as a last symbolic gesture on their way out the door, the Republicans passed the Civil Rights Act of 1875, requiring that all persons born within the jurisdiction of the United States be entitled regardless of race or color to full and equal enjoyment of public accommodations

including inns, theaters, and places of public amusement. The Republicans claimed constitutional authority to regulate private businesses based on the power delegated to Congress by the Enforcement Clause of the Thirteenth Amendment. The Act, Congress claimed, eliminated private behavior that perpetuated the "badges of slavery." Republicans also found authority for the act in the Fourteenth Amendment, even though that Fourteenth Amendment prohibited discriminatory action by states, rather than private citizens. The Act's defenders argued that, because states regulated and licensed public accommodations, those businesses became, in essence, extensions of the state, and business owners' behavior could thus be reached by Congress and the Fourteenth Amendment's Equal Protection Clause.[45]

Although enforcement of the new law was haphazard, United States Attorneys did prosecute and secure indictments against some business owners, North and South, for violating the law. African-American plaintiffs also filed civil suits against businesses that refused them service. Business owners fought back by arguing that the Civil Rights Act was unconstitutional. In 1883, the Supreme Court combined five cases from California, Kansas, Missouri, New York, and Tennessee into what became known collectively as the *Civil Rights Cases*. In two of these cases, white business owners had denied African Americans rooms in their hotels; in two, African Americans had been denied admission to the dress circle at the opera; and in one, railroad officials had refused to allow an African-American woman to ride in the ladies car of a train.[46]

In October 1883, the Supreme Court in an 8-1 decision declared the 1875 Act to be unconstitutional. Congress, the Court determined, did not have authority under the Thirteenth Amendment to pass such a law. Being denied access to the dress circle of an opera, they said, did not impose a badge slavery upon the rejected person. The Fourteenth Amendment, in turn, provided redress only against the operation of state laws like the Black Codes or actions by state officers, not the actions of private business owners. If a *state* wanted to pass a law requiring private businesses to provide equal service to all races, it could. But the Fourteenth Amendment did not give Congress the authority to create a code of municipal law for the regulation of private rights.[47]

In his majority opinion, Justice Bradley added a now infamous rhetorical flourish that looks particularly unfortunate in hindsight given what subsequently occurred in the South. "When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected," Bradley wrote. To this, Justice John Marshall Harlan, in his lone dissent, responded sardonically, "It is ... scarcely just to say that the colored race has been the special favorite of the law."[48]

For some commentators, the Court's decision in the *Civil Rights Cases* proves that the Court was deliberately undermining the purpose of the Civil War Amendments in order to allow white supremacy to be fully restored in the South. If the *Slaughter-House Cases* fail to prove the point, the *Civil Rights Cases* are the smoking gun, clear evidence that the majority of the Court shared President Johnson's view of the meaning of the Civil War, rather than the view of the Radical Republicans in Congress. This is despite the fact that all of the Justices in the 8-1 majority in the *Civil Rights Cases* had been appointed by Republican Presidents.[49]

But that critical view overlooks the fact that, in 1883, most of the Justices on the Court, that is, the Civil War-generation Republican

Justices as opposed to those who later decided *Plessy v. Ferguson*, still hoped for a different result, one that would eventually lead to full equality for African Americans. Although historians often mark the end of Reconstruction as 1877, when President Hayes ordered federal troops in the South to stand down, African Americans did not immediately lose all of their political clout. In Virginia, for example, the Readjuster Party, a biracial coalition of poor whites and blacks committed to public education, won control of the state legislature in the early 1880s and sent to the U.S. Senate William Mahone, a former Confederate general who actively courted black voters. Examples like Mahone's election fueled the Republican Justices' hopes that if you protected African Americans' right to vote as well as their rights to contract, sue, testify in court, sit on juries, and to be free from physical violence, full equality would naturally follow. When the day came that both political parties courted African-American voters and the black vote split between the Republicans and Democrats, racial animosities would crumble and African Americans could be assimilated into the main currents of American life without abandoning federalism.[50]

This view is reflected in often ignored rulings the Court issued at the same time as the Civil Rights Cases. In 1880, for example, the Court announced a string of decisions protecting the rights of African Americans to serve on juries and to vote. In *Strauder v. West Virginia* (1880), the Supreme Court ruled that a West Virginia law that limited jury service to white men violated the Fourteenth Amendment's Equal Protection Clause. In *Ex Parte Virginia* (1880), the Court barred efforts by Southern states to exclude blacks administratively from juries and jury pools. When judges, city officials, and sheriffs created all-white juries by selecting only jurors they considered "sober and judicious persons" or "persons of good moral character," the Court declared such practices unconstitutional and upheld federal indictments of state officials charged with such discriminatory behavior. In *Neal v. Delaware* (1880), the Court ruled that a black defendant indicted by an all-white jury from which blacks were unfairly excluded had the right to have his conviction overturned. Delaware law required that jurors have "intelligence, experience, and moral character" necessary for the task, and Delaware officials claimed that no African-American venireman could be found in Delaware who fit that criteria. The fact that no African-American juror had ever served in Delaware, the Court noted, "presented a prima facie case of denial of equality of protection of the laws."[51]

In 1882, in *Ex Parte Yarbrough*, the court upheld the federal conviction of Georgia Ku Klux Klansman Jasper Yarbrough, who rode in disguise with other Klansmen to terrorize a black man named Berry Saunders, who had recently voted in the Congressional elections. The Justice Department indicted and convicted Yarbrough for nearly beating Saunders to death. Yarbrough's attorneys filed an application for a writ of *habeas corpus*, and, pointing to the recent precedents the *Civil Rights Cases* and *Cruikshank v. Louisiana*, they claimed that the Fifteenth Amendment, like the Fourteenth Amendment, did not give the federal government power to punish private citizens for voting rights violations; they could prosecute state officials, but not Klansmen like Yarbrough. Justice Miller and a unanimous court disagreed. In *Yarbrough*, Miller gave a broad reading to the Fifteenth Amendment and to Congress's Article One, Section Four authority to make regulations for "the times, places, and manner of holding elections." In powerful language, Miller described the dire threats to American democracy he saw from violent white supremacists in the South *and* from wealthy capitalists and corporations in the North. "If the recurrence of such (violent) acts as these prisoners stand convicted of are too common in one quarter of the country and

give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety," Miller cautioned. "No lover of his country, can shut his eyes to the future danger from both sources." Armed with the *Yarbrough* decision, the Republican Party and the Department of Justice continued a principled effort to protect black voting rights throughout the 1880s.[52]

The Supreme Court did eventually support Jim Crow—but it was the Fuller Court that forsook African Americans completely, and to do so that Court had to undermine, disregard, or overturn key Waite Court precedents. In the 1890s, Southern states revived the spirit of the Black Codes by passing laws that mandated segregation in schools, public facilities, and private businesses, and actively disfranchised black voters through the use of poll taxes and unfairly applied literacy tests. This time, the Justices capitulated almost completely to the white South, abandoning the commitment to protecting African Americans' due process and political rights that they had shown in cases like *Neal v. Delaware* and *Yarbrough*, and instead giving the Court's imprimatur to Jim Crow in cases like *Plessy* and *Williams v. Mississippi*.[53]

By the time of *Plessy* and *Williams*, all but one of the Justices appointed by Lincoln and Grant—the Civil War Era Justices—had died or retired. In their place were younger men, some of whom embraced the tenets of Social Darwinism and Legal Formalism and all of whom, with the notable exception of John Marshall Harlan, embraced the ethos of reconciliation between the white North and white South that accompanied the Spanish-American War. It was at the turn of the twentieth century that most white Americans, including historians, came to agree that it was good that the South lost the Civil War, that the Union was saved, and that slavery ended, but that it was also good that Reconstruction (the "Tragic Era") failed and that white supremacy was restored. By the end of the 1890s, it was clear that the Radical Republicans in Congress had lost; the moderate, Reconstruction Era Republicans on the Supreme Court had lost; and the struggle to define the meaning of the Civil War had been won, at least for a time, by the ideological descendants of Andrew Johnson.[54]

ENDNOTES

[1] *See* Justice Kennedy's introduction to the Silverman Lecture delivered by the author (March 11, 2015): http://www.c-span.org/video/?324778-1/discussion-reconstruction-us-supreme-court.

[2] For an excellent analysis of the meaning of what occurred at Appomattox, *see* Elizabeth Varon, **Appomattox: Victory, Defeat, and Freedom at the End of the War** (New York: Oxford University Press, 2013), pp.1-3, 48-78.

[3] Claudia Goldin and Frank Lewis, "The Economic Cost of the American Civil War: Estimates and Implications," *The Journal of Economic History* 35 (June 1975), 299-326. The traditional estimate of the number of Civil War dead was 620,000, but in 2011 historian J. David Hacker published a groundbreaking article that employed public-use microdata samples of the 1850, 1860, 1870, and 1880 censuses to reveal that a more accurate estimate of Civil War deaths was somewhere between 650,000 and 850,000 with a preferred estimate of 750,000. See J. David Hacker, "A Census-Based Count of the Civil War Dead," *Civil War History*, 57 (December 2011), 307-48.

[4] Eric Foner, **The Fiery Trial: Abraham Lincoln and American Slavery** (New York: W.W. Norton, 2010), pp. xv-xxi, 166-336; John C. Rodrigue, **Lincoln and Reconstruction** (Carbondale: Southern Illinois University Press, 2013), 126-28, 136, 143-47.

[5] Johnson's "Treason Must Be Made Odious" Speech, June 9, 1864, reprinted in Walter Lynwood Fleming, **Documentary History of Reconstruction: Political, Military, Social, Religious, Educational, and Industrial, 1865 to the Present Time**, vol. 1 (Cleveland, Ohio: Arthur H. Clark, 1906), p. 116.

[6] Eric Foner, **Reconstruction: America's Unfinished Revolution, 1863-1877** (New York: Harper & Row, 1988), p., 190; Eric L. McKitrick, **Andrew Johnson and Reconstruction** (Chicago: University of Chicago, 1960), pp. 145-49.

[7] McKitrick, **Andrew Johnson and Reconstruction**, p. 184 ("white men"). Johnson did once suggest to Mississippi's provisional governor in August 1865 that he'd consider giving literate black men and those who owned more than $250 worth of property the right to vote as a way of thwarting Radical Republicans' calls for

universal black male suffrage. Partial black suffrage, Johnson wrote, would "completely disarm the adversary ... [T]he radicals, who are wild upon negro franchise, will be completely foiled." But the plan came to nothing, and Johnson quickly pivoted back to total opposition to black suffrage of any kind. *See* Louis P. Masur, **Lincoln's Last Speech: Wartime Reconstruction and the Crisis of Reunion** (New York: Oxford University Press, 2015), p. 180 ("completely disarm").

[8] Dan Carter, **When the War was Over: The Failure of Self-Reconstruction in the South, 1865-1867** (Baton Rouge, Louisiana: Louisiana State University Press, 1986), pp.148-50, 177, 217-27 (quotations); Foner, **Reconstruction**, pp. 199-202.

[9] Michael A. Ross, **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era** (Baton Rouge: Louisiana State University Press, 2003), p. 114; Christopher Waldrep, "Substituting the Law for the Lash: Emancipation and Legal Formalism in a Mississippi County Court," *Journal of American History* 82 (March 1996), 1425-51; Harold Hyman and William Wiecek, **Equal Justice Under Law: Constitutional Developments, 1835-1875** (New York: Harper Collins, 1982), pp. 319-20.

[10] Carter, **When the War Was Over**, 229, 230; Foner, **Reconstruction,** 196; Ross, **Justice of Shattered Dreams,** pp. 111113

[11] Foner, **Reconstruction**, p. 189; James McPherson, **The War that Forged a Nation: Why the Civil War Still Matters** (New York: Oxford University Press, 2015), pp. 175-79; Ross, **Justice of Shattered Dreams**, p. 111.

[12] Hyman and Wiecek, **Equal Justice under Law,** p. 311; Ross, **Justice of Shattered Dreams,** pp.116-21.

[13] Congress attempted at first to undo the Black Codes with the Civil Rights Act of 1866, which empowered the federal government to act if Southern states failed to protect the rights of African Americans to make and enforce contracts, to bring lawsuits and give evidence in court, to own property, and to enjoy the "full and equal benefit of all laws and proceedings ... as is enjoyed by white citizens." Civil Rights Act of 1866, *Statutes at Large* 14 (1866): 137. There was some concern, however, about the Civil Rights Act's constitutionality and whether it might be easily repealed if the Democrats gained a majority in Congress. In the face of Southern resistance, Republicans decided that a constitutional amendment was needed. For passage by Congress of the Fourteenth Amendment, see Michael Kent Curtis, **No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights** (Durham, NC: Duke University Press, 1986), pp. 2, 3, 9, 131-53; Garrett Epps, **Democracy Reborn: the Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America** (New York: Henry Holt, 2006), pp, 11-12, 224-53; William Nelson, **The Fourteenth Amendment: From Political Principle to Judicial Doctrine** (Cambridge: Harvard University Press, 1998), pp. 40-91; Ross, **Justice of Shattered Dreams**, pp.119-21, 136-38.

[14] Foner, **Reconstruction,** p. 273 ("the point where"); Joseph B. James, **The Ratification of the Fourteenth Amendment** (Macon, Ga.: Mercer University Press, 1984), pp. 23, 139-40; Michael Perman, **Reunion Without Compromise: The South and Reconstruction, 1865-1868** (Cambridge: Cambridge University Press, 1973), pp. 156-57, 169-70; Ross, **Justice of Shattered Dreams**, pp. 137-38.

[15] In addition, Congress passed the Habeas Corpus Act, which, by increasing citizens' ability to remove cases to federal courts, protected federal officials and loyal Southerners from obstructionist state tribunals. Foner, **Reconstruction**, pp. 273-78; Ross, **Justice of Shattered Dreams**, p. 148.

[16] A few Congressional Republicans also justified Military Reconstruction by citing the Constitution's Article 4, Section 4 guarantee that the United States guarantee each state a Republican form of government. Michael Les Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," in **Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era** (New York: Fordham University Press, 2006), pp. 10-11.

[17] Joe Gray Taylor, **Louisiana Reconstructed, 1863-1877** (Baton Rouge, LA: Louisiana State University Press, 1974), pp. 146-51; Ted Tunnell, **Crucible of Reconstruction: War, Radicalism, and Race in Louisiana, 1862-1877** (Baton Rouge: Louisiana State University Press, 1984), p. 107.

[18] Michael Ross, "Justice Miller's Reconstruction: The Slaughter-House Cases, Health Codes, and Civil Rights in New Orleans, 1861-1873," *Journal of Southern History*, 64 (Nov., 1998), 649-76 at 663 (quote).

[19] Foner, **Reconstruction,** pp. 444-49. For the impeachment and trial of Andrew Johnson see Michael Les Benedict, **The Impeachment and Trial of Andrew Johnson** (New York: Norton, 1973), and David O. Stewart, **Impeached: The Trial of Andrew Johnson and the Fight for Lincoln's Legacy** (New York: Simon and Schuster, 2009).

[20] For a partial list and brief biographies of African-American office holders during Reconstruction *see* Eric Foner, **Freedom's Lawmakers: A Directory of Black Officeholders during Reconstruction,** rev. ed (Baton Rouge: Louisiana State University Press, 1996). For the challenges African-American politicians faced, *see* Philip Dray, **Capitol Men: The Epic Story of Reconstruction Told through the Lives of the First Black Congressmen** (New York: Houghton Mifflin Harcourt, 2008). For an account of the roles played by the

first black detectives in New Orleans, see Michael Ross, **The Great New Orleans Kidnapping Case: Race, Law, and Justice in the Reconstruction Era** (New York: Oxford University Press, 2015).

[21] John Russell Young, **Around the World with General Grant: A Narrative of the Visit of General U.S. Grant, Ex-President of the United States, to Various Countries in Europe, Asia, and Africa, in 1877, 1878, 1879**, 2 vols. (New York: American News, 1879), 1:362 (quotation). For most Northern Republicans' desire to return to the old system of federalism, see Benedict, "Preserving the Constitution," 3-22.

[22] Some scholars argue the Republicans counted too heavily on the transformative power of voting rights, in particular. Some even suggest that granting African Americans the right to vote in 1868 was a mistake. For a recent scholarly exchange on the subject, *see* Adam Fairclough, "Was the Grant of Black Suffrage a Political Error? Reconsidering the Views of John W. Burgess, William A. Dunning, and Eric Foner on Congressional Reconstruction," *Journal of the Historical Society*, 12 (June 2012), 155-88, and Michael A. Ross and Leslie S. Rowland, "Adam Fairclough, John Burgess, and the Nettlesome Legacy of the 'Dunning School,'" *Journal of the Historical Society*, 12 (September 2012), 249-70.

[23] *Ex Parte Milligan*, 71 U.S. 2, 121 (1866).

[24] *Ex Parte Milligan*, 71 U.S. 2, 140-42 (1866).

[25] *Harper's Weekly*, January 19, 1867 *Indianapolis Journal*, January 2, 1867; Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (Lawrence, KS: University Press of Kansas, 1997), p. 109; Ross, **Justice of Shattered Dreams**, pp. 121-28.

[26] *Cummings v. State of Missouri* 71 U.S. 277 (1866); *Ex Parte Garland* 71 U.S. 333 (1866).

[27] *New York Herald*, December 20, 1866 Ross, **Justice of Shattered Dreams**, p. 144. For Bingham's threat, *see Congressional Globe*, 39th Congress, 2nd Sess., 500-503.

[28] *Mississippi v. Johnson*, 71 U.S. 475 (1867); *Georgia v. Stanton*, 73 U.S. 50 (1867); *Ex Parte McCardle*, 74 U.S. 506 (1869).

[29] Michael A. Ross, "Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign against Louisiana's Republican Government, 1868-1873," 49 *Civil War History*, 235-53; Ross, "Justice Miller's Reconstruction," 663-65. *See also* Cynthia Nicoletti, "Strategic Litigation and the Death of Reconstruction," in Sally Hadden and Patricia Minter, eds., *Signposts: New Directions in Southern Legal History* (Athens: University of Georgia Press, 2003): 265-88.

[30] *Ibid. See also* Paul Kens, **The Supreme Court under Morrison R. Waite 1874-1888** (Columbia: The University of South Carolina Press, 2010), p. 19.

[31] *Ibid.*

[32] *Daily Picayune*, June 7, 1870 ("aggressive measures"), June 17, 1870 ("antidote"), June 16, 1870, Ronald M. Labbe and Jonathan Lurie, **The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment** (Lawrence, Kansas: University Press of Kansas, 2005), p. 143.

[33] Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," 3-22; Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *The Supreme Court Review*, Vol. 1978 (1978): 39-79.

[34] So many books and articles have been written on the subject of whether the Fourteenth Amendment's Privileges or Immunities Clause incorporated the Bill of Rights against the states, that only a representative sample can be listed here. For examples of the pro-incorporationist argument, *see* Richard L. Aynes, "On Misreading John Bingham and the Fourteenth Amendment," *Yale Law Journal* CII (October 1993): 57-104; Michael Kent Curtis, **No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights** (Durham, NC: Duke University Press, 1986); Kurt T. Lash, **The Fourteenth Amendment and the Privileges and Immunities of National Citizenship** (New York: Cambridge University Press, 2014); William E. Nelson, **The Fourteenth Amendment: From Political Principle to Judicial Doctrine** (Cambridge: Harvard University Press, 1988), 155-68. For the anti-incorporationist position, *see* Raoul Berger, "Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat," *Ohio State Law Journal*, XLII (No. 2, 1981), 435-66; Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," *Stanford Law Review*, II (December 1949), 5-139; Phillip Hamburger, "Privileges or Immunities," *Northwestern University Law Review* 105 (2011): 61-148.

[35] *Ibid.*

[36] *Slaughter-House Cases*, 83 U.S. 36, 67 (1873).

[37] *Slaughter-House Cases*, 83 U.S. 36, 79-80 (1873) (emphasis supplied).

[38] Leo Pfeffer, **This Honorable Court: A History of the United States Supreme Court** (Boston: Beacon Press, 1965), p. 200 ("the only thing slaughtered"). For representative "Retreat from Reconstruction" monographs, see Lawrence Goldstone, **Inherently Unequal: The Betrayal of Equal Rights by the Supreme Court, 1865-1903** (New York: Walker & Company, 2011); Robert J. Kaczorowski, **The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876** (New York: Oceana Press, 1985); Charles Lane, **The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction** (New York: Henry Holt, 2008); Frank J. Scaturro, **The Supreme Court's Retreat from Reconstruction** (Wesport, CT: Greenwood Press, 2000).

[39] *See, for example*, Pamela Brandwein, **Rethinking the Judicial Settlement of Reconstruction** (New York:

Cambridge University Press, 2011), pp. 53-59; Labbe and Lurie, **The Slaughterhouse Cases,** 1-16; Ross, **Justice of Shattered Dreams,** pp. 189-210; Ross, "Obstructing Reconstruction," pp. 235-53.

[40] *Slaughter-House Cases*, 83 U.S., 68.

[41] *Slaughter-House Cases*, 83 U.S., 70-71.

[42] For the influence of "Lost Cause" and "Dunning School" historians on the historiography of the era, *see* David W. Blight, **Race and Reunion: The Civil War in American Memory** (Cambridge: Harvard University Press, 2001); Gaines Foster, **Ghosts of the Confederacy: Defeat, the Lost Cause, and the Emergence of the New South** (New York: Oxford Univ. Press, 1987); J. Vincent Lowery and John David Smith (eds.), **The Dunning School: Historians, Race, and the Meaning of Reconstruction** (Lexington University of Kentucky Press, 201); Charles Reagan Wilson, **Baptized in Blood: The Religion of the Lost Cause, 1865–1920** (Athens: Univ. of Georgia Press, 1980).

[43] *Slaughter-House Cases*, 83 U.S., 72. For an opposing view that Miller's assessment of the ideological origins of the Fourteenth Amendment was too narrow, *see* Michael Kent Curtis, "Reflections on Albion Tourgée's 1896 View of the Supreme Court: A 'Consistent Enemy of Personal Liberty and Equal Right'?," 5 *Elon Law Review* 19-87 (2013), pp. 43-44.

[44] Brandwein, **Rethinking the Judicial Settlement of Reconstruction.** See also her article in this issue at p. 329-46. *See also* Kens, **The Supreme Court under Morrison R. Waite 1874-1888.**

[45] Civil Rights Act of 1875, 18 Stat. 335 (1875). *See also* Kens, **The Supreme Court under Morrison R. Waite 1874-1888**, pp. 53-58.

[46] *Civil Rights Cases*, 109 U.S. 3 (1883). *See also* Goldstone, **Inherently Unequal**, pp. 99-104; Kens, **The Supreme Court under Morrison Waite,** pp. 53-55; John Hope Franklin, "The Enforcement of the Civil Rights Act of 1875," *Prologue*, 6(Winter 1974), 225-35.

[47] *Civil Rights Cases*, 109 U.S., 24-25.

[48] *Ibid.*, 24-25, 61-62.

[49] *See, for example*, Goldstone, **Inherently Unequal,** pp. 118-29.

[50] Ross, **Justice of Shattered Dreams**, pp. 249-50; Pamela Brandwein, **Rethinking the Judicial Settlement of Reconstruction** (New York: Cambridge University Press, 2011), pp. 1-27; Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," 1978 *Supreme Court Review* 39-79. For the Readjuster Party in Virginia, *see* Jane Dailey, **Before Jim Crow: The Politics of Race in Postemancipation Virginia** (Chapel Hill University of North Carolina Press, 2000); **C. Vann Woodward, Origins of the New South 1877-1913** (Baton Rouge, Louisiana State University Press, 1951), pp. 86-106.

[51] *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880); *Neal v. Delaware*, 103 U.S. 370 (1882).

[52] *Ex parte Yarbrough*, 110 U.S. 651 (1884). *See also Ex Parte Siebold*, 100 U.S. 371 (1880), and *Ex Parte Clarke*, 100 U.S. 399 (1880). For a superb description of the constitutional theory utilized by the majority in *Yarbrough* and *Siebold*, *see* Brandwein, **Rethinking the Judicial Settlement of Reconstruction,** pp. 144-60. For efforts by the federal government to protect black voting rights in the South in the 1880s, *see* Brandwein, *Id.*, pp. 7, 9, 15; Charles W. Calhoun, **Conceiving a New Republic: The Republican Party and the Southern Question, 1869-1900** (Lawrence: University Press of Kansas, 2006).

[53] *Plessy v. Ferguson* 163 U.S. 537 (1896); *Williams v. Mississippi*, 170 U.S. 213 (1898). *See also* Brandwein, **Rethinking the Judicial Settlement of Reconstruction**, 1-27, 184; Benedict, "Preserving Federalism," 65-67; Mark Elliott, **Color Blind Justice: Albion Tourgee and the Quest for Racial Equality from the Civil War to *Plessy v. Ferguson***, (New York: Oxford, 2008); Williamjames Hull Hoffer, ***Plessy v. Ferguson*: Race and Inequality in Jim Crow America** (Lawrence, Kansas: University of Kansas Press, 2012).

[54] Edward L. Ayers, **The Promise of the New South: Life after Reconstruction** (New York: Oxford University Press, 1992), 422-24; Epps, **Democracy Reborn,** 262-64; Blight, **Race and Reunion,** 255-99; Paul Kens, ***Lochner v. New York*: Economic Regulation on** Trial (Lawrence, KS: University of Kansas Press, 1998), 74-79, 182-84; Charles Lofgren, **The Plessy Case: A Legal-Historical Interpretation** (New York: Oxford University Press, 1988), 93-155, 93-115; Nina Silber, **The Romance of Reunion: Northerners and the South 1865-1900** (Chapel Hill, NC: The University of North Carolina Press, 1997), Chapters 5, 6.

The Three Narratives of the *Slaughter-House Cases*

RANDY E. BARNETT

The *Slaughter-House Cases*,[1] decided in 1873, involved a state statute granting a franchise to a privately-owned slaughter-house, which would then have a monopoly on slaughtering livestock for the entire City of New Orleans and surrounding parishes. In those days, prominent cases were sometimes given descriptive names, such as the *Legal Tender Cases*[2] or the *Lottery Case*.[3] The "*Slaughter-House Cases*" is plural because it consolidated many challenges that had been brought by individual New Orleans butchers as well as by associations of butchers and livestock dealers. Because these challenges alleged that the monopoly violated the Fourteenth Amendment, this then became the first Supreme Court case to pass upon the meaning of the Fourteenth Amendment since it was ratified five years earlier.

The case became enormously influential —not for everything it held, most of which has been superseded by other decisions, but for what it said about the scope of the Privileges or Immunities Clause of the Fourteenth Amendment, which reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[4] Now, if you were a stranger to constitutional law and I read you that sentence, you would think it sounded pretty important, wouldn't you? "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." That sounds like a big deal.

Yet, it's no exaggeration to say that, because of the decision in *Slaughter-House* and *United States v. Cruikshank*[5] decided three years later, the Privileges or Immunities Clause ceased to play any meaningful role in protecting either enumerated or unenumerated rights. Until Justice Thomas's concurring opinion in the 2010 case of *McDonald v. City of Chicago*,[6] in which he provided the crucial fifth vote to invalidate a city's ban on all privately owned handguns, the Privileges or Immunities Clause had made just one appearance in a Supreme Court decision since *Slaughter-House*. The clause has been all-but-redacted from the text of the Constitution.

"Redacted" is a lawyer's term for excised or eliminated.

