A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court

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This article reconsiders the conventional wisdom that the Supreme Court definitively abandoned the freedmen to their former masters through the "state action" decisions of the 1870s and 1880s. Arguing that anachronisms distort our understanding of this critical period, I offer an historical institutional analysis of state action doctrine by recovering the legal categories, assumptions, and distinctions that constituted judicial discourse about the state action rule. Showing that federal power to protect blacks was more intact than scholars realize, I also add a perspective from the sociology of knowledge. By examining a series of modern developments that erased the contexts of the state action decisions, I show how institutional practices gave rise to the anachronisms that this article seeks to correct.

Over the past half-century, the story of the Supreme Court's post–Civil War abandonment of blacks has become standard and routine.[1] Blamed for defeating Republican efforts to secure national protection for black rights, the Court has been the target of trenchant criticism. The Court "paralyzed the federal government's attempt to protect black citizens," charges Levy, "in effect, shap[ing] the Constitution to the advantage of the Ku Klux Klan" (2000:733). So narrow were judicial interpretations of the Reconstruction amendments, asserts Bell, that the promised protection

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[1] See, e.g., Woodward 1974; Gressman 1952; Logan 1954; Harris 1960; Miller 1966; Gillette 1979; Hyman and Wiecek 1982; Kaczorowski 1985; Murphy et al. 1986; K. Hall 1992; Amar 2000; Tribe 2000; Urofsky and Finkelman 2002.

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for the freedmen was rendered "meaningless in virtually all situations" (1992:58).

A central place in this story of abandonment is occupied by the *Civil Rights Cases* (109 U.S. 3 [1883]), the landmark decision that struck down the public accommodations provisions of the Civil Rights Act of 1875 (18 Stat. 335). Condemned for establishing the doctrine of "state action," the rule that put "merely private" wrongs outside the scope of the Fourteenth Amendment,[2] the *Civil Rights Cases* is characterized as the Court's own "bit of reconciliation" between North and South, which sacrificed blacks in order to cement reunion (Woodward 1974:71). The majority opinion of Justice Joseph P. Bradley, indeed, gave fuel to the fire, stating that the freedmen had been the "special favorite of the laws" (*Civil Rights Cases* 1883:24–5). Exclusions from public accommodations were not a badge of slavery, and it would be "running the slavery argument into the ground" to suggest otherwise (1883:24–5). Surely, the Court's invalidation of the public accommodation provisions and Justice Bradley's remarks are evidence of judicial unfriendliness, if not hostility toward basic black rights. Or are they?

This article reconsiders the standard view that the Court definitively abandoned the freedmen through the "state action" decisions of the 1870s and 1880s. The standard view is best understood not as a plain reading of the decisions, but as an anachronistic interpretation generated by twentieth-century institutional developments. Aiming to correct this anachronistic interpretation, I recover the intellectual universe of justices who served during the era named for Chief Justice Morrison R. Waite. More specifically, I recover the legal categories, assumptions, and distinctions that constituted judicial discourse about "state action" during the Waite era (1874–1888). As this historical institutional analysis of state action doctrine reveals, these categories and distinctions are not our own. Indeed, this article renders early state action doctrine unfamiliar and even strange.

The second and third parts lay out two features of this doctrine: a concept I call "state neglect"[3] and a legal theory that distinguished between the Fourteenth and Fifteenth Amendments, despite their shared "no state" language. Taking these two features of state action doctrine into account, I show that the Waite Court did not handcuff congressional power to protect blacks to the

[2] See *Shelley v. Kraemer* (1948): "Since the decision of this Court in the *Civil Rights Cases*, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful" (334 U.S. 1, 13 [1948]).

[3] This article advances my early formulation of this concept (Brandwein 2006).

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extent imagined by scholars. Emerging here, then, is a very different picture of the *Civil Rights Cases*.

The fourth part links my reinterpretation of the state action cases to an emerging revisionist literature on political development between 1877 and 1893. While the Compromise of 1877 is generally regarded as a political abandonment of blacks by the Republican party, this revisionism demonstrates that Republican administrations persisted in efforts to enforce voting rights legislation until 1893 (Wang 1997; Goldman 2001; Valelly 2004). This evidence is central here, as it shows that contemporaneous lawyers and litigants did not see a definitive or wholesale legal abandonment in the 1870s and 1880s. While this section is more suggestive than conclusive, my goals are to argue that political as well as legal sequences have been misunderstood and to move toward a new account of constitutional development during this transitional period.

The fifth part brings the article full circle, as it examines a series of twentieth-century developments that erased the intellectual context I recover in the second and third parts. Revealing the standard account of abandonment as an institutional artifact, this last section aims to show how anachronistic thinking about the Waite era was established in the first place. This article's revisionist account of the developmental path of civil rights law, indeed, illuminates the formation of a key feature of the modern American state: an expansive private sphere outside the reach of constitutional limitations. Tracing the institutional developments that gave rise to an anachronistic perspective on the "state action" cases, the fifth part of the article begins to show how a broader view of state responsibility than we have today—a view that was embodied in state neglect concepts—was largely erased.

With this road map in hand, I now introduce the major concepts of the article. To begin, what was this concept of state neglect? Appearing in little-studied passages of the *Civil Rights Cases,* Justice Bradley used state neglect principles to identify the nonenforcement of state laws protecting black "civil rights" as a rights denial under the Fourteenth Amendment. This category of "civil rights" is crucial, and its familiarity is deceiving. As I explain shortly, it must be understood with reference to its nineteenth-century meaning. For now, it is important to note only that this was a narrow category, including the rights to property, contract, and physical security. Public accommodation rights were not included.

At the core of the state neglect concept was the idea that states had an affirmative duty to administer laws protecting "civil rights" equally on the basis of race. The duty to administer the law equally created correlative rights, so that dereliction of this duty counted as a rights denial. Accordingly, if a state punished violence against

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whites but failed to punish violence against blacks, this failure was a rights denial ("state action") within the meaning of the Fourteenth Amendment. State neglect, in short, was an equality-of-rights concept. It was developed by moderate Republicans such as Representative James A. Garfield (see Brandwein 2006:287–9), and it expressed the Jacksonian principle that "[t]he State can have no favorites" (*People v. Salem*, 20 Mich. 452, 486 [1870]).[4] The corpus of Waite Court Fourteenth Amendment cases, indeed, supplied a larger framework for conceptualizing state neglect as a form of state action.

While the concept of state neglect has dimensions that are unfamiliar today, there is a feature to early state action jurisprudence that is downright foreign: a legal theory that justified different rules for congressional enforcement of the Fourteenth and Fifteenth Amendments. These amendments, of course, share "no state" language, and so we might imagine that state action rules applied to both. Not so. Using a conventional nineteenth-century distinction between rights that "preexisted" the Constitution (and had their source in history, religion, and nature) and rights "created" by the Constitution, Justice Bradley drew a principled distinction between the amendments, exempting congressional enforcement of the Fifteenth Amendment from state action rules. The upshot? Congress had direct power to punish private individuals who interfered with voting on the basis of race, regardless of state action/neglect.

A generation ago, Benedict (1978) argued that Waite-era cases gave Congress this Fifteenth Amendment power. His argument never gained institutional traction, but a lack of evidence was not the reason. Appearing while the scholarship of judicial abandonment flowered, the only theme of Benedict's article that took institutional hold was that of preserving federalism. But Benedict also never explained how the Court could apply state action rules to the Fourteenth but not the Fifteenth Amendment. This looks unprincipled and therefore dubious. In recovering the Court's principled distinction between the amendments, I aim to solve a puzzle (albeit one few have noticed) created nearly 30 years ago.

Regarding state neglect concepts, the general tendency among political scientists and historians is to miss their presence altogether.[5] One of the many reasons for this is the overt appearance of

[4] Michigan Supreme Court Justice Thomas M. Cooley's concern in *People v. Salem* was the use of state power to benefit already privileged individuals and corporations (Jones 1967:765).

[5] A law review article by Frantz (1964) offers a skeletal but suggestive state neglect reading of Waite-era Court decisions. Acting as a lawyer, Frantz extends the coverage of state neglect concepts to cover public accommodation rights. But as a historian, Frantz overreaches. Today, a handful of law professors have resuscitated this underappreciated article by Frantz (Michelman 1989; Post & Siegel 2000).

state neglect language in *United States v. Hall* (26 F. Cas. 79, 81 [1871]). Finding the statement in *Hall* that "Denying [rights] includes inaction as well as action and the omission to protect" (*United States v. Hall*, 26 F. Cas. 79, 81 [1871]), scholars have looked for a similar statement by the High Court. Not finding any, scholars have concluded that the Court disavowed state neglect principles (Kaczorowski 1985; Williams 1996). But such a conclusion is a mistake.

There was, to be sure, no assertive racial egalitarianism in Waite Court cases. The Court, moreover, continued to deny a central feature of Congressional Reconstruction, namely, the invigoration of national citizenship (more on this later). But state action doctrine was not a definitive or wholesale abandonment of blacks to their former masters. Because the intellectual universe of the Waite era has disappeared, the capacity to perceive the Court's stance toward black "civil freedom"—a stance that eludes capture using the conventional liberal-conservative spectrum—has been impaired. One must understand the old legal lexicon in order to see that conventional wisdom about judicial abandonment is a distortion.

But what about Justice Bradley's famous ridicule for public accommodation claims? How can this be consistent with support for state neglect concepts and nationalist Fifteenth Amendment rules? As I explain below, a nineteenth-century "hierarchy of rights" concept permitted Republican jurists to combine disdain for public accommodation claims and genuine support for black physical security and property. This combination looks contradictory today, but it was not ever thus.

The impacts of this analysis reverberate across political science, history, and law. For example, a whole series of received propositions about constitutional development during the post–Civil War decades must be reevaluated. Currently, a picture of an integrated and harmonious "political system" (Dahl 1957) during these years dominates the discipline of political science. The Compromise of 1877 is viewed as the Republican Party's political abandonment of the freedmen (see sources cited in footnote 1), and Court decisions are viewed as a consolidation of that abandonment. Indeed, Justice Bradley's participation on the Electoral Commission that resolved the disputed election of 1876 is seized upon to explain the *Civil Rights Cases* as a synchronized judicial expression of the Compromise (Magrath 1963:132–4; Scott 1971:565–9; Murphy et al. 1986:744). Justice Bradley, given the pejorative label of "railroad lawyer" during the Progressive and New Deal eras (Myers 1912:537; Wright 1942:95–107; McCloskey 1951:79–80, 181), thus represents the intertwined themes of black abandonment and the embrace of big business.

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Here, I use Orren and Skowronek's (1996) notion of "multiple orders" to begin the work of reconceptualizing constitutional development during the Waite era. The multiple orders thesis rejects the concept of a synchronized political system and adopts the term *intercurrence* to capture the "ongoing push and pull" among institutions, each with its own rules, norms, and purposes (1996:112). In beginning to flesh out this point, I suggest that the Court's toned down, or modulated, expression of state neglect principles is plausibly understood as a strategic move to preserve its legitimacy and influence. While scholars have identified institutional legitimacy as an implicit decision calculus in civil liberties cases in times of war (Rossiter 1951:1–10), this article suggests there are other contexts in which such a calculus may occur.

