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New Perspectives on the Waite Court

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PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (Cambridge Univ. Press 2011). Pp. 282. Hardback. $90.00.

PAUL KENS, THE SUPREME COURT UNDER MORRISON R. WAITE, 1874-1888 (Univ. of S.C. Press 2010). Pp. 272. Cloth. $49.95.

Legal scholars have never accorded the Waite Court the attention that they have expended on such heavyweights as the Marshall, Taney, and Warren Courts. In his survey, Professor Kens notes that "relatively few cases from the era have survived to be part of our constitutional discourse."[1] Yet, some of its decisions have had a profound effect on American constitutional history and continue to shape the nation's constitutional law today. At least four Waite Court's decisions remain foundational for present-day constitutional law doctrine. The opinion in *The Civil Rights Cases*[2] remains the key case for the proposition that the Fourteenth Amendment delegated power to Congress only to counteract state action that deprived people of rights protected by the Fourteenth Amendment, as distinct from private invasions of rights. An offhand comment in *Santa Clara County v. Southern Pacific Railroad Co.*[3] established the principle that corporations were entitled to the same constitutional rights as persons. In *Welton v. Missouri*,[4] the Court established the principle that states cannot levy taxes in ways that discriminate against interstate commerce. In *Wabash, St. Louis and Pacific Railway Co. v. Illinois*,[5] the Court first applied the principle of the "dormant" interstate-commerce clause to state railroad regulation. The Waite Court also established in *Munn v. Illinois* (the so-called Granger Cases)[6] the doctrine that governments may regulate businesses affected with a public interest. Now primarily of historical interest, it is nonetheless an important and well-known decision, regularly discussed in studies of American constitutional history. Not quite as well known any longer but equally influential was *Hurtado v. California*,[7] which held that the Fourteenth Amendment did not apply the provisions of the Bill of Rights to the states.

Another foundational case illustrates how problematic it is to chronologize

1. PAUL KENS, THE SUPREME COURT UNDER MORRISON R. WAITE, 1874-1888, at 14 (2010).
2. Civil Rights Cases, 109 U.S. 3 (1883).
3. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886).
4. Welton v. Missouri, 91 U.S. 275 (1875).
5. Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886).
6. Munn v. Illinois, 94 U.S. 113 (1876).
7. Hurtado v. California, 110 U.S. 516 (1884).

Supreme Court history by the terms of its chief justices. Any study of the "Waite Court" has to include the *Slaughter-House Cases*,[8] as do the two books under review here.[9] It established the proposition that fundamental rights are not among the privileges and immunities of citizens of the United States but rather pertain to state citizenship, and that the Fourteenth Amendment bars state infringement only of the former and not the latter. The *Slaughter-House* decision remains a bedrock of American constitutional law and history. The Court has circumvented much of its force by interpreting the Fourteenth Amendment's Due Process Clause to bar states from infringing most of the provisions of the Bill of Rights, but there is no way to tell how differently Americans' rights might have been protected had the justices decided *Slaughter-House* the other way. Moreover, it is truly a Waite Court case. Its parameters are consistent with and intimately connected with the civil-rights law the Waite's Court developed even though it was decided months before Waite was sworn in.

The Waite Court's decisions have been treated primarily in the histories of the development of laissez-faire constitutionalism during the second half of the nineteenth century and in assessments of Reconstruction and its aftermath.[10] With regard to the latter, a spate of studies have appeared recently, revolving especially around the Colfax Massacre and the case *U.S. v. Cruikshank*[11] that grew out of it.[12] That case has been described as a watershed in the constriction of federal power to protect civil and political rights in the South. Constitutional historians have also published a number of excellent biographies of key Waite Court justices in the past twenty years or so.[13]

However, there are few studies of the Waite Court itself. Professor Kens' new *The Supreme Court under Morrison R. Waite*,[14] part of the University of South Carolina Press's series, *Chief Justiceships of the United States Supreme Court*, is one of only three books that looks at the Court and its decisions as a unit. The others are D. Grier

8. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

9. *See, e.g.*, Howard Gillman, *The Waite Court (1874-1888): The Collapse of Reconstruction and the Transition to Conservative Constitutionalism*, *in* THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 124, 129-32 (Christopher Tomlins ed., 2005); DONALD GRIER STEPHENSON, JR., THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY 150-53 (Peter G. Renstrom ed., 2003).

