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# WHAT IF THE BUTCHERS IN THE *SLAUGHTERHOUSE CASES* HAD WON?: AN EXERCISE IN "COUNTERFACTUAL" DOCTRINE

Jane L. Scarborough\*

*The spirit of liberty is the spirit which is not too sure that it is right.*<sup>1</sup>

In thinking about my contribution to this conference with the rather daunting task of exploring "Law, Feminism & the 21st Century," I found myself reflecting upon the state of the law, or more particularly, constitutional law. As we prepare to end one century and begin another, how well has the United States Constitution—America's unique contribution to jurisprudence—and the legal doctrine which has evolved in "expounding" that extraordinary document, served the issues about which women care the most, namely, human rights?

This is more than a rhetorical question for me. As the person responsible for teaching constitutional law to half of my law school's first-year students, I am faced with the increasingly impossible task of both imparting and interpreting the growing body of constitutional literature—mostly in the traditional form of Supreme Court opinions.<sup>2</sup>

I respond to that challenge by, on the one hand, leading my students on a "forced march" through the standard "oldies but goodies" found in virtually every casebook and bar review outline in the country and, on the other, affirming their justifiable frustration, bewilderment, and ultimate anger at the doctrinal contortions and hair-splitting that too often masquerade as principled judicial interpretations of the Constitution. As one woman in my class recently entreated, "Please tell me that the study of constitutional law is not going to contribute to my growing cynicism." Sadly, my response satisfied neither of us. But my students and I clearly are not the only ones troubled by the current state of constitutional doctrine as it is presented in casebooks and studied in law school classrooms.

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1. Learned Hand, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS & ADDRESSES OF LEARNED HAND* 190 (Irving Dilliard ed., 1974).

2. For the past several years, I have used one of the most popular casebooks in the field, Seidman, Sunstein & Tushnet's *Constitutional Law* (3d ed. 1996), which is just shy of 2000 pages in length. Derrick Bell has recently departed from traditional casebook formats with the publication of his two-volume book, *Constitutional Conflicts* (1997). Incredibly, the primary text is less than 500 pages, with a second volume made up entirely of edited, relevant cases cross-referenced to in volume one. The author acknowledges that his methodology (which depends heavily on class discussions of hypotheticals as an introduction to the major constitutional themes) may not be suitable for large sections of first-year students.

In a recent *Harvard Law Review* commentary, two well-known constitutional scholars called into question not only what Supreme Court cases are "canonized" in casebooks, but whether the "Court-centeredness" of our scholarship and teaching about constitutional law has led to an impoverishment of the discourse on justice. The authors document how "[c]ases become important to teach and remember because they serve as the icons (and demons) of an *invented constitutional tradition*"<sup>3</sup>—a tradition that "comes into being at a particular point in history, and then regards itself as always having been there."<sup>4</sup>

There is no better example of such an icon illustrating the canonization of "invented tradition" than the *Slaughter-House Cases*.<sup>5</sup> More important, they represent the way in which, once accepted into legal orthodoxy, such icons can provide the foundation for a reduction in rights originally thought to be inherent in our most sacred historical and legal texts.<sup>6</sup> Finally, the *Slaughter-House Cases* offer a point of departure for conceptualizing an alternative doctrinal framework with which to revise and expand the existing canons of constitutional law. Such a revision would at once be more faithful to the historical intent and inchoate promise of the Fourteenth Amendment and a more principled source for grounding fundamental human rights than existent equal protection and substantive due process doctrine.<sup>7</sup>

One approach to challenging the legacy of the *Slaughter-House Cases* is to borrow from a new methodology, much in vogue among historians, called "counterfactual history."<sup>8</sup> The use of this notion of alternative events is based on the premise that the understanding of history can be greatly enhanced by changing one significant fact and examining other

3. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1019 (1998) (emphasis added). Balkin and Levinson compare the canonization of legal texts with that in the liberal arts and conclude that the judicial doctrine of stare decisis and the Supreme Court-centeredness of law school pedagogy give legal scholars less influence in the choice and institutionalization of constitutional canons than scholars in other disciplines. See *id.* at 1008-19. For a brief etymology and explanation of the word "canon" as used by the authors, see *id.* at 1024 n.24.

4. *Id.* at 1008.

5. 83 U.S. (16 Wall.) 36 (1873).

6. The Declaration of Independence, the Bill of Rights, and the 14th Amendment, in particular, represent the "scriptures" of human rights fashioned out of the peculiarly American experience and translation of 18th Century Enlightenment ideals. As I suggest later, other nations have benefitted from those texts without the accompanying reductive, negative aspects of our own doctrinal developments. See *infra* text accompanying notes 13-18.

