The Slump: Infamous United States Supreme Court Decisions from the Gilded Age, Explanations About What Happened, and Why It Matters Now

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I. INTRODUCTION

The United States Supreme Court has issued more than 30,000 opinions in its more than 230-year history.[1] While all are important to the parties and participants, many are largely forgotten. Some withstand the test of time, while others do not.

Along with individual opinions, various eras of the Court are, at times, singled out for praise or criticism. Looking at Court eras by Chief Justice, a 2019 poll of judges asked to vote for "the all-time most consequential chief

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[1] *Collection: United States Reports (Official opinions of the U.S. Supreme Court)*, LIBR. OF CONG., https://www.loc.gov/collections/united-states-reports/?fa=subject:court+opinions [https://perma.cc/8TNM-U4T5].

justice of the United States" had Chief Justice Warren getting the most votes, followed closely by Chief Justice Marshall, then followed (with quite a gap) by Chief Justices Burger, Rehnquist, John Jay, and Roberts.[2] These Court eras are viewed as at or near the pinnacle of the Court's history, sometimes referred to subjectively as the "best Court" or maybe even a list of "all-star" Chief Justices. But for every winner, there is an also-ran; for every high point, there is a low point; for every all-star era, there is a slump.

As a contrast to all-stars, this article focuses on a slump, perhaps the low point of the Court: infamous decisions spanning three decades just after the Civil War, sometimes called the "Gilded Age." Many Supreme Court decisions that have not withstood the test of time in a high-profile way were decided during the "Gilded Age," a phrase coined in 1873 in a fictional classic co-authored by Mark Twain.[3] Although variously defined, the Gilded Age began after the end of the Civil War and ended around 1900.[4] For our purposes, we focus on 1870 to 1900. This thirty-year period was a time of rapid growth in the country, with incredible prosperity for some and incredible hardship for others. The enormous contradictions from the Gilded Age "revealed a country transformed by immigration, urbanization, environmental crises, political stalemate, new technologies, the creation of

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[2] *See* Anna-Leigh Firth, *Slightly Surprising Winner Emerges in Poll to Name the Most Consequential Supreme Court Chief Justice,* THE NAT'L JUD. COLL. (July 16, 2019), https://www.judges.org/news-and-info/slightly-surprising-winner-emerges-in-poll-to-name-the-most-consequential-u-s-supreme-court-chief-justice [https://perma.cc/AU3F-5DE6]; *see also* James E. Hambleton, *The All-Time All-Star All-Era Supreme Court,* 69 A.B.A. J. 462 (1983) (listing historical "all-star" Justices); Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93 (1995) (addressing the topic more recently and arriving upon a list with substantial overlap but adding Justices Stephen J. Field and William J. Brennan Jr. and listing Justice Benjamin N. Cardozo as an "also ran"); NATHAN AASENG, GREAT JUSTICES OF THE SUPREME COURT (Oliver Press 1992) (profiling eight notable justices of the United States Supreme Court and their landmark cases); *cf.* Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407 (2010) (addressing similar issues from a data-based perspective).

[3] *See generally* CHARLES DUDLEY WARNER & MARK TWAIN, THE GILDED AGE: A TALE OF TODAY (1873) (using the term "Gilded Age" to describe post-Civil War America).

[4] Admittedly, this definition is approximate, given the various durations provided for the Gilded Age. *See* HUGH ROCKOFF, GREAT FORTUNES OF THE GILDED AGE 3 n.1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 14555, 2008), http://www.nber.org/papers/w14555 [https://perma.cc/DZU5-KLCV] ("There is no precise set of years that constitute the 'Gilded Age.' Most historians date it from somewhere in the 1870s to 'around' the turn of the century."); *compare What Was the Gilded Age?*, NEWPORT MANSIONS, https://www.newportmansions.org/gilded-age [https://perma.cc/W6UT-A84J] (stating the Gilded Age went from "approximately 1870–1910" and "was a period of unprecedented change in America"), *and* Sam Dangremond, *What Exactly Was The Gilded Age?*, TOWN & COUNTRY (Jan. 23, 2022, 11:00 AM), https://www.townandcountrymag.com/society/a38651973/gilded-age-history-meaning [https://perma.cc/5ZSR-QJZV] (stating the Gilded Age started in 1865 and ended in 1910), *with* Danny Crichton et al., *The Gilded Age*, JOURNALISM IN THE DIGIT. AGE, https://cs.ford.edu/people/eroberts/cs181/projects/2010-11/Journalism/index5534.html?page_id=6 [https://perma.cc/3FZD-HG9H] ("The Gilded Age, generally defined as the period following the Civil War, although more specifically between the election of Rutherford Hayes and the end of reconstruction in 1[8]76 and the Panic of 1893.").

powerful corporations, income inequality, failures of governance, mounting class conflict, and increasing social, cultural, and religious diversity."[5]

We call this Court era, from the early 1870s to the late 1890s, "The Slump." We focus on ten infamous Court decisions from this era that have not withstood the test of time, what we call "The Slump Cases." More accurately, this article focuses on nine infamous Supreme Court cases from the Gilded Age—starting with *The Slaughter-House Cases* and ending just after *Plessy v. Ferguson*—as well as the Justices' unprecedented extra-judicial involvement in resolving the 1876 Presidential Election. By focusing on The Slump Cases, we do not mean to suggest that other Court decisions from this era could not be included.[6] Nor do we mean to suggest that the Court did not issue decisions during The Slump that *have* withstood the test of time.

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[5] *See* RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896 3 (David M. Kennedy ed., Oxford Univ. Press 2017).

[6] This is true from a variety of perspectives. At least two dozen decisions from the Gilded Age—other than The Slump Cases—were overruled by subsequent decisions, some in just years, but others decades later. *See, e.g.*, *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, LIBR. OF CONG.: CONST. ANNOTATED, https://constitution.congress.gov/resources/decisions-overruled (last visited Dec. 19, 2024) (on file with authors); NEIL S. SIEGEL, THE COLLECTIVE-ACTION CONSTITUTION 257 (Oxford Univ. Press 2024) (noting "the *Legal Tender Cases* (1870) . . . overruled *Hepburn v. Griswold* (1869) from the prior term," holding Congress has "broad authority to provide a national currency not only with coins but also with paper money") (citations omitted). Moreover, largely given the focus in this article on the Reconstruction Amendments to the United States Constitution, *United States v. Kagama*, 118 U.S. 375 (1886) is not addressed here. Decided during the Gilded Age, *Kagama* upheld a federal statute allowing federal courts to exercise jurisdiction in crimes allegedly committed by Native Americans even when committed on Native American reservations, adding in conclusion that:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

Id. at 384–85. *Kagama* has been identified as having "fabricated" this plenary power doctrine and as a primary source "of the now infamous plenary power doctrine" regarding Native American jurisdiction. Mary Kathryn Nagle, *Standing* Bear v. Crook*: The Case for Equality Under Waaxe's Law*, 45 CREIGHTON L. REV. 455, 459, 463 (2012) (citations omitted). These examples also do not include other decisions made during The Slump that some might call infamous. *See, e.g.*, Ernest A. Young, *Dying Constitutionalism and the Fourteenth Amendment*, 102 MARQ. L. REV. 949, 952–62 (2019) (referring to "the Fourteenth Amendment's first seventy-five years" as "lost years," and summarizing Court opinions and commentary about them from that era); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1803 n.3 (2010) (noting Supreme Court precedent "that had severely limited Congress's power to enforce the" Reconstruction Amendments) (citing United States v. Cruikshank, 92 U.S. 542 (1875) and The Civil Rights Cases, 109 U.S. 3 (1883), which are discussed below; United States v. Reese, 92 U.S. 214 (1875) (limiting power to enforce 15th Amendment); and United States v. Harris, 106 U.S. 629 (1883) (limiting power to enforce 13th and 14th Amendments and striking down parts of Ku Klux Klan Act of 1871)).

Instead, we focus on The Slump Cases curated here as examples, providing some context for them and discussing explanations about what happened and why it matters now.

This article first provides a brief glimpse of how the country expanded and grew during the Gilded Age, highlighting some significant events during that time. The article then turns to The Slump Cases, discussing and providing context for the decisions and events from The Slump that time has not viewed favorably. The article then offers various possible disparate explanations that may explain aspects of The Slump and follows by exploring a unified explanation for The Slump Cases.

Why, then, did The Slump happen? We discuss historical perspectives providing some insight into this important question. These include how the quality of human life and dignity were valued; the Court's unwillingness to recognize the change in the balance of power from the states to the federal government caused by the Reconstruction Amendments; the common law nature of the Court during The Slump; the homogeneity (by gender and race) of the Justices and political leaders during The Slump; and the weariness of the north-south conflict. We also examine, but discard, several other potential explanatory factors.

We then discuss our unified explanation for The Slump Cases. With caveats discussed below, the unified explanation for The Slump Cases is deceptively simple: with the exception of the 13th Amendment's elimination of slavery and the 14th Amendment's providing citizenship to those born or naturalized in the United States, the United States Supreme Court failed to address the constitutional revolution wrought by the Civil War. Consequently, The Slump Cases failed to advance individual rights consistent with those profound changes. Many years later, the Supreme Court reversed most of The Slump Cases, due to the Court's failure during The Slump to account for these profound changes. The recognition of those rights was delayed by generations, resulting in devastating consequences for millions of people. Recognizing that justice delayed is justice denied, The Slump was an enormous lost opportunity, resulting in justice being denied for so many for such a long time.

Turning to why it matters now, The Slump could be construed as an anomaly that is unlikely to be repeated. The various ways in which the post-Civil War Court failed, however, continue to resonate. Whether such failures derived from the omission of facts, the selection of cases to elide a core issue, or the Justices' off-the-Court activities, The Slump Cases and The Slump itself provide lessons for the modern Court. First, there is a significant caution from The Slump Cases about the drawbacks of permitting the Court to have the dual responsibility of shaping the development of constitutional issues and deciding cases that make it onto the merits docket. Second, significant changes in constitutional law require a reappraisal of past doctrine. Third, although Justices are selected by a political process, they must take

(and refuse to take) actions suggesting partisan politics influence their judicial activities. The lessons from The Slump, and how to avoid another slump, are important and profound now and will continue to be in the future.

II. AN OVERVIEW OF THE GILDED AGE

Much has been written both about the Gilded Age and the time immediately preceding it. The scholarship about that era will not be repeated here.[7] What follows, instead, is a brief summary of some of the changes during the Gilded Age and selected events just before and during the Gilded Age.

The Gilded Age was an era of unprecedented growth. The population of the United States nearly doubled, from nearly 38,600,000 people in 1870 to more than 76,000,000 in 1900.[8] Growth, however, was regional, with population in the western states and territories more than quadrupling.[9] People migrated from rural to urban, with New York City and its boroughs nearly tripling in size to almost 3,500,000 people by 1900.[10] Nearly 12,000,000 immigrants came to the country during the Gilded Age,[11] and eight new states joined the Union.[12]

The federal government, however, did not grow much during the Gilded Age. Federal government receipts in 1870 were about $411,000,000, increasing to slightly more than $567,000,000 in 1900,[13] representing an annual increase of about one percent. Federal expenditures excluding debt also were largely flat, with nearly $310,000,000 in expenses in 1870 and about $365,000,000 in 1897, although then increasing substantially to more than $520,000,000 in 1900.[14] Industry, wealth, and the workforce changed far more dramatically:

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[7] *See, e.g., generally* DAVID M. POTTER, THE IMPENDING CRISIS: AMERICA BEFORE THE CIVIL WAR 1848–1861 (Don E. Fehrenbacher ed., 2011) (providing a masterful discussion of the dozen or so years just before the Civil War).

[8] U.S. CENSUS BUREAU, STATISTICS OF POPULATION xix tbl.III, https://www2.census.gov/library/publications/decennial/1900/volume-1/volume-1-p2.pdf [https://perma.cc/CQ4M-GLS9].

[9] *Id.* at xxii tbl.VII.

[10] *Id.* at lxxx tbl.XXVII.

[11] *Id.* at cii tbl.XLV.

[12] U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES 1789–1945 289, https://www2.census.gov/library/publications/1949/compendia/hist_stats_1789-1945/hist_stats_1789-1945.pdf [https://perma.cc/5773-RF37].

[13] *Id.* at 296–97.

[14] *Id.* at 299–300.

Year	1870	1900	Change
Approximate Miles of Railroad Track	40,000[15]	193,000[16]	Nearly fivefold increase
Approximate Gross National Product	$36 Billion	$123 Billion[17]	Nearly fourfold increase
Approximate number of banks	1,900	10,000[18]	More than fivefold increase
Approximate bank resources	$1.8 Billion	$10.8 Billion[19]	Tenfold increase
Approximate national workforce “10 years old and over” (reflecting the approach to child labor during the Gilded Age)	13,000,000	29,000,000[20]	More than double increase

[15] *Evidence 3: U.S. Railroad Construction, 1860–1880*, DIGIT. HIST. READER, https://www.dhr.history.vt.edu/modules/us/mod05_industry/evidence_detail_03.html [https://perma.cc/GEV4-45AV].

[16] Adam Burns, *Railroads in the 20th Century (1900s)*, AMERICAN-RAILS.COM (July 24, 2024), https://www.american-rails.com/1900s.html#:~:text=By%201900%2C%20the%20country's%20total,193%2C346%2C%20from%20163%2C597%20in%201890 [https://perma.cc/M39X-C6T7].

[17] Nathan S. Balke & Robert J. Gordon, *The Estimation of Prewar Gross National Product: Methodology and New Evidence*, 97 J. POL. ECON. 38, 781 (1989) (citing App. B: Historical Data) (listing amounts in 1972 dollars), https://www.nber.org/system/files/chapters/c10036/c10036.pdf [https://perma.cc/7CPF-PJ6F].

[18] U.S. CENSUS BUREAU, *supra* note 12, at 262.

[19] *Id.*

[20] *Id.* at 63.

As a counter to this substantial growth, the Gilded Age also saw financial crises called "panics," with the Panics of 1873 and 1893 being the most severe, significant, and long-lasting.[21]

"Entrepreneurs and inventors flourished."[22] As emphatically noted by one commentator:

> We still remember the names, more than a century later: McCormick and Deere in agricultural machinery; Vanderbilt, Hill, Harriman, Gould, Stanford, and Pullman in railroads; Armour and Swift in meat packing; Guggenheim in copper; Reynolds and Duke in tobacco; Carnegie and Frick in steel; Dupont in chemicals; Rockefeller in oil; Westinghouse in electrical equipment; Morgan, Cooke, and Belmont in finance. By the end of the era, Ford was producing his first car, Bell had invented the telephone, and Edison was inventing everything else![23]

Wealth, however, "came at a price. Bribery, conspiracy, conflict of interest, blackmail, and other asserted crimes were commonplace during the Gilded Age."[24]

"Politically, the era was insecure," with a "weak" Presidency.[25] It was an era of emerging (and sometimes short-lived) political parties, such as the Straight Democratic, Liberal Republican, Temperance, Prohibition, American, Greenback-Labor, United Labor, Union Labor, Socialist-Labor, Nationalist Democratic, People's Democratic, United Christian, Union Reform, Socialist Democrat, and Populist Democratic parties.[26] During the Gilded Age, only President Ulysses S. Grant served two full consecutive terms; Presidents Lincoln and Garfield were assassinated; "Andrew Johnson was impeached and almost removed from office" while "Chester Arthur was not even able to secure renomination by his own political party;" the President and Congress tended to be Republican, "[b]ut the Republicans

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[21] *See The Panic of 1873*, LIB. OF CONG.: RSCH. GUIDES, https://guides.loc.gov/this-month-in-business-history/september/panic-of-1873#:~:text=The%20Panic%20of%201873 %20triggered,century%20was%20based%20on%20specie [https://perma.cc/MJ7T-UTNM]; ROBERT V. REMINI, A SHORT HISTORY OF THE UNITED STATES 171 (2008) ("[T]he onset of the Panic of 1873 proved devastating. This was an economic depression that hit hard and lasted from 1873 to 1879."); Gary Richardson & Tim Sablik, *Bank Panics of the Gilded Age 1863–1913*, FED. RSRV. HIST., https://www.federalreservehistory.org/essays/banking-panics-of-the-gilded-age (referring to the Panic of 1893 as "one of the most severe financial crises in the history of the United States") [https://perma.cc/7B45-XS7G].

[22] James O'Hara, *The Gilded Age and the Supreme Court: An Overview*, 33 J. SUP. CT. HIST. 123, 124 (2008).

[23] *Id.*

[24] REMINI, *supra* note 21, at 167.

[25] O'Hara, *supra* note 22, at 126.

[26] U.S. CENSUS BUREAU, *supra* note 12, at 289.

were usually fractionalized by geographic division."[27] Both in stated and unstated ways, these and many other events during the Gilded Age had a profound impact on The Slump and The Slump Cases.

III. CONSTITUTIONAL AMENDMENTS RATIFIED DURING THE GILDED AGE

After being ratified in 1788, the United States Constitution had been amended on three occasions before the Gilded Age: (1) in 1791, when the first ten Amendments (often called the Bill of Rights) were ratified; (2) in 1795, when the Eleventh Amendment (addressing suits against states) was ratified; and (3) in 1804, when the Twelfth Amendment (procedure for electing the President and Vice President) was ratified.[28] The Constitution was amended three times, in less than a decade, during the Gilded Age.

The three amendments ratified during the Gilded Age came just after the end of the Civil War and are frequently referred to as the Reconstruction Amendments, a phrase we use here.[29] After the last Reconstruction Amendments was ratified in 1870, the Constitution would not again be amended until 1913.[30] The summary of the Reconstruction Amendments here provides the briefest of history and the text of the amendments, leaving further detail for others who have far more authoritatively addressed them.

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[27] O'Hara, *supra* note 22, at 126–27.

[28] *See Amendments to the U.S. Constitution*, NAT'L ARCHIVES FOUND., https://www.archivesfoundation.org/amendments-u-s-constitution [https://perma.cc/UYW3-332U] (noting that "[m]ore than 11,000 amendments to the Constitution of the United States have been proposed, but only 27 have been ratified. The first 10 amendments, known as the Bill of Rights, were ratified in 1791"). The 11th Amendment was adopted in response to *Chisholm v. Georgia*, 2 U.S. 419 (1793), which allowed a suit by a citizen of South Carolina to proceed against the State of Georgia in federal court. *Amdt11.1 Overview of Eleventh Amendment, Suits Against States*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt11-1/ALDE_00013675 [https://perma.cc/V9EF-B8PZ]. The 12th Amendment was adopted as a result of the Presidential Election of 1800, where Thomas Jefferson and Aaron Burr received the same number of Electoral College votes, "sending the selection of a President to the House of Representatives, despite the fact that the electors had intended Jefferson to be President and Burr to be Vice President." *Amdt12.1 Overview of Twelfth Amendment, Election of President*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt12-1/ALDE_00013668 [https://perma.cc/P7K9-SLY7]. *See generally* SIEGEL, *supra* note 6, at 408–14 (discussing both successful and unsuccessful attempts to amend the U.S. Constitution).

[29] *See, e.g.*, Danforth v. Minnesota, 552 U.S. 264, 269 (2008) (using the phrase "Reconstruction Amendments"); Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999); Bush v. Vera, 517 U.S. 952, 968 (1996).

[30] *See Amendments to the U.S. Constitution*, *supra* note 28.

A. The Thirteenth Amendment

Passed by Congress on January 31, 1865, and ratified by a sufficient number of States so that it became effective on December 6, 1865,[31] the 13th Amendment generally abolishes slavery and involuntary servitude.[32] Containing two sections, the 13th Amendment states:

> Section 1.
>
> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2.
>
> Congress shall have power to enforce this article by appropriate legislation.33

B. The Fourteenth Amendment

Passed by Congress on June 13, 1866, and ratified by a sufficient number of States so that it became effective on July 9, 1868, among other things, the 14th Amendment (1) addresses citizenship; (2) prohibits states from abridging "the privileges or immunities of citizens of the United States;" (3) subjects states to due process and equal protection obligations; (4) apportions representation; and (5) disables individuals who "have engaged in insurrection or rebellion" against the United States or "given aid or comfort

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[31] To become effective, a proposed amendment originating with Congress must be passed by (1) "two-thirds of both Houses" and (2) "ratified by the Legislatures of three-fourths of the several States." U.S. CONST. art. V.

[32] *See Amendments to the U.S. Constitution*, *supra* note 28. A very different proposed 13th Amendment, which would have protected slavery from federal action, gained significant traction during the lame duck session of the 36th Congress. In late February 1861, Ohio Congressman Thomas Corwin introduced a proposed 13th Amendment, which read: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any state, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." By March 2, 1861, the House approved the proposal 133–65 and the Senate by a vote of 24–12, both meeting the two-thirds majority vote necessary. Then-President Buchanan signed the proposed amendment (although his signature was not required) and President Lincoln, who took office on March 4, 1861, sent the proposed amendment to the states for ratification. Secession of the southern states from the Union and the Civil War apparently derailed the effort and, in any event, the Corwin 13th Amendment was never ratified. *See* Jessie Kratz, *Unratified Amendments: Protection of Slavery*, NAT'L ARCHIVES: PIECES OF HIST. (Feb. 19, 2020), https://prologue.blogs.archives.gov/2020/02/19/unratified-amendments-protection-of-slavery [https://perma.cc/R3F9-MBAZ] (describing this history for this proposed 13th Amendment); *see also* ERIK LARSON, THE DEMON OF UNREST 275–76 (Crown 1st ed. 2024) ("Only a few states would ultimately ratify the amendment before events made it irrelevant. Known to future centuries as the Shadow or Ghost Amendment, it remained an active congressionally approved but unratified amendment into the twenty-first century, theoretically still open to a final vote by the states.").

[33] *See Amendments to the U.S. Constitution*, *supra* note 28.

to the enemies thereof" from holding federal office.[34] The longest of the Reconstruction Amendments, the 14th Amendment contains five sections and states:

> Section 1.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2.
>
> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
>
> Section 3.
>
> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

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[34] *Id.*

> Section 4.
>
> The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
>
> Section 5.
>
> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.35

C. The Fifteenth Amendment

Passed by Congress on February 26, 1869, and ratified by a sufficient number of States so that it became effective on February 3, 1870, the 15th Amendment provides the right to vote cannot be abridged based on "race, color, or previous condition of servitude."[36] Containing two sections, the 15th Amendment states:

> Section 1.
>
> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude–
>
> Section 2.
>
> The Congress shall have the power to enforce this article by appropriate legislation.37

IV. THE SUPREME COURT DURING THE GILDED AGE

In the 1860s, the United States Supreme Court played a less significant role than at least some had expected.[38] "Most legal observers—from the president down to local politicians—expected the Supreme Court to decide

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *See generally* Jonathan W. White, *The Strangely Insignificant Role of the U.S. Supreme Court in the Civil War*, 3 J. CIV. WAR ERA 211, 231 (2013) ("Many scholars have rightly pointed out that the constitutional history of the Civil War was not written by the Supreme Court, but none has adequately explained *why* the Court had such an insignificant role.").

the major issues of the Civil War."[39] Although the Court addressed important Civil War-related issues, it did not play a central role in the conflict.[40] Among other concerns, there were efforts questioning the viability of the Court and speculation that President Lincoln "likely would have chosen not to enforce judicial decisions that struck down his emancipation policy."[41] As noted far later, "[a]n event as cataclysmic as the Civil War was bound to place considerable strain on the Constitution, and the brunt of the judicial burden of putting it back in shape was borne in the decade following the war itself," just before The Slump began.[42]

The Court lost one Justice because of the Civil War. John Archibald Campbell, a former slaveowner and successful lawyer in Georgia (where he was admitted to the bar at age 18) and in Alabama, joined the Court as Justice in 1853.[43] While in practice, Campbell argued several cases before the Court, with one source noting "one of Campbell's most notable stances was his stance on slavery. Although Campbell was pro-slavery, he managed to express his opinions on the topic in a manner that appeased the northern abolitionists and allowed for well thought out compromises to be made between the two sides."[44] In April 1862, apparently after failing in his attempt as a mediator to prevent the Civil War, Justice Campbell resigned from the Court to join Confederate forces after Alabama, his home state, seceded from the Union.[45] Former Justice Campbell would later serve as Confederate

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[39] *Id.* at 215.

[40] *Id.* To be sure, the Court decided significant cases during and just after the Civil War. *See generally* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888 263–781 (The Univ. of Chi. Press 1985) (discussing cases decided toward the end of Chief Justice Taney's service on the Court from 1836 to 1864); *id.* at 287–329 (discussing cases decided at the beginning of Chief Justice Chase's service on the court from 1864 to 1873). A detailed discussion of the Court during and just after the Civil War is beyond the scope of this article.

[41] *See* White, *supra* note 38, at 226 n.53 (referencing a December 1861 Senate resolution "that inquired into the viability of abolishing the U.S. Supreme Court") (citation omitted).

[42] CURRIE, *supra* note 40, at 287.

[43] *Justice John Archibald Campbell*, JUSTIA, https://supreme.justia.com/justices/john-archibald-campbell/#:~:text=Justice%20John%20Archibald%20Campbell%20joined,at%20just%2014%20years%20old [https://perma.cc/ZCF2-FAJE].

[44] Donald Scarinci, *John Archibald Campbell*, CONST. L. REP., https://constitutionallawreporter.com/previous-supreme-court-justices/john-archibald-campbell [https://perma.cc/J4NF-4XUG].

[45] *See* George Webster Duncan, *John Archibald Campbell*, *in* 5 TRANSACTIONS 107, 129 (Ala. Hist. Soc'y, Reprint No. 33, 1905), https://scholarsjunction.msstate.edu/cgi/viewcontent.cgi?article=1659&context=fvw-pamphlets [https://perma.cc/2HWS-XA42]. For a detailed discussion of Campbell's involvement as a go-between in the unsuccessful attempts of "Confederate commissioners" to negotiate with the United States Government in the months leading up to the Civil War, *see* LARSON, *supra* note 32, at 337–98.

Assistant Secretary of War,[46] and then argue as an advocate—and lose—in *The Slaughter-House Cases*.[47]

The Court also had members with active partisan legal pasts during the time leading up to the Civil War, and at times, partisan elected office desires while serving on the Court, including seeking nominations for President. Justices had slaveowner backgrounds, specifically Justice Campbell (who had freed his slaves before joining the Court),[48] Justice Samuel Freeman Miller (who emancipated the slaves he owned in 1850, when he moved from Kentucky to Iowa, and served on the Court from 1862 to 1890),[49] and Justice John Marshall Harlan, from Kentucky, who served on the Court from 1877 to 1911, and became known as "The Great Dissenter" due to his dissents in cases that restricted civil rights and liberties.[50]

There were three Chief Justices during The Slump, all from the Midwest: Ohio's Salmon Chase (1864–73); another Ohioan Morrison Waite (1874–88); and Illinoian Melville Fuller (1888–1910).[51] Chase died within a month of his dissents in the first two Slump Cases.[52] He had served as Governor, a U.S. Senator, and Secretary of Treasury, also seeking the 1860 and 1864 Republican Presidential nominations.[53] Chase, a Lincoln appointee to the Court, unsuccessfully sought the Democratic presidential nomination in 1868 and was considered for both the Democratic and the Liberal Republican

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[46] Duncan, *supra* note 45, at 130.

[47] In describing the arguments presented by Campbell and his co-counsel, the reporter of decisions noted they "*argued the case at much length and on the authorities, in behalf of the plaintiffs in error*. The reporter cannot pretend to give more than such an abstract of the argument as may show to what the opinion of the court was meant to be responsive." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 44–45 (1872).

[48] Scarinci, *supra* note 44.

[49] Charles Noble Gregory, *Samuel Freeman Miller: Associate Justice of the Supreme Court of the United States*, 17 YALE L.J. 422, 424, 427, 438–39 (1908).

[50] PETER S. CANELLOS, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA'S JUDICIAL HERO 19–20 (Simon & Schuster 2021).

[51] *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/J48A-PREQ].

[52] *Salmon Portland Chase, 1864–1873*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/chief-justices/salmon-chase-1864-1873 [https://perma.cc/73HG-D7UU] (noting Chief Justice Chase died on May 7, 1873, less than a month after the *Slaughterhouse Cases* opinion issued on April 14, 1873, and the *Bradwell v. Illinois* opinion issued on April 15, 1873).

[53] *Id.*; WALTER STAHR, SALMON P. CHASE: LINCOLN'S VITAL RIVAL 289–301, 471–76 (Simon & Schuster 2021); CURRIE, *supra* note 40, at 285–358 (discussing the Court during Chief Justice Chase's tenure); *see generally* DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN (Simon & Schuster 2005) (discussing Abraham Lincoln's Presidency, including his Presidential Cabinet, which included Secretary of Treasury Salmon P. Chase).

presidential nominations in 1872.[54] The second Chief Justice during The Slump, Waite, was a Grant appointee with an "undistinguished" public career before being appointed to the Court.[55] He had previously represented the United States in an international proceeding to win damages against Great Britain for assisting the Confederacy during the Civil War.[56] Waite was, by some accounts, Grant's fifth or sixth choice for chief justice.[57] While on the Court, he declined an inquiry about being a Republican Presidential candidate in the 1876 election.[58] The last Chief Justice during The Slump, Fuller, was nominated by President Grover Cleveland.[59] One book summarizing these Chief Justices bluntly states that "[m]ost Supreme Court historians view" the Waite and Fuller Courts "as transitional and forgettable."[60]

Along with these three Chief Justices, twenty-three Associate Justices served on the Court during The Slump.[61] Some served for a very short time and did not participate in any of The Slump Cases, and many are not household names. But these were the Justices—all white men, a few former slaveholders, and all born and primarily educated before the Civil War—who served on the Court during The Slump.

V. THE SLUMP CASES

Any list of "best" or "worst" decisions by any court is riddled with qualitative assessments influenced by any number of things, although the

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[54] STAHR, *supra* note 53, at 637–41; WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 125–26 (Alfred A. Knopf ed., 1st ed. 2004).

[55] *Morrison Remick Waite*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYS., https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/mjc/interest/grand-concourse/morrison-remick-waite [https://perma.cc/9WT6-7YUL].

[56] *Morrison R. Waite, 1874–1888*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/chief-justices/morrison-waite-1874-1888 [https://perma.cc/3VJZ-HYA2]; *Morrison Remick Waite*, *supra* note 55.

[57] *See* REHNQUIST, *supra* note 54, at 129–32; KENNETH E. DAVISON, THE PRESIDENCY OF RUTHERFORD B. HAYES 124–25 (Greenwood Press 1972) ("After five or six men in public and private life declined or caused too much opposition, Grant finally decided to select a solid lawyer for the post. The lot fell to Morrison R. Waite, a Toledoan and a leader of the Ohio bar, whose father had been chief justice of the Connecticut Supreme Court.") (footnote omitted).

[58] *See* REHNQUIST, *supra* note 54, at 126; DANIEL A. COTTER, THE CHIEF JUSTICES: THE SEVENTEEN MEN OF THE CENTER SEAT, THEIR COURTS, AND THEIR TIMES 181 (Twelve Tables Press 2019).

[59] *See Melville Weston Fuller, 1888–1910*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/chief-justices/melville-weston-fuller-1888-1910 [https://perma.cc/JYW4-HFB3]. Fuller had previously declined nominations to the United States Civil Service Commission and as United States Solicitor General. *See id.*; *see also* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986 1–83 (The Univ. of Chi. Press 1990) (discussing the Court during Chief Justice Fuller's tenure).

[60] COTTER, *supra* note 58, at 181.

[61] *See Justices 1789 to Present*, *supra* note 51.

characterization of most of The Slump Cases as infamous is not ours alone.[62] With that caveat, however, we turn to The Slump Cases, beginning with *The Slaughter-House Cases*.

