# SLAUGHTERING ABOLITION DEMOCRACY

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The Supreme Court's decision in the *Slaughter-House Cases* was released a day after the single bloodiest racial massacre in the history of Reconstruction.[1] Mere miles from the slaughterhouse at constitutional issue, a White mob murdered scores of Black Republicans in Colfax, Louisiana at the encouragement of Democratic gubernatorial candidate John McEnery.[2] The Colfax Massacre marked the end of Reconstruction

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1. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 437, 529–30 (rev. ed. 2014) (1988). The Colfax Massacre took place on April 13, 1873; The *Slaughter-House Cases* were released on April 14th.

2. *Id.* at 437, 550. For comprehensive recent histories, see LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION, at xviii (2008); CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008).

in Louisiana. When the Court tossed out the convictions of the massacre's ringleaders, it cited *Slaughter-House*.[3]

Few ideas have proven more generative or inspirational on the American left than abolition democracy.[4] As articulated by W.E.B. Du Bois in his magisterial *Black Reconstruction*,[5] abolition democracy names two different but closely related concepts.[6] It *was* a political bloc that emerged after the Civil War and played a leading role in Reconstruction.[7] It *is* a political aspiration to build a democratic polity that is free of racialized domination.[8] The coalition's "splendid failure" to realize the aspiration was confirmed when industrial capital withdrew its support for Reconstruction and the federal government withdrew troops from the former Confederate states.[9] This Essay draws upon Du Bois's conceptions of abolition democracy and his account of the relationship between constitutionalism, economic power, and violence to understand and evaluate the *Slaughter-House Cases* and the work of the Reconstruction Court afresh.

*Black Reconstruction* devotes little attention to the meaning of the Constitution or the decisions of the Supreme Court. When the Constitution appears in his narrative, it is often as a "fetich."[10] The choice of words calls to mind Karl Marx's analysis of commodity exchange under capitalism,[11] and it's been said that Du Bois's Marxism both "inspires and deforms" *Black Reconstruction*.[12] One might be tempted to count among

3. United States v. Cruikshank, 92 U.S. 542, 549 (1875).

4. *See* ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 95–96 (2005); Dorothy Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 3–11 (2019); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1613–17 (2019); Quinn Lester, *Whose Democracy in Which State?: Abolition Democracy from Angela Davis to W. E. B. Du Bois*, 102 SOC. SCI. Q. 3081, 3082–84 (2021); Sandeep Singh Dhaliwal, *Investing in Abolition*, 112 GEO. L.J. 1, 54–55 n.393 (2023); Brandon Hasbrouck, *Democratizing Abolition*, 69 UCLA L. REV. 1744, 1744 (2023).

5. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860–1880 (Free Press ed. 1998) (1935).

6. *See* DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 118–19 (2021); BERNARD E. HARCOURT, COOPERATION: A POLITICAL, ECONOMIC, AND SOCIAL THEORY 190–93 (2023).

7. *See* DU BOIS, *supra* note 5, at 184.

8. *See id.* at 325.

9. *Id.* at 691–92, 708.

10. *See id.* at 328, 336, 340.

11. For an exceptionally thoughtful exploration of Du Bois's "reconceptualization of the Marxian concept of capital's phantasmagoria," see Allison Powers, *Tragedy Made Flesh: Constitutional Lawlessness in Du Bois's* Black Reconstruction, 34 COMPAR. STUD. S. ASIA, AFR., & MIDDLE E. 106, 108 (2014).

12. DAVID LEVERING LEWIS, W.E.B. DU BOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919–1963, at 367 (2000). There is a voluminous literature on Du Bois's Marxism that cannot be engaged here. This Essay is concerned with the conceptions

the deformations its reduction of law to a superstructural byproduct of productive forces and class conflict.[13] Indeed, Du Bois's discussion of the Supreme Court spans several paragraphs and does not substantively engage the Court's constitutional reasoning.[14]

This temptation should be resisted. Du Bois's account of the collapse of Reconstruction is complex and ought not be labelled reductive in any pejorative sense. It describes working class Whites who act against their material interests in return for the "*psychological* wage" of whiteness.[15] It does not treat law as a mere instrument of ruling-class rule but as contested ground—albeit ground shaped by economic power and violence.[16]

So, too, do the *Slaughter-House Cases* resist reduction. Before the litigation that produced Justice Samuel Miller's 1873 opinion for a five-to-four Court even commenced, supporters and opponents of the Crescent City Live-Stock Landing and Slaughter-House Company had shaped conflicting narratives.[17] Constitutional scholars have long been similarly divided.[18] Supporters of Justice Miller's opinion have praised him for

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of abolition democracy and the constitutional political economy articulated by Du Bois in *Black Reconstruction*, not whether and to what extent they are Marxist.

13. *See* Karl Marx, *Preface to a Contribution to the Critique of Political Economy (1859)*, *in* DYNAMICS OF SOCIAL CHANGE: A READER IN MARXIST SOCIAL SCIENCE, FROM THE WRITINGS OF MARX, ENGELS AND LENIN 52 (Howard Selsam et al. eds., 1970) ("In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure . . . .") For a defense of the base-superstructure metaphor, see G. A. COHEN, KARL MARX'S THEORY OF HISTORY: A DEFENSE 216–19 (2000). For criticism, see Ellen Meiksins Wood, *Falling Through the Cracks*, *in* E. P. THOMPSON: CRITICAL PERSPECTIVES 126 (Harvey J. Kaye & Keith McClelland eds., 1990). *See also* Nate Holdren & Rob Hunter, *No Bases, No Superstructures: Against Legal Economism*, LEGAL FORM (Jan. 15, 2020), https://legalform.blog/2020/01/15/no-bases-no-superstructures-against-legal-economism-nate-holdren-and-rob-hunter.

14. *See* DU BOIS, *supra* note 5, at 690–91.

15. *See id.* at 700 ("It must be remembered that the white group of laborers, while they received a low wage, were compensated in part by a sort of public and psychological wage."); *see also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1741 (1993) ("The material benefits of racial exclusion and subjugation functioned, in the labor context, to stifle class tensions among whites. White workers perceived that they had more in common with the bourgeoisie than with fellow workers who were Black.").

16. *See* DU BOIS, *supra* note 5, at 591.

17. *See* Randy E. Barnett, *The Three Narratives of the* Slaughter-House Cases, 41 J. SUP. CT. HIST. 295, 299, 301 (2016).

18. For a valuable overview, see *id.* at 296. Barnett's discussion of the role of Democratic attorney and "implacable foe" of Reconstruction Jeremiah Black has been criticized by Pamela Brandwein. Barnett claims that "one of Jeremiah Black's proudest accomplishments was his successful defense of the slaughterhouse act in the Supreme

upholding reasonable health regulations and resisting reactionary lawyering.[19] Opponents have condemned him for effectively redacting the Fourteenth Amendment's most rights-protective provision and relying upon reasoning that would later be used to constitutionally hamstring Congress.[20] Situating the case within Du Bois's analytical frames helps us understand what happened and why and invites today's abolition democrats to confront difficult questions about left engagement with the U.S. Constitution.

## I. *BLACK RECONSTRUCTION* AND ABOLITION DEMOCRACIES

### *A. As Aspiration*

Chapter VII of *Black Reconstruction* begins by introducing and distinguishing "two theories of the future of America" which "clashed and blended just after the Civil War."[21] The first is "abolition-democracy based on freedom, intelligence and power for all men."[22] The second is "industry for private profit directed by an autocracy determined at any price to amass wealth and power."[23] It gradually becomes clear that for Du Bois Abolition-democracy-as-bloc *just is* the "clash[ing] and blend[ing]" of the aspiration with the interests and designs of industry.

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Court of the United States." *Id.* at 303. Brandwein responds that Black in fact defended the butchers in the middle of the litigation—after they bought the monopoly that they were challenging and moved to dismiss the case. *See* Pamela Brandwein, *Justice Joseph Bradley and the Fourteenth Amendment*, C-SPAN (Nov. 6, 2019), https://www.c-span.org/video/?466109-1/justice-joseph-bradley-fourteenth-amendment.

19. *See, e.g.*, Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST. 476, 482–84 (1996); *see also* RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003); Michael A. Ross, *Justice Miller's Reconstruction: The* Slaughter-House Cases, *Health Codes, and Civil Rights in New Orleans, 1861–1873*, 64 J. S. HIST. 649, 667–68, 676 (1998); Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1308 (1984).

20. *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 372 (7th ed. 2018) (describing the case as "infamous for its narrow reading of the Privileges or Immunities Clause, which . . . became virtually a dead letter following the decision"); James W. Fox, Jr., *Re-readings and Misreadings:* Slaughter-House, *Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 68–69 (2002); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *without Exhuming* Lochner: *Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 3 (1996); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 627 (1994).

21. DU BOIS, *supra* note 5, at 182.

22. *Id.*

23. *Id.*

Du Bois presents aspirational abolition democracy largely through the speeches and actions of particular individuals—most prominently, Pennsylvania Congressman Thaddeus Stevens and Massachusetts Senator Charles Sumner. Stevens and Sumner are small and big-R radical Republicans who stand against domination[24]—first and foremost in the form of the hyper-exploitation of enslaved people by their enslavers, but also in the exploitation of poor White labor by the enslaving class and Northern industry.[25] Stevens more quickly and clearly than Sumner recognizes that "beneath all theoretical freedom and political right must lie the economic foundation."[26] That's what leads him to propose the confiscation of enslavers' estates and their redistribution to freed people along with *and on the same ground* as the franchise.[27]

This aspirational concept of abolition democracy has played an influential role in left political theory and organizing, thanks largely to the work of Angela Davis.[28] For Davis, realizing abolition democracy entails (negatively) abolishing the carceral state—consisting in prisons, police, and other punitive methods of social control that can trace their origins through Jim Crow and thence through chattel slavery—and (positively) building racially egalitarian institutions that empower and protect people from harm.[29] Like Du Bois, she insists that abolition democracy requires economic transformation.[30] Abolition is not "the isolated dismantling of the facilities we call prison and jails," but instead dismantling the "economic, social, and political conditions" from which a "prison-industrial-complex" has emerged.[31] Ultimately, she contends that realizing abolition democracy requires abolishing capitalism.[32]

24. By domination here is meant arbitrary, effectively unaccountable power to interfere in someone else's life. *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 52 (1999); *see also* Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, *in* REPUBLICANISM AND POLITICAL THEORY 83, 84 (Cécile Laborde & John Maynor eds., 2008); K. Sabeel Rahman, *Democracy against Domination: Contesting Economic Power in Progressive and Neorepublican Political Theory*, 16 CONTEMP. POL. THEORY 41, 46 (2017); ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 10–11 (2015). For Marxist accounts, see SØREN MAU, MUTE COMPULSION: A MARXIST THEORY OF THE ECONOMIC POWER OF CAPITAL 3–5 (2023); WILLIAM CLARE ROBERTS, MARX'S INFERNO: THE POLITICAL THEORY OF CAPITAL 91 (2017).

