



REFLECTIONS
ON JUSTICE SAMUEL F. MILLER
AND THE *SLAUGHTER-HOUSE CASES*:
STILL A MEATY SUBJECT

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At the outset, a confession is appropriate. When the editors of this journal invited me to prepare an article for it, I recalled the piquant comments by the late Yale Law professor Fred Rodell. “There are,” he wrote, “two things wrong with almost all legal writing. One is its style. The other is its content.” Even worse was his finding that “the average law review writer is peculiarly able to say nothing with an air of great importance.”¹ It is thus with some real trepidation that I offer these reflections on a most famous and still very controversial decision, the *Slaughter-House Cases*, decided in 1873.² Hopefully, Rodell’s conclusions will not apply to what follows.³

Until quite recently, time has not been good to this Supreme Court decision, described by its author, Justice Samuel F. Miller, as “the best and most beneficial public act of a man’s life.”⁴ Typical is the comment by another late Yale Law Professor, Charles Black, who labeled Miller’s opinion as “probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court.”⁵ Finally, Lawrence Tribe, in an extended review of Black’s book, concluded that “there is considerable consensus among constitutional thinkers that the Supreme Court made a scandalously wrong decision in this case.”⁶ Certainly there are many stu-

¹ Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

² *The Slaughter-House Cases*, 83 U.S. 36 (1873).

³ Some of this article is based upon our recently published history of the litigation, RONALD LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION AND THE FOURTEENTH AMENDMENT* (2003). Readers wanting to read of the Slaughterhouse story are respectfully referred to its chapters.

⁴ LABBÉ & LURIE, *supra* note 3, at 14 (Miller to Justice David Davis, September 7, 1873).

⁵ *Id.* at 2.

⁶ *Id.*

dents of the case who would concur with Tribe. A vast plethora of commentary on *Slaughter-House*, much of it negative, has appeared since 1873.⁷

In recent years, however, new scholarship has emerged which indicates that Miller's decision may have been unfairly relegated to the historical dust bin.⁸ The appearance of this new scholarship makes this an appropriate time to offer some reflections on *Slaughter-House*. For reasons which follow, I seek to explain why it remains a great case, one replete with optimistic hopes, possibly unrealistic assumptions, and unintended results that, while they may be seen today as unfortunate if not tragic, by no means inevitably followed from the decision itself. It is time to extricate the case from a negative view of Reconstruction, to consider it in the context of the late nineteenth century, and to understand the forces which spawned this great litigation. The case may indeed have tragic overtones, but for very different reasons from those usually attributed to it.

I

It cannot be emphasized enough that the 1869 Slaughterhouse Act which gave rise to the case was far from a typical byproduct of a corrupt, graft-ridden, and newly integrated Louisiana Legislature. New Orleans had been grappling with problems of municipal sanitation for more than half a century preceding its enactment, and this statute must be seen in that context. As early as 1804, city authorities had sought, in vain, to have slaughtering facilities moved out of the city. Located in an area with poor drainage, hot humid weather, and no municipal sewage system, the proliferation and expansion of such establishments as the city grew only made a critical situation worse. In 1813, Louisiana Governor C.C. Claiborne described "the pollution . . . which arises from the filth of the city thrown into the water's edge" as "too offensive for a civilized person to submit to."⁹ In 1854, Dr. Edward Barton, one of the most energetic spokesmen for sanitary reform, admitted that New Orleans "is one of the dirtiest . . . and consequently the sickliest city in the Union."¹⁰

⁷ See, e.g., the citations in an array of Slaughterhouse studies listed in Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051 (2000), and its sequel, Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457 (2000). However, see also the perceptive, and to my mind persuasive, essay by David Bogen, *Slaughterhouse Five: Views of the Case*, 55 HASTINGS L.J. 333 (2003).

⁸ Besides Bogen's article, *supra* note 7, and the Labbé—Lurie analysis, *supra* note 3, see, e.g., Michael Ross's outstanding treatment of Justice Miller in *JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA* (2003).

⁹ LABBÉ & LURIE, *supra* note 3, at 22. Claiborne had already lost two wives as well as a daughter to yellow fever epidemics, which periodically visited the Crescent City. In chapter two of our study, we explored in some detail the consistent but futile efforts to bring sanitation reform to New Orleans prior to the Civil War.

¹⁰ *Id.* at 23. Between 1796 and 1869, the year in which the Slaughterhouse Act was enacted, New Orleans recorded at least thirty-six epidemics of yellow fever. Between 1832 and 1869, at least eleven epidemics of cholera occurred in the city. Barton's description of it as "an urban Golgotha" does not seem unwarranted.

