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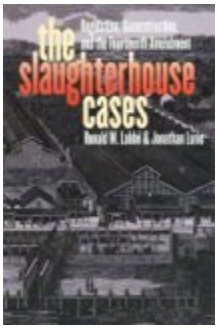
Ronald M. LabbÖ©, Jonathan Lurie. *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment.* Lawrence: University Press of Kansas, 2003. xiv + 295 pp. $34.95 (cloth), ISBN 978-0-7006-1290-1.



Michael A. Ross. *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era.* Baton Rouge: Louisiana State University Press, 2003. xxii + 323 pp. $69.95 (cloth), ISBN 978-0-8071-2868-8; $25.95 (paper), ISBN 978-0-8071-2924-1.

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Can the <cite>Slaughter-House Cases</cite> Be Saved from Its Critics?

Dispute has been no stranger to the *Slaughter-House Cases*, the Supreme Court's first major interpretation of the Fourteenth Amendment.[1] In rejecting a claim by white butchers that a Louisiana law deprived them of their right to pursue a trade, the majority opinion of Justice Samuel F. Miller restricted the scope of the newly enacted Amendment, narrowly defining the rights of national citizenship. Since the Second Reconstruction, Miller's opinion has spawned an enormous literature and inspired the derision of critics. A glance at the legal historiography of Reconstruction confirms the multiple charges against Miller's majority opinion: it upheld a monopoly established by a corrupt legislature, it defied Republican intent to secure national protection for citizenship rights, it embodied negligence if not malevolence toward the freedmen, and it began the judicial retreat from Reconstruction.

In two new books, appearing coincidentally at the same time, Ronald Labbé and Jonathan Lurie, and Michael Ross, reevaluate this familiar, negative view of the *Slaughter-House Cases*. They situate the case within its social, political, and economic contexts, aiming to build a new angle of vision on Miller's infamous opinion.

The results, in many ways, are stunning. Those who have long viewed the decision as retrograde are in for a few surprises. The Court's approval of an exclusive franchise that required butchers to do their slaughtering at a central facility looks reasonable in light of awful health conditions, prior regulation in other cities, mid-century police power doctrine, and the state's dire financial circumstances. Justice Miller, furthermore, looks to be a racial moderate in light of his contempt for recalcitrant white Southerners, his condemnation of unpunished violence against blacks in the South, and his support for blacks' civil and political rights. What, then, was Miller doing when he constricted the meaning of the privileges or immunities clause?

The *Slaughter-House Cases* is more complex than scholars have imagined. While these books will not settle debate over this pivotal case, they shift the parameters of that debate. They leave us with new questions and new puzzles. Given the institutionally routine condemnation of *Slaughter-House* among liberal scholars, that is quite an achievement.

I.

The job of rehabilitating the *Slaughter-House Cases* can be broken down into two distinct tasks. The first task is defending the Court's reading of the privileges or immunities clause, i.e., its notorious distinction between state and national citizenship, which was not necessary

to the holding. The second task is defending the reasonableness of the slaughterhouse law at issue in the decision.[2]

With regard to the first (and much harder) task, Ross is far more successful than Labbé and Lurie, though there are some sticking points in his intriguing and provocative argument about what Miller was up to when he narrowly defined the rights of national citizenship. Before getting, however, to the combustible issues involved in each book's reinterpretation of Miller's narrow definition of national citizenship, the success of both books in arguing for the reasonableness of the Louisiana law deserves some comment.

The slaughterhouse law, as many readers will already know, granted an exclusive franchise to a slaughtering company and required butchers to do their slaughtering at this central location, paying a fee set by the legislature. Scholars have frequently taken a cynical stance toward the public health rationale for this law, viewing it as a disguise for monopoly established by a corrupt legislature.[3]

Labbé and Lurie and Ross have a common antidote for scholarly cynicism about the public health rationale for the law: descriptions of the abysmal sanitary conditions of New Orleans. Slaughterhouses, we learn, were located in the city's most populous areas, operating alongside crowded tenements, businesses, hospitals, and schools. As New Orleans had no public sewer system, butchers emptied the waste of butchered animals into the streets and the Mississippi River, which supplied the city's water. The authors' descriptions of rotting entrails and animal feces overflowing the city's gutters and accumulating on the riverbanks leave a lasting impression, as do their references to the continual outbreaks of cholera and yellow fever. Clearly, there was a health problem.