But surely this analysis confirms a Dahlian view of Court decisionmaking. After all, law (revisionism on state action doctrine) and politics (revisionism on political development in the 1877 to 1893 period) still align, though not in the way conventionally thought. But here is what makes a multiple orders analysis and its associated idea of institutional convergence better. While Dahlian analysis can capture the policy/strategic dimensions of the state action decisions, it cannot capture the jurisprudential dimensions. A multiple orders analysis can capture both. A multiple orders analysis, moreover, can distinguish between the judicial and executive branches, each of which had distinct logics of legitimacy. The tacking back and forth on rights enforcement during Republican administrations from Hayes to Harrison (Hirshson 1962) is notably different from the steadier stance of the Court.

A multiple orders analysis, indeed, is better able to capture institutional transition. In bringing new evidence to bear on the question of what the Waite Court was saying and doing in its state action cases, I emphasize that there was no settled order or equilibrium at the time. The turbulence and upheaval of war created conditions of profound flux and uncertainty. A moment for the formation of new concepts and new ideas, nobody knew—even after the Compromise of 1877 and into the 1880s—which ones would grow institutional roots. The election of Benjamin Harrison in 1888 opened a "policy window" (Valelly 2007) for Republicans committed to black rights, and so as late as 1890 bets were still off on this question.

Thirty years ago, Stinchcombe (1978:13–6) urged detailed attention to sequence in the study of institutional change, and his admonition is especially applicable here. Legal and political sequences between 1877 and 1894 have been misunderstood, and getting both an empirical and theoretical grip on constitutional change during this period requires that we look anew at these sequences. Indeed, it is significant that there was no "lock-in" (Pierson 2000:253–4) of the Waite Court's state neglect concepts or

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Fifteenth Amendment exemption. These legal innovations were part of an attempt to judicially settle Reconstruction, but they did not endure. During the watershed decade of the 1890s and the first decade of the twentieth century, decisions of the Fuller Court (1888–1910) shifted course.

Questions aside about institutional transition, this analysis carries immediate constitutional consequences. The federalism jurisprudence of the Rehnquist Court returned the *Civil Rights Cases* to legal prominence, as the Court invalidated a variety of civil rights laws as beyond Congress's power under Section 5 of the Fourteenth Amendment. Relying on the *Civil Rights Cases* as a central source of authority, these federalism cases dramatically raised the stakes that attach to the interpretation of this canonical decision.

The recovery of state neglect concepts transforms the scope of Congress's power to enforce the Fourteenth Amendment, opening up avenues for legitimating the civil rights statutes invalidated in these cases. For example, *United States v. Morrison* (2000, 529 U.S. 598) invalidated Section 13981 of the Violence Against Women Act (108 Stat. 1902), which allowed victims of gender-based violence to sue their attackers in federal court. Writing for the majority, Chief Justice William Rehnquist stated that the invalidity of Section 13981 was "controlled by" the *Civil Rights Cases* and *United States v. Harris* (*United States v. Morrison* 2000:602; *United States v. Harris*, 106 U.S. 629 [1883]). The law did not target state officials, explained Justice Rehnquist, and this was a flaw (*United States v. Morrison* 2000:626–7). The recovery of state neglect concepts, however, shows that Justice Rehnquist's (conventional) reading of the *Civil Rights Cases* and *Harris* is in doubt. The recovery of state neglect concepts shows that these cases do not mandate the invalidity of Section 13981 under Section 5. But to be sure, the recovery of state neglect concepts does not mandate its validity either. There were ambiguities in the state neglect concept from the beginning, and the concept was undertheorized, which means that history cannot be the last word in today's federalism disputes.

As space here prevents the elaboration of this argument, I spend the final section of this article exploring how distorted knowledge about the *Civil Rights Cases* came to be institutionally established. In previous work, I framed the institutional establishment of distorted constitutional knowledge as a sociological question (Brandwein 1996:290). Here, I examine how modern institutional developments have shaped interpretations of Waite-era decisions. These developments include the establishment of the scientific or "case" method of legal education, the 1891 creation of the U.S. Circuit Courts of Appeals, and the decline and collapse of nineteenth-century legal frameworks during the Progressive and New Deal years. At bottom, this is a story about a loss of context.

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Much of the context of the state action cases has either been stripped away or fallen away, so that later interpreters have been unable to fully understand the early juridical "language" of state action. These interpreters, notably, include racial liberals such as the New Deal lawyers of the Civil Rights Section, who made prosecutorial decisions based on their (mistaken) belief that the *Civil Rights Cases* compelled those decisions. In this instance, policy preferences did not drive interpretation.

On that note, which runs against the grain of behavioral scholarship in political science, I move to the body of the article, which runs against the grain of many decades of scholarship not only in political science, but also in history and law.

An Historical Institutional Analysis of State Action Doctrine

In constitutional studies today, a central question is whether different constitutional regimes "draw their constitutional ideas from the same well" (Scheppele 2004:390). As this article makes clear, justices of the Waite era drew their constitutionalism from a well of ideas that was not our own. It is only relatively recently, in fact, that scholars have cracked open the intellectual universe of late-nineteenth-century jurists.

In a body of work aimed not at Reconstruction but at "laissez-faire constitutionalism," scholars are detailing the architecture of nineteenth-century constitutional thought. Siegel (1990) has illuminated the "historist" mode of jurisprudence, which blended commitments to natural and positive law and which remained conventional throughout the nineteenth century.[6] The central influence of Jacksonian principles in Gilded Age constitutional thought is now clear as well (Jones 1967; Gillman 1993), though the contested status of these Jacksonian concepts is a fairly new understanding (Kens 1997). Insights from this body of scholarship are relevant here, for Waite Court justices drew from historist jurisprudence and Jacksonian values in facing novel questions about the reach of the Reconstruction Amendments.

Indeed, both substantive and methodological parallels exist between my study of state action doctrine and Gillman's (1993) historical-interpretive analysis of *Lochner*-era jurisprudence (*Lochner v. New York* 1905). As Gillman's study (and *Lochner*-era revisionism, generally) erodes the conventional portrait of *Lochner* as rooted in judicial policy preferences for laissez-faire economics, my study erodes the conventional portrait of the *Civil Rights Cases* as

[6] On the distinction between historism and the more familiar term, historicism, see Siegel 1990:1437–51 and 1545–6.

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rooted in judicial policy preferences for the dismantling of Reconstruction. By identifying distinctively "institutional" perspectives (Smith 1988:95), both studies respond to pure attitudinalists (Segal & Spaeth 1993) who view judicial opinions as empty rhetoric designed to mask personal ideological or policy preferences. Here, I suggest there are both jurisprudential and strategic elements in the state action decisions.

Methods developed by historians of political discourse (Skinner 2002; Pocock 1985) are exceptionally useful for studying the jurisprudential elements. These techniques focus on the use of language in institutional settings, and the methodological emphasis on tracing patterns in the use of vocabularies flows from the basic recognition that texts belonging to the history of political discourse were public acts of communication. Usage had to be conventional for communication to take place. The challenge for historians of political discourse is the same challenge here: "to learn to read and recognize the diverse idioms of political discourse as they were available in the culture and at the time" (Pocock 1985:9).

A side note: this article also extends the Cambridge School. While its members tend to start with anachronistic interpretations of classic texts, I examine institutional developments that produce an anachronistic interpretation of a classic text in the first place.[7] I focus, moreover, on a genre of speech acts (constitutional interpretation) whose specificity makes them less amenable to anachronistic interpretation than political theory, a favorite focus of the Cambridge School.[8] This article extends the Cambridge School, then, by identifying factors (such as the case method of legal study) that generate anachronistic interpretations of the *Civil Rights Cases,* a speech act whose specificity makes it less open to anachronism than, say, *The Prince*.

The *Civil Rights Cases*

Let us now look closely at the *Civil Rights Cases*. This decision struck down the public accommodation provisions in the Civil Rights Act of 1875, which barred racial discrimination in inns, public conveyances, theatres, and other places of amusement. The Court ruled these provisions invalid under the Fourteenth Amendment. Why? The conventional answer is that these provisions regulated the conduct of private individuals, and the Fourteenth

[7] The anachronistic interpretation of past texts is a common phenomenon in intellectual history, but the catalysts for stripping a specific text of its context are always historically particular in character. Anachronisms, in other words, are always historical products.

[8] The point that texts are not equally vulnerable to anachronism (though they are all vulnerable) is a significant one that takes me beyond the scope of this article.

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Amendment applied only to state action; private individuals, then, were beyond the reach of Section 5 legislation.

There is an obstacle to this conventional interpretation: the Court's explicit approval of statutes deriving from the Civil Rights Act of 1866 (14 Stat. 27), which guaranteed blacks the same "civil rights" as whites. Justice Bradley treated the act of 1866 and these derivative statutes[9] as valid Section 5 legislation.[10] Critically, his discussion of the act of 1866 illuminates the meaning of "state action" and "merely private conduct," as well as rules for defining "corrective" legislation under Section 5. The intertextual study of Justice Bradley's language demonstrates that the *Civil Rights Cases* was not a definitive abandonment of blacks, and that the decision left open constitutional possibilities that scholars and jurists have presumed closed.

So what made the act of 1866 "clearly corrective in its character" (*Civil Rights Cases* 1883:16)? Justice Bradley emphasized that it was "intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified" (*Civil Rights Cases* 1883:16). The act thus aimed at state laws, notably the infamous Black Codes of 1865–66, but discriminatory state laws were not its only target. The act vindicated the "equal benefit of the laws" and penalties applied to "persons" but "only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any State or Territory" (*Civil Rights Cases* 1883:16–7).

We must recover the historical meaning of the phrase "under color of law . . . or custom." Today, both scholars and jurists interpret this phrase narrowly, holding that the crimes of private persons cannot have the "color of law" unless state agents jointly and actively participate in that wrongdoing.[11] This view is at odds with

[9] Justice Bradley cited with approval sections 1977, 1978, 1979, and 5510 of the Revised Statutes, all of which derived from the act of 1866. Today, key civil rights statutes derive from these sections: 42 U.S.C. 1981 derives from §1977; 42 U.S.C. 1982 derives from §1978; 42 U.S.C. 1983 derives from §1979; 18 U.S.C. 242 derives from §5510. This article, then, speaks to early meanings of current civil rights laws.

[10] The Civil Rights Act of 1866 was originally passed to enforce the Thirteenth Amendment. It was reenacted in the Enforcement Act of 1870, a measure passed to enforce the Fourteenth and Fifteenth Amendments. Justice Bradley was uncommitted about the extent to which the act was authorized under the Thirteenth Amendment. "Whether [the Civil Rights Act of 1866] was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire" (*Civil Rights Cases* 1883:22).

