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Rebuilding the Slaughter-House: The Cases' Support for Civil Rights

David S. Bogen

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REBUILDING THE *SLAUGHTER-HOUSE*: THE *CASES*' SUPPORT FOR CIVIL RIGHTS

David S. Bogen *

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I. INTRODUCTION

The *Slaughter-House Cases*¹ have a bad reputation for good reason. Justice Miller's narrow reading of the Privileges or Immunities Clause was used to prevent the federal government from adequately protecting African-Americans after the Civil War.² Further, his opinion for the

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1. 83 U.S. (16 Wall.) 36 (1872).

2. See, e.g., *United States v. Harris*, 106 U.S. 629, 643-44 (1883); *United States v. Cruikshank*, 92 U.S. 542, 549 (1875); see also *The Civil Rights Cases*, 109 U.S. 3, 11 (1883)

Court significantly delayed the application of the Bill of Rights to the states.³ But no one knows whether the world would be better with a different decision, because counterfactuals are never certain.⁴ The case did not involve either racial discrimination or incorporation, and total condemnation of the opinion for weakening civil rights misses its context and misreads its design.

This Article sets forth the *Slaughter-House Cases*' support for civil rights. Justice Miller used federalism in order to protect Reconstruction legislatures where significant numbers of African-Americans participated fully for the first time.⁵ His recital of the history and purpose of the Civil War Amendments centered on the Amendments' design to protect African-Americans, and suggested sweeping federal power to accomplish that end.⁶ Gutting the Privileges and Immunities Clause compelled the Court to read the Equal Protection Clause broadly, and was indirectly responsible for the reapportionment decisions of the Warren Court. The *Slaughter-House* Court's structural analysis and its view of federal protective power provide a basis for congressional power to protect citizens from any interference with their participation in the federal political process (voting and discussion of and access to the

(relying on *Cruikshank* and stating that the Fourteenth Amendment does not authorize Congress to create "a code of municipal law for the regulation of private rights").

3. Even today, the latest case on the application to the states of the Second Amendment's right to bear arms holds that it does not, albeit the precedent is more than a century old. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008) (noting that "[w]ith respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* . . . did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions . . . reaffirmed that the Second Amendment applies only to the Federal Government.").

4. For example, southern legislatures reconstituted under President Andrew Johnson would still have countered the federal government, the north might still have tired of the effort to enforce the laws, segregation could still have developed, the state action doctrine might still have frustrated congressional action, and Campbell might have succeeded in blocking progressive legislation with an emphasis on property freedom that could even have invalidated civil rights laws aimed at private individuals.

5. See MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 202 (2003) ("When placed within the context of Louisiana politics, Miller's majority opinion in *Slaughter-House* seems hardly a racist attempt to retreat from Reconstruction. On the contrary, it was a vote of confidence for a biracial Reconstruction government then struggling to overcome the forces of reaction."); Jonathan Lurie, *Reflections on Justice Samuel F. Miller and the Slaughter-House Cases: Still a Meaty Subject*, 1 N.Y.U. J. L. & LIBERTY 355, 366-69 (2005); see generally Michael A. Ross, *Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign Against Louisiana's Republican Government, 1868-1873*, 49 CIV. WAR HIST. 235, 235-53 (2003) (examining the crucial role played by John Campbell, ex-Confederate and counsel to the butchers in *Slaughter-House*, in his ultimately successful legal war to destroy Louisiana's biracial Reconstruction government).

6. See *Slaughter-House Cases*, 83 U.S. at 49-54.

federal government).⁷ Justice Miller's analysis also supports federal power to protect citizens from race-based obstruction to their participation in state elections. The difficulties of proving racial motivation do not justify blaming Miller's opinion for the end of Reconstruction and the rise of segregation.

At the turn of the century, the Supreme Court retreated from the federal power to deal with race proclaimed by *Slaughter-House* and its progeny, but *United States v. Guest* revived the analysis in 1966.⁸ More recently, *United States v. Morrison* cast doubt on *Guest*'s statements of federal power to reach private action.⁹ This Article argues the Court should resolve that doubt in favor of the constitutionality of laws to prevent discriminatory interference with access to state elections or other facilities. As I will discuss further, Article IV's guarantee of a republican form of government reinforces that result and provides an alternative path for returning to the vision of the *Slaughter-House Cases*.¹⁰

II. *SLAUGHTER-HOUSE CASES*

The Fourteenth Amendment¹¹ and the federal government's measures to reconstruct governments in the old Confederacy produced state legislatures with significant numbers of African-Americans, as well as newcomers from the northern states and southerners who had not

7. *See id.* at 79-81.

8. 383 U.S. 745, 757-60 (1966) (upholding indictment under federal statute for conspiracy to obstruct privileges or immunities of citizens of the United States by private attempts to prevent interstate travel).

9. 529 U.S. 598, 621-23 (2000) (reviving state action of *Harris* and *Civil Rights Cases* in rejecting dicta from *Guest*).

10. *See infra* Part VI.

11. U.S. CONST. amend. XIV. Section 1 is the focus of the Fourteenth Amendment today, but contemporaries expected other sections to have the most significant impact. They were designed to strip the old Confederacy of power and to reconstitute it with governments that were not corrupted by the evils of secession and slavery. Not yet ready to proclaim the right to vote regardless of race that would be advanced in the Fifteenth Amendment, Section 2 protected against the effect of racial exclusion in the South by providing for a reduction in representatives in states that denied the vote. Section 3 of the Fourteenth Amendment wiped out the old establishment and opened all political offices to new and untried individuals. It disqualified from holding state or federal office any person who previously took an oath to support the Constitution and then engaged in rebellion or aided it. Section 4 repudiated the debts of the Confederacy and prohibited payments for the loss or emancipation of slaves. Wealthy planters who had supplied the Confederacy were left with handfuls of worthless paper and lost the power that wealth had brought. *See, e.g.*, DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 167-69 (1996).

played any leading role in the War.¹² Opponents condemned the Reconstruction legislatures with epithets both racial and non-racial – for example, “carpetbaggers”¹³ and “scalawags.”¹⁴ But these legislatures brought civil rights to the states. For example, Louisiana enacted a public accommodations law in February 1869 that prohibited the exclusion of persons of color from places of public conveyances and accommodation.¹⁵ It also enacted further civil rights statutes.¹⁶

Along with its civil rights statutes, the Louisiana legislature also adopted a measure to restrict the slaughtering of meat in New Orleans to a single location, a slaughterhouse owned by a group of investors known as the Crescent City Slaughter-House Company.¹⁷ The opposition to the monopoly was high: the butchers, of course, opposed limits on their practice; the old southern Democrats opposed anything done by the Republican legislature; and accusations of bribery and monopoly filled the air.¹⁸ A series of suits and countersuits, as well as political and pragmatic twists and turns, took place before the group of cases known as the *Slaughter-House Cases* reached the Supreme Court.¹⁹

The butchers hired former Supreme Court Justice John Campbell, a member of the *Dred Scott* majority who had resigned from the Court and served in the Confederate government.²⁰ Campbell sought to use the

12. For example, about thirty-seven percent of the House and twenty-five percent of the Senate in the Louisiana legislature of 1869-71 were African-American. RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT* 72 (2003). The Lieutenant-Governor, Oscar J. Dunn, was an African-American. See, e.g., KWANDO M. KINSHASA, *AFRICAN AMERICAN CHRONOLOGY: CHRONOLOGIES OF THE AMERICAN MOSAIC* 55 (2006).

13. “[A] Northerner in the South after the American Civil War usu. seeking private gain under the reconstruction governments.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 189 (11th ed. 2003).

14. “[A] white Southerner acting in support of the reconstruction governments after the American Civil War often for private gain.” *Id.* at 1107.

15. 1869 La. Acts 37. This Act – derisively labeled as the “Social Equality Bill” by its opponents – “made it a criminal offense to deny African Americans entry to hotels, steamboats, railroad cars, barrooms, and other public places.” ROSS, *supra* note 5, at 196.

16. See ROSS, *supra* note 5, at 196-97 (“In the following month [after the ‘Social Equality Bill’] the legislature passed a law to enforce the article in the 1868 constitution that required public schools in Louisiana to be open to all races. This further enraged whites, who labeled the enactment the ‘School Integration Bill.’”).

17. 1869 La. Acts 170.

18. See LABBÉ & LURIE, *supra* note 12, at 72-73, 103-06.

19. *Id.* at 136-66.

20. Ross, *supra* note 5, at 241, 251.

new Amendments to foil the laws of the Reconstruction legislature.²¹ He claimed the monopoly violated the Thirteenth Amendment ban on involuntary servitude and the Fourteenth Amendment's restrictions on state violations of due process, equal protection, and the privileges or immunities of citizens of the United States.²² Campbell and his co-counsel emphasized the generality of the language of the Fourteenth Amendment and urged that it apply to all restrictive legislation.²³

Justice Miller's opinion for the majority began with a straightforward public health analysis of the statute: confining the operation of slaughterhouses to a single location below the city and regulating its operation served the public health.²⁴ The limited monopoly served the interests of the city by encouraging private enterprise to finance the slaughterhouse and assure enforcement of restrictions.²⁵ This was within the police power of the state.²⁶

Responding to the butchers' linguistic argument, Miller said that the new amendments must be interpreted in light of the purpose of ending racial discrimination.²⁷ In that perspective, the Thirteenth Amendment did not apply to a monopoly for a slaughterhouse location.²⁸ The Amendment forbade personal servitude, not limitations on the use of property.²⁹

Justice Miller distinguished the privileges and immunities of citizens of a state from those of citizens of the United States.³⁰ The fundamental rights of "protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain

21. *Id.* at 249-50. For example, Campbell argued that the Louisiana public accommodations law denied theater owners their privileges or immunity to run their businesses without intrusion. *Id.* at 249 (citing THE NEW ORLEANS DAILY PICAYUNE, May 16, 1869).