True, the municipal fathers as well as the state legislature had made numerous efforts to bring about reform. By 1847, for example, no less than eight different boards of health for New Orleans had been created. But they came and went with minimal success and even less significance. Municipal authorities appeared to welcome suggestions for change, yet they shied away from their implementation, all the more as the butchers had coalesced into an effective political power bloc. When confronted with this reality, they indulged in what might be called a sanitation waltz of avoidance: several steps sideways, one step forward, and one step backward—always managing to end up exactly where they had started.¹¹ Another city physician, Dr. William Hort, asked “of what avail are solutions and ordinances, if they are not rigidly enforced . . . ?” His solution in 1848 was simple. “We say, let this nuisance be at once abated; let the commissioners be compelled to do their duty . . . subject to fine or reform [removal] from office in default thereof.”¹²

By the 1850s, enough statistical data had been gathered and published to establish beyond any doubt the unhealthy nature of New Orleans. Indeed, it had “a mortality exceeding any city” in America.¹³ Barton deplored the city’s inability to accept this reality and to act upon it. In truth, he noted, “we hug our chains with delight, and stone the man who will attempt to convince us that they are but the chains of sciolism [sic] and ignorance, forgetful at the time that we but deceive ourselves, and the world is not to be gulled [in] this enlightened epoch by our assertion, when unsupported by facts, and our complacency when not based upon the truth.”¹⁴ On the eve of the Civil War, yet another physician denounced not only the sanitary conditions, but also the incredible tolerance for such “scandalous conditions” demonstrated by city officials. His description included “gutters sweltered with the blood and drainings of slaughter-pens,” as well as the fact that “every highway that chanced to be unpaved was broadcast with the rakings of gutters and the refuse filth of private yards and stables.”¹⁵

Such was the context in which General Benjamin Butler took control of New Orleans in May 1862. Indeed, the Crescent City was one of the first to surrender to Union forces during the Civil War. Butler wasted no time in sanitizing, quite literally, a city of which he recalled that “the streets were reeking with putrefying filth.”¹⁶ He not only ordered a thorough cleanup involving a force of up to 2,000 workers, but also that they be paid from funds assessed directly upon those who had recently paid for the defense—albeit unsuccessful—of their city.¹⁷ Leaving

¹¹ *Id.* at 29.

¹² *Id.* at 30.

¹³ *Id.* at 32.

¹⁴ *Id.* at 33.

¹⁵ *Id.* at 34. Slaughterhouses were but one of the numerous causes for the sanitation crisis facing New Orleans.

¹⁶ *Id.* at 35.

¹⁷ See *id.* at 35-37 for details concerning Butler’s policies. Natives had already experienced Butler’s harsh regulations with his notorious order that women who did not show proper respect to his officers were to be treated as common prostitutes. Supposedly this order was provoked “by a woman who dumped the

New Orleans for another assignment seven months later, Butler could boast quite accurately “that pestilence can be kept from your borders.”¹⁸ But the rigor with which he had instituted and enforced sanitary regulations waned, as ultimately did the war itself, and by 1866 according to a local medical journal, “this city is now filthy in the extreme.”¹⁹ Again, cholera and yellow fever visited New Orleans, and again efforts to contain it were ineffectual.

Also, in 1866, a bloody clash between New Orleans policemen, “all of them white and most of them former Confederate soldiers, and a group of several hundred blacks” resulted in what Union General Philip Sheridan described as “an absolute massacre by the police.”²⁰ Such incidents, replete with the introduction of the notorious “black codes[,]” including one adopted by Louisiana, contributed to the impetus for Congressional Reconstruction. After it was implemented in 1867 under military aegis, enough Louisiana Republicans—the great majority of them black—registered to vote and approved a call for a convention to write a new constitution. “Of the ninety eight delegates, half were black and only two called themselves Democrats.”²¹ The new legislature, elected in 1868 after the new constitution had been ratified, reflected heavy Republican victories. The House included sixty-five Republicans, of which thirty-five were black, and thirty-six Democrats; the Senate consisted of twenty-three Republicans, seven of whom were black, and thirteen Democrats, all white. Although blacks were now members of the Louisiana legislature for the first time in that state’s history, in no way did they or could they control its output. The important fact here is that any measures they favored required support from their white Republican colleagues, and vice versa.²²

Such support was readily forthcoming in 1869, as an alliance of sorts between black voters and a small minority of white Republicans, at least for a short time, embraced “an ideology of equality and the rejection of rules of caste.”²³ The new Legislature enacted several statutes, remarkable for a Southern state. One enforced open accommodation in public places. These included hotels, railroad cars, and bar rooms. Another ordinance required integrated public schools in Louisiana. These statutes are a good example of the bond between blacks and carpetbaggers noted by Eric Foner.²⁴ Sandwiched in between these two new laws was the Slaughterhouse Act. At first glance, it appeared to pose a direct threat to the financial in-

contents of a chamber pot from a French-Quarter balcony on Fleet [Commander] David Farragut’s head.” JAMES MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 552 (1988).

