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## Article: The Origins of Civil Rights in America

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# THE ORIGINS OF CIVIL RIGHTS IN AMERICA

*G. Edward White*<sup>†</sup>

## ABSTRACT

This Article makes three contributions. First, it represents the first sustained effort to identify and trace the origins of the legal category of civil rights in American constitutional jurisprudence. Contrary to conventional wisdom, the category of civil rights did not extend back to the Declaration of Independence or to the framing of the Constitution. There was no established category of “civil rights” in eighteenth- and early nineteenth-century American law, although one can find discussion of the “privileges and immunities” of citizens of the United States and occasional mention of the term “civil rights.” The category only came into being with the passage of the Civil Rights Act of 1866<sup>1</sup> and received its first judicial interpretations in the context of the Reconstruction-era constitutional amendments. In the decades of the 1870s and 1880s, the category was refined, but there was never a clear consensus about the content or scope of civil rights, or the extent to which they could be enforced by the federal government.

Second, the Article follows the work of recent scholars, such as William Nelson, Michael Collins, and most prominently Pamela Brandwein, in seeking to revise a conventional narrative about the constitutional history of the Reconstruction era. That narrative asserts that Reconstruction began as a distinctly libertarian and egalitarian vision, premised on the creation of new universal rights of citizenship and enforcement of those rights by the federal government. It then claims that in the years between 1866 and the mid-1880s, that vision was derailed and the prospective rights of former African American slaves in former Confederate states largely abandoned. It assigns some responsibility for the abandonment of the original goals of Reconstruction to the Supreme Court of the United States in the tenures of Chief Justices Salmon Chase and Morrison Waite, emphasizing Court majorities’ narrow readings of the Fourteenth Amendment’s Privileges and Immunities and Equal Protection Clauses in the *Slaughter-House Cases*<sup>2</sup> and invalidation of

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1. Ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. §§ 1981–1982 (2012))).
2. 83 U.S. (16 Wall.) 36 (1873).

the public accommodations provisions of the Civil Rights Act of 1875<sup>3</sup> in the *Civil Rights Cases*.<sup>4</sup>

Finally, the Article has implications for a longstanding debate about the “original understandings” of framers of the Reconstruction Amendments, in particular whether the Fourteenth Amendment was originally understood as “incorporating” some of the provisions of the Bill of Rights against the states. The Article finds that the Court’s Reconstruction-era civil rights jurisprudence was primarily driven by a concern that too-broad readings of the power of the federal government to enforce new civil rights would radically disturb the existing balance of state and federal powers. That concern, the Article suggests, emanated from an assumption on the part of the justices that the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment were capable of being read as robust definitions of the privileges and immunities of national citizenship and of a right to equal treatment under the law, both of which could be enforced by the federal courts. Precisely because of this assumption, Chase and Waite Court majorities sought to define the meaning of “privileges or immunities”<sup>5</sup> and “equal protection of the laws”<sup>6</sup> narrowly.

The Article concludes by maintaining that a proper understanding of the category of “civil rights” at its origin needs to take into account the fact that both the conceptualization and interpretation of the category were driven by established antebellum understandings about “rights” and federalism. The result was that instead of initially expansive definitions of new national civil rights being narrowed in the 1870s and 1880s, the category remained fluid and uncertain.

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3. 18 Stat. 335.

4. 109 U.S. 3 (1883).

5. U.S. CONST. amend. XIV, § 1, cl. 2.

6. U.S. CONST. amend. XIV, § 1, cl. 4.

CONTENTS

INTRODUCTION..... 757

I. THE ANTEBELLUM LEGACY OF “RIGHTS”..... 765

    A. *Corfield v. Coryell*..... 765

    B. *Luther v. Borden*..... 769

II. THE THIRTY-NINTH CONGRESS AND “CIVIL RIGHTS” ..... 771

    A. *The Thirteenth Amendment* ..... 771

    B. *The Civil Rights Act of 1866*..... 772

    C. *The Fourteenth Amendment*..... 775

    D. *The Fifteenth Amendment*..... 776

    E. *Modifications of the Antebellum Legacy*..... 776

        1. Parties..... 777

        2. The Federal Government as Enforcer of “Rights”..... 780

III. THE JUDICIAL FASHIONING OF ENFORCEMENT RULES FOR CIVIL RIGHTS CASES ..... 780

    A. *United States v. Cruikshank*..... 780

    B. *United States v. Reese* ..... 787

    C. *Federal Voting Rights Cases, 1877–1884* ..... 790

    D. “*Civil Rights*” and the *Slaughter-House and Civil Rights Cases* ..... 793

        1. *The Slaughter-House Cases* ..... 794

        2. *The Civil Rights Cases*..... 801

    E. *Implications*..... 808

CONCLUSION: A REVISED NARRATIVE OF THE ORIGINS OF CIVIL RIGHTS ..... 812

INTRODUCTION

We tend to think of “civil rights” as a ubiquitous category, encompassing a variety of freedoms and entitlements associated with being an American. We also tend to think of the heritage of civil rights as extending back to the Declaration of Independence, the framing of the Constitution, and the Magna Carta and ancient rights of English subjects. But in fact, civil rights, as a legal category, was imperfectly understood in the United States before the Civil War. It was only after three decades of legislation, court decisions, and commentary before the boundaries of the category were established.

This Article reviews that process. Sections II and III recover the dominant understandings about legal “rights” in antebellum American jurisprudence and the possible effect of the Civil Rights Act of 1866<sup>7</sup> and the Thirteenth, Fourteenth, and Fifteenth Amendments on those

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7. Ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. §§ 1981–1982 (2012))).

understandings. Those inquiries reveal that when the three Amendments and the Civil Rights Act of 1866 were enacted between 1865 and 1870, there was no widespread consensus about the content of “civil rights,” nor about which institutions of government were to enforce those rights. The category of “civil rights,” by which was meant rights that attached to all American citizens, was itself new: “rights” had not been understood in so universal a fashion before the Civil War. Thus the enactments collectively raised the possibility that a spate of new rights, associated with state and United States citizenship, had been created, and that the federal government could enforce them against states.

That possibility served as background to three decades of judicial decisions and legislative commentary in which the legal category of “civil rights” was refined. Section IV of the Article, building on the work of Pamela Brandwein and others, describes the manner in which the category took shape. The category had two dimensions, one connected to its content and the other to its implications for the American system of federalism. Distinctions such as those between “secured” and “created” rights, and between “civil” and “social” rights, were designed to place types of conduct within or outside the category. They also were designed to signal which sorts of rights could be enforced against the states by the federal government and which sorts remained in the province of the states.

With those distinctions and their federalism implications in place, the Article reconsiders the leading Court decisions in the conventional narrative of Reconstruction, the *Slaughter-House Cases* and the *Civil Rights Cases*. That reconsideration engenders a narrative of the constitutional history of the Reconstruction era that differs from the one currently in place.

The narrative has three central features. First, in what has become the conventional historiographical narrative of the constitutional history of Reconstruction, the Reconstruction Congresses have been described as treating the Union’s eradication of slavery and opening up of “free” western territory as mandates for a new egalitarian and libertarian vision of postbellum American society. Meanwhile, the Supreme Court, under the tenure of Chief Justice Morrison Waite, has been characterized as reluctant to embrace that vision. The Waite Court’s agenda, according to the narrative, was fostering reunion between the North and South at the expense of newly freed African Americans, and the Court’s posture has been seen as fatal to the promise of Reconstruction.<sup>8</sup>

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8. The most influential illustration of that narrative, Eric Foner’s *Reconstruction*, called the Reconstruction era “America’s Unfinished Revolution” and announced that one of the major themes of his account was “the emergence during the Civil War and Reconstruction of a national state possessing vastly expanded authority and a new set of

Building on recent scholarship that identified problems with the conventional narrative, this Article concludes that the narrative is anachronistic and in need of refinement. The Court's interpretations of Reconstruction-era civil rights enactments were not incompatible with the protection of the rights of African Americans in certain contexts. But they rested on doctrinal distinctions that have become obscured with time.<sup>9</sup>

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purposes, including an unprecedented commitment to the ideal of a national citizenship whose equal rights belonged to all Americans regardless of race." Both that ideal and the accompanying authority of the federal government to enforce it were casualties, Foner maintained, of the compromise of 1877, which "marked a decisive retreat from the idea . . . of a powerful national state protecting the fundamental rights of American citizens." The ideals of Reconstruction were further undermined, Foner argued, by the Supreme Court, which "during the 1870s . . . retreated from an expansive definition of federal power, and moved a long way toward emasculating the postwar amendments," and in the 1880s "declared the Civil Rights Act of 1875 unconstitutional" and used its "expanded jurisdiction born of Reconstruction" to "protect corporations from local regulation" rather than protecting African Americans from discrimination. FONER, RECONSTRUCTION, xxvi, 529, 582, 586–87 (1988). In a recent lecture at Marquette University Law School, Foner reaffirmed this view, saying, "Reconstruction was a time of remarkable experiment in democracy, but of course it was short-lived, and there followed a long period where the rights protected by the [Reconstruction-era] constitutional amendments were flagrantly violated in the South and indeed much of the rest of the nation. One part of this long process of retreat from the egalitarian impulse of Reconstruction was a sharp narrowing of the rights that came along with being an American citizen. In this, the Supreme Court led the way." Eric Foner, *The Civil War, Reconstruction, and the Origins of Birthright Citizenship*, MARQUETTE LAWYER, Summer 2013 at 41–42 [hereinafter Foner, *The Civil War*].

9. Work by legal scholars contemporaneous with and following Foner's book advanced readings of Supreme Court and lower federal court decisions that suggested that Foner's characterization of the response of the federal judiciary to Reconstruction Amendments and legislation was oversimplified. See, e.g., ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION* 1–6 (1985); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DECISION* 194–96 (1988); Michael G. Collins, *Justice Bradley's Civil Rights Odyssey Revisited*, 70 TUL. L. REV. 1979 (1996). More recently Pamela Brandwein has set forth a major reinterpretation of what she calls the "judicial settlement of Reconstruction," emphasizing, among other things, the anachronistic assumptions of the conventional narrative. See Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343, 380 (2007); PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* (2011) [hereinafter BRANDWEIN, *RETHINKING RECONSTRUCTION*]. My subsequent narrative of the Reconstruction-era history of the category of civil rights should be understood as informed, in some places, by that work, and in other places addressing issues outside its scope. Instances in which I have

After the passage of the Civil Rights Act of 1866,<sup>10</sup> judicial decisions in the 1870s and 1880s distinguished between two different classes of rights, so-called “secured” or “natural” rights and so-called “created” or “conferred” rights.<sup>11</sup> The former class included rights that in antebellum jurisprudence were thought to be among the “privileges and immunities” of state citizens. Those rights were creatures of state law, meaning they could be restricted by states and were reserved only for citizens, which did not include all residents of states. The latter class consisted of rights that had been granted to citizens by provisions of the Constitution.<sup>12</sup> Brandwein’s analysis of Supreme Court and lower federal court decisions in voting rights cases has shown that the most conspicuous example of that class was the right afforded to black as well as white people, who were citizens of both the states and the United States after the passage of the Fourteenth Amendment, not to have their opportunities to vote restricted on the basis of race.

The federalism implications of those two classes of civil rights were different. With respect to the first class, the federal government could not intervene to protect “secured” rights under its Fourteenth Amendment enforcement powers unless a state had intentionally or negligently failed to safeguard them. This meant that in many cases individual infringements of civil rights in the states remained unprotected. With respect to “created” or “conferred” rights, however, the enforcement powers of the federal government were available to protect against civil rights violations, whether by states or individuals.<sup>13</sup>

Because some provisions of the Fourteenth Amendment appeared to be conferring new rights on citizens or persons, it was necessary for courts to consider whether rights contained in the Privileges or Immunities, Due Process, and Equal Protection Clauses were

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relied directly on the findings or interpretations of other scholars are identified in the notes that follow.

10. 14 Stat. 27.
11. *See, e.g.*, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96 (1873) (Field, J., dissenting) (questioning whether the Privileges and Immunities Clause “refers to the natural and inalienable rights which belong to all citizens,” as opposed to new privileges “confer[red]” upon citizens by the Amendment).
12. Both Collins, *supra* note 9, at 1990–98, and BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, at 11–17 (recognizing that the distinction between “secured” and “created or conferred” rights was crucial to Justice Joseph Bradley and his contemporaries, although Collins uses different language to describe the distinction).
13. Both Collins, *supra* note 9, at 1993–95, and BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, at 11–14, recognize the federalism implications of the distinction between “secured” and “conferred” rights.

understood as being enforced against the states by the federal government. Over a course of decisions that included both the *Slaughter-House Cases*<sup>14</sup> and the *Civil Rights Cases*,<sup>15</sup> the Supreme Court answered that question in the affirmative but at the same time read the rights conferred by those provisions narrowly.<sup>16</sup> Thus, on the whole, the antebellum balance between state and federal powers was retained after the passage of the Reconstruction Amendments. The Court primarily anticipated federal supervision of state or private activity in the area of voting rights. That approach, however, was not a judicial “retreat” from the anticipated goals of Reconstruction;<sup>17</sup> it reflected mainstream late nineteenth-century understandings of the category of “civil rights” and of the interactions between the states and the federal government. Both the *Slaughter-House Cases* and the *Civil Rights Cases* need to be situated within those understandings, rather than being seen primarily as cases in which Court majorities rejected broad interpretations of the civil rights of American citizens.

Finally, the article has implications for a debate about the “original understandings” of the framers of the Reconstruction Amendments. It suggests that the Court’s “narrow” interpretations of the Fourteenth Amendment’s Privileges or Immunities and Equal Protection Clauses in the *Slaughter-House Cases* and the *Civil Rights Cases* were driven by an assumption that the Amendment could be read as anticipating a robust definition of the privileges or immunities of national citizenship, and of a right to equal treatment before the law that extended to all persons, both of which could be enforced by the federal courts. It was precisely because of this assumption that the Court advanced minimalist interpretations of both the Privileges or Immunities and Equal Protection Clauses. Broader interpretations, Supreme Court majorities feared, would radically upset the balance between state and federal powers that they had inherited from antebellum jurisprudence.

This Article thus seeks to dislodge two established propositions about nineteenth-century constitutional history and to intervene in a longstanding interpretative debate. It attempts to undermine the

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14. 83 U.S. (16 Wall.) 36 (1873).

15. 109 U.S. 3 (1883).

16. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1873) (holding that the Privileges and Immunities Clause did not alter the police powers of the state, but instead affected only the rights of citizens of the United States, as opposed to citizens of the particular state); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (holding that the Equal Protection Clause did not affect the private choices of individuals to exclude black persons from business establishments).

17. See Foner, *The Civil War*, *supra* note 8, at 41 (referring to those Court opinions as a “retreat” and a judicial “narrowing of . . . rights”).



assumption that there was a received understanding of the category of “civil rights,” which formed a background to the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, and the Civil Rights Act of 1866. There was no such understanding; “civil rights” was a novel and fluid category, spending the last quarter of the nineteenth century in a process of evolution.

In aligning itself with and elaborating upon the revisionist work of other scholars, the article also seeks to modify the conventional view that the Supreme Court, in the 1870s and 1880s, fashioned interpretations of Reconstruction-era amendments and legislation which were designed to narrow the scope of judicially protected civil rights in order to undermine the libertarian and egalitarian goals of Reconstruction. The Court did fashion narrow interpretations in some cases, but not in all cases. While seeking to preserve antebellum models of federalism, it acknowledged that in some instances Reconstruction-era Amendments had conferred new civil rights on all American citizens, and the federal judiciary was required to protect those rights against efforts to curtail them by states or private individuals.

Finally, the article suggests that the focus of twentieth- and twenty-first-century scholars on whether the Fourteenth Amendment “incorporates” provisions of the Bill of Rights against the states has rested on an anachronistic reading of the Amendment. That reading is understandable, since the Court itself has used the language of incorporation in treating some Bill of Rights provisions as part of the “due process” requirements imposed on states by the Amendment.<sup>18</sup> But it departs from the way in which contemporaries viewed the Reconstruction Amendments and the Civil Rights Act of 1866.