25. *See* DU BOIS, supra note 5, at 708.

26. DU BOIS, *supra* note 5, at 197.

27. DU BOIS, *supra* note 5, at 198, 200–01.

28. *See generally* DAVIS, *supra* note 4; *see* Lester, *supra* note 4, at 3081–82.

29. DAVIS, *supra* note 4, at 73.

30. *See id.* at 95–97.

31. *Id.* at 72.

32. *Id.* at 24 (contending that "[w]e must be able to disentangle our notions of capitalism and democracy so to pursue truly egalitarian models of democracy").

That last contention takes Davis beyond Du Bois, albeit not in a direction with which Du Bois would have disagreed. Aspirational abolition democracy in *Black Reconstruction* is a descriptive concept, an account of ideological commitments that particular people actually held. It thus maintains a tenuous connection with capitalism, just as did the small-r republican tradition of which Stevens—"who advocated not only universal suffrage and free schools, but protection for Pennsylvania iron"[33]—is a radical but not revolutionary representative.[34] For Davis, aspirational abolition democracy is a normative concept, proffered to catalyze political action today. Thus, it can be forthrightly anti-capitalist in ways that Du Bois's historically situated account could not be.

What *does* divide Du Bois and Davis is their overall appreciation of the legal achievements of Reconstruction. For Du Bois, the Thirteenth, Fourteenth, and Fifteenth Amendments, the Freedmen's Bureau, and the federally supported democratic constitutionalism that took place in the former Confederate states were monumental achievements, and the tragedy of Reconstruction is in large part the failure of their implementation. For Davis, even the Thirteenth Amendment is fatally flawed, containing a "loophole" that in short order enabled "black human beings . . . to be enslaved under the auspices of southern systems of justice" that anticipated the contemporary prison-industrial complex.[35]

### *B. As Bloc*

Du Bois devotes far more attention to the political bloc that strove to realize aspirational abolition democracy during Reconstruction than to the aspiration itself. This is "*the* abolition democracy," consisting of "laborers and small capitalists" for whom "[t]he abolition of slavery meant not simply abolition of legal ownership of the slave" but "the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States."[36] Abolition democrats like Stevens and Sumner shared what Du Bois called the "American Assumption" that "wealth is mainly the result of its owner's effort and that any average

33. DU BOIS, *supra* note 5, at 187.

34. PURNELL, *supra* note 6, at 119 (observing that "[t]hough Du Bois affirmed abolition democracy as a courageous viewpoint, he seemed ambivalent about whether it was the correct one").

35. ANGELA Y. DAVIS, *From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System*, *in* THE ANGELA Y. DAVIS READER 74, 75–76 (Joy James ed., 1998). For an argument that convict leasing violated the original meaning of the Thirteenth Amendment, see James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1478–79 (2019).

36. DU BOIS, *supra* note 5, at 184, 189 (emphasis added).

worker can by thrift become a capitalist."[37] But they "saw the danger of slavery to both capital and labor" and some were eventually "pushed towards the conception of a dictatorship of labor."[38]

Du Bois makes clear that even the most committed abolition democrats made mistakes. Those mistakes cannot be easily classified as "ideological" or "tactical." Thus, he laments that most abolition democrats did not support "rule . . . by civil government, backed by Federal police" in the South prior to the ratification of the Fourteenth Amendment even though "it would have saved the United States and the whole world untold injury, retrogression and world war."[39] Was this a tactical error or an ideological one? Both—abolition democrats erred in eschewing the tactic as unnecessary because they were in the grips of an erroneous American Assumption and erroneously doubted "the ability of the state to secure servants as honest and efficient as private industry."[40] The abolition democracy "was largely based on property, believed in capital and formed in effect a powerful petty bourgeoisie" and so "believed in democratic government but only under a general dictatorship of property."[41]

Still, Du Bois recognizes that abolition democracy achieved some of the greatest acts of liberation in human history.[42] Abolition democrats did almost everything that they could to "hammer in the ears of the people" that the aspiration could only be realized by attacking economic domination—and thus capitalism itself.[43] Under the circumstances, it is difficult to imagine what Sumner could have done had "that other Charles—Karl Marx— . . . published *Das Kapital*" before his passing to turn failure into success.[44]

### *C. Abolition Democracy's Constitutionalism*

Du Bois recognizes that abolition democrats supported sweeping constitutional reforms and made constitutional arguments in support of their preferred Reconstruction policies. At all points, however, his

37. *Id.* at 183–84.
38. *Id.* at 184–85.
39. *Id.* at 328.
40. *Id.* at 328–29.
41. *Id.* at 595.
42. *See id.* at 716 ("The North went to war without the slightest idea of freeing the slave . . . . [I]t was abolition and belief in democracy that gained for a time the upper hand[,] . . . a great moral movement which turned the North from its economic defense of slavery and led it to Emancipation.").
43. *See id.* at 708.
44. *Id.* at 591.

presentation of Republican engagement with the Constitution is equivocal and at crucial junctures it is highly critical.

According to Du Bois, the antebellum Constitution was neither pro-slavery nor anti-slavery.[45] It was an artifact of a particular conjuncture that did not anticipate the problems confronting the nation in the wake of a Civil War *that the antebellum Constitution failed to prevent*.[46] Every path forward from Appomattox was unconstitutional in the sense of neither being "provided for in that instrument . . . or reasonably implicit in its words."[47] To look to it for guidance was therefore "idiotic."[48] The North had "formed a new United States on a basis broader than the old Constitution and different from its original conception."[49] *That* Constitution needed to be defended, regardless of a "written rule of government [ninety] years old."[50]

Du Bois considers that there was entirely too much talk *about* constitutionality during Reconstruction. Abolition democrats are praised when they set aside "fetich-worship of the Constitution" and rely upon "right, justice[,] and plain commonsense"—none more so than Thaddeus Stevens.[51] Stevens disregards "constitutional subtleties" in the service of his "stern belie[f] in democracy."[52] He demands military rule in the former Confederate states until loyal governments can be established; voting rights for Black people; land and education for Black and White labor; and the confiscation and redistribution of enslavers' estates.[53] He never gets everything that he wants, but he is right to want it, and those who "blather" on about constitutionality are disastrously wrong.[54]

It would be a mistake, however, to infer from this a general hostility on Du Bois's part to engagement with the Constitution or law more generally. When Stevens fails to win the debate over whether the

45. *See id.* at 4 ("The men who wrote the Constitution sought by every evasion, and almost by subterfuge, to keep recognition of slavery out of the basic form of the new government.").

46. *Id.* ("They founded their hopes on the prohibition of the slave trade, being sure that without continual additions from abroad, this tropical people would not long survive, and thus the problem of slavery would disappear in death. They miscalculated, or did not foresee the changing economic world.").

47. *Id.* at 336.

48. *Id.*

49. *Id.*

50. *Id.* For a contemporary argument in favor of conceptualizing Reconstruction as a revolution that produced a new Constitution, see KERMIT ROOSEVELT III, THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA'S STORY 1–6 (2022).

51. *See* DU BOIS, *supra* note 5, at 336.

52. *Id.* at 265.

53. *Id.* at 197–98, 268.

54. *Id.* at 268.

Fourteenth Amendment ought to secure voting rights,[55] Du Bois does not suggest that his defeat made no difference or that Stevens was wasting his time. When Du Bois emphasizes that the forcible overthrow of Reconstruction "had to be carried out in open defiance of the clear letter of the law," he does so to condemn, not merely to flag for those who care about such things.[56] When he describes the framing and ratification of the Louisiana Constitution of 1868, with its sweeping guarantees of equal civil and political rights and common schools, he can scarcely contain his enthusiasm.[57] After describing how Whites "reviled" it as the work of an "iniquitous Radical Conclave," Du Bois exults that "[i]n the face of this, the laws of Louisiana, as codified on the basis of this Constitution and subsequent legislation, were finally adopted in three main codes, signed by the black Lieutenant Governor of the state, Oscar J. Dunn, and remain to this day as the basic law of the state!"[58]

Du Bois's criticism of fetich-worship should thus be understood in connection with *a particular object of worship*—the antebellum Constitution—and a constitutionalism that is tethered to *its* rules and political economy. There is no comparable criticism of the Reconstruction Amendments, their implementing legislation, or the legal institutions that they made possible. What there is in abundance is skepticism that abolition democracy can be achieved absent concerted attention to the connection between economic power, political power, and violence.