For this reason, perhaps it is no surprise that the Court's decision in *Slaughter-House* has been widely criticized by constitutional scholars. As Yale Law School's Akhil Amar has stated: "Virtually no serious modern scholar left, right, and center—thinks that *Slaughterhouse* is a plausible reading of the Fourteenth Amendment."[7]

Not that the modern consensus is unanimous. In a recent book, University of Illinois law professor Kurt Lash has taken up the mantle of defending the Court's opinion in *Slaughter-House*.[8] Professors Michael Ross[9] and Pamela Brandwein[10] have also had some kinder things to say about Justice Samuel F. Miller's majority opinion, as do Ronald Labbé and Jonathan Lurie in their marvelous 2003 book about the history of the case.[11]

In this article, however, I am not going to litigate this dispute. My own view that the majority misinterpreted the Privileges or Immunities Clause is a matter of public record.[12] Indeed, in the interest of full disclosure, I should mention that law professors Richard Aynes, Jack Balkin, Steven Calabresi, Michael Kent Curtis, Michael Lawrence, Bill Van Alstyne, Adam Winkler, and I filed an amicus brief in *McDonald* contending that *Slaughter-House* should be reversed.[13] To support that conclusion here, however, would require an exegesis of historical materials and interpretive methodology that would necessarily be incomplete. Even worse, it would be extremely tedious.

Instead, I wish to view the case through the lenses of three competing narratives. The first is the Narrative of Public Health that is offered to support the majority's decision to uphold the slaughter-house monopoly. The second is the Narrative of Public Corruption that undercuts their decision. Finally, in recent years a third narrative has been offered to defend the outcome in *Slaughter-House*: the Narrative of Race.

Then, at the end of this article, I am going to question whether we should be judging Supreme Court decisions by such narratives and explain why the conflicting nature of these three narratives suggests that it is better to simply follow the original meaning of the text. But first let me tell the stories, beginning with the Narrative of Public Health.

The Narrative of Public Health

As Labbé and Lurie chronicle in grisly detail, the health conditions in New Orleans in the years leading up to and following the Civil War were atrocious.[14] In the 1820s, they note, a visiting French physician reported that, "with the exception of the homes of the elite, the condition of the yards is such that you would think savages lived there."[15] In 1854, an advocate of sanitary reform wrote that "New Orleans is one of the dirtiest ... and consequently the sickliest city in the Union."[16] Another reformer summarized the sanitary conditions of the city between 1796 and 1869 as "one long, disgusting story of stagnant drainage, foul sewerage, environing swamps, ill and unpaved streets, no sanitary regulations, and filth, endless filth, every where."[17]

In the years between 1796 and 1869, yellow fever plagued New Orleans on thirty-six occasions.[18] In a single summer, the epidemic of 1853 killed one-tenth of the population, followed by epidemics nearly as severe in 1854 and 1855.[19] In addition to the attacks of yellow fever, "[e]leven epidemics of cholera descended on the Crescent City between 1832 and 1869."[20]

New Orleans was only spared these epidemics during its occupation by Union forces after its surrender in 1862.[21] The controversial Union General Ben Butler, who took charge of the city, later wrote that its streets were "reeking with putrefying filth."[22] On a carriage ride with his wife to inspect the town, as they approached the basin near Lake Pontchartrain,

the air, he said, was "filled with the most noxious and offensive stenches possible."[23] He found the thick odor to be "so noxious as almost to take away the power of breathing. The whole surface of the canal and the pond was covered with a thick growth of green vegetable scum, variegated with dead cats and dogs or the remains of dead mules on the banking."[24]

Butler ordered a complete cleanup of the city, including hiring a force of some 2,000 men to clean the streets, squares, and unoccupied areas.[25] He established a quarantine station seventy miles below the city to inspect every ship before it could come into port.[26] According to his biographer, "He tore away shanties, filled up holes, purged the canals, cleaned the streets, repaired the levee, and kept the city in such perfect cleanliness" that even the occupied citizenry that despised him had to admit that "the federals could clean the streets, if they couldn't do anything else."[27] As a result of all this effort, "New Orleans was spared from epidemics throughout Federal occupation."[28]

After the city was returned to civilian control, however, sanitary conditions reverted to their previous slovenly state. With the city now "filthy in the extreme," in the words of one observer, it was struck twice with cholera epidemics in 1866.[29] A year later, yellow fever again hit the city.[30]

Although public health advocates had advocated and even enacted health measures as early as the 1820s, political resistance and corruption prevented their effective implementation.[31] Among these unenforced regulations were restrictions on the disposal of the waste that accompanied the slaughtering of animals that took place throughout the city limits. Labbé and Lurie tell us that:

> In New Orleans, animals were routinely herded through the streets. Slaughtering sometimes took place in the open within sight of the

Union General Ben Butler ordered New Orleans cleaned up after it surrendered in 1862, but the city retreated to its filthy state when it returned to civilian control. Cholera and yellow fever epidemics quickly followed. Above is Canal Street circa 1864.

> public, including children. When offal was disposed of "correctly," it was loaded into open carts . . . that were driven, leaking and reeking, through the streets to "nuisances wharves," where it was supposed to be dumped in the river. But much of it was simply discarded into the streets and gutters or left to rot and fester in butchers' backyards.[32]

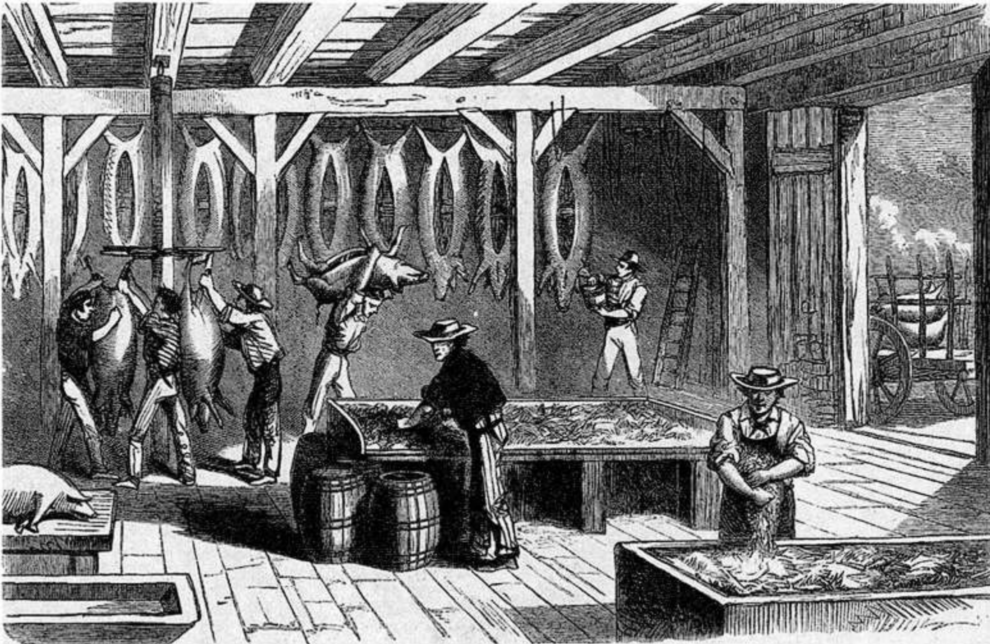
An 1859 report of the Board of Health described the gutters as "sweltered with the blood and draining of slaughter-pens."[33]

In 1868 it was estimated that New Orleans hosted 150 slaughterhouse,[34] with the great majority of these "located in well-populated areas of the city, only about one and a half miles upstream from the two large intake pipes for the city's water supply."[35] One health officer testified that:

> The amount of filth thrown into the river above the source from which the city is supplied with water, and coming from the slaughterhouses, is incredible. Barrels filled with entrails, livers, blood, urine, dung, and other refuse portions in advanced stage of decomposition, are being constantly thrown into the River, but a short distance from the banks, poisoning the air with offensive smells and necessarily contaminating the water near the banks for miles.[36]

The slaughterhouse act enacted by the Louisiana legislature addressed these public health issues in three ways.[37] First, it stipulated that there would be just one slaughterhouse to service the City of New Orleans and surrounding parishes. Second, it issued a franchise to build and operate this facility to a specially chartered corporation made up of private investors. Third, it located the slaughterhouse across the river and downstream from the City.

Two years earlier, the legislature formed a special committee to address the



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slaughterhouse issue.[38] It was comprised of ten representatives from each of the four New Orleans municipal districts as well as the neighboring Jefferson and St. Bernard parishes.[39] The committee took evidence from "nine physicians, including all four of the city's health officers, the superintendent of the waterworks, a representative of the board of health, several wharf managers, and a number of individuals with knowledge of or interest in slaughterhouse operations or the conditions of the river."[40]

Labbé and Lurie found that the evidence amassed by the committee "constituted a well-thought-out, comprehensive, and fact-based justification for slaughterhouse reform."[41] They conclude that "almost two years before enactment of the famous (or infamous) slaughterhouse statute, the Louisiana legislature had for its consideration all available evidence, options, alternatives, proposals, justifications, and rebuttals concerning relocation of the slaughterhouses."[42]

So, according to the Narrative of Public Health, the decision in *Slaughter-House* was correct because there was a strong police power rationale for the measure. Removing the numerous slaughterhouses scattered throughout New Orleans abated the nuisance they caused and confining all slaughtering to below the city protected the water supply. And creating a single monopoly slaughterhouse across the river from the city served two purposes.

First, the potential profits from the franchise would induce private investors to spend the money to build a state-of-the-art abattoir during a time when the ability of local government either to raise taxes or float bonds to pay for such a facility was very weak. As Michael Ross has observed, "Because of the lack of capital in Louisiana after the war and the dire financial circumstances of the Reconstruction government, legislators had little choice but to turn to creative methods of funding their Whiggish development program."[43] Second, confining slaughtering to a single facility would enable a more effective regime of meat inspections to be implemented than was possible with small establishments scattered throughout the city.

As for the butchers' claim that the monopoly infringed on their right to pursue their lawful occupation—a right they claimed to be among the privileges or immunities of American citizens—the monopoly was obligated by law to allow any butcher to use the slaughterhouse facility at a regulated rate. So no one's privilege to be a butcher was impeded by confining slaughtering to this facility. Indeed, by creating this public utility, the capital requirements to entering the butchering business were lowered. The law was a win for the franchise holders, a win for the butchers, and above all a win for the health of the general public. According to this narrative then, the Supreme Court was right to uphold the slaughterhouse law.

The Narrative of Public Corruption

But there is another narrative that was advanced by the law's political opponents, including Democratic newspapers, and it is this: the slaughterhouse act was a product of a corrupt state legislature. Back then, government at all levels in Louisiana was notoriously corrupt. Okay, strike "back then." Make it: "government in Louisiana has *always* been notoriously corrupt."

In the wake of the Civil War, "men saw opportunities for personal profit" from public improvements "particularly if they could be undertaken in partnership with the state in terms of either authority or funding."[44] As a result, Labbé and Lurie note that "a great many sinecures and exclusive franchises for such things as a state lottery, state printing, hay inspection, and state aid for the construction of navigation and drainage canals were adopted."[27] For example, the franchise granted to a private company to establish a monopoly Louisiana State Lottery around the

same time as the slaughterhouse scheme was well-known to have been the product of bribes paid to state legislators.[45]

When you think about it, Louisiana politics has led to some of our most famous—and infamous—Supreme Court cases: *Slaughter-House*, *Cruikshank*,[46] *Hans v. Louisiana*,[47] and *Plessy v. Ferguson*[48] all involved Louisiana. But perhaps we should not be too hard on poor Louisiana. In fairness, corruption of state legislatures—as well as in Congress—associated with economic development schemes was commonplace in the Nineteenth and early Twentieth Century. As Eric Foner has observed, "[b]ribery, fraud, and influence peddling have been endemic to American politics. . . . Nor did government in the Reconstruction North—the era of the Tweed and Whiskey rings—offer a model of probity."[49] Indeed, as someone who grew up in Illinois and was an Assistant Cook County State's Attorney, I would say that corruption is pretty common with economic development schemes even today.

Be this as it may, in Louisiana, schemes such as the state lottery and the slaughterhouse law "engendered intense resentment because of the widespread belief that they had been obtained dishonestly."[50] Far from being a public health measure, the law was characterized by its opponents as "a private measure aimed at the unjust enrichment of a few at the expense of the stock dealers [and] butchers" who it would displace and of "the general public of New Orleans."[51] And this resentment was enhanced as victorious

The Louisiana legislature passed an act calling for just one slaughterhouse to service the City of New Orleans and surrounding parishes. It also issued a franchise to build and operate this facility to a specially chartered corporation made up of private investors. While the act was a much needed public health measure, it also granted a monopoly privilege to a favored few at the expense of the small independent butchers (above) trying to pursue an honest living.

Northerners headed to New Orleans to find their fortunes, giving rise to the term "carpet-baggers."

We have good reason to believe that the slaughterhouse act was indeed the product of corruption. In one of the literally dozens of lawsuits surrounding the statute, state court judge William H. Cooley ruled that stock in the corporation has been issued "in order to bribe the members of the General Assembly and other men who stood in their way in order to obtain final passage of the Bill and its signature by the Governor."[52] He found members of both the House of Representatives and Senate had been bribed for their votes.[53] The evidence further showed, he ruled, that other city officials had been bribed and that the Governor's signature was corruptly obtained.[54] In 1875, the Louisiana Supreme Court concurred, ruling: "On the merits we are satisfied from an examination of the testimony that the ground from which this action springs was a fund created for the purposes of corrupting and improperly influencing members of the Legislature. . . ."[55]

Rather than viewing the *Slaughter-House Cases* favorably for upholding a much needed public health measure, then, one can view it unfavorably as upholding a grant of monopoly privilege to a well-connected few at the expense of the small independent butchers trying to pursue an honest living.

On the other hand, these two narratives are not necessarily mutually exclusive. Perhaps no genuine public health measure would have passed the legislature without corruption! Put another way, legislatures holding the power to dispense wealth in the form of monopoly franchises simply won't act until they are paid off with bribes. So, as the old song said about love and marriage, perhaps you can't have one without the other.

Before commenting on how the decision in *Slaughter-House* should properly be assessed in light of these two narratives, let me turn to a third—The Narrative of Race—which turns out to be more complicated than some scholars may think. It is here where this article may contribute something new to the three narratives of *Slaughter-House*.

The Narrative of Race

Historian Michael Ross deserves much of the credit for uncovering the role that race played in the *Slaughter-House Cases*. In his biography of Justice Miller[56] and his previous writings, he made a powerful case that the constitutional challenge to the slaughterhouse act was racially motivated.

The Louisiana legislature that passed the law was a reconstructed biracial legislature dominated by Republicans. The house was comprised of sixty-five Republicans—thirty-five of whom were black—to thirty-six Democrats. The senate held twenty-three Republicans—seven of whom were black—and thirteen Democrats.[57]

This legislature was a product of a new state constitution that "desegregated education, prohibited racial discrimination in public places, and denied former Confederates the right to vote. It also included a bill of rights—the first in Louisiana history—that voided the Black Codes, outlawed slavery, and guaranteed trial by jury, the right to assemble peacefully, and freedom of religion and the press." To all this, "[m]ost white Louisianans reacted with hostility" and Louisiana newspapers "issued a racial call to arms."[58]

Adding fuel to the fire, the new legislature passed an ordinance that enforced open accommodations in public locations and another requiring the integration of public schools in the state.[59] In between these two racially charged laws came the slaughterhouse bill, which got tarred by the same brush. White New Orleans closed ranks behind the all-white butchers to oppose the

bill even though "it finally ameliorated the terrible conditions in and around the slaughterhouses,"[60] and even though the butchers themselves had previously been rather unpopular since they were accused of conspiring to raise the price of dressed meat.

Moreover, the lawyer who represented the white butchers from the initial lawsuits to the oral argument in the Supreme Court was none other than former Supreme Court Justice John A. Campbell. Campbell, an Alabama Democrat nominated to the Court by Democrat James Buchanan, who had resigned as a Justice to return to the Confederacy. There he was named Assistant Secretary of War by Confederate President Jefferson Davis, a position he held until the end of hostilities.

Campbell viewed the legal challenge to the slaughterhouse bill as part of a campaign to destroy Reconstruction. Indeed, at the same time that Campbell was arguing in Louisiana courts for the broadest possible meaning of the Fourteenth Amendment, he had also filed suit claiming that the newly enacted Louisiana public accommodation law violated the privileges or immunities of a New Orleans opera house owner who wished to segregate his black patrons.[61] In short, it was Campbell's litigation objective to turn the Republicans' Fourteenth Amendment against the Republican's program of reconstruction.

In sharp contrast to Campbell stood Justice Samuel Freeman Miller. Miller was a former Whig Republican who was appointed to the Court by President Lincoln. In light of the racial context of Louisiana politics, Michael Ross characterizes Miller's majority opinion in *Slaughter-House* as "a vote of confidence for a biracial Reconstruction government then struggling to overcome the forces of reaction."[62] Moreover, Miller was a trained physician who spent years of his career studying the causes of and treatments for cholera.[63] As a long-time resident of Keokuk, Iowa, Miller had first-hand knowledge of slaughtering, and he recognized the connection between cholera and fouled water long before others.[64] Given his understanding of the need for a sanitation movement, Miller's support for the slaughterhouse law was only natural.[65]

When Miller's public health background and his Whiggish sympathy for public works programs are combined with his Republican interest in Reconstruction, his *Slaughter-House* opinion can be viewed favorably within the narrative of race. Ross maintains that:

> Had the Court ruled against the slaughterhouse law, it would have supported the Reconstruction legislature's critics who alleged that blacks and Yankees were either too ignorant or too corrupt to adopt legislation that could pass constitutional muster.[66]

So the Narrative of Race can be said to cut in favor of the majority's decision in *Slaughter-House.*

However, near as I can tell, Ross, as well as Labbé and Lurie, seem to have overlooked a political dimension that turns the Narrative of Race in the opposite direction. For, while they properly emphasize the role and motivation of John Campbell for challenging the slaughterhouse act, they uncharacteristically neglect the role and motivation of one of the slaughterhouse law's greatest defenders: the attorney Jeremiah Black.

Who was Jeremiah Black? Jeremiah or "Jere" Black was one of the preeminent lawyers of his time. After rising to be Chief Justice of the Pennsylvania Supreme Court, he was named Attorney General of the United States by President Buchanan. Buchanan intended to nominate Black to replace Roger Taney as Chief Justice, as Taney was expected to resign due to his feeble health. But when Taney chose to hang on, the lame duck Buchanan nominated Black instead to succeed Peter V. Daniel as an Associate

Justice. Ardently opposed by Horace Greeley and the *New York Tribune* because of his Democrat politics, Black's nomination came just one vote shy of confirmation in a Senate now dominated by newly elected Republicans.

Although Black was a Democrat Unionist who alienated his fellow Democrats by opposing secession, he became an implacable foe of everything that the Reconstruction Republicans—all of whom he called "radicals"—were attempting. As his biographer glowingly observed, "[f]rom the beginning of Reconstruction to the end, Black played a singular and dynamic role."[67]

As a litigator, Black successfully challenged the use of military tribunals in *Ex parte Milligan*.[68] After a week of oral argument, the Supreme Court, led by Chief Justice Salmon Chase, upheld his challenge. Then, in 1867, Congress passed its two Reconstruction bills that abolished all Southern state governments—replacing them with military districts—and authorized martial law and military commissions throughout the South. President Andrew Johnson, a fellow Democrat, called upon Black to draft his veto message on the grounds that both bills unconstitutionally interfered with "the unspeakable blessings of local self government."[69] As expected, however, Johnson's veto was overridden by the Republicans in Congress.

After arguing successfully before the Supreme Court to end military rule in the North, in *Ex parte McCardle*[70] Jere Black sought a writ of habeas corpus to end it in the South as well.[71] The Republicans had enacted the Habeas Corpus Act of 1867 to allow the freedman and Southern Unionist to bypass unsympathetic lower courts and seek their writs in the Supreme Court. Black turned the table on the Republicans by using their new law to bring a challenge to Northern military rule of the South directly to the Chase Court, where he had prevailed once before in *Milligan*. After four days of oral argument, the Court delayed handing down its decision long enough to allow the Republicans in ongress to repeal the Habeas Corpus Act and deny the Supreme Court jurisdiction to decide all pending cases, most especially the challenge brought by Jeremiah Black.[72]

When Andrew Johnson was impeached by the House of Representatives, he retained Jere Black as one of his team of defense lawyers for his Senate trial.[73] Although he was advised that so ardent a Democrat could hurt his chances before the Republican Senate, Johnson doggedly insisted on keeping Black on his team.[74] Only a conflict of interest caused Black to resign before the trial commenced.[75]

I tell this story because one of Jeremiah Black's proudest accomplishments was his successful defense of the slaughterhouse act in the Supreme Court of the United States. Indeed, after failing to become Chief Justice, after Johnson's veto was overridden by Congress, and after jurisdiction to decide his challenge to military reconstruction was withdrawn, *Ex parte Milligan* and the *Slaughter-House Cases* were his two greatest victories over the Republicans, with the latter certainly the most momentous and long lasting.

Why so avid a defender of states' rights as Jeremiah Black would have stood in opposition to his fellow Democrat John A. Campbell's challenge to the slaughterhouse law is obvious: to gut the despised Fourteenth Amendment of its intended effect. As Black's fawning biographer writing in the "Dunning school" of pro-Southern revisionist history tells it: "In vain did the minority of the Supreme Court, including Chief Justice Chase, point out that [Justice Miller's] interpretation practically made a nullity of" the Privileges or Immunities Clause.[76] "This rider of the Amendment—forced upon the South at the point of the bayonet and foisted upon the North by its attachment to punitive measures against the South—was severed from the Constitution. Here indeed was one of

the epoch-making decisions of the Supreme Court. . . ."[77] Black, he said, "had aided in cutting off bodily from the Fourteenth Amendment that portion of it which took civil rights from the States and gave it to the national government."[78]

So we can now see that the Narrative of Race cuts in opposing directions. On one hand, Democrat and former Confederate John Campbell attempted to turn the Fourteenth Amendment against a biracial Republican state legislature. On the other, Democrat Jeremiah Black attempted to gut the Republicans' amendment itself.

In the next and last part of this article, I will contend that Black's was the more impactful of the competing litigation strategies, for it was Black's victory that led almost directly to *Plessy v. Ferguson*—or at least made it much easier for the majority in *Plessy* to rule as it did. Little wonder that even old John Campbell, the defeated counsel in *Slaughter-House*, admitted in later years that it was "probably best for the country that the case so turned out."[79]

Jeremiah S. Black, a Pennsylvania Democrat and foe of the Reconstruction Republicans, successfully defended the slaughterhouse act in the Supreme Court of the United States in 1876. In 1861 lame duck president James Buchanan had nominated Black to succeed Peter V. Daniel as Associate Justice, but newly elected Republicans in the Senate managed to block his appointment by one vote.

So, with these wonderful stories in mind, let us now consider the wisdom of using narratives such as these to assess Supreme Court decisions like the *Slaughter-House Cases.*

How Sticking with the Text Beats Narratives

Now, as the forgoing discussion would suggest, I like a good narrative as much as the next person. But according to the three narratives, the Narrative of Public Health supports upholding the slaughterhouse act, the Narrative of Public Corruption supports invalidating the statute, and the Narrative of Race seems to cut in both directions. Perhaps this illustrates why constitutional cases should not be decided to serve even a salutary political narrative. Perhaps constitutional cases should be decided, instead, according to the original meaning of the text, and then let the narrative chips fall where they may. Why might that be?

As I said at the start, in this article, I am not going to enter into the debate over whether Justice Miller's opinion in *The Slaughter-House Cases* was faithful to the original meaning of the Fourteenth Amendment. I ask readers instead simply to assume that the four dissenters in *Slaughter-House* were right that the original meaning of "privileges or immunities of citizens of the United States," included the unenumerated natural right of a person to pursue a lawful occupation, subject to the reasonable regulation thereof. How might that have worked out in the long run, from the perspective of public health, corruption, and race?

Let us begin with the *Slaughter-House* case itself. Even conceding the existence of a right to pursue a lawful occupation, we can

see that there is very strong evidence that the slaughterhouse act was a reasonable health and safety measure that was very likely enacted by the legislature in good faith. Had the state of Louisiana been called upon to justify this claim, such a claim would have been pretty easy to sustain. Indeed, this may have been why the case was decided the way it was.

When we read the decision today, we may mistakenly be reading it through post-New Deal glasses. Since the 1955 case of *Williamson v. Lee Optical*,[80] courts will make up a rational basis for a law, regardless of whether this rationale is supported by evidence or whether it was instead a mere pretext for restricting liberty. Prior to that, however, the factual foundation of even legislation enjoying a presumption of constitutionality could be challenged as unfounded.

As the New Deal Supreme Court said in the famous 1938 case of *U.S. v. Carolene Products*, "a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis." [81] And that "such facts may properly be made the subject of judicial inquiry."[82]

According to the traditional approach, a court would look to see whether a particular regulation was "irrational or arbitrary." These were terms of art. A measure is "irrational" if the means adopted poorly fit the supposed end. A measure is "arbitrary" if the liberties of some are being restricted in ways that the liberties of other similarly situated persons or companies are not.

The inquiry into rationality and arbitrariness is to ascertain whether a particular restriction on liberty was enacted in good faith or was instead enacted to serve a purpose that is outside the legitimate police power of the states. Such illicit motives include the desire to benefit some persons or firm at the expense of others, or the desire to stigmatize the exercise of a liberty of which the legislature disapproves, or to make its exercise more costly.

In other words, courts should be trying to smoke out pretextual legislation that only purports to serve a health and safety rationale but is really enacted for other improper motives or purposes. As Chief Justice Marshall said in a generally neglected passage of the Necessary and Proper Clause case of *McCulloch v. Maryland*, "should Congress, *under the pretext of executing its powers*, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."[83]

So we can read Justice Miller's opinion as simply accepting the factual record below that justified the law as a public health measure, when he wrote:

> It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual.[84]

Indeed, the dissenters do not really contest this claim. Their sole contention was that granting a *monopoly privilege* to a private company was an improper *means* of executing the police power of the state regardless of how efficacious it might be.

But think about it. Once the Court decided that the privileges or immunities of citizens did not include "the right to pursue a lawful occupation," there was no longer any

reason for a court to consider whether the slaughterhouse act was a rational health and safety regulation or was instead an arbitrary restriction on the butchers' liberty. Indeed, under the majority's approach, everything in Justice Miller's statement about the rationality of the act, like everything in the narratives so ably presented by Labbé and Lurie and by Michael Ross, is legally irrelevant to the outcome of the case. The statute would be just as constitutional if it had been solely a product of political corruption as it would be if it had been a good faith effort to protect the public health.

In contrast, had the dissenters' approach been adopted, it would have been incumbent upon the government to present evidence to support its regulations on slaughtering in New Orleans. With this as its burden, the legislature would need to gather and consider such evidence, which Labbé and Lurie show they already had. Then, when the butchers challenged the rationality of the law in court, a judge would decide whose case was stronger: theirs or the legislature's.

Under the majority's approach, however, the legislature need not have held a single hearing or sworn a single witness. Once there was no such enforceable right, they were under no such burden. Under the majority's reading of the Constitution, a legislature was entirely free to restrict the liberty of the butchers solely to benefit the investors in the monopoly who had paid them off with stock in the new company. Or simply because they did not like the butchers.

But you need not take my word for this. Consider the Court's decision in *Bradwell v. Illinois*[85] announced on the very next day after *Slaughter-House*. In that case, a woman named Myra Bradwell was denied a license to practice law by the Illinois Supreme Court after she had passed the bar exam. Like the butchers in New Orleans, she challenged this under the Privileges or Immunities Clause of the Fourteenth Amendment as a violation of her right to pursue a lawful occupation.

