THE RISE AND FALL OF TRANSCENDENT CONSTITUTIONALISM IN THE CIVIL WAR ERA

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In the aftermath of the Civil War, American intellectuals saw the war itself as a force of transcendent lawmaking. They viewed it as a historical catalyst that had forged the United States into a nation. In writing the Fourteenth Amendment, Congress sought to translate the war's nationalistic spirit into text. But in the eyes of many contemporary thinkers, the war's centripetal energy was a double-edged sword. It could create a nation out of disparate parts, but it was also potentially uncontainable, divorced from the regular lawmaking process and beyond the control of human actors. As a result, many American jurists feared that the war could result in the complete destruction of American federalism and the erection of a system based on unitary sovereignty.

After the Civil War, the Supreme Court significantly narrowed the revolutionary potential of the Fourteenth Amendment, as generations of legal scholars have noted. What scholars have failed to appreciate, however, is exactly what the Court meant to do in its controversial opinion in the Slaughterhouse Cases. *In* Slaughterhouse *and other post-war cases, the Court sought to provide a counterforce against the forces of transcendent lawmaking, intending to preserve the fundamental distinction between state and federal authority in the United States, which the Justices feared might be entirely elided otherwise. To many Americans living in the aftermath of the Civil War, the Supreme Court's decision to quash the radical potential of transcendent constitutionalism represented a welcome return to the ordinary operation of law in the United States.*

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INTRODUCTION

How did the Civil War transform American constitutionalism? Scholars have traditionally understood the Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth) as creating a new constitutional order in the United States.[1] Michael McConnell pointed to

[1] There is a vast literature on the Reconstruction Amendments' transformative effect on American constitutional law, including Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998); Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (2d ed. 1997); Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986); Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship (2014); Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863–1869 (1990); Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992) [hereinafter

the "extraordinary character of the change" wrought by the amendments,[2] and Bruce Ackerman maintained that the amendments signified nothing less than a national "re-founding."[3] While they disagree on the precise meaning of the amendments, scholars have tended to locate the source of revolutionary change in the act of adding the new amendments to the Constitution between 1865 and 1870.[4]

Americans who had lived through the horrors of the Civil War had a different perspective—they considered the war itself to have altered the Constitution. For them, the war had been a world-churning, paradigm-shifting event. Civil War-era lawyers conceived of the post-war

Amar, Fourteenth Amendment]; Richard L. Aynes, On Misreading John Bingham and the Fourteenth Amendment, 103 Yale L.J. 57 (1993) [hereinafter Aynes, Misreading John Bingham]; Jack M. Balkin, The Reconstruction Power, 85 N.Y.U. L. Rev. 1801 (2010); Randy E. Barnett, Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment, 3 J. Legal Analysis 165 (2011); Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949); William Winslow Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 U. Chi. L. Rev. 1 (1954); Daniel A. Farber & John E. Muench, The Ideological Origins of the Fourteenth Amendment, 1 Const. Comment. 235 (1984); John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385 (1992); Kevin Christopher Newsom, Setting Incorporationism Straight: A Reinterpretation of the *Slaughter-House Cases*, 109 Yale L.J. 643 (2000); Mark A. Graber, Subtraction by Addition?: The Thirteenth and Fourteenth Amendments, 112 Colum. L. Rev. 1501 (2012); Lea VanderVelde, The Thirteenth Amendment of Our Aspirations, 38 U. Tol. L. Rev. 855 (2007); Bryan H. Wildenthal, Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67, 68 Ohio St. L.J. 1509 (2007); Rebecca E. Zietlow, James Ashley's Thirteenth Amendment, 112 Colum. L. Rev. 1697 (2012).

[2] See Michael W. McConnell, The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?, 25 Loy. L.A. L. Rev. 1159, 1159 (1992); see also Michael W. McConnell, The Forgotten Constitutional Moment, 11 Const. Comment. 115 (1994) (arguing that the retrenchment following Reconstruction should lead legal scholars to view the period as significantly less revolutionary).

[3] 2 Bruce Ackerman, We the People: Transformations 198 (1998); see also Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution, at xix-xx (2019) (conceptualizing the Reconstruction amendments as a "second founding"); Norman W. Spaulding, Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory, 103 Colum. L. Rev. 1992, 2045 (2003) (agreeing with Ackerman that Reconstruction constituted a re-founding in favor of national power).

[4] Scholarship that directly locates revolutionary change within the formal amendment process includes David E. Kyvig, Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995, at 154–87 (1996) (detailing the amendments to the Constitution) and John R. Vile, Constitutional Change in the United States: A Comparative Study of the Role of Constitutional Amendments, Judicial Interpretations, and Legislative and Executive Actions (1994) (identifying formal amendments as the source of change in constitutional law). On the general importance of reliance on text in legal interpretation, see Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (new ed. 2018).

amendments as memorializing or ratifying a change that had already taken place through the brutal ordeal of war. The amendment process was their attempt to capture the war's energy and to begin to spell out its meaning, but the words did not supply that energy. Nineteenth-century Americans identified the chaotic, bloody, unruly, and unfathomable experience of the war as the catalyst, the source of constitutional change. It ruptured their world and provided a transcendent source of lawmaking. In their view, the war's scope and its ultimate significance were not quite within the realm of human control; God and forces of destiny directed the conflict more than they did. As they put their nation back together in the war's aftermath, nineteenth-century Americans had to try to fathom its meaning.

This Article examines contemporaries' understanding of the war as a supernatural force that remade the fundamental law of the nation, a phenomenon that I call "transcendent constitutionalism." I employ the term "transcendent constitutionalism" for three distinct reasons. First, I focus on informal, unwritten changes to the Constitution, which stemmed from the extraordinary power of war rather than more ordinary methods of constitutional interpretation. Here I seek to broaden our conception of the non-formal means of constitutional change, which include the political process, grassroots social movements, and even mob violence.[5] By including war within the ambit of constitutionalism, I intend to expand the scope of what we view as agents of constitutional transformation. Second, because I mean to describe the world as nineteenth-century Americans conceived of it, I have chosen not to rely on the phrases "unwritten constitutionalism" or "popular constitutionalism," which invoke a modern view of how we understand history and extra-textual sources to have shaped our constitutional traditions.[6] Third, I also want to

[5] On various mechanisms of non-formal constitutional change, see generally Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (2004) (detailing the interaction of legal and social factors in ending de jure segregation); Tomiko Brown-Nagin, Courage To Dissent: Atlanta and the Long History of the Civil Rights Movement (2011) (examining the role of local communities as agents of legal change within the civil rights movement); John Phillip Reid, In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution, 49 N.Y.U. L. Rev. 1043 (1974) (exploring the phenomenon of mob violence as an instrument of constitutional change in the Revolutionary period).

[6] Scholars who have developed theories of how historical change shapes modern American constitutionalism include Ackerman, supra note 3; Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By (2012); Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Responding to

convey a sense of the otherworldly or the mystical in describing this mode of thinking.[7] Americans focused on the war itself as a source of lawmaking, and they also considered war to be a force that was outside of human control. They were unsure about whether it could be directed. This way of understanding constitutional change may sound unfamiliar, and because none of us has lived through the world-shattering experience of the Civil War, it is difficult to comprehend the turmoil the war's survivors experienced.

The transcendent constitutionalism that followed Union victory in the Civil War caused a number of momentous shifts in the United States, but this Article will focus on one in particular: the change wrought to nationhood and federalism.[8] Federal structure necessarily intersected with other very important issues: the war's impact on race and slavery, and the federal government's relationship with the citizen, particularly in terms of the rights guaranteed to individuals as a matter of federal constitutional law. In the eyes of many legal thinkers, the war had altered the nature of sovereignty in the United States. For decades, Americans had wrangled over whether sovereignty was held primarily in the states, which could exit the federal arrangement at will, or whether the people as a whole were the constituent sovereign and had created an unbreakable Union at the Founding.

The Civil War's survivors interpreted Northern victory as a triumph over the forces of secessionist disintegration. It functioned as a confirmation (or an establishment) of the basic integrity and existence of

Imperfection: The Theory and Practice of Constitutional Amendment (Sanford Levinson ed., 1995); David A. Strauss, The Living Constitution 120–32 (2010); David A. Strauss, The Irrelevance of Constitutional Amendments, 114 Harv. L. Rev. 1457 (2001) [hereinafter Strauss, Irrelevance]. A number of scholars have also examined unwritten constitutionalism's intersection with the original understanding of the Constitution, including Thomas C. Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan. L. Rev. 843 (1978); Jed Rubenfeld, The New Unwritten Constitution, 51 Duke L.J. 289 (2001); Suzanna Sherry, The Founders' Unwritten Constitution, 54 U. Chi. L. Rev. 1127 (1987); Lawrence B. Solum, Originalism and the Unwritten Constitution, 2013 U. Ill. L. Rev. 1935.

[7] Cf. Mark A. Noll, The Civil War as a Theological Crisis (2006) (discussing the theological crisis that grew out of the American Civil War); George C. Rable, God's Almost Chosen Peoples: A Religious History of the American Civil War (2010) (discussing Americans' understanding of the religious forces at work during the Civil War).

[8] The other huge, looming issue that seemed to be settled by the war was the end of slavery in the United States.

the United States as a nation.[9] Former Confederate Congressman Clement Clay admitted to President Andrew Johnson that:

> [T]he subordination of the States & supremacy of the General Government has been established in the Court of last resort—the field of battle . . . . The established theory now is, that the citizen owes his highest & first allegiance to the Genl. Govt. Such is the fact & none should dispute it.[10]

The war's energy was, however, a double-edged sword. It could forge a nation out of a number of disparate parts, but it could also, as many American lawyers feared, destroy federalism in the process, ushering in what contemporaries (and the Founders) termed "consolidation."[11] The war could provide an impetus for reform. But it could also overcorrect and kill the states entirely.

The war was unlike the formal amendment process in that it was not deliberative. It was not the product of thought and consideration. Instead, it was savage and unpredictable. Once unleashed, the Civil War's progress was a force that could not be contained by human efforts. As a result, a number of American intellectuals (lawyers, historians, political theorists, and journalists) worried that the basic federal structure of the original Constitution would be altogether lost in the aftermath of the war. Some thinkers welcomed the chaos, which could enable Americans to slough off their old, irrational attachment to the tradition of localism. Many others regarded it with dread. One lawyer compared the Civil War to "the deadly heat of fever, which consumes without remedy the vitals

[9] For a discussion of this basic assumption in the scholarly literature, see Cynthia Nicoletti, The American Civil War as a Trial by Battle, 28 Law & Hist. Rev. 71, 73–74 (2010) [hereinafter Nicoletti, Trial by Battle]. For a deeper analysis of how, precisely, the war established this maxim, see id. at 76 (arguing that "American jurists and other intellectuals adopted the language of the medieval legal custom of trial by battle" as a way of rationalizing the war's determination of secession's illegitimacy); Spaulding, supra note 3, at 2038, 2040–42 (arguing that the war itself functioned as a mechanism of legal adjudication); Strauss, Irrelevance, supra note 6, at 1482–85 (arguing that the Reconstruction Amendments did not alter the Constitution so much as societal change did). Strauss also discusses the war's settlement of the permanence of the Union, although he notes that no formal amendment recognized this. Id. at 1486.

[10] Letter from Clement C. Clay, Jr., to Andrew Johnson (Nov. 23, 1865), *in* 9 Papers of Andrew Johnson 420, 421 (Paul H. Bergeron ed., 1991).

[11] The Federalist No. 32, at 155 (Alexander Hamilton) (Ian Shapiro ed., 2009); id. No. 45, at 238 (James Madison).

of the Constitution."[12] The war would leave America a unitary state, and it was not clear that intrepid human energy could prevent a slide into consolidation.

During Reconstruction, Congress sought to capture the transcendent energy of the war and infuse it into the written Constitution. In the process of translating the war's energy into the written text of the Fourteenth Amendment, Congress sought to establish two principles.[13] First was the confirmation of the primacy of the nation rather than the states. The sovereignty of the nation was, the war made clear, derived from the people directly and not from the states as a conduit for the people. The second—the protection of civil rights—followed from the first.[14] As Congressional Republicans argued, the primacy of national sovereignty meant that the citizen's principal relationship was with the national government rather than with the states. Correspondingly, the federal government was now to be the guarantor of the citizen's rights, bound to protect citizens even against interference by their own state governments.

Questions about the war's impact on American federalism, as partially, but not wholly, expressed in the new constitutional amendments, eventually found their way to the Supreme Court. Rereading the Court's opinions, and particularly, the *Slaughterhouse Cases*,[15] with an eye toward claims of transcendent constitutional change is revealing. In a number of cases, the Court explicitly addressed the premise that the war, rather than the ratification of the Fourteenth Amendment, had remade the vitals of the Constitution—and rejected it. Instead, the Court opted to rely on the text of the Constitution and on longstanding—and distinctly non-radical—notions of federal structure. The Court would supply the counterforce against consolidation that the most extreme post-war commentators had desired. In numerous ways, the Court took on the role of policing the boundaries of federal and state power and arresting the prospect of consolidation.

By the time of *Slaughterhouse* in 1873, the Court's role in limiting the centripetal energy unleashed by the war generally met with the approval of most American legal commentators, who were anxious to find

[12] Charles O'Conor, Opinion, Age Has Not Softened Him Nor Taught Him Manners or Charity—He Holds that the Republic Has Been Dead Since M'Dowell Moved on Richmond, N.Y. Times, Dec. 6, 1876, at 1.

[13] U.S. Const. amend. XIV.

[14] See infra note 183 and accompanying text.

[15] 83 U.S. (16 Wall.) 36 (1873).

normalcy and achieve balance. As one legal commentator enthused, the Justices "all shrank from the hideous features of the apparition [of consolidation] when [the details] were fully disclosed. Not one was found willing to abolish the States . . . ."[16] Americans who had wearied of the war's revolutionary spirit endorsed the Court's rejection of transcendent constitutionalism and the radical consequences that accompanied it.

The Civil War, violent and messy, looms large in the popular understanding of how American constitutionalism has changed over time, but not in the dominant scholarly narrative, which focuses instead on the formal and intentional act of ratifying the Reconstruction Amendments. This is not to say that previous scholars have been uninterested in investigating the broader political and legal culture surrounding the adoption of the amendments,[17] but they have seldom taken account of the war itself as a source of lawmaking power.[18] Thinking only about the Constitution as the product of deliberate human choices by politicians and lawmakers misses a key part of Civil War-era discussion about the ways that American life—and the U.S. Constitution—could be changed.

Nineteenth-century American intellectuals understood the course of history and the abstract forces behind it in a fatalistic way that is

[16] Robert Ould, The Last Three Amendments to the Federal Constitution, 2 Va. L.J. 385, 392 (1878).

[17] See David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789–1888, at 400–02 (1985); Charles Fairman, Reconstruction and Reunion, 1864–88: Part One, *in* 6 The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States 1, 1118, 1127–28, 1298–1300 (Paul A. Freund ed., 1971); Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 256–57 (1988); Harold M. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution, at xv–xvi (1973); Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866–1876, at 2, 4–6 (2005); Michael Les Benedict, A Compromise of Principle: Congressional Republicans and Reconstruction, 1863–1869, at 22–23 (1974); William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 8–9 (1988); Michael A. Ross, Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era, at xv–xvii (2003); Michael Vorenberg, Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment 2–3 (2001); Michael Les Benedict, Salmon P. Chase and Constitutional Politics, 22 Law & Soc. Inquiry 459, 476–78, 490 (1997) (reviewing John Niven, Salmon P. Chase: A Biography (1995)); Robert J. Kaczorowski, To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War, 92 Am. Hist. Rev. 45, 48–53 (1987).

[18] There is some discussion of this topic in Spaulding, supra note 3, at 2040, and Strauss, Irrelevance, supra note 6, at 1479–80. My own work has explored it in other contexts, such as how the war settled the question of secession's constitutionality and the availability of treason charges against the perpetrators of an unsuccessful rebellion. See Cynthia Nicoletti, Trial by Battle, supra note 9, at 74–76; Cynthia Nicoletti, Secession on Trial: The Treason Prosecution of Jefferson Davis 84–86 (2017) [hereinafter Nicoletti, Secession on Trial].

unfamiliar to modern American legal scholars. This Article recreates a largely overlooked intellectual debate over the nature of constitutionalism in the aftermath of the Civil War by exploring a broad array of previously neglected sources that range far beyond Congress and the Supreme Court. Nineteenth-century American jurists understood the Constitution to be *both* the written product of formal deliberation and the result of the decidedly non-deliberative, explosive power of transcendent lawmaking. They feared that the war's energy could destroy the states the same way it had destroyed secession, thus resulting in the total annihilation of American federalism. Reconstructing the Union after the Civil War involved a more difficult task than scholars have previously realized, because of the ease of veering, without conscious choice, into consolidation.

I seek to situate the Supreme Court's much maligned *Slaughterhouse Cases* against this larger intellectual backdrop and thus offer a way to make sense of the Court's seemingly indefensible decision to twist the language of the Privileges or Immunities Clause beyond recognition.[19] Although *Slaughterhouse* itself did not undercut the federal government's role in securing racial equality in the United States, the decision signaled the Supreme Court's subsequent unwillingness to invalidate schemes of racial discrimination in the United States until the mid-twentieth century. In cases like *Cruikshank v. United States* and the *Civil Rights Cases*, the Court built on *Slaughterhouse*'s firm distinction between the state and federal aspects of citizenship in crafting the state action doctrine, which put most forms of racial discrimination beyond the reach of federal regulatory power.[20]

Certainly the criticism *Slaughterhouse* has received for both its shaky logic and the limitations it imposed on federal power has been well deserved, but scholars have also missed a crucial aspect of what the *Slaughterhouse* Court sought to achieve in the aftermath of the Civil War. *Slaughterhouse* reflected the fact that white northerners, including the elites in the legal community, were increasingly uninterested in using federal power to protect Black Americans from violence and

[19] See infra notes 283–88 and accompanying text on *Slaughterhouse*'s poor reputation among jurists and academics.

[20] See infra Section III.C for more on the connection between *Slaughterhouse* and later cases undercutting the federal government's power in the realm of civil rights, based on an expansive reading of the state action doctrine.

discrimination.[21] But the widespread acclaim with which the mainstream legal community greeted the decision in the 1870s and 1880s was also the product of another aspect of post-war national conservatism.[22] As Reconstruction waned, the American legal community sought to shrug off the explosive potential of transcendent constitutionalism along with the radical promise of racial egalitarianism that had seemed possible at the moment of Union victory in the Civil War.

The Article proceeds in four parts. Part I begins by reconstructing nineteenth-century Americans' conception of war as a means of constitutional change and their understanding of the effect that Union victory would have on the American federal arrangement. American intellectuals were conflicted about the legitimacy of using violence as a source of law, but they nonetheless recognized the explosive power of the Civil War to reshape the course of history. They were also unsure about what the war's ultimate significance might be. They feared that the nationalism unleashed by the war would result in consolidation—or the complete eradication of federalism in favor of a unitary state.

Part II discusses the relationship between ideas about transcendent constitutionalism, fashioned by the war itself, and the formal changes to the Constitution through the ratification of the Fourteenth Amendment. In debating the Amendment and the Civil Rights Bill in 1866, congressmen consistently revealed that they understood the Civil War to have altered

[21] This Article focuses on the views of lawyers, judges, legislators, and other public commentators on constitutional law in the aftermath of the Civil War, which necessarily means that it channels the voices of the elite class. For more on the historical exclusiveness of the American bar in both racial and class terms, see Kenneth W. Mack, Representing the Race: The Creation of the Civil Rights Lawyer 12–26 (2012) (discussing Black lawyers in the nineteenth century) and Robert W. Gordon, "The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910, *in* The New High Priests: Lawyers in Post-Civil War America 51, 51–74 (Gerard W. Gawalt ed., 1984) (discussing class prejudice in the elite legal profession of the late nineteenth century).

