TO: USC Workshop Readers
FROM: Barry Friedman
RE: November Workshop

Attached you will find the fifth chapter of a book I am writing on the history of the relationship between judicial review and popular opinion. I have been working hard to get the entire book down on paper, which means I've given insufficient attention to editing. Please forgive the rough state of this. I'm extremely grateful for the chance to workshop the chapter. I am open to any thoughts, ideas, suggestions you have. (I'm especially thankful if you can save me from the mortification of factual error.)

I thought it would be easier to appreciate the chapter if you had some idea of the thesis and direction of the project. The book is framed against the common assumption – held by many proponents and opponents of judicial review alike – that the Court necessarily acts contrary to the popular will. My argument here is that the Court necessarily swims in the mainstream of public opinion. If it does not, then there are ample means of correction. The Court understands this, and largely avoids trouble. This does not mean the Court is or should be always right where public opinion rests. The very fact that it runs ahead or lags behind is what moves the story, and provides the basis for an important societal conversation about what the Constitution means. Over time, though, the Court will not resist contrary popular will. This fact, and the equally important fact that the public supports the practice of judicial review, suggests the Court is not the anti-majoritarian body so often assumed. (It also suggests, though I do not insist on the point, that the Constitution itself comes to mean over time what the American people believe it should.)

My claim is not that it has always been this way. To the contrary, the first half of the book is an explanation of how the practice of judicial review became embedded in American democracy. I begin by arguing that judicial review was an American invention that developed as a response to concerns about legislative authority running riot. The practice experienced a remarkably rapid rise between 1776 and the end of the 19th Century. Then, in 1800, the judiciary encountered a superior force: politics. In the battles during the Jeffersonian era, the judiciary had more at stake than simply the power of judicial review. Those fights ended with a tacit deal that judges would largely stay out of partisan politics, in exchange for retaining their judicial independence. Independence did not mean power, however. In the period that followed, the Supreme Court's orders often were defied, not infrequently with approbation by the highest authorities. It was only later – coinciding with Andrew Jackson realizing he needed the Court during the Nullification Crisis – that notions of judicial supremacy began to take hold. (A sub-theme of the book is that national authorities constantly props up the federal judiciary because they need it to keep the States in line.)

Judicial supremacy posed a problem for the country, particularly after the decision in Dred Scott. The answer to nascent supremacy proved to be controlling the court though means such as jurisdiction stripping and manipulating its membership to ensure judicial judgments were acceptable. The idea that such control was acceptable largely came to an

end, however, in the great fight of 1937, when Roosevelt proposed packing the Court. The death of Roosevelt's plan ushered in the modern era. Now, the judiciary is largely immune from direct attacks, but only so long as its decisions remain acceptable to the majority of the American people.

Although this book draws heavily – albeit often implicitly – upon the vast political science literature on the Supreme Court and judicial review, it has its novelty even within that genre. The political literature largely sees judicial review through the lens of a power struggle among the political branches. Because it is the branches acting, the story is often told as an equilibrium game. My book works hard to step beyond the branch actors and look at the role played by the American people. As a lay historian, I am well aware of the difficulty of capturing "public opinion." My argument, nonetheless, is that body politic stands outside of, and ultimately governs the actions of, branch actors. (In the lingo of positive political theory, public opinion works to correct for principal-agent slack.) Thus, looking only at branch politics, there was every reason to think FDR's plan would succeed. He had won an overwhelming electoral mandate, and had firm control of both houses of Congress. Where his plan failed was in the highest court in the land – the court of public opinion. It failed because the public at that time was concerned about overweening executive authority and valued an independent body to protect individual rights. That is largely what the Court has been doing since.

As I say, capturing public opinion is not easy, and I try to be realistic about what one can accomplish. Elite opinion tends to be favored. Often the people are complacent. Yet, many of the events chronicled here did attract widespread attention and occasioned great debate, outside the corridors of government. Not infrequently opinion "outside the Beltway" was different from that within.

The chapter you are kind enough to read is but one part of that broader story. This chapter follows one on Dred Scott, the Civil War, and the instances of controlling the Court by manipulating its size, and stripping its jurisdiction. This chapter begins with the collapse of Reconstruction and move from there, ending on the verge of the *Lochner* era.

As you will see, I am trying to write this as a historical narrative that might reach an audience a bit (though perhaps not much) beyond the professoriate. The main consequence of this is that I've moved all the scholarly references to the footnotes. The notes will be plump, and are yet incomplete. Please excuse their raggedy shape. I am always happy to learn about anything I should read that I have not (including your own work).

Once again, please bear with me. This is assuredly a work in progress. I'm grateful for any efforts you are able to devote to it, and extremely open to help.

I look forward to meeting with you.

Chapter 5
The Court and the Corporations
"the importance of the Federal courts has rapidly increased"

Like the phoenix rising from the ashes of its own funeral pyre, the Supreme Court experienced a remarkable rebirth over the next generation. By 1885, the historian of judicial review William Meigs would talk of judicial supremacy: "The very idea of a court's judgment in a suit between A. and B. finally and forever settling as to everybody and all departments of government the great questions of constitutional law, seems almost an absurdity."[1] Yet, he acknowledged "this is the view ordinarily accepted" – so much so that "an argument on the other side runs a very good chance of not even being listened to."[2]

Then as now, observers attributed the rise of judicial supremacy to "acquiescence,"[3] the gradual acceptance by the people over the passage of time. "The thing which Lincoln feared has come," wrote Thomas Speed Mosby in the Progressive magazine The Arena, in 1906, "so quietly, so stealthily, that it is even now scarcely recognized."[4] Tellingly, Mosby's article was titled "The Court as King."

While rise the Court did, the explanation is hardly so simple. The people did not submit to the Court. Rather, the Court found its way to the center of the American stage by recognizing the key to its own strength: giving the people, or at least a powerful constituency, what it wanted.