[11] See *United States v. Price* (383 U.S. 787 [1966]) and Eisenberg 2000:444–5. The "under color of" phrase appears today in § 242 of the Federal Criminal Code and its civil counterpart, 42 U.S.C. 1983. For the Court's narrow constructions of § 242 and § 1983, see *Screws v. United States* (325 U.S. 91 [1945]) and *Monroe v. Pape* (365 U.S. 167 [1961]), respectively.

Justice Bradley's text, which suggests that certain race-based wrongs committed by private individuals gain the color of law or custom if state authorities do not punish them. Consider the passage below, where Justice Bradley defines a "rights denial." This passage follows his endorsement of the act of 1866:

> In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, [the] rights [of the injured party] remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the State where the wrongful acts are committed (*Civil Rights Cases* 1883:17).

When it comes to understanding this critical passage, we must first ask if Justice Bradley was using any recognizable legal concepts. He was. He was using the "hierarchy of rights" concept. This nineteenth-century concept helps us understand the meaning of both this passage and Justice Bradley's infamous ridicule for the public accommodation claims.[12]

This tripartite concept was part of an old rights regime, and it can be imagined as a pyramid.[13] At the base of this pyramid were "civil rights," in the middle were "political rights," and at the tip were "social rights," which were considered nonessential for freedom. The term *civil rights* is certainly familiar today, and it has an all-encompassing coverage. The old meaning of this term,

[12] See Lurie 1986:365–8 for the (rare) glimpse that a "hierarchy" of values explains Justice Bradley's views on racial matters.

[13] See Hyman and Wiecek 1982:395–6. A good introduction to the hierarchy of rights concept is Tushnet 1987:884–90. See also Belz 1976:xii–xiii. There was instability in certain regions of this typology, e.g., voting switched categories over time. For my purposes, what matters is consensus on "core" civil rights.

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however, was far narrower. While the boundaries of the civil rights category were contested, there was consensus on the core: the right to property, contract, sue, testify in court, be subject to the same criminal penalties as others, and protection from physical violence. Republicans agreed that these rights were fundamental; these were the rights deemed essential for blacks to compete as "free laborers" on equal terms with whites (Foner 1988:244). As Justice Bradley himself stated, the rights protected by the Civil Rights Act of 1866 were "those fundamental rights which are the essence of civil freedom" (*Civil Rights Cases* 1883:22). Justice Bradley's civil rights category also appears to be an adaptation to the *Slaughter-House Cases* (1873) and *United States v. Cruikshank* (1876). While many Republicans identified Bill of Rights freedoms as fundamental rights to be protected by the national government, this pair of cases moved most of these freedoms outside this category. As I show later, the civil rights category gained meaning as well from a Whig view of history as the story of Teutonic liberty.

Were public accommodation rights included in the civil rights category? Senator Charles Sumner, one of the most prominent Radical Republicans, said yes, arguing passionately that public accommodation rights were fundamental. No consensus, however, emerged on this point. Many Republicans at the time, including Justice Bradley, believed that access to inns and public theatres were not among "the essentials of freedom" (Justice Bradley, sometime between 1875 and 1876, quoted in Lurie 1986:367). Justice John M. Harlan, writing in dissent in the *Civil Rights Cases*, is certainly persuasive today in explaining why access to public accommodations is a civil right, but his view was not a consensus view among Republicans at the time. The title of the 1875 act (a "civil rights" act) is not clear evidence that Republican congressmen agreed with Justice Harlan. A lame duck Congress passed the public accommodation provisions, and many Republicans treated them as a tribute to Senator Sumner, who had just died (Lofgren 1987:137). These provisions were also considered dead on arrival.

The 1875 Charge to Grand Jury-Civil Rights Act, involving a challenge to the recently passed public accommodation provisions, helps illuminate the conventional civil rights/social rights distinction. Charging the jury, Federal Circuit Judge Halmer H. Emmons, a Grant appointee, expressed "sympathy" for blacks who were the victims of "murder and cruel and shocking outrages" that were "perpetrated with impunity" and subject to "mock trials" (1875:1006–7). Judge Emmons then expressed disdain for the public accommodation provisions, calling them "a grotesque exercise of national authority" (1875:1007). "I have," the judge declared, "but small sympathy for the right of the negro to see the . . . ballet dance." Protection from "pillage and

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murder," however, was a "more precious and beneficent privilege" (1875:1007).

Judge Emmons' derision for the right to see the "ballet dance" signaled the jury that no fundamental right was at issue. Protection from pillage and murder, however, was a different matter. Indeed, Judge Emmons presented the perpetration of murder with impunity as a denial of "protection," invoking the language of state neglect. His dual expression—contempt for a black citizen's public accommodation claim yet commitment to protection from physical violence—is especially telling. Today, this dual expression seems contradictory. Due to the success of the civil rights movement, we take for granted that equal access to public accommodations is a basic right. Ridicule for public accommodation rights therefore looks like ridicule for all basic rights.

During the 1870s and 1880s, however, the prevailing hierarchy-of-rights concept made it possible to ridicule public accommodation claims while expressing commitment to the protection of black physical safety. Judge Emmons was working within this conventional rights hierarchy. So was Justice Bradley. When interpreting Justice Bradley's hostile language, which is infamous but not unique, we must be familiar with the civil/social distinction.

Returning to the passage above, note that Justice Bradley's list of interferences in civil rights included physical violence and interferences in property, contract, and jury service.[14] A Republican consensus, as noted, regarded these rights as fundamental. Justice Bradley left off the list rights associated with the social rights category, namely, public accommodation rights, marriage rights, and education rights. This absence was just as significant. Indeed, Justice Bradley stated that the act of 1866 did not protect "what may be called the social rights of men and races in the community" (*Civil Rights Cases* 1883:22). We must, in short, be familiar with the rights distinctions used by jurists of the day in order to understand what Justice Bradley was doing in offering this list. He was, I suggest, limiting the application of state neglect concepts to rights a consensus regarded as fundamental.

Justice Bradley limited state neglect concepts in another way when he identified the circumstances under which Section 5 regulation of private individuals became permissible. Some form of state "support" or "sanction" (*Civil Rights Cases* 1883:16) had to be given to these race-based wrongs. State authorities had to "protect" these wrongs "by some shield." The wrong had to "rest upon"

[14] The right to vote was included in this list because voting began to shift from the "political rights" category to the "civil rights" category after the passage of the Fifteenth Amendment. Justice Bradley identified voting as a civil right in *Hornbuckle v. Toombs* 1874:656. Certain Court decisions from the 1880s, however, continued to classify voting as a political right. See, e.g., *Yick Wo v. Hopkins* 1886:370, *Baldwin v. Franks* 1887:691.

some state authority "for its excuse and perpetration" (*Civil Rights Cases* 1883:18). If this occurred, individual invasions of civil rights gained the color of law . . . or custom.

The phrase "under color of" is thus clearly associated with state action of some kind. As this passage makes apparent, individuals cannot deprive other individuals of rights; only a state can deny rights. However, a state can deny rights by shielding, excusing, or protecting individual, race-based wrongs. Rights remain in "full force" unless such shielding, etc., occurs. This last statement requires pause, for it means that in the circumstances under discussion, state laws are neutral on their face.

In what ways, for example, might state authorities shield, protect, or excuse Klan violence if state laws are facially neutral? The practice of refusing to punish it is one obvious answer. Indeed, recall Justice Bradley's statement that an individual wrongdoer "will only render himself amenable to satisfaction or punishment" unless that wrong is protected "by some shield of State authority" (*Civil Rights Cases* 1883:17). The active participation of officials in Klan violence might also support or protect such wrongdoing. However, Justice Bradley's language does not require the active participation of state agents in order for that wrongdoing to have the color of law. This is indicated by Justice Bradley's use of the term *individual*. Hundreds of federal court opinions before and after the *Civil Rights Cases* used a distinction between "individuals" and "officers,"[15] and there is overwhelming intertextual agreement on usage. While "officials" might sometimes fall into the category of "individuals," the category of individuals cannot be limited to officials. Thus, individual wrongs can gain the "color of law or custom" even when laws are facially neutral and even without the active participation of state agents in that wrongdoing. What else could shield and protect these wrongs under these circumstances but the failure to remedy them?

Here is Justice Bradley in his circuit opinion in *United States v. Cruikshank* (25 F. Cas. 707 [1874]): When a right is

> denied or abridged by a state on account of their race, color, or previous condition of servitude, either by withholding the right itself *or the remedies which are given to other citizens to enforce it,* then undoubtedly, congress [*sic*] has the power to pass laws to directly enforce the right and punish individuals for its violation, because that would be the only appropriate and efficient mode of enforcing the amendment" (1874:713; emphasis added).

[15] A Lexis-Nexis search for Supreme Court cases between 1874 and 1888 using both the words *individuals* and *officers* produced 525 hits. I was unable to locate a case among them in which *individual* did not mean either a person or a human being.

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I have never seen this passage quoted in the Reconstruction legal literature, but it expresses state neglect concepts.[16]

We are now in a position to see that the critical passage several pages back divides private, race-based interferences with civil rights into two categories (1) "merely private" wrongs where punishment is available and administered, and (2) private wrongs that state authorities shield, excuse, sanction, support, or protect. The Fourteenth Amendment does not authorize Congress to reach the first category. As the Court states in the *Civil Rights Cases,* "[i]ndividual invasion of individual rights is not the subject matter of the Amendment" (1883:11). But the Amendment does reach the second category, permitting federal punishment of private individuals, whose wrongs gain the imprimatur of the state through the state's failure to remedy them. In sum, the status of individual, race-based wrongs—as "merely private" or having the "color of law"—depends on how state authorities respond.

This logic was not Justice Bradley's innovation. Moderate Republicans married the concept of state neglect to a concept of "denying equal protection." Indeed, numerous scholars (Harris 1960; Frantz 1964; Belz 1976; Zuckert 1986) have identified the view, developed in the Reconstruction Congresses, that "state action" included the failure to punish. Republicans predicated federal protection of individual rights under the Fourteenth Amendment on state denial of rights, an illustration that Moderates (not Radicals) held the balance of power.[17] But while Republicans included unpunished race-based and politically based wrongs in their state neglect concept, the Court included only race-based wrongs.[18]

[16] Dissenting in *Blyew v. United States* (80 U.S. 581 [1872]), which involved the federal prosecution of private individuals under the Civil Rights Act of 1866, Justice Bradley called it "an inestimable right" to "invok[e] the penalties of the law upon those who criminally or feloniously attack our persons or our property . . . To deprive a whole class . . . of this right . . . is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law" (80 U.S. at 598–9). Space here forbids a detailed examination of the points of dispute between Justice Bradley and the Court. I cite this passage only to suggest that Justice Bradley's views remained consistent. See also Lurie 1986:365.

[17] Consider Representative John Bingham's original version of the Fourteenth Amendment, which did not contain "no state" language ("The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property," *Congressional Globe*, 39th Cong., 1st sess., 1866, 1034). Republicans criticized the proposal, in part, because it would permit Congress to pass municipal codes of civil and criminal law, preempting the states. Bingham brought forth the "no state" language in his next draft, making state denial of rights a predicate for federal protection.