Although contemporaries of those enactments differed on the content of their central provisions, they viewed them holistically, as charters for the new rights and privileges of citizens of the United States that were potentially to be enforced against the states by the

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18. An abiding difficulty, in seeking to recover the original understanding of the framers of constitutional provisions, is separating the language of those provisions from subsequent judicial interpretations of them. When one examines the comments of contemporaries at the time of the framing of the Fourteenth Amendment, one is unable to find any mention of Bill of Rights provisions being “incorporated” against the states by that Amendment’s passage. Nonetheless, as we will see in more detail, some Reconstruction-era members of Congress, and judges, assumed that the Fourteenth Amendment’s Privileges and Immunities Clause was designed to create a new set of national civil rights, which included not only rights mentioned in the Bill of Rights but also traditional civil rights that had been hitherto thought as being directed only at states. The idea of rights held against the federal government as being “incorporated” against the states by the Due Process Clause of the Fourteenth Amendment did not surface until *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

federal government. Since both the idea that all citizens of states were now also citizens of the United States, and the corresponding idea that citizens of the United States had “privileges or immunities” and “libert[ies]” that states were now constitutionally bound to recognize, were departures from antebellum constitutional jurisprudence, the critical question for contemporary interpreters of the Reconstruction-era enactments was how much they would disturb the existing balance of federal and state powers. That question turned on what new national “civil rights,” which states were now bound to protect, were contained in the enactments.

This Article’s focus is on the evolution of judicial doctrine, not on the social or political context of the Waite Court’s decisions. It therefore does not overlap with some of the emphasis of the conventional historiography of Reconstruction, insofar as that emphasis is drawn from analyses of late nineteenth-century political, social, and economic developments. But the article does confront an image of the Chase and Waite Courts that appears in that literature. One might ask where that image comes from, especially since it does not rest on any detailed analysis of those Courts’ work.

The image is a product of an interpretation of the work of judges advanced by many historians and political scientists. That interpretation is grounded on the outcomes reached by influential judges, such as Supreme Court justices, in visible cases, such as those that involve interpretations of the Constitution. Those outcomes are treated as political statements comparable to the legislative decisions of Congress or Presidential orders. The outcomes are given political labels, such as “liberal” or “conservative,” and sometimes partisan labels as well, such as “Republican” or “Democratic.” The analysis presupposes that judges are self-conscious political actors who often have partisan agendas, and the outcomes they reach in cases reflect those agendas. Part of the conclusion that the Court helped “abandon” the libertarian and egalitarian goals of Reconstruction flows from the assumption that the Court’s justices, as post-Civil War political actors, were unsympathetic to those goals.<sup>19</sup>

This Article assumes that conceiving of judicial decisions as political statements, and interpreting them in terms of their outcomes, results in an incomplete understanding of the nature of

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19. BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 25–26, states the following: “During the Progressive and New Deal eras . . . materialist histories of post-Civil War America were written which cast the postwar Court as the tool of big business. . . . In general, these materialist histories projected the political and economic developments of the 1890s backward onto the postwar years.” While I do not disagree with that comment, my explanation for the anachronistic character of the conventional narrative emphasizes perceptions about the nature of law and judging.

judicial decision making. In the view of this Article, the primary task of judges is the interpretation of purportedly authoritative legal sources, and those interpretations are primarily constrained not by the political context of judicial decisions but by the received doctrinal frameworks in which those decisions are set. Those doctrinal frameworks invariably bring with them existing legal categories and interpretive “understandings,” which are necessarily the product of previous generations. Those preexisting doctrinal frameworks, and the understandings that help drive them, significantly constrain judicial decision making by limiting the scope of “authoritative” legal justifications on which judges can ground their decisions.

When the enactment of new authoritative legal sources, such as the Civil Rights Act of 1866 or the Reconstruction-era constitutional amendments, requires judges to interpret those sources, pressure is implicitly placed on the interpreters to integrate the sources into existing doctrinal frameworks. Sometimes terminology employed in the new sources is sufficiently open-ended as to invite judges to supply it with content in the course of their interpretations; the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment provide illustrations. It is in the process of seeking determinate meaning for open-ended terms that received doctrinal frameworks and understandings come into play.

When justices confronted cases that required them to give content to the “privileges or immunities of citizens of the United States,” or “liberties” within the Due Process Clause, or the “Equal Protection of the Laws,” they did so with an awareness of what those terms had meant in antebellum jurisprudence, as well as an awareness of the relationship between the powers of the states and those of the federal government in the antebellum decades. They recognized that they were being asked to determine how far antebellum doctrines and understandings had been displaced by new Reconstruction-era authoritative sources.

If one assumes that justices approached the interpretation of the new sources with that posture, it should be no surprise that two concerns should have animated their interpretations. One concern was whether the scope of the new “privileges” or “immunities” or “liberties” conferred on individuals by the Reconstruction-era enactments was intended to extend beyond the area of race relations. The other was whether any new “civil rights” conferred on individuals by the Civil Rights Act of 1866, or any of the Reconstruction amendments, were to be enforced against states by the federal government, thereby potentially transforming the laws of the states. In addressing those concerns across a range of cases between the early 1870s and the mid-1880s, Court majorities concluded that the new authoritative sources were not designed to have a fully transformative effect. Their impact was to be limited to violations of “civil rights” with a racial animus, and their effect on traditional understandings of

the relationship between federal and state powers was to be negligible. The method by which the justices reached those conclusions was to fashion new doctrinal distinctions within the traditional framework of antebellum constitutional jurisprudence. Thus, to understand the constitutional history of Reconstruction, it will be necessary to start with antebellum conceptions and understandings of “civil rights” and of federalism.

## I. THE ANTEBELLUM LEGACY OF “RIGHTS”

### A. *Corfield v. Coryell*

In 1823 Supreme Court Justice Bushrod Washington, in his capacity as a circuit judge for the third federal circuit, decided the case *Corfield v. Coryell*.<sup>20</sup> The plaintiff in *Corfield* was a citizen of Pennsylvania whose ship was used to harvest oysters in the state of New Jersey. A New Jersey statute forbade non-residents from taking shellfish from state waters. It was under this statute that Corfield’s vessel was seized, condemned, and sold. He sued in federal court for trespass, arguing, among other things, that the New Jersey statute was in violation of the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution, which states that “the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.”

Washington responded to this argument by attempting to ascertain “the privileges and immunities of citizens in the several states.”<sup>21</sup> He began that task by asserting that the terms would be “confined . . . to those privileges and immunities which are in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”<sup>22</sup>

By characterizing privileges and immunities as “fundamental,” Washington was seeking to identify the privileges and immunities that citizens brought with them, so to speak, when they became members of free, republican governments. The privileges appeared to be a species of “natural rights,” held, against the powers of the state, by those who agreed to participate in the formation of republics. Since the United States had been a republic since its creation, the privileges and immunities of all its citizens had been “enjoyed” by them “at all times . . . from the time of [the American states] becoming free, independent, and sovereign.”<sup>23</sup>

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20. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

21. *Id.* at 551.

22. *Id.*

23. *Id.*

Because the privileges and immunities of citizens of all the American states were “in their nature, fundamental,” Washington did not think it would be “difficult,” though perhaps “tedious,” to identify them.<sup>24</sup> He gave a list, adding that there were “many others which might be mentioned.”<sup>25</sup> The list included

[T]he enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes and impositions than are paid by the other citizens of the state . . . .<sup>26</sup>

To those Washington added “the elective franchise,” which he acknowledged could be “regulated and established by the laws or constitution of the state in which it is to be exercised.”<sup>27</sup> He also suggested that the Privileges and Immunities Clause “was manifestly calculated,” in the words of the preamble of the Articles of Confederation, to “secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”<sup>28</sup>

One commentator has concluded that determining “[w]hich rights met [the] threshold” of being “fundamental” was “more obscured than clarified” by Washington’s analysis,<sup>29</sup> and two others have suggested that “judicial interpretation of the [Privileges and Immunities Clause] got off to a bad start” with *Corfield*.<sup>30</sup> But if one takes Washington’s effort to catalog “fundamental” privileges and immunities as a snapshot of early nineteenth-century jurisprudential thinking about the nature and sources of foundational legal rights, it has some illuminating features.

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24. *Id.*

25. *Id.* at 552.

26. *Id.* at 551–52.

27. *Id.* at 552.

28. *Id.* (internal quotations marks omitted).

29. GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY* 25 (2013).

30. Brainerd Currie & Herma Hill Kay, *Unconstitutional Discrimination in the Conflict of Laws; Privileges and Immunities*, in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 460–61 (1963).

First, it is clear from Washington's analysis that most of the "fundamental" privileges and immunities he cataloged did not originate in the text of the Constitution. He described them as "hav[ing], at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their being free, independent, and sovereign."<sup>31</sup> That "time" began with the issuance of the Declaration of Independence, eleven years before the Constitution was drafted. Moreover, only one of the privileges Washington listed was embodied in a provision of the Constitution, that of the writ of habeas corpus. The others—enjoying life, liberty, happiness, and safety, acquiring, possessing, and disposing of property, bringing legal actions in the courts of a state, residing in or traveling through a state, and being free from the burdens of unequal taxation—appear to be something like the "inalienable rights" referred to in the Declaration of Independence, privileges and immunities inherent in the status of being a citizen of a free republican government.

Second, Washington's analysis suggested that the purpose of the Privileges and Immunities Clause was to "secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."<sup>32</sup> The clause appears in the same article of the Constitution that contains the Full Faith and Credit Clause,<sup>33</sup> requiring states to enforce the legal judgments of other states;<sup>34</sup> a clause compelling states to "deliver up" persons charged<sup>35</sup> with treason, felony, or other crimes to the states where they had been charged; and the Fugitive Slave Clause,<sup>36</sup> which provided that when slaves escaped into other states they were to be returned by the authorities of those states to their masters.<sup>37</sup> In this context, the Privileges and Immunities Clause appears to have been an effort to prevent states from provoking other states by interfering with the policies of those states or the exercise of certain classes of rights held by nonresident citizens.

Finally, Washington's analysis in *Corfield* suggested that the category of "fundamental" privileges and immunities was a limited one. It did not extend, for example, to the free enjoyment of the fishing beds of a state by noncitizens. States could conclude, as part of their power to promote "the general good" of their residents, that the supply of fish within their boundaries might be exhausted if

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31. *Corfield*, 6 F. Cas. at 551.

32. *Id.* at 552 (internal quotation marks omitted).

33. U.S. CONST. art. IV, § 1.

34. *Id.*

35. *Id.* at art. IV, § 2, cl. 2.

36. *Id.* at art. IV, § 2, cl. 3.

37. *Id.*

nonresidents were given unlimited access to state waters.<sup>38</sup> Even though the right to harvest oysters might seem to be an example of the right to acquire property that Washington had identified as “fundamental,” it could be limited to in-state residents. This suggested that the Privileges and Immunities Clause was not going to cut very deeply into the power of states to treat their residents more favorably than nonresidents.

Washington’s opinion in *Corfield* cited no authorities in support of his categorization of some privileges and immunities as fundamental, but we have seen that his most likely basis for including the privileges he singled out was an intuitive sense that they represented inalienable rights that citizens of free republican governments possessed. Thus, one could use *Corfield* as an illustration of what Washington and his contemporaries believed were the “natural rights” of early nineteenth-century Americans. There was, however, another feature of Washington’s language in *Corfield*, and of the Privileges and Immunities Clause itself: the “privileges and immunities” protected were reserved for citizens. The clause referred to the “Citizens of each State,” and to “Citizens in the several States.”<sup>39</sup>

Other legal categories for describing persons existed in early nineteenth-century American jurisprudence. The category of “alien” described persons who were not citizens because they owed allegiance to foreign powers. The category of “denizen” was less precise: it referred to noncitizen residents of a particular area who might or might not be aliens. An example was “Indians not taxed,” a category mentioned in Article I of the Constitution. That category captured the ambiguous status of Native American tribes at the time of the Constitution’s framing. It was assumed that some tribal members owed allegiance to their tribes rather than the United States, but tribes were not regarded as “foreign nations,” so tribal members could not be aliens.<sup>40</sup> On the other hand, only those tribal members who had become fully integrated into settler communities were considered “citizens,” and some of those members voted, held property, and paid taxes. Hence the term “Indians not taxed” referred to members of tribes who were not considered citizens.<sup>41</sup>

The categories described above revealed that a number of residents of the United States in the early nineteenth century were not regarded as citizens and that the inalienable privileges

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38. *Corfield*, 6 F. Cas. at 552–54.

39. U.S. CONST. art. IV, § 2, cl. 1.

40. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 144–45 (1997).

41. SMITH, *supra* note 40 at 144–45.

Washington listed in *Corfield* were reserved for persons with citizenship status. The conferral of “citizenship” of this sort was understood as being within the province of states from independence through the Civil War, and it was clear that numerous residents of America, the most conspicuous being the majority of African Americans and Native Americans, were not treated as citizens.<sup>42</sup>

In the late eighteenth and early nineteenth century, citizenship status was not explicitly conferred by statute. Instead, citizenship was implicitly conferred by laws and practices limiting the number of persons who could exercise Washington’s list of privileges.<sup>43</sup> In most states only white male freeholders could vote. In many, married women could not own property independent of their husbands. Slaves were not permitted to own or acquire property, to travel freely, or to vote, and their ability to bring actions in court was limited. Native Americans were rarely permitted to vote. Only a handful of states permitted free blacks to vote, and in Southern states they were not permitted to travel freely.<sup>44</sup>

*B. Luther v. Borden*

In addition to governing the decision in *Corfield*, antebellum understandings of the nature and scope of “rights” can be seen in an argument before the Supreme Court in the 1849 case *Luther v. Borden*,<sup>45</sup> in which the Court concluded that it could not decide, under the Guarantee Clause of the Constitution,<sup>46</sup> a controversy about

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42. For an extended discussion of the limitations on the definition of citizen in the first three decades of the nineteenth century, including free African Americans, Native Americans, and women, see *id.* at 165–96. Citizenship in the sense of being regarded as a person who possessed inalienable privileges and immunities was distinguishable from naturalized citizenship. The latter term was reserved for former aliens who chose to transfer their allegiance to the United States. The framers of the Constitution, mindful of the quite different standards states had applied in considering whether to naturalize aliens, reserved the power “to establish a uniform rule of naturalization” in Congress. U.S. CONST. art. I, § 8, cl. 4. Thus it was possible for a person to be a naturalized citizen of the United States but not a full “citizen” of a state in the sense of being able to exercise all the privileges associated with citizenship.
43. See *Gardner v. Ward*, 2 Mass. (2 Will.) 244, 244 (1805) (stating that the determination of “what were the rights of Mr. G., or in what state he must be considered in law” would not be “affected by any . . . legislative act . . . [but rather] by the principles of the common law. . .”).
44. For more detail, see RUTHERGLEN, *supra* note 29, at 21–23.
45. 48 U.S. (7 How.) 1 (1849).
46. U.S. CONST. art IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall



which of two competing governments was the legitimate government of Rhode Island.<sup>47</sup>

One argument invoked by supporters of the displaced government maintained that “every male inhabitant over twenty-one years of age” in Rhode Island “[had] a natural right to vote.”<sup>48</sup> In response, John Whipple, representing the defendant in the case, took the occasion to review “classes of rights” in American jurisprudence. Whipple identified three classes: “natural, such as those recognized in the Declaration of Independence; civil, such as the rights of property; and political rights.”<sup>49</sup> He then went on to say that

Society has nothing to do with natural rights except to protect them. . . . Every one has the right to acquire property, and even in infants the laws of all governments preserve this. But political rights are matters of practical utility. A right to vote comes under this class. If it was a natural right, it would appertain to every human being, females and minors. . . . But . . . the State has the power to affix any limit . . . to the enjoyment of this right . . . . It can confine the right of voting to freeholders . . .<sup>50</sup>

Whipple did not clearly distinguish between “natural” and “civil” rights, although his understanding of the latter category appeared to be similar to that of Washington in *Corfield*. But he obviously regarded “political” rights as those conferred by government rather than inherent in citizenship. Under this interpretation, the Fourteenth Amendment’s broadening of the category of citizens to include “all persons” meant that a larger number of residents of a state would possess “civil rights,” but the state could still place restrictions on the right to vote. At the close of the Civil War, most states continued to limit the franchise to male freeholders.

