The Slaughter-House Cases - Revisited

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While the Supreme Court decision in the *Slaughter-House Cases* has been much discussed, most of the real analysis of it took place before the revolutionary change occurred which made the due process clause of the fourteenth amendment the most significant portion of the Constitution in civil liberties cases. The result of this fact is that most previous discussion has been partial in nature, and has proceeded from the assumption that the fourteenth amendment was not especially important to libertarians. Thus, while Louis Boudin, for instance, regarded it as the most significant case of its era, his criticism of it is colored highly by the inability to foresee that the amendment could (and would) be used in a manner more congenial to him and that this would be done without repudiating the decision.²

For this reason it appears that there is value in taking a fresh look at this case. There are other reasons, as well. The *Slaughter-House* decision is, for example, one of the examples *par excellence* of the way in which judges can reach desired conclusions through the use of judicial discretion and thus play roles of great importance in the American political system. Then, too, the case is fascinating because of the ambivalent feelings it has always produced in commentators, scholars, lawyers, and politicians. Liberals, for instance, tend to admire the decision because it upholds the states’ police powers; but they dislike the fact that it reinforced the existence of a monopoly. Conservatives do not object to the monopoly; but they distrust it because it was state-imposed and so implied the power of states to regulate private business. They were thus happy to see that this

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1. 83 U.S. (16 Wall.) 36 (1873).
2. 2 BOUDIN, GOVERNMENT BY JUDICIARY 101 (1932).
aspect of the decision was gradually reversed, *sub silentio*, under the prodding of Mr. Justice Field. Libertarians, while not approving of the dissenters' emphasis on the rights of property, disapprove still more heartily the majority opinion, which attempted (all too successfully for many years) to foreclose the use of the fourteenth amendment as a means of protecting civil rights and liberties. And, of course, the case is always of interest in the aspect for which it is perhaps most famous, as one of the steps in the development of substantive due process.

Such a case never dies; there is always interest and importance in its re-evaluation, and the final word about it is never said.

**THE SETTING**

In 1873 the United States was, for the first time, beginning consciously to assess the effects of a burgeoning modern industry. States were experimenting with various kinds of protective legislation, while at the same time the Republican radicals in Congress were pressing for greater national powers which, while keyed primarily to the crisis of Reconstruction in the South, could have been adapted for use in the economic field. The Supreme Court was at the end of its "Civil War nationalism" phase; new judges were beginning to reassert the powers of the states, and at the same time (somewhat ambivalently, as pointed out above) were concerned with the protection of business from these same states. Chief Justice Chase was ill and would not survive the term; Mr. Justice Hunt was a recent Grant appointee who had not yet, perhaps, settled into his work. Field and Miller were the strong men on the Court; and while on opposite sides in the *Slaughter-House Cases*, they were rather alike in many ways. In any case they set the dominant tone of the opinions in the case.

The case itself grew out of Reconstruction conditions in more ways than one. Most obvious is the fact that, legally, it involved the Reconstruction amendments, particularly the fourteenth. But it was also bound up in the peculiar political conditions obtaining in the radical-dominated Congress and in the southern carpetbag governments. It is one of the ironies of history that in order to oppose the carpetbaggers in Louisiana, southerners were forced to favor a broad construction of the hated fourteenth amendment, or, alternatively, to support the unpopular government in order to oppose the amendment.
Louisiana’s legislature (for reasons which appear somewhat misty, and perhaps, as Rodell claims, bribed) passed a law creating a slaughter-house corporation, assigning to it the one piece of property on which the same law permitted slaughtering and prohibiting anyone else from using any other premises for slaughtering within New Orleans. While this law is characterized by the dissenters (and by most text writers) as one creating a legal monopoly, it should be noted that it did not literally drive other slaughterers or butchers out of business. On the contrary, it contained a clause requiring the corporation to permit other persons to slaughter animals on its premises, with a fine for refusal, and also set a maximum charge for this service. Although the records do not show this, it is perfectly possible that an independent slaughterer could actually have done business more cheaply under this arrangement than by maintaining his own abattoir. The state defended the statute on the grounds that it was an ordinary exercise of its police power; while the independent butchers attacked it as a violation of their rights under the thirteenth and fourteenth amendments. The complexities of the situation in which various parties found themselves in relation to this law and the court case have perhaps been best described by Louis Boudin.

