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Wilson R. Huhn

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THE LEGACY OF *SLAUGHTERHOUSE, BRADWELL, AND CRUIKSHANK* IN CONSTITUTIONAL INTERPRETATION

Wilson R. Huhn *

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I. INTRODUCTION

Slaughterhouse Cases,¹ *Bradwell v. Illinois*,² and *Cruikshank v. United States*,³ which were all decided between 1873 and 1876, were the first cases in which the Supreme Court interpreted the 14th Amendment. The reasoning and holdings of the Supreme Court in those cases have affected constitutional interpretation in ways which are both profound and unfortunate. The conclusions that the Court drew about the meaning of the 14th Amendment shortly after its adoption were contrary to the intent of the framers of that Amendment and a betrayal of the sacrifices which had been made by the people of that period. In each case, the Court perverted the meaning of the Constitution in ways that reverberate down to the present day.

In these cases the Court ruled upon several critical aspects of 14th Amendment jurisprudence, including (1) Whether the 14th Amendment prohibits the States from interfering with our fundamental rights; (2) How the equality of different groups should be determined; and (3) How

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1. 83 U.S. 36 (1873).
2. 83 U.S. 130 (1873).
3. 92 U.S. 542 (1876).

much power Congress has to protect the civil and political rights of American citizens – in particular, whether the 14th Amendment authorizes Congress to enact legislation to prevent mobs or other private individuals from violating people’s fundamental rights. The Court narrowly construed the constitutional principles of liberty, equality, and the power of Congress to protect civil rights.

II. *SLAUGHTERHOUSE CASES*

In *Slaughterhouse Cases* the Supreme Court came to a commonsense result – the Court upheld a law that concentrated all of the butchering business in the City of New Orleans to a location south of the city limits in an area controlled by a state-created monopoly.⁴ The Court found the law to be a constitutional exercise of the police power of the State, a reasonable regulation protecting the public health.⁵ And the Court could have rested its opinion solely upon this finding, as even the *Lochner* Court would likely have upheld the law on those grounds.⁶ But the *Slaughterhouse* Court went much further. In doing so, the Court practically eviscerated the Privileges and Immunities Clause of the 14th Amendment.

The Supreme Court ruled in *Slaughterhouse* that the butchers had no constitutional claim under the 14th Amendment against the law because the constitutional right that they were asserting – the right to earn a living at an honest occupation – although a fundamental right, was not a “privilege or immunity of national citizenship” within the meaning of the 14th Amendment.⁷ The key to the reasoning of the Court on this point was that there is a distinction between state citizenship and national citizenship. The Court stated, “[i]t is quite clear, then, that there

4. See *Slaughterhouse*, 83 U.S. at 59-63 (setting forth and upholding the Louisiana statute creating the monopoly and designating the area where butchering could occur).

5. See *id.* at 61-65 (discussing the “police power” of the state to enact laws protective of the public health); *id.* at 63 (“The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power.”).

6. See *Lochner v. New York*, 198 U.S. 45, 61 (1905) (striking down a law prohibiting bakers from working more than sixty hours per week). The Court stated:

[W]e think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals

Id.

7. *Slaughterhouse*, 83 U.S. at 73-74.

is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.”⁸ The Court then reasoned that our fundamental rights do not arise from the fact of American citizenship; rather they arise from our status as citizens of the several states.⁹ In reaching this conclusion the Court relied upon a pre-14th Amendment case, *Corfield v. Coryell*,¹⁰ in which Judge Bushrod Washington had defined the privileges and immunities of citizens of the several states as being “those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign,”¹¹ and as including at least the following: “Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.”¹²

Citing *Corfield*, the *Slaughterhouse* Court identified our “fundamental” rights in the following terms:

The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which the [sic] fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.¹³

The *Slaughterhouse* Court asked rhetorically, “[w]as it the purpose of the fourteenth amendment [sic], by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?”¹⁴ To the majority of the Court, the

8. *Id.* at 74.

9. *Id.* at 74-76.

10. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

11. *Id.* at 551, quoted in *Slaughterhouse*, 83 U.S. at 76.

12. *Id.* at 551-52, quoted in *Slaughterhouse*, 83 U.S. at 76.

13. *Slaughterhouse*, 83 U.S. at 76.

14. *Id.* at 77.

answer was “No,” but legal scholars almost unanimously agree with the four dissenters that the Court answered that question wrong.¹⁵

In reaching this result the Court ignored the straightforward language of the 14th Amendment. The first words of the Amendment state:

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 States¹⁶

The Framers of the 14th Amendment made state citizenship secondary to national citizenship. They provided that all persons born in the United States are American citizens, and that Americans are citizens of whatever state they happen to reside in. Yet in *Slaughterhouse* the Supreme Court turned that unmistakable hierarchy on its head, and as a result they consigned the fundamental freedoms that Americans rightfully regard as their birthright to the dubious protection of the States. After *Slaughterhouse* all of our fundamental rights – freedom of speech, freedom of the press, freedom of religion, freedom of assembly, and all of the other privileges and immunities set forth in the Bill of Rights, as well as all of our unenumerated rights, would thenceforward be subject to the whims and prejudices of state constitutions, state laws, state and local police, state courts, and state juries.

In placing state citizenship over national citizenship, the *Slaughterhouse* Court reflected the view of John C. Calhoun. In 1833, Calhoun had equated the idea of a citizen of the United States to a “citizen of the world, . . . a perfect nondescript,”¹⁷ and stated that our

15. *Id.* at 78. 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, 627-29 (1994) (collecting views of scholars on the *Slaughterhouse* Court’s interpretation of the Privileges and Immunities Clause).

16. U.S. CONST. amend. XIV, § 1.

17. See 2 THE WORKS OF JOHN C. CALHOUN 242 (Richard Krenner Crallé ed.) (1888). In objecting to the Revenue Bill pending before the Senate, Calhoun said:

In what manner are we citizens of the United States? Without weakening the patriotic feeling with which, I trust, it will ever be uttered. If by citizen of the United States he means a citizen at large, one whose citizenship extends to the entire geographical limits of the country, without having a local citizenship in some State or territory, a sort of citizen of the world, all I have to say is, that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population.

Id. at 242-43.

rights depend upon being the citizen of a State or territory.¹⁸ Dissenting in *Slaughterhouse*, Justice Stephen J. Field excoriated the majority for adopting Calhoun's view of the relative importance of state and national citizenship.¹⁹ In the words of Charles L. Black, Jr., the *Slaughterhouse* Court "surrendered to Calhoun."²⁰ Black explains:

The fact (an amazing one in view of the intervening great Civil War for national unity), is that, on the level of our highest values, this *Slaughterhouse* holding is a very close fit with the banefully "classic" doctrines of John C. Calhoun, the great heresiarch, on the relative importance and worth of *national* citizenship (not very much) and state citizenship (nearly everything).²¹

Even more seriously, the reasoning of the Court in *Slaughterhouse* making our fundamental rights dependent upon state citizenship and state institutions allowed future segregationists to base their political philosophy upon the theory of "states' rights." George Wallace could not have argued, in his January 1963 inauguration address as Governor of Alabama, that he had the power to protect and defend "segregation today . . . segregation tomorrow . . . segregation forever"²² unless he believed that such a question was a matter of state citizenship.