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

Although the 13th and 15th Amendments represented foundational changes, their importance in constitutional litigation was less significant in The Slump Cases than the 14th Amendment. The 14th Amendment addresses a variety of substantive, procedural, and technical issues, such as voting rights arising out of the elimination of slavery,[63] office-holding restrictions on persons who supported insurrection or rebellion against the country,[64] and prohibitions against recognition of debts involving rebellion or the emancipation of slaves.[65]

Section 1 of the 14th Amendment addresses substantive issues about citizenship and civil rights. Although the shortest section, it is wide-ranging in scope.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

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[62] *See, e.g.*, M. Frances Rooney, Note, *The Privileges or Immunities Clause of the Fourteenth Amendment and an Originalist Defense of Gender Nondiscrimination*, 15 GEO. J.L. & PUB. POL'Y 737, 758 (2017) ("The *Slaughter-House Cases* are often described as 'infamous.'") (citations omitted); Phyllis A. Kravitch, *Women in the Legal Profession: The Past 100 Years*, 69 MISS. L.J. 57, 62 (1999) (referring to *Bradwell* as one of the United States Supreme Court's "more infamous decisions"); José D. Román, Comment, *Trying to Fit an Oval Shaped Island into a Square Constitution: Arguments for Puerto Rican Statehood*, 29 FORDHAM URB. L.J. 1681, 1703 (2002) (describing *Minor* as "an infamous case"); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 960 (2009) (noting "the Court's infamous decision in *United States v. Cruikshank*"); Akhil Reed Amar & Jed Rubenfeld, *A Dialogue*, 115 YALE L.J. 2015, 2032 (2006) (referencing "the infamous *Civil Rights Cases* of 1883"); Lori A. Nessel, *Deporting America's Children: The Demise of Discretion and Family Values in Immigration Law*, 61 ARIZ. L. REV. 605, 631 (2019) (noting "the infamous case of *Chae Chan Ping v. United States*"); Courtney M. Cox, *The Uncertain Judge*, 90 U. CHI. L. REV. 739, 791 (2023) ("*Plessy*, the infamous case."); *see also* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 462 n.65 (1982) (asserting that *Pace v. Alabama* "helped lay the foundation for the acceptability of segregation"); Richard Delgado, *J'Accuse: An Essay on Animus*, 52 U.C. DAVIS L. REV. ONLINE 119, 143 n.127 (2018) (citing *Williams v. Mississippi* as supporting the proposition that the Supreme Court "has a long history of ignoring practical realities in favor of legal formalisms when it comes to recognizing minority rights").

[63] *See Amendments to the U.S. Constitution*, *supra* note 28 (citing Section 2 of the 14th Amendment).

[64] *Id.* (citing Section 3 of the 14th Amendment).

[65] *Id.* (citing Section 4 of the 14th Amendment).

> due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.66

It is not hyperbole to place the 14th Amendment as the most important, or at least most referenced, change to the Constitution's original text. While the first sentence corrected a major issue in constitutional law, as reflected in a Supreme Court decision just before the Civil War that denied citizenship to Black Americans,[67] the second sentence has served as an anchor for most discussions about substantive rights not explicitly enumerated in constitutional text, as well as whether a federal right applies to the States.[68]

Our discussion of The Slump Cases begins with the Court's initial attempt to apply the 14th Amendment, which set the stage for later controversies, both soon after and that continue to the present.

The Court chose an unusual case to first address the 14th Amendment. It did not involve a Black citizen, racial discrimination, or a principal controversy at issue in the Civil War or its aftermath.[69] In *The Slaughter-House*

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[66] *Id.* (citing Section 1 of the 14th Amendment).

[67] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403–05 (1857) (enslaved party) ("Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? . . . They were at [the ratification] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them."). Although not altering quoted material, this article uses the phrase "Black American" to be broadly inclusive.

[68] Substantive due process protects against federal or state actions to deprive any person of life, liberty, or property without "adequate reason." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 603 (4th ed. 2013). Even Professor Chemerinsky acknowledges, however, that "there is no concept in American law that is more elusive or more controversial than substantive due process." Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999). This remains true. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231, 237 (2022) ("The underlying theory . . . that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for 'liberty'—has long been controversial.") (rejecting argument and precedent that 14th Amendment due process clause protects right to abortion).

[69] Unlike current practice, the Court did not have discretionary review to choose its cases until 1891. *See* Evarts Act, ch. 517, 26 Stat. 827 (1891). Nonetheless, through procedural devices, "the Court was willing and able to dodge cases, though it thought it only proper to do so under limited circumstances (e.g., when the lower court judges and Supreme Court Justices agreed that the case outcome was obvious)." Benjamin B. Johnson, Essay, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 817 (2022). Similarly, the Court had (and has) considerable discretion in the timing of oral argument and how quickly to issue its opinion. Finally, as a practical matter, an appellate court necessarily chooses the depth and detail of its analysis of any issue in a particular case, although the parties—and sometimes the justices themselves—believe the majority's analysis of an issue was cursory or conclusory. *See, e.g.*, Thompson v. Clark*,* 596 U.S. 36, 54 (2022) ("[W]e should not decide this important question without independent analysis, and the Court's own cursory analysis is erroneous.") (Alito, J.,

Cases, decided just four years after the 14th Amendment was ratified, the Court consolidated three cases brought by white butchers and their professional associations against the Crescent City Company.[70] The Company "grew out of" Louisiana legislation titled, "*An act to protect the health of the City of New Orleans, to locate the stock landings and slaughter-houses, and to incorporate 'The Crescent City Live-Stock Landing and Slaughter-House Company*,'" enacted in March 1869 and effective June 1869, to regulate and limit the landing and processing of animals in the City of New Orleans.[71] The stated purpose of the Act was to mitigate public health threats regarding disease and waste management from the largely unregulated slaughter of hundreds of thousands of animals close to New Orleans by more than a thousand butchers.[72] The Act awarded the Company exclusive authority to land and slaughter livestock, but with provision for local butchers to use its facilities for a fee.[73] The Act was much like those in place in other major cities.[74] The plaintiff butchers argued in multiple cases that the Act restricted their economic right to practice their trade and unlawfully sanctioned a monopoly.[75]

The Act passed seven months after the 14th Amendment was ratified and litigation in several cases began almost immediately.[76] Within a year, the Louisiana Supreme Court found for the Company in every case.[77] The

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dissenting); Harris v. McRae*,* 448 U.S. 297, 336 n.6 (1980) ("The Court rather summarily rejects the argument . . . .") (Brennan, J., dissenting).

70 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 38 (1872).

71 *Id.*

72 JACK BEATTY, AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865–1900 177 (Alfred A. Knopf 2007).

73 *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 42 ("[A]ll persons slaughtering or causing to be slaughtered, cattle or other animals in said slaughter-houses, shall pay to the said company or corporation.") (quoting "*An act to protect the health of the City of New Orleans, to locate the stock landings and slaughter-houses, and to incorporate 'The Crescent City Live-Stock Landing and Slaughter-House Company'*").

74 *See e.g.*, Ex parte Shrader, 33 Cal. 279, 287 (Cal. 1867) (conviction upheld for keeping a slaughterhouse in prohibited area); *see also generally* RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (Univ. Press of Kan. 2003) (providing an excellent history about the regulation of slaughterhouses from Ancient Rome through the 19th century).

75 Plaintiffs also alleged the Act created an "involuntary servitude" forbidden by the 13th Amendment. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 66. The Court scarcely addressed this contention, leaving it to Justice Field to tartly observe in his dissent that he had "not supposed [the 13th Amendment] was susceptible of a construction which would cover the enactment in question." *Id.* at 89 (Field, J., dissenting).

76 The effective date of the act was June 1, 1869. The Benevolent Butchers Association sought an injunction on May 26, 1869. LABBÉ & LURIE, *supra* note 74, at 111. Additional suits were filed, of which six were consolidated into a single appeal with an agreement to stay other proceedings until the Louisiana Supreme Court issued its decision. *Id.* at 124–25.

77 Louisiana ex rel. Belden v. Fagan, 22 La. Ann. 545, 557 (La. 1870) (affirming the district court's judgment in November 1870).

complexity of these cases was so great that a new state court was formed to consolidate the matters;[78] multiple attempts at settlement failed; injunctions issued and were held in abeyance; politicians and newspapers weighed in constantly; and federal proceedings were initiated, including the involvement (and a merits opinion) of United States Supreme Court Justice Bradley sitting as a circuit court judge.[79] At one point, the Supreme Court became involved with a motion for an order to enjoin enforcement of the Act[80] and a motion to dismiss.[81]

Notwithstanding these complexities, the Supreme Court allowed the cases to be "taken up out of their order on the docket . . . [o]n account of the importance of the questions involved."[82] The Court then held oral argument with one Justice absent.[83] Despite a seeming push to address the not-unusual law quickly, the Court scheduled re-argument a year later with the full bench, stating it had been "[i]mpressed with the gravity of the questions raised in the [first] argument."[84] It is not clear why the issue it choose to address (or even the case itself) was so important that it demanded such attention. This may explain, in part, why *The Slaughter-House Cases* are at best controversial, and at worst described as a "grievous error"[85] still needing correction. Most scholars criticize the Court's interpretation of the Privileges or Immunities Clause in the case, which had the effect of eliminating most practical applications of it.[86] They also criticize the conclusory reasoning of Justice Miller, the author of the majority opinion.

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[78] Slaughter-House Cases, 77 U.S. (10 Wall.) 273, 277 (1869) ("[T]he legislature of that State created a new court, known as the Eighth District Court of New Orleans, giving to *it* exclusive original jurisdiction in cases of injunction.").

[79] Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 649 (C.C.D. La. 1870).

[80] *See generally* Slaughter-House Cases, 77 U.S. (10 Wall.) 273 (1869) (discussing the motion to enjoin the act and the Court's involvement with it).

[81] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 58 (1872) (denying "motion by the defendant to dismiss the cases, on the ground that the contest between the parties has been adjusted by an agreement made since the records came into this court, and that part of that agreement is that these writs should be dismissed").

[82] *Id.*; *see also Fagan*, 22 La. Ann. at 555 (rejecting butchers' objections to Act based on Louisiana constitution and 14th Amendment).

[83] *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 58. Justice Samuel Nelson was in poor health and was absent for "much of the Court's 1871–1872 term." He retired before a decision was rendered and Justice Ward Hunt took his place before re-argument in February 1873, which also led to speculation that the Court was evenly split after the first argument. *See* LABBÉ & LURIE, *supra* note 74, at 178 n.34.

[84] *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 58.

[85] Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 35, McDonald v. City of Chicago, 561 U.S. 742 (2010) (No. 08-1521), 2009 WL 4099504, at *35.

[86] *See* ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 123 (Matt Gallaway ed., Cambridge Univ. Press 2020) (stating the *Slaughter-House Cases* "effectively wrote the privileges or immunities clause out of the Constitution").

The principal issue addressed by the Louisiana courts was whether the state's police power included the authority to remedy health problems caused by unregulated processing of livestock across its major city through the vehicle of a private corporation to construct and maintain a central slaughterhouse.[87] The butchers argued that the prohibition against private slaughterhouses and the creation of a central facility—available for use by all butchers—deprived them of the right to practice their trade and was an illegal monopoly.[88] Using pre-Civil War precedent, the Court concluded the power to impose health laws "remain subject to State legislation" and the right to do so through a private corporation "seems hardly to admit of debate."[89]

The Court then addressed the novel arguments that the butchers were relegated to slave status, and they were illegally deprived of the right to practice their trade under the recently enacted 14th Amendment under three clauses: Privileges or Immunities, Due Process, and Equal Protection.[90] The Court indirectly rejected the slavery argument in a rambling discussion of serfs attached to a property interest versus involuntary servitude.[91] The Due Process argument was discarded because there was "no construction of [the Act that could be] . . . held to be a deprivation of property."[92] The Court also doubted that white butchers could assert Equal Protection claims because the Act was not directed to "discrimination against the negroes as a class, or on account of their race."[93] The Privileges or Immunities Clause, however, received far greater attention.

The majority began with a review of the reasons for the Civil War (stating the "overshadowing and efficient cause was African slavery"); it admitted federal government intervention was needed to protect Black citizens from conditions "almost as bad" as slavery; and, it generally saw the Reconstruction Amendments as a "remedy" for the "evil" of African slavery, as well as subsequent attempts to deny Black Americans the rights of citizenship.[94] The Court then turned to citizenship.[95] It recognized its holding

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[87] *Fagan*, 22 La. Ann. at 550 (asserting that a "considerable portion of the elaborate brief of the counsel for defendants is devoted to . . . the powers of State Legislatures").

[88] *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 60–61.

[89] *Id.* at 63–64.

[90] *Id.* at 66–67 (considering for the first time "involuntary servitude forbidden by the thirteenth article," abridgement of the privileges and immunities clause, and denial of the equal protection of the laws and deprivation of property without due process of law).

[91] It is not clear why the Court failed to make the obvious observation that the Act did not require anyone to become or to work as a butcher. *Id.* at 69.

[92] *Id.* at 81.

[93] *Id.*

[94] *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 68, 70, 72.

[95] *Id.* at 73.

in *Dred Scott v. Sandford*[96] fifteen years earlier, that a person "of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States,"[97] was reversed by the first sentence of the 14th Amendment. This observation set the stage for its discussion of the Privileges or Immunities Clause:

> [T]he distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.98

Using a distinction between federal and state citizenship, *The Slaughter-House Cases* interpreted the Privileges or Immunities Clause to be only intended as a protection for rights associated with the former.[99] Its reasoning hinged on the lack of a reference to state citizenship in the Clause.[100]

The Court completed its analysis with an examination of federal versus state civil rights and, if differences affect the result, whether the latter can be transferred to the former for enforcement.[101] *The Slaughter-House Cases* limit federal rights to those specifically enumerated in the Bill of Rights,[102] as well as a smattering of "implied guarantees," such as the right to make claims against the government and access to navigable waterways, land offices, and courts.[103] The opinion states that more expansive civil rights, especially those deemed fundamental, "have always been held to be the class of rights which the State governments were created to establish and secure."[104] By this demarcation, the Court concluded the Privileges or Immunities Clause did

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[96] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party).

[97] *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 73.

[98] *Id.* at 73–74.

[99] *Id.* at 74 ("Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.").

[100] *Id.*

[101] *Id.* at 74–77.

[102] *Id.* at 77.

[103] *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 79.

[104] *Id.* at 76.

not protect the economic rights claimed by the butchers.[105] Finally, the Court held the Civil War revealed the danger to the Union "in the capacity of the State organizations to combine and concentrate all the powers of the State" against the federal government, and the 14th Amendment was insufficient to support the butchers' constitution claims against a state law.[106] Instead, the Court concluded that although the Reconstruction Amendments imposed "additional limitations" on the States (and gave more power to the federal government), "the regulation of civil rights—the rights of person and of property" must be left to State governments.[107] As a result, the butchers had their chance before the Louisiana Supreme Court to claim whatever civil rights might exist under Louisiana law, and the United States Supreme Court would not disturb that court's interpretation of its law.[108] More important, there was no place in the dispute for federal law.

Justice Field wrote the main dissent, which was longer than the majority opinion and was joined by three Justices. Justices Bradley and Swayne also wrote dissents. The dissents can be broadly summarized with three points. First, the state's police powers do not include authority to create a monopoly with exclusive privileges.[109] Second, the 14th Amendment imposed on the states a bar against laws that limit its citizens' practice of a trade.[110] Third, the majority erred in limiting the Privileges or Immunity Clause.[111] Significantly, they did not dispute the majority's description of why the Reconstruction Amendments were enacted, nor construct a significant explanation about the framers' intent to protect individual economic interests through the 14th Amendment.[112]

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[105] *Id.* at 80 ("[W]e are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration.").

[106] *Id.* at 82.

[107] *Id.*

[108] *Id.*

[109] *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 87–88 (Field, J., dissenting)

[110] *See id.* at 101–10 (Field, J., dissenting).

[111] *See id.* at 116–19 (Bradley, J., dissenting).

[112] In contrast with the majority, Justice Bradley's dissent took a different view of the events leading to the Civil War. *E.g.*, *id.* at 123 (Bradley, J. dissenting):

> The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every

At most, the dissenting Justices posited a disagreement about the boundaries of the police power exercised through a corporate entity. They certainly did not state or suggest that the majority's cabining of the Privileges or Immunity Clause would harm Black Americans, women, or other groups without suffrage protections. For those reasons, it is reasonable to question if the majority should have rested on its initial police power conclusions while deferring extensive discussion of the Reconstruction Amendments for another case and parties more directly impacted by post-Civil War law.

1. Critique and Post-Script

This article is not the place to review the many formal criticisms[113] (or the occasional defense)[114] of *The Slaughter-House Cases*. They generally start from not-unreasonable assumptions that the parties were who they were, they made arguments that had to be addressed head-on, and the timing was set in motion by the Louisiana legislature. These assumptions, however, may not be as solid as once thought. Recent scholarship illuminates the great discretion a court of final jurisdiction, especially the Supreme Court, might use when addressing petitions for review, summary adjudications, and the details of how and why the Court reached a particular result.[115] Thus, we start

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> portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.

[113] *See, e.g.*, Lucile Lomen, *Privileges and Immunities Under the Fourteenth Amendment*, 18 WASH. L. REV. & STATE BAR J. 120, 124 (1943) ("Though broad in its terms, the Amendment was conceived for the protection of the negro. It would have been little aid to him to have the privileges and immunities created by national laws protected against state impairment while all of the fundamental rights 'which belong to him as a free man and a free citizen'—those rights which affected his whole manner of living—were left to the unfettered discretion of the local governments."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 418 (The Found. Press 1978) ("Whatever goals the framers set for the fourteenth amendment, the Supreme Court quickly dismantled them;" citing the *Slaughter-House Cases*); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 627 (1994) ("[T]hree of the Court's significant legal conclusions have been rejected and 'everyone' agrees the Court incorrectly interpreted the Privileges or Immunities Clause.").

[114] *See, e.g.*, Kevin C. Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 648–50 (2000).

[115] H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 216–90 (Harvard Univ. Press 1991) (discussing how in reviewing petitions for review, justices take into account whether the merits decision will support or detract from their view of the law); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIB. 1, 4–5 (2015) (arguing that non-merits decisions can have a subtle but significant effect, particularly on lower courts); STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 274–79 (1st ed. 2023) (discussing how the Supreme Court makes significant rulings on the shadow docket to advance or delay cases on the merits docket) ("[L]egitimacy turns upon the Court's ability to explain itself, then the rise of the shadow docket is anathema to that understanding."). Supreme Court justices in the 1800's might not have had the same procedural devices to affect the agenda and direction of constitutional doctrine, but there were

from the perspective that (1) the framing of issues was not absolutely dictated by the parties and (2) the Court could have directed case resolution, on procedural or substantive grounds, to a different conclusion.

The starting point is the Reconstruction Amendments themselves. What motivated Congress to submit them to the States? Was there concern that the Privileges and Immunities Clause in Article IV, Section 2, of the Constitution, *without* the Reconstruction Amendments, had been applied indiscriminately or too broadly? Separate from slavery, were there concerns that the Bill of Rights was being applied too forcefully against state actions? Generally, the answers to such questions are "no." In the majority opinion, Justice Miller described his view of the principal reasons for the Reconstruction Amendments, which are disconnected from the Privileges or Immunities Clause analysis:

> [W]hatever auxiliary causes may have contributed to bring about [the civil] war, undoubtedly the overshadowing and efficient cause was African slavery.
>
> In that struggle slavery, as a legalized social relation, perished. . . . But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the ***thirteenth article of amendment*** of that instrument. . . .
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> . . . .
>
> . . . [N]otwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom

devices—which are unavailable today—to promote a particular position in advance of the merits decision. For instance, Justice Bradley described in detail his views on the constitutionality of the Act while sitting as a circuit judge. *See* Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 653 (C.C.D. La. 1870) (stating that the 14th Amendment of the Constitution was intended to protect the citizens in some fundamental privileges and immunities of an absolute character).

> was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.
>
> They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.
>
> . . . [Statesmen decided] something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the ***fourteenth amendment***, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.
>
> . . . [Former slaves] were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.
>
> Hence the ***fifteenth amendment*** . . . .
>
> 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.[116]

If the purpose of the Reconstruction Amendments was to secure constitutional protection against the slavery of Black Americans, and to provide the same civil rights in slave-owning states that were now refusing to

[116] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 68–71 (1872) (emphasis added).

treat former slaves as equal citizens, what role did the Court assign to the framers' intent in the 14th Amendment analysis? Absolutely none.[117] The approach used by the majority in *The Slaughter-House Cases* was both a flawed analysis and a missed opportunity.

The first Supreme Court case to address a Reconstruction Amendment should have involved Black Americans. At a minimum, the Court could have based its analysis on Louisiana's police power to enact health and safety grounds.[118] Our conclusion stands on pragmatic legal grounds as well as the need for the highest court to respect the development of constitutional law by non-judicial means. Interpretation of a new statute, let alone a recently ratified Amendment to the Constitution, requires judicial officers to examine how the language applies to people and circumstances envisioned by the drafters. The wording of the opinion, and the rationales employed for one interpretation versus another, are directly influenced by the facts and application of the law to those facts in the lower courts. Without the facts, the law becomes a sterile, intellectual exercise.

It was not enough for the Court to explain in the majority opinion the purpose of the Reconstruction Amendments. It needed to show the other branches of government and the people that it applied to circumstances involving Black Americans. By choosing a case involving only white citizens and argued by former Justice Campbell who resigned from the Court to serve as assistant secretary of war for the Confederacy,[119] the Court telegraphed how the Amendments would be used and, in doing so, diminished the goals for which Congress submitted them to the States.

Some will argue the Court can only adjudicate what is before it and cannot reorder their sequence to meet other analytical needs. Even if that contention is accepted, it does not explain why *The Slaughter-House Cases* majority makes no effort to integrate the purpose of the Reconstruction Amendments with its analysis of the 14th Amendment. Instead, it relies on cases about privileges and immunities that have nothing to do with slavery or

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[117] *See also* CURRIE, *supra* note 40, at 350 ("What [Justice Miller in the majority in the *Slaughter-House Cases*] failed to do . . . was to read the privileges or immunities clause broadly enough to accomplish what he acknowledged to be the purpose of the amendment; . . . Miller seems to have selected an interpretation particularly difficult to reconcile with the history of the amendment.") (footnotes omitted).

[118] *See* LABBÉ & LURIE, *supra* note 74, at 211.

[119] *See also id.* at 107–09 (noting Justice Campbell was reportedly opposed to secession and left only because of loyalty to the South, he did not renounce his views after the Civil War). Campbell may have left the Court with a "heavy heart," but his arguments to the Court in *The Slaughter-House Cases* contended the Civil War was the result of a mere "difference of opinion" in the interpretation of the Constitution about the authority of the states to control lives. Brief for Plaintiffs in Error at 5, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) (Nos. 60–62), 1872 WL 15120. Further, the Union soldiers "had almost sacrificed their lives in the cause of human liberty and freedom from oppression of caste and monopoly." *Id.* at *10. There is no mention or recognition of the post-war activities against former slaves.

the denial of civil rights to subjugated people.[120] This oversight is all the more puzzling because the majority knew, and said, that in:

> [A]ny 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.[121]

The Court did not observe the minimum analytical precondition it set for itself.

B. *Bradwell v. Illinois, 83 U.S. 130 (1873)*

For most of the first century in the United States, the practice of law was uniquely a male endeavor.[122] In 1869, Arabella Mansfield was admitted to the Iowa bar, becoming the first woman admitted to practice law in the United States.[123] In 1870, Ada Kepley graduated from Chicago University Law School, a predecessor to Northwestern University, becoming the first woman

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[120] *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 75–78 (citing Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) ("[C]itizens of each State shall be entitled to all privileges and immunities of citizens in the several states.")); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 40 (1867) (holding a statute imposing a tax upon the passenger for the privilege of leaving the State conflicts with the Constitution of the United States); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 179 (1868) (finding that a corporation is not a citizen under Privileges or Immunities Clause); Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (holding state statute is not unconstitutional because "oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them").

[121] *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 72.

[122] *See generally* HEDDA GARZA, BARRED FROM THE BAR: A HISTORY OF WOMEN AND THE LEGAL PROFESSION (1996) (discussing women's attempts to become practicing attorneys); *see also id.* at 33 (noting Margaret Brent, "administrator for the estate of Maryland's governor Leonard Calvert in the 1640s, is often referred to as the first (and only) woman attorney on the American continent before the American Revolution," adding that "for over 200 years" that followed there is no record of a practicing woman attorney in the country).

[123] *See* Mary L. Clark, *The Founding of the Washington College of Law: The First Law School Established by Women for Women*, 47 AM. U. L. REV. 613, 622 n.45 (1998) (citing Ada M. Bittenbender, *Women in Law*, *in* WOMAN'S WORK IN AMERICA 218, 221 (Annie Nathan Meyer ed., 1891)); *see also* Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 349 (Iowa 2013) (describing statutory interpretation analysis directing "that masculine terms include feminine words" resulting in Mansfield becoming "the first woman to secure a state law license in the United States") (citing RICHARD LORD ACTON & PATRICIA NASSIF ACTON, TO GO FREE: A TREASURY OF IOWA'S LEGAL HERITAGE 132 (Iowa State Univ. Press 1st ed. 1995)); Roxann Ryan, *Recognizing Iowa's Pioneering Women Lawyers*, 84 THE IOWA LAW., no. 1, Feb. 2024, at 12, 12.

law school graduate in the United States.[124] In 1872, Howard University School of Law graduate Charlotte E. Ray was admitted to the District of Columbia bar, becoming the first female Black American admitted to practice law in the United States.[125]

Myra Colby Bradwell sat for, and passed, the Illinois bar examination in 1869 and sought to become the first woman to be admitted to that state's bar.[126] The Illinois Supreme Court, however, denied her application, declaring "[t]hat God designed the sexes to occupy different spheres of action."[127] Under Illinois law, as "a married woman," Bradwell "would be bound neither by her express contracts, nor by those implied contracts, which it is the policy of the law to create between attorney and client."[128] Bradwell sought review of that ruling.

In the United States Supreme Court, Bradwell was represented by Matthew Hale Carpenter.[129] Along with being a United States Senator from Wisconsin at the time,[130] Carpenter had been counsel in other high-profile cases, including *Ex parte Garland*, 71 U.S. 333 (1866), a post-Civil War "test-oath" case, *Ex parte McCardle*, 74 U.S. 506 (1868), where he argued the Supreme Court lacked jurisdiction to review a President's acts, and *The Slaughter-House Cases*, representing the Crescent City Company, arguing the 14th Amendment applied only to Black Americans.[131]

Carpenter's argument for Bradwell was limited to the Privileges or Immunities Clause of the 14th Amendment, and did not rely on Due Process or Equal Protection.[132] Carpenter presented the issue as "a narrow matter: Can a female citizen, duly qualified in respect of age, character, and learning, claim, under the fourteenth amendment, the privilege of earning a livelihood by practicing at the bar of a judicial court?"[133] Noting the Supreme Court had declared that "*all avocations, all honors, all positions, are alike open to every one, and*

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[124] *See* Clark, *supra* note 123, at 621 n.42 (citing CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 50 (Univ. of Ill. Press 2d ed. 1993) and J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944 84 n.222 (Univ. of Pa. Press 1993)).

[125] *See* Clark, *supra* note 123, at 621 n.42 (citing SMITH, JR., *supra* note 124, at 84 n.222).

[126] *In re* Bradwell, 55 Ill. 535, 535 (Ill. 1869) ("At the last term of the court, Mrs. Myra Bradwell applied for a license as an attorney at law, presenting the ordinary certificates of character and qualifications.").

[127] *Id.* at 535–36, 539.

[128] *Id.* at 535–36.

[129] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 133 (1872).

[130] *See* E. BRUCE THOMPSON, MATTHEW HALE CARPENTER: WEBSTER OF THE WEST 100 (State Hist. Soc'y of Wis. 1954).

[131] *Id.* at 89–103.

[132] *Bradwell*, 83 U.S. (16 Wall.) at 133–35.

[133] *Id.* at 133 (citation omitted).

that in the protection of these rights all are equal before the law"[134] and that attorneys "are officers of the court, admitted as such by its order, *upon evidence of their possessing sufficient legal learning and fair private character,*"[135] Carpenter argued that:

> [T]he conclusion is irresistible, that the profession of the law, like the clerical profession and that of medicine, is an avocation open to every citizen of the United States. And while the legislature may prescribe qualifications for entering upon this pursuit, they cannot, under the guise of fixing qualifications, exclude a class of citizens from admission to the bar.[136]

Regardless of what Illinois law provided, the 14th Amendment's Privileges or Immunities Clause "opens to every citizen of the United States, male or female, Black or white, married or single, the honorable professions as well as the servile employments of life; and that no citizen can be excluded from any one of them."[137]

Bradwell's argument was the only position asserted in the Supreme Court; no opposing brief was filed by the Illinois legislature, judiciary, or bar association,[138] suggesting those potential respondents were not concerned that the Supreme Court would reverse. And in fact, the Supreme Court affirmed the Illinois decision 8–1.[139] Justice Miller, primary author of *The Slaughter-House Cases*, wrote the majority opinion in *Bradwell* (issued the day after *The Slaughter-House Cases* opinion) joined by four other Justices. Justice Miller viewed the issue as simple and easy: Bradwell was a citizen of Illinois and the Privileges or Immunities Clause of the 14th Amendment "has no application to a citizen of the State whose laws are complained of."[140] Although "there are privileges and immunities belonging to citizens of the United States, . . . the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States."[141] *The Slaughter-House Cases* were "conclusive of the present case," showing that:

> [T]he right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal

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[134] *Id.* at 134 (quoting Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 321–22 (1866)).

[135] *Bradwell*, 83 U.S. (16 Wall.) at 134–35 (quoting *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378 (1866)).

[136] *Bradwell*, 83 U.S. (16 Wall.) at 135.

[137] *Id.* at 137.

[138] *Id.* at 137 (noting "[n]o opposing counsel").

[139] *Id.* at 137, 139, 142.

[140] *Id.* at 138.

[141] *Id.* at 139.

> government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.[142]

Justice Bradley, joined by Justices Swayne and Field, concurred in the judgment.[143] His concurrence started by stating that Bradwell's claim "assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life."[144] This assumption, he quickly added, was wrong:

> On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[145]

Justice Bradley continued:

> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. ***The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.*** And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[146]

Adding that the legislature could prescribe regulations "founded on nature, reason, and experience for the due admission of qualified persons to professions," Justice Bradley concluded that Illinois' decision did not abridge "any of the privileges and immunities of citizens of the United States."[147]

Chief Justice Chase, who "was too sick to explain his reasons in an opinion" and would die three weeks later,[148] was the lone dissenter in *Bradwell*,

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[142] *Bradwell*, 83 U.S. (16 Wall.) at 139.

[143] *Id.* at 139, 142 (Bradley, J., concurring).

[144] *Id.* at 140 (Bradley, J., concurring).

[145] *Id.* at 141 (Bradley, J., concurring).

[146] *Id.* at 141–42 (Bradley, J., concurring) (emphasis added).

[147] *Id.* at 142 (Bradley, J., concurring).

[148] STAHR, *supra* note 53, at 605, 649.

stating simply that he "dissented from the judgment of the court, and from all the opinions."[149]

1. Critique and Post-Script

The analysis in *The Slaughter-House Cases* dictated the result in *Bradwell*. The argument in *Bradwell* was limited to the Privileges or Immunities Clause in the 14th Amendment, which the *Slaughter-House Cases*—issued the day before *Bradwell*—negated. Given *The Slaughter-House Cases* and *Bradwell*, advocates would later turn to the Due Process clauses of the 5th and 14th Amendments as well as the Equal Protection clause of the 14th Amendment.[150]

Given his opinion in *The Slaughter-House Cases*, that Justice Miller would write the majority in *Bradwell* using the same approach is not surprising. The striking difference between the cases is in the fervent, lengthy, and pointed dissents in *The Slaughter-House Cases* and the acquiescence by those same Justices in *Bradwell*. Justice Field's primary dissent in the *Slaughter-House Cases* spanned many pages and more than 10,000 words. In *Bradwell*, however, Justice Fields joined Justice Bradley in declaring that "the law of the Creator" was that "woman are to fulfil the noble and benign offices of wife and mother."[151] Justice Swayne, whose *Slaughter-House Cases* dissent was the shortest, also joined Justice Bradley in *Bradwell*. And Justice Bradley himself, who invested more than 4,500 words in his *Slaughter-House Cases* dissent favoring white New Orleans butchers, had no problem quickly concluding in *Bradwell* that the Constitution allowed states to exclude women from the practice of law. In doing so, Justices Field, Bradley, and Swayne appeared far more convinced that the white male butchers in New Orleans should be able to practice their trade without obstruction than women should be allowed to practice law at all.

