

The Spectre of the Second Amendment: Re-reading the *Slaughterhouse Cases* (1873) and *U.S. v. Cruikshank* (1876) in light of the KKK Cases (1871-2)

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In 1866 Members of the Joint Committee on Reconstruction introduced the Fourteenth Amendment into the House of Representatives and the Senate, respectively. Several speakers indicated that the force of the new amendment would be to protect basic or fundamental citizen rights against adverse action by state governments and would allow Congress for the first time to protect such rights against such state action. One speaker in the House, John Bingham, who had written Section One of the amendment, indicated that among the protected "privileges or immunities of citizens" were those rights listed in the first eight amendments to the Constitution, rights that previously had been enforceable only against Congress, not against state governments. He specifically cited the Eighth Amendment's prohibition on cruel and unusual punishments by way of example.¹ In the U.S. Senate it was Sen. Jacob Howard

¹ CONG.GLOBE, 39th Cong., 1st Sess 1088-1095 (Feb.3, 1866); 2542-3 (May 8, 1866). Rep. Bingham makes clear his understanding that the Fourteenth Amendment would apply the privileges listed in the Bill of Rights against state governments by stating that the amendment would overturn *Barron v. Baltimore*, 32 U.S. 243 (1833), the case that had established the contrary rule. Four years later, Bingham had occasion to discuss the Amendment again

who introduced the Amendment, and he explained that the “views and motives that had influenced the Joint Committee” in proposing the Amendment included the goal of protecting against state governmental abridgment “the personal rights guaranteed and secured by the first eight amendments of the Constitution.”² This speech received detailed coverage and was featured prominently on page one or two of major newspapers all over the U.S.³ In the ensuing debates over adopting the Fourteenth Amendment, no one questioned the claims that the amendment would incorporate against the states the rights listed in the first eight amendments, but many speakers referred in more general

on the floor and at this time he said he had specifically reworded the Amendment in order to make clear that it secured “the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment.” CONG GLOBE, 42d Cong., 1st Sess. 84 (1871).

² CONG.GLOBE, 39th Cong., 1st Sess 2765-6 (May 23, 1866).

³ Stephen Halbrook lists the following newspapers as giving extensive quotation or detailed first or second page coverage to the Howard speech, less than a month before the Amendment went to the states for ratification: *New York Times*, *New York Herald*, *National Intelligencer*, *Philadelphia Inquirer*, *Chicago Tribune*, *Baltimore Gazette*, *Boston Daily Journal*, *Boston Daily Advertiser*, *Springfield Daily Republican*, *Richmond Daily Examiner*, *Charleston Daily Courier*. Senator Howard’s speech stated that the import of the privileges and immunities clause was incorporation of the personal rights listed in the first eight amendments against state governments and the constitutionalizing of the rights listed in the Civil Rights Act of 1866. Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms*, 1866-1876 (Praeger, 1998), 36.

terms to those rights that were fundamental to members of a free society.⁴

The U.S. Supreme Court decision that first set forth an interpretation of the Fourteenth Amendment was the *Slaughterhouse Cases* (1873).⁵ It presents a number of mysteries:

1) If it is correct that the Republican 39th Congress, which wrote the Fourteenth Amendment, intended its Privileges or Immunities Clause to incorporate fundamental civil rights and liberties against state governmental abridgment *and was widely thus understood*--so widely that the Supreme Court had to have been aware of it-- and if it is also correct that the *Slaughterhouse* majority turned its back on that clause,⁶ why would a Supreme Court made up of 7/9

⁴ David Bogen, "Slaughterhouse Five: Views of the Case," 55 (Dec.2003) *Hastings Law Journal* 333-398.

⁵ *Slaughterhouse Cases*, 83 U.S. (10 Wall.) 36 (1873).

⁶ There is an enormous literature on the Fourteenth Amendment. The modern scholarly consensus reads the intent of the Privileges or Immunities Clause as incorporating against state government the individual liberties of the first eight amendments of the Bill of Rights. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 22-30 (1980)(interpreting the Congressional debates as manifesting an intent to incorporate the Bill of Rights plus other fundamental rights); Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham: Duke University Press, 1986); "Resurrecting the Privileges or Immunities Clause and Revising the *Slaughterhouse Cases* without Exhuming *Lochner*: Individual Rights and the 14th Amendment," 38 (1996) *Boston Coll. L. Rev.* 1-106 ; Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869*, at 113-18 (1990); 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); Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale Univ. Press, 1998); Akhil Reed

Amar, "The Bill of Rights and the Fourteenth Amendment," 101 *Yale L.J.* 1193 (2000); Laurence H. Tribe, *American Constitutional Law* 7-6, at 1320-31 (3d ed. 1999); William Winslow Crosskey, "Charles Fairman, 'Legislative History,' and the Constitutional Limitations on State Authority," 22 *U. Chi. L. Rev.* 1, 2-119 (1954); dissent of Justice Black in *Adamson*, 332 U.S. 46, 68 (1947). For the view that was prevalent from 1947 until the mid-nineteen eighties, cf. Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 *Stan. L. Rev.* 5 (1949). For many years, Raoul Berger carried on the anti-incorporation argument of Charles Fairman, e.g., Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* 8, 141 (1989). See also, Pamela Brandwein, *Reconstructing Reconstruction* (Duke University Press, 1999), surveying the course of these "dueling histories." Even the "anti-incorporation" school, as represented by Fairman and Berger, acknowledged that everyone in Congress seemed to understand that the Fourteenth Amendment would have the force of declaring a wide range of civil rights fundamental as a federal matter, and therefore unabridgable by the states and enforceable by Congress. In other words, **both** sides see Miller's opinion in the *Slaughterhouse Cases* as abandoning what Congress understood as the project of the amendment.

Cf. recent survey of the scholarship on the privileges and immunities clause, David Bogen, *supra* note 4 (arguing that scholarly opinion on its "original intent" shares no consensus but rather is still divided.) Prof. Bogen acknowledges that testimony on the floor of the 39th Congress does support incorporation (because liberties in the Bill of Rights were "fundamental" ones). *Id.* at 337-9, 378-381, 392-393. As he puts it, "[Sponsors] Representative Bingham and Senator Howard believed that the amendment would make the Bill of Rights applicable to the states, and no one in Congress specifically said they were wrong" (*id.* at 393); "Bingham and Howard said the Bill of Rights were privileges and immunities" (*id.* at 380). Yet he insists, on the side of the critics of a simple incorporation reading, that this reading cannot come to terms with the fact that the ratification debates (of which only two are in extant records) did not discuss incorporation and many of the ratifying states had laws or constitutional clauses flatly inconsistent with provisions of the federal Bill of Rights (if it were apply to state governments) (*id.* at 380 and 393). He then suggests that the readings that attempt a way out of this puzzle--either equal treatment of the races as to fundamental rights, or absolute incorporation of only the truly fundamental rights, each runs into criticism as well. Thus, he concludes, there are

Republican Justices,⁷ turn its back on this meaning to empty the clause of any force within only 5 years?⁸

too many plausible competing accounts of original intent (*id.* at 384). For this last point he cites William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*, 123 (1988) and Timothy Bishop, "Comments: The Privileges or Immunities Clause of the Fourteenth Amendment: the Original Intent," *Northwestern University Law Review* 79 (March 1984): 142-190.

I disagree with Prof. Bogen on the dispositive significance of conflicting laws in the ratifying states. A state representative who, knowing that his state had a conflicting law on the books, voted to ratify may have simply understood the act of ratification as wiping that law off the books, or requiring its modification.

⁷ Stanley Kutler commented that the Republicans expected from this Court a "judicial imprimatur for their policies." *Judicial Power and Reconstruction Politics* (University of Chicago Press, 1968), 162. Eight had been appointed by either Lincoln or Grant. Justice Stephen Field, although appointed by Lincoln, was nominally a California Democrat. Thus at the time of *Slaughterhouse* two of the nine justices (Field and the Buchanan-appointed, Democratic holdover, Nathan Clifford) had entered the Court with a Democratic party affiliation. Field and Clifford, the two Democrats, were to be the two dissenters against the Court decisions of 1880 that ruled that the Fourteenth Amendment secured to blacks the right to serve on state and local juries (see n.22 below) and also against two 1880 decisions that upheld federal Congressional authority to regulate corrupt behavior of state officials in Congressional elections (*Ex Parte Siebold*, 100 U.S. 371, and *Ex Parte Clarke*, 100 U.S. 371, Field dissenting at 404). (Justice David Davis, who voted in the *Slaughterhouse* majority, left the Court in 1877 to serve in the Senate as an Independent rather than Republican. In 1872 he had unsuccessfully sought the Presidential nomination of the Liberal Republicans, so this was his political affiliation around the time of *Slaughterhouse*.)

