Joseph P. Bradley's Journey: The Meaning of Privileges and Immunities

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Justice Joseph P. Bradley of New Jersey will forever be remembered as the judge who in 1883 cruelly scorned black rights in the Civil Rights Cases.[1] Yet Bradley's position that year marked the end of a journey that had started in a quite different place. Thirteen years before, when he first joined the Court, Bradley had read Fourteenth Amendment protections of citizens' rights expansively, believing "it is possible that those who framed the [Fourteenth Amendment] were not themselves aware of the far reaching character of its terms." In 1870 and 1871 Bradley wrote that the Fourteenth Amendment's Privileges and Immunities Clause reached "social evils…never before prohibited," and represented a commitment to "fundamental" or "sacred" rights of citizenship, which stood outside the political process and "cannot be abridged by any state."[2] By 1883, Bradley had turned away from such views. In the Civil Rights Cases, Bradley wrote that nothing in the Thirteenth or Fourteenth Amendments countenanced a law against segregation. Blacks, he said, must take "the rank of mere citizen" and cease "to be the special favorite of the laws."[3]

President Ulysses S. Grant nominated Bradley and William Strong to the Supreme Court on February 7, 1870, the day Chief Justice Salmon P. Chase ruled the Legal Tender Act unconstitutional in *Hepburn v. Griswold*. Though a Republican and adamantly opposed to slavery, Chase agreed with Democratic critics of the expanded national authority that Congress's power should be curbed and Jeffersonian principles of small

government reasserted. Chase's antebellum legal practice had largely consisted of fights against such federal law as the fugitive slave acts and for the states' right to protect their citizens from a wrong-headed nationalism bent on invading the rights of black Americans. Even on those occasions when Chase had advocated national power, as when he urged Congress to abolish the slave trade and end slavery in the District of Columbia, he did so on strict constructionist terms. The federal government had only enumerated powers, he said, and slavery was not one of them.[4]

Grant had every reason to believe Bradley more committed to national power than Chase. Bradley's opinions were "generally known" through speeches he had been giving for two decades, attacking states' rights and favoring national power.[5] In those speeches, Bradley narrated American history as a long struggle for national strength against decentralizing forces. While the defenders of states rights pointed to the Revolutionary period as proof that state sovereignty had a long history, legitimately emerging from the colonies' conflict with England, Bradley argued that the English had tried to sabotage the colonists' national aspirations by deliberately planting many independent societies on the North American continent. The British had engineered a diversity of interests in North America, intending to make each colony dependent on the mother country. This created an obstacle for patriotic Americans to overcome, according to Bradley. He pointed out that strong jealousies did arise between the colonies, rivalries that continued after independence. Those attending the 1787 Constitutional Convention, he said, had learned to fear the "infinite danger" of such "evils." The Constitution rejected British localism, Bradley believed, implying great powers for the government, "the most ample powers to preserve, protect, and defend itself." Nonetheless, some mistaken leaders contended that

the federal government lacked the power to compel obedience from the states. Bradley condemned that as "a pestilent heresy." The U.S. Government is supreme, he proclaimed, "in all respects national", with national powers, "unlimited powers of self preservation." "So thought every true hearted lover of his County," he continued, at least those with eyes "not blinded by a superstitious regard for the consideration and importance of the State Governments and the sacredness of state sovereignty."[6] Grant's administration may have picked Bradley for the Court in hopes he would vote in favor of legal tender, should the question arise again. Grant may also have had a grander ambition for Bradley in mind. He probably considered Bradley a more reliable vote than Chase on a whole host of constitutional principles favoring national power at a time when public support wavered for the kind of centralized government authority Reconstruction needed.

Bradley joined the Court at a time when many Americans especially valued higher law ideals discovered through individual reflection. After watching white southerners put allegiance to the Union up to a majority vote, northerners experienced the bloody fruits of majority rule on Civil War battlefields. No one came to symbolize this new commitment to personal reflection more than Ralph Waldo Emerson. By 1870 he had became the icon for individualism, personal reflection, and a commitment to natural law over majority rule. According to the best current scholarship, this should matter. As one recent writer explained, "because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broadest social and political context of the times."[7] By the end of the Civil War, elements of Emerson's thinking had become pervasive in American culture. As one scholar has observed, Emerson was "a veritable oracle, an American icon…recognized as a person whose vision helped to shape

the destiny of his nation and the course of Western thought." If justices necessarily follow the culture and the political environment they inhabit, then it is an irony that after the Civil War important segments of the public believed true law could not be found by a majority vote or by following public opinion.[8]

The Framers of the Fourteenth Amendment were all politicians, products of the political process. Nonetheless, after the Civil War they questioned the role politics should play in determining rights. Roughly one third of those voting for the Fourteenth Amendment in the House of Representatives – the only branch of the national government elected directly by the people in 1866 – took no position other than voting; they made no speech revealing their position on rights. Rutherford B. Hayes, his biographers explain, had grown suspicious of political speechmaking while serving in the army.[9] Of the two thirds of House members that did make speeches, one third made a political argument, saying that public opinion had shifted in favor of civil rights. James M. Ashley of Ohio exulted that a "great anti-slavery revolution which has swept over the country" which Congress had only to follow.[10] The final third made a constitutional argument, several openly announcing that they intended to follow the framers no matter what their constituents thought. Pennsylvanian William D. Kelley declared that he had "consulted no popular impulse…I have seated myself at the feet of the fathers of our country."[11] This last group received sustenance from the universe of thought Emerson represented. While Emerson developed deep skepticism about the Bible, his faith in absolute truth never waned. Every individual must search for "the law of the soul," a quest necessarily pursued without maps or markers, but one with a single destination nonetheless. He told one audience, "You cannot conceive yourself as existing…absolved

