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CONSTRICTING THE LAW OF FREEDOM:
JUSTICE MILLER, THE FOURTEENTH AMENDMENT,
AND THE *SLAUGHTER-HOUSE CASES*

RICHARD L. AYNES*

"[O]ne of the canons of construction never to be lost sight of is to give effect, if possible, to every word of the written law."

Fourteenth Amendment author John A. Bingham¹

"Criticism of [the *Slaughter-House Cases*] has never entirely ceased, nor has it ever received universal assent by members of this Court."

Justice William Moody²

INTRODUCTION

The *Slaughter-House Cases*³ are simultaneously unremarkable and extraordinary. They are unremarkable because the matter at issue—whether butchers can be required to ply their trade at a central, state-franchised facility—has long since ceased to be a matter of concern. They are extraordinary because in spite of the fact that three of the Court's significant legal conclusions have been rejected and "everyone" agrees the Court incorrectly interpreted the Privileges or Immunities Clause,⁴ the conclusion that the Privileges or Immunities Clause of the Fourteenth Amendment⁵ had no meaningful place in our constitutional scheme continues to live on.

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1. Referring to the Act of April 10, 1869 in the 1871 debate over the question of whether Representatives from Mississippi should be seated. CONG. GLOBE, 42d Cong., 1st Sess. 9 (Mar. 4, 1871).

2. *Twining v. New Jersey*, 211 U.S. 78, 96 (1908).

3. 83 U.S. (16 Wall.) 36 (1873).

4. For example, Thomas B. McAfee suggests that this aspect of Miller's decision was "clearly wrong" and that "this is one of the few important constitutional issues about which virtually every modern commentator is in agreement." Thomas B. McAfee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282 (1986). See also LEONARD W. LEVY, *The Fourteenth Amendment and the Bill of Rights*, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 64, 69 (1972) ("one of the most tragically wrong opinions ever given by the Court."); LOUIS LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 201 (1975) ("defying the plain intention of the Constitutors").

5. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." U.S. CONST. amend. XIV.

Even those who have a narrow view of the Fourteenth Amendment conclude that beyond due process and equal protection, the Fourteenth Amendment was "meant to establish some substantial rights" and that "[t]hese were the 'privileges and immunities of citizens of the United States.'"⁶ Yet almost all sources agree that Justice Miller's majority opinion in the *Slaughter-House Cases*, or at least its dicta, "virtually scratched [the Privileges or Immunities Clause] from the constitution."⁷

This Article argues that Justice Miller's majority opinion was indeed based on an incorrect reading of the Fourteenth Amendment, and then explores why Justice Miller, as well as the other Justices in the majority and the dissents, reached the conclusions they did. Part I sketches the basis for the view that the Privileges or Immunities Clause of the Fourteenth Amendment was designed to protect substantive rights, primarily the Bill of Rights, from state abridgement.

6. Charles Fairman, *What Makes a Great Justice?: Mr. Justice Bradley and the Supreme Court, 1870-1892*, 30 B.U. L. REV. 49, 77 (1950).

Fairman is not totally correct. The legislative history makes it clear that the framers of the Fourteenth Amendment did not mean to "establish" any new substantive rights; rather, they intended it to be a procedure through which they could enforce existing substantive rights. Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 73 (1993).

Fairman's general interpretation of the Fourteenth Amendment has been disputed. See, e.g., MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Aynes, *supra*.

7. Fairman, *supra* note 6, at 78. See also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 37, 166 (1990) (the clause has remained "dormant" and "properly . . . a dead letter."); 2 LOUIS B. BODIN, *GOVERNMENT BY JUDICIARY* 106, 107, 204 (1932) (the Supreme Court had "emasculat[ed]" and "annulled" the Fourteenth Amendment); RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS* 10 (1981) ("reduced to insignificance"); 2 CORWIN ON THE CONSTITUTION 125 (Richard Loss ed., 1987) ("at first . . . eliminat[ing] the Fourteenth Amendment from the law of the land"); LUSKY, *supra* note 4, at 189, 197 ("the crippling interpretation placed on the Privileges or Immunities Clause" and the "decapitation of the Fourteenth Amendment"); Michael Les Benedict, *Preserving Federalism, Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 60 ("virtually eliminating" the clause "as a source of national power"); Howard Graham, *Builed Better Than They Knew, Part I: The Framers, the Railroads and the Fourteenth Amendment*, 17 U. PITT. L. REV. 537, 579 (1956) (*Slaughter-House* "emasculat[ed]" the clause); Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 71, 73 (1989) (*Slaughter-House* "ruthlessly eviscerated the Clause of practically all operative meaning."); Patricia Allan Lucie, *White Rights As A Model for Black: Or—Who's Afraid of the Privileges or Immunities Clause?*, 38 SYRACUSE L. REV. 859 (1987) (the case belongs in the "dinosaur section" because it "became extinct in 1873"); Walter F. Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 2 (1987) ("guttered the privileges or immunities clause"); Aviam Soifer, *Protecting Posterity*, 7 NOVA L. REV. 39, 45 (1982) (*Slaughter-House* "narrowed this protection . . . to redundancy and oblivion"); *Stripping Away the Fictions: Interview with Mr. Justice Arthur J. Goldberg*, 6 NOVA L. REV. 553, 557 (1982) (*Slaughter-House* "virtually wrote the privileges or immunities clause out of the Constitution"); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 342 (1949) (the clause was "officially killed" in *Slaughter-House*).

Part II examines the *Slaughter-House* decision, summarizing the arguments presented by counsel and analyzing the opinions written by Justices Miller, Field, Bradley, and Swayne. Part III critiques Justice Miller's opinion. Part IV seeks to explain the positions of the Justices by examining the political background of each of the Justices and, where available, their personal reactions to the adoption of the Amendment. Part V tests this analysis of the opinions and background of the Justices against the popular and professional commentary on the *Slaughter-House* opinion from 1873 to 1949.

I. ANTISLAVERY VIEWS LEADING TO THE FOURTEENTH AMENDMENT

The adoption of the Fourteenth Amendment was a thoughtful and deliberative process. The first version of Section 1 of the Fourteenth Amendment was introduced on February 13, 1866,⁸ some ten months after the end of the Civil War. The various proposals for an amendment were discussed intermittently, often in the midst of other legislation such as the Civil Rights Bill of 1866, until the final debate on the Fourteenth Amendment itself took place in the House on May 10, 1866, and in the Senate on June 8, 1866.⁹ The ratification process continued for over two years until Congress declared the Amendment ratified on July 21, 1868.¹⁰

The Fourteenth Amendment was, for all practical purposes, also "ratified" by a large popular vote. It had been proposed by overwhelming majorities in both the House and the Senate.¹¹ The Amendment was a "central issue" in the 1866 Congressional elections,¹² when in spite of small mid-term losses, the Republicans retained a commanding control of Congress, holding 143 of 192 seats in

8. CONG. GLOBE, 39th Cong., 1st Sess. 813 (Feb. 13, 1866). John Bingham was the author of the privileges or immunities, due process, and equal protection clauses. For biographical information concerning Bingham, see Aynes, *supra* note 6; Richard L. Aynes, *The Impeachment and Removal of Tennessee Judge West Humphreys: John Bingham's Prologue to the Johnson Impeachment Trial*, II GA. J. S. LEGAL HIST. 71 (1993); Richard L. Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 CATH. U. L. REV. 881 (1988).

9. CONG. GLOBE, 39th Cong., 1st Sess. 2545 (May 10, 1866); *id.* at 3042 (June 8, 1866). The decision of the House to agree with the changes to the Amendment made by the Senate took place on June 13, 1866. *Id.* at 3149 (June 13, 1866).

10. Congress declared its view that the Amendment was ratified on July 21, 1868. Secretary of State William H. Seward did not certify the Amendment as being ratified until July 28, 1868.

11. The vote was 128-37 in the House, CONG. GLOBE, 39th Cong., 1st Sess. 2545 (May 10, 1866), and 33-11 in the Senate. *Id.* at 3042 (June 8, 1866).

12. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 59 (1988).

the House and 42 of 53 seats in the Senate.¹³ Indeed, William Nelson recounts the wide public discussion of the Amendment and the fact that at least some state legislators felt they had a “duty” to ratify the Amendment based upon the results of the Congressional elections.¹⁴ In the words of New York Governor Reuben E. Fenton: “Never before in the history of the Government, upon any great question affecting our national interests has there been such unanimity in the expression of the popular will.”¹⁵ This “consensus” followed decades of debate over slavery, the enforcement of the fugitive slave clause, and the rights of citizens to oppose slavery and its extension.

A key element in that debate was the interpretation of Article IV of the United States Constitution. Those who struggled legally and politically against slavery and “Slave Power” saw Article IV, Section 2 of the Constitution¹⁶ as protecting the substantive rights of United States citizens.¹⁷ Among the most important rights thought to be binding upon the states through Article IV, Section 2 were the Bill of Rights.¹⁸ By 1866 there was a split among antislavery leaders in Congress over the ability of Congress to provide for the enforcement of the Bill of Rights against the states.

The majority’s view, represented by Iowa Representative and House Judiciary Committee Chairman James Wilson, was that the precedents finding constitutional power to enforce the fugitive slave laws would also support the enforcement of the Bill of Rights through Article IV against the states.¹⁹ This led to the conclusion that while

13. *Id.*

14. *Id.*

15. *Id.* (quoting *Governor Fenton’s Message*, N.Y. COM. ADVERTISER, Jan. 2, 1867, at 4, col. 1).

16. “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. CONST. art IV, § 2.

While the first reference to “Citizens of each State” is clear, the reference to “Citizens in the several States” is ambiguous. It could refer to state citizens or to United States citizens. The modern reading is to change “in” to read “of”; thus, “Citizens [of] the several States.” See *infra* text accompanying notes 52-56, 139-54.

17. For an analysis of the underlying “national citizenship theory” see Aynes, *supra* note 6, at 69-71, 78-79.

18. *Id.* at 70-74, 79-81. This view is contrary to our understanding of *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). In some cases antislavery theorists may, like others in the country, have simply been unaware of *Barron*. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5, 29-34, 102 (1949) (providing examples of people who were unaware of *Barron* and thought the Bill of Rights applied to the states); *Rhinehart v. Schuyler*, 7 Ill. (1 Gilm.) 375, 414 (1845) (unaware of *Barron*).

In other instances they were aware of *Barron* and reinterpreted it to mean only that while the Bill of Rights were obligatory on the states, that obligation could not be enforced. Aynes, *supra* note 6, at 71-83.

19. Wilson’s view is captured in his statement: “We will turn the artillery of slavery upon itself.” CONG. GLOBE, 39th Cong., 1st Sess. 1118 (Mar. 1, 1866).

there had been no enforcement of the Bill of Rights against the states, Congress could provide for such by statute. As Robert Kaczorowski has emphasized, one of the purposes of the Civil Rights Act of 1866 was to provide such enforcement.²⁰ A minority Republican view, represented by Fourteenth Amendment author John A. Bingham, adhered to the traditional antislavery "non enforcement" doctrine and saw the Fourteenth Amendment as the way to cure this "defect" in the Constitution.²¹

Bingham indicated in at least three Fourteenth Amendment-related speeches that it was his intent that the Bill of Rights be enforced against the states.²² The spokesman for the Amendment in the Senate, Jacob Howard, indicated that among the privileges and immunities of citizens were the Bill and Rights, and he read most of Amendments I through VII on the Senate floor.²³ Neither of these

20. Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction* 61 N.Y.U. L. REV. 863, 932-35 (1986).

21. Aynes, *supra* note 6, at 71-73. The view that Article IV was only a "compact" and unenforceable by the federal government was, in addition to those outlined in Aynes, *id.*, made in legal proceedings in New York, Wisconsin, Kentucky and Massachusetts. In re Sherman M. Booth, 3 Wis. 2, 86, 96-99, 101-02, 119 (1854) (separate opinion of Smith, J.); In re Booth and Rycraft, 3 Wis. 157, 192 (1854) (separate opinion of Smith, J.); Thomas Sim's Case, 61 Mass. (7 Cush.) 285, 290 (1851); Argument of William Johnston, on behalf of the Governor of Ohio in State of Ohio v. Forbes and Armitage, *Franklin County Kentucky Circuit Ct., reprinted in* 2 FUGITIVE SLAVES AND AMERICAN COURTS 269 (Paul Finkelman ed., 1988); Abstract of Gerrit Smith's argument in Trial of Henry W. Allen, *reprinted in* 1 FUGITIVE SLAVES AND AMERICAN COURTS 233-37 (Paul Finkelman ed., 1988); *Argument of Robert Rantoul, Jr. in the Trial of Thomas Sims, reprinted in* 2 FUGITIVE SLAVES AND AMERICAN COURTS 617, 619, 635-37 (Paul Finkelman ed., 1988).

In 1844, the second edition of Timothy Walker's *Introduction to American Law* suggested that were it "not for long acquiescence, there would be good reason to doubt whether Congress had any power at all" concerning the fugitive slave clause. TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* 160 n.1 (2d ed. 1844). Though the note is to the fugitive from justice clause, the analysis applies to the fugitive slave clause as well and includes a discussion of *Prigg*.

Modern commentators have suggested that this was, in fact, the proper view of the Constitution. See Paul Finkelman, *Story Telling in the Supreme Court*, 1995 SUP. CT. REV. __ (forthcoming); Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L.J. 605, 614, 620 (1993); Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086, 1131-32 (1993).

22. Aynes, *supra* note 6, at 71-74.

23. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 23, 1866). "Privileges" and "Immunities" are simply subdivisions of the broader term "rights." If one asked the average citizen to name the rights of a U.S. citizen, she would undoubtedly list "rights" from the Bill of Rights. This was as true in the 19th Century, Charles R. Pence, *The Construction of the Fourteenth Amendment* 25 AM. L. REV. 536, 540 (1891) (noting the first eight amendments are privileges and immunities), as it is in the 20th Century. See Russell W. Galloway, *Slaughtering Slaughter-House*, 7 CAL. LAW. 16, 18 (1987).

The fact that Howard thought his effort to apply the Bill of Rights against the states was politically acceptable is shown by his statements to the Senate that it did not matter if a majority of the Senate wanted to extend the right to vote to African Americans. What was important, according to Howard, was

spokesmen was contradicted by any other Representative or Senator.²⁴

As far as it can be determined, there were only three constitutional law treatises published after the Fourteenth Amendment was proposed but before it was adopted, which also spoke to the question of the meaning of the Amendment.²⁵ All three of these treatises indicated the Amendment would enforce the Bill of Rights against the states.

It was with the background of this public debate that the court heard the *Slaughter-House Cases*.

II. OVERVIEW OF THE *SLAUGHTER-HOUSE CASES*

In 1869, Louisiana gave a private corporation of seventeen individuals an exclusive right to maintain a central slaughter-house south of New Orleans, but all butchers were allowed to use that facility for a fee.²⁶ The butchers who were not part of the corporation challenged the state's action in federal court. The cases were heard by Justice Bradley and Judge Woods on the Circuit in 1870.²⁷ Bradley issued two opinions, giving judgment for the butchers challenging the statute.²⁸

The corporation brought the case to the Supreme Court, where it was first argued on January 11, 1872. Because Justice Nelson did not hear the case, reargument was ordered and the matter was heard

what will the Legislatures of the various States to whom these amendments are submitted do in the premises; what is it likely will meet the general approbation of the people who are to elect the Legislatures. . . . The committee was of the opinion that the States were not prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race.

CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

24. CURTIS, *supra* note 6, at 91.

25. TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES* 145, 196-202 (1867); GEORGE W. PASCHAL, *THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED* 290 (1868); JOHN NORTON POMEROY, *AN INTRODUCTION TO THE CONSTITUTION LAW OF THE UNITED STATES* 145-51 (1868). For an analysis of the position taken in each treatise and biographical information on the authors see Aynes, *supra* note 6, at 83-94.

Those treatises published between 1866 and 1868 which contain no reference to the Fourteenth Amendment include, WILLIAM WEDGWOOD, *THE GOVERNMENT AND LAWS OF THE UNITED STATES* (1867); GEORGE COMSTOCK, *COMMENTARIES ON AMERICAN LAW BY JAMES KENT* (11th ed. 1867); WILLIAM ALEXANDER DUER, *A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES* (1868); THOMAS M. COOLEY, *TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (1868).

26. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 39 (1873).

27. *Live-Stock Dealers' & Butchers' Ass'n. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649 (C.C.D. La. 1870) (No. 8408).

28. *Id.*

again on February 3, 4, and 5, 1873.²⁹ The corporation was represented by Republican Senator Matthew Carpenter;³⁰ Jeremiah S. Black, a former Pennsylvania Supreme Court Chief Justice, U.S. Supreme Court Reporter, and Democratic U.S. Attorney General;³¹ and Louisiana radical Republican politician Thomas Jefferson Durant.³² Former U.S. Supreme Court Justice and Confederate Assistant Secretary of War John A. Campbell and Louisiana lawyer J.Q.A. Fellows represented the independent butchers.³³

Campbell's argument before the Court presented arguments based on the common law, and the Thirteenth and Fourteenth Amendments. He extensively traced the history of monopolies in French and English law, often using antislavery rhetoric to argue that monopolies were against English common law and American "genius" and that this monopoly made it "unlawful for men to use their own land for their own purposes."³⁴ Campbell argued that if the monopoly was not "void at common law, it would be so under both the thirteenth and the fourteenth amendments."³⁵

Campbell argued that the monopoly created a "servitude" in the feudal sense, which the Thirteenth Amendment prohibited.³⁶ Campbell felt that "[t]he act is even more plainly in the face of the fourteenth amendment" and that the Fourteenth Amendment was "a more comprehensive exposition of the principles" of the Thirteenth.³⁷ Campbell maintained that the Amendment "forever destroyed" the states rights doctrine of John Calhoun and worked an "indefinite en-

29. *Slaughter-House Cases*, 83 U.S. at 44.

30. Justice Miller had great respect for the lawyering abilities of Senator Carpenter. Letter from Miller to William P. Ballinger (Feb. 27, 1881), *reprinted in* CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890, at 116-17 (1939) [hereinafter FAIRMAN ON MILLER]. Ballinger was Miller's hometown friend and brother-in-law with whom Miller maintained a lifelong friendship and correspondence.

31. Miller thought Black had ability, but he had disdain for Black's character. FAIRMAN ON MILLER, *supra* note 30, at 111 (Miller's conversation on Black reduced to memorandum by S.W. Pennypacker).

32. On September 5, 1866, Durant was one of Chief Justice Chase's guests at a dinner which included three members of Congress, the Governors of Texas, Missouri and Pennsylvania, and former U.S. Attorney General Speed. PAPERS OF SALMON P. CHASE 631-632 (John Niven ed., 1994) [hereinafter CHASE PAPERS]. Chase indicated he urged Durant to support the Fourteenth Amendment. *Id.* at 632.

33. *Slaughter-House Cases*, 83 U.S. at 44. Miller had respect for Campbell's abilities, but wanted to hold him accountable for deserting the U.S. government and joining the Confederacy. Letter from Miller to William P. Ballinger (Mar. 18, 1877), *reprinted in* FAIRMAN ON MILLER, *supra* note 30, at 351-52.

34. *Slaughter-House Cases*, 83 U.S. 45-49. The full text of the briefs filed can be found in 6 LANDMARK BRIEFS 475 (Philip B. Kurland ed., 1975).

35. *Slaughter-House Cases*, 83 U.S. at 49.

36. *Id.* at 49-51.

37. *Id.* at 51. In the summary in the reported case, the quoted sentence is italicized.

largement" of national authority.³⁸ Campbell indicated that "State laws must be so framed as to secure life, liberty, property from arbitrary violation and secure protection of law to all" and that this was an effort to guard "the great personal rights of each and every person."³⁹

Campbell argued that the privileges and immunities of the Fourteenth Amendment were "the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country."⁴⁰ Freedom from monopoly, or the right to pursue a profession, was a privilege or immunity which Campbell sought to bring within the protection of the Amendment.

Campbell's equal protection argument was simply that the seventeen members of the new corporation received benefits that were being denied to the 1,000 other butchers.⁴¹ His due process argument was that the right to labor was property and the butchers were being deprived of that right without due process of law.⁴² Campbell argued that the "police power" could not overcome this constitutional right.⁴³

A. *Justice Miller's Majority Opinion*

Justice Miller delivered the opinion of the Court on April 14, 1873, rejecting all of the petitioner's arguments.⁴⁴ Initially, Miller pointed to the right of the butchers to continue to work at their trade in the central slaughter-house and concluded that there was no denial of a right to pursue a trade.⁴⁵ Quoting *Kent's Commentaries* for the proposition that slaughter-houses were among "[u]nwholesome trades" which the state could regulate, Miller found the regulations appropriate.⁴⁶

38. *Id.* at 52-53.

39. *Id.* at 53.

40. *Id.* at 55. This was consistent with Campbell's suggestion that the rights protected by the "English Magna Charta" were applied through this Amendment, *id.* at 54, and his later statement that the Amendment "assumes that there were privileges and immunities" and is a command that the state not "abridge" them. *Id.* at 55.

