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WAITE, WAITE, DON'T TELL ME

Morrison R. Waite was not President Grant's first choice to fill the seat that had become vacant when Chief Justice Salmon P. Chase died in May 1873. Quite to the contrary, the president's efforts to replace the deceased chief justice lasted eight months and was at times such a fiasco that one member of Congress sarcastically suggested a bill to abolish the chief justiceship "so as to spare the president the mortification of further appointments."¹ It did not help matters that three sitting justices, Samuel F. Miller, Noah H. Swayne, and Joseph Bradley, coveted the position. Each had supporters among powerful Republicans, and Miller and Swayne in particular lobbied hard for the appointment.² Grant, however, decided against appointing from inside the Court, and on November 8, 1873, he offered the job to Senator Roscoe Conkling of New York. Conkling, a powerful figure who was renowned for his arrogance, rejected the seat.

Surprised, and probably embarrassed, Grant reportedly offered the seat to two other senators, Timothy O. Howe and Oliver P. Morton, both of whom turned him down. Next, he offered it to Secretary of State Hamilton Fish, who also declined. Grant's next choice, Attorney General George H. Williams, accepted the nomination. However, charges of corruption derailed Williams's nomination. Among other things, he was said to have mingled Justice Department money with his personal accounts to purchase extravagances for his own use. On January 7, 1874, bowing to pressure from Senate Republicans, Williams withdrew his name.

Within a few days Grant selected Caleb Cushing for the post. Although the seventy-four-year-old Cushing was a respected lawyer, he was burdened by a proslavery past. In the 1850s, while serving as President Franklin Pierce's attorney general, Cushing had defended the *Dred Scott* decision. Although he belatedly converted to Republicanism, party purists still detected taint, and he was attacked vehemently in the press. The *New York Times*, for example, charged that "Jeff Davis himself could not have picked a man more pleasing to the Democrats."³ And the *Nation* observed that in nominating Cushing, "the President has at last entered the small circle of eminent lawyers and then with great care chosen the worst man in it."⁴ In the face of intense opposition from within the president's own party, on January 14 Cushing asked Grant to withdraw his name.

Perhaps the party faithful were relieved when, on January 19, Grant turned to the relatively unknown Morrison R. Waite to fill the post. The nomination did not receive universal acclaim. Critics maintained that Waite was not qualified for the job of chief justice. The *Chicago Times* conjured the ghosts of former chief justices to express its dissatisfaction: "Verily, the shades of Jay and Marshall, and Taney, and Chase may arise to protest against a profanation of this venerated seat by a man so utterly incapable of filling it acceptably."⁵ Most of the objections took a milder tone, however. Describing Waite as a gentleman of only limited or local legal practice who had never argued a case before the nation's highest tribunal, the *New York Times* reported that "the judges of the Supreme Court regret that the selection has not been made from lawyers known and admitted by the entire country as in the first ranks of their profession."⁶

Indeed, Justices Field and Miller both expressed reservations about Waite, referring to him as "mediocre," "a man of fair but not great abilities," and of "limited legal acumen."⁷ The *Nation* agreed that the president had, with remarkable skill, avoided choosing a first-rate man. Waite, it said, "stands at the front rank of second-rate lawyers."⁸

Even critics agreed, however, that Waite was "a man of the highest character and best possible standing at the bar of his own state."⁹ Although he was relatively unknown in the national political scene, Waite was not necessarily unsuited for the job of chief justice. He was born on November 27, 1816, in Lyme, Connecticut, to a family that traced its roots to the American Revolution. Although he described his father as a country lawyer, the elder Waite served as chief justice of the Connecticut Supreme Court for about twenty years.

Morrison Waite received the best education available in his time. From a modest beginning in the Lyme schoolhouse, he attended a prestigious private school, Bacon Academy, and then went on to Yale College. While at Yale he became a close friend of William Evarts, who would go on to be one of the leading lawyers and political figures of his time. In those days the typical legal education consisted of "reading law" in the office of an established lawyer. In 1837, after graduating near the top of his Yale class, Waite returned to Lyme to read law with his father.¹⁰

Like many young New Englanders of his generation, Waite soon left his hometown in search of success in the western frontier. In 1838 he settled in Maumee City, a growing town in northwestern Ohio, where his uncle worked as a merchant. There he took a job with Samuel M. Young, a lawyer who had arrived in Maumee a few years earlier. Together, Young and Waite built a successful legal practice specializing in business and property issues. When Toledo became the county seat in 1850, Waite moved there to set up a branch office. Young left the firm in 1856 and went on to become a successful businessman.

The Toledo area was frontier at the time Waite arrived. Ohio was so sparsely populated that lawyers and judges "rode circuit," with a group of perhaps two or three lawyers and a judge riding horseback from town to town to hear cases. They sometimes shared rooms in pioneers' log cabins and held court wherever they could. Because there were no libraries and few books available, Waite honed his memory

for the law. In these early years he polished his legal skills and developed a reputation for fairness and honesty. As the state grew Waite's legal practice in Toledo became more conventional and prospered. By the time Grant tapped him for the high court in 1874, he was considered to be one of the best lawyers in northeastern Ohio.

