CONSTITUTIONAL TORTS IN 'THE FORGOTTEN YEARS': RETRACING THE WINDING ROAD TO *MONROE V. PAPE*

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I. The Brief Triumph of Radical Republican Theory of Constitutionalism

A. The Ku Klux Klan Act of 1871

The Civil Rights Act of 1871[1] became popularly known as the Ku Klux Klan Act. The language in Section 1 remained largely the same as in Shellabarger's H.R. 320, despite the lengthy attempts in the Senate to add to the liability provisions.[2] The final, enacted version of Section 2, which was considered the core of the bill, did undergo some changes. The final version of Sec. 2 provided for civil and criminal sanctions against public and private conspiracies, including efforts to (a.) challenge federal authority; (b.) deprive persons of the "equal protection of the law," or (c) prevent states from protecting persons against deprivations of their rights. Sections 3 and 4 authorized the use of federal force to redress a state's inability or unwillingness to deal with the Klan or other violence. Sections 3 and 4 went so far as to state that state complicity against anti-federal combinations would be deemed "rebellion against the government of the United States," with a resulting suspension of the writ of habeas corpus. Section 5 included a juror oath in federal courts, which required jurors to declare that they had "never, directly or indirectly, counseled, advised, or voluntarily aided" any Klan activities. Section 6 introduced penalties for those aiding conspiracies as defined in Sec. 2. Section 7 stated that the bill would not supercede other enforcement acts.

The first four sections of the Act demonstrate the seriousness of purpose felt by Congress in the face of the widespread violence in the South. Republicans united around

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[1] Civil Rights Act of 1871, 17 Stat. 13. For a reprint of the legislation, see Library of Congress, American Memory, *A Century of Lawmaking for the New Nation: U.S. Congressional Documents and Debates, 1774-1875*, available at http://memory.loc.gov/cgibin/ampage?collId=llsl&fileName=017/llsl017.db&recNum=54.

[2] For more on the debates preceding the enactment of the Civil Rights Act of 1871 *see* (Dodd 2004: Ch. 2).

their recognition that the full authority of Congress under the 14th Amendment to protect the rights of U.S. citizens trumped all competing concerns about states' rights or the values of federalism. The sheer scope of the Klan reign of terror convinced Republicans to rally around the most Radical understanding of the 14th Amendnment. The Republicans' "Revolutionary Constitutionalism" reached its zenith with the Civil Rights Act of 1871.[3]

B. Tort versus Criminal Enforcement Strategies

Although members of Congress thought it important to include tort provisions in enforcement legislation, hoping that it would provide an indirect way to encourage leaders of communities to help suppress the Klan, it was at that point an unrealistic option.[4] Impoverished, intimidated blacks, and their Republican sympathizers, could hardly be expected to take up the responsibility and fund the cost of civil lawsuits against those officials who had already demonstrated they were unable to assist them, or were, at worst, collaborators with the Klan.[5] The primary responsibility for enforcement was therefore given to the federal government, where the Department of Justice,[6] itself

[3] (Kaczorowski 1986).
[4] The Attorney General observed that "the sufferers of the crimes punishable by these Acts [of Congress] are, for the most part, poor and ignorant men, who do not know how to put the law in motion, or who have some well-grounded apprehension of danger to themselves from the attempt to enforce it." (Hyman 1973: 480)(quoting letter from Amos T. Akerman to C. Cole, Jan. 31, 1871).
[5] The group that was in the position to rely on civil damages suits during Reconstruction was southern whites, who sued Freedmen Bureau officials and military officers in such large numbers following the war that Congress included a removal provision in the 1863 Habeas Corpus Act (and later revised and expanded in 1866 and 1867), in order to guarantee to federal officer defendants the option of removal the case from state to federal court. (Hyman 1973: 452, 471-4).
[6] Congress created the Department of Justice in 1870, in order to increase efficiency and also to assist with the Klan prosecutions. (Kaczorowski 1985: 79). For a succinct overview of the history of the Office of the Attorney General leading up to the creation of the Department of Justice, *see* (Goldman 2001: 25-31).

burdened by inadequate resources and funding, would supervise the federal criminal prosecutions.[7]

The Attorney General in charge of enforcement, Amos T. Akerman, was a moderate Republican, but his experiences in Georgia convinced him that the Klan would not be suppressed without an aggressive enforcement policy.[8] The already burdened U.S. Attorneys stationed across the South were given the task of implementing these laws, and they continued to file reports to Washington, supplementing the volumes of testimony the Joint Committee in Congress was gathering, describing the Klan violence. After reviewing the reports, Akerman concluded that "these combinations amounted to war," and, one federal judge in the south, Judge Bond, became convinced that only military force could bring down the Klan.[9]

Ackerman nevertheless pursued a policy of enforcement in federal courts. He had issued a circular soon after taking office in June 1870, urging all federal legal officers to prosecute every reported civil rights violation. The goal was to demonstrate to the Klan and its supporters that the federal government was taking its criminal enforcement powers seriously, and thereby intimidate them into submission. The federal officials faced incredible obstacles. There was little or no funding available for investigations. Each U.S. Attorney was responsible for a vast geographical area, and would have to travel hundreds of miles to meet with witnesses. The federal prosecutors were completely overwhelmed.[10]

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[7] Although there were criminal provisions in the 1866 Civil Rights Act, the Johnson Administration had discouraged their use. (Kaczorowski 1985: 49)
[8] *Id*. at 79-80.
[9] (Kaczorowski 1995: 159).
[10] *Id*. at 57-8, 83-4.

Making matters worse were the definitions of crimes included in Section 2 of the Civil Rights Act of 1871. After much debate in the Senate, the conference committee finally settled on a private conspiracy provision that included an intent element. This change greatly complicated the investigative tasks of the U.S. Attorneys, who now were required to conduct interviews and complete the necessary investigations to meet their burden of proof with respect to intent. The indictments had to be drafted with precision, because in order to support federal jurisdiction, the prosecutors had to establish the intent to deprive someone of a constitutional right. [11]

Working without any clerical or administrative assistants, these prosecutors settled into a routine of trial appearances during the day, and research and preparation every night. They were responsible for trials and conducting other grand jury investigations simultaneously.[12] The U.S. Attorneys sent numerous requests for assistance from the Department of Justice, and Akerman in turn lobbied Congress for additional support. Although Congress made special appropriations for civil rights enforcement, the level of funding remained far below what was needed.[13]

The Klan presented special obstacles. Many of those facing charges were leading members of their communities, and they received a tremendous amount of assistance from their local communities. Their neighbors, for example, often led funding drives for their defense.[14] The leading members of the Klan were able to hire the best legal talent in the South to serve on their defense.

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[11] *Id*. at 59.
[12] *Id*. at 59.
[13] *Id*. at 84-7.
[14] *Id*. at 58.

Judges were burdened by the unprecedented expansion of their dockets. The federal judges supervising the Klan prosecutions did not have clerks to assist them, nor did they have at their disposal legal libraries or research materials. One new federal judge arrived at his court in Memphis, Tennessee to discover a docket backlog of over 400 cases.[15]

Despite these pressures, all of the southern district judges voted to uphold the constitutionality of the enforcement acts. Kaczorowski states: "That these unsympathetic judges accepted or attributed such broad power to Congress under the Reconstruction Amendments is revealing evidence of contemporaries' understanding of the expansive scope of legislative intent and the authority of the national government under the Thirteenth and Fourteenth Amendments."[16] In 1871, the total number of enforcement cases exploded, from 43 in the previous year to 271 – an enormous 630% growth rate. Although the conviction rate dropped as the number of cases expanded, the rate was still comparable to the conviction rate in other, less complex criminal cases (41 % for the civil rights cases, 51 % for other criminal cases).[17] Some U.S. Attorneys were more productive than others. For example, the successes in North Carolina far exceeded the record in the other states, and most of the credit for these prosecutions was due to the combined efforts of the U.S. Attorney, D.H. Starbuck, and the federal circuit judge, Hugh Bond.[18]

The U.S. Attorney in South Carolina, on the other hand, did not fare so well. Democrats decided to focus their constitutional challenges to the enforcement acts in

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[15] *Id*. at 60-1.
[16] *Id*. at 72.
[17] *Id*. at 87.
[18] Id. at 87-8.

South Carolina, because the federal government's enforcement effort had been so aggressive there. In October 1871, Akerman was able to convince Grant to issue a proclamation declaring a "condition of lawlessness" in nine upcountry counties of South Carolina, and to suspend the writ of habeas corpus (pursuant to Sec. 4 of the Ku Klux Klan Act). After federal troops entered these counties, arresting hundreds of Klansmen, an estimated 2,000 or more quickly fled the state. In the trials that followed, the U.S. Attorney, Daniel Corbin was outmatched by the opposing counsel. On behalf of the defendants, Wade Hampton raised the funds to hire Senator Reverdy Johnson and former Attorney General Henry Stanberry, each of whom were widely considered to be among the leading constitutional lawyers in the country, to serve as their counsel.[19] Although, after a month long trial, the five defendants were convicted, the trial left the Attorney General skeptical about the prospects of a criminal enforcement strategy: "If it takes a court over a month to try five offenders, how long will it take to try four hundred, already indicted, and many hundreds who deserve to be indicted?"[20]

By the end of 1871, in order to conserve extremely scarce resource, Akerman had decided to pursue a policy focusing on prosecuting only the highest-ranked leaders, whose fate at the hand of the federal government would serve as a deterrent to the rank and file Klansmen. Those who confessed and identified the Klans' leaders would escape prosecution.[21] One of the major goals of the federal enforcement policy was to use prosecutions as a means of publicizing the Klan's atrocities, in order to maintain public

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[19] *Id*. at 59. This case, challenging the constitutionality of the Enforcement Act of 1870, reached the Supreme Court in 1871. *U.S. v. J.W. Avery et al*., 13 U.S. 251 (1871). For a narrative account of the South Carolina trials, *see* (Williams 1996).

[20] (Swinney 1987: 195)(quoting from the Attorney General's Report of 1871).

[21](Foner 1988: 458; Kaczorowski 1985: 89-91).

support in the North for a strong enforcement policy.[22] Akerman resigned soon after announcing this policy shift. Although the circumstances prompting his resignation are unknown, some speculated that he was growing impatient with the lack of support from the Grant Administration, which was becoming increasingly preoccupied with accusations of corruption and economic concerns. Akerman himself denied that was true, and in fact the number of prosecutions under his successor, George H. Williams,[23] increased the following year.[24] By the beginning of 1872, the effects of the enforcement policy were becoming apparent. Although judges and prosecutors remained burdened by the backlogs of cases, reports of new violence were dwindling. Fear of prosecution ended much of the violence, and many Klan members began pleading guilty or offering information in the hopes of receiving leniency from the government.[25] But Williams' resolve soon faded away, and he began moving the Department away from a strong enforcement policy.[26] By early 1873, the federal government had completely abandoned its criminal enforcement policy.

The short-term legacy of the enforcement legislation consisted of the hard lessons learned about the institutional and financial prerequisites of a successful federal criminal enforcement policy, but the long-term legacy of these statutes, especially Section 1 of the Civil Rights Act of 1871, would come from the liability provisions allowing civil suits against persons acting under color of law to deprive citizens of their constitutional rights. Although Klan victims were not then in a position to make use of these liability

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[22] *Id*. at 92.
[23] Grant later nominated Williams to the Supreme Court, but his nomination failed after corruption allegations surfaced.
[24] *Id*. at 93. 100-102.
[25] *Id*. at 93.
[26] *Id*. 110-11.

mechanisms, other citizens soon would. The Supreme Court, however, thwarted these developments. In a series of opinions offering narrow interpretations of the scope of the Reconstruction Amendments, the Court created a near century-long delay in the development of a civil rights enforcement strategy, based on liability rules, and led by citizen plaintiffs.

II. Enforcement Legislation in the Federal Courts

A. Early Lower Court Assessments

The first constitutional challenges to the Enforcement Acts of 1870 and 1871 were presented to federal district courts, presided over by 11 district court judges. Only one of these judges, Judge Underwood in Virginia, had been an abolitionist before the war and a radical Republican afterwards. None of the eleven district court judges were appointed by Grant.[27] Only three of these judges – Judges Ballard, Hill, and Underwood – publicly supported of Reconstruction policies.[28] There was, therefore, little reason for confidence about the prospects for successfully defending the constitutionality of the enforcement legislation.

Because of the bleak prospects for success, many U.S. Attorneys chose to bring charges in the circuit courts instead. There were three circuit court judges involved in Enforcement Cases in the early 1870s. All had been appointed by President Grant, after the Circuit Courts were established by Congress in 1869. The Fourth Circuit judge, Hugh

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[27] There were four Johnson appointees: George H. Brooks of North Carolina (1865), George S. Bryan of South Carolina (1866), John Erskine of Georgia (1866), and Robert A. Hill of Mississippi (1866). Five judges were appointed by Lincoln: Bland Ballard of Kentucky (1861), Richard Busteed of Alabama (1863), John Jackson, Jr. of West Virginia (1861), Connally F. Trigg of Tennessee (1862), and John Underwood of Virginia (1863). The remaining pre-war appointees were, John Cadwalader of Pennsylvania, who was appointed by Buchanan in 1858, and Humphrey Howe Leavitt of Ohio, who was appointed by Jackson in 1834. (Kaczorowski 1985: 67).

[28] 27 F. Cas. 785 (1867).

Lennox Bond, was a former abolitionist and one of the founders of the Republican Party in his native Maryland. The Fifth Circuit judge, William B. Woods, was a native of Ohio who had moved to Alabama after the war and became one of the founding members of the Republican Party. Judge Halmer Emmons was appointed a circuit with two states, Kentucky and Tennessee, with enforcement cases, and two northern states, Indiana and his home state of Michigan.

It is not surprising that the circuit judges proved to be far more supportive of congressional enforcement policies. However, because their territories were much larger, and because they, unlike their district court counterparts, were required to divide their time among many courts, they were simply unable to handle all enforcement legislation. The U.S. Attorneys were forced to bring some of these cases before the less friendly district court judges. Some of the district court judges were sympathetic to the plight of freedmen who were being victimized by the Klan, yet, perhaps because of their long careers and political work in their home states, they were unwilling to publicly condemn the Klan. Judge Busteed of Alabama, for example, would publicly deny that the Klan existed, but in private letters he not only admitted its existence but also called for more extensive legislation. Judge Hill in Mississippi expressed his concerns about maintaining his legal reputation in his home state.[29]

Given this survey of the judges political backgrounds and commitments, the fact that *all* of the federal district courts upheld the constitutionality of the Civil Rights Act of 1866,[30] and all of the federal district judges, except two, upheld the constitutionality of

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[29] (Kaczorowski 1985: 70-1).
[30] (Kaczorowski 1985: 4).

the Enforcement Acts of 1870 and 1871[31] is remarkable. These judges deferred, even if they were not themselves inclined to support the Reconstruction policies, the congressional interpretation of the Reconstruction Amendments.

The circuit court cases were, as one might predict, more supportive of Reconstruction policies. Because Supreme Court Justices continued to "ride circuit" until 1889, the early circuit court decisions offer an opportunity for a preview of their approach to the constitutional questions surrounding Reconstruction. There were some early indications in the initial circuit court opinions that the Chase Court would endorse the theory of a broad national authority to protect civil rights underpinning the civil rights enforcement legislation.

Justice Swayne wrote the circuit court opinion in *U.S. v. Rhodes*.[32] After a careful examination of the framers' intent, he offered a sweeping defense of congressional authority under the Thirteenth Amendment to secure the rights of national citizenship, against public or private action.[33] Swayne argued that congressional enforcement powers

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[31] (Kaczorowski 1985: 131) (noting that Judges Ballard and Cadwalader were the only two exceptions). Kaczorowski bases this conclusion, which encompasses both unpublished and published opinions, on a comprehensive survey of the Department of Justice archives, correspondence between U.S. Attorneys and the Attorney-General, the private papers of numerous judges and attorneys, as well as a survey of newspaper coverage of the enforcement litigation.

[32] 27 F. Cas. 785 (1867).

[33] There were more difficult issues concerning statutory construction. Section 3 of the Civil Rights Act of 1866 conferred federal courts jurisdiction over "all causes, civil and criminal, affects persons who are denied or cannot enforce in the courts . . . the rights secured to them by the first section of this act. . . ." Clearly this provision would help black defendants. But what of the case of a criminal prosecution of whites who viciously attacked blacks? Could one argue that the prosecution of the white defendant was a "cause" affecting the victims of a crime? The Supreme Court had previously argued in *United States v. Ortega*, 11 Wheat. 467 (1826), that criminal prosecutions were "cases" only affecting the state and the defendant. The U.S. Attorney, Benjamin Bristow (soon to be appointed Solicitor-General) was so concerned about this that he wrote to Senator Trumbull and asked him to pass new legislation clarifying the removal provisions so that cases involving black victims could also be removed to federal courts, which would be more likely to interpret Section 1 of the 1866 Act to require black witnesses to testify on the same terms as whites.

