STATE POLICE POWER, OLD AND NEW: THE *SLAUGHTERHOUSE CASES* AND THE MEANING OF REPUBLICANISM IN THE GILDED AGE

By Kevin Walker, Ph.D.
Graduate of Claremont Graduate University

Abstract:

State "police power" is usually understood as the authority of state governments to regulate "health, safety and morals," which seem to encompass a broad variety of local affairs. The Fourteenth Amendment, however, guarantees U.S. citizens the same "privileges and immunities," "due process of law," and "equal protection," which establish a view of "fundamental" rights not subject to local legislation. Hence, the conflict that has brought many cases before the Supreme Court. This essay is a study in the origins of that conflict in the early part of the "Lochner Era," when the Court first reviewed state regulatory laws that seemed to infringe on constitutionally protected rights, based on the "liberty of contract" reading of the Fourteenth Amendment. I will challenge the conventional history of this era, which holds that the Court's involvement in police powers jurisprudence was in fact little more than judicial activism, or at least activism of the wrong sort. With a look at the classic definition of police power, and how it was first applied in *Slaughterhouse Cases* (1873), I will show the Court's true intent: to return state police power to its own purpose, which was to protect the right of property, and ensure the sort of neutral republican government that would allow citizens to pursue it. In short, I will argue that the duty of protecting fundamental rights was not for the Court, as we have come to believe, but of the people themselves and their elected officials.

State Police Power, Old and New: The *Slaughterhouse Cases* and the Meaning of Republicanism in the Gilded Age

Frederic Bastiat gives us the best glimpse into the classic definition of "police powers" in his electrifying (and very French) opening lines from his book, *The Law*, published in 1850:

> *The law perverted! And the police powers of the state perverted along with it* [sic]*! The law, I say, not only turned from its proper purpose but made to follow an entirely contrary purpose! The law become the weapon of every kind of greed! Instead of checking crime, the law itself guilty of the evils it is supposed to punish!*[1]

If this was true, Bastiat wrote, it was nothing less than a "moral duty" of critics like himself to call attention to it – to teach the true meaning of law, and what it means for law to rule. Police power, by his definition, is derived from a very basic right, which precedes all civil society: it is nothing less than self-defense for the right to life through the defense of one's property. This is what best informs the purpose of any legitimate government, in his view. "If every person has the right to defend even by force – his person, his liberty, and his property, then it follows that a group of men have the right to organize and support a common force to protect these rights constantly," he wrote. There can be no other reason why people might join a civil society; anything that does not meet this end is a fraud. All collective right was ultimately the sum of individual rights. The ability of the state to execute police powers came from the power of individuals to do so on their own; the state merely "acts as a substitute." "Force has been given to us to defend our own individual rights," meaning that such a force, once turned against the very people who granted it legitimacy, would plainly defeat itself. It would not be a bad

[1] Fredric Bastiat, *The Law: The Classic Blueprint for a Just Society* (Irving-on-Hudson: Foundation for Economic Education, 1998) 1. (Emphasis original.)

government, by Bastiat's reasoning, but *no* government at all, meaning that citizens were perfectly justified in overthrowing it. It was no light suggestion in a nation that experienced that kind of revolution only a generation before, with disastrous results. But Bastiat never wavered from his moral certainty. "Who will dare to say that force has been given to us to destroy the equal rights of our brothers?" he asked. "Since no individual acting separately can lawfully use force to destroy the rights of others, does it not logically follow that the same principle also applies to the common force that is nothing more than the organized combination of the individual forces?"[2] Police power, as Bastiat saw it, was the surest instrument for safeguarding liberty – which in his mind, made its "perversion" all the more horrific.

Yet how could Bastiat have called protection of property an exercise of "police power"? Consult any American Government college textbook today: police power is the authority of state governments to manage social welfare and public morals – concerns that stand quite apart from economic rights, which is primarily a national (and increasingly global) concern. Plainly, the term lacks a definition, and any attempt "to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts," according to Justice William O. Douglas. It was not that the definition had evolved or adapted to the times; it had simply become uncertain – so uncertain that it had no reason to be taken seriously. For this reason, not only the issues but the very definition, he wrote, "is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition."[3] Most modern Americans share Justice Douglas' point of view:

[2] *Id*., pp. 2-3.
[3] *Berman v. Parker* 348 U.S. 26, at 32 (1954).

police power is nothing more than an expression of pure legislative will over local affairs – that the very definition of police power itself is created, and not found. More recently, it is what Markus Dirk Dubber, writing for the *Buffalo Law Review*, called "the most expansive, least definite, and yet least scrutinized, of governmental powers." The arrangement that placed state authority exclusively at the local level "denied the federal government any police power of its own," he writes. The whole idea of police power "was inherent in the very concept of government"; yet the Founders maintained this while at the same time "erecting a government without that very power." Still, this has not disrupted the "rhetorical usefulness of the police concept over the past two hundred years. The clear assignment of police power to the states, and only to the states, dramatically simplified constitutional analysis. If it was police, it was the states' business."[4] This, of course, means for many Americans that police power can be a serious threat to the rights and liberties of citizens – that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of [state] government."[5]

I. The Original Meaning of Police Power

The history of the word "police," though, shows that there was in fact a great deal more confidence about its meaning than Douglas and Dubber believed. The word is itself comes from none other than the ancient *polis*, and the officials entrusted with maintaining

[4] Markus Dirk Bubber "'The Power to Govern Men and Things': Patriarchal Origins of the Police Power in American Law," in *Buffalo Law Review* (Fall 2004): pp. 1277; 1334.
[5] *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, at 772 (1986) (O'Connor, dissenting.)

it.[6] For William Blackstone, police power was concerned with offences that directly affected the commonwealth, i.e., "those against the public police and oeconomy," he wrote. It is clear, though, that he meant "oeconomy" in the classical sense: it was the life of the home, where property and wealth was stored up by the accumulation of family members, meaning there was no separation at all between economic and moral considerations: the prosperity of the family is the prosperity of the commonwealth. These were the means "whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners," Blackstone wrote.[7] Yet he dealt with an understanding of police power that was a national concern; the question for the generation of revolutionary Americans, however, was not the direction of national police regulation, but its effectiveness, which they found above all at the local level, in state governments. For all of their differences with Blackstone (particularly over the existence of natural rights, as opposed to customary ones), the American Founders held much the same view when it came to the purpose of police power. Such regulation now came, not in the monarchy or the common law, but from state governments, which they made plain enough in their respective constitutions.

[6] "Police" was closest in meaning to Greek *politicos*, who were not "politicians" as we think of them today, but the ones who held offices more essential to the general prosperity of the city. "The political partnership requires many functionaries," Aristotle wrote, "so that not all of those chosen by election or lot can be regarded as officials," i.e., as police officers, albeit in the classical sense. Some perform less essential functions, but others "are political and are either over all of the citizens with a view to a certain action… or over a part." Among the things that concern politics is, of course, "management of the household," i.e., economics, in the classical sense. *The Politics*, trans. Carnes Lord (Chicago: Chicago University Press, 1984) 1299a15. Much of Justice Douglas' confusion, it seems, comes from his lack of awareness of "how many modes can exist," as Aristotle put it, and how to "fit the sorts of offices to the sorts of regimes for which they are advantageous" – let alone what police power means in a republican form of government. *Id*., 1299a10.

[7] William Blackstone, *Commentaries on the Laws of England, Volume IV* (Chicago: University of Chicago Press, 1979), p. 162. [Edited into modern English.]