from this law which you carry within you." Some scholars have emphasized Emerson's commitment to the potential inherent in the Declaration of Independence, but others, especially Judith Shklar, have observed that Emerson really struggled with democracy. His theory of greatness recognized that not all people had minds capable of finding higher law, a realization that clashed with his commitment to self-evident equality. In his darker moods, and Emerson could be quite moody, he had real contempt for the masses and condemned anyone relying on the brute force of numbers for truth. Just because most people favored something did not make it right, Emerson believed. Emerson had a deep skepticism for the political process. For those people capable of finding truth, they did it alone, in private reflection. Truth did not emerge from the tumult of public debate.[12]

Emerson made a name for himself promoting universal truths higher than American law or even the U.S. Constitution, becoming a spokesperson for an American individualism so cosmopolitan that, according to one writer, it anticipated globalization. Emerson, in the words of Gregg Crane, rejected "law as a tribal inheritance." Unlike Daniel Webster, who believed the national identity produced justice, Emerson searched for ethical norms outside the United States, outside Christianity.[13]

So did Bradley. As a member of the Supreme Court Bradley rode the Fifth Circuit, holding court across the South. On the borderlands between the United States and Mexico, he confronted unfamiliar legal systems, land disputes involving Spanish land grants and law from Spain, Mexico and the United States, truly terra incognita for a New Jersey lawyer. Bradley labored over the unfamiliar principles but he gloried in the work, delighting in the collision between cultural worlds. Bradley lived at a time when borderlands had effectively become "bordered lands," but he could still sentimentalize

the mingling of diverse traditions and look forward to a rejuvenation of law based on cultural exchange.[14] Bradley certainly did not introduce foreign law into American jurisprudence, but in his most private moments, he really luxuriated in the work of understanding foreign legal concepts. "What a great country ours is," Bradley exulted to his son, "lying at the breasts of so many traditions and grand histories, and making the milk of political wisdom from so many fountains."[15] Like other Supreme Court justices, Bradley taught constitutional law to Washington, D.C. law students and in those classes he said that the same "uniform and permanent principles" govern all law in every society, in any nation. For this reason, no person in any community need become learned in local law to live a peaceful life. Echoing Emerson, he believed individuals could look within themselves for transcendent legal values. "All he has to do is follow the dictates of his conscience and endeavor to do right.…" Law is not arbitrary but immutable, Bradley said, visible to anyone willing to "gaze profoundly into its depths" and gain that insight only available through "deep study and reflection." By this standard, all law comes from nature. All rights are natural.[16]

During his first tour of the Fifth Circuit, Bradley heard the case that would prove crucial to the Supreme Court's determination of civil rights after the Civil War. In 1869, Louisiana's Republican-dominated legislature had passed a law monopolizing all slaughtering operations in New Orleans in a single slaughterhouse. The numerous independent butchers hired John A. Campbell to argue that the Fourteenth Amendment's privileges and immunities clause protected workers from onerous state legislation. Campbell had a political purpose. A Democrat and a former Confederate, Campbell wanted to thwart Louisiana's Republican legislature and Reconstruction generally.

Campbell's political motives initially repelled both Bradley and the circuit judge, William Woods, who sat with Bradley on the case. According to his opinion, Bradley recoiled from Campbell's manipulation of the Fourteenth Amendment's Privileges and Immunities clause on behalf of a bunch of ex-Confederate white men. "When the question was first presented," Bradley wrote, "our impressions were decidedly against the claim put forward by the plaintiffs." Bradley understood that Campbell and the New Orleans butchers intended their lawsuit as a strike against Reconstruction.[17]

Bradley and Woods nonetheless set aside their distaste for Campbell's motives and did what he asked. Bradley wrote that Campbell's suit "brings upon the question" of "whether the Fourteenth Amendment to the Constitution is intended to secure to the citizens of the United States of all classes merely equal rights; or whether it is intended to secure to them any absolute rights." Bradley and Woods answered yes, it did.[18]

When he initially read his opinion, Bradley dismissed the Civil Rights Act from consideration. He thought the Fourteenth Amendment more empowering:

> As to the Civil Rights bill, we are clearly of the opinion that it does not apply; that it was intended merely to secure to citizens of every race and color the same civil rights and privileges as are enjoyed by white citizens; and not to enlarge or modify the rights or privileges of white citizens themselves. The Fourteenth Amendment is much broader in its terms, and must be examined with more attention and care.[19]

That was what Bradley said on June 10, 1870. The next day he changed his mind and deleted that passage from his opinion. It appears in the published report of the case, but in brackets and taken from Myra Bradwell's report on the case in the *Chicago Legal News*. On June 11, Bradley appended a note to his original opinion saying that he had spoken "somewhat hastily." On reflection, he decided that the Civil Rights Act had been written to reach the same object as the Fourteenth Amendment. The Civil Rights Act, he said, "must be construed as furnishing additional guarantees and remedies to secure" privileges and immunities.[20]