41. *Id.* at 56.

42. Campbell made no argument that these individuals had their own facilities which were now made useless so as to deprive them of that property. Perhaps he thought the police power could justify that action.

43. *Id.* at 57.

44. *Id.*

45. *Id.* at 60-61.

46. *Id.* at 62-64. Miller distinguished the English authorities and concluded that Louisiana had the power to create the exclusive privilege here, unless prohibited by some provision of the U.S. Constitution. *Id.* at 65-66.

Miller then turned to the Thirteenth Amendment “servitude” argument. Looking to the institution of American slavery and using Chief Justice Chase’s Circuit Court opinion in *In re Turner*⁴⁷ concerning apprenticeship as an example of the purpose of the Thirteenth Amendment, he concluded that the servitude spoken of in the Thirteenth Amendment was not of the nature complained of in the case before the Court.⁴⁸

Miller next traced the history of the Thirteenth, Fourteenth and Fifteenth Amendments. While admitting that only the Fifteenth Amendment made any reference to race, Miller nevertheless concluded that his “recapitulation of events, almost too recent to be called history” showed that “*the one pervading purpose*” of these amendments was “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizens.”⁴⁹ Nevertheless, Miller begrudgingly acknowledged that the protection of the Amendments was not limited to African Americans.⁵⁰ In discussing the citizenship clause of the Fourteenth Amendment, Miller indicated it was designed to define citizenship for the first time and to overrule *Scott v. Sandford*.⁵¹

47. *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).

48. *Slaughter-House Cases*, 83 U.S. at 68-69.

49. *Id.* at 71 (emphasis added). Miller softened this statement in the third numbered paragraph of the syllabus he prepared, concluding that “the letter and spirit of those articles [of Amendment] must apply to all cases coming within their purview, whether the party concerned be of African descent or not.” *Id.* at 37.

The syllabus prepared by Judge Woods in the Circuit Court decision below had explicitly indicated that the Fourteenth Amendment “applie[d] to whites.” *Live-Stock Dealers’ & Butchers’ Ass’n. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649 (C.C.D. La. 1870) (No. 8408).

50. *Slaughter-House Cases*, 83 U.S. at 72. Miller’s examples were to the “Mexican or Chinese race” without any explicit indication that it could apply, for example, to these butchers who were apparently white.

51. *Id.* at 73. Of course, if Section 1 was intended to overrule Chief Justice Taney’s “Opinion of the Court” as Miller suggested, then it might follow that the Bill of Rights was made applicable to the states. In explaining why he could not believe that the slave-holding states would have allowed African Americans to be included within the term “citizens” as that word is used in the Constitution, Taney indicated that if this were so, African Americans would be “entitled to the privileges and immunities of citizens.” *Dred Scott v. Sandford*, 50 U.S. (19 How.) 393, 416 (1856). This would “exempt them from the operation of the special laws and from the police regulations which [the slave-holding states] considered to be necessary for their own safety.” Moreover,

[i]t would give persons of the [N]egro race, who were recognized as citizens in any one State of the Union . . . full liberty of speech in public and private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.

Id. at 417.

It may be that Taney assumed that every state guaranteed these First and Second Amendment rights to its citizens and that the equality reading of Article IV would guarantee those

Miller indicated that "great weight" must be placed upon the distinction between U.S. and state citizenship in Section 1.⁵² Miller relied upon *Corfield v. Coryell*⁵³ as "[t]he first and the leading case" on the meaning of Article IV, Section 2 and quoted from it extensively.⁵⁴ But while *Corfield* had up to that time been generally understood to protect the rights of national citizens, Miller made it appear that it had protected the rights of state citizens by misquoting both Article IV and *Corfield*.⁵⁵ In this way, Miller concluded that most of the rights of citizens protected under Article IV, Section 2 were state rights, and left very little to be federal rights under Section 1 of the Fourteenth Amendment.⁵⁶

Miller suggested a limited number of rights to be protected by Section 1 of the Fourteenth Amendment, each of which was already protected by the federal government and enforced against the states by the Supremacy Clause.⁵⁷ Miller held that the rights claimed by the butchers were rights protected by the states and that for them to be privileges and immunities under Section 1 would "radically" change the whole nature of the government.⁵⁸ Such a reading would "degrade the State governments by subjecting them to the control of Congress" and make the Court a "perpetual censor" of the states.⁵⁹ Because Miller could see no such purpose in the Amendment, he denied the butchers' privileges and immunities claims.

Turning to the due process claim, Miller thought this was the same as that of the Fifth Amendment and in "nearly all" of the state constitutions; the only difference was the federal government was now

rights to national citizens as well. But it may also be that Taney meant that Article IV conferred these rights as substantive protections.

52. *Slaughter-House Cases*, 83 U.S. at 74-75.

53. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

54. *Slaughter-House Cases*, 83 U.S. at 75-76.

55. *Id.* In both instances Miller changed the phrase "citizens in the several states" to read "citizens of the several states." Though today we view the clause as merely prohibiting discrimination, this is not an obvious reading of the text and is a result of judicial interpretation. Most courts in the 1800s concluded that Article IV protected substantive rights. JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 258 (1978).

56. See *infra* notes 139-54 and accompanying text.

57. *Slaughter-House Cases*, 83 U.S. at 79-80. The single exception to that statement might be Miller's inclusion of rights he indicated were "guaranteed by the Federal Constitution." *Id.* at 79. The only examples he gave of these were "[t]he right to peaceably assemble and petition for redress of grievances, [and] the privileges of the writ of habeas corpus" *Id.* Though this reference has caused some to think that Miller was suggesting that the Bill of Rights constituted privileges or immunities under the Amendment, these are more likely structural rights of the type Miller thought protected by the Supremacy Clause even if the Bill of Rights did not exist. See *infra* text accompanying notes 186-98.

58. *Slaughter-House Cases*, 83 U.S. at 78.

59. *Id.*

given the authority to enforce it.⁶⁰ In his second paragraph concerning this argument, Miller concluded that “under no construction of that provision that we have ever seen, or any that we deem admissible”, could the “restraint” Louisiana placed on the trade of the butchers be a deprivation of property.⁶¹

Finally, Miller turned to the Equal Protection Clause. But here, unlike his treatment of the Reconstruction amendments as a whole and his slavery example, Miller suggested an extreme racial limitation:

We doubt very much whether any action of a State not directed by way of discrimination against the [N]egroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.⁶²

Miller found “no such case” before him.⁶³

In concluding, Miller noted that the “line” between state and national powers had “never been very well defined in public opinion” and that there were still conflicting views in 1873.⁶⁴ In spite of the “pressure of all the excited feeling growing out of the war,” Miller concluded that “our statesmen have still believed [in] the existence of the States” and did not mean “to destroy the main features of the general system.”⁶⁵ Ignoring the “fluctuations” of “public opinion,” on this subject the Court had “always held with a steady and an even hand the balance between State and Federal power” and Miller expressed an intent to continue to do so.⁶⁶

B. Justice Field's Dissent

Four justices dissented. The first dissent—written by Justice Field and joined by Chief Justice Chase and Justices Swayne and Bradley—has the appearance of a majority opinion because of its extensive discussion of the facts.⁶⁷ While Field was prepared to accept the requirement that the meat be inspected and that animals be slaughtered “below” the City of New Orleans as proper police regulations, he

60. *Id.* at 80.

61. *Id.* at 81.

62. *Id.*

63. *Id.*

64. *Id.* at 81-82.

65. *Id.* at 82.

66. *Id.*

67. *Id.* at 83-86 (Field, J., dissenting). An examination of the dissents in volumes 82, 83, and 84 of the United States Reports fails to reveal any other dissent with the extensive factual introduction which Field provides in his *Slaughter-House* dissent.

thought the creation of a "monopoly" at one central slaughter-house went beyond that power.⁶⁸

While ultimately deciding not to rest his dissent on the Thirteenth Amendment argument, Field nevertheless entered into a discussion of that provision and, unlike Miller, specifically suggested that it prohibited the slavery of "white men as well as of black men."⁶⁹ Drawing upon antislavery arguments about the right of a free man to his own labor, Field suggested that the abolition of slavery was intended to make everyone a "freeman" and thereby give "the right to pursue ordinary avocations of life."⁷⁰

Even while he discussed the Thirteenth Amendment issues, equality arguments seemed to dominate Field's thought. The pursuit of a profession could be regulated, but only upon the same terms as others "of the same age, condition, and sex."⁷¹ But a person must be able to "equally" enjoy the "fruits of his labor" as others similarly situated.⁷² Returning to the pure Thirteenth Amendment analysis, Field suggested that a person who was restricted to pursuing only one profession, in only one locale—much like the Black Codes might have required—was really not a freeman, but "in a condition of servitude."⁷³

Though Field based most of his dissenting opinion upon the Privileges or Immunities Clause, he continued to express an equal protection concern throughout. Field saw the Fourteenth Amendment as providing a "supplement to the thirteenth."⁷⁴ He suggested that the citizenship clause rejected the view that state citizenship was paramount and national citizenship derivative; instead: "[a] citizen of a State is now only a citizen of the United States residing in that State."⁷⁵

68. *Id.* at 87 (Field, J., dissenting).

69. *Id.* at 90 (Field, J., dissenting).

70. *Id.*

71. *Id.* The notation of "gender" may have been prompted by Field's position in *Bradwell v. The State*, 83 U.S. (16 Wall.) 130 (1873), which followed *Slaughter-House* the next day. Miller could deny that Myra Bradwell had a federally protected right to pursue the profession of an attorney and consistently deny the right of the butchers to pursue their trade. But Field, Swayne, and Bradley had to explain why the butchers had a protected right to pursue their chosen profession but Ms. Bradwell did not. Their explanation was based upon gender classification. Chief Justice Chase did not have any inconsistency to explain because he also dissented, without opinion, in *Bradwell*. *Id.* at 142.

72. *Slaughter-House Cases*, 83 U.S. at 90 (Field, J., dissenting).

73. *Id.*

74. *Id.* at 93 (Field, J., dissenting).

75. *Id.* at 95 (Field, J., dissenting).

Like Miller, Field relied upon *Corfield* to establish the meaning of Article IV, which he viewed as protecting substantive rights.⁷⁶ He also read Article IV to require nondiscrimination in these fundamental rights between the citizens of one state against those of another state.⁷⁷ He found the Fourteenth Amendment referred "to the natural and inalienable rights which belong to all citizens," just as *Corfield* found with Article IV.⁷⁸

In summary, Field indicated:

What [Article IV, Section 2] did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States.⁷⁹

Because Field concluded the right to pursue a trade was a privilege or immunity now protected by the Fourteenth Amendment, it followed that all monopolies were prohibited.⁸⁰ This was so because monopolies infringed upon "liberty" to work and acquire property.⁸¹ Field provided a discussion of the English *Case of Monopolies* because it included language, which he often italicized, that indicated that a monopoly interfered with the "liberty of the subject."⁸²

While Field admitted there could be restraints on the pursuit of a profession, the restraint had to be applied "equally."⁸³ Again, the very notion of a monopoly violated the "equality of right" by favoring those who received the monopoly.⁸⁴ In the case at bar the "equality of right" to pursue a trade had been violated.

C. Justice Bradley's Dissent

Though Justice Bradley joined Field's dissent, he also wrote separately. Like Field, Bradley thought that the Fourteenth Amendment made U.S. citizenship "primary" and state citizenship "secondary."⁸⁵

76. *Id.* at 97 (Field, J., dissenting). In quoting *Corfield*, Field italicized the words indicating that privileges and immunities are those "which of right belong to the citizens of all free governments."

77. *Id.* at 98 (Field, J., dissenting) ("No discrimination can be made by one State against the citizens of other states" in the enjoyment of privileges or immunities).

78. *Id.* at 96 (Field, J., dissenting).

79. *Id.* at 100-01 (Field, J., dissenting).

80. *Id.* at 101 (Field, J., dissenting).

81. *Id.*

82. *Id.* at 102-03 (Field, J., dissenting).

83. *Id.* at 105 (Field, J., dissenting).

84. *Id.* at 109 (Field, J., dissenting).

85. *Id.* at 112-13 (Bradley, J., dissenting).

Bradley began with the proposition that the “right, liberty, or privilege” protected by the Fourteenth Amendment included the right to choose any lawful employment.⁸⁶ Bradley indicated that without the “right to choose one’s calling” one “cannot be a freeman.”⁸⁷ Although admitting that the state’s right to regulate occupations under its police power, Bradley, like Field, found that the state’s regulations here went beyond its articulated interest.⁸⁸ While acknowledging that the state’s power of regulation was “undoubtedly a very broad and extensive one”, Bradley indicated that it was limited by “certain fundamental rights.”⁸⁹

Bradley’s discussion of the Article IV Privileges and Immunities Clause and the Privileges or Immunities Clause of the Fourteenth Amendment reiterated standard abolitionist/antislavery analysis.⁹⁰ Bradley argued that Miller’s view of American citizenship would make it “an empty name” and that Miller had relegated the “rights, privileges, and immunities of the greatest importance” to the state’s protection alone.⁹¹

Bradley relied upon the “often-quoted” language in *Corfield*, which he found “very instructive.”⁹² Unlike Miller, Bradley quoted *Corfield* correctly and specifically pointed out Miller’s change of language in both Article IV and *Corfield*.⁹³ Bradley acknowledged that “usually” the Court had treated Article IV as protecting the “equality” of rights, but suggested that this was so because equality is “one of the privileges and immunities of every citizen” and because it had not become “necessary to vindicate any other fundamental privilege of citizenship.”⁹⁴

Bradley emphasized that “the language of the clause . . . seems fairly susceptible of a broader interpretation than that which makes it a guarantee of mere equality of privileges with other citizens.”⁹⁵ Brad-

86. *Id.* at 113 (Bradley, J., dissenting).

87. *Id.* at 116 (Bradley, J., dissenting).

88. *Id.* at 119-20 (Bradley, J., dissenting).

89. *Id.* at 114 (Bradley, J., dissenting).

90. One could oppose slavery or “The Slave Power” without being an abolitionist. There is no suggestion that Bradley was an abolitionist or even an antislavery advocate. But those theories were widely discussed, providing the basis for much of the activity of the 39th Congress and Bradley was undoubtedly well aware of them.

91. *See Slaughter-House Cases*, 83 U.S. at 116 (Bradley, J., dissenting).

92. *Id.* at 117 (Bradley, J., dissenting).

93. *Id.*

94. *Id.* at 118 (Bradley, J., dissenting).

95. *Id.* (Bradley, J., dissenting).

The Court’s then recent decision in *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870), was consistent with Bradley’s view. Maryland created a tax which discriminated against non-resi-

ley indicated that one need not look to English law for these privileges. Rather, “an authoritative declaration of some of the most important privileges and immunities of citizens of the United States” were found “in the Constitution itself.”⁹⁶ After referring to the original privileges and immunities contained in Article I, Section 9, Bradley observed that “others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal Government” in the constitution.⁹⁷

At that point Bradley listed the right of habeas corpus, right of trial by jury,⁹⁸ free exercise, free speech, free press, the rights of assembly,⁹⁹ the prohibition against unreasonable searches and seizures¹⁰⁰ and the Fifth Amendment Due Process Clause:¹⁰¹ “These, and still others are specified in the original Constitution, or *in the early*

dents. The tax was challenged on grounds of “direct discrimination” and not on a claim of substantive immunity from taxation. *Id.* at 421. See also *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868) (corporation is not a “citizen” for purposes of Article IV, Section 2); *Conner v. Elliott*, 59 U.S. (18 How.) 591 (1855) (community property by virtue of marriage is not a privilege within the scope of Article IV, Section 2).

The language of Article IV speaks of citizens being entitled to “all privileges and immunities of citizens.” If it had been intended to protect only equality, then, contrary to the language, there is only one privilege and immunity: that of being treated equal. Cf. ROGER HOWELL, *THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP* 105 (1918). If this was the object of Article IV, Section 2, then it would have been written in words similar to the Equal Protection Clause. The only way the language of Article IV, Section 2 makes sense is to read it as a substantive guarantee of rights.

96. *Slaughter-House Cases*, 83 U.S. at 118 (Bradley, J., dissenting). Earlier in his opinion Bradley indicated that Americans “brought with them . . . the rights of Englishmen.” *Id.* at 114 (Bradley, J., dissenting). These included the Magna Carta and habeas corpus, summarized by Blackstone’s classifications of “absolute rights of individuals” as “the right of personal security, the right of personal liberty, and the right of private property.” *Id.* at 115 (Bradley, J., dissenting). It is these rights of life, liberty and property—and not simply the right that one will not lose life, liberty, or property without due process of law—which Bradley indicated “belong to the citizens of every free government.” *Id.* at 116 (Bradley, J., dissenting). Bradley, in a reference to the Declaration of Independence, indicated that “the pursuit of happiness” was equivalent to the right to “property.” *Id.* at 115-16 (Bradley, J., dissenting). While Bradley did use the deprivation language, he also indicated that these rights could “only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all.” *Id.* at 116 (Bradley, J., dissenting).

97. *Id.* at 118 (Bradley, J., dissenting).

98. U.S. CONST. amend. VI-VII.

99. U.S. CONST. amend. I (except for the Establishment Clause). This was consistent with Bradley’s Circuit Court opinion where he indicated that Louisiana’s police power could not “interfere with liberty of conscience, nor with the entire equality of all creeds and religions before the law.” *Live-Stock Dealers’ & Butchers’ Ass’n. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 653 (C.C.D. La. 1870) (No. 8408).

100. U.S. CONST. amend IV.

101. *Slaughter-House Cases*, 83 U.S. at 118 (Bradley, J., dissenting).

amendments of it, as among the privileges and immunities of citizens of the United States"¹⁰²

Bradley also indicated that unenumerated privileges included buying, selling, and enjoying property, engaging in any lawful employment, and using the law for "redress of injuries and the like."¹⁰³ Bradley acknowledged that, "except in a few instances,"¹⁰⁴ "[p]rior to the fourteenth amendment" these privileges and immunities could not be enforced "for want of the requisite authority."¹⁰⁵ But the Amendment changed this and provided enforcement power.¹⁰⁶

Bradley termed Miller's attempt to limit the Amendments to African Americans a "futile" argument:

The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government . . . and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation.¹⁰⁷

Likewise, Bradley discounted Miller's concerns about Congress supervising the states. "Like the prohibition against passing a law impairing the obligation of a contract, it would execute itself."¹⁰⁸ But even if it did require legislation, Bradley said the "great question is, What is the true construction of the amendment?"¹⁰⁹ In Bradley's mind "inconvenience" had no role to play in the case because "[t]he National will and National interest are of far greater importance."¹¹⁰ In essence, Bradley argued that Miller had missed the purpose and result of the Union victory in the Civil War.

102. *Id.* at 118-19 (Bradley, J., dissenting) (emphasis added). Bradley proceeded to suggest that these rights may apply to all persons "whether citizens or not." *Id.* at 119 (Bradley, J., dissenting).

103. *Id.* at 119.

104. *Id.* at 121 (Bradley, J., dissenting). Bradley was probably referring to the rights given against the state in Article I, Section 9.

105. *Id.* at 121.

106. *Id.* at 122 (Bradley, J., dissenting).

107. *Id.* at 123 (Bradley, J., dissenting).

108. *Id.* This same argument was presented by John Norton Pomeroy as late as 1881. SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD, WITH AN INTRODUCTORY SKETCH BY JOHN NORTON POMEROY 56, 144 (1881) [hereinafter SOME ACCOUNT]. Page 56 is part of Pomeroy's introduction. It is unclear who actually authored page 144.

109. *Slaughter-House Cases*, 83 U.S. at 124 (Bradley, J., dissenting).

110. *Id.* Bradley never directly confronted Miller's claim that such a radical change in the government required a clearer statement. Given his view of the Amendment giving enforcement power to fundamental rights which already existed, *id.* at 118-19, 122 (Bradley, J., dissenting), Bradley probably did not see this as a radical change. Further, Bradley's suggestion that the Court look to the "true construction" of the Amendment implied a rejection of Miller's "unclearness" argument. *Id.* at 124 (Bradley, J., dissenting).

D. Justice Swayne's Dissent

In his dissenting opinion Justice Swayne relied upon Field's and Bradley's opinions to support his views of the merits of the cases before them.¹¹¹ Swayne's separate opinion was directed solely to the effect of the new Amendments and reads as if it came right out of the Congressional debates. Undeterred by Miller's fear of a "radical" change in the government, Swayne embraced the Reconstruction Amendments as "a new departure" and "an important epoch" in constitutional history.¹¹² The Reconstruction Amendments "trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven."¹¹³

Ignoring Taney's opinion in *Scott v. Sanford*¹¹⁴ and articulating traditional antislavery doctrine, Swayne indicated that a "citizen of a State is *ipso facto* a citizen of the United States."¹¹⁵ Swayne interpreted Article IV as protecting equality in state-created privileges or immunities.¹¹⁶ Referring to "equal protection of the laws," Swayne indicated that "all" were placed "upon a footing of legal equality and give[n] the same protection to all for the preservation of life, liberty, and property, and the pursuit of happiness."¹¹⁷

Responding to Miller's argument about the radical change in government, Swayne indicated that the "prejudices and apprehensions as to the central government . . . were dispelled by the light of experience."¹¹⁸ He continued, "It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted."¹¹⁹

Further, Swayne, unlike Miller, had no apprehensions about the effect of the change. He termed the Amendments "all eminently conservative in their character. They are a bulwark of defence, and can never be made an engine of oppression."¹²⁰ Indeed, Swayne saw the Amendments as desirable, stating that without such "authority" a na-

111. *Id.* at 128 (Bradley, J., dissenting).