Justice Swayne resolved the issue in the *Rhodes* opinion by distinguishing the terms "case" and "cause" and concluding that the latter should be interpreted more broadly.

should be interpreted in light of the necessary and proper clause, and cited *McCulloch v. Maryland*[34] in support of this position.[35]

In the case *In re Turner*,[36] Justice Chase offered another broad interpretation of the scope of the Thirteenth Amendment and the constitutionality of the Civil Rights Act of 1866. This case involved a private apprenticeship indenture between a black child, Elizabeth Turner, and her former master. The suit challenged the indenture under the Civil Rights Act, arguing that the young girl was not afforded the financial and education benefits guaranteed to white apprentices under Maryland's indenture laws. Chief Justice Chase upheld the constitutionality of the Civil Rights Act, as a proper exercise of congressional authority under Sec. 2 of the Thirteenth Amendment. The indenture contract was invalidated under the Civil Rights Act because it did not provide the "full and equal benefit" of Maryland's indenture laws to blacks and white. This case made clear the potential extent of the federal courts' supervisory power over states' administration of their laws. Federal courts now had the authority to scrutinize private contracts to ensure that they were enforced in ways that did not violate the civil rights mandates of the Reconstruction Amendments and enforcement legislation.[37]

Soon judges began addressing questions regarding the scope of the 14th Amendment and the constitutionality of the enforcement statutes. When the *Slaughterhouse Cases* were first tried in the Circuit Court in Louisiana, the Supreme Court Justice assigned to the panel was Joseph Bradley. The butchers group brought the case under both the 1866 Civil Rights Act and the Fourteenth Amendment. When the

[34] 17 U.S. 316 (1819).
[35] 27 F. Cas. at 793-4.
[36] 24 F. Cas. 337(Case No. 14, 247) (C.C.D. Md. 1867); *see also* (Hyman 1997: Ch. 9).
[37] (Kaczorowski 1993:58). Because the 14th Amendment had not yet been ratified, Chase's opinion relied only on the authority of the 13th Amendment and the Civil Rights Act of 1866.

state granted a monopoly to the Crescent City Company, they argued, our right to pursue an occupation was infringed upon. The state attorney argued that the state had not created a monopoly, but had simply introduced a regulation to protect the health, safety, and welfare of its citizens.

Justice Bradley's opinion[38] addressed three questions: Does the Civil Rights Act apply to this case? Does the 14th Amendment incorporate absolute rights or simply equal rights? If it incorporates absolute rights, which ones are they and do they include the right to pursue an occupation? Although he suggested in his opinion that the Civil Rights Act did not apply, Bradley came down firmly in favor of the absolutist interpretation of the 14th Amendment's Privileges and Immunities Clause. Without providing a complete catalogue of the rights protected by the clause, Bradley accepted the butchers' argument that the right to pursue an occupation was among them. He also mentioned the right to possess and enjoy one's property. He concluded that the Louisiana law, even if justified under its police powers, could not be pursued in a way that interfered with the privileges and immunities of United States citizens. Bradley also took the remarkable step of changing the portion of his opinion concerning the Civil Rights Act. The day after issuing his opinion, which held that the Act only guaranteed that blacks would enjoy the same rights as whites, he reversed that portion of his opinion and, after arguing that the Act was intended to provide remedies to both blacks and whites whenever their privileges and immunities were threatened, concluded that the Civil Rights Act did apply to the case.[39]

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[38] *Live-stock Dealers & Butcher's Ass'n v. Crescent City Live-stock Landing & Slaughter-House Co.*, 15 F. Cas. 649 (1870).
[39] (Kaczorowski 1987: 233-4).

In *United States v. Hall* (1871),[40] Circuit Judge (and future Supreme Court Justice) William Woods was presented with an opportunity to consider the constitutionality of the Enforcement Act of 1870. The case concerned the conspiracy provisions in Section 6 of the Act. The case involved the prosecution of a group of whites who had ambushed a group of blacks attending a Republican party meeting in Alabama. The gang had killed two and injured dozens of those attending. The lawyers for the defendants argued that the Act was designed solely to protect the right to vote, and that attendance at a political meeting could not be included under that guarantee. Section 6, however, covered conspiracies to deprive individuals of their constitutional rights in general, and prosecutors framed the indictment to include the charge of conspiracy to interfere with the victims' First Amendment guarantees of freedom of speech and assembly. This case, therefore, was one of the very first to raise the question of incorporation: Did the 14th Amendment, through the privileges and immunities clause, establish that First Amendment rights were rights of United States citizens?

Judge Woods wrote to Justice Bradley asking him for guidance on this question. In his first reply, Bradley argued that these First Amendment rights were among the most sacred rights of citizenship, and he concluded that they were part of the privileges and immunities that Congress could secure against the states. After Judge Woods reminded him that the case involved a charge of conspiracy by private individuals, Bradley considered the separate state action question. After conceding that the state of Alabama had not itself abridged these First Amendment guarantees, he nevertheless concluded that

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[40] 26 F. Cas. 79 (1871).

the Fourteenth Amendment authorized Congress to protect the rights of U.S. citizens against private individuals as well as states.[41]

Judge Woods accepted Bradley's advice and in his opinion argued that, after the ratification of the Fourteenth Amendment, national citizenship was primary and that the rights associated with that status were secured through the Privileges and Immunities Clause. Judge Woods also explicitly stated that the Privileges and Immunities Clause included all the natural rights of free men, including the Bill of Rights guarantees. Congress could act to secure these rights against infringements by private individuals as well as by the states themselves.[42]

In the case *United States v. Given* (1873),[43] Justice Strong was given his first opportunity to evaluate the constitutionality of the enforcement legislation. The case concerned the prosecution of Archibald Given under Section 2 of the Enforcement Act of 1870, which established a misdemeanor for failing to provide citizens the equal opportunity to vote. Given challenged the conviction, arguing that the Act itself was unconstitutional. Justice Strong's opinion defended a broad construction of the Reconstruction Amendments. Congress was given the power to enforce these new guarantees against both private persons and state officials.[44]

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[41] Without discussing the debates, Bradley simply rested this conclusion on logic: "as it would be unseemly for Congress to interfere with state statutes, and as it cannot compel the actions of state officials, the only appropriate legislation that it can make is that which will operate directly on offenders and offences and protect the rights which the Amendment secures. The contents of Bradley's letter are discussed in (Kaczorowski 1985: 14-15); (Kaczorowski 1987: 236-7)(describing Bradley's apparent lack of familiarity with the legislative history of the Fourteenth Amendment).

[42] For a similar explanation of the scope of the 14th Amendment, *see* Judge Wood's opinion in *United States v. John Mall, Jr. et al.* 26 F. Cas. 1147 (1871).

[43] 25 F. Cas. 1324 (1873).

[44] Given that Justice Strong articulated the Radical Republican theory of the Reconstruction Amendments in this case, it is difficult to understand why, just one year earlier, when the Supreme Court heard its first case requiring an interpretation of the scope of the Civil Rights Act, and a question nearly identical to that presented in *Rhodes* case, he limited the application of the Civil Rights Act of 1866 on technical grounds, arguing that the prosecution of a crime is not a cause affecting the victim of a crime, and so he denied the

Because Grant had recently appointed the Circuit Court judges with the enforcement program in mind, it is not very surprising that these judges upheld the constitutionality of the enforcement acts. The Supreme Court Justices – including Swayne, Chase, Bradley, and Strong – who, when sitting in the Circuit Courts, upheld the legislation present a more interesting puzzle, because some would eventually come to defend much more restrictive views about the scope of the Reconstruction Amendments.

B. The Supreme Court Confronts Reconstruction

Traditional studies of the Chase Court explain its importance by arguing that it was the first Court possessing an activist understanding of the judicial power, and convinced of the validity of judicial review.[45] But there have been some dissenting views by political scientists, who focus less on theories regarding the appropriateness of judicial review, and instead pay more attention to the institutional position of the Court as well as the substantive political views of its members. Howard Gillman, for example, explains the Chase Court's activism by emphasizing that the Court after 1875 was granted federal subject-matter jurisdiction, which allowed it to take on a more supervisory role over Congress.[46] Mark Graber, in the course of explaining the ideological continuity of the Chase Court with its Jacksonian predecessors, argues that "Supreme Court Justices did

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removal to federal court under Section 3 of the Act. *See U.S v. Blyew* 80 U.S. 581 (1872). Perhaps even more inexplicable is Strong's decision to endorse, in the very same year he wrote the opinion in *Given*, Miller's opinion in *Slaughterhouse*. *See* discussion below at note ___ *infra*.

[45] *See, e.g.*, (Kutler 1968: 114-142). *See also* (Hyman and Wiecek: 335) (suggesting that the Court in 1854 exercised little influence over the course of Reconstruction policy, but – after noting its gradual growth in stature through 1873, when Chase died –- concluding that the Court had assumed the role of final arbiter on the constitutionality and scope of Reconstruction).

[46] (Gillman 2002) Graber also emphasizes that the Chase Court should not be deemed the first "activist" Court, because the previous Courts simply had few opportunities, primarily because of the lack of federal court jurisdiction, to consider the constitutionality of federal statutes. (Graber 1999: 19)(noting that after the 1875 statute establishing federal question jurisdiction, the Court's docket doubled, and the number of cert petitions challenging the constitutionality of federal laws quadrupled).

not respond to the changes wrought by the Civil War and Reconstruction by instrumentally adjusting their understandings of federal powers . . ."[47] These arguments raise a vitally important question: *Why* did the Chase Court refuse to acknowledge the changes in federalism and protection for the rights associated with national citizenship brought about with the passages of the Reconstruction Amendments?

Political scientists who criticize the antimajoritarian thesis, like Robert Dahl, suggest that, for most of U.S. history, the dominant majority coalition is able to influence the ideological tenor of the Supreme Court through the appointment process, and that there is a lag period of approximately ten years,[48] after which the Court will become more responsive to the view of the new governing coalition. Graber emphasizes that at the very beginning of the Chase Court in 1864 there were competing constitutional visions of the federal power between a majority of Justices on the Chase Court and those of the radical Republicans in Congress just beginning the process of Reconstruction.[49] Following Dahl, one would assume that this gap would have narrowed as more appointments by Republican presidents were made. Why then did the Court remain opposed to the constitutional vision of the Republicans in Congress nearly a decade later?

Graber suggests that Lincoln had intentionally nominated non-Republicans or former Democrats to the Supreme Court in order to appeal to Democratic voters in the

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[47] (Graber 1999: 19, 22) Graber divides the members of the Chase Court into four categories: Jacksonian holdovers from the Taney Court (Nelson, Grier, Clifford, and Wayne) who viewed federal powers narrowly; Republicans (Miller and Bradley) who were formerly Whigs and who supported the broader antebellum theory of federal powers advanced by former Whig Justice Joseph Story; and Republican appointees with Jacksonian or Democratic connections (Field, Chase, and Davis) who supported a middle position. A fourth category is comprised of Justices, including Swayne and Strong, who were Democrats before the war, but became staunch supporters of a strong federal government after the war.

[48] (Dahl 1957) This is a variation of the phenomenon of "intercurrence," a term that Karen Orren and Stephen Skowronek use to describe such conflicts, when competing institutions represent competing interests in a given historical period. (Orren 1994).

[49] (Graber 1999: 23).

North, a short-term political calculation that had incalculable long-term disadvantages for the Reconstruction program.[50] As a result, the Democrats and "Jacksonian Republicans" on the Chase Court still constituted a majority up until 1871.

Gillman's argument about the expansion of federal court jurisdiction introduces another puzzle: Why did the Republicans in Congress expand the jurisdiction of the Court through the Judiciary and Removal Act of 1875, when they should have had some indication, especially given the recent *Milligan* decision, that the Court would refuse to endorse the new enforcement legislation they had so painstakingly debated? Did Congress believe that the Court would "entrench" Reconstruction, once it became politically unpopular?[51] Gillman suggests that, by the 1870s, Republicans in Congress were attempting to entrench, not Reconstruction, but other domestic policy goals. By 1872, most Republicans in Congress were aware of the political costs of a strong enforcement policy.[52] The Liberal Republican defection, and the nomination of Horace Greeley as a third party candidate against Grant, provided a warning to those who

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[50] (Graber 1999: 32-33).

[51] During the earliest stages of Reconstruction, Republicans in Congress considered the Court to be a potential foe, and they expressed their resolve to fight back if the Court challenged them. John Bingham, for example, declared that the Court must go along with military plans in the 1867 Act, or Congress would simply fight for new constitutional amendments, and, perhaps, strip the Court of its jurisdiction or "abolish the tribunal itself." (Friedman 2002: 1)(quoting remarks of Rep. Bingham, Cong. Globe, 39th Cong., 2nd Sess. 501-02 (1867)). Such a confrontation never occurred, primarily because the Court avoided it. *See,e.g., Ex Parte McCardle* 74 U.S. 509 (1869) (dismissing the case for lack of jurisdiction); (Friedman 2002: 25-38)(discussing the Act of March 27, 1868 repealing the Court's appellate jurisdiction over habeas petitions). Bingham does not mention directly the court "packing" option. Because Congress had in 1863 expanded the number of Justices on the Court from nine to ten, perhaps in order to manipulate case outcomes from the Court, such an option was well known (and would indeed be used, once Johnson was replaced by Grant, in 1869 when Republicans in Congress increased the size of the Court from seven to nine). *See also* (Friedman 2002: 38-45) (discussing a different variant of the "court-packing" accusation – which alleged that Grant filled vacancies on the basis of policy preferences – and the *Legal Tender* cases).

By the 1870s, Gilman argues, Republicans in Congress evidently perceived the Court to be an ally, rather than a potential foe. It is this change in stance that I address in what follows.

[52] After winning the 1872 election in a landslide, President Grant, fighting charges of corruption and "bayonet rule," halted enforcement of the new civil rights laws. After the 1874 midterm election, and only after Charles Sumner died, the Republicans passed a watered down Civil Rights bill, forbidding discrimination in places of public accommodation, but refusing to include a section banning segregation in schools. *See* discussion below at notes __ *infra*.

insisted on identifiying the Republican Party with securing the rights of freedmen. It is also likely that the growing prominence of Social Darwinist ideas influenced some political leaders to abandon protections for freedmen.[53] Recognizing the growing electoral opposition, and responding to the Paris Commune uprising of 1871, the Granger movement's successes, and the Panic of 1873, the Republican Party focused its attention on economic issues, and they were attempting to entrench policies more protective of property rights and eliminating barriers to and establishing the infrastructure for a national capitalist market.[54] Given these motives, it makes sense to characterize their willingness to expand federal jurisdiction and federal court oversight in the 1875 Act as part of a strategy of "partisan retrenchment."[55] As Gillman suggests, expanding federal jurisdiction might have been "part of the Republican Party's efforts to restructure national institutions better to facilitate national economic development."[56]

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[53] (Smith 1997: 291-5; Klinkner 1999: 82).

[54] (Gillman 2002: 516; Hyman 1973: 532).

[55] (Gillman 2002: 512); *see also* (Hirshl 2000)(discussing a similar "hegemonic preservation" strategy). Gillman's entrenchment argument does not offer enough evidence of intent, however, to prove the Republicans did by the 1870s view the Court as an ally. The Republicans' previous decisions to expand federal court jurisdiction offer interesting insights. For example, with respect to the earlier removal provisions in the civil rights bills, it was clear that the federal courts were the only hope for freedmen, given state courts' record of failure. Expanding jurisdiction in this particular context might not warrant the conclusion that Republicans were trying to "entrench" their policies, but rather hoping, without any guarantees or expectations of success, to provide them with a modest chance for success. The same motivational logic might hold true for Congress in 1875. The Republicans had just lost control of the House in the 1874 midterms, it may be that they believed they had nothing to lose by giving the federal judges a larger role to play in economic litigation. It may be that Gillman's entrenchment argument attributes to Republicans a shared level of confidence about the Court that the historical evidence does not support. (Gillman 2001) In addition, Gillman does not explain why Grant did not seek to appoint those committed to enforcement. He clearly was not averse to appointing "unknowns," and so in private conversation or in another form of screening, he could have easily found nominees who would have defended federal supervisory powers over fundamental civil rights and also promoted the Party's economic nationalization policies. Much of the blame for the failure of Reconstruction should be left with the presidents who had numerous opportunities to shape the ideology of the Court, and to do so without necessarily suffering any consequences at the polls. Lincoln and Grant, however, preferred to use these appointment opportunities to court new constituencies, rather than entrench endangered policies.

[56] (Gillman 2002: 512). The Republicans in 1875 missed an opportunity to restructure the federal judiciary, by eliminating circuit riding and expanding the numbers of lower federal court judges. Once the Democrats assumed control of the House of Representatives, they opposed all such reforms, and it was not until 1889, after nearly two decades of enormous docket overloads, that both branches of Congress were

Furthermore, with new opportunities for appointments to the federal courts, the Republicans could – at least until Cleveland entered the White House in 1885 – control the makeup of the judiciary, and do so without the interference of the House of Representatives (which after 1875 was led by the Democrats).[57] The 15 Supreme Court Justices that were appointed between 1870 and 1893 were all supporters of the Party's economic nationalization policies; a commitment to enforcement or the federal control over civil rights was not, however, a part of the working "litmus test" for new appointments.[58] For example, Morrison Waite, Grant's choice[59] to replace Chief Justice Chase, was a relative unknown offering no evidence of his commitment to strong enforcement policies. Apparently, little consideration was given to the nominees' position on the enforcement legislation, and the effects of the Republican's abandonment of that commitment would soon become all too clear, as the Court began issuing opinions striking down key provisions in the enforcement acts, basing their decisions on narrowing

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controlled by Republicans, and with the vocal support of the Republican President Harrison, who included a proposal for an intermediate court of appeals in his annual message of 1889, were able to reform the lower federal courts. Although the new legislation did not abolish the circuit courts (which were stripped of their appellate jurisdiction and served as trial courts along with the district courts), it did establish nine circuit courts of appeal with appellate jurisdiction over all diversity cases. The three-judge panels on the new appellate courts would include a new courts of appeals judge for each circuit (nine new judges), and two available district or circuit judges. The Evarts Act was passed in March 1891 by a lame-duck Congress, just before the Democrats would once again resume control of the House of Representatives. (Gillman 2002: 521) As long as the Act was finalized, the change in control mattered little, because all new appointments under the Evarts Act would remain the responsibility of the Republican president and Senate. Because the new appellate courts would have the final say in almost all diversity cases, the Evarts Act resulted in a dramatic drop in the Supreme Court's caseload – from an astounding 623 cases in 1890 to 275 in 1892.

