
REFLECTIONS ON ALBION TOURGÉE'S 1896 VIEW OF THE
SUPREME COURT: A "CONSISTENT ENEMY OF
PERSONAL LIBERTY AND EQUAL RIGHT"?

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Selections from the Constitution of the United States of America:

The Preamble: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

The Fugitive Slave Clause: Article IV, Section 2 [3]: "No [slave] held to service or labor in one State under the Laws thereof, escaping into another, shall *in Consequence of any Law or Regulation therein*, be discharged from such [slavery] but shall be delivered up on the Claim of the [slave owner]." [Emphasis added].

Article IV, Section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government"

13th Amendment: Section 1. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Section 2. "Congress shall have the power to enforce this article by appropriate legislation."

14th Amendment: Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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." Section 2: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, [note 19th and 26th Amendments] and citizens of

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the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. . . .” Section 5: “Congress shall have the power to enforce, by appropriate legislation the provisions of this article.”

15th Amendment: Section 1: “The 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.” Section 2: “The Congress shall have power to enforce this article by appropriate legislation.”

I. INTRODUCTION: THE 19TH AND EARLY 20TH CENTURY COURT: A CONSISTENT ENEMY OF LIBERTY AND EQUAL RIGHT?

In an 1896 Memorial Day lecture in Boston, Massachusetts, Albion Tourgée told his audience: “Caste—the worst element of slavery—the legal subjection of one class to the domination and control of another, still exists, and, under the protection of a supreme court, which has always been the consistent enemy of personal liberty and equal right”¹ Tourgée was speaking shortly after losing the case of *Plessy v. Ferguson*, challenging segregated railroad cars.² Did his statement merely reflect anger at his loss in *Plessy*, or was there much more to it? In this article, I will very briefly introduce Tourgée, look at how Tourgée might have come to his bleak view of the Supreme Court, and finally look at Tourgée’s views of Reconstruction and of its failure—and the failure (in his time) of his constitutional vision.

In what follows, I will explore Tourgée’s claim about the Court. Was it a consistent enemy of liberty and equal right? No. The Court was not consistently an enemy of liberty and equal right over Tourgée’s lifetime. It was just usually an enemy of liberty and equal right during Tourgée’s life and, indeed, for years after his death.

II. ALBION TOURGÉE

Tourgée was an attorney, Radical Republican, and a democrat with a small “d.” He had been a Union soldier. Whatever the early-announced goals of the Lincoln administration, Tourgée was fighting for a “new birth of freedom,” for a nation and a Constitution without slavery, and for a nation that protected the liberty and equality of its

¹ OTTO OLSEN, *CARPETBAGGER’S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE* 334 (1965).

² 163 U.S. 537 (1896).

citizens throughout the land.³ After the war, Tourgée migrated to North Carolina from Ohio.⁴ Once he arrived in Greensboro, North Carolina, Tourgée became a Republican Party activist fighting for equality, including racial equality.⁵ He sought a coalition that included and protected less wealthy whites and former slaves.⁶

Tourgée was a framer of the North Carolina Constitution of 1868. It provided for broad manhood suffrage (with no literacy or property qualification), for general and free public education, for the abolition of the whipping post and the pillory, and for a host of other reforms.⁷ In 1868, Tourgée was elected Superior Court Judge. As Judge, he required that blacks have an opportunity to serve on jury panels and that jails be heated in winter.⁸ From the bench, Tourgée fought the Klan.⁹ Eventually, Tourgée felt compelled to leave the state. He became a successful novelist of Reconstruction and he remained a reformer, still fighting for equality, for public education, against the racial caste system, against lynching, and for progressive economic reforms.¹⁰

In the nation's first Gilded Age (we are in the second), Tourgée was a critic of unregulated capitalism. "The power of wealth," he wrote in 1893, "is just as properly subject to restraint as that of the biceps and is even more liable to abuse."¹¹ As he saw it, "[t]he history of civilization is a struggle in which wealth has been the right hand of oppression."¹² Similarly, in 1886, he criticized the "association of allied capital and organized fraud," which was "drawing closer and closer the network of its power, gathering every year many more helplessly and

³ See OLSEN, *supra* note 1, at 24 (quoting Tourgée, "I want [and] fight for *the Union better* than 'it was.'" (emphasis in original)).

⁴ See Michael Kent Curtis, *Albion Tourgée: Remembering Plessy's Lawyer on the 100th Anniversary of Plessy v. Ferguson*, 13 CONST. COMMENT. 187, 188-89 (1996).

⁵ *Id.*

⁶ *Id.* at 189-90.

⁷ *Id.* at 190.

⁸ *Id.* at 190-91.

⁹ *Id.*

¹⁰ For Tourgée's efforts after leaving North Carolina, see OLSEN, *supra* note 1, at 223-349. For a splendid current biography of Tourgée, see MARK ELLIOTT, *COLOR-BLIND JUSTICE: ALBION TOURGÉE AND THE QUEST FOR RACIAL EQUALITY FROM THE CIVIL WAR TO PLESSY V. FERGUSON* (2006). For a collection of some of Tourgée's writings and causes during this period, see UNDAUNTED RADICAL: THE SELECTED WRITINGS AND SPEECHES OF ALBION W. TOURGÉE (Mark Elliot & John David Smith eds., 2010) [hereinafter UNDAUNTED RADICAL].

¹¹ OLSEN, *supra* note 1, at 238 n.19.

¹² *Id.* at 273.

hopelessly within control of the few.”¹³ For Tourgée, democracy required citizens who were “well fed, comfortably clothed, well housed, and well educated.”¹⁴ Government at all levels should restrict the misdeeds of the rich and assist the less fortunate.¹⁵

Tourgée’s critique of the Supreme Court as the consistent enemy of liberty and equal justice invites consideration of Supreme Court decisions, an understanding of the world he had experienced, and the legal context he confronted.

III. BACKGROUND: THE WORLD IN WHICH TOURGÉE MATURED:
SLAVERY, SECTIONAL STRIFE, SOUTHERN SUPPRESSION OF
FREE SPEECH ON THE SUBJECT OF SLAVERY, CIVIL
WAR, AND RECONSTRUCTION

Was Tourgée correct? Was the Supreme Court in his day, and for some time before and after, a *consistent* enemy of personal liberty and equal right? No. The Court was not *consistently* an enemy of liberty and equal right. It was only *generally* an enemy of liberty and equal right. In what follows, I will explore this question until around Tourgée’s death in 1905 and for a few years after. First, I will look at the Court’s record on liberty, equality, race, and social justice and I will consider exceptions. Throughout, I will consider a related question: if the Court was typically an enemy of liberty and equal justice, were its unfortunate decisions legally compelled? Then, I will look at Tourgée’s view of Reconstruction and at his constitutional vision. Finally, I will look briefly at the Second Reconstruction, in which President Lyndon Johnson, the Congress, and the Warren Court, combined did much to dismantle the racial caste system and to move the nation closer to Tourgée’s ideal of national liberty and equality.

A. *Historical and Legal Context: From the Revolution to the Civil War*
Slavery and the Constitution

The Declaration of Independence proclaimed independence and much more: that legitimate government rested on the consent of the governed; that all men are created equal, endowed by their Creator with certain unalienable rights; and that among these rights are life, liberty, and the pursuit of happiness. The Preamble of the Constitution proclaims as one of its purposes securing the blessings of liberty to

¹³ *Id.* at 273-74.

¹⁴ *Id.* at 285.

¹⁵ *Id.*

ourselves and our posterity. While proclaiming liberty, the new Constitution had provisions protecting slavery. Article I, Section 9 [1] provided that “the Migration or Importation of such Persons [including slaves] as the States now existing shall think proper to admit, shall not be prohibited by the Congress” before 1808.¹⁶ This guaranteed, for a time, the right to continue to import and enslave kidnapped Africans.

If a slave succeeded in escaping to a free state, he or she had to be returned. Article IV, Section 2 [3] provided that “No [slave] . . . in one state escaping into another, shall in Consequence of any Law or Regulation therein, be discharged from such [slavery] but shall be delivered up on Claim of the [slaveholder].”¹⁷ Essentially, this provided that “no state shall,” by law or regulation, free a slave escaping into another state, but should deliver up the slave.

In addition, Article I, Section 2 based representation in the House of Representatives on a state’s free population plus three-fifths of all slaves. Under Article II, Section 1 [2], votes in the Electoral College were based on adding the two senators to the number of representatives in the House. So, the Three-Fifths Clause swelled the influence of slaveholders in the national government. Worse yet, many Southern states had little three-fifths clauses, giving extra political power to slaveholding areas of the state.¹⁸ State and federal constitutions gave “the slave power” disproportionate power and influence in government.¹⁹

The new nation was a republic, but a slaveholding republic. Basic rights were denied to slaves. At first, slavery existed in most of the

¹⁶ U.S. CONST. art. I, § 9, cl. 1.

¹⁷ The Framers were embarrassed about slavery and used euphemisms. The full wording of the Fugitive Slave Clause was: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.” U.S. CONST. art. IV, § 2, cl. 3.

¹⁸ See, e.g., N.C. CONST. art. I, § 2 (1835); JOURNAL OF THE CONVENTION, CALLED BY THE FREEMEN OF NORTH-CAROLINA, TO AMEND THE CONSTITUTION OF THE STATE, WHICH ASSEMBLED IN THE CITY OF RALEIGH, ON THE 4TH OF JUNE, 1835, AND CONTINUED IN SESSION UNTIL THE 11TH DAY OF JULY THEREAFTER 96 (1835) (“The House of Commons shall be composed of one hundred and twenty representatives, biennially chosen by ballot, to be elected by counties according to their federal population, that is, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, *three fifths of all other persons* . . .”) (emphasis added).

¹⁹ See LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780-1860 (2000).

states, North as well as South, though after the Revolution most Northern states abolished or began to abolish slavery. As a result, it would seem that free Americans of African descent would be protected by the Bill of Rights, at least from invasion by the national government. The Bill of Rights prohibits depriving “any person” of liberty without due process of law, protects against unreasonable searches and seizures, gives a host of guarantees to those accused of crimes, and seeks to protect free speech, press, assembly, and religion.²⁰ All these were protected from *national government* abridgment, and, as it turned out, *only* from abridgment by the national government.

Sectional Conflict, the Rise of the Republican Party, and the Decline of Free Speech in the South

Slavery in the Territories?

The nation expanded. While earlier compromises had limited the expansion of slavery in the national territories,²¹ the slaveholding elite demanded the abolition of these restrictions. When in 1854 Congress, bowing to Southern demands, repealed a provision of the Missouri Compromise banning slavery north of thirty-six degrees, thirty minutes, the result was a political earthquake.²² The Republican Party emerged almost at once. The Republican platform demanded containment of slavery; it sought to ban slavery from the territories, but left the loathsome institution untouched in the states.²³ Ultimately, Republicans hoped for the national extinction of slavery by state-by-state action.²⁴ Lincoln glumly observed that the nation could not continue half slave and half free. It would become all one thing or all the other.²⁵

²⁰ U.S. CONST. amends. I-X.

²¹ *E.g.*, Act of Aug. 7, 1789 (Northwest Ordinance), ch. 8, 1 Stat. 50 (1848); Act of Mar. 6, 1820 (Missouri Compromise), ch. 22, 3 Stat. 545 (1850).

²² *See* DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 177-88* (1978).

²³ *See* 1 NATIONAL PARTY PLATFORMS 1840-1956, at 27 (Donald Bruce Johnson ed., 1978).

²⁴ *See* ABRAHAM LINCOLN, “*House Divided*” *Speech at Springfield, Illinois*, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858: SPEECHES, LETTERS AND MISCELLANEOUS WRITINGS: THE LINCOLN-DOUGLAS DEBATES 426 (Don E. Fehrenbacher ed., 1989) [hereinafter LINCOLN: SPEECHES].

²⁵ *Id.*

The South Becomes a Closed Society

Before the Civil War, meaningful democracy disappeared from the slave states. Democracy requires free speech, free press, freedom to assemble, and freedom to associate—at the very least on political issues and matters of public concern. In the 1850s, slavery and its expansion into the territories was fast becoming the central political issue in the nation. But, Southern mobs and laws banned anti-slavery speech and Republican Party speech.²⁶ Attacks on free speech over slavery were not limited to the South: mobs in the North as well had sought to drive advocacy of abolition and criticisms of slavery from public discussion and debate, but they had failed.²⁷

By the 1850s, however, suppression in the South was pervasive. In the 1858 Lincoln-Douglas debates, Lincoln and Douglas agreed that Republicans could not campaign in the South.²⁸ North Carolina was typical. A state law made it a crime to publish items that had the “evident tendency . . . to cause slaves to become discontented with the bondage in which they are held” and “free negroes to be dissatisfied with their social condition.”²⁹ This law and mob law reached anti-slavery and Republican Party speech.³⁰

Benjamin Hedrick was a chemistry professor at the University of North Carolina. He told some of his students that in 1856 he planned to vote for the Republican, John C. Fremont, for president. The *Raleigh Weekly Standard* outed Professor Hedrick, and the Board of Trustees of the University fired him. Hedrick returned to his home in Salisbury, North Carolina, but a mob drove him from the state.³¹ The Raleigh newspaper celebrated its achievement:

²⁶ See, e.g., MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 260-63, 271-88 (2000) . *Id.* at 138-51 (discussing Southern suppression, the debate in Congress reflecting Southern suppression, and the North Carolina prosecution of Daniel Worth). *Id.* at 217-49 (discussing suppression in the North).

²⁷ *Id.* at 138-51, 217-49, 289-99.

²⁸ *The Fifth Joint Debate at Galesburg, October 7, 1858*, in THE LINCOLN-DOUGLAS DEBATES: THE FIRST COMPLETE, UNEXPURGATED TEXT 243, 254-55 (Harold Holzer ed., 2004) [hereinafter LINCOLN-DOUGLAS DEBATES] (statement of Stephen A. Douglas) (“Republican principles and measures cannot be advocated in any slaveholding state in this Union.”) (Lincoln agreeing but pointing out that Douglas cannot proclaim democracy in Russia).

²⁹ CURTIS, *supra* note 26, at 293.

³⁰ See e.g., *State v. Worth*, 52 N.C. (7 Jones) 488 (1860).

³¹ CURTIS, *supra* note 26, at 290.

Our object was to rid the University and the State of an avowed Fremont man; and we succeeded. And now we say, after due consideration . . . that no man who is avowedly for John C. Fremont for President ought to be allowed to breathe the air or tread the soil of North Carolina.³²

Whether to protect Hedrick from the mobs or to permit pro-Republican speech was merely a matter for the semi-sovereign state.

In 1857, Hinton Helper, a North Carolinian, published *The Impending Crisis of the South: How to Meet It*. Helper argued that slavery impoverished the slave states and especially non-slaveholding whites.³³ He advocated peaceful political action at the state level to abolish slavery. Helper sought to settle the issue at the ballot box with “free speech” and “fair play.”³⁴ But, if the “actual slave owners” and their “cringing lickspittles” used violence to prevent free speech and peaceful democratic change, Helper said the non-slaveholders should fight back.³⁵ Not counting the slaves, who, Helper provocatively said, would in nine cases out of ten be delighted to cut their masters’ throats, non-slaveholders greatly out-numbered slaveholders.³⁶

Republicans in Congress hit on a plan to publish an abridgment of Helper’s book as a campaign document for the 1860 election.³⁷ Meanwhile, in North Carolina, Daniel Worth, a Wesleyan Minister and a Republican Party activist, was circulating the Helper book. He was also outed by the ever-vigilant *Raleigh Standard*, was arrested for distributing copies of Helper’s book, was tried, convicted, and sentenced to prison. In 1859, in the midst of the Worth controversy, the North Carolina Council of State passed a resolution saying that postmasters who delivered incendiary books or newspapers should be prosecuted as circulators of the item. The *Raleigh Standard* reminded postmasters of their duty. “Let every copy of Helper’s book, and every copy of the *New York Tribune* [the nation’s main Republican paper] and every document franked by [named Republican senators and representatives] . . . be committed to the flames.”³⁸

Though Worth did not give the book to slaves, the North Carolina Supreme Court affirmed Worth’s conviction on the theory that circula-

³² *Id.*

³³ *Id.* at 271.

³⁴ *Id.* at 271-72.

³⁵ *Id.* at 272.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 291.

tion was likely to eventually reach slaves.³⁹ As a result, general circulation among whites was criminal. But the Court held that limited circulation among white critics of the book was permissible. One opponent of the book's ideas could show it to another. But it was a crime for supporters of the ideas in the book to circulate it.⁴⁰ Today, such a rule would be a flagrant violation of freedom of speech and of the press protected by the First and Fourteenth Amendments. In 1860, these questions were up to the semi-sovereign state.

In 1860, the North Carolina legislature amended the incendiary documents statute providing the death penalty for the first offense.⁴¹ Whether the punishment was cruel or unusual was a matter for the semi-sovereign state. Tourgée was well aware of the Worth case. Before the Civil War, he had written an essay critical of the prosecution.⁴²

Debate over Helper's book had raged in Congress as well. Republican Congressman Owen Lovejoy argued that he had a constitutionally protected free speech right of "discussing this question of slavery anywhere, on any square foot of American soil over which the stars and stripes float, to which the privileges and immunities of the Constitution extend."⁴³ Congressman Martin of Virginia responded that if Lovejoy came to Virginia, they would hang him.⁴⁴

IV. THE COURT AND ITS DECISIONS. A CONSISTENT ENEMY?

The Supreme Court Before the Civil War

The Bill of Rights

Though Lovejoy, like many Republicans before the Civil War and before 1866, believed that the Constitution and the Bill of Rights, properly interpreted, protected civil liberties throughout the nation,⁴⁵ the Supreme Court had held otherwise. In 1833, in the case of *Barron v. Baltimore*,⁴⁶ the Court held the Bill of Rights limited only the national

³⁹ *State v. Worth*, 52 N.C. (7 Jones) 488, 492 (1860).