But why did the legislature address this problem by granting an exclusive franchise to the Crescent City Live-Stock Landing and Slaughtering Company? This looks suspicious. Ross provides one answer, pointing to the post-war state of Louisiana's economy. "With the economy prostrate and many whites simply refusing to pay taxes to the Reconstruction government, tax revenues slowed to a trickle" (p.194). Further, as Louisiana's credit rating plummeted, the option of financing a slaughterhouse through state bonds evaporated. The exclusive private charter, which relieved the State of the burden of funding the slaughterhouse, was its response to this lack of capital.

This argument is augmented by Labbé and Lurie, who show that the idea of centralizing slaughtering was not new to New Orleans. They devote a chapter to charting the struggle to rein in slaughtering that accompanied urban expansion in cities such as New York and Chicago. By 1869, when the Louisiana legislature enacted its centralizing law, "the problem of slaughterhouse reform had been discussed, debated, and evaluated from virtually every angle for more than a generation" (p. 65). The legislature's appeal to the police power, furthermore, was conventional. In mid-nineteenth-century American law, the dominant view was that the police power applied to the regulation of slaughterhouses.[4]

In countering the charge that the exclusive franchise was a monopoly, both books also note the restrictions imposed on the company. It was subject to fines if it did not provide adequate facilities for all who desired them and it had to submit to sanitary inspections. And the butchers, it turns out, had resisted health regulations and operated an informal monopoly for years, conspiring to inflate meat prices.[5] The tightly knit community of butchers had also driven off black competitors. Indeed, the legislative franchise undermined the butchers' control of the trade and lowered the capital requirements to enter the trade, thus opening the trade to blacks.

Ross's discussion of the popularity of the monopoly/corruption charge is also especially noteworthy. While no hard evidence of corruption has ever surfaced, even if bribery had occurred, he notes, legislative corruption was common in Louisiana and usually provoked little public outrage. The butchers' vigorous resistance to the law[6] and their embrace of the monopoly charge made sense because they had grown accustomed to a completely unregulated business environment. But why, asks Ross, did white New Orleans enthusiastically accept the corruption charge and rally around the butchers, who were "unsympathetic protagonists at best" (p.197)? The reason, he argues, was a deep hatred of the biracial legislature that was rooted in white supremacist beliefs.[7] Indeed, as Ross explains, "Louisiana newspapers issued a racial call to arms, urging citizens to fight any and all acts passed by the legislature" (p.196). Even if New Orleans residents owed better health to the Yankees, they were not about to acknowledge it.[8]

In locating the origins of the widely popular corruption charge in political and racial resistance to the Reconstruction government of Louisiana, Ross lays out a perspective that may startle contemporary readers: the holding in the *Slaughter-House Cases* supported Recon-

struction and the biracial legislature. Had the Court ruled against the slaughterhouse law, Ross comments, "it would have supported the Reconstruction legislature's critics who alleged that blacks and Yankees were either too ignorant or too corrupt to adopt legislation that could pass constitutional muster."[9]

These books make a compelling case that the public health rationale was genuine and that the charges of corruption and monopoly were misplaced and misleading. Indeed, these books provide a much-needed reminder that Reconstruction was not only about black rights but also about modernization and northern-style public improvement projects. As these authors emphasize, the Court's support for Louisiana's effort to modernize sanitation was support for Reconstruction.