There is a large literature on the racial motivations and implications of the Reconstruction-era Supreme Court's decisions. See, e.g., Eric Foner, supra note 17, at 530, and Michael Les Benedict, Preserving Federalism: Reconstruction and the Waite Court, 1978 Sup. Ct. Rev. 39, 60–62 [hereinafter Benedict, Preserving Federalism] (both highlighting the Supreme Court's crucial role in limiting the federal government's power to address racial inequality in the post-Reconstruction United States).

[22] Bryan H. Wildenthal's article, Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–1873, 18 J. Contemp. Legal Issues 153, 221–29 (2009), comes the closest to examining public discussion around the Fourteenth Amendment, but ends in 1873 with the *Slaughterhouse* decision. See infra notes 283–346 and accompanying text for discussion of reactions to *Slaughterhouse*.

the national arrangement in fundamental ways. The new Fourteenth Amendment sought to capture that change by memorializing the primacy of national sovereignty. In addition, Congress connected the Amendment's protections for individual rights, along with the federal power to protect those rights from state incursion, to the new conception of national sovereignty. This understanding was informed by natural law.

The Supreme Court's role in checking the excesses baked into concepts of transcendent constitutionalism is explored in Part III. The danger of consolidation loomed large, and the Supreme Court saw its role as policing the balance between federal and state power, a necessary function in the post-war period. The most notable decision in this regard was the (now) much-maligned *Slaughterhouse Cases*, in which the Court indicated its willingness to cut down on the radical centralizing potential of the Fourteenth Amendment.

Finally, Part IV explores reactions to the Supreme Court's post-war federalism jurisprudence, and particularly, the *Slaughterhouse Cases*. For the most part, commentators welcomed the Supreme Court's influence in preventing consolidation and checking the federal government's authority. The wider American legal community saw the Court's actions as returning American constitutionalism back to its ordinary state.

I. THE CIVIL WAR AND THE RISE OF TRANSCENDENT CONSTITUTIONALISM

It is an uncomfortable fact that war and violence are part of the human condition. Resort to violence, in the popular understanding, seems to be a breakdown or a rupture in the legal system. But this view fails to capture much of the nuance of the ways we think about law and violence. [23] War has often been a means of lawmaking and nation-making, even if its legitimacy as such has always been contested. [24] It has existed both in

[23] On the difficult relationship between law and violence, see Christoph Menke, Law and Violence, 22 Law & Literature 1 (2010); Robert M. Cover, Violence and the Word, 95 Yale L.J. 1601 (1986); Austin Sarat, Situating Law Between the Realities of Violence and the Claims of Justice, *in* Law, Violence, and the Possibility of Justice 3, 3–16 (Austin Sarat ed., 2001).

[24] See James Q. Whitman, The Verdict of Battle: The Law of Victory and the Making of Modern War 2–3 (2012); David Kennedy, Of War and Law 5–6 (2006); John Fabian Witt, Law and War in American History, 115 Am. Hist. Rev. 768, 768–69 (2010); Norman W. Spaulding, The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction, 46 Wm. & Mary L. Rev. 2001, 2004–06 (2005); Reid, supra note 5, at 1043–44, 1063–66, 1088–89. Conquest, for instance, is no longer seen as a legitimate basis for the acquisition of territory under international law, although commentators are not

tension and in tandem with the law.[25] Though it was violent and catastrophic, nineteenth-century American intellectuals viewed their own Civil War as both a historical catalyst and as a means of lawmaking.[26] War had the potential to propel societies forward with an awesome suddenness that was seldom present with respect to more mundane and regularized historical processes.[27]

In 1861, northerners had gone to war to maintain the integrity of the Union and prevent the secession of eleven southern slaveholding states. The destruction of slavery had become a war aim in 1863, when President Abraham Lincoln declared that the emancipation of the four million people held as slaves in the Confederate states was necessary to win the war.[28] In the aftermath of the war, as they sought to process its

prepared to question the validity of territorial acquisition that occurred throughout history. Compare, for example, the treatment of the acquisition of territory in James Crawford, Brownlie's Principles of Public International Law 228–29 (9th ed. 2019), arguing that acquisition through conquest is no longer seen as a legitimate means of establishing sovereignty, with 1 Lassa Oppenheim, International Law: A Treatise 304 (1905), arguing that subjugation has legal force because it has always been recognized as a means of acquiring territory. See also Sharon Korman, The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice (1996) (tracing the shift in attitudes towards forcible acquisition of territory by states from the sixteenth century to the twentieth century).

[25] See Oppenheim, supra note 24, at 304–05. War, while perhaps the form of violence with the most claim to legal sanction, is not the only instance of this phenomenon. James Whitman also points out that violence can legitimize power in other contexts. The recognition of a right to do violence would elevate a prince's exercise of power. As Whitman put it, "[s]uch was the mark of legitimate sovereign: a sovereign had the license to do what would be murder if done by any other agent." Whitman, supra note 24, at 169.

[26] On historical thinking in the nineteenth century, see Eileen Ka-May Cheng, The Plain and Noble Garb of Truth: Nationalism and Impartiality in American Historical Writing, 1784–1860 (2008); David Levin, History as Romantic Art: Bancroft, Prescott, Motley, and Parkman (1967); Peter Novick, That Noble Dream: The "Objectivity Question" and the American Historical Profession 21–72 (1988); David D. Van Tassel, Recording America's Past: An Interpretation of the Development of Historical Studies in America, 1607–1884 (1960); Dorothy Ross, Historical Consciousness in Nineteenth-Century America, 89 Am. Hist. Rev. 909 (1984); William R. Taylor, Francis Parkman, *in* Pastmasters: Some Essays on American Historians 1, 1–38 (Marcus Cunliffe & Robin W. Winks eds., 1975); J.C. Levenson, Henry Adams, *in* Pastmasters, supra, at 39, 39–73; Howard R. Lamar, Frederick Jackson Turner, *in* Pastmasters, supra, at 74, 74–109; William P. Leeman, George Bancroft's Civil War: Slavery, Abraham Lincoln, and the Course of History, 81 New Eng. Q. 462 (2008).

[27] Probably the best-known exemplar of this type of nineteenth-century thinking is Karl Marx, who believed that history progressed in pre-ordained stages. All of these changes needed a spark to ignite them, and Marx thought of "violence, war, pillage, murder and robbery" as heretofore "the driving force of history." Karl Marx & Frederick Engels, The German Ideology: Part One 89 (C.J. Arthur ed., Int'l Publishers 1970) (1932).

[28] See Abraham Lincoln, Emancipation Proclamation (Jan. 1, 1863), *in* 6 Collected Works of Abraham Lincoln 28–30 (Roy P. Basler ed., 1953); see also Gary W. Gallagher, The Union

significance, many American intellectuals understood Union victory as a force that had settled the two weighty legal questions the war had ignited: the illegitimacy of slavery and the permanency of the Union. Isaac Redfield, the former chief judge of the Vermont Supreme Court, declared in 1865 that "the war has determined the truth that slavery is incompatible with . . . our complicated form of government."[29] Redfield also believed that the war functioned as "action in a court of justice" that resolved "the paramount sovereignty of the nation . . . by force of arms."[30] The war had successfully killed both slavery and state secession.[31]

However effective it may have been, the Civil War remained, unsurprisingly, an imperfect form of lawmaking. There were two primary problems with it. First, equating war with law was morally problematic, particularly when fought on the scale of the American Civil War.[32] It constituted both a legal process and a break with the rule of law.[33] Oliver Wendell Holmes, Jr., a Union veteran, embodied both aspects of this contradictory thinking about the war's function as a method of legal adjudication. Holmes had volunteered for the Union army right out of college, flush with youthful exuberance.[34] The young Holmes believed wholeheartedly in the righteousness of the abolitionist cause, and when the war began in 1861, he was willing to die for its vindication. Holmes was badly wounded a number of times, and the horror of war sapped his enthusiasm for the good a war could accomplish. Even if war could usher in astonishing changes with a speed that could never be matched by the conventional legal process, it demanded too high a price. Later in life, Holmes "loathe[d] war," because it consumed the lives of young men on a massive scale—and because it overrode the institutions of the regular

War 34 (2011) (arguing that maintaining the Union was initially the primary war aim). But see James Oakes, Freedom National: The Destruction of Slavery in the United States, 1861–1865, at 49–50 (2013) (arguing that emancipation was inevitable as soon as the war began).

[29] Isaac Redfield, Judge Redfield's Letter to Senator Foot Upon the Points Settled by the War 17 (N.Y., Hurd & Houghton 1865) [hereinafter Redfield, Letter to Senator Foot].

[30] Id. at 8.

[31] See Nicoletti, Trial by Battle, supra note 9.

[32] Scholars have recently estimated that the casualties reached as high as 750,000. See J. David Hacker, A Census-Based Count of the Civil War Dead, 57 Civ. War Hist. 307, 310–11 (2011); see also Drew Gilpin Faust, This Republic of Suffering: Death and the American Civil War (2008) (discussing society's efforts to cope with the scope of death).

[33] See Nicoletti, Trial by Battle, supra note 9, at 76–77.

[34] See Stephen Budiansky, Oliver Wendell Holmes: A Life in War, Law, and Ideas 2–3 (2019).

legal system.[35] He repudiated the certitude about moral causes that had led him to enlist as a young soldier in favor of trust in sober institutional mechanisms that would blunt human passion and perhaps thus prevent war. But as terrible as war was, Holmes did not dispute that it functioned as the ultimate method of lawmaking. "[F]orce," as he told his friend Frederick Pollack, "is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world[s] I see no remedy except force."[36] Its allure came from its ability to provide a final resolution to intractable social questions that the law could not resolve satisfactorily.[37]

Viewing the Civil War as a means of lawmaking was problematic in another way. War was a blunt instrument, and it was not altogether clear what victory would signify. If Union victory had made secession impossible and slavery untenable, what else had it done? In the immediate aftermath of the war, it was not apparent how those practical battlefield results would be translated into law. Any larger implications were even less certain. The war had freed slaves and stopped secession, but it had not settled the meaning of freedom in the United States nor delineated the contours of American federalism.[38] To be sure, a law's true meaning and enduring significance is always opaque, but divining the meaning of a war was particularly problematic. There was no textual summary, no explanatory writing, that came out of the war.[39] More troubling still was the fact that a war's consequences were frighteningly unpredictable. Once set in motion, war unleashed forces that could not always be contained by human actors.

[35] Letter from Oliver Wendell Holmes to Frederick Pollock (Feb. 1, 1920), *in* 2 Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874–1932, at 36 (Mark DeWolfe Howe ed., 5th prtg. 1942).

[36] Id.

[37] On Holmes's conflicted views, see George M. Frederickson, The Inner Civil War: Northern Intellectuals and the Crisis of the Union 218 (1965), and Louis Menand, The Metaphysical Club 61–69 (2001).

[38] See Nicoletti, Secession on Trial, supra note 18, at 1–4, 9, 11; see also George Rutherglen, The Rule of Recognition in Reconstruction: A Review of *Secession on Trial: The Treason Prosecution of Jefferson Davis*, by Cynthia Nicoletti, 103 Va. L. Rev. Online 72, 74–75 (2017) [hereinafter Rutherglen, Rule of Recognition] (discussing the unresolved issues and open questions left after the war).

[39] There wasn't even a peace treaty, since the Union did not recognize the Confederacy as a separate nation. See Quincy Wright, How Hostilities Have Ended: Peace Treaties and Alternatives, 392 Annals Am. Acad. Pol. & Soc. Sci. 51, 56, 60 (1970) (on the conclusion of hostilities in formal and informal ways).

A. The Civil War and America's Destiny as a Nation

Legal scholar Francis Lieber believed that the war had fundamentally changed the character of the United States by forging a rather loosely-allied conglomeration of states into a real nation. Lieber, an American immigrant by way of Napoleon-dominated Prussia, had experienced the turmoil of war throughout his childhood.[40] He saw war as a dynamic force that could forge a nation's destiny. War and revolution provided the necessary impetus to wrench society from one path onto an entirely new one.[41] For Lieber, the Civil War had been instrumental in establishing the primacy of national identity in the United States. Before the war, Americans had been far too attached to state sovereignty for his liking, and the secession movement had demonstrated the problems state sovereignty could cause. In 1868, Lieber proclaimed that "[o]ur people have gone through a sanguinary and laborious war in order to save and establish more firmly our nationality. We are a nation, and we mean to remain one."[42]

Although he believed that the movement in this direction was pre-determined, the war had provided the catalyst to move the United States towards its destiny. "The heat of a civil war of such magnitude would alone be sufficient to ripen thoughts and characteristics which may have been in a state of incipiency before," he wrote. "[A] contest so comprehensive and so probing makes people abandon many things, to which they had clung by mere tradition without feeling their sharp reality."[43] Lieber predicted that the shock of civil war would catapult the United States into a new era of nationalistic feeling and self-assured power.[44]

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[40] For more on Lieber, see John Fabian Witt, Lincoln's Code: The Laws of War in American History (2012); John Fabian Witt, A Lost Theory of Emergency Constitutionalism, 36 Law & Hist. Rev. 551 (2018).

[41] See Marx & Engels, The German Ideology, supra note 27, at 89.

[42] Francis Lieber, On Nationalism and Internationalism (1868), *in* 2 Francis Lieber, The Miscellaneous Writings of Francis Lieber: Contributions to Political Science 221, 238 (Phil. & London, J.B. Lippincott Co. 1880) [hereinafter Lieber, On Nationalism]; see also Merle Curti, Francis Lieber and Nationalism, 4 Huntington Libr. Q. 263, 268, 288–89 (1941) (discussing Lieber's emphasis on nationalism and the problems secession posed).

[43] Francis Lieber, Amendments of the Constitution: Submitted to the Consideration of the American People 11 (N.Y., Loyal Publ'n Soc'y 1865) [hereinafter Lieber, Amendments]; see also John R. Vile, Francis Lieber and the Process of Constitutional Amendment, 60 Rev. Pol. 525, 527, 534–38 (1998) (discussing Lieber's amendment proposals following the war).

[44] Lieber, On Nationalism, supra note 42, at 238; Lieber, Amendments, supra note 43, at 35.

German historian Hermann Von Holst agreed with Lieber about the benefits of the Civil War in propelling the United States toward true nationhood.[45] Von Holst's multi-volume history of the United States took as its premise the idea that Americans had been desperately confused about their identity as a nation since the founding. In Von Holst's view, the national government had been "the sole outward representative of sovereignty," but the states (and Americans' unreasonable attachment to them) had foiled American greatness since the beginning.[46] Von Holst wrote from the understanding that the triumph of history was national unity: groups were supposed to throw off the shackles of localism to form an outward-facing unified polity. He celebrated the war, which he termed "a manly struggle for the nation's existence," for crushing the "dark powers" of state-centered ideology of thinkers like John C. Calhoun.[47] What had emerged from the war was a "Union incomparably stronger, more majestic and richer in promise for the future."[48] As his parting salvo, on the concluding page of his first volume, Von Holst solemnly invoked Otto von Bismarck's insistence that "[s]overeignty can only be a unit and it must remain a unit."[49] By this, Von Holst meant that sovereignty, properly understood, could not be divided between two levels of government.[50]

Von Holst argued that the Civil War had unleashed the destiny of the United States, which aligned with the great purpose of all nation-states in the late nineteenth century: centralization and unification. [51] The United

[45] On the late nineteenth-century emergence of German university training as the model for American academics, see Daniel T. Rodgers, Twilight of Laissez-Faire, *in* Atlantic Crossings: Social Politics in a Progressive Age 76–111 (1998); Laurence R. Veysey, The Emergence of the American University 126–30 (1965).

[46] 1 Hermann Von Holst, Constitutional and Political History of the United States 23 (John J. Lalor & Alfred B. Mason trans., Chicago, Callaghan & Co. 1889).

[47] 7 id. at 459 (John J. Lalor trans., Chicago, Callaghan & Co. 1892).

[48] Id.

[49] 1 id. at 505 (John J. Lalor & Alfred B. Mason trans., Chicago, Callaghan & Co. 1889) (quoting Joseph von Held, Die Verfassung des Deutschen Reiches 19 n.1 (Leipzig, F.A. Brockhaus 1872)).

[50] See John Codman Hurd, Theory of Our National Existence, As Shown by the Action of the Government of the United States Since 1861, at 107 (Bos., Little, Brown & Co. 1881) [hereinafter Hurd, Theory of Our National Existence], for an explication of Von Holst's meaning.

[51] James McPherson (among many others) famously declared that the war had transformed the United States from a plural entity into a singular one. James M. McPherson, Battle Cry of Freedom: The Civil War Era 859 (1988); see also Robert Penn Warren, The Legacy of the Civil War 4, 6–7 (1983) (arguing for the significance of a unified nation); Gallagher, supra

States was caught up, as many countries were, in an age of nationalism and expansionism.[52] Italian unification had taken place by 1861, and German unification followed in 1871.[53] Nearby Canada provided another example. The Confederation of Canada was completed in 1867, not long after the American Civil War.[54] This was no coincidence. To its northern neighbors, America's nationhood looked strong and complete after the resounding defeat of Confederate secession.[55] And in the wake of Union victory, Americans called for the annexation of Canada.[56] To Canadians, their own confederation could help ward off the prospect of a U.S. takeover. Sir Etienne Pascal Taché, one of the architects of the confederation plan, warned his countrymen of the threat posed by a newly-empowered United States.[57] If Canadians did not unite, Taché worried that they "would be forced into the American Union by violence, and if not by violence, would be placed upon an inclined plane which would carry us there insensibly."[58] To many nineteenth-century intellectuals, centralization, particularly when sparked by the dynamic force of civil war, seemed inevitable.

B. The Contested Nature of the Union

Lieber and Von Holst's celebratory writing about the triumph of nationalism considered the war to have settled a long-standing debate about the nature of divided sovereignty in the United States. Prior to the Civil War, American jurists had engaged in a long-standing debate about whether sovereignty inhered in the people of the United States as a whole

note 28, at 161 (stating that the United States had become a singular entity). But see Minor Myers, Supreme Court Usage and the Making of an "Is", 11 Green Bag 457 (2008) (analyzing the use of the plural usage in Supreme Court opinions from 1790 to 1919).

[52] See Norman Rich, The Age of Nationalism and Reform, 1850–1890 (2d ed. 1977).

[53] See Andre M. Fleche, The Revolution of 1861: The American Civil War in the Age of Nationalist Conflict 7–8, 68–69 (2012).

[54] See Phillip Buckner, "British North America and a Continent in Dissolution": The American Civil War in the Making of a Canadian Confederation, 7 J. Civ. War Era 512, 512 (2017).

[55] Id. at 522–24.

[56] See Charles Sumner, Prophetic Voices About America: A Monograph, Atlantic Monthly, Sept. 1867, at 302, 305; see also Adrian Cook, The Alabama Claims: American Politics and Anglo-American Relations, 1865–1872, at 112–13 (1975) (discussing Sumner's desires for Canada and the United States to be united).

[57] See Hon. Sir Etienne-Pascal Taché (Feb. 3, 1865), *in* The Confederation Debates in the Province of Canada, 1865, at 1–5 (Peter B. Waite ed., 2d ed. 2006).

[58] Id. at 1.

or in the people of each individual state.[59] The state-centered view of the nature of the Union had gained enough traction by 1860–61 to animate secession, but its intellectual foundations stretched back to the Founding, growing increasingly heated as they became entangled with the politics of slavery's expansion. Politicians, theorists, and constitutional lawyers wrangled endlessly over the precise relationship between the people, the states, and the national government. State-centered "compact theorists" argued that the people within the states were the primary unit of sovereignty in the United States, while nationalist "perpetual Unionists" believed that sovereignty resided in the people of the United States as a whole. The arguments were grounded not so much in text but in logical inferences about the history of the creation of the United States as a government in the 1770s and 1780s.[60] Was the Union a mere creature of the states, each of which could leave the Union when they so desired? Or had the people created a single, permanent union, in which both the states and the federal government occupied separate spheres of sovereignty?