112. *Id.* at 125 (Bradley, J., dissenting).

113. *Id.*

114. 60 U.S. (19 How.) 393 (1857).

115. *Id.* at 126 (Swayne, J., dissenting).

116. *Id.* at 127 (Swayne, J., dissenting).

117. *Id.* Note that Swayne, like Bradley, did not limit the life, liberty, and property protection to "deprivation" by the government, but rather referred to "protection . . . for the preservation of life, liberty, and property." *Id.* (Swayne, J., dissenting).

118. *Id.* at 128 (Swayne, J., dissenting).

119. *Id.* at 129 (Swayne, J., dissenting).

120. *Id.* at 128 (Swayne, J., dissenting). See also *id.* at 129 ("[T]he power is beneficent in its nature, and cannot be abused").

tional government was “glaringly defective.”¹²¹ Noting that before the Civil War there was “ample” protection against national “oppression” and “little . . . against wrong and oppression by the states,” Swayne concluded “[t]hat want was intended to be supplied by this amendment.”¹²²

III. ANALYSIS OF JUSTICE MILLER’S OPINION

A. Criticisms

Though Miller regarded *Slaughter-House* as “the ablest opinion he ever prepared,”¹²³ his craftsmanship has not received high evaluations from scholars. Louis Lusk complained about “the shabbiness of the Court’s reasoning”¹²⁴ and Sanford Levinson has called it “shoddily justified.”¹²⁵ Walter Murphy contrasted the fact that Miller was “among the most able of judges” with the fact that his opinion was an “intellectual shambles.”¹²⁶

There are four important difficulties with the Fourteenth Amendment aspect of Miller’s opinion: (1) Miller’s claim that the equal protection was directed almost exclusively toward African Americans was historically inaccurate and ignored an obvious reading of the text of the Amendment; (2) Miller’s textual argument, distinguishing between the rights of national citizens and the rights of state citizens, was based upon his deliberate misquotation of Article IV and of the *Corfield* case; (3) Miller’s discussion of the citizenship clause demonstrated either woeful ignorance or duplicity by failing to discuss the Civil Rights Act of 1866; and (4) Miller’s ultimate justification of his opinion was misplaced. Each of these will be discussed in turn.

1. Miller’s Attempt to Limit Equal Protection

Justice Miller’s opinion would not have been so problematic if he had claimed only that one of the primary goals of the Reconstruction Amendments was the protection of African Americans.¹²⁷ But his claim that equal protection would be limited almost exclusively to African Americans is inexplicable. As Miller acknowledged, unlike the

121. *Id.* at 129 (Swayne, J., dissenting).

122. *Id.*

123. *Justice Harlan on Justice Miller*, 31 *CENTRAL L.J.* 333 (1890).

124. LUSKY, *supra* note 4, at 197.

125. Levinson, *supra* note 7, at 73.

126. Murphy, *supra* note 7, at 5.

127. The focus is upon Miller’s opinion because he was the only one who wrote for the majority. But a statement by conservative Republican Senator Timothy O. Howe suggests that Howe had been told by someone in the majority that they did not agree with Miller’s rationale:

Fifteenth Amendment, which made reference to race, the Fourteenth Amendment was framed in broader language.¹²⁸

Contemporary sources believed Miller's reading of the Fourteenth Amendment's Equal Protection Clause to be wrong. For example, on May 24, 1873, *The Chicago Legal News* concluded that the *Slaughter-House* majority had given "to the colored citizen, rights and privileges not possessed by the white citizen."¹²⁹ Similarly, in the 1874 edition of *Sedgwick's Statutory and Constitutional Law*,¹³⁰ John Norton Pomeroy criticized Miller's claim by saying that it was "utterly unnecessary to the decision of the case"¹³¹ and "contradict[ed] at once the meaning of language and the facts of history."¹³²

While it has been suggested that Miller's memory of the history of the Amendments was "dimming" by 1873,¹³³ others have not been so charitable. William Nelson called Miller's view an "extreme position" which the Court rejected by 1876.¹³⁴ Walter Murphy characterized Miller's reading as an attempt to change "any person" to read "any [N]egro" and as contrary to "the amendment's plain words."¹³⁵ Eric Foner has suggested that a review of Congressional debates seriously undermines Miller's limitation.¹³⁶

Indeed, the debates are replete with indications that the Fourteenth Amendment was also intended to protect Southern white Unionists, Northerners moving South, and aliens.¹³⁷ Bingham himself

Mr. President, I am glad to *feel authorized to say that that is not the conclusion of the court*. I understand that to be a part of the argument simply by which the justice who delivered the opinion of the majority undertook to defend the judgment of the court.

43 CONG. REC. 4148 (May 22, 1874) (emphasis added).

Though the truth is likely to remain unknown, Howe's statement leaves open the possibility that one or more of the Justices in Miller's majority may have joined on narrower grounds.

128. *Slaughter-House Cases*, 83 U.S. at 71-72.

129. *The Recent Amendments to the U.S. Constitution Construed*, 5 CHI. LEGAL NEWS 414 (May 24, 1873). The newspaper was edited by Myra Bradwell who, by then, had lost her own effort to use the Privileges or Immunities Clause to gain admission to the Illinois bar. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

130. THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW* (John Norton Pomeroy ed., 2d ed. 1874).

131. *Id.* at 565 n.(b).

132. *Id.* at 564 n.(b). As late as 1881 Pomeroy continued to argue that the dissent in *Slaughter-House* was correct. SOME ACCOUNT, *supra* note 108, at 54-55.

133. HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875*, at 437-38 (1982).

134. NELSON, *supra* note 12, at 179.

135. Murphy, *supra* note 7, at 2.

136. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 530 (1988).

137. CONG. GLOBE, 39th Cong., 1st Sess. 1065 (Feb. 27, 1866) (John Bingham indicating that the Amendment would protect Southern Unionists).

made the distinction between the Magna Carta, which protected only the “freemen”, and the Fifth Amendment Due Process Clause, which “adopted in its stead the more comprehensive words ‘no person.’”¹³⁸ It was hardly possible that it escaped the framers or the ratifiers that the Fourteenth Amendment applied to all “citizens” in one part and in other parts to all “persons.”

2. Miller’s Misquotations

A large part of Justice Miller’s privileges and immunities argument was premised upon the distinction between the privileges and immunities of state citizenship and those of national citizenship. To establish this distinction, Miller first looked to Section 1 of the Fourteenth Amendment, which provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.¹³⁹

While this clause established simultaneous citizenship, it did not suggest in any way that the rights of those citizens were different. To reach that determination Miller relied upon Article IV, Section 2 which provides, in relevant part:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

According to Louis Lusky,¹⁴⁰ Miller “deliberately misquote[d]” this clause by writing it, with quotation marks around the entire provision, as follows:

“The citizens of each State shall be entitled to all *the* privileges and immunities of citizens *of* the several States.”¹⁴¹

Even prior to the adoption of the Amendment, many believed that the American government was based upon equal protection of the laws. Bingham indicated that the Constitution recognized “the absolute equality before the law of all persons, whether citizens or strangers.” CONG. GLOBE, 39th Cong., 1st Sess. 158 (Jan. 9, 1866). In an era where Christian religion was a strong force, aliens were often referred to as “thy stranger that is within thy gates.” *Exodus* 20:10 (King James). See CONG. GLOBE, 39th Cong., 1st Sess. 1292 (Mar. 9, 1866) (speech of John Bingham: “Ye shall have the same law for the stranger as for one of your own country”). A religious base to the Equal Protection Clause was seen in *Deuteronomy* 27:19: “Cursed be he that pervereth the judgment of the stranger.”

138. CONG. GLOBE, 37th Cong., 2d Sess. 1638 (1862). In that same speech, Bingham indicated the Fifth Amendment applied to those born in America, Asia, Africa, and Europe and to every “person,” “human being” and “member” of the “family of man.” *Id.*

See also CONG. GLOBE, 39th Cong., 1st Sess. 1291-92 (Mar. 9, 1866) (Bingham stating that Rep. Wilson had indicated that the word “inhabitant” had been printed in the Civil Rights Bill by mistake instead of “citizens,” and that Bingham objected to “citizen” because it was narrower than “person”).

139. U.S. CONST. amend. XIV, § 1.

140. LUSKY, *supra* note 4, at 194-95.

141. *Slaughter-House Cases*, 83 U.S. at 75 (emphasis added).

By inserting the word “the” before privileges and immunities and changing the word “in” to make the clause read “of the several States” instead of “in the several States” Miller made this provision appear to protect state, not national rights.

Miller’s opinion would help this become the modern reading of the Article IV, Section 2.¹⁴² But in 1873 Bingham’s national citizenship reading was “the dominant judicial understanding” of the clause.¹⁴³ Indeed, Justice Swayne, in his dissent, thought the provision “intelligible and direct” with no need for “analysis” or “construction.”¹⁴⁴

Miller also paraphrased Article IV as setting forth rights “of citizens of the several states”¹⁴⁵ and in purporting to quote Justice Washington’s opinion in *Corfield v. Coryell*,¹⁴⁶ misquoted Justice Washington by inserting the word “of” for “in” between “citizens” and “the several states.”¹⁴⁷ Justice Bradley called attention to these misquotations in his dissenting opinion.¹⁴⁸ Yet this language not only remained in Justice Miller’s majority opinion¹⁴⁹ but also appeared in the syllabus of the opinion.¹⁵⁰

The significance of this is found by reference again to antislavery doctrine. The reference to “citizens in the several states” is unclear as to whether the reference is to U.S. citizens or state citizens. Chancel-

142. The modern reading of Article IV is inconsistent with both early precedent and the plain reading of the text. See *supra* note 127-38 and accompanying text.

143. KETTNER, *supra* note 55, at 255-61.

Robert Palmer, while acknowledging that Miller misquoted Article IV and *Corfield*, defends Miller by indicating that Miller was merely “updat[ing] his sources.” Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 754, 756 (1984). It may be that Palmer accepts the “modern” non-discrimination view of Article IV, assumed that this view was undisputed by 1873, and that Miller changed the language of both Article IV and *Corfield* to be consistent with that view.

144. *Slaughter-House Cases*, 83 U.S. at 126 (Swayne, J., dissenting). In an obvious reference to Miller’s majority opinion, Swayne wrote of “analysis to eliminate [Section 1’s] meaning”, that “[e]very word employed has an established signification”, and that “[e]laboration may obscure, but cannot make clearer, the intent.” *Id.* (Swayne, J., dissenting).

145. *Id.* at 74.

146. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

147. For Miller’s misquotation, see *Slaughter-House Cases*, 83 U.S. at 76. For Washington’s actual quotation, see *Corfield*, 6 F. Cas. at 551.

148. *Slaughter-House Cases*, 83 U.S. at 117-18 (Bradley, J., dissenting).

149. *Id.* at 74-76.

150. 83 U.S. at 37, in paragraph 4 of syllabus number 3. The Lawyer’s Edition of the case indicates that the syllabus was prepared by Justice Miller. 21 L. Ed. 394, 395 (1873).

The Democrats who relied upon Miller’s opinion to oppose the Civil Rights Act of 1875 quoted his opinion accurately by quoting his mis-paraphrase of Article IV, Section 2, and yet, when referring to the clause itself, quoted it accurately. 43 CONG. REC. 4086-87 (May 20, 1874) (statement of Sen. Thurman).

lor Kent thought that a citizen of a state was, *ipso facto*, a citizen of the United States, and antislavery leaders, like John Bingham, adopted this view.¹⁵¹ This meant the importance of the reference is not to which citizen it is referring, but rather to which collection of rights: rights guaranteed nationally or rights guaranteed locally. Bingham's public reading of the Amendment was as if the clause had an ellipsis and, if properly read, referred to "citizens of the United States in the several states."¹⁵² This view was shared by Senator Howard, who was the spokesman for the Fourteenth Amendment in the Senate.¹⁵³

Miller's opinion has been generally understood to indicate that the privileges and immunities of state citizens and those of federal citizens were independent and mutually exclusive.¹⁵⁴ In this too, Miller was obviously in error. Many of the same rights are protected by both the state and the federal constitutions.

3. Miller on Citizenship

In speaking of the Fourteenth Amendment citizenship clause, Miller indicated that "[n]o such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress."¹⁵⁵ Yet the Civil Rights Act of 1866 had explicitly defined citizenship as follows: "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."¹⁵⁶

It is difficult to know what to make of this omission. The debate over the Civil Rights Act had been strong and widely publicized.¹⁵⁷ President Johnson vetoed the act on constitutional grounds and Congress had overridden his veto.¹⁵⁸ This was generally thought to be

151. See CONG. GLOBE, 35th Cong., 2d Sess. 984 (Feb. 11, 1859); Aynes, *supra* note 6, at 69-70, 78-79.

152. CONG. GLOBE, 35th Cong., 2d Sess. 984 (Feb. 11, 1859).

153. CONG. GLOBE, 39th Cong., 1st Sess. 2764-68 (May 23, 1866). For a collection of similar views, see Aynes, *supra* note 6, at 78-79.

Though not addressing these concerns, John Harrison reaches a contrary view, suggesting that the Privileges or Immunities Clause was intended to protect state-created rights. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385 (1992).

154. Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L. J. 785, 824 (1982). *Contra* Palmer, *supra* note 143, at 744 n.28, 745.

155. *Slaughter-House Cases*, 83 U.S. at 72.

156. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (April 9, 1866).

157. CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION 1864-1888, PART ONE* 1169-1204 (1971).

158. CONG. GLOBE, 39th Cong., 1st Sess. 1809 (Apr. 6, 1866) (Senate); *id.* at 1861 (House).

only the second time in history Congress had overridden a President's veto.¹⁵⁹ This "momentous" event was one of the major political and legal events of the age and yet Miller acted as if he did not know it had occurred.¹⁶⁰

Further, the citizenship clause lacks the interpretative power Miller attributed to it. If he followed the debates in Congress at all or if he reviewed the Congressional Globe, he knew that the citizenship clause was added in the Senate at the last moment to write into the constitution the antislavery view that the Thirteenth Amendment granted citizenship along with freedom.¹⁶¹ As historian Eric Foner has pointed out, Miller's conclusion about the distinctions between the privileges and immunities of state and federal citizens "should have been seriously doubted by anyone who read the Congressional debates of the 1860s."¹⁶²

4. Miller's Ultimate Justification

Ultimately, Miller's opinion rested upon his view that to give the Privileges or Immunities Clause the meaning sought would "radically change . . . the whole theory of the relations of the State and Federal Governments to each other and of both of these governments to the people" and cause the Court to be "a perpetual censor upon all legislation of the States, on the civil rights of its own citizens."¹⁶³ Yet, it is not disputed that the Fourteenth Amendment was designed to change the relationship between the states and the federal government.

In determining how "radical" of a change the Fourteenth Amendment was designed to make, one must first determine what the relationship was before the change. People like House Judiciary Chairman James R. Wilson, a Republican from Iowa, thought that Ar-

159. K.C. Cerny, *Appendix to the Opinion of the Court*, 6 HASTINGS CONST. L.Q. 455, 456 (1979). The first veto overridden by Congress occurred in 1845. Congress overrode President John Tyler's veto of a bill providing that no revenue cutter could be built unless there was a prior Congressional appropriation. JOSEPH NATHAN KANE, *FAMOUS FIRST FACTS* 687 (4th ed. 1981).

160. Cerny, *supra* note 159, at 456. In an interesting and important article, Robert Palmer suggested that Miller omitted any reference to the act because its constitutionality was open to question. Palmer, *supra* note 143, at 756.

Yet Miller did not purport to look for a firmly established, well-accepted definition by Congress. Instead, his language indicated that such a definition had never been "attempted" by Congress. *Slaughter-House Cases*, 83 U.S. at 72. Further, as Kaczorowski has observed, the Civil Rights Act of 1866 had been upheld as constitutional by every federal Court considering the question and by the majority of state courts. Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 21 N. KY. L. REV. 151, 161 (1993).

161. FAIRMAN, *supra* note 157, at 1291-96.

162. FONER, *supra* note 136, at 503.

163. *Slaughter-House Cases*, 83 U.S. at 78.

ticle IV, Section 2 already authorized the enforcement of the Bill of Rights against the states and that the Fourteenth Amendment, like the Civil Rights Act of 1866, merely provided an enforcement mechanism which had been previously lacking.¹⁶⁴ Other Republicans, like John Bingham, thought that Article IV, Section 2 required the Bill of Rights to be followed by the states, but, unlike Wilson, thought there was no authority for federal enforcement. In their eyes the change wrought by the Amendment was to add enforcement power by the federal government.¹⁶⁵

Whether viewed from the Wilson wing of the party or the Bingham wing, the Fourteenth Amendment Privileges or Immunities Clause was mainly about requiring the states to do what they should have done all along. It might be a significant and an important change, but it was not a "radical" change in the form of the government in the way it was portrayed by Justice Miller. To the contrary, the Republicans responded to the claim that this was a violation of state's rights by indicating that the state never had a right to violate these individual rights; therefore opposition was a plea for "state wrongs."¹⁶⁶

On the other hand, for people who believed that the states had no obligations to abide by any of the Bill of Rights,¹⁶⁷ this may have been a "radical" change.¹⁶⁸ As G. Edward White has suggested, both Miller and Chase were not acting upon short-run principles, but rather acting out their ante-bellum principles.¹⁶⁹ They reached different results, in part, because of different ante-bellum views. The difficulty in the *Slaughter-House Cases*, however, is that the change sought by the Fourteenth Amendment was evident no matter which of the ante-bellum principles one was devoted to and the magnitude of the change was legally irrelevant to implementing it.

Of course it might well be argued that even federal enforcement of such rights was, itself, a revolutionary act. But this was the very point Wilson himself countered. Wilson relied upon *Prigg v. Penn-*

164. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (Mar. 9, 1866).

165. Aynes, *supra* note 6, at 71-72.

166. *E.g.*, 43 CONG. REC. 340 (Dec. 19, 1873) (Statement of Rep. Butler). See also CONG. GLOBE, 34th Cong., 3d Sess. 136 app. (Jan. 13, 1857) (Statement of Rep. Bingham). In speaking of his theory that only the original states could have slavery, Bingham indicated that the states were equal "in the right" but "unequal in the right to do wrong."

167. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

168. Even for these people, however, the change as articulated by Bradley was not nearly so radical as that claimed by Miller.

169. G. Edward White, *Reconstructing the Constitutional Jurisprudence of Salmon P. Chase*, 21 N. KY. L. REV. 41, 115-16 (1993).

*sylvania*¹⁷⁰ for the enforcement power and much of the Civil Rights Act of 1866, for example, was taken from the Fugitive Slave Act of 1850.¹⁷¹ Opponents were hard pressed logically to deny that federal power used to enforce slavery without any explicit constitutional authority could not be used to protect freedom with the explicit constitutional authority of the Thirteenth and Fourteenth Amendments.

Nor would this result in any wide-ranging use of federal power to regulate the states. The most logical reading of Justice Washington's interpretation of Article IV, Section 1 in *Corfield* is that "fundamental" was not being used in a natural law sense, but rather as a synonym for "constitutional."¹⁷² This would mean that the Article IV privileges and immunities would most reasonably be limited to those specified in the constitution: the Bill of Rights, and those set forth in Article I, Section 9.¹⁷³ This is, of course, the same result as that articulated by Justice Bradley in his dissent.

170. 41 U.S. (16 Pet.) 539 (1842).

171. Kaczorowski, *supra* note 160, at 156. See Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850).

172. Conant, *supra* note 154, at 817.

Black's Law Dictionary has no "natural law" definition for "fundamental." But it defines "fundamental law" as: "The law which determines the constitution of government in state, and prescribes and regulates the manner of its exercise; the organic law of a state; the constitution." BLACK'S LAW DICTIONARY 674 (6th ed. 1990).

Rights protected under the Ninth Amendment would, like *Crandell v. Nevada* rights, be protected whether the Fourteenth Amendment existed or not. What the Fourteenth Amendment added was enforcement by the federal government of those natural right codified in the Federal constitution which heretofore had not been applied to the states.

173. This view could be based upon the concept that, notwithstanding the Ninth Amendment, most of the "fundamental rights" had been codified in the original Constitution or the Bill of Rights. Though reading the *Slaughter-House Cases* in a way much different than most, Robert Palmer nevertheless concludes the "most rational" way to interpret the Fourteenth Amendment is that the privileges and immunities constitute the first eight amendments and "much of article I section 9." Palmer, *supra* note 143, at 740-41.