A few months after the decision, women's rights activist Susan B. Anthony wrote to Bradwell criticizing her attorney, stating his argument "was such a school boy pettifogging speech—wholly without a basic principle—but still the courts are so entirely controlled by prejudice and precedent we

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[149] *Bradwell*, 83 U.S. (16 Wall.) at 142 (Chase, C.J., dissenting).

[150] *See generally* Reed v. Reed, 404 U.S. 71 (1971) (striking, as violating the Equal Protection clause, a law affording males a preference over females to administer estates on rational basis review); Craig v. Boren, 429 U.S. 190 (1976) (addressing gender-based distinctions on the minimum age to purchase 3.2 percent alcohol beer, later adopted an intermediate scrutiny review for such challenges); *see also* Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 852 (2011) ("In the years after *Craig v. Boren*, the Court accepted and applied an intermediate scrutiny standard to sex classification in a number of cases.").

[151] *Bradwell*, 83 U.S. (16 Wall.) at 141–42 (Bradley, J., concurring).

have nothing to hope from them but endorsement of dead men's actions."[152] Some press reports viewed the challenge as being doomed from the start. Ten days after the decision, one article derisively declared:

> It is a rather ludicrous illustration of the character of the woman movement, that a prominent female agitator should have seized the opportunity to prove the fitness of her sex for professional life by taking for her first important case one which she must have known the court would decide against her, unless she either supposed that they were likely to be influenced by personal solicitation and clamor, or else that they were all gone crazy.[153]

And Myra Bradwell and women practicing law? "With President Rutherford B. Hayes' approval of the 'Lockwood Bill' in 1879, women were permitted to practice [law] in the United States federal court system. Not long after, Belva Lockwood became the first woman to argue before the United States Supreme Court."[154] In 1890, nearly two decades after *Bradwell*, the Illinois Supreme Court on its own motion approved her original application to practice law.[155] Two years later, the United States Supreme Court admitted Bradwell to practice before that Court.[156] Both orders, however, stated that her official admission to the bars was in 1869.[157] Bradwell was then ill with cancer, dying in 1894 when she was 63 years old.[158]

C. Minor v. Happersett, 88 U.S. 162 (1875)

Along with the effort to gain licensure as professionals, in the 1870s, significant efforts were underway to secure the right to vote for women. Long before the 1920 ratification of the 19th Amendment guaranteeing women the right to vote, some western states and territories guaranteed women the right

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[152] Jane M. Friedman, *Myra Bradwell: On Defying the Creator and Becoming a Lawyer*, 28 VAL. U. L. REV. 1287, 1294 (1994) (quoting Letter from Susan B. Anthony to Myra Bradwell (July 30, 1873)); *see also* Louisa S. Ruffine, *Civil Rights and Suffrage: Myra Bradwell's Struggle for Equal Citizenship for Women*, 4 HASTINGS WOMEN'S L.J. 175, 197 (1993) ("Carpenter [Bradwell's attorney] sent Bradwell a copy of the [United States Supreme Court] brief only after he submitted it to the court. The brief appears to have been hastily written, and was logically unpersuasive.") (citation omitted).

[153] Friedman, *supra* note 152, at 1287 (quoting *The Supreme Court Righting Itself*, 16 THE NATION, Apr. 24, 1873, at 280).

[154] Claire G. Schwab, *A Shifting Gender Divide: The Impact of Gender on Education at Columbia Law School in the New Millennium*, 36 COLUM. J.L. & SOC. PROBS. 299, 304 (2003) (footnotes omitted).

[155] *See* JANE M. FRIEDMAN, AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL 30 (1993).

[156] *Id.* As seen firsthand by one of the authors, the United States Supreme Court Courthouse has a display highlighting Bradwell and the case (photographs on file with authors).

[157] *See id.*

[158] *Id.* at 11, 30.

to vote.[159] Elsewhere in the United States, however, litigation sought to secure that right. *Minor v. Happersett*[160]—a case with many similarities to *Bradwell*—was one of those cases.

In 1872, Virginia L. Minor, a leader of the women's suffrage movement in Missouri, attempted to register to vote.[161] When "registering officer" Reese Happersett refused, Minor and her husband attorney Francis Minor filed a legal challenge.[162] Francis Minor apparently was a plaintiff because his joinder was "required by the law of Missouri."[163] Happersett justified his refusal to register Virginia Minor to vote "on account of her sex," citing Missouri's Constitution and law limiting the vote to "every male citizen."[164] The Minors argued these provisions violated the United States Constitution.[165]

The Minors lost in the trial court and appealed, and lost, in the Missouri Supreme Court. By that time, Virginia Minor was represented by her husband Francis Minor, who in 1869 had published a pamphlet advocating the legality of women's suffrage based on the 14th Amendment.[166] "Francis Minor was the clerk of the Missouri Supreme Court, but was removed or voluntarily stepped down" a week before the Missouri Supreme Court heard Virginia Minor's case.[167] Noting that, before the adoption of the 14th Amendment, states could "limit the right to vote . . . to the male sex," the Missouri Supreme Court concluded the 14th Amendment did not change that conclusion.[168] The 14th Amendment, the court found, "was to compel the former slave States to give these freedmen [former slaves] the right of suffrage," and "it

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159 *See generally* REBECCA J. MEAD, HOW THE VOTE WAS WON: WOMAN SUFFRAGE IN THE WESTERN UNITED STATES, 1868–1914 (N.Y. Univ. Press 2004) (highlighting the enfranchisement of female citizens in Western states in contrast to the rest of the United States); *see also* Samuel A. Thumma, *Women's Suffrage in the Western States and Territories*, 59 JUDGES' J. 27, 27 (2020) (discussing how Western states broadly accepted women's suffrage before many Eastern states and the 19th Amendment).

160 Minor v. Happersett, 53 Mo. 58 (Mo. 1873).

161 *Id.* at 62.

162 *Id.*

163 *Minor v. Happersett*, VIRGINIA & FRANCIS MINOR MEM'L INST., https://virginiaminor.com/documents-pertaining-to-minor-v-happersett [https://perma.cc/3WUU-ANYS].

164 *Minor*, 53 Mo. at 58, 62.

165 *Id.* at 62.

166 *See* Lauriane Lebrun, *7 Suffragist Men and the Importance of Allies*, TURNING POINT SUFFRAGIST MEM'L (July 7, 2015, 8:43 PM), https://suffragistmemorial.wordpress.com/2015/07/07/7-suffragist-men-and-the-importance-of-allies [https://perma.cc/A3KW-UXZY]; *see also* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 164 (1874) (discussing the procedural history of the case).

167 *Virginia Minor and Women's Right to Vote*, NAT'L PARK SERV. (Sept. 30, 2022), https://www.nps.gov/jeff/learn/historyculture/the-virginia-minor-case.htm [https://perma.cc/8V52-DJF7].

168 *Minor*, 53 Mo. at 63.

was not intended that females, or persons under the age of twenty-one years, should have the right of suffrage conferred on them."[169] Minor sought review of that ruling.

The reporter's summary of argument in the United States Supreme Court states that Francis Minor "went into an elaborate argument, partially based on what he deemed true political views, and partially resting on legal and constitutional grounds," but that was largely based on various aspects of the Privileges or Immunities Clause of the 14th Amendment.[170] As in *Bradwell*, Minor's argument was the only position asserted in the Supreme Court; no opposing brief was filed by the State of Missouri, or any of its officials or subdivisions,[171] suggesting those potential respondents were not concerned that the Supreme Court would reverse.

Chief Justice Morrison R. Waite, just appointed to the Court, wrote the opinion unanimously affirming the Missouri Supreme Court:

> The question is presented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone.[172]

The opinion then provided substantial discussion about what it meant to be a "citizen" and how a person could become a citizen, starting with the statement that "[t]here is no doubt that women may be citizens" and variously referring to the Constitution, the Articles of Confederation, Congressional action "as early as 1790" and diversity jurisdiction.[173] The opinion then stated that the ratification of the 14th Amendment "prohibited the State, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption."[174]

Stating the 14th Amendment "did not add to the privileges and immunities of a citizen," *Minor* declared that "[i]t is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted."[175] *Minor* concluded that suffrage was not "coextensive with the citizenship of the

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[169] *Id.* at 64–65.

[170] *Minor*, 88 U.S. (21 Wall.) at 164.

[171] *Id.* at 164 (noting "*[n]o opposing counsel*").

[172] *Id.* at 165.

[173] *Id.* at 166–70.

[174] *Id.* at 170.

[175] *Id.* at 171.

States at the time" the Constitution was adopted.[176] "Women were excluded from suffrage in nearly all the States by the express provision of their constitutions and laws."[177] "No new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her [the new State's] admission."[178] *Minor* went on to uncouple citizenship and the right to vote, adding (with examples) that "citizenship has not in all cases been made a condition precedent to the enjoyment of the right to suffrage."[179]

Approaching its conclusion, *Minor* suggested the issue was quasi-frivolous:

> Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.[180]

Minor added that "[i]f the law is wrong, it ought to be changed; but the power for that is not with us."[181] Then, in a curious final sentence, which Chief Justice Waite attempted to clarify in a different case a year later, *Minor* concluded that: "Being unanimously of the opinion that the Constitution of the United States *does not confer the right of suffrage upon any one*, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we AFFIRM THE JUDGMENT."[182]

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[176] *Minor*, 88 U.S. (21 Wall.) at 176.

[177] *Id.*

[178] *Id.* at 177.

[179] *Id.* ("Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.").

[180] *Id.* at 177–78.

[181] *Id.* at 178.

[182] *Minor*, 88 U.S. (21 Wall.) at 178 (emphasis added).

1. Critique and Post-Script

Minor has been called "devastating,"[183] and meant that "hopes for a judicial solution to the woman suffrage question were dashed."[184] *Minor* also prompted continued efforts in the territories and states leading to the 19th Amendment.[185]

> The territories of Wyoming and Utah already allowed women to vote, and Wyoming came into the union as a state in 1890 with no voting restrictions placed upon women. In 1893, Colorado allowed women the vote; in 1896, Idaho, and Utah came into the union in that year with no voting restrictions against women. The State of Washington allowed women to vote in 1910, followed by California in 1911 and Oregon, Arizona and Kansas in 1912. These nine states were the only states to allow woman suffrage before the ratification of the 19th Amendment in 1920.[186]

Minor cites no cases from the Supreme Court or any other court. It was one of the first opinions written by Chief Justice Waite, who is delicately described as leaving "a less memorable legacy than many Chief Justices."[187] The next year, in *United States v. Reese*, Chief Justice Waite attempted to explain *Minor*'s final sentence that the Constitution did not confer the right to vote on anyone, albeit without citing *Minor*:

> The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. [188]

When attorney Francis Minor died in 1892,[189] Susan B. Anthony wrote: "No man has contributed to the woman suffrage movement so much

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[183] Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2178 (1993).

[184] *Virginia Minor and Women's Right to Vote*, *supra* note 167.

[185] LeeAnn Whites, *The Tale of Two Minors: Women's Rights on the Border*, *in* WOMEN IN MISSOURI HISTORY: IN SEARCH OF POWER AND INFLUENCE 101, 101 (LeeAnn Whites et al. eds., Univ. of Mo. Press 2004) (noting that, after *Minor*, "[u]ndaunted, Virginia Minor redoubled her efforts, organizing, lobbying, and petitioning the state legislature for the vote for women until the end of her life some twenty years later").

[186] *Virginia Minor and Women's Right to Vote*, *supra* note 167.

[187] *Chief Justice Morrison R. Waite*, JUSTIA, https://supreme.justia.com/justices/morrison-r-waite [https://perma.cc/9RUQ-87KS].

[188] United States v. Reese*,* 92 U.S. 214, 217 (1875).

[189] Whites, *supra* note 185, at 117

valuable constitutional argument and proof as Mr. Minor."[190] In 1893, the National American Woman Suffrage Association received a resolution, at Anthony's request, commemorating his death, noting that Francis Minor "was the first to formulate the doctrine" that the Constitution provided "women with the elective franchise" at a convention in 1869 "presided over by his distinguished wife, Virginia L. Minor."[191]

Virginia Minor died in 1894, more than 25 years before the passage of the 19th Amendment guaranteeing women the right to vote.[192] Her will gave half of her estate to two nieces and half to Susan B. Anthony, "in gratitude for the many thousands she has expended for woman."[193] In 2023, the Minors were featured in a book by Nicole Evelina, *America's Forgotten Suffragists Virginia and Francis Minor*.[194]

D. *United States v. Cruikshank, 92 U.S. 542 (1875)*

The decisions in *The Slaughter-House Cases*, *Bradwell*, *Minor*, and *United States v. Cruikshank* came at a critical period in the direction of the country. Republican Ulysses S. Grant was reelected President in 1872, defeating Horace Greeley, candidate of the Democratic and Liberal Republican Parties, which opposed Reconstruction and advocated return of full rights and authority to those who supported the Confederate succession.[195] In several southern states, the rights of Black Americans to assemble, vote, and hold office were under political and physical attack by the Ku Klux Klan and other white supremacist organizations. The resolve of the northern states, especially the Republicans, to ensure freed slaves were accorded safety and the rights of citizenship was continuously tested. Congress responded with Enforcement Acts.[196] Although prosecutions under these statutes were at

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[190] *Honors*, VIRGINIA & FRANCIS MINOR MEM'L INST., https://virginiaminor.com/honors [https://perma.cc/WVK5-33R9].

[191] NAT'L AM. WOMAN SUFFRAGE ASS'N, PROCEEDINGS OF THE TWENTY-FIFTH ANNUAL CONVENTION OF THE NATIONAL AMERICAN WOMAN SUFFRAGE ASSOCIATION 26 (Harriet Taylor Upton ed., 1893), https://babel.hathitrust.org/cgi/pt?id=hvd.rslfc2&view=1up&seq=36&q1=minor (on file with authors) (last visited May 18, 2023).

[192] Whites, *supra* note 185, at 101.

[193] *Id.* at 117.

[194] *See generally* NICOLE EVELINA, AMERICA'S FORGOTTEN SUFFRAGISTS: VIRGINIA AND FRANCIS MINOR (2023) (describing how Virginia and Francis Minor made a lasting impact on the women's rights movement by bringing the issue before the Supreme Court).

[195] Robert W. Burg, *Amnesty, Civil Rights, and the Meaning of Liberal Republicanism, 1862–1872*, 4 AM. NINETEENTH CENTURY HIST. 29, 47–50 (2003).

[196] *See, e.g.*, Enforcement Act of 1870, ch. 114, 16 Stat. 140; Enforcement Act of 1871, ch. 22, 17 Stat. 13.

first effective,[197] violence surrounding elections continued to be a threat, especially in communities where many registered Republicans were freed slaves and Democrats were Confederate veterans and their supporters.[198]

Colfax, a small town in northern Louisiana, was the site of the worst racial violence during Reconstruction in what became known as the Colfax Massacre.[199] The dispute started over the 1872 contested elections for county judge and sheriff. Competing candidates claimed victory and jockeyed for recognition with state officials who were contending with their own disputed elections; each side's supporters took turns occupying the small county courthouse. The governor eventually recognized the Republican candidates as the winners. The opposing "Fusion" coalition vowed to place their candidates in office by force.[200] On Easter Sunday 1873, a heavily armed paramilitary group of more than 300 white men on horses retook the courthouse after a brief battle with a smaller group of mostly Black Republicans, including women and children. After they agreed to leave the courthouse, a "Fusion" leader was shot, either by one of his own men or a Black defender. The paramilitary group then killed somewhere between 75 and 150 of the Black defenders. The paramilitary then fled.

The United States Attorney for Louisiana charged 98 defendants in federal court under the Enforcement Act.[201] In 1874, nine defendants were tried in New Orleans. Of the nine, there were several acquittals and a hung jury for the remainder. A second trial was quickly scheduled, but with a twist: Supreme Court Justice Joseph P. Bradley, sitting as a circuit judge, came to New Orleans to assist the original trial judge at the beginning of the retrial.[202]

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[197] *The Enforcement Acts of 1870 and 1871*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm [https://perma.cc/3WGJ-9NSN] ("While the Force acts and the publicity generated by the joint committee [investigating status in southern states] temporarily helped put an end to the violence and intimidation, the end of formal Reconstruction in 1877 allowed for a return of largescale disenfranchisement of African Americans.").

[198] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 454–59 (Ann Finlayson ed., 1st ed. 1988).

[199] *Id.* at 437.

[200] CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 65–72 (1st ed. 2008).

[201] *Id.* at 126.

[202] Although it is unusual in modern practice for a jury trial to have two trial judges, it was permissible in the 1870s. *Id.* at 162. One ostensible purpose was to set up conflicting legal rulings between the judges, which could guarantee an appeal to the Supreme Court. *Id.* Trial Judge William Burnham Woods was an accomplished professional who had already succeeded in political, legal, and military activities. President Grant appointed him in 1869 to the Fifth Circuit and President Rutheford B. Hayes appointed him to the United States Supreme Court, where he began in 1881 and served until his death in 1887. He had been admitted to the Bar twenty-two years earlier, served in multiple political offices, joined the Union army, and was appointed to the Supreme Court in 1880. *See generally William Burnham Woods*, THE SUP. CT. OF

Defendants moved to dismiss, and the court heard argument. The next day, Justice Bradley concluded the motions could not be decided before or during trial; however, if there were convictions, the defendants could then move to vacate the judgment.[203] Justice Bradley would be leaving the trial, but would return to help the trial judge decide a post-trial challenge.[204] The jury acquitted the defendants of murder, but convicted three of conspiracy to violate the victims' civil rights.

Justice Bradley had been working on a draft opinion and, at about the time the jury returned the guilty verdicts, he cabled the trial judge to say that he would mail the opinion in several days. When the United States Attorney objected to any ruling made in absentia, Justice Bradley came to New Orleans and read his ruling in the courtroom. The ruling struck the indictment as defective under a narrow reading of the Enforcement Act's scope involving crimes actionable under state law.[205] The trial judge disagreed with Bradley, which guaranteed an appeal heard by the Supreme Court.

Justice Bradley immediately returned to Washington, D.C., directing that copies of his ruling be sent to President Grant's Cabinet members, Congressional leaders, newspapers, and law journals.[206] The effect was immediate. The United States Attorney General told the prosecutor that he did "not think it is advisable" to prosecute white terrorism until the Supreme

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OHIO & THE OHIO JUD. SYS., https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/mjc/interest/grand-concourse/william-burnham-woods [https://perma.cc/7WAT-6DT3] (highlighting the background of Judge Woods).

Justice Bradley's decision to assist Judge Woods, at least intermittently, may have been part of his circuit riding responsibilities. They knew each other, including evidence that Justice Bradley had advised Judge Woods, in an earlier case about mob violence against Black Americans, that voter intimidation, especially where state action was missing, violated federal law. LANE, *supra* note 200, at 210–11; they also joined in a circuit court opinion in *The Slaughter-House Cases*. *See* Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 649 (C.C.D. La. 1870); early in the trial, it became clear that defense counsel sought Justice Bradley's participation to encourage application of *The Slaughter-House Cases* as a defense against charges that could have been brought in a state prosecution. LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 142 (Oxford Univ. Press 2008); *see also* LANE, *supra* note 200, at 194–97 (describing defense counsel's efforts to recruit Justice Bradley).

[203] LANE, *supra* note 200, at 197.

[204] "I will hold myself ready to come and sit with Judge Woods and pass upon the matter, on a motion for arrest of judgment." *Id.*

[205] United States v. Cruikshank, 25 F. Cas. 707, 714–16 (C.C.D. La. 1874) (Bradley, Circuit Justice).

[206] LANE, *supra* note 200, at 213.

Court ruled.[207] Killings of Black Americans and politicians were attributed to Justice Bradley's ruling.[208]

The Supreme Court heard oral argument in March 1875.[209] After a reported false start with another Justice, Chief Justice Waite apparently re-assigned the opinion to himself.[210] He issued the unanimous opinion a year later,[211] affirming Justice Bradley's ruling following very similar reasoning.[212]

The *Cruikshank* opinion is remarkable for what it omitted. There is no mention about the murders of scores of Black Americans by an all-white armed paramilitary group acting at the direction of candidates for office who rejected the state's decision recognizing their opponents' electoral victories.[213] To have found the grand jury's indictment inadequate without discussing the specifics alleged in the indictment was more than a little surprising, unless the only consideration was the constitutionality of the Enforcement Act. In fact, however, the Court did not strike the Enforcement Act as unconstitutional. This begs the question: why were the facts not discussed and did their omission have a material effect on the Court's conclusions? Moreover, the opinion did not mention that one of the Justices sat as a judge at the beginning of the trial and then participated in the Supreme Court's resolution.

As a general proposition, a challenge to the sufficiency of an indictment rests on, for example, whether a defendant is fairly apprised of the charges and can assess if a prior acquittal or conviction provides a defense to the charges.[214] A defendant's allegation of surprise or confusion about the actual

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[207] *Id.* at 214.

[208] KEITH, *supra* note 202, at 149 ("Sheriff Frank Edgerton . . . wrote, less than two weeks before his death, '[to defy the armed militia] would only be a second Colfax, thanks to Justice Bradley.'") (citing M. H. Twitchell, *The Coushatta Massacre—The Preliminaries of the Blood Work—Letters from the Victims—A Statement from Senator Twitchell*, *in* H.R. REP. NO. 261, pt. 3, at 773 (1875)).

[209] LANE, *supra* note 200, at 230.

[210] *Id.* at 244.

[211] United States v. Cruikshank, 92 U.S. 542, 548 (1875). Justice Clifford is listed as dissenting, but he actually concurred in the result "for reasons quite different from those given by the court." *Id.* at 559 (Clifford, J., dissenting).

[212] The opinion even copies examples listed in Bradley's circuit court ruling. *Compare* United States v. Cruikshank, 25 F. Cas. 707, 713 (C.C.D. La. 1874) *with Cruikshank*, 92 U.S. at 550 (utilizing the same example of assault on a federal officer).

[213] Justice Bradley's opinion is also silent on the facts. *See Cruikshank*, 25 F. Cas. at 708–09.

[214] *See* Russell v. United States, 369 U.S. 749, 763–64 (1962) ("[W]hether the indictment 'contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet,"' and, secondly, 'in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'") (citations omitted).

charges could be sufficient. This was not the case in *Cruikshank*. Because the Court did not explain its omission of the facts, we can only surmise the reason.

The tensions involving race and politics were as high in 1876 as they had been sixteen years earlier.[215] Individual and loosely organized violence was a constant threat in the south.[216] The possibility of another civil war was not theoretical. It is not surprising that the Court was loath to recite undisputed facts, such as the killing of between 75 and 150 former slaves by hundreds of white armed militia members. Although the massacre was covered in major newspapers,[217] Court discussion would have made such facts more permanent and given them credibility. Even assuming the Court was motivated to avoid causing additional tensions, the question remains how that affected the decision-making process, as well as the precedential value of the case.

Undisputed facts establish a starting point and provide the foundation on which the legal analysis rests.[218] Without case facts, a decision becomes solely a contest of ideas. In *Cruikshank*, the Court took on two daunting tasks involving Black Americans: interpreting the meaning of the Reconstruction Amendments and the permissible scope of the Enforcement Act. That it chose to do so in the context of a procedural argument ensured much shadow boxing. In such a case, the legal analysis tends to bounce back and forth between constitutional principles and procedural technicalities. That is, it is often unclear from the decision whether a statute violates the constitution, or the prosecutor made an indictment drafting error that can be corrected in another case. The lack of facts sowed confusion.

Several examples are illustrative. After concluding that the right to vote was protected by state law, and that the 15th Amendment only prohibited racial discrimination affecting voting rights, the Court suspected "race was the cause of the hostility" (the Colfax Massacre) but it was not alleged.[219] Had

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Russell also noted that until 1872 common law guided this determination, but Congress enacted general legislation barring technical defects "which shall not tend to the prejudice of the defendant." *Id.* at 762–63 (citation omitted). *Cruikshank* makes no reference to this statute despite its seeming applicability. *See, e.g.*, *Cruikshank*, 92 U.S. at 559 ("[C]ounts are too vague and general."); *id.* at 569 (Clifford, J., concurring) ("Such a vague and indefinite description of a material ingredient of the offence is not a compliance with the rules of pleading in framing an indictment.").

[215] FONER, *supra* note 198, at 575 ("[S]ixteen years after the secession crisis, Americans entered another winter of political confusion, constitutional uncertainty, and talk of civil war.").

[216] *See, e.g.*, *id.* at 570–71 (discussing the Louisiana political murders and Hamburg South Carolina Massacre, respectively).

[217] LANE, *supra* note 200, at 22.

[218] *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006) (discussing the importance of the case-or-controversy requirement, which "plays a critical role" in the federal judicial system in ensuring the adversarial system).

[219] *Cruikshank*, 92 U.S. at 556.

the Court included the facts, it would have been apparent this "defect" was at best technical and at worst wrong.

On a strictly constitutional matter, *Cruikshank* held that Congress had no power to punish murder or conspiracy to murder because such authority rested exclusively with the states.[220] Rather than directly addressing the permissible scope of the Enforcement Act, the Court concluded that certain counts were "objectionable."[221] While this may be characterized as inartful drafting, failing to state clearly that the murder of recently freed slaves could not be a federal crime under the 14th Amendment, and why, tended to obscure its meaning and impact.[222]

1. Critique and Post-Script

The lack of facts hid what was becoming the major undoing of Reconstruction goals. State officials could not or would not enforce laws protecting Black Americans. It is beyond the scope of this article to address the federalism issues inherent in the Court's construction of the Reconstruction Amendments, such as whether the Constitution limits federal jurisdiction when state law has no effect. What is clear, however, is the failure in *Cruikshank* to discuss what occurred factually was a disservice to a country that needed an unblinking view of the facts. The long-standing effects of *Cruikshank*'s failure to grapple with the facts can be seen as recently as two years ago in Colfax.

In 1921, local politicians and judges, along with many dignitaries, unveiled a monument at the Colfax courthouse honoring the three white men who died in the initial skirmish, stating "In Loving Remembrance" to the "Memory of the Heroes" (named on the monument) "Who fell in the Colfax Riot fighting for White Supremacy April 13, 1873." Fifty years later, in 1971, the State of Louisiana posted a sign in Colfax stating: "On this site occurred the Colfax riot in which three white men and 150 negroes were slain. This event on April 13, 1873, marked the end of carpetbag misrule in the South."[223]

With further reflection and research, and notwithstanding these events in 1921 and 1971, in April 2023, descendants of the white militiamen and the Black defenders unveiled a memorial to the victims of the Colfax Massacre

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[220] *Id.* at 553–54.

[221] *Id.* at 553.

[222] *See generally* LANE, *supra* note 200 (explaining the meaning of stripping federal jurisdiction over murder of former slaves was clear to the participants in Cruikshank).

[223] *Id.* at 259–60.

and to provide an historical account of the events.[224] William Cruikshank's great grandsons attended the unveiling. One of them, Douglas Cruikshank, said he was happy to be there because "I'm just thinking it's a wonderful idea to share the truth."[225]

E. The Presidential Election of 1876

The 2000 Presidential Election ended with the Supreme Court's decision in *Bush v. Gore*,[226] leading to Republican George W. Bush becoming President, by a 271 to 266 Electoral College vote, over Democrat Albert A. Gore, Jr.[227] Close as that was, the Presidential Election of 1876 was far closer. The 1876 election was not resolved until "the early morning hours of Friday, March 2, 1877," two days before the inauguration, when the president pro tempore of the Senate "proclaimed the Republican ticket of" Rutherford B. Hayes and William A. Wheeler won, by a 185 to 184 Electoral College vote, over the Democratic ticket of Samuel J. Tilden and Thomas A. Hendricks.[228] That outcome was determined by an unprecedented 15-member Electoral Commission made up of five partisan Senators, five partisan Congressmen and five Supreme Court Justices. The Electoral Commission's decisions turned on votes by Justice Bradley, purportedly President Grant's third choice as a nominee to the Court and not the first choice to serve on the Commission.

The impact of the economic Panic of 1873 was still felt during the 1876 election. Along with resulting in the New York Stock Exchange closing for ten days, the Panic of 1873 resulted in many jobs being lost, nearly 90 (of the country's approximately 360 railroads) declaring bankruptcy and about 18,000 businesses failing in 1873, 1874, and 1875.[229] By 1876, unemployment was 14 percent and "[f]alling farm prices, wage cuts, and unemployment

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[224] Faimon A. Roberts III, *150 Years After White Mob Slaughtered Blacks in Rural Louisiana, New Monument Tells True Story of Colfax Massacre*, NOLA.COM (Apr. 13, 2023), https://www.nola.com/news/150-years-after-white-mob-slaughtered-blacks-in-rural-louisiana-new-monument-tells-true-story/article_a1037952-d8cc-11ed-9dfd-3726f0d0e831.html [https://perma.cc/4ZUY-4AV3]; Esther Schrader, *'Long Overdue': Black Men Killed in Infamous Colfax Massacre Commemorated on New Monument*, S. POVERTY L. CTR. (Apr. 28, 2013), https://www.splcenter.org/news/2023/04/28/colfax-louisiana-massacre-memorial [https://perma.cc/FFA8-L7AK].

[225] Roberts III, *supra* note 224.

[226] Bush v. Gore, 531 U.S. 98 (2000).

[227] *See generally* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2008) (discussing the court challenges to the 2000 Presidential election).

[228] DAVISON, *supra* note 57, at 40–41.

[229] PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 117 (Cambridge Univ. Press 2014).

generated deep labor unrest."[230] Under these clouds, the 1876 Presidential Election was hard-fought.

Democrat Tilden clearly won the popular vote, receiving 4,288,191 votes, with Republican Hayes receiving 4,033,497.[231] There were 38 states at the time and, on December 6, 1876— "the day fixed by law for the electors to gather in their respective states and cast their votes"—34 states did so "without controversy."[232] "But in Florida, South Carolina, Louisiana, and—at the last minute—Oregon—the question was 'Which electors?'"[233] Numerous efforts in the states and in Congress did not answer that question.[234] To compound things, Congress was divided, with a Democratic majority in the House, and Republican majority in the Senate.[235] The Senate considered various possible solutions, including "a proposed constitutional amendment authorizing the Supreme Court to decide the contest."[236]

By January 1877, no winner had been declared and, behind closed doors, members of Congress "were considering the idea of a commission composed of members of the House, the Senate, and the Supreme Court."[237]

> On January 13, a version of the [commission] plan was leaked to the public. It called for a commission composed of five House members, five Senate members, and five members from the Supreme Court. It was the choice of the justices which proved the greatest stumbling block. It was simply assumed that the congressional Republicans on the commission would vote for Hayes, and the congressional Democrats would vote for Tilden. ***It was therefore obvious that the final decision would be made by the votes of the members of the Court.***[238]

On January 29, 1877, Congress enacted the Electoral Commission Act of 1877,[239] creating "an Electoral Commission, composed of five congressional Democrats, five congressional Republicans, and five members

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[230] *Id.* at 117–18.

[231] *Election Years: 1876*, THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/elections/1876 [https://perma.cc/8HXK-KFBQ].

[232] REHNQUIST, *supra* note 54, at 103–04.

[233] *Id.* at 104.

[234] *See id.* at 104–14.

[235] *See id.* at 115.

[236] *Id.* at 114.

[237] *Id.* at 115.

[238] REHNQUIST, *supra* note 54, at 115 (emphasis added).

[239] *See* Benjamin C. Block, *Bradley, Breyer,* Bush *and Beyond: The Legal Realism of Legal History*, 15 U. FLA. J.L. & PUB. POL'Y 57, 65 (2003) (citing Act of Jan. 29, 1877, Pub. L. No. 44–37, 19 Stat. 227 (uncodified)).

of the United States Supreme Court, to make what was in effect a final determination as to which returns from Florida, South Carolina, Louisiana, and Oregon would be counted."[240] How, then, to pick the Justices to serve on the Commission?

