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The Constitution in the Supreme Court: Limitations on State Power, 1865-1873

David P. Currie

The most prominent feature of the constitutional work of the Supreme Court during the Chief Justiceship of Salmon P. Chase was a series of decisions concerned with the Civil War and with measures adopted in its wake. Many of these cases I have considered in an earlier installment of this study. There remain for discussion not only the celebrated Slaughter-House Cases, in which a sharply divided Court wrestled for the first time with the construction of the constitutional amendments adopted in response to the war, but a plethora of other decisions, most of which also dealt

† Harry N. Wyatt Professor of Law, University of Chicago. I should like to thank Paul Mishkin, Michael E. Smith, Geoffrey Stone, and Cass Sunstein for helpful criticism and Mark Holmes for valuable research assistance.


2 83 U.S. (16 Wall.) 36 (1873).
with limitations on the powers of the states. These cases are the subject of the present article.

I. THE COMMERCE CLAUSE

In 1851, after years of haggling, a majority of the Justices had agreed, in the famous case of Cooley v. Board of Wardens, that the commerce clause of article I, though phrased simply as a grant of authority to Congress, implicitly precluded the states from enacting laws on commercial “subjects” that were “in their nature national, or admit only of one uniform system, or plan of regulation.” In Cooley itself, however, the challenged state law had been upheld. In the remaining fourteen years of Chief Justice Taney’s tenure, moreover, despite frequent opportunities, the Cooley doctrine had never again been mentioned, and no state law had been struck down explicitly on the basis of the commerce clause. It was during Chase’s tenure that the Court resuscitated Cooley and first made the negative effect of the clause a reality. The road the Court traveled in so doing was by no means smooth; the confused body of decisions handed down in this field by Chase and his brethren suggests the depth of the can of worms that Cooley had opened up and that we have never since succeeded in closing.

A. Gilman v. Philadelphia

The Court’s first significant encounter with the commerce clause after Chase’s appointment came in 1866 in Gilman v. Philadelphia, in which a wharf owner attacked a Pennsylvania statute authorizing the construction of a bridge over the Schuylkill River that would prevent vessels from reaching his dock. In upholding

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* See Currie IV, supra note 1, at 497-506; Currie III, supra note 1, at 938-56.
* 53 U.S. (12 How.) 298, 319 (1852) (upholding state regulation of pilotage); see Currie IV, supra note 1, at 506-10.
* See Currie IV, supra note 1, at 510-13.
* See Pomeroy, The Power of Congress to Regulate Inter-State Commerce, 4 S.L. REV. (n.s.) 357, 358 (1878) (“The entire subject was, for a long time, tacitly surrendered to the domain of the individual states . . . . The last fifteen years, however, have witnessed a complete revolution both in opinion and in practice.”).
* 70 U.S. (3 Wall.) 713 (1866).
* The year before, the Court had divided 4-4, without opinions, over the legality of a bridge over the Hudson. The Albany Bridge Case, 69 U.S. (2 Wall.) 403 (1865), noted in 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 51 (1971). Cooley itself had been reaffirmed in Steamship Co. v. Joliffe, 69 U.S. (2 Wall.) 450 (1865) (Field, J.), despite the passage of a federal statute purporting to license pilots and to replace the existing system of pilotage; over the dissents of Miller, Wayne, and Clifford, id. at 463, four Justices concluded that the statute referred only “to pilots having charge of steamers on the
the law,\(^9\) Justice Swayne relied principally upon Marshall’s cryptic opinion in \textit{Willson v. Black Bird Creek Marsh Co.},\(^10\) which had similarly permitted a state, in the absence of congressional action, to obstruct a navigable stream. As the three dissenters in \textit{Gilman} observed, it was not at all clear that Congress had not acted.\(^11\) More important for present purposes, \textit{Gilman} represented a significant extension of the \textit{Willson} case and a sharp turn away from the attitude apparently expressed in \textit{Cooley}.

In the first place, as Clifford noted in dissent,\(^12\) Marshall had spoken of the creek in \textit{Willson} “as a low, sluggish water, of little or no importance, and treated the erection described in the bill of complaint as one adapted to reclaim the adjacent marshes and as essential to the public health”; \textit{Gilman} upheld a purely commercial measure\(^13\) obstructing what Swayne conceded to be significant navigation.\(^14\) Further, although Swayne, with his penchant for voyage, and not to port pilots,” \textit{id.} at 461. \textit{Cooley} was reaffirmed once more in an unduly wordy Swayne opinion in 1872. \textit{Ex parte McNiel}, 80 U.S. (13 Wall.) 236 (1872). The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) (Davis, J.), and The New York Indians, 72 U.S. (5 Wall.) 761 (1867) (Nelson, J.), striking down state taxes on Indian lands shortly after \textit{Gilman}, seem, like Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), to have been based essentially upon treaties and not upon the Indian commerce clause. For a discussion of \textit{Worcester}, see Currie III, \textit{supra} note 1, at 953-56.

\(^*\) 70 U.S. (3 Wall.) at 732.

\(^9\) 27 U.S. (2 Pet.) 245 (1829); see Currie III, \textit{supra} note 1, at 946-47.

\(^10\) 70 U.S. (3 Wall.) at 732-44 (Clifford, J., dissenting, joined by Wayne, J., and Davis, J.). The Court had held in \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) 1 (1824), that a federal coating license preempted a state law giving others exclusive rights to navigate the Hudson River. Though a similar license had been ignored in \textit{Willson}, another had been one of the grounds for the later holding that Congress had forbidden obstruction of the Ohio River. Pennsylvania v. Wheeling & Belmont Bridge Co. (I), 54 U.S. (13 How.) 518 (1852); see Currie IV, \textit{supra} note 1, at 511-12; Currie III, \textit{supra} note 1, at 941-42, 947; see also Pomeroy, \textit{supra} note 6, at 378 (finding it “difficult to reconcile” \textit{Gilman} with \textit{Wheeling Bridge I}); Wintersteen, \textit{The Commerce Clause and the State}, 28 Am. L. Rev. (n.s.) 733, 744 (1889) (describing \textit{Gilman} as “receding” from \textit{Wheeling Bridge} and praising it as “practical” because a contrary result would have deprived the states of power to “establish[,] new avenues of land . . . communication”).

The license argument highlighted the standing problem that the Court resolved in favor of the plaintiff on the authority of \textit{Wheeling Bridge I}, 70 U.S. (3 Wall.) at 722-24; although, as argued, the wharf owners were “not the owners of licensed coating vessels” nor themselves engaged in navigation, it was enough that they suffered “specific injury” from the obstruction of the stream. \textit{id.} at 722.

\(^11\) 70 U.S. (3 Wall.) at 743 (paraphrasing 27 U.S. (2 Pet.) at 251-52). In fact it was Mr. Wirt, representing the defendants, and not Marshall who had used the word “sluggish” in describing the creek. 27 U.S. (2 Pet.) at 249.

\(^12\) The only justification offered for the bridge in the statement of the case was that it would “connect parts of one street . . . having one part on the east and one part on the west of the stream” and thus improve transportation by land. 70 U.S. (3 Wall.) at 719.

\(^13\) The Schuylkill was “navigable . . . for vessels drawing from eighteen to twenty feet of water,” and “[c]ommerce has been carried on in all kinds of vessels for many years to and
citing hornbook rules rather than giving reasons,\textsuperscript{15} paraphrased Justice Curtis's \textit{Cooley} test at one point in his opinion,\textsuperscript{16} he made no effort to apply it to the case. If he had, he might have had difficulty explaining why the construction of bridges over navigable waters was not a subject requiring uniformity; one might have thought there was no more serious threat to commerce than obstructions that might prohibit the passage of vessels entirely. Yet Swayne concluded quite implausibly and without explanation that "[b]ridges are of the same nature with ferries" and thus fell within the powers that Marshall had said were "'not surrendered to the General Government.'"\textsuperscript{17} This would mean, if taken seriously, that the states could obstruct any river they liked unless Congress had told them not to; and that would seem to mean there was precious little left of the \textit{Cooley} doctrine. Indeed, at the end of his opinion Swayne appeared to revert to Taney's extreme position that the commerce clause did not limit the states at all: "Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the States is plenary . . . ."\textsuperscript{18}

In appearing to embrace the three inconsistent positions of Marshall, Curtis, and Taney in a single case, Swayne made clear only that if the Court was to make sense out of the commerce clause it would have to start assigning the opinions to someone else; but in upholding the bridge in \textit{Gilman} the Court seemed to take a very dim view of the negative effect of the commerce clause.

B. The \textit{Portwardens} Case and \textit{Crandall v. Nevada}

Within two years after \textit{Gilman}, however, the Court seemed to repudiate most of what that case stood for, without even citing it, and to take an even more nationalistic view than that taken in \textit{Cooley}—without the dissent of Swayne or of anyone else.

The occasion was \textit{Steamship Co. v. Portwardens},\textsuperscript{19} and the year was 1867. The opinion was delivered by Chase: Louisiana from the complainants' property." \textit{Id.} at 721.

\textsuperscript{15} Cf. Conway v. Taylor's Executor, 66 U.S. (1 Black) 603 (1862), \textit{discussed in} Currie IV, \textit{supra} note 1, at 511 n.278.

\textsuperscript{16} 70 U.S. (3 Wall.) at 726-27.

\textsuperscript{17} \textit{Id.} at 726 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824)). Ferries, unlike bridges, do not prevent the passage of other vessels.

\textsuperscript{18} 70 U.S. (3 Wall.) at 732; \textit{see} Currie IV, \textit{supra} note 1, at 499-502 (discussing the License Cases, 46 U.S. (5 How.) 504 (1847), and the Passenger Cases, 48 U.S. (7 How.) 283 (1849)).

\textsuperscript{19} 73 U.S. (6 Wall.) 31 (1867).
lacked power to impose a five-dollar tax on vessels entering the port of New Orleans. One ground was that the law offended the ban on "Dut[ies] of Tonnage" found in article I, section 10;20 intended to prevent evasion of the ban on import taxes, this provision had to be construed despite its narrow wording to embrace "not only a pro rata tax . . . . but any duty on the ship" in order to accomplish its purpose.21 Before reaching this reasonable conclusion, however, Chase had already determined that the law also offended the commerce clause.