Our modern theory of federalism draws on the views of perpetual Unionists, as glossed over time.[61] In the 1990s, Justice Anthony Kennedy gave a pithy recapitulation of the nature of American federalism (and the perpetual Unionist view of the nation's creation) in *U.S. Term Limits, Inc. v. Thornton*. Kennedy argued from the understanding that the people of the United States had created both the states and the national government, entrusting each with a distinct set of powers. "[The Constitution had] split the atom of sovereignty[,]" Kennedy wrote.[62] He continued:

> It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its

[59] See Michael Stokes Paulsen, The Civil War as Constitutional Interpretation, 71 U. Chi. L. Rev. 691, 692, 703 (2004) (reviewing Daniel Farber, Lincoln's Constitution (2003)).

[60] See Charles Black, Structure and Relationship in Constitutional Law (1969), for a more thorough explication of constitutional arguments that proceed from structural implications about federal and state spheres of sovereignty.

[61] Much of this gloss came after the war, and indeed, will be detailed here. See infra notes 219–30 and accompanying text for discussion of *Texas v. White*.

[62] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); see also Kathleen M. Sullivan, Dueling Sovereignties: *U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78, 91 (1995) (providing an analysis of the different conceptions of federal structure embedded in the various opinions in *U.S. Term Limits*).

> own set of mutual rights and obligations to the people who sustain it and are governed by it.[63]

President Abraham Lincoln, the foremost contemporary expositor of the perpetual Union theory, argued from similar premises. Like Kennedy, Lincoln located ultimate sovereignty in the people of the United States.[64] To him, the Union was older than the Constitution, formed by the collective people of the United States beginning in the 1770s when they first discussed breaking away from Britain. They had associated together under different governmental structures, most notably the Articles of Confederation and the Constitution. The Union, having been delegated powers directly from the people, had the power to preserve itself, a right that inhered in the "fundamental law of all national governments. . . . [N]o government proper, ever had a provision in its organic law for its own termination."[65] Lincoln considered the Union formed by the Constitution to have derived its authority from the people directly and not via the states.[66]

Compact theorists such as John C. Calhoun had argued that sovereignty resided with the people in the states, rather than in the aggregate. In his view, the people of each state had delegated their sovereign authority to their states, which had in turn come together to write the Constitution.[67] Through the Constitution, they had endowed the federal government with only very limited powers. That government was the creature of the states and all of its sovereignty ultimately derived therefrom. The national government was the agent of the states, and it could not act in ways that were contrary to their interests. Neither could it favor the interests of

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[63] *U.S. Term Limits*, 514 U.S. at 838 (Kennedy, J., concurring).

[64] The other aspect of Kennedy's formulation—that the people delegated power separately to the states and the federal government, which were each insulated from incursions by the other—was not spelled out in Lincoln's formulation. Post-war glossing by the Reconstruction-era Supreme Court supplied that necessary step. See infra notes 219–30 and accompanying text, discussing the Court's articulation of these principles and their lasting influence.

[65] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 Collected Works of Abraham Lincoln 264 (Roy P. Basler ed., 1953).

[66] In *McCulloch v. Maryland*, Marshall made a similar argument. In responding to the contention that the people assembled and ratified the Constitution *within the states*, Marshall contended, "[W]here else should [the people] have assembled? . . . [W]hen they act, they act in their States." 17 U.S. (4 Wheat.) 316, 403 (1819).

[67] See John C. Calhoun, A Disquisition on Government and a Discourse on the Constitution and Government of the United States 111–12 (Richard K. Cralle ed., Charleston, S.C., Steam Power Press 1851). Chief Justice Taney tacitly endorsed this reasoning in *Dred Scott* too. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 448, 489 (1857).

certain states over others, a premise that pro-slavery theorists interpreted as requiring the federal government to protect slavery in the federal territories. Finally, because the states and not the people had created the United States, they could reassert their independence at will and secede from the Union.[68]

Although the perpetual Union theory holds sway today, its logical superiority was not firmly established before the Civil War. The state sovereignty views of the compact theorists were not relegated to an obscure corner of political and constitutional discourse. Both positions were endlessly honed and debated in the antebellum period.[69] Neither is it true that Justice Kennedy's formulation of dual sovereignty was seen as the encapsulation of Union victory as soon as the war concluded. Victory at Appomattox had demonstrated that the national government would act to prevent the disintegration of the American Union, but the chaotic process of war did not itself delineate the precise contours of federal and state power in the United States.[70] The war's ultimate meaning still had to be constructed in the war's aftermath.

1. Sliding Toward "Consolidation"

If the Civil War could be interpreted as establishing the perpetuity of the Union, it still left many questions about the nature of federalism in the post-war United States unanswered. There was a wide range of views on the degree of alteration that the post-Civil War generation would witness, although most of the discussion on the topic was marked by a frustrating lack of specificity. Some commentators predicted that the recalibration of state and federal power would involve the transfer of authority that had previously been reserved to the states into the federal domain.[71] To others, the unalloyed nationalism that Lieber and Von Holst celebrated seemed

[68] Nicoletti, Secession on Trial, supra note 18, at 14–16.

[69] In fact, historian Kenneth Stampp argued that compact theory was the predominant view of constitutional thinkers prior to the Nullification crisis in 1832. See Kenneth M. Stampp, Concept of a Perpetual Union, 65 J. Am. Hist. 5, 21–22 (1978); see also Don Fehrenbacher, Constitutions and Constitutionalism in the Slaveholding South 33–56 (1989) (detailing antebellum southerners' state sovereignty constitutional arguments); Daniel W. Hamilton, Still Too Close To Call? Rethinking Stampp's "The Concept of a Perpetual Union," 45 Akron L. Rev. 395, 401 (2012) (reviewing and reevaluating the antebellum perpetual Union and compact theory arguments as discussed in Stampp's article).

[70] As I have argued elsewhere, Union victory alone did not even establish the illegitimacy of secession in the United States. See Nicoletti, Secession on Trial, supra note 18, at 1–19.

[71] See, for instance, discussion of E.L. Godkin, infra notes 89–94 and accompanying text.

to signal the imminent demise of the states. They worried that the war would usher in what they denominated "consolidation," or the complete centralization of the United States. The word—used to indicate "an entire subordination" of the states—hearkened back to the adoption of the Constitution.[72] Madison and Hamilton both employed the term in the Federalist Papers.[73] In Federalist 32, for example, Hamilton sought to alleviate concerns that the Constitution would result in "[a]n entire consolidation of the States into one complete national sovereignty."[74] After the war, the fear came back with a vengeance. Federalism itself could be a casualty of the war. As legal historian Charles McCurdy noted, nineteenth-century American lawyers tended to "view[] constitutional issues in all-or-nothing terms."[75] If the war had routed the spirit of secessionism in the United States, could it do so without obliterating the states in the process? Could the nation overcome the forces of disintegration that had threatened its survival during the war without overcorrecting and destroying the federal system, thus upending the delicate balance between the states and the federal government?

In a review of Von Holst's *Constitutional History of the United States*, historians Henry Adams and Henry Cabot Lodge pushed back against Von Holst's contempt for the American notion of divided sovereignty.[76] His rejection of federalism in favor of centralization was dangerous in their view. Von Holst was all too fond of absolutes and models, which led him to believe that a nation would inevitably disintegrate if the national government shared sovereignty with states. They defended American federalism against Von Holst's charge that it was simply nonsensical to divide sovereignty. There had been no flaw in the attempt to "provide for

[72] See The Federalist No. 32, supra note 11, at 155 (Alexander Hamilton); Essay by Montezuma, *in* 3 The Complete Anti-Federalist 53, 55 (Herbert J. Storing ed., 1981); Letters of Cato, III: To the Citizens of the State of New-York, *in* 2 The Complete Anti-Federalist 109, 111 (Herbert J. Storing ed., 1981).

[73] The Federalist No. 32, supra note 11, at 155 (Alexander Hamilton); The Federalist No. 39, supra note 11, at 195 (James Madison); The Federalist No. 45, supra note 11, at 238 (James Madison); see also Frank Towers, The Threat of Consolidation: States' Rights and American Discourses of Nation and Empire in the Nineteenth Century, 9 J. Civ. War Era 612, 613 (2019) (identifying "consolidation" as a topic of concern in political discourse throughout the nineteenth century).

[74] The Federalist No. 32, supra note 11, at 155 (Alexander Hamilton).

[75] Charles W. McCurdy, Legal Institutions, Constitutional Theory, and the Tragedy of Reconstruction, 4 Revs. Am. Hist. 203, 211 (1976) (book review).

[76] Adams was a history professor at Harvard and Lodge was his Ph.D. student. Henry Adams & Henry Cabot Lodge, Von Holst's History of the United States, 123 N. Am. Rev. 328, 350 (1876).

the existence of two supreme powers in the nation."[77] Nonetheless, Adams and Lodge admitted that the Civil War revealed that mysterious forces were at work, propelling Americans toward nationalism. Living in its aftermath, Adams and Lodge maintained, the historian "cannot but become conscious of a silent pulsation that commands his respect, a steady movement that resembles in its mode of operation the mechanical action of Nature herself."[78] Without exerting some effort to move the nation in the other direction, Americans would drift towards centralization.

This problem of calibrating the post-war federal system occupied American intellectual Orestes Brownson. In 1865, Brownson set forth his theory of American nationhood in his book *The American Republic*, which also captured his hopes and fears for the future of the nation. For Brownson, the central problem of American history "has been from the first, [h]ow to assert union without consolidation, and State rights without disintegration?"[79] These issues were not yet resolved. Brownson believed that "[t]he war ha[d] silenced the State sovereignty doctrine," but he was unsure about the other side of the equation. It seemed possible that the forces unleashed by the war would overtake the states altogether. "In suppressing by armed force the doctrine that the States are severally sovereign, what barrier is left against consolidation?" Brownson queried. "Has not one danger been removed only to give place to another?"[80]

Brownson hoped that his worries about the republic's "tendency to consolidation" would dissipate after a few years, as Americans hammered out the meaning of the war both as a theoretical and practical matter.[81] If American jurists were mindful of the centralizing forces unleashed by the war, the nation could "escape alike consolidation and disintegration."[82] Once warned, they could guard against the threat. Vigilance, coupled with education, would ensure that the worst tendencies of the war would be checked.[83]

Conservative jurist George Ticknor Curtis (the brother of *Dred Scott* dissenter Benjamin Curtis) feared that some of his countrymen might

[77] Id.
[78] Id. at 361.
[79] O.A. Brownson, The American Republic 7–8 (N.Y., P. O'Shea 1865).
[80] Id. at 8.
[81] Id. at 242.
[82] Id. at xi.
[83] Id. at 8–9.

incorrectly interpret the war's results more broadly than they should.[84] Curtis considered the calibration of the federal system to be a pressing problem at the conclusion of the war. He insisted that the "dividing line between the sovereignty of the United States and the sovereignty of each separate State" had to remain inviolate. "It is now of infinite consequence for us to perceive that any effort of the general government . . . to break down that line, is revolutionary," just as it had been for the Confederate states to try to usurp those of the national government.[85] It was equally as important to ensure that the states retained the residuum of power under the Tenth Amendment as it was to establish the supremacy of the national government. For Curtis, state sovereignty was crucial not just for its own sake, but also for the sake of individual liberties. "If ever the State lines are obliterated for the purposes of government, and all the elements of political and governmental authority are fused into one mass with the physical force of the nation, we shall see a government more despotic than that of Russia," he wrote.[86] Curtis hearkened back to the link Madison had drawn between divided government and individual rights at the founding: a national government unrestrained by the states would also know no limits when it came to the people's liberty.[87]

2. Striking a New Balance

Brownson and Curtis hoped to check the impulse to lodge more power in the national government, but other post-war thinkers embraced the bold invitation to rethink the federal arrangement. The triumph over secession allowed Americans to start from square one in reconceiving the distribution of powers between the states and the federal government. E.L. Godkin, founder of the popular magazine the *Nation*, embraced the challenge unabashedly. Writing in 1864, Godkin celebrated the Civil War for forcing Americans to recognize their constitution-worship for the "hallucination" it was.[88] The division of sovereign authority was not "fixed by some fundamental principle of government," and it was not true that the states "found themselves invested with a mysterious something

[84] See Francis S. Drake, Dictionary of American Biography 236 (Bos., James R. Osgood & Co. 1874).

[85] George Ticknor Curtis, A Discourse on the Nature of the American Union, as the Principal Controversy Involved in the Late Civil War 29 (N.Y., E.P. Dutton & Co. 1875).

[86] Id. at 30.

[87] See The Federalist No. 51, supra note 11, at 265 (James Madison).

[88] Edwin L. Godkin, The Constitution, and Its Defects, 99 N. Am. Rev. 117, 120 (1864).

called 'sovereignty.'"[89] Godkin sought to go back to first principles. He scorned those political theorists who seemed to believe that "the American people exist for the purpose of maintaining and perpetuating this State sovereignty," when it should clearly work the other way around.[90] The states were only valuable if they furthered the interests of the American people. The form of government was meaningless; it was the virtue of the people that safeguarded liberty: "Our great safeguard against despotism does not lie, and will never lie, wholly in the manner in which we parcel out power between the governing bodies, but in the character of the persons we charge with the management of our affairs."[91]

Godkin thus rejected the traditional intellectual justifications for federalism, which left him free to reimagine the entire system or even discard the idea entirely. Americans could merge the states together, or they could strip a state of "one half, or two thirds, or three fourths of its sovereignty."[92] There was no set formula, Godkin emphasized; state governments were to be entrusted with power only insofar as it was expedient. Godkin believed that American history had proved that reserving the police power to the states was a disaster. State control had led to a patchwork system of diverse policies, which were mostly terrible.[93] Both education and family law—along with other unspecified areas of policymaking—should be delegated to the federal government. Now was the time to shed state sovereignty, as the war had unleashed a flood of nationalism that would cause battle-scarred Americans not to be "deterred by either names or traditions from making any changes that are plainly called for by the public 'safety, honor, and welfare.'"[94]

Isaac Redfield, the former chief judge of the Vermont Supreme Court, also embraced the idea of reconceptualizing the federal arrangement, although he was more cautious than Godkin about discarding the central tenets of the existing system. Unlike Godkin, he was mindful of the dangers of consolidation. For Judge Redfield, the war had left the states "[u]nquestionably in a subordinate position."[95] Redfield believed that before the war, the American tendency had been to guard against the

[89] Id. at 133.
[90] Id. at 134.
[91] Id. at 136–37.
[92] Id. at 135.
[93] Godkin would have quarreled with Louis Brandeis's view of the states as laboratories of democracy. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).
[94] Godkin, supra note 88, at 145.
[95] Redfield, Letter to Senator Foot, supra note 29, at 9.

encroachment of federal power—to an almost ludicrous degree.[96] This had been a mistake, although Redfield believed that American lawyers worried legitimately about the "absorbing and centralizing tendency of the national authority," which possessed the "irresistible power to . . . sweep away all obstructions from the subordinate powers of government, unless very narrowly watched."[97]

But the war had changed things. After a vast and ferocious conflict, Redfield wrote, "every one is ready and forward in yielding almost everything to the national authority."[98] The pendulum had swung in the other direction, and now Redfield feared that it might swing too far. Because the federal government had proved itself so capable and lethal during the war, now it "will be in danger of absorbing all the important functions of governmental administration."[99] The war had already sapped the states of power, and its tendency in that direction had no natural stopping point. "Encroachment, in such a relation, is the natural course of events," he wrote.[100] "[T]he nation should exercise the utmost circumspection not to claim more of the States than its own indispensable necessities demand."[101] Redfield pinned his hopes for achieving the right equilibrium on lawyers. They were cognizant of the danger posed by the war's unifying tendencies and the benefits of dividing power and thus were "extremely solicitous to maintain the just balance between the powers and functions of the States and those of the nation."[102]

C. Centralization and Reconstruction

American intellectuals who feared the prospect of consolidation in the United States pointed to Reconstruction itself as a prime example of the frightening post-war tendency to ignore restrictions on federal power and eventually destroy the integrity of the states. Indeed, Reconstruction presented entirely novel problems for American federalism. Reconstruction required federal intervention in the former Confederate states along two dimensions. First was the protection of newly freed Black

[96] Isaac Redfield, The Proper Limits Between State and National Legislation and Jurisdiction, 15 Am. L. Reg. 193, 194 (1867).
[97] Id. at 196.
[98] Id. at 197.
[99] Id.
[100] Redfield, Letter to Senator Foot, supra note 29, at 9.
[101] Id.
[102] Id.

Americans from violence and discrimination, both on the part of the states and on the part of private individuals, whom state governments largely declined to prosecute. Second was the ongoing issue of subduing and punishing the white South, with the goal of eventually reintegrating the former Confederate states back into the national fold. In the aftermath of the war, the states of the former Confederacy could not be allowed simply to resume their status within the federal Union as though nothing had happened. For the time being, their peculiar circumstances required a suspension of the ordinary functioning of federal-state relations.[103]

The two aspects of Reconstruction posed distinct constitutional dilemmas, although they intersected in some respects. The states of the defeated Confederacy resisted federal directives to recognize emancipation and to grant Black Americans legal equality, which made the oversight of state law on questions of race a crucial part of the national project of Reconstruction. Allowing the federal government to protect Black Americans against state indifference or state-sponsored discrimination required a long-term solution, since the calibration of citizens' rights were generally left to the control of states. Prior to the adoption of the Thirteenth Amendment, there was no constitutional basis for barring discrimination on the basis of race by the states, and the Bill of Rights applied only when the federal government sought to restrict citizens' rights.[104]

Placing the states of the former Confederacy under direct federal supervision at the conclusion of the war raised a different issue, because it overrode the independent functioning of state government. During Reconstruction, President Andrew Johnson required the "seceded" states to ratify the Thirteenth Amendment and write new state constitutions outlawing slavery and repudiating secession.[105] Congress refused to seat representatives from the states of the former Confederacy on the grounds that they did not represent legitimate state governments. When these measures failed to quell the spirit of defiance, Congress reorganized the ten former Confederate states into five military districts, each under the

[103] See Foner, Reconstruction, supra note 17, at xxvi, 243–45; Eric McKitrick, Andrew Johnson and Reconstruction 7–11 (1960).

[104] See infra notes 178–94 and accompanying text for discussion of *Barron v. Baltimore*.

[105] See McKitrick, supra note 103, at 9.

command of a military governor (a general).[106] That governor was empowered to suppress disorder and protect Black Americans from violence, and to that end, could also disregard the judgments of civilian courts and supplant them with military commissions when necessary.[107] In order to qualify for readmission to the Union and representation in Congress, each state had to ratify the Fourteenth Amendment.[108]

There was an impasse between the worthy political goals of Reconstruction and its constitutional foundations. These extraordinary actions on the part of the federal government had no precedent and no explicit constitutional sanction. Critics complained that Reconstruction represented a major deviation from the delegation of distinct powers to each level of government.[109] Instead of possessing autonomy, the states were treated as administrative units of the federal government, charged with carrying out federal policy according to federal directives.[110] Opponents of the policy cited Reconstruction as persuasive evidence that consolidation would follow in the wake of the Civil War.[111]

Federal officials offered several creative arguments for the legitimacy of federal oversight during Reconstruction within the conventional framework of American constitutionalism. Congressional Republicans cited the Guarantee Clause of the Constitution for support, which requires that the federal government "guarantee to every State . . . a Republican Form of Government," and thus provides an exception to the general rule that the federal government does not act directly on the states.[112] They also justified plenary federal control on the grounds that the Confederate states had lost their status as states because their attempted secession (an illegal act on the part of a state) had caused them to revert to territorial

[106] Tennessee (the eleventh Confederate state) had been readmitted to the Union in July of 1866. The state had ratified the Fourteenth Amendment and its representatives had thereafter been readmitted to Congress.