7. The need to revisit the *Slaughter-House Cases* and their impact on the Privileges or Immunities Clause is argued most forcefully in Charles L. Black's latest book, *A New Birth of Freedom: Human Rights, Named & Unnamed* (1997). Balkin and Levinson also identify the Privileges or Immunities Clause of the 14th Amendment as one of several candidates ripe for resurrection to expand current orthodoxy with respect to significant parts of the Constitution that have been ignored or eviscerated. See Balkin & Levinson, *supra* note 3, at 1020.

8. See William H. Hoonan, *Historians Warming to Games of "What If,"* N.Y. TIMES, Jan. 7, 1998, at B7.

outcomes.<sup>9</sup> It is thus a way of “undoing the determinism that haunts our every conception of history”<sup>10</sup> that can then lead us to question long-held assumptions by eliminating “hindsight bias.”<sup>11</sup> You might well ask, why look backward as a way of thinking about future doctrinal developments in constitutional law? As someone who was trained in constitutional history long before I became a lawyer and, subsequently, a law school teacher, I am keenly aware that history informs our future choices as much as it reflects those made in the past. “Virtual history”—as this new methodology is sometimes called—allows the practitioner to transport herself or himself into a contemporaneous context of a chosen event and imagine a different outcome, another “reality.”<sup>12</sup>

The counterfactual doctrinal framework I propose is based on three premises: first, that the Fourteenth Amendment was this country’s true “Never Again” formulation of basic human rights; second, that beginning with the *Slaughter-House Cases*, the Supreme Court took what was intended to be an affirmation of substantive, positive rights protected by national citizenship and interpreted it in such a way as to result in a crabbed, negative doctrine that pitted the rights of some individuals and groups against others; and, third, that there is no principled doctrinal approach today to equal protection jurisprudence (or its more suspect “poor relation,” substantive due process)—a fact that has been particularly devastating to women and minorities who are most vulnerable to legislative enactments which disproportionately burden them.

9. Having only recently discovered “counterfactual” or “virtual” history, I suddenly seem to encounter it everywhere. I even woke up the other morning to a report on National Public Radio talking about counterfactual *sports* history—what if Knute Rockne hadn’t gone to Notre Dame—so there would never have been “The Gipper” to win one for, and Ronald Reagan’s career might never have taken off.

10. Sven Birkerts, *In Camp With History, Gore Vidal’s Novel Raises the Question: What Happens When the Past is Altered?*, BOSTON GLOBE, Mar. 8, 1998, at E1 (referring to Gore Vidal’s use of this genre in his new novel, *The Smithsonian Institution*).

11. Balkin and Levinson suggest the benefit of an analogous methodology—the use of “counter-canon,” or different sets of cases and materials than those typically found in casebooks, “to critique existing normative theories of constitutional law.” Balkin & Levinson, *supra* note 3, at 1020.

12. Counterfactual history is the flip-side of what Reva Siegel employs when she invites her readers “to assume an imaginary standpoint in the middle of the twenty-first century,” from which to view retrospectively “the evolution of our current constitutional framework.” Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1130 (1997). Siegel suggests that such a viewpoint might well reveal a dynamic at work which she calls “preservation-through-transformation” where doctrinal structure and justificatory rhetoric evolve as an old regime is contested resulting in continued “inequalities among status-differentiated groups” even while the past is discredited. *See id.* at 1119-30. I certainly share Siegel’s view that “retrospective judgment” can result in a certain hypocrisy and myopia with respect to entrenched systems of subordination in our own times and that the meaning of equal protection can and has changed over time. As I suggest in this presentation, however, I believe “equal protection” was never intended to carry the doctrinal weight imposed on it after the “privileges or immunities” clause was eviscerated in the *Slaughter-House Cases*.

## THE "NEVER AGAIN" PRINCIPLE

In a lecture given this winter at my law school, a member of South Africa's Constitutional Court (equivalent to our Supreme Court) and one of the new South African "founding fathers," Justice Albie Sachs, emphasized the importance of context and history in understanding the structural nature of any system of law governed by a written constitution.<sup>13</sup> One could only understand the nature of equality as guaranteed under the South African Constitution, he explained, within the context of South Africa's history of apartheid. Within *that* context, equality meant "inclusion" for South Africans. Thus, establishing *substantive* equality, not just *formal* equality, became a conscious goal of the framers of the South African charter. It was, Justice Sachs said, the "Never Again" principle of their bill of rights. That concept of non-discrimination became the first right enumerated in the South African Constitution—their equivalent of "equal protection." But, as he pointed out, it has some important differences from equal protection doctrine as it has developed under our own Constitution. The equality provision prohibits discrimination without regard to whether it is direct or indirect, private or public.<sup>14</sup> When Justice Sachs offered an example of what a comparable "Never Again" principle might have been in our own Bill of Rights, he pointed to the Third Amendment's prohibition against quartering troops during peacetime in civilian homes.<sup>15</sup>