⁸ That *Slaughterhouse* effectively nullified the Privileges or Immunities Clause is a conclusion on which the consensus is longstanding and overwhelming. Sanford Levinson's characterization, for example, of the decision as having "ruthlessly eviscerated the Clause of practically all operative

2) In the wake of *Saenz v. Roe* (1999),⁹ where Justices Thomas and Rehnquist, in dissent, called for a re-evaluation of the *Slaughterhouse Cases*,¹⁰ a few scholars have argued that *Slaughterhouse* is best read as not having turned its back on incorporation.¹¹ But if they are right, then how to explain the all but unanimous decision in *U.S. v. Cruikshank*,¹² where the justices only three years later

meaning" is utterly typical. Sanford Levinson, "Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 *Harv. J.L. & Pub. Pol'y* 71, 73 (1989).

⁹ 526 U.S. 489 (1999).

¹⁰ 526 U.S. 489, at 527-8.

¹¹ Kevin Christopher Newsom, "Setting Incorporationism Straight: A Reinterpretation of the *Slaughter-House Cases*," 109 *Yale L.J.* 643 (2000); Bryan 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). Earlier suggestions along these lines appeared in Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," *supra* note 6, at 1258(1992) (suggesting that Miller's *Slaughterhouse* opinion is more ambiguous as to incorporation than the "conventional reading" of it maintains); Robert C. Palmer, "The Parameters of Constitutional Reconstruction: *Slaughter-House*, *Cruikshank*, and the Fourteenth Amendment," 1984 No. 3 *U. Ill. L. Rev.* 739 (1984) (struggling to reconcile an incorporationist reading of *Slaughterhouse* with the plainly anti-incorporationist *Cruikshank*).

¹² 92 U.S. 542 (1876). To the extent that part of *Cruikshank* relies on the companion case of *U.S. v. Reese*, 92 U.S. 214 (1876), it was not unanimous, but that is not central to the argument here. Also, in *Cruikshank*, while the judgment that all the indictments were to be thrown out was unanimous, Justice Clifford (the lone Democrat on the Court) dissented as to the reasoning, limiting his concerns to the sloppiness of the drafting of the indictments. In other words, he did not adhere to the portion of the Court opinion that rejected incorporation of the right to bear arms as against state governments. This

emphatically reject incorporation--specifically, incorporation of First Amendment rights, for which there is the strongest evidence of original intent in the incorporationist direction,¹³ and of Second Amendment rights, for which there is also more than ample incorporationist evidence—indeed for a specific motive of incorporation with an eye to giving blacks equal status as members of the armed citizen militia and the means of self-defense?¹⁴

3) If it is correct to read *Slaughterhouse* as having gutted the Privileges or Immunities Clause, in such a way as consciously to abandon the former slaves to the “tender mercies of the very states that had so recently made mincemeat of them,”¹⁵ then why would Justice Miller have made such a fuss in the same

may or may not be related to the fact that white southern Klan-type groups were deploying arguments that they were the true militia of the state and that their right to bear arms in “defense” of the white citizenry could not be restrained. See note 44 below.

¹³ Bogen, *supra* note 4 at 381, 382; Wildenthal, *supra* note 11, at 1075 (citing several authorities).

¹⁴ Halbrook, *supra* note 3. Robert J. Cottrol and Raymond T. Diamond, “The Second Amendment: Toward an Afro-Americanist Reconsideration,” 80 (1991) *Georgetown Law Journal* 309-361, 346.

¹⁵ Quote from Curtis, “Resurrecting” the Privileges or Immunities Clause and Revising the *Slaughterhouse* Cases without Exhuming *Lochner*,” 38 *Boston College Law Rev.* 1-106, 77. As early as 1878, some legal scholarship had begun to condemn the *Slaughterhouse* Cases as a backtracking on the protection of former slaves that was the purpose of the Fourteenth Amendment. William Royall, “The Fourteenth Amendment: The *Slaughterhouse* Cases” 4 *Southern Law Review* 558, 576n (1878). See also, Aynes, “Constricting the Law of Freedom,” *supra* note 6; Abraham Davis and Barbara L. Graham, *Supreme Court, Race, and Civil Rights* (New York: Sage, 1995), 16 (“For blacks, this interpretation of the Fourteenth Amendment meant that protection of their rights

opinion over the need to read the central message of the Fourteenth Amendment as providing protection to the newly freed black "from the oppressions of those who had formerly exercised unlimited dominion over him"?¹⁶ In other words, was Justice Miller sincere in his description of the core purpose of the Fourteenth Amendment?¹⁷ Did he not perceive that his

remained the responsibility of the states that were least likely to provide that protection."); Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* (New York: Harper and Row, 1988), 529 (noting "Few of these rights [that Miller said the Privileges or Immunities Clause does protect] were of any great concern to the majority of freedmen."); Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (Yale, 1997), 333 ("[T]he majority had to know that the ruling's stress on states' powers might also mean deference to efforts to preserve or rebuild the old racial status quo."); and R. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876*, at 155-59 (New York: Oceana, 1985) and "The Chase Court And Fundamental Rights: A Watershed In American Constitutionalism," 21 N. Ky. L. Rev. 151-191. Scholars' willingness to read *Slaughterhouse* as the beginning of a national backtracking on Reconstruction, even though no blacks and no racial issues were involved in the case, may be fueled by the fact that 1873 was the same year that Grant began pardoning persons who had pled guilty in the South Carolina KKK trials. Kermit Hall, "Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872," *Emory Law Journal* 33 (1984):921-951.

¹⁶ *Slaughterhouse Cases*, 83 U.S. (10 Wall.) 36, 71 (1873).

¹⁷ As to Miller himself, his biographer Charles Fairman cites evidence from private letters that demonstrate that at least in the 1866-1869 period, Miller sincerely (albeit unenthusiastically) supported the Fourteenth Amendment as a necessary check on (1) Southerners unrestrainedly violent expressions of "fiendish hatred for the Negro" by attacks on "the negro and Union white man" in such massacres as took place in Memphis and New Orleans in 1866 and (2) on the Black Codes that virtually reinstated slavery. Charles Fairman, *Mr. Justice Miller and the Supreme Court 1862-1890* (Cambridge, Harvard

emptying all force from the Privileges and Immunities Clause would hurt rather than help blacks?

4. And if he was sincere in his *Slaughterhouse* depiction of the core purpose of the Fourteenth Amendment, how can this reading possibly be made compatible with his and the Court's votes to set free on legal technicalities the vicious murderers of multiple Southern black victims in such decisions as *Blyew v. U.S.* (1872), *U.S. v. Cruikshank* (1876) and *U.S. v. Harris* (1883)?¹⁸

university Press, 1939) 191-192, citing letters of 1866 and 1869. The 1866 letter is unquestionably misdated by Fairman at February 11, 1866, because the massacres in question took place in early May and at the end of July of that year. Foner, *supra* note 15, 261-3. His more recent biographer, Michael Ross, also treats the expressed concern for protecting the rights of freedmen as sincere, noting that the legislature whose statute the Miller majority was upholding was a legislature that contained a notoriously sizable percentage of blacks. Michael Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era* (Baton Rouge: LSU Press, 2003), pp. 201, 202, and generally ch.8.

¹⁸ *Blyew v. U.S.*, 80 U.S. 581 (1872); *U.S. v. Cruikshank*, 92 U.S. 542 (1876); *U.S. v. Harris*, 106 U.S. 629 (1883). The only scholars I have encountered who take seriously this question are Michael Ross, *id.*, and Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," 1978 *Supreme Court Review* 39-79 (arguing that the commitment to Reconstruction by the Chase and the Waite Courts has been underestimated by scholars and that it differed significantly from that of the truly anti-Reconstruction Fuller Court). Ross's analysis of Justice Miller's views on Reconstruction closely parallels that of Benedict.