Thus by the time that the 39th Congress, controlled by representatives from the Union states, considered drafting the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866, there was no consensus on what the “civil rights” of Americans were, or to whom those rights extended.<sup>51</sup> The legacy of the late

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protect them against Invasion, and on Application of the Legislature . . . against domestic violence.”).

47. *Luther*, 48 U.S. (7 How.) at 1.

48. *Id.* at 28.

49. *Id.*

50. *Id.* at 28–29.

51. RUTHERGLEN, *supra* note 29, at 53–54, notes that the 1856 edition of *Bouvier’s Law Dictionary*, at the time a standard source for the definition of legal terms, had no entry for “civil rights.” Editions published after 1866 added an entry that defined “civil rights” as

eighteenth and early nineteenth centuries, while affirming the theoretical proposition that citizens of free republican governments enjoyed some inalienable privileges and immunities, had mainly been a restrictive one, emphasizing the extent to which states could limit the exercise of those privileges.

## II. THE THIRTY-NINTH CONGRESS AND “CIVIL RIGHTS”

The question that galvanized the 39th Congress into action on the issue of “civil rights” was the prospective eradication of African American slavery and what had come to be called its “badges and incidents.”<sup>52</sup> The Supreme Court’s 1857 decision in *Dred Scott*<sup>53</sup> had concluded that Congress had no power to abolish slavery in federal territories and that African Americans were not “citizens” for the purpose of being able to bring actions in the federal courts.<sup>54</sup> If there had been any ambiguity about the connection between citizenship status and the exercise of fundamental privileges and immunities after *Corfield*, *Dred Scott* resolved it: African Americans did not have the right to sue in the federal courts because they were not citizens.

### A. The Thirteenth Amendment

There were thus two potential issues in *Dred Scott* in which the 39th Congress could intervene. One was the status of slavery in the United States; the other was the citizenship status of African Americans after emancipation. The Thirteenth Amendment explicitly addressed the former of those issues and implicitly addressed the latter. The Amendment’s first section declared that “[n]either slavery nor involuntary servitude shall exist within the United States, or any place subject to their jurisdiction.”<sup>55</sup> This meant that slavery was abolished in all states and remaining federal territories and that its abolition reached private action. The language of the section was modeled on Article VI of the Northwest Ordinance, which abolished slavery in that territory and had been understood to apply to the conduct of private parties.

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“certain rights secured to citizens of the United States by the 13th and 14th amendments to the constitution, and by various acts of congress made in pursuance thereof.”

52. The first use of that term came in debates over the Civil Rights Act of 1866. See RUTHERGLEN, *supra* note 29, at 66–67. It is not clear exactly what members of the 39th Congress meant by “badges and incidents” of slavery.

53. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

54. *Id.* at 427.

55. U.S. CONST. amend. XIII, § 1.

The second section of the Thirteenth Amendment stated, “Congress shall have power to enforce this article by appropriate legislation.”<sup>56</sup> Since no legislation was needed to emancipate former slaves after the Amendment’s passage, that section was designed to allow Congress to prescribe rules for the treatment of emancipated African Americans, including the potential categorization of them as citizens of states or of the United States. It was this feature of the Amendment that caused its opponents to claim that it amounted to a radical disruption of the existing balance between state and federal power. They were concerned that enforcement legislation directed at the status of free blacks in states with large African American populations would constitute a usurpation by the federal government of the traditional powers of states to pass laws affecting the lives of their residents.<sup>57</sup>

*B. The Civil Rights Act of 1866*

When the text of the Civil Rights Act of 1866 is unraveled, it becomes clear that the drafters of that legislation intended to do exactly what opponents of the Thirteenth Amendment had feared: use the enforcement powers of Congress to alter the treatment of emancipated African Americans in former slave states. Section 1 of the Act provided:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.<sup>58</sup>

Of particular interest are two dimensions of the Act’s coverage: the “civil rights” it enumerated, especially when compared with Washington’s list of the privileges and immunities of citizenship in *Corfield*; and its governing theory of the relationship of federal and

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56. U.S. CONST. amend. XIII, § 2.

57. RUTHERGLEN, *supra* note 29, at 38.

58. Civil Rights Act of 1866, § 1, 14 Stat. 27.

state institutions in enforcing the Act's provisions. The passage of the Act left both of those dimensions in an unsettled state.

The Act employed the familiar antebellum categories for describing persons. It identified the possession of civil rights with the status of citizenship and defined citizens as all persons, regardless of race and color, who were born in the United States and not aliens (those "subject to any foreign power") or "Indians not taxed." Its understanding of who was a citizen was thus the antebellum understanding, with one conspicuous difference: all nonwhite, native-born Americans (save "Indians not taxed") were given citizenship status. This meant that any state law or practice explicitly or implicitly denying citizenship to free blacks was contrary to the Act.

In keeping with antebellum understandings, the civil rights listed in the Act were accorded to citizens. Those rights were facially narrower than the privileges and immunities listed by Washington in *Corfield*. They included making and enforcing contracts, bringing actions in court, holding, acquiring, and conveying property. As in *Corfield*, citizens were entitled to the benefit of laws protecting the security of person and property and were governed by laws subjecting them to civil and criminal penalties and punishments. They did not include voting rights, rights to travel and to reside within a state, rights to equal taxes, or rights to acquire and to pursue happiness. They also modified Washington's understanding of civil rights in *Corfield* in one important respect. At the time of *Corfield*, black residents of many states were not afforded the rights catalogued in the Act and were subjected to civil and criminal penalties that differed from those imposed on white residents. The Act explicitly changed that treatment. Black citizens, under the Act, were deemed "to have the same right[s]" as were "enjoyed by white citizens" in "every State and Territory in the United States." This was so even if "any law, statute, ordinance, regulation, or custom" was "to the contrary." The obvious referents of this language were the "Black Codes" drafted by several Southern states late in 1865, as the Thirty-Ninth Congress came into session.<sup>59</sup>

Some of the black codes, notably those of South Carolina and Mississippi, recited rights purportedly enjoyed by black as well as white persons, such as holding and acquiring property, suing and being sued, and having the protection of civil and criminal laws. The codes then inserted provisions stating that those declarations of rights were to be modified by subsequent provisions, which discriminated against free blacks in numerous respects. The declarations of "civil rights" in the codes were used as models by the drafters of the Civil

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59. For illustrations of Black Codes, see THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* 61-80 (1965).

Rights Act, who then made it clear that the Act overrode any black codes to the contrary.<sup>60</sup>

The Act assumed that the principal mechanism for enforcing its provisions would be the federal courts,<sup>61</sup> although sections of the Act alluded to enforcement by the military or federal marshals.<sup>62</sup> There was considerable debate in Congress about what judicial enforcement of the Act might mean, with some opponents believing that the declaration of rights derived from natural law or the common law would give the federal courts license to work out the contours of those rights, thereby transforming state law.<sup>63</sup> But in the end, the Act's emphasis on the equal treatment of black and white citizens with respect to the civil rights inherent in citizenship appeased opponents. As one supporter of the Act put it, "[t]he bill does not declare who shall or shall not have the right to sue, give evidence, inherit, purchase, and sell property. These questions are left to the States to determine . . . ."<sup>64</sup>

There was, however, an issue of federalism that lingered over the passage of the Act: what was the basis for its citizenship clause? The Act had extended national citizenship to "all persons in the United States," excepting aliens and "Indians not taxed" and had then provided that all such persons had to be afforded the same rights as were enjoyed by white persons. It was not clear where Congress's power to accomplish those goals had originated.

One possible basis was the Naturalization Clause. Congress could unquestionably have passed legislation making all slaves citizens of the United States under this clause. That would have effectively ended their slave status, since slavery was incompatible with the privileges and immunities of national citizenship identified in *Corfield*. But Congress had passed the Thirteenth Amendment instead,

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60. For more detail, see RUTHERGLEN, *supra* note 29, at 47–48. The last portion of the Act's last sentence, "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding," would have been taken as a reference to Black Codes. Although its language sweeps more broadly, facially overriding "any law" or "custom" inconsistent with the Act, such "notwithstanding" clauses were conventionally employed as boilerplate in the early nineteenth century. See, e.g., Act of Mar. 3, 1805, ch. 41, § 8, 2 Stat. 339, 342; Act of June 17, 1844, ch. 98, 5 Stat. 677; Act of July 17, 1862, ch. 201, § 13, 12 Stat. 597, 599.

61. For a deeper explanation, see RUTHERGLEN, *supra* note 29, at 79.

62. See, e.g., Civil Rights Act of 1866, ch. 31, §§ 5, 9, 14 Stat. 27. For more detail, see RUTHERGLEN, *supra* note 29, at 57.

63. See CONG. GLOBE, 39th Cong., 1st Sess. 478 (1866).

64. CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (Statement of Rep. William Lawrence of Ohio).

indicating that its primary goal was to abolish slavery, leaving the question of slave citizenship to “appropriate legislation.”

Another potential basis for the Act was that after the Thirteenth Amendment, the power was simply declaratory of existing law.<sup>65</sup> But, the form of the Thirteenth Amendment also undermined this rationale. Had that power self-evidently followed from the passage of the Thirteenth Amendment itself, Section 2 of the Amendment would not have been necessary. No language in the Amendment, however, addressed the equal treatment of persons, and no language addressed citizenship. Moreover, a large number of persons residing in the United States were not citizens under common law.

So the question remained whether Section 1 of the Civil Rights Act, increasing the category of persons who were citizens of the United States and providing them equal treatment on the basis of race, was “appropriate” legislation. In this context, the Fourteenth Amendment seemed to have been designed to remove any uncertainty about the constitutional basis of the Act.<sup>66</sup>

### C. *The Fourteenth Amendment*

The framers of the Fourteenth Amendment decided to further broaden the category of national citizenship and to further limit the states’ power to restrict the rights of citizens. First, they extended the category of national citizens to “[a]ll persons, born or naturalized in the United States,”<sup>67</sup> thereby including all Native Americans in the category. Next, they equated state citizenship with national citizenship, requiring states to treat Native Americans as citizens as well. Then they added two additional limitations on the power of states to restrict the rights of individuals. No state could “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” and no state could “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>68</sup> The last two clauses, by using the language “any person,” widened the restrictions on the conduct of states to include their treatment of aliens (and subsequently corporations). It was inevitable, given the potentially radical inroads into state sovereignty made by the language of the Fourteenth Amendment, that the courts would need to supply some meaning to terms such as “privileges or immunities”

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65. Senator Lyman Trumbull of Illinois made this argument in the debates over the Act. *See* CONG. GLOBE, 39th Cong., 1st Sess. 475, 500, 600 (1866).

66. For more detail, *see* RUTHERGLEN, *supra* note 29, at 59–71, and BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, at 162.

67. U.S. CONST. amend. XIV, § 1.

68. *Id.*

of national citizenship, “due process of law,” and “equal protection of the laws,” and judicial interpretations of those terms became common after 1870 and have played a major part in the conventional historical narrative of Reconstruction.

*D. The Fifteenth Amendment*

The Fifteenth Amendment, passed in 1870, would also play a role in the Court’s creation of rules of civil rights enforcement. The Fifteenth Amendment had a distinctive phraseology, revealing how antebellum understandings of “rights” remained extant during the Reconstruction years. The Amendment’s first section provided that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” That language did not mean that all American citizens were enfranchised. It meant that race, color, or previous enslavement could not be made the basis for denying voting privileges. The obvious import of the provision was to strike at official efforts to prevent African Americans from voting.

What explains the peculiar wording of the section? Its language did not prevent states or the federal government from restricting the franchise, so long as restrictions were not based on race, color, or a previous condition of servitude. Nor did it, on its face, prevent private individuals from interfering with the exercise of voting rights. Instead, it created a new right that in the antebellum vocabulary would be designed a “political right”: the right not to have one’s capacity to vote curtailed on the basis of race, color, or previous condition of servitude.<sup>69</sup> What were the implications, for the enforcement of civil rights by federal authorities, of the Amendment’s phraseology? Were there to be different enforcement rules for different violations? And what was the connection between enforcement rules and the class of right being violated?

*E. Modifications of the Antebellum Legacy*

Two inquiries are central to an examination of the cumulative impact of the Thirteenth, Fourteenth, and Fifteenth Amendments, and of the Civil Rights Act of 1866 on the status of antebellum understandings of “rights.” One inquiry is whether the “rights” successively protected by the 39th Congress’s enactments were

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69. As we have seen, a distinction between “civil” and “political” rights had existed in antebellum jurisprudence, political rights being thought of as those conferred or created by some positive enactment, such as a constitutional amendment, and civil rights being associated with “natural” rights. But once a political right had been created, Reconstruction-era judges thought it capable of evolving into the status of a “civil” right. See BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, at 163 (discussing voting rights).

intended to be applied against the conduct of private parties as well as state actors. The other is each enactment's anticipated role for the states and the federal government in securing those rights.

### 1. Parties

The language of the Thirteenth Amendment suggested that its coverage was not limited to state action. Slavery and involuntary servitude was abolished throughout the United States by the federal government, and there was no language in Section 1 of the Amendment restricting the scope of that abolition.

Section 2 of the Amendment gave Congress the power to enforce the Amendment by "appropriate" legislation, and the Civil Rights Act of 1866 was intended to be an example of that legislation. Its language defining national citizenship, listing rights associated with it, and declaring that all persons holding national citizenship "shall have the same right[s]" as white citizens was directed at states, but also at federal territories, and at customs as well as laws.<sup>70</sup> One can therefore assume that its limitations on the restriction of the rights of national citizens applied to private as well as state conduct.

But the scope of protection afforded to "civil rights" by the Thirteenth Amendment and the Act was not as broad as the latter's language might have suggested. There was considerable debate about whether the formal emancipation of slaves in the Amendment automatically conferred upon them the civil rights of citizens and gave the federal government plenary power to enforce those rights.<sup>71</sup>

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70. Civil Rights Act of 1866, § 1, 14 Stat. 27.

71. There has been a substantial historical literature on this issue. Compare Robert Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: A Moral Anomaly*, 73 FORD. L. REV. 153, 154 (2004) (concluding that plenary enforcement power was anticipated by the Amendment), with MICHAEL LES BENEDICT, PRESERVING THE CONSTITUTION 3–22 (2006) (arguing that federal enforcement power was only triggered by the denial of rights by states).

In an earlier treatment of lower court cases decided between 1866 and 1873, Kaczorowski argued that "[j]udges expressed the belief that the Reconstruction Amendments and the Civil Rights Act [of 1866] were intended to establish the primacy of national citizenship and national authority over the right of citizens." KACZOROWSKI, *supra* note 9, at 5. The cases that Kaczorowski discussed primarily involved challenges to the constitutionality of the Act. He maintained that "judges uniformly understood that the Civil Rights Act of 1866 expressed a legal theory that assumed that Congress and the federal courts possessed primary authority to protect civil rights because these rights were recognized and secured by the United States Constitution as rights of American citizenship." *Id.* at 7. Having described the posture of judges between 1866 and 1873 in that fashion, Kaczorowski then argued that the Waite Court retreated from that posture because it was "unable to devise a theory for primary national civil rights authority that would have permitted the states to continue to fulfill functions that the Court



The issues were contested because the only obligations facially imposed on states and private parties by the Amendment and the Act were not to allow persons to be held in a condition of slavery and to afford all citizens of the United States the same civil rights as white citizens. States remained free to define state citizenship, with its corresponding rights, as they chose. They could limit the category of persons who were treated as state citizens, and accordingly restrict the “civil rights” of a variety of their residents.

Until the enactment of the Fourteenth Amendment, then, the federal government’s power to abolish slavery was unquestioned, and its power to define national citizenship and the rights associated with it established, but the states retained power to define state citizenship and thereby limit both eligibility for that status and the rights associated with it. Although states (and private parties) could not treat nonwhite national citizens differently from white national citizens, they could treat state residents differently in multiple ways. A large residuum of state power to define the “civil rights” of residents of states remained after the two enactments.