The original proposal had the names of the six senior Justices placed in a hat, "one name would be drawn, and the remaining five would serve."[241] Tilden, who "disliked the whole idea" of the Commission, opposed this approach, stating, "I may lose the Presidency, but I will not raffle for it." [242] Hayes also opposed the Commission, but there was a broad recognition of the need for some type of resolution.[243] Chief Justice Waite asked not to be considered for the Commission, "and in any event would not have been selected because he was thought to be too close to his fellow Ohioan Hayes."[244] Ultimately, a House Committee recommended that the five senior members of the Supreme Court serve: Justices Clifford and Field ("thought to be sympathetic to the Democrats"); Justices Miller and Swayne ("thought to be sympathetic to the Republicans") and Justice Davis ("who was regarded as an Independent"). [245] So, it would seem, Justice Davis would have the non-partisan, and perhaps deciding, vote.

Republicans argued Justice Davis was "to all intents and purposes, a Democrat", while Democrats countered he was a true independent.[246] In the end, Congress named two Justices favored by Republicans and two by Democrats and those four Justices would name the fifth, with "an unspoken understanding that this fifth justice would be Davis." [247] The four partisan Justices were Justices Clifford and Field (Democrats) and Justices Miller and Strong, not Swayne (Republicans).[248] Justice Davis, however, would not be the fifth, ironically for political reasons.

Appointed to the Supreme Court in 1862 by President Lincoln, Justice Davis remained close to Lincoln, serving as administer of his estate.[249] Urged

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[240] REHNQUIST, *supra* note 54, at 5; *see also* § 2, 19 Stat. at 228 (uncodified) (describing how the Electoral Commission is to be constituted).

[241] REHNQUIST, *supra* note 54, at 115.

[242] *Id.* (footnote omitted).

[243] *Id.* at 116.

[244] *Id.* at 221.

[245] *Id.* at 116–17.

[246] *Id.* at 118.

[247] REHNQUIST, *supra* note 54, at 118–19.

[248] *See id.* at 119, 156 (stating the reason for the apparent change from Justice Swayne to Justice Strong "is not clear," but may be attributed to "reasons of geographic diversity" or Justice Swayne's "expressed desire to avoid serving").

[249] *See id.* at 135, 139.

to run for President in 1872, Justice Davis declined.[250] However, in January 1877, the Illinois legislature met to elect a United States Senator from Illinois, as was the process before the 17th Amendment was ratified in 1913.[251] After more than 35 ballots failed to yield a majority, the Illinois legislature elected Justice Davis to serve as the state's Senator.[252] Although he would not join the Senate until inauguration day (after resolution of the Presidential Election), Justice Davis declined to serve on the Electoral Commission. As a result, a different fifth Justice was needed, "but another with Davis' independent status was unavailable. All of the remaining members had been appointed by Republican presidents."[253] So, then, who would be the fifth?

On January 30, 1877, the four Justices named to serve on the Commission met to select the fifth Justice to serve.[254] One news report noted that three of the four thought that Justice Davis (despite his election to the Senate) would be a good fifth, with Justice Miller purportedly stating Justice Davis's election to the Senate "had to some extent disqualified him."[255] That same report recounts different perspectives by one or more of the four about the wisdom of selecting Justice Davis, Justice Bradley, or Justice Ward Hunt as the fifth.[256] The next day, the four elected "Justice Bradley to be the fifth" Justice on the Commission, with the news report stating the decision "was made very promptly and with entire unanimity."[257] So, after some apparent disagreement and leaks about which of their colleagues they wanted (which might have caused some tension during their Court service), the five Justices who would serve on the Commission were set. In an editorial from the time, the *New York Sun* stated that "[t]he almost absolute decision of the Presidential question is left to" Justice Bradley, described as "a partisan to whom his party [has] never looked in vain."[258] The *Chicago Tribune* relayed "the conventional wisdom" that Republicans "'fear that Bradley is more lawyer than Republican, and the Democrats fear that he is more Republican than lawyer.'"[259]

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[250] *See id.* at 140.

[251] *Landmark Legislation: The Seventeenth Amendment to the Constitution*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/senate-and-constitution/seventeenth-amendment.htm [https://perma.cc/TMH3-W8AZ].

[252] REHNQUIST, *supra* note 54, at 140–41.

[253] *Id.* at 142.

[254] *See id.* at 155–58.

[255] *Id.* at 157–58 (quoting *The Choice of the Judges*, N.Y. SUN, Jan. 30, 1877).

[256] REHNQUIST, *supra* note 54, at 158–59.

[257] *Id.* at 159.

[258] *Id.* at 159.

[259] Block, *supra* note 239, at 68 (quoting CHI. TRIB., Feb. 14, 1877, *quoted in* CHARLES FAIRMAN, FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877, *in* VII HISTORY OF THE SUPREME COURT OF THE UNITED STATES 6–9 (Paul A. Freund & Stanley N. Katz eds., Supp. 1988)).

The Electoral Commission—five partisan Senators, five partisan Congressmen and five Justices, with Justice Clifford serving as President—then undertook proceedings to decide the disputed election.[260] David Dudley Field, Democrat representative from New York and brother of Commission Member Justice Stephen Johnson Field, was a chief advocate for the Democrats.[261] After considerable procedural and substantive wrangling, the Electoral Commission found that (1) Hayes' electors in Florida were lawfully chosen; and (2) Hayes' certificates in Louisiana, Oregon, and South Carolina were valid.[262] The Commission votes for those findings each were 8–7, with the eight Republicans (including Justice Bradley) voting for, and the seven Democrats voting against, and members of the Court voting 3–2 in favor of Hayes each time.[263] Efforts in Congress to override these determinations failed, aided by a purported agreement sometimes called the "Compromise of 1877," where southern Democrats agreed to support the result in exchange for Hayes (as President) withdrawing federal troops from Southern states, particularly South Carolina, Florida, and Louisiana.[264] The Electoral Commission's votes gave Hayes a 185–184 Electoral College win and, on March 4, 1877, there was a "peaceful" inauguration of President Hayes.[265]

1. Critique and Post-Script

By some significant reckoning, given the "Compromise of 1877," President Hayes' inauguration "marked the formal end of reconstruction."[266] The reverberation of the end of Reconstruction has a significant impact even now, nearly 150 years later. Hayes served one term, keeping a pledge that he would not run for re-election; one biographer wrote that the Hayes' Administration "is best described as a time of turmoil and transition, of tragedy and triumph."[267]

The Justices who served on the Commission may have avoided a more significant constitutional crisis for the country if the impasse had not been

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[260] REHNQUIST, *supra* note 54, at 163–79.

[261] Block, *supra* note 239, at 69 n.68; Rehnquist, *supra* note 54, at 165.

[262] *See* REHNQUIST, *supra* note 54, at 175–77.

[263] *See id.*; Block, *supra* note 239, at 70; *see also generally* PROCEEDINGS OF THE ELECTORAL COMMISSION APPOINTED UNDER THE ACT OF CONGRESS APPROVED JANUARY 29, 1877, ENTITLED "AN ACT TO PROVIDE FOR AND REGULATE THE COUNTING OF VOTES FOR PRESIDENT AND VICE-PRESIDENT, AND THE DECISIONS OF QUESTIONS ARISING THEREON, FOR THE TERM COMMENCING MARCH 4, A. D. 1877." (1877) [hereinafter PROCEEDINGS OF THE ELECTORAL COMMISSION] (providing a detailed description of the Election Commission's proceedings and findings).

[264] DAVISON, *supra* note 57, at 43–44.

[265] JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 211 (The Univ. of Chi. Press 3rd ed. 2013).

[266] *Id.*

[267] DAVISON, *supra* note 57, at 235.

resolved. Not surprisingly, whether they did so properly depends upon perspective, often based on the outcome. To their credit, the Commission members issued written "remarks" setting forth their views of the issues presented,[268] including Justice Bradley explaining his decisive votes.[269] But as noted more than a century ago, the Commission was closely divided with the votes based on "party lines; upon every important question the vote was invariably eight to seven."[270]

Noting that "[i]t was quite natural for Congress to turn to the justices of the Supreme Court as members of the Electoral Commission," and that the judiciary "was chosen by default," Chief Justice Rehnquist questioned "what would be the consequences for the individual justices who would serve on the Commission, and for the Court as an institution?"[271] Perhaps not surprisingly, the 8-7 votes favoring Republican Hayes "were roundly denounced by the Democrats and heartily praised by the Republicans."[272] Justice Bradley, in particular, was "singled out . . . for abuse"[273] and "was believed to have changed his vote at the last minute at the behest of Republican friends."[274] "Bradley was 'threatened with bodily injury . . . even to the taking of his life'; he was 'inundated by a flood of vulgar and threatening communications,'" and reflecting the era's more casual approach to security, "the government finally placed his house under guard."[275] A disappointed Democrat Senator from Missouri declared on the Senate floor that Justice Bradley's name "'will go down . . . after ages covered with equal shame and disgrace,'" adding "never will it be pronounced without a hiss from all good men in this country."[276] "The harassment got so bad that Bradley took the unusual step of publishing a public explanation of his actions, although it did little to mute the criticism."[277] The passage of time has done "little to settle the controversy over Justice Bradley's role."[278] Nor

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[268] *See* PROCEEDINGS OF THE ELECTORAL COMMISSION*, supra* note 263.

[269] *Id.* at 259–67. These proceedings, running more than 300 pages, capture in significant detail the information considered by and the deliberations of the Electoral Commission. *See generally id.* (providing a detailed description of the Election Commission's proceedings and findings).

[270] PAUL LELAND HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876 336 (1906).

[271] REHNQUIST, *supra* note 54, at 119.

[272] *Id.* at 180.

[273] Block, *supra* note 239, at 70.

[274] REHNQUIST, *supra* note 54, at 180.

[275] C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 162 (Oxford Univ. Press 1991) (footnote omitted).

[276] *Id.* (footnote omitted).

[277] Block, *supra* note 239, at 71 (quoting a letter published in the New Jersey *Advertiser* on September 5, 1877).

[278] *Id.* at 72; *see also id.* at 72–73 (providing additional examples).

were the other Justices on the Commission immune from criticism: "Justices Strong and Miller were hung in effigy. Justices Clifford and Field were attacked in the press for refusing to attend President Hayes' inauguration."[279]

The participation of Justices on the Commission seems to have been assumed, at least by members of Congress. But three Justices—Chief Justice Waite, Justice Davis (perhaps for unique reasons), and apparently Justice Swayne—declined to participate. There is no reason why the Court as a whole could not, for good reason, have refused to participate. Moreover, the Justices who participated in the Commission were selected based on their political affiliations. "None of these justices were picked for their legal learning, but for their partisan backgrounds."[280] The decisions by the Commission, perceived (at least) to have been based on partisan politics, could not have furthered the perception that Justices were to decide legal issues presented to them based on the law, not politics. "The Court's involvement and the impact on the 1876 election 'only blurred further the distinction between politics and the rule of law.'"[281]

The participation of five Justice on the Commission (of eight sitting Justices, given Justice Davis's resignation from the Court) also left very little Court to consider any legal action if advocates could find a way to bring the issue to the Court. It is true that Justices "serving in extrajudicial capacities neither began nor ended with the Electoral Commission of 1877."[282] But those instances, ranging from Chief Justice Jay negotiating a Treaty to Chief Justice Warren leading the Commission investigating President Kennedy's assassination,[283] do not involve a majority of the Justices simultaneously serving in the same non-judicial endeavor to determine who would become President. Unlike other extrajudicial service by the Justices, in the first part of 1877, there would have been almost no Court remaining to consider any legal challenge arising out of the election, given five Justices served on the Electoral Commission issuing the decision that would have been challenged and Justice Davis had resigned, leaving, at most, three remaining Justices to consider any such legal challenge.

It is significant that there has been no counterpart to the five Justices participating in the Commission before or since. It may be that the Justices were willing to participate to prevent an even more significant Constitutional crisis. But this non-judicial participation is an unprecedented example of actions by Justices resulting in significant criticism of the Court as an institution with implications reverberating ever since. More than 125 years

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279 *Id.* at 73 n.96 (citation omitted).

280 REHNQUIST, *supra* note 54, at 221–22.

281 COTTER, *supra* note 58, at 186–87 (quoting PAUL KENS, THE SUPREME COURT UNDER MORRISON R. WAITE 1874–1888 xii (The Univ. of S.C. Press 2010)).

282 REHNQUIST, *supra* note 54, at 222.

283 *Id.* at 222–46.

after the election, titles describing the undertaking include Roy Morris, Jr.'s, book *Fraud of the Century: Rutherford B. Hayes, Samuel Tilden and the Stolen Election of 1876* and Chief Justice Rehnquist's book *The Centennial Crisis: The Disputed Election of 1876*.

More broadly, why did the Justices deem it prudent and proper to serve on a Commission, in a non-judicial capacity, with partisan Senators and Congressmen to resolve a hotly disputed election to pick the equally partisan leader of the Executive branch of government? Why did Justices representing a majority of the Court determine that that their non-judicial involvement with partisan members of Congress could properly select the partisan President? There is no textually demonstrable constitutional commitment to such a process. Instead of serving as members of the Supreme Court, the Justices took off their robes, stepped away from the bench, and served on a partisan Commission to resolve, as Commission members and not as Justices, the closest Presidential election in history. In doing so, instead of stepping away from partisan politics, they stepped right in it. The Court lost an opportunity to enhance its stature as a non-political, or perhaps apolitical, entity striving to apply the law in the best way it can, with long-lasting negative perceptions as a result.

F. Pace v. Alabama, 106 U.S. 583 (1883)

After the Civil War, marriage and sex between members of different races was portrayed as a great danger to white Americans.[284] It was used to influence reconstruction political campaigns and as a justification for racial violence.[285] An interracial relationship is sometimes called "miscegenation" to make it sound like a legal or classical term, and prohibitory statutes are often called anti-miscegenation laws.[286] In fact, miscegenation was a word created by two anonymous journalists who wrote a scientific sounding pamphlet in 1863 promoting the "superiority" of mixed races.[287] The authors were anti-abolitionists who hoped to derail President Lincoln's 1864 re-election campaign by portraying the pamphlet as a treatise he and his supporters would endorse. It is more than coincidental that the Court upheld a law described by a phony term created to support white supremacy.

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[284] A common depiction involved Black men and white women. *See, e.g.*, Sidney Kaplan, *The Miscegenation Issue in the Election of 1864*, 34 J. NEGRO HIST. 274, 319 (1949) ("[B]eastly doctrine of the intermarriage of black men with white women."); LANE, *supra* note 200, at 83.

[285] NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 14 (Univ. of Ill. Press Illini Books ed. 1990) ("Of all interracial proscriptions, none was more fiercely held by whites and none more frequently transgressed through white initiative than the taboo on interracial sex. . . . The unthinkable horrors of 'race degeneracy' justified the most barbarous forms of interracial violence and made the injunction against 'amalgamation' the first law of white supremacy.").

[286] *See, e.g.*, Note, *Constitutionality of Anti-Miscegenation Statutes*, 58 YALE L.J. 472, 473 (1949).

[287] *See generally* Kaplan, *supra* note 284, at 277 (describing the pamphlet and the journalists' creation of the "new word" to present their argument).

Unlike the expectations of some white citizens, Black Americans in 1865 apparently had little interest in interracial marriage, except as a general expression of equal civil rights with white citizens.[288] Interracial marriage and sex was prohibited in a majority of the states, and in a significant number such relations constituted a crime. This was especially true in states whose Black population was more than four percent of the total population.[289] The number of states prohibiting interracial marriage and sex actually increased after the Civil War.[290] In 1883, the Supreme Court addressed Alabama's statute.[291] It was a new statute (enacted in 1876) because, before Reconstruction, Alabama had no clear prohibition against interracial marriage.[292] In fact, at that time, interracial marriage in Alabama was not uncommon.[293]

Tony Pace, a Black American man, and Mary Ann Cox, a white woman, were indicted and convicted for "*liv[ing] together in a state of adultery or fornication*."[294] They were each sentenced "to two years' imprisonment in the State penitentiary."[295] On appeal, the convictions and sentences were affirmed by the Alabama Supreme Court.[296] Although acknowledging that adultery or fornication by members of the same race had a less serious punishment, the Alabama court found that as long as members of differing races received the same punishment for the same offense, the convictions did not violate the 14th Amendment.[297] It also explained that a significant increase in the range of penalty (possible six-month jail term if the couple was of the same race versus mandatory two to seven years in prison if the couple consisted of "any white person and any negro") was required because adultery or fornication by an interracial couple presented greater dangers:

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288 FONER, *supra* note 198, at 321.

289 RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 219 (1st ed. 2003).

290 Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1344 (1998).

291 The Alabama Code in *Pace v. Alabama* prohibited intermarriage, adultery, and fornication between a white and Black person. Pace v. Alabama, 106 U.S. 583, 583 (1883). As discussed *infra* the couple prosecuted were not alleged to have been married. Nonetheless, there was no significant difference in how cases were prosecuted regardless of the defendants' marital status. *See* Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890–1934*, 20 L. & HIST. REV. 225, 232 (2002) (illustrating that prosecutions for miscegenation would take place under the same analytical and evidentiary frameworks as prosecutions for adultery and fornication).

292 Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 CHI.-KENT L. REV. 371, 375 (1994).

293 *Id.* at 373.

294 Pace v. Alabama, 69 Ala. 231, 232 (Ala. 1881).

295 *Pace*, 106 U.S. at 584.

296 *Pace*, 69 Ala. at 233.

297 *Id.* at 232.

> The evil tendency of the crime of living in adultery or fornication is greater when it is committed between persons of the two races, than between persons of the same race. Its result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government.[298]

Less than ten years earlier, the Alabama Supreme Court had reached almost the opposite conclusion. In *Burns v. State*,[299] the court reversed the conviction of a justice of the peace for officiating at the wedding of a white and Black couple. It concluded that marriage is a contract to be enjoyed by its citizens, which under the Reconstruction Amendments, included Black citizens. It explained no state could impose a blanket disability against its citizens on "so important a matter as marriage," which now included Black Americans under the 14th Amendment and accompanying federal legislation.[300] *Burns* offered no assistance to Pace and Cox, however, because it was overruled a few years after it was decided,[301] but it could have provided the Supreme Court with a constitutionally based alternative to the arguments and conclusions of the state court in *Pace*.

In a two-page unanimous opinion by Justice Field containing just three substantive paragraphs, the Supreme Court in *Pace v. Alabama* summarily rejected the constitutional claims by examining only whether the defendants of differing races receive the same criminal punishment.[302] Because both races were punished the same way, the opinion concluded there was not "any discrimination against either race."[303] Nor did the Court purport to provide any boundaries to the opinion; if a marriage between people of different races could be criminalized, what prevented states from criminalizing a contract between people of different races to sell land, or rent a house, or provide food or lodging? It did not consider the explicit role of race to be an

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[298] *Id.* Section 4189 of the Alabama Code of 1876 provided a greater punishment for adultery between a white and Black person than for adultery between people of the same race, as punishable under Section 4184 of the Alabama Code. *Id.*

[299] Burns v. Alabama, 48 Ala. 195 (Ala. 1872).

[300] *Id.* at 197–98.

[301] Green v. Alabama, 58 Ala. 190, 192, 194 (Ala. 1877). The Court found *Burns* to be "a very narrow and an illogical view of the subject." *Id.* at 192. Instead, it cited "natural law" that forbids the intermarriage of white and Black people. *Id.* at 194 ("[N]atural law . . . forbids their intermarriage and that amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures.") (citation omitted). Similar arguments were later raised in opposition to same-sex marriage cases. *See* KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY, 193–95 (N.Y. Univ. Press 2015).

[302] Pace v. Alabama, 106 U.S. 583, 585 (1883) ("[P]unishment of each offending person, whether white or black, is the same."). For a discussion of *Pace*, in the context of Chief Justice Waite's tenure, see CURRIE, *supra* note 40, at 387–90.

[303] *Pace*, 106 U.S. at 585, *overruled by* McLaughlin v. Florida, 379 U.S. 184 (1964).

enhancing factor in the severity of the punishment for the identical behavior. Nor did it discuss the explicit race-based grounds the Alabama Supreme Court used to justify the statutory scheme. Moreover, the Supreme Court would not address the "arbitrary or invidious discrimination" in such statutes for another eighty years.[304]

1. Critique and Post-Script

If the Court in *Pace* had recalled the purposes of the Reconstruction Amendments as recounted in *The Slaughter-House Cases*, it might not have reached a different result, but it would have exposed its reasoning to closer scrutiny in a shorter period. Instead, it sanctioned greater racial discrimination in intimate relationships than was present, at least in Alabama, ***before*** the Civil War. *Pace's* discriminatory effect increased in Alabama. In 1901, the prohibition on interracial marriage was incorporated into the Alabama Constitution: "The Legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro."[305] Alabama courts upheld the prohibition[306] until *Pace* was overruled in *McLaughlin v. Florida*[307] and *Loving v. Virginia*.[308] Although unenforceable, the Alabama Constitution's prohibition against interracial marriage did not end until 2000, when the voters annulled the provision.[309]

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304 *McLaughlin*, 379 U.S. at 191 ("[Racial classification] question is what *Pace* ignored and what must be faced here.").

305 ALA. CONST. of 1901, art. IV, § 102.

306 *See, e.g.*, Rogers v. Alabama, 73 So. 2d 389, 390 (Ala. Ct. App. 1954).

307 *McLaughlin*, 379 U.S. at 188 ("In our view, . . . *Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court.").

308 Loving v. Virginia, 388 U.S. 1 (1967). The Court's rejection of its prior holding was indirect; in rejecting Alabama's reliance on the "equal application" reasoning, it observed:

> "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.

Id. at 10 (citations omitted).

309 Ala. Const. art. IV, § 102 (2022); *see also* Jeremy W. Richter, *Alabama's Anti-Miscegenation Statutes*, 68 ALA. REV. 345, 364–65 (2015) ("Owing to the election results of November 7, 2000, Article IV, § 102 of the Constitution of Alabama of 1901 now reads: 'Miscegenation laws. The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro. This section has been annulled by Amendment 667.'").

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

Including *The Civil Rights Cases* in The Slump Cases might engender surprise, as the opinion has not been reversed in some respects.[310] We include it because Justice Harlan's solo dissent continues to resonate and as well as the majority's narrow view of the 14th Amendment, contrary to the intent of its drafters. It also provokes whether the Court was following popular sentiment in striking a statute that was no longer favored by the Reconstruction-weary (and often angry) population, except those people for whom it was intended to protect.

The Civil Rights Cases were five consolidated cases brought under the Civil Rights Act of 1875 involving the refusal to serve or accommodate Black Americans in public settings, such as a railroad "ladies" car, a theater seat, and a hotel room.[311] The cases were brought in federal courts in Kansas, California, Missouri, New York, and Tennessee.[312] In each case, the defendant prevailed, typically on a pretrial motion.[313] On appeal, the "primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand."[314]

This Civil Rights Act of 1875 was at least the third major attempt to protect Black Americans from the discrimination that was a regular part of their lives after slavery was abolished. The Act was passed by the 43rd Congress, which might be considered in modern times a lame duck Congress because the 1874 election resulted in Democrats regaining control of the House, and the 1875 Republican leaders wanted to preserve what remained of Reconstruction.[315] Although Black suffrage had been decided five years earlier, federal protection in the southern states by use of troops or the Freedmen's Bureau remained controversial. Equally significant was the question of "social" versus "political" rights, which was debated throughout the country because many northern states had laws limiting Black American access to educational and public settings. The Radical Republicans were in the minority in asserting Black Americans should be able to participate freely or equally in all spheres of communal life. But the majority passed a watered-down bill that avoided school segregation and limited enforcement to cases

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[310] City of Boerne v. Flores, 521 U.S. 507, 524 (1997) (recognizing the "remedial and preventive nature of Congress' enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment"); Federoff v. Geisinger Clinic, 571 F. Supp. 3d 376, 383 (M.D. Pa. 2021) (describing the limitation in the "*landmark* Civil Rights Cases") (emphasis added).

[311] The Civil Rights Cases, 109 U.S. 3, 4 (1883) ("These cases were all founded on the first and second sections of the Act of Congress, known as the Civil Rights Act, passed March 1st, 1875.").

[312] *Id.* at 3 (citing consolidated caption).

[313] *Id.* at 8.

[314] *Id.* at 8–9.

[315] FONER, *supra* note 198, at 554–56.

brought in federal court.[316] It was a bill that never would have made it out of the House of the in-coming Congress.

The main component of the Act was the first section, protecting "all persons . . . full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."[317] Justice Bradley, writing for the majority in *The Civil Rights Cases*, questioned whether the 14th Amendment gave Congress authority to legislate affairs among private citizens, including discriminatory acts that would be unconstitutional if required or permitted under state law.[318] He concluded the 14th Amendment did not authorize Congress "to create a code of municipal law for the regulation of private rights."[319] Rather, individuals harmed by other individuals only had a remedy, if any, under state law.[320]

Justice Bradley determined the 13th Amendment was equally unavailing because a violation of fundamental rights under slavery was different from a violation of "social rights," and that the 13th Amendment "merely abolishes slavery."[321] In telling dictum, Bradley voiced a not uncommon 1883 view of Reconstruction legislation, as well as a reconsideration of the limits of the Reconstruction Amendments:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances

[316] *Id.*

[317] *The Civil Rights Cases*, 109 U.S. at 9.

[318] *Id.* at 11 ("It is State action of a particular character that is prohibited.").

[319] *Id.*

[320] *Id.* at 17.

[321] *Id.* at 22, 25.

> and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery.[322]

The Civil Rights Cases held the Civil Rights Act of 1875 unconstitutional when applied to discriminatory acts by non-state actors.[323]

Justice John Marshall Harlan, who dissented, was an unlikely candidate to make a strong argument for a broad view of the Reconstruction Amendments and their authority for Congress to protect and promote former slaves. Although an advocate for the Union and a strong national government, he was born into a Kentucky slave-holding family, had supported slavery, and initially opposed the Reconstruction Amendments.[324] President Hayes nominated Harlan to the Court in 1877 as a southerner who might be more appealing to moderates of both parties after the acrimonious 1876 election.[325]

Justice Harlan's dissent immediately identified the problem, noting that the majority "opinion [rests] . . . upon grounds entirely too narrow and artificial. . . . [T]he substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."[326] He first reminded the Court that, when slavery was legal, Congress had implicit authority under the Constitution to legislate the return of slaves to their owners.[327] Harlan exhorted the Court to recall the Black Codes described in *The Slaughter-House Cases*, which were in obvious conflict with the purpose of freeing Black citizens from servitude and its badges, including protection from the "oppression of those who had formerly exercised unlimited dominion over him."[328] He also recognized the national assertion of authority was novel yet consistent with the purpose of the federal

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322 *Id.* at 25.

323 *The Civil Rights Cases*, 109 U.S. at 25–26.

324 *See generally* CANELLOS, *supra* note 50, at 36–52 (discussing the background of Harlan and his family).

> As a very young man, he had owned slaves and supported slavery right up through the Civil War. He was also on the record as having initially opposed the postwar amendments to the Constitution, maintaining that his state of Kentucky—which had painfully resisted the Confederacy—should be rewarded by getting to make its own decision on whether to free its slaves based on a popular vote.

Id. at 19–20.

325 *Id.* at 223–29 (stating President Hayes "leaned toward choosing a southerner" but Republican members of the Senate Judiciary Committee were skeptical of Harlan's commitment to the Reconstruction amendments, and only agreed after significant effort to convince them of the sincerity of his post-Civil War views).

326 *The Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).

327 *Id.* at 29–33 (Harlan, J., dissenting) (citing Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) and Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party)).

328 *The Civil Rights Cases*, 109 U.S. at 44 (Harlan, J., dissenting).

government to protect and enforce fundamental rights of citizenship.[329] Harlan focused on the quasi-governmental duties of actors who provide public services. In that respect, he implicitly argued social rights were not at issue. He distinguished the right of a person to decide with whom he will interact as critically different from the denial of public accommodations open to anyone with the money to pay for them.[330] Harlan made explicit the argument citizenship carries the right of common dignity, which then involved former slaves, but which implicitly pertains to everyone:

> At every step, in this direction, the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, 'for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot.' To-day, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination.[331]

Notwithstanding Justice Harlan's strong dissent, Justice Bradley, in the majority, made no attempt to engage the criticism or address the contradictions in his depiction of federalism with the pre-Civil War precedent that granted significant authority to the national government to protect the property rights of slave owners. The majority also largely ignored the intent of the framers of the Reconstruction Amendments to invest the national government with constitutional authority over the protection of individual rights in the original constitution. Instead, the majority opinion implicitly stands on the 1787 division of power between the states and the federal government where Congress might be "clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States."[332]

1. Critique and Post-Script

It would be speculation to consider what the Court would have said about the intent of the framers of the 14th Amendment. The Justices and the framers of the 14th Amendment were political, and temporal, contemporaries. They knew congressional opponents of a constitutional

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[329] *Id.* at 49 (Harlan, J., dissenting).

[330] *Id.* at 59–60 (Harlan, J. dissenting).

[331] *Id.* at 62 (Harlan, J., dissenting). For a discussion of *The Civil Rights Cases*, focusing on Justice Harlan's dissent in the context of Chief Justice Waite's tenure, *see* CURRIE, *supra* note 40, at 398–402.

[332] *The Civil Rights Cases*, 109 U.S. at 18.

amendment regularly described the most dramatic possible consequences of enactment, while supporters tended to minimize its impact. In many respects, it was easier to rely on formal constitutional theories rather than grapple with the intent of Congress in proposing the amendments and the import of the state ratification proceedings. It also leads to whether *The Civil Rights Cases* reflected political realism that the Act would not be used and, if it was employed, courts and juries would not apply it as written. Had it become a dead letter? More important, did it affect the Court's reasoning? Like engaging the counter-factual of considering the framers' intent, we are unable to answer the question.

One week after *The Civil Rights Cases* opinion, Frederick Douglass spoke about it in Washington, D.C. His critique of the Court's duty is as relevant today as it was in 1883. It is difficult to conclude the Court met its duty, as described by Douglass, in *The Civil Rights Cases*.

> Now, when a bill has been discussed for weeks and months, and even years, in the press and on the platform, in Congress and out of Congress; when it has been calmly debated by the clearest heads, and the most skillful and learned lawyers in the land; when every argument against it has been over and over again carefully considered and fairly answered; when its constitutionality has been especially discussed, pro and con; when it has passed the United States House of Representatives, and has been solemnly enacted by the United States Senate, perhaps the most imposing legislative body in the world; when such a bill has been submitted to the Cabinet of the Nation, composed of the ablest men in the land; when it has passed under the scrutinizing eye of the Attorney-General of the United States; when the Executive of the Nation has given to it his name and formal approval; when it has taken its place upon the statute-book, and has remained there for nearly a decade, and the country has largely assented to it, you will agree with me that the reasons for declaring such a law unconstitutional and void, should be strong, irresistible and absolutely conclusive.[333]

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[333] Frederick Douglass, Address Before the Civil Rights Mass Meeting at Lincoln Hall, Washington, D.C. (Oct. 22, 1883), *in* PROCEEDINGS OF THE CIVIL RIGHTS MASS-MEETING HELD AT LINCOLN HALL, OCTOBER 22, 1883: SPEECHES OF HON. FREDERICK DOUGLASS, AND ROBERT G. INGERSOLL, at 6, https://www.loc.gov/item/mss1187900440 [https://perma.cc/A8WP-LZSU].

H. Ping v. United States, 130 U.S. 581 (1889)

Sometimes called the "*Chinese Exclusion case*,"[334] *Ping v. United States*[335] is an exception to other Slump Cases in that, at least on the surface, it addressed international issues. Textually addressing Congress' treaty and immigration powers, *Ping* is included here for how it characterized the dispute, the language the opinion uses, and what the opinion failed to address.[336] In 1844 and 1858, the United States and China entered into treaties about, among other things, travel between the countries, with new articles added in 1868.[337] An 1881 supplement allowed the United States to "regulate, limit or suspend"—but "not absolutely prohibit" —"the coming of Chinese laborers to the United States."[338] This supplement provided that "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."[339]

In 1882, tightening immigration even further, Congress enacted the Chinse Exclusion Act, which "provided a ten-year suspension of immigration of Chinese laborers."[340] The Act originally provided that the exclusion did not apply to Chinese citizens in the United States on November 17, 1880, or who arrived within 90 days after passage of the Act. An 1884 amendment required a Chinese citizen seeking to remain in the United States to provide a government issued "certificate containing [certain] particulars" about their presence in the country on November 17, 1880, or within 90 days after passage of the Act;[341] a Chinese citizen possessing such a certificate had a right "to return to and reenter the United States."[342]

In 1888, another amendment prevented Chinese citizens from re-entering the United States altogether, even if they had a certificate authorized by the 1884 amendment. Instead, as of October 1, 1888, "it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who

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334 Ting v. United States, 149 U.S. 698, 734 (1893) (Brewer, J., dissenting).