¹⁸ LABBÉ & LURIE, *supra* note 3, at 37.

¹⁹ *Id.* at 53.

²⁰ *Id.* at 69.

²¹ *Id.*

²² *Id.* at 70. This point should be kept in mind when one considers the slaughterhouse statute enacted by this legislature in 1869. Eric Foner observed of the typical white Southern “carpetbaggers” that “their commitment to far-reaching changes in Southern Life created a bond of sympathy between carpetbaggers and blacks.” ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION* 294–96 (1988).

²³ See Rebecca J. Scott, *Degrees of Freedom: Building Citizenship in the Shadow of Slavery*, 47 *LAW QUADRANGLE NOTES* 88 (2004).

²⁴ FONER, *supra* note 22.

terests of a large, well organized, and “coherent group of tradesmen who knew how to complain,” as indeed they did.²⁵

Apart from the fact that the 1869 statute came from an integrated legislature, which the vast majority of white Louisianans held in much contempt, it is submitted here that race is one of the less important factors in the *Slaughter-House* story. Even if no blacks had been present in the legislature, opposition to this particular statute would have been profound. To be sure, it was the only one of the three cited statutes that did *not* deal with race, but its many critics were in no mood to distinguish the Slaughterhouse law from all other products emanating from a suspect and discredited legislative body. Conservatives willingly attacked *any* statute it enacted. Even if, as is the case here, the law had much to recommend it, “the issue of slaughterhouse relocation became one with Reconstruction measures in general, and all were unacceptable.”²⁶

Stripped to its essentials, the 1869 Slaughterhouse statute—“An Act to Protect the Health of the City of New Orleans, and to Locate the Stock Landings and Slaughterhouses”—had three important provisions: a) It incorporated seventeen individuals into a corporation and gave them the *exclusive* right to slaughter within the city proper, at fees also set out in the statute. b) All other butchers were compelled either to slaughter in its new facility themselves or to pay to have their beef slaughtered there for them. c) If the corporation did not provide such service, it was liable to heavy penalties, also specified in the new law. In exchange for assuming the expenses involved in the construction, operation, and maintenance of this “grand slaughterhouse,” the incorporators received the exclusive right to have all beef and pork in the Crescent City slaughtered in their facilities.

The protracted and voluminous litigation, which began almost immediately after the statute became law and continued for more than a decade, has been detailed elsewhere and need not be repeated here.²⁷ It comprised an extended legal battle fought with tenacity and intensity in a number of state district courts, the Louisiana Supreme Court, the federal District Court, and ultimately the U.S. Supreme Court. However, the arguments of counsel which ultimately framed how the case was presented to the Supreme Court do warrant some comment. Indeed, they may be as significant as the decision itself.

II

The lead attorney for the butchers, John A. Campbell, holds a unique place in the history of the Supreme Court.²⁸ In the first place, Campbell is the only Justice

²⁵ LABBÉ & LURIE, *supra* note 3, at 73.

²⁶ *Id.* at 9, 73.

²⁷ *Id.* at 66–166.

²⁸ These comments on Campbell draw heavily from my lecture to the Supreme Court Historical Society in February 2004, and forthcoming in its Journal.

ever to resign because his state seceded, although in 1861, the Court was heavily Southern in judicial background as well as viewpoint. He had served for eight years as a Justice. Further, he is the only ex-Justice ever to be imprisoned by federal authorities for several months and ultimately pardoned by a Chief Executive, in this case Andrew Johnson. Also, he is the only Justice who attended West Point, even though he did not graduate. Finally, Campbell apparently is the only lawyer appointed to the Court at the unanimous request of all the sitting Justices.²⁹ Of course, from time to time many individual Justices have conferred with the president about a possible appointment, but for the entire bench to join in a written request that one individual be selected is indeed unusual.

Upon his resignation from the Supreme Court, Campbell served as an Assistant Secretary of War for the Confederacy. He was imprisoned after the assassination of President Lincoln, but never tried; upon his release and pardon, the former Justice undertook to rebuild his law practice in his recently adopted state of Louisiana. To oppose secession was one thing, and Campbell had. To acquiesce in abolition was another, and again, Campbell had. Yet he yearned for the restoration of the old South, albeit without slaves, but with its sense of place and social stability intact; this sense, however, appeared to have vanished. Further, as he reconstructed his law practice and library in Louisiana, his anger with what he perceived to be a misguided, if not actually malevolent, process of reconstruction led him to use his considerable skills as an attorney to hinder and restrict its course whenever he could.