The Fourteenth Amendment arguably cut into that residuum of state power significantly. The first clause of the Amendment’s first section identified “all persons born or naturalized in the United States” as both “citizens of the United States” and citizens of the states in which they resided. That language did not in itself equate state with national citizenship. But the Amendment’s next clause declared that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” If those “privileges or immunities” were correlative to the “rights” identified in the Civil Rights Act of 1866, then states were not merely required to afford “all persons” the same privileges and immunities they afforded white persons, but rather they could not “abridge” any of them. They could not interfere with the rights of “all persons” to make and enforce contracts; sue or be sued; or inherit, purchase, sell, lease, hold, and convey property.<sup>72</sup>

In other words, if the “privileges and immunities” of citizens of the United States amounted to the rights that antebellum

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believed were essential to the survival of American federalism.” *Id.* at 183.

My analysis agrees with Kaczorowski’s conclusion that federalism issues were important for the Chase and Waite Courts. But I disagree with his assertion that there was a uniform understanding among state and federal judges that the Civil Rights Act of 1866 gave Congress and the federal courts authority to safeguard all the civil rights of American citizens against state interference. In my view the meaning and scope of “civil rights,” and their implications for federalism issues, were deeply contested issues in the 1870s and 1880s.

72. Civil Rights Act of 1866, § 1, 14 Stat. 27.

jurisprudence had implicitly understood as inherent in the status of being a citizen, states could no longer limit those rights to a comparatively small sector of their resident population. “All persons” enjoyed those rights in the form of the “privileges or immunities” of national citizenship, and states could not abridge them. Further, if states did attempt to limit those rights, the federal judiciary could enforce the Fourteenth Amendment against them.

But the Fourteenth Amendment only forbid *state* actors from abridging the privileges or immunities of national citizenship, or denying persons due process of law or the equal protection of the laws.<sup>73</sup> Unlike the strictures of the Thirteenth Amendment and the Civil Rights Act of 1866, those of the Fourteenth Amendment did not extend to private action. Thus after the passage of the Fourteenth Amendment, the three enactments stood in a somewhat paradoxical relationship to one another.

By imposing restrictions on the ability of states to restrict the privileges and immunities of United States citizens, or to deny persons due process of law or equal protection of the laws, the Fourteenth Amendment had refocused the emphasis of “civil rights” in the post-Civil War years. The emphasis of the Thirteenth Amendment and the Civil Rights Act of 1866 had been on slavery and racial discrimination. The civil rights protected in those enactments had been the right to be free from involuntary servitude and the right of black citizens to enjoy the same common law privileges as white citizens. The Fourteenth Amendment broadened the category of “privileges or immunities” to include rights unconnected to racial status. At the same time it reaffirmed that those privileges or immunities were being protected against the actions of states.

Here one can see how the legacy of “rights,” as they were understood in antebellum jurisprudence, had invaded the consciousness of the framers of Reconstruction-era civil rights enactments. To the extent that Americans were thought of in the antebellum years as citizens of “free republican governments,” those governments were, on the whole, states.<sup>74</sup> The list of privileges and immunities cataloged in *Corfield* and restated in the Civil Rights Act of 1866 was thought to be held against state governments. The supporters of the Act who responded to charges that it threatened to upset the balance between state and federal powers acknowledged that states could impose conditions on such “rights” as access to

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73. U.S. CONST. amend. XIV, § 1 (emphasis added) (“No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

74. See discussion *supra* Part I.

courts, voting, and transferring property.<sup>75</sup> It thus made sense for the Fourteenth and Fifteenth Amendment's framers to think of violations of civil rights as primarily emanating from state officials.

## 2. The Federal Government as Enforcer of "Rights"

Since the federal judiciary was expected to be the chief mechanism by which the constitutionality of alleged state abridgements of the privileges or immunities of citizens of the United States was to be tested, passage of the Fourteenth and Fifteenth Amendments assured that two issues would be in the forefront of civil rights litigation. One, previously discussed, was the meaning of "privileges or immunities of citizens of the United States," including their enumeration and scope.<sup>76</sup> The other was what conduct on the part of a private party or state official could trigger the intervention of the federal courts to ensure that civil rights would be protected. Over the course of the 1870s and 1880s, the Supreme Court developed a set of legal doctrines to govern that intervention.

### III. THE JUDICIAL FASHIONING OF ENFORCEMENT RULES FOR CIVIL RIGHTS CASES

#### A. *United States v. Cruikshank*

*United States v. Cruikshank*<sup>77</sup> arose out of a massacre of between sixty-two and eighty-one black men in Colfax, Louisiana, by a large group of members of the Ku Klux Klan. The murdered men were prospective voters in a state gubernatorial election.<sup>78</sup> Three Klan members were charged under a section of the Enforcement Act of 1870<sup>79</sup> that made it a felony for two or more persons to conspire to "injure . . . any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."<sup>80</sup>

Three of the men convicted under the section challenged their convictions in federal court in the Fifth Circuit, where Justice Joseph P. Bradley was the circuit judge. Bradley took the occasion to write a sweeping opinion in which he sought to clarify the reach of the Thirteenth, Fourteenth, and Fifteenth Amendments and their

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75. RUTHERGLEN, *supra* note 29, at 52, 56.

76. *See supra* Parts I, II.

77. 92 U.S. 542 (1876).

78. *See* CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* 265–66 (2008).

79. 16 Stat. 140.

80. *Id.* at 141.

enforcement legislation.<sup>81</sup> In that opinion Bradley addressed the effects of the amendments on each of the ambiguous legacies of antebellum civil rights jurisprudence: the nature of civil rights, the impact of the amendments on private as well as state conduct, and the implications of the federal government's new enforcement powers for traditional understandings of federalism. Although Bradley's opinion only represented the views of one circuit judge, it was widely distributed, and the Court subsequently cited it in cases interpreting the state action component of the Fourteenth and Fifteenth Amendments.<sup>82</sup>

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81. *United States v. Cruikshank*, 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897).

82. *Id.* Bradley's opinion, and a March 12, 1871, letter he wrote to then-federal judge William B. Woods, have been noted by NELSON, *supra* note 9, at 196, Collins, *supra* note 9, at 1985–86, 1988–1995; and BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, at 12–17, 93–112. In the letter, prompted by circuit court decisions interpreting enforcement provisions of the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866, Bradley said that “denying the equal protection of the laws includes the omission to protect as well as the omission to pass laws for protection . . . . Denying includes inaction as well as action.” Letter from Justice Joseph Bradley to Judge William B. Woods (on file with Joseph Bradley Papers, New Jersey Historical Society). Although each of those scholars recognized that by 1871 Bradley had come to believe that civil rights could be infringed by states through “inaction” as well as “action,” they made different uses of that finding.

Nelson merely noted the affinity between Bradley's 1871 position and Justice John Marshall Harlan's dissent in the *Civil Rights Cases*. NELSON, *supra* note 9, at 195–96.

Collins, as part of an effort to demonstrate that Bradley's constitutional jurisprudence was consistent over time, emphasized that Bradley distinguished between “preexisting” rights, which were only protected by the Fourteenth Amendment when they were intentionally or negligently violated by states, and “newly conferred” rights, such as the right to be free from the condition of slavery conferred by the Thirteenth Amendment and the right “to vote free of racial discrimination” conferred by the Fifteenth Amendment. The federal government could protect the latter set of rights against interference by private as well as state actors. Collins, *supra* note 9, at 1990–93.

Brandwein fastened on the “inaction as well as action” language in Bradley's letter to Woods and his distinction between preexisting and conferred rights to suggest that several Reconstruction-era constitutional decisions by the Supreme Court can be understood as pivoting on what she calls the concept of “state neglect” (inaction that caused the denial of civil rights) and the “Fifteenth Amendment exception” (the view that the right to vote free of racial discrimination could be protected against private as well as state action). BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, at 12–17. She maintained that “a new understanding of the judicial settlement of Reconstruction” emerges from a focus on those concepts. *Id.* at 17.

We have seen that the existing categories of antebellum rights jurisprudence suggested that the Thirteenth, Fourteenth, and Fifteenth Amendments, together with the Civil Rights Act of 1866, were addressing two different sorts of rights. The rights associated with “privileges or immunities of citizens of the United States” were natural rights, enjoyed by all citizens of free republican governments and held against states.<sup>83</sup> Thus in making reference to the privileges or immunities of national citizenship, due process of law, or equal protection of the laws, the Fourteenth Amendment did not create any new rights. “Due process of law” was equated with the privileges and immunities identified in *Corfield* and *Luther v. Borden*, and “equal protection of the laws” was equated with the right of all citizens to safety, security, and like treatment before the courts.<sup>84</sup>

In contrast, Bradley saw the Thirteenth and Fifteenth Amendments as creating new rights. In abolishing slavery, the Thirteenth Amendment had, as Bradley put it in his circuit court opinion in *Cruikshank*, created “a positive right that did not exist before.”<sup>85</sup> That was correct in the sense that slaves had been denied the right of freedom and that African Americans, but not whites, had been treated as eligible for slave status. But freedom and equal treatment before the law had been natural rights at common law. In contrast, the right not to have one’s vote “abridged . . . on account of race, color, or previous condition of servitude” had been created by the Fifteenth Amendment. It was, Bradley noted, a “right . . . to be exempt from the disability of race, color, or previous condition of servitude, as respects the right to vote.”<sup>86</sup> This made it, in the language of antebellum civil rights jurisprudence, a “political” rather than a “natural” right.

Bradley would make use of that distinction in *Cruikshank*, adopting the vocabulary of antebellum jurisprudence employed for different categories of rights, which referred to natural rights as “secured,” “declared,” or “guaranteed,” and political rights as

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I agree with each of those scholars that a distinction between “secured” and “created” civil rights (to use terminology employed by contemporaries) and a recognition that a state’s infringement of civil rights could arise from inaction as well as action were crucial to the constitutional jurisprudence of the Reconstruction era. My primary purpose in emphasizing those features, however, is to demonstrate the fluidity of the category of civil rights, and the abiding concern of Supreme Court justices with retaining something like the antebellum relationship between state and federal power, in that period.

83. See discussion *supra* Part I.

84. See generally RUTHERGLEN, *supra* note 29, at 74.

85. *Cruikshank*, 25 F. Cas. at 712.

86. *Id.*

“granted, given, or conferred.” In *Cruikshank*, Bradley alluded to “every right and privilege given or guarantied [sic] by the constitution”<sup>87</sup> and also to “rights and privileges” that “are secured in the constitution” rather than being “created or conferred by the constitution.”<sup>88</sup>

The different categories of rights, Bradley believed, triggered different allocations of power to enforce them.<sup>89</sup> When natural rights were at issue, the federal government’s enforcement power was contingent on a state’s denial of the rights. This was because, at common law, natural rights existed against state governments.<sup>90</sup> The ordinary criminal laws of a state, for example, were designed to prevent the state from infringing the rights of citizens to life and liberty; only when a state infringed or failed to protect one’s rights could the federal government step in to enforce them.

Created, or political, rights were different. They represented an effort on part of the framers of constitutional provisions to add to the stock of rights enjoyed by Americans. In Bradley’s view, this meant that it was not necessary to have a showing of willful or negligent state failure to enforce the rights before the federal government could step in to enforce them.<sup>91</sup> Given his view that the Fifteenth Amendment “substantially guaranties [sic] the equal right to vote to citizens of every race and color,” Bradley was “inclined to the opinion that congress has the power to secure that right not only against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state laws.”<sup>92</sup>

There were textual difficulties with Bradley’s position. Although he understood the language of the Thirteenth Amendment as being categorical, “a positive declaration that slavery shall not exist,”<sup>93</sup> and therefore applicable to private individuals as well as states or the federal government, the Thirteenth Amendment only covered slavery. The Fifteenth Amendment’s language governed voting rights of the

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87. *Id.* at 710.

88. *Id.* For more detail, see Collins, *supra* note 9, at 1992–94; BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 94–101.

89. My analysis of Bradley’s *Cruikshank* opinion is indebted to Collins, *supra* note 9, at 1990–95; and to BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 94–101.

90. Collins, *supra* note 9, at 1990–91. *See also* BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 97–98.

91. BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 95, 99; Collins, *supra* note 9, at 1991–92.

92. 25 F. Cas. at 713.

93. *Id.* at 711.

sort that the defendants in *Cruikshank* had disrupted, but that amendment contained the same state action limitations as the Fourteenth Amendment. How, then, could action by private parties to deprive black citizens of voting rights be made the basis of a federal offense?<sup>94</sup>

In his circuit opinion in *Cruikshank*, Bradley sought to circumvent those difficulties by drawing upon the antebellum distinction between natural and political rights. Whereas the former category of rights was held against state governments, the latter category had been created by constitutional provisions. This meant, for Bradley, that the powers of the federal government to enforce rights “will depend on the character of the right . . . .”<sup>95</sup> If the federal government were to have power to enforce natural rights against states, it could “pass laws for the general preservation of social order in every state,”<sup>96</sup> transforming the traditional relations between it and the states. Thus with respect to natural or secured rights, the enforcement role for the federal government was that of an overseer, only becoming active when states failed, either deliberately or inadvertently, to protect those rights.<sup>97</sup>

Since there was no language in the Thirteenth Amendment or the Civil Rights Act of 1866 limiting violations of the designated civil rights to states or the federal government, Bradley acknowledged that the Amendment’s prohibitions could be enforced against individuals. But, he pointed out, the Amendment and the Act did not state that no institutions or individuals could violate the civil rights listed in the Act. They merely stated that no persons in the United States could be slaves and that all citizens were required to be given the same privileges and immunities as white citizens. Bradley read this language as authorizing Congress to intervene only when the civil rights of citizens were interfered with because of racial animus.<sup>98</sup> “To constitute an offense . . . of which congress and the courts of the United States have a right to take cognizance under [the Thirteenth] amendment,” he maintained, “there must be a design to injure a person . . . by reason of his race, color, or previous condition of servitude. Otherwise it is a case exclusively within the jurisdiction of the state and its courts.”<sup>99</sup>

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94. See BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 98–102.

95. *Cruikshank*, 25 F. Cas. at 710.

96. *Id.*

97. See BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 97–98; Collins, *supra* note 9, at 1991.

98. BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 101–02.

99. *Cruikshank*, 25 F. Cas. at 712.

The first step in Bradley's analysis was thus to confine federal enforcement of state or private violations of civil rights to those violations made because of racial animus. The next step was to surmount, in some instances, the state action limitations of the Fifteenth Amendment. Here again Bradley made use of the antebellum distinction between natural and political rights, while retaining the distinguishing feature of racial animus. Because voting rights were conferred, political rights, the federal government could enforce them against usurpations by private individuals as well as states. It could also enforce them if states neglected to uphold them as well as when they deliberately withheld them. But a showing of racial animus was still necessary to trigger federal intervention.<sup>100</sup> This enabled Bradley to dismiss all the indictments against the defendants in *Cruikshank*. All that had been shown was that the defendants assaulted citizens who happened to be black: that was an "ordinary crime," cognizable only in the state courts. To show that the defendants had conspired to deprive the black citizens of their voting rights, it was necessary to establish a racial motive.<sup>101</sup>

The Supreme Court subsequently ratified Bradley's dismissal of the indictment in *United States v. Cruikshank*,<sup>102</sup> and that decision has conventionally been regarded as undermining the federal government's efforts to protect black citizens against usurpations of their rights, with one commentator asserting that *Cruikshank* "shaped the Constitution to the advantage of the Ku Klux Klan."<sup>103</sup> But although Bradley allowed the defendants in *Cruikshank*, who were very likely motivated by racial animus, to escape punishment, his opinion also offered three suggestions for the federal courts in their efforts to enforce the voting rights of blacks in the South.

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100. BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 98–100; Collins, *supra* note 9, at 1992.

101. The defendants in *Cruikshank* had been indicted under Section 6 of the Enforcement Act of 1870, designed to enforce the Fifteenth Amendment. That section made it a felony for two or more persons to conspire to "injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." 16 Stat. 140, 141. Because Bradley found that section "not confined to cases of [racial] discrimination," he concluded it was "not supported by the constitution." *Cruikshank*, 25 F. Cas. at 715.

102. 92 U.S. 542 (1876).

103. Leonard W. Levy, *United States v. Cruikshank*, in LEONARD W. LEVY ET AL., 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 733 (2d ed. 2000).



One suggestion has been described as the doctrine of “state neglect.”<sup>104</sup> Bradley indicated that although individual violations of civil rights were not covered by the Fourteenth and Fifteenth Amendments, if states neglected to provide citizens relief against deprivations of their rights, the federal government could intervene.