The tax in question, Chase wrote, was "a regulation of commerce."22 This conclusion itself seemed to contradict the distinction drawn by Marshall in Gibbons v. Ogden23 and to imply, surprisingly, that the commerce clause gave Congress power to impose taxes. Chase explained with some persuasiveness, however, that the purpose of the clause was "to place . . . commerce beyond interruption or embarrassment arising from the conflicting or hostile State regulations" and that the tax, which imposed a "serious burden," therefore "work[ed] the very mischief against which the Constitution intended to protect commerce among the States."24 This of course could have been said with much greater force in Gilman, where the state law had been upheld: one would have thought a physical obstruction of navigation a far more serious "embarrassment" of commerce than a paltry five-dollar tax.25 The Court might have attempted to reconcile the two cases by arguing that

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20 U.S. Const. art. I, § 10.
21 73 U.S. (6 Wall.) at 34-35. See also the State Tonnage Tax Cases, 79 U.S. (12 Wall.) 204 (1871), where, in a typically uninformative Clifford opinion, the Court unanimously held that, although a state could impose a property tax on vessels, it could not measure the tax by tonnage as a surrogate for value. Later cases were to take a more functional view. See, e.g., Packet Co. v. Keokuk, 95 U.S. 80 (1877) (Strong, J.) (wharfage fee may be proportioned to tonnage); Cannon v. New Orleans, 87 U.S. (20 Wall.) 577, 581 (1874) (Miller, J.) (tonnage tax "a contribution claimed for the privilege of arriving or departing from a port").
22 73 U.S. (6 Wall.) at 33.
23 22 U.S. (9 Wheat.) 1 (1824). The bans on state import and tonnage taxes in U.S. Const. art. I, § 10, Marshall argued, did not imply that otherwise the states were free to regulate interstate commerce; for the Constitution treated the tax and commerce powers as "distinct from each other," and the prohibitions "presuppose the existence of that which they restrain, not of that which they do not purport to restrain." 22 U.S. (9 Wheat.) at 201-03; see also Currie IV, supra note 1, at 502-06 (discussing the Passenger Cases, 48 U.S. (7 How.) 283 (1849)).
24 73 U.S. (6 Wall.) at 33. For discussion of the purposes of the clause, see Currie III, supra note 1, at 944-45 n.400.
25 Money has depreciated since 1867, but the ship tax struck down in the State Tonnage Tax Cases, 79 U.S. (12 Wall.) 204, 211 (1871), was one dollar per ton and thus upwards of three hundred dollars for some vessels; those in the Passenger Cases, 48 U.S. (7 How.) 283 (1849), had been one to two dollars per passenger; id. at 284-85.
the whole port of New Orleans was more essential to commerce than a few miles of the Schuylkill, but it did not do so; and thus the two decisions seemed to stand the Cooley test on its head.

Even more interesting than the result, however, was the approach taken by Chase to the general question of the effect of the commerce clause on state law. Swayne had just finished saying the states retained power until Congress acted; the Chief Justice said "the regulation of commerce among the States is in Congress" alone with certain exceptions. The first class of exceptions included "quarantine and other health laws, laws concerning the domestic police, and laws regulating the internal trade of a State," which "have always been held not to be within the grant to Congress." The second, exemplified by Cooley, consisted of "cases in which, either by express provision or by omission to exercise its own powers, Congress has left to the regulation of States matters clearly within its commercial powers."

Finally, the charge assessed in Cooley was based "not only on State laws but upon contract," for "[p]ilotage is compensation for services performed; half pilotage is compensation for services which the pilot has put himself in readiness to perform by labor, risk, and cost ...." Apart from the obvious difficulty of explaining the duty of an unwilling shipowner to pay for a pilot as one based on contract, this statement of the law was revolutionary. Ignoring the Cooley

25 See T. COOLEY, CONSTITUTIONAL LIMITATIONS 593 (1868) ("[T]he same structure might constitute a material obstruction in the Ohio or the Mississippi, where vessels are constantly passing, which would be unobjectionable on a stream which a boat only enters at intervals of weeks or months.").
27 Marshall's familiar but questionable principle that the power to tax was the power to destroy, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819), would have supported the Portwardens decision, but it would equally have outlawed the pilotage charges upheld in Cooley. Cooley's insistence on investigating the degree of necessity for uniformity seems hard to reconcile with a rigid rule that all taxes on commerce are forbidden.
28 See supra text accompanying note 18.
29 73 U.S. (6 Wall.) at 34.
30 Id. at 33. These are powers "properly within State jurisdiction," which are "not affected by the grant of power [to Congress] to regulate commerce," in spite of the fact that they are powers "which may . . . affect commerce." Id.
31 Id.
32 Id. at 34.
33 Field, concluding in Steamship Co. v. Joliffe, 69 U.S. (2 Wall.) 450, 456-57 (1865), that repeal of a statute giving a rejected pilot half his fee did not affect rights previously vested, had unnecessarily attempted to explain the right as quasi-contractual. Miller's answer was devastating: "Here is no element of contract; no consent of minds; no services rendered . . . . It is purely a case of a violation of the law in refusing to perform what it enjoins . . . ." Id. at 468 (Miller, J., dissenting).
test altogether, Chase seemed to be returning to Marshall's notion of reserved powers, with a strong and startling suggestion that such matters as the quarantine of foreign vessels were not within congressional cognizance at all. More important, Chase seemed to be saying that states could regulate matters that did fall within the commerce power only with congressional permission. This seemed to take back Cooley's conclusion that the states were free to regulate commerce in the absence of congressional action unless the subject demanded uniformity, and it squarely contradicted Cooley's express determination that Congress could not authorize the states to regulate commerce. Finally, Chase was the first spokesman for the Court to espouse the recurring fallacy that in some undefined cases congressional inaction was to be treated as if it were permissive or prohibitory legislation—though the Constitution makes clear that Congress can act only by affirmative vote of both Houses. Thus in two short years, without dissent and without significant changes in membership, the Court had gone from saying the states could impede commerce unless Congress had said otherwise to essentially the opposite position, that they could not do so unless authorized by Congress.

Adding to the confusion was the virtually contemporaneous decision in *Crandall v. Nevada*, in which, while invalidating a tax on passengers leaving the state on grounds quite difficult to discover in the Constitution, all the Justices but Clifford and Chase doubted there was a commerce clause violation because the subject seemed neither "uniform" nor "national" within the Cooley test. Justice Miller, who wrote the opinion, did not bother saying why that was so or how uniformity could be the test after

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34 See supra text accompanying notes 10-18.
35 See supra text accompanying note 4.
36 53 U.S. (12 How.) at 317 ("If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate."); see Currie IV, supra note 1, at 506-10.
38 U.S. CONST. art. I, §§ 1, 7; see T. Powell, *Vagaries and Varieties in Constitutional Interpretation* 162 (1956) (describing the congressional-inaction theory as "sheer make-believe").
39 73 U.S. (6 Wall.) 35 (1868).
40 See infra text accompanying notes 194-96.
41 73 U.S. (6 Wall.) at 49 (Clifford, J., dissenting, joined by Chase, C.J.). Clifford's brief opinion was nothing but a conclusion: "the State legislature cannot impose any such burden upon commerce among the several States." Id.
42 Id. at 43.

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what Chase had said in *Portwardens,* and he made no effort to distinguish that case. There was no apparent reason to think ships required more uniformity than trains, or commerce entering the state more than that departing, or freight more than passengers; the Court did not revive the rejected contention that passenger traffic was not commerce. Indeed, by modern standards the tax in *Crandall* was more offensive in commerce clause terms than that in *Portwardens,* for only the former applied *solely* to interstate travelers; if the purpose of the clause was, as Chase had said, to protect interstate commerce against "interruption or embarrassment," one might have thought its most obvious effect was to protect it from outright discrimination. Fortunately for consistency, neither Miller's dicta about commerce in *Crandall* nor the commerce basis of *Portwardens* was necessary to the result; but they did raise a serious question whether the Court had any idea of what it was doing.

C. *Woodruff v. Parham*

The year after *Crandall* was decided, Justice Miller had another opportunity to write a narrow interpretation of the negative effect of the commerce clause in an opinion for the Court. Alabama had levied a tax on the sale of goods at auction, and the Court

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43 The one thing the two preceding decisions had had in common was Marshall's idea of reserved state powers, which Miller did not mention.  
45 See, e.g., Philadelphia v. New Jersey, 437 U.S. 617 (1978) (striking down a law forbidding the importation of most solid or liquid waste); South Carolina State Highway Dep't. v. Barnwell Bros. Inc., 303 U.S. 177, 185 n.2 (1938) (Stone, J.) ("[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation . . . ."); *The Federalist* No. 22 (A. Hamilton) (describing the purpose of the clause as being to suppress "the interfering and unneighborly regulations of some States"); L. Tribe, *American Constitutional Law* 326 (1978) ("any state action which imposes special or distinct burdens on out-of-state interests unrepresented in the state's political process" viewed with suspicion); cf. Currie III, *supra* note 1, at 934-38 (discussing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)). Moreover, a tax of one dollar per passenger seems, in *Portwardens's* own terms, a more "serious burden" than one of five dollars on an entire ship. Several Justices had pronounced a similar tax on incoming passengers from abroad invalid on commerce clause grounds as early as 1849. See Currie IV, *supra* note 1, at 502-05 (discussing the Passenger Cases, 48 U.S. (7 How.) 283 (1849)).  
46 Much later Miller himself was to treat *Crandall* as if it had struck the tax down on commerce clause grounds. See C. Fairman, *supra* note 8, at 1307 n.14; see also Pomeroy, *supra* note 6, at 364 (writing in 1878: "I think it very clear from later decisions that the views of the[] dissenting judges [on the commerce issue] would now be adopted by the court as correct.").
upheld it as applied to goods brought in from other states and sold in their original package.47 Most of the opinion was devoted to a well-written though disputable refutation of Marshall’s dictum that the import-export clause forbade state taxation of imports from other states.48 In the last few paragraphs Miller also rejected an attack based on the commerce clause.

The key to the case, in Miller’s opinion, was that “[t]here is no attempt to discriminate injuriously against the products of other States”: the tax was “imposed alike upon all sales made in Mobile, . . . whether the goods sold are the produce of [Alabama] or some other [state].”49 A tax applicable only to out-of-state goods, he stated flatly, would be contrary to the commerce clause.50 But, he noted in connection with his import clause argument, if a state could not subject such goods to a nondiscriminatory tax, it could not require a merchant who bought his wares elsewhere to “con-

48 75 U.S. (8 Wall.) at 130-40 (disavowing Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827)). Miller stressed the absence of any reference by the Framers to taxes on “imports” from other states, and correctly dismissed Marshall’s statement as unexplained dictum. He reclassified Almy v. California, 65 U.S. (24 How.) 169 (1861), which had held that a state tax on gold shipped from California to New York offended the import-export clause, as based on the commerce clause and on “the rule laid down in Crandall v. Nevada,” 75 U.S. (8 Wall.) at 138, since, as he rightly observed, the fact that the shipment was interstate and not foreign “seems to have escaped the attention of counsel . . . and of the Chief Justice who delivered the opinion,” id. at 137. See Currie IV, supra note 1, at 512. As Nelson said in dissent, 75 U.S. (8 Wall.) at 142-44, the words of the prohibition did not distinguish between interstate and foreign trade, and the commerce clause expressly equated them; and there was something to his argument that at least some of the policies underlying the imports clause applied equally to interstate traffic, id. at 144. See Currie III, supra note 1, at 949-51; see also T. Powell, supra note 38, at 182 (“When the Framers spoke in 1787, the states were substantially sovereign, and their exercises of sovereign powers in adversely affecting trade from sister states was one of the factors leading to the Annapolis conference . . . .”). In a companion case reaching the same result as Woodruff, the Court seems to have overlooked an allegation that some of the goods had come from foreign countries. Hinson v. Lott, 75 U.S. (8 Wall.) 148, 149 (1869). See also Low v. Austin, 80 U.S. (13 Wall.) 29 (1872) (Field, J.), which uncritically and unanimously followed the implications of Marshall’s ill-conceived Brown opinion in holding the same clause forbade a nondiscriminatory property tax on imported goods while they remained in their original package, though some of the purposes of the clause suggested it outlawed only taxes on imports as such. See Currie III, supra note 1, at 949-51; Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) (overruling Low). The arguably erroneous view that the imports clause barred even nondiscriminatory taxes weighed heavily in Miller’s refusal to hold that it applied to imports from other states. See 75 U.S. (8 Wall.) at 137; see also 4 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 80 (2d ed. Wash., D.C. 1836) (1st ed. Wash., D.C. 1827-1830) (comments by Gov. Johnston indicating that at the time of the North Carolina Ratifying Convention, some states were in fact taxing goods imported from other states).
49 75 U.S. (8 Wall.) at 140.
50 Id.
tribute a dollar to support its government, improve its thoroughfares or educate its children." Miller seemed to be suggesting, as counsel had argued, that "it would be strange" if the Constitution required the state "to work a discrimination against its own manufacturers." All of this must strike a responsive chord in the modern reader, for much of what Miller said about the commerce clause in Woodruff has survived: discrimination is almost always contrary to the clause, but interstate commerce may be required to pay its way.