Writing for the majority, Justice Miller tersely dismissed her challenge. "The opinion just delivered in the *Slaughter-House Cases*" he wrote:

> *renders elaborate argument in the present case unnecessary*, for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.[86]

Notice that Justice Miller now felt no need whatsoever to justify this outcome by reciting any reasonable basis for Myra Bradwell's exclusion. Under his approach, such a basis is not constitutionally required, and excluding Myra Bradwell from the practice of law could have been entirely arbitrary. This suggests that Justice Miller's observations about the rationality of the slaughterhouse act were *dicta* and legally irrelevant to the outcome of the *Slaughter-House Cases.*

Given their reading of the Privileges or Immunities Clause, the dissenters in *Slaughter-House* had a different burden. When three of these four sided with the majority in *Bradwell*, their approach to the duty of the judiciary to enforce the Privileges or Immunities Clause required them to explain why such a restriction on Bradwell's pursuit of a lawful occupation was not arbitrary. This duty led Justice Bradley to file his notoriously misogynist concurring opinion in which he described at length the "wide difference in the respective spheres and destinies of man and woman," as well as the impact of the laws of coverture on the ability of married women to perform the duties of an attorney.[87]

Of course, we today reject Justice Bradley's analysis as egregiously mistaken and conclude that the restriction was indeed arbitrary. Even back then, "according to one contemporary Court observer," Justice Bradley's opinion "seemed to cause no little amusement upon the Bench and the Bar."[88] But at least the approach of the dissenters in *Slaughter-House* forced Justice Bradley to articulate the basis for restricting this right before finding the limitation to be constitutional. And this articulation helped feminists object to, and very soon thereafter, defeat such restrictions.[89] (Indeed, the case may well have been moot when it was decided, as the Illinois Supreme Court had already altered its rules to allow a nineteen-year-old woman, Alta M. Hulett, to practice law that same year).[90]

However, while three of the four dissenters in *Slaughter-House* joined Justice Bradley's concurring opinion, the fourth also voted to invalidate the Illinois restriction on the right of women to practice law. That dissenter was Chief Justice Salmon P. Chase. By the time of the decision, Chase was too incapacitated by a series of strokes to write a dissent. Indeed, he died a mere three weeks after the decisions in *Slaughter-House* and *Bradwell* were announced. Yet in his last official act of his long and distinguished career fighting against injustice, he instructed the Supreme Court reporter to note that "The Chief Justice dissented from the judgment of the Court and from all the opinions."[91]

In other words, Chief Justice Chase not only dissented from Justice Miller's majority opinion in *Bradwell*, he also dissented from Justice Bradley's concurring opinion. One wonders whether, had he been healthy, the Chief Justice might have been able to persuade one of the *Slaughter-House* five-Justice majority to side with the dissenters' reading of the Privileges or Immunities Clause. (Indeed, I sometimes wonder whether the medical marijuana case of *Gonzales v. Raich*,[92] which I argued before the Court, might have been decided differently, had Chief Justice William H. Rehnquist not been so gravely ill).

In *Bradwell*, the three *Slaughter-House* dissenters felt obligated to justify the state's restriction on the liberty of women to practice law. By 1896, however, thanks to Justice Miller's approach in *Slaughter-House* and *Bradwell*, seven of eight Justices felt they were under no obligation to consider whether the law barring Homer Plessy from riding in a whites-only New Orleans trolley car was irrational or arbitrary. In *Plessy v. Ferguson*, the majority could simply defer to the discretion of state authorities, which—citing *Slaughter-House*—is exactly what they did.

In *Plessy*, Justice Brown's entire discussion of the rationality of the law segregating street cars consisted of this sentence: "In determining the question of reasonableness," he wrote, the legislature "is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order."[93] In the next sentence, he concluded that if racially segregated schools were reasonable, so too were segregated street cars. End of analysis.

Under Justice Miller's approach in *Slaughter-House* and *Bradwell*, there was simply no need to ask the state of Louisiana to support its claim that racial segregation was required to preserve "the public peace and good order."

* * *

Some years ago, while in New Orleans for the annual law professors meeting, my colleague Larry Solum and I visited the spot where Homer Plessy was arrested for boarding a whites-only streetcar. As fate would have it, it was just a few blocks away from the site of the municipal slaughterhouse that immediately succeeded the one at issue the *Slaughter-House Cases*—just as the constitutional reasoning of the Supreme Court in *Slaughter-House* was only a few short steps

from its decisions in both *Bradwell* and *Plessy*.

Those who would elevate historical narratives above the original meaning of the Constitution might stop for a moment to consider this *legal* narrative about what happens when you redact the Privileges or Immunities Clause from the Fourteenth Amendment as the Supreme Court did in the *Slaughter-House Cases*.

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ENDNOTES

[1] 83 U.S. 36 (1873).

[2] 79 U.S. 457 (1870).

[3] 188 U.S. 321 (1903).

[4] U.S. Const. amend. XIV, §1.

[5] 92 U.S. 542 (1875).

[6] 561 U.S. 742 (2010).

[7] *See, e.g.*, Akhil Reed Amar, "Substance and Method in the Year 2000," 28 *Pepp. L. Rev.* 601, 631 n.178 (2001).

[8] *See* Kurt Lash, **The Fourteenth Amendment and the Privileges or Immunities of American Citizenship** (New York: Cambridge Univ. Press, 2014). For a critique of Lash's thesis, see Christopher R. Green, "Incorporation, Total Incorporation, and Nothing But Incorporation?," 24 *William & Mary Bill of Rights Journal* 24 (2015, Forthcoming). See also, Christopher R. Green, **Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause** (New York, NY: Routledge, 2015).

[9] *See* Michael A. Ross, **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era** (Baton Rouge: Louisiana State Univ. Press, 2003), 201:

> When viewed within the political, economic, and social context of the early 1870s, the *Slaughter-House Cases* may be read as a progressive—though ultimately failed—attempt to affirm the authority of the biracial government of Louisiana, to grapple with the horrible sanitary conditions in New Orleans, and to thwart conservatives such as Justice Field, who hoped to defeat state regulation of private property.

[10] *See* Pamela Brandwein, **Rethinking the Judicial Settlement of Reconstruction** (New York: Cambridge Univ. Press, 2011), 59 ("despite *Slaughter-House*'s constriction of national citizenship, nothing in its language contradicts the logic of state neglect or impedes the ongoing development of the concept").

[11] *See generally*, Ronald M. Labbé & Jonathan Lurie, **The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment** (Lawrence, Kansas: Univ. Press of Kansas, 2003).

[12] *See, e.g.*, Randy E. Barnett, **Restoring the Lost Constitution: The Presumption of Liberty** (Princeton: Princeton University Press, 2d ed. 2014), 197-206.

[13] Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521), http://theusconstitution.org/cases/briefs/mcdonald-v-city-chicago/supreme-court-amicus-brief-mcdonald-v-city-chicago.

[14] *See generally*, Labbé & Lurie, **The Slaughterhouse Cases**, *supra* note 11.

[15] *Id.* at 23.

[16] *Id.*

[17] *Id.* at 35.

[18] *Id.* at 23.

[19] *Id.* at 33.

[20] *Id.* at 23.

[21] *See id.* at 35.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 35-36.

[26] *Id.* at 36.

[27] *Id.* at 36-37 (*citing* James Parton, **General Butler in New Orleans** (New York: Mason Brothers, 1864), 308-09).

[28] *Id.* at 37.

[29] *Id.* at 53.

[30] *Id.*

[31] *Id.* at 25.

[32] *Id.* at 40.

[33] *Id.*

[34] *Id.* at 41

[35] *Id.* at 61.

[36] *Id.* at 205

[37] *Id.* at 74.

[38] *Id.* at 60.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 61.

[42] *Id.*

[43] Ross, **Justice of Shattered Dreams**, *supra* note 9, at 194.
[44] Labbé & Lurie, *supra* note 11, 81.
[45] *See* John S. Baker, Jr., **Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?** *Rutgers Law Journal*, 16 (1985): 495, 532-36.
[46] *United States v. Cruikshank*, 92 U.S. 542 (1875).
[47] *Hans v. Louisiana*, 134 U.S. 1 (1890).
[48] Ple*ssy v. Ferguson*, 163 U.S. 537, at 550 (1896).
[49] Eric Foner, **Reconstruction: America's Unfinished Revolution: 1863-1877** (New York: Harper & Row, 1988), 384, *cited in* Labbé & Lurie, *supra* note 11, at 71.
[50] Labbé & Lurie, *supra* note 10, at 82.
[51] *Id.* at 72.
[52] *Id.* at 82.
[53] *Id.* at 82-83.
[54] *Id.* at 83.
[55] *Id.* at 83 (*citing Durbridge v. Slaughterhouse Co.*, 27 La. Ann. 676 (1875)).
[56] Ross, **Justice of Shattered Dreams**, *supra* note 9.
[57] Labbé & Lurie, *supra* note 11, at 70.
[58] Ross, **Justice of Shattered Dreams,** *supra* note 9, 195-96.
[59] Labbé & Lurie, *supra* note 11, at 73.
[60] Ross, **Justice of Shattered Dreams,** *supra* note 9, at 197.
[61] Mitchell Franklin, "The Foundations and Meaning of the Slaughterhouse Cases, Part II," *Tulane Law Review* 18 (1943): 218, 229, *cited in* Labbé & Lurie, *supra* note 11, 194 n.40.
[62] Ross, **Justice of Shattered Dreams**, *supra* note 9, at 202.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 208.
[67] William N. Brigance, **Jeremiah Sullivan Black** (New York: Da Capo Press, 1971), 161.
[68] 71 U.S. (4 Wal.) 2 (1866).
[69] Brigance, **Jeremiah Sullivan Black**, *supra* note 67, at 166.
[70] 74 U.S. 506 (1869).
[71] Brigance, **Jeremiah Sullivan Black**, *supra* note 67, at 171.
[72] *Id.* at 176-77.
[73] *Id.* at 181.
[74] *Id.* at 181-82.
[75] *Id.* at 182.
[76] *Id.* at 201-02.
[77] *Id.* at 202.
[78] *Id.* at 203.
[79] Charles Warren, **The Supreme Court of the United States History,** vol. 3 (1922), 268.
[80] 348 U.S. 483 (1955).
[81] 304 U.S. 144, 152 (1938).
[82] *Id.* at 153.
[83] *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819) (emphasis added). The passage is neglected, in part, because it was reversed *sub silentio* by the New Deal Court in *United States v. Darby*, 312 U.S. 100, 115 (1941):

> The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction, and over which the courts are given no control. . . . Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.

[84] *Slaughter-House Cases*, 83 U.S. 36, 64 (1872).
[85] 83 U.S. 130 (1873).
[86] *Id.* at 139 (emphasis added).
[87] *Id.* at 141.
[88] Labbé & Lurie, **The Slaughterhouse Cases**, *supra* note 11, 227 n.60.
[89] *See* Jane M. Friedman, "Myra Bradwell: On Defying the Creator and Becoming a Lawyer," *Valparaiso Law Review* 3: 1287, 1300 (quoting letter from Susan B. Anthony to Myra Bradwell urging her to write a letter criticizing the decision that can be used to "pour hot shot into that old Court").
[90] *Id.* at 1301.
[91] *Bradwell*, 83 U.S. at 141. For more on Chief Justice Chase's career both on and off the bench, see Randy E. Barnett, "From Antislavery Lawyer to Chief Justice: The Remarkable but Forgotten Career of Salmon P. Chase," 63 *Case Western Reserve Law Review* 63 (2013) 653.
[92] 125 S. Ct. 2195 (2005).
[93] *Plessy v. Ferguson*, 163 U.S. 537, at 550 (1896).

The Reconstruction of Rights: The Fourteenth Amendment and Popular Conceptions of Governance

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Introduction

In 1870 Maria Mitchell, an African-American woman in Edgecombe County, North Carolina, did something that she could not have done when she was enslaved: she "talked for her rights." Mitchell had a problem with B.D. Armstrong, a white landowner who was likely her employer. According to the testimony in the trial that followed, she expressed her anger in a form common to the nineteenth-century South: a highly stylized, verbal barrage designed to draw attention to the situation and to shame the intended target. Or, as her son put it, "his Mama was talking loud." Armstrong demanded that she stop. Mitchell responded that "she was talking for her rights and would as much as she pleased and as loud as she pleased." So Armstrong issued a threat: "if she did not hush he would make her hush." When Mitchell continued to denounce him, he struck her in the face and broke out a piece of her tooth—or so she alleged when she turned her words into action and used her rights to file charges against him.[1]

I stumbled across Maria Mitchell's case while I was looking for something else. I flagged it, nonetheless, because I thought it provided a particularly compelling example of something I already knew: how the constitutional changes of the Reconstruction era extended rights to African Americans and, as a result, opened up the legal system to them. The Reconstruction Amendments profoundly altered the legal status of Maria Mitchell and other African Americans: the Thirteenth Amendment abolished slavery; the Fourteenth Amendment established birthright citizenship and provided federal protection of civil rights, which prohibited states from discriminating on the basis of race; and the Fifteenth Amendment provided federal oversight of voting rights. Mitchell's words, that "she was talking for her rights and would as much as she pleased and as loud as she pleased," underscored the

importance of those changes in a way that was hard to miss.

That initial interpretation, however, obscured a much more interesting story, one of constitutional change located in places that most of us would be hard-pressed to find on a map and in the context of legal matters that most of us would consider unremarkable, not constitutional. The key to this other story lay in the particular legal context that produced cases like the one involving Maria Mitchell. These sources are not the published materials —the statutes, appellate cases, and legal treatises—that most people associate with the law and legal history. These are loose, handwritten documents. Some were produced by clerks in circuit courts, which met on a regular schedule in court towns and which held jury trials. Others were produced by magistrates, many of whom had no legal training and set up court where they were, taking time out of their day to hear complaints, issue warrants, adjudicate minor cases, and send more serious issues up through the system. The people involved in these cases took an active part in this system, collecting evidence, providing information, and observing the proceedings. You actually see that context in the documents. The handwriting is by the officials, pen in hand, struggling to keep up with oral testimony and to capture the words in writing. The names are those of all the people there—the men and women, rich and poor, white and black, free and enslaved, young and old—who were hashing out life's problems. You can even catch accents in the idiosyncratic spelling—bits of French, perhaps German, some Irish, definitely Scottish, and certainly the Creole cadences that marked the speech of so many people of African descent.[2]

While Maria Mitchell's case was adjudicated in the South, the legal framework that shaped her case was not exclusively Southern. It characterized the operation of law in local courts throughout the United States, and it was the one with which most Americans had familiarity in the early nineteenth century. This part of the legal system, focused at the local level, was charged with maintaining the public order or, in the terminology of the time, keeping the peace—a body of issues that included all but the most serious criminal cases as well as a broad range of issues involving the public health and welfare. The expectation was that officials would adjudicate conflicts in the community, doing what was right, although, obviously, not everyone agreed on what was right and not everyone's opinion carried equal weight, given the rigid inequalities of the early nineteenth century. Once local cases were concluded, the documents were folded in thirds, tied with a ribbon, filed away, and forgotten. So, too, was the legal context that produced these documents.[3]

These local courts seem far removed from the Fourteenth Amendment and the rights it protected. But they were not. To explain the connection and its implications, this article will turn first to the legal system in the early nineteenth century and two different legal frameworks operative then: one focused on the rights of legally recognized individuals, which was the purview of state and federal jurisdictions, and the other focused on maintaining the public order and, essentially, doing what was right, which was associated with local jurisdictions. Then, the article will explore the changes that followed from the passage of the Fourteenth Amendment, which brought those two legal frameworks together and encouraged Americans to see federal authority, in particular, as the protector of *both* rights and what was right. The result was a rights revolution, one that predates the rights revolution of the twentieth century. Initiated by ordinary Americans, this rights revolution transformed not just the meaning of rights, but also the reach of federal authority, stretching both to cover a much wider array of issues than had been the case before passage of the Fourteenth Amendment. That was not necessarily the intention;

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L B Broughton being duly sworn said.
B D Armstrong came home and Maria Mitchell
was talking very loud and he asked her what
she was talking about. She said she was talking
for her rights. And said she would talk as much
as she pleased. B D Armstrong told her to hush—
she said she would talk as much as she pleased
and as loud as she pleased. Armstrong said if
you dont hush I will make you hush and he slaped
her in the mouth one time and pushed her about.
I [illegible], but he hit her with his open hand.
Upon the hearing these allegations and
proofs It was adjudged that the defendant B D
Armstrong pay a fine of one dollar and the
cost of this action.

Fine	(paid to [illegible].)	1.00
Costs	" "	2.75
		$3.75

Whereupon the plaintiff craved an appeal
to the Superior Court.

John W. Taylor J.P.

The constitutional changes of the Reconstruction era extended rights to African Americans and, as a result, opened up the legal system to them. Above is the second page of the decision in an 1870 suit filed by Maria Mitchell, an African-American woman in Edgecombe County, North Carolina, against B. D. Armstrong, a white landowner who was likely her employer. She accused him of punching her in the mouth because she was "talking too loud about her rights" and Armstrong was fined one dollar plus court costs.

but that was the result. And the implications have been both profound and enduring, supporting expansive expectations of what rights can do and what federal authority can accomplish.[4]

Various Legal Authorities

Maria Mitchell was "talking for her rights." Reading only her words, it seems like a straightforward claim: Mitchell was demanding rights that other American citizens had but that had been denied to her by state law until the federal government interceded with the Reconstruction Amendments, particularly the Fourteenth Amendment. When placed within the broader context of the legal system in the nineteenth century, however, that interpretation provides only a partial explanation of the import of Maria Mitchell's words.

Current scholarship tends to focus on law and legal institutions at the state and federal

levels. But those jurisdictions did not have a monopoly on legal authority or the governing practices that initiated new laws and enforced existing ones in the first half of the century. Instead, legal authority was widely dispersed and resided in institutions that were relatively private, such as households, churches, and communities, as well as those that were relatively public, such as local, state, and federal governments in their judicial, legislative, and administrative forms—although the lines between the categories of private and public forms of governance often blurred. Together, these various jurisdictions constituted a governing system that captured and contained the contradictory impulses of American life: they maintained existing inequalities while also adjudicating conflicts generated by those inequalities.[5]

Americans had more experience with some legal jurisdictions than with others. The federal government figured prominently in the territories, which lacked the institutional apparatus of state government. But the federal government was a distant entity for most Americans, who encountered it in only a few ways: through the military, the campaigns of aspirants to federal office, and the postal service.[6] People were more likely to encounter the legal authority of states, which had jurisdiction over most of the work of governance, through their responsibilities to protect the rights of individuals and to maintain the public order. But states then delegated significant power to counties and municipalities in matters involving the public order, making local areas, not the states, the jurisdictions most closely associated with those duties. That situation dates from the Revolution, when lawmakers turned their colonies into states and then decentralized the most important functions of state government, all in the name of bringing law closer to the people. Much of the daily business of governance was done in local legal venues such as the circuit courts and even more localized proceedings, such as magistrates' hearings and trials. These locations made the law part of the fabric of people's lives. They convened wherever there was sufficient space —in a house, a barn, a mill, or a yard. That was true even for circuit courts in the first decades of the nineteenth century, when many counties lacked the formal courthouses that would later house circuit courts. Local courts were the legal jurisdictions that would have been the most familiar to most Americans, given the wide range of issues handled in these venues and the wide variety of people who were involved in the process of adjudicating them.[7]

It was state and federal jurisdictions that dealt with the protection of individual rights, although states handled a much wider variety of such cases. This article follows conventions of the nineteenth century, using the term "individual rights"—or "rights" for short—to refer to those rights that, at the time, were thought to be conferred by government, namely civil rights and, increasingly, political rights, which were available to those people recognized as legal individuals (namely free white men, particularly those with property). Secondarily, the term refers to natural rights, which belonged to everyone and could not be abridged by government, at least in theory. In practice, what constituted a natural right was contested and ultimately dependent on government recognition and enforcement. Natural rights—even life and liberty—were also connected to civil and political rights, in the sense that those who could claim civil and political rights (free white men) had stronger claims to natural rights than those who did not (such as married women, the enslaved, and even the working poor). Property ownership was inseparable from individual rights in the early nineteenth century. Property requirements for suffrage had only recently been eliminated for white men by the time of the Civil War. Even then, universal white manhood suffrage was not quite universal: elections for some offices in some states were still restricted on the basis of property. And

Much of the daily business of governance in the Reconstruction era was done in local legal venues such as the circuit courts and even more localized proceedings, such as magistrates' hearings and trials. States delegated considerable authority over matters regarding the public welfare to local courts, such as the one housed in this mill in Spartanburg, South Carolina.

most civil rights involved the ownership, accumulation, and exchange of property or access to those jurisdictions with authority over that body of law.[8]

The Limits of Rights

While authority over the legal framework of rights lay with state and federal jurisdictions, states handled far more cases and a much wider variety of them. The federal government did deal with the rights of those individuals who were not within a state's jurisdiction: in the territories, in relation to Indian nations, in the District of Columbia, and in federal cases. That situation resulted in an uneven experience with federal power, one reflected in recent scholarship. Native Americans, in particular, felt the full weight of federal authority. So did American citizens in the District of Columbia and the territories, although the federal government often protected the interests of western settlers—and their rights—at the expense of Indians.[9] But people who lived within the jurisdiction of existing states—whether citizens or not—encountered federal legal authority only in the context of federal cases, of which there were few, particularly in the first few decades of the nineteenth century.[10]

States maintained purview over a much wider range of issues involving the rights and status of the American people. That authority even extended to the meaning of citizenship. Before passage of the Fourteenth Amendment, there was no definitive statement about who qualified for U.S. citizenship or what that status meant. The 1790 Naturalization Act did limit citizenship to those who were free and

white. But that act and subsequent legislation addressed the situation of new immigrants who sought application for naturalization. Those provisions did not extend to those who resided in the United States at its inception and never applied for citizenship. To the extent that there was a link between U.S. citizenship and rights at all, it was at the state level, where there was a concept of state citizenship, which did establish claims to rights, as defined within states. To complicate matters, the two notions—state citizenship and U.S. citizenship—emerged in an ad hoc way, through statues and case law, with no clear distinction between the two. States did not usually question the citizenship status of those who lived in their boundaries, although there was considerable discussion about the rights and citizenship status of free blacks in the decades immediately preceding the Civil War.[11] Those debates culminated in the U.S. Supreme Court's decision in *Dred Scott*, which denied all people of African descent U.-S. citizenship. But *Dred Scott* was controversial precisely because it upset the status quo and encroached on the jurisdiction of states. In fact, the controversy surrounding *Dred Scott* made its implications ambiguous.[12]

States had purview over individual rights, but those were neither as capacious nor as powerful as the political rhetoric of the time suggests. Nineteenth-century political leaders, regardless of party affiliation, invoked rights in expansive terms, often in connection to liberty, freedom, and equality, with the implication that they could accomplish those ends. To be sure, rights were necessary for individuals to function independently in American society. Without them, it was impossible to claim legal ownership of property, enter into contracts, or defend one's interests in state or federal courts. But, in the legal system, rights did not do the kind of work that the political rhetoric of the time implied. They resolved competing claims among individuals by identifying winners and losers, a situation that undercut the connection between rights and equality posited in political rhetoric. State courts, moreover, were committed to the preservation of rights as such, not to the concerns of the individuals who brought their problems for adjudication. As a result, the legal framework of rights produced outcomes of questionable justice, according to the standards of many Americans: a conviction overturned because of an improperly framed indictment, for instance, or the seizure of property because of a faulty bill of sale. More often than not, the application of rights tended to preserve existing inequalities, because lawmakers concerned themselves with the rights that governed property ownership and economic exchange, a body of law concerned with the interests of those who owned property, not those without. That situation explains the popular stereotype of lawyers as parasites who exploited arcane rules to profit from the misfortune of others.[13]

Upholding the Social Order

The fact that states also had broad powers to regulate in the name of the public health and welfare also limited people's rights. State constitutions did have bills of rights, but the rights they enumerated were not absolute. In fact, state and local governments exercised wide latitude in limiting or suspending the rights of individuals in the name of the public good. That legal logic sanctioned not just slavery, but also the range of restrictions placed on free blacks, all women, and many white men without property. A right was a right only as long as the state decided not to take it away.[14]

States delegated considerable authority over matters regarding the public welfare to local courts. In adjudicating most of these issues, local courts aimed to keep the peace—to do what was right, not to uphold the rights of individuals. "The peace" was a well-established concept in Anglo-American law that expressed the ideal order of the

metaphorical public body, subordinating everyone (in varying ways) within a hierarchical system. The peace was inclusive, but only in the sense that it forced everyone into its patriarchal embrace, raising its collective interests over those of any given individual. Keeping the peace meant keeping everyone —from the lowest to the highest—in their appropriate places, as defined by rigid inequalities of the early nineteenth century. Maintaining the peace was never a peaceful proposition; it was about coercion.[15]

While this localized system did not recognize the rights of free women, children, enslaved people, or free blacks, it still incorporated them into its basic workings, because they were part of the social order that the legal process was charged with overseeing. The system maintained their subordination and regulated their behavior. But it also relied on information they supplied about community disorder. Take, for example, two cases in North Carolina initiated by slaves: one slave complained to a magistrate that a free black man had been playing cards with other slaves on a Sunday; another complained that the same free black man assaulted one of those slaves after the card game. (One suspects that another complaint could have been filed about the consumption of "spirituous liquors," a common morals charge.) Technically, these slaves gave "information," because laws prohibited all slaves from filing a complaint; the magistrate then proceeded with the case based on that information. These two enslaved men had their own reasons for what they did, reasons distinct from the magistrate's likely concerns about disorder among slaves and free blacks. As such, the cases illustrate central elements of this part of the legal system. Different people pursued different ends within it, sometimes at the same time. Masters filed charges against slaves they could not control. Wives filed charges against husbands. Children informed on their parents. Families regularly brought their feuds to court for resolution, with wives, husbands, parents, children, siblings, aunts, uncles, and cousins all lining up to air their dirty laundry. Even enslaved people tried to mobilize local courts to address their concerns. That was possible, because the system *depended* on the participation of everyone in the local community.[16]

The "law" in this part of the system was capacious and uncontrolled by legal professionals. In most legal matters, the interested parties collected evidence, gathered witnesses, and represented themselves. Local courts did follow state laws regarding rights in procedural respects, particularly in determining who could prosecute cases in their own names. But determinations about the merits of the claims—righting the wrongs in question—relied on common law in its traditional sense as a flexible collection of principles rooted in local custom, but that also included an array of texts and principles, in addition to statutes and state appellate law, as potential sources for authoritative legal principles. The information provided by those with an interest in the case also mattered, because the expectation was that outcomes should preserve the social order, as it existed in particular localities. Of course, the definition of "interest" was broad and varied, reflecting the interpersonal conflicts that characterized even the most-tightly-knit communities. So it was not unusual for witness after witness to come forward to tell what they knew, a situation that magistrates bore patiently, knowing that the resolution of the legal conflict was also about healing a rift in the community. Preservation of the social order was also why court officials took evidence and even prosecuted cases on behalf of individuals without the legal right to testify or prosecute—enslaved people, married women, and minors. This area of law existed in the lived context of people's lives and existing social relationships—what the scholarship tends to identity as elements of social history, distinct from the law.[17]

In adjudicating issues, local courts aimed to keep the peace—to do what was right, not to uphold the rights of individuals. The "law" in this part of the system was capacious and uncontrolled by legal professionals. In most legal matters, the interested parties collected evidence, gathered witnesses, and represented themselves. In this 1850 painting, "Justice's Court in the Back Woods" by Matteson Tompkins Harrison, a shoemaker who is also Justice of the Peace and postmaster, is hearing an assault case, as the lawyers for the plaintiff (with bandaged head, leaning on the table at right) and the defendant (sitting by the window at left being consoled by a woman) argue strenuously.