⁴⁰ *Id.* at 490.

⁴¹ CURTIS, *supra* note 26, at 295-96.

⁴² OLSEN, *supra* note 1, at 13.

⁴³ CURTIS, *supra* note 26, at 287.

⁴⁴ *Id.* at 287-88.

⁴⁵ *E.g.*, CURTIS, *supra* note 26, at 250-60, 266-70, 277-88; MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 36-56 (1986) [hereinafter CURTIS, *NO STATE SHALL ABRIDGE*] (quoting Republicans who believed free speech and press limited the states before 1868).

⁴⁶ 32 U.S. (7 Pet.) 243, 250 (1833).

government, not the states. *Barron* insulated incendiary-document statutes like that of North Carolina and decisions like *State v. Worth*⁴⁷ from United States Supreme Court review. This was the era of the semi-sovereign state. Did a state limit the freedom of free blacks and of whites? That, largely, was an issue for the semi-sovereign state.

Prigg v. Pennsylvania (1842)

As noted above, in a period of liberalization after the Revolution, Northern states began to abolish slavery.⁴⁸ And, of course, some masters liberated slaves. As a result, the population of the United States included a number of free Americans of African descent.

Pennsylvania freed slaves in the state shortly after the Revolution. The state also passed a series of acts attempting to protect former Pennsylvania slaves and free blacks from kidnapping and re-enslavement. An 1826 statute provided for return of fugitive slaves, but required due process, a judicial hearing, and a certificate from a state judge before an alleged slave was removed from the state.⁴⁹ In short, Pennsylvania law attempted to ensure that the person hauled into slavery really was an escaped slave.⁵⁰

In the 1842 case of *Prigg v. Pennsylvania*, the Supreme Court considered the case of a black woman and her children claimed as escaped slaves. The slave catchers brought them before a Pennsylvania state judge, but he refused to issue the certificate required by the state statute. Prigg, the slave-catcher, then removed the woman and her children anyway, and was indicted under the Pennsylvania anti-kidnapping statute. Though the jury found the woman was an escaped slave, Prigg was convicted for violating the safeguards for all blacks in the Pennsylvania statute. Though there was no question that Prigg violated the Pennsylvania statute by removing the woman and her children without a certificate from a state judge, the Supreme Court reversed Prigg's conviction.⁵¹

Recall the Fugitive Slave Clause of the Constitution: "No [slave] . . . in one state escaping into another, shall in Consequence of any

⁴⁷ See 52 N.C. (7 Jones) 488 (1860).

⁴⁸ FEHRENBACHER, *supra* note 22, at 29.

⁴⁹ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 550-52 (1842).

⁵⁰ The statute is set out in the UNITED STATES REPORTS (Peters) report of the case, as are arguments of counsel. See *Prigg*, 41 U.S. at 550-608.

⁵¹ *Id.* at 673-74.

Law or Regulation therein, be discharged from such [slavery] but shall be delivered up on Claim of the [slaveholder].”⁵² As I read it, this essentially provided that “no state shall,” by law or regulation, free a slave escaping into another state, but instead, the state was required to return the slave.

From this clause, with its ban on state laws or regulations freeing an escaped slave and requiring the state to deliver the slave up, the Court inferred a right of the slave owner to get his slave back. The Court said a right implies a remedy.⁵³ As a result, a slave owner could immediately, without any legal process at all, seize her “slave” and take her back to slavery.⁵⁴ Since the Pennsylvania statute required a due process hearing to determine the issue of slavery, the Court held it was inconsistent with the slaveholder’s right to “*immediate*”⁵⁵ possession and return of the “slave.” This was a right that the Court found guaranteed by the Fugitive Slave Clause. So, the state statute was unconstitutional. The Court did not explain why the later-enacted Due Process Clause did not limit the Fugitive Slave Clause. In addition, the Court held the Fugitive Slave Clause allowed Congress to pass laws enforcing the return of fugitive slaves, as it had done. Though the congressional statute did not ban state laws on the subject, the Court nonetheless held it also preempted and therefore voided the state statute.⁵⁶

The attorney for Pennsylvania argued that in Pennsylvania, all persons are presumed free and the burden is on the claimant to prove otherwise. The state statute enforced the rebuttable presumption of freedom. In slave states, being black raised a presumption of slavery.⁵⁷

Pennsylvania’s statute provided for return of slaves. “[B]ut,” the lawyer for Pennsylvania argued, “we do claim the right of legislating upon this subject so as to bring you under legal restraint, which will prevent you from taking a free man.”⁵⁸ He noted that “[t]he same power that can, upon simple allegation, seize and carry off a slave, can, on the allegation of service due, seize and carry off a free man [W]e are not arguing the want of power to ‘claim’ and take a slave, but

⁵² The Framers were embarrassed about slavery and used euphemism. For the full wording of the Fugitive Slave Clause, see *supra* note 17, and accompanying text.

⁵³ *Prigg*, 41 U.S. at 613.

⁵⁴ *Id.*

⁵⁵ *Id.* at 612 (emphasis added).

⁵⁶ *Id.* at 622.

⁵⁷ See *id.* at 550-52, 576 (argument of Mr. Hambly).

⁵⁸ *Id.* at 576-77 (argument of Mr. Hambly).

to claim and take a free man! Admit the fact that he is a slave, and you admit away the whole question.”⁵⁹ A construction of the Fugitive Slave Clause which allowed the *supposed* agents of the *alleged* slave owner simply to seize a man, woman, or child as he would a stray horse, he argued, would violate the Bill of Rights which in the Fifth Amendment forbade denial of liberty without due process and in the Fourth Amendment guaranteed the right of the people to be secure in their persons against unreasonable seizures.⁶⁰

Justice Story’s opinion for the Court did not directly answer these Bill of Rights arguments. But he did provide an answer of sorts: “Now certainly . . . any state law or regulation which interrupts, limits, delays or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labor, operates, pro tanto, a discharge of the slave therefrom.”⁶¹ There we have it. A hearing to determine if the alleged slave is really an escaped slave could delay the right of the “slave owner” to immediate service of the slave. So the requirement of due process in this instance would violate the Fugitive Slave Clause. The Fugitive Slave Clause “contains a positive and unqualified recognition of the right of the owner of the slave, unaffected by any state law or legislation whatsoever”⁶² The Clause gave the slave owner the rights in a free state that he would have had over the slave in his slave state. (“[T]he clause puts the right to the service or labor upon the same ground and to the same extent in every other state as in the state from which the slave escaped”⁶³). Later, the Court made clear that Congress could punish private persons who assisted a fugitive slave.⁶⁴ So, at least where protecting the rights of slaveholders was at stake, the rights of slaveholders trumped those of the semi-sovereign state to protect its black inhabitants.

In this case, claims of liberty and equal right lose. Liberty loses because the Court strikes down the state protection of the liberty of free blacks from kidnapping. Equality loses because those denied protection of due process and against unreasonable seizures of their persons are only Americans of African descent. The semi-sovereign state

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 612.

⁶² *Id.* at 613.

⁶³ *Id.*

⁶⁴ *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

approach allowed the states broad power to abridge Bill of Rights liberties. But, state power to protect those liberties for Americans of African descent who were free in fact was sharply limited. This case supports the Tourgée thesis.

Dred Scott v. Sandford (1857)

In the 1857 case of *Dred Scott v. Sandford*,⁶⁵ the Court considered the case of a slave who claimed his freedom, and that of his wife, by virtue of being taken into a free territory to live. A common law rule that had, for a time, been followed by many states provided that a slave domiciled with his owner in a free territory became free. Those taken by temporary visitors did not.⁶⁶ Dred Scott had been taken into territory from which slavery had been banned by the Missouri Compromise. Scott's suit had been filed in federal court. In *Dred Scott*, the Court's majority, in an opinion written by Chief Justice Taney, had two answers to Dred Scott's claim.

Dred Scott filed his suit under the provision of Article III that extended federal judicial power to cases between "Citizens of different states."⁶⁷ Taney read this as limited to citizens of the United States who were also citizens of different states.⁶⁸ According to Taney, all persons who were citizens of the several states at the time of the separation from Britain and of the Constitution became citizens of the United States. Their descendants and others admitted in accordance with the Constitution and laws became citizens too, but no others. The "personal rights and privileges guaranteed to citizens of this new sovereignty" were limited to such citizens.⁶⁹

Did United States citizens include free blacks descended from slaves? No. Why? "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . ." ⁷⁰ The Constitution, according to Taney, "speaks not only in the same words, but with the same meaning and intent with which it

⁶⁵ 60 U.S. (19 How.) 393 (1856).

⁶⁶ FEHRENBACHER, *supra* note 22, at 50-61.

⁶⁷ U.S. CONST. art. III, § 2.

⁶⁸ 3 WILLIAM WINSLOW CROSSKEY & WILLIAM JEFFREY, JR., *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 28-29 (1980).

⁶⁹ *Dred Scott*, 60 U.S. at 406.

⁷⁰ *Id.* at 407.

spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States.”⁷¹

For Taney, the original meaning of the Constitution and the original intent of the Framers was to create what Stephen A. Douglas called a government on a “white basis.”⁷² In addition, Taney said that the statement in the Declaration of Independence, “that all men are created equal,” should not be read to include descendants of slaves either. Otherwise, the men who framed the Declaration, including a number of slaveholders, “would have been utterly and flagrantly inconsistent with the principles they asserted”⁷³

So descendants of slaves were entitled to no federal constitutional privileges (or rights) at all. One of these privileges was the right of suing in federal court.⁷⁴ No

change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.⁷⁵

The principles of the Constitution were limited by the racist expected application that, according to Taney, infused the Constitution. So the court had no jurisdiction.

Suppose, hypothetically, that a pro-slavery government in the Kansas territory, *to which the Bill of Rights applied*,⁷⁶ made it a crime for free blacks to criticize slavery and provided that offenders should have their tongues cut out. That should violate the First Amendment’s guarantee of free speech and the Eighth Amendment’s protection against cruel and unusual punishments. But no. By *Dred Scott*, free Americans of African descent were entitled to no constitutional rights.⁷⁷

Though the Court had held it had no jurisdiction to hear Scott’s claim (since he was not entitled to sue in federal court), nevertheless the Court proceeded to consider whether domicile in the territory declared free by the Missouri Compromise made Scott a free person. The Court held the ban on slavery in the Missouri Compromise was

⁷¹ *Id.* at 426.

⁷² *Id.* at 407; LINCOLN: SPEECHES, *supra* note 24, at 151-52.

⁷³ *Dred Scott*, 60 U.S. at 410.

⁷⁴ *Id.* at 403.

⁷⁵ *Id.* at 426.

⁷⁶ *Id.* at 449-50.

⁷⁷ *Id.* at 406-07.

unconstitutional.⁷⁸ The territories were bound by the Constitution and the guarantees of the Bill of Rights.⁷⁹ To forbid slave owners from bringing their “property” into the territories would deprive them of their “property” without due process of law in violation of the Fifth Amendment. Of course, under the Articles of Confederation, slavery had been banned in the Northwest Territory by the Northwest Ordinance. Then, the Ordinance was reenacted by the first Congress.⁸⁰ Taney distinguished the Northwest Ordinance as a compact between the states.⁸¹

Justice Curtis dissented, noting that free blacks had been voters in several states at the time of the Constitution.⁸² So, for Justice Curtis, they were part of the people who framed the Constitution.

The *Dred Scott* decision was the mirror image of the Republican Party platform. *Dred Scott* found the ban on slavery in the territories to be unconstitutional under the Due Process Clause. The Republican Platforms of 1856 and 1860 held slavery in the territories violated the Fifth Amendment Due Process Clause because slaves were persons and the Bill of Rights applied fully to the territories. Since slaves had not been deprived of their liberty in accordance with due process, slavery in the territories was unconstitutional.⁸³

Taney’s reading of the Declaration was also a mirror image of the Republican reading. By the Republican reading, expressed, for example, by Abraham Lincoln, the Declaration’s promise of equality and liberty was an ideal to be pursued and gradually approximated. The authors of the Declaration, Lincoln explained, “meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit.”⁸⁴ Lincoln continued:

They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and aug-

⁷⁸ *Id.* at 452.

⁷⁹ *Id.* at 449-50.

⁸⁰ *Id.* at 438.

⁸¹ *Id.*

⁸² *Id.* at 572-74.

⁸³ NATIONAL PARTY PLATFORMS, *supra* note 23, at 27, 32 (paragraphs 7 and 8).

⁸⁴ ABRAHAM LINCOLN, *Speech on the Dred Scott Decision at Springfield, Illinois*, in LINCOLN: SPEECHES, *supra* note 24, at 398.

menting the happiness and value of life, to all people of all colors everywhere.⁸⁵

In *Dred Scott*, liberty and equal rights lose again. Liberty loses because free Americans of African descent are deprived of any and all national constitutional rights. Equality loses because this denial of any and all constitutional rights is happening uniquely to free Americans of African descent. This case is a second one that provides support for the Tourgée thesis.

*The Thirteenth and Fourteenth Amendments and the
Civil Rights Act of 1866*

With the end of the Civil War, Congress proposed and the states ratified the Thirteenth Amendment. Section One of the Thirteenth Amendment provided that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁸⁶ Congress was given the power to enforce the article by appropriate legislation. President Andrew Johnson required the defeated Southern states to ratify the amendment.⁸⁷ Still, Southern states and localities passed Black Codes to control their newly freed slaves. The worst of these denied basic rights such as the right to speak, preach or assemble without permission from the authorities; denied the right to bear arms, to make contracts, or to testify in cases where whites were parties; and infringed many economic liberties enjoyed by whites.⁸⁸

Congress responded with the Civil Rights Act of 1866,⁸⁹ declaring all persons born in the country and not subject to any foreign power were citizens of the United States. Indians “not taxed” were also excluded. The Act gave

such citizens of every race and color . . . the same right . . . 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

⁸⁵ *Id.*

⁸⁶ U.S. CONST. amend. XIII, § 1.

⁸⁷ ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 79 (1988); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 304-05 (1982).

⁸⁸ For a black code, see *infra* note 99.

⁸⁹ Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

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full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens⁹⁰

It further provided that these citizens “shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.”⁹¹

One source cited by Republicans to support constitutional power to pass the Civil Rights Act was the Thirteenth Amendment. The Amendment, leading Republicans insisted, banned not only slavery but also those laws, regulations, and customs that arose from it: “incidents” of slavery and “badges of servitude,” as Senator Lyman Trumbull of Illinois explained.⁹²

Next, the Thirty-ninth Congress submitted the Fourteenth Amendment to the states. It was ratified in 1868. The Amendment provided that all persons born in the country (and subject to its jurisdiction) were citizens of the United States and of the state in which they resided. It continued:

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.⁹³

Section Five gave the Congress power “to enforce, by appropriate legislation, the provisions of this article.”⁹⁴ There are at least three reasons to read the Amendment as protecting Bill of Rights liberties at least against the states.

First, the leading framers of Section One of the Amendment said one effect of it would be to protect liberties in the Bill of Rights against the states. John Bingham, the author of Section One (less the Citizenship Clause) had explained that an earlier version of the Amendment was designed to correct the decision in *Barron v. Baltimore*⁹⁵ and to make the guarantees of the Bill of Rights effective against the states.⁹⁶

⁹⁰ *Id.* § 1.

⁹¹ *Id.*

⁹² CONG. GLOBE, 39TH CONG., 1ST SESS. 322, 474 (1866) (statement of Sen. Trumbull); CURTIS, NO STATE SHALL ABRIDGE, *supra* note 45, at 81.

⁹³ U.S. CONST. amend. XIV, § 1.

⁹⁴ *Id.* § 5.

⁹⁵ 32 U.S. 243 (1833).

⁹⁶ CONG. GLOBE, 42ND CONG., 1ST SESS. app. 84 (1871) (statement of Rep. Bingham); CONG. GLOBE, 39TH CONG., 1ST SESS. 1033-34, 2542 (1866) (statement of Rep. Bingham).

Senator Howard, who presented the Amendment to the Senate on behalf of the Joint Committee that proposed it, said essentially the same thing with specific reference to the Privileges or Immunities Clause.⁹⁷ The privileges or immunities of citizens of the United States, he said, included the “personal rights guaranteed and secured by the first eight amendments to the constitution,” many of which Howard read verbatim.⁹⁸ Speaking in 1871 on an anti-Klan bill, John Bingham explicitly reiterated that the Privileges or Immunities Clause was designed to require states to obey the commands of the Bill of Rights.⁹⁹ Other comments in Congress in the 1870s point in the same direction.¹⁰⁰ Still, history rarely speaks with one voice, and some scholars have cited evidence they say points in the other direction.¹⁰¹

Second, the words “privileges or immunities” were a natural way to describe Bill of Rights liberties. Before 1866 (and after), there was a long and rich history of using the words “privileges” and “immunities” to describe basic liberties such as those in the Bill of Rights.¹⁰²

⁹⁷ CONG. GLOBE, 39TH CONG., 1ST SESS. 1033-34, 2764-67 (1866) (statement of Sen. Howard).

⁹⁸ *Id.* at 2765.

⁹⁹ CONG. GLOBE, 42ND CONG., 1ST SESS. app. 84 (1871) (statement of Rep. Bingham).

¹⁰⁰ *E.g.*, CONG. GLOBE, 42ND CONG., 1ST SESS. 381-82 (1871) (statement of Rep. Hawley); *id.* at 475-77 (statement of Rep. Dawes) (listing rights in the Bill of Rights and then saying, “[s]till further, every person born on the soil was made a citizen and clothed with them all”); *id.* at 334 (statement of Rep. Hoar) (explaining that the Fourteenth Amendment “comprehends all the privileges and immunities declared to belong to the citizen by the Constitution itself”).