### *D. Constitutional Political Economy and the Counterrevolution of Property*

Du Bois's account of constitutional political economy—the ways in which questions of wealth accumulation and distribution shape constitutional politics and the latter the former[59]—is subtle and specific. The Reconstruction Amendments and the work of the Reconstruction Congress more broadly are not solely a function of transformations in

55. *See id.* at 289–91.
56. *Id.* at 670.
57. *Id.* at 468–69.
58. *Id.* at 469.
59. For a comprehensive presentation and defense of a long-neglected American tradition of thinking about and framing such questions in constitutional terms, see JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 6–8 (2022). For general introductions to an emergent law-and-political economy movement that seeks to revive this tradition, see Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1792 (2020); Corinne Blalock, *Introduction: Law and the Critique of Capitalism*, 121 S. ATL. Q. 223, 223 (2022).

modes of production or class identity. What we perceive in *Black Reconstruction* is methodologically consistent with Marx's account of the rise of Louis Bonaparte in France between 1848 and 1852, which culminated in a violent coup d'état.[60]

Stuart Hall observes of *The Eighteenth Brumaire of Louis Bonaparte* that "all kinds of social and political forces come into play that . . . have no precise class location."[61] In place of "two fundamental classes—capital and labour"—Marx "talks about the great landowners, the industrial bourgeoisie, the financial bourgeoisie, the industrial proletariat, the peasantry, and the lumpen proletariat."[62] Similarly, we encounter in Du Bois's mapping of Reconstruction's political terrain not merely "capital" and "labor," "proletariat" and "bourgeoisie" but Black laborers and White laborers; northern industrialists and southern planters; petty-bourgeois White elites and Black leadership; abolition Democrats and conservative Republicans.[63]

Consider the "pitiful figure" of President Andrew Johnson, whose betrayal of Reconstruction was not dictated by his class identity but by his own prejudices and vanity.[64] In Du Bois's telling, Johnson was "transubstantiat[ed]" from a "champion of the poor laborer" who "demand[ed] that the land monopoly of the Southern oligarchy be broken up" into a "puppet" who "died with the conventional ambition of a poor white to be the associate and benefactor of monopolists, planters[,] and slave drivers."[65] He did this not because of "deliberate thought or conscious desire to hurt,"[66] but rather, because "he could not conceive of Negroes as men" and was "drunk, not so much with liquor, as with the heady wine of sudden and accidental success."[67]

But José Itzigsohn observes that *Black Reconstruction* exceeds *The Eighteenth Brumaire* in respect to empirical research and substantive

60. *See* Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, *in* MARX'S 'EIGHTEENTH BRUMAIRE': (POST)MODERN INTERPRETATIONS 19 (Mark Cowling & James Martin eds., Terrell Carver trans., Pluto Press 2002).

61. STUART HALL, CULTURAL STUDIES 1983: A THEORETICAL HISTORY 93 (Jennifer Daryl Slack & Lawrence Grossberg eds., 2016).

62. *Id.*

63. *See* Gerald Horne, *Abolition Democracy*, NATION (May 3, 2022), https://www.thenation.com/article/society/web-du-bois-black-reconstruction/ ("What gives *Black Reconstruction* added relevance today is that Du Bois does not analyze US history teleologically but rather by scrutinizing the forces on the battlefield.").

64. DU BOIS, *supra* note 5, at 322.

65. *Id.*

66. *Id.*

67. *Id.*

analysis.[68] The most enduring of Du Bois's substantive innovations is his account of how racial division "drove such a wedge between the white and black workers that there probably are not today in the world two groups of workers with practically identical interests who hate and fear each other so deeply and persistently."[69] To be sure, what Du Bois referred to as the "wages" of Whiteness that tempted poor White laborers away from forging a biracial proletarian alliance against capitalist exploitation were in the main enforceable legal rights with material consequences.[70] Still, Du Bois refers to "*psychological* wage[s]"[71] and depicts "a social system in which race is much stronger than class in terms of the assignment of social status, the formation of identities, and the development of collective action."[72]

Du Bois's nuanced treatment of the Freedmen's Bureau also illustrates his appreciation of the ways in which the complexity of

68. *See* José Itzigsohn, *Class, Race, and Emancipation: The Contributions of* The Black Jacobins *and* Black Reconstruction in America *to Historical Sociology and Social Theory*, 19 CLR JAMES JOURNAL 177, 179 (2013).

69. DU BOIS, *supra* note 5, at 700. Du Bois both contributed to and inspired the theorization of racial capitalism. The phrase "racial capitalism" first appeared in an anonymous essay, *Neo-Marxism and the Bogus Theory of 'Racial Capitalism*,' that was published in *Ikwezi: A Black Liberation Journal of South African and Southern African Political Analysis*. *See* Peter James Hudson, *Racial Capitalism and the Dark Proletariat*, BOS. REV. (Feb. 20, 2018), https://www.bostonreview.net/forum_response/peter-james-hudson-racial-capitalism-and/. But it is now most closely associated with the work of Cedric Robinson. *See* Michael Ralph & Maya Singhal, *Racial Capitalism*, 48 THEORY & SOC'Y 851, 860 (2019); CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 2 (1983) (using the term "racial capitalism" to capture how "[t]he development, organization, and expansion of capitalist society pursued essentially racial directions" and "racialism . . . permeate[d] the social structures emergent from capitalism"); *see also* Jodi Melamed, *Racial Capitalism*, 1 CRITICAL ETHNIC STUD. 76, 77 (2015) (explaining that "the term 'racial capitalism' requires its users to recognize that capitalism *is* racial capitalism" ... and that "Capital can only be capital when it is accumulating, and it can only accumulate by producing and moving through relations of severe inequality among human groups . . . "); James Thuo Gathii & Ntina Tzouvala, *Racial Capitalism and International Economic Law: Introduction*, 25 J. INT'L ECON. L. 199, 202 (2022) (reading Du Bois to hold that "racial capitalism does not necessarily hinge on white supremacy or even have to follow pronounced racial lines" because "[a]s capitalism evolves and new models of accumulation arise, new ways of stratifying and managing populations also emerge"); Carmen G. Gonzalez & Athena D. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127, 131 (2022) (crediting Du Bois with the insight that "racial stratification . . . stabilizes capitalism by dividing the working class, allowing non-elite white workers to perceive their interests as aligned with those of white owners of capital. Race-making also divides the earth among racialized groups through legal concepts of property and sovereignty, and facilitates the commodification of nature.").

70. *See* Jeff Goodwin, *Black Reconstruction as Class War*, 6 CATALYST 52, 78–79 (2022).

71. DU BOIS, *supra* note 5, at 700 (emphasis added).

72. Itzigsohn, *supra* note 68, at 186.

conjunctures can shape legal-institutional design.[73] Grounded upon the authority conferred by the Thirteenth Amendment,[74] the Freedmen's Bureau Act of 1865 empowered a new agency to "set apart, for the use of loyal refugees and freedmen," up to forty acres of abandoned or acquired land in former Confederate states.[75] Freedmen could purchase the land for an appraised value within or at the end of a three-year period; rent was set on the basis of the appraised value.[76] Here was Republican constitutional political economy most fully realized: forced laborers would transition to full citizenship, with the aid of massive redistribution that would provide a material base on which economic and political freedom would be built.[77] The Act authorized "provisions, clothing, and fuel" for "the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children."[78] It also adjudicated disputes between freed people and planters.[79] Du Bois details how it "made laws, executed them and interpreted them[,] . . . laid and collected taxes, defined and punished crime, [and] maintained and used military force. . . ."[80]

The structure of the Freedmen's Bureau reflected a compromise between Republicans. Abolition democrats wanted to empower the agency to confiscate large slave plantations into forty-acre parcels to be

73. Besides *Black Reconstruction*, essential literature on the Freedmen's Bureau includes, for example, DALE KRETZ, ADMINISTERING FREEDOM: THE STATE OF EMANCIPATION AFTER THE FREEDMEN'S BUREAU 1–14 (2022). *See also* BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 66–72 (2019); MARY FARMER-KAISER, FREEDWOMEN AND THE FREEDMEN'S BUREAU: RACE, GENDER, AND PUBLIC POLICY IN THE AGE OF EMANCIPATION 1–13 (2010); Robert C. Lieberman, *The Freedmen's Bureau and the Politics of Institutional Structure*, 18 SOC. SCI. HIST. 405, 406–07 (1994); Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1363 (2016); Bernice B. Donald & Pablo J. Davis, *"To This Tribunal the Freedman Has Turned": The Freedmen's Bureau's Judicial Powers and the Origins of the Fourteenth Amendment*, 79 LA. L. REV. 1, 5 (2018); Daniel Backman, *"A Vast Labor Bureau": The Freedmen's Bureau and the Administration of Countervailing Black Labor Power*, 40 YALE J. ON REGUL. 837, 837 (2023).

74. Graber, *supra* note 73, at 1370. On the Thirteenth Amendment as authority for the Civil Rights Act of 1866, see Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40, 45–46 (2011).

75. Freedmen's Bureau Act of 1865, ch. 90, § 4, 13 Stat. 507, 508.

76. *Id.*

77. On the political economy of the Thirteenth Amendment, see William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L.J. 1115, 1124, 1128 (2011). *See also* Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1701–07 (2012); Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859, 860 (2016).

78. Freedmen's Bureau Act of 1865 § 2.

79. *See* Backman, *supra* note 73, at 849.

80. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 27 (2d ed. 1903).

granted to each formerly enslaved person.[81] Other Republicans worried that redistribution could not be confined to the South and complained that "the Northern white working man himself had not achieved such economic emancipation."[82] The rent-and-purchase structure was the result.[83] The coalition fractured over funding, and using what Bernice Donald and Pablo Davis call "the ready-made scaffolding the military offered" enabled it to draw upon existing "resources, personnel, and discipline."[84] The Bureau was thinly staffed by some 550 agents and 350 clerks across all of the former Confederate states.[85] The vast majority had no experience in social planning and received only regular Army pay in return for serving "tens of thousands of freedpeople, often unaided and with a hostile White population surrounding the assignment."[86]

Still, while it operated, the Bureau achieved "astonishing" things.[87] In the midst of ambiguities about just what free labor *was*[88] and in the teeth of violent reaction, the Bureau instituted "a dictatorship by which the landowner and the capitalist were to be openly and deliberately curbed and which directed its efforts in the interest of a black and white labor class."[89]

By "dictatorship" is not meant totalitarian governance.[90] Instead, Du Bois sees the Freedman's Bureau as a substantively democratic