This legal framework allowed for the handling of situations that might not have had legal standing in either state or federal jurisdictions. Magistrates regularly prosecuted husbands, fathers, and even masters for violence against their wives, children, and slaves, because the authority granted heads of household was not absolute but was contingent on the maintenance of the social order. The point was to keep flagrant abuses of power in check so that households did not fall apart, not to attend to the individual rights of either household heads or dependents. Magistrates also recognized that wives and slaves controlled property, even though they could not own it in other areas of law. The point was to keep the property where it belonged, not to uphold property rights. Such was the case involving three wives and two geese: Catherine Saunders filed charges against Mary McAfee for stealing two of her geese and selling them to Mrs. Warren. Of course, none of these women could prosecute a case, let alone own or sell geese, because of coverture—which subsumed wives' legal identities within those of their husbands and limited their ability to prosecute cases and to own property in their own names. But coverture, while operative in property cases as defined by state and federal law, did not apply in this case. The magistrate tried the case, based on the information of the wives. He ultimately gave the geese back to its original owner, Catherine Saunders, not because the court recognized her property rights, but because that was where the geese belonged. Disorder was disorder—when it happened, people expected that court would right those wrongs.[18]

Particular, Not Universal

The effects of legal decisions then remained with the particular people involved, because the system was so personalized. Local courts meted out justice on a case-by-case basis to right wrongs, not to maintain individual rights or even to produce precedents that others could claim. One person's experience did not transfer to another person of similar status or predict any other case's outcome. Each jurisdiction thus produced inconsistent rulings, aimed at resolving particular matters, rather than producing a uniform, comprehensive body of law. Many saw that situation as natural and just: it made no sense to impose arbitrary rules developed elsewhere, instead of paying attention to the particular dynamics of local communities. Locals knew the difference between a harmless drunk who picked a fight occasionally and someone who was habitually violent with the intent to do serious damage to others. They knew which enslaved people had their masters' permission to travel on their own, carry guns, and engage in other activities prohibited for most slaves and which ones did not. And they knew which married women controlled property, such as geese, and traded on their own, despite the restrictions of coverture. More to the point, locals knew who had what, meaning that they knew when anyone in the community had stolen property. All that information was necessary to maintain order—to do what was right. In determining what was right, local legal

African Americans (like those pictured here behind Union lines in Cumberland Landing, Virginia in 1862) began bringing their complaints to legal venues during the Civil War, when their claims to freedom, let alone to rights, were still tenuous. Once behind federal lines, they sought out military officials and military courts to adjudicate their conflicts. They continued to do so after the Confederate surrender but before passage of the Fourteenth Amendment—a time when the states of the former Confederacy limited the rights of all African Americans through the notorious Black Codes.

venues and the people involved in them played a crucial role in *defining* as well as *maintaining* the public order.[19]

People in local communities regularly disagreed on what was right. The legal process at the local level acknowledged that situation and provided a means for arriving at an outcome that would allow people to put conflicts behind them and move on. Consensus, however, was more apparent than real. In the slave South, it rested on a social order that subordinated the vast majority of the population—all African Americans, free white women, and property-less white men. All these groups experienced different levels of subordination, with enslaved African Americans enduring the most extreme forms. But none of these people could redefine the structural dynamics of the social order, even though they participated in the system and occasionally bent it to their interests. To the extent they had credibility, it was because of the social ties that also defined their subordination. They were insiders, not outsiders: enslaved people who had the support of their masters and other whites; married women who were known as good wives and neighbors; a poor white man known for his work ethic and amiability. Positive outcomes of cases involving those insiders did not result in favorable treatment for anyone else. To the contrary, local communities in the slave South inflicted horrific punishments on those, particularly enslaved African Americans, who did not fulfill their subordinate roles. Those outcomes seemed just plain wrong to those who did not have the status to receive favorable treatment.[20] Still, the legal culture of local courts was deeply engrained within American society and carried considerable power at the time of the Civil War. It framed expectations about what the law was supposed to be and do, even for those on the margins of the local legal system: the law should actively uphold what was right.[21]

African Americans' Rights during Reconstruction

African Americans, like Maria Mitchell, brought those expectations to the courts during Reconstruction. When Mitchell filed assault charges against B.D. Armstrong in 1870, she was using her new civil rights, which allowed her to access the legal system. But those rights were not the ones she had been talking about; *those* rights—the ones that were unspecified, but loudly asserted—were about what was right. The charges underscore the point: she charged B.D. Armstrong with assault, which was an offense against the peace of the community, a disruption of the public order, not a violation of Maria Mitchell's rights. People pursued such cases because they wanted public condemnation of behavior at odds with their view of the public order. In the first half of the nineteenth century, claims about what was right—the claims of slaves who were upset about gaming on Sunday or married women with conflicts over geese—stayed at the local level. But the Reconstruction Amendments, particularly the Fourteenth Amendment, changed all that. Those Amendments did not just affirm the rights of African Americans. They also made it possible for claims about what was right to travel elsewhere in the system, altering the meaning of rights and changing people's relationship to the federal government. What was right acquired a closer relationship to rights.

Claims about what was right first traveled into federal jurisdictions through the claims of enslaved African Americans during the Civil War. Maria Mitchell's efforts to use the legal system are characteristic of the actions of many formerly enslaved people. Although contemporary observers and later historians have taken such actions for granted, it is remarkable that people who had been enslaved would look for redress in the very legal system that had maintained their enslavement. But they did. Historians

usually attribute such faith in the law to the promise of rights. But formerly enslaved African Americans also were acting on other, deeply rooted expectations about the law—that it should do what was right and maintain a just public order. The promise of the moment gave them hope that they could access legal authority to elaborate *their* vision of what was right—of what constituted a just society.[22]

Those expectations explain why enslaved African Americans began bringing their complaints to legal venues during the Civil War, when their claims to freedom, let alone to rights, were still tenuous. Once behind federal lines, African Americans sought out military officials and military courts to adjudicate their conflicts. They continued to do so after the Confederate surrender but before passage of the Fourteenth Amendment—a time when the states of the former Confederacy limited the rights of all African Americans through the notorious Black Codes. African Americans came to these venues with rights claims. But they also expected federal officials to address the kinds of issues that would have fallen to local courts and that had been handled within the framework of doing what was right: interpersonal conflicts, often involving violence and including domestic issues, as well as matters involving broader questions of social justice, such as the treatment of refugees, payment of wages, and reunification of families. In those cases, they expected federal venues to do what was right, not just to uphold rights. The various courts under federal jurisdiction, which lacked an established body of law to handle this diverse array of claims, struggled to keep up. When one reads the records, the consternation of some officials is so palpable that one can almost see their furrowed brows and their heads in their hands, trying to figure out how to handle the conflicts in front of them. Needless to say, most of the issues were not of the kind that had fallen within federal purview before. But African Americans persisted, pushing past jurisdictional boundaries in the pursuit of justice.[23]

The exercise of federal authority in cases of this kind might have been temporary if not for the passage of the Reconstruction Amendments, particularly the Fourteenth Amendment, which gave the federal government authority over the states' handling of rights—something that the federal government did not have before. To be sure, those powers were limited and largely negative. The Fourteenth Amendment placed restrictions on states, prohibiting them from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States" or depriving any person "of life, liberty, or property, without due process of law." It also prohibited the denial "to any person within its jurisdiction the equal protection of the laws." The federal government could regulate the administration of rights, as defined by the states, but it could not create or distribute rights. Later Civil Rights Acts extended federal authority in ways that brought it into state law more actively. But, given political opposition and the limited resources of federal enforcement agencies, that authority was never fully utilized in the late nineteenth century.[24]

That negative power was nonetheless profound, particularly in the states of the former Confederacy. The Fourteenth Amendment forced states to extend rights to African Americans, which made it possible for Maria Mitchell to turn B. D. Armstrong's assault into a legal matter. If she had still been enslaved, Maria Mitchell could not have prosecuted a case of assault; like the two slaves mentioned earlier, she could only have given information. A local official might have prosecuted the act as an offense against the peace but was more likely to have seen it as legally sanctioned "discipline" that a master could use against a recalcitrant slave. The U.S. Constitution might seem distant, even irrelevant to minor disputes in remote parts of the rural South. It was not. Mitchell and other African Americans could file charges because

of their civil rights, which were enabled by the Fourteenth Amendment, enshrined in state constitutions, and protected by the threat federal intervention.[25]

What happened in those local courts then altered federal authority. Specifically, the Fourteenth Amendment opened up paths for ordinary Americans' conceptions about "what was right" to migrate out of local venues through the framework of "rights." (So did the Fifteenth Amendment, which did for voting rights what the Fourteenth did for civil rights.) Before those constitutional changes, Americans' claims about what was right remained in the local courts. Local jurisdictions handled each case as a particular matter involving particular people, a wrong done by one (aggrieved) person to another (aggrieved) person. Once that wrong was righted, order was restored. There were no further consequences for the law. Such cases would never have made it to a federal jurisdiction. They could have been appealed to the state level, but only on a procedural point of state law, such as the wording of the indictment, which applied to similar kinds of cases. An appeal could not be based on the substantive merits of Mitchell's complaints about B.D. Armstrong's actions; appellate courts did not consider whether B.D. Armstrong's actions represented an offense against the public order.[26]

Beyond Local Jurisdiction

Jurisdiction made all the difference. Maria Mitchell's case did not migrate out of the local courts, but her words point to the logic of the process that did allow such claims to travel into new judicial venues at the state and federal levels: B. D. Armstrong's actions were not right *and* they violated her rights. When claims about what was right were attached to the framework of rights and placed within the context of state and federal jurisdictions, they acquired meanings that they did not have in local jurisdictions. They were no longer about particular conflicts involving particular people. Instead, they involved rights, universally applicable to others in like circumstances and enforced by the authority of the state government or the federal government.[27]

The framework of rights allowed one person's claims about what was right to acquire the power of a universal claim, enforceable by federal authority. They could even acquire the status of constitutionally protected rights. One of the most dramatic examples is access to public venues and services, such as streetcars, railroads, restaurants, hotels, and even government jobs and education. In the early nineteenth century, claims to access involved the maintenance of the public order, not the rights of individuals. To the extent that questions of access involved rights, they were part of the nebulous category of social rights (privileges that were established in context and thus varied from one community to another and that were not protected by state or federal law). Vendors of such services were required to serve the public and were subject to state and local regulation as a result. But such expectations never guaranteed equal access. To the contrary, access to public areas and public services had always been restricted, particularly for African Americans but also for all women. The result was a patchwork of local ordinances and longstanding customary practices, which constrained where African Americans could go and how they could act. During and after the Civil War, African Americans framed claims to new spaces in terms of rights that the state should extend to them and that the federal government should protect. Who, they asked, had a right to access public space and public accommodations if not the public? Was it not the government's duty to ensure access?[28]

Such claims were not that far removed from those of Maria Mitchell, who was claiming the right to use space in ways that her employer clearly rejected: she could speak her mind where she wanted to and how she

In the 1870s the U.S. Constitution might have seemed distant, irrelevant even, to minor disputes in remote parts of the South, such as this courthouse in Lawrence Count, Alabama. It was not. To the extent African Americans could access the legal system at all, it was because of civil rights that were enabled by the Fourteenth Amendment, enshrined in new state constitutions, and protected by the threat federal intervention—although those promises were not always realized at the time.

wanted to. To be sure, such views also had the support of key Congressional leaders. But it was ordinary people who pushed popular conceptions of access to public spaces as a "right" into legal arenas. The Civil Rights Act of 1875 explicitly acknowledged such claims as rights. Those provisions were subsequently declared unconstitutional, but cases involving access to public space continued to cast the issues in terms of civil rights, a characterization that was ultimately accepted and institutionalized.[29]

Violence

African Americans' claims to those rights already recognized in state and federal law were always difficult to separate from their conceptions of what was right, because of the structural racism in nineteenth century society. Structural racism often took form in violence. In fact, violence was so pervasive in the Reconstruction-era South that it was difficult to parse its meaning. White supremacists used violence widely and indiscriminately to keep African Americans from using their civil and political rights—to keep them from going to court or voting. But white supremacists also used violence widely and indiscriminately to keep African Americans from pursuing their vision of what was right—to keep them from using public space, advancing economically, gathering together, and even going to school.[30] Local courts routinely adjudicated cases involving violence that did not involve violations of civil or political rights—like that of Maria Mitchell.

Many more acts of violence never reached the courts for adjudication at all. What distinguished the conflicts that remained at the local level from the ones that migrated to federal jurisdictions was the link to civil and political rights: if the violence in question resulted in a rights violation, then it could move up and out of the local courts. But the emphasis on those cases involving rights obscures underlying commonalities in all cases of violence: when African Americans challenged violence in court, they were challenging a social order marred by structural racism. They were substituting their own vision of what was right, by using their rights.

United States v. Cruikshank, one of the most famous cases of the period to reach the U.S. Supreme Court, provides a particularly dramatic example. The case resulted from the federal government's involvement in sorting out voting rights violations in Louisiana's 1872 election. A year later, there was no clear outcome and some local areas were still in a state of upheaval. In the town of Colfax, uncertainty exploded into violence, when a white mob, aligned with the Democratic Party, attacked local African Americans, aligned with the Republican Party. There is still no clear reckoning of the death toll, but it is estimated that the white mob killed between 60 and 150 African Americans. Federal prosecutors did what they could to identify, charge, and convict the members of the white mob. The defendants then promptly turned around and appealed, claiming that the federal government had overstepped its authority. In *Cruikshank*, as in so many other cases from this period, it was difficult to distill questions about rights from broader questions about what was right: the voting rights of African Americans and the civil rights claimed by the white mob were questions about the public order. Ultimately, the questions about rights could not resolve the underlying problem, which was the pervasiveness of white supremacy. That was what made *Cruikshank* so difficult and so controversial, both then and now. Ultimately, the Justices who decided the case had no choice but to do so through the framework of rights, the framework operative in that jurisdiction and one that clearly frustrated some of the Justices, who could find no good way uphold rights *and* to achieve justice. The decision affirmed the claims of the aggrieved members of the white mob, limiting federal authority and, with it, the federal government's ability to intervene on behalf of African Americans who claimed rights violations.[31]

Myra Bradwell and Women's Rights

The implications of the era's constitutional changes did not end with African Americans. The Reconstruction Amendments, particularly the Fourteenth Amendment, altered the relationship of *all* Americans to rights and the federal government: they positioned the federal government as an arbiter between all Americans and their states, while also elevating the importance of rights as the means by which Americans could access federal power. It did not take them long to do so, as evidenced in *Bradwell v. United States* and *The Slaughterhouse Cases*, both of which were heard by the Supreme Court in 1873, the very year of Colfax massacre. Myra Bradwell—the Bradwell in *Bradwell v. United States*—played an influential role in Illinois legal circles as editor of the *Chicago Legal News*, the publication on which many lawyers in the state depended to keep current on the law. It was, then, deeply ironic when the Illinois state legislature—filled with lawyers who read her publication—refused to consider her application to the bar. Not one to be cowed, Bradwell challenged the decision, making creative use of the Fourteenth Amendment. And she was, by the way, using arguments that other women's rights activists were advocating. She admitted that the opportunity

to apply to the bar was not, in itself, a right. Even so, it was centrally connected to her right to pursue her livelihood and her property interests—issues of central importance to women, who lost such rights under coverture. So when the legislature refused to consider her application, they had denied rights to her that were granted as a matter of course to other (male) citizens. The Supreme Court rejected the first part of the argument, which focused on what qualified as a protected right in the Fourteenth Amendment, thereby evading the second part, which dealt with the amendment's application to women. Still, her use of the Fourteenth Amendment illustrates the broader transformation underway.[32]

It is difficult to imagine stranger legal allies than Myra Bradwell and the New Orleans butchers in the *Slaughter-House Cases*, but there are distinct parallels in their cases. The butchers were challenging an ordinance that regulated the slaughtering of meat and, among other things, required licensing and designated a central location for slaughterhouses, downstream from the city. The New Orleans ordinance was not particularly unusual. State and local governments had traditionally regulated the slaughterhouses where butchers worked, because of the obvious health risks involved to the general public. But the butchers in New Orleans had a particular beef (so to speak) with their government: they were white men, mostly supporters of the Democratic Party, who saw the regulation as overreach on the part of the Republican Party, then in control of the city. With the backing of their party's leadership, they reached for the laws of their political opponents and used the Fourteenth Amendment to protect what they saw as their right—their right to pursue a livelihood as others could. The judges in the *Slaughter-House Cases* arrived at their conclusion by a different legal route from those in *Bradwell v. Illinois*. But, like the butchers, Myra Bradwell framed access to economic opportunities as a right protected by the Fourteenth Amendment. The court rejected the butchers' claims, just as it did Bradwell's, upholding the states' rights to regulate for the public good—not a bad thing, considering the nature of the waste (entrails and whatnot) from slaughterhouses. In the *Slaughter-House Cases*, the court was also explicit in trying to limit the meaning of rights in the Fourteenth Amendment, insisting that it was designed to protect the civil and political rights of African Americans—that is, their claims to those rights already recognized in state law. It was not intended for the expansive uses to which the butchers wished to put it. In both cases, the judges sought to contain the multiplication of rights.[33]

In which direction do these cases move? It is possible to read them as an affirmation of the Fourteenth Amendment's protection of African Americans' civil and political rights, because they limited other rights claims. It is also possible to read them as a harbinger of arguments that connected the Fourteenth Amendment to economic claims and, ultimately, a broader array of rights, often at the expense of protecting the civil and political equality of African Americans. Scholars have made both arguments, and the scholarship has stalled out there, unable to resolve the conflict. Yet the conflict was—and is—the point. These cases are examples of the efforts of Americans—all kinds of Americans—to make their view of what was right into a right.

Conclusion

In fact, the cases of formerly enslaved people like Maria Mitchell and the African Americans who lived in Colfax, Louisiana actually had a lot in common with those of Myra Bradwell and the New Orleans butchers. They all made rights claims, appealing to federal authority either indirectly or directly. All these Americans expected a lot of federal jurisdictions, and they were not alone. The key cases of the late nineteenth century

feature an amazingly diverse array of characters—a grain elevator operator in Illinois, German brewers in Kansas, bakers in New York, just to name a few—all with expansive views of federal power and what it could accomplish. Those views were firmly embedded in the constitutional changes of the Reconstruction era that dealt with rights but did so in a way that tied rights to expectations that legal venues would right wrongs—that rights made the world right. If anything, the connection between rights and what was right was even stronger in popular conceptions of the legal order, which increasingly identified rights as a means—even the primary means—to achieve justice. That link carried its own problems—and still does. As the frustration of Justices in *Cruikshank* suggests, individual rights, even in their most expansive form, had definite limits when it came to achieving social justice. Nor was the preservation of an individual's rights always synonymous with the public good. Still, the policy changes of the Reconstruction era allowed the aspirations of diverse groups of Americans to move into the realm of federal law and, once there, to acquire the status of universal legal principles. The specific claims expressed the values of particular groups of Americans; but they were also deeply rooted in governing practices that were widely held by a broad range of Americans, from all parts of the country and from all walks of life. The results remade the relationship between Americans and the nation state, raising expectations about the federal government's role in maintaining a just social order. Those expectations could only result in conflict, as there was no consensus among the American people about what was right—about what constituted a just society. At the same time, though, the conflicts were and are necessary: they are about our aspirations for what the nation can be and our faith in the law to realize those aspirations.

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ENDNOTES

[1] *State v. B.D. Armstrong*, 1870, Edgecombe County Criminal Action Papers, State Archives of North Carolina, Raleigh, North Carolina (NCSA).

[2] Laura F. Edwards, **The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South** (Chapel Hill: University of North Carolina Press, 2009), particularly pp. 57-133. The discussion of local courts draws extensively on the analysis in this book. *See also* Martha S. Jones, "*Hughes v. Jackson*: Race and Rights beyond *Dred Scott*," *North Carolina Law Review* 91 (June 2013): 1757–83; Kimberly Welch, "Black Litigiousness and White Accountability: Free Blacks and the Rhetoric of Reputation in the Antebellum Natchez District," *Journal of the Civil War Era* 5 (September 2015): 372-98; Kelly Kennington, **In the Shadow of *Dred Scott*: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America** (Athens: University of Georgia Press, forthcoming 2017); Felicity Turner, "Rights and the Ambiguities of Law: Infanticide in the Nineteenth-Century U.S. South," *Journal of the Civil War Era* 4 (September 2014): 350-72.

[3] Edwards, **The People and Their Peace.** The analysis in that book was based on local court records in North Carolina and South Carolina, but the local courts in parts of the country worked similarly, as my own research and that of others suggests. *See, for instance*, Laura F. Edwards, "Textiles: Popular Culture and the Law," *Buffalo Law Review* 64 (January 2016): 193-214 as well as the works cited in note 2.

[4] In addition to **The People and Their Peace**, this article draws on three other publications by the author: Laura F. Edwards, "Status without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth-Century U.S. South," *American Historical Review* 112 (April 2007): 365–93; Edwards, "Reconstruction and the History of Governance," in Gregory P.

Downs and Kate Masur, eds., **The World the War Made** (Chapel Hill: University of North Carolina Press, 2015), pp. 30-44; Edwards, **A Legal History of the Civil War and Reconstruction: A Nation of Rights** (New York: Cambridge University Press, 2015).

[5] Edwards, "Reconstruction and the History of Governance." Such a perspective is common in scholarship that focuses on the colonial period. *See* Christopher L. Tomlins and Bruce H. Mann, eds., **The Many Legalities of Early America** (Chapel Hill: University of North Carolina Press, 2001); Lauren Benton, **A Search for Sovereignty: Law and Geography in European Empires, 1400-1900** (New York: Cambridge University Press, 2011); Philip J. Stern, **The Company-State: Corporate Sovereignty and the Early Modern Foundation of the British Empire in India** (New York: Oxford University Press, 2011). But the idea of "many legalities" and overlapping legal arenas tends to drop out of the scholarship focused on the nineteenth century, where the presumption is that the new nation secured a monopoly on legal authority with its founding. Recent work, however, suggests otherwise. *See, for instance*, William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in Meg Jacobs, William J. Novak, and Julian Zelizer, eds., **The Democratic Experiment: New Directions in American Political History** (Princeton: Princeton University Press, 2003), pp. 85-119; Novak, "The American Law of Association: The Legal-Political Construction of Civil Society," *Studies in American Political Development* 15 (Fall 2001): 163-88; Christopher Tomlins and Michael Grossberg, eds., **The Cambridge History of Law in America**, vol. 2, "The Long Nineteenth Century, 1789-1920" (New York: Cambridge University Press, 2008); Barbara Young Welke, **Law and the Borders of Belonging in the Long Nineteenth Century United States** (New York: Cambridge University Press, 2010).

[6] Richard R. John, **Spreading the News: The American Postal Service from Franklin to Morse** (Cambridge: Harvard University Press, 1995).

[7] Edwards, **The People and Their Peace**, particularly pp. 26-53, 256-85.

[8] Edwards, **A Legal History**, particularly pp. 90-119.

[9] Recent historiography, particularly work in western history and Indian history, reflects the disparity between the experiences of those who lived inside and outside the jurisdiction of states. Historians in these two fields tend to portray the federal government as not only more powerful, but also more involved in the legal status of individuals than did the traditional historiography on Reconstruction. That disparity reflects facts on the ground, namely, the federal government's jurisdiction over Indians and American settlers in the territories. As a result, those people experienced the federal government differently from those who lived in established states to the east. Geography made all the difference. The recent collection of essays, Downs and Masur, eds. **The World the War Made**, provides an excellent example. *See also* Steven Hahn, "Slave Emancipation, Indian Peoples, and the Projects of a New American Nation-State," *Journal of the Civil War Era* 3 (September 2013): 307–30; Heather Cox Richardson, **West from Appomattox: The Reconstruction of American after the Civil War** (New Haven: Yale University Press, 2007); Stacy I. Smith, **Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction** (Chapel Hill: University of North Carolina Press, 2013); Elliott West, **The Last Indian War: The Nez Perce Story** (New York: Oxford University Press, 2009).

[10] Some Americans were more likely to be involved in federal courts than others. As the work of Martha S. Jones shows, free blacks actively defended their rights in local, state, and federal jurisdictions precisely because their legal status—and their ability to live within the United States—was so tenuous. *See, for instance*, Jones, "*Hughes v. Jackson*." *See also* Stephen D. Kantrowitz, **Fighting for Black Citizenship in a White Republic, 1829–1889** (New York: Penguin, 2012).

[11] Naturalization Act, 1 U.S. *Statutes at Large* 103 (1790). Novak, "The Legal Transformation of Citizenship"; James H. Kettner, **The Development of American Citizenship, 1608–1870** (Chapel Hill: University of North Carolina Press, 1978).

[12] *Dred Scott v. Sandford* 60 U.S. 393 (1857). In the 1830s and 1840s, Northern courts adopted the position that slave law from Southern states could not reach into their states; *see* Leonard W. Levy, **The Law of the Commonwealth and Chief Justice Shaw** (Cambridge: Harvard University Press, 1957); Paul Finkelman, **An Imperfect Union: Slavery, Federalism, and Comity** (Chapel Hill: University of North Carolina Press, 1981). That was why both the Fugitive Slave Act, 9 U.S. *Statutes at Large* 462 (1850), and the decision in *Dred Scott* proved so controversial. Literature on African Americans' attempts to sue for freedom suggests how legally ambiguous the distinction between slavery and freedom was for African Americans in the decades between the Revolution and the Civil War: Martha S. Jones, "Time, Space, and Jurisdiction in Atlantic World Slavery: The Volunbrun Household in Gradual Emancipation New York," *Law and History Review* 29 (November 2011): 1031–60; Kennington, **In the Shadow of *Dred Scott***; Edlie L. Wong, **Neither Fugitive nor Free: Atlantic Slavery, Freedom Suits, and the Legal Culture of Travel** (New York: New York University Press, 2009). Questions about freedom were tied to questions about racial identity, which were not easy to resolve either; *see* Ariela J. Gross, **What Blood Won't Tell: A History of Race on Trial in America** (Cambridge: Harvard University Press, 2008).

[13] Edwards, **The People and Their Peace**, particularly pp. 205-98. For a particularly compelling account of the limits of rights in the early nineteenth century, *see* Christopher L. Tomlins, **Law, Labor, and Ideology in the Early American Republic** (New York: Cambridge University Press, 1993).

[14] The best statement on states' regulatory power is William J. Novak, **The People's Welfare: Law and Regulation in Nineteenth-Century America** (Chapel Hill: University of North Carolina Press, 1996).

[15] Edwards, **The People and Their Peace**, particularly pp. 64-99.

[16] *State v. Woodson Chavis,* 1851, Criminal Actions Concerning Slaves and Free Persons of Color, Granville County, NCSA. Edwards, **The People and Their Peace**, pp. 64-132.

[17] Edwards, **The People and Their Peace**, pp. 64-132.

[18] *State v. Mary McAfee,* 1804, Indictments, Court of General Sessions, Kershaw District, South Carolina Department of Archives and History, Columbia, South Carolina. Edwards, **The People and Their Peace**, pp.100-201.