22. See Transcript of Oral Argument at 3-30, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), in 6 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 734, 736-63 (Philip B. Kurland & Gerhard Casper eds., 1975).

23. See *id.* at 22-30, in 6 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 734, 755-63 (Philip B. Kurland & Gerhard Casper eds., 1975). Senator Matthew Carpenter represented the Slaughter-House incorporators. David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 1019 (1985). He also took a broad view of the substance of privileges and immunities, but argued that the Clause protected against racial discrimination and did not apply to the health concerns that led to the monopoly. See *id.* at 1018-20.

24. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 64 (1872).

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

26. See *id.* at 60-66.

27. See *id.* at 67-73.

28. See *id.* at 67-69.

29. See *id.* at 69.

30. *Id.* at 73-74.

happiness and safety” were privileges of citizens of a state.³¹ Thus, slaughterhouse ownership and freedom to butcher in other places were matters for state concern, not privileges or immunities within the scope of the Fourteenth Amendment Clause.³² The Clause itself created no privileges or immunities of citizens of the United States, but only referred to those derived from the “[f]ederal government, its [n]ational character, its [c]onstitution, or its laws.”³³

Justice Miller dismissed arguments based on the Due Process Clause as beyond any previously accepted.³⁴ He also rejected the butchers’ equal protection claim because it was not comparable to the race-based denials that gave rise to the Clause.³⁵

III. THE *SLAUGHTER-HOUSE CASES*’ BARRIER TO CIVIL RIGHTS

Justice Miller’s opinion contradicted the Framers’ vision of the Privileges or Immunities Clause³⁶ and contributed to a judicial retreat from Reconstruction.³⁷ His historical analysis of the new amendments supported Reconstruction, but his concern for federalism led him to view

31. *Id.* at 76 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823)).

32. *See id.* at 74-79.

33. *Id.* at 79.

34. *See id.* at 80-81.

35. *See id.* at 81.

36. Section 1 of the Fourteenth Amendment overruled *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), by making all persons born in the United States citizens of the United States. *Slaughter-House Cases*, 83 U.S. at 73. *See also* U.S. CONST. amend. XIV, § 1. The drafters believed that citizens were entitled to the same privileges and immunities that are in Article IV, that the Privileges or Immunities Clause of the Fourteenth Amendment made the Civil Rights Act of 1866 constitutionally unassailable and converted it from a statutory to a constitutional command. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens that provisions of Section 1 of the Amendment are all asserted in the organic law already, and Constitutional Amendment will prevent repeal of the Civil Rights Act); *id.* at 2511 (Rep. Eliot implicitly equated the Privileges or Immunities Clause with prohibiting state legislation discriminating against class); *id.* at 2539 (Rep. Farnsworth stated that Equal Protection was the only clause in Section 1 not already in the Constitution). No state could abridge the privileges or immunities of citizens of the United States, and, thus, no state could deny them on the basis of race. *Id.* at 2462 (statement of Rep. Garfield that the Amendment was to fix the Civil Rights bill in the Constitution); *id.* at 2465 (Rep. Thayer said “it is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law”); *id.* at 2467 (opposing the Amendment, Boyer said “the first section embodies the principles of the civil rights bill”); *id.* at 2498 (statement of Rep. Broomall that Congress voted for Section 1 “in another shape, in the civil rights bill”); *id.* at 2502 and 2513 (statements of Rep. Raymond [Raymond had voted against the Civil Rights Bill as beyond congressional power and opposed other sections of the proposed Fourteenth Amendment, but supported Section 1, saying now the bill “comes before us in the form of an amendment to the Constitution, which proposes to give Congress the power to attain this precise result.”]).

37. *See* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336-43 (1952).

the Privileges and Immunities Clause warily.³⁸ Justice Miller feared the expansive nationalizing effect of privileges and immunities if the Fourteenth Amendment Clause referred to the fundamental rights that Justice Washington identified in *Corfield v. Coryell*³⁹ as the privileges and immunities of citizens in Article IV.⁴⁰ On the other hand, Miller recognized racial civil rights as the core of the Civil War Amendments.⁴¹

The *Slaughter-House Cases* dissenters identified the privileges and immunities of citizens of the United States as fundamental rights, such as those articulated by Justice Washington in *Corfield v. Coryell*.⁴² The dissent focused on the negative rights that restrict the power of government to interfere with the enjoyment of life, liberty, and property: “Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.”⁴³ Miller surely recognized the dangers to civil rights in this argument – Campbell had used a very similar analysis to argue in Louisiana that the state’s public accommodations law violated the Privileges or Immunities Clause.⁴⁴

More importantly, *Coryell*’s fundamental rights included positive rights, specifically the right to protection by the government.⁴⁵ Justice Miller understood that the federal government had the responsibility and power to secure all the privileges or immunities of citizens of the United States.⁴⁶ If they included the protection of life, liberty, and property, then the security and protection of fundamental civil rights would be transferred from the states to the federal government.⁴⁷ The federal government could remedy state failures to secure and protect such rights, but it could also protect them regardless of state actions.⁴⁸ If the federal government had plenary power to enact such laws, federalism would be

38. See *Slaughter-House Cases*, 83 U.S. at 49-54.

39. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

40. See *Slaughter-House Cases*, 83 U.S. at 75-76.

41. *Id.* at 49-54.

42. *Id.* at 96-98 (Field, J., dissenting, joined by Chase, C.J., Bradley & Swayne, JJ.).

43. *Id.* at 97.

44. Ross, *supra* note 5, at 249 (citing THE NEW ORLEANS DAILY PICAYUNE, May 16, 1869).

45. *Slaughter-House Cases*, 83 U.S. at 97 (identifying “protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind . . .”).

46. See *id.* at 77-78.

47. *Id.*

48. *Id.* at 78 (stating “not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects.”).

at an end.⁴⁹ Government would change to a national form.⁵⁰ Insisting that the Fourteenth Amendment's framers did not intend such a result, Miller said that privileges and immunities of citizens of the United States refer to their rights as federal citizens, that privileges or immunities relate to the function of the government, and that the scope of federal power had not been significantly altered except by the other amendments and other clauses of the Fourteenth Amendment itself.⁵¹

After *Slaughter-House*, courts throughout the legal system used the limited version of privileges or immunities to deny the Amendment's application to state licenses, including bar membership.⁵² Worse, the Court consistently cited *Slaughter-House* in decisions finding that the federal government lacked power to protect citizens against violence directed at preventing their voting.⁵³ The decision's rationale precluded the use of the Privileges and Immunities Clause as a source for congressional regulation of contract and property rights. Thus, Congress had to use other powers to protect individuals from private acts of discrimination, and even today the Court holds that some attempts by Congress to protect citizens from violent acts and discrimination are beyond its power.⁵⁴

Further, pursuant to Miller's reasoning, the Clause could not be used in any argument for fundamental rights not derived from the functions of the federal government. His insistence that the Privileges or Immunities Clause did not create any new constitutional rights precluded

49. *See id.* "[I]t radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people . . ." *Id.*

50. *See id.*

51. *Id.* at 82 ("[W]e do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.").

52. *See Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1872); *In re Taylor*, 48 Md. 28, 32-34 (1877) (citing *Bradwell* in concluding that the Fourteenth Amendment did not apply to the exclusion of blacks from membership in the bar).

53. *See James v. Bowman*, 190 U.S. 127, 138 (1903); *United States v. Harris*, 106 U.S. 629, 638, 643 (1883); *United States v. Cruikshank*, 92 U.S. 542, 549 (1875).

54. *See United States v. Morrison*, 529 U.S. 598, 621-24 (2000) (reviving the state action doctrine of *Harris* and *Civil Rights Cases* in rejecting dicta from *Guest*); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's Commerce Clause authority).

the use of that Clause to incorporate the individual rights guarantees.⁵⁵ Thus, the Court for many years refused to apply the Bill of Rights against the states, citing the *Slaughter-House Cases* as support for that position.⁵⁶

Nevertheless, in context, Miller's interpretation of the Privileges or Immunities Clause protected civil rights legislation of reconstructed legislatures through a strong version of federalism. The misuse of the case to impair federal power ignored the opinion's design to shift protection of the civil rights of African-Americans to other clauses.

IV. *SLAUGHTER-HOUSE* DETOURS: NEUTRAL ANALYSIS PERMITTING EXPANSIVE INTERPRETATION

Although Justice Miller's opinion foreclosed use of the Privileges or Immunities Clause to enforce the fundamental rights of citizens, it left the door open for the use of other clauses to accomplish many of the same ends. With respect to several of these clauses, the *Slaughter-House Cases* did not support civil rights, but it offered them no barrier. The Court eventually moved into the openings to accomplish through the Commerce Clause, the Thirteenth Amendment, and the Due Process Clause much of what might have been accomplished by a broad interpretation of the Privileges or Immunities Clause.