“What was more important to the South . . . : To find a means of preventing misgovernment by carpetbag legislatures, by invoking the aid, and thereby augmenting the power, of the Federal Judiciary? Or, to prevent, if possible, the North from using the Fourteenth Amendment as the efficient instrument, which it was designed to be, of the Northern Reconstruction policy — by denying that the Fourteenth Amendment had any real life or substance to it? On this question the North and the Republican Party were no less divided than the South and the Democratic Party, although the division here was of a different kind. On the one hand, there were those who were deeply interested in securing to the Negroes the rights which were intended to be given to them by the War Amendments and the various Civil Rights Laws passed by Congress. Opposed to them were the “moderates,” who thought that the “peace and harmony of the country” would be better subserved by not stressing Negro rights too much, and by restricting as much as possible the operation

3. RODELL, NINE MEN 159 (1955).
of the War Amendments. This political situation was further complicated by certain economic considerations, which tended to further muddle an already muddled situation. The "moderates" of the North were usually conservatives who were interested in various State franchises in the form of monopolies. They were therefore opposed to Federal interference. But, on the other hand, they had an instinctive feeling that in the Fourteenth Amendment there was a weapon of great potency against radicalism of all sorts, which should not be neglected."4

THE OPINIONS

The Court's handling of this case, while it involves many complexities, must be analyzed before we can proceed to a conclusion. In a closely divided vote, the Court decided that the butchers of New Orleans had not been deprived of any federally protected right. But Mr. Justice Miller, in his opinion for the Court, went far beyond the needs of the case before him in an obvious attempt to destroy, so far as possible, any affirmative reading of the fourteenth amendment. This required some doing, however, and made his opinion a long and casuistic argument, since he had to demolish (one by one) every clause in Section One of the amendment.

Miller began by taking a hasty look at the purposes of the amendment. Apparently conscious that it might not serve his purpose, he refrained from looking at the legislative history or the statements of the framers. In fact, all the opinions in the case evidence a deliberate refusal to go into the legislative history—a few hortatory comments based on general knowledge notwithstanding. As Swisher remarks:

"It is a significant commentary on the judicial processes of the time that neither the justices who took opposing positions . . . nor counsel before the Court deemed it relevant to discuss the intention of Congress as revealed by the contents of the Congressional Globe. The several justices approached the subject, not from the point of view of detailed information concerning the framing and adoption of the amendment, but from broad conceptions of the recent history of the rela-

tions between the nation and the states and of the fundamental rights of man."^5

In answer to this, of course, there remains Justice Felix Frankfurter's tart reply to Black's historical arguments in *Adamson v. California*: "What was submitted for ratification was his [Rep. Bingham's] proposal, not his speech."^6 Nevertheless, such a comment, however pithy, does not necessarily dispose of the point. For it assumes that "the proposal" (i.e., the text of the fourteenth amendment) is so clear in meaning that resort to the legislative history is irrelevant. Yet Frankfurter has many times revealed his profound awareness that the text is *not clear*; not only this, but he has been perfectly willing to use evidence of legislative intent in other cases.^7 And it must still seem remarkable that no Supreme Court Justice before Black ever attempted to go into this question. Thus Miller's rather off-hand remarks have served to foreclose investigation, as they did for Mr. Justice Moody in *Twining v. New Jersey*, in which he noted that criticism of the *Slaughter-House* decision "has never entirely ceased," even on the Court, yet refused to investigate the question himself despite a rather obvious reluctance to approve the *Slaughter-House* holding unequivocally.^8

In any case, Justice Miller emphasized only the obvious fact that the Reconstruction amendments were written because of the need of protecting the freed slaves. He rather clearly implied that they should be used for no other purpose, although he was wary of saying so explicitly:

"We do not say that no one else but the negro can share in this protection . . . . But what we do say . . . is, that in any fair and just construction . . . , it is necessary to look to the purpose."^9

Turning his attention to the citizenship clause ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

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5. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 338 (2d ed. 1954). Note also Royall's comment, written as long ago as 1879: "[N]ot any of the judges appears to have thought it worthwhile to consult the proceedings of the Congress which proposed this amendment." 4 So. L. Rev. 563 (1879).