Although Waite was active in politics, he did not harbor any particular ambitions for high public office. He landed in Ohio as a "Henry Clay Whig"—attuned to the interests of business and government involvement in promoting economic prosperity.¹¹ According to his biographer C. Peter Magrath, however, life on the frontier also molded Waite's political ideals by adding a strong faith in self-government.¹²

In 1849 Ohio Whigs took a position against slavery. Waite ran on that platform to win a seat in the state's House of Representatives, where he served one term in 1850. In 1854 Waite left the Whig Party. Along with other Whigs, antislavery Democrats, and Free-Soilers, he helped develop the Ohio Republican Party. Throughout the Civil War and afterward he became a mainstay in state Republican politics and even ran a losing campaign for Congress in 1862 as a conservative Republican. But Waite never again held significant elected office and was not particularly active in the national party.

The event that thrust Waite into the national scene, garnered Grant's attention, and eventually resulted in his nomination to the Supreme Court involved a legal dispute with Great Britain. The United States claimed that Great Britain had violated the rules of neutrality during the Civil War by supplying and outfitting Confederate ships in British ports. The countries agreed that the claim should be submitted to an international board of arbitration, with each side being represented by an agent and three legal counsels.

President Grant chose Assistant Secretary of State J. C. Bancroft Davis to be the U.S. agent to the Geneva Tribunal. His first two selections for legal counsel, Caleb Cushing and Waite's college friend William Evarts, came from the highest ranks of the nation's legal profession. His third pick, at the suggestion of Secretary of Interior Columbus Delano, was Morrison R. Waite.

When the Geneva Tribunal convened in June 1872, Waite comported himself well. While the more famous and flamboyant Cushing and Evarts handled most of the oral argument, Waite did much of the painstaking work that was essential for America's case. Marshaling evidence from Great Britain's own naval records, he proved that the British had allowed Confederate vessels to use British ports as a base of operations. The result was a satisfying \$15.5 million judgment and even more satisfaction in terms of national pride.

Waite's performance at the Geneva Tribunal hearings and support of friends like Evarts brought him to the president's attention. On January 18, 1874, Republican Party insiders reported, "It seems highly probable that he [the president] will name Mr. Waite of Ohio. We are convinced Mr. Waite has every requisite except repute."¹³ The following morning President Grant sent Waite's nomination to the Senate where, considering the pandemonium resulting from his earlier nominations, lack of repute may have been a positive factor. It took the Senate only two days to confirm the nomination by a vote of sixty-three to zero.

The Civil War was less than a decade in the past when Waite took the office of chief justice in March 1874. The Court's docket still contained some cases that involved disputes growing directly out of the war. In one the Court upheld a ruling that a loan of Confederate currency, made in May 1862, could not be repaid in Confederate currency that had become worthless after the war.¹⁴ Scattered cases of this sort, some involving confiscation of property by Union or Confederate troops, remained on the docket for another decade.¹⁵ Although they are not important in terms of constitutional development, they serve as a reminder that the Civil War was not history to Americans of Waite's time. It was recent memory.

By far the most lasting legacy of the Civil War in terms of constitutional law was the ratification of the three postwar amendments to the Constitution. Two of these Reconstruction Amendments had relatively straightforward expressed purposes. The Thirteenth Amendment, ratified in 1865, prohibited slavery and involuntary servitude. The Fifteenth Amendment, ratified in 1870, guaranteed that the right to vote shall not be denied because of a citizen's race, color, or previous condition of servitude. The Fourteenth Amendment, ratified in 1868, is less explicit. Section 1 reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Although the meaning of this language has remained controversial to this day, it is fair to say that, like the other two Reconstruction Amendments, its most immediate purpose was to guarantee political and civil rights for the former slaves. But the language of the Fourteenth Amendment is both vague and sweeping. Ultimately its reach would be as well.

Many of the ideas contained in these amendments—abolition of slavery, the right to vote, U.S. citizenship, privileges and immunities of citizens, due process, and equal protection—would be first defined and explained during the Waite Court era. The first case to address them, however, was decided on April 14, 1873, about nine months before Waite took office. To understand these issues and the legacy of the Waite Court it is necessary to go back to that time.

The case, known as the *Slaughterhouse Cases*, involved a Louisiana statute designed to centralize and regulate the slaughtering industry in the city of New Orleans.¹⁶ There was little question of the need to regulate the industry. New Orleans butchers traditionally dumped waste, called offal, into the Mississippi River. And because most slaughterhouses were located upstream of the city, their means of discarding garbage contaminated the city's water supply. A city health official graphically described the problem: "Barrels filled with entrails, liver, blood, urine, dung, and other refuse, portions in an advanced stage of decomposition, are constantly being thrown into the rivers but a short distance from the banks, poisoning the air with offensive smells and necessarily contaminating the water near the bank for miles."¹⁷ As a result of these practices, New Orleans suffered repeated cholera epidemics and gained a reputation as one of the unhealthiest cities in the United States.¹⁸

To address the problem, the Louisiana legislature passed a law authorizing one centralized slaughterhouse downstream from the city. It granted to the Crescent City Live-Stock Landing and Slaughterhouse Company an exclusive twenty-five-year franchise to build and operate the facility. The statute also prohibited slaughtering for profit in any other location. One company would control the central slaughtering facility under this plan, but the statute did not create a monopoly on the business of slaughtering. To the contrary, it expressly prohibited the company from refusing to allow any butcher to slaughter animals in its facilities, and it strictly regulated the fees the company could receive for the use of the facilities.¹⁹