A. Police Power in America

Those state governments, when they first formed in late eighteenth century, recognized how dangerous socio-economic inequalities could be. Carter Braxton's address to the Virginia state convention in 1776, for instance, shows how state governments sought to counter those disparities by encouraging a common prosperity. True, "in some ancient republics, [there] flowed those numberless sumptuary laws, which restrained men to plainness," he wrote – and worst of all, "equality by an equal division of property." Such schemes may be necessary in places with few resources, which were prone to the scarcity that frequently caused violent upheavals. But instead of relying on police power to put down the uprisings of class warfare, why not use it to preempt such problems by encouraging a general condition of common prosperity? Sumptuary laws, after all, "can never meet with a favorable reception from people who inhabit a country to which Providence has been more bountiful," he wrote – much less one experienced in the practice of a free market.[8]

The lay preacher Nathaniel Niles made a similar point in his popular treatise, *Two Discourses on Liberty*. Liberty was not simply the lack of obstructions to prosperity, "but rouses even indolence to action, and gives honest, laborious industry a social, sprightly, cheerful air," he wrote. In contrast, in "a *state* of slavery, sloth hangs heavily on the heels of dumb, sullen, moross melancholy." Such an obligation on the part of liberty caused a spontaneous civil order; it encouraged "every generous sentiment" in the public, thus freeing up the state from having to address civil upheavals that tend to disturb republics. "It discountenances disorder, and every narrow disposition," Niles wrote.

[8] "A Native of This Colony," in *American Political Writing During the Founding Era, 1760-1805, Volume I*, eds. Charles H. Hyneman and Donald S. Lutz (Indianapolis: Liberty Fund, 1983), p. 329.

"Thus the mind is fortified on all sides, and rendered calm, resolute, and stable." It fell, of course, to the power of the state to positively encourage such a condition of industry and overall self-reliance among all citizens, rich and poor alike. "In such a state, a free people will enjoy composure of soul and their taste will become refined."[9] A republican government, it seemed, was actually able to encourage the very condition among the citizens that made republicanism possible, and according to Niles, police power was the way to do it.

James Wilson, the famous figure at the Constitutional Convention, concurred in his famous essay on the origins of property. It was in the interest of a republic – particularly for state governments, who would always be the front line against domestic factions, should they appear – to design police power in such a way that deterred potential violence. "Exclusive property," James Wilson wrote, "prevents disorder, and promotes peace." Private ownership and pursuit of property was not simply a moral imperative: it was the bedrock of a just society. "Without its establishment, the tranquility of society would be perpetually disturbed by fierce and ungovernable competitions for the possession and enjoyment of things, insufficient to satisfy all, and by no rules of adjustment distributed to each."[10] This, as the evidence shows, was precisely what state governments set out to do: their police powers, based on their "republican forms of government," were viewed as the surest safeguards of not only liberty but the overall stability of local affairs.

B. State Governments

[9] Nathaniel Niles, "Two Discourses on Liberty," in *American Political Writings*, pp. 267-268.
[10] James Wilson, "On the History of Property," in *Collected Works of James Wilson, Volume 1* (Indianapolis: Liberty Fund, 2007), pp. 396-397.

Accordingly, the state of Virginia declared that citizens enter the compact in order to protect their property, and cannot "deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[11] The state of Pennsylvania recognizes certain fundamental rights, also in its constitution, "among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness"; the state of New Jersey also declares a natural right to "acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." All of these are stated in Article I of each constitution. Each state "established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated," Chief Justice John Marshall later wrote in *Barron v. Baltimore* (1833). The Constitution's Bill of Rights was, of course, little more than a compromise over ratification, and that the truest securities of liberty were, once again, primarily in the states. The people framed their state constitutions in a way "best adapted to their situation and best calculated to promote their interests," he wrote.[12] For all of Marshall's constitutional nationalism, he was certain that questions of civil liberty were best protected by those institutions that were closest to the people.

This was, no doubt, a result of Marshall's experience in Philadelphia in 1787, where the delegates at the convention agreed that the protection of private property and the right to acquire it was best left to local institutions at the state level. At one point,

[11] Carter Braxton, "A Native of This Colony," in *American Political Writing During the Founding Era, 1760-1805* (Indianapolis: Liberty Fund, 1983) p. 329.
[12] 32 U.S. 243, at 247 (1833).

delegates proposed that among the enumerated powers of the national government, the Constitution should include the authority

> to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the Government of the individual States in any matters of internal police which respect the Govt. of such States only, and wherein the general welfare of the U. States is not concerned.

Gouvernor Morris opposed this, claiming that "[t]he internal police, as it would be called & understood by the States ought to be infringed in many cases, as in the case of paper money & other tricks by which Citizens of other States may be affected."[13] Elsewhere, he insisted that the Chief Executive should appoint a "Secretary of Domestic Affairs," who would "attend to matters of general police." It was almost an inverse New Deal: an executive power to protect the liberty of contract on a national scale. Such an administrator would include "the State of Agriculture and manufactures, the opening of roads and navigations, and the facilitating communications [throughout] the [United] States."[14] It was Edmund Randolph, though – the architect of the Virginia Plan – who led the rejection of that proposal. "This is a formidable idea indeed," he wrote. "It involves the power of violating all the laws and constitutions of the States, and of intermeddling with their police."[15] The clause, of course, was soon dropped from the Constitution altogether: there was no need to restrict the national government's interference with police power when it could simply be ignored – or better yet, when the national government could focus its attention only on the property that passed through "commerce with foreign nations, and among the several states, and with the Indian Tribes," according to Section 8. Still the shared assumption was clear: police power in a republic existed to

[13] July 17. James Madison, *Notes on Debates in the Federal Convention of 1787* (New York: W.W. Norton & Company, Inc., 1966), p. 303.
[14] August 20, 1787. *Id*., p. 487
[15] July 17. *Id*., p. 303.

promote economic prosperity. It could only conflict with the right of property and liberty of contract when the people and their officials forgot (or rejected) what it was for.

C. Ratification and Union

The Anti-Federalists rarely explained what they meant by "police." They had little reason to, of course, since the proposed Constitution never used the term, or indicated that it would interfere with the inner affairs of states. Yet the few times they mentioned it, it was always referred to as "internal police." It was internal, of course, because the state governments in question were closest to the people; hence, whatever regulations they imposed were drafted by officials the people themselves had elected, once again adhering to the republic principle. It was inconceivable for those of the Founding generation that a large, consolidated nation could ever ensure a just protection of property, precisely because they could not practice an effective police power.

The "Impartial Examiner," as one dissenter called himself, agreed. Under the Articles of Confederation, he wrote,

> the internal police of each [state] is left free, sovereign and independent: so that the liberties of the people being secured as well as the nature of their constitution will admit; and the declaration of rights, which they have laid down as the *basis* of government, having their full force and energy, any farther stipulation on that head might be unnecessary.[16]

No matter what its stated guarantees, or its means of ensuring the liberty of American citizens generally, a national government placed over states in *any* sense was a threat to liberty when it claimed to protect rights. But there was one specific reason for this in the Anti-Federalist mind: it would stifle the abilities of the states to fulfill that task well enough on their own. It was a misunderstanding, of course; but the criticism is quite

[16] In John P. Kaminski, Gaspare J. Saladino, *Ratification of the Constitution by the States: Virginia, Vol. 8* (Wisconsin Historical Society, 1991), p. 393.

revealing. Broad, national regulations, even when designed to protect rights, would no doubt be a threat to liberty. It was therefore best to leave those affairs at the state level, because they were the ones must efficient at protecting rights, specifically with the use of police powers.