Campbell's anger can be better understood if one looks at his perspective. He and his peers had suffered much. As one who visited on at least two occasions with the President, who was regarded by many contemporaries as an extremely able and distinguished attorney, who had seen his impressive law library—along with the rest of his property in Alabama—destroyed by Union troops, who had been confined in prison, and who had finally returned to his new home in New Orleans, only to see his old world upside-down—his sense of angry resentment becomes comprehensible, if not totally justified. From 1869 to 1873, as one scholar has noted, the unifying theme of his newly reestablished legal practice was “his intense and ardent opposition to Reconstruction[,]” which specifically included the new role that African Americans now seemed destined to play in it.³⁰

This former Supreme Court Justice, writes Professor Michael Ross, “was a bitter, hate-filled man.” “We have,” complained Campbell, “Africans in place all about us.” They serve as “jurors, post office clerks, custom house officers, and day by day they barter away their obligations and privileges.” In fact, “corruption is the

²⁹ See JUSTINE STAIB MANN, *THE POLITICAL AND CONSTITUTIONAL THOUGHT OF JOHN ARCHIBALD CAMPBELL*, 14 (1966).

³⁰ Michael A. Ross, *Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign Against Louisiana's Republican Government, 1868-1873*, XLIX *CIVIL WAR HISTORY* 235, 235-53 (2003).

rule.”³¹ But these conditions reflected a deeper crisis. Campbell poured out his bitterness to his old friend and former judicial colleague, Justice Nathan Clifford. “We are fast losing all of our ancient notions of what is becoming and fit in administration. The public are tolerant of corruption, maladministration, partiality in courts, worthlessness in juries . . . Indifference to anything wrong is the common sentiment . . . Discontent, dissatisfaction, murmurings, complaints, even insurrection would be better than the insensibility that seems to prevail.”³²

Unlike many of his Louisiana contemporaries, however, he did not turn to violence, intimidation, and terror. Those were not his weapons of choice. His ultimate goals, however, were not that different from the KKK and its ilk. Like them, he sought to delay, hinder, and obstruct Reconstruction measures wherever possible, but not through the robe as much as the writ. Instead he returned to the courtroom, where starting in 1868, he launched a series of obstructionist law suits;³³ the most famous of these were, of course, *The Slaughter-House Cases*.

In his appearances before the Louisiana courts, Campbell had developed and refined what essentially was a three-part argument. In the first place, the 1869 statute had been enacted through “the bribery of the members of the Legislature,” as well as “the purchase of their votes.” Any statute, he insisted, “can be set aside for fraud . . . bribery and corruption of [those who passed] it.” Moreover, the statute was void because it had not been signed within the allotted number of days after its enactment. Finally, the slaughterhouse law was unconstitutional in that it established a monopoly “in every sense of that term.”³⁴ Here the ex-Confederate official who had glorified states’ rights now repudiated the idea “that the Legislatures of the States have powers . . . limited only by the express prohibitions of the [state and federal constitutions], or by necessary implication.”³⁵

Moreover, Campbell made it quite clear that he sought a greatly expanded role for the courts—for “all the judiciaries of the country”—in the defense of fundamental rights against unreasonable legislative intrusions. This was all the more important because the legislative and executive branches—typified by Louisiana in 1869—had defaulted in their obligations to protect them. The courts had to fill the

³¹ *Id.* at 241–42.

³² CHARLES FAIRMAN, MR JUSTICE MILLER AND THE SUPREME COURT, 1862–1890, at 180 (1939).

³³ ROSS, *supra* note 30.

³⁴ LABBÉ & LURIE, *supra* note 3, at 127–28.

³⁵ *Id.* Before the Louisiana Supreme Court, Campbell developed these points in a brief which extended to more than seventy pages. He only mentioned the new Fourteenth Amendment once however, insisting that it represented “a new declaration of rights” and that a state could not grant a monopoly “without violating that article.” By the time the litigation reached the Supreme Court, Campbell would have much more to say about it.

resulting vacuum, and “Woe!, Woe!, Woe! To this country if these tribunals falter in the performance of their duty.”³⁶

Counsel for both the State of Louisiana as well as the favored slaughterhouse corporation responded to Campbell’s arguments. In a brief of barely fourteen pages, Attorney General Simon Belden dismissed any claim of relevance in this litigation for the Fourteenth Amendment: it has “not the remotest application to the solution of the question presented by the record.” The 1869 statute was based on the police power regulations “promotive of the health and cleanliness of the city.” Indeed, one might ask what type of statute could be more indicative of the police power than this one. Nor did Belden have any difficulty dismissing Campbell’s claim of a monopoly.

