# A Symposium on Salmon P. Chase and the Chase Court: Perspectives in Law and History

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## NOTE

Personal Policy and Judicial Reasoning: Salmon P. Chase and *Hepburn v. Griswold* | James A. Dietz | 235
Salmon Portland Chase
The conversion experience was common in nineteenth-century American politics, perhaps as much so as the more familiar religious conversions of the age. In part, this was because the boundaries between parties were not rigid and candidates and voters moved frequently from one organization or ideology to another. Such a phenomenon was not unique to the nineteenth century, and those familiar with the history of the 1950s and 1960s are well aware of the change seen in Lyndon Johnson as he moved from a segregationist Texas senator to a civil rights-oriented president. While we might debate the motivation of this dramatic switch, it remains a classic conversion. Students of nineteenth-century America will cite the equally stunning political reversals of John C. Calhoun and Daniel Webster which occurred in opposite directions and almost simultaneously in the decade after the War of 1812. Calhoun was a nationalist and supporter of strong central government into the early 1820s; by the end of the decade he became the classic states' rights advocate as he formulated his nullification theory as a means to protect slavery. Webster began his political career as a defender of New Hampshire shipping interests and thus an opponent of protective tariffs and other strong central government measures. By the mid-1820s, however, he represented Massachusetts textile manufacturers and became the leading advocate of high tariffs and central government in general.

For Johnson, Calhoun, and Webster, political expediency as well as principle played some role in their conversions. In each case there was a price paid in moving to the new stance; both psychic and political wounds resulted from pulling away from old...
constituencies and positions. Each assumed a new identity in the process and acquired a new family of political supporters. Each gave the public signals of the change as it was occurring. Each strongly defended the newly-held stance with the same vehemence as the one he deserted. Each of the three was already well-established in his political career before the reversal was complete—Johnson as president and Calhoun and Webster as vice president and senator, respectively. In the case of our subject today, Salmon P. Chase, the transformation came much earlier in his political life, but it was equally traumatic. Chase also paid a price and revealed his conversion with tell-tale signals as it was happening. For him the change was from right to left—from a conservative Whig attorney to a defender of fugitive slaves and member of a despised third party dedicated to the eradication of slavery. For him, like Johnson, Calhoun, and Webster, it was a difficult path filled with setbacks and accomplishments, as well as expediency and stern principle.

Nothing in the early life of Salmon P. Chase suggested a career of antislavery leadership and later prominence among Republicans championing the cause of racial equality. Born in rural New Hampshire in 1808, Chase experienced little in his first twenty-five years to indicate he would live a life other than one in the schoolroom or before the bar. His father farmed the rock-strewn New England soil and dabbled in local Federalist politics. With the elder Chase's premature death in 1817, young Salmon was raised for a time by his authoritarian uncle, the aristocratic Episcopal Bishop of Ohio, Philander Chase. Returning to New Hampshire after four years in Ohio, Chase enrolled at Dartmouth College while teaching school in a small nearby town. Graduating from college at eighteen, he moved first to Washington, D.C. There he opened his Select Classical School for young boys, determined to earn enough money to pursue his chosen career as an attorney.¹

A protege of Attorney General William Wirt, Chase found his already conservative views reinforced by his mentor, who became his model as both lawyer and politician. In 1829, when the attorney general left Washington following the election of An-

¹ For a description of Chase's early years, see FREDERICK J. BLUE, SALMON P. CHASE: A LIFE IN POLITICS 1-13 (1987).
drew Jackson, Chase was forced to ponder his own uncertain future. To a budding aristocrat, the Jacksonians represented all that was wrong with society—an unwelcome intrusion of the lower classes on his previously secure world. Wrote Chase: “A more savage spirit breathes” in the Jackson administration, for a new “purse proud vulgar” crowd had replaced the “pure and gentle and refined and cultivated circle” of William Wirt. As Chase prepared to leave Washington to seek his fortune in Cincinnati in 1830, his elitism and pompous nature, along with a degree of smugness—characteristics which later associates would find so disconcerting—were already revealing themselves.

Nor did his early years in Cincinnati give any hint of the political conversion to come. As a rising young attorney, he held true to his Whiggish politics and espoused traditional causes even as he struggled to secure clients. He became active in the temperance crusade and in religious affairs, both within and outside his Episcopal church. Highly ambitious and hard-working, he wanted so to make his mark that he even considered changing his own name to fit more closely with the conservative goals he sought. He explained only half-jokingly that he had been thinking about changing “my awkward fishy” first name, as well as the spelling of his last name, “so as to disconnect us from the world a little more than we are.” The new names he considered were “Spencer De Cheyce or Spencer Payne Cheyce”!

As Chase told Alexis de Tocqueville during his visit to Cincinnati in 1831, universal suffrage had led to the election of some highly unqualified city and state officials. In Chase’s view, the evils resulting from the ascendancy of the Jacksonians in Washington might spread to Ohio politics as well. Only by maintaining strict property qualifications for voting and office-holding rights could such dangers be avoided. Chase’s conservative tendencies thus remained as strong as they had ever been. Various factors pointed toward a career as a traditional Whig attorney, including marriage in 1834 to the daughter of a prominent Cincinnati family,

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3. Letter from Salmon P. Chase to Charles D. Cleveland (Feb. 9, 1830), in CHASE PAPERS, LC.
a developing legal practice which included being named solicitor of the Cincinnati branch of the Bank of the United States, and friendship with Nicholas Longworth, one of the wealthiest and most influential businessmen in the city.

Yet there were also some early signs of a growing interest by Chase in the slavery controversy and a vague awareness of the plight of black Americans. Before coming to Cincinnati, he had shown a passing concern for abolition in the District of Columbia. In 1831, he had expressed admiration for the role of Henry Brougham in the English abolition movement.\(^5\) He also had indicated an interest in the colonization movement which sought to return blacks to Africa. He felt that an appropriate place to begin would be with the ten percent of Cincinnati's population who were African-Americans. Living in poverty in a ghetto known as Little Africa, they had been the victims of a cruel race riot in 1829. Prior to that outbreak, city officials had threatened to enforce a long-neglected Ohio statute requiring them to post a $500 bond on entering the state to guarantee their good behavior. Whites in the city had needed little such encouragement and had eagerly pillaged Little Africa while the police made no move to stop the destruction. In the wake of the riot, close to half of the blacks made the agonizing decision to relocate in Canada.\(^6\)

When Chase arrived the following year, the city remained tense, and his initial reaction was to endorse the colonization concept. His hasty conclusion was brutally direct and insensitive: because the two races could not live together in peace, blacks must give up their homes to avoid further violence. In 1834, in addressing the Young Men's Colonization Society of Hamilton County, he endorsed African colonization as "a sure and powerful mode of extending Civilization and Christianity to that great, but as yet barbarous continent." He later joined the local colonization group and attended a meeting of the state society in Columbus.\(^7\)

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5. Salmon P. Chase, Autobiographical Sketch, Diary (Mar. 2, 1831), in CHASE PAPERS, LC; BLUE, supra note 1, at 12-13, 15-16.
With his elitist New England background, he believed that African-Americans were not his equals and concluded condescendingly that it was in their best interest to resettle in Africa. An active role in the Colonization Society, as well as in temperance and religious organizations, appealed to Chase, both because of the fraternal association they provided and the improved status, prestige, and publicity that might be accorded to him as a result of his participation.

At this point, his conservative political and social outlook led him to associate with business and professional leaders of Cincinnati in their efforts to persuade blacks to leave the city. Chief among these leaders were Longworth and the president of the Lafayette Bank, Josiah Lawrence. Yet most abolitionists in Ohio and elsewhere had long since rejected the colonization concept, concluding that it was a device of slaveholders and their racist sympathizers to strengthen the peculiar institution by ridding the country of the disturbing presence of a black population which was not enslaved. Reflecting his conservative bent, Chase remained a colonizationist and rejected the abolitionist position. In fact, at this time his diary and correspondence reveal that he was far more concerned with apolitical organizations such as the American Sunday School Union and the Young Men's Temperance Society and with family matters than he was with slavery and race relations.8

In 1836, Chase's approach and philosophy suddenly changed; in fact, his early attitudes and actions had indicated none of the intensity with which he would soon join the antislavery crusade. The transformation was due in part to the presence in Cincinnati of his sister Abigail, who had married a leading abolitionist and physician, Isaac Colby. Colby, who had attended Chase's wife Catherine during her fatal illness, had introduced him to many of the leading abolitionists of the city. These contacts had helped fill some of the void in his life created by Catherine's death in December 1835.

Still, Chase revealed no special concern or sympathy for antislavery activities until the summer of 1836, when a mob began to harass James G. Birney, the editor of the city's recently established abolitionist newspaper, the Philanthropist. Cincinnati,

8. Salmon P. Chase, Diary (Jan. 9, 1833), in Chase Papers, LC.
with its extensive commercial ties with the lower Mississippi Valley and its many recent emigrants from Kentucky and Virginia, was no safer for an abolitionist to write or speak in than it was for blacks to live. White business leaders and average citizens alike sympathized strongly with the South and slavery and were intolerant of any view which threatened their Southern friends or their ties with them. Thus, when Birney began publishing his paper in January 1836, trouble was predictable, despite the former Alabama slaveholder's moderation in his opposition to slavery and his open invitation to discuss both sides of the question. 9

At the urging of the proslavery Cincinnati Whig, a mass meeting chaired by Mayor Samuel Davies, assembled on January 22, 1836, to protest the newly established newspaper. Birney surprised the hostile gathering by attending and by courageously defending himself and his paper. He did not change any minds, however, for the first violence erupted on July 12th, when his printer's office was broken into and his press destroyed. Another mass meeting on July 23rd heard angry declarations from such leading citizens as Longworth and Lawrence, and urged the destruction of the Philanthropist "peaceably if it could, forcibly if it must." 10 The members chose a committee of twelve, including Longworth and former Senator Jacob Burnet, to inform Birney that his paper must cease publication immediately. They met with Birney and a group of abolitionists, including Colby and Gamaliel Bailey, who rejected their ultimatum. 11

Birney explained in the next issue of the Philanthropist that he and his supporters had no choice but to continue publication, for while supporting freedom for the slave, he also supported "liberty for those who are yet free." The mob needed no further urging than this defiance, and on the night of July 30th, it again broke into the printing office, tore the press apart, and dumped it into the Ohio River. The angry crowd then sought Birney

9. BETTY FLADELAND, JAMES GILLESPIE BIRNEY: SLAVEHOLDER TO ABOLITIONIST 129 (1955).


himself but, failing to find him, in frustration began four hours of systematic looting in black neighborhoods. Only when Mayor Davies told the mob, "[w]e have done enough for one night" did the destruction cease. The following night the mob assembled again, this time seeking Birney at a nearby hotel, the Franklin House, where he had earlier moved to protect his family from possible danger.

This was the setting in which Chase first became involved. His sister, Abigail Colby, had taken refuge in his home, fearing for her own safety. Like so many others of his background and position, Chase had been insufficiently moved by slavery itself or by the plight of free blacks in his own city to take action. But the challenge to freedom of the press and the threat to the personal safety of Birney, as well as to that of his sister and brother-in-law, finally brought a response. Personally "opposed at this time to the views of abolitionists," he would defend their right to express those views. He now concluded that "the Slave Power" was "the great enemy of freedom of speech, freedom of the press and freedom of the person." Following the lead of antislavery Whigs John Quincy Adams and Joshua Giddings, Chase was more concerned with protecting civil liberties for whites than he was for civil rights for blacks.

The young attorney thus joined with the editor of the Cincinnati Gazette, Charles Hammond, in calling a public meeting to protest the mob action. When he and Hammond arrived at the appointed time with resolutions which Chase had written, their opponents were already there and in control. Instead of defending Birney and his right to publish, the resolutions adopted endorsed the mob's actions by claiming that the abolitionists had caused the conflict. In the meantime, Birney remained out of the city until calm was restored. That same evening, the mob went to the Franklin House searching for him. Summoning all of his courage, the young, broad-shouldered Chase dramatically stood at the door of the hotel barring their entrance and exchanging defiant words as tensions mounted. Finally, assurances from Mayor Davies that Birney was not inside induced the angry

12. PHILANTHROPIST, Apr. 22, July 24, 1836; FLADELAND, supra note 9, at 140-42.
13. Chase, Autobiographical Sketch, supra note 5.
crowd to leave, but only after the ringleader told Chase that he "should answer for this." Chase's account concludes, "I told him I could be found at any time." 14

In defending Birney, Chase had also challenged the conservative leaders of the Cincinnati business community, the Longworths and the Lawrences, who led the city's opposition to antislavery agitation. It was thus an act of bravery which radicalized Chase in a dramatic way. In a letter published in the Gazette two days later, he repudiated a statement attributed to him that he would give ten thousand dollars to support an abolition press, but said he would donate such a sum "sooner than see the abolition press put down by a mob." Although he opposed many actions of the abolitionists, he regarded "all the consequences of their publications" as minor when compared with the threat to civil liberties posed by the mob. Chase's later recollection suggested that the incident pushed him closer to the antislavery leaders: "[f]rom this time on though not technically an abolitionist, I became a decided opponent of slavery and the Slave Power," and if any chose to call him an abolitionist he would not deny it. 15 Although differing with most abolitionists as to the best means to end slavery, he had nonetheless accepted their goal that it must be overthrown.

Chase demonstrated his conversion when he agreed to represent the owners of the Philanthropist in the suits brought against mob leaders the next winter for damages done to the press and its office. Chase accepted the cases reluctantly, for "I had just begun to acquire a pretty good practice" and those to be sued included "several of my personal friends." He feared that these friends might take his role personally. Always ready to attribute his actions to the highest motives, he explained his willingness "to surrender every professional prospect" if the alternative was "a departure from principle." 16 Increasingly secure in his profession by this time, he could now more easily afford to chance the loss of potential clients than he could have a few years earlier.

14. Id.; Fladeland, supra note 9, at 142-45.
15. Letter from Salmon P. Chase to CINCINNATI DAILY GAZETTE (Aug. 4, 1836); Chase, Autobiographical Sketch, supra note 5. For a fuller account of Chase's involvement, see Blue, supra note 1, at 28-31.
16. Chase, Autobiographical Sketch, supra note 5; Letter from Salmon P. Chase to Charles D. Cleveland (Feb. 17, 1837), CHASE PAPERS, HSP.
It is unlikely, however, that the suits hurt his practice in any substantial way.

Chase was involved in two cases tried in 1838, the first of which resulted in a disappointing fifty dollar judgment against the accused mob leaders, despite his impassioned defense of the abolitionists and freedom of the press. The second involved Achilles Pugh, Birney's printer, and resulted in a hung jury, although the following year Pugh received $1500 in damages. More importantly, Chase's role in these cases led directly to an even more active involvement in several highly publicized fugitive slave trials—a role which would bring him his first national recognition and thrust him into antislavery politics.

The case which gave Chase his initial contact with the fugitive issue was brought to his attention by his friend, James Birney. Matilda, a light-skinned mulatto, had been hired as a maid by Birney's wife Agatha in 1836 in the mistaken belief that she was white. City officials charged that Matilda was the slave and daughter of Larkin Lawrence of Missouri, who had stopped briefly in Cincinnati en route to St. Louis. While the boat was tied to the dock, she slipped away into the city, hiding first in the black community, and then seeking employment with the Birneys. Lawrence had hired a slave-catcher, John M. Riley, to find her, and it was on Riley's testimony that she was arrested as a fugitive under the federal Fugitive Slave Act of 1793.

Because of Cincinnati's location, slaveowners frequently passed through the city when traveling westward, especially when traveling by water. The city therefore assumed a central role in the issue of whether owners could travel through regions where slavery was illegal and still enjoy legal protection over their slaves. Chase would have the opportunity to challenge the rights of comity in his claim that the ban on slavery in Ohio took precedence.

17. Fladeland, supra note 9, at 146.
18. Case of Matilda, A Colored Woman, Philanthropist, Mar. 17, 24, 31, 1837, at 3; Robert Warden, An Account of the Private Life and Public Services of Salmon Portland Chase 282-84 (1874) (Mar. 16, 1864 letter from Chase to John T. Trowbridge); Chase, Autobiographical Sketch, supra note 5; Fladeland, supra note 9, at 149-53.
19. The roles of Chase and other attorneys in challenging intersectional comity are developed in three recent studies. See Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity (1981); William M. Wiecek, The Sources of Antislavery: Constitutionalism in America, 1760-1848 (1977); and Robert M. Cover, Justice Accused:
Following Matilda's arrest, Birney immediately retained Chase in her defense. Birney believed that the case would be stronger if an attorney who was not an avowed abolitionist argued for Matilda's freedom. Chase quickly agreed to defend her. Any earlier hesitation on his part about such involvement had apparently disappeared with the events of the previous year. With less than twenty-four hours to prepare his case, Chase obtained a writ of habeas corpus from Judge D.K. Este of the Court of Common Pleas.20

Both Birney and Chase knew that chances of a favorable verdict were slim, yet the young attorney presented his case forcefully and effectively. In his arguments before Judge Este, Chase adopted the position that Birney had long advocated. His defense of Matilda was based in part on an English precedent established in the case of *Somerset v. Stewart* in 1772, which held that the right to possess slaves was limited to those areas where it was sanctioned. Slaves thus became free when brought outside of those areas—the situation which had occurred when Lawrence had voluntarily taken Matilda to Cincinnati. As Chase noted, "The moment [a] slave comes [into a free] state, he acquires a legal right to freedom." Furthermore, the Act of 1793 was not applicable in Ohio because the Northwest Ordinance of 1787 had made slavery illegal there. In effect, Chase was claiming the law to be unconstitutional. He also took the opportunity to suggest that slavery itself was a violation of the natural right to human liberty, a right "proclaimed by our fathers, in the declaration of independence." Said Chase, "All men are born 'equally free.'"21

Judge Este surprised few when he ruled that Matilda was legally a slave and must be delivered to Lawrence's agent Riley. He also noted that although the Northwest Ordinance kept slavery out, residents were obligated by the same Act to surrender...

20. WARDEN, supra note 18; Chase, Autobiographical Sketch, supra note 5; FLADELAND, supra note 9, at 151-52.

21. Salmon P. Chase, Speech of Salmon P. Chase, in the Case of the Colored Woman, Matilda, Who Was Brought Before the Court of Common Pleas of Hamilton County, Ohio by Writ of Habeas Corpus, March 11, 1837 (Mar. 11, 1837); WIECEK, supra note 19, at 20-21, 39.
fugitives. As the judge announced his decision, Riley hurried the hapless woman to a waiting carriage, drove her to the river, and the next day placed her on a boat for New Orleans for sale at public auction. Neither Chase nor Birney ever heard of her whereabouts again. 22

Chase would have another opportunity to develop and refine his arguments when pro-slavery elements secured an indictment of Birney for violating the Ohio law of 1804 prohibiting the harboring of a slave. 23 The prosecution was conducted by some of the same attorneys who had instigated the mob against Birney and his press in 1836, so determined were they to silence him. Despite an able defense by Chase, Birney was found guilty by Judge Este and fined fifty dollars.

Determined not to let the matter rest and, at the same time, to receive a wider hearing for their position, Chase and Birney quickly appealed the conviction to the state supreme court. In presenting his argument that Matilda became free when brought to Ohio, thus removing any possibility of complicity by Birney, Chase sought a decision on the broader issue of the constitutionality of the Fugitive Slave Act. Instead, the court, in reversing Birney’s conviction, did so on the technical ground that the indictment had failed to charge that he had knowingly assisted a fugitive. Birney was innocent because he had not known that Matilda was a fugitive. Chase had hoped instead to establish the precedent that slavery, although legal in those states where sanctioned by law, could not be supported by the federal government in those areas where it was illegal—that government must divorce itself from slavery by relinquishing all obligation to extend its protection over it. He had argued that Matilda, in effect, was not escaping from Lawrence, but rather exercising the freedom given to her by the Ordinance of 1787 and the Constitution of Ohio when the boat tied up at Cincinnati. 24

Although Birney was acquitted, Chase was disappointed that the justices had failed to rule on his constitutional arguments, for, although they were convinced of the editor’s innocence, they

22. FLADELAND, supra note 9, at 153.
were reluctant to adopt such a bold course. Yet the court did order Chase's opinion printed and circulated, believing it "desirable to have the argument itself brought to the notice of the profession." In the course of two years, Chase had dramatically altered his earlier beliefs and through his new involvement had drawn considerable attention to himself by his actions on behalf of both Birney and fugitives from slavery. He had been strongly influenced by the events around him as he moved from the more traditional, less controversial reforms to which he gave his attention through the mid-1830s to a concern by the end of the decade for antislavery and, specifically, the plight of fugitives and those who assisted them.

In the next years, Chase would defend several fugitives who had been arrested in the Cincinnati area, each time further developing his argument that the presence of a fugitive on soil where slavery was illegal made the accused a free person. Although largely unsuccessful in persuading Ohio judges to free his clients, he was soon labeled by Kentucky opponents as the "attorney general for runaway negroes." Chase soon was using the title with pride, although it was not meant as a compliment, for "I never refused my help to any person black or white." Chase also took up another less controversial humanitarian effort on behalf of the black community of Cincinnati when he helped establish an orphan asylum for African-American children. In 1844, he donated his legal assistance in drawing up a charter for the asylum and the following year secured a special act of incorporation from the Ohio legislature. He maintained an interest in and support for the institution for the remainder of his life.

His increasing involvement in race-related issues further separated Chase from much of Cincinnati's white society and placed him in closer alliance with the black community and with many white abolitionists.

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25. WARDEN, supra note 18; Salmon P. Chase, James G. Birney vs. The State of Ohio, Error, Argument for Defendant, PHILANTHROPIST, Jan. 30, 1838, at 1; FLADELAND, supra note 9, at 153-54.

26. Letter from Salmon P. Chase to John T. Trowbridge (Mar. 21, 1864), CHASE PAPERS, Cincinnati Historical Society, [hereinafter CHS].

27. Letter from Salmon P. Chase to Flammen Ball (Dec. 27, 1844), Flammen Ball to Salmon P. Chase, Memorandum (1872), CHASE PAPERS, LC; S. P. Brux, An Appeal to the Citizens of Ohio, CINCINNATI DAILY GAZETTE, Dec. 4, 1844. See also CINCINNATI DAILY GAZETTE, Aug. 14, 1844.
A similar evolution in his political beliefs accompanied this change. Chase had left Washington in 1830, predicting the dire results that would come from the leveling tendencies of Andrew Jackson and his Democratic party. In Cincinnati, he had joined the national Republican party and become active in city politics. In 1831, he had been chosen as a delegate to the party convention which nominated Henry Clay. Chase's support for Clay was lukewarm, however, for he much preferred his mentor William Wirt. When the latter accepted the nomination of the Anti-Masons, Chase endorsed him, not because he agreed with the third-party movement, but because of his personal affection for him and "my active confidence in his public and private virtues." Wirt, he felt, was "more likely to conciliate all sections," and restore harmony than Clay. But because of Wirt's poor chances, Chase had voted for a general ticket of electors pledged to the candidate who might win a majority of the electoral college. His primary concern was the defeat of Andrew Jackson, for "if he should be reelected all is lost." He believed that the Ohio Valley would be ruined, and felt that business and property values had already begun to sink in anticipation of a Jackson re-election. 28

Economic developments during Jackson's second term convinced Chase even more of the need for a Whig president. He thus had become an active organizer of the new anti-Jackson pro-Bank party, formed in Cincinnati in January, 1834. Chase was part of the young professional-small business alliance which took the lead in organizing the party on the ward level. Initially, he supported Supreme Court Justice John McLean for president rather than William Henry Harrison, the candidate of many older, more conservative leaders of the Ohio Whig party. Chase urged McLean to press his own candidacy against Harrison's because the Whigs should not support a candidate "on the sole ground of military service." Yet when McLean withdrew from the race in August, 1835, Chase agreed to back Harrison against Jackson's chosen successor Martin Van Buren, "for whom I had no sympathy." 29 At a time when the mob had just destroyed Birney's

28. Letter from Salmon P. Chase to John T. Trowbridge (Mar. 18, 1864), CHASE PAPERS, CHS; Letter from Salmon P. Chase to Charles D. Cleveland (Dec. 21, 1831, Aug. 13, 1832), CHASE PAPERS, HSP.
press and Chase had publicly defied it at Franklin House, his political ties remained as conservative as ever.

The four years of the Van Buren administration would bring a gradual shift for Chase. As his relationship with Birney became more intimate, he committed himself to the fugitive slave cause in the *Matilda* case in 1837. That same year the editor wrote to him as a full antislavery confidant, urging him to join with abolitionists in energizing the opponents of Texas annexation. Yet Chase was not ready to move with many of his antislavery friends to support Birney and the abolitionist Liberty party against Harrison in 1840.\(^\text{30}\) He had retained his Whig ties despite the stormy events of 1836 and 1837 and had remained active in the local party organization, still believing that it offered him the best opportunity for a future in politics. Moreover, he was not yet convinced that a tiny, uninfluential third party could have any effect on slave-related issues.

Chase was not alone in this belief. Others, like future Liberty leader Samuel Lewis, agreed that the Whig party could be moved toward a more active antislavery stance and could challenge the South on the fugitive and slave-expansion issues. Because the Cincinnati Whig organization continued to have a faction of younger men eager to prevent defections to the new Liberty party, Chase was not ostracized. His Whig background and his potential as a rising attorney and politician made him welcome among those party leaders who disagreed with his views on slavery. In March, 1840, the first ward Whigs chose Chase, Lewis, and Alexander Ewing as candidates for the city council on a "Log Cabin" ticket pledged to Harrison's nomination for president. The Whigs swept the city elections in April, with their first ward candidates defeating Democratic opponents by more than two to one. In the presidential contest that followed, Chase actively campaigned for Harrison, even preparing resolutions in his defense against alleged Democratic "slanders."\(^\text{31}\)


31. *Cincinnati Daily Gazette*, Mar. 19, Apr. 6, 8, & 23, 1840; Chase, Diary (May 29, 1840), *CHASE PAPERS, LC*. 
Nonetheless, Chase was disturbed by Harrison's record on slave-related issues. As governor of the Indiana Territory almost forty years earlier, Harrison had asked Congress to permit slavery there despite the prohibition in the Northwest Ordinance. As a member of the House of Representatives in 1819, he had opposed the Tallmadge Amendment limiting slavery in Missouri. Most seriously, in 1835, he had argued that slavery was a southern evil which Northerners should refrain from challenging. But in 1840, when Chase's antislavery friend Gamaliel Bailey attacked Harrison's record and endorsed Birney's candidacy in the Philanthropist, Chase agreed, at Harrison's urging, to try to convince Bailey to retract his "unwonted harshness" toward the Whig candidate.32 Chase firmly believed that the small Liberty vote might hurt Whigs more than it would Democrats, but he was in a dilemma as the election approached. Although he felt that Harrison was motivated by a "sincere and elevated patriotism," and was capable of leading "ably and faithfully," he despaired over the complete subservience of both parties toward the South on the "vital question of slavery." Still unwilling to join a "premature" third-party movement, he clung to a promising future with the Whigs and prospects of more immediate victory.33 In Chase's eyes, the Liberty party in 1840 was so tiny and powerless that any other course was impractical.

Chase still insisted that the Whig party could become antislavery as Harrison assumed the presidency in March, 1841. He thus urged the Chief Executive to support abolition in the District of Columbia. This, he suggested privately, might best be achieved by rejecting the view of conservative Whigs who argued that Congress could not abolish slavery there without the consent of its inhabitants. For the president to endorse such a hands-off approach, Chase advised, would only produce "a schism" among northern Whigs and result in "fatal consequences."34

32. General Harrison - The Abolitionists, PHILANTHROPIST, Feb. 4, 1840, at 2, 3; Chase, Diary (July 1, 1840), CHASE PAPERS, LC. In 1837, Birney moved to New York to assume the post of Secretary of the American Anti-Slavery Society. Bailey had already become editor of the Philanthropist by that time. See Fladeland, supra note 9, at 155. For Bailey's conversion to third-party agitations, see Harrold, supra note 11, at 33-35.
33. Letter from Salmon P. Chase to Charles D. Cleveland (Aug. 29, 1840), CHASE PAPERS, HSP.
34. Letter from Salmon P. Chase to William H. Harrison (Feb. 13, 1841), HARRISON PAPERS, LC.
Harrison was more concerned with a national constituency and ignored Chase's advice. In his inaugural address, he announced his opposition to any congressional interference with slavery, even in areas outside the slave states such as the nation's capital. A month later, Harrison died and Virginia slaveholder John Tyler became president. This triggered Chase's decision to abandon the Whigs and join his antislavery friends in the Liberty party, for if he could not convince Ohioan Harrison, there would be no hope with a Tyler-led party. Furthermore, factors which had originally made him a Whig now appeared less significant. For example, with the death of the Bank of the United States, he had been won over to the independent treasury concept of the Democrats. Much later in life, Chase claimed that his support of the Whig party had never been wholehearted and rationalized, "I was not a life-long Whig, but a sort of independent Whig with Democratic ideas, from 1830 to 1841. Sometimes I voted for a Democrat, but more generally for Whigs." From 1841 on, however, slavery loomed paramount to him. He had supported Harrison "because I imagined that his administration would be less proslavery than Mr. Van Buren's." When he realized his mistake, he was ready to join the Liberty party. Another racial disturbance directed against the black community of Cincinnati in the summer of 1841, aided and abetted by some of Chase's wealthy Whig friends, provided further proof that he had done the right thing.35

Chase's decision to join the Liberty party was agonizingly painful, and reached only after much deliberation and with considerable misgivings; in leaving the well-established and smoothly-functioning Whigs whom he had helped to organize in Cincinnati, he joined a tiny, inexperienced one-year-old party. A small group of antislavery leaders, including Bailey and former senator Thomas Morris, had organized the third party in Ohio in time for the election of 1840. Bailey, editor of the Philanthropist since Birney moved to New York in 1837, had, after early opposition to an independent nomination, supported Birney's candidacy. Although many Liberty leaders argued that the federal government must abolish slavery everywhere, Bailey more closely shared the po-

35. ALBERT BUSHNELL HART, SALMON P. CHASE 88-89 (1899) (quoting letter from Salmon P. Chase to Charles Sumner (Mar. 9, 1849) and another Chase letter written to an unidentified recipient in 1868); Letter from Flammen Ball to Salmon P. Chase (Sept. 4, 1841), CHASE PAPERS, HSP; RICHARDS, supra note 12, at 122-29.
sition which Chase had since assumed: the need for a complete divorce of the federal government from any responsibility for slavery. He felt that there was no constitutional power to abolish slavery in states where it already existed. Other than Bailey's editorials in support of Birney late in the campaign, and small Liberty meetings in Cincinnati and in the Western Reserve, there had been no organized statewide third-party effort in 1840. As Chase explained later, "[i]t was more a moral and religious movement" with "no regular political organization." Birney, in fact, received 903 votes in Ohio, out of nearly 275,000 cast.

Following Harrison's victory over Van Buren, state and local antislavery societies provided the personnel to form a permanent third party which Chase joined in late 1841. A small convention in January of that year, led by Bailey and Morris, proposed independent nominations in future state elections instead of the old policy of merely questioning Whigs and Democrats on state-related issues and voting for the least objectionable candidate or abstaining if neither was acceptable. In effect, this recommendation established the Liberty party in Ohio. At this point, supporters were few and potential party leaders still clung to the two-party system. In fact, Chase sought re-election to the city council in April 1841 as a Whig, but along with many other incumbents, was swept out of office by the Democrats.

The young attorney's attendance at a Hamilton County Liberty meeting in May was the first public indication of a personal change. By request, he briefly addressed the meeting of some three hundred. Chase's hesitancy remained evident through the summer, for although he gave signs of his readiness to leave the Whigs for the third party, he still sought the influence which went with a major party. In a final effort to remain a Whig and


39. Letter from Salmon P. Chase to Charles D. Cleveland (May 18, 1841), *Chase Papers*, HSP.
move the party to an antislavery stance, he sought the party's nomination for state senator. The Whigs of Hamilton County, however, were now ready to push him in the direction he was so reluctant to take. They overwhelmingly rejected his nomination at their August convention because of his antislavery position, notifying him that "there was no place in the Whig party for him or his principles." No further reason now existed for Chase and others like him to resist Bailey's appeal for antislavery Democrats and Whigs alike to join the third party.40 Thus, when the Whigs rejected him and his antislavery philosophy, Chase could find sympathy only within the Liberty party.

Ideologically, there remained few ties between him and the Whig party and he was thus finally ready to take on a new identity and join the Liberty family. In noting the emotionally charged atmosphere in Cincinnati which had produced three disturbances against abolitionists and African-Americans in the past five years, Chase reflected that there was still a surprising "amount of genuine antislavery feelings." Although Democratic and Whig leaders denounced the third-party appeal, he had become persuaded that there was no other means to bring "the whole question of slavery before the people as Antislavery political action." He admitted that the movement would be unpopular in the beginning, but "it will go on and gain friends constantly."41

Chase's conversion experience is perhaps most similar to that of Charles Sumner of Massachusetts. Three years younger than Chase, the young Boston-born Sumner had been raised among elitist Brahmins. A graduate of Harvard and the Harvard Law School, he became the protege of Supreme Court Justice Joseph Story and appeared destined for a career of legal scholarship. But a concern for reform issues such as education and prison discipline, as well as pacifism, brought him into contact with antislavery advocates. Like Chase, he broke a long-time association with the elitist Whig party over slave-related issues. For Sumner, the conversion came several years later and involved the question of expanding slavery into Texas and Mexican War territories rather than the fugitive slave issue. Rejecting asso-

40. PHILANTHROPIST, Aug. 20, 23, Sept. 1, 1841; HART, supra note 35, at 88 (quoting George Hoadly's Memorial Address); HARROLD, supra note 11, at 50, 58.
41. Letter from Salmon P. Chase to Charles D. Cleveland (Oct. 22, 1841), CHASE PAPERS, LC.
ciation with the Liberty party which Chase had joined in 1841, Sumner and his Conscience Whig friends nevertheless helped form the Massachusetts Free Soil party in 1848 as Chase did in Ohio. First meeting at the Buffalo convention of the Free Soilers in August, 1848, the two became lifelong associates in the struggle against slavery and racial discrimination. Each used a Free Soil coalition with antislavery Democrats to fashion a legislative election to the Senate, where they combined in 1854 to lead the protest against the Kansas-Nebraska bill and to initiate the formation of the Republican party.42

Chase had begun his career in antislavery politics in 1841. His path to prominence would find him a leader in first the Liberty and then the Free Soil and Republican parties. Eleven years earlier he had come to Cincinnati as a budding, somewhat impressionable, attorney without roots and family ties to guide him. The early death of his father had left him without a role model after whom to pattern his life. Reflecting later on his college days, he lamented, “I had no friend to advise me” despite “the vast importance to a boy of a wise and practical adviser. I had lost my father. I was separated from my mother.”43 For Chase, Wirt played a similar role as mentor as Story did for Sumner. In Cincinnati he had at first done all the necessary things to establish himself in a law practice. He had shown no special interest in the slavery controversy except to endorse the conservative concept of colonization.

Chase’s political conversion experience had begun with the events of 1836, the July 30th mob and the confrontation at the hotel door, and his defense of his action in his letter in the Cincinnati Gazette. As he developed close ties with Birney, Colby, and Bailey, Chase became caught up in the drama unfolding in the city. His wife’s death the year before had brought him closer to Colby and made him appreciative of Colby’s views on slavery. The mob attack on Birney and his abolition press, along with the possible danger to the safety of his sister Abigail, quickly moved Chase to concern and involvement—first for his friends and family and the principle of freedom of the press, and then for fugitive slaves like Matilda. The combination of Chase’s conser-

42. For the most thorough study of Sumner’s pre-Civil War career, see DAVID H. DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR (1960).
43. Chase, Autobiographical Sketch, supra note 5.
ervative New England background and the social unrest in Cincinnati led him to a belief that slavery was the fundamental cause of society's degraded state. His conversion experience took on religious overtones as he became convinced of the sin of slaveholding.

Not ready to accept abolition as a goal in the way that Birney and Colby had, Chase nevertheless became involved in first the fugitive issue and then the Liberty party—both with a religious zeal. His decision to leave the Whigs was reached after painful deliberation. Only with President Harrison's refusal to recognize the need to limit slavery, followed by the shock of John Tyler coming to office as both a Whig and a slaveholder, did Chase cast his lot with the Liberty men and give up any immediate hope of political advancement within the two-party system. His interest in the issue of the constitutionality of slavery evolved as he matured in the legal profession and as he attained a measure of professional and financial security. His new concern soon became all-consuming, but he was not a lonely crusader battling by himself. With a strong support system of antislavery friends of all varieties of opinion, he continued to be influenced by them even as he gradually assumed a leadership role. Thus, Chase's conversion represented a complex set of factors which moved him from ambition and self-aggrandizement to reform. Surely Chase never totally abandoned his personal goals of prestige and power as seen in his later efforts to obtain the presidency. Yet, as he rejected his conservative values, he committed himself to the cause of antislavery.

It is tempting to speculate that one of the factors causing his conversion was his desire to become a father figure for those he felt he could help in the same way Wirt had been for him. Perhaps he hoped to provide the kind of assistance and guidance he had missed as a young man growing up in New Hampshire. No longer the young aristocrat trying to change his name to fit more closely with what he believed to be his proper station in society, Chase began to turn away from self-concern and self-indulgence toward the welfare of others. These others included members of his own family, young attorneys in his office, clients, fugitives, and free blacks, all of whom he sought to help as teacher and counselor. Rather than a world dominated by greedy Jacksonians and virtuous Whigs, he now saw one of struggle and oppression. In this move from right to left, Chase recognized the
interest of a new kind of people typified by the fugitive Matilda—a people he believed he could serve.
“If men were angels,” James Madison wrote in Federalist No. 51, “no government would be necessary.”¹ His words ring true, and they have special relevance to the career of Salmon Portland Chase. Born in 1808, Chase matured in a nation that ignored the natural rights of some of its citizens. Wealth, class, and race determined the extent to which Americans benefitted from the law.² By choosing a career in law, Chase assumed responsibility to help oversee the administration of justice. His law practice in Ohio, before he burst upon the national scene, offers an opportunity to assess his early career. Therefore, as I comment on Professor Frederick Blue’s essay, I will use the following criteria to evaluate Chase: (1) his commitment to justice and equity for all Americans, (2) his ability to rise above the crowd who had settled views about race, and (3) his vision for American society as compared to the nation’s founding principles and laws.³

In “From Right to Left,” Professor Blue explains that Chase underwent a transformation during the 1830s. Before his metamorphosis, his world view and political affiliations were those of

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³ It is a foregone conclusion that the Declaration of Independence and the Constitution affirmed the natural rights of mankind. Many nineteenth-century reformers extolled these truths in their campaign for civil rights reform. See Bernard Bailyn, The Ideological Origins of the American Revolution (1967). For an evaluation of primary sources from this period, see Bernard Bailyn, The Debate on the Constitution (1993). The reform movement of abolitionists also emphasized these themes and, according to some scholars, influenced a second revolution in the United States. See Jacobus Ten Broek, Equality Under Law (1965) (originally published as the Anti Slavery Origins of the Fourteenth Amendment). Also of interest is Howard N. Meyer, IV: The Amendment That Refused to Die (1978). Chapter two evaluates the antislavery origins of the Fourteenth Amendment.
a conservative Whig lawyer who feared the "vulgar" crowd that came to power with Andrew Jackson. Afterwards, Chase became a defender of abolitionists and refugees from the slaveholding South, as well as organizer for the Liberty party—the only U.S. political party to call for the abolition of slavery. Nothing from his early life in New Hampshire prepared him for such a transformation. He lost his father at an early age and witnessed the financial struggles of his mother, who temporarily parceled out her children among friends and relatives. He spent a few years with his uncle Philander Chase, whom Professor Blue calls "the aristocratic Episcopal Bishop of Ohio." Chase mingled with the political elite while a law student in Washington, D.C., and opted for a career in law because of its prominence in American culture and possibly as preparation for a political career.

Chase's decision to settle in Cincinnati also illustrated his zeal to establish a successful law practice. He considered moving to Maryland or Louisiana, but neither offered the promise of Cincinnati, the gateway to the West. He joined the professional class in the Queen City, whose political culture included settled views on race and slavery. The prosperity of Ohio had been wedded to the economies of slaveholding states since its territorial period, and white residents, especially those in southern Ohio, shunned political issues they believed might injure this commerce. Most whites considered blacks a nuisance, and hoped to limit the growth of their population in Ohio. They believed slavery was a problem of the South and had no place in their political debates. These were familiar sentiments to Chase, who had become acquainted with them while a law student in the nation's capitol and under the tutelage of William Wirt, the U.S. attorney general who was also a slaveholder. Given the social and political environment of Ohio and Chase's own sensibilities, his support of antislavery reform appeared unlikely.

The legacy of Salmon Chase is complex. As Professor Blue observes, Chase moved to Cincinnati one year after a massive exodus of African-Americans. Whites had attacked them periodically, and in 1829 they led an assault against blacks in Little Africa, a Cincinnati neighborhood where city planners had confined colored people. With sacks draped across their backs, African-Americans fled their homes for refuge in Canada. Their flight from racial persecution might have been a powerful lesson for Chase. Tension between whites and blacks who remained in the Queen City lingered. But Chase suppressed his religious instincts—his sense of right and wrong—and directed his attention to temperance and the educational programs of the Lyceum Committee. The condition of black Americans did not arouse him. He "believed," as Professor Blue explains, "that African-Americans were not his equals." Apparently, Chase never matured beyond this notion. In many ways, he was a man of little faith in the racial diversity of the United States, and his doubts limited him as an antislavery reformer.

Soon after settling in Cincinnati, Chase joined business leaders who embraced conservative racial views. They supported the colonization of African-Americans, defending it as an alternative to the floundering black laws of the state. The legislature had invented the black laws beginning in 1804, hoping to discourage the flight of refugees from slavery to Ohio. The black laws included an immigration and residency clause, which required that blacks produce "free papers," register their names at the court house in the county wherein they resided, and post a hefty bond as a requisite for their settlement. Ostensibly, the Assembly mandated the surety for the welfare and security of the black newcomers, should they become destitute. Actually, they closed the state's welfare fund to colored people. Moreover, the black laws mandated that employers verify the free status of their hire, and placed the jury box, ballot, and school room beyond the reach of anyone with blood ties to Africa. These statutes were called "black laws" because they singled out African-Americans

10. Blue, supra note 4, at 4-5.
for special treatment. But these racial codes did not stop the flight of men and women imprisoned by the slave system. Refugees from slavery crossed the border in droves for the promise of freedom that lay northwest of the Ohio River. Men, women, children, and infants not yet weaned from their mothers' breasts settled in Ohio or boarded the Underground Railroad for Canada or another liberated zone.\(^\text{12}\) Unable to restrict this immigration, racial conservatives in Ohio, with whom Chase had forged an alliance, turned to colonization.

Undoubtedly, Chase backed the cause which some whites believed would have preserved the homogeneity of Ohio. For instance, whites in Harrison County submitted a petition to the General Assembly beseeching the legislature to encourage Southern states to emancipate and colonize African-Americans. The General Assembly adopted the resolutions in 1829, endorsing colonization as a solution to the race problem. Chase actively supported the local chapter of the Ohio Colonization Society.\(^\text{13}\) Yet, he knew that African-American leaders had denounced colonization as a scheme of the slaveholding South to return mainly free blacks and recalcitrant slave workers back to Africa. Black leaders exposed the plot at a convention in Philadelphia in 1817. Later, their comrades in Ohio endorsed their declaration. Moreover, James Gillespie Birney, who became Chase's mentor in antislavery law, had undergone a conversion from slaveholder to colonizationist. Later, Birney experienced a second awakening which elevated him to the abolition movement. In contrast, Chase, a devout Christian—surrounded by a "cloud of witnesses" who had frowned on colonization—did not budge.\(^\text{14}\) Certainly his selection of this cause produced in him some consternation. As he pondered the merits of the movement, he asked Frederick Douglass about the prospect of the mass exodus of colored people to Africa. Douglass replied generously, advising Chase that there was "favorable indication" that black Americans would remain in the United States.\(^\text{15}\)


\(^{13}\) Blue, supra note 4, at 4-5.

\(^{14}\) This biblical reference is applicable to Salmon P. Chase, who claimed to have been a dedicated believer.

Certainly Chase underwent a transformation during the 1830s, and it was "From Right to Left." His conversion to antislavery reform was gradual, rational, and cerebral, not moral, ethical, or humanitarian. His religious faith undergirded, but did not inspire, his transformation. Neither the condition of black Americans in the South, nor the quasi free status of blacks in the North aroused him. The elements of his shift to antislavery politics included the conduct of mobs organized in Cincinnati to censurate the abolitionist press of James Birney, and their persecution of Chase's relatives who had become abolitionists. A mob had them on the run in 1836. Abigail and Isaac Colby, his sister and brother-in-law, and their associates, feared for their lives. Chase did not agree with their politics, but he considered them honest and noble people and he deplored any cause which threatened their safety.  

His transition came during the summer of 1836, when city leaders organized a meeting downtown on Market Street to plan their strategy to silence abolitionists. Chase privately confessed his antipathy for mob rule, but the person in whom he had confided started a rumor that Chase had pledged money to support the abolitionist press. His private remarks distorted, Chase embarked upon a campaign to set the record straight. "Freedom of the press and constitutional liberty," he declared, "must live or perish together." He had never intended anything more than his faith in the legal foundation of the republic. Chase, who had practiced law in Ohio for six years, compiled three volumes of Ohio statutes (which included the black laws), wrote a brief history of Ohio, and witnessed the capture and removal of black refugees from the state, still had not been persuaded to join the cause of freedom and reform. As Professor Blue puts it, "Chase had been insufficiently moved by slavery itself or by the plight of free blacks in his own city to take action." Chase interpreted mob rule as a threat to fundamental American rights.


17. Letter from Salmon P. Chase to Flamman Ball (Mar. 10, 1864), Salmon P. Chase Papers, Cincinnati Historical Society, Cincinnati, Ohio; Cincinnati Gazette, Aug. 11, 1836.
and he laid his career on the line to preserve their constitutional rights.

Nonetheless, Chase could not long avoid the runaway slave issue. Abolitionists in Cincinnati had made note of his rhetoric expressed at the Market Street meeting. James Birney lured him into their struggle, tutoring him on antislavery law, hoping he would lend a hand should they test the tenets of automatic emancipation in court. That opportunity came in 1837, when Matilda Lawrence, Birney's maid, was captured as a fugitive slave. Abolitionists planned the legal strategy, which Chase accepted unequivocally: Ohio law had freed Matilda the moment she entered the state. William Doty, justice of the peace, scheduled the hearing for that March, but such an officer would address procedural questions only. Chase and his partner Samuel Eels wanted the court to rule on the larger question of automatic emancipation, so they petitioned the common pleas court for an injunction. Judge D. K. Este agreed to hear the case. And there began Chase's odyssey as an antislavery lawyer.18

Chase did not approve of slavery and he demonstrated his revulsion for the "peculiar institution." He had subordinated his personal inclinations for years and explained his outlook during his preliminary remarks at the trial. Slavery, he contended, "exists only in virtue of positive law. The right to hold a man as a slave is a naked legal right."19 The U.S. Constitution had tolerated slavery, and a state could authorize the practice within its limits. But once a person held to slavery entered a free jurisdiction, that person became automatically free. This doctrine became the paradigm upon which Chase launched a crusade against the Slave Power. It was a matter of law. Constitutional law recognized the right of a state to remain free from slavery; it also recognized the right of a state to allow slavery.20 Chase's states' rights construction of the Constitution made him less menacing to slaveholders who remained in the South.

Chase also used the Matilda case to inaugurate an assault on the federal fugitive slave law. American constitutional and statutory law had branded refugees from slavery as criminals, and

18. Speech of Salmon P. Chase in the Case of the Colored Woman Matilda 1-3 (1837).
19. Id. at 8.
authorized slaveholders to hunt them down and reclaim them. Under the comity provisions of the Federal Constitution, slaveholders also demanded the right to carry enslaved people through free zones unmolested by their laws. But Chase argued that the Constitution did not empower Congress to enact fugitive slave legislation. Conceding that Congress had such a power, its fugitive slave law would not have been enforceable on state officers. Only the states could enact such a legislation. Hence, Chase considered the federal fugitive slave law unconstitutional. Common Pleas Judge Este ruled against him, and remanded the case to Justice of the Peace Doty for final sentencing. Matilda, who had enjoyed a one-year respite from bondage, again disappeared into slavery.

Historian Blue has summarized the conviction of James Birney in Hamilton County. Birney had enemies who wanted to punish him for his abolitionist work. They accused him of violating the state's employment law when he hired Matilda Lawrence. The statute had been largely a dead letter and, like the rest of the black laws, was selectively enforced by civic-minded whites. Judge Este fined him the maximum penalty allowed under state law. Birney employed Chase as counsel, who appealed the conviction to the state supreme court.

Chase launched into an extended speech on the sovereignty of Ohio and its ability to remain free from slavery. He explained that slavery ended whenever a person entered Ohio. He suggested that the founders of the nation envisioned the gradual abolition of slavery. Ohio embraced their vision, and planned a state committed to the "equal freedom of all men." Had Ohio been a nation, Chase concluded, there would have been no doubt about its sovereignty, including its power to close its borders to slavery. This is a curious point of view, for Chase knew that Ohio had tolerated various forms of slavery. It had approved intrastate transit of slaves, tolerated hired-out slave workers,

22. Speech of Salmon P. Chase, supra note 18, at 11-13, 15-17.
23. Matilda Lawrence v. Larkin Lawrence, CINCINNATI DAILY REPUBLICAN, March 16, 1837.
and sanctioned the return of refugees from slavery. Ohio had accommodated its free laws to favor slaveholders. But Chase insisted that intolerance for slavery was one of the underpinnings of the republic and its free states.

For example, Chase explained that the Ordinance of 1787 and the nation’s Constitution were supreme on matters relating to reclamation. From his investigation into the founding, he identified two key concepts in the foregoing documents. The term “escaping” held special meaning to Chase. “[T]he slave who might escape into [a free jurisdiction],” he explained, “would become a free man the moment he should enter their territory.”26 James Madison perceived this problem, Chase insisted, and sounded the alarm in Virginia. “At present, if any slave elopes to any of those states where slaves are free,” Madison declared, “he becomes emancipated by their laws.”27 Slaveholders dreaded this prospect, and the founders inserted the Fugitive Slave Clause into the Constitution to assure them of their legal right to capture and remove runaway slaves. But the fugitive slave law had no power over persons brought into, or allowed to enter, a free state.

Furthermore, Chase contended that the founders did not recognize the principle of property in black people. The Fugitive From Labor Clause applied equally to whites who were indentured servants and apprentices. “If I am correct in this construction of the constitution and the ordinance,” Chase concluded, “it follows that there is nothing in either which requires or authorizes the legislature of any state to pass laws for the protection of the right of property in human beings.”28

When Chase directed the court to Matilda Lawrence, the woman whom his client had allegedly harbored, he explained that the shackles which bound her were unlocked by the free laws of Ohio. Chase emphasized that this doctrine had become settled law. Quoting from decisions reached in Louisiana, England, and France, as well as the writings of Chancellor James Kent and Supreme Court Justice Joseph Story, Chase insisted that the relationship between master and slave ceased automatically the moment such a person entered a free jurisdiction.29 The state

26. Id. at 233.
27. Id.
28. Id. at 235.
29. Id. at 235-38.
supreme court, although sympathetic, did not align Ohio with the states which had approved automatic emancipation.

Chase also represented the Ohio Antislavery Society and Achilles Pugh, the publisher of the Philanthropist newspaper, who sued leaders of the mob for damage done to their property. The cases came to trial in 1838. Chase prevailed, but damages awarded by the court did not come close to the appraised value of the property destroyed. This disappointed Chase. Yet, when the defense called him an abolitionist he denounced the charge. "If such were my beliefs," he retorted, "I would not hesitate to avow it." Nearly ten years later, Chase remained on the fringe of the struggle for freedom. In 1845, for example, when men from Virginia abducted Ohio citizens for allegedly harboring runaway slaves, abolitionists from the Western Reserve called on Chase to help them shield the refugees and win the release of their comrades. The incident became known as the Parkersburg Case, and it offered Chase the opportunity to press the claim that slavery ended the moment an enslaved person entered Ohio. It also offered the prospect of litigation before the U.S. Supreme Court.

For an antislavery reformer, Chase's advice is puzzling. Certainly he would aid in the suit to free Ohio citizens. But he advised them to divorce the alleged slaves from the case, thinking that they were irrelevant to the cause. Perhaps a discussion of runaway slaves would have clouded the issue. But it is difficult to see how counsel could have properly represented his clients without a discussion of the conflicting laws of slavery in Virginia and freedom in Ohio. The alleged slaves had been in Ohio when the abolitionists aided them. It would seem that knowledge that the men knew that they were criminals under federal law was essential to their conviction. But Chase saw it otherwise.

Salmon Portland Chase imposed limitations on himself in the crusade against slavery. The catalyst for his conversion to anti-

30. **PHILANTHROPIST, Feb. 27, 1838; MIDDLETON, supra note 7, at 85.**
31. Letter from Caleb Emerson to Governor Mordecai Bartley (Aug. 9, 1845), **CALEB EMERSON FAMILY PAPERS**, Western Reserve Historical Society, microfilm collection, roll 3 (hereinafter EMERSON PAPERS).
32. Letter from Salmon P. Chase to Caleb Emerson (Aug. 16, 1845), **EMERSON PAPERS**; **SALMON P. CHASE PAPERS**, Ohio Historical Society (Columbus), mss. 304.
33. Letter from Caleb Emerson to Governor Mordecai Bartley (Aug. 9, 1845), **EMERSON PAPERS**.
slavery reform was the protection of civil rights for whites. He considered mob violence contrary to republican government. As Judge Jacob B. Foraker put it, Chase’s interest in protecting First Amendment rights “aroused him to the intolerance of the slave spirit and the necessity of resisting its encroachment by protecting free speech and a free press if the rights of the white man were to be preserved.” Chase shunned civil rights questions, when some of his colleagues had filed suits to end school segregation in Ohio and Massachusetts.

What is Chase’s historical legacy? He argued for the release of black Americans who entered a free jurisdiction. He embraced the tenets of antislavery law and made the doctrine a legal force in Ohio. Ultimately, the courts agreed that the presumption of freedom reigned in Ohio, and this did not end when a slaveholder brought a prisoner of the slave system or allowed such a person to enter the Buckeye State. But his efforts to nullify the Federal Fugitive Slave Law failed. The United States never retreated from its commitment to empower slaveholders to hunt down runaways and haul them back to a life of slavery in the states which approved the practice. As a senator from Ohio and in his speeches and writings, Chase helped set the agenda for the containment of slavery in the South and its prohibition on federal lands. But his flame for racial justice did not illuminate as brightly as his contemporaries such as James Birney, Flamman Ball, and Joshua Giddings. Nonetheless, his contributions were significant and the Salmon P. Chase College of Law is a monument worthy of his historical legacy.

COMMENTARY ON PRESENTATION BY PROFESSOR FREDERICK J. BLUE ON CHASE AND THE ANTISLAVERY MOVEMENT

by W. Frank Steely*

It must have taken courage for Professor Frederick Blue to undertake a biography of Salmon Portland Chase only a few years after the reprinting of Albert Bushnell Hart’s classic biography with the plaudits of no less a figure in the profession than Arthur Schlesinger, Jr. The favorable reception of Professor Blue’s work by historians, in the American Historical Review and the Journal of American History (just to note the two major relevant scholarly journals), is testimony to its quality.

The only facet of Chase’s life on which this commentator would presume to comment is that portion relating to the institution of antebellum slavery and the movements against it. This is, of course, the subject of Professor Blue’s speech entitled “From Right to Left: The Political Conversion of Salmon P. Chase.” The pressure of time precludes an examination of the question of whether a movement from “right” to “left” really constitutes “conversion.” Might not such movement be considered by many, certainly in theological parlance, a “falling from Grace”?

But, to the substance of the discussion, this writer is unaware of any critic who has significantly challenged the basic interpretation of Salmon Chase’s thoughts and actions on the slavery issue as presented by Professor Blue in either today’s speech or in his larger biography. Unlike Albert Bushnell Hart, whose father was active in the antislavery movement and an admirer of Chase, Professor Blue may be complimented for trying to strike a balanced and fair picture of his subject. Note his candor as he refers to Chase’s “elitism and pompous nature, along with a degree of smugness.” This was the New Englander who decided to come west to Cincinnati in 1830 to practice law.

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And what was Cincinnati and the West like in 1830? To impose personal convictions upon this audience, was not Ohio the most important state in the Union in antislavery movements, and Kentucky the most important slave state in its various manifestations of antislavery activity? In this immediate locale, this Ohio Valley, Salmon Chase chose to settle. Historians generally do not believe that environment is as important as history in shaping a person, but it is fair to assume that it does play a significant role when that environment possesses marked characteristics which come to be the characteristics of that individual.