¹⁰¹ *See generally*, CURTIS, NO STATE SHALL ABRIDGE, *supra* note 45, at 1-4; Michael Kent Curtis, *The Fourteenth Amendment and the Bill of Rights*, 18 J. CONTEMP. LEGAL ISSUES 3 (2009) (discussing arguments pro and con).

¹⁰² *See* Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1089-1151 (2000) (citing a great many examples throughout English and American history of people using the words “privileges” and “immunities” to encompass rights such as those in the Bill of Rights). For additional examples brought to my attention by Daniel Rice, see ROBERT W. MERRY, A COUNTRY OF VAST DESIGNS: JAMES K. POLK, THE MEXICAN WAR, AND THE CONQUEST OF THE AMERICAN CONTINENT 331 (2009) (citing President Polk’s description of General Stephen Kearny’s August 15, 1846 proclamation, which purported to extend United States law over conquered areas of New Mexico and promised local Catholics freedom of religion, as the “offspring of a patriotic desire to give to the inhabitants the privileges and immunities so cherished by the people of our own country”); Michael Coenen, *The Significance of the Signatures: Why the Framers Signed the Constitution and What They Meant by Doing So*, 119 YALE L. J. 966, 1000 (2009-2010) (citing an Antifederalist who termed the liberties of conscience, press, and jury “sacred rights and privileges” and another who spoke of “[t]he privilege of trial by jury”).

Third, the understanding of the Fourteenth Amendment as protecting Bill of Rights liberties also responded to long-standing historical grievances. Crucial Bill of Rights liberties (speech, press, assembly, free exercise of religion, protection against unreasonable searches and seizures, and prohibition of cruel and unusual punishments, for example—all important to opponents of slavery) had been denied in the South before the Civil War.¹⁰³ For newly freed Americans of African descent, many of these liberties were again infringed by Black Codes.¹⁰⁴

The former Confederate states, except Tennessee, rejected the Fourteenth Amendment, and Congress initiated military Reconstruction.¹⁰⁵ These states were required to hold constitutional conventions elected by manhood suffrage; black males were included as voters. Those who had sworn to defend and protect the Constitution and rebelled (public officials and army officers for example) were not allowed to vote for the convention, though most states immediately or soon thereafter enfranchised them. A new biracial political coalition controlled the Southern states.¹⁰⁶

This sort of democracy was intolerable to many unreconstructed Confederates; the Klan and similar organizations responded with violence. When Congress investigated, witness after witness spoke about violence—whippings, murders, killing the victims' animals, and burning their barns, aimed at suppressing political activity by white as well as black Republicans.¹⁰⁷

¹⁰³ See *supra* notes 26-44, and accompanying text.

¹⁰⁴ See CONG. GLOBE, 39TH CONG., 1ST SESS. 516-17 (1866) (statement of Rep. Eliot) (discussing ordinance of Opelousas, Louisiana which banned meetings of freedmen without the permission of the mayor; no speeches by freedmen without the special permission of the mayor; no preaching to congregations of freedmen without special permission; no freedman to have firearms without permission of his employer in writing and approval by the mayor or president of the board of police); 1 WALTER FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION: POLITICAL, MILITARY, SOCIAL, RELIGIOUS, EDUCATIONAL, AND INDUSTRIAL, 1865 TO THE PRESENT TIME 279-81 (1906) (discussing similar ordinance to that of Opelousas, Louisiana).

¹⁰⁵ FONER, *supra* note 87, at 276-80; HYMAN & WIECEK, *supra* note 87, at 423, 441.

¹⁰⁶ FONER, *supra* note 87, at 281-307, 316-33 (discussing state constitutional conventions).

¹⁰⁷ The issue in the violent attack on Reconstruction and later disfranchisement was democracy and majority rule. See, e.g., FONER, *supra* note 87, at 342-43, 425-59; Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1398-1400 (2009) [hereinafter Curtis, *The Klan, the Congress, and the Court*]. See generally, VERNON LANE WHARTON, *THE NEGRO IN MISSISSIPPI 1865-1890*, at 157-80 (1965); Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow*

Congress responded by passing anti-Klan acts. The Act of May 31, 1870 attempted to protect citizens otherwise qualified to vote by state or territorial laws and to require state officials to respect their right to vote and not to discriminate based on race.¹⁰⁸ The Act also reached private persons who “shall prevent, hinder, control, or intimidate, any person . . . to whom the right of suffrage is secured or guaranteed by the fifteenth amendment.”¹⁰⁹ Section Five of the Act prohibited threats, including threats of “depriving such person of employment or occupation, or of ejecting such person from rented house, lands, or other property.”¹¹⁰

In addition, the 1870 Act sought to protect other rights. Section Six reached private persons who:

shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent 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, or because of his having exercised the same . . .¹¹¹

The Act of April 20, 1871 made any person liable for damages (or injunctive relief) who under color of law “shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States”¹¹² Section Two reached persons who “go in disguise upon the public highway or upon the premises of another” for the purpose of “depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws” or “for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws . . .” or to obstruct or defeat the due course of justice “with intent to deny any citizen of the United States the due and equal protection of the laws”¹¹³

and the Counter-Majoritarian Difficulty, 43 HARV. C.R.-C.L. L. Rev. 65, 83-98 (2008). The title of the article captures nicely the central issue.

¹⁰⁸ Act of May 31, 1870, ch. 114, 16 Stat. 140 § 1-3 (1870).

¹⁰⁹ *Id.* § 5.

¹¹⁰ *Id.*

¹¹¹ *Id.* § 6.

¹¹² Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, § 1.

¹¹³ *Id.* § 2.

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A Lower Court Considers the Reconstruction Act of 1870

In May of 1871, Judge (later Justice) William Woods considered a federal indictment against John Hall, Jr. and William Pettigrew. They were charged under Section Six of the Enforcement Act of May 31, 1870 with banding and conspiring together

TO INJURE, OPPRESS, THREATEN, AND INTIMIDATE CHARLES HAYS AND OTHER[]
. . . CITIZENS OF THE UNITED STATES OF AMERICA, WITH INTENT TO PREVENT
AND HINDER THEIR FREE EXERCISE AND ENJOYMENT OF THE RIGHT OF FREEDOM
OF SPEECH, THE SAME BEING A RIGHT AND PRIVILEGE GRANTED AND SECURED
TO THEM BY THE CONSTITUTION OF THE UNITED STATES.¹¹⁴

The second count was similar, charging that the defendants did band and conspire with intent to injure, oppress, threaten and intimidate William Miller and others from exercising the right to peaceably assemble, this being a “right or privilege granted or secured by the [C]onstitution of the United States.”¹¹⁵

The defendants claimed these rights only limited the federal government and that Congress lacked power to enforce these rights even against the states. Judge Woods agreed that, under the original Constitution and the first eight amendments, “congress had not the power to protect by law the people of a state in the freedom of speech and of the press, in the free exercise of religion, or in the right peaceably to assemble.”¹¹⁶ But, he held, the Fourteenth Amendment had changed things.

The Amendment defined citizenship of the United States and was independent of citizenship of a state. So, an American citizen “is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the [C]onstitution of the United States to citizens thereof.”¹¹⁷ Those privileges were fundamental.¹¹⁸ They included those “expressly secured to the people, either as against the action of the federal or state governments.”¹¹⁹ These included “the right of freedom of speech, and the right peaceably to assemble.”¹²⁰ Since the decision dealt extensively with the power of Congress, and

¹¹⁴ United States v. Hall, 26 F. Cas. 79, 79 (C.C.S.D. Ala. 1871) (No. 15,282).

¹¹⁵ *Id.* at 79-80.

¹¹⁶ *Id.* at 81.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

that power was later contracted by very technical decisions, it is important to quote it at substantial length.

[The court quoted the Equal Protection Clause and Section 5's enforcement power.] "Congress may enforce this provision by appropriate legislation." From these provisions it follows clearly, as it seems to us, that congress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws. Therefore, to guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the amendment gives congress the power to enforce its provisions by appropriate legislation. And as it would be unseemly for congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures. *The extent to which congress shall exercise this power must depend on its discretion in view of the circumstances of each case.* If the exercise of it in any case should seem to interfere with the domestic affairs of a state, it must be remembered that it is for the purpose of protecting federal rights, and these must be protected even though it interfere with state laws or the administration of state laws [T]he right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States, . . . they are secured by the constitution, . . . congress has the power to protect them by . . . legislation appropriate to the end in view, namely, the protection of fundamental rights of citizens of the United States.¹²¹

Some things are unclear about this opinion, but some are very clear. Judge Woods' opinion recognized the power of Congress, under privileges or immunities and equal protection, to reach private persons who conspired to oppress citizens in the exercise of their Bill of Rights liberties. Congress could do so under a statute that simply reached such private conspiracies with the intent to deny constitutional rights and that did not specifically require state neglect. The rights protected were "secured," not "granted" rights. There was no allegation that the victims were black, and because of the generality of the protection, none was necessary. The Judge upheld an indictment that was not predicated on state neglect. Direct action was appropriate because

¹²¹ *Id.* at 81-82 (emphasis added).

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Congress could not compel the state or its officers. Whether circumstances justified passing the Act was a matter in the discretion of Congress. Finally, this decision was not simply that of one federal judge. It was largely ghostwritten by Justice Bradley, who would soon abandon a number of points in the opinion.

The Supreme Court After the Civil War

The Fourteenth Amendment in the Slaughterhouse

After the Civil War, New Orleans' slaughterhouses were its worst noxious nuisances. They were scattered throughout the city, beside hospitals, schools, businesses, and tenement houses. Some 300,000 animals a year were driven through the streets to be slaughtered. The employees or owners of the slaughterhouses threw entrails, liver, blood, urine, dung, and other refuse into the streets or into the Mississippi River where some of it was sucked up in pipes that provided the city's drinking water. The Louisiana legislature, following an approach used by New York City, passed a statute requiring the city's butchers to use a new, centralized, state-of-the-art slaughterhouse, located well away from downtown neighborhoods.¹²²

Facing difficulty raising revenue, a result of resentment many whites felt against the biracial Republican state government, the legislature used a common 19th century device: it granted a franchise to a private company that agreed to build the slaughterhouse. While there was now only one slaughterhouse, which any butcher could use on payment of a fee, there were now many more butchers, undermining the quasi monopoly the butchers had enjoyed.¹²³ The owners of the now-prohibited slaughterhouses sued, claiming violation of the Thirteenth and Fourteenth Amendments, and especially the Privileges or Immunities Clause of the Fourteenth Amendment.

In the 1873 *Slaughter-House Cases*,¹²⁴ the Court upheld the Louisiana slaughterhouse law. Justice Miller's majority opinion for the Court distinguished between privileges and immunities of state citizenship (which he said protected nearly every civil right) and a much more limited set of privileges and immunities of citizens of the United

¹²² Michael A. Ross, *Justice Miller's Reconstruction: The Slaughter-House Cases, Health Codes, and Civil Rights in New Orleans, 1861-1873*, 64 J. OF S. 648, 664 (1998).

¹²³ *Id.* at 656. For a brilliant discussion of *Slaughter-House*, see Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627 (1994).

¹²⁴ 83 U.S. 36 (1873).

States.¹²⁵ The privileges or immunities of citizens of the United States included the right to visit the sub-treasuries and to visit Washington, D.C., to use the navigable waters, and to be protected on the high seas and in foreign lands. The Court also listed the right to assemble and petition,¹²⁶ though only to assemble and petition the national government as it turned out.¹²⁷

Newly freed slaves and their Republican allies could perhaps be protected by the national government on the high seas and once they arrived in Paris. Sadly, however, these were not pressing problems for people facing Klan *political* terror. After *Slaughter-House*, Fourteenth Amendment protection from politically inspired violence looked bleak. The shriveled list of privileges and immunities of citizens of the United States seemed to forecast the hollowing out of sections of the Reconstruction statutes written in terms of protecting rights, privileges, and immunities of citizens of the United States.¹²⁸

The opinion for the Court framed the history of the Fourteenth Amendment in terms of black slavery, emancipation, and the Black Codes, “laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty and property” so “their freedom was of little value.”¹²⁹ Justice Miller specifically mentioned bans on their appearing in towns except as menial servants, requirements that they reside on and cultivate the soil without the right to purchase or own it, their exclusion from many occupations, and their inability to testify in cases in which whites were a party.¹³⁰ (He omitted laws that abridged their Bill of Rights liberties such as speech, assembly, and free exercise of religion). “It was said,” Miller continued, “that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.”¹³¹ Miller was skeptical—“[t]hese circumstances, whatever of

¹²⁵ *Id.* at 74-75.

¹²⁶ *Id.* at 79.

¹²⁷ *Id.*

¹²⁸ *E.g.*, Act of May 31, 1870, ch. 114, 16 Stat. 140, § 6 (protecting against those who conspire to go on the highway or on the premises of another “with intent . . . 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, or because of his having exercised the same . . .”).

¹²⁹ *Slaughter-House Cases*, 83 U.S. at 70.

¹³⁰ *Id.*

¹³¹ *Id.*

falsehood or misconception may have been mingled with their presentation,” convinced the Congress that more was needed to protect the black race.¹³²

Miller’s history, except for his accounts of mistreatment of former slaves after the war,¹³³ leaves out much of the background of the Fourteenth Amendment. It omits the long history of Southern suppression of civil liberties for thirty years or more before the war. The suppression included freedom of speech, press, assembly, religion, and freedom from unreasonable searches—all in the interest of protecting slavery. It omits the fact that much of this suppression was aimed at white opponents of slavery and eventually at members of the Republican Party. In short, it omits laws and violence aimed at suppressing anti-slavery and Republican speech before the war.¹³⁴ As to Southern blacks, it leaves out the fact that black codes had abridged freedom of speech and religion, the right to bear arms, the right to assemble, and freedom from cruel punishments.

Slaughter-House was a step back in the direction of the pre-Civil War paradigm of the semi-sovereign state—with limited federal power to protect American citizens within the states and broad state power to deny Bill of Rights liberties.¹³⁵ Indeed, the Court justified its decision on federalism grounds.¹³⁶

By this view, the right to protect free speech, press, assembly, and the rest against private violence aimed at punishing citizens for exercising these rights, could not be inferred from the fact the Fourteenth Amendment created national citizenship or from the fact that the Bill of Rights limited both the states and national government, therefore implying that the rights were privileges and immunities (or rights or

¹³² *Id.*

¹³³ *Id.*

¹³⁴ CURTIS, *supra* note 26, at 131- 299 (discussing the efforts to suppress free speech and press in the interest of protecting slavery).

¹³⁵ Aynes, *supra* note 123, at 636, 650; Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 71-72 (1996). Gifted scholars have taken a more charitable view of *Slaughter-House* on the Bill of Rights question, seeing it as consistent with application. See, e.g., Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051 (2000). Professor Wildenthal has written a host of important articles on incorporation that support the historical case for incorporation.

¹³⁶ *Slaughter-House Cases*, 83 U.S. at 78.

liberties) belonging to citizens of the United States. In contrast, the Fugitive Slave Clause's prohibition of state laws and regulations freeing a slave and the duty of the *state* to deliver the slave up (a natural reading of the clause) implied the right of the slaveholder to get his slave back. Since the Court held a right implies a remedy, the slaveholder could use self-help and the national government could punish private persons who aided the slave in his or her attempt to escape.¹³⁷

The square holding of *Slaughter-House* upholding an environmental regulation is defensible. The demotion of the privileges or immunities of citizens of the United States to things like protection on the high seas is not.

The decision set the stage for undermining protection of Bill of Rights liberties of speech, press, assembly, and the rest as a limit on the states. It also undermined the idea that these rights were rights of citizens of the United States that the Congress could protect against private violence specifically aimed at the rights—as Klan violence was.

Once again the Supreme Court appears as an enemy of liberty. In addition, the decision undermined equality. Basic liberties shared by all citizens are themselves a guarantee of equality. *Slaughter-House* is a third case supporting Tourgée's thesis. Still, if one agreed with the Court's reading of privileges or immunities and federalism, or if one found the government lacked power to protect free speech and press, for example, from private conspiracies designed to destroy political opposition, then the criticism would have to be re-thought. (Power to protect speech, press, and assembly could be reinforced by power to protect national citizenship, by the guarantee of republican government, and by equal protection).

United States v. Cruikshank (1876) and Justice Bradley's 1874 Circuit Court Opinion

Cruikshank involved a bloody massacre of black Republicans in connection with an election dispute in Louisiana. The indictment was brought under Section Six of the Enforcement Act of 1870 which made it a crime for "two or more persons" to band or conspire to go in disguise on the highway or the premises of another "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*

¹³⁷ See *Ableman v. Booth*, 62 U.S. 506 (1859); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

him by the Constitution or laws of the United States, or because of his having exercised the same . . ."¹³⁸ This was the same statute Justice Bradley, as ghost writer, had considered in *United States v. Hall*.

The indictment in *Cruikshank* alleged, among other things, violation of the right peaceably to assemble and to bear arms.¹³⁹ Another count alleged that the conspiracy was designed to prevent certain named Americans of African descent from voting.¹⁴⁰

In his circuit opinion, Bradley considered the Thirteenth, Fourteenth, and Fifteenth Amendments. He distinguished between granted rights—which could be directly protected by the Congress—and secured rights, like those in the Fourteenth Amendment, which could not. As to the Thirteenth Amendment, Bradley found a granted right: Congress could reach and punish private action designed to deprive persons of the rights of contract, holding property, etc., secured by the Civil Rights Act of 1866—*provided the deprivation was racially motivated*.¹⁴¹ As to other crimes, they were cognizable only in state courts unless “the state should deny to the class of persons referred to the equal protection of the laws. Then . . . congress could provide remedies for their security and protection.”¹⁴² But in cases of murder, assault, etc. the violence would have to be racially motivated. Otherwise, the case would be within the exclusive jurisdiction of the states.¹⁴³

This seems to limit redress under equal protection to state neglect plus racially motivated crimes. It would exclude politically motivated crimes of murder, assault, arson, etc.—the sort of crimes being aimed at white and black Republicans by the Klan’s political terror. White and black Republicans were being murdered, beaten, and more, because of their commitment to the Republican Party.