It was clear that in its wisdom a state might establish a centralized abattoir and insist not only that all animals destined for city markets be slaughtered there, but also that a reasonable fee be charged to all who used its facilities. Surely, insisted the Attorney General, no one would deny the ability of a state to do this. But because the state had, instead, delegated a private corporation to construct, operate, and maintain at its own cost a similar facility, “with the right of charging a reasonable [fee] as a *quid pro quo*, fixed by law for the enjoyment of the facilities thus provided, it constitutes a monstrous monopoly!” Is there, asked Belden, “a single line in the act which hinders any one from following the occupation of a butcher?” Only *where* slaughtering might take place was restricted. He added further, that “our statute books are full of similar delegations of power.”³⁷ Finally, Belden reminded the Court of the extensive penalties levied by the statute against the Company if it failed to provide its services to all who sought to butcher there.³⁸

It fell to counsel for the Company to respond to Campbell’s repeated emphasis on corruption and bribery. Randell Hunt called the Court’s attention to

³⁶ *Id.* at 114. “I pray that the judges of the land may fulfill their high vocation, and defend, and protect and guard the liberties that are embodied in these constitutions.”

³⁷ *Id.* at 128–29. Belden would appear to have been correct in this assertion, although the practice of awarding exclusive franchises remained controversial. On the other hand, Justice Stephen Field, who dissented vigorously in *Slaughter-House* and objected vociferously to the exclusive franchise granted in the 1869 statute, appears to have had no difficulty with the legal principle involved. In 1887, for example, in a case involving a monopoly granted to a local telegraph company, Field stated that Florida possessed “the absolute right to confer upon a corporation created by it [an] exclusive privilege for a limited period.” Indeed, he added, “the exclusiveness of a privilege often constitutes the only inducement for undertakings holding out little prospect of immediate return.” *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 15–18 (1887). Apparently, for Field the issue was what the monopoly affected, and NOT the principle of a monopoly itself.

³⁸ *Id.* Belden’s point would receive greater emphasis before the U.S. Supreme Court. In defining the occupation of a butcher, Campbell apparently drew no distinction between one who slaughtered, as contrasted with one who trimmed and sold meat. Implicit in his arguments was the assumption that they were one and the same. But were they? Moreover, Campbell was unable to confront the fact that no one appeared to have been prevented from earning a living by the Slaughterhouse Act. Neither, for that matter, were Justices Stephen Field and Joseph Bradley, who would dissent when the *Slaughter-House Cases* were decided.

Campbell's apparent obsession with such emphasis.³⁹ Moreover, "when a large and consolidated capital is necessary to accomplish works important to the public good, it is quite customary for States to grant charters of incorporation to private individuals," along with "special and often exclusive privileges to that end."⁴⁰ In confronting the claim of dishonesty, Hunt turned on Campbell with eloquence akin to his own. "You shrink and you skulk. You skulk behind a generous railing and informal accusation. You say members of the legislature were bribed. Tell us who they are. Name them. Name any one. You say you have witnesses to prove it. Who are these witnesses? Let us have their names . . . You say these men ought to be in the penitentiary. Why not do your duty and put them there?"⁴¹

Attention should be given to Campbell's duality of motive, as he had crafted his arguments in *Slaughter-House*. As with any able attorney, he certainly was anxious to win for his clients. Thus, in attacking, for example, the Slaughterhouse Act of 1869, Campbell took apparent aim at a statute which, his butchers believed, was inimical to their interests. In reality, however, he had a deeper objective. More offensive to Campbell than the statute, I suspect, was what he saw as the process, with its pervasive atmosphere of graft, greed, and government by military imposition, which had enabled such an act to become law—namely Reconstruction itself. Given the fact that the police power was a long held legislative prerogative, extensively supported by both state and federal judicial authority, he had to find a new legal strategy with which to attack the 1869 statute, as well as attain his deeper objective. This became a more urgent matter after he lost in the Supreme Court of Louisiana. Otherwise, Campbell might well be in the soup, as it were.

In his arguments to the Supreme Court, he chose as his key weapon against the new state enactment the recently ratified Fourteenth Amendment—a provision which he had not utilized to any great extent in prior state court proceedings. Always, he sought to employ the new constitutional realities of Reconstruction as a legal weapon against the process itself, thus to hasten its ultimate demise. And so he worked to apply not only the new Thirteenth and Fourteenth Amendments to his clients, but also the recently enacted Civil Rights Act of 1866. The irony of his choice of weapons was not lost on the local press. "Few observers," noted the *Daily Picayune*, "would have dreamed . . . it necessary to appeal to the Civil Rights Bill to protect the rights of the people in this or any other Southern city from invasion." But the only remedy for current conditions apparently rested in the federal courts, employing "poison as an antidote for poison."⁴²

³⁹ *Id.* at 129 n.106 ("I should like to know if he ever brings a suit against anyone who is not charged by him with fraud; if fraud is not his monomania; if it is not that that he speaks whenever he addresses a court of justice.").