The Louisiana legislature's approach to reducing the health problems associated with slaughtering animals in urban environments was not the least bit unusual at that time. European nations had much earlier used a system of centralized slaughterhouses, and by 1869 many American cities had adopted the practice as well.²⁰ The idea was not unique to the slaughtering industry. Using a centralized public market as a means of regulating trade and assuring safe products was a common practice in nineteenth-century America, fully supported by legal precedent.²¹ Even the technique of giving an exclusive franchise to a private company was entirely common and sanctioned in constitutional law. In short, the legislature's plan to control the industry fit neatly into the mid-nineteenth-century ideal of the well-ordered market as well as the current trends for regulating businesses that posed a danger to the public health. Yet the plan met vehement resistance. Opponents charged that the statute was a product of corruption. The result, they claimed, was the grant of exclusive privilege to a monopoly of outsiders with no experience in the slaughtering industry. Politics and race also factored into the opposition. Enacted in 1869, the slaughterhouse law was a product of a Reconstruction legislature in which blacks joined with white Republicans to form a plurality in both houses in Louisiana. Many New Orleans whites chafed at being governed by a legislature made up of blacks and "carpetbaggers" and were inclined to view any laws it enacted as illegitimate.²² Opposition also came from the established butchers of New Orleans, who sought an injunction in the state courts to prevent the company from implementing the terms of the slaughterhouse statute. After a series of suits and countersuits lasting more than a year, the Louisiana Supreme Court upheld the statute.²³

Before ratification of the Reconstruction Amendments, the decision of the state's highest court would have ended the dispute. Under the view of federalism prevalent at the time, the federal government was supreme in its sphere of activity. But the federal sphere of authority was relatively small. It included only those powers enumerated in or implied by the Constitution. The vast majority of governmental functions, which were left to the states, were called the "police power of the states."

The boundaries of the "police power of the states" were broad and only vaguely defined. Typically judges described the state's police power as the power to make rules governing health, safety, education, morals, peace and good order, and the general welfare of the state. Over time, the definition would become controversial. In the 1870s, however, the slaughterhouse law was generally thought to be the kind of regulation that fell within the "police power of the states." Most lawyers and judges

of the time would have agreed that the determination of how to regulate the slaughterhouse industry, or whether to regulate it at all, was entirely up to the states. With a display of adroit legal skill and good imagination, the independent butchers' attorney, John Campbell, used the new amendments to the Constitution to give the case a new life in the federal courts. Campbell took full advantage of the fact that the Reconstruction Amendments had not yet been tested in the Supreme Court. Posturing the dispute as one of arbitrary government power versus individual liberty, he argued that the new amendments gave the federal courts the authority to secure individual liberty, individual property, and individual security and honor from unjust legislation of state governments. His argument tied together the Thirteenth Amendment's prohibition of slavery and indentured servitude and the Fourteenth Amendment's guarantee that no state shall deny the privileges or immunities of citizens of the United States. He maintained that these privileges and immunities included immunity from compulsory work at the will of or for the profit of another, and a guarantee that any man may engage in any lawful pursuit for which he may have the requisite capacity, skill, or capital. They also included a right to be entitled to the full fruits of one's labor and a right to be free from monopoly.

It was true, he admitted, that the white butchers of New Orleans were not handcuffed and taken away in chains, as had been African slaves. Nevertheless, Campbell argued, the guarantees of the amendments were not confined to any race or class. Their guarantee of free labor applied to the white butchers as well as former slaves. The butchers had been compelled to close up their shops and prohibited from engaging in their trade except on the property and for the profit of the corporation. Their rights had been taken away and become the sole and exclusive privilege of a single corporation.²⁴

John Campbell was a former justice of the U.S. Supreme Court who had resigned when Louisiana joined the Confederacy. His legal skill was legendary. But it was not enough to convince a majority of the Supreme Court that the slaughterhouse act violated the Constitution. Writing for a five-to-four majority, Justice Samuel Miller ruled that under the American system of government, the states had the power to regulate businesses such as the slaughtering industry. A Lincoln appointee, Miller took a seat on the Court in 1862 and served until 1890, two years after Waite's death. Miller's background gave him a unique perspective of the conflict over the slaughterhouse legislation. Born and raised on a farm in rural Kentucky, the future Supreme Court justice stood six feet tall and weighed more than two hundred pounds by the time he was a young adult. He looked like a strapping farm boy, but his inclinations pointed elsewhere.

When he was fourteen, Miller left the farm and went to work in a local drugstore. Six years later he entered the Medical School at Transylvania University. A cholera epidemic that hit the United States just before he entered school peaked his interest in prevention of disease and epidemics. And although the treatments he learned—bloodletting and doses of calomel or turpentine to induce vomiting—eventually and happily went out of favor, the experience instilled in him an interest in the prevention of disease and epidemics.

