Justice Bradley’s Civil Rights Odyssey Revisited

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Justice Bradley is remembered equally for his early opinions (such as his dissent in the Slaughter-House Cases) which seemed to champion a broad view of the Reconstruction-era amendments and congressional power, as for his later opinions (such as that in the Civil Rights Cases) that took an apparently narrower view. Some have therefore argued that Bradley underwent a profound, and perhaps politically inspired, intellectual metamorphosis during his tenure on the Supreme Court that caused him to turn his back on Reconstruction. But, as the following Essay argues, an internal analysis of Bradley’s own opinions during this period actually suggests a far greater degree of doctrinal coherence and consistency than is commonly thought. The Essay thus suggests that there may be little need to look to external or political events to explain any supposed change of heart.

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I. INTRODUCTION

Joseph P. Bradley, who sat on the Supreme Court for most of the last quarter of the nineteenth century, has always had something of a shady reputation. Historians, legal scholars, and novelists have all taken their shots at the ex-railroad lawyer’s supposed change of heart concerning Reconstruction and the national enforcement of civil rights.1 Probably best known for his narrow “state action” opinion in

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1. The conventional account is John A. Scott, Justice Bradley’s Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases to the Civil Rights Cases, 25 Rutgers L. Rev. 552 (1971); see also Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 179 (1986) (observing that Bradley “completely changed positions”); Gore Vidal, 1876 (1976) (presenting an unflattering

1979
the 1883 Civil Rights Cases, the Justice is often attacked for the retreat which that case is thought to represent from his expansive approach to the Fourteenth Amendment detailed just ten years earlier in his equally famous Slaughter-House Cases dissent. As Michael McConnell recently put it, Bradley’s shift was the Reconstruction Era’s equivalent to the “switch in time” commonly associated with the New Deal Court.

The usual explanation for Bradley’s supposedly schizophrenic approach to the Amendment, and to Reconstruction generally, is that something went wrong between the two decisions. Critics often focus on Bradley’s pivotal role (while still on the Court) as the swing vote on the congressionally appointed commission that sorted out the results of the 1876 presidential election. These suspicious events resulted in the notorious “Compromise” with the Democratic South—the 1877 inauguration of the Republican presidential candidate in exchange for the end of Reconstruction in the ex-Confederate states and the restoration of “home rule.” Gore Vidal may have sensed the verdict of popular history when one of the characters in his novel 1876 announced that Bradley had been flat-out bribed for his vote.

Bradley’s involvement in the Compromise of 1877 is supposed to have marked a “turning point” in his own attitude toward Reconstruction and the Civil War amendments—an attitude that is reflected in his journey from an expansive to a narrow approach to the Civil War amendments between his dissent in Slaughter-House, a pre-
Compromise decision, and the *Civil Rights Cases*, a post-Compromise decision. Even while historians have cleared Bradley of misconduct on the Commission,\(^9\) other critics have more recently noted that shifts in Bradley's approach to the Reconstruction-era questions of racial justice and state-federal relations were discernible even before the *Civil Rights Cases* (or the 1877 Compromise).\(^{10}\) These shifts in approach, however, are also said to reflect Bradley's gradual retreat from the promise of a genuinely nationalist Reconstruction, of which the 1877 Compromise was perhaps more a culmination than a turning point.

It is the argument of this Essay that between those two landmark opinions, Bradley's views about the Fourteenth Amendment and other Reconstruction-era civil rights enactments did not undergo any particularly "radical change" as some have charged.\(^{11}\) Indeed, the two opinions themselves reflect a consistent and relatively coherent picture of the constitutional issues surrounding Reconstruction. Bradley's views about the Reconstruction amendments are, by modern terms, both broader and narrower than those customarily associated with him. Moreover, as this Essay will try to show, the views on state action and Congress's power to enforce the Fourteenth Amendment that Bradley staked out for the Court in the *Civil Rights Cases* were in rough harmony with his otherwise expansive views about the scope of the Fourteenth and the other Civil War amendments.

This Essay will focus on certain judicial opinions written by Justice Bradley, both while on the Court and while riding Circuit in the deep South—the very opinions that are supposed to best reflect his change of heart. This largely doctrinal approach is not meant to suggest that Bradley may not, in fact, have helped cut the notorious deal that brought an end to Reconstruction. Nor does it argue that external events were necessarily irrelevant to his decisionmaking while on the Supreme Court. But if Bradley's opinions themselves reflect no serious shift in approach to civil rights or national power, there may not be as great a need to look for external explanations to make sense

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10. See infra note 53.
11. See, e.g., Scott, supra note 1, at 562.
of his treatment of the Reconstruction amendments.\textsuperscript{12} Thus, although the \textit{Civil Rights Cases} and other opinions of his may well reflect the nation's rejection of Reconstruction's goals of racial justice and enhanced federal power, they still may not mark the results of an intellectual odyssey on the part of Justice Bradley himself.

II. \textsc{Reconstruction Ascendant—Justice Bradley Before the Compromise of 1877}

The portrait of the "good" Justice Bradley begins with his powerful dissent in \textit{Slaughter-House} in which the majority rebuffed a constitutional challenge to a state law creating a slaughtering monopoly in New Orleans.\textsuperscript{13} Justice Miller's opinion for the Court is best remembered for trashing the Privileges or Immunities Clause of the recently ratified Fourteenth Amendment and for its less-than-expansive view of the Equal Protection and Due Process Clauses. As to the privileges or immunities question, Miller concluded—questionably, in light of much current historical scholarship\textsuperscript{14}—that most ordinary common-law interests, such as the right to ply one's trade or pursue one of the common callings, could not be included within the incidents of national (as opposed to state) citizenship.\textsuperscript{15} Accordingly, the Clause did not protect such interests from state interference.\textsuperscript{16}