A. *Commerce Clause*

The federal government did not regulate expansively during the nineteenth century. The states' power to enact laws affecting commerce posed the main Commerce Clause issue. The Court's analysis of the problem distinguished commercial regulation from exercises of the police power.⁵⁷ The *Slaughter-House Cases* noted that regulation of slaughtering was within the police power of the states, citing *Gibbons v. Ogden* for the proposition that health laws were matters subject to state

55. See *Slaughter-House Cases*, 83 U.S. at 77. Congressman John Bingham, the chief drafter of the Fourteenth Amendment, understood that the Privileges and Immunities Clause secured the fundamental rights of citizens, including the individual rights in the Bill of Rights, against state abridgement. CONG. GLOBE, 42d Cong., 1st Sess. app. 84-85 (1871) (statement of Rep. Bingham). See generally MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); Richard L. Aynes, Commentary, *Refined Incorporation and the Fourteenth Amendment*, 33 U. RICH. L. REV. 289 (1999).

56. See, e.g., *Twining v. New Jersey*, 211 U.S. 78, 93-97 (1908).

57. See *Slaughter-House Cases*, 83 U.S. at 63; *Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465, 489-91 (1888).

legislation.⁵⁸ Justice Miller referred to “the exclusive authority of State legislation over this subject,”⁵⁹ citing several cases to show that health regulation was a matter for the states and not for Congress.⁶⁰ Most of the cited cases upheld state laws against dormant Commerce Clause challenges and did not focus on the federal power to enact laws regulating commerce.⁶¹

The categorical distinction between police and commerce regulations reflected in the *Slaughter-House Cases* was a weak barrier to congressional power. As long as Congress regulates interstate commerce, it preempts state law, even exercises of state police power.⁶² The key question was how far the federal power to regulate commerce extended. The *Slaughter-House Cases* did not discuss that, because no relevant federal statute applied. Thus, the decision posed no obstacle to the broad interpretation of the commerce power in the twentieth century, a power that has become the primary source for the exercise of federal power, including the exercise of power to promote civil rights.⁶³

B. Thirteenth Amendment

Campbell argued for the butchers that the slaughterhouse monopoly was an involuntary servitude in violation of the Thirteenth Amendment because it prohibited men and women from using their own property as

58. *Slaughter-House Cases*, 83 U.S. at 63 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824)).

59. *Id.* (citing *City of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837)).

60. *Id.* at 64 (citing *United States v. DeWitt*, 76 U.S. (9 Wall.) 41 (1870) and *License Tax Cases*, 72 U.S. (5 Wall.) 462 (1867)).

61. The only one of these cases to hold federal legislation unconstitutional involved a federal tax statute that made it a misdemeanor to sell certain illuminating oil. *See DeWitt*, 76 U.S. at 44. The Supreme Court unanimously found the statute could not be supported as a revenue measure, and that it was beyond congressional power because it related exclusively to the internal trade of the states. *Id.* at 44-45. The government’s argument focused on the tax justification rather than the Commerce Clause. *Id.* at 44. There was no mention in the *Slaughter-House Cases* of the spending power, which has become another major source of federal power today. *See South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (upholding condition on the grant of federal highway funds that required recipients to prohibit purchase of alcoholic beverages by persons under the age of twenty-one).

62. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 26 (1824). *See Gibbons* for the distinction between commerce and the police power as sources of power.

63. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (upholding the public accommodations provisions with regard to hotels, motels, and similar establishments under Title II of the Civil Rights Act of 1964); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (upholding the public accommodations provisions with regard to restaurants under Title II of the Civil Rights Act of 1964).

they wished.⁶⁴ Miller responded that the Thirteenth Amendment referred to personal servitude and not to limitations on the use of property, and he gave some examples of involuntary servitude.⁶⁵ His brief analysis did not touch on congressional power to assure that slavery would not exist.

Justice Miller's history of the adoption of the Amendments noted that the Black Codes were "almost as bad" as slavery,⁶⁶ and that the Fourteenth Amendment was adopted because the Thirteenth Amendment had not secured all the Framers supposed they had secured.⁶⁷ Even if each law individually did not create slavery, the total had that effect. Miller wrote his brother-in-law, William Ballinger, that the Black Codes "do but change the form of slavery."⁶⁸ Miller's comment suggested that cumulative acts that imposed personal servitude would be fodder for Congress. Even if statesmen believed "something more was necessary in the way of constitutional protection,"⁶⁹ Section 2 of the Thirteenth Amendment might still grant Congress power to enact statutes like the Civil Rights Act of 1866.⁷⁰ Republicans passed the Civil Rights Act and the Fourteenth Amendment in the same session, arguing just that position.⁷¹ Thus, the Supreme Court acted consistently with the *Slaughter-House* opinion when it held in *Jones v. Alfred H. Mayer Co.* that Congress could prohibit private persons from racially discriminating in the sale or lease of property.⁷²

64. See Transcript of Oral Argument, *supra* note 22, at 7-8, in 6 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 734, 740-41 (Philip B. Kurland & Gerhard Casper eds., 1975) ("I conclude therefore . . . that wherever a law of a State, or a law of the United States, makes a discrimination between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them, to subserve the power, pride, avarice, vanity or vengeance of others, that this constitutes a case of involuntary servitude under the 13th Amendment to the Constitution.").

65. *Slaughter-House Cases*, 83 U.S. at 69.

66. *Id.* at 70.

67. *Id.* (stating that the Black Codes forced upon statesmen who had guided the nation through the war "who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much").

68. ROSS, *supra* note 5, at 115.

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

70. See *United States v. Cruikshank*, 25 F. Cas. 707, 711-12 (C.C.D. La. 1874) (Bradley, Circuit Justice).

71. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 823 (1999).

72. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968).

C. Due Process

Campbell and co-counsel Fellows also argued for the butchers that the monopoly violated the Due Process Clause, claiming that “it deprives them of their property without due process of law.”⁷³ They contended that “[t]he right to labor, the right to one’s self physically and intellectually, and to the product of one’s own faculties, is past doubt property, and property of a sacred kind.”⁷⁴ And they concluded that the grant of privilege was improper and not due process of law.⁷⁵

Miller’s response to the due process argument focused on Campbell’s contention that the right to labor was a property right.⁷⁶ He pointed to past interpretations of due process and noted that prior courts had never found restraints of trade to be deprivations of property subject to the prohibition of the Clause.⁷⁷ Because Campbell had not argued that the butchers were denied liberty without due process, Miller’s rejection of the property argument did not address whether the restriction was of a liberty interest or whether government was substantively limited when it attempted to regulate liberty.⁷⁸ Similarly, the opinion did not comment on whether the Due Process Clause could be a vehicle for incorporation of the Bill of Rights, since no issue arose for application of individual rights provisions of the Constitution against the states.

Justice Bradley’s dissent in *Slaughter-House* noted that the Due Process Clause swept in almost all of the individual rights mentioned in the Constitution.⁷⁹ Because Justice Miller made no comment on this, later courts could pick up the Clause and run with it. And that is what the Court has done, incorporating almost all of the guarantees of the Bill of Rights to apply to the states through the Due Process Clause.⁸⁰ The delay may not have harmed civil rights significantly, because most of the important rights were recognized in state declarations and constitutional provisions, and the Supreme Court did not take an expansive view of

73. *Slaughter-House Cases*, 83 U.S. at 56 (providing an abstract of oral argument against the monopoly) (emphasis omitted).

74. *Id.*

75. *See id.*

76. *Id.* at 80-81.

77. *Id.*

78. If forced to confront the issue at that time, Miller quite likely would have found against the butchers.

79. *Slaughter-House Cases*, 83 U.S. at 118 (Bradley, J., dissenting) (stating “. . . above all, and including almost all the rest, the right of *not being deprived of life, liberty, or property, without due process of law.*”).

80. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 154, 157-58 (1968) (holding that the right to jury trial in serious crimes applies to states).

those rights prior to incorporating them. For example, the Court incorporated the guarantee of freedom of speech in *Gitlow v. New York*,⁸¹ but the abstract right of free speech did not restrain the government until the Court began to overturn convictions in 1937.⁸²

Once the Court accepted the incorporation of freedom of speech and other substantive individual rights through the Due Process Clause, it could extend the Clause to unenumerated substantive rights.⁸³ The noncommittal approach of the *Slaughter-House Cases* left the due process door ajar for the Court to walk through.

V. THE *SLAUGHTER-HOUSE CASES*' SUPPORT FOR CIVIL RIGHTS

Justice Miller rooted his opinion in a vision of the Civil War Amendments as a series of attempts to accomplish the basic purpose of ending racial oppression:

[T]he 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.⁸⁴

He said that purpose must be considered in any interpretation of the Amendments:

[I]n any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.⁸⁵

The Court's rejection of the involuntary servitude and due process claims reflected this view,⁸⁶ but its federalism-focused privileges or

81. 268 U.S. 652, 666 (1925). *See also id.* at 672-73 (Holmes and Brandeis, JJ., dissenting).

82. *See De Jonge v. Oregon*, 299 U.S. 353, 365 (1937); *Herndon v. Lowry*, 301 U.S. 242, 263-64 (1937). The first recognition that Holmes' and Brandeis' dissents were a proper statement of the law came in *Dennis v. United States*, 341 U.S. 494, 505-08 (1951).

83. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the right to privacy); *Lawrence v. Texas*, 539 U.S. 558 (2003) (recognizing the right to autonomy in intimate choices); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing the limited right to pregnancy termination).

84. *Slaughter-House Cases*, 83 U.S. at 71.

85. *Id.* at 72.

86. *See id.* at 80-81.

immunities discussion⁸⁷ seemed to conflict. In order to reconcile federalism with racial equality, the Court relied on the Equal Protection Clause.⁸⁸ To reconcile federalism with the need to protect citizens from racial intimidation, it stressed implied structural rights and federal protective power over affirmative rights.⁸⁹

A. Equal Protection

The butchers' counsel attacked the monopoly as an act of "legislative partiality" in violation of the Equal Protection Clause.⁹⁰ Miller responded that equal protection was concerned with racial discrimination, and the monopoly was not a similar oppression:

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.⁹¹

Taken alone, the Equal Protection Clause offers no guidance for application. All classes are distinguishable by reason of the criteria used to define the class. The only issue is whether that criterion is a permissible one, and that is a substantive decision.⁹² Without context, a court could find that nothing violates the Clause or that anything it disliked violates the Clause. Miller's racial focus provided a guideline to determining appropriate criteria without opening the door to ad hoc judicial invalidation. Since *Slaughter-House*, the Court has expanded the Clause beyond race, but the underlying purpose of the Clause and the relationship of forbidden categories to the reasons for outlawing racial discrimination remain relevant.⁹³

87. See *id.* at 72-80.

88. See *id.* at 80-81.

89. See *id.* at 79-80.

90. *Id.* at 56 (providing an abstract of oral argument against the monopoly).

91. *Id.* at 81.

92. See, e.g., Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 548-56 (1982).

93. Race is inherent, immutable, politically isolating, stigmatic, and has no inherent correlation to legitimate government purposes. Gender, alienage, and illegitimacy share many of these characteristics, and the Court carefully analyzes the situations where the characteristic does have a proper relationship to the government purpose.

The butchers' argument assumed that laws regulating the use of property were subject to equal protection,⁹⁴ but that was questionable. Operating a slaughter-house could be characterized as a privilege rather than a property right. "Protection" could be limited to securing life, liberty, or property "against injury or wrong or outrage or violence."⁹⁵ However, Miller did not envision any such limitation on the application of the Equal Protection Clause. If the Privileges or Immunities Clause did not secure racial equality, the Equal Protection Clause must be the source for fulfilling the purpose of the Amendment. Thus, Miller characterized the equal protection of the laws in terms that could apply to all discriminatory laws.

Miller's *Slaughter-House* opinion undergirded the Supreme Court's civil rights decision in *Strauder v. West Virginia* that defendants were entitled to a jury selected without racial discrimination.⁹⁶ The *Strauder* dissenters (Justices Field and Clifford) argued that all defendants received equal treatment since they faced the same jury, and various groups, such as nonresidents, might be excluded from jury membership.⁹⁷ The majority, however, insisted that equal protection applied to jury membership and, at a minimum, should preclude racial discrimination.⁹⁸ Quoting Miller's *Slaughter-House* opinion, the Court said, "The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied, and by it [the Fourteenth Amendment] such laws were forbidden."⁹⁹ Equal protection should not be limited to laws that exclude one race from the protections of tort, contract, property, and criminal law, but should reach all laws that discriminate racially:

What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or

94. *Slaughter-House Cases*, 83 U.S. at 56 (providing an abstract of oral argument against the monopoly).

95. CONG. GLOBE, 42d Cong., 2nd Sess. 496 (1872) (statement of Sen. Thurman). Senator Alan Thurman argued that the Equal Protection Clause did not apply to the proposed Civil Rights Act. *Id.* There are a number of viable narrow interpretations of the Equal Protection Clause – equality in protecting the fundamental rights secured by a broad interpretation of privileges or immunities; equality in criminal penalties; equality in protecting individuals from harms caused by others, etc. See Bogen, *supra* note 23, at 1020 n.272.

96. 100 U.S. 303, 312 (1879).

97. See *id.* at 312 (citing *Ex parte Virginia*, 100 U.S. 339, 349 (1879) (Field, J., dissenting)). See also *Ex parte Virginia*, 100 U.S. at 367.

98. See *Strauder*, 100 U.S. at 310.

99. *Id.* at 307 (quoting *Slaughter-House Cases*, 83 U.S. at 81).

white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, – the right to exemption from unfriendly legislation against them distinctively as colored, – exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.¹⁰⁰

Justice Holmes cited the *Slaughter-House Cases*' statement of the purpose of the Fourteenth Amendment when he applied the Fourteenth Amendment to primary elections in *Nixon v. Herndon*.¹⁰¹ *Slaughter-House* itself had noted that suffrage was essential to fully secure the person and property of the freed slave, suggesting that equal protection could not be achieved without the vote.¹⁰² Holmes' decision in *Herndon* that racial discrimination in primaries violated equal protection¹⁰³ led to the application of the Fourteenth Amendment in voting rights cases. That progression enabled the Court to examine claims of legislative malapportionment under equal protection that it had rejected as political questions when argued as violations of the guarantee of a republican form of government.¹⁰⁴ Thus, by focusing on the touchstone for interpreting the Clause and intimating a general application, Miller's *Slaughter-House* opinion supported the growth of equal protection that has occurred in the twentieth and twenty-first centuries.

B. Privileges or Immunities Implied from the Federal Government's National Character

Miller's interpretation of the Privileges or Immunities Clause rendered the Clause ineffective, but not the privileges or immunities themselves. His structural reading encouraged courts to find implied

100. *Id.* at 307-08. The broad vision of the Equal Protection Clause, traceable to the *Slaughter-House Cases* and *Strauder*, was mentioned by the Court when it struck down residential segregation ordinances in *Buchanan v. Warley*, 245 U.S. 60, 76-77, 82 (1917).

101. 273 U.S. 536, 541 (1927) (“[I]t seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them.” (citing *Slaughter-House*, 83 U.S. at 36; *Strauder*, 100 U.S. at 303)).

102. *See Slaughter-House Cases*, 83 U.S. at 71.

103. *Herndon*, 273 U.S. at 541.

104. *See, e.g., Baker v. Carr*, 369 U.S. 186, 208-37 (1962).

rights that relate to the function of the federal government.¹⁰⁵ Thus, Miller's *Slaughter-House Cases* opinion reinforced his opinion in *Crandall v. Nevada*, which discovered a right to travel interstate implicit in national citizenship.¹⁰⁶ The federal government can protect the exercise of that privilege against private as well as government obstruction.¹⁰⁷ Moreover, the right of access to federal offices underlying the right to travel supported federal power to protect citizens of the United States against private interference with their relationship to the federal government, including voting in federal elections,¹⁰⁸ access to federal facilities,¹⁰⁹ and petition and assembly on federal matters.¹¹⁰

1. Right to Travel

The road the Court took encouraged recognition of a right to travel, including the freedom from discrimination against new residents.¹¹¹ Today, the best known citation of *Slaughter-House Cases* to support civil rights is the use made in *Saenz v. Roe*:

[I]t has always been common ground that this Clause protects the third component of the right to travel [the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State]. Writing for the majority in the *Slaughter-House Cases*,

105. Miller's list of privileges and immunities of citizens of the United States included a variety of international relationships. His quotation from *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867), implied a freedom to engage in foreign commerce. He pointed to the privilege to request protection while abroad, which is also an implicit rather than explicit Constitutional right, and he added the rights secured to citizens by treaties with foreign nations as privileges or immunities. See *Slaughter-House Cases*, 83 U.S. at 79-80. The implications of his international references have only started to be worked through, but they provide fodder for thought. See David S. Bogen, *Mr. Justice Miller's Clause: The Privileges or Immunities of Citizens of the United States Internationally*, 56 *DRAKE L. REV.* 1051 (2008). In addition to the right to be free from state interference with international commerce embodied in the dormant foreign Commerce Clause concept and the right to claim protection from the federal government, there is a privilege to be free of state interference in international travel, and a limited privilege to rights secured for individuals by international common law. *Id.* at 1055.

106. See *Crandall v. State of Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867).

107. *United States v. Guest*, 383 U.S. 745, 757-60 (1966) (upholding an indictment under federal statute for conspiracy to obstruct privileges or immunities of citizens of the United States by private attempts to prevent interstate travel).

108. *Ex parte Yarbrough*, 110 U.S. 651, 660-67 (1884) (endorsing Fifteenth Amendment exemption and strong Article I, Section 4 jurisprudence for federal protection of voters in congressional elections).

109. See *Crandall*, 73 U.S. (6 Wall.) at 44.

110. *Hague v. C.I.O.*, 307 U.S. 496, 512-13 (1939); *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1875).

111. *Saenz v. Roe*, 526 U.S. 489, 500-04 (1999).