One wonders, then, how legal scholars came to accept the charges of corruption and monopoly if they were unwarranted. Labbé and Lurie offer the insight that when the slaughterhouse law is viewed in the context of Reconstruction history "that emphasizes the negative aspects of that era, it becomes easy to dismiss the statute ... as a product of a corrupt, reconstructed Louisiana legiislature" (p. 3). This suggests that there are surviving vestiges of old Reconstruction history, dating to the Progressive era, that are influencing contemporary perspectives on *Slaughter-House*.

Indeed, the exclusive franchise may look suspicious today for reasons that are quite different from the reasons it was suspect to Democrats who first promoted the corruption charges, such as John A. Campbell. (Campbell, a former Supreme Court member who resigned his seat to join the Confederacy, argued the butchers' case before the Court). The reasons the slaughterhouse law looks suspect to contemporary scholars may have something to do with institutional dynamics of the mid-twentieth century, as the New Deal context for interpreting *Slaughter-House* (in which Miller's opinion looked good)[10] gave way to the context of the Second Reconstruction (in which Miller's opinion looked bad). As Miller's opinion became viewed mainly through the lens of Reconstruction and condemned for its impact on black rights, the charges of corruption and monopoly, developed and used by arch-racists to oppose the biracial legislature, were resuscitated by liberal scholars. In reinvigorating these charges, of course for different purposes, liberal scholars helped keep the political context of the slaughterhouse law buried.[11]

II.

By situating the slaughterhouse law within its social and political context, these books are successful in casting new light on this long disparaged statute. In defending the Court's use of the police power to uphold the law, they complicate scholarly understandings of the Court's relationship to Reconstruction.

Contextualization of the slaughterhouse law, however, cannot do the work of justifying Miller's exegesis on state and national citizenship, which was unnecessary to the holding. These authors, then, need additional arguments to defend Miller from charges that he artificially narrowed the scope of the Fourteenth Amendment in "an obvious attempt to destroy, as far as possible, any affirmative reading" of the Amendment.[12]

Labbé and Lurie's defense of Miller's narrow conception of national citizenship is unpersuasive. They run into trouble with the claim that "when the Court interpreted the new amendment, Miller could have reasonably concluded that the congressional debates furnished no clear guidance as to intent in general..." (pp. 5-6). For anyone who has read the Reconstruction debates, suspicion of Miller's narrow definition of national citizenship comes easily. Indeed, since the Second Reconstruction, a mountain of evidence has been accumulated showing that Republicans sought to invigorate the notion of national citizenship. This intent was clear in general even if the precise definition was murky.[13] Labbé and Lurie could have argued, fairly, that this intent was in tension with Moderate Republican attachment to notions of limited federal power.[14] Instead, they suggest that the Reconstruction debates paint no clear picture of Republican intent to secure national protection for rights deemed fundamental. This suggestion cannot withstand scrutiny in light of the evidence gathered in recent decades.

Labbé and Lurie also dismiss the incorporation thesis in summary fashion,[15] though evidence in favor of original incorporation is far stronger than they suggest. Given that debate over original incorporation has been a central feature in the literature on the *Slaughter-House Cases*, it is surprising to find the debate so readily dismissed in a book that presents itself as a complete analysis of the decision.[16]

Labbé and Lurie's weak defense of Miller's opinion is the last chapter of an otherwise useful and insightful book about the background of the case. While they successfully argue the slaughterhouse law was reasonable and the police powers doctrine of *Slaughter-House* deserves greater attention, their unconvincing defense of Miller's narrow definition of national citizenship dam-

ages their broader claim that "it is far from clear that in 1873 Miller's opinion was 'scandalously wrong.' "[17] At the end of their book, critics of the decision will have to reassess their view of the law and they may even entertain a new contradiction between Miller's support for Louisiana's biracial Reconstruction government and Miller's constriction of the privileges or immunities clause. But the critics' arguments indicting Miller's narrow definition of national citizenship will continue to weigh heavily.

III.

Michael Ross is more successful than Labbé and Lurie in casting Miller's narrow definition of national citizenship in a more positive light, though there are ambiguities and sticking points in his intriguing analysis of Miller's purpose in constricting the privileges or immunities clause.