In that this essay too attempts to take seriously that the Waite Court may have been sincere in developing a reading of the Thirteenth through Fifteenth Amendments that would protect the civil rights of blacks while honoring states' rights, Benedict's and Ross's analyses are compatible with this one. This essay goes beyond their analyses, however, both in attempting to locate a specific contextual reason for the Court's rejection of

This essay sketches out a re-reading of the *Slaughterhouse* decision in such a way as to make sense of these controversies.¹⁹ In doing so, it pays heed to the cases immediately before and after the *Slaughterhouse* decision--cases from the decade of the 1870s: Circuit Court case *U.S. v. Hall* (1871), decided by later-to-be-Justice Woods;²⁰ the KKK cases of 1871-2, which the Supreme Court

incorporation of the Bill of Rights in *Slaughterhouse* and in focusing on the Guaranty Clause reasoning of *Cruikshank* to demonstrate that the decision is not so anti-Reconstruction as its concrete results cause it to appear.

¹⁹ There are two additional controversies that I do not address here: (A) Was the law at issue, which established a state-regulated butchering monopoly, a product (to a greater degree than usual) of bribery and corruption, or was it a legitimate public health measure? Scholars as distinguished as Robert F. Cushman have suggested the former. *Cases in Constitutional Liberties* (Englewood Cliffs, NJ: Prentice-Hall, 1979, 20. Labbé and Lurie's recent book on the decision concludes persuasively that the legislation was a normal public health measure, responding to concerns well-documented in the legislative record, and that the corruption image that has haunted the legislation was in large part attributable to racist reaction to the fact the Louisiana legislature contained thirty elected black representatives. Ronald M. Labbé and Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* (Univ. Press of Kansas, 2003), Ch. 1-4. (B) A second long-controverted aspect of *Slaughterhouse* goes as follows: If incorporation of the personal liberties of the first eight amendments was the correct reading of the Privileges or Immunities clause, how does one explain the apparent redundancy between the 5th and 14th Amendment due process clauses? Scholars (see list of them in Wildenthal, supra n.11, at n.272) have satisfactorily answered this with the explanation that the 39th Congress understood the Privileges or Immunities Clause to protect specifically U.S. citizens, while the 14th Amendment due process clause then extended this particular fundamental protection to all persons as against the state governments.

²⁰ 26 F.Cas. 79 (C.C.S.D. Ala. 1871). Judge Woods there, having consulted Justice Bradley by mail, followed Bradley's advice to

avoided deciding on the merits,²¹ *Blyew v. U.S.* (1872) and the nearly unanimous *U.S. v. Cruikshank* decision of 1876, where the Court directly rejected a claim that state failure to protect First or Second Amendment rights enabled the federal government to secure these rights against private violence.²² It also pays heed to the prevalence in the South of violence perpetrated by armed

read the First Amendment free speech and assembly rights as having been incorporated against the states by the Fourteenth Amendment privileges or immunities clause, and to treat state inaction to protect these rights for blacks as grounds for federal intervention under the equal protection clause (both arguments at 81). Woods joined the U.S. Supreme Court in 1880. Frank Scaturro, *The Supreme Court's Retreat from Reconstruction* (Westport, CT: Greenwood Press, 2000), 28; Lou Falkner Williams, *The Great South Carolina Ku Klux Klan Trials, 1871-1872* (Athens: University of Georgia Press), 131. Robert J. Kaczorowski, *The Nationalization of Civil Rights; Constitutional Theory and Practice in a Racist Society 1866-1883* (New York: Garland Press, 1987), 210-252.

²¹ *U.S. v. James W. Avery*, 13 Wall. 251 (1872); *Ex Parte Jefferson Greer*, Sup. Ct. App. Case Files No.6200 (1872) *U.S. v. Elija Sapaugh*, Sup. Ct. App. Case Files No. 6482. The Supreme Court refused to decide *Avery* on the grounds that the decision of these issues was properly within the jurisdiction of the lower court; it refused even to grant a writ of habeas corpus in the *Greer* case; and the U.S. Attorney General George Williams forced the District Attorney Daniel Corbin to drop the *Sapaugh* case with a *nolle prosequi*. Lou Falkner Williams, *id.* 100-112.

²² There are in the same decade two Seventh Amendment cases-- *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532 (1874) and *Walker v. Sauvinet*, 92 U.S. 90 (1876)--where the Court unanimously refused incorporation of the right to jury for civil cases, and a Second Amendment case -- *Presser v. Illinois*, 116 U.S. 252, 267-8 (1878)-- where the Court did the same as to the right to bear arms. These buttress the reading of *Slaughterhouse* and *Cruikshank* as rejecting incorporation. Interestingly, the (losing) attorney in the *Presser* case, who argued that the Second Amendment right to bear arms did apply against the state government of Ohio, was Senator Lyman Trumbull.

white mobs, the widespread awareness that the Fourteenth Amendment was intended, *inter alia*, to undo the *Dred Scott* decision;²³ and to the fact that the Supreme Court in certain important cases in the 1880s did uphold the rights of blacks against both state and private interference.²⁴ Had the Court majority been simply anti-Reconstruction,²⁵ it need not have moved in this latter direction.

The argument here treats as settled the scholarly case that the intent of the 39th Congress was to incorporate the personal rights of the first eight amendments (along with other rights mentioned in the national Constitution such as habeas corpus) into the Bill of Rights,²⁶ and that this fact is something that would have been known to the justices in 1873.²⁷ The following is a sketch of how the *Slaughterhouse* majority opinion of Justice Miller might be most plausibly understood.

I. Providing a Motive for *Slaughterhouse*

²³ 60 U.S. 393 (1857).

²⁴ *Strauder v. West Virginia*, 100 U.S. 303 (1880), *Ex Parte Virginia*, 100 U.S. 339 (1880), *Neal v. Delaware*, 103 U.S. 350 (1880), *Ex Parte Yarborough*, 110 U.S. 651 (1884).

²⁵ Cf. Richard L. Aynes, "Constricting" *supra* note 6; Kaczorowski, *supra* note 20; Rogers M. Smith, *Civic Ideals supra* note 15, pp. 327-337.

²⁶ The "fundamental rights" reading of Charles Fairman would not alter the analysis here (see note 6 *supra*). Miller's opinion would still need explaining, because he read the clause as adding NO new rights to be protected from state abridgment.

²⁷ See note 3 *supra*.

Those scholars who attempt to provide a motivation other than the undermining of Reconstruction for Miller's *Slaughterhouse* undercutting of the Privileges and Immunities Clause have not been able to explain away these mysteries. John Ely, for instance, suggested that the language of the clause itself "frightened" off the Miller majority. The seemingly limitless nature of the phrase "privileges and immunities of citizens," pushed Miller to cut the clause down so small as to render it effectively "dead."²⁸ But surely, had the Court wanted to, it could have referred back to Congressional debates and cited the leading spokesmen for the Amendment as to its purpose of incorporating the Bill of Rights and the rights of the 1866 Civil Rights Act against state governments. This is a big list, but not a limitless one. (The Court could have done this while still rejecting the butchers' claim, since there were clearly some "reasonable" grounds for the law the butchers challenged.)

Michael Les Benedict offers a thoughtful account that explains the backing away from allowing any clout to the Privileges or Immunities Clause in *Slaughterhouse* as part of a broad commitment on the part of both the Chase and Waite courts to dual federalism (i.e., the view that a certain body of implicit states' rights function to check federal powers).²⁹ He notes persuasively that this

²⁸ Ely, *supra* note 6, pp.22-3.

²⁹ Benedict, "Preserving Federalism," *supra* note 18. Michael Ross, *supra* note 17, ch.8, essentially endorses Benedict's account of the majority in *Slaughterhouse* as moved by federalism concerns rather than any anti-Reconstruction animus, and also by

commitment to preserving an appropriately state-centered federal balance was reiterated in Republican Party Platforms of the Civil War and post-bellum periods and also in speeches in Congress on behalf of the postbellum Amendments and the postbellum Civil Rights Acts.³⁰ He illustrates the depth of this judicial commitment with, among others, the unanimous decision of *Lane County v. Oregon* (1868),³¹ for which the opinion was written by Chief Justice Salmon Chase, the most prominently anti-slavery justice to serve on the Supreme Court in the nineteenth century. This decision declared unconstitutional a federal law making federal notes legal tender for all purposes, including the payment of state taxes. A law of Oregon squarely conflicted, requiring that taxes be paid in gold or silver coin. The U.S. Supreme Court struck down the federal law.