7. See, for instance, his opinion in *Kirschbaum v. Walling*, 316 U.S. 517 (1942), in which he investigates the legislative debates leading to the passage of Section 3(j) of the Wages and Hours Act of 1938, 52 Stat. 1060, 29 U.S.C. § 203(j) (1938).


wherein they reside."), Miller used his preceding argument to indicate that, since the clause’s objective was “to establish the citizenship of the negro,” it would be improper to read it as producing any change in the citizenship status of people in general. In other words, the clause gave to Negroes whatever rights (and no others) citizens of the United States had possessed previous to the adoption of the amendment. Since the Constitution had not recognized any citizenship of the United States until the passage of the amendment, this was a difficult argument to make; but Miller was able to take advantage of the fact that, while the Constitution had not defined citizenship, it had contained (in Article IV, Section 2) a privileges and immunities clause for “citizens in the several States.” This clause had been defined in Crandall v. Nevada,11 and what Miller did was, in substance, to say that the rights of United States citizens before 1867 were the rights defined in Crandall as those of citizens in the several states. Thus he could conclude that citizens of the United States were given no rights by the fourteenth amendment; all of their rights remained in the same status as previously: that is, most of them are under state, not national, protection. The “citizens” protected by the new privileges or immunities clause are citizens only in their capacity as “citizens of the United States,” not in their other role as state citizens.

This distinction between state and national citizenship has the effect of making the privileges or immunities clause a mere tautology, since the rights of “citizens in the several States” could never have been constitutionally abridged by any state; thus the labors of the framers of the fourteenth amendment were nullified by a few strokes of Mr. Justice Miller’s pen.

Miller’s next task was to define what the privileges or immunities held by United States citizens are — which, of course, merely amounted to enumerating what they had been considered to be before 1867.12 Not very surprisingly, he finds that such rights are few and far between; they certainly do not include the right to engage in the trade of butchering, and they seem to include little else of any great importance. As Justice Moody was to put it later, they are the rights which flow from the nature of the national government, not from the nature of American citizenship.13

10. Id. at 73.
11. 73 U.S. (6 Wall.) 36 (1867).
12. Id. at 73-75.
It becomes obvious long before he finishes this analysis that Miller is not really much worried about butchers or slaughterhouse monopolies: he is attempting no less than the preservation of the ante-bellum federal system, and he is in no mood to allow a mere amendment to the Constitution to change that system. Miller bypasses the argument that a constitutional clause should not be regarded as a tautology, for in this case giving it its most likely meaning would make a more drastic change in the federal system than Miller felt judges were entitled to assume the framers wanted.

"[S]uch a construction . . . would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of this Amendment. . . . [T]hese consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions[, that] . . . the effect is to fetter and degrade the state governments . . . ; . . . it 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."14

The obvious difficulty with Miller's conclusion is that almost all the available evidence indicates that the fourteenth amendment was intended to make some kind of fundamental change in the federal system.15 Just what kind and extent of change was envisaged is, to be sure, a matter of considerable doubt, but it seems abundantly clear that substantial change was contemplated. The decision was, then, dictated by an ante-bellum concept of federalism; the Court majority was determined that, beyond emancipation, the Civil War was to have as little effect as possible on American politics; and it used its power to that end.

15. Even scholars who support Justice Miller admit this. The amendment "was meant to establish a federal standard below which state action must not fall," says Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights, 2 STAN. L. REV. 5 (1949). Miller's opinion rendered privileges and immunities "an idle provision," remarks McGovney, Privileges and Immunities Under the Fourteenth Amendment, 4 IOWA L. REV. 219 (1918). Cf. 2 Boudin, Government by Judiciary 114 (1932); Collins, The Fourteenth Amendment and the States 10 (1912); Corwin, The Constitution and What It Means Today 187-88 (9th ed. 1947); 2 Crosskey, Politics and the Constitution in the History of the United States 1049-1158 (1959); Flack, The Adoption of the Fourteenth Amendment (1908); James, The Framing of the Fourteenth Amendment 197 (1956); Lien, Concurring Opinion: The Privileges or Immunities Clause of the Fourteenth Amendment (1957); Rodell, Nine Men 159 (1955); ten Broek, The Anti-Slavery Origins of the Fourteenth Amendment 223 (1951).
Justice Miller made short work of disposing of the due process argument—a fact which seems a little strange as one looks back on the case, since we now know that attorney John A. Campbell's idea of substantive due process was eventually to gain dominance on the Court, under the pressures of the industrial barons and the Court leadership of Mr. Justice Field. Yet considering the rather obvious illogic of the whole concept (an illogic which is familiar to any teacher who has watched generations of students trying to puzzle it out) it is not surprising that the majority regarded due process as a minor aspect of the Slaughter-House Cases. Nor did the equal protection clause seem any more relevant to Mr. Justice Miller.