According to Ross, in order to understand the *Slaughter-House Cases*, we need to understand Miller as a representative of 1850s western, river-town Republicanism. Miller ardently subscribed to the 1850s free labor, producerist vision. After the Panic of 1857, he witnessed first hand the economic collapse of the Mississippi river-town Keokuk, as it defaulted on bond payments and sought to renegotiate its debt. For Miller, the needs of indebted western communities took precedence over bondholder interests. Though he had himself invested in a railroad, he became a passionate critic of those he called "money men"-eastern financiers, bondholders, and railroad magnates–whom he reegarded as a threat to free labor. Miller was sensitive to the growing problems of industrialization, urbanization, and, especially, the concentration of capital, and he supported state regulations of business.

Ross positions *Slaughter-House* as an early battle over economic regulation,[18] arguing that Miller's constriction of the privileges or immunities clause had an economically progressive purpose. Watching his colleague Stephen J. Field, Miller had grown alarmed that economic conservatives were beginning to assert control over the meaning of the language of free labor and national citizenship. Miller constricted the meaning of the clause, Ross argues, in order to block Field and the economic conservatives from turning the Fourteenth Amendment into a weapon with which they could strike down state regulatory laws. Incorporation of the Bill of Rights and a broad definition of national citizenship would have given the economic conservatives the weapon they sought.[19] Had Field won the day in 1873, "[e]very piece of state regulatory legislation would be scrutinized" (p. 206). The Court would become, in Miller's words, a "perpetual censor upon all legislation of the states."[20] By placing this famous language (for which Miller has been maligned) in the context of the judicial struggle over economic regulation, Ross gives it a progressive reinterpretation.[21] His emphasis on Miller's 1850s Republican ideology, furthermore, doubles as a warning against anachronistic thinking about the 1870s. Scholars tend to think about 1873 in terms of the Gilded Age, and Ross's account offers a corrective to these distorting effects.

A certain ambiguity, however, winds its way through Ross's analysis. It is unclear if Ross thinks (a) that Miller ignored Republican intent in order to thwart the economic conservatives, or (b) that Miller's narrow definition of national citizenship was a justifiable reading of Republican intent. His comments on the incorporation debate contribute to this ambiguity.[22] Perhaps this ambiguity reflects Ross's sense that the categories for debating original intent are inadequate for reaching a proper understanding of Miller's opinion.

Ross does not say this, but his analysis suggests that the categories of debate over original intent (fidelity and betrayal) actually impede understanding of Miller's opinion. For scholars who are convinced, for example, that Republicans intended to incorporate the Bill of Rights, it is intriguing to consider that Miller would have been foolish to be "true" to this Republican intent because economic conservatives were threatening to co-opt a ruling acknowledging incorporation. The categories of fidelity and betrayal cannot capture this predicament. In fact, they obscure it. Ross's defense of Miller's narrow definition of national citizenship may possibly be the only line of argument that can "save" Miller's constriction of the privileges or immunities clause from the criticism of scholars.

But what about the impact of Miller's opinion on blacks? Isn't Miller still vulnerable to the charge that he negligently left blacks to the mercy of their former masters? Ross makes the pertinent observation that "[i]n early 1873, it was still not clear that congressional Reconstruction would fail or that the old economic and racial order of the South would return" (p. 207). Congress, after all, had just passed the Enforcement Acts of 1870 and 1871. Ross suggests that Miller's reliance on state governments to protect blacks was not unreasonable in this context.[23]

But while it is important to note that Miller could not have known Redemption was coming, Ross's sug-

gestion that Miller reasonably relied on state governments to protect blacks conflicts with Ross's evidence that Miller did not trust Southern governments to protect blacks' civil and political rights.[24] Indeed, Ross adds that Miller did more than rely on state governments to protect blacks. Miller relied on the equal protection clause, which protected blacks from the infamous Black Codes. If "[s]tates do not conform their laws to its requirements," Miller stated,[25] Congress could act to bring states into line.