The purpose of this essay is not to dispute that the accepted federal balance of late nineteenth century America was far more state centric than at present—indeed, there was not even a federal Justice Department until 1870.³² Nor is it to deny that Justice Miller in 1873 found the dissenters' position in

Justice Miller's interest in permitting legislative regulation of the economy detailed in note 34 below.

³⁰ *Id.*, at 45, 47-53. See also Nelson, "Fourteenth Amendment" *supra* note 6, at 64-90; Bogen, *supra* note 4, at 389-393.

³¹ 74 U.S. (7 Wall.) 71 (1868).

³² Robert Goldman, *Reconstruction and Black Suffrage: Losing the Vote in Reese and Cruikshank* (Lawrence: University Press of Kansas, 2001), 5.

Slaughterhouse to present a frighteningly radical upsetting of the federal balance; he himself says as much.³³ The argument here agrees with those scholars who depict Justice Miller as not attempting in 1873 to block Reconstruction, but goes further in that it attempts to explain why he and his majority reached beyond the issues of the case to reject what they had to have known to have been Congress' incorporationist intent.³⁴

His most likely, this essay suggests, albeit heretofore unnoticed, motive was a desire to avoid incorporating the Second Amendment against state governments.³⁵ By 1871 federal enforcement of Reconstruction was already

³³ *Slaughterhouse*, at 78.

³⁴ Of course, at a more obvious level, they were also rejecting the dissenters' concern with entrenching as "fundamental rights" economic freedoms of property-holders against regulation perceived by state government as promoting public well-being. This aspect of the decision presents no mystery. Justice Miller in a private letter of 1875 expressed frustration with having to "contend with" fellow justices "who have been at the bar the advocates for forty years of railroad companies and all the forms of associated capital" in cases involving "such interests." "All their training," he lamented, all their feelings are from the start in favor of those who need no such influence." Fairman, *Mr. Justice Miller*, *supra* note 17, 374.

³⁵ The argument here is not concerned with deciding whether the Second Amendment right was a personal right to bear arms or a right to bear arms as a member of an organized citizen militia. Amar *supra* note 6 *Bill of Rights* argues that its meaning evolved from 1789 (militia right of states) to the Civil War period (when it was often discussed as an individual right of blacks for self-defense). Stephen P. Halbrook *supra* note 3 insists strenuously on the individual rights reading, and he marshals much documentary evidence for it. In fact, in this postbellum period, a good deal of the armed white violence against blacks was perpetrated by Southern whites organized as nongovernmental

bound up with the incorporation question. Judge Woods on Circuit upheld a prosecution under the Enforcement Act of 1870 for deprivation of the rights of free speech and peaceable assembly via private white violence against blacks.³⁶ In two of the three KKK cases that the Supreme Court ducked in 1872, Second Amendment incorporation had been an issue confronting the Court, in the sense that private interference by whites with this right as to blacks had been charged and the defense claimed that Second Amendment rights were not incorporated at the state level. For the first of these KKK cases, the Court would have examined the two sets of competing arguments from the judges below on the topic, although the Court was ultimately persuaded by the arguments of Attorney General George Williams to deny its own jurisdiction for the case. By the time the second of the cases posing the issue reached the Supreme Court, although the judges below had again issued competing rulings on the question, the defense attorney John Ficken had dropped this issue from his appeal.³⁷

militias and sometimes claiming a Second Amendment membership-in-the-militia right. See *infra* note 45. Also the arming of blacks in official state militias was so heatedly controversial that the Republican governor of South Carolina caved to political pressure from whites and literally disarmed his state black militia. Foner, *supra* note 15, 438-9; see also Lou Falkner Williams, *supra* note 20, 23-27.

³⁶ See *supra* note 20.

³⁷ It came to the Supreme Court as a question needing decision, because of division on the issue between the two judges in the court below, in the first request for review, *U.S. v. James W. Avery*, 13 Wall. 251 (1872). This case had certified to the

Much of the South was in a state of armed insurgency during the years leading up to both the *Slaughterhouse* and the *Cruikshank* cases. The situation that had led up to the KKK Cases involved such massive violence that the federal government had placed nine counties under martial law. In 1872, when the Court ducked the KKK cases, more than 1200 more Enforcement Act cases still awaited trial; the crimes ranged from murder or conspiracy to murder, to interference with First or Second Amendment rights, to interference with voting rights.³⁸ It makes sense to imagine that Southern Republican state governments (of which there were only a few left by 1873)³⁹ may have wished to enact some

Supreme Court two questions: (1) Could ordinary [state] crimes be federally punished under the 1870 Enforcement Act if they were committed in order to violate civil rights of former slaves, and (2) could a private conspiracy to deprive blacks of Second Amendment rights be federally punished under the Enforcement Act? For the second of the cases that had originally produced judicial division over the issue, *U.S. v. Eliza Sapaugh*, the Justice Department removed it from the Supreme Court's docket by *nolle prosequi*. Lou Falkner Williams *supra* note 20, at 100-102, 110-112.

³⁸ Williams, *id.*, 123.

³⁹ By 1873 Republicans had lost their firm control of all Southern states except Arkansas, Louisiana, Mississippi, and South Carolina. Tennessee, Georgia and Virginia had gone into the control of the Democrats, and Alabama, Florida, North Carolina and Texas had divided government. In the 1874 election following the 1873 depression, with Democrats openly wielding the race card, Democrats retook Texas, Arkansas, Florida, Alabama, and Virginia. Foner, *supra* note 15, 539-553. They took Mississippi in 1874-1875 in a campaign marked by rampant mob violence perpetrated by armed bands of whites in broad daylight. *Id.*, 558-563. By the time of the March 1876 *Cruikshank* decision only Louisiana and South Carolina were still under Republican control -- (like Mississippi, they were majority black)-- but Louisiana was the scene of repeated, disputed electoral

sort of restrictions on the "keep[ing] and bear[ing of] arms" by non-members of the official militia.

The armed insurgency of the white South continued in the years between *Slaughterhouse* and the Court's specific rejection of Second Amendment incorporation in *Cruikshank*. In Arkansas in 1874 a series of armed "skirmishes" ensued between competing self-proclaimed militias, each backing rival claimants of victory in the disputed legislative and gubernatorial elections of 1872. The armed conflicts continued until President Grant intervened in May of 1874. In Louisiana, according to historian Eric Foner, "Every election between 1868 and 1876 was marked by rampant violence." In Alabama in August, 1874 two Republican county leaders were assassinated; mobs destroyed homes and crops of black people, murdered one person guarding a ballot box and burned the ballot box; and Klan-type groups instituted a "reign of terror," openly firing upon unarmed blacks headed for ballot boxes, killing seven and wounding dozens, and by public threats of armed force driving away from the polls numberless others. In Mississippi, bands of armed whites kept blacks from the polls in 1874 in Vicksburg and drove the black sheriff out of town. When a posse of armed blacks showed up from the state capital, their pistols and shotguns proved no match for the long-range rifles of the white forces. By early January of 1875, when President Grant intervened with federal troops, as many as 300

outcomes, where, according to Eric Foner, "every election between 1868 and 1876 was marked by rampant violence and pervasive fraud." *Id.*, 550.

blacks had been murdered.⁴⁰ *U.S. v. Cruikshank* was argued at the Court in mid-January, less than two weeks later (although the Court would hold its decision for more than a year.)

A year before *Slaughterhouse* was handed down but after lawyers had already argued the case,⁴¹ the Supreme Court did decide one case on the merits that involved Southern anti-black violence. *Blyew v. U.S.*⁴² would have impressed upon the Court not only the viciousness with which some Southern whites were attacking their black neighbors but also the feebleness of the federal government as a national policing system for dealing with such violence. This case concerned an exceptionally brutal ax murder by two white men of a black family, including a blind 97-year old grandmother, both parents, one non-hidden daughter, and a son who had been left for dead, but who lived long enough to give eyewitness testimony under oath. One daughter who had hidden from the attackers also was able to give eyewitness testimony.⁴³ Because Kentucky law prohibited blacks from testifying against whites, the case was removed to federal court under § 3 of the 1866 Civil Rights Act, which provided,

“That the district courts of the United States, within their respective districts,

⁴⁰ Foner, *supra* note 15, 528, 550, 552-553, 557-558.

⁴¹ Robert D. Goldstein, “Blyew: Variations on a Jurisdictional Theme,” 41 *Stan. L. Rev.* 469-566, at n.221.