10. *See, e.g.*, LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877-1917, at 138-215, *passim* (1971); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 359-452 (1985); SIDNEY FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901, at 126-64 (1956); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 64-75 (1993); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 161-73 (1993); 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 284-411 (1922); Walton H. Hamilton, *The Path ofDue Process of Law*, 48 Ethics 269 (1938).

11. Historians attend closely to the case both at the circuit court and Supreme Court levels. United States v. Cruikshank, 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897), 92 U.S. 542 (1876).

12. ROBERT M. GOLDMAN, "A FREE BALLOT AND A FAIR COUNT": THE DEPARTMENT OF JUSTICE AND THE ENFORCEMENT OF VOTING RIGHTS IN THE SOUTH, 1877-1893 (2001); LEEANNA KEITH, THE COLFAX MASSACRE (2008); CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008).

13. PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE (1997); LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN (1999); MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA (2003).

14. KENS, *supra* note 1.

Stephenson's entry in the ABC-Clio volumes on the history of the Supreme Court[15] and Charles Fairman's encyclopedic but unreadable volume on the Waite Court in the *History of the Supreme Court of the United States* sponsored by the Oliver Wendell Holmes Devise.[16]

A prolific and respected constitutional historian on the faculties of political science and history at Texas State University-San Marcos, Kens has prepared a judicious, insightful, and informative survey of this important Court. As a survey, it should be of especial use to teachers of constitutional history, specialists in other areas of the field, and those with a general interest in the history of Supreme Court doctrine. Unfortunately, it has no bibliography or bibliographical essay—a significant shortcoming in a survey of this type. Readers will have to rely on discussions of the secondary literature that Kens presents in the text, as well as his endnotes, which cite much of the current literature.

Much of the information Kens presents will be familiar to constitutional historians and especially to those who have studied the Court in the Reconstruction era and the Gilded Age, although, many will learn new things from his discussions of the *Sinking-Fund Cases*[17] and federal land law. More important, Kens challenges established understandings of the Waite Court in ways that will surely influence future historical interpretations.

The Waite Court has usually been described as "transitional" in terms of its jurisdiction, structure, and duties, with its decisions stepping-stones on the way to the aggressive judicial defense of property rights that characterized laissez-faire constitutionalism.[18] In the area of civil rights, however, both constitutional historians and historians of the Civil War and Reconstruction have described it as foreclosing federal protection of African Americans after the Civil War. In this regard, it has been treated as transitional only in the sense that the Fuller Court's decision in *Plessy v. Ferguson*,[19] which sanctioned state-enforced racial segregation, was the natural culmination of Waite Court precedents.[20]

Kens takes issue with this view. He insists that the Waite Court was not a transitional court at all. Rather, the Waite Court was "traditional."[21] "[I]t tended to look backward for its cues and tended to follow the path that had already been laid," he writes.[22] Implicitly, he indicates that the Fuller Court, which succeeded Waite's, was the real harbinger of the modern Court.

Kens makes his argument most persuasively in his account of cases dealing with corporate property rights. As he tells the tale, the Waite Court faced an aggressive group

15. STEPHENSON, *supra* note 9.

16. CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-1888--PART TWO (1987).

17. Sinking-Fund Cases, 99 U.S. 700 (1879).

18. STEPHENSON, *supra* note 9, at 223-28; Gillman, *supra* note 9.

19. Plessy v. Ferguson, 163 U.S. 537 (1896).

20. *See* ROBERT J. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT 83-103 (1960); JOHN R. HOWARD, THE SHIFTING WIND: THE SUPREME COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO *BROWN* 71-155 (1999); J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 221-52 (2d ed. 1993). All treat judicial interpretation of the Fourteenth Amendment as running a straight line from *Slaughterhouse* to *Plessy*.