[107] See Military Reconstruction Act of Mar. 2, 1867, ch. 153, pmbl., 14 Stat. 428, 428.

[108] See McKitrick, supra note 103, at 484 n.86.

[109] Nicoletti, Secession on Trial, supra note 18, at 9.

[110] See the Military Reconstruction Acts, of which there were four. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428; Act of Mar. 23, 1867, ch. 6, 15 Stat. 2; Act of July 19, 1867, ch. 30, 15 Stat. 14; Act of Mar. 11, 1868, ch. 25, 15 Stat. 41.

[111] Cynthia Nicoletti, Strategic Litigation and the Death of Reconstruction, *in* Signposts: New Directions in Southern Legal History 271 (Patricia Hagler Minter & Sally E. Hadden eds., 2013); see also McKitrick, supra note 103, at 186–213 (discussing former Confederates' arguments about the constitutional irregularities of Reconstruction policy).

[112] U.S. Const. art. IV, § 4. For the general principle, see New York v. United States, 505 U.S. 144, 165 (1992) (establishing that the Constitution gave Congress the power to "exercise its legislative authority directly over individuals rather than over States").

status.[113] The President claimed that he had the power to remake the states as part of his executive power.[114]

The government also offered legal justifications that derived from sources apart from the Constitution. Reconstruction's proponents also relied on international law. Because the Supreme Court had recognized the Confederacy's de facto status as a belligerent under the laws of war, Union officials maintained that the law of nations, rather than domestic constitutional law, governed their interactions with the defeated Confederacy.[115] The law of conquest was in force. Under this theory, Union victory entitled the United States to remake the domestic laws of the conquered territory to the satisfaction of the victorious party. It permitted the Union to exercise plenary federal control over the states.[116]

As Boston international lawyer Richard Henry Dana put it, Union victory put "the political systems of the rebel states, at the discretion of the republic."[117] This was so because "when a conqueror has obtained military possession of his enemy's country," as Dana argued the United States had done with respect to the defeated Confederacy, "it is in his discretion whether he shall permit the political institutions to go on . . . or whether he shall obliterate them."[118] Dana further argued that the extraordinary power that victory had placed at the federal government's discretion had not ceased at the conclusion of hostilities. It was hardly a temporary formulation. Instead, Dana stated, "[t]he conquering party may hold the other in the grasp of war until it has secured whatever it has a right to require."[119] The arguments Dana advanced were unorthodox, to say the least.

[113] See McKitrick, supra note 103, at 99–101, 110–12.

[114] See id. at 102.

[115] See The Prize Cases, 67 U.S. (2 Black) 635, 667–68 (1863). On the interaction between domestic constitutional law and the law of nations during the Civil War, see generally Witt, Lincoln's Code, supra note 40 (discussing the Union's use of international law in its dealings with the Confederacy); Nicoletti, Secession on Trial, supra note 18 (explaining how the applicability of international law to the Civil War complicated the government's efforts to try Confederates for treason); Burrus M. Carnahan, Act of Justice: Lincoln's Emancipation Proclamation and the Law of War (2007) (exploring the reasons, context, and implications of Lincoln's decision to rely on the law of war as a source of executive power).

[116] See McKitrick, supra note 103, at 99–101.

[117] Richard Henry Dana, Jr., The "Grasp of War" Speech, *in* Speeches in Stirring Times and Letters to a Son 234, 257 (Richard H. Dana III ed., 1910).

[118] Richard H. Dana, Reconstruction, N.Y. Times, June 24, 1865, at 8.

[119] Richard Henry Dana, Jr., supra note 117, at 246.

II. TRANSCENDENT LAWMAKING AND THE (WRITTEN) CONSTITUTION

Legal theorist John Codman Hurd, writing in 1867, confronted the gap between the written Constitution and the new transcendent constitution wrought by the Civil War. Hurd did not want to tiptoe around the disjunction, or to pretend that the ordinary constitutional framework could provide persuasive support for the extraordinary acts of Reconstruction. If one approached Reconstruction with the understanding that the United States was operating within the normal bounds of constitutional federalism, he would be hopelessly perplexed. The theories undergirding the policy were contradictory, Hurd said, and most of them collided with the basic premise that had undergirded the Union war effort, which was that secession was illegal and, as a result, the states had never left the Union. There was, for Hurd, a real impasse between the "abstract justice" that Congress was trying to effect through Reconstruction and the specific provisions of the written Constitution, which to Hurd's mind, did not justify the Radical view of Reconstruction.[120]

But Hurd considered the question in another light. He recommended that American jurists take a broader view of the Constitution. The Constitution, he said, had two aspects. It was a written legal document ("the constitution as law," as he put it), which set forth rules with specificity, but it was also a "matter of political knowledge."[121] When Hurd moved beyond the "question [of Reconstruction's legitimacy] as a legal one only," he reached an inquiry on a different plane.[122] The Constitution also represented the will of the people who made it, he claimed, and they were entitled, in the aftermath of Union victory, to enforce their vision of the meaning of national sovereignty. Here Hurd relied on a more metaphysical manifestation of sovereign power than the written constitution—what he termed the "providential Constitution . . . the fact by which the written constitution became law."[123] This constitution was, he said, "fact above law."[124]

In interpreting the Constitution in a moment of great tumult like the one he was living through, Hurd insisted that one had to take account of the tumult. The Civil War had effectively changed the constituent

[120] John C. Hurd, Theories of Reconstruction, 1 Am. L. Rev. 238, 246, 261 (1867) [hereinafter Hurd, Reconstruction].
[121] Id. at 246, 249.
[122] Id. at 251.
[123] Id. at 262.
[124] Id.

sovereign in the United States from the states to the national government.[125] When confronted with the problem of dealing with the disruption of the war in its aftermath, the sovereign possessed all powers necessary to quell the problem. By virtue of their defeat, the seceded states "became the territory of this people of the United States, to be governed as such under the laws of Congress."[126] The fact of victory alone served as the legal foundation for the exercise of the new sovereign's powers.[127] It made no sense to interrogate the matter any further.

A. Translating Transcendent Power into the Written Word

When Congress convened for the first time after the surrender at Appomattox, its members sought to bridge the gap that John Codman Hurd had identified between the written Constitution and the transcendent power of the war. They set themselves the task of translating the meaning of the war into the text of the Constitution. This required them to try to capture the kinetic energy the war had unleashed and bottle its lightning. The idea was to harness the results of the war, channeling its power while preventing it from spinning out of control. All the while, there was profound disagreement over how the war's meaning should be interpreted and where the limits of national authority should be located.

There is no shortage of scholarly analysis of the Reconstruction Congress's discussions about the meaning of the Fourteenth Amendment, but congressmen's engagement with the Civil War itself is absent from most studies of debates in the Thirty-Ninth Congress.[128] By focusing on the specific language of Section One against a backdrop of thin

[125] Here Hurd's point intersects with the arguments of some conservatives during Reconstruction who argued that the Fourteenth Amendment was unconstitutional, based not on the unorthodox process by which it was adopted, but its subject matter instead. This seems today to be a rather bizarre position, but the point was that the amendments had moved too far from the initial design and altered the Constitution in ways that destroyed the system as it had been set up in 1787. The amendment did nothing less than alter the nature of sovereignty. Hurd might well have agreed with these ideas, but his point was that the war had changed things profoundly. The post-war paradigm was entirely new and the nature of the sovereign had changed. See Vorenberg, supra note 17, at 107–12 (arguing that some Civil War-era thinkers believed that the fundamentals of the U.S. constitutional arrangement were unchangeable, even by constitutional amendment).

[126] Hurd, Reconstruction, supra note 120, at 263. Hurd expounded on these points in much more detail in his 1881 book, *The Theory of Our National Existence*.

[127] For more on this point, see Rutherglen, Rule of Recognition, supra note 38, at 80, and Nicoletti, Secession on Trial, supra note 18, at 322–24.

[128] See supra note 1 for literature on the meaning of the language of Section One.

antebellum judicial precedent, most scholarship covers only a sliver of the wide-ranging contours of Congress's discussions about the Fourteenth Amendment.[129] Ideas about transcendent constitutionalism are, it is fair to say, hidden in plain sight. Explicit references to the war's transformative impact on the United States fairly litter the *Congressional Globe*.

Although all three of the post-Civil War constitutional amendments acknowledged the growth of federal power vis-à-vis the states, two other proposed amendments attempted to capture the war's nationalistic energy directly. In 1865, Senator Aaron Cragin of New Hampshire proposed a constitutional amendment that specified that "[p]aramount sovereignty . . . reside[d] in the United States" and that citizens would owe their primary "faith, loyalty, and allegiance to the United States."[130] This amendment would have formally repudiated the secessionist logic that located sovereignty in the states, which had "compacted" with one another to form the federal Union and could thus withdraw from the compact at will. After Cragin's proposed amendment, the Constitution would have embodied the idea that sovereignty resided in the people of the nation rather than in the states. A few months after Cragin's failed proposal, the House also entertained a proposal to change the name of the country from the "United States of America" to simply "America."[131] Missouri Republican George Anderson, its sponsor, told his colleagues that the old name was inadequate because it was "not sufficiently comprehensive and significant to indicate the real unity and destiny of the American people."[132] Just as the Constitution had been amended to "comport with the new interests and condition of the country" since the war, the new appellation would convey that the nation was "the eventual, paramount power of this hemisphere."[133] It would help forge a new national identity. What better way to mark a new beginning than to slough

[129] See also Jonathan Gienapp, The Second Creation: Fixing the American Constitution in the Founding Era 6–9 (2018) (arguing that the idea that the writing contained the whole meaning of the Constitution was invented in the decade after ratification).

[130] S.J. Res. 8, 39th Cong. (1865).

[131] H.R.J. Res. 61, 39th Cong. (1866); see also Herman Ames, The Proposed Amendments to the Constitution of the United States During the First Century of Its History 279–80 (N.Y., Burt Franklin 1896) (noting that Congressman Anderson's amendment was "singular" and difficult to categorize).

[132] H.R.J. Res. 61, 39th Cong. (1866).

[133] Id.

off the old, state-centered baggage that the name "United States" called to mind?

These proposed amendments went nowhere, but the idea they embodied permeated congressional debates in the aftermath of the war. For instance, in 1866, Representative Samuel Shellabarger (R. OH), sought to define the power the United States held at the close of the Civil War. For him, the full meaning of American nationhood "was only comprehended when it was written in letters of mingled fire and blood—the fires of a war which swept half a continent."[134] Union victory had meant, in his view, that American nationhood was now "written, comprehended. It is the judgment of by far the most august court . . . of the mighty people; and men comprehend at last that this is a nation with right to live."[135] Shellabarger argued that the war had altered the federal structure, giving the national government primacy over the states and establishing that the citizens' primary relationship was with the federal government. Natural law provided the foundation for his claims. By virtue of its existence as a nation, the United States commanded the loyalty and allegiance of its citizens, and in turn owed them protection and rights. "[B]y the very essence and nature of sovereignty," Shellabarger said, "it is and must be the nation, the supreme Government, that determines who shall be members of the nation's body, its citizens, and whom it will admit to demand its protection and enjoy its powers."[136] For Shellabarger, the war made the United States a true nation, with all the powers and responsibilities that entailed.

A number of Democrats pushed back against the idea that the war created a transcendent national sovereignty that would displace the central position the states had previously held in American life. They worried that Congress's Reconstruction policy would accelerate, rather than arrest, the destruction of the antebellum federal system in the United States. Precipitous actions taken by Congress in the euphoria of Union victory would hurtle the country toward consolidation. Senator James Nesmith of Oregon insisted that the proposed Reconstruction legislation would overcorrect against "the ultra State-rights doctrine" the nation had seen during the war.[137] "Let us avoid the other extreme," he said, "and escape the evils likely to result from an attempted consolidation of all the

[134] Cong. Globe, 39th Cong., 1st Sess. 2103 (1866).
[135] Id.
[136] Id.; see also Harrison, supra note 1, at 1435–36.
[137] Cong. Globe, 39th Cong., 1st Sess. 292 (1866).

rights of the States in a centralized Government."[138] Rep. John Nicholson, a Delaware Democrat, complained that Section One of the proposed Fourteenth Amendment created a nationalized government. In his view, the original Constitution had effected "the most perfect equilibrium . . . in the equal distribution of the Federal powers, in the limitation upon State and Federal power, and the line that is drawn between them."[139] The new amendment would "permanently overthrow[]" that balance.[140] The parchment protections given to the states "in the absolute control of their municipal affairs are now to be thrown down for the Federal Government to enter this wide domain."[141] The war had thrown off the balance first, and now "this amendment will completely subvert our present system of Government."[142]

Senator Edgar Cowan, a conservative Republican from Pennsylvania, repeatedly expressed his frustration with the types of constitutional arguments that the congressional Republicans had advanced. They called on the metaphysical energy that the war unleashed and the vagaries of powers that necessarily inhered in national governments to increase the power of the federal government immeasurably. These ideas were now to be inserted into the Constitution. Congressional powers would now be elastic. Republicans talked in "generalities all the time constantly. There is nothing specific here; there is nothing fixed; there is nothing tangible; there is nothing definite."[143] In post-war America, men no longer venerated the Constitution and thought of the document as limited in scope. The war had scrambled an older way of thinking about government power. Americans now looked to the federal government as though it possessed the residuum of police powers. If they deemed a power "necessary" for the federal government to exercise, they would ensure that the Constitution granted it.[144] If states passed distasteful laws, Congressmen now asserted that "there is a complete remedy under this much-abused Constitution, which is now to require seventy amendments

[138] Id.
[139] Id. at 2080.
[140] Id.
[141] Id.
[142] Id.
[143] Id. at 342.
[144] See Hyman, supra note 17, at 124–40 for more on the idea of "adequate constitutionalism." The idea was that the Constitution gave whatever powers were necessary for the government to possess. This was a wartime idea, and Cowan critiqued its extension post-war.

in order to make it conformable to the new state of things which has been brought about by the last war!"[145]

Cowan decried this new constitutional universe, in which Americans' belief in the importance of states' rights had been swept away by the currents of war. He understood that these arguments for local control had been abused by the Confederates, but this did not mean that state sovereignty should be discarded. "I am in favor of those rights which belong legitimately to the States, and which have never been denied to them, and upon which, in my judgment, depends the individual liberty of the people of this country . . . ."[146] Cowan argued that the fate of the American system of government was at stake. If "this General Government or this Congress [was allowed] to absorb unto itself and to swallow up and annihilate these particular State rights, then . . . the essential virtue[] of the Constitution is gone."[147] Over in the House, fellow conservative Andrew Jackson Rogers summed up the import of the Fourteenth Amendment in a nutshell: "[t]he proposed amendment to the Constitution undertakes to consolidate the power in the Federal Government."[148] Conservatives like Cowan and Rogers acknowledged that the war had ended slavery and secession, but they refused to believe that it had remade the fundamentals of the U.S. Constitution.[149]

B. The Connection Between National Sovereignty and Civil Rights

The arguments about structural federalism and national sovereignty were directly connected to the civil rights guarantees afforded to individuals by the Reconstruction Congress. Reorienting sovereignty away from the states and towards the national government had far-reaching consequences, because as Reconstruction-era congressmen understood it, national sovereignty pertained not just to the relations between the federal government and the states but also to the relations between each sovereign and its citizens. In their view, certain powers inhered in the national government simply by virtue of its enhanced sovereignty, including the authority—and the responsibility—to protect citizens' civil rights. Simply put, Republicans insisted that the war's establishment of paramount national sovereignty *obligated* the federal

[145] Cong. Globe, 39th Cong., 1st Sess. 342 (1866).
[146] Id.
[147] Id.
[148] Id. at 354.
[149] Id.

government to extend protection to the individual in the exercise of his civil rights—even when those rights were infringed by another (lesser) sovereign.

In spelling out the national government's obligations to citizens, the Reconstruction Congress drew on a shared understanding of natural law.[150] William Nelson's influential book on the Fourteenth Amendment emphasized the importance of situating the Reconstruction-era fundamental rights discourse against background principles of natural rights, but the natural law framework undergirding the Fourteenth Amendment congressional debates extended much further.[151] It encompassed conceptions of governmental structure and sovereign power too.

Abraham Lincoln's arguments about the perpetuity of the Union provide a good example of natural law reasoning as applied to the concept of sovereign state power. Lincoln said that the federal government had the ability to protect itself against secession and disintegration because the right to self-preservation inhered in the very concept of statehood. It was a right "implied . . . in the fundamental law of all national governments."[152] States (in both the national and the sub-national sense) possessed rights simply by virtue of their statehood. International law theorists traditionally considered the law of nations to be (at least in part) a subspecies of the law of nature, embodying the same principles of reason or divine law but applying them to states rather than individuals.[153] The relations between different sovereign bodies in the federal system were somewhat analogous, although the positive law of the Constitution also governed much of the federal structure.[154] The nineteenth-century

[150] See Edward Corwin, The "Higher Law" Background of American Constitutional Law, 42 Harv. L. Rev. 365, 370 (1929).

[151] Nelson, supra note 17, at 8–9.

[152] Lincoln, First Inaugural Address, supra note 65, at 264.

[153] See, e.g., Henry Halleck, International Law; Or, Rules Regulating the Intercourse of States in Peace and War 63–64 (San Francisco, H.H. Bancroft & Co. 1861); Stephen Neff, A Short History of International Law, *in* International Law 3, 5, 15 (Malcolm D. Evans ed., 2010); Emer de Vattel, The Law of Nations 52–57 (Joseph Chitty ed., Phil., T. & J.W. Johnson & Co. 1861). Aside from natural law, there was an overlay of positive law, which derived from treaties and practice and custom. According to Vattel, the natural law aspects of the law of nations were immutable, although positive law changed according to evolving real-world conditions. See Vattel, supra, at 53 n.2. I use the 1861 edition of Vattel to give a close approximation of understanding at the time of the Civil War.

[154] In his dissent in *Dred Scott*, Justice Curtis treated international law as though it governed the relations between the states in the federal system, unless displaced by positive law principles in the Constitution (such as the Fugitive Slave Clause) or federal statute. Here Curtis

concept of sovereignty (both by measuring the extent of the state's internal power to regulate and its external relation with the other level of government) was rooted in natural and international law thinking.

As nineteenth-century American lawyers understood it, sovereignty had two dimensions: external and internal. Its "external . . . character" concerned a state's "ability or capacity to govern itself, independently of foreign powers."[155] The external sovereignty of a state came into play in thinking about a state's relationship with other sovereign entities.[156] By contrast, a state's internal sovereignty described its relation with its citizens. Thomas Hobbes's political theory expounded on the creation of this relationship between subjects and the state. "A Commonwealth," he wrote, was instituted when men agreed to authorize the sovereign to act for "means of them all."[157] Once delegated this power, the sovereign's authority was to be expended "to the end [of men] . . . liv[ing] peaceably amongst themselves, and be[ing] protected against other men."[158] William Blackstone echoed these thoughts, writing that "[a]llegiance is the tie, or ligamen, which binds the subject to the king, in return for that protection which the king affords the subject."[159] In joining together through the social compact, citizens gave sovereign power to the state. The state, in turn, was to exercise power for the public good, extending protection to citizens and safeguarding their rights against intrusion.

Nineteenth-century jurists believed that a reciprocal relationship between state and citizen inhered in the very idea of sovereignty.[160] A

essentially viewed international law as a species of common law. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 595 (1857) (Curtis, J., dissenting). The Supreme Court's reasoning in modern structural federalism cases such as the commandeering cases and the sovereign immunity cases looks similar too. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 44 (1996); Alden v. Maine, 527 U.S. 706, 706–07 (1999); New York v. United States, 505 U.S. 144, 145 (1992).

[155] Halleck, supra note 153, at 64.