Bradley's dissent persuasively argued that certain such common-law interests—that had previously been protected from interstate discrimination under Article IV's Privileges and Immunities Clause contained in the body of the Constitution—were precisely what the Fourteenth Amendment's Privileges or Immunities Clause did

\begin{itemize}
\item \textsuperscript{13} 83 U.S. (16 Wall.) 36, 60-62 (1873).
\item \textsuperscript{14} See, \textit{e.g.}, CURTIS, \textit{supra} note 1; WILLIAM E. NELSON, \textsc{The Fourteenth Amendment} 163 (1988); Akhil R. Amar, \textit{The Bill of Rights and the Fourteenth Amendment}, 101 YALE L.J. 1193, 1218-54, 1272-74 (1992).
\item \textsuperscript{15} \textit{Slaughter-House Cases}, 83 U.S. (16 Wall.) at 73-79.
\item \textsuperscript{16} \textit{Id. at} 78-79.
\end{itemize}
cover. Under Article IV, a state could not treat citizens of other states any worse than it treated its own citizens—at least with respect to certain common-law rights that could be dubbed “fundamental,” as they had been in Corfield v. Coryell, including the right to pursue a lawful calling. Of course, a state might well deny its own citizens, and thus deny out-of-state citizens, those same rights, but Article IV guaranteed a measure of equality or comparative protection.

For Bradley, however, the newly ratified Fourteenth Amendment provided some measure of protection from a state’s deprivations of such “fundamental” common-law rights even as to its own citizens. The Amendment may have included some absolute protection from deprivation of such interests, or perhaps, as John Harrison has suggested, it may (merely) have prevented unfair discrimination by states among their own citizens as to these “fundamental” rights. In the latter case, the Privileges or Immunities Clause would have operated as an equality principle, and some of the language of Bradley’s (as well as much of Justice Field’s) dissent suggests such an interpretation. But because of the new Amendment’s provision for congressional enforcement in section 5, the majority concluded that Bradley’s approach would have given the national government potentially far-reaching legislative powers to secure those common-law rights against interference—something that the majority was

17. Id. at 113-14 (Bradley, J., dissenting).
18. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, Circuit Justice) (including the right “to pass through, or to reside in any other state ... to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property”).
20. Id. at 119 (Bradley, J., dissenting).
21. Id. at 121-22 (Bradley, J., dissenting). Bradley had said as much on Circuit in a lower court opinion in the same case. Live-Stock Dealers’ & Butchers’ Ass’n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 651 (C.C.D. La. 1870) (No. 8408); see also Amar, supra note 14, at 1257-58.
23. See Nelson, supra note 14, at 156-61. Compare Slaughter-House Cases, 83 U.S. (16 Wall.) at 113 (Bradley, J., dissenting) (focusing on intrastate “equal rights” and “equality of rights”) with id. at 118 (Bradley, J., dissenting) (suggesting privileges or immunities clause might go beyond “a guarantee of mere equality”); see also id. at 101 (Field, J., dissenting).
 disinclined to believe the Amendment’s framers or the ratifying states had intended.  

Also appearing on Bradley’s list of Fourteenth Amendment privileges or immunities were the first eight amendments to the Constitution which, before the advent of the Fourteenth, the Court had seen as a limit on the federal government only. This early version of the modern “incorporation” theory by which the Bill of Rights were made applicable to the States—although in Bradley’s case, through something other than the Due Process Clause—made it easy for twentieth-century civil rights advocates to claim the Justice Bradley of Slaughter-House as their intellectual ally.

Another snapshot of the “good” Justice Bradley, usually viewed in tandem with his Slaughter-House dissent, is his involvement in the lower court decision of United States v. Hall. The defendants in Hall—white citizens—were charged with conspiring to deprive African-American citizens of their rights of free speech and assembly. They were indicted under a Reconstruction-era federal criminal statute that made it a crime to conspire to deprive any person of a right, privilege, or immunity secured by the Constitution. The defendants had broken up a pre-election gathering in Green County, Alabama, by firing on, wounding, and killing a large number of those assembled. The trial court upheld the statute and its application in the face of a constitutional attack on Congress’s authority to enact the legislation under the Fourteenth Amendment.

The Hall opinion was written by federal Circuit Judge William B. Woods, who would later join Bradley on the Supreme Court. But historians now note that much of the opinion’s reasoning tracked a letter from Bradley to Woods, written in response to Woods’s request for help on the tough legal questions presented by the case. The opinion (and the letter) concluded that the First Amendment’s

25. Id. at 118-19 (Bradley, J., dissenting).
26. 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).
27. Id. at 79.
28. Id. (citing Act of May 31, 1870, ch. 114, 16 Stat. 140).
29. Id.
30. Id.
guarantees were among those covered by the Fourteenth Amendment's Privileges or Immunities Clause and that they were thus secured against certain kinds of state interference. More interestingly, the opinion (and the letter) also concluded that Congress could make the private parties in Hall liable for the acts charged in that case, at least where the state had somehow failed to protect against the deprivation of First Amendment rights. To the extent that First Amendment guarantees could be applicable in some measure to the States, the opinion obviously foreshadowed Bradley's own quasi-incorporationist sentiments in Slaughter-House, a case that reached the Supreme Court a couple of years after the decision in Hall. So, that part of the opinion tells us nothing new. But Hall's suggestion that private action implicating the Fourteenth Amendment (and the First Amendment as well) might be reached by Congress, and that Congress's power under section 5 of the Fourteenth Amendment included providing remedies "as well against state legislation as state inaction or incompetency," had no obvious parallel in Slaughter-House. And this, too, has understandably struck a responsive chord in the modern debate over state action.

A final favorite illustration of the pro-Reconstruction Bradley is his broad interpretation of an 1866 civil rights statute in United States v. Blyew. The 1866 act mandated that all "citizens" have the "same right" as "white citizens" to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property." A second section of the act provided criminal penalties for those who, acting "under color of" law,

32. Hall, 26 F. Cas. at 81.
33. Id. at 81-82 (indicating that equal protection denial included "the omission to protect, as well as omission to pass laws for protection"). Bradley's letter stated:

"The Amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen but prohibits the States from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect as well as the omission to pass laws for protection."