So the majority decided the case almost solely on the basis of the privileges or immunities clause, which was the most obviously applicable. And so congenial to the post-Reconstruction mind were Miller's arguments that no later case was successful in reviving the privileges or immunities clause.

Professor Fairman has written that the Miller opinion put the privileges or immunities clause "to a rigorous scrutiny." But it seems clear that this is not true: or at least, that if Miller's scrutiny was rigorous, it was also one-sided; and if it was superficially convincing, it was also ad hominem. It carried conviction primarily to a generation tired of re-fighting the Civil War and anxious to get down to the important business of making money. Any instability threatened by the fundamental shifts in power which the fourteenth amendment might have brought about would have endangered the main goals of men holding what later became known as the "Gospel of Wealth."

Of the three dissents, that of Justice Stephen J. Field has commonly been regarded as the most significant. Field differed from the majority at every point. To him, the citizenship clause made state citizenship derivative and subordinate to national citizenship: "a citizen of a state is now only a citizen of the United States residing in that state." And this citizenship carried with it "the fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen." He contended, convincingly, that if the majority was correct the fourteenth amendment was a "vain and idle enactment, which accomplishes nothing and most unnecessarily excited Congress and the

16. 83 U.S. (16 Wall.) 36, 95 (1873).
17. Ibid.
people on its passage."

On the contrary, the privileges or immunities clause was meant, he felt, to protect "the natural and inalienable rights which belong to all citizens," such as those enumerated by Mr. Justice Bushrod Washington in Corfield v. Coryell: "protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."

But Field's opinion, at least to a modern liberal, paints with too broad a brush (just as Miller's does, but for a different reason). For, as will be pointed out below, Miller could have upheld the Louisiana law with a much different construction of privileges or immunities than the one he chose: i.e., he had alternatives, and one can therefore speculate why he chose as he did. Field, on the other hand, had no alternative; he had to state his argument broadly or not at all, for the right to engage in the trade of butchering was the privilege (or immunity) which needed protection in the case. The other dissenters were, of course, in the same position. The result was that each side went to an extreme, and the moderate position which could have defended civil liberty without defending the butchers of New Orleans was never presented at all. It is when reading opinions such as these that one realizes that concurring opinions do have value, and one wishes that the custom of writing them had been present in 1873, and that some silent member of the majority had availed himself of the opportunity to present views different from those of Miller.

Mr. Justice Joseph P. Bradley followed much the same lines as Field, with perhaps somewhat greater emphasis on the nature of the privileges or immunities. The third dissent, that of Justice Noah H. Swayne, is undoubtedly the most eloquent of all, if not the most clearly reasoned. Swayne felt that the Reconstruction amendments "rise to the dignity of a new Magna Carta;" the meaning of the fourteenth is really quite plain—it includes the fundamental rights of life, liberty and property (although there is perhaps less stress on property rights than in the opinions of Field and Bradley). He admitted that a great change in the federal system might ensue from the enforcement of the amendment, but found in this fact no reason for narrow construction:

18. Id. at 96.
19. 4 Wash. C.C. 371 (1825).
20. 83 U.S. (16 Wall.) 36, 124 (1873).
21. Id. at 125.
"[T]he novelty was known and the measure deliberately adopted. The power is beneficent in its nature, and cannot be abused. . . . The construction adopted [by the majority] is . . . much too narrow. It defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted. To the extent of that limitation it turns, as it were, what was meant for bread into a stone."  

There is in Swayne's opinion a pre-Civil War abolitionist flavor which makes it stand out from the others. It somewhat resembles the type of approach to human rights which has been brought out by Jacobus ten Broek in his study of abolitionist thought.