In 1836 Miller opened a medical practice in Barbourville, Kentucky, a stopping point for people traveling across the Cumberland Gap along the Old Wilderness Road. He saw the town plagued by repeated outbreaks of cholera, and although not yet aware of germ theory, he began to suspect that the disease was linked to the water. He also started to become disenchanted with the practice of medicine. In 1842 he married Lucy Ballinger, whose father, uncle, and brother were all lawyers. Perhaps inspired by his wife's family, he began to study law. In 1846 he was admitted to the bar and began practice in Barbourville. With an economy heavily dependent on the traffic of immigrants across the Cumberland Gap, Barbourville was entering upon hard times. By the late 1840s new routes along the Ohio River, along with the development of steamboats and railroads, began to cut into the town's trade. In 1850 the Miller family moved west to the Mississippi River town of Keokuk, Iowa. Barbourville's economic decline was not the only motivation for Miller's move, however. During his years there Miller had become an ardent and vocal opponent of slavery. When, in 1849, Kentucky voters ratified a new proslavery constitution, he decided it was time to leave the dying town and slave state.²⁵

At the time, Keokuk was on the verge of an economic boom as a hub for the transportation of farm goods and steamboat traffic. Soon after arriving Miller joined the practice of one of the town's most successful lawyers. Both Keokuk and Miller prospered. But the town's prosperity was not assured. Although it billed itself as "the gate city to the west," it was actually engaged in a fierce competition with Burlington, Iowa, for the right to claim that title. When, in 1856, the main route of the Chicago, Burlington, and Quincy Railroad skipped Keokuk and went to Quincy, Illinois, instead, Keokuk's fortunes began to decline. The town tried to compete by issuing municipal bonds to draw railroads. But its efforts were to no avail. By 1859 Keokuk had only the debt incurred by its bonds, and its only remaining major industry was, ironically, hog slaughtering.²⁶

In 1856 Miller participated in Iowa's first Republican Party Convention. Convention delegates chose him as their president and, that same year, nominated him to run for the state senate. Although Miller lost his election, Republicans did well in the state, and John Frémont, the Republican candidate for president, won Iowa. During the next presidential campaign in 1860, Miller vigorously campaigned for Lincoln throughout Iowa and southern Illinois.

In 1862, when Congress passed legislation reorganizing the federal judiciary, Iowa, Minnesota, Kansas, and Missouri were placed into a new Ninth Circuit. Political allies in Iowa had already been pressing for Miller's appointment to a vacant seat on the Supreme Court. Now, with that vacant seat targeted for a justice from a state in the new Ninth Circuit, they got their wish. On July 16, 1862, just one day after enactment of the judicial reorganization law, Lincoln nominated Miller to be an associate justice. Three days later the Senate confirmed the appointment.²⁷ In Miller, Lincoln undoubtedly appointed a staunch Republican. But as historian Michael A. Ross observes, Miller's political and judicial philosophy was shaped not only by his opposition to slavery but also by the experience of sharing in the dashed dreams of Barbourville and Keokuk. Describing Miller as belonging to the western wing of the

Republican Party, Ross explains that while all Republicans championed the benefits of free rather than slave labor, the western party members eventually came to believe that northeastern capitalists harmed their region in much the same way that slaveholders poisoned the South.²⁸ Something of this philosophy—its distrust of speculators, financiers, and creditors; its faith in the common farmer and worker; and its belief in the right of voters to address economic problems—was evident in Miller's early decisions.²⁹ It certainly helps explain his majority opinion in the *Slaughterhouse Cases*. Although the butchers' attorney, John Campbell, complained that the slaughterhouse law created an illegal monopoly, Miller viewed the statute as a normal exercise of the "police power of the states." Moreover he rejected Campbell's portrayal of the nature of that power. Where Campbell portrayed the dispute as a conflict between individual liberty and government power, Miller viewed the police power as a balancing between individual liberty and community interests. The police power, he said, was based not only upon the principle that all people ought to use their property so as not to injure their neighbors, but also upon the principle "that private interests must be made subservient to the general interests of the community."³⁰

Miller also rejected Campbell's idea of the degree to which the Reconstruction Amendments had given the federal courts a new tool for overseeing state laws. Under the standard legal doctrine of the time, the Constitution's limitations on the states' use of the police power were very few. Federal courts did overrule acts of state legislatures, but their authority to do so was limited. For example, state laws that interfered with Congress's power to regulate interstate commerce were subject to the scrutiny of the federal courts. In addition, Article I, Section 10, of the Constitution contained a few specific limitations on state authority, most important the provision that no state shall pass any law "impairing the obligation of contracts." Otherwise, the Constitution did not interfere with the "police power of the states." Not even the federal Bill of Rights applied to state legislation.³¹

Campbell had argued that the Reconstruction Amendments changed both the nature of the state's police power and the character of American federalism. The amendments, he argued, placed a new limit on the states by allowing the federal courts greater latitude in protecting individual rights, including some not enumerated in the Constitution, against state legislation. Justice Miller agreed that the Reconstruction Amendments changed the federal system in some ways. That much was obvious. But he was unwilling to agree that the amendments' framers intended to reshape American federalism or create new rights. He believed the amendments had a much more limited purpose.

Although Miller did not try to precisely define that purpose, he did provide some parameters. "No one can fail to be impressed with the one pervading purpose found in [the Reconstruction Amendments], lying at the foundation of each, and without none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him."³² Miller made it clear that he was not saying only former slaves or African Americans could share in the amendments' protections.