[57] The only exceptions being the 47th and the 51st Congresses. (Gillman 2002: 516).

[58] President Grant: Justice Ward Hunt and Chief Justice Morrison Waite. President Hayes: Justices John Marshall Harlan and William Woods. President Garfield: Justice Thomas Stanley Matthews. President Arthur: Justices Horace Gray and Samuel Blatchford. President Cleveland: Justices Lucius Lamar and Chief Justice Melville Fuller. President Harrison: Justices David Brewer, Henry Brown, George Shiras, and Howell Jackson. President Taft: Chief Justice Edward White and Justice Rufus Peckham. *See* (Gillman 2002: 518)(describing their economic views, as well as their connections to railroad corporation and leading capitalists).

[59] Grant's first and second choices, Roscoe Conkling and Hamilton Fish, declined the offers. His third and fourth choices, Attorney General George Williams and Caleb Cushing, faced opposition in the Senate, resulting in Grant's withdrawal of the nominations. (Smith 2001: 559-61).

interpretations of the Reconstruction Amendments. Unlike the conventional legal view of the post-Reconstruction Court, which assigns blame (or credit, depending on one's perspective) to an activist and conservative Supreme Court for curbing the enforcement legislation, the more sophisticated interpretation, informed with the insights of political science scholarship, should acknowledge the complicity of Republican Party politicians, in both the White House and Congress, in the negation of the radical theory of Republican Constitutionalism forged during the debates over the Reconstruction Amendments.

C. Slaughterhouse, Privileges and Immunities, and the Postponement of Incorporation

The *Slaughterhouse Cases* were appealed to the Supreme Court in 1873.[60] The Court's majority opinion was the first in a series of cases limiting the scope of the Reconstruction Amendments, and consequently the utility of the civil enforcement provisions of the 1871 Civil Rights Act. Justice Samuel F. Miller, one of Lincoln's more obscure choices for the Supreme Court, demonstrated in his majority opinion[61] the extent of his opposition to the goals of the Republicans in Congress.[62] By introducing a sharp

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[60] 83 U.S. 36 (1873).

[61] Joining Miller's majority opinion were Justices Clifford (a partisan Democrat appointed by Buchanan); Davis (a Lincoln appointee who opposed emancipation and wrote the Court's decision in *Ex Parte Milligan*); Hunt (a brand-new Grant appointee and former New York judge who had voted to uphold a similar New York state health regulation of slaughterhouses); and Strong (Grant appointee).

Aynes fails to acknowledge that Strong had previously issued a defense of a broad interpretation of the Reconstruction Amendments in *U.S. v. Ghiven*. *See* (Aynes 1994: 669). Strong, rather than Hunt, should perhaps be considered the swing voter in *Slaughterhouse*. For this reason, the evolution of his views from 1870 to 1873 warrants closer attention.

[62] On Miller's political background, *see* (Aynes 1994: 657-665)(describing Miller's familiarity with and disapproval of congressional Republican views concerning the Reconstruction Amendments, and stating that during the ratification debates for the 14th Amendment, Miller privately expressed his approval of the southern Governors' counterproposal that had already received the endorsement of President Johnson)

distinction between state citizenship and national citizenship,[63] Miller rejected the radical Republican theory of citizenship, which made state citizenship dependent upon national citizenship (citizens of the United States would automatically be citizens of the state in which they resided), and which assumed that states would be under the supervisory power of the federal government to protect all fundamental rights of citizens of the United States. Instead, Miller argued that the privileges and immunities of citizens of the United States are completely separate from those that apply to state citizens, and only the former are protected in Section 1 of the 14th Amendment against the states.[64]

In justifying his position, Miller failed to take into account the abolitionist constitutional view, which suggested that the Article IV privileges and immunities clause should be read as declaring a set of rights that states should guarantee to their own citizens, as well as to visitors.[65] Because he ignored the well-documented statements of Republican supporters of Reconstruction in the *Globe* and elsewhere, Miller was able to argue that the framers of the 14th Amendment could not have contemplated such a sweeping transformation of federal and state responsibilities for protecting fundamental

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[63] *Id*. at 74 ("[T]here is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.").

[64] *Id*. at 74.

[65] Miller misquotes *Corfield v. Coryell* when comparing the Article IV privileges and immunities clause with the 14th Amendment. Justice Washington's famous catalogue of fundamental rights began with the question: "What are the privileges and immunities of citizens in the several States." Miller substituted "citizens of the several States" when quoting the opinion. The substitution affects the way one reads the *Corfield* opinion. Bingham, for example, referred to Article IV as containing "an ellipsis," by which he meant the clause should be understood as referring to "citizens *of the United States* in the several states."

Ignoring the abolitionist interpretation of Article IV, Miller read the clause to require only that states, once they decided what rights to grant their citizens, must offer those rights to citizens of other states when they are within that state's jurisdiction. According to Miller, the only absolute limitations on the states in the Constitution of 1787 were found in Article I, which forbade ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. *Id*. at 76. Miller's adoption of the comity interpretation of Article IV was perhaps influenced by Justice Field's recent opinion in *Paul v. Virginia*, 75 U.S. 168 (1868). There was, however, a more recent interpretation of Article IV in *Ward v. Maryland*, 81 U.S. 430 (1870), which adopted the fundamental rights view, but Miller attempted to argue that the holding should be interpreted narrowly. *Id*. at 76. Interestingly, Field appears to have supplemented the comity interpretation with the fundamental rights view by the time he wrote his *Slaughterhouse* dissent. For an extensive defense of the fundamental rights interpretation of Article IV, *see* (Antieau 1967).

rights.[66] Miller's argument takes the form of an elliptical slippery slope argument. He asks: Was this Amendment designed to transfer all protection of civil rights from the states to the federal government? Would Congress now have the authority to legislate in every subject affecting civil rights, even those that traditionally belonged exclusively to the states? For Miller, to answer yes to these questions would require assent to the unthinkable:

> [T]hese consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions, when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irrestible, . . . [w]e are convinced that no such results were intended by the Congress, which proposed these amendments, nor by the legislatures of the States which ratified them.[67]

Instead of acknowledging, as numerous Republican supporters of the 14th Amendment had contended, that the Bill of Rights and the *Corfield* list of fundamental rights would, after the ratification of the 14th Amendment, now be protected by the Congress, Miller argued that the privileges and immunities clause in Section 1 only protected a small number of rights associated with the citizen's relationship to the federal government, such as the right to petition the federal government, to run for office, and the free access to seaports.[68] In his discussion of the rights of national citizenship, Miller omitted any discussion of the guarantees listed in the Civil Rights Act of 1866. Given that many of

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[66] *Id*. at 77.
[67] *Id*. at 78. Indeed, such a result was so far-reaching and such a great departure from the original structure of the American constitutional system, that is may be thought to exceed the power of "amendment." For a description and critique of this kind of argument, *see* (Murphy 1987); *see also* (Moore 2003: 27-8)(suggesting that Miller sought to avoid challenges to the authority of the 14th Amendment by offering a narrow interpretation of its meaning).
[68] *Id*. at 79-80.

the supporters of the 14th Amendment thought they were providing additional support for the rights of national citizenship listed in the Civil Rights Act, Miller's majority opinion ignores and distorts the legislative history.[69]

Justice Field, a Lincoln appointee and former Democrat, wrote a dissent, which was joined by those justices who had already demonstrated in circuit court cases their support for a broad interpretation of the Reconstruction Amendments – Chief Justice Chase and Justices Swayne and Bradley. Field's dissent rejected Miller's approach the citizenship issue and endorsed the radical Republican view. In contrast to Miller's emphasis on their supposed distinctiveness, Field emphasized that state citizenship was dependent upon national citizenship, and he argued that the rights of state citizens would now be protected by the federal government:

> A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.[70]

To accept Miller's view, which suggests that the only rights of national citizenship are those that were present before the 14th Amendment was ratified, would require one to assert that the Amendment was itself "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[71]

In order to define the privileges and immunities of the United States, Field turned to the Civil Rights Act of 1866 as well as the *Corfield* opinion, but he did not stop with

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[69] It is also worth emphasizing Miller's attempt to confine the scope of the equal protection clause to discrimination on account of race, despite the careful efforts of the Republicans in the 39th Congress not to incorporate such limiting language in the text of the Amendment, as they would later do with the Fifteenth Amendment. *Id*. at 81.

[70] *Id* at 95-6.

[71] *Id* at 95-6.

those sources. According to Field, "[t]he privileges and immunities designated are those which of right belong to the citizens of all free governments."[72] He concluded that the "right to pursue a lawful and necessary calling" was one of the rights of United States citizens that the 14th Amendment protected against state infringement.[73]

Justice Bradley wrote a separate dissent to emphasize that the 14th Amendment should be interpreted as conclusively establishing that national citizenship is "primary" and state citizenship is "derivative and secondary."[74] Bradley argued that the rights of national citizenship include "the rights of citizens of any free government."[75] After discussing English precedents and the *Corfield* opinion, he went on to argue that the privileges and immunities clause guarantees more than an "equality of privileges," although he concedes that the courts usually regarded the Article IV privileges and immunities clause as providing no more. Instead, Bradley suggests "the language of the

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[72] *Id*. at 96-8.
[73] *Id*. at 109-110. One doubts that Field would have chosen to write such a passionate opinion in a case had dealt directly with the rights of freedmen, rather than a state-issued monopoly. Historians have made much of the fact that the first important 14th Amendment case concerned claims regarding economic liberties, rather than the rights of freedmen. One hypothesis, advanced most directly by Kaczorowski, is that the Court chose this case so they could weaken the Privileges or Immunities Clause in a case that would not cause much political disruption. *See, e.g*, (Kaczorwoski 1985: 160)("[T]he Court consciously may have chosen the *Slaughterhouse Cases* to express its view of national civil rights enforcement authority as the safest way to resolve the intensely political and controversial constitutional issues created by Republican Reconstruction policies and legislative enactments"); (Kaczorowski 1993: 171-4)("When one considers that the Court had disposed of the typical Klan-types cases [such as *Blylew* and *Avery*] on narrow technical grounds without deciding the central constitutional issues they presented, its decision to do so in *Slaughter-House* when it did not have to suggests the Court's case selection was a masterful political strategy devised by some members of the Chase Court to decide the politically explosive legal questions in a . . . [case] that confused the political impact of the Court's decision.") Benedict, on the other hand, suggests that the facts in *Slaughterhouse*, which dealt with the Republican-controlled Louisiana legislature's economic policies, forced the Republican appointees on the Chase Court – who had retained a Jacksonian commitment to dual sovereignty and therefore preferred to defer to the social policy choices of state legislatures – to confront the potential slippery slope of the 14th Amendment protections. *See* (Benedict 1978: 59-61). Nelson emphasizes that Field's dissenting opinion left room for the states to pursue reasonable exercises of the police powers and that the core of Field's opinion is his conclusion that the Louisiana law was impermissible class legislation. (Nelson 1988: 156-8, 164).
[74] *Id*. at 112.
[75] *Id*. at 114.

clause is as I have stated it, and seems fairly susceptible of a broader interpretation."[76] To find a declaration of the fundamental rights of citizenship, Bradley states that it is not necessary to review the constitutional history of England. Rather, the "authoritative declaration . . . is in the Constitution itself." The Bill of Rights, however, specifies "only a few of the personal privileges and immunities of citizens," it is not an exhaustive list.[77] Some of the privileges and immunities of citizenship were thought to be so obvious that they need not have been included in the original Constitution, including "the right to follow such profession or employment as each one may choose, subject only to uniform regulations equally available to all."[78]

These competing views about the autonomy of the states in the post-Reconstruction era presented stark alternatives. Either the federal government would assume supervisory authority over the states to ensure fundamental rights are protected, or the 14th Amendment was "a vain and idle enactment, which accomplished nothing."[79] Because of its success in thwarting the Republican supporters of the 14th Amendment, the Court's adoption of the states' rights view has long been the target of constitutional scholars' contempt. Kaczorowski, for example, describes the Court's opinion in *Slaughterhouse* as "an example of extraordinary judicial activism" that "annulled a

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[76] *Id*. at 118.
[77] *Id*. at 114-119.
[78] *Id*. at 199. Justice Swayne also wrote a separate dissent to underscore the historical importance of the 14th Amendment for federalism:

> These amendments were all the consequence of the late civil war. The prejudices and apprehensin as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members. The provisions of this section are all eminently conservative in their character. They are a bulwark of defence, and can never be made an engine of oppression.

Id. at 128-9.
[79] *Id*. at 95-6.

revolution in American constitutionalism."[80] Not only did it present a stunning dismissal of the framers' own statements about the purpose of the Amendment, it also rejected a nearly unanimous set of decisions in the lower federal courts upholding the constitutionality of the enforcement legislation passed by Congress under the authority of Section 1 of the 14th Amendment.

In recent years, scholars have defended a revisionist interpretation of Miller's opinion in *Slaughterhouse*.[81] According to the revisionist scholars, Miller's opinion, with

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[80](Kaczorowski 1993: 151); (Curtis 1986: 171)("[In *Slaughterhouse*,] the Court nullified the privileges and immunities clause").

[81] An early example of the revisionist interpretation can be found in (Palmer 1979). For more recent variants, *see* (Newsom 2000: 683)(suggesting, *inter alia*, that Miller's list of rights associated with federal citizenship was not meant to be exclusive, and that other provisions in the Bill of Rights may also have been considered applicable to the states), (Wildenthal 2000: 1063)(examining legal briefs and congressional debates to support the incorporationist reading of Miller's opinion), (Wildenthal 2001)(discussing the recent revival of the incorporationist reading of *Slaughterhouse*). It appears that some prominent legal scholars have endorsed the incorporationist reading offered by the revisionists. *See, e.g.*, (Tribe 1999)(endorsing Newsom's arguments). An insightful critique of the revisionist view is offered by James Fox, who, while not endorsing their views regarding incorporation, argues that, even if revisionists are correct in arguing that the conventional reading of Miller's opinion as entirely precluding incorporation is wrong, the revisionists still fail to highlight the extent to which Miller's interpretation of the Privileges or Immunities Clause disregarded the framers' views about fundamental rights. (Fox 2003: 164). Fox also stresses that, if Miller meant to defend incorporation, he would have been as explicit as Bradley was in doing so. (Fox 2003: 79).

I would go further and question why, if Miller believed that the privileges and immunities of national citizenship included the Bill of Rights, he did not clarify his views in cases raising the issue of the incorporation of Bill of Rights guarantees. *See, e.g.*, *Walker v. Sauvinet*, 92 U.S. 90 (1876) (rejecting incorporation of the 7th Amendment right to civil jury trial); *Hurtado v. California*, 110 U.S. 516 (1884). *See also* (Aynes 1994: 654-7). Newsom dismisses this evidence on the grounds that these cases did not present a "true" incorporationist argument (which apparently would entail arguing that a provision in the Bill of Rights was incorporated through the 14th Amendment), but instead involved the argument that specific rights should be protected "directly" against state infringements or the claim that a given right was a "privilege of United States citizenship." (Newsom 2000: 711-12). In discussing *Sauvinet*, Newsom suggests that it allows for the possibility that Miller supported selective incorporation, and that civil jury trials were not among the select group of rights. *Id.* at 728-30. Newsom also points out that, because Harlan, in *Hurtado*, did not rely on the Privileges and Immunities Clause, but rather the Due Process Clause, Miller should not have felt compelled to explain his *Slaughterhouse* opinion regarding incorporation. *Id.* at 724-5. Miller was perhaps not "compelled" to explain his views about incorporation, but given the fact that he had many opportunities in these cases to write an opinion stating that the Bill of Rights were applicable to the states through the 14th Amendment Privileges or Immunities Clause, and he chose not to do so, they raise serious questions about Miller's commitment to the extension of Bill of Rights guarantees to states. Perhaps it is true that Miller was an advocate of judicial restraint and so was disinclined to develop his views in these cases, *id.* at 726, but he *was* willing in *Slaughterhouse* to write extensive dicta suggesting what might be deemed the privileges and immunities of citizens of the United States – a list which left out almost all of the Bill of Rights guarantees. Newsom's argument is creative and thorough, but it does not provide any convincing, direct evidence that Miller did support incorporation.

respect to limiting the scope of Section 1 and preventing the incorporation of the Bill of Rights, has been misunderstood. Once Justice Miller's jurisprudence as a whole is taken into account, revisionists argue that it is possible to read his opinion as endorsing a selective incorporation view.[82] For the revisionists, the *Slaughterhouse* opinion was a praiseworthy "compromise" honoring all of the core commitments of the Republicans.[83] They appear to believe that most of the supporters of Section 1 of the 14th Amendment had little more in mind than the incorporation of the Bill of Rights.[84] They dismiss the references to the *Corfield*-fundamental rights interpretation of Article IV, and supporters' suggestions that the 14th Amendment would finally secure what had only been declaratory in Article IV. Miller ignored these statements of congressional intent, and he even misquoted *Corfield* in a way that permitted him to avoid grappling directly with the abolitionists' interpretation of Article IV.[85]

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[82] (Newsom 2000: 687-706). Newsom uses Amar's phrase "refined incorporation," so it is possible that he would endorse, as consistent with the Miller opinion, some unenumerated rights, such as the right to travel. *See id*. at 649, n. 16. Even so, he does not give due respect to the intent of the framers of the 14th Amendment who sought to endorse the full scope of the abolitionist theories regarding fundamental rights.