It is here that Ross's argument falters, for Ross provides evidence that Miller knew that Southern laws were not the major problem after 1867 when the Reconstruction governments repealed the Black Codes. The problem was the unequal application of neutral laws and it was a problem Miller identified and condemned.[26] Challenging William Pitt Ballinger, his brother-in-law and frequent correspondent, to produce evidence that southerners opposed and prosecuted violence against blacks, Miller wrote: "Show me a single white man that has been punished in a State court for murdering a negro or a Union man. Show me that any public meeting has been had to express indignation at such conduct. Show me that you or any of the best men of the South have gone ten steps to prevent the recurrence of such things. Show me the first public address or meeting of Southern men in which the massacres of New Orleans or Memphis have been condemned" (p. 147). Given Miller's image in legal history, as one who purposely or negligently left blacks at the mercy of their former masters, this language is utterly unexpected. Indeed, readers will be struck by Miller's contempt for intransigent Southern whites.[27] Indeed, violent, intransigent Southern whites were one of Miller's two villains, along with "money men."

Ross's argument that Miller relied on the equal protection clause to protect blacks falters because a "state action" interpretation of the equal protection clause left this unpunished violence outside the scope of the remedial powers of Congress. (A "state action" reading of Miller's opinion is conventional and it is the reading to which Ross ascribes.) Given Miller's condemnation of systematic Southern failure to prosecute violence against blacks, it is hard to believe that Miller would be satisfied with an equal protection doctrine that failed to protect blacks against these state derelictions of duty.

Ironically, then, Ross's evidence that Miller was sensitive to black vulnerability *highlights* his apparent negligence of the freedmen. His evidence raises the perplexing question: If Miller condemned the problem of systematic state failure to punish violence against blacks, especially when they voted, why would he endorse an equal protection jurisprudence that barred Congress from providing a remedy? Instead of securing Miller's reputation regarding race, Ross creates a new puzzle.

In fact, it can be argued that Miller got his guarantee of a constitutional remedy for systemic state failure to prosecute violence against blacks, but that we have misunderstood the means by which the Court secured this result. This is not the place to develop this argument, but the impact of *Slaughter-House* on blacks has been overdrawn because a modern conception of equal protection has been attributed to the case. Today, we regard the equal protection clause as a basic right of *national* citizenship. However, it is also possible to view the equal protection clause as a national guarantee that the rights of *state* citizenship will not be denied on account of race. The text of the clause allows for this reading. Indeed, this latter conception aligns with the dominant antebellum tradition of viewing state citizenship as the source of basic rights.[28]

IV.

The critical accomplishment of these books is to suggest that the Court's settlement of Reconstruction has not yet been understood. The judicial retreat from Reconstruction did not happen as early as it has been conventionally thought. Interestingly, the book that is more successful in shaking loose the conventional negative view of the *Slaughter-House Cases* is not the one devoted to the case but the one that provides an intellectual biography of its author. Indeed, the portrait of Miller's views on race, politics, and capitalism that emerges in *Justice of Shattered Dreams* is fascinating and deeply disruptive of conventional suspicions about Miller.[29] There are many smart people who write on the history of the Fourteenth Amendment and *Justice of Shattered Dreams* will hopefully be read by every one of them. We need a collective evaluation of Ross's arguments about Miller's opinion, for they are important arguments indeed.

Notes

[1]. 83 U.S. (16 Wall.) 36 (1873).

[2]. The character of the law matters from both a historical and a constitutional perspective. First, both books seek a renewed appreciation for the police power doctrine elaborated in the *Slaughter-House Cases*, and showing that the slaughterhouse law was reasonable is necessary toward this end. Second, while neither book states

this explicitly, the conventional assumption that the law was a disguise for a monopoly has helped frame the way the opinion is read. This assumption has helped shape the conclusion that Republican justices in 1873 were turning away from Reconstruction and turning toward supporting large-scale corporate interests.