Ever since Gilbert Hobbes Barnes published his *Antislavery Impulse* in 1933, historians have not underrated the Western phase of that movement in contrast to the New England and New York activity.

Salmon Chase was not unaware of Theodore Dwight Weld and the "Lane Rebels" who, in the 1830s, were expelled from the Cincinnati seminary and who went to Oberlin, Ohio, and established a training ground for young abolitionist missionaries, several score of whom spread out through the Midwest and into two slave states, Kentucky and North Carolina. At that time, although New York State boasted more antislavery societies than did Ohio, the state of Ohio counted 213 to New England's 145.

President Lyman Beecher of the Lane Seminary was the minister who performed the marriage ceremony of Chase and his first wife, Catherine Jane Garniss. And Beecher was, of course, the father of Harriet Beecher Stowe, the author of *Uncle Tom's Cabin*. She had witnessed slavery across the river in Kentucky when she visited the old town of Washington, near Maysville. She had, more importantly, slept with Theodore Dwight Weld's book, *Slavery As It Is*, under her pillow. This volume was the nation's classic source book which exposed the institution of slavery.

Barnes undoubtedly exaggerated when he said that the area of the Midwest worked over by Weld's young missionaries was the area that gave to Lincoln in 1860 the "votes that made him President." But when the Oberlin movement and *Uncle Tom's*

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Cabin and the publication of James G. Birney's (later Gamaliel Bailey's) Philanthropist in Cincinnati are all considered, it seems fair to use the superlative in ranking Ohio in the antislavery crusade. Also, one should not ignore the work of Kentuckians across the river. Cassius Clay in the Lexington area is the best-known antislavery figure the state produced. More important in the later antebellum period was John Gregg Fee, who founded Berea College to be, as he phrased it, "to Kentucky, what Oberlin is to Ohio."5 Throughout the 1850s, one of the few abolitionist newspapers published on slave soil was edited by a self-styled "poor mechanic," William Shreve Bailey, in Newport. He suffered the same violent destruction of his presses that Birney had experienced across the Ohio River in Cincinnati at an earlier date. Kentucky supporters later helped him rebuild. This writer is not aware that Ohio supporters helped Birney.

Only one slave state, Maryland, reported more runaway slaves than Kentucky. Certainly, through Ohio ran many routes of the so-called underground railroad, some of whose passengers Salmon P. Chase would serve as legal counsel.

Some of the preceding accounts describe activities occurring after Chase had firmly embraced an antislavery position. They appropriately can be noted as elaborations of the ferment of reform movements in this still, in many respects, frontier setting. Is it legitimate to pose a question (and in so doing, to violate the credo of historians): "Would Salmon Chase have been as active and as significant a figure in antislavery activity had he remained in his native New England rather than migrate to the West?" Might he not have been overshadowed by figures such as his later friend, Charles Sumner? Obviously, the question cannot be answered; but to plant the seed of doubt seems legitimate.

This writer believes that had Chase remained in New England, he at some time would have come to attack slavery and to sympathize with its victims, because, as Professor Blue notes, years before Chase moved west he had a significant religious experience. It seems fair to accept the proposition that historians should believe what their subjects say about themselves, barring compelling evidence to the contrary. Regardless of psychological theory, an intelligent and sane individual knows himself or herself

better than does anyone else. Salmon P. Chase testified of a revival he attended as a student at Dartmouth, that the "spirit of God continues to proceed in Hanover." He wrote, "It has pleased God in his infinite mercy to bring me ... to the foot of the cross and to find acceptance through the blood of His dear Son." Of his second wife, Chase wrote, "We are in a common dependence on the Savior and in a common hope of immortal life." Of her death he penned, "[A]ll is not dark. The cloud is fringed with light. She died trusting in Jesus." On the eve of the death of his third wife, Chase counseled his little daughter Kate, "[Y]ou may die soon and cannot in any event live very many years.... How short then is this life! And how earnest ought to be our preparations for another!" Had Chase not been a devout orthodox Christian, why would he morbidly warn his eleven year old youngster of her likelihood of dying before "very many years?"

In an age when men believed in God and in Heaven and Hell, it is logical to accept Chase's testimony that he was an orthodox Christian. Therefore, when in the 1830s he became rationally convinced of the evil of slavery, he was compelled by his conscience to stand against it. He may have experienced a gradual "political conversion," but was it not founded primarily upon an earlier religious conversion in 1826 on the campus of his alma mater? The greatest force behind the antislavery movement in pre-Civil War America, as indeed behind most of the major reform movements of that era, was evangelical Protestantism. Elie Hallevy, the great French historian of nineteenth-century Britain, maintains that evangelical Protestantism, in the Methodist movement, was the prime force in maintaining social order in that country, in that period, while upheavals wrecked the continental states. The tone of the young Oberlin antislavery missionaries was set by the theology of the president of the school, Charles Grandison Finney. Finney was the greatest evangelist preacher of his day, the Billy Graham of the antebellum period. However, he didn't preach against slavery; he would not even pray for abolitionists. Sermons against slavery did not elaborate its im-

6. BLUE, supra note 4, at 7.
7. Id. at 25.
8. Id. at 26.
9. Id.
moral or unjust or irrational character; they declared that slavery was a sin of which one must repent or burn forever in Hell fire. Only when the power of this belief is understood can a secular age begin to understand the antislavery movement and its apostles.

To expand the consideration of the broad context of slavery and antislavery in which Professor Blue's speech is set, it is appropriate to note that in his biography of Chase he is properly critical of what can only be characterized as the hypocrisy of certain Northern reform groups. In the "address" (statement of goals, or platform) of the Southern and Western Liberty Convention in 1845, the Liberty party, Professor Blue notes, "omitted mention of rights for [N]orthern blacks."\(^\text{10}\) The successor third party which claimed antislavery votes, the Free-Soilers, in the 1848 platform in Ohio "opposed a large, permanent black population 'for our state.'"\(^\text{11}\)

The Wilmot Proviso in the Mexican War period was not a humane gesture. David Wilmot said when introducing it: "[T]he negro race already occupy enough of this fair continent; let us keep what remains for ourselves, and our children ... for the free white laborer."\(^\text{12}\)

There are college textbooks written for basic survey courses in American history which now recognize, as one phrased it, that "Much of the agitation in the North against the spread of slavery into the new territories in the 1840s and 1850s grew out of race prejudice, not humanitarianism. Antiblack feeling was in fact frequently stronger in the North than in the South."\(^\text{13}\)

An extension of the balanced emphasis of Professor Blue introduces the only point which might be made in minor criticism of his comments today and in his very excellent biography of Chase. For the mob attacks on James G. Birney's Philanthropist in 1836, he fixes blame with the sentence: "Cincinnati, with its extensive commercial ties with the South and its many recent emigrants from Kentucky and Virginia, was not a city in which it was any safer for an abolitionist to write or speak than it was

10. Id. at 51.
11. Id. at 71.
for blacks to live."\(^{14}\) Is it really fair to blame the Cincinnati violence in 1836 on Southern "wetbacks"? After all, William Lloyd Garrison was dragged through the streets of Boston with a rope around his waist; Elijah Lovejoy was lynched in Alton, Illinois. Note, for example, the violence against teachers of black children in the North, even in New England. The minuscule vote for Birney as Liberty party candidate for president in 1840 (fewer than seven thousand out of a total presidential vote of almost two and a half million) and the pitiful 2.3% he received in 1844 symbolize the fact that antislavery sentiment was about as rare among Northerners as among Southerners. Even the Free-Soil party, with its racist incentive, could poll only 4.91% of the vote in 1852. (In 1848, Van Buren did manage to garner 10.12%).\(^{15}\)

With the blossoming of revisionist history about slavery and antislavery in the decades since World War II, many errors in past emphasis have been corrected. However, ancient errors, preached by post-Civil War Union veterans, among others, have been reborn. The civil rights movement in the era of the 1960s often painted the fact that antislavery sentiment was about as rare among Northerners as among Southerners. Even the Free-Soil party, with its racist incentive, could poll only 4.91% of the vote in 1852. (In 1848, Van Buren did manage to garner 10.12%).\(^{15}\)

In an analogous way, Professor Blue is perhaps unfairly harsh when he says of Chase, "With his elitist New England background, he believed that blacks were inferior to whites and argued condescendingly that it was in the best interest of blacks to return to Africa."\(^{16}\) Is it fair to saddle this prejudice on "elite" New Englanders as distinct from all other New Englanders? No Americans were more racist in their prejudices than the poor and ignorant masses, North and South—Karl Marx's theories to the contrary notwithstanding.

Northern attitudes toward blacks during and after the Civil War paralleled their attitudes before the war. Radicals in Congress mandated the franchise for freedmen in the former Con-

\(^{14}\) Blue, supra note 4, at 29.
\(^{16}\) Blue, supra note 4, at 28.
federate states, but left it up to state governments in the North to decide on votes for their black populations. Even Garrison was shocked at extending the franchise *immediately* after emancipation. The Homestead Act in 1862, passed by an almost completely free state Congress, was so phrased that it resulted in a *de facto* exclusion of most black farmers.

It might surprise many to learn that in the antebellum period, as late as 1827, there were more antislavery societies in the South than in the North. Benjamin Lundy, an antislavery publisher in Ohio and later in Baltimore, counted 106 societies with 5,150 members in the slave states, and only twenty-four societies, with 1,475 members, in the free states. Additionally, slavery was more often defended in written works (pamphlets, etc.) by Northerners than by Southerners in slave days, according to one recent scholarly study.

Antislavery activity by emancipationists, abolitionists, colonizationists (and they *were* antislavery—Henry Clay, a president of the American Colonization Society, declared that slavery was a great evil, but that the problem always had been what to do with the free negro), and an endless variety of opponents in the North and South, did not effect the freeing of the slaves. When the Civil War came, it was indeed caused primarily by the issue of slavery in the territories. This issue led to the birth of the Republican party, a sectional party whose victory in 1860 frightened the South. All of those radicals who had damned Southern society and culture as totally evil had supported Lincoln. Historians should not underrate the role of Southern *pride* in promoting secession.

Ignore the fact that other issues, such as the Depression and the promise of a Homestead Act, undoubtedly bulked larger among the voters in 1860. Ignore the fact that Southerners, certainly Democrats, would still control Congress. Ignore the foolishness of secession; but surely it is possible to understand why it happened. With that secession and Lincoln’s determination to put it down came the bloodiest war in American history. Finally, in that war, the president issued the Emancipation Proc-

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lamination in the hope of strengthening the Union's position at home and abroad. Many Northern soldiers threw down their arms upon hearing of the Emancipation Proclamation. Black soldiers recruited by the Union were often paid only half the salaries of white soldiers. Recently, historians have come to recognize that the great role of the slaves themselves was necessary for them to gain their freedom.

There is, indeed, no reason to credit Americans in the North any more than Americans in the South for superior virtue and humanitarianism in the realization of the epochal emancipation. And there is certainly reason to erase every vestige of the simplistic contrast of Northern and Southern sections, which contrast became a theme of many in the North after the Civil War. If a slave society, per se, is to be utterly and completely despised, then one must condemn Ancient Greece and Rome and practically every other high civilization of the West, and more enthusiastically to condemn the cultures of the non-Western world, ancient and modern and (many of them) contemporary as well.

The latter emphasis of this paper is not to diminish the excellence of Professor Blue's very fine speech and biography of Salmon Chase, whose contributions this law school which bears his name salutes in its centennial year of service to Greater Cincinnati. This emphasis is to mention a tendency in the present age to interpret the South's past in what is really an unfair and an historically inaccurate fashion—as distorted as is the overly romantic portrayal of the slave South as a land of Taras and Twelve Oaks, of hoop skirts and dashing cavaliers, of duels and mint juleps.

Finally, it is redundant to note that the author of these comments is well aware that the last part of this paper is not, in the year 1993, politically correct!
RECONSTRUCTING THE CONSTITUTIONAL JURISPRUDENCE OF SALMON P. CHASE

by G. Edward White*

I. CHASE'S REPUTATION

Abraham Lincoln said that Salmon Chase was "about one and a half times bigger than any other man I ever knew."1 Justice Samuel Miller, Chase's colleague on the Supreme Court of the United States, told his brother-in-law that he knew of "no one against whom I should undertake to measure myself with more diffidence."2 Historian Allan Nevins, writing in 1936, identified "three jurists of consummate ability" who had occupied the position of chief justice of the United States from 1801 to 1873, "John Marshall, Roger B. Taney, and Salmon P. Chase."3 Such comments testify to the effect Salmon Portland Chase had on contemporaries and close students of his work. He was by all accounts one of the formidable legal and political figures of the antebellum, Civil War, and Reconstruction years: an antislavery advocate; United States senator from and governor of Ohio; secretary of the treasury under Lincoln; and from 1864 to 1873, the last nine years of his life, chief justice of the United States. Of the years of Chase's chief justiceship, a commentator wrote on Chase's death that "[t]he nine annual terms through which he has presided constitute a judicial period of little less importance than that period of constitutional interpretation which it was the fortune of Chief Justice Marshall almost exclusively to fill."4

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3. Allan Nevins, Hamilton Fish 659-60 (1936), quoted in Hughes, supra note 1, at 368.
4. 6 Charles Fairman, History of the Supreme Court of the United States, Reconstruction and Reunion 1864-88, at 1474-75 (1971).
When Chase had a stroke in 1870 and his health began to decline, two prospective biographers, both longtime friends, began a competition to produce his authorized biography, which ended in a virtual dead heat, two lengthy volumes of the "life and letters genre" appearing only a year after Chase's death.\(^5\) Another biography appeared in 1899, and between that time and the 1930s, when Nevins compared Chase to Marshall and Taney, the perception of Chase's contemporaries that he was a major figure and his chief justiceship a significant episode in the history of the Supreme Court appeared still in place. But between the 1930s and 1987, no additional biography of Chase appeared, although most of his fellow antislavery ideologues, mid-century politicians, cabinet members, and even Supreme Court justices received extended treatment from historians in that period.\(^6\) A sense of the change in Chase's reputation can be gleaned from the assessment made by Charles Fairman in his 1971 Holmes Devise history of the Supreme Court during Chase's tenure as chief justice. "Insofar as the years of Chase's Chief Justiceship may be said to stand out as a distinct period in the annals of the Court," Fairman concluded, "it was not by reason of any profound impulse he imparted."\(^7\) In contrasting Chase with his successor, Morrison Waite, Fairman said that the Court "would receive as its new Chief a man of unpretentious dignity who would devote himself singly to the duties of his office and prefer his brethren to himself."\(^8\)

Fairman's comments signified an infelicitous interaction of historiographical trends with some of Chase's personal characteristics. Students of Chase's life and career had long been aware that his contemporaries, in addition to noting Chase's intellectual strengths, his commanding presence, and his apparently tireless capacity for work, had also regularly commented on his engrossing political ambition. In 1902, an autobiography by George S. Boutwell revealed a conversation Boutwell had had with President Lincoln before Lincoln appointed Chase chief justice of the

\(^{5}\) Jacob W. Shuckers, The Life and Public Services of Salmon Portland Chase (1874); Robert B. Warden, An Account of the Private Life and Public Services of Salmon Portland Chase (1874). See also Frederick J. Blue, Salmon P. Chase: A Life in Politics 318 n.29 (1987) (an account of the competition between the biographers).

\(^{6}\) See Blue, supra note 5, Bibliographical Essay, at 400-01.

\(^{7}\) 6 Fairman, supra note 4, at 1477.

\(^{8}\) 6 id. at 1481.
United States in December, 1864. In that conversation Lincoln allegedly said that there was one very strong reason against [Chase's] appointment: that he was a candidate for the presidency. The surfacing of Lincoln's assessment of Chase was additional evidence that Chase's peers believed him to be insatiably ambitious and hopelessly infected with presidential fever.

Examples of this perception of Chase by his contemporaries are numerous. Judge Charles C. Nott, writing on Chase's death, had spoken of his "burning ambition" and his "thinly disguised electioneering." Rutherford B. Hayes, at the same time, had said that "[political intrigue, love of power, and a selfish and boundless ambition were the striking features of [Chase's] life and character." Justice David Davis, Chase's colleague, had written in 1870 that, with the exception of Stephen Douglas, Chase was "the most ambitious man . . . that I ever knew personally." Finally, Justice Miller, in the course of an assessment of Chase on his death, had said that Chase "judged every important man he met with the question 'how can I utilize him for my presidential aspirations?'" Miller concluded that Chase's great strengths were "warped, perverted, shrivelled by the selfishness generated by ambition."

Chase's ambition, by itself, would not seem to be a reason to diminish his reputation as a figure of historical interest, nor would his continued interest in politics during his years on the Supreme Court of the United States. Justices from Joseph Story through Abe Fortas have participated closely in political affairs, and Charles Evans Hughes resigned from the Court to run for the presidency. If anything, those features of Story's, Fortas', and Hughes' careers have enhanced their interest among recent scholars. To understand the negative effect Chase's attributed "ambition" and "presidential fever" have had upon his reputation, it is also necessary to assess recent trends in the historiography of the years in which Chase served as chief justice.

9. id. at 22.
10. id. at 1475.
11. Hughes, supra note 2, at 600.
12. Blue, supra note 5, at 320.
13. Id.
Beginning in the 1960s, an older view of Reconstruction as a "tragic era," in which a fanatical band of Republicans in Congress overrode the moderate accommodationist policies envisaged by Lincoln and endorsed by Andrew Johnson to impose their vindictive will upon the defeated South, was displaced with an interpretation that emphasized the principled commitments of Republican spokesmen to racial equality, the recalcitrance and unrepentant racism of the Confederate states, and the ineptitude of Johnson. The shift in historiographical attitudes eventually had an effect on the image of the Supreme Court during Chase's tenure. Initially thought of as an ineffectual, insignificant force during a period of congressional activism, the Chase Court eventually came to be seen as an institution that the Republican Congress did not invariably oppose and on some occasions supported. A 1968 study by Stanley Kutler concluded that "the Court in this period was characterized by forcefulness and not timidity, by judicious and self-imposed restraint rather than retreat, by boldness and defiance instead of cowardice and impotence, and by a creative and determinative role with no abdication of its rightful powers." 15

The interesting feature of this historiographic shift, for present purposes, is that it did not result in a corresponding elevation of Chase's reputation. While Chase's Court was pictured as more of a positive force in Reconstruction events, which were themselves treated more sympathetically, Chase himself, called "the high priest of radicalism" 16 by the Richmond Examiner, was not apparently given much credit for the Court's newly-discovered significance. As Charles Fairman, whose 1971 history of the Chase Court amply documented the persistent involvement of the Justices with policy issues in the Reconstruction years, put it, "such influence as [Chase] exerted was confined to those few categories in which he took some particular interest." 17

Prior to that assessment, Fairman had quoted Rutherford Hayes' assessment of Chase at his death and associated himself with it. Hayes's portrait of Chase, as excerpted by Fairman, had included the following passage:

16. Hughes, supra note 2, at 583.
17. 6 Fairman, supra note 4, at 1477.
He was cold, selfish, and unscrupulous.... [H]is ... contempt for the great office he held and his willingness to degrade it, should have made lawyers, at least, chary of praise.... [H]e always preferred the title of Governor to that of Chief Justice. He often expressed preference for the place of Senator to that of Chief Justice.\textsuperscript{16}

After quoting Hayes, Fairman added, "However severe that may be as a conclusion, Hayes' statement of what he had observed is hardly to be questioned.\textsuperscript{19}" He then contrasted Chase to Waite, who, rather than a man of voracious ambition was one of "unpretentious dignity,"\textsuperscript{20} who, rather than continually harboring political ambitions, "would devote himself singly to the duties of his office,"\textsuperscript{21} and who, rather than being "cold, selfish, and unscrupulous,"\textsuperscript{22} would "prefer his brethren to himself.\textsuperscript{23}

The diminution of Chase's reputation, then, turns out to be a complex historiographic phenomenon. On the one hand, more recent interpretations of Reconstruction have de-emphasized its bitter partisanship and restored to prominence the moral and ideological convictions that played a part in congressional Reconstruction policy. Just as Congress has come to be seen as relatively less vindictive and punitive, the Supreme Court in the Reconstruction period has come to be seen as relatively less impotent or quiescent. Yet the image of Chase's "ambition" and "presidential fever" has persisted, so that his "influence" on the Court on which he served is relegated to "those few categories" in which, purportedly because of his own political ambitions, he "took some particular interest." Moreover, Chase's blending of "judicial" and "political" roles, his self-preoccupation, and even his vanity have been treated as diminishing not only his stature, but his interest, as a Supreme Court justice. A comment by Justice William Strong, made on Chase's death, implicitly takes on pejorative overtones. Strong said of Chase that "[h]e was not a thoroughly trained and learned lawyer, nor was he at home in habits of close legal reasoning, though there was a class of subjects, semi political, either constitutional or arising out of

\textsuperscript{18}  6 id. at 1475.  
\textsuperscript{19}  6 id.  
\textsuperscript{20}  6 id. at 1481.  
\textsuperscript{21}  6 id.  
\textsuperscript{22}  6 id. at 1475.  
\textsuperscript{23}  6 id. at 1481.
legislation during or following the war, in discussing which he showed great power." 24 In that comment, Chase's contributions as a justice are made out to be not so much those of a "thoroughly trained lawyer" but one whose instincts were invariably "semi-political."

II. GETTING AT CHASE'S JURISPRUDENCE

I do not propose here to revise the image of Chase as a judge with persistent political ambitions. The fact that he was courted by national parties during every presidential election while he served as chief justice, and did little to discourage that courting, would by itself make that task difficult. Nor do I propose that the image of Chase as self-preoccupied and ambitious be revised. Those features of Chase, in fact, are part of an argument that he has been, to some extent, misunderstood as a judicial figure.

My argument, in summary, is as follows. To understand Chase as a judge requires getting to the bottom of his jurisprudence; understanding his judicial convictions. When one embarks on that task, one is projected back into the world of antebellum moral and constitutional theory, a world which is difficult for moderns to fathom. But when one seeks to reconstruct that world—while at the same time making an assumption, that on matters of ultimate conviction, Chase was sincere and largely consistent in his views—one finds that a certain subset of Chase's constitutional positions cannot readily be described as prudential responses to current political exigencies. On the contrary, they were positions that flowed from Chase's persistent belief that when he had studied an issue of social policy thoroughly, and had been persuaded as to the proper response to that issue, others would come to see the rightness of his views, however idiosyncratic or controversial they might first appear to be.

The difficulty such an approach to Chase presents, however, is that, as Strong's comment suggests, there were relatively few issues on which Chase held strong convictions. On a variety of issues, he seemed, in retrospect, to be engaging in temporarizing or strategic behavior, behavior that can be readily explained by the conventional perception of him as "politically ambitious" and

24. 6 id. at 1476-77.
therefore "unjudicial." His strategizing, in fact, has served to lower his reputation. He has been seen as insufficiently supportive of the policies of congressional Republicans, who shared his deep antipathy toward slavery, and thus timid and irresolute in contrast to his fellow "radicals." At the same time, he has been seen as a minor judicial figure, too much inclined to consider constitutional analysis in light of his own ambitions for the presidency, evading or dodging issues to avoid alienating potential constituents.25

I would suggest, however, that with respect to a particular group of issues, Chase's views were not a product of temporarizing or strategizing. This is not to say, of course, that his views are free from internal contradiction; in addition, to moderns they may appear obscure or idiosyncratic. It is to say, however, that it is incomplete and misleading to see Chase, as a judge, strictly as a self-serving, ambitious politician. To get at this overlooked dimension of Chase's jurisprudence, I propose to make two extended excursions, one into the world of antebellum constitutional theory, and the other into Chase's career as an early nineteenth-century lawyer and political theorist. I then will take up the set of constitutional issues that most engaged Chase as a Supreme Court justice.

A. THE STARTING ASSUMPTIONS OF ANTEBELLUM CONSTITUTIONAL THEORY

In a recent work on the history of the Fourteenth Amendment, William E. Nelson argues that in the debates that preceded that amendment's passage, "antebellum ideas of individual rights and equality were ... used ... exactly as they had [been] used ... before the Civil War: to articulate a moral posture and, by enacting their morality into law, to encourage others to abide by it."26 Nelson's purpose in making that claim is to suggest that the Fourteenth Amendment's framers "understood constitutional politics as a rhetorical venture designed to persuade people to do good, rather than as a bureaucratic venture intended to establish precise legal rules and enforcement mechanisms."27 His

27. Id.
general point is that a dominant twentieth-century conception of the role of constitutional adjudication, namely that of a device through which the Supreme Court and other federal courts employ the Constitution as a mandate for enforcing individual rights against state efforts to restrict them, was alien to the Reconstruction period.

Nelson then seeks to show that this antebellum view of constitutional politics was, in the latter years of the nineteenth century, gradually replaced by a more "doctrinal" conception in which the Supreme Court, speaking for the federal judiciary, did in fact begin to use constitutional provisions as a way of protecting specific individual rights against legislative interference. I am less interested in that dimension of his work than in his two preceding observations about antebellum constitutional jurisprudence. I would endorse both of those observations, but in a qualified fashion.

First, I believe that antebellum constitutional ideas were preserved, virtually intact, in the constitutional discourse of the Reconstruction period, especially at the levels of metatheory and metapolitics. Second, I believe that few of the late nineteenth- and twentieth-century issues that have clustered around the practice of constitutional review of legislative activity—most significantly, issues involving the substantive review of legislation affecting individual rights by a "countermajoritarian" Supreme Court—were important issues for constitutional discourse in the Reconstruction years. However, such issues were beginning to surface, and those issues were among the ones with which Chase was most engaged as a Supreme Court justice.

Put starkly, I would argue that, on the whole, the Supreme Court of the United States, during Chase's tenure as chief justice, functioned in an "antebellum" universe of constitutional theory that entertained "antebellum" conceptions of the role of the Supreme Court as a constitutional interpreter. In many respects, Chase's own jurisprudence was "antebellum" in that it rested on the starting assumptions of political economy that were taken largely for granted in the decades before the Civil War. At the same time, however, certain antebellum political convictions of Chase appeared to harmonize with a more expansive, "modern" role for Supreme Court justices, that of substantive doctrinal scrutinizers of both state and federal legislation in the service of protection for textually derived constitutional rights.
In addition to Nelson’s interpretation, I want to mention three other historical works to which my comments on Chase’s jurisprudence bear an affinity. William Wiecek, in a study of the sources of antislavery constitutionalism, has drawn connections between positions advanced by early “moderate” antislavery theorists, such as Chase in the 1830s and 1840s, and those held by Republicans from 1860 on.28 Eric Foner, in an analysis of the ideas of “free soil” and “free labor” in antebellum thought, has an extensive discussion of the way in which Chase derived antislavery arguments from the Constitution and from natural law, invoking the millennial and apocalyptic modes of antebellum rhetoric in the process.29 And Harold Hyman, in a constitutional history of the Civil War and Reconstruction, has shown that those who supported structural changes in the Constitution after 1865 nonetheless retained antebellum constitutional theories, which resulted in their simultaneously supporting the federal enforcement of civil rights for blacks and the preservation of significant state autonomy and power in a federal system of government.30

In short, when one thinks of epistemological “divides” or “watersheds” in constitutional and jurisprudential discourse over the course of the nineteenth century, it increasingly appears to scholars that the identification of the Civil War or Reconstruction years as one such “divide” may be misplaced. To be sure, the structure of American politics and government was radically different after the war and the Reconstruction amendments; and to be sure, the legal status of many black Americans was irrevocably altered. But at the close of Chase’s tenure in 1873, it seems fair to say that prevailing assumptions about the role of the Constitution in American life, the nature and sources of American law, the place of the Supreme Court of the United States in determining questions of sovereignty in the American federal republic, and the relationship of sovereign governments to their citizens within that republic were not essentially different from prevailing assumptions in the 1830s, even though they would

be markedly different from the assumptions that governed constitutional and jurisprudential discourse a generation later.  

At this point, I want to describe what might be called some foundationalist premises of antebellum constitutional thought. One can see evidence of these premises scattered throughout judicial opinions, treatise literature, and constitutional commentary from the 1830s to the 1860s. Since my primary orientation in this essay is with the jurisprudence of Chase, I will not take the space to detail that evidence,  

contenting myself with a description and discussion of the premises. I will then refer to those premises, and to the altered governmental setting of the Reconstruction period, in my treatment of Chase. 

The first of the premises is that no sharp separation existed, in constitutional discourse, between morality, constitutional politics, and law. A sharp distinction was made between "constitutional politics" and partisanship: antebellum commentators assumed that, at one level, rhetorical positions were advanced in the service of self-interest and could be exposed and delegitimized as such. But if constitutional law was not equated with partisan lobbying, neither was it equated with the positivistic edicts of governments nor with the literal language of the constitutional text. It was perceived of as an amorphous blend of "fundamental principles of republican government," the "higher laws" of morality and religion, "general principles" of law derived from a variety of authorities, the language of the Constitution, settled precepts about human nature and social organization, and values, such as liberty, equality, and the inviolability of property, that were taken to be intrinsically American. 

If this conception of constitutional law seems broad and vague, one might consider what it did not contain. It did not contain a  

31. For a vivid description of contemporary theorists' sense that the starting assumptions of legal and constitutional discourse were undergoing rapid revision in the 1880s and 1890s, particularly with respect to attitudes about judicial review, see ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960).

32. The general observations made in these sections rest on examination of a number of early nineteenth-century treatises on constitutional law. See, e.g., WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1829); THOMAS SERGEANT, CONSTITUTIONAL LAW (1830); WILLIAM A. Duer, A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES (1843); FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT (1853). For an analogous discussion of treatise literature on constitutional issues in the period of the Marshall Court, see G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 81-137 (1988).
determinate theory of constitutional interpretation, either in the
sense of constitutional meaning being permanently fixed or in
the sense of constitutional exegesis being confined to the Con-
istitution's text. On the other hand, it did not contain a radically
indeterminate theory of constitutional interpretation, such as the
theory that the meaning of the Constitution was simply what a
given set of judges said it was. Constitutional law was conceived
of as a set of fixed and permanent, if broad and abstract, prin-
ciples, to be adapted, as Chief Justice Marshall once said, to the
"various crises in human affairs." 33 Those principles were to be
derived not only from the text of the Constitution, but from
extratextual sources, ranging from specialized doctrines of civil
and maritime law to general moral and philosophical precepts.
Since the Constitution was not just a technical legal document,
but an embodiment of moral and political values, judges, in
interpreting the document, were free to draw upon moral and
political principles as well as legal texts and doctrines. But the
principles of the Constitution were intended to endure over time:
judges were not free to replace constitutional principles with
their own partisan concerns—to substitute, as Marshall put it,
"the will of the Judge" for "the will of the law." 34

The second foundationalist premise of antebellum constitutional
theory thus rested on what to moderns appears to be a singular
paradox. Judges were free to employ a variety of extratextual
sources, including abstract principles of justice and morality, in
interpreting the Constitution's text. They were given significant
discretion to be creative interpreters. At the same time, judges
were not free to advance partisan interpretations. They had to
follow the will of the law, not their individual beliefs. One might
ask, as a person conditioned by twentieth-century theories of
judging, how this distinction could be maintained in practice. If
judges were tacitly permitted to range beyond the words of the
constitutional text in interpreting it, if indeed they were theo-
retically permitted to ground their decisions on other than the
constitutional text, how could they be constrained from advancing
subjective, "partisan" interpretations? How did one know the
difference between the "will" of a "law" based on abstract prin-

principles of morality and justice and the "will" of a judge who happened to believe in those principles?

Although this paradox seems readily apparent to moderns, antebellum constitutional theory did not recognize it in its modern versions. There was considerable interest in the concept of judicial "discretion" in antebellum jurisprudence and considerable concern about the possibilities of judicial partisanship. But there was not a corresponding sense that judges, in the guise of constitutional interpretation, "made law" in the same sense as legislators. As late as twenty years after Chase's death, one can find statements that the judicial role is inconsistent with "making policy" in the legislative sense. The apparent latitude that judges had to range beyond the constitutional text to consider sources that to a modern might appear "nonlegal" was a function of the assumption that those sources were themselves fixed and binding. When a judge invoked the "fundamental principles of our free institutions" or "the nature of things" as authority for a constitutional decision, that invocation was not treated as unintelligible or partisan because the judge was merely declaring starting premises of republican government.

In a jurisprudential universe in which judges are constrained by first principles of social organization and governance, rather than being implicitly given opportunities to create such principles, the two primary twentieth-century devices employed to prevent indiscrimate judicial "lawmaking" in the guise of constitutional interpretation become far less significant. As noted, antebellum constitutional theory did not insist that judges confine their interpretations to the language of the Constitution's text or to the "original intent" of the framers of the Constitution. Nor were judges required to confine their decisions to questions that they had a peculiar "competence" to decide. Twentieth-century institutional competence theory, with its distinctions between "political" and "legal" questions and its assumption that the intrusion of the judiciary into a sphere of "policy making" properly re-

35. See id. (Marshall's comment about a "mere legal discretion").
36. The most commonly cited is Justice David P. Brewer's 1893 address in which he declared, "[t]he courts ... make no laws, ... establish no policy, [and] ... never enter into the domain of public action." Brewer, The Movement of Coercion, Address Before the New York State Bar Association, quoted in G. Edward White, The American Judicial Tradition 145 (1988).
served for the legislative or executive branches raises a "counter-majoritarian difficulty," was not at the center of antebellum constitutional discourse.\textsuperscript{37}

An example may be helpful here. When the Supreme Court of the United States announced its decision in \textit{Dred Scott v. Sandford},\textsuperscript{38} and Chief Justice Taney's "opinion of the Court" was made public, there was, of course, sharp protest among numerous commentators. But, as several historians have pointed out,\textsuperscript{39} that protest did not take the form modern critics of judicial "activism" might have expected. One feature of \textit{Dred Scott} was the Taney opinion's apparently gratuitous invalidation of the constitutionality of the Missouri Compromise, an effort to settle the conflicts generated by the potential expansion of slavery by a political branch of government. Another was the Taney opinion's novel substantive reading of the Fifth Amendment's Due Process Clause to prevent federal legislatures from infringing upon the property rights of slaveholders, an interpretation of that clause not previously advanced in so sweeping a form. Both of these features of Taney's \textit{Dred Scott} opinion were criticized. But the criticism centered on their deficiencies as substantive constitutional arguments, not as examples of "unjudicial" excesses in textual interpretation or jurisdictional reach.\textsuperscript{40}

Moreover, although it is widely assumed that the \textit{Dred Scott} decision "lowered the Court's stature" as a functioning branch of government during the Civil War years, the basis of that assumption is sometimes erroneously assumed to originate in a conviction among commentators that the Court had egregiously overstepped its interpretive and institutional boundaries in rendering the \textit{Dred Scott} decision. In fact, the other branches of government had invited the Court to find a "solution" to the slavery crisis in the 1850s: implicit in that invitation had been a belief that judges were capable of rendering "definitive" resolutions to political issues that had a constitutional dimension. The

\textsuperscript{37} See Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 626 (1869) (Miller, J. dissenting: one sees occasional indications of a distinction between judging and policy making).

\textsuperscript{38} 60 U.S. (19 How.) 393 (1856).


\textsuperscript{40} See 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1836-1918, at 279-80, 302-19 (1937).
principal difficulty with the Taney opinion in *Dred Scott*, for contemporaries, was not that the Taney Court had decided the case, nor that Taney had given a substantive reading of the Fifth Amendment’s Due Process Clause. The principal difficulty was that a large number of commentators found the decision “wrong”—wrong as a matter of principle, wrong as a potential legitimation of efforts to expand slavery even into states that currently outlawed it. If one focuses on contemporary reaction, it appears that the Court lost stature after *Dred Scott* because it confirmed the worst substantive fears of antislavery proponents. Slavery was not only sanctioned by the Constitution, it arguably could not be eradicated anywhere in the United States, at least as long as a “Southern” majority of Justices existed on the Supreme Court of the United States. The *Dred Scott* Court had declared a fixed and permanent constitutional principle that its critics found intolerable.

When one focuses on the substantive dimensions of *Dred Scott*, one gets a sense of what jurisprudential issues “really counted” for antebellum constitutional commentators. The intolerable feature of *Dred Scott*, from the perspective of contemporary critics, was that it threatened to disrupt settled expectations among antebellum Americans about the nature of sovereignty in the American republic. There were two dimensions to *Dred Scott*’s potentially disruptive effect, both of which reveal the distinctive cast of antebellum constitutional jurisprudence.

To understand the first of the sovereignty issues embedded in *Dred Scott*, it is necessary to make a brief detour back earlier into the nineteenth century. The sovereignty debates that were precipitated by decisions of the Marshall Court from 1816 on have often been caricatured as conflicts between “nationalism” and “states’ rights,” with the Court being persistently supportive of national power and its critics fighting a rearguard action on behalf of the memory of antifederalist principles.41 In fact, the debates neither constituted a rehearsal of sovereignty conflicts at the time of the framing of the Constitution nor a precursor of federalism debates in the world of expanded national regulatory power. The debates, which originated with the Marshall Court’s

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sovereignty cases after the War of 1812 and arguably continued past the years of Marshall's retirement, were about the implications of an "axiom" of political theory that both sides took for granted, that the judicial power of every government was necessarily coextensive with that of the legislative power, and vice versa. "Coterminous power" theory, as it was understood by Marshall and his contemporaries, framed the terms of the great sovereignty debates between Marshall, Jefferson, and supporters and antagonists of the Supreme Court.\footnote{See generally White, supra note 32, at 124-25; G. Edward White, Recovering Coterminous Power Theory, 14 Nova L. Rev. 155 (1989).}

The symbiotic relationship between the judicial and legislative branches of a government posited by coterminous power theory rested on four interrelated "axioms" of late eighteenth- and early nineteenth-century political economy. The axioms were that a government would need to take pains to secure its existence; that courts would be part of the mechanism for enforcing governmental power; that substantive rule-making power (the power to declare the law) followed from a federal court's assumption of jurisdiction; and that, therefore, as a government expanded its sovereign powers through its legislative department, the jurisdiction of its courts would concomitantly expand.

Although these axioms were taken to be settled and unproblematic, they had potentially troublesome implications for the American experiment with a federated republic. The new federal sovereign had been created out of sovereign states, but its relationship to those states had not been precisely spelled out. Some features of the Constitution were nonetheless apparent: the federal government had certain enumerated powers, including the power to create its own federal courts, and, where its powers directly clashed with those of the states, its laws were deemed by the Constitution to be supreme. Moreover, one of those federal courts, the Supreme Court of the United States, had by 1819 claimed the constitutional power not only to review acts of Congress but acts of state legislatures and the final decisions of state courts that arguably raised issues of federal constitutional law.

In \textit{Marbury v. Madison},\footnote{5 U.S. (1 Cranch) 137 (1803).} Marshall, for his Court, had taken pains to distinguish his "department" of the federal government
from its legislative branch, and to suggest that the two might on occasion be in conflict. But when, in a series of sovereignty decisions, the Marshall Court began arguably to invade the prerogatives of state legislatures and state courts, its critics identified it as being the departmental representative of the federal sovereign, and as such, having an interest hostile to that of the states. They then invoked coterminous power theory, predicted the "consolidation" of the American republic, and warned direly of an emerging federal leviathan.44 Before dismissing such warnings as paranoia, one should recall that even though very few of the Marshall Court's decisions supported an increased federal legislative presence, as distinguished from restricting state legislative or judicial efforts to regulate the conduct of individuals, Marshall himself employed the language of coterminous power theory as support for restrictions on state autonomy.45

In retrospect, the most interesting feature of the coterminous power dimension of early nineteenth-century sovereignty debates is that it has been largely lost to modern commentators. The reason for its "disappearance" stems from a tacit compromise that the respective participants seemed to have made in the 1830s. A decade earlier, debates about constitutional theory had been notable for the presence of two apparently incompatible positions: the "Union" and "compact" theories of sovereignty, in which ultimate sovereign power was located, alternatively, in the people as ratifiers of the Union or in the people as citizens of the respective states who made a "compact" to form the Union. The implications of the "compact" theory pointed toward doctrines, such as interposition and nullification, that were regarded as heretical both by the Marshall Court and ultimately by all the presidents in office from 1819, including Andrew Jackson. The implications of the "Union" theory, however, were equally threatening to "states' rights" commentators, in significant part because the assumptions of coterminous power theory appeared to make the "Union" position a rationale for consolidation.

By 1833, with the appearance of Justice Joseph Story's *Commentaries on the Constitution*, the "compact" theory of sovereignty had been authoritatively discredited. But at the same

44. WHITE, supra note 32, at 162-78, 182-84.
45. Id. at 184-91.
time, the appearance of the doctrine of “concurrent sovereignty” in Commerce Clause cases, the Court’s avoidance of a direct confrontation with the state of Georgia in the Cherokee cases, and Marshall’s disinclination, for a unanimous Court in *Barron v. Baltimore*, to extend the provisions of the Bill of Rights against the states signaled that the Court had come to believe that its broad exercise of Article III jurisdictional powers would be less threatening to its critics if it declined to couple that posture with an insistence that Article I, and other structural provisions of the Constitution, carved out a large ambit of exclusive federal regulatory power and provided for a battery of federally-enforced safeguards for individuals against state regulation.

Between the 1830s and the 1850s, this tacit compromise about the powers of the respective sovereigns in the American republic appeared to be in place. It took place at two levels, both of which were implicated in the *Dred Scott* decision. The first level, addressed by the coterminous power theory debates of the 1820s, involved the relationship between the sovereign Union and the sovereign states; as noted, the continued maintenance of broad Article III federal review powers was tacitly exchanged for a cutting back on broad interpretations of Article I federal plenary powers. Congress did not pass much affirmative regulatory legislation; the legislation it did pass, such as that affecting slavery, was openly the product of compromises among state sovereign interests; and the Supreme Court continued to construe the Commerce Clause as permitting states to regulate the economy so long as the objects of their regulation were “local” in character. At the same time, in areas such as the Contracts Clause and admiralty jurisdiction, the Court continued to assume that it had broad supervisory powers. The effect of the compromise, at this level of sovereignty disputes, was that the states retained considerable power to regulate their domestic affairs, so long as they did not encroach upon “national” subjects or transgress on property rights that the Constitution had singled out for protection, such as preexisting contracts.

This level of sovereignty questions—relationships between the nation and the states as sovereigns—had been the major focus

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46. 32 U.S. (7 Pet.) 243 (1833).
of discussion in the 1820s and 1830s, and continued as such in
the two subsequent decades preceding the Civil War. But there
was another level of sovereignty questions also implicated in
Dred Scott: the level of relationships among “the people,” as
individuals, and the sovereign entities of the federal government
and the states. With respect to this level of sovereignty questions,
antebellum constitutional thought did not anticipate two areas of
conflict that became staples of the constitutional discourse of the
late nineteenth and twentieth centuries. One area was that of
conflict between the states and their own citizens with respect
to the great majority of federally or constitutionally created civil
rights and liberties. Antebellum constitutional jurisprudence as-
sumed that conflict between individual rights and state power
would be confined to certain economic relationships, such as those
involving contracts or property rights, that had been singled out
by the Constitution as requiring a degree of protection. The other
area was that of conflict between the federal government and
the civil rights and liberties of individuals. After the tacit no-
enforcement of the Alien and Sedition Acts in the early nine-
teenth century, Congress declined to exert any authority over
the non-economic rights of individuals, with one important excep-
tion, until the Civil War.

The above discussion of sovereignty issues in the antebellum
period has been designed to clarify the last of the fundamental
premises of antebellum constitutional jurisprudence: that no per-
vasive conflict existed, outside the narrow ambit of constitution-
ally protected economic rights, between state sovereignty and
the protection of individuals. Indeed, antebellum jurists assumed
that states and localities were the fora within which individual
citizenship flourished in a republican form of government. They
neither saw the states as persistently thwarting individual lib-
erties nor did they see the federal government as a potential
protector of the rights of individuals who had been discriminated
against by states. To the extent that ultimate sovereign power
in a republic, the people, had an individual identity in antebellum
sovereignty debates, it was as a hypothetical economic actor with
an “inalienable” right to property rights that had “vested.” The
States were expected to protect private property and personal
security against private aggression. That was all they were
expected to do, but in those protections lay the rationale for the
very existence of government.
But of course, as *Dred Scott* made abundantly clear, there was one area of antebellum constitutional law which revealed that the above premises were not free from internal conflict—the area of slavery. Many of the Supreme Court's efforts in slavery cases between the 1820s and the *Dred Scott* decision can be seen as attempts to avoid making slavery a question of constitutional law, especially in the extended, antebellum sense of constitutional morality and politics. If slavery were simply a question of municipal, positive law, and its issues consequently not rising to the level of antebellum sovereignty conflicts involving the Union and the states, or, if slavery, because of its "peculiar" nature, was not an area of law the judiciary was obligated to subject to constitutional scrutiny, its capacity to turn the premises of antebellum constitutional thought against themselves might be suppressed. But the only way in which antebellum jurists could derive that place for the law of slavery was to assert that the "local" practice of treating certain black persons as the equivalent of furniture or domestic animals somehow did not raise questions about the moral basis of a constitutional jurisprudence which permitted that practice to exist. The Taney opinion in *Dred Scott* marked the end of that evasion. Slavery was now an issue that affected not just the invisible liberties of blacks but the very visible "liberties" of slaveholders to their property, as well as the liberties of citizens of free states to outlaw the practice of slavery. Moreover, slavery was now a practice that the Constitution had decisively embraced and sanctioned; it might even be a practice that could not constitutionally be abolished. The limited conflicts among federal supremacy, state autonomy, and individual rights assumed by antebellum constitutional thought were suddenly and dramatically expanded in the *Dred Scott* case.

Eventually, of course, slavery began to have an impact on all of the foundationalist premises of antebellum jurisprudence. But an often misunderstood feature of post-Civil War constitutional jurisprudence centers on the immediacy of that impact. The abolition of slavery, the Civil War, and the constitutional amendments of the Reconstruction period were eventually to force a reconsideration of all of those premises. But that reconsideration had just begun to surface during Chase's tenure on the Supreme Court.

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Court. A new structure of sovereign relationships may have been in place, and a new role for the federal judiciary as interpreter of the Constitution may have been foreordained. But Chase and his contemporaries, in the years of his chief justiceship, could only survey the constitutional landscape from the jurisprudential perspective of their antebellum peers. They had no other way of thinking about constitutional issues.

B. CHASE'S IDIOSYNCRATIC PERSPECTIVE

I have been arguing that Chase's constitutional jurisprudence started from the premises of antebellum constitutional theory that I have just sketched out. I am also arguing, however, that within that structure of these premises, Chase had his own distinctive perspective—one which flowed from a combination of temperament and ideology. By all accounts, Chase was not a conventional politician, either in the sense of invariably adopting positions calculated to minimize the degree to which he offended prospective supporters or of invariably adopting conventional strategies of political organization and office-seeking. On the contrary, he seems to have been consistently outspoken in affirming positions in which he deeply believed, notwithstanding their political consequences, and to have been singularly disinclined to develop any political organization or coterie of political lieutenants.50

Chase, in short, often took positions because he believed they were intrinsically "right"; assumed, because of a high degree of self-confidence and vanity,51 that others would follow his lead in adopting those positions; and expected that public prominence would follow. While invariably interested in public power and visibility, which he associated with high public offices, he rarely campaigned directly for such offices, expecting that others would seek him out. He also seems to have believed that election to public office would follow from the favorable impression others would inevitably receive of his intelligence, his character, and the soundness of his views. In this belief he was often disappointed, but he either declined to adjust his behavior to more

50. BLUE, supra note 5, at 114-15, 123-28, 288-97, 322; Hughes, supra note 1, at 30, 36.
51. Hughes, supra note 1, at 9-15; BLUE, supra note 5, at 13.
resemble that of a conventional politician or was incapable of doing so.52

At the core of Chase's ideological perspective was a set of convictions that he took to be guiding principles for his conduct, and in which he had a moral investment. On issues where those convictions were implicated, Chase was, as one contemporary put it, "thoroughly persuaded" as to the rightness—and hence the legitimacy—of the views that he reached.53 When those issues emerged as having constitutional dimensions, and thus required attention to legal authorities and doctrines, Chase responded to them no differently as a judge than he had as a lawyer or politician. He shared his antebellum contemporaries' belief that constitutional interpretation was an exercise which included recourse to moral and political principles as well as to legal doctrines.

Chase brought with him to the chief justiceship three particularly strongly held convictions on contemporary public issues, each of which was a product of his antebellum experiences as a lawyer and politician in Ohio. First, he was unalterably opposed to slavery in principle and to the proposition that the Constitution associated the national government with the perpetuation of slavery. Slavery for Chase was a morally illegitimate institution, being in conflict with the inalienable right of humans to their liberty, and was a legally defensible practice only when imposed by municipal law in a setting where the Constitution did not prohibit it, namely those states whose positive laws had ratified the practice.54

Second, Chase was deeply committed to the idea of "freedom," which for him was equated with equality of economic opportunity and was captured in the phrases "free labor" and "free soil." It is important to understand that the equality dimensions of Chase's commitment to "freedom" were not comparable to the equality dimensions of twentieth-century equal protection jurisprudence, as exhibited in desegregation cases and other instances where the Court found certain discriminatory legislation "invidious"

52. See Hughes, supra note 2, at 578-581 (portrait of Chase, based on observations of him by his contemporaries).
53. 6 FAIRMAN, supra note 4, at 1477 (quoting letter from Justice William Strong).
54. FONER, supra note 29, at 75-77, 83-84; Hughes, supra note 1, at 19-21; BLUE, supra note 5, at 37-38, 45-46, 51.
violations of the equality principle. Chase's opposition to slavery, and commitment to equality of economic opportunity, did not mean that he regarded blacks as equal to whites or that he was supportive of efforts to integrate the races or to abolish racial distinctions. He was opposed to slavery because he believed that humans could not deprive other humans of their "freedom," by which he meant the opportunity to hire out one's services, enjoy the fruits of one's labor, and acquire and own property without regard to one's social rank or status.\footnote{See Foner, \textit{supra} note 29, at 92-99 (discussion of Chase's linkage of slavery to the growth of an oligarchic, despotic "slave power" that would spread out of the South and compete with the "free labor" of non-Southern whites).}

In being an antislavery advocate and a proponent of equality of economic opportunity, Chase fit comfortably within the spectrum of mid-nineteenth-century "reformist" thought. He was opposed to the prospect of large landowners from the original Eastern states "colonizing" the states created out of the Northwest territories in the manner that Virginia landowners had threatened to colonize Kentucky and Tennessee. In championing the position of mid-Western settlers who sought to use the prospect of free land and growing markets as a way of raising their social status, Chase was raising an elemental theme in antebellum American culture, the theme of economic opportunity, with consequent social leveling, through equal access to uninhabited space. By keeping slavery—and dispossessed Indian tribes—out of the vast area from the Appalachians to the Rockies, Chase and his "free soil" colleagues were trying to create a space into which population could move, commerce could flourish, land could be acquired, and the disappointed or disinherited scions of Eastern families could be freed from their stratified, privilege-ridden origins. In this space, power, wealth, and distinction would be tied to merit, since each user would start on an equal footing. All the potential users, however, were white males.

It is difficult to characterize Chase's antislavery and "free labor"/"free soil" positions in terms that extend them beyond their immediate antebellum context. In some respects, Chase's views on economic opportunity anticipated the attacks on entrenched economic privilege leveled by late nineteenth-century populists, but Chase was not a consistent opponent of banks, large corporations, or railroads—three bugaboos of the populist
vision. On race issues, Chase preferred colonization to abolition and conceded that his slogan "slavery local, freedom national" could envisage a polity in which slavery would not only remain but flourish, so long as it was wholly divorced from the operations of the federal government. On some economic issues, in fact, Chase's convictions more closely resembled those held by orthodox Northeastern Whigs than any other antebellum political subculture.

An example is the last of Chase's overriding convictions, his belief in "sound money," or the use, where possible, of gold and silver coin as currency. This particular conviction is perhaps the least accessible to moderns, and thus requires some additional contextual detail.

The politics of antebellum currency was extremely complex and is not easily replicable in conventional political labels. In general, however, two recurrent and interlocking fiscal issues surfaced from the 1830s through Chase's tenure as chief justice. One involved the efficacy of state or national banks as financial institutions, an issue that was resolved, after the 1830s, in favor of state banks, two efforts by Congress to recharter the Bank of the United States being vetoed by Presidents Jackson and Tyler. The other followed from the first: if the American banking system was going to include state banks, with or without a national bank, what sorts of currency could those banks issue, and on what would it be based?

The resolution of the first issue in favor of state banks, which caused a number of prominent Whigs to disassociate themselves from Tyler in 1842,56 made an older fear of state control of the money supply more acute. In early nineteenth-century debates on issues of political economy, proponents of a national bank had seen it as a conservative bulwark against the threats of state demagoguery and financial destabilization. Their arguments made a series of associations: paper currency, the debtor classes, and state banking. The archetypal financial nightmare, in their rhetorical vision, was that potentially produced by demagogic state politicians, who would lobby for the issuance of state currency, which would fluctuate widely in value and be offered as payment for previous debts. The clauses in Article I, Section 10 of the

Constitution prohibiting states from coining money, emitting bills of credit, and making “any Thing but gold and silver Coin a Tender in Payment of Debts” were responsive to that nightmare. Notwithstanding the Constitution, and notwithstanding the Supreme Court’s legitimation of Congress’ power to create a national bank in *McCulloch v. Maryland*, currency trends in the antebellum years did little to assuage the fears of those who were concerned about the implications of state banking for the currency system. State banks proliferated and began to issue bank notes, which in practice became treated as security for debts. While no state attempted to coin money, Missouri issued certificates that looked remarkably like bills of credit, and the Supreme Court sustained Missouri’s action against a constitutional attack. As a commercial medium, paper, whether in the form of a bank note or a bill of exchange, had a significant advantage over coin: it could be transmitted from person to person, and transported over distances, far more efficiently. By the time Chase entered national politics, in the late 1840s, paper currency was an entrenched, if not necessarily stable, means of facilitating financial transactions.

The proliferation of paper currency took place, however, in a setting where both debtors and creditors could assume that “legal tender,” that which could be redeemed when a paper obligation was presented to a bank, was coin. The antebellum currency marketplace was thus a mixed conglomeration of “money” practices. Congress alone “coined” money, that is, minted coins in denominations. Those coins found their way into the reserves of state banks, as well as those of private individuals. Since it was unwieldy and insecure for most private individuals to amass large amounts of coins, most individuals deposited the coins they owned in banks and used some form of bills or notes for their financial transactions. While these bills or notes could be redeemed for “specie” (coin), they also fluctuated in value in the marketplace. There was thus a considerable market of exchange involving paper currencies that were not redeemed in specie, and whose use amounted to a kind of speculation among participants as to their future value.

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57. 17 U.S. (4 Wheat.) 316 (1819).
58. Craig *v.* Missouri, 29 U.S. (4 Pet.) 410 (1830); see also WHITE, supra note 32, at 585-88.
In this marketplace, the fears of "hard money" advocates such as Chase crystallized. Their fear was that since state banks could issue their own paper currency, they could affect the value of that currency and thus affect directly, or indirectly, the value of "paper transactions" in the marketplace. Given that the market value of a state bank note or a private bill of exchange could fluctuate widely, creditors might be placed in a position of having to accept depreciated paper currency in settlement of an obligation. Although this risk is inherent in any debtor-creditor relationship where the debtor's payment is deferred (if all transactions were in coin, the value of coin might still fluctuate), "hard money" advocates assumed there was a stability and a permanence to coin that prevented its fluctuating in the same manner as did paper currencies.

Even worse, from the point of view of a "hard money" advocate, was the prospect that "any Thing but gold and silver Coin" might be made a legal tender for the payment of debts. In a fluctuating world of paper currency, one at least had the solace that one could always get coin from a bank. The Constitution prohibited states from attempting to create their own paper legal tender, but it did not explicitly prohibit Congress. Article I, Section 8 of the Constitution gave Congress the power to "coin Money" and to "regulate the value thereof." No section spoke directly to the power of Congress to make anything but gold and silver coin legal tender. While the phrase "coin Money" arguably precluded the creation of any "money" other than that which could be "coined," it would have been simple enough for the framers of the Constitution to include a clause analogous to that restricting the powers of the states to make paper currency legal tender, and no such clause existed. But the idea of Congress allowing paper currency to function as legal tender was nightmarish to "hard money" advocates. They assumed, as Chase put it in his first address after being elected Governor of Ohio in 1856, that the "best practicable currency" for the states and the nation was coin. 59 Given this assumption, it was bad enough that states were allowing state banks to issue paper currency at all. For any sort of paper currency to be allowed to serve as the equivalent of coin in legally satisfying public or private debts was monstrous.