Letter of Joseph Bradley to William Woods, Mar. 12, 1871, quoted in Nelson, supra note 14, at 196 n.210. This part of the letter is quoted almost word-for-word in Judge Woods's opinion. See Hall, 26 F. Cas. at 81.
34. Hall, 26 F. Cas. at 81.
35. 80 U.S. (13 Wall.) 581, 598-601 (1871) (Bradley, J., dissenting).
36. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.
violated such rights, while a third section conferred original federal court jurisdiction over civil and criminal suits “affecting persons who are denied or cannot enforce in the [state] courts” the rights secured by the first section of the 1866 act. The third section also allowed for removal of civil or criminal proceedings that were commenced in state or local courts involving any “such person.”

_Blyew_ was a murder prosecution brought by the United States for the racially motivated killing of a ninety-year-old African-American woman by two white assailants. Under the law of Kentucky, where the killing occurred, only whites could testify in court. Yet the only eyewitnesses to the brutal slaying were other black citizens who managed to escape the defendants’ murderous rampage. Focusing their attention on the question of statutory interpretation, a majority of the pre- _Slaughter-House_ Supreme Court concluded that those who could invoke the federal jurisdiction provisions of the 1866 statute, or on whose behalf they could be invoked, were only those who were “parties” or potential parties to state-court lawsuits who were denied or could not enforce their rights in state proceedings. An African-American victim of a racially motivated beating might therefore seek removal of his state-court civil action or a criminal action against the wrongdoers if blacks could not testify in state court, and the 1866 act also seemed to allow the filing of a civil or criminal action in federal court in the first instance in some such cases. But the _Blyew_ Court found that no one in the case was “affected in the enforcement of their rights” within the meaning of the statute. Of course, the deceased victim was posthumously “denied or impeded from” enforcing her rights via a state-court prosecution. But the Court concluded that the statute’s “persons affected” language had reference to living persons only. Black witnesses who could not testify in state court were denied rights that the 1866 statute guaranteed but, as non-“parties,”

37. _Id._ § 2.
38. _Id._ § 3.
39. _Id._
40. 80 U.S. (13 Wall.) 581, 583 (1871).
41. _Id._ at 581 (citing KY. REV. STAT. § 1, ch. 107).
42. _Id._ at 583.
43. _Id._ at 593.
44. See Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.
45. _Blyew_, 80 U.S. (13 Wall.) at 592-93.
46. _Id._ at 593-94.
they were not among the class of those "persons affected" to which the statute referred and on whose behalf the federal jurisdiction provisions of the act could be invoked.\textsuperscript{47}

Bradley dissented. He rightly pointed out that the murder prosecution in question presented the very sort of evil at which the 1866 statute was aimed—"Black Codes" that imposed legal disabilities on an entire race from participation in the judicial system and that stifled the prosecution of a racially motivated crime.\textsuperscript{48} Moreover, because the majority seemed prepared to assume that the statute could be invoked by a federal prosecutor on behalf of a surviving victim, Bradley observed there would be a perverse incentive for racially motivated killers to finish off their victims, not just maim them, to avoid the operation of the civil rights statute.\textsuperscript{49}

From his dissents in cases such as \textit{Slaughter-House} and \textit{Blyew}, and from partially ghost-written opinions such as \textit{Hall}, we have the portrait of the "good" Justice Bradley. Yet in the eyes of contemporary critics, the politics of compromise quickly intervened to produce a more sinister figure. The surest manifestation of that sinister side of Bradley would be his apparent conclusion in the \textit{Civil Rights Cases} that the Fourteenth Amendment's equal protection provision was not enforceable against private action alone and that congressional civil rights legislation aimed at preventing private discrimination by inns and other common carriers was unconstitutional.\textsuperscript{50}

III. A "SWITCH IN TIME'"?—JUSTICE BRADLEY AND THE POLITICS OF COMPROMISE

As the troubled decade of the 1870s wore on, Bradley is supposed to have undergone an intellectual metamorphosis to which a number of events are thought to have contributed. One such event was his participation on the congressionally appointed Electoral Commission that swung the 1876 election to Republican Rutherford B. Hayes. Hayes's victory was nothing short of miraculous given his decided second-place finish in the popular vote and his eventual one-

\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.} at 595-96 (Bradley, J., dissenting).
\textsuperscript{49} \textit{Id.} at 599 (Bradley, J., dissenting). For a terrific discussion of \textit{Blyew} and its fallout, see Robert D. Goldstein, \textit{Blyew: Variations on a Jurisdictional Theme}, 41 STAN. L. REV. 469 (1989).
\textsuperscript{50} 109 U.S. 3, 17, 24 (1883).
electoral-vote margin. Bradley’s vote was pivotal on a commission that otherwise consisted of half Republicans and half Democrats. Also, Bradley ultimately wrote the Commission’s conclusions after some apparent trouble making up his mind.

Of course, by coming out in favor of Hayes, Bradley did no more than what the other Republican commission members did (including two other Republican Justices from the Supreme Court), which was to vote the party line. And one might question the plausibility of a thesis that supposes that the Supreme Court shifted its approach to Reconstruction because of Bradley’s participation in the events that produced the 1877 Compromise. But even if those events might be a fair basis for supplying a motive to explain any change in Bradley’s approach to Reconstruction, the fact of change remains uncertain, even after an inspection of his post-Reconstruction opinions.

A. Cruikshank and the Grant Parish Massacre

Some scholars have concluded that the roots of the “bad” Justice Bradley were first revealed, not in the 1883 Civil Rights Cases, but in a prosecution arising out of an 1873 racial massacre in Grant Parish, Louisiana. In United States v. Cruikshank, Bradley, while riding Circuit, ruled on a post-trial motion to throw out indictments against a number of white defendants who participated in an armed uprising in which more than a hundred African-Americans were killed. Although the case would eventually end up in the Supreme Court fewer than two years after the decision in Slaughter-House, it fell into

51. The Commission resolved twenty disputed electoral votes from three states in the deep South, and concluded that all should go to Hayes over his opponent, Samuel Tilden (who needed only one of the contested electoral votes to win). See Woodward, supra note 7, at 174.