[19] Edwards, **The People and Their Peace**, pp. 64-99,

[20] Edwards, **The People and Their Peace**, pp. 169-201.

[21] Edwards, "Status without Rights."

[22] *Ibid.*

[23] Edwards, "Status without Rights." Gregory P. Downs, **After Appomattox: Military Occupation and the Ends of War** (Cambridge, MA: Harvard University Press, 2015), emphasizes the pervasiveness and importance of federal legal venues, which often took over for local courts in the years follow Confederate surrender. Recent scholarship on African Americans' experiences during the Civil War and Reconstruction often uses government documents, particularly legal records, and underscores the fact that African Americans made every effort to use of various levels of the legal system. Generally, however, such work does not link those sources or the resulting cases to broader changes in law and legal institutions. The work associated with the Freedmen and Southern Society Project, which pioneered in the use of federal records that had been largely overlooked, provided the framework for subsequent scholarship. *See, for instance*, Ira Berlin, Joseph P. Reidy, and Leslie S. Rowland, eds., "The Black Military Experience," vol. 2 of **Freedom: A Documentary History of Emancipation, 1861–1867** (New York: Cambridge University Press, 1982); Ira Berlin, Barbara J. Fields, Thavolia Glymph, Joseph P. Reidy, and Leslie S. Rowland, eds., "The Destruction of Slavery," vol. 2 of **Freedom: A Documentary History of Emancipation, 1861–1867** (New York: Cambridge University Press, 1985); and Ira Berlin, Stephen F. Miller, and Leslie S. Rowland, "Afro-American Families in the Transition from Slavery to Freedom," *Radical History Review* 42 (1988): 89–121. For other work on the period that makes extensive use of legal sources, *see* Laura F. Edwards, **Gendered Strife and Confusion: The Political Culture of Reconstruction** (Urbana: University of Illinois Press, 1997); Mary Farmer-Kaiser, **Freedwomen and the Freedmen's Bureau: Race, Gender, and Public Policy in the Age of Emancipation** (New York: Fordham University Press, 2010); Crystal N. Feimster, "'What If I Am a Woman'" Black Women's Campaigns for Sexual Justice and Citizenship," in Downs and Masur, eds., **The World the Civil War Made;** Barbara J. Fields, **Slavery and Freedom on the Middle Ground: Maryland during the Nineteenth Century** (New Haven: Yale University Press, 1985); Kate Masur, **An Example for All the Land: Emancipation and the Struggle Over Equality in Washington, D.C.** (Chapel Hill: University of North Carolina Press, 2010); Susan E. O'Donovan, **Becoming Free in the Cotton South** (Cambridge: Harvard University Press, 2007); John C. Rodrigue, **Reconstruction in the Cane Fields: From Slavery to Free Labor in Louisiana's Sugar Parishes, 1862–1880** (Baton Rouge: Louisiana State University Press, 2001); Julie Saville, **The Work of Reconstruction: From Slave to Wage Laborer in South Carolina, 1860–1870** (New York: Cambridge University Press, 1994); Leslie A. Schwalm, **A Hard Fight for We: Women's Transition from Slavery to Freedom in South Carolina** (Urbana: University of Illinois Press, 1997).

[24] Laura F. Edwards, **A Legal History of the Civil War and Reconstruction: A Nation of Rights** (New York: Cambridge University Press, 2015), pp. 90-119.

[25] *Ibid.*

[26] Edwards, "Reconstruction and the History of Governance."

[27] *Ibid.*

[28] For a particularly compelling account of African Americans' efforts to access public spaces, *see* Masur, **An Example for All the Land.** For a fascinating discussion of the regulation of public carriers and people's access to them, *see* Barbara Young Welke, **Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920** (New York: Cambridge University Press, 2001). Education is also an example of African Americans' efforts to access public services. The Reconstruction era constitutions of many states in the former Confederacy included access to public education as something akin to a right. *See* Emily Zackin, **Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights** (Princeton: Princeton University Press, 2014), 67–105. As Zackin argues, states recognized an array of positive rights in the late nineteenth century, often at the behest of citizens who actively sought out government protection. The claims of African Americans to schooling is well documented. In addition to Masur,

above, *see also* Heather Williams, **Self-Taught: African American Education in Slavery and Freedom** (Chapel Hill: University of North Carolina Press, 2005). Hugh Davis, **"We Will Be Satisfied with Nothing Less": The African American Struggle for Equal Rights in the North during Reconstruction** (Ithaca: Cornell University Press, 2011); Davison M. Douglas, **Jim Crow Moves North: The Battle over Northern School Segregation, 1865–1954** (New York: Cambridge University Press, 2005).

[29] Civil Rights Act, 18 U.S. *Statutes at Large*, 335 (1875); *Civil Rights Cases*, 109 U.S. 3 (1883). Edwards, **A Legal History**, pp. 163-64. *See also* Masur, **An Example for All the Land**; Amy Dru Stanley, "Slave Emancipation and the Revolutionizing of Human Rights," in Downs and Masur, ed., **The World the Civil War Made.**

[30] The extent of violence is strikingly evident in most of the literature on Reconstruction, and has become the focus of recent work. *See* Downs, **After Appomattox**; Carole Emberton, **Beyond Redemption: Race, Violence, and the American South after the Civil War** (Chicago: University of Chicago Press, 2013); Hannah D. Rosen, **Terror in the Heart of Freedom: Citizenship, Sexual Violence, and the Meaning of Citizenship in the Postemancipation South** (Chapel Hill: University of North Carolina Press, 2009); Kidada E. Williams, **They Left Great Marks on Me: African American Testimonies of Racial Violence from Emancipation to World War I** (New York: New York University Press, 2012). Examples of violence pervade the literature, and some of the most horrific examples were documented in federal hearings. *See, for instance*, 39th Cong., 1st sess., House Report 101, Select Committee on the Memphis Riots; 40th Cong., 3rd sess., House Miscellaneous Document 52, Condition of the Affairs in Georgia; 42nd Cong., 2nd sess., House Report 22, Testimony Taken by the Joint Committee to Enquire into the Condition of Affairs in the Late Insurrectionary States (Ku Klux Klan Hearings); 43rd Cong., 2nd sess., House Report 261, Condition of Affairs in the South (Louisiana); 43rd Cong., 2nd sess., House Report 262, Affairs in Alabama; 43rd Cong., 2nd sess., House Report 265, Vicksburg Troubles; 44th Cong., 1st sess., Senate Report 527, Mississippi in 1875 44th Con., 2nd sess., House Miscellaneous Document 31, Recent Election in South Carolina; 44th Cong., 2nd sess., Senate Miscellaneous Document 45, Mississippi; 44th Cong., 2nd sess., Senate Miscellaneous Document 48, South Carolina in 1876. The literature on voting rights cases suggests how violence made its way into federal courts through these kinds of cases. *See, in particular*, the work cited in note 6 above.

[31] *United States v. Cruikshank*, 92 U.S. 542 (1876). *See also United States v. Reese*, 92 U.S. 214 (1876). Edwards, **A Legal History**, pp. 146-72. For Colfax, *see* Leanna Keith, **The Colfax Massacre: The Untold Story of Black Power, White Terror, and the Death of Reconstruction** (New York, 2008); Charles Lane, **The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction** (New York, 2008). Conventional historiographical wisdom has laid much of the blame for Reconstruction's failure at the feet of the U.S. Supreme Court, arguing that the Court's decisions represented nothing less than the conscious abandonment of African Americans to conservative whites intent on stripping them of their newly acquired civil and political rights. Recent scholarship, however, has moderated those conclusions, arguing that the Court was not as hostile to African Americans' rights as previous scholarship suggests, particularly in the area of voting rights, where it left significant protections in place. *See* Pamela Brandwein, **Rethinking the Judicial Settlement of Reconstruction** (New York, 2011); G. Edward White, "Article: The Origins of Civil Rights in America," 64 *Case W. Res. L. Rev.* 755 (2014), available at: http://scholarlycommons.law.case.edu/caselrev/vol64/iss3/5. Throughout the late nineteenth century, however, the Court upheld a narrow, individualized view of civil rights, one at odds with the aspirations of many Americans. While it upheld federal enforcement, the Court's decisions did nothing to make an already difficult job any easier.

[32] *Bradwell v. Illinois*, 83 U.S. 130 (1873). Edwards, **A Legal History**, pp. 146-72. Joan Hoff, **Law, Gender, and Injustice: A Legal History of U.S. Women** (New York, 1991), pp. 151–91. Myra Bradwell's case, however, also suggests countervailing political currents, giving women the same rights as men without acknowledging the particularities of structural inequalities that they faced as women; Illinois allowed women admission to the bar within a year of the U.S. Supreme Court's decision.

[33] *Slaughter-House Cases*, 83 U.S. 36 (1873). Edwards, **A Legal History**, 146-72. *See also* Michael A. Ross, "Justice Miller's Reconstruction: The Slaughter House Cases, Health Codes, and Civil Rights in New Orleans, 1861–1873," *Journal of Southern History* 64 (1998): 649–76.

A Lost Jurisprudence of the Reconstruction Amendments

PAMELA BRANDWEIN

The Conventional Story

Reconstruction, of course, was America's Second Revolution. The Thirteenth Amendment abolished slavery and there was going to be, in Lincoln's words, "a new birth of freedom." But, according to conventional legal-historical wisdom, Reconstruction was dead by 1877; the fatal blow was inflicted by the Supreme Court and the weapon was "state action" doctrine.[1] Now the state action doctrine holds that the rights guaranteed by the Fourteenth and Fifteenth Amendments are protected against the government only. And one gets this from the text of the Amendment. Section One reads, in part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[2]

In this regard, it is important to recognize that a distinction is needed between state action and private action to get the amendment off the ground, to make it usable.[3] And a distinction can be seen between state action and private action in canonical statements of state action doctrine that come from the *Civil Rights Cases* in 1883.[4] "The first section of the Fourteenth Amendment," stated the Court, "is prohibitory in its character, and prohibitory upon the States."[5] Likewise, "It is State action . . . that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[6]

And so these statements show a general distinction. The conventional view, however, is that state action doctrine put a major problem outside the reach of the Fourteenth and Fifteenth Amendments—the problem of unpunished Klan violence. Unpunished white supremacist violence and intimidation was rampant across the South. Klan violence was the major form of resistance to Reconstruction after the first effort to resist emancipation—passage of the Black Codes of 1865-66—was rebuked by Republicans.[7] But according to the conventional story, the state's failure to punish the Klan—the unequal enforcement of the law—was not "state action" within the meaning of the Fourteenth and Fifteenth Amendments. According to standard wisdom, the state action doctrine designated violence by private individuals as private action, under

all circumstances, which could never be punished under those amendments. And so, under this reading, it makes sense to see state action doctrine as handcuffing the federal government and defeating Reconstruction.[8]

There are a number of reasons for thinking that this conventional story is plausible. First, there are the outcomes of the state action cases. A brutal massacre was committed by private individuals (Klansmen) in *United States v. Cruikshank*.[9] Nobody was punished. There were exclusions of blacks from public accommodations by private individuals in the *Civil Rights Cases*. Again nobody was punished. There were also a number of decisions during this time that invalidated Reconstruction-era statutes.[10] With all these outcomes, the Court looked unfriendly to Reconstruction.[11]

Second, the Court offered no broad statement about equality under law in the state action cases. There never was a strong endorsement of black rights in these cases, and not even the facts were given in *Cruikshank*, which involved a bloody and cold-blooded massacre.

Third, there was gratuitous racism from Justice Joseph P. Bradley in the *Civil Rights Cases*. This was the canonical state action case that invalidated the public accommodations provisions of the Civil Rights Act of 1875. In his majority opinion, Justice Bradley was contemptuous of the public accommodations rights claims and he cast blacks as "the special favorite of the laws."[12]

Fourth, there is a historical account of the "Compromise of 1877." According to historian C. Van Woodward, author of that account, Republicans and Democrats struck a deal in the aftermath of the disputed election of 1876. Republicans would get the presidency and control of national economic policy. Democrats would get control over the former slaves and "home rule." Van Woodward represented the Compromise as a falling curtain, and Reconstruction is said to end in 1877. With Van Woodward's account, it looks as if the Supreme Court gave a narrow construction to "state action" doctrine, and it looks as if they were consolidating the political abandonment of blacks by the Republican Party.[13]

That legal construction, moreover, looked unnecessary. The text of the Fourteenth Amendment can accommodate the view that the unequal enforcement of the law is a violation of the Equal Protection Clause. Likewise, the legislative history makes clear that Republican congressmen understood the rampant failure to punish Klan violence as a violation of the Equal Protection Clause. And so the narrow legal construction of "state action" looks Court-imposed, and it looks unnecessary.[14]

The New Political History

My point of entry on the Court and Reconstruction is a new revisionist literature on the Republican Party and political development in the 1870s, 1880s, and 1890s. This literature has emerged in roughly the last fifteen years, so it is quite new. The basic finding is that the Republican Party did not abandon blacks in 1877. The Party, or that wing of it that controlled the Presidency, maintained a principled and pragmatic effort to protect black rights, in particular black voting rights, through the early 1890s. That effort was encumbered but it was genuine. And so the story of the Comprise of 1877 as a political abandonment of blacks is basically a myth.[15]

The legal literature has not grappled with the new political history. However, that new literature must be confronted because it throws the conventional story off balance. I offer some highlights from the new political history in order to set the scene for a return to the state action cases.

The first highlight is the economic Panic of 1873, which triggered a steep depression that ran throughout the 1870s. It was known at

the time as the "Great Depression." The New York Stock Exchange closed for ten days. Unemployment hit about fourteen percent. About 18,000 businesses went bust. One-quarter of all railroads went bankrupt. And there were deep wage cuts. The Panic and subsequent Depression fundamentally changed the politics of civil rights enforcement. Not surprisingly, voters blamed Republicans, the party in control of the national government since the war. It is a political axiom that voters blame the party in power for steep economic declines, and indeed Democrats won control of the House of Representatives in the 1874 election. Democratic control of the House was a major obstacle to rights enforcement because control of the House gave them control over appropriations. And Democrats turned off the money for rights enforcement, which was expensive. More generally, civil rights enforcement became a political liability for the Republican Party in the context of the Depression, when Northern whites did not want scarce economic resources sent to the South. News reports exacerbated that impulse. Democrats controlled the wire offices in the South and sent false reports typically denying racial violence or blaming that violence on blacks. If more accurate accounts emerged in Republican newspapers, as sometimes occurred, it was always after the fact—after first impressions had already formed. And so after the Panic of 1873, civil rights enforcement became much harder for a combination of reasons.[16]

The new political history shows, too, that Republicans in the 1870s and 1880s were trying to build a Southern wing of their party. They needed to build a Southern wing. And they tried a number of strategies, including offering infrastructure improvements to the South and forming alliances with independent parties. All strategies failed in the face of Democratic fraud and violence. And each time a new strategy failed, Republicans turned back to rights enforcement. But each return brought diminishing results. An early iteration of that cycle occurred with Republican President Rutherford B. Hayes, who after the disputed election of 1876 tried "conciliation," which basically meant offering money for infrastructure and railroads. Hayes assumed Democratic compliance, but compliance was not forthcoming. The election of 1878 was rife with Democratic fraud and violence, and that election ominously gave the Senate to the Democrats, who now controlled both houses of Congress. Republicans held the Presidency but only by a thread. And everyone knew that if the Democrats added the Presidency, Reconstruction enforcement legislation would be repealed. And so, in the wake of the 1878 election, Hayes repudiated his conciliation policy, publicly calling it a mistake. He vetoed on numerous occasions Democratic bills to repeal Reconstruction legislation, and he turned back to rights enforcement to the extent he could.[17]

What happened next is another highlight of the new political history: a significant upturn in voting rights enforcement between 1880 and 1885. A Republican, James A. Garfield, won the Presidency in 1880, and he ran on a black rights platform. The stakes for the 1880 election were high (recall that the Democrats now controlled the House and Senate), and the election of 1880 could have been mistaken for the election of 1868. It was sectional antagonism all over again. Not only did Garfield win (narrowly). Republicans also (narrowly) got back control of the House and Senate. Importantly, the Depression had lifted by 1880, which helped Republicans. And so it was during the Garfield and Arthur Administrations that Republicans revitalized voting rights enforcement. The number of prosecutions never returned to its height (in 1873, just before the Panic), but the upturn was significant both politically and constitutionally.[18]

Now if conventional legal-historical wisdom about state action doctrine were correct, that upturn in voting rights enforcement would

The conventional view of Reconstruction is that state action doctrine put the problem of unpunished Ku Klux Klan violence, which was rampant across the South, outside the reach of the Fourteenth and Fifteenth Amendments. But white supremacists were jailed following the Supreme Court's *Ex Parte Yarborough* decision, in part under the Fifteenth Amendment.

have been impossible. If Republicans had really abandoned blacks in 1877 and if the federal government were really handcuffed, the Garfield-Arthur Administrations would not have wanted to bring voting rights charges and, in any case, would not have been able to.

And notably, the Garfield-Arthur Administrations won an important victory in the *Ex parte Yarbrough* decision of 1884.[19] That decision approved the voting rights theory that they used to bring cases between 1880 and 1885. Scholars never used to talk about *Yarbrough*. But Klansmen went to jail under, in part, the Fifteenth Amendment. And it was a unanimous decision. In *Yarbrough* the Court finally used stronger language about violence and free elections. All of this is unexplained under the conventional story about state action doctrine.

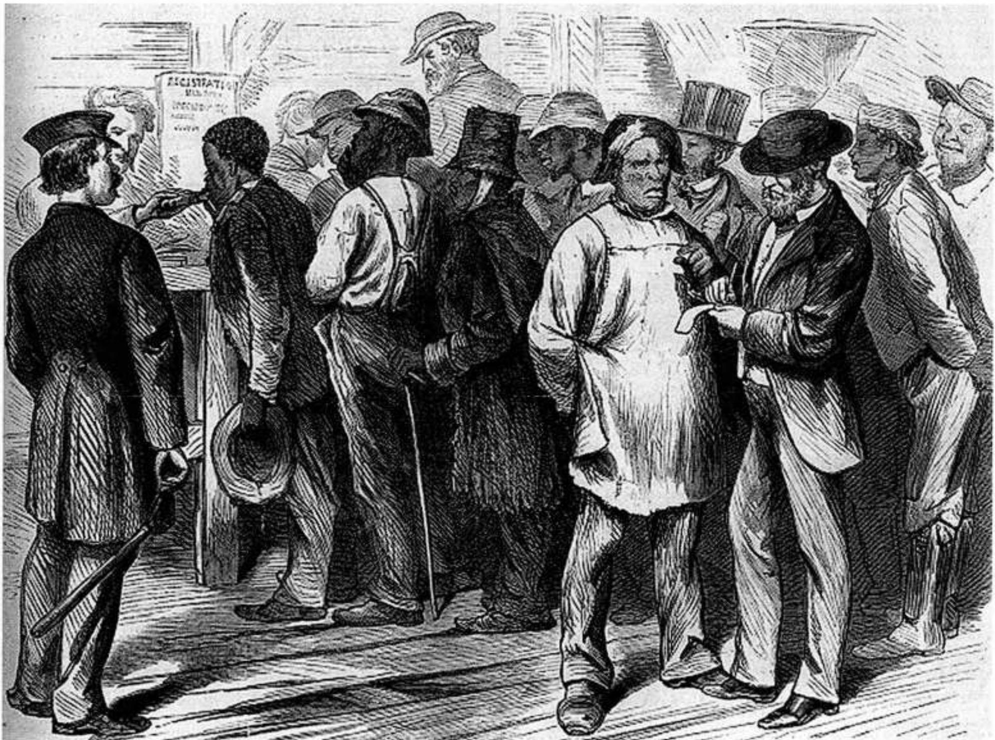
A Lost Jurisprudence of Rights

And so there is a puzzle. In my 2011 book, **Rethinking the Judicial Settlement of Reconstruction**, I challenge the conventional wisdom about state action doctrine. I trace a lost jurisprudence of rights and rights enforcement, a jurisprudence obscured by a host of anachronisms. There were three elements to this jurisprudence, sketched here in only the briefest of terms. First, there was the "state neglect" formulation of state action, which could protect blacks from unpunished racial violence and unpunished racial interference in contract and property rights. The "state neglect" formulation did not clearly cover public accommodations, integrated schools, or racial intermarriage.[20]

The second component was the "Fifteenth Amendment exemption" from state action doctrine. The Fifteenth Amendment was exempted from state action doctrine by the Supreme Court under Chief Justice Morrison R. Waite (1874-1888). And that looks odd today. The Fifteenth Amendment contains "no state" language, and so the exemption seems strange. But in fact a principled and conventional rights distinction underlay it. That rights distinction was particular to the nineteenth century—it is gone today—and so it is difficult for modern readers to perceive. But that principled distinction was there, and it provided for the Hayes, Garfield, and Arthur Administrations a robust theory of voting rights enforcement, which they used though in encumbered ways. It was a robust theory because it permitted the federal government to prosecute private individuals for race-based interferences in voting, regardless of action/neglect.[21]

The third element of the lost jurisprudence was "federal elections" jurisprudence. The Waite Court pointed to a section of the U.S. Constitution, Article I, Section 4. According to the Court, that Section was the source of plenary federal power over federal elections. This meant the federal government had original jurisdiction in cases involving federal elections—there was no state action/neglect predicate—and the federal government could punish private and official interference in federal elections, whatever the motive. And so white Republican voters as well as black voters got protection here.[22]

Taken as a whole, this lost jurisprudence protected black physical safety, black contract and property rights, and black voting rights. It also protected white Republicans



During the Garfield and Arthur Administrations, beginning in 1880, there was a significant upturn in voting rights enforcement. Above are newly enfranchised black Southerners engaged in the discussion of political questions upon which they are to vote.

and blacks in federal elections. But it did not clearly protect anything that went under the mantle of "social equality." This was the terminology of the nineteenth century, and it covered a sphere of "association." That sphere of association included public accommodations, schools, and marriage, and even centrist or so-called "Moderate" Republicans—who held the balance of power —sought to keep that sphere walled off from blacks. It remained a sphere of caste. But critically, centrist Republicans combined their commitments to white superiority—manifest in their denial to blacks of "social rights"—with genuine commitments to legal protections for black physical safety, contract and property, and voting. It is a mistake to think of racism as a dichotomous variable. Racism exists along a continuum and centrist Republicans were right in the middle of that continuum. The centrists were not like Fredrick Douglass. But they were also not like the Democrats.[23]

State Neglect

The "state neglect" concept should now be explained in more detail. It had its origins in the problem of unpunished white supremacist violence. This was occurring on a massive scale in the South. There was a breakdown in the enforcement of criminal law, and Republicans (centrists and radicals, alike) saw this failure as a basic rule of law issue. Violence against blacks was being committed with impunity, and this is the language that was used at the time: crimes of the deepest dye were being committed with impunity. The Klan was being exempted from the law, and it was clear to Republican Congressmen that this was a violation of republican (small "r") principles. It was a very old idea that government had a duty to provide equal redress for injuries. This was a part of the natural rights tradition: protection (equal redress for injuries) in exchange for allegiance. Republicans used this idea in developing the state neglect formulation of state action. And it was centrist Republicans who developed it. And they did so not in opposition to Democrats, who voted against every piece of Reconstruction legislation. Centrist Republicans developed the concept of state neglect in opposition to Radicals, who want to give to the federal government original control over crime. Original control meant giving the federal government power to punish crime, regardless of whether states were doing their job. Centrists balked at this; they said no. Centrists wanted to give the federal government power to punish private Klan violence, but only under conditions where states did not do their job, i.e., when states failed to equally enforce the law. Centrists insisted, in other words, that federal punishment of private perpetrators be made contingent upon a showing of state action/failure to equally enforce the law.[24]

This insistence is seen in a speech by centrist Republican James A. Garfield, given during congressional debate over the Ku Klux Klan Act of 1871. Garfield stated, "[T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or *a neglect or refusal to enforce their provisions,* a portion of the people are denied equal protection under them."[25] Garfield continued by introducing the state neglect predicate: "Whenever such a state of facts is clearly made out, I believe [Section Five of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection."[26] Garfield then reiterated the need for a state action/failure predicate:

> Now if the . . . pending bill can be so amended that it . . . shall employ no terms which assert the power of Congress to take jurisdiction of the subject until such denial be clearly made, and shall not in any way assume the original jurisdiction of the rights of private persons and of

> property within the state—with these conditions clearly expressed ... I shall give it my hearty support.[27]

And so here Garfield clearly articulated the state neglect concept. There are many more statements like this from centrist Republicans.[28] Current scholarship, for the most part, identifies in the Reconstruction Congresses the articulation of state failure/neglect concept.

But I argue that the concept of state neglect found expression in court decisions, as well. In its mature expression by the Supreme Court, the state neglect formulation of state action was housed in the legal phrase, "the color of law . . . or custom." That phrase originated in the Civil Rights Act of 1866.[29] How did the "state neglect" concept work constitutionally? If one starts with an assault by the Klan, whether that assault can or cannot be punished by the federal government depends on whether the state has a habit of punishing that kind of violence. The status of that assault is "private" if remedies are normally available. But if remedies are not normally available, that assault gains what is called "the color of law or custom." Under those conditions, the federal government could come in and punish the perpetrator. But the constitutional violation here is not the original assault, and the federal government is not punishing private action. Rather, the constitutional violation is the state's failure to provide equal redress for injuries: the federal government is punishing a private individual whose assault has gained "the color of law or custom." And federal punishment of the individual has to be made contingent on a showing of state failure to provide remedies. So that is how the concept works constitutionally.[30]

Bradley's Opinion in *United States v. Cruikshank* (1874)

The state neglect concept was articulated in the *United States v. Cruikshank* opinion of 1874.[31] Now this was Justice Bradley's circuit opinion. Bradley was "riding circuit," as Justices did in the nineteenth century, and Bradley had charge of the Fifth Circuit, which included Louisiana, site of the brutal massacre that gave rise to *Cruikshank.* Between sixty-one and eighty-two people were killed, mostly in cold blood. Nobody was held accountable. The federal government indicted ninety-seven individuals and managed to secure convictions of three of them. But Bradley threw out the indictments, so these Klansmen walked free. The conventional view is that *United States v. Cruikshank* gave the "green light" to the Klan and handcuffed the federal government when it came to the protection of black rights.

There is a more complicated story to tell about *Cruikshank.* The decision clearly gave comfort to the Klan, as Klansmen walked free. But the legal and political story is more complicated, spanning many years. It starts in 1874 with Bradley's circuit opinion and it continues through the *Ex Parte Yarbrough* decision in 1884. Justice Bradley plays a central role in this story. In 1874, he developed the voting rights theory that "wins" in *Yarbrough.* He also expressed disdain for public accommodation rights. That combination is unexpected today.

Justice Bradley's 1874 opinion is an unrecognized milestone in constitutional development. Bradley attempted a coordinated theory of all three Reconstruction Amendments. And there was nothing in the case that demanded this. He was not entirely successful. But there was principled content that wound its way through the opinion. Bradley made key choices. Some involved rebuffs to Congress that limited federal power over rights. Other choices opened the door to federal enforcement of rights. He endorsed the state neglect concept for the first time in a circuit opinion. He also outlined the Fifteenth Amendment exemption from state action rules and provided the underlying theory.[32] But he threw out the charges. That is why the

case is complicated. Klansmen walked free, but at the same time Bradley provided a blueprint for future indictments. And when the clock is kept rolling past the 1876 election, the federal government is seen following the blueprint and having taken up Bradley's theory.