One case is representative of many. In North Carolina in 1870, Republican Superior Court Judge Albion Tourgée wrote to Senator Joseph Abbott. He told Abbott that his friend and colleague, Republican State Senator John W. Stephens, had been murdered by Klansmen in the grand jury room of the Caswell County courthouse. Stephens was white and a strong ally of black Republicans. “Another brave honest

¹³⁸ Act of May 31, 1870, ch. 114, 16 Stat. 140, § 6 (emphasis added).

¹³⁹ *United States v. Cruikshank*, 25 F. Cas. 707, 708 (C.C.D. La. 1874) (No. 14,897).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 711.

¹⁴² *Id.* at 711-12.

¹⁴³ *Id.* at 711.

Republican,” Tourgée wrote, “has met his fate at the hands of these fiends.”¹⁴⁴ Though warned of the danger and encouraged by friends and family to do so, Stephens refused to abandon his office and his politics. Tourgée said Stephens had told his friends “that 3,000 poor, ignorant, colored Republican voters in that county had stood by him and elected him, at the risk of persecution and starvation, and that he had no idea of abandoning them to the Ku-Klux.”¹⁴⁵ Tourgée recounted a long list of Klan crimes and pleaded for legal protection, for a massive force of detectives, and for military protection.¹⁴⁶

Cruikshank in the Supreme Court

The Supreme Court opinion in *Cruikshank* reiterated the distinction between state citizenship and citizenship of the United States¹⁴⁷ and insisted on dual sovereignty: “the powers which one [sovereign] possesses, the other does not.”¹⁴⁸ Sometimes, the Court conceded, a person could be “amenable to both jurisdictions for one and the same act.”¹⁴⁹

The indictment alleged that the defendants acted against the victims with intent to “hinder and prevent the citizens named in the free exercise and enjoyment of their ‘lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose.’”¹⁵⁰ But, the Court explained, the right to assemble (except, for example, to petition the national government) came from the states, and the obligation to protect it remained with the states. “The right [to assemble] was not created by the [first] amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States.”¹⁵¹ But, as was quite apparent by this time, the Reconstruction governments were simply too feeble to protect the liberties of citizens against organized and widespread Klan terror.

¹⁴⁴ Letter from Albion W. Tourgée to Senator Joseph C. Abbott (May 24, 1870), in UNDAUNTED RADICAL, *supra* note 10, at 47-48.

¹⁴⁵ *Id.* at 48.

¹⁴⁶ *Id.* at 51.

¹⁴⁷ *United States v. Cruikshank*, 92 U.S. 542, 549 (1876).

¹⁴⁸ *Id.* at 550.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 551.

¹⁵¹ *Id.* at 552.

Another count of the indictment alleged a conspiracy to deprive United States citizens of the right to bear arms. It was equally defective. The right to bear arms, the Court explained, “is not a right granted by the Constitution.” Citizens of the United States did not have the rights set out in the Bill of Rights. Instead, they merely had a guarantee that the national government could not infringe the rights. Whether or not to provide and protect the rights was up to the semi-sovereign state. *Barron v. Baltimore*, holding that the guarantees of the Bill of Rights did not limit the states, the Court announced, was still good law.¹⁵² Eight years after the ratification of the Fourteenth Amendment, it was “too late” to question *Barron*.¹⁵³ In this respect, the Court announced, the Fourteenth Amendment had changed nothing.

Another count of the indictment charged the defendants with killing victims with the intent to deprive them of life and liberty without due process of law and to deprive them of equal protection of the laws.¹⁵⁴ But, the Court explained, the United States had no duty to protect the lives and liberties of its citizens, including apparently from those who sought to kill them for *political* purposes. A racial motive had not been alleged. Protection against murder was a state matter. The Due Process Clause and Equal Protection Clauses merely limited state action. These added nothing to the rights of one citizen against another.¹⁵⁵ The requirement of a racial motive meant black and white Republicans in the South murdered for political reasons would too often be outside the protection of the federal laws. As we will see, some more limited theories remained viable for a time.

This was an early announcement of the state action syllogism. The Fourteenth Amendment limited state action and allowed Congress to legislate against states and state action. Klansmen and similar “private” terrorist groups were not states or state actors. Therefore, no direct power existed under the Fourteenth Amendment to reach private violence by politically motivated Klan-type groups aimed at the exercise of Bill of Rights liberties.

Recall again *Prigg v. Pennsylvania*. In that case, the Court found a constitutional and congressionally protectable right for slave-holders to get their escaped slaves back—a right that included self-help.¹⁵⁶ The

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 553.

¹⁵⁵ *Id.* at 554-55.

¹⁵⁶ *See Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 539 (1842).

implied right was based on the Fugitive Slave Clause banning any state (by law or regulation) from freeing fugitive slaves, and requiring the state to deliver the slave up. (The passive voice, “shall be delivered up,” could be read more comprehensively). The implied right further implied the power of Congress to protect it—even by punishing *private persons* who helped the escaping slave.¹⁵⁷ Unlike the Fugitive Slave Clause, according to the Court in *Cruikshank*, the Fourteenth Amendment did not allow the federal government to protect Fourteenth Amendment rights directly against private persons; and, at any rate, those rights did not include Bill of Rights liberties.¹⁵⁸

Cruikshank suggests that the government could directly protect rights granted (like those given to slaveholders), but not those merely secured against state denial. The right to the return of a fugitive slave was a granted right. The right to assemble freely was not.¹⁵⁹ The circuit court opinion by Justice Bradley in *Cruikshank* had suggested that private violence based on race might be reached under the Thirteenth Amendment if designed to prevent blacks from contracting, holding property, etc. And it seemed to suggest protection would exist for *racially inspired* murders (but not politically inspired ones) if the state law did not provide a remedy. In *Cruikshank*, the Supreme Court did not directly address these issues.

Another count alleged an intent to injure and oppress the black victims because, being qualified voters, they had voted in an election. It fared no better. There was no allegation that this was a federal election or that the action was based on race. (Indeed, it might have been, and probably was, because they were active Republicans). The Court had decided that there was no national right to vote belonging to citizens of the United States, but there was a right not to be discriminated against because of race.¹⁶⁰ Denial based on race had not been alleged.¹⁶¹

The Fourteenth Amendment could have been more promising. But, *Cruikshank* explicitly stripped the Bill of Rights out of the Fourteenth Amendment and made clear that these rights were not rights, privileges, or immunities of American citizens.¹⁶² It held that without a

¹⁵⁷ See *Ableman v. Booth*, 62 U.S. (21 How.) 506, 506 (1859).

¹⁵⁸ *Cruikshank*, 92 U.S. at 554-55.

¹⁵⁹ *Id.* at 551.

¹⁶⁰ *United States v. Reese*, 92 U.S. 214 (1876).

¹⁶¹ *Cruikshank*, 92 U.S. at 556.

¹⁶² *Id.* at 551-52.

claim of racial motive, equal protection could not reach private actors. In doing so the Court abridged liberty and equal right. The state action syllogism is plausible, though by no means the only reasonable interpretation. Even if state neglect survived under equal protection, the Court required that the crime have a racial motive.¹⁶³

The Court might have reached a different result. It might have held the Fourteenth Amendment guarantee of United States citizenship and the provision in the Constitution that the United States shall guarantee each state in the Union a republican form of government, plus application of the Bill of Rights to the states by the Fourteenth Amendment, meant that citizens had a right to political expression, association, and assembly related to state or national issues. So, Congress could protect these and related rights against private as well as state action aimed at them. As I have suggested:

Political terror should also activate congressional power under Article I, section 4 of the Constitution: "The United States shall guarantee to every State in this Union a Republican Form of Government." No state can be Republican where a minority is permitted to use tactics of terror to deny their opponents the rights of speech, press, association, and franchise and to thwart majority rule.¹⁶⁴

The Court might have held that by the Privileges or Immunities Clause, rights in the Bill of Rights and others were protected against state violation. Since they were protected against both state and federal violation, they could have been seen as rights of citizens of the United States. Under *Prigg*, a right implies a remedy and federal power to protect it, even against private persons. To prevent total federal jurisdiction over all crimes, the Court could have required the sort of specific intent Congress wrote into the Reconstruction acts.

There is evidence pointing in the opposite direction. An early version of the Fourteenth Amendment reported by the Joint Committee

¹⁶³ *Id.* at 554.

¹⁶⁴ Curtis, *The Klan, the Congress, and the Court*, *supra* note 107, at 1416 & n. 184. See also WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 24-27 (1972) (discussing the nature of republican government and the obligation imposed by the clause). *Id.* at 33 (discussing concern with mob violence). *Id.* at 42 (discussing delegitimizing extralegal violence). *Id.* at 57 (discussing securing the states against "dangerous commotions, insurrections and rebellions," according to James Wilson in the Constitutional Convention). *Id.* at 67 (stating that according to *Federalist* 21, the clause was designed to prevent violent changes in republican institutions). *Id.* at 67-68 (finding that the clause was designed to assure popular control of government and rule by majorities in the states with safeguards for the rights of minorities).

did not explicitly limit states but gave Congress power to secure to all persons equal protection in the rights of life, liberty, and property.¹⁶⁵ An objection to this provision was that it would allow Congress to legislate directly on all issues and so to preempt all subjects of state legislation.¹⁶⁶ Instead, the Congress adopted the current version of the Fourteenth Amendment. Some Republicans refused to vote for the 1871 Act and adopted a strong state action limitation on federal power, with no state neglect limit.¹⁶⁷

The Court's choice between covering all crimes under the Fourteenth Amendment or covering only race-based violence ignored a middle ground. The anti-Klan Acts did not attempt to cover any and all violations of state criminal law or any private violation of due process, equal protection, etc. Instead, for private violations, each required a specific intent to deprive the citizen of constitutional rights or equal protection of the laws. Referring to the Equal Protection Clause, Senator Edmunds of Vermont said that it meant that the citizen "shall have the protection of the law. Although the word is negative in form, it is affirmative in its nature and character."¹⁶⁸ Senator Edmunds noted that the Fourteenth Amendment secured the rights of "white men" as much as "colored men."¹⁶⁹ He insisted that under the Fourteenth Amendment the national government could

preserve the lives and liberties of white people against attacks by white people, against rapine and murder and assassination and conspiracy, contrived in order to drive them from the States in which they have been born or have chosen to settle, contrived in order to deprive them of the liberty of having a political opinion¹⁷⁰

The disorders in the South are not like the disorders in many other States, where there always are disorders, the results of private malice. The slaying of men [in the South], as a rule, is not because the murderer and the assassin have any hostility or quarrel with the person who is the victim; but it is one step in the progress of a systematic plan and an ulterior

¹⁶⁵ The full text of the Bingham prototype reads as follows: "The Congress shall have power to make all laws which shall be necessary and proper to secure the citizens of each state all privileges and immunities of citizens in the several states; and to all persons in the several states equal protection in the rights of life, liberty, and property." CURTIS, NO STATE SHALL ABRIDGE, *supra* note 45, at 62 (objections were directed only at the equal protection provision).

¹⁶⁶ *Id.* at 128-29.

¹⁶⁷ These included Rep. Farnsworth, Rep. Willard, and Sen. Trumbull. Curtis, *The Klan, the Congress, and the Court*, *supra* note 107, at 1412 (Rep. Garfield is a special case since he endorsed state neglect in theory and then voted for a statute that omitted it.).

¹⁶⁸ CONG. GLOBE, 42ND CONG., 1ST SESS. 697 (1871) (statement of Sen. Edmunds).

¹⁶⁹ *Id.* at 696.

¹⁷⁰ *Id.*

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purpose, and that is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter.¹⁷¹

Most framers of the Fourteenth Amendment supported provisions of the anti-Klan Acts that directly reached private persons who acted with the required specific intent.¹⁷²

Though the decision in *Cruikshank* rejected congressional power to reach private politically motivated conspiracies under the Fourteenth Amendment, it seemed to leave open attacks on black voters because they were black under the similarly worded Fifteenth Amendment. By this view, the Fifteenth Amendment would contain no state action syllogism. That was the opinion of Justice Bradley in his circuit court *Cruikshank* decision. He suggested that the Fifteenth Amendment granted a right not to be prevented from voting (even by private persons) based on race.¹⁷³ At first blush, this seems helpful. But, under the Fifteenth Amendment, Bradley explained that Congress

can regulate as to nothing else. No interference with a person's right to vote, unless made on account of his race . . . is subject to congressional animadversion. There may be a conspiracy to prevent persons from voting having no reference to *this discrimination*. It may include whites as well as blacks, or may be confined altogether to the latter. It may have reference to the particular politics of the parties. All such conspiracies are amenable to the state laws alone.¹⁷⁴

That was a perfect description of Klan violence, a vast conspiracy designed to deprive people, *for political reasons*, of the right to assemble, advocate, and vote. One lower court decision following the Bradley approach suggested that race had to be the *only* reason for the violence.¹⁷⁵ Klan violence was aimed at white and black Republicans.

¹⁷¹ *Id.* at 702. For more discussion of the debates and the contrasting positions on state action (including some Republicans framers who embraced the state action syllogism) and a more detailed discussion of alternatives to the approach the Court took in *Cruikshank*, see generally Curtis, *The Klan, the Congress, and the Court*, *supra* note 107, at 1397-425. For other discussions of state action see *id.* at 1425 n.234. For a fine book on *Cruikshank* and its background, see CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2009).

¹⁷² See Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 *HOFSTRA L. REV.* 1379, 1430-43 (2006).

¹⁷³ *United States v. Cruikshank*, 25 F. Cas. 707, 712 (C.C.D. La. 1874) (No. 14,897).

¹⁷⁴ *Id.* at 713 (emphasis added).

¹⁷⁵ Curtis, *The Klan, the Congress, and the Court*, *supra* note 107, at 1421, n.211 (from which the following language is taken: "Charge to Grand Jury-Civil Rights Act, 30 F. Cas. 1005, 1007 (C.C.W.D. 1875). The opinion despaired the lack of power in the federal government to protect citizens against, e.g., politically motivated murders, such as that

Hearings before Congress on Klan violence and speeches by Republicans in Congress had made this point clearly.¹⁷⁶ “Speaker after speaker, quoting witness after witness, told the same story: violence was aimed at whites and blacks as a means to regain political dominance.”¹⁷⁷

Representative Rainey of South Carolina was the first American of African descent elected to the House of Representatives. He agreed. If “the negroes . . . would only cast their votes in the interest of the Democratic party, all open measures against them would be immediately suspended, and their rights, as American citizens, recognized.”¹⁷⁸ But, he said, “we love freedom more, vastly more, than slavery.”¹⁷⁹

The text and history of the Fifteenth Amendment raised serious problems for a broadly protective Fifteenth Amendment approach. The framers of the Fifteenth Amendment had failed to ban literacy tests, property tests, poll taxes, read-and-understand statutes, and the rest. Senator Henry Wilson had proposed a version of the amendment that broadly protected the right to vote. It would have prohibited discrimination “among citizens of the United States in the exercise of the

of a wealthy young man killed because he had asked the governor to protect ‘negroes of his county who were being driven from their homes, their houses burned, and themselves murdered’ The judge suggested that the Bradley approach still held out the hope of protecting Americans of African descent from ‘violence upon the negro, *simply because he is such, finding its sole animus in his race and color*’ and that such violence ‘may be made penal by congressional enactment.’ (emphasis added). The judge suggested that the Supreme Court might still (as he hoped) find in the Thirteenth Amendment or the first clause of the Fourteenth the power to punish private persons where ‘life, liberty, and property are violently taken, solely on account of the race and color’ of the victim. This was, of course, important and worthwhile, but of no help to white and black Republicans targeted because of their political opinions and activities—which is exactly what the Klan and similar groups were up to. Reading a requirement of racial animus for private violence into Section 1 of the Fourteenth Amendment substantially undermined its potential against private violence. Similar problems existed under the Fifteenth Amendment. *Cf.*, *United States v. Miller*, 107 F. Cas. 913, 916 (1901) (‘It cannot be successfully contended that the amendment confers authority to impose penalties for every conceivable wrongful deprivation of the colored man’s right to vote. It is only when the wrongful deprivation is on account of race, color, or previous condition of servitude that congress may interfere and provide for its punishment’). Curtis, *The Klan, the Congress, and the Court*, *supra* note 107, at 1421, n.211.

¹⁷⁶ This issue is discussed alongside cited examples in Curtis, *The Klan, the Congress, and the Court*, *supra* note 107, at 1397-1420 (discussing Klan terror, the congressional reaction, the Enforcement Acts, and some court decisions).

¹⁷⁷ Curtis, *The Klan, the Congress, and the Court*, *supra* note 107, at 1400.

¹⁷⁸ *Id.* (quoting Rep. Rainey).

¹⁷⁹ *Id.*

elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or creed.”¹⁸⁰ But it was defeated.¹⁸¹

As we have seen, Bradley’s circuit court opinion in *Cruikshank* limited congressional power to enforce equal protection under the Fourteenth Amendment too. In spite of the text of the Fourteenth Amendment, the setting in which the anti-Klan Act was passed, and the clear statement of Senator Edmunds, it seems that for Bradley, the motive for the violence also had to be racial, not political.¹⁸² Still, as to attacks motivated *simply by race*¹⁸³ in cases where the state failed to provide protection, Bradley did not foreclose direct action against private violence under the Fourteenth Amendment.¹⁸⁴ While there might be scope for more limited future legislation and prosecution, in the short run, under *Cruikshank* political terrorists escaped.