52. The Commission consisted of five Senators, five House members, and five members of the Supreme Court, with eight of these fifteen members being Republicans. Predictably, perhaps, the final tally giving all of the contested electoral votes to Hayes was 8-7 along party lines. Justices Miller and Strong—both Republicans—were on the Commission with Bradley. See Scott, supra note 1, at 565-66; see also supra text accompanying note 9.

53. See, e.g., Curtis, supra note 1, at 179 & n.53 (pinpointing Bradley’s change of heart and retreat to this decision); Gibbons, supra note 1, at 1388 (same).

Bradley's lap at the trial stage while the ink was still drying on his forceful Slaughter-House dissent.

*Cruikshank* was a complicated but extraordinary opinion which provides an unusually revealing treatment of Bradley's approach to the questions of congressional power to enforce the Reconstruction amendments and of state action. Federal prosecutors based their *Cruikshank* indictments on an 1870 voting rights statute (the "Enforcement Act"). The statute did many things. It banned discrimination on the basis of race in voting in state and local elections; it provided that "equal opportunity" be given to all citizens, without regard to race, to perform those acts preparatory to voting; and it provided for criminal penalties for persons who prevented citizens from voting or from performing acts preparatory to voting. The act's two final provisions were the specific basis for the *Cruikshank* indictments. One of these provisions outlawed conspiracies to violate any provision of the act, and the other outlawed conspiracies aimed at preventing the exercise "of any right or privilege granted or secured ... by the constitution or laws of the United States." The indictments charged that the white defendants conspired to intimidate African-American citizens in order to deprive them of their rights to free assembly, to keep and bear arms, and to vote, and that the defendants deprived their victims of life, liberty, and property without due process of law. The indictments also charged murder in addition to, and while carrying out, the conspiracy. The defendants argued that all of the indictments had to be dismissed. They argued first that the crimes charged were not ones that the 1870 statute forbade. In addition, they argued that, if the 1870 statute did proscribe what they

55. *Cruikshank*, 25 F. Cas. at 708; see Act of May 31, 1870, 16 Stat. 140. The same statute had been at issue in *Hall*. See infra note 44. For a thoughtful treatment of Bradley's *Cruikshank* opinion, see Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 Tul. L. Rev. 2113, 2151-60 (1993).


57. *Cruikshank*, 25 F. Cas. at 708.

58. *Id.* at 709.

59. *Id.* at 708.

60. *Id.*

61. *Id.* at 708-09.

62. *Id.* at 709.
were charged with, the statute was an unconstitutional exercise of congressional power.\footnote{Id. at 708.}

Bradley agreed with the defendants and wrote an opinion throwing out the indictments.\footnote{Id.} The result to deny enforcement of the 1870 statute obviously contrasts with the result in \textit{Hall} (which had construed the same statute), and with the apparent tone of both his \textit{Blyew} and \textit{Slaughter-House} dissents. However, the opinions are, in most respects, consistent with one another. Bradley’s lower court \textit{Cruikshank} opinion began by focusing on the question of congressional power.\footnote{Id. at 709.} He noted that although Congress could enforce every “right or privilege given or guaranteed by the Constitution,” the manner in which Congress might properly legislate to do so could vary depending on the nature of the right or privilege at issue.\footnote{Id. at 710.}

It may be by the establishment of regulations for attaining the object of the right, the imposition of penalties for its violation or the institution of judicial procedure for its vindication when assailed, or when ignored by the state courts; or it may be all of these together. One method of enforcement may be applicable to one fundamental right, and not applicable to another.\footnote{Id.}

With respect to the Thirteenth Amendment, for example, Bradley noted that it was not merely “a prohibition against the passage or enforcement of any law” setting up slavery, “but it is a positive declaration that slavery shall not exist. It prohibits the thing.”\footnote{Id. at 711.} It was that affirmative conferral in the Constitution of “a positive right which did not exist before,”\footnote{Id. at 712.} said Bradley, that enabled Congress to enforce such provisions against its individual (private) violators.\footnote{Id.}

Bradley’s focus on the fact that the federal right was newly “created or conferred” as a justification to enable Congress to reach private action may seem an odd one today. But it is critical to an understanding of his approach to civil rights and the issue of congressional enforcement. Bradley drew a line between rights that pre-existed the Constitution (such as most common-law or “natural”
rights) which the Constitution may have protected against state or other governmental interference, and those rights that were “created or conferred” as an original matter by the Constitution itself (such as the guarantee against slavery in the Thirteenth Amendment). The former category of rights was under the primary protection of the States and their denial could be congressionally remedied, he said, only indirectly and only when the state “fails to comply with the duty” to enforce them or “violates the prohibition.”71 But the latter category of rights—newly conferred rights—could be remedied, as Bradley put it, “directly” by congressional regulation or “affirmative enforcement” (i.e., by passing “laws to directly enforce the right and punish individuals for its violation”).72

Bradley gave an illuminating example of this approach to legislative power in his discussion of the Thirteenth Amendment in Cruikshank (rather more reminiscent of his “good” side):

If in a community or neighborhood composed principally of whites, a citizen of African descent ... should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it cannot be doubted that this would be a case within the power of congress to remedy and redress. It would be a case of interference with that person’s exercise of his equal rights as a citizen because of his race.73

Although the passage speaks of equal rights, it is clear from the opinion that Bradley was discussing not the Fourteenth Amendment but the Thirteenth.74 The “disability to be a citizen and enjoy equal rights”75 as reflected in his example was a “badge of servitude” which Congress could redress.76 The full citizenship that Bradley assumed the Thirteenth Amendment granted promised ex-slaves not only freedom from involuntary servitude, but legislatively enforceable rights to equal citizenship. Again, it was easy for Bradley to take such

71. Id. at 713.
72. Id. at 710, 713.
73. Id. at 712. No such private interference was made out in Cruikshank because there had been no allegation that the acts were undertaken “on account of . . . race, color, or previous condition of servitude.” Id. at 713.
74. See id. at 711-12 (stating that this was an “illustration” of Congress’s power to enforce “the rights and privileges conferred by the 13th amendment”).
75. Id. at 711.
76. Id.
a view of congressional power under the Thirteenth Amendment, because for him federal rights came in two packages, and only those rights that the Constitution had created and "which did not exist before" were enforceable against private violators without regard to state action. It was the fact that the right to be free from involuntary servitude was such a right, not simply the Thirteenth Amendment's omission of "state action" language, that allowed for direct congressional enforcement.