Rather, he said, this pervading purpose should be used as a guideline. In construing the amendments the Court should look at their pervading spirit and the evil they were designed to remedy.³³

Miller's opinion for the majority also rejected Campbell's claim that the slaughterhouse law violated his clients' constitutionally guaranteed rights to freely engage in their business or profession. In doing so Miller focused on the Fourteenth Amendment's guarantee: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Miller began by explaining that under the American system of federalism, certain rights were derived from being a citizen of the United States, and other rights were derived from being a citizen of a state. The privileges and immunities clause, he ruled, protects only the former. He provided some examples of what he considered to be the privileges and immunities of citizens of the United States, mentioning the right of habeas corpus, the right to petition Congress, and some others. But Miller did not intend his list to be exhaustive. It was unnecessary to go any further he said, because the rights the butchers claimed, if they existed at all, certainly did not fall into the category of privileges and immunities of citizens of the United States.³⁴ Although Miller's interpretation of the privileges and immunities clause was vague, he was clear about two things: the privileges and immunities clause protected some finite set of rights that were based directly on the language of the Constitution, and it did not create any new rights. Four justices dissented from the Court's decision, and three of them wrote separate opinions. The first written dissent came from Justice Stephen Field, who was one of the most flamboyant personalities ever to sit on the nation's high court. The preacher's son was raised in the Berkshire Hills of western Massachusetts and educated at Williams College. He began his career in an unremarkable fashion when he studied law and joined the practice of his brother David Dudley Field.³⁵

In 1849, however, Stephen Field, like many other Americans, caught gold fever. Leaving his brother's New York practice, he traveled by boat to Panama, crossed the isthmus, and made his way up the Pacific Coast to California. He landed in San Francisco in the heat of the Gold Rush and quickly headed to Marysville, a budding supply center for the gold fields. The story of Field's experiences is the stuff of western novels. His memoir of the time tells of staring down William R. Turner, a local judge who threatened to "cut off his ear and shoot him on the spot." Field brings order to a courtroom by pulling out a pistol and threatening to shoot rowdy spectators. He challenges a fellow legislator to a duel, is saved from attack in a saloon, and is bushwhacked on the street while unarmed. Describing his experience as a pioneer, he recalled, "There was a smack of adventure to it. The going to a country comparatively unknown and taking part of the fashioning of its institutions, was an attractive subject of contemplation."³⁶

Indeed, Field did take part in fashioning the institutions of California. Citizens of Marysville elected him as their first alcalde, the town's chief administrative and judicial officer. Active in the Democratic Party, he served one term in the state assembly in 1851. In 1857 he won election to the California Supreme Court and later became chief justice. Field was serving in that capacity in 1863 when Congress expanded the

size of the U.S. Supreme Court during the Civil War, and Lincoln appointed him as the tenth justice. Like Miller, Field sat on the Court throughout the Waite era and beyond. When he retired in 1897 he had been on the Court for more than thirty-four years, setting a new record for longevity.

Throughout the Civil War and after, Field remained loyal to the Union and to the Democratic Party. In part, he owed his appointment to the Court to circumstances. Lincoln wanted a Californian on the Court, and Field held the highest judicial office in the state. He also had the support of many of the state's most important politicians. Ultimately, though, he owed much to the influence of his brother David Dudley, who had become a leader in the antislavery movement, joined the Republican Party, and been an early supporter of Lincoln.

Field possessed admirable intellect, a strong will, and an irascible personality that made him a lightning rod for controversy. As a state assemblyman and state judge Field was involved in shaping both the personal fortunes of Californians and the ideological backdrop of California. He continued to influence California politics after he took a seat on the bench. This was in part because U.S. Supreme Court justices were each assigned as the chief federal judge for a particular circuit. Until 1891, when Congress reorganized the judiciary creating the circuit courts of appeals, justices traveled to their circuit to hold court. As the U.S. Supreme Court justice who was responsible for riding the circuit covering California, Field returned to his home state just about every year. He was essentially the highest federal judicial authority in California.

This had the effect of making him even more influential in shaping the fortunes of the state, and even more controversial. Admirers say he brought order to the law in the new state. That may be true, but it was a certain brand of order, one that often favored the interests of large landowners and the Southern Pacific Railroad. At least that is the way it was perceived by homesteaders, independent miners, and the anti-monopoly movement, who counted Field among their worst of enemies.³⁷

Field's dissent in the *Slaughterhouse Cases* contained the embryo of a constitutional theory for which he is most remembered. The theory was founded upon two principles that grew out of the Fourteenth Amendment's guarantee that no state shall deprive any person of life, liberty, or property without due process of law. One of the principles later became known as "substantive due process." The most conventional meaning of due process was that it guaranteed that a person could not be deprived of property or liberty without proper judicial procedure. The theory of substantive due process went farther. It held that due process did not only mean that the proper procedures must be followed. It also required that the substance of any legislation that had the effect of depriving a person of liberty or property must be fair and just. The other principle, "liberty of contract," was founded upon the theory that the Fourteenth Amendment's protection of liberty and property included a right to enter into contracts free from government interference.³⁸

These ideas would be debated in many cases during the Waite era but never fully accepted. After the Waite era, however, they would be molded into a doctrine of entrepreneurial liberty that allowed the Court to use the Fourteenth Amendment as

a limit on state governments' power to regulate the economy. That doctrine, which is sometimes referred to as *laissez-faire* constitutionalism, would last from the end of the nineteenth century until 1937.