⁴² 80 U.S. 581 (1872).

⁴³ Robert D. Goldstein, “Blyew” *supra* note 41.

shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act” [Ch. 31, § 3, 14 Stat. 27 (emphasis added) .]

The first section of the act had plainly specified that black citizens now must have the same "right . . . to . . . give evidence" as white persons. Defense counsel pointed out to the Court that to interpret witnesses in a criminal case as persons being "affect[ed]" by "the cause" would render all laws in Kentucky unenforceable due to judicial backlogs, because any person charged with a crime could then insist on use of a black witness and therefore removal to federal court, and there existed only two federal courts to serve the entire state. The Supreme Court chose to interpret persons affected by the "cause" in criminal cases to be only the prosecutor and the accused and threw the case out of federal court. Blyew was then indicted in state court but fled from the authorities before he could be convicted.⁴⁴

And shortly before the Court handed down the *Slaughterhouse* decision, the much-publicized Colfax massacre took place. (This massacre eventually was to bring its perpetrators before the Court in *U.S. v. Cruikshank*, 1876, where the Court would finally have to confront, and would squarely reject, a Second

⁴⁴ *Id.* at 563

Amendment incorporation claim). The Louisiana situation in the month preceding the massacre had been as follows: A dispute over electoral results led to armed conflict in New Orleans in March of 1873 between the official (Republican-supported) black militia and a competing, purportedly official white militia headed by the losing gubernatorial candidate. The official militia successfully fought them off without serious casualties, but the following month the Colfax massacre perpetrated by a similarly organized group of whites took place in Grant parish, producing the deaths of somewhere between one and four hundred blacks and the arrests that culminated in *U.S. v. Cruikshank*. TWO DAYS LATER THE COURT HANDED DOWN THE SLAUGHTERHOUSE DECISION (on April 14). The Crescent City White League then formed, organizing, among other things, the assassination of six Republican officials. On September 14, 3,500 Leaguers (many of them Confederate Army vets) overwhelmed similar numbers of blacks organized as militiamen and the Metropolitan Police of New Orleans. They occupied the statehouse, city hall and arsenal and withdrew only in the face of federal troops ordered there by President Grant.⁴⁵

Apart from the ongoing use of federal troops and federal prosecutions to

⁴⁵ Foner, *supra* note 15, 550-551. As part of their defense when arrested, these White Leaguers relied on their Second Amendment right to bear arms as the true citizen militia of Louisiana. Carole Emberton, "The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South," presented at Conference "Gun Control: Old Problems, New Paradigms," Stanford Law School, Sept.16-17, 2005. Forthcoming *Stanford Law and Policy Review*.

stem race-based slaughter in the South at the time of the *Slaughterhouse* decision, several Southern states under Republican leadership had in recent years found it necessary to implement widespread martial law or martial law-like proceedings.⁴⁶

It is thus plausible that Miller understood himself in *Slaughterhouse*, to be (1) avoiding the shoals of Bill of Rights incorporation which could have hampered state ability to deal with armed violence, but yet (2) still reading the Fourteenth Amendment in a way protective of the newly granted civil rights of blacks (pushed through Congress by his own party). This reading fits (a) his background as a Republican, who had been motivated to join the party and to change state of residence due to his hostility to slavery and (b) his privately expressed belief that the Fourteenth Amendment was needed to protect blacks from the mad violence of Southern white mobs.⁴⁷ It also fits (c) the fact that the *Slaughterhouse* majority was 4/5 Republican, and (d) the fact that the Court did uphold black rights in three jury trial cases of 1880⁴⁸ and upheld federal enforcement against private criminal action interfering with black voting in *Ex Parte Yarborough* in 1884.⁴⁹ It also fits (d) Miller's description of the three

⁴⁶ Eric Foner cites Tennessee, Arkansas, North Carolina and Texas in this regard for the period of 1868-1870. *Id.*, 439-441.

⁴⁷ See *supra* note 17.

⁴⁸ See *supra* note 24.

⁴⁹ *Id.*

amendments as meant to protect the blacks from oppressions common at the time,⁵⁰ which does not strike one as an anti-Reconstruction message.

Slaughterhouse treats the generality of *Corfield v. Coryell*⁵¹ fundamental rights of free-persons-in-a-free-society (understood as civil rights of state citizenship) to be (as Justice Washington had said in *Corfield*) amenable to reasonable restrictions at the state level that were up to each state, but (just as *Corfield* had said in effect, "However you restrict them, they have to be alike as to out-of staters") Miller reads the Fourteenth Amendment to say, "However you states restrict these rights, they have to be alike as to the two races, black and white, or as to the two peoples, the former enslavers and the former slaves." The latter version explains the link to the Thirteenth Amendment and would allow Congress to enforce the basic civil rights against private violence, as long as a race-based animus or pattern were alleged. This rule of non-discrimination as to basic rights is what Congress sought to accomplish in the 1866 Civil Rights Act, and what it then entrenched (per Miller of the *Slaughterhouse* opinion) in the Equal Protection (not the Privileges or Immunities) Clause.

My reading is influenced by a couple of generally neglected passages in the Court opinion for *Cruikshank* that (a) flatly reject incorporation of the Second Amendment, as well as of the First Amendment; (b) that suggest that if RACE discrimination had been in the indictment, this fact would have made a

⁵⁰ See *supra* note 16.

⁵¹ 4 Wash.C.C. 371, F. Cases No. 3,230 (Cir.Ct.E.D.Pa., 1823).

legal difference (I read this passage as suggesting that in such event interference with the equal protection required in a republican form of government would trigger the legitimacy of Congressional intervention); and that (c) suggest to Congress not terribly subtly that it might justify its federal enforcement on the republican form of government clause which would then not require a state action component. The Fourteenth Amendment constitutionally entrenched the declaration from §1 of the 1866 Civil Rights Act that all persons born or naturalized in the United States are citizens. The *Cruikshank* ruling appears to indicate that in a republican form of government second class status among citizens is not permitted. Miller does not write *Cruikshank* but he silently concurs as does Bradley, who had notably omitted the Second Amendment from his incorporation list in his *Slaughterhouse* dissent.⁵²

If all this is correct, did the Miller majority knowingly turn the Privileges or Immunities Clause into a nullity in rejecting incorporation in the *Slaughterhouse-Cruikshank* combo? No. If I am right and they saw the granting of STATE citizenship in the Fourteenth as the granting of basic civil rights to blacks, protected from state race-based infringement by the Equal Protection Clause (which then, like the 1866 act, forbids race-based discrimination but does not allow for a complete federal take-over of defining the basic rights of citizens), what did they make of the Privileges or Immunities Clause? As the first sentence

⁵² 83 U.S. 36, dissenting at 111, listing rights from Bill of Rights at 118-119.

of the Fourteenth gives state citizenship to blacks and the Equal Protection Clause enforces it as to blacks, so the rest of the first sentence gives national citizenship to blacks and the Privileges or Immunities Clause protects them in the attendant rights. What did it protect? It protected just what the *Dred Scott*⁵³ decision had denied. *Dred Scott* had said blacks, even if citizens of a state, could not be national citizens in the sense of having constitutional rights to invoke the diversity of citizenship jurisdiction of the federal courts. The Privileges or Immunities Clause says states may not insist that their state citizens somehow differ among themselves or are otherwise restricted in their access to the privileges or immunities of national citizenship, such as access to the federal courts. It is true that one might have thought the supremacy clause ALREADY denied states such a power, once the first sentence of the Fourteenth Amendment made blacks citizens, but the *Dred Scott* ruling had specifically rejected access to federal courts by all persons of African descent. Under *Dred Scott* a suit by a black citizen of Massachusetts against a black citizen of New Hampshire, could not be taken up in federal court under diversity of citizenship jurisdiction. In short, the Privileges or Immunities Clause, like the first sentence of the Fourteenth Amendment is being read by the *Slaughterhouse* majority as a response to the *Dred Scott* holding.

II. What is the Evidence?

A. Circumstantial

⁵³ 60 U.S. 393 (1857).