The renaissance of the Court can be tied to two pieces of legislation enacted by Congress in 1875. The first, the Civil Rights Act of 1875, granted black citizens equal access to public accommodations such as transportation, theatres and hotels.[5] The second, innocuously titled the Act of March 3, 1875, dramatically expanded the jurisdiction of the federal courts.[6] While the latter act might have been thought to serve the first, by opening the doors of the federal courts still wider to blacks seeking to enforce their rights, history had it otherwise. The new jurisdiction was invoked first and foremost by corporations, while the courthouse door was slammed in blacks' faces.

By abandoning blacks and embracing corporations, the Court rose to the pinnacle of power. Beginning in 1873 the Supreme Court dismantled most congressional civil rights legislation, including the 1875 Act, and took the teeth out of the new constitutional amendments. This it did to plaudits from an American populace fatigued by Reconstruction. Simultaneously, the federal courts devoted their energies to providing a

[1] Meigs, Relation, supra note _ at 198.
[2] Meigs, Relation, supra note _ at 191.
[3] Graber, Naked Land Transfers, supra note _ at 78; Graber, Emblematic Establishment, supra note _ at 28; Collins, Before, supra note _ at 1310-1320; Ashley, supra note _ at 221; Mosby, supra note _ at 118; Rosenberger, supra note _ at 55; Power of the Judiciary at 597; Moschzisker, supra note _ at 71; The Nation, May 21, 1924 Volume 118 at 579, 580.
[4] Mosby, supra note _ at 118.
[5] See infra notes ** and accompanying text.
[6] See infra notes ** and accompanying text.

safe haven for corporations seeking relief not only from ordinary suitors but also from state laws. Although some grumbled, this served the purposes of the dominant Republican Party and its chief clients, the tycoons of America's flourishing big businesses.

Once again, the Court's salvation rested in its nationalizing power at the expense of the States. By the time Mosby wrote, in 1906, the judiciary was under severe attack – the most sustained and hostile in all of history – for its decisions protecting the interests of business. In the 1870s, though, all that lay ahead. The Supreme Court, its reputation tattered by its own bad judgment, had a long climb to the sort of power that evokes wrath. This is the story of how it got there.

"the law which operates upon one man shall operate equally upon all"

From the end of the Civil War until its last act in 1875, the Reconstruction Congress worked to specify and protect the rights of newly-emancipated blacks. This process yielded three constitutional amendments and at least twice as many major congressional enactments. While struggling with the theoretical question of how precisely to define equality, Congress had to deal with the very practical problem of continuing Southern recalcitrance.

Looking back, James Blaine of Maine, congressional leader and failed Republican Presidential candidate, observed that Southerners seemed to view readmission to the Union "only as the beginning of the era in which they would more freely wage conflict against that which was distasteful and, as they claimed, oppressive."[7] Southern resistance was so virulent it yielded a new vocabulary of hate. "'Carpet-baggers,'" Blaine explained, were named "from the insulting presumption that the entire worldly estate . . . was carried in a carpet-bag, enabling him to fly at any moment of danger from the State whose domestic policy he sought to control." "The prospect of success of the new movement," Blaine continued, "induced a number of former rebels to join in it, and to them the epithet of 'Scalawag' was applied."[8]

Congress' first steps to ensuring black equality became law with relative ease. The Thirteenth Amendment, ratified in 1865, barred "slavery" and "involuntary servitude."[9] Congress was given power to enforce the Amendment "by appropriate legislation."[10] Then, Congress passed the Civil Rights Act of 1866, which granted Negroes the right to contract and own property, and to participate as suitor and witness in court proceedings, on equal terms with whites.[11]

There were two difficulties with these measures that led to further Amendments. First, freeing the slaves served ironically to increase the political strength of the rebel

[7] Blaine, supra note _ at 467.
[8] Blaine, supra note _ at 471.
[9] U.S. Const. amend. XIII, § 1.
[10] U.S. Const. amend. XIII, § 2.
[11] Scaturro, supra note _ at 8; Fairman, Reconstruction, supra note _ at 133.

states. The Constitution allocated congressional seats based on each State's population. Slaves, recall, counted only for "three fifths" for these purposes, so once the slaves were emancipated, the Southern states gained increased congressional seats from the increase in "population." While emancipation increased Southern political power, the laws in those states did not permit blacks to vote. As a practical matter that meant all the new seats were likely to go to opposition Democrats. [12] Second, there were doubts, even among supporters, that the Civil Rights Act of 1866 was authorized by the Thirteenth Amendment, that it was not "appropriate legislation" to eliminate slavery.[13]

The Fourteenth Amendment solved one of these problems, and dealt with the other in part. The sweeping clauses of the Fourteenth Amendment's first section addressed issues of equality and rights directly. Section 5 then gave Congress power to enact enforcing legislation.[14] Describing this combination, Thaddeus Stevens, a leading House Radical and one of the Amendment's drafters, said it "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all."[15] Together these clauses plainly gave Congress authority for the 1866 Civil Rights Act, which was re-passed as a precaution in 1870.[16] Section 2 solved the voting problem. It held that if a State failed to permit voting by any "male inhabitants" representation was reduced accordingly.[17] Section 2 did nothing to assure Republican control of the Southern states but it did ensure they did not gain political power from emancipation.