59. See Blue, supra note 5, at 150.
As a public official, prior to being named chief justice by Lincoln in December, 1864, Chase had a significant number of opportunities to predicate his responses to political issues on the above set of convictions. His opposition to slavery and his commitments to “free soil” and “free labor” shaped his political affiliations from the mid-1830s until his appointment to the Court. He abandoned the Whig party for the Liberty party in 1842 because of the slavery issue. Six years later, he became one of the founders of the Free-Soil party, which he thought of as having a broader appeal than the Liberty party because it combined an opposition to slavery with a commitment to positions such as releasing federally-owned public lands to the states so that they could be settled under homestead principles. By 1856, Chase had become a “Free Democrat,” the party label under which he was elected governor of Ohio. His election was ensured by support from the Know-Nothing splinter party, whose principal platform rested on opposition to foreigners in the American labor market. In the late 1850s, he began flirting with the newly-composed Republican party as it became apparent that the national Democratic party was not about to endorse antislavery positions. Chase’s shifting of his political bases during this period was widely perceived by his contemporaries as self-serving and opportunistic, but he invariably affiliated himself with a party that opposed slavery and supported the ideal of equality of economic opportunity.

With respect to “hard money,” Chase found it more difficult to equate his convictions with fiscal policies. Despite endorsing coin as the only practicable currency on being elected governor of Ohio, he eventually proposed that the Ohio legislature expand state banking facilities and consider augmenting the paper currencies circulating in the state. That proposal was ultimately submitted to a popular referendum and defeated. Although it was theoretically possible to be a proponent of expanded state banks and a “hard money” advocate, some commentators have taken Chase’s preference for coin as currency to be “antibank,” associating an increase in state banks with an increase in the circulation of state bank notes. If so, Chase’s support for ex-

60. Id. at 83.
61. See Foner, supra note 29, at 78-87.
panded state banking may have been strategic, since Republicans in Ohio were also supporting the idea.62

Chase's reluctant support of federal legislation making paper currency legal tender during his tenure as Lincoln's secretary of the Treasury has been more widely remarked upon, with most commentators taking the view that Chase never endorsed the principle behind 1862 legislation making government-issued bank notes (called "greenbacks" because of their color) legal tender for all public and private debts, but only supported the legislation as a temporary wartime exigency. There seems no reason to doubt that general consensus, especially in light of subsequent statements by Chase himself that the greenback legislation was a product of the political and economic repercussions of the Union war effort.63 What has been less emphasized, in discussions of Chase's role in the 1862 greenback legislation, is the extent to which the fund-raising difficulties faced by the Union government in late 1861 and 1862 were a product of Chase's views on currency.

In 1846, Congress passed a statute, the Independent Treasury Act,64 that prevented the federal government from drawing interest on money it deposited in state banks and required it to pay for its obligations and receive its accounts only in coin. The economic philosophy of the statute may seem obscure to moderns. In passing the statute, Congress seems to have combined a purpose of making sure that the Treasury did not abandon "hard money" practices with a purpose of preventing the Treasury from exhibiting any leverage on the state banks in which it deposited funds. The image is that of a federal government keeping large amounts of coin in subtreasuries, to which it would repair each time it engaged in a financial transaction. It is hard to know why, under such a system, the federal government would be inclined to deposit money in state banks at all. Perhaps that is what Congress intended.

When the Treasury Department's resources became diminished in 1861 because of the costs of maintaining the Union army in a wartime conflict that was taking longer than anticipated, Congress, in the summer of 1861, authorized Chase to borrow up to

62. See Blue, supra note 5, at 108-09 (this is Blue's conclusion, although his statement that "hard money advocates ... opposed all banks" is surely an oversimplification).
63. Id. at 152.
64. Independent Treasury Act, 9 Stat. 59 (1846).
$250 million dollars for the military effort. As security for the loans, he was empowered to issue government bonds and two types of Treasury notes, the latter type bearing no interest but being immediately redeemable for coin on presentation to a government subtreasury. After consultations with bankers in Boston, New York, and Philadelphia, Chase arranged to borrow $100 million in the fall of 1861. The bankers anticipated that the arrangements for the loan would follow practices then (and now) commonly used for such transactions: the amount borrowed would be credited to Treasury accounts in the state banks in question and, when the government incurred obligations, the Treasury would pay its creditors by writing checks on those accounts.

Chase informed the bankers that this arrangement was precluded by the Independent Treasury Act of 1846. He maintained that they would have to transfer the amounts loaned to the Treasury in coin to the federal government, which would then deposit the loans in subtreasuries. When the Treasury received war-related and other bills, those bills would be paid in coin from the subtreasury reserves. Chase took this position despite the fact that Congress, when authorizing him to undertake the loans in the summer of 1861, had provided that he could deposit money he had borrowed in any “solvent specie-paying banks” he might choose. That provision clearly anticipated Chase’s using the loaning banks as depositaries for government funds, but Chase declined to do so. He later spelled out his reasons to his friend and campaign biographer John T. Trowbridge:

The banks had constantly urged me to forego the farther issue of United States notes, and draw directly upon them for the sums subscribed, and placed on their books to the credit of the government. ‘In what funds will my drafts be paid?’ I asked. ‘We in New York are entirely willing to pay in coin,’ was the reply. ‘But how will it be in Boston? how in Philadelphia? How, if you in New York give the draft holder a check on Cincinnati or St. Louis, will the check be paid?’ ‘In whatever funds the holder of the draft or check is willing to receive.’ ‘That is to say,’ I answered, ‘in coin, if the holder insists on coin, and the bank is able and willing to pay; but in bank notes if he will consent to receive bank notes. I can not consent to this, gentlemen. You ask me to borrow the credit of local banks in the form of circulation. I prefer to put the credit of the people into notes and use them as money. If you can lend me all the coin required ... I will withdraw every [federal bank] note already issued, and pledge myself never to issue an-
other; but if you can not, you must let me stick to United States 
notes, and increase the issue of them just as far as the deficiency 
of coin may require."

Chase’s account of his discussions with the bankers lays bare 
his assumptions about currency issues. The issue in the negotia-
tions, from the bankers’ perspective, was that the federal gov-
ernment was prepared to issue its own bank notes. The bankers 
preferred not to have those notes in circulation, since they 
anticipated, rightly, that federal notes would compete with any 
bank notes they issued. Chase recognized this, but he was afraid 
that if he used the state banks as his depositories, his drafts, 
when presented to those banks, might be paid in currency other 
than in coin, such as state bank notes. In particular, he was 
concerned that if state banks did not adhere to a practice of 
paying all drafts on their federal government accounts in coin, 
eventually the bank notes would themselves become a fluctuating 
market item, with different creditors either insisting on coin or 
being willing to settle for notes, depending on the circumstances 
of their transaction with the government. For Chase, it was 
essential that every government debt be paid in coin: he was 
even willing to forego issuing federal bank notes if he could 
secure the bankers’ assurance that they would invariably pay in 
coin, an assurance the banks, not knowing what the future extent 
of war-related government financial transactions would be, were 
hardly likely to give.

One wonders why Chase insisted on all government transac-
tions being paid in coin, despite Congress’ intent to allow him to 
use state banks as government depositories. His insistence even-
tually undermined the borrowing arrangement he sought to cre-
ate, since after two sets of loans of $50 million each, the bankers 
concluded that their coin reserves would become unduly depleted 
under the arrangement and declined to lend any more. This 
eventually led to the 1862 statute authorizing greenback notes 
as legal tender. On balance, Chase’s reluctance to allow the bank 
to assume the role of federal depositories seems only attributable 
to a visceral dislike of paper currency as inherently unstable, 
especially when issued by state banks. As he put it to the

65. Letter from Samuel P. Chase to John T. Trowbridge, n.d., quoted in WARDEN, 
supra note 4, at 387-88.
bankers, they asked him to “borrow the credit of local banks in the form of circulation”; he preferred to “put the credit of the people into [federal bank] notes.” Both federal and state bank notes were, at the time, redeemable in specie if the currency holder demanded it, but only the federal government could be counted on not to be tempted to pay off redeemable paper currency in some other form of paper currency if the holder was indifferent to the medium of payment.

Each of these convictions of Chase was to play an important part in shaping his jurisprudence as chief justice, and I shall subsequently have occasion to explore some examples. At this point, however, it is worth mentioning, alongside this set of issues about which Chase had strong and settled views, another set of issues that he had not encountered, to any significant extent, before becoming chief justice, and on which his opinions appear as prudent, very possibly strategic, short-run solutions, consistent with his image as an aspiring national presidential candidate.

A listing of the commonly anthologized Chase Court constitutional decisions gives a sense of the jurisprudential novelty of the issues Chase and his colleagues encountered. One line of cases involved challenges, on habeas corpus, to the decisions of military commissions that had been established during the Civil War. In those cases, alleged supporters of the Confederacy were appealing to the Supreme Court of the United States on the ground that their constitutional rights were being infringed upon by a congressionally created wartime tribunal, and that the Court was competent to review the decisions of such tribunals. Neither question had been entertained by previous Courts, and antebellum jurisprudence had given little attention to the question of whether the Supreme Court of the United States could engage in independent constitutional review of actions by agencies of the federal government that allegedly infringed upon the civil rights of American citizens.

Another line of cases involved efforts on the part of states, or the federal government, to condition eligibility for public office, or for the professions, on an oath that the candidate in question

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66. Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866); Ex parte McCardle, 73 U.S. (6 Wall.) 318 (1868); Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869).
had been loyal to the Union during the Civil War. The ability of states to attach conditions for professional qualifications, and to restrict freedom of speech, had been taken for granted in ante-bellum constitutional jurisprudence. In these "test oath" cases, however, the issues involved the power of Congress, or a state remaining in the Union, to deny a license to persons allegedly in sympathy with a territorial entity that they had previously treated as a belligerent.67

Another set of cases involved the constitutionality of Reconstruction itself: whether the president, other federal officials, or readmitted states could enforce policies that had an adverse impact on formerly rebellious states or on the property rights of citizens residing in those states. While some of the sovereignty dimensions of those cases tracked themes that were central to ante-bellum jurisprudence, such as the role of states within a Union, others involved the novel presence of Congress as an arbiter of relationships among formerly seceded states and their citizens, and of the Supreme Court as a potential overseer of Congress' role in that capacity.68

In addition to these cases, in which Chase produced opinions that were, on the whole, temporizing and cautious, were two classes of novel cases directly implicating his core convictions. One class, involving congressional efforts to change the currency policies of the nation, was to be regarded as the most significant set of cases decided by the Chase Court by commentators for the remainder of the nineteenth century.69 In a subset of that class of cases, decisions testing the constitutionality of making federal bank notes legal tender, Chase's views were ultimately repudiated by his colleagues in one of the dramatic episodes of American constitutional history.

The other class of cases has come to be seen as a symbol of the dramatic gulf taken by most commentators to divide ante-

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69. See, e.g., *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1869); *Bronson v. Rodes*, 74 U.S. (7 Wall.) 229 (1869); *Willard v. Tayloe*, 75 U.S. (8 Wall.) 557 (1870); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870); *Broderick’s Executor v. Magraw*, 75 U.S. (8 Wall.) 639 (1870); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871).
bellum from postbellum constitutional jurisprudence. This class of cases involved the constitutional implications of the Reconstruction amendments, particularly as they pertained to the elevation of the federal judiciary as a protector of certain types of individual rights against state regulation. Chase himself, in an 1867 circuit opinion subsequently to be discussed, was to signal the potential of the Reconstruction amendments and attendant enforcement legislation which would radically alter the relationship between the Supreme Court and state legislatures in constitutional cases. But that radical alteration was not to take place on the Chase Court, whose best known interpretation of the Reconstruction amendments, *The Slaughter-House Cases*, can be seen to be an orthodox antebellum decision in its assumption that the states remained the principal forum in which definitions of the scope of protection for the civil rights of individuals would be formulated.

The last two classes of cases will subsequently occupy us in some detail. It is important to recognize, however, that in considering all of the constitutional issues raised by commonly anthologized Chase Court decisions, Chase was confronting issues for which his antebellum experience provided him with no precise analogy. In deciding the cases, he had to fall back on his experience as a politician and public figure from the late 1840s until his nomination to the Court, his instincts as a political actor on the national stage during and after the Civil War, and his convictions.

III. CHASE’S CONSTITUTIONAL OPINIONS IN “DEEP CONVICTION” CASES

A. SLAVERY, FREE LABOR, AND THE RECONSTRUCTION AMENDMENTS: FROM IN RE TURNER TO THE SLAUGHTER-HOUSE CASES

Between 1867 and his death in May, 1873, Chase had a few opportunities to consider the implications of the Thirteenth and Fourteenth Amendments. He had, of course, been an enthusiastic supporter of both, and had taken them to mean, at a minimum,
that black Americans could no longer be held in bondage or denied the fundamental rights of republican citizens. There were other implications of the amendments, however, that went to the balance between sovereign entities in the American polity. In particular, the categorical language of the amendments—expressly outlawing slavery or "involuntary servitude" in the United States, flatly prohibiting states from abridging the privileges and immunities of citizens of the United States, from depriving any person of life, liberty, or property without due process of law, from denying any persons within their jurisdiction equal protection of the laws, and granting Congress power to enforce those provisions—augured a potential recasting of sovereign relationships. It was immediately apparent to those examining the text of the amendments that when Congress took it upon itself to pass legislation that apparently operationalized the provisions of one of the amendments, or when states sought to restrict the rights of citizens within their borders, the federal judiciary would be available to decide whether the newly amended Constitution anticipated far greater supervisory federal power, in the name of protection for civil rights, than had been exercised in antebellum jurisprudence.

On the sovereignty issues raised by the Reconstruction amendments, Chase's antebellum attitudes pointed in different directions. He had, of course, strenuously opposed any effort to identify the federal government with slavery, and had just as strenuously encouraged efforts to associate the Union government, during and after the Civil War, with emancipation and the protection of the rights of freed slaves. But his jurisprudential approach to slavery identified it as a "local" issue and did not seek to make the Union an abolitionist force. "Freedom national" only meant that the federal government could not itself be identified with slavery. Chase had been a conventional antebellum jurist in his assumption that civil rights issues, including slavery, were largely local in character, but once Congress took it upon itself to make the abolition of slavery and involuntary servitude national issues, Chase enthusiastically supported that effort.

One should also recall that Chase's opposition to slavery was primarily based on the proposition that the practice controverted a man's inalienable right to the fruits of his labor: it was a practice that, although imposed on blacks, posed an even greater threat to whites. Thus, one might have expected that in constru-
ing the Reconstruction amendments, Chase would be simultaneously attracted to two potentially contradictory principles that they could be taken to embody. The first was the eradication of the practice of slavery and all vestiges of it, including differential treatment of blacks and whites that were reminiscent of the edicts of the slavocracy. The second was the extrapolation of the antislavery principle to all efforts to restrict the free labor of citizens, regardless of their color. The principles were potentially contradictory because, given the broad language of the Fourteenth Amendment, with its Privileges and Immunities, Equal Protection, and Due Process Clauses, they could be consistent with a comparatively narrow, race-based construction of the amendments and their enforcement legislation, or with a much broader construction that would decisively elevate the Supreme Court as an activist watchdog on behalf of newly federalized personal rights and privileges.

Chase’s earliest construction of the Reconstruction amendments gave every indication that he was entirely willing to recognize the Thirteenth Amendment as having decisive sovereignty implications. It came in *In re Turner*, a case that came before Chase in his capacity as circuit judge for the Fourth Circuit, which included Maryland. Elizabeth Turner, a “young person of color,” had previously been a slave in the household of Philemon T. Hambleton of Talbot County, Maryland. After the Maryland Constitution of 1864, which went into effect in November of that year, abolished slavery, “many of the freed people of Talbot county were collected together under some local authority ... and the younger persons were bound as apprentices, usually, if not always, to their late masters.” Elizabeth Turner was indentured to Hambleton by a contract of indenture, dated November 3, 1864, which was allegedly “executed under the laws of Maryland relating to negro apprentices.”

In comparing the terms of Elizabeth Turner’s indenture with those required under Maryland law for white persons being apprenticed, it became apparent that, as Chase put it in his opinion, “the variance is manifest.” Those apprenticing white persons were required to have them taught reading, writing, and

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72. 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).
73. Id. at 339.
74. Id.
arithmetic; the indenture agreement involving Elizabeth Turner placed no such obligation on Philemon Hambleton. White apprentices were prevented from having their indenture assigned or transferred to other persons; Hambleton could assign or transfer Turner at will. Hambleton was described in the indenture agreement as having an authority over Turner based on "property and interest," a provision that was not present in standard Maryland indenture agreements involving white persons.

Turner's petition to be discharged from the custody of Hambleton claimed that she was "restrained of her liberty" by being held in Hambleton's custody under the indenture agreement, and that the restraint was "in violation of the constitution and laws of the United States." Specifically, her counsel pointed to the Thirteenth Amendment, abolishing slavery and involuntary servitude, and to the Civil Rights Act of 1866, which enforced that amendment and declared that all citizens of the United States, without regard to race or color, were entitled to "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." When the petition was filed before Chase, in his capacity as circuit judge, he granted the petition and asked Hambleton to respond. At the hearing on the petition, Hambleton appeared and stated that "he wished to retain the girl, but he did not feel sufficient interest in the case to spend any money on it," and was thus "satisfied to leave the case with the court" without being represented. Chase responded that "the questions in the case were so grave and important" that he would prefer to hear argument from counsel on behalf of Hambleton's position, and adjourned court for a day in order to give "the claimant or any person interested in the decision of the case an opportunity to appear." No argument was forthcoming, and Chase decided the case the next day.

_In re Turner_ was an exceptionally one-sided case at first appearance, but there were some complexities. The Thirteenth Amendment had outlawed "involuntary servitude," but one could

75. _Id._ at 337.
78. _Id._ at 338-39.
79. _Id._ at 339.
have argued that Turner's apprenticeship was not "involuntary" since the articles of indenture recited that Elizabeth Turner's mother, Betsey Turner, had consented to the agreement, and that Elizabeth was under the age of majority at the time. One could also have argued that the Civil Rights Act of 1866 did not apply to indenture agreements made before its passage, such as that involving Turner and Hambleton. Finally, there was no other "equal protection" argument relevant to the case, because the Fourteenth Amendment had not yet been passed at the time In re Turner was decided. Maryland was clearly treating black apprentices differently from white apprentices in the period from 1864 to 1867, but, unless the Civil Rights Act of 1866 had retroactive application, there was arguably no constitutional barrier to that different treatment.

Chase, while regretting that he had been obliged to consider the Turner case "without the benefit of any argument" in support of Hambleton's position, maintained that he had "considered it with care, and an earnest desire to reach right conclusions." One could have anticipated that those conclusions would result in Elizabeth Turner's being released from Hambleton's custody. Chase did not linger over the "voluntariness" issue, concluding that Turner's apprenticeship "is involuntary servitude, within the meaning of [the first clause in the Thirteenth Amendment]." He gave no reasons for that conclusion. He added, however, that even "if this were otherwise," the Civil Rights Act of 1866 applied to the case. The indenture agreement did not "contain important provisions for the security and benefit of the apprentice which are required by the laws of Maryland in indenture of white apprentices," Chase maintained, and therefore contravened, the "full and equal benefit" clause of the act. Moreover, the act was "constitutional, and applies to all conditions prohibited by it, whether originating in transactions before or since its enactment." Chase added, to make sure that no one misunderstood that Dred Scott had not survived the Civil War, "[c]olored

80. Id.
81. Id.
82. Id.
83. Id. (quoting the Civil Rights Act of 1866, 14 Stat. 27).
84. Id.
persons equally with white persons are citizens of the United States."\textsuperscript{86}

At one level, \textit{Turner} was an obvious and predictable decision. One could hardly expect that apprenticeship agreements involving minors whose parents had formerly been slaves of the very person into whose custody the apprentice was being placed would be "voluntary" in any real sense. Moreover, the Thirteenth Amendment had an enabling section, and the Civil Rights Act of 1866 appeared to be appropriate enforcement legislation. Maryland laws affecting indentured servitude were clearly laws affecting the "security of persons and property," and the different treatment of black and white apprentices with respect to the masters' educational obligations and the masters' power to transfer apprentices to third parties was patently inconsistent with the act's declaration that all citizens should have "equal benefit" of such laws.

Nonetheless, \textit{In re Turner} conveyed the unmistakable message that in the newly-reconstructed American republic, states which sought to continue the practice of deciding for themselves what comparative treatment they wanted to give their black and white residents could expect to have such decisions scrutinized, and possibly overturned, by the federal courts. To be sure, the practices scrutinized in \textit{Turner} were blatant efforts to perpetuate discriminations that followed from a world in which slavery had been permitted, and the Thirteenth Amendment had expressly disapproved of that world. But a great many other comparable practices existed in former slaveholding states, and Chase's posture in \textit{Turner} invited challenges to any such practices. He could have reformed Elizabeth Turner's indenture to conform to the indenture agreements of white citizens in Maryland; instead, he discharged Turner from service altogether, granting her a writ of habeas corpus. In short, Chase's opinion in \textit{Turner} announced that the federal courts would be available to any freed black who sought to show that state laws continued to permit blacks to be held in a condition of "involuntary servitude" or treated them differently from whites with respect to their persons or property. As such, the opinion demonstrated that at least with respect to slavery or its vestiges, Chase's deep conviction that slavery was

\textsuperscript{86} \textit{In re Turner}, 24 F. Cas. 337, 340 (C.C.D. Md. 1867) (No. 14,247).
wrong as a matter of principle trumped any solicitude he had for allowing states latitude to define the civil rights of their residents as they saw fit.

*Turner* was a slavery case and a race case: on its face, it did not raise the issue of how far federal court power to scrutinize the allegedly discriminatory acts of state legislatures might extend. With the passage of the Fourteenth Amendment, with its broad Privileges and Immunities, Due Process, and Equal Protection Clauses, those issues were bound to surface, and the Chase Court, in Chase's last Term, first confronted them directly in *The Slaughter-House Cases.* But before that case was decided, an interesting episode occurred. In the 1867 Term, before the passage of the Fourteenth Amendment, the Chase Court decided the case of *Crandall v. Nevada.* In that case, the State of Nevada enacted an 1865 statute imposing a capitation tax of one dollar on every person leaving Nevada by railroad, stage coach, or "other vehicle engaged or employed in the business of transporting passengers for hire." The tax was to be paid by the proprietors of the transportation services, who were to provide the state with monthly reports of the number of passengers they had transported outside the state. An agent of a stage company that carried passengers through Nevada refused to report the number of passengers his company had carried and refused to pay the tax. When arrested, he challenged the statute as a violation of Article I, Section 10 of the Constitution, prohibiting states from laying any "Imposts or Duties on Imports or Exports" without the consent of Congress, and of Article I, Section 8, granting to Congress the power to regulate interstate commerce.

Neither basis for attacking the Nevada statute was free from difficulties. First, the tax was on passengers, not goods, and although Nevada made the transportation companies, rather than the passengers, directly responsible for collecting the tax, one could hardly disagree with Justice Samuel Miller's conclusion that the tax was directly imposed on the passengers, and the railroad and stagecoach companies who reported their interstate passengers were simply "the collectors of the tax." Miller also indicated that the ultimate financial burden of the tax would be

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87. 83 U.S. (16 Wall.) 36 (1873).
88. 73 U.S. (6 Wall.) 35 (1868).
89. Id. at 36.
borne by the passengers in the form of increased rates. Given the nature of the tax, it was hard to see how "a citizen of the United States travelling from one part of the Union to another" could "be called an export."

Second, although the statute clearly regulated interstate commerce, Congress, at the time, had not passed any legislation affecting interstate transportation facilities. Moreover, as previously noted, after years of wrestling with the intricacies of "dormant" commerce power cases, the Court had since 1851 adopted a doctrinal approach that allowed the states to regulate, in the absence of congressional action, all subjects that were not "in their nature national" or "of one uniform system" across the entire nation. Justice Miller found himself hard pressed to say that a capitation tax on passengers engaged in interstate transportation fell into the "national" or "uniform" categories. This might seem odd from a contemporary perspective, but interstate travel at the time of _Crandall v. Nevada_ typically involved several carriers, even several modes of transportation, and was significantly affected by local conditions. Thus, neither the Imports-Exports Clause nor the Commerce Clause clearly invalidated Nevada's capitation tax.

On the other hand, the tax was significantly burdensome in that, if sustained, it invited states to impose "head taxes" as a way of generating revenue from persons who happened to be passing through them. States such as Nevada, which at the time lacked the climate or resources capable of attracting large numbers of residents but were contiguous to states, such as California, which were more hospitable, were ideal candidates to impose such taxes as revenue-raising devices. If more states followed Nevada's lead, the cost of interstate travel might well be increased, and Americans might even be deterred from resettlement. Miller thus supplied an additional, novel argument on which to invalidate the Nevada tax. He argued that the United States, as part of its sovereign powers, had the right to require the service of its citizens at the seat of the federal government, and the right to transport troops through all parts of the Union, pursuant to its powers to make war and to defend its own

90. Id. at 40 (citing the Passenger Cases, 48 U.S. (7 How.) 283 (1849)).
91. Id. at 41.
.existence. These rights created "correlative rights" in the citizens of the United States: to come to the seat of government, to free access to the institutions of the government, to access to seaports and other places where "the operations of foreign trade and commerce are conducted." 93

Were the states able to impose taxes on the transportation of persons through the states by ordinary carriers, then, they could ultimately prevent the federal government from defending itself and its citizens from having access to that government. Quoting Chief Justice Marshall in *McCulloch v. Maryland* 94 that "the power to tax involves the power to destroy," 95 Miller concluded that if states were permitted to tax passengers on interstate transportation carriers they could "totally prevent or seriously burden all transportation of passengers from one part of the country to the other." 96 He believed that although "no express provision of the Constitution" directly prevented Nevada from imposing its capitation tax, the tax "interfered with an authority of the Federal government, which was itself only to be sustained as necessary and proper to the exercise of some other power expressly granted." 97

Miller's opinion in *Crandall* illustrated the peculiar jurisprudential situation the early Chase Court found itself in. There was no Fourteenth Amendment, with its restriction on state usurpation of the privileges and immunities of United States citizens, which might have given Miller firmer support for his claim that Nevada was infringing the "correlative rights" of interstate passengers. There was, at the same time, the dormant commerce power doctrinal compromise of the 1850s, which discouraged the Court from suggesting that for all the reasons outlined by Miller as support for his "necessary and proper" argument, interstate transportation was a "national" subject. As a consequence, Miller had to fall back on an argument that bordered on the extratexual. If the government had power to defend itself and make war, surely it had power to regulate commerce in pursuit of those goals. If Miller thought it necessary to strengthen his case

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96. *Id.*
97. *Id.* at 48.
by bringing in the "correlative rights" of passengers, it is interesting that he did not refer to Article IV, Section 2 of the Constitution, with its reference to the "Privileges and Immunities of Citizens in the several States." It was as if he thought a mere recital of the adverse consequences likely to follow from a legitimation of Nevada's capitation tax enough to invalidate it.

One might have anticipated that Chase would have been an enthusiastic supporter of Miller's opinion. For him, the ability of American citizens to move from place to place was an essential component of his commitment to "freedom national." Miller's list of "correlative rights," with its emphasis on the extent to which full participation in civic affairs by a republican citizenry necessarily involved the freedom to move across state lines, closely paralleled Chase's own comments about the restrictive effects of slavery. Yet Chase disassociated himself from Miller's opinion, joining Justice Nathan Clifford's concurrence, which held that the commerce power rationale was sufficient to invalidate Nevada's tax. 98

Just why Chase acted as he did in Crandall is unclear, but his eventual position in The Slaughter-House Cases 99 provides a possible explanation. Recall that Chase had concurred in Crandall: he did not like the principle of Nevada's tax any better than the majority. Could he have felt that Miller's articulation of the "correlative rights" of United States citizens was too meager a definition of "freedom national?" One cannot answer that question with much confidence, because Chase was ill by the time The Slaughter-House Cases came down, and had to be content with joining Justice Stephen Field's dissent. But his position in The Slaughter-House Cases indicated that he did not think that the Fourteenth Amendment was intended to give as restrictive a definition of the rights of individuals against the states as Miller's majority opinion suggested. Moreover, there was language in Field's dissent that expressed Chase's deepest beliefs about the nature of freedom in America. Although Chase's Turner opinion indicated that he was undoubtedly prepared to invoke the power of the federal judiciary against the states on behalf of those who had previously been in a condition of slavery, he thought that, at bottom, slavery and its

98. Id. at 49.
vestiges implicated the principle that republican governments were created to protect freedom, and that freedom was not confined to persons of color, nor was it confined to issues involving personhood. His joining Field's dissent was consistent with those beliefs.

The Slaughter-House Cases are sufficiently familiar not to belabor in detail. I am interested in two features of the cases: Justice Miller's observations about the nature of American federalism after the Reconstruction amendments, and Justice Field's observations on the same subject, with particular reference to his conclusion that the Privileges and Immunities Clause of The Fourteenth Amendment "change[d] [the] whole subject" of whether there was any meaningful concept of United States citizenship "independent of the citizenship of the State." An examination of those two features can provide some light on Chase's reaction to the potentially momentous sovereignty implications of the Reconstruction amendments.

The Slaughter-House Cases were the first occasion on which the Supreme Court was invited to construe the meaning of the Fourteenth Amendment, and in the process to offer some opinion of its purpose. This was because the plaintiffs in the cases were not blacks seeking to have their civil rights protected against the sorts of discriminations typified by Maryland's administration of indenture laws in Turner, but white butchers in New Orleans seeking to continue the practice of maintaining slaughterhouses in portions of the city where they saw fit. Louisiana had passed a law creating a corporation that would henceforth have a monopoly on the slaughterhouse trade, directing that corporation to build a slaughterhouse in a particular part of the city, and outlawing the practice of slaughtering animals in all other parts. The law's rationale was that it would prevent slaughterhouses from contaminating the city's water supply. A group of butchers and other affected persons challenged the law on constitutional grounds.

The principal argument of the butchers in The Slaughter-House Cases rested on an assumption that the Reconstruction amendments had altered the sovereign "police powers" of the states, at least where they infringed upon rights singled out for protection by the amendments. Specifically, they argued that even if before the passage of the Fourteenth Amendment the parameters of

100. Id. at 95, 94.
citizenship in the United States were defined solely at the state level, the amendment had expressly declared that all persons born or naturalized in the United States were citizens of the United States as well as of the states in which they resided, and no state could abridge the privileges and immunities of citizens of the United States. Among the privileges and immunities of United States citizenship, they argued, was the right to carry on a business, to use one’s own property, and to engage in free labor, on equal terms with all other citizens. 101

The butchers’ argument in The Slaughter-House Cases had momentous implications because the kind of franchise created by the city of New Orleans, ostensibly for public health reasons, was a typical arrangement in antebellum America: a state-created, regulated monopoly established as a “police regulation” to protect the health and comfort of the public. To the extent that carrying on the slaughterhouse trade was a “privilege” or a “property right” in antebellum jurisprudence, it was well-settled that such activities could be regulated under state and local police powers, even though the regulations might interfere with the equal access of all citizens to a particular business or occupation. 102 The butchers were arguing, however, that the Fourteenth Amendment had altered that state of affairs, because the “privileges and immunities” of all citizens could now be taken to be protected from abridgement by the states. Although it was not clear exactly what those “privileges and immunities” were, previous constructions of the Privileges and Immunities Clause of Article IV had indicated that they included “the right to acquire and possess property of every kind, ... [and other rights that] belong to the citizens of all free governments.” 103

If the butchers could invoke the Federal Constitution to invalidate a garden variety antebellum corporation created by the state under its police powers, pre-Civil War conceptions of sovereign powers had surely been altered. On the other hand, if such arrangements as the New Orleans slaughterhouse monopoly were

101. Id. at 55.
to continue after the Fourteenth Amendment, what was that amendment’s purpose? This was the issue that Miller confronted for the majority in *The Slaughter-House Cases*. His answer was straightforward. “Was it the purpose of the fourteenth amendment,” he asked, “by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?”104 And was the Enforcement Clause of the Fourteenth Amendment intended “to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?”105 To state the questions in this fashion, for Miller, was to answer them. Were Sections 1 and 5 of the Fourteenth Amendment to be interpreted in that fashion, the result would “radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.”106 The majority in *The Slaughter-House Cases* was concerned that under those two sections, both the federal courts and Congress could get into the business of displacing the private law of the states.

Miller’s governing jurisprudential assumptions in *The Slaughter-House Cases* were thus antebellum assumptions. Individual civil rights were “left to the State governments for security and protection”;107 “the existence of the State with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government.”108 Miller conceded that the Reconstruction amendments had “impose[d] additional limitations on the States, and ... confer[red] additional power on that of the Nation,” but he maintained that they were not intended radically to disturb “the balance between State and Federal power.”109

Miller’s assumption that the antebellum configuration of state-federal relations with respect to civil rights remained intact com-

105. *Id.*
106. *Id.* at 78.
107. *Id.*
108. *Id.* at 82.
109. *Id.*
plemented his conclusion that the provisions of the Fourteenth Amendment were principally directed at "[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class." He doubted that Section 5 of the Fourteenth Amendment, authorizing Congress to enforce the amendment’s other provisions, would ever be directed at state action other than that which discriminated “against the negroes as a class.” The ironic cast of these comments, in light of the Supreme Court’s subsequent pattern of taking a permissive attitude toward state-supported racial discrimination and adopting an aggressive stance toward state efforts to regulate private economic activity, has often been commented on. But Miller’s comments were unexceptionable if one assumed that the states, after the Civil War, continued to be the primary locus for the regulation and protection of civil rights. Given that assumption, any efforts to “transfer the security and protection of . . . civil rights . . . from the States to the Federal government” must have been directed toward “gross injustice[s] and hardship[s]” that some states were perpetrating. Only laws such as that Chase had invalidated in Turner, imposed against blacks as a class “in the States where the newly emancipated negroes resided,” qualified. Only those laws could have precipitated the radical reconfiguration of sovereign powers allegedly created by the constitutional provisions under consideration in The Slaughter-House Cases.

Miller’s opinion, however, minimized one strand of antebellum sovereignty jurisprudence. Although his assumption that security for civil rights was largely entrusted to the states by antebellum constitutional theorists was accurate, he did not take the additional step of explaining why, given the starting premises of late eighteenth- and early nineteenth-century political economy, the states, as distinguished from the federal government, should be the logical unit for protecting and restraining individual rights. That explanation flowed from certain “axioms” of republican theory that

110. Id. at 81.
111. Id.
112. Id. at 77.
113. Id. at 81.
114. Id.
115. Id.
antebellum jurists took for granted. Most central among these axioms were the coterminous power principle, previously discussed, and the principle that a primary purpose of government was to "secure" individual rights that were taken to be in existence prior to the formation of the government itself. In combination, these axioms yielded the proposition that too large a "general" government, occupying too vast an amount of territory, would invite tyranny, corruption, and the loss of liberty. Individual rights were best secured at the local level, where government was of minimal size and scope.

If one approached *The Slaughter-House Cases* from this perspective, and assumed that the right to pursue a trade, to locate one's business where one saw fit, and to have an opportunity to enjoy the fruits of one's labor comparable to the opportunities granted other citizens, the restrictions imposed by the city of New Orleans in *The Slaughter-House Cases* appeared to be an example of a local government departing from the principle that it was in existence to secure the preexisting rights of republican citizens. This was what Field had in mind when he said, in his dissent, that "the equality of right among citizens in the pursuit of the ordinary avocations of life," 116 which antedated society, had been infringed by the Louisiana legislation. He particularized:

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition . . . . This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name . . . . [I]t is to me a matter of profound regret that . . . [the act of Louisiana] is recognized [as valid] by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated . . . . [G]rants of exclusive privileges . . . are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained. 117

116. *Id.* at 109.
117. *Id.* at 109-11.
In Field's view, the "first clause of the fourteenth amendment [had] change[d] th[e] whole subject"118 of citizenship rights in American jurisprudence. "The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State."119 All that was necessary to decide The Slaughter-House Cases correctly, Field suggested, was to recognize that the right to pursue one's trade or profession free from "all disparaging and partial enactments"120 was an inalienable right that antedated society, and that the Fourteenth Amendment had now made such rights part of the privileges and immunities of national citizenship, which could no longer be denied by states.

Of course, Field's solution seemed to anticipate the very transfer of sovereign powers that Miller's opinion found so threatening. In particular, Field's solution seemed to anticipate that the ultimate arbiter of sovereignty questions in the reconstructed Republic would be the federal judiciary. Since states could no longer infringe upon the privileges and immunities of citizens of the United States, and under Field's interpretation, those privileges and immunities were now synonymous with "the ... sacred and imprescriptible rights of man,"121 some judicial particularization of those rights seemed inevitable.

It is interesting that Chase, whose sovereignty opinions in other cases appeared anxious to maintain a careful balance between state and federal powers,122 should have associated himself with Field's dissent, the least moderate in tone of the three published dissents in the case.123 Although Chase's poor health may have played a factor in his choice to be associated with Field rather than write his own dissent, it is very possible that he saw the

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118. Id. at 95.
119. Id.
120. Id. at 109.
121. Id. at 110.
122. The most notable of these opinions is arguably Texas v. White, where Chase, in considering the status of secessionist states during the Civil War, referred to the government of the United States as an "indestructible Union, composed of indestructible States." 74 U.S. (7 Wall.) 700, 725 (1869).
123. Justices Joseph Bradley and Noah Swayne also dissented and also condemned the Louisiana monopoly as an interference with "fundamental" rights to pursue a trade and to enjoy the fruits of one's labor, but neither opinion approached that of Field in its impassioned rhetoric. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 111 (1873).
New Orleans monopoly as every bit as threatening to "the right of free labor, one of the most sacred and imprescriptible rights of man,"\(^\text{124}\) as did Field. Recall that Chase's opposition to slavery had been expressed in a political slogan, "free labor," that combined two of the concepts that implicated his deepest convictions. He believed in "freedom," not only in the sense of independence from social and political hierarchies and customs, but in the sense of economic independence—escape from dependence on economic privilege—as well. He had left the Eastern seaboard, schoolteaching, and a legal apprenticeship to make his mark in Cincinnati through his "labor" as a young lawyer. As a "free-soiler" he had come to associate freedom with the opportunity to gain economic advantages through unrestricted access to a commodity that could help one reap the fruits of one's labor—land. The idea of labor was, for Chase, inextricably bound up with the ideas of freedom and equality of economic opportunity. Slavery was an abomination because it restricted both ideas at the same time. So, potentially, was a regulation such as that in *The Slaughter-House Cases*. By cutting off equal access to the pursuit of a calling, it restricted equal opportunities to make use of the fruits of one's labor, and therefore struck at the very heart of Chase's concept of freedom in America. In such a case, as in *Turner*, Chase's instincts for a cautious and balanced approach to controverted subjects were overwhelmed by his assurance that he was in the right.

B. "HARD MONEY," BANKS, AND THE CONSTITUTIONAL IMPLICATIONS OF CURRENCY POLICY: FROM VEAZIE BANK V. FENNO TO THE LEGAL TENDER CASES

One of Chase's principal clients in his early law practice in Cincinnati was the Cincinnati branch of the National Bank of the United States, and he subsequently came to represent a state bank, the Lafayette Bank, in the same city.\(^\text{125}\) Although Chase was not initially supportive of efforts to renew the Second Bank of the United States' charter in 1836,\(^\text{126}\) we have seen that by the time he became secretary of the Treasury he had associated state banks with paper currency and had resolved, at least initially, to

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\(^\text{124}\) Id. at 110.

\(^\text{125}\) Blue, supra note 5, at 18.

\(^\text{126}\) Id. at 157.
restrict the federal government, both as an issuer of currency and as a redeemer of state bank notes, to coin. The sequence of negotiations with Eastern state bankers that ultimately led to Chase's authorization of federal "greenbacks," we have seen, was evidence of his antipathy to paper currency and his distrust of state banks.

Five years after Chase had resigned his position as secretary of the Treasury and had eventually been appointed chief justice, he came to consider one of the currency policies to which he had directed his attention at the Treasury Department. That policy was embodied in a congressional statute, the last of a series of actions begun in July, 1862, which imposed a ten percent tax on state bank notes. "It can hardly be doubted," Chase was to say of that series of actions, "that [their purpose] was to inform the proper authorities of the exact amount of paper money in circulation, with a view to its regulation by law." 127

The last of the actions, taken after Chase had left the Treasury Department, was enacted in 1866. It had the effect of requiring state banks, as well as national banking associations (which had been created in 1863) and state banking associations, to pay ten percent of the amount of any bank notes they circulated after August 1, 1866. The Veazie Bank, located in Maine, was assessed a tax on its bank notes pursuant to the 1866 statute and declined to pay the tax, claiming it was unconstitutional. Eventually, the Veazie Bank paid the tax under protest and sued the Collector of Internal Revenue to recover the payment. The case, Veazie Bank v. Fenno, 128 was certified up to the Supreme Court of the United States from the Circuit Court for Maine. Justice Nathan Clifford of the First Circuit and the local district judge disagreed on the constitutionality of the tax.

The principal issue in the Veazie Bank case was whether the tax imposed on the state banks was a "direct tax" within the meaning of Article I, Section 9 of the Constitution, which states that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." 129 Since the tax had been based on the number of

128. 75 U.S. (8 Wall.) 533 (1869).
bank notes issued rather than on the population of Maine, it was inconsistent with Article I, Section 9 if it was "direct."

Chase's opinion for the Court took pains to set the 1866 legislation in context. He spoke of the fact that "[a]t the beginning of the rebellion the circulating medium consisted almost entirely of bank notes issued by numerous independent corporations variously organized under State legislation."

He added that the "very unequal resources" of these state banks were "not unfrequently administered with little skill, prudence, and integrity." He noted that various congressional statutes "prohibiting the receipt or disbursement, in the transactions of the National government, of anything except gold and silver ... prevented the disappearance of gold and silver from circulation." Finally, he reviewed the events that had led to his decision to issue federal "greenbacks" in 1862, and ultimately to the 1866 act taxing state banks that was under review. His summary of the context of the 1866 act, he said, "has been made for the purpose of placing in a clear light its scope and bearing." He suggested that the summary revealed that "when the policy of taxing bank circulation was first adopted ... Congress was inclined to discriminate for, rather than against, the circulation of the State banks; but that when the country had been sufficiently furnished with a National currency ... the discrimination was turned, and very decidedly turned, in the opposite direction."

The constitutional issue at stake in Veazie Bank v. Fenno was not a particularly difficult one, but Chase's summary of the context of the 1866 Act was to serve as a buttress for his conclusion that the tax on state banks was constitutional. The relative one-sidedness of the issue came from the language of Article I, Section 9 of the Constitution and from the fact that the "direct tax" clause had received a very early construction in the case of Hylton v. United States, in which all of the Supreme Court justices who decided that case concluded that a congressional statute imposing
a duty on carriages was not a "direct tax" within the meaning of the Constitution. The language of Article I, Section 9 referred to "[n]o Capitation, or other direct Tax," and then referred to "Census or Enumeration" surveys as a basis for the proportionate application of the any such tax. Since "capitation" taxes clearly referred to taxes on individuals, and the only other object of census or enumeration surveys at the time was land, "other direct taxes" would appear to refer to those taxes for which some proportionate basis, whether population or acreage, could be determined. Carriages did not seem to fit those criteria, nor did bank notes.

Chase was able to show, in fact, that a series of congressional "direct" taxes, imposed on a proportionate basis between 1798 and 1861, confined the subjects taxed to lands, improvements, dwelling-houses, and slaves, the first three subjects associated with real property, and the last either a capitation tax or a tax on "property" that principally affected the value of the land on which slaves worked. He also reviewed the Hylton decision, pointing out that Justice Patterson, who had been a member of the Constitutional Convention, said in his seriatim opinion that "I never entertained a doubt that the principal ... objects that the framers of the Constitution contemplated as falling within the rule of apportionment [prescribed in Article I, Section 9] were a capitation tax and a tax on land."

But Chase was not content to dispose of the Veazie Bank case solely on those grounds. He also took up the argument that the direct tax on state banks was unconstitutional because it interfered with the reserved power of the states, under the Tenth Amendment, to create corporate franchises, since through use of the taxation power Congress could destroy the state banks. This was not an idle argument, even though many previous Supreme Court decisions had made it clear that although the states could not tax federally-created institutions, such as the Bank of the United States, the federal government could tax the property of state-created corporations. The idea that the power of taxation was a means by which a sovereign could destroy the existence of its

140. Id. at 546.
rivals, or its colonies, was deeply embedded in early American political thought. When Chase noted that counsel for the Veazie Bank had "insisted ... that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank," he did not find it startling that the conclusion of counsel's argument had been that "therefore" the tax was "beyond the constitutional power of Congress" under the Tenth Amendment.141

Chase felt, however, that there was an "answer" to that argument "which vindicates ... the wisdom and the power of Congress."142 He noted that although Congress had until very recently "only partially and occasionally exercised" its powers that followed from its general power to coin money, such as to "supply a currency for the entire country," lately it had called those powers "into full activity."143 The various measures Chase summarized at the beginning of his opinion gave evidence, he concluded, that Congress, "in the exercise of undisputed constitutional powers," had undertaken to create a national currency.144 Having done so, it could take steps to protect that currency, such as "restrain[ing], by suitable enactments, the circulation as money of any notes not issued under its own authority."145

In short, even if the rationale for Congress's decision to tax state banks was that its former solicitude for those institutions had "very decidedly turned in the opposite direction,"146 and even if its primary purpose in the tax legislation was to cripple, even destroy, state banks, its activities were justifiable because it had recently gotten into the business of creating and promoting a national currency and it could restrain its state competitors. The earlier description Chase had provided of the currency measures Congress adopted throughout the 1860s had conveyed a sense that the nation, laboring under a system in which the "circulating medium" consisted "almost entirely" of state bank notes, whose resources and credit terms varied widely and whose administration was uneven at best, now reinforced his conclusion that Congress

141. Id. at 548.
142. Id.
143. Id.
144. Id. at 549.
145. Id.
146. Id. at 539.
had taken matters into its own hands, produced a uniform and sound national currency, and should be encouraged in its efforts. When the notes that the federal government had issued "shall be made convertible into coin, at the will of the holder," Chase concluded, "this [national] currency will, perhaps, satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised."\textsuperscript{147}

\textit{Veazie Bank} thus shows Chase's suspicion of state banks, fondness for uniformity in currency media, and confidence in the rightness of his own convictions, whether as fiscal policymaker or constitutional interpreter, in harmony with one another. Just as he had no doubt that the federal government could restrict the states in the pursuit of freedom and equality of citizenship, he had no doubt that Congress could discriminate against its state competitors in the pursuit of a sound currency system. When his strongest political or economic beliefs clashed with his abstract support for the autonomy and integrity of the sovereign states within the American republic, it was the latter that gave way.

But what if the actions of the \textit{federal} government, with which he had most recently been identified as a public official, appeared to be inconsistent with Chase's central convictions? Such was the case in \textit{The Legal Tender Cases}.\textsuperscript{148} Despite his support for the congressional efforts in the 1860s to create and maintain a national system of currency, Chase remained, we have seen, deeply troubled by the prospect that that "mixed system" of currency might not be entirely convertible into coin. It was one thing to issue national bonds or national bank notes; it was quite another to make them legal tender for the payment of debts. The latter step would mean, Chase was convinced, that their value would immediately fluctuate, and ultimately they would become as unpredictable a medium of currency as had the state bank notes. This could hardly reflect well, he felt, on the financial standing of the United States government, nor assure security and predictability in currency transactions.\textsuperscript{149}

But Chase's difficulties in raising revenue for the war effort, compounded by his insistence that the federal government borrow and pay out only in coin, had ultimately forced him to acquiesce

\textsuperscript{147} Id. at 549.
\textsuperscript{148} 79 U.S. (12 Wall.) 457 (1871).
\textsuperscript{149} See id.
in the legislation making "greenbacks" legal tender. Less than eight years after the first passage of that legislation, however, in the same Term that the Veazie Bank case was decided, Chase found himself in the position of being able to review the greenback legislation's constitutionality. The case was Hepburn v. Griswold,\(^\text{150}\) arising out of a transaction between "a certain Mrs. Hepburn" and Henry Griswold on June 20, 1860, in which Hepburn, in the form of a promissory note which she executed, agreed to pay Griswold eleven thousand, two hundred and fifty "dollars" on February 20, 1862. Five days after Hepburn's promissory note became due, the Legal Tender Act was passed in Congress.

When Hepburn's note matured, she did not pay it, and interest began to accrue. In 1864, Griswold sued her in the Louisville, Kentucky Chancery Court for the value of the note and interest, and in March, 1864, Hepburn tendered a sum of twelve thousand, seven hundred, and twenty dollars in "greenback" notes to Griswold, allegedly in satisfaction of the note, interest, and some court costs. Griswold refused the tender, insisting on being paid in coin. The notes were eventually escrowed in the Chancery Court, and the chancellor concluded that they were good tender, notwithstanding that the transaction had occurred prior to the passage of the 1862 greenback legislation. Griswold then appealed the chancellor's judgment to the Court of Errors of Kentucky, which reversed the judgment. Hepburn appealed the court of error's decision directly to the Supreme Court of the United States, and the case was first argued in the December, 1867 Term. The Justices then concluded that because of "the great public importance of the question"\(^\text{151}\) of the greenback legislation's constitutionality, the case would be reargued in the December 1868 Term, and the attorney general of the United States was given leave to make an argument. After that round of arguments, Hepburn v. Griswold\(^\text{152}\) was kept under advisement until the Court's December 1869 Term, when the decision, made by a majority of five justices, which included Justice Robert Grier, who subsequently announced his retirement from the Supreme Court, was delivered by Chase. The decision was against the constitutionality of the greenback legislation.

\(^{150}\) 75 U.S. (8 Wall.) 603 (1870).
\(^{151}\) Id. at 605.
\(^{152}\) 75 U.S. (8 Wall.) 603 (1870).
Chase assigned the *Hepburn* opinion to himself. He first considered the question whether Congress intended to make the effect of the greenback legislation extend to debts contracted before its passage. His approach to that question was somewhat unusual. He eventually concluded that Congress must have so intended because it said nothing to the contrary, and yet exempted interest on loans and duties on imports from the effect of the act. That exception, he concluded, "affords an irresistible implication that no description of debts, whenever contracted, can be withdrawn from the effect of the act if not included within the terms or the reasonable intent of the exception." 153 This was not overwhelming evidence, but Chase did not linger over it. Instead, he spent much of his time, in discussing the retroactive effect of the legislation, on another observation, which he took to provide a strong reason for the opposite conclusion, that "the word *debts* [had] reference only to debts contracted subsequent to the enactment of the law." 154

Here is that observation:

No one will question that the United States notes, which the act makes a legal tender in payment, are essentially unlike in nature, and, being irredeemable in coin, are necessarily unlike in value, to the lawful money intended by parties to contracts for the payment of money made before its passage. The lawful money then in use and made a legal tender in payment, consisted of gold and silver coin. The currency in use under the act, and declared by its terms to be lawful money and a legal tender, consists of notes or promises to pay impressed upon paper, prepared in convenient form for circulation, and protected against counterfeiting by suitable devices and penalties. The former possess intrinsic value, determined by the weight and fineness of the metal; the latter have no intrinsic value, but a purchasing value, determined by the quantity in circulation, by general consent to its currency in payments, and by opinion as to the probability of redemption in coin ....

There is a well-known law of currency, that notes or promises to pay, unless made conveniently and promptly convertible into coin at the will of the holder, can never, except under unusual and abnormal circumstances, be at par in circulation with coin. It is an equally well-known law, that depreciation of notes must increase with the increase of the quantity put in circulation and the diminution of confidence in the ability or disposition to redeem. Their

153. *Id.* at 610.
154. *Id.* at 607.
appreciation follows the reversal of these conditions. No act making them a legal tender can change materially the operation of these laws. 155

Once again Chase had taken the opportunity, in a Supreme Court opinion on a matter of constitutional law, to articulate his convictions about currency. Paper currency was "essentially un-like" coin in its "nature" and its value. Coin possessed "intrinsic" value based on its weight and "fineness"; paper currency had only a "purchasing" value, based on "opinion". Indeed, the value of paper currency was directly related to how easy it was to convert to coin "at the will of the holder." The reason for the "law" that paper currency necessarily depreciated in value as a function of the amount of paper currency put in circulation was that the more bank notes existed, the greater strain they placed on coin reserves, making redemptors disinclined to exchange them for specie. Chase pointed out that United States bank notes had fluctuated significantly in value since they were first issued in March, 1862, and had never reached the equivalent value of coin dollars. He went on to note that if the Legal Tender Act of 1862 was constitutional, and retroactive, a holder of a promissory note for one thousand dollars "was required, when depreciation [of greenbacks] reached its lowest point [between 1862 and the date of the Hepburn opinion], to accept in payment a thousand note dollars, although with the thousand coin dollars, due under the contract, he could have purchased on that day two thousand eight hundred and fifty [greenback] dollars." 156

His entire argument, coming when it did in his Hepburn opinion, seemed curiously out of place. It followed from his observations that if the Legal Tender Act was retroactive, "it certainly needs no argument to prove" that it "alter[ed] arbitrarily the terms of [contracts made prior to its passage] and impair[ed] [their] obligation." 157 Nor did it "need much argument to prove that the practical operation of such an act is contrary to justice and equity." 158 But Chase, at this point, had not yet concluded that Congress had intended the Legal Tender Act to be retroactive; his argument seemed to provide good evidence that Congress could not have.

155. Id. at 607-08.
156. Id. at 608.
157. Id. at 609.
158. Id.
Yet when he came to consider that question, as noted, he resolved it in favor of a congressional intent to apply the legislation retroactively after only a cursory discussion.

It thus appears that Chase's dissertation on currency may have had some purposes other than clarifying the retroactivity issue. Two come to mind. First, Chase may have wanted to prepare readers of his opinion for his ultimate conclusion that the Legal Tender Act of 1862 was unconstitutional by pointing out some of its apparent inconsistencies with the Contracts Clause of the Constitution and "justice and equity" at the very outset of his opinion. Second, Chase may have wanted to show how those constitutional and jurisprudential difficulties followed from certain "well-known law[s]" about currency. In other words, Chase may have wanted to give others the benefit of his "expertise" about currency matters as a way of simultaneously rehearsing his convictions and pointing out that others necessarily shared them. For if Chase was correct in his assumption that paper and coin currency were essentially "unlike," and that only the latter possessed "intrinsic" value, it followed that paper currency could only reach par as a circulating medium with coin currency if paper notes were inevitably and immediately redeemable in specie. That policy of "at will" and immediate redeemability had, of course, been a fundamental basis of Chase's approach to fiscal matters.

But Chase's assumption about the essential difference between paper and coin currency, whether widely shared or not, could hardly be made the equivalent of a "law." It rested, in fact, on silver and gold being regarded as intrinsically valuable commodities in society. Silver, gold, and other "precious" metals were only "intrinsically" valuable because they were relatively scarce and because they could be fashioned into items that were tacitly considered "decorative" and therefore pleasing. Sand or iron could also have functioned as "currency" had tacit preferences been different and had they been less abundant or less difficult to convert into relatively light-weight coin. In short, there was no "intrinsic" difference between coin and paper as circulation media; there was simply a collective "valuing" of gold and silver as distinguished from other potential commodities. Indeed, gold and silver and other metals that could be coined, were comparatively poor currency media in that their weight made their circulation difficult. Paper was more "convenient," as Chase noted. Yet Chase not only retained the belief that "hard" money was intrinsically
different (and more valuable) than paper money, he converted that belief to a "law" of the currency market.

One wonders, then, why Chase would ever have contemplated making greenbacks legal tender when he was secretary of the Treasury, since he "knew" that greenbacks could never approximate the value of coin, and the more greenbacks the federal government placed in circulation the lower their value would become. The answer recalls Chase's comments describing his 1861 negotiations with the bankers and his expressed hopes in his Veazie Bank opinion for a nationally-directed system of "mixed currency." As secretary of the Treasury of the Union government during an expensive war, Chase needed to raise revenue. Once increased taxation was placed to one side, the major source of that revenue was loans from the banks of other nations or private, state-created corporations. When it became clear to Chase that he could not expect an indefinite amount of such loans in coin, or in currency immediately redeemable in coin, he regarded himself as confronted with two undesirable options. One was to allow sources other than the federal government to redeem the government's obligations to them or to others in paper currency. The other was to make government-issued paper currency legal tender. Chase chose the latter because he felt it gave him, as secretary of the Treasury, the greatest amount of control over redemption policies and the amount of federal paper currency in circulation. He hoped to limit the number of greenbacks, and eventually to make greenbacks immediately redeemable in coin. In that fashion, he hoped to compete with other paper currencies, and ultimately to drive them out of the market.