[18] This is a notable move by the Court, and it occurred in *Cruikshank* (1874). See the discussion of *Cruikshank* below.

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The corpus of Waite Court cases provides a legal framework for conceptualizing state neglect as a form of state action. For example, *Neal v. Delaware* (1880) involved a state's failure to redress a race-based wrong, committed by a state actor, against a civil right. *Neal* is significant because it identifies a failure to redress as a form of action.

In *Neal,* a black man was charged with raping a white woman. Lawyers for William Neal argued, among other things, that black men were excluded from the jury that indicted him and that the trial court violated his rights by failing to quash the indictment. The Waite Court agreed, stating that the trial court had a duty to correct this wrong. It was "bound to redress" (*Neal v. Delaware* 1880:394) this exclusion. Its refusal to do so was a rights denial: "The refusal of the State court to redress the wrong by them [the jury officers] committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States. Speaking by Mr. Justice Strong, in Ex parte Virginia, we said, and now repeat, that 'a State acts by its legislative, its executive, or its judicial authorities'" (1880:397). The state, then, had a duty to redress the racially motivated wrong, and to refuse to redress was to "act." Justice Bradley joined the *Neal* decision.

It should be remembered that *Neal* involved jury rights, and the Court referred to jury rights as a "civil right" (1880:386, 387). It is also significant that *Neal* relied mainly on *Virginia v. Rives* (1880), another jury case that laid out rules for removing cases to federal court under Section 641, which derived from the Civil Rights Act of 1866. *Neal*'s reliance on *Rives* is significant because the *Civil Rights Cases,* too, cited *Rives* as among those cases containing a "quite full" discussion of the rules for proper Section 5 legislation (*Civil Rights Cases* 1883:12). This seems initially puzzling. Why would rules for applying a removal statute be relevant for an exposition of state action doctrine?

In *Virginia v. Rives* (1880), the Court turned down a petition to remove the case to federal court, explaining that the defendant's expectation that he would not get a fair trial was insufficient to establish a cause for removal. Justice William Strong stated, "It is during the trial or final hearing the defendant is denied equality of legal protection, and not until then. Nor can he know till then that the equal protection of the laws will not be extended to him. Certainly not until then can he affirm that it is denied" (1880:313). The removal statute, the Court explained, can be used before a trial begins when a defendant can affirmatively know—from the state's unequal laws—that equal protection will be denied. If state laws are neutral on their face, a defendant cannot say ahead of time that equal protection will be denied. Thus, the defendant in *Rives* was denied a removal petition, keeping the matter under state

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authority, because it had to be presumed that the state would enforce its neutral law; a denial of equal protection had not therefore been established.

The rule in *Rives*—that it must be presumed that states will enforce neutral laws and that only the defeat of this presumption legitimates a federal remedy—is what makes sense of Justice Bradley's reference to *Rives* in the *Civil Rights Cases*. This rule also aligns with Justice Bradley's construction of "under color of law . . . or custom." Recall his statement that rights "remain in full force and may presumably be vindicated by resort to the laws of the state for redress" (*Civil Rights Cases* 1883:17) unless state authorities maladminister those laws by shielding or excusing certain wrongdoing. Thus, according to *Rives* and the *Civil Rights Cases,* a federal remedy becomes legitimate only after state practices have defeated the presumption that the state will equally enforce its neutral laws. The refusal of the state court to redress the wrong in *Neal* was a rights denial because the refusal defeated this presumption.

These constructions of "state action" and "under color of law . . . or custom" have been missed, which means legal actors have missed the extent to which the Waite Court viewed the nonenforcement of neutral laws as a rights denial and preserved federal power to reach private individuals as a remedy. The recovery of these historical constructions means, too, that any constitutional limitations on the scope and justification for remedies that reach private individuals remains to be established, as do any requirements concerning their connection to underlying violations.

The *Slaughter-House Cases* (1873), *United States v. Cruikshank* (1876), and *United States v. Harris* (1883)

So how does this analysis square with other Court decisions from this period, all of which are conventionally understood as disasters for black rights? Brief comments about these cases are in order, though I do not offer here a full reconciliation.

In the *Slaughter-House Cases* (83 U.S. 38 [1873]) the Supreme Court embraced a state-centered federalism,[19] rejecting the Republican effort to make national citizenship primary and robust (Foner 1988:258). Indeed, a compelling case has been made that the Court derailed the Republican effort to apply the Bill of Rights to the states (Curtis 1986; Amar 1998). The damage was considerable, especially for white Republicans in the South. However, the constriction of national citizenship rights did not leave blacks entirely at the mercy of states. *Slaughter-House* did not block or preclude state neglect concepts or a nationalist Fifteenth Amendment

[19] On the postwar dominance of state-centered federalism, see Benedict 1978:50–3.

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jurisprudence. There is language from Justice Samuel F. Miller, in fact, that supports state neglect concepts.[20] Justice Miller, furthermore, authored *Ex parte Yarbrough* (110 U.S. 651 [1884]), which endorsed both the Fifteenth Amendment exemption and a robust Article 1, Section 4 jurisprudence that justified federal protection of both white and black Republican voting in congressional elections (Valelly 2007).

The Court's state-centered federalism in *Slaughter-House* was not the Democrats' conservative variety.[21] Multiple versions of state-centered federalism were possible, and the Waite Court crafted its own version, which took away from states more prerogatives than scholars have recognized. Justice Miller's purpose in constricting the definition of national citizenship should be reexamined, as there is accumulating evidence between Michael Ross's work (2003) and my own that it has been misperceived.[22] The view that *Slaughter-House* left First Amendment free speech rights completely unprotected should be reexamined as well.[23]

What about *Cruikshank* (92 U.S. 542 [1876]) and *United States v. Harris* (1883)? In both cases, Klansmen who massacred blacks walked free. The Court did not condemn these racial murders, nor did it even provide a description of the facts. *Cruikshank,* furthermore, stemmed from a voting-related massacre in Colfax, Louisiana, of at least one hundred blacks, "the bloodiest single act of carnage in all of Reconstruction" (Foner 1988:530). The case is conventionally understood as leaving black voters "defenseless" (Miller 1966:158) and bringing an immediate end to black voting (Warren 1922:604).

This view, however, overlooks critical facts, which make the story of *Cruikshank* much more complex. The massive violence in Colfax did not drive blacks from the polls, as "the Republican ticket in Grant Parish polled nearly as high a percentage in the 1876 presidential election as the percentage of African-American males

[20] See footnote 34 and accompanying text. See also Michael Ross (2003), who has compiled extensive evidence that Justice Miller and *Slaughter-House* were more supportive of Reconstruction than scholars have realized.

[21] My earlier work reinforces the view that it was the Democrats' conservative variety (Brandwein 1999:63–8). I show that Justice Miller used a Democratic history of the Civil War to justify a narrow definition of national citizenship. Justice Miller did indeed use history in this way. However, I have reassessed my earlier view of his purpose.

[22] Michael Ross argues that Justice Miller's purpose was to block Justice Stephen J. Field and the economic conservatives from gaining an instrument to strike down state regulations of business.

[23] "The right to peaceably assemble and petition for redress of grievances . . . are rights of the citizen guaranteed by the Federal Constitution" (*Slaughter-House Cases* 1873:79). See also *Cruikshank* 1876:552 and *Hague v. CIO* 1939:513, quoting *Slaughter-House* and *Cruikshank*. Inquiries into why Republican administrations at the time did not seek to protect assembly rights would certainly be worthwhile, but doctrine did not tie their hands.

of voting age in the parish'' (Kousser 2003: n.p.). Further, the door to future prosecutions remained open, if prosecutors alleged and proved a racial motive. As noted on a handful of occasions (Magrath 1963:124–5; Collins 1996:1994–5; Goldman 2001:14–7; Brandwein 2006:293–302), *Cruikshank* was decided on technicalities. An observation by Benedict is important here. As he states, ''[n]either black Americans nor radical Republicans felt much like thanking the Waite Court for sustaining congressional power while they released southern killers'' (1978:79). Democrats, furthermore, praised the decisions, for ''it was in their interests politically to ignore the fact that these decisions were based on technicalities of statutory construction, [and] that beneath the surface most of Congress's power to protect rights remained unimpaired'' (1978:79).[24] We must keep in mind that reactions to decisions are not necessarily a good guide to the ''law'' in decisions. This is essentially a ''realist'' point: the interests of Democrats led them to present the legal basis for these decisions in distorted ways.

Cruikshank is especially important because it produced the first systematic attempt by a Court justice (Justice Bradley) to elaborate rules for the congressional enforcement of all three Reconstruction amendments. Justice Bradley attached significant importance to his circuit opinion, as he sent it immediately upon completion to prominent cabinet members and senators, all the justices, federal district judges throughout the South, and the editors of three legal periodicals.[25] The wide circulation of this opinion is highly significant, as it means that contemporaneous actors possessed a fleshed-out statement of these rules. (Today, virtually nobody reads Justice Bradley's circuit opinion, and this has impaired understanding of Chief Justice Waite's opinion in *Cruikshank*, which tracks Justice Bradley's opinion in most respects, but in far more skeletal fashion. The skeletal nature of Chief Justice Waite's opinion, I argue later, has left it vulnerable to anachronistic interpretation.) In the next section, I return to Justice Bradley's rules, which distinguished between Congress's power to enforce the Fourteenth and Fifteenth Amendments. For now, what is important is that Justice Bradley threw out the counts of the indictment drawn under the equal protection clause.[26] His reasons are our central concern.

Justice Bradley threw out the equal protection counts because they did not allege that the wrong was done on account of the race

[24] Benedict directs these comments at the Waite Court's Thirteenth and Fifteenth Amendment rules. I apply them to the Court's Section 5 rules, as well.

[25] Bradley Papers, New Jersey Historical Society, Newark, NJ.

[26] These counts, the fourth and the twelfth, charged the intent to interfere with ''the full and equal benefit of all laws and proceedings'' enacted by Louisiana and the United States.

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of the victim. "This [was] an essential ingredient in the crime to bring it within the cognizance of the United States authorities" (*United States v. Cruikshank* 1874:715). Chief Justice Waite followed Justice Bradley's reasoning.[27] In criticism of Justice Bradley and the Court, one might argue that a race-based motive was obviously present, even if not formally alleged. But before this is interpreted as a retreat into formalism intended to subvert judicial protection for blacks, we must remember that Justice Bradley made a point of distinguishing between violence based on the victim's race and violence based on the victim's politics (*United States v. Cruikshank* 1874:714). Justice Bradley endorsed federal oversight over the former but not the latter. Because Colfax was both a racially and politically motivated massacre, Justice Bradley's insistence on the allegation of a racial motive served notice that politically motivated violence was outside the reach of Section 5.[28] And while Justice Bradley did not explicitly address a mixed-motive scenario (political and racial motives), it is plausible to conclude from his statements that he would permit prosecution on racial motive, as long as that motive could be established. The key point here is that Justice Bradley's invalidation of the equal protection counts cannot be described doctrinally as "losing the vote" because federal power to reach unpunished Klan violence against blacks remained intact. The door to future indictments, drawn under the rules announced by the Court, remained open.