None of this should be taken as an argument in purely in favor of the Anti-Federalist position, much less ideas about nullification or "state sovereignty" as they appeared in the nineteenth century. The strongest supporters of state supremacy did not view their states as merely the guardians natural rights anyway: they instead held "that all the rights, powers, and immunities of the whole people come to be attributed to the numerical majority," as John Calhoun would later put it. While checks on political power and protection of rights were important, it was far more important to recognize the *origin* of rights in the states, which for Calhoun and his colleagues, meant the collective creation of rights. This could only happen, though, in a small community – ideally, a state, as opposed to a national government. Good government "assigns to power and liberty their proper spheres," Calhoun wrote. "To allow to liberty, in any case, a sphere of action more extended than this assigns" – i.e., a national sphere of liberty – "would lead to anarchy; and this, probably, in the end, to a contraction instead of an enlargement of its sphere. Liberty, then, when forced on a people unfit for it, would, instead of a blessing, be a curse." Plainly the strongest advocate of "states rights" of all time did not see police power the same way earlier Americans did.[17]

Alexander Hamilton exemplified the original view his defense of the Constitution in the Federalist Papers. Though he was hardly a proponent of state authority, he nonetheless agreed with his Anti-Federalist (and later Jeffersonian) opponents on this

[17] *A Disquisition on Government* (Indianapolis: Bobbs-Merrill Co., Inc., 1953), pp. 24; 41.

point: the powers of the proposed national government were not directly concerned with the protection of basic rights. This appeared in his description of federal offices in Federalist #17: "[t]he regulation of the mere domestic police of a State appears… to hold out slender allurements to ambition," he wrote. The legislative and executive offices were meant to attract ambitious and "energetic" individuals, he observed – and it was this very ambition that would prevent them from bothering with the tedious complexities of local governments. With Gouvernor Morris' proposal in mind, he assured the Anti-Federalists that "the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction."[18] This, Hamilton held, was for the people to resolve, according to local customs and democratic wisdom.

Indeed, for all of Hamilton's cynicism about democracy, he still seemed to understand the character of the American people, who are "entirely the masters of their own fate." For this reason, they knew the means by which corrupted states governments could be corrected: "Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government." The people, "by throwing themselves into either scale," would use both federalism and nationalism as "instruments of redress."[19]

But his colleague James Madison knew which direction that scale would usually lean: "The State governments will have the advantage of the Federal government," he wrote, especially because of "the powers respectively vested in them," which would

[18] Federalist #17, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, eds. Charles R. Kessler and Clinton Rossiter (New York: Signet Classic, 1999), p. 114.
[19] Federalist # 28, in *Id*., pp. 176-177.

ensure the "predilection and probable support of the people." State governments were, after all, closest to the people, who were always the surest defenders of their own liberty. This confirmed the classic definition of police power: the protection of liberty occurred, once again, through popular local institutions, "which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[20] The constitution was ratified in large part because of the people's recognition of all the things that the proposed national government would *not* do; it would allow their state governments to operate on their own to protect their rights through their institutions that would ensure their neutrality.

It was obvious, of course, that there would be instances when "instrument of redress" would fail – and when the national government would have to become involved in local affairs. The quick and peaceful end to the Whisky Rebellion proved that well enough, if not the calm and logical Supreme Court ruling in *M'Colloch v. Maryland* (1819). But in all cases, Hamiltonian nationalism had the same objective: if it ever happened that the United States government over-rode state authority, it did so only in order to correct states by the states' *own* principles. It was not meant to permanently usurp state governments, which happened in the New Deal Era or, as some would argue, through modern judicial review in the later twentieth century. It was instead a far more pointed goal: to bring a state (or a group of states) back to the purpose for which states are intended – and then proceed with national concerns. Perhaps this would involve certain protections of rights. ("Executive energy" in particular was designed for "the protection of property," according to Hamilton.) But that protection was attained, he wrote, when the government exercised its power "against those irregular and high-handed

[20] Federalist #45, in *Id*., pp. 287; 289.

combinations which sometimes interrupt the ordinary course of justice," and the "security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy."[21] When the course of justice was restored, ambition defeated, and factions put down – then the national government could return to its intended purpose.

All of this proves how Justice Douglas' and Dubber's claims about the ambiguity of police power are not true in light of the historical evidence. State governments, it appears, had a specific purpose when it came to their police powers: they existed to protect the right of citizens to keep and pursue private property, and to involve the national government only when necessary.

It may be overly simplistic, or even laughable, to view states in such a way, given the sad history of their governments since the Founding, and especially since the Civil War. Perhaps they were doomed to fail over time – creating monopolies and Black Codes on one hand, and then slowly giving way to incorporation into the national government on the other. It was, of course, a tremendous gamble to say that such institutions, so closely tied as they were to popular factions and mob impulses, could maintain such protections of liberty, or even the basic Article IV requirement of a "republican form of government." It may very well happen, as many of the Founders knew, that states might abuse their power over the people. "The despotic power," Justice William Patterson later wrote, was defined entirely as "taking private property." Hence, the opposite of despotism, the practical and most prominent feature of liberty, could only be the protection of property. Patterson knew, though, that such taking of property "exists in every government," because "the existence of such power is necessary; government could not subsist without it" – i.e., governments must have the power to tax.

[21] Federalist #70, in *Id*., p. 421.

For this reason, he wrote, such a power "cannot be lodged any where with so much safety as with the Legislature. The presumption is, that they will not call it into exercise except in urgent cases, or cases of the first necessity."[22] Whether or not it was truly a necessity was for the people, above all, to decide. Yet that sort of legislative process could only occur in a government that was close to the people, as only the states were. The states, it seems, were viewed as the bulwarks of rights at the time of the Founding.

D. Police Power in Practice

Many Americans turned their attention to France (as many Frenchmen turned attention to America) in an effort to understand what makes a successful revolution. The final outcome of France's failure was, of course, the "universal perversion of the law," as Bastiat wrote, where "instead of checking injustice," the law becomes "the invincible weapon of injustice."[23] Yet Bastiat did not see the necessary cause of that condition: it was simply the national scope of the French government. Bastiat's homeland had always been far more nationally than locally minded; and it was, by the early nineteenth century, growing to a vast bureaucratic order. Joel Barlow, an American businessman, seized on Bastiat's missing ingredient during his visit to France in 1805. Like Bastiat, he recognized that with a civil society, "personal strength becomes no longer necessary to personal protection"; at the same time, though, "it is a general maxim, that individual safety is best secured where individual exertion is least resorted to," whether because the government is too weak to protect citizens, or too powerful to control itself. But Barlow went on to recognize the value of American federalism, and the ability of states to ensure

[22] *Vanhorn's Lessee v. Dorrance*, 2 U.S. 304, at 311 (1795).
[23] Bastiat, *The Law*, pp. 6-7.

the basic protections of citizens. "The few men to whom the government of a state must be confided, cannot extend their knowledge nor multiply their attentions to such a degree as the affairs of a great people would require," he wrote. "France, in her present limits, presents a mass of population and territory sufficient for at least twenty integral and well constituted states." The French Assembly, while numerous, was still encumbered with full scope of national business, which it could not possibly manage on its own: "not half the affairs which are necessary to the people are ever brought up for its deliberation," he wrote. "This republic, for the purposes of interior or local legislation and police, should be organised into about twenty subordinate republics," i.e., like the American states.[24]

This was the outlook of even the most nationally-minded Americans. Though a thoroughgoing Federalist and champion of constitutional supremacy, Chief Justice John Marshall could see well enough that states did have a distinct purpose, which was best omitted from national concerns. The national government, while "limited in its powers," was "supreme within its sphere of action." Its relationship with the states, according to Marshall, "would seem to result necessarily from its nature."