[83] (Newsom 2000: 666).

[84] Wildenthal does acknowledge that supporters of the 14th Amendment also expected the clause to protect unenumerated rights, but he suggests that the incorporationist view was the consensus view in the 39th Congress. (Wildenthal 2000: 1112-3, 1170-2). *See also id*. at 1066 (suggesting "total incorporation" would have been "an honorable, elegant, and profoundly reasonable compromise"); (Newsom 2000: 654, n.37) (acknowledging these views yet still endorsing Miller's approach – when understood as endorsing selective incorporation – as a credible "compromise").

It is also worth noting that Michael Curtis, who has done the most of any scholar to offer evidence of congressional intent to incorporate the Bill of Rights, rejects the revisionist reading of Miller's *Slaughterhouse* opinion. Yet Curtis also criticizes arguments made by the *Slaughterhouse* dissenters, who argued that the predominant view of the framers of the 14th Amendment held that the Privileges or Immunities Clause would protect *all* fundamental, even unenumerated, rights. *See* (Curtis 1996: 37, 41-3, 88-89); (Curtis 2000). Curtis appears to be overly concerned about the contemporary consequences of the unenumerated rights view, especially the prospect of a judicial effort to reinvigorate *Lochner*-style economic liberties arguments. He pays less attention to the consequences of a Privileges or Immunities Clause revival for congressional authority under Section 5. For a contrasting argument, suggesting that the reinvigoration of a fundamental rights theory of the Privileges or Immunities Clause could aid efforts to promote progressive constitutionalist substantive political commitments, *see* Ch. 5 *infra*.

[85] Aynes emphasizes the misquote that allowed Miller to ignore the abolitionists' declaratory theory of Article IV, but Newsom argues that another misquote is critical: when Miller quotes from Justice Washington's list of fundamental rights, he only refers to three of Washington's four general head[ing]s. Miller refers to the right of protection by the government, the right to acquire and hold property, and the

Moreover, in the 1870s, Miller's opinion was understood to be a dramatic rebuke of the intent of the Framers of the 14th Amendment.[86] The implications of Miller's narrow interpretation of the scope of Section 1 of the 14th Amendment for the federal protection of fundamental civil rights were immediately felt. Miller's opinion would pose serious challenges to plaintiffs seeking to invoke the civil rights damages remedy introduced in the Civil Rights Act of 1871, which covered infringements of the "rights, privileges, and immunities" of United States citizens. Because Miller had so narrowly interpreted the definition of privileges and immunities enforceable against the states, there were very few opportunities for plaintiffs to rely on these provisions in the Civil Rights Act of 1871 to sue local officials.

Most scholars discussing the influence of *Slaughterhouse* emphasize its importance in postponing for decades the incorporation of most provisions in the Bill of Rights. It is also important, however, to highlight the full magnitude of the Court's rejection of the Republicans' revolutionary theory of constitutionalism. The abolitionist theory of privileges and immunities of national citizenship adopted by the Republican supporters of the 14th Amendment did not contemplate limiting that category of rights to

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right to pursue happiness. He did not refer to "the enjoyment of life and liberty" as remaining solely rights of state citizenship. For Newsom, this suggests that Miller had in mind other rights of U.S. citizenship besides those he chose to list in his opinion – in particular, the Bill of Rights. (Newsom 2000: 674). *See also* (Palmer 1984: 755)(also emphasizing significance of Miller's omission of the "life and liberty" language).

[86] *See* (Aynes 1994: 654, 678-86) (refuting the revisionist view by discussing Miller's later votes in *Cruikshank* and *Hurtado* and describing Miller's own speeches and statements about his *Slaughterhouse* opinion, as well as the reactions in the press and constitutional treatises).

By the 1880s and 1890s, constitutional theorists began articulating cautious defenses of Miller's opinion. For example, while acknowledging that Miller refused to honor the goals of the Amendment's framers, treatise writer Christopher G. Teideman argued that Miller took the "bold and courageous" course, by modifying the Radical's attempt to undermine state autonomy with an interpretation keeping "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." (Aynes 1994: 684)(*quoting* Teideman, The Unwritten Constitution of the United States 106 (1890)). For a similar analysis of the Waite Court's civil rights decisions by a contemporary historian, *see* (Benedict 1978).

those listed in the Bill of Rights.[87] Instead, they sought to guarantee all the fundamental rights associated with citizenship in a free government, including many left unenumerated in the original Constitution. First and foremost among these rights was the right to protection by the government. The right to protection was understood in the nineteenth century to include the state's duty to prevent acts of violence committed by citizens against other citizens.[88] The debates preceding the passage of the Ku Klux Klan Act reaffirmed this understanding of the privileges and immunities of citizens articulated by Justice Washington in *Coryell*. In Sections 1 and 5 of the 14th Amendment, the Republican supporters of enforcement legislation found authority to act to protect individuals against private violence. Acknowledging the full scope of the original understanding of the Privileges or Immunities Clause has important implications for contemporary scholarship addressing § 1983 doctrine. Proposals for the revival of the Privileges and Immunities Clause, for example, should take into account the unenumerated rights view, especially the guarantee of protection, and to consider how these positive rights may affect plaintiffs' constitutional torts claims.

Because the privileges and immunities of citizens included guarantees of positive rights, such as the protection by government, that were not mentioned in the Bill of Rights, focusing exclusively on the incorporation debate shields from view the full extent

[87] (Olson 1994: 348-9)("[A] majority of the inquiry on both sides of the incorporation debate remains locked in the jurisprudential time warp of positivism . . .").

[88] (Heyman 1991)(arguing that a central aim of Reconstruction and the Fourteenth Amendment was to transfer to the federal government supervisory authority over the states to ensure the rights of protection were secured) Heyman ably defends the view that, even in the pre-New Deal era, the state was thought to have responsibilities to prevent private sources of inequality or domination. Drawing from the works of Coke, Blackstone, and Locke, Heyman demonstrates the centrality of the right to protection in classical liberal thought. In addition, with respect to the radical Republicans, rather than focus solely on their free labor views, Heyman emphasizes that they were, at least in cases involving private acts of physical violence, just as "progressive" as legal realists like Morris Cohen in refusing to acknowledge formalistic distinctions between the public and private spheres. For a similar argument, *see* (Barber 2003)(describing the "positive" guarantees of traditional constitutionalism and discussing the implications for contemporary debates in constitutional law).

of the effect of Miller's *Slaughterhouse* opinion. Highlighting the unenumerated rights protected by the Privileges or Immunities Clause, and in particular emphasizing the right of protection, can also help to clarify the often misunderstood reasoning in the Court's later cases involving enforcement legislation, especially *Cruikshank* and *Harris*. The Court's refusal to accept the radical Republicans' intention to apply the Bill of Rights, and other fundamental unenumerated rights, against state governments who refused to protect them was the first obstacle, but it was not to be the only one the Court placed in the way of the enforcement policy. Shortly after the *Slaughterhouse* opinion was handed down, the new Waite Court turned to a consideration of a series of cases that resulted in a significant narrowing of the scope of Congress' authority under Section 5. The introduction of a quasi-state action requirement[89] presented the second radical departure from the original understanding of the Republican vision of constitutionalism (especially the *Prigg* analogy justifying enforcement powers over private individuals), and one that would have more far-reaching consequences. Although the *Miller* opinion in *Slaughterhouse* delayed the incorporation of the Bill of Rights, which itself caused a

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[89] I use the term "quasi" here to acknowledge that the Waite Court did not endorse the modern notion of the state action limitation, but instead introduced a more modest requirement of proof of state neglect. I thank Pamela Brandwein for making these distinctions clearer to me. *See* (Brandwein 2004) (discussing the doctrine of state neglect in Waite Court civil rights opinions); *see also* (Benedict 1978: 46) (suggesting that the "moderate" Waite Court – in decisions like *Cruikshank* and *Harris*, addressing federal jurisdiction under the enforcement statutes – merely required allegations that states were failing to perform their duty); (Frantz 1964)(arguing the early enforcement cases left room for Congress to act when the states were negligent).

Even if the Waite Court opinions are read with the state neglect concept in mind, it is important to emphasize the significance of the Waite Court's departure from the Radical Republicans' emphasis on *Prigg* when justifying comprehensive enforcement powers, and to describe the ways in which these Waite opinions laid the groundwork for the later, more stringent state action requirements and narrower interpretations of the scope of Congress's Section 5 authority. For this reason, I reject Brandwein's attempts to rebut what she calls the "judicial abandonment thesis," which suggests that the Waite Court turned their backs on the freedmen. Although the abandonment thesis as she formulates it is a bit too blunt in its assessments, it is fair to say that the Waite Court continued on the road chosen by Justice Miller in *Slaughterhouse*, and contributed to the curtailment of the federal government's ability to protect the rights of the freedmen. *Cf.* (Brandwein 2004: *3).

postponement in the use of the liability provisions in the1871 Civil Rights Act, that postponement was eventually, albeit only partially, corrected by the Court's subsequent adoption of selective incorporation in a piecemeal fashion during the 20th century.[90] In contrast, the consequences of this second departure, limiting Congress' enforcement powers, introduced a new limitation that grew to a more stringent set of requirements during the Fuller Court and still today remains one of the most serious obstacles for congressional civil rights policies.[91]

D. The Waite Court and the Enforcement Acts Cases

The Waite Court cases are best analyzed in a manner that highlights their political context. Morrison Waite assumed the office of Chief Justice at a time when the Republican Party's commitment to the civil rights of the freedmen was waning. The Waite Court decisions would be responsive to the changing priorities of the Republican Party, yet at the same time politicians were relying on the Supreme Court to offer them guidance in their debates about civil rights enforcement. During the debate over the Civil Rights Act of 1875, for example, the opponents of the legislation, mostly Democrats, cited the *Slaughterhouse* opinion to bolster their position that all of the rights addressed in the civil rights bill involved incidents of state citizenship beyond the authority of Congress to regulate. Congressmen Beck, for example, argued that "the whole spirit and bearing of the decision is against the constitutionality of the law now proposed," because

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[90] For more on the potential contributions of a revival of the radical Republicans' theory of the privileges and immunities of national citizenship, *see* Ch. 5, *infra*.

[91] Although these limits were for a while thought to be transcended with the successful substitution of a commerce clause justification for civil rights statutes, after the Rehnquist Court's revival of state sovereign immunity doctrine, the importance of defining the scope of Congress' Section 5 authority became a far more prominent issue. *See* discussion in Ch. 4, *infra*.

the object to be regulated "bear only on the individual as a citizen of the State, and not as a citizen of the United States."[92] A significant portion of the debate centered on the question supposedly resolved in *Slaughterhouse*: the definition of the privileges and immunities of citizens of the United States.[93] Republicans conceded that justifications for the legislation based upon the Privileges and Immunities Clause were more vulnerable after the *Slaughterhouse* decision was handed down, so they changed their strategy.[94] Republican supporters of the bill acknowledged that states retained primary authority to regulate schools, churches, and place of public accommodation, but they argued that Congress could enact legislation to ensure that states abided by the dictates of the Equal Protection Clause.[95] Placing more emphasis on equal protection rather than fundamental rights was the Republicans' best option. However, after the schools clause was cut out of the final bill, supporters of the measure were less optimistic about its prospects for effecting important changes in society, and there were few celebrations of victory upon the bill's passage. To make matters worse, the lame-duck Republicans were soon thereafter turned out of office, and the attention of the party became focused on the upcoming presidential election of 1876.

During this same period, the Court began to articulate constitutional arguments limiting congressional authority over civil rights enforcement in the states. The debates

[92] (Fox 2003: 149) (*quoting* Cong. Rec., 43rd Cong., 1st Sess. 342 (1873)).
[93] For analyses of the debate, *see* (McConnell 1995: 998-1049); (Aynes 1994: 679-81). Aynes describes an interesting exchange in the Senate between Senator Thurman, who suggested that the Court had made "the final interpretation" of the Clause, and Senator Edmunds, who interrupted to exclaim: "I do not admit it." *Id*. (*quoting* Cong. Rec., 43rd Cong. 1st Sess. 4087 (1874)). Wildenthal emphasizes the some Democratic opponents of the Civil Rights Act relied on Miller's opinion in *Slaughterhouse* to argue the 14th Amendment protected the Bill of Rights against state infringements, but the privileges and immunities did not include the "social rights" at issue in the bill. Wildenthal's arguments about the congressional interpretation of *Slaughterhouse* are intriguing and warrant further study, but they do not help him establish his assertion that Miller intended his opinion to be so read. (Wildenthal 2000: 1116-1124).
[94] For an overview of the near decade-long reform movement leading up to the Civil Rights Act of 1875, *see* (McPherson 1965).
[95] (Fox 2003: 149-150).

preceding the 1871 Ku Klux Klan Act produced two justifications for the extending congressional enforcement authority over private individuals, through criminal penalties for civil rights violations. The more sweeping justification relied on the analogy to *Prigg v. Pennsylvania* and held that Congress had the authority to enforce any provision in the Constitution directly against private individuals. The second argument offered by Republican supporters was more narrow, but it still endorsed a revolutionary change in federalism. The "supervisory authority" argument proposed that congressional authority be justified only when the states themselves failed to peform their duties as the primary guarantors of individual rights.

The conventional view of the Waite Court decisions evaluating the enforcement legislation assumes that the Court rejected both of these conceptions of congressional authority, in favor of a strict state action limitation.[96] According to this interpretation, the state action limitation does not contemplate the possibility that state neglect – the states' failure to protect liberty or to secure rights – would itself constitute a violation of the 14th Amendment. Instead, the holdings in *Cruikshank*, the *Civil Rights Cases*, and *Harris* are thought to turn on the fact that the legislation did not regulate state violations of rights, but rather private actions. This view of the Waite Court trio of enforcement opinions has been endorsed in recent years by the Rehnquist Court, but it has long been recognized to be an overly simplistic reading of these opinions.[97]

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[96] The originators of the strictest variant of the state action doctrine were in fact the Democrats in the 42nd Congress who opposed the Ku Klux Klan Act on the grounds that the 14th Amendment only prohibited unconstitutional state legislation. Their Republican critics quickly responded with the argument that if that was all the 14th Amendment was meant to secure, then there would be no need for Section 5, because the Court would be left with the role of overturning unconstitutional legislation.

[97] (Frantz 1964: 1369).

In the lower circuit court proceedings in *United States v. Cruikshank*,[98] Justice Bradley served on the panel. Bradley's circuit court opinion offers interesting insights into his thinking about the scope of congressional enforcement powers, which, when examined together with his dissent in *Slaughterhouse*, reveal the complexities of these issues. Although in *Slaughterhouse* Bradley was unflinching in his willingness to defend the broadest interpretation of the rights guaranteed by the Privileges or Immunities Clause in Section 1 of the 14th Amendment, his views about enforcement powers suggest that he remained sensitive to concerns that the Republican enforcement regime would overtake states' authorities over criminal and civil law.

The question before the circuit court in *Cruikshank* was a motion in arrest of judgment on conspiracy charges under the Enforcement Act of 1870. The charges were filed after the Colfax Massacre of 1873, one of the most brutal and infamous of all of the Klan outrages. After the closely contested elections of 1872 left the state of Louisiana with two competing state slates of officials, from the Fusionist and Republican parties, claiming they won the election, a group of Republicans in Colfax, Louisiana broke into the Grant Parish courthouse building to defend their authority as sheriff and judge. After hearing about these attempts at take over these parish offices, whites throughout the county began to organize. Fearing for their safety, large numbers of blacks began to go to the courthouse in order to protect themselves. Approximately one week later, white supremacists surrounded the building, and after setting it on fire and calling the blacks to come out and surrender, executed an estimated 280 of them. The remaining few that

[98] 25 Fed. Cas. 707 (No. 14, 897) (1874).

were captured were executed later that evening.[99] After an investigation by the Department of Justice, a group of the white conspirators was charged with conspiring to, as Bradley phrased it, "deprive them of . . . the free exercise and enjoyment of certain supposed constitutional rights and privileges."[100] The counts alleged interference with the following rights:

> [In the first count,] the right peaceably to assemble themselves together; in another, the right to keep and bear arms; in a third, the right to be protected against deprivation of life, liberty and property without due process of law; in a fourth, the right to the full and equal benefit of the laws; in another, the right to vote, etc. The second series or counts charges murder in addition to, and whilst carrying out, the conspiracies charged.[101]

Bradley emphasized that the U.S. prosecutors never established that states had somehow failed to provide a remedy for the violation. He was troubled by the fact that Section 6 of the Enforcement Act of 1870 did not require them to make an initial showing that states had failed to protect these individuals' rights.