What about the difficulty of proving racial motivation? The significance of state neglect concepts, it may be argued, is undercut by the reality that racial motivation is next to impossible to prove; redress, therefore, would be unlikely under state neglect concepts. This reality, however, has been shaped by twentieth-century doctrine, which has imposed the "animus" standard. The Waite Court left the standard of proof on this matter unclear. Because a range of thresholds, ranging from low to high, might be imagined, we must accept that history cannot answer this standard-of-proof question.

The Court, not incidentally, went out of its way to consider the equal protection counts, for they were not technically before the Court.[29] This can be interpreted as a purposeful communication to

[27] "[i]t is nowhere alleged in these counts that the wrong contemplated against the right of these citizens was on account of their race or color" (*Cruikshank* 1876:554, 555).

[28] White Republican voters were not completely abandoned as the Court interpreted Art. 1, Sec. 4, to permit congressional regulation of private interferences in federal elections, regardless of motive (*Ex parte Siebold*, 100 U.S. 371 [1880]).

[29] The federal government had abandoned all but two counts involving voting (one involving conspiracy to interfere with the right to vote, the other involving conspiracy to harm someone because they had voted). "'[w]e will confine ourselves to the 14th and 16th counts' of the indictment" (brief from *Cruikshank,* reprinted in Kurland & Casper 1975:290).

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the executive branch regarding the rules for drawing up proper indictments. If the Court were hostile to future prosecutions, it is unclear why it would have done this.

It is important to recognize, too, that a judge's invalidation of a federal indictment against a Klansman was not automatic evidence of hostility to federal power. Even Republican judges deeply sympathetic to federal prosecution of Klansmen threw out indictments when they lacked the proper allegations. Circuit Judge Hugh L. Bond, for example, was "roundly distrusted by Southerners who looked upon him as an incorrigible radical" (Magrath 1963:156). In *United States v. Crosby* (1871), however, Judge Bond quashed nine of 11 counts of an indictment because they were not correctly drawn.

After *Cruikshank* was decided, the U.S. attorney in Charleston, South Carolina, lamented. "If red shirts [a term for white mobs] break up meetings by violence, there is no remedy, unless it can be proved to have been done on account of race" (quoted in Magrath 1963:133). Note the basis of his lament: it was not a lack of power. This contemporary interpretation throws into doubt the conventional view of *Cruikshank*. This historical evidence that the conventional view is wrong is supported by jurisprudential evidence.[30]

In *United States v. Harris* (1883), again, Klansmen walked free. But why? The Court threw out part of the Ku Klux Klan Act of 1871 (Section 5519) because it was "directed exclusively against the action of private persons, without reference to the laws of the State *or their administration by her officers*" (*United States v. Harris* 1883:640; emphasis added). As Justice William B. Woods explained, "When the State has been guilty of no violation of its provisions, when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress" (*United States v. Harris* 1883:639).

Justice Woods' references to maladministration, moreover, were part of a constellation of terms that lower federal courts had used since 1867 to identify the nonenforcement of neutral laws protecting black civil rights as a rights violation.[31] This constellation of terms helped make up the idiom of state neglect (e.g., "prejudices affecting the administration of justice" [*United States v. Hall* 1871:81-82], the "hostile . . . administ[ration of] justice" [*United States v. Rhodes* 1867:787], the lack of "punishment for mischief" (*United States v. Crosby* 1871:701), and murder "perpetrated with

[30] See *Logan v. United States* (144 U.S. 263, 288 [1892]).

[31] For a more extensive examination of these lower court cases, see Brandwein 2006:289–93.

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impunity" (*Charge to Grand Jury-Civil Rights Act* 1875:1006). When Justice Woods explained that Section 5519 was directed exclusively against individuals without reference to the laws or their administration, he was tapping into the established language of state neglect, of which he himself had made use in *Hall*.

It is also significant that Justice Woods' reference to the maladministration of laws echoed Justice Miller's reference to the nonenforcement of laws in the *Slaughter-House Cases*. Justice Miller stated that where black lives "were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced," these states were not yet in "proper" relation to the federal government (*Slaughter-House Cases* 1873:70).[32] This language ought to jump off the page at this point.

No single key word, then, referenced the concept of state neglect. This is not surprising since possessing a concept, as Skinner explains, is not the equivalent of knowing the meaning of a single word (2002:7–8). Rather, concepts are associated with groups of words. "The surest sign that a group or society has entered into the self-conscious possession of a new concept is that a corresponding vocabulary will be developed, a vocabulary which can then be used to pick out and discuss the concept with consistency" (Skinner 2002:8). Using the vocabulary of state neglect, Waite Court cases consistently picked out the idea that a state's nonenforcement of neutral laws protecting civil rights was a rights violation under the Fourteenth Amendment.

I conclude by returning to classic quotes from the *Civil Rights Cases* (1883), which are routinely cited as expressions of state action doctrine:

> The first section of the Fourteenth Amendment. . .is prohibitory in its character, and prohibitory upon the States . . . .That Amendment erects no shield against merely private conduct, however discriminatory or wrongful . . . Individual invasion of individual rights is not the subject-matter of the amendment (1883:11).
> [The Fourteenth Amendment] does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment (1883:11).

These passages are fully consistent with state neglect principles, which hold (in sum) that private interferences in civil rights,

[32] Justice Miller's support for state neglect principles is less surprising in light of his private correspondence, which condemned unpunished violence against blacks by intransigent whites (M. Ross 2003:147) and expressed frequent support for blacks' civil and political (but not social) rights (M. Ross 2003:116–8, 165, 210).

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motivated by the race of the victim, are "merely private" wrongs unless the state neglects to remedy them. Congress has power to correct this maladministration under Section 5 by providing for the federal prosecution of the offenders, but remedies must be conditioned on state neglect. This insures that the federal government does not take over municipal functions.

What, finally, can we conclude about why the Court invalidated the public accommodation provisions? Was the problem the lack of a state neglect predicate?[33] Unlikely. Justice Bradley's ridicule for the public accommodation claim is inconsistent with this view, as was his use of the civil/social distinction. For purposes here, the point is that the conventional explanation for this invalidation (the provisions violated a rule that Section 5 legislation cannot reach private individuals) is incorrect. There was no such rule, as the Court's approval of the Civil Rights Act of 1866 makes clear.

State Action, "Historist" Jurisprudence, and the Fifteenth Amendment

This section continues to build my argument that the state action cases cannot be seen as a definitive abandonment of blacks that consolidated a political abandonment by the Republican Party. Here, I recover what I call the "Fifteenth Amendment exemption," the rule that permitted direct federal protection of black voting rights against racially motivated interference by public and private actors, regardless of state action. After recovering the legal theory that underlay this rule and identifying its presence in Waite Court doctrine, I tie my analysis to a growing revisionist literature that demonstrates that Republican administrations continued to enforce voting rights legislation in the South until 1893 (Wang 1997; Goldman 2001; Valelly 2004; see also Hirshson 1962). This enforcement was inadequate and uneven in many respects, but I press the following point. Up until 1893, the practices of contemporaneous lawyers and litigants show that there was no definitive or wholesale legal abandonment of the South to "home rule," and Court decisions such as *Ex parte Yarbrough* (1884) validated these efforts. The Democrats, indeed, launched an effort to repeal voting legislation during the second Cleveland administration (succeeding in 1894) precisely because they too understood that Republican administrations and the Waite Court had kept these statutes alive.

[33] A group of law professors has suggested that the Court invalidated the public accommodation provisions because they were not made contingent upon a violation by the states. See Michelman 1989:307, note 54, Post and Siegel 2000:475–6, and McConnell 1995:1090.

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A 30-year-old article by Benedict (1978) is a fitting place to begin my recovery of the Fifteenth Amendment exemption. In this article, Benedict argued that Waite Court cases permitted federal regulation of private, race-based interferences in voting, regardless of state behavior. This argument has been picked up sporadically in the legal literature (e.g., Klarman 2004:37), but it has never gained the status of conventional wisdom.[34] A lack of evidence is not the reason.

One reason is undoubtedly the power of the traditional abandonment narrative and the progressive "materialist" narrative, which holds that the Waite Court served the interests of big business. But another reason is the puzzle created by Benedict's work: how could the Court apply state action rules to the Fourteenth Amendment but not the Fifteenth, given that they share "no state" language? This looks unprincipled and therefore doubtful. Again, an historical-interpretive analysis proves illuminating, as "historist" jurisprudence offers a way of drawing a principled distinction between the amendments. This requires some explanation.

"Historism" is Siegel's label (1990:1437) for a view of history that bridged the traditional, eighteenth-century, millennial view of American history (as divinely ordained and governed by static principles) and the modern, twentieth-century view of history (as dynamic and ordered by forces that lay within itself). The historist viewpoint combined elements of the traditional and the modern: history was dynamic and societies might progress, but the continued strength of the traditional view cabined recognition of change. As Dorothy Ross explains, social change was "understood as the product of extrahistorical phenomena—as the appearance in history of a timeless reason or the working out of God's millennial plan" (D. Ross 1984:911).

A blend of commitments to both natural and positive law characterized historist jurisprudence. This blend may seem odd today, but the simultaneous use of natural and human law was a defining characteristic of nineteenth-century American legal thought.[35] Indeed, the blend characterized the early phase of scientism in law. The science of law exemplified by Joseph Story, for example, was associated with God's plan.[36]

[34] Scholars understand the Waite Court's Fifteenth Amendment decisions as promulgating "state action" rules. See, e.g., Tribe 2000:931.

[35] On the simultaneous espousal of "the law of God" and "human law," see Parsons 1857:265.

[36] For Story, "natural law reflected the universal reason and moral principles God had built into human nature, while [positive] law reflected the special conditions that had created unique cultures and changing stages of development. Such a view could carry conviction because Story appeared to accept, as did most of his contemporaries, the guiding hand of God in the historical process" (D. Ross 1984:20).

In 1870, Christopher Langdell introduced the "scientific" method of legal study, which discarded most of the defining commitments of antebellum legal science, especially its natural theology (Schweber 1999:455–64). But the antebellum conception of legal science did not suddenly disappear. Indeed, Siegel calls Langdell's entirely secular conception of law an "oddity in the Gilded Age" (2002:636). What is clear is that during the 1870s and 1880s, the antebellum conception of science and the jurisprudential blending of natural and positive law remained conventional. Langdellian legal science was taking hold at Harvard, but not yet elsewhere. The fact that Justice Bradley and his fellow justices were not Langdellians, then, should not be surprising. They came to maturity before the Civil War, when the intellectual bases of educated thought in America focused on traditional social thought (moral and political philosophy), not on the sciences.[37]

This excursion has been necessary to make a key point: the origins of Justice Bradley's distinction between the Fourteenth and Fifteenth Amendments can be found in this pre-Langdellian intellectual context. Indeed, in laying out this distinction, the intellectual context for state action/neglect concepts is fleshed out in greater detail.

