Revisiting the *Slaughter-House Cases* (1873)

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Abstract

Fear of yet another cholera epidemic plagued New Orleans in 1869. Attributing the cause of cholera to the pollution of the water supply, of which slaughterhouse waste dumping was a chief component, the Louisiana State Legislature passed a law regulating slaughterhouses. Opposition to this law by butchers eventually led to an 1873 Supreme Court ruling, which became a landmark decision in Fourteenth Amendment jurisprudence, as the butchers had sought relief under that amendment. The conventional modern opinion of Justice Samuel Freeman Miller's majority ruling in the *Slaughter-House Cases*, which denied the butchers' claim, is that it was an anti-Reconstruction ruling that gutted the "privileges or immunities" clause in the amendment, forcing future courts to rely on "substantive due process" to justify their decisions. However, relatively recently, several historians and legal scholars have offered a revisionist view that looks more favorably upon Miller's opinion, asserting that it was misinterpreted. This paper analyzes the majority and dissenting opinions in that case and related cases, reports on the congressional debate on the Fourteenth Amendment, and considers the historiography of the case, both conventional and revisionist. It concludes that Justice Miller, a Lincoln appointee and physician with a long-standing interest in public health, wrote a decision defending the actions of the biracial Louisiana Reconstruction legislature against white supremacists, defending it against laissez-faire economics, and defending the concept of federalism in general.

Keywords: slaughterhouse, Fourteenth Amendment, privileges or immunities, Reconstruction, cholera, Samuel F. Miller, butchers, Louisiana, revisionist, federalism, New Orleans

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Revisando los *Casos de la Matanza* (1873)

Resumen

El temor a otra epidemia de cólera plagó la Nueva Orleans de 1869. Atribuyendo la causa del cólera a la contaminación del suministro de agua, del cual el vertido de desechos del matadero era un componente principal, la Legislatura del Estado de Luisiana aprobó una ley que regula los mataderos. La oposición a esta ley por parte de los carniceros finalmente llevó a un fallo de la Corte Suprema de 1873 que se convirtió en una decisión histórica en la jurisprudencia de la Decimocuarta Enmienda, ya que los carniceros habían buscado alivio bajo esa enmienda. La opinión moderna convencional del fallo mayoritario del juez Samuel Freeman Miller en los casos de Slaughter-House, que niega la afirmación de los carniceros, es que fue un fallo anti-Reconstrucción que destripó la cláusula de "privilegios o inmunidades" en la enmienda, obligando a los futuros tribunales a confiar en un "debido proceso sustantivo" para justificar sus decisiones. Sin embargo, relativamente recientemente, varios historiadores y estudiosos del derecho han ofrecido una visión revisionista que considera más favorablemente la opinión de Miller, afirmando que fue malinterpretada. Este documento analiza las opiniones mayoritarias y disidentes en ese caso, así como los casos relacionados, informa sobre el debate del Congreso sobre la Decimocuarta Enmienda, y considera la historiografía del caso, tanto convencional como revisionista. Concluye que el juez Miller, designado por Lincoln y médico con un largo interés en la salud pública, escribió una decisión defendiendo las acciones de la legislatura bi-racial de la Reconstrucción de Luisiana contra los supremacistas blancos, defendiéndola contra la economía de laissez-faire y defendiendo el concepto del federalismo en general.

Palabras clave: matadero, Decimocuarta Enmienda, privilegios o inmunidades, Reconstrucción, cólera, Samuel F. Miller, carniceros, Luisiana, revisionista, federalismo, Nueva Orleans