18. *See id.* at 243. Calhoun stated:

Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some State or territory, and, as such, under an express provision of the constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this, and in no other sense, that we are citizens of the United States.

Id. at 243.

19. *See Slaughterhouse*, 83 U.S. at 95 (Field, J., dissenting).

20. CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM* 32 (1997).

21. *Id.* More colorfully, Black stated:

This denial to each of the States of the right to choose its own citizens might be looked on now as just another nail in the coffin of the theory that our states are "sovereign." That coffin can use all the nails it can get, because it yawns every now and then, on some inauspicious midnight, to give up its undead, clad perhaps in the senatorial toga of Calhoun.

Id. at 24.

22. *See* George C. Wallace, Governor, 1963 Inaugural Address (Jan. 14, 1963), available at http://www.archives.state.al.us/govs_list/inauguralspeech.html. Governor Wallace said:

Today I have stood, where once Jefferson Davis stood, and took an oath to my people. It is very appropriate then that from this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done, time and time again through history. Let us rise to the call of freedom-loving blood that is in us and send our answer to the tyranny that clanks its chains upon the South. In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny . . . and I say . . . segregation today . . . segregation tomorrow . . . segregation forever.

Id.

Similarly, three months later, those who denounced the civil rights activities of Martin Luther King, Jr., and other members of the Southern Christian Leadership Conference in Birmingham, Alabama, as the work of “outsiders,”²³ relied upon the implicit belief that only Alabama institutions had the right and the power to address matters of constitutional importance in the State of Alabama.

Here is a portion of King’s response to this argument:

I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial “outside agitator” idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.²⁴

Whether it be Daniel Worth circulating Hinton Helper’s *Impending Crisis*²⁵ or Viola Liuzzo responding to the events at Edmond Pettus

23. See Statement by Alabama Clergymen on Racial Problems in Alabama (Apr. 12, 1963), available at <http://www.stanford.edu/group/King/frequentdocs/clergy.pdf> (“We are now confronted by a series of demonstrations by some of our Negro citizens, directed and led in part by outsiders.”).

24. See Martin Luther King, Jr., Letter from a Birmingham Jail (Apr. 16, 1963), available at <http://www.mlkonline.net/jail.html>. King continued:

I think I should indicate why I am here in Birmingham, since you have been influenced by the view which argues against “outsiders coming in.” I have the honor of serving as president of the Southern Christian Leadership Conference, an organization operating in every southern state, with headquarters in Atlanta, Georgia. We have some eighty five affiliated organizations across the South, and one of them is the Alabama Christian Movement for Human Rights. Frequently we share staff, educational and financial resources with our affiliates. Several months ago the affiliate here in Birmingham asked us to be on call to engage in a nonviolent direct action program if such were deemed necessary. We readily consented, and when the hour came we lived up to our promise. So I, along with several members of my staff, am here because I was invited here. I am here because I have organizational ties here.

But more basically, I am in Birmingham because injustice is here. Just as the prophets of the eighth century B.C. left their villages and carried their “thus saith the Lord” far beyond the boundaries of their home towns, and just as the Apostle Paul left his village of Tarsus and carried the gospel of Jesus Christ to the far corners of the Greco-Roman world, so am I compelled to carry the gospel of freedom beyond my own home town. Like Paul, I must constantly respond to the Macedonian call for aid.

Id.

25. See MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 289-95 (2000) (describing the trials and convictions of Daniel Worth in North Carolina for circulating Helper’s anti-slavery book,

Bridge,²⁶ Americans have both the right and the moral duty to protest fundamental injustice anywhere in the United States, because these are matters of national citizenship, not state citizenship. Yet even today, the misconception that the States should have the final word in defining our fundamental rights holds influence in some quarters. During the recent presidential campaign, in an interview with veteran television journalist Katie Couric, Republican Vice-Presidential nominee Governor Sarah Palin expresses both her belief in the right to privacy and her understanding that the parameters of that right should be determined by the individual states:

Couric: Do you think there's an inherent right to privacy in the Constitution?

Palin: I do. Yeah, I do.

Couric: The cornerstone of *Roe v. Wade*.

Palin: I do. And I believe that individual states can best handle what the people within the different constituencies in the 50 states would like to see their will ushered in an issue like that.²⁷

The immediate and principal consequence of the Court's ruling in *Slaughterhouse* was to remove the Privileges and Immunities Clause as the safe harbor of our fundamental rights. But Americans proved reluctant to believe that the Constitution afforded no remedy when the States violate fundamental rights. The task of preserving our substantive rights against state injustice eventually fell to the Due Process Clause of the 14th Amendment. Later in the 19th century, the Supreme Court turned to the Due Process Clause as the textual home of our fundamental rights. As semantically awkward and historically inaccurate as the choice of the Due Process Clause was, the word "liberty" nevertheless shone brightly there, and the Court began the long, slow process of "incorporating" our substantive fundamental rights into the Fourteenth

events that Curtis calls "a crucial part of the background of the much disputed history of the Fourteenth Amendment").

26. See generally MARY STANTON, FROM SELMA TO SORROW: THE LIFE AND DEATH OF VIOLA LIUZZO (1998) (describing the life of a Detroit housewife who was killed in Alabama in March 1965, as a result of her civil rights activities).

27. Interview by Katie Couric with Joe Biden and Sarah Palin, U.S. Vice-Presidential Nominees, (Oct. 1, 2008), available at <http://www.cbsnews.com/stories/2008/10/01/eveningnews/main4493062.shtml>.

Amendment – defining the nature and the scope of the rights that are “implicit in the concept of ordered liberty.”²⁸

Supreme Court Justices have rightfully objected that neither the text nor the history of the Due Process Clause justifies the theory of “substantive due process.” For example, in *Griswold v. Connecticut* Justice Potter Stewart dissented for the following reason:

We are told that the Due Process Clause of the Fourteenth Amendment is not, as such, the “guide” in this case. With that much I agree. There is no claim that this law [prohibiting the use of birth control], duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining “the wisdom, need, and propriety” of state laws.²⁹

Eight years later in *Roe v. Wade* Justice Stewart changed his view and recognized the doctrine of substantive process,³⁰ yet even today, some justices still maintain the illegitimacy of the concept. For example, Justice Antonin Scalia has stated his belief that the Due Process Clause protects only procedural, not substantive rights: “The text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty ‘without due process of law.’”³¹

In hindsight it should not be surprising that the first substantive due process right recognized by the Supreme Court a century ago was

28. *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937) (Cardozo, J.) (“In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.”).