Justice Bradley's circuit opinion in *Cruikshank* (25 F. Cas. 707, 710-714 [1874]) is the focus of our attention. In taking up the question of Congress's power to enforce the Reconstruction amendments, he began by citing *Prigg v. Pennsylvania* (41 U.S. 618 [1842]), the pro-slavery decision, for the rule that "congress has power to enforce, by appropriate legislation, every right and privilege given or guarantied [*sic*] by the constitution" (*Cruikshank* 1874:710, spellings in original). Note the distinction between "given" and "guaranteed" rights. This distinction may easily slip by modern readers who regard these words as synonyms. But they were not. These words designated two types of rights.

Rights "given" by the Constitution had their source in the Constitution. The Constitution "gives" or "creates" a right when it "confers a positive right which did not exist before" (*Cruikshank* 1874:712). Rights "guaranteed" by the Constitution were "not created or conferred" by the Constitution (1874:710). Rather, they were derived "from those inherited privileges which belong to every citizen, as his birthright, or from that body of natural rights, which are recognized and regarded as sacred in all free governments" (1874:714). Guaranteed rights were part of the "political inheritance derived from the mother country" that were

[37] On Justice Bradley's education, see Fairman 1949:229–35. On Chief Justice Waite's education, see Magrath 1963:25–33.

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"challenged and vindicated by centuries of stubborn resistance to arbitrary power" (1874:710).[38]

This is the idiom of historist jurisprudence. Justice Bradley looked to written law (the Constitution) as one source of rights. He looked to unwritten law (history, nature) as another source of rights; the Constitution could "secure" or "guarantee" this latter type of rights, but the Constitution was not the source of these rights. Justice Bradley's identification of these two sources of rights[39] was conventional.[40] Indeed, Justice Miller, a known antagonist to substantive due process, also used "natural rights" concepts.[41]

So why were these two categories of rights so significant? Because the manner in which Congress could protect a right depended on the category into which it fell: "The method of enforcement, or the legislation appropriate to that end, will depend upon the character of the right" (*Cruikshank* 1874:710).

"When any [pre-existing right] is secured in the constitution [*sic*]," Bradley explained, "only by a declaration that the state . . . shall not violate or abridge them, . . . the duty and power of [congressional] enforcement take their inception from the moment that the state fails to comply with the duty enjoined, or violates the prohibition imposed" (*Cruikshank* 1874:710). The rights to "personal security, personal liberty and private property" were "wrested from English sovereigns," Justice Bradley wrote in dissent in *Slaughter-House* (1873:115), rights he associated with the Civil Rights Act of 1866 in the *Civil Rights Cases*. Thus, according to

[38] See also *Boyd v. United States* 1884:630 (Bradley, J.).

[39] Justice Bradley appealed to the Whig view of history as the story of Teutonic liberty. Dorothy Ross describes the Whig view of history as a static form of early modern historical consciousness: "Born among the Teutonic tribes that vanquished Rome, the seeds of democratic and federal self-government were thought to have been carried by the Saxons to England, preserved in the Magna Carta and Glorious Revolution, and then planted in the colonies, particularly New England, where they reached their most perfect form in the American Revolution and the Constitution" (D. Ross 1984:917).

[40] Lawyer and legal writer John Norton Pomeroy, for example, divided law into two species: written and unwritten (Pomeroy 1868:7–20). Pomeroy explained that while the U.S. Constitution is "all written" (1868:11) and while a textual mode is "indispensable" to constitutional interpretation (1868:15), "the lessons taught by history" are "not entirely superceded." Indeed, they are "often absolutely necessary" in constitutional interpretation (1868:15, 18). Justice Bradley's jurisprudence, then, can be linked to his contemporaries at the level of conceptual architecture. This of course left room for disagreement. Pomeroy, for example, admired Field's dissent in *Munn v. Illinois* 1877 (Siegel 1990:note298), while Justice Bradley inspired and supported *Munn*.

[41] Both Justice Miller and Chief Justice Waite invoked "natural rights" in their opinions. See, e.g., *United States v. Cruikshank* (1876:555) (Waite), *Campbell v. Holt* (1885:629) (Miller), *Blanchard v. Kansas* (1883) (Miller), and *In re Brosnahan* (1883:67) (Miller). Parenthetical names following cases indicate the majority opinion author. See also *Leavenworth v. United States* (1876:746) (Davis) and *Yick Wo v. Hopkins* (1886:370) (Matthews). *Slaughter-House* (1873), then, was not a wholesale rejection of natural law. Rather, natural rights concepts were contested.

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Justice Bradley's rules, congressional protection of security, liberty, and property required a state action/neglect predicate.

By contrast, Congress could directly protect rights "created" by the Constitution or federal law without awaiting state action/neglect. The Fifteenth Amendment, unlike the Fourteenth, created a new right. The amendment, the Court explained in *United States v. Reese* (1876), "invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude" (92 U.S. 214, 218 [1876]).[42] This new right, therefore, could be protected not only against state agents[43] but also against private persons, regardless of state action/neglect. "I am inclined," Justice Bradley stated, "to the opinion that Congress has the power to secure [the Fifteenth Amendment right] not only against the unfriendly operation of state laws but against outrage, violence, and combinations on the part of individuals, irrespective of state laws" (*Cruikshank* 1874:713).[44]

In a circuit opinion that is largely unknown among scholars, Chief Justice Waite embraced Justice Bradley's inclination. In *United States v. Butler* (25 F. Cas. 213 [1877]), which sprang from a racial massacre in Ellenton, South Carolina, Chief Justice Waite interpreted Section 5508 of the Revised Statutes (the direct descendant of Section 6, under which William Cruikshank was charged) to protect black voting rights against private, racially motivated conspiracy, regardless of state action/neglect. Chief Justice Waite began by stating that the "controlling element" in the federal indictment against 12 men, including A. P. Butler, a former colonel in the Confederate Army, was "the race or color" of David Bush, the victim. In order to find the defendants guilty under the Fifteenth Amendment, Chief Justice Waite instructed the jury, they had to find that the conspiracy had to be motivated by Bush's race. It was not enough that the "defendants may have conspired against him on account of his political opinions, or on account of his support or advocacy of any political party" (*United States v. Butler* 1877:223–4). Then came this: "Equally unimportant is it to you or to us whether

[42] Quoted in *Cruikshank* 1876:555.

[43] In *Reese,* the Court upheld federal power to prosecute Kentucky officials under the Fifteenth Amendment, as long as those officials interfered in voting on the basis of race. *Reese,* however, was not a "state action" decision, though modern readers (Tribe 2000) have mistakenly understood it as such. Rather, the Court's theory of federal power to prosecute the Kentucky officials was rooted in the notion of a "created" right.

[44] Justice Bradley invalidated the Fifteenth Amendment counts upheld against William Cruikshank because they did not allege a racial motive (Cruikshank 1874:713–4). Chief Justice Waite followed his reasoning (*Cruikshank* 1876:555). Again, the problem was not a lack of federal power—it was a badly drawn indictment.

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the state or its officers have been unable or unwilling to punish offences against its own laws, or to bring to judgment in its own courts the violators of its own peace" (1877:224). There was, then, no state neglect predicate for federal prosecution.

In *Ex parte Yarbrough* (1884), a unanimous Court followed this rule, as it upheld a federal indictment of a private Klansman under, in part, the Fifteenth Amendment. Still later, in 1892, the Court used Justice Bradley's distinction, contrasting the manner by which Congress might protect fundamental rights that are "recognized and declared" by the Constitution from the manner in which it might protect rights "granted or created" (*Logan v. United States*, 144 U.S. 263, 293 [1892]).

Clearly then, Justice Bradley and the Court did not embrace a narrowly conceived textualism. As Justice Bradley explained, it was more important that the Fifteenth Amendment created a new right. "Although negative in form and therefore, at first view, apparently to be governed by the rule that congress [*sic*] has no duty to perform until the state has violated its provisions, nevertheless in substance, it confers a positive right which did not exist before" (*Cruikshank* 1874:712). A principled distinction between the Fourteenth and Fifteenth Amendments, in sum, can be based on a conventional rights distinction in historist jurisprudence.

Toward a New Account of Constitutional Development

I now turn my attention to constitutional development during the 1870s and 1880s. The conventional story of this period, as noted earlier, is that the judicial abandonment of blacks consolidated the Republican Party's political abandonment of blacks, symbolized by the Compromise of 1877. Lurie has commented that scholars may well have made "too much of the Compromise of 1877" (1986:367) and have "mistakenly identified [Justice Bradley] as the executor of this 'agreement' in the form of the 1883 decision" (1986:368). These comments, unfortunately, have accumulated more dust than citation.

I have already begun to recast the story of constitutional development during the Waite era by paying attention to the toned-down expression of state neglect concepts (Brandwein 2006:303–7). An example of this modulated expression is the absence of a statement such as that of Justice Woods in *United States v. Hall*: "denying [rights] includes inaction as well as action [and] the omission to protect, as well as the omission to pass laws for protection" (1871:81). Another is the absence of the facts that gave rise to the original convictions in *Cruikshank*. If the Court supported state

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neglect principles, it would seem that the Court would give recognition to this massacre.

The following argument is not conclusive, but it is plausible to view the Court's modulated expression as reflecting sensitivity to the political context and a concern for its own institutional influence.[45] In a post-1874 political context, repeating Justice Woods or recounting Colfax risked Court legitimacy.

Here is where a proper historical rendering of political sequence and context become crucial. Evidence confirms that Republicans did not politically abandon blacks after 1877 (Hirshson 1962; Goldman 2001; Wang 1997; Valelly 2004). Thus there is not a huge and implausible gap between the wider political context and the Court's acceptance of state neglect principles and the Fifteenth Amendment exemption. At the same time, this evidence suggests that the Court was in a precarious spot. I recount here just some of this evidence.

After the economic panic of 1873, the election of 1874 returned control of the House to the Democrats, and an economic depression set in for the rest of the decade. Elections, significantly, were decided by razor-thin margins (Silbey 1991). In this political environment, which combined a loss of interest in Reconstruction by Northern voters but also cyclical (and effective) returns by Republican elites to sectionalism, civil rights enforcement became a dicey affair and rights enforcement became unsteady. For example, in 1877, President Rutherford Hayes announced a new policy of sectional reconciliation. But "[i]f . . . the Republican party had deserted the [freedmen] in 1877, that abandonment was short-lived. By 1878, sectionalism was once again the official policy of a Republican administration" (Hirshson 1962:251). After the election of 1878, which was marred by violence and fraud, President Hayes realized that his conciliatory strategy had failed. His sectional attitude "stiffened considerably" (Hirshson 1962:46), and he vetoed numerous Democratic efforts in 1879–1880 to rescind voting protections. Until the early 1890s, the race problem played a central role in party affairs.