In finding that the Fourteenth Amendment increased the power of Congress to authorize judicial protection of rights, Bradley did not feel limited by legislators' original intent. He thought it possible that the framers of the Fourteenth Amendment did not understand the far-reaching nature of the language they chose to use. "It is to be presumed that the American people, in giving it their imprimatur, understood what they were doing, and meant to decree what has in fact been decreed." The Fourteenth Amendment took language from Article IV, giving it "a broader meaning" that extended "its protecting shield over those who were never thought of when it was conceived." The Fourteenth Amendment, Bradley wrote, "was intended to protect the citizens of the United States in some fundamental privileges and immunities of an absolute and not merely of a relative character." The result was that Congress now had power to reach "social evils" that had once been the states' exclusive domain. Congress could even furnish additional guarantees protecting citizens' Fourteenth Amendment rights.[21]

The phrase "social evils" is arresting, particularly in light of Bradley's later declaration that he "modified" his views after "subsequent reflection so far as relates to

the powers of Congress to pass laws for enforcing social equality between the races."[22] When white southern slaveholders had written about their "social institutions," they meant slavery, obviously, but also the racial ideologies and practices that underlay and authorized the Peculiar Institution. At the outset of the Civil War, Jefferson Davis had denounced northerners for proclaiming "the theory that all men are created free and equal" as "the basis of an attack upon [the South's] social institutions."[23] In his debates with Stephen Douglas, Abraham Lincoln denied that he intended to bring about political or social equality of the white and black races "in any way."[24] Lincoln had understood political equality as requiring, for example, that blacks be admitted to juries. As an example of social equality, he cited marriage: "I do not understand because I do not want a negro woman for a slave, that I must necessarily want her for a wife."[25] With such discourse so closely identifying slavery and racial practices as social, it strains credulity to suggest that when Bradley spoke of reaching "social evils," he meant something other than racial discrimination. But what kind of discrimination did he mean? At the moment when Bradley spoke of reaching "social evils," he did not favor throwing juries open to blacks and the question of marriage was not at the forefront of public debate. The greatest social evil faced by blacks came in the form of whites' brutally effective racial violence. Bradley's statement that he had changed his mind about "social equality" came after whites had shifted their focus from one social evil to another, from racial violence to public accommodations.

Bradley did not say he thought the question of federal intervention against such "social evils" turned on the question of state action. The state action doctrine was not an issue in the Slaughterhouse Cases because the Louisiana legislature had so obviously

committed a state action by passing its butcher shop law. As a result, the limits Bradley envisioned on Congressional power to reach social evils was not yet clear. In his private correspondence, Bradley acknowledged that both the Fourteenth and Fifteenth Amendments only protected against state action not private conduct, but that does not necessarily mean that he yet saw the state action requirement as a serious barrier to federal intervention.[26]

This became evident in 1870, after Alabama whites attacked a political gathering of blacks in Eutaw, Alabama, murdering an unknown number of persons. In Alabama, Woods heard complaining witnesses and wrote a narrative of the affair in his own hand, accusing the whites of violating the Republicans' rights to free speech and assembly. Woods worried that the Supreme Court might object to such a prosecution, involving, as it did, no state action whatsoever. Bradley assured Woods that he was on firm ground, because the state of Alabama had abandoned its responsibilities. "Suppose the state authorities are inactive," he asked Woods, "and will do nothing to punish the crime?" White men shooting into a political rally did not have the right to prevent persons from exercising the right of suffrage, secured by the Fifteenth Amendment. This violated section four of the 1870 Enforcement Act which made it a crime for any person, "by force" to "hinder, delay, or obstruct any citizen from doing any act required to be done to qualify him to vote or from voting at any election…."[27] Bradley added that the white gunmen also violated section six which prohibited banding and confederating together…

…to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or the laws of the United States…[28]

Bradley then pointed to section five, making it a crime for anyone to prevent someone from exercising the right of suffrage under the Fifteenth Amendment.[29]

In March 1871 Bradley wrote that federal prosecutors did not even have to prove that violent racists intended to violate the Constitution. He summed up Woods' concerns this way: "You ask whether the breaking up of a peaceable political meeting by riot and murder when committed simply for that purpose, without any definite intent to prevent the exercise of the right of suffrage, is a felony…in view of the First amendment…."[30] As Bradley put it, the question was exactly what Congress had debated but not conclusively resolved: "where Congress is prohibited from interfering with a right by legislation, does that authorize Congress to protect that right by legislation?" Before the Fourteenth Amendment, Bradley told Wood, there was no question but that only the states could protect the people's rights. Bradley refined his question: "Does the XIVth Amendment in giving Congress power to enforce its provisions by appropriate legislation, make any alteration in this respect?"[31]

The answer, Bradley said, was yes because the Privileges and Immunities Clause "undoubtedly" included fundamental rights. For this, Bradley cited without comment a case that had repeatedly come up during congressional debates over the privileges and immunities clause, Corfield v. Coryell. Among the fundamental rights Congress had the power to protect, "I suppose we are safe in including those which <in the Constitution>

are expressly secured to the people, either as against the action of the Federal Government or the State Governments."[32] And so, Bradley concluded, Congress had the right to protect through appropriate legislation such fundamental rights: "undoubtedly". If the states refused to protect their citizens' rights, then Congress could. In such a lawless environment, Bradley wrote, the law authorized federal prosecution, "and the law is within the legislative power of Congress."[33]