Another followed from Bradley’s distinction between the enforcement powers of the federal government where natural and political rights were concerned. When a right “conferred” by the Constitution was being usurped by a state or an individual, he maintained, the federal government could enforce the right notwithstanding state action limitations. The Fifteenth Amendment was an example of conferred or political rights. In a passage in his *Cruikshank* circuit opinion, Bradley said that “[i]f in a community or neighborhood composed principally of whites, a citizen of African descent . . . should propose to lease and cultivate a farm, and a combination should be formed to . . . prevent him from the accomplishment of his purpose on account of his race or color, it cannot be doubted that this would be a case within the power of congress to remedy and redress.”<sup>105</sup> Similarly, although the Fifteenth Amendment did not grant unrestricted rights to vote, it did confer a right not to have the opportunity to vote restricted because of race or color. Bradley concluded that had racial animus been shown in *Cruikshank*, the federal government could have successfully indicted the defendants in that case for conspiracy to deprive black citizens of their voting rights.<sup>106</sup>

The third mechanism by which the federal government could protect the voting rights of blacks was simply alluded to by Bradley in his *Cruikshank* opinion. This was the “times, places and manner” clause of Article I, Section 4 of the Constitution, which gave Congress the power to “make or alter such Regulations” as “shall be prescribed

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104. The term was coined by Pamela Brandwein in BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, at 14. It describes Bradley’s conclusion in his 1871 letter to Woods that the federal government could violate citizens’ civil rights by inaction, previously noted by NELSON, *supra* note 9, at 196, and Collins, *supra* note 9, at 1985–86, 1988–95. See also HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW* 435–36 (1982) (hereinafter *EQUAL JUSTICE UNDER LAW*) (“[T]he federal government had both a right and a duty under the Thirteenth and Fourteenth Amendments to reach into states in order to inhibit the actions of state officials or individuals intended to deprive citizens of . . . rights.”) and Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 919, 937 (1986) (noting that state infringement of civil rights could come from “inaction” as well as “action”).

105. 25 F. Cas. at 712.

106. Collins, *supra* note 9, at 1995.

in each State by the Legislature thereof” as to “[t]he Times, Places, and Manner of holding [federal] Elections . . . .”<sup>107</sup> That clause appeared to give the federal government plenary power to protect the right to vote in national elections.

Pamela Brandwein has shown that in cases decided between 1874 and 1876, lower federal courts and the Supreme Court picked up on all of Bradley’s suggestions.<sup>108</sup> In three cases involving efforts by individuals to harass, assault, or murder African Americans in connection with voting, federal judges, in charges to grand juries, made it clear that if racial animus was shown, federal authorities could punish private individuals for those actions if state authorities had not done so.<sup>109</sup> Those charges retained the racial animus requirement for any federal intervention but also linked the concepts of state neglect and political rights. Ordinarily assaults, batteries, or murders were state crimes, but when the motivation of the defendants was racially based and the actions were efforts to deprive black citizens of Fifteenth Amendment rights, the federal government, on a showing of state neglect, could intervene.

*B. United States v. Reese*

In 1876, the Supreme Court reviewed Bradley’s decision in *Cruikshank* and a companion case where officials in Lexington, Kentucky, had refused to count the vote of an African American, also retaining the concept of state neglect, as well as insisting that federal prosecutions under the Fifteenth Amendment or the Civil Rights Act of 1866 could only be brought if a racial motive was asserted. The companion case, *United States v. Reese*,<sup>110</sup> has, like *Cruikshank*, been treated as evidence of the Court’s hostility to Reconstruction because “state action” was clearly involved and the Court dismissed the indictment.<sup>111</sup>

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107. U.S. CONST. art. I, § 4, cl. 1.

108. See BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 108–26.

109. The cases were *United States v. Blackburn*, 24 F. Cas. 1158 (C.C.W.D. Mo. 1874) (No. 14,603) (Judge Arnold Krekel); *Charge to Grand Jury—Civil Rights Act*, 30 F. Cas. 1005 (C.C.W.D. Tenn. 1875) (No. 18,260) (Judge Halmer Emmons); and [unnamed case from Oct. 1874], (reported in *NEW YORK TIMES*, Oct. 24, 1874, at p. 1 and also in *CHICAGO TRIBUNE*, Oct. 24, 1874, at p. 7) (Judge Bland Ballard).

110. 92 U.S. 214 (1876).

111. *E.g.*, Leonard W. Levy, *Reese v. United States*, in LEONARD W. LEVY ET AL., 5 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 2145 (2d ed. 2000) (“The Supreme Court crippled the attempt of the federal government to protect the right to vote and made constitutionally possible the circumvention of the Fifteenth Amendment . . .”).

But *Reese*, like *Cruikshank*, was based on the Court's understanding that racial animus was required where the federal government was seeking to penalize violations of Fifteenth Amendment voting rights. In *Cruikshank* no racial animus had been shown. In *Reese* it could be presumed because the prospective voter was black, but an 1874 codification of the Enforcement Act of 1870, on which the federal prosecution was based, had failed to include language prohibiting only those denials of voting made "on account of race, color, or previous condition of servitude."<sup>112</sup> The sections under which the defendants in *Reese* had been indicted were thus unconstitutionally broad.

Two passages in Chief Justice Morrison Waite's opinion for the Court in *Reese* demonstrated that the Court had entertained each of Bradley's suggestions for the federal enforcement of voting rights.<sup>113</sup> One, referring to the failure of the indictment in *Reese* to allege racial animus, stated, "It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment."<sup>114</sup> Although the passage was chiefly directed toward disposing of the indictment, it contained all of the elements of the Court's jurisprudence of federal voting rights cases in the South. The "right" at stake was that of not having one's voting rights in a municipal election discriminated against on the basis of race, a Fifteenth Amendment right. Federal intervention was triggered by the "wrongful" refusal of access to voting. That refusal could be the result of the action of state officials (as in *Reese*) or private individuals (as in *Cruikshank*). It also could be the result of inaction on the part of state officials: state neglect. Neither official action nor intentional conduct was necessary to trigger federal intervention.

In addition, Waite said that "[t]he effect of art. 1, sect. 4, of the Constitution, in respect to election for senators and representatives, is not now under consideration."<sup>115</sup> That provision would play a role in the Court's subsequent voting rights cases. It was not relevant in *Reese* because that case involved a municipal election, and the article pertained to national elections.<sup>116</sup> But the Clause gave Congress the power to make "regulations" for those elections, including the "manner" of holding them, and it did not require a showing of racial

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112. 92 U.S. at 218.

113. Both passages are discussed in BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 123, 125.

114. 92 U.S. at 218.

115. *Id.*

116. The clause provides that states may elect the times, places, and manner of holding elections for Senators and Representatives, but Congress may alter these regulations. U.S. CONST. art. I, § 4, cl. 1.

animus to be enforced. So it appeared to be a basis for the positioning of federal officials to uphold African American voting rights in the South.

Two months before the 1876 presidential election, Attorney General Alphonso Taft issued a circular deploying Federal Marshals to several Southern states to enforce “the peace of the United States” in federal elections. He based his authority on Article I, Section 4, and noted that in the *Reese* case the Court had indicated that it was not considering that provision. *Reese*, Taft said, “arose upon an election of State officers, only, and this order relates to the election of Federal officers, only.”<sup>117</sup>

The above actions by the Court and the Grant administration demonstrate that without knowing the doctrinal setting of Court decisions in the years immediately following the passage of the Civil Rights Act of 1866 and the Fourteenth and Fifteenth Amendments, it is easy to gain a false impression of those decisions. Distinctions such as that between secured and created rights, or between ordinary crimes and the actions specially sanctioned by the Fourteenth and Fifteenth Amendments, were crucial for Justices who wanted to acknowledge the federal government’s power to enforce the Amendments’ provisions but did not want to radically disturb antebellum understandings of the relationship between state and federal powers.

The differential treatment of violations of voting rights in state and federal elections captured those concerns. Where state elections were concerned, as in *Cruikshank* and *Reese*, the power of the federal government to oversee the conduct of state officials and private individuals was limited to actions motivated by racial animus (or by the disinclination of state officials to correct private actions of that sort). To allow the federal government to enforce voting rights without evidence that those rights had been restricted because of racial animus was to invite undue interference with state prerogatives. But no such concern was present in federal elections. Here, the rights were created rights, which extended to all voters, so the federal government’s supervisory power need not be limited to instances of racial discrimination. Stationing federal marshals in Southern states to regulate the process of federal elections was not an unwarranted extension of federal power.<sup>118</sup>

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117. Taft’s circular was reprinted in the NEW YORK TIMES, Sept. 5, 1876, at p.2. BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 130–39, calls attention to the circular as evidence that the Grant administration had picked up on Bradley’s and Waite’s suggestions about the role of Article I, Section 4 in voting rights cases.

118. BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 133, argues that “Waite had signaled [the] availability [of the Article I, Section 4 argument]. So had Bradley. Taft was . . . taking [the Court’s]

*C. Federal Voting Rights Cases, 1877–1884*

Brandwein has also shown that three cases decided between 1877 and 1884 can be seen as illustrating the continuing vitality, in those years, of the doctrinal guideposts first introduced by Bradley in his circuit court opinion in *Cruikshank*.<sup>119</sup> The first decision was a circuit opinion by Waite in *United States v. Butler*.<sup>120</sup> In September 1876, members of “rifle clubs” in Aiken County, South Carolina, sought to intimidate African Americans from participating in forthcoming elections by besieging and shooting them. In a riot near the town of Ellenton, many African Americans were killed, and some retaliated by killing whites. Federal troops were dispatched to the area, and twelve rifle club members were arrested, including Andrew Pickens Butler, a former colonel in the Confederate army.

The federal government, pursuing the lines laid out in Taft’s circular, brought an indictment against Butler and the others based on two theories. One was under Article I, Section 4; the other under the Fifteenth Amendment and the Enforcement Act of 1870. In his charge to the jury, Waite followed the *Cruikshank* rules for federal enforcement of civil rights. For the three counts under Article I, Section 4, Waite made it clear that the federal government had a general power to police federal elections and that no racial animus on the part of those interfering with them needed to be shown. For the two counts under the Fifteenth Amendment, Waite concluded that the “controlling element” to make out a successful indictment was a showing that those indicted had conspired to deprive African Americans of the opportunity to vote on the basis of their race.<sup>121</sup>

In the second case, *Ex parte Siebold*,<sup>122</sup> the Supreme Court relied on Article I, Section 4 to secure the convictions of five Maryland election officials who stuffed ballot boxes and allowed others to be destroyed in a national election. They were charged under election

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cue.” Although Taft might have noted those “signals,” as Attorney General of the United States, he was in a position to pay attention to constitutional provisions affecting voting in federal elections.

119. See *id.* at 144–51.

120. 25 F. Cas. 213 (C.C.D.S.C. 1877) (No. 14,700). *Butler* had received comparatively little attention from scholars before Brandwein, who discusses it in BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 145–47. After Waite’s charge to the jury, it deadlocked, presumably along racial lines, resulting in no conviction. For more detail, see Lou Faulkner Williams, *Federal Enforcement of Black Rights in the Post-Redemption South: The Ellenton Riot Case*, in LOCAL MATTERS: RACE, CRIME, AND JUSTICE IN THE NINETEENTH-CENTURY SOUTH 172–89 (Christopher Waldrep & Donald G. Nieman eds., 2001).

121. 25 F. Cas. at 223–24.

122. 100 U.S. 371 (1879).

laws that called for the prosecution of state officials who refused to perform duties in national elections or interfered with the duties of federal officials. They sought a writ of habeas corpus after being imprisoned on the ground that keeping the peace was a duty reserved for state officials. The Court, in an opinion written by Bradley, held that the federal government had a power to police national elections and could compel state officials to assist federal officials in that task. The election laws sanctioning state officials for not cooperating in the policing of federal elections were valid implementations of the Times, Places, and Manner Clause of Article I, Section 4.<sup>123</sup>

The third case, *Ex parte Yarbrough*,<sup>124</sup> involved another effort to interfere with voting by African Americans in a federal election. Five members of the Klu Klux Klan beat a Georgia black voter. Indictments were brought under the Fifteenth Amendment and Article I, Section 4. A unanimous Supreme Court upheld the indictments against arguments that state action was necessary to convict under the Fifteenth Amendment and that the right to vote for a member of Congress was governed by state law. Justice Miller explained the Court's rationale:

The reference to cases in this court in which the power of congress under the first section of the fourteenth amendment has been held to relate alone to acts done under state authority can afford petitioners no aid in the present case. . . . [A]cts which are mere invasions of private rights[ and] have no sanction in the statutes of a state, or . . . are not committed by any one exercising its authority, are [normally] not within the scope of that amendment, [but] it is quite a different matter when congress undertakes to protect the citizen in the exercise of rights conferred by the constitution of the United States . . .

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Violations of “secured” rights thus required state action under the Fourteenth and Fifteenth Amendments, but not violations of “conferred” rights, and, as Miller explained, by protecting African Americans against discrimination in voting “whenever the right to vote may be granted to others,” the Fifteenth Amendment “substantially confer[red] on the negro the right to vote, and Congress has the power to protect and enforce that right.”<sup>126</sup> Moreover, the right to vote for a member of Congress was not dependent on state law, as in the case of voting rights generally. It was “created by the

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123. *Id.* at 394–95, 399.

124. 110 U.S. 651 (1884).

125. *Id.* at 665–66.

126. *Id.* at 665.

Constitution,” and thus the federal government had plenary power to endorse it.<sup>127</sup>

Brandwein’s readings of the above decisions suggest that the Supreme Court’s constitutional jurisprudence in “civil rights” cases had crystallized around three propositions between the early 1870s and the mid-1880s. First, the passage of the Civil Rights Act of 1866 had left the antebellum category of “natural” or “secured” rights essentially undisturbed, and the definition of those rights continued to be a matter of state law. Second, however, the Civil Rights Act of 1866 and the Fourteenth and Fifteenth Amendments, taken together, prohibited states, and in some instances private individuals, from restricting rights conferred by the Constitution, the foremost example of which was the right of all citizens to vote in federal elections. Third, some cases had suggested that the federal government had power to enforce the “secured” rights of individuals if states neglected to enforce them.

The context in which those propositions had been formulated had typically been that of efforts on the part of African Americans to vote in state or federal elections. With respect to state elections, interference with those efforts, such as assaults on prospective African American voters, required racial animus, and voting in state elections was designated a “secured” right, one that could be restricted by state law. With respect to federal elections, voting rights were placed in a different category. They were designated “conferred” rights, constitutionally created civil rights whose enforcement was not dependent on state law or on the actions of state officials. Most prominent among those was the right not to have one’s opportunity to vote in federal elections restricted on the basis of race. The right of African Americans to vote in federal elections could be enforced by the federal government either under the Fifteenth Amendment or under the Times, Places, and Manner Clause of Article I, Section 4.

Finally, systematic failure on the part of state authorities to enforce the right of African Americans to vote in state elections could result in intervention by the federal government to protect that right. If, for example, private individuals sought to harass or intimidate African American voters in state elections, and state authorities took no action to prevent that conduct, their neglect could amount to sufficient “state action” to trigger the enforcement provisions of the Fourteenth and Fifteenth Amendments.

The endorsement of those propositions by the Supreme Court in the two decades following the Civil War suggests that the conventional view of the Court as contributing to a retreat from the initial goals of Reconstruction needs modification. The conventional

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127. *Id.* at 663–64.

view characterizes the Court as abandoning the egalitarian promise of Reconstruction in two respects: by allowing violent reprisals against African Americans in Southern states to go unpunished unless explicit racial animus was shown, and by declining to interpret the Fourteenth and Fifteenth Amendments as charters for new federal civil rights.<sup>128</sup>

Brandwein's analysis of voting rights cases in the 1870s and 1880s reveals that the conventional view is misplaced.<sup>129</sup> First, the Court signaled that where state authorities had neglected to enforce the civil rights of individuals, federal authorities could step in to enforce those rights. Second, the Court distinguished between civil rights that were "secured" and those that had been "conferred" or "created" by the Constitution, and indicated that neither states nor private individuals could infringe on the latter set of rights. Thus in one group of cases, where states allegedly restricted the opportunities of blacks to sue in the courts, or own property, it was necessary to show an institutional pattern of failure to allow the enjoyment of those rights for federal enforcement to take place; in another, where states or private individuals allegedly interfered with the efforts of blacks to vote in federal elections, nothing but an interference needed to be shown.<sup>130</sup>

From the perspective of federalism, the Court's approach to civil rights cases did not represent the abdication of federal enforcement suggested by the conventional view. Although, as we will see, the Court treated the Fourteenth and Fifteenth Amendments as only creating a limited number of federal civil rights, it treated the federal government both as an overseer of state governments with respect to the accommodation of "secured" civil rights and as an enforcer of "created" federal civil rights. In those capacities, the federal government could be expected to encroach into state sovereignty.