> The people of a state," he wrote, "give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse.[25]

It was, of course, the Sixteenth Amendment that complicated the nature of taxation in the twentieth century. But in Justice Marshall's day, such policies were a clear indication of the purpose of state governments – the only institutions that could tax directly because they consisted of officers closest to the people. To assume, as he did, that the national government has a distinct nature is to assume the same thing about state governments. In

[24] Joel Barlow, *"*To His Fellow Citizens of the United States. Letter II: On Certain Political Measures Proposed to Their Consideration," in *American Political Writings*, pp. 1100-1104.
[25] *M'Culloch v. State of Maryland*, 17 U.S. 316, at 405; 428 (1819).

light of the Constitution's specific function, he wrote that it was "neither necessary nor proper to define the powers retained by the states," because it was simply understood, and required no explanation from the Court. "These powers proceed, not from the people of America, but from the people of the several states," he wrote, "and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument." Much of Marshall's teaching is vague, at least when it came to state police power and its relationship with property. But this much was certain: that the Court should "consider the power of the states as existing over such cases as the laws of the Union may not reach."[26]

So again, it is not true to say that the meaning of police power is hopelessly vague, as Justice Douglas and Dubber claim: the term itself was quite clear at the time of the Founding, and it had everything to do with the aims of the modern judiciary and its effort at protecting rights. The ambiguities instead developed through the course of the twentieth century, and it was due to a growing lack of confidence in the purpose of republican government, on both the state and national level. The assumption, of course, was that some rights were so fundamental – "older than the Bill of Rights… older than our political parties, older than our school system" – that their surest protection could only come from the federal government, and the Supreme Court in particular.[27] But for the Supreme Court in the Lochner Era, the meaning of police power was still quite clear – even as conditions changed in such a way that made that definition more difficult to apply. The essential question for the Court was this: if state police power is broken in such a way, or if it fails to meet its pre-existing goal, on what principle is it corrected?

[26] *Sturges v. Crowninshield*, 17 U.S. 122, at 192-193; 195 (1819)
[27] *Griswold v. Connecticut*, 381 U.S. 479, at 486 (1965).

Does it depend on permanent incorporation into the national sphere? Or is it a matter of returning state governments to their own first principles?

II. The Fourteenth Amendment: Making State Police Power Explicit

There was, of course, one major outlier in this common and consistent understanding of police power: Chief Justice Roger Taney. Justice Marshall left it vague because it was universally understood; but Taney gave police power the strongest definition it had ever received from the Court in the *Charles River Bridge* case (1837) – and in doing so, he introduced a view of government that diverged from the old way, would trouble the Supreme Court's treatment of the issue for decades. It was "the object and end of all government," he wrote, "to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created." Happiness and prosperity clearly had nothing to do with rights or freedoms, at least in Taney's mind. They depended instead on the unrestrained and absolute power of the people, exercised through the instrument of a state government. Any appeal to rights, even of the most basic economic kind, would stifle freedom – albeit freedom understood as an assertion of power. "While the rights of private property are sacredly guarded," Taney wrote, "we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation." Even if there were natural rights, they could not be used to second-guess the community's general interest. This meant that a state was quite within its legitimate authority to favor one part of society over another – in this case, granting exclusive privileges to the

proprietors of the Charles River Bridge in the state of Massachusetts. He concluded that the Court cannot "take away from them any portion of that power over [the states'] own internal police and improvement, which is so necessary to their well-being and prosperity."[28]

If the Thirteenth Amendment was designed to cancel the affect of Justice Taney's other infamous opinion in *Dred Scott v. Sanford* (1857), then the Fourteenth Amendment could be said to address this view of police power in the *Charles River Bridge* ruling. The Amendment empowered Congress to repair state governments according to the states' own first principles, i.e., that a state exists to protect the rights of individuals. Communities certainly had rights, as Justice Taney saw it; but those broad political rights were only legitimate if they favored the whole population, rather than a single part – not in terms of public benefits as a bridge would provide, but in terms of the right to keep and pursue property. It was a goal far greater than resolving the ill treatment of former slaves. The Thirteenth and Fifteenth Amendments did that well enough (with the government's limited ability, at least), emphasizing the racial aspect of factional state laws. But Congress understood that its future ability "to enforce, by appropriate legislation, the provisions of this article," as the Amendment says, depended on a much broader understanding of rights, and privileges – one that transcended race, and established a clear view of citizenship. This was a result of the lesson of the Civil Rights Act of 1866.

The act, which passed over President Andrew Johnson's veto, embodied the same wording and general structure as the later Amendment, still acknowledged of racial problems: while it nationalized citizenship, it also said in Section 1 that such citizens, "of

[28] *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, at 548-549; 552 (1837).

every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States." It was clear, though, that the goal of those protections found their basis in economic rights. Former slaves now had the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens," according to Section 1.

In his veto message, President Andrew Johnson wrote that it would certainly result in an "absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited power, and break down the barriers which preserve the rights of the States." What was worse according to Johnson was how the bill "proposes a discrimination against large numbers of intelligent, worthy and patriotic foreigners, and *in favor of the negro*." The very awareness of African-Americans in the bill was no doubt "made to operate in favor of the colored against the white race," and by doing that, "the tendency of the bill must be to resuscitate the spirit of rebellion, and to arrest the progress of those influences which are more closely drawing around the States the bonds of union and peace." Johnson's objection was obviously fueled by the usual racism of the time, which saturated much of his other writings and speeches. (The legislation sought "a perfect equality of the white and colored races," he wrote.)[29] But despite his bigotry, he brought attention to an important point: no matter how severe the oppression, no matter how grave the injustice, civil rights legislation is not meant to favor one particular class of citizens over another. Such

[29] Andrew Johnson, "Veto of the Civil Rights Bill," March 27, 1866.

policies are legitimate when their goal is general; it must be broader and more basic than mere social inequalities.

Congress certainly had these things in mind when it drafted the Fourteenth Amendment. They omitted any specific reference to race, and sought to ensure the most general guarantees, i.e., "life, liberty and property." The only way to solve the problem of racial discrimination was to envelop the injustice of "Black Codes," thus correcting it according to a much broader and more fundamental understanding of rights. Ideally, this meant *natural* rights, or the sort that all human beings had *as* human beings. This was not President Johnson's objective, but it certainly presented the challenge that any new Amendment had to include if it was to protect former slaves in a just manner. In this case, the Amendment (and ensuing legislation) should be greater than negative feelings that come from slavery and segregation by helping African-Americans, on the one hand, *and* appealing to even the most racist white supporters of Johnson on the other.

This explains the simplicity of the provisions of the Amendment's Section 1: citizenship is nationalized; state laws cannot abridge privileges and immunities; "nor shall any person be deprived of life, liberty, or property without due process of law"; nor shall any state deny persons of "equal protection of the laws." It was a remarkably calm and simple set of provisions, given the extremism tendencies of the Reconstruction Era Congress. This was apparent as well in the modest punishments placed on the South in Section 3: only those who had "engaged in insurrection or rebellion" were forbidden from entering public office, though Congress could remove such restrictions by a two-thirds vote in each house for the truly repentant. But more importantly, it was a calm that gave way to careful thinking about how to best correct state governments: the task was to

bring them back to their true purpose, i.e., to protect the ends of government through due process guarantees of "life, liberty and property," and then protect the proper means of attaining those ends through equal protection, which would prevent class legislation. It was, again, a principle that was meant to be realized in the states; the national government's involvement, whether thought legislation or litigation, was only meant to set things right according to a universal view of justice.