Enforcement power predicated on state neglect raises serious problems. How is it to be proved? Must it be proved case by case? Must Congress legislate county by county or judicial district by judicial district? Or once Congress finds widespread politically inspired violence (as it had), could Congress simply pass a national act (as it did) and apply it to private actors as a curative and a preventative measure? Or did Congress need to target the act only in certain states or perhaps districts within a state and only after the political terrorism had occurred? If so, might the political terrorists capture power and elect their friends before new, narrowly targeted, acts could be passed?

Still, state neglect is an important qualification.¹⁸⁵ At this point the Court’s decisions did not clearly signal abandonment of blacks. Racially motivated attacks on the right to vote in state or federal elections might be directly prosecuted under the Fifteenth Amendment—because it “created” the right not to be denied the right to vote based on race. Racially motivated attacks on blacks might, perhaps, be directly prosecuted by the national government under the Fourteenth

¹⁸⁰ ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 95 (2000).

¹⁸¹ *Id.*

¹⁸² *United States v. Cruikshank*, 25 F. Cas. 707, 715 (C.C.D. La. 1874) (No. 14,897).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ For a book emphasizing that the Court had not definitively abandoned blacks before the 1890s, see generally PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* (2011).

Amendment in the case of state failure or neglect to protect. Some racially motivated violence could be prosecuted directly under the Thirteenth Amendment. What could not be effectively reached was the main problem—politically motivated attacks on black and white Republicans.

The Court had not simply abandoned protection of blacks. But it had largely abandoned federal judicial protection of the black-white political coalition attempting to govern the Southern states. Voting in federal elections could potentially be protected, and sometimes was.¹⁸⁶ Race-based crimes could perhaps be reached under equal protection if one could prove state neglect. Politically-motivated crimes were another matter. But losing state governments was losing quite a lot—sheriffs, judges, prosecutors, legislatures, governors, and more. In theory, after the political terrorists took over, blacks might still have substantial and adequate protection under Bradley's truncated view of federal power. In practice, it did not turn out that way.

At any rate, Court decisions were simply one factor in the collapse of democracy in the South. A major factor was the unwillingness or inability of the national government to continue to use the substantial force needed to protect the Republicans' Reconstruction state governments. Vernon Lane Wharton describes the massive and awful political violence that met black and white Mississippi Republicans in 1875-1876. In the face of desperate pleas from mostly black Republicans and after state efforts had failed to stem the violence, Governor Adelbert Ames turned to the federal government. During negotiations, Grant's Attorney General Edward Pierrepont announced, "[t]he whole public are tired out with these annual autumnal outbreaks in the South."¹⁸⁷ Twenty years later Ames wrote that this "flippant utterance of Attorney General Pierrepont was the way the executive branch of the National government announced that it had decided that the reconstruction acts of congress were a failure."¹⁸⁸ Democracy lingered longer in some Southern states than in others. National support ebbed and flowed. By the turn of the century, blacks were being systematically removed as voters in all Southern states. For Tourgée,

¹⁸⁶ *Ex parte Yarbrough*, 110 U.S. 651, 652 (1884); BRANDWEIN, *supra* note 185, at 144-53 (discussing federal voting rights enforcement in federal elections in the 1870s and 1880s).

¹⁸⁷ WHARTON, *supra* note 107, at 193-94.

¹⁸⁸ *Id.*

Cruikshank was clearly another case supporting his view of the Court as an enemy of liberty and equal right.¹⁸⁹

United States v. Harris (1883)

In 1883, the Court decided *United States v. Harris*.¹⁹⁰ A lynch mob in Tennessee had broken into a jail and killed one prisoner and maimed and beaten others. Members of the mob were indicted in federal court and charged under section 5519 of the Revised Statutes of the United States, which punished persons who conspired “for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws” or to prevent or hinder “the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws.”¹⁹¹

The Court held the statute unconstitutional.¹⁹² It said congressional power to enact laws was limited to powers delegated in the Constitution or necessary and proper to carry out delegated powers.¹⁹³ It cited the Tenth Amendment.¹⁹⁴ The government argued that power to enforce could be found in Sections One and Five of the Fourteenth Amendment. In this case, state authorities were unable to protect the prisoner, so one might find this failure to be state action. Or, one might conclude that citizens of the United States as such were entitled to equal protection of basic rights such as the right to a trial according to due process rather than by a lynch mob. The Court rejected the claim of power under the Fourteenth Amendment and invoked the state action syllogism. “It is perfectly clear,” the Court announced, “from the language of the first section that its purpose . . . was to place a restraint upon the action of the States.”¹⁹⁵ The Court cited Justice Bradley’s circuit court opinion in *Cruikshank*:¹⁹⁶ “It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the State, not a guaranty against the com-

¹⁸⁹ ALBION W. TOURGÉE, *Brief of Plaintiff in Error (1895)*, in UNDAUNTED RADICAL, *supra* note 10, at 317.

¹⁹⁰ 106 U.S. 629 (1883).

¹⁹¹ *Id.* at 632.

¹⁹² *Id.* at 636-37 (quoting U.S. CONST. art. I, §8; U.S. CONST. amend. X).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 638.

¹⁹⁶ *Id.* at 638 (citing *United States v. Cruikshank*, 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897)).

mission of individual offenses.”¹⁹⁷ The power under the Fourteenth Amendment did not allow Congress to pass laws to suppress crime within the states.¹⁹⁸ That was so, apparently, even for crimes committed with the specific intent of denying equal protection or due process of law, and done with the intent to substitute lynch law for due process of law. The Court’s position was crystal clear: “The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there.”¹⁹⁹ Of course, the Reconstruction governments had proved unable to protect citizens and after they were “redeemed” the states were too often unwilling to do so. In any case, the failure or inability of state authorities to protect the prisoners appeared on the face of the record. In *Harris*, the Court noted that there was no allegation of racial motive.²⁰⁰ So the Court found a statute that had been supported by a great majority of Republicans (including a number of framers of the Fourteenth Amendment) unconstitutional on its face, even as applied to a case where the state was unable or unwilling to provide equal protection.

In any case, *United States v. Harris* is still another case that supports the Tourgée thesis.²⁰¹

As we have seen, before *Slaughter-House*²⁰² and *Cruikshank*,²⁰³ Justice Woods as a circuit judge had reached a very different conclusion—in an opinion largely ghostwritten by Justice Bradley.²⁰⁴ That case had held that rights of speech and assembly were privileges and immunities of citizens of the United States, and those guarantees plus equal protection allowed direct prosecution of individual action aimed at punishing or suppressing the exercise of those rights.²⁰⁵ The statute was

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 639.

²⁰⁰ *Id.* at 641.

²⁰¹ For a contrary view in a deeply researched book that makes a qualified effort to defend the role of the Court up to 1896, see generally BRANDWEIN, *supra* note 185. For the *Harris* case, see *id.* at 154-60. Professor Brandwein argues that the Court did not definitively abandon blacks before 1896 and that the concept of state neglect provided a route for congressional legislation to protect them. The point here, however, is that existing statutes were limited or struck down at a time when there was little hope of new ones and that the Court played a part in abandoning Republican state governments.

²⁰² 83 U.S. 36 (1873).

²⁰³ 25 F. Cas. 707, 708 (C.C.D. La. 1874) (No. 14,897).

²⁰⁴ *United States v. Hall*, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282); see also CURTIS, NO STATE SHALL ABRIDGE, *supra* note 45, at 172.

²⁰⁵ *Hall*, 26 F. Cas. at 79-82; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 45, at 172.

not written in terms of state neglect, and the indictment did not mention it.²⁰⁶ But Bradley had changed his mind, and *Cruikshank* and other precedents had undermined Woods' earlier, more protective approach.

The Court in *Harris* considered other bases of Congressional power. It held the Thirteenth Amendment could not justify the statute. This was because the statute protected whites as well as blacks and could be violated as well by former slaves.²⁰⁷

Lynching "became quite common in the 1880s, with roughly 60 or so deaths by public hanging each year," and the practice continued and the number of victims rose substantially in the 1890s, though the numbers decreased in the early 1900s.²⁰⁸ Summary justice became more grisly, however, including burning at the stake.²⁰⁹ The victims of lynching and burning at the stake were denied due process and equal protection, but under the state action syllogism, this was a matter for the semi-sovereign state, even apparently where the state had failed to protect. The lynch mobs were not the state.²¹⁰ Of course, they were assuming and usurping a state function, the trial of crimes and punishment of those found guilty by the mob. Lynching was not limited to the South.

The Civil Rights Cases (1883)

On the death of Massachusetts Senator Charles Sumner, who had long advocated outlawing racial discrimination in a variety of settings, Congress passed the Civil Rights Act of 1875. The Act protected Americans against discrimination in inns, public conveyances, and places of public entertainment. Congress refused to include a ban on school segregation.²¹¹

²⁰⁶ *Hall*, 26 F. Cas. at 79-80.

²⁰⁷ *United States v. Harris*, 106 U.S. 629, 641 (1883).

²⁰⁸ MICHAEL PERMAN, *STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888-1908*, at 268-69 (2001).

²⁰⁹ *Id.*

²¹⁰ For a different view and a description of the actual facts in the *Harris* case, as perhaps distinguished from those the Court assumed, see BRANDWEIN, *supra* note 185, at 153-60. Though the analysis in Professor Brandwein's book differs from that suggested here, it is a treasure trove of information and perspectives about the courts, state action, and Reconstruction.

²¹¹ *Id.* at 62.

Writing for the Court, Justice Bradley struck down the statute.²¹² Not until 1964, acting this time under the Commerce Clause as well as the Fourteenth Amendment, did Congress pass and the Court uphold (on a Commerce Clause theory) a law banning discrimination based on race, religion, or national origin in places of public accommodation.²¹³

As to the Fourteenth Amendment, Bradley invoked the state action syllogism. Public conveyances, inns, and theaters were not the state. The Fourteenth Amendment banned only state action.

[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.²¹⁴

Bradley seems to have left the door open a crack for a claim based on state neglect to enforce the public accommodation rights, assuming (without deciding) that a right to equality in this sphere existed.

Justice Bradley addressed the Thirteenth Amendment prohibition against slavery second. The Thirteenth Amendment argument for upholding the 1875 Act was straightforward. The Thirteenth Amendment was not limited to state action, and Section Two gave Congress power to enforce it. It allowed Congress to legislate directly to protect freedom. It could attack not only the institution, but also its “badges and incidents,” as Republicans argued in the 38th Congress.²¹⁵

Discrimination against blacks was based on assumptions as to their inferiority and their unfitness to associate with the white race, as *Dred Scott* put it.²¹⁶ Indeed, Alexis de Tocqueville had argued that in the United States, unlike in the ancient world, slavery was conjoined with color.²¹⁷ This meant that the stigma of slavery followed free Americans

²¹² The Civil Rights Cases, 109 U.S. 3, 4-26 (1883).

²¹³ *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding Civil Rights Act of 1964 as applied to hotel accommodations); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding Act as to accommodation at a barbecue restaurant).

²¹⁴ The Civil Rights Cases, 109 U.S. at 13.

²¹⁵ *Id.* at 20-21.

²¹⁶ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

²¹⁷ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 400 (1835) (Gerald E. Bevan, trans., 2003).

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of African descent and made it more difficult to assimilate them as free citizens with all the rights of citizens.²¹⁸

In contrast, Justice Bradley insisted on a narrow definition of slavery. It involved compulsory service for the master, restraint on movement except as approved by the master, disability to make contracts, to hold property, to have standing in court, or to be a witness against a white person.²¹⁹ The “only 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, and without any sanction or support from any state law or legislation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country?²²⁰

The Court's answer was no. To hold otherwise would run “the slavery argument into the ground.”²²¹ After all,

[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 progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.²²²

Bradley may have thought public accommodation rights were “social rights,” not the sort of basic civil rights Congress might directly protect under the Thirteenth Amendment.

In an important book, Professor Pamela Brandwein has attempted to contextualize Bradley's “special favorite” language by suggesting that some contemporary critics and the Republican *Chicago Tribune* claimed the Civil Rights Act of 1875 did not protect Jews or the Irish, for example, although they were sometimes the victims of discrimination in public accommodations.²²³ Hence, the invocation of special rights. Here it is worth recalling the language of the Act:

[A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; *subject only to the conditions and*

²¹⁸ *Id.*

²¹⁹ The Civil Rights Cases, 109 U.S. at 22.

²²⁰ *Id.* at 23.

²²¹ *Id.* at 24.

²²² *Id.* at 25.

²²³ BRANDWEIN, *supra* note 185, at 173-75.

*limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.*²²⁴

Taking the statute literally, Jews and the Irish are persons within the jurisdiction entitled to the full and equal enjoyment of public accommodations. In addition, in the Nineteenth Century, “race” was commonly used as equivalent to nationality—treating Finns, Germans, the Irish, and Jews as races.²²⁵ If the statute were ambiguous, courts might reasonably look at the title and the preamble to determine the intent of the drafters.²²⁶ The title of the Act was “An act to protect all citizens in their civil and legal rights.”²²⁷ The preamble referred to the duty of government to “mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political”²²⁸

Justice Harlan’s dissent reversed the order followed by Justice Bradley. He began with the Thirteenth Amendment. Before considering it directly, he looked at the Fugitive Slave Clause and the ways the Court had used it to protect the rights of the slave owner. The Fugitive Slave Law of 1793 had established a mode of recovering a fugitive slave and had provided for punishment for any person who hindered the master in recovering his slave.²²⁹

Justice Harlan cited the rules from the *Prigg* case. Since the right of the master to get his slave back was provided by the Clause, the master could seize the slave and carry him back to slavery, regardless of any state law. Since the right to have the slave delivered up was held to be guaranteed by the Constitution, the national government was clothed with the power to enforce it.²³⁰ In contrast, the attorney for Pennsylvania had argued that the obligation to return the slaves was on the states and for the states; and that the general government was limited to judicial action to correct state laws that freed true slaves.²³¹ Harlan noted that the Fugitive Slave Act of 1850 had provided compre-

²²⁴ Act of Mar. 1, 1875, ch. 114, 18 Stat. 114 335, 336 (emphasis added).

²²⁵ *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610-12 (1987) (citing contemporaneous dictionaries and encyclopedias).

²²⁶ 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:4 (7th ed. 2007 & Supp. 2011-2012).

²²⁷ Act of Mar. 1, 1875, ch. 114, 18 Stat. 114 335, 335.

²²⁸ *Id.*

²²⁹ *The Civil Rights Cases*, 109 U.S. 3, 28 (1883) (Harlan, J., dissenting).

²³⁰ *Id.* at 29.

²³¹ *Id.* at 29-30.

hensive legislative protection for the rights of the slave owner,²³² including punishment of private persons assisting the slave to escape. In *Ableman v. Booth*, the Court upheld the Act in all its provisions.²³³

Harlan was well aware of the irony:

We have seen that the power of Congress, by legislation, to enforce the master's right to have his slave delivered up on claim was implied from the recognition of that right in the national Constitution. But the power conferred by the Thirteenth Amendment does not rest upon implication or inference.²³⁴

The Thirteenth Amendment was designed "to establish universal freedom."²³⁵ It allowed Congress to protect freedom and "the rights necessarily inhering in a state of freedom."²³⁶ Harlan continued, "there are burdens and disabilities which constitute badges of slavery and servitude," and the express power delegated to Congress to enforce the Thirteenth Amendment could be used to eradicate these.²³⁷

Harlan conceded that the Thirteenth Amendment did not empower Congress to regulate all civil rights that citizens enjoy or may enjoy in the states. But

since slavery . . . was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.²³⁸

So Congress, by legislation, could protect "that people against the deprivation, because of their race, of any civil rights granted to other freemen in the same State"²³⁹

The Court in the *Civil Rights Cases* had based the Fourteenth Amendment aspect of its decision on the lack of state action requiring discrimination. *Plessy v. Ferguson* raised the state action issue directly. Louisiana had required segregated railway cars.

In 1866, the United States Congress had a mixed record on segregation. It provided schools for black children in the District of Colum-

²³² *Id.* at 30.

²³³ *Id.*

²³⁴ *Id.* at 33-34 (emphasis omitted).

²³⁵ *Id.* at 34.

²³⁶ *Id.*

²³⁷ *Id.* at 35.

²³⁸ *Id.* at 36.

²³⁹ *Id.* (emphasis omitted).

bia, a huge step forward since before no schools had been provided for black children. But it segregated them.²⁴⁰ The Senate galleries had been closed to Americans of African descent, but the Senate opened them to blacks, another huge step forward. Still, they were apparently segregated at the time the Senate passed the Fourteenth Amendment and sent it to the states.²⁴¹ Streetcars are the closest analogy to the railway cars in *Plessy*, and the Congress had banned segregation in streetcars.²⁴²

In *Plessy*, the majority upheld Louisiana's mandatory segregation law. In this case, Tourgée represented the plaintiff. The Court explained that

[a] statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.²⁴³

This proved entirely wrong. The racial caste system soon expanded. It did tend to produce “slavery by another name.”²⁴⁴ *Plessy*, like the *Civil Rights Cases* before it, distinguished civil rights (the right to contract and testify, freedom of movement, etc.) from social rights.²⁴⁵ There was support for this view among some Republicans,²⁴⁶ though the line between civil and social rights is far from clear. But the idea that the anti-caste principle of the Fourteenth Amendment could survive pervasive segregation in supposedly social rights was illusory. The system

²⁴⁰ See CONG. GLOBE, 42ND CONG., 2ND SESS. 353 (1872) (statement of Sen. Bayard) (opposing a bill to integrate D.C. schools and citing the Act of 1866 setting up and funding schools of black children); *id.* at 2539 (statement of Sen. Sumner) (advocating a bill to integrate schools in the District); see also DAVISON M. DOUGLAS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865-1954, at 70-73 (2005) (discussing other states' segregated schools at the time).

²⁴¹ CONG. GLOBE, 39TH CONG., 1ST SESS. 766 (1866) (statement of Sen. Johnson) (“Why is it that [sic] separate places for the respective races even in your own Chamber?”).