*D. "Civil Rights" and the Slaughter-House and Civil Rights Cases*

How might the Court's two most prominent decisions interpreting Reconstruction enactments, the *Slaughter-House Cases*<sup>131</sup> (1873) and the *Civil Rights Cases*<sup>132</sup> (1883), be understood once attention has been drawn to the distinction between "secured" and "created" civil

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128. In addition to FONER, *supra* note 8, evidence of this view can be found in EQUAL JUSTICE UNDER LAW, *supra* note 104, at 493, and KACZOROWSKI, *supra* note 9, at 187.

129. As she puts it, "The two-pronged voting rights jurisprudence elaborated between 1877 and 1884 rested on the Fifteenth Amendment and Article I, Section 4. State action limitations did not apply." BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 144–45.

130. *Id.*

131. 83 U.S. 36 (1873).

132. 109 U.S. 3 (1883).



rights, to the race-based character of the “created” rights category, and to the overlapping treatment of intentional and negligent state infringements on rights? The conventional view of both decisions is that their majority opinions contributed to the demise of the egalitarian ideals of Reconstruction and encouraged the reemergence of white supremacist governments in former Confederate states.<sup>133</sup> When language in those opinions is matched up with language in earlier cases, however, the opinions can be seen as retaining, rather than transforming, the distinctive, and ambivalent, vocabulary of “civil rights” as the category evolved out of antebellum jurisprudence.<sup>134</sup>

### 1. The *Slaughter-House Cases*

Recent scholarship on the *Slaughter-House Cases* has corrected one historiographical stereotype: that the Louisiana legislation challenged in the cases, which granted an exclusive franchise to the Crescent City Live-Stock Landing and Slaughtering Company, created a monopoly and was passed by a corrupt legislature. In fact, the company granted the franchise was required to allow all butchers to use its facilities and subjected to fines if it did not do so. The rationale for creating an exclusive franchise was to make the business of slaughtering animals less of a public health hazard by ensuring that slaughtering would take place in one facility that could be regularly inspected. Although the butchers who challenged the legislation invoked anti-monopoly and anti-corruption rhetoric, the invocations

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133. See Harold M. Hyman, *Slaughterhouse Cases*, in LEVY ET AL., 5 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2423 (2d ed. 2000) (“[Justice Samuel] Miller separated federal from state privileges and immunities. He assigned to the states the definition of ordinary marketplace relationships essential to the vast majority of people. More important, he assigned to state privileges and immunities all basic civil liberties and rights, excluding them from federal protection. Miller’s sweeping interpretation relegated everyone, including Negroes, who had assumed that the Fourteenth Amendment had assigned the federal government the role of ‘guardian democracy’ over state-defined civil rights, to the state governments for effective protection.”). See also Leonard W. Levy, *Civil Rights Cases*, in LEVY ET AL., 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 408 (2d ed. 2000) (“[The Court’s opinion] had the effect of reinforcing racist attitudes and practices, while emasculating a heroic effort by Congress and the President to prevent the growth of a Jim Crow society. The Court also emasculated the Fourteenth Amendment’s enforcement clause, section five.”).

134. Although the emphasis in my discussion of the *Slaughter-House Cases* and the *Civil Rights Cases* differs from Brandwein’s analysis, we are both suggesting that the typology of civil rights present in Bradley’s *Cruikshank* opinion can be seen in the opinions in both of those cases. See BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, at 57–58, 163–65.

were disingenuous. The butchers had a virtual monopoly of the slaughtering trade prior to the legislation's passage and had collectively ignored health regulations and inflated the prices of meat. Louisiana had a tradition of legislative corruption, and support of the butchers' arguments by white residents of New Orleans was more of a protest against the fact that the Louisiana legislature included black representatives than a concern about it being corrupt. Other cities had regulated the slaughtering trade by invoking the police power of states and municipalities to promote public health.<sup>135</sup>

That same scholarship has remained wedded, however, to another stereotype about the *Slaughter-House Cases*: that Justice Samuel Miller's majority opinion began the post-Civil War judicial abandonment of African Americans by construing the privileges or immunities and equal protection clauses of the Fourteenth Amendment narrowly.<sup>136</sup> If, however, one reads Miller's opinion against the backdrop of antebellum conceptions of citizenship, Miller's private correspondence, and the cases previously discussed, it is clear that although he did undertake a narrow reading of the clauses, he did so in part because he anticipated that an effect of the Fourteenth Amendment might be to impose a new set of restrictions on the ability of states to define the scope of "civil rights."<sup>137</sup> Moreover, Miller did not find a narrow reading of the clauses incompatible with judicial protection of the civil rights of black residents of southern states.

The key to understanding Miller's construction of the Reconstruction Amendments in the *Slaughter-House Cases* is to

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135. See RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES 17–102* (2003); MICHAEL A. ROSS, *JUSTICE OF SHATTERED DREAMS 189–99* (2003).

136. LABBÉ & LURIE, *supra* note 135, at 211–21; ROSS, *supra* note 135, at 200–04.

137. There is considerable evidence that the framers of the Fourteenth Amendment were concerned about the restriction of Bill of Rights guarantees by Southern states in the antebellum years, and thus anticipated that the Privileges and Immunities Clause of the Fourteenth Amendment would be interpreted as incorporating many of those guarantees and applying them against the states. See generally MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986). See also the comment by John Bingham in the course of debates over the Fourteenth Amendment, declaring that "[t]here was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction." CONG. GLOBE, 39th Cong., 1st Sess., 2542 (1866). Additional comments along the same lines can be found in FONER, *supra* note 8, at 228–80.

recognize that he retained antebellum conceptions of “civil rights” and accompanying antebellum assumptions about federalism. His conclusion that the Thirteenth, Fourteenth, and Fifteenth Amendments, taken together, had “one pervading purpose . . . lying at the foundation of each . . . the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him,”<sup>138</sup> was the same conclusion that Bradley, Waite, and he would derive in *Cruikshank*, *Reese*, and federal voting rights cases. Racial animus was necessary to make out a Thirteenth, Fourteenth, or Fifteenth Amendment violation because the protection of African Americans lay behind each of those Amendments.<sup>139</sup>

Hence the Fourteenth Amendment, Miller maintained, evolved out of a recognition that even after the abolition of slavery “the condition of the slave race” in former slave states “would, without further protection of the federal government, be almost as bad as it was before” because “[a]mong the first acts of legislation” in those states “were laws which . . . curtailed [the rights of freed slaves] in the pursuit of life, liberty, and property to such an extent that their freedom was of little value . . . .”<sup>140</sup> Miller particularized:

They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.<sup>141</sup>

Further, the Fifteenth Amendment was the product of a recognition by “the thoughtful men who had been the authors of the other two amendments” that those “were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon.”<sup>142</sup> This was because former slaves “were in all those States denied the right of suffrage. The laws were administered by the white man alone.”<sup>143</sup> Hence, “[t]he negro having, by the [F]ourteenth [A]mendment, been declared to be a citizen of the United States,” was

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138. 83 U.S. (16 Wall.) at 71.

139. *Id.* at 71–72

140. *Id.* at 70.

141. *Id.*

142. *Id.* at 71.

143. *Id.*

“made a voter in every state of the Union”<sup>144</sup> by the Fifteenth Amendment.

Note that the same implicit understandings about civil rights and the indifference of former slave states to their exercise by African Americans that we have observed in *Cruikshank*, *Reese*, and the voting rights cases appear in Miller’s *Slaughter-House* opinion. Although pursuing a calling, owning property, or giving testimony in the courts were examples of antebellum “secured” or “natural” rights, they were rights connected with state citizenship. Once slaves were freed by the Thirteenth Amendment, states still had no obligation to treat them as citizens, and Miller’s list of practices suggested that many did not.<sup>145</sup> The declaration in the Fourteenth Amendment that freed slaves were citizens of states was designed to deal with those practices. But African Americans continued to be disenfranchised in former slave states, which meant that their life, liberty, and property could still be curtailed. Hence the enactment of the Fifteenth Amendment, which created a civil right not to have one’s ability to vote restricted on the basis of race.<sup>146</sup> The Fifteenth Amendment could be enforced by the federal government if states declined to uphold the right to vote.

Miller thus seems to have anticipated that the principal role of the federal government as an enforcer of violations of civil rights in the states would come in the area of voting rights. Outside that area, it was necessary to show that a state actor had deprived a citizen of a civil right, either by intentional conduct or negligent conduct (as where state laws were “insufficient” or “not enforced”). One illustration of this role was when states declined to allow African Americans to own property or to give testimony in court. In such instances, Miller anticipated the Fourteenth Amendment’s Equal Protection Clause coming into play. Indeed, he thought that to be the primary purpose of the Clause. “The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class,” he wrote in his *Slaughter-House* opinion, “was the evil to be remedied by this clause . . . .”<sup>147</sup> So “[i]f . . . the States did not conform their laws to its requirements,” the federal government could intervene under Section 5 of the Fourteenth Amendment.<sup>148</sup>

Miller’s discussion of the Equal Protection Clause in the *Slaughter-House Cases* has typically been singled out for its

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144. *Id.*

145. *Id.* at 70.

146. *Id.* at 71.

147. *Id.* at 81.

148. *Id.*

purportedly narrow interpretation of that clause, with emphasis on his comment that “[w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.”<sup>149</sup> But for present purposes the important feature of Miller’s discussion of the Equal Protection Clause is that he viewed it as a measure designed to give the federal government corrective power when the rights of state citizens were discriminated against by states on the basis of race. Under this reading, the Equal Protection Clause was not safeguarding the rights of national citizens, nor was it a basis for federal intervention in most instances where a state curtailed “natural” or “secured” rights. If a state, for example, restricted the opportunities of women or male non-freeholders to vote in state or local elections, that was not a violation of the Equal Protection Clause. Only when a state allowed some opportunities to its white citizens and denied them to its black citizens could the Clause come into play.<sup>150</sup>

The above reading of Miller’s view of the Equal Protection Clause seems consistent with two other features of his *Slaughter-House* opinion, both of which have figured prominently in the conventional account of the opinion as beginning a judicial retreat from the egalitarian vision of Reconstruction. The first feature is Miller’s narrow construction of the “privileges or immunities of citizens of the United States” under the Fourteenth Amendment. The second, and related, feature is Miller’s claim that the Reconstruction Amendments were not designed “to transfer the security and protection of all . . . civil rights . . . from the States to the federal government,” and therefore “to bring within the [enforcement] power of Congress the entire domain of civil rights heretofore belonging exclusively to the States.”<sup>151</sup>

In the cases decided between 1874 and 1884, previously discussed, we have seen that Justices on the Waite Court distinguished between classes of what were coming to be generically called civil rights: “natural” or “secured” rights, “created” or “conferred” rights.<sup>152</sup> The latter category was small, restricted to rights that were enacted in provisions of constitutional amendments, such as the Fifteenth Amendment’s right not to have one’s ability to vote restricted on the

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149. *Id.*

150. *Id.* (“It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other.”).

151. *Id.* at 77. In contrast, Justice Bradley thought that among the “privileges and immunities” included in the Fourteenth Amendment were those enumerated in the first eight amendments to the Constitution. *Id.* at 118–19 (Bradley, J., dissenting).

152. *See, supra* Part IV.A–C.

basis of race. Most of the “civil rights” described in the Civil Rights Act of 1866, and most of the “privileges and immunities” identified by Washington in *Corfield*, were “natural” or “secured” rights. That class of rights was associated with state, not national citizenship, and was subject to, as Washington put it, “such restraints as the government may justly prescribe for the general good of the whole.”<sup>153</sup>

When one superimposes a map of federal and state power onto this categorization of “civil rights,” it becomes clear that one of the major considerations for judges interpreting the Reconstruction Amendments was how far those amendments had expanded the class of “created” or “conferred” rights by including provisions abolishing slavery or involuntary servitude, or alluding to the “privileges or immunities of citizens of the United States,” to “due process of law,” to “the equal protection of the laws,” and to “the right of citizens of the United States to vote.” According to the Waite Court’s typology of “civil rights,” if any of those provisions “created” or “conferred” a new civil right, that right was national in character, and could be enforced by the federal government against states.<sup>154</sup>

So if the “privileges or immunities of citizens of the United States” were going to be treated as the federal equivalent of Washington’s list of “privileges and immunities” enjoyed by state citizens, then when a state “abridged” the making of contracts, or the pursuit of an occupation, or access to the courts, or freedom from physical attack or punishment, the federal government could enforce those “privileges” or “immunities” against the state in question. Similarly, if “due process of law” meant the opportunity to pursue economic activity free from governmental restraints, or if “equal protection of the laws” meant a new federal civil right not to be treated unequally in the economic marketplace, those were “created” civil rights, as capable as being enforced against willful or negligent states as the right not to have one’s ability to vote restricted on the basis of race.

That was why Miller resolved to make it clear that unless the antebellum map of civil rights federalism were retained, momentous consequences would follow. As he put it,

[T]he entire domain of the privileges and immunities of citizens of the States [previously] lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State shall make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and

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153. 6 F. Cas. at 552.

154. See *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1875).

protection of all . . . civil rights . . . from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

. . . [S]uch a construction . . . would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens . . . . [T]he 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 . . . it radically changes the whole theory of the relations of the State and Federal governments to each other . . . .<sup>155</sup>

Thus, a minimalist interpretation of the “privileges or immunities of citizens of the United States” was necessary, Miller believed, to prevent the derivation and enforcement of “civil rights” from becoming the exclusive province of the federal courts and the federal government. He also advanced a minimalist interpretation of the Fourteenth Amendment’s Due Process Clause, dismissing the claim that the Louisiana statute deprived the butchers of their property by restraining their trade as supported by “no construction of that provision that we have ever seen, or any that we deem admissible . . . .”<sup>156</sup>

That left the Equal Protection Clause. If one recalls the allusions to “state neglect” that surfaced in Waite Court decisions after the *Slaughter-House Cases*, it is possible that Miller thought of the Equal Protection Clause and Section 5 of the Fourteenth Amendment as giving the federal courts or Congress power to step in when states declined to enforce the “secured” civil rights of their African American citizens, such as by denying them the opportunity to hold property or sue in court.

Two passages in Miller’s *Slaughter-House* opinion seem consistent with that interpretation. In one, he noted that “[i]f . . . States did not conform their laws to [the] requirements [of the Equal Protection Clause], then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation.”<sup>157</sup> In the other, speaking of the racial thrust of the Equal Protection Clause, he said, “[W]e may safely leave that matter until . . . some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands.”<sup>158</sup> The passages suggest that in instances in

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155. 83 U.S. at 77–78.

156. *Id.* at 81.

157. *Id.*

158. *Id.*

which states declined to afford black citizens the same “natural” or “secured” rights they afforded to white citizens, the Equal Protection Clause could serve as a mandate for federal intervention.<sup>159</sup>

In short, the *Slaughter-House Cases* seem consistent with the subsequent circuit court and Supreme Court decisions previously discussed with regard to three issues: the uncertain, limited status of federal “civil rights” after the Reconstruction Amendments; the enduring power of the antebellum map of federal and state powers, with its emphasis on the primacy of states in defining and limiting the civil rights of their citizens; but at the same time a growing awareness by Justices on the Waite Court that Southern states were systematically denying African Americans opportunities to exercise their secured rights, and a corresponding awareness that the federal government could step in, under provisions of the Reconstruction Amendments, to enforce those opportunities.<sup>160</sup>

## 2. The *Civil Rights Cases*

In the conventional historiography of Reconstruction, the *Civil Rights Cases* are treated as perhaps the strongest evidence that the Waite Court had abandoned black freedmen to the white supremacists that had reemerged in Southern legislatures.<sup>161</sup> The cases

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159. That reading of the passages is consistent with Miller’s belief, expressed in correspondence with his brother-in-law William Pitt Ballinger, a resident of Texas, that Southern states were not enforcing laws protecting the secured rights of their citizens when the parties seeking protection under the laws were African American. “Show me a single white man,” Miller wrote Ballinger, “that has been punished in a State court for murdering a negro . . . Show me that any public meeting has been had to express indignation at such conduct. Show me that you or any of the best men of the South have gone ten steps to prevent the recurrence of such things.” Letter from Justice Samuel Miller to William Pitt Ballinger (Feb. 6, 1867) (quoted in Ross, *supra* note 135, at 147).