B. Natural Law in a Written Constitution

But here is the problem: the Constitution was not meant to make such universal things explicit. As all the evidence of the Convention and the ratification debates shows, it was meant to deal only with broad questions of national interest, stated in terms of distinctly positive law. The particulars of moral philosophy and political theory, much less natural or God-given rights, were no less important; but they were best kept in the realm of public consciousness, and general understanding among a free people. They were premises, not conclusions: they were "settled usages and modes of proceeding"[30]; they constituted the "basis on which the whole American fabric has been erected, and, "so established are deemed fundamental," and were "designed to be permanent."[31] The bedrock principle of those rights was, of course, the right to keep and acquire property. There were "certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power," Justice Samuel Chase wrote. To not review laws that sought to restrict this right would "authorize manifest injustice by positive law; or to take away that security for personal

[30] *Murray's Lessee v. Hoboken Land Improvement Co.* 18 Howard 272, at 282 (1865).
[31] *Marbury v. Madison*, 5 U.S. 137, at 76 (1808).

liberty, or private property, for the protection whereof of the government was established."[32]

To make those precepts explicit in the document itself, as the Fourteenth Amendment does, is to invite a great deal of complexity. Like many other clauses in the Constitution, they are stated in broad ambiguities. "If the controversy about the meaning of its provisions, which existed from the first case in which it was interpreted, was partly the result of the defects or limitations or preference of its interpreters, it must also, to some extent, be blamed on the defects of the draftsmanship," Christopher Wolfe writes.[33] But those ambiguities were there for a reason: like many clauses in the Constitution – that Congress shall do whatever is "necessary and proper"; that the President shall "take care that the laws be faithfully executed"; that the Constitution itself shall be the "supreme law of the land" – the Fourteenth Amendment was meant to offer flexibility.

It is one thing to give Congressional or Presidential power a broad, sweeping grant of authority, especially when the institutions are elected by the people and then pitted against each other in a system of checks and balances. It is quite another thing to place substantive rights explicitly in the domain of positive law. This leaves far fewer chances to declare something a "political question," and it creates far more serious responsibilities for the Supreme Court. Most of the Court's earlier statements about "fundamental laws" and "natural rights" and the "fabric" of our republic appeared in dictum, or words that were not essential to the outcome of the case. But now, it would become an essential interpretation of the law of the land, and open up vast new precedents. "The historic irony is that the ambiguity of the Fourteenth Amendment,"

[32] *Calder v. Bull*, 3 U.S. 386, at 388 (1798).
[33] Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (Lanham: Rowman & Littlefield Publishers, Inc., 1994), p. 141.

Wolfe writes, "which should have served to minimize judicial review, has become instead the very basis for judicial review."[34]

III. Origins of Police Power Jurisprudence: *The Slaughterhouse Cases*

In the years leading up to the Court's first stand-off with state regulatory laws, the justices held to the classic definition of police power as it had been handed down to them – and, of course, in opposition to Justice Taney's distortion of that definition, which the Fourteenth Amendment had plainly cancelled. They emphasized that state police power had its own specific aim: it was, again, meant to protect private property and the right of citizens to acquire that property.

Obviously, state and local governments had a legitimate interest in regulating the misuse of that right; business practices could be harmful to public health and morals, and require state intervention to prevent it from threatening public health and safety. The transportation of flammable lamp-oil, for instance, required cautious state laws. "Standing by itself, it is plainly a regulation of police," Chief Justice Samuel Chase wrote, meaning that Congress had no authority to regulate it, no matter how serious the public interest was. "As a police regulation, relating exclusively to the internal trade of the State, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation."[35] But many times in this era, the Court went further and recognized this is the mere surface of state police power: far more important was its ability to protect property and trade.

---

[34] *Id*., p. 143.
[35] *U.S. v. DeWitt*, 76 U.S. 41, at 45 (1869).

A. Appeals for Constitutional Protection

The Slaughterhouse Cases involved what appeared to be a standard safety concern: city butchers could not dispose of large amounts of animal remains without creating a serious threat to public health, especially in the sub-tropical environment New Orleans. The state therefore required them to take their livestock to a central location with all the necessary facilities to dispose of waste in a safe and clean manner – a slaughterhouse owned and operated by a single company. While it was a sensible regulation, such a law revealed a clear threat, not only to business, but to everyone, the butchers claimed: the regulations tended to violate the most basic goal of good government by favoring one interest (the company-owned slaughterhouse) over all others.

But why exactly did so many object? Attorney John A. Campbell's amicus brief (which was so important that the Court included the entire text in the actual *Slaughterhouse* opinion) seems to have offered the objection that prevailed when the Court finally struck down many state regulatory laws. Campbell and his associates saw something far worse than a treat to public health: a menace to the common good, as the regulations tended to violate the most important guarantees of the Fourteenth Amendment. No state, the law said, shall "deprive any person of life, liberty, or property, without due process of law." The "process," in this case, had singled out one special interest – the slaughterhouse – over all others. In doing so, it may not have infringed on the right to property; but it certainly limited the "liberty of contract," "discovery," – i.e., the ability to *acquire* property. Such protections were not yet viewed as "substantive."

While the right to keep wealth was clear in his mind, Campbell was focused primarily on the means to that end – "that every man has a right to his own faculties, physical and intellectual, and that this is a right, one of which no one can complain, and no one deprive him," he wrote. Accordingly, all laws relating to that process had to conform to a predictable pattern – a "due" process, expected of any government worth calling "just." Hence, the basis for Campbell's objection: "The act was a pure MONOPOLY; as such against common right, and void at the common law of England. And it was equally void by our own law." Campbell also pointed out how many state constitutions explicitly outlawed government-sponsored monopolies, because "every species of exclusive privilege is an offence to the people."[36]

While monopoly was certainly a concern, Campbell's brief was far more focused on the "fundamental rights" aspect of the law. The mandate of the Fourteenth Amendment, he argued, was "universal in its application to persons of every class and every condition." It was "the right to labor… and to the product of one's faculties," which resulted in no ordinary product, but "property of a sacred kind." The Amendment, as Campbell and his associates claimed, was "made under an apprehension of a destructive faculty in the State governments," which could easily destroy those rights. "It consolidated the several 'integers' into a consistent whole," meaning that the reason for federalism, either in the Founders' sense, or in the Southern "states rights" view, was long gone. Though the Amendment was designed to emphasize certain points about national authority over the basic rights of citizens, it rendered the purpose and even legitimacy of state governments quite dubious. The Amendment's language was hardly

[36] *Id*., at 48-49.

"confined to the population that had been servile"; its guarantees were, after all, not for members of groups, but for individual persons.[37]

It was a strange argument, coming from a man who had been so involved in the Confederacy during the Civil War. The truth is, of course, that Campbell did not care at all about the butchers, much less the right to property of liberty of contract. His aim was instead "to employ the new constitutional realities of Reconstruction as a legal weapon to bring about its ultimate demise."[38] Such litigation would shift the effect of the Fourteenth Amendment away from civil rights legislation: if the war had settled the power of the national government over the states, that power should at least concern itself with rights that would not cause the sort of dreaded "equality of the races" that so many white Southerners feared. Campbell's brief was obviously in reaction against the existing cases dealing with the various reconstruction acts, where the Court proved to be quite willing to allow even the most radical reconstruction laws to move forward. "Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?" Chief Justice Chase asked?[39] The answer in a series of unanimous cases, decided by Abraham Lincoln appointees, was no. Clearly, from a Southerner's point of view, this called for a different approach to undermining the Amendment.