[156] Henry Wheaton, Elements of International Law 20 (Richard Henry Dana, Jr. ed., Bos., Little, Brown, & Co. 1866).

[157] Thomas Hobbes, Leviathan 121 (Richard Tuck ed., 1991).

[158] Id.

[159] 1 William Blackstone, Commentaries *354. Blackstone's 1765 edition made reference to "king" and "subject," but Representative Shellabarger misquoted (or purposely adjusted) the phrase in 1866 to make it applicable to a democracy, attributing it to Blackstone while substituting "government" and "citizen" for "king" and "subject." See Cong. Globe, 39th Cong., 1st Sess. 2103 (1866).

[160] See Hannah Weiss Muller, Subjects and Sovereign: Bonds of Belonging in the Eighteenth-Century British Empire (2017), on the long historical trajectory of this notion of sovereignty.

writer for the *Washington National Republican* put it starkly: "allegiance and protection are reciprocal. The Government which demands of the citizen allegiance . . . must extend protection to the citizen not only as the equivalent of the allegiance rendered, but as necessary to . . . render that allegiance." These principles, the writer claimed, were common to all governments, and no "government can subsist without them."[161] Thomas M. Cooley's prominent 1868 treatise on state constitutional law, one of the first to address the legitimate use of the state's police powers in a comprehensive way, described a similar idea.[162] According to Cooley, the police powers constituted the "system of internal regulation" by which the state promoted the general welfare, preserved public order, and established rules to ensure harmony between citizens.[163] The state exceeded its "just powers" and transgressed the limits of its regulatory authority when it encroached on the individual rights of its citizens.[164] It was something of a tautology because the citizen's rights began where the state's powers ran out.

Senator Cragin's proposed 1865 constitutional amendment locating paramount sovereignty in the national government had not gained adherents, but the National Citizenship Clause of the Fourteenth Amendment arguably performed the same function. It defined, for the first time, both national and state citizenship. It also established that

[161] Citizenship of the United States and the Late Supreme Court Decisions, Nat'l Republican (D.C.), Apr. 5, 1876, at 2.

[162] Incidentally, the rethinking of sovereign power as it related to the citizen and to the federal government also extended to local government. It is not a coincidence that Cooley's treatise and John Dillon's treatise on cities and local governments appeared soon after the conclusion of the Civil War. See John F. Dillon, Treatise on the Law of Municipal Corporations (Chi., James Cockcroft & Co. 1872); cf. Gregory Ablavsky, Empire States: The Coming of Dual Federalism, 128 Yale L.J. 1792, 1795–96, 1824 (2019) (arguing that the structural relationship between states and localities is an important component of sovereignty).

[163] Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 572 (Bos., Little, Brown, & Co. 1868); see William Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (1996) (describing the nineteenth-century idea of the police powers); see also Randy Barnett, The Proper Scope of the Police Power, 79 Notre Dame L. Rev. 429, 478–80 (2004) (noting that the Fourteenth Amendment sparked the development of a "positive theory" of state police power).

[164] Cooley, supra note 163, at 572. The treatise expounded upon the extent of the powers of state and local governments over citizens. Id. at iii. For more on Cooley's ideas about the limits on the police power, many of which stemmed from the invasion of property rights, see D. Benjamin Barros, The Police Power and the Takings Clause, 58 U. Miami L. Rev. 471, 484–86 (2004); Maureen E. Brady, The Damagings Clauses, 104 Va. L. Rev. 341, 356, 361, 368 (2018).

national citizenship was superior and that state citizenship was derivative thereof.[165] By placing national citizenship above the state's, it declared that the citizen's primary relationship was with the federal government, which was equivalent to a declaration of paramount sovereignty. "When the war ended in the triumph of the armies of the Union a mighty impulse in favor of nationality swelled the hearts of the people," the *Washington National Republican* said. The amendment "settle[d] this vexed and dangerous question of supremacy between the States and the Federal Government."[166]

Congressional debate about the Fourteenth Amendment reveals the close connection between ideas about the transfer of ultimate sovereignty to the national government and federal protection of citizens' fundamental rights against state intrusion.[167] As has been well documented by constitutional scholars, the Fourteenth Amendment was framed in order to provide a constitutional foundation for the Civil Rights Act of 1866, and the two were discussed in tandem in Congress.[168] The Civil Rights Bill defined United States citizenship as extending to all persons born in the U.S. and protected all citizens in their exercise of the right to make and enforce contracts, sue and be sued, and purchase property on the same basis as white citizens.[169]

[165] Here the amendment overturned the *Dred Scott* decision. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 447–49, 489 (1857); Curtis, supra note 1, at 7.

[166] Citizenship of the United States and the Late Supreme Court Decisions, supra note 161, at 2; see infra Section III.C and Part IV for discussion of the *Slaughterhouse Cases* and the Supreme Court's reading of the citizenship clause.

[167] The question of which rights were specifically included in the concept of "fundamental" or "civil" rights is beyond the scope of this Article, because the focus is on the source of the rights and their relation to the national sovereign rather than the content of the rights, but this is one of the most enduring problems of constitutional law. See supra note 1 for more on the content.

[168] See George Rutherglen, Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866, at 6, 8 (2013) [hereinafter Rutherglen, Shadow of Slavery]; Kurt T. Lash, Enforcing the Rights of Due Process, 106 Geo. L.J. 1389, 1391, 1447 (2018). Congressional Republicans argued that Section Two of the Thirteenth Amendment provided an adequate foundation, but fears that the act would be found unconstitutional prompted Congress to draft the Fourteenth Amendment. The act was reenacted following the ratification of the Fourteenth Amendment. See Rutherglen, Shadow of Slavery, supra, at 8; Lash, supra, at 1391, 1404–05. Indeed, when the act's constitutionality was tested during Reconstruction, the Court found that it did not reach private discrimination because the Fourteenth Amendment only prohibited discrimination by state actors. A hundred years later in *Jones v. Alfred H. Mayer*, 392 U.S. 409, 437–39 (1968), the Supreme Court found that the reach of the act to private conduct was justified by the Thirteenth Amendment.

[169] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

Representative James Wilson (R. IA), who supported the Civil Rights Act of 1866, argued that its constitutional predicate was not the Thirteenth or the (proposed) Fourteenth Amendment, but instead the enhanced sovereignty of the nation following the Civil War. He started with the idea that the nation, rather than the states, was the primary unit of sovereignty. In his view, the very essence of sovereignty was the duty to protect citizens in the exercise of their rights. If the national government was indeed sovereign, it necessarily had to have the power to guarantee and defend its citizens' civil rights. In his view, citizens of the United States "are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect." As the constituent sovereign, the national government owed its citizens protection against any invasion of their rights, even if that threat came from another sovereign power. The United States owed its citizens a duty to prevent the states from encroaching on their fundamental rights.[170]

For Wilson, the idea of protection by the sovereign was baked into the very essence of "civil rights." Although we associate the term "civil rights" today with the right to be free from racial discrimination, it only acquired that meaning *after* the passage of the Reconstruction-era civil rights acts.[171] The first edition of *Black's Law Dictionary*, published in 1891, defined them as "[r]ights appertaining to a person in virtue of his citizenship in a state or community."[172] According to Wilson, civil rights belonged to a U.S. citizen by virtue of being "a constituent member of the great national family." The Congress "must be invested with power to legislate for [citizens'] protection or our Constitution fails in the first and most important office of government."[173] This national power to protect citizens' rights did not depend on any particular grant in the U.S. Constitution; instead, it inhered in sovereignty.

In making the case for paramount national sovereignty and its necessary relationship to the rights citizens enjoyed thereunder, Republicans drew heavily on the ideas of international law thinkers, such as Emer de Vattel and Henry Wheaton.[174] From these sources, they sought

[170] Cong. Globe, 39th Cong., 1st Sess. 1117–19 (1866).

[171] See Risa L. Goluboff, The Lost Promise of Civil Rights 23–25 (2007); Rutherglen, Shadow of Slavery, supra note 168, at 53.

[172] Civil Rights, Black's Law Dictionary (1st ed. 1891); see also Harrison, supra note 1, at 1435–36 (observing that in the nineteenth century and Reconstruction the term "protection of the laws" involved the government securing individuals their rights).

[173] Cong. Globe, 39th Cong., 1st Sess. 1118 (1866).

[174] See id. at 1117, 1293, 1756, 1832, 1835, 3212.

to unspool the very essence of nationhood based on its natural law foundations. Their arguments were designed to combat Democratic complaints that the Republicans were upending the old order. Republicans explained that a national guarantee of civil rights was not a new invention. It was merely the logical corollary of sovereignty, which had been misunderstood before the war. In the Democrats' view, the new amendments and the Reconstruction measures were instantiating their worst fears about the consolidation that the war would initiate.

Senator Lyman Trumbull, who sponsored the Civil Rights Bill and the Freedman's Bureau Bill in the Senate, rebuffed the notion that the Fourteenth Amendment and the Civil Rights law themselves changed the nature of American federalism in a fundamental way.[175] The measures merely clarified, in writing, what Trumbull understood as the proper conception of the constitutional order in the post-war United States. The national government had been in existence since the Revolution, but the war had proven that the United States was truly a state. Its sovereignty, latent at the beginning, had now been proven for all to see. "[T]he people of our day have struggled through [the] war, with all its sacrifices and all its desolation, to maintain it, and at last . . . we have got a Government which is all-powerful," Trumbull told the Senate. To be a state in possession of true sovereignty, Trumbull argued, the United States had to be able to protect its citizens. It was necessary for the national government to possess the "power to protect its own citizens in their own country. Allegiance and protection are reciprocal rights."[176]

Representative John Bingham, the "father of the Fourteenth Amendment," described Section One as encompassing the transcendent power of the war. Section One contained all the "lessons that have been taught . . . to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations."[177] The war had vindicated national sovereignty, and Bingham considered it his job to imprint that reality onto the Constitution.

In connecting national sovereignty to the protection afforded to individual rights in Section One, Bingham advanced a novel—and rather improbable—reading of the original Constitution which, he argued, had

[175] See Howard Jay Graham, Our "Declaratory" Fourteenth Amendment, 7 Stan. L. Rev. 3, 28–32 (1954).

[176] Cong. Globe, 39th Cong., 1st Sess. 1757 (1866).

[177] Id. at 2542.

always guaranteed individual rights. Contrary to the Supreme Court's long-standing precedent in *Barron v. Baltimore*,[178] decided more than a generation earlier, Bingham interpreted the Supremacy Clause and the Bill of Rights as restraining state officers from invading individual rights.[179] Bingham believed that the original Constitution had been written to secure to Americans "the sacred rights of person,"—the "rights of human nature." The states were not empowered to "invade the rights of any citizen or persons by unjust legislation."[180] This was not made explicit in the Constitution, but Bingham believed that the principles followed from a proper understanding of what "police powers" actually were. They ran out, as Thomas M. Cooley's treatise spelled out, when they improperly encroached on individual rights.[181]

According to Bingham, the original Constitution had contained a major flaw, due to the compromises the Founders had made with slaveholders: it had not given the national government power to enforce the Constitution's restrictions on the states' police powers. The constraints on state power had been essentially self-enforcing. When the states had wrongfully invaded citizens' rights, the federal courts had not possessed the power to restrain them from doing so.[182] Bingham argued that the Fourteenth Amendment and the Civil Rights Bill thus only altered the federal arrangement in one particular. The states' power was not diminished; only the national enforcement power was enhanced. The experience of war had confirmed the necessity of endowing the federal government with the power to restrain the states from engaging in illegal actions.

In seeking to encapsulate the war's power, Congress confirmed the primacy of the nation in the text of the Fourteenth Amendment. And as a consequence of that paramount federal sovereignty, the citizen's rights were now to be derived from the national government, which would protect those rights against state interference. Although the amendment

[178] 32 U.S. (7 Pet.) 243, 249, 250–51 (1833).

[179] Cong. Globe, 39th Cong., 1st Sess. 1090 (1866). Much later, the Supreme Court repudiated Bingham's reading and found that the Supremacy Clause only bound state courts. Testa v. Katt, 330 U.S. 386, 394 (1947); New York v. United States, 505 U.S. 144, 178–79 (1992); Printz v. United States, 521 U.S. 898, 907 (1997).

[180] Cong. Globe, 39th Cong., 1st Sess. 1090 (1866).

[181] See Cooley, supra note 163, at 15.

[182] Here Bingham cited *Barron v. Baltimore* for this proposition, which is discussed infra notes 192–94 and accompanying text. Cong. Globe, 39th Cong., 1st Sess. 1089–90 (1866). He intimated that *Barron* was decided incorrectly. Id. at 1090.

boldly reconceptualized federal-state relations, it certainly did not obliterate the states; indeed, it presumed their existence by barring the states from infringing individual rights.[183] But neither did it alleviate worry that the states' basic integrity and autonomous functioning would remain intact. Nor was it clear that the Fourteenth Amendment would mark the final adjustment of the federal-state relations in the post-war world. It provided no assurance of a brake on the centralizing tendencies of the war.

III. THE SUPREME COURT AND THE FALL OF TRANSCENDENT CONSTITUTIONALISM

Ratification of the Fourteenth Amendment necessarily represented a shift in the parameters of the national discussion about the war's impact on the federal system. In the minds of at least some of the amendments' authors, the new text had been enacted to embody the principles of transcendent constitutionalism. But now that the war's power had been infused into (or reduced to) text, the future of transcendent constitutionalism was uncertain. The text could now be interpreted in a variety of ways. The broad language of the Citizenship, Privileges or Immunities, and Enforcement Clauses could be read against a backdrop of transcendent constitutionalism and the understanding that war had ushered in the inexorable growth of national power. Or they could be read in accordance with pre-war constitutional traditions, as representing no major break with the principles of federalism laid out in the original Constitution.

The text could support two readings, and with the Fourteenth Amendment's ratification, the fate of transcendent constitutionalism—and the future direction of American federalism—now passed out of congressional hands. Although some commentators had despaired at the possibility of checking the growth of federal authority, others had suggested that a concerted exertion of human will could, possibly, counterbalance the centripetal supernatural energy the war had unleashed. Judge Redfield, for one, had recommended lawyers as good candidates

[183] Sections Two, Three, and Four of the Fourteenth Amendment also presumed the existence of states, as did the Fifteenth Amendment. See Currie, supra note 17, at 395–402, and Michael Les Benedict, Preserving the Constitution: The Conservative Basis of Radical Reconstruction, 61 J. Am. Hist. 65, 76–79 (1974) [hereinafter Benedict, Conservative Basis] (arguing that the states remained the primary repository of citizens' rights, with the Fourteenth Amendment merely barring them from infringing those rights in certain ways).

for the task, given that they understood its importance.[184] All of this pointed to the possibility that the Supreme Court could step into this role. Over the next decade or so, the Court did so, declining to embrace principles of transcendent constitutionalism.

John Codman Hurd had talked about the two constitutions at work during Reconstruction—the "constitution as law" and the "providential Constitution."[185] The Court, for the most part, embraced only the first. Even when confronted with the extraordinary dislocation of Reconstruction, the Court did not invoke extraordinary arguments. The rhetoric of revolution only rarely crept into the Court's opinions, often in dissent. The Court accepted the permanent Unionist version of federalism and policed the dividing line between the two spheres of sovereignty, but it declined to go further. What resulted was a conservative view of the change the war had made. In the end, the Court chose to undercut the more transcendent notion of the change wrought by the Civil War in favor of a defense of rather traditional principles of federalism, in which the Court would carefully parse the dividing line between state and federal power.[186]

A. Transcendent Power Arguments in Pervear *and* Twitchell

Litigants' attempts to persuade the Court to interpret the Constitution according to principles of transcendent constitutionalism came early—and fell flat. In a couple of little-known cases in the late 1860s, *Pervear v. Massachusetts* and *Twitchell v. Pennsylvania*, two criminal defendants asked the Court to invalidate their convictions because their states had violated rights afforded to criminal defendants by the Bill of Rights.[187] This claim sounds rather unexceptional today, given that the Supreme Court has held that most of the provisions of the Bill of Rights apply

[184] Redfield, Letter to Senator Foot, supra note 29, at 9.

[185] Hurd, Reconstruction, supra note 120, at 261–62.

[186] See Kaczorowski, To Begin the Nation, supra note 17, at 67–68.

[187] Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475, 476 (1866); Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321, 321–22 (1868); see Amar, Fourteenth Amendment, supra note 1, at 1254–56 (on *Twitchell*); see also Felix Frankfurter, Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746, 750 (1965) (noting that in *Twitchell* the Court relied on *Barron v. Baltimore* to reject an argument that the Fifth and Sixth Amendments applied to the states); Currie, supra note 17, at 355 n.24.

against the states.[188] But the Court only selectively applied individual provisions of the Bill of Rights to the states via the Fourteenth Amendment's Due Process Clause beginning in the late nineteenth century.[189] The argument had been attempted earlier, however. In 1878, in *Davidson v. City of New Orleans*,[190] the Court entertained—and rejected—the argument that the Fourteenth Amendment's Due Process Clause incorporated provisions of the Fifth Amendment against the states.[191] The idea that the language of the new amendment limited the police powers of the states to operating in ways that would not contravene the rights of individuals (as spelled out in the Bill of Rights) does not surprise us.

What made *Pervear* and *Twitchell* remarkable was that neither litigant relied on the Fourteenth Amendment. Indeed, *Pervear* came to the Court in 1866, before the Fourteenth Amendment was part of the Constitution. *Twitchell* was argued in 1869, after the amendment's ratification, but did not cite the new amendment. The only textual constitutional predicate for both cases was the Bill of Rights itself. The litigants asked the Court to overrule its 1833 holding in *Barron v. Baltimore*, in which the Marshall Court had held that the Bill of Rights only constrained the national government.[192] In *Barron*, Marshall had drawn a sharp line between the federal and state government's spheres of sovereignty. To redress abuse of state power, citizens would have to find limitations in state constitutions.[193]

[188] See Fairman, supra note 1, at 139; see also Louis Henkin, "Selective Incorporation in the Fourteenth Amendment", 73 Yale L.J. 74 (1963) (exploring the theoretical soundness and implications of the selective incorporation doctrine).

[189] This was *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 239 (1897), which involved a takings claim. The incorporation of non-economic rights, such as those belonging to criminal defendants, is a twentieth-century phenomenon. See, e.g., Gitlow v. New York, 268 U.S. 652 (1925) (applying the First Amendment's provisions protecting freedom of speech and freedom of the press to the states).

[190] 96 U.S. 97, 99, 105 (1878).

[191] *Slaughterhouse*, discussed below, made the claim that the Privileges or Immunities Clause applied fundamental rights against the states, although it did not rely on any provision of the Bill of Rights. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 73–74 (1873). In *Davidson*, the Court rejected the argument that the Due Process Clause had a different scope. Neither justified an invasion of the states' police powers. *Davidson*, 96 U.S. at 100–01.

[192] Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833).

[193] There were *some* limitations on the power of state government to constrain the rights of individuals set forth in the Constitution, of course. A prominent example is found in the Privileges and Immunities Clause of Article IV. In *Corfield v. Coryell*, a federal circuit interpreted the clause to prohibit discrimination by one state against out of state citizens when

Barron's holding went unchallenged for the next thirty years.[194] But after the Civil War, Pervear and Twitchell's counsel both asked the Court to overrule it. They argued that *Barron's* premises no longer held true, because the Civil War had transformed the federal arrangement. The litigants echoed Representative Wilson's claims about the consequences of Union victory. Its force alone made the nation the primary source of citizens' rights, which in turn endowed the federal government with the authority and the responsibility to protect the citizens' rights from state incursion.