160. There were vigorous dissents in the *Slaughter-House Cases* by Justices Field, Bradley, and Swayne, with Chase concurring in Field’s dissent. 83 U.S. at 83–129. But the areas of disagreement between Miller and the dissenting justices centered on their interpretations of the Privileges and Immunities Clause and Due Process Clause, both of which, in the view of the dissenters, provided support for protection of the right to pursue a lawful calling (butchery) without interference by a state. None of the dissenting opinions openly disagreed with Miller’s concern about the federal government and the federal courts becoming “perpetual censors” on the states, or all “civil rights” becoming national rights, nor did any of them reject his claim that the federal government could intervene under the Equal Protection Clause when states declined to afford black citizens their “secured” civil rights. *Id.*

161. See, e.g., C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 132–34 (1963); EQUAL JUSTICE UNDER LAW, *supra* note 104, at 497–500.



invalidated the Civil Rights Act of 1875.<sup>162</sup> That legislation was initially designed to prevent states, and in one instance private enterprises, from discriminating on the basis of race in public schools; the selection of juries; and public accommodations, which included inns, forms of public transportation; and places of public amusement, such as theaters and concerts.<sup>163</sup> Although the public accommodations provision extended to enterprises operated by private individuals, such enterprises were taken to be open to members of the public generally, so the line between state and private action did not seem significant. By the time the Act was passed by a lame-duck session of Congress in early 1875, the public schools provision had been dropped.<sup>164</sup> The other two provisions were immediately challenged on constitutional grounds.

Securing broad protection against racial discrimination in public accommodations had been part of the agenda of some Republicans in Congress since the conclusion of the Civil War. Initially, legislation providing such protection was thought to rest on the Privileges or Immunities Clause of the Fourteenth Amendment, but after the *Slaughter-House* majority opinion's limited reading of that clause, such a rationale appeared problematic.<sup>165</sup> Attention then turned to two other sources of protection: the Thirteenth Amendment<sup>166</sup> and the Fourteenth Amendment's Equal Protection Clause.<sup>167</sup> The first basis had the advantage of being applicable to private individuals as well as states, but it required that equal access to public accommodations for blacks be thought of as a way of preventing the perpetuation of the "badges and incidents of slavery." The second basis was consistent with a view of the Equal Protection Clause as directed at state-sanctioned racial discrimination, but it required that private activity in the public accommodations area be regarded as state activity.<sup>168</sup>

In the *Civil Rights Cases*, Bradley's majority opinion would seize upon both of those difficulties. But his opinion was very likely affected by another concern about racial discrimination in public accommodations. In the course of an 1876 correspondence with Justice William Woods about whether the Civil Rights Act of 1875 was constitutional, Bradley wrote a memorandum with some thoughts on "Civil Rights." They included the following:

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162. 109 U.S. at 26.

163. See RUTHERGLEN, *supra* note 29, at 88.

164. *Id.* at 89.

165. *Id.* at 90.

166. CONG. GLOBE, 42nd Cong., 2nd Sess., 728 (1872) (remarks of Senator Sumner).

167. See RUTHERGLEN, *supra* note 29, at 90.

168. *Id.* at 89.

Surely Congress cannot guaranty to the colored people admission to every place of gathering and amusement. To deprive white people of the right of choosing their own company would be to introduce another kind of slavery. . . . Surely a white lady cannot be enforced by Congressional enactment to admit colored persons to her ball or assembly or dinner party.

. . .

It never can be endured that the white shall be compelled to lodge and eat and sit with the negro. . . . The antipathy of race cannot be crushed and annihilated by legal enactment. . . .

The 13th Amendment declares that slavery and involuntary servitude shall be abolished, and that Congress may enforce the enfranchisement of the slaves. Granted: but does freedom of the blacks require the slavery of the whites? [A]nd enforced fellowship would be that.

The 14th amendment declares that no state shall make or enforce any laws which shall abridge the privileges and immunities of citizens of the United States. True. But is it a privilege and immunity of a colored citizen to sit and ride by the side of white persons?

It declares that no person shall be denied the equal protection of the laws. But are they denied that protection when they are required to eat and sit and ride by themselves, and not with whites. . . . [S]urely it is no deprivation of civil right to give each race the right to choose their own company.<sup>169</sup>

It is clear from these comments that Bradley believed that the right to choose one's own company was what had come to be called a "social" right rather than a civil right. That distinction appeared in a passage in his *Civil Rights Cases* opinion, in which, referring to the Civil Rights Act of 1866, he said that "Congress did not assume . . . to adjust . . . the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship . . . ." <sup>170</sup> That comment, and

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169. The memorandum from the Joseph Bradley Papers is quoted in CHARLES FAIRMAN, *RECONSTRUCTION AND RENUION, 1864–1888: PART TWO* 564 (1987).

170. 109 U.S. 1, 22 (1883). Rutherfren demonstrates that the distinction between civil and social rights was present in the debates over both the Civil Rights Act of 1866 and the Civil Rights Act of 1875. See RUTHERFREN, *supra* note 29, at 52, 89. Brandwein has argued that the distinction was central in the latter set of debates and that it was understood as having different federalism implications by Bradley and Justice John Marshall Harlan in the *Civil Rights Cases*. See Brandwein,

other passages in Bradley's opinion, such as "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit as to make as to the guests he will entertain,"<sup>171</sup> and "[w]hen a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the process of his elevation when he . . . ceases to be the special favorite of the laws,"<sup>172</sup> have contributed to the conventional view of the decision as an effort on part of the Waite Court to facilitate a retreat from the egalitarian ideals of Reconstruction.

But, as noted, the distinction between civil rights and social rights had appeared in debates over the passage of the Civil Rights Act of 1866 and the Civil Rights Act of 1875: Bradley's assumption that an individual's choice to discriminate with respect to the entertainment of guests implicated "social" rather than "civil" rights was neither novel nor exceptional.

Justice John Marshall Harlan, dissenting in the *Civil Rights Cases*, acknowledged the existence of the civil rights and social rights distinction. "I agree," Harlan wrote, "that government has nothing to do with social, as distinguished from technically legal, rights of individuals. . . . I agree that if one citizen chooses not to hold social intercourse with another, he is not and cannot be made amenable to the law for his conduct in that regard; for even upon grounds of race," Harlan conceded, "no legal right of a citizen is violated by the refusal of others to maintain social relations with him."<sup>173</sup> But the rights being secured by the Civil Rights Act of 1875 were in Harlan's view "legal, not social rights."<sup>174</sup> He maintained that the right of black citizens to have access to public accommodations on the same terms as white citizens was "no more a social right than . . . [their] right to sit in a public building with others, of whatever race, for the purpose of hearing the public questions of the day discussed."<sup>175</sup>

Bradley and Harlan's contemporaries thus agreed that the category of "civil rights"—protected legal rights of citizens—did not include "social" rights. Their position on the protected status of a right to equal access to public accommodations differed, however. Bradley analogized equal access to public accommodations to equal

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*The Judicial Abandonment of Blacks?*, *supra* note 9, at 352–57; BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, at 78–86, 163–64, 170–73.

171. 109 U.S. at 24.

172. *Id.* at 25.

173. *Id.* at 59.

174. *Id.*

175. *Id.* at 59–60.

access to a dinner party or a ball. Enforced access for blacks would submit whites to “another form of slavery”; each race had the right to “choose its own company.”<sup>176</sup> Harlan analogized the public accommodations provisions of the 1875 Act to the right of a colored citizen to use the accommodations of a public highway on the same terms as are permitted to white citizens.<sup>177</sup>

But the social rights/civil rights distinction, or, for that matter, Bradley’s observation that “[i]ndividual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment,”<sup>178</sup> did not figure prominently in his analysis of the constitutionality of the Civil Rights Act of 1875. That Act was constitutionally defective, Bradley concluded, because it exceeded the mandates of both the Fourteenth and Thirteenth Amendments. The Fourteenth Amendment, he maintained, was predicated on the principle that:

where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers.<sup>179</sup>

The provision of the Fourteenth Amendment giving Congress the power to enforce its other provisions “by appropriate legislation” thus meant that the enforcement power would be limited by the scope of those provisions.<sup>180</sup> All the restrictive provisions of the Amendment—its privileges or immunities, due process, and equal protection clauses—were restrictions on states or their officials. The enforcement provision of the Amendment could only come into play as a “mode[] of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment.”<sup>181</sup>

Although Bradley clearly felt that access to public accommodations was a social rather than a civil right, his opinion in the *Civil Rights Cases* formally took no position on that issue. He stated that although the Court had assumed “that a right to enjoy equal accommodation and privileges in all inns, public conveyances,

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176. *Id.* at 25.

177. *Id.* at 59.

178. *Id.* at 11.

179. *Id.* at 18.

180. *Id.* at 11.

181. *Id.*

and places of public amusement, is one of the essential rights of the citizen,” it was not necessary to resolve that issue because the Civil Rights Act of 1875 far exceeded the enforcement power of the federal government under the Fourteenth Amendment.<sup>182</sup> It not only was directed at individuals rather than states or state actors, it was “primary and direct,” not “corrective” legislation. As Bradley put it,

The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such accommodations and privileges. This is not corrective legislation; it is primary and direct . . . . It supersedes and displaces State legislation on the same subject . . . . It . . . . assumes that the matter is one that belongs to the domain of national regulation.<sup>183</sup>

The theory of federalism animating Bradley’s analysis of the Fourteenth Amendment in the *Civil Rights Cases* was thus similar to that animating Miller’s *Slaughter-House Cases* opinion. In both the *Slaughter-House* and *Civil Rights Cases*, Court majorities treated the enforcement provisions of the Fourteenth Amendment as extending only as far as the explicit coverage of that Amendment. Because the prohibitions of the Privileges or Immunities, Due Process, and Equal Protection Clauses were against “state” action, federal enforcement could only take place against states or state officials. Otherwise the federal government, and the federal courts, would be a “perpetual censor” on the activities of the states;<sup>184</sup> otherwise Congress could “legislate on subjects which are within the domain of State legislation”;<sup>185</sup> otherwise Congress could “create a code of municipal law for the regulation of private rights”;<sup>186</sup> otherwise Congress could “take the place of the State legislatures and . . . supersede them.”<sup>187</sup>

In short, allowing Congress to legislate generally on the rights of life, liberty, and property because states were known to be capable of depriving persons of those rights without due process of law assumed that every time states were forbidden from legislating on a subject, Congress had a general power to legislate on it. That assumption,

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182. *Id.* at 19.

183. *Id.* at 18–19.

184. *Id.* at 12–15.

185. *Id.*

186. *Id.* at 11.

187. *Id.* at 13.

Bradley declared in the *Civil Rights Cases*, was “certainly unsound.”<sup>188</sup>

There was, however, the possibility that the Thirteenth Amendment provided support for the Civil Rights Act of 1875. That amendment did not merely prevent states from establishing or maintaining slavery; it declared that slavery should not exist in the United States and gave Congress power to enforce that declaration. If one employed Bradley’s terminology in the *Civil Rights Cases*, the amendment anticipated that federal legislation enforcing the abolition of slavery could be “primary and direct in its character.”<sup>189</sup> As Bradley put it, Congress “has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents . . . .”<sup>190</sup>

Thinking of the *Slaughter-House Cases* and the *Civil Rights Cases* primarily as federalism cases, making use of language designed to reveal when federal enforcement powers under the Civil Rights Act of 1866 and the Reconstruction Amendments could, or could not, be invoked to correct state or private violations of civil rights, places the previously quoted passages about “running the slavery argument into the ground,” and African Americans being “the special favorite of the laws” in a different light. They can be seen as rhetorical efforts to counter the argument that denying black persons access to public accommodations was a form of slavery, and thus correctable by the federal government under the Thirteenth Amendment.<sup>191</sup> Bradley conceded that under the enforcement provision of the Thirteenth Amendment, Congress could pass laws that were “direct and primary,” and could “operat[e] upon the acts of individuals” as well as those of states.<sup>192</sup> So the question was whether “the refusal to any persons of the accommodations of an inn or a public conveyance or a place of public amusement by an individual” amounted to a “badge or incident of slavery.” In Bradley’s view that question answered itself; such an act of refusal had “nothing to do with slavery or involuntary servitude.”<sup>193</sup>

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188. *Id.* at 15.

189. *Id.* at 20.

190. *Id.* at 21.

191. BRANDWEIN, RETHINKING RECONSTRUCTION, *supra* note 9, at 173–78, adds another issue to which Bradley’s rhetoric might have been directed: the idea that the Civil Rights Act of 1875 might have been thought of as “special legislation,” singling out African Americans for protection against discrimination in public accommodations where Jews and Irish were not comparably protected.

192. 109 U.S. at 23.

193. *Id.* at 24.

Moreover, Bradley noted, “[t]here were thousands of free colored people in this country before the abolition of slavery, . . . yet no one, at that time, thought that it was any invasion of [their] personal status as [freemen] because . . . [they were] subjected to discriminations in the . . . amusement. Mere discriminations on account of race and color were not regarded as badges of slavery.”<sup>194</sup> It may be the case that after the passage of the Fourteenth Amendment “the enjoyment of equal rights in all these respects [had] become established.”<sup>195</sup> But if that were so, it was necessary for a state to deny such rights or neglect to enforce them before corrective federal legislation could come into play.

#### *E. Implications*

To summarize, two issues figured prominently in the constitutional history of civil rights after the passage of the Civil Rights Act of 1866. The first issue was the content and the scope of the category of “civil rights.” The other was the effect of the 1866 Act and the Reconstruction Amendments on the antebellum relationship between the federal government and the states. By the 1880s, a consensus on those issues had been forged by the Supreme Court of the United States. That consensus has not been described accurately by conventional accounts of the constitutional history of the Reconstruction years.

In recovering the context in which the category of civil rights originated in American constitutional history, it is essential to understand that the framers of the Civil Rights Act of 1866 were simultaneously committed to ensuring that newly freed African Americans were accorded the same civil rights as white persons and to preserving the antebellum balance of state and federal powers. They employed three devices in the Act to accomplish those goals: making “all (non-alien) persons born in the United States” citizens of the United States; affording all U.S. citizens an enumerated list of civil rights; and stating that “all persons” were to have the same such rights accorded white citizens.<sup>196</sup> The rights listed, however, were ones that had been traditionally reserved for citizens of states and were thus held against state governments.

Understood in that fashion, the Civil Rights Act of 1866 created no new civil rights for newly designated “citizens of the United States” that had not already been held by citizens of states, with the exception of free African Americans. By being citizens of the United States, free African Americans had the same civil rights as white citizens.

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194. *Id.* at 25.

195. *Id.*

196. § 1, 14 Stat. 27.

The enforcement sections of the Act demonstrated its ambiguous relationship to antebellum models of federalism. Although the civil rights listed in the Act were rights traditionally held against state governments, Congress was given power to enforce the Act by “appropriate” legislation, and the federal courts were given power to uphold its provisions. The wording of Section 1 of the Act suggested that its enforcement by agencies of the federal government would likely take place when a state declined to afford free blacks the same civil rights it afforded its white citizens.<sup>197</sup> This raised the question of whether the Act was designed to transform the balance between state and federal powers; that question, we have seen, was debated in Congress when it passed the Act.