Some of the early pleading indicates the source of Campbell's argument. Reconstruction was not a political question at all, "but one of property, appropriate for judicial cognizance," wrote a certain Mr. Austin in a case that challenged the military occupation of Georgia. "The right of property was undoubtedly involved." The attorney

[37] *Id*., at 52; 54.
[38] Ronald M. Labbe and Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* (Lawrence: University of Kansas Press, 2003), 183.
[39] *Mississippi v. Johnson*, 71 U.S. 4 Wall. 475, at 498 (1866).

based his argument, though, on a curious formulation of state sovereignty. In the new world, "where feudal tenures are abolished… the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction."[40] The Court, of course, responded with a simple denial of its own jurisdiction over this question. Such a simple solution would no doubt become greatly disrupted with the passage of the Fourteenth Amendment, which would be exploited in the same way by the likes of John Campbell. Campbell finally had his way several years later when the Court handed down *Plessy v. Ferguson* (1896), which cancelled the effect of the Equal Protection Clause by introducing the "separate but equal" doctrine.

That was the extent of Campbell's concern. At best, states took preventative measures against their own abuses of power; the possibility that police power was itself meant to *encourage* a certain level of economic well-being was not at all on Campbell's mind. There was no end of any importance, in his view, for state governments; he was quite uninterested in whether or not the states were fulfilling their intended purpose through the police powers.

B. Dissents: The Court's Power Over the States

The Court, of course, did not side with Campbell and the butchers. In response, though, the dissenting justices raised the "fundamental rights" view of the Constitution to even greater heights – an approach to jurisprudence that would introduce an entirely new view of constitutional law. Justice Field in particular was the classic defender of fundamental rights at all costs; though aware of the threat to health and safety, he remained certain that the right to property and liberty of contract were still "fundamental

[40] *State of Georgia v. Stanton*, 73 U.S. 50, at 73 (1867).

principles," which surpassed all other considerations – that "the State cannot be permitted to encroach upon any of the just rights of the citizens, which the Constitution intended to secure against abridgement." Field was concerned enough about monopolies and the usual problems of class legislation[41]; but, like Campbell, he was far more concerned about what he perceived to be the end of government, which was, again, the protection of fundamental rights. Yet, it was an end which, in his view, state governments were entirely unable to protect: there was no purpose to those governments other than very basic local concerns. The Fourteenth Amendment was meant to do nothing less than place all citizens "under the protection of the National government," he wrote. "The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation."[42] For the first time, it seemed clear that state police powers just might have very little to do with the fundamental rights of citizens. It fell instead to the national government to ensure them; to argue otherwise, according to Field, was to invoke the earlier views of rights as emerging out of state sovereignty, thus reviving the political thought of John Calhoun, which had caused the Civil War in the first place.

State governments, he pointed out, were not competent to protect the sort of freedoms guaranteed to citizens anyway. The Fourteenth Amendment was meant for the "protection of every citizen of the United States against hostile and discriminating

[41] Justice Field was in fact open to the possibility of extreme class legislation, so long as it did not damage the right to property. He even stated that "[s]pecial burdens are often necessary for general benefits, – for supplying water, preventing fires, lighting district, cleaning streets, opening parks, and many other objects." *Barbier*, at 32.
[42] *Slaughterhouse*, at 87; 93; 96 (Field, dissenting).

legislation against him in favor of others," he wrote, "whether they reside in the same or in different States." Even if state governments were meant to protect the rights of the individual, there was little they could do in the latter situation. It was better for the national government to secure these rights, and leave state governments aside. Justice Field based this view of the Fourteenth Amendment on the Declaration of Independence: rights exist by nature, meaning the purpose of government was to protect those rights. The Fourteenth Amendment, he wrote, did not draw from the intent of the Constitution or the political power of Congress; rather, it was intended to give effect to "inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes." American political institutions were reliable enough when it came to protecting those rights; but according to Field, there was only one final safeguard: the judiciary itself. He insisted that "whenever this has occurred, with the exception of the present cases from Louisiana, which are the most barefaced and flagrant of all, the enactment interfering with the privilege of the citizen has been pronounced illegal and void."[43]

Justice Bradley reinforced this view in his own dissent, where he addressed the Court's role squarely: did it afford the butchers a remedy? He acknowledged that "[p]rior to the fourteenth amendment this could not be done," which meant that there was indeed a time when states were entrusted with the very duties that now fell to the Court. He wrote that the "protection of the citizen in the enjoyment of his fundamental privileges and immunities… was largely left to State laws and State courts, where they will still continue to be left unless actually invaded by the unconstitutional acts or delinquency of the State governments themselves." But such protections were never the fundamental

[43] *Id*., at 100-101; 105; 106.

safeguard, and it was clear that police powers had declined in their ability to fulfill their end. Indeed, it was possible that such an end was never fully present in the first place. It was instead the national government of the union that guaranteed both the fundamental rights of citizens and the means to those rights; it was the "the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen."[44] The structure of Section 1 of the Amendment made this clear enough: equal protection was the means to that end, since it prohibited class legislation and monopolies; due process would ensure that the end – that the right of property and the "liberty of contract" by which they might acquire it are protected. Justice Bradley therefore had at least some sense of the purpose of state governments: they had a role to fulfill in the lives of their citizens, which they shared with the national government. It was only time and circumstances that changed this.

C. Justice Samuel Miller: State Purpose and National Intervention

Justice Samuel Miller is best known for his restrained approach to judicial review, a broad definition of state authority, and an awareness that judicial involvement "would constitute this court a perpetual censor upon all legislation of the States," and that the Court would intervene only to maintain "a steady and an even hand the balance between State and Federal power," and nothing more.[45] For this reason, his *Slaughterhouse* opinion has received little more than shallow interpretation, from both his critics and his fans. Charles L. Black, for instance, writes that the ruling "was a judicial rehabilitation of the states, as semi-independent political entities, with inflexible legal claims of

[44] *Id*., at 121-122. (Bradley, dissenting.)
[45] *Id*., at 78; 82.

power." Reconstruction was not sufficient, it seemed; the supremacy of the national over the state governments was meant to become apparent inside the states as well: "nothing could have been so apt to give to that rehabilitation to firmness of unimpeachable legality as a judicial decision by a Court representing that very government that had just won a war vindicating federal supremacy." With this, "vast areas of state activity are stamped as legitimate."[46] At the same time, Justice Miller receives much praise for his "moderate" approach to judicial review of state laws, or what Chief Justice William Rehnquist called his "great gift of common sense." This made him the last remnant of a great legal establishment, which had far more to do with sharpening the legal mind to focus on positive law and clear facts, rather than philosophic abstractions. Having received such training, Miller "was able to emancipate himself from current fashionable intellectual dogma, which possessed much of his profession and many of his colleagues," Rehnquist writes, "and thereby to establish his reputation as one of the great justices who had served upon the Court."[47]

But a careful study of Justice Miller's *Slaughterhouse* opinion reveals more to his thinking than his latter-day critics and friends realize. Miller was not fearful of the new duties left to the Court at this time. Nor did he believe that the Fourteenth Amendment had no place function over state police power, or that it was the Court's obligation to allow state governments to do anything within their local spheres of authority. For Miller, the Amendment was in fact meant to bring state governments back to their intended purpose, which Campbell, Field, as well as Black and Rehnquist, have all ignored. It fell to the Court in this era to determine whether or not that goal was met.