29. *Griswold v. Connecticut*, 381 U.S. 479, 528 (1965) (Stewart, J., dissenting).

30. See *Roe v. Wade*, 410 U.S. 113, 167-68 (1973) (Stewart, J., concurring). Speaking of the Court’s decision in *Griswold* striking down a Connecticut law making it unlawful to use birth control, Justice Stewart stated:

[I]t was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the ‘liberty’ that is protected by the Due Process Clause of the Fourteenth Amendment. As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.

Id. at 167-68.

31. *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

“liberty of contract.”³² In this individualistic nation of self-sufficient farmers and tradesmen, where government regulation was largely unknown, with a frontier that took three centuries to move from the beachheads along the Atlantic coast to the interior of Alaska – a frontier where the existence of government itself was barely felt – in this country of small farmers, ranchers, small businessmen, and adventurers, we might rationally expect an economic philosophy of *laissez faire* to arise. That it did not disappear with the erection of mills in Lawrence and Lowell, or even the rise of the robber barons, is testament to the fact that values emerge from the society in which they are born and they do not necessarily die with that society – they may live on past their appointed time.³³ “Liberty of contract” did not expire until 1937 at the height of the Great Depression and the commencement of Roosevelt’s second term.³⁴

What is surprising – what should be surprising – is that the Supreme Court took so long to recognize and protect the non-economic political and social rights of American citizens. Even the specific provisions of the Bill of Rights listing the privileges and immunities of criminal defendants were not automatically applied against the States by

32. See *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897) (striking down a Louisiana statute attempting to regulate the sale of insurance by a New York company and stating, “In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto.”); see also BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT 179-82* (1993) (describing “Due Process and Liberty of Contract”).

33. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 861-64 (1992) (discussing how it was proper for the Court to overrule the doctrines of “separate but equal” and “liberty of contract” in light of new facts or new understandings of fact). The Court stated:

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court’s response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court’s constitutional duty.

Id. at 863-64.

34. See *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937) (“In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract.”).

the Court, as the Framers of the 14th Amendment so clearly intended.³⁵ Instead, the Court took decades to decide whether each of those specific guarantees should be considered inherent to 14th Amendment Due Process. Ever so slowly, the Court came to recognize that the States, no less than the United States government, should be obedient to the right to counsel,³⁶ the right to silence,³⁷ the right to a speedy trial,³⁸ the right to a trial by jury,³⁹ and freedom from unreasonable or warrantless searches.⁴⁰

The Court labored even longer to begin defining the enumerated and unenumerated substantive rights of personal autonomy, what the Declaration of Independence calls “the pursuit of happiness,”⁴¹ and that is protected by the word “liberty” in the Constitution.⁴² The Supreme Court first struck down a law because it interfered with the rights of

35. See *Adamson v. California*, 332 U.S. 46, 71-72 (1948) (Black, J., dissenting) (contending that one of the chief purposes of the Fourteenth Amendment was to make the Bill of Rights applicable against the States, and assembling historical evidence in support of that proposition); see also MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

36. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel).

37. See *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment right to be free of compelled self-incrimination).

38. See *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment right to a speedy and public trial).

39. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to a jury trial).

40. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment right to be free from unreasonable searches and seizures and the right to have illegally seized evidence excluded from evidence at trial).

41. In a number of decisions from different eras, the Supreme Court has echoed the language of the Declaration. See *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (“That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

42. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) (O’Connor, Souter & Kennedy, JJ.) (basing the right to privacy on the word “liberty” in the Due Process Clause of the Fourteenth Amendment, stating “[t]he controlling word in the cases before us is ‘liberty’”).

parents to raise their children in 1923.⁴³ The Court first enforced the First Amendment's prohibition on laws abridging freedom of speech and freedom of the press in 1931.⁴⁴ The Supreme Court first upheld a person's right to freedom of religion in 1940.⁴⁵ The Supreme Court first defended a person's freedom of procreation in 1942.⁴⁶ The right to contraception followed in 1965,⁴⁷ the right to marriage in 1967,⁴⁸ a woman's right to terminate a pregnancy in 1973,⁴⁹ the right to live with extended family in 1977,⁵⁰ and the right to die in 1990.⁵¹ Why did it take so long for the Court to recognize these rights? Why did it take until 2003 for a majority of the Supreme Court to announce the simple, straightforward principle that people have the right to make "intimate and personal choices" involving sex, marriage, raising children, and living arrangements?⁵² The answer to that question depends not only upon an understanding of *Slaughterhouse*, but an understanding of *Bradwell* as well. I now turn to that case.

43. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down Nebraska law prohibiting the teaching of foreign languages in the lower grades).

44. See *Stromberg v. California*, 283 U.S. 359 (1931) (reversing conviction of defendant charged with violating a California statute that prohibited displaying a red flag as an emblem of opposition to organized government); *Near v. Minnesota*, 283 U.S. 697 (1931) (striking down Minnesota law which authorized the issuance of an injunction against the publication of defamatory newspapers).

45. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (reversing defendant's conviction for breach of the peace for playing a phonograph record expressing his religious beliefs).

46. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down Oklahoma mandatory sterilization law for "habitual criminals").

47. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down Connecticut law prohibiting the use of birth control).

48. See *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia law criminalizing interracial marriage).

49. See *Roe v. Wade*, 410 U.S. 113 (1973) (striking down Texas law prohibiting abortion except to save the life of the woman).

50. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (striking down city ordinance narrowly defining the classes of family members who may live together in a home located in an area zoned for "single-family" residences).

51. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (recognizing the right of a competent adult to refuse lifesaving medical treatment).

52. See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (Kennedy, J.) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (O'Connor, Kennedy & Souter, JJ.))).

III. *BRADWELL V. ILLINOIS*

The Court decided *Bradwell* the same day as *Slaughterhouse*, and the reasoning in *Bradwell* relied upon and reinforced the legal theories developed in *Slaughterhouse*. But unlike *Slaughterhouse*, in *Bradwell* the Supreme Court came to an unjust result.