The basis for Bradley's coordinated theory of the three amendments was a rights distinction that was conventional in the nineteenth century but is gone today, so it is unfamiliar. There were two kinds of rights: natural rights, which were understood as pre-existing the Constitution. They had their source in nature or God and were won against the kings of England. These rights were "declared" or "secured" by the Constitution. There were also rights that were "created" by the Constitution. These rights were understood as having their source in that document. These rights were "given" "conferred," or "granted" by the Constitution or federal law. So these were different kinds of rights. The Constitution was a hybrid document, understood as protecting both kinds of rights.[33]

The distinction between "secured" and "created" rights was critical for Bradley, who said that the manner in which Congress could protect rights depended on two things: the kind of right at issue and the language of the constitutional clause that protected that right. For natural rights (e.g., property, contract, suing, testifying, equal redress for injuries) protected by prohibitory language, states had original jurisdiction but the federal government could intervene in a "corrective" capacity when states denied rights. This is state action doctrine.[34]

The massacre in Colefax County, considered the worst instance of racial violence during Reconstruction, was precipitated by the contested Louisiana gubernatorial election of 1872. A group of white Democrats attacked Republican freedman and state militia (also black) who were trying to guard the courthouse. This illustration from *Harper's Weekly*, published May 10, 1873, shows the dead being gathered.

Importantly, when Bradley articulated state action doctrine, he used state neglect language:

> [When a right is] denied or abridged by a state on account of race, color, or previous condition of servitude, either by withholding the right itself *or the remedies which are given to other citizens to enforce it*, then undoubtedly, congress has the power to pass laws to directly enforce the right and punish individuals for its violation, because that would be the only appropriate and efficient mode of enforcing the amendment.[35]

Bradley's personal correspondence also showed his acceptance of the state neglect concept: "To have redress for injuries the same as all others have ... [is] to have and enjoy the equal protection of the laws."[36] It could not be clearer.

Likewise, newspapers saw in Bradley's opinion the state neglect concept. The *Chicago Tribune* explained state action doctrine this way: "The moment the State *fails* to comply with the duties enforced upon it, the United States is called on to interfere ... " And here comes the state neglect predicate: "but the interference of Congress, when a State is *ready to punish* a violation of these rights, is unnecessary, injudicious and illegal ... When a State *refuses this right*, Congress has the power to pass laws to enforce the amendment. Congress has also the power to secure these rights against individuals."[37]

Bradley's 1874 *Cruiskhank* opinion, his personal correspondence, and newspaper coverage all provide evidence of Bradley's acceptance of the state neglect concept. State action doctrine in its fullest development applied only to the Fourteenth Amendment. As noted earlier, this seems surprising because the Fifteenth Amendment also has "no state" language. The reason Bradley did not ultimately apply state action doctrine to the Fifteenth Amendment was because that Amendment "created" a right. The right to vote was understood as a "created" right, not a natural right. That right was created in state constitutions. But the national constitution/the Fifteenth Amendment created the right to vote free from racial interference.[38]

Bradley's general rule, expressed in his 1874 opinion, was that when a right was created by the national Constitution, the national government had plenary control over the enforcement of that right. Construing the Fifteenth Amendment as creating a right to vote free from racial interference against both private individuals and officials, Bradley concluded that the national government had plenary control. That meant the federal government had original jurisdiction and could punish these interferences, regardless of state action/neglect.

But the text of the Fifteenth gave Bradley trouble because of its "no state" language, and he wrestled with this. Bradley stated, "Although negative in form"—this is him referring to the Amendment's text—"and therefore, at first view, apparently to be governed by the rule that congress has no duty to perform until the state has violated its provisions"—here comes the deciding factor for Bradley—"nevertheless in substance, [the Fifteenth Amendment] *confers* a positive right which did not exist before ... "[39] There is the key term: confer.

Bradley here was wrestling with whether or not to apply the state action/neglect rule: "The real difficulty in the present case is to determine whether the [Fifteenth] amendment has given to congress any power to legislate except to furnish redress in cases where the states violate the amendment."[40] The alternative that should be kept in mind was a "state neglect" interpretation of the Fifteenth Amendment. But Bradley

Chief Justice Morrison R. Waite (seated center) wrote the *Cruikshank* decision allowing the Colefax Klansmen to go free. Unlike the reactionary Fuller Court (1888-1910), however, the Waite Court provided the federal government broad authority to protect black and white voters in national elections from intimidation, violence, and fraud perpetrated by either private citizens or state officers.

ultimately concluded that the creation of a right mattered more:

> Considering, as before intimated, that the amendment, notwithstanding its negative form, substantially guaranties the equal right to vote to citizens of every race and color, I am inclined to the opinion that congress has the power to secure that right not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state laws.[41]

This was the first articulation of the Fifteenth Amendment exemption. Bradley also cued about the right to vote in federal elections. According to Article 1, Section 4 of the U.S. Constitution, states can set the "times, places and manner" of congressional elections, but Congress "may at any time" alter such regulations.[42] Here was another created right: the right to vote in federal elections. That meant the federal government had plenary control over rights enforcement, and that it could punish both private and official interference in federal elections, regardless of state action/neglect and regardless of the motive for interference. White Republicans, also subject to Klan violence and intimidation, here gained some protection.

Bradley then applied this rights theory to the indictments. And the counts drawn under the Fifteenth Amendment and the Equal Protection Clause were all bad under Bradley's theory. He threw out the Fifteenth Amendment counts because they did not allege a racial motive. He was quite clear about this, and a racial motive was the only thing needed under his Fifteenth Amendment theory. In this regard, it should be noted that Judge Hugh L. Bond, who had charge of the Klan trials in South Carolina, threw out Fifteenth Amendment charges because they lacked a racial allegation. And Judge Bond was known as a strong supporter of Reconstruction. Given that Judge Bond did this—Bond, a clear and

unambiguous supporter of Reconstruction—we should be careful about what we assume about Bradley when he threw out the Fifteenth Amendment counts.[43]

More puzzling is Bradley's invalidation of counts drawn under the Equal Protection Clause. Bradley threw out these counts because they, too, did not allege a racial motive. But this is more puzzling because the Fifteenth Amendment does specify race. The Equal Protection Clause, unlike the Fifteenth Amendment, says nothing about race. And so what was going on? Bradley was issuing a partial rebuff to Congress. He was narrowing the Equal Protection Clause to race. This was not required by the text. Bradley did this. Centrist Republicans in Congress understood the Equal Protection Clause as applying to unpunished political violence, as well as unpunished racial violence. When James Garfield spoke about state failure to punish the Klan, he was speaking about the failure to punish violence against both blacks and white Republicans. And so Centrist Republican congressmen included political violence within the ambit of their state neglect concept. When Bradley said that the federal government had to allege a racial motive in their indictments under the Equal Protection Clause, he was saying that they could *not* prosecute political violence. So Bradley here was filtering out political violence from the state neglect concept.[44]

At the same time, he was saying that the federal government could prosecute men like William J. Cruikshank if they alleged a racial motive. Legally, the door remained open. And importantly, proof thresholds for establishing a "race-based" motive looked easy to meet. Circuit court opinions at the time (and later an 1877 circuit opinion by Chief Justice Waite) suggested that the proof threshold for establishing "racial violence" was low. That threshold was nothing like the "animus" standard today.[45]

The reaction of lawyers for the Klan provides an indicator that Bradley approved the (filtered) state neglect concept. Even though he threw out the indictments, the Klan lawyers were alarmed by Bradley's opinion. Klansmen loved the decision, as their confederates walked free. Moreover, the Democratic press spun Bradley's decision as shutting the door on federal rights enforcement. But Klan lawyers were concerned, and they devoted their written and oral briefs for the Supreme Court to an argument against Bradley's state neglect theory. The energy they devoted to that attack suggests there was real weight behind Bradley's state neglect concept.[46]

And so from the distinction between "secured" and "created" rights, Bradley generated a blueprint for future indictments based on a jurisprudence of rights and rights enforcement. That jurisprudence included the (filtered) state neglect formulation of state action, the Fifteenth Amendment exemption from state action doctrine, and federal elections jurisprudence. That jurisprudence existed even without incorporation of the Bill of Rights. Even without the Privileges and Immunities Clause as a source of rights protections, and the *Cruikshank* decision in 1876 affirmed that the clause was unavailable, that jurisprudence existed.

There are two additional notable matters about Justice Bradley's 1874 opinion: First, Bradley, returning to Washington for two weeks, consulted with his fellow Justices in the midst of the trial. This was significant because it provided authority for Bradley's coordinated theory of rights and rights protections. Indeed, Bradley's circuit opinion, not the Court opinion in 1876, was cited by the Court from 1882-1907 as the authoritative expression of that decision. This is remarkable. Second, Bradley gave wide circulation to the opinion, sending it to Cabinet members, Southern judges, and legal periodicals. Also highly unusual, it was an indication of the authority of the opinion. Major legal actors knew Bradley's rights theory. It was not obscure.[47]

Waite's Opinion in *Cruikshank* (1876)

When it comes to understanding the Court opinion in 1876, we need to understand it against the background of Bradley's widely circulated and highly authoritative 1874 opinion. The 1876 *Cruikshank* opinion was written by Chief Justice Morrison R. Waite and was handed down in the run-up to the 1876 election. Recall that the nation was in the grip of a horrible Depression. It looked as if Republicans were going to lose. They had already lost the House in 1874. It looked like they were going to lose the Presidency in 1876. And they were being buffeted by corruption scandals. In the midst of this, Waite wrote a skeletal opinion. He gave broad generalizations—so broad that none of them were objectionable. So it is difficult to figure out what is going on with those generalizations. There was no rights theory, but he tracked Bradley's reasoning on why the Fifteenth Amendment counts were bad, and why the equal protection counts were bad. He also pointed to the availability of Article 1, Section 4, and federal elections law. It looked like a shorthand version of Bradley's opinion. And, while Waite supplied no facts about the massacre, he treated as constitutional the Reconstruction statute under which Cruikshank et al. were prosecuted. This is important to notice because down the line, that statute became a basis for future successful prosecutions, including in *Yarbrough*. Finally, Waite said clearly that Section One of the Fourteenth Amendment did not apply the Bill of Rights to the states. In his dissenting opinion in the *Slaughter-House Cases*,[48] Bradley had read Section One to incorporate the Bill of Rights. He sought to keep that interpretation alive in his 1874 circuit opinion in *Cruikshank*, but Waite shut that down.[49]

Waite's opinion is difficult to parse. The Court appeared to throw out the Fifteenth Amendment and equal protection counts on technicalities. Indeed, some Independent newspapers at the time said it was decided on technicalities. What is important for us is that these newspapers did not see the 1876 opinion in the way it is understood today. They did not see the Court as closing the door on rights enforcement.

In order to understand Waite's opinion, the clock must be kept rolling. In doing that, clues are revealed about what might have been going on with Waite's shorthand opinion, issued in the midst of the Depression when it looked like Republicans might well lose the election.[50] Those clues start accumulating after *Cruikshank* and its companion case, *United States v. Reese*,[51] are issued.

The first clue is a circular to federal marshals sent by Attorney General Alphonso Taft. In that circular, Taft instructed federal marshals to protect the upcoming election, which everyone knew was vulnerable to violence and fraud. Taft issued his circular under the authority of *Cruikshank* and *Reese*. And so Taft and the Grant Administration saw in those decisions authority for the federal protection of voting rights.[52] The second clue is that U.S. Attorneys started drawing up proper indictments under the Fifteenth Amendment. They now alleged a racial motive. They did, in other words, what Bradley told them to do. This is part of the story of *Cruikshank*. The third clue is an important election case, *United States v. Butler* (1877),[53] a case that is not part of the familiar pantheon of Reconstruction cases, although it should be. *Butler* involved yet another election-related massacre, this one in Ellenton, South Carolina. It received extensive national attention, so eyes were on Chief Justice Waite, who wrote the opinion while riding circuit, not long after writing the *Cruikshank* opinion.

The contrast between Waite's *Cruikshank* opinion and his *Butler* opinion is profound. Whereas the earlier opinion supplied no facts and no theory and appeared non-committal on black rights, the later opinion provided twelve pages of facts. He outlined details of the violence and horror of

the massacre. He also clearly articulated the Fifteenth Amendment exemption. In issuing his jury instructions, Waite stated, "unimportant to you or to us is whether the state or its officers have been unable or unwilling to punish offenses against its own laws." The only thing that mattered, the "controlling element" in the case, was the race of the victim. Here the U.S. Attorney had drawn up a proper indictment; a racial motive had been alleged. Waite's endorsement of the Fifteenth Amendment exemption was unmistakable. Importantly, the election uncertainty was over when he issued this opinion, and Republicans had won.[54]

And then James Garfield was elected President in 1880. Under the Garfield-Arthur Administrations, an upturn in voting rights enforcement took place between 1880 and 1885. Arising from that upturn was the *Yarbrough* decision of 1884, a unanimous decision written by Justice Samuel F. Miller, which sent Klansmen to jail under both the Fifteenth Amendment exemption and federal elections law. *Yarbrough* is also not part of the familiar pantheon of Reconstruction cases, and people today are surprised by it. But they are surprised only because of the standard wisdom that the Court was hostile to Reconstruction. That ruling indicates that, within clearly defined bounds, the Court was not hostile. Indeed, the voting rights theory embraced by the Court in *Yarbrough* traced back to Bradley's 1874 opinion in *Cruikshank*.[55]

And so the upturn in rights prosecutions between 1880 and 1885, and the victories from these years including *Yarbrough*, are additional clues for the understanding of *Cruikshank* and state action doctrine. Notably, the federal government brought all of their 1880-1885 cases under the Fifteenth Amendment and Art. 1. Sec. 4. This made sense for U.S. Attorneys at the time, as resources were low and it was easier to bring a Fifteenth Amendment case or a federal elections case than a state neglect case. Even if they possessed a blueprint for bringing a state neglect case, they still had to show state failure. And the proof threshold was unclear. In contrast, a Fifteenth Amendment charge required only a racial motive. For a federal elections case, a political motivation sufficed. But we should not conclude from this that the state neglect formulation was gone as a matter of law.[56] In fact, it was rearticulated by Justice Bradley in the *Civil Rights Cases* (1883), for which the foregoing sets the stage.

The Civil Rights Cases

The *Civil Rights Cases* involved exclusions from public accommodations, not a "separate but equal" law. It should be recalled that Justice Bradley in his majority opinion expressed gratuitous racism and was disdainful of black claims to public accommodation rights. The decision, which invalidated the public accommodations provisions of the 1875 Civil Rights Act under both the Thirteenth and Fourteenth Amendments, is conventionally understood as consolidating the political abandonment of blacks. In understanding that decision, two factors should be stressed: Bradley (1) called access to public accommodations a *social right* and (2) embraced the 1866 Civil Rights Act as "clearly corrective" Fourteenth Amendment legislation. Both pertain to Bradley's use of a distinction between *civil rights* and *social rights*. These categories were part of a Reconstruction-era rights typology that was used to debate the meaning of freedom. That hierarchy of rights is gone today. But when it is traced, a better sight is obtained on what was going on in the *Civil Rights Cases*.

The term *civil rights* today has a broad meaning. But at the time, its meaning was more narrow. There are some rough generalizations that can be made regarding the rights typology. Centrist and Radical Republicans agreed on a core body of *civil rights*: contract, property, suing, testifying, and equal redress for injuries. For centrists, access to public

accommodations, schools, intermarriage were typically *social rights*. As noted earlier, these matters proved the limit of centrist Republican egalitarianism. And so centrists exhibited a distinctive combination: commitment to core civil rights and voting rights but rejection of public accommodation rights, integrated schools, and intermarriage.

And so, when Bradley rejected Thirteenth Amendment grounds for the public accommodation provisions, he called access to public accommodations a *social right*. Justice John Marshall Harlan, dissenting in the Civil Rights Cases, called access a *civil right*. Harlan's view, of course, resonates today. But at the time, Harlan was expressing a Radical Republican position, which had always been marginal.

Now one might wonder about the passage of the public accommodation provisions in the 1875 Civil Rights Act. Congress passed this legislation, and so one might think there would have been broad Republican support for these provisions, but there actually was not. That bill was bottled up for many years, and it passed mainly because of the death of Senator Charles Sumner, known as the Great Abolitionist. This was his bill and Republicans very much wanted to memorialize Sumner. Many centrists said at the time that the bill was unconstitutional. But the desire to memorialize Sumner was genuine and Republicans passed the bill during a lameduck session of Congress. Scholars have disagreed about whether the lameduck session mattered regarding its passage, but it is clear that absent the death of Sumner, the bill would never have left committee.

A brief treatment of an excerpt from the *Civil Rights Cases* is in order. This excerpt is part of a larger discussion in which Bradley expressed approval for the 1866 Civil Rights Act as Fourteenth Amendment legislation. That Act, among other things, provided for race equality in contract, property, and remedies for injuries. Bradley approved the Act as part of his articulation of state action doctrine. As a technical matter, the 1866 Act was originally passed to enforce the Thirteenth Amendment. It was re-enacted as Fourteenth Amendment legislation in 1870. Its re-enactment as Fourteenth Amendment legislation is important here, as Bradley called the 1866 Act "clearly corrective" Fourteenth Amendment legislation. The 1866 Act had an all-important enforcement clause, which provided for federal penalties for "persons" whose race-based wrongs gained the "color of law ... or custom."[57]

And so what Bradley was doing in this excerpt was marking out a distinction between (1) individual, race-based wrongs that are private wrongs and are not violations of civil rights, which the federal government cannot reach under the Fourteenth Amendment, and (2) individual, race-based wrongs that have the "color of law or custom" and can be punished by the federal government under the Fourteenth Amendment.

The excerpt from the opinion reads:

> [C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may,

> by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment.[58]

Notice that the first lines point to the distinction between individual wrongs that do not impair civil rights and individual wrongs that do impair civil rights:

> [C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual.

Notice, too, that the determining factor in whether an individual wrong impairs civil rights is "state support" for that individual wrong. The passage from Bradley provides many synonyms for "state support": wrongs are "sanctioned in some way" by the State or "done under State authority"; wrongs are "protected ... by some shield ... of state authority." In a later paragraph, Bradley used another formulation: such wrongs "rest upon state authority for their excuse and perpetration." Now when individual wrongs are not supported/sanctioned/protected/shielded/excused, "rights remain in full force and may presumably be vindicated by resort to the laws of the State for redress." Under these conditions, there is no civil rights violation and the Fourteenth Amendment does not apply.

Now when individual wrongs are not "supported," "sanctioned," "protected," "shielded" or "excused" (the Court is using these terms as synonyms), "rights remain in full force and may presumably be vindicated by resort to the laws of the State for redress." In these instances, rights are not in "full force" because redress from the State is *insufficient* or *unavailable*. Under these circumstances, individual wrongs have the "color of law or custom" and may be punished under the Fourteenth Amendment.

To recap: if a state is "supporting," "protecting," "shielding," or "excusing" individual, race-based wrongs, there is a civil rights violation and the federal government may prosecute the individual perpetrator. That intervention renders the rights denial (the state's failure to provide equal redress) "innocuous" (Bradley's term). But federal prosecution must be "predicated" (Bradley's term) on state shielding, excusing, etc. of the wrongdoing.

This was the vocabulary of state neglect. And it was a vocabulary that had been circulating in circuit courts for over a decade. But it was also under-theorized. Legal actors today may want to take the state neglect concept and pluck it out of history. But it must be remembered that it was under-theorized. Bradley did not talk to us about thresholds. So it is not fully theorized in the way that some today might want it to be.

This article began with the canonical expressions of state action doctrine, which come from this decision: "The first section of the Fourteenth Amendment . . . is prohibitory in its character, and prohibitory upon the States."[59] And too: "It is State action . . . that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[60] These statements are fully consistent with the "state neglect" concept just sketched. That is because individual, race-based wrongs that are supported/protected/shielded/excused by state authority have the "color of law." In these instances, state action has taken place and the federal

government might punish the individual perpetrator(s). Such punishment is not "a code of municipal law."[61] Codes of municipal law take original jurisdiction. And Bradley was clear that the Act of 1866 was corrective because it did not take original jurisdiction. Federal punishment of "persons" under the Act of 1866 was predicated on state support/protection/shielding/excusing.

It is still important to know which individual wrongs were covered. The excerpt opened by invoking the *civil rights* category. The use of that category is a clue, as is Bradley's use of the civil/social distinction. Bradley explicitly listed interferences with property, buying and selling, being a witness or juror, and assault and violence. That list should sound familiar: these are the "core" civil rights. Bradley's inclusion of voting rights in the *civil rights* category should be noticed, because voting rights migrated unevenly from the category of *political rights* (those granted by the political community) into the *civil rights* category after the passage of the Fifteenth Amendment. After 1870, Bradley started to refer to voting as a *civil right*. For other Republicans, the migration took a bit longer.

As to the public accommodation provisions, it can be said that say they were invalid under the Fourteenth Amendment because they took original control of the issue. There was no state action/neglect predicate in the 1875 provisions. This was "municipal legislation." But would the Court have upheld that legislation had it contained a state action/neglect predicate? Some constitutional lawyers say "yes." I think it is unclear. And I think it is unclear because Bradley expressly reserved the question. In the syllabus (the fourth entry) provided by Bradley, it was stated, "whether public accommodation rights are constitutionally demandable and in what form is not now decided." So he was explicit. The syllabus also stated that the Court was not deciding whether the public accommodations provisions could be upheld under the Commerce Clause.[62]

What is clear is that the invalidation of these provisions and Bradley's gratuitous "special favorite of the laws" comment reach less far juridically than has been conventionally imagined. Bradley preserved the availability of the state neglect concept, housing it in the concept "under color of law ... and custom." He preserved it, moreover, in a context characterized by an upturn in the enforcement of voting rights. And don't forget: it was Klan lawyers who in 1876 devoted their briefs to an attack on his state neglect concept. His opinion in 1883 was his first chance to rearticulate that concept, and rearticulate it he did.

Once again, newspapers saw the concept of state neglect in his opinion. The *Chicago Tribune,* which approved the outcome in the *Civil Rights Cases*, rendered state action doctrine this way:

> The [black] citizen enjoys everywhere the same political and civil rights under the law which the white citizen enjoys. Any person who interferes with these rights is subject to the same penalties as if he had interfered with the rights of a white citizen. If there are State or local laws anywhere which decree otherwise, *or if there are State or local officers who refuse to extend to black citizens the protection to which they are entitled as citizens,* it is the function of the United States courts and authorities to defend their citizenship and their rights ...[63]

One year later, the Court issued the unanimous *Yarbrough* decision, and so it is vital to keep *Yarbrough* in mind.

Conclusion

It remains to be asked: What follows from racism? If assumptions are made about what follows necessarily from Justice

Bradley's racism in the *Civil Rights Cases*—such as the twentieth-century assumption that judges who articulate racist views when it comes to public accommodation rights are not going to support rights for black physical safety, black contract rights, or black voting rights—it is an anachronistic assumption. And if that has been done, one will miss the possibilities for protecting blacks rights that were present in the state action cases.[64]

We can speak of the death of Reconstruction, but the periodization must be shifted. Grover Cleveland, a Democrat, won the 1884 election. When he took office in 1885, he shut down voting rights enforcement in the South. The last gasp of Reconstruction was the Lodge Elections bill of 1890. In 1888, Benjamin Harrison, a Republican, won the Presidency and Republicans regained control of Congress. But the Lodge Election bill failed by one vote, and afterward the Republican Party abandoned voting rights enforcement. Afterward, too, Democrats launched the era of "lynch law," which ushered in Jim Crow. The Supreme Court supplied the edifice for Jim Crow in a series of cases beginning in 1896 with *Plessy v. Ferguson*[65] and extending through *Hodges v. United States*,[66] an understudied 1906 case that gutted the 1866 Civil Rights Act. The 1866 Act contained the "color of law ... or custom" language that housed the "state neglect" concept. At this time, too, the Fifteenth Amendment exemption was silently discarded.[67]

And so Reconstruction died. It died for a host of reasons. First and foremost, its death is attributable to massive white supremacist violence and intimidation. There was also the economic Panic of 1873 and the ensuing Depression, as well as grossly inadequate bureaucratic machinery. There was not nearly enough money. There was also declining Northern popular commitment. Reconstruction died for many reasons, but a closed doctrine of state action that handcuffed the federal government was not among those reasons.

Editor's Note: This article is derived from a lecture the author gave at the Supreme Court as part of the Society's 2015 Silverman Lecture Series on Reconstruction.

ENDNOTES

[1] Pamela Brandwein, **Rethinking the Judicial Settlement of Reconstruction** (2011), pp. 1-2, hereinafter cited as Brandwein.
[2] U.S. Constitution, Amendment XIV (1868).
[3] Brandwein, p. 22.
[4] *Civil Rights Cases*, 109 U.S. 3 (1883).
[5] *Id.*, p. 10.
[6] *Id.*, p. 11.
[7] Brandwein, pp. 28-29.
[8] Brandwein, pp. 3-4.
[9] *United States v. Cruikshank*, 92 U.S. 542 (1876).
[10] *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Harris*, 106 U.S. 629 (1883).
[11] Brandwein, p. 20.
[12] 109 U.S. p. 25 ("When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of this elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or as a man, are to be protected in the ordinary modes by which other men's rights are protected").
[13] Brandwein, p. 5.
[14] *Id.*, p. 5.
[15] *Id.*, pp. 7-11.
[16] *Id.*, pp. 8, 9, 54, 68-69, 117-118, 129.
[17] *Id.*, pp. 139-144, 147, 151, 238.
[18] *Id.*, p. 9.
[19] *Ex parte Yarbrough*, 110 U.S. 651 (1884).
[20] Brandwein, pp. 12-14.
[21] *Id.*, pp. 15-16.
[22] *Id.*, pp. 16-17.
[23] *Id.*, pp. 70-81.
[24] *Id.*, pp. 28-45.
[25] *Congressional Globe*, 42nd Cong., 1st sess. 153 (1871) (Rep. James A. Garfield), emphasis added.
[26] *Id.*
[27] *Id.*
[28] Brandwein, pp. 40-41.
[29] Civil Rights Act of 1866, 14 Stat. 27.
[30] *Id.*, p. 13, 161-170.
[31] *United States v. Cruikshank*, 25 Fed. Cas. 707 (Case No. 14, 897) (1874).
[32] Brandwein, pp. 16, 87-104.

[33] *Id.*, p. 94-97.
[34] *Id.*, p. 97-98.
[35] 25 F. Cas., p. 707, emphasis added.
[36] Letter of Joseph Bradley to Sen. Fredrick Frelinghuysen (July 19, 1874).
[37] *Chicago Tribune* (June 28, 1874), emphasis added.
[38] Brandwein, pp. 98-101.
[39] 25 F. Cas. pp. 712, 713 (1874), emphasis added.
[40] *Id.*
[41] *Id.*
[42] U.S. Constitution, Article 1, Section 4: "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."
[43] Brandwein, pp. 49, 104-108.
[44] *Id.*, p. 103.
[45] *Id.*, p. 107.
[46] *Id.*, pp. 112-115.
[47] *Id.*, p. 93.
[48] *Slaughter-House Cases*, 83 U.S. 36 [16 Wall.] (1873).
[49] Brandwein, p. 117-128.
[50] Brandwein, p. 118-122.
[51] *United States v. Reese*, 92 U.S. 214 (1876).
[52] Brandwein, p. 130-139.
[53] *United States v. Butler*, 25 Fed. Cas. 213 (C. C. D. S. C. 1877).
[54] Brandwein, p. 144-147.
[55] *Id.*, p. 144-151.
[56] *Id.*, p. 151-153.
[57] Brandwein, pp. 161-178.
[58] 109 U.S., p. 17. *See also* Brandwein, pp. 163-170.
[59] 109 U.S., p. 10.
[60] 109 U.S., p. 11.
[61] "[Section 5] does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress [against state action]." *Civil Rights Cases*, 109 U.S., p. 11 (1883).
[62] Brandwein, p. 178-180.
[63] *Chicago Tribune*, October 17, 1883, emphasis added. *See also* Brandwein, p. 12, 170-173.
[64] Brandwein, p. 3.
[65] *Plessy v. Ferguson*, 163 U. S. 537 (1896).
[66] *Hodges v. United States*, 203 U.S. 1 (1906).
[67] Brandwein, pp. 18-19, 184-205.