81. DU BOIS, *supra* note 5, at 198.
82. *See id.* at 206.
83. Backman, *supra* note 73, at 846.
84. Donald & Davis, *supra* note 73, at 9.
85. *Id.* at 10–11.
86. *See id.*
87. DU BOIS, *supra* note 5, at 224.
88. *See* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 769–70 (1985). The canonical account of Republican free labor is ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 298 (2d ed. 1995).
89. DU BOIS, *supra* note 5, at 219.
90. On "dictatorship of the proletariat" as a Marxist term of art, see Lea Ypi, *Democratic Dictatorship: Political Legitimacy in Marxist Perspective*, 28 EUR. J. PHIL. 277, 281 (2020). *See also* HAL DRAPER, THE "DICTATORSHIP OF THE PROLETARIAT" FROM MARX TO LENIN 8, 26 (1987). Candor requires me to acknowledge that I find it almost impossible to read certain passages in *Black Reconstruction* without thinking of Du Bois's silence regarding Soviet totalitarianism. *See* ROBIN D. G. KELLEY, FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION 57 (2002) (lamenting that neither Du Bois "nor anyone else with a continuing commitment to the Left had anything to say about Stalin's atrocities" and stating that "the silence that followed these revelations [by Khruschev in 1956] is one of the great tragedies in the history of the Communist movement"). As Draper demonstrates, "dictatorship of the proletariat" has been used to justify totalitarian one-party rule, and I have no desire to enter into a debate about whether there is anything in the language or underlying concept worth salvaging. *See* DRAPER, *supra*, at 38–41. Suffice to say that I do not read Du Bois as endorsing totalitarianism in *Black Reconstruction*. *See* Elvira Basevich, *What is a Black Radical Kantianism Without Du Bois? On Method, Principle, and Abolition*

institution, empowered to act on behalf of an oppressed majority during a period of transition to what Blake Emerson describes as "egalitarian social conditions under which a future democracy could flourish."[91] Du Bois lauds its "indispensable work of mercy and relief"[92] and strongly implies that it did nearly most that it could have done under the circumstances to combat "the worst methods of exploitation" and "protect[] the Negro from violence and outrage, from serfdom, and in defending his right to hold property and enforce his contracts."[93] If it was not "perfect and well-planned . . . for its mission,"[94] its imperfections stemmed from the divided coalition behind it and adamant opposition that "bitterly fought and maligned the Bureau at every turn."[95]

Du Bois's discussions of law *in the courts*—that is, constitutional doctrine—at first seems crude by comparison. The Supreme Court is mentioned only in passing until "appear[ing] upon the scene" in the 1870s to "effectively stop[] Northern Federal dictatorship [from] enforc[ing] democracy in the South."[96] Du Bois tells us that "the [C]ourt, through a process of reasoning very similar to that of Democratic legislators, deprived the enforcement legislation of nearly all its strength when it rendered its decisions in the cases of *United States v. Reese* and *United States v. Cruikshank*."[97] The reasoning of these decisions appears in brief excerpts which Du Bois does not substantively engage. Instead, he provides a bottom-line assessment of their consequences—"[b]oth the Fourteenth and Fifteenth Amendments were thus made innocuous so far as the Negro was concerned"—and implies that these and later decisions, which made "the Fourteenth Amendment in particular . . . the chief refuge and bulwark of corporations," were procured by "Northern Big Business."[98]

Du Bois insists that the Court did a great deal of harm. But he is scant on the explanatory details. The little that he says initially suggests

*Democracy*, 2023 J. SOC. PHIL. 1, 12–14 ("Du Bois's main concern is to show that the exploitation of black freedmen reveals American democracy on the whole to be a sham, one that rationalizes the structural domination of capital over the propertyless as a class. Ex-slaves offered a new take on an old ideal: liberty for all. Foregrounding their demands would do much to achieve substantive equal freedom for all by protecting basic political liberties and productive powers as an alternative universalizable public standard of political judgment.").

91. EMERSON, *supra* note 73, at 71.
92. DU BOIS, *supra* note 5, at 227 (internal quotation marks omitted).
93. *Id.* at 226–27.
94. *Id.* at 223–24.
95. *Id.* at 223.
96. *Id.* at 690.
97. *Id.* at 690–91.
98. *Id.*

a crude form of class instrumentalism whereby ruling class interests dictate the content of law.[99] The possibility of transformative social change through U.S. constitutionalism—a constitutionalism in which constitutional adjudication is centrally important—has become the subject of increasingly urgent attention. Du Bois's account might be taken to lend support to an ascendant left constitutional skepticism.[100]

The *Slaughter-House Cases* are absent from Du Bois's narrative. They are, however, contemporaneous with the decline of abolition democracy. Du Bois's concepts and analytical method hold the potential to shed light upon what happened in them and why, as well as to evaluate the Court's work. They also provide an opportunity to reflect upon the prospects of left constitutionalism. First, however, we must set the political-economic scene in Louisiana.

## II. THE EIGHTEENTH BRUMAIRE OF HENRY WARMOTH

### *A. The Battles of New Orleans*

Louisiana in 1869 was a battlefield—metaphorically and often literally. At the peak of federal support for Reconstruction, a radical state constitution had just been ratified and a biracial legislature elected.[101] Not three years earlier, however, Black Republicans were slaughtered at a constitutional convention in New Orleans in what General Philip Sheridan called "an absolute massacre."[102] In his inaugural 1868 address,

99. *See* HUGH COLLINS, MARXISM AND LAW 26–29 (1982) (describing and rejecting this picture as implausible). *But see* G. A. Cohen, *Base and Superstructure: A Reply to Hugh Collins*, 9 OXFORD J. LEGAL STUD. 95, 98 (1989) (contending that "Collins himself favours a different version of class instrumentalism, in which classes act out of perceptions of their interests that may be incorrect").

100. For leading examples, see, for example, AZIZ RANA, THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM, at x–xii (2024). *See also* LOUIS MICHAEL SEIDMAN, FROM PARCHMENT TO DUST: THE CASE FOR CONSTITUTIONAL SKEPTICISM 1–14 (2021); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703, 1718 (2021); Aziz Rana, *Who Owns the Constitution?*, JACOBIN (Oct. 15, 2020), https://jacobin.com/2020/10/us-constitution-law-supreme-court-socialism; Ryan D. Doerfler & Samuel Moyn, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022), https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html. Rana claims Du Bois as a skeptic. *See* Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity*, 71 MD. L. REV. 1015, 1025 (2012) (citing the "fetich" language and claiming that "[t]he driving logic of Du Bois's position was that, given its colonial foundations, the constitutional tradition was a limited site to locate a racially redemptive politics in America").

101. DU BOIS, *supra* note 5, at 469–70.

102. *See* JAMES G. HOLLANDSWORTH, JR., AN ABSOLUTE MASSACRE: THE NEW ORLEANS RACE RIOT OF JULY 30, 1866, at vii (2001).

Republican Governor Henry Warmoth described the "almost daily accounts of violence and outrage . . . without any effort on the part of the people to prevent or punish them."[103]

The fact that Warmoth was elected at all illustrates the precarity of Radical Reconstruction. Warmoth entered the political scene in 1865, in the wake of a Republican Party convention at which Radicals carried the day.[104] The convention adopted the theory that Louisiana was a federal territory and proposed a voluntary election for a delegate to Congress.[105] The leading figures who garnered support for these ideas were Black men, Oscar J. Dunn and W.R. Crane.[106] The nominee-by-acclamation for the role of delegate was Thomas Durant, a Southern Unionist and socialist who had worked with President Lincoln to restore Louisiana to the Union.[107] When he declined, Warmoth was substituted for him. Explaining the choice of Warmoth, Du Bois offers that "it was political wisdom to send a white man to Washington, and few others were willing to take the risk."[108]

Du Bois calls Warmoth "an unmoral buccaneer"—"shrewd, likable, and efficient" but utterly undependable when it came to Black freedom.[109] The closest thing that he appears to have had to a political lodestar was a Whiggish commitment to internal improvements as a means of promoting economic growth and social peace.[110] Perhaps he imagined that racial terror would cease and his political power would be secure if he raised money for public projects that contributed to the general welfare.[111]

Warmoth was not wrong that Louisiana in general and New Orleans in particular stood in need of internal improvements. When he described New Orleans as a "dirty, impoverished, and hopeless city," he was stating what Republicans regarded as sociological facts.[112] Louisiana's economy had been crippled; city streets were unpaved and the cities themselves surrounded by unnavigable swamps and bayous; public transportation

103. DU BOIS, *supra* note 5, at 473 (internal quotation marks omitted).
104. *See id.* at 462.
105. *Id.*
106. *Id.*
107. *Id.* at 463. On Durant, see generally Joseph G. Tregle, Jr., *Thomas J. Durant, Utopian Socialism, and the Failure of Presidential Reconstruction in Louisiana*, 45 J. S. HIST. 485, 494 (1979).
108. DU BOIS, *supra* note 5, at 463.
109. *See id.* at 461.
110. *See* Michael A. Ross, *Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign Against Louisiana's Republican Government, 1868–1873*, 49 CIVIL WAR HIST. 235, 238 (2003).
111. *See id.*
112. *See* LABBÉ & LURIE, *supra* note 19, at 71 (internal quotation marks omitted).

was practically nonexistent; and yellow fever and cholera were rampant.[113]

And yet internal improvements would not pay for themselves, and White Louisianans would not pay for them. Michael Ross details how "many whites simply refuse[d] to pay taxes to the Reconstruction government," with the result that "tax revenues slowed to a trickle."[114] Issuing bonds to pay for projects did not work because of Louisiana's low credit.[115] Accordingly, the legislature granted exclusive charters to private corporations to perform traditional public functions.[116] This third-best option succeeded in raising money as investors bought the publicly traded stock of chartered companies.[117] But it also gave opponents of Reconstruction "ammunition for potent charges of corruption and monopoly."[118]

### *B. Fear of a Black Proletariat*

It would be difficult to conjure up a less promising group of claimants on Louisianan public sympathies in 1869 than New Orleans butchers. A formidable political power bloc that had stymied decades' worth of sanitation-reform efforts, the butchers were leading contributors to the highest mortality rate of any city in the nation.[119] Filth from their tradecraft clogged gutters, flooded streets, polluted the Mississippi River—the city's water source—and rotted and festered in backyards.[120] They conspired to inflate meat prices, forcibly drove off competitors, and generally confirmed every concern that has ever been raised about monopolies.[121]

Conversely, the Crescent City Slaughter-House would seem to have everything going for it. Herbert Hovenkamp describes it as "a public utility, open to every butcher who wanted to use it,"[122] and it operated like an administrative agency.[123] The charter designated a location on

113. MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 193 (2003).
114. *Id.* at 194.
115. *Id.*
116. *Id.*
117. *Id.* at 194–95.
118. *Id.* at 194.
119. *See id.* at 197–98; *see also* Parmet, *supra* note 19, at 484–85 ("To disallow a slaughtering regulation, would be, in effect, to hold that the state was defenseless against yellow fever.").
120. *See* LABBÉ & LURIE, *supra* note 19, at 40.
121. Ross, *supra* note 19, at 656.
122. Hovenkamp, *supra* note 19, at 1302–03.
123. *Id.* at 1303–04.

which the slaughterhouse was to be constructed; prescribed rules and regulations governing slaughtering that applied equally to all butchers in the city; and established fixed prices.[124] No concrete evidence has ever been adduced that the Slaughtering Act of 1869 was the product of bribery or corruption.[125] And the result was an arrangement that primarily benefited "new entrants into the business" at the expense of "established wholesale meat companies . . . owned primarily by old southern families."[126]

And yet the butchers became the heroes of an anti-monopolistic narrative—one in which a corrupt legislature deprived working people of their rights to earn a living in order to enrich elite capitalists.