Shaken from his usual lethargy, Justice Nelson dissented alone, making the intelligent objection that a ban on discrimination was not enough to protect producers in other states: a New York tax on "all sales of cotton, tobacco, or rice . . . would be a tax without any discrimination; and yet it would be in fact, in its operation and effect, exclusively upon these Southern products." There is a sense, of course, in which such a tax could be found discriminatory; as Nelson's example portended, the Court has not found discrimination a self-defining concept in later cases.

What is most interesting about Woodruff is once again the Court's treatment of prior law. Miller's discrimination principle would appear to mean that the Court was wrong to rely on the commerce clause in Portwardens, where the tax evidently applied to ships entering the port from other places in the same state; yet Portwardens was nowhere cited, nor were any of the other recent commerce clause cases. Miller elected to write as if the case before him were the first in which the Court had had occasion to develop a theory of the effect of the clause on state law. Most jarringly, the

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51 Id. at 137.
52 Id. at 128 (Mr. Phillips). Marshall's reasoning in McCulloch, though not the absolute rule Marshall laid down in that case, also supports Miller's distinction: when a legislature can harm disfavored interests only by inflicting similar burdens on its own favorites, the political process provides its own check on arbitrary action. 17 U.S. (4 Wheat.) 316, 428, 435 (1819).
55 75 U.S. (8 Wall.) at 145-46.
56 See, e.g., Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (upholding a law forbidding refiners to operate retail service stations though no gasoline was refined in Maryland); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (holding discriminatory a law requiring that all apples sold bear their federal grade or none at all, because the enacting state had no grading system of its own); Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (invalidating as discriminatory a requirement that milk be processed within five miles of the place of sale, though the rule excluded milk from elsewhere in the same state as well).
57 See supra text accompanying notes 19-38.
test he enunciated was a brand-new one that seemed to depart from all of the inconsistent theses that had been espoused in the past five years without even adverting to them. In a companion case he attempted to show that he was really applying the Cooley test, which he had embraced in Crandall; but by saying that discrimination and nothing else brought state legislation within the requirement of national uniformity he really appeared to be using the familiar formula as a cover for an entirely new approach. The pretense seemed certain to produce confusion in future cases as to whether the need for uniformity or discrimination or both was the constitutional test.

D. Railroad Taxes

Justice Miller's conclusion in Woodruff that discrimination was the key to the validity of state laws affecting commerce proved as fleeting as it was novel. Within four years the Court was to strike down one nondiscriminatory tax on commerce clause grounds, and Miller was to complain because it refused to strike down another.

Pennsylvania had imposed two taxes on railroads doing business within its borders: a flat charge of two to five cents per ton of freight carried anywhere in Pennsylvania, and a levy of 0.75% of the gross receipts of railroads incorporated there. To Justices Swayne and Davis, both taxes were constitutional as applied to interstate shipments and their proceeds: as they said of the freight tax, neither discriminated against interstate commerce, and that should have sufficed under Woodruff—which they did not cite.

The majority, however, held the first charge unconstitutional in the Case of the State Freight Tax in 1873—apparently the first time that any state law had been struck down solely on commerce clause grounds. Since interstate freight carriage was interstate commerce, Justice Strong wrote, the freight tax regulated in-

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*Hinson v. Lott, 75 U.S. (8 Wall.) 148, 152 (1869).*

*See supra text accompanying notes 39-42.*

*Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1873).*

*State Tax on Railway Gross Receipts, 82 U.S. (15 Wall.) 284 (1873).*

*Case of the State Freight Tax, 82 U.S. (15 Wall.) at 232-33.*

*State Tax on Railway Gross Receipts, 82 U.S. (15 Wall.) 284, 284-85 (1873).*

*Id. at 282.*

*82 U.S. (15 Wall.) 232 (1873).*

*See Pomeroy, supra note 6, at 365 (“Few more important decisions have been made concerning the regulation of commerce since the leading case of Gibbons v. Ogden.”).*
terstate commerce; if a state could impose a two-cent tax it could impose a prohibitive one; and interstate transportation was a subject—unlike the construction of bridges over local streams in *Gilman*—requiring uniform regulation. In support of these conclusions Strong relied on *Crandall* and another decision striking down a state tax without invoking the commerce clause and ignored the one precedent in his favor: the opinion against the ship tax in *Portwardens*.

Cooley, the source of the uniformity test professedly applied, was also not cited—perhaps because it would have been difficult to reconcile with the decision that the freight tax was invalid. Not only could it have been argued with as much force that the power to charge pilot fees was also the power to destroy; interstate transportation had been the "subject" of state law in *Cooley* in exactly the same sense as it was in the *Freight Tax Case*. If nothing else, it had become evident that under the Cooley test everything depended on how the relevant "subject" was defined, and that the Court was prepared to define it inconsistently and without explanation. No effort was made to distinguish *Woodruff* either. Without attribution, the majority pooh-poohed its discrimination principle by begging the question: "if an act to tax interstate or foreign commerce were to be applied to the transportation of goods across state lines, it would be a discriminatory tax and therefore unconstitutional." No attempt was made to distinguish whether the tax was one of privilege or of burden.

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67 82 U.S. (15 Wall.) at 275-76.
68 *Id.* at 276. In contrast to the opinion in *Portwardens*, Strong did not bother describing the burden actually imposed as a "serious" one. See supra text accompanying note 24.
69 See supra text accompanying notes 8-19.
70 82 U.S. (15 Wall.) at 279-80. Strong noted once again that the stream in *Gilman* had been "wholly within a [single] State" and, like Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), speculated that perhaps the states had no power to regulate interstate commerce as such at all: "Cases that have sustained State laws, alleged to be regulations of commerce among the States, have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations." 82 U.S. (15 Wall.) at 279.
71 82 U.S. (15 Wall.) at 280-81. That the privilege of traveling to the seat of government recognized in *Crandall*, infra text accompanying notes 167-69, applied to the shipment of freight everywhere in the country seems questionable, and the *Crandall* opinion seemed to suggest that even a discriminatory tax would not offend the commerce clause. See supra text accompanying notes 39-45. The other case cited was *Almy v. California*, 65 U.S. (24 How.) 169 (1861), which had been based on the import-export clause, and reexplained on commerce clause grounds in *Woodruff v. Parham*, 75 U.S. (8 Wall.) at 137-38. See supra note 48.
72 Strong argued that the tax was indistinguishable from a tariff on the entry and exit of goods from the state, 82 U.S. (15 Wall.) at 276; but a tariff applies only to incoming commerce, while the freight tax was even-handed.
73 See supra text accompanying notes 4-6.
74 See Greeley, *What is the Test of a Regulation of Foreign or Interstate Commerce?* 1 Harv. L. Rev. 159, 181 (1887) (pointing out that Strong’s argument was enough to outlaw any state measure affecting interstate or foreign commerce).
commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State. 75

In a second opinion by Strong, immediately following, the Court upheld the second Pennsylvania tax in the case of the State Tax on Railway Gross Receipts. 76 Unlike the freight tax, this one was said to fall upon railroad property—its money—rather than on the transportation of freight, and thus, although its effect on interstate commerce might be the same as that of the freight tax, it was not a regulation of commerce at all. 77 A more sterile distinction can scarcely be imagined: if the Framers meant to protect commerce from interference, as Strong had said in the Freight-Tax Case, 78 one would think the effect rather than the form of the exaction decisive. 79

75 82 U.S. (15 Wall.) at 277. The intervening decision in Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) (Field, J.) (alternative holding); see also infra text accompanying notes 163, 182, which allowed a state to discriminate against foreign insurance corporations, suggests a possible distinction: if a foreign insurer's agreement is not an interstate transaction because both parties signed it in the same state, perhaps the sale of goods after their importation is not either. But to hold that the tax in Woodruff was not a regulation of interstate commerce would seem to suggest that a discriminatory tax on the sale of out-of-state goods would also pass muster; and that would seem squarely contrary to the purpose of the clause.

In light of future developments it is noteworthy that the Court in the Freight Tax Case treated as part of interstate commerce a rail journey that began and ended within a single state—where the freight was then taken out of the state by ship. 82 U.S. (15 Wall.) at 234. The point passed without discussion. Marshall had said in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824), that Congress's power extended to those parts of an interstate trip within a single state, but the Freight Tax case was an extension of his conclusion; for in Gibbons the entire journey had taken place in the same vessel.

76 82 U.S. (15 Wall.) 284 (1873).

77 Id. at 294-95. For a thorough exploration of the later history of the formalistic distinctions made by Strong in these cases, see Powell, Indirect Encroachment on Federal Authority by the Taxing Powers of the States (pt. 2), 31 Harv. L. Rev. 572 (1918). For criticism, see part 5 of the same article, 32 Harv. L. Rev. 234, 244 (1919) (noting that in these and other early cases the Justices "were prone to indulge in nominalism and conceptualism in finding what was the subject taxed" and "seemed to be feeling their way in the dark").

78 82 U.S. (15 Wall.) at 275.

79 See Kitch, Regulation and the American Common Market, in Regulation, Federalism, and Interstate Commerce (A. Tarlock, ed. 1981) (terming the distinction "bizarre"). Kitch argues that in terms of effects the freight tax was indeed the less harmful to interstate commerce: "the flat tax on freight per pound weighed more heavily on the short haul, largely intrastate, traffic while the gross receipts tax directly taxed that portion of the revenue derived from the out-of-state haul." Id. at 28. The Court's formal distinction was made to appear still more inexplicable by Strong's insistence that, although the freight tax was nominally levied upon the railroads, in "practical operation" its "burden" could be passed on to the shipper. 82 U.S. (15 Wall.) at 272-75; cf. id. at 294 (defending the gross receipts tax: "A tax upon the occupation of a physician . . . measured by . . . income . . . will hardly be claimed to be a tax on his patients . . ., though the burden ultimately falls upon them."). On Strong's behalf it should be said, as he noted, that a similarly formalistic distinction had been drawn in determining whether states could impose taxes based upon the
Miller made this objection in his dissent in the *Gross Receipts* case, and Field and Hunt joined him. What was interesting about Miller's position was the facile way in which he abandoned all he had said about the commerce clause in *Woodruff v. Parham*. There he had said a tax on out-of-state goods was permissible because not discriminatory; here he said interstate commerce was "exempted . . . from [state] . . . control" entirely. In *Woodruff* he had said interstate commerce must pay its fair share of the cost of government; in the *Gross Receipts* case he said (in italics) that "by no device or evasion . . . can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State." Miller's principle was, as usual, clear and simple; the only trouble was that he kept enunciating different principles every time a new case came along.

There is one passage in the *Freight Tax Case* that suggests why the Court properly concluded that nondiscrimination alone would not be enough to assure interstate traffic an equal opportunity; and, although the argument was not carried through, it points toward a possible basis for legitimately distinguishing between the two railroad taxes:

It is of national importance that . . . there should be but one regulating power, for if one State can . . . tax persons or property passing through it, . . . every other may, and thus commercial intercourse between States remote from each other may be destroyed. . . . [F]or though it might bear the imposition of a single tax, it would be crushed under the load of many.  