Justice Miller explained that one of the privileges conferred by this Clause “is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.”¹¹²

Justice Stevens used the *Slaughter-House Cases* to support a decision that found a federal law unconstitutional because it distinguished between newly arrived citizens and established citizens in the receipt of TANF benefits.¹¹³ Stevens also noted the right to travel interstate.¹¹⁴ Although Stevens did not cite *Slaughter-House* for this right,¹¹⁵ Miller’s *Slaughter-House Cases* opinion, quoting from *Crandall v. Nevada*, asserts it:

[A privilege or immunity of citizenship in the United States is] the right of the citizen of this great country, protected by implied guarantees of its Constitution, “to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.”¹¹⁶

The security and protection of national privileges or immunities rests with the federal government.¹¹⁷ Thus, the federal government can assure its citizens they can travel to its facilities. In *United States v. Guest*, the Court held that private citizens who acted with the intent of interfering with interstate travel could be indicted under 18 U.S.C. § 241 for conspiracy to injure a citizen in the free exercise of a “right or privilege secured to him by the Constitution or laws of the United States”¹¹⁸ Although Justice Harlan argued that the constitutional right to travel was only a right to be free of state interference,¹¹⁹ the majority found that the right included freedom from private interference, citing

112. *Id.* at 503 (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1872)).

113. *Id.* at 492-93, 502-03, 509-11.

114. *Id.* at 500-01.

115. *Id.* at 501 (“For the purposes of this case, therefore, we need not identify the source of that particular right in the text of the Constitution.”).

116. *Slaughter-House Cases*, 83 U.S. at 79 (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867)).

117. *See id.* at 75, 77.

118. *United States v. Guest*, 383 U.S. 745, 747 (1966) (quoting 18 U.S.C. § 241 (1964)). *See also id.* at 757-59.

119. *Id.* at 762-63 (Harlan, J., concurring in part and dissenting in part).

Crandall.¹²⁰ Congress could have enacted a specific statute to punish such interference using its power to regulate interstate commerce, but *Guest* shows that the privilege is applicable against private citizens and serves as an independent source of congressional power.

In short, Miller's *Slaughter-House* opinion recognized that a right to interstate travel and to reside in other states is a privilege or immunity of citizens of the United States inferred from the nature of the union, and that recognition supports federal legislation to protect travelers from private acts of violence aimed at them.

2. Federal Political and Civil Rights

The Court has used the structural analysis exemplified by *Slaughter-House* to find additional privileges or immunities derived from the nature of the federal government. These decisions are rooted in an understanding of government by the people: voting in federal elections,¹²¹ access to the federal government,¹²² and discussion of federal affairs.¹²³ Congress can protect all of these privileges from interference, whether the interference comes from government or from private individuals.

Even before the *Slaughter-House Cases* decision, Judge Hugh Lennox Bond of the Fourth Circuit upheld the Enforcement Act of 1870 in the trial of members of the Ku Klux Klan in South Carolina for interference with voting in federal elections.¹²⁴ He said that Congress had power to protect the integrity of federal elections.¹²⁵ The Supreme Court agreed with that position in *Ex parte Siebold*,¹²⁶ noting congressional power to regulate time, place, and manner of federal elections,¹²⁷ and asserting that this includes power to protect the vote

120. *See id.* at 757-58 (citing *Crandall*, 73 U.S. at 48-49). *See also id.* at 759 n.17.

121. *Ex parte Yarbrough*, 110 U.S. 651, 663-64 (1884).

122. *See Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867).

123. *Hague v. C.I.O.*, 307 U.S. 496, 512-13 (1939) ("Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgment, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects." (citations omitted)).

124. *See United States v. Crosby*, 25 F. Cas. 701, 704-05 (C.C.D.S.C. 1871). *See generally* Kermit L. Hall, *The Courage of His Convictions: Hugh Lennox Bond and the South Carolina Ku Klux Klan Trials*, in *NOBLE PURPOSES: NINE CHAMPIONS OF THE RULE OF LAW 49-63* (Norman Gross ed., 2007). *See also United States v. Mitchell*, 26 F. Cas. 1283, 1285-86 (C.C.D.S.C. 1871) (noting Bond's charge to the jury in the Ku Klux Klan case).

125. *See Crosby*, 25 F. Cas. at 704.

126. 100 U.S. 371 (1879).

127. *Id.* at 383-84 (citing U.S. CONST. art. I, § 4).

from private injury and from state misfeasance.¹²⁸ Similarly, writing for the Court in *Ex parte Yarbrough*, Justice Miller upheld the convictions of private individuals for injuring a person in the exercise of his right to vote in a federal election.¹²⁹ The defendants argued that states could provide the necessary laws, but Miller responded that state action was irrelevant to the federal power to protect federal operations, and that voting was a critical federal operation: “It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people, as that the original form of it should be so.”¹³⁰ It did not matter that the voter was not a federal official, since the voter was acting in the exercise of a federal right:

The power in either case [protecting federal officials or protecting voters in federal elections] arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States. In both cases it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.¹³¹

Federal law can also protect access to federal offices.¹³² Miller’s opinion in *Crandall v. Nevada* based the citizen’s right to travel on an assumption that citizens had a right of access to federal offices and agencies.¹³³ Pursuant to that reasoning, interference with a citizen’s

128. *Id.* at 396. The Court noted:

Is it possible that Congress could not, in that case, provide for keeping the peace at such elections, and for arresting and punishing those guilty of breaking it? If it could not, its power would be but a shadow and a name. But, if Congress can do this, where is the difference in principle in its making provision for securing the preservation of the peace, so as to give to every citizen his free right to vote without molestation or injury, when it assumes only to supervise the regulations made by the State, and not to supersede them entirely?

Id.

129. 110 U.S. 651, 660-67 (1884).

130. *Id.* at 666.

131. *Id.* at 662.

132. *See* *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867).

133. *Id.*

access to federal offices and agencies interferes with the exercise of a federal right, even if the individual sought access in his or her home state.¹³⁴

Another structural right implied from the nature of government is the right to assemble and petition the federal government for redress of grievances. After listing travel and protection abroad as privileges of citizens of the United States in the *Slaughter-House Cases*, Miller said that “[t]he right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution.”¹³⁵ Less than four years after *Slaughter-House*, the Court noted in *Cruikshank* that the First Amendment prohibited “Congress from abridging ‘the right of the people to assemble and to petition the government for a redress of grievances.’”¹³⁶ The Court asserted that the right pre-existed the Constitution; it was essentially a natural right for the states to protect.¹³⁷ The Amendment only prevented Congress from abridging it.¹³⁸ Thus, the Court, with Miller’s support, repudiated incorporation of the Bill of Rights through the Privileges or Immunities Clause.¹³⁹ But the Court added:

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.¹⁴⁰

134. See *In re Quarles*, 158 U.S. 532, 535-36 (1895) (recognizing the right to inform officials of violations of federal law); *Logan v. United States*, 144 U.S. 263, 285 (1892) (recognizing the right of prisoners in custody of federal marshal to be protected from “lawless violence”); *United States v. Waddell*, 112 U.S. 76, 80-81 (1884) (recognizing the right to access federal land grant). See also Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1491 (2008) (arguing that *Crandall* reasoning leads to a right of access to the courts).

135. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872).

136. *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (citation omitted).

137. See *id.*

138. *Id.*

139. See David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333 (2003), for a discussion on *Slaughter-House* and the incorporation of the Bill of Rights against the states.

140. *Cruikshank*, 92 U.S. at 552.

The Court went on to say that if it had been alleged that the “object of the defendants [had been] to prevent a meeting for such a purpose, [then] the case would have been within the [Enforcement Act] statute, and within the . . . sovereignty of the United States.”¹⁴¹ Thus, Congress may protect people who are petitioning or attempting to transact business with the federal government, or even meeting among themselves to discuss federal affairs.

The *Cruikshank* dicta revealed the dual nature of the *Slaughter-House* reference to peaceable assembly. It became central to the holding of the twentieth century Supreme Court decision in *Hague v. C.I.O.*¹⁴² Labor organizers sued to stop city officials from interfering with their actions to promote the labor law.¹⁴³ Citing the *Slaughter-House Cases*, the Supreme Court said that “the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the [Fourteenth] Amendment protects.”¹⁴⁴ Because there have been few cases of federal legislation protecting speakers from private interference, later cases have focused on the limits on government contained in the Free Speech Clause and its incorporation through due process.¹⁴⁵ However, the implied structural privilege to discuss federal laws goes beyond the express Clause and enables Congress to protect citizens engaged in that activity from private interference.

3. State Political and Civil Rights

Critics of *Slaughter-House* often focus on its use in subsequent cases that struck down indictments and convictions for horrendous assaults, including killing African-Americans who dared to act politically.¹⁴⁶ The murderers escaped punishment for unspeakably

141. *Id.* at 552-53.

142. 307 U.S. 496 (1939).

143. *Id.* at 500-01.

144. *Id.* at 512-13 (citations omitted). “Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom. All of the respondents’ proscribed activities had this single end and aim.” *Id.* at 513. Justice Stone concurred, preferring to rely on incorporation through the Due Process Clause, which would apply to all persons. *Id.* at 524-27.