21. KENS, *supra* note 1, at 14.

22. *Id.*

of railroad entrepreneurs who hired the best legal talent of the day to establish the Constitution as a bulwark against state regulation. They had a powerful ally on the Court in the indomitable Justice Stephen J. Field, who Kens says sought to make the Court the protector of corporate property rights—a view at odds with the more benign picture of Field that Charles McCurdy presented in an influential revisionist article some thirty years ago.[23] Always interpreting statutes to promote railroad interests, Field worked to secure constitutional protection for corporate property rights through the new Fourteenth Amendment. Having failed to persuade the Court in *Slaughter-House* that the Amendment's Privileges and Immunities Clause protected property rights against state infringement, he worked unceasingly to accomplish his goal through the Amendment's Due Process Clause.

Rather than providing stepping stones for the Court's inexorable adoption of laissez-faire constitutionalism, Kens writes, Waite and his colleagues resisted. They repudiated the railroad lawyers' constitutional arguments in the Granger Cases, the *Sinking-Fund Cases*, and other decisions. Even the appointment of railroad lawyer Stanley Matthews in 1881 did not change the Court's course. It would take the appointment of Waite's successor, Melville W. Fuller, and a new majority of justices between 1888 and 1892 to change the Court's course.

Kens argues persuasively that in these cases the Court reflected the traditional view that government had broad powers to regulate the economy in the public interest, as described in the work of William J. Novak and Harry L. Scheiber[24] and as manifested in the classic *Charles River Bridge* case.[25] Public regulation of property was the norm; restraints on the police power were the exception. Railroad lawyers wanted to reverse this understanding. Granger-inspired railroad regulation was more in line with existing constitutional doctrine than the laissez-faire constitutionalism that challenged it. "[I]f by 'radical' we mean an agent of change," Kens urges, "the term more accurately applies to railroad lawyers than proponents of rate regulation."[26] The Waite Court's pro-regulatory jurisprudence represented the "last gasp" of the idea that the rights of the community took precedence over the property rights of the individual.[27]

Kens puts the Court's commitment to protecting the integrity of bankrupt railroads against the claims of creditors in the same framework. The railroads were simply too important to both local economies and the national economy to be allowed to fail. He describes the Court's attitude thus: "[A]ll persons who chose to deal with the corporation as a creditor did so with the knowledge that, if the railroad went into insolvency, the court would have a duty to do what was necessary to serve the public."[28]

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23. Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975).

24. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); Harry N. Scheiber, *The Road to* Munn: *Eminent Domain and the Concept of Public Purpose in the State Courts*, in 5 PERSPECTIVES IN AMERICAN HISTORY 327-402 (1971). Professor Kens recognizes the influence of *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (Mass. 1851) as a legal precedent for the broad understanding of the police power and therefore might also have cited Leonard Levy's seminal discussion of the case and its context in THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 229-65 (1957).

25. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

26. KENS, *supra* note 1, at 77.

27. Kens entitled the relevant chapter, "The Last Gasp of the Rights of the Community." *Id.* at 78.

28. *Id.* at 94.

Yet in other areas of law that Kens describes, the Waite Court does not emerge as all that concerned with the rights of the community. The Court sided firmly with bondholders when western communities tried to repudiate the obligations of bonds issued to foster railroad development. The way in which these bonds were secured and distributed was often questionable, but the Court sided with the communities only in cases of the most obvious and outrageous frauds. According to the Court, local efforts to repudiate bonds secured by sharpers, swindlers, and defaulters almost always ran afoul of the Obligations of Contracts Clause. In choosing who would bear the loss, the Court imposed the costs on the local communities rather than on the eastern and foreign bondholders, whom the justices assumed purchased bonds in good faith. Here Field's pro-railroad position carried the day against Justice Samuel F. Miller's pro-community one. This too reflected the Waite Court's traditionalism, Kens says.[29] The justices "could tie their reasoning to a long tradition," going back to the Marshall Court, "that favored a system of commerce based on the sanctity of contract."[30]

Similarly, the Waite Court respected and built upon precedents that strictly limited settlers' claims based on preemption or the provisions of federal homestead acts. Kens reports that these decisions favored large claimants and railroads over ordinary settlers. They may have followed traditional precedents, but it seems hard to reconcile these decisions with the notion that community rights trumped property rights.