⁴⁰ *Id.* at 129–30.

⁴¹ *Id.* at 130. By the time he drafted his briefs for the High Court, Campbell had minimized his references to the alleged corruption of the Louisiana Legislature.

⁴² LABBÉ & LURIE, *supra* note 3, at 143.

As he prepared his briefs (the High Court heard arguments on the merits of *Slaughter-House* in two successive years, 1872 and 1873), Campbell cast a wide net. He claimed, for example, that the 1869 statute subjected his white butchers to involuntary servitude, now banned forever by the Thirteenth Amendment. The prohibition of slavery and involuntary servitude, he insisted, meant much more than just African slavery. Any type of such servitude was forbidden, and all free men were entitled to work how, when, and where they could—free from arbitrary and capricious restraint. Campbell added yet another right, to be free of monopolies, so that a man's course of trade "should be free from unreasonable obstruction." Of course, he conceded, the butchers were not slaves in the usual sense of that term. But "the common rights of men have been taken away and have become the *sole and exclusive privilege* of a single corporation."⁴³

Campbell may have realized that in spite of his eloquence, it was a rather drastic reach to place his butchers within the type of involuntary servitude associated with the Amendment, which invariably had been assumed to apply only to black slavery. But he added the Fourteenth Amendment to his arsenal, insisting that together "they go very far to determine that the Constitution . . . creates a national government and is not a federal compact;" and this from a man who not only had emphasized the primacy of states' rights, but also had willingly followed his state into secession.⁴⁴ Moreover, he argued, the Fourteenth Amendment clearly banned monopolies—following a trend well established in both American and European history. In so claiming, Campbell misquoted and distorted a famous part of Thomas Jefferson's first inaugural address, as well as incredibly insisting that the Louisiana litigation had involved "no question of the health of the city, or the location of the landings for stock."⁴⁵

He added comments reflecting a larger concern that went well beyond his butchers. Emancipation and the suffrage, he complained, were now joined together. "[N]early four million of emancipated slaves, without education, capacity, and generally with the habits and ignorance that belonged to a savage condition—the heathen of the country'— . . . have become free citizens." When this unfortunate trend was linked to the "large and growing population who come to this country without education . . . and who had begun to exert a perceptible influence over government and administration," the results were unfortunate, if not deadly. One need only examine Campbell's old South and witness "a subversion of all the relations in society[,] and a change in social order and conditions" immediately became

⁴³ *Id.* at 186. Again, Campbell twisted and distorted the words of the Louisiana statute. More telling, however, was his insistence that the Thirteenth and especially the Fourteenth Amendments did not have "any particular or limited reference to Negro slavery."

⁴⁴ *Id.* at 188. One expects that expediency trumped Campbell's vaunted state's rights convictions when he added that "the sovereignty of the State government is reduced—and wisely reduced by the Constitution—to a very limited extent." It was the results of state action as expressed in the Slaughterhouse Act that bothered him, not the rationale itself.

⁴⁵ *Id.* at 190.

apparent. It included “an effusion over the whole land of an alert, aspiring, over-reaching, unscrupulous class, the foulest offspring of the war, who sought money, place and influence in the worst manner.”⁴⁶ To whom might the citizenry turn for relief and redress from such abuse?

The only man ever to resign from the Supreme Court to follow his state into secession had a ready answer—the Fourteenth Amendment. It would ensure that the Constitution could cope with, among other things, “the annual influx of aliens, and the mighty changes produced by revolutionary events. . . .” This new enactment “is not,” Campbell emphasized, “confined to any race or class. It comprehends all within the scope of its provisions. . . . The mandate is universal in its application to persons of every class and every condition of persons.”⁴⁷ Surely it could deal with the type of despotism demonstrated by a “State legislature concerning itself with dominating the avocations, pursuits, and modes of labor of the population, conferring monopolies on some, voting subsidies to others, restraining the freedom and independence of others, and making merchandise of the whole.”

Counsel for the Company essentially reiterated the points that had been made in the Louisiana Supreme Court. The statute was a legitimate and appropriate use of the police power. Further, the statute imposed more compulsion on the corporation than the butchers. It had to construct and maintain at its own expense a facility large enough to meet the needs of all butchers and faced heavy penalties if certified animals were turned away. In short, “every butcher may slaughter his own cattle, and his right to labor in his vocation is not taken away.”⁴⁸ If such were true, how could the 1869 Act be denounced as one which granted a monopoly to the Crescent City Company?