My evidence for the Second Amendment motivation of the Miller group in *Slaughterhouse* is basically circumstantial, the circumstances being (1)the prevalence of armed violence in the South,⁵⁴ (2)the Court's prior unofficial confrontation with the Second Amendment issue, unofficially in the KKK cases in 1871-1872, which would have made the matter salient for them, (3)and the fact that it was white Southern Democrat Congressmen (not the pro-Reconstruction northern Republicans) were the ones in the immediate wake of the *Slaughterhouse* decision who touted the incorporation intent of the Privileges or Immunities Clause.⁵⁵ To them the right to bear arms would have protected the weapons of white vigilante groups, by this point very prominently active throughout the South, the very groups whom the Miller majority might now be worried about shielding.

There is additional circumstantial evidence that the Miller majority in *Slaughterhouse* had reason to be concerned about the Second Amendment consequences of incorporation. The KKK cases occupied not only the executive and judicial branches of government. From April 1871 through February 1872, Congress was engaged in hearing testimony before a Joint Select Committee to investigate Klan violence. The amount of testimony was so massive that the Committee published thirteen volumes on it; the Committee's Majority and Minority Report comprised the first volume of the set, and the other twelve

⁵⁴ See *supra* text at nn. 38-46.

⁵⁵ Wildenthal, *supra* n.11, 1108 and Section III-A.

volumes were transcripts of testimony. The Majority Report prominently featured Klan activity aimed at disarming Southern blacks, even former Union soldiers, as part of the effort to uphold the traditions of slavery. The Minority (i.e. Democratic Party) Report was replete with claims of the wrongfulness of arming black militias (who allegedly caused trouble) while disarming white militias. “[T]he white men are denied the right to bear arms or to organize, even as militia, for the protection of their homes....” Discussion of Klan attacks aimed at disarming blacks featured prominently in the other twelve volumes.⁵⁶ In President Grant’s message to the House of April 1872 reporting on his enforcement of the Civil Rights Act of 1871, he explained that the nine counties of South Carolina had been put under martial law in order to check the Klans, whose objects were “by force and terror to prevent all political action not in accord with [their own]..., to deprive colored citizens of the right to bear arms and of the right to a free ballot, to suppress schools in which the colored citizens were taught, and to reduce [them]...to a condition closely akin to that of slavery....”⁵⁷

In sum, my evidence undergirding the supposition that Miller’s *Slaughterhouse* five were reading the Constitution in such a way as to channel rather than undo Reconstruction is partly circumstantial: (1) It fits their likely Second Amendment concerns--concerns made salient by the rampant level of Southern armed violence; by discussions of the right to bear arms in

⁵⁶ Halbrook, *supra* note 3, 145-148.

⁵⁷ *Id.*, 148-152.

Congressional testimony, commentary and reports; by discussion of the right in federal KKK prosecutions and in the President's report on them; and by the Court's having been presented with this issue in the first of the KKK cases. (2) It also is compatible with the Court's later rulings in *Strauder*, *Neal*, *Ex parte Virginia* and *Ex Parte Yarborough*.⁵⁸

This *Slaughterhouse* interpretation also, however, has textual evidence, derived from a close reading of largely neglected passages from the *Cruikshank* decision of 1876. The latter decision at first blush appears to be a direct assault on Reconstruction, since it threw out indictments of convicted white murderers of blacks, and (relying on the highly contestable argument of *U.S. v. Reese*⁵⁹ issued the same day) threw out two sections of the Enforcement Act of May 1870 as unconstitutional, due to the way they were drafted (saying "as aforesaid," instead of spelling out "on the basis of race or previous servitude").⁶⁰

⁵⁸ See *supra* note 24.

⁵⁹ 92 U.S. 214 (1876).

⁶⁰ Congress within four days of the *Reese* declaration of unconstitutionality began discussing whether and how to revise Sections 3 and 4 of the May 31 1870 Enforcement Act. The discussion arose in the context of a resolution by Sen. Morton (GOP Indiana) and Sen. Christiancy (GOP Michigan) to investigate the degree of "force, fraud, and intimidation" against black voters present in the Mississippi election of 1875, and to propose appropriate legislation to deal with and prevent such problems. The resolution had been around since December, 1875, four months before *Cruikshank* and *Reese* were handed down, but now Sen. Bayard (Dem. Delaware) was arguing that the two Supreme Court decisions showed that "the letter and spirit" of the various Reconstruction enforcement acts were all unconstitutional, and therefore no new legislation could be

(In the 1883 *U.S. v. Harris* decision the Court would throw out §5519 of the

adopted either. Republican Senators contested his (extreme) claim that all the Fourteenth and Fifteen Amendments did was to forbid state legislation, and only courts could enforce the amendments by striking down such legislation (and, implicitly therefore, that Congress's only legislative role would be to lay out appropriate jurisdiction for such declarations.) Sen. Frelinghuysen of New Jersey noted correctly that all Congress would have to do to render Sections 3 and 4 constitutional in the eyes of the Supreme Court was to add the six words, "on account of race or color." The proposal for legislative initiatives to clarify the 1870 Enforcement Act went nowhere because the House of Representatives was now heavily Democrat. *Cong. Record 44th Cong. 1st Session, Vol.4* (Washington: Govt. Printing Office, 1876) pp. 2064-2076, 2100-2107, 2108-2120, 5274-5298. Frelinghuysen comment at 2112.

Congress in 1873-4 had produced a recodification of federal laws, and this recodification slightly altered the wording of Sections 3 and 4, such that they would have now been even more objectionable to the Waite Court (in that they removed the references to racial motivation for interference with voting rights that had previously been in the sections in the phrase "as aforesaid" (which the Waite majority had found too vague to suffice as indication that the crimes must include proof of racial motivation). Now those sections contained no such qualifying term. Congress then produced a Second Edition of the Revised Statutes in 1878. In this edition the original §2 of 1870 became in the Revised Statutes partly §2005 and partly §2006; Section 3 became partly §2007, partly §2008; Section 4 became partly §2006 and partly §5506; Section 5 became §5507. Section 5506 was adopted March 3, 1875 (a year prior to the *Reese* and *Cruikshank* decisions), as an amended version of §4 of the 1870 Act. The amendment omitted the "as aforesaid" language, as noted above. *U.S. Statutes at Large, Revised Statutes of the United States, Second Edition (Volume 18, Part One)* (Washington D.C.: Govt. Printing Office, 1878) Titles XXVI, pp. 352-353 and LXX, ch.7, p.1067. Sections 5506 and 5507 remained part of the U.S. Code until they were repealed in 1893. *U.S. Code Service Tables*, L.Ed. (Lexis-Nexis, 2004).

In sum, the divided Congress's response to *Reese/Cruikshank* was neither to amend the sections to meet the Court's objections, nor to remove them from the statute books. Cf. Robert M. Goldman, *supra* note 32, at 109 (asserting, apparently erroneously, that Congress promptly re-drafted the sections to meet the Court's concerns and re-enacted them as sections 5506 and 5507 of the Revised Statutes).

Revised Statutes on similar grounds: by neglecting to mention racial motivation or effect this piece of legislation fell out from under the Thirteenth Amendment's authorizing power to Congress.⁶¹

B Textual Evidence from *U.S. v. Cruikshank* (1876)

Nonetheless, certain passages in Chief Justice Waite's *Cruikshank* decision that discuss incorporation can also plausibly be read as a guidebook to Congress and the federal executive on how constitutionally to uphold the rights of blacks in the South, as to First Amendment rights and voting rights. These concerns would have played to the pragmatic as well as the principled side of the Republican Party. To the degree that Southern violence could succeed in violently suppressing Republican party gatherings and the votes of Southern blacks (by far the most solid Republican voting bloc), the Republican national majority would be threatened. Indeed this majority was hanging by a thread at the time of the March 1876 *Cruikshank* decision, having lost the House overwhelmingly and most Southern state legislatures in the 1874 election.⁶²

⁶¹ *U.S. v. Harris* 106 U.S. 629 (1883), at 639-643. Nor could the Guaranty Clause authorize §5519 (the Court implied), since it applied "no matter how well the State may have performed its duty" (at 639).