重审1873年的屠宰场案

摘要

1869年对另一场霍乱流行的恐惧笼罩着新奥尔良。将霍乱起因归咎于水供应污染（屠宰场废物倾倒是该污染的主要成分），路易安纳州立法机关通过了一项监管屠宰场的法案。

屠夫对该法案的反对最终导致1873年最高法院进行判决，该判决成为了第14条修正案法学中的一个标志性决定，因为此前屠夫企图在该法案下寻求帮助。对屠宰场案中法官塞缪尔·弗里曼·米勒（Samuel Freeman Miller）多数裁定法（否决屠夫所伸张的权利）所持的传统现代观点则是，这一裁定是一项将修正案中“特权或豁免权”条款加以提炼的反重建裁定，它强制要求未来法院依赖“实质性正当程序”来为各自的决定进行辩护。然而，相对而言近几年，一些历史学家和法律学者提出了一个修正主义者观点，这一观点看似更倾向于米勒的看法，并声称他的看法被错误解读。本文分析了屠宰场案例中的主流观点与反对观点，以及与国会就第14条修正案进行辩论的相关案例和报告，并考量该案例的历史学，包括传统与修正主义观点。本文结论认为，经林肯总统任命的法官米勒兼长期研究公共卫生的内科医生，写下了一个决定，维护路易安纳州重建时期双种族立法机关对反对白人种族优越论者所采取的行动，维护其对自由放任式经济学的反对，维护联邦主义的整体概念。

关键词：屠宰场，第14条修正案，特权或豁免权，重建，霍乱，塞缪尔·弗里曼·米勒，屠夫，路易安纳州，修正主义者，联邦主义，新奥尔良

In 1869, the Louisiana State Legislature passed a public health law that led to an 1873 Supreme Court ruling that became a landmark decision in Fourteenth Amendment jurisprudence. The conventional modern opinion of Justice Samuel Freeman Miller's majority ruling in the *Slaughter-House Cases* is that it was an anti-Reconstruction ruling that gutted the "privileges or immunities" clause in the amendment. However, relatively recently, historians and legal scholars have offered a revisionist view that looks more favorably upon Miller's opinion, asserting that it was misinterpreted. This paper shows that Justice Miller, a Lincoln appointee and physician with a long-standing interest in public health, wrote a decision defending the actions of the biracial Louisiana Reconstruction legislature against white supremacists, defending it against laissez-faire economics, and defending the concept of federalism in general.

New Orleans in 1869 was a city known for its squalid conditions.[1] Naturalist John James Audubon reportedly called the city's French Market the "dirtiest place in all the cities of the United States."[2] Probably the most noxious sites were the slaughterhouses.[3] Butchers had largely concentrated the slaughterhouses upstream from the city, in

Slaughterhouse Point.[4] They scattered others throughout the city, sometimes next to hospitals, schools, businesses, and tenements.[5] None of these locations were good, as the butchers simply threw the bloody waste from the slaughter of 300,000 animals a year into the streets or into the river, where it collected around the giant suction pipes from which New Orleans drew its water supply.[6] As far back as 1804, the government had attempted to move the slaughtering operations out of the city, but as the political power of the butchers grew, the slaughterhouses came back.[7] Epidemics of cholera and yellow fever occurred regularly, killing as many as forty thousand people in 1853 and thousands more into the 1860s.[8] These were part of global pandemics that still continue to kill thousands a year in developing countries with limited sanitation and clean water.

By 1869, other American cities had begun regulating slaughterhouses, including San Francisco, Boston, and Milwaukee.[9] New York City required the use of a centralized slaughterhouse, an idea unpopular with the city's butchers, but more popular with its residents.[10] The 1869 Louisiana law similarly required a central slaughterhouse.[11] The law banned the slaughtering of food animals within city limits, creating a new company with the exclusive (monopoly) privilege of operating a slaughterhouse.[12] A butcher could still conduct his trade, the law said, but must do his slaughtering at a specified place and pay a fee.[13]

Butchers in New Orleans attacked the law as a product of "black ignorance and Yankee (carpetbagger) greed."[14] As in other states, the legislature granted the monopoly privilege to wealthy individuals with political pull and to their friends in politics.[15] Critics complained of this corruption, charging those "carpetbaggers" and "scalawags" who benefited as being out for "plunder"—although historian Michael Les Benedict points out that the incorporators of the new Crescent City Company included both Republicans and Democrats.[16]