In his analysis of the Court's economic decisions, Kens identifies a conflict between the rights of the community championed by the Waite Court majority, and the property rights of individuals championed by Field. He dismisses an alternative interpretation that has gained wide currency in the constitutional history literature. It posits that for nineteenth-century Americans, the key problem was not how to reconcile the general welfare—that is, the rights of the community—and individual rights. It was rather the problem of "special" or "class" legislation—how to distinguish public policies that served the general welfare from those that served the interests of favored individuals or privileged portions of the community.[31] Kens dismisses the seminal work of constitutional historians and political scientists who have identified the importance of this problem. In his view, they have simply and erroneously asserted the primacy of individual over community rights before the Civil War. But hostility to special and class legislation was different than exaltation of private rights. It was anti-monopolistic and anti-special privilege. Therefore, it was entirely consistent with broad ideas of government power to promote the general welfare. Kens fails to see how corporate lawyers harnessed and reinterpreted a deeply held, essentially egalitarian constitutional principle into one that exalted private over community rights.

Stressing the Waite Court's traditionalism and its deference to state exercise of the police powers, Kens understates the degree to which something was happening to the judicial role in American constitutionalism after the Civil War. Kens points out that most

29. *Id.* at 66.

30. *Id.* at 66-67.

31. *See* GILLMAN, *supra* note 10; Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967); McCurdy, *supra* note 23.

of the Waite Court justices were committed to the principle of popular sovereignty. But he interprets that commitment narrowly—as a recognition of broad state police powers and a deference to their legislative exercise. However, up to and through the Civil War, popular sovereignty meant something more than this. It meant that the primary responsibility for making constitutional policy lay with the people, not with judges—not even the justices of the Supreme Court. The issues separating Hamiltonian Federalist from Jeffersonian Republican, state-rights Jacksonian from nationalist Whig, proslavery Democrat from antislavery Republican had all been settled by constitutional politics, not constitutional law.[32] The Court's role was primarily in shaping constitutional law to accommodate policies already determined through constitutional politics.

Kens does attend briefly but pointedly to the political context surrounding the Waite Court's decisions, but he does not make clear the degree to which those politics were constitutional in nature—the degree to which the constitutional issues that came before the Court had already been thrashed out in the political forums. In the decades following the Civil War, courts, and especially the Supreme Court, began to stake a stronger claim to final constitutional authority than they had before and during the war. The active role that the Waite Court played in determining Reconstruction policy was part of this change. Never before had the Court played such an aggressive role in shaping constitutional policy. This is a story hiding in plain sight, a rehearsal for the role the Court would take in up in the twentieth century.

According to Kens, the Waite Court's restrictive interpretation of federal power to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments demonstrated a commitment to tradition rather than a claim to a broader role in making public policy. He provides a careful account of the pre-Waite Court *Slaughter-House Cases*, reflecting recent studies that have demonstrated that the decision was not intended as a blow against Reconstruction.[33] He follows this with equally sensitive assessments of *Cruikshank*, the *Civil Rights Cases*, and others in which the justices, he says, tried both to cabin and maintain federal power to protect rights. Unlike John R. Howard, who identified this traditionalism primarily in terms of the maintenance of racial hierarchy,[34] and Waite's biographer C. Peter Magrath, who said the decisions were meant to conciliate the South and ratify the Republican abandonment of the Negro in the Compromise of 1877,[35] Kens endorses the arguments of Pamela Brandwein and myself that the Court was motivated by a commitment to the traditional roles of state and nation

32. For recent literature making this point, see JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS (1998); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES (2007); Michael Les Benedict, *Lincoln and Constitutional Politics*, 93 MARQ. L. REV. 1333 (2010); Gerald Leonard, *Party as a "Political Safeguard of Federalism": Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221 (2001).