The Eutaw rioters went on trial and Woods laid out the government's theory of the case in his charge to the jury on January 13, 1872. Woods read sections of the 1870 Enforcement Act to the jury and told the jurors that the government pursued the murdered not from political motives but simply because the rioters had violated the constitutional rights of private citizens. "This statute is the law of the land," he said, "and it is your duty and mine …to enforce it." Woods emphasized that the law protected all races and all parties. "Its operation is equal." He continued,

> It is a just and wholesome act, and designed to promote peace and order, to protect every man, whether lofty or lowly, rich or poor, learned or ignorant, who can say, 'I am an American citizen,' in the full enjoyment of all the privileges and immunities which are granted or secured to him by the Constitution of his country.[34]

Woods explained to the jury that they had to find that the government had proven every element of the offense charged before they could return a guilty verdict. Woods said that in this case, there were only two elements the government had to prove. The

law was a conspiracy statute, so the prosecutor had to prove that two or more of the defendants had banded together, making an agreement to do an unlawful act. Second, the government had to prove that the defendants had conspired for "the purpose of preventing or hindering the free exercise and enjoyment of any right or privilege granted or secured him by the Constitution of the United States."[35]

Woods spelled out for the jurors rights the 1870 Enforcement Act protected that the Eutaw whites had attacked, including free speech, free assembly, and the right to bear arms:

> I feel it my duty to say to you, that it is the right of an American citizen, whether he be black or white, to bear arms, provided he does so for his defense or for no unlawful purpose, and in a manner not forbidden by law.[36]

Woods did not see the three rights he outlined for the jury as a definitive list; he articulated the rights relevant for this particular case. The point is that they all came from the Bill of Rights. After consulting with Bradley, he felt confident that the Fourteenth Amendment had incorporated the Bill of Rights.

What is most interesting in Woods' charge to the Eutaw riot jury was what he did not say. He never mentioned state action. There can be no proof that Bradley read or approved Woods' interpretation of his letters, but nor can there be doubt that Woods faithfully followed what he understood Bradley to be saying. In his January 3, 1871 letter to Woods, Bradley had summarized the Fourteenth Amendment in a way that emphasized its state action limitations: "By the 14th Amendment, No State shall make or enforce any

law which shall abridge the privileges or immunities of Citizens of the U.S." Bradley put the emphasis on "No State" himself. He did this as a way of discounting the problem of state action, suggesting that it posed no obstacle to federal prosecution of murdering white. "But suppose the state authorities are inactive," he wrote. He then further discounted state action as a limitation. "Is not the case referred to one in which an offense has been offered to the sovereignty or jurisdiction of the United States?" Merely firing into a political meeting was not a federal crime, Bradley acknowledged. "That is only a private, municipal offence." The offenders acted in "an attempt by force, threats and violence to prevent citizens of a certain class from voting." That, Bradley believed, as a federal crime and one that required no state action to trigger a federal intervention. Accepting this logic, Woods saw no reason to bring up state action. For gunmen interfering with the federally protected right to vote, prosecutors need prove no state action to make their case.[37]

Bradley's ideas about privileges and immunities encouraged not only Woods, but a biracial group of women organized to assert their right to vote in the District of Columbia. The women crowded into the registrar's office at city hall, occupying the office for two hours, making speeches. They laid the groundwork to demand their rights in court. Their lawyers, A. G. Riddle and Francis Miller, intended to base their legal argument on the Fourteenth Amendment and especially on Bradley's Slaughterhouse circuit opinion. Riddle claimed voting was a natural right protected by the Fourteenth Amendment's privileges and immunities clause. To support this position, Riddle relied on Bradley, including a lengthy excerpt from his circuit opinion in his brief. The amendment attacked "social and political wrong," Riddle quoted Bradley as saying. It

reaches "social evils" never before prohibited. The amendment bears a "broader meaning" and throws "its protecting shield" over those never thought of by its authors. "It not merely requires equality of privileges, but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired," Bradley had said in soaring rhetoric that Riddle quoted. After he took Bradley's ideas to the Supreme Court of the District of Columbia Riddle concluded with a flourish: "Thus stands the argument." Riddle argued his case in 1871. Unfortunately for him, and for the women he represented, the Supreme Court of the District of Columbia did not render its decision until September, 1873, after the U.S. Supreme Court had decided the Slaughterhouse Cases the previous April. Based on their reading of the Slaughterhouse Cases, the District of Columbia judges rejected Riddle's argument.[38]

When Bradley's circuit opinion on the Slaughterhouse Cases reached the Supreme Court, his views collided with those held by Samuel Miller, and the Iowan organized a five-man majority against Bradley's argument. Miller's opinion sustained the Republican-dominated Louisiana legislature, but he nonetheless attacked the central element in the Republicans' Reconstruction plan. Like Bradley, he understood that reconstructing power arrangements between the states and the federal government depended on the Fourteenth Amendment's privileges and immunities clause. Miller cited Corfield v. Coryell, as well as other Court rulings that addressed the meaning of privileges and immunities, but he significantly narrowed the term's meaning so much that privileges and immunities ceased to have much constitutional significance. Bradley's intuition that that privileges and immunities might bring a host of natural rights under the care of the federal government came to naught.[39]