Once the wartime emergency ceased, and the federal government's need for immediate revenue arguably diminished, Chase then reverted to his previous assumptions about paper currency: whether issued by the federal government or the states, it needed to be capable of being redeemed in coin at the pleasure of the holder. These assumptions were to control his disposition of the constitutional issues in Hepburn v. Griswold.

The structure of Chase's argument, in disposing of those issues, was as follows. He first treated congressional power to make

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160. 75 U.S. (8 Wall.) 603 (1870).
paper currency legal tender as an "implied" power, not being expressly granted in the Constitution but arguably following from its Article I power to coin money. He then quoted Chief Justice John Marshall's famous dictum in *McCulloch v. Maryland*, setting forth a framework for determining whether an implied power was permitted under the "necessary and proper" clause of Article I, Section 8. Marshall's dictum was, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

Chase then proceeded to use Marshall's dictum as the standard to evaluate whether the legal tender legislation was "necessary and proper." He considered, for example, whether the power to make money legal tender was an "appropriate and plainly adapted" means of implementing the concededly legitimate congressional power of waging war. In discussing that question, however, Chase did not use "appropriate" and "plainly adapted" in the sense of bearing a logical relationship to the express power. One could have easily derived such a relationship. The power to wage war implied a power to raise revenue to support a war effort; that revenue-raising power implied a power to choose means "plainly adapted" to raising revenue; issuing government notes and making them legal tender were examples of revenue-raising devices instituted during wartime. Chase, however, equated the terms "appropriate" and "plainly adapted" with the substantive efficacy of making federal bank notes legal tender. In so doing, he brought into his analysis the presuppositions about coin and paper currency that had informed his earlier comments.

Thus Chase pointed out that large numbers of United States notes were issued during the course of the Civil War that were not made legal tender, and had circulated with those that were "without unfavorable discrimination." He added that "[a]ll modern history testifies that, in time of war ... notes issued by the authority of the government, and made receivable for dues of the government, always obtain at first a ready circulation; and

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163. *Id.* at 618-19.
even when not redeemable in coin, on demand, are as little and usually less subject to depreciation than any other description of notes ...." 164 He thus suggested that the relative "success" of greenbacks as a circulating medium rested on their being issued by the government rather than their being made legal tender. Indeed, he felt that the value of such notes would be much more affected by the number of notes that were issued and the speed by which they could be redeemed in specie: the "laws of currency" he had previously outlined. As a result, he concluded, there was no reason to believe that making government notes legal tender increased their value as a circulating medium.

In fact, Chase concluded, there was reason to think that no "appreciable advantage" was gained by compelling creditors to receive bank notes, as distinguished from coin, in satisfaction of preexisting debts. This was because "there is abundant evidence that any advantage" of having debts redeemable in greenbacks was "far more than outweighed by the losses of property, the derangement of business, the fluctuations of currency and values, and the increase of prices to the people and the government, and the long train of evils which flow from the use of irredeemable paper money."

Making greenbacks legal tender, in Chase's view, "widen[ed] the extent and protract[ed] the continuance" of such evils. 165 In short, making greenbacks legal tender was not an "appropriate and plainly adapted means for the execution of the power to declare and carry on war" because the policy "add[ed] nothing to the utility of the notes," and "debase[d] and injure[d] the currency in its proper use." 166

For Chase, then, making greenbacks legal tender was not an "appropriate" action for Congress because it was substantively wrongheaded. But he was not content to rest on his particular reading of that portion of Marshall's dictum on the Necessary and Proper Clause. He also found that the legal tender legislation violated the rest of Marshall's dictum in not being "consistent with the letter and spirit of the Constitution." First, the legislation was inconsistent with the Contracts Clause, prohibiting any state from passing a law impairing the obligation of contracts,

164. Id. at 620.
165. Id. at 621.
166. Id. at 603.
167. Id. at 621-22.
even though the federal government was involved. This was because "those who framed and those who adopted the Constitution intended that the spirit of this prohibition should pervade the entire body of legislation, and the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency." Chase gave no reasons for his conclusions about the framers's intent. He appeared to be claiming that since the framers obviously thought it was unjust for states to impair the obligations of contracts, they also thought it would be unjust for the federal government to do so. But the Constitution had given Congress power to enact bankruptcy legislation, which might well have the effect of altering the obligations of debtors incurred before the legislation was passed. In short, it was entirely possible that the framers were particularly concerned with the potential ability of the states to disrupt contractual arrangements, as distinguished from the ability of the federal government to do so. Chase's Contracts Clause argument boiled down to an assertion that the framers could not have meant the federal government to make paper money legal tender because such a policy was unjust. He was prepared to equate "unjust" with what he thought was unwise in principle.

Chase then added two other constitutional provisions that he thought might be violated by the legal tender legislation. He was on very shaky ground in invoking either of them, and his arguments had the appearance of being tossed off without extended consideration. He invoked the Takings Clause of the Fifth Amendment, prohibiting private property from being taken for a public use without compensation. But, as he conceded, the Takings Clause "does not, in terms, prohibit legislation which appropriates the private property of one class of citizens to the use of another class": it refers to the seizure of property by the government for public purposes. In passing the legal tender legislation, the government had simply introduced another factor into the currency market; it had not "taken" anything from anyone. Chase claimed that it was "difficult to understand how [private property] can be taken for the benefit of a part [of the population] without

168. Id. at 623.
169. Id.
violating the spirit of the [Takings Clause],"170 but this claim rested on a showing that in making greenbacks legal tender for the payment of debts, Congress necessarily benefitted someone. Chase assumed that debts that could be paid in greenbacks would necessarily be worth less than debts paid in coin, but that assumption rested on the belief that "everyone" shared his lack of confidence in paper currency. Some creditors might actually prefer payment in greenbacks if the payment was made promptly, feeling that they were benefitted in having the money in hand.

Finally, Chase invoked the Fifth Amendment's Due Process Clause. His doing so was another signal that substantive judicial readings of that clause, first prominently displayed on the Supreme Court by Chief Justice Roger Taney in *Dred Scott v. Sandford,171* were coming to be regarded as part of the canon of judicial interpretation. But the due process argument foundered on the same difficulty present in Chase's Takings Clause argument. Greenback legislation only "deprived" creditors of "property" if it compelled the creditors to take less than the amount of the debts owed to them. But all it did was create the possibility that those debts, by being capable of being paid in greenbacks, would end up being paid in currency that was currently worth less in the market. Chase attempted to distinguish payment of debts in paper currency from a decline in the stock of a corporation when a legislature had granted a franchise to a competitor. The deprivation in the present case, he asserted, was "direct and inevitable"; in the former it was "purely contingent and incidental." But just as the stock in a corporation might rise and fall in the market, the value of currency might rise and fall. Chase's use of the word "inevitable" simply invoked his currency "laws," which made it axiomatic that paper currency would always be worth less than coin. Those laws, however, came from Chase's own premises.

The *Veazie Bank-Hepburn v. Griswold*172 sequence, perhaps more clearly than any other episode in Chase's career as a constitu-

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170. Id. at 623-24.

171. 60 U.S. (19 How.) 393 (1857). It is important that the first "substantive" due process cases were cases in which property was arguably being "taken" without the benefit of a judicial proceeding. Laws abolishing slavery or allowing repayment of debts in other than specie could be seen as close to "takings." This was a different conception of due process from the "liberty" conception that would surface later, in cases such as *Lochner v. New York.*

tional jurist, revealed that when Chase's convictions were deeply engaged on an issue, he reacted on grounds of substantive "principle" and policy and was comparatively indifferent to the contemporary political implications of his stance. In *Veazie Bank*, he had construed a congressional statute liberally and permitted the federal government to increase the costs of state bank notes as a circulating medium, freely admitting that even if the legislation was an effort to drive state banks out of the market, it was constitutionally permissible. The outcome in *Veazie Bank* may have been popular with a Republican-dominated Congress, but it was hardly calculated to endear Chase to the numerous persons who bought and sold state bank notes. In *Hepburn*, by contrast, he had construed a congressional statute strictly, bringing in what amounted to "natural justice" arguments in his constitutional analysis, and treated the statute as clearly upsetting the expectations of private individuals who engaged in commercial transactions. One wonders why raising the costs of issuing state bank notes, which would then have an effect on the value of such notes, was not equally upsetting to expectations. The answer, for Chase, was that the statute in *Veazie Bank* was a punitive measure against banks who circulated fluctuating paper currency and, therefore, designed to make the paper currency market more predictable and uniform, whereas the statute in *Hepburn* actually encouraged the circulation of paper currency, albeit a paper currency issued by the federal government, by making some of that paper currency legal tender. From a "hard money" perspective, then, and from the perspective of one who believed that the nation's currency system should be made more stable, the different postures taken toward congressional legislation in *Veazie* and *Hepburn* made sense. The two decisions indicated, however, that Chase did not feel particularly constrained by considerations of federalism, by deferential or activist canons of judicial review of congressional legislation, or by the short-run "popularity" of a decision. He was more interested, where fiscal policy was implicated, in equating constitutional interpretation with a "sound" approach to currency issues.

Chase, of course, had not concluded his examination of the constitutionality of currency policy with *Hepburn v. Griswold.* He personally believed that the legal tender legislation of 1862

173. 75 U.S. (8 Wall.) 603 (1870).
was unconstitutional whether applied retroactively or prospectively. When the "laws of currency" were taken into account, making debts redeemable in greenbacks rather than specie invariably resulted in a deprivation of the creditor's property or a violation of "the spirit of the Constitution." But there was no language in Chase's Hepburn opinion indicating that debts incurred after the passage of the 1862 legislation could not be redeemed in greenbacks. Mrs. Hepburn's debt had preceded the legislation, and Chase had added, at the very close of his opinion, that "[i]t is proper to say that Mr. Justice Grier ... stated his judgment to be that the legal tender clause, properly construed, has no application to debts contracted prior to its enactment; but that upon the construction given to the act by the other judges he concurred in [Chase's majority] opinion." 174 This cryptic paragraph meant that the decision had been five to three that the 1862 legal tender legislation was unconstitutional as applied to debts incurred before its passage. It also meant that the question of the constitutionality of the legislation to debts incurred after March, 1862 remained open.

Given that paragraph and the circumstances that prompted Chase to include it, it was almost inevitable that the constitutionality of legal tender legislation would not be regarded as definitively settled by Hepburn. Grier's vote in Hepburn had taken place immediately before his retirement from the Court, which had been prompted by the mental and physical effects of a stroke he suffered in 1867, which eventually made it virtually impossible for him to perform the duties of a justice. 175 Grier's vote was the result of a lengthy conference of the Justices held on November 27, 1869, in which Grier first voted to sustain the constitutionality of the statute, and then voted the other way in a companion case to Hepburn, Broaderick's Executor v. Magraw. 176 When confronted with the inconsistency, Grier apparently declared that he believed that the legal tender legislation was constitutional when applied to contracts made after its passage. Informed that the contract in Hepburn had preceded the legislation, he changed his Hepburn vote, creating the five-to-three majority. Had Grier not changed his mind, the Court would have

174. Id. at 626.
175. See the account of Grier's resignation in Hepburn, 75 U.S. (8 Wall.) at vii-viii.
176. 75 U.S. (8 Wall.) 639 (1870).
been equally divided in *Hepburn*, assuring that the issue would be revisited. With Grier's switch, Chase was able to deliver his *Hepburn* opinion, whose language apparently confined the decision to contracts made before the 1862 legislation and whose cryptic last paragraph alluded to Grier's position.

Shortly after the November 27 conference, Chase and Justice Samuel Nelson called upon Grier and advised him to resign, taking advantage of a congressional statute, passed in April, 1869, that provided for a lifetime salary for any resigning Justice who had reached the age of seventy and had served on the Court for at least ten years. The statute was to take effect on December 1, 1869. Chase and Nelson met with Grier on December 9 and he agreed to resign, effective February 1, 1870.

Grier's resignation reduced the size of the Court from eight justices, where it had rested since James Wayne's death in 1867, to seven. The same statute that created annuities for retiring federal judges over the age of seventy had increased the size of the Court from (ostensibly) seven to nine, so President Grant had two vacancies to fill after Grier's departure. He moved swiftly, as did Congress, and by March 21, 1870, Justices William Strong and Joseph Bradley had joined the Court. Four days later, Attorney General Ebenezer Hoar, who may have been aware of Grier's having changed his mind at the November conference on *Hepburn*, and in any event had a strong interest in clarifying the effect of the 1862 legal tender legislation on contracts made after its passage, made motions before the Court for an early hearing of some additional legal tender cases that had been on the Court's docket and had been "passed" by the justices while they prepared to hear *Hepburn*.

At that point, an extraordinary series of events took place within the Court. Chase maintained that any legal tender issues

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177. 16 Stat. 44 (1869). The statute actually applied to all federal judges, and the annuity of a retiring judge was fixed as the salary which he held on his retirement. The statute also increased the number of Supreme Court justices from seven to nine. See also 6 FAIRMAN, *supra* note 4, at 559-60. An 1866 statute prospectively reduced the number of justices to seven, preserving the positions currently on the Court, and between 1866 and 1869 only one justice, James Wayne, left the Court, so that for two and a half years the Court was composed of eight justices. See also 6 id. at 168-70.

178. 6 FAIRMAN, *supra* note 4, at 730.

179. 6 id. at 730-37.

180. See 6 id. at 741.

181. 6 id. at 738-39.
in forthcoming cases should be regarded as settled by Hepburn. He was supported in this position by all the remaining justices that had joined his Hepburn opinion—Nelson, Clifford, and Field. The dissenters in Hepburn, however—Swayne, Miller, and David Davis—insisted that the Court's decision to "pass" additional legal tender cases did not mean that it had decided that Hepburn should control those cases. They were supported in their position by the new appointees, Strong and Bradley, who were expected to validate the prospective application of the 1862 legal tender legislation. Chase and Miller provided conflicting accounts of the Court's deliberations on the question of "passing" additional legal tender cases, with Miller's account mentioning that "an aged and infirm member of the Court" had changed his vote in Hepburn and asking, "of what value was his concurrence [in that case] and of what value is the judgment under such circumstances?" 182 Eventually Chase announced that the "passed" cases would be heard, whereupon the parties that had appealed those cases to the Court withdrew their appeals. Eventually, after Chase's stroke in the summer of 1870 and Justice Nelson's and Justice Field's prolonged absence from Court for portions of the 1870 Term, a majority of the justices ordered that argument take place in two legal tender cases, Knox v. Lee 183 from Texas and Parker v. Davis 184 from Massachusetts, in which the constitutionality of the 1862 legal tender legislation would be argued, both with respect to contracts made before its passage and transactions made after its passage. 185 Clifford, Nelson, and Field dissented from that order; Chase was still absent, recuperating from his stroke. 186

By January 15, 1872, when the opinions in the Legal Tender Cases 187 (Knox v. Lee and Parker v. Davis) were delivered, Chase, while still impaired, had sufficiently recovered to be able to dissent. The Legal Tender Cases had been decided in May, 1871, but the delivery of opinions was deferred in order to allow some of the infirm Justices additional time to prepare opinions. Chase wrote in his diary, on the day the opinions were read in court,

182. See 6 id. at 739.
183. The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871).
184. Id.
185. 6 FAIRMAN, supra note 4, at 752-56.
186. 6 id. at 756-57.
187. 79 U.S. (12 Wall.) 457 (1871).
that "[t]he opinion of the majority reverses Hepburn v. Griswold .... It is I think a sad day for the country & for the cause of constitutional government. The consequences of the sanction this day given to irredeemable paper currency may not soon manifest themselves but are sure to come."\(^{188}\)

Chase's lengthy dissent in _The Legal Tender Cases_ made few points that he had not covered in his _Hepburn_ opinion. Two, however, are worth noting, not so much for their novelty as for the evidence they provide of Chase's consciousness when writing constitutional opinions on subjects that deeply engaged him. First is a passage on the political economy of currency:

The real support of note circulation not convertible on demand into coin, is receivability for debts due the government, including specie loans, and limitation of amount. If the amount is smaller than is needed for the transactions of the country, and the law allows the use in these transactions of but one description of currency, the demand for that description will prevent its depreciation. But history shows no instance of paper issues so restricted ....

Now does making [United States] notes a legal tender increase their value? It is said that it does, by giving them a new use. The best political economists say that it does not. When the government compels the people to receive its notes, it virtually declares that it does not expect them to be received without compulsion. It practically represents itself insolvent. This certainly does not improve the value of its notes. It is an element of depreciation. In addition, it creates a powerful interest in the debtor class and in the purchasers of bonds to depress to the lowest point the credit of the notes. The cheaper these become, the easier the payment of debts ....

It is true that such a state of things is acceptable to debtors, investors in bonds, and speculators. It is their opportunity of relief or wealth. And many are persuaded by their representations that the forced circulation is not only a necessity but a benefit. But the apparent benefit is a delusion and the necessity imaginary. In their legitimate use, the notes are hurt not helped by being made a legal tender. The legal tender quality is only valuable for the purposes of dishonesty.\(^{189}\)

\(^{188}\) Salmon P. Chase, Diary (Jan. 15, 1872), in CHASE PAPERS, Historical Society of Pennsylvania, _quoted in_ 6 FAIRMAN, _supra_ note 4, at 759-60.

\(^{189}\) The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 578-79 (1871) (Chase, C.J., dissenting).
In this passage, Chase elaborated on themes he had raised in *Hepburn*, giving them a more pointed spin. He renewed his characterization of paper currency as essentially unstable, indicating that, in addition to having the quality of fluctuating widely, it had a tendency not to be "restricted" once issued. In issuing paper currency at all, then, the government was losing an opportunity to exercise control over the value of that currency, since it would be unable, given "history," to limit the amount issued. Making United States notes legal tender made the situation even worse from the government's point of view. By making greenbacks legal tender, Chase maintained, the federal government "virtually declare[d]" that it would not expect them to be received by citizens "without compulsion." That was another way of communicating to the public that the government lacked the financial strength to back up its transactions in coin. This would result in the public having less confidence in government-issued notes, depreciating their value.

Chase's logic seemed compelling if one granted his assumptions that it was impossible to limit the amount of paper currency issued, and that the issuance of paper currency was always taken as a symbol that the issuer was in a precarious financial situation. In other words, coin currency was "intrinsically" valuable, but paper currency was "intrinsically" unstable, being a creation of the marketplace, so that when an issuer of paper currency chose to make that currency legal tender, it was obvious that the issuer was in such bad financial shape that it would forego being paid in coin in order to be paid in something. This state of affairs naturally awakened the interest of debtors and those—bondholders—who could continue to expect that their investments would be paid in coin. They thus agitated for the "forced circulation" of paper currency as legal tender. But they were only serving their "dishonest" purposes.

It is intriguing that in these ruminations on political economy, which Chase presented in support of his argument that making greenbacks legal tender was not "a necessary or proper means" of exercising "any express power of the government," it never entertained the possibility that the degree to which the government could limit the issuance of currency, and the confi-

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190. *Id.* at 579.
dence gained or lost from making a particular currency legal
tender, might be affected whatever the currency medium. He
invariably assumed that coin currency could be limited and that
coin currency would engender confidence. “The best support for
note circulation,” he announced, “is not limitation, but receiva-
bility, especially for loans bearing coin interest.” In other
words, when government currency, of any kind, was the direct
equivalent of coin because it could be received at will for coin,
it would not depreciate in value. One wonders how Chase then
explained the inability of the United States government to borrow
money from foreign nations when it agreed to pay the money
back in coin. The prospective lenders might well have concluded
that their investments would not be sound since when the United
States came to pay back the loans the value of its coin currency
might have depreciated. Chase seemed to be suggesting that
could only happen with paper currency.

The second passage comes from that portion of Chase’s dissent
where he renewed his argument that the legal tender legislation
violated “an express provision of the Constitution, and the spirit,
if not the whole letter of the instrument.” His “spirit of the
Constitution” argument had been one of the weakest portions of
his Hepburn opinion, provoking Justice Miller, in dissent, to make
the following response:

This whole argument of the injustice of the law ... and of its
opposition to the spirit of the Constitution, is too abstract and
intangible for application to courts of justice, and is, above all,
dangerous as a ground on which to declare the legislation of
Congress void by the decision of a court. It would authorize this
court to enforce theoretical views of the genius of the government,
or vague notions of the spirit of the Constitution and abstract
justice, by declaring void laws which did not square with those
views. It substitutes our ideas of policy for judicial construction,
an undefined code of ethics for the Constitution, and a court of
justice for the National legislature.

191. Id. at 578.
192. Id. at 579.
193. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 638 (1870) (Miller, J., dissenting). This
passage represents one of the earliest nineteenth-century judicial declarations that it
would be “dangerous” for judges “to enforce theoretical views ... by declaring void laws
which did not square with those views.” A more common judicial response was the flat
assertion that judges never made “policy” in construing the Constitution.
Perhaps mindful of these comments, Chase now sought to refine his "spirit of the Constitution" argument by linking it to an "express provision of the Constitution."

After repeating his arguments that the legal tender legislation violated the Fifth Amendment's Taking and Due Process Clauses, and adding that the legislation violated "that fundamental principle of all just legislation that the legislature shall not take the property of A. and give it to B.,"194 Chase sought to link those arguments to the power granted to Congress by Article I to "coin money." His eventual reading of that clause was that it meant that the power granted to Congress to "coin" money necessarily precluded Congress from making "money," in a legal sense, anything but "coin." This was an argument that had been crisply put by Oliver Wendell Holmes Jr. in an unsigned note in the American Law Review in July, 1870, commenting on Hepburn.

"[T]he power to 'coin money,'" Holmes argued, "means ... (1.) to strike off metallic medals (coin), and (2.) to make those medals legal tender (money). [If] the Constitution says expressly that Congress shall have power to make metallic coins legal tender, how can it ... be taken to say by implication that Congress shall have power to make paper legal tender?"195

Chase was to take a more circuitous route in arriving at that argument. He began by saying that the question of the constitutionality of prospective application of the legal tender legislation to public and private debts could be phrased as "has Congress power to make the notes of the government ... a legal tender without contract and against the will of the person to whom they are tendered?"196 He then continued,

In considering this question we assume as a fundamental proposition that it is the duty of every government to establish a standard of value. The necessity of such a standard is indeed universally acknowledged. Without it the transactions of society would become impossible .... The selection, therefore, by the common consent of all nations, of gold and silver as the standard

194. The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 580 (1871). This principle, subsequently described by scholars as the "vested rights" principle, was a staple of antebellum jurisprudence, figuring prominently in the treatise literature. It was not, however, inevitably given primacy in cases where legislative activity restricted private rights. See discussion in White, supra note 32, at 595-606.
195. [Holmes], 4 Am. L. Rev. 768 (July, 1870).
196. The Legal Tender Cases, 79 U.S. (12 Wall.) at 583.
of value was natural, or more correctly speaking, inevitable. For whatever definitions of value political economists may have given, they all agree that gold and silver have more value in proportion to weight and size, and are less subject to loss by wear or abrasion than any other material capable of easy subdivision and impression, and that their value changes less and by slower degrees, through considerable periods of time, than that of any other substance which could be used for the same purpose .... In the construction of the constitutional grant of power to establish a standard of value every presumption is, therefore, against that which would authorize the adoption of any other materials than those sanctioned by universal consent.197

Chase then went on to show, by quotations from Madison's account of the Constitutional Convention, Daniel Webster, the Federalist Papers, and other sources,198 that "[s]tatesmen who have disagreed widely on other points have agreed in the opinion that the only constitutional measures of value are metallic coins, struck as regulated by the authority of Congress."199 Along the way he conceded that "notes issued by banks ... were ... in circulation, and were used in exchanges, and in common speech called money, and that bills of credit ... had been recently in circulation under the same general name."200 But these notes and bills, he insisted, "were never regarded as real money, but were always treated as its representatives only, and were described as currency."201 The idea that such bills and notes could ever be made "a standard of value" by the framers of the Constitution was "wholly new," Chase felt, and "[i]t is assertion seems to us to ascribe folly to the framers of our fundamental law, and to contradict the most conspicuous facts in our public history."202

Once again, Chase, in a passage on the political economy of currency, had confused the propositions that those who drafted the Constitution had difficulty conceiving "money" as other than "coin," or should not have equated "money" with anything other than gold or silver coin, with the proposition that Congress, at some point when its consciousness of "money" had expanded,
lacked the power to make something other than coin legal tender. To say that it was the duty of every government to establish a standard of value for its currency was not to say that the only kind of currency capable of being made legal tender was coin. Chase simply could not entertain the idea that the power of a government to fix the terms, and determine the redeemability, of its currency media could endure past the point where those establishing currency policy generally equated "money" with gold and silver coins. He assumed that all other forms of currency were so "intrinsically" inferior to gold and silver coin that they could not be given the appellation "money" for constitutional purposes.

IV. CONCLUSION: PLACING CHASE IN CONTEXT

When one temporarily suspends the conventional description of Chase’s Chief Justiceship as that of a strategic, politically ambitious “presidential aspirant” and considers the contextual and individual sources of Chase’s jurisprudential views, another dimension of Chase’s historical role is arguably brought to the surface. But that dimension needs to be selectively recognized. First, it appears that on many of the nonconstitutional issues that came before the Court, Chase was not particularly engaged, and that he gave them less than his full attention, concerning himself at the same time with matters, such as the composition, circuit duties, and salaries of the Court’s members, that, under modern separation of powers theory, may well appear “extrajudicial” in character. Chase’s relative lack of concern with many of the “routine” legal matters that came before the Court, and his persistent concern with such “extrajudicial” matters, lends support for the conventional view of his primarily being interested in “semi-political” matters while chief justice.

Further, it appears that on some constitutional issues, particularly those involving the terms on which the rebellious states

203. In an 1887 essay on legal tender, James Bradley Thayer cited Holmes’ argument about the power of Congress to “coin money” and declared that Holmes’ “reasoning seems to me obviously defective.” “The Constitution, in the coinage clause,” Thayer maintained, "simply confers on Congress one of the usual functions of a government, that of manufacturing metallic money and regulating the value of such money. As to what shall be done with it when it is manufactured and its value regulated, the Constitution says nothing.” James Thayer, Legal Tender, 1 HARV. L. REV. 73 (1887), reprinted in JAMES BRADLEY THAYER, LEGAL ESSAYS 60, 73 (1908).
were to be “readmitted” to the Union, the effect of the rebellion on private property rights in those states, and certain wartime measures imposed by Congress on the seceded states, such as confiscation measures and loyalty oaths, Chase was circumspect, compromising, and arguably “political” in his approach, acting consistently with an interest in avoiding the extremes of too much solicitude for “states’ rights” or too punitive a posture toward the subjugated confederacy. One could, without much effort, associate his prudent and moderate posture on these constitutional issues with angling for the presidency, or at least with attempting to stake out an inoffensive and “statesmanlike” posture on contested public matters.

Finally, there is abundant evidence that Chase was not loath to act strategically on matters involving his discretionary powers as chief justice, whether they involved holding circuit courts in the former confederate states, attempting to make Hepburn v. Griswold stand as a definitive ruling on subsequent legal tender cases, or even taking advantage of Grier’s obvious incapacity to forge a “majority” in Hepburn itself. Miller was undoubtedly correct in his observation that Chase tried to use the powers of his office to bend the will of his colleagues in the direction of his own views, and that this sparked controversy and resistance.

The issues and cases I have considered, however, arguably present Chase in a different light. Where issues of slavery, freedom, or currency policy surfaced in constitutional cases, Chase was uncompromisingly faithful to the convictions he had come to entertain on those issues as an antebellum lawyer and politician, indifferent to the short-run political consequences of his constitutional positions, and prepared to depart from his previously expressed views that individual rights of person and property were best defined and restricted by states and localities.

Thus, Chase was fully aware that his position in In re Turner augured considerable scrutiny by the federal courts of the treatment of blacks by states in which slavery had previously existed, notwithstanding his previous concession that slavery had been a local matter. He was also aware that his positions in Crandall v.

204. There is ample evidence of this posture in secondary sources on Chase. See, e.g., Hughes, supra note 1; Hyman & Wieck, supra note 39.
205. 75 U.S. (8 Wall.) 603 (1870).
Nevada,\textsuperscript{207} and to a much clearer extent in *The Slaughter-House Cases*,\textsuperscript{208} appeared to anticipate that along with an aggressive judicial reading of previously established federal plenary powers in the regulation of commerce might well come an aggressive reading, based on the Fourteenth Amendment, of federal supervisory power to protect the private economic rights of all citizens, white as well as black, against state regulation. And he was unmistakably aware that his positions in *Veazie Bank*\textsuperscript{209} and the legal tender decisions were arguably inconsistent on federalism principles,\textsuperscript{210} and that his "spirit of the Constitution" arguments in the legal tender decisions had been criticized as beyond the appropriate limits of judicial interpretation of the Constitution.

Nonetheless, Chase was prepared to take strikingly activist, controversial, and in some instances publicly dissenting positions in the cases I have analyzed because, at bottom, he "knew" that the jurisprudential views he was expounding were "correct." Slavery, economic freedom, and a commitment to "hard money" had been the major professional themes of Chase's career. He had made his reputation as a lawyer representing banks, as an antislavery and "free-soil" advocate, and as an official of the federal government charged with making fiscal policy. He believed that he understood the fundamental principle of republican governments—"freedom"—how slavery threatened that principle, and how freedom to conduct one's economic affairs was predicated on the government's providing a sound and real currency base. He not only never deviated from those beliefs, whether he was a lawyer, a politician, or a judge, he had very great difficulty attributing any weight or stature to alternative viewpoints. On short-run, "semi-political" constitutional questions of sovereignty arising out of the Civil War and Reconstruction, Chase could weigh all sides and steer a middle ground. On slavery, freedom, and currency issues he was entirely convinced of the rightness of his views and took pains to conform the meaning of the Constitution to those views.

\textsuperscript{207} 73 U.S. (6 Wall.) 35 (1867).
\textsuperscript{208} 83 U.S. (16 Wall.) 36 (1873).
\textsuperscript{209} *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869).
\textsuperscript{210} Chase made an effort to restate "the doctrine" of *Veazie Bank*, and to reconcile that case with *Hepburn*, in his dissent in *The Legal Tender Cases*. See *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 574-75 (1871) (Chase, C.J., dissenting).
An analysis of Chase's antebellum jurisprudence, taken together with an analysis of selected constitutional cases that engaged him at the deepest level, can thus refine our understanding of his performance as Chief Justice. But arguably the most intriguing feature of this dimension of Chase's performance is what it suggests about the Supreme Court of the United States as it confronted a reconstructed Union. From a conventional perspective, the Chase Court, as well as Chase himself, has appeared to be consumed with the short-run political difficulties of the Civil War and Reconstruction: loyalty oaths, the terms under which confederate states would reenter the Union, the impeachment of Andrew Johnson, the relationship between civilian and military courts in the reconstructed South. Even in The Slaughter-House Cases\(^ {211}\) the Court appears, with the advantage of hindsight, to have engaged in a short-run "political" solution, with Miller's majority opinion avoiding the full implications of the case for constitutional interpretation under the Fourteenth Amendment.

If one were to undertake an analysis of Chase's contemporary justices comparable to that undertaken for Chase in this essay, however, the Chase Court might appear to be one occupying a singular place in the history of American constitutional interpretation. It might appear to be a Court composed of individuals whose jurisprudential sensibilities, although idiosyncratic in some respects, were collectively derived from the starting assumptions of antebellum constitutional jurisprudence. At the same time, it might appear to be a Court whose members were confronting, for the first time in their lives, a potentially vast expansion of their constitutional review powers, signified by the broadly worded text of the Thirteenth and Fourteenth Amendments, with their possible eradication of not only slavery and its vestiges but the whole apparatus of tacit control over the civil rights of individuals that antebellum jurisprudence allocated to states and localities.

Chase and his contemporaries, then, might come to be seen as judges whose power to interpret the Constitution to include natural justice, first principles of republican government, and the "spirit" of the document had been taken as unexceptionable and not an overstepping of the limits of their office. Those judges

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211. 83 U.S. (16 Wall.) 36 (1873).
were then suddenly provided with a new battery of textual provisions that potentially expanded their capacity as constitutional supervisors of the states as well as of the federal government. They were the first generation of Supreme Court Justices who had implicitly been given the power to protect private rights against both the states and the federal government. And yet they were confronting the prospect of this enhanced power from a jurisprudential perspective whose assumptions about the boundaries of federalism, the intelligibility of "federal" civil rights, and the relationship between private rights and government in a republic were not far removed from those that had characterized the jurisprudential universe of John Marshall.

Seen in this fashion, the constitutional decisions in which Chase was most engaged, and which most closely tracked the antebellum foundations of his jurisprudence, typified the cultural predicament of the Chase Court. In the Turner-Crandall-Slaughter-House Cases\textsuperscript{212} sequence, his convictions propelled him decisively forward in time: the activist champion of newly created federal civil rights and newly-strengthened federal regulatory powers. In the Veazie Bank-Hepburn-Legal Tender Cases\textsuperscript{213} sequence, those same convictions identified him firmly with an antebellum mistrust of paper currency and associated inability to imagine that anything other than coin money was "real." In neither case, on balance, does he appear to have acted with short-run political considerations in mind. He seems, rather, to have acted as a judge who believed that constitutional law was synonymous with natural justice, but whose version of natural justice was simultaneously prescient and archaic. Perhaps if we can disengage Chase and his Court from the stereotypes associated with seeing them as conventional Reconstruction politicians, we can place them in a broader jurisprudential and cultural context.

\textsuperscript{212} In re Turner, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

\textsuperscript{213} Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870); The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871).
Although modern historical scholarship in general rests on the philosophical assumption that all truth is historical truth, legal historian G. Edward White is exceptional in his rigorous and self-conscious adherence to this historicist premise. In his magisterial work, *The Marshall Court and Cultural Change 1815-1835*, Professor White reconstructed the jurisprudential universe in which the Supreme Court acted in the early nineteenth century. Viewing the Court as "a cultural artifact" that reflected the distinctive cultural attitudes of its time, he emphasized "the uniqueness, the 'differences,' and the time-boundedness" of the Marshall Court. The inference to be drawn from White's study, which might be considered the guiding principle of his approach to legal history, is that the legal order in a given historical context is constituted by rules, theories, and ways of thinking that reflect the dominant culture and ideology of the time.

Professor White's analysis of the jurisprudence of Salmon P. Chase adopts this historicist approach. Without rejecting categorically the traditional view of Chase as a judge who possessed political ambitions, White seeks to recover and understand his jurisprudence by focusing on Chase's judicial convictions. This requires entry "into the world of antebellum moral and constitutional theory, a world which is difficult for moderns to fathom." In leading us into this world, White makes a major assumption: on matters of ultimate conviction, Chase was sincere and largely consistent in his views. He proceeds to argue, contrary to pre-
vious interpretations of the Supreme Court during Reconstruction, that in a number of significant decisions, Chase was not a political judge. In these cases, his constitutional positions are not accurately described as "prudential," "temporizing," or "strategizing" responses to current political exigencies. White thus offers a revisionist account of Chase as a principled judge who demonstrated what might be described as "deep-conviction jurisprudence."

This comment will argue, first, that White's historicism, while affording an original perspective on Chase and a necessary first step in any historical inquiry, is ultimately inadequate for achieving genuine historical understanding. This is because strict historicism, in its insistence on viewing historical actors exclusively in terms of their own values or the values of the time in which they lived, is unable to account for the continuity between past and present that causes ideas and events in the past—in this instance the ideas and convictions of Salmon Portland Chase—to be of interest to us. Second, I shall argue that the distinction between political judging and deep-conviction decision making, on which White's revisionist interpretation rests, is difficult, if not impossible, to maintain. The concept of a nonpolitical deep-conviction jurisprudence appears to be a late twentieth-century construct that is inconsistent with the explicitly historicist assumptions underlying White's account. Third, I shall discuss *Texas v. White*, Chase's most famous opinion, as an example of deep-conviction jurisprudence that was political in a principled and prudential sense, insofar as it resolved basic issues in antebellum jurisprudence concerning the nature of the Union.

The explicit and insistent character of White's historicism invites analysis. His study emphasizes the extent to which "antebellum constitutional ideas were preserved, virtually intact," in the Reconstruction period. White says it is apparent in retrospect that sovereign relationships in the constitutional system underwent major structural alteration as a result of the Civil War. A new role for the federal judiciary might even be said to have been "foreordained." Yet, the justices of the Supreme Court, White observes, "could only survey the constitutional landscape from the jurisprudential perspective of their antebellum peers.

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3. 74 U.S. (7 Wall.) 700 (1869).
They had no other way of thinking about constitutional issues."  

White does not disavow knowledge of post-Reconstruction constitutional developments to which the actions of the Chase Court might be related. In a historicist universe, however, the nature of such a relationship is problematic and unclear. Some of Chase's antebellum convictions, White points out, "appeared to harmonize with a more expansive, 'modern' role for Supreme Court justices" as doctrinal scrutinizers of state and federal legislation. Similarly, in the *Turner-Crandall-Slaughter-House* line of decisions, Chase's convictions "propelled him decisively forward in time" as "the activist champion of newly created federal civil rights." These statements suggest that Chase and his colleagues were not in fact prisoners of their historical context, and were able in some sense to extricate themselves from the "cultural predicament" that confronted them in approaching the constitutional problems of Reconstruction from the perspective of antebellum legal assumptions.

The means by which Chase may have been able to escape the confinement of historical contextualism were his deeply-rooted political and moral convictions. This is the key to his jurisprudence, at least in the cases not previously understood as principled decisions that White discusses. In explaining this central feature of Chase's constitutionalism, Professor White explains that Chase had an "idiosyncratic perspective," formed of temperament and ideology, that led him to adopt positions he believed were intrinsically right. At the core of Chase's personal vision were deeply rooted convictions about slavery, freedom and sound money which provided the ground of decision in the cases under review.

The nature of these convictions is open to question. Conceivably they are to be understood as expressions of timeless and universal principles, as when White states that Chase "acted as a judge who believed that constitutional law was synonymous with natural justice." White's historicist assumptions, however, preclude serious consideration of the possibility that Chase's convictions embodied or apprehended transcendent, universal principles or

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5. *Id.* at 48.
6. *Id.* at 116.
7. *Id.*
ideas. On the contrary, we learn that the convictions that formed
the basis of Chase's jurisprudence were also time-bound and
contingent. "It is difficult," White says, "to characterize Chase's
antislavery and 'free labor/free soil' positions in terms that extend
beyond their immediate antebellum context." Chase's hard money
views in particular are inaccessible to late twentieth-century
students and hence require the greatest amount of contextual
elaboration. In general, Chase's convictions were a "product of
his antebellum experiences as a lawyer and politician in Ohio." In
White's account, Chase's convictions, although superficially
liberal in their anticipation of modern libertarian tendencies, were
not progressive. They were not continuous with and essentially
similar to twentieth-century ideas of civil rights equality and
economic liberty. Rather, Chase's convictions are time-bound and
contextually defined, and hence unique. As an historicist, White
philosophically rejects progressive or Whig history, in which the
ideas and institutions of a given period are understood not only
to be superior to those of an earlier era, but also immanent in
those earlier institutions and ideas. Historicism denies the tele-
ological nature of history as conceived in Whig or progressive
historiography.

According to White, Chase's version of natural justice was at
once "prescient" and "archaic." This is apparently intended to
mean that while Chase's convictions on slavery and freedom were
prophetic from a twentieth-century point of view, his sound
money thinking is now considered irrelevant and behind the
times. If we suspend historicist assumptions, however, it is pos-
sible to understand Chase's convictions as expressions of univer-
sal principles. Universal principles are to some extent historically
conditioned, as they necessarily must be when they assume form
in the world of time and space. But they are not simply or utterly
contingent. From the standpoint of a particular historical context,
universal principles may well appear either archaic or prescient.
Yet that appearance does not necessarily disclose all that is
pertinent or that can be known about them.

8. Id. at 62.
9. Id. at 61.
10. Id. at 116.
11. See LEO STRAUSS, NATURAL RIGHT AND HISTORY 1-34 (1953).
Although in terms of its own contextualist logic White's study of Chase's jurisprudence would seem to deny the possibility that it throws light on significant patterns of constitutional development, it may be pertinent to contemporary constitutional theory. His revisionist assessment can be seen as an attempt to offer a theory of constitutional adjudication. Alongside theories such as natural law, sociological jurisprudence, legal realism, process jurisprudence, critical legal studies, and the like, we observe in the career of Chief Justice Chase an approach to constitutional interpretation that can be characterized as nonpolitical deep-conviction jurisprudence. Notwithstanding the strict historicist assumptions on which it rests, White's analysis of Chase's constitutional decision making bears a strong resemblance to White's analysis—in a very different historical context—of the constitutional jurisprudence of Chief Justice Earl Warren. In his study of Chief Justice Warren, for example, White says that Warren defined legal craftsmanship as "knowing what results best harmonized with the ethical imperatives of the Constitution and how best to encourage other justices to reach those results." Warren's constitutional reasoning consisted of "conclusory statements of what he perceived the be ethical imperatives: embodied in the Constitution. 12 Contrary to the logic of historicism, White's interpretations of Chief Justice Chase and Chief Justice Warren, a century apart, suggest the possibility of a type of constitutional reasoning that exists outside the confining limitations of cultural and historical context.

If this jurisprudential comparison is not simply coincidental, there may be an element of Whig presentism in White's reassessment of Chase. The theory of deep-conviction jurisprudence may be a late twentieth-century concept not supported by evidence from the Reconstruction period. White uses this concept to describe a type of legal craftsmanship that is distinguished not by technical mastery of legal precedent and doctrine, the usual connotation of the term, but rather by ethical commitments grounded in personal beliefs and values, or what is commonly known as ideology. Chase's contemporaries, anticipating his appointment as Chief Justice, employed different criteria of judicial performance. For some observers the relevant standard for ap-

pointment to the Court was judicial statesmanship. This referred to a broad grasp of public policy issues, thorough knowledge of fundamental constitutional principles, sympathy with the objectives of the government in its war and reconstruction policies, and strength of character and intellect. Other commentators held to a standard of legal craftsmanship that emphasized judicial learning and experience, disinterest in political office, and judicial temperament.\(^\text{13}\)

White's concept of deep-conviction jurisprudence is closer to the first of these two models of judicial performance. It differs significantly, however, in its denial of a political dimension. White contends that when Chase decided cases based on deep conviction, he disregarded consideration of political support, approval, and consequences.\(^\text{14}\) White's historicist methodology required him to interpret the actions and events of the past in their own terms, or in relation to the values, assumptions, and criteria that prevailed in a specific historical context. The type of nonpolitical jurisprudence attributed to Chase, which denies "temporizing," "strategic," and "prudential responses to current political exigencies," seems to reflect more of a late twentieth-century understanding of constitutional adjudication, perhaps shaped by White's biographical perspective, than a nineteenth-century view.\(^\text{15}\)

Yet an element of uncertainty persists. For in describing the legal assumptions of the antebellum period which informed Chase's constitutional outlook, White says Chase shared his contemporaries' belief that "constitutional interpretation was an exercise which included recourse to moral and political principles as well as to legal doctrines."\(^\text{16}\) In what sense, then, were Chase's deep-conviction decisions political and in what sense were they not? In order fully to understand White's revisionist interpretation there would appear to be a need for clarification about the nature and significance of politics and political principles in relation to constitutional jurisprudence in the mid-nineteenth century, and perhaps in relation to constitutionalism in general.

\(^{13}\) 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 403-09 (1926); 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864-88, at 5-31 (1971).

\(^{14}\) White, supra note 2, at 60.

\(^{15}\) Id. at 47.

\(^{16}\) Id. at 61.
Whatever the provenience of the concept, the validity and usefulness of the theory of nonpolitical deep-conviction jurisprudence for an understanding of Chief Justice Chase remains to be considered. What kind of evidence is required to determine that a judicial decision resulted from this approach to constitutional adjudication? If we accept White's contention that Chase had deep convictions on at least three subjects—slavery, freedom, and sound currency—how do we know that his decisions on other issues were not grounded on deep conviction? In short, how does one distinguish between nonpolitical deep-conviction decisions and decisions that are informed by political motives, principles and purposes?

It is not clear on the evidence that this distinction can be maintained. A case such as *Hepburn v. Griswold*, which in White's view illustrated deep-conviction jurisprudence, can be understood as a politically motivated and expedient decision. By the same token, a case like *Texas v. White*, which is generally considered to be a political decision, can be understood as a principled holding based on deep conviction and prudence.

*Texas v. White* was a prudential decision in the sense that it involved delicate judgments about the most controversial issues of the day, including the respective powers of Congress and the executive branch over Reconstruction and the legality of the reorganized government of Texas and, by extension, other Southern state governments. As Professor White notes, however, the case also raised questions concerning the role of the states within the Union that were central to antebellum jurisprudence. The nature of the Union, like any constitutional question, could be a pretext for the pursuit of partisan and ideological ends. Yet constitutional theorizing about the nature of American federalism since the beginning of the government made this an issue of deep—if at times more passionate than deliberate—conviction.

Chase's opinion in *Texas v. White* effected a theoretical synthesis of nationalist and states' rights concepts of Union that had

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17. 75 U.S. (8 Wall.) 603 (1870).
18. Bernard Schwartz writes of *Hepburn v. Griswold*: "What in another judge might have been considered high moral courage was in Chase condemned as but another example of political jobbery." BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 156 (1993).
19. 74 U.S. (7 Wall.) 700 (1869).
20. White, supra note 2, at 71.
coexisted in an uneasy tension for a generation before coming into open conflict in the secession crisis. The case presented the technical question of whether Texas in 1867 could sue in the Supreme Court to enjoin payment of United States bonds that were sold by the Confederate Texas government in February 1865. To answer this jurisdictional question it was necessary to decide whether Texas, under its presidentially organized government of 1867, was a state in the sense of the Constitution. The case offered the Supreme Court yet another opportunity to review the complex of questions left unresolved by the Civil War dealing with the nature of the Federal Union. These questions were, principally, the status of the former Confederate states, the significance and effect of secession as a purportedly constitutional act, and the nature of the American state system. In contrast to previous occasions since the end of the war when these questions were raised, the Supreme Court accepted this invitation to examine issues that in one form or another had divided the nation for over a generation.

Writing for a five-to-three majority, Chief Justice Chase held that Texas could file suit in the Supreme Court. It could do so because it had a legitimate state government in the sense of the Constitution, although it was not at the time represented in Congress. In upholding the validity of the state government for the procedural purpose in question, Chase acknowledged the efficacy of executive authority in restoring a government capable of being represented in the national legislature. The principal reason for deciding that Texas was a state, however, concerned the legal nullity of secession and the nature of the Union.

Chase explained the nature of the Union in a way that was intended to obviate as much as possible, without simply dismissing, consideration of the validity and legal effect of secession as a legitimate object of inquiry in constitutional law. Having come to the conclusion that centralization had gone too far as a result of Reconstruction policy, Chase made the nature and existence of the states the paramount concern of his opinion. Apparently relying on James Madison's Report of 1800 on the Alien and Sedition Laws as his authority, Chase defined a state as a people

22. ALBERT BUSHNELL HART, SALMON PORTLAND CHASE 371 (1899).
or community of individuals, the territory they inhabited, and the government under which they lived. Although all three usages were found in the Constitution, the primary constitutional meaning was that of the people as a political community of free citizens. Chase declared this the "fundamental idea" on which American republican institutions were established.23

Given the primacy of the states as the foundation of American constitutionalism, Chase said it was "needless to discuss, at length," the constitutionality of the claimed right of a state to withdraw from the Union.24 Chase tended to regard secession as not even arguable a constitutional right because the nature of the Union precluded it. The Union was the product of an organic, natural development that was incapable of being destroyed by mere political action. "The Union of the States was never a purely artificial and arbitrary relation," Chase reasoned. The Union began among the colonies, growing out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. Confirmed and strengthened by the Revolutionary War, the Union received definite form in the Articles of Confederation, which declared it to be "perpetual." The Constitution then ordained "a more perfect Union," expressing the idea of indissoluble unity. "What can be indissoluble if a perpetual Union, made more perfect, is not?" Chase asked.25

Yet this perpetuity and indissolubility detracted nothing from the principle of state self-government on which the nation and the Constitution were founded. Reiterating the primacy of the states, Chase noted the states' retention of their sovereignty under the Articles of Confederation. He pointed out that although the Constitution restricted the powers of the states, the Tenth Amendment reserved powers not delegated to the United States to the states respectively or to the people. Quoting from Lane County v. Oregon,26 a case decided earlier in the same term which discussed the nature of the Union, Chase declared: "Without the States in Union, there could be no such political body as the United States."27 The preservation of the states and the main-

24. Id. at 724.
25. Id. at 725.
26. 74 U.S. (7 Wall.) 71 (1869).
27. Texas v. White, 74 U.S. (7 Wall.) at 725. In Lane County v. Oregon, Chase wrote:
tenance of their governments, therefore, was as much within the design of the Constitution as the maintenance of the national government. "The Constitution, in all its provisions," Chase concluded, "looks to an indestructible Union composed of indestructible States." 28

In this part of his opinion, Chase gave expression to the organic nationalist tradition of the Whig party, as represented in the writings of Daniel Webster and Joseph Story. Chase seems to have modeled his argument in particular on Abraham Lincoln's first inaugural. Chase's reference to "an indestructible Union of indestructible States" recalls Lincoln's assertion that "in contemplation of universal law, and of the Constitution, the Union of these States is perpetual." 29 What was implicit in Lincoln's discussion of the creation of the republic, however, became explicit in Chase's opinion, namely, the specific sources that sustained the growth of the Union and an argument for the indispensability of the states—and hence their indestructibility—as the logical corollary of a perpetual Union of states.

As Chase placed greater emphasis on the organic sources of the Union, so he gave less attention than Lincoln to the question of agency that lay at the center of the antebellum debate over the nature of the Union. This was the question of who made the Union: the states or the people of the states severally, or the people of the United States in the aggregate, considered as a single political community? Lincoln had essentially avoided this issue. 30 Chase was even less precise about the human actions involved in stating that the Union grew out of a variety of historical forces. Against the background of decades of theorizing on the nature of the Union, the notable fact about Chase's opinion in Texas v. White was that it incorporated neither the classic states' rights formulation—that the states made the Union—nor

"[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in Union there could be no such political body as the United States." 74 U.S. (7 Wall.) 71, 76 (1869).

30. In his July 4, 1861 message to Congress, Lincoln said that "Originally, some dependent colonies made the Union; and, in turn, the Union threw off their dependence, for them, and made them States." Id. at 434-35.
the classic nationalist formulation—that “We, the People of the United States” made the Union and the Constitution. To conceive of the Union as an organic development, described in the theory of dual federalism with its divided sovereignty and reciprocally limiting spheres of state and national authority, obviated the question of rights, responsibility and ultimate supremacy to which the problem of agency logically gave rise.  

Chase’s nationalism was tempered and balanced by a tendency toward compact thinking that reflected what was probably the major current in antebellum constitutional theory on the nature of the Union. In the first place, the more perfect Union of the 1787 Constitution, according to Chase, was the same Union referred to in the Articles of Confederation, with its assertion of state sovereignty. This was a major point of contention between states’ rights theorists and centralizing nationalists, who held that the Constitution signified a break in constitutional development and the creation of a new and different Union. Moreover, the theory of the Union expounded in _Texas v. White_ incorporated compact and contract elements that were deeply embedded in antebellum constitutionalism.

Chase stated that when Texas joined the Union, she entered an indissoluble relationship. The act admitting Texas as one of the United States was “something more than a compact,” he said; it was an act of incorporation that made the state a member of the political body. Moreover, the act was final. “There was no place for reconsideration, or revocation,” Chase reasoned, “except through revolution, or through consent of the States.” He added that “The Union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States.”

How to conceive of the Constitution, if not as a compact or contract, was one of the central questions of American political theory in the antebellum period. In one of the most famous speeches in the debate over the nature of the Union, Daniel

32. JOHN C. HURD, _THE UNION-STATE: A LETTER TO OUR STATES-RIGHTS FRIEND_ 73-79 (1890).
34. _Id._
Webster, rejecting the compact theory of the Union advanced by John C. Calhoun, argued that the Constitution was not a compact between sovereign states. Webster said the Constitution, by its own terms, was not a compact; it was a constitution, or "the fundamental law." Chase's answer in *Texas v. White* was equivocal. In explaining the origin of the Union as not simply an arbitrary or artificial relation, Chase implied that the Union, and by extension the Constitution, was an organic historical development and thus not a deliberate agreement that took the form of a compact or contract. In explaining the relation of Texas to the other states of the Union, however, and the relation of the original states to each other in the Constitution, he employed contract or compact thinking. He said the act incorporating Texas in the Union was more than a compact. He did not say that it was not a compact or that it was less than a compact. The inference can be drawn that, in Chase's view, the Constitution was a compact—a special kind of compact that required unanimity among the compacting parties concerning determinations of its fundamental terms and conditions. Chase's recognition of the "consent of the States" as a means by which the terms of the Union could be reconsidered or revoked recalls Lincoln's argument, in his first inaugural, that if the United States was "an association of States in the nature of a contract merely," it could not "be peaceably unmade, by less than all the parties who made it."  

What, then, is the nature of the Union and where does sovereignty reside, according to the theory of *Texas v. White*? Chase seems to hold finally that the Union is a system of political community in which ultimate sovereignty resides in "the States in union." This was the language Chase used in *Lane County v. Oregon* and in *Texas v. White* to explain the existence of the political body known as "the United States." In *Lane County v. Oregon*, Chase went so far as to say that "The States disunited might continue to exist." This was a remarkable assertion coming from the judge who in *Texas v. White* would proclaim the indissolubility of the Union. To conceive of the states as disunited meant that there was a way by which the Union could be broken up after all. In *Lane County v. Oregon*, Chase did not explain

35. 6 DANIEL WEBSTER, THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 186 (1903).
36. COLLECTED WORKS, supra note 29, at 285.
37. Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869).
how this might happen. In *Texas v. White*, referring to the consent of the states as a way by which the incorporation of a new member in the political body might be reconsidered or revoked, he provided an answer.

In Chase's theory of the Union, secession is finally illegitimate not so much because the Union is a natural and living organism, the existence of which is impervious to and incommensurable with human agency and political action. Rather, secession is unconstitutional because its proponents wrongly claimed for individual states a power rightly possessed by the states in union or collectively. *Texas v. White* presents a synthetic theory, informed more by dual federalist concern for divided sovereignty than by a desire for consolidation and centralization. In this theory, the authority of the Constitution derives from the consent of the states in union, or the states united, in contrast to the states in severalty or individually or the people of the United States considered as a single mass.38

The determination of state indestructibility and the illegality of secession did not resolve the question of jurisdiction in *Texas v. White*.39 Chase went on to consider the disorganized character of the Confederate Texas government during the Civil War and the powers of the president and Congress in restoring loyal governments in the former Confederate states under the Guarantee Clause of the Constitution. Chase acknowledged both preponderant legislative power over Reconstruction and the efficacy of executive authority in reorganizing legitimate state governments in the former Confederacy. In this respect, Chase's opinion evinced the skillful and expedient legal strategy for which *Texas v. White* is primarily remembered.40

Although Chase's treatment of the nature of the Union can be seen as a short-range tactical maneuver aimed at accommodating conflicting political pressures, his opinion expressed reasoned convictions about the American state system that were widely shared in antebellum jurisprudence. Chase's analysis of the constitutional meaning of statehood was the most searching and comprehensive examination of the subject in constitutional law.

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His opinion served the important purpose, moreover, under a written constitution, of maintaining legal continuity in a time of potentially revolutionary change. The war was fought on the assumption that secession was legally impossible; it ended with the former Confederate states out of the Union for all practical purposes. There was no way, other than by accepting the Southern view that an oath of allegiance by individual citizens was all that was needed to restore constitutional governments in the seceded states, to avoid this logical dilemma. In *Texas v. White*, the Supreme Court attempted to resolve this dilemma in a principled and prudential way.

John Norton Pomeroy, a leading Unionist legal commentator, praised Chase's opinion in *Texas v. White* for correcting what Pomeroy considered to be historical and logical defects in the traditional nationalist theory of the Union. As expounded by John Marshall, for example, the nationalist theory placed undue weight on the language in the Preamble to the Constitution identifying "We, the People" as the creator of the Union and the Constitution. Pomeroy said it was necessary to clarify the foundations of the constitutional order after the Civil War; this the Supreme Court did in *Texas v. White*. "[F]or the first time in its entire history," Pomeroy wrote, the Court "struck the solid ground of historic fact," announcing a theory that defined and preserved "both the inherent nationality of the United States and the separate existence, necessity, and local rights of the several States." The Supreme Court "has placed the nation and the States upon exactly the same footing," he concluded. "Whoever weakens the one, weakens the other."