33. RONALD M. LABBE & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003); Michael A. Ross, *Justice Miller's Reconstruction:* The Slaughter-House Cases, *Health Codes, and Civil Rights in New Orleans, 1861-1873*, 64 J. S. HIST. 649 (1998).

34. *See* HOWARD, *supra* note 20, at 79-116.

35. C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 112-149 (1963). Magrath entitled one of his chapters on the Waite Court's handling of civil and voting rights cases "Conciliation: The Court Faces the Southern Question" and another "Guardian of the Compromise of 1877." *Id.* at 111, 135.

in the federal system.[36] For many Republicans, the cases the Waite Court struggled with "brought to a head the tension between their long-held ideal of federalism and the Republican desire to secure freedom for blacks."[37] "It is possible," he writes, "that, rather than only being morally opaque, justices of the era were truly conflicted, perhaps even confused."[38]

In *Rethinking the Judicial Settlement of Reconstruction*, Professor Brandwein finds the justices of the Waite Court anything but confused.[39] In a remarkable feat of scholarly archeology, Brandwein unearths the surprisingly complete structure of constitutional law that the Waite Court developed in response to the Civil War constitutional amendments. She describes the demolition of the Waite Court's doctrines by the Fuller Court that followed and explains why twentieth-century constitutional scholars failed even to find its traces. In the process, she challenges both legal and historical understandings of the Waite Court's interpretation of the Fourteenth and Fifteenth Amendments.[40]

As to constitutional law, Brandwein demonstrates that the present-day view that the state-action doctrine limits Congress to acting only when rights violations can be connected to some positive (even if remote) action of the state is inconsistent with the original intent of the framers of the Civil War Amendments and the decisions of the Waite Court. Brandwein recovers "an entire jurisprudence of rights and rights enforcement [that] has been lost to twentieth-century observers."[41] Of course, the erroneous doctrines that replaced this jurisprudence are now well-established, supported by a large body of decisions that have both reaffirmed them and reinterpreted them to expand the meaning of state action. There is little likelihood that Brandwein's careful exegesis will alter the law. Besides, Brandwein avows "in no uncertain terms, that no originalist assumptions reside here."[42] At most, a better understanding of the history of early interpretations of the Civil War Amendments might "create space" for new constitutional analysis of what are now old questions.[43]

Brandwein also presents a potent challenge to the orthodox view, articulated most trenchantly by Robert J. Kaczorowski and Frank J. Scaturro,[44] that the Waite Court's

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36. Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39 (1978); Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343 (2007). Kens also had access to the manuscript of Brandwein's *Rethinking the Judicial Settlement of Reconstruction*, reviewed in this essay.

37. KENS, *supra* note 1, at 43.

38. *Id.*

39. PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011).

40. Brandwein's conclusions are not entirely without precedent. I reached a number of similar ones in Benedict, *supra* note 36. *See also* XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE & NORTHERN REPUBLICANS, 1860-1910, at 119-33, 207-15 (1997). Nonetheless, Brandwein is correct in her description of the dominant legal and historical interpretations.

41. BRANDWEIN, *supra* note 39, at 2.

42. *Id.* at 240.

43. *Id.*

44. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 (1985); FRANK J. SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION: A DISTORTION OF CONSTITUTIONAL JURISPRUDENCE (2000); LAWRENCE GOLDSTONE, INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865-1903 (2011). Eric Foner describes the Waite Court's rulings as part of a general retreat from Reconstruction in his standard account, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 529 (1988) ("[D]uring the 1870s, responding to the shifting currents of Northern public opinion, it retreated

decisions amounted to a wholesale repudiation of the Republican Reconstruction program and that they closed the door on federal protection of rights. In their view, the Republicans shifted primary responsibility for protecting the civil and political rights of citizenship to the federal government—a revolution in the federal system.[45] From this perspective, the Waite Court's obsessive determination to preserve the traditional division of authority between the states and the federal government destroyed the clear meaning of the Civil War constitutional amendments.