Indeed, the Republican Party's policies in the South were unstable and unsettled between 1877 and 1893, as each Republican president tried a fresh strategy for building Southern Republicanism (e.g., internal improvements, support for Independents, and a high tariff). After each strategy failed in the face of Democratic violence and fraud, each president returned to sectionalism and federal enforcement of election laws (Hirshson 1962:253). And as Goldman (2001) has shown, the U.S. Department of Justice made

[45] Additional evidence from the personal papers of the justices would support this assertion more firmly.

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real efforts to prosecute violence, intimation, and fraud aimed at black voters between 1877 and 1893. While these efforts ultimately failed due to Southern intransigence, a lack of money, and inadequate bureaucratic structure, a lack of power under the Constitution was not the reason.

It seems clear that the Court, in this highly unstable political environment, lacked the clout to lead with an assertive racial egalitarianism. The Court faced institutional concerns regarding the preservation of its legitimacy. Recounting Colfax or repeating Justice Woods would have highlighted Southern maladministration of law as a rights denial. And as events made plain, the Court could not count on the executive branch to undertake the broad prosecutorial efforts necessary to remedy this rights denial, i.e., to enforce the Court's rules. By recounting Colfax or repeating Justice Woods, the Court thus risked appearing ineffectual. The Court's modulated expression of state neglect, then, can be seen as an "available device for not doing" (Bickel 1986:125); that is, for not putting itself out in front of the political branches during a period of instability when four Republican presidents (Grant, Hayes, Arthur, Harrison) tacked away and then back toward rights enforcement. This secured key legal principles without risking the influence of the Court.

It is useful here to compare the worry of Warren Court justices that a decision striking down school segregation would go unenforced by the executive branch. Of course, the justices went ahead in *Brown v. Board of Education* (347 U.S. 483 [1954]). There were important differences, however, between the context of *Brown* and the context of Waite cases. *Brown* had a section of the country behind it. There were also large-scale developments that made Jim Crow morally untenable as well as an albatross around the neck of the United States in its effort to condemn Soviet violations of human rights (Dudziak 2000). By contrast, the large-scale currents that supported state neglect principles were ebbing after 1873–1874, though they had not disappeared, and the Court would have recognized this.

It is plausible, then, to see the Waite era as covering a period of political uncertainty and fluctuation where multiple political institutions with their own logics were at work. Significantly, there was more fluctuation with the executive branch than with the judicial branch. The notion of a transitional order, however, is entirely appropriate here, as attempts at settlement (both political and judicial) did not endure. There was "incomplete institutionalization" of the biracial coalition of 1867–68 in the South (Valelly 2004:47–71). There was also no "lock-in" for Justice Bradley's innovations on civil rights and the Fifteenth Amendment. More work must be done, of course, to capture these political and legal sequences. But

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revisionist work now demonstrates that the Republican Party continued to be involved in Southern party politics and support black voting until 1893. What remains to be examined is the relationship between the party's definitive abandonment of blacks in the 1890s and the definitive legal abandonment of blacks in *Plessy v. Ferguson* (163 U.S. 537 [1896]), *James v. Bowman* (190 U.S. 127 [1903]), and *United States v. Hodges* (203 U.S. 1 [1906]), under the auspices of Chief Justice Melville W. Fuller. Finally, we must also remember that Justice Bradley's toned-down expression of state neglect in 1883 was not a rationalization of the Jim Crow regime, which did not yet exist.[46] From our perspective, 1883 looks to be close in time to 1896, the year *Plessy v. Ferguson* legitimated a Jim Crow segregation statute. We need to remember, however, that Justice Bradley could not know in 1883 what would happen. In fact, Justice Bradley died in January 1892, before the waves of disfranchising legislation swept the South.

Establishing Anachronisms

This article, so far, has devoted itself to reconnecting the "state action" decisions of the Waite era to their historically appropriate "languages" and contexts. As these contexts both fell away and were stripped away, the Waite Court's use of state neglect concepts and the Fifteenth Amendment exemption became difficult to recognize. Their decisions became highly vulnerable to anachronistic interpretations. Had the Court repeated Justice Woods, of course, or repeated Chief Justice Waite's words in *United States v. Butler* (1877), it is doubtful that such distorted interpretations would have occurred. This is a lesson, then, in how toned-down expression (one form of "presence") can become unrecognizable ("lost") as a result of later institutional developments. With these developments, the broader conception of governance and state responsibility that was present in these Waite Court concepts was largely erased.

This section examines some of these developments, beginning with the "scientific" or case method of legal study. Established in nearly all the stronger law schools by 1915 (Schweber 1999:464), the case method was a dimension of the knowledge revolution that swept institutions in the late nineteenth and early twentieth centuries (White 2003:26). Dorothy Ross (1991:53–64) has connected the emergence of scientific thinking to the crisis of American

[46] Blacks continued to participate in politics in reduced though significant numbers during the Waite era. "The notion that disfranchisement was simultaneous with the textbook end of Reconstruction in 1877 and that the South became 'solid' immediately after that date are myths" (Kousser 1999:20). See also Valelly 2004:121–48.

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exceptionalism that gathered force after the Civil War, as rapid industrialization and immigration created massive upheaval.

On one level, the crisis was connected to the problem of intellectual authority, as science increasingly discredited the apologetic stance and naïve resort to divine providence of the established voices in American culture. On another level, the crisis grew out of the social and political challenges of the Gilded Age, as Civil War and Reconstruction and then rapid industrialization appeared to test whether America could sustain the principles that defined her place in history (D. Ross 1991:53).[47]

Responding to this growing crisis, the gentry class—largely Northeastern, well educated, liberal or heterodox in religion—presided over a turn toward positivism and historicism. Langdell's case method was part of this turn. With its emphasis on classification and inductive reasoning, the case method assumed the exclusivity of a few selected judicial opinions as source materials. "The student is not referred to a mass of cases . . . but *a few classified cases*, selected with a view to developing the cardinal principles of the topic under consideration" (Keener 1894:481; emphasis in original). From these few cases, the student was to "extract the underlying principles" (Gray 1892:159).

While Langdell (1871) introduced this method of legal instruction in 1870, it cannot be said to have "won" institutionally until at least the 1890s. Only then did every faculty member at Harvard teach a course from his own casebook (Harvard Law School Association 1918:82). Only then was the case method adopted by other law schools such as Columbia and Chicago. And only then did the publication of casebooks multiply.[48] The institutional reasons for this "win" are many.[49]

So what did the case method mean for study of the *Civil Rights Cases* (1883)? It meant that the decision was slated for study, isolated from legal materials crucial for understanding the Waite Court's "state action" jurisprudence. This isolation can be seen in

[47] See also Wiecek 1998:64–89 and White 2003:20–6.

[48] In 1908, West Publishing entered the trade with its "American Casebooks Series," (James Brown Scott, General Editor, St. Paul, MN, 1908). In 1915, the U.S. Bureau of Education reported, "the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools in the country" (cited in Schweber 1999:464).

[49] See, generally, LaPiana 1994. White (2003:xxv) identifies both the responsiveness of the case method to concerns about order and classification that were perceived as pressing, as well as the embrace of the case method by a group of elites. Gordon 1984 links the case method with rites of professionalization. Tomlins 2000 explains that the case method met the institutional imperative of mass-producing lawyers, adaptable to any local situation of the industrial economy. He also argues that the case method helped secure law's prominence in the emerging competition with the academic disciplines to furnish the state's policymaking discourse.

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the very first constitutional law casebook, the two-volume *Cases on Constitutional Law* (1895) by Thayer.[50] A colleague of Langdell's at Harvard, Thayer taught constitutional law 22 times between 1870 and 1917. Thayer parted company with Langdell on the role of legislatures in lawmaking, and he did not initially adopt the case method. Thayer came to accept it, however, stating in his preface that he favored the study of cases as the principal method in legal education.

> Dean Langdell's associates have all come to agree with him . . . that there is no method of preparatory study so good as the one with which his name is so honorably connected—that of studying cases carefully chosen and arranged so as to present the development of principles (1895:vi).

As Thayer explains, he "selected only the leading titles," giving to these "a fairly full treatment" (1895:vii). In Thayer's casebook, Justice Bradley's majority opinion in the *Civil Rights Cases* appears in full (1895:554–67). Significant passages in *Cruikshank* (1876) and *Harris* (1883) are neither excerpted nor footnoted, Justice Bradley's circuit opinion in *Cruikshank* (1874) receives no notice, and *Neal* (1880) and *Rives* (1880) go without mention. Thayer's casebook thus exemplifies the practice of isolating the study of the *Civil Rights Cases*.[51]

Following suit was the 1913 casebook of James Parker Hall, professor of law and dean of the University of Chicago Law School. This casebook was part of West Publishing's "American Casebook Series." In Hall's casebook, a three-page excerpt from the *Civil Rights Cases* opens a chapter on "Personal and Religious Liberty" (1913:151). Later, in a chapter on "Fundamental Rights," the remainder of Justice Bradley's opinion appears (1913:240–8). Hall adds a citation to *Harris* (1913:248), moving closer to what is today the standard practice of presenting excerpts from Justice Bradley's opinion, accompanied by citations to *Harris* and *Cruikshank* (but not to the passages emphasized here).

Thayer and Hall were not alone in thinking the case method "suited to the subject of constitutional law" (Thayer 1895:v). The Harvard Law School Association, which published the *Centennial History of the Harvard Law School* (1918), put constitutional law into the same category as contracts, torts, and conflict of laws. These subjects were different from jurisprudence and the philosophy of law, which "call for abstract courses" and are therefore unfit for the "general professional curriculum" (1918:168). In order for legal

[50] Hook 1993:5 identifies Thayer's casebook on constitutional law as the first, though treatises on constitutional law preceded it.

[51] The many editions of Gunther's *Constitutional Law* (1937–2004) exemplify this practice as well.

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instruction to be "effective," the association explains, it "must be concrete." Constitutional law, like common law (but unlike jurisprudence), involves the application of law, and the application of law is what matters: "Langdell's method requires us to study the applications and to derive our principles by critical investigation of the law in action" (1918:168).

The case method indeed had wide appeal, as legal actors of varying jurisprudential persuasions endorsed it. Holmes, for example, became a critic of Langdell, but he defended and practiced the case method (1920:42–3). This suggests that the case method had a wide impact, as legal actors who disagreed on the nature of law and the role of courts nevertheless agreed on a method of study.

The establishment of the case method at the turn of the century occurred as a period of racial gloom set in for blacks (disfranchisement, Jim Crow, etc.). At this time, it became convenient to have available an innovation in legal education, practiced by well-respected experts, which helped hide the older legal context of the 1870s and 1880s—a context that gave greater support to black rights. It is easy to imagine, of course, that the entrenchment of Jim Crow during the Progressive era inclined interpreters to "read back" contemporary disdain for black rights onto the Waite Court. But this explanation is inadequate. Racial conservatives during the Progressive era accepted distorted knowledge about Waite-era decisions (Dunning 1907:260–5; Burgess 1905:viii–ix; Bowers 1929:405). But as we see shortly, so did liberal lawyers during the 1940s (Rotnem 1942:257–60; 1943:64–7) and liberal scholars during the Second Reconstruction. Distorted knowledge remained entrenched, then, even after support for black rights became commonplace. Developments that transcend racial ideology, therefore, must have been operating.