Myra Bradwell was an accomplished legal publisher who stood for the bar in the State of Illinois.⁵³ The Illinois Supreme Court rejected her application on the ground that she was a woman even though the state statute governing admission to the bar referred to “persons” and made no distinction upon gender lines.⁵⁴ The Illinois Supreme Court ruled that the law had been intended to permit only men, and not women, to enter the legal profession,⁵⁵ and it turned down Bradwell’s application to be a lawyer.⁵⁶

On appeal, the majority of the United States Supreme Court noted that Bradwell had no claim under the Privileges and Immunities Clause because, as the Court had just ruled in *Slaughterhouse*, her right to earn a living was a fundamental right under *state* law, not *national* law, and accordingly she must look to the State of Illinois for redress of that right.⁵⁷

It may be surprising to modern readers that the Court did not specifically discuss Bradwell’s rights under the Equal Protection Clause. However, the Court had discussed Equal Protection in *Slaughterhouse*, and it incorporated its reasoning from *Slaughterhouse* into its opinion in *Bradwell*.⁵⁸ In *Slaughterhouse* the Court found “the one pervading purpose” of the 14th Amendment to be the protection of “the freedom of

53. See Richard L. Aynes, *Bradwell v. Illinois: Chief Justice’s Dissent and the “Sphere of Women’s Work,”* 59 LA. L. REV. 521, 525 (1999); see also *id.* at 537-38 (constructing a dissenting opinion that Chief Justice Salmon Chase might have written in *Bradwell* in light of his values and the role that his daughter played in his life and career).

54. *Bradwell v. Illinois*, 83 U.S. 130, 131-33 (1873).

55. *Id.* at 132-33.

56. *Id.*

57. See *id.* at 139. The Court stated:

The opinion just delivered in the *Slaughter-House Cases* renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

Id.

58. See *id.* (“It is unnecessary to repeat the argument on which the judgment in [*Slaughterhouse Cases*] is founded. It is sufficient to say they are conclusive of the present case.”).

the slave race.”⁵⁹ The Court expressed the opinion that Framers intended the Equal Protection Clause to protect African-Americans – but no other groups – from discrimination:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.⁶⁰

Accordingly, the majority in *Bradwell* relied entirely upon the Court’s reasoning in *Slaughterhouse* in rejecting Bradwell’s 14th Amendment claim.

Justice Joseph P. Bradley’s concurring opinion in *Bradwell*, however, articulated a different legal theory which has affected constitutional analysis ever since. Bradley concluded that the inequality of women is not simply a matter of the law of Illinois or even the law of man – it is the law of God.⁶¹ In a passage from his opinion which deserves to be repeated in full because it represents a prejudice that we must be vigilant against, Bradley stated:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her

59. 83 U.S. 36, 71 (1873) (Miller, J.). Justice Miller stated:

[N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

Id.

60. *Id.* at 81.

61. See *Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1873) (Bradley, J., concurring in the judgment).

husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor

The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.⁶²

Justice Bradley's reasoning relies primarily upon tradition ("the civil law has always recognized a wide difference in the respective spheres and destinies of man and woman") and religious doctrine ("founded in the divine ordinance") in concluding that women should not be permitted to serve as lawyers. It is this general jurisprudential approach which continues to hamper and constrain analysis of the Equal Protection Clause. Compare Justice Bradley's reasoning in *Bradwell* with that of Chief Justice Warren Burger a century later in *Bowers v. Hardwick*,⁶³ a gay rights case:

62. *Id.*

63. 478 U.S. 186 (1986) (upholding Texas law criminalizing oral and anal sex as applied to same sex couples).

As the Court notes, the proscriptions against sodomy have very “ancient roots.” Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See *Code Theod.* 9.7.6; *Code Just.* 9.9.31. See also D. Bailey, *Homosexuality and the Western Christian Tradition* 70-81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King’s Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described “the infamous crime against nature” as an offense of “deeper malignity” than rape, a heinous act “the very mention of which is a disgrace to human nature,” and “a crime not fit to be named.” The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.⁶⁴

Compare, as well, Justice Scalia’s reasoning from his dissenting opinion in *United States v. Virginia*,⁶⁵ where he argued that the Commonwealth of Virginia had the right to exclude women from attending a prestigious state university. Justice Scalia commenced his opinion with an inaccurate charge and an appeal to history: “Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half.”⁶⁶ The Supreme Court, of course, did not “shut down” the Virginia Military Institute, it merely ordered the Commonwealth of Virginia to admit women to the Institute.⁶⁷ Justice Scalia repeatedly invoked “tradition” as justifying the state’s egregious gender discrimination, for example stating, “[the Court] counts for nothing the long tradition, enduring down to the present, of men’s military colleges supported by both States and the Federal Government.”⁶⁸ Justice Scalia closed his opinion with a long quotation from “The Code of the Gentleman,” a booklet that VMI students had been required to keep in

64. *Id.* at 196-97 (Burger, C.J., concurring).

65. 518 U.S. 515 (1996) (striking down official policy barring women from Virginia Military Institute).

66. *Id.* at 566 (Scalia, J., dissenting).

67. *Id.* at 557 (Ginsburg, J.).

68. *Id.* at 566 (Scalia, J., dissenting).

their possession at all times.⁶⁹ This booklet, which Justice Scalia apparently found reflected a tradition of “manly honor,”⁷⁰ was filled with romanticized notions of etiquette towards women:

A Gentleman . . . Does not speak more than casually about his girl friend. Does not go to a lady’s house if he is affected by alcohol. . . . Does not hail a lady from a club window. . . . [N]ever discusses the merits or demerits of a lady. . . . Does not . . . so much as lay a finger on a lady⁷¹

Justice Scalia concluded:

I do not know whether the men of VMI lived by this code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction.⁷²

In his opinion in the *VMI* case, Justice Scalia summarized his approach to constitutional analysis in this brief statement: “It is my position that the term ‘fundamental rights’ should be limited to ‘interest[s] traditionally protected by our society.’”⁷³ More specifically, Justice Scalia explained:

[I]n my view the function of this Court is to *preserve* our society’s values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede – and indeed ought to be crafted *so as to reflect* – those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts. More specifically, it is my view that “when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.”⁷⁴

The “tradition” approach favored by Chief Justice Burger and Justice Scalia is entirely consistent with Justice Bradley’s reasoning in

69. *Id.* at 601-02.

70. *Id.* at 601.

71. *United States v. Virginia*, 518 U.S. 515, 602-03 (Scalia, J., dissenting).

72. *Id.* at 603.

73. *Id.* at 567.

74. *Id.* at 568.

Bradwell. Traditional understandings of liberty and equality effectively strangle emerging constitutional claims by groups which have been traditionally discriminated against such as gays and women. Similarly, tradition was also used to justify racial segregation in *Plessy v. Ferguson*,⁷⁵ where the Court stated that in determining whether or not people could be segregated by race on trains, the State of Louisiana was entitled to act in accordance with “the established usages, customs, and traditions of the people.”⁷⁶

It took 98 years for the Supreme Court to rectify its decision in *Bradwell*. As late as 1948, the Court sustained a state law that prohibited a woman from working in a tavern unless the tavern was owned by her husband or her father.⁷⁷ The first time that the Supreme Court found any law to be in violation of the Equal Protection Clause because it discriminated on the basis of gender was 1971, in the case of *Reed v. Reed*.⁷⁸ Other groups who have been traditionally discriminated against waited even longer for the Court to acknowledge their equality. Not until 1996 did the Court for the first time strike down a law because it discriminated against people on the basis of sexual orientation,⁷⁹ and not until 2003 did the Court finally invalidate state laws making homosexuality a crime.⁸⁰

A majority of the Supreme Court has now rejected the “tradition” approach to defining constitutional rights advocated by Justice Bradley in *Bradwell*, Justice Brown in *Plessy*, Chief Justice Burger in *Bowers*,

75. 163 U.S. 537 (1896) (upholding Louisiana statute requiring segregation of the races on trains).