335 Ping v. United States, 130 U.S. 581 (1889).

336 Significant additional detail about the *Ping* decision and related issues can be found elsewhere, including in a symposium published in the Oklahoma Law Review. *See generally* Symposium, Chae Chan Ping v. United States*: 125 Years of Immigration's Plenary Power Doctrine*, 68 OKLA. L. REV. 3 (2015) (providing a more detailed analysis of *Ping* and its impact on immigration).

337 *Ping*, 130 U.S. at 590–93.

338 *Id.* at 596.

339 *Id.* at 596–97.

340 *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 465 (2005) (footnote omitted).

341 *Ping*, 130 U.S. at 597–98.

342 *Id.* at 598.

may not or hereafter be, a resident within the United States, and who shall have departed, or shall depart therefrom, and shall not have returned before [October 1, 1888] to return to, or remain in, the United States."[343] Stated simply, a Chinese citizen who held a certificate previously authorizing reentry in the United States was prohibited from doing so on or after October 1, 1888.

Chae Chang Ping, a Chinese citizen and "laborer by occupation," lived and worked in San Francisco for a dozen years.[344] In 1887, Ping returned to China "having in his possession a certificate, in terms entitling him to return to the United States" under the Chinese Exclusion Act as amended in 1884.[345] After spending a year in China, he sailed back to the United States, arriving in San Francisco on October 8, 1888.[346] Upon arrival, Ping presented "his certificate, and demanded permission to land."[347] He was refused entry, however, based "solely on the ground that under the act of Congress, . . . the certificate had been annulled and his right to land abrogated."[348] Stated simply, Ping came back to the United States eight days too late.[349]

Ping filed a habeas corpus petition[350] in the United States Circuit Court for the Northern District of California, which found the Act as amended barred him from reentering the United States.[351] The court rejected Ping's arguments that the Act was unconstitutional, both by divesting a vested right and being an ex post facto law, finding there was no contract between the United States and Ping, given "[t]he right of congress to legislate in such manner as to control and repeal stipulations of treaties . . . was clearly recognized," and because the law was not criminal and did not impose a penalty, it was not an improper ex post facto law.[352] The court concluded: "[a]s we faithfully enforced the laws, as we found them, when they were in favor of the Chinese laborers, we deem it, equally, our duty to enforce them

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[343] *Id.* at 599 (quoting Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504).

[344] *Ping*, 130 U.S. at 582.

[345] *Id.*

[346] *Id.*

[347] *Id.*

[348] *Id.*

[349] *Id.*

[350] Rose Cuison Villazor, Chae Chan Ping v. United States*: Immigration as Property*, 68 OKLA. L. REV. 137, 142 (2015) (stating that, technically, "[a] person by the name of Jaia Mon Tong filed a *habeas corpus* petition on behalf of Ping").

[351] *In re* Ping, 36 F. 431, 432 (C.C.N.D. Cal. 1888) ("There is no possible ground under this specific language of inferring an exception in favor of those who were on the high seas at the date of the passage of the act.").

[352] *Id.* at 434.

in all their parts, now that they are unfavorable to them."[353] Ping sought review of that decision.

In the United States Supreme Court, the U.S. Solicitor General "filed a brief supporting the law" as did California, whose attorneys included a United States commissioner involved in the United States-China treaties.[354] In a unanimous decision by Justice Field, the Court affirmed.[355] The opinion described Ping as arguing that the 1888 amendments impaired a vested right he held under the 1880 treaty, as evidenced by his certificate to re-enter the United States.[356] Quickly rejecting that argument, the Court noted Congress had treaty authority and whether the 1888 amendment was consistent with the treaty was for Congress, not the courts, to decide.[357] *Ping* added, "Congress had no power to promise not to exercise its legislative authority."[358] *Ping* also noted that Congress, not the courts, controlled immigration: "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy." [359] Describing Ping's certificate and right to return as a "license," the Court added it was "held at the will of the government, revocable at any time, at its pleasure."[360]

The *Ping* opinion characterized the dispute as whether the United States had the power "to exclude foreigners," not whether someone who had lived in the United States and left the country with proper paperwork to re-enter could then be denied re-entry.[361] Although perhaps a difference in semantics, a dissent by Justice Fields a few years later would clarify that how the issue was phrased may have been dispositive.[362] The language used in *Ping* is also noteworthy. In what was described as "a brief statement," *Ping* provided lengthy history of the relationship between China and the United States,

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[353] *Id.* at 436.

[354] CAROL NACKENOFF & JULIE NOVKOV, AMERICAN BY BIRTH: WONG KIM ARK AND THE BATTLE FOR CITIZENSHIP 51–52 (Univ. Press of Kan. 2021).

[355] Ping v. United States, 130 U.S. 581, 611 (1889); *see also* Recent Case, HARV. L. REV. 136, 136 (1889) (briefly summarizing the United States Supreme Court decision in *Ping*); Recent Case, 2 HARV. L. REV. 287, 287 (1888) (briefly summarizing the Circuit Court decision in *Ping*). "By reason of illness," Justice Stanley Matthews apparently did not participate in *Ping*. Jennifer L. Behrens, *The Empty Chair: Reflections on an Absent Justice*, 10 J. L. 241, 251–52 n.44 (2020) (citations omitted).

[356] *Ping*, 130 U.S. at 600.

[357] *Id.*

[358] CURRIE, *supra* note 59, at 14.

[359] *Ping*, 130 U.S. at 603.

[360] *Id.* at 609.

[361] *Id.* at 606.

[362] Ting v. United States, 149 U.S. 698, 745 (1893) (Field, J., dissenting).

including detailing trade delegations and their leaders by name.[363] After summarizing "strong expressions of friendship and good will" between the countries, *Ping* turned negative in describing "events . . . transpiring on the Pacific coast which soon dissipated the anticipations indulged as to the benefits to follow the immigration of Chinese to this country."[364]

Noting the California gold rush caused "a large immigration" from around the world, "laborers came from [China] in great numbers . . . . [A]nd, as domestic servants, and in various kinds of out-door work, proved to be exceedingly useful."[365] But over time, *Ping* continued, "[A]s their numbers increased, they began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field."[366] This "our" vs. "they" dichotomy continued. *Ping* stated Chinese laborers had "small" expenses "and they were content with the simplest fare" adding:

> The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace. The differences of race added greatly to the difficulties of the situation.[367]

Ping went on: "[T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living."[368] This, *Ping* suggested, created a sort of hysterical reaction:

> As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by

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[363] *Ping*, 130 U.S. at 589–94; *see also id.* at 590 (noting a trade delegation to China in the 1840s led by "Mr. Caleb Cushing, a gentleman of large experience in public affairs"); *id.* at 591 (highlighting "Mr. William B. Reed, of Philadelphia, was appointed" minister plenipotentiary to China); *id.* at 592 (noting "Mr. Anson Burlingame, an eminent citizen of the United States," was part of a mission from China).

[364] *Id.* at 593.

[365] *Id.* at 594. As bluntly noted by a commentator 125 years later, "[b]y the mid-1870s, racial animosity and economic recession in California led to calls for restricting the migration of Chinese." Villazor, *supra* note 350, at 140.

[366] *Ping*, 130 U.S. at 594.

[367] *Id.* at 595.

[368] *Id.*

> them unless prompt action was taken to restrict their immigration.[369]

All this in a case deciding whether the United States could, retroactively, change the requirements for a person to legally re-enter the country. But it went on. By 1879, *Ping* continued, the framers of the California Constitution:

> [T]ook this subject up, and memorialized Congress upon it, setting forth, in substance, that the presence of Chinese laborers had a baneful effect upon the material interests of the State, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; that the discontent from this cause was not confined to any political party, or to any class or nationality, but was well-nigh universal; that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the State, without any interest in our country or its institutions; and praying Congress to take measures to prevent their further immigration. [370]

Ping added that "the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath" caused a self-certification process to be modified.[371] In other words, *Ping* broadly attributed improper conduct based on national origin, again addressing purported facts that fairly seem irrelevant to the legal issues presented.

Apart from how the issue was defined, and the language used, *Ping* is significant for what it did not address. Although finding Congress had seemingly absolute power over immigration, *Ping* "did not cite to any provisions in the Constitution granting Congress such authority over immigration."[372] And although *Ping* did not suggest that due process arguments had been raised, they were raised in briefs before the Supreme Court:

> Ping's individual rights arguments are not mentioned in the Supreme Court decision, and immigration law commentators traditionally have assumed that no individual constitutional rights claims were raised in the case. However, the briefs reveal that . . . Ping also squarely rooted

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[369] *Id.*

[370] *Id.* at 595–96.

[371] *Id.* at 598.

[372] Alix Sirota, Note, *Locked Up:* Demore*, Mandatory Detention, and the Fifth Amendment*, 74 WASH. & LEE L. REV. 2337, 2353 (2017).

> his claim in a *Yick Wo* [*v. Hopkins*, 118 U.S. 356 (1886)] argument that the Constitution applied to resident aliens and prohibited their arbitrary expulsion without due process. [Ping] suggested that both principles of territoriality and membership supported his claim. Resident aliens were "'persons' within the jurisdiction of the United States, [to whom] all the protection afforded by the Constitution to 'persons' not citizens, can apply." [373]

Ping's briefs unmistakably raise due process issues, arguing: "The Act . . . is in contravention of the Fifth Amendment of the Constitution . . . in . . . that it deprives [Ping] of both Liberty and Property without due Process of Law."[374] The *Ping* opinion, however, does not mention, let alone resolve, those arguments.[375]

1. Critique and Post-Script

Four years after authoring the *Ping* opinion, Justice Field dissented in a case addressing a similar issue. Relying heavily on *Ping*, the majority in *Ting v. United States* affirmed the deportation of three Chinese citizens for not having certificates of residence under the 1892 Chinese Deportation Act.[376] Justice Field, however, dissented, stating bluntly that "the real question in" *Ting* was "the question of deporting them [Chinese citizens] from the country after they have been domiciled within it by the consent of its government," which he wrote was not at issue in *Ping*.[377] He added: "[B]etween legislation for the exclusion of Chinese persons—that is, to prevent them from entering the country—and legislation for the deportation of those who have acquired a residence in the country under a treaty with China, there is a wide and essential difference."[378] Given this difference, Justice Field would have

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[373] Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 125 (2002) (citing and quoting Ping's briefs before the United States Supreme Court) (footnotes omitted).

[374] *Id.* at 125 ns. 874–75 (quoting Ping's briefs before the United States Supreme Court). Ping also pressed claims that he had a vested property right to return to the United States, which was being denied, that *Ping* did address, and rejected. *See* Villazor, *supra* note 350, at 144 ("In three separate briefs to the Supreme Court, Ping's lawyers put forward four arguments as to why his exclusion from the United States constituted a violation of his property rights.") (footnote omitted); *see also id.* at 144–48 (describing, in some detail and with citation to the briefs, these arguments made by Ping's lawyers to the United States Supreme Court).

[375] For a view, 125 years later, of what might have happened if Ping prevailed on his property rights arguments, *see* Villazor, *supra* note 350, at 152–63.

[376] *See generally* Ting v. United States, 149 U.S. 698 (1893) (upholding the Geary Act, which required Chinese residents to carry Certificates of Residence, and holding that the right to exclude or expel foreigners was "essential" for national security and welfare).

[377] *Id.* at 756 (Field, J., dissenting).

[378] *Id.* at 746 (Field, J., dissenting); *see also* Sirota, *supra* note 372, at 2356 n.141 (quoting this portion of Justice Field's dissent in *Ting*).

reversed the deportations in *Ting*, adding that the punishment "is beyond all reason in its severity. It is out of all proportion to the alleged offence. It is cruel and unusual."[379] But was *Ping*, who had previously lived in the United States for more than a decade and left with proper documentation needed to return, materially different than the detentions in *Ting*?

And what of the Chinese Exclusion Act and the *Ping* analysis? "In 1943, when China was a member of the Allied Nations during World War II, Congress repealed all the exclusion acts," including the Chinese Exclusion Act.[380] Casting a larger shadow on *Ping*'s refusal to address Ping's due process arguments, by the early 1980s, the Supreme Court in *Landon v. Plasencia*,[381] "held that returning resident aliens, such as . . . Ping, are entitled to due process in exclusion hearings."[382] Even more recently, in 2011 and 2012, "Congress condemned the Chinese Exclusion Act and affirmed a commitment to preserve civil rights and constitutional protections for all people . . . ."[383]

Researchers have done further work on the language and tone of the *Ping* opinion.

> One aspect of the opinion that often draws criticism from modern commentators is Justice Field's xenophobic, anti-Chinese rhetoric. Field was writing at a time when the previously valued Chinese workers had outlived their usefulness in the eyes of some, especially Californians who saw them as threats to white laborers and/or Anglo-Saxon culture.[384]

In 1937, "the University of California acquired four letters written by" Justice Field "to John . . . Pomeroy, first Professor of Municipal Law in Hastings Law College."[385] One commentator states that an April 1882 letter by Justice Field—written five years before *Ping*—"belies [the] perspective" that Justice "Field's unfortunate word choice" in *Ping* reflects "California's—not the Justice's—views."[386]

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379 *Ting*, 149 U.S. at 759, 761 (Field, J., dissenting).

380 *Milestone Documents: Chinese Exclusion Act (1882)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/chinese-exclusion-act#:~:text=In%201943%2C%20when%20China%20was,limit%20of%20105%20Chinese%20immigrants [https://perma.cc/AR3X-W5CV].

381 Landon v. Plasencia, 459 U.S. 21 (1982).

382 Cleveland, *supra* note 373, at 161 (citing *Landon*, 459 U.S. at 32–34).

383 *Milestone Documents: Chinese Exclusion Act (1882)*, *supra* note 380.

384 Victor C. Romero, *Elusive Equality: Reflections on Justice Field's Opinions in* Chae Chan Ping *and* Fong Yue Ting, 68 OKLA. L. REV. 165, 167 (2015).

385 Howard Jay Graham, *Four Letters of Mr. Justice Field*, 47 YALE L.J. 1100, 1100 (1938).

386 Romero, *supra* note 384, at 167–68.

In the letter expressing his disappointment with then-President Arthur's veto of the first version of the Chinese Exclusion Act, Field makes clear that his immigration policy would reserve the United States for Caucasians only:

"It must be apparent to every one, that it would be better for both races to live apart—and that their only intercourse should be that of foreign commerce. The manners, habits, mode of living, and everything connected with the Chinese prevent the possibility of their ever assimilating with our people. They are a different race, and, even if they could assimilate, assimilation would not be desirable. If they are permitted to come here, there will be at all times conflicts arising out of the antagonism of the races which would only tend to disturb public order and mar the progress of the country. It would be better, therefore, before any larger number should come, that the immigration be stopped. You know I belong to the class, who repudiate the doctrine that this country was made for the people of *all* races. On the contrary, I think it is for our race—the Caucasian race. We are obliged to take care of the Africans; because we find them here, and they were brought here against their will by our fathers. Otherwise, it would be a very serious question, whether their introduction should be permitted or encouraged."

It appears, then, that the rhetoric—though perhaps not as offensive then as it is today—reflected not just California's views on the Chinese, but Justice Field's as well. Given his long sojourn in California before joining the Court, it is no surprise that his negative views about the Chinese may have been influenced in part by his time in that state.[387]

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[387] *Id.* at 168 (footnotes omitted) (quoting a portion of the April 14, 1882 letter from Justice Field to Professor Pomeroy. *See* Graham, *supra* note 385, at 1104); *see also* Polly J. Price, *A "Chinese Wall" at the Nation's Borders: Justice Stephen Field and* The Chinese Exclusion Case, 43 J. SUP. CT. HIST. 7, 12 (2018) (noting that, as a sitting Justice, Justice Fields "made two unsuccessful attempts to become the Democratic party's nominee for President. Distancing himself from the perception that he favored Chinese immigration and was sympathetic to their plight, his campaign literature denied this: 'I have always regarded the immigration of the Chinese in large numbers into our state as a serious evil, and likely to cause great injury to the morals of our people as well as their industrial interests.'" (footnote omitted) (quoting material appearing in PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 205 (Univ. Press of Kan. 1997))).

What happened to Chae Chan Ping? He was "expelled from the United States—despite a written promise from the U.S. government that he would not be—on September 1, 1889. After that, he vanished."[388]

I. Plessy v. Ferguson, 163 U.S. 537 (1896)

Plessy v. Ferguson[389] writes itself onto the list of The Slump Cases. It is one of three anti-canonical cases, along with *Dred Scott v. Sandford*[390] and *Korematsu v. United States*.[391] Less often discussed is whether the Court engaged in poor reasoning or made a poor policy choice. If only the latter, an objective view shows the Court was forced to decide between two policies long in conflict (*i.e.*, abolition versus slavery), or asked to confirm restrictions on the civil rights of a minority group of people, which restrictions were supported by a majority. Pointing out that the Supreme Court should have chosen the "better" policy that would become dominant in the next century is not particularly helpful in addressing how to decide cases. It amounts to little more than telling the Justices that they should strive to do better.

On the other hand, if a particular anti-canonical case evidenced subtle and continuing flaws in legal analysis or judicial procedures, then knowledge of those flaws could be helpful in the future. Good legal analysis and judicial procedures apply regardless of the particular constitutional issue. The top three worst list involves distinctions among groups based on racial characteristics. In the future, equally controversial topics may involve elections and politics, religion, or economic groups. Is there an aspect of *Plessy*, when considered as at the pinnacle of multiple subpar decisions, that might illuminate how the Court can avoid a future anti-canonical decision? We will try to ascertain something more instructive than the observation that *Plessy* should have been decided more like *Brown v. Board of Education*.[392]

Homer A. Plessy was a mixed-race (albeit predominately of European descent) person—probably seven-eighths white and one-eighth Black given his ancestry—who refused to sit in a railway coach "assigned to persons of the colored race."[393] He was ejected by the conductor with help from a police officer, taken to the parish jail, and tried before Judge John H. Ferguson.[394]

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[388] Garrett Epps, *The Ghost of Chae Chan Ping*, THE ATLANTIC (Jan. 20, 2018), https://www.theatlantic.com/politics/archive/2018/01/ghost-haunting-immigration/551015 (on file with authors); Kit Johnson, Chae Chan Ping *at 125: An Introduction*, 68 OKLA. L. REV. 3, 4 (2015) ("As for what happened to Chae Chan Ping after his final deportation and return to China, nothing is known.").

[389] Plessy v. Ferguson, 163 U.S. 537 (1896).

[390] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party).

[391] Korematsu v. United States, 323 U.S. 214 (1944).

[392] Brown v. Board of Educ., 347 U.S. 483 (1954).

[393] *Plessy*, 163 U.S. at 541–42.

[394] *Id.* at 541.

The Louisiana statute required railway companies to provide separate and equal coaches for persons of different races, and prohibited members of one race to sit in the coach designated for the other. Citizens who refused to do so could be fined and jailed.[395]

Plessy's role as defendant was not coincidental.[396] Resistance to the Louisiana separate car bill began in the legislature with seventeen Black members denouncing it as "class legislation" that violated principles of equality, ethnic origins of color, and settled rights of national citizenship.[397] After the act passed, various groups in New Orleans organized to create a test case to challenge the segregation law.[398] They secured prominent national and local attorneys who were well-versed in federal and state law.[399] The railroads and prosecutors were, at most, ambivalent about the law because it cost more money to provide separate railway cars and its enforcement was difficult and sporadic.[400] They helped Plessy prosecute his appeal as much as they could while maintaining their roles as neutrals or government representatives.[401] The goal was to get a case before the Supreme Court to strike down all such state laws.[402] They had to consider the multiple ways in which courts could skirt the principal issue of racial segregation and the Reconstruction Amendments, such as the Interstate Commerce Clause, state law interpretations, and civil versus criminal penalties.

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[395] *Id.* ("[S]hall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison.").

[396] CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 28–60 (Oxford Univ. Press 1987) (providing background on the preparation and planning behind Plessy's argument).

[397] *Id.* at 28.

[398] *Id.* at 28–29.

[399] *Id.* at 30 (profiling Albion W. Tourgée, the "nation's leading white publicist for Negro rights" and James C. Walker, a New Orleans criminal lawyer). These lawyers sought a test case that provided the most direct route, navigating around the interstate travel exceptions, civil actions, and unpredictable trial proceedings. *Id.* at 33–43.

[400] *Id.* at 32.

[401] LOFGREN, *supra* note 396 at 32, 39, 42–43.

[402] At that time, the Judiciary Act of 1789 allowed federal challenges to a state court judgment only if the state court denied a constitutional claim. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73, 85–86; *see also* Coleman v. Miller, 307 U.S. 433, 443 (1939) ("The original Judiciary Act of 1789 provided in [Section] 25 for the review by this Court of a judgment of a state court 'where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity'; that is, where the claim of federal right had been *denied*. By the Act of December 23, 1914, it was provided that this Court may review on certiorari decisions of state courts *sustaining* a federal right.") (footnotes omitted). Therefore, when *Plessy* was being litigated, a ruling by a Louisiana state court that the segregation act violated the United States Constitution would have been a victory in Louisiana but would not have provided a nation-wide prohibition against segregated travel.

In the Supreme Court, Plessy argued the statute, enacted in 1890, constituted a badge of slavery and involuntary servitude in violation of the 13th Amendment and a prohibited burden and disability under the 14th Amendment.[403] Justice Henry B. Brown, joined by all sitting Justices save Justice Harlan, concluded it was "too clear for argument" that the Louisiana law did not violate the 13th Amendment, and devoted the rest of the decision to the 14th Amendment.[404]As a state law, the Court recognized that the prohibition on members of one race from riding in the other's coach needed to be nondiscriminatory.[405] It assumed, without discussion, that the coaches would be equal. After noting that segregation of races in matters of marriage and school were typically within the power of the states, *Plessy* considered whether states could issue similar regulations based on hair color, national origin, housing on right or left sides of the street, and house color.[406] The opinion stated that:

> [T]he enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment.[407]

To avoid arbitrary discrimination based on such factors, the opinion posited that state exercise of police power must be reasonable, enacted in good faith for the public good, and not for the annoyance or oppression of a particular class.[408] Without citing specifics, *Plessy* measured the reasonableness of the Louisiana railway regulations against "established usages, customs, and traditions of the people."[409] The Court concluded that a state law requiring the separation of two races was not unreasonable "or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia."[410] Instead, *Plessy* placed the blame for adverse attributions arising out of segregation on Black citizens: "[If] the enforced separation of the two races stamps the colored race with a badge of inferiority. . . . it is not by reason

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403 Plessy v. Ferguson, 163 U.S. 537, 542 (1896).

404 *Id.* Justice Brewer "did not hear the argument or participate in the decision." *Id.* at 552 Apparently, his daughter had died, and he was grieving at the time. William M. Wiecek, *Justice David J. Brewer and "The Constitution in Exile"*, 33 J. SUP. CT. HIST. 170, 179 n.81 (2008) ("Brewer abstained because of his daughter's death and funeral.").

405 *Plessy*, 163 U.S. at 542.

406 *Id.* at 549–50.

407 *Id.* at 548.

408 *Id.* at 550.

409 *Id.*

410 *Id.* at 550–51.

of anything found in the act, but solely because the colored race chooses to put that construction upon it."[411] Finally, *Plessy* observed that separation of races might be the result of social prejudices, but that equal rights could not be provided to Black citizens by an "enforced commingling of the two races."[412]

In dissent, Justice Harlan challenged the majority's 14th Amendment conclusions based on the reasons for the legislation, the effects of separating the races, and the long-term impact on the "destinies of the two races . . . indissolubly linked together."[413] As to the reason for the 1890 act:

> Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.[414]

Justice Harlan wrote that the act aroused "race hate . . . [to] create and perpetuate a feeling of distrust between these races . . . on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."[415] Justice Harlan predicted the impact of the decision to be "quite as pernicious as the decision made by this tribunal in the *Dred Scott* Case."[416]

1. Critique and Post-Script

Less than sixty years after it was decided, *Plessy* was famously overruled in *Brown v. Board of Education*.[417] *Plessy* might be seen as a typical decision from its era.[418] Racism was predominant in southern states after Reconstruction ended and not unusual in northern states. Measured from a worst-case perspective, some argue that a legal requirement of "equal" accommodations

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[411] *Plessy*, 163 U.S. at 551.

[412] *Id.*

[413] *Id.* at 560 (Harlan, J., dissenting).

[414] *Id.* at 557 (Harlan, J., dissenting).

[415] *Id.* at 560 (Harlan, J., dissenting).

[416] *Id.* at 559 (Harlan, J., dissenting).

[417] Brown v. Board of Educ., 347 U.S. 483, 494–95 (1954).

[418] LOFGREN, *supra* note 396, at 5–6.

was a step-up from a complete denial of access for Black citizens that was common in the Black Codes of the late 1860s.[419] Such arguments inevitably downplay the role of the Reconstruction Amendments and accompanying federal legislation. Equally important, the Court's first analytical error resulted in an incomplete analysis. The Court failed to address the reasons for the Louisiana act.

Justice Harlan's dissent threw down the gauntlet when asserting the purpose of the Louisiana act was to keep Black citizens out of coaches with white travelers. Nonetheless, it was incumbent upon the Court to form its own view of the act based on existing law and the record. It should have then compared the explicit legislative intent in Louisiana with the Congressional intent. It would have been harder, if not impossible, to justify the result. It also would have been easier and faster for a subsequent Court to reassess the holding.

The second major analytical problem in *Plessy*, like *Cruikshank* and *Williams v. Mississippi*, was the failure to recite and evaluate the facts. The Court never addressed why Plessy, who was mixed-race and primarily of European descent, was considered to be exclusively Black. It never confronted how or why the conductor made that determination. It did not consider the standards and evidence Judge Ferguson might have considered. Of course, the Court was required to take the arguments presented by the parties,[420] but it was not precluded from asking the factual questions to provide direction for the constitutional analysis. Finally, although the Court arguably avoided "the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person," declaring it a matter of state law,[421] it failed to address how the same person could have the constitutional right to travel in a better car in one state but not in another. The failure to confront such facts made a strained and weak analysis that only became worse with time.

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[419] *Id.* at 13 (noting Booker T. Washington underscored the emphasis on equality rather than integration: "[I]t is not the separation that we complain of, but the inequality of accommodations").

[420] *See* Thomas J. Davis, *More Than Segregation, Racial Identity: The Neglected Question in* Plessy v. Ferguson, 10 WASH. & LEE RACE & ETHNIC ANC. L.J. 1, 38–40 (2004) (arguing that while the indeterminacy of color and racial identity were raised on appeal, the arguments were muted because, in part, they raised both issues of law and fact)*; see also* Brief for Plaintiff in Error at 11, Plessy v. Ferguson, 163 U.S. 537 (1896), 1893 WL 10660 ("There is no law of the United States, or of the State of Louisiana defining the limits of race-who are white and who are 'colored'?") *and* Brief for Plaintiff in Error at 6, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210), 1896 WL 13990 ("The record of the information does not show whether Plessy is *White* or *Colored*.").

[421] *Plessy*, 163 U.S. at 552 ("[T]hese are questions to be determined under the laws of each State and are not properly put in issue in this case.").

J. *Williams v. Mississippi, 170 U.S. 213 (1898)*

In 1890, the Mississippi legislature called a constitutional convention to replace the state's 1868 constitution.[422] The 1868 constitution, created by white and Black delegates, banned slavery, extended protections to Black Mississippians, and had been ratified by the people.[423] Judge Sol S. Calhoon, a former lieutenant colonel in the Confederate Army, was president of the 1890 constitutional convention. Calhoon emphatically explained the reason to draft a new constitution: "Let us tell the truth if it bursts the bottom of the Universe . . . . We came here to exclude the negro. Nothing short of this will answer."[424] Calling a constitutional convention in 1890 to limit the rights of Black citizens was a remarkable about-face for the Mississippi legislature. In 1870, the Mississippi legislature had elected Hiram Revels the first Black American to the United States Senate.[425] After President Hayes removed federal troops from Mississippi in 1877, however, Democrats routed virtually all Republican officeholders and Black state officials.[426] Voter-related violence and fraud tainted many elections, which began in earnest after the 1874 national election.[427]

The 1890 constitutional convention delegates consisted of 132 white Democrats and one Black delegate.[428] Other participants expanded the

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422 E.L. MARTIN, JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI 3 (1890) ("Pursuant to an Act of the Legislature of the State of Mississippi, entitled 'An Act to provide for calling a Convention to amend the Constitution.'").

423 *See* E. STAFFORD, JOURNAL OF THE PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI 720–22 (1868); *see also* MCMILLEN, *supra* note 285, at 37 (discussing how black Mississippians registered to vote under the Reconstruction Act of 1867, and helped to draft and ratify the 1868 constitution).

424 MCMILLEN, *supra* note 285, at 41.

425 *See Hiram Revels: A Featured Biography*, U.S. SENATE, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Revels.htm#:~:text=Hiram%20Revels%20of%20Mississippi%20became%20the%20first%20African%20American%20senator%20in%201870 [https://perma.cc/8WJ2-PNCK].

426 As noted by the National Park Service:

> White Democrats took control of the judicial branch of government as well in 1876, and Congressional Reconstruction in Mississippi was all but finished. The next year saw the official end of Reconstruction, with the Compromise of 1877 that made Rutherford B. Hayes President of the United States, removed all military forces from the former Confederacy, and the authorized southern states to "deal with blacks without northern influence." In the years that followed, the political and civil gains made by African Americans in Vicksburg and throughout Mississippi were systematically erased.

The End of Reconstruction, U.S. NAT'L PARK SERV., https://www.nps.gov/vick/learn/historyculture/the-end-of-reconstruction.htm [https://perma.cc/SE62-MWXG].

427 FONER, *supra* note 198, at 558–63; *see also id.* at 562 ("[I]n defiance of federal law and the national Constitution, Democrats gained control of Mississippi.").

428 MCMILLEN, *supra* note 285, at 48–52.

purpose of the new constitution to secure white supremacy.[429] A white Republican candidate for the convention who supported Black suffrage was murdered before the convention.[430]

The constitution produced by this convention created a subjective "good moral character" test for voting, included an expanded list of disenfranchising criminal offenses, a poll tax, and a literacy test to vote.[431] Each requirement was designed to burden or eliminate Black suffrage. The Mississippi Supreme Court relied on this express purpose when deciding whether nontaxable property could be seized for nonpayment of the poll tax:

> Within the field of permissible action under the limitations imposed by the federal constitution, *the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race*. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament and of character, which clearly distinguished it, as a race, from that of the whites—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.[432]

Against this backdrop, in *Williams v. Mississippi*, the Supreme Court considered an equal protection challenge to an indictment charging a Black citizen with murder issued by a grand jury composed of only white citizens.[433]

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[429] MARTIN, *supra* note 422, at 94, 275 (1890) ("What are you here for, if not to maintain white supremacy;" "It is the manifest intention of this Convention to secure to the State of Mississippi, 'white supremacy.'"); *see also* Harness v. Watson, 143 S. Ct. 2426, 2426 (2023) (Jackson, J., dissenting) ("The President of the 1890 Mississippi Constitutional Convention said it plain: 'Let us tell the truth if it bursts the bottom of the Universe . . . We came here to exclude the negro. Nothing short of this will answer.") (footnote omitted).

[430] In 2011 the Mississippi Department of Archives and History posted a historical marker in Jasper County with the following inscription:

> On July 23, 1890, Marsh Cook of Jasper County was gunned down by six men after warning citizens that the 1890 Mississippi Constitutional Convention would likely limit voting rights and disfranchise black voters. Cook was a white Republican candidate for delegate to the Constitutional Convention. He had urged black voters to organize against disfranchisement. No one was ever arrested or tried for his murder.