Subsequently, the dual federalist convictions of Chase's opinion in *Texas v. White* came under attack. In the post-Reconstruction period, proponents of exclusive national sovereignty condemned Chase's theory of "an indestructible Union, composed of indestructible States." The political scientist John W. Burgess was the most vocal critic who objected that Chase's dual federalist convictions had acquired the authority of a political dogma that

41. Pierson, supra note 38, at 3.
42. Pierson, supra note 38, at 17.
43. Hart, supra note 22, at 337.
prevented the nation from addressing contemporary problems in a realistic manner.\(^{45}\)

G. Edward White's reassessment of the Supreme Court during Reconstruction provides a useful service in opening up the question of the role of deep conviction in the jurisprudence of Chief Justice Chase. In addition to the questions that are raised by White's historicist methodology, the nonpolitical nature of Chase's deep-conviction decisions required clarification. Moreover, there is evidence that fundamental ideas about the nature of the Union were among the convictions that informed Chase's constitutional decision making. In *Texas v. White*, Chase synthesized conflicting elements of antebellum jurisprudence into a theory of dual federalist nationalism. Although it reflected the pressures of Reconstruction politics, its principal significance was to embody and attempt to reconcile long-standing conceptions of the American state system. Moreover, the theory of *Texas v. White* is not merely of antiquarian interest, confined to the historical context of Reconstruction, but continues to be of interest to constitutionalists a century later. Its basic principles of limited government and the consent of local political communities as the source of authority in a system of divided and distributed sovereignty remain timely and relevant in the altered historical context of late twentieth-century American constitutionalism.

SALMON P. CHASE AS JURIST AND POLITICIAN:  
COMMENT ON G. EDWARD WHITE,  
RECONSTRUCTING CHASE'S JURISPRUDENCE  

by Michael Les Benedict*

In his discussion of Salmon P. Chase as jurist and politician, Professor White makes two primary points. First, he says that contrary to the dominant scholarly assessment, Chase did decide cases involving certain key constitutional issues according to a deeply-held philosophy, irrespective of the political consequences. In those areas of deep commitment, Chase the jurist, like Chase the politician, stood on principle without considering political consequences, confident that the rightness of his position must necessarily persuade reasonable men and women. Second, both Chase's opinions and those of his Court reflected the continued predominance of an antebellum constitutional jurisprudence that was not transformed until later in the nineteenth century. Legal scholars have mistakenly considered the Civil War and Reconstruction era to mark an epistemological watershed in the history of the Supreme Court's constitutional jurisprudence, and this has led to misunderstandings of its decisions.

Professor White rightly points out the paucity of modern research on Chase and the great difference between contemporary estimates of his stature and later scholarly ones. Chase was a dominant figure in the history of the Civil War era. It is not enough to say that he was one of the most important leaders of the Republican party. He was a preeminent leader, a figure of immense proportions. Many of the participants in this symposium will quote Lincoln's description of him: "Chase is about one and a half times bigger than any other man that I ever knew."1 Among Republicans, only Charles Sumner, William H. Seward,

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1. ALBERT BUSHNELL HART, SALMON P. CHASE 435 (1899).
Thaddeus Stevens, and Abraham Lincoln equaled his contemporary stature.²

Chase’s ambition for the presidency was legend among contemporaries and among historians of the Civil War era. But no one doubted that he was worthy of the ambition, except for those who scrupled at his inability to mask his aspiration. Chase was at the center of the efforts to convert antislavery sentiment into an organized political force. On his death in 1873, the New York Tribune credited him “more than any other one man” for accomplishing that goal.³ As a consequence, he was a serious, powerful contender for the Republican presidential nomination every presidential year from 1856 to 1868, at the heart of the calculations of all rivals and observers.⁴ As his chances for the Republican nomination faded in 1868, he became a serious contender for the Democratic nomination.⁵ Until his stroke in 1870, he remained an important factor in calculations about both parties’ nominations for 1872. It was no accident that upon becoming president Abraham Lincoln named Seward and Chase—the two preeminent rivals for leadership of the Republican party—secretary of state and secretary of the Treasury, the leading positions in the cabinet.

As treasury secretary, Chase fashioned policies that revolutionized the American financial system—funding a great national debt, establishing a paper currency, framing a national banking system, and shifting the tax base from the tariff to excises and the nation’s first income tax. James G. Blaine, the great post-

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² For the estimate of contemporaries, see William M. Evarts, Eulogy on Mr. Chase, Delivered Before the Alumni of Dartmouth College (June 24, 1874), in Jacob W. Shuckers, The Life and Public Services of Salmon Portland Chase 635, 646, 661 (1874); Alexander K. McClure, Colonel Alexander K. McClure’s Recollections of Half a Century 397 (1902). Chase was among the eight Republican leaders (ten, if one includes Ulysses S. Grant and Horace Greeley) that Harriet Beecher Stowe chose to profile among eighteen statesmen, soldiers, and orators in Harriet Beecher Stowe, Men of Our Times; or Leading Patriots of the Day (1868). He followed Lincoln, Grant, the great abolitionist William Lloyd Garrison, and Charles Sumner. He was one of five men profiled by the influential newspaperman Donn Piatt, Men Who Saved the Union (1897).


⁴ For Chase’s political career and presidential candidacies, see Frederick J. Blue, Salmon P. Chase: A Life in Politics (1987); the essays on the elections of 1856 through 1868 in Arthur M. Schlesinger, Jr., History of American Presidential Elections, 1789-1968, at 1024, 1114-16, 1167, 1251 (1971); Charles H. Coleman, The Election of 1868, at 73-78 (1933).

⁵ Coleman, supra note 4, at 102-40; Blue, supra note 4, at 283-97.
war leader of the Republican party, was certainly correct that Chase's success in raising the immense revenue necessary to finance the war "entitle him to rank with the great financiers of the world." Only Hamilton could compare. The great lawyer and statesman William M. Evarts summed up the contemporary judgment: they "stand together, in the judgment of their countrymen, the great financiers of our history."6

But Chase was not only one of the preeminent politicians and statesmen of his day, contemporaries recognized him as the architect of the mainstream antislavery constitutional argument. His published arguments in the great cases of Jones v. Van Zandt7 and the slave Matilda8 made him "the attorney general for fugitive slaves."9 Through his campaign addresses and lectures, his speeches in Congress, which were reprinted in newspapers and broadcast as pamphlets across the country, Chase became the antislavery movement's acknowledged spokesman on constitutional issues.10 His nomination to the Supreme Court was designed to give him a position commensurate with his stature in both the political world and the world of antislavery constitutionalism. It was the only position other than the presidency itself that would do him justice.

In light of that stature, it is surprising that Chase has not received more scholarly attention. Professor Blue's is the only biography of him prepared since the revolution in Civil War and Reconstruction historiography began in the 1950s, and it is limited to his career as a politician.11 Scholarly attention to his post-Civil War career has been especially skimpy. Chase plays a major role

6. JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 434 (1884); Evarts, supra note 2, at 649; LEONARD P. CURRY, BLUEPRINT FOR MODERN AMERICA: NONMILITARY LEGISLATION OF THE FIRST CIVIL WAR CONGRESS 181-206 (1968); BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 718-34 (1957).


8. Salmon P. Chase, Speech of Salmon P. Chase, In the Case of the Colored Woman, Matilda, Who Was Brought Before the Court of Common Pleas of Hamilton County, Ohio by Writ of Habeas Corpus, March 11, 1837 (Mar. 11, 1837).


11. BLUE, supra note 4.
in accounts of antislavery and Civil War politics, but there has
been hardly any scholarly discussion of his post-war career, as
politician or as jurist.\footnote{12. David F. Hughes, Salmon P. Chase: Chief Justice (1963) (unpublished Ph.D. disser-
tation, Princeton University) (the only study of Chase's judicial career).} Professor White exaggerates a bit when
he suggests that conventional accounts charge Chase with allow-
ing his political ambitions to determine his actions on the bench.
There has not been enough scholarship to define a "conventional
account." Professor Blue provides an overview in two chapters
of his political biography, but he does not go into much detail.
He titles one chapter “Chief Justice as Presidential Candidate,”
but he does not relate Chase's judicial activities to his politics.\footnote{13. BLUE, supra note 4, at 247-307.}
Charles Fairman scattered descriptions of Chase's political and
judicial activities throughout the monumental first part of his
Holmes Devise study of the Chase Court. But I think it safe to
say that those descriptions do not amount to a coherent whole.\footnote{14. 6 CHARLES FAIRMAN, HISTORY OF THE
SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864-68 (1971).}
And while this conference does begin to remedy the lack of
attention to Chase's judicial career, its connection to his post-
war political career has been left out here as well.

Professor White's point that Chase represented an older, an-
tebellum constitutional jurisprudence that continued into the
post-Civil War era is a good one. Constitutional historians, like
most historians, are generally concerned with assessing how the
present evolved from the past. As a result, they have tended to
analyze antebellum American constitutional history in a way that
stresses the origins of doctrines and institutions whose influence
continues to the present day. They have looked for and stressed
the origins of activist judicial review, substantive due process of
law, and nationalist and states' rights doctrines of constitution-
alism. Professor White focuses on jurisprudence itself—the way
the Supreme Court approached the issues, the perception of the
Court's role, the techniques of analysis, and the most general
understandings that underlay specific doctrines. Professor White
utilized this approach in his study of the Marshall Court.\footnote{15. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835 (1991).}
Howard Gillman and Morton J. Horwitz have done the same for the
Lochner-era Court.\footnote{16. HOWARD GILLMAN, THE CONSTITUTION BSEIGED: THE RISE AND DEMISE OF LOCHNER

Professor White views the alternatives that the Civil War amendments presented from the perspective of the justices, trained and experienced in a constitutional world in which giving the national government the responsibility of protecting the basic rights of citizenship was almost inconceivable—the ravings of radical extremists wholly removed from the realities of the American constitutional, political, and social system. Implicitly he presents the paradox they faced. Antebellum constitutional jurisprudence permitted appeals to wide-ranging general understandings about human rights, civil rights, and the nature of society. Judges were not restricted to technical legal authorities and narrow legal doctrine. This approach would have permitted almost unconstrained federal intervention in states' public policy had the Constitution not delegated only a limited jurisdiction over individual rights to the federal courts. Even that limited delegation of jurisdiction had caused a crisis of interpretation as long as jurisprudents adhered to the "coterminous" principle—the idea that federal court jurisdiction and congressional jurisdiction were identical. By repudiating that principle and limiting Congress strictly to the powers enumerated in Article I, Section 8 and a few others, White says, antebellum jurisprudence made it possible for the Supreme Court to exercise final authority in a broader but still limited area. It, not Congress, enforced the limitations that Article I, Section 10 imposed on the states, especially the limitations of the Obligation-of-Contracts Clause. It, not Congress, decided when a state law impermissibly entrenched on federal authority. (One might add to White's catalog of compromises that permitted the Court to exercise such authority its abjuration of power to enforce the Bill of Rights against the states.)

White's description of antebellum jurisprudence enables us to imagine how the justices felt as they faced the new jurisprudential world that was potential in the Civil War Amendments. Those Amendments were on their face a repudiation of antebellum jurisprudence. They radically extended the Court's jurisdiction over rights. The congressional managers of the Fourteenth Amendment explicitly stated that it secured the Bill of Rights


against state infringement. And the justices stood at the threshold of this radical extension of federal court jurisdiction with a constitutional jurisprudence that permitted virtually unconstrained decision making. Moreover, the amendments apparently incorporated the coterminous principle; unlike Article I, Section 10 and other sections of the original Constitution that restricted state action, each amendment explicitly authorized Congress to enforce it through “appropriate” legislation. In an article presented as part of this symposium, Professor Robert Kaczorowski says the Supreme Court refused to accept the original understanding of the Fourteenth Amendment, imposing a cramped legalism on a revolutionary constitutional provision. If he is right, Professor White’s article tells us why they did it.

Professor White says that Chase, as chief justice, took principled positions on the issues of slavery, freedom, and currency that came before his Court, while he temporized and took “arguably political” positions on issues involving restoration of the Union, the effect of confiscation, loyalty oaths, and the effect of the rebellion on private property. However, Professor White does not discuss these latter issues in his paper. He shows us how Chase’s opinions on slavery, freedom, and the currency correspond to long-held principles. But he does not show us how his performance in these other areas differed. What were his “prudential,” “temporizing and cautious” opinions? How did they “arguably” reflect his political ambitions? Why is the conclusion only “arguable”? How does one distinguish “principled” decisions from “prudential” ones?

The charge that Chase was over-ambitious originated in an age that treated political ambition quite differently than our own. It was an age when politicians as a matter of course disclaimed political aspirations. Americans believed that the man should not seek the office but that the office should seek the man. No mid-nineteenth-century politician declared his candidacy for a political nomination. His “friends” urged him to accept the nomination

18. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (Rep. Bingham); id. at 2765 (Sen. Howard).
19. I do not find the Court’s interpretation as radical a departure from the original understanding of the Fourteenth Amendment, which I find more ambiguous than Professor Kaczorowski does. See Michael Les Benedict, Preserving the Constitution: The Conservative Basis of Radical Reconstruction, 61 J. AM. HIST. 65 (1974); Michael Les Benedict, Preserving Federalism: Reconstruction and the Waite Court, 1978 SUP. CT. REV. 39.
they secured for him. Thus, George W. Julian recalled that he first stood for Congress "[i]n compliance with the wishes of my anti-slavery friends, and by way of doing my part of the work."20 James A. Garfield wrote a friend just before he was nominated for a third term in Congress, "My policy ... has been ... [t]o secure the support of my constituents by doing my duty here [in Congress] ... rather than by palaver and begging them to give me their votes."21 Rutherford B. Hayes's campaign biographer, William Dean Howells, reassured potential voters of his candidate's modesty. Hayes "had not, of course, sought the nomination, but at the urgence of friends, he had let the matter take its course."22

An historian investigating the private papers of these modest statesmen will find plenty of evidence to belie their pretensions. They kept in close touch with their lieutenants, and they often adjusted their political activities according to the reports they received about their constituents' wishes and opinions. There is not much evidence to suggest that they were less ambitious than modern politicians, although they well may have suffered more inner conflict over their feelings.23

Chase likewise disclaimed personal ambition. "I really think that I am not half so ambitious of place as I am represented to be," he wrote. "I worked for ideals and principles and measures embodying them, ... and was always quite willing to take place, or be left out of place, as the cause, in the judgment of its friends, required."24 But he was less able than most of his contemporaries to maintain the discretion that the public expected. His private correspondence seems more frank in its discussion of his political fortunes. One does not have to do so much reading between the lines. His contemporaries sensed this and were offended by it. The reaction of Chase's colleague Justice Samuel F. Miller, quoted by Professor White, is a good example.

20. GEORGE WASHINGTON JULIAN, POLITICAL RECOLLECTIONS, 1840 to 1872, at 116-17 (1884).
24. ROBERT B. WARDEN, AN ACCOUNT OF THE PRIVATE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 683 (1874).
More serious, Chase's ambition seemed to affect his political judgment. In 1864 he was willing to be the candidate of radical Republicans dissatisfied with Lincoln's Civil War policies while he sat in Lincoln's cabinet. Not only did this put him in an awkward position, but there is no indication he considered how unlikely it was that he would win the general election as the candidate of a party that had repudiated its own president; yet a Democratic victory would have been catastrophic for the principles in which Chase so deeply believed. 25

In 1868 Chase dallied with Democrats, which really damaged his reputation. There seems little question that his desire for their presidential nomination blinded him to the danger that they would use his great reputation for their own ends, betraying his ideals upon achieving power. 26

Chase did not have to tailor his judicial opinions to his political aspirations. The plain fact was that his judicial positions had political implications. Because of his political stature, his appointment to the Supreme Court did not remove him from the political calculations of the day, and Chase never rejected the possibility that he might leave the bench for yet higher office. Quite the contrary, the activity of his Republican friends from 1865 to 1867 and his political discussions with a wide group of Democratic correspondents in 1868 made his willingness to serve quite apparent. He wrote the letter disclaiming inordinate political ambition, quoted above, in the midst of these negotiations, and it probably reflected accurately how he perceived the situation. He was taking positions on issues of political consequence, and if those who shared his positions wanted him to run for the presidency, he would be happy to do so.

But all those letters explaining his position to Democrats simply were not discreet. Even his close friend and sympathetic biographer Robert B. Warden had to concede, "Never was a heart more self-deceived than was the heart of our hero when he wrote that letter." 27 Others, like his colleague Miller, were more offended and their judgment was harsher.

But Chase's willingness to be considered for the presidency while on the Court does not mean that he tailored his opinions

25. BLUE, supra note 4, at 214-27.
26. Id. at 285-300.
27. WARDEN, supra note 24, at 683.
to his political possibilities. Rather, his judicial opinions and positions made him a leading representative of public policies with widespread appeal. Understanding that appeal requires a bit of knowledge about the political background. In the aftermath of the Confederate surrender, Republicans were divided loosely into radical and conservative factions. Although there were no rigidly defined programs, radicals generally favored harsh measures to re-order Southern society and eliminate the influence of the old slaveowning elite, including confiscation of property and broad disfranchisement, and a firm policy of securing equal civil and political rights for former slaves. They favored long-term provisional, civil governments for the Southern states, under the control of loyal unionists. (To avoid misunderstanding, it should be said that most radicals advocated equal rights for African-Americans in the North as well.) More conservative Republicans favored federal action to secure equal civil rights for former slaves, more limited political disqualifications of ex-Confederates, and short-term military government of the South. They rejected confiscation and minimized disfranchisement. Although many moderate Republicans personally favored black suffrage, they hesitated to make it part of Reconstruction policy. But in response to white Southern intransigence, they did finally endorse racially equal political rights as well. In the end, it was the more moderate Republican policy that generally prevailed. But the idea of expanding equal rights to African-Americans, especially equal political rights, was such a radical departure from pre-war racial policy, that the program embodying it came to be called Radical Reconstruction, and political opponents labeled the entire Republican party radical.28

Democrats, a small number of conservative Republicans, and Lincoln's successor to the presidency, Andrew Johnson, rejected all the elements of the Republican program. Uniformly and bitterly hard-line on the issue, Democrats fought Radical Reconstruction tooth and nail through 1867, appealing to Americans' commitment to states' rights and to their racism.29 At the same

time, Civil War financial and banking policies created a deflationary shortage of currency in the states west of Pennsylvania and in the South. Many Democrats in those states abandoned their party's traditional commitment to specie currency. They advocated an inflated paper currency and uncontrolled, so-called "free banking," rather than the new system of national banks created under Chase's administration of the Treasury Department.\(^{30}\)

By 1868 some of the leaders of the Democratic party, especially in New York, recoiled from the growing radicalism of their party. With the inflationists strongly identified with root-and-branch opposition to Radical Reconstruction, the "hard money" Democrats urged acceptance of the results of the war, including equal rights, coupled with opposition to further federal intervention in the South and support for traditional Democratic "hard money" currency policies. They tried to convince other Democratic party activists that the only way to return to national power was to make this "new departure," as it would later be called. This would attract the support of Republicans who were dissatisfied with some of the consequences of Radical Reconstruction, win over undecided voters who believed some changes in the South essential, and retain the support of eastern Democrats alienated by inflationary proposals. And the best way to symbolize the change would be to nominate to the presidency none other than Salmon P. Chase.\(^{31}\)

Chase's initial activities as Chief Justice during Reconstruction had helped to maintain his position among the leading radical Republicans in the nation, and the most likely one to receive the Republican presidential nomination in 1868. In the fall of 1865, Chase traveled through the leading cities of his court of appeals circuit in Maryland, Virginia, North Carolina, and South Carolina. He let it be known that he was reporting on conditions to President Johnson, advocating the extension of voting rights to former slaves.\(^{32}\) By 1866 he was firmly identified with the policy


31. SILBEY, supra note 29, at 189-206; MUSHKAT, supra note 29, at 133-35; FELICE A. BONADIO, NORTH OF RECONSTRUCTION: OHIO POLITICS, 1865-1870, at 158-59 (1970); COLEMAN, supra note 4, at 146-49.

of universal suffrage. At the same time, he refused to preside at circuit court trials in the parts of his circuit under military occupation, saying it was inappropriate for Supreme Court justices to hold court where they could be overridden by martial law. This was an implicit criticism of the use of the military to govern the South and an implicit endorsement of the radical program of governing through provisional civil governments controlled by Southern loyalists. At the same time, as an implicit criticism of the militarization of Reconstruction policy, it placed Chase in apposition to the potential presidential candidate most favored by Republican moderates, General Ulysses S. Grant.

Chase also joined the bloc of justices who refused to concur in Supreme Court opinions that challenged aspects of Republican Reconstruction policy. He wrote the concurring opinion in Ex parte Milligan, repudiating the majority's dictum that Congress could not suspend the privilege of the writ of habeas corpus in districts where the civil courts were open. He joined the dissenters in Cummings v. Missouri and Ex parte Garland, in which the Court ruled that retrospective loyalty oaths required of people seeking to practice their professions violated the constitutional prohibitions of bills of attainder and ex post facto laws. In a well-publicized circuit court case, Chase took a broad view of the scope of the Thirteenth Amendment and the Civil Rights Act of 1866.

However, once the Reconstruction Acts imposed black suffrage on the South, Chase began to indicate that he favored conciliation of former Confederates, aligning himself with a growing number of Republicans who worried that Reconstruction was putting Republican extremists in control of the South. Led by Chase's longtime ally, Horace Greeley, the editor of the powerful New York Tribune, these Republicans urged moderation and a liberal policy of amnesty for Confederates upon their Southern allies. Now, Chase's well-known distaste for military government

33. BLUE, supra note 4, at 259.
34. 6 FAIRMAN, supra note 14, at 146-48.
35. 71 U.S. (4 Wall.) 2 (1866).
37. 71 U.S. (4 Wall.) 333, 382 (1867).
made him a conservative alternative to President Grant. Chase's hostility to militarism made him a threat to Radical Reconstruction itself, and Republicans seriously worried that the Supreme Court, with Chase's support, would rule unconstitutional military trials undertaken under the Reconstruction Act's authority.40

Chase manifested his antipathy to proscription by his reluctance to preside over the trial of Jefferson Davis, which was to take place before the circuit court of appeals in Virginia, on Chase's circuit. His refusal to participate in circuit court proceedings as long as the South remained under martial law delayed the trial for over a year, and he continued to delay matters thereafter, finding it difficult to schedule the time in light of his Supreme Court duties. When the government and the district judge agreed to release Davis on bail in May 1867, Chase's ally Greeley was first on the list of sureties.41 The following month, Chase, from the bench, offered an exegesis on amnesty. In Shortridge & Co. v. Macon,42 he confirmed that waging war against the United States was treason; the fact that the Confederacy had acquired the status of a de facto belligerent did not exculpate offenders. But,

Wise governments never forget that the criminality of individuals is not always or often equal that of the acts committed by the organization with which they are connected. Many are carried into rebellion by sincere though mistaken convictions.... When the strife of arms is over, and such governments ... address themselves mainly to the work of conciliation and restoration, and exert the prerogative of mercy, ... complete remission is usually extended to large classes by amnesty ....43

Chase's conduct as presiding officer in the impeachment of Andrew Johnson confirmed the shift. Chase insisted on observing legal formalities, encouraged the acceptance of a legal standard of guilt, and slowed the proceedings. When the Senate failed to

40. 6 Fairman, supra note 14, 465-66; Hughes, supra note 12, at 243-54.
42. Shortridge v. Macon, 22 F. Cas. 20 (C.C.D.N.C. 1867) (No. 12,812), in Johnson, supra note 41, at 136.
43. Johnson, supra note 41, at 141-42.
convict Johnson, Chase received a good deal of the credit and the blame.\textsuperscript{44}

It was this record that made Chase a logical representative of the policy advocated by the "hard money," Eastern Democratic moderates. They were also encouraged by the fact that after abandoning the Whigs for third-party antislavery politics, Chase had always advocated coalitions with Democrats in preference to Whigs. He had often referred to himself and his allies as the "Independent Democracy" and the "Free Democrats."\textsuperscript{45} Within the Republican party, his firmest allies had been ex-Democrats, especially in Ohio and New York.\textsuperscript{46} As rumors of discussions between Chase and leading Democrats percolated, some Republican radicals were convinced that there was a conspiracy among Johnson, Democrats, and the seven Republican senators who had refused to convict Johnson to nominate Chase as the presidential candidate of a coalition of dissident Republicans and Democrats.\textsuperscript{47}

Democratic leaders carefully sounded out Chase's opinions on future Reconstruction policy. Satisfied with his answers, they carefully planned a strategy to secure him the Democratic nomination. Hard-line, inflationist Democrats frustrated these machinations at the Democratic national convention of 1868, and the Democrats went down to defeat in the ensuing congressional and presidential elections.\textsuperscript{48} By 1869, Chase represented the road not taken and was a formidable candidate for the 1872 nomination. After a spontaneous Chase demonstration in the Tammany Society Wigwam, the \textit{New York Herald} pronounced him "far ahead of all other competitors" among the Democratic rank and file.\textsuperscript{49}

\begin{thebibliography}{9}
\bibitem[44]{Benedict} Michael Les Benedict, \textit{The Impeachment and Trial of Andrew Johnson} 115-22 (1973); 6 Fairman, supra note 14, at 521-27.
\bibitem[45]{Schuckers} Schuckers, supra note 2, at 561-62; Blue, supra note 4, at 68-73, 84-88; Reinhard H. Luthin, \textit{Salmon P. Chase's Political Career Before the Civil War}, 29 Miss. Valley Hist. Rev. 517, 520-22 (1943).
\bibitem[46]{Bonadio} Bonadio, supra note 31, at 144-46; Luthin, supra note 45, at 534; Hughes, supra note 12, at 40-41.
\bibitem[47]{Coleman} Coleman, supra note 4, at 82, 113-116.
\bibitem[48]{Warden} Warden, supra note 24, at 702-16; Blue, supra note 4, at 285-300.
\bibitem[49]{N.Y. Herald} N.Y. Herald, July 7, 1869 at 6. The demonstration was described \textit{id.}, July 6, 1869, at 7. There is no study of Chase's role as the representative of Democratic New-Departure sentiments in 1869 and 1870. For indications of it, see Letter from Salmon P. Chase to William N. Boyd (Apr. 3, 1869), Letter from Salmon P. Chase to George H. Hill (Jan. 7, 1870), and Letter from Salmon P. Chase to Thomas H. Yeatman (Jan. 12, 1870), in \textit{Chase Letterbooks}, Chase Ms., Mss. Div., Lib. of Cong., Washington, D.C. [hereinafter Chase Ms., LC]; Charleston Daily Courier, June 2, 1869, at 2; N.Y. Herald, June 22, 1869, at 6; The Commonwealth (Boston), July 20, 1869, at 2.
\end{thebibliography}
At the same time, Chase came to represent Republicans who had been thoroughly antislavery but who now favored a liberal amnesty for ex-Confederates and worried about centralization, militarism, and Southern Republican radicalism. When these dissidents launched the Liberal Republican movement in 1872, one of its leaders would call Chase "the father of the party."\(^{50}\)

Chase's activities on the bench continued to make him the leading representative of moderation on Reconstruction and a potential candidate who could appeal both to Democrats and to Republicans who favored liberality towards the South—people who by 1869 were beginning to be called "liberal Republicans." In November 1868, after the presidential election and several months after the ratification of the Fourteenth Amendment, Davis's lawyers moved to have his treason indictment quashed, arguing that the office-holding disqualification of its third section repealed the treason statute under which the indictment was brought. Chase and the district court judge sitting with him certified their disagreement over this farfetched argument, sending the question to the Supreme Court. Chase let it be known that he had favored the defense motion.\(^{51}\) At the same time he suspended the Test Oath for grand jurors in his circuit, saying that too many good grand jurors scrupled to take it. Greeley's *Tribune* gave his action front-page attention.\(^{52}\)

In May 1869, as Virginia's radical Republicans struggled to prevent a coalition of liberal Republicans and Democrats from gaining control of the state as it emerged from military occupation, Chase quashed a campaign by Virginia radicals to force the resignation of all ex-Confederate state officials continuing to hold office in violation of the disqualification section of the Fourteenth Amendment. Failing to persuade President Grant to order the military commander to remove the offending officials, the radicals sought a writ of habeas corpus to release a felon convicted in a

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50. Letter from Charles I. Grady to Salmon P. Chase (Mar. 29, 1872), Chase Mss., LC. Little has been written about Chase's part in the early development of Liberal Republicanism. Michael Perman alludes to his 1872 Republican presidential ambitions in Michael Perman, The Road To Redemption: Southern Politics, 1869-1879, at 14 (1984). See also *National Antislavery Standard*, June 26, 1869, at 2-3; *Philadelphia Press*, July 31, 1869, at 4 (quoting the *Baltimore American*); *Richmond Daily Dispatch*, July 31, 1869, at 3 (quoting the *Baltimore Gazette*).
trial presided over by a judge disqualified from holding office. Radical district court Judge John C. Underwood granted it. Chase immediately intervened. In what a scholar calls a "frankly bullying" letter, he forced Underwood to reverse himself and join Chase's decision that the disqualification section of the Amendment was not self-executing and could be enforced only by congressional legislation. Construing the amendment to dislodge all officials for their past actions smacked of a bill of attainder and ex post facto law, he opined. The following month Chase charged a grand jury that the sanction of the Confederate government excused acts of a strictly military character, rendering their perpetrators immune from prosecution.

Grateful Southern Democrats recollected that "a short time sufficed to dispel all doubts" they had entertained about how Chase's legal rulings would affect them.

Rising at once to the greatness of the occasion, he delimited and declared ... principles of public law ... which operated as amnesty, peace, and security for life and property.... [Hj]is decisions ... did more to restore confidence, to reconstruct our shattered institutions, and rehabilitate peace than all other acts of all other functionaries.

The New York Herald observed that "Chief Justice Chase, in his tour of the Southern States, is gaining golden opinions from all the anti-radical Southern elements, and, plank by plank, is building up a strong democratic platform for 1872."

Democrats and conservative Republicans also found Chase's view of federalism attractive. As Professor White points out in his paper, Chase accepted antebellum notions of limited federal power. When the federal government was in the hands of slaveowners and their allies, Chase's antislavery constitutional argument had been designed primarily to end the federal government's support of slavery through the Fugitive Slave Act, to prevent the federal government from imposing slavery in

53. Hughes, supra note 12, at 278-81.
54. (Caesar Griffin's Case, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815), in Johnson, supra note 41, at 364.
55. Johnson, supra note 41, at 421.
57. Johnson, supra note 41, at xiii-xiv.
58. N.Y. Herald, June 22, 1869, at 6.
territories conquered from Mexico, to end its support of the
institution in the District of Columbia. Part of an insurgent
minority, he had fought a defensive battle to keep the northern
states and the United States territories free of slavery. He had
not aspired to enlist the federal government in the protection of
human rights but only to deny it the constitutional power to
promote slavery. The federal government, bound to obey the
Fifth Amendment's injunction against depriving any person of
liberty without due process of law, could have nothing to do with
slavery, which could be established and sustained only by the
positive law of the individual states.59

With the passage of the Civil War constitutional amendments,
most Republicans had moved to new ground, making the federal
government responsible for protecting rights when states failed
in their responsibility to do so. More conservative Republicans
lagged behind. Chase plainly was torn, like most of the justices
of the Supreme Court. He articulated his commitment to tradi-
tional ideas of federalism in his opinion in the great case of Texas
v. White.60 His paean to "an indestructible Union, composed of
indestructible States"61 did not necessarily preclude federal pro-
tection of civil and political rights, but Democrats and conser-
vative Republicans took it to indicate a concern for states' rights
and a warning against centralization. He encouraged their belief
by confessing in private correspondence with Southern Demo-
cratic acquaintances that "centralization & consolidation have
gone far enough & too far."62 Southern Democrats exulted that
the Caesar Griffin Case and Texas v. White posited principles
"that must overthrow the inequities of the present Federal Gov-
ernment and again restore to Americans a large part of their
former liberties."63

Yet in 1873, Chase would join Justice Stephen J. Field's dissent
in The Slaughter-House Cases.64 As Professor Kaczorowski points
out in his article below, acceptance of Field's and Chase's position
that the Fourteenth Amendment empowered the judges to pro-

59. FONER, supra note 10, at 73-102; Earl M. Maltz, Slavery, Federalism, and the
60. 74 U.S. (7 Wall.) 700 (1869).
61. Id. at 725.
62. Letter from Salmon P. Chase to William N. Boyd (Apr. 3, 1869), Chase Mss., LC.
63. MEMPHIS DAILY APPEAL, May 20, 1869, at 2.
64. 83 U.S. (16 Wall.) 36, 83 (1873).
tect a wide range of fundamental rights would have meant a revolution in federalism. How could Chase have reconciled that with the commitment to states' rights he articulated elsewhere? One answer is that, despite the Enforcement Clauses of the Fourteenth Amendment, Chase may have continued to adhere to the antebellum rejection of what Professor White calls the co-terminous principle. That would be the position taken by his fellow dissenter Field. He was anxious to have the courts take broad new authority to protect rights against state infringement, but he was set as flint against Congress doing the same.65

Chase's decisions with regard to the currency likewise set out a political platform. As Professor White points out, he had always been a "hard money" man. He had only with the greatest reluctance concluded that the federal government must issue a paper currency in excess of specie reserves and make it legal tender. He signaled his continued commitment to a specie-based currency in 1868, in his opinion for the court in Bronson v. Rhodes.66 Implicitly criticizing the Legal Tender Act for its "introduction of varying and uncertain measures of value"67 to the heart of the financial system, he insisted that "gold and silver ... are the only proper measures of value."68 Bronson v. Rhodes prefigured the Legal Tender Cases,69 which Professor White describes so well in his paper. At the same time, Chase remained a staunch proponent of the national banking system. When he sustained the federal tax on state-chartered bank currency in Veazie Bank v. Fenno,70 he manifested his commitment to both positions, overcoming any states' rights scruples he might have considered. Again, his position linked him both to the conservative, "hard money" wing of the Democratic party and to the liberal Republicans, who also shared his anti-inflationary views.

65. Justice Stephen Field consistently held congressional statutes enforcing the Civil War Amendments unconstitutional or inapplicable to the facts of the case. United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Reese, 92 U.S. 214 (1875); Virginia v. Rives, 100 U.S. 313 (1879); Ex parte Virginia, 100 U.S. 339 (1879); Civil Rights Cases, 109 U.S. 3 (1883).
66. 74 U.S. (7 Wall.) 229 (1868).
67. Id. at 252.
68. Id. at 249.
70. 75 U.S. (8 Wall.) 533 (1869).
Did the fact that Chase's judicial opinions were taken as political platforms mean that he shaped his judicial opinions to serve his political ambitions? Professor White distinguishes "prudential" decisions which may have done so from "principled" ones which did not. Yet the *Legal Tender Cases*, which Professor White says reflected Chase's deepest principles, also served his political interests. The fact is, Chase did not have to shape his judicial opinions to serve his political ambitions. A towering figure of his times, for decades considered as a potential president, his judicial opinions, augmented by other judiciously worded public statements and actions, would amount to a political platform as long as he declined to issue a Shermanesque abjuration of presidential aspirations. Chase was not the man to do that. His views coincided with those of important segments of the Democratic and Republican parties. His stature made him the natural representative of those views.

That he fulfilled this role for so long a time is an indication of his contemporary stature. With all his faults, he was a great man, so highly regarded that he was what contemporaries called "available"—a man whose public record was so well known that simply endorsing him let everyone know where his advocates stood.
THE CHASE COURT AND FUNDAMENTAL RIGHTS:
A WATERSHED IN AMERICAN CONSTITUTIONALISM

by Robert J. Kaczorowski*

Three weeks before he died in May 1873, the frail and ailing Salmon P. Chase joined three of his brethren in dissent in one of the most important cases ever decided by the United States Supreme Court, the Slaughter-House Cases.1 This decision was a watershed in United States constitutional history for several reasons. Doctrinally, it represented a rejection of the virtually unanimous decisions of the lower federal courts upholding the constitutionality of revolutionary federal civil rights laws enacted in the aftermath of the Civil War.2 Institutionally, it was an example of extraordinary judicial activism in overriding the legislative will of Congress.3 Politically, it abolished the constitutional theory on which the Justice Department depended in its enforcement of the fundamental rights of Americans in the South during Reconstruction. The Court thus provided legal sanction for the Grant administration’s retreat in 1873 from its civil rights enforcement efforts. The Court’s decision annulled a revolution in American constitutionalism.4

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1. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Three cases were decided together.

2. See Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876 (1985) [hereinafter JUDICIAL INTERPRETATION]. The conclusions stated in this paragraph are based primarily on this work.


I would like to tell you why I think these generalizations about *Slaughter-House* are accurate. I will briefly discuss the legislative background of the case, focusing on the history of the Civil Rights Act of 1866 for what it tells us about the framers' understanding of the Fourteenth Amendment. I will then discuss the valiant efforts of federal lawyers and judges to enforce the fundamental rights of Americans under these and other statutory and constitutional provisions up to 1873. I will then discuss the Chase Court’s decisions. This will provide the context for, and, hopefully, make more clear the significance of the *Slaughter-House* Cases.

The Fourteenth Amendment confers citizenship on all Americans and protects their privileges and immunities and rights to due process and equal protection of the law. In my view, the framers of the Fourteenth Amendment intended to revolutionize the constitutional structure of the nation in 1866 by making more explicit the delegation of constitutional authority to secure the status and fundamental rights of citizens they believed the Thirteenth Amendment conferred on Congress. The framers defined the freedom the Thirteenth Amendment secures as the status and rights of free men, which they equated to the status and rights of citizenship. They believed that the Thirteenth Amendment delegated to Congress constitutional authority to enforce the fundamental rights of American citizens.

In enacting the Civil Rights Act of 1866 in the same session of Congress, the framers of the Fourteenth Amendment intentionally exercised plenary legislative authority under the Thir-

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6. *Cong. Globe*, 39th Cong., 1st Sess. 474, 476, 527-28, 573-74, 600, 1756, 1780-81 (1866) [hereinafter *Cong. Globe*] (Sen. Trumbull); id. at 602, 741 (Sen. Lane); id. at 1255 (Sen. Wilson); id. appendix at 101 (Sen. Yates); id. at 1124 (Rep. Cook); id. at 1151 (Rep. Thayer); id. at 1156-57 (Rep. Thornton); id. appendix at 158 (Rep. Delano). This was the understanding of contemporaries outside of Congress. See Kaczorowski, *Revolutionary Constitutionalism*, supra note 3, at 899 n.156.

7. *Cong. Globe*, supra note 6, at 474, 605 (Sen. Trumbull); id. at 503-04 (Sen. Howard); id. at 570 (Sen. Morrill); id. at 602 (Sen. Lane); id. at 768 (Sen. Johnson); id. at 1118 (Rep. Wilson); id. at 1124 (Rep. Cook); id. at 1152 (Rep. Thayer); id. at 1159 (Rep. Windom).

teenth Amendment to secure the civil rights of all Americans as the fundamental rights of United States citizenship, not simply the rights of African-Americans. Thus, Senator Lyman Trumbull of Illinois, the chairman of the Senate Judiciary Committee and author of the Civil Rights Act, explained that the rights of United States citizenship that the bill was intended to secure "are those inherent, fundamental rights which belong to free citizens as free men in all countries...." "[C]itizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect," declared Congressman James Wilson of Iowa, House floor manager of the Civil Rights Act of 1866. Relying on Chief Justice John Marshall's opinion in *McCulloch v. Maryland*, Wilson continued, "possession of these rights by the citizen raises by necessary implication the [plenary] power in Congress to protect them." From this perspective, section one of the Fourteenth Amendment can be understood as making more explicit the Thirteenth Amendment's delegation of plenary authority to secure citizens' rights.

The Civil Rights Act of 1866 thus conferred citizenship on all Americans. It also conferred on all United States citizens certain fundamental rights specified in section one. In other words, the citizen possessed these rights independent of state law. Thus, Senator Trumbull declared:

To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union.

He emphasized the point when he admonished "that the federal government has authority to make every inhabitant of [any state] a citizen, and clothe him with the authority to inherit and buy real estate, and the [states] cannot help it." Congressman Lawr-

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10. *Id.* at 1118.
11. *Id.* at 1119. Regarding the framers' intention to secure the rights of all Americans, see Kaczorowski, *Revolutionary Constitutionalism*, supra note 3, at 895-99.
12. I have developed this argument in the articles cited *supra* note 3.
14. *Id.* at 500.
ence made the same point in the House: "There are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him." 15

However, the statute contemplated concurrent state jurisdiction over, and the continuation of the states' essential role in securing these rights. 16 The framers' desire to preserve concurrent state jurisdiction over civil rights led to confusion among some twentieth-century scholars over the essential scope and nature of the statute. Section one guarantees that all United States citizens shall enjoy the enumerated rights and immunities as white citizens enjoyed them. It thus prohibited the states from discriminating on the basis of race or politics in regulating the exercise of these rights. 17 The framers intended the states to retain the authority they had previously exercised in regulating the enjoyment and the exercise of civil rights in other respects. Section one of the Civil Rights Act thus conferred citizenship and some of the rights of United States citizenship in a way that permitted the states concurrent authority to regulate in a racially and politically impartial manner the exercise of these rights. Even the most radical Republicans never intended to abolish the states. Nor did any Republicans wish to supplant the states in administering ordinary civil and criminal justice. They merely sought to supplant the state with the federal administration of justice in those situations when citizens were unable to enforce their rights or redress rights violations within state and local legal process. 18 The framers envisioned a federal system of civil rights enforcement in which the states would exercise their traditional jurisdiction over ordinary civil and criminal process, and that citizens would turn to federal legal process when they were unable to enforce their rights within the states.

The reasons that explain why the framers retained concurrent state jurisdiction over national rights reveals their commitment to dual sovereignty, albeit a radically changed version, and the

15. Id. at 1833.
17. The framers intended to protect white Unionists, Republicans, and federal officers in the South from civil rights violations attributable to political animus owing to their loyalty to the Union and to the causes of the Republican party. See, Kaczorowski, Enforcement Provisions, supra note 3, at 589 n.115; Kaczorowski, Revolutionary Constitutionalism, supra note 3, at 897 n.153.
18. Id. and Kaczorowski, To Begin the Nation Anew, supra note 3, at 56-57.
limits of their commitment to equal rights. If the Civil Rights Act had made a blanket grant of the specified rights to all citizens, the grant would have voided state laws regulating the manner in which they were enjoyed and exercised. State regulations based on sex, marital status, age, and mental disability, which the framers considered reasonable and legitimate discriminations, would have been abolished if the statute had conferred the right unconditionally.\textsuperscript{19} The framers wanted to avoid this result. They succeeded in retaining concurrent state authority over civil rights by providing that all citizens shall have the same enumerated rights "as [are] enjoyed by white citizens."\textsuperscript{20}

Nevertheless, the Civil Rights Act also provided for the enforcement of civil rights directly in the federal courts. Because they understood that Congress could enforce federal rights only through the federal courts and other national institutions, the framers provided an alternative system of civil and criminal justice to those of the states when individuals could not enforce or were denied their civil rights in the state courts.\textsuperscript{21} Conferring jurisdiction on the federal courts to enforce fundamental rights was required not only by nineteenth-century legal theories of constitutional law and federalism, it was dictated by the fact that the states were failing to secure these rights and were actually infringing them. Thus, after asserting that civil rights were federally secured rights of United States citizens, Congressman Wilson proclaimed: "The possession of the rights by the citizen raises by implication the power in Congress to provide appropriate means for their protection; in other words, to supply the needed remedy."\textsuperscript{22} If a citizen was unable to enforce his rights through a state's legal process, he queried,

[H]ave we no power to make him secure in his priceless possessions? When such a case is presented can we not provide a remedy? Who will doubt it? Must we wait for the perpetration of the wrong before acting? Who will affirm this? The power is with us to provide the necessary protective remedies.\textsuperscript{23}

\textsuperscript{20} Id. at n.38.
\textsuperscript{22} \textit{Cong. Globe, supra} note 6, at 1294.
\textsuperscript{23} Id.
If Congress could not provide the remedies, Wilson wanted to know, then "from whom shall they come? From the source interfering with the right? Not at all. They must be provided by the government of the United States, whose duty is to protect the citizen in return for the allegiance he owes to the Government."24

Moreover, the framers expressly stated their intention to bypass state law enforcement institutions by enforcing citizens' fundamental rights and providing remedies for civil rights violations in and through the federal courts whenever citizens could not enforce their civil rights in the state courts or through state legal process.25 This intention could not have been stated more clearly than it was by Congressman Thayer when he said that the Civil Rights Act provided for the enforcement of citizens' fundamental rights through the quiet, dignified, firm, and constitutional forms of judicial procedure. The bill seeks to enforce these rights in the same manner and with the same sanctions under and by which other laws of the United States are enforced. It imposes duties upon the judicial tribunals of the country which require the enforcement of these rights. It provides for the administration of laws for the enforcement of these rights.26

Further evidence of this point is the fact that many of the enforcement provisions of the Civil Rights Act of 1866 were taken from the Fugitive Slave Act of 1850, a statute enacted by Congress to provide for the rendition of fugitive slaves through national institutions, including the federal courts, after the Supreme Court had decided that Congress did not have the authority to require state officers and state courts to enforce federal rights and duties, but that it could enforce them only through federal courts and only with federal officers.27 Thus, opponents of the Civil Rights Bill strenuously objected that this statute would transfer all civil suits to the federal courts. "Every little petty case of a civil character in which from ten cents to thousands of dollars are involved" would be absorbed by the federal

24. Id. at 1118.
25. See, e.g., id. at 1118, 1294.
26. Id. at 1153. See also id. at 479 (Sen. Saulsbury); id. at 598-99 (Sen. Davis); id. at 601 (Sen. Hendricks); id. at 1271 (Rep. Kerr); id. at (Cong. Bingham).
courts, complained Senator Saulsbury.\textsuperscript{28} Opponents similarly warned that the states' whole criminal codes would be taken over and administered by the federal courts.\textsuperscript{29}

The Civil Rights Act, therefore, established a federal system of civil and criminal justice that supplanted those of the states whenever Americans could not enforce or were denied their civil rights in state courts. The framers authorized federal courts to replace state courts, and to try civil and criminal cases that were otherwise within the jurisdiction of the state courts, whenever individuals could not enforce their rights in or were denied their rights by state courts and legal process. Such persons could bring their causes into federal court either by originating the action in the federal court or by removal from a state court.\textsuperscript{30}

Although the enforcement of civil rights under the Civil Rights Act of 1866 in the federal courts during the administration of President Andrew Johnson was relatively quiescent, two cases, one civil and the other criminal, demonstrate the extraordinary expansion of federal jurisdiction over citizens' rights intended by its framers. The first case was decided by the Chief Justice whom we honor today while he sat as circuit justice in the United States Circuit Court at Baltimore, Maryland. The case, \textit{In re Turner},\textsuperscript{31} involved a private apprenticeship indenture between a black girl and her former master. The suit challenged the legality of the indenture under the Civil Rights Act of 1866 on the grounds that it did not afford the girl the financial and educational benefits to which white apprentices were entitled under the Maryland indenture statute. Chief Justice Chase upheld the constitutionality of the Civil Rights Act under the Thirteenth Amendment which, he declared, "establishes freedom as the constitutional right of all persons in the United States."\textsuperscript{32} He ruled that the indenture contract was void under the Civil Rights Act because it failed, as required in section one, to give the black girl the

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\item \textsuperscript{28} CONG. GLOBE, supra note 6, at 479. See also id. at 598-99 (Sen. Davis).
\item \textsuperscript{29} Id. at 479 (Sen. Saulsbury); id. at 601 (Sen. Hendricks); id. at 1271 (Rep. Kerr).
\item \textsuperscript{30} Civil Rights Act of 1866, § 3, 14 Stat. 27 (1866); KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 27-48; Kaczorowski, Enforcement Provisions, supra note 3, at 586-88.
\item \textsuperscript{31} 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).
\item \textsuperscript{32} Id. at 339.
\end{itemize}
full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

Chief Justice Chase’s decision in *Turner* is significant for several reasons. First, it demonstrates the potential reach of the federal courts into the state administration of civil justice. Chase affirmed federal jurisdiction in a case that was essentially a contract dispute between two private parties.

The *Turner* decision is also important for the insight it offers into contemporaries’ understanding of the right to the equal protection of the law. The provision of the Civil Rights Act that conferred jurisdiction on the federal court to decide this contract dispute was that clause of section one that guarantees citizens the equal protection of the laws for the security of persons and property. The party who violated Turner’s equal protection right in this case was not the state, but Turner’s former master, a private party. The instrument that violated Turner’s right was not a state statute, but the private apprenticeship contract. Thus, the right to the equal protection of the law, a right which today we understand exclusively as a right one has against the government to be treated in the same manner as similarly situated people, was also understood by nineteenth-century Americans as a private right one possessed in relation to other private individuals.

More broadly, this case offers an interesting insight into Americans’ understanding of constitutional rights enforcement in the nineteenth century. They conceived of constitutional rights essentially as private rights that individuals enjoyed against other private individuals, which they enforced through private litigation.

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33. *Id.*

34. This application of federal jurisdiction is parallel to that invoked by freedmen’s bureau agents who tried to enforce labor contracts between black field hands and white landholders who refused to honor the terms of their agreements. If black workers were unable to enforce their contract rights in the local courts, they were permitted to bring their actions into the federal courts by the explicit provisions of section three of the Civil Rights Act of 1866. See, Kaczorowski, *Enforcement Provisions*, *supra* note 3, at 580-81 for a discussion of the relationship between the military’s and freedmen’s bureau’s enforcement of individual rights and the enforcement provisions of the Civil Rights Act of 1866. The *Turner* decision, therefore, legitimized the legal actions federal officers undertook to enforce the freedmen’s private and civil rights.

35. Private parties were also criminally prosecuted under the Enforcement Act of 1870 for violating individuals’ rights to equal protection of the law. See *supra* notes 21, 22 and related text.
against defendants who were private parties rather than public officers. The framers of the Fourteenth Amendment legislated within a legal framework that barred the kind of legal action against state officials to remove legal disabilities unconstitutionally imposed by state law that we, today, have come to regard as commonplace. The framers, guided by nineteenth-century rules of dual federalism, state sovereign immunity, and equitable relief, would not have thought in terms of civil suits against a state to enjoin the enforcement of discriminatory state action as a remedy for the enforcement of constitutionally-secured rights.

Moreover, the notion of public rights enforced through public lawsuits brought against governmental agencies and officials on behalf of aggrieved groups did not exist in the nineteenth century. The model of rights-enforcement that the framers had in mind was a civil suit between private parties, not an action by an aggrieved individual or class against the state. It is not surprising, therefore, that suits against state officers for injunctive relief were relatively rare until the end of the nineteenth century. Injunctive relief against state officials was given very scant attention in nineteenth-century legal treatises on injunctions and the law of equity, usually no more than a paragraph with citations to only a few cases. Moreover, treatise writers appeared unfamiliar with the rules regarding civil actions against state officials, for they reported them in an imprecise manner. It was not until the 1890s that treatises gave more than passing attention to the subject.

Consequently, even an individual whose civil rights were allegedly infringed by a state officer acting under color of law would sue the state officer as a private party; he would not sue the state. Thus, the butchers sued the state-chartered corporation

36. This point is developed in Kaczorowski, Enforcement Provisions, supra note 3, at 574-86.
37. See Kaczorowski, Enforcement Provisions, supra note 3, at 574-86 for a more detailed discussion. See also supra text accompanying note 26.
38. See, e.g., William W. Kerr, A Treatise on the Law and Practice of Injunctions in Equity 3, 599-600 (1871); 1 Abbot's United States Practice 222-23 (1871); Joseph Story, Commentaries on Equity Jurisprudence 163 (6th ed. 1873) and id. at 180 n.4, 260 (13th ed. 1886); and Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 118-19 (1880).
rather than the state in the *Slaughter-House Cases*.\(^{40}\) The important point is that the judicial creation of the state action doctrine in the 1870s limited the scope of the Fourteenth Amendment in a manner unanticipated by its framers.\(^{41}\)

The other noteworthy civil rights case was a criminal prosecution brought right here in Kentucky. The federal legal officers in Kentucky presented a striking exception to the lethargy that characterized federal officers elsewhere during the Johnson administration. The United States Attorney at Louisville, Benjamin Helm Bristow, assisted by another Louisville attorney by the name of John Marshall Harlan, conscientiously prosecuted crimes in federal court under section three of the Civil Rights Act of 1866 that were offenses against the criminal statutes of Kentucky. Bristow brought prosecutions directly into federal court without even testing the state courts because black Kentuckians were barred by state law from testifying in civil and criminal cases in which a white person was a party.\(^{42}\)

The most detailed federal judicial examination of the constitutionality of the Civil Rights Act of 1866 was made in 1867 by Justice Noah H. Swayne, as circuit justice, in a prosecution brought by Bristow against three whites charged with robbing the home of a black family in Nelson County.\(^{43}\) In this case, *United States v. Rhodes*,\(^{44}\) Justice Swayne upheld the constitutionality of the Civil Rights Act of 1866 in an opinion in which he affirmed the congressional Republicans' interpretation of the

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40. For other examples of private lawsuits to enforce fundamental rights, see *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247) (suit by apprentice against master for release from apprenticeship contract that violated her right to the equal protection of the laws); *United States v. Buntin*, 10 F. 730 (C.C.S.D. Ohio 1882) (civil suit and prosecution of public school teacher for excluding black child from public school). See also *Cooley*, *supra* note 38, at 118 (although state may not be sued, state-chartered corporation may be sued even when state is primary stockholder).


42. Kaczorowski, *Judicial Interpretation*, *supra* note 2, at 52.

43. Id. at 9.

44. 27 F. Cas. 785 (C.C. Ky. 1866) (No. 16,151).
Thirteenth Amendment as securing to all Americans the status and fundamental rights of citizenship and as conferring on Congress plenary authority to enforce civil rights. Justice Swayne interpreted the Thirteenth Amendment as conferring upon all Americans, not just the former slaves, the status and rights of citizenship. He reasoned to this conclusion under the same reasoning as the framers of the Civil Rights Act. The amendment secured to all Americans the status and rights of free inhabitants, which he equated to the status and rights of citizenship. Consequently, in abolishing slavery, the Thirteenth Amendment secured to all Americans the status and rights of citizenship. Therefore, "the provision in the act of Congress conferring citizenship was unnecessary, and is inoperative," he concluded. In interpreting the Thirteenth Amendment as a constitutional guarantee of the status and natural rights of citizenship, Swayne had "no doubt of the constitutionality of the act in all its provisions," since it was enacted to implement the Amendment's guarantee of liberty.

Every federal judge who was presented with a challenge to the constitutionality of the Civil Rights Act of 1866 upheld it. Most state appellate courts upheld its constitutionality as well under the theory of citizenship affirmed by its framers. Even states rights-oriented judges acknowledged the revolutionary constitutional theory reflected in the statute in refusing to accept its legitimacy.

This excursion into the history of the Civil Rights Act of 1866 is intended to give a fuller understanding of the framing of the Fourteenth Amendment and of the Chase Court's initial interpretation of the Fourteenth Amendment in the *Slaughter-House Cases*. Congress enacted additional civil rights enforcement statutes after the ratification of the Fourteenth and Fifteenth

45. Id. at 789.
46. Id.
47. Id. at 794.
48. Kaczorowski, Judicial Interpretation, supra note 2, at 1-12; Kaczorowski, Revolutionary Constitutionalism, supra note 3, at 902-03; Kaczorowski, To Begin the Nation Anew, supra note 3, at 56-62.
49. Kaczorowski, Judicial Interpretation, supra note 2, at 5-7; Kaczorowski, Revolutionary Constitutionalism, supra note 3, at 903.
50. Kaczorowski, Judicial Interpretation, supra note 2, at 5-7; Kaczorowski, Revolutionary Constitutionalism, supra note 3, at 907-909.
Amendments, which are also part of the background. These statutes provided for the enforcement of fundamental rights directly in the federal courts.

Two are of particular interest here. The Enforcement Act of May 31, 1870 was primarily directed at protecting citizens' rights to vote in local, state, and federal elections.51 The second statute was the Ku Klux Klan Act of April 20, 1871.52 This statute was intended to enforce the Fourteenth Amendment and therefore focused on protecting the fundamental rights of citizens, other than political rights, including their right to the equal protection of the law. It defined as federal crimes terrorist activities, such as those in which the Klan was engaged to prevent citizens from exercising their fundamental rights.53

Even more than the Civil Rights Act of 1866, the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871 enormously expanded federal criminal jurisdiction over the enforcement of

51. Enforcement Act of 1870, 114 Stat. 141 (1870). It also criminalized election fraud and bribery. In addition, the 1870 statute made it a federal crime to prevent citizens from voting and from exercising their other constitutionally secured rights through the use of violence, "bribery, threats, or threats of depriving such person of employment or occupation, or of ejecting such person from rented house, lands, or other property, or by threats of refusing to renew leases or contracts of labor." Id. at § 5. Finally, it criminalized actions that injured, oppressed, threatened, or intimidated "any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same." Id. at § 6. Criminal penalties ranged from fines of from $500 to $5,000 and imprisonment of from one month to ten years, depending upon the crime. The 1870 statute re-enacted the Civil Rights Act of 1866, presumably to ensure its constitutionality after the recent ratification of the Fourteenth Amendment.