In other words, since the freight tax was not apportioned to the length of travel, cumulative burdens imposed by several states on value of federal government securities. See 82 U.S. (15 Wall.) at 272 ("[T]he decisions turned upon the question, what was the subject of the tax . . . .").

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80 82 U.S. (15 Wall.) at 298.
81 See supra text accompanying notes 49-50, 53-54.
82 82 U.S. (15 Wall.) at 299.
83 75 U.S. (8 Wall.) at 136-37.
84 82 U.S. (15 Wall.) at 299. The Court conceded in the *Freight Tax Case* that a state could charge a fee for the actual use of its own facilities, such as a toll road or canal, but properly concluded that no such facilities were involved in the case of a privately owned railroad. 82 U.S. (15 Wall.) at 277-79. Miller also acknowledged in the *Gross Receipts* case that the state could impose a property tax on the instrumentalities of interstate commerce, 82 U.S. (15 Wall.) at 299; he did not explain how this concession was to be squared with his theory.
85 82 U.S. (15. Wall.) at 280.
the same shipment—even though not discriminatory—could have placed interstate traffic at a competitive disadvantage by subjecting it alone to multiple exactions. Unlike the freight tax, however, the gross-receipts provision applied only to Pennsylvania corporations; if each state taxed only its own companies, there was no risk of multiple taxation. Thus the result of the two railroad decisions can be reconciled if one assumes, as the Court would actually later hold, that no other state could tax the same gross receipts; but Strong nowhere suggested that this was the basis of his distinction.

The circle was closed by Chase’s 1873 opinion for a unanimous Court in Osborne v. Mobile, upholding a tax that not only posed

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44 See Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 255-56 (1938); L. Tribe, supra note 45, at 360-69; Note, The Multiple Burden Theory in Interstate Commerce Taxation, 40 Colum. L. Rev. 653 (1940). Professor Powell remarks:

If we discard all the doctrinal disquisitions of the opinions and look only to the results of the decisions, we find that the controlling motive of the Supreme Court has been the desire to prevent the states from imposing on interstate commerce any peculiar or unusual burden . . . . What the court is insistent upon is that there must be adequate safeguards against subjecting interstate commerce to heavier taxation than local commerce.

Powell, Indirect Encroachment on Federal Authority by the Taxing Powers of the States (pt. 7), 32 Harv. L. Rev. 902, 917-18 (1919). The tax in Portwardens, see supra text accompanying notes 19-46, which the Court also struck down, posed the same risk of multiple burdens. Of course the Court might have insisted upon a showing that other states actually did tax the same transaction. See L. Tribe, supra note 45, at 360 (citing General Motors Corp. v. Washington, 377 U.S. 436 (1964)). A freight tax proportioned to miles traveled would have avoided this possibility, see L. Tribe, supra note 45, at 367-69, and cases cited; yet Strong’s blunderbuss opinion seemed to mean that such a tax would be unconstitutional too—though he did note that the tax in question was not so proportioned, 82 U.S. (15 Wall.) at 273, 278.

45 Fargo v. Michigan, 121 U.S. 230 (1887) (Miller, J.) (invalidating a gross-receipts tax on out-of-state corporations, even though apportioned to their local earnings). Even before the first Gross Receipts decision the Court had similarly held, without explicitly invoking the commerce clause, that ships could be subjected to property taxes only in their home port, Hays v. Pacific Mail S.S. Co., 58 U.S. (7 How.) 596 (1855), cited in Currie IV, supra note 1, at 512; and it soon wrote this distinction into the commerce clause itself, Morgan v. Parham, 83 U.S. (16 Wall.) 471, 479 (1873) (Hunt, J.). As later cases have suggested, there may be more equitable formulas for apportioning the power to tax interstate operations among the states affected. See, e.g., Moorman Mfg. Co. v. Blair, 437 U.S. 267 (1978); L. Tribe, supra note 45, at 367-69.

46 Strong did indicate his awareness that the tax reached only domestic corporations; an alternative basis for upholding the tax was that it was laid on the franchise granted by Pennsylvania. 82 U.S. (15 Wall.) at 296 (“It is not to be questioned that the States may tax the franchises of companies created by them . . . .”). Ironically, the Gross Receipts decision was overruled shortly after the Court had demonstrated, by precluding taxation by other states, supra note 87, that there was ample justification for the distinction Justice Strong had originally drawn. Philadelphia & So. S.S. Co. v. Pennsylvania, 122 U.S. 326 (1887) (per Bradley, J., who had been with the majority in the original Gross Receipts case).

47 83 U.S. (16 Wall.) 479 (1873).
a patent risk of multiple taxation but actually discriminated against interstate commerce as well. Miller held his peace; apparently discrimination, which in Woodruff he had said was determinative, was no longer either necessary or sufficient to show invalidity.

Chase’s death spares us from pursuing the saga further in this article; his successor was left with precedents reflecting just about every conceivable view of the commerce clause problem. The overall tendency of commerce clause decisions during Chase’s time seemed lenient. The only measures struck down were the taxes on arriving ships and on interstate freight; the states were apparently free to obstruct navigable rivers and even to discriminate against interstate operations, so long as they did not make the mistake of labeling a tax as one on interstate commerce itself. In doctrinal terms the Court’s efforts in this field can be described only as a disaster.

II. THE CIVIL-WAR AMENDMENTS

The thirteenth amendment, abolishing slavery, was proclaimed law in 1865; the fourteenth, extending citizenship to

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90 The city imposed a license tax of $50 on express companies operating only within the city, of $100 on those operating only within the state, and of $500 on those “having a business extending beyond the limits of the State.” Id. at 480. Like the gross-receipts tax, wrote Chase, this exaction fell upon “a business carried on” in the state; it was immaterial that the business in question included “the making of contracts . . . for . . . transportation beyond it” or that it might “increase the cost of transportation . . . .” Id. at 482-83. The Court added that there was no discrimination against citizens of other states—proving there was no violation of the privileges and immunities clause but ignoring Woodruff’s distinct principle forbidding discrimination against interstate commerce itself. Id. at 481-82. 91 See also Ward v. Maryland, 79 U.S. (12 Wall.) 418, 432 (1871) (Bradley, J., concurring) (arguing that a state tax on sales by sample would violate the commerce clause even if it applied equally to local sellers, since it would “effectually” require foreign manufacturers to “establish[] commercial houses” within the state). This rather extreme view was to become an alternative holding in Robbins v. Shelby County, 120 U.S. 489 (1887), written by Bradley himself. In Ward the Court found a discrimination against outsiders in violation of article IV. See infra text accompanying note 185. 92 See 2 C. Warren, The Supreme Court in United States History 626 (rev. ed. 1926) (until the Freight Tax Case, in this period “only a few interstate commerce cases had been considered, but in each the Court had taken a pronounced stand in favor of State regulation”). 93 In his classic study of early commerce clause decisions, Professor Frankfurter passed over the entire Chase period, observing that Chase’s contribution “consists in the main of fugitive and confused themes in the Supreme Court’s symphonic evolution of the commerce clause.” F. Frankfurter, The Commerce Clause Under Marshall, Taney, and Waite 74 (1937). 94 U.S. Const. amend. XIII. 95 U.S. Const. amend. XIV.
blacks and protecting them against official discrimination, in 1868; the fifteenth, giving them the vote, in 1870. Beginning in 1866, Congress, on the strength of these provisions, enacted a series of statutes designed to make the vision of equality concrete. These statutes were to engage the Court’s most serious attention shortly after Chase’s death. But in the meantime, in two historic cases in 1873, the Court was asked for the first time to interpret the amendments themselves.

The critical decision came in a case remote from the amendments’ central purpose of racial justice. Louisiana had given a partial monopoly of the slaughtering business to one company; its competitors argued that this created an “involuntary servitude,” abridged their “privileges or immunities,” denied them “equal protection of the laws,” and “deprived” them of “liberty, or property, without due process of law,” in violation of the thirteenth and fourteenth amendments. By a bare majority, the Court rejected all four objections in an opinion by Justice Miller.

The thirteenth amendment contention was nothing but a play on words: the whole tenor of the congressional debate confirms that, as Miller said, “servitude” was included to prevent evasion of the ban on slavery, not to forbid limitations on the right to use one’s property. In light of later developments, it is noteworthy that the equal protection and due process arguments were given equally short shrift.

First, since the purpose of the former clause was to set aside laws discriminating against blacks, the Court “doub[ed] very

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88 U.S. CONST. amend. XV.
87 See Act of Mar. 1, 1875, ch. 114, 18 Stat. 335; Act of Apr. 20, 1871, ch. 22, repealed by Act of Feb. 8, 1894, ch. 25, 28 Stat. 36; Act of Apr. 28, 1871, ch. 99, 16 Stat. 433, repealed by Act of Feb. 8, 1894, ch. 25, 28 Stat. 36; Act of May 31, 1870, ch. 114, 16 Stat. 140, repealed by Act of Feb. 8, 1894, ch. 25, 28 Stat. 36, 37; Act of Apr. 9, 1866, ch. 31, 14 Stat. 27. The decisions involving these statutes, with other cases of the Waite period, will be the subject of the final chapters of this study in book form.
86 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). The background of the litigation is described in detail in C. Fairman, supra note 8, at 1301-88.
89 As the Court emphasized, the statute did not forbid others to do their own slaughtering; it required them to do it on the company’s premises and to pay a fee for the privilege. 83 U.S. (16 Wall.) at 42, 61.
100 Field’s dissent, 83 U.S. at 83, was joined by Chase, Bradley, and Swayne; the last two added dissenting opinions of their own. Id. at 83, 111, 124.
101 Id. at 68-69; see Clyatt v. United States, 197 U.S. 207 (1905) (upholding, on the basis of the thirteenth amendment, a federal statute outlawing peonage); Cong. Globe, 38th Cong. passim (1864-65). Field gave the thirteenth amendment argument a glance by suggesting that a person excluded from an occupation was not truly free, but he fell short of resting his dissent on that provision. 83 U.S. (16 Wall.) at 89-93.
much whether any action . . . not directed by way of discrimination against the negroes as a class, or on account of their race, would ever be held to come within the purview of this provision.”

This might have been a plausible enough holding if documented, as I shall discuss below; but it was not the holding. Miller expressly reserved the question of nonracial discrimination until “some case of State oppression, by denial of equal justice in its courts,” was presented—leaving the reader with the bare conclusion that Slaughter-House was not such a case and with no immediate clue as to why he thought the clause applied only to injustices committed in the courts.