Other historians have pointed to the complexities and ambiguities of the Republican Reconstruction program. They point to the divisions among the Republicans who framed the legislation and constitutional amendments. They argue that the program was devised primarily by centrist Republicans, who were committed to protecting African-American rights without revolutionizing federalism, rather than more radical Republicans, who urged the revolution in federalism Kaczorowski and Scaturro say occurred.[46] Brandwein's research leads her to agree with this understanding of Reconstruction. Looking at the Waite Court's decisions and opinions in cases involving African-American rights, she concludes that the Court reflected the commitments of the centrist Republicans who had developed the Reconstruction program and who continued to control the Republican party.

While centrist Republicans posited "a robust definition of national citizenship," Brandwein argues that from the beginning they determined to give the national government corrective power to protect rights rather than primary power.[47] Republican federalism was "'state-centered,'" she says, in that their program authorized the exercise of federal power only after states denied rights.[48] The Civil Rights Act of 1866, the Fourteenth Amendment, and the Fifteenth Amendment all reflected this determination.[49] However, this corrective power was not limited to counteracting positive state actions infringing rights. American political theory held that the purpose of government was to secure citizens' rights. The failure to do so because of a victim's race—what Brandwein labels "state neglect"—was as much a denial of equal rights as was discriminatory legislation.[50] Brandwein presents overwhelming evidence sustaining her conclusion and demonstrates conclusively that the Waite Court's decisions reflected the same understanding. Thus, contrary to present legal doctrine, the Waite Court indicated that the federal government could prosecute private violations of rights when states failed to

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from an expansive definition of federal power, and moved a long way toward emasculating the postwar amendments.").

45. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986); Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45 (1987).

46. 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 3-22 (2006); MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869 (1974); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990); ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960).

47. BRANDWEIN, *supra* note 39, at 39.

48. *Id.*

49. Civil Rights of 1866, ch. 31, 14 Stat. 27; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

50. *See* BRANDWEIN, *supra* note 39, at 28-30.

do so. The state's inaction itself meant that the private offense was committed under the color of law or custom.

But for the federal government to gain such jurisdiction, the private actions had to violate rights secured by the Constitution. Determined to preserve a line between state and federal jurisdiction, the justices of the Waite Court carefully delineated what those rights were. Justice Bradley, whose circuit included the states of the Deep South,[51] played the crucial role. In his all-important circuit court opinion in the *Cruikshank* case, Bradley distinguished between natural, inalienable rights, which were guaranteed or secured by the Constitution, and rights created by the Constitution in the same way that any statute or ordinance created rights.[52] Brandwein refers to this bifurcated treatment of rights as making ours a "hybrid Constitution."[53] The secured rights included the great rights of property, contract, and personal liberty, for the protection of which all governments were established. Under the American federal system, it was the states' obligation to protect citizens in these rights.[54] The Fourteenth Amendment authorized Congress to intervene only when the states failed to do so.

On the other hand, the United States had the direct power to protect citizens in the rights the Constitution itself created. As the Court made clear in *Ex parte Siebold*[55] and *Ex parte Yarbrough*,[56] the Constitution established federal elections, and Congress could enact whatever legislation necessary to govern them and protect their integrity, holding both state officers and private individuals responsible for their actions. Although the Court found it necessary to use convoluted and negative language, it held that the Fifteenth Amendment created a new right of not being denied the right to vote on account of race, color, or previous condition of servitude. As a Constitution-created right, Congress could enforce it directly upon private individuals, regardless of what states did in the premises. Likewise, the Thirteenth Amendment created a right to not be denied state protection of basic rights inherent in freedom on account of race or previous condition of servitude.[57] While the Thirteenth Amendment has no state-action language, the Fifteenth Amendment does. Brandwein points out that the construction that Bradley and the rest of the Waite Court justices put on it in effect created a "Fifteenth-Amendment Exemption" to the state-action rule.[58]

Surprisingly, Brandwein hardly refers to one of the standard questions of Fourteenth Amendment jurisprudence—whether Republicans intended the Fourteenth

51. Until the Judiciary Act of 1891, ch. 517, 26 Stat. 826, changed the system, Supreme Court justices were each assigned to ride a circuit, joining with district court judges to preside over circuit court proceedings.