See Assassination of F.M.B. "Marsh" Cook, THE HIST. MARKER DATABASE, https://www.hmdb.org/m.asp?m=56188 [https://perma.cc/HE9X-SFMQ].

[431] MISS. CONST. art. XII, §§ 241, 244 (1890) (§ 244 repealed 1975).

[432] Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896) (emphasis added).

[433] Williams v. Mississippi, 170 U.S. 213, 213 (1898).

The appellant provided a detailed recitation of how the Mississippi constitution tried to block any Black citizen from voting, and thus from serving on a grand jury.[434] He did not, however, show specific race discrimination in how his specific grand jury was empaneled.[435] The *Williams* opinion, written by recently-confirmed Justice Joseph McKenna, accepted it was the intent of the constitutional delegates to disfranchise Black citizens, but dismissed its significance unless the language of the state constitution achieved that purpose, or it could be shown that its administration in the case involved racial discrimination.[436] *Williams* did not address the obvious problem that, when structural racism is built into creating voter rolls, there is no need to discriminate with a particular grand jury. If it had considered the practical effect of challenging the entire voter roll in each criminal indictment against a Black citizen, the impossible task would have become obvious. Instead, the Court concluded that, facially, the Mississippi constitution and related statutes "do not . . . discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."[437]

1. Critique and Post-Script

Williams has never been explicitly overruled. In 1964, the poll tax was abolished for federal elections by the 24th Amendment,[438] and struck down several years later for state elections in *Harper v. Virginia Board of Elections*.[439] Literacy tests, despite their intended discriminatory intent from their start, continued to exist[440] until Congress banned them in 1964 in federal elections.[441] What remains contentious is the current list of crimes as bases for disenfranchisement, which the 1890 Mississippi constitutional convention created on the belief that more Black people than white people

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[434] *Id.* at 215.

[435] *Id.* at 223.

[436] *Id.*

[437] *Id.* at 225.

[438] U.S. CONST. amend. XXIV, §§ 1–2 ("SECTION 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax. SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.").

[439] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[440] Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 54 (1959) (requiring a voter to be able to read and write the state constitution "seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springes for the citizen").

[441] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10501); *see also* Oregon v. Mitchell, 400 U.S. 112, 118 (1970) ("Congress . . . can prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and federal elections.").

would be convicted of those crimes.[442] Individual Justices continue to point out the lingering effects of extant state law whose explicit purpose was to deny and delay implementation of the 15th Amendment.[443] If the Court had worked without blinders in *Williams*, the voting discrimination tactics that began in 1890 would have had a much shorter life.

VI. ANALYSIS

What could explain The Slump in the Supreme Court resulting in The Slump Cases? Is there a unified theory that could explain The Slump Cases? Identifying a unified theory is always a challenge, and with any degree of complexity, there is a good argument that unified theories almost never exist. Identifying a unified theory explaining nine cases (and a Presidential Election) decided over nearly thirty years, that in significant respects are historical lows for the Supreme Court (aka The Slump), is a particularly unique challenge.

Given these complications, the analysis that follows starts with a discussion that explains, or might explain, some but less than all of The Slump Cases, and how they are interrelated. Although hopefully instructive, these disparate explanations fail to explain the entirety of The Slump as evidenced by The Slump Cases. After discussing these possible disparate explanations, we turn to what is more akin to a unified theory, or at least a unified explanation, based on what The Slump Cases did and at times did not say, society as a whole and the role the Supreme Court assumed during The Slump.

A. Possible Disparate Explanations

1. Razor Thin Majorities

There are qualitative and other differences in perception and evolution of, for example, a razor thin 5–4 majority in a Supreme Cout decision, a decision with many separate opinions espousing different theories, and a unanimous decision. Given those and other alternatives, perhaps The Slump Cases were hard fought, close cases where the vote of one Justice would have tipped the case the other direction. After all, 5–4 decisions are the product of a divided Court that, at times, can reflect a divided legal system, with surveys

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[442] Harness v. Watson, 143 S. Ct. 2426, 2426 (2023) (Jackson, J., dissenting) ("[T]he Convention placed nine crimes in § 241 of the State's Constitution as bases for disenfranchisement, believing that more Black people would be convicted of those crimes than White people.") (citations omitted).

[443] *Id.* at 2428 (Jackson, J., dissenting) ("We were asked to address this problem 125 years ago in *Williams*, and declined to do so. . . . Mississippians can only hope that they will not have to wait another century for a judicial knight-errant.") (citation omitted).

suggesting 5–4 decisions are viewed suspiciously by society at large.[444] Maybe The Slump Cases reflected evenly divided disagreement in society more broadly, perhaps suggesting the need for additional discussion, disagreement, time, and change in thinking for a more consensus-based resolution of important issues. The thought that The Slump Cases were explained by razor thin majorities, however, is misplaced.

The only 5–4 Slump Case was *The Slaughter-House Cases*, decided in 1873 and the first case during The Slump. The votes in the other Slump Cases were not close. Four of The Slump cases were unanimous: (1) *Minor v. Happersett*; (2) *Pace v. Alabama*; (3) *Ping v. United States*; and (4) *Williams v. Mississippi*. The other four had just one Justice dissenting: (1) *Bradwell v. Illinois*; (2) *United States v. Cruikshank* (counting Justice Nathan's separate statement as a dissent); (3) *The Civil Rights Cases* and (4) *Plessy v. Ferguson*. The extrajudicial participation in the resolution of the Presidential Election of 1876 defies this kind of nose counting, but even counting Justice Davis as in opposition, at most, three Justices on the Court opposed the Electoral Commission approach. Collectively, in The Slump Cases, there were more than seventy votes in favor of the majority approach, with just eight dissenting votes. The thought that the closeness of the Justices' votes in The Slump Cases might explain them is not supported.

2. Presidential Appointments

It has been suggested that Presidential appointments might explain the Court's jurisprudence during The Slump.[445] Undoubtedly that had an influence, but the math does not support the thought that Presidential appointments could explain The Slump Cases. President Lincoln was the only President to appoint a majority of Justices who participated in The Slump Cases, and even then, it was a bare majority of five Justices. Those five Justices, however, were on the Court right at the beginning of The Slump, when just two of The Slump Cases were decided: *The Slaughter-House Cases* and *Bradwell*, both in 1873. And in those two cases, the Lincoln appointees did not vote as a block. Chief Justice Chase dissented in both, just weeks before he died. In *The Slaughter-House Cases*, Justice Miller (joined by Justice Davis, and others) wrote the majority, while Justice Field (joined by Chief justice Chase, Justice Swayne, and non-Lincoln appointee Justice Bradley) dissented, with Justice Swayne also dissenting separately. The Lincoln-appointed five Justice majority ended with Chief Justice Chase's death in

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[444] Michael Miller & Samuel A. Thumma, *It's Not Heads or Tails: Should SCOTUS Have An Even or Odd Number of Justices?*, 31 S. CAL. INTERDISC. L. J. 1, 8 (2021) ("[A]s a matter of public perception, deadlocked decisions can be perceived as making the Court appear weak or unfocused."); *see generally id.* at 38–40 (discussing the public perception of deadlocked decisions and partisan decision-making) (citations omitted).

[445] BRANDWEIN, *supra* note 229, at 21 ("[T]he Waite Court, nearly all of whose members were appointed by Presidents Lincoln and Grant, acted at times to support the ruling Republican coalition (or at least the Grant-Garfield-Arthur wing of the party).") (footnote omitted).

1873. The Slump then continued for nearly three more decades. So, it cannot be said that President Lincoln's appointees—the only group of Justices appointed by the same President representing a majority of the Court during The Slump—explain The Slump Cases.

Along with the lack of any sustained majority of Justices appointed by the same President, the Justices who participated in The Slump Cases were broadly distributed looking at Presidential appointments. This distribution resulted in Justices appointed by several different Presidents being involved in each of The Slump Cases. This participation of the Justices by Presidential appointment negates the thought that the same Justices, appointed by a small number of Presidents, could explain much about the analysis in The Slump Cases.

The Slaughter-House Cases (the 5–4 Slump Case, authored by Justice Miller, with Chief Justice Chase and Justices Field, Bradley, and Swayne dissenting) and *Bradwell* (an 8-1 decision, authored by Justice Miller, with Chief Justice Chase dissenting) were decided by one Justice appointed by President Buchanon (Justice Clifford); five appointed by President Lincoln (Chief Justice Chase and Justices Swayne, Miller, Davis, and Field); and three by President Grant (Justices Strong, Bradley, and Hunt). *Minor* (a unanimous decision) and *Cruikshank* (nearly so, with Justice Clifford writing a "dissent" that agreed with the majority's result) were decided by one Justice appointed by President Buchanon (Justice Clifford); four appointed by President Lincoln (Justices Swayne, Miller, Davis, and Field); and four by President Grant (Chief Justice Waite and Justices Strong, Bradley, and Hunt). Of the five Justices on the Electoral Commission deciding the 1876 Presidential Election, one was appointed by President Buchanon (Justice Clifford); two were appointed by President Lincoln (Justices Miller and Field) and two were appointed by President Grant (Justices Strong and Bradley).[446]

Pace (a unanimous decision) and *The Civil Rights Cases* (an 8–1 decision) were decided by two Justices appointed by President Lincoln (Justices Miller and Field); two by President Grant (Chief Justice Waite and Justice Bradley); two by President Hayes (Justices Harlan and Woods); one by President Garfield (Justice Mathews) and two by President Arthur (Justices Gray and Blatchford). *Ping* (a unanimous decision) was decided by two Justices appointed by President Lincoln (Justices Miller and Field); one by President Grant (Justice Bradley); one by President Hayes (Justice Harlan); two by President Arthur (Justices Gray and Blatchford) and two by President Cleveland (Chief Justice Fuller and Justice Lamar). *Plessy* (a 7–1 decision) was decided by one Justice appointed by President Lincoln (Justice Field); one by President Hayes (Justice Harlan); one by President Arthur (Justice Horace); three by President Cleveland (Chief Justice Fuller and Justices White and

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[446] President Lincoln appointed one of the Democrat "partisan" Justices (Field) and one of the Republican "partisan" Justices (Miller) that served on the Electoral Commission. *See* REHNQUIST, *supra* note 54, at 119.

Peckham) and two by President Harrison (Justices Brown and Shiras). *Williams* (a unanimous decision) was decided by one Justice appointed by President Hayes (Justice Harlan); one by President Arthur (Justice Gray); three by President Cleveland (Chief Justice Fuller and Justices White and Peckham); three by President Harrison (Justices Brewer, Brown, and Shiras) and one by President McKinnley (Justice McKenna). Looking at the Justices' participation by appointing President reveals that no single chief executive could explain The Slump Cases.

3. Court Leadership and Authors of The Slump Cases

Three Chief Justices served during The Slump:

- Chief Justice Chase presided over two Slump Cases—*The Slaughter-House Cases* and *Bradwell*—both decided in 1873 a few weeks before he died.
- Chief Justice Waite, who served from 1874 to 1888, was on the Court when the Justices participated in the Electoral Commission resolving the Presidential Election of 1876 and presided over four Slump Cases: *Minor*, *Cruikshank*, *Pace*, and *The Civil Rights Cases*.
- Chief Justice Fuller, who served from 1888 to 1910, presided over three Slump Cases: *Ping*, *Plessy*, and *Williams*.

No single Chief Justice presided over the Court during a majority of The Slump Cases. Chief Justice Waite came the closest, although, even then, he refused to participate in the Presidential Election Commission. This distribution does not support the thought that leadership by a Chief Justice explains the Slump.

Similarly, no single Justice wrote more than two majority Slump Case opinions, with three Justices writing two such opinions:

- Justice Miller wrote the majority in *The Slaughter-House Cases* and in *Bradwell*, decided on consecutive days in 1873.
- Chief Justice Waite wrote the majority in *Minor* and in *Cruikshank*, decided about a year apart in 1875 and 1876.
- Justice Field wrote the majority in *Pace* and in *Ping*, decided about six years apart in 1883 and 1889.

This shows a bit of commonality in authorship. But particularly for Justice Miller, whose authorship was the majority in *The Slaughter-House Cases* one day and in *Bradwell* the next in 1873 and no other Slump Case during his tenure that lasted until 1890, it is difficult to conclude that a single author was a driver of The Slump Cases. The same Justice writing two opinions in two different cases fairly close in time cannot explain The Slump Cases decided over the course of three decades. Moreover, there were more solo authors

that repeat authors, with three Justices writing one majority decision during The Slump:

- Justice Bradley wrote the majority in *The Civil Rights Cases* (although he also had a significant hand in the *Cruikshank* analysis);
- Justice Brown wrote the majority in *Plessy*; and
- Justice McKenna wrote the majority in *Williams*.

This distribution does not support the thought that one Justice's authorship explains The Slump Cases.

4. Justices as Slave Owners

The Court that decided The Slump cases included two former slave owners: Justice Miller (who emancipated the slaves he owned in 1850, when he moved from Kentucky to Iowa, and served on the Court from 1862 to 1890),[447] and Justice Harlan, from Kentucky, who served on the Court from 1877 to 1911.[448] But the views of those two Justices, at least at times, differed quite significantly and their prior ownership of slaves is an inconsistent predictor of their positions. Justice Miller's history as a slaveowner, at least in general, may be viewed as predictive of his jurisprudence. He authored the majority in *The Slaughter-House Cases* and *Bradwell* and joined the majority in *Minor, Cruikshank, Pace, The Civil Rights Cases*, and *Ping*. But the same cannot be said about Justice Harlan, at least in the latter part of The Slump. Justice Harlan wrote dissents in *The Civil Rights Cases* and *Plessy* that served as a template for what the Court would do decades later in *Brown v. Board of Education* and other decisions that would reverse, in whole or in part, many of The Slump Cases. So, it does not appear that the Justices' prior ownership of slaves explains The Slump Cases.

5. The Overlap Between the Justices and Contested Partisan Politics

There appears to have been a great deal more involvement (or desire for involvement) by some of the Justices during The Slump in seeking elected partisan office than in modern times. This undoubtedly was a continuation of those Justices' participation in partisan politics before joining the Court. For example, before joining the Court in 1864, Salmon Chase unsuccessfully sought the 1860 and 1864 Republican Presidential nomination.[449] At least as reported, his participation in partisan politics continued while on the Court, where he unsuccessfully sought the Democratic Presidential nomination in

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[447] *See* Gregory, *supra* note 49, at 424, 427, 438–39.

[448] *See* CANELLOS, *supra* note 50, at 1–9.

[449] *See Salmon Portland Chase, 1864–1873*, *supra* note 52; *see also* STAHR, *supra* note 53, at 289–301, 471–76 (discussing the Court during Chief Justice Chase's tenure); CURRIE, *supra* note 40, at 285–358 (discussing such cases decided at the beginning of Chief Justice Chase's service on the court from 1864 to 1873).

1868 and was considered for the Democratic and Liberal Republican Presidential nominations in 1872.[450] But, again, Chief Justice Chase served on only two of The Slump Cases just before he died. After Chief Justice Chase, Chief Justice Waite[451] and Justices Bradley[452] and Davis[453] apparently dabbled, attempted to dabble, or were asked to dabble in partisan politics (as elected officials and otherwise) while serving on the Court.

Just as significantly, the Justices' involvement in resolving the 1876 Presidential election was steeped in partisan politics. Some of that focus centered on Justice Davis, who was appointed to the Court by President Lincoln in 1862, served as the administrator of President Lincoln's estate[454] and was urged to run for President in 1872, but declined.[455] His election as United States Senator by the Illinois Legislature in January 1877, and his subsequent resignation from the Court, put additional focus on the political affiliation of the Justices, particularly given Justice Bradley serving as the fifth Justice on the Electoral Commission.[456] The partisan nature (at least by attribution) of the Justices' votes while serving on the Electoral Commission furthered the perception of a partisan Court.

All that seems quite different than aspects of modern-day conduct by Justices. There are no suggestions that current Justices are, for example, seeking or being considered for Presidential nominations or seats in Congress. But did the lack of a firm and clear boundary between partisan politics and Supreme Court Justices seeking elected political positions provide a basis to conclude that any overlap changed the outcome of The Slump Cases? For the unanimous or nearly unanimous decisions (in other words, almost all of The Slump Cases), probably not. But it is certainly true that at least some Justices were more directly involved in partisan politics by seeking elected political positions during The Slump than in later eras, and that such involvement must have had some influence in why the Justices crafted The Slump Cases in the way that they did.

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[450] *See* STAHR, *supra* note 53, at 589–97, 637–41; REHNQUIST, *supra* note 54, at 125–26

[451] *See* REHNQUIST, *supra* note 54, at 126; COTTER, *supra* note 58, at 181.

[452] LANE, *supra* note 200, at 213 (noting that Justice Bradley, immediately upon his return to Washington, D.C., from sitting with the district court in *United States v. Cruikshank*, directed that copies of his opinion be sent to President Grant's Cabinet members, Congressional leaders, newspapers, and law journals); REHNQUIST, *supra* note 54, at 159 (noting, in the context of his participation on the Electoral Commission to resolve the Presidential election of 1876, the *New York Sun* described Justice Bradley, a Republican, as "a partisan to whom his party has never looked in vain").

[453] REHNQUIST, *supra* note 54, at 141–42 (discussing how Justice Davis resigned from the Court in early 1877 to serve as a United States Senator from Illinois).

[454] *See id.* at 139.

[455] *See id.* at 141.

[456] *See id.* at 141–42.

6. Circuit Riding

Until 1891, when the Circuit Courts of Appeals Act (also called the Evarts Act) created the United States Circuit Courts, Justices "rode circuit," curiously (from today's perspective) sometimes serving both with trial judges and on the Supreme Court.[457] In *Cruikshank*, Justice Bradley's decision in the trial proceedings had an outsized importance.[458] And, perhaps at times, similar outsized influences of circuit riding resulted.[459] But Justices riding circuit only applied in federal court cases, meaning for The Slump Cases, that practice could help explain, at most, *Cruikshank* (where it did have significant influence) as well as *Ping* and *The Civil Rights Cases* (where it apparently did not). The other Slump Cases came from state courts, where riding circuit would have no application. Thus, circuit riding does not appear to explain The Slump Cases.

7. Advocacy

Could poor advocacy help explain The Slump Cases? *The Slaughter-House Cases* left the 14th Amendment's Privileges or Immunities Clause moribund. As a result, in hindsight, it is no surprise that relying on the Privileges or Immunities Clause in *Bradwell* was ineffective. But the thought that counsel in *Bradwell* should have anticipated with precision what the Court would do in *The Slaughter-House Cases* is not all that realistic, including given *Bradwell* was decided the next day. After the fact, Susan B. Anthony was critical of *Bradwell*'s attorney, Mathew Hale Carpenter, calling his argument "a school boy pettifogging speech."[460] But it is difficult to conclude that identifying better or different advocacy in advance would have changed the results of The Slump Cases, particularly the unanimous or near unanimous cases.

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[457] BRANDWEIN, *supra* note 229, at 25, 211–12; *see also* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 824 (2022) (noting that, before the Everts Act of 1891, Justices "were still required to ride circuit, which often meant crossing the country . . . to serve as trial judges on circuit courts. The crushing workload drove Chief Justice Morrison Waite into an early grave") (citation omitted); *see also id.* at 824–25 (noting the Everts Act "transformed the Court's workload in two ways. First, fewer litigants could directly appeal to the Court. . . . Second, it maintained the Court's ability to enforce and unify federal law through certification or certiorari. The Act thus reduced the number of cases the Court had to decide but not the number of cases it might decide") (citation omitted).

[458] BRANDWEIN, *supra* note 229, at 45–52 (discussing examples).

[459] *Id.* at 93 ("The significance of Justice Bradley's circuit opinion [in *Cruikshank*] cannot be overstated."); *see also* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1818–26 (2003) (discussing circuit riding by the Justices from 1869 to 1911, including Cunningham v. Neagle, 135 U.S. 1 (1890), where Justice Field was assaulted on a train by a party in a suit he had heard while circuit riding in California, a deputy U.S. Marshall shot and killed the assailant, Justice Field and the U.S. Marshall were charged with and arrested for murder, the charge against Justice Field was dropped but the deputy was only released after the Supreme Court granted his petition for a writ of habeas corpus by a 6–2 vote).

[460] Friedman, *supra* note 152, at 1294 (quoting the July 30, 1873 letter from Susan B. Anthony to Myra Bradwell).

What type of advocacy is required to move a unanimous decision one way, even in a 5–4 decision, to the other? Experienced Supreme Court advocates focus on perceived swing votes of a small number of Justices (often one) to secure a win.[461] How often is it practical, regardless of the quality of advocacy, to move four or five Justices from one position to a contrary conclusion? Answering that question is speculative, in the extreme. But a reasonable, albeit speculative, answer is not very often.

There also is some basis to question whether improved advocacy would have mattered much at all, at least in some of The Slump Cases. The unanimous *Ping* decision gives little indication that due process and equal protection arguments were made. The briefs filed for Ping, however, show those arguments clearly were made, but were not squarely addressed by the Court. Using that opinion as a proxy, it is tempting to suggest that improved advocacy may not have mattered a great deal, at least when focusing on the outcome of The Slump Cases.

Could the United States Solicitor General's participation in The Slump Cases have prevented The Slump? Again, not likely. The Office of the Solicitor General was created in 1870, meaning the Solicitor General could have participated in any of The Slump Cases, although not the Presidential Election of 1876.[462] For The Slump cases coming to the Supreme Court from state courts, however, the federal government was not a party.[463] There were three Slump Cases that came to the Supreme Court from federal courts: *Cruikshank*; *The Civil Rights Cases*; and *Ping*. In *Cruikshank*, the Solicitor General filed a brief arguing in favor of affirming the convictions, which the Court unanimously rejected.[464] In *Ping*, however, the Solicitor General filed a brief supporting the constitutionality of the Chinese Exclusion Act.[465] And in *The Civil Rights Cases*, the Solicitor General "defended the law on Thirteenth as well as Fourteenth Amendment grounds"[466] and lost 8–1. These cases

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[461] For a good summary of effective advocacy before the United States Supreme Court, *see generally* Theodore B. Olson, *Ten Important Considerations for Supreme Court Advocacy*, 44 LITIG. 12 (2018) (highlighting ten considerations to consider when preparing for a Supreme Court argument).

[462] Robert Holt Edmunds, Jr., *Who Calls the Shots? The Solicitor General in a Political World*, at 3–4 n.10 (citing Act of June 22, 1870, ch. CL, § 2, 16 Stat. 162) (unpublished thesis) (on file with the authors); *see also generally* Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297 (2000) (discussing civil rights and the creation of the solicitor general following the Civil War, and how they have influenced each other).

[463] Waxman, *supra* note 462, at 1297–98 ("The Solicitor General is, among other things, the United States's lawyer in the Supreme Court . . . [The Solicitor General] is also responsible for supervising litigation on behalf of the United States in the lower federal courts and in the state courts.") (footnote omitted).

[464] United States v. Cruikshank, 92 U.S. 542, 547 (1875).

[465] Ping v. United States, 130 U.S. 581, 589 (1889).

[466] Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 583 (2012).

provide little suggestion that further participation by the Solicitor General would have helped avoid The Slump.

Selecting and pressing test cases is another aspect of advocacy, and advocacy certainly can be questioned in the selection and pressing of test cases during The Slump. *Bradwell* and *Minor* were test cases early in The Slump. Their results cannot be what were hoped for by those pressing the cause of women practicing law or voting, at least in litigation. They may have served as a broader catalyst for allowing women to join the bar through legislative and rule changes (in the years after *Bradwell*) and women's suffrage through the 19th Amendment (forty-five years after *Minor*). *Plessy*, by contrast, may be the most infamous test case ever taken to the Supreme Court. It would be nearly sixty years until it was reversed in 1954 in *Brown v. Board of Education* and with remedies that lagged after.

8. Opinion Writing

The divergent approaches to how the opinions were written in The Slump Cases is noteworthy. Some opinions go into excruciating detail about facts that appear, at most, tangentially relevant, if relevant at all. *Ping*, in particular, goes into great detail about various international trade delegations and their leaders spanning decades in a case that addressed the constitutionality of a statutory amendment by Congress that had nothing, or almost nothing, to do with those activities.[467] *Pace*, by contrast, includes essentially no facts in a 515 word opinion affirming a state statute criminalizing interracial marriage. *Cruikshank* found a grand jury indictment was inadequate without discussing the specific facts on which the argument was made, involving the murders of scores of Black Americans by an all-white armed paramilitary group acting at the direction of candidates for office who rejected the state's decision recognizing their opponents' electoral victories.

Along with these selective inclusions and omissions, several of The Slump Cases seem to stand alone as islands, without citing any authority. *Pace* mentions the 14th Amendment, a civil rights act and the Alabama statute being considered, but no other legal authority at all. *Minor* cites some statutes, the United States Constitution, and even the Articles of Confederation, but no case law. As another example, *The Civil Rights Cases* found the federal government's power in implementing the 13th and 14th Amendments was extremely limited, even though both expressly state Congress has the power to enforce the guarantees they contain.

Notwithstanding these observations, it would be a mistake to conclude that the way The Slump Cases were written had much to do with the analysis other than to, perhaps, aim at a result. It is naive to think that *Cruikshank*, for example, was unaware of the brutality that led to the murders of so many

[467] *See Ping*, 130 U.S. at 589–99.

leading up to the prosecutions. Nor is it likely that *Minor* simply forgot about relevant precedent or that, if only the opinion had cited other law, it would have come out the other way. So, as with these other possible disparate explanations, how these opinions were written does not explain The Slump.

B. A Unified Explanation – The What and the Why

Given that these possible disparate explanations do not explain The Slump Cases, is there a unified theory (or something akin to a unified theory) that might? With some significant qualifiers, our answer is yes, both for the "what" the Court did and "why" the Court did it.

Any unified theory for a complicated topic like The Slump will fray on the margins. As one commentator noted not so long ago, "[u]nified theories are, as yet, relatively undeveloped in constitutional law," quickly adding that "an upsurge of recent interest suggests that this may not be the case for long."[468] That same author, however, then offered a unified theory to "supplement . . . current analytical approaches," with the hope "of supplying a more general analytical structure for the problem at hand, and, in some cases, of suggesting possible answers which might not be generated through the application of traditional constitutional theory."[469] Our approach here is more modest; not a unified predictive theory, but a conceptual framework for a unified theory (really a unified explanation) for The Slump Cases in the hopes of avoiding any future slump.

The unified explanation we offer comes with caveats. One obvious epistemological concern is whether our unified explanation reflects what occurred in and at the Supreme Court during The Slump broadly, or whether it only helps to explain The Slump Cases we selected. That concern, in turn, begs the question of whether The Slump Cases are, in fact, the worst of the Supreme Court's decisions during The Slump; whether The Slump Cases are representative of all of the Supreme Court's decisions during The Slump; or something else altogether. Depending upon the resolution of these questions, is the framework we have selected in identifying the Slump Cases sufficiently robust such that it applies to most decisions during The Slump, or would a larger sample of Gilded Age cases (perhaps even all of them) be necessary to support any claimed unified explanation about the Supreme Court's decisions during the era?

Even more broadly, why try to explain The Slump Cases at all? What value does offering a unified explanation about Supreme Court cases decided during a three-decade period ending 125 years ago have? Our desire to explain The Slump Cases is based on a curiosity to try to better understand why these infamous cases were decided individually but, more broadly, how

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[468] Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 CARDOZO L. REV. 201, 207 (1993).

[469] *Id.* at 208.

and why they came with such apparent frequency in a significant cluster spanning a bit more than a generation. We looked in vain for technical issues with voting, legal education, Presidential appointments and other issues of the time that could help ensure there would be no repeat or sequel to The Slump and found only the possible disparate explanations dismissed above. In identifying this unified explanation, the hope is that there will be no repeat of or sequel to The Slump, particularly given that the Supreme Court combines a variety of different tools—including interpretative methods, legal trends, policy, foreshadowing, and other considerations—in considering what issues to consider and in resolving specific issues in its opinions.[470]

1. What Unified Explanation Describes the Court's Failures?

With these caveats and this fanfare, the unified explanation for The Slump Cases is deceptively simple: *with the exception of the 13th Amendment's elimination of slavery, and the 14th Amendment's providing citizenship to those born or naturalized in the United States,* ***the United States Supreme Court failed to address the constitutional revolution wrought by the Civil War; consequently, The Slump Cases failed to advance individual rights consistent with those profound changes.*** Many years later, the Supreme Court reversed most of The Slump Cases, due to the Court's failure during The Slump to account for these profound changes. The recognition of those rights was delayed by generations, resulting in devastating consequences for millions of people. Recognizing that justice delayed is justice denied, The Slump was an enormous lost opportunity, resulting in justice being denied for so many for such a long time.

The first Slump Case—*The Slaughter-House Cases*—was decided in 1873. In the sixteen years before that decision, the country had seen unprecedented change. In *Dred Scott v. Sandford*, decided in 1857, Chief Justice Roger B. Taney wrote for a 7–2 majority that, "for more than a century before" the Constitution, Black slaves were:

> [R]egarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.[471]

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[470] *See, e.g.*, PERRY, JR., *supra* note 115, at 216–90; Baude, *supra* note 115, at 1; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019); Leslie C. Griffin, *The Shadow Docket: A Symposium*, 23 NEV. L.J. 669, 669 (2023); VLADECK, *supra* note 115, at 274–79.

[471] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (enslaved party).

After reciting "these historical facts," the majority concluded that, under the Constitution, Dred Scott "was a slave, and not a citizen."[472] By the time of *The Slaughter-House Cases*, all nine Justices who participated in *Dred Scott* were gone from the Court. Of the Justices who participated in *Dred Scott*, only Justices Grier (who left the Court in 1870) and Nelson (who left in 1872) were on the Court for any part of The Slump.

Between *Dred Scott* and *The Slaughter-House Cases*, the United States experienced the bloody Civil War, during which the Supreme Court largely addressed legal questions involving certain aspects of the Civil War.[473] Among many other things, during the time between those two decisions, President Lincoln was assassinated, President Johnson almost immediately hit an impasse with Congress and was impeached, coming just one vote of being convicted. For the first time in more than sixty years, the United States Constitution had been amended, in incredibly significant ways, on three occasions: (1) the 13th Amendment in 1865; (2) the 14th Amendment in 1868 and (3) the 15th Amendment in 1870. The Civil Rights Act of 1866, implementing some of these new parts of the Constitution, was enacted over President Johnson's veto. With less Presidential resistance, Congress also enacted the 1870 and 1871 Civil Rights Acts.

The Reconstruction Amendments made enormous changes to the Constitutional text (eliminating slavery, providing citizenship to those born or naturalized in the United States, and prohibiting voting discrimination "on account of race, color or previous condition of servitude") and added transcendent new rights (due process applicable to the states and equal protection).[474] Unlike the text of the Constitution before their enactment, the Reconstruction Amendments largely focused on the states, not on the federal government, but gave the federal government express authority to enforce their provisions. This was particularly significant because the Reconstruction Amendments came decades before the selective incorporation of the Bill of Rights to the states began in the first part of the 20th Century. The Reconstruction Amendments were written and designed to have new and independent meaning.

The Reconstruction Amendments also rejected case law based on the previous text of the Constitution. But the majorities in The Slump Cases largely failed to recognize what was, and what was not, still valid after the Reconstruction Amendments. There were, to be sure, some exceptions. The 13th Amendment (abolishing slavery) negated the infamous 1842 *Prigg v. Pennsylvania* decision that invalidated a state law prohibiting the extradition of

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[472] *Id.* at 409, 453.

[473] David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865–1873*, 51 U. CHI. L. REV. 131, 131 (1984); *see also* CURRIE, *supra* note 40, at 285–358 (discussing the Supreme Court and Chief Justice Chase's role regarding Reconstruction and state power limitations following the Civil War).

[474] U.S. CONST. amends. XIII, XIV, XV.