The significance of the newly-conferring-rights versus pre-existing-rights analysis for Bradley is revealed further in his discussion in Cruikshank of Congress's power to enforce the Fifteenth Amendment. Surprisingly to modern ears, Bradley concluded that the Amendment, which declares that "the right . . . to vote shall not be denied or abridged by the United States or by any State on account of race," also conferred a "new" right: not the "right to vote" (which, for Bradley, was a pre-existing, largely state-created right), but the right to vote free of racial discrimination. And this affirmatively granted right, not having existed before, was enforceable by Congress, not just against government, but "against outrage, violence, and combinations on the part of individuals, irrespective of the state laws." One might have thought that the right created by the Fifteenth Amendment was the right to be free from governmental deprivations alone, given the language with which it is introduced. But even the "bad" Bradley of Cruikshank did not agree. The fact that the Amendment speaks specifically of abridgment by government did not mean for him that Congress would not have the power to outlaw private actions that interfered with the right. For Bradley, the legislative power directly to outlaw private interferences with voting equality followed automatically from the constitutional creation of the new right to vote free of discrimination. Bradley therefore read the Fifteenth Amendment as establishing two things: (1) it created a federal right to nondiscrimination in voting; and (2) it specifically stated that government (state or federal) could not abridge that right. But for Bradley those were two separate commands. And the first

77. U.S. CONST. amend. XV, § 1.
78. Cruikshank, 25 F. Cas. at 711.
79. Id. at 713; see also Michael Les Benedict, Preserving Federalism: Reconstruction and the Waite Court, 1978 SUP. CT. REV. 39, 71-74 (noting early limits to Bradley's views on congressional power to reach private action).
command, because it created a new right, was enforceable by Congress against individual actors.  

The big question at this point was whether Bradley’s Thirteenth and Fifteenth Amendment analyses would give Congress the ability to legislate against private denials of equal protection of the laws under the Fourteenth Amendment (or other provisions of the Amendment). Could it be said that the Fourteenth Amendment did two things too—that it created a new right to be free from discrimination in the enjoyment of various activities traditionally protected at common law, as well as proscribing state invasions of them? Apparently not. Bradley concluded (perhaps because of the implications of the majority opinion in *Slaughter-House*) that the underlying rights safeguarded by the Equal Protection Clause were not “rights that did not exist before” as they consisted of the mass of common-law rights that pre-existed the Constitution (unlike the right to vote free of racial discrimination specifically conferred by the Fifteenth Amendment). All that was new was the limitation on state denials of “equal protection of the laws” (and deprivations without “due process of law”). Accordingly, to Bradley these provisions seemed to require some preliminary involvement by the state through “disregard or violation” before congressional remedies could attach.

Bradley took a similar view of the enforcement of rights protected by the Fourteenth Amendment’s Privileges or Immunities Clause. Some of those rights of national citizenship were conferred elsewhere in the Constitution or by federal laws enacted pursuant to Congress’s Article I powers, and therefore could be directly enforceable against private action. Yet, to the extent that these rights “consist[ed] of rights and privileges not derived from the grants of the constitution, but from those inherited privileges which belong to every citizen” (i.e., that pre-existing batch of *Corfield* rights that he had championed in *Slaughter-House*), they could only be protected

80. At least two opinions of the Court not authored by (but joined by) Bradley said as much, albeit in dicta. See United States v. Reese, 92 U.S. 214, 218 (1876) (reasoning that private, race-motivated violations of the Fifteenth Amendment could be punished by Congress); United States v. Cruikshank, 92 U.S. 542, 555-56 (1876) (same).
81. *Cruikshank*, 25 F. Cas. at 711, 714.
82. See infra note 117 (cases cited therein); see also Laurence H. Tribe, American Constitutional Law 353 & n.13 (2d ed. 1988).
83. *Cruikshank*, 25 F. Cas. at 714.
84. See supra text accompanying notes 18-19.
against governmental interference. Thus, he concluded that these rights, too, could not be "directly enforce[d]" but only enforced after the state had somehow "disregarded or violated" the prohibition.\footnote{85} Interestingly, Bradley was still willing to assume, \textit{arguendo} (and despite \textit{Slaughter-House}), that the First and Second Amendments were applicable to the States under the Privileges or Immunities Clause. But these, like the other provisions of the Bill of Rights, he viewed as primarily enforceable only against government because, although they were spelled out in the Constitution, they too were merely declaratory of pre-existing rights and had not been newly conferred by the Constitution either as an original matter or through incorporation under the Fourteenth Amendment.\footnote{86} In fact, as discussed below, Bradley had said much the same thing in a less well-known passage of his \textit{Slaughter-House} dissent.\footnote{87}

Bradley felt compelled to describe and limit congressional power through his newly-conferred versus pre-existing-rights analysis, lest one of two conclusions be drawn: either "that congress can never interfere where the state laws are unobjectionable, however remiss the state authorities may be in executing them, and however much a proscribed race may be oppressed,"\footnote{88} or that Congress should be able to "pass an entire body of municipal law for the protection of person and property within the states ... for the ... benefit of a particular class of the community."\footnote{89} Neither conclusion was acceptable.