⁶² By 1873 Republicans had lost their firm control of all Southern states except Arkansas, Louisiana, Mississippi, and South Carolina. Tennessee, Georgia and Virginia had gone into the control of the Democrats, and Alabama, Florida, North Carolina and Texas had divided government. In the 1874 election following the 1873 depression, with Democrats openly wielding the race card, Democrats retook legislatures in Texas, Arkansas, Florida, and Alabama. Foner, *supra* note 15, 539-553. At the national level, the landslide 1874 election had been devastating

Michael McConnell has described the election season of 1876 as possibly the "most violent, fraud-ridden, and tumultuous in history," and has noted that people were openly predicting another civil war over the election outcome.⁶³ Although in the immediate short term the federal executive proceeded, after the Hayes-Tilden election was settled, to stop using federal troops to protect black rights in the South, Chief Justice Waite's willingness expressed in the *Cruikshank* reasoning, to allow federal prosecutions for violent private interference with voting rights, as long as the indictments were more carefully framed, was not lost on the federal government.⁶⁴ The Republican

to the Republicans in Congress. Democrats went from having only one-third of the House seats to having a majority of 169-109. Michael McConnell "The Forgotten Constitutional Moment," *Constitutional Commentary* 11(1994):115-144, 125. Democrats "redeemed" Mississippi in 1874-1875 in a campaign marked by rampant mob violence perpetrated by armed bands of whites in broad daylight. Foner, *id.*, 558-563. By the 1876 *Cruikshank* decision, only Louisiana and South Carolina (like Mississippi, majority black) were still under Republican control -- but Louisiana was the scene of repeated, disputed electoral outcomes, where, according to Eric Foner, "every election between 1868 and 1876 was marked by rampant violence and pervasive fraud." Foner, *id.*, 550. In these two states and in Florida, Republicans still controlled the governorship. *Id.*, 575.

⁶³ Michael McConnell, *id.* 127-8.

⁶⁴ Chief Justice Waite himself almost immediately after *Cruikshank* displayed his willingness in this direction by upholding indictments against South Carolina whites charged with violent interference with black voting rights during the 1876 campaign. Donald G. Nieman, *Promises to Keep: African Americans and the Constitutional Order, 1776 to the Present* (Oxford University Press, 1991), 99. According to Charles Fairman, Southern Democrats in the Senate were expressing "general unfriendliness to the federal judiciary" in January of 1882, *Mr.*

administration did pick up on his *Cruikshank* advice for the *Ex Parte Yarborough* prosecutions of perpetrators of violence during the 1882 congressional elections. Second Amendment rights were another story. Talk of their incorporation was buried for good in the *Cruikshank* decision.

In terms of Republican party principles, Chief Justice Waite's turn in *Cruikshank* to the clause guarantying a republican form of government (Art. IV, Sec.4) as the grounding for federal enforcement of black civil rights against private violence had impeccable credentials. The link between "essential principles of republican government" and the protection (entrenched in the Fourteenth Amendment) of a distinct "portion of the population" to whom a state "systematically refuses or neglects to [give] protection" was elaborated by no less mainstream an authority than Thomas M. Cooley in his widely consulted edition of Story's *Commentaries on the Constitution*.⁶⁵ Chief Justice Salmon Chase himself (Mr. Anti-slavery among the nineteenth century justices) had penned the unanimous opinion in *Texas v. White* to uphold Congressional Reconstruction as authorized by the Guaranty Clause.⁶⁶

Justice Miller, supra note 17. One can infer that if the federal courts had been undermining Reconstruction, southern Democrats seemed not to have noticed it.

⁶⁵ Thomas M. Cooley, ed. *Joseph Story's Commentaries on the Constitution of the United States*, Vol.II, 4th ed. (Boston, 1873), ch.XLVII, pp.682-685, as cited in Kaczorowski, *Nationalization of Civil Rights, supra* note 20, p.290 at n.80.

⁶⁶ *Texas v. White*, 7 U.S. 700, at 728-730 (1869) says the following:

There are four separate lines of constitutional reasoning used in *Cruikshank*. First, the Court rejects the four of the sixteen counts of the indictments (6th, 7th, 14th, and 15th) concerning interference with the right to vote because no racial motivation of the perpetrators was alleged. The Fifteenth Amendment forbade racial discrimination in voting but did not guarantee voting as such. Although the words of the Fifteenth Amendment forbid race-based denials or race-based abridgment of the vote "by the United States, or by any state," the Waite court was prepared to allow federal protection of the vote even against private racially-motivated violence, as long as the racial motivation was in the charge and was proved.⁶⁷

The three remaining lines of argument in *Cruikshank* are tightly interwoven. They all appear at pages 92 U.S., 551-555 of the opinion; I disentangle them

"The new freemen necessarily became part of the people; and the people still constituted the State: for States, like individuals, retain their identity, though changed, to some extent, in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty.

"In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution...

"[T]he power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress..."

⁶⁷ This is a point stressed in Benedict "Preserving Federalism," *supra* note 18.

here, but if the reader would like to see how Chief Justice Waite intertwines them, I reproduce an extended passage containing them in the Appendix.

Waite's second line of argument rejects the idea that First or Second Amendment rights have been incorporated via wholesale incorporation of the Bill of Rights through the Privileges or Immunities Clause against state governments. The Second Amendment, he says [at 553], "has no other effect than to restrict the powers of the federal government." As to the First Amendment, he distinguishes [at 552] between peaceably assembling for any lawful purpose and assembling to "petition[] Congress for redress of grievance or for any thing else connected with the ... national government." The latter is [now] protected as "an attribute of national citizenship" "by the United States" [at 552]. The former remains in the hands of the state police power. This section of his opinion, then, recapitulates the Miller opinion in *Slaughterhouse*. But this time, Bradley concurs silently. This rejection of incorporation, incidentally, breaks with Justice Bradley's circuit court rationale for the case. He had retained First and Second Amendment incorporation, but had argued that private action could not violate those rights; under the Fourteenth Amendment state action was required for a violation of those rights.⁶⁸

⁶⁸ Bradley's argument that state action was needed for a violation varied as to the right in question. When it came to a racially motivated private conspiracy for preventing a black person from leasing property, there Bradley insisted, "it cannot be doubted that this would be a case within the power of congress to remedy and redress." *U.S. v. Cruikshank*, 25 F. Cas. 707, at 714. To this extent Bradley in 1874 was sticking with

Thirdly, Waite [at 553-555] throws out those counts alleging interference with either due process of law or equal protection of the law, on the grounds that these Fourteenth Amendment clauses refer only to actions by states, not by private persons. Neither clause "adds any thing to the rights which one citizen has under the Constitution against another." He is ruling out Congressional enforcement of either the equal protection or the due process clauses against private persons, as distinguished from states.

Then (fourthly), interspersed within his arguments both on the First Amendment right to assemble peaceably for any lawful purpose and his arguments on the right to be equally protected by the laws in one's person and property, Chief Justice Waite inserted several statements about the demands of a republican form of government. For instance, he writes [at 552], "The very idea of a government, republican in form, implies a right on the part of its

his 1871 advice to Judge Woods on the idea that state inaction might justify federal intervention against private wrongdoing. There is a Thirteenth Amendment logic for this position. The Thirteenth made blacks free persons, and the right to earn, buy and sell property is a fundamental right of free persons. Congress is authorized to enforce the Thirteenth Amendment. Bradley had put forth this Thirteenth Amendment rationale in his dissent (with Swayne) for the 1872 *Blyew* case. There he had insisted that the Court should uphold a law that (per his interpretation) "provides a remedy where the State refuses to give one; where the mischief consists in inaction or refusal to act, or refusal to give requisite relief," because under the Thirteenth Amendment, "The power to enforce the amendment by appropriate legislation must be a power to do away with the incidents and consequences of slavery, and to instate the freedmen in the full enjoyment of that civil liberty and equality which the abolition of slavery meant." 80 U.S. 581, 597 and 601.

citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." He also writes [at 555], "The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, *if within its power.*" (Emphasis added.)