Though less probable, Conant's suggestion that this referred not just to the United States Constitution, but also to the "rights of Englishmen" including common law matters is still a reasonable reading of the clause. This could include "constitutional" portions of the common law such as Magna Carta (1215), the Petition of Rights (1628), the Habeas Corpus Act (1679), and the Bill of Rights of 1689. These documents are all reproduced in *SOURCES OF OUR LIBERTIES* (Richard L. Perry ed., 2d ed. 1978).

Or, as John Gibbons has suggested, the Northwest Ordinance could be looked to as defining these rights (religious liberty, habeas corpus, trial by jury, proportionate representation, due process, bail except in certain capital cases, moderate fines, no cruel and unusual punishment, due process of law and jury of peers, no interference with contracts, schools encouraged, no slavery or involuntary servitude). John G. Gibbons, *Intentionalism, History, and Legitimacy*, 140 U. PA. L. REV. 613, 634-37 (1991).

Read together, the "rights" outlined in these various documents are often redundant. See, e.g., 43 CONG. REC. 455 (Jan. 7, 1874) (Rep. Butler suggesting that all rights under British Magna Carta were protected under the U.S. Constitution). But they are clearly ascertainable and more manageable and limited than Miller's own "rights" derived from "inherent limitations" on government or from the structure of government itself. See *Citizen's Sav. & Loan Assoc. v. Topeka*

One of the extraordinary aspects of Miller's opinion was that his wide-ranging treatment of the Privileges or Immunities Clause was unnecessary. Miller could have found that pursuing a profession was a privilege or immunity, but that it was not "abridged" here.¹⁷⁴ He could have found that this "abridgment" was still a "reasonable regulation," justified by the state's police power. Or, he could have found that it was not a privilege or immunity of federal citizenship. All of these approaches would have limited the scope of the decision, a prudent judicial approach to a new amendment. By going beyond these limited questions, Miller deliberately embarked on a much wider ranging mission.

B. *Defenses of Miller's Opinion*

The only person to attempt to defend Miller's opinion on originalist grounds has been Justice Frankfurter.¹⁷⁵ Frankfurter argued, in effect, that the contemporary Court was more likely to have known and expressed the intent of the Fourteenth Amendment than any individual member of Congress.¹⁷⁶

Most place Miller's defense upon making a choice between two otherwise untenable positions. In 1950 Charles Fairman claimed that "[t]he words meant too much, or almost nothing. The majority chose the latter alternative."¹⁷⁷ This is part of the suggestion that Miller's opinion was an attempt to keep the Court from exercising the type of free-wheeling judgment under the Privileges or Immunities Clause that it was later to do under due process during the *Lochner* era.¹⁷⁸

Yet it is evident that Court was not forced to choose between any such extremes. While it is true that Attorney Campbell's definition of privileges and immunities might well have placed every right under the protection of the Fourteenth Amendment,¹⁷⁹ Justice Bradley of-

City, 87 U.S. (20 Wall.) 655, 662-63 (1874); *Crandall v. Nevada*, 73 U.S. (19 Wall.) 35, 43-44 (1867).

174. Indeed, Miller seems to suggest as much. *Slaughter-House Cases*, 83 U.S. at 66.

175. *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).

176. *Id.* at 64.

177. Fairman, *supra* note 6, at 78. See also LUSKY, *supra* note 4, at 199 (in Miller's view he had "to restrict the Privileges or Immunities Clause to nearly nothing, or to interpret it as a self-executing source of a full panoply of legal rights"); *Edwards v. California*, 314 U.S. 160, 183 (1941) (Jackson, J., concurring) (the Court "always hesitated to give any real meaning to the privileges and immunities clause lest it improvidently give too much").

178. Charles Fairman, *Justice Samuel F. Miller*, 50 POL. SCI. Q. 15, 26-28 (1935).

179. *Slaughter-House Cases*, 83 U.S. at 52. See generally Harrison, *supra* note 153.

ferred the manageable standard of using the text of the Constitution as the basis for identifying privileges and immunities.¹⁸⁰

Further, Justice Miller's own conduct in other cases suggests that "judicial restraint" played no part in his decision. In *Loan Association v. Topeka*¹⁸¹ Justice Miller had no reluctance in holding that freedom from taxation except for a public purpose was a right "beyond the control of the state."¹⁸² This was not based upon Due Process or any other provision of the Constitution. Instead, in what might be regarded as part of a natural law theory, Miller based his holding upon the view that "[t]here are limitations on such power which grow out of the essential nature of all free government. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all government entitled to the name."¹⁸³

It seems hardly possible that Miller could consistently act in *Slaughter-House* in order to avoid abuse of a provision explicitly in the Constitution and then reach the decision he did in *Topeka* without reliance upon any constitutional provision, if his intent was to defeat substantive due process or natural law type concepts.¹⁸⁴ Indeed, if Justice Miller was willing to "find" rights from the structure of the government, as he did in *Crandall v. Nevada*¹⁸⁵ and from natural law concepts, like he did in *Topeka*, then he held open the door for judicial creation of all types of rights.

A more appealing alternative has been to suggest that Justice Miller's opinion has been misunderstood. Robert Palmer, for example, has suggested that Miller's opinion could have contemplated the Bill of Rights and many of the rights list in Article I, Section 9, as privileges and immunities of national citizenship under Section 1 of the Fourteenth Amendment.¹⁸⁶ This theory is based largely on the portion of Miller's opinion which includes as Fourteenth Amendment privileges or immunities "[t]he right to peaceably assemble and petition for redress of grievances, [and] the privilege of the writ of habeas

180. *Slaughter-House Cases*, 83 U.S. at 118 (Bradley, J., dissenting). Bradley, of course, also seemed willing to treat the rights guaranteed at common law and catalogued in the Civil Rights Act of 1866 as privileges and immunities. *Id.* at 119 (Bradley, J., dissenting). But this, likewise, is a manageable standard.

181. 87 U.S. (20 Wall.) 655 (1874).

182. *Id.* at 662.

183. *Id.* at 663.

184. Fairman indicates that eventually this doctrine was absorbed by substantive due process. See Fairman, *supra* note 178, at 29 n.50.

185. 73 U.S. (6 Wall.) 35 (1867).

186. Palmer, *supra* note 143. See also JOHN H. ELY, *DEMOCRACY AND DISTRUST* 22 and notes to page 22 at 196-97 (1980).

corpus."¹⁸⁷ Palmer suggests that Miller must be applying these to the states, because "[t]he only way a state could abridge the article I, section 9 habeas corpus right was to grant the federal government the power to suspend the issuance of habeas corpus beyond the named emergencies" and this was "ludicrous on its face."¹⁸⁸

But Palmer overlooked a more obvious example from the days of the fugitive slave acts. States could frustrate writs of habeas corpus issued by federal judges by using force and judicial process to declare prisoners free or by initiating state prosecutions against federal officers residing in state territory or citizens aiding federal officer executing writs of habeas corpus.¹⁸⁹

Similarly, Palmer's theory does not account for the fact that state government could attempt to prohibit, or to even place a tax upon assemblies for purpose of petitioning Congress or the President, just as they could to attempt prohibit or tax the travel which the Court condemned in *Crandall v. Nevada*.¹⁹⁰ Indeed, the obvious omission of free speech and the limitation of the privilege or immunity to assembly and petition suggest the type of "structural" right recognized in *Crandall* instead of the First Amendment.¹⁹¹

To be sure, judicial decisions and the Supremacy Clause may have prevented these acts even prior to the Fourteenth Amendment. But this was also true of the other examples Miller gave. Further, in spite of the other intriguing points in Miller's opinion which Palmer identifies,¹⁹² there is no evidence that any contemporary source, including Miller, understood Miller's opinion in the way Palmer interprets it.

Palmer acknowledges that *United States v. Cruikshank*¹⁹³ would have been an appropriate case for Miller to apply these principles,¹⁹⁴ but excuses Miller from doing so because without the aid of Field,

187. *Slaughter-House Cases*, 83 U.S. at 79.

188. Palmer, *supra* note 143, at 749-50.

189. *E.g.*, *Ex parte Bushnell*, 9 Ohio St. 77 (1859); *In re Booth*, 3 Wis. 13 (1854); *In re Booth and Rycraft*, 3 Wis. 144 (1854).

190. Palmer, *supra* note 143, at 764.

191. See Loren P. Beth, *The Slaughter-House Cases Revisited*, 23 LA. L. REV. 487, 497 (1963). This was what the court later indicated was the case in dicta in *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."). Palmer considers this possibility and rejects it. Palmer, *supra* note 143, at 749.

192. Palmer, *supra* note 143, at 752 (the amendment "'placed' the privileges and immunities of national citizenship under the protection of Congress"); *id.* at 753 n.64 (rights defined in *Corfield* "remain, with certain exceptions mentioned in the Federal Constitution, under the care of the state governments").

193. 92 U.S. 542 (1875).

194. *Id.* at 756.

Bradley and Swayne, *Cruikshank* “simply did not seem an appropriate field of battle.”¹⁹⁵ Unfortunately, Miller never found an “appropriate field of battle.” In *Hurtado v. California*,¹⁹⁶ for example, Harlan’s powerful dissent provided a unique opportunity for Miller to explain *Slaughter-House*, but he did not do so.

Charles Fairman, having reviewed all of the surviving Miller papers, apparently found nothing to suggest Miller held the view Palmer attributes to him.¹⁹⁷ Miller’s 1880 lectures discussed the Fourteenth Amendment and *Slaughter-House* without giving a glimmer of Palmer’s reading and would seem to reject it by indicating that the First Amendment’s Establishment Clause applied only to the Federal Government and not to the states.¹⁹⁸

The rejection of Palmer’s theory returns one to the conclusion that there is simply no principled basis for Miller’s opinion.

IV. MOTIVATION OF THE JUSTICES

A. Justice Samuel F. Miller

The question then becomes, why would an “able” Justice write an opinion which is so clearly and unmistakably wrong? All commentators who have addressed this question have agreed that Miller’s opinion was grounded in his strongly held ante-bellum views.¹⁹⁹ Walter Murphy suggested that Miller’s opinion was the result of an “unstated, and perhaps unconsciously held” premise that the Fourteenth Amend-

195. *Id.* at 769.

196. 110 U.S. 516 (1884).

197. See generally FAIRMAN ON MILLER, *supra* note 30.

198. JUSTICE SAMUEL MILLER, *THE CONSTITUTION OF THE UNITED STATES* 67-68, 86-87 (1880). In addition, Palmer’s otherwise careful and detailed reading of the *Slaughter-House Cases* is mistaken when it refers to Bradley and Field as “Radicals.” Palmer, *supra* note 143, at 757 (“[t]hey are called Radical Republicans for a reason”); *id.* at 761 (“Bradley . . . was a radical.”). Field was a War Democrat and maybe even a Unionist, but never a Republican and certainly not a radical Republican. None of the biographical materials on Bradley have suggested that he was a radical Republican. This is not to say that Field and Bradley were not familiar with radical Republican theory or that in their effort to find the intent of the Fourteenth Amendment they did not properly use Radical Republican theory.

199. White, *supra* note 169, at 115-16. White suggests that all of the Justices were starting with ante-bellum assumptions and concludes that at least Chief Justice Chase was not acting upon short-run political considerations, but rather upon strongly held, long-range constitutional views. *Id.* See also Beth, *supra* note 191, at 493.

An intriguing opposite opinion is offered by Miller’s contemporary, John Norton Pomeroy. In 1881 Pomeroy suggested that Miller’s opinion was “strange and inconsistent and since Judge Miller has always advocated views which tend to break down almost all limitations upon the general government, and to make the legislative powers of Congress almost universal.” POMEROY, *supra* note 25, at 54 n.*.

ment could not change the fundamental nature of the government.²⁰⁰ But the more common view is that this was an act of “judicial lawmaking of which Justice Miller must have been quite aware.”²⁰¹

One of Miller’s motivations may have been to write an opinion that served as a compromise among the various contemporary political positions. Michael McConnell sees Miller’s decision “as an attempt to assuage the conflict over Reconstruction by prudent compromise, and as foreshadowing the Compromise of 1877.”²⁰² In McConnell’s view, the Court adopted the Northern idea of “equality” by looking to the Equal Protection Clause to protect the rights of African Americans.²⁰³ But it accepted the doctrine of states rights—not a post-war Northern view of the importance of the states—but “the southern, Democratic theory of states’ rights”²⁰⁴ in denying any substantive content to the Privileges or Immunities Clause. This, of course, relegated the protection of African-American rights primarily to former slave-masters and former Confederate soldiers.

Robert Kaczorowski adopts the same general theory, but presents it with a much sharper focus. In Kaczorowski’s view, the decision was “an example of extraordinary judicial activism” that “annulled a revolution in American constitutionalism.”²⁰⁵ This was so because “it represented a rejection of the virtually unanimous decisions of the lower federal courts upholding the constitutionality of revolutionary federal civil rights laws” adopted in Reconstruction and also a rejection of the Justice Department’s enforcement of those acts.²⁰⁶

Kaczorowski argues that the *Slaughter-House Cases* employed “a masterful political strategy” because it involved white plaintiffs rather than African Americans. This allowed the Court to “decide the ex-

200. Murphy, *supra* note 7, at 6. Murphy develops this argument in more detail, but rejects it. *Id.* at 12-22.

201. NELSON, *supra* note 12, at 163; DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION 214 (1993) (Miller’s motive was not “interpretive” but “politically consequentialist.”); Beth, *supra* note 191, at 490 (“an obvious attempt to destroy . . . any affirmative reading of the fourteenth amendment”).

202. Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENTARY 115, 133 (1994).

203. *Id.* at 134.

204. *Id.*

205. Kaczorowski, *supra* note 160, at 151.

In an article which treats *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1871), and *Slaughter-House* as closely related cases, Robert Goldstein found the Court to be “an ideological and political leader in the reaction to Reconstruction.” Robert D. Goldstein, *Blyew: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 526 (1989).

206. Kaczorowski, *supra* note 160, at 151.

ceedingly controversial constitutional issues” in a case that was not nearly as controversial politically.²⁰⁷ Further, as Kaczorowski points out, the political alignment of this decision was confusing. The Louisiana corporation, represented by radical Thomas Durant and Republican U.S. Senator Matthew Carpenter,²⁰⁸ was making states rights arguments generally “associated” with the Democrats.²⁰⁹

At the same time, former Supreme Court Justice and Confederate Assistant Secretary of War John A. Campbell was arguing the Republican party’s theory of the constitutional amendments to support the butchers who were supported by the opponents of Louisiana’s state Republican government.²¹⁰ These were exactly the opposite of the constitutional positions the “political partisans” usually took on questions of the interpretation of the Fourteenth Amendment and its various enforcement acts.²¹¹ Thus, the *Slaughter-House Cases* offered the Court the opportunity to “neutralize[]” the “political fallout” from its decision.²¹²

The McConnell and Kaczorowski views are supported by an examination of Miller’s background and politics. Until his appointment on the Court, Miller was an obscure man. He was unknown, even by reputation, to President Lincoln and unknown to the nation.²¹³

Miller was born into a slave-holding Kentucky family.²¹⁴ He himself held slaves until 1850, and he married into a slave-holding fam-

207. *Id.* at 175. See also Goldstein, *supra* note 205, at 526 (indicating that the first oral argument in *Slaughter-House* took place before the decision in *Blyew*, allowing the Court to “reach the constitutional question which Blyew seemed to pose, in a case not involving race”); Lou Falkner Williams, *Samuel Freeman Miller, in THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 317-18 (Melvin I. Urofsky ed., 1994) (“the Court deliberately chose a case which would depoliticize the explosive legal questions involved”).

208. Carpenter may not have been as active a Republican as he was a practitioner before the Supreme Court. He was not selected to serve on the Joint Committee on Reconstruction and played no major role in the drafting of or debate over the Fourteenth Amendment. Further, he voted against the Civil Rights Act of 1875. 43 CONG. REC. 1870 (Feb. 27, 1875).

209. *Id.* Kaczorowski, *supra* note 160, at 177.

210. *Id.*

211. *Id.*

212. *Id.* Kaczorowski felt this “neutralizing” effect would take place either way the Court resolved the matter.

213. In 1879 Miller himself indicated that at the time of his appointment he was “comparatively unknown” outside of Iowa. *Address of Mr. Justice Miller*, ALBANY L.J. 25 (1879). See also CHARLES NOBLE GREGORY, *SAMUEL FREEMAN MILLER* 10, 15 (1907) (giving an account of John Kasson’s conversation with Lincoln in 1862 indicating that Miller was unknown to Lincoln, and the *New York Tribune* article of July 26, 1862: “Mr. Miller’s name is printed ‘Samuel’ in the dispatches announcing Miller’s appointment, but we presume it is Daniel F. Miller”).

214. Fairman, *supra* note 178, at 17; FAIRMAN ON MILLER, *supra* note 30, at 16 n.28. Though Fairman never indicated how many people Miller’s family held as slaves, the Federal Census Records show that Miller’s father had no slaves in 1810, two slaves in 1820, and four slaves in

ily.²¹⁵ The flogging of the slave woman who cared for Miller as a child—probably by Miller's father—was said to be the source of his antislavery feelings.²¹⁶ In an 1882 autobiographical account, Miller recalled himself as "an active emancipationist" and indicated that when the emancipation movement failed in Kentucky in 1848, he thought slavery would never be abolished and decided to move to Iowa.²¹⁷

These facts, when included with Miller's appointment by a Republican President, might suggest that Miller would be sympathetic to the interests sought to be advanced by the Congress which proposed the Fourteenth Amendment.²¹⁸ But Miller's antislavery views do not appear to have included a commitment to racial equality. While there were certainly many people who were opposed to slavery who also had an interest in the rights of African-American people, there were also many who did not. It is clear that many opposed "slavepower" out of resistance to its influence, rather than from any sympathy for the people held in slavery.²¹⁹

None of the biographical material available on Miller suggests any dedication to African Americans as people or to the broader aims of the framers of the Fourteenth Amendment. To the contrary, Miller's earliest biographer, in treating Miller's opposition to slavery, indicated that Miller acted "more for the sake of the Whites than from sympathy for the Blacks."²²⁰

1830. Population Schedules of the Third, Fourth, Fifth, and Sixth Census (National Archives—microfilm).

Fairman discovered that Miller once held a chattel mortgage to secure a debt on a thirteen year old girl held in slavery by another, with no evidence the note was ever discharged. Fairman attached no significance to this event. FAIRMAN ON MILLER, *supra* note 30, at 16 n.28.

215. GREGORY, *supra* note 213, at 64; FAIRMAN ON MILLER, *supra* note 30, at 16 n.28.

216. FAIRMAN ON MILLER, *supra* note 30, at 16 n.28. Fairman also concluded that some of the positions Miller took in an 1830s debating society corroborated the view that Miller held an antislavery position. Charles Fairman, *Justice Samuel F. Miller and the Barbourville Debating Society*, 17 MISS. VALLEY HIST. REV. 595, 597 (1931).

217. This document is reprinted in Charles Fairman, *Samuel F. Miller, Justice of the Supreme Court, 1862-1890*, 10 VAND. L. REV. 193, 196-98 (1957).

Fairman indicated that Miller "freed" his slaves in Iowa, and this was the effect if he took people held in slavery to Iowa. But technically they became free by operation of the law when Miller took them into "free" territory where slavery was prohibited. See generally PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY* (1981).

218. Lowell F. Schechter, *A Comment on the Chase Court and Fundamental Rights*, 21 N. KY. L. REV. 203, 208 (1993) (suggesting it was significant that Miller was "interested" in "the issue of slavery" and "had been actively engaged in fighting against slavery" and yet ruled the way he did in *Slaughter-House*).

219. See EUGENE H. BERWANGER, *THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY 1-2* (1967); Lary Gara, *Slavery and the Slave Power: A Crucial Distinction*, 15 CIV. WAR HIST. 5 (1969).

220. GREGORY, *supra* note 213, at 4. Gregory cites no authority for this statement. See also Williams, *supra* note 207, at 320 ("Miller was no proponent of equality for blacks").

Even Lincoln, who was by no means a radical, articulated pre-war rights for African Americans. In his first reply to Douglas in the Lincoln-Douglas debates, Lincoln indicated that "there is no reason in the world why the [N]egro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty, and the pursuit of happiness."²²¹ There is no indication that Miller ever expressed any similar views.²²² At least on the issue of suffrage, Miller seems to have been opposed to African-American rights.²²³

The context of Miller's views can most easily be seen by contrasting them with those of Fourteenth Amendment author John Bingham. Three years after Bingham had publicly called for the abolition of slavery,²²⁴ Justice Miller wrote his brother-in-law: "[a]n abolitionist has been my abhorrence all my life."²²⁵ At a time during the initial secessionist crisis when Bingham re-introduced President Jackson's Force Bill of 1833 to help maintain the Union,²²⁶ Miller was willing to

221. *First Debate with Stephen A. Douglas at Ottawa, Illinois (Aug. 21, 1858)*, in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 16 (Roy P. Basler ed., 1953).