76. *Id.* at 550. The Court stated:

So far, then, as a conflict with the fourteenth amendment [sic] is concerned, the case reduces itself to the question 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. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.

Id.

77. *See* *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding Michigan law prohibiting women from working as a bartender in a tavern unless they were “the wife or daughter of the male owner”).

78. 404 U.S. 71 (1971) (striking down Idaho statute which favored males over females in the appointment of administrators of estates).

79. *See* *Romer v. Evans*, 517 U.S. 620 (1996) (striking down Colorado constitutional amendment prohibiting the adoption of laws or official policies directed against discrimination on the basis of sexual orientation).

80. *See* *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas statute making oral and anal sex between persons of the same gender a crime).

and Justice Scalia in *VMJ*.⁸¹ Justice Anthony Kennedy has stated, “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”⁸² Justice O’Connor has stated that she would not “foreclose the unanticipated” by adopting a strictly historical approach to constitutional analysis.⁸³ In *Lawrence v. Texas*, the Court expressly adopted the language proposed by Justice Stevens from his *Bowers* dissent, stating:

[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.⁸⁴

In place of tradition the Supreme Court has adopted a realistic standard for defining the concepts of “liberty” and “equality” under the Constitution. In defining “liberty,” the Court now takes two factors into account: (1) How important is this behavior in the life of the individual – how “intimate and personal” is that choice? and (2) How much harm is this behavior likely to cause?⁸⁵ The principal definition of “liberty” was given expression by Justice Kennedy in *Lawrence v. Texas*:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁸⁶

81. See *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (acknowledging that the majority of the Court does not agree with his tradition approach).

82. *Lawrence*, 539 U.S. at 572 (Kennedy, J.) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

83. *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (O’Connor, J., concurring in part) (“I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.”).

84. *Lawrence*, 539 U.S. at 577-78 (Kennedy, J.) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

85. See *id.* at 572, 577-78.

86. *Id.* at 574 (Kennedy, J.) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (O’Connor, Kennedy, and Souter, JJ.)).

Justice Kennedy also took particular care to imply that the activity upon which the claim of constitutional right was centered must not be causing harm:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.⁸⁷

Similarly, constitutional standards regarding equality are no longer based primarily upon tradition and certainly not upon religious teachings.⁸⁸ The legal standard that comes closest to a realistic definition of equality was first announced in 1885 in the case of *Barbier v. Connelly*,⁸⁹ in which the Court stated:

Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.⁹⁰

A year later, in *Yick Wo v. Hopkins*,⁹¹ the Supreme Court quoted this language and applied this principle in ruling that the City of San Francisco acted illegally when it denied permits to operate laundries to persons of Chinese extraction.⁹² The “similarly situated test” from this case has been widely quoted and used in Equal Protection cases.⁹³ Even Justice William Rehnquist agreed in his opinions that the constitutional principle of equality demands that “persons [who are] similarly situated should be treated similarly.”⁹⁴

87. *Id.* at 578.

88. *See* *Bowers v. Hardwick*, 478 U.S. 186, 211-12 (1986) (Blackmun, J., dissenting) (“A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus.”).

89. 113 U.S. 27 (1885).

90. *Id.* at 32.

91. 118 U.S. 356 (1886) (striking down discriminatory enforcement of municipal ordinance issuing permits for the operation of laundries).

92. *Id.* at 368.

93. *See id.* at 373-74.

94. *Trimble v. Gordon*, 430 U.S. 762, 780 (1977) (Rehnquist, J., dissenting). Justice Rehnquist stated:

In the case of equality and equal protection, the constitutional principle – the thing to be protected to a greater or lesser degree – is not even identifiable from within the four corners of the Constitution. For equal protection does not mean that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly.

Id. at 779-80.

In his concurring opinion in *Railway Express Agency v. New York*,⁹⁵ Justice Robert Jackson illustrated how to apply this realistic approach to Equal Protection questions. The issue in that case concerned the constitutionality of a municipal ordinance which prohibited the operation of motor vehicles on the streets of New York solely for the purposes of advertising.⁹⁶ The law permitted advertising on vehicles which were operated for other purposes.⁹⁷ Justice Jackson gave the following reason for joining the decision of the majority upholding the law:

The question in my mind comes to this. Where individuals contribute to an evil or danger in the same way and to the same degree, may those who do so for hire be prohibited, while those who do so for their own commercial ends but not for hire be allowed to continue? I think the answer has to be that the hireling may be put in a class by himself and may be dealt with differently than those who act on their own. But this is not merely because such a discrimination will enable the lawmaker to diminish the evil. That might be done by many classifications, which I should think wholly unsustainable. It is rather because there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price.⁹⁸

The “real differences” test articulated by Justice Jackson is simply the reverse side of the “similarly situated” coin. Groups of persons who are similarly situated must be treated similarly. Groups of persons may be treated differently only if there are “real differences” between them, and only if those differences “have an appropriate relation to the object of the legislation or ordinance.”⁹⁹

In the interpretation of the Constitution, we now stand on firmer ground than did the Court in *Slaughterhouse*, *Bradwell*, *Plessy*, and *Bowers*. Tradition is still an important consideration in constitutional analysis, but it is not the only determinant, nor is it controlling. In assessing our constitutionally protected sphere of liberty to engage in certain activity, in addition to tradition, we look to the importance of the activity to the individual as well as to the harm that may result from the

95. 336 U.S. 106 (1949) (upholding municipal ordinance regulating advertisements on vehicles against equal protection challenge).

96. *Id.* at 107.

97. *Id.*

98. *Id.* at 115-16 (Jackson, J., concurring).

99. *Id.* at 115 (Jackson, J., concurring).

individual's actions. In defining equality, we consider not only tradition but also whether the group of people whom the law is treating differently is similar to or different from other groups in the context of the law being challenged. Most importantly, we no longer regard fundamental rights to liberty and equality as aspects of state citizenship rather than national citizenship. No longer are the States considered to be the repositories, and more frequently the graveyards, of human rights.

In the third case which is the subject of this conference, *United States v. Cruikshank*, the Supreme Court inflicted even more damage to the Constitution and to the cause of human rights than it had in *Slaughterhouse* and *Bradwell*. The Court reached an even more unjust result, and its reasoning was even more twisted. The discussion of *Cruikshank* follows.