The Judicial Bookshelf

DONALD GRIER STEPHENSON JR.

Justice Scalia

As a new year began, the Supreme Court's initial sitting in 2016 extended from Monday, January 11, through Wednesday, January 20. Of the two cases for which argument was scheduled on the last day, the second was *Sturgeon v. Frost*,[1] litigation that combined issues of federalism and land use and the Alaska National Interest Lands Conservation Act (ANILCA) of 1980 and pitted a moose hunter and his hovercraft and the State of Alaska against the National Park Service. About five minutes before the Chief Justice submitted the case at 12:21 that day,[2] Justice Antonin Scalia queried Rachel Kovner, assistant to the Solicitor General, who had spoken for the United States:

JUSTICE SCALIA: "100751 is a general statute; it applies everywhere, right?"

MS. KOVNER: "Yeah."

JUSTICE SCALIA: "And—and 3101, Section 103 is specific to Alaska, isn't it?

MS. KOVNER: "Yes."

JUSTICE SCALIA: "Isn't there a general rule that the specific governs the general?"

MS. KOVNER: "Yes. And I think then—"

JUSTICE SCALIA: "So this general provision is limited by what Congress has said about Alaska. And that sentence says, 'Only those lines within the boundaries of any CSU [conservation system unit][3] which are public lands shall be deemed to be included as a portion of such unit.'"

MS. KOVNER: "Yes."

JUSTICE SCALIA: "And if you read that back into 100751, it seems to me the Park Service doesn't have jurisdiction."

Those eighteen words in Justice Scalia's response to Ms. Kovner proved to be his last official utterances from the Bench as an Associate Justice of the Supreme Court. When the Court next convened for oral arguments on February 22, it did so without the 103rd Justice whose death on February 13—just four weeks shy of his eightieth birthday—shocked the nation.

Intriguingly, as Professor John Q. Barrett observed, the day of Justice Scalia's death was also the 124th anniversary of the birth of Justice Robert H. Jackson, who served from 1941 until his death in 1954 and whose "seat" on the Court Justice Scalia had occupied for thirty years.[4]

Reaction to his passing from each of the other Justices reflected the magnitude of what had occurred. "In years to come," insisted Justice Anthony Kennedy, "any history of the Supreme Court will, and must, recount the wisdom, scholarship, and technical brilliance that Justice Scalia brought to the Court." "We disagreed now and then," added Justice Ruth Bader Ginsburg,

> but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation. Justice Scalia nailed all the weak spots—the "applesauce" and "argle bargle"—and gave me just what I needed to strengthen the majority opinion. He was a jurist of captivating brilliance and wit, with a rare talent to make even the most sober judge laugh.

Justice Stephen Breyer referred to him as a "legal titan," and Justice Samuel Alito viewed him as "a towering figure who will be remembered as one of the most important figures in the history of the Supreme Court and a scholar who deeply influenced our legal culture." For the Court's most junior member, "Nino Scalia will go down in history as one of the most transformational Supreme Court Justices of our nation. His views on interpreting texts have changed the way all of us think and talk about the law," insisted Justice Elena Kagan. Retired Justice Sandra O'Connor, who occupied the next most junior seat during Justice Scalia's first years on the High Bench, recalled him as "a tireless public servant who left an indelible mark on the Court and on our jurisprudence. His gifts of wisdom, wit, and wordsmithing were unparalleled."[5]

For those outside the Court, Justice Scalia's passing meant not only the loss of a rapier wit, critic of an imperious judiciary,

Retired Justice Sandra O'Connor, who was also appointed by Ronald Reagan (above), recalled Justice Scalia as "a tireless public servant who left an indelible mark on the Court and on our jurisprudence. His gifts of wisdom, wit, and wordsmithing were unparalleled."

and perhaps most the most energetic questioner at oral argument, but also one of the modern era's most dependable and enthusiastic judicial advocates of originalism and textualism as interpretative methods.[6] The departure of so distinctive a voice quickly made it apparent that the Court's public sessions had fundamentally changed as had, one suspects, its internal dynamics as well. Also different would be the public face that the institution's decisions and opinions project. Moreover, the Court faced the prospect of functioning for an undetermined and conceivably extensive period with a complement of only eight Justices. The situation posed the question whether the Justices would seem hopelessly deadlocked or function effectively as a party of eight.

If an even-numbered Bench is both rare and less than desirable, it is nonetheless hardly unprecedented. Students of the Court recall the eight-month gap between the retirement of Justice Lewis F. Powell, Jr. in June 1987 and the arrival of Justice Anthony M. Kennedy in February 1988.[7] In recent Court history, so lengthy an interval has been exceeded only by the full year that elapsed between Justice Abe Fortas's resignation in May 1969 and the swearing in of Justice Harry A. Blackmun in June 1970, although even that span fell short of the leave of absence Justice Robert H. Jackson had from the Court, at President Harry Truman's request, from May 1945 until October 1946, when Jackson was chief U.S. Prosecutor at the Nuremberg war crimes trials. Nonetheless, the even-numbered Bench following Justice Scalia's death created a novel situation for the remaining Justices, none of whom had reached the Court prior to Justice Kennedy's arrival.

With both the Powell-to-Kennedy and the Fortas-to-Blackmun situations, the lengthy intervals were a result not of simple inaction by the Senate but of very unusual political circumstances. With the first interval, Justice Fortas's resignation followed by only eight months his withdrawal of his name from consideration after President Lyndon Johnson had nominated him to be Chief Justice to replace the retiring Chief Justice Earl Warren and his nomination had been blocked by a filibuster in the Senate in the fall of 1968. (With relevance to the controversy forty-eight years later over a replacement for Justice Scalia, opponents of the Fortas nomination insisted, among other objections, that "the appointment should be left to the next President, who will be elected in November.")[8] The Senate, however, voted down the next President's first two nominees—Judge Clement Haynsworth and Judge Harrold Carswell—for the Fortas seat, thus making President Richard Nixon the first occupant of the White House since Grover Cleveland in 1893 and 1894 to have two nominees rejected for the same Supreme Court vacancy. Less similarly, the Powell-to-Kennedy interval followed the Senate's rejection on October 23, 1987, of President Ronald Reagan's nomination of Judge Robert Bork for Powell's seat. Finding an acceptable nominee for the position that had been vacant since late June then met further delay after Reagan's selection of Judge Douglas H. Ginsburg never materialized into a formal nomination once news spread of the judge's marijuana use as a law student and professor. It was then on November 30 that the President formally nominated Judge Anthony Kennedy for the vacancy, with confirmation by the Senate, 97–0, following on February 3, 1988.

Ironically, Antonin Scalia's appointment to the Supreme Court came about through the confluence of a rare judicial event and another unusual political situation. On June 17, 1986, President Ronald Reagan, midway through his second term, made two important announcements: the decision of Chief Justice Warren Burger (who had succeeded Earl Warren as Chief in 1969) to retire and the nomination of Justice William Rehnquist as Chief Justice, a move that would make

Rehnquist only the third chief to have been selected from within the Court itself. Applying a variation on the double switch in baseball, Reagan then revealed his choice of Judge Antonin Scalia of the Court of Appeals for the District of Columbia Circuit to fill Rehnquist's seat as Associate Justice. Scalia had sat on the appeals court since 1982 and would become the first Italian American to serve on the nation's highest court. His appellate judicial service was preceded by seven years of private practice in Cleveland, Ohio, between 1960 and 1967 that were followed by teaching positions in the law schools at the University of Virginia, University of Chicago, Stanford University, and Georgetown University. He had also been general counsel in the Office of Telecommunications Policy in the Executive Office of the President, 1971-1972, and assistant attorney general, Office of Legal Counsel, in the Department of Justice during 1974-1977.

The timing of Scalia's nomination was auspicious, in that since 1981 Republicans had been the majority party (53:47) in the United States Senate for the first time since the early 1950s, assuring that direction of the confirmation process in the Judiciary Committee and the scheduling of floor debate and a vote would be in Republican, not Democratic, hands. (Party control is a significant consideration in confirmation politics, as Judge Robert Bork, whom Reagan seriously considered naming in 1986 in place of Scalia, discovered in 1987, after Democrats regained control of the Senate following the 1986 elections.)[9] Probably also a positive factor for Scalia's nomination was the fact that the Court of the mid-1980s was widely perceived as ideologically balanced in a way that the addition of Scalia would not cause a major shift in the Court's position on the most politically salient issues, such as abortion rights. Rather he "represented an even trade for the Rehnquist vote, as Rehnquist did, more or less, for Burger's."[10] However, the success of Scalia's nomination first required Rehnquist's confirmation. Otherwise there would be no vacancy in the ranks of Associate Justices to fill.

From the outset, however, the Rehnquist nomination encountered intense opposition—a "Rehnquisition," as Utah's Senator Orrin Hatch called it.[11] In part a repeat airing of concerns that had surfaced during his hearings in 1971, when President Richard Nixon named Rehnquist an Associate Justice to replace Justice John Marshall Harlan II and in part a review of his tenure of some fifteen years on the High Court, hearings by the Judiciary Committee on the Rehnquist nomination consumed four days and Senate floor debate five. Confirmation, by a vote of 65-33, came on September 17. Not since 1836, when the Senate confirmed Roger Taney, had a nominee for Chief Justice been approved by a ratio of less than two-to-one.

Perhaps because the Senate's scrutiny of Rehnquist was so intense, Scalia's nomination generated only mild turbulence. It was as if the Senate's negative energy had already been fully expended. The prospect of two back-to-back anti-nominee crusades may have seemed unappealingly daunting for many Democrats. Besides, particularly in light of the nominee's Italian heritage, many Democratic Senators could hardly ignore their ethnic constituencies. Remarkably brief as measured by more recent confirmation proceedings, the Judiciary Committee's hearings on Scalia lasted only two days and produced a favorable vote of 18–0. Floor debate did not exceed five minutes. Following the vote on Rehnquist, the Senate confirmed Scalia, 98–0.

One suspects that such unanimity in a confirmation vote on a Supreme Court nominee will not soon be repeated. That seems to be a reasonable prediction for at least two reasons. The first lies in a common thread running through assessments of Justice Scalia's career. For many, especially in the wake of the rejection of the Bork nomination in 1987, Scalia did as much as anyone to present originalism as a respectable and serviceable method of constitutional interpretation. For

that reason Senators supporting or opposing a future nominee may well determine their votes based on the degree to which a prospective member of the Court seems like or unlike the former Justice. The second is related to the first and stems from the political maneuverings to fill his seat that became vivid reminders of the continuing role of the Justices not only in the legal but in the political life of the nation. That reality is amply illustrated by recent books on the Court.

Selecting Justices

Occasionally, publication of a book is particularly timely—a statement that can truly be made about **Picking Judges**, by Nancy Maveety, who teaches political science at Tulane University.[12] An entry in Transaction Publishers' Presidential Briefings Series, this volume on federal judicial appointments—especially those at the Supreme Court level—is both compact and densely, if engagingly written. Her book is compact in the sense that its page count only modestly surpasses the century mark. To say that it is densely written is not a criticism but merely a forewarning that nearly every sentence matters. There is no fluff between the book's covers. To say that the writing is engaging is to suggest that, once begun, the book is hard to put down. In short, hers is not one of those books where the reader should practice speed reading or pay close attention only to each paragraph's topic sentence. To attempt either will mean the loss of much substance.

The Maveety study joins an already crowded shelf of literature on federal judicial selection, a subfield of political science and Supreme Court history that amazingly barely existed as recently as several decades ago. Alongside a standard work such as Henry J. Abraham's **Justices, Presidents, and Senators**, the first edition of which appeared under the title **Justices and Presidents** in 1974,[13] and in addition to nominee specific books like David J. Danelski's **A Supreme Court Justice Is Appointed** and Ethan Bronner's **Battle for Justice**,[14] one finds general analyses such as the pioneering work of John P. Frank that appeared as three installments in a law review in 1941.[15] These important efforts have been augmented, especially since 1990 by a host of others.[16]

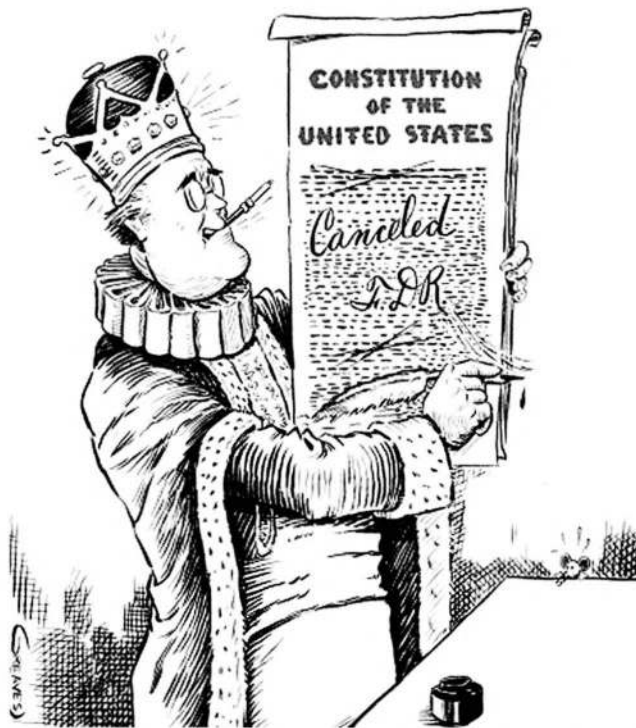
What distinguishes Maveety's book, however, is the larger purpose for which it seems to have been written. Well over a half century ago, a Columbia University professor named Richard Neustadt wrote a book called **Presidential Power**, in which he contended that the American presidential office is institutionally weak in that its occupant requires the cooperation of Congress to accomplish major policy objectives. Accordingly, a President must resort to personal persuasion and to be skillful in drawing upon professional reputation and public prestige to achieve goals. Appearing just before the presidential election of 1960, Neustadt's work caught the attention of Senator John F. Kennedy, who, after becoming President, is supposed to have looked to Neustadt and his book for advice. In his ground-breaking account of the election of 1960, Theodore White reflected Neustadt's influence when he wrote that "a president governing the United States can move events only if he can persuade. . . . This art of persuasion is politics—yet entirely different from the kind of politics that brings a man to the White House."[17]

In similar fashion, the reader should think of Maveety's volume as a tablet-size briefing book for an incoming President on how to use part of the position's constitutional powers both wisely and effectively. The baseline assumption is not only that a President "can" pack the courts but that a President "must" pack the courts.[18] That is, through careful vetting and application of the authority to nominate and through meticulous preparation and follow-up attention to the process of confirmation in the Senate, a chief

executive may be able through the occasions that arise to shape or even sometimes to "circumvent"[19] the federal judiciary. Moreover, a President *should* engage in such behavior because it is through those opportunities that a President may "leave a legacy that far outlasts the tenure of his or her administration."[20] With this end in mind, one thinks of the assessment offered by a leading opinion journal more than seven decades ago after President Franklin D. Roosevelt nominated Professor Felix Frankfurter to the Supreme Court to fill the opening occasioned by the death of Justice Benjamin N. Cardozo: "The good that Presidents do is often interred with their Administrations. It is their choice of Supreme Court Justices that lives after them."[21]

An incoming President, therefore, should consider the power of appointment as a gift from the framers. This is true, the author advises, because "the most successful presidents, the presidents to emulate, are those who earn the distinction of a court era named after them. These are the presidents who claim the authority to act on their own independent understandings of the Constitution and subsequently install members of the federal judiciary who share and will perpetuate the substance of that understanding."[22] Thus, scholars today write of the Roosevelt Court or the Reagan Court "because these presidents utilized their executive appointive powers to extend the reach and policy significance of their respective political regimes." It is true that

numbers of appointees were part of that reach and significance, but not the only element. Legal and ideological quality of appointees, attention to their vetting and selection,



In her new book, *Picking Judges*, political scientist Nancy Maveety outlines eight periods in history that transformed the appointment process of Supreme Court Justices. Franklin D. Roosevelt's Court-packing episode of 1937, satirized above, constitutes the fourth period.

> aggressive embrace of the judicial branch as a policy arm of the president's political regime—these attributes and actions, in addition to the sheer numbers of judges placed, were critical to the presidential record of success.[23]

However one remembers Franklin D. Roosevelt and Ronald Reagan, "they appreciated and approached court packing as possible, desirable, and necessary for an efficacious presidency, short and long term."[24] While some presidential advisers "might counsel against wasting political capital on a minimally significant part of the presidential agenda," Maveety believes that such advice should be "taken with a grain of salt"[25] if only because what might be seen as a small part of the President's agenda may in the long term have much to do with the fate of the President's larger agenda. After all, "[b]eyond the decorative honor of depiction on the nation's currency, picking judges is the closest most presidents can come to political immortality."[26]

The first chapter, "History," comprises about a third of **Picking Judges,** and for students of the Court it may be the most serviceable of the book's five chapters. In it Maveety explores a series of historical periods that reveal what she considers "transformative" or teaching moments[27] that in turn partly explain the evolution of the judicial appointment process.

The first period extended from the Washington presidency through Jackson. From the beginning, alongside the pursuit of excellence, "two criteria stood out in presidential identification of nominees and senatorial evaluation of them: party loyalty and identity, and geographic or regional representation." The first was important in terms of fealty to the Constitution, but the second served twin purposes in that it furthered the goal of binding the states together into a nation and reflected an important judicial reality. For "most of the first century of their service on the institution," Justices "had the critical state-based duties of siting in circuit with state-located district judges . . . . As those circuits and a Justice's share of the work were defined by region, the Justice's home state mattered, for he was not only an emissary of the national government but also a local son familiar with and sympathetic to that circuit's particular kinds of legal cases and controversies."[28] Notably, what Washington understood "but some of his successors over the decades did not, was that loyalty to the party cause is best tempered with stature as a jurisprudential figure." In this respect Maveety highlights John Adams with his nomination of John Marshall, "the great and truly first *Chief* Justice" in that Adams "nonetheless struggled to convince a Senate *controlled by his own party* to accept a candidate without judicial experience or apparent aptitude (Marshall seemingly possessed neither)."[29] The Jackson years then witnessed "an adroit presidential wielding of the candidate qualities of party loyalty, geographic identity, and affinity for the judicial institution to select judges who both served political purposes and promoted judicial branch sovereignty." The latter was essential because without it "a president's judicial appointees cannot fully realize the presidential aspiration to use the court to further partisan and administrative objectives."[30]

The second "moment" includes the Civil War years and especially the presidency of Andrew Johnson when "the Senate gets political."[31] With the Judiciary Act of 1866 as a centerpiece, "the Johnson story is also a lesson as to the constitutionally supplied pitfalls of any period of congressional assertiveness." The legislation of 1866 is remembered for its reduction of the Court's roster from ten to nine and eventually by "natural attrition" to eight—all in response to Johnson's attempt to fill a vacancy on the Court. "What the act communicates, first and

foremost, is that *Congress controls* the number of potential justices, the number of presidential appointees." Furthermore, a "vigorous Congress will take advantage of such opportunities." Thus, "Congress ascendant poses a significant constitutional threat to an unwary or inept president, as proposals in 1867 and 1868 to place judicial selection entirely in legislative hands suggest."[32] The secondary Johnson lesson may be that Senators "can have political or ideological appointment objectives just as much as presidents can."[33]

Maveety designates President Woodrow Wilson's nomination of Louis Brandeis in 1916 as marking the third milepost "in the evolution of [the] judicial appointive power." The controversy that ensued "integrated historical changes of a political and cultural variety." These changes included "the rise of organized group interests in American politics, new ethnic and religious demographics . . . and new notions of professional merit ... that challenged the old political order."[34] The nomination "also earmarked a new presidential aspiration for judicial candidates: political fealty demonstrated in innovative and impactful legal advocacy." In particular, Brandeis "was a new kind of judicial candidate, in several ways." Because he represented "the force of legal progressivism in law and a stance toward law and courts as engines of social reform," he was "an activist legal intellectual." For this reason, opponents portrayed him as a "dangerous radical: a socialist critic of the capitalist system and a practitioner of a sociological jurisprudence that advantaged the cause of pro-labor, egalitarian reform."[35] Although Wilson succeeded in placing Brandeis on the Court, the lesson from the episode "was less one of victory ... than of the new style of rendering advice and consent: organized interests could and would mount a political opposition to presidential judicial nominees, and senators would and could formally integrate such organized opposition into the more publicly open confirmation process."[36] In short, a new reality was at hand.

The Court-packing controversy of 1937 marks the fourth transformative moment. Indeed, Maveety insists that it is because of this episode that the phrase "packing the court" is "first, foremost, and forever associated with Franklin Roosevelt."[37] Through his brinksmanship in attempting to increase the Court's congressionally-fixed allotment of nine Justices to potentially as many as fifteen, the President lost the battle but won the war. In future Justice Robert Jackson's appraisal, in politics "the blackrobed reactionary justices had won over the master liberal politician of our day. In law, the President defeated the recalcitrant Justices in their own Court."[38] While Congress never approved Roosevelt's proposal, the Court, through more conciliatory votes by Chief Justice Charles Evans Hughes and Justice Owen J. Roberts—the "switch in time that saved Nine"[39]—altered its jurisprudential posture sufficiently to give the Chief Executive the policy approvals he needed. Furthermore, Justice Van Devanter's nearly simultaneous retirement handed Roosevelt his first opportunity to select a Justice since taking office in 1933. For Maveety, the monumental struggle over the Court's direction was "the mirror image of the Andrew Johnson episode: not a Senate ascendant, but a Chief Executive, expansively and confidently utilizing formal appointment posers to decisively orient the federal judiciary."[40] Significantly, "Roosevelt's major premise that he had articulated throughout his struggle with the Court, that the judicial function is inevitably political, was confirmed by the Court itself."[41]

The fifth landmark for Maveety in the development of judicial appointment politics centers on the election of 1968, where former U.S. Senator and Vice President Richard Nixon ran against the Warren Court. The campaign was noteworthy not only because Nixon eked out a narrow victory[42] but because "it marks the first time a presidential candidate made judicial appointment power a centerpiece of his candidacy,

with an explicit promise to reshape the Supreme Court in his policy image. Nixon was, in essence, guaranteeing to replicate the executive dominance of the judiciary that Franklin Roosevelt had achieved."[43] His crusade became a continuing reminder to voters of the link between elections and those who are named to the federal bench. It was Nixon who injected the phrase "strict constructionist" into campaign discourse. It is a phrase that, particularly after the Court's ruling on abortion in *Roe v. Wade*[44] five years later, fueled a debate between those who favored a "living" Constitution that would give birth to new rights and those who preferred some version of originalism that would not.

That debate became plainly explicit in the sixth period that Maveety anchors in the presidency of Ronald Reagan and its team devoted to judicial selection. "FDR had added judicial selection to the presidential leadership agenda; Nixon had advertised it; Reagan institutionalized it."[45] For Maveety, the most visible manifestation of the Reagan administration's emphasis on judicial selection was the unsuccessful nomination of Judge Robert Bork. This failure, she maintains, is a "milepost to model, as chief executives consider how to choose, frame, and sponsor their preferred candidates. . . ." The episode yielded abundant lessons for future Presidents in that the Reagan Administration had woefully undergauged both the breadth and depth of the opposition that the nomination generated. That was seen in the scope of interest group activism that had played such a critical role in the Brandeis nomination. Yet with Bork, what proved dispositive for his fate was the "reality that public opinion matters for *all* the elected officials in the Article II appointment process. . . . Senators' stances on the selection of Bork cannot be separated from this electoral connection, and the interest group campaign against him took full advantage of senatorial electoral vulnerabilities, perceived and real."[46] Thus the Bork debacle is a "watershed moment" in that "nothing about the president's appointment power looks the same after Ronald Reagan and Robert Bork."[47]

The last of the Maveety mileposts is centered in the years since 2005—that is from the second term of President George W. Bush into the Obama Administration. This has been an era of intense partisanship in Congress that reflects the increased political polarization within the United States. Presumably the days are gone when the Senate contained noticeable numbers of liberal and moderate Republicans and conservative and moderate Democrats. Instead, the period has been characterized by "tit-for-tat backlashing between president and Senate, of extreme institutional uncooperativeness, and the threat of a zero-sum future of judicial staffing for the unwary chief executive."[48] The result is a situation "in which presidents with party-compatible Senates max out their preferred judicial appointees while presidents without do without." Or it may be that "different times call for different kinds of nominees." In that case, the briefing book's advice "would be the same as it long has been: "candidate qualifications are an elemental president calculation and an essential presidential compromise."[49] The take-away point remains that options and opportunities are for the President to shape or ignore.

Presidential Power

Just as Presidents may adroitly use their Article II power to shape the Supreme Court for a considerable period of time, that shaping has in reality long been a two-way street because the Justices—thanks to the Supreme Court's central role in constitutional interpretation—help to define presidential authority though the process of deciding cases. Moreover, the record is clear that Presidents have effectively shaped the Constitution through their own actions as well.[50] As Justice Felix

Frankfurter insisted in his concurring opinion in the *Steel Seizure Case*, presidential actions may help to mark the limits of presidential power:

> [T]he content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by Art. II.[51]

Presidents may also effectively engage in constitutional interpretation by acting or refusing to act on certain matters, as Andrew Jackson did when he vetoed Congress's renewal of the charter of the Second Bank of the United States because he thought Congress lacked the authority to charter a bank in spite of the Marshall Court's ruling to the contrary.[52] Similarly, a few decades later, Abraham Lincoln refused in his first inaugural address to accept the Court's decision in the *Dred Scott* case[53] as a valid reading of Congress's powers under the Constitution.[54]

It is constitutional change in this larger institutional sense—one encompassing presidential actions, inactions, and Supreme Court appointments and decisions—that characterizes **Presidents and the Constitution,** an important new resource, edited by Ken Gormley,[55] president-elect of Duquesne University, where he was formerly dean of the law school. In both its ambitious scope and in its depth the volume represents an essential addition to the literature on the Supreme Court, the presidency, and American political and constitutional history generally.

A key to grasping the contribution of Gormley's book lies in the subtitle, "A Living History," in that the American presidency is not static but unfolding. As it came from the hands of the Framers, the Constitution, after framers all provides in Article II at best only a sketchy outline of the presidency. Article II on the executive is much shorter than Article I on the Congress and lacks Article I's fulsome detail, which seemed to create Congress nearly full-blown. Indeed, if the Constitution were a script for a play or a screenplay for a motion picture, the President would clearly seem to have been given a "bit part," at least by the standards of Article I.