Miller correctly described Corfield v. Coryell as "the leading case" on privileges and immunities. But, while Bradley and many others understood Corfield v. Coryell generously, as protecting many national rights, including the right to vote, Miller read it parsimoniously, as putting few rights under the care of Congress. Miller's biographer doubts he really put much stock in precedent, and his concern with managing public opinion is evident throughout the text of his decision. He wrote that founders of the country had disagreed over where the draw the line between federal and state authority, and the question remained undecided.[40] Miller appealed to public opinion while asserting the Court's role as a steadying influence. Public opinion, he said, fluctuated on this subject, but "we think it will be found that this court…has always held with a steady and an even hand the balance between State and Federal power." Miller trusted that the Court would continue that function.[41]

Miller effectively neutralized the privileges and immunities clause, rejecting Bradley's hope that it had placed citizens' natural rights under the protection of Congress. The public's response to his opinion measured its success, Miller believed. Miller also taught a law class and he later told his students that his opinion won public sentiment "with great unanimity."[42]

Bradley fought back with a vigorous dissenting opinion.[43] But his commitment to a broad reading of the privileges or immunities clause wavered after his defeat in the Slaughterhouse Cases. Whereas he had earlier stressed the Fourteenth Amendment's expansive qualities, after Slaughterhouse his private correspondence stressed its limits: "Has it not always been the fact, Bradley asked, that the Constitution implicitly conferred citizenship?" Bradley then asked, "And has any such power as that now claimed ever

been asserted or pretended?" Bradley no longer worried about conflict between national and state jurisdictions. The rights Congress could protect had to be circumscribed, or Congress could legislate on any subject whatsoever. Bradley rejected this possibility because it would allow the federal government to duplicate state authority for all purposes, creating a structure with the states and the federal government performing the same tasks and assuming the same responsibilities. No sensible man would contemplate such a monstrosity, Bradley believed. "I do not think," Bradley continued, "that the rights, privileges and immunities of a citizen embrace all private rights."[44]

In April 1874, while riding on circuit, Bradley returned to the question of privileges and immunities in United States v. Cruikshank. William Cruikshank had joined a group of whites in an attack on African American Republicans in Colfax, Grant Parish, Louisiana, murdering an unknown number of blacks. A jury convicted three of the whites under the same May 31, 1870 Enforcement Act Bradley had approved in 1871. Woods was still the circuit judge and must have drawn on his notes from the 1872 Eutaw riot case to craft his charge to this jury. Sentences and whole paragraphs reappeared, exactly as he had stated them before. He again read from the 1870 Enforcement Act and again told jurors they had to accept it as the law of the land. He again stated that the law protected all citizens, "whether white or black." He again insisted politics had nothing to do with the prosecution. He again acknowledged that the government had to prove every element of the offense before jurors could return a guilty verdict. This time, there were three such elements:

1. There must be a banding or conspiring together of two or more of the accused persons named in the indictment.
2. This banding and conspiring must be with the intent to injure, oppress, threaten or intimidate Levi Nelson or Alexander Tillman.
3. This intention to injure, oppress, threaten or intimidate must be thereby specified in the several counts of the indictment; as, for instance, as stated in the first count, the purpose to hinder and prevent Nelson and Tillman in the right peaceably to assemble, as stated in the third count, the purpose to deprive Nelson and Tillman of their lives and liberty and person without due process of law.[45]

Once again, state action was not an element the government had to prove, according to Woods. In contrast to his Eutaw riot charge, though, this time Woods addressed the issue directly. He explained that the Fifth Amendment declared that no person should be held to a capital crime except upon indictment by a grand jury and that no person can be deprived of life without due process of law. The Fourteenth Amendment, Woods continued, said that no state shall deprive any person of life without due process of law. Louisiana's constitution likewise declared that prosecution shall be by indictment or information and that the accused shall be entitled to a speedy and public trial. The 1870 Enforcement Act declared that all persons shall have the rights in every state to the full and equal benefit of all laws as is enjoyed by white persons. Woods concluded:

> These provisions of constitutional and statute law show that the right of due process of law where the life or liberty of a citizen of the United States and of the State of Louisiana are involved is secured by the Constitution and laws of the United States.[46]

The black victims of the Colfax massacre had a right to a trial, if whites thought they had committed some crime. Woods said, "If the natural result of the conduct of the indicted persons in killing Tillman and attempting to kill Nelson was to deprive Nelson and Tillman of their constitutional and lawful right to a fair and impartial jury trial, then you are justified in holding that such was their intent" and finding them guilty.[47]

When Woods delivered his charge to the jury, repeating key passages from his 1872 charge to the Eutaw riot jury, he spoke as though the Supreme Court had never decided the Slaughterhouse Cases. Cruikshank's lawyers responded by attacking the 1870 Enforcement Act Woods had endorsed as unconstitutional, "municipal in character, operating directly on the conduct of individuals." Although Bradley had endorsed Woods' approach in 1871, he now ruled in favor of Cruikshank.[48]

Bradley began by addressing an issue he had seen as central at least since 1871 and which Congress had so vigorously debated in 1866: Did Congress have the power to enforce privileges and immunities? Bradley used Prigg v. Pennsylvania (1842) to say, "It seems to be firmly established by the unanimous opinion of the judges…that Congress has the power to enforce…every right and privilege given or guarantied by the Constitution."[49] That sounded expansive, but he actually limited federal protection of rights and privileges Congress chose to guard. The voters, through their representatives,

could pick and choose rights and groups worthy of protection. Judges, Bradley now emphasized, could not find rights to protect as he had said in 1871.