The law further annoyed white butchers by allowing freedmen to more easily become butchers, as they would no longer have to raise money to build their own slaughterhouses.[17] Primarily, though, the butchers, along with white New Orleans and the white press, were opposed to the biracial Reconstruction legislature on principle.[18]

The butchers unsuccessfully challenged the law in state court on the grounds that it was not within a state's police powers to charter a company for this purpose.[19] When the monopoly Crescent City Company got injunctions against the operation of a butchers' association slaughterhouse, the butchers appealed to federal court.[20]

The case—actually several similar cases lumped together as the *Slaughter-House Cases*—ended up before the Supreme Court. Lead attorney for the butchers was John A. Campbell (1811–1889), a former Associate Justice of the Supreme Court—where he had voted with the majority in *Dred Scott*—who left to become an Assistant Secretary of War for the Confederacy and was later

a successful anti-Reconstruction attorney.[21] Campbell, on a mission to destroy Reconstruction state governments, feared the development of a democratic system incorporating blacks and uneducated immigrants.[22] He looked to the Fourteenth Amendment to keep this new population out of public life, by attempting to turn the amendment on its head.[23] Essentially, Campbell proposed to transfer all individual rights, especially economic rights, from the states to the federal government.[24] In one sense, Campbell would eventually get his wish: as the country abandoned Reconstruction, the state governments returned to a white rule that restricted the rights of blacks. This was a future, however, that neither side in the *Slaughter-House Cases* was able to foresee.

Campbell argued that the privileges and immunities of the Fourteenth Amendment—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"—included all rights that people had, including common law rights preceding the Constitution, even going back to the Magna Carta.[25] Campbell also argued that the butchers were in de facto slavery to the monopoly Crescent City Company, violating the Thirteenth Amendment, and that their Fourteenth Amendment due process rights had been violated.[26]

The justice who would write the majority opinion, Samuel Freeman Miller (1816–1890), was from a much different background. He had lived in Keokuk, Iowa, a "Porkopolis," and had seen firsthand hog slaughtering and the town's attempts to regulate it.[27] Miller, a medical doctor, had written his medical school dissertation on the causes and treatment of cholera.[28] Historian Michael A. Ross calls Miller a pioneer in linking cholera to polluted water.[29]

The "privileges or immunities" issue that Campbell raised required Justice Miller to define just what privileges and immunities meant, as the amendment itself did not offer a definition. In the Congressional debates on the amendment, New Jersey Representative A.J. Rogers asserted that it included all the rights that citizens had come to enjoy, a sentiment similar to what Campbell would later argue in the case.[30] However, Constitutional scholar Akhil Reed Amar notes that Ohio Representative John Bingham, the key framer of the amendment, had specifically linked the privileges and immunities clause primarily to the Bill of Rights, in speeches and in a pamphlet he wrote.[31]

Michigan Senator Jacob Howard, sponsor of the amendment in the Senate, similarly linked them in a speech reprinted in *The New York Times* and in *The New York Herald*, the nation's best-selling newspaper in 1866.[32] During the debates, referring to the privileges and immunities clause in the fourth article of the Constitution, second section, Howard offered: "To these privileges, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution."[33] Based on this, it appears that at least one of the framers had a fairly expansive view of these privileges and im-

munities, including what would later be called "incorporation"—that is, that the Bill of Rights, originally applying only to the federal government, would now act upon the states via the Fourteenth Amendment.