222. In Miller's unsuccessful 1856 campaign for the Iowa State Senate, Miller did state his "conviction" that slavery was "full of evil" "both to the master and the slave"; that slavery was "the most stupendous wrong, and the most prolific source of human misery, both to the master and the slave." Miller's statement "To the Voters of Lee and Van Buren Counties," reprinted in FAIRMAN ON MILLER, *supra* note 30, at 28-32. The quoted portion is from page 30.

In an 1869 letter reviewing the history of Reconstruction, Miller indicated that it had been hoped that the "legal rights and citizenship" of African Americans would have been recognized by the state governments of the South and that the Johnson reconstruction would have worked if the black codes had not been framed and the "fiendish hatred" of African Americans could have been "restrained." Letter from Miller to William P. Ballinger (Aug. 29, 1869), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 193. It is difficult to determine how much of this was a question of strategy and how much reflected Miller's feelings upon the merits. But the choice of the word "fiendish" clearly implies disapproval.

Miller seemed generally to disapprove of the murder of African Americans. But, in response to an incident in South Carolina in which several African Americans were killed, Miller wrote Ballinger that if his "friends will kill [N]egroes, I am glad they select the Presidential year for that amusement." Letter from Miller to William P. Ballinger (July 26, 1876), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 282.

223. For example, on January 11, 1866 Miller described the "most potent" of what he saw as three factions in the Congress who did not want to work with President Andrew Johnson as "certain ultra [N]egro suffrage impracticable[s]." Letter from Miller to William P. Ballinger (Jan. 11, 1866), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 128. A year later Miller wrote that there were "many [R]epublicans who now regret the extreme policy of the reconstruction acts, in the question of suffrage." Letter from Miller to William P. Ballinger (Dec. 22, 1867), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 139-40.

224. See generally JOHN A. BINGHAM, AN ADDRESS DELIVERED BEFORE THE LITERARY SOCIETIES OF FRANKLIN COLLEGE AT NEW ATHENS, OHIO, ON THE 23D SEPTEMBER, 1851 (1851).

225. Letter from Miller to William P. Ballinger (Mar. 19, 1854), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 27. Miller balanced this with the following sentence: "So has been a proslavery disunionist such as Calhoun & Jeff Davis." *Id.*

226. CONG. GLOBE, 36th Cong., 2d Sess. 219 (Dec. 31, 1860).

see the country divide into two nations.²²⁷ When Bingham was working for the adoption of the Fourteenth Amendment, Miller was willing to accept a conservative counter-proposal by certain Southern Governors and endorsed by President Johnson.²²⁸

Justice Miller undoubtedly had knowledge of the fact that the framers of the Fourteenth Amendment intended for it to provide a mechanism through which the Bill of Rights could be enforced against the states. Beyond the fact that Miller must be assumed to understand the meaning and intent of the words of the Amendment as used in the Congressional debates, Miller undoubtedly had actual knowledge of the debates. He was a man who watched Congress closely. On January 11, 1866, Miller wrote his brother-in-law about the opening of the discussion of Reconstruction in both Houses, indicating that it promised to be "able, and somewhat bitter."²²⁹ This was not a casual comment, for the rest of the letter included an account of Miller's assessment of President Johnson's goals, the goals of "a large body of influential [R]epublicans," and an account of three other factions within the Congress and their goals.²³⁰

227. Letter from Miller to William P. Ballinger (Nov. 11, 1860), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 36.

228. Letter from Miller to William P. Ballinger (Feb. 6, 1866), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 189-93. This alternative Fourteenth Amendment was President Johnson's attempt to "redirect" the thinking of Congress. JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* 138 (1984). Its supporters thought this "flank movement" would "defeat the Radical program." *Id.* at 140. While Section 3 of the Johnson proposal contained virtually the same citizenship, due process, and equal protection Clauses as Section 1 of the Fourteenth Amendment, the privileges or immunities clause was a re-publication of the Article IV Privileges and Immunities Clause and there was no enforcement clause. *Id.* (Interestingly, James reprints the clause as if it read the way Miller wrote it in *Slaughter-House*: "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." But the source which James cites as his authority for his quotation prints the proposed amendment in the same words as Article IV, "of citizens in the several states." 1 W. L. FLEMING, *DOCUMENTARY HISTORY OF RECONSTRUCTION* 240 (1906).) If adopted, this proposal would have left the Constitution's approach to privileges and immunities exactly as it was before the proposed amendment.

Indeed, the rejected proposal would have produced the very result Miller reached in *Slaughter-House*. The fact that this alternative Fourteenth Amendment was seen as a conservative proposal orchestrated by President Johnson and that it was specifically rejected in favor of Bingham's more potent formulation, demonstrates that Miller's interpretation of the Fourteenth Amendment was wrong.

In an early post-*Slaughter-House* grand jury charge, Circuit Judge Emmons said that Miller's opinion was the "equivalent to expunging" the Privileges or Immunities Clause from the Amendment. The effect of the decision was to leave "the organic law in this regard precisely where it was" before the Amendment. Charge to Grand Jury—Civil Rights Act, 30 F. Cas. 1005, 1006 (C.C.W.D. Tenn. 1875) (18,260).

229. Letter from Miller to William P. Ballinger (Jan. 11, 1866), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 128.

230. *Id.* at 128-29.

Miller tried to work closely with Congress to implement his ideas on judicial reform, submitting "a long communication" to the Chairmen of the Judicial Committees of both Houses prior to Chief Justice Chase's appointment in 1864,²³¹ advising Chase of the status of a pending bill in 1866,²³² and asking Iowa Congressman and House Judiciary Chairman James Wilson to meet with Chase about a bill pending in the House.²³³ Miller's close attention to Congress, in and of itself, suggests that Miller knew the content of the debates.

Even if Miller did not actually follow the Congressional debates, he had at hand a source which explained Congress' intent to him. In 1868, Judge George W. Paschal²³⁴ published *The Constitution of the United States Defined and Carefully Annotated*.²³⁵ Paschal made it clear that all of Section 1 of the Amendment, except the citizenship clause, had already existed in Article IV, Section 2 and "the thirteen amendments."²³⁶ The "new feature" of the Amendment was that these "general principles which had been construed to apply only to the national government, are thus imposed upon the States."²³⁷ Thus, Paschal made it clear that the Bill of Rights had not been enforceable against the states before, but would be now.

231. Letter from Miller to Samuel Chase (June 27, 1866), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 402.

232. *Id.*

233. *Id.* Fairman indicated this was Senator Henry Wilson of Massachusetts. But the bill in question had already passed the Senate and there is no record of any special relationship between Senator Wilson and Justice Miller. Congressman James F. Wilson had been instrumental in Miller's appointment to the Court, and was Chairman of the House Judiciary Committee.

234. Paschal was a former Supreme Court Justice of Arkansas and a nationally known Texas Unionist who had been arrested for "disloyalty" to the Confederacy. Aynes, *supra* note 6, at 86 n.174. Prior to *Slaughter-House*, Paschal was counsel in at least four cases heard by Justice Miller, *National Bank of Wash. v. Tex.*, 87 U.S. (20 Wall) 72 (1873); *Board of Comm'rs v. Gorman*, 86 U.S. (19 Wall.) 661 (1873); *Texas v. White*, 131 U.S. 95 (1870); *Texas v. White*, 74 U.S. (1 Wall.) 700 (1869), and a party in a fifth case Miller heard. *In re Paschal*, 77 U.S. (10 Wall.) 483 (1870) (dispute over Paschal's fee in *Texas v. White*, 74 U.S. (1 Wall.) 700 (1869)).

Miller authored *National Bank v. Texas*, where he was called upon to review Paschal's deposition testimony. 87 U.S. (20 Wall.) 72, 77, 81-82 (1874). The Lawyer's Edition, 22 L. Ed. 295, indicates that *National Bank v. Texas* was argued on April 18, 1872; affirmed on March 17, 1873; reargued and the judgment vacated on May 1, 1873; and a new decision issued April 20, 1874. Paschal's testimony was quoted, 87 U.S. at 77, and summarized, 87 U.S. at 82.

The Court referred to Paschal by name in two of its cases, once as "a loyal citizen of the State of Texas," *Texas v. Hardenberg*, 77 U.S. (10 Wall.) 68 (1869), and once as one "who had remained constant to the Union." *Texas v. White*, 74 U.S. (1 Wall.) 700 (1868).

By 1869 Paschal was living in Washington, D.C. where he taught law at Georgetown while Justice Miller taught at National University. APPLETONS' CYCLOPAEDIA OF AMERICAN BIOGRAPHY 667 (James Grant Wilson & John Fiske eds., 1888); CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, PART TWO 536 (1987).

235. PASCHAL, *supra* note 25.

236. *Id.* at 290.

237. *Id.*

Justice Miller was undoubtedly aware of Paschal's treatise because Paschal's close Texas Confederate friend and frequent correspondent was Miller's brother-in-law, home-town friend and life-long correspondent, William P. Ballinger.²³⁸ Miller used Paschal's treatise in 1877 to determine John Campbell's age.²³⁹ Though undoubtedly referring to the book as a whole and not the specific section on the Fourteenth Amendment, in 1880 Justice Miller referred to Paschal's treatise as a "very valuable work."²⁴⁰ Because of its citation in the *Legal Tender Cases*,²⁴¹ Miller was also undoubtedly familiar with John Norton Pomeroy's 1868 treatise which clearly indicated that the Fourteenth Amendment would enforce the Bill of Rights against the states.²⁴²

Finally, Fourteenth Amendment author Bingham and Miller travelled in the same party on a tour of the Pacific Coast in the summer of 1871 when Bingham was speaking publicly on the meaning of the Fourteenth Amendment.²⁴³ For example, Miller heard Bingham's Portland, Oregon speech of almost an hour "upon the relation and dependence of the States to the Nation."²⁴⁴ This was a speech which U.S. District Judge Matthew P. Deady described as "logical, eloquent and grand."²⁴⁵ As Howard J. Graham concluded, "[i]t hardly seems possible . . . that Justice Miller was unfamiliar with the framers' view" ²⁴⁶

One explanation for Miller's majority opinion is the contempt which he held for the Congress which proposed the Fourteenth Amendment. While Miller undoubtedly knew the intent of Congress,

238. See JAMES MARTEN, *TEXAS DIVIDED* 72-74 (1970) (Paschal-Ballinger relationship); see generally FAIRMAN ON MILLER, *supra* note 30 (Ballinger-Miller relationship).

239. Letter from Miller to William P. Ballinger (Mar. 18, 1877), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 351.

240. MILLER, *supra* note 198, at 34.

241. 79 U.S. (12 Wall.) 457, 602 n.152 (1871) (Clifford, J., dissenting).

242. POMEROY, *supra* note 25, at 147-51. Miller may not have felt bound by the reading of the Fourteenth Amendment by Paschal and Pomeroy. But, even if it were assumed that Miller had no constructive or actual knowledge of the debates, the conclusions of these two treatises should have caused Miller, if he was acting in good faith, to at least test his own views against the Congressional debates.

243. THE DIARY OF JUDGE MATTHEW P. DEADY 28 (Malcolm Clark, Jr. ed., 1975) (entry of July 18, 1871). A newspaper account indicated that Bingham had said the result of the Civil War and the Fourteenth Amendment was that "no State will attempt to set up an authority in opposition to human rights." *Our Visitors*, PORTLAND OREGONIAN, July 19, 1871, at 3 (col. 2).

244. *Our Visitors*, *supra* note 243, at 3 (col. 2). The local newspaper characterized Bingham's speech as follows: "The address on the whole, was an able and intellectual effort. It was upon a much higher plane than that of common partisan speeches, and was received with great satisfaction by the audience." *Id.*

245. *Id.*

246. HOWARD J. GRAHAM, *EVERYMAN'S CONSTITUTION* 124 (1968).

he had little respect for Congress. Congress' performance in Reconstruction, as well as its failure to enact what Justice Miller viewed as needed reform in the federal judiciary, led Miller to develop a "rather poor opinion of Congress' performance."²⁴⁷

Approximately a year before his opinion in *Slaughter-House*, Miller termed the Senate Judiciary Committee "the damnest nuisance the Congress presents."²⁴⁸ Miller apparently thought the problem was that "[e]very man on it thinks himself the embodiment of constitutional wisdom and statesmanship, and each is jealous of the other."²⁴⁹

Miller was "heart sick" because of Congress' preoccupation with Reconstruction, which he saw as "politics," and its failure to give what he viewed as sufficient attention to his own proposals for judicial reform.²⁵⁰ This caused him to characterize the judiciary committees of both houses as "political committees" and the committee members as "politicians *par excellence*."²⁵¹

Miller's greatness, according to his biographer, was not in "legal learning but in statesmanship."²⁵² "Statesman" Miller was troubled by the Congressional (and perhaps national) majority. Miller was "worried about the possibility of balanced government being over-

247. Letter from Miller to William P. Ballinger (Apr. 23, 1872), reprinted in Fairman, *supra* note 217, at 202.

248. Letter from Miller to William P. Ballinger (Apr. 23, 1872), reprinted in FAIRMAN ON MILLER, *supra* note 230, at 403. See also Letter from Miller to William P. Ballinger (Mar. 9, 1872), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 404 ("the greatest nuisance of its kind in either House of Congress").

249. *Id.* At this point one is tempted to note that it was obviously impossible for any of the members of the Senate to be the "embodiment of constitutional wisdom and statesmanship," because it was Miller who enjoyed that role.

250. *Id.* Miller was opposed to the system of riding the Circuit and by 1872 was himself preoccupied with the dramatic increase in the docket of the Court, "an increase of which very few persons have any just conception." Samuel H. Miller, *Judicial Reforms*, 2 U.S. JURIST 1 (1872), quoted in FELIX FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY OF THE FEDERAL JUDICIAL SYSTEM* 61 n.20 (1927).

In a private letter to his brother-in-law, Miller complained about the "vast increase" in the Court's docket and expressed concern that if it continued to increase at this rate even his proposals could not solve the problem. Letter from Miller to William P. Ballinger (Mar. 9, 1872), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 404. Concerns about the increase in the court's docket are also found in Letter from Miller to William P. Ballinger (Apr. 23, 1872), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 403, and Letter from Miller to William P. Ballinger (Oct. 24, 1872), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 404.

251. Fairman, *supra* note 217, at 202.

252. Fairman, *supra* note 216, at 600. Writing in 1957, Fairman commended Justice Miller to lawyers as "a responsive and ever-helpful companion" because Miller was "[g]reat in spirit, in mental power, in sense of right, and in patriotism." Fairman, *supra* note 178, at 208. Indeed, one of Fairman's earliest articles on Miller was subtitled *A Study of a Judicial Statesman*. Fairman, *supra* note 178.

turned by an irresponsible crew in Congress bent on wrecking an independent executive and judiciary."²⁵³

Charles Fairman concluded that Reconstruction convinced Miller to regard Congress "as the least reliable branch of government."²⁵⁴ On February 4, 1867, while the Fourteenth Amendment was under consideration by the state legislatures, Miller wrote his former law partner, a Radical Republican. Miller saw his former partner's radical views as a proposal "to prostrate the judicial and executive branches of the government, at the feet of the legislative or at the behest of a temporary popular majority."²⁵⁵

Two months later Miller wrote his brother-in-law that "[t]he strain upon constitutional government, from the pace at which the majority is now going, is one which cannot be much longer continued without destroying the machine."²⁵⁶ In early 1868 Miller wrote:

[I]n the threatened collision between the Legislative branch of the government and the Executive and judicial branches I see consequences from which the cause of free government may never recover in my day. The worst feature I now see is the passion which governs the hour in all parties and all persons who have who have controlling influence²⁵⁷

In addition to contempt for the Congress, a view of the electorate as a "temporary" majority, and a fear that Congress' actions would ruin the government, Miller had the temperament to interpose his own will against that of the political process. According to Fairman, Miller had confidence "in his own mental power," "a certain impatience with lesser minds," and "a touch of wolfishness" towards people who disagreed with him.²⁵⁸ While complaining about the

253. William Gillette, *Samuel Miller*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978, at 1017 (Leon Friedman & Fred L. Israel eds., 1980).

254. Fairman, *supra* note 217, at 201.

255. Letter from Miller to John W. Rankin (Feb. 4, 1867), *reprinted in* FAIRMAN ON MILLER, *supra* note 30, at 137 (emphasis added).

256. Letter from Miller to William P. Ballinger (Apr. 24, 1867), *reprinted in* FAIRMAN ON MILLER *supra* note 30, at 138. This only was part of Miller's analysis. Southern adoption of the Reconstruction plan could slow down "the onward course of public affairs." *Id.* Seven months later Miller wrote that "the progress of Congress in invading the functions of the Executive and Judicial branches of the Government, was only less dangerous than a return to power of the [D]emocratic party . . ." Letter from Miller to William P. Ballinger (Dec. 22, 1867), *reprinted in* FAIRMAN ON MILLER, *supra* note 30, at 140.

257. Letter from Miller to William P. Ballinger (Jan. 19, 1868), *reprinted in* FAIRMAN ON MILLER, *supra* note 30, at 140. Miller included the Supreme Court in the group affected by "passion." *Id.*

258. Fairman, *supra* note 216, at 600.

“political feeling” in the Court, Miller admitted that “perhaps” he had his “share” of political feelings.²⁵⁹

Miller also admitted he had “strong passions, an excitable temperament, ardent desires and powerful antipathies.”²⁶⁰ In reviewing this statement and other incidents in Miller’s life, his principle biographer wrote that “[i]t was Miller’s way to continue to march breast forward, firm in the right as he understood it.”²⁶¹ These are the traits of a justice who, if he could, would disregard the action—even a constitutional amendment—by a branch of government he did not respect to avoid a result he thought unwise.

Miller was disappointed when he was not appointed as Chief Justice to succeed Chase. While he blamed the “intrigue” of Bradley and Swayne for his being “passed over,” he thought the substantive reason was his opinion in *Slaughter-House*.²⁶² This may well have reflected Miller’s acknowledgement that he betrayed the intent of his party in rendering that decision.

B. Other Members of the Majority

1. Justice Nathan Clifford

Nathan Clifford “was at once the most prolix and the most pedestrian member” of the Court²⁶³ and “did not succeed in penetrating central questions of constitutional interpretation.”²⁶⁴ The most striking fact about Clifford was his intense partisanship. Justice Miller de-

259. Letter from Miller to Charles P. Ballinger (Feb. 10, 1870), *reprinted in* Fairman, *supra* note 178, at 18.

260. Letter from Miller to William P. Ballinger (Oct. 3, 1879), *reprinted in* FAIRMAN ON MILLER, *supra* note 30, at 279.

261. FAIRMAN ON MILLER, *supra* note 30, at 279.

Similar views were expressed in GREGORY, *supra* note 213. Gregory was the Dean of the College of Law of the University of Iowa. *Id.* at xii. Gregory explained Miller’s depreciation of juries as “that contempt which a distinctly arbitrary judge is apt to feel for any impediment to his own will”, *id.* at 33, and indicated that the failure to refer to previous decisions were made “with an accent almost of contempt for any other view.” *Id.* at 20.

In memorial services for Miller the Attorney General of the United States lamented the fact that “[u]ndiscriminating eulogy has said that Judge Miller was wont to sweep away law in order that justice might prevail.” Nevertheless, Chief Justice Fuller noted that one of the characteristics of Justice Miller’s opinions was “undoubting firmness of conclusion.” *In Memoriam*, 137 U.S. 701, 705, 707 (1890).

262. Kaczorowski, *supra* note 160, at 188 n.160 (citing and quoting from letter of Miller to David Davis (Sept. 7, 1873), David Davis Papers, Chicago Historical Society).

263. FAIRMAN, *supra* note 157, at 77.

264. William Gillette, *Nathan Clifford*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978, at 972 (Leon Friedman & Fred L. Israel eds., 1980). *See also* David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 473-77 (1983) (an article, though humorous in nature, suggesting Clifford as one of three justices for consideration as the most insignificant justice).

scribed Clifford as a "lifelong bitter Democrat."²⁶⁵ Clifford was "the last will and testament of antebellum Democracy, grown crusty and bankrupt in its obsession with centralization of authority and concentration of power in Washington."²⁶⁶ Clifford's long Democratic career included opposition to abolition of slavery in the District of Columbia²⁶⁷ and opposition to "mean and incendiary schemes" to base representation on free persons, abrogating the three-fifths clause.²⁶⁸

His national prominence came from his service as President Polk's Attorney General where he supported the war with Mexico which was such an anathema to antislavery advocates.²⁶⁹ Indeed, by the time of his appointment to the Supreme Court Clifford was so well-known as known as a "pro-slavery Democrat," and a "dough-face" that there was a "storm of protest" over his appointment.²⁷⁰

A sense of his petulance can be gathered from the fact that when Whig William Henry Harrison was elected president, Clifford referred to him as "an imbecile old man" and refused to attend his inauguration.²⁷¹ Similarly, Clifford considered President Hayes an "usurper" and refused to enter the White House while Hayes was President.²⁷²

It is not surprising that Clifford's contemporaries felt he had "little sympathy with the rise and growth of the enlarged views of national authority and Federal power which soon afterward obtained."²⁷³ There is nothing in Clifford's public life suggesting support for the Fourteenth Amendment.