The racial politics of resistance to Reconstruction obscured the butchers' vices and the Slaughter-House's virtues. The Slaughter-House was created less than a month after the Louisiana legislature criminalized the exclusion of Black people from places of public accommodation and mere weeks before the legislature required that Louisiana public schools be open to all races.[127] It also lowered capital requirements for entering the butchering trade by eliminating the need for would-be entrants to build their own slaughter-houses.[128] Black people who had been driven off by the existing butchering monopoly would surely take advantage of this—and those who denounced the "Social Equality Bill" and the "School Integration Bill" surely knew it.[129]

What might otherwise have been recognized as transparently self-serving arguments by White elites on behalf of economic privileges that harmed everyone were thus transmogrified into the cause of all Whites against free Black labor and governance.[130] Du Bois does not detail the ways in which *constitutional arguments* could perform this transmogrification. But the litigation that led to the *Slaughter-House Cases* shows us how.

### *C. Reactionary Lawyering*

As the Crescent City Slaughter-House cannot be understood absent political-economic context, neither can the litigation against it. Representing the butchers was John A. Campbell, a former Supreme Court Justice who concurred in *Dred Scott v. Sanford* in support of the

124. *Id.* at 1302–03.
125. *Id.* at 1305–06.
126. *Id.* at 1307.
127. ROSS, *supra* note 113, at 196–97.
128. *See* Hovenkamp, *supra* note 19, at 1298, 1302–03.
129. *See* ROSS, *supra* note 113, at 196–98.
130. *See id.*

constitutional impossibility of Black citizenship.[131] He resigned from the Court to serve as the Confederacy's assistant secretary of war and devoted his legal practice to minimizing the impact of the battlefield defeat of the secessionist cause.[132] In short, he earned profit and pleasure from undermining Reconstruction.

Campbell's constitutional hook was the right to earn a lawful calling free of monopolistic interference.[133] What made this strategy truly devious—and nearly successful—is that the Crescent City Slaughter-House *was* a monopoly, and thus faced a strong presumption of illegitimacy that could unite even *Republicans* of a Jacksonian persuasion in opposition to it.[134] If Campbell acted in bad faith—and there is little doubt of this—certain of his constitutional arguments were still plausible.

Indeed, Campbell's argument that the Privileges or Immunities Clause of the Fourteenth Amendment protects a right to pursue a lawful calling is probably *correct* as a matter of the original meaning of the constitutional text. Writing with Randy Barnett, I've shown that the Privileges or Immunities Clause protects civil rights that were widespread and entrenched in the states and associated with citizenship.[135] Some of these are expressly listed in constitutional text; some are not, like those enumerated in the Civil Rights Act of 1866.[136] That the right to pursue a lawful occupation was among them was recognized by Justice Bushrod Washington, riding circuit in 1823.[137] Although Washington in *Corfield v. Coryell* interpreted the Privileges *and* Immunities Clause of Article IV,[138] leading Republicans used his basic theory of privileges and immunities to expound the Privileges or Immunities Clause of the Fourteenth Amendment.[139]

The same legal traditions that Campbell invoked in support of the right to pursue a lawful calling recognized that the exercise of that right—indeed, of *any* right—could be reasonably regulated. Immediately after placing the rights of citizenship under the capacious general headings of "[p]rotection by the government; the enjoyment of life and

131. Ross, *supra* note 19, at 665.
132. *Id.*
133. *See* ROSS, *supra* note 113, at 199.
134. *See* FONER, *supra* note 88, at 91 (describing the "countless Jacksonians" who joined the Republican Party because they saw slavery as the "goliath of all monopolies").
135. *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 61, 128–55 (2021).
136. *Id.* at 29.
137. Corfield v. Coryell, 6 F. Cas. 546, 550–552 (C.C.E.D. Pa. 1823) (no. 3,230).
138. *Id.* at 551–52.
139. BARNETT & BERNICK, *supra* note 135, at 61.

liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety," Washington added that these rights were "subject . . . to such restraints as the government may justly prescribe for the general good of the whole."[140] Campbell did his utmost to shift focus away from the catastrophic public health problems that might seem to make *any* regulatory scheme reasonable by misrepresenting the scope of the monopoly.

Besides falsely claiming that it made slaughtering into "the sole and exclusive enjoyment of a corporation," Campbell alleged that the Crescent City Slaughter-House "embrac[ed] 1200 square miles."[141] Pamela Brandwein has shown this geographical figure to be wildly misleading: "Contemporaneous sources indicated that nearly all that land was uninhabitable. In 1870, the total population for the three parishes covered by the law was 212,738 with almost all of it (191,418) in Orleans Parish and the lower half of Orleans Parish at that, less than [seventy-five] square miles."[142] In Campbell's presentation, all of this was part of a city, within which "the community . . . are deprived of what was a common right and bound under a thraldom."[143]

It almost worked. Campbell was able to convince four Justices that his clients—monopolists before 1869 *and themselves the owners of the Crescent City Company against which Campbell was litigating!*[144]— had been deprived of their right to earn a lawful calling by a monopoly. Three of the four dissenters were Republicans; but so was the author of the majority opinion sustaining the Crescent City Slaughter-House's constitutionality. The strongest and broadest readings of the Reconstruction Amendments were advanced by dissenters *against* Reconstruction governance, at the invitation of an inveterate foe of Reconstruction. The majority opinion, by contrast, adopts a narrow reading of the Amendments *and* congressional power to enforce them.[145]

140. *Corfield*, 6 F. Cas. at 551–52.

141. The Slaughter-House Cases, 83 U.S. 36, 50, 86 (1873) (reporting plaintiffs' argument).

142. Pamela Brandwein, *The* Slaughter-House *Dissents and the Reconstruction of American Liberalism,* 118 AM. POL. SCI. REV. 1005, 1012 (2023) (citations omitted).

143. *The Slaughter-House Cases*, 83 U.S. at 51.

144. This stunning discovery was made by Brandwein, *supra* note 142, at 1011 ("[T]he many named plaintiffs in the consolidated cases, Paul Esteban, William Fagan et al., were well-heeled business owners. They lost in the highest state court, won in circuit court . . . and waited while the Supreme Court held the case over for re-argument. Then, in 1871, Esteban et al. bought the Crescent City Company. Full stop. They became the 'monopoly' they had been raging against, taking their seats as the new Board of Directors and President.").

145. *See* discussion *infra* Sections III.B–C.

We can't chalk this fractured decision up to the priorities of Northern industry. What we *can* do is appreciate the limited degree to which abolition-democracy-as-bloc were able to influence national politics in light of Republican sensitivity to those priorities. At a more granular level, we can then recognize how unlikely it was that abolition democrats would be appointed to the Supreme Court—and more unlikely still that an abolition-democratic majority would carry the day in the *Slaughter-House Cases*, or that anything that any majority decided would prevent the violent overthrow of Reconstruction. Economic power cannot explain everything that happened here. Along with *beliefs about* the relationship between the Constitution, economic power, and violence, it *can* explain a lot.

## III. THE CONSTITUTIONAL POLITICAL ECONOMY OF THE *SLAUGHTER-HOUSE* CONJUNCTURE

### *A. The Reconstructed Court*

The Supreme Court was, during the antebellum period, captured by the "Slave Power"—a proslavery power bloc that controlled all three branches of the federal government for the benefit of an enslaving elite.[146] So Republicans believed—and reasonably so in the wake of *Dred Scott v. Sandford*, which saw slaveholding Justices declaring Black citizenship to be constitutionally impossible.[147] Abraham Lincoln ran for office on a platform of opposition to the reasoning of *Dred Scott*, and he and other Republicans promised that a Republican administration would "reconstitute" the Court.[148]

Not long after assuming office on March 4, 1861, Lincoln found himself with three Supreme Court vacancies to fill. Justice Peter Daniel, a "brooding pro-slavery fanatic"[149] and a member of the *Dred Scott* majority had died the previous May.[150] In April 1861, Justice John McLean, celebrated by abolitionists for his *Dred Scott* dissent, passed away.[151] Finally, John Campbell resigned in May to become the Confederacy's Secretary of War.[152]

146. *See* FONER, *supra* note 88, at 88–91.
147. *Id.* at 88, 97, 292–93.
148. ROSS, *supra* note 113, at 65 (internal quotation marks omitted).
149. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 234 (1978).
150. Ross, *supra* note 113, at 65.
151. *Id.* at 66.
152. *Id.*