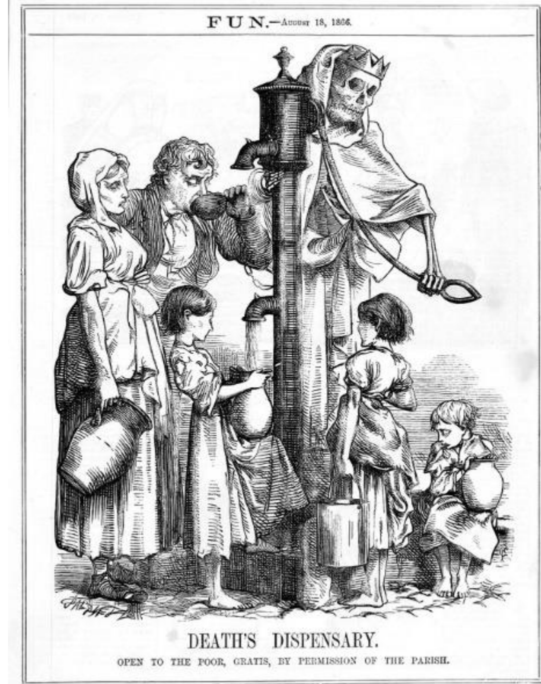
Yet, while the Fourteenth Amendment expanded on citizen rights, it was unclear to Congress just what that entailed. Bingham, for one, believed that this expansion did not infringe on existing states' rights, given that no state ever had the right to circumvent equal protection of the laws or privileges and immunities granted to all citizens.[34] Others thought that future Congresses would define them further. Indiana Senator Thomas A. Hendricks observed that he had never heard any senator actually define these rights.[35] Maryland Representative Charles E. Phelps stated his presumption that Congress, in the future, should determine what these immunities and privileges were to be.[36] Pennsylvania Representative Benjamin M. Boyer perhaps summed it up by saying that the amendment was "open to ambiguity and ... conflicting constructions."[37]

This ambiguity seems purposeful. Historian Eric Foner notes that Republicans resisted calls to define what "fundamental rights" of citizens, an oft-used phrase during the debates, actually were.[38] Foner goes on to say that the Fourteenth Amendment was intended as a broad statement of principle that disavowed any "legal discrimination" and enlarged the concept of freedom for all citizens.[39] But constitutional scholar David S. Bogen writes that what the amendment's framers meant to say is "slippery," with too many possible interpretations.[40] Kevin Christopher Newsom, a former appellate litigator and current United States Appeals Court judge, sees limits to privileges and immunities, noting that Bingham, in an 1871 Congressional speech, saw these rights as being chiefly limited to the first eight amendments in the Bill of Rights.[41]

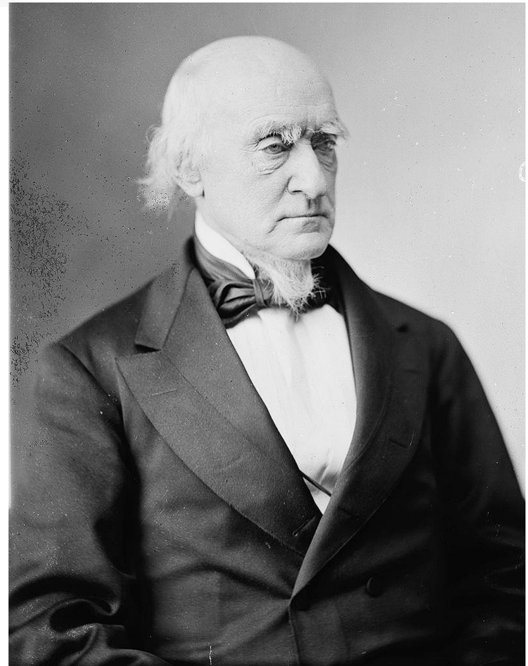
Congress seemed to agree that the purpose of the amendment was to ensure the equality of rights among all citizens. Vermont Senator Luke P. Poland noted that the first clause did not go beyond the original provision in Article IV of the Constitution, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[42] New York Representative Henry J. Raymond noted that the amendment followed his long-time support of providing equal rights to all.[43] Representative Phelps added: "[the amendment] allows Congress to correct the unjust legislation of the States, so far that the law which operates on one man shall operate *equally* upon all."[44] (The reference to unjust legislation was to the purposefully discriminatory Black Codes.)

The Court decided the case five to four against Campbell and the butchers. Justice Miller wrote the majority opinion, joined by Justices Nathan Clifford, David Davis, William Strong, and Ward Hunt. Three of the four dissenters wrote their own separate opinions: Stephen J. Field, Joseph P. Bradley, and Noah H. Swayne; Chief Justice Salmon P. Chase simply joined the other dissenters. This split was not along party lines, as, for

Death's Dispensary by British cartoonist George Pinwell, referencing the recent discovery by Dr. John Snow that cholera was spread through contaminated drinking water. Source: University of Florida Digital Collections, https://ufdc.ufl.edu/UF00078627/00010/206j.