Field argued in his *Slaughterhouse* dissent that the Reconstruction Amendments had changed the relative powers of the state and national governments in very significant ways.³⁹ If Miller's narrow reading was correct, he warned, the amendments were "vain and idle enactment[s] which accomplished nothing."⁴⁰ Field disagreed not only with Miller's definition of federalism but also with his conclusion that the Reconstruction Amendments did not create new rights. In this early version of his thinking Field's attention focused on the privileges and immunities clause. "The privileges and immunities designated are those which of [natural and inalienable] right belong to the citizens of all free governments," he noted. "Clearly among these must be placed the right to pursue lawful employment in a lawful manner without other restraint than such as equally affects all persons."⁴¹

Justice Joseph Bradley wrote a separate dissent that took Field's general complaint in a different direction. Bradley agreed with Field that the Reconstruction Amendments were not limited to race but also guaranteed to all citizens of the United States rights common to citizens of all free states. He also agreed that among these rights was the right to pursue a lawful calling and that the slaughterhouse law violated this right. However, Bradley's opinion added one very important element to Field's formula. Where Field hinged his right to pursue a lawful calling on the Fourteenth Amendment as a whole, emphasizing the privileges and immunities clause, Bradley specifically stated that prohibiting people from entering into lawful employment "deprive[s] them of their liberty as well as property, *without due process of law*."⁴² While Bradley may not have realized it at the time, this addition was extremely significant because by the turn of the century the due process clause would become a powerful and controversial tool that the Supreme Court used to expand its oversight of state legislation.⁴³

In his arguments Campbell had emphasized the evil of monopoly.⁴⁴ Field and Bradley picked up on that theme. Field emphasized the state's misuse of power. The act of Louisiana, he said, was a naked case of the state taking away the right to pursue a lawful and necessary calling and vesting it exclusively for twenty-five years in a single corporation.⁴⁵ Bradley focused on state action as well, but he also appeared to leave open the possibility that monopoly posed a danger regardless of whether it was state imposed.

The difference between Field's and Bradley's views of monopoly in their *Slaughterhouse* dissents seemed merely one of emphasis. A few years later, however, the two would split in the case of *Munn v. Illinois*, another case involving charges of monopoly.⁴⁶ Then their opinions would reflect more substantial differences in their views about the powers of government, the rights of the community, and monopoly as the source of privilege and a threat to liberty.

With the benefit of that hindsight, it is possible to detect a different tone in the opinions of the two men. Field's total emphasis was on state interference with individual rights. Quoting from Adam Smith and Sir William Blackstone, he emphasized

that free government, in the American sense of the term, is one “under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.”⁴⁷ Bradley noted that the statute was dangerous for reasons other than its interference with pure individual rights. Exclusive privileges like the slaughterhouse law, he wrote, “are getting to be more and more regarded as wrong in principle, and as inimical to the just right and greatest good of the people.”⁴⁸ For him, the state had the duty not only to avoid passing laws that interfered with individual rights but also to protect the good of the people. He went a step further. “This right to choose one’s calling is an essential part of that liberty *which it is the object of government to protect*; and a calling, when chosen, is a man’s property right. Liberty and property are not protected where these rights are arbitrarily assailed.”⁴⁹ He did not specify who or what posed the threat.

Given his background, Bradley’s distaste for monopoly must have surprised contemporary observers. In contrast to the western frontiersmen Waite, Miller, and Field, Bradley stepped onto the Court from the highest levels of the eastern establishment. He was not born into privilege but rather attained influence and power through discipline, diligence, and perseverance.

Born in Berne, a small town in upstate New York, Bradley was the first of twelve children. From an early age he displayed a strong desire for learning. Formal education in Berne took place only in the winter, when children were not otherwise occupied with chores. Although his parents were farmers, they prided themselves in learning and maintained a general library in the family home. After Bradley had devoured its contents, along with the contents of his uncle’s library, he decided that he needed a more formal education.

A local teacher and Dutch Reform minister took him under his wing and helped to prepare Bradley for admission to Rutgers College—which was then affiliated with the Dutch Reform church. Bradley, who was one of the college’s brightest students, graduated from Rutgers in three years. While there he made several influential friends. Perhaps the most influential of them was Frederick Frelinghuysen, the son of a prominent New Jersey family who would become a noted Republican senator and President Chester Arthur’s secretary of state.⁵⁰

After graduation from Rutgers, Bradley studied law and was admitted to the New Jersey bar in 1839. He soon joined the office of John P. Jackson, a successful attorney whose clients included the New Jersey Railroad and Transportation Company. This company was one of the myriad of holdings connected to the Joint Companies, a corporation so powerful in the New Jersey transportation industry and in New Jersey politics that it was simply called “the Monopoly.” His association with Jackson thus opened the door for Bradley to become one of the most important railroad lawyers in New Jersey. By the time he was appointed to the Supreme Court, Bradley was chief counsel for the Joint Companies and one of its key lobbyists in both Newark and Washington. He also served as a director of the company and several of its subsidiaries.⁵¹ Payment for his services often included company stock, which, in a display of ethics not very common in his time, he sold before taking his seat on the high court.⁵²

Although business interests required Bradley to be deeply involved with politics, he did not seem particularly interested in elected office. Bradley began political life as a Whig in a strongly Democratic state. When the Whig Party collapsed in the late 1850s, he joined a coalition called the Opposition, which successfully elected the governor and several other state officials. As the Civil War approached, Bradley remained a strong advocate for preservation of the Union. Although he did not immediately link himself to the Republican Party, in 1860 he joined his friend Frelighuysen and other Opposition members in supporting Lincoln.