53. For example, it provided that any person "shall be deemed guilty of a high crime" who was convicted for engaging in conspiracies to commit, and for actually committing, the following actions: for resisting federal authority and the execution of any federal law; for injuring federal legal officers to prevent them from performing their federal duties; for threatening or injuring federal jurors on account of any presentment, indictment, or verdict; for depriving or conspiring to deprive any person or any class of persons of the equal protection of the laws, or of equal privileges and immunities; for preventing the authorities of any state from securing to all persons within the state the equal protection of the laws; for defeating the due course of justice within the state; and for preventing any voter from expressing his support for any candidate for federal office. 22 Stat. 13, § 2. It also conferred a civil cause of action in law and equity against "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State," shall deprive "any person" of "any rights, privileges, or immunities secured by the Constitution of the United States." 22 Stat. 13, § 1 (codified in 42 U.S.C. § 1983). It also empowered the President to declare martial law and to suspend habeas corpus under certain conditions. 22 Stat. 14-15, §§ 3-4.
citizens' fundamental rights. These statutes were enacted to meet the increasingly virulent Southern resistance to Reconstruction as Republicans captured control of Southern state governments after 1867.\textsuperscript{54} White supremacist groups such as the Ku Klux Klan emerged as paramilitary wings of the Democratic Conservative parties of the South. Their political purposes were to unseat Republican officeholders, to return political power and offices to white supremacists, and to disenfranchise Southern blacks.

The paramilitary structure of the Ku Klux Klan and other terrorist groups enabled them to intimidate black and white Republicans. With membership rolls numbering in the thousands in some counties, the Klan paralyzed local government. In York County, South Carolina, for example, some 1,500 to 2,000 suspects were said to have escaped military arrest in 1872, even though federal authorities had succeeded in arresting hundreds of others.\textsuperscript{55} The administration of criminal justice collapsed in sections of the South, their populations victimized by bands of criminals who brutalized them with impunity. In short, these groups were in armed rebellion against the United States.\textsuperscript{56}

The Grant administration initially threw its full support behind the vigorous prosecution of Klansmen under the 1870 and 1871 statutes.\textsuperscript{57} Literally hundreds of defendants were prosecuted and convicted of violating citizens' fundamental rights, such as the First Amendment guarantees of freedom of speech and of assembly, the Second Amendment right to bear arms, the Fourteenth Amendment right to the equal protection of the laws, and the right to life itself. Federal judges generally upheld the constitutionality of the 1870 and 1871 statutes and federal jurisdiction in these cases.\textsuperscript{58} That even disapproving judges upheld these statutes evinces how broadly contemporaries interpreted the Recon-


\textsuperscript{55} Kaczorowski, Judicial Interpretation, supra note 2, at 55.

\textsuperscript{56} Id.; Otis A. Singletary, Negro Militia and Reconstruction (1963).

\textsuperscript{57} The history of the efforts of the Department of Justice to enforce civil rights during Reconstruction is recounted in Kaczorowski, Judicial Interpretation, supra note 2, at 49-134.

\textsuperscript{58} Id. at 72.
struction amendments and Congress' authority to enforce citizens' fundamental rights.

In many areas of the South, the federal administration of criminal justice was the only justice available. Even though the magnitude of the lawlessness was so great that it overwhelmed the limited resources of federal legal officers, they were remarkably successful in bringing criminals to justice. Indeed, federal legal process succeeded in destroying the Ku Klux Klan and almost eliminated terrorism in the early 1870s, at least temporarily. Peace depended upon the continued vigorous prosecution of terrorists. Despite the pleadings of federal lawyers in the South, the Grant administration began to curtail prosecutions toward the end of 1872. By the summer of 1873, the Justice Department abandoned efforts to enforce civil rights in the South in the hope that clemency and appeasement would preserve the peace. President Grant's decision also reflected growing sentiment in the North that called for the federal government to stop interfering in Southern affairs and to make peace with the South.

It was just as Northern opinion was becoming unfavorable to federal civil rights enforcement and the Grant administration was curtailing its efforts to enforce citizens' civil and political rights that the Chase Court interpreted the scope of the national government's authority to enforce citizens' fundamental rights under the Reconstruction amendments and civil rights statutes. The first case it decided, Blyew and Kennard v. United States, arose here in Kentucky and tested the constitutionality of federal criminal prosecutions under the Civil Rights Act of 1866. The petitioners were two white men who had been tried and convicted in the United States District Court at Louisville for the mutilation

59. Id. at 87-113.
60. Id. at 93-94.
61. Id. at 94-95.
62. Id. at 108-12.
63. Id. at 112-13. The best history of the Grant administration's Southern policy is WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879 (1979).
64. Letter from Amos Ackerman to B. Conley (Dec. 28, 1871), 1 LETTERBOOKS 272-77, AMOS T. ACKERMAN PAPERS, Alderman Library, University of Virginia.
and ax murder of a black woman in Lewis County. Judge Bland Ballard sentenced them to death. It is noteworthy that this case had been removed from the state courts by United States marshals while the defendants were in state custody awaiting trial.

Defense counsel challenged the federal court's jurisdiction, arguing that the crime for which his clients had been tried, the crime of murder, was an offense against the laws of Kentucky, not those of the United States. He insisted, therefore, that the federal prosecution of offenses against the state's criminal code was an unconstitutional usurpation of the state's exclusive jurisdiction over its system of criminal justice.

Judge Ballard turned back the challenge and upheld federal jurisdiction. His reasoning affirmed the congressional Republican theory of the Thirteenth Amendment and citizenship which Justice Swayne had earlier adopted in the Rhodes case. Acknowledging that Congress had not enacted a criminal code which made offenses such as murder federal crimes, Ballard nonetheless concluded that Congress could authorize the federal courts to try and punish violations of civil rights, such as the right to life, according to the laws of the states in which the violations occurred.

Alarmed by what it saw as a revolutionary centralization of judicial power, the Kentucky legislature, on the recommendation of the governor, appropriated funds to hire the best available lawyers to challenge the constitutionality of the Civil Rights Act of 1866 to the Supreme Court. The attorneys it chose included one of the foremost lawyers of the day, President James Buchanan's attorney general, Jeremiah S. Black, and the locally prominent Isaac Caldwell.

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67. The lower court decision is not reported. The proceedings were recorded in the LOUISVILLE COURIER-JOURNAL, Nov. 29, 1868, at 4; MAYSVILLE BULLETIN, n.d., reprinted in LOUISVILLE COURIER-JOURNAL, Dec. 19, 1868, at 1. See, KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 136.

68. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 136.

69. Id. at 137.
In their arguments to the Chase Court in February 1871, Black and Caldwell urged the Court to strike down the Civil Rights Act of 1866. They insisted that the statute was unconstitutional because it attempted to secure civil rights by conferring primary criminal jurisdiction on the federal courts to try offenses against the criminal statutes of the state. Thus elaborating the arguments that had been made in the court below, they insisted that, if Congress had the constitutional authority to enact this statute, then it had the authority to supplant the states in any matter “touching civil and political rights.”

Defense counsel also made a technical argument from the statute’s language in section three that became the basis of the Court’s decision. Section three confers jurisdiction on the federal courts “over all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts ... the rights secured to them by the first section of this act.” Black and Caldwell argued that the only parties affected by a criminal prosecution are the government and the defendant. Therefore, the Civil Rights Act did not confer jurisdiction over this and similar cases even where the black victim of, and the black witnesses to, a crime were denied the right to testify in a state court, a right secured by section one of the Civil Rights Act of 1866, because they were not parties to the criminal “cause”. This point was supported by United States v. Ortega, which held that a criminal prosecution was a “case” that affected only the government and the defendant.

This argument was first raised in United States v. Rhodes. Justice Swayne rejected this reading of section three by distinguishing the language in the statute, “cause”, from the language used in Ortega, “case”, and holding that Ortega did not apply to the Civil Rights Act which refers to “the origin or foundation of a thing, as of a suit or action; a ground of action,” not to a specific case itself. Swayne concluded that the victims of a crime are parties affected by the prosecution of the perpetrators within

70. Brief for Appellants at 9, Blyew, 80 U.S. (13 Wall.) 581. Defense counsel argued that the Thirteenth Amendment did not delegate any civil rights enforcement authority to Congress, for it merely abolished slavery.
71. 24 U.S. (11 Wheat.) 467 (1826).
72. 27 F. Cas. 785 (C.C. Ky. 1866) (No. 16,151).
73. Id. at 786-87.
the meaning of the Civil Rights Act of 1866. Therefore, the federal court had jurisdiction to try white defendants for crimes committed against black victims. 74 As we shall see, the Supreme Court took a different view.

In a remarkable coincidence, the government's advocate was none other than the former United States Attorney at Louisville, Benjamin Helm Bristow. He had been appointed to the position of solicitor general while the Blyew case was pending before the Supreme Court. Bristow contended that the states could no longer claim exclusive jurisdiction over violations of their criminal codes, for, in enacting the Civil Rights Act of 1866, "Congress made the common law and state statutes the law of the United States" in those civil and criminal causes in which citizens were unable to enforce their rights in the state courts. 75 If Congress possessed the constitutional authority to confer on the federal courts concurrent jurisdiction over civil and criminal causes on the theory that fundamental rights were constitutionally secured rights of American citizens, as Bristow argued, then Congress did indeed possess the authority, "to be exercised at will," to supplant the states in all matters relating to civil and criminal matters as Black and Caldwell argued.

Opposing counsel had presented for the first time to the United States Supreme Court the central questions of constitutional interpretation relating to citizenship and federal jurisdiction over citizens' fundamental rights under the Civil Rights Act of 1866. The Chase Court deliberated for more than one year. Unfortunately, the Chief Justice was too ill to participate in the oral arguments and in the Court's deliberations. 76

The Court announced its decision on April 1, 1872. It avoided resolving the difficult questions relating to the national govern-

74. See, KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 11-13.
75. Brief for Appellee at 24, Blyew, 80 U.S. (13 Wall.) 581.
76. FREDERICK J. BLUE, SALMON P. CHASE: A LIFE IN POLITICS 313 (1987). In 1869, Chase was impeded with a "general nervous disorder" and irregular heartbeat. Id. In the summer of 1870, Chase suffered a serious stroke that left him paralyzed on his right side and with a partial speech loss. He suffered two additional minor strokes in the fall of 1870. Although Chase's health improved, Professor Blue reports that in the spring of 1871, "[f]riends found him frail and aging, and a few even failed to recognize him." Id. at 315. He was convalescing under the care of his daughter in Narragansett, Rhode Island when the Blyew case was argued in 1871. Id. at 313-15. Although he resumed his duties on the Court in the fall of 1871, he did not participate in the Court's Blyew decision. Id. at 318.
ment’s constitutional authority to enforce the fundamental rights of its citizens. The Court decided the case instead on a technical interpretation of the statute’s language regarding jurisdiction in section three, which confers jurisdiction on the federal courts of all “causes, civil and criminal” “affecting persons who are denied, or cannot enforce in the [state] courts ... any of the rights secured to them by the first section of the act.” 77 The district court and the Department of Justice claimed jurisdiction on the ground that black victims and witnesses of crimes committed by white assailants were denied their right to testify by the laws of Kentucky, a right secured to them by the Civil Rights Act of 1866.

The Court rejected the government’s and the lower federal court’s interpretation of the Civil Rights Act on this jurisdictional point. It instead adopted that of defense counsel. The Court held that the statute did not confer jurisdiction on federal courts to try criminal prosecutions of white defendants for crimes against black victims in which the testimony of black witnesses was inadmissible under state law. The Court reasoned that the only parties affected by a criminal cause are the government and the defendant. Consequently, “witnesses in a criminal prosecution are not persons affected by the cause.” 78 If federal jurisdiction could be asserted merely by claiming that potential witnesses and even victims of crimes were prevented from giving evidence because of their race or color, the Court reasoned, “there is no cause either civil or criminal of which those courts may not at the option of either party take jurisdiction.” 79 Federal courts could try any case, civil or criminal, even those involving only white parties, “whenever it was alleged that a citizen of the African race was or might be an important witness.” 80 The Court refused to believe that Congress had intended such a result. It sharply curtailed federal criminal jurisdiction, holding that section three conferred jurisdiction on the federal courts only in those criminal cases involving black defendants who were “denied in the State courts any of the rights mentioned and assured to them in the first section of the act.” 81

77. Blyew, 80 U.S. (13 Wall.) at 590-91.
78. Id. at 595.
79. Id. at 592.
80. Id.
81. Id. at 581, 592-93.
The majority evoked a stinging dissent from Justice Joseph P. Bradley. He was joined by Justice Noah H. Swayne, who had earlier adopted the government's interpretation of federal jurisdiction sitting as circuit justice in the *Rhodes* case. Bradley chided the majority for subjecting black Americans to "wanton insults and fiendish assaults" that would render "their lives, their families, and their property unprotected by law." He warned that the Court's decision would invite "vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case." As circuit justice for states of the Deep South, Bradley had direct experience with these conditions and knew what he was talking about. The Court's decision very well could have had this effect because it eliminated the only criminal justice blacks in states like Kentucky could expect to receive.

The federal district court judge whose ruling the Supreme Court reversed, Judge Bland Ballard, also reacted bitterly. "Blessed are they who expect little for they shall not be disappointed," he wrote sarcastically to Solicitor General Bristow. "[I]f Congress meant what the Court say they meant is not all of their legislation which relates to the negro a mockery?" he queried. Referring to other enforcement provisions of the 1866 statute, Judge Ballard hypothesized:

Think of the President using the army & navy not to capture the desperado who has committed numberless outrages on the negro & who sleeps secure under State laws, but to arrest the poor

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82. Bradley admonished the majority for adopting a "view of the [Civil Rights Act of 1866] too narrow, too technical, and too forgetful of the liberal objects it had in view." *Id.* at 599 (Bradley, J., dissenting). Those liberal objectives were to give the federal courts jurisdiction and to provide a remedy whenever "the State refuses to give one, where the mischief consists in inaction or refusal to act, or refusal to give requisite relief." *Id.* at 597. Thus, he insisted that, "if the State should refuse to allow a freedman to sue in its courts, thereby denying him judicial relief, or should fail to provide laws for the punishment of white persons guilty of criminal acts against his person or property, thereby denying him judicial redress, there can be no doubt that the case would come within the scope of the [Civil Rights Act]." *Id.* Such causes affect not only the specific victims of such crimes, but the whole class of persons to whom she belongs, he insisted. *Id.* at 598.

83. *Id.* at 599.

84. *Id.*

85. Letter from G. C. Wharton to Judge H. H. Emmons (Apr. 9, 1872), HALMER H. EMMONS PAPERS, Burton Historical Collection (box 1, folder 6), Detroit Public Library; KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 142.
negro & drag him before the United States to be there tried & punished with high ceremony!!

Not only did the Court’s ruling in *Blyew* eliminate the government’s authority to prosecute whites who committed crimes against blacks, it prompted the government to release previously convicted defendants from prison.

Notwithstanding the devastating impact of the Court’s decision on the criminal jurisdiction of the federal courts, Black and Caldwell failed in their central mission: to persuade the Chase Court to declare the Civil Rights Act of 1866 unconstitutional. Moreover, the Court concluded that the statute was intended to give black Americans remedies in the federal courts in cases in which they could not enforce their “personal, relative, or property rights” in the courts of the states. In addition, because the Court upheld federal jurisdiction in criminal cases in which black defendants could not enforce their rights in the state courts, its decision could be interpreted as having affirmed the government’s broader and more significant argument regarding congressional authority to enforce personal rights by incorporating state common and statutory law into the Civil Rights Act of 1866. Thus, John Marshall Harlan speculated that Black and Caldwell would receive lower fees than they expected, because “the Democracy are [not] at all jubilant over the result.”

In April 1872, the Supreme Court managed to avoid deciding the most politically explosive issues of American constitutionalism since the Civil War. A few weeks earlier it had dismissed on narrow procedural grounds a case that Attorney General Amos T. Akerman and United States Attorney for South Carolina, Daniel T. Corbin, had agreed with defense counsel to send to the Supreme Court to test the constitutionality of the government’s

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87. Solicitor General Bristow ordered their release to avoid civil suits against federal legal officers for false imprisonment. All of the criminal defendants who had been convicted in the federal court at Louisville under the Civil Rights Act of 1866 were released and their sentences were set aside. Letter from G. C. Wharton to B. H. Bristow (Apr. 19, 1872), *BRISTOW PAPERS*, LC; *Kaczorowski, Judicial Interpretation*, supra note 2, at 142.

88. *Kaczorowski, Judicial Interpretation*, supra note 2, at 141.

89. Letter from J. M. Harlan to B. H. Bristow (Apr. 15, 1872), *BRISTOW PAPERS*, LC (container 2).
criminal prosecutions of the Klan under the Enforcement Act of 1870.\textsuperscript{90} This case came out of South Carolina, the state in which Ku Klux Klan terrorism was the most virulent and the most pervasive in 1871. The Klan actually controlled several counties in the northwestern portion of the state.\textsuperscript{91} South Carolina Democratic Conservatives established a public fund to defend the Klan and to challenge the constitutionality of the Justice Department's efforts to enforce and protect citizens' civil and political rights.\textsuperscript{92} They retained as defense counsel two of the most eminent lawyers of the day, Henry Stanbery, who had served as United States attorney general under President Andrew Johnson, and Senator Reverdy Johnson of Maryland, who was reputed to be the Senate's leading constitutional lawyer.\textsuperscript{93} The government's case was argued by the recently-appointed attorney general, George H. Williams, and he was assisted by Assistant Attorney General C. H. Hill.

The facts in the test case are clear and simple. The white defendants, acting out of racial and political animus, had raided the house of a black leader, robbed him of his weapons, and lynched him.\textsuperscript{94} The lead defendant was James William Avery. Avery was Grand Cyclops of the Ku Klux Klan in York County, South Carolina, and a prosperous merchant there.\textsuperscript{95} The case, \textit{United States v. Avery}, presented a similar issue under the 1870

\textsuperscript{90} United States v. Avery, 80 U.S. (13 Wall.) 251 (1872); PROCEEDINGS IN THE KU KLUX TRIALS, AT COLUMBIA, S.C. IN THE UNITED STATES CIRCUIT COURT, NOVEMBER TERM, 1871, at 111, 139-45 (1872).

\textsuperscript{91} The local authorities were completely overwhelmed and unable to maintain law and order. The United States attorney in South Carolina reported to the attorney general that not a single successful prosecution of Ku Klux Klan outrages was brought under state law in the state courts. Letter from D. T. Corbin to G. Williams (Feb. 20, 1872), ATTORNEY GENERAL'S PAPERS, Series 947, Record Group 60, National Archives [hereinafter ATTORNEY GENERAL'S PAPERS]. South Carolina was the only state in which President Grant was forced to suspend the writ of habeas corpus under the Ku Klux Klan Act of 1871. The United States attorney in South Carolina brought more prosecutions than federal attorneys in any other state. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 88-91. He indicted literally hundreds of defendants in 1871.

\textsuperscript{92} KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 88, 124.

\textsuperscript{93} According to the Lawyer's Edition, the defense team of Stanbery and Johnson was joined by a third lawyer, David Dudley Field, who was as experienced and as eminent as they. Field, of course, was also the brother of one of the justices before whom they argued the case, Justice Stephen J. Field. However, the official reporter identifies only Stanbery and Johnson as the defendant's attorneys.

\textsuperscript{94} KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 122.

\textsuperscript{95} Id. at 129.
statute that was raised in *Blyew* under the 1866 statute: whether the federal court had jurisdiction to try the defendants for murder in order to determine the punishment that should be applied for their violation of citizens' fundamental rights. However, it raised another issue as well: whether the Second Amendment right to keep and bear arms is a right """"granted and secured by the Constitution of the United States, so as to support the . . . indictment, and render the offense therein charged cognizable in [federal] court.""""96

The *Avery* case was certified to the Supreme Court in December 1871. It was argued over two days, March 19 and 20, 1872.97 Chief Justice Chase, who had resumed his place on the Court, announced the Court's decision the next day in a terse and cryptic statement: """"A majority of the court are of opinion that the case must be ruled by *United States v. Rosenburgh*, and the case be DISMISSED FOR WANT OF JURISDICTION.""""98 However, the Chief Justice evidently wanted to decide *Avery* on the merits, because he disagreed with the majority's decision.99 This suggests

96. United States v. Avery, 80 U.S. (13 Wall.) 251 (1872); Kaczorowski, *Judicial Interpretation*, supra note 2, at 129 n.24. The official report of the case differs from the Lawyer's Edition regarding the questions presented for decision. The Lawyer's Edition identifies the two questions, whereas the official reporter identifies only the first, regarding federal jurisdiction to try a case of murder. *Compare Avery*, 80 U.S. 252, and *Avery*, 20 L. Ed. 610.

97. The United States Attorney urged Attorney General Akerman to secure an early hearing. Letter from D. Corbin to Amos Akerman (Dec. 22, 1871), Series 947, ATTORNEY GENERAL'S PAPERS. Apparently, Akerman complied. Letter from Amos Akerman to D. Corbin (Jan. 2, 1872), Series M701 (vol. C, at 131), ATTORNEY GENERAL'S PAPERS.


99. The Lawyer's Edition report of Chase's opinion in this case contains a disapproving sentence that is omitted from the official report: """"I am unable to concur in that opinion [of the majority of the Court], but the case must be dismissed."""" *Avery*, 20 L. Ed. at 611 (emphasis in original). The *Rosenburgh* case, which the majority thought mandated dismissal, was decided in 1868. It held that the Supreme Court did not have jurisdiction to decide a motion to quash an indictment certified on a division of opinion whether the indictment was sufficient """"upon a true interpretation of the act under which the indictment was made."""" United States v. Rosenburgh, 74 U.S. (7 Wall.) 580. However, *Avery* presented a different question, namely, whether Congress constitutionally could confer jurisdiction upon the federal courts to try criminal offenses, such as murder, and criminal violations of fundamental rights, such as the Second Amendment right to keep and bear arms. One could argue that these questions regarding the court's jurisdiction are different from those regarding the correct interpretation of a statute to determine if it supports an indictment and should be decided before the defendants are put through the ordeal and expense of a criminal trial. Apparently, Chief Justice Chase thought so, since he disagreed
that he alone on the Court was willing to confront directly the constitutional issues raised in the Ku Klux Klan prosecutions, for, as in Blyew, the Court disposed of Avery on technical jurisdictional grounds.

The Court’s dismissal of Avery for want of jurisdiction without deciding it on the merits reflected a change in policy of the new attorney general.\textsuperscript{100} When the case was certified to the Chase Court in December 1871, United States Attorney, Daniel Corbin, and United States Attorney General, Amos Akerman, asked the Court for expedited review, which the Court evidently granted. However, before the case was argued in March 1872, George Williams replaced Akerman as Attorney General. In his argument, Williams urged the Court to do what it did: dismiss for want of jurisdiction. In contrast to Akerman, Williams manifested curious indifference to bringing a test case to the Supreme Court. Just three weeks before they argued Avery in the Supreme Court, Williams disingenuously asserted in a letter to Senator Reverdy Johnson that he did not “perceive that the questions presented in [the Ku Klux Klan trials in South Carolina] are of such pressing public importance as to require immediate decision.”\textsuperscript{101} Williams apparently wanted to avoid the risk of the Court eliminating the Justice Department’s authority to pursue its policy of rights enforcement.

Thus, the Avery case and similar cases involving Klan trials in the South were politically explosive cases for the Chase Court to decide, because they directly challenged the constitutionality of the Justice Department’s rights enforcement policies. Regardless of how the Court ruled, it could expect fierce condemnation from substantial portions of the American public. The Court might slip out of this no-win situation if it had a case that raised the central constitutional issues in the Klan prosecutions but did

\textsuperscript{100} It appears that the Justice Department changed its mind about the desirability of the Supreme Court’s resolution of these constitutional questions. Subsequent attempts to get the Supreme Court to decide the issues raised in the South Carolina Ku Klux Klan prosecutions also failed despite persistent efforts of defense counsel to get a final resolution.\textsuperscript{101} Letter from George H. Williams to Reverdy Johnson (Feb. 29, 1872), Series M699 (reel 14, vol. 1, at 258-59), ATTORNEY GENERAL’S PAPERS.
not involve the political groups and interests in those cases. The Court heard oral arguments in just such a case just weeks before it decided Avery and Blyew.

I am referring, of course, to the *Slaughter-House Cases*. The petitioners were white butchers who claimed that a state-created corporate monopoly deprived them of their fundamental rights under the Thirteenth and Fourteenth Amendments, including their fundamental right to labor. Consequently, their claims offered the Chase Court the opportunity to interpret these amendments and to determine the extent to which they protected citizens’ fundamental rights. This was the central constitutional question presented in the Justice Department’s prosecution of the Ku Klux Klan in the federal courts under the 1870 and 1871 statutes.

The facts of the *Slaughter-House Cases* are straightforward. The Republican-controlled Louisiana legislature created a slaughterhouse corporation in 1869 and conferred on it the exclusive privilege of carrying on the business of slaughtering animals for human consumption. The statute permitted existing butchers and slaughterhouses to continue their operations, but they had to remove their businesses to the premises of the corporation and to pay it a fee for the privilege. This ostensible health measure applied to three parishes comprising over eleven hundred square miles and two to three hundred thousand people. It put many butchers out of business. Compounding the perceived injustice to the unemployed butchers was the fact that the process that led to its enactment was riddled with blatant corruption, bribery, graft, and economic self-interest. To the butchers and other members of the affected communities, including the Conservative Democratic press of New Orleans, this regulation was not a health and sanitation measure at all. Rather, they saw it as an infamous example of pork-barrel legislation that conferred monopolistic privileges on an interest group favored by the corrupt Republican-controlled Louisiana legislature.

Thus, the parties and facts of this case could not be farther removed from the government’s prosecution of Klansmen. Moreover, the Court did not have to interpret the scope of the

103. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 144.
Reconstruction amendments to decide the *Slaughter-House Cases*. Indeed, the majority decided the legal question of the monopoly's constitutionality without reference to the Reconstruction amendments. Consequently, its interpretation of the Fourteenth Amendment was dicta. When one considers that the Court had disposed of the typical Klan-type cases on narrow technical grounds without deciding the central constitutional issues they presented, its decision to do so in *Slaughter-House* when it did not have to suggests the Court's case selection was a masterful political strategy devised by some members of the Chase Court to decide politically explosive legal questions in a relatively nonpolitical way. The Court did decide the exceedingly controversial constitutional issues relating to the national enforcement of fundamental rights in a case that removed the Court from the political context that made their resolution so urgent and so controversial.

Furthermore, the interests in these cases and their relationship to the Reconstruction amendments confused the political impact of the Court's decision. For example, the litigation created a severe meat shortage in New Orleans, and the aroused public, already opposed to the Republican party-inspired monopoly, strongly favored the butchers.104 When the case filed by the butchers was heard in the federal court at New Orleans, the newly appointed circuit justice, Joseph P. Bradley, and circuit judge, William B. Woods, ruled in favor of the butchers.105 In an opinion written by Justice Bradley, they held that the Fourteenth Amendment secured the fundamental rights of citizenship, and concluded that "[T]here is no more sacred right of [United States] citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."106 Characterizing the corporation as an odious monopoly, Bradley declared, "we feel compelled to decide

104. *Id.* at 145. The litigation became very complicated as the various parties brought different suits in different local courts around New Orleans with contradictory decisions. The butchers also filed an action in the United States Circuit Court at New Orleans. Charles Fairman ably recounts this history. 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864-88, at 1320-63 (1971).

105. Live-Stock Dealers' & Butchers Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 849 (C.C. La. 1870) (No. 8,408) [hereinafter *Live-Stock Dealers*].

106. *Id.* at 652-53.
that the act in question is a violation of one of the fundamental privileges of the citizen..." 107

Bradley's interpretation of the Fourteenth Amendment complemented and supported those of the lower court judges who upheld the constitutionality of the government's civil rights enforcement prosecutions. 108 It affirmed the broad nationalist theory of the amendment associated with the Republican party in Congress and with the Department of Justice in the Ku Klux Klan prosecutions and implicitly rejected the limited view of the amendment identified as the "Democratic" states rights interpretation of the Constitution. Nonetheless, the Democratic Conservative press praised the decision and Bradley's opinion. The New Orleans Daily Picayune, for example, stated that the decision dispelled the public's suspicion of these federal judges from the North. It lauded them for their integrity and impartial administration of the law, "for their learning, intelligence, courteous official manner, and regard for law." 109 On the other hand, the Republican New Orleans Times caustically criticized Bradley and Woods for stretching federal authority beyond accepted judicial limits to "a vast and indefinite extension of the power and authority of the judicial department of the Government." 110 The reactions of these partisan newspapers would have been just the reverse if the proponent of the constitutional interpretation the court adopted had been the government instead of white butchers, and if the government were asserting it in criminal prosecutions against Ku Klux Klan defendants rather than a monopolistic corporation. 111

107. Id. at 654.

108. See, e.g., United States v. Hall, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282); United States v. Crosby, 25 F. Cas. 701 (C.C.S.C. 1871) (No. 14,893); United States v. Given, 25 F. Cas. 1324 (C.C. Del. 1873) (No. 15,210 and 15,211). For a discussion of these and other cases, see Kaczorowski, Judicial Interpretation, supra note 2, at 1-25.

109. New Orleans Daily Picayune, June 7, 1870, at 4; id., June 8, 1870, at 4; id., June 20, 1870, at 6.

110. 6 Fairman, supra note 104, at 1335-36 (quoting the New Orleans Times).

111. The only New Orleans newspaper that acknowledged the implications of the circuit court's decision for the federal government's enforcement of the civil rights of black Americans was the New Orleans Bee. Recognizing its potential importance for the rights of black Americans, the editor of this black newspaper described Bradley's opinion as "one of the most luminous expositions of American constitutional law." He compared it favorably to the opinions of Chief Justice John Marshall and Justice Joseph Story: Not even these great jurists, the editor wrote, "ever uttered grander principles than did Justice Bradley yesterday." Reprinted in 1 Alb. L.J. 11 (1870).
The confused relationship of the *Slaughter-House Cases* to the politics of civil rights enforcement was reflected in the litigants’ attorneys and the constitutional theories they argued before the United States Supreme Court. The butchers were represented by John Archibald Campbell, a former justice of the United States Supreme Court who resigned his seat when Alabama, his native state, seceded in 1861. This states rights Southerner essentially adopted the Republican party’s theory of constitutionalism when he tried to persuade the Supreme Court in February 1872 that the Constitution, as amended by the Reconstruction amendments, secured the fundamental rights of all citizens and conferred plenary authority on the national government to enforce and protect these rights. Counsel for the slaughterhouse corporation included a Republican United States Senator, Matthew Hale Carpenter, and a local Radical Republican, Thomas J. Durant. Although they did not rebut this theory, their arguments emphasized state rights, a view associated with the Democratic party. They argued that the Louisiana statute was a legitimate exercise of the state’s police power. However the Court decided this case, the political fallout conceivably could be neutralized since political partisans favored in the *Slaughter-House Cases* the constitutional positions of the opposite side in the Ku Klux Klan cases.

The Supreme Court heard oral argument in the *Slaughter-House Cases* in January and February of 1872. It took the Court a year to render its decision. By a five-to-four margin, the Court upheld the constitutionality of the Louisiana statute and the corporation it established. Justice Samuel F. Miller spoke for the five-man majority. It ruled that the Louisiana statute did not establish an illegal monopoly and did not violate the butchers’ right to labor. On the contrary, it was a legitimate and effica-

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112. Brief for Appellants, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Democratic Conservatives who opposed the slaughterhouse as a monopoly created by a corrupt Republican-controlled state legislature also embraced this theory of the constitution. KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 146-47.


114. The first argument occurred in January 1872, but one Justice was absent and the Justices were divided. The case was reargued before the full Court on February 4, 1872, just weeks before it heard and decided *Avery* and two months prior to its decision in *Blyew*.

cious exercise of the most important power pertaining to state government, the power to protect "the lives, limbs, health, comfort, and quiet of all persons, and ... of all property within the State." 116 Quoting one of the most eminent state supreme court justices of his era, Isaac F. Redfield of Vermont, Miller elaborated the significance of the states' police power:

"[P]ersons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." 117

The majority apparently regarded the states' police power as the most important of all governmental powers, for on this power, they declared, depends

the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. 118

Moreover, the state's exercise of its police power was constitutional even when it indirectly intruded on the powers delegated to Congress, such as the commerce power. 119 Expressly affirming the state's power to charter corporations, even when their charters conferred on them "exclusive privileges—privileges which it is said constitute a monopoly," 120 the Court concluded that the Louisiana statute, and the corporation it established, was a legitimate, an appropriate, an effectual, and a constitutional exercise of the state's police power. The emphasis Miller placed on the police power suggests that the majority's major concern was its preservation.

116. Id. at 62 (quoting Thorpe v. Rutland & Burlington R.R. Co., 27 Vt. 139, 149 (1854)).
117. Id. Significantly, the Vermont case from which this statement was quoted involved the power of the state to regulate railroad corporations chartered by the state, and the extent to which the state can alter or repeal their charters and impose duties on them for the protection of the public. This suggests the majority's primary concern in Slaughter-House: how would their decision affect the police power of the states generally, and this power relating to the regulation of the slaughtering of animals, a power Miller described as "among the most necessary and frequent exercises of this [police] power." Id. at 63.
118. Id. at 62.
120. Slaughter-House Cases, 83 U.S. (16 Wall.) at 64.
Having decided the legal question presented in these cases, the majority did not have to decide whether the Thirteenth and Fourteenth Amendments secured citizens' fundamental rights, such as the right to labor. Moreover, it did not matter whether the right to labor was a constitutionally secured right. Even if it were, this constitutional guarantee would not have prevented Louisiana from enacting this scheme of regulating the slaughtering of animals, according to Miller's analysis of the state's police power.

Yet, Miller went on to interpret the meaning and scope of the Thirteenth and Fourteenth Amendments. "No questions so far-reaching and pervading in their consequences . . .," Miller opined, "have been before this court during the official life of any of its present members."121 Although he characterized the Thirteenth Amendment as a "declaration of the personal freedom of all the human race,"122 Miller interpreted its scope narrowly, as a guarantee against slavery.123

However, Miller's most important comments were directed to section one of the Fourteenth Amendment. They are well-known for their effect: the emasculation of its Privileges or Immunities Clause. Miller interpreted the amendment as recognizing dual citizenship, state and national, and different bodies of rights that pertain to each. His conception of the rights of state citizenship reflected his understanding of the state police power. The rights of state citizenship are "those rights which are fundamental," and they "[embrace] nearly every civil right for the establishment and protection of which organized government is instituted."124 Moreover, the states had exclusive jurisdiction over these fundamental rights.125

To preserve the states' police powers, the majority rejected the theory that United States citizens possessed fundamental rights as such. For, like the Democratic opponents of civil rights enforcement, Miller warned that if the Constitution secured fundamental rights as rights of United States citizenship, Congress would have complete legislative authority over these rights. He

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121. Id. at 67.
122. Id. at 69.
123. Id.
124. Id. at 76.
125. Id. at 78. States were free to grant or establish whatever rights they chose, and to limit, qualify, or restrict their exercise free of any interference by the national government.
feared that this power would subject the states to the control of Congress and would destroy local government. The majority refused to accept such a dangerous theory. They concluded that the Fourteenth Amendment leaves to the states the security and protection of citizens' personal and fundamental rights. The rights of United States citizenship which the Fourteenth Amendment's Privileges or Immunities Clause secures are a few relatively unimportant rights.

Miller's analysis completely ignored the Civil Rights Act of 1866, which conferred substantive civil rights on American citizens, as such, and jurisdiction on the federal courts to enforce them. He could not consider the statute, because it represented the radical changes in "the relations of the State and Federal governments to each other and of both these governments to the people" that the majority sought to avoid. Most scholars agree that the framers of the Fourteenth Amendment understood its first section to be identical in scope and objectives to those of the Civil Rights Act of 1866, which they enacted over a presidential veto within weeks of adopting the proposed amendment.

126. Miller stated:
For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all subjects. . . . Such a construction . . . would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.

127. Miller identified some of these rights: the right to assemble and to petition the national government; access to its seaports and navigable waterways, administrative offices and courts; the protection of the national government when on the high seas and in foreign lands; the right of interstate travel; the rights secured to American citizens in foreign treaties; the right to become a citizen of the state of one's residence with the same rights as other state citizens enjoy. He also included the rights secured by the other clauses of the Fourteenth Amendment and by the Thirteenth and Fifteenth Amendments. Id. at 79-80. For a novel textual critique of Miller's interpretation of the Fourteenth Amendment's Privileges or Immunities Clause which connects this clause with its equivalent in the Northwest Ordinance, see John J. Gibbons, Intentionalism, History, and Legitimacy, 140 U. Pa. L. Rev. 613, 629-38 (1991).


129. See, e.g., Akhil R. Amar, The Bill of Rights and the Fourteenth Amendment 1193, 1244-46 (1992); Raoul Berger, Government By Judiciary: The Transformation of the Fourteenth Amendment 22-51 (1977); Charles Fairman, Does the Fourteenth Amend-
The framers knowingly incorporated the statute into the Fourteenth Amendment to obviate the possibility of the statute's repeal by a future Congress and to settle any doubts that might exist over the statute's constitutionality.\textsuperscript{130} Drafted and proposed by the very same session of Congress, the Fourteenth Amendment must have been intended by its framers to delegate to Congress at least as much constitutional authority to secure the fundamental rights of citizens as they had just exercised in the Civil Rights Act of 1866, especially since one of their purposes in adopting the Fourteenth Amendment was to ensure the constitutionality of the statute. Moreover, the framers of the Fourteenth Amendment must have intended the statutory scheme of rights enforcement they had just enacted with the Civil Rights Act of 1866 as the minimum scheme of fundamental rights enforcement under the Fourteenth Amendment. The Court has never resolved conflicting interpretations of the Fourteenth Amendment and the Civil Rights Act of 1866.

It is understandable, therefore, that opponents of national civil rights enforcement objected to the proposed Fourteenth Amendment on essentially the same ground on which they opposed the Civil Rights Act of 1866. They warned that the amendment would radically change American federalism by conferring upon Congress the authority to supplant state administration of civil and criminal justice.\textsuperscript{131} The Fourteenth Amendment delegated to Congress power that would produce a revolution worse than the Civil War, opponents complained, because the amendment would transfer all state authority over citizens' fundamental rights from the states to the national government, producing irreconciliable conflicts in federal-state jurisdiction. They had earlier in the debates opposed the Civil Rights Bill because it supplanted the state administration of civil and criminal justice and transferred authority over citizens' fundamental rights from the states to the national government.\textsuperscript{132} It is significant that supporters acknowl-
edged these revolutionary changes in American federalism, although they denied any intention of destroying the states and absorbing their authority over ordinary civil and criminal process.\textsuperscript{133} It is precisely these acknowledged revolutionary changes in American constitutionalism that the Supreme Court rejected in the \textit{Slaughter-House Cases}.\textsuperscript{134}

Having emasculated the Privileges or Immunities Clause, Miller went on to consider whether the Louisiana statute violated the butchers' Fourteenth Amendment rights to due process and equal protection of the law. Miller curtly concluded that it did not. He disposed of the due process claim with the conclusory assertion that the Louisiana statute did not deprive the butchers of any property rights.\textsuperscript{135} Miller disposed of the equal protection claim by limiting the Equal Protection Clause to a guarantee against racially discriminatory state statutes, and virtually only such statutes that discriminated against blacks.\textsuperscript{136} Completely ignoring the enforcement of the civil rights statutes of 1870 and 1871 by the Department of Justice and the federal courts against terrorists charged with depriving citizens of their fundamental rights under the Fourteenth Amendment, including their right to the equal protection of the laws, Miller concluded that the Court "doubt[s] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."\textsuperscript{137} Thus was created the state action interpretation of the Fourteenth Amendment.

The Chief Justice, along with Justices Bradley and Swayne, joined a lengthy dissenting opinion written by Justice Field. The dissenters agreed with the majority that these cases presented a question "of the gravest importance, not merely to the parties here, but to the whole country."\textsuperscript{138} It "is nothing less than ... whether the recent amendments to the Federal Constitution

\textsuperscript{133} \textit{Cong. Globe}, \textit{supra} note 6, at 1065-67 (Rep. Higby); \textit{id.} at 1066 (Rep. Price); \textit{id.} at 2534-35 (Rep. Eckley); \textit{id.} at 2942 (Sen. Howard); \textit{id.} at 2961 (Sen. Poland).

\textsuperscript{134} \textit{Slaughter-House Cases}, 83 U.S. (16 Wall.) 36, 78 (1873).

\textsuperscript{135} \textit{Id.} at 81.

\textsuperscript{136} "It is so clearly a provision for [negroes] and that emergency [created by the Southern black codes], that a strong case would be necessary for its application to any other," Miller opined. \textit{Id.}

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} \textit{Id.} at 89 (Field, J. dissenting).
protect the citizens of the United States against the deprivation of their common rights by State legislation."\textsuperscript{139} Consistent with the congressional Republican supporters of civil rights enforcement and the decisions of lower federal court judges, the dissenters insisted that the Thirteenth and the Fourteenth Amendments did afford Americans this protection. Field wrote that the Thirteenth Amendment was "intended to make every one born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life . . . ."\textsuperscript{140} An individual who did not enjoy the right "to pursue certain callings," as others enjoyed, Field reasoned, "certainly would not possess the liberties nor enjoy the privileges of a freeman."\textsuperscript{141} Having earlier shown that the Louisiana statute created an illegal monopoly because it conferred on the corporation an exclusive privilege to exercise an individual right, the "right to pursue one of the ordinary trades or callings of life,"\textsuperscript{142} Field also concluded

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\textsuperscript{139} Id.
\textsuperscript{140} Id. at 90.
\textsuperscript{141} Id. Field's discussion of the theory of the Thirteenth Amendment shows that his interpretation corresponds to that of congressional Republicans in 1866 and of lower federal court judges prior to Slaughter-House; that is, that the Thirteenth Amendment secured the rights of free men or citizens. However, his elaboration of the manner in which the facts of this case fit within the protective guarantees of the Thirteenth Amendment contain the seeds of Justice Bradley's "badges of servitude" interpretation of the amendment in the Civil Rights Cases, 109 U.S. 3 (1883). Field's discussion of the Civil Rights Act of 1866 also reflects this ambiguous interpretation of the Thirteenth Amendment. He explained that the statute conferred citizenship on all Americans and secured to them enumerated rights "upon the theory that citizens of the United States as such were entitled to the rights and privileges enumerated," and laws that deny citizens equality in these rights subjected them to involuntary servitude in violation of the Thirteenth Amendment. Id. at 91. He went on to explain that the Louisiana statute required every butcher and every person who had animals to sell within three parishes, an area "exceeding one thousand one hundred square miles, and embraced over two hundred thousand people," to go to the slaughterhouse and there carry on their trade or business and pay it tribute. Id. at 92. These "prohibitions imposed by this act upon butchers and dealers in cattle" are "odious" "oppressions [which] cannot be applied to a free man . . . except in violation of his rights." Id. at 92-93.
\textsuperscript{142} Id. at 88-89. Field's lengthy opinion was based on three conclusions of law. First, the Louisiana statute was not a legitimate exercise of the state's police power. Id. at 88-89 (Field, J. dissenting). He characterized the health and sanitation objectives of the statute as a shallow pretense for the grant of "exclusive privileges" to the corporation. Whereas the state legitimately could restrict slaughterhouses to a specific area outside urban centers in the interests of health and sanitation, it could not legitimately or constitutionally confer an exclusive "right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual." He insisted that, if the exclusive privileges in this case were constitutional, "there is no monopoly, in the most
that the statute was unconstitutional because it deprived the butchers of this fundamental right which is secured by the Thirteenth Amendment.

However, Field did not base his objections to the Louisiana statute on the Thirteenth Amendment because, in his opinion, the Fourteenth Amendment covered the case. Field forcefully concluded that the statute violated the Fourteenth Amendment which was "intended by the Congress which framed it and the States which adopted it" to "protect the citizens of the United States against the deprivation of their common rights by State legislation." The critical predicate of Field's understanding of the amendment was the nature of United States citizenship which it conferred. "A citizen of a State is now only a citizen of the United States residing in that State." It is by virtue of his United States citizenship conferred by the Fourteenth Amendment, Field reasoned, that he now possesses and enjoys the fundamental rights of free men. "[T]he fundamental rights, privileges, and immunities which belong to [the individual] as a free man and a free citizen," Field declared, "now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State." Field explained that "They do not derive their existence from [state] legislation, and cannot be destroyed by its power." Although he recognized concurrent

odious form, which may not be upheld." Field thus distinguished exclusive grants for ferries, bridges, and turnpikes whose franchises are of a public character "appertaining to government," and are legitimate. Id. at 88 (Field, J. dissenting).

This conclusion leads to the second: the statute created an illegal monopoly. Reasoning from English history, English common law, and recent American judicial authorities, Field asserted that all exclusive privileges conferred by government on an individual or a corporation to engage in any lawful trade or business were monopolies and void as restraints on freedom and liberty. Because the Louisiana statute conferred on the corporation the exclusive privilege to carry on the slaughterhouse business it restrained the butcher's freedom and liberty. Id. at 84-89 (Field, J. dissenting).

This conclusion leads directly to Field's third: that this illegal monopoly was also unconstitutional because it infringes constitutionally secured rights of American citizens. It is this aspect of Field's opinion that I analyze in the text.

143. Id. at 89 (Field, J. dissenting).
144. Id.
146. Id. at 95 (Field, J. dissenting). Field's interpretation of the Fourteenth Amendment echoed the views of its Congressional framers. Field took his definition of the privileges and immunities of United States citizenship from the very authority that Miller cited in defining the rights of state citizenship: Justice Bushrod Washington's circuit court opinion in Corfield v. Coryell, 6 F. Cas. 546 (C.C.N.J. 1823) (No. 3,230). Field declared that they
state jurisdiction over citizen's fundamental rights, Field concluded that "[t]he fourteenth amendment [sic] places them under the guardianship of the National authority." 147 Field characterized the right to labor as "one of the most sacred and imprescriptible rights of man...." 148 Therefore, the Louisiana statute which conferred on the corporation the exclusive privilege to carry on the slaughterhouse business restrained the butchers' freedom

"are those which of right belong to the citizens of all free governments." Slaughter-House Cases, 83 U.S. (16 Wall.) at 97 (Field, J. dissenting). He thus characterized the Fourteenth Amendment as "intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes." Id. at 105 (Field, J. dissenting). Thus, the Fourteenth Amendment places these rights under the protection of the national government. This interpretation of Field's dissent parallels those of Charles W. McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1889-1897, 61 J. AM. HIST. 970 (1975); and HAMILTON, THE PATH OF DUE PROCESS OF LAW, THE CONSTITUTION RECONSIDERED 167 (C. Read ed., rev. ed. 1968). It is on this critical point that this analysis of Field's dissent differs from that of William Nelson. Nelson characterizes Field's conception of the Fourteenth Amendment's protective guarantees as "narrow because it held that not all rights, but only fundamental rights, such as the right to engage in the common occupations, are within the ambit of section one and thus subject to federal judicial control." NELSON, supra note 128, at 158. Nelson then reduces this "narrow" protection even further to "only one right against governmental infringement—the right to equality." Id. at 161. This analysis disagrees with Nelson's because, according to Field's analysis, a citizen possessed fundamental rights independent of the states because they "now belong to him as a citizen of the United States." Slaughter-House Cases, 83 U.S. (16 Wall.) at 95 (Field, J. dissenting). Field made this point explicitly when he declared that these fundamental rights "do not derive their existence from [state] legislation, and cannot be destroyed by its power." Id. at 95-96. For Field, as for Bradley and Swayne, the Thirteenth and Fourteenth Amendments secured the rights themselves, not merely a right to equal protection. Therefore, under Field's analysis a state could not abolish its citizens' right to pursue a common calling because this right was secured to them under the Thirteenth and Fourteenth Amendments. Moreover, this theory of constitutionally secured rights enlarged Congress' authority over the states' police power, because Congress could virtually supplant the states in their regulation of citizens' personal rights since they were rights of United States citizenship as such. Consequently, this analysis also disagrees with Nelson's conclusion that Bradley's and Swayne's interpretation of the Fourteenth Amendment differed significantly from Field's.

147 Slaughter-House Cases, 83 U.S. (16 Wall.) at 101 (Field, J. dissenting).

Field observed that the exercise and enjoyment of these fundamental rights "are always more or less affected by the condition and the local institutions of the State, or city, or town where [the citizen] resides." Id. at 95. Although the state may regulate all such pursuits, professions, and avocations in the interest of health, order, and prosperity, "the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations." Id. at 110.

148 Id. Quoting Justice Bradley's circuit court opinion with approval, Field asserted that "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor." Id. at 106 (Field, J. dissenting) (quoting Live-Stock Dealers, 15 F. Cas. 649, 652 (C.C. La. 1870) (No. 8,408).
and liberty and violated their constitutionally-secured right to labor.

Although Bradley joined Field's opinion, he added one of his own, analyzing the case essentially in the same way that Field did. Bradley's opinion is noteworthy because of its attack on the majority opinion's failure to interpret the Reconstruction amendments within their historical context. The majority's views of citizenship and citizens' rights "evince a very narrow and insufficient estimate of constitutional history and the rights of men," Bradley complained. Referring to Klan terrorism with which, as circuit justice for Southern states, he was well acquainted, Bradley admonished, "We shall be a happier nation, and a more prosperous one than we now are, when the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to" the rights of United States citizenship.

Swayne's dissent emphasized the revolutionary nature of the Reconstruction amendments. They are nothing less than "a new

149. Bradley's analysis differed from Field's in one essential respect: the meaning of the Comity Clause and citizens' rights before the adoption of the Fourteenth Amendment. Whereas Field expressed the view that the privileges and immunities secured by the Comity Clause were rights of state citizenship and that the Comity Clause guaranteed to citizens of other states an equality in those rights which the state extended to its own citizens, Bradley understood these rights to be the fundamental rights of citizenship which the individual possessed both as a United States citizen and as a citizen of the state of his residence. Slaughter-House Cases, 83 U.S. (16 Wall.) at 121 (Bradley, J. dissenting). But Bradley and Field expressed the same understanding of the nature of citizenship and citizens' rights which the Fourteenth Amendment defined and secured. However, Bradley also made more explicit how the monopoly violated the butchers' Fourteenth Amendment due process rights to liberty and property and their Fourteenth Amendment right to the equal protection of the laws. He also addressed the fears Miller expressed regarding the effects this interpretation of the Fourteenth Amendment would have on Congress' power to interfere with the internal affairs of the states and the expanded dockets of the federal courts. Disagreeing with the majority as to the seriousness of these problems, Bradley declared:

The great question is, What is the true construction of the amendment? When once we find that, we shall find the means of giving it effect. The argument from inconvenience ought not to have a very controlling influence in questions of this sort. The National will and National interest are of far greater importance. Id. at 124.

150. Id. at 113 (Bradley, J. dissenting).

151. Id. Bradley also characterized the Louisiana statute 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." Id. at 120. He added, "It seems to me strange that it can be viewed in any other light." Id.
Magna Charta," Swayne declared, for they secure to every person within the United States the fundamental rights to life, liberty, and property, which include the right to labor.\textsuperscript{152} Reflecting the nationalizing impact of the period, Swayne declared that "[W]ithout such authority any government claiming to be national is glaringly defective."\textsuperscript{153} Moreover, Swayne insisted that the framers of these amendments intended to confer this power on the national government.\textsuperscript{154}

In what today seems ironic, Swayne admonished the majority for taking liberties with their construction of the Thirteenth and Fourteenth Amendments, a criticism levied in recent years by narrow-construction originalists against liberals who seek to interpret the Fourteenth Amendment in broad ways to reach liberal results. Swayne invoked what today we would characterize as an originalist and narrow-constructionist argument on behalf of a broad construction of constitutionally-secured rights in opposition to the majority's narrow construction, an interpretation of the Fourteenth Amendment that many today would characterize as nonoriginalist and noninterpretivist.\textsuperscript{155} Swayne chided the majority that "[T]his court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it."\textsuperscript{156}

Swayne added some ominous remarks that reflected his experience as circuit justice for Kentucky and other states that were plagued with Ku Klux Klan-type terrorism. He repeated the need for national guarantees against oppression. "But this arm of our jurisdiction," Swayne lamented, "is, in these cases, stricken down by the judgment just given."\textsuperscript{157} Acknowledging the dissenters' fears concerning the impact of the Court's decision on the affairs of the Southern states, he concluded: "I earnestly hope that the

\textsuperscript{152. Id. at 125 (Swayne, J. dissenting).}
\textsuperscript{153. Id. at 129 (Swayne, J. dissenting).}
\textsuperscript{154. Id.}
\textsuperscript{155. Nonoriginalism is fairly self-explanatory. "Noninterpretivism" is a counterintuitive, technical term that constitutional theorists use to describe that view of constitutional interpretation that is not limited to the text or to the intent and understanding of the framers. See Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204 (1980); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).}
\textsuperscript{156. Slaughter-House Cases, 83 U.S. (16 Wall.) at 129 (Swayne, J. dissenting).}
\textsuperscript{157. Id.}
consequences to follow may prove less serious and far-reaching than the minority fear they will be.\textsuperscript{158}

The statements made in the majority and dissenting opinions strongly suggest that the justices understood that the Court’s decision in the \textit{Slaughter-House Cases} emasculated the power of the national government to protect and enforce the fundamental rights of United States citizens against terrorism in the South.\textsuperscript{159} Miller blamed his opinion and the intrigue of Bradley and Swayne for being passed over to replace Chase as chief justice.\textsuperscript{160}

To a limited extent, the press recognized the consequences of the \textit{Slaughter-House} decision for the administration’s civil rights enforcement policies. The \textit{Chicago Tribune} called the decision a needed check “upon the determination of the Administration to enforce its policy and to maintain its power, even at the expense of the constitutional prerogatives of the States.”\textsuperscript{161} The \textit{New York World} speculated that the Court was restrained in its decision because of “their consciousness that they were running counter to the impetuous hostility of the Republican Party to the constitutional rights of the States.”\textsuperscript{162} The editor of the \textit{American Law Review} satirized the decision’s impact upon Grant’s Southern policy with the observation,

\begin{quote}
that, while the executive department keeps Casey in New Orleans, and sends its soldiers to regulate the internal politics of Louisiana, the judicial department remits to the people of the State, to its
\end{quote}

\begin{footnotes}
\item[158] Id. at 130 (Swayne, J. dissenting).
\item[159] I am referring here not only to Swayne’s comments quoted in the text, but also to Miller’s characterization of the questions before the Court, the references Bradley and Swayne made to conditions in the South that accounted for the framing and ratification of the Thirteenth and Fourteenth Amendments, the nature of the interpretations and analyses these dissenters expressed which tracked so closely opinions they wrote as circuit justices, and the fifteen months it took for the Court to decide the case.
\item[160] Letter from Justice Sam. F. Miller to Justice David Davis (Sept. 7, 1873) (file 110), DAVID DAVIS PAPERS, Chicago Historical Society. This “will not be the first time that the best and most beneficial public act of a man’s life has stood in the way of his political advancement,” Miller wrote to Davis. He complained that the position of chief justice had “always been the reward of political, I may say [sic] partisan services.” Disclaiming partisanship in the Slaughter-House Cases, Miller condescendingly suggested that “it is perhaps looking for too much to expect Grant with these examples before him, to look alone to the voice of the profession or to the qualifications of the nominee.”
\item[161] 2 CHARLES WARREN, \textit{THE SUPREME COURT IN UNITED STATES HISTORY} 544 (1937) (quoting the \textit{Chicago Tribune}).
\item[162] Id. at 545 (quoting the \textit{New York World}).
\end{footnotes}
courts and legislature, the custody of the privileges and immunities of its citizens.\textsuperscript{163}

However, press reaction to \textit{Slaughter-House} generally did not discuss its impact on President Grant's Southern policy.\textsuperscript{164} Newspaper commentary supports the view of contemporaneous constitutional expert, M. F. Taylor, that the public did not fully understand the import of the decision in this regard.\textsuperscript{165} Thus, the Court's apparent strategy of interpreting the Fourteenth Amendment in a politically neutral case to avoid strong political reaction, if not retaliation, seems to have worked.