But Republicans would not control the Court anytime soon. Five of the remaining Justices on the Court were members of the *Dred Scott* majority, and the sixth—Nathan Clifford—was a proslavery Democrat.[153] In the wake of Chief Justice Roger Taney's determination in *Ex parte Merryman*[154] that the President lacked the constitutional authority to suspend habeas corpus on his own initiative, Republicans called for structural reforms that would empower Republican judges and ensure the constitutionality of Lincoln's war measures.[155] These reforms included increasing the number of seats on the Supreme Court and reorganizing the nation's judicial circuits to remedy an imbalance between population and judicial representation that favored slaveholding states and failed entirely to account for westward expansion.[156] As the balance of circuits stood, five of nine circuits covered slaveholding states, even though the population of one Northern circuit alone equaled that of all slaveholding circuits combined, and Texas, Florida, Wisconsin, Oregon, Minnesota, Kansas, California, and Iowa had not yet been assigned to circuits.[157]

Michael Ross details how these circumstances redounded to the benefit of Samuel Miller, the eventual author of the *Slaughter-House Cases*. Republican Senator John Sherman of Ohio proposed a reorganization plan that would assign three judicial circuits to the Northeast, three to the South, and three to the Middle West.[158] Besides diminishing Southern Justices' power, the proposal would ensure that all three vacancies on the Court would be filled by Justices who supervised western circuits and thus have "a profound effect on the administration of justice in that region."[159]

Iowa's congressional delegation opposed the bill, owing to concerns that Lincoln would appoint a justice from his home state of Illinois to

153. *Id.*

154. *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). For an exhaustive account of the *Merryman* opinion, complete with a deconstruction of enduring myths about the opinion's precise nature and Lincoln's response to it, see Seth Barrett Tillman, Ex Parte Merryman: *Myth, History, and Scholarship*, 224 MIL. L. REV. 481 (2016). Tillman persuasively argues that Taney did not order the release of John Merryman, a Confederate sympathizer who was detained by the Union Army on suspicion of destroying bridges and railway lines. Nonetheless, Tara Grove emphasizes that the episode became a focal point of constitutional contestation, with Democrats lauding Taney's reasoning and Republicans condemning it. *See* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 493 (2018).

155. *See* ROSS, *supra* note 113, at 68.

156. *Id.* at 68–70.

157. *Id.* at 68–69.

158. *Id.* at 69.

159. *Id.* at 69–70.

supervise a Ninth Circuit that included Iowa and whom they did not like.[160] This was Senator Orville Browning, a fervent supporter of the railroad industry whom they expected to rule in favor of railroad interests, particularly in cases involving the repudiation of bonds and other debts incurred for rail construction.[161]

Lincoln used his first appointment on Noah Swayne, an antislavery Republican who could be counted upon to be favorable to Lincoln's war measures and was strongly backed by big business—including the rail business.[162] Iowans then sought inclusion in a circuit with other steamboat-trade-oriented states that faced the burden of railroad debt.[163] They succeeded; the Judicial Reorganization Act of 1862 included Iowa in a circuit in which three of four states were tied to the river trade.[164]

Empowered by this victory, Iowans pressed Lincoln to appoint one of their own: Miller, a prominent Republican lawyer.[165] Litigating on behalf of an aggrieved steamboat owner, Miller had succeeded in securing an order to remove the hazardous Rock Island bridge, which was seen by steamboat owners as "evidence of the railroads' devious attempts to create a transportation monopoly."[166] Miller's appointment does not appear to have been a difficult sell. Miller's backers emphasized his consistency in refusing to indulge sectional compromises with slaveholders and his uncompromising stance towards the rebels.[167] And both men came of political age within the Whig Party, with its commitments to "internal improvements, factories, banks, tariffs, and aggressive economic growth."[168]

Lincoln would make three more appointments, all with an eye to "shared commitment to the Union and the war effort" as well as to regional and coalitional priorities.[169] When Browning proved unenthusiastic about Lincoln's policies, Lincoln selected another Illinoisan: David Davis, his friend and campaign manager.[170] Stephen Field, the lone Democrat appointed by Lincoln, was selected because he "publicly declared his allegiance to the Union and had urged his fellow Californians to do the same" and could "deflect partisan charges that the

160. *Id.* at 70.
161. *See id.* at 70–71, 98.
162. *Id.* 71–72.
163. *Id.* at 72.
164. *Id.* at 74.
165. *Id.*
166. *Id.* at 38–40. The railroad appealed, and the Supreme Court in 1862 ultimately overturned the removal order. For obvious reasons, Miller had to recuse himself. *Id.*
167. *Id.* at 77.
168. *Id.*
169. *See id.* at 88–89, 95.
170. *Id.* at 84.

president was packing the Court."[171] Finally, there was Salmon Chase, a distinguished antislavery lawyer and secretary of the treasury, whose strong commitments to emancipation and paper money as legal tender ultimately overcame Lincoln's personal dislike for a man whom he regarded as ambitious to a fault.[172]

It would be another four years before the next Supreme Court appointment, thanks in part to Republican distrust of Andrew Johnson. In 1866 Republicans reduced the size of the Supreme Court to seven Justices to prevent Johnson from getting any appointments.[173] Once Ulysses S. Grant replaced him, Congress increased the size of the Court to nine Justices.[174] Grant would appoint four Justices during his two terms; two of them, William Strong and Joseph Bradley, cast votes in the *Slaughter-House Cases*.[175]

The importance of constitutional support for Reconstruction was apparent when Grant appointed Strong and Bradley. It is equally apparent that Grant did not appoint these men because of their commitment to Reconstruction.[176] Strong and Bradley were both railroad lawyers with influential political friends.[177] In this regard, Grant's judicial priorities mirrored a broader Republican turn towards economic nationalism that was committed to "the creation of national markets and the defense of the contract and property rights of capital."[178]

The opinions in the *Slaughter-House Cases* reflect the complexity of different conjunctures, as well as the idiosyncrasies of the Justices who authored them. It was possible to *be* a Republican and to say what Justice Miller and the two principal dissenters, Bradley and Field, said about the Reconstruction Amendments. Not to mention, the politics of appointment did not encourage the selection of abolition democrats. We can be disappointed without being surprised.

171. *Id.* at 88.

172. *See id.* at 93–94.

173. Josh Chafetz, *Unprecedented: Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 123 (2017).

174. Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1128 (2020).

175. Jonathan Lurie, *Mr. Justice Bradley: A Reassessment*, 16 SETON HALL L. REV. 343, 350–51 (1986); The Slaughter-House Cases, 83 U.S. 36 (1873)

176. *See* C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 20 (1963) ("Without any fixed purpose, [Grant] regarded appointments as essentially personal gifts to be bestowed on those who won his gratitude.").

177. JAMES MACGREGOR BURNS, PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT 83–84 (2009).

178. Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 62 (2005).

### *B. Justice Miller's Moderate Reconstruction*

Samuel Miller's political evolution resembles that of the President who appointed him. He was no racial egalitarian and was, prior to the Civil War, contemptuous of abolitionists.[179] But he grew more egalitarian and closer to the radical position over time. He initially gravitated towards moderate Republicans like Senator Lyman Trumbull, who introduced the Civil Rights Act of 1866 and the Freedmen's Bureau Bill and supported civil but not political rights for Black people.[180] The combination of the Black Codes and racial terrorism against Black voters in the run-up to Grant's election in 1868 brought Miller around to supporting Black suffrage.[181] He also supported the Military Reconstruction Act of 1867, which divided all former Confederate states but Tennessee into military districts.[182]

Like many Republicans, Miller supported a "dynamic economic vision for the postwar South" that included government-funded internal improvements.[183] But his enthusiasm for Northern-style industrial capitalism had limits. Once a prolific speculator in real estate and coal mining, the Panic of 1857 led him to develop a small-r republican concern that "capital had become dangerously concentrated in the hands of parasitical financiers."[184] This concern would distinguish him from other Republican appointees, about whom he would complain that they were "*always* in favour of enforcing bonds, at the expense of all other rights."[185]

Miller also knew something about slaughterhouses. A doctor who had written his dissertation on cholera and lived in the nation's sixth largest hog-slaughtering center at the height of a successful campaign to regulate the industry, Miller was "uniquely knowledgeable among the Court's justices about cholera, medicine, hogs, and slaughterhouses."[186] Together with his Whiggish commitment to internal improvements, this knowledge and experience may have inclined him to regard the slaughterhouse bill as laudable means of simultaneously bringing Louisiana into the economic present and resolving a public health crisis.

Finally, Miller knew something about John Campbell and his reactionary agenda. He despised Campbell for having left the Court to join the Confederacy, and Campbell's subsequent career only confirmed

179. *See* ROSS, *supra* note 113, at 10–11.
180. *Id.* at 118–20.
181. *See id.* at 136, 145–48.
182. *Id.* at 148–49.
183. *Id.* at 203.
184. *Id.* at 25, 78–79.
185. *Id.* at 222 (internal quotation marks omitted).
186. Ross, *supra* note 19, at 668–69.

him in his contempt.[187] Describing him as "an active leader of the worst branch of the New Orleans democracy," Miller opined that Campbell "deserves all the punishment he . . . can receive . . . for the persistency with which he continues the fight when all men ought to seek to forget it as much as possible."[188]

Miller's constitutional reasoning for the *Slaughter-House* majority discloses these influences. He declares that "undoubtedly the overshadowing and efficient cause [of the Civil War] was African slavery" and identifies the "pervading purpose" of the Reconstruction Amendments as "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[189] He underscores the extent of state police powers over public health and emphasizes the care with which the slaughterhouse was designed to "remove from the more densely populated part of the city, the noxious slaughter-houses, and large offensive collections of animals necessarily incident to the slaughtering business of a large city."[190] He observes that the statute "does not, as has been asserted, prevent the butcher from doing his own slaughtering" or "destroy the business of the butcher, or seriously interfere with its pursuit."[191] As if to ward off future litigation inspired by Campbell's example, he states that "such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States."[192]

Two features of Miller's opinion have long troubled commentators who view the *Slaughter-House Cases* as anticipating—if not actively contributing to—a retreat from Reconstruction.[193] The first is Miller's conservative account of the changes wrought in the distribution of power between the federal government and the states. For example, Miller declares the importance of avoiding an interpretation of the Reconstruction Amendments that 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."[194] The second is the apparently limited scope of his theory of the privileges and immunities of