The final amendment gave black men the vote, thereby giving Republicans an advantage in the South and North alike. As such, observed Radical Congressman William D. Kelley, "party expediency and exact justice coincide for once."[18] The North posed a particular problem for Republicans. The National Anti-Slavery Standard explained that "evenly as parties are now divided in the North, it needs but the final ratification of the pending Fifteenth Amendment, to assure . . . the balance of power in national affairs."[19] Ratified in 1870, the Fifteenth Amendment states that the vote cannot be "denied or abridged . . . on account of race, color, or previous condition of servitude." It too granted power for congressional enforcement.[20]

Three constitutional amendments were hardly enough to deter Southerners hell-bent on subjugating blacks and overturning rule by Reconstruction authorities. The Klan, and later other organizations, engaged in terrorist activities to recover Southern white rule. Federal Judge Hugh L. Bond, who traveled to North Carolina to deal with Klan violence, told his wife "I never believed such a state of things existed in the United

[12] Fairman, Reconstruction, supra note _ at 132; Nelson, supra note _ at 46.
[13] Fairman, Reconstruction, supra note _ at 133; Nelson, supra note _ at 48.
[14] U.S. Const. amend. XIV, § 1,5; Scaturro, supra note _ at 9.
[15] Cong. Globe, 39th Cong., 1st Sess., 249 (1866), quoted in M. Curtis, supra note _ at 86.
[16] Fairman, Reconstruction, supra note _ at 133.
[17] U.S. Const. amend. XIV, § 2; Scaturro, supra note _ at 9; Fairman, Reconstruction, supra note _ at 134.
[18] National Anti-Slavery Standard, November 14, 1868, in Gillette, supra note _ at 19.
[19] National Anti-Slavery Standard, June 26, 1889, in Gillette, supra note _ at 19.
[20] U.S. Const. amend. XV.

States."[21] Fearing to put on paper what he had heard and seen he would say only "I do not believe any province in China has less to do with Christian civilization."[22] Attorney General Amos Akerman, himself from Georgia, said the Klan had "revealed a perversion of moral sentiment among the Southern whites . . . I can hardly bring myself to say savage, but certainly very far from Christian."[23] Bond described a case where a woman was "dragged from her cabin, beaten, and then 'her hair burned off her privates'" and an "'outrageous and unprovoked assault with intent to kill a man who was absolutely unknown to most of his would be murderers.'"[24] Debating congressional Reconstruction measures, black South Carolina Representative Robert Elliott related the custom "of Democratic journals to stigmatize the negroes of the South as being in a semi-barbarous condition" and asked "pray tell me, who is the barbarian here?"[25]

Election related violence was the worst, as suppressing the black vote was the ultimate goal. "So bitter was the hostility to impartial suffrage," Senator Blaine explained, "that vicious organizations . . . were formed throughout the South for the express purpose of depriving the negro of the political rights conferred on him by law." Blaine described the Klan in classic, colorful terms: "They rode by night, were disguised with masks . . . They whipped, maimed, or murdered the victims of their wrath."[26] A federal marshal on the ground in Gibson County, Tennessee reported "a mob at every poll" and "a perfect reign of terror. Intimidation, violence . . . and preventing of the colored citizens from voting was the order of the day."[27] As late as 1874, President Grant was still reporting "[b]ands of men masked and armed" and "murders enough were committed to spread terror among those whose political action was to be suppressed."[28]

Congress stepped in by enacting numerous enforcement acts in 1870 and 1871, doing its "utmost to strengthen the hands of the President in a contest with these desperate elements."[29] Often stated in sweeping terms, these acts were aimed primarily at protecting black suffrage and eliminating the Klan.[30] One act, for example, made it illegal for "two or more persons" to "conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving" anyone of "equal protection under the laws."[31] Opponents fought the measure, arguing that the rights at stake fell within the

[21] Hugh L. Bond to Anna, February 9, 1871, quoted in Kaczorowski, supra note _ at 54.
[22] Hugh L. Bond to Anna, February 9, 1871, quoted in Kaczorowski, supra note _ at 54.
[23] Akerman to General Alfred H. Terry, November 18, 1871, quoted in Kaczorowski, supra note _ at 54.
[24] Hugh L. Bond to Anna, June 14, 1871; n.d., Hugh Lennox Bond Papers, The Maryland Historical Society quoted in Kaczorowski, supra note _ at 54.
[25] Cong. Globe, 42d Cong., 1st Sess., 391-392 (1871), quoted in Foner, Freedom's Lawmakers, supra note _ at 70.
[26] Blaine, supra note _ at 469.
[27] L. B. Eaton to Attorney General, August 12, 1874, quoted in Gillette, supra note _ at 29.
[28] Grant, Sixth Annual Message, December 7, 1874, in Richardson, supra note _ at 297.
[29] Blaine, supra note _ at 469.
[30] Gillette, supra note _ at 25-26; Scaturro, supra note _ at 10-11; Fairman, Reconstruction, supra note _ at 143-47.
[31] Act of April 20, 1871, To Enforce the Fourteenth Amendment- The Ku Klux Act, quoted in Fairman, Reconstruction, supra note _ at foldout preceding 137.

excusive control of the states to protect.[32] They lost, proponents insisting Congress had the power to protect all the rights of citizenship, including those in the Bill of Rights.[33]

Ultimately, the congressional agenda reached more broadly still, beyond ensuring purely "political" rights. In 1873, Grant asked the Congress for more legislation. "The effects of the late civil strife have been to free the slave and make him a citizen. Yet he is not possessed of the civil rights which citizenship should carry with it."[34] What Grant had in mind had been the pet project of Senator Charles Sumner of Massachusetts for years, to obtain civil rights for blacks.