[46] Charles L. Black, *The People and the Court: Judicial Review in a Democracy* (Englewood Cliffs: Prentice Hall, 1960), pp. 153-154.
[47] William Rehnquist, *The Supreme Court* (New York: Vintage Books, 2001), p. 99.

Did a state law actually do what it was meant to do, in light of what state governments were for?

Circumstances had, of course, made that question unclear, leaving the Court "incapable of any very exact definition or limitation" Miller wrote. But he was certain that upon this question "depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the *beneficial use of property*."[48] Such a rule might apply to any number of careless business practices, which could damage public welfare. But for these justices, while it was good to protect the public, it was even more important that the public to receive the "beneficial" presence of industry. For Miller, much like the Founders, state police power existed to encourage that.

But, as my thesis holds, this involved two parts: the ends of government, as well as the means to those ends. Justice Field and Attorney Campbell emphasized the end, i.e., the protection of property and the right to pursue it through one's chosen trade. But it took Miller's guidance to show them the whole picture by emphasizing the means as well: a government that used its police powers to encourage that end.

Still, the misuse of Miller's opinion remains strong among even the most thoughtful critics. Howard Gillman points out, for instance, that the Court's rulings in this era were concerned above all with maintaining government neutrality at the state level. The question before Miller's Court, according to Gillman, was nothing more than "whether the slaughterhouse should be treated as a legitimate promotion of the interest of the community as a whole or whether it as an illegitimate use of government power to advance the special interests of a privileged elite at the expense of the well-being of many

[48] *Id*., at 62. (Emphasis added.)

others."[49] There was only one true reason it was upheld: the slaughterhouse "furthered the well-being as a whole," meaning that inquiries into "fundamental rights" or laissez-faire principles were quite separate from the Court's concerns.

But it is plain that Justice Miller did not hold the view that Gillman ascribes to him. Though he approached the question with a physician's expertise, Miller still knew that "the interest of the whole" was not reducible to mere well-being understood as the "community interest" in health, safety, and general comfort, as Justice Taney would have it. It was instead a certain enjoyment of basic economic rights that mattered most. Miller was quite concerned about Sections 3 and 4 of the state law declared that the company "shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business," and that the animals shall be slaughtered in the company's central location – "and nowhere else."[50]

In this, Justice Miller was not entirely unaware of the importance of Campbell's objection to the law, or Justice Field's dissent, either; the right to keep and pursue property was abundantly important. But to treat it as an absolute, fundamental, untouchable right, and as the end of government, was to forget the means by which a republican government was designed to protect that end – and how states themselves were designed to do precisely that. This, in turn, would *include* – not oppose – the more pragmatic considerations of health and safety. Hence, the true reason for the Court's ruling in *Slaughterhouse*: while the only way for the law to be effective was to require a central location, operated under a single company, "it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the

[49] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993), pp. 65; 67.
[50] *Slaughterhouse*, at 59. Justice Miller emphasized "nowhere else" twice, also at 61.

people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit."[51] If the statute did deprive them of that right, then it was indeed the national government's duty to correct that error. Were those rights not as important as the need to break down class legislation, as Howard Gillman would have it, Miller would have made that clear. But he did not, and kept substantive rights very much in view. It was not true "that it deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit," he wrote.[52]

Accordingly, the Lochner Court upheld the earlier state regulatory laws because the majority understood the goal, which was still implicit in the definition of police power, and made explicit by Justice Miller in the *Slaughterhouse* opinion: that "the entire domain of the privileges and immunities of citizens of the States, as above defined, *lay within the constitutional and legislative power of the States*, and without that of the Federal government." On the purpose of the Fourteenth Amendment, Justice Miller asked: "was it intended to bring within the power of Congress the entire domain of *civil rights* heretofore *belonging exclusively to the States*?"[53] The answer was no; but the reason why is apparent in Miller's understanding that the national government might very well corrupt the ability of the states to effectively protect the most fundamental rights if it intervened at the wrong time or for the wrong reason.

Miller's position on the Fourteenth Amendment actually encompassed Attorney Campbell's accusation: it *did* mean something bigger than the mere protection of former

[51] *Id*., 62-63.
[52] *Id*., at 60.
[53] *Slaughterhouse*, at 77. (Emphasis added.)

slaves. If it happened that "other rights are assailed by the States which properly and necessarily fall within the protection of these articles," he wrote, "that protection will apply, though the party interested may not be of African descent." True, he did say that "it is necessary to look to the purpose which we have said was the pervading spirit of them all," and "the evil which they were designed to remedy."[54] But it proceeded on the understanding that slavery was not simply a wrong done to African-Americans in this case: it was a wrong done to all people of all colors *everywhere* – and worst of all, it was the greatest harm a free nation could ever inflict on itself. The only reason slavery had persisted for so long was, of course, because of the states: it was therefore a failure of each slave state to fulfill its intended purpose, not only for the slaves, but for all citizens.

Hence, the Amendment's necessary remedy: citizenship was to be nationalized – but not in a way that rendered all state governments irrelevant, because there continued to be "a state wherein [citizens] reside." Forbidding states from abridging the "privileges and immunities" of those citizens was meant for the "protection to the citizen of a State against the legislative power of his own State," Justice Miller wrote. "It is too clear for argument that the change in phraseology was adopted understandingly and *with a purpose*," i.e., a purpose that had state governments very much in mind.[55]

This point, though, was even more apparent in Miller's treatment of the Privileges and Immunities Clause. That guarantee, of course, preceded the Fourteenth Amendment in the original Bill of Rights; it was an expression of the purpose, not only of the national government, but for the idea of republican government in general. This principle plainly included state governments, where such rights "must rest for their security and protection

[54] *Id*., at 72.
[55] *Id*., at 74.

where they have heretofore rested," Miller wrote, "for they are not embraced by this paragraph of the amendment." This was not for a lack of nationalizing effect of the Amendment, but because of a recognition of what state governments were designed to do on their own. There were a few nation-wide restrictions in the original Constitution – no ex post facto laws, no bills of attainder, and no laws impairing the obligation of contracts. "But with the exception of these and a few other restrictions," Miller wrote, "the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government." But Miller went on to point out something that is quite ignored in the literature, though it became the central question for the Lochner Era Supreme Court in later years: if it happened that the consequences of state legislation "are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions," he wrote, there was certainly a call for national authority to step in. Regular occurrences of this would, of course, "fetter and degrade the State governments by subjecting them to the control of Congress"; it 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." But that did not exclude Miller's most essential point: states could proceed with great exertions of police power "until some case involving those privileges may make it necessary to do so."[56] Despite the basis of this ruling – that the Louisiana statute did not deprive butchers of their livelihood, that it "does not… prevent the butcher from doing his own slaughtering," nor "deprived [them] of the right to labor in their occupation," nor does it "destroy the business of the butcher, or seriously

[56] *Id*., at 75; 77; 78-79.

interfere with its pursuit"[57] – it was apparent that there was a guideline for states, and that the Court as quite willing to address it if the occasion arose. The need for the Court to be a "perpetual censor upon all legislation of the States" would indeed be a burden for the Court, and Miller sought to avoid that.[58] But a censor imposes obligations more than he corrects the broken system. Maintaining a "a steady and an even hand the balance between State and Federal power" assumes that there are two equal weights – each depending on the other to know its proper place. Such was the case with state and national governments in Justice Samuel Miller's mind.[59]

Conclusion: The Framework of the Lochner Era

On its face, it seemed *Slaughterhouse* showed how the Justices were too weak, perhaps intimidated by the task of reviewing state laws, or sympathetic to Southern state affairs in the wake of the Reconstruction Era. But there appears to have been much more going on. There was in fact a broad array of questions about state police power under the Fourteenth Amendment: Justice Miller did not give the final work on post-war state supremacy, as his critics would have it; he instead revived the traditional view of what state governments were for, and how they related to the Constitution.