Pervear, a Massachusetts resident who had been indicted for the unlicensed sale of intoxicating liquors in contravention of state law, argued that the state's imposition of a $50 fine and three-month sentence of imprisonment at hard labor ran afoul of the Eighth Amendment's ban on cruel and unusual punishment.[195] Twitchell, a Pennsylvanian, had been convicted of murder and claimed that the state's prosecution had violated his Fifth Amendment right to due process and his Sixth Amendment right to be informed of the charges against him.[196] The state had recently enacted an odd statute, copied from an English model, that made it unnecessary "to set forth the manner in which, or the means by which the death of the deceased was caused."[197]

Pervear and Twitchell's counsel both argued that the specific provisions of the Bill of Rights bound Massachusetts and Pennsylvania

it came to the exercise of fundamental rights. See 6 F. Cas. 546, 549 (C.C.E.D. Pa. 1823). Others include Article I, Section 10, which prohibits the states from invading their own citizens' rights by impairing an obligation of contracts or passing a bill of attainder or ex post facto law. But such specified limitations on the powers of states' police powers and citizens' rights as against the state governments are few and far between in the pre-Reconstruction Constitution.

[194] There were two cases between 1833 and 1866 that raised the issue, one only tangentially. They were both primarily preemption cases, where the main issue was about the intersection of state and federal law. See Fox v. Ohio, 46 U.S. (5 How.) 410, 416, 434 (1847) (involving state power to punish counterfeiting of national currency); Smith v. Maryland, 59 U.S. (18 How.) 71, 71–72, 76 (1855) (involving the applicability of admiralty jurisdiction to places below the low-water mark in the Chesapeake Bay).

[195] Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475, 476 (1866).

[196] Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321, 323–24 (1868). The *Twitchell* case presented the issue of the expansion of federal police powers and the extent of national sovereignty after the Civil War even more starkly than *Pervear* had. *Twitchell* involved a question of state law, plainly and simply. There were no issues of possible preemption based on the application of a federal law and the limitations it imposed on a state regulatory regime, as there had been in *Pervear*.

[197] Id. at 325 (quoting 1860 Pa. Laws 435); see The Twitchell Case in the Supreme Court, Sun (Balt.), Apr. 3, 1869, at 1 (noting the statute's English origin).

because the federal government owed citizens protections against state actions that invaded their fundamental rights. Pervear's brief stated that "[i]f a State Government fines or imprisons an American citizen . . . , the American Government owes him protection against the State."[198] Twitchell's counsel argued that the Pennsylvania statute was "contrary to the common law as embodied in the constitution of the United States," and should therefore be summarily abrogated.[199] This was a radical reinterpretation of federal-state relations as well as the written Constitution as an instrument of positive law.[200] Twitchell not only maintained that state law could be displaced by federal principles, but by equating the written U.S. Constitution with the common law, also turned the idea of a limited government based on delegated federal powers on its head.[201]

By arguing that the federal government should, in the absence of any textual predicate in the Constitution, intervene between a citizen and a state's illegitimate exercise of power, *Pervear* and *Twitchell* advanced an extraordinary theory about federal structure. The litigants asked the Court to embrace a view of national sovereignty and the power that inhered in

[198] Brief for Plaintiff in Error at 3, Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1866) (No. 377). Pervear raised several issues in challenging the sentence, including a preemption argument based on the federal taxes imposed on alcoholic beverages. He argued that the state's regulation of liquor could not run afoul of federal standards, since the federal government had seen fit to levy taxes on the sale and distribution of alcohol. To some extent, his Eighth Amendment claim was bound up with the preemption argument, in that he insisted that the federal tax scheme imported a baseline of federal standards that the state's regulatory regime could not contravene. This included, because of the federal backdrop, a prohibition on criminal enforcement of state law in a manner that would transgress the limits of the Federal Constitution. But Pervear's claims were independently rooted in the U.S. Constitution as well, apart from their entanglement with the preemption issue. Pervear's counsel relied both on the text of the Eighth Amendment and on a more generalized notion of individual rights the U.S. Constitution guaranteed to criminal defendants. See Transcript of Record at 4, Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1866) (No. 377); *Pervear*, 72 U.S. at 476.

[199] The Twitchell Case in the Supreme Court, supra note 197, at 1. There are no surviving briefs in *Twitchell*, and it is likely that the proceedings were all oral rather than written, given that the federal appeal was filed on Wednesday, argued that Friday, and decided the following Monday. See Fairman, supra note 17, at 1318 n.47; *Twitchell*, 74 U.S. at 322.

[200] See David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 879 (1996) (arguing that long history of constitutional interpretation in the United States is best understood as aligning with common law evolutionary reasoning rather than strict textualism).

[201] See Jonathan Gienapp, The Lost Constitution: The Rise and Fall of James Wilson's and Gouverneur Morris's Constitutionalism at the Founding 4 (Aug. 18, 2020) (unpublished manuscript) (on file with Gienapp) (arguing that the Framers did not understand the Constitution as a document granting only limited powers to the national government).

the federal government as a result that hearkened back, ironically, to the antebellum theory of state interposition. They turned interposition on its head. State sovereignty theorists had claimed that the states, by virtue of their innate sovereignty, had the duty and the obligation to declare unconstitutional federal laws null and void within their boundaries.[202] James Madison and Thomas Jefferson articulated this controversial theory in the Virginia and Kentucky Resolutions of 1798–99, in which they purported to nullify the Alien and Sedition Acts.[203] John C. Calhoun echoed it later in drafting South Carolina's "Exposition and Protest," which became the basis of the state's 1832 Nullification Act, declaring the federal "Tariff of Abominations" void within the state.[204]

Nullification was the act of declaring the voidness of the unconstitutional federal law, whereas interposition was the process by which the state effectuated this purpose. Nullificationists argued that because the states were the primary unit of sovereignty in the United States, they had the responsibility to "interpose" that sovereignty as a barrier between their citizens and an unconstitutional federal law that exceeded the powers granted to the federal government. As Madison put it in the Virginia Resolution, "the states . . . have the right, and are in duty bound, to interpose, for arresting the progress of the evil."[205] The state had the duty to step between its citizens and the government of the United States when, in the state's judgment, the federal government abused its power.[206] Interposition theory rested on a premise of ultimate state

[202] This was initially conceived of before *Marbury v. Madison* established the legitimacy of judicial review, and afterwards theorists argued that it supplemented judicial review. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803); Fehrenbacher, supra note 69, at 41, 50 (describing antebellum southern views about the states' ability to use nullification and interposition to strike down an unconstitutional federal act within their borders).

[203] Virginia and Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 540, 546–47 (Jonathan Elliot ed., 2d ed. 1836); Alien and Sedition Acts, 1 Stat. 577 (1798); 1 Stat. 596 (1798).

[204] South Carolina Ordinance of Nullification, 1 S.C. Stat. 329 (1836); see Richard E. Ellis, The Union at Risk 7–8 (1987); William W. Freehling, Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836, at 131, 137 (1992).

[205] James Madison, Virginia Resolutions of 1798, *reprinted in* 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 528 (Jonathan Elliot ed., 2d ed. 1836).

[206] See John C. Calhoun, On the Relation Which the States and General Government Bear to Each Other (July 26, 1831), *reprinted in* Va. Comm'n on Constitutional Gov't, The Fort Hill Address of John C. Calhoun 1, 4, 10 (1960); see also Edward S. Corwin, National Power and State Interposition, 1787–1861, 10 Mich. L. Rev. 535, 544 (1912) (discussing the idea of a right and a duty to interpose in antebellum constitutional thought).

sovereignty and, by extension, transcendent state power. Interposition's state sovereignty underpinnings fell into disfavor with the defeat of the Confederacy,[207] but the logic behind its view of sovereign authority, now held by the federal government instead, found purchase in the *Pervear* and *Twitchell* cases.

The Supreme Court rejected the defendants' arguments in both *Pervear* and *Twitchell* out of hand. In both cases, it affirmed the holding of *Barron v. Baltimore* without much additional discussion. Chief Justice Chase noted in passing that if *Barron* had not precluded a federal claim, Pennsylvania's actions might well have run afoul of the Fifth and Sixth Amendments, although Massachusetts's prison sentence would not pose a problem under the Eighth Amendment.[208] Regardless of the Court's view of the substance of the claims, the rights the law afforded to a criminal defendant was a matter "wholly within the discretion of State legislatures."[209] On the question of whether the Bill of Rights now applied to the states in the wake of the Civil War, Chief Justice Chase wrote, "it is enough to say that the article of the Constitution relied upon in support of it does not apply to State but to National legislation."[210] The transcendent power arguments were too fanciful and too radical for the Court to accept.

To the extent that the public took notice of the decisions in *Pervear* and *Twitchell*, it interpreted the Court's rulings as rejecting the prospect of a unitary state. *Twitchell*, the *North American and U.S. Gazette* said, was based on a "farce,"[211] and the *New York World* interpreted the *Twitchell* decision as "pointedly reaffirm[ing]" that "the old and beneficial doctrine of delegated powers, [such] that the States retain all such functions as they

[207] The arguments had a rather ignominious revival in the aftermath of *Brown v. Board of Education*, when the southern states vowed to block its implementation with massive resistance. See The Decision of the Supreme Court in the School Cases—Declaration of Constitutional Principles, 84 Cong. Rec. 4255, 4460 (1956) (popularly known as the Southern Manifesto); see also John Kyle Day, The Southern Manifesto: Massive Resistance and the Fight To Preserve Segregation 15 (2014) (identifying the southern resistance to desegregation as a revival of antebellum interposition theory); Justin Driver, Supremacies and the Southern Manifesto, 92 Tex. L. Rev. 1053, 1078 n.137, 1092–93 (2014) (discussing the manifesto's connections to interposition theory).

[208] Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321, 325 (1868); Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475, 480 (1866).

[209] *Pervear*, 72 U.S. at 480.

[210] Id. at 479–80.

[211] A Statement by George S. Twitchell to His Pastor, N. Am. & U.S. Gazette (Phila.), Apr. 5, 1869.

have not delegated to the general government."[212] The Court had confirmed that "all the rights of sovereignty . . . shall be deemed to remain with and shall be exercised by the several States."[213] The Court, the paper noted with relief, had been able to check the centralizing tendencies of the war. It had sorted out the important function of state sovereignty from the "trash [that had] been mixed up with the doctrine [of states' rights]."[214] Now that secession and slavery had been divorced from state sovereignty, the *World* declared that "it is a good thing that the Supreme Court defends [state sovereignty] from assault."[215]

B. Carving Out Separate Spheres of Sovereignty

In a number of cases, the Court indicated its willingness to police the boundaries of federal and state authority. The Court's rulings would be guided by an understanding of the proper federal structure, with an eye toward making sure that neither level of government encroached on the other. [216] In the course of steering a middle path between secession and consolidation, the Court constructed a vision of dual federalism that has endured until today.[217]

1. Structural Federalism Cases

In *Texas v. White*, the Supreme Court confronted a challenge to military Reconstruction that also implicated secession.[218] In the process of writing a majority opinion that affirmed the legality of Reconstruction and condemned secession, Chief Justice Salmon P. Chase articulated a pithy conception of the nature of the federal Union that has stood the test of

[212] The Decision in the Twitchell Case, World (N.Y.), Apr. 7, 1869, at 4.

[213] Id. (quoting Proceedings of the Meeting at Harrisburg, in Pennsylvania (Sept. 3, 1788), *reprinted in* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 545 (Jonathan Elliot ed., 2d ed. 1901)).

[214] Id.

[215] Id.

[216] See Edward S. Corwin, The Passing of Dual Federalism, 36 Va. L. Rev. 1, 3 (1950) (discussing the contours of the nineteenth-century understanding of federal structure).

[217] See Ablavsky, supra note 162, at 1862 & nn.380–81 (arguing that the term and the concept of dual federalism was constructed in the late nineteenth century, although the cases Ablavsky cites for this proposition came after dual federalism's initial construction in the cases discussed here).

[218] Texas v. White, 74 U.S. (7 Wall.) 700 (1869).

time and still endures today.[219] Secession, Chase declared, had never removed Texas from the Union, and so the state of Texas had not ceased to exist or ceased to be a member of the Union. The states and the Union were linked together. The Constitution, Chase said memorably, "looks to an indestructible Union, composed of indestructible States."[220] He declared that both the federal government and the states were integral parts of the federal system in the United States.

Chase also sustained the constitutionality of military Reconstruction, which placed the states of the former Confederacy under the direct supervision of the federal government. Litigants had challenged the program of military Reconstruction right away, on the grounds that it "involve[d] a complete extinction of State power over any of the State's own internal affairs. At a single stroke [the Reconstruction Acts] convert[ed] the Union into a Consolidated Government."[221] Chase's opinion declined to characterize the program as a break in the normal functioning of the federal system—and thus a major step toward consolidation.[222] Instead of invoking transcendent federal power unleashed by the war as the basis for Reconstruction, Chase relied on the Guarantee Clause instead. After the war, the state of Texas had "no government . . . in constitutional relations with the Union," Chase wrote, and so "it became the duty of the United States to provide for the restoration of such a government," as the Guarantee Clause required.[223]

Chase's reasoning in *Texas v. White* was legalistic and rather unexceptional in tone.[224] He also justified Reconstruction with reference only to John Codman Hurd's "Constitution as law."[225] There was no discussion—or even acknowledgment—of the war's revolutionary

[219] See Charles W. McCurdy, Federalism and the Judicial Mind in a Conservative Age: Stephen Field, *in* Power Divided: Essays on the Theory and Practice of Federalism 31, 33 (Harry N. Scheiber & Malcolm M. Feeley eds., 1989); see also supra notes 62–64 and accompanying text (describing Kennedy's articulation of American federalism in *U.S. Term Limits*).

[220] *White*, 74 U.S. at 725.

[221] Brief for Complainant on Motions at 48, Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867) (No. 13), *in* 5 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 4, 51 (Philip B. Kurland & Gerhard Casper eds., 1975).

[222] See supra notes 103–19 and accompanying text (discussing Reconstruction and its link to consolidation).

[223] *White*, 74 U.S. at 729. On the Guarantee Clause, see Luther v. Borden, 48 U.S. (7 How.) 1, 32 (1849); William M. Wiecek, The Guarantee Clause of the U.S. Constitution (1972); Ryan C. Williams, The "Guarantee" Clause, 132 Harv. L. Rev. 602 (2018).

[224] See Spaulding, supra note 3, at 2040–42.

[225] Hurd, Theory of Our National Existence, supra note 50, at 273.

impact on the nation or the Constitution.[226] The Court was at pains to justify Reconstruction within the bounds of conventional constitutional reasoning. Of all the legal arguments mounted for the extraordinary arrangements of Reconstruction, the Guarantee Clause was the least revolutionary, and Chase seized upon it. His opinion owed nothing to the logic of Union victory and never acknowledged that the Court's decision-making was influenced by the radical churning of the nation during the Civil War.

In *Lane County v. Oregon*, Chase built on the formulation of American federalism he had articulated in *Texas v. White*. In *Lane County*, the Court decided that Congress's designation that greenbacks (U.S. paper currency) would be legal tender for debts did not apply to taxes owed to the state of Oregon.[227] State law required that sheriffs and county treasurers remit payment in coin. The Court carved out an exception to the federal legal tender requirement, so as to ensure that federal power would not intrude on the functioning of state government. In writing the opinion, Chief Justice Chase made clear that he was determined to maintain two distinct spheres of sovereignty. Chase wrote:

> The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.[228]

Read together with *Texas v. White*, *Lane County* revealed all of the elements of what federalism would look like in the post-war period. And indeed, Chase's vision of dual sovereignty has proved enduring: Justice Kennedy drew on precisely this formulation in writing his concurring opinion in *U.S. Term Limits v. Thornton*.[229] In *Texas v. White*, Chase laid out the theory, borrowed from Lincoln, that the people were the constituent sovereign, who had made the federal government. In *Lane County*, Chase built on these ideas, claiming that the people had also delegated their authority, under separate cover, to the states. Chase conceived of a system in which both the states and the union of states were assured of their basic integrity, and inextricably linked together. The

[226] See Currie, supra note 17, at 311–12.
[227] Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 78 (1868).
[228] Id. at 76.
[229] 514 U.S. 779, 838–39 (1995) (Kennedy, J., concurring).

states retained their "separate and independent autonomy," and the federal government remained sovereign in the spheres of power the Constitution granted to it.[230] Chase envisioned a harmonious system, wherein each level of government owed its maintenance and continued existence to the other.[231]

In *Collector v. Day*, the Court held that state judges would be exempted from federal income tax.[232] The power to tax could well be used "to destroy," the Court concluded, and the "separate and independent condition of the States . . . should be left free and unimpaired" by interference from the federal government.[233] The functioning of one sovereignty could not be left at the mercy or forbearance of the other.

The Court policed the state governments' intrusions into the federal sphere as well. In *Tarble's Case*, the Court refused to allow state judges to issue writs of habeas corpus to release prisoners from federal custody. State courts could release prisoners from illegal detention unless "it appear[s] upon [the prisoner's] application that he is confined under the authority, or claim and color of the authority, of the United States."[234] In *U.S. v. Holliday* and *The Kansas Indians*, the Court limited the reach of the state's police powers in the area of Indian relations. Regulation of commerce among the Indian tribes was a power the Constitution delegated to the federal government, and so the Court prevented the states from intruding into a realm occupied by federal law.[235] And in *Veazie Bank v. Fenno*, the Court upheld Congress's broad authority to tax bank notes issued by a state-chartered bank with the goal of removing them from circulation. This was a valid exercise of Congress's power to regulate the value of coin, and Congress could "restrain . . . the

[230] Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869).

[231] See Corwin, supra note 216, at 19.

[232] Collector v. Day, 78 U.S. (11 Wall.) 113, 127 (1870).

[233] Id. at 127, 125 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819)). Here the Court relied on the reasoning in *McCulloch v. Maryland*. See id. at 123 (quoting *McCulloch*, 17 U.S. at 427, 432).

[234] Tarble's Case, 80 U.S. (13 Wall.) 397, 409 (1871); see also Ann Woolhandler & Michael Collins, The Story of *Tarble's Case*: State Habeas and Federal Detention, *in* Federal Courts Stories 141 (Vicki C. Jackson & Judith Resnik eds., 2010) (detailing the history of *Tarble's Case*).

[235] See U.S. Const. art. I, § 8, cl. 3; United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865); Kan. Indians, 72 U.S. (5 Wall.) 737 (1866).

circulation . . . of any notes not issued under its own authority" in any manner it saw fit.[236]

The Justices did not always agree on where the dividing line between the realms of state and federal authority should be drawn, and as a result, the Court's structural federalism cases were not all unanimous. The Court was divided on questions of whether a federal action intruded too far into the federal realm, and vice versa. But there was widespread agreement among the Justices that drawing the line was within the Court's competency. What was more, it was the Court's responsibility. The Court took on the role of preventing the nation from sliding towards consolidation.[237]

2. National Police Powers

The Supreme Court's expansive reading of the Interstate Commerce Clause beginning with the New Deal looms large in our understanding of the massive growth of national power in the twentieth century.[238] But when confronted with Congress's burgeoning regulatory power under the Commerce Clause, the Chase Court set firm limits, thus deferring the expansion of federal authority until the dawn of the new century.[239] In several post-war cases, the Court confronted challenges to Congressional regulation of activities that had traditionally been viewed as part of the states' internal police powers.

In the *License Tax Cases*, the Court considered the constitutionality of provisions of the Internal Revenue Acts of 1864 and 1866, which required merchants engaged in the sale of liquor or lottery tickets to obtain a license to conduct business. The litigants argued that the license requirement was functionally a police power regulation touching internal,

[236] See Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 549 (1869); U.S. Const. art. I, § 8, cl. 5. The states were also constitutionally barred from issuing their own currency as legal tender unless it was in specie. U.S. Const. art. I, § 10, cl. 1.

[237] See Kaczorowski, To Begin the Nation, supra note 17, at 68; Currie, supra note 17, at 354 (describing the Court's crucial role in curtailing Reconstruction).

[238] See William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt 213–17 (1995); Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution 139–40, 156–76 (1998) (describing how the understanding of the commerce power broadened during the time of the New Deal).