Forces that transcend academic discipline must also have been at work, for political scientists and historians not trained in the case method accepted these distortions. What could generate such a broad impact? One likely influence is the Judiciary Act of 1891, which among other things created permanent seats for circuit court judges. With this act, Supreme Court justices finally stopped "riding circuit." The significance and authority of circuit decisions naturally declined, and the circuits became the institutional site where conflicting interpretations pooled, signaling the need for resolution by the Supreme Court. The habit of ignoring circuit opinions on matters of constitutional law, visible among political scientists and historians as well as law professors, might be traced at least in part to the anachronistic assumption that circuit opinions from the 1870s, even those written by Supreme Court justices, occupied the same institutional position as circuit opinions after 1891. While it remains necessary to map the discourse of state

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action that developed in political science departments, the "mass of cases," as Keener put it, was excluded from study in the academic disciplines as well as in law schools.

Excluding the "mass of cases" from study was profoundly significant. Without studying Justice Bradley's circuit opinion in *Cruikshank,* Court opinions in *Neal* and *Rives,* and lower federal cases where the nonenforcement of laws protecting black civil rights was identified as a rights denial, the significance of such terms as *shield* and *excuse* in the *Civil Rights Cases* might easily slip by. Indeed, Justice Bradley's use of negative language in his early articulation of state action principles in *Cruikshank* ("fails to comply with the duty enjoined") aligned with his use of the terms *shield* and *excuse* in the *Civil Rights Cases*.

But Justice Bradley's language has been difficult to understand in the twentieth century for reasons that go beyond the case method and the Judiciary Act of 1891. The decline and disappearance of nineteenth-century intellectual frameworks is a third reason for this difficulty. Historist jurisprudence, for example, declined in use and legitimacy during the Progressive era, as dissatisfaction with *Lochner* grew and support for business regulation built up.[52] With the collapse of *Lochner* during the New Deal, the central distinctions of traditional police powers jurisprudence were discarded (Gillman 1993:175–93), and with this went the last remains of the nineteenth-century historist idiom. A loss of familiarity with the historist idiom naturally accompanied its disappearance, and it became easy to miss the Waite Court's use of it. It became easy to "read over," for example, major clues that the Waite Court applied state action rules to the Fourteenth but not the Fifteenth Amendment.

One clue was *United States v. Reese*'s references to a "new constitutional right" and rights "created" by the Constitution (1876:218, 217). For modern readers, these references look mundane because it has become conventional to view all rights as created by the Constitution. The "created rights" category thus looks like an obvious truism, and obvious truisms are not in need of investigation.

The "created rights" category in *Reese,* though, was anything but ordinary. It gained meaning within the historist idiom, which Justice Bradley used to distinguish between rights created by the Constitution and rights that preexisted the Constitution. As he explained, different rules for congressional enforcement of the Fourteenth and Fifteenth Amendments sprang from this rights distinction. This distinction, alien to modern readers, is easily missed today because the term *created rights* exists in today's legal

[52] As dissatisfaction with *Lochner* rose, the natural law concept (freedom-of-contract) on which *Lochner* rested became discredited.

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lexicon. Skinner (2002) has identified this danger in historical study, where interpreters impart modern meanings to words used in earlier periods. The result is that an alien element is "dissolve[d] into a misleading familiarity" (2002:76). That *Reese* is viewed as a state action decision (e.g., Tribe 2000) is evidence that this has occurred. Mabry (1909), in contrast, perceived the nature and reach of the Waite era's Fifteenth Amendment doctrine.

It is only recently that conditions permitting the perception of early state action concepts have been established. This is a critically important point. For the bulk of the twentieth century, there was an absence of scholarly efforts to reconstruct the intellectual context of nineteenth-century jurists. Political scientists built progressive, "materialist" accounts that viewed the postwar Court as the instrument of big business. Historians, whose research practices were most suited to this recovery, did not direct them toward this end. Dunning school (1907) and progressive narratives of Reconstruction (Beard 1913) dominated history for roughly the first half of the twentieth century; for the second half, historians built and embraced the abandonment narrative. As much as these dominant narratives differed in their portrayals of Reconstruction, each made it unlikely that the intellectual universe of the Waite era would become an object of inquiry.

Among law professors, the "turn to history" did not occur until the 1980s. In response to the surging influence of originalism and a crisis in liberal legalism, a republican revival swept law schools (Kalman 1996:132–63). It was only in 1997 that Gordon announced the arrival of critical historicism in the *Stanford Law Review*. The central approach in critical history—the contextualization of past texts—now gained systematic attention in a high-profile law review (Fisher 1997).

Recently, too, scholars across the academy have revised the conventional account of "laissez-faire constitutionalism." Their recovery of the intellectual universe of late-nineteenth-century jurists has helped make possible historical institutional analyses of the turn-of-the-century Court (Gillman 1993; Novkov 2001), as well as the analysis here.

This work was unavailable in the 1940s, when a federal grand jury reported that a Sikeston, Missouri, lynching did not constitute a federal crime.[53] At this time, the Civil Rights Section (CRS) of the Justice Department and its chief, Victor Rotnem, struggled to revive Reconstruction-era statutes. Viewing Southern refusals to give

[53] In 1942, a white mob murdered Cleo Wright, who was in state custody at the time. The grand jury, authorized by Attorney General Francis Biddle because the incident had become fodder for Axis propaganda, found that the Sikeston police "failed completely to cope with the situation" (quoted in Rotnem 1943:58).

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police protection to blacks as a constitutional violation, Rotnem saw an equal protection approach to be "the strongest basis" for attacking this dereliction of duty (1942:260).

But the CRS directed its attack at state officials who misused their power, viewing *Harris* (Rotnem 1943:71–3) and the *Civil Rights Cases* (Rotnem 1943:64–7) as obstacles to the federal prosecution of private persons in most cases (see, generally, Carr 1947). Private persons who cooperated with officials in their criminal acts could be prosecuted, Rotnem asserted (1942:259), and so could private members of lynch mobs who attacked somebody in state custody (Rotnem 1943:63–73). But private persons who abducted and lynched blacks out of their homes, who did so without the participation of local officials, and who remained unpunished because state officials refused to prosecute them, remained outside federal reach. Or so the CRS believed.

Certainly, the liberal interests of CRS attorneys do not explain their deliberate and reluctant choice to leave such persons unprosecuted. But if a behavioral model cannot explain this choice, what can is a constitutive conception of legal institutions (Smith 1988). Indeed, the concept of a "jurisprudential regime," which builds on Smith, is especially applicable here. Richards and Kritzer define a jurisprudential regime as "a key precedent, or a set of related precedents, that structures the way in which [legal actors] evaluate key elements of cases in arriving at decisions in a particular legal area" (2002:308). My use of their concept suggests, of course, that a jurisprudential regime can consist of anachronistic interpretations of key precedents. What is clear, though, is that an institutionally constituted perspective on the *Civil Rights Cases* and *Harris* was shaping the path of constitutional development.

During the Second Reconstruction, the assumptions and concepts that constituted early state action doctrine remained mostly unrecognizable. During this period, indeed, liberal scholars built the retreatist narrative. The prominent historian C. Vann Woodward outlines this narrative in the highly influential *Strange Career of Jim Crow:*

> The cumulative weakening of resistance to racism was expressed also in a succession of decisions by the United States Supreme Court between 1873 and 1898 that require no review here . . . The court, like the liberals, was engaged in a bit of reconciliation–reconciliation between federal and state jurisdiction, as well as between North and South, reconciliation also achieved at [black] expense (1974:71).

We have arrived, then, back where this article began. Woodward's reputation gave weight to this narrative, but his work was also part of a major upheaval going on in history departments. At mid-century,

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historians overthrew Dunning school accounts of Reconstruction, building new histories that centered the egalitarian-minded Radical Republicans. Legal scholars drew from these histories in constructing the retreatist narrative, which legitimated not just demonstrations in Birmingham and Selma but also the rights revolution.

Conclusion

The Civil War opened great debates over black rights and the scope of the nation's power to protect those rights, but the judicial settlement of those debates has been misunderstood. The recovery of state neglect principles and the Court's theory of the Fifteenth Amendment does not mean we should recast Waite Court justices as racial heroes or substitute an embrace-of-Reconstruction story. The Court, after all, refused to declare access to public accommodations a fundamental right. The Court also permitted (Justice Harlan included) harsher punishment for cross-race fornication than intrarace fornication (*Pace v. Alabama* 1883). Still, the Waite Court did not definitively abandon blacks. The Court left intact federal power to protect black physical security and voting, though it left unanswered important standard-of-proof questions.

We are left, too, with many new research topics. It is worth examining, for example, the disappearance of the tripartite rights hierarchy during the struggle over *Lochner*. The Court used this tripartite concept for the last time in 1917 (*Buchanan v. Warley*, 245 U.S. 60, 78-79), around the same time that Chafee's work (1920) exemplified a new and rearranged way of thinking about rights and rights protections. Chafee's "process-protecting" defense of free speech offered a solution to a problem that confronted legal Progressives (how to justify Court restraint in matters of business regulation and Court intervention in matters of free speech), and Chafee's work was enshrined by the New Deal Court when it laid out a new "bifurcated" rights regime (Graber 1991). This new rights regime appeared promising for minority rights. But did it help bury the meaning of the old civil/social distinction in the *Civil Rights Cases?* Did the expansion of Commerce Clause jurisprudence play a role as well, in lowering the stakes of civil rights advocates in state action cases and hence lowering motivation to take a fresh look as these cases?

It would also be useful to track the establishment and circulation of Justice Bradley's reputation as a servant of the great corporate interests. This image supports the view that Justice Bradley turned away from Reconstruction and toward the giant corporations, and it thus reinforces distorted interpretations of the *Civil*

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Rights Cases. Scholars have forgotten that Justice Bradley dissented in *Chicago, Milwaukee & St. Paul Railway v. Minnesota* (134 U.S. 418 [1890]), the decision that began a trend toward invalidating statutes on substantive due process grounds. Also forgotten is Fairman's (1956) work on Justice Bradley and Justice Felix Frankfurter's conclusion that "Bradley was a striking disproof of the theory of economic determinism, because he, who by his previous experience would supposedly reflect the bias of financial power, was as free from it as any judge and indeed much more radical" (quoted in Lurie 1986:363). Justice Bradley's reputation, in short, is ready for an overhaul, and we should map how conventional portraits of him have reinforced the abandonment narrative. Clearly, then, this article is very much of a beginning.

My point has been to show that our understanding of the state action cases depends on our access to the Waite Court's way of seeing and to political sequences of the time. There are unrecognized pieces of the story about the Court and Reconstruction, and my aim has been to show how our perspective shifts once we begin to recover the legal language of that era, which has disappeared.

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