²⁴² Act of Mar. 3, 1865, ch. 119, 13 Stat. 536, 537 (prohibiting segregation on streetcars in the District of Columbia); John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws,”* 1972 WASH. U. L. Q. 421, 453 (1972) (discussing the integration of streetcars in the District of Columbia).

²⁴³ *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896).

²⁴⁴ See, e.g., DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

²⁴⁵ *Plessy*, 163 U.S. at 551-52.

²⁴⁶ BRANDWEIN, *supra* note 185, at 3, 71-85 (discussing the civil right-social right issue).

infected equality before the law in many areas, including the criminal justice system.

As to the Fourteenth Amendment, the Court saw the question as “whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature.”²⁴⁷ The state could act with reference to usages, customs, and traditions of the people and with a view to protecting the public peace.²⁴⁸ By that standard, the law was not unreasonable, “or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia”²⁴⁹

The fallacy in the plaintiff’s argument was “the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.”²⁵⁰ If that were so, it was only because “the colored race chooses to put that construction upon it.”²⁵¹ At any rate, a decision for the plaintiff would do no good and some harm. “Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences”²⁵² Tourgée had argued that the same principles would allow the state to require separate cars for people of different hair color or who are aliens or to require houses of blacks to be painted black and those of whites to be painted white, or to require the races to use separate sides of the street. No problem, the Court answered. “[E]very exercise of the police power must be reasonable.”²⁵³

Justice John Marshall Harlan dissented, often agreeing with points made in Tourgée’s brief. The railroad was a public highway, and the corporation that operated railroads was engaged in a public function.²⁵⁴ Traveling on this highway without race discrimination was a public right. In connection with civil rights, the Constitution did not permit public authorities to know the race of persons entitled to enjoy those rights.²⁵⁵ The Thirteenth Amendment “does not permit the withholding or the deprivation of any right necessarily inhering in free-

²⁴⁷ *Plessy*, 163 U.S. at 550.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 550-51.

²⁵⁰ *Id.* at 551.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 550.

²⁵⁴ *Id.* at 553.

²⁵⁵ *Id.* at 554.

dom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery”²⁵⁶

Louisiana had argued that the law did not discriminate—blacks could not ride with whites, but whites equally could not ride with blacks. For Harlan, however, what was going on was clear. “[U]nder the guise of giving equal accommodation for whites and blacks,” the statute was designed to force blacks to keep to themselves.²⁵⁷ The statute interfered with personal liberty. “If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so.”²⁵⁸ No government, acting on grounds of race, could prevent their choice “without infringing the personal liberty of each.”²⁵⁹

Plessy denied freedom of association, the liberty of white and black Americans to ride side by side on the same railroad car. Though separate but equal supposedly treated both races equally, in fact, it stigmatized Americans of African descent. The statute infringed both liberty and the right of Americans of African descent to equality. *Plessy* is still another case supporting the Tourgée thesis.

Voting and Jury Service.

Jury Service

In 1879, in the case of *Strauder v. West Virginia*,²⁶⁰ (decided before the 1883 *Civil Rights Cases* and the 1896 decision in *Plessy*) Taylor Strauder, “a colored man,” had been indicted for murder. West Virginia law limited jurors to white males; Strauder had moved to quash the jury panel because all Americans of African descent were barred from jury service. The Court held the Fourteenth Amendment, like the Thirteenth and Fifteenth, was “one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.”²⁶¹ The Fourteenth Amendment “not only gave citizenship and the privileges of citi-

²⁵⁶ *Id.* at 555.

²⁵⁷ *Id.* at 557.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ 100 U.S. 303 (1879). *Dicta* in *Strauder* that jury service could be limited to men, was disapproved in *Taylor v. Louisiana*, 419 U.S. 522 (1975).

²⁶¹ *Strauder*, 100 U.S. at 306.

zanship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.”²⁶² The words of the amendment were

prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, —the right to exemption from unfriendly legislation against them distinctively as colored, —exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.²⁶³

The West Virginia statute was such a discrimination. If a state with a majority black population excluded white jurors, the Court said, no one would doubt that the exclusion denied white men the equal protection of the laws.²⁶⁴

The West Virginia Constitution guaranteed a right to a jury trial; the Court noted that “the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure,” and the jury was “a body of men composed of the peers or equals” of the person they were summoned to judge.²⁶⁵ The Court saw that “prejudices often exist against particular classes in the community” that could affect jury decisions.²⁶⁶ Exclusion of blacks from the jury panel increased the prejudice that former slaves were likely to encounter.²⁶⁷

The Fourteenth Amendment spoke in general, comprehensive terms. Though its language was prohibitory, “every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.”²⁶⁸ The Court continued, “[a] right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress. *Prigg. v. The Commonwealth of Pennsylvania*”²⁶⁹ *Strauder* is an exception to the Tourgée thesis.

²⁶² *Id.* at 306-07.

²⁶³ *Id.* at 307-08.

²⁶⁴ *Id.* at 308.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 309.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 310.

²⁶⁹ *Id.* (citing *Prigg v. Commonwealth*, 41 U.S. (16 Pet.) 539 (1842)).

Of course, Tourgée knew that he was being somewhat hyperbolic when he described the Court as a consistent enemy of liberty and equal right. He had cited *Strauder* in his brief in *Plessy*.²⁷⁰

In 1880, in *Ex parte Yarbrough*,²⁷¹ the defendants were Klansmen who had severely beaten a black voter. The Court held that for national elections under Article I, Section 4 of the Constitution, the government could protect the right of voters from private violence. Here the Congress had undertaken “to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself.”²⁷² As to the Fifteenth Amendment, the Court held it did create a federal right that could be enforced against private persons—the right not to be maltreated because of race for having exercised the Fifteenth Amendment right to vote. “Congress,” the Court announced, “has the power to protect and enforce that right.”²⁷³ The state action syllogism did not apply in any of its incarnations. Since this was a federal election, the federal government could protect voters; since the attack was racially motivated, the federal government could directly punish private persons. In *Yarbrough*, the Court decided a voting case in a way that advanced liberty and equality. The Court rejected the state action syllogism for racially motivated attacks on black voters, and it protected voters in federal elections, regardless of race.²⁷⁴ The decision advanced liberty and equality, though only in the Court’s previously circumscribed spheres—national elections or racial motivation.

The record of the Court in the 1870s and 1880s was mixed and far from providing full or robust protection for the gains of Reconstruction. But things got much worse in the 1890s and following. In 1903 in *James v. Bowman*,²⁷⁵ the Court held the Congress could not punish private persons who used violence to punish or prevent blacks from voting. The Court seemed to apply the state action syllogism to the Fifteenth Amendment, though the decision is ambiguous on that point. In subsequent cases, state action barred enforcement against private persons under the Fifteenth Amendment.²⁷⁶

²⁷⁰ TOURGÉE, *supra* note 189, at 322.

²⁷¹ 110 U.S. 651 (1884).

²⁷² *Id.* at 666.

²⁷³ *Id.* at 665.

²⁷⁴ *Id.* at 666-67.

²⁷⁵ 190 U.S. 127 (1903).

²⁷⁶ Compare *id.* at 139, with BRANDWEIN, *supra* note 185, at 189-90.

In the late nineteenth and early twentieth centuries, elites in Southern states had used violence and election fraud as tools to regain political dominance. Once successful in dislodging Republicans, they followed political terror with legal devices to disenfranchise Americans of African descent. These devices included poll taxes, literacy tests, disqualification for minor crimes, white-only Democratic primaries, grandfather clauses, and others.²⁷⁷ Bad as these devices were, there is no reason to think they were neutrally applied.

In *Williams v. Mississippi*,²⁷⁸ Henry Williams claimed that the grand jury that indicted him had been selected in a racially discriminatory manner because the grand jury list came from the voting rolls from which virtually all blacks had been excluded. Mississippi had held a disfranchising constitutional convention. As the Mississippi Supreme Court had said in a passage quoted in *Williams*, the state constitutional convention had, within the limits of the Fifteenth Amendment, “swept the field of expedients, to obstruct the exercise of suffrage by the negro race Restrained by the federal constitution from discriminating against the negro race, the convention discriminates against its characteristics”²⁷⁹ The Supreme Court held “nothing tangible can be deduced from this.”²⁸⁰ Mississippi was simply designing rules within the Fifteenth Amendment with the purpose of excluding blacks.²⁸¹ Under modern equal protection law, proof of a racially discriminatory purpose would shift the burden of proof, requiring the state to prove by a preponderance of the evidence that the section would have been enacted without a discriminatory purpose.²⁸² The case is still another example, supporting a modified version of the Tourgée thesis, that the claim that the Court was *usually* an enemy to liberty and equal right.

In subsequent cases, the Court continued its permissive approach to disfranchisement, with the exception of cases where racial discrimi-

²⁷⁷ See, e.g., PERMAN, *supra* note 208, at 84, 108-10, 125, 131, 138, 140, 164-66, 183, 212, 214-15 (discussing literacy test); *id.* at 63-67, 68, 83, 88, 140-44, 164, 258-59 (discussing poll tax).

²⁷⁸ 170 U.S. 213 (1898).

²⁷⁹ *Id.* at 222.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 222-23.

²⁸² See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (provision in the 1901 Alabama Constitution that disenfranchised persons convicted of any crime involving moral turpitude struck down as violating equal protection since a racially discriminatory purpose was proved and the state failed to show that the provision would have been enacted even without a purpose to discriminate against Americans of African descent).

nation was apparent on the face of the statute. Unfortunately, the Fifteenth Amendment had failed to outlaw literacy tests, read and “understand” clauses, property or taxpaying requirements, and other devices that could be used to disfranchise.²⁸³ So Southern states claimed, falsely, that they were strictly following the Fifteenth Amendment as they set out to disenfranchise as many blacks as possible.

In 1902, after Alabama’s disfranchising 1901 constitution, the registrars refused to register Jackson Giles as a voter, even though he had voted in Montgomery, Alabama for thirty years.²⁸⁴ Giles sued, alleging that the refusal to register him was part of a scheme to disfranchise black voters and that he, along with a large number of qualified blacks, had arbitrarily been rejected. Giles had sought injunctive relief, registration of himself and other blacks as voters, and a declaration that the fraudulent scheme was void. The Court rejected the proposed request for two reasons. First, if the sections of the Alabama Constitution concerning registration were illegal and void, the Court said it could not attempt to fix it by adding qualified black voters. To do so would make the Court a party to a fraudulent scheme.²⁸⁵ Second, the Court said that the Court could not effectively enforce its order. “Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.”²⁸⁶

Pursuing the damage route seemingly suggested by the Supreme Court, Giles sued for \$5,000 in damages and made a separate claim for a writ of mandamus ordering the registrars to register him and other black voters.²⁸⁷ The Alabama Supreme Court dismissed both claims.²⁸⁸ If Giles were correct and the provisions of the Alabama Constitution of 1901 violated the Fourteenth and Fifteenth Amendments, the Alabama Court opined, then they were void. The result was that the registrars would lack authority to register Giles under the void provisions. The United States Supreme Court affirmed the decision of the Alabama

²⁸³ KEYSSAR, *supra* note 180, at 95-102 (discussing the failure to enact a broadly protective Fifteenth Amendment).

²⁸⁴ SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 69 (3d ed. 2007).

²⁸⁵ Giles v. Harris, 189 U.S. 475, 486-87 (1903).

²⁸⁶ *Id.* at 488.

²⁸⁷ Giles v. Teasley, 136 Ala. 164, 164-65 (1903).

²⁸⁸ *Id.* at 166.

Court.²⁸⁹ The case is still another supporting the modified version of the Tourgée thesis.

In addition to the elusive damage action, the Court in *Giles* had suggested an appeal to the political process. In 1902, in South Carolina, after disfranchisement, a defeated candidate for the United States House of Representatives tried that route. He alleged that the new South Carolina Constitution had resulted in disfranchising thousands of voters in his district, in violation of the 1868 Reconstruction Act. The House Committee on Elections suggested that the defeated candidate take his complaint to the courts. “[A] legislative body is not the ideal body to pass judicially upon the constitutionality of the enactments of other bodies”; instead, any disfranchised voter who was able to vote in 1868 could attempt to register and if his right were denied, he should “bring suit in a proper court for the purpose of enforcing the right or recovering damages if he is denied.”²⁹⁰ The Court was usually the enemy of liberty and equal right, but it was not alone.

Even before constitutional disfranchisement, violence, intimidation, economic pressure, and threats had diminished the Republican and black vote in many former Confederate states. In the Revolution of 1875, Mississippi was “redeemed” by violence, threats, and attacks on Republican meetings and parades, and worse. The vote in six mostly black counties declined as follows: Amite: in 1873, 1093 votes, in 1876, 73 votes; Lowndes: in 1873, 2723 votes, in 1876, 13 votes; Madison: in 1873, 2323 votes, in 1876, 13 votes; Tallahatchie: in 1873, 840 votes, in 1876, 1 vote; Warren: in 1873, 4709 votes, in 1876, 623 votes; Yazoo: in 1873, 2433 votes, in 1876, 2 votes.²⁹¹ In Louisiana, though intimidation and violence had greatly reduced black voting, in 1888 blacks were still registered to vote. As a result, “their votes could be stolen by Democratic election officials, as was the general practice in black-majority districts.”²⁹²

The effect of disfranchisement was a dramatic reduction of registered black voters. “Three years after Mississippi’s [disfranchising] convention, the number of African Americans who registered had dwindled to 8,965 out of a total black population in the state of 747,720, that is, about 6 percent of the eligible adult males.”²⁹³ In Vir-

²⁸⁹ *Giles v. Teasley*, 193 U.S. 146, 167 (1904).

²⁹⁰ ISSACHAROFF, KARLAN & PILDES, *supra* note 284, at 71-72.

²⁹¹ WHARTON, *supra* note 107, at 201.

²⁹² PERMAN, *supra* note 208, at 127-28.

²⁹³ *Id.* at 313.

ginia the year after the constitutional convention, registration dropped to 21,000 and to half that amount in the next year.²⁹⁴ In Louisiana, after the 1898 constitution, the black vote dropped to 5320.²⁹⁵ In Louisiana, there were 127,923 registered black voters and 126,884 registered white voters in 1888, but by 1910, only 730 blacks were registered to vote.²⁹⁶

An intended effect of disfranchisement was to torpedo the possibility of a coalition between black voters and some whites. Indeed, according to Michael Perman and other scholars, disfranchisement (and violence and fraud) had been selected by leaders of the state Democratic parties to ensure their political domination.²⁹⁷ Segregation had a similar purpose and effect: to divide blacks from actual and potential white allies by “stigmatizing blacks as social pariahs.”²⁹⁸ Bradley’s opinion for the Court in the *Civil Rights Cases*, with its excision of public accommodation rights from rights protected by the Thirteenth Amendment, had been a step in this direction. Legally enforced segregation quickly spread from railroad cars to streetcars, steamboats, waiting rooms, and other venues.²⁹⁹

In the debates on the 1871 KKK Act, Senator Ames of Mississippi had noted attacks on Republican speakers and meetings in Mississippi making it impossible to advocate Republican principles.³⁰⁰ Though whites were also victims, Ames said Americans of African descent had the most to lose. “And when this ‘white man’s party’ shall dominate, should it ever, you will see class legislation so harsh and so cruel as . . . to force the colored people into a serfdom worse than slavery”³⁰¹ Ames was prophetic. Without the seizure of political power by violence and intimidation, followed by disfranchisement, it is quite unlikely that the virtual re-enslavement of black men that occurred in a number of Southern states would have occurred—including the arrest of a hundred thousand or more black men for minor or trivial crimes such as

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ ISSACHAROFF, KARLAN & PILDES, *supra* note 284, at 65.

²⁹⁷ PAUL ESCOTT, *MANY EXCELLENT PEOPLE: POWER AND PRIVILEGE IN NORTH CAROLINA, 1850-1900*, at 265 and chapter 10 (1988) (discussing the Democratic elite’s response to democratic and bi-racial politics); PERMAN, *supra* note 208, at 12-22.

²⁹⁸ PERMAN, *supra* note 208, at 248.

²⁹⁹ *Id.* at 264-69.

³⁰⁰ CONG. GLOBE, 42ND CONG., 1ST SESS. 196 (1871) (statement of Sen. Ames).

³⁰¹ *Id.* at 197.

vagrancy and selling and sending those men to forced labor in mines, mills, lumber camps, and other establishments.³⁰²

During Reconstruction, state support for black and whites schools in Southern states was typically equivalent. After the overthrow of Reconstruction and disfranchisement, the picture was very different. Michael Klarman reports that

[b]efore black political power was nullified in the South, public funding for black and white education remained nearly equal The disfranchisement of blacks removed political constraints on the racially discriminatory administration of public school funds By 1915, per capita spending on white pupils was roughly three times that on black pupils in North Carolina, six times in Alabama, and twelve times in South Carolina. Incredibly, these disparities were mild in comparison with other inequalities, such as spending on physical plants, equipment, and transportation.³⁰³

In the case of denial of the right to vote to Americans of African descent, by around 1900 the Court was, as Tourgée noted, an enemy of liberty (the right to vote) and equality (the equal right to participate). These cases are more examples supporting the qualified version of Tourgée's thesis.

But the Court was not entirely consistent. The Court looked at the world with special spectacles. It could see racial discrimination in the franchise or in juries if it was clearly apparent from the face of the statute. For example, in *Guinn v. United States*,³⁰⁴ Oklahoma had a grandfather clause; the law required a literacy test, but exempted those who in 1866 were entitled to vote or whose lineal ancestors had been entitled to vote in 1866. This obviously discriminated against blacks and was too much for the Supreme Court.³⁰⁵ The Court struck down obvious cases of jury discrimination. But in the case of voting and juries, lacking facial discrimination, the Court was often unwilling to confront what was going on.³⁰⁶

³⁰² See generally BLACKMON, *supra* note 244.

³⁰³ MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 43, 45 (2004).