52. United States v. Cruikshank, 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897), *aff'd*, 92 U.S. 542 (1876).

53. BRANDWEIN, *supra* note 39, at 94. I think this choice of words is unfortunate. According to the OXFORD UNIVERSAL DICTIONARY ON HISTORICAL PRINCIPLES 937 (3d ed. 1955), "hybrid" means "[a]nything derived from heterogeneous sources" or "composed of incongruous elements." While the rights protected by the Constitution may derive from different sources, that does not speak to the origins of the Constitution itself.

54. Although Brandwein does not make the point, it is clear that this understanding underlies the pre-Waite *Slaughter-House* decision as well. Once one recognizes the distinction, it becomes clear that Justice Miller, who wrote the opinion, considered pre-existing, natural rights to constitute the privileges and immunities of state citizenship, while the privileges and immunities of United States citizenship consisted of rights created by the United States Constitution itself.

55. Ex parte Siebold, 100 U.S. 371 (1880).

56. Ex parte Yarbrough, 110 U.S. 651 (1884).

57. U.S. CONST. amend. XIII.

58. BRANDWEIN, *supra* note 39, at 98.

Amendment to bar state infringements of the Bill of Rights and what the Waite Court said about it. Citing statements by two important Republicans and the influential study by Michael Kent Curtis,[59] she says that Republicans did intend to apply the Bill of Rights to the states,[60] but that the Court foreclosed that formulation for protecting rights in *Slaughter-House* before Waite's term began. The *Hurtado* case, in which the Waite Court reconfirmed this restrictive interpretation, does not rate a mention.[61] Yet the issue seems closely connected to the distinction Brandwein says the Court made between rights secured by the Constitution and those created by it.

Finally, Brandwein says the Court distinguished between civil and political rights, which the Civil War Amendments empowered the government to protect in the circumstances so carefully delineated above, and social rights, with which the justices held the Amendments had nothing to do. Bradley articulated that distinction clearly in the *Civil Rights Cases*. The Civil Rights Act of 1875 barred private individuals from discriminating against African Americans in public accommodations and transportation.[62] Not only was there no allegation of state neglect, Bradley opined, but the Thirteenth Amendment secured only the civil rights inherent in freedom. Equal access to public accommodations involved equal social rights, which were denied to all sorts of people who had never been subject to slavery.[63] In taking this position, the Court reflected the views of centrist Republicans, who Brandwein says had never favored federal protection of social rights, except during the few, aberrational months in which they sustained the Civil Rights Act as a testament to the great, recently deceased radical Charles Sumner. That same centrist opinion endorsed Bradley's decision in the *Civil Rights Cases* even as it continued to support federal protection for African-American civil and political rights. Justice John Marshall Harlan's dissent, in contrast, echoed the position of radical Republicans that equal access to public accommodations and transportation was a civil rather than a social right.

Brandwein chronicles the inadequate but persistent efforts on the part of the federal government to protect civil and voting rights after the Compromise of 1877, which many erroneously believed ended them. This effort culminated in the attempt to pass a new federal elections law in 1890. It was the defeat of this so-called Lodge Bill that really signaled the end of Reconstruction. She calls it "the last gasp of Reconstruction," citing for support recent studies that have said much the same thing.[64] That disaster opened the flood gates of southern disfranchisement and segregation, ratified by the Fuller Court, which dismantled the Waite Court's Civil War Amendments jurisprudence in *Plessy v.*

59. *Id.* at 56. Brandwein cites MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986). She also cites the statements, well-known to specialists, of Representative John A. Bingham, CONG. GLOBE, 39TH CONG., 1ST SESS. 1088-95, 2542-43 (1866) and Senator Jacob M. Howard, *id* at 2765-66.