[239] See Richard Franklin Bensel, The Political Economy of American Industrialization, 1877–1900, at 312 (2000) (arguing that the Supreme Court narrowed Congress's economic regulatory power in the late nineteenth century).

intrastate commerce within the states.[240] It therefore, in their view, transgressed the limits of Congress's power under the Interstate Commerce Clause and invaded the reserved powers of the states. Because the license requirement applied to trade in offensive items, they argued that Congress had attempted to regulate public morals, a power that properly belonged to the states as an exercise of police powers. In their view, the licensure requirement was merely in place to allow the Congress to do an end-run around its inability to regulate intrastate commerce.

The Court agreed that there were no national police powers, and the licensure requirement could not stand if the licenses at issue "must be regarded as giving authority to carry on the branches of business which they license."[241] But the Court construed the license requirement as a tax rather than a regulation. The statutes "simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid."[242] Congress unquestionably possessed the power to tax and to penalize individuals for the non-payment of taxes. It was perfectly acceptable to structure a tax in the form of license. Because this was an exercise of the taxing power (which both the states and the federal government possessed concurrently)[243] rather than a general police regulatory power, the Court sustained the statutes in question.[244]

The Court limited the *License Tax* holding in *United States v. Dewitt*, decided three years later. In *Dewitt*, the Court drew a firm dividing line between Congress's valid exercise of the taxing power and the invalid regulation of intrastate commerce. After the *License Tax* holding, Congress had gone farther. At issue was another statute, passed in March 1867, a revenue and appropriations bill that in fact covered a number of other subjects. Section 29 of the act prohibited the mixture and sale of oil

[240] The Court struck down federal legislation based on similar arguments about the reach of the interstate commerce power until the New Deal. See, e.g., United States v. E.C. Knight Co., 156 U.S. 1, 1 (1895); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542–43 (1935) (striking down federal regulations as exceeding the scope of the commerce power).

[241] The License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1866).

[242] Id.

[243] See The Federalist No. 45, supra note 11, at 237 (James Madison) (describing the concurrent possession of the taxing power).

[244] See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425–28 (1819) (setting forth the principle that the state and federal taxing powers must be exercised with due respect for the other government's sovereignty); see also United States v. Butler, 297 U.S. 1, 69 (1936); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536–37 (2012) (describing the overlap between the taxing power and authority to regulate interstate commerce).

used for "illuminating purposes, inflammable at less temperature or fire test than one hundred and ten degrees."[245] Failure to comply with the directive was a criminal offense, and Dewitt, a Detroit man, had been indicted in federal court for mixing and selling naphtha oil.[246] He challenged the constitutionality of the act, arguing that it exceeded Congress's delegated powers and invaded the authority reserved to the states. The government countered that the *License Tax* holding should govern the new statute as well. A federal tax on trade in potentially dangerous goods was permissible, and the power to regulate—and prohibit—that trade was incidental to the taxing power.[247] These were only "modes of enforcing the payment of excise taxes."[248]

The Court disagreed, striking down the statute. Chief Justice Chase, writing for the Court, confirmed that Congress's power to regulate commerce was confined to interstate or international commerce. In order to ensure the proper functioning of the federal system, "commerce among the States" had to be understood as "limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States."[249] Chase also rejected the argument that the statute was designed to facilitate the collection of taxes. He pointed out that banning a substance necessarily thwarted the collection of any revenue based on its trade. In no sense was a prohibition an "appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes."[250] The statute was "plainly a regulation of police," and because it "relat[ed] exclusively to the internal trade of the States," it was unconstitutional.[251]

[245] Act of Mar. 2, 1867, ch. 169, § 29, 14 Stat. 471, 484.

[246] United States v. Dewitt, 76 U.S. (9 Wall.) 41, 42 (1869).

[247] Beginning in the early twentieth century, the Court upheld federal statutes banning the interstate trade in noxious items, such as lottery tickets, unsafe food, and prostitution, even though Congress's regulatory motive had been to protect public health or morals rather than a purely economic one. See Champion v. Ames, 188 U.S. 321, 357 (1903); Hipolite Egg Co. v. United States, 220 U.S. 45, 57 (1911); Hoke v. United States, 227 U.S. 308, 322 (1913). These cases marked the early recognition of a national police power.

[248] *Dewitt*, 76 U.S. at 43 (noting argument of Assistant Att'y Gen. David Dudley Field).

[249] Id. at 44.

[250] Id.

[251] Id. at 44–45.

C. The Slaughterhouse Cases

The most important structural federalism case of the Reconstruction period is the *Slaughterhouse Cases*.[252] In *Slaughterhouse*, the Court was called upon to interpret the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, which prevented the states from "mak[ing] or enforc[ing] any law which shall abridge the privileges or immunities of citizens of the United States."[253]And here, the Court addressed the issue of transcendent constitutionalism—and its absorption into the text of the Reconstruction Amendments—head-on. *Slaughterhouse* involved a challenge to a Louisiana act that granted a monopoly to certain slaughterhouses in a specified area of New Orleans. This was a health regulation, designed to keep the health hazards of animal slaughter in a contained area of the city, south of the Mississippi River.[254] Several butchers kept out of the monopoly challenged the ordinance, arguing that it deprived them of the right to "exercise their trade."[255] Among other things, they claimed that the monopoly thus invaded a "privilege and immunity" of their citizenship.

In a 5–4 opinion authored by Justice Samuel Miller, the Court rejected the claim, carefully parsing the meaning of the Privileges or Immunities Clause. The butchers, Miller explained, had failed to appreciate that there were two aspects of citizenship in the United States. An American citizen was a citizen of the state and a citizen of the United States, but the two types of citizenship were distinct. The new amendment protected the incidents of federal citizenship from state infringement, but it did not say anything at all about the incidents of state citizenship. Those, Justice Miller said, "must rest for their security and protection where they have heretofore rested," which was with the state governments.[256] For this interpretation of the amendment and its recognition of two spheres of government power, Miller cited Justice Washington's opinion in *Corfield v. Coryell*, an early circuit court case interpreting the Privileges and

[252] See infra notes 283–88 and accompanying text (discussing the modern reaction to *Slaughterhouse*).

[253] U.S. Const. amend. XIV, § 1.

[254] Ronald M. Labbé & Jonathan Lurie, The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment 73 (2003); Michael A. Ross, Justice Miller's Reconstruction: The *Slaughter-House Cases*, Health Codes, and Civil Rights in New Orleans, 1861–1873, 64 J.S. Hist. 649, 653 (1998) (describing the public health aim of the regulation).

[255] The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 60 (1872).

[256] Id. at 75.

Immunities Clause of Article IV of the Constitution.[257] By contrast with the Fourteenth Amendment, Article IV dealt with the "privileges and immunities of citizens of the several states" (i.e. those that flowed from state citizenship) and required that states apply them equally to state citizens and citizens of other states that came within their jurisdiction. Miller noted that Article IV did not specify or define the content of privileges and immunities of state citizenship; it merely enacted a non-discrimination principle that allowed the state to define the scope of the rights so long as they were extended to out-of-state citizens.[258]

The Fourteenth Amendment was different in kind, not only because it acted on a wholly distinct class of rights—those incident to federal citizenship—but also because its enforcement required a great deal of federal oversight over state activity. If the Court adopted the butchers' reading of the amendment, Congress and the federal courts would now be in the business of protecting citizens against the incursions of their own states. Fundamental rights, which "belong of right to the citizens of all free governments," would now be guaranteed by federal law.[259] Until the war's conclusion and the ratification of the new constitutional amendments, "no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States."[260] Instead, Miller wrote, it was assumed that the power to define the rights of citizenship "lay within the constitutional and legislative power of the States, and without that of the Federal government."[261]

Miller pointed out that interpreting federal power in such a way would sap the ordinary police powers of the state and transfer them to the federal government. Under Section 5 of the Amendment, Congress could "also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all subjects."[262] To interpret the Amendment in this way "radically changes the whole theory of the relations of the State and Federal governments to each other and of both

[257] Id. at 75–76 (citing Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823)).
[258] Id. at 75–77.
[259] Id. at 76 (quoting *Corfield*, 6 F. Cas. at 551).
[260] Id. at 77.
[261] Id.
[262] Id. at 78.

these governments to the people," Miller found, and so he declined to do so.[263] Instead, Miller cabined the meaning of the privileges of United States citizenship to the enjoyment of rights created by the Constitution and those associated with the very existence and function of the national government.[264] These were limited in number, but included such things as the enjoyment of the writ of habeas corpus or the right to be defended by the federal government when in the jurisdiction of a foreign government.[265] These were rights that pre-existed the Fourteenth Amendment's enactment, and as Justice Field pointed out in dissent, would presumably have been protected against state infringement without the intervention of the Fourteenth Amendment.[266]

In the *Slaughterhouse* opinion, Miller made clear that he would not read the Fourteenth Amendment against the background premise that the Civil War had represented a break in the normal functioning of the American federal system. Interestingly, Miller did indicate in *Slaughterhouse* that he viewed the war as a sort of transcendent legal force, but he confined its impact to the abolition of slavery. During the war, he wrote, "slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict."[267] Miller was explicit about the fact that the Thirteenth Amendment had been conceived to instantiate this change. Its purpose was to imprint this "great act of emancipation" onto the Constitution, which would otherwise "rest [solely] on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times."[268] Miller was willing to analyze "events, [such as the war,] almost too recent to be called history," in determining what Congress was trying to capture in the text in the new amendments to the Constitution.[269] He discerned that Congress had first sought to provide a legal foundation for the war's destruction of slavery, and then had seen that "something more was

[263] Id.

[264] See Michael G. Collins, Justice Bradley's Civil Rights Odyssey Revisited, 70 Tul. L. Rev. 1979, 1982 (1996); Michael G. Collins, October Term, 1896—Embracing Due Process, 45 Am. J. Legal Hist. 71, 83 (2001) (discussing the content of rights associated with the existence of the federal government).

[265] *Slaughterhouse*, 83 U.S. at 79.

[266] Id. at 96–97 (Field, J., dissenting).

[267] Id. at 68.

[268] Id.

[269] Id. at 71.

necessary in the way of constitutional protection to the unfortunate race who had suffered so much."[270]

The *Slaughterhouse* decision, as parsimonious as it was in calculating the extent of the Privileges or Immunities Clause, did not limit the federal government's oversight of the states when it came to matters of racial discrimination. The goal of the amendments' framers, Miller emphasized, had been to secure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman . . . from the oppressions of those who had formerly exercised unlimited dominion over him."[271] The *Slaughterhouse* Court would put racial equality into the federal sphere and prevent the states from discriminating on the basis of race. Only in subsequent cases did the Court begin circumscribing the power of the federal courts and the Congress to prevent racial discrimination. In *United States v. Cruikshank* and the *Civil Rights Cases*, the Court interpreted the Fourteenth Amendment and the Civil Rights Acts as applying only to discrimination licensed by the state or conducted under color of state law.[272] These cases revealed that the issues of state police power, the extent of federal authority over the states to protect citizens' rights, and discrimination on the basis of race were inextricably interconnected. In *Slaughterhouse* itself, however, Miller indicated that the ability to discriminate on the basis of race had been carved out from the pre-war baseline of state police powers that had survived the Fourteenth Amendment intact.[273]

For Miller, there was no such analogue when it came to thinking about the war's effect on the federal system in areas of law that did not relate to racial equality. He did not discern the "pervading spirit" of the amendment to reflect a revolution that had brought about a centralized state.[274] He was unpersuaded that the architects of the Fourteenth Amendment had "intended to bring within the power of Congress the

[270] Id. at 70.

[271] Id. at 71.

[272] United States v. Cruikshank, 92 U.S. 542, 554 (1876); The Civil Rights Cases, 109 U.S. 3, 24 (1883).

[273] See Pamela Brandwein, Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth 78 (1999); Pamela Brandwein, A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court, 41 Law & Soc. Rev. 343, 346 (2007); Benedict, Preserving Federalism, supra note 21, at 60–63; Benedict, Conservative Basis, supra note 183, at 90 (discussing the Reconstruction-era Supreme Court's narrow reading of the state action doctrine, which excluded "private" discriminatory conduct from the reach of the Fourteenth Amendment).

[274] *Slaughterhouse*, 83 U.S. at 72.

entire domain of civil rights heretofore belonging exclusively to the States."[275] Legal commentator John Codman Hurd read Miller's opinion as operating "upon the idea he had adopted beforehand of the 'main features of the general system.'"[276] Miller was explicit about his goal of protecting the balance between state and federal power in the United States. To adopt the butchers' reading of the Fourteenth Amendment was to license a tremendous "departure from the structure and spirit of our institutions."[277] This much Miller was unwilling to do.

In dissent, Justice Field read the Fourteenth Amendment to do just what Miller had found problematic, which was to "place the common rights of American citizens under the protections of the National government."[278] Field argued that the amendment created a uniform national citizenship that was not dependent on geography, and now, the citizen's fundamental rights were to derive from national citizenship. He wrote:

> A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. . . . They do not derive their existence from its legislation, and cannot be destroyed by its power.[279]

In his view, Miller's reading of the amendment was simply wrong. The amendment had not created two classes of fundamental rights that were bifurcated along state and national lines. To read the amendment as Miller had reduced its meaning to a duplication of pre-existing legal principles. The Supremacy Clause already made it impossible for the states to interfere with the exercise of the limited class of rights associated with national citizenship.

Justices Bradley and Swayne both wrote dissents that ranged beyond the pure legalism of Field's opinion. Although they agreed with Field's analysis, both Justices invoked broader themes about the Civil War and the amendments' distillation of the principles northern victory had established. Justice Bradley maintained that one of the purposes of the

[275] Id. at 77.

[276] Hurd, Theory of Our National Existence, supra note 50, at 371.

[277] *Slaughterhouse*, 83 U.S. at 78; see also Justin Collings, The Supreme Court and the Memory of Evil, 71 Stan. L. Rev. 265, 272–74 (2019) (reading Miller's *Slaughterhouse* opinion in a similar way and highlighting Miller's analysis of the war's meaning).

[278] *Slaughterhouse*, 83 U.S. at 93 (Field, J., dissenting).

[279] Id. at 95–96.

Fourteenth Amendment was to memorialize the nationalism that came out of the war. "The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years," Bradley argued. The Amendment had sought to imprint the results of the war onto the Constitution. "The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety," Bradley said. It gave expression to "National will and National interest."[280]

Justice Swayne's dissent echoed the same themes. The new amendments "are all consequences of the late civil war," he wrote. As such, they had sought to make the national government truly national by throwing off "[t]he prejudices and apprehension" about the dangers of centralization that had prevailed when the country was new. The antebellum experience with extreme pro-slavery, states' rights arguments made Americans understand "that there was less danger of tyranny in the head than of anarchy and tyranny in the members."[281] Swayne insisted that the war had been a repudiation of state sovereignty principles, and that the Fourteenth Amendment's drafters had meant to reorder the nation's structure to align with the powerful national vision the war had brought about. "[T]he novelty was known and the measure deliberately adopted," he insisted. In his view, it only made sense that the new interpretation of the nation would give rise to the idea that the citizens' rights would spring from national sovereignty. Protecting citizens' fundamental rights was a power that "should exist in every well-ordered system or polity. . . . Without such authority any government claiming to be national is glaringly defective." The Amendment had been intended to change the fundamental aspects of the Constitution "as it stood before the war" to reflect a different understanding of American nationhood.[282]

[280] Id. at 123–24 (Bradley, J., dissenting).

[281] Id. at 128 (Swayne, J., dissenting).

[282] Id. at 129; see also Collings, supra note 277, at 274 (reading the *Slaughterhouse* dissents in a similar way and highlighting the dissenters' analysis of the war's meaning).

IV. RATIFYING THE FALL OF TRANSCENDENT CONSTITUTIONALISM: PUBLIC REACTIONS TO *SLAUGHTERHOUSE*

Miller's *Slaughterhouse* opinion comes in for a great deal of criticism today.[283] It is one of the most disparaged decisions in the constitutional law canon, condemned across the ideological spectrum.[284] Deliberately or not, Miller misapprehended what Congress intended in writing the Fourteenth Amendment, at least if we judge its intent by looking at the views of the amendment's proponents.[285] He twisted the meaning of the phrase "privileges or immunities of citizens of the United States" beyond recognition.[286] Miller's reading of the clause also verged on the nonsensical, as Justice Field pointed out. If Miller's view were correct, that would mean that Congress had written a new amendment that merely duplicated what the Constitution already said.[287] Miller's opinion in the *Slaughterhouse Cases* led to the adoption of a more unlikely vehicle—the Due Process Clause—as the source of substantive federal rights in the twentieth century.[288]

All this is true, and yet, mainstream contemporary reactions to *Slaughterhouse* were largely favorable. This is not to say that nineteenth-century lawyers were insensible to the fact that the Court "got it wrong," for all of the reasons just mentioned. The Court's departure from the plain meaning of the amendment was well understood.[289]A number of mainstream nineteenth-century commentators—ranging from lawyers to

[283] See, e.g., Harrison, supra note 1, at 1415 (calling Miller's reading "wrong").

[284] Jamal Greene designated it as on the fringes of the "anti-canon" of American constitutional law. He distinguished the decision from *Plessy* and *Lochner* because it remains good law. Jamal Greene, The Anticanon, 125 Harv. L. Rev. 379, 394 n.80 (2011). For critiques of *Slaughterhouse* from across the ideological spectrum, see *McDonald v. City of Chicago*, 561 U.S. 742, 852 (2010) (Thomas, J., concurring in part); Lawrence H. Tribe, Equal Dignity: Speaking Its Name, 129 Harv. L. Rev. F. 16, 21 (2015); Amar, Fourteenth Amendment, supra note 1, at 1258–59.

[285] Aynes, Misreading John Bingham, supra note 1, at 99–101. As discussed above, it is fair to say that the amendment's opponents in Congress disliked it because they agreed with the proponents on its meaning. See supra Section II.A for discussion of Senator Cowan and Representative Rogers.

[286] See Loren P. Beth, The Slaughter-House Cases—Revisited, 23 La. L. Rev. 487, 492 (1963).

[287] The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 96 (1872) (Field, J., dissenting).

[288] See Wilson R. Huhn, The Legacy of *Slaughterhouse*, *Bradwell*, and *Cruikshank* in Constitutional Interpretation, 42 Akron L. Rev. 1051, 1057 (2009).

[289] See, e.g., Tiedeman, infra note 323, at 101–03 (acknowledging that the Court departed from the literal meaning of the amendment); Royall, infra note 317, at 576–77 (noting that the Court forced a limited construction upon the amendment).

scholars to journalists—welcomed the opinion nonetheless.[290] For those who feared the radical possibility of discarding the basic federal structure, the Court's bold obstruction of Congress's intent was the feature, not the bug.[291]

In the eyes of contemporary observers, Miller had done what many American legal thinkers feared was impossible after the conflagration of the Civil War, which was to insist that federal and state spheres of sovereignty be kept distinct. To many, it did not seem as though human power could prevent the American federal system from sliding towards consolidation.[292] Congress had succumbed, writing the new amendments to bottle, rather than squelch, the centralizing energy the war had unleashed. American jurists had feared that if destiny impelled the nation toward a particular target, perhaps no human bulwark could stop it from hurtling in that direction. If the lightning of the war exerted too much force, Miller's opinion in *Slaughterhouse* signaled that the Court could provide a human counterforce.

[290] I base this conclusion on my reading of digitally searchable newspapers and magazines, law review articles, and books written in the twenty years following the decision, which are discussed and analyzed in this Part. My sources necessarily skew in the direction of the elite, who were the people writing such pieces. My decision to survey twenty years' worth of public writing on the topic is due to the fact that in the late nineteenth century, there were very few law reviews, and most initial discussions of Supreme Court decisions in both law and general periodicals was summary rather than commentary. The culture of legal academic writing, in short, looked much different than it does today, and surveying reaction for a period of twenty years gave me enough results to have a good sense of mainstream views about the case.