Although Bradley acknowledged the *Prigg* precedent in his opinion, he nevertheless rejected the most sweeping claims for congressional enforcement authority offered by Republican supporters of the Enforcement Act. The radical Republicans who invoked *Prigg* had argued that Congress had the power to enforce *any* right in the Constitution, with laws reaching directly to private individuals. To justify his rejection of such a sweeping view of Congress' implied enforcement powers, Bradley carefully delineated the differences between the precise rights to be protected, and the scope of the enforcement power that would follow.[102] For example, he suggested that the Fugitive

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[99] (Foner 1988: 437; Rable 1984: 126-9; Goldman 2001: 42-50) Estimates about the numbers murdered vary from approximately 100 to nearly 300.
[100] *Id*. at 708.
[101] *Id*. at 708.
[102] *Id*. 709-10.

Slave Clause was sufficiently different than the Reconstruction Amendments' guarantees. According to Bradley, when rights and privileges are guaranteed using the language that "no state shall," then it should be understood that the Constitution is guaranteeing that they shall not be impaired *by the state*. The federal government's only enforcement power is a supervisory power:

> The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon it [the federal government], but belongs to the state government as part of its residual sovereignty. . . . The enforcement of the guaranty does not require or authorize congress to perform the duty which the guaranty itself supposes it to be the duty of the state to peform. The duty and power of enforcement take their inception at the moment that the state fails to comply with the duty enjoined, or violates the prohibition imposed.[103]

Bradley considers Section 1 of the 14th Amendment to include affirmative obligations upon states to guarantee that these rights are secured.[104] If the state fails to act, then Congress may rely on its Section 5 powers to ensure that these rights are protected. Section 6 of the Enforcement Act of 1870 is unconstitutional because it is too broad; it does not include an initial showing that the state was negligent in performing its constitutional duties assigned to it under the 14th Amendment.

Bradley offered a broad reading of the 13th Amendment, arguing that it was intended guarantee the liberty of the freedmen. Although the lack of the "no state shall" language meant that Congress would *not* be limited to a supervisory power over the states, Congress nevertheless was restricted in that it only had the authority to pass criminal laws involving racially-motivated attempts to deprive freedmen of their rights

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[103] *Id*. at 710.
[104] *Id*. at 711-12.

and privileges. It was not enough to simply note that the victims were black; intent must be an element of the criminal charges.[105]

Bradley's reading of the 15th Amendment melded together his views about the 14th and 13th Amendments. The Amendment imposes on states an affirmative obligation to ensure that race would not be used to interfere with voting. But unlike the 14th Amendment, the 15th Amendment does not contain the "no state shall" language. Although Bradley seemed conflicted about extended congressional enforcement power, he concluded that, with respect to the 15th Amendment, Congress could pass laws to protect these rights, regardless of whether the state has neglected to do so. In other words, the federal charges are not required to include a showing of state neglect or indifference.[106] Moreover, according to Bradley, the 15th Amendment, like the 13th Amendment, is designed to protect the rights of blacks. Any enforcement legislation must therefore be limited to interference with voting that is racially motivated; intent must be an element of the criminal charges.[107]

So, according to Bradley, under the 13th and 15th Amendments, Congress has the power *directly* to outlaw private violence that is motivated by race. The problem with Section 6 of the Civil Rights Act of 1870 is that it did not limit the crimes to those involving racial intent, and so prosecutors had not thought it necessary to include such allegations in the charges. Although Bradley did not explicitly declare Section 6 unconstitutional because it exceeded congressional enforcement power, his rejection of the charges on the grounds that they did not allege intent suggests that he must have thought the enforcement provision itself to be invalid. Ultimately, the men charged with

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[105] *Id*. at 711-12.
[106] *Id*. at 713.
[107] *Id*. at 713-14.

conspiring to commit one of the worst race massacres in this country's history were set free, partly because the federal prosecutors failed to established "racist intent."

Compared to Bradley's thorough theoretical discussion of congressional authority under Section 5 of the 14th Amendment and the second sections of the 13th and 15th Amendment, Chief Justice Waite's opinion for the Supreme Court is frustratingly vague.[108] Rather than center the analysis on the scope of congressional enforcement powers, Waite relied heavily on *Slaughterhouse* to emphasize that many of the rights violations alleged in the indictment were not rights of United States citizens, but rather rights of Louisiana citizens that must be enforced in that state's courts.[109] Waite argued that the right of assembly was not a privilege of United States citizenship, unless it is explicitly shown that they were assembling in order to petition Congress.[110] It is puzzling that Waite did not directly address Bradley's arguments about the scope of congressional enforcement powers. Even more puzzling is Bradley's decision to sign onto Waite's opinion, despite the fact that it directly contradicted his own dissenting opinion in *Slaughterhouse*. By relying on the distinction between rights associated with national and state citizenship, Waite was able to offer an indirect method for narrowing the scope of congressional enforcement powers. Only for the very small category of rights

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[108] *Unites States v. Cruikshank*, 92 U.S. 542 (1876).

[109] The *Slaughterhouse* precedent was stressed in all of the defendants' briefs submitted to the Court. (Goldman 2001: 83-7) The fact that the briefs, and also Waite's *Cruikshank* opinion, interpreted Miller's *Slaughterhouse* opinion to exclude incorporation, presents significant problems for the revisionist interpretation of *Slaughterhouse*.

[110] Waite acknowledged that some of the charges involved a conspiracy to hinder the right to vote, and he cited *United States v. Reese*, 92 U.S. 214, 217-18 (1875), for the holding that this right – the right to be free from discrimination when exercising the franchise – is a right associated with national citizenship. However, Waite, following *Reese's* holding that racial intent must be established in order to rely on the 15th Amendment to support a charge, concluded, as Bradley did below, that those claims were not separately established by the prosecutors in the *Cruikshank* case. 92 U.S. at 555-556.

With respect to the equal protection clause, Waite similarly argued that, although Congress does have the authority under Section 5 of the 14th Amendment to remedy deprivations of "the full and equal benefit of law and proceedings," the indictment itself did not allege that the Louisiana prosecutors or other officials were motivated by racial prejudice. *Id*. at 554.

associated with national citizenship, Waite suggested, does Congress have the authority under Section 5 to protect these with laws reaching directly over private persons.

Defenders of the Waite Court, such as Michael Les Benedict and Pamela Brandwein, argue that Waite's decision in *Cruikshank* offered a reasonable minimalist defense of federalism against the radical Republican agenda.[111] It is true that simply

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[111] (Benedict 1978); (Brandwein 2004). Similar praise for the Waite Court was offered by the chief proponent of the Civil Rights Act of 1871, Samuel Shellabarger. At the Supreme Court's memorial service for Chief Justice Waite in 1888, Shellabarger referred to Waite's decision in *Cruikshank* and argued that, although his approach had failed to honor the intent of the framers of the 14th Amendment, historians would later praise the Chief Justice when "the lapse of years has matured men's views and cooled their feelings regarding the results of the late war." (Aynes 1994: 683) (*citing* "In Memoriam: Morrison Remick Waite," L.L.D. 126 U.S. app. 585, 600-01 (1888)).

Given even Shellabarger's condonation, it may seem unreasonable to argue that Waite deserves criticism for failing to take the opportunity in *Cruikshank* to disavow the Supreme Court's rejection of the Republican theory of constitutionalism – particularly the federal government's supervisory power to guarantee all fundamental civil rights – in *Slaughterhouse*. Whether Miller or Waite deserves praise or blame, their decisions are more plausibly viewed as resting on political grounds rather than principled review of the leading Republicans' understanding of the meaning of privileges and immunities.

In her defense of the Waite Court, Brandwein argues that it should not be blamed for the disenfranchisement of blacks. She may be correct in arguing that there is a tendency among political scientists and legal scholars to blur the 1870s and 1880s with the 1890s (or, in the case of the state action doctrine, to mistake the 1870s and 1880s for the 1920s). (Brandwein 2004: *4-5, *52) Historians like Morgan Kousser have argued that blacks continued to vote during these decades, and the turnouts remained quite substantial. Robert Goldman stresses that, during the 1870s and 1880s, the Department of Justice continued attempting to enforce federal criminal statutes protecting voting rights. (Goldman 2001: 119-23) Movements in the south to disenfranchise blacks occurred long after the *Reese* and *Cruikshank* opinions were handed down. (Kousser 1974: 239-40)(arguing that the first campaign, from 1888 to 1893, was part of a backlash against the Lodge Bill and the second campaign, from 1898 to 1902, followed the decline in influence of the Republican Party). *Cf.* (Woodward 1965); (Woodward 1988).

In addition, Brandwein helpfully points out that incorporation was not a fatal blow to the rights of blacks, because the Court still recognized that federal courts would guarantee equal protection, and protect blacks against discriminatory state laws. (Brandwein 2004: *56) For other cases involving the Equal Protection Clause and the right to serve on juries, *see Ex Parte Virginia*, 100 U.S. 339 (1879) (upholding Section 4 of the 1875 Civil Rights Act, making it a crime to exclude, on the basis of race, a citizen from serving on juries); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (upholding removal provision for defendant, because West Virginia did not allow blacks to serve on juries); *but see Virginia v. Rives*, 100 U.S. 313 (1879) (rejecting use of removal statute in a state which never called blacks for jury service, on the grounds that Virginia *law* did allow blacks to serve on juries).

However, Brandwein's reliance on the protective role of equal protection doctrine to defend the Waite Court cannot bear the weight she gives it. Although Brandwein seeks to distinguish the Waite and Fuller Court, cases like *Virginia v. Rives* offer an important example of the direct links between the Waite and Fuller Courts. The Waite Court had left open the possibility in cases, like *Rives,* where the law itself did not rest on classifications by race, that the Court would conclude the formal requirements of the Equal Protection Clause were met. Indeed, the Fuller Court quickly enough asserted just this sort of argument in *Williams v. Mississippi*, 170 U.S. 213 (1897), upholding provisions in the Mississippi constitution of 1890 that were intended to keep blacks off juries by drawing panels from voter registration lists. The Court held that, because there was no racial classification in the law, there was no violation of equal protection. Because similar laws establishing literacy tests and poll taxes also did not rely on racial classifications,

requiring a showing of racial discrimination when relying on the Enforcement Act of 1870 would still permit federal prosecutors to protect the blacks' right to vote.[112] However, by endorsing the distinction between national and state citizenship and the distinct sets of rights associated with these statuses, Waite failed to take advantage of an early opportunity to defend an account of the federal government's supervisory role over states, in order to protect *all* the fundamental rights that members in the Reconstruction Congresses were concerned about, including freedom of speech and protection from politically motivated acts of violence. This failure to defend the radical interpretation of the Privileges and Immunities Clause, or to endorse the incorporation of the Bill of Rights, also had important implications for the implementation of the Civil Rights Act of 1871, which was passed under the authority of Section 5 of the Fourteenth Amendment. Members of the 42nd Congress were well aware that the extent of congressional authority under Section 5 was directly linked to the scope of the rights guaranteed by Section 1.[113] After the endorsement of a narrow reading of Section 1 in *Slaughterhouse* and *Cruikshank*, it was an open question whether the 1871 Ku Klux Klan Act itself would become vulnerable to states' rights arguments that Congress exceeded its constitutional authority under Section 5.

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these survived constitutional scrutiny as well. Even if the Waite Court cannot be held directly responsible for the disenfranchisement of blacks, in an indirect way its introduction of a formalist equal protection jurisprudence opened the door for such policies, and left them immune from constitutional challenge.

[112] (Brandwein 2004).

[113] *See* discussion in Ch. 2 *supra*.

This issue was soon addressed by the Waite Court.[114] In *United States v. Harris*,[115] the Court declared parts of Section 2[116] of the Ku Klux Klan Act of 1871 unconstitutional, on the grounds that the federal government could not rely on its Section 5 powers to reach private conspiracies without proof that the state had failed in its efforts to protect those rights. Although Waite ignored the Section 5 arguments in *Cruikshank*, the *Harris* Court revived Bradley's circuit court opinion in *Cruikshank* defending congressional authority to pass enforcement legislation designed to protect rights once state negligence had been established. In this case, which involved the lynching of four black men who were held in the custody of a deputy sheriff, there was no allegation regarding the state's discriminatory or inadequate enforcement of its laws. Writing for the majority, Justice Woods concluded:

> [Section 2] is not limited to take effect only in case the State shall abridge the privileges and immunities of citizens of the United States, or deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws. It applies no matter how well the State may have performed its duty.[117]

Rather than offer the sweeping holding stating that Congress cannot punish private acts, Wood suggests that Congress may due impose criminal sanctions on private individuals, in situations where the state has failed to provide adequate protection. If Section 2 included as a separate requirement the finding that the state had failed to prevent the

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[114] The Waite Court experienced a great deal of turnover in the years between *Cruikshank* and *Harris*. From 1877 to 1881, Presidents Grant and Garfield were able to appoint a new majority of five on the Court. Davis, Swayne, Strong, Clifford, and Hunt left the Court, and Harlan, Wood, Matthews, Gray, and Blatchford were appointed. With the exception of perhaps Harlan and Wood (Bradley's protégé who wrote the circuit court opinion, *United States v. Hall*), Grant's choices reflected the low priority the Republican Party had assigned to enforcement policies.
[115] 106 U.S. 629 (1883).
[116] This section made it a crime to conspire to deprive any individual of the equal protection of the laws, or to hinder state authorities from providing equal protection.
[117] 106 U.S. at 639.

violence, or the state failed to punish the perpetrators, then it presumably would pass muster.

This more precise overview of the actual holding in *Harris* is neglected in contemporary constitutional debates, especially in Rehnquist Court opinions citing *Harris* in support of the general proposition that Congress cannot rely on its Section 5 cannot to reach private actors.[118] What about the contemporary relevance of *Harris* for constitutional torts liability? Although *Harris* clearly offers an important discussion of the scope of congressional enforcement powers, its significance for debates about the constitutional tort liability of officers for so-called private actions is less direct. During the debates on the Ku Klux Klan Act in the 42nd Congress, Section 2 of the 1871 Act was considered to be far more controversial than Section 1, primarily because it operated directly on private individuals and had the potential of displacing states' traditional control over criminal enforcement policies. Section 1, on the other hand, included an "under color of law" provision, which many felt adequately distinguished the civil liability provisions from traditional state tort law. The criminal counterpart to § 1983 (Section 1 of the Ku Klux Klan Act of 1871) is Section 2 of the Civil Rights Act of 1866. That criminal provision similarly includes an "under color of law" requirement, which

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[118] *See, e.g. ,United States v. Morrison*, 529 U.S. 598, 621 (2000). (Chief Justice Rehnquist, majority opinion) ("In Harris, the Court considered a challenge to § 2 of the Civil Rights Act of 1871. That section sought to punish 'private persons' for 'conspiring to deprive any one of the equal protection of the laws enacted by the State.' 106 U.S. at 639. We concluded that this law exceeded Congress' § 5 power because the law was 'directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers.' 106 U.S. at 640. In so doing, we reemphasized our statement from Virginia v. Rives, 100 U.S. 313, 318, 25 L. Ed. 667 (1880), that ''these provisions of the fourteenth amendment have reference to State action exclusively, and not to any action of private individuals.' Harris, supra, at 639 (misquotation in Harris).") *See also id.* at 622 ("The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time, who all had intimate knowledge and familiarity with the events surrounding the Amendment's adoption.").

did not face the kind of constitutional scrutiny that the criminal provisions at issue in *Harris* confronted.

Because Section 2 of the 1866 Act included the "under color of law" requirement, the provision was not challenged with the argument that the criminal provision, by operating directly on private individuals, exceeded the scope of congressional authority under Section 5. Instead, the initial questions concerning the "under color of law" phrase addressed the more precise meaning of the phrase. Would it cover only those circumstances when the state law itself violated an individual's federal constitutional rights? What about cases in which a state official violated state laws? An early case addressing the state action requirement, *Virgnia v. Rives,* is important for constitutional tort cases because of a famous piece of dicta suggesting the Waite Court's approach to the "color of law" question : "[W]hen a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which state law accords him . . . it ought to be presumed the state court will redress the wrongs."[119] The *Rives* dicta was consistent with the Waite Court's general approach to enforcement. "Preserving federalism"[120] weighed more heavily than the Reconstruction framers' intent, whenever the two conflicted.[121] With the *Rives* case, the Waite Court completed the steps needed to shut federal courthouse doors in almost all conceivable constitutional torts cases. After

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[119] 100 U.S. at 321-2.
[120] (Benedict 1978).
[121] In some cases, the Waite Court did produce rulings that upheld federal criminal convictions of private individuals, but in these cases the sharp conflict between federalism and enforcement was absent. In *Ex Parte Yarborough*, 110 U.S. 651 (1884), for example, the Waite Court justified federal convictions of whites accused of committing Klan-type outrages against blacks in retaliation for their participation in a recent election on the grounds that Congress had authority under Article 1 to regulate the "manner and conduct" of elections, and this authority extended to efforts to intimidate voters in future elections. Relying on the Article I power raised no states rights' complaints, and it allowed the federal government to attempt to protect the rights of all voters, white or black, and so did not leave the impression that the Republicans were favoring the freedmen with special protections.