IV. *UNITED STATES V. CRUIKSHANK*

This case weighed an appeal from the conviction of three individuals on federal charges resulting from the mass murder known as the Colfax Massacre.¹⁰⁰ The underlying facts of the case and the miscarriage of justice that the Supreme Court authored in their opinion reversing the defendants' convictions are ably set forth in Charles Lane's *The Day Freedom Died: The Colfax Massacre, The Supreme Court and the Betrayal of Reconstruction*.¹⁰¹

Briefly, following the election of 1872, the Democratic Party of Louisiana attempted to steal the election by means of fraud and intimidation.¹⁰² The Republican Party – African-Americans and their supporters – resisted these efforts in one parish by occupying the courthouse in Colfax.¹⁰³ On April 13, 1873, a large mob of whites attacked the courthouse and killed over 60 persons, mostly African-Americans, in cold blood, most of them after they surrendered.¹⁰⁴ Only

100. See *United States v. Cruikshank*, 92 U.S. 542, 548-49 (1876).

101. CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT AND THE BETRAYAL OF RECONSTRUCTION* (2008).

102. See *id.* at 65-66.

103. See *id.* at 70.

104. See Charles Lane, *To Keep and Bear Arms*, WASH. POST, Mar. 22, 2008, at A13, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/21/AR2008032102540.html>; see also Leslie Friedman Goldstein, *The Second Amendment, the Slaughter-House Cases, and United States v. Cruikshank*, 1 ALB. GOV'T L. REV. 365, 387 (2008) (stating that between 100 and 400 individuals were killed in the attack).

three of the attackers were convicted,¹⁰⁵ and these three were not convicted of murder but rather for violating a statute which Congress had enacted in 1870 that made it a crime for individuals to conspire to interfere with any rights of American citizens under the Constitution or under federal laws.¹⁰⁶ The Supreme Court reversed the defendants' convictions under this statute because the indictments failed to sufficiently allege that the defendants violated rights protected under the Constitution or laws of the United States.¹⁰⁷

The Court began its consideration of the legality of the indictments and resulting convictions with an extended discussion of the principal theory that it had announced in *Slaughterhouse* and applied in *Bradwell* – the distinction between state and national citizenship.¹⁰⁸ The Court stated:

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other.¹⁰⁹

The Court elaborated upon this theory and concluded that citizens might seek the federal government's protection from encroachments on their national rights, but they must seek the state government's protection from violations of their rights derived from state citizenship.¹¹⁰

105. See Lane, *supra* note 104 (“No one was ever punished for the Colfax Massacre. [U.S. Attorney James] Beckwith secured only three convictions, and they were later overturned by the Supreme Court in one of the worst miscarriages of justice in American history.”).

106. See *United States v. Cruikshank*, 92 U.S. 542, 548 (1876) (quoting Section 6 of the federal Enforcement Act of 1870). The Act provided:

That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or 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, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court

Id.

107. See *id.* at 551-57.

108. See *id.* at 549-51.

109. *Id.* at 549.

110. See *id.* at 551. The Court concluded:

The trial court convicted defendants on sixteen counts of the indictment which consisted of eight different charges relating to two victims of the massacre.¹¹¹ The first and ninth counts of the indictment charged the defendants with interfering with the victims' right to peaceably assemble.¹¹² The Supreme Court concluded that Congress lacked the authority to protect this particular right because it was a matter which was committed to the States:

The first amendment to the Constitution prohibits Congress from abridging 'the right of the people to assemble and to petition the government for a redress of grievances.' This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the 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. The power for that purpose was originally placed there, and it has never been surrendered to the United States.¹¹³

The third and eleventh counts of the indictment alleged that the defendants conspired to deprive the victims of life and liberty without due process of law.¹¹⁴ At this point, the Court, for the first time in constitutional history, invoked what has become known as the "state action" doctrine. The Court based this theory upon the previous distinction it constructed between state and national citizenship. The Court stated:

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

Id.

111. *United States v. Cruikshank*, 92 U.S. 542, 548 (1876).

112. *Id.* at 551.

113. *Id.* at 552.

114. *Id.* at 553.

The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these ‘unalienable rights with which they were endowed by their Creator.’ Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The fourteenth amendment (sic) prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.¹¹⁵

In essence, the Court ruled that the defendants’ convictions had to be reversed because the conduct of the defendants constituted *private action* and not *state action*. Accordingly, it was for the States, and not the federal government, to punish their behavior.

Other scholars and I have written about how the Framers of the 14th Amendment were, in fact, primarily concerned with addressing the practices of racial discrimination by private parties and the many acts of private violence being visited upon blacks and their white allies in the South¹¹⁶ – how Congress enacted statute after statute prohibiting that discrimination and punishing that violence¹¹⁷ – and how Congress adopted the 14th Amendment with the avowed purpose of making that

115. *Id.* at 553-54.

116. See B.F. Butler, To Protect Loyal and Peaceable Citizens of the United States, H.R. Rep. No. 41-37, at 1-4 (1871) (describing dozens of assaults and murders of blacks and their white allies across the South). The Report stated:

If . . . the State is powerless to prevent such murders and felonies . . . from being daily and hourly committed . . . , and if, added to that, comes the inability of the State to punish the crimes after they are committed, then the State has, by its neglect or want of power, deprived the citizens of the United States of protection in the enjoyment of life, liberty, and property. . . .

Id. at 4.

117. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified at 42 U.S.C. §§ 1981-1982 (2000)) (originally entitled “An Act to protect All Persons in the United States in Their Civil Rights, and furnish the Means of their Vindication”); Ku Klux Klan Act of 1871, ch. 22, § 2, 17 Stat. 13 (codified at 42 U.S.C. § 1985, 18 U.S.C. § 241 (2000)) (originally entitled “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes”); Civil Rights Act of 1875, ch. 114, §§ 3-5, 18 Stat. 335 (codified at 42 U.S.C. § 1984 (2000)) (originally entitled “An act to protect all citizens in their civil and legal rights”).

legislation constitutional.¹¹⁸ After all of their efforts – after the terrible struggle of the Civil War and the immense suffering their generation endured to bring a new birth of freedom to America¹¹⁹ – the Supreme Court struck down the Civil Rights Acts adopted by the Reconstruction Congress on the ground that Congress lacked authority to punish the acts of private parties.

The Court’s ruling on state action in *Cruikshank* certainly did not accord with the understanding of the Framers. The Republican members of Congress articulated this principal theory: “Allegiance and protection are reciprocal rights.”¹²⁰ They believed that citizens owe allegiance to their government because (and to the extent that) the government affords them protection.¹²¹ The Framers of the 14th Amendment enacted

118. See *infra* notes 120-122 and accompanying text.

119. See, e.g., Abraham Lincoln, President, Second Inaugural Address (Mar. 5, 1865). Lincoln stated:

One-eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was somehow the cause of the war. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union even by war, while the Government claimed no right to do more than to restrict the territorial enlargement of it. Neither party expected for the war the magnitude or the duration which it has already attained

Id.

120. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Lyman Trumball, floor manager of the Fourteenth Amendment). Trumball said:

How is it that every person born in these United States owes allegiance to the Government? . . . [C]an it be that our ancestors struggled through a long war and set up this Government, and that the people of our day have struggled through another war, with all its sacrifices and all its desolation, to maintain it, and at last that we have got a Government which is all-powerful to command the obedience of the citizen, but has no power to afford him protection? . . . Sir, it cannot be. Such is not the meaning of our Constitution. Such is not the meaning of American citizenship. This government, . . . has certainly some power to protect its own citizens in their own country. Allegiance and protection are reciprocal rights.

Id.

121. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866) (remarks of Rep. John H. Broomal). Broomal said:

But throwing aside the letter of the Constitution, there are characteristics of Governments that belong to them as such, without which they would cease to be Governments. The rights and duties of allegiance and protection are corresponding rights and duties. Upon whatever square foot of the earth’s surface I owe allegiance to my country, there it owes me protection, and wherever my Government owes me no protection I owe it no allegiance and can commit no treason.

Id. A leading congressional Republican quoted Daniel Webster, a leading Whig and ardent Unionist, for the proposition that there is a reciprocal relation between “allegiance” and “protection.” See Cong. Globe, 42nd Cong., 1st Sess. 85 (1871) (John Bingham quoted Daniel Webster as having said, “[t]he maintenance of the Constitution does not depend on the plighted faith of the States as States to support it It relies on individual duty and obligation. . . . On the other

legislation to protect American citizens in their fundamental rights from interference either by the states or by private parties, and they adopted Section 5 of the 14th Amendment to remove any possible doubts about the constitutionality of that legislation.¹²² The Supreme Court rejected the Framers' political philosophy when they ruled that the States, and not the national government, had responsibility for protecting citizens in their fundamental rights. The Court betrayed the intent of the Framers when they declared the civil rights laws enacted by the Reconstruction Congress unconstitutional.¹²³

The *Cruikshank* Court found that other counts of the indictment similarly failed to allege that the defendants deprived the victims of any federal rights. For example, the Court ruled that separate charges of the indictment were insufficient because they neglected to specify whether the defendants assaulted the victims because they voted in elections for national office as opposed to elections for state office,¹²⁴ or because the indictments failed to allege that the defendants assaulted the victims "because of the race or color of the persons conspired against."¹²⁵ The

hand, the Government owes high and solemn duties to every citizen of the country. It is bound to protect him in his most important rights and interests." See also DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 430-33 (2d ed. 2005) (describing the Republican Party's linkage of allegiance and protection); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 740 (2003); Alan R. Madry, *State Action and the Due Process of Self-Help; Flagg Bros. Redux*, 62 U. PITT. L. REV. 1, 40 (2000); Wilson Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1403-04 (2006).

122. See, e.g., Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 553-54 (1991) (noting that John Bingham, the leading drafter of the Fourteenth Amendment, and other Republicans, considered the adoption of the Amendment as ensuring the constitutionality of the Civil Rights Act of 1866); see also Aynes, *supra* note 15, at 631; Richard L. Aynes, *The Continuing Importance of John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589, 610 (2003); FRANK J. SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION: A DISTORTION OF CONSTITUTIONAL JURISPRUDENCE 78-79 (2000).

123. See *Civil Rights Cases*, 109 U.S. 3, 26-27 (1883) (Harlan, J., dissenting) (taking the position that the majority of the Court had erred in striking down the Civil Rights Act of 1875 on state action grounds and stating, "the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted."). See generally Huhn, *supra* note 121, at 1430-43 (assembling authorities supporting the proposition that the framers of the Fourteenth Amendment intended to clothe Congress with the authority to prohibit individuals from interfering with the fundamental rights of American citizens).

124. *United States v. Cruikshank*, 92 U.S. 542, 556 (1875) ("There is nothing to show that the elections voted at were any other than State elections . . .").

125. *Id.* at 554.

Court also found that some charges of the indictment were unconstitutionally vague.¹²⁶

The cruel and heedless result reached by the Court in *Cruikshank* signaled open season on blacks and other racial minorities.¹²⁷ The decision in *Cruikshank* prevented the federal government from protecting black voters from violence. This initiated a shameful period in American history – the Jim Crow era – in which the Court was fully complicit.¹²⁸ In numerous decisions between 1896 and 1927, the Court narrowly construed the constitutional rights of African-Americans and other racial and ethnic minorities, upholding state laws that fostered racial segregation and other discriminatory policies.¹²⁹ Not only did the Court refuse to enforce the principle of equality implicit in the Equal Protection Clause of the 14th Amendment, but it also refused to let Congress enforce this principle. In some cases the Court misconstrued federal civil rights legislation as it had in *Cruikshank*.¹³⁰ In other cases the Court simply declared federal civil rights laws unconstitutional, usually invoking the state action doctrine it had formulated in

126. *Id.* at 557-59.

127. See Douglas Linder, *Lynchings: By State and Race, 1882-1968*, <http://www.law.umkc.edu/faculty/projects/ftrials/shipp/lynchingsstate.html> (last visited Jan. 31, 2009) (citing statistics provided by the Archives at Tuskegee Institute showing large numbers of lynchings in the period following *Cruikshank*); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 43 (1966) (“[I]t was, after all, in the ’eighties and early ’nineties [of the 19th century] that lynching attained the most staggering proportions ever reached in the history of that crime.”); see also GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 560-61 (1944) (describing lynching in America, almost all of which occurred in the southern and border states); Douglas Linder, *The Trial of Joseph Schipp, et al.: An Account*, <http://www.law.umkc.edu/faculty/projects/ftrials/shipp/trialaccount.html> (last visited Jan. 31, 2009) (describing the 1906 lynching of Ed Johnson in Tennessee and the subsequent trial of Sheriff Joseph Schipp and other members of the mob in the United States Supreme Court for criminal contempt).

128. See WOODWARD, *supra* note 127, at 70-71 (“[T]he cumulative weakening of resistance to racism was expressed also in a succession of decisions by the United States Supreme Court between 1873 and 1898 . . .”).

129. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding Louisiana statute requiring separate railroad cars for blacks and whites); *Williams v. Mississippi*, 170 U.S. 213 (1898) (upholding provisions of Mississippi constitution and laws such as poll tax, literacy test, disqualification for certain crimes, and residency requirements, which were designed to disqualify African-Americans from voting); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding Mississippi statute requiring separation of the races in the public schools).