In a sense, one might consider the entire Bill of Rights as having collectively represented a "Never Again" principle of state sovereignty after the colonial experience under English rule. But five years of the bloodiest civil war in the history of the world, prior to this century, forever changed that interpretation. As one of the leading jurists at the time wrote, the Thirteenth, Fourteenth, and Fifteenth Amendments, taken together, have "radically changed the original theory of government" by emphasizing the rights of "life and liberty," rather than

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13. While many of the emerging nations of the 20th Century have looked to the United States Constitution as a model, constitutional scholars in this country have, with few exceptions, shown little interest in drawing on the experience of some of these more recent "experiments" in government under a written constitution. Recent interdisciplinary approaches to the law, such as critical race and feminist theories, queer law, and postmodernist theories, along with a more international law student population, have had the salutary effect of changing our "smug self-assurance" and led to "an increasing curiosity about how things might be done" differently. Balkin & Levinson, *supra* note 3, at 968-69.

14. See Justice Albie Sachs, Remarks at The Valerie Gordon Human Rights Lecture (Jan. 15, 1998) (given at the Northeastern University School of Law). Justice Sachs, appointed by President Nelson Mandela, was a human rights lawyer and freedom fighter in the anti-apartheid struggle and played a leading role in negotiating that country's democratic transition after Mandela's release from prison in 1990.

15. "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

property.<sup>16</sup> No longer—"Never Again"—would it be necessary, he said, for the words "people," "persons," and "citizens" to be "twisted and tortured . . . for contemporaneous history leaves no doubt of what was intended" under the Civil War Amendments.<sup>17</sup> What was intended was to correct "the great flaw in the Antebellum constitutional scheme," specifically, the lack of congressional authority to enforce the Bill of Rights (and thus the newly enacted Civil Rights Act of 1866) against the states.<sup>18</sup>

### THE SLAUGHTER-HOUSE CASES: "BREAD INTO A STONE"

The immediate issue that precipitated the *Slaughter-House Cases* was a number of constitutional challenges to a twenty-five-year charter granted by the Louisiana Legislature establishing a monopoly on the slaughtering of animals in three parishes along a ten-mile stretch of the Mississippi—including the entire port of New Orleans.<sup>19</sup> Various groups

16. George W. Paschal, REMARKS AT THE AMERICAN UNION ACADEMY OF LITERATURE, SCIENCE, AND ART (Mar. 7, 1870) (pamphlet found in the Paschal biographical collection in the Austin, Texas Public Library). A Texas unionist during the Civil War, Paschal successfully argued the landmark case of *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868), before the Supreme Court in which Chief Justice Salmon Chase declared secession a nullity. Paschal was later instrumental in the founding of Georgetown University Law School. See Jane L. Scarborough, George W. Paschal: Texas Unionist and Scalawag Jurisprudent (1972) (unpublished Ph.D. dissertation, Rice University); see generally HAROLD M. HYMAN, THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE: *IN RE TURNER & TEXAS V. WHITE* (1997).

17. Paschal, *supra* note 16.

18. Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933 (1984) (arguing that the historical and legal background of the "privileges or immunities" clause at the time of the 14th Amendment's passage "provides evidence that the language encompasses not only the entire Bill of Rights, but other rights as well," but concluding that a review of the proceedings of the Report of the Joint Committee on Reconstruction "evinced no clear consensus on the meaning of the language of section one, particularly the privileges and [sic] immunities clause"). John Bingham was one of the few Republicans who had opposed passage of the Civil Rights Bill because of the lack of congressional authority to enforce the Bill of Rights against the states. Bingham's language, which was ultimately adopted as Section One, was "designed to remedy that flaw." *Id.* at 951.

19. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 59-60 (1873). The Louisiana statute in question was entitled, "An act to protect the health of the city of New Orleans, to locate stock landings and slaughter houses, and to incorporate the 'Crescent City Live Stock Landing & Slaughter House Company.'" *Id.* at 38. The act provided that, after June 1, 1869, it was unlawful for anyone other than the C.C.L.S.L. & S.H. Co. to land, keep, or slaughter cattle, sheep, swine, or other animals, or to maintain any stock landing, yards, pens, slaughter houses, or abattoirs, at any point on either side of a 10-mile stretch of the Mississippi River, including the entire city of New Orleans. See *id.* at 38-39. Despite being framed in terms of a health regulation, the immediate impetus for the slaughterhouse monopoly undoubtedly came from a desire to make New Orleans, rather than Chicago, "the very heart of the world-slaughtering industry." Mitchell Franklin, *The Foundations and Meaning of the Slaughterhouse Cases* (pt. 1), 18 TUL. L. REV. 1, 4 (1943). With an estimated surplus of 5,000,000 cattle in Texas at the end of the Civil War, see *id.* at 1 & n.1, and with the completion in 1869 of the first transcontinental railroad far north of this vast supply of meat, see *id.* at 4, such a vision was highly compatible with that held by die-hard advocates of a

of the more than one thousand butchers, who were effectively put out of business, challenged the monopoly as a violation of the Civil Rights Act of 1866 and of their "privileges or immunities" under Section One of the Fourteenth Amendment.<sup>20</sup> After the Louisiana Supreme Court upheld the monopoly, the case was appealed on writ of error to the Supreme Court.

As the full Court's first opportunity to address the meaning of the recently enacted Fourteenth Amendment, it seems unlikely that the importance of this decision was lost on any of the participants. Indeed, there is even some suggestion that the Court's desire to seize the moment led it to deny a motion to dismiss the petition despite the fact that a settlement had been reached between the original parties to the suit prior to reargument before the Court.<sup>21</sup> Writing for the majority, Justice

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southern route for a second transcontinental railroad. The C.C.L.S.L. & S.H. Co. "was conceived of as a customhouse through which this Texas beef must go in order to reach the American market." *Id.* Opponents of the monopoly at the time estimated its value to New Orleans alone could be worth as much as \$45,000,000 over the 25-year life of the legislative grant. *See id.* at 10. The slaughterhouse charter was also part of a larger public discussion of monopolies and their economic functions as the South attempted to adjust to post-Civil War economic dislocations and opportunities. In this way, the slaughterhouse monopoly bridged the earlier debate around Fulton's steamship monopoly (which also loomed large in establishing New Orleans and the Mississippi River's place in the then emerging transportation revolution) and the growth of monopolies generally in the late 19th Century. *See id.* at 36-39.

20. Although traditional accounts of the *Slaughter-House Cases* describe it as a legal battle by "white" butchers attempting to use the newly minted 14th Amendment to protect their rights rather than those of the freedmen, there were in fact elements of ethnic and class (if not racial) overtones to the controversy. The butchers who were challenging the legislative monopoly granted to the C.C.L.S.L. & S.H. Co. were known locally as "Gascons." These natives or descendants of natives from Gascony, a province in southwestern France, traditionally had been the local purveyors of butchered meat in New Orleans, many of them having learned the trade in the French abattoirs. Local newspapers at the time were filled with evidence of xenophobic comments directed at the Gascons, including remarks made by one of the seventeen incorporators of the new monopoly who referred to the butchers who opposed them as "French carpetbaggers,"—the ultimate epithet in the South during Reconstruction. The *New Orleans Times*, owned by Charles A. Weed (who had much the better claim to the hated term, having come to New Orleans from Connecticut during the military occupation of the city under Union General Benjamin Butler), was the major mouthpiece for the monopoly and noted for its anti-Gasconism. *See Franklin, supra* note 19, at 22, 34.

21. There is also evidence that John A. Campbell (representing the butchers) may have had ulterior motives in the formulation of his arguments. Appointed to the Supreme Court in 1853 by Democrat Franklin Pierce, Campbell resigned after his native state seceded, served in the Confederate subcabinet during the war, and was one of the Confederate Commissioners who met with Lincoln at the Hampton Roads Conference in 1865 to discuss the conditions of surrender. *See HENRY G. CONNOR, JOHN ARCHIBALD CAMPBELL: ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT* (Da Capo Press 1971) (1920). To Campbell, a devoted admirer of Calhoun, would fall the ironic (some would say demonic) role of appearing 15 years later before his former colleagues as counsel for the butchers in *Slaughter-House*. In his exhaustive and little-known, two-part article on the *Slaughter-House Cases*, Mitchell Franklin accused Campbell of "tak[ing] upon himself the task of overcoming the results of the Civil War by veering the Fourteenth Amendment about, so that it became the instrument of the defeated South and not a weapon against the defeated South, as it had been intended to be." Mitchell Franklin, *The Foundations and Meaning of the Slaughterhouse Cases* (pt. 2), 18 TUL. L. REV. 218, 237 (1943). In a similar vein (if somewhat

Miller made it clear that if

there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.<sup>22</sup>

The effect of Miller's opinion was to read out any substantive meaning to national citizenship and to reassert the antebellum locus of individual rights in the hands of the states.