The Aftermath

The changes in the American federal system which Justice Miller sought to prevent have come about anyway; and the police power of the states, which he sought to uphold, has been continuously limited since at least the 1890's. Yet the Slaughter-House Cases have left a legacy which is of great importance, as the dispute between the majority and the dissenters in Adamson v. California illustrates. For in Adamson Justice Black was arguing, in substance, that Miller had been wrong (he was writing that non-existent 1873 concurring opinion) and that the Slaughter-House precedent should be disregarded. Frankfurter, on the contrary, stood squarely behind what had become the "traditional" interpretation of the fourteenth amendment. For it has always been assumed by later Court majorities that Miller's construction of the citizenship clause was correct. Consequently, it is still true today that the rights of persons as state citizens are in some respects different from their rights as national citizens. This is conspicuously true of the right to obtain due process from police and courts; the rule of Palko v. Connecticut, elucidated by Justice Cardozo to justify the Court's refusal to apply the double jeopardy rule to the states, is based on this distinction, and it is this that Frankfurter was defending. In this respect, then, Miller was successful in imposing his view of the fourteenth amendment on the future.

22. Id. at 129.
24. 332 U.S. 46, 64 (1947).
He was also successful in permanently depriving the privileges or immunities clause of life. Peculiarly enough, as Crosskey points out, he may not have meant to do so, for his opinion left a possible loophole for bringing in at least the first amendment (or part of it) under the protection of the clause. In defining the rights of United States citizens under the clause, he provided a list of examples which included "the right to peaceably assemble and petition for redress of grievances." This was buried in the list and its implications (if any) were not explored. Crosskey thinks it was put in so that later courts would be able to jump either way in interpreting the clause, although he admits it is likely that Miller himself wished the narrowest possible construction. It seems more likely, however, that Miller's listing (which also mentions the right to travel to Washington and abroad, to obtain the writ of habeas corpus, and to use navigable waters) was carefully constructed so as to include only those types of rights which have been referred to above as pertaining peculiarly to the very nature of the national government. If this interpretation is correct, then none of the rest of the first amendment or any other part of the Bill of Rights would be included. And this is the way the clause has uniformly been construed. As a matter of fact it has never even been applied in an actual case involving any of the rights which Miller listed!

There has always been, it is true, an undercurrent of judicial dissatisfaction with the emasculation of the privileges or immunities clause. Justice Frankfurter was almost certainly inaccurate when he referred, in this connection, to the first Justice Harlan as "an eccentric exception." For the position was taken at one time or another by a round dozen or so judges, and one has no way of knowing how many more. The Slaughter-House dissenters are the obvious examples: Field, Chase, Bradley, and Swayne. Apparently Bradley was so satisfied by the development of substantive due process that he never returned to the defense of privileges or immunities. Field, however, stuck to his guns for a time, as his dissents in at least two cases indicate. Justice Brewer joined in Field's dissent in O'Neil v. Vermont.

27. 2 Crosskey, Politics and the Constitution in the History of the United States 1128-29 (1953).
30. 144 U.S. 322 (1892).
as did Harlan. It was Harlan, however, who developed a powerful constitutional argument on civil liberties grounds — thus avoiding the emphasis on property which was Field's main objective. Harlan's thought on the subject apparently developed gradually through several dissenting opinions spread over many years. It probably was germinated in the Civil Rights Cases (1883), but perhaps more importantly in Hurtado v. California, decided later in the same year. It was then refined and developed in O'Neil v. Vermont (1892), Maxwell v. Dow (1899), and reached maturity in Twining v. New Jersey (1908). His most famous statement probably appeared in the Maxwell case, in which he charged the majority with believing that "the protection of private property is of more consequence than the protection of life and liberty of the citizen."

Harlan's arguments had some effect, for the majority opinion in the Twining case (written by Mr. Justice William H. Moody) bore clear signs of misgivings about the path of decision in fourteenth amendment cases. Moody seemed to feel that Miller had written his opinion too broadly; he also, in referring to the "weighty arguments" (of Harlan?) that the amendment was meant to protect liberty, seemed to be rather regretfully abiding by precedent merely because it was precedent. He concluded, rather lamely, that despite the weighty arguments, "the question is no longer open in this court," and apparently the only reason it was no longer open was the feeling — later expressed also by Justice Holmes — that by 1908 it was "too late" to observe the original meaning of the amendment. How many other judges have taken this position one cannot tell.

When one adds to this continuing uncertainty by quite a number of respected judges the fact that four additional Justices adopted the same position in the Adamson case, it becomes clear that Harlan's position is more intellectually respectable than Justice Frankfurter would allow.