The public perception of the case at the time shows what had actually happened. *The New York Times* reported that the opinion "is calculated to throw the immense moral force of the Court on the side of rational and careful interpretation of the rights of the states of the Union." One would think, at first glance, that the Court had asserted national

[57] *Id*., at 61-62.
[58] *Id*., at 78.
[59] *Id*., at 82.

power like never before, and affirmed the position of Campbell and Field. Clearly there was more to this case the Court's refusal to fulfill a critical duty as professor Black would have it, much less an act of "judicial restraint" by Justice Rehnquists' account. Despite its immediate ruling, there was no doubt what the opinion itself meant for the nature of national supremacy. "It is also a severe and, we might also hope, fatal blow to that school of constitutional lawyers who have been engaged, ever since the adoption of the Fourteenth Amendment, in inventing impossible consequences for that addition to the Constitution."[60]

This is the critical insight about the early days of the Lochner Era: there was, in fact, no conflict between state legislation and judicial interpretation of the Fourteenth Amendment. What eventually did occur was a conflict within the meaning of police power itself. Correcting that inner flaw meant a great deal of judicial intervention, not only in striking down state laws, as they did in *Lochner v. New York* (1905) and *Adkins v. Children's Hospital* (1923), but in agreeing to review those cases in the first place.

A. Concurring Interpretations of Police Power and the Fourteenth Amendment

Many justices confirmed Miller's view of state governments. Justice John Marshall Harlan, for instance, wrote that the Court sought to ensure that "State police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and *property*, which each State owes to her citizens." Police regulations were not concerned with any ordinary set of guarantees, but a "complete and salutary power with which the States have never parted," he wrote. This

[60] "The Scope of the Thirteenth and Fourteenth Amendments," *New York Times*, April 16, 1873.

was not to equate property with the usual health and safety concerns: it was in fact a fundamental basis for those conditions. Police regulations went even further than the right of property: "The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself," he wrote.[61]

Perhaps states could regulate the ways that people would "discover" or make their property; but they would only do this to ensure that the end was something achievable, and that it would serve as the basis for the sort of equality of opportunity that prosperity would ensure. "Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights," Chief Justice Melville Fuller wrote, thus giving more credit to the states themselves to meet this end than to the abilities of his own Court. The Fourteenth Amendment, as his court interpreted it, "was not designed to interfere with the power of the state to protect the *lives, liberties, and property of its citizens*, and to promote their health, peace, morals, education, and good order."[62] Consequently, much of the Lochner Era Court was concerned with recovering that aspect of state police power – to make each state fulfill its reason for existing. Perhaps that is an abuse of judicial power, as many critics of that era claim. But it is important to see how different it is from the reason why the justices viewed it as such an abuse: it was, as Bastiat claimed, a "perversion" of what police powers were for.

Even Justice Stephen Field appeared to change his mind, at least on occasion. Unlike his dissent in *Slaughterhouse*, he later insisted that the Amendment, "broad and comprehensive as it is," was not meant to infringe on the states, particularly because they

[61] *Patterson v. Kentucky* (1878) 97 U.S. 501, at 506.
[62] *In Re Kemmler*, 136 U.S. 436, at 448-449 (1890). (Emphasis added.)

could protect these rights well enough on their own. The authority of state governments, "sometimes termed its police power," was certainly meant "to prescribe regulations to promote the health, peace, morals, education, and good order of the people." This, however, was merely the surface of what police power actually meant: far more important was the way local governments were at their best when they sought to "increase the industries of the state, develop its resources, and *add to its wealth and prosperity*," Field wrote. "From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains."[63] This, according to Field, was the bedrock principle for promoting the general good; no amount of moral legislation could surpass in importance the ability of government to not only ensure the protection of property, but to positively encourage popular accumulation of wealth. It was only when those states had failed to fulfill this end that the Amendment applied.

It is critical to see that these justices did not say these things as a guise for defending the interests of "the rich," much less some abstract and untouchable laissez-faire doctrine. It was instead a recognition that laws encouraging wealth and prosperity were in fact most attuned to a neutral form of public interest – even more so than conventional "health and morals" social policy. Police power that encouraged industry overcame the perennial danger for every piece of legislation, i.e., that such law would favor one interest group over all others, thus violating the fundamental principle of neutral government.

B. The Framework and its Problems

[63] *Barbier v. Connolly* (1884) 113 U.S. 27, at 31-32.

As we know, things became more complex in the following years, when legislators were not seeking to correct health and safety problems, but to remedy something far more troubling than public sanitation from animal remains social and economic injustices: in light of this new condition, the Court did not seek to limit state police power, but to follow Justice Miller's method in defining the *constitutional* reason for it. Most of the time, the state was meant to be neutral; but when was it allowed to break that neutrality, and engage in "active state" liberalism? Such a rule required a clear understanding of both the ends of government and the means to that end – and just how broad those means were.

That question evaporated, of course, with the rise of the New Deal. But it is worth recovering, at least so we might understand why the New Deal happened, as well as the Progressive Era that preceded it. It was an explicit rejection of republican government. The evidence shows, however, that republican government was in fact designed to confront these problems directly, and to set things right – to allow its means to *surpass* its end, in order to better preserve it.

Hence, the opinions of the early Lochner Era were full of references to the "proper exercise" of police power, which shared the classic definition. It was a principle much older than the term "police" itself – older than American Federalism, in fact, and having much more to do with the definition of government than the static sort of federalism that would come later. It brings out an important aspect of early American constitutionalism, which is the central challenge to a study of this kind: much of what the justices wrote proceeded on unspoken assumptions rather than clearly stated precepts.

Constitutional scholarship is a challenge in that it depends on our ability to read things the justices did not write – while at the same time, not attributing ideas to them that they did not have. But on the issue of state police powers, at least, Chief Justice John Marshall did give us a reliable point: he looked to principles that were "now universally admitted," ones that "could command the universal assent of mankind." They were "now" understood; yet there was nothing new involved at all according to Marshall. It was the truth "that the government of the Union, though limited in its powers, is supreme within its sphere of action." There were "spheres," with the national sphere encompassing the federal. There were, of course, certain "enumerated powers" that established these spheres; they allowed the national to encompass the federal, and kept the two distinct in their operations. But as the present case demonstrated, enumeration was only a method of understanding the more important basis for state and national governments: "[t]his would seem to result, necessarily, from its nature," he wrote. For Marshall, it was enough to say the explicit, written, enumerated powers were meant to show the government's "great outlines should be marked"; all other principles could "be deduced from the nature of the objects themselves."[64] What happens to our understanding of police power, state government – or republican government in general – when we lose sight of such an essential precept of law?

[64] *M'Culloch v. Maryland* (1819), 17 U.S. 316, at 405. (Emphasis added.)