Sumner's proposed civil rights legislation faced intense opposition. As originally conceived, the Act guaranteed blacks equal access to hotels, transportation, public entertainment, schools, churches and burial grounds.[35] James Rapier, a black Representative of Alabama provided eloquent testimony of the need for the law: "[T]here is no law to secure me any accommodations whatever while traveling here to discharge my duties as a Representative of a large and wealthy constituency. Here I am the peer of the proudest, but on a steamboat or car I am not equal to the most degraded."[36] Nonetheless, much about the law was controversial. The idea of mixed schooling aroused particular passions, as did the notion that congressional legislation would govern so much private conduct.[37] Allen G. Thurman, a Democrat Senator from Ohio, argued that the Fourteenth Amendment said "no state shall" yet the proposed legislation was "aimed against the acts of individuals." "[T]here is not one single act or omission in this bill which is not already punishable in Louisiana under her State statute."[38]

Proponents of Sumner's law conceded the law's intrusion into many areas of what traditionally was state responsibility, explaining the necessity nonetheless. Benjamin Butler, the floor sponsor, argued "when a railroad-car is in full speed . . . and a negro is taken neck and heels and thrown out of the car, it may be difficult to tell whether that was done on one side or the other of the State line."[39] Also acknowledging the unusual scope of the law in going after private citizens rather than state officials or those acting "under color of state law," supporters candidly explained, "We desire to protect the right by punishing the wrongdoer," and no state law "shall protect the criminal from punishment."[40]

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[32] Kaczorowski, supra note _ at 57; Gillette, supra note _ at 27.
[33] Kaczorowski, supra note _ at 57; Gillette, supra note _ at 27.
[34] Grant, Second Inaugural Address, March 4, 1873, in Richardson, supra note _ at 221.
[35] Foner, Reconstruction, supra note _ at 504.
[36] 2 Cong. Rec. at 4782 (1874), quoted in Davis, supra note _ at 1712.
[37] Gillette, supra note _ at 204; Scaturro, supra note _ at 122, 126; Fairman, Reconstruction, supra note _ at 181-83. The Democrats in the Senate focused most of their attack on the clause governing schools, prompting many Republican senators to concede that the act would not require mixed schooling; voluntary segregation would be perfectly legal. Gillette, supra note _ at 204.
[38] Cong. Rec., 43rd Cong., 1st Sess., at 4083, quoted in Fairman, Reconstruction, supra note _ at 179. See also M. Curtis, supra note _ at 158 (noting that some Congressmen, Republicans and Democrats alike, believed that the Fourteenth Amendment did not govern the actions of private individuals).
[39] 2 Cong. Rec., 340 (1873), quoted in Scaturro, supra note _ at 121.
[40] 2 Cong. Rec. Appendix 360-61 (1874) (Senator Oliver P. Morton), quoted in Scaturro, supra note _ at 124. See also Corwin, supra note _ at 645 (noting that one theory upon which the act was based was that

After a long struggle, Sumner's measure was enacted in 1875, although limited to inns, public conveyances, jury duty, theatres and other public amusements.[41] Schools were most notably omitted from the list. Passage in the Senate was a tribute to Sumner, who had died the previous year and breathed this as his dying wish.[42] Following a contentious 1874 election in which Democrats had swept to victory, the lame duck session that enacted the law served as the last gasp of Reconstruction Republicans.[43]

"The legislation . . . for the protection of civil rights has been held . . . unconstitutional"

Little came of the Reconstruction Congress' ambitious civil rights agenda. Even before Congress enacted the 1875 Act, the Supreme Court was tearing the teeth out of the measures. In 1888 George Holt published a comprehensive treatise on the jurisdiction of the state and federal courts.[44] The section entitled "Civil Rights Suits" was a short one indeed. Though it went on a just few lines longer, the first sentence held all the punch: "The legislation of Congress for the protection of civil rights has been held by the United States Supreme Court to be, in its principal general provisions, unconstitutional."[45]

As fate would have it, the first request that the Court interpret the Fourteenth Amendment came at the behest of butchers challenging a monopoly established by the City of New Orleans.[46] Following the Civil War, Texas had a glut of cattle waiting to find their way to northern markets. The city imagined its slaughterhouse business to flourish, and among other measures passed a law requiring that all butchering occur at the facilities of the Crescent City Live Stock Landing and Slaughterhouse Company.[47] The salutary purpose was ensuring sanitary conditions essential to the elimination of yellow fever.[48] Municipal law also forbade the monopoly from excluding any butcher from

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Section Five of the Fourteenth Amendment gives Congress the power to pass "affirmative legislation, designed to supply the inadequacies of State legislation and directly impinging upon private individuals.").

[41] The Senate's first version omitted churches, Gillette, supra note _ at 205; the House watered down the bill by excluding cemeteries and schools as well, Gillette, supra note _ at 263, 270; Scaturro, supra note _ at 15, and the Senate passed this watered down version.

[42] Foner, Reconstruction, supra note _ at 533; Scaturro supra note _ at 123; Fairman, Reconstruction, supra note _ at 175.

[43] See infra notes ***.

[44] Holt, George C., The Concurrent Jurisdiction of the Federal and State Courts, (New York, Baker, Voorhis & Co. 1888).

[45] Holt, supra note _ at 29. Ironically, given *Dred Scott*, the sentence concluded "except as to the territories and public domain over which Congress has exclusive legislative authority." Holt, supra note _ at 29. The Court began by denying Congress the power to regulate slavery in the territories; by the time it was over, the territories were the only place Congress could protect civil rights in the way it chose.

[46] As these words are typed, the City of New Orleans lies under water, ravaged by the Hurricane Katrina. Time will tell if the Crescent City will rise again.

[47] The Slaughter-House Cases, 83 U.S. 36, 38 (1872); Franklin, Part One, supra note _ at 3-4; Beth, supra note _ at 489; Kaczorowski, supra note _ at 144.

[48] Franklin, Part Two, supra note _ at 222-24; Davis, supra note _ at 1715. Before the Civil War, yellow fever epidemics repeatedly ravaged New Orleans. General Butler, the first military governor of the city after the war, virtually eradicated the disease through quarantines and clean-ups. Yet after federal troops left the city, the disease quickly regained strength and epidemics raged once again. Franklin, Part Two, supra note _ at 219-224.

plying his trade there.[49] Still, the butchers bristled. It was common knowledge, and subsequently adjudicated, that Crescent City was a "wholesale bribery concern"[50] that had plied its own trade with the legislature in order to obtain the monopoly.