187. ROSS, *supra* note 113, at 200.
188. *Id.* (internal quotation marks omitted).
189. The Slaughter-House Cases, 83 U.S. 36, 68, 71 (1873).
190. *Id.* at 62–64.
191. *Id.* at 61–62.
192. *Id.* at 78.
193. *See* sources cited *supra* note 20.
194. *The Slaughter-House Cases*, 83 U.S. at 78.

citizenship and the list of rights that accompanies it. On Miller's account, the privileges and immunities of United States citizenship are different from those of state citizenship.[195] The latter are those that meet Justice Washington's *Corfield* criteria and include "nearly every civil right for the establishment and protection of which organized government is instituted."[196] They are protected by the Privileges and Immunities Clause only against parochial discrimination against visiting out-of-state citizens.[197] The former are those "which owe their existence to the Federal government, its National character, its Constitution, or its laws" and include the right of free access to subtreasuries and protection on the high seas.[198] The Privileges or Immunities Clause prohibits states from denying the latter to *any* U.S. citizen.[199]

*Really? Subtreasuries?* Several revisionist scholars contend that Miller's opinion was originally intended to include constitutionally enumerated rights, including those listed in the first eight amendments.[200] On this view, the Court's retreat from Reconstruction began in *United States v. Cruikshank*, in which the Court expressly denied that the rights to assemble and to bear arms were privileges of citizenship which Congress could protect against state or private violence.[201] Among the difficulties with this interpretation is that *Cruikshank* relied upon *Slaughter-House* and was joined by its author.[202] And regardless of Miller's intentions, the words he used to express them lent themselves to a narrow conception of the privileges of citizenship *and* correspondingly limited congressional power to implement Reconstruction.

Still, the immediate effect of the *Slaughter-House Cases* was to shore up Reconstruction governance in Louisiana, at a moment when the fate of Reconstruction was not sealed.[203] The Court sustained the

195. *Id.* at 73–74.
196. *Id.* at 76.
197. *Id.* at 77.
198. *Id.* at 79.
199. *Id.* at 78–79.
200. *See* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 264 (2014); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 706 (2000); Bryan H. Wildenthal, *How I Learned to Stop Worrying and Love the* Slaughter-House Cases: *An Essay in Constitutional-Historical Revisionism*, 23 T. JEFFERSON L. REV. 241, 245 (2001).
201. United States v. Cruikshank, 92 U.S. 542, 552–53 (1875).
202. *Id.* at 549.
203. Gregory Elinson, *Judicial Partisanship and the* Slaughterhouse Cases*: Investigating the Relationship Between Courts and Parties*, 31 STUD. AM. POL. DEV. 24, 34 (2017) ("Even if we allow that Reconstruction was less popular in 1873 than in 1867, the demise of robust federal intervention in the South was far from a *fait accompli*.").

constitutionality of a small and big-R republican institution that was calculated to break a monopoly, which operated as a bastion of racial privilege and power. Enacted by a Republican legislature and signed by a Republican governor following Black-led, federally supported radical state constitutional reform, the Slaughter-House was attacked by Campbell along with civil rights and school integration bills for precisely that reason.[204] When one considers the alternatives offered by the dissenters in the latter context, Miller looks much less the villain.

Miller doesn't actually *say* any of that, though. Indeed, as Maeve Glass shows, he omitted publicly available records of the sufferings and struggles of enslaved people that described "the relentless continuation of assault"[205] and which "had become a basis for a radical vision of America's future as a constitutional democracy."[206] He presented instead an account of slavery "as a Southern institution that had died with the march of Northern armies."[207] Freed people were denied agency and the federal government was absolved of responsibility for its antebellum role in constructing an "inescapable system of surveillance and policing."[208] Nor does Miller respond at length to the dissenters' articulation of theories of constitutional political economy, which "animated the Republican Party as it steered the North through the Civil War and the nation through Reconstruction."[209] The effect was to allow the dissenters to present themselves as defenders of small-and-large-r republicanism against a conservative majority that was afraid of Reconstruction.

And there *was* something to the dissenters' charge. However understandable Miller's motivations might be in the context of Campbell's reactionary litigation and the precarious state of Reconstruction governance in the former Confederate states, the result was an opinion that not only fell well short of the Fourteenth Amendment's original meaning but implied that Congress could not take a broader view. Among the horrible consequences for federalism that Miller predicts would result from a victory for the butchers, that of *congressional* domination receives comparable attention to that of judicial domination.[210] If the plaintiffs are right about the rights of

204. *Id.* at 30.

205. Maeve Glass, *Killing Precedent: The* Slaughter-House *Constitution*, 123 COLUM L. REV. 1135, 1169–70 (2023).

206. *Id.* at 1141.

207. *Id.* at 1171.

208. *See id.* at 1150. For a spellbinding account of antislavery resistance to the antebellum regime which focuses on litigation under the Fugitive Slave Act of 1850, see Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1877 (2019).

209. *See* Forbath, *supra* note 88, at 773–74.

210. The Slaughter-House Cases, 83 U.S. 36, 77–78 (1873).

citizenship, Miller reasons that "these rights [will be] subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation."[211] The implication is that those rights *will not* be subject to the control of Congress following the Court's decision.

The notion that congressional and judicial power to implement citizenship are roughly coextensive was utterly alien to a Thirty-Ninth Congress that remembered *Dred Scott*—whether one looks to the opinions of moderates or those of radicals. Like Section 2 of the Thirteenth Amendment, Section 5 of the Fourteenth Amendments specifically empowers Congress to enact "appropriate legislation" in recognition of the Court's reactionary history.[212] It also operates as part of a broader constitutional design within the Fourteenth Amendment to empower a Republican Congress to define and implement *their* understanding of citizenship.

Sections 2 and 3 of the Fourteenth Amendment were regarded as essential by Republicans because of their capacity to democratize constitutional structure. By 1865, Republicans had become convinced that emancipation might tilt federal elections in favor of democracy's enemies.[213] The abolition of slavery meant the effective deletion of the Three-Fifths Clause as a means of apportioning congressional representation.[214] Enslaving states could thus count freed people to swell their congressional ranks while denying Black people the franchise and perpetuating racialized domination.[215] Sections 2 and 3 of the Fourteenth Amendment were calculated to deny this undemocratic bonus by penalizing states that denied Black people the franchise by diminishing their congressional representation and prohibiting proven enemies of democracy from holding any federal office.[216]

Nothing required Miller to say anything about congressional power. But what he *did* say suggests an attachment to an antebellum conception

211. *Id.*

212. BARNETT & BERNICK, *supra* note 135, at 114–115, 250–51. For similar accounts of the breadth of the Fourteenth Amendment's enforcement power, see Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 156 (1997); Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 187 (2005); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1808–10 (2010); REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 4, 19 (2006).

213. *See* MARK A. GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF CONSTITUTIONAL REFORM AFTER THE CIVIL WAR 213–23 (2023).

214. *See id.*

215. *See id.*

216. *See id.* at 94.

of federalism.[217] Congressional Republicans contemplating civil rights legislation would struggle around the limits that the *Slaughter-House Cases* had seemingly imposed upon them.[218] And subsequent Supreme Court decisions would make good on the implication that Congress could do little more than the Court to implement citizenship.[219]

### *C. Bradley, Field, and Capital's Constitution*

To hear them tell it, Joseph Bradley and Stephen Field were the only Justices who were committed to implementing the Reconstruction Amendments. The only thing that mattered, Bradley intoned, was "the true construction of the [Fourteenth] [A]mendment."[220] Miller's concern about perpetual judicial censorship was an "argument [of] convenience" that ought to give way to the "National will and National interest."[221] Similarly, Field charged that if the majority's account of the Privileges or Immunities Clause were correct, the Fourteenth Amendment "was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[222] Those fundamental civil rights that Justice Washington said were protected by the Privileges and Immunities Clause against parochial discrimination were now the rights of national citizenship.[223] The right to pursue a lawful calling being among them, the deprivation of that right by "any monopoly whatever" was unconstitutional.[224]

In expounding the constitutional value of the right to pursue a lawful calling, Bradley and Field stood at an ideological intersection within the Republican Party. Willy Forbath finds that Field relied primarily on a small-r republican anti-monopoly tradition, confusingly conflated with classical liberal political economy.[225] "Free labor" within the republican tradition required ownership of productive property; in the classical liberal tradition, it required only freedom to sell one's own labor.[226]

217. *See* Cynthia Nicoletti, *The Rise and Fall of Transcendent Constitutionalism in the Civil War Era*, 106 VA. L. REV. 1631, 1688 (2020) ("In the *Slaughterhouse* opinion, Miller made clear that he would not read the Fourteenth Amendment against the background premise that the Civil War had represented a break in the normal functioning of the American federal system.").

218. *See* BARNETT & BERNICK, *supra* note 135, at 185–87.

219. *See* NICOLETTI, *supra* note 212, at 1689.

220. The Slaughter-House Cases, 83 U.S. 36, 124 (1873) (Bradley, J., dissenting).

221. *Id.*

222. *Id.* at 96 (Field, J., dissenting).

223. *Id.* at 97–98.

224. *Id.* at 97, 101.

225. *See* Forbath, *supra* note 88, at 780–82.

226. *See id.* at 776, 779.