³⁰⁴ See 238 U.S. 347 (1915).

³⁰⁵ *Id.*

³⁰⁶ KLARMAN, *supra* note 303, at 42 (“[O]ther decisions . . . largely nullified *Strauder* [on jury service] by making such discrimination virtually impossible to prove.”). In addition, since juries were often selected, at least in part, from registered voters, disfranchisement eliminated many black jurors. *Id.*

Economic Inequality, Unequal Power, and Regulation

In the area of economics, Tourgée also saw a denial of liberty and equal right. The issue of liberty and equal right is complex. It raises the problem of what counts as liberty and equal right. Laissez faire constitutionalism insisted it was the model of liberty and equal right, because it allowed decisions to be “freely” made by contracts between the parties. Some persons, such as giant corporations, had much more power than others, such as workers, but that was “natural.”³⁰⁷ Tourgée had a more nuanced view. Recall his warning that the power of wealth was as capable of abuse as the power of the bicep and more dangerous.

The laissez faire claim to equal liberty and equal right ignored “prior determinations,” past actions by which wealth was acquired or not acquired. As Charles Lindblom has noted, “prior determinations” decide what each person inherits and that, “aside from genetic factors, is in large part shaped by a long, long history of war, conquest, looting, deceit, and intimidation, and law on property and inheritance.”³⁰⁸ Consider the Norman Conquest and its long effect on wealth, power, and privilege. Or, consider slavery. Encouraged by the rewards provided by Europeans, one African tribe looted and enslaved another, selling the looted people to slave traders. With emancipation, slaves inherited nothing. As a formal matter, they enjoyed equal liberty and equal rights. In reality, prior determinations (including bans on teaching them to read and write and rules that slaves could not own property or contract) limited their options, hampered Reconstruction, and influenced political power and the law.

Howard Gilman notes the “enormous disparities in the distribution of wealth that arose during the [first] Gilded Age.” (We are in the second Gilded Age.) According to the census of 1890, “9 percent of the nation’s families controlled 81 percent of the nation’s wealth. The 1900 report of the U.S. Industrial Commission concluded that between 60 and 88 percent of the American people [were] poor or very poor.”³⁰⁹

³⁰⁷ The term “laissez faire constitutionalism” is a term of art here, a shorthand to describe a tendency of the cases. But, of course, the reality is far more complex than the label suggests.

³⁰⁸ CHARLES E. LINDBLOM, *THE MARKET SYSTEM: WHAT IT IS, HOW IT WORKS, AND WHAT TO MAKE OF IT* 171 (2001).

³⁰⁹ HOWARD GILMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 77 (1993).

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In 1894, the Congress passed a tax of two percent on incomes above \$4,000.00. In dollars of 2011 value, this would be a tax on income somewhere between \$104,400.00 (using the Consumer Price Index), \$508,000.00 (using the unskilled wage), \$840,000.00 (using the average production worker wage), or a great deal more using the share of the Gross Domestic Product.³¹⁰ In oral argument before the Supreme Court, one lawyer who brought the litigation challenging the Act claimed that the tax was “communistic in its purposes and tendencies”³¹¹ Though the Court had upheld an income tax during the Civil War, “the Court struck down the graduated income tax statute as an unconstitutional direct tax.”³¹²

In 1886 in *Godcharles v. Wigeman*,³¹³ the Pennsylvania Supreme Court struck down a law passed by the state legislature requiring workers to be paid by cash or check—as opposed to scrip which might be redeemable, for example, only in the company store or for company housing. In reality, the law requiring payment by cash or check protected the right of the employees to freely contract when purchasing food, shelter, etc. The Pennsylvania court held that the Act was “utterly unconstitutional and void.”³¹⁴ It was “an attempt . . . by the legislature . . . [to] prevent persons who are *sui juris* from making their own contracts.”³¹⁵ This was “an infringement alike of the rights of the employer and the employe [sic].”³¹⁶ It was an “insulting attempt to put the laborer under a legislative tutelage . . . degrading to his manhood” and “subversive of his rights as a citizen of the United States.”³¹⁷ In 1901 the Supreme Court came to an opposite conclusion,³¹⁸ but by 1905 in *Lochner v. New York*,³¹⁹ the Court cited the Pennsylvania case with approval.³²⁰

In *Lochner*, in light of very substantial evidence of occupational disease among bakers,³²¹ the New York legislature sought to limit their

³¹⁰ MEASURING WORTH, <http://www.measuringworth.com> (last visited Dec. 27, 2011).

³¹¹ MICHAEL KENT CURTIS ET AL., CONSTITUTIONAL LAW IN CONTEXT 140 (3d ed. 2011).

³¹² *Id.*; see *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

³¹³ 6 A. 354 (Pa. 1886).

³¹⁴ *Id.* at 356.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901).

³¹⁹ 198 U.S. 45 (1905).

³²⁰ *Id.* at 63.

³²¹ *Id.* at 70-71 (Harlan, J., dissenting).

hours of work to sixty hours per week.³²² In spite of the evidence of occupational disease, the Court found “no reasonable ground for interfering with the liberty of person or the right of free contact, by determining the hours of labor”³²³

The law had permitted great aggregations of capital in corporations. When workers sought to form unions, one response was to fire the workers who joined the union. Congress outlawed this practice for interstate common carriers. Nonetheless, William Adair, a company supervisor, fired O.B. Coppage from his job with the Louisville and Nashville Railway Company because he had joined a union. For the Court, in *Adair v. United States*,³²⁴ the issue was simple. The workers had an equality of right to quit for almost any reason and the large corporation had an equal right to fire the worker for joining a union. Legislation that disturbed this “equality of right” was “an arbitrary interference with the liberty of contract”³²⁵

In 1916, during the Progressive era, Congress had banned from interstate commerce items manufactured with the labor of small children. The Court struck the statute down as beyond congressional power over commerce.³²⁶ Little boys and girls as young as eight years old continued to be employed in mining and manufacturing.

Laissez faire constitutionalism waxed and waned. The Court was not entirely consistent.³²⁷

The Vision of Albion Tourgée

The Court's Curious Course: A Review

Tourgée's vision needs to be compared to what the Court had done. For that purpose, a quick review is in order. As we have seen, Congress did pass some protective legislation in response to Klan out-

³²² *Id.* at 46.

³²³ *Id.* at 57.

³²⁴ 208 U.S. 161 (1908).

³²⁵ *Id.* at 175. Though the case occurred after Tourgée's death, it illustrates his concerns.

³²⁶ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

³²⁷ For scholarly appraisals of the issue and its development over time, see WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991) (describing a broad pattern of court decisions hostile to both the unions and protective labor laws for the average male worker); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 Y.B. SUP. CT. HIST. SOC'Y 53 (1983); Melvin I. Urofsky, *State Courts and Protective Legislation during the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63 (1985).

rages, and in the early case of *United States v. Hall*, an opinion largely ghostwritten by Justice Bradley, Judge Woods upheld the right of Congress to protect free speech and other rights in the first eight amendments and to protect these rights directly against private violence.³²⁸ The court in *Hall* cited the Privileges or Immunities Clause as securing Bill of Rights liberties against state or federal infringement—these were fundamental rights.³²⁹ The court then cited the Equal Protection Clause and Section Five of the Fourteenth Amendment. From all these provisions, the court concluded that “congress has the power, by appropriate legislation to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation”³³⁰ As to equal protection, denying included “inaction” and “the omission to protect.”³³¹ The only appropriate legislation in response would operate directly on individuals to protect the rights that the Fourteenth Amendment secured, since the court and Congress could not compel activity by state officials. Exercise of the power “must depend on [Congress’s] discretion in view of the circumstances of each case.”³³² Federal rights needed to be protected even if “it interferes with state laws or the administration of state laws.”³³³

Next, in 1874, Justice Bradley, as a circuit judge, substantially changed his position.³³⁴ Direct congressional enforcement of equal protection against individuals was limited to state failure to protect, and the private action that could be punished in cases of state neglect had to be motivated by race.³³⁵

In the *Slaughter-House Cases*,³³⁶ the Court dramatically limited the privileges or immunities of citizens of the United States, though the preexisting right to assemble to petition the national government survived. The *Slaughter-House* Court’s historical background of the post-Civil War amendments left out much of the story—the suppression of free speech and civil liberties by mobs and laws in the Southern states before the Civil War.³³⁷ The *Slaughter-House* Court suggested that pro-

³²⁸ 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (No. 15,282).

³²⁹ *Id.* at 81.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 82.

³³⁴ *United States v. Cruikshank*, 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897).

³³⁵ *Id.* at 711-12.

³³⁶ 83 U.S. 36 (1873).

³³⁷ *Id.* at 71.

tection of newly freed slaves was all that motivated the Fourteenth Amendment as well as the Thirteenth and Fifteenth Amendments.³³⁸

In 1876 in *Cruikshank*,³³⁹ the Court emphasized dual federalism and the limited role of the federal government in protecting civil liberty.³⁴⁰ In doing so, the decision was similar to the distinction in the *Slaughter-House Cases* between quite limited privileges or immunities (rights) of citizens of the United States and the privileges and immunities (rights) of state citizens, which included nearly every civil right.³⁴¹ Protection of privileges and immunities of state citizenship was, *Cruikshank* announced, still largely up to the states.³⁴² A count in the *Cruikshank* indictment charged a conspiracy to deprive American citizens of the right to assemble.³⁴³ The Court dismissed that count. The right to assemble was a state right and obligation was on the states to protect it. The guarantees of the Bill of Rights did not limit the states, and Congress had no direct power to protect the right peaceably to assemble, except to petition the federal government. Rights in the Bill of Rights were not rights of American citizens³⁴⁴—contrary to a common popular pre-Civil War view.³⁴⁵

Cruikshank embraced the state action syllogism with no express reference to a state-neglect theory, held Fourteenth Amendment rights (with the Bill of Rights excluded) were simply a limit on state action,³⁴⁶ and emphasized the role of the semi-sovereign states to protect life, liberty, and property.³⁴⁷ As to equal protection, there was no allegation that the denial was based on race;³⁴⁸ the duty of equal protection remained with the states.³⁴⁹ “The only obligation resting upon the United States [was] to see that the States do not deny the right.”³⁵⁰ National power was “limited to the enforcement of this guaranty.”³⁵¹

³³⁸ *Id.* at 68-72.

³³⁹ 92 U.S. 542 (1876).

³⁴⁰ *Id.* at 549-51.

³⁴¹ *Slaughter-House Cases*, 83 U.S. at 74-75.

³⁴² 92 U.S. at 551.

³⁴³ *Id.*

³⁴⁴ *Id.* at 551-53 (noting that the right to assemble to petition Congress could be protected as a right of national citizenship).

³⁴⁵ CURTIS, *supra* note 26, at 229-60.

³⁴⁶ 92 U.S. at 554.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 555.

³⁵⁰ *Id.*

³⁵¹ *Id.*

The count alleging an intent to injure black citizens because they had voted in the election of November 1872 was defective. There was no showing that it was other than a state election or that the motive was racial—as opposed, for example, to a political motive.³⁵²

After *Slaughter-House*, Bradley's circuit opinion in *Cruikshank*, and the opinion of the full Court in that case, it seemed unlikely that Congress had the power to punish, for example, the politically motivated Klan murder (discussed below) of Tourgée's friend, state senator John W. Stephens, and those of countless others like him. After this review, I turn to the very different views of Albion Tourgée.

Tourgée's Views

Tourgée knew that race and the status of Americans of African descent were central issues in Reconstruction. But, as far back as 1868, he saw the race issue in a larger context—oligarchy versus democracy, free speech and other essential democratic rights versus suppression of liberties, and equality versus a caste system. For Tourgée, the Civil War had been “a struggle between Republicanism and Oligarchy, between the rights of the people and the usurpations of Aristocracy, between the elevation of the mass and the exaltation of the few, between feudal theory and free principles.”³⁵³

Tourgée looked back repeatedly at the failure of Reconstruction. In his best-selling novel of Reconstruction, *A Fool's Errand*, Tourgée saw the effort to establish Reconstruction governments in the Southern states as a continuation of the struggle against slavery and the slave power.³⁵⁴ Violent methods used before the Civil War to silence anti-slavery expression and political action in the South were revived and expanded for use against the Republican white-black coalition that supported civil and political rights for Americans of African descent. Before the Civil War, opponents of slavery were silenced; in the 1870s the black-white Republican coalition began to meet a similar fate.³⁵⁵

In his 1892 essay, *Is Liberty Worth Preserving?*, Tourgée wrote that

³⁵² *Id.* at 555-56.

³⁵³ ALBION W. TOURGÉE, *Speech on the Elective Franchise* (Feb. 21, 1868), in UNDAUNTED RADICAL, *supra* note 10, at 40.

³⁵⁴ See ALBION WINEGAR TOURGÉE, *A FOOL'S ERRAND. BY ONE OF THE FOOLS* (New York, Ford's, Howard & Hulbert, 1st ed. 2000) (1879).

³⁵⁵ *Id.* at 285-97.

[i]n a large number of the States of the American Union, such rights as freedom of speech, of public assemblage, of party organization and the effective exercise of ballatorial power are no more permitted to citizens of African descent or Republican politics, than is free speech to a Jew in Russia.³⁵⁶

Tourgée contended that:

free speech, peaceful assemblage, unrestricted discussion of all questions affecting the public welfare, party organization, the nomination and support of candidates are inalienable rights of every citizen of the United States, which it is the duty of the general government to assert and maintain in every part of the National domain.³⁵⁷

Peaceful exercise of the right to vote was a sacred right, and the “security of . . . the whole fabric of free government” depended on it.³⁵⁸ One race or party had no right to deny crucial democratic rights to any other.³⁵⁹ Unlike the Court, Tourgée’s principles were not limited to federal elections or to race.

Writing in 1889, Tourgée saw the issue in the South as whether full and meaningful democracy would survive. Responding to an article entitled *Shall Negro Majorities Rule?*, Tourgée entitled his response, *Shall White Minorities Rule?*³⁶⁰ “The particular point in controversy,” he wrote, “is not whether the colored man shall be allowed a new privilege, but whether [he] shall be permitted to exercise a right already guaranteed by law.”³⁶¹ Those in the South who answered that question, “No!,” “boastfully admit that for a decade and a half they have nullified the law and defied the national power,” and they “boldly proclaim their determination to continue to do so as long as they may see fit.”³⁶² Full democratic rights were essential because “[t]he past has shown conclusively that the white man of the South is not a fair or just guardian of the interests of the colored man.”³⁶³ Slavery grew more repressive over time. In its latter days, it was a felony to teach the slave to read, and the master could not free a slave by will.³⁶⁴

³⁵⁶ ALBION W. TOURGÉE, *IS LIBERTY WORTH PRESERVING?* (1892), reprinted in UNDAUNTED RADICAL, *supra* note 10, at 255.

³⁵⁷ *Id.* at 254.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ ALBION W. TOURGÉE, *Shall White Minorities Rule? (1889)* [hereinafter TOURGÉE, *Shall White Minorities Rule?*], in UNDAUNTED RADICAL, *supra* note 10, at 112.

³⁶¹ *Id.* at 113.

³⁶² *Id.*

³⁶³ *Id.* at 116.

³⁶⁴ *Id.*

In light of the views of the Southern elite as to black political rights, Tourgée, tongue in cheek, suggested they could simply restore the term “white” as an essential qualification for citizenship.³⁶⁵ But elite Southerners were determined both to deny the black man the effective right to vote *and* to keep him as a “political counter,” swelling Southern representation in Congress and the Electoral College.³⁶⁶ “The simple fact is, that he desires the Negro’s constituent power in the government to be added to his own, in order to give him the same advantage over his peer, the white man of the North, which he enjoyed during the slave epoch.”³⁶⁷ Actually, the advantage was even greater, since the slave was counted as three-fifths of a man and the disenfranchised black voter counted as a full person.

Under Section Two of the Fourteenth Amendment, to the extent that a state disfranchised a portion of its male population over twenty-one (except for rebellion or other crime), the representation of the state in Congress (and therefore in the Electoral College) was to be proportionally reduced.³⁶⁸ But Section Two was flouted and never enforced. In the end, the white Southern elite were able to have their cake and eat it too, disfranchising black voters and keeping the illegitimate extra political power these inhabitants provided in Congress and the Electoral College.³⁶⁹

Tourgée said rejection of black political power came from the type of

southern white man, who is not willing that any one should differ with him in opinion or dissent from him in practice; who is the traditional . . . enemy of free thought and free speech, and is so confident of his own infallibility that he would rather appeal to arms or become a cowardly and disguised murderer, than submit to the control of a lawfully-ascertained majority of legal voters.³⁷⁰

Neither American institutions nor domestic peace could be secured, Tourgée wrote, “so long as the question of depriving a majority of the qualified electors of any State [through any unlawful means] of the rights which they are solemnly guaranteed by law . . . is coolly discussed as a living issue in the great organs through which popular thought

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 117.

³⁶⁷ *Id.*

³⁶⁸ U.S. CONST. amend. XIV, § 2.

³⁶⁹ Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 *DRAKE L. REV.* 911, 955-61 (2008) (recounting the failure to enforce Section Two).

³⁷⁰ TOURGÉE, *Shall White Minorities Rule?*, *supra* note 360, at 122.

finds expression.”³⁷¹ Tourgée had deep personal memories of the issue.