[3]. See, e.g., Harold M. Hyman's entry on the *Slaughter-House Cases* in Leonard W. Levy and Kenneth L. Karst, eds., *Encyclopedia of the American Constitution* (New York: Macmillan, 2000), p. 2423. "In 1869, Louisiana, ostensibly as a public health measure, incorporated the Crescent City Stock Landing and Slaughterhouse Company and granted it a monopoly of licensed butchering in New Orleans." Kermit L. Hall, William M. Wiecek, and Paul Finkelman also call the exclusive franchise a "monopoly," noting that "[t]he state and city claimed this was a legitimate health regulation under the state's police powers." See Hall, Wiecek, and Finkelman, *American Legal History: Cases and Materials* (New York: Oxford University Press, 1996), pp. 236-237.

[4]. See, e.g., Labbé and Lurie's discussion (pp.48-50) of *Metropolitan Board of Health v. Heister*, 37 N.Y. 661 (1868). The Board of Health barred the business of slaughtering cattle south of a designated line. They also barred cattle driving from certain streets except at certain times of day. The majority opinion, written by Chief Justice Ward Hunt, turned away a claim by Heister that these regulations deprived him of his property. (Hunt was later appointed to the Supreme Court by President Grant and joined the majority opinion in the *Slaughter-House Cases*.)

[5]. *The New Orleans Times*, the only New Orleans newspaper that supported the slaughterhouse law, argued that it would lead to cheaper meat prices. It charged that butchers' interest in keeping the price of meat artificially high explained their "garlic-scented" cries of "monopoly" (*Times*, June 22, 1869, p. 2, quoted in Labbé and Lurie, p.105). Even newspapers supporting the butchers conceded that the "butchers may have practiced a monopoly" (*New Orleans Bee*, June 22, 1869, quoted in Ross, p. 198).

[6]. Some three hundred suits were brought against the Crescent City company and the legal controversy over the slaughterhouse law lasted over three years (in the Louisiana district courts, the Louisiana Supreme Court, and the federal courts). Labbé and Lurie chart the progression of these suits, laying out the patterns in argumentation that quickly took shape on both sides.

[7]. In a point of disagreement between the books, Labbé and Lurie argue that "race is one of the less important factors in the *Slaughterhouse* story. To argue that the *Slaughterhouse Cases* must be seen primarily in the context of racial Reconstruction is to miss the point that had there been no blacks in the legislature, opposition to the statute still would have been profound" (p. 9). As evidence, they cite the fact that the slaughterhouse law "posed a direct threat to the interests of a large and coherent group of tradesmen who knew how to complain" (p. 73). They are surely right that the butchers would have heartily complained even if there had been no blacks in the legislature. But Ross's concern is the popularity of the butchers' cause. He attributes the popular embrace of the butchers cause to political resistance to the biracial legislature. Indeed, the butchers' cause attracted high-profile ex-Confederate legal talent because the butchers' resistance to the law intertwined with popular racial/political resistance to the legislature. "In different times," Ross notes persuasively, "the community would not have rallied around the butchers" (p. 197).

[8]. So strong was hatred for Union General Benjamin F. Butler, who commanded the Union occupation of New Orleans between 1862 and 1864, that breaks in cholera and yellow fever epidemics–the result of Butler's wartime sanitation effort to protect the health of his troops–were explained as coincidental (Ross, p.193).

[9]. Ross, p. 208. Labbé and Lurie agree, stating that Miller "upheld as legitimate the action of a biracial reconstructed legislature committed to a program of change, reform and modernization.... Far from gutting Reconstruction legislation, his opinion endorsed it" (p. 12).

[10]. Charles Fairman's seminal 1939 biography of Miller viewed *Slaughter-House* through the lens of the New Deal, approving Miller's support for business regulation and treating the slaughterhouse law as reasonable regulation. See Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862-1890* (Cambridge: Harvard University Press, 1939).