145. *See, e.g.*, *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

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

outrageous acts because the Court either construed the statute¹⁴⁷ or the indictment¹⁴⁸ to broadly apply to any voter interference without regard to racial motivation. The Court held that rights such as voting in state elections are not privileges or immunities of citizens of the United States, but only privileges of state citizenship.¹⁴⁹ The Court reasoned that, unlike voting in national elections, the state elective office was not constitutionally based, and the only federal privilege was to be free of racial discrimination.¹⁵⁰ Thus, violent but non-racially based assaults on state voters were like assaults on anyone else.¹⁵¹ The Court feared the danger to federalism if the federal government could punish these acts. Their decisions overlooked paths that would have upheld federalism and the indictments; but, even as it released the perpetrators, the Court traced out a theory of federal power to punish the acts that took place.¹⁵²

The search for federal power to reach perpetrators of violence on African-Americans begins with Miller's analysis of the purpose of the Civil War Amendments. Miller's reference to clauses of the Civil War Amendments as new privileges or immunities of citizens of the United States¹⁵³ signaled an expansion of congressional power to protect citizens from private interference with the exercise of those rights. Miller said they called for protecting the new citizen "from the oppressions of those who had formerly exercised unlimited dominion over him."¹⁵⁴ But the Fourteenth and Fifteenth Amendments created rights primarily against the state.¹⁵⁵ Where the right is only against the

147. *United States v. Reese*, 92 U.S. 214, 216-22 (1875) (invalidating convictions by interpreting sections three and four of the statute to apply to nonracial obstruction and holding that would not be warranted by the Fifteenth Amendment). Justice Hunt dissented on the grounds that the Court incorrectly construed the statute, which he interpreted to apply only to racially motivated interference with suffrage. *Id.* at 242-45. The Court subsequently questioned the propriety of the majority's statutory interpretation. *See United States v. Raines*, 362 U.S. 17, 24 (1960).

148. *See United States v. Cruikshank*, 92 U.S. 542, 555-57 (1875) (holding the indictment invalid because it did not allege a racial motivation for the interference with the vote).

149. *See Reese*, 92 U.S. at 217-18 (holding that the only federal privilege with respect to voting in state elections was to be free of racial discrimination). *See Cruikshank*, 92 U.S. at 556.

150. *See Cruikshank*, 92 U.S. at 556-57.

151. *See id.* at 556.

152. The Court could have construed the statute and the indictments to apply only to racially based actions in these cases. Alternatively, they might have pursued the Guarantee Clause theory proffered in discussion *infra* Part VI. *See* Pamela Brandwein, *Rethinking United States v. Cruikshank: Law and Politics in a Transitional Period* (Nov. 14, 2008) (unpublished manuscript, presented at the 2008 Annual Meeting of the American Society for Legal History) (discussing Supreme Court's design to empower Congress to deal with racial violence).

153. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71, 74-80 (1872).

154. *Id.* at 71.

155. *See* U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

state, only the state can violate the Amendment. Yet, unless the federal government could deal with private acts of terrorism and the destruction of the African-Americans' civil and political rights by violence, new citizens would not be protected from the oppressions of their former masters. However, Miller believed that Congress could prohibit racially motivated political violence.¹⁵⁶ Of course, Congress has power to prohibit interference with constitutional rights, since Congress has power to enforce those rights. The problem was how private behavior could constitute interference with a right that existed solely against the state. Miller's subsequent decisions show how Congress was authorized by those Amendments to protect citizens from private as well as governmental interference.

Circuit Court Judge Bond's opinion in *Crosby* offered one explanation to sustain the application of the Enforcement Act against private citizens. He argued that Congress was the sole judge of the appropriateness of legislation to enforce the Amendment and that it could find that the best way to protect against state discrimination was to punish all persons who acted to prevent the vote on a racial basis.¹⁵⁷

Justice Bradley's opinion on circuit in *Cruikshank* gave another explanation. He distinguished between the fundamental rights that exist independently of the Constitution and those created by the Constitution and federal law.¹⁵⁸ With respect to natural rights, Bradley said the Constitution does not create the rights but only limits government interference with them, and congressional power must be directed to government action.¹⁵⁹ The right to vote, he contended, was different in nature, because it conferred a positive right that did not exist before.¹⁶⁰

156. See *Ex parte Yarbrough*, 110 U.S. 651, 666-67 (1884).

157. *United States v. Crosby*, 25 F. Cas. 701, 704 (C.C.D.S.C. 1871) (“[T]he constitution has declared that the states shall make no distinction on the grounds stated in this first section. And, by this legislation, congress has endeavored, in a way which congress thought appropriate, to enforce it Congress may have found it difficult to devise a method by which to punish a state which, by law, made such distinction, and may have thought that legislation most likely to secure the end in view which punished the individual citizen who acted by virtue of a state law or upon his individual responsibility. If the act be within the scope of the amendment, and in the line of its purpose, congress is the sole judge of its appropriateness.”).

158. See *United States v. Cruikshank*, 25 F. Cas. 707, 712, 714 (C.C.D. La. 1874).

159. See *id.* at 714.

160. *Id.* at 712 (“Although negative in form, and therefore, at first view, apparently to be governed by the rule that congress has no duty to perform until the state has violated its provisions, nevertheless in substance, it confers a positive right which did not exist before. The language is peculiar. It is composed of two negatives. The right shall not be denied. That is, the right shall be enjoyed; the right, namely, to be exempt from the disability of race, color, or previous condition of servitude, as respects the right to vote.”).

On this basis, Bradley argued that a right created by the Constitution may be protected by the federal government:

Considering, as before intimated, that the amendment, notwithstanding its negative form, substantially guaranties the equal right to vote to citizens of every race and color, I am inclined to the opinion that congress has the power to secure that right not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state laws. Such was the opinion of congress itself in passing the law at a time when many of its members were the same who had consulted upon the original form of the amendment in proposing it to the states. And as such a construction of the amendment is admissible, and the question is one at least of grave doubt, it would be assuming a great deal for this court to decide the law, to the extent indicated, unconstitutional.¹⁶¹

Both Bradley and Bond saw the protection of voting without racial discrimination as the aim of the Fifteenth Amendment, and found Congress has power to achieve that end by prohibiting private race-based conspiracies to prevent persons from voting in state elections. Both explanations had difficulty with the Amendment's references to state action, but the Court soon indicated its agreement with their views.¹⁶² The Court said in *Reese* that the Fifteenth Amendment gave citizens a new constitutional right to be exempt from racial discrimination.¹⁶³ It said in *Cruikshank* that the Fifteenth Amendment provides the right to vote where state law discriminates, and that Congress can therefore protect that right.¹⁶⁴ Both opinions spoke of

161. *Id.* at 713.

162. *See* *United States v. Cruikshank*, 92 U.S. 542, 555-56 (1875); *United States v. Reese*, 92 U.S. 214, 218 (1875).

163. *Reese*, 92 U.S. at 218. ("Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'").

164. *Cruikshank*, 92 U.S. at 555-56 (citing *Reese*, 92 U.S. 214). The Court said:

[T]he fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, &c., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.

exemption from discrimination rather than exemption from state acts that discriminate.

Justice Miller's subsequent opinion in *Ex parte Yarbrough* provided a better basis for reconciling the language of the Amendment with the power to forbid private racially motivated attacks on voters in state elections. After holding that the federal government could protect the right to vote in federal elections because it was a federal privilege, he argued that the right to vote in a state election without being subject to discrimination was also a federal privilege.¹⁶⁵ The source of the right to vote where the state excluded African-Americans would be the provisions of the Fifteenth Amendment.¹⁶⁶ Thus, the person exercising that vote would be exercising a federal constitutional right, and the federal government can protect the exercise of federal rights:

In all cases where the former slave-holding States had not removed from their Constitutions the words "white man" as a qualification for voting, this provision [the Fifteenth Amendment] did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women. In such cases this fifteenth article of amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right.¹⁶⁷

This analysis focused on the constitutional obligation of the state to provide the opportunity to vote without racial discrimination.¹⁶⁸ Federal law may prohibit interference with the state's performance of that obligation.¹⁶⁹ Even if state law is racially neutral, private violence by groups like the Ku Klux Klan could exclude a race from the opportunity to vote provided by the state.¹⁷⁰ The result would be ballots handed out by the state to one race only. The citizen has a right to obtain the vote

Id. (citing *Reese*, 92 U.S. 214). The Court found the count on interference with the franchise "not good and sufficient in law" because it failed to allege that any obstruction was on account of color – but it did not indicate that state action need be alleged. *See id.* at 555-57.

165. *See Ex parte Yarbrough*, 110 U.S. 651, 663-65 (1884).

166. *Id.* at 664-65.

167. *Id.* at 665 (citing *Neal v. Delaware*, 103 U.S. 370 (1880)).

168. *See id.*

169. *Id.*

170. *See id.* at 661-62.

from the state without racial discrimination, and private acts on a racial basis could exclude the voter from a benefit that the state was constitutionally bound to provide. Thus, Congress should have power to prohibit interference with the right of the citizen to vote without being subjected to racial discrimination.

This analysis empowers Congress to assist states in fulfilling their constitutional duties; it does not preempt them. Where the constitutional duty of the state is negative – for example, “do not interfere with someone’s natural rights” – private interference with those rights does not interfere with the state’s constitutional obligation. Where the state has an obligation to provide individuals with something, private acts may interfere with the state’s performance of its obligation. However, even if the duty is the positive one of protecting another individual from harm, infliction of the harm does not interfere with the state performing its duty. Thus, the analysis does not threaten federalism because it does not authorize the federal government to enact criminal and civil laws of contract, property, and criminal law.

Given the purpose analysis of *Slaughter-House*, the dicta in the cases following it correctly found congressional power to ban election interference based on race. *Reese*, *Cruikshank*, and *Yarbrough* discussed the right to vote in state elections entirely in terms of the Fifteenth Amendment, because the Court had not yet found that the Equal Protection Clause applied to voting.¹⁷¹ Although the state determines what state offices are elective as well as defining eligibility to vote for them, equal protection developments that describe voting as a fundamental interest suggest it may be time to reexamine the scope of privileges and immunities of United States citizens in state elections.