Although there were three separate dissenting opinions,<sup>23</sup> Justice Joseph Bradley's dissent is particularly instructive with regard to his view of the potential scope of the Fourteenth Amendment. Bradley was no stranger to the long trail of litigation which ultimately led to the Supreme Court's landmark decision. As a newly appointed associate justice riding the Fifth Circuit, Bradley heard arguments as early as June 1870 on behalf of the anti-monopoly butchers in New Orleans who were seeking injunctive relief. The question before the Court, as Bradley explained it, was "whether the fourteenth amendment to the constitution is intended to secure to the citizens of the United States of all classes merely equal rights; or whether it is intended to secure to them any absolute rights."<sup>24</sup> In granting the temporary injunction until the Supreme Court issued its decision, Bradley concluded "that the fourteenth amendment of the constitution was intended to protect the citizens of the United States in some fundamental privileges and immunities of an absolute and not merely of a relative character."<sup>25</sup> Identifying the privileges guaranteed by the new amendment with "the very foundations of republican government,"<sup>26</sup> Bradley gave the Fourteenth Amendment the broadest possible meaning:

The new prohibition that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" is not identical with the clause in the [original] constitution . . . . It embraces much more. . . . The "privileges and

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differing tone), Charles Fairman's scholarly treatment of *Slaughter-House* in his volume on the *History of the Supreme Court of the United States* suggests Campbell's role in making that case the Court's first opportunity to interpret the new Amendment was crucial. CHARLES FAIRMAN, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88*, at 1319 (1971). A familiar saying at the time the Supreme Court decided the *Slaughter-House Cases* was: "Leave it to God and Mr. Campbell." *Id.*

22. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 75.

23. Chief Justice Salmon P. Chase dissented without opinion. *See id.* at 111. Suffering from a recent stroke, Chase died a few weeks after the *Slaughter-House Cases* were decided. *See* HYMAN, *supra* note 16, at 164-65.

24. *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 650 (C.C.D. La. 1870) (No. 8, 403).

25. *Id.* at 653.

26. *Id.* at 652.



immunities" secured by the original constitution, were only such as each state gave to its own citizens. . . . But the fourteenth amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges; but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.<sup>27</sup>

While Bradley did not attempt to list all of these privileges or immunities, he concluded that these "fundamental privileges" were not intended "only to secure to all citizens equal capacities before the law. That was at first our view of it. But it does not so read."<sup>28</sup> The difference between "capacities" and "rights" to Justice Bradley was the difference between procedure and substance.

Bradley's views two years later, as expressed in his dissent from the majority opinion in *Slaughter-House*, had not changed. If anything, his understanding of the revolution wrought by the Radical Republicans of the 39th Congress was clearer. Echoing the expansive view in his circuit court opinion, Bradley equated the fundamental rights of a free citizen with the "privileges or immunities" clause and not simply a guarantee of mere "equality of privileges" with other citizens.<sup>29</sup> Where could one find "an authoritative declaration of some of the most important privileges and immunities of citizens of the United States?"<sup>30</sup> Bradley answered that it could be found in the Constitution itself and in the Bill of Rights.<sup>31</sup>

The resulting five-to-four decision effectively gutted the "privileges or immunities" clause which from the standpoint of the Amendment's drafters was the key to insuring the protection of fundamental rights through the primacy of national citizenship.<sup>32</sup> In addition, the Court narrowed the availability of the newly-created remedies to the freedmen only, despite legislative intent to the contrary.<sup>33</sup> Within a matter of

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27. *Id.*

28. *Id.* at 654.

29. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 118 (Bradley, J., dissenting).

30. *Id.*

31. See *id.*

32. At least one legal scholar has suggested that if Justice Field would have "supplemented his opinion with a correct analysis of the Ninth Amendment," he might have been able to garner a majority. Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 790 (1982).

33. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 81. As a number of constitutional historians and scholars have pointed out, John Bingham specifically intended the language of Section 1 of the 14th Amendment (which he wrote) to remedy "the great flaw" in the passage of the Civil Rights Bill, namely that Congress lacked the authority to enforce the Bill of Rights against the states. See, e.g., Maltz, *supra* note 18, at 951. Additionally, the fact that the Joint Committee had rejected the language of the so-called "Owen Plan," which specifically referred to the civil rights of Blacks, would seem to offer conclusive proof that the narrow interpretation given to the 14th

years, however, the Court would see the possibilities of broadening these remedies as a sword to strike down progressive state legislation on behalf of private economic rights of the very type denied the unfortunate butchers. All of these results were obvious at the time as evidenced by Justice Noah Swayne's words in his dissent:

The construction adopted by the majority of my brethren is, in my judgment, much too narrow. It defeats, by a limitation not anticipated, the intent of those by whom the [Fourteenth Amendment] was framed and of those by whom it was adopted. *To the extent of that limitation it turns, as it were, what was meant for bread into a stone.* . . . I earnestly hope that the consequences to follow may prove less serious and far-reaching than the minority fear they will be.<sup>34</sup>

Unfortunately, the fears of the dissenting justices proved well-founded.