The due process discussion was even more perfunctory: the fourteenth amendment provision subjected the states to the same limitations to which the fifth subjected the federal government; and

under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

Miller did not even say whether he meant that there had been no deprivation or that the rights involved were not property, let alone explain what he thought either “deprivation” or “property” meant. There is language in the context of an earlier and apparently gratuitous discussion of the scope of Louisiana’s police power that suggests he thought there had been no deprivation; but, unlike

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102 83 U.S. (16 Wall.) at 81.
103 See infra text accompanying notes 115-21.
104 83 U.S. (16 Wall.) at 81. During oral argument in a later railroad case, Miller emphatically denied that he had meant in Slaughter-House to limit the clause to the protection of blacks. See C. Fairman, Mr. Justice Miller and the Supreme Court, 1862-1890, at 187 (1939).
105 Bradley concluded, without giving reasons, that the law denied equal protection, 83 U.S. (16 Wall.) at 122; the other dissenters relied on other provisions.
106 Id. at 81.
107 After giving examples of British monopolies, explaining that limiting the place and manner of slaughtering was a standard means of combating nuisances, and invoking McCulloch v. Maryland’s test for the necessity and propriety of federal laws, see Currie III, supra note 1, at 929-32, Miller concluded that Louisiana’s “authority . . . to pass the present statute is ample,” unless there was something to the contrary in either the state or the federal constitution. 83 U.S. (16 Wall.) at 66. Why he thought the Supreme Court had power to determine anything beyond the federal question when reviewing a state-court judgment he did not say.
108 See 83 U.S. (16 Wall.) at 61-62 (denying that the complaining butchers had been “deprived of the right to labor” or that the law “seriously interfere[d]” with their business).
later Justices, he nowhere attempted to tie his police power discussion to the due process clause, and he did not even cite the Court's recent declaration in the *Legal Tender Cases*\(^{109}\) that the clause applied "only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."\(^{110}\) Finally, the statement that the Court had "[n]ever seen" a construction of the clause that would invalidate the monopoly was not easy to take at face value, since both Taney in *Dred Scott*\(^{111}\) and Chase in the repudiated *Hepburn v. Griswold*\(^{112}\) had employed due process to strike down federal statutes in what arguably were analogous circumstances; some explanation of what the clause did mean seems to have been in order.\(^{113}\)

The bulk of both the majority and dissenting opinions, however, was devoted to the question whether the monopoly offended the provision that "no State shall . . . abridge the privileges or immunities of citizens of the United States."\(^{114}\) Miller's negative answer was simply stated: the introductory clause of the amendment spoke separately of state and of national citizenship; therefore the privileges and immunities of "citizens of the United States" were those "belonging to a citizen of the United States as such," not those enjoyed by virtue of state citizenship.\(^{115}\) From this critical conclusion the result followed easily: unlike rights secured by federal treaties or by the thirteenth amendment, the right to slaugh-
ter animals did not "owe [its] existence to the Federal government, its National character, its Constitution, or its laws," and thus was not a privilege of national citizenship. 116

The difficulty, of course, was with Miller's apparent conclusion that the sole office of the clause was to protect rights already given by some other federal law. Apart from the amendment's less than conclusive reference to dual citizenship, 117 his sole justification was that a broader holding would "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people" 118—which quite arguably was precisely what the authors of the amendment had in mind. 119 The dissenters did not hesitate to argue that Miller's interpretation wrote the privileges or immunities clause entirely out of the Constitution. 120 Though Miller disdained to cite it, there was nevertheless some legislative history to support the view that the clause created no new rights. Moreover, the dissenters overstated their objection, since the fifth section of the amendment gave Congress explicit authority to pass legislation to enforce the rights it protected, and it was not clear that Congress had previously had such power with regard to some of the federal rights identified in

116 83 U.S. (16 Wall.) at 79-80. Other examples of privileges of national citizenship given by Miller were habeas corpus, the right to travel on federal government business recognized in Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); see infra text accompanying notes 194-96, and "[t]he right to peaceably assemble and petition for redress of grievances." Id. at 79.

117 "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." U.S. Const. amend. XIV, § 1; see 83 U.S. (16 Wall.) at 73-74. The most obvious explanation of this language was that it was meant to overturn Chief Justice Taney's conclusion in Dred Scott that even free blacks were not state citizens entitled to invoke the diversity jurisdiction, see Currie V, supra note 1, at 728, not to limit the scope of the privileges or immunities clause. Indeed the citizenship clause was added long after the inclusion of the protection of privileges and immunities. See Cong. Globe, 39th Cong., 1st Sess. 2286, 2869, 2890 (1866).

118 83 U.S. (16 Wall.) at 78.


120 If this inhibition . . . only refers . . . to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment . . . . With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character.

83 U.S. (16 Wall.) at 96 (Field, J., dissenting, joined by Chase, C.J., and Swayne & Bradley, Jd.); see also J. ELY, DEMOCRACY AND DISTRUST 22 (1980); C. FAIRMAN, supra note 8, at 1354; L. TRIBE, supra note 45, at 423-24.
the debate as intended to be protected.121

There was also, however, legislative history to support no fewer than three other interpretations of the privileges or immunities clause, all of which were put forward by the dissenting Justices. In presenting the proposal to the Senate, Senator Howard had said among other things that it was designed, as Justice Black later argued,122 to make the Bill of Rights applicable to the states.123 Still other passages in the debates seemed to suggest that Congress meant to give federal protection to all privileges or immunities that were “fundamental” in the sense described by Justice Washington in his famous circuit court interpretation, in *Corfield v. Coryell,*124 of the privileges and immunities clause of article IV.125 Finally, numerous legislators suggested that the prin-

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121 See, e.g., *Cong. Globe,* 39th Cong., 1st Sess. 2542-43 (remarks of Rep. Bingham) (arguing that the amendment “takes from no State any right that ever pertained to it” but merely authorized Congress for the first time to protect federal rights against state abridgement), 2961 (remarks of Sen. Poland) (arguing that it merely gave Congress power to enforce the privileges and immunities clause of article IV: “State legislation was allowed to override it, and as no express power was by the Constitution granted to Congress to enforce it, it became really a dead letter.”), Contrast the express authority of Congress to enforce the full faith and credit clause of the same article. U.S. Const. art. IV, § 1.


123 *Cong. Globe,* 39th Cong., 1st Sess. 2766 (1866) (summarizing the Bill of Rights, noting its inapplicability to the states, and declaring it “[t]he great object of the first section of this amendment . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”); see also *Adamson v. California,* 332 U.S. 46, 71-72, 93-123 (1947) (Black, J., dissenting); O’Neil v. Vermont, 144 U.S. 323, 360-64 (1892) (Field, J., dissenting); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 118 (1873) (Bradley, J., dissenting); Crosskey, Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority, 22 U. Chi. L. Rev. 1, 6 (1954). It is not entirely clear that Justice Miller rejected the incorporation theory in *Slaughter-House,* indeed Professor Ely takes Miller’s inclusion of the right to assemble and petition the Government among the privileges of national citizenship, see *supra* note 116, as indicating that the Court actually embraced incorporation. J. Ely, *supra* note 120, at 196-97. Miller’s reference is ambiguous; he may have meant only that the states were forbidden to interfere with citizens assembling to petition the federal government, and he conspicuously neglected to refer to the Bill of Rights as a whole.


125 E.g., *Cong. Globe,* 39th Cong., 1st Sess. 2766 (1866) (remarks of Sen. Howard) (quoting from *Corfield v. Coryell,* 6 Fed. Cas. at 551-52); see 83 U.S. (16 Wall.) at 114-19 (Bradley, J., dissenting); United States v. Hall, 26 Fed. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282) (Woods, J.); cf. Kurland, The Privileges or Immunities Clause: “Its Hour Come Round at Last?”, 1972 WASH. U.L.Q. 405, 419 (arguing for a modified version of the fundamental rights view). Ely finds the most plausible interpretation of the Privileges or Immunities Clause to be, as it must be, the one suggested by its language—that it was a delegation to future constitu-
The principal aim of the amendment was to provide a firm constitutional basis for the Civil Rights Act of 1866, which had outlawed racially discriminatory state action. As Field said in dissent, what article IV did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States.

The textual difficulty with the incorporation theory pointed out by the second Justice Harlan seems less compelling than Professor Fairman’s demonstration that nobody thought the amendment invalidated the numerous provisions permitting trials for infamous crimes without indictment that were adopted by states and approved by Congress shortly after its adoption, and that Senator Howard’s interpretation was apparently shared by virtually none of the many others who spoke to the clause in the debates. The fundamental-rights notion reflects once again the

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126 Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27.


128 83 U.S. (16 Wall.) at 100-01.

129 Duncan v. Louisiana, 391 U.S. 145, 179 n.9 (1968) (dissenting opinion) (“The great words of the four clauses of the first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that ‘The rights heretofore guaranteed against federal intrusion by the first eight Amendments are henceforth guaranteed against state intrusion as well.’”). If one wishes to be technical, it is hard to see how a state could “abridge” the privileges in the Bill of Rights, since the only rights there confirmed were of freedom from federal action. See A. McLAUGHLIN, supra note 115, at 730-31 & n.18. But see Crosskey’s observation that the first amendment demonstrated it was not unusual “to forbid the ‘abridging’ . . . of a ‘right’ not previously existing against the agency forbidden, and not formally created against it in the prohibition itself”: for the “‘right of the people peaceably to assemble, and to petition the Government,’ ” which Congress was forbidden to abridge, “did not exist previously against Congress . . . .” 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1094 (1953).

130 Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 STAN. L. REV. 5 (1949). The existence of the due process clause in the amendment provides another argument against incorporation; it suggests that when the drafters of the amendment meant to make bill of rights provisions apply to the states, they said so. The later argument that the due process clause incorporates the Bill of Rights is even more questionable, for it makes all the other provisions of the original bill redundant. Moreover, the incorporation
incessant quest for the judicial holy grail; perhaps at long last we have discovered a clause that lets us strike down any law we do not like.\textsuperscript{131} There is no textual reason why the clause could not have created a new and undefined class of federal privileges, and if that is what the framers meant to do it is no objection that they may have misunderstood what Justice Washington was talking about on circuit, or that he may have misunderstood article IV.\textsuperscript{132}

The basic objection to the fundamental-rights argument, as well as to Miller's interpretation and to the incorporation thesis, is that none of them may reflect what most of the framers actually had in mind. The dominant theme in the debates, as Fairman has shown,\textsuperscript{133} was to provide a constitutional basis for the Civil Rights Act of 1866, which provided that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.\textsuperscript{134}

There is no doubt what this statute was: a simple prohibition of state racial discrimination. It created no substantive federal rights, however fundamental; it did not make the Bill of Rights apply to

\textsuperscript{131} Cf. Currie VI, supra note 1, at 174-85 (discussing Hepburn v. Griswold, 72 U.S. (8 Wall.) 603 (1870)).

\textsuperscript{132} The Court had made clear before the fourteenth amendment debates that the original privileges and immunities clause was merely a protection of outsiders from discrimination in respect to privileges created by state law; Washington held, despite some loose language, that it gave no protection even where there was discrimination unless the right was fundamental. See Fairman, supra note 130, at 9-15; Currie V, supra note 1, at 698-700 (discussing Conner v. Elliott, 59 U.S. (18 How.) 591 (1856)).

\textsuperscript{133} See Fairman, supra note 130, passim.

\textsuperscript{134} Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27.
the states. But it did more than enforce rights already existing; it provided that the rights that states chose to give white people were the measure of the rights of nonwhites too.

Speaker after speaker proclaimed that it was this statute for which the fourteenth amendment would provide an unassailable constitutional base. If the language actually adopted did not permit such an interpretation, such statements could not alter its meaning. But a comparison of the amendment with the statute shows that the text is admirably designed to accomplish just what the speakers said it would do.

The statute did three things. First, it extended citizenship without regard to race; this provision was essentially copied into the first clause of the amendment. Second, the statute forbade racial discrimination with respect to certain enumerated rights: to contract, to sue, to deal with property; and at the end it forbade racial discrimination in the infliction of punishment. The second clause of the fourteenth amendment seems to generalize these provisions: all legal privileges and immunities are protected—not only the privileges of contracting and suing, and not only the immunity from punishment. That the provision is merely a guarantee of equal treatment is strongly suggested by the choice of the language of article IV, which the Court had already so construed: as Field said, the original Constitution forbade discrimination against citizens of other states; the new provision, like the statute it was

135 See R. Berger, Government by Judiciary, ch. 2 (1977); 5 C. Swisher, History of the Supreme Court of the United States 415 (1974); supra note 127; see also Fairman, supra note 130, passim. Fairman concludes, nevertheless, that "Justice Cardozo's gloss on the due process clause—what is 'implicit in the concept of ordered liberty'—comes as close as one can to catching the vague aspirations that were hung upon the privileges and immunities clause." Fairman, supra note 130, at 139 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)); see also Royall, The Fourteenth Amendment, 4 S.L. Rev. 558, 571 (1878) (arguing that the fourteenth amendment incorporated, and did not merely make constitutional, statutes such as the Civil Rights Bill).