Slaughterhouse, few constitutional rights were thought to be "rights associated with national citizenship," and after *Rives*, state officials' misconduct would be left to the state courts to address. The civil liability provisions of the Ku Klux Klan Act were never explicitly declared unconstitutional, but the Waite Court left them in a position of near dormancy for decades.

The next significant Waite Court enforcement case continued the search for limits on the ability of Congress to regulate "private" affairs. In the term immediately following its *Harris* decision, the Waite Court struck down the Civil Rights Act of 1875. In his opinion in the *Civil Rights Cases*,[122] Justice Bradley concluded that Congress could not rely on its Section 5 enforcement power to regulate against private discrimination, arguing that allowing Congress to do so would be unduly insulting to states. Many scholars point to the tripartite distinction among civil, political, and social rights to explain Bradley's view that the Civil Right Act of 1875 was unconstitutional, while in the same opinion continuing to voice support for the constitutionality of the Civil Rights Act of 1866.[123] In comparing the two civil rights bills, Bradley emphasized that, with the 1875 Act, Congress was not attempting to protect "those fundamental rights which are the essence of civil freedom," but instead Congress was overreaching its authority by seeking "to adjust what may be called the social rights of men and races in the community."[124]

The social rights distinction does not explain why Bradley chose to emphasize the limits of congressional enforcement authority over private actors. The discussion was not necessary, if he was arguing that social discrimination was not prohibited by any of the

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[122] 109 U.S. 3 (1883).
[123] *See, e.g.,*(Brandwein 2004: *17).
[124] 109 U.S. at 22.

rights guaranteed by the Thirteenth or Fourteenth Amendments. Nevertheless, Bradley himself argued that it was not necessary to examine the question whether the Civil Rights Act involved "essential rights of the citizen which no State can abridge or interfere with."[125] Instead, he chose to base his assessment of the Act's constitutionality upon an evaluation of the scope of congressional enforcement powers under Section 5 of the 14th Amendment. His views were quite similar to those he defended in his circuit court opinion in *Cruikshank*, yet he used language in the *Civil Rights Cases* that is easily taken out of context and misconstrued to suggest a more limited view of congressional enforcement power. For example, Bradley wrote:

> [Section 5] of the Amendment invests Congress with the power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it.[126]

Inferring a state action requirement from this quotation alone is quite reasonable. But when the opinion as a whole is examined, it becomes more evident that Bradley was not suggesting that only overt actions by state officials could trigger a violation. Instead, when a state fails to protect the "positive" rights of the Amendment, including the guarantee of equal protection, then there is a violation.[127] As long as Congress is careful

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[125] 109 U.S. at 20.
[126] 109 U.S. at 11.
[127] It is unfortunate that Bradley was not more straightforward in his use of terminology. The upshot of his opinion is that the failure to protect could be deemed state action. The continuing resort to this kind of argument, that inaction is a form of action, has resulted in a state action doctrine that is "a conceptual disaster area." (Black 1967: 95)("Taking [academic scholarship on state action] as a whole, what we see exhibited is a 'doctrine' without shape or line. The doctrine-in-chief is a slogan from 1883. The sub-doctrines are nothing but discordant suggestions. The whole thing has the flavor of a torchless search for a way out of a damp, echoing cave.") Rather than focus, as later state action doctrine would, on the causation question, which asks "how much" state involvement is there, Bradley acknowledges that even when the

when drafting its enforcement legislation to include the requirement that the state has failed to perform its duty, then the resulting enforcement statute will be deemed constitutional.[128]

Bradley acknowledged that Congress may act directly when relying on the Thirteenth Amendment, but he argued that societal discrimination should not be considered among the "badges and incidents of slavery."[129] Bradley more generally defended limiting the reach of the Thirteenth Amendment and civil rights enforcement under the 14th Amendment when he concluded:

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state fails to act at all, it may nevertheless be deemed a condoning "action" performed despite a duty to intervene.

The relationship between Bradley's arguments about state neglect in the *Civil Rights* Cases and contemporary arguments about a constitutional affirmative duty to protect under § 1983 should not be overstated. In the *Civil Rights Cases*, Justice Bradley suggested that the 14th Amendment guarantee of equal protection would not be violated when the state government was prepared to provide a remedy for private harms. 109 U.S. at 17 ("[When the wrong] is not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.") If this reasoning were applied to a case like *DeShaney*, then one might conclude that there could only have been a constitutional violation of due process if Wisconsin failed to provide adequate remedies. Arguments supporting the modern affirmative duty to protect therefore should acknowledge that the 14th Amendment itself guarantees a substantive right to protection, via the Privileges and Immunities Clause. The more important case for this argument is therefore *Slaughterhouse*, not the *Civil Rights Cases*.

[128] In an interesting section of dicta, Justice Bradley explained why other parts of the 1875 Civil Rights Act are constitutional. Section 4, which addressed discrimination for jurors, included the requirement that it be alleged that the state law itself was discriminatory or that the state officials were enforcing a neutral law in a racially discriminatory manner. The terms of Section 4, Bradley emphasized, are corrective in nature. Congress can legislate to provide remedies when the state fails to guarantee equal protection in this way. *Id*. at 15-16. What is most interesting about Bradley's discussion of the second part of Section 4 is that he implied that a state official's actions, even when in violation of or not endorsed by state law, can be attributed to the state.

He elaborated his views by examining Section 2 of the Civil Rights Act of 1866. He pointed out that this provision is similarly corrective in nature, and that it only applies when persons acting "under color of law" deprive individuals of their rights and privileges. *Id*. at 16.

Taken together, Bradley's observations hint that he would endorse a fairly broad definition of "under color of law." Recall that, in *Rives*, the Court declined to invoke a removal statute and held that in the case of unauthorized conduct, state officials should instead be sued or indicted in state courts. Here, in dicta, Bradley appeared to be endorsing a broader definition of "under color of law" that includes unauthorized conduct. It does not appear, however, that this discussion had much of an impact on enforcement policy. The White Court would later make this kind of argument much more directly in *Home Telephone & Telegraph v. Los Angeles,* 227 U.S. 278 (1913), by arguing that the state action requirement is met whenever officers misuse their authority. *See id.* at 287 ("The theory of the [F]ourteenth Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant. . . . .").

[129] 109 U.S. at 20-24.

> When a man has emerged from slavery . . . there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be a special favorite of the laws, and when his rights as a man, are to be protected in the ordinary mode by which other men's rights are to be protected.[130]

In his *Civil Rights Cases* dicta, Bradley fully endorsed the application of the impartiality view of the 14th Amendment that had been becoming more prominent in Waite Court opinions since *Slaughterhouse*.[131] Now, Bradley suggested, the standard of equal treatment should be applied to legislation seeking to *protect* blacks.[132]

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[130] 109 U.S. at 25.

[131] Nelson emphasizes the following opinions: *Bradwell v. Illinois*, 83 U.S. 129 (1874) (Bradley, joined by Field and Swayne, concluding that the Illinois legislation denying women admission to the state bar was a reasonable exercise of the police power); *Bartemeyer v. Iowa*, 85 U.S. 129 (1874) (Bradley, joined by Field and Swayne, arguing that the Iowa temperance law was a reasonable exercise of the state's police powers); *Loan Association v. Topeka*, 87 U.S. 655 (1875) (a unanimous decision, written by Justice Miller, concluding that municipal bonds issued in favor of a private corporation were void, because the people had a right to be taxed only for public purposes, not to aid private interests). Nelson suggests, based on Miller's opinion in *Davidson v. New Orleans*, 96 U.S. 97 (1878), that Miller joined the opinion in the Topeka bonds case, because he believed that when the Court was exercising its diversity jurisdiction, it could rely on the *Swift* rule to interpret the 14th Amendment in a manner broader than when it was reviewing state court decisions. (Nelson 1988: 165-171).

[132] In order to explain Bradley's shift from *Slaughterhouse* to his *Civil Rights Cases* dicta, especially his views about the protective responsibilities of the federal government, many scholars have pointed to his participation on the Hayes-Tilden electoral commission. After the presidential election ended in 1876 with a stalemate in the House, members of Congress negotiated a solution to settle the issue. Justice Bradley was a member of the electoral commission appointed to resolve the controversy, and he cast the deciding votes in favor of what became known as "The Compromise of 1877." As a condition for their support of Hayes, the Democrats secured from the Republican Party the promise that the federal government would remove their remaining troops from the southern states, and to allow the white "redeemer" governments more autonomy. These governments then introduced numerous statutes and law that had the effect of denying to blacks equal opportunities. *See, e.g.*, (Scott 1971: 565-9); (Collins 1996: 1998)(questioning a purely political explanation, but conceding that Bradley's opinion in places "reads like an epitaph for Reconstruction").

Some of these laws introduced *de jure* segregation, and when the Fuller Court heard challenges to these laws on equal protection grounds, the effects of the Waite Court's abandonment of the anti-subordination view of equal protection were given full force. The Court held in *Plessy v. Ferguson*, 163 US 537 (1896), that state-mandated segregation did not violate equal protection, as long as the separate provisions were equal. Any impression that the law imposed a "badge of inferiority" upon blacks was not due to the state, but rather the private views of those affected. Segregation was an impartial law and therefore constitutional.

Michael Klarman argues that scholars should not expect the Court to have ruled otherwise. *See* (Klarman 1998: 304-5)("[G]iven the background state of race relations at the turn of the century and the limited capacity of the Supreme Court generally to frustrate dominant public opinion, it may be implausible to think that the Justices realistically could have reached different results in these cases.") I choose to emphasize instead the Republican Party's failure to pursue an entrenchment strategy, to preserve the commitment to Reconstruction expressed in the early 1870s through the Supreme Court appointment process throughout the 1870s, and even the early 1880s. *See* (McConnell 1995)(arguing that a

E. The Rise of Police Powers Jurisprudence

The connections between the Waite Court's ideology supporting these limitations on congressional enforcement powers and the "*Lochner* era" also require more attention.[133] A previous generation of public law scholars highlighted the abruptness of the shift to liberty of contract in the 1890s, after its earlier consideration and rejection in *Slaughterhouse*, and concluded that the adoption of the liberty of contract doctrine by the Fuller Court was done in order to entrench protections for property and business interests once those values became endangered by more populist state legislatures, as well as progressive candidates for national office in either Congress or the White House.[134] But the claim that the Fuller Court doctrines were "abruptly" adopted only makes sense if one interprets those doctrines in a certain manner. A revisionist account of the traditional theory of liberal constitutionalism informed by the Jacksonian views of equality is

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commitment to desegregation among political elites existed in the years immediately following ratification of the 14th Amendment).

Rogers Smith criticizes McConnell for failing to emphasize that, while significant numbers in Congress may have viewed the 1875 Civil Rights Act an appropriate exercise of their authority under Section 5, it does not mean they believed that Section 1 required desegregation and that the judiciary should enforce it. *See* (Smith 1998); *and* (McConnell 1998). Perhaps so, and in that case, it may be unrealistic then to blame the Republican political leaders for failing to entrench desegregation policies via Supreme Court appointments. Still, even if the entrenchment argument may be weaker for "social rights" legislation like desegregation, it is not at all weak for the core civil rights issue. Indeed, one would have expected the Republicans to pursue a dual strategy: find Justices who would uphold their theories of Section 1 when and if the party was turned out of power, but support a broad construction of Section 5 as long as the Republicans remained in power. As the above account shows, however, the Grant appointees to the Supreme Court promoted neither goal.

[133] The election of Grover Cleveland in 1884 gave the Democratic Party its first opportunity in decades to appoint Justices to the Supreme Court. Cleveland chose a states' rights southerner and former Confederate officer, Lucius Lamar, to replace Wood. After Waite's death in 1888, Cleveland passed over Stephen Field and appointed a railroad attorney, Melville W. Fuller, to serve as Chief Justice. When Benjamin Harrison entered the White House, his choice of David Brewer offered evidence that both the Republicans and the Democrats favored nominees who would protect property interests.

[134] Examples of the earlier progressive views, offering a more pernicious view of the purposes of *Lochner* era jurisprudence, can be found in (Paul 1960); (Corwin 1948); (Twiss 1942]; (Swisher 1943).

A more recent work which attempts to revive this Progressive Era interpretation is (Kens 1990). Compare, though, the qualifications to his thesis presented in (Kens 1991).

strikingly distinct from that offered in the earlier scholarly commentary on the *Lochner* Era, and offers an assessment of these cases emphasizes the continuity with many Waite Court cases.

The revisionist view rejects the traditional scholarly interpretation suggesting that the *Lochner* Court was attempting to usurp legislative power by imposing their own conception of laissez-faire economic ideology. According to revisionists like Howard Gillman, the Court was endorsing a more long-standing ideology of legitimacy informing state police powers jurisprudence, according to which the government may intervene in common law or private relations only in order to promote public-regarding objectives. [135]

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[135] *See, e.g.,*(Benedict 1985)(providing an overview of the revisionist thesis); (Gillman 1993) (highlighting the Jacksonian origins of the prohibition against class legislation and providing support for the revisionist thesis through an extensive review of state court and Supreme Court police powers cases); (Rowe 1999)(offering an updated overview of revisionist scholarship).

For accounts considering whether the impartiality ideal helped or hurt African-Americans, *compare* (Paludan 1972: 609-10)(offering a critical account of the influence of Thomas Cooley's Jacksonian theory of impartiality and suggesting that, although he "falsified the intentions of the framers of post-war changes, his argument was sufficiently plausible to gain the acceptance of war-weary people who sought an explanation that demanded little of them"); *and* (Bernstein 2001)(arguing that decisions invalidating labor regulations helped disenfranchised blacks with inferior skills find work).

Other scholars, such as Herbert Hovencamp, offer accounts which appear to me to be slightly at odds with these revisionist views, by providing evidence that the Supreme Court's jurisprudence was based more on classical economic principles, rather than the broad theoretical standards of legitimacy described by Gillman. *See, e.g.,* (Hovencamp 1995) (suggesting that the notion of economic efficiency -- not the impartiality conception of legitimacy -- determined doctrines concerning government regulation of private relationships and was ultimately the most significant touchstone for the Fuller Court's jurisprudence).

None of the above accounts go so far as to suggest that the laissez-faire ideology had no place in *Lochner*-era jurisprudence. One need look no farther than Justice Field's dissent in *Munn v. Illinois* to find a powerful theoretical defense of the laissez-faire alternative to the prevailing police powers jurisprudence. There are, however, other convincing assessments of Field's jurisprudence (focusing especially on his dissent in *Slaughter-House*) which place him firmly within the mainstream police powers school of thought. *See, e.g.* (McCurdy 1975). Nelson reconciles Field's positions in *Slaughterhouse* and *Munn* by arguing that Field believed legislative restrictions, such as entry barriers or price regulations, limited to a single enterprise were unreasonable class legislation. (Nelson 1988: 173-4).

What the impartiality ideal allowed was (1.) a definite distinction between public and private authority, and (2.) a principled justification for government interventions into the private sphere. The old public purposes jurisprudence did *not* create an entirely inviolable private realm of individual choice – as caricatures of "laissez-faire" constitutionalism might imply. Indeed, the historical evidence regarding the *application* of police powers arguments *suggests* that the doctrine allowed very extensive – and arguably pernicious -- state intervention. *See, e.g.,* (Phillips 1998: 453, 489-90)(citing Charles Warren's claim that the Supreme Court had rejected over ninety-five percent of the Fourteenth Amendment due process and equal protection challenges it considered between 1887 and 1911, conducting his own review of substantive due process cases between 1902-1932, and, after arguing that the Court struck down legislation

The revisionists view the emergence of the Fuller Court's liberty of contract doctrines to be part of a longstanding commitment to a certain type of equality – the notion of impartiality – dating back to the Jacksonian Era. A few of these scholars, such as Michael Les Benedict and William Nelson, go so far as to suggest that emphasizing this type of impartiality ideal was an appropriate way for the Waite Court to implement the goals of the Republicans serving in Congress during the Reconstruction Era, while also honoring states' rights values.[136] The debates addressing proposals for amendments and enforcement legislation, however, make it abundantly clear that the dominant Republican view accepted a fundamental, substantive rights view of the Section 1 provisions in the 14th Amendment. The Waite Court discarded the congressional understanding when it began moving from an anti-subordination view to the impartiality ideal informing Bradley's dicta in the *Civil Rights Cases*. By doing so, the Waite Court established the doctrinal support that allowed the Fuller Court, when considering the constitutionality of federal and state wage and hour legislation, to endorse a vision of the Due Process Clause grounded in the limits imposed by the liberty of contract ideology. Although liberty of contract was a specific application of the general ideology of legitimacy, and one that depended upon an acceptance of economic theories defending the fairness of basic common law rules protecting private property and contractual obligations, one can still

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on liberty of contract grounds in only 15 cases but upheld 40 others challenged on the same basis, concluding that the doctrine's "kill ratio" – the number of majority opinions striking down statutes – was smaller than one might expect); (Benedict 1992) (discussing, *inter alia*, the criminalization of the Morman practice of polygamy in *Reynolds v. United States* and the forced sterilization of Carrie Buck in *Buck v. Bell*).