31. 109 U.S. 3 (1883).
32. 110 U.S. 516 (1883).
33. 144 U.S. 323 (1892).
34. 176 U.S. 581 (1899).
35. 211 U.S. 78 (1905).
36. It seems to have been more true then than now that judges sometimes felt bound to refrain from re-evaluating issues that had already been decided in precedent cases. But since this practice has never been invariable it is difficult to say how significant it is in connection with the Slaughter-House cases. On Holmes' statement, see Baldwin v. Missouri, 281 U.S. 586, 596 (1928).
37. Adamson v. California's dissenting judges were Black, Douglas, Murphy, and Rutledge.
In this connection one of Miller's failures is involved. In *Slaughter-House* he paid little attention to the due process clause, perhaps correctly regarding it as a minor contention of the lawyers in the case. But he refused, as he had in the instance of the privileges or immunities clause, to countenance the idea that due process could be used to protect private business from state governmental regulation. In this he was destined to fight a losing battle (at least in the short run), for within twenty years the due process clause had been converted into the major defense bastion against such regulation, and it is quite possible that had the *Slaughter-House Cases* come up in 1900 they would have received much more hospitable treatment from the Court. And although substantive due process is now unofficially dead as a limitation on state control of business, it lives on in the area of civil liberties. The result is that, at one time or another, most of what the dissenters contended for in the *Slaughter-House Cases* has been brought under the due process umbrella.

In one respect, indeed, the due process clause allows even broader protection than privileges or immunities would, since it includes entities which are not citizens. It might have been difficult to protect either aliens or business corporations under the privileges or immunities clause, which extends only to "citizens" of the United States. But since the due process clause protects all "persons" it can reasonably be extended to aliens and has also (under cover of the convenient fiction that a corporation is a person) been used to protect corporations. Whether a corporation could have been considered a United States citizen under the fourteenth amendment is highly doubtful, if only because corporations are neither born nor naturalized.

A word might also be added regarding the equal protection clause. Although, as has been remarked, it figured in the *Slaughter-House Cases* to only a minor extent, Justice Miller's holding — that it could not apply to the New Orleans situation — serves as an example of what he could, had he wished, have done with the privileges or immunities clause. It had the effect of leaving the clause free to lead, as it has led, a long, interest-

40. Corporations have been held by the Supreme Court not to be protected by the privileges or immunities clause. See Selover, Bates & Co. v. Walsh, 226 U.S. 112 (1912); Western Turf Ass'n v. Greenberg, 204 U.S. 359 (1907); Orient Ins. Co. v. Daggs, 172 U.S. 537 (1899).
ing, and increasingly fruitful life, as the only part of the four-
teenth amendment which has figured importantly in the protec-
tion of the one group which Miller conceded the amendment
was intended to shield.

In substance, then, one may say that the fourteenth amend-
ment has wrought those changes in our federal system for which
the Slaughter-House dissenters contended. It has actually been
used to limit the reach of the states' police powers, and it is
still so used today (albeit in a different area). Nevertheless,
there are two significant differences between what the dissent-
ers wanted and what has been achieved.

First, the fourteenth amendment has come to be applied only
(or primarily) by court action, whereas it was probably intend-
ed to be carried into effect primarily through acts of Congress.
Whether this was in the minds of the Slaughter-House dissent-
ers is unknown, but is perhaps unlikely. The issue, after all, was
faced by the Court in the Civil Rights Cases ten years later;
and the two dissenters who still remained on the Court both
stood with the majority — Bradley, indeed, wrote the Court's
opinion — which practically made Congress powerless under the
amendment.41

Second, although the Court has in later times given the four-
teenth amendment much more meaning than Miller would have
wished, it has never gone all the way. By maintaining Miller's
basic distinction between state and national citizenship it has
given itself the power to choose which individual rights are
fundamental enough to claim legitimate cover of the amendment,
and which are not. This is the aspect of the Slaughter-House
legacy which the dissenters in the Adamson case tried unsuccess-
fully to reverse.

To a large extent Miller won the battle but lost the war; but
it is significant that the war was lost on a different battlefield
than that on which the Slaughter-House cases took place, and
that the lineup of the opposing forces was not always the same.