The case posed a dilemma to Southern whites opposed to Reconstruction. Was it better "[t]o find a means of preventing misgovernment by carpetbag legislatures," using the Fourteenth Amendment and the federal judiciary to this end? Or would it be better instead "denying that the Fourteenth Amendment had any real life or substance to it," thereby reducing its value to the North as tool to govern the South?[51]

As it happened, Southerners managed to do both. The butchers retained Justice John Campbell to represent them in the Supreme Court. Campbell was an Alabama native who resigned from the Supreme Court and headed home once the Civil War began. Campbell grossly over-argued his case, claiming an enormous scope to the Fourteenth Amendment. The outcome, a loss for his clients, made one wonder whether Campbell, an accomplished lawyer, acted out guile or by accident.[52]

In the 1873 *Slaughterhouse Cases*, the Supreme Court took a butcher's knife to the Fourteenth Amendment. By the time Justice Miller's opinion for the Court majority was done, little remained of the three majestic clauses of Section 1. The New York Times termed it "a severe . . . blow to that school of constitutional lawyers who have been engaged, ever since the adoption of the Fourteenth Amendment, in inventing impossible consequences for the addition to the Constitution."[53]

The butchers' relied primarily on the "privileges and immunities" clause of the Fourteenth Amendment, which the *Slaughterhouse* majority basically wrote out of the Constitution. Justice Miller did so by drawing a distinction between "citizenship of the United States, and a citizenship of a State:" it was, according to the Court only the rights of the "former which are placed by this clause under the protection of the Federal Constitution."[54] Miller then limited that set of national rights severely, depriving the clause for all time of any meaningful content. In addition to the right "to come to the seat of government to assert any claim he may have,"[55] came such things as "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."[56]

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[49] *Slaughterhouse*, 83 U.S. at 41; Beth, supra note _ at 489.
[50] Supreme Court Transcript in Durbridge v. The Slaughterhouse Company, at 409, quoted in Franklin, Part One, supra note _ at 25; see also Kaczorowski, supra note _ at 144.
[51] Boudin, Government By Judiciary Vol. 2, 98-99 (1932), quoted in Beth, *supra* note _ at 489.
[52] See Franklin, Part One, supra note _ at 81-82(arguing that Campbell, a Southern Democrat, only cared about persuading the Supreme Court to interpret its own powers broadly so that it might use those powers to cut back on the Republican Congress' actions; although Campbell argued for a broad construction of the content of the Fourteenth Amendment, "[e]ven acceptance of the "narrow' view of the content of the Fourteenth Amendment ultimately prepared the way for a Southern Democratic victory, a Campbell victory, and was merely a prelude to the greater victory to come.")
[53] The New York Times, April 16, 1873, quoted in Warren, supra note _ at 544.
[54] *Slaughterhouse*, 83 U.S. at 74.
[55] *Slaughterhouse*, 83 U.S. at 79 (quoting Crandall v. Nevada, 6 Wallace, 36 (1867)).
[56] *Slaughterhouse*, 83 U.S. at 79.

This narrow interpretation of the "privileges and immunities" clause was under no conceivable view what the Framers of that Amendment had expected. Although debate would rage throughout history about just how far the Framers had intended to go, this was turning back before leaving the barn.[57] The four dissenters were beside themselves (all wrote but Chief Justice Chase, who was not to live out the year.[58]) Justice Swayne said the Court had turned "what was meant for bread into a stone."[59] His colleague Justice Stephen Field noted wryly that under the majority's decision the clause "was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[60]

The Court was equally dismissive of the claim that the Louisiana monopoly deprived them of property without "due process of law." Here the work was quick. "[U]nder no construction of that provision that we have ever seen," wrote Justice Miller, "can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held" a constitutional violation.[61]

Even with regard to claim that the Louisiana provision denied "equal protection of the law," the Court had narrowing work to do. The Fourteenth Amendment, it turned out, was about blacks, and nothing but, despite its sweeping language. Referring to the various clauses of Section 1, the Court said "no one can fail to be impressed with the one pervading purpose . . . we mean the freedom of the slave race."[62] Interpreted through that lens, "[w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class or on account of their race, will ever be held to come within the purview of this provision."[63] Never mind, for example, drafter Thaddeus Stevens' observation that according to the provision, "the same laws must and shall apply to every mortal, American, Irishman, African, German or Turk."[64]

More remarkable even than the specific interpretations was the view of federalism that served as the Court's guiding light. Conceding that the Civil War had demonstrated that the states presented a "true danger to the perpetuity of the Union," Miller still did not "see in those amendments any purpose to destroy the main features of the general system."[65] The Court, Miller wrote, "has always held with a steady and an even hand the balance between State and Federal power."[66] To rule as the butchers wished "would constitute this court a perpetual censor upon all legislation of the States" thereby serving to "fetter and degrade the State governments by subjecting them to the control of

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[57] See *infra* Chapter VIII, at *** (discussing the incorporation debate).
[58] Beth, supra note _ at 488; Kaczorowski, supra note _ at 159.
[59] *Slaughterhouse*, 83 U.S at 129 (Swayne, J., dissenting).
[60] *Slaughterhouse*, 83 U.S. at 96 (Field, J., dissenting).
[61] *Slaughterhouse*, 83 U.S. at 81.
[62] *Slaughterhouse*, 83 U.S. at 71.
[63] *Slaughterhouse*, 83 U.S. at 81.
[64] The Pending Canvass! Speech of the Hon. Thaddeus Stevens, delivered at Bedford, Pa., on Tuesday Evening, September 4, 1866, quoted in Nelson, supra note _ at 116.
[65] *Slaughterhouse*, 83 U.S. at 82.
[66] *Slaughterhouse*, 83 U.S. at 83.