[136] (Benedict 1978: 77)("[T]he Supreme Court's construction of congressional power under the constitutional amendments hardly subverted Republican intent."); (Nelson 1988: 175, 181)(acknowledging that the original intent of the framers of the 14th Amendment did not offer clear guidance on this issue, but concluding that the Court's reliance on the impartiality ideal was the best way to forge a consensus on the meaning of the 14th Amendment) . *See also* (Harrison 1992)(rejecting the fundamental rights reading of the Privileges or Immunities Clause, and defending an equality interpretation).

find the roots of this approach in the Waite Court's rejection of an anti-subordination approach and its endorsement of the impartiality ideal.

In a few cases, *Lochner* Era ideology promoted the interests of blacks, especially when addressing laws regulating property rights. For example, in *Buchanan v. Warley*,[137] the Court struck down a municipal ordinance forbidding individuals to occupy a residence in a neighborhood block within which a majority of another race resided. Rather than rely on the Equal Protection Clause, Justice Day argued that the city law infringed upon individuals' common law property rights, which included the rights to free use, enjoyment, and transfer.[138] According to Day, although states may rely on their police powers to limit property rights, they may not do so in a way that depends on class interests – or, in this case, on the basis of race. For this reason, the law was not a legitimate exercise of the state's police powers, and by infringing on individuals' property rights, it violated substantive due process.[139]

For the vast majority of blacks, however, the reemergence of the impartiality ideal had devastating consequences. The formal requisites of impartiality were met with new measures, such as the "Mississippi Plan," which involved carefully drafted constitutional provisions imposing poll taxes, literacy tests, and other devices so that much discretion was left to local administrators to decide whether a prospective voter had met these requirements. Officials across the south began using such laws to permit illiterate, poor whites to vote, while refusing to register blacks. When the Supreme Court held in the 1898 case, *Williams v. Mississippi*,[140] that these laws passed muster under the Equal

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[137] 245 U.S. 60 (1917).
[138] *Id*., at 74.
[139] *Id*., at 82. For further discussion, *see* (Klarman 1998b).
[140] 170 U.S. 213 (1898).

Protection Clause on the grounds that they were facially neutral, blacks across the south were left to fend for themselves. As a result, in states like Louisiana, which passed similar laws in 1896, black voter registration fell from 95.6 percent before the new law, to less than 10% immediately following its enactment.[141]

Waite Court precedents evaluating the scope of congressional authority under Section 5 were also cited to support narrower interpretations of the 14th Amendment's substantive protections. Lawyers defending a strict state action requirement quoted dicta from *Harris, Rives,* and, the *Civil Rights Cases* to support the argument that the 14th Amendment is only triggered when the state acts, either by enacting statutes or by enforcing them in a discriminatory matter. Bradley's argument that state complaisance despite its duties to act may itself constitute state action under the 14th Amendment was no longer accepted. In addition, Bradley's refusal, in his *Cruikshank* circuit court opinion, to impose a state action requirement on the 15th Amendment was rejected in *James v. Bowman*.[142] The "by any state" language in the 15th Amendment was now thought to impose the same state action requirement as the "no state shall" language in the 14th Amendment. As a result, the Department of Justice rarely intervened in cases involving private violence, without the active participation of at least one state official.[143]

The effects of these constitutional cases should not be underestimated. Upholding the constitutionality of these laws aimed at the disenfranchisement of blacks meant that

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[141] (Klarman 1998: 356).
[142] 190 U.S. 127 (1903). Progressive era cases like *Guinn v. United States*, 238 U.S. 347 (1915), and *Myers v. Anderson*, 238 U.S. 368 (1915), which are sometimes viewed as anomalies in an era of weak civil rights enforcement, are easier to understand once one realizes that these cases raised no state action objection under the 15th Amendment. The cases challenged the grandfather clauses in disenfranchisement provisions from Oklahoma and Maryland, on the grounds that they were not facially neutral, but by their very terms excluded blacks. The Court remained unwilling to examine facially neutral laws and evaluate their effects. (Klarman 1998b: 917-21).
[143] (Waldrep 2003).

they no longer would hold the office of sheriff, justice of the peace, or serve as jurors or county commissioners. Leaving these offices to the care of a hostile white population meant that violence committed against blacks would go unpunished. The combination of a narrow view of the 14th Amendment's protections and the disenfranchisement of blacks was quite literally a deadly one for thousands of black American citizens.[144]

III. Early Constitutional Tort Claims

A. Explaining "The Dormant Years"

The conventional explanation for the low numbers of constitutional tort cases points to two factors: (1) the *Slaughterhouse* opinion's narrow definition of privileges and immunities, which caused an extended postponement of the incorporation of the Bill of Rights, and (2) the distinction between public and private developing in 14th Amendment doctrine. After the emergence of the state action doctrine, traditional theories of liberal constitutionalism reasserted themselves: constitutional rights were thought to involve protections *against* the state, rather than to require state action.[145] Once the state action doctrine became entrenched in constitutional discourse, direct

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[144] According to Klarman, lynchings declined significantly by the 1920s, but heightened tensions in the aftermath of World War I led to a brief resurgence. After the war, black servicemen were more assertive about defending their rights, and the NAACP was becoming far more organized. Klarman suggests that these developments triggered "anxiety" among southern whites, which led to an increase in the numbers of lynchings, including murders of returning servicemen still in uniform. (Klarman 1998b: 906-7).

As lynchings declined, other forms of violence became more common. After the Great Migration, violent acts to intimidate blacks, in order to prevent them from entering all-white residential neighborhoods, became more common. In Chicago, for example, 58 bombings designed to intimidate black neighbors were reported to police between 1917 and 1921. In nearly all of these cases, the police failed to take any action to protect the intended victims. (Klarman 1998b: 943).

Other forms of intimidation became more common during this same period. It is perhaps no surprise that as blacks migrated north, so did white supremacy groups. The Ku Klux Klan was transformed in the 1920s into a kind of mass political and social reform movement, with active groups in every region of the country. (Klinkner 1999: 114).

[145] For a few leading accounts of the traditional theory of liberal constitutionalism, *see* (McIlwain 1947)); (Pennock & Chapman 1979); (Friedrich 1968); (Murphy 1993).

action by the government was considered the only possible source of harm or constraint on liberty for which the government is responsible.[146]

Despite the emergence of the increasingly stringent state action requirement, one might assume there were many opportunities in the early twentieth-century to sue state and local officials for violations of constitutional rights.[147] It is therefore puzzling to learn how few constitutional torts cases there were in the first half of the twentieth century. One scholar estimated that in the years between 1871 and 1920, there were only twenty cases decided under § 1983.[148]

B. Property Rights Cases

For cases involving substantive due process, liberty of contract claims, the incorporation limitation was not an issue. Moreover, in those cases, the plaintiff would almost always be challenging the enforcement of an official policy or regulation, so the state action limitation posed no obstacle. One can imagine a variety of uses for the § 1983 damages remedy in these cases. Unlike the freedmen who were supposed to be the original beneficiaries of this provision, the plaintiffs seeking to protect their businesses from state regulations would certainly have the means and ability to take advantages of a civil lawsuit provision. Plaintiffs challenging economic regulations would also probably favor a damages award, because prospective relief would not provide full compensation

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[146] For further discussion of the influence of the state action doctrine in *DeShaney*, *see* Ch. 5 *infra.*

[147] (Weinberg 1991). When the Revised Statutes of 1873 were introduced, the Ku Klux Klan Act of 1871 was codified as Revised Statutes § 1979. When discussing these cases, I will use the contemporary U.S. Code citation, § 1983, for the sake of clarity. *See* Table 1.1 for an overview of the Reconstruction enforcement statutes and their contemporary U.S. Code citations.

[148] (Comments 1951: 366) S*ee also* (Blackmun 1985: 12)("From the 1890's to the 1940's, the Civil Rights Act lay virtually dormant."); (Shapo 1965: 282)("The post-Reconstruction judicial history of the civil-damage section of the Ku Klux Klan Act is relatively skimpy up to 1939.").

for their losses. Yet, despite the seeming compatibility between these claims and the § 1983 remedy, there were no substantive due process cases brought using this provision.

One explanation points to a short-lived, strained approach to statutory construction. Section 1983 states that the remedy will be available against any person acting under color of law who interferes with "rights, privileges and immunities secured by the Constitution and laws of the United States." In early court cases invoking § 1983, courts interpreted the phrase "secured by" extremely narrowly, to include only those rights that were conferred by or created by the Constitution. Equal protection cases were generally thought not to involve rights directly secured by the federal constitution.[149] The same rationale appeared to apply to cases brought under the Contracts Clause, because the Article I provision, like the equal protection clause, merely provided additional security for rights already protected by state law.[150] For cases involving substantive due process claims, this narrow definition of "secure" may have been thought to preclude such claims because these limitations on state police powers were protected by states long before the ratification of the 14th Amendment.[151]

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[149] *See Holt v. Indiana Mfg. Co.,* 176 U.S. 68, 72 (1900) (rejecting § 1983 claim for an equal protection claim against a state tax). In *Holt*, the Court also held that a corporation could not sue under § 1983, only civil rights of individuals were protected by the statute. *Id*. at 72.

[150] *See Carter v. Greenhow*, 114 U.S. 317, 322 (1885) (Contracts Clause claims are not actionable under Civil Rights Act of 1871 because those rights are not "directly secured" by the Constitution).

[151] (Comments 1951: 366-7). Cases relying on this distinction include *Marcus Brown Holding Co. v. Pollak*, 272 F. 137, 141 (C.C.C.S.D.N.Y. 1920)(Hand, J.)("the general right of property does not have its origin in the Constitution . . ."); *Simpson v. Geary*, 204 F. 507, 511-12 (D. Ariz. 1913 ("right to contract for and retain employment in a given occupation or calling" is not secured by the Constitution). For further discussion, s*ee* (Collins 1989: 1502-3, & n. 60)(observing that the Supreme Court relied on the distinction between constitutional rights deriving from natural or common law and those other constitutional rights created by the Constitution in pre-*Lochner* cases, including *Strauder* and *Cruikshank*). As Collins describes the distinction:

> [T]he phrase ['secured by'] excluded rights that did not, in some often hard-to-define sense, take their origin in or derive 'directly' from the Constitution or federal law. For example, property rights, even though protected against deprivation by the due process clause, were defined and created by the common law; they predated the Constitution and thus took their origin outside of it. Because the old Court viewed the due process clause

Many substantive due process claims for damages were instead brought directly as "implied constitutional actions" under the 1875 federal questions statute.[152] The use of implied federal actions for equitable relief in the early twentieth century is often acknowledged in cases and by commentators.[153] Implied actions under the Constitution for equitable remedies were an innovation of federal common law. Allowing suits seeking injunctions allows injured plaintiffs to "bring coercive actions to secure the Constitution's guarantees, rather than having to wait to raise those guarantees as a shield in defense to state-initiated enforcement proceedings. These actions arise under federal law within the meaning of the federal question statute because federal law – the Constitution – has created the right of action, albeit only by implication." *Ex Parte Young*[154] is the most famous example of a federal question suit seeking an injunction against state officers to prevent enforcement of an unconstitutional law. Michael Collins suggests that business owners during the *Lochner* era would have preferred prospective injunctive relief afforded by *Ex Parte Young*, because "[t]he magnitude of the economic injury arising from those regulatory schemes ensured that no business would dare risk penalities or rely on relief from a postdeprivation damage action, even if one were possible."[155]

Far less attention, therefore, has been paid to the early reliance on implied constitutional actions as an alternate source of jurisdiction for damages actions, in those

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> as providing constitutional protection for those rights that had been created or secured by the common law, litigants could not use § 1983 to vindicate such rights.

Id.

[152] 28 U.S.C. § 1331.

[153] (Collins 1989: 1510) For cases acknowledging the history of implied constitutional actions for injunctions*, see Bell v. Hood*, 327 U.S. 678, 684 (1946); *David v. Passman*, 442 U.S. 228, 241-3 (1979); *Carlson v. Green*, 446 U.S. 14, 32 (1980).

[154] 209 U.S. 123 (1908).

[155] (Collins 1989: 1530-1) Also, these plaintiffs most likely would have preferred to litigate using equity claims so that they could avoid jury trials and instead leave the decision to Article III federal judges.

cases for which a right not deemed "secured by" the Constitution was at issue.[156] Implied constitutional damage actions would quickly lose favor as the *Ex Parte Young* option became available, and after the idea of a general common law fell into disrepute.[157] Moreover, by the time the "secured/protected" distinction collapsed, the *Lochner* era was near its end, and so these choices between implied actions and § 1983 became less urgent ones.

C. First Amendment Cases

Justice Stone's opinion in *Hague v. C.I.O.*[158] established the rule that provisions in the Bill of Rights incorporated through the Due Process Clause of the 14th Amendment could be defended in a § 1983 action. Before *Hague*, the Court had not considered the Bill of Rights guarantees to be "secured by" the Constitution, as the statute required. In his *Hague* opinion, Stone rejected the narrow definition of "secured by" and held that § 1983 covered rights, such as First Amendment rights[159] or 5th Amendment Due Process protections, that the Court previously would have viewed as merely "protected" by the Constitution:

> The argument that that the phrase in the state 'secured by the Constitution' refers to rights 'created', rather than 'protected' by it, is not persuasive. The preamble of the Constitution, proclaiming the establishment of the

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[156] Early examples of cases include the *Virginia Coupon Case*, 114 U.S. 269 (1885); *White v. Greenhow*, 114 U.S. 307 (1885). *See also* (Collins 1989: 1519)(observing that in these cases, the Court held that a case could 'arise under' the Constitution and still not involve a right 'secured by' the Constitution under § 1983. In effect, the federal questions statute picked up where § 1983 left off").

[157] *Id*. at 1532.

[158] 307 U.S. 496, 518 (1939).

[159] *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357(1927); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Herndon v. Lowry*, 301 U.S. 242 (1937); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Board of Education*, 330 U.S. 1 (1947).

> Constitution in order to 'secure the Blessings of Liberty', uses the word 'secure' in the sense of 'protect' or 'make certain'.[160]

After *Hague*, the importance of § 1983 would grow as the development of the incorporation doctrine proceeded. Because of the early incorporation of the First Amendment guarantees, even in the mid-1940s there were quite a few First Amendment constitutional tort cases.[161]

D. Voting Rights Cases

As early as 1909, the Supreme Court acknowledged that an action brought under § 1983 was a proper method for challenging state interferences with the exercise of the right to vote. In *Giles v. Harris*,[162] the plaintiff alleged discrimination in the administration of a facially neutral provision in the Alabama Constitution establishing "good character and . . . understand[ing of] the obligations of citizenship"[163] as a prerequisite for registering to vote. Justice Holmes held that, even if the allegations of discriminatory administration were true, Giles was not entitled to an injunction to force the board to allow him and others in his position to register. Holmes argued that if Alabama's administration of the voting laws were part of a conspiracy to disenfranchise blacks, the Court on its own could do little to dismantle it. According to Holmes, the Court would be powerless when attempting to enforce its injunction:

> The bill imparts that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be

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[160] *Id*. at 526-7. This provision were part of a transitional plan that, in addition to the contested provision, also required the payment of a poll tax. The permanent plan, which would go into effect in 1903, established even stricter requirements, including literacy tests, regular employment, and stringent real property requirements.
[161] *See e.g.*, *Douglas v. City of Jeannette*, 310 U.S. 147 (1942).
[162] 189 U.S. 475 (1903).
[163] *Id*. at 483.

> needed. If the conspiracy and the intent exists, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that States by officers of this court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself must be given by them or by the legislative and political department of the government of the United States.[164]

When Giles brought a suit for damages under § 1983 in *Giles v. Teasley*,[165] the Court once again rejected his claim. Because he had first brought his claim to the state court, Justice Day argued that if the state ruling rested on independent state law grounds, the Supreme Court must decline jurisdiction. The state court had held that, assuming that Giles' argument that the Alabama constitutional provisions are in violation of the 14th and 15th Amendments is true, then "the defendants were wholly without authority to register the plaintiff as a voter, and their refusal to do so cannot be made the predicate for a recovery of damages."[166] If judges relied on such a circular argument in all § 1983 cases alleging that state and local officials were implementing authorized state policies in violation of the federal constitution, one can scarcely contemplate any use whatsoever for the § 1983 cause of action.

According to Michael Klarman, "[t]he two *Giles* opinions are among the most candid confessions of limited judicial power in the U.S. Reports.[167] Klarman's assessment presumes that Holmes' assertions about judicial power were accurate. Damage remedies certainly do not pose the same kind of challenges that injunctions do.

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[164] *See* (Fiss 1993: 372-9, 376)("[The *Harris*] opinion was especially striking because Holmes seemed almost perversely determined to proclaim his impotence. There were many ways of avoiding this confrontation, but Holmes chose none of them.").
[165] 193 U.S. 146 (1904).
[166] *Id*. at 161 (quoting from the Alabama Supreme Court opinion).
[167] (Klarman 1998: 365).