Today, the Court has recognized a much broader scope for federal privileges in state elections, noting that equal protection “restrains the States from fixing voter qualifications which invidiously discriminate.”¹⁷² The Constitution now protects against discrimination based on gender,¹⁷³ age,¹⁷⁴ or property,¹⁷⁵ and the Court has found the

171. See *United States v. Reese*, 92 U.S. 214, 217-18 (1875); *United States v. Cruikshank*, 92 U.S. 542, 555-66 (1875); *Ex parte Yarbrough*, 110 U.S. 651, 663-65 (1884).

172. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966).

173. U.S. CONST. amend. XIX.

174. U.S. CONST. amend. XXVI.

175. U.S. CONST. amend. XXIV; see *Harper*, 383 U.S. at 666-67 (holding poll tax unconstitutional).

Equal Protection Clause secures equality in representation,¹⁷⁶ in the way votes are counted¹⁷⁷ and, combined with the right to travel, protects new residents as well.¹⁷⁸ In making these decisions, the Court has said that “the right of suffrage is a fundamental matter in a free and democratic society.”¹⁷⁹ Thus, the Fourteenth Amendment protects voting against any invidious discrimination by the state – such a right is a privilege of citizens of the United States because it is derived from the Constitution. Under the reasoning used in *Slaughter-House*, *Cruikshank*, *Reese*, and *Yarbrough*, Congress should have power under Section 5 of the Fourteenth Amendment to prohibit private interference with voting in state elections based on invidious discrimination.

*James v. Bowman*¹⁸⁰ stands as an obstacle to this analysis. It was decided at the turn of the century and, to some degree, put a nail in the coffin of Reconstruction. In *James*, the Court stated that a statute that purports to punish individual action could not be sustained under the Fifteenth Amendment.¹⁸¹ Thus, Congress could not punish “anyone who, by means of bribery, prevents another to whom the right of suffrage is guaranteed by [the Fifteenth Amendment] from exercising that right.”¹⁸² In reaching its decision, the Court relied on Fourteenth Amendment cases that held state action is necessary – the *Civil Rights Cases* and *Harris*.¹⁸³ Because the indictment in *James* did not charge that the act was done with a racial intent, the holding is slightly ambiguous; however, the Court’s language on the need for state action was clear.¹⁸⁴

176. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”).

177. See *Bush v. Gore*, 531 U.S. 98, 105-06 (2000) (per curiam) (requiring specific standards in recounts to ensure “nonarbitrary treatment of voters”).

178. *Dunn v. Blumstein*, 405 U.S. 330, 338-46 (1972) (invalidating state durational residence laws as a means of qualifying voters).

179. *Reynolds*, 377 U.S. at 561-62.

180. 190 U.S. 127 (1903).

181. *Id.* at 139.

182. *Id.* at 136.

183. See *infra* notes 197-200 and accompanying text.

184. See *James*, 190 U.S. at 139. The Court stated:

No discrimination on account of race, color, or previous condition of servitude is charged. These authorities show that a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the 15th Amendment upon Congress to prevent action by the state through some one or more of its official representatives, and that an indictment which charges no discrimination on account of race, color, or previous condition of servitude is likewise destitute of support by such amendment.

A majority of the Supreme Court rejected this analysis in a fractured opinion in *United States v. Guest*.¹⁸⁵ Three justices in the plurality agreed with the three dissenting justices that Congress could reach private action under its power to enforce the Fourteenth Amendment's Equal Protection Clause.¹⁸⁶ Justice Brennan wrote a dissent in which Chief Justice Warren and Justice Douglas joined that argued Congress could require the state to provide facilities on a nondiscriminatory basis and could then protect access to such facilities:

Viewed in its proper perspective, § 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. No one would deny that Congress could enact legislation directing state officials to provide Negroes with equal access to state schools, parks and other facilities owned or operated by the State. Nor could it be denied that Congress has the power to punish state officers who, in excess of their authority and in violation of state law, conspire to threaten, harass and murder Negroes for attempting to use these facilities. And I can find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—not state officers themselves and not acting in concert with state officers—who engage in the same brutal conduct for the same misguided purpose.¹⁸⁷

In other words, where the Constitution requires a state to furnish something on a nondiscriminatory basis, Congress has power to vindicate that right by punishing anyone who interferes with access to that good or service. Section 5 of the Fourteenth Amendment, like Section 2 of the Fifteenth Amendment, empowers Congress to protect the states from acts that would interfere with fulfilling their constitutional obligation.¹⁸⁸ This is the reasoning of *Yarbrough*.¹⁸⁹

Justice Clark, joined by Justices Black and Fortas, wrote a concurring opinion that stated “there now can be no doubt that the

Id.

185. *United States v. Guest*, 383 U.S. 745, 757-60 (1966) (upholding indictment under federal statute for conspiracy to obstruct privileges or immunities of citizens of the United States by private attempts to prevent interstate travel).

186. *Id.* at 762 (Clark, J., concurring); *Id.* at 777-84 (Brennan, J., concurring in part and dissenting in part).

187. *Id.* at 784 (Brennan, J., concurring in part and dissenting in part) (citations omitted).

188. *See id.* at 777; *Ex parte Yarbrough*, 110 U.S. 651, 662-63 (1884).

189. *See Yarbrough*, 110 U.S. at 662-63.

specific language of § 5 empowers the Congress to enact laws punishing all conspiracies – with or without state action – that interfere with Fourteenth Amendment rights.”¹⁹⁰ Although the Justice did not fully explain how private action can interfere with a Fourteenth Amendment right, he believed that preventing access to state facilities on a racial basis would be such an interference.¹⁹¹

The Supreme Court in *United States v. Morrison* dismissed this portion of the *Guest* decision as dicta.¹⁹² However, the Court overlooked the distinction between affirmative and negative rights. *Morrison* stressed that state action was required by *United States v. Harris*¹⁹³ and the *Civil Rights Cases*,¹⁹⁴ the cases that *James v. Bowman*¹⁹⁵ relied upon.¹⁹⁶ But neither case involved interference with a constitutional right. Although a state may not discriminate in providing any form of public accommodation, there is no interference with that obligation when a private company discriminates. Thus, the *Civil Rights Cases* concerned negative rights to be free of state behavior rather than a right to get something.¹⁹⁷ *Harris* involved a lynching where the mob took a person from state officials.¹⁹⁸ The state cannot take a life without due process, but that constitutional right is a shield against the behavior of the state.¹⁹⁹ The state’s obligation to provide due process is conditioned upon the state being the source of the deprivation. Thus, a private actor or group who murders does not interfere with the state’s constitutional obligation, because the state did not do the killing. Under the theory of the law in *Harris*, virtually any criminal act would be a federal crime, and the Court said that Congress lacked the power to reach simple breaches of the law.²⁰⁰

The petitioner’s theory in *Morrison* was that Congress could act when it considered states acted in a discriminatory fashion in providing

190. *United States v. Guest*, 383 U.S. 745, 762 (1966) (Clark, J., concurring).

191. *See id.*

192. 529 U.S. 598, 622-24 (2000).

193. 106 U.S. 629 (1883).

194. 109 U.S. 3 (1883).

195. 190 U.S. 127 (1903).

196. *Morrison*, 529 U.S. at 622-24 (citing *Harris*, 106 U.S. at 639; *Civil Rights Cases*, 109 U.S. at 18; *United States v. Cruikshank*, 92 U.S. 542, 544 (1875); *Virginia v. Rives*, 100 U.S. 313, 318 (1879)).

197. *Civil Rights Cases*, 109 U.S. at 11 (“Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges . . .”).

198. 106 U.S. 629, 629-632 (1883).

199. *See* U.S. CONST. amend. XIV § 1.

200. *See Harris*, 106 U.S. at 643.

remedies, and the Court at the very least required a greater showing of necessity on that issue.²⁰¹ But none of these cases involved an attempt to protect the state and to enable it to provide mandated goods and services. Since *Morrison* did not refer to issues of access to state goods or services, Rehnquist's opinion is itself dicta. Congress should have power to protect the state in fulfilling its constitutional obligations – that is a method of enforcing the obligation itself.

For example, segregation by school officials violates the Fourteenth Amendment, and Congress may prohibit it under its Section 5 powers.²⁰² But Congress should be able to protect state officials from rioters who attempt to compel them to segregate.²⁰³ The federal government must have power to protect them as it does any other person carrying out a federal obligation. Violence generally does not interfere with the ability of the state to protect its citizens equally, because the state satisfies its obligation by punishing the offender through its civil and criminal laws; however, where private persons interfere with access to the state so that the state provides its benefits to only one group (the ones who were able to show up), the private action creates discrimination. In that context, the federal government should be able to protect the state from private interference with its federal obligation.

VI. THE GUARANTEE CLAUSE

The Court might be reluctant to expand federal power under the Fourteenth and Fifteenth Amendments in light of the precedent of *James* and *Morrison*. However, just as the Court used equal protection to circumvent prior Guarantee Clause precedents in *Baker v. Carr*,²⁰⁴ it could use the Guarantee Clause to avoid the state action limits of its equal protection precedents.