By 1862 Bradley identified himself as a Union Republican. In an unsuccessful run for Congress on that ticket, he campaigned on a platform of preserving the Union. In these years Bradley did not appear to be motivated by a desire to abolish the institution of slavery. By the war's end, however, he came to believe that the preservation of the Union and the end of slavery were intertwined. He had also by that time become a full-fledged Republican.⁵³

Although Bradley's political credentials did not make him an obvious choice for the Supreme Court, he was a prominent lawyer, having appeared before the Court six times in his career.⁵⁴ In addition, his connection to railroad interests made him a powerful insider who had influential friends. On February 7, 1870, when President Grant had the opportunity to make two appointments to the Supreme Court, one went to William Strong, who sat on the bench until 1880. The other went to Bradley, who was confirmed on March 22, 1870.⁵⁵ Bradley, like Miller and Field, also outlasted the Waite era. He was still serving on the Court when he died on January 22, 1892.

By all accounts Bradley was an eccentric man with a less than cheery personality. Cortlant Parker, his friend from Rutgers, described Bradley as "amusingly petulant" and "naturally eccentric."⁵⁶ Near the end of Bradley's career a less friendly observer of the Court described him as follows: "Bradley is a little dried-up anatomy of a man. . . . He has a big nose, sharp bright little eyes, iron grey hair and a pair of tightly closed lips. His skin hangs in wrinkles and all of his fat has long since gone to figures and judicial decisions. He is seventy-seven years old, but there is a chance he will live at least twenty-three years longer. There is not much of him to die, and when his soul is disembodied it will not be much freer than it is now."⁵⁷

Given such unflattering descriptions of his personality, one might wonder how Bradley was ever successful as a lawyer and lobbyist. Perhaps it was because his contemporaries also agreed that he was highly intelligent and fair-minded. Historian Charles Fairman, an admirer of Bradley, noted that he possessed many of the characteristics of a great justice. In one respect in particular Fairman ranked Bradley as "No. 1 in the long list of justices." It was in his ability to pursue inquiry back to the crucial fact.⁵⁸

In his *Slaughterhouse* dissent that "crucial fact" appears to be the existence of the monopoly. But given the fact that central slaughterhouses similar to the one in New Orleans were a common method of assuring sanitary conditions in urban slaughterhouses, it is hard to understand why Field and Bradley so fully bought into Campbell's attack on the monopoly. The explanation, for Bradley, at least, may be tied to

a belief in the supremacy of the Union that he had displayed in the Civil War years and a view of the South that he had developed since then. His depiction of the slaughterhouse law as “one of those arbitrary and unjust laws made in the interest of a few scheming individuals, by which some of the Southern States have, within the past few years, been so deplorably oppressed and impoverished” clearly reflected a disenchantment with Reconstruction governments in the South.⁵⁹

But Bradley’s account of the purpose of the Reconstruction Amendments reveals an even more fundamental prejudice about the Southern states. “The mischief to be remedied was not merely slavery and its incidents and consequences,” he wrote, “but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation.” Bradley concluded the Reconstruction Amendments represented “an attempt to give voice to the strong National yearning” for a condition in which American citizenship guaranteed the full enjoyment of every right and every privilege belonging to every freeman.⁶⁰ Although he wrote confidently here about a strong yearning to guarantee the rights of national citizenship, as we shall see in the coming chapters, Bradley was soon less confident about just what those rights were and what was the power of the national government to protect them.

The last of the dissenters, Justice Noah Swayne, could trace his American heritage to ancestors who had settled in William Penn’s Quaker colony in 1710. Swayne, whose family moved to northern Virginia, was the youngest of nine children. His father died when Noah was four years old, leaving his widowed mother to support the family. Nevertheless Swayne received a good education for the times. He attended local schools until he was thirteen, then studied at a respected Quaker academy.

Like Miller, Swayne began his professional career studying medicine. He soon changed to law, however. After reading law in the office of a prominent attorney, he was admitted to the Virginia bar in 1823 at nineteen years of age. He then moved to Ohio to start his legal career.

Swayne began his political career as a Jacksonian Democrat. He was twice elected to the Ohio legislature and was appointed by Andrew Jackson to serve as the U.S. attorney for the District of Ohio. But Swayne was an ardent opponent of slavery and eventually grew uncomfortable with the Democratic Party’s proslavery stance. He switched to the Republican Party in the 1850s and worked for its first presidential candidate, John Frémont, in 1856. Then, in 1860, he campaigned for Abraham Lincoln, who won both the Republican nomination and the presidency. Swayne, who also played an active part in securing the ratification of the Fifteenth Amendment, was committed to the Republican plan for Reconstruction.

Swayne had no judicial experience before his appointment to the Supreme Court, but he did have the support of the governor of Ohio and the state’s entire congressional delegation. More significant, Justice John McLean, who was about to retire, made it known to the president that he wanted Swayne to succeed him. Thus,

on January 21, 1862, President Lincoln nominated Swayne as his first appointment to the Supreme Court.⁶¹

In his first years on the high court Swayne proved to be an ardent supporter of national power, so his dissent in the *Slaughterhouse Cases* came as no surprise. He was not very certain about why the slaughterhouse law denied New Orleans butchers of their constitutional rights. To some extent, he deferred to Field and Bradley on that score. But Swayne, a staunch Republican, was very explicit about the reach of the Fourteenth Amendment. He vehemently attacked Miller's idea that the Court should be guided by the framer's intent to protect the rights of former slaves. The amendment makes no distinction on account of race or color, Swayne observed. "This court has no authority to interpolate a limitation that is neither expressed nor implied." Conveniently ignoring that he and his fellow dissenters proposed to mold into the Constitution a new right—the right to pursue a lawful occupation—he then concluded that the Court's duty "is to execute the law, not to make it."⁶² Swayne was equally clear in his opinion about the impact of the Reconstruction Amendments on federalism. "By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrongs and oppression by the States. That want was intended to be supplied by this [the Fourteenth] amendment."⁶³