### THE TIME IS RIGHT

The Supreme Court's decision in the *Slaughter-House Cases* is a perfect example of what Howard Jay Graham called "law office history"<sup>35</sup>—that is, history written (and in this case rewritten) by judicial interpretation of constitutional and statutory provisions and by the legal profession's dependence on the concept of *stare decisis*. Although all history is written from a point of view, lawyers are particularly susceptible to a result-oriented version of the facts.<sup>36</sup> This distortion is magnified by the Supreme Court's premier role in interpreting the Constitution, with the resulting "big cases" dominating the legal "canons" we come to take for granted and which pervade our doctrinal and pedagogical "habits of thoughts."<sup>37</sup>

Amendment by Justice Miller in *Slaughter-House* was, at the very least, unfaithful to legislative intent with respect to the reach of the protections. See *id.* at 948-70.

34. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 129 (Swayne, J., dissenting) (emphasis added).

35. Graham wrote "that law review constitutional history seldom has been institutional history; the political juices, and even chronology, generally are lost in extracting the rules. More and more, what we get is the story of a few major cases; then ultimately merely a truncated analysis of the prevailing appellate opinions." HOWARD JAY GRAHAM, *EVERYMAN'S CONSTITUTION* 247 (1968); see also Alfred H. Kelley, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 119-32 (1965).

36. Kelly further defined "law-office history" as the "selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered." Kelly, *supra* note 35, at 122 n.13; see also Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997) (calling for a form of "Critical History," somewhat akin to Critical Legal Studies and Critical Race Theory, that would include new voices and stories across disciplines to enrich the context of our understanding of constitutional law and history). Since "most of our reasoning about the present is in fact deeply historical in nature," Rakove points out that "historians have an important critical function to play in preventing sloppy appeals to the authority of the past." *Id.* at 1032-33.

37. Balkin & Levinson, *supra* note 3, at 1002-03.

[S]ome cases and materials may languish in relative obscurity for decades or even centuries . . . and then become central to the pedagogical, theoretical, or cultural literacy canons. . . . Cases and opinions become timeless . . . when the time is right.<sup>38</sup>

The decision in the *Slaughter-House Cases* has been characterized recently by one of the legendary constitutional commentators of this century as “probably the worst holding, in its effects on human rights, ever uttered by the Supreme Court.”<sup>39</sup> Yet, every first-year law student learns in constitutional law that the “privileges or immunities” clause of the Fourteenth Amendment applies only to the rights of national citizenship,<sup>40</sup> rendering the clause meaningless as a source of federal protection against state infringement of unenumerated rights or of individual rights of the type originally guaranteed by the Bill of Rights.<sup>41</sup> The practical effect of the *Slaughter-House* doctrine was to reassert the primacy of state citizenship—at least within the domestic boundaries of the United States—over that of federal citizenship. The political effect was to mark the end of so-called Radical Reconstruction as surely as the Hayes-Tilden disputed presidential election in the same year marked the end of military occupation of the defeated southern states. Finally, the legal effect of *Slaughter-House* was to focus the Court’s attention on interpreting what remained of the Fourteenth Amendment guarantees—namely, the “due process” and “equal protection” clauses as applied to the states, and the enforcement powers granted to Congress to pass “appropriate legislation” to enforce those protections.

It is beyond the scope of this conceptual presentation to persuade you that such a rendering of the Fourteenth Amendment was wholly inconsistent with the historical, legislative, and political events that preceded it. Suffice to say that, as has been observed by more than one

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38. *Id.* at 1010.