Blacks to other states for slavery, based on the Supremacy Clause of the United States Constitution and the Fugitive Slave Law of 1793.[475] And the 13th Amendment, along with the 14th Amendment's citizenship guarantee, negated *Dred Scott*, as the majority in *The Slaughter-House Cases* conceded.[476]

But the Reconstruction Amendments, particularly the 14th Amendment, broadly added new protections by their express terms and otherwise, including not abridging privileges or immunities of citizenship and due process and equal protection for all. Section 1 of the 14th Amendment declares that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[477] It then continues, "nor shall any State deprive any person of life, liberty, or property, without due process of law" and that no State could "deny to any person within its jurisdiction the equal protection of the laws."[478]

The Civil War and the resulting Reconstruction Amendments represented a tipping point in the nation. Would the United States split into two countries, one that continued to recognize slavery and one that would not? The Civil War, and its resolution, rejected that outcome. Would the country continue and expand slavery, or would it end slavery? The Civil War, and the Reconstruction Amendments, appeared to answer that question in a definitive end of slavery. Would the country then recognize liberty, dignitary, and economic rights for all (whites, Black Americans, former slaves, women, people of color, minorities generally, and others)? The Reconstruction Amendments appeared to answer those questions in the affirmative. But such an answer would turn on Supreme Court decisions that would not come during The Slump. Instead, The Slump Cases gave broad deference to action by the states to continue what had been done before these amendments to the Constitution, something the Reconstruction Amendments appeared to have rejected. At the same time, The Slump Cases narrowly limited the power of the federal government to enforce the rights guaranteed in the Reconstruction Amendments, even though the constitutional text expressly authorized Congress to enforce their provisions legislatively.

The Slaughter-House Cases concluded that any rights guaranteed by the Privileges or Immunities Clause of the 14th Amendment were those controlled by the federal government, and not the states.[479] But the Privileges

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[475] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 543, 625–26 (1842).

[476] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872) ("[I]t had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. . . . [The 14th Amendment] overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States.").

[477] U.S. CONST. amend. XIV, § 1.

[478] *Id.*

[479] *Slaughter-House Cases*, 83 U.S. (16. Wall) at 82.

or Immunities Clause of the 14th Amendment is expressly directed to the states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[480] Given that Article IV, Section 2, of the Constitution, in place for eighty years before the Reconstruction Amendments and providing that "[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," the 14th Amendment fairly had to mean something different than Article IV.[481] The decision in *The Slaughter-House Cases* easily could have recognized that and gone the other way. But it did not. In that way, the Supreme Court failed to account for the enormous changes in the years leading up to *The Slaughter-House Cases*.

Given the opinion in *The Slaughter-House Cases*, and the near-exclusive reliance on the Privileges or Immunities Clause of the 14th Amendment by Myrna Bradwell's counsel, *Bradwell* was destined to the same fate. But some Justices thought it wise to go even further. Justice Bradley, joined by two other Justices, felt compelled to write separately that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."[482] In those two sentences, particularly in contrast to his dissent in *The Slaughter-House Cases* the day before, Justice Bradley made plain that constitutional protections for economic rights also turned on the gender of those seeking them.

In *Minor*, the Court again rejected a 14th Amendment Privileges or Immunities Clause argument. For a time, *Minor* seemed to up the ante from *Bradwell* and *The Slaughter-House Cases* by oddly adding that that the Constitution did not give anyone the right to vote, a declaration the Court attempted to fix a year later in *United States v. Reese*, albeit without citing *Minor*. *Cruikshank* followed by finding, after a jury trial resulting in guilty verdicts, defects in factual allegations of an indictment required dismissal of charges against former confederate armed militia members. *Cruikshank* used constitutional and procedural rhetoric capped by a significant focus on the importance of states' rights when compared to the federal government's power. In doing so, the Supreme Court failed to account for the enormous Congressional and other efforts to implement the Reconstruction Amendments, with the *Cruikshank* outcome significantly impeding individual rights for the victims of mob violence.

After deciding four of the Slump Cases, five Justices decided it was a good idea to participate as members of a partisan Electoral Commission to decide the Presidential Election of 1876. They did so in an era where some sitting Justices actively sought, or at least considered, Presidential nominations themselves. Even Justice Davis, who declined to participate in

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480 U.S. CONST. amend. XIV, § 1.

481 U.S. CONST. art. IV, § 2, cl. 1.

482 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141–42 (1872) (Bradley, J., concurring).

the Electoral Commission, did so for partisan political reasons: his election to the United States Senate. This non-judicial participation by a majority of the Court to decide who would be the elected leader of a different branch of the federal government elevated the partisan political actions of the Justices, devalued the independent role of the Court,[483] and effectively precluded the Court from considering any legal challenges to the election. The Electoral Commission determined the outcome of the election in a series of 8–7 votes, with the elected partisan politicians voting with their party and the Justices splitting 3–2 in favor of Hayes. Had one Justice voted differently in resolving the electoral votes from just one of the states at issue, Tilden, a northern Democrat, would have become President. If that happened, the "Compromise of 1877" might not have been made or have any force, meaning federal troops might have remained in the South seeking to enforce the rights granted by the Reconstruction Amendments. And all this occurred in an era where close Presidential elections were likely to pervade.[484]

This significant involvement by the Justices in contested partisan politics blunts speculation that The Slump Cases might have been driven by the Justices' desire to simply move beyond the conflict of the Civil War and its aftermath and not look back. It may have been that the Justices believed that the country was tired of conflict and wanted to return to the past, except for technically eliminating slavery and granting citizenship. The Justices, however, never expressly adopted such an approach, recognizing Justice Bradley's concurrence in *Bradwell* does something similar in negating any thought of gender equality. But, regardless of their desire to leave conflict behind, it was the Constitution the Court needed to apply in The Slump Cases, not the political mood of the country.

The Slump Cases that followed the 1876 Presidential election continued the theme of the Court failing to account for the enormous changes in the years leading up to The Slump and, particularly, failing to acknowledge individual rights. *Pace* provided the *ipsi dixit* that a statute criminalizing interracial marriage and intimate relations did not violate equal protection

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483 *See, e.g.*, REHNQUIST, *supra* note 54, at 247–48 ("Even before the first meeting of the [Electoral] Commission, each [Justice] . . . could surely see that its work would be the subject of violent and prolonged criticism from the party against whom it ruled."); *id.* at 248 ("Critics, including Earl Warren, have expressed the view that the justices serving on the Electoral Commission demeaned the Court."); *see also id.* at 221–22 ("None of these justices [who served on the Electoral Commission] were picked for their legal learning, but for their partisan backgrounds."); Bush v. Gore, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting) (noting that "the participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process"); *see generally* WOODWARD, *supra* note 275 (interpreting the Compromise of 1877 and analyzing the Reconstruction period, the Republican party's history, and the realignment of the North and South).

484 BRANDWEIN, *supra* note 229, at 141. ("Like other national elections between 1874 and 1892, the margin of victory [in the 1880 Presidential election] was razor thin.") (footnote omitted).

because it punished both whites and Black Americans similarly. Such an approach would seem to cut a large swath, without apparent boundaries, for states to prohibit any interaction between whites and Black Americans, like contracts with each other, working with each other, or working for each other. Also in 1883, *The Civil Rights Cases* severely restricted the power of Congress to prohibit racial discrimination, finding unconstitutional, and beyond the proper power of the federal government to enact, a statute requiring "full and equal enjoyment" of accommodations, public transportation and other public places "to citizens of every race and color, regardless of any previous condition of servitude."[485] *Ping* took a different route to the same destination: it ignored due process arguments (this time, under the 5th Amendment) and focused, instead, on federal treaty and immigration power.

During the final years of The Slump, *Plessy* found segregation in public transportation was not unlawful discrimination and that state segregation, enforcing the separation of Black Americans and whites, did not violate the 14th Amendment.[486] *Williams*, the final Slump Case, rejected an equal protection challenge to statutes excluding Blacks from jury service, based on the exclusion of Black Americans from voting rolls, under a state constitution drafted with the stated purpose "to exclude the negro."[487] Throughout The Slump Cases, the Supreme Court failed to account for the enormous changes in the years immediately before The Slump, resulting in a failure to recognize racial and other equality.[488] The Court did so in cases involving Black Americans (*Plessy* and *Williams*); gender (*Bradwell* and *Minor*); immigrants (*Ping*) and white men (*The Slaughter-House Cases*). It did so in cases involving vocations (*The Slaughter-House Cases* and *Bradwell*); marriage and intimate relations (*Pace*); travel, transportation and lodging (*The Civil Rights Cases*, *Ping*, and *Plessy*); voting (*Minor* and *Williams*); and jury service (*Williams*). It did so in cases originating in state courts (*The Slaughter-House Cases*, *Bradwell*, *Minor*, *Pace*, *Plessy*, and *Williams*) and in federal courts (*Cruikshank*, *The Civil Rights Cases*, and *Ping*). It did so largely in addressing the Reconstruction Amendments, but also at times when applying the Bill of Rights and the original Constitution (*Cruikshank* and *Ping*). It did so in ways that typically affirmed action or inaction by states (*Bradwell*, *Minor*, *Pace*, *Plessy*, and *Williams*) and that typically negated federal legislation or action (*Cruikshank* and *The Civil Rights Cases*). For at least some of The Slump Cases, it did so in a way

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[485] The Civil Rights Cases, 109 U.S. 3, 9 (1883).

[486] Plessy v. Ferguson, 163 U.S. 537, 548 (1896).

[487] Williams v. Mississippi, 170 U.S. 213, 214–15 (1898); MCMILLEN, *supra* note 285, at 41.

[488] *See* CURRIE, *supra* note 59, at 40 ("The Fuller Court [from 1888 to 1910] did little to further the fourteenth amendment's central goal of racial justice; it was in the economic arena that Fuller and his brethren made fourteenth amendment history.") (footnote omitted).

that could not be fixed legislatively.[489] It did so without any express or apparent critical assessment of the significant changes the Civil War, the Reconstruction Amendments, and subsequent legislative enactments had, beyond the technical abolition of slavery and granting of citizenship. And it did all this at a time of enormous ongoing change during the Gilded Age, including the growing importance of transportation, expanding workforce, the move from an agrarian barter culture to the need for increased financial earning capacity, the transition from a rural to an urban America, and the general industrialization of the country.

The Supreme Court did all this intentionally. At least by the second half of The Slump, the Supreme Court decided The Slump Cases knowing there clearly was a different analytical path available. Justice Harlan, who served on the Court during most of The Slump and did not write separately in many of The Slump Cases, dissented in *The Civil Rights Cases* and *Plessy*. Those dissents are telling, both for what a majority of the Supreme Court did not do in those cases, and in predicting what the Supreme Court would do later, after The Slump.

Justice Harlan's dissent in *The Civil Rights Cases* addressed the Supreme Court's previous decisions concluding that common carrier transportation, lodging with innkeepers and "places of public amusement" had public or at least quasi-public functions and that discrimination practiced by corporations and individuals in the exercise of their public or quasi-public functions "is a badge of servitude the imposition of which Congress may prevent under its power" conferred under the 13th Amendment.[490] His dissent correctly, and importantly, noted the 14th Amendment "presents the first instance in our history of the investiture of Congress with affirmative power, by *legislation*, to *enforce* an express prohibition upon the States."[491] After discussing *Prigg* and *Dred Scott*, Justice Harlan declared that, if the Reconstruction Amendments:

> [A]re so construed that Congress may not, in its own discretion, and independently of the action or non-action of the States, provide, by legislation of a direct character, for the security of rights created by the national Constitution; . . . then, not only the foundations upon which the national supremacy has always securely rested will be materially disturbed, but we shall enter upon an era of constitutional law, when the rights of freedom and American citizenship

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[489] *Cf.* CURRIE, *supra* note 40, at 402 (opining that, for cases interpreting the Reconstruction Amendments decided during the tenure of Chief Justice Waite (1874–88), including *Pace*, *Cruikshank*, and *The Civil Rights Cases*, "the Court's restrictive interpretations of the Constitution were unavoidable, but by manipulating the statutory issues of coverage and severability the Court went out of its way to incapacitate the enforcement authorities after it was too late politically to expect Congress to fill the gap by enacting narrower statutes").

[490] *The Civil Rights Cases*, 109 U.S. at 41–43 (Harlan, J., dissenting).

[491] *Id.* at 45 (Harlan, J., dissenting).

> cannot receive from the nation that efficient protection which heretofore was unhesitatingly accorded to slavery and the rights of the master.[492]

Justice Harlan's dissent in *Plessy* was even more crisp, and perhaps even more prescient: "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case." [493] The Supreme Court clearly knew it had options during The Slump, yet it issued The Slump Cases nonetheless.

Stated simply, other than recognizing the abolition of slavery and that Black Americans, including former slaves, were citizens, the Court in The Slump Cases did not recognize or extend liberty, dignitary, or economic rights to people of color or to members of other historically disenfranchised groups. The Slump became a time of elevation of pre-existing economic and business rights over the individual rights addressed in the Reconstruction Amendments and related legislation. Those advances and recognition of individual rights would have to wait for decades.

2. Why Did the Court Fail?

Why did the Court fail to recognize the profound changes the Reconstruction Amendments made to the very fabric of the country? Why did the Court continue with the pre-Civil War, pre-Reconstruction Amendments' approach to state's rights, the rights of the federal government, and individual rights? Seeking to identify what prompts the Court to act (the "why") is an even riskier proposition than identifying what the Court did (the "what") in the form of a unified explanation. But there are some historical perspectives providing insight (perhaps merely shadows, rather than true insight) as to the why.

a. The Slump Era Did Not Broadly Value the Quality of Human Life or Dignity

The quality of life and dignity has, for many in many significant ways, significantly advanced since The Slump era. The values of the day undoubtedly influenced the Court in The Slump Cases. During The Slump, working conditions were significantly less humane than they would later become. The Slump era involved, for example, terrible working conditions in the meat packing industry as well as unhealthy and unsanitary meat packing practices leading to Upton Sinclair's *The Jungle* and the Federal Meat Inspection Act and the Pure Food and Drug Act, all appearing in 1906.[494]

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[492] *Id.* at 57 (Harlan, J., dissenting).

[493] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[494] *See generally* UPTON SINCLAIR, THE JUNGLE (1906) (criticizing the meat-packing industry); Federal Meat Inspection Act, 21 U.S.C. §§ 601–695 (1906); Pure Food and Drug (Wiley) Act, 21 U.S.C. §§ 1–15 (1906).

As another example, during The Slump, workers injured on the job were generally left to their own devices without significant recourse. Workers' compensation did not exist until after The Slump, with the federal government enacting a system in 1908, with many states following soon after.[495] Focusing on the fast-growing railroad system, President Benjamin Harrison repeatedly urged Congress to enact legislation "to obviate and reduce the loss of life and the injuries" to railroad workers, graphically noting in 1889 that "[i]t is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war."[496] He later reported that, in the year ending in mid-1891, nearly 2,700 railroad workers had been killed and more than 26,000 injured in incidents coupling railroad cars.[497] These injuries occurred during The Slump, before the Federal Employer Liability Act, initially enacted in 1906 and then re-enacted in 1908 after the Court struck the original act as unconstitutional,[498] provided protections for railroad workers not covered by regular workers' compensation.[499]

The organized labor movement during The Slump involved violence against organizers and workers and limitations on labor organizers based on conspiracy law. In 1886, the Haymarket Massacre in Chicago, arising out of protests over labor conditions, "ended in clashes with the police that resulted in the hanging of four anarchist labor leaders."[500] After the Debs' Rebellion, caused by the American Railway Union striking against the Pullman Palace Car Company, which cut wages an average of 28 percent in the wake of the devastating Panic of 1893,[501] it took a failed appeal to the Supreme Court,[502] and at least another 20 years before laborers were exempted from the

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[495] *See* MARK J. WARSHAWSKY ET AL., SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2017 38 (2018) ("The federal government was the first to establish a workers' compensation program, covering its civilian employees with an act that was passed in 1908 to provide benefits for workers engaged in hazardous work. The remaining federal workforce was covered in 1916. Nine states enacted workers' compensation laws in 1911. By 1921, all but 6 states and the District of Columbia had workers' compensation laws.").

[496] Johnson v. S. Pac. Co., 196 U.S. 1, 19 (1904).

[497] *Id.*

[498] The Employers' Liability Cases, 207 U.S. 463, 464 (1908).

[499] *See* Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (codified as 45 U.S.C. §§ 51–60).

[500] REMINI, *supra* note 21, at 183.

[501] *See* Richard Schneirov, *The Pullman Strike*, N. ILL. UNIV. DIGIT. LIBR., https://digital.lib.niu.edu/illinois/gildedage/pullman [https://perma.cc/VK26-LBHF]; *Debs Biography*, DEBS FOUND., https://debsfoundation.org/index.php/landing/debs-biography [https://perma.cc/C8V4-UNNQ].

[502] *See In re* Debs, 158 U.S. 564, 600 (1895).

Sherman Antitrust Act[503] and, nearly 40 years later, from labor injunctions more broadly.[504]

For front-line workers, at least, The Slump era did not, broadly, appear to value the quality of human life or dignity, like later eras would more fully recognize. The Justices were, unquestionably, in and of that era, with changes better valuing the quality of human life and dignity coming later, in future eras.

b. The Court Did Not Fully Acknowledge the Substantial Change in the Balance of Power from the States to the Federal Government Effectuated by the Reconstruction Amendments

Since perhaps before the United States existed, the balance of power between the federal government and the states has caused friction or perhaps an uneasy stalemate. From the July 4, 1776 Declaration of Independence, to the Articles of Confederation ratified in 1781 (which failed because they did not give Congress the authority necessary to enforce laws or raise taxes), to the United States Constitution ratified in 1789 (particularly Article IV, addressing relationships between the states), to the 10th Amendment ratified in 1791 ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")[505] to the 11th Amendment ratified in 1795 ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."),[506] the balance of power between the states and the federal government has created debate and angst.[507] And in significant respects, that debate and angst continue to the present times.

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[503] *See* MICHAEL HANNON, THE PULLMAN STRIKE OF 1894 42 (2010), https://librarycollections.law.umn.edu/documents/darrow/trialpdfs/Pullman_Strike.pdf [https://perma.cc/R5NQ-6WSQ].

[504] *Id.* To be sure, there were some pro-labor developments during The Slump era, including the Anti-Pinkerton Act, passed in 1893, to limit the Pinkerton Detective Agency's quasi-military provision of armed strikebreaking personnel by limiting the federal government's ability to hire private investigators. *See* 5 U.S.C. § 3108; *see also* United States *ex rel.* Weinberger v. Equifax, Inc., 557 F.2d 456, 461 (5th Cir. 1977) (noting "[t]he Anti-Pinkerton Act is an expression of legislative frustration") (noting background in enacting the Anti-Pinkerton Act, including a "particularly violent and bloody confrontation" in Homestead, Pennsylvania in 1892 prompting Congressional injury and action).

[505] U.S. CONST. amend. X.

[506] U.S. CONST. amend. XI.

[507] *See generally, e.g.*, SIEGEL, *supra* note 6 (discussing disputes between the states and federal government regarding "collective-action problems," like funding the federal government, commerce, and national defense); Craig Green, *Beyond States: A Constitutional History of Territory, Statehood, and Nation-Building*, 90 U. CHI. L. REV. 813 (2023) (discussing constitutional struggles between the states and federal government regrading federal territories); Kathryn Abrams,

Looking at the Gilded Age, by any meaningful measure, the Reconstruction Amendments tilted the balance of power profoundly away from states' rights and in favor of the federal government. The text of the Reconstruction Amendments contained crisp prohibitions (the 13th Amendment abolishing slavery), expressly subjected the states to various minimum requirements (the 14th Amendment's guarantee of privileges or immunities, due process, and equal protection) and guaranteed the right to vote (the 15th Amendment, prohibiting denial of that right on account of race, color, or "previous condition of servitude"). And unlike any provision of the original Constitution, or the dozen Amendments preceding them, each of the three Reconstruction Amendments includes a specific provision expressly authorizing Congress the power to enforce each of the Reconstruction Amendments. The Reconstruction Amendments were unprecedented in the history of the country in how they allocated substantial power and authority to the federal government and as a check to the power and authority of the states.

The Court, however, was unwilling to recognize the substantial change in the balance of power from the states to the federal government effectuated by the Reconstruction Amendments. It may have been that the Court could not appreciate or comprehend the growth of the federal government itself. As noted above, the federal government grew very little during The Slump era; federal government receipts grew by less than one percent annually during The Slump, and federal government expenditures were flat until the very late 1890s. The concept of independent federal agencies and their power did not emerge until the vast expansion of the federal government brought on by President Franklin D. Roosevelt's New Deal in the 1930s and 1940s, including through the Securities and Exchange Commission, the National Labor Relations Board, and other commissions, boards and agencies.[508] The first of the significant federal regulatory agencies, the Interstate Commerce Commission, did not exist until 1887, toward the end of The Slump era.[509] Functions later taken for granted as properly being federalized (like the Bureau of Investigation, later the Federal Bureau of Investigation, which began in 1908) did not exist during The Slump.[510] It also may have been that at least some members of the Court were comfortable leaving to the states the thorny issues raised by The Slump Cases, or at least were not willing to

Note, *On Reading and Using the Tenth Amendment*, 93 YALE L.J. 723 (1984) (exploring "state sovereignty" in the context of the Tenth Amendment); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989) (exploring "state sovereignty" in the context of the Tenth, and in particular, the Eleventh Amendment).

[508] *See generally* Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565 (2011) (drawing connections between President Franklin Roosevelt creating new agencies and the increase in power to agencies as a whole).

[509] *Id.* at 1569 n.7.

[510] *See A Brief History: The Nation Calls, 1908–1923*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/history/brief-history [https://perma.cc/JM47-8853].

allow or extend to the federal government the power to regulate those issues based on a traditional states' rights principles. This perspective, using one view of the world before the Reconstruction Amendments, may have been part of why the Court was unwilling to recognize the substantial change in the balance of power from the states to the federal government effectuated by the Reconstruction Amendments.

c. The Court During The Slump Was a Common Law Court, Not the Textualist Court That It Later Would Become

"We're all textualists now," famously quipped by Justice Kagan in 2015,[511] was far from true during The Slump. The Court during The Slump was the product of a rich, deep common law tradition, an era long before *Erie Railroad v. Tompkins* held that "[t]here is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State."[512]

The Slump occurred before the systematic organization and expansion (sometimes called an explosion) of federal statutory law. By the early 1870s, when The Slump began, the primary source of federal statutory law was the seventeen volume chronological Statutes at Large, tracing back to the First Congress in 1789–1791.[513] Given how the Statutes at Large were published, "[i]t was almost a practical impossibility to make a thorough search of the statutes on many subjects."[514] After various intermediate efforts to improve that situation, with limited successes, in 1897, a Presidential commission was established to revise and codify federal criminal and penal codes, expanded in 1901 to include revising and codifying all federal law.[515] In 1906, after a nine-year effort, "[t]he Criminal Code and Judicial Code were adopted by Congress, but the remainder of the commission's work was never enacted as law although it was presented to Congress several times."[516] At least compared to the present times, the Court during The Slump was far more common law driven and, likely as a result, less textualist. That approach during The Slump may have meant the Court's approach (and perhaps skill)

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[511] *See* Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg?si=-uYuWLXU4A7K-aQk&t=508 [https://perma.cc/ARX6-BD9P] ("I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.").

[512] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[513] Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1012 (1938).

[514] *Id.*

[515] *Id.* at 1018.

[516] *Id.* (footnote omitted).

in construing the Reconstruction Amendments and federal statutory provisions enacted during The Slump was more limited.[517]

d. The Court During The Slump Was, by Gender and Race, Homogenous

During Reconstruction, Black American men served as government leaders "[a]t every level of government, federal, state, and local."[518] Sixteen Black American men served in Congress, two in the United States Senate and fourteen in the House of Representatives, along with two Ambassadors.[519] In the states, there was one Black American Governor, nine Secretaries of State, four Speakers of the House, four Superintendents of Education, and two state Treasurers.[520] More than 100 Black American men served as state Senators, while nearly 700 served in the House of Representatives in various states.[521]

In the courts, however, Reconstruction was quite different. All the Justices on the United States Supreme Court were white men until 1967, when Thurgood Marshall became the first African American Justice;[522] in 1991, Clarence Thomas became the second African American Justice.[523] The gender bar did not change until 1981, when Sandra Day O'Connor became

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[517] Although tempting to reject such a thought out of hand, in 1892, the Court decided *Church of the Holy Trinity v. United States*, where the statutory construction analysis began by stating, "It must be conceded that the act of the [defendant] corporation is within the letter of this section," but then cited as "a familiar rule" the thought "that a thing may be within the letter of the statute" but also "yet not within the statute, because not within its spirit, nor within the intention of its makers." 143 U.S. 457, 458–59 (1892) (citing Act of Feb. 26, 1885, ch. 164, 23 Stat. 332). After concluding the United States "is a Christian nation," the Court asked "shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?", and then concluded that while the actions of the church were "within the letter," the act "cannot be within the statute." 143 U.S. at 465–71. At very least, *Church of Holy Trinity* provides some fodder for the why being that the Court used an approach when construing the Constitution that was quite different than the textualist approaches cited applied by many Justices more recently.

[518] ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION xiv (La. State Univ. Press rev. ed. 1996).

[519] REMINI, *supra* note 21, at 164 ("A total of sixteen African-Americans served in Congress during Reconstruction, but each served only one or two terms."); FONER, *supra* note 518, at xiv–xv (citing Table 3); *see generally* PHILIP DRAY, CAPITOL MEN: THE EPIC STORY OF RECONSTRUCTION THROUGH THE LIVES OF THE FIRST BLACK CONGRESSMEN (2010) (describing the astounding odds these sixteen Black Southerners faced while advocating for reform).

[520] FONER, *supra* note 518, at xv (citing Table 5).

[521] *Id.*

[522] *See* MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 240, 263–65 (Citadel Press updated & rev. ed. 1994).

[523] *See Current Members: Clarence Thomas: Associate Justice*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/H92P-J3UB].

the first female Justice;[524] in 2009, Sonia Sotomayor became the first Hispanic Justice (male or female),[525] and in 2022, Ketanji Brown Jackson became the first female African American Justice.[526] Unlike the other branches of federal government, during The Slump, federal judicial officers were exclusively white men.[527]

State courts were slightly more racially diverse, but only by a bit: Black American Jonathan J. Wright was the sole state supreme court justice during Reconstruction, serving as an Associate Justice on the South Carolina Supreme Court from 1870 until resigning in 1877, when he was faced with impeachment after he "voted with the court's majority to recognized Democrat Wade Hampton as governor, then unsuccessfully tried to change his vote."[528] There were eleven other Black American state judge "officeholders" during Reconstruction, and more than 200 justices of the peace or magistrates.[529] And there was no significant gender diversity in such positions during The Slump. This homogeneity, by gender and race, of those on the Court during The Slump could not have engendered an experience-based wide view of perspectives in resolving The Slump Cases.[530]

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[524] *Past Exhibitions: Sandra Day O'Connor: First Woman on the Supreme Court*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/visiting/sandradayoconnor.aspx [https://perma.cc/KUR4-E5FY].

[525] *See Current Members: Sonia Sotomayor: Associate Justice*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/H92P-J3UB]; *Justice Sonia Sotomayor*, JUSTIA, https://supreme.justia.com/justices/sonia-sotomayor [https://perma.cc/8QD5-J23V].

[526] *See Current Members: Kentanji Brown Jackson, Associate Justice*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/H92P-J3UB]; *Justice Ketanji Brown Jackson*, JUSTIA, https://supreme.justia.com/justices/ketanji-brown-jackson [https://perma.cc/V7TK-PP9L].

[527] *See, e.g.*, RENEE KNAKE JEFFERSON & HANNAH BRENNER JOHNSON, SHORTLISTED: WOMEN IN THE SHADOWS OF THE SUPREME COURT 16–36 (N.Y. Univ. Press 2020) (noting Florence Ellinwood Allen was "the first female appointed to an Article III federal appellate court, the United States Court of Appeals for the Sixth Circuit," including for a time as chief judge, where she served from 1934 until taking senior status in 1959); *see also* Mary L. Clark, *One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 514 (2004) (noting Constance B. Motley was the first African American woman appointed to the federal bench, nominated by President Johnson in 1966 and serving on the United States District Court for the Southern District of New York); SUSAN OKI MOLLWAY, THE FIRST FIFTEEN: HOW ASIAN AMERICAN WOMEN BECAME FEDERAL JUDGES 1, 49 (Rutgers Univ. Press 2021) (noting Susan Oki Mollway became the first Asian women federal judge, appointed by President Clinton in 1998 to the United States District Court for the District of Hawaii, while Jacqueline Nguyen became the first Asian woman federal appellate judge, appointed by President Obama in 2012 to the United States Circuit Court for the Ninth Circuit Court of Appeals).

[528] FONER, *supra* note 518, at xv–xvi, 236 (citing Tables 5 and 6).

[529] *See id.* at xvii (citing Table 8).

[530] For a thoughtful analysis of other common and dissimilar aspects of the Justices during the history of the Court, *see generally* Benjamin H. Barton, *An Empirical Study of Supreme Court Justice*

e. Some Political Leaders Stated the Need for Government to Be a "White Man's Government"

Until the end of the Civil War in 1865, slaves in the United States were treated as assets, not people. "America's first bond market was backed by . . . human beings, kidnapped from Africa and tortured into forced labor."[531] Surviving documents "show how slaves were used as collateral to secure mortgages and then could be seized for non-payment of the mortgage."[532] And in 1857, the Supreme Court's *Dred Scott* opinion declared that a person "of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States."[533] The end of the Civil War was supposed to change all that.

But by 1865, the year the Civil War ended, "several Confederate states had already passed a series of 'Black Codes' defining the condition of the freedmen in such a way as to keep them bound to the land."[534] The Ku Klux Klan was founded the next year, "aimed specifically at restoring white rule through violence and lawlessness by striking terror among blacks if they dared to vote."[535] Notwithstanding calls "for the dissolution of the Klan, its popularity was so widespread that a women's auxiliary was formed. The 1923 State Fair of Texas, held at Dallas's Fair Park, even had a Ku Klux Klan Day, and the public was invited to witness the largest group ever initiated into Klan membership."[536] Jim Crow laws, starting in the early 1880s, led to *Plessy*.[537]

Some elected officials echoed this approach. South Carolina Governor Benjamin F. Perry is attributed as stating in September 1865—just a few months after the end of the Civil War—that "this is a white man's

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Pre-Appointment Experience, 64 FLA. L. REV. 1137 (2012) (analyzing the "pre-Court experience for every Supreme Court Justice from John Jay to Elena Kagan," and arguing that the unique background experiences of "Roberts Court Justices" is harmful).

[531] Pedro Nicolaci de Costa, *America's First Bond Market Was Backed by Enslaved Human Beings*, FORBES (Sept. 3, 2019, 11:59 AM), https://www.forbes.com/sites/pedrodacosta/2019/09/01/americas-first-bond-market-was-backed-by-enslaved-human-beings/?sh=3e379d081888 [https://perma.cc/BS22-YZ75].

[532] Davis Mac Marquis, *Enslaved People as Collateral*, WILLIAM & MARY LIBRS. (Apr. 14, 2016), https://libraries.wm.edu/blog/special-collections/enslaved-people-collateral [https://perma.cc/8JSD-6N9C]; *see also generally* SHARON ANN MURPHY, BANKING ON SLAVERY IN THE ANTEBELLUM SOUTH (Yale Univ. ed., 2017), https://economics.yale.edu/sites/default/files/banks_and_slavery_yale.pdf [https://perma.cc/UUU3-6QRY] (citing Professor Murphy's paper prepared for presentation at the Yale University Economic History Workshop on May 1, 2017, where she discussed bank financing of slavery).

[533] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872) (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party)).

[534] REMINI, *supra* note 21, at 157.

[535] *Id.* at 165.

[536] MIMI CLARK GRONLUND, SUPREME COURT JUSTICE TOM C. CLARK: A LIFE OF SERVICE 30 (Univ. of Tex. Press 1st ed. 2010).