Author of the majority opinion in the Slaughter-House Cases, Supreme Court Associate Justice Samuel Freeman Miller (1816–1890, photographed by Mathew Brady. Source: The United States Library of Congress Prints and Photographs Division, digital ID cwpbh.03994.



Lead attorney for the plaintiff butchers, former Supreme Court Justice John Archibald Campbell (1811–1889), photographed by Matthew Brady. Source: The United States Library of Congress Prints and Photographs division, digital ID cwpbh.04017.

example, Miller and Chase were both Lincoln appointees. But Lincoln had picked justices based on unionism and not on economic philosophy.[45] Miller, for instance, a product of a small-town Western upbringing opposed to the financial and railroad empires headquartered back east, found himself left out in a Republican Party increasingly tied to big business.[46]

Miller rejected each of Campbell's arguments. The existence of a monopoly, no matter if it were a good idea, Miller ruled, did not prevent the butchers from exercising their trade.[47] Furthermore, he found that the police power of the states allowed regulation.[48] Miller also ruled against the butchers' Fourteen Amendment claim that this monopoly had effectively taken their property without due process of law.[49]

The heart of Miller's opinion, and the part that became the most controversial, revolved around the "privileges or immunities" clause. Miller approached this by first finding that Americans have dual[50] citizenship, and so dual rights, in the United States and in the state they reside in. The Fourteenth Amendment, Miller found, dealt only with the rights of a United States citizen.[51] Other rights, under the concept of federalism, belonged to the states to administer.[52] So, it is the states that provide the right to exercise a trade, and not the federal government. To read the Fourteenth Amendment otherwise, to include under federal domain all of a citizen's rights, including "common rights" that existed before the Constitution—which is what the plaintiffs were asking for—would radically disrupt the whole concept of federalism that governed the relationship of the state and federal governments to each other.[53] Miller did not believe the framers of the post-war amendments, or the state legislatures that ratified them, had intended this.[54] Miller firmly believed that the rationale for these amendments was "the freedom of the slave race."[55] Miller mentioned nothing one way or the other about incorporation—the concept that the Bill of Rights applies to the states—because no right enumerated in the Bill of Rights was at issue in this case. Finding that the rights being argued in the case were rights of state citizens, to be decided by state governments, he found no need to define the "privileges and immunities" of United States citizens.[56] Conventional historiography criticizes Miller's decision not to list those rights, but it is legally understandable, as it was not his place in writing this particular case opinion to decide what they were.

Having read the Fourteenth Amendment as continuing the concept of dual citizenship, Miller then read the next sentence: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" as applying only to those rights attached to national citizenship and not to state citizenship.[57] Miller feared that, without federalism, as a practical matter, the federal courts would be "inundated with legislation."[58]

Four members of the Court found Campbell's arguments to be reasonable and so dissented from the majority opinion. This began a movement towards a pro-business (lais-

sez-faire) interpretation of the Fourteenth Amendment, using the concept of "substantive due process," including the classic right-of-contract case, *Lochner v. New York* (1905).[59] (Substantive due process is a legal doctrine intended to prevent the violation of rights even when proper due process procedures have been followed.) In particular, Justice Field's dissenting opinion was the polar opposite of Miller's. He wrote that the amendment was intended to protect "common rights" from the States.[60] He further noted that if the monopoly were sustained, then there would be no limit to favors by a state government to preferred businesses.[61] Field also rejected the concept of United States citizenship apart from state citizenship.[62] "The privileges and immunities designated are those which of right belong to the citizens of all free governments," taking a lead from Justice Washington in *Corfield v. Coryell* (1823).[63] Field added: "the right of free labor" is "one of the most sacred and imprescriptible rights."[64] Essentially, Field argued that the amendment had been adopted in order to set the federal government as the protector of Americans' common rights."[65] From another point of view, Field may have viewed the slaughterhouse law as an attempt at redistribution—agreeing with the butchers' complaint that their property had been taken from them—rather than as a health issue.[66]