THE ALTERNATIVES

The question next to be considered is: Could Justice Miller
have arrived at the same decision in the case without spreading
his net so wide? If so, how? And why didn’t he? There are

41. 109 U.S. 3 (1883).
surely few cases which illustrate so well the role of judicial discretion in the use of judicial review, for Miller had numerous alternatives.

If one were to assume (erroneously, as we have seen) that Miller's chief objective was merely to allow the creation of the butchers' monopoly in Louisiana—or in a larger sense to prevent the attrition of state power to regulate private enterprise—there were at least four lines which his opinion could have taken.

In the first place, he could have proceeded on the assumption that the fourteenth amendment was meant to apply only—or mainly—to Negro rights, and could have little or no application beyond such rights. As a matter of fact, as we have seen, Miller's opinion starts out as though this were what he intends. Yet, as Boudin avers, he ends by interpreting the amendment so narrowly that it actually protects no one, not even Negroes.42 The immediate reason for this is quite clear: all of the framers of the amendment agreed that it was intended as a protection for the rights of Negroes, certainly—but also that it was intended to have general effect. Its words are not limited to Negroes; as a matter of fact, race or color are not even mentioned in the amendment. It would have been too much even for a casuist of Miller's ability to say that the words "citizen" and "person" applied only to Negro citizens or persons.

The question remains, however, of Miller's motive in introducing the race issue at all, since he could not base his decision on it. There seems little doubt of the answer. Miller and the Court majority were engaging in strategic obfuscation of the issues. They were attempting to indicate that they had investigated the legislative history of the amendment and were paying some attention to the intentions of the framers. This is the obvious purpose of Miller's remark that

"[N]o one can fail to be impressed with the one pervading purpose found in [the Reconstruction Amendments] . . . lying at the foundation of each, and without which none of them would have been even suggested."43

Having thus indicated that the majority has given due attention

42. 2 Boudin, Government by Judiciary 110 (1932).
43. 83 U.S. (16 Wall.) 36, 71 (1873).
to the intent of the amendment, Miller can proceed to ignore it in the rest of his opinion.

Secondly, the majority could undoubtedly have made out a case that the Louisiana statute did not actually prevent the butchers from plying their trade and was not, therefore, a monopoly law at all. If such a conclusion had been reached, the butchers would have had no case. As noted earlier, the law did not prevent anyone from engaging in the business, and it is difficult at this point in history to know how gravely disadvantaged they would have been by the operation of the law. It must be assumed that they thought they would be driven out of business or gravely injured, or they would not have gone to court. On the other hand, it is certain that southern political leaders wanted a decision from the Supreme Court as to the meaning of the amendment: on the whole, they probably wanted the decision Miller gave them, even though this involved losing the case. It is even possible that John A. Campbell, counsel for the butchers, made his argument as sweepingly outrageous as possible in the hope of getting just such a reaction from at least five Justices as, in the event, was forthcoming. This is, of course, sheer speculation and is to be labelled possible (if that), not probable. In any case, no succeeding commentator seems to have regarded the law as anything but a straight monopoly statute, even though on its face it does not seem to have been precisely that.

Thirdly, the majority could have rested its entire case on the police power, and merely said that the Louisiana law was a legitimate police statute; as such, the Court might have reasoned, it could hardly be considered to violate something as inherently vague as the privileges or immunities clause. This is, after all, basically the argument used only a few years later in *Munn v. Illinois* against a substantive attack not too dissimilar from the one employed by the butchers. It would have been easy to find that slaughtering is a “business affected with a public interest,” or, more broadly, that the fourteenth amendment was not meant to encompass state regulation of business enterprise. It would be necessary only to indicate that the framers of the amendment had only the substantive protection of the rights of liberty in mind: an argument which certainly would be no more difficult for a judge of Miller’s ability than the one he did use.

44. 94 U.S. 113 (1876).
Finally, the majority could have predicated its case on the nature of "privileges or immunities." It could have pointed out that this clause was intended to protect the fundamental rights of all citizens (an interpretation which almost certainly is consistent with the facts), but that the right to engage in a particular occupation was not a fundamental right. Such a course would have left the clause open for use in Bill of Rights cases without involving the courts in the protection of business enterprise against substantive state law. It would have left the clause in a workable and meaningful condition rather than tacitly nullified. It would, further, have met the dissenters on solid ground rather than sliding past them. And it would have been capable of development along much the same lines as the due process clause has undergone since the *Palko* doctrine was announced in 1937: a developing distinction between fundamental and non-fundamental rights which could be adapted to the conditions of time and place as Cardozo attempted to do in his *Palko* opinion.