136 Berger denies that there was any generalization: the privileges and immunities protected were only those listed in the Civil Rights Act. R. Berger, supra note 135, at 36. There seems no reason to doubt, however, that the Framers meant to employ the term as broadly as it had been construed in article IV. See Corfield v. Coryell, 6 Fed. Cas. 456 (C.C.E.D. Pa. 1823) (No. 3,230) (declaring that the term included all rights that were "fundamental").

137 See supra text accompanying note 128.

138 See Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) (dictum); Conner v. Elliott, 59 U.S. (18 How.) 591, 594 (1856), discussed in Currie V, supra note 1, at 698-700; see also Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430-32 (1871) (Clifford, J.) (striking down a tax that discriminated against citizens of other states). It is worth noting Miller's own explanation of the article IV provision in Slaughter-House itself:

Its sole purpose was to declare to the several States, that whatever those rights, as
meant to sustain, extended the same protection to a state's own citizens—without regard to race.\textsuperscript{139}

It may be objected that Field's interpretation cannot be accepted because it makes the equal protection clause redundant;\textsuperscript{140} every student knows that the latter clause does precisely what Field said was done by privileges or immunities.\textsuperscript{141} The text of the statute the amendment was designed to justify once again suggests an answer. The third feature of the 1866 act was to give to non-whites "the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens."\textsuperscript{142} As Miller recognized in the introductory part of his \textit{Slaughter-House} opinion, there were two distinct problems with which the mere abolition of slavery did not deal: the southern states had adopted Black Codes denying blacks a variety of privileges and immunities, and "[i]t 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."\textsuperscript{143} Against this background equal protection seems to mean that the states must protect blacks to the same extent that they protect whites: by punishing those who do them injury.\textsuperscript{144} "Protection of the laws" is, after all, a pecu-

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\textsuperscript{138} See Crosskey, supra note 123, at 7-9 (agreeing that this was the purpose of the amendment but arguing that it was accomplished by the equal protection clause, not by the clause repeating the terms of article IV that the framers meant to amend); for further elaboration, see 2 W. Crosskey supra note 129, at 1083-1158. Ely concurs: "[T]he slightest attention to language will indicate that it is the Equal Protection Clause that follows the command of equality strategy, while the Privileges or Immunities Clause proceeds by purporting to extend to everyone a set of entitlements." J. Ely, supra note 120, at 24. Ely adds, fairly enough, that statements indicating a desire for equality or an intention to justify the 1866 act are not necessarily inconsistent with a desire to confer additional rights as well. Id. at 23, 199. As indicated in the text, I think the language of the amendment, in light of its origins, also cuts in favor of Field's interpretation.

\textsuperscript{141} E.g., Missouri \textit{ex rel.} Gaines \textit{v.} Canada, 305 U.S. 337 (1938) (equal access to public education).

\textsuperscript{142} Act of Apr. 9, 1866, ch. 31, § 1, 14, Stat. 27, 27.

\textsuperscript{143} 83 U.S. (16 Wall.) at 70.

\textsuperscript{144} Compare the remarks of Senator Cowan, discussing the definition of citizenship: Even the foreigner, while not a citizen, "is entitled, to a certain extent, to the protection of the laws. You cannot murder him with impunity . . . . You cannot commit an assault and battery upon him . . . . He has a right to the protection of the laws." \textit{Cong. Globe,} 39th Cong., 1st Sess. 2890 (1866). Blackstone speaks of protection of the laws in a similar fashion: "For in vain would rights be declared, in vain directed to be observed, if there were no
liar way to express a general freedom from discrimination; it may well have been the privileges or immunities clause instead that was meant to protect blacks' rights to contract, to sue, and to hold property.

The next objection to Field's position is that the privileges or immunities clause cannot possibly have been an anti-discrimination provision because it is too broad; since it is not confined to racial discrimination, it would mean that the state could not bar two-year-olds from driving trucks or halfwits from teaching school. This objection, it will be noted, is just as applicable to the equal protection clause, which the Court has used for the same purpose; the Court has dealt with it, as Field did,\(^4\) essentially by saying the intention was not to outlaw reasonable classifications.\(^4\) An alternative construction that takes no greater liberties with the text seems to correspond much better with its expressed purpose: despite the broad drafting, privileges or immunities are secured only against racial discrimination, for that was the only thing forbidden by the statute whose constitutionality the amendment was meant to assure.\(^147\)

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\(^1\) The method of recovering and asserting those rights, when wrongly withheld or invaded. This is what we mean properly, when we speak of the protection of the law.” 1 W. BLACKSTONE, COMMENTARIES *55-56; see also J. TENBROEK, supra note 103, at 26-29, 96-98, 163-79, 192-221 (arguing that “equal protection” had been used in this sense ever since the earliest days of abolitionism and not in the sense of improper classifications); cf. Willing, Protection by Law Enforcement: The Emerging Constitutional Right, 35 Rutgers L. Rev. 1, 60 (1982) (even in the traditional terms of Slaughter-House, preservation of effective law enforcement when a state fails to provide it is a “right” guaranteed by the federal government). Senator Howard, however, spoke of the equal-protection and due process clauses in a broader sense as intended to “abolish[] all class legislation and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.” CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

\(^4\) The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations.

83 U.S. (16 Wall.) at 110.

\(^14\) See, for example, the Court's analysis in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976): Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police. . . . [M]andatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective.

\(^15\) Id. at 314-15.

\(^147\) Some members of Congress had also referred to the need to enable Congress to enforce the privileges of Northerners in the South already protected by article IV. See supra
Thus Miller may have been on the right track to suggest that equal protection was a safeguard only against racial discrimination\footnote{148}{See supra text accompanying note 102. Given this passage and others indicating that "the pervading purpose" of all three civil-war amendments (13th-15th) was "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," 83 U.S. (16 Wall.) at 71, it seems more than a little odd to suggest, as Kutler does, that Miller's opinion "laid the foundation for the legal subversion of Negro hopes for full equality." See S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 165 (1968).}—though the use of the broader term "person" in contrast to "citizen" in that clause and the fact that it would not be unreasonable to guarantee literally everyone equal protection in the narrow sense suggest that his argument is more persuasive as applied to privileges or immunities. Miller may also have been suggesting a plausibly narrow interpretation of equal protection when he hinted that the clause might apply only if justice was denied in the courts\footnote{149}{See supra text accompanying notes 104-05.}—he seems to have had some perception that the clause referred only to procedures for the redress of wrongs. What he failed to do, however, was to read the privileges or immunities clause broadly enough to accomplish what he acknowledged to be the purpose of the amendment;\footnote{150}{See 83 U.S. (16 Wall.) at 70; L. TRUMB, supra note 45, at 419 n.26.} thereafter it seemed inevitable that the Court would have to read the equal protection clause, despite its arguably distinct purpose, in such a way as to fill the gap.\footnote{151}{One result of this, as I shall argue in a subsequent study, was that the original purpose of the equal protection clause was largely forgotten and the powers of Congress to enforce it accordingly may have been too narrowly construed.} Just how the Court should have construed the privileges or immunities clause it is not easy to say, but Miller seems to have selected an interpretation particularly difficult to reconcile with the history of the amendment,\footnote{152}{For a nearly contemporaneous criticism of the Court for ignoring the legislative history, see Royall, supra note 135, at 563.} and without adequate attention to the problem.

Just as Miller's opinion diverted discrimination analysis from privileges or immunities to equal protection, it diverted fundamental-rights analysis to the due process clause. While his interment of the privileges or immunities approach has so far been permanent, the due process argument was to rise again despite the blows it had received in the Legal Tender Cases\footnote{153}{See supra text accompanying note 105. But power to punish violations of an existing duty is a far cry from a general prohibition of classifications the Court finds unreasonable.} and in Slaughter-House
itself. All of this, however, is material for a later study, for only one more fourteenth amendment case was decided before Chase's death: Bradwell v. State, which immediately follows Slaughter-House in the official reports.

If Field's theory of privileges or immunities had prevailed, Bradwell would have been an interesting case testing whether the amendment forbade only racial discrimination: it concerned an Illinois decision that only males could practice law. Justice Bradley, who disagreed with Slaughter-House, had to face that issue in a concurring opinion. In so doing, rather than limiting the clause to race, he uttered some benighted observations about the woman's place in the home, some of which he had the temerity to attribute to "the Creator;" his basic point was that the discrimination was acceptable on the merits. After Slaughter-House, however, the privileges or immunities claim was easy: as Miller said for the Court, the clause did not forbid discrimination of every kind, and there was no federal right to practice law. Most revealing with respect to later developments is the total absence of any argument that sex discrimination in bar admission offended the equal protection clause; apparently it had not yet occurred to anybody that "protection of the laws" included the right to be a lawyer.

Chief Justice Chase dissented alone in Bradwell. Since he had agreed with Slaughter-House's narrow interpretation of the only clause relied on, it is impossible to see why; and he did not have the courtesy to tell us.

CONCLUSION

The principal constitutional task of the Court under Chase was to deal with the many important and varied issues arising directly or indirectly out of the Civil War. Apart from the war issues, questions of the extent of congressional power were scarce

104 83 U.S. (16 Wall.) 130 (1873).
105 Id. at 141-42. Swayne and Field, who had also dissented in Slaughter-House, joined Bradley's opinion.
106 Id. at 139. An argument had also been made on the basis of article IV's guarantee of equal privileges for citizens of other states. Miller's conclusive response was that although Ms. Bradwell had been born in Vermont, she had become an Illinois citizen by residing there, in accordance with the first clause of the fourteenth amendment. Id. at 138; see also Corker, Bradwell v. State: Some Reflections Prompted by Myra Bradwell's Hard Case that Made "Bad Law", 53 WASH. L. Rev. 215 (1978) (suggesting that the issue may have been moot by the time the court decided it, since Illinois had passed legislation prohibiting most sex-based restrictions on employment, Act of March 22, 1872, 1871-72 Ill. Laws 578).
107 83 U.S. (16 Wall.) at 142.
108 See Currie VI, supra note 1, at 133.
and of relatively minor interest. The commerce clause was read, not surprisingly, to authorize federal regulation of liquor sales to Indians, registration of ship mortgages, permission to build railroad bridges, and inspection of vessels carrying goods and passengers on an intrastate portion of an interstate journey, though the famous and peculiar decision in Paul v. Virginia that states could regulate insurance because it was not commerce seemed to mean that Congress could not regulate it at all. Thus although the Court generally construed congressional powers amply, it was not prepared to ignore the fact that Congress had only the powers the Constitution enumerated; and it made this point by appropriately holding, in United States v. Dewitt, that the only oil whose flammability Congress could limit was that moving in interstate or foreign commerce. Apart from the oath and military-trial cases and the ups and downs of due process in the two controversies over legal tender, little attention was given to provisions limiting the enumerated congressional powers; of most significance for the future was the plausible holding in Pumpelly v. Green Bay Co. that the flooding of land by a dam was a taking of property within the meaning of the Wisconsin constitution.