201. *United States v. Morrison*, 529 U.S. 598, 624-27 (2000). The Court noted that the remedy was not congruent and proportional to any alleged violation of the amendment; it was not directed at the state, and applied even in states that had no history of discrimination. *Id.* See Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 *LAW & SOC'Y REV.* 343, 355-59 (2007) (arguing that the Waite Court era "preserved federal power to reach private individuals as a remedy" when there was "state neglect" to protect race-based wrongs).

202. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-96 (1954); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 487-88 (1989).

203. See *Brewer v. Hoxie Sch. Dist. No. 46*, 238 F.2d 91, 100 (8th Cir. 1956) ("[T]he existence of a Constitutional duty . . . presupposes a correlative right in the person upon whom the duty is imposed to be free from direct interference with its performance.").

204. 369 U.S. 186, 209 (1962).

The Guarantee Clause recognizes the importance of governance by the people of a state as a privilege of citizens of the United States. Article IV, Section 4 provides that the “United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”²⁰⁵

The Court has treated the Guarantee Clause as raising a political question inappropriate for judicial review.²⁰⁶ However, the Necessary and Proper Clause grants Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States”²⁰⁷ Thus, Congress has power to enact a law necessary to guarantee every state a republican form of government. Some Republicans used the Guarantee Clause to justify Reconstruction measures after the Civil War.²⁰⁸ In *Texas v. White*, Chief Justice Waite said that “the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress.”²⁰⁹ In general, however, there has been very little litigation over congressional power under this Clause.

The Court has indicated that the Guarantee Clause may be satisfied by a variety of structures.²¹⁰ If the core meaning of republican government is control by the people over their rulers, the guarantee may protect the choices that the state makes from federal interference.²¹¹ Professor Merritt has argued powerfully that the Clause “prohibits the states from adopting nonrepublican forms of government [and] forbids

205. U.S. CONST. art. IV, § 4.

206. *Baker v. Carr*, 369 U.S. 186, 209 (1962) (“We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause.”); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (“[T]he Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.”).

207. U.S. CONST. art. I, § 8, cl. 18.

208. See MICHAEL LES BENEDICT, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, in MICHAEL LES BENEDICT, *PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA* 3, 11-12, 17 (2006); WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 166-243 (1972).

209. *Texas v. White*, 74 U.S. (7 Wall.) 700, 730 (1868).

210. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874) (“No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated.”).

211. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

the federal government from interfering with state governments in a way that would destroy their republican character.”²¹²

But the guarantee of a republican form of government should also empower the federal government to assist the existing state government in maintaining its republican character. Rather than interfere with state choices, the federal government could protect those choices. Thus, the federal government should have the power to assure that persons are able to vote when they are properly constituted as voters by the state or by the constitutional prohibition against invidious discrimination. Any attempt by persons to prevent others from voting for reasons that would be invidious discrimination should be within the power of Congress to regulate. These individuals are preventing access to something that the Constitution requires the state afford without such discrimination. As a majority of justices suggested in *Guest*, this should be a basis for the exercise of congressional enforcement power under Section 5 of the Fourteenth Amendment.²¹³

A. Voting

According to the reasoning in the *Slaughter-House Cases* and its progeny, the federal government can protect individuals from interference with their exercise of federal rights. If a republican form of government is guaranteed to the states by the Constitution, the federal government should have power to protect the states from threats to their form of government. Several Supreme Court cases have denied federal power to protect voting in state elections, either on the ground that voting in state elections is not a federal right, or that the constitutional limits apply only to state and not individual actions.²¹⁴ However, none of these cases squarely addressed the federal power to act under the Guarantee Clause.²¹⁵

212. *Id.* at 25.

213. *United States v. Guest*, 383 U.S. 745, 761-62 (1966) (Clark, J., concurring, joined by Black and Fortas, JJ.); *id.* at 777 (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J., and Douglas, J.).

214. *James v. Bowman*, 190 U.S. 127, 142 (1903) (holding federal statute prohibiting bribery in elections pursuant to Fifteenth Amendment unconstitutional because no state action required); *United States v. Cruikshank*, 92 U.S. 542, 555-57 (1875) (holding the indictment invalid because it did not allege a racial motivation for the interference with the vote); *United States v. Reese*, 92 U.S. 214, 217-18 (1875) (holding that the only federal privilege with respect to voting in state elections was to be free of racial discrimination).

215. In *Reese*, the Court construed a voting rights statute to apply to non-racially motivated obstructions to state voting. 92 U.S. at 220. It then held that the statute was not justified by the Fifteenth Amendment, which was confined to prohibition of racial discrimination. *See id.* at 220-

The Court did mention the Guarantee Clause in *United States v. Cruikshank*, but it did not directly confront the argument that the Clause supported voting rights legislation. In *Cruikshank*, the Court dismissed an indictment that charged defendants with injuring parties because they had voted in a state election.²¹⁶ The Court said that the “right of suffrage is not a necessary attribute of national citizenship,” citing *Reese*.²¹⁷ However, the indictment was based on the Enforcement Act of 1870, which made it a crime to conspire to injure a person “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”²¹⁸ In order to find a violation of the Enforcement Act, the Court would have to hold that voting in states was a right or privilege secured by the Constitution or laws of the United States. It did not do so.²¹⁹ The Court could not rely on the Guarantee Clause to establish the right because its precedents held that the Clause was non-justiciable.²²⁰ The Court indicated that the Guarantee Clause was relevant but did not apply in this case.²²¹

The state made no request for assistance. Although Justice Bradley on circuit had held the voting intimidation provisions of the Enforcement Act unconstitutional because they did not require an intent to discriminate,²²² Justice Waite’s Supreme Court opinion did not discuss them.²²³ Since the Court did not discuss a statute specifically prohibiting interference with the vote, it did not examine whether the Guarantee Clause empowered Congress to enact such a statute. Thus, *Cruikshank*

22. The government waived all other constitutional arguments, so the case failed to set any precedent with respect to congressional power under the Guarantee Clause, or even under equal protection. See *id.* at 216. Similarly, although it raised the state action barrier, *James v. Bowman* did not examine the Guarantee Clause power.

216. *United States v. Cruikshank*, 92 U.S. 542, 555-57 (1875).

217. *Id.* at 555 (citing *Reese*, 92 U.S. 214).

218. *Id.* at 544 (citing Act of May 31, 1870, ch. 114, § 6, 16 Stat. 141).

219. *Id.* at 556.

220. See *Baker v. Carr*, 369 U.S. 186, 209 (1962).

221. *Cruikshank*, 92 U.S. at 556 (“If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution (art. 4, sect. 4); but it applies to no case like this.”). See Leslie Friedman Goldstein, *The Second Amendment, the Slaughter-House Cases (1873), and United States v. Cruikshank (1876)*, 1 ALB. GOV’T. L. REV. 365, 405-07 (2008), for a discussion of the *Cruikshank* Court’s use of the Guarantee Clause.

222. See *United States v. Cruikshank*, 25 F. Cas. 707, 715 (C.C.D. La. 1874).

223. He did make reference to *Reese*, decided at the same term, which held that the Fifteenth Amendment did not empower Congress to enact the statutes, but did not examine Guarantee Clause issues. See *Cruikshank*, 92 U.S. at 555-56. Thus, the opinion in *Cruikshank* may have assumed the unconstitutionality of the statutes and, thus, their inability to support the indictment.

also sets no precedent with respect to congressional Guarantee Clause power.

B. Other Aspects of a Republican Form of Government

The Guarantee Clause should also extend to empower Congress to protect individuals in obtaining access to state government, as *Guest* suggested.²²⁴ Interaction of government with the people is an essential part of the republican form of government, and the federal government should be able to guarantee it.

In addition, the federal government should be able to protect speech on local and state political affairs. As the Court said in *Cruikshank*, “The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.”²²⁵ If Congress has power to guarantee to the states a republican form of government, it must be able to protect the political speech of its citizens on local matters.

The implied right to discuss governmental matters based on representative government is not unique to the United States. Near the end of the twentieth century, the Australian High Court recognized that freedom of political speech was indispensable to a representative democratic government, and found that it was implied in the constitutional provisions for representative government.²²⁶ In the same way, United States courts should find that the guarantee of republican government implies freedom of speech in political matters. Such freedom of speech would not be as broad as the guarantee in the First Amendment, but it is derived from the function of speech in the operations of government.

VII. CONCLUSION

The *Slaughter-House Cases* have been used by opponents of civil rights because Justice Miller limited the impact of one clause of the Fourteenth Amendment. Much of the negative effect of this aspect of Miller’s opinion has been overcome by using other clauses of the Amendment in ways that his opinion left open. The opinion itself was

224. See *United States v. Guest*, 383 U.S. 745, 759 n.17 (1966).

225. *Cruikshank*, 92 U.S. at 552.

226. *Austl. Cap. Television Pty. Ltd & New South Wales v. Commonwealth* (1992) 104 A.L.R. 389, 393-95.

designed to protect Reconstruction legislatures in the hope that they could secure civil rights on a state level. A number of aspects of the opinion do promote the protection of civil rights. The historical analysis in the opinion has been used to support broader federal power to deal with racial discrimination, and its reference to the right to travel has been cited to support such a federal right. Finally, the opinion's support for federal protection of political speech has been overlooked, but the analysis of privileges of federal citizenship – in conjunction with the often neglected Guarantee Clause – warrants federal protection of individual access to state government in voting, facilities, and political discussion.