Justice Bradley, while generally agreeing with Justice Field, added some further thoughts.[67] He, too, believed that there are fundamental rights belonging to the citizens of any free government.[68] To Bradley, state citizenship was secondary.[69] Citizens had a right to choose any lawful employment.[70] He found the Louisiana law to be "arbitrary and unjust" and not a proper exercise of the police powers. The granting of monopolies "is an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty."[71] In answer to Miller's fear of the collapse of federalism, Bradley wrote that under his interpretation, he did not believe the federal government would end up supervising the internal affairs of the states.[72]

Justice Swayne, in his own dissent, added that monopoly abridges both the privileges and immunities of a citizen and deprives him of liberty or property without due process of law.[73] Unlike Miller, Swayne was not afraid of a radical change in government.[74] To Swayne, every state citizen was a United States citizen and all have equality, protected by the Fourteenth Amendment, in state-created privileges and immunities.[75]

Radical Republicans and western Democrats criticized Miller's decision as too limited in its interpretation of the Fourteenth Amendment.[76] Legal scholar Charles Warren notes that Vermont Senator George F. Edmunds, who had helped pass the amendment, thought Miller's decision a "radical" departure from what the amendment's framers had intended or what the amendment actually said.[77] Warren also notes that New York Senator Roscoe Conkling, leader of the Stalwart anti-reform branch of the Republican Party and a member of the House at the time it passed the amendment, complained

that the amendment was not only meant to help the freed slaves but also protect business from legislators.[78]

Constitutional law scholar Richard L. Aynes notes contemporary criticism of the majority opinion from the *Chicago Legal News* in 1873 and Sedgwick's *Statutory and Constitutional Law* in 1874, on grounds that Miller was reading the Fourteenth Amendment as being passed primarily to help "the colored citizen," while they believed it was intended generally.[79] Other publications were less subtle. *The Cincinnati Enquirer*, on April 16, 1873, called out the "degeneracy of the Court" in upholding "a law passed by a so-called Legislature, elected by the bayonet and through the agency of the most degraded and ignorant portion of the population ... to reward particular favorites."[80] In a similar vein, the *Southern Law Review* claimed that the decision sustained a "menacing monopoly created by a corrupt and ignorant carpet-bag State Government."[81]

Still, Warren notes that many Americans, particularly those leery of government centralization, did not share this attitude.[82] *The Chicago Tribune*, *The Nation*, and *The Independent*, among others, defended the decision.[83] *The New York World*, April 16, 1873, found Miller had "fairly interpreted" the new amendments intention to retain the concept of federalism.[84] *The New York World* went on to say that "certain shallow people" have "gone crazy" about the scope of the Fourteenth Amendment.[85]

At least two later cases that cited *Slaughter-House* reiterated Miller's defense of federalism. In *In re Kemmler* (1890), Chief Justice Melville Fuller wrote for the majority that the privileges and immunities of citizens of the United States, granted by the Constitution, are protected by the Fourteenth Amendment, but that the "protection to life, liberty, and property rests, primarily, with the states."[86] In *Twining v. New Jersey* (1908), Justice William Henry Moody wrote for the majority that while the decision in *Slaughter-House* had disappointed those looking for the Fourteenth Amendment to have greater effect, the alternative would have been much worse.[87] If the dissenters had prevailed, then the authority of the states would have been much diminished, by "subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the national government."[88] He added that the judgment in *Slaughter-House* continues to be upheld.[89]