Yet Clifford undoubtedly knew the intent of the Amendment from the public debates. Further, Justice Clifford cited as authority in his 1871 dissenting opinion in *Knox v. Lee*²⁷⁴ the 1868 treatise of John Norton Pomeroy.²⁷⁵ Pomeroy unequivocally indicated that the adop-

265. Gillette, *supra* note 264, at 967.

266. *Id.* at 973.

267. PHILIP G. CLIFFORD, NATHAN CLIFFORD, DEMOCRAT 25 (1922).

268. *Id.* at 101-02. See also CONG. GLOBE, 26th Cong., 1st Sess. 476 (Apr. 24, 1840).

269. CLIFFORD, *supra* note 267, at 156.

270. *Id.* at 270; Gillette, *supra* note 264, at 967.

271. CLIFFORD, *supra* note 267, at 107. In describing this incident, the author, Clifford's grandson, referred to Harrison as "the despised Whig" and to Clifford as "the ultra Democrat" whose "sensibilities" could not bear to see the inauguration. *Id.*

272. *Id.* at 323.

273. *Id.* at 291 (quoting a *New York Tribune* article of an undisclosed date).

274. 79 U.S. (12 Wall.) 457, 602 n.* (1871).

275. Pomeroy was then Dean of the Law School and Griswold Professor of Political Science at the University of New York. POMEROY, *supra* note 25, at 5. He was an important Republican theoretician, HYMAN & WIECEK, *supra* note 133, at 409, who has been called "[t]he greatest legal scholar of the day." John V. Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C. L. REV. 747, 761 (1981) (referring to 1883). For a more modest assessment of

tion of the Fourteenth Amendment would enforce the Bill of Rights against the states.²⁷⁶

2. Justice David Davis

David Davis, Lincoln's campaign manager at the 1860 Republican Convention, was not an unnatural choice for the Supreme Court. Indeed, Stanley Kutler described him as "rich in judicial experience."²⁷⁷ Yet, except for *Ex parte Milligan*,²⁷⁸ Davis "wrote few noteworthy opinions"²⁷⁹ and gave us little basis upon which to judge his ability as a Supreme Court Justice.

We do know, however, that Davis was not a likely candidate for a sympathetic reading of the Fourteenth Amendment. "[S]ome of the abolitionist wing of the Illinois Republican Party" opposed his nomination to the Court.²⁸⁰ During the Civil War "there was some deterioration in Davis' relationship" with Lincoln.²⁸¹

This split appears to have occurred over two substantive issues. The first was over the trial of civilians by military commissions in which Davis triumphed in *Ex parte Milligan*.²⁸² More importantly, Davis also split with the President over emancipation. He not only opposed emancipation but urged Lincoln to withdraw his proclamation after it was issued.²⁸³ Given his opposition—even if it was based upon tactical grounds—to emancipation itself, Davis is unlikely to have been sympathetic to the goals of protecting Southern Blacks through the Fourteenth Amendment as its framers intended. Indeed, as late as April 1868 Davis thought "[b]oth parties have run into extremes"²⁸⁴ and confessed "a great alarm at the tendency to consolidated Govt manifested by the Republican party. This alarms me more than all other things besides"²⁸⁵

Pomeroy's prominence, see Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1453-55.

Pomeroy was later to work to assist Justice Field in his efforts to become President. FAIRMAN ON MILLER, *supra* note 30, at 297.

276. POMEROY, *supra* note 25, at 145-51.

277. Stanley I. Kutler, *David Davis*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978, at 1045 (Leon Friedman & Fred L. Israel eds., 1980).

278. 71 U.S. (4 Wall.) 2 (1866).

279. Kutler, *supra* note 277, at 1045.

280. *Id.* at 1048.

281. *Id.*

282. 71 U.S. (4 Wall.) 2 (1866).

283. Kutler, *supra* note 277, at 1048.

284. FAIRMAN, *supra* note 157, at 153 (quoting portions of a letter from Justice Davis to Judge Rockwell, his brother-in-law, on April 22, 1868).

285. *Id.* at 484.

Given Kutler's description of Davis as "deeply entangled in personal and partisan politics," and Miller's claim that "every act" of Davis' life was governed by "his hope of the Presidency,"²⁸⁶ one can hardly be assured that his vote in the *Slaughter-House Cases* was a concerted effort to implement the intent of the framers of the Fourteenth Amendment.

3. Justice William Strong

Justice Miller's majority also included William Strong. Strong has not been the subject of any full-length biography, but is generally considered to have been an "average" Justice who spent "ten years on the High Court in relative obscurity."²⁸⁷ Strong's area of expertise was patent law and most of the other opinions he was assigned to write were in the areas of admiralty, revenue law, and common law questions.²⁸⁸

Strong had been elected as a Democrat to the House of Representative in 1846 and was re-elected in 1848.²⁸⁹ In 1857 he was elected as a Democrat to the Supreme Court of Pennsylvania.²⁹⁰ Strong's most noted decisions on the Pennsylvania Supreme Court sustained the constitutionality of the Legal Tender Act.²⁹¹ Though he is thought to have become a Republican sometime between 1857 and 1861, it is not known whether he supported the election of President Lincoln in 1860.²⁹² There is also no evidence of his having supported the passage of the Fourteenth Amendment. As late as 1874 Strong was described "[i]n political faith" as having been "a Democrat of the old school" without any acknowledgment of the fact that Strong became a Republican.²⁹³

286. Letter from Miller to William P. Ballinger (Dec. 5, 1875), reprinted in FAIRMAN ON MILLER, *supra* note 30, at 373-74. Davis left the Court to accept an appointment as Illinois' Democratic U.S. Senator. Kutler, *supra* note 277, at 1052.

287. Stanley I. Kutler, *William Strong*, in THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978, at 1153 (Leon Friedman & Fred L. Israel eds., 1980).

288. *Id.* Fairman's assessment is similar. Strong's "great strength" was seen chiefly "in the private law fields." Fairman, *supra* note 6, at 64. As Fairman was to phrase it later, Strong's "contributions" were "in the competent disposition of humdrum litigation." Charles Fairman, *The Supreme Court in 1878*, 64 A.B.A. J. 1024, 1028 (1978).

289. Kutler, *supra* note 287, at 1154.

290. *Id.*

291. *Shollenberger v. Brinton*, 52 Pa. 9 (1866).

In *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871), Strong and Bradley promptly joined the minority from *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), to create a new majority in reversing *Hepburn* and upholding the act.

292. Kutler, *supra* note 287, at 1154.

293. THE BIOGRAPHICAL ENCYCLOPEDIA OF PENNSYLVANIA IN THE NINETEENTH CENTURY 409 (1874). Strong did render a nationalist decision in *United States v. Given*, 25 F. Cas. 1324

Strong's political and judicial philosophies were manifest in his opinion in *Blylew v. United States*. In that case, there was a challenge to Kentucky's statute prohibiting African Americans from testifying in cases in which white people were parties. The United States District Attorney brought the case under the 1866 Civil Rights Act, which provided that "citizens, of every race and color, shall have the same right in every State . . . to . . . give evidence."²⁹⁴ In what has been said to be the beginning of "the substantial devastation of the federal government's civil right powers"²⁹⁵ and a "tortured interpretation of the law,"²⁹⁶ Justice Strong rejected the removal remedy provided by Congress. While Strong carried with him the votes of Justices Miller, Clifford, Davis and soon-to-be *Slaughter-House* dissenter Field, Justice Bradley and Swayne dissented.²⁹⁷

There is nothing in Justice Strong's background to suggest that he would give a sympathetic interpretation to the intent of the framers of the Fourteenth Amendment.²⁹⁸ To the contrary, Strong's background makes it unlikely that he welcomed the adoption of the Fourteenth Amendment.

4. Justice Ward Hunt

Finally, Miller needed the vote of Justice Ward Hunt, who had been appointed by President Grant.²⁹⁹ Hunt had served as a Justice of the New York Court of Appeals (1865-1869), as its Chief Justice (1868-1869), and as a Commissioner of Appeal (1869-1873).³⁰⁰ There

(C.C.D. Del. 1873) (No. 15,210), which is thought to be inconsistent with his approach in *Slaughter-House*.

The exact date of *Given* is not set forth in the opinion. Professor Kaczorowski indicates that it was decided "[j]ust weeks" before *Slaughter-House*. Kaczorowski, *supra* note 160, at 191. Kaczorowski also suggests that the views Strong expressed in *Given* should have caused him to join the dissents in *Slaughter-House* and that there is no explanation for Strong's change of position. *Id.*

294. 80 U.S. (13 Wall.) 581 (1872). The April 1, 1872 date of the decision is taken from 20 L. Ed. 638.

Both the Kentucky statute and the relevant portion of the Civil Rights Act are reprinted in *Blylew*, 80 U.S. at 581-82.

295. This conclusion, as well as a powerful account of *Blylew* and an insightful analysis of the issues before the Court, are found in Goldstein, *supra* note 205, at 474.

296. Kutler, *supra* note 287, at 1158.

297. Goldstein, *supra* note 205, at 500. Chief Justice Chase and Justice Nelson did not participate in this case. *Id.* at 500 n.118.

298. Yet when the *Civil Rights Cases* were decided in 1883 Strong, who had retired, told Harlan that "[it] may be that you are right." Letter from John M. Harlan to Mallie Harlan, (undated), quoted in Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637, 681 (1957).

299. Stanley I. Kutler, *Ward Hunt, in THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978*, at 1221 (Leon Friedman & Fred L. Israel eds., 1980).

300. *Id.* at 1222.

is no indication that Hunt had any significant experience with constitutional issues in his past judicial experience.³⁰¹ On the other hand, as Chief Justice of the New Court of Appeals, Hunt authored a majority opinion which prohibited the driving and slaughtering of cattle in certain portions of New York City.³⁰² He may have been the member of the Court with the greatest knowledge of the health implications of the Louisiana ordinance.

Justice Miller, while considering Hunt a "cultivated lawyer and gentlemen," found him "not a very strong man in intellect."³⁰³ According to Fairman, Hunt's "most significant act" on the Court was "casting the decisive vote" in *Slaughter-House*.³⁰⁴

Though originally a Jacksonian Democrat, Hunt supported Martin Van Buren as a Free Soil candidate in the election of 1848 and was an organizer of the New York Republican Party in 1855.³⁰⁵ If Hunt remained true to these early antislavery views, he may have been the only member of the majority sympathetic to the aims of the Fourteenth Amendment.

It may be significant to note, however, that Hunt began service on January 9, 1873,³⁰⁶ *Slaughter-House* was argued for the second time on February 3-5, 1873,³⁰⁷ and the decision was announced on April 14, 1873.³⁰⁸ Whether his prior judicial experience prepared Hunt to independently assess the issues in such an important case so soon after his appointment to the Supreme Court is unknown.

301. He authored only four published opinions treating constitutional issues. See *Metropolitan Bd. of Health v. Heisler*, 37 N.Y. 661 (1868) (act creating sanitary district did not violate the state constitution and did not violate the jury trial and due process provisions); *Gaskin v. Meek*, 42 N.Y. 186 (1870) (act was void under the state constitution because it embraced two subjects); *Vose v. Cockcroft*, 44 N.Y. 415 (1871) (state statute was void because it conflicted with the exclusive admiralty jurisdiction of the federal courts); *First Nat'l Bank of Sandy Hill v. Fancher*, 48 N.Y. 524 (1872) (following U.S. Supreme Court precedent, attempt to tax national bank was unconstitutional).

302. *Metropolitan Bd. of Health*, 37 N.Y. at 661.

303. Kutler, *supra* note 299, at 1228 (quoting Justice Miller).

304. Fairman, *supra* note 288, at 1030.

305. Kutler, *supra* note 299, at 1221. Hunt appears to have owed his appointment to the Court to Senator Roscoe Conkling. See Judith K. Schafer, *Roscoe Conkling*, in *THE OXFORD COMPANION TO THE SUPREME COURT* 417 (Kermit L. Hall ed., 1992); Marian C. McKenna, *Ward Hunt*, in *THE OXFORD COMPANION TO THE SUPREME COURT* 178 (Kermit L. Hall ed., 1992). See also Letter from Miller to William P. Ballinger (Dec. 14, 1879) reprinted in *FAIRMAN ON MILLER*, *supra* note 30, at 377.

Hunt had been a supporter of Representative and Senator Roscoe Conkling, a Republican from New York. Letter from Abraham Lincoln to Ward Hunt (Aug. 16, 1864), reprinted in *7 THE COLLECTED WORKS OF ABRAHAM LINCOLN* 498 (Roy P. Basler ed., 1953) (responding to Hunt's inquiry seeking support for Conkling's Congressional election).

306. Kutler, *supra* note 299, at 1221.

307. *Slaughter-House Cases*, 83 U.S. at 44.

308. *Id.* at 57.

C. *The Dissenters*

1. Justice Stephen Field

Stephen Field is generally thought of as a Democrat. But he was appointed to the Court by Lincoln, in spite of his Democratic background, because he was one of California's strong Unionists.³⁰⁹ Indeed, the creation of a tenth Justice in 1863 was "partly to insure that the Pacific Coast circuit would be headed by a man familiar with the region's peculiar legal problems."³¹⁰ Field was the unanimous bipartisan choice of California's members of Congress.³¹¹ In 1864 the Republican Party had become the National Union Party in order to create a coalition with the War Democrats. Field's attitude on the Fourteenth Amendment may be seen by a portion of his June 30, 1866 letter to Chief Justice Chase: "The proposed amendments to the Constitution, prepared by the committee on reconstruction, and passed by Congress appear to me to be just what we need. I think all members of the Union party can unite cordially in their support."³¹²

Though much of the Democratic party saw President Johnson as their ally, this was not the case with Field, again manifested in this passage from the same letter to Chase: "If the President withholds his approval he will sever all connection with the Union party. Two things are certain—the American people do not intend to give up all that they have gained by the war—and they do intend that loyal men shall govern the country."³¹³ Unlike Miller, Davis and Clifford, Field welcomed the Fourteenth Amendment.

2. Justice Joseph Bradley

One of the key dissenters was Justice Joseph Bradley.³¹⁴ Bradley, like many members in the majority, had Republican credentials, but

309. Loren P. Beth, *Stephen Johnson Field*, in *THE OXFORD COMPANION TO THE SUPREME COURT* 290 (Kermit L. Hall ed., 1992).

310. Robert McCloskey, *Stephen J. Field in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978*, at 1073 (Leon Friedman & Fred L. Israel eds., 1980).

311. *Id.*

312. Letter from Field to Samuel Chase (June 30, 1866), *quoted in* CARL BRENT SWISHER, *STEPHEN J. FIELD: CRAFTSMAN OF THE LAW* 145-46 (1969).

313. *Id.*

314. Most of the important biographical work on Bradley has been done by Charles Fairman. CHARLES FAIRMAN, *FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877* (1988); Charles Fairman, *Mr. Justice Bradley*, in *MR. JUSTICE 73* (Allison Dunham & Philip B. Kurland eds., rev. ed. 1964) [hereinafter Fairman, *Mr. Justice Bradley*]; Charles Fairman, *The So-Called Granger Cases, Lord Hale and Justice Bradley*, 5 *STAN. L. REV.* 587 (1953); Charles Fairman, *The Education of a Justice: Justice Bradley and Some of his Colleagues*, 1 *STAN. L. REV.* 217 (1949); Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 *HARV. L. REV.* 977 (1941); Fairman, *supra* note 6.

not necessarily those which would suggest he was sympathetic with the purposes of the Fourteenth Amendment. Bradley was truly a "railroad" lawyer, with the Amboy and Camden Railroad as his major client. Before his appointment to the Court, Bradley became the Secretary of its Board of Directors and, as such, was involved in its management.³¹⁵

Newark had strong economic ties with the South and, like all of New Jersey, was largely Democratic.³¹⁶ Bradley himself once represented those who opposed the argument that the New Jersey constitution abolished slavery.³¹⁷ Finally, Bradley's real commitment was to the Union and not to abolishing slavery.³¹⁸ Indeed his college classmate and friend at the bar, Cortlandt Parker, described Bradley as a Whig, then a Native American and then a "National Union man."³¹⁹ It was only "as the war went on" that Bradley became a Republican.³²⁰

At the same time, Bradley, whatever his personal beliefs, was in a better position than most to be intimately acquainted with antislavery theory. New Jersey was the scene of the influential antislavery decision of *State v. Sheriff of Burlington* in 1836.³²¹ This was the same year in which Bradley and future New Jersey Senator Frederick T. Frelinghuysen graduated from Rutgers.³²² Frelinghuysen and Bradley had been classmates, best friends, and members of the same literary society at Rutgers.³²³ After graduation they both read law with Frelinghuysen's uncle Theodore in Newark.³²⁴

It was Uncle Theodore Frelinghuysen, Bradley's preceptor, who argued the antislavery case in the New Jersey Supreme Court.³²⁵

315. Fairman, *supra* note 6, at 56.

316. Fairman, *Mr. Justice Bradley*, *supra* note 314, at 73.

317. Daniel R. Ernst, *Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845*, 4 LAW & HIST. REV. 337 (1986).

318. Ruth Whiteside, *Justice Joseph Bradley and the Reconstruction Amendments 230* (1981) (unpublished Ph.D. thesis, Rice University).

319. CORTLANDT PARKER, MR. JUSTICE BRADLEY 16 (1893).

320. *Id.* at 17. Jonathan Lurie found that Bradley was a "conservative" Republican in his unsuccessful 1862 candidacy for Congress and that his post-war views on "racial relations" were "virtually identical" with those of southern Democrats. Johnathan Lurie, *Joseph Bradley, in THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 33 (Melvin I. Urofsky ed., 1994).

321. Opinion of Chief Justice Hornblower, on the Fugitive Slave Law, *reprinted in* 1 FUGITIVE SLAVES AND AMERICAN COURTS 99-103 (Paul Finkelman ed., 1988). *See also* Paul Finkelman, *State Constitutional Protections of Liberty and the Antebellum New Jersey Supreme Court: Chief Justice Hornblower and the Fugitive Slave Law*, 23 RUTGERS L.J. 753, 768-74 (1992).

322. Fairman, *Mr. Justice Bradley*, *supra* note 314, at 70.

323. Fairman, *supra* note 6, at 54.

324. Fairman, *Mr. Justice Bradley*, *supra* note 314, at 70.

325. Finkelman, *supra* note 321, at 99.

Bradley later married Mary Hornblower, the daughter of Chief Justice Hornblower, who rendered the decision.³²⁶ This background may be reflected in Bradley's dissent in *Blyew*, with Swayne concurring, articulating the familiar abolitionist theme that being excluded from testifying in court was one of the badges of slavery which the Thirteenth Amendment was designed to eliminate and that the 1866 Civil Rights Act was designed to accomplish that end.³²⁷

By the time the *Slaughter-House Cases* were argued, Bradley had had more time for reflection upon the meaning of the Fourteenth Amendment and to test that reflection against the realities of specific cases than any other member of the Court. This began with his own Circuit Court opinions in the *Slaughter-House Cases*, one of which was issued on June 10, 1870, and another on June 11, 1870.³²⁸ Bradley also participated in the decision concerning relief pending appeal, where he dissented.³²⁹ He collaborated with District Judge and future Supreme Court Justice William B. Woods in the preparation of Woods' Fourteenth Amendment, Enforcement Act opinion in *United States v. Hall*.³³⁰ Like the other Justices, except for Hunt, Bradley participated in the initial *Slaughter-House* argument of January 11, 1872, and reargument in February of 1873.

Thus, Bradley's opinion was not the result of an initial reaction to an unexpected question, but perhaps the most reflective of all the Justices of the Court. Though Bradley himself could hardly be called a radical Republican, as John Scott has observed,³³¹ even up to the time of his lower Court decision in *United States v. Cruikshank*³³² Bradley "possessed, enunciated, and made widely known, a theory of the War-time Amendments that classified him, ideologically, among the radical Republicans."³³³ Bradley was hardly a radical, but the intent of the Fourteenth Amendment and its ideological underpinnings were

326. John V. Orth, *Joseph P. Bradley*, in *THE OXFORD COMPANION TO THE SUPREME COURT* 81 (Kermit L. Hall ed., 1992).

327. *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595, 599 (1872) (Bradley, J., dissenting).

328. 15 F. Cas. 649 (C.C.D. La. June 10-11, 1870).

329. *Slaughter-House Cases*, 77 U.S. (10 Wall.) 273, 298 (1869). This portion of the case was argued on November 18, 1870 and decided on December 2, 1870. 19 L. Ed. 915.

330. 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).

See also John A. Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughter-House Cases to the Civil Rights Cases*, 25 *RUTGERS L. REV.* 554, 557 n.18 (1971) (referring to drafts of January 3 and March 12, 1871 in the Bradley papers of the New Jersey Historical Society).

331. Scott, *supra* note 330, at 59-60.

332. 25 F. Cas. 707 (C.C.D.La. 1874) (No. 14,897).