Drawing from Campbell's brief, Field likened the Crescent City Slaughter-House to feudal institutions, thus implying that the "Reconstruction amendments rendered the Constitution a charter for a free marketplace."[227] But in Field's affirmation that "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,"[228] Forbath perceives "traditional republican notions of social equality and widespread distribution of productive property."[229] Pamela Brandwein notes the absence of the small-r conception of free labor from Bradley's opinion, which presses instead a conception of "absolute rights"—including a "right to labor"—that Bradley borrows from Blackstone long after it had been "rejected by legal figures of the well-regulated society."[230] Brandwein sees this as a bid to "reconstruct[] . . . the legal subject in purely individualistic terms" that would ultimately prove successful.[231]

Forbath contends that the butchers were class-situated in ways that could justify a claim on the anti-monopoly tradition. He speculates that "they saw arising from the new monopoly . . . a serious threat that they would be reduced to the condition of wage-earners."[232] And that Field saw them as illustrations of the truth of "Republicans' rhetoric and economic theories," according to which "[p]roperty owner and worker were identical."[233]

*But the butchers were the monopolists!* If Field really believed what he was saying about the butchers fighting a good anti-monopoly fight, he was duped. Writing with Joseph Fishkin, Forbath describes the emergence of a new liberalism that "represented an unraveling of Lincolnian 'Free Labor' ideology, discarding some of its democratic strands and fortifying its liberal ones."[234] Fishkin and Forbath present Justice Field's brother, corporate attorney David Dudley Field, as a case study in new liberalism. Wary of "the growing power of large corporations, especially in the political sphere," new liberals like David Field nonetheless believed that "restor[ing] equality and respect between labor and capital . . . could not be the business of government."[235] So, too,

227. *Id.* at 780.
228. *The Slaughter-House Cases*, 83 U.S. at 109–10 (Field, J., dissenting).
229. *See* Forbath, *supra* note 88, at 783.
230. *See* Brandwein, *supra* note 142, at 9–10.
231. *Id.* at 10.
232. Forbath, *supra* note 88, at 776.
233. *Id.* at 777.
234. FISHKIN & FORBATH, *supra* note 59, at 143–44.
235. *Id.* at 144–45.

his brother, in ways that his *Slaughter-House* dissent anticipates. Justice Field would go on to vote consistently in favor of industrial capital, and he would vote with Republican majorities.[236]

### *D. Reconstruction, Slaughtered*

Until quite recently, the legal-academic consensus of the *Slaughter-House Cases* was that it at least *helped* kill Reconstruction. It narrowed the judicially enforceable scope of the Fourteenth Amendment; it paved the way for future limitations on judicial and congressional enforcement power in *Cruikshank* and the *Civil Rights Cases*.[237] Richard Aynes claims that this was deliberate—that Miller's majority, like many Republicans, had tired of Reconstruction.[238]

It's more complicated than that. If Miller was no abolition democrat, neither were the dissenters. The immediate effect of the *Slaughter-House Cases* was to ward off an attack on Reconstruction governance *and* sustain the constitutionality of an institution which Black-built abolition democracy made possible and was calculated to alleviate a racialized imbalance of economic power. And yet, *Slaughter-House*'s negative reputation is deserved. Miller's opinion is riven with profound and unforced errors. That it might have been the least harmful of reasonably available opinions, given the four dissenters to Miller's right, is a measure of the dismal circumstances.

Du Bois's conceptions of abolition democracy and his constitutional political economy help us to understand these contradictions. Abolition democracy's command over Louisiana was never complete enough for an abolition democrat to be elected governor. But it did result in the enactment of a radical constitution, enable biracial governance, and generate a much-needed public health measure that promoted Black integration into economic life. Abolition democracy's command over the Republican Party could never secure the appointment of abolition democrats to the Supreme Court. But it was able to move moderate appointees like Miller to more-radical positions. Enforced by federal troops, abolition democracy was able to make civil rights and voting rights exist "both on paper and in practice."[239] But it was not able to seat a Court that listened to Black people about the *ongoing* violation of those rights, recognized the constitutional standing of those rights, or affirmed the constitutionality of federal power to secure them. Nor was it able to

236. *See* Brandwein, *supra* note 142, at 11–12.
237. The Civil Rights Cases, 109 U.S. 3 (1883).
238. *See* Aynes, *supra* note 20, at 686–87.
239. *See* GREGORY P. DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR 236 (2015).

prevent a Democratic sweep in the 1874 elections or the eventual withdrawal of military force from southern states, which led directly to the rise of Jim Crow.[240]

Which brings us back to Du Bois's critiques of the Supreme Court and of constitutional fetishism. Crudely instrumentalist though the former appear at first, too course-grained to explain the votes of individuals—like those of Bradley, of whom Jonathan Lurie remarks that "[h]is independent attitude toward railroads" was "probably, from the railroads' viewpoint, very unexpected"[241]—Du Bois's account of the Court captures something crucially important that might be lost in a more "nuanced" presentation. So, too, his denunciations of constitutional fetishism. The Court and the Constitution failed to save abolition democracy. And they failed not merely because five Justices misunderstood the Fourteenth Amendment but because of economic power and violence.

## IV. WHITHER CONSTITUTIONALISM NOW AND WHY?

Virtually everyone who has thought about the *Slaughter-House Cases* has an idea about what Justice Miller *should* have said.[242] Du Bois's concepts and methods enable us to focus attention on more politically urgent questions. How did abolition democrats find themselves in a place where what Miller *did* say was among the best of things that anyone could reasonably have expected him to say? In which nothing the Court could have done would have stopped the previous day's slaughter or the racial terror and apartheid to come? How can we avoid ending up in a similar place?

Du Bois is adamant that the slaughter of abolition democracy was not inevitable in any sense which relieves any person of moral responsibility for what they did or failed to do.[243] But he documents how

240. *See id.* at 239, 244–45.

241. Lurie, *supra* note 175, at 368.

242. It would be difficult to improve upon Francisco Valdes's rewritten opinion for the *Slaughter-House Cases*. Francisco Valdes, The *Slaughterhouse Cases*, *in* CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 118 (Bennett Capers et al. eds., 2022).

243. Indeed, he criticizes fellow constitutional political economists Charles Beard and Mary Beard on this ground. *See* DU BOIS, *supra* note 5, at 714–15 ("One reads, for instance, Charles and Mary Beard's 'Rise of American Civilization,' with a comfortable feeling that nothing right or wrong is involved. Manufacturing and industry develop in the North; agrarian feudalism develops in the South. They clash, as winds and waters strive . . . . [T]here is no room for the real plot of the story, for the clear mistake and guilt of rebuilding a new slavery of the working class in the midst of a fateful experiment in democracy; for the triumph of sheer moral courage and sacrifice in the abolition crusade; and for the hurt

damnably difficult it is to dismantle entrenched systems of domination. And he implies that it is *impossible* without confronting economic power and violence.[244] Abolition-democracy-as-bloc failed in part because its vanguards were insufficiently willing to do either of the latter.

It is Du Bois's demands for force that may jar readers who are more familiar with Angela Davis. Quinn Lester points out that Du Bois unambiguously endorses the use of state violence *to establish* AD-as-aspiration.[245] Thus, Du Bois regrets that even Thaddeus Stevens did not fully appreciate that "such a revolution was economic and involved force" and that power "cannot be expected to yield save to superior power."[246] What Du Bois calls the "vision of democracy" in America for all men depended upon "a *standing* Federal police" to prevent White vigilantes, politician, and police from using "brute force" to "destroy the possibility of democracy in the South."[247] That being said, the police which Davis seeks to abolish are part of a broader system that "brands Blacks as criminals, and that as alleged 'criminals' condemns them to be slaves of the state."[248] When Du Bois imagines federal officials using force to protect formerly enslaved people from White-supremacist violence, it is not clear that he is imagining the kind of "policing"[249] Davis would have any principled objection to under the desperate circumstances.[250]

Like questions about the influence of economic power on congressional and judicial decision-making during Reconstruction, the question of the appropriate role of violence in establishing Black citizenship might not sound "constitutional." Our legal culture has become used to thinking about the distribution of wealth as a policy matter to which the Constitution does not speak.[251] As to violence, it's the business of law to *restrain* force—the content of the Constitution cannot be affected by who *deploys* force in the service of their understanding of

and struggle of degraded black millions in their fight for freedom and their attempt to enter democracy.").

244. *Id.* at 591.

245. Lester, *supra* note 4, at 3084–85.

246. *See* DU BOIS, *supra* note 5, at 591.

247. *Id.* at 632 (emphasis added).

248. Eduardo Mendieta, *Prisons, Torture, Race: On Angela Y. Davis's Abolitionism*, 50 PHIL. TODAY 176, 180 (2006).

249. On policing as a form of domination, see MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT at xiii–xiv (2005); MARK NEOCLEOUS, THE FABRICATION OF SOCIAL ORDER: A CRITICAL THEORY OF POLICE POWER 1–43 (2000).

250. *See* Dhaliwal, *supra* note 4, at 54–55 n.393 (observing that "this was an assessment of a particular moment in history, with its own balance of social forces").

251. *See generally* FISHKIN & FORBATH, *supra* note 59, at 1–8.

it.[252] To the extent that the Court constitutionalized economic questions or deferred to lawless violence, it erred and ought to have done differently.

*Black Reconstruction* helps us to appreciate the costs of neglecting economic power and violence in thinking about constitutionalism and transformative politics. The question of whether the Supreme Court correctly interpreted the Reconstruction Amendments in the *Slaughter-House Cases* is not unimportant. It is important to understand that the Court reached the right result for the wrong reasons, and that its narrow conception of the Fourteenth Amendment was used to inflict harm. But it isn't enough to prevent such harms in the future.

Du Bois shows us that economic power and violence are part of constitutionalism in the United States, shaping and making constitutional meaning inside and outside the courts. Not just in the sense of changing the Constitution's text; in the sense of determining the extent to which its text will be given *practically* meaningful effect. Assessing the utility of the Constitution and its institutions—Congress, the executive, the courts—to the realization of abolition democracy requires exploring (1) what the Constitution has been and might be read to say about economic power and violence and (2) how economic power and violence affects what it is read to say. If Du Bois does not give us answers about the prospects of transformative constitutional politics in 2024, he compels us to confront long-neglected questions.

252. A characteristic expression of this conventional view can be found in *McGirt v. Oklahoma*. 140 S. Ct. 2452, 2482 (2020) ("Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."). For a timely challenge to it, see Farah Peterson, *Our Constitutionalism of Force*, 122 COLUM. L. REV. 1539, 1549–50 (2022) ("[V]iolence has at times fueled the Constitution's evolution and defined the limits of constitutional amendment by more formal means. The Ku Klux Klan's campaign of terror defined the scope of the Reconstruction Amendments more than its framers' intentions did."). *See* Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the World, the Deed, and the Role*, 20 GA. L. REV. 815, 833 (1986) ("In law to be an interpreter is to be a force, an actor who creates effects even through or in the face of violence. To stop short of suffering or imposing violence is to give law up to those who are willing to so act.").