While the conventional reading of this "if" phrase is to take "power" as a reference to legitimate authority, as distinguished from effective capacity, in fact Waite's statement has close echoes not only in the Bradley lower court opinion described above, but also in speeches made by stalwart supporters of Reconstruction in the U.S. Senate, in an extended discussion of *Reese* and *Cruikshank* that transpired within days of the decision. Whereas Chief Justice Waite put the force of constitutional authorization in the republican form of government clause in order to get around what he saw as the state action limitations of the Equal Protection and Due Process clauses, Senator Morton placed the authorization in the Equal Protection clause and in the Fifteenth Amendment, insisting,

"When a State government utterly fails to protect a large class of her people, that is denying them the equal protection of the laws. It is the duty of the State to protect every class of her population and when a state fails to do it...it is denying equal protection of the laws, and Congress can come in and furnish that protection. This was the understanding with which both these [Fourteenth and

Fifteenth] amendments were passed... and we all know it...[I]f the State by its government failed to protect a part of her people, or *if she were unable to do it, if anarchy prevailed*, that failure ... of the State [denies equal protection]. That was the understanding we had of the Fourteenth and Fifteenth Amendments....and this whole country knows it."⁶⁹

Chief Justice Waite pointedly adds to his equal protection discussion the fact that, "There is no allegation that this [depriving others of equal benefit of laws] was done because of race or color of the persons conspired against" [at 554]. If he were simply making the argument that Congress may not act to enforce the equal protection clause unless there is unconstitutional state action to restrain, there would have been no reason for him to add these passages. If one takes the words seriously, one sees them pointing to a Congressional rationale for punishing racially motivated attacks on persons and property, as Justice Bradley's circuit court opinion would have permitted under (evidently) either the Thirteenth Amendment or some sort of combination of the citizenship clause of the Fourteenth and the Privileges or Immunities clause of the Fourteenth.⁷⁰ But Justice Waite's, and now the Supreme Court's, rationale for allowing this protection would be the republican form of government clause.

⁶⁹ *Emphasis added. Congressional Record, Vol.4, pp.2071-2072 (March 30, 1876).*

⁷⁰. See note 68 *supra*.

This implicit suggestion from Waite [at 554-555] was that Congress invoke its duty to guaranty a republican form of government to the states (under Article IV, § 4) in any situation where the state showed it not "within its power" to secure such government. Such "republican" government, according to the Waite Court included both the First Amendment right to petition government for redress of grievance, and the same right for black persons as is enjoyed by white persons "to the full and equal benefit of all laws and proceedings" of the state "... for the security of their respective persons and property."

In my judgment the most sensible way to read this set of arguments is as follows: (1) The Court is rejecting Second Amendment incorporation against state governments; but (2) is inviting the federal government, if it again gets mobilized in a pro-Reconstruction direction,⁷¹ to legislate to protect First Amendment rights of assembly and political expression against private violence

⁷¹. See note 62 *supra*. Notably, the Senate Committee appointed five days after the *Reese* and *Cruikshank* decisions to investigate the "force, fraud, and intimidation" against blacks and their allies in the 1875 Mississippi election and to recommend appropriate legislation to deal with the problem picked up on Waite's suggestion. The recommendation came in the committee's report on August 8, 1876, and grounded its legislative recommendation not on the power to secure fifteenth Amendment rights nor on the Fourteenth Amendment's equal protection clause, but rather on the republican form of government guarantee. "The United States has guaranteed to the State of Mississippi a republican form of government, and this guarantee must be made good." *Cong. Record Vol.4*, pp.5280-5281. The recommendation of laws to be passed came in the most general of terms, and with the House controlled by Democrats, no more concrete proposals to protect voting rights were put forth in this Congress. But see note 60 *supra* for information on what became of the federal code in this respect.

as part of its power under the clause that assures that the United States will guaranty a republican form of government to every state. This approach eliminates the troublesome specter of Second Amendment incorporation, allowing states to regulate to reduce gun violence, but protects those freedoms mentioned in the First Amendment that are needed for a republican form of government. It was also an approach with some familiarity. Republican candidates had been invoking the clause regularly in campaign speeches in defense of their Reconstruction policies in the 1867-1870 period.⁷² Discussion of the clause figured prominently in the debates over readmission of Virginia and Mississippi to the Union in February of 1870.⁷³ Just three months later Congress had enacted the first of the Ku Klux Klan Enforcement Acts, under which Cruikshank and his criminal associates had been found guilty. And, as noted, former Chief Justice Salmon P. Chase had used the clause to support the constitutionality of Congressional Reconstruction in *Texas v. White* (1869).

(3) Finally, The Waite opinion for *Cruikshank* invites the federal government to produce more particularly drawn indictments that specify racial animus behind private violence or a pattern of non-enforcement of state laws

⁷² Michael Les Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," *J of American History*, 61 (1974):65-90, 75.

⁷³ Charles O. Lerche, "Congressional Interpretations of the Guarantee of a Republican Form of Government during Reconstruction," *Journal of Southern History* XV (1949): 192-211, at 205-207.

for the protection of blacks as such. The Court implies that it will uphold such indictments as proceeding (again) from the republican form of government clause. Under this clause there would be no state action requirement as a prerequisite to punishing private wrongs. Now that blacks have been freed by the Thirteenth Amendment, they and their descendants are implicitly guaranteed the basic rights of free persons in a free society (subject to reasonable police power limits) and thus may not as a group be denied equal protection of the laws, through state inaction. Such inaction would amount to a state failure to provide a republican form of government and would make federal intervention appropriate.

III. Conclusions

This essay has presented a far more Reconstruction-friendly reading of *Cruikshank* than is typical.⁷⁴ It is true that the specific outcome of *Cruikshank* by setting free three white men who had murdered black people left the impression that it was saying by deed what *Dred Scott* had said in words, that the black man in this country had no rights that the white man was bound to respect. Still, the *Cruikshank* court did go out of its way to point to avenues for future legal redress for aggrieved blacks. And this is the only reading I can think of that can account for (a) the majority of eight concurring in the reasoning—all the Republicans on the Court including Bradley, the *Slaughterhouse* incorporationist (my premise is that the Second Amendment issue caused him to

⁷⁴ The exception to the typical picture is Michael Les Benedict, "Preserving Federalism," *supra* note 18.

back away from wholesale incorporation); (b) the extended language about the requirements of a republican form of government, which is not needed to settle the issues of the case; and (3) the language concerning a race-based animus behind the violence. The absence of state action may in the eyes of the Court make the Equal Protection Clause unavailable as the foundation of the federal power to prosecute. Even if this is so, however, there is no reason for the Court to mention the lack of a racial animus accusation, unless the Court is planning to treat such an allegation as legitimating the federal power to prosecute future cases under a different part of the Constitution. The Court is pointing to the Guaranty Clause, as supplemented in the Thirteenth and Fifteenth Amendments, as that part.

Thus, it is a mistake to judge *Cruikshank* simply as part of the sign-off of Reconstruction that occurred after the 1876 election when Hayes promised to stop enforcing the rights of Southern blacks as the price by which he bought the presidency in that disputed election. *Cruikshank* lets those three murderers go free as the cost of assuring the country of what leading Republican spokesmen had been saying since the war's end--the Republican party did not plan or wish to license the federal government to supplant state governments as the basic law enforcers.⁷⁵ Rather, the party line on the Thirteenth and Fifteenth Amendments was that these simply empowered the federal government to

⁷⁵ See citations at note 30 *supra*.

secure these rights (of free persons and of voting) for the freed slaves.

Cruikshank continued to allow such federal enforcement as long as indictments were carefully drawn.⁷⁶ As to the Fourteenth Amendment, many in Congress had insisted it would protect fundamental rights, or Bill of Rights privileges, of all Americans from abridgment by state governments, but armed violence was so prevalent in the South and Second Amendment rights so prominent in the discourse of Bill of Rights protections, that the Supreme Court “interpreted” that meaning out of the Privileges or immunities Clause. The Supreme Court has never put that meaning back with respect to the Second Amendment, and once *Cruikshank* squarely confronted Second Amendment incorporation neither Justice Bradley nor Justice Woods, both of whom had earlier endorsed Bill of Rights incorporation, abandoned the incorporation position.⁷⁷ The reading of the 1870s justices did not match Congress’s original intention as to the Privileges or Immunities Clause. But perhaps the Court’s was the wiser one, at

⁷⁶ Robert Kaczorowski (*supra* notes 15 and 20) makes a good case that decisions like *Cruikshank* were followed by a drastic reduction in federal enforcement efforts. But the electoral politics of the nation were simultaneously turning against Reconstruction at both executive and legislative levels, so disentangling an independent impact from Supreme Court decisions is not easy.

⁷⁷ Bradley endorsed it in dissent in *Slaughterhouse*, 83 U.S. 36, dissenting at 111, listing First Amendment rights at 118-119. Woods, following advice in a letter from Bradley, endorsed it on circuit in 1871 as to the First Amendment, *supra* note 20. After he joined the Supreme Court in 1880, Woods wrote the opinion in which the Supreme Court (again) squarely rejected a Second Amendment incorporation argument, *Presser v. Illinois*, 116 U.S. 252, at 264-268 (1886).

least as to the Second Amendment.