333. Scott, *supra* note 330, at 59-60.

widely known and Bradley was in a position to apply them.³³⁴ Bradley's dissent, consistent with the articulated intent of Congress and contrary to his own ideological leanings, bears indicia of reliability.

3. Justice Noah Swayne

Noah Haynes Swayne was born in slave-holding Virginia in 1804, but his opposition to slavery caused him to move to Ohio.³³⁵ His sincerity in opposing slavery may be seen from the fact that when, while still in Virginia, his marriage brought slaves, he and his wife "immediately" emancipated them.³³⁶ He was an "active" Democratic supporter of President Jackson and was appointed U.S. Attorney for Ohio where he served from 1830-1841.³³⁷ Swayne also served as counsel in "several" fugitive slave cases,³³⁸ and at the 1856 Ohio Republican Convention was designated as one of the State Central Committee Members.³³⁹

That Convention selected Christopher P. Wolcott, brother-in-law of Edwin Stanton and the attorney who would make the classic anti-slavery argument in *Ex parte Bushnell*,³⁴⁰ along with Swayne, to be District Delegates to the Philadelphia Republican Convention of 1856.³⁴¹ Swayne supported the candidacy of John Fremont for President in the 1856 election³⁴² and the re-election of radical Benjamin Wade to the Senate.³⁴³

334. Murphy notes later that "a radical change [took] place in Bradley's views" and attributed that to his participation in the Electoral Commission and the Compromise of 1877. Murphy, *supra* note 7, at 562, 565-69. See also, Aynes, *supra* note 6, at 101-02.

335. Jonathan Lurie, *Noah Haynes Swayne*, in *THE OXFORD COMPANION TO THE SUPREME COURT* 850 (Kermit L. Hall ed., 1992).

336. J. FLETCHER BRENNAN, 1 *THE (OHIO) BIOGRAPHICAL CYCLOPEDIA AND PORTRAIT GALLERY* 101 (1880).

337. *Id.* A LEXIS search failed to reveal Swayne's involvement in the prosecution of any federal fugitive slave cases during this time.

338. *Id.*; William Bosch, *Noah Haynes Swayne*, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 455 (Melvin J. Urofsky ed., 1994).

The only reported cases in which Swayne appeared as counsel involving the Fugitive Slave Law were the Oberlin rescue cases. *Ex parte Bushnell*, 8 Ohio St. 599 (1858) and 9 Ohio St. 77 (1859). He was co-counsel for the United States in these cases. Though Swayne was undoubtedly familiar with antislavery legal theory before, participation in these cases exposed him to the most sophisticated version of the comity, no enforcement theory of Article IV.

339. 1 *HISTORY OF THE REPUBLICAN PARTY IN OHIO* 72 (Joseph P. Smith, ed. 1898). One of the delegates to that same Convention was future Fourteenth Amendment author John A. Bingham. *Id.* at 73.

340. 9 Ohio St. 77 (1859).

341. 1 *HISTORY OF THE REPUBLICAN PARTY IN OHIO* *supra* note 339, at 54.

342. Lurie, *supra* note 335, at 850.

343. Francis P. Weisenburger, *Lincoln and His Ohio Friends*, 68 *OHIO HIST. Q.* 223, 245 (1959).

When Swayne's friend Justice McLean died, President Lincoln selected Swayne as his first appointee to the Court. On the Court, Swayne was a strong supporter of Lincoln's war measures.³⁴⁴ His son, Major General Wager Swayne, was a Congressional Medal of Honor winner for his Civil War heroism.³⁴⁵ During Reconstruction, Wager Swayne was the director of the Freedmen's Bureau in Alabama.³⁴⁶

Swayne's contemporaries held him in high regard during the time immediately preceding the *Slaughter-House Cases*. Indeed, one of the reasons Congress created a "western" Circuit, allowing the appointment of Miller to the bench, was because the lawyers in Swayne's Circuit did not want to be transferred to another Justice.³⁴⁷ In 1864 Justice Davis indicated that Swayne was "by all odds the best lawyer" among the Justices appointed by Lincoln: Miller, Davis, Field, and Swayne.³⁴⁸ An 1870 New York decision referred to Swayne as one "whose character and learning are deservedly held in very high respect."³⁴⁹

After the war, Swayne sustained the constitutionality of the 1866 Civil Rights Act in *United States v. Rhodes*,³⁵⁰ which relied upon standard antislavery theory.³⁵¹ Swayne had joined the four dissenters in *Ex parte Milligan*,³⁵² finding that Congress had the power to provide for the trial of Milligan by a military Commission, although in this case the trial actually violated the Congressional statute. Though he agreed with Chief Justice Chase's majority opinion in *Texas v. White*,³⁵³ he agreed with Justice Grier "as to the incapacity of the State of Texas, in her present condition, to maintain an original suit"

344. Lurie, *supra* note 335, at 851.

345. STEWART SIFAKIS, WHO WAS WHO IN THE CIVIL WAR 636 (1988).

346. *Id.* Swayne's approach to reconstruction may have been influenced by his son's experiences in Alabama. See CHASE PAPERS, *supra* note 32, at 605. In the week prior to January 7, 1866, Swayne indicated to Chase that Wager Swayne's dispute in 1866 over an unjust law pending in the Alabama Legislature convinced Swayne of the wisdom of Black suffrage.

347. FAIRMAN ON MILLER, *supra* note 30, at 45. Later Fairman was to write, "[h]astening public issues, however, called for wisdom of a higher mood, and Swayne's early pre-eminence was not sustained." Fairman, *supra* note 288, at 1025.

348. Letter from David Davis to Judge Julius Rockwell (his brother-in-law) (Dec. 12, 1864), quoted in FAIRMAN, *supra* note 157, at 11-12.

349. The Comet, 6 F. Cas. 195, 196 (N.D.N.Y. 1870) (No. 3050) (classifying part of Swayne's opinion as dicta).

350. 27 F. Cas. 785 (C.C.D. Ky. 1867).

351. HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 485 (1973). Hyman's statement that this was a "brilliant historical analysis" is overstated. Loren Beth found a "pre-Civil War abolitionist flavor" to Swayne's dissent. Beth, *supra* note 191, at 496.

352. 71 U.S. (4 Wall.) 1, 132, 142 (1866).

353. 74 U.S. (7 Wall.) 700, 741 (1868).

in the Supreme Court.³⁵⁴ Swayne also joined Bradley's dissent in *Blyew v. United States*.³⁵⁵

Miller thought Swayne a "timid" man, "much governed by authorities" with which Swayne was "more familiar" than any of the other Justices.³⁵⁶ Swayne not only knew the authorities, but had "a just estimate of their relative value."³⁵⁷ But Miller's view was that Swayne was too much concerned with "the principle of law which ought to govern" a case and was "not a man much affected by the justice of a case."³⁵⁸

Thus, Swayne had the background to understand the amendment and its history and to be sympathetic to it.³⁵⁹ Yet, Miller tells us that Swayne was careful with authority, not looking to "do justice." These are the marks of a Justice likely to follow the intent of the framers of the Amendment.

4. Chief Justice Salmon P. Chase

Chief Justice Salmon P. Chase is often seen as a minor figure in *Slaughter-House* because he joined Justice Field's opinion and did not write separately. But Chase's vote was significant. His diary indicates that he generally did not dissent in cases in which he was in the minority, because "except in very important cases dissent [is] inexpedient."³⁶⁰

Prior to holding any political office, Chase was known as the "Attorney General for the Fugitive Slaves"³⁶¹ and a "walking arsenal of the law of liberty."³⁶² Indeed, as Les Benedict has stated, Chase was a "preeminent" politician and statesman in his own time and was "recognized . . . as the architect of the mainstream antislavery constitutional argument."³⁶³

354. *Id.*

355. *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 642 (1872).

356. Charles Fairman, *Justice Miller and the Mortgaged Generation*, 23 IOWA L. REV. 351, 373 (1938) (referring to, and quoting from, but not giving a full date for a letter written in the summer of 1868).

357. *Id.*

358. *Id.* Ironically, one could make the same point with respect to Miller's treatment of Fourteenth Amendment cases involving African Americans.

359. In 1883, Swayne, who had retired, strongly supported Harlan's dissent in the *Civil Rights Cases*, writing that it was "one of the great—indeed one of the greatest—opinions of the Court." Letter from Noah Swayne to John M. Harlan (Nov. 20, 1883), quoted in Westin, *supra* note 298, at 681.

360. CHASE PAPERS, *supra* note 32, at 517 (quoting Chase's diary entry of January 16, 1865).

361. HARRY BARNARD, RUTHERFORD B. HAYES 189 (1954).

362. HISTORY OF CINCINNATI AND HAMILTON COUNTY 173 (1894).

363. Michael Les Benedict, *Salmon P. Chase as Jurist and Politician: Comment on G. Edward White, Reconstructing Chase's Jurisprudence*, 21 N. KY. L. REV. 133, 135 (1993).

In speaking of the Thirteenth Amendment, the Civil Rights Act of 1866, and the Fourteenth Amendment, historian Harold Hyman concluded that “[a]s much as anyone in Washington, Chase knew the inside history of all these monumental measures. He shared the motives, fears, and hopes of many of their backers and opponents.”³⁶⁴

Chase would have liked the Fourteenth Amendment to have guaranteed the right to vote for black men.³⁶⁵ But even without that guarantee, Chase’s fear during the ratification process was that the Fourteenth Amendment might have gone too far to enjoy enough political support for it to be ratified.³⁶⁶ Chase had given evidence of being willing to enforce the intent of the Thirteenth Amendment and acceptance of the Wilson view of Congress’ power by his broad reading of the Amendment and the 1866 Civil Rights Act in *In re Turner*.³⁶⁷ After the proposal of the Fourteenth Amendment Chase argued for the “adoption of the Constitutional Amendment” to Southern guests in his home.³⁶⁸

364. Harold Hyman, *Comment on Robert Kaczorowski’s Paper, The Chase Court and Fundamental Rights*, 21 N. KY. L. REV. 193, 196 (1993). *Contra* FAIRMAN, *supra* note 157, at 1462 (“Chase is to be credited with no adequate comprehension.”).

For example, on the day of the vote on the Fourteenth Amendment in the House, Chase hosted a dinner which Congressmen Washburne, Patterson and Hayes, two generals, Secretary of the Treasury McCulloch, and the Director of the Smithsonian attended. When Bingham failed to come to the dinner, Chase noted in his diary that Bingham had “made a great speech” in Congress and was “probably revising the report.” CHASE PAPERS, *supra* note 32, at 610 (diary entry for May 10, 1866).

The speech to which Chase made reference was Bingham’s last speech supporting the adoption of the Fourteenth Amendment before the House voted that same day. CONG. GLOBE, 39th Cong., 1st Sess. 2541-44 (May 10, 1866). In that speech Bingham indicated that the “want” of the Constitution had been the “power” for the “whole people” of the United States to “protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person against state infringement.” *Id.* at 2542. In speaking about the violations of these rights by the states in the past, Bingham made specific reference to the Eighth Amendment, quoting, with quotation marks in the Globe version of the speech, “cruel and unusual punishments.” *Id.*

365. Chase consistently advocated the right of African-American men to vote. He frequently tried to convince others this was the best policy, CHASE PAPERS, *supra* note 32, at 605-06 (entry of Jan. 7, 1866) and made “universal suffrage” the basis of his attempt to secure the Democratic nomination for President in 1868. *See* J.W. SHUCKERS, *THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE* 567 (1874) (reprinting a statement that Chase circulated).

366. JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 118 (1956) (“Even loyal people in Northern states . . . might oppose the amendment because of its threat to state rights.”) *quoted in* Raoul Berger, *Activist Indifference to Facts*, 61 TENN. L. REV. 9, 15 (1993). *See also* FAIRMAN, *supra* note 153, at 1462 (quoting letter of Chase to Justice Field, April 30, 1866, suggesting that Sections 2 and 4 were enough: “Prohibiting the States from interfering with the rights of citizens” and granting Congress enforcement power was, in Fairman’s paraphrase “beyond what was expedient”) (footnote omitted).

367. 24 F. Cas. 337, 339 (C.C.D. Md. 1866).

368. CHASE PAPERS, *supra* note 32, at 640 (diary entry of Sept. 24, 1866).

In the *Legal Tender Cases*,³⁶⁹ Justice Miller complained of the "desperate struggle" he had to wage against Chase and told of his effort to keep up "my forces" against "a domineering Chief."³⁷⁰ Indeed, while Miller complained that "the trouble" with Bradley was that Bradley did not recognize Miller's "intellectual preeminence,"³⁷¹ Miller said of Chase that there was "no one against whom I would attempt to measure myself with more diffidence."³⁷² Likewise, Justice Strong indicated that it was in "semi political" cases, those which were constitutional or which arose from "legislation during or following the war," that Chase "showed great power."³⁷³

It is unlikely that any such struggle took place here, because *Slaughter-House* was decided three weeks before Chase's death³⁷⁴ and he was ill during that time.³⁷⁵ But unlike Miller, who was appointed to the Court primarily to satisfy the requirements of the politics of geography and regionalism, Chase was appointed because Lincoln thought well of his abilities³⁷⁶ and felt confident that as Chief Justice Chase would preserve the victory of the Civil War. Indeed, even though Miller had supported the Lincoln administration in its war measures and Chase had been a political rival and a politically faithless Secretary of the Treasury, it was Chase, and not Miller, whom Lincoln chose for Chief Justice. And it was Chase, not Miller, who was most likely to be faithful to the aims of the Fourteenth Amendment.

V. THE VIEW OF HISTORY: 1873-1949

If, as suggested above, the dissenters were the ones faithful to the intent of the Fourteenth Amendment, one would expect to find evidence of this in the commentary on the cases. The purpose of this

369. *Knox v. Lee*, 79 U.S. 457 (1871).

370. FAIRMAN ON MILLER, *supra* note 30, at 170-71.

371. FROM THE DIARIES OF FELIX FRANKFURTER 312 (Joseph P. Lash ed., 1975) (entry of Apr. 25, 1947).

372. White, *supra* note 169, at 41.

373. FAIRMAN, *supra* note 157, at 1476-77.

374. FREDERICK J. BLUE, SALMON P. CHASE: A LIFE IN POLITICS 306 (1987).

375. White, *supra* note 169, at 81. Robert Kaczorowski has speculated that a healthy, vigorous Chase might have been able to gain Justice Strong's vote and turn the minority into a majority. Kaczorowski, *supra* note 160, at 191. Similarly, David Hughes wondered "what the outcome would have been had Chase lived in good health." David F. Hughes, *Salmon P. Chase: Chief Justice*, 18 VAND. L. REV. 569, 614 (1965).

On the other hand, Field's opinion has the appearance of being drafted as a majority opinion. This raises the possibility that the dissenters once had a majority and, with or without a struggle, one member changed his vote.

376. "Of all the great men I have ever known, Chase is equal to about one and a half of the best of them." Abraham Lincoln, *quoted in* SHUCKERS, *supra* note 365, at 488.

section is to examine the work of historians and lawyers from 1873 through 1949³⁷⁷ concerning the *Slaughter-House Cases*.

A. General Reaction of the Press and the Congress

The reaction of the press to the decision was mixed. *The Nation* had reacted to the Circuit Court decision of Bradley and Woods by expressing fear that if it were upheld by the Supreme Court "every moneyed [sic] corporation in the country is in danger of destruction."³⁷⁸ By the time of the Supreme Court decision many recognized the cases as "among the most important decisions ever rendered by the Supreme Court."³⁷⁹ After encapsulizing the dissenting opinions, the *Chicago Legal News* concluded that "the better reason is with the dissenting four of the nine Judges."³⁸⁰

The Congressional reaction to the *Slaughter-House Cases* can be seen in the debate over what was to become the 1875 Civil Rights Act. The opponents of the Bill, almost exclusively Democrats, sought to define all the substantive provisions of the Civil Rights Bill as being incidents (privileges or immunities) of state citizenship and therefore outside of the scope of Congress' jurisdiction under the *Slaughter-House Cases*.³⁸¹ Many Republicans conceded the general right of the

377. As will be developed more fully below, it appears that Charles Fairman's seminal 1949 article, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949), marked the end of one era of *Slaughter-House* scholarship and the beginning of another. Prior to Fairman's article, scholars writing on the *Slaughter-House Cases* found them to be contrary to the intent of the framers of the Fourteenth Amendment. This was true even of those who praised the *Slaughter-House* decision and who liked its result.

Fairman, by suggesting that a review of the legislative history of the Privileges or Immunities Clause could produce no better results than that reached by the *Slaughter-House Cases*, opened the door to the argument that there was no inconsistency between the *Slaughter-House Cases* and the intent of the Framers of the Fourteenth Amendment. As a result, after 1949 the debate changed from a focus upon the desirability of the results of the *Slaughter-House Cases* to question the intent of the framers of the Fourteenth Amendment. This new debate produced a variety of conflicting articles.

378. *Monopolies and the Fourteenth Amendment*, 1870 THE NATION 361 (Dec. 1, 1870).

379. *The Slaughter-House Cases*, 1873 ALB. L.J. 289 (May 10, 1873). See also *Summary of Events: United States*, 7 AM. L. REV. 732 (1873) (noting that the interpretation of the Civil War Amendments by the Court "is . . . one of the most important acts of government, growing out of the war"); *The Recent Amendments to the U.S. Constitution Construed*, 5 CHI. LEGAL NEWS 414 (May 24, 1873) ("No more important opinion was ever delivered by any tribunal.").

380. *The Recent Amendments to the U.S. Constitution Construed*, supra note 379, at 414.

381. James B. Beck (D.-Ky.), 43 CONG. REC. 342 (Dec. 19, 1873) ("corporations, and inferentially . . . common schools" under state control); John T. Harris (D.-Va. 43 CONG. REC. 376 (Jan. 5, 1874) (no new rights are conferred on Congress and states are free to "manage their internal policy" as long as "the same protection" is given to life, liberty, and property); William S. Herndon (D.Tex.) 43 CONG. REC. 420-21 (Jan. 6, 1874) (indicating that the rights protected are in the Bill of Rights and treaties, but arguing that the subject of the Civil Rights Bill relates to local matters under the jurisdiction of the states); Milton I. Southard (D.-Ohio), 43 CONG. REC. app. at 2 (Jan. 7, 1874); William T. Hamilton (D.-Md.), 43 CONG. REC. app. at 362 (May 22,

state to regulate schools, grave-yards, inns, and opera houses, but still insisted upon prohibiting discrimination in that regulation under the Equal Protection Clause.³⁸² But Senator Frederick Frelinghuysen, a Republican from New Jersey, indicated that he was “aware” of the majority opinion in *Slaughter-House*, but that the Circuit Court opinion “undoubtedly [gave] the true construction to the amendments as to their application.”³⁸³

In the course of Democratic Senator Allen Thurman’s argument on the Civil Rights Bill of 1875, Thurman indicated that federal privileges and immunities “must necessarily be derived from the Constitution of the United States,” referencing the Bill of Rights.³⁸⁴ Conservative Wisconsin Republican Senator Timothy O. Howe interrupted Thurman to suggest that Article IV, Section 2 referred to “[p]rivileges of citizens of the United States.”³⁸⁵ Similarly, moderate Indiana Republican Senator Oliver Morton insisted that the privileges and immunities of Article IV, Section 2 were identical with those of Section 1 of the Fourteenth Amendment.³⁸⁶ In the continuing ex-

1874); William B. Read (D.-Ky.), 43 CONG. REC. app. at 342 (May 29, 1874); William E. Finck (D.-Ohio), 43 CONG. REC. app. at 949 (Feb. 3, 1875); Eppa Hunton (D.-Va.), 43 CONG. REC. app. at 119 (Feb. 3, 1875); John A. Smith (R.-Va.) 43 CONG. REC. app. at 157 (Feb. 3, 1875); Allen G. Thurman (D.-Ohio), 43 CONG. REC. 1791 (Feb. 26, 1875).

382. E.g., Robert B. Elliott (R-S.C.), 43d Cong., 1st Sess. 408-09; William Lawrence (R-Ohio), 43d Cong., 1st Sess. 413 (Jan. 6, 1874)(*Slaughter-House* cases “concede the power to pass this bill.”); Benjamin Butler (R-Mass.) 43d Cong., 1st Sess. 455 (Jan. 7, 1874) (indicating agreement with Elliott’s analysis of *Slaughter-House*); Frederick Frelinghuysen (R.-N.J.) 43rd Cong., 1st Sess.(April 29, 1874); Oliver Morton (R-Indiana), 43 Cong., 1st Sess. App. 359 (May 21, 1874); Timothy O. Howe (Union Rep.-Wisc.) 43d Cong., 1st Sess. 4148 (May 22, 1874); and John Roy Lynch (R-Miss.), 43d Cong., 2d Sess. 943 (May 3, 1875).

Senator James L. Alcorn (R.-Miss.), a former Confederate officer, dismissed Miller’s opinion in *Slaughter-House* as dicta and used Miller’s *Crandell v. Nevada*, 73 U.S. (6 Wall.) 35 (1867) decision to argue in favor of the Bill. Alcorn suggested that discrimination in transportation impeded the right to travel as much, or more, than Nevada’s tax and that Miller’s opinion therefore supported the Act. CONG. GLOBE, 43d Cong., 1st Sess. App. 304 (May 22, 1874).