Some of today's critics of the *Slaughterhouse* majority opinion maintain that Miller's very limited definition of the privileges and immunities that are derived from being a citizen of the United States virtually scratched the privileges and immunities clause from the Constitution. His narrow reading, they say, thus severely weakened the Fourteenth Amendment's protection for African Americans.⁶⁴ That was not Miller's intent, however. Rather, he was driven by the fear of expanding the amendment's protections beyond race.⁶⁵ Responding to the *Slaughterhouse* dissenters, Miller worried that an interpretation of the new amendments that would create new rights and radically change the federal system "would constitute this court as a perpetual censor upon all legislation of the States."⁶⁶

Even the dissenters would have to agree that their right to pursue a lawful calling could not be absolute. That would leave the courts with the extremely subjective task of determining what legislation was legitimate and what legislation was oppressive. This was made obvious in another case decided on the same day as the *Slaughterhouse Cases*.

Bradwell v. Illinois raised the question of whether a state's refusal to allow a woman to practice law violated her constitutional rights. In 1869 Myra Bradwell petitioned the Illinois Supreme Court for a license to practice law. Bradwell had studied law in her husband's office and passed the Illinois bar exam with high honors. Later she would create the *Chicago Legal News* and mold it into one of the most important legal publications in the nation. She undoubtedly possessed the skills necessary to practice law. Yet the Illinois high court denied her petition, ruling that she was not of the class of persons the legislature had intended to be admitted to the practice of law.⁶⁷

Like the New Orleans butchers, Bradwell argued that the state's refusal to grant her a law license violated her right to choose a profession or trade. The right to

choose a profession or trade was recognized as a privilege and immunity of every white citizen, she argued. The Fourteenth Amendment clearly made it a privilege and immunity of every black citizen and, by implication, a privilege and immunity of female citizens as well.⁶⁸

Since they did not agree that the right to choose a profession was one of the privileges and immunities of citizens of the United States, Miller and the *Slaughterhouse* majority had no difficulty in rejecting Bradwell's claim. However Justices Bradley, Field, and Swayne, who had been champions of the butchers' right to pursue a lawful trade, now agreed with Miller. In their opinion the privileges and immunities of *women as citizens* do not guarantee a right to engage in any and every profession or occupation. "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many occupations of civil life," Bradley observed. "The paramount destiny and mission of a woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."⁶⁹ In *Bartemeyer v. Iowa*, still another case argued at the same time as the *Slaughterhouse Cases*, a saloon keeper maintained that a state law prohibiting the sale of liquor deprived him of his right to choose a trade or calling and deprived him of his property without due process of law.⁷⁰ It should come as no surprise that Miller and the *Slaughterhouse* majority rejected his argument. That was fully consistent with their position that the Reconstruction Amendments had not created new rights. What is more interesting is that Field, Bradley, and Swayne agreed with the outcome, which also seems at odds with their dissents in the *Slaughterhouse Cases*.

The fact that *Bartemeyer* did not involve a state-granted monopoly might have had something to do with their change of heart. But Field, in a concurring opinion, revealed that the difference had more to do with the reach of the right to pursue a lawful calling and the nature of the state's police power. "No one has ever pretended . . . that the Fourteenth Amendment interferes in any respect with the police power of the State," he wrote. "That power embrace[s] all regulations affecting the health, good order, morals, peace, and safety of society."⁷¹ Apparently, for the *Slaughterhouse* dissenters, Louisiana's plan to save downstream citizens from the ravages of disease was not a regulation affecting health, safety, or morals. Iowa's plan to save its citizens from the ravages of drink was.

All of these cases involved the question of what rights the new amendments to the Constitution protected, and to what degree they remolded the antebellum meaning of federalism by increasing the national government's power over the states. *Bradwell* and *Bartemeyer* showed that these matters were complex and that even the most nationalistic of the justices realized that there were limits to the Court's oversight of state legislation. Nevertheless, on the eve of Waite's appointment as chief justice, the Court seemed to be aligned five to four with regard to the meaning of the Reconstruction Amendments. Justices Clifford, Davis, Strong, and Hunt agreed with Miller's opinion that the amendments should have a very limited impact. Justices Field, Bradley, and Swayne, along with Chief Justice Chase, believed that the amendments protected a wide range of rights and substantially changed the federal system.

Chief Justice Chase, who was ill at the time the Court decided the *Slaughterhouse Cases*, would die within the month.⁷²

As the new chief justice, Waite seemed to be walking into a hornets' nest occupied by men of big egos debating even bigger issues. Some thought he was not up to the task. Later Waite's biographer C. Peter Magrath wrote: "As an individual Morrison Waite was not spectacular. He lacked the intellectual brilliance of a Bradley, the boldness of a Field, the wit of a Harlan, and the aggressiveness of a Miller."⁷³ Although Waite was not well received at first, members of the Court warmed to him. His colleagues and later commentators agreed that he was a congenial, honest, and fair man who successfully managed the business of the Court and the often difficult relations among its members. This modest endorsement is usually all Waite receives, but a deeper look will show that he did more. The new chief justice had ideas of his own to add to the mix.