Thus, even as he was about to let the defendants off the hook in \textit{Cruikshank}, Bradley articulated a justification in that very case for a comparatively powerful enforcement mechanism against private racial violence when the subject was voting or equal rights of citizenship

\footnote{85} \textit{Cruikshank}, 25 F. Cas. at 711, 714. Bradley had said virtually the same thing about state action/nonaction in \textit{Slaughter-House} itself. \textit{See infra} text accompanying note 96. To the extent that this part of \textit{Cruikshank} differed from Judge Woods's result in \textit{Hall}, it should be noted that Woods and Bradley apparently disagreed in \textit{Cruikshank} itself, with Bradley, but not Woods, arguing for dismissal of the charges. \textit{See Lawrence, supra} note 55, at 2153 n.158. \textit{Hall}, too, was premised on a kind of state action notion, although its discussion of the issue is brief. \textit{Cruikshank} and \textit{Hall} are arguably different, however, insofar as \textit{Hall} seems willing to give Congress discretion \textit{ex ante} to infer state inaction from a category of private action or the nature of events, whereas \textit{Cruikshank} (and later, the \textit{Civil Rights Cases}) seems to require more case-specific evidence of such inaction before congressional mechanisms can be put into play.

\footnote{86} \textit{Cruikshank}, 25 F. Cas. at 714.

\footnote{87} \textit{See infra} note 96 and accompanying text.

\footnote{88} \textit{Cruikshank}, 25 F. Cas. at 714.

\footnote{89} \textit{Id.}
associated with the Thirteenth Amendment’s abolition of slavery. The prohibition, however, was only a prohibition on interferences based on, or because of, race or color. Some of the criminal counts in the indictment were therefore dismissed because, although they alleged a private interference with the right to vote of black citizens (which Congress properly could legislate against when the interference was racially motivated), no allegation was made in the indictment that the interference was racially motivated. The congressional civil rights statutes under which the indictments in Cruikshank were drawn-up also proscribed private interferences with Bill of Rights guarantees—whatever the motivation. But those underlying rights, as not being newly granted, were actionable only against governmental deprivations and not against a private party in the absence of such governmental involvement. Deprivations of those same rights of citizenship might be made actionable under the Thirteenth Amendment, however, if the deprivation was race-based. Thus, Bradley did suggest that a racially motivated deprivation of one of the Bill of Rights by “private” actors (as arguably occurred in Hall) might be actionable in a federal court without regard to state involvement. Unfortunately, the Bill of Rights violations that were arguably implicated in the criminal charges in Cruikshank were not alleged to have been racially motivated, so that those parts of the indictment had to be thrown out as well.  

B. The Civil Rights Cases

Even if the decision in Cruikshank fails to reveal Justice Bradley’s “switch in time,” his decision in the Civil Rights Cases seems to provide better evidence. Yet Bradley’s opinion striking down the 1875 Civil Rights Act that banned private discrimination by innkeepers, theaters, and certain other common carriers is a largely unremarkable outgrowth of the position that he had staked out on congressional power to enforce the Civil War amendments in his earlier opinions. After Cruikshank some nine years before, the Equal Protection and Due Process Clauses of the Fourteenth Amendment could provide no basis for the exercise of “direct” regulation of

90. See Lawrence, supra note 55, at 2153-56. Remaining indictments were dismissed on vagueness grounds. Id.
individual violators insofar as those clauses were enforceable only in a “corrective” manner and only in light of state involvement of some kind. Perhaps Justice Harlan, in dissent, had the better of the argument in reading the Fourteenth Amendment as having conferred new rights of United States citizenship which (even in Bradley’s universe) Congress could directly implement against private actors to guarantee “equality of the rights of citizens.” But, had Bradley signed onto Harlan’s reasoning, there really would have been a “switch in time” given Bradley’s prior thinking on the subject.

None of this meant, however, that Congress could provide no kind of remedy whatsoever against private actors in its enforcement of the Fourteenth Amendment. Bradley’s decision in the Civil Rights Cases suggests that he was proceeding under the assumption that state remedial mechanisms were available to the victims of private racial discrimination and that, under existing laws, places of public accommodation were “bound” to admit patrons. Bradley had, in other contexts, outlined and supported the historic and vast power of states to regulate common carriers and other activities which involved matters affected with the public interest. The Civil Rights Cases certainly suggest that Bradley assumed that, absent such state remedial mechanisms (and assuming that state laws were not themselves at fault), the prerequisite for federal intervention could still be met, and a congressional remedy would be possible where the state had failed to give one. In such a case, however, even though a private individual might be held accountable, the violation of the Constitution would arise from the state’s action, not the individual’s. This deference to state process in such contexts is remarkably consistent with Bradley’s

93. McConnell, supra note 4, at 137 & n.79; see also Geoffrey Stone et al., Constitutional Law 1698 (3d ed. 1996) (stating “[this position] is broad in the sense that it treats state failures to act as state action for purposes of the fourteenth amendment; it is narrow in the sense that it incorporates a federalism-based limit on the federal government’s power to act”).
94. See Civil Rights Cases, 109 U.S. at 24-25. It has been noted that in 1883 most laws affirmatively requiring segregation were not yet in force. See Loren P. Beth, The Development of the American Constitution, 1877-1917, at 194 (1971); C. Vann Woodward, The Strange Career of Jim Crow 6-7 (3d ed. 1974).
earlier view in *Cruikshank* that, with respect to the (equal) protection of common-law rights, the federal role was merely corrective in cases of state action or in default of state action. And such deference is even consistent with his old *Slaughter-House* dissent. In that opinion, he first stated that the protection of the many privileges and immunities that he would have included under section 1 of the Fourteenth Amendment, including the Bill of Rights, would be "largely left to State laws and State courts, where they will still continue to be unless actually invaded by the unconstitutional acts or delinquency of the State governments themselves."96

Therefore, whatever form the requisite state "sanctioning" might take—through "State authority in the shape of laws, customs, or judicial or executive proceedings,"97—Bradley understood that at least some instances of a state's failure to protect essential or fundamental rights could trigger federal corrective action, at least through congressional provision of a federal judicial forum for redress after the fact. Indeed, some scholars have so read the *Civil Rights Cases*, despite the conventional wisdom surrounding the decision; and they have concluded that Bradley believed that states were under an affirmative constitutional duty to supply such remedies for private deprivations of such rights.98 But, as Bradley said in *Cruikshank*, "[i]f


the amendment is not violated, [Congress] has no power over the subject.”