Counsel insisted that an exclusive franchise was not the same thing as a monopoly. In this case, the Company’s franchise was conditional “upon the consideration of moneys to be expended and duties to be performed by the corporation for the public benefit.” They were, in other words, compulsory obligations imposed upon the company by the legislature. A monopoly according to Charles Allen, soon to become a Justice of the Massachusetts Supreme Judicial Court, “is an exclusive privilege, *granted without consideration*.”⁴⁹ Hence the Crescent City Company did not fit within the “legal test of a monopoly.” Finally, Allen emphasized that far from restricting a butcher from carrying on his trade, in fact the 1869 statute facilitated it:

⁴⁶ *Id.* at 192–93.

⁴⁷ *Id.* With no indication of any inconsistency, Campbell could insist on a narrow view of any rights possessed by the ex-slave in Louisiana, even as he painted a broad interpretation of the Fourteenth Amendment in general. Years later, the Supreme Court would embrace Campbell’s conception and apply it for much worthier purposes and to many more diverse groups, far beyond what Campbell had envisaged. It should be noted once again, however, that his clients in *Slaughter-House* were white. Legal historians are usually and properly not concerned with “what if” historical issues, but one cannot help wondering what might have happened in this litigation if any of his butcher clients had been black.

⁴⁸ *Id.* at 200.

⁴⁹ *Id.* at 204 (emphasis in original).

“there is no longer any necessity of a butcher providing a slaughterhouse for himself.” Indeed, far from creating a monopoly, the statute “makes it easier to be a butcher than it was before.”⁵⁰

As to the apparently all-inclusive character of the Amendment’s wording, Allen reminded the Court that “the object to be accomplished by the Amendment, and the mischief to be remedied” must be considered. What was the state of things in 1866 when the amendment was enacted? Why was it considered necessary?⁵¹ In fact, he concluded, what Campbell had sought to do by such a vast, expansive reading of the Fourteenth Amendment was to transform it into something totally different from what its framers had conceived and intended. The basic purpose had been “to assure to all citizens and persons the same rights enjoyed by white citizens and persons.”⁵² It was a direct result of the Civil War, and if that cataclysmic event had not occurred, there would have been no need for such an enactment.

III

The outcome of this great case is well known and need not be repeated here. But several points may be noted about Justice Miller’s decision. He accepted without question the claim that the police power provided ample justification for the 1869 statute. It is easy to observe in retrospect that he could have, and perhaps should have, stopped there. It is also obvious that such a course would have rendered any discussion of the Fourteenth Amendment unnecessary. Why then did he move beyond a narrow holding and instead get into the murky waters of Fourteenth Amendment interpretation?

One can only offer some possible answers to this question. Of course, Miller was well aware of the great emphasis Campbell, and to a lesser extent his opponents, had placed on the enactment. He also knew that his dissenting brethren were going to make major use of it, even as they rejected his limited interpretation. It became all the more important, therefore, for Miller to explain why he saw the amendment as NOT important to the outcome of this case. He may well have considered it an unsatisfactory foundation on which to construct a new and lasting constitutional analysis of a recently enacted constitutional amendment. While he was, I think, correct, the context of the case as it had been presented might have impelled him to do just what earlier he may well have been inclined not to undertake.

Much more than Campbell, Miller had explored the background of the Fourteenth Amendment and the continued resistance to Reconstruction in the

⁵⁰ *Id.*

⁵¹ Allen reminded the Court of numerous instances wherein judicial interpretation differed from a literal construction of constitutional provisions. He noted, for example, the customary limiting of *ex post facto* laws only to crimes, although no such limitation can be found in the Constitution.

⁵² *Id.* at 206.

South, typified by the infamous “Black Codes,” of which Louisiana’s was a prime example. More was necessary to protect the freedman than just the Civil Rights Act of 1866. A jurist not prone to the rhetorical excesses of Campbell, Miller pointed to the underlying conditions which had made the Amendment necessary. There is no reason to doubt that he chose his words carefully. After summarizing events between 1865 and 1868, Miller added:

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all, and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him . . .

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter . . . And so, if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is that, in 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.⁵³

How could Campbell’s white butchers fit into this analysis? Their condition had in no way inspired the Reconstruction Amendments; nor were they the intended beneficiaries of the new enactments. Whoever was supposed to gain, reasoned Miller, surely this group did not include white butchers bickering over a legitimate police power regulation. In other words, whatever the privileges and immunities of United States citizens might be, the right to choose where they might slaughter beef within a crowded urban setting was not one of them. Miller may not have damned such a clause permanently, as much as holding simply that it did not apply in *this* litigation.