39. BLACK, *supra* note 7, at 55.

40. These rights include the right to travel to the seat of government and the right to safety on the high seas. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

41. Jerry Goldman’s list of “truly canonical cases,” based on his comparative study using 11 major constitutional casebooks, included only 10 cases found in all of the casebooks. In addition, there were eight more “candidates” found in all but one of the samples—the *Slaughter-House Cases* was among those eight. See Jerry Goldman, *Is There a Canon of Constitutional Law?*, AM. POL. SCI. ASS’N. NEWSL. (Law and Courts Sec. of the Am. Pol. Sci. Ass’n), Spring 1993, at 2-4, cited in Balkin & Levinson, *supra* note 3, at 974 n.43. I agree that any list of “truly canonical cases” should include the *Slaughter-House Cases*, but like others before me, I am arguing for a fresh look at other materials and voices, beyond Justice Samuel Miller’s majority opinion and the subsequent doctrinal implications that flowed from that decision, in the hope of finding a more principled path to constitutional protection of fundamental rights through the Privileges or Immunities Clause of the 14th Amendment.

historian, what the South lost on the battlefield was to a large extent regained in the courts—albeit in new forms.<sup>42</sup>

Despite his later defection in the *Civil Rights Cases*, Bradley's original interpretation of the meaning of the Fourteenth Amendment remained intact and can be traced through a line of Supreme Court dissents beginning with his own in *Slaughter-House*. The first Justice John Marshall Harlan took up the mantle—ironically in his dissent from Bradley's majority opinion—in the *Civil Rights Cases*,<sup>43</sup> later that same term in *Hurtado v. California*,<sup>44</sup> and subsequently in *Twining v. New Jersey*.<sup>45</sup> After twenty years, Harlan began to have an impact as evidenced by Justice William Moody who, writing for the majority in *Twining*, showed "clear signs of misgivings about the path of decision in fourteenth amendment cases," but who "concluded, rather lamely, 'the question is no longer open in this court.'"<sup>46</sup>

Although *Slaughter-House*, along with the *Civil Rights Cases*, has been repeatedly cited as embracing the correct meaning of the Fourteenth Amendment, a close examination of the four separate opinions in *Slaughter-House* reveals a conspicuous lack of concern for the recent legislative history, probably because that history was well-known (and understood) by all the participants. In fact, it was not until 1947, when Justice Hugo Black, in *Adamson v. California*,<sup>47</sup> launched his own substantial attack on what had become the traditional interpretation of the Fourteenth Amendment, that the most exhaustive historical research began on the legislative history—research that was later used to buttress the Court's unanimous decision in *Brown v. Board of Education*.<sup>48</sup> If one accepts the notion that substantive due process had its origins in the *Dred Scott* decision (as Cass Sunstein does), then the post-*Slaughter-House* Court picked up where Chief Justice Taney left off.<sup>49</sup>

42. See Conant, *supra* note 32; see generally HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* (1973); HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER THE LAW* (1982).

43. 109 U.S. 3 (1883).

44. 110 U.S. 516 (1884).

45. 211 U.S. 78 (1908).

46. This view apparently was shared by Oliver Wendell Holmes in a later decision. See *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting) (stating that by 1903 it was "too late" to observe the original meaning of the amendment); see also LOREN P. BETH, *THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877-1917*, at 207-08 (1971) (noting Justice Moody's dismissal of the "old privileges or immunities argument" in *Twining v. New Jersey*).

47. 332 U.S. 46 (1947).

48. 347 U.S. 483 (1954).

49. See Cass R. Sunstein, *The Dred Scott Case: With Notes on Affirmative Action, the Right to Die & Same-Sex Marriage*, 1 GREEN BAG 2d 39, 44 (1997) (concluding that Chief Justice Taney's decision in the *Dred Scott* case "was the birthplace of the idea of 'substantive due process,' the idea used in the *Lochner* era cases, in *Roe v. Wade*, and in many of the most controversial decisions in the Court's history"). The Court's interpretation of the 14th Amendment in the *Slaughter-House Cases* is a perfect example of Siegel's concept of "preservation-through-transformation"—

There have been periodic attempts to resurrect the "privileges or immunities" clause over the years.<sup>50</sup> One recent example can be found in the Colorado Supreme Court's decision striking down that state's controversial "Amendment 2."<sup>51</sup> Justice Scott wrote a concurring opinion arguing that the anti-gay amendment was unconstitutional under the "privileges or immunities" clause of the Fourteenth Amendment, stating that: "Citizenship, not the good graces of the electorate, is the currency of our republican form of government."<sup>52</sup> Although the Supreme Court ultimately affirmed the judgment of the Colorado Supreme Court, the majority expressly disavowed relying on the equal protection analysis of the state court.<sup>53</sup> And although the Court made no reference to Justice Scott's "privileges or immunities" analysis, although Justice Kennedy did begin his opinion for the majority by borrowing Scott's use of Justice Harlan's dissent in *Plessy* (that the Constitution "neither knows nor tolerates classes among its citizens").<sup>54</sup>

### CONCLUSION

I have used the *Slaughter-House Cases* as the fulcrum of this exercise in counterfactual doctrine because I believe that the Fourteenth Amendment codified this country's true "Never Again" principles and, unlike Justice Holmes, I do not believe that it is "too late to observe the original meaning of the amendment,"<sup>55</sup> which was understood at the time to "nationalize a constitutional limitation on state action" which singled out any person or group of persons for special benefits or burdens

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that is, preservation of the original understanding of federalism as though the Civil War had never happened and Calhoun had won. See also Siegel, *supra* note 12.