Of course, there was also the Thirteenth Amendment, which even in Bradley’s world would have allowed for direct legislation against private violators. Despite the result in the Civil Rights Cases, Bradley reiterated his view that federal legislation here could be “direct and primary” and therefore directed against private actors in the first instance. Nor did he waiver from his antislavery view of the Thirteenth Amendment that by “establishing and decreeing universal civil and political freedom throughout the United States . . . Congress [acquired] power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.” Yet his remarkable and mean-spirited statement that for a person who has “emerged from slavery . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws,” all but reads like an epitaph for Reconstruction. And previously, Bradley had seemed to give a generous interpretation of the badges and incidents of slavery that Congress might outlaw, as in his Cruikshank hypothetical of the black farmer forced off his leasehold by a combination of whites motivated by racial animus. This example, perhaps more than anything else, may suggest a possible change of heart or modification of his views, as illustrating Bradley’s unwillingness to carry through the logic of congressional power under the Thirteenth Amendment to remedy social inequality.

Nevertheless, even here there may be more consistency than difference, although the matter is not free from doubt. The fundamental common-law rights for which Bradley would have allowed direct federal remediation—a primary remedy against the racially motivated private wrongdoer—were those rights previously

100. Civil Rights Cases, 109 U.S. at 20.
101. Id.; see Benedict, supra note 79, at 75.
103. Cruikshank, 25 F. Cas. at 712.
104. See John P. Roche, Civil Liberty in an Age of Enterprise, 31 U. Chi. L. Rev. 103, 110 (1963) (noting Bradley’s own (undated) private observation that, concerning question of congressional power to regulate “social equality,” his thinking had been “modified” from the time of his correspondence with Judge Woods in connection with Hall).
articulated in *Corfield*, including the right to pursue a common calling (such as cultivating a farm) and perhaps the other citizenship rights that had been originally associated with the 1866 Civil Rights Act (such as the equal right to “lease [and] hold . . . real . . . property”).

While the list might be substantial, it was not endless, and it perhaps did not, for Bradley, allow Congress directly to remedy all individual acts of private race discrimination—a qualification arguably hinted at even in the carefully limited hypothetical that he used in *Cruikshank* to illustrate the breadth of Congress’s power. In addition, his recognition in *Cruikshank* that Congress could outlaw and provide an affirmative remedy for private “violence,” “outrage,” “atrocities,” or “conspiracies” may further suggest that he did not then believe that all manner of race-based interferences or isolated trespasses (even with fundamental rights) were directly reachable by Congress (as opposed to the possibility of remediation in default of state action). Thus, in both *Cruikshank* and the *Civil Rights Cases*, Bradley appeared to require some greater nexus between the wrongful private conduct and the basic rights of equal citizenship associated with the abolition of slavery (*i.e.*, something above and beyond racial animus *simpliciter*) before Congress could legislate a federal right of action to redress it. The two opinions, therefore, even on the question of racial justice,

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105. See Act of Apr. 9, 1866, 14 Stat. 27. These rights (at a minimum) were meant to be absorbed and constitutionalized by the Fourteenth Amendment’s Privileges or Immunities Clause. See Kaczorowski, supra note 31, at 896, 925.

106. Bradley noted that the 1866 Act, like the Thirteenth Amendment, had been designed to protect “civil” and perhaps “political” rights, but not necessarily “social” rights such as those involved in the public accommodations cases. The distinction may sound hollow today, but it was apparently an accepted one at the time. See Hyman & Wicke, supra note 31, at 394-402; Lurie, supra note 9, at 366-67.


108. Id. at 714. Finally, although Bradley may have been prepared to allow for primary protection from concerted race-based interference with freely negotiated contracts, he may have been less inclined, out of federalism and perhaps autonomy concerns, to allow direct federal regulation of the initial refusal to contract, even when it was racially motivated. But once again, if the latter was among the “essential” rights protected by the Fourteenth Amendment, Congress could still supply a remedy if the States refused to supply their own. Jonathan Lurie has pointed out that Justice Bradley had written privately in 1874 (long before the *Civil Rights Cases*) that the ability to “choose one’s company” (contractually or otherwise) was itself a fundamental right. See Lurie, supra note 9, at 367. Governmental regulation of such choices, said Bradley, would introduce “another kind of slavery.” Id. If this suggests a civil rights odyssey on Bradley’s part, perhaps it had already ended before it is commonly thought to have begun (*i.e.*, around the time of *Slaughter-House*).
arguably bear a greater degree of affinity than separation. Cases like Blyew, therefore, would remain easy ones for him, because there had been both state action and racial discrimination antecedent to the operation of the federal removal statutes. And Hall was arguably still an easy case, too, since it involved what appears to have been a racially motivated deprivation of certain Bill of Rights guarantees, coupled with a hint of state inaction.\footnote{But see supra note 85.}

IV. CONCLUSION

The main difference between Bradley’s Slaughter-House dissent and his opinion for the Court in the Civil Rights Cases appears to be that Bradley would have ruled in favor of the civil rights claimants in the first case and that he ruled against them in the second. Obviously, that is too thin a distinction on which to premise an intellectual odyssey. As this Essay has tried to show, Bradley’s position on state action and the Fourteenth Amendment was set up as early as Slaughter-House and Cruikshank, which were decided within a year of each other. And his complex views about federal power to remedy violations of the Civil War amendments seem, in his judicial opinions, to have undergone only modest change during the decade between them.