[537] *See* REMINI, *supra* note 21, at 178.

government, and intended for white men only," citing *Dred Scott* and adding the thought "[t]hat each and every State of the Union has the unquestioned right of deciding for herself who shall exercise the right of suffrage, is beyond all dispute."[538] About two years earlier, during the Civil War, Andrew Johnson (soon to become Vice President and, later, President after Abraham Lincoln's assassination), declared his view that ending slavery was based on his concern for white people, not slaves. During a speech in Franklin, Tennessee, he is quoted as stating "I was then, as I am now, for a white man's government, and for a free intelligent, white constituency, instead of a Negro aristocracy."[539] It is not a large leap to think that some of the why for The Slump Cases was influenced by such views.

f. The Court Was Tired of the Strife and North-South Conflict and, Accordingly, Focused on Other Things

In 1876, as Reconstruction was ending, the Governor of Mississippi asked President Grant for federal help to end and prevent violence there. President Grant rejected the request, stating "The whole public are tired out with these annual autumnal outbreaks in the South, and a great majority are now ready to condemn any interference on the part of the [federal] government."[540] A few years before, the Panic of 1873 had shifted the priorities of the north, "ushering in what was referred to as the 'Great Depression' until the 1930s."[541] From the perspective of many, the Compromise of 1877, described as part of the resolution of the Presidential Election of 1876 and the election of President Hayes, also "marked the formal end of reconstruction."[542]

During The Slump, the Court seemed to focus, in no small part, on recognizing states' police powers,[543] states' power to regulate business and

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[538] Walter Steven Bright, Radicalism and Rebellion: Presidential Reconstruction in South Carolina April 1865 to May 1866 68 (May 2008) (M.A. thesis, Clemson University) (ProQuest) (citing "*Extracts from Gov. Perry's Message*," THE ANDERSON INTELLIGENCER, Sept. 28, 1865).

[539] Travis Dorman, *Andrew Johnson, the Impeached President Who Wanted 'A White Man's Government*,' KNOXVILLE NEWS SENTINEL (July 30, 2020, 4:13 PM), https://www.knoxnews.com/story/news/local/tennessee/2020/07/30/andrew-johnson-impeached-president-tennessee-history/5450438002 [https://perma.cc/8Q5M-39NN].

[540] Daniel Byman, *White Supremacy, Terrorism, and the Failure of Reconstruction in the United States*, 46 INT'L SEC. 53, 83 (2021) (quoting MICHAEL FELLMAN, IN THE NAME OF GOD AND COUNTRY: RECONSIDERING TERRORISM IN AMERICAN HISTORY 134 (Yale Univ. Press 2010)).

[541] Byman, *supra* note 540, at 83.

[542] FRANKLIN, *supra* note 265, at 211.

[543] *See generally* Mugler v. Kansas, 123 U.S. 623 (1887) (upholding police power of Kansas to prohibit the manufacture or sale of liquor in an 8-1 decision); Munn v. Illinois, 94 U.S. 113 (1877) (upholding police power of Illinois to regulate grain warehouse and elevator rates in a 7–2 decision). *But see generally* Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890) (concluding Minnesota improperly imposed railroad rates in a 6-3 decision).

contracts[544] and, at times at least, the states' power to tax and regulate commerce.[545] In that respect, it seems, the why may have been explained by the Court having grown tired of the north-south conflict and wanting to focus on other things.

VII. WHY IT MATTERS NOW: SPECIFIC PROCESS LESSONS FOR THE MODERN COURT

Despite the salience of Santanya's admonition,[546] history rarely repeats in the exact same form. Regardless of whether the country's advances in science, technology, and international power in the last eighty years match the eighty-year period after the Civil War, there is no corollary advancement in changes to the Constitution. Even in the face of the current partisan rancor about constitutional law and the principles of government, it is unlikely that there will be textual amendments that will rival the force and scope of the Reconstruction Amendments.[547] Instead, significant changes will come elsewhere, including from the Supreme Court. For instance, the Reconstruction Amendments altered the pre-Civil War expansive view of states' rights and limited view of the federal government's authority, but it was the Court—long after The Slump—that permitted the expansion of federal agency authority.[548] Executive and congressional action through federal agencies gives weight to the force of federal authority over the states.

There is a catch with Court-derived changes to constitutional law: what the Court decides, the Court can reverse. It recently obviated a significant constitutional doctrine about individual rights, returning the issue to the

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[544] *See generally* Stone v. Mississippi, 101 U.S. 814 (1880) (unanimous decision affirming power of Mississippi to outlaw lotteries). *But see generally* Allgeyer v. Louisiana, 165 U.S. 578 (1897) (striking Louisiana law prohibiting out-of-state insurance companies from conducting business in the state without maintaining an office in the state in a unanimous decision).

[545] *See generally* Plumley v. Massachusetts, 155 U.S. 461 (1894) (upholding power of Massachusetts to ban the manufacture and sale of oleomargarine colored yellow to look like butter in a 6–3 decision); Brown v. Houston, 114 U.S. 622 (1885) (affirming power of Louisiana to tax goods that remained stored on boats before sale in a unanimous decision). *But see generally* Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886) (rejecting power of California to increase property taxes on railroad companies when they added value to property by building fences in a unanimous decision).

[546] "Those who cannot remember the past are condemned to repeat it." GEORGE SANTAYANA, THE LIFE OF REASON: INTRODUCTION AND REASON IN COMMON SENSE 284 (1905).

[547] *See generally* Darren R. Latham, *The Historical Amendability of the American Constitution: Speculations on an Empirical Problematic*, 55 AM. U. L. REV. 145 (2005) (comparing constitutional change through different eras of American history).

[548] *See, e.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

states.[549] More recently, the Court reversed its prior direction about judicial discretion to be given to agency authority.[550] Whatever one's opinion about the Court's decisions on a particular issue, the process by which the Court decides and communicates its decisions can be as important as the decision itself. For this reason, our final focus is not on Court decisions in the recent past or future, but instead on what the Court and others might learn about judicial decision-making and the justices' conduct during The Slump based on cases and controversies in a tempestuous period that did not survive the test of time. This is a brief list, recognizing others have already found meaning in the cases decided shortly after the Civil War that apply to the modern Court.[551]

A. *The Court's Role in Case Selection and Issue Development Should Be Limited or Eliminated*

The Court is the final arbiter of constitutional law, including the meaning of the words of the Constitution themselves. All other federal and state courts are bound by the Court's rulings. [552] The legislative and executive branches are also bound by the Court's holdings.[553] These concepts are

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[549] "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. . . . It is time to heed the Constitution and return the issue of abortion to the people's elected representatives." Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231–32 (2022).

[550] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024) (overruling *Chevron*, holding "*Chevron* gravely erred" in requiring courts to defer to an agency's interpretation of its own rule when the enabling statute is silent or ambiguous with respect to the specific issue at hand). Previously, Justice Gorsuch (among others) questioned whether *Chevron* deference violates Article III. *See* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 791 (2020) ("And why should courts, charged with the independent and neutral interpretation of the laws Congress has enacted, defer to such bureaucratic pirouetting?").

[551] *See, e.g.*, Thomas M. Keck, *The U.S. Supreme Court and Democratic Backsliding*, 46 L. & POL'Y 197, 210–13 (2024); Ian Millhiser, *The Case Against the Supreme Court of the United States*, VOX (June 25, 2022, 7:00 AM), https://www.vox.com/2022/6/25/23181976/case-against-the-supreme-court-of-the-united-states [https://perma.cc/7EQ5-YAJW].

[552] *See, e.g.*, Hutto v. Davis, 454 U.S. 370, 374–75 (1982) ("[T]he Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases 'by virtue of their commissions, not their competence.' And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from *Rummel*. But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

[553] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."). Equally important, the Court's authority is recognized by other branches of government. "The Court's caseload is almost entirely appellate in nature, and the Court's decisions cannot be appealed to any authority, as it is the final judicial arbiter

particularly important now, when Court "interpretations of federal statutes are less likely to be overruled by Congress," and Court "interpretations of the Constitution are less likely to be met with federal statutes stripping" the Court's jurisdiction, or packing the Court.[554] These hierarchical principles, however, obscure an equally important reality. In this context, "the Court" is not an institution or even a branch of government. It is a group of nine (or sometimes fewer) individuals who gather together to collectively announce constitutional and federal law on specific issues in a particular case.[555] Unlike other federal and state courts and other government officials, the Court is not bound by past decisions of any other body, including the Court itself. As Justice Robert Jackson famously quipped: "We are not final because we are infallible, but we are infallible only because we are final."[556]

Supreme Court Justices recognize such power derives from trust developed by all the justices that preceded them. They also recognize that such power is based on a foundation that the Court will adhere to a consistent structure of rules, doctrines, and methods by which it reaches its conclusions, thereby avoiding the charge that its decisions only reflect the shared opinion of five individuals' idiosyncratic views on any given day. These methods are so carefully developed and longstanding that it is only necessary to discuss one of them here.[557]

The Constitution is a relatively short, organic document created by people other than the Court or Justices serving on the Court. Invoking a

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in the United States on matters of federal law." *The Judicial Branch*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/#:~:text=The%20White%20House%201600%20Pennsylvania%20Ave [https://perma.cc/5QQS-87YZ].

[554] *See* SIEGEL, *supra* note 6, at 474 (footnote omitted).

[555] The conclusion about whether the meaning of the Constitution changes with the membership on the Court may be influenced by whether one is an observer or a participant trying to adjust to changes. One candid assessment of constitutional interpretation as a process is found in Judge Noonan's concurrence in Carrington v. United States, 503 F.3d 888, 895 (9th Cir. 2007) (Noonan, J., concurring) ("Of course the constitution changes its meaning with changing majorities. Not as frequently as statutes are changed by legislators, the old foundational document has its speech altered by new authorized interpreters. The Supreme Court is the engine and champion of constitutional change."), *opinion amended on denial of reh'g*, 530 F.3d 1183 (9th Cir. 2008).

[556] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). Justice Jackson also opined that decisions from one Court reversed by another "reflects a difference in outlook normally found between personnel comprising different courts." *Id.*

[557] *See, e.g.*, BRANDON J. MURRILL, CONG. RSCH. SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION 2 (2018) ("When exercising its power to review the constitutionality of governmental action, the Supreme Court has relied on certain 'methods' or 'modes' of interpretation—that is, ways of figuring out a particular meaning of a provision within the Constitution. This report broadly describes the most common modes of constitutional interpretation; discusses examples of Supreme Court decisions that demonstrate the application of these methods; and provides a general overview of the various arguments in support of, and in opposition to, the use of such methods of constitutional interpretation.") (quoting the Summary section of the report).

simplistic truism declared by the current Chief Justice, the Court's principal role is to call strikes and balls.[558] Just as referees do not make rules governing the game, the Court should strive as much as possible from creating new constitutional law. Of course, the on-the-ground reality is much messier because the power assumed by the Court is so great. Nonetheless, a corollary to the Chief Justice's truism is restraint or an actual prohibition on the development or direction of constitutional law by the Court.

The modern Supreme Court does not have the procedures in place that allow individual Justices to sit on the trial bench or issue public rulings that virtually guarantee a merits decision, as was the case in *Cruikshank*. As discussed above, Justice Bradley participated in the *Cruikshank* trial, seemingly raised issues that had not been previously addressed, and issued a written ruling that he immediately circulated to influential government officials in the executive and legislative branches of the federal government. There is no doubt that Justice Bradley wanted the issue of federal authority over civil rights enforcement to be brought before the Court, and he strenuously advanced a particular outcome for that issue. Without Justice Bradley's authority as a sitting Justice on the Supreme Court, while also having acted as a trial judge, and his pre-decision advocacy, it is plausible that the *Cruikshank* decision would have been dramatically different.

While it is reasonable to assume the modern Court is immune from determined efforts by individual Justices to shape the docket and merits decisions in cases before a petition seeking review by the Court akin to what Justice Bradley did in *Cruikshank*, the opportunity for issue development by a plurality of Justices, or even a single Justice,[559] is as great now as it was during The Slump. Starting with the 1925 Judges' Bill,[560] Congressional changes to the Court's jurisdiction have given it almost unlimited discretion over the issues it decides in the cases it chooses to hear. The modern Court's practice of 'signaling' issues that could or should be addressed in the future

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[558] "I will remember that it's my job to call balls and strikes, and not to pitch or bat." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

[559] In a recent example, a single justice suggested how prosecution of the president by a special counsel should first be vetted by the trial court. *See* Trump v. United States, 603 U.S. 593, 643–44 (2024) (Thomas, J., concurring) ("The lower courts should thus answer these essential questions concerning the Special Counsel's appointment before proceeding."). Such a case was shortly thereafter dismissed by the trial judge, citing the concurrence. *See* United States v. Trump, No. 23-80101, 2024 WL 3404555, at *7 (S.D. Fla. July 15, 2024). Constitutional scholar Laurence Tribe argued the connection between the concurrence and the dismissal was more than coincidence. *See* Laurence H. Tribe & Dennis Aftergut, *Aileen Cannon Has Taken a Sledgehammer to the Rule of Law*, THE GUARDIAN (July 16, 2024, 2:45 PM), https://www.the guardian.com/commentisfree/article/2024/jul/16/aileen-cannon-has-taken-the-sledge hammer-to-the-rule-of-law [https://perma.cc/XM4Q-6J2Z].

[560] *See generally* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000) (discussing the 1925 Judges' Bill).

is well-known.[561] And the comparatively new role of the shadow docket in encouraging or suppressing the development of constitutional law has been acknowledged by members of the Court.[562] Individual Justices, as a matter of routine procedure, easily possess the power to indirectly influence issue development similar to the more direct methods of Justice Bradley. The question is whether The Slump Cases provide historical evidence to show the Court is ill-served by such efforts.

Of The Slump Cases, *Cruikshank* is the most blatant example of the efforts by a single Justice to sway constitutional law. More detrimental, however, is when a majority of the Justices select a case to advance a particular issue and to suppress another issue. *The Slaughter-House Cases* demonstrate this problem. Despite the obvious import and intent of the 14th Amendment, the Court moved quickly on a case not involving Black Americans and gave only window-dressing to its history arising out of the Civil War. In doing so, it demolished the Privileges or Immunities Clause of the 14th Amendment while largely ignoring a non-controversial police powers resolution. It is not beyond the pale to ask whether the butchers' lawyer, former Supreme Court Justice and Confederate Officer John Archibald Campbell, might have been aided by sympathetic Justices to reach such an unusual result. And even if they were not,[563] the power of the Justices

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[561] For instance, Richard Hasen shows how the Court may not overrule precedent in a pending case, but may suggest a future intention to do so, and in doing so, encourages litigants to argue against precedent in future cases, or invites Congress to overrule statutory-grounded precedent. Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 781 (2012).

[562] *See*, *e.g.*, Merrill v. Milligan, 142 S. Ct. 879, 883 (2022) (Kagan, J., dissenting) (noting "the scanty review this Court gives matters on its shadow docket."); Danco Lab'ys, LLC v. All. for Hippocratic Med., 143 S. Ct. 1075, 1076 (2023) (Alito, J., dissenting) ("I did not agree with [shadow docket] criticisms at the time, but if they were warranted in the cases in which they were made, they are emphatically true here.").

[563] One author states that Justice Miller, the author of *The Slaughter-House Cases* majority:

> [D]espised Campbell for resigning from the Court to join the Confederacy and for refusing to give up the fight after the war. "I have never seen nor heard of any action of Judge Campbell's since the rebellion which was aimed at healing the breach he contributed so much to make," Miller wrote privately.

Michael A. Ross, *Melancholy Justice: Samuel Freeman Miller and the Supreme Court During the Gilded Age*, 33 J. SUP. CT. HIST. 134, 142 (2008). This same author describes Campbell as losing the battle in *The Slaughter-House Cases*, but winning the war given the conundrum he presented:

> If the Justices sided with Campbell and accepted his expansive reading of the Fourteenth Amendment, they would humiliate the biracial legislature of Louisiana and arm critics of that legislature who alleged that blacks were too ignorant and corrupt to adopt legislation that could pass constitutional muster. If, however, they ruled against Campbell, they would constrict the meaning of the Fourteenth Amendment in the process.

Id. at 143.

to fashion the relevant issues thwarted consideration of the primary issues considered by the President, and debated in Congress, state legislatures, and by the people during the drafting, passage, and ratification of the 14th Amendment.

The modern Court undoubtedly decries partisan issue development by individual Justices, but it asserts the need for exclusive power to: 1) choose its cases, 2) decide the issues to be addressed, 3) reverse past decisions, and 4) require acceptance by all others, government and private actors alike. While there are practical arguments supporting the Court's authority for the latter two powers, the first two powers are a relatively recent development and primarily derive from a concern that the Court would be overwhelmed by petitions and cases if it was required to issue a merits decision in all cases asserting constitutional or federal issues.[564] Nonetheless, the solution to an over-burdened Court is not unlimited discretionary review, however much the Justices may assure the public that they will not use such power to shape constitutional law to their own preferences. It may be long past the time to separate the authority to select constitutional cases and issues from the authority to finally resolve the cases and issues selected.[565]

Suggestions for such proposals arise from time to time.[566] The power to select could be delegated to a larger group of rotating appellate judges whose primary job is deciding appeals from lower courts. Expertise will not be lacking. These judges routinely decide constitutional issues, and they know from those cases and their own research which issues are contested across the country. Even with life tenure, there are many more judges on the circuit courts and their natural inclinations are broader than nine Justices. Perhaps most important, a group with limited term membership would focus on the case and questions in each petition, limiting consideration of how the case might be quashed or tailored to achieve a particular result in broader constitutional law.

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[564] *See* Hartnett, *supra* note 560, at 1736 ("[A]t the time of the Judges' Bill in 1925, the Court's control over its docket was viewed as a 'new dispensation' from Congress."); *Supreme Court Research Guide: Decisions & Court Documents*, GEORGETOWN L. LIBR. (Sept. 30, 2024, 11:00 AM), https://guides.ll.georgetown.edu/c.php?g=316498&p=2114300 [https://perma.cc/R974-PGDK] ("In a typical year, over 8,000 petitions are filed with the Supreme Court for review of lower court decisions.").

[565] Such a change also might result in more substantive review by the Court of state court decisions. *See* SIEGEL, *supra* note 6, at 293 n.88 ("The Court today grants certiorari in relatively few cases coming from state courts. Of the sixty-nine cases decided during the October 2020 Term by formal opinions, only four cases (6 percent) came from state courts. Of the sixty-six cases decided during the October 2021 term, only five cases (8 percent) came from state courts.") (citations omitted).

[566] *See generally* Charles R. Haworth & Daniel J. Meador, *A Proposed New Federal Intermediate Appellate Court*, 12 U. MICH. J.L. REFORM 201 (1979) (proposing a new intermediate court to address the lack of uniformity and predictability in the law and reduce the case volume of the federal appellate courts).

This proposal is not made lightly or without recognition that similar ideas have gone nowhere.[567] There are numerous practical aspects that would require specificity. Support from Congressional and Executive branches would be essential. Any significant changes may require concessions from Supreme Court practitioners, who have an understandable wish to preserve a system they have spent long years mastering. There may be other ways that are more practical or politically viable to eliminate or limit the Court's development of constitutional law vis-à-vis case and issue selection. Whatever the form of disentangling selection from merits decision-making, our suggestion is made based on historical evidence and recent concerns expressed that the Court acts like politicians in black robes, or at least is perceived as doing so. Such a solution would require acknowledging the issue and need to improve followed by open debate and the opportunity for all parties to participate in considering the right solution.

B. Significant Changes in Constitutional Law Require a Reappraisal of Past Doctrine

Just as *The Slaughter-House Cases* and *Cruikshank* failed to consider the history of the Reconstruction Amendments and enforcement statutes for Black Americans, *Bradwell* and *Minor* ignored the fact that women had long been participating in public life. The omission in the latter two cases is even more glaring because no state official filed an opposition to the request for relief with the Court. As a result, the Court, without opposing briefs, created reasons on its own to explain why women could not expect the same citizen rights to practice a profession and to vote guaranteed to "all persons" by the 14th Amendment of the Constitution. In large part, the Court would only concede that the Reconstruction Amendments vacated the *Dred Scott* holding. From a modern perspective, this may appear as an instance of persons in authority, who are different from petitioners in some visible aspect, not wishing to recognize that the law has changed to erase the legal significance of those differences. It also represents an analytical failure in judicial decision-making.

A new amendment to the Constitution or a request to reverse precedent interpreting the Constitution requires an analysis of the new text or changed conditions supporting a diametric change in constitutional law. Given how infrequently the Constitution is amended and how difficult it is to amend, the changed conditions analysis arises far more frequently. Nonetheless, many times the holding in such a case is limited to the confines of the case. It is not unusual for a case to be decided on the narrowest possible grounds.[568] Unless

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[567] *See generally* MICHELLE ADAMS ET AL., PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES 84–94 (2021) (analyzing previous reform proposals that led to serious constitutional questions).

[568] Deciding a case on the "narrowest possible grounds" is a bit of a truism, which tends to be cited more frequently in dissenting or concurring opinions. *See, e.g.*, Citizens United v. Fed.

the Court's analysis requires it to directly confront contrary authority, there is rarely discussion of other precedent that will likely be affected by the holding. A dissenting or concurring opinion might challenge the majority to predict how the holding or its reasoning affects other cases. The majority may choose to respond but, even then, the response might be considered dicta when such a future case arises.[569]

In the great majority of such cases, the Court is not changing the direction of constitutional law 180 degrees. Similarly, some constitutional amendments have corrected or clarified a relatively narrow point of law whose effect is limited in scope or to unusual circumstances.[570] Where the Court is confronted with a new constitutional amendment or, more frequently, is asked to reverse long-standing and significant precedent, The Slump Cases suggest that a vital part of its analysis should be express consideration of other cases likely affected. There are two principal reasons for departing from the usual practice of limiting discussion to only the case at bar.

First, the Court should acknowledge that many prior cases relied on constitutional text or doctrine that the new decision changes or finds no longer correct. Such reliance is not limited to the courts. Statutes, agency rules and regulations, and common practices are also affected. The Court has a responsibility to explain the new direction with examples and highlighting. This does not mean it decides the application of the new constitutional law in future cases. Instead, it signals significance by defining the likely scope of the holding. Moreover, it illustrates with some detail that the people have changed the law through new constitutional text, or that a prior opinion of the Court was (or at times prior opinions were) markedly wrong.[571]

Second, and perhaps more important for reversing significant precedent, the Court should provide its own assessment of how big a change the new text or doctrine may require. It is also intellectually honest and analytically

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Election Comm'n, 558 U.S. 310, 405–06 (2010) (Stevens, J., concurring) ("[M]ajority has transgressed yet another 'cardinal' principle of the judicial process: '[I]f it is not necessary to decide more, it is necessary not to decide more.'") (citing PDK Labs. Inc. v. Drug Enf't Admin., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring)).

[569] *See* Cent. Virginia Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) (noting the Court is not bound by dicta, quoting Chief Justice John Marshall for the proposition that "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision") (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821)).

[570] *See, e.g.*, U.S. CONST. amend. XXII (addressing presidential term limits); U.S. CONST. amend. XXV (addressing presidential succession and disability); U.S. CONST. amend. XXVII (addressing congressional compensation).

[571] For a case technically discussing the right to a unanimous verdict in criminal trials but providing substantial insight into the views of various Justices on reversing prior precedent, *see generally* Ramos v. Louisiana, 590 U.S. 83 (2020) (highlighting the various opinions on reversing prior precedent).

sound to both expressly address and list (or sometimes limit) the affected areas. The mere exercise of discussing the possible consequences of a major shift in constitutional law shows an appreciation for the seriousness of regarding its opinions as infallible. If the *Bradwell* and *Minor* Justices had discussed the impact of giving its constitutional imprimatur on the many laws that had treated women as second-class citizens (or worse), it might have reached a different result. Even if it had only stated the obvious, perhaps the 19th Amendment reversing *Minor* would have come sooner.

C. *Justices Are Selected by a Political Process, but Must Reject Pronouncements and Roles Suggesting That Partisan Politics Influences Their Judicial Activities*

The appointment of Supreme Court Justices is an explicitly and intentionally political process. There is no requirement that nominees have specialized training or even have demonstrated competence in the law. There is no formal, binding committee that examines or evaluates the moral or ethical standards of would-be justices. In many respects, this absence of explicit requirements is not unique in any branch of government. With its Constitutional "Advice and Consent" powers,[572] the Senate has the authority to examine a nominee's suitability for the life-tenure position on the Court. But without formal requirements for appointment to the Court, it is inevitable and expected that partisan political considerations will influence whom the President nominates, how the Senate deliberates, and the votes of individual Senators.

Although Justices during the Gilded Age had been political actors before joining the Court, they were not unusual in their era or even recently. Until Justice Ketanji Brown Jackson's appointment in 2022, as the 112th Justice, the majority of Supreme Court Justices had held elected, non-judicial offices.[573] Justice O'Connor was the last Justice to have been an elected public official before joining the Court (serving as a Member, and Majority Leader, of the Arizona State Senate), and she retired in 2006. Instead, modern Justices frequently participated in politics without running for political office, which frequently entails taking public positions on topical controversies. For modern Justices, their first public vetting is typically for an appointment to the federal judiciary.

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[572] U.S. CONST. art. II, § 2, cl. 2.

[573] Fifty-eight of the prior or sitting justices (112) had been elected to public office, not including positions such as judge or prosecutor. Justice Ketanji Brown Jackson is the 116th justice appointed to the Court. Kristen Bialik, *What Backgrounds Do U.S. Supreme Court Justices Have?*, PEW RSCH. CTR. (Mar. 20, 2017), https://www.pewresearch.org/short-reads/2017/03/20/what-backgrounds-do-u-s-supreme-court-justices-have [https://perma.cc/EXS9-F84X]; *see also* Barton, *supra* note 530, at 1155 ("Supreme Court Justices have served as President of the United States, governors of multiple states, and even mayors. Fourteen different Justices have been U.S. Senators and seventeen have been U.S. Representatives.").

Justices and nominees publicly demur when asked how they would vote on an issue in a hypothetical or pending case.[574] They do so, in part, to counter the perception that they are partisans acting in judicial clothing. The Court recognizes the general ethical rule that judicial officers must decide each case based on the applicable law and facts presented in court.[575] In other words, a Court ruling cannot be preordained based on partisan or ideological beliefs. It is beyond the scope of this article to address whether and how Justice's votes are influenced by their past or current beliefs, partisan, ideological, or otherwise. To the extent the Justices in The Slump Cases were influenced by partisan or ideological positions, it has been discussed above. Notwithstanding the modern differences in political backgrounds with Justices of the past, there are two subtle lessons from The Slump Cases, but especially the 1876 Presidential Commission, discussed here.

1. Nominees Must Push Back Against Statements That Their Nomination Depended on How They Would Vote on Specific Topics

An "independent judiciary," which adheres to the ethical rule that judicial officers "should not be swayed by partisan interests, public clamor, or fear of criticism,"[576] ensures that there are three separate branches of government, each of which must follow the rule of law. As Chief Justice Roberts has stated in response to assertions that Justices vote with the party that supported them, "We do not have [political party] judges."[577] In the abstract, or even when answering the questions posed by the Senate Judiciary Committee, a personal affirmation that politics will not play a role in their judicial decision-making is anodyne and expected from nominees.

Personal and relatively private statements do not seem adequate to convince a sufficient number of Americans that Justices and nominees for the Court (and by implication, most judicial officers, federal and state) are

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[574] "[Judicial] canons squarely prohibit some forms of conduct during the judicial confirmation process, such as pledging to reach specified results in future cases if confirmed." VALERIE C. BRANNON & JOANNA R. LAMPE, CONG. RSCH. SERV., R45300, QUESTIONING JUDICIAL NOMINEES: LEGAL LIMITATIONS AND PRACTICE 2 (2022) (quoting the Summary section of the report).

[575] Chief Justice Roberts has written that "[a]ll Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations." JOHN ROBERTS, C.J., U.S. SUP. CT., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2011); *see* CODE OF CONDUCT FOR U.S. JUDGES Canons 1, 3(C)(1)(a) (U.S. CTS. 2019).

[576] CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(1).

[577] Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, THE ASSOCIATED PRESS (Nov. 21, 2018, 5:42 PM), https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-immigration-c4b34f9639e141069c08cf1e3deb6b84 [https://perma.cc/4876-NYHH]. Chief Justice Roberts's full quote in response to a question by the Associated Press was: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."

apolitical and non-partisan.[578] As a matter of policy and public perception, Justices and nominees need to be more proactive in asserting a personal commitment to the requirements of an independent judiciary. They have to demonstrate commitment by words and by deeds.

It is increasingly common for nominee supporters, and even a nominating President, to proclaim that a nominee should be confirmed because he or she will decide an important (and typically high profile and often politicized) issue in what is perceived as a favored manner.[579] Political party platforms and tickets, as well as interest groups, announce that they will only support nominees they believe will decide cases consistent with their political ideology.[580] Nominees should proactively and publicly assert that their supporters are wrong when they state the nominee will decide the issue consistent with the party's positions, as opposed to the law as written and applied to the facts as presented. A nominee's rebuke could be considered mere window-dressing, but one should not underestimate the courage required to publicly correct the person who just nominated the nominee for the most sought-after position in the judiciary. At a minimum, it may discourage executive officers and political party operatives from touting nominees as supporters of their partisan interests.

2. Justices Should Not Serve on Partisan or Political Groups Alongside Non-Judicial Members

The selection of Justices for positions on partisan or political commissions has largely ended, and to the extent it continues, it should end. It is unlikely another commission would be empaneled to decide a contested

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[578] Despite Chief Justice Roberts's remarks:

> A large majority of adults – regardless of party or ideology – said in January [2022] that Supreme Court justices should not bring their own political views into how they decide major cases. But there was skepticism about whether justices were living up to this ideal. . . . [The] majorities of Republicans and Democrats said that justices were not doing a good job at keeping their personal political views out of cases.

Carrie Blazina & John Gramlich, *5 Facts About the Supreme Court*, PEW RSCH. CTR. (Feb. 25, 2022), https://www.pewresearch.org/short-reads/2022/02/25/5-facts-about-the-supreme-court [https://perma.cc/7QB7-DSKJ].

[579] Although an issue for both major political parties, as one example, during the 2016 presidential debates, nominee Donald Trump responded to a question about whether he wanted the Court to overturn *Roe v. Wade*, stating, "[I]f we put another two or perhaps three justice on, that's really what's going to be -- that will happen. And that'll happen automatically, in my opinion, because I am putting pro-life justices on the court." Aaron Blake, *The Final Trump-Clinton Debate Transcript, Annotated*, WASH. POST (Oct. 19, 2016, 10:29 PM), https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated (on file with authors).

[580] *See, e.g.*, DEMOCRATIC PLATFORM COMM., 2016 DEMOCRATIC PARTY PLATFORM 23 (2016) (stating, "We will appoint judges who . . . will protect a woman's right to safe and legal abortion").

Presidential election because disappointed candidates and others increasingly file litigation with the courts seeking a resolution. Nonetheless, the role and status of Justices in many matters touching on the Constitution makes it easy for non-judicial organizers to request their participation on a voting group, especially if the topic is controversial. The Justices' involvement in the 1876 Electoral Commission suggests the Court should actively decline participation in such endeavors. It does not make any difference whether the group process results in a binding conclusion, a report or whitepaper, or other final product. The fact of a vote in a group where partisan interests are at play will color the Justices as political actors, rightly or wrongly. They should actively avoid such compromising, and avoidable, situations.

VIII. CONCLUSION

The Reconstruction Amendments changed, in significant ways, the pre-Civil War expansive view of states' rights and limited view of the federal government's authority. The Slump Cases failed to appreciate those changes. Instead, after the Reconstruction Amendments and resulting federal legislation, the Supreme Court continued to take a broad, pre-Civil War view of states' rights and a narrow view of federal authority. It did so contrary to the efforts by the executive and legislative branches of the federal government seeking to ensure meaningful privileges and immunities, due process, and equal protection for all.

The Court could have, but failed to, reevaluate its prior reasoning, assumptions, and approach, in light of new constitutional and statutory text, and then could have, but failed to, apply that new analysis to cases presented to it. The Court could have, but failed to, explicitly consider the reasons why the framers of the Reconstruction Amendments made such dramatic changes to the Constitution that were then ratified by the states. And the Court could have, but failed to, discuss these topics with transparency and candor, in the context of at times brutal facts, in the analysis offered in The Slump Cases. These failures resulted in The Slump, which should not have happened and should never happen again.

The what and the why of The Slump are significant, regardless of whether the unified explanation frays at the margins, or even in the main. The lessons from The Slump, and how to avoid another slump, are important and profound now and will continue to be in in the future.