Moreover, by 1873, the people of the Northern states had shifted their attention from Reconstruction to the problems associated with industrialization and urbanization. Even many who had earlier supported the cause of civil rights desired an end to Reconstruction in order to grapple more effectively with the problems of economic development, particularly the need to regulate growing concentrations of economic power by business entities that were acquiring monopolistic and oligopolistic control of markets. For example, the \textit{Chicago Tribune}, an avid supporter of civil rights protection in 1866, strongly supported the majority's decision in \textit{Slaughter-House}, because it understood the decision as a vindication of the states' power to control monopolies. Ironically, the Supreme Court's sanction of state-conferred special privileges to process meat for human consumption in Louisiana implicitly affirmed the states' power to regulate monopolies in Northern states such as Illinois.\textsuperscript{166} \textit{The Nation}, having earlier expressed fears regarding the \textit{Slaughter-House} Case's impact upon the viability of private franchises, such as railroads, canals, and patents, hailed the Supreme Court's decision as preserving "al-

\textsuperscript{163} 7 AM. L. REV. 732 (1873). The “Casey” to whom the editor referred was James F. Casey, President Grant's brother-in-law, who was serving as the Collector of the Port of New Orleans and was associated with the Kellogg-Packard wing of the Republican party in Louisiana at the time \textit{Slaughter-House} was decided.

\textsuperscript{164} For newspaper reaction, see KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 2, at 170 n.58.

\textsuperscript{165} M. F. Taylor, \textit{The Slaughterhouse Cases}, 3 So. L. REV. 476, 477 (1874).

\textsuperscript{166} CHI. TRIB., Apr. 19, 1873. For the Tribune's editorial policies regarding civil rights enforcement in 1866, see, CHI. TRIB., Jan. 12, 1866, at 2; id., Jan. 17, 1866, at 2; id., Feb. 5, 1866, at 2; id., Apr. 30, 1866, at 2; id., May 1, 1866, at 2; id., May 19, 1866, at 2; id., May 31, 1866, at 2; id., June 6, 1866.
most every franchise in the United States” and vindicating the states’ power to charter corporations. The primary contemporaneous importance of Slaughter-House, then, was not that it curtailed national civil rights enforcement authority. Rather, it was that the Court affirmed the state’s police power.

Many of the North’s spokesmen and leaders chose to revivify state rights at the expense of national enforcement of citizens’ rights. For example, like the Chicago Tribune, The Nation in 1866 had been a strong supporter of national civil rights enforcement. Again like the Chicago Tribune, in 1873 it condemned the butchers’ interpretation of the Fourteenth Amendment as bringing citizens’ civil rights within the protection of the national government. This “monstrous conclusion,” the editor admonished, “would put an end to federal government, do away with state courts, laws and constitutions, and throw pretty much the entire business of the country into the hands of Congress and the officials of the United States.” He congratulated the Supreme Court for “recovering from the War fever, and ... [for] abandoning sentimental canons of [constitutional] construction.”

Apparently, a majority of the Chase Court made the same choice in the Slaughter-House Cases. Their decision, however, represents one of the most blatant examples of judicial legislation in the Court’s history. It was also one of the most important decisions in the Court’s history, for it nullified a revolution in American constitutionalism that the congressional framers of the Fourteenth Amendment intended, and the Department of Justice and federal courts implemented, to enforce citizens’ fundamental rights involving Bill of Rights guarantees. The consequences of these choices were a series of decisions through the remainder of the nineteenth century that further curtailed the constitutional and statutory authority of the national government to enforce

167. 16 The Nation 280 (Apr. 24, 1873). See also, 11 id. 361 (Dec. 1, 1870).
168. Kaczorowski, Judicial Interpretation, supra note 2, at 159-66.
169. 1 The Nation 711 (Dec. 7, 1865); 2 id. 262 (Mar. 1, 1866); 2 id. 122 (Apr. 5, 1866); 2 id. 744 (June 12, 1866).
170. 16 id. 280 (Apr. 24, 1873).
171. Id. Commenting approvingly that the majority’s decision was a desperately needed check on the centralization of power in the national government which cut deeply into the power of the states, the Chicago Tribune’s editor happily reported that the decision held that the national government “had no power to interfere with municipal relations, however unjust in themselves, or with previously-existing states rights.” Chi. Trib., Apr. 19, 1873, at 4.
citizens' rights. The end result was the legalization of American apartheid.

One wonders, though, what this history would have been if Chief Justice Chase had retained some of his earlier vigor. Would the result have been different? Would he have been able to persuade one justice to transform the dissenters into the majority? He may very well have succeeded. Just weeks before the Court announced its decision in *Slaughter-House*, Justice William Strong issued an opinion as circuit justice for Delaware in which he, and the district court judge, Edward Bradford, ruled that the Reconstruction amendments affirmatively secured the fundamental rights of citizens. Strong's opinion in this circuit court case would have placed him with the dissenters in *Slaughter-House*. We do not know how and why he changed his understanding of the Reconstruction amendments. Had a healthy Chase been able to hold him with the dissenters, American legal and constitutional history very likely would have been very different.

172. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874); United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Reese, 92 U.S. 214 (1875); Virginia v. Rives, 100 U.S. 313 (1880); United States v. Harris, 106 U.S. 629 (1882); Pace v. Alabama, 106 U.S. 583 (1882); Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896). The Court did not completely eliminate the national government's power to enforce citizens' rights. See, *Ex parte Siebold*, 100 U.S. 371 (1879); Strauder v. West Virginia, 100 U.S. 303 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880); *Ex parte Clarke*, 100 U.S. 399 (1880); *Ex parte Yarbrough*, 110 U.S. 651 (1884); Yick Wo v. Hopkins, 118 U.S. 351 (1886); *Ex parte Logan*, 144 U.S. 263 (1892). However, it described that role by defining the national government's power to enforce citizens' rights as limited to racially discriminatory state action. See, e.g., *Cruikshank*, *Reese*, and *Strauder v. West Virginia*, 100 U.S. 303 (1880).

COMMENT ON ROBERT KACZOROWSKI'S PAPER,
THE CHASE COURT AND FUNDAMENTAL RIGHTS

by Harold M. Hyman *

I begin with two poems. The first is by W. H. Auden:

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.
Yet law-abiding scholars write;
Law is neither wrong nor right,

... Others say, Law is our Fate;
Others say, Law is our State;
Others say, others say
Law is no more
Law has gone away.
And always the loud angry crowd
Very angry and very loud
Law is We,
And always the soft idiot softly Me.1

The second is from the racist Columbus, Ohio, Crisis:

Chase on de bench
Nigger at de bar
Get away, white man,
What you doin' dar?2

Anyone chasing Salmon Chase in an effort the better to understand the man and to assign him his appropriate place in American history is involved in no trivial pursuit. For those here who do indulge in trivial pursuit games, however, I ask: Whose portrait is on the U.S. $10,000 bill?

* William P. Hobby Professor of History, Rice University. B.A., University of California at Los Angeles (1948); M.A., Columbia University (1950); Ph.D., Columbia University (1952).

2. CRISIS, Jan. 15, 1865.
Considering the core theme of this assembly, the unsurprising correct reply is, Chase. But in what may be a symbolic warning to scholars who wrestle with him, I note that although Chase was Lincoln's secretary of the Treasury during the nation's greatest crisis, the Civil War, his image no longer appears among those of the leading public figures that grace our paper money. Yet, during the Union's darkest destabilizing years, Chase helped greatly to preserve the Union's credit, in part by issuing and redeeming paper currency as legal tender. His image disappeared recently because the Treasury, hoping to diminish dirty-money laundering by evaders of various civil and criminal laws, decided no longer to print $10,000 bills. Exit Chase.

It is conceivable, if barely, that not everyone at this meeting feels deprived by the absence of $10,000 bills. Nonetheless, it is arguable also that if Elvis deserves his icon on a postage stamp, Chase retains a claim at least to some like form of public recognition. But odds are that he will not receive it until and unless scholars continue attempts to reestimate more adequately than we have to the present his private life and public services.

Most of us here are academic historians and/or lawyers with special interests in Chase. Substantial contributions to our knowledge of particular phases of his manifold careers by scholars, especially Professors Kaczorowski and Blue and others who grace these sessions, and by others not here including David Donald, Bill Weicek, and John Niven. Yet among Lincoln's cabinet officers Chase alone at this writing lacks what I estimate to be a satisfying full-scale biography. In short, notwithstanding the tribute paid to Chase by the very name of this distinguished College of Law, few historians or other analysts have sought for him, and in my opinion none have won, a front-row-center place for Chase on the stage of America's history.

Why has Chase few claims on stellar billing? The question suggests a second query, one that I suggest is less trivial than it may seem at first hearing to lawyer-colleagues here whose research relies primarily on printed sources like case reports. Here is the second query: Who were the two lawyers that contemporaries acknowledged to be the generation's premier

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3. This situation should soon change. Professor John Niven, Claremont Graduate School, has a Chase biography in production by Oxford University Press. He edits the Chase Papers project and has likely exploited all available manuscript and printed sources. See also THE SALMON P. CHASE PAPERS (John Niven et al. eds., 1993) for the most conveniently accessible version of Chase's manuscript journals.
constitutionalists, yet who have not inspired full-scale scholarly biographies? Answer: The conservative Maryland senator, Reverdy Johnson, and Chase, the Radical Republican, if that is what he was.

Yet in addition to copious printed sources, Chase, especially, left mountainous manuscripts. The empire of paper he created includes his famous diaries, plus letters, legal briefs while he lawyered, and draft decisions and opinions during his chief justiceship. And therein lies a possible reason why both Chase and Reverdy Johnson lack the kind of biographies to which I adverted earlier.

Worse even than Horace Greeley's, the handwritings of both Chase and Johnson are awful. Many Chase manuscripts have obstructed even diligent researchers' attempts at deciphering, with result that some of his cryptic scribblings retain their meanings virginally intact. Perhaps from over-fatigue or consciousness of life's brevity, several generations of mature researchers have abandoned attempts fully to restudy these two men, and young searchers for dissertation topics have followed mentors' advice to shy away from attempting such brave explorations.

Chase's monumental handwritten outputs and deplorable handwriting exacerbated the problem of comprehending fully his several diverse careers. So many research proficiencies are needed to cope with Chase! To his credit, Professor Blue has carved comprehensible ways, especially through Ohio's jungly antebellum politics and this region's antislavery movements. In her paper, Professor Court further illuminated complexities in the uneasy yet fruitful Lincoln-Chase political partnership. New York University's historian Irwin Unger has made more understandable various public finance policies of Chase's Treasury years. And now I exploit my opportunity to comment more explicitly on Professor Kaczorowski's engaging, thoughtful, and very useful exploration into Chase's career on the Supreme Court.

Wisely exploiting primarily printed sources that exempted him from wrestling with Chase's exacerbating penmanship, at this meeting Bob Kaczorowski has clarified significant pivot-points in his subject's too-brief Chief Justiceship. For several reasons, I am delighted as well as informed by his presentation. First, it buries further tenacious classic "revisionist" conclusions like those with which Professor Steely tried to mislead us earlier today about the post-Appomattox Reconstruction. Unburied, that "fa-
miliar history” was learned but unfortunately not forgotten, and repeated in an important 1945 dissent by U.S. Supreme Court Justices Frankfurter, Jackson, and Roberts. They concluded that “much ... legislation was born of that vengeful spirit which in no small degree envenomed the Reconstruction era.”

That distinguished dissenting trio relied understandably but unwisely on obsolescing views of mid-nineteenth century history. Since the 1940s, race and gender equality concerns of our own “Second Reconstruction” generation have inspired recognition of the fact that, with Appomattox, Chase and other officials faced a globally unprecedented need, one Chase’s case reporter described as “untrammelled by precedents.” The need was, without the comfort of guidelines, to define acceptably the nation’s responsibilities concerning the immense changes the Civil War had made and could make in black and white Americans’ daily marketplace relationships. Definition would have to accommodate the context of white majorities’ undiminished passions for state-centered federalism, for economic capitalism, and, ultimately, for racial hierarchies.

As Professor Kaczorowski suggested further, Chase, the new Chief Justice of the re-United States, as part of his duties, like other high officials had to consider the plastic outreaches of the ink-still-damp Thirteenth Amendment, the 1866 Civil Rights Act, enacted to implement that amendment, and the Fourteenth Amendment proposal. In early 1867, at the height of bitter debates about all the foregoing plus the Military Reconstruction bill, the proposed Fourteenth Amendment was out to the states for ratification after its own stormy passage through Congress.

As much as anyone in Washington, Chase knew the inside history of all these monumental measures. He shared the motives, fears, and hopes of many of their backers and opponents. My conviction is that Chase would have agreed with Professor Kaczorowski’s judgements: that “[t]he framers of the Fourteenth Amendment must have intended [in the Civil Rights Act] the

statutory scheme of rights enforcement" under the Thirteenth Amendment which they must have contemplated as "the minimum scheme of fundamental rights enforcement under the Fourteenth Amendment," since one of their express reasons for "adopting the [latter] was to ensure the constitutionality of the statute."6

Agreed. Among the significant points in Professor Kaczorowski's paper, there is one on which I wish to concentrate. It is the fact that in his Ex parte Turner opinion while on circuit, Chase provided substantiation for Professor Kaczorowski's views.7

Riding circuit was a duty the Supremes then performed. Chase's circuit was the one including Maryland that the unlamented Taney had travelled. What occurred there led Chase to confide to a lawyer-friend that "It is only as a Circuit Judge that the Chief Justice, or any other Justice of the Supreme Court, has, individually, any considerable power."8

As Bob Kaczorowski, Ted White, and others here noted, in October 1867, a "young person of color," recent slave Elizabeth Turner, through a lawyer, petitioned Chase for habeas corpus release from performing her obligations under an apprenticeship contract she had made with her former master, "a gentleman of substance who had been the owner of her, her mother and other slaves." The owner's name, Philemon T. Hambleton, is fit for Victorian romances or TV sitcoms. But neither love nor laughter fit Turner's situation.

Maryland's new 1864 constitution had changed her status from slave to free, but not equal. Again, to quote Chase's case reporter:

The legislature of Maryland in regard to apprenticeship of white persons and free negroes, [during the slavery centuries] had always preserved the broad line of demarkation between the white ruling race, and the black subject one.... [T]he free negro, while having no political rights, was entitled to civil or legal rights to a large degree, but not equally with the whites. Under these circumstances

the petitioner had been apprenticed [to Hambleton], immediately after the enfranchisement of the slaves.\(^9\)

Chase, “in view of the importance of the questions involved,” wanted Hambleton to discuss them fully and adjourned court for a day “to give anyone interested an opportunity to be heard.” But, disappointing Chase and frustrating historians, the next day, no counsel appeared for Hambleton. He “had expressed his intention not to be thus represented, and no member of the Bar indicated ... a desire to be heard as amicus curiae.” Thereupon, Chase issued his decision and opinion. Intentionalists please note that despite the brevity of Chase’s statement, in it he attended to law, history, and other externalities.

The Chief Justice specified that two days after Maryland abolished slavery, Hambleton had collected his former slaves “under some local authority, the nature of which does not clearly appear, and the younger persons [including Turner] were bound as apprentices, usually, if not always, to their late masters.” Then, after comparing Maryland’s two standard apprenticeship agreements, one for whites and the other for blacks, Chase decided that “the variance is manifest.” Because of her race, Turner, Chase continued:

is not entitled to any education; a white apprentice must be taught reading, writing and arithmetic. The petitioner [Turner] is liable to be assigned and transferred at the will of the master to any person in the same county; the white apprentice is not so liable. The authority of the master over the petitioner is described in the [Maryland] law as a ‘property and interest’; no such description is applied over a white apprentice.\(^{10}\)

Then, as if further to confound historians, Chase, adverting to docket pressures, felt it “unnecessary to mention other particulars” supporting Turner’s petition. He offered, however, the following views as “sound law”: (1) that the Thirteenth Amendment “establishes freedom as the constitutional right of all persons in the United States;” (2) that Turner’s “alleged apprenticeship ... is involuntary servitude” prohibited by the Thirteenth Amendment; (3) that the race inequalities in Maryland’s apprenticeship law violated the 1866 Federal Civil Rights Act; (4) that the Civil Rights Act, enforcing the Thirteenth Amendment, was itself

\(^9\)JOHNSON, supra note 5, at 158.

\(^{10}\)Id. at 159.
constitutional, "and applies to all conditions prohibited by it, whether originating in transactions before or since its enactment"; and (5) that "Colored persons ... equally with white persons are citizens of the United States."

As Professor Kaczorowski made vividly clear, Chase discharged Turner from Hambleton's "custody ... upon the ground that the detention and restraint is in violation of the constitution and laws of the United States." Hambleton had also to pay court costs.

Elizabeth Turner has faded from history. She is remembered only rarely as in the present paper and in others at this meeting. For a young black woman to sue a white male Marylander in 1867 for any reason required great courage and determination. Someday I hope to learn her fate and that of her attorney. Bravery was needed on his part as well as hers. Was he a full- or part-time solo practitioner or Freedmen's bureau lawyer? Did his private practice suffer? Further neither the published record nor Chase's manuscripts sayeth anything.

Professor Kaczorowski's further resurrection of Ex parte Turner is itself praiseworthy, and I offer it. He surveyed cogently also many other aspects of Chase's sadly truncated judicial career. Throughout his comprehensive paper, Professor Kaczorowski contributed a sense of how complex were the hangover opportunities and constraints that defunct slavery bequeathed to post-Appomattox Americans. Opportunities stemmed from Lincoln's vision that in sovereign manner the Thirteenth Amendment cured all America's ills. Constraints derived from the sad stew slavery had made of many human relationships and the base and noble uses to which lawyers, while performing professionally on behalf of clients, put the laws and altered Constitution. In my opinion, both Chief Justice Chase and Professor Kaczorowski are correct in their views of the recent history undergirding the post-Appomattox amendments, views the latter placed in this legal history context:

The framers of the Fourteenth Amendment legislated within a legal framework that barred the kind of legal action against state officials to remove legal disabilities unconstitutionally imposed by

11. Id. at 160.
12. Id. at 160-161.
state law that we, today, have come to regard as a commonplace. The framers, guided by nineteenth-century rules of dual federalism, state sovereign immunity, and equitable relief, would not have thought in terms of civil suits against a state to enjoin the enforcement of discriminatory state action as a remedy for the enforcement of constitutionally-secured [private] rights.

Moreover, the notion of public rights enforced through public lawsuits brought against governmental agencies and officials on behalf of aggrieved groups did not exist.... The model of rights-enforcement... was a civil suit between private parties, not an action by an aggrieved individual or class against the state.  

I agree also with Professor Kaczorowski, Chase, and Lincoln that the war-born Thirteenth Amendment prohibited formal slavery and what moderns call its persisting incidents everywhere in the American universe. Further, it seems clear that the prohibition embraced private contracts that substantively reduced any person to the legal condition of involuntary servitude broadly equivalent to a state-defined chattel, as in Elizabeth Turner's instance.

The broadness is suggested by a frequent, nettlesome, but important correspondent of both Chase's and Lincoln's, Michael Hahn of Louisiana. In November 1865, when the Civil Rights Act and Fourteenth Amendment were unthought of and only the Thirteenth Amendment measured the war's effects, Hahn addressed a Washington audience. Decrying the reforming but unreformed southern states' black codes, he urged the new Chief Justice and the lawmakers of the imminent Thirty-Ninth Congress to look carefully at the unstated but visible purposes and effects of other, less obvious internal race policies. "Let us not mince matters; let us call things by their right names," Hahn urged. The nation should "throw its protecting arms around liberty and secure the substance as well as the name of freedom." The South's states, counties, and towns were applying policies "which, in substance and reality,... in all but the name... revive all the features of the institution." Towns' "sunset" ordinances; pass requirements only for black employees; exclusions of Negroes from specified housing areas; inequitable tax rates; bans on blacks owning guns, serving in county militias or towns' constabularies, assembling to petition; and, particularly meaningful in the context of Elizabeth Turner's lawsuit, states' "laws

13. Kaczorowski, supra note 6, at 159.
concerning apprenticeship and vagrancy," were all, "under the color" of delegates state authority "insidious approaches to slavery."14

Among its many other merits, Professor Kaczorowski's paper returns our attention, if too briefly I complain greedily, to the Thirteenth Amendment and its enforcing statute, the 1866 Civil Rights Act. The Fourteenth Amendment repealed neither, and both are still on the books. The Slaughter-House majority helped to sanction judicially the legal profession's fateful, unhistorical relegation of the Thirteenth Amendment and the Civil Rights Act to obscure sidelines of jurisprudence, legal practice, and historical analysis. Building on Slaughter-House, generations of constitutional law academics in Langdell-inspired, case-fixated law schools and imitative political science "con law" courses, perpetuated this unfortunate and unnecessary relegation. This fact affirms the wisdom of W. H. Auden's poetic admonition: "Never sit next to a statistician/Nor commit a social science."

In closing, permit me to note that almost a decade ago, Stephen Botein, an extraordinarily talented young legal historian, died, tragically young. He had become discouraged at the widening chasms of research and interpretation separating historians from lawyers. "Let lawyers be their own legal historians ... and let

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14. Michael Hahn, Manhood the Basis of Suffrage, Speech Before the National Equal Suffrage Association of Wash. (Nov. 17, 1865), at 2-3; G. Edward White, Reconstructing the Constitutional Jurisprudence of Salmon P. Chase, Speech at the Symposium on Salmon P. Chase and the Chase Court: Perspectives in Law and History (Oct. 1, 1993), in 21 N. KY. L. REV. 41. Professor White agrees that:

In re Turner conveyed the unmistakable message that in the newly-reconstructed American republic, states which sought to continue the practice of deciding for themselves what comparative treatment they wanted to give their black and white residents could expect to have such decisions scrutinized, and possibly overturned, by the federal courts. To be sure, the practices scrutinized in Turner were blatant efforts to perpetuate discriminations that followed from a world in which slavery had been permitted, and the Thirteenth Amendment had expressly disapproved of that world. But a great many other comparable practices existed in former slaveholding states, and Chase's posture in Turner invited challenges to any such practices. ... In short, Chase's opinion in Turner announced that the federal courts would be available to any freed black who sought to show that state laws continued to permit blacks to be held in a condition of "involuntary servitude" or treated them differently from whites with respect to their persons or property. As such the opinion demonstrated that at least with respect to slavery or its vestiges, Chase's deep conviction that slavery was wrong as a matter of principle trumped any solicitude he had for allowing states latitude to define the civil rights of their residents as they saw fit.

Id. at 77-78.
historians be the same,” Botein wrote in what I believe is his final published piece. “Once in a while they may have something to say to one another.”

“Once in a while” is now.

A COMMENT ON THE CHASE COURT AND FUNDAMENTAL RIGHTS

by Lowell F. Schechter*

I. INTRODUCTION

In addressing the topic of the Chase Court and fundamental rights, Professor Kaczorowski has focused his attention on the Slaughter-House Cases, which he considers not only the most significant fundamental rights case decided by the Chase Court, but "one of the most important cases ever decided by the United States Supreme Court." The basic thesis of Professor Kaczorowski's paper is that Justice Miller's exceedingly narrow interpretation of the Privileges and Immunities Clause, restricting it to a few relatively unimportant rights, directly contravened the intentions of the congressional drafters and supporters to provide broad federal protection for all fundamental rights. Professor Kaczorowski proceeds to argue that this narrow reading effectively nullified the revolution in American constitutionalism wrought by the framers of the Fourteenth Amendment and to a series of decisions legalizing "American apartheid." At the conclusion of his paper, Professor Kaczorowski speculates about what might have happened if Salmon P. Chase had not been days away from his death when the Slaughter-House Cases were decided in 1873. What if he had retained some of his earlier vigor? Would the result have been different? Might he have persuaded Justice Strong to provide a fifth vote for the dissenters? Professor Kaczorowski concludes his paper:

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1. 83 U.S. (16 Wall.) 36 (1873).
3. Id. at 151-52.
4. Id. at 191.
5. Id.
Had a healthy Chase been able to hold [Strong] with the dissenters, American legal and constitutional history very likely would have been different.6

It is not my purpose in this comment to directly challenge the basic part of Professor Kaczorowski’s thesis that Miller’s interpretation was in direct conflict with the intention of the drafters. However, I would note that there has been a long and vigorous debate over (1) what the congressional framers really intended and (2) whether the state legislators whose approval was necessary for the ratification of the Fourteenth Amendment had the same intentions.7 Nor is it my purpose to engage in an extensive debate over Professor Kaczorowski’s culminating suggestion that a healthy Chase’s power to persuade one more justice to join his side in the Slaughter-House Cases would have significantly altered our constitutional history. However, I would suggest that even if Professor Kaczorowski’s basic thesis is correct—even if Justice Miller’s vision of the Fourteenth Amendment was in direct conflict with the vision of the congressional framers—Justice Miller's vision was probably more consonant with the views of the legal community and the society at large, which were not ready to grant full equality to the newly freed slaves nor willing to fundamentally alter the federal constitutional structure in order to do so.8 Therefore, I have my doubts whether any change in doctrine in this one case at the Supreme Court level would have, in practice, produced much more effective protection of the rights of African-Americans or appreciably slowed the development of a legally segregated society in the latter third of the nineteenth century, given public resistance both to continuing Reconstruction in the South and to providing true equality in the North.

Whether a broader interpretation of the Privileges and Immunities Clause in the Slaughter-House Cases might have provided us in the last third of the twentieth century with a more solid basis than the Due Process Clause for protecting individual rights from government abuse is another, perhaps more interesting

6. Id.
8. See, e.g., discussion infra Part III., concerning contemporaneous state court decisions restrictively interpreting the Fourteenth Amendment and denying African-American children the right to attend white schools.
question to ponder. However, my basic purpose is not to speculate about what might have been, but rather to discuss what actually did happen from a local perspective. And in doing so, I want to embellish upon a recurring theme in Professor Kaczorowski’s work: the incredible ironies that run throughout the Slaughter-House Cases.

Examining the proceedings, Professor Kaczorowski notes that the plaintiffs who were seeking to take advantage of the protection of fundamental rights seemingly offered by the Fourteenth Amendment were not black freedmen, but white butchers.9 He points out that the law they were protesting was not one enacted by an unreconstructed Southern legislature, but one passed by the reconstructed Republican government of Louisiana.10 As a result, we have the curious spectacle of one of the attorneys for the butchers, John Campbell, a former Supreme Court justice turned secessionist, arguing for a broad interpretation of federal power under the Fourteenth Amendment; while one of the attorneys for the Louisiana legislature, Thomas J. Durant, a professed Radical Republican, pleads for a narrow reading of the same amendment.11

Reviewing Justice Miller’s opinion, Professor Kaczorowski expresses the view that Miller did not have to reach the issue of the meaning of the Fourteenth Amendment given his finding that the Louisiana legislation was a perfectly legitimate exercise of the police power to protect public health.12 He notes that Justice Miller’s decision upholding a Southern state’s power to create a monopoly was welcomed in some quarters for at the same time protecting the power of Northern state legislatures to control monopolies and to regulate major business interests without interference.13

Finally, he points to the charge of judicial legislation leveled against Justice Miller’s opinion’s restrictive interpretation of the Privileges and Immunities Clause by the dissenters:

In what today seems ironic, Swayne admonished the majority for taking liberties with their construction of the Thirteenth and

10. Id.
11. Id. at 177.
12. Id. at 178-79.
13. Id. at 189.
Fourteenth Amendments, a criticism levied in recent years by narrow-construction originalists against liberals who seek to interpret the Fourteenth Amendment in broad ways to reach liberal results.  

I propose to pursue and embellish on this theme of Professor Kaczorowski's by discussing certain other ironies which I believe are especially poignant given the site and purpose of this Chase Symposium: at a university physically situated in Kentucky, but also serving a metropolitan region centered in Ohio; at a law school existing independently in Cincinnati for eighty years before moving to join Northern Kentucky University for the last twenty; and at a centennial celebration designed to honor the namesake of the law school, a prominent resident of this metropolitan region who, after being governor of Ohio, United States senator, and secretary of the treasury, became chief justice of the United States Supreme Court.

In elaborating on this theme, I will first contrast the respective roles of Chief Justice Chase and Justice Miller in the Slaughter-House Cases, then compare two contemporaneous state cases, the Kentucky Supreme Court's decision in Marshall v. Donovan\textsuperscript{15} and the Ohio Supreme Court's decision in Ohio ex rel. Garnes v McCann,\textsuperscript{16} with the Slaughter-House Cases, and finally comment on Chief Justice Chase's role in another Supreme Court decision involving fundamental rights, Bradwell v. Illinois,\textsuperscript{17} handed down only two days after the Slaughter-House Cases.

II. THE RESPECTIVE ROLES OF JUSTICES CHASE AND MILLER IN THE SLAUGHTER-HOUSE CASES

We are engaged here today in a centennial celebration of the Salmon P. Chase College of Law's namesake, an eminent Ohio statesman and jurist. Professor Kaczorowski has chosen to focus his paper on the Slaughter-House Cases as the most important decision of the Court during Chief Justice Chase's tenure, and I am in no way suggesting that this choice is wrong. But it does present us with somewhat of a problem, in that, in marked

\textsuperscript{14} Id. at 187.
\textsuperscript{15} 73 Ky. (10 Bush) 681 (1874).
\textsuperscript{16} 21 Ohio St. 198 (1871).
\textsuperscript{17} 83 U.S. (16 Wall.) 130 (1873).
contrast to his most well-known predecessors—Chief Justice Marshall, who authored the Court's opinion in *Marbury v. Madison*,\(^\text{18}\) the most important case of his tenure, and Chief Justice Taney, who wrote the majority opinion in *Dred Scott v. Sandford*,\(^\text{19}\) the defining decision of his stay—Chief Justice Chase did not write the majority opinion in the *Slaughter-House Cases*. Chief Justice Chase was not even in the majority.

There is certainly no shame in writing a great dissent on the losing side—certainly the first Justice Harlan is remembered today for his magnificent dissent in *Plessy v. Ferguson*,\(^\text{20}\) but Chief Justice Chase, probably because of his illness, was the only dissenter in the *Slaughter-House Cases* not to write a dissenting opinion. To give Chief Justice Chase his due as a supporter of individual rights, therefore, I want to mention his role in *Bradwell v. Illinois*,\(^\text{21}\) decided just two days after the *Slaughter-House Cases* on April 15, 1873 and less than a month before his death on May 7, 1873.\(^\text{22}\)

Before going on to *Bradwell*, however, it is appropriate, especially given our Kentucky roots, to note the role of the Justice who did write the majority opinion in the *Slaughter-House Cases*, Justice Samuel Miller,\(^\text{23}\) a man who, during a span of twenty-eight years on the Court, wrote 615 other opinions for the Court. For Justice Samuel Miller was a native of Kentucky. Born in Richmond, he earned his M.D. degree from Transylvania University in Lexington and practiced medicine in Barbourville until, evidently finding the practice of medicine unsatisfying, he took up the profession of law.

What I want to stress about Justice Miller's background is that during the 1840s he actively campaigned for the emancipation of the slaves. He even sought election as a delegate to the 1849 convention to revise the Kentucky Constitution on a pro-emancipation platform, but eventually withdrew his candidacy to

\(^{18}\) 5 U.S. (1 Cranch) 137 (1803).
\(^{19}\) 60 U.S. (19 How.) 393 (1857).
\(^{20}\) 163 U.S. 537 (1896).
\(^{21}\) 83 U.S. (16 Wall.) 130 (1873).
\(^{23}\) For a more detailed treatment of Justice Miller's judicial career, see CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890 (1939).
support another pro-emancipation candidate. The 1849 Convention, however, resulted in a new Kentucky Constitution which was more strongly pro-slavery than the old constitution, expressly endorsing the practice of slavery and the rights of the slave owner. According to Miller's biographers, it was this endorsement of slavery in Kentucky which propelled him into leaving the slave-state of Kentucky for the free-state of Iowa, where he soon became a leading Republican and an early Lincoln supporter. 24

My point is that the author of the majority decision in the Slaughter-House Cases—a decision which, while it did not deal directly with the rights of African-Americans, quite clearly was going to limit federal protection for African-Americans—was not someone who previously had been uninterested, indifferent, or uncaring on the issue of slavery; rather, he was an individual who had been actively engaged in fighting against slavery, who had left his home state over its support of slavery, who had freed his own slaves, and who had been an early and staunch supporter of the Republican party. 25

If such a staunch Republican and long-time opponent of slavery such as Samuel Miller was willing in the Slaughter-House Cases to interpret away federal power to enforce the civil rights of blacks—whether to protect state regulation of business from federal intervention or for some other reason—how much support for full equality for blacks could be expected anywhere else in the federal or state judiciaries? 26 This question may be answered, in part, by examining two contemporaneous Kentucky and Ohio Supreme Court decisions: Marshall v. Donovan and Ohio ex rel. Garnes v. McCann.

26. There is another irony worth noting about Miller's opinion in the Slaughter-House Cases. After Salmon P. Chase died, Samuel Miller was the leading candidate to succeed Chase as chief justice. President Grant, however, chose Morrison Waite instead. Professor Kaczorowski points out that Miller expressed the belief that opposition to his nomination by Justices Bradley and Swayne, engendered by his opinion in the Slaughter-House Cases, was responsible for his failure to get the nomination. Given Miller's Kentucky roots and his long service on the Supreme Court, had he in fact become Chief Justice, we might well be holding this centennial symposium at the Samuel Miller, rather than the Salmon Chase, College of Law. Kaczorowski, supra note 2, at 188 n.160.
III. CONTEMPORANEOUS LOCAL DECISIONS ON THE MEANING OF THE PRIVILEGES AND IMMUNITIES CLAUSE

Marshall v. Donovan and Garnes v. McGann were both decided in the early 1870s and both addressed the same issue of constitutional interpretation raised in the Slaughter-House Cases—the scope of protection offered by the Fourteenth Amendment. In both these cases, however, the question of interpretation of the Privileges and Immunities Clause arose in the context of state legislative schemes excluding black students from public school systems reserved for whites. The Ohio Supreme Court case, Ohio ex rel. Garnes v. McCann, was decided in 1871, two years before Slaughter-House, while the Kentucky case, Marshall v. Donovan, was not decided until 1874, the year after Slaughter-House. Nevertheless, I want to discuss the Kentucky case of Marshall v. Donovan first.

Marshall was a white resident of Bracken County who challenged the seizure of his cow for unpaid school taxes. He argued that the Kentucky law which provided for the establishment of public or “common” schools for white students only, after a vote limited to qualified white residents, through a tax imposed only on white residents, violated the Civil War Amendments.

I doubt that it would surprise anyone here that in 1874, a year after Slaughter-House, the Supreme Court of Kentucky, a former slave state, would give a very restrictive interpretation to the Privileges and Immunities Clause and that it would cite the Slaughter-House decision in support of this interpretation:

We need not inquire critically as to the rights intended to be conferred upon the negro as a citizen of the United States. Whatever interest he may claim in the school-fund of Kentucky, if any, and whatever benefits he may be entitled to under our system of common schools, he must receive as a citizen of this commonwealth, and not as a citizen of the United States.

These interest and benefits are privileges and immunities pertaining to the citizenship of the state owning the school-fund and maintaining the school-system, and they must be secured and protected by the state government. They do not fall within the

27. 21 Ohio St. 198 (1871).
28. 73 Ky. (10 Bush) 681 (1874).
29. Id. at 683-84.
class of fundamental rights which, according to the opinion of the Supreme Court in the Slaughter-House Cases, are under the special care of the Federal government. 30

While the Kentucky Supreme Court's decision cited the Slaughter-House majority's narrow interpretation of the Privileges and Immunities Clause, it did not believe that narrow interpretation was necessary to sustain the Kentucky school law from attack. For the Kentucky Supreme Court went on to hold that even if the Court were to be guided by the broad enumeration of fundamental rights contained in the civil rights bills, which included such rights as the right to make and enforce contracts and to lease, sell, hold, and convey real estate, none of these enumerations included the right to "participate in the advantages of the common-school system." 31

More surprising, perhaps, is the Ohio Supreme Court's decision in Garnes v. McCann. Under Ohio law, school townships or districts were authorized to establish separate schools for colored children when there were twenty or more colored children in the district. If there were fewer than twenty colored children in one township or district, then it might join with a neighboring township or district to provide a school, which was to be governed by the district or township in which the school was physically located. 32

William Garnes was a black man with three children in a district with fewer than twenty black children, so his children were required under the law to attend an inter-district school for colored children, which was located in a neighboring district. Garnes's attorney argued that Garnes was not only denied the privilege of having his children attend school in the district in which he lived, but also the district in which he voted and might have a voice in the management of the school. 33

Two years before the Slaughter-House decision, the Supreme Court of Ohio, Salmon Chase's home state, adopted a narrow interpretation of the Privileges and Immunities Clause, distinguishing between states' rights and federal rights, and holding

30. Id. at 688-89.
31. Id. at 690.
32. 51 Laws of Ohio 441 (1853). See discussion in Ohio ex rel. Garnes v. McCann, 21 Ohio St. 198, 205-07 (1871).
33. Garnes v. McCann, 21 Ohio St. at 200.
that only the federal rights were protected by the clause.

The language of the clause ... taken in connection with other provisions of the amendment, and of the constitution of which it forms a part, affords strong reason for believing that it includes only such privileges or immunities as are derived from, or recognized by, the constitution of the United States. A broader interpretation opens into a field of conjecture limitless as the range of speculative theories, and might work such limitations of the power of the States to manage and regulate their local institutions and affairs as were never contemplated by the amendment.34

The Ohio Supreme Court concluded that:

If this construction be correct the clause has no application to this case, for all the privileges of the school system of this State are derived solely from the constitution and laws of the state.35

The Ohio Supreme Court also denied that there was any violation of the Fourteenth Amendment through unequal treatment of blacks and whites. Both sets of children were provided with schools and equality of rights did not necessitate educating white and colored children together in the same school.36

It should be stressed that the Kentucky and Ohio decisions were representative of state court decisions of that day. As Professor Nelson points out in his book on the Fourteenth Amendment, while the Iowa Supreme Court did hold that the Fourteenth Amendment barred segregation in public schools, the supreme courts in California, New York, and Pennsylvania came to the same result as the courts in Kentucky and Ohio.37

IV. CHIEF JUSTICE CHASE AND FUNDAMENTAL RIGHTS IN BRADWELL V. ILLINOIS

Given that the topic for this panel is the Chase Court and fundamental rights, some mention should be made of the Chase Court’s consideration of “fundamental rights” in Bradwell v. Illinois,38 a decision handed down only two days after the decision in the Slaughter-House Cases. Bradwell was similar to the Slaugh-
ter-House Cases in that it involved a white person's claim that
the state action in question restricted that person's privilege of
earning a livelihood in that person's chosen field of occupation
and therefore violated the Privileges and Immunities Clause of
the Fourteenth Amendment. Bradwell was different in that the
person raising that challenge was a woman, Myra Bradwell,39
who had been denied admission to the bar in Illinois on the
grounds that women were not eligible for admission under the
laws of Illinois.

It should be noted that the legislature in Illinois had never
enacted any express limitation against women entering the legal
profession. In fact, the Illinois legislature had delegated the
authority to admit individuals to the practice of law to the Illinois
Supreme Court, with the only express limitation on the Supreme
Court's authority being that the person be of good moral char-
acter.40 Nevertheless, the justices of the Illinois Supreme Court
reasoned that they would be violating an implied limitation on
their delegated power to admit women, because:

If we were to admit them, we should be exercising the authority
conferred upon us in a manner which, we are fully satisfied, was
never contemplated by the legislature.41

Myra Bradwell's Fourteenth Amendment privileges and im-
munities claim posed little difficulty for Justice Miller, who wrote
the opinion for the same five justices who made up the Slaughter-
House majority. Given the majority's narrow interpretation of
the Privileges and Immunities Clause in the Slaughter-House
Cases—restricting the clause to apply to only a limited number
of privileges specifically arising from the special status of federal
citizenship—it was clear that the right of practicing law within
a state related to state, rather than federal, citizenship and was
simply not protected by the Fourteenth Amendment's Privileges
and Immunities Clause.42

Myra Bradwell's claim presented somewhat more difficulty for
the dissenters in the Slaughter-House Cases, who had taken the
position that the Fourteenth Amendment's Privileges and Im-

39. For a recently published biography of Myra Bradwell, see JANE FRIEDMAN, AMER-
40. Bradwell, 83 U.S. (16 Wall.) at 131.
41. In re Bradwell, 55 Ill. 535 (1869).
42. Bradwell, 83 U.S. (16 Wall.) at 139.
munities Clause protected all fundamental rights, including the right of the individual to pursue the profession, occupation, or employment of choice. Three of the four Slaughter-House dissenters, however, also rejected Myra Bradwell's Privileges and Immunities Clause claim in an opinion written by Justice Bradley. Justice Bradley reached this result by "emasculating," or should we say "eviscerating," the clause in a different way—by holding that the privileges and immunities possessed by men could not necessarily be claimed by women.\textsuperscript{43} According to Justice Bradley, Myra Bradwell's claim:

\begin{quote}
[A]ssumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation or employment in civil life. It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex.\textsuperscript{44}
\end{quote}

Justice Bradley then went on to deliver a peoration on the fundamental differences between men and women, which included the often quoted passage:

\begin{quote}
The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exception cases.\textsuperscript{45}
\end{quote}

It is a bitter irony that Justice Bradley, the supporter of broad federal protection for fundamental rights in Slaughter-House, probably ended up doing far more damage to the protection of the fundamental rights of women over the next century by his opinion in Bradwell than Justice Miller did by his decision in Slaughter-House. For the Bradley opinion, with its emphasis on the differences between men and women, could be used to refute any claims by women of violation of the Equal Protection Clause as well.

Only one Supreme Court justice dissented in Bradwell: the dying Chief Justice, Salmon P. Chase. We cannot be certain why Chief Justice Chase dissented. I have found a copy of a letter from Chief Justice Chase, written in his own hand, to Justice

\begin{flushright}
\textsuperscript{43} Id. at 140-41 (Bradley, J., dissenting). \textsuperscript{44} Id. at 141. \textsuperscript{45} Id. at 141-42.
\end{flushright}
Field, dated April 13, 1873, concerning his Bradwell dissent, in the Chase Papers, but all this brief letter (really a note) says is:

Will you please say for me that I dissent from the opinion in Myra Bradwell v. Illinois. I think it better to dissent generally, than to dissent from the reasoning(?) of the opinion.46

Another letter written by Chase in December of 1872 may, however, provide some explanation. Evidently replying to a correspondent who had praised his support for opening employment at the Treasury Department to women during the Civil War, Chase wrote a private note in which he concluded that:

I have always favored the enlargement of the sphere of woman's work and the payment of just compensation for it.

V. CONCLUSION

Although we may never fully know the reasons for his dissent, Chase's lone dissent in Bradwell compels even more admiration than his participation as one of four dissenters in the Slaughter-House Cases. And while the views expressed by Justice Miller in his majority opinions in the Slaughter-House Cases and Bradwell v. Illinois may have been more consonant with the beliefs of the society of that time, the dissenting votes cast by Chief Justice Chase in these cases are good reason to honor him today at this centennial celebration.

46. Letter from Salmon Chase to Stephen J. Field (Apr. 13, 1873), COLLECTED PAPERS OF SALMON P. CHASE, ser. 1., # 16086.
AN UNEASY PARTNERSHIP: THE POLITICAL RELATIONSHIP BETWEEN SALMON CHASE AND ABRAHAM LINCOLN

by Susan J. Court*

Salmon Chase as an historical figure suffers from the same problem as most contemporaries of Abraham Lincoln. There is no comparison. Some could not match Lincoln's wisdom or integrity. Others could not match his intelligence or vision. Chase was a man of integrity. Chase was an intelligent man. Chase, however, was remarkably stuffy even for a relatively formal era. He adhered to forms and disliked humor at official gatherings.1 Lincoln, of course, was remarkably witty and amiable. "Chase was always the quintessence of cold dignity and reservation; the type of man who was admired and respected but never loved as was Lincoln."2

Chase and Lincoln's first meeting exemplifies their differences. Lincoln had recently been elected president of the United States. He was still in Springfield, Illinois, where he was forming his cabinet. Chase, whom Lincoln had summoned to Springfield, was staying at a local hotel. Without warning, Lincoln called on Chase. Chase was aghast at the casualness of this encounter. Not only did the president-elect visit him (when protocol would have required the reverse), he did so unannounced and unscheduled.

The Chase-Lincoln meeting in late 1860 set the tone for their subsequent relationship which was, without question, an uneasy partnership. Their "relationship" before they met, however, was notably different. They were closely, although not identically, aligned philosophically. Both opposed slavery. Both worked in their respective states for similar goals. Both sought public office, although Chase was more successful than Lincoln. He was elected

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1. ALONZO ROTHSCHILD, LINCOLN, MASTER OF MEN: A STUDY IN CHARACTER 184 (1906).
twice as Ohio governor (1855 and 1857) and twice as a United States senator (1848 and 1860).

In 1858, Chase campaigned for Lincoln in Illinois, although they never met during that campaign. Lincoln was very grateful for Chase's efforts. "As to Governor Chase," Lincoln wrote, "I have a kind side for him." As Lincoln approached the 1860 Republican nominating convention, he cautioned his cohorts to avoid doing any "ungenerous thing towards Governor Chase, because he gave us his sympathy in 1858, when scarcely any other distinguished man did." Lincoln, in his writings of the late 1850s, repeatedly praised Chase. He considered the Ohioan "renowned," "distinguished," "right-minded"—a man with "ability, firmness and purity of character."

Lincoln believed that Chase was a viable candidate for president in 1860, so their rivalry for the nomination in that year didn't surprise Lincoln. Chase thought otherwise. He considered himself a front-runner, because he had worked hard, writing letters, traveling, and campaigning for others. He further believed his reelection as Ohio's governor in 1857 and his election to the United States Senate in 1860 were signs of his political strength. Yet on the first ballot at Chicago, Chase received only forty-nine out of 465 votes.

With this backdrop, Chase's reaction to his initial meeting with Lincoln is even more understandable. Chase thought he was more qualified to be president, and the then president-elect didn't even

5. Letter from Abraham Lincoln to Samuel Galloway (March 24, 1860), in Lincoln, Speeches and Writings, supra note 3, at 151-52.
6. Abraham Lincoln, Speech Delivered at Columbus, Ohio (Sept. 16, 1859), in 3 Collected Works, supra note 3, at 401.
7. Letter from Abraham Lincoln to Salmon P. Chase (May 26, 1860), in 4 id. at 53.
8. Letter from Abraham Lincoln to Samuel Galloway (July 28, 1859), in 3 id. at 395.
9. Letter from Abraham Lincoln to Lyman Trumbull (Jan. 7, 1861), in 4 id. at 171.
treat the position with appropriate respect. Further, Lincoln did not ask Chase to join his cabinet immediately after this meeting in Springfield. He waited a couple months. In fact, Chase had already been sworn in as United States senator when the invitation arrived. His feelings were hurt. Only after a private meeting with Lincoln did Chase accept the nomination.\textsuperscript{12}

Lincoln's selection of Chase as secretary of the Treasury was based on Lincoln's opinion of Chase as a "distinguished" man, his recognition of Chase as a standard bearer of the party, and his gratitude for Chase's support in 1858. Also, Lincoln believed that Chase in his cabinet provided a balance to William Seward. The Secretary of the Treasury and the Secretary of State represented West and East, Democrat and Whig, Radical and Conservative.\textsuperscript{13}

A remarkable aspect of the following four years was that Chase remained on the cabinet. Lincoln and Chase were often at odds. Moreover, and especially incomprehensible from a modern perspective, Chase persistently and consistently criticized the President. He criticized Lincoln's position on slavery.\textsuperscript{14} He blamed Lincoln personally for the mismanagement of the war and the failures of the executive branch.\textsuperscript{15} Yet, Chase did not consider himself disloyal criticizing a government in which he held a prominent and confidential position.\textsuperscript{16} In his opinion, there was no real administration and what existed was reckless, negligent, and extravagant. Thus, he felt justified openly courting disaffected and disgruntled military and political figures, never hesitating to give his advice on how the war and the government should be run.\textsuperscript{17}

Chase's criticism of Lincoln and the administration reflected his self image. He believed that he was capable and that his

\textsuperscript{12} Jacob W. Schuckers, The Life and Public Services of Salmon Portland Chase 201, 207 (1884); Hart, supra note 10, at 202, 206.
\textsuperscript{13} Letter from Abraham Lincoln to Lyman Trumbull (Jan. 7, 1861), in 4 Collected Works, supra note 3, at 171; Hart, supra note 10, at 206; Reinhard H. Luthin, Salmon P. Chase's Political Career Before the Civil War, 29 Miss. Valley Hist. Rev. 531 (1943) 531; Rothschild, supra note 1, at 160.
\textsuperscript{15} Inside Lincoln's Cabinet, The Civil War Diaries of Salmon P. Chase 22 (David Donald ed. 1954) [hereinafter Civil War Diaries]; Zornow, supra note 2, at 7.
\textsuperscript{16} Rothschild, supra note 1, at 179.
\textsuperscript{17} Smith, supra note 10, at 556, 773; Rothschild, supra note 1, at 179.
colleagues were inept. In a letter to J. W. Hartwell on February 2, 1864, Chase wrote: "So far I think I have made few mistakes. Indeed, on looking back over the whole ground .... I am not able to see where, if I had to do my work all over again, I should in any manner do materially otherwise than I have." Needless to say, he was consulted less and less, and the more remote he became from Lincoln the more he criticized.

Lincoln tolerated Chase for years for several reasons. For one thing, the practice of cabinet members' criticizing the chief executive was not uncommon. Also, Lincoln understood political ambitions. He understood a voracious appetite for the presidency. Most significantly, Lincoln did not like, and did not have a talent for, the business of Chase's department. He realized that Chase could "do no more harm [by his criticism] in the [administration] than he [could] outside." If the lure of the presidency made Chase work harder at the Treasury Department, so much the better for Lincoln. And Lincoln, with a distaste for finances, needed a strong administrator in that department to raise the revenue required to pay for an unexpectedly and increasingly expensive war. Chase quoted Lincoln in an entry on September 1863: "'You understand these things; I do not,' and [Lincoln] signed the approval [of Chase's financial recommendations]."

Also remarkable—and unheard of today—were Chase's efforts while a cabinet member to secure the 1864 Republican nomination for president. Earlier in that year, he had acted as a candidate by campaigning for Republicans in Ohio, Indiana, and Maryland, by permitting his friends to represent his interests in Pennsylvania and New York, by soliciting newspaper support, and by writing scores of letters. His approach was reminiscent of 1860. Again, he believed he could stand on his record and the people

18. Smith, supra note 10, at 773; Civil War Diaries, supra note 15, at 12.
19. Smith, supra note 10, at 773 (quoting letter from Salmon P. Chase to J. W. Hartwell (Feb. 2, 1864)).
20. Civil War Diaries, supra note 15, at 44.
23. Rothschild, supra note 1, at 209. This writer recounts a story in which Lincoln compared Chase's presidential aspirations to a "chin-fly"—a creature which would even make a lazy horse plow energetically.
25. Id. at 192.
would call him. On October 7, 1863, Chase wrote to Joshua Leavitt:

Perhaps I am over confident but I really feel as if, with God’s blessing, I could administer the government of this country so as to secure ... our institutions and create a part ... which would guarantee a succession of successful administrations. I may be over confident ..., and I shall take it as sign that I am, if the people do not call me, and shall be content.

Again, he deluded himself. Also, he failed to organize his efforts into a systematic, coordinated campaign. Events in December 1863, however, almost did that for him.

On December 8, 1863, Lincoln issued his proclamation of amnesty. Since this proclamation threatened to take the matter of Reconstruction out of their hands, the Radicals wanted to prevent Lincoln’s nomination in 1864. A group met on the following day in Washington and formed what was soon called the Republican National Executive Committee. They favored Chase as their standard bearer because he supported their program and because he needed no encouragement to run. Chase agreed with the Radical program, which refused to make any concessions to the South, demanded that slavery be abolished without condition, that the black man be accorded his full share of political rights, and that the terms for readmission into the Union should be dictated by Congress. Although Chase was not present at this meeting, he later consented to the use of his name and became

27. Id. at 604.
28. Id. at 586, 595-97, 772; Zornow, supra note 2, at 16-18, 20. Tactically, Chase had two enviable campaign advantages—his face was on the greenbacks, and his office controlled a patronage force of over 10,000 employees.
29. By this declaration, Lincoln proposed a general amnesty and restoration of property other than slaves to most of those who would take an oath of loyalty to the Union. The purpose of this proposal was to bring the seceded states back into normal relations with the federal government as painlessly as possible.
31. Zornow, supra note 2, at 18-19. The original members were primarily Ohioans—Robert Schenck, Rufus Spaulding, Whitelaw Reid, and Major D. Taylor. When the December 9 committee expanded, it included Senators Samuel Pomeroy of Kansas, James Winchell of New York, and Representatives John Sherman and James Garfield of Ohio. Id. at 19.
32. Id. at 10.
publicly involved. His one condition was that he would withdraw if he failed to win the support of Ohio.

In early February 1864, the Committee issued a pamphlet entitled The Next Presidential Election, which was a scathing denunciation of the Lincoln administration and a scurrilous attack on Lincoln personally. Although there was an immediate and negative reaction to this publication, the Committee proceeded to issue on February 20 another pamphlet called the Pomeroy Circular, which continued the attack on Lincoln and specifically suggested Chase as his replacement. The Pomeroy Circular criticized Lincoln as being too compromising and dragging on the war so that an insurmountable debt was being accumulated. The public furor to this circular was so great that the Ohio Legislature, in which repeated efforts to secure a Lincoln endorsement had been thwarted by Chase advocates, declared in favor of the president on February 25. In early March, Chase officially withdrew his name by writing Ohio friends who had his letter published in Columbus and Cincinnati newspapers.

Immediately following the publication of the Pomeroy Circular, Chase wrote Lincoln disavowing any connection with it and offering his resignation. Five days later, on February 29, 1864, Lincoln replied with a half-hearted rejection of the resignation. Lincoln concurred with Chase that neither should be held responsible for what their respective friends might do without their instigation or countenance. As to Chase's remaining at the Treasury Department, Lincoln said he would only consider the question from the standpoint of public service, and did not "perceive occasion for change." Meanwhile, Frank Blair, Chase's foe and Lincoln's ally, introduced a resolution in the House demanding a congressional investigation of Chase's department. Lincoln then nominated Blair as a major-general of volunteers, an action which

33. Id. at 19; Schuckers, supra note 12, at 476.
34. Smith, supra note 10, at 772.
35. Wilson, supra note 30, at 64.
36. Zornow, supra note 2, at 22, 27.
37. Id. at 21. This was not the first time Chase had offered to resign. He had resigned in December 1862, when pressure came from the Republican congressional caucus for Seward to resign. Lincoln was grateful because he more easily could reject two resignations than one. Schuckers, supra note 12, at 474-75; Smith, supra note 10, at 572.
38. Letter from Abraham Lincoln to Salmon P. Chase, Lincoln, Speeches and Writings, supra note 3, at 576-77.
Chase considered an endorsement of Blair's attack. Relations between the President and his treasury secretary, already strained, were now reaching their breaking point.

The final break between Lincoln and his treasury secretary occurred soon after Lincoln had secured the Republican presidential nomination. The cause celebre was a disagreement over a replacement for the assistant treasurer of New York City. Since this officer handled large sums of money and controlled over one hundred patronage jobs, the position was considered a political plum. Senator Edwin Morgan of New York had made several suggestions, none of which was satisfactory to Chase. Chase's choice was Maunsell B. Field, then assistant secretary of the Treasury. When Lincoln expressed reservations about Chase's selection, Chase tendered his resignation. One day later, on June 30, 1864, Lincoln accepted this resignation in a letter which praised Chase's fidelity and ability but noted that their official relations had reached a point of mutual embarrassment.

Chase left Washington almost immediately after his resignation, and primarily spent the summer visiting friends and relatives in New England. His opposition to Lincoln, however, had not ceased. A self-appointed committee of Republican leaders, dissatisfied with the war and Lincoln's approach to Reconstruction, met in New York on August 30, 1864, and called for another Republican convention. Chase's connection with this effort is unclear, although during the summer he visited many people who were involved in the movement. He also continued to criticize Lincoln in conversation and in print. More significantly, in a letter to the New York committee, he gave guarded approval of their scheme. And he sent a personal representative, William Noyes, to the August meeting.