[11]. Ross's recovery of the political context of the law, i.e., his account of the popularity of these charges, opens crucial questions (though he does not explore them) about the history of the corruption charges, e.g., how and why liberal scholars came to accept them. This history must be reconstructed if we are to have a more complete accounting of the dominant negative reputation of *Slaughter-House* that these books seek to displace.

[12]. Loren P. Beth, "Slaughter-House Cases Re-

visited," *Lousiana Law Review* 23 (1963): pp. 487-505.

[13]. In the secondary literature, see Michael Les Benedict, "The Slaughterhouse Cases," in Kermit L. Hall, ed. *The Oxford Companion to the Supreme Court* (New York: Oxford University Press, 1992), p. 789 ("the rhetoric of the debates suggested a vague but general belief that all Americans, white and black, had certain fundamental rights that had been violated in the interest of slavery and that should henceforth be secured against infringement"). See also Eric Foner, *Reconstruction: America's Unfinished Revolution*, (New York: Harper & Row, 1988), p. 258 ("In establishing the primacy of a national citizenship whose common rights the states could not abridge, Republicans carried forward the state-building process born of the Civil War."). In the primary literature, see, e.g., *Congressional Globe*, 39th Cong. 1st Sess., p. 2542 ("There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed [fourteenth] amendment will supply. What is that? It is the power ... to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction" [Bingham].). See also the primary sources gathered by Foner, *Reconstruction*, pp. 228-280.

[14]. Moderate Republicans held commitments to both national protection for basic rights and limited federal power. For an argument that these twin commitments have been insufficiently understood in the legal literature and that vagueness in the term "traditional federal system" has run understandings of Republican intent aground, see Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham: Duke University Press, 1999), pp. 5-6.

[15]. "Contrary to the positions taken by Michael Curtis and Akhil Reed Amar, it can be argued that in the absence of more specific wording in the amendment, a measure of diffidence is in order when drawing conclusions concerning its scope" (Labbé and Lurie, p. 5).

[16]. It is also surprising to find that scholars such as Richard L. Aynes have been ignored. Aynes has made compelling arguments that Miller made false statements and misrepresentations. See Aynes, "Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases," *Chicago-Kent Law Review* 70 (1994); and Aynes, "On Misreading John Bingham and the Fourteenth Amendment," *Yale Law Journal* 103 (1993): p. 57. Labbé and Lurie do not acknowledge these arguments. For example, they simply note as "not accurate" (p. 215 n. 24), without further comment, Miller's false statement that the Fourteenth Amendment was the first time a definition of national citizenship had been offered by Congress.

[17]. Labbé and Lurie, p. 4 (quoting Lawrence Tribe on "scandalously wrong").

[18]. Other scholars have suggested that the *Slaughter-House Cases* "may be seen as an articulation of judicial restraint in economic cases." See Michael Les Benedict, n. 13 above, p. 789.

[19]. Ross's argument explains the irony that Democrats, who violently opposed Reconstruction, were arguing for a broad definition of national power in the *Slaughter-House Cases*, something seemingly "Republican" in nature.

[20]. *Slaughter-House Cases*, 83 U.S. at 78.

[21]. See also Ross's discussion of *Davidson v. New Orleans*, 96 U.S. 97 (1878). In his majority opinion, Miller "feigned puzzlement about why the dockets of state and federal courts had filled with cases brought by aggrieved property owners who invoked the Fourteenth Amendment's due process clause" (p. 232). Miller knew, argues Ross, "that railroad, industrial, and financial interests were looking for new legal means to fight regulations then being passed by state legislatures" (p. 233). After *Slaughter-House* had rendered the privileges or immunities clause useless for that purpose, "the attorneys for vested interests set their sights on the due process clause" (ibid). It is important to remember, of course, that Miller's economic views continued to "win" in the 1870s. See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1877). His rivertown view of capitalism did not completely lose out until the 1890s.