There is minimal scholarship charting public reactions to the *Slaughterhouse* decision, and it tends to focus on the criticism that the Court distorted congressional intent in *Slaughterhouse* by denying that the Fourteenth Amendment incorporated the Bill of Rights against the states. See Richard L. Aynes, Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases, 70 Chi.-Kent L. Rev. 627, 679 (1994) (arguing that reaction was more mixed than favorable and linking favorable reactions to increased conservatism following Reconstruction); Aynes, Misreading John Bingham, supra note 1, at 99–101 (arguing that critics charged the *Slaughterhouse* Court with betraying Congress's lofty goals in writing the Fourteenth Amendment). I agree with Aynes's view that the favorable reactions reflect a retreat from the Radical goals of early Reconstruction, but I found that the legal commentariat of the 1870s and 1880s largely supported the Court's retreat. See also Bryan H. Wildenthal, Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–1873, 18 J. Contemp. Legal Issues 153, 167 (2009) (analyzing public discussion of the meaning of the Privileges or Immunities Clause prior to *Slaughterhouse*).

[291] But cf. Aynes, Misreading John Bingham, supra note 1, at 99–101 (arguing that critics charged the Court with obstructing Congress's goals). For a particularly stark example of a scholar celebrating the Court's "misreading" of the Fourteenth Amendment, see Tiedeman, infra note 323, at 102–03.

[292] See supra Part I.

The biggest booster of Miller's importance in this regard was, unsurprisingly, Miller himself. In the 1880s, in a speech at the University of Michigan, Miller told his audience that *Slaughterhouse* had saved the Republic by taking on the fraught and delicate task of balancing state and federal power after the Civil War. The Supreme Court, he said, possessed the breathtaking authority "to bring States before it, States which some of our politicians have been in the habit of considering sovereign; not only when they come voluntarily, but by judicial process."[293] Not only did the Court hear the claims of sovereigns, Miller marveled, it arbitrated between them. This extraordinary power was remarkably ordinary in the United States, as the Court's "every-day business, almost, is to pass upon the question of conflicting rights and jurisdictions between the States and the United States."[294] As a result, Miller argued, "This court . . . may well be considered one of the highest that the world has ever seen."[295]

Miller also emphasized the important role the Court had played in soothing the fears about the likelihood of consolidation that had been so palpable as American jurists had surveyed the battered state of the country in 1865. After the Union army had staved off secession at the cost of 700,000 lives, some American jurists believed that the only way to check the disintegration baked into state sovereignty was by demolishing the states entirely. "At the close of the civil war," Miller said,

> [M]any very wise and patriotic statesmen . . . had come to the conclusion that the powers left with the States in the original formation of the Constitution . . . had been the source of a protracted and terrible war, which was just terminated by the reestablishment of the General Government in all its original powers.[296]

According to Miller, the new amendments were intentionally designed to limit the powers of the states so as to stifle their "capacity to bring about another such catastrophe."[297]

There had seemed to be no natural equilibrium between consolidation and disintegration until the Court had stepped in to calibrate the balance.

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[293] Justice Samuel F. Miller, The Supreme Court of the United States, Address at the University of Michigan (1887), *in* University of Michigan, 1837–1887: The Semi-Centennial Celebration of the Organization of the University of Michigan 85, 123 (Ann Arbor, Univ. of Mich. Press 1888).

[294] Id.

[295] Id. at 122–23.

[296] Id. at 116.

[297] Id. at 117.

The Court had saved American federalism, Miller argued. For Miller, *Slaughterhouse* signaled to the American public that they could indeed trust "that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power."[298] Miller even boasted of the Court's power to override Congress in this regard, based on the public's acceptance of the project. When the Court had undercut federal power to prevent the states from interfering with citizens' rights in *Slaughterhouse*, "public sentiment, as found in the press and in the universal acquiescence which it received, accepted it with great unanimity."[299] Congress had then ultimately acquiesced. There had been "no attempt to overrule or disregard this elementary decision of the effect of the three new constitutional amendments upon the relations of the State governments to the Federal Government."[300] In Miller's view, the Court had successfully dialed back the tremendous potential of the amendment to more manageable proportions. The Court had ensured that in the post-war period, the federal government's powers had increased (and the states' sovereignty had shrunk) only in certain narrow particulars.[301] Change had come, but it had not run amok. As a result, Miller enthused, the division of authority between the federal government and the states "remain as the great features of our complex form of government."[302]

Judge Robert Ould, a prominent Virginia lawyer and former Confederate, told law students in Virginia in 1878 that Salmon P. Chase, the late Chief Justice of the United States, had believed that the Fourteenth and Fifteenth Amendments had transformed the "character of our Government and converted the people of the Union into a Nation, in the proper sense of that word."[303] The amendments' authors, Ould conceded, had intended them "practically to obliterate the States, or make them the play-things of Federal legislation and Federal courts."[304] But the language used in the Fourteenth Amendment to effect this radical change was oblique by design, Ould said, so that it would pass muster in northern state

[298] Id. at 118 (quoting The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 82 (1872)).
[299] Id. at 118.
[300] Id.
[301] Id. at 118–19.
[302] Id. at 119.
[303] Ould, supra note 16, at 385. Ould said he did not agree, because he thought that the federal arrangement set up by the original Constitution could not be changed by amendment. Id. at 386; see Vorenberg, supra note 17, at 107–12.
[304] Ould, supra note 16, at 392.

legislatures.[305] And because of the vagueness of the language of the Privileges or Immunities Clause, the amendments' radical drafters had "outwitted themselves."[306]

In the *Slaughterhouse Cases*, the appellants' efforts to secure the Supreme Court's endorsement of radical centralization had fallen flat. The litigants had "contended that the last three amendments . . . consolidated the several States into one people . . . plac[ing the States] under the oversight and restraining and enforcing hand of Congress; in a word, that these amendments changed what before had been universally recognized as a Union of States into an Empire."[307] Instead of endorsing this theory, the Court had read the language narrowly and thus defeated the "hideous features" of the Republican program. The Justices had proved "[un]willing to abolish the States, or to declare that Congress had supremacy over the rights of citizens of the States." [308] The judiciary had saved American federalism, Ould declared.

Northerners welcomed Miller's opinion too. Brooklyn lawyer Samuel T. Spear praised the Court's decision for its careful differentiation between state and federal citizenship. It made sense, Spear decided, for the citizen to be bound to his government in two respects, and for each government to offer protections in distinct realms.[309] The *New York Times* praised the Court for its "rational and careful interpretation of the rights of the States and those of the Union."[310] The paper hoped that the decision would strike "a fatal blow to that school of constitutional lawyers who have been engaged, ever since the adoption of the Fourteenth Amendment, in inventing impossible consequences for that addition to the Constitution."[311]

Famed jurist Thomas M. Cooley defended the post-war Supreme Court against accusations that the Justices were interested in expanding federal power at the expense of the states. Cooley said that such a characterization was based on associating the Justices with the Republican Party, based on their appointments by Republican presidents, rather than looking at their

[305] Id.
[306] Id.
[307] Id. at 390.
[308] Id. at 392.
[309] Samuel T. Spear, United States Citizenship, 16 Alb. L.J. 176, 177, 180–81 (1877).
[310] The Scope of the Thirteenth and Fourteenth Amendments, N.Y. Times, Apr. 16, 1873, at 6.
[311] Id.

judicial records.[312] The Court had confirmed a moderate Unionist point of view, "affirm[ing] and re-affirm[ing] that the Union formed under the constitution was an indissoluble Union of indestructible States," but it had also "upheld the rights of the States in the plainest terms, and protected them with plenary power."[313] Cooley cited the *Slaughterhouse Cases* as "ample proof of what is here asserted."[314] The *Pittsburgh Daily Post* rejoiced that in the *Slaughterhouse* decision, the Supreme Court had pushed back against the "extreme Federal theory" embodied in the new constitutional amendments and committed itself to "maintaining States' rights."[315] The Supreme Court had awakened the nation and the Republican Party to the realization that their duty was to arrest "the tendency towards a consolidation of the entire powers of government."[316]

William Royall, a Virginia lawyer and former Union soldier, admitted that the *Slaughterhouse Cases* represented a vast departure from what Congress intended in drafting the Fourteenth Amendment.[317] But the Court's pushback reflected the concerns of most Americans, who had feared that the war would signal the loss of state sovereignty. "The truth is," he wrote, "when this amendment first came before the Supreme Court for construction, the minds of patriotic men were filled with alarm at the centralizing tendency of the government."[318] Reconstruction itself was deeply troubling: the President "was holding a half-dozen states under the armed heel of military despotism; the Congress of the United States was indicating its disposition, strongly and more strongly at each successive session, to encroach upon the reserved rights of the states."[319] Indeed, Royall argued, "those who wished well to their country looked with sorrowing eyes upon the prospect that the ancient landmarks of the states were to yield before the advancing strides of an imperial despotism."[320] This worry had animated the Court in *Slaughterhouse*; the Court was looking "to put some construction upon this amendment which would

[312] Thomas M. Cooley, The Uncertainty of the Law, 22 Am. L. Rev. 347, 354 (1888).

[313] Id.; see also Thomas M. Cooley, The Legal Aspects of the Louisiana Case, 1 S.L. Rev. (n.s.) 18, 42 (1875) (arguing for the importance of maintaining a strong dividing line between federal and state power after the Civil War).

[314] Cooley, supra note 312, at 354.

[315] The Supreme Court and State Rights, Pitt. Daily Post, Dec. 9, 1887, at 4.

[316] Id.

[317] William L. Royall, The Fourteenth Amendment: The Slaughter-House Cases, 4 S.L. Rev. (n.s.) 558, 576 n.35 (1878).

[318] Id. at 576.

[319] Id.

[320] Id.

curb the progress of Federal power."[321] The Justices' impulse, Royall believed, was "a most patriotic one."[322]

Law professor and prolific treatise writer Christopher Tiedeman praised the Court for its fortitude in recalibrating the American federal balance after the war. The perpetual Unionist point of view had been borne out by the logic of Union victory, when "change was . . . wrought in the views entertained on this constitutional question, by the arbitrament of the sword."[323] It was then made manifest in the Fourteenth Amendment, which declared the primacy of national citizenship, and made state "citizenship a derivative of the national."[324] But then, Tiedeman argued, the amendment's drafters, "[f]lushed with a decisive victory over the State Rights' party, obtained in the highest court of appeals known to politics [i.e., the war]," had overcorrected.[325] They had gone too far in the direction of centralization. If the Fourteenth Amendment "had been allowed to have its full literal effect," the parade of horribles that the Founding generation had sought to guard against would have come to pass.[326] It would have resulted in "the establishment of a strong national government and the subjection of the States to the condition of provinces, and this government would have very soon ceased to be a federal government, save in name."[327]

The Court had pushed back in *Slaughterhouse* by construing the language of the Fourteenth Amendment against a background assumption that the state and federal governments had to remain distinct and intact. The Court had understood that the war had warped citizens' sensibilities momentarily and thus earned Tiedeman's praise for "dar[ing] to withstand the popular will as expressed in the letter of this amendment."[328] If the Court had not taken this "bold and courageous stand" and ruled the other way, Americans would have witnessed "a complete reduction of the States to the condition of provinces, and a grant to the United States Government of a supervisory control over the

[321] Id.
[322] Id.
[323] Christopher G. Tiedeman, The Unwritten Constitution of the United States: A Philosophical Inquiry into the Fundamentals of American Constitutional Law 97 (N.Y., G.P. Putnam's Sons 1890).
[324] Id. at 98.
[325] Id. at 101.
[326] Id. at 102.
[327] Id.
[328] Id. at 102–03.

smallest concerns of life."[329] As Miller had, Tiedeman read the lack of popular outcry over *Slaughterhouse* as popular acceptance of the compromise the Court had engineered, in which the courts would calibrate the balance between the two levels of government.[330] By the 1870s, thanks to the Supreme Court, Americans had, in Tiedeman's view, recovered from their war-induced mania for consolidation.

There were skeptics too, to be sure, who attacked the Court from multiple directions. Not everyone was satisfied with the Court's record in policing the boundaries of federal and state authority. Among the Court's critics was prominent New York lawyer David Dudley Field, whose brother Stephen was an associate Justice on the Court—and author of one of the *Slaughterhouse* dissents.[331] In a popular essay published in 1881, Field decried the centralization that had gripped the nation in recent years, which was "no doubt due in part to the surges of the civil war."[332] This was "deplorable"—if somewhat inevitable.[333] During the war, "[t]he nation was struggling for life, and those who administered its affairs did not always measure their power by their right," and this worrisome trend had continued in the war's aftermath.[334]

The war had pushed the country to overcorrect against secession, and Field argued that the Supreme Court had not done enough to stem the tide of centralization that had come on since the war. In his mind, the Court paid lip service to state sovereignty, seeking to demonstrate that the war had not altered the balance between the states and the federal government in a profound way. Yet the federal government continued its slow accretion of power, unchecked by the Court.[335] He disliked the Court's

[329] Id. at 102, 108; see Louise A. Halper, Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemma of Small-Scale Property in the Gilded Age, 51 Ohio St. L.J. 1349, 1350 (1990) on Tiedeman's (positive) views on counter-majoritarianism and fears of large-scale institutions both in the economy and in government.

[330] Tiedeman, supra note 323, at 108–09.

[331] Henry M. Field, The Life of David Dudley Field 82 (N.Y., Charles Scribner's Sons 1898). David Dudley Field also argued a number of Reconstruction-era cases to come before the Court, including *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868); *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1869); and *United States v. Cruikshank*, 92 U.S. 542 (1876); see also Field, supra, at 68–106, 182–207, 219–242 (providing a biography of David Dudley Field and detailing his reputation as a prominent legal reformer).

[332] David Dudley Field, Centralization in the Federal Government, 294 N. Am. Rev. 407, 422 (1881) [hereinafter Field, Centralization].

[333] Id.

[334] Id.

[335] Id. at 417.

adoption of the term "police power" to describe the state's authority,[336] "as if these great commonwealths which, according to the theory, divide the attributes of sovereignty with the United States, and which make most of the rules of property and of conduct under which we live, had been reduced to the condition of a body of police officers!"[337] The post-war Court, in Field's estimation, had denigrated the importance of state sovereignty and had not limited the usurpations of Congress sufficiently.[338]

There were critiques from the opposite direction as well, although praise for the opinion dwarfed criticism in the public arena.[339] Vermont Senator George Edmunds denounced *Slaughterhouse's* logic in the course of debate over the Civil Rights Act of 1875.[340] "What is it to be a citizen of the United States if . . . the citizen cannot be protected in those fundamental privileges and immunities which inhere in the very nature of citizenship?" Edmunds asked.[341] Edmunds insisted that the new law would, contrary to the *Slaughterhouse* holding, declare that "every privilege and every immunity of an American citizen shall be sacred and protected by the power of the nation."[342] He rejected the sophistry of "those . . . who go . . . talking dialectics about attorneys and slaughter-house cases and police regulations," and thus denied federal power to prevent states from invading the rights an individual held by virtue of his state citizenship.[343] An 1876 article in the *Washington National Republican* made a similar point, marking *Slaughterhouse* as a terrible betrayal of the nationalistic spirit the war had ignited. Union triumph in the war had unleashed "a mighty impulse in favor of nationality," which

[336] See Cooley, supra note 163, at 572, for a sense of the general understanding of the police powers just after the conclusion of the Civil War. The term had been used in the Marshall Court era, and the idea stretched far back, but thinking about police powers and the regulatory powers of states took off after the Civil War. See Munn v. Illinois, 94 U.S. 113, 145–48 (1876) (providing what was considered the foundational analysis of the states' police powers in the late nineteenth century); Novak, supra note 163, at 246; Harry N. Scheiber, Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America, 107 Yale L.J. 823, 824 n.6 (1997) (noting that the concept of police powers stretches at least as far back to Blackstone) (reviewing William J. Novak, The People's Welfare: Law & Regulation in Nineteenth-Century America (1996)).

[337] Field, Centralization, supra note 332, at 413.

[338] Id. at 423.

[339] See supra note 290.

[340] Act of Mar. 1, 1895, ch. 114, 18 Stat. 335, 335–37.

[341] 3 Cong. Rec. 1870 (1875).

[342] Id.

[343] Id.

culminated in the Fourteenth Amendment, making national citizenship paramount.[344] But Miller's opinion in *Slaughterhouse* had effectively "declar[ed] that the solemn provision of the Constitution creating citizenship of the United States means nothing."[345] The decision had undercut the "grandest result of the war." The Supreme Court had effectively settled the country back into old patterns. Read collectively, the Court's post-war jurisprudence had established that the lion's share "of allegiance is due from the citizen to the State governments, and but a diminutive fraction to the Federal Government."[346]

CONCLUSION

In the aftermath of the Civil War, American intellectuals viewed the Civil War as a force of transcendent lawmaking. It was a historical catalyst, forging the United States into a nation—and thereby vindicating the views of perpetual Unionists and demolishing the compact theory of the Union. But its power was also uncontrollable, and American jurists feared that the war could result in the destruction of American federalism. Because the impetus for consolidation was rooted in the transcendent forces of history rather than the ordinary processes of law creation, legal thinkers of the Civil War era believed that it might be impossible for human actors to check the centripetal energy the war had unleashed.

Congress sought to translate the war's nationalistic energy into text in the course of writing the Fourteenth Amendment. The amendment's proponents argued that Section One merely instantiated national sovereignty—and the logical corollary of the primacy of national sovereignty, which was that citizens' fundamental rights would derive from and be protected by the federal government. The post-Civil War amendments had captured some of the nationalistic spirit of the war, but it was not clear that they would constrain the power of the federal government or prevent the creation of a unitary national state.

After the Civil War, the Supreme Court significantly narrowed the revolutionary potential of the Fourteenth Amendment, as generations of legal scholars have noted. What scholars have failed to appreciate, however, is exactly what Justice Miller meant to stifle in writing the

[344] Citizenship of the United States and the Late Supreme Court Decisions, Nat'l Repub. (D.C.), Apr. 5, 1876, at 2.

[345] Id.

[346] Id.

majority opinion in *Slaughterhouse*. The Supreme Court sought to provide a counterforce against the forces of transcendent lawmaking, intending to preserve the fundamental distinction between state and federal authority in the United States, which the Justices feared might be entirely elided otherwise.

In doing so, the Court rejected arguments that transgressed the bounds of ordinary constitutional principles, choosing instead to ground their opinions in "the constitution as law," as legal theorist John Codman Hurd termed it.[347] The Justices translated the larger social changes swirling around them into the language of law, transmuting them in the process. The post-war Court did preserve the structure of American federalism in the face of a threat that has long-since vanished from historical memory, largely because the Court did its job so well that the transition from wartime chaos to post-war stability appears seamless in retrospect.[348] There were, to be sure, great tradeoffs that came with the Court's decision to reject the revolutionary potential of transcendent constitutionalism in the Civil War era. The Court's parsimonious reading of the Privileges or Immunities Clause required later proponents of the growth of federal power to interpret the Due Process Clause in unlikely ways, but the Court's decision to undercut the intention of the Fourteenth Amendment's drafters also served an unappreciated purpose. To many American legal thinkers living in the aftermath of the Civil War, the Supreme Court's decision to quash the radical potential of transcendent constitutionalism represented a welcome return to the ordinary operation of law in the United States.

[347] See Hurd, Reconstruction, supra note 120, at 246, 250–52.

[348] See William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 8–21 (2019), on the idea that (messy) history is often distilled, over time, into more orderly principles useful for the modern day. A similar theme can be found in William Baude & Stephen E. Sachs, Originalism and the Law of the Past, 37 Law & Hist. Rev. 809, 813 (2019), arguing that legal doctrine is the part of the past that can reliably be translated for modern contexts.