This final Radical anti-Lincoln effort was short-lived because of Lincoln's increasing strength, especially after Sherman's army occupied Atlanta in early September. In addition, there was a strong reaction to the Democrat platform which condemned the war as a failure and called for peace, a signal for disunion to many loyal Northerners. Chase's enthusiasm consequently cooled

40. Schuckers, supra note 12, at 480.
41. Id. at 484-87.
42. Civil War Diaries, supra note 15, at 236-38; Smith, supra note 10, at 831.
43. Civil War Diaries, supra note 15, at 239.
and when he reached New York in September, he advised his friends to drop the project of a new Republican convention. By mid-September he indicated his support of the regular Republican ticket.\textsuperscript{44} He stopped complaining about Lincoln, and began actively campaigning for the president in Ohio, Kentucky, and Indiana.\textsuperscript{45}

During the campaign, Roger B. Taney, chief justice of the Supreme Court, died. His death on October 12 required Lincoln to replace a jurist who had served on the Court for twenty-eight years. The President was not without candidates. Associate Supreme Court Justice Noah Swany and Postmaster-General Montgomery Blair both vied for the position.\textsuperscript{46} Senator Charles Sumner supported Chase and, along with other Republicans, urged his appointment. Chase, who had as early as 1863 indicated his interest in the chief justice position, would not openly solicit the appointment.\textsuperscript{47} He did, however, write Sumner that he would accept if it were offered and Sumner showed this letter to the President.\textsuperscript{48} Chase was not without his opponents. In fact, on the morning of his nomination, a self-appointed deputation of his Ohio enemies waited upon the President to protest against it. They produced letters in which Chase freely criticized Lincoln. Lincoln’s response was that while Chase had said harsh things about him so had he said harsh things about Chase, and that seemed to square the account.\textsuperscript{49}

Lincoln delayed the appointment until after the election. On December 6, he sent Chase’s nomination to the Senate, where it was unanimously approved. Seven days later Salmon Portland Chase was sworn in as the sixth Chief Justice of the Supreme Court of the United States.\textsuperscript{50}

There is a theory that Lincoln appointed Chase to the Supreme Court to neutralize him as a presidential rival. This seems unfeasible. Chase’s threat to Lincoln in 1864 was totally non-existent by the time of Taney’s death. A threat four years hence was also unrealistic. In addition to the question of Lincoln’s seeking a

\textsuperscript{44} Id. at 254 (entry for Sept. 17, 1864); Smith, \textit{supra} note 10, at 827.

\textsuperscript{45} \textit{CIVIL WAR DIARIES}, \textit{supra} note 15, at 239, 254-59.

\textsuperscript{46} \textit{SCHUCKERS}, \textit{supra} note 12, at 487.

\textsuperscript{47} \textit{CIVIL WAR DIARIES}, \textit{supra} note 15, at 179-80 (entry for Aug. 30, 1863).

\textsuperscript{48} Id. at 240.

\textsuperscript{49} \textit{SCHUCKERS}, \textit{supra} note 12, at 487.

\textsuperscript{50} \textit{CIVIL WAR DIARIES}, \textit{supra} note 15, at 260.
third term, Chase had never proved a really viable opponent earlier when he was at the height of his political career. In both 1860 and 1864, he had failed to organize an effective campaign and to gain the support of a significant party vote getter. To appoint Chase to the Supreme Court, therefore, would have been an unnecessary political tactic. A better explanation is that Lincoln understood and appreciated Chase. He knew Chase to be consistently loyal to his own principles, especially in his attitude toward slavery and the rights of the black man, and to be religiously conscientious. Unfortunately, this understanding was notably one-sided. After years of much official and some personal association, Chase wrote about the President in his diary: "I feel that I do not know him." 51.

51. Id. at 254 (entry for Sept. 17, 1864).
Few biographers have attempted to write about the life of Salmon Portland Chase. On the other hand, thousands have written about Abraham Lincoln. When Lincoln and Chase were brought together by the Civil War, their political ideas and personalities had matured. They saw each other frequently during the great crises of the war. It should be instructive, therefore, to see how the best of the Lincoln biographers treat Chase.

One can expect Lincoln biographers to be sympathetic to the affable Lincoln and critical of the puritanical Chase. Such expectation is not disappointed, especially in the partisan biography by Lincoln's secretaries, Nicolay and Hay. But most respected Lincoln biographers were careful in their criticism of Chase, and many recognized the enormous service Chase rendered Lincoln. Indeed, Lincoln had so much confidence in Chase's ability that he rarely gave him any direction. He expected Chase to raise money to fight the war, and Chase did it, together with his political appointees and a notable financial advisor, Jay Cooke. In fact, Chase was left alone so much that instead of valuing his independence, he came to resent that Lincoln paid him so little attention.

It was inevitable that Chase and Lincoln would not understand each other. They were studies in contrast. Lincoln loved political campaigning; Chase tended to wait for a groundswell of support. Lincoln's pre-Civil War political career consisted of only a few terms in the Illinois legislature and a single two-year term in Congress; Chase's political experience was broader. He was twice elected United States senator and Ohio governor before meeting Lincoln. And, of course, he completed the cycle of national service by serving in the President's cabinet and, later, on the Supreme Court as chief justice. Finally, Lincoln wanted above all to pre-
serve the Union, whereas Chase's overweening purpose was to eradicate slavery. Chase began to fear a Southern conspiracy to nationalize slavery as early as 1839, but Lincoln did not develop the same concern until the 1850s.¹ And Chase always saw the Fugitive Slave Acts of 1793 and 1850 as unconstitutional, whereas Lincoln was not inclined to find them so.² In fact, Lincoln as a lawyer defended both sides in fugitive slave cases.³ In contrast, Chase was called the "attorney general for runaway negroes" because he defended fugitive slaves so often.⁴ In 1859, Lincoln warned Chase that a proposed plank for repeal of the Fugitive Slave Act would "explode" the Republican party.⁵

Lincoln and Chase came from different backgrounds and developed contrasting personalities. Chase was raised by a bishop of the Episcopal Church in Worthington, Ohio.⁶ Lincoln's political image was defined by his persona as a backwoods railsplitter. Chase grew up to be so devoted a church member that he recited psalms while bathing and dressing.⁷ Lincoln grew up in his father's Primitive Baptist churches and was known for his unflattering imitations of the preachers.⁸ Although he rented pews in the Springfield First Presbyterian Church and the New York Avenue Presbyterian Church in Washington, he never joined them. The degree of his piety has been questioned ever since.⁹ Chase was that rare individual in his day to have graduated from college—Dartmouth College, to be exact. Lincoln was almost entirely self-educated. "Chase was spoken of as "handsome," as having a "stately figure," a "classic face.""¹⁰ Lincoln was consid-

2. Id.; Letter from Abraham Lincoln to Alanzo J. Grover (Jan. 15, 1860), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 514 (Roy P. Basler ed. 1953) [hereinafter COLLECTED WORKS].
4. NEELY, supra note 1.
5. Letter from Abraham Lincoln to Salmon P. Chase (June 20, 1859), in 3 COLLECTED WORKS, supra note 2, at 386.
7. NEELY, supra note 1.
erred homely. Chase was married and widowed three times; he had two daughters who survived into adulthood. Lincoln had one son who survived into adulthood and was married to one woman, who survived him.

The impact of Lincoln's words on history might lead one to conclude that his writings were voluminous. It appears, however, that Chase's correspondence and other writings far exceeded Lincoln's. The most significant of Lincoln's speeches, letters, drafts, and fragments number only 795 pieces. Chase's output on microfilm numbers 14,500 documents, affirming the principle that quantity does not equate with quality.

In May of 1864, Lincoln asked the cabinet what actions should be taken against the Confederacy after the massacre of a large number of colored soldiers at Fort Pillow. Chase joined other cabinet members in urging the execution of an equal number of rebel officers held prisoner. Lincoln's instructions on May 17 to Secretary of War Edwin Stanton approved no such execution. Interestingly, on the same day, Lincoln sent to the Union officer in command at Fort Monroe, Virginia, one of those letters of mercy that so confounded Stanton. It read, "If there is a man by the name of William H. H. Cummings, of Co. H. 24th. Mass. Volunteers, within your command, under sentence of death for desertion, suspend execution until further order." Thus, Chase, the devout Christian, called immediately for vengeance; Lincoln, the unconfirmed Christian, was inclined to be merciful.

A final note on the contrasting personalities of the two men relates to the sense of humor. One cannot find a biographer that credits Chase with a sense of humor, but Lincoln's was so well-known that it inspired many spurious joke books. Lincoln once opened a cabinet session about the Emancipation Proclamation with a silly story called *A High Handed Outrage at Utica* by

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13. *Blue*, *supra* note 6, at 198.
14. 7 *Collected Works*, *supra* note 2, at 345.
15. Letter from Abraham Lincoln to Joseph Roberts (May 17, 1864), in 7 *Collected Works*, *supra* note 2, at 344.
16. A few carefully researched books have been written. *See, e.g.*, *Paul M. Zall, Abe Lincoln Laughing* (1982).
Artemus Ward. The cabinet was tense because the bloody victory at Antietam had preceded the meeting. Chase is described as not being amused and "wearing a sick smile." 17 Chase never appreciated Lincoln's humor and often found it inappropriate to the occasion. "The truth is, I have never been able to make a joke out of this war," he told Whitelaw Reid, a correspondent of the Cincinnati Gazette. 18 As for Lincoln, he said it was impossible to get through so dark an experience as the Civil War without humor. 19

Lincoln biographers tend to describe Chase at crucial points where Lincoln and Chase's careers intersect. These points include their first meeting in Springfield, the cabinet crisis when Radicals tried to oust Seward, the drafting and signing of the Emancipation Proclamation, the confrontation over the Pomeroy Circular, and the New York customs controversy, when Chase's resignation was finally accepted.

The first occasion was the January 4, 1861 meeting between Chase and Lincoln at Springfield to discuss his possible cabinet appointment. 20 The two men had already sized each other up and liked what they saw. Lincoln had already told Chase how much he appreciated his "being one of the very few distinguished men, whose sympathy we in Illinois did receive last year [during the Lincoln-Douglas contest for the Senate]." 21 To his friend, Senator Lyman Trumbull, Lincoln spoke of Chase's "ability, firmness and purity of character." 22 Chase was no less full of praise for Lincoln. On January 16, he assured G. W. Julian that "Mr. Lincoln is worthy of the high esteem you express for him." 23 After that meeting in Springfield, their personal relations remained professionally correct while their political relations deteriorated steadily. Perhaps the slide began with Chase's consternation at not being offered a cabinet appointment. Lincoln took so long to

17. OATES, supra note 3, at 319.
19. SANDBURG, supra note 10, at 569 (describing Lincoln's conversation with Isaac N. Arnold on the day after the defeat at Fredericksburg).
20. LINCOLN DAY BY DAY, 1861-1865, at 3 (1960).
22. WILLIAM E. BARINGER, A HOUSE DIVIDING 160 (1945).
23. Letter from Chase to G. W. Julian (Jan. 16, 1861), in BARINGER, supra note 22, at 150.
appoint him secretary of the Treasury that Chase first learned about his appointment after Lincoln submitted it to the Senate after failing to offer him the job in Springfield. All cabinet members accepted their nominations except Chase, who asked for a day to consider his.24

After taking control of the Treasury Department, Chase played major roles in the discussions about the resupplying of Fort Sumter, the selection of commanding generals, especially McClellan and McDowell, and the promulgation of the Emancipation Proclamation. These were relatively straightforward exercises of his duties. In other instances Chase indulged in the political intrigue that led Lincoln finally to accept a fourth resignation letter. The politically-charged events that preceded the resignation were the dump-Seward movement, the Pomeroy affair, and the dispute over the appointment of Maunsell B. Field that led to his exit from the cabinet.25 At any one of these points, a Lincoln historian might choose to pause in the Lincoln narrative and elaborate on the strengths and weaknesses of Salmon P. Chase.

Single-volume biographies appeared immediately after Lincoln's death. Of these, Josiah G. Holland's *Life of Abraham Lincoln* is considered the best.26 Holland's biography appeared in 1866 when Chase was serving as chief justice of the Supreme Court. One could not expect Holland to indulge in critical evaluation of Chase so soon after Lincoln's death, but one comment foreshadowed grievances that later came to light in Chase's letters to his friends. According to Holland, Chase said “he never attended a meeting of the cabinet without taking with him the figures that showed the exact condition of the Treasury at the time, and that, during the whole of his official life, he was not once called upon to show these figures.”27 It later became known that Chase complained often about a do-nothing cabinet, and about Lincoln's failure to heed his advice.28

There were other notable nineteenth-century biographies by Ward Hill Lamon, Isaac Arnold, Francis Fisher Browne, and

24. BARINGER, supra note 22, at 335.
25. BLUE, supra note 6, at 234-35.
27. HOLLAND, supra note 26, at 430.
28. BLUE, supra note 6, at 189-90.
William H. Herndon. These, also, were too close to the historical events to be of much use in evaluating Chase. Finally, in 1890, the ten-volume magnum opus of John G. Nicolay and John Hay was published. Volume six contained an entire chapter entitled, “Seward and Chase.” At last a Lincoln biography would focus on Chase, and the authors, the private secretaries of Lincoln, would gain the respect of modern historians. Unfortunately, the hopes of a balanced treatment of Chase were not realized. Practically all the negative aspects of Chase were supremely magnified by Nicolay and Hay. They wrote, “[Chase] looked upon the President and all his colleagues as his inferiors in capacity, in zeal, in devotion to liberty and the general welfare. He sincerely persuaded himself that every disaster which happened to the country happened because his advice was not followed....” And consider this passage: “He never lost an opportunity for ingratiating himself with the general in favor, or the general in disgrace. He paid equally assiduous homage to the rising and the setting sun.” They added that Chase cultivated the closest relations with those generals who imagined they had a grievance against the administration, carrying him at one instance to the point of absolute disloyalty to the President. If these sound suspiciously like the statements of persons defending their chief against a traitor, then another statement leaves no doubt. They wrote, “The surest way to [Chase’s] confidence and regard was to approach him with conversation derogatory to Mr. Lincoln.”

Benjamin Thomas, one of the great Lincoln historians, confirms Nicolay’s and Hay’s dislike of Chase. Thomas quotes a letter of Hay to Nicolay dated August 10, 1885 as saying, “There is enough in Chase’s letters abusing Lincoln, behind his back for a quiet scorcher.” In the same letter, Hay told Nicolay they should have regard for the feelings of living relatives such as Mrs. Hoyt, Chase’s surviving daughter. But Thomas notes that when Nicolay and Hay came to deal with Chase, they “did not think of her too

29. ANGLE, supra note 26, at 20-32.
30. JOHN G. NICOLAY & JOHN HAY, ABRAHAM LINCOLN (1890).
31. “The strictly biographical part of Nicolay and Hay has high merit.” ANGLE, supra note 26, at 34.
32. 4 NICOLAY & HAY, supra note 30, at 254.
33. 4 id. at 259.
34. 4 id. at 260.
35. BENJAMIN THOMAS, PORTRAIT FOR POSTERITY 105 (1947).
Twentieth-century Lincoln scholarship began with publication of a two-volume biography by Ida Tarbell.³⁶ Tarbell was a reporter, not a trained historian, but her reporter's instincts helped her to find new documents about Lincoln's early life.³⁷ She had practically nothing to say about Chase, however.

Another prolific Lincoln biographer, who also unearthed much new material on Lincoln's early life, was William E. Barton, the Congregational minister. His writing on the war years is regarded as undistinguished.³⁸ After reciting the usual statements about Chase's belief that he was superior to Lincoln, Barton surprises the reader with high praise for Chase's work in the Treasury. He wrote, "Chase was not primarily a financier, but he was conscientious and thorough, and he mastered the work of his office in a way that made him indispensable to the country."³⁹ Barton states that in a very important sense, Chase's promotion of the greenback (a direct promise on the part of the United States to pay) saved the country.⁴⁰ Was this an exaggeration? Perhaps not. Chase's value was so great that even his detractor, John Hay, feared for the country when Lincoln accepted Chase's resignation in 1864. Barton quotes Hay's diary where he wrote, "Chase's leaving at this time is little less than a crime."⁴¹

At the same time that Barton was writing, an English biographer named Lord Charnwood entered the picture. His one-volume biography added no new material but was prized for its insight into Lincoln's character and its full discussion of his cabinet.⁴² Charnwood admitted that Lincoln had complete confidence in Chase and could not easily have replaced him, but then added, "this handsome, dignified, and unrighteous person was unhappily a sneak."⁴³ He would pay court to a man if Lincoln had done something disagreeable to him. "Chase must have really

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³⁶ Id. at 105.
³⁷ Ida Tarbell, The Life of Abraham Lincoln (1900).
³⁸ See Ida Tarbell, Early Life of Abraham Lincoln (1896).
³⁹ Angle, supra note 26, at 48.
⁴⁰ 2 Barton, supra note 18, at 34-35.
⁴¹ 2 id.
⁴² 2 id. at 311.
⁴³ Lord Charnwood, Abraham Lincoln (1916), discussed in Angle, supra note 26, at 42.
⁴⁴ Charnwood, supra note 43, at 329.
been a good man in the days before he fell in love with his own goodness," Charnwood wrote.\footnote{45. \textit{Id.} at 406.}

In 1939, perhaps the most moving account of Lincoln’s Civil War years was published. Carl Sandburg’s four volumes, entitled \textit{Lincoln: The War Years}, captured the feeling of the period like no other biography. Sandburg, an amateur historian, rebounded from the mauling critics gave him for careless scholarship in his earlier volumes, \textit{The Prairie Years}, after their publication in 1926. He was writing more like a trained historian, although he still included many unauthenticated scenes and stories.\footnote{46. STEPHEN OATES, \textit{ABRAHAM LINCOLN: THE MAN BEHIND THE MYTHS} 13 (1984).} And he had plenty to say about Chase. He said Chase was a man trying to be a hero to himself, not knowing when he was hero, marplot, or simple snob. But Sandburg showed much sympathy for this “simple snob.” He, alone among the biographers, emphasized the potential damage done Chase’s personality by “accumulated griefs.”\footnote{47. 1 CARL SANDBURG, \textit{LINCOLN: THE WAR YEARS} 146 (1939).} He reported Chase writing to his friend, Charles Sumner that “Death has pursued me incessantly.”\footnote{48. \textit{Id.}} He noted that “in 1852 [Chase] had in seventeen years stood at the burial caskets of three wives and four children.”\footnote{49. \textit{Id.}} In contrast, Mary Lincoln was rendered unstable by the death of two sons and never fully recovered. Still, Sandburg delivered some now familiar criticism. He said Chase’s “gnawing ambition was a chronic personal ailment beyond remedy or softening.”\footnote{50. \textit{Id.} at 147.}

The last of the great multi-volume histories was written by J. G. Randall, a professor at the University of Illinois. His volumes represented the crowning achievement of the realist school of Lincoln biography.\footnote{51. J. G. RANDALL, \textit{LINCOLN THE PRESIDENT} (1945), \textit{discussed in Thomas, supra note 35, at 278.}} He portrayed Lincoln as a shrewd and calculating politician, not an unsophisticated country lawyer. His portrayal of Chase, however, was typically unflattering. He pointed out that Chase’s Puritan mind caused him as a young man to chide himself on his unworthiness and to suffer miserably from religious self distrust. As an adult, the same Puritan mindset
blocked him from appreciating Lincoln's playfulness at the beginning of cabinet meetings.52

Two more biographies of the realists gained critical acclaim. Curiously, the volume by Rheinhard Luthin contains no critical words at all about Chase.53 The other is by Benjamin Thomas.54

The Thomas biography and a biography by Stephen Oates55 are the most successful biographies published in the second half of the twentieth century. Oates wrote other biographies of the African-American civil rights heroes, Nat Turner and Martin Luther King,56 and so, in his Lincoln biography, he understandably emphasized the antislavery aspects of Lincoln's career. It is said that he went too far in assimilating Lincoln to the positions of Chase and the Radicals, however.57 In Oates, we find Lincoln preparing for his debates with Douglas by studying Chase's arguments that the Founding Fathers deplored slavery, tried to restrict its growth, and regarded freedom and equality as the natural condition of men.58 We also find Lincoln drawing from the writings of Chase and Greeley for his Cooper Union speech in 1860.59

Oates characterized Chase at the meeting in Springfield in 1861 as a sanctimonious man who insisted on neat and orderly ways and spoke with a slight lisp. He had dedicated enemies, but he was a capable senator, a brilliant Cincinnati lawyer, and Lincoln thought his honesty and rectitude might deflect criticism of the cabinet.60 Later, Lincoln is portrayed as often seeking out Chase as one of his favorites in the cabinet, for opinions about military matters.61 Oates points out that Chase, along with Scott, brought McClellan to Lincoln's attention after McClellan cleared the Rebels out of western Virginia in May of 1861.62 And he depicts Chase later as joining Lincoln in asking McClellan when he was

54. BENJAMIN THOMAS, ABRAHAM LINCOLN: A BIOGRAPHY (1952).
55. OATES, supra note 3.
58. OATES, WITH MALICE TOWARD NONE, supra note 3, at 112-13.
59. Id. at 171.
60. Id. at 202-03.
61. Id. at 247.
62. Id. at 257.
going to stop stalling and fight. Not once does Oates say anything reminiscent of the severe criticism of Chase found in other books. Chase is Lincoln’s ever-present conscience during cabinet discussions about slavery and serves as his liaison to the radicals in Congress. Even when Chase was committing the sin of disloyalty by contemplating a run for the presidency in January, 1864, all Oates could say was that “Chase candidly and honestly thought himself a better man than Lincoln.”

Thus, the chain of Lincoln biography ends on a positive note for Chase. But one biographer’s name was omitted, a preeminent Lincoln historian named David Donald. Donald has written books about Lincoln, but until now has not produced a biography. We can predict that if he does, his treatment of Chase will be more severe than Oates’. In *Lincoln Reconsidered*, Donald says Chase was “self-confident, upright and able.” He looked upon Lincoln as a well-meaning incompetent who began scheming for the 1864 nomination the day he became secretary of the Treasury. He could not openly announce his aspirations, so he converted his numerous Treasury agents into a tightly organized Chase-for-President league, and cooked up little quarrels over patronage so that he would have an excuse for resigning. No, Donald will not be forgiving of Chase’s engine of ambition.

One can turn to Chase’s own biographers for some sympathetic words, but will not find many. When the subject is Lincoln and Chase, the two main biographies of Albert Bushnell Hart and Frederick Blue bear down on Chase harder than the Lincoln biographers. In the final analysis, Chase was one of the great achievers in American politics, even though his integrity was tainted by too much ambition.

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63. *Id.* at 285.
64. *Id.* at 319, 425.
65. *Id.* at 382.
66. See *David Donald, Lincoln Reconsidered* (1955); *David Donald, Lincoln’s Herndon* (1948).
68. *Id.* at 73.
PERSONAL POLICY AND JUDICIAL REASONING: SALMON P. CHASE AND HEPBURN V. GRISWOLD

by James A. Dietz

I. INTRODUCTION

History attempts to put everything in proper perspective by using the tool of hindsight. Whether an event is truly profound depends on its relevance over time, and something once considered important later may be deemed insignificant if its impact is not historically enduring. This process of revision applies to legal history as well. Chief Justice Salmon P. Chase's majority opinion in the 1870 U.S. Supreme Court case of Hepburn v. Griswold declared as unconstitutional the Legal Tender Acts, which for the first time had made paper notes issued by the Federal Treasury "legal tender." Merely thirteen months later, the Court reversed Hepburn in the Legal Tender Cases, prompting one scholar from that era to describe the entire episode as "probably the most remarkable chapter in the history of that tribunal." Today, however, Hepburn and its reversal are seldom mentioned in the study of constitutional law and American judicial history. Scholars seem to have dismissed the episode as a mere aberration on the vast landscape of the high Court.

This treatment of Hepburn is unfortunate. Although the legal question which gave rise to the case is no longer controversial, the decision itself has interesting historical significance, and it also raises a number of issues which are predominant in the

1. 75 U.S. (8 Wall.) 603 (1869).
2. 12 Stat. 345 (1862); 12 Stat. 532 (1862); 12 Stat. 709 (1863).
3. "Legal Tender is that kind of coin, money, or circulating medium which the law compels a creditor to accept in payment of his debt, when tendered by the debtor in the right amount." BLACK'S LAW DICTIONARY 1467 (9th ed. 1990).
7. A more recent work offering an extensive recapitulation of the Hepburn decision and its aftermath is 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864-88, at 677-775 (1971).
study of constitutional law. Moreover, knowledge of the behind-the-scenes wrangling leading to the decision serves well as a prototype for an examination into the ingredients of judicial decision making. Chief Justice Chase's possible motives for declaring the Legal Tender Acts unconstitutional challenge us today to seek out possible extraneous influences on the reasoning of the Supreme Court and all other courts as well.

Hepburn had its genesis in the financial exigencies of the Civil War. With the Federal Treasury in dire need of funds to meet its debts, in February of 1862 Congress passed the first of three Legal Tender Acts, which hailed the birth of the legal tenders, or "greenbacks," as the new notes were quickly dubbed. Until that time, gold and silver coin were the only recognized legal tender. With the passage of the first Act, however, equal status was given to the paper currency all of us take for granted today.

In June of 1860 in Louisville, Kentucky, Susan Hepburn gave Henry Griswold a promissory note, due five days before President Abraham Lincoln signed the first Legal Tender Act into law. However, Hepburn did not timely repay the debt, and finally attempted to do so in greenbacks after Griswold instituted a suit for the amount due. But Griswold refused to accept the greenbacks; Hepburn instead paid them into the court, and a Chancellor declared the debt to be satisfied. Griswold appealed, and the Kentucky Court of Errors reversed the Chancellor's decision, whereupon Hepburn appealed to the U.S. Supreme Court. When the case was heard four years later, Chief Justice Chase seized the opportunity to form a majority and declare the Legal Tender

8. For an extensive discussion of the financial constraints caused by the war and Chase's role in it, see FREDERICK J. BLUE, SALMON P. CHASE: A LIFE IN POLITICS 129-72 (1987).
9. 12 Stat. 345 (1862); 12 Stat. 532 (1862); 12 Stat. 709 (1863). The two subsequent Acts were further authorizations to increase the amount of legal tender to be put into circulation.
10. dam, supra note 6, at 373.
11. "The Congress shall have Power ... To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures." U.S. Const. art. I, § 8, cl. 5.
12. SCHUCKERS, supra note 5, at 258-59.
13. Id. at 259.
14. Id.
16. SCHUCKERS, supra note 5, at 259.
Acts unconstitutional. The irony of the matter lies in the fact that Chase, as secretary of the Treasury under President Lincoln, had ultimately supported Congress’ actions in passing the acts. Moreover, “he was recognized, the country over, as the champion of the constitutionality of the acts....”

This casenote will examine the history of Hepburn and offer a defense for its contemporary study. En route, this note will also examine why Chief Justice Chase committed such an unusual reversal on a fiscal and constitutional policy he had personally supported just eight years earlier.

II. BACKGROUND

Familiarity with the historical circumstances surrounding Hepburn is vitally important in understanding the reasoning behind the majority opinion. Chief Justice Chase, who previously served as Ohio’s governor and United States senator, began his term as secretary of the Treasury in March of 1861. The Civil War, which most persons initially did not expect to last beyond several months, had quickly placed the nation’s finances in the red. The cost of raising and supplying an army and navy was overwhelming the Federal Treasury. Secretary Chase, who professed

18. BLUE, supra note 8, at 151.
19. ALBERT B. HART, SALMON P. CHASE 389 (1899); see also FAIRMAN, supra note 7, at 689.
20. See Dam, supra note 6, at 370.
21. Id.
22. See id. at 371. In attempting to finance the war soon after beginning his position as treasury secretary, Chase was “[c]onsistent in his belief that the Confederacy would be defeated within six months.” BLUE, supra note 8, at 147.
23. When Chase came to the Department in March 1861 he found that the treasury was empty, and that in the latter part of Buchanan’s Administration the Government’s credit had been shattered.” 6 FAIRMAN, supra note 7, at 678. Outlays from the Federal Treasury increased from $63.1 million in 1860 to $474.8 million in 1862, while customs, the nation’s principal source of revenue at that time, brought in only $49.1 million in 1862. Dam, supra note 6, at 371. Yet early in his tenure, Chase “was convinced that the sale of government bonds, Treasury notes, and demand notes circulating as currency would suffice” to finance the war. BLUE, supra note 8, at 147.
24. SCHUCKERS, supra note 5. Wrote Schuckers in his Chase biography:

Instead of the army of four hundred thousand men proposed by the President ... seven hundred and fifty thousand had been accepted up to the beginning of the new year [1862], and recruiting still went on.... The daily expenditures approximated to two millions; three hundred and fifty millions were necessary to carry
a distaste for funding the war through taxation, hoped to do so primarily through borrowing.\textsuperscript{25}

Soon after taking office, Secretary Chase met in New York City with a number of the nation's financial leaders to present a plan he had devised to help raise the sorely needed funds: the sale, through state-chartered banks,\textsuperscript{26} of three sets of fifty million dollars in interest-bearing bonds issued by the Federal Treasury.\textsuperscript{27} State banks and the federal government had for many years issued their own bonds and notes\textsuperscript{28} which were redeemable for specie, or gold and silver coin.\textsuperscript{29} For these particular bonds, the plan was that the state banks would pay the federal government from their own reserves of specie, and in turn sell the notes to their customers for a return specie payment.\textsuperscript{30} Secretary Chase insisted on this arrangement because at that time, the federal government by law dealt exclusively in specie for its own debts and expenditures.\textsuperscript{31} Therefore, instead of the state banks crediting the amount borrowed to the federal government and allowing it to pay its debts by checks drawn on those banks, the Federal Treasury was to receive the amount in specie up front from the reserves of the state banks.\textsuperscript{32} In August of 1861, the major state banks of New York, Boston, and Philadelphia alone had sixty-three million dollars in coin in their reserves.\textsuperscript{33}
Unfortunately, sales slumped and the plan withered for a number of reasons, mostly due to faltering confidence in a Union victory. By December of 1861, state bank supplies of specie had been depleted to the extent that they could not pay for the final fifty million dollar installment. Fearing that private hoarding of gold would deplete their own supplies, on December 30, 1861, state banks suspended specie payments on their own notes. Secretary Chase’s plan had failed to produce sufficient funds to meet the huge war debt and, having failed to tax adequately, the government in 1862 would have to borrow even more money. But with the failure of this most recent plan, the question now was, how would the funds be raised?

Since a “hard money” war appeared to be impracticable, resorting to paper money now seemed to be the only alternative. At first, Secretary Chase opposed any such plan. In a report to Congress on December 9, 1861, he expressed a dislike for the idea of giving legal tender status to paper currency, even if the paper could still be redeemed for specie. Moreover, he especially disagreed with any plan for paper legal tender not redeemable for specie. Despite this early sentiment and the conflicting advice he received on both sides of the issue, Secretary Chase eventually became convinced that issuing paper legal tender was required in order to avoid financial collapse of the Union. Con-

34. Blue, supra note 8, at 146-47.
35. Id. at 149.
36. Id.
37. Dam, supra note 6, at 373.
38. Schuckers, supra note 5, at 238.
39. Id. at 239.
40. Id.
41. Id. at 242. Chase had “serious apprehensions of disaster” concerning the proposal to introduce into circulation U.S. notes in an amount left wholly to the discretion of Congress, and under the exclusive management and control of the Treasury Department. Id. Investing legal tender status in these same notes, which were not redeemable in coin, to pay both public and private debts, and with retroactivity in scope and operation, filled Chase with “an almost invincible repugnance.” Id.
42. Blue, supra note 8, at 150.
43. “The historical fact is, then, that Mr. Chase did not originate the legal-tender measure, nor come to its support even until he had exhausted all the means at his command to make its adoption unnecessary.” Schuckers, supra note 5, at 243. In a letter to Congressman Thaddeus Stevens in January 1862, Chase acknowledged: “The condition of the Treasury certainly makes immediate action on the subject of affording provision for the expenditures of the Government both expedient and necessary. The general provisions of the bill submitted to me seem to be well adapted to the end proposed.” Id.
gress responded to his acquiescence and passed the first Legal Tender Act in February of 1862. 44

For the most part, the legal tenders worked their desired end and helped the government meet its exorbitant wartime debts. 45 Aside from any questions of their legality, the consensus held that the need for the greenbacks in the midst of the War was overwhelming and unavoidable. 46 As late as 1864, Secretary Chase still expressed a belief in the constitutionality of the Legal Tender Acts, 47 while at the same time he hoped the greenbacks would serve only as a wartime measure. 48 But five years later, when he took his seat on the Supreme Court, what he saw was "a prosperous country accepting issues then irredeemable and likely to be unredeemed, and refusing to provide either for their withdrawal or their restoration to a specie basis." 49 When the Supreme Court heard Hepburn, Chief Justice Chase had the opportunity to address the legality of a congressional action to which he had once acquiesced, but later regarded with trepidation.

III. THE COURT'S REASONING

The promissory note Hepburn signed to Griswold described the sum to be repaid as 11,250 dollars. 50 Since the note was due

at 244. Several days later, in another letter, Chase wrote: "It is true I came with reluctance to the conclusion that the legal-tender clause is a necessity, but I came to it decidedly and I support it earnestly. I do not hesitate when I have made up my mind, however much regret I may feel over the necessity of the conclusion to which I came...."

Id. at 245.

44. 12 Stat. 345 (1862).

45. "[The Legal Tender Act] enabled the Government at once to relieve itself of embarrassment.... It restored confidence, by furnishing a substitute for money, which for the time, at any rate, perfectly performed all the functions of money." SCHUCKERS, supra note 5, at 253-54.

46. Id. at 256.

47. "[I]n a letter of May 18, 1864, he says to a friend: 'I do not agree with you in advocating that the Constitution prohibits the issue of legal tender notes under authority of Congress.'" HART, supra note 19, at 389-90.

48. BLUE, supra note 8, at 302-03. Even though he argued that, however unwise, Congress did have the constitutional authority to issue legal tender notes, Chase had always looked upon the notes as nothing more than a temporary means for financing the war, hoping they would be redeemed at the war's end with the nation returning to the gold standard. Id.

49. HART, supra note 19, at 390.

50. SCHUCKERS, supra note 5, at 258-59.
before the first Legal Tender Act was passed, Hepburn would have been required to pay the amount in gold or silver coin, the only legal tender at that time. But because she did not timely repay the debt, technically the debt was still in existence when the first Legal Tender Act became effective. Therefore, the case was ripe for the two broad questions Chief Justice Chase posed in the opinion: Essentially, did the Legal Tender Acts affect contractual debts already in existence when the first Act was passed? If so, did this violate the constitutional authority of Congress?

In the opening paragraphs of the opinion, the Chief Justice candidly displayed his negative view of greenbacks by noting the depreciation tendencies of paper currency as opposed to coin, echoing the fears he expressed when the law was first proposed. Because of this depreciation, he said, if the Legal Tender Acts did affect debts entered into prior to their enactment, they would compel a creditor to receive less than what he contracted to be paid. The question was, did the Acts create this situation?

The Chief Justice answered this by attempting to ascertain whether Congress intended the term "debts" as used in the statute to mean existing debts as well as those subsequent to the law's enactment. He noted that "[t]here is nothing in the terms of the act which looks to any difference in its operation on different descriptions of debts payable generally in

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51. Id.
53. "We are thus brought to the question, whether Congress has power to make notes issued under its authority a legal tender in payment of debts, which, when contracted, were payable by law in gold and silver coin." Id. at 610.
54. Id. at 608. Wrote Chase, "There is a well-known law of currency, that notes or promises to pay, unless made conveniently and promptly convertible into coin at the will of the holder, can never, except under unusual and abnormal conditions, be at par in circulation with coin." Id. He added:

It is an equally well-known law, that depreciation of notes must increase with the increase of the quantity put in circulation and the diminution of confidence in the ability or disposition to redeem.... No act making them a legal tender can change materially the operation of these laws.
55. See supra note 41.
56. Hepburn, 75 U.S. (8 Wall.) at 608-09.
57. "Are we at liberty, upon a fair and reasonable construction of the act, to say that Congress meant that the word 'debts' used in the act should not include debts contracted prior to its passage?" Id. at 609.
money ...."58 In other words, a debt is a debt, no matter when it was entered into, either before or after the enactment of the first statute.59 Furthermore, in a strict interpretation, the term "debts" could only truly mean those already in existence, since a debt does not arise until a contractual arrangement is reached between two parties.60 Although such an interpretation is too strict for what the law intended to encompass, since obviously it meant to affect later debts, "it is certainly conclusive against any interpretation which will exclude existing debts from its operation."61 Moreover, if Congress had meant to exclude existing debts from the scope of the Act, then the law would have specifically stated so, as it did regarding interest on loans and import duties, which were to be paid in coin.62 As a final point, Chief Justice Chase offered the fact that the exclusion of existing debts was never mentioned in any of the debates leading up to the passage of the Act.63 "These considerations seem to us conclusive" that the act did in fact encompass existing debts.64

In determining whether Congress had the constitutional authority to accomplish this end,65 the Chief Justice began with a lengthy discourse on the Supreme Court's obligation to engage in judicial review of congressional acts.66 He found that since the Constitution contained no express grant of power for Congress to make paper money a legal tender for existing debts, then Congress could have done so only through an implied power through the Necessary and Proper Clause.67 Quoting from former Chief Justice Marshall's "rule" for what constitutes a legitimate implied power, Chief Justice Chase emphasized that any implied power must be "appropriate, plainly adapted to constitutional and legitimate ends," as well as "consistent with the letter and

58. Id.
59. Id. at 609-10.
60. Id. at 610.
61. Id.
62. "The same conclusion results from the exception of interest on loans and duties on imports from the effect of the legal tender clause." Id. See 12 Stat. 345 (1862).
64. Id.
65. See supra note 53.
67. Id. at 614-15. "The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers ..." U.S. CONST. art. I, § 8, cl. 18.
spirit of the Constitution." The question now distilled was whether the Legal Tender Acts could be found to fit within this "rule." 

The Chief Justice answered this by analyzing the possible express grants of power which, it may have been argued, contain within them an implied power to impart the quality of legal tender to paper currency. First, he quickly dismissed the existence of an implied power in the express grant of authority to coin money. The power to impart the quality of legal tender to paper money is not "in any reasonable or satisfactory sense an appropriate or plainly adapted means to the exercise of that power [to coin money]." He proffered a strict interpretation of the coinage clause, stating that "this power of regulation is a power to determine the weight, purity, form, impression, and denomination of the several coins, and nothing more." Secondly, even though Congress may authorize the Treasury to issue notes and bills of credit, which in turn can be used as currency, nevertheless he determined that "the power to issue notes and the power to make them legal tender are not the same power." After dismissing these two possibilities as a source of authority for the Legal Tender Acts, he discussed at length whether the implied power could have extended from Congress' express powers to carry on war. Deferring again to Chief Justice Marshall's

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68. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 615 (1869). The "rule" is from McCulloch v. Maryland: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315 (1819).

69. "The question before us, then, resolves itself into this: 'Is the clause which makes United States notes a legal tender for debts contracted prior to its enactment, a law of the description stated in the rule?'" Hepburn, 75 U.S. (8 Wall.) at 615.

70. Id. at 616.

71. Id.

72. See supra note 11.


74. Currency is "coined money and such banknotes or other paper money as are authorized by law and do in fact circulate from hand to hand as the medium of exchange." Black's Law Dictionary 382 (6th ed. 1990). The difference between mere currency and legal tender is that legal tender had to be accepted by a creditor as repayment of debt, whereas something circulating as currency did not.

75. Hepburn, 75 U.S. (8 Wall.) at 616.

76. U.S. Const. art. I, § 8, cl. 11-14.
“rule” that an implied power must be appropriate, Chief Justice Chase discoursed on the fact that during the Civil War there were other types of notes that circulated as currency with the greenbacks, including the interest-bearing notes from the program he initiated as treasury secretary. All of these were freely accepted by the public and, as such, it was not appropriate to make the greenbacks legal tender because “all the useful purposes of the notes would have been fully answered without making them a legal tender for pre-existing debts.” Therefore, he concluded, “We are unable to persuade ourselves that an expedient of this sort is an appropriate and plainly adapted means for the execution of the power to declare and carry on war.”

Having disposed of these possibilities for a constitutional source of authority for Congress’ actions, Chief Justice Chase put forth two final reasons why the statutes were unconstitutional. First, they violated the “spirit” of the Constitution. The states were expressly forbidden in the Constitution from making any law impairing the obligation of contracts, and although a similar restriction was not placed on Congress, he felt that “the spirit of the prohibition should pervade the entire body of the legislation...” Perhaps to bolster this point, his final assertion was that the Acts, since they compelled those who held contracts to accept payment of a currency of inferior value, deprived them of property without due process of law. Therefore, the Legal Tender Acts were unconstitutional since their scope reached pre-existing debts without an express or implied source of constitutional authority.

Despite the pervasive fear that the Hepburn decision would drop a major bombshell on the nation’s financial landscape, the actual fallout was not so drastic. The decision only affected pre-1862 debts, most of which were no longer outstanding. Primarily,

77. Chase described the various notes authorized by Congress during the Civil War, comprising “the common currency of the United States.” Some of these were made legal tender, while the rest were not. He concludes that “[t]he notes which were not declared a legal tender have circulated with those which were so declared without unfavorable discrimination.” Hepburn, 75 U.S. (8 Wall.) at 618-19.
78. Id. at 620.
79. Id. at 621.
80. “No State shall ... make any ... Law impairing the Obligation of Contracts....” U.S. CONST. art. I, § 10, cl. 1.
82. Id. at 624.
long-term governmental and big business obligations felt the pinch of the decision.\textsuperscript{83} Chief Justice Chase initially had intended the scope of the decision to reach debts entered into after the passage of the Acts.\textsuperscript{84} However, he was unable to persuade enough of his brethren to join him, and was forced to limit the decision's scope.\textsuperscript{85}

But perhaps the primary reason for \textit{Hepburn}'s limited effects was simply that the decision was not expected to last.\textsuperscript{86} President Ulysses S. Grant's administration opposed the opinion,\textsuperscript{87} and several propitious events allowed for an expedient revisiting of the legal tender issue. First, one of the \textit{Hepburn} majority, Justice Grier, had tendered his resignation after the decision had been written, but before it was announced.\textsuperscript{88} Second, Congress had recently authorized the number of justices to be increased to nine, so that on the same day \textit{Hepburn} was handed down, President Grant also announced the appointment of two new justices, Strong and Bradley,\textsuperscript{89} known to be supporters of the Legal Tender Acts.\textsuperscript{90} Chief Justice Chase, however, made every effort to keep \textit{Hepburn} from being reheard,\textsuperscript{91} prompting Justice Miller to complain that the Chief Justice had "resorted to all the stratagems of the lowest political trickery" to keep the case from appearing again on the Court's docket.\textsuperscript{92} Instead, the Court soon agreed to hear two similar cases in which the validity of greenbacks was also at issue, and thirteen months later handed down an opinion in \textit{Knox v. Lee} and \textit{Parker v. Davis}, known as the \textit{Legal Tender Cases}.\textsuperscript{93}

\textsuperscript{83. IRWIN UNGER, THE GREENBACK ERA: A SOCIAL AND POLITICAL HISTORY OF AMERICAN FINANCE, 1865-1879, at 176 (1964).}
\textsuperscript{84. BLUE, supra note 8, at 304; 6 FAIRMAN, supra note 7, at 713.}
\textsuperscript{85. BLUE, supra note 8, at 304; 6 FAIRMAN, supra note 7, at 713. With this fact in mind, the shrewdness and controversy of Chase's opinion are evident. He wanted to declare the Legal Tender Acts unconstitutional per se, but his brethren would not join him in stating that Congress could not create a paper money legal tender. Chase therefore had to find that the scope of the Acts as written encompassed pre-existing debts, that there was no constitutional authority to do so, and so the Acts as written were invalid.}
\textsuperscript{86. UNGER, supra note 83, at 176.}
\textsuperscript{87. Id. at 177.}
\textsuperscript{88. Dam, supra note 6, at 377 & n.50.}
\textsuperscript{89. 6 FAIRMAN, supra note 7, at 677.}
\textsuperscript{90. UNGER, supra note 83, at 177-78.}
\textsuperscript{91. BLUE, supra note 8, at 305.}
\textsuperscript{92. 6 FAIRMAN, supra note 7, at 744.}
\textsuperscript{93. 79 U.S. (12 Wall.) 457 (1870).}
Justice Strong, writing the majority opinion, made clear his intent to find a constitutional authority for Congress to issue legal tender notes valid for debts incurred both before and after the Acts became effective. Primarily, he accomplished this by evoking a much wider latitude for the implied powers of Congress. He also quoted the same McCulloch rule cited by Chief Justice Chase in Hepburn, yet reached an opposite result. Justice Strong asserted that it was not the Court's role to determine the appropriateness of Congress' actions, only whether or not they were within the boundaries of the Constitution. As such, he attacked the Chief Justice's use of hindsight to determine that the notes could have worked the same end without being declared legal tender; furthermore, Justice Strong claimed that nothing else other than the Legal Tender Acts could have accomplished the same result under the dire circumstances in which the laws were passed. Ultimately, "when a statute has proved effective in the execution of powers confessedly existing, it is not too much to say that it must have had some appropriateness to the execution of those powers." The powers which gave rise to the implied legal tender power, he alluded, were the powers

94. Id. at 529. Justice Strong felt that if Congress did not have the power, under any circumstance or under any emergency, to make treasury notes a legal tender for payment of all debts, then "the government is without those means of self-preservation which, all must admit, may ... become indispensable ..." Id.  
95. Id. at 534. Wrote Justice Story:  
[I]t is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred.  
Id. Later, Justice Story continued:  
Indeed the whole history ... has exhibited the use of a very wide discretion, even in times of peace ... in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court.  
Id. at 536.  
96. Id. at 539.  
97. Id. at 539-40.  
98. Id. at 541.  
99. "It is plain to our view, however, that none of those measures which it is now conjectured might have been substituted for the legal tender acts, could have met the exigencies of the case, at the time when those acts were passed." Id. at 542.  
100. Id. at 543.
to carry out warfare to preserve the Union.\textsuperscript{101} Moreover, he attacked Chief Justice Chase's position that the Acts illegally impaired the operation of contracts.\textsuperscript{102} Through several means of exercising its granted authority, said Justice Strong, Congress may violate certain "rights," such as seizing land by eminent domain, or impairing contracts by enacting bankruptcy laws.\textsuperscript{103} Clearly, then, "the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair, the obligation of contracts."\textsuperscript{104} As for Chief Justice Chase's due process argument, this "provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."\textsuperscript{105} With that, the efficacy of \textit{Hepburn} expired only a little more than a year after it began, and the Legal Tender Acts were held as valid for all debts, regardless of when they arose.

\textbf{IV. ANALYSIS}

Despite \textit{Hepburn}'s truncated viability and antiquated notions, by no means is it devoid of instructional value for contemporary legal students. For example, the decision demonstrates one way of interpreting Congress' implied powers, a rather strict and narrow interpretation based on Chief Justice Marshall's "rule." Read in conjunction with the \textit{Legal Tender Cases}, \textit{Hepburn} demonstrates an important lesson by showing the wide latitude such general statements of the law afford judicial decision makers, since the two opinions cited the same rule, yet reached opposite conclusions. This result indicates the rather low value of broad legal generalizations, since vastly different conclusions can fit within such vague paradigms.\textsuperscript{106}

The \textit{Hepburn} episode also vividly evinces that the Supreme Court is certainly not above dispensing with the principle of \textit{stare decisis}\textsuperscript{107} when it finds an expedient reason to do so, or when a

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\textsuperscript{101} Id. at 541.
\textsuperscript{102} Id. at 549-50.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 550.
\textsuperscript{105} Id. at 551.
\textsuperscript{107} "To abide by, or adhere to, decided cases." \textsc{black's law dictionary} 1406 (6th ed. 1990).
\end{flushleft}
majority feels that a detrimental mistake has been made in a previous decision. Constitutional law students encounter this phenomena in the study of the Commerce Clause and the controversies it has spawned throughout this century.\textsuperscript{108} \textit{Hepburn} is analogous to the Commerce Clause decisions since they all exemplify the problems which may arise when a strict reading of the Constitution is enforced within the present exigencies of a dynamic society.\textsuperscript{109} The \textit{Hepburn} episode and the Commerce Clause cases demonstrate that reasons of practicality, and not just pure legal reasoning, may urge the Court to overrule its own previous decisions.\textsuperscript{110}

Neither should the pure historical interest of \textit{Hepburn} be overlooked. It was only the third case up to that time which

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\textsuperscript{109} Hammer, 247 U.S. 251, and National League, 426 U.S. 833, were both overruled essentially because their tenets were either not followed or proved to be unworkable. In \textit{Darby}, Justice Stone wrote:

\begin{quote}
The conclusion is inescapable that Hammer v. Dagenhart, was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.
\end{quote}

\textit{Darby}, 312 U.S. at 116. In \textit{Garcia}, Justice Blackmun declared:

\begin{quote}
[The attempt to draw the boundaries of state regulatory immunity ... is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which National League of Cities purported to rest. That case, accordingly, is overruled.

\textit{Garcia}, 469 U.S. at 531. Such language exposes practicality mixed with pure legal reasoning in reaching the respective results.

\textsuperscript{110} The rationalizations of the overruling Commerce Clause cases, supra, should be compared to Justice Strong's language in the Legal Tender Cases:

If now, by our decision, it be established that these debts and obligations can be discharged only by gold coin; if, contrary to the expectation of all parties to these contracts, legal tender notes are rendered unavailable, the government has become an instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume ... ruinous sacrifices, general distress, and bankruptcy may be expected.

\textit{Knox v. Lee}, 79 U.S. (12 Wall.) 457, 530 (1870). Such a utilitarian approach to constitutionality echoes Chief Justice Chase's own admonition of practicality in \textit{Hepburn}: Such laws "are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be given to them." \textit{Hepburn}, 75 U.S. (8 Wall.) at 607.
\end{quote}
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declared an act of Congress unconstitutional,\textsuperscript{111} and was only the second to cite a deprivation of Fifth Amendment Due Process rights as grounds for its decision.\textsuperscript{112} More interestingly, the entire episode was the first situation in the Court's history which lead to allegations of "court packing."\textsuperscript{113} When President Grant appointed Justices Strong and Bradley, Chief Justice Chase accused the president of appointing these two particular men with the primary intention of overturning \textit{Hepburn}.\textsuperscript{114} Although the two new justices had the same party affiliation as the President, as did nearly all appointees then as today,\textsuperscript{115} no hard evidence was ever presented that they were instructed by President Grant or anyone else to bring about a reversal of \textit{Hepburn}.\textsuperscript{116} The two new justices did, however, join with the three \textit{Hepburn} dissenters to form the majority for the \textit{Legal Tender Cases}. Regardless, the controversy was the chief historical precedent for the more famous court-packing charges against President Franklin D. Roosevelt in 1937.\textsuperscript{117}

Aside from these considerations, the paramount lesson to be garnered from \textit{Hepburn} stems from the most obvious question the case poses: Exactly why did Chief Justice Chase feel it necessary to declare unconstitutional a law he had once supported as being within constitutional boundaries,\textsuperscript{118} and one that had already been in operation for eight years? This question underscores an essential inquiry into the judicial decision-making process: How much of this process is based on impartial legal reasoning, and how much is based on personal policy? In a realm in which objectivity in application of the law is typically expected, the importance of this inquiry is evident. The true answer, of course, will vary from one decision to the next. But once Chief Justice Chase's personal fiscal policies are uncovered, they certainly beg

\textsuperscript{111} The two previous cases were \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137 (1803), and \textit{Scott v. Sandford} (the Dred Scott decision), 60 U.S. (19 How.) 393 (1856).

\textsuperscript{112} The first was in Chief Justice Taney's majority opinion in \textit{Scott v. Sandford}, 60 U.S. (19 How.) 393 (1856).

\textsuperscript{113} See Dam, \textit{supra} note 6, at 377-78.

\textsuperscript{114} See Hart, \textit{supra} note 19, at 399; Blue, \textit{supra} note 8, at 305.

\textsuperscript{115} Hart, \textit{supra} note 19, at 399-400.

\textsuperscript{116} Id. at 400-01.

\textsuperscript{117} For a discussion of "court packing" under President Roosevelt, see, for example \textit{Lawrence Baum, The Supreme Court} 21-22 (1989).

\textsuperscript{118} See Hart, \textit{supra} note 19.
the question as to what degree these influenced his interpretation of the Constitution in *Hepburn*.

As discussed above, Chief Justice Chase never did care for the Legal Tender Acts, and "desire[d] to see all paper money eliminated." An example of one cause of this distaste can be demonstrated by the steady depreciation of the value of legal tender dollars against gold dollars throughout his term as treasury secretary. This difference reached a crisis point in mid-1864, when he had to push for tax increases and sell off federal gold to flood the market in an attempt to hold down skyrocketing gold prices, and bring the two forms of legal tender more in line with each other. Having two different types of legal tender, with the same value stamped on the face of each, but differing in actual worth, perhaps prompted him to decry in *Hepburn* that whatever benefit may have come from the Legal Tender Acts,

*[It] is far more than outweighed by the losses of property, the derangement of business, the fluctuations of currency and values, and the increase of prices to the people and the government, and the long train of evils which flow from the use of irredeemable paper money.*

As chief justice, Chase found himself in the unique position of being able to abolish a law he perceived as detrimental to the country, needing only the concurrence of enough of his brethren to do so. Ironically, President Lincoln nominated Chase for the Court with the hope and belief that he would support and uphold Civil War legislation. Whether or not it may be said, regarding *Hepburn*, that Chief Justice Chase abused his position is debatable at best. One may take the view that he seized the opportunity, became in effect a one-person legislature, and repealed a law he felt was wreaking havoc on the nation’s monetary system, merely fashioning a constitutional argument to achieve that end. The opposite view is that he genuinely came to the realization that the Acts violated Congress’ granted authority, and that he had been wrong to support them in the heat of the Civil War.

119. BLUE, supra note 8, at 304.
120. *Id.* at 163.
121. *Id.* at 163-64.
123. BLUE, supra note 8, at 242.
Some scholars expressing an opinion on the matter lean toward the former of these views. One states outright that the *Hepburn* opinion "is practically a legal defense for a change of mind which was founded really on financial and political considerations."\(^{124}\) Another says that "the decision ... was thus grounded more in economic philosophy than constitutional law...."\(^{125}\) Still another theorizes that the Chief Justice's own political ambitions may have guided his reasoning, as he had been a serious contender for the 1868 Democratic presidential nomination, and may have written *Hepburn* to further endear himself to that party, since the Democrats were anti-greenbacks.\(^{126}\) Chief Justice Chase himself, however, attempted to cultivate an opposite viewpoint, offering an explanation in *Hepburn* for his change of heart:

It is not surprising that amid the tumult of the late civil war ... different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority.... Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions....\(^{127}\)

Chief Justice Chase was not the first, nor certainly the last, Supreme Court justice to admit a mistake in prior legal reasoning and do a noted turnabout on a particular constitutional question.\(^{128}\)

\(^{124}\) Hart, supra note 19, at 394.

\(^{125}\) Blue, supra note 8, at 304.

\(^{126}\) Unger, supra note 83, at 175.

\(^{127}\) Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 625 (1869). Chief Justice Chase offered a similar apologetic in the *Legal Tender Cases*. Speaking of himself in the third person as the secretary of the Treasury, he iterated:

Examination and reflection under more propitious circumstances have satisfied him that this opinion was erroneous, and he does not hesitate to declare it. He would do so, just as unhesitatingly, if his favor to the legal tender clause had been at that time decided, and his opinion as to the constitutionality of the measure clear.


The difference in *Hepburn*, based on his personal fiscal policies, is the more pressing matter of whether he truly had a legal epiphany, or used his office to essentially effect a legislative change. The true motive, of course, will forever be known only to Salmon P. Chase. But even today, *Hepburn* should resonate with significance, for essentially it challenges us not to take any legal decision at face value. Knowledge of Chief Justice Chase's personal policies and the politics surrounding *Hepburn* demands an assessment of the influence of such factors.

Especially when sensitive questions are before the Supreme Court or any other, we should examine the conclusions closely for how judges and justices fashion their opinions: Do they cite a general principle of law as their basis? Do they give unusually wide or narrow interpretations of statutes or doctrines, especially in opposition of past or established interpretations? What is the political climate in which the decision is made? Which judges or justices are part of this opinion, and what is known about them? These and other questions of which *Hepburn* makes us cognizant can and should be used today by discriminating court watchers, unwilling simply to take an opinion at its face value. Moreover, *Hepburn* would serve well as a model to instill these skills in today's students of the law. Clearly, the case shows the difficulty of making decisions in a vacuum of completely objective legal application, since life experiences to some degree influence everyone's reasoning. But ultimately, if any court's decision is perceived as tainted and based not on the law but on personal dogma, it leaves us with the enduring problem of how this reflects on the respect and credibility necessary for the vitality of our nation's courts, particularly our highest one.

V. CONCLUSION

The uniqueness of *Hepburn v. Griswold* makes it worthy of more than passing notice. The background politics, controversies, and historical circumstances which led to the decision and its reversal make it worthy of study and stand as an example of how a legal decision, particularly one of far-reaching importance, should be scrutinized. Even if one concludes that Chief Justice Chase was guilty of overreaching his duty and authority, nevertheless *Hepburn* should not be shelved as historical folly. Instead, we should attempt to learn a lesson from one of the more unusual opinions ever to emanate from the Supreme Court.