These opinions reflect nothing more than the lack of will among members of the Fuller Court to protect the rights of blacks.[168]

Later voting rights cases brought under § 1983 involved the white primary schemes. In *Nixon v. Herndon*,[169] the Court invalidated a Texas statute excluding blacks from participating in party primaries. Because a state statute provided authorization for the white primary, the plaintiffs easily met the state action requirement. For this reason, *Herndon* presented the most straightforward of the white primary challenges. In his brief two-page opinion for the Court, Justice Holmes declined to reach the 15th Amendment claim, arguing that "it seems hard to us to imagine a more direct and obvious infringement of the Fourteenth."[170] Almost immediately after the Court's opinion was handed down, however, the Texas legislature circumvented by the ruling by delegating responsibility to the executive committees of the political parties to determine who participates in the party primaries. Other southern states had already used such approaches, and so it became clear that the state action issue would not be so easily resolved in future cases.[171]

After local litigation in Texas proved unsuccessful, five years after *Herndon* the NAACP filed a brief in with the Supreme Court to overturn the new Texas statute and to put an end to the state Democratic Party's reliance on the white primary. The central question in *Nixon v. Condon* was whether the decision to exclude blacks, once it was left up to the parties' executive committees, should be deemed state action.[172] The Supreme

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[168] For more critical assessments of the Court's treatment of Giles' claims, *see* (Fiss 1993: 372-9); (Pildes 2000: 306)(describing Holmes opinion in *Harris* "the most legally disingenuous analysis in the pages of the U.S. Reports").
[169] 273 U.S. 536 (1927).
[170] *Id*. at 541.
[171] (Klarman 2001: 58-9).
[172] *Nixon v. Condon*, 286 U.S. 73 (1932).

Court ruled that there was state action, because the new Texas statute had directed the party's executive committee to develop membership qualifications. The opinion did not express an opinion on the more fundamental question – whether the party's decision in the absence of any statutory authorization would constitute state action.

When the Texas Democratic Party held its annual convention and passed a new resolution barring blacks from participating in they party's primary, the NAACP brought another equal protection claim, this time against the party directly. In *Grovey v. Townsend*, the Court held that because there was no statutory delegation of power to the party to make a decision about qualifications for participation, the decision to exclude blacks could not be attributed to the state and so did not violate the 14th Amendment.[173] Justice Roberts' opinion provided very little guidance about the state action issue. Although he conceded that there was extensive state regulation of the primary system, he also mentioned other factors such as the facts that the parties paid for the primary and used their own ballots.[174] But Roberts never explained why those factors were determinative.

In *Lane v. Wilson*,[175] another voting case presenting no state action concerns, the Supreme Court ruled in favor of a plaintiff suing an Oklahoma register of elections under § 1983 for $5,000, for invoking an unconstitutional Oklahoma grandfather provision[176] to prevent him from registering to vote. Even a former student of the Dunning School of Reconstruction such as Justice Frankfurter,[177] who also was as much an advocate of

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[173] 295 U.S. 45, 48 (1935).
[174] *Id*. at 50.
[175] 307 U.S. 268 (1938).
[176] Oklahoma had substituted another grandfather clause provision almost immediately after the Supreme Court's ruling in *Guinn v. United States*, 238 U.S. 347 (1915).
[177] (Amar 1998)(discussing the Dunning School's influence on Frankfurter).

judicial restraint as was Justice Holmes, found a way to distinguish the ruling in *Giles v. Harris*,[178] by declaring the provision unconstitutional and awarding damages to the plaintiff.

In the 1943 case, *Smith v. Allwright*,[179] a damage suit under § 1983 helped bring about the end of the white primary. A crucial doctrinal development made this success possible. In the 1941 case, *United States v. Classic*,[180] the Court argued that the primary was an integral part of the state's electoral machinery before concluding that a primary official had committed fraud "under color of law." Although the Court had avoided directly overturning *Grovey*,[181] these arguments about the crucial role of the primary did alter the state action analysis in *Allwright*.[182] In an 8-1 decision, the Court ruled that the white primary system in Texas violated the 14th Amendment.[183]

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[178] 307 U.S. at 273 (highlighting the contrast between injunctions and damages). One suspects Frankfurter would have found it more difficult to distinguish *Giles v. Teasley*. For whatever reason, he does not refer to the *Teasley* case at all.
[179] 321 U.S. 649 (1943).
[180] *See United States v. Classic*, 313 U.S. 299 (1941) (applying "under color of law" requirement in § 2 of the Civil Rights Act of 1866).
[181] The Court's majority opinion did not mention *Grovey*, but it was possible to distinguish them. For example, unlike the Texas statutes, Louisiana's election code required the state to pay for the administration of primary (Klarman 2001: 62).
[182] To the extent the *Allwright* decision turned on the fact of extensive state regulation of primaries, it was vulnerable to further attempts by southerners to circumvent the holding. South Carolina, for example, responded to the opinion by repealing all 150 provisions in the state code addressing political parties and the primary system. (Klarman 2001: 66) A district court judge rejected this approach, arguing that the effects of the primary made it integral to the electoral machinery, and based on that alone ruled that the party's decision constituted state action. *Id.* at 66-7. The Supreme Court later rejected a longstanding practice of private clubs in Texas to hold "pre-primary" meetings. In *Terry v. Adams*, 345 U.S. 461 (1952), the Court ruled the decision to exclude blacks from these meetings constituted state action in violation of the Fifteenth Amendment.
[183] 321 U.S. at 664. Klarman assesses the causes for this Supreme Court reversal:

> The shift from a nine-to-zero result in Grovey to an eight-to-one decision overruling it in Smith, within just a nine-year period, is unprecedented in Supreme Court history. It is tempting to attribute this turnabout to President Roosevelt's virtually complete recomposition of the Court during the intervening years. Only one Justice – Harlan Fiske Stone – changed his mind in the interim. The only other surviving member of the Grovey Court was the decision's author – Justice Owen Roberts. He penned a bitter dissent in Smith, lamenting the Stone Court's propensity for overruling precedents, which 'tends to

The Department of Justice by this point was endorsing the use of § 1983 for civil lawsuits seeking damage remedies, because their experiences using the criminal civil rights statues had taught them that it was almost impossible to convict the white primary officials in these states.[184] The white primary cases offer a good example of the comparative advantages of a civil damages remedy over a criminal enforcement strategy in civil rights cases. Deferring to the Department of Justice to take the necessary action meant that enforcement would depend on whether the Administration was willing to assume political risky backlashes from southerners,[185] whether DOJ had enough resources, and – for those few cases that went to trial – whether southern jurors would convict.[186] Thurgood Marshall and the NAACP initially chose to wait for DOJ to decide

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> bring adjudication of this tribunal into the same class as a restricted railroad ticket, good for this day and train only.'

Klarman argues further that, in addition to the changes in Court membership, the rapid changes in the political and social contexts, occurring in the aftermath of World War II, should also be taken into account. (Klarman 2001: 64-5) For other discussions of the impact of the "Cold War imperative" on the civil rights movement, *see* (Klinkner 1999:194-5, 207-14)(discussing impact on the white primary cases and Truman's civil rights agenda); (Dudziak 2000)(evaluating impact on *Brown*). As part of a study addressing the formation of rights consciousness, the political scientist George Lovell is studying letters requesting assistance sent to the CRS in the years between 1939 and 1941. Many of the letter writers referred to the war effort, including one who asked: "[I]f me and my race are debarred from any of rights and privileges, . . . [why should we] shoulder the arms and march to the Battlefront and give our lives to protect something that we don't get the benefit of?" (Lovell 2002: 13).

[184] (Carr 1947: 148-9).

[185] President Roosevelt, for example, proved far less willing than Truman to anger southern Democratic voters. *But see* (McMahon 2000); (McMahon 2004). McMahon argues that Roosevelt deserves more credit for appointing federal judges and Supreme Court Justices more willing to support civil rights claims. Although, as McMahon acknowledges, it is less clear that Roosevelt considered much else, besides support for his New Deal agenda, when choosing nominees to the Supreme Court, he does offer other important and persuasive support for his more general claim that Roosevelt deserves more credit on civil rights issues. (McMahon 2004: 142) By reviewing private correspondence from the president's papers and DOJ archives, McMahon is able to demonstrate Roosevelt's support for and continued interest in the CRS litigation.

[186] (Carr 1947: 132) (noting that less than one percent of the complaints reaching CRS resulted in federal prosecutions, and citing the Reports of the Attorney General stating that conviction rates in those cases were extremely low). *See also id.* at 138-146 (discussing juries).

whether to initiate a criminal investigation,[187] but they soon learned that many southern blacks preferred to take charge of their own lawsuits when local branch offices were willing to assist them.[188]

Another lesson of the white primary cases is that relying on civil damages litigation as a reform tool can only work when there are sufficient attorneys willing to bring these cases. During this period, the NAACP branch offices had the resources to hire more attorneys than the DOJ employed in its entire Civil Rights Section.[189] It is therefore important to keep in mind that the effectiveness of a § 1983 for social reform depends on securing access to the civil justice system, especially for the most vulnerable indigent plaintiffs for whom the costs of hiring an attorney would be prohibitive.

IV. The Dawning of a New Civil Rights Era

During the 1940s, after its success in *Classic* targeting election fraud, the CRS focused its efforts on police brutality, peonage, and lynching cases.[190] In 1946, after a wave of lynchings, the NAACP renewed its longstanding anti-lynching campaign[191] and

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[187] (Klarman 2001: 79-80) Based on his review of NAACP correspondence, Klarman observes the NAACP's growing frustration with the DOJ enforcement approach, which emphasized investigations rather than actual prosecutions. (Klarman 2001: 80, 98-99).

[188] (Klarman 2001: 74-5) Not all blacks were as confident about asserting their rights in court. Blacks residing in poorer, rural, and more isolated communities were less able or willing to serve as plaintiffs in a civil lawsuit. Finding an attorney was often an insurmountable challenge. Even if an NAACP chapter provided an attorney, blacks often refused to allow their names to be used publicly because their feared retaliation.

[189] Attorney General Frank Murphy established the Civil Liberties Unit in 1939. In1941, the name of the unit was changed to the Civil Rights Section (or CRS). (Carr 1947: 24-5) Technically, the CRS could enlist the help of the local U.S. Attorneys, but many of the most politically ambitious of the southern U.S. Attorneys resisted such overtures.

[190] (Blackmun 1985: 14); (Carr 1947: 116-20, 151-190). For an analysis of one particularly infamous lynching, and the impact that heightened anti-totalitarian views had on the federal government in the post World War II period, *see* (Capeci 1986)(addressing causes and consequences of the failed prosecution of Cleo Wright's lynchers).

[191] For an overview of the campaigns earlier stages, *see* (Zangrado 1965).

joined with other civil rights groups to demand new legislation in Congress.[192] When that effort failed in the Senate due to the opposition of southern conservative Democrats, the group prevailed upon President Truman to take action. Moved by these accounts,[193] Truman used an executive order to establish the President's Committee on Civil Rights. Its first responsibility was to study the increase in racial violence and to provide recommendations for the Administration. The group issued a report, *To Secure These Rights*, in October of 1947.[194] The Committee highlighted weaknesses in the federal government's enforcement machinery,[195] and in its long presentation of suggestions included the recommendation that the CRS be given civil authority to issue injunctions – a power that would be granted a decade later in the Civil Rights Act of 1957. Interestingly, the Report does not mention the use of § 1983 as an alternative source of enforcement.[196]

The criminal enforcement cases during this period did contribute some useful precedents for those seeking to rely on the civil liability alternative in § 1983. In cases like *Screws v. United States*,[197] the CRS "paved the way for the rebirth of § 1983."[198] This case involved a shockingly vicious attack on a black man, Robert Hall, after his arrest by a Georgia sheriff, Screws, and his deputies. After beating him with a blackjack

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[192] (Klinkner 1999: 205-6).
[193] (Klinkner 1999: 207).
[194] (Committee 1947).
[195] (Committee 1947: 119-125)(expressing concerns about, *inter alia*, inadequate personnel, "lack of cooperation" by U.S. Attorneys, the role of the FBI in enforcement investigations, and the hostility of local communities preventing indictments by grand juries or convictions in jury trials).
[196] Robert Carr, one of the members of the Committee, offered qualified praise of § 1983 in his 1947 book about civil rights enforcement. (Carr 1947: 148-9, 198-9) Perhaps the Committee thought that a dual enforcement strategy – one led by the Administration, the other by the private bar and groups like the NAACP – would result in beneficial synergies. It is true that, for areas like the rural south, a civil litigation strategy would not be sufficient.
[197] 325 U.S. 91 (1945).
[198] (Blackmun 1985: 15).

weighing nearly two pounds, they handcuffed Hall and then continued to beat him for another half hour until he was unconscious and left to die.

In their case against Screws, federal prosecutors relied on the criminal provision in Section 2 of the 1866 Civil Rights Act, the criminal counterpart to § 1983, which is now codified at 18 U.S.C. § 242. Because both § 242 and § 1983 use the "under color of law" language, the *Screws* opinion would produce an important precedent for later § 1983 cases. Screws argued before the Supreme Court that because his actions violated Georgia laws, and so was unauthorized by the state of Georgia, they were not performed "under color of law." A plurality of the Court rejected his arguments, referring to *Classic*'s holding that the "[mis]use of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.'"[199] It remained to be seen if this view of the meaning of "under color of law" would be extended to § 1983.

Although the passage of the Rules Enabling Act in 1934 and the introduction of the Federal Rules of Civil Procedure in 1938 opened up many opportunities for civil rights litigators to pursue civil causes of action,[200] there were not many opportunities for a test case to determine whether the *Screws* holding concerning "under color of law" should be extended to § 1983. To understand why, one must consider the broader context surrounding the development of civil liberties and civil rights doctrines in the 1940s and 1950s. For an essay on the history of § 1983, Justice Blackmun offered an assessment of this transitional period:

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[199] 325 U.S. at 109-110.

[200] (Frymer 2003: *)(observing that there was no indication that the ABA's push for reforms was directly motivated by a concern for civil rights, but also addressing the broad impact the reforms in civil procedure had for civil rights cases brought against labor unions).

> Between 1939 and 1961, the significant § 1983 cases, like those prior to 1939, were few. It is difficult to compile an accurate list. Often, there is no mention in the Court's opinions of the statutory basis for jurisdiction and remedial authority. An opinion might simply note that certain conduct is challenged as violative of the Constitution. I have not attempted to survey the significant § 1983 cases that did not reach the Supreme Court. I have looked back, however, into the complaints and records in a number of Supreme Court cases during this 22-year period before *Monroe*. The cases can almost be counted on one hand.[201]

The transition period Blackmun examined was an extremely important one for civil rights and civil liberties doctrines. The Court emerged from the New Deal searching for a new theory of constitutionalism. Once the Supreme Court endorsed the New Deal by abandoning its formalistic Commerce Clause doctrine, a new source of congressional authority for federal civil rights legislation became available.[202] Because the Court had by then acknowledged that the *Lochner*-era impartiality theory was based on theories of the economy that had became outmoded with the rise of corporate capitalism, the impartiality criterion of legitimacy, and more specific applications of it like the liberty of contract doctrine, no longer served as a valid limitation on the scope of state police powers.[203] Now it became even more important to define those rights so "essential to the

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[201] (Blackmun 1985: 19) In his review, Blackmun did not distinguish § 1983 cases that requested damages. The cases he cites include *Hague v.C.I.O.*; *Smith v.Allwright; Shelton v. Tucker*, 364 U.S. 479 (1960) (challenging Arkansas statute requiring public school teachers to disclose association members and contributions); and two post-*Brown* cases extending its desegregation mandate beyond public schools, *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches), *Gayle v. Browder*, 353 U.S. 903 (1956)(buses). Later school desegregation lawsuits in the post-*Monroe* 1960s would explicitly invoke § 1983.

[202] For an overview of the New Deal era cases, *see* (Cushman 1998)(defending the New Deal Court's principled development of modern commerce power jurisprudence against charges that the "revolution of 1937" was part of a reaction to FDR's court-packing plan).

[203] (Gardbaum 1997)(stressing that the New Deal expanded the powers of states as well as the federal government).

concept of ordered liberty" that they should be protected against both federal and state violations.[204]

A key remaining obstacle for § 1983 was the incorporation of the Bill of Rights, and in particular the criminal procedure provisions,[205] which presumably would provide courts with more opportunities to evaluate an "unauthorized action" § 1983 case. The process of incorporating provisions in the Bill of Rights against the states through the Due Process Clause was still underway up through the 1960s.[206] The Warren Court's commitment to incorporation was "the pivotal development" that made the *Monroe* damages remedy for unauthorized actions so consequential.[207]

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[204] (Gillman 1994: 640-44)(discussing origins of the preferred freedoms doctrine in Progressive Era dissents); *Palko v. Connecticut*, 302 U.S. 319 (1937) (introducing selective incorporation through the "ordered liberty" construct); *Adamson v. California*, 332 U.S. 784 (1947) (Black, J., dissenting)(defending total incorporation of the Bill of Rights). Interestingly, Justice Stone's famous footnote four in *United States v. Carolene Products*, 304 U.S. 144, 152, n.4 (1938), which proposed that the judiciary should extend heightened scrutiny to legislation affecting "discrete and insular minorities," was not referred to often during this period. It appears that the "canonization" of footnote four occurred much later than is commonly assumed. *See* (Rosenberg 1998).

[205] *See, e.g.*, *Wolf v. Colorado*, 338 U.S. 25 (1949) (incorporating 4th Amendment's guarantee against unreasonable searches and seizures); *Robinson v. California*,370 U.S. 660 (1962) (incorporating 8th Amendment prohibition against cruel and unusual punishments).

[206] (Williams 1951).

[207] (Weinberg 1991: 745. 757).

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