When he distinguished the rights protected by the states from those guarded by Congress, Bradley adopted the same states' rights arguments he had once denounced, arguments based on a history quite different from the one Bradley himself had once taught. Some rights and privileges derive from the mother country, "challenged and vindicated by centuries of stubborn resistance to arbitrary power" and belong to all citizens as part of their birthright. These rights predate the Constitution. When the Constitution declared them, "it is understood that they are not created or conferred by the Constitution" but recognized as existing rights originally won by the states from the British. Bradley said that enforcement of these rights was therefore the job of each state, "as a part of its residuary sovereignty."[50]

This would seem to leave the federal government with very few rights to protect, but Bradley refused to yield on the question of federal power totally. He singled out trial by jury as a federal right. Citizens have "a constitutional security against arbitrary and unjust legislation." If states proceed against their citizens "without benefit of those time-honored forms of proceeding in open court and trial by jury," then the federal government can act. The Congress can legislate, Bradley said, when states misbehave. "The duty and power of enforcement take their inception from the moment that the state fails to comply with the duty enjoined…." The manner of enforcing these rights depends on the character of the privilege and immunity in question. He concluded, "there can be no constitutional legislation of Congress for directly enforcing the privileges and immunities of citizens of the United States by original proceedings in the courts of the

United States…." Bradley agreed with the defense lawyers: Congress cannot create a "municipal code" against ordinary crimes, like murder.[51]

Bradley had begun to move away from his original commitment to privileges and immunities, documented in the private letters he wrote in 1871 and 1874 as well as in his Slaughterhouse opinions. In 1883 Bradley wrote the Court's infamous decision striking down the 1875 Civil Rights Act outlawing segregated public accommodations. Fragments of Bradley's earlier thinking persisted on this new landscape. State action of every kind, he wrote, which impairs the privileges and immunities of American citizens is the subject of the Fourteenth Amendment. "Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment," he said. But then Bradley wrote that the victims of discrimination had to look to the political process for relief and not to judicial interpretation of the Fourteenth Amendment. Those victims should look to the laws of their own states for relief and if those states offered no protection, "his remedy will be found in the corrective legislation which Congress has adopted, or may adopt." Instead of absolute rights protected in Court, Bradley now said that "If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy…."[52] Congress. Not the Court. Bradley no longer believed it "possible that those who framed the [Fourteenth Amendment] were not themselves aware of the far reaching character of its terms."[53] When Bradley wrote those words he believed judges could identify "far reaching" characteristics inherent in privileges or immunities not recognized by lawmakers. No longer. In his private files Bradley placed an undated note saying that his views had been "much modified by subsequent reflection so far as relates to the power of Congress

to pass laws for enforcing social equality between the races."[54] Miller's concerns with public opinion had displaced Bradley's principled approach, which had roots in the public culture and mind as well. Emerson's influence, however, had its limits.

Bradley's Evolving Ideas

about the Power of Congress to Regulate Social Evils.

1870	[Live-Stock Dealers & Butchers Assn. v. Crescent City Live-Stock Landing & Slaughter-House Co. Et al., 15 F. Cas. 649] It is possible that those who framed the article were not themselves aware of the far reaching character of its terms. They may have had in mind but one particular phrase of social and political wrong…. Yet, if the amendment…does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional amendment, it is to be presumed that the American people…understood what they were doing….
?	Bradley, undated note, box 18, Bradley Papers, New Jersey Historical Society, Newark, NJ. The views expressed…were much modified by subsequent reflection so far as relates to the powers of Congress to pass laws for enforcing social equality between the races.
1874	[United States v. Cruikshank, et al., 25 F. Cas. 707] It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state, not a guaranty against the commission of individual offenses… This would be to clothe the Congress with power to pass laws for the general preservation of social order in every state. The enforcement of the guaranty does not require or authorize Congress to perform the duty which the guaranty itself supposed to be the

	duty of the state to perform….

[1] 109 U.S. 3 (1883); 16Wall. (83 U.S.) 36 (1873). Historians have very often found consistency when looking at Bradley's career, but not all. John A. Scott does not, "Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughter-House Cases to the Civil Rights Cases," *Rutgers Law Review* 25 (1971): 553-569. Ruth Whiteside also argues for inconsistency, "Justice Joseph Bradley and the Reconstruction Amendments," (PhD diss., Rice University, 1981). Michael McConnell has called Bradley's change of heart a nineteenth-century "switch in time." Michael McConnell, "The Forgotten Constitutional Moment," *Constitutional Commentary* 11 (1994): 115; Charles Fairman, "Mr. Justice Bradley," in Mr. Justice Allison Dunham and Philip B. Kurland, eds., (Chicago: University of Chicago Press, 1956), 69-95. Fairman seems hagiographic, entitling one article "What Makes a Great Justice?" and writing that he meant to cultivate a "just appreciation" of judges and defending Bradley against accusations that he had been placed on the Court to "pack" it for legal tender. Fairman, "What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court, 1870-1892," *Boston University Law Review* 30 (1950): 49ff; Fairman, "The Education of a Justice: Justice Bradley and some of his Colleagues: *Stanford Law Review* 1 (January 1949): 217-255; Fairman, "Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases," *Harvard Law Review* 54 (1941): 977-1034; Charles Fairman, "Mr. Justice Bradley," in *Mr. Justice* Allison Dunham and Philip B. Kurland, eds., (Chicago: University of Chicago Press, 1956), 69-95. Fairman seems hagiographic, entitling one article "What Makes a Great Justice?" and writing that he meant to cultivate a "just

appreciation" of judges and defending Bradley against accusations that he had been placed on the Court to "pack" it for legal tender. Fairman, "The Education of a Justice: Justice Bradley and some of his Colleagues: *Stanford Law Review* 1 (January 1949): 217-255. Other scholars have followed Fairman to argue for consistency. Jonathan Lurie, "Mr. Justice Bradley: A Reassessment," *Seton Hall Law Review* 16 (1986): 343-375; Pamela Brandwein, "A Judicial Abandonment of Blacks? Rethinking the 'State Action' Cases of the Waite Court," *Law and Society Review* 41 (June 2007): 343-381.