Representative George F. Hoar (R.-Mass.) argued that *Slaughter-House* was irrelevant to the Civil Rights Bill and relied upon *McCulloch v. Maryland*, 17 U. S. (4 Wheat) 316 (1819). 43rd Cong., 1st Sess. 980 (Feb. 4, 1875). Representative Benjamin F. Butler (R.-Mass.) limited the effect of *Slaughter-House* to “the law of the case” and held it irrelevant to the matter before the Senate. 43d Cong., 1st Sess. 1792 (Feb. 26, 1875).

383. 43 CONG. REC. 3451 (Apr. 29, 1874). In making this statement, Frelinghuysen was focusing upon the question of whether the Amendment applied to those who were not African Americans. But Frelinghuysen also quoted from and relied upon that same opinion’s interpretation of Article IV. *Id.* at 3454.

This same opinion, particularly when read in light of Bradley’s Supreme Court dissent, left no doubt that Bradley felt the Fourteenth Amendment enforced the Bill of Rights against the states.

384. 43 CONG. REC. 4085-86 (May 20, 1874).

385. *Id.* at 4087.

386. *Id.* It is unclear whether Morton was suggesting both clauses protected the privileges and immunities “of state citizens” or that state citizens were also federal citizens and that both clauses protected national privileges and immunities.

change between Thurman and Morton, Thurman admitted that the rights of Article IV, Section 2 were treated as being identical in the Senate, "in this Hall," but argued that they had not been treated as the same by the Court.³⁸⁷ In response to Thurman's assertion that the *Slaughter-House Cases* had made "the final determination of what is the law and Constitution of this land" Vermont Republican George F. Edmunds, a member of the Senate when the Amendment was proposed, interrupted from his seat: "I do not admit it."³⁸⁸

The key framers of the Fourteenth Amendment had left Congress by this time. Death had claimed Thaddeus Stevens and Jacob Howard. John Bingham was denied renomination for Congress and was about to embark upon an ambassadorship. But the "destruction" of the purpose of the amendment was lamented by framers such as Senator George F. Edmunds,³⁸⁹ Senator Timothy Howe,³⁹⁰ Senator Oliver Morton,³⁹¹ and Senator James Blaine.³⁹² Former Attorney General Benjamin Bristow thought the Fourteenth Amendment, once the Constitution's "crowning glory" was being "frittered away by judicial construction."³⁹³

B. Legal Commentary

The initial legal commentaries had, of course, indicated that the minority opinion had the better interpretation of the Amendment.³⁹⁴ Writing in 1878, former Confederate and Democratic lawyer William Royall suggested that Miller's opinion was a result of "alarm at the

387. *Id.*

388. *Id.*

389. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 541 (1928). Edmunds indicated that Miller's decision was "radically" different from "the intent of the Framers and the construction of the language used by them."

390. HOWARD N. MEYER, *THE AMENDMENT THAT REFUSED TO DIE* 77 (rev. ed. 1978). Howe likened Miller's opinion to *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), and indicated that the people would say "it was not law and could not be law."

391. 4 CONG. REC. 5585 (1876) (complaining that the Supreme Court had taken the "broad, ample, and specific" Fourteenth and Fifteenth Amendments and "in some respects almost destroy[ed them] by construction.").

392. 2 JAMES G. BLAINE, *TWENTY YEARS OF CONGRESS* 419 (1886) (Congress followed the intent of the framers and the Court had deprived the amendment "in part of the power which Congress no doubt intended to impart to it.").

393. Letter from Bristow to O.P. Morton (May 6, 1873), *quoted in* ROSS A. WEBB, *BENJAMIN HELM BRISTOW: BORDER STATE POLITICIAN* 121-22 (1969). Bristow proposed that a constitutional amendment be sought, but Morton was too ill to pursue the matter. *Id.*

For that very reason, Mississippi's former Confederate Colonel and future U.S. Supreme Court Justice, Representative Lucius Q.C. Lamar, praised the Supreme Court as a "refuge" from reconstruction legislation and referred to the *Slaughter-House Cases* as an example of the Supreme Court's protection. 44 CONG. REC. 999 (Jan. 26, 1877).

394. *See supra* note 379.

centralizing tendency of the government" and that while the majority's opinion was "patriotic," it was not "wise" to change the meaning of the Amendment.³⁹⁵ Instead, Royall argued the Court should have given the Amendment "a literal construction . . . and leave it to the institutions themselves to cure the evils which flowed from it at the ballot box."³⁹⁶

Royall thought the need for national enforcement came because states might infringe upon the privileges and immunities of African Americans.³⁹⁷ Royall thought the minority view presented "with great ability" and the majority interpretation not the Amendment's "primary and most obvious signification."³⁹⁸

The 1890s was probably the nadir of concern similar to those of the Reconstructionists.³⁹⁹ Yet during that time John W. Burgess of Columbia would write that the Court in *Slaughter-House* had thrown away the "great gain in individual liberty" won through the Civil War.⁴⁰⁰ Burgess thought the Bill of Rights were the privileges and immunities of natural citizenship and was confident that in the future the *Slaughter-House* decision would be seen as "intensively reactionary" and overturned.⁴⁰¹ Harvard Law Professor James Bradley Thayer thought the *Slaughter-House* minority "seems to be the sounder."⁴⁰² Independent scholars like corporate attorney William D.

395. William L. Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 1878 SOUTHERN L. REV. 558, 576-78 (1878).

396. *Id.* at 577.

397. *Id.* at 579.

398. *Id.* at 559, 563. Indeed, Royall suggested that ninety-nine out of a hundred people would read the Amendment differently from the majority, and "it is only by an effort of ingenuity" that the majority could advance its position. *Id.* at 563.

Charles Fairman discounted Royall's analysis because he represented bondholders opposing Virginia's Readjuster Movement and later supported Justice Field's bid for the Democratic nomination as President. FAIRMAN, *supra* note 157, at 1372-74. It is, however, not self-evident how Royall's acknowledgment that the Amendment was necessary to protect the rights of African Americans would help the Conservative Party in Virginia or Virginia bondholders. Similarly, while his political work for Justice Field in 1880 may affect one's assessment of Royall's publications during that time, without a showing of a prior relationship, it does not inevitably follow that it has an effect retroactive to 1878 which Fairman attempts to give it.

John Norton Pomeroy, another supporter of Field, later referred to Royall's article as a "very instructive and able" article. See SOME ACCOUNT, *supra* note 108, at 128.

399. E.g., RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO* 88-104 (5th ed. 1970). This chapter is entitled "The Nadir under McKinley."

400. 1 JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* 228-30 (1890). Burgess was no radical. He is generally associated with William Dunning and the "Dunning School" of Reconstruction.

401. *Id.*

402. NELSON, *supra* note 12, at 159.

Guthrie would conclude that the intent of the framers of the Fourteenth Amendment was to incorporate the Bill of Rights.⁴⁰³

Ohio Congressman Samuel Shellabarger had been a "principal Radical theoretician,"⁴⁰⁴ but as early as 1871 he had indicated that he did not "want the full idea of the Fourteenth Amendment interpreted by the old rules of construction."⁴⁰⁵ In the memorial services for Chief Justice Waite in 1888, Shellabarger acknowledged that Waite's decision in *United v. Cruikshank*⁴⁰⁶ was contrary to the intent of the framers of the Fourteenth Amendment, but indicated that Waite would still be well thought of by history because "the lapse of years had matured men's views and cooled their feelings regarding the results of the late war."⁴⁰⁷ The linkage between an acknowledgment that the Court had refused to enforce "the letter" of the Amendment and a feeling that its action was legitimate because the tumultuous times of Reconstruction called forth no deference is seen in the histories of the Court.

University of Missouri Law Professor Christopher G. Tiedman indicated that if the Court had applied the Amendment's language as written, it would have put an end to "local self-government."⁴⁰⁸ The Court avoided that "disastrous result" by its "bold and courageous"

403. WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH AMENDMENT 58-59 (1898).

See also Hon. D.J. Brewer, Protection of Private Property from Public Attack: An Address Delivered Before the Graduating Classes at the Sixty-Seventh Anniversary of Yale Law School 22 (June 23, 1891). Though this speech is often cited for Brewer's declared objective of protecting private property, his statements also refer to the protection of personal rights generally.

404. WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 164 (1972).

405. Letter from Shellabarger to J. Comly (Apr. 10, 1871), Comly MSS, Ohio Historical Society. The relevant portions of this letter are quoted in HYMAN & WIECEK, *supra* note 133, at 471 (1982). Shellabarger had been the manager, in the House of Representatives, of the 1871 Force Bill. *Id.*

406. 92 U.S. 542 (1875).

407. *In Memoriam: Morrison Remick Waite, L.L.D.* 126 U.S. app. 585, 600-01 (1888). In that same address Shellabarger spoke of "judicially adjusting the constitutional amendments to the States," *id.* at 604, and "reconstruct[ing] the symmetry and strength of judicial predominance over the passions and memories of war." *Id.* at 607.

Waite's first biographer frankly admitted that *Cruikshank* and the *Slaughter-House Cases* "marked the overthrow of the congressional plan of reconstruction within seven years after the adoption of the Fourteenth Amendment." BRUCE R. TRIMBLE, CHIEF JUSTICE WAITE: DEFENDER OF THE PUBLIC INTEREST 172 (1938).

It may be significant that Shellabarger represented the Hayes electors in the 1876 electoral dispute and may have therefore been involved in the "compromise" of 1877. See CHARLES FAIRMAN, FIVE JUSTICES AND THE ELECTORAL COMMISSION 172 (1938).

408. CHRISTOPHER G. TIEDMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 102 (1890).

decision in *Slaughter-House*.⁴⁰⁹ “The noble fundamental purpose of the Court” resulted in “checking the literal operation of the fourteenth amendment.”⁴¹⁰ The justification for that action was to keep “the amendment within the limits which [the majority of the Court] felt assured would have been imposed by the people, if their judgment had not been blinded with passion, and which in their cooler moments they would ratify.”⁴¹¹ In explicitly acknowledging that the opinion violated the intent of the people who “ratified” the amendment, and not just the framers, Tiedman wrote:

Feeling assured that the people in their cooler moments would not have sanctioned the far-reaching effects of their action; that they lost sight of the general effect in their eager pursuit of a special end, the court dared to withstand the popular will as expressed in the letter of this amendment⁴¹²

Thus, the *Slaughter-House Cases* worked “a successful modification of the rule found in the fourteenth amendment.”⁴¹³

Hampton Carson, writing in 1891, praised the Court as the “great conservative department government” and justified its actions as seen “after the lapse of years, when the temper and spirit in which the text of the Amendments was penned has cooled, and the views of men have matured.”⁴¹⁴

The new century brought the work of government reformist Horace Flack concluding that the Amendment applied the Bill of Rights to the states.⁴¹⁵ Even Justice Moody, who refused to follow the intent of the Amendment, admitted that “[u]ndoubtedly, [the *Slaughter-House Cases*] gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended.”⁴¹⁶

409. *Id.* Bernard Schwartz indicates that Tiedman was “second only to [Thomas] Cooley in his influence on [the] bench and Bar.” BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 303 (1993).

410. TIEDMAN, *supra* note 408, at 106.

411. *Id.* This theme actually began with the announcement of the *Slaughter-House* decision. See *Slaughter-House*, 83 U.S. at 82; Kaczorowski, *supra* note 160, at 190 n.171 (quoting the April 24, 1873 *Chicago Tribune*, which indicated that the Supreme Court had recovered “from the War fever, and . . . abandoned sentimental canons of [constitutional] construction”).

412. TIEDMAN, *supra* note 408, at 102-03.

413. *Id.* at 108.

414. 2 HAMPTON L. CARSON, *HISTORY OF THE SUPREME COURT 485-86* (1891). A textbook for law students in 1899 echoed this view: “It is best, we think, that the amendments which were adopted in haste, and reluctantly accepted by a portion of the Union, should have been construed as they have been,—mildly.” CHARLES E. CHADMAN, *CONSTITUTIONAL LAW: FEDERAL AND STATE* 169 (1899). Immediately following this sentence is a discussion of the minority opinion in *Slaughter-House* with an indication that “[a] wiser opinion prevailed.” *Id.*

415. HORACE E. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 94 (1908).

416. *Twining v. New Jersey*, 211 U.S. 78, 96 (1908).

Four years later a source unsympathetic to reconstruction determined that *Slaughter-House* and *Cruikshank* “marked the practical overthrow of the Congressional ideal for the Fourteenth Amendment within seven years after its victorious adoption.”⁴¹⁷ A year later another commentator wrote that the Supreme Court “began its series of adjudications under the Fourteenth Amendment by substantially repudiating it.”⁴¹⁸

Indeed, in his classic *The Supreme Court in United States History, 1836-1919*,⁴¹⁹ Charles Warren noted that Miller’s opinion was “directly contrary” to the intent of the framers of the Amendment and that in its history the Court had, with “very little variation” acted to “controvert the purpose of the Amendment [and] to belittle its effect.”⁴²⁰ Warren welcomed this action by the Court and quoted a portion of Carson with approval.⁴²¹

Until 1949 the leading commentaries all suggested that Amendment had been interpreted by the Court contrary to its intent.⁴²² Thus, for over seventy-five years the major figures to speak upon the

417. CHARLES W. COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* 22 (reprint 1974) (1912). Collins had little sympathy for the goals of the framers of the Fourteenth Amendment. But he concluded that the “majority of the United States Supreme Court in interpreting [the Fourteenth] amendment followed, in effect, the reasoning of the Democratic opposition, and refused to give effect to the ideas of the Radical Republicans.” *Id.* at 15. See also D.O. McGovney, *Privileges or Immunities Clause: Fourteenth Amendment*, 4 IOWA L. BULL. 219, 219 (1918) (Supreme Court “completely disappointed the avowed purposes of some of its framers”).

418. EVERETT V. ABBOTT, *JUSTICE AND THE MODERN LAW* 75 (1913).

419. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 541 (1928).

420. *Id.* at 567.

421. *Id.* at 608. Warren’s approval was based in large part on his view that the Court’s decision had “largely eliminated from National politics the [N]egro question” and “relegated the burden and duty of protecting the negro to the States, to whom they properly belonged.” *Id.* Carson is quoted with approval in *id.* at 616-17.

422. For an example indicating that *Slaughter-House* was incorrect because it defeated the framers’ intent to incorporate the Fourteenth Amendment, see Lucile Lomen, *Privileges and Immunities Under the Fourteenth Amendment*, 18 WASH. L. REV. 120 (1943) (designed to overrule *Barron v. Baltimore*).

There are some commentators who have taken the view that the Court was correct in *Slaughter-House*. Fairman does so on the grounds that he could not discover the intent, and that Justice Cardozo’s due process formulation “implicit in . . . ordered liberty” was as good as one could do in applying it. Fairman, *supra* note 18, at 139 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

Arnold Lien, having found that the “tide of extremism and vindictiveness” from early days “subsided” by 1873 and that congressional leadership had changed (two-thirds of the Joint Committee, including Bingham and Howard, were no longer in Congress), and a lack of any “general outburst of condemnation” of the decision, concluded that the decision must have been consistent with that of Congress, the legislatures and the people. ARNOLD J. LIEN, *CONCURRING OPINION: THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT* 82-83 (1958). This analysis, of course, ignores the fact that Lien is comparing the attitude of 1873 with that of 1868 or even 1866.

Robert Bork has also been unable to discover the intent of the clause and has compared it to an “inkblot.” BORK, *supra* note 7, at 166.

Slaughter-House Cases, whether to praise them or to condemn them, consistently indicated that Justice Miller's opinion was contrary to the intent of the Fourteenth Amendment. This history reinforces the view that Miller's opinion was an illegitimate one.

CONCLUSION

This study has shown that there was a clear consensus that the Privileges or Immunities Clause of the Fourteenth Amendment was to have a substantive role. That role was to enforce national privileges and immunities or rights. Those rights, whether examined from a textual, legislative history or policy viewpoint, were chiefly the Bill of Rights. These views were before the public in the debates of Congress and undoubtedly specifically known to the Justices.

When one examines the opinion articulated by Justice Miller to defend the majority decision, one finds the errors so immense and the gap between the intent of the amendment and Miller's ruling so great, that many are willing, on that basis alone, to believe the Miller deliberately attempted to defeat the force of the amendment. An examination of Miller's background suggests that Miller was hostile to the Fourteenth Amendment and the Congress which proposed it. He had the personality to purposely negate an amendment he felt was unwise.

Miller, of course, had to obtain four other votes to accomplish his result. But in examining the background and views of the other Justices, we find that staunch conservative Democratic Clifford and anti-emanicipationist Davis had the background and temperament to join Miller in such an enterprise. The data on Hunt and Strong is much more ambivalent, but Strong had been a Democrat most of his life and no evidence exists suggesting his support for the Fourteenth Amendment. Hunt had been on the Supreme Court bench for less than a month when the decision was argued and only three months when the decision was announced.

On the other hand, Chase, Bradley, Field and Swayne were all part of the "Union" coalition. Field, Chase, and Swayne all welcomed the Fourteenth Amendment and, while Bradley's views on the adop-

William E. Nelson views Section 1 as conflicting with local self-rule in a way not seen by the framers and therefore incapable of being resolved by original intent. In these circumstances, Nelson concludes the Court did the best it could. William E. Nelson, *The Role of History In Interpreting the Fourteenth Amendment*, 25 LOY. L.A. L. REV. 1177, 1178 (1992).

Palmer reads *Slaughter-House* in an unconventional way and suggests that Miller actually suggested the Bill of Rights were privileges and immunities under the Fourteenth Amendment and that it was *Cruikshank* which nullified the Amendment. See generally Palmer, *supra* note 143.

tion of the amendment are unknown, his personal and family background no doubt gave him an added sensitivity to the arguments advanced in support of the amendment.

Bradley's dissent seems to be against his own political proclivities. Swayne appears to be in sympathy with the purposes of the Amendment, but his personality, as described by Miller, was such that we can trust him to try to apply their intent and not "do justice" on his own. Chase had been specifically chosen by Lincoln, over Miller, for just such an occasion. Chase had the background to know and sympathize with the intent of the framers and yet, because of his own fear that the Amendment went too far to enjoy majority political support, can be trusted to have cast his own vote to implement the intent of the Amendment and not simply his own preferences. Finally, War Democrat Field was also a Lincoln appointee. Field, unlike Miller, Davis and Clifford, welcomed the amendment. There can be no doubt but that the dissenters were more likely to properly express the intent of the Amendment than the majority.

It has been suggested that the Supreme Court has "compensated" for the loss of this clause by reading some of its purpose into the Due Process and Equal Protection Clauses.⁴²³ Indeed, while Justice Goldberg suggested that the *Slaughter-House Cases* should be overruled,⁴²⁴ Justice Douglas indicated that, at least in the Eighth Amendment context, the "result is the same" whether one used due process or privileges or immunities.⁴²⁵

While the result may be the same in most instances, the proper interpretation of the Privileges or Immunities Clause would change our jurisprudence with respect to the unincorporated portions of the Bill of Rights, primarily in the application of the Second, Third, Fifth, and Seventh Amendments. Further, it distorts our understanding of the Constitution to reach a "correct" result through a forced reading of the Due Process Clause. It makes the Court engage in a decision-making process it knows is wrong, and, thereby, teaches everyone disrespect for the Court and the rule of law.

423. Lucie, *supra* note 7, at 861-62. It has also been suggested that Miller's opinion "obligated" the Justices to read matters into the Due Process Clause which would not have otherwise been there. See Edwin Borchard, *The Supreme Court and Private Rights*, 47 *YALE L.J.* 1051, 1063 (1938). It is possible that the "distortion" of the Due Process Clause which New Dealers like Felix Frankfurter and Charles Fairman abhorred was the price to be paid for the "distortion" and destruction of the Privileges or Immunities Clause which they applauded.

See also LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 554 (2d ed. 1988) (majority opinion "helped pave the way for the substantive due process doctrine").

424. *Stripping Away the Fictions*, *supra* note 7, at 557.

425. *Furman v. Georgia*, 408 U.S. 238, 241 (1972).

Justice Bradley's "great question" was "[w]hat is the true construction of the [Fourteenth] amendment?"⁴²⁶ The Thirteenth and Fourteenth Amendments were designed to establish "universal civil freedom."⁴²⁷ Justice Harlan's words in the *Civil Rights Cases*⁴²⁸ seem equally applicable to Miller's opinion in the *Slaughter-House Cases*: The Supreme Court limited the law of freedom "by a subtle and ingenious verbal criticism" which is inconsistent with the "substance and spirit" of the Amendment.⁴²⁹

426. *Slaughter-House Cases*, 83 U.S. at 124.

427. *Plessy v. Ferguson*, 163 U.S. 537, 563 (1896) (Harlan, J., dissenting).

428. 109 U.S. 3, 26 (1883).

429. *Id.*