163 75 U.S. (8 Wall.) 168, 183 (1869) (Field, J.) (alternative holding) ("The policies are simple contracts of indemnity against loss by fire, . . . not articles of commerce . . . . They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them . . . ."); accord Ducat v. Chicago, 77 U.S. (10 Wall.) 410 (1871) (Nelson, J.); see United States v. South-Eastern Underwriters Association, 322 U.S. 533, 539, 546-47 (1944) (overruling this holding); supra note 75 (discussing the alternative ground that the transactions in question were not interstate); infra text accompanying notes 182-84 (discussing whether the state law in Paul offended the privileges and immunities clause).
164 Cf. License Tax Cases, 72 U.S. (5 Wall.) 462 (Chase, C.J.) (upholding a privilege tax on activities assumed to be beyond Congress's regulatory powers because, in contrast to the steamboat license in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (see Currie III, supra note 1, at 941-42,) the statute did not purport to give a right to engage in the licensed activities without regard to state law).
165 76 U.S. (9 Wall.) 41 (1870) (Chase, C.J.).
166 See Currie VI, supra note 1, at 182-84; see also Osborn v. Nicholson, 80 U.S. (13 Wall.) 654 (1872) (Swayne, J.) (suggesting without explanation that the due process clause forbade congressional impairment of contracts); Stewart v. Kahn, 78 U.S. (11 Wall.) 493 (1871) (Swayne, J.) (holding due process not offended by revival of causes of action barred by the statute of limitations during the war).
167 80 U.S. (13 Wall.) 166 (1872) (Miller, J.); see also Yates v. Milwaukee, 77 U.S. (10 Wall.) 497 (1871) (Miller, J.) (holding in a case coming from federal circuit court, without stating what provision was at stake, that a city could not order the removal, without compensation, of a wharf that posed no threat to navigation).
Similarly, the reconstruction cases account for most of the important decisions of the Chase years respecting the powers of the federal courts. In other expectable decisions the Justices reaffirmed that Congress could not subject the Court's decisions to revision by other branches, held that a county was to be treated as a "citizen" for diversity purposes, and allowed removal from a state court on the basis of a federal defense. Auguring most for the future was the appearance of two dissents from the decision in Davis v. Gray, which seemed only to follow Marshall's holding in Osborn v. Bank of the United States that the eleventh amendment did not preclude suits to enjoin state officers from acting unconstitutionally; in the next few years the Court was to develop highly sophisticated distinctions in this area.

See Currie VI, infra note 1, at 133, 144-68.

Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865) (without opinion). Taney's draft opinion, belatedly printed at 117 U.S. 697 (1885) (Appendix), was not the opinion of the Court. For antecedents, see Currie I, supra note 1, at 822-25 (discussing Hayburn's Case, 2 U.S. (2 Dall.) 409 (1799)), and Currie V, supra note 1, at 726 n.199 (discussing United States v. Ferreira, 54 U.S. (13 How.) 40 (1852)).

Cowles v. Mercer County, 74 U.S. (7 Wall.) 118 (1869) (Chase, C.J.); cf. Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314 (1854) (fictitiously deeming all persons representing a private corporation to be citizens of its state of incorporation), discussed in Currie V, supra note 1, at 723-24. In the case of a county this presumption makes more sense, see P. BATOR, P. MISKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1089 (2d ed. 1973), and the risk of bias seems quite real, since otherwise the outsider would have to sue the county in its own courts.

The Mayor v. Cooper, 73 U.S. (6 Wall.) 247 (1868) (Swayne, J.). Marshall had presaged this result in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379 (1821), discussed in Currie II, supra note 1, at 694, saying that a case arises under federal law whenever the claim of either party relies on federal law, and many times (as in Cohens itself) the Court had reviewed state-court decisions where a defendant's federal right had been denied. See also Justices v. Murray, 76 U.S. (9 Wall.) 274 (1870) (Nelson, J.) (properly holding the seventh amendment forbade retrial after removal of fact questions already determined by a state-court jury); The Alicia, 74 U.S. (7 Wall.) 571 (1869) (Chase, C.J.) (holding Congress without power to order transfer of appeals in prize cases to the Supreme Court on the highly technical ground that the trial court's decree had been vacated by the filing of an appeal); cf. Currie II, supra note 1, at 668-70 (discussing Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807)).

83 U.S. (16 Wall.) 203 (1873) (Swayne, J.). The suit was to enjoin a state official from conveying to others lands claimed by the plaintiffs. Chase joined Davis's dissent. Id. at 233.

22 U.S. (9 Wheat.) 738 (1824), discussed in Currie II, supra note 1, at 695-701. The dissenters (Davis and Chase) made no attempt to distinguish Osborn, saying in one brief paragraph only that the effect of the decision was "to deprive the State of the power to dispose, in its own way, of its public lands." 83 U.S. (16 Wall.) at 233. Later cases were to make it important whether title had already passed to the plaintiffs, but the Court gave this question no attention, and it did not distinguish Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828), which had placed an ill-defined limitation on Osborn.

On the related question of the implicit immunity of the federal government from suit, see The Davis, 77 U.S. (10 Wall.) 15 (1870) (Miller, J.) (allowing a salvage claim against
By far the greater number of cases, as in the Taney period, dealt with constitutional limits on the powers of the states. The Slaughter-House Cases and Bradwell seemed to portend a narrow application of the new fourteenth amendment. The Court finally invalidated two state taxes for obstructing interstate commerce, but on the whole it was not particularly aggressive in applying the limiting effect of the commerce clause. Contract clause litigation, as usual, dominated the docket in terms of sheer numbers, but no interesting new questions were decided.

In obedience to Marshall's ill-conceived reasoning in Brown v. Maryland, the imports-exports clause was held to bar nondiscriminatory taxes on goods in the hands of their importer but to allow taxes after he had sold them, without even discussing whether they were discriminatory. Paul v. Virginia confirmed the debatable implication of government property because it was not in government possession; The Siren, 74 U.S. (7 Wall.) 152 (1869) (Field, J.) (holding that the United States had consented to claims against a fund by filing a claim of its own).

See supra text accompanying notes 176-178.

See supra text accompanying notes 176-178.

See supra text accompanying notes 176-178.

The Court reaffirmed that states could reserve the right to alter corporate charters, e.g., Pennsylvania College Cases, 80 U.S. (13 Wall.) 190 (1872) (Clifford, J.); it appeared both to embrace and to reject the unexplained suggestion of Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175, 206 (1864) (see Currie IV, supra note 1, at 493-95) that the clause forbade judicial as well as legislative impairment. Compare Havemeyer v. Iowa County, 70 U.S. (3 Wall.) 294, 303 (1866) (Swayne, J.) ("if the contract, when made, was valid . . . no subsequent action by . . . the judiciary can impair its obligation"), and Thomson v. Lee County, 70 U.S. (3 Wall.) 327, 331 (1866) (Davis, J.) ("change in judicial decision cannot be allowed to render [contracts] invalid"), and Butz v. Muscatine, 75 U.S. (8 Wall.) 575, 583-84 (1869) (Swayne, J.) (Court has as much duty "to protect the contract from [judicial action] as from [legislation]", with Railroad Co. v. Rock, 71 U.S. (4 Wall.) 177, 181 (1867) (Miller, J.) (invalidation by state court not unconstitutional unless in support of state statute), and Railroad Co. v. McClure, 77 U.S. (10 Wall.) 511, 515 (1871) (Swayne, J.) (state court invalidation of bonds outside Court jurisdiction), and Bank of West Tennessee v. Citizens' Bank, 81 U.S. (14 Wall.) 9, 10 (1872) (Swayne, J.) (state court refusal to enforce bank obligation outside Court jurisdiction). See generally C. FAHRMAN, supra note 8, at 918-1116 (discussing Gelpcke and other municipal bond cases). Most interesting was the addition of Miller, Chase, and Field to the list of dissenters denying that states had power to give contractual tax exemptions. Washington Univ. v. Rouse, 75 U.S. (8 Wall.) 439, 448-44 (1869) (Miller, J., dissenting); see Currie IV, supra note 1, at 490-93. Though he lost this battle, Miller's ideas would soon persuade the Court in an analogous field of state regulation. See Stone v. Mississippi, 101 U.S. 814 (1880) (state had no power to promise not to revoke lottery charter). The remaining 20-odd contract clause decisions merely applied settled law.

See supra text accompanying notes 176-178.

See supra text accompanying notes 176-178.

See supra text accompanying notes 176-178.

25 U.S. (12 Wheat.) 419 (1827); see Currie III, supra note 1, at 948-53.

Low v. Austin, 80 U.S. (13 Wall.) 29 (1872) (Field, J.); see supra note 48.

Waring v. Mayor, 75 U.S. (8 Wall.) 110 (1869) (Clifford, J.).

75 U.S. (8 Wall.) 168, 177-82 (1869) (Field, J.); see also supra text accompanying note 163 (discussing Paul's holding that insurance was not commerce).
cation of Bank of Augusta v. Earle that corporations were not "Citizen[s]" for purposes of article IV's privileges and immunities clause despite what the Court had done for them under the similar language of article III; Ward v. Maryland properly repeated that the clause forbade discriminatory taxes on out-of-state traders; and Bradwell v. State appropriately concluded that it ceased to protect individuals who had become citizens of the state of whose action they complained.

More interesting are a handful of decisions dealing with implicit governmental immunities. On the one side, Collector v. Day finally recognized, contrary to dicta in McCulloch v. Maryland and to the thrust of the Veazie Bank case, that the constitutional argument that Congress could not tax the states was at least as strong as its converse. On the other, the Court was faithful to the purposes of federal immunity in holding, despite the implications of Cooley v. Board of Wardens, that Congress could waive the implicit federal immunity, and Tarble's Case reaf-

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183 38 U.S. (13 Pet.) 519 (1839); see Currie V, supra note 1, at 729.
184 See supra note 170.
185 79 U.S. (12 Wall.) 418, 432 (1871); see supra note 91.
186 83 U.S. (16 Wall.) 130, 139 (1873); see supra notes 154-56 and accompanying text. The full faith and credit clause was held in Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866) (Clifford, J.), not to permit one state to look behind another's judgment for fraud or on the ground that the original claim had been barred by time; Cheever v. Wilson, 76 U.S. (9 Wall.) 108 (1870) (Swayne, J.), required respect for a divorce rendered at a wife's separate domicile. See also the two confusing and minor full faith and credit decisions in Green v. Van Buskirk, 72 U.S. (5 Wall.) 290 (1867) (Clifford, J.), and 74 U.S. (7 Wall.) 139 (1869) (Davis, J.) (writ of attachment granted by Illinois court in suit between New York citizens binding on New York courts). The Court also reaffirmed the inapplicability of the Bill of Rights to the states in the pre-fourteenth amendment cases of Pervear v. Commissioners, 72 U.S. (5 Wall.) 475 (1867) (Chase, C.J.) (cruel and unusual punishment), and Twitchell v. Commonwealth, 74 U.S. (7 Wall.) 321 (1869) (Chase, C.J.) (right to be informed of charge).
188 17 U.S. (4 Wheat.) 316 (1819).
189 75 U.S. (8 Wall.) 533 (1870); see Currie VI, supra note 1, at 170-74.
190 Cf. Currie VI, supra note 1, at 175 n.257 (discussing Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1869)); Currie V, supra note 1, at 709-10 (discussing Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860)). See also United States v. Railroad Co., 84 U.S. (17 Wall.) 332 (1873) (Hunt, J.), decided after Chase's death but before the appointment of his successor, barring a federal tax on interest paid to a city, which was treated as a state for this purpose—over dissents arguing the principle was inapplicable because the activity in question was essentially proprietary. Cf. Currie II, supra note 1, at 700-01 (discussing Bank of United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904 (1824)).
191 53 U.S. (15 How.) 299 (1852); see supra text accompanying notes 3-6.
192 Van Allen v. Assessors, 70 U.S. (3 Wall.) 573 (1866) (Nelson, J.). See also the peculiar decisions in Thomson v. Pacific R.R., 76 U.S. (9 Wall.) 579 (1870) (Chase, C.J.), that a state may tax a federal corporation if it also gives it a charter, which hardly seems to reduce the risk of disrupting federal interests, and in Society for Savings v. Coite, 73 U.S. (6 Wall.)
firmed the inability of state courts to free federal prisoners on the apparent basis of McCulloch's argument that the states may not impede federal functions. Most important and most questionable, however, was the famous decision in Crandall v. Nevada, in which the Court, after disdaining the aid of a commerce clause argument that had prevailed against an indistinguishable state law in the immediately preceding case, elected to rely on McCulloch for the proposition that Nevada's tax on passengers leaving the state interfered with government operations (and with an unpedigreed correlative right of the citizen) by obstructing travel to government offices—without saying that the passengers in question were on their way to visit the government. This opinion was by Miller, who would soon afterward hold, without invoking any constitutional provision, that a city could not issue bonds to promote private industry. The natural-law overtones of the Crandall opinion were reflected not only in Hepburn v. Griswold, from which Miller loudly dissented, but also in three contemporaneous decisions rejecting state claims of what the Court viewed as extraterritorial powers. In another case, nevertheless, the Court emphatically denied that it had authority to invalidate laws simply because they offended "fundamental principles."

Moving from the decisions to the Justices, one finds as usual that the business of writing significant opinions was largely confined to a handful of the Court's members. Catron never sat after Chase was appointed, Wayne disappeared without writing a word after delivering a decisive vote against test oaths, and Hunt barely

594 (1868) (Clifford, J.), allowing the state to tax the franchise of a corporation though its funds were partly invested in federal securities that, as reaffirmed in Banks v. Mayor, 74 U.S. (7 Wall.) 16 (1869) (Chase, C.J.), could not themselves be taxed.
193 80 U.S. (13 Wall.) 397 (1872) (Field, J.); see Currie V, supra note 1, at 710-13 (discussing Ableman v. Booth, 62 U.S. (21 How.) 506 (1859)).
194 73 U.S. (6 Wall.) 35 (1868) (Miller, J.).
195 See supra text accompanying notes 39-45.
196 Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875).
197 75 U.S. (8 Wall.) 603, 626 (1870); see Currie VI, supra note 1, at 184.
put in an appearance at the end. Nelson was as inconspicuous as he had been during twenty years with Taney, Grier noteworthy only because of the unfortunate effects of his senility in the legal-tender controversy. Clifford and Swayne, for perfectly adequate reasons, were never assigned anything of importance; they were two of the poorest opinion-writers ever to sit on the Court. Davis wrote essentially nothing but that stirring and ultimately disappointing opinion against military trials in *Milligan*; it is surprising only that it took him so long to discover that he would really be better off in the Senate. Even the famous Bradley, who served only three years with Chase, barely got his feet wet during this period, contributing little beyond a scattergun dissent in *Slaughter-House*, a few embarrassing remarks about women in *Bradwell*, and a disturbing suggestion in the *Legal Tender Cases* that Congress could do anything that governments were ordinarily empowered to do.

We have reduced the field to four Justices: Miller, Field, Chase, and Strong. The last of these is in a way the most remarkable, for in a time as brief as that of Bradley, Strong far outshone his more celebrated colleague, writing opinions for the Court not only in the towering *Legal Tender Cases* but also in the climactic railroad-tax cases that represented the mature commerce clause judgment of the Chase period. Chief Justices aside, only the notable Curtis had been given such responsibility so soon. Moreover, though Strong's two commerce clause decisions appear poorly explained to modern eyes, his *Legal Tender* opinion was both powerful and reminiscent of Marshall in its confidence that the men in Philadelphia had granted us a perfect constitution.

Chase himself, appreciating like his two immediate predecessors the prerogatives of his office, dominated the civil-war and re-

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200 See Currie V, supra note 1, at 746-49.
201 See Currie VI, supra note 1, at 174 n.255.
202 See C. Fairman, supra note 8, at 77 ("In his day Clifford was at once the most prolix and most pedestrian member of the Court."); see also Currie, The Most Insignificant Justice: A Preliminary Inquiry, 50 U. Chi. L. Rev. 466, 473-77 (1983) (discussing Clifford's high ranking on scale of Inanities Per Page).
203 71 U.S. (4 Wall.) 2 (1867); see Currie VI, supra note 1, at 133-39.
204 83 U.S. (16 Wall.) 36, 111 (1873); see supra note 105.
205 83 U.S. (16 Wall.) 130, 139 (1873); see supra text accompanying note 155.
206 79 U.S. (12 Wall.) 457, 554 (1871); see Currie VI, supra note 1, at 185 n.317.
207 79 U.S. (12 Wall.) 457 (1871); see Currie VI, supra note 1, at 184-85.
208 Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1873); State Tax on Railway Gross Receipts, 82 U.S. (15 Wall.) 284 (1873); see supra text accompanying notes 60-88.
209 See Currie V, supra note 1, at 744-45; Currie IV, supra note 1, at 506-10.
construction cases, and in so doing he seems to have been more politician than legal craftsman. In Johnson and McCordale he saved the Reconstruction Acts from the risk of invalidation and the Court from that of reprisal; in Klein he asserted the Court's ultimate independence from Congress; in Texas v. White he gave Radical theory the imprimatur of the judges. Not one of these four opinions is satisfying from the standpoint of legal analysis. Chase's opinions in the legal-tender controversies represent the triumph of policy preferences over legal reasoning. That on the taxation of state banknotes in Veazie, with which his legal-tender opinions clash, is little more than a bare conclusion; and so is his concurrence in Milligan unnecessarily affirming the power of Congress to authorize military trials. It is interesting that despite his propensity to assign important cases to himself he was one of a minority who had nothing to say about the fourteenth amendment in the Slaughter-House Cases.

Apart from Chase, clearly the most influential member of this Court was Miller, and it was no fluke that it was he who spoke for the Slaughter-House majority. His name crops up everywhere, and everywhere it is associated with a strong and controversial position. Several times he expressed forceful and general theories of the commerce clause; often alone he continued to fulminate against the effort to extend the contract clause to judicial action; it was he who revived the cry that states could not contract away their tax powers and elevated Taney's offhand remark about the right to travel to a constitutional principle in Crandall. He wrote always with exemplary clarity and brevity, and often with

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210 See C. Fairman supra note 8, at 1474-77.
211 71 U.S. (4 Wall.) 475 (1867); see Currie VI, supra note 1, at 147-50.
212 73 U.S. (6 Wall.) 318 (1868); see Currie VI, supra note 1, at 154-55.
213 80 U.S. (13 Wall.) 128 (1872); see Currie VI, supra note 1, at 158-63.
214 74 U.S. (7 Wall.) 700 (1869); see Currie VI, supra note 1, at 163-68.
215 See Currie VI, supra note 1, at 185.
216 75 U.S. (8 Wall.) 533 (1869); see Currie VI, supra note 1, at 170-74.
217 71 U.S. (4 Wall.) 2, 132 (1867); see Currie VI, supra note 1, at 137-38.
218 See C. Fairman, supra note 104, at 3 (quoting Chase's view that Miller was clearly the "dominant personality" on the Court in his early years), 63 (speaking of constitutional law as a field where Miller's "preeminence was undisputed"), 248 (concluding that Miller's "strength lay in the wisdom of his judgments rather than in the artistry of their doctrinal elaboration"), 426 ("When Justice Miller died it was generally remarked that the Court had lost the ablest of its members and the greatest figure in constitutional law since Marshall.").
219 83 U.S. (16 Wall.) 36 (1873); see supra text accompanying notes 98-154.
220 Passenger Cases, 48 U.S. (7 How.) 238, 492 (1849) (dissenting opinion); see Currie IV, supra note 1, at 503 n.219.
221 73 U.S. (6 Wall.) 35, 48-49 (1868); see supra text accompanying notes 194-96.
great effect; his dissents in the oath cases222 and in the first legal-tender decision223 are among the best reasoned opinions of the period. Sometimes, as in Hepburn224 and in the municipal bond cases,225 he was the reasonable voice of obedience to written law. Other opinions, however, confirmed a tendency to reach the desired result without much attention to the relevant sources.226 Further criticism may be directed at his cavalier dismissals of the equal protection and due process claims in Slaughter-House227 and his persistent contempt for precedent in commerce clause cases,228 which made his inherently reasonable but ever-changing general theories of the clause appear cynical afterthoughts designed to shore up a preconceived determination. Most troubling, however, is his free and easy fabrication of a right to travel in Crandall,229 where even his own audacious thesis did not appear to support the result he reached. The picture that emerges is of a strong judge with unusually great abilities and little respect for the law.

I come at last to Field, who was destined to sit for nearly thirty years with Miller and whose fundamental disagreements with him were to form the central theme of Court history for nearly twenty years after Chase had disappeared. This polarization had manifested itself strongly before 1873. Field wrote to invalidate the test oaths230 and Miller to uphold them; Miller wrote the majority opinion for the slaughtering monopoly and Field the most notable opinion against it;231 they wrote on opposite sides of the legal-tender controversy.232 Field was less likely to support Radical measures than Miller, and later cases confirm Slaughter-House's

222 Ex parte Garland, 71 U.S. (4 Wall.) 333, 382 (1867); see Currie VI, supra note 1, at 141-43.
223 Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 626 (1870); see Currie VI, supra note 1, at 184.
224 See Currie VI, supra note 1, at 181.
225 See supra note 178.
226 See supra text accompanying notes 42-44, 57, 80-84.
227 83 U.S. (16 Wall.) 36, 81 (1873); see supra text accompanying notes 102-13.
228 See, e.g., Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869); supra text accompanying notes 43-44, 56-58.
229 73 U.S. (6 Wall.) 35, 48-49 (1868); see supra text accompanying notes 194-96.
230 Ex parte Garland, 71 U.S. (4 Wall.) 333, 374 (Field, J.), 382 (Miller, J.) (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 316 (1868) (Field, J.); see Currie VI, supra note 1, at 139-44.
231 83 U.S. (16 Wall.) 36, 57 (Miller, J., for the Court), 83 (Field, J., dissenting) (1873); see supra text accompanying notes 128, 137-41, 145.
232 Legal Tender Cases, 79 U.S. (12 Wall) 457, 634 (1871) (Field, J., dissenting); Hepburn v. Griswold, 75 U.S. (8 Wall) 603, 626 (1870) (Miller, J., dissenting); see Currie VI, supra note 1, at 174-85.
implication that he was more likely to find ways of protecting economic freedom. In style Field was notably more prolix and pomposous than Miller, but his best opinions—in *Slaughter-House* and the oath cases—show that Miller had a worthy adversary in terms of intellectual power.

With two strong and youthful Justices ranged on apparently opposite sides of the major issues that were about to confront the Court, the stage was set for the appointment of a new Chief Justice in 1874.

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2 E.g., *Munn v. Illinois*, 94 U.S. 113 (1877).