[2] Live-Stock Dealers' and Butchers' Ass'n v. Crescent City Life-Stock Landing and Slaughter-House Co. et al. case No. 8408, Circuit Court, District of Louisiana, 15 F. Cas. 649 (1870), at 652 (first and second quotations); Bradley to Woods, Marsh 12, 1871, box 18, Bradley Papers, NJ Historical Society, Newark, (third quotation; italics in original.); Bradley to Woods, January 3, 1871, box 3, ibid. (fourth and fifth quotations).

[3] *Civil Rights Cases*, 109 U.S. 3 (1883).

[4] Michael Les Benedict, *Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era* (New York: Fordham University Press, 2006), 133-7.

[5] Charles Fairman, "Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases," *Harvard Law Review* 54 (1941): 1032. For Bradley's speeches, see Bradley, "The American Union and the Evils to Which it has been Exposed," *Proceedings of the New Jersey Historical Society* 5 (1850-1851): 105-129; Paper Read before Lecture Association, Morristown, March 22, 1865, box 15, Bradley Papers, New Jersey Historical Society, Newark.

[6] Paper Read before Lecture Association, Morristown, March 22, 1865, box 15, Bradley Papers, New Jersey Historical Society, Newark.

[7] Michael Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (New York: Oxford University Press, 2004), 5.

[8] Len Gougeon, **Emerson and Eros: The Making of a Cultural Hero** (Albany: State University of New York Press, 2007), 2.

[9] Charles R. Williams, **The Life of Rutherford Birchard Hayes: Nineteenth President of the United States** 2 vols. (1914; reprint edn., New York: DaCapo Press, 1971), 1:278.

[10] Congress, House, Representative Ashley of Ohio, 39th Cong., 1st sess., *Congressional Globe* (May 29, 1866), pt. 4, 2882.

[11] Congress, House, Representative Kelley of Pennsylvania, 39th Cong., 1st sess., *Congressional Globe* (January 10, 1866), pt. 1, 180.

[12] Emerson, "Introductory Lecture," December 2, 1841, in *The Collected Works of Ralph Waldo Emerson* (Cambridge: Harvard University Press, 1971), 1:167-176; Judith N. Shklar, "Emerson and the Inhibitions of Democracy," *Political Theory* 18 (November 1990): 601-614; Gustaaf Van Cromphout, *Emerson's Ethics* (Columbia: University of Missouri Press, 1999), 22-3, 34-5, 53, 101.

[13] Gregg D. Crane, **Race, Citizenship, and Law in American Literature** (Cambridge: Cambridge University Press, 2002), 87-95.

[14] Jeremy Adelman and Stephen Aron, "From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between North American History," *American Historical Review* 104 (June 1999): 814-41; James F. Brooks, **Captives and Cousins: Slavery and**

Kinship, and Community in the Southwest Borderlands (Chapel Hill: University of North Carolina Press, 2002), 2-79.

[15] Brownsville v. Cavazos, et al., 4 F. Cas. 460 (1876); Paul Finkelman, "Foreign Law and American Constitutional Interpretation: A Long and Venerable Tradition," *New York University Annual Survey of American Law* 63 (2007): 29-61; Dred Scott v. Sandford, 60 U.S. 393; Bradley to Charley, June 4, 1876, box 4, Bradley Papers, New Jersey Historical Society, Newark, NJ.

[16] Charles Bradley, ed., **Miscellaneous Writings of the Late Hon. Joseph P. Bradley** (Newark: L. J. Hardham, 1902), 246-247.

[17] *Live-Stock Dealers & Butchers' Ass'n. v. Crescent City Life-Stock Landing & Slaughter-House Co., et al.,* case 8408, 12 F. Cas. 649 (1870).

[18] *Live-Stock Dealers & Butchers' Ass'n. v. Crescent City Life-Stock Landing & Slaughter-House Co., et al.,* case 8408, 12 F. Cas. 649 (1870) at 650.

[19] *Live-Stock Dealers & Butchers' Ass'n. v. Crescent City Life-Stock Landing & Slaughter-House Co., et al.,* case 8408, 12 F. Cas. 649 (1870), at 651.

[20] *Live-Stock Dealers & Butchers' Ass'n. v. Crescent City Life-Stock Landing & Slaughter-House Co., et al.,* case 8408, 12 F. Cas. 649 (1870), at 655.

[21] *Live-Stock Dealers & Butchers' Ass'n. v. Crescent City Life-Stock Landing & Slaughter-House Co., et al.,* case 8408, 12 F. Cas. 649 (1870).

[22] Bradley, undated note, box 18, Bradley Papers, New Jersey Historical Society, Newark, NJ.