Since then, historians and legal scholars have come down hard on Miller's decision, especially its lack of clarity regarding incorporation and its limits on privileges and immunities. Amar writes that the conventional reading of Miller's opinion "falls far short of incorporation."[90] He further refers to it as "strangling the privileges or immunities clause in its crib."[91] Lawrence Tribe writes that the *Slaughter-House Cases* "artificially constricted" the Fourteenth Amendment's "privileges or immunities" clause by reading those words more narrowly than how most Americans understood them or how the amendment's framers intended them, which was to protect citizens' rights

against the states.[92] Benedict sums up Miller's opinion: Miller "concluded that the 'one pervading purpose' behind the Civil War amendments was to secure the freedom of black Americans, not to expand or add protections for the rights of white."[93] (However, Miller also wrote: "We do not say that no one else but the negro can share in this protection."[94]) Legal historian Donald G. Nieman adds: "The Slaughterhouse Cases dealt the privileges and immunities clause a blow from which it never recovered."[95]

Foner also expresses disappointment with the limits of the decision. He views Miller's definition of rights due to "national citizenship" as too narrow to be of any use to blacks.[96] Essentially, Foner is looking for the federal government to protect the rights of blacks against private individuals and/or local officials not enforcing the law,[97] and not just against racist state laws; however, the Supreme Court rejected this concept in the 1883 *Civil Rights Cases*, with both Miller and Bradley on the same side that time.[98]

Ross finds that the current consensus on Miller's interpretation of the Fourteenth Amendment's privileges and immunities clause is that it was incorrect, ignored the intent of the framers, and did not incorporate the Bill of Rights.[99] The criticism about incorporation is particularly critical, as it is the principle of incorporation that has largely defined late twentieth century constitutional law, from Miranda rights to abortion rights. Ross notes the overall dissatisfaction with the opinion, quoting a Supreme Court historian, Leo Pfeffer, that "the only thing slaughtered in the Slaughterhouse cases was the right of the Negro to equality."[100] Ross concludes that the majority opinion and Miller have become "lightning rods for censure in the tragic unraveling of Radical Reconstruction."[101]

Aynes, for one, reads Miller's opinion as being antagonistic to incorporation, while seeing Congressional views in the debate over the 1875 Civil Rights Act as supporting incorporation.[102] He thinks the amendment was being "frittered away by judicial construction," quoting former Attorney General Benjamin Bristow (1873), while former Confederate and future Supreme Court Justice Lucius Q.C. Lamar saw the Court, especially regarding *Slaughter-House*, as anti-Reconstruction.[103]

Aynes further notes that historian John W Burgess and others in the 1890s saw *Slaughter-House* as non-incorporationist.[104] He explains Miller's decision with a reference to legal scholar Christopher G. Tiedman, who, in 1890, thinking that a literal reading of the Fourteenth Amendment would have ended local self-government in the US, applauded the Miller opinion, even though it violated the intent of both the framers and the ratifiers.[105] Tiedman believed, according to Aynes, that Miller's opinion opposed the popular will at the time, but was more in line with what cooler heads would want.[106] Aynes also finds that Congressional opinion had changed by 1873, so that Miller's opinion was in line with that thinking, just not in line with the Congress that had passed

the Fourteenth Amendment in 1866.[107] This is similar to what Warren said, back in 1923, that by 1873, the country had moved away from centralization and back to the states' rights views held by Democrats before the war.[108]

In recent years, scholars have taken a fresh look at the *Slaughter-House Cases* and especially its effect on incorporationism. In an in-depth article on the topic, Newsom finds that the conventional reading of the case is not unreasonable, but is also not the best.[109] Like conventional historiographers, Newsom sees the intent of the amendment framers as incorporating the Bill of Rights, but does not think that Miller interfered with this.[110] He finds nothing in Miller's opinion to think he was opposed to incorporation.[111] Miller had specifically said that federal privileges and immunities include the "right to peaceably assemble and petition for redress of grievances."[112] This is from the First Amendment, so it does look like he intended to incorporate at least some of the Bill of Rights.[113] While conventional historiography pointed to the skimpy list of privileges and immunities that Miller had listed, Newsom views this list as illustrative rather than exhaustive.[114]

Newsom finds Miller thinking that Congress had designed the Fourteenth Amendment to promote equality in civil (economic) rights and not to expand them.[115] Newsom thinks that Justice Field misread the Civil Rights Act of 1866, thinking it expanded rights, whereas Newsom thinks it just ensured that blacks had the same rights as whites, whatever those rights were.[116]