It is also true that there was nothing inevitable about Miller's interpretation of the citizenship clause. Here the dissenters have at least an even argument with the majority. For while there is little doubt that the major purpose—as Miller said—was to make sure that the freedmen would have the rights of citizenship, under Miller's construction of the clause there would be little meaningful protection even for Negroes. At the same time, the clause was not in terms restricted to Negroes, and there is nothing in its wording to justify such a restriction. It may be worth recalling, as a part of this picture, that Chief Justice Taney had referred to the Bill of Rights as being privileges or immunities of United States citizens even before the adoption of the fourteenth amendment. So Miller had a reason for trying to prove that the privileges of American citizenship were not changed by the amendment.

Certain conclusions seem to follow inevitably from this survey of alternatives. Justice Miller was obviously concerned about the possibility that the fourteenth amendment might be used—as indeed the butchers' lawyers tried to use it—to extend federal judicial control over the entire reach of the states' police powers, and more particularly to inhibit states in their attempts to regulate their economies. In his effort to prevent this he was, of course, to fail; but in 1873 he could not know

this. Yet it seems abundantly clear that the state statute could have been upheld, and with it the states' right to control business affairs, without nullifying the whole fourteenth amendment. For this reason one must conclude that Miller and his majority were in reality attempting judicial repeal of that amendment: repeal by emasculation. There seems no reason to question the opinion itself in this regard. The majority simply was not willing to accept the amendment even at face value; it should only mean equal protection for the Negro (if that). “State government should be carried on with no further restriction than was necessary to secure such protection.”

This is, then, one of those interesting cases in which the majority and the minority both seem to be wrong. The majority erred (probably deliberately) in constricting the amendment's meaning. The dissenters erred (also probably deliberately, at least in Field's case) in expanding it; for all of the dissenters argued that the amendment was meant to protect business people in the conduct of their businesses. Thus they contended that under its terms states could not legally create monopolies — at least some monopolies. The attempt was to assimilate what later became substantive due process to the privileges or immunities clause, or perhaps to the amendment as a whole. Field's later career indicates that property rights were very dear to him — dearer than other human rights, apparently — and he was eventually successful, with the aid of lawyers at the bar, in shaping the due process clause to this use. The first fumbling attempt in this direction, made at a time when the full potentialities of the various clauses of the fourteenth amendment were not yet clear, occurred in the Slaughter-House Cases. But as later cases showed, Field and his followers were not particularly anxious to apply the same principle to the defense of Negroes, of trial rights, or of first amendment freedoms; only Harlan, in that period, tried to do so.

CONCLUSION

In a sense, the Slaughter-House Cases show the Supreme Court at its most typical, for both sides seemed to be trying to shape the Constitution to their personal prejudices. While, as many writers have recognized, this is inevitable in some degree, there was in Slaughter-House no apparent attempt — or at least

47. See TWISS, LAWYERS AND THE CONSTITUTION (1942).
no successful attempt — to dissemble these prejudices, to rationalize them, or to raise them to a level of higher principle. The motives, therefore, are plain enough to make the case an outstanding example of the judicial process at work in constitutional issues. The moral is what the observer makes it: this is judicial usurpation at its worst, as Louis Boudin would have said; or it is a necessary and on the whole desirable component of our system of constitutional (i.e., limited) government, as Charles L. Black might say. Certainly one may disagree with the decision in this case without condemning the courts or judicial review as such.

Another instructive aspect of the case has to do with the later history of the fourteenth amendment, which illustrates that in the judicial world as in life, cats may be killed in many ways. And the way in which judges have for almost ninety years evaded the Slaughter-House majority opinion without ever overruling the decision (indeed, usually while praising it) is certainly one of the best extant illustrations of the alternative lines of development available to men who know what they want, even if they happen to be judges. The Slaughter-House decision remains “good law” even though it has not been observed. Even in its most effective aspect — the nullification of the privileges or immunities clause — it could have been, and still could be, evaded without reversal. But the due process clause has proven so capacious as to make this unnecessary. A Supreme Court decision can, it seems, be important without being significant.