60. *Id.*

61. Hurtado v. California, 110 U.S. 516 (1884).

62. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

63. Although Bradley did not make this explicit, Brandwein points out that it was well known that Jews and Irish, among others, were denied equal access to public accommodations although they had not been slaves and were recognized as white. BRANDWEIN, *supra* note 39, at 175.

64. *Id.* at 182; *See generally* CHARLES W. CALHOUN, CONCEIVING A NEW REPUBLIC: THE REPUBLICAN PARTY AND THE SOUTHERN QUESTION, 1869-1900 (2006); RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 1-144 (2004).

Ferguson,[65] *James v. Bowman*,[66] and *Hodges v. U.S.*[67] By the twentieth century, the earlier jurisprudence was entirely lost to law and legal scholarship---a result explained in part by the repudiation of natural-rights notions of law upon which Bradley's careful distinctions rested and the rise of the case-book method of imparting law, which eschewed careful consideration of historical context and ignored lower-court cases, where judicial understandings of Supreme Court doctrines are often explicated.

Brandwein's reconstruction of the Waite Court's rights decisions is compelling, but whether one agrees that the Waite Court's jurisprudence was consistent with Republican Reconstruction will depend on one's view of the original program. Historians who believe that the Republican commitment to federalism circumscribed their Reconstruction legislation will agree; those who believe Republicans intended a revolutionary transfer of power to the federal government will not. Brandwein's evidence on that score is not as fully developed as the evidence that sustains her interpretation of the court decisions. Readers who want to decide for themselves will have to turn to histories of the development of the Republican Reconstruction program, if not to the original sources themselves.[68]

Because her project is different, Brandwein attends to constitutional arguments in Congress and the public sphere in a way Kens does not. She utilizes the constitutional politics of Reconstruction to elucidate the Waite Court's doctrines and to support her argument that they were consistent with the centrist Republican program. She does not discuss the Court's decisions and opinions as part of a larger process, but her discussion makes clear that this was the case—for example, when she describes how the failure of the Lodge Bill of 1890 set the stage for the Fuller Court's reversal of Waite Court doctrine.

However, in linking the Waite Court's jurisprudence to the centrist Republican Reconstruction program so effectively, Brandwein minimizes the Waite Court's assertiveness. She herself makes clear that the Court reshaped the centrist program in fundamental ways. The justices repudiated the Republican understanding that the Fourteenth Amendment applied the Bill of Rights to the states. Contrary to Republican intentions, they limited congressional authority to protect Civil War Amendment rights against private violation to instances in which they were motivated by the race of the victims. Brandwein is right that the decisions preserved federal power to protect rights, but they significantly altered the policy Americans had established in a bitter constitutional struggle. Moreover, the Court could have established its interpretive principles by statutory interpretation rather than ruling important provisions of the laws

65. Plessy v. Ferguson, 163 U.S. 537 (1896).

66. James v. Bowman, 190 U.S. 127 (1903).

67. Hodges v. United States, 203 U.S. 1 (1906).

68. Compare the analyses of Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, supra* note 45; Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War, supra* note 45, *and* SCATURRO, *supra* note 44, *with* BENEDICT, PRESERVING THE CONSTITUTION, *supra* note 46; BENEDICT, A COMPROMISE OF PRINCIPLE, *supra* note 46,; MALTZ, *supra* note 46, *and* MCKITRICK, *supra* note 46. *See also* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 99-252 (1998); DAVID HERBERT DONALD, THE POLITICS OF RECONSTRUCTION 1863-1867 (1965); FONER, *supra* note 44, at 228-80; DAVID A. J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS (1993).

unconstitutional. It is hard to escape the conclusion that the Court was flexing its muscles.

Professors Kens and Brandwein have given us new, more nuanced accounts of the Waite Court's constitutional jurisprudence. Theirs will be the standard accounts to which constitutional scholars will turn for a long time to come. However, there is still room to assess the Supreme Court's role in the broader constitutional politics of the Reconstruction era. For any such project, Kens' and Brandwein's work will be the starting points.