Tourgée was living in North Carolina in 1870 and serving as a Superior Court Judge. In May of 1870, he wrote U.S. Senator Joseph C. Abbott. He reported scores of political murders, hundreds of politically motivated beatings, and worse. The letter began,

It is my mournful duty to inform you that our friend John W. Stephens, State Senator from Caswell, is dead. He was foully murdered by the Ku-Klux. . . . Against the advice of his friends, against the entreaties of his family, he constantly refused to leave those who had stood by him. . . . He was accustomed to say that 3,000 poor, ignorant, colored Republican voters in that county had stood by him and elected him, at the risk of persecution and starvation, and that he had no idea of abandoning them to the Ku-Klux.³⁷²

Tourgée ended the letter by calling for national legislation and massive national enforcement that would protect citizens from political violence. Tourgée concluded, “any member of Congress who, especially if from the South, does not support, advocate, and urge immediate, active, and thorough measures to put an end to these outrages . . . is a coward, a traitor, or a fool.”³⁷³

By 1876, national Republicans were largely abandoning the effort to protect Republican Reconstruction state governments.³⁷⁴ In 1876, President Grant, fearing a Northern backlash, refused to send troops desperately sought by Mississippi Governor Adelbert Ames. Ames had received anguished pleas from besieged black and white Republicans. Grant’s Attorney General told Ames, “[t]he whole public are tired of these annual autumnal outbreaks in the South.”³⁷⁵ Ames’ conclusion, written twenty years later, was that “this flippant utterance” signaled the view of the executive branch that the Reconstruction Acts had been a failure.³⁷⁶

Efforts at enforcement of the right to vote in national elections continued off and on at least through the 1880s. In 1884, *Ex parte Yar-*

³⁷¹ *Id.*

³⁷² ALBION W. TOURGÉE, Letter to Senator Joseph C. Abbott (1870), in UNDAUNTED RADICAL, *supra* note 10, at 47-48.

³⁷³ *Id.* at 51.

³⁷⁴ See BRANDWEIN, *supra* note 185, at 130; WHARTON, *supra* note 107, at 157 (describing the violent overthrow of Republican rule).

³⁷⁵ WHARTON, *supra* note 107, at 194.

³⁷⁶ *Id.*

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brought³⁷⁷ was strongly protective of the right to vote in national elections, but by then the fate of Reconstruction was largely sealed.³⁷⁸ Political violence had worked, and it would work again when an anti-democratic coup would be useful.³⁷⁹

Why would Bradley and his colleagues have excised politically motivated crimes even from his state neglect equal protection theory? Why did the Court become less protective of citizens, including white Republicans, against political violence? By the 1870s, many Northerners had become leery of democracy in which “proletarians,” immigrants, and blacks might wield political power.³⁸⁰ This view helped to shape public opinion about Reconstruction.

In *A Fools Errand*, Tourgée noted that before the Civil War most Southern newspapers and most ministers in their pulpits did their part to craft pervasive pro-slavery sentiment. After the war, the Southern press overwhelmingly attacked Reconstruction and vilified Republicans and Southern state governments.³⁸¹ But by the 1870s, the hostile Southern view of Reconstruction governments in the South had substantial support in the Northern press. According to Tourgée, “the press of the North, almost without exception, echoed the clamor and invective of the Southern journals³⁸² . . . espoused the prejudices of its conquered foes, and poured the vials of its wrath and contempt upon the only class in the conquered territory who defended its acts [and] supported its policy”³⁸³

The negative view of Southern Reconstruction governments seems to have influenced Justice Bradley and some of his colleagues. Bradley had never been a strong supporter of black rights or abolition.

³⁷⁷ 110 U.S. 651 (1884).

³⁷⁸ *Id.* (discussing the Court’s protective stance regarding the right to vote in federal elections and against racially motivated violence because of voting). *Cf.*, *James v. Bowman*, 190 U.S. 127 (1903) (suggesting power under the Fifteenth Amendment is limited to state action.); BRANDWEIN, *supra* note 185, at 184-205 (arguing that a definitive abandonment of blacks did not occur until the 1890s when the state action syllogism seemed to have been grafted onto even racially inspired violence aimed at the right to vote).

³⁷⁹ *E.g.*, DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY (David S. Cecelski & Timothy B. Tyson eds., 1998); ESCOTT, *supra* note 297, at 241-262.

³⁸⁰ KEYSSAR, *supra* note 180, at 119-162 (discussing the reaction against universal suffrage and the imposition of various barriers to access to the ballot).

³⁸¹ OLSEN, *supra* note 1, at 145, 151; TOURGÉE, *supra* note 354, at 155-56, 284.

³⁸² TOURGÉE, *supra* note 354, at 157.

³⁸³ *Id.* at 161.

In 1862, Bradley had referred to the Civil War as a war for freedom and human rights, but, unlike Tourgée, he explicitly excluded domestic slavery from the cause of freedom.³⁸⁴ In 1867, he had sympathized with Southern complaints that the Freedmen's Bureau was teaching Negroes to be discontented and was making them unsuited to labor.³⁸⁵ Bradley had opposed abolition before the war and even (contrary to mainstream Republican doctrine) had suggested allowing slavery in some Western territory, as a compromise.³⁸⁶ Before the Civil War, he had defended a slave owner in a suit that claimed the New Jersey constitution outlawed slavery. Bradley countered the abolitionist lawyer's claim that slavery violated the Ten Commandments with Biblical passages recognizing slavery. In the same case, he suggested that New Jersey slaves were well treated (like farmers' children) and were better off in slavery.³⁸⁷

In the *Slaughter-House Cases*, the Court had considered the Louisiana statute responding to the health and environmental problems produced by New Orleans' filthy slaughterhouses. The law was a reasonable protection of health, and a similar approach had been used in the New York, but Bradley called it "one of those arbitrary and unjust laws made in the interest of a few scheming individuals, by which some of the Southern States have, within the past few years, been so deplorably oppressed and impoverished."³⁸⁸ Bradley's theory of unique protection for racial violence, but not for political violence, left despised Southern Republican governments, Southern white Republicans, and Americans of African descent more vulnerable.

Tourgée had a different view of the Reconstruction state governments. While not without their faults, Tourgée pointed to accomplishments: free public schools, abolition of barbaric punishments such as whipping and branding, the reduction of the number of capital crimes from seventy to two or three, elected local governments, abolition of property qualifications for voters and office holders, and the abolition of those qualifications for jurors.³⁸⁹

³⁸⁴ LANE, *supra* note 171, at 192.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 191.

³⁸⁸ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 120 (1872) (Bradley, J., dissenting). For a defense of the act as a health measure, see BRANDWEIN, *supra* note 185, at 59; Ross, *supra* note 122.

³⁸⁹ ALBION W. TOURGÉE, Letter to Professor Jeremiah W. Jencks (1892), in UNDAUNTED RADICAL, *supra* note 10, at 279.

Justice Miller also seems to have had mixed feelings about Reconstruction. After recounting the Black Codes as a reason for the Fourteenth Amendment, Miller continued, speaking of blacks, “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.”³⁹⁰ Miller followed this statement with a suggestion that the claims may have been overblown. He referred to “whatever. . . falsehood or misconception may have been mingled with” the presentation of these circumstances.³⁹¹ At the end of his *Slaughter-House* opinion, Justice Miller insisted that the amendments had not been meant to destroy the federal system, which is undoubtedly true, though whether more robust protection of individual liberties than protection on the high seas and the rest would have done that is dubious. But Miller thought it the function of the Court to maintain “the balance between State and Federal power.”³⁹² To a considerable degree, the pre-Civil War semi-sovereign state was surviving.

Tourgée’s brief in *Plessy v. Ferguson*³⁹³ (the suit against state-mandated railway segregation) confronted and rejected much judicial orthodoxy. In response to the state action syllogism, Tourgée, like Justice Harlan before him,³⁹⁴ pointed to the affirmative protections of United States and state citizenship.³⁹⁵ These, he insisted, should be read in connection with the “no state shall” portions of the Fourteenth Amendment. Tourgée took issue with Miller’s suggestion in *Slaughter-House* that the post-Civil War amendments were to be understood as about protecting black rights from state enactments. Tourgée pointed out that the Fourteenth Amendment used broad language: “[e]very person,’ ‘no State,’ . . . ‘any person’ . . . Yet in the face of these, the Court arrives at the conclusion that this section was intended *only to protect the rights of the colored citizen from infringement by State enactment!*”³⁹⁶ The language of the Amendment was not particular, but universal. “If it protects the colored citizen from discriminating legislation, it protects also, in an equal degree, the rights of the white citizen.”³⁹⁷

³⁹⁰ *Slaughter-House Cases*, 83 U.S. at 70.

³⁹¹ *Id.*

³⁹² *Id.* at 82.

³⁹³ The brief is reprinted in UNDAUNTED RADICAL, *supra* note 10, at 296-327.

³⁹⁴ The Civil Rights Cases, 109 U.S. 3, 46 (1883) (Harlan, J., dissenting).

³⁹⁵ TOURGÉE, *supra* note 189, at 302-03, 305, 315; *see also* ALBION W. TOURGÉE, *Oral Argument of A.W. Tourgée (1896)* [hereinafter *Oral Argument of A.W. Tourgée*], in UNDAUNTED RADICAL, *supra* note 10, at 328, 338-39.

³⁹⁶ TOURGÉE, *supra* note 189, at 310 (emphasis in original).

³⁹⁷ *Id.* at 311.

That the Amendment was adopted “for the protection of the colored citizen, was at best only half-true.”³⁹⁸ Tourgée alluded to the history of abuses by the semi-sovereign state. “Exclusive state control over the persons and rights of the citizens of the state was not only the Gibraltar of slavery, but was the chief ingredient . . . of secession.”³⁹⁹ For Tourgée, states could have their “police regulations,” but only “so long as the same do not conflict with the personal rights and privileges of the citizen.”⁴⁰⁰

Tourgée sought to explain why the Court had been reluctant to follow what he saw as the path suggested by the post-Civil War constitutional amendments: “It was natural that so great a change should prove a shock to established precedent. To avoid giving full and complete effect to the plain words of this amendment, the theory of exclusive state control over ‘police regulations’ was formulated in . . . the ‘Slaughter-House Cases.’”⁴⁰¹ For Tourgée, the correct interpretation was that the amendment protected fundamental rights of citizens and “universal equality whereby the rights of life, liberty, and property are secured to all—the rights which belong to a citizen in every free country and every republican government.”⁴⁰² Tourgée summarized his views in the conclusion of his oral argument.

As the final and exclusive jurisdiction over the rights of all the inhabitants of a state was intended solely to protect and perpetuate slavery, it is fit and proper that it should disappear with slavery. As it was intended to promote inequality of right, it is proper that it should disappear with the dawn of the epoch of equality in our government. As it was intended to promote injustice it should not be perpetuated in the hope of establishing justice.⁴⁰³

Tourgée saw his hopes turn to ashes, with pervasive disfranchisement, absence of Americans of African descent from juries, lynchings, burnings at the stake, and more. Through it all Tourgée worked for liberty and racial equality.⁴⁰⁴

Realization of Tourgée’s vision of liberty and equality and the power of the national government to protect its citizens was long

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 306.

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 314.

⁴⁰³ *Oral Argument of A.W. Tourgée, supra* note 395, at 339.

⁴⁰⁴ *E.g., ALBION W. TOURGÉE, A Bystander’s Notes: White Caps (1888)*, in UNDAUNTED RADICAL, *supra* note 10, at 237-39.

delayed, and, like all ideals, it was never fully achieved. Still, during the Civil Rights Revolution and the Second Reconstruction of the 1950s and 1960s, the Court and then the Congress struck at school segregation. President Lyndon Johnson and the Congress joined the battle for equality and liberty, so for a time all three branches of the federal government were attacking the racial caste system. The Civil Rights Act of 1964 abolished the caste system for public accommodations; the Voting Rights Act of 1965 broke the back of massive resistance to equal voting rights for blacks; and blacks returned to juries in the South in substantial numbers. In 1964, the Twenty-Fourth Amendment abolished the poll tax in federal elections, and the Court then struck it down in the few states that still had it for state elections.⁴⁰⁵

In *United States v. Guest*, most of the Justices embraced a theory by which the national government could reach private violence designed to interfere with Fourteenth Amendment rights.⁴⁰⁶ As Justice Brennan wrote

Section 5 [of the Fourteenth Amendment] authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection.⁴⁰⁷

The country had moved a long way toward Tourgée's "radical" vision of democracy.

But progress is never simply uniform. The Court rejected *Guest* and returned to the state action syllogism in 2000 in *United States v. Morrison*,⁴⁰⁸ citing *United States v. Harris*⁴⁰⁹ (the lynch mob case) and the *Civil Rights Cases*.⁴¹⁰ The nation faces new forms of economic barriers to voting in Voter ID laws and the things one must do to obtain the ID. Other barriers to voting are being constructed in search of partisan advantage.⁴¹¹ That, of course, was the motive in the attack on the first Reconstruction. The Brennan Center for Justice estimated that the

⁴⁰⁵ *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

⁴⁰⁶ 383 U.S. 745, 774 (1966) (Harlan, J., concurring in part and dissenting in part). *Id.* at 781-82 (Brennan, J., concurring in part and dissenting in part).

⁴⁰⁷ *Id.* at 782 (Brennan, J., concurring in part and dissenting in part).

⁴⁰⁸ 529 U.S. 598 (2000).

⁴⁰⁹ 106 U.S. 629 (1883).

⁴¹⁰ 109 U.S. 3 (1883).

⁴¹¹ The Brennan Center's typology is as follows: photo ID laws, proof-of-citizenship laws, laws making voter registration harder, laws reducing early and absentee voting days, and laws making it harder to restore voting rights. *Study: New Voting Restrictions May Affect More than Five Million*, BRENNAN CENTER FOR JUSTICE (Oct. 3, 2011), <http://>

changes would disenfranchise some five million otherwise eligible voters, but some of these disfranchising laws have now been struck by the courts, at least for this election.⁴¹² Legislative redistricting in North Carolina, and no doubt elsewhere, seeks to pack more blacks into majority black districts, to disrupt white-black political alliances, and to weaken black political power.⁴¹³ The Court may be reverting to its older approach to the conflict between the powers of the semi-sovereign state and democratic rights and the liberty and equality of citizens.

As to economic matters, regulation of economic power is again under assault. The economic and tax systems have helped to concen-

www.brennancenter.org/content/resource/study_new_voting_restrictions_may_affect_more_than_five_million/.

⁴¹² *Id.* For reports of some recent court decisions, see, e.g., *Obama for America v. Jon Husted*, Nos. 12-4055, 12-4076, ___ F.3d ___, 2012 WL 4753397, at *1 (Oct. 5, 2012) (affirming the preliminary injunction against the state from “enforcing Ohio Rev. Code § 3509.03 to the extent that it prevents some Ohio voters from casting in-person early ballots during the three days before the November 2012 election on the basis that the statute violates the Equal Protection Clause of the Fourteenth Amendment.”); Lizette Alvarez, *Judge to Toss Out Changes in Florida Voter Registration*, N.Y. TIMES, Aug. 29, 2012, <http://www.nytimes.com/2012/08/30/us/judge-to-block-changes-in-florida-voter-registration.html> (discussing a Florida federal judge who said in August that he planned to block provisions of a Florida measure that would make it more difficult for organizations to register voters in Florida) (“Judge Robert L. Hinkle of Federal District Court in Tallahassee said he expected to prohibit the voter registration restrictions once a federal appeals court dismissed the case. The judge had suspended the restrictions on May 31, calling them ‘harsh and impractical’ and ‘burdensome.’”); Ethan Bronner, *A Tight Election May be Tangled in Legal Battles*, N.Y. TIMES, Sept. 9, 2012, <http://www.nytimes.com/2012/09/10/us/politics/legal-battles-on-voting-may-prove-a-critical-issue-in-election.html?pagewanted=all> (stating that “[i]n Ohio, early voting has been restored and rules restricting voter registration drives have been struck down.” The Ohio preliminary injunction in the Ohio cases was affirmed by the Federal Court of Appeals for the Sixth Circuit under expedited review.); Ethan Bronner, *Voter ID Rules Fail Court Tests Across Country*, N.Y. TIMES, Oct. 2, 2012, http://www.nytimes.com/2012/10/03/us/pennsylvania-judge-delays-implementation-of-voter-id-law.html?_r=0 (discussing a Pennsylvania judge who ruled to uphold the voter ID law in August 2012. The judge was instructed by the Pennsylvania Supreme Court to hold additional hearings “to focus on whether enough had been done to ensure ‘liberal access’ to the picture ID cards” and therefore stalling the implementation of the Pennsylvania’s voter ID law. He later determined that enough had not been done.).

⁴¹³ For some of the more egregious modern gerrymanders, see Aaron Blake, *The Most Gerrymandered Districts of 2011*, THE WASHINGTON POST, Sept. 23, 2011, http://www.washingtonpost.com/blogs/the-fix/post/the-most-gerrymandered-districts-of-2011/2011/09/23/gIQAbSdHrK_blog.html.

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trate more and more wealth in fewer hands.⁴¹⁴ Great concentrations of wealth and the distress of the middle and poorer classes threaten the economic foundations of democracy. Shortages of resources have emboldened those who seek to attack the social safety net and public education.

Were Tourgée to return, he would be impressed by progress that has been made, and, no doubt, distressed by the threats to the more egalitarian democracy he envisioned. Still, today we accept the right of Americans of African descent to vote in the South and elsewhere (while efforts are made to limit the power of their votes), and we have abolished much of the racial caste system. Views of Tourgée today are far more positive than were the judgments of those who viewed him through the lens of opposition to Reconstruction and all it stood for. To them he was a fool or a knave or a bit of both. Tourgée wrote in the introduction to *A Fool's Errand*

[t]he life of the Fool differs from his fellow-mortals chiefly in . . . that he sees or believes what they do not, and consequently undertakes what they never attempt. If he succeed in his endeavor, the world . . . calls him a Genius; if he fail, it laughs the more, and derides his undertaking as A FOOL'S ERRAND. So the same individual is often both fool and genius . . . a fool to one century and a genius to the next . . .⁴¹⁵

⁴¹⁴ See, e.g., JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010); Paul Krugman, Op-Ed., *Oligarchy, American Style*, N.Y. TIMES, Nov. 4, 2011, at A31.

⁴¹⁵ TOURGÉE, *supra* note 354, at 3.