Uncertainties about the effect of the goal of protecting the civil rights of newly freed African Americans on the antebellum alignment of state and federal powers also marked, we have seen, the debates over the Thirteenth, Fourteenth, and Fifteenth Amendments. It was clear that those Amendments were designed to protect the civil rights of African Americans as well, but were they designed to protect other newly created federal civil rights? That was the central issue for the courts who began their interpretations of the Amendments in the 1870s.

The work of the scholars previously cited, particularly that of Brandwein on voting rights cases, has demonstrated that a judicial consensus eventually emerged on how to resolve the above ambiguities involving civil rights and federalism.<sup>198</sup> The best way to see that consensus in place is to read Bradley’s opinion in the *Civil Rights Cases* against the backdrop of the cases, beginning with the *Slaughter-House Cases* that have been previously discussed.

With respect to what was included and excluded in the category of “civil rights,” one should first look to the terminology employed by antebellum courts to characterize those rights, making use of designations such as “natural,” “secured,” “guaranteed,” “created,” and “conferred” rights. As courts began to work out the judicial enforcement of rights after the passage of the Civil Rights Act of 1866 and the Reconstruction Amendments, it became clear that they were treating different categories of rights as triggering different institutional enforcement responses. Rights “created” by the Reconstruction Amendments, such as the right not to have one’s opportunity to vote restricted on the basis of race, could be enforced by the federal government. In contrast, “secured” or “guaranteed” rights, which had their origins in the “natural law” foundations of common law, were rights held against states.<sup>199</sup> Congress or federal

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197. *Id.*

198. *See supra* Part III.C.

199. BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, at 15.



courts could only enforce those rights if states had willfully or negligently failed to uphold them.

Thus the antebellum terminology of rights, as retained and modified by post-Civil War enactments, served as the working framework for both the inclusion and exclusion of those rights associated with civil rights and the federalism issues. And Bradley's opinion in the *Civil Rights Cases* revealed that at the center of that framework was an interpretation of the Civil Rights Act of 1866.<sup>200</sup>

Early in his opinion, Bradley had used the Civil Rights Act to highlight his distinction between federal enforcement legislation that was "corrective" in character and the "direct and primary" legislation of the Civil Rights Act of 1875.<sup>201</sup> After identifying the rights enumerated in the Civil Rights Act of 1866, Bradley noted that they were rights "for which the States alone were or could be responsible."<sup>202</sup> That is, the "secured" or "guaranteed" rights identified as "civil rights" by the 1866 Act were rights held against the states, and as such were to be enforced by state authorities. Efforts on the part of individuals to infringe upon those rights did not "destroy or injure" the rights because they could be "vindicated by resort to the laws of the State for redress."<sup>203</sup> That was what Bradley meant in saying that "civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings."<sup>204</sup> He noted that when the Civil Rights Act of 1866 enacted penalties against individuals for violating the civil rights it enumerated, it had included language making clear that individual violations needed to be "under color of any law, statute, ordinance, regulation or custom."<sup>205</sup>

Bradley's primary purpose in associating individual violations of the rights enumerated in the 1866 Act with state law or custom was to demonstrate that, unlike its 1875 counterpart, the 1866 Act was limiting federal enforcement powers to those supporting "corrective" legislation.<sup>206</sup> But it is possible to understand his interpretation of the Civil Rights Act of 1866 in another way.

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200. Brandwein, *Judicial Abandonment of Blacks?*, *supra* note 9, at 352–57, and BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, at 161–67, recognize this point.

201. 109 U.S. at 20.

202. *Id.* at 18.

203. *Id.* at 17.

204. *Id.*

205. *Id.* at 16.

206. *Id.*

Elsewhere in his opinion, Bradley had indicated that the constitutional basis for the Civil Rights Act of 1866 was the Fourteenth Amendment, whose Privileges or Immunities and Equal Protection Clauses prohibited states from treating black and white citizens differently in the exercise of their civil rights.<sup>207</sup> The constitutionality of the 1866 Act was thus taken for granted by Bradley, but he understood Congress's power to enforce the civil rights it enumerated as being predicated on their being violated under the authority of a state. Where individuals deprived black citizens of the fundamental rights they now shared with white citizens *and states, under color or law or custom*, failed to correct those deprivations, Congress could use its enforcement powers.<sup>208</sup>

The Civil Rights Act of 1866 acted as both a floor and a ceiling for the content and scope of "civil rights." The only rights that states were bound to enforce were those now associated, after the passage of the Reconstruction Amendments, with state citizenship. And when states failed to enforce those rights, corrective federal legislation could ensue. It was not necessary that state officials or policies are the source of deprivations of the civil rights of blacks; state officials or policies could also fail to punish individual violations of civil rights of blacks and trigger enforcement. But "civil rights" meant only the "fundamental rights" identified by Bradley as listed in the Civil Rights Act of 1866.

We are now in a position to understand more clearly what Bradley meant in saying that "civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals . . . ." <sup>209</sup> He meant that only when state authorities failed to vindicate such rights from infringement, or to punish those who infringed them, would the enforcement provisions of the 1866 Act or the Fourteenth Amendment come into play. We are also in a position to understand more clearly what he meant when, in the course of discussing the Thirteenth Amendment as one of the bases for the 1866 Act, he said that "Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community, but only to declare those fundamental rights which appertain to the essence of citizenship . . . ." <sup>210</sup> He looked to the Civil Rights Act of 1866 as an authoritative source of fundamental rights, but also as an indication of what rights were not "fundamental."

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207. *Id.* at 21–25.

208. Brandwein, *Judicial Abandonment of Blacks?*, *supra* note 9, at 352–57, and BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, at 162–65, read Bradley's opinion in the same fashion.

209. 109 U.S. at 17.

210. *Id.* at 22.

This prepared Bradley for his conclusion in the *Civil Rights Cases* that access to inns, public conveyances, and places of public amusement was a “social” rather than a civil right. In his view, the framers of the Civil Rights Act of 1866 could not have regarded equal access to public accommodations as a “fundamental right” of citizenship.<sup>211</sup> That Act was the ceiling as well as the floor of Reconstruction-era civil rights.<sup>212</sup>

CONCLUSION: A REVISED NARRATIVE OF THE  
ORIGINS OF CIVIL RIGHTS

Bradley’s opinion in the *Civil Rights Cases* represents a snapshot of the legal status of civil rights in America approximately twenty years after the end of the Civil War.<sup>213</sup> It also represents a snapshot of the predominant view of the relationship of the federal government and the states in the area of civil rights. Here, again, the Civil Rights Act of 1866 served as a template.

I began this analysis by suggesting that recent scholarship has shown that the conventional history of the Supreme Court’s role in interpreting the Reconstruction Amendments in civil rights cases needs refinement. Drawing on that scholarship, I am claiming that the two most “notorious” decisions featured in that conventional history, the *Slaughter-House* and *Civil Rights Cases*, need to be read in connection with other civil rights decisions of the Court and its Justices between 1871 and 1883. From those decisions, the following

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211. *Id.*

212. It is worth noting here how this understanding of equal access to public accommodations as a “social right” rather than a fundamental civil right, and of the practice of denying free persons of color equal access to public accommodations in the antebellum period, might have served to validate the practice of racial segregation on railroad cars that the Court upheld in *Plessy v. Ferguson*, 163 U.S. 537 (1896). One might recall Bradley’s 1876 memorandum, in which, after reciting the Privilege or Immunities and Equal Protection Clauses of the Fourteenth Amendment, asked, “[I]s it a privilege and immunity of a colored citizen to ride and sit by the side of white persons?” and “[A]re [blacks] denied [the equal protection of the laws] when they are required to ride and sit and eat by themselves, and not with whites?” See *supra* note 169 and accompanying text. Elsewhere in the memorandum, Bradley had said that “it never can be endured that the white shall be compelled to eat and lodge and sit with the negro . . . . The antipathy of race cannot be crushed and annihilated by legal enactment.” *Id.* Brandwein, however, takes the view that the doctrinal connections between the *Civil Rights Cases* and *Plessy* were tenuous, and required some additional steps on the part of the Court. See BRANDWEIN, *RETHINKING RECONSTRUCTION*, *supra* note 9, 187–88.

213. 109 U.S. 3 (1883).

jurisprudential consensus affecting the role of the states and the federal government in “civil rights” cases can be extracted.

Most civil rights were creatures of state law. Whether the sources of those rights were natural law, antebellum common law, the Civil Rights Act of 1866, or judicial efforts to identify “fundamental rights” associated with citizenship, the consensus was that articulated by Bradley in the *Civil Rights Cases*: the civil rights of individuals were, on the whole, to be enforced by state courts, unless it could be shown that states had willfully or negligently failed to protect those rights. There was, however, a category of civil rights that had been “created” or “conferred” by provisions of the Constitution, such as the Fifteenth Amendment right not to have one’s opportunity to vote restricted on the basis of race or color. Created rights, like the right not to have one’s ability to vote restricted on racial lines, could be enforced by Congress and the federal courts, and did not require state action.

The majority in the *Civil Rights Cases* rebuffed Harlan’s view that equal access to public accommodations was a civil right rather than a social right.<sup>214</sup> But that did not mean that the majority took those “fundamental” civil rights enjoyed by black as well as white citizens to be wholly at the sufferance of states and state officials. The disinclination of the Court in the *Civil Rights Cases* to compel equal access to public accommodations left the rest of its post-Civil War jurisprudence intact, which meant that whenever one of the “fundamental” civil rights accorded to citizens was not enforced, whether willfully, carelessly, or inadvertently by a state court, “corrective” federal legislation under the Thirteenth or Fourteenth Amendment could enforce the right, and whenever an individual or a state interfered with the exercise of voting on the basis of race or color, “direct and primary” federal legislation could ensue.<sup>215</sup>

The Court’s post-Civil War jurisprudence of civil rights was thus designed to preserve, in large measure, the antebellum balance of federal and state powers so as to prevent the federal government from becoming a “perpetual censor” of the activities of states. At the same time, the Court’s jurisprudence was designed to create a space for “primary and corrective” federal legislation to guarantee the enforcement of two sorts of civil rights violations: the willful or negligent failure of states to enforce the “secured” civil rights enumerated in the Civil Rights Act of 1866, and the failure of state or private actors to guarantee civil rights “created” or “conferred” by the Constitution. Because the latter category of civil rights was comparatively small, and because some “under color of state law” requirement was necessary to trigger federal enforcement of the former category, the Court’s Justices believed that an appropriate

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214. *Id.* at 59.

215. *See supra* Part III.C.2.

balance between state and federal powers would remain after the Reconstruction enactments.

Two decades after the conclusion of the Civil War, the state of civil rights in America was in a distinctive place. In one respect, the concept of “civil rights” had evolved dramatically from its virtually nonexistent status in antebellum jurisprudence. “Rights” had been associated with state citizenship, which had been extended to virtually all native-born residents of a state and had been equated with national citizenship.<sup>216</sup> A list of civil rights had been enumerated in the Civil Rights Act of 1866 and been characterized as “fundamental” in Supreme Court decisions.<sup>217</sup> Those rights had explicitly been afforded to black as well as white persons. In contrast to the antebellum jurisprudence of rights, in which states could define citizenship in a fashion that excluded numerous categories of persons from that status and could limit the rights of non-citizens with impunity, this was a substantial change. Not only had “civil rights” become an established and meaningful legal category, but also nearly all Americans were regarded as possessing civil rights.

In another respect, the jurisprudential status of civil rights in the 1880s reflected the origins of that category in the antebellum legacies of slavery, racial discrimination, and the autonomy of the states.<sup>218</sup> Although the language of some provisions of the Fourteenth Amendment had been expansive, speaking of “privileges or immunities of citizens of the United States,” “due process of law,” and the “equal protection of the laws,” court decisions had interpreted the Amendment’s primary purpose as elevating blacks out of slavery by preventing states from subjecting them to discriminatory treatment. The Privileges or Immunities Clause was read narrowly, the Due Process Clause was deemed not to cover economic “liberties,” and the Equal Protection Clause was read as a corrective standard for the acts of state and state officials, not as the source of a new national right to be free from discrimination of a variety of sources.

Each time a Reconstruction-era Congressional statute or constitutional amendment raised the possibility of the federal government’s exercising vigorous oversight of discriminatory state customs or laws, courts rejected the notion. The enforcement provision of the Civil Rights Act of 1866 was treated as applicable only to racially discriminatory actions engaged in, or tolerated by,

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216. “Indians not taxed,” which included most members of Native American tribes living on reservations, were not regarded as citizens of the United States until 1924 and were not allowed to vote in several states as late as the 1970s. See FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 164–81 (2009).

217. 109 U.S. at 22.

218. *See supra* Part I.

state officials. The Fourteenth Amendment's provisions were treated in a comparable fashion. Only the Fifteenth Amendment's enforcement provision pertaining to voting rights was made applicable to individuals as well as state actors. "Direct and primary" legislation allowing the federal government to enforce civil rights without a predicate of state neglect, such as that anticipated in the Civil Rights Act of 1875, was invalidated.

Perhaps most ominously, the category of "fundamental" civil rights only expanded in one respect after the passage of the Civil Rights Act of 1866. Voting rights, conceived of as rights not to have voting opportunities restricted on the basis of race or color, were thought of as "fundamental" rights, and because they had been conferred, they could be enforced without a state action predicate.<sup>219</sup> Otherwise, the list of "fundamental" rights associated with citizenship looked about the same in 1883 as it had when Washington sought to enumerate "privileges and immunities" in 1823.<sup>220</sup> Moreover, the category of "social rights" had emerged as an implicit limitation on the category of civil rights. To say that someone had a "social right" to do something was the equivalent of saying that the action had no legal protection.

The "social rights" category threatened to become more robust as the focus of racial discrimination moved, in the late nineteenth and early twentieth centuries, from explicit efforts on the part of states to afford blacks fewer opportunities than whites to efforts on the part of states and private individuals to prevent blacks and whites from contact in public places. As inns, public conveyances, other public facilities such as schools, hospitals, and "places of public amusement" recognized that they could not entirely bar groups of persons from access, they, along with state legislatures, began to segregate their black and white patrons.

Racial segregation can be thought of as a response to several of the concerns Bradley raised in his 1876 memorandum on civil rights.<sup>221</sup> It reinforced the idea that in social settings people could choose with whom they associated, exercising what amounted to a "natural" right of association, which Bradley felt could not be overcome by law. It also reinforced what Bradley called "racial antipathy"—the belief that most whites would not want blacks to "eat, sit, or lodge" with them. Finally, it introduced the rationale of "separate but equal." As

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219. See § 1, 14 Stat. 27; 109 U.S. at 17–18.

220. Compare Civil Rights Cases, 109 U.S. 3 (1883) with *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

221. The memorandum from the Joseph Bradley Papers is quoted in CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–1888: PART TWO 564 (1987).

Bradley noted, if blacks were required to eat or sit or ride with other blacks, that was just a choice to be in the society of their own kind.<sup>222</sup>

But it is a mistake to allow the expansion of the social rights category in segregation statutes and court decisions from the 1890s through the 1920s to overwhelm the civil rights jurisprudence of the 1870s and 1880s. Those decades are best seen not as preparation for the world of Jim Crow, but as a period in which antebellum conceptions of rights and federalism awkwardly coexisted with impulses to define and to protect the legal rights of African Americans emerging from slavery into an uncertain future.

In retrospect, the Civil Rights Act of 1866, not the Thirteenth, Fourteenth, or Fifteenth Amendments, was the talismanic post-Reconstruction civil rights document. It was in some respects a replay of lingering antebellum issues. Its focus was primarily on buttressing the rights of former slaves by protecting them from further discrimination. Its list of protected “fundamental” rights was drawn from antebellum jurisprudence. Courts interpreted its potential to transform state law through its enforcement provisions as minimal, and thus its enactment had little effect on the antebellum map of federal and state relations. But at the same time, it did something monumental.

The Civil Rights Act of 1866 transformed the indeterminate antebellum status of “rights” in America into a legal category whose application was as broad as the new legal category of citizen, which after the Fourteenth Amendment applied to the vast majority of persons residing in the United States. No longer could states limit the rights of their residents simply by declining to treat them as citizens. Moreover, persons of “every race and color,” as citizens, were entitled to the same rights as white citizens: no longer could states make race a proxy for granting or denying civil rights. It seems fair to say that with the enactment of the Civil Rights Act of 1866 came the origins of civil rights in America.

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222. *Id.*