In addition, as a simple matter of chronology, the Compromise probably cannot mark any particular divide in Bradley’s thinking. If Cruikshank is the turning point, as some have argued, then the shift must have taken place within months of Slaughter-House and without the intervention of the Compromise. But more significantly, Bradley’s Slaughter-House and Cruikshank opinions are not fundamentally in conflict. And if the turning point is supposed to have come later, it is hard to see how anything in the Civil Rights Cases was not foreshadowed in Cruikshank, nine years before. Besides, in other, post-Compromise opinions, Bradley stubbornly continued to reassert his view that the Fourteenth Amendment would protect against legislation denying a class of persons the right to pursue a lawful calling, Slaughter-House notwithstanding,\footnote{See, e.g., Butchers’ Union Co. v. Crescent City Co., 111 U.S. 746, 764-66 (1884) (Bradley, J., concurring) (maintaining that the law at issue violated the Fourteenth Amendment because it compromised “those ordinary pursuits and callings which every citizen has a right to follow if he will”); Civil Rights Cases, 109 U.S. 3, 23-24 (1883);} and he also continued to
endorse broad constructions of federal power, even when state “laws” were not the sticking point. And in pre-Compromise decisions (like Cruikshank and even Slaughter-House) Bradley was already simultaneously endorsing important limits on federal power to enforce the Civil War amendments. Bradley did, of course, sign on to a number of the Court’s post-Reconstruction opinions that limited the reach of the Civil War amendments, such as those holding that certain guarantees in the Bill of Rights were not applicable even against the States under the Privileges or Immunities (or Due Process) Clause. But that may have been an unavoidable concession to Slaughter-House itself. And other decisions, such as United States v. Harris, even though limiting Congress’s enforcement powers, still did not foreclose the “failure to protect” analysis of the Fourteenth Amendment suggested in the Civil Rights Cases. Moreover, that

Bradwell v. State, 83 U.S. (16 Wall.) 130, 140-42 (1873) (Bradley, J., concurring) (concluding, however, that gender restrictions on law practice did not implicate these “fundamental” privileges or immunities).

111. See, e.g., Ex parte Virginia, 100 U.S. 339, 348-49 (1880) (upholding criminal prosecution against state judge for racially discriminatory selection of jurors even when state law was race-neutral); Strauder v. West Virginia, 100 U.S. 303, 311-12 (1880) (upholding civil rights removal provision when state laws discriminated against African-Americans in jury composition).

112. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 368, 373-74 (1886) (finding a pattern of discrimination against Chinese-Americans in the granting of licenses to operate laundries, pursuant to race-neutral statute granting uncontrolled discretion to officials); Neal v. Delaware, 103 U.S. 370 (1881) (holding that a stark pattern of exclusion of African-Americans from juries was “prima facie case” of intentional discrimination); Ex parte Virginia, 100 U.S. 339 (discussed supra note 111). But cf. Virginia v. Rives, 100 U.S. 313, 321 (1880) (limiting provisions of a civil rights removal statute to cases in which “denial of,” or “disability to enforce” rights in state court was due to state law); Texas v. Gaines, 23 F. Cas. 869, 870 (C.C.W.D. Tex. 1874) (No. 13,847) (Bradley, Circuit Justice) (denying civil rights removal where claimed rights denial was “[n]ot by the laws themselves, but by the prejudice and enmity of the people”).

113. See, e.g., United States v. Reese, 92 U.S. 214 (1876) (opinion of Waite, C.J.) (striking down 1870 legislation regulating right to vote as beyond Congress’s power under Fifteenth Amendment because not limited to racial discrimination).


115. 106 U.S. 629, 637, 640-44 (1883) (invalidating federal antilynching law; law was not limited to race-based Lynchings for purposes of Thirteenth Amendment and could not be applicable directly against private parties under Fourteenth).

116. See CURRIE, supra note 98, at 397 & n.195 (discussing Justice Woods’s recognition in Harris, 106 U.S. at 639-40, that there had been no allegation that the state
Bradley’s concerns with allocations of state-federal power to reach private action were genuine (and not made up in the Civil Rights Cases to carry out the Compromise of 1877) is arguably borne out by other opinions in which private action (including racial discrimination) that affected federally conferred rights was unproblematically held to be within the power of Congress to proscribe.\footnote{117}

Finally, as William Nelson has noted, the Civil Rights Cases may well be consistent with Bradley’s Slaughter-House dissent even in terms of their political ideology.

\[T\]he antislavery movement of the 1840s and 1850s, to which [Bradley] owed [his] ideology, was itself a child of classic nineteenth-century liberalism, complete with all its assumptions about the limited power of government and the autonomy of individuals from government. Before the Civil War it was possible to be both a classic liberal and an advocate of antislavery because no one had any idea how extensively the government would have to use its power to enable former slaves to participate equally in American government and society. It was equally possible, when the Civil Rights Cases demonstrated how intrusively governmental power would need to be used to legislate equality, for men like [Justices] Field and Bradley to conclude that classic liberal values were at least as important as a specific antislavery result.\footnote{118}

Clearly, there were others who more fully embraced the lost promises of Reconstruction than did Bradley. But it ignores both the complexity and diversity of opinions among those who welcomed Reconstruction to assume that there had been a retreat, a change of heart, or even some more sinister motive for Bradley to hold the views that he did.

\footnote{117. \textit{See Ex parte} Yarbrough, 110 U.S. 651, 665 (1884) (opinion of Miller, J.); \textit{see also Ex parte} Clarke, 100 U.S. 399, 403, 404 (1879) (opinion of Bradley, J.) (upholding provisions of 1879 Enforcement Act in context of federal elections); \textit{Ex parte} Siebold, 100 U.S. 371 (1880) (opinion of Bradley, J.) (same).

118. \textsc{William E. Nelson, The Roots of American Bureaucracy,} 1830-1900, at 70-71 (1982).}