[23] *Congressional Globe*, 36th Cong., 2d sess. part 1, 487.

[24] *Chicago Press and Tribune*, September 21, 1858.

[25] *Chicago Press and Tribune*, September 21, 1858.

[26] Bradley to Woods, January 3, 1871, box 3, Bradley Papers, New Jersey Historical Society, Newark, NJ.

[27] An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for other Purposes, chap. CXIV, 16 Stat. 140, 141 (1870).

[28] *An Act to Enforce the Rights of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes*, *Statutes at Large*, 16, sec. 6, 141.

[29] Bradley to Woods, January 3, 1871, box 3, Bradley Papers, New Jersey Historical Society, Newark, NJ.

[30] Congressional hearings investigating the Ku Klux Klan took considerable and detailed testimony on the Eutaw riot, including testimony by Congressman Charles Hays, one of the Republicans at the Eutaw rally. Hays told Congress that he did not think it safe to testify in court about what happened. Charles Hays testimony, June 2, 1871, Congress, House, Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, *Testimony…Alabama*, 42d Cong., 2d sess., 1872, 1:12-25. Willard Warner testified that one Eutaw riot case went to trial but had to be postponed because Hays did not want to testify. Warner testimony, June 3, 1871, ibid., 1:37.

[31] Bradley to Wood, March 12, 1871, box 18, Bradley Papers, New Jersey Historical Society, Newark.

[32] Bradley to Wood, March 12, 1871, box 18, Bradley Papers, New Jersey Historical Society, Newark.

[33] Bradley to Wood, March 12, 1871, box 18, Bradley Papers, New Jersey Historical Society, Newark. Legal scholars have disagreed over whether the Fourteenth

Amendment incorporated the Bill of Rights. In a superb summary of this scholarship, Michael Les Benedict, *Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era* (New York: Fordham University Press, 2007), 222-3n46, shows that the scholarly consensus has now sifted in favor of believing that the Fourteenth Amendment did incorporate.

For the death of the Alabama solicitor in Greene County, see Willard testimony, Congress, House, Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, *Testimony…Alabama*, 42d Cong., 2d sess., 1872, 1:39. Willard said, "Boyd was killed while the matter was pending, and that was the end of it."

[34] "Important Trial," *Semi-Weekly Louisianian*, March 28, 1872.

[35] "Important Trial," *Semi-Weekly Louisianian*, March 28, 1872.

[36] "Important Trial," *Semi-Weekly Louisianian*, March 28, 1872.

[37] Bradley to Woods, January 3, 1871, box 3, Bradley Papers, New Jersey Historical Society, Newark.

[38] Jill Norgren, **Belva Lockwood: The Woman Who Would be President** (New York: New York University Press, 2007), 59-65; J. O. Clephane, reporter, *Suffrage Conferred by the Fourteenth Amendment. Woman's Suffrage in the Supreme Court of the District of Columbia, in General Term, October 1871…Argument of the Counsel for the Plaintiffs* (Washington: Judd and Detweiler, 1871), 29; Sara S. Spencer v. The Board of Registration, Sarah E. Webster v. the Superintendents of Election, 1 MacArth., 169 (1873).

[39] Slaughterhouse Cases, 83 U.S. 36 (1873); Richard L. Aynes, "Freedom: Constitutional Law: Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and

the Slaughterhouse Cases," *Chicago-Kent Law Review* 70 (1994): 627-686; Ross, **Justice of Shattered Dreams,** 189-210; Ronald M. Labbe and Jonathan Lurie, **The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment** (Lawrence: University Press of Kansas, 2003).

[40] *Slaughterhouse Cases*, 83 U.S. 36, 81-82 (1873).

[41] *Slaughterhouse Cases*, 83 U.S. 36, 85-86 (1873).

[42] Miller, *Lectures on The Constitution of the United States*, 411.

[43] *Slaughterhouse Cases*, 83 U.S. 36, 111-124 (1873).

[44] Bradley to Frelinghuysen, July 19, 1874, box 18, Bradley Papers, New Jersey Historical Society, Newark, NJ.

[45] *New Orleans Republican*, March 14, 1874.

[46] *New Orleans Republican*, March 14, 1874.

[47] *New Orleans Republican*, March 14, 1874.

[48] *United States v. Cruikshank, et al*., 25 F. Cas. 707 (1874).

[49] *United States v. Cruikshank, et al.,* 25 F. Cas. 707, 710 (1874).

[50] Bradley to Frelinghuysen, July 19, 1874, box 18, Bradley Papers, New Jersey Historical Society, Newark, NJ.

[51] *United States v. Cruikshank,. et al.,* 25 F. Cas. 707 (1874); Pamela Brandwein, "A Judicial Abandonment of Blacks? Rethinking the 'State Action' Cases of the Waite Court," *Law and Society Review* 41 (June 2007): 356. Brandwein seeks to resurrect an argument made by Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *Supreme Court Review* (1978): 39-79.

[52] Civil Rights Cases, 109 U.S. 3 (1883).

[53] *Live-Stock Dealers' and Butchers' Ass'n v. Crescent City Life-Stock Landing and Slaughter-House Co. et al.* case No. 8408, Circuit Court, District of Louisiana, 15 F. Cas. 649 (1870), at 652.

[54] Bradley, undated note, box 18, Bradley Papers, New Jersey Historical Society, Newark, NJ.