Congress, in the exercise of powers heretofore universally conceded to them."[67] The Court simply would not buy a view of the Fourteenth Amendment that "radically changes the whole theory of the relations of the State and Federal governments to each other and of both those governments to the people."[68]

This theory of the "relations of the State and Federal governments to each other" no doubt came as quite a surprise to those who drafted the amendment. True enough, the amendment's supporters had denied any intent to achieve "consolidated Government."[69] Still, they were quite clear that the war had changed things. "I had in the simplicity of my heart, supposed that 'State rights' being the issue of the war, had been decided," declared Radical Richard Yates of Illinois.[70] Another Radical colleague agreed: "Hitherto we have taken the Constitution in a solution of the spirit of State rights. Let us now take it as it is sublimed and crystallized in the flames of the most gigantic war in history."[71] Engaging in typical understatement, Senator Blaine would look back and say that "[b]y decisions of the Supreme Court, the Fourteenth Amendment has been deprived in part of the power which Congress no doubt intended to impart to it."[72]

Even with the Fourteenth Amendment eviscerated thus, the carnage ultimately made of congressional Reconstruction legislation was not a foregone conclusion. The Civil Rights Act of 1875 was passed after *Slaughterhouse*. Sumner was quick to make the point that the Supreme Court's ruling did not disturb the impending legislation "by a hair's breadth."[73] After all, if the Court had granted Congress any due, it was the intention to help the blacks.[74]

By the time the Court was through, Congress might have saved its energies throughout the 1870s. *United States v. Cruikshank* and *United States v. Reese* both involved criminal prosecutions for gross violations of civil rights. *Cruikshank* concerned the mass slaughter and mutilation of some sixty freedmen in the struggle for political control of Louisiana.[75] *Reese* arose out of naked scheme to deny the vote to blacks in Lexington, Kentucky by refusing them the right to pay necessary taxes.[76] The Supreme Court overturned both convictions, and struck down the statute at issue in *Reese*. In *Cruikshank*, the Court concluded that the Fourteenth Amendment only protected the

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[67] *Slaughterhouse*, 83 U.S. at 78.
[68] *Slaughterhouse*, 83 U.S. at 78.
[69] Cong. Globe, 39th Cong., 1st sess., at 99 appendix (1866), quoted in M. Curtis, supra note _ at 55. This is a central point of William Nelson's book, The Fourteenth Amendment. See Nelson, *supra* note _ at 115 (quoting Representative Woodbridge, proponent of the amendment, saying it would "not destroy the sovereignty of a State"). Yet, Nelson argues that the Court's interpretation of the Fourteenth Amendment in *Slaughterhouse* was simply implausible. See Nelson, supra note _ at 163 (stating that "[b]oth of Justice Miller's approaches for narrowing the reach of section one were flatly inconsistent with the history if its framing in Congress and its ratification by the state legislatures.").
[70] Cong. Globe, 39th Cong., 1st sess., at 99 appendix (1866), quoted in M. Curtis, supra note _ at 55.
[71] Cong. Globe, 39th Cong., 1st sess., 163 (1866), quoted in M. Curtis, supra note _ at 48.
[72] Blaine, supra note _ at 419.
[73] Fairman, Reconstruction, supra note _ at 172.
[74] Fairman, Reconstruction, supra note _ at 172.
[75] Kaczorowski, supra note _ at 175.
[76] Kaczorowski, supra note _ at 200; Fairman, Reconstruction, supra note _ at 226-28.

victims from acts of the state itself, not the acts of private citizens.[77] One Southern lawyer described the reaction in Louisiana to release of the murderers as "the utmost joy . . . and with it a return of confidence which gave best hopes for the future."[78] A Radical paper commented that as construed the civil rights act was "only a pretense, keeping a promise to the colored man's ear and breaking it to his hope."[79] The Court in *Reese* proclaimed that the Fifteenth Amendment only created a right to be free from racial discrimination while voting. The states retained the power to both create and protect the general right to vote. Because the statute at issue punished all interferences with the right to vote, not just those motivated by race, it exceeded congressional power under Section Two of the Fifteenth Amendment.[80]

In 1883, the Court invalidated the Civil Rights Act of 1875. Ruling in the *Civil Rights Cases*, the Court held that the Fourteenth Amendment did "not invest Congress with power to legislate upon subjects which are within the domain of State legislation" nor "authorize Congress to create a code of municipal law for the regulation of private rights."[81] Put simply, Congress lacked the power under the Fourteenth Amendment to reach the acts of private individuals. The sole dissenter was Justice Harlan, but even he argued only that the rights at stake – to equal accommodation – already existed under state law, and therefore the statute fell within the Fourteenth Amendment's equality principle, that Congress can pass legislation to guarantee that state law operates equally on both races.[82]

Even the jury and suffrage rights eventually fell victim to the Court's undoing, at least if the states were at all subtle. In *Strauder v. West Virginia* the Court struck down a state law that banned blacks from juries, but later cases made de facto jury discrimination incredibly difficult to prove.[83] Depriving blacks of the vote took a little artifice on the part of states. In 1890 the Chicago Tribune would explain that to avoid federal interference, "the Southern States all have constitutional provisions and election laws which apparently guarantee the negroes the right to vote" but "[u]nder this cover election cheating has been reduced to a system and the blacks are practically disenfranchised in

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[77] *United States v. Cruikshank*, 92 U.S. 542, 555 (1875) (stating that the obligation of affording each citizen equal rights was "originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees but no more."); see also M. Curtis, supra note _ at 179; Kaczorowski, supra note _ at 216; Warren, supra note _ at 604. The Court in *Cruikshank* only held that the indictment was too broad and did not strike down the statute itself. Thus, as a strictly legal matter, the Court's narrow interpretation of the Fourteenth Amendment was dicta. *Cruikshank*, 92. U.S at 559; Kaczorowski, supra note _ at 216.

[78] Carleton Hunt, Fifty Years' Experience in Practice at the Bar, address at a meeting of the Lousiana Bar Association, June 6, 1908, quoted in Warren, supra note _ at 608.

[79] Warren, supra note _ at 607.

[80] *United States v. Reese*, 92 U.S. 214, 217-18, 221 (1875); Warren, supra note _ at 602; Kaczorowski, supra note _ at 213.

[81] *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

[82] *Civil Rights Cases*, 109 U.S. at 27, 37-43, 48-50 (Harlan J., dissenting); see also Nelson, supra note _ at 195. Justice Harlan also argued that the Thirteenth Amendment not only ended slavery but also ensured former slaves basic freedoms, and therefore Congress had the power under that amendment as well to "protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State." *Civil Rights Cases*, 109 U.S. at 36 (Harlan, J., dissenting).

[83] *Strauder v. West Virginia*, 101 U.S. 303 (1879); Klarman, supra note _ at 373, 376.

several Southern States."[84] By the time it decided *Giles v. Harris* in 1903, the Supreme Court had given up on policing even flagrant disenfranchisement.[85]

"a general apathy among the people concerning the war and the negro"

Had the Court unraveled this much of Congress' handiwork at any other time in history, it would have evoked an angry response. In this case, the popular reaction was at best a shrug, and more often plaudits. Undoing Reconstruction served only to enhance the Court's authority, for by the time it acted the people had tired of the entire endeavor. Writing after *Slaughterhouse*, the Nation applauded the Court for "recovering from the War fever, and . . . getting ready to abandon sentimental canons of construction."[86] A decade later, commenting on the *Civil Rights* decisions, the New York Times commended the Court for "serving a useful purpose in thus undoing the work of Congress."[87] Although the reasons for the collapse of national faith are complex, by 1876 the fact itself was inescapable.

By 1872, it looked like the government was making progress in suppressing Klan violence and protecting black rights. In addition to the enforcement acts of 1870 and 1871, Congress also had created the Department of Justice, centralizing the Attorney General's functions for the first time.[88] The combination of congressional authorization and aggressive government enforcement had served largely to suppress the Klan, and the country enjoyed its most peaceful Reconstruction election.[89]

Even yet, there were already troubling signs that Northern will was cracking. Horace Greeley, editor of the New York Tribune, and once an abolitionist, ran on the Democrat and Liberal Republican tickets against Grant. Greeley talked of "reconciliation" and advocated "local self-government," a code for abandoning military control in the South.[90] Although Grant trounced Greeley, the issue was now appropriate for public debate and Greeley had some prominent supporters.[91] The changing mood can be seen in the actions of Representative James A. Garfield of Ohio. In 1866 Garfield said he intended to "see to it that, hereafter, personal rights are placed in the keeping of the nation."[92] In 1871, he opposed passage of the KKK Act on the ground that the protection of personal rights is the realm of state governments.[93] (A decade later, Garfield would become President.)

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[84] The "Original-Package" Bill, Chicago Tribune, July 15, 1890..
[85] *Giles v. Harris*, 189 U.S. 475 (1903); Klarman, supra note _ at 365.
[86] The Nation, April 24, 1873, Volume 16 at 280-81, quoted in Kaczorowski, supra note _ at 162.
[87] The New York Times, January 24, 1883, quoted in Warren, supra note _ at 614.
[88] Scaturro, supra note _ at 11; Kaczorowski, supra note _ at 93.
[89] Foner, Reconstruction, supra note _ at 508.
[90] Gillette, supra note _ at 71; Foner, Reconstruction, supra note _ at 502, 503, 509.
[91] Gillette, supra note _ at 71-72; Foner, Reconstruction, supra note _ at 504, 511.
[92] Burke A. Hinsdale, ed., The Works of James Abram Garfield, Vol. 1, 110-11, quoted in Kaczorowski, supra note _ at 163.
[93] Kaczorowski, supra note _ at 163.

Public reaction to the *Slaughterhouse Cases* was a sign that by 1873 the public was losing interest. The Court itself was fully mindful of "the great responsibility" the cases presented: "No questions so far-reaching and pervading in their consequences . . . have been before this court during the official life of any of its present members."[94] While this likely was true, the public was not tuned in. "The decision was given to an almost empty Courtroom and Bar, and has as yet attracted little attention outside of legal circles," [95] reported the Boston Daily Advertiser. Yet the public quickly realized the importance of the decision.

There was some critical reaction. The American Law Review noted the irony that while the President kept federal troops in New Orleans to govern affairs there, the Supreme Court sent the people to the local courts.[96] Most of the critics, however, assailed the Court's approval of a corrupt monopoly rather than its failure to protect blacks. The Cincinnati Enquirer wrote: "It gives a legal sanction to the consummation of an outrage on individual rights . . . It is truly the monopolists' decision."[97] The Southern Law Review agreed, attacking the Court for allowing a "menacing monopoly created by a corrupt and ignorant carpet-bag State Government."[98]

However, most major newspapers tended to be supportive of the Court.[99] The idea that the State, not National, government was the proper one to deal with a monopoly was "undoubtedly in accord with the temper of the times. The country was tiring of the . . . usurpations of Federal power which had been the natural outcome of war and of war necessities"[100] The Nation gently commended the Court for showing "a very laudable determination to cling to the old and well-settled maxims of interpretation" (read: States rights).[101] The New York World wrote that the "Court very properly decided that . . . the new Amendments, fairly interpreted, leave all the broader relations between the States and the Federal Government unchanged and untouched."[102] The New York Tribune lauded the case as a "most important decision" because it "set up a barrier against new attempts to take to the National Government the adjustment of questions legitimately belonging to State tribunals and legislators."[103] The Chicago Tribune proclaimed: "The decision has long been needed, as a check upon the centralizing tendencies of the Administration to enforce its policy and to maintain its power, even at the expense of the

[94] The Slaughter-House Cases, 83 U.S. 36, 67 (1872).
[95] Boston Daily Advertiser, April 16, 1873, quoted in Warren, supra note _ at 539.
[96] Kaczorowski, supra note _ at 159.
[97] Cincinnati Enquirer, April 17, 1873, quoted in Warren, supra note _ at 542.
[98] William L. Royall, The Fourteenth Amendment and the Slaughterhouse Case, Southern L. Rev. (1879), quoted in Warren, supra note _ at 542.
[99] See Warren, supra note _at 542-45 (surveying major newspapers and finding them supportive of the Court's decision); Kaczorowski, supra note _ at 160-62 (noting a lack of controversy in newspaper reports as well as support from some Republican papers).
[100] Warren, supra note _ at 542-543.
[101] The Nation, September 24, 1874, Vol. 482 at 200. A mere seven years earlier, The Nation had argued that "Congress is directly invested with full power to legislate" to ensure the protection of black's civil rights." The Nation, March 1, 1866, Vol. 2 at 262-263, quoted in Kaczorowski, supra note _ at 162.
[102] New York World, April 16, 1873, quoted in Warren, supra note _ at 543.
[103] Quoted in Warren, supra note _ at 544.

constitutional prerogatives of the States. The Supreme Court has not spoken a moment too soon or any too boldly on this subject."[104]

The Democrats swept to power in the mid-term elections of 1874, which many viewed as a referendum on Reconstruction. Republicans sought to play down Reconstruction as an election issue, but the Senate's passage of Sumner's civil rights measure that year brought it front and center.[105] The Democrats took the House of Representatives, and won many state races.[106] James Garfield saw the election results as stemming in part from "a general apathy among the people concerning the war and the negro."[107]

The effect of weakening Northern will was reflected in extensive election turmoil and violence in the South. Not only was there a renaissance of the Klan, but also numerous other groups like the White Leagues emerged to fight Northern rule and political activity by blacks. More subtle than the Klan, these groups operated by day, and relied upon "social ostracism and economic pressure."[108] In Louisiana, a constant battleground, Grant twice used federal troops to ensure that loyal Republicans stayed in control of the Government. In wry editorial tones the New Orleans Times observed that Louisiana had been through five acting Governors: "It's not our fault that we haven't had more. Times are hard and we can't afford as much style as Costa Rica."[109] Others would comment on how "Mexicanized"[110] the government of the United States had become, given that victory in every presidential election during Reconstruction required the use or threat of force. When Grant called out the troops to quell violence prior to the election, the country was supportive.[111] When federal troops stepped in after the election to prevent a coup by Democrats, the mood was completely reversed.[112] An embattled Grant restored order in his own party basically by apologizing to the nation.[113] In the face of similar violence in Mississippi, Northerners were ambivalent and Democrats regained control of the state.[114]

Passage of the 1875 Act was the last gasp of Reconstruction. The politics of enactment were delicate. The Senate passed a version of the bill as a tribute to Sumner before the Republican's crushing defeat in the 1874 mid-term election. The measure had died in the House before the elections, leading Wisconsin Democrat Charles A. Eldredge

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[104] Chicago Tribune, April 19, 1873, quoted in Warren, supra note _ at 545.
[105] Gillette, supra note _ at 212, 217.
[106] Foner, Reconstruction, supra note _ at 523.
[107] Garfield to Julius O. Converse, January 21, 1875, quoted in Gillette, supra note _ at 131.
[108] Gillette, supra note _ at 45. In the chaotic New Orleans fall of 1874, the White Leagues switched tactics and participated in a violent coup. Gillette, supra note _ at 118.
[109] New Orleans Times, quoted in Gillette, supra note _ at 118.
[110] Woodward, supra note _ at 14.
[111] Foner, Reconstruction, supra note _ at 551.
[112] Gillette, supra note _ at 124-125; Foner, Reconstruction, supra note _ at 554; Scaturro, supra note _ at 16. But see Gillette, supra note _ at 124-25 (noting small indications of support for Grant's actions after the election).
[113] Gillette, supra note _ at 129.
[114] Foner, Reconstruction, supra note _ at 562-563.

to tell Republicans "it is the deadest corpse you ever saw and you are all glad of it."[115] No one expected Republicans to revive the bill in the post-election lame duck session at Congress for fear of ruining their chances of retaining the presidency in the election of 1876.[116] Yet a group of Republican representatives supported the bill for a plethora of reasons. More Radical Republicans felt a moral obligation to protect blacks. Others supported the bill for political reasons: to ensure that blacks would vote in the Election of 1876, to make the Democrats look racist or unprogressive, or to dispose of the issue before the 1876 presidential elections. [117] The House Judiciary Committee omitted the clauses requiring equal access to schools and cemeteries before sending the bill out to the floor.[118] Debate raged through throughout the holiday recess and into 1875, when one Washingtonian captured the spirit saying "*As a Democrat, I* would manage after a hard fight to be beaten; and *as a Republican I* would do the same. My opinion is that the side that wins will be beaten before the Country."[119] The goal of the Democrats was to oppose the bill in order to win the votes of most of the country's white population; passage of the bill would further help the Democrats by driving a permanent wedge between the Republicans and the white population.[120] On the other hand, many Republicans wanted to outwardly express support for the bill, in order to send a message that the Republican Party still stood for equality and justice. Yet the same Republicans did not actually want the bill to pass, for fear of permanently alienating whites, especially Southern whites.[121] The bill passed the House only after Republicans changed the rules to prohibit a filibuster by opponents.[122] The Republicans in the Senate then accepted the House's watered-down version of the law without changes, and Grant signed it.[123] "With the close of this Congress," reported Philadelphia's Republican *American and Gazette* "the era of reconstruction must be considered closed."[124]

The end of Reconstruction was confirmed in the resolution of the chaotic election of 1876. As returns came in on election night, it appeared initially that Democrat Samuel Tilden had beaten Republican Rutherford Hayes. Hayes recorded in his diary that "history will hold that the Republicans were by fraud violence and intimidation, by a nullification of the