⁵³ *The Slaughter-House Cases*, 83 U.S. 36, 71–72 (1872).

More than a decade later, Miller revisited the Slaughterhouse controversy. Much had happened since 1873. Reconstruction had ended in Louisiana, a new white legislature had repealed the 1869 statute, and this time it was the Crescent City Company's turn to claim that such action extended far beyond the legislative purview. Speaking for a unanimous bench, Miller rejected this assertion. Again a Louisiana Legislature had acted in the exercise of its police power, and again Miller sustained the new statute. "As such," he wrote, "it is a valid law, and must be obeyed, which is all that was decided by this Court in the *Slaughter-House Cases*.⁵⁴ Miller's use of the word "all" is intriguing. Did it refer to his sense that his first *Slaughter-House* decision was a very limited holding, *not* intended to provide a definitive delineation of the Fourteenth Amendment's parameters? Did Miller assume that there would be later opportunities for his Court to undertake such a significant exegesis, and that a better case in which to explore the Privilege and Immunities Clause might yet arise? Did he possibly not intend his narrow view of the clause to be authoritative and lasting?

There are, it would seem, no definitive answers to these questions. Although Miller remained on the bench until his death in 1890, expressed pride in his 1873 decision and later denied that the Fourteenth Amendment could apply only to the ex-slave—apparently he never again revisited the Privilege and Immunities Clause. Further, he acquiesced in silence as the worst legacies of Reconstruction were molded by his Court. He was with the majority in *Cruikshank*,⁵⁵ *Reese*,⁵⁶ *Minor v. Happersett*,⁵⁷ and the *Civil Rights Cases*.⁵⁸ And in the final year of his life, in one of his last concurrences, he even endorsed—albeit in a tentative and uncertain manner—the Court's major step toward judicial activism through substantive due process.⁵⁹

The heyday of what William Wiecek has called "classical legal thought," came after Miller's death.⁶⁰ It reflected more the judicial activism embraced by the dissenting Justices in *Slaughter-House I*, Stephen Field and Joseph Bradley, rather than Miller's acceptance as constitutional an important statute enacted by a Reconstruction legislature. Indeed, the judicial restraint characterized by much of Miller's jurisprudence, and typified by this 1873 decision, also waned as the Gilded Age drew to a close. Seen in this light, Miller's decision in *Slaughter-House* warrants greater understanding if not actual praise.⁶¹

⁵⁴ *Butchers' Union v. Crescent*, 111 U.S. 746, 750 (1884).

⁵⁵ *United States v. Cruikshank*, 92 U.S. 542 (1876) (indictments for "conspiracy" too vague).

⁵⁶ *United States v. Reese*, 92 U.S. 214 (1876) (holding that courts could not impose penalties for violations of Fifteenth Amendment and its implementing statutes in absence of those penalties being listed in acts).

⁵⁷ *Minor v. Happersett*, 88 U.S. 162 (1874) (holding that Fourteenth and Fifteenth Amendments do not guarantee female suffrage).

⁵⁸ *The Civil Rights Cases*, 109 U.S. 3 (1883).

⁵⁹ See his concurrence in *The Minnesota Rate Case*, 134 U.S. 418, 459 (1890).

⁶⁰ See WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT* (1998).

⁶¹ In this context, see again the article by David Bogen, *supra* note 7.

He had sustained a new statute enacted by the Legislature of Louisiana, a body committed, albeit temporarily, to reform, change, and modernization--a course which, had the legislature persevered, augured well, he believed, for the future not just of Louisiana, but of the entire South. 1873 was not 1877. The eventual undoing of Reconstruction was not an inevitability caused by his decision. Yet it must be admitted that later Miller failed to expand and explain how he perceived the Privileges and Immunities Clause. But future Courts and Justices clung to his narrow holding, due more to their own predilections rather than Miller's constitutional cautions.

Finally, it might be noted that more than a century after *Slaughter-House*, the Privilege and Immunities Clause still remains part of our living constitution. Whenever the Supreme Court wishes to utilize it, the clause is there. All Miller held in 1873 was that with the exception of the ex-slave, the clause was irrelevant to the facts of *that* case. In his view, and he was far from alone in holding it, the Civil War and its constitutional aftermath had not yet transformed traditional federalism. Such a conclusion may have been unfortunate, but it cannot be said to have been totally unwarranted.⁶² *Slaughter-House* remains a great case, and like any great decision, controversy forms a major part of its legacy.

⁶² LABBÉ & LURIE, *supra* note 3, at 1–16, 232–52.

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