[22]. Ross accepts some of the evidence gathered in favor of original incorporation. "Although the evidence of the framers' intent [to apply the Bill of Rights] is by no means conclusive, it is clear that at least two of the amendment's proponents (Jacob Howard and John Bingham) did want the Fourteenth Amendment to incorporate the Bill of Rights, and that Miller could have found support for that argument had he so desired" (p. 201).

[23]. The number of federal prosecutions under the Enforcement Acts looks woefully inadequate today, but this number reached a high water mark in the early 1870s and the federal government had success in the famous Klan trials. It is also worth noting that Miller could not have foreseen the election results of 1874. Following the economic Panic of 1873 that hit Wall Street in Septem-

ber, the election of 1874 gave control of the House to the Democrats. (*Slaughter-House* was decided in April.)

[24]. Miller expressed frequent support for blacks' civil and political rights (Ross, pp. 116-118, 165, 210) and it is important to understand the terms "civil rights" and "political rights" according to their nineteenth century meaning. At the time, civil rights and political rights were part of a "hierarchy of rights," and this concept has disappeared from constitutional thinking. The content of these categories of rights was disputed but there was consensus on "core" body of basic civil rights, which included physical security, property rights, and contract rights. Political rights included voting and holding public office. Access to public accommodations, racially integrated schools, and inter-racial marriage were considered by most legal actors at the time to be "social rights," and non-basic. Ross does not locate Miller's support for civil and political rights within this rights hierarchy, even though doing so would buttress his argument that Miller was a racial moderate. For an introduction to the "hierarchy of rights" concept, see Mark Tushnet, "The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston," *Journal of American History* 74 (1987): pp. 884-890. See also Harold M. Hyman and William M. Wiecek, *Equal Justice under Law* (New York: Harper & Row, 1982), pp. 395-96.

[25]. *Slaughter-House Cases*, 83 U.S. at 81.

[26]. *Justice of Shattered Dreams* is the first comprehensive look at Miller since Charles Fairman's influential 1939 biography. Fairman, like many historians of his era, regarded Reconstruction as a mistake and he presented Miller as sharing this view. One of Ross's objectives is to correct Fairman on this score, and his portrait of Miller's views on race is invaluable.

[27]. According to Miller, these were men "incapable of forgiving or learning" (p. 136). Miller was one of only a few Republicans, along with Benjamin Wade, to call for the executions of top Confederate leaders. He also rejected a speedy Reconstruction, supporting loyalty oaths and the Military Reconstruction Act of 1867. In 1867, he found President Johnson "more odious than the democratic party" (p. 146). In 1877, he stated that John A. Campbell "deserves all the punishment he ... can receive, not so much for joining the rebellioon as for the persistency with which he continues the fight" (Miller to W.P.B, quoted in Ross, p. 200).

[28]. Elsewhere, I begin to develop the argument that the lower federal courts developed a doctrine of state neglect between 1867 and 1873 and that the Supreme Court endorsed this doctrine, which remained consistent with a state-centered federalism. It was this doctrine, I argue, that protected the basic rights of blacks from the systematic state neglect that Miller condemned. See Pamela Brandwein, "The *Civil Rights Cases* and the Lost Doctrine of State Neglect," in *The Supreme Court and American Political Development*, eds. Ronald Kahn and Ken I. Kersh (forthcoming, University Press of Kansas). I present this argument in fully elaborated form, and also account for the institutional rise of state action orthodoxy, in Brandwein, *The Supreme Court and the Lost Doctrine of State Neglect* (forthcoming).

[29]. Ross sums up his view of Miller's opinion: "When viewed within the political, economic, and social context of the early 1870s, the *Slaughter-House Cases* may be read as a progressive–though ultimately failed–attempt to affirm the authority of the biracial government of Louisiana, to grapple with the horrible sanitary conditions of New Orleans, and to thwart conservatives such as Justice Field, who hoped to defeat state regulation of private property" (Ross, p. 201).

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