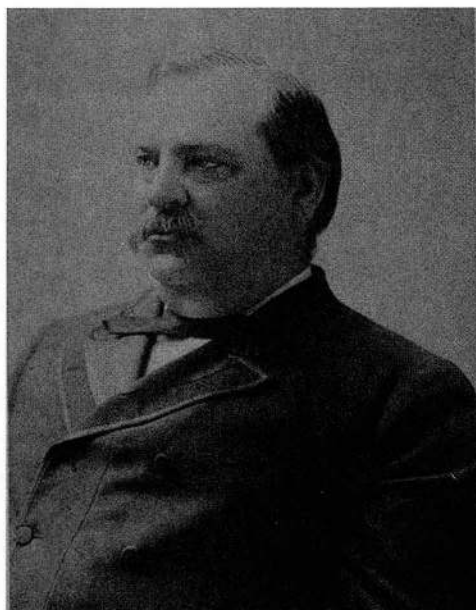
"As reduced to parchment in the new U.S. Constitution," writes Gormley, "the presidency was therefore a uniquely American office,"[56] one without parallel in the world of its day. It was also perhaps a surprise, given the colonial experiences with King George III and royal governors, attempts in some of the earliest state constitutions to keep their chief executives on a very short leash, and the absence of a separate executive under the Article of Confederation. Thus, if Article II seemed deliberately incomplete, "[s]ome of the blanks would be filled in during the expected presidency of George Washington. . . . The rest of the blanks would be left to history itself. The new American presidency would

be defined by the Constitution but also would be allowed to play itself out, gradually giving definition to the sparse words of the written document."[57] The result is that each time a new President takes office, that person "inherits a rich body of experience and precedent; he or she must draw upon that valuable storehouse in riding out unexpected gusts, gales, and tsunamis, keeping the ship of state steady and creating a fresh set of markers for future occupants of the office. At the same time each president must wrestle with unplanned events, in order to shape his or her own legacy."[58] Thus, the framers' unfinished sketch continues to acquire new dimensions and detail.

As the editor explains in the introductory chapter, the volume seeks to chronicle this progression by bringing to life "the rich story of forty-four (and still counting) Presidents as they have interfaced with the Constitution and to tell their stories in the context of American history." Yet the book is not intended to be "solely, or even primarily, about famous Supreme Court cases defining presidential power. Nor does it follow the pattern of traditional books on presidential power, which examine groups of cases and other material dealing with specific topics, such as presidential power as commander in chief, in foreign affairs, in domestic matters, and so on."[59] Rather, to convey the full picture the contents explore the "fast-moving events of history that propel presidents into office and animate their time in public life." Doing that is important "if one is to understand the unique interplay between the American presidency and the Constitution. Thus the book recounts the people and events that have pushed, tugged at, lit fires under, made heroes of, or destroyed American presidents as they carried out their duties in office."[60]

To achieve this large-scale objective, Gormley has knit together chapters by some forty contributors drawn from multiple professions and academic disciplines. Aside from Gormley's introduction and conclusion, there is a chapter on each President from Washington to the present, extending into Obama's second term. The chapters are then grouped into twelve chronologically arranged major sections. The challenge for the editor, of course, was to deliver a manuscript that consisted of more than merely a series of biographical essays on the Presidents. That would have been relatively easy to compile. Much more difficult to achieve is what the volume accomplished, beginning with the book's planning stages: a collection of essays of manageable size that fit into a connected historical narrative and analysis.

The length of each presidential chapter is approximately the same, so the reader will find that Gormley has truly been an equal opportunity editor. For example, although Franklin Roosevelt was elected to four terms and served longer than any of the other chief executives and faced uncommon challenges, he is the subject of only a single chapter of



Grover Cleveland was the solitary Democratic President between James Buchanan's election in 1856 and Woodrow Wilson's victory in 1914. He also made abundant use of the tools of his office and expanded presidential power.

eighteen pages, only two pages more than the chapter on Harry Truman's Presidency. Gerald Ford, who completed Richard Nixon's second term, receives fourteen pages, while Jimmy Carter and his single term comprise fourteen pages. The chapter on William Henry Harrison, who was President for only thirty-one days before his death, contains ten pages, some of which understandably are devoted not to Harrison himself but to the issues of presidential succession that arose in the wake of this first passing of a sitting President.[61] For customary reasons of nomenclature as explained below, Grover Cleveland is the only one who is assigned two chapters, and they illustrate the political and constitutional perspective provided for each of his predecessors and successors.[62]

Cleveland, the solitary Democratic President between James Buchanan's election in 1856 and Woodrow Wilson's victory in 1914, was seen as so intensely conservative that Wilson, a progressive Democrat, is supposed to have once jested that he, not Cleveland, was the first Democrat since 1860 to live in the White House.[63] Yet to say that Cleveland was conservative is not to say that he believed in an altogether passive presidency or that he was unwilling to make abundant use of the tools of his office.

Electorally, Cleveland is unique in at least three ways among American Presidents. Only he, having been defeated for reelection, later regained the nation's highest office. For this reason, he is counted twice—as both the twenty-second and twenty-fourth Presidents. Additionally, alongside other nineteenth-century Presidents, he received the most popular votes in three, not two, elections because of the one he lost when opponent Benjamin Harrison garnered the necessary *electoral* vote majority to beat him in 1888. Finally, Cleveland retains the distinction of having won election by one of the smallest *popular* vote margins: by about .03 per cent out of nearly ten million votes cast in 1884.

Constitutionally, the twin Cleveland Presidencies were noteworthy for at least two reasons. First, while the Supreme Court through Chief Justice Taft in *Myers v. United States* insisted, without formally holding, that the infamous Tenure of Office Act of 1867 was unconstitutional,[64] it is Cleveland who deserves credit for forcing its repeal.[65] This was a statute that had haunted his predecessors, including Andrew Johnson, who had been impeached ostensibly for failing to adhere to its command. Pursuant to this legislation, the President not only had to seek the Senate's constitutionally mandated advice and consent for an appointment—as all Presidents had done—but he also had to gain the Senate's concurrence on a removal.

Cleveland's actions that helped to undo the statute merit a brief retelling here. In July 1885, Cleveland suspended George M. Dushkin, a Republican, who was United States Attorney for the Southern District of Alabama, naming in his place a recess appointee named John D. Burnett, a Democrat. When the Republican-controlled Senate reconvened in December, the Judiciary Committee asked Attorney General Augustus Garland to turn over all documentation relating both to Dushkin's removal and to Burnett's nomination. Garland complied with materials on Burnett but explained that the President had barred him from releasing supporting materials on Dushkin. As a result, the Senate censured Garland, and by extension the President, for non-compliance. Congress eventually capitulated. A bill to repeal the Tenure of Office Act was introduced in July 1886 and passed the Senate in December followed by approval in the Democrat-controlled House. Cleveland's signature formalized the repeal in March 1887.

Second, Cleveland did more than his share to show that the veto could be a formidable tool of presidential power, and he acquired a deserved reputation as a determined naysayer. He wielded a total of 170 regular and pocket vetoes in his first

term followed by 414 such vetoes in the later term, most often taking aim at private bills trying to emerge as law from Congress. His large tally of vetoes surpasses those of all his presidential predecessors combined and those of each of his successors save Franklin D. Roosevelt.[66]

Judicially, Cleveland made four appointments to the Supreme Court, two in the earlier term[67] and two in the later.[68] Significantly the four appointments included the naming of a Chief Justice,[69] Melville W. Fuller, making Cleveland only the fifth President after 1789 to be afforded that distinction.

Certainly by late twentieth or early twenty-first century expectations, most would not regard Cleveland as a strong President. Yet, when his later term ended, the record suggests that he not only helped to shape the Supreme Court but left the presidency constitutionally larger than he had found it and so contributed to its expansion under his successors.

Freedom of Speech

Across many of the administrations surveyed in Gormley's book, a common policy issue engaging Presidents, Congress, and state governments as well as the Supreme Court has been political dissent and the proper scope of freedom of speech. As the American constitutional tradition has demonstrated, protections of freedom of expression in the First Amendment make possible a continuing debate on matters large and small, without which the electoral process and democratic politics itself become empty rituals and self-expression and the search for truth are stifled. As Chief Justice Charles Evans Hughes explained the link between speech and government by consent of the governed,

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.[70]

Yet constitutional guaranties such as those found in the First Amendment confront the Court with a difficult task, one that is not present in all instances of judicial review. Where enumerated powers of the President or Congress are subject to interpretation, for example, the Court's function is at an end when the action taken is found to be within the limits of constitutionally-conferred power. In reaching such a conclusion, the Court is aided by the well-established presumption of constitutionality that accompanies review of most legislative and executive actions. In cases involving freedom of speech, however, the Court must interpret and apply a grant of national power or the reserved powers of the states while, at the same time, it must interpret and apply a constitutional limitation on power. Such cases typically involve a clash of important objectives: order and freedom. Government must have authority to "insure domestic Tranquility," just as it must have military power to resist attacks from abroad. Yet excessive emphasis on order negates the freedom the political system is designed to protect. Thus, in this field the easy path to constitutional decision by way of presumption of constitutionality is not readily available.

Such tensions are the subject of **Judging Free Speech**, a helpful collection of essays edited by Helen J. Knowles and Steven B. Lichtman, who teach political science at the State University of New York at Oswego and

Pennsylvania's Shippensburg University, respectively.[71] While there is abundant literature on freedom of speech, the Knowles–Lichtman volume is unique in both its design and content in that the co-editors have chosen symbolically to focus on exactly nine Supreme Court Justices and their views on this constitutionally protected liberty. The chosen "starting nine,"[72] as the editors call them, include Justices Oliver Wendell Holmes, Jr., George Sutherland, Hugo L. Black, Jr., John Marshall Harlan II, William J. Brennan, Jr., and Potter Stewart from previous Courts, and Justices Anthony M. Kennedy, Clarence Thomas, and Stephen G. Breyer from the contemporary Court. The editors co-authored an introduction ("Oh What a Tangled Web They Weave") and a conclusion ("It's Complicated..."). The nine Justice-focused essays are the work of ten authors including Knowles, who wrote on Justice Kennedy, and Lichtman, who wrote on Justice Thomas. The remaining authors variously teach in either law schools or political science departments.

In their introduction, Knowles and Lichtman emphasize that collectively the essays have less to say about how the several Justices have *voted* in free speech cases and far more to say about what the Justices have *written* about free speech in their opinions. While not dismissing the importance of the former—votes after all determine the outcome of cases and the values that triumph—they dedicate their volume "to the idea that opinions themselves matter, and they matter a great deal." They matter because it is in the opinions that one finds the "public explanations and reasoning ... that lawyers and judges will draw upon in subsequent cases."[73] Particularly for opinions that speak for a majority or plurality of the Bench, Knowles and Lichtman remind the reader that they "were the end products of not only several rounds of editing but also several rounds of negotiating. A Justice tasked with writing a free speech opinion had to do so in a way that would garner the support of colleagues, which in turn means that those colleagues had some capacity to nudge the author in a particular direction. But the reality that bargaining is part of the processes of constructing an opinion does not mean that the opinion is only politics. . . . In fact, the opposite is true, for as Justice Felix Frankfurter once asserted, 'voting is one thing, and expressing views in support of a vote are quite another.'" For the editors, therefore, examining "how individual justices craft their free speech opinions thus enables us to track and explain competing judicial philosophies across time."[74]

In the third sentence of that same introduction, the editors quote Justice Black's insistence from a 1959 opinion that "I read 'no law abridging' to mean *no law abridging*."[75] They then follow the Justice's display of absolutism and literalism with examples of situations in which he either wrote an opinion upholding the suppression of speech or signed on to someone else's opinion that did. Yet Justice Black usually defended the right of free speech in cases that came before the Supreme Court. In fact, his last opinion as a Justice was a concurrence in the Pentagon Papers Case[76] barely three months before his death on September 25, 1971—an opinion that restated his emblematic perspective: "In my view, it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment."[77]

Black's apparent variations pose an intriguing question about this former Senator from Alabama who in 1937 became Franklin Roosevelt's first appointment to the High Court: Particularly in the 1960s, did Black moderate his absolutism? This is the central question Michael Paris and Kevin J. McMahon probe in their contribution to the Knowles–Lichtman book, "Absolutism and Democracy: Hugo L. Black's Free Speech

Jurisprudence." Their conclusion follows instructive analysis of some fifteen opinions authored by Black. Their key to explain or unlock seeming inconsistences lies in the distinction Black drew between speech and conduct, leading the essay's authors to insist that even "in these late-career dissents Black did not deviate very much from his younger self."[78] Cases where he sided with government over speech were those in which, in his eyes, the claimants had engaged in "uncivil behavior that *undermined* the democratic process."[79]

The authors arrive at this conclusion after laying out four propositions about Black's thinking. First, "Black typically subjected regulations that were vague, overbroad, or possibly discriminatory in either application or impact, to very strict scrutiny." Second, "matters of government convenience (such as a concern with littering or noise) should not trump the robust protection of speech." Third, "[m]edium bans (such as a restriction on sound trucks, or a prohibition of door-to-door canvassing or proselytizing) had to be strictly scrutinized in order to prevent government from taking away the means of communication used by ordinary (nonwealthy, relatively powerless) citizens." Fourth:

> [h]owever, if Black viewed the regulation as impacting "conduct," pure and simple, he often afforded government significant leeway to regulate, provided it did so in an even-handed way. ... In situations where speech was enmeshed with public action, if Black thought that persuasion was giving way to coercion or a threat of mob behavior, then he could come down in favor of government regulation.[80]

The fourth proposition leads Paris and McMahon to conclude that Black had "absolute faith in the First Amendment, but his 'constitutional faith' in the nation's demos[81] was not unqualified. A particular, and essentially contested, vision of democracy guided Hugo Black throughout his long and volatile career."[82]

The Court and Property

Justice Black's judicial career began about the same time that cases involving property rights ceased to populate the Supreme Court's docket. Yet property had long held a central place in American political thought and in the way that people commonly viewed individual liberty. "The right of acquiring and possessing property and having it protected," Justice William Paterson wrote in an early circuit court opinion, "is one of the natural inherent and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact."[83]

Paterson's point was echoed more than a generation later by Justice Joseph Story: "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be sacred."[84]

This link between property and liberty and between property and citizenship lies at the center of **The Safeguard of Liberty and Property** by Guy F. Burnett, who teaches government and foreign affairs at Hampden-Sydney College.[85] His book is a revealing and nicely written case study of one of the most controversial decisions by the Supreme Court to come down in the last years of

the Rehnquist Court: *Kelo v. City of New London*.[86] In this decision, five Justices ruled that the homes of Susette Kelo and several neighbors who were long-term residents of the Fort Trumbull neighborhood of New London, Connecticut, could be taken by the municipality in condemnation proceedings under eminent domain for the purpose of economic redevelopment.

The constitutional provision at issue in *Kelo* is what is commonly known as the Takings Clause of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation." Applicable to the national government since ratification of the Bill of Right in 1791, this limitation was the first from the Bill of Rights that the Supreme Court, in 1897, made applicable through the Fourteenth Amendment to state governments and by inference to their municipal subdivisions as well.[87]

While the most troublesome part of this provision for the Court over the years has been in determining what constitutes a "taking," the outcome in *Kelo* turned on the meaning of "public use." Was the term meant to apply only to property, such as roads, schools, and parks that would be maintained by government and generally open to or dedicated to the public or was it something broader? Specifically, did public use also encompass "public purpose" where that purpose was economic revitalization? As Polly Price has written, it is in such situations involving eminent domain that one sees the "most straightforward application of the Takings Clause."[88] The Court's own precedents did not point to a single outcome, but hinted at a flexible approach. For example, *Berman v. Parker*[89] allowed redevelopment in Washington D.C., while *Hawaii Housing Authority v. Midkiff*[90] presented a situation in which the state required large landowners to sell their property to others. Against the charge in the latter that the law took private property for private, not public, use, all eight participating Justices decided that Hawaii's plan served a public purpose. "Where the legislature's purpose is legitimate and its means are not irrational," declared Justice O'Connor, "our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."[91] The hands-off approach represented by *Midkiff*, may explain the willingness of the majority in *Kelo*—a majority that did not include Justice O'Connor, to approve New London's use of eminent domain in this instance.

Throughout, Burnett's case study is instructive, although a more complete index—the names of Justices Kennedy, O'Connor, Stevens, and Thomas (each of whom filed opinions) are missing from it—would make the book more useful. The book nonetheless succeeds in part because of the productive use the author made not only of the expected published and archival sources but because the author was able to convey the views of the opposing parties effectively, especially in terms of Kelo herself and the decision's aftermath.

That outcome included a compromise that Burnett describes as "one of the strangest in American legal history."[92] Even though the neighborhood in question was not redeveloped, Kelo worked through mediators and received a sufficient settlement from the city that allowed her house to be dismantled piece by piece, "[s]lat-by slat, brick-by-brick"[93] and relocated and reassembled in 2008 on a lot across the Thames River in the city of Groton that overlooked the same waterfront.

Given the sharp division within the Court and the changes in personnel that have occurred since June 2005, when the case came down, Burnett notes Justice Scalia's comparison of the decision with *Dred Scott* and prediction of its demise[94] and questions whether the same ruling would be

forthcoming today, In *Kelo,* Justice John Paul Stevens recognized "the hardship that condemnations may entail, notwithstanding the payment of just compensation [and] emphasize[d] that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."[95] Many states have since taken that observation to heart in that no fewer than forty-two states have enacted legislation or passed ballot or constitutional measures in response to *Kelo* that disallow a similar use of eminent domain in those particular locales.[96] As with the other books surveyed here, Burnett's not only depicts the judicial process at work but illustrates how the Court is very much a part of a larger and complex political system, and why the selection of each Justice has a far-reaching impact on the lives of all Americans.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

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ENDNOTES

[1] No. 14-1209.

[2] *Sturgeon v. Frost* came down on March 22, 2016. Writing for a unanimous Bench, Chief Justice Roberts reversed the decision by the U.S. Court of Appeals for the Ninth Circuit, siding instead with Sturgeon against the Park Service.

[3] According to the Alaska Department of Natural Resources, "The term conservation system unit (CSU) means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System, National Wilderness Preservation System, or a National Forest Monument, including additions and expansions to these systems in the future (see Section 102(4) of ANILCA). CSUs managed by the National Park Service in Alaska include 15 national parks, preserves, and monuments." http://dnr.alaska.gov/commis/opmp/anilca/more.htm. (Last accessed March 15, 2016).

[4] "Judge John M. Harlan was appointed to succeed Justice Jackson. When Justice Harlan retired in 1971, William H. Rehnquist was appointed to succeed Justice Harlan. And when Justice Rehnquist was elevated in 1986 to serve as Chief Justice of the United States, Judge Antonin Scalia was appointed to succeed Rehnquist as an Associate Justice." http://thejacksonlist.com. (Last accessed on May 5, 2016).

[5] Comments by the Justices that are included here are from the Supreme Court's website: "Statements From the Supreme Court Regarding the Death Of Justice Antonin Scalia (Updated)," February 15, 2016. http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-14-16. (Last accessed on May 2, 2016.)

[6] Antonin Scalia and Bryan A. Garner, **Reading Law** (2012), 78-92.

[7] There of course have been other instances when absences occasioned by illness have caused cases to be held over.

[8] Marjorie Hunter, "Senate Coalition May Block Action on Warren's Post," *New York Times*, June 28, 1968, p. 1.

[9] The battle that ensued over Judge Bork was the most vitriolic since President Woodrow Wilson's nomination of Louis Brandeis in 1916. The Judiciary Committee, chaired by Senator Joseph Biden, forwarded Bork's nomination to the floor with a recommendation that it be rejected. The 58–42 vote on the Senate floor on October 23 against Bork included six negative notes from Republican Senators.

[10] Henry J. Abraham, **Justices, Presidents, and Senators** (2007), 354.

[11] Barry Friedman, **The Will of the People: How Public Opinion Has Influenced the Supreme Court** (2009), 314.

[12] Nancy Maveety, **Picking Judges** (2016), hereafter cited as Maveety.
[13] Professor Abraham's book is now in its 5th edition (2007). *See* note 10.
[14] Danelski's book was published in 1964 and focused on the appointment of Pierce Butler in 1922. Bronner's, on the nomination of Robert Bork in 1987, appeared in 1990.
[15] John P. Frank, "The Appointment of Supreme Court Justices: Prestige, Principles, and Politics," 1941 *Wisconsin Law Review*, 172, 343, 461(1941).
[16] Among other works, any list should include: Michael Comisky, **Seeking Justices** (2004), Lee Epstein and Jeffrey A. Segal, **Advice and Consent: The Politics of Judicial Appointments** (2007), Christine L. Nemacheck, **Strategic Selection: Presidential Nominations of Supreme Court Justices from Herbert Hoover through George W. Bush** (2007), Mark Silverstein, **Judicious Choices: The New Politics of Supreme Court Confirmations**, David A. Yalof, **Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees** (1999), Sheldon Goldman, **Picking Federal Judges** (1997), John A. Maltese, **The Selling of Supreme Court Nominees** (1995), John Massaro, **Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations** (1990).
[17] Theodore H. White, **The Making of the President 1960** (1961), 370.
[18] Maveety, ix.
[19] *Id.*, 114.
[20] *Id.*, ix.
[21] Editorial, "Felix Frankfurter," *The Nation*, January 14, 1939, p. 52.
[22] Maveety, 115.
[23] *Id.*, 115-16.
[24] *Id.*, 115-16.
[25] *Id.*, ix.
[26] *Id.*, 116. Maveety notes, however, that President George W. Bush's appointments to the Court will apparently far outlast President Andrew Jackson's depiction on the twenty-dollar bill. *Id.*, 117, n. 4.
[27] *Id.*, 1.
[28] *Id.*, 5.
[29] *Id.*, emphasis in the original.
[30] *Id.*, 6.
[31] *Id.*, 7.
[32] *Id.*
[33] *Id.*, 7-8.
[34] *Id.*, 8.
[35] *Id.*, 9.
[36] *Id.*, 11.
[37] *Id.*, 17.
[38] Robert H. Jackson, **The Struggle for Judicial Supremacy** (1941), 196.
[39] Bernard Schwartz, **A History of the Supreme Court** (1993), 234.
[40] Maveety, 16-17.
[41] Alpheus Thomas Mason, **The Supreme Court from Taft to Warren** (1958), 114.
[42] In the three-way race with Democratic nominee Hubert Humphrey and independent challenger George Wallace, Republican Nixon's plurality of the popular vote was 43.4 percent, with 302 electoral votes.
[43] Maveety, 18.
[44] 410 U.S. 113 (1973).
[45] Maveety, 21.
[46] *Id.*, 25., emphasis in the original.
[47] *Id.*, 22.
[48] *Id.*, 29.
[49] *Id.*, 33.
[50] *See* Robert Sigliano, **The Supreme Court and the Presidency**, chapter 2 (1971).
[51] *Youngstown Sheet & Tube* v. *Sawyer*, 343 U.S. 579, 610-611 (1952).
[52] *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316 (1819).
[53] *Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857).
[54] The Jackson and Lincoln messages appear in James D. Richardson, ed., **A Compilation of the Messages and Papers of the Presidents** (1908), vol. 2, 581–82, and vol. 6, 9, respectively.
[55] Ken Gormley, ed., **The Presidents and the Constitution** (2016), hereafter cited as Gormley. The editor's full name is Kenneth G. Gormley, but only "Ken Gormley" appears on the book's title page.
[56] *Id.*, 8.
[57] *Id.*
[58] *Id.*, 654.
[59] *Id.*, 9.
[60] *Id.*, 10.
[61] While there would have been good reasons for the publisher to have set chapter size according to the relative importance or complexities of the several dozen individual administrations, doing so might well have yielded a less useful finished product and one of unmanageable length and prohibitive cost. Presentation of each President thus necessarily involved tradeoffs of breadth, depth, and detail.
[62] The author of this review essay contributed the chapters on Cleveland for Gormley's book, and the several paragraphs that follow accordingly draw from material in chapters 22 and 24.
[63] Henry J. Abraham, **Justices and Presidents**, 3rd ed. (1992), 140.
[64] *Myers v. United States*, 272 U.S. 52, 176 (1926). In this case the Court upheld President Woodrow Wilson's removal of a presidentially appointed (and Senate-confirmed) postmaster, even though a statute allowed removal during the postal official's four-year term only

with Senate approval. In his opinion for the Court Chief Justice, Taft reasoned that the power to remove was derived from the power to appoint and quoted from President's Cleveland's statement on the subject in 1886: "I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which, in express terms, provides that 'the executive power shall be vested in a President of the United States of America,' and that 'he shall take care that the laws be faithfully executed.'" *Id.* at 169. With different officials or agencies, however, the power could be limited by Congress, as seen in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

[65] Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, **The American Constitution: Its Origins and Development**, 7th ed. (1991), vol. 2, 365.

[66] Data drawn from table at: http://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm. (Last accessed on May 11, 2016).

[67] L. Q. C. Lamar (1888–1893) and Melville W. Fuller (1888–1910). Lamar had been Cleveland's Secretary of the Interior. His appointment to the Court was particularly noteworthy in that it was the first of a true Southerner since Franklin Pierce named John Campbell in 1853. Lamar was also the first Supreme Court nominee whose resume included active service in the Confederate Army.

[68] Edward Douglass White (1894–1910) and Rufus W. Peckham (1896–1909). White would be elevated to Chief Justice by President Taft in 1910.

[69] Melville W. Fuller was appointed in 1888 and served until 1910.

[70] *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937).

[71] Helen J. Knowles and Steven B. Lichtman, eds., **Judging Free Speech** (2015), hereafter cited as Knowles and Lichtman.

[72] *Id.*, 3.

[73] *Id.*, 2.

[74] *Id.*, 3.

[75] *Id.*, 1.

[76] *New York Times Co. v. United States*, 403 U.S. 713 (1971).

[77] *Id.*, 715.

[78] Knowles and Lichtman, 93.

[79] *Id.*, emphasis in the original.

[80] *Id.*, 80.

[81] This word from ancient Greek refers variously to a village or the citizens of a Greek city-state.

[82] *Id.*, 93.

[83] *Van Horne's Lessee v. Dorrance*, Cir. Ct. Pa., 2 U.S. 304, 310 (1795).

[84] *Wilkinson v. Leland*, 27 U.S. (2 Peters) 627, 657 (1829).

[85] Guy F. Burnett, **The Safeguard of Liberty and Property** (2015), hereafter cited as Burnett.

[86] 545 U.S. 469 (2005).

[87] *Chicago*, B. & Q. R. Co. v. Chicago, (1897).

[88] Polly J. Price, **Property Rights** (2003), 107.

[89] 348 U.S. 26 (1954).

[90] 467 U.S. 229 (1984).

[91] *Id.*, 243.

[92] Burnett, 138.

[93] *Id.*

[94] *Id.*, 8, n. 13.

[95] 545 U.S. at 469.

[96] http://www.ncsl.org/research/environment-and-natural-resources/eminent-domain-overview.aspx. (Last accessed on May 13, 2016.)

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Errata:
In the previous issue, John M. Scheb's article "Edward T. Sanford—Knoxville's Justice" contained a few errors. Dr. Scheb wishes to thank Stephanie Slater for her assistance in correcting these errors.

The article incorrectly stated that E.J. Sanford and Emma Chavannes had eight children and that two of them died of cholera in 1864. In fact, they had ten children, four of whom met untimely deaths. Two of them died in 1864, most likely as the result of smallpox. Two others died as infants, one in 1868, the other in 1872.

The article misspelled the name of one of Justice Sanford's daughters: her name was Anna Magee.

The location of Justice Sanford's funeral was Greenwood Cemetery in Knoxville, where Justice Sanford is interred.

Only four Supreme Court Justices attended Sanford's funeral: Associate Justices Pierce Butler, Harlan F. Stone, and James C. McReynolds and Chief Justice Charles Evans Hughes, who had just been appointed to the Court to succeed William Howard Taft.