50. The most thorough recent scholarly effort was John Harrison's meticulous review of the legislative history, as well as the commentary, in *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). See also Normand G. Benoit, *The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life After Death?*, 11 SUFFOLK U. L. REV. 61 (1976); Conant, *supra* note 32, at 785; Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U.L.Q. 405 (1972). The fact that Charles Black chose to make this theme the subject of what he describes in the preface as a "short book to state and to support, in my own voice, my own life's conclusions" is powerful testimony to the possibilities such a resurrection still holds. BLACK, *supra* note 7, at ix.

51. See *Evans v. Romer*, 882 P.2d 1335 (Col. 1994) (en banc).

52. *Id.* at 1351 (Scott, J., concurring).

53. See *Romer v. Evans*, 116 S. Ct. 1620, 1624 (1996).

54. *Id.* at 1623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)); see also *Evans v. Romer*, 882 P.2d at 1351 (Scott, J., concurring) (quoting *Plessy v. Ferguson*, 163 U.S. at 559 (Harlan, J., dissenting)).

55. The most recent Amendment to the Constitution is the 27th Amendment which was ratified in 1992, even though the Amendment was one of the original 12 amendments proposed in 1789 (including those which subsequently became known as the Bill of Rights). State legislatures resurrected and began to approve the Amendment in 1978, and the requisite number of states (38) eventually ratified it into law. The controversial Amendment is discussed in William Van Alstyne, *What Do You Think About the Twenty-Seventh Amendment?*, 10 CONST. COMMENTARY 9 (1993).

without an adequate "public purpose."<sup>56</sup> The Fourteenth Amendment's "privileges or immunities" clause was intended to ground substantive rights in each individual's national citizenship. Had one vote been different in the *Slaughter-House Cases*, the counterfactual doctrinal development in the twentieth century might have been very different.<sup>57</sup>

Instead of going down the road of economic substantive due process in *Lochner*, the doctrinal debate could have been framed in terms of core values (central to the concept of ordered liberty) protecting the individual, while granting the need to regulate some behaviors in the interest of public welfare. The balancing could have been between the core right to a livelihood and the freedom to make personal economic decisions, on the one hand, and the public good to be derived from protecting workers from exploitive working conditions and uneven bargaining power, on the other. The Justices could have avoided the "incorporation" struggle and the search for a penumbra to protect the "right to privacy." Would such an outcome have avoided the artificial construct of the private/public debate, the state action requirement as a way of allowing private discrimination to flourish, or the hierarchy of rights or double standards in terms of the Court's deference to, or scrutiny of, state regulation of non-economic *and* economic rights? Would the Court have avoided the spurious levels of scrutiny, which in recent decisions show some signs of collapsing into possibly a more meaningful level of review without the qualifiers (which of course, become disqualifiers for certain folks)? Here we must face the limits of "counterfactual doctrine" as a predictor of actual outcomes had this one event turned out differently. Rather "virtual doctrinal development" allows us to envision what *could* have been . . .<sup>58</sup>

Today, we face a new century in many ways captive of the past century, with its failure to achieve Abraham Lincoln's vision of "a rebirth of freedom." We also are experiencing a doctrinal implosion in constitutional rights theory and a serious erosion of confidence in all three branches of government. Perhaps in the next millennium, the time

56. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247-48 (1997).

57. In her only reference to the *Slaughter-House Cases*, Robin West agrees that the Supreme Court "confused and aborted" the concept of natural or affirmative rights intended by its framers in her. Nevertheless, even as she argues persuasively and passionately for a reorientation of our understanding of the 14th Amendment, she ignores the significance of the "privileges or immunities" clause as a possible vehicle for such revision. See ROBIN WEST, TOWARD AN ABOLITIONIST INTERPRETATION, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 34 (1994).

58. I think the new Democratic Republic of South Africa got it right. Prima facie evidence of discrimination should shift the burden of proof. No *Washington v. Davis* proof of intent, no multi-tiered levels of scrutiny, and no suspect classifications within which a plaintiff must fit for the Court to take seriously the allegation of discrimination. Justice Sachs and others studied our Constitution *and* our jurisprudence thoroughly. They made sure they avoided the quagmire in which we now find our own rights doctrine.

will be right to recommit to the full implications of our “Never Again” principles—principles which have ignited international movements for human rights, even while a comprehensive human rights policy under our own constitutional regime remains elusive.