130. See *Blyew v. United States*, 80 U.S. 581 (1872) (Strong, J.) (giving Section 3 of Civil Rights Act of 1866 narrow construction, denying jurisdiction of federal court to hear murder case where Kentucky law prohibited blacks from testifying as witnesses to crimes committed by whites, viz., the murder of an elderly black woman witnessed by members of her family); *United States v. Reese*, 92 U.S. 214 (1876) (Waite, C.J.) (construing Section 3 of the first Enforcement Act broadly, so as to render it unconstitutional as beyond Congress’s power to enact under the Fifteenth Amendment).

Cruikshank.¹³¹ By this series of decisions the Court enabled state-sponsored segregation,¹³² inferior educational programs,¹³³ “anti-miscegenation” statutes,¹³⁴ lynching,¹³⁵ and loss of the right to vote¹³⁶ for African-Americans.

Not until 1938 did the Supreme Court, fortified with two justices newly appointed by Franklin Delano Roosevelt,¹³⁷ begin to strike down the system of state-sponsored segregation that the Court had helped to

131. See *Harris v. United States*, 106 U.S. 629, 640 (1883) (Wood, J.) (declaring provision of Ku Klux Klan Act unconstitutional). Justice Wood stated:

As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution.

Id.; see also *The Civil Rights Cases*, 109 U.S. 3 (1883) (striking down federal Civil Rights Act of 1875); *Baldwin v. Franks*, 120 U.S. 678 (1887) (following *Harris* in finding the Ku Klux Klan Act to be unconstitutional insofar as it applies to private action); *Hodges v. United States*, 203 U.S. 1, 14 (1906) (Brewer, J.) (overturning convictions of a group of individuals for interfering with the civil rights of other individuals in violation of Civil Rights Act of 1866, in part because the statute could not be grounded upon the Fourteenth Amendment, stating, “that the 14th and 15th Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the state is complained of.”); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down federal Violence Against Women Act as applied to private acts of gender violence).

132. See WOODWARD, *supra* note 127, at 145 (stating that in the early 1950s “[s]egregation was required by law in the schools of seventeen states and the District of Columbia, permitted by local option in four, prohibited by law in sixteen, and eleven states had no laws on the subject.”).

133. See *id.* (stating that in the early 1950s “in many areas Negro schools were disgracefully behind schools for whites.”); see also *Cumming v. Bd. of Educ. of Richmond County*, 175 U.S. 528 (1899) (refusing to issue an injunction against local authorities who had closed the separate secondary school for African-Americans while continuing to operate a school for white students).

134. See *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding the constitutionality of a state law that punished interracial marriage or living arrangements). The law provided:

[I]f any white person and any negro, or the descendant of any negro to the third generation, inclusive, though one ancestor of each generation was a white person, intermarry or live in adultery or fornication with each other, each of them must, on conviction, be imprisoned in the penitentiary or sentenced to hard labor for the county for not less than two nor more than seven years.

Id. at 583.

135. See *supra* note 127 and accompanying text.

136. See WOODWARD, *supra* note 127, at 71 (“[I]n *Williams v. Mississippi* the Court completed the opening of the legal road to proscription, segregation, and disenfranchisement by approving the Mississippi plan for depriving Negroes of the franchise.”).

137. Hugo Black joined the Court on August 19, 1937, and Stanley Reed was added on January 31, 1938. See Oyez Project, Hugo L. Black Biography, http://www.oyez.org/justices/hugo_1_black (last visited Jan. 31, 2009); Oyez Project, Stanley Reed Biography, http://www.oyez.org/justices/stanley_reed (last visited Jan. 31, 2009); see also Oyez Project, <http://www.oyez.org/courts/warren/war1> (last visited Jan. 31, 2009) (listing Justices from the first term of the Warren Court).

erect.¹³⁸ Not until 1954 did the Supreme Court, with five members appointed by Roosevelt,¹³⁹ declare “separate but equal” to be inherently unequal and unconstitutional.¹⁴⁰ And not until 1964 did Congress enact and the Supreme Court uphold major civil rights legislation, this time under the Commerce Clause.¹⁴¹

V. CONCLUSION

The Supreme Court’s decisions in *Slaughterhouse*, *Bradwell*, and *Cruikshank* had a devastating effect on human rights under the Constitution. Our basic liberties were placed at the mercy of state laws and state officials. Equality was defined primarily by reference to tradition, a tradition which was all too often intolerant. And Congress was prevented from enacting legislation that would have protected people in their basic rights.

Thank goodness the reasoning of those cases has largely been circumvented or overruled. Even though *Slaughterhouse* emasculated the Privileges and Immunities Clause, the evolving doctrine of Substantive Due Process has served to make both the Bill of Rights and the Right to Privacy effective against the States.¹⁴² Even though *Slaughterhouse* and *Bradwell* eviscerated the Equal Protection Clause, limiting its application to race alone and defining equality as no more than traditional conceptions of human potential, today Equal Protection applies to all classes of persons and equality is measured realistically by reference to how similar or how different groups of people really are. Furthermore, our right to liberty is also no longer limited by tradition but

138. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (ordering the School of Law of the State University of Missouri to admit an African-American student).

139. Hugo Black, Stanley Reed, Felix Frankfurter, Robert Jackson, and William Douglas were all appointed by Roosevelt and were still members of the Court in May 1954. See Oyez Project, <http://www.oyez.org/courts/warren/war1> (last visited Jan. 31, 2009) (listing Justices from the first term of the Warren Court).

140. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”).

141. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding Congress’s power under the Commerce Clause to enact the Civil Rights Act of 1964); see also *Katzenbach v. McClung*, 379 U.S. 294 (1964).

142. See David Bogen, *Mr. Justice Miller’s Clause: The Privileges or Immunities of Citizens of the United States Internationally*, 56 *DRAKE L. REV.* 1051, 1053-54 (2008) (“The Supreme Court is unlikely to alter Justice Miller’s interpretation of the Clause because overturning it would serve little purpose. By interpreting the Equal Protection and Due Process Clauses broadly to attack racial discrimination, to enforce guarantees of the Bill of Rights against the States, and to apply fundamental rights limitations, the Court has achieved the results that an expansive reading of the Privileges or Immunities Clause would reach.”).

rather depends upon how important an activity is to an individual and whether that activity is causing harm. As Thurgood Marshall admonished in *United States v. Kras*,¹⁴³ “[i]t is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.”¹⁴⁴ Finally, although the Supreme Court in *Cruikshank* commenced its vocation of narrowly interpreting and striking down civil rights acts as unauthorized under Section 5 of the 14th Amendment, Congress has found other constitutional sources of authority besides the 14th Amendment which authorize it to adopt civil rights legislation. The baneful legacy of *Slaughterhouse*, *Bradwell*, and *Cruikshank* has nearly run its course.

143. 409 U.S. 434 (1973).

144. *Id.* at 460 (Marshall, J., dissenting).