Ross, despite the conventional view of Miller's opinion, saw it as upholding the authority of a biracial Reconstruction government to deal with a health crisis in New Orleans, and in so doing prevent conservatives like Justice Field from putting private property outside of state regulation.[117] Ross finds that Miller and the majority did not believe that Congress had designed the Fourteenth Amendment to do away with the traditional system of federalism,[118] which would have opened the gates to federal overruling of state business regulations.[119] Ross believes that Miller was afraid of the "notoriously conservative" federal judiciary striking down state legislation.[120] Further, it was not clear at this time that Reconstruction would fail, and so Miller had faith in state governments as protecting the rights of blacks.[121] Miller felt, according to Ross, that Congress passed the Fourteenth Amendment as an antidote to the Black Codes, but not something that would strike down a state health regulation having nothing to do with race.[122]

Keeping the case in historical perspective is critical to understanding it, including what Miller's contemporaries thought about incorporation. Professor Bryan H. Wildenthal, after studying the evidence, believes that the *Slaughter-House* majority adopted a reading of the Fourteenth Amendment that applied, at a minimum, the Bill of Rights to the states—and that this view was widely shared at the time.[123] He finds that disincorporation happened afterwards, in cases like *Plessy v. Ferguson* (1896), the landmark racial segregation case.[124]

One of the strikes against Miller is that there were later cases where the Court did not invoke incorporation, but, as Newsom points out, none of these cases actually involve the incorporation issue.[125] This is an important point, often overlooked, because, typically, an appellate court will only consider legal issues raised by the parties, and not address issues that the parties could have mentioned, but did not. For instance, *US v. Cruikshank* (1874) was about private actions of individuals and not state actions.[126] In *Eilenbecker v. District Court* (1890) and *Hurtado v. California* (1884), appellants made the legal error of invoking the Bill of Rights against state actions without invoking the Fourteenth Amendment, so the issue of incorporation never came up.[127]

The Court eventually followed the dissenters, except that instead of using the privileges and immunities clause, it used "substantive due process," overruling state regulation of business in *Allgeyer v. Louisiana* (1897) and, in the case that gave the court of this period its name, *Lochner*.[128] But this "ultimate victory of virulent racism and laissez-faire jurisprudence is not what Miller and the Court's majority in the *Slaughter-House Cases* intended."[129]

Modern critics have often castigated Justice Miller's opinion in *Slaughter-House*, thinking that it was responsible for future courts not being able to use the Fourteenth Amendment's "privileges and immunities" clause to prevent rights violations. However, that view could well be unfair. *Slaughter-Houses Cases* depict a state, through its Reconstruction legislature, trying to provide equal protection for blacks. That this situation would later reverse, with states preventing equal rights while the federal government moved to protect them, is not something Miller could have foreseen. Miller was also handicapped by the framers of the Fourteenth Amendment, trying to negate states' Black Codes, not considering, back in 1868, that the big problem for blacks would be private action rather than direct state action. However, Miller's decision did not prevent Congress or the Courts from enforcing equal rights, including the use of incorporation. That they did not do so cannot be laid on *Slaughter-House.*

The majority's commitment to federalism created a defense of an action of a Reconstruction state government against both white supremacist opposition and oversight by a federal government favoring laissez-faire economics. Miller accomplished this by differentiating between the rights of citizens of a state and the rights of a citizen of the United States. With that distinction, the "privileges or immunities" of the Fourteenth Amendment only applied to rights given to citizens of the United States by the Constitution or Congress, and not to common rights that traditionally belonged to the states to uphold. Later courts, the laissez-faire "Lochner" courts, got around this by defending common rights, like the right of contract, using the due process clause in the amendment. Later still, during the Great Depression, Congress and the Courts would reject that interpretation. Eventually, they would

act against racism by private interests, primarily using the Commerce Clause (US Constitution, Art. 1, Sec. 8, cl. 3.), but that would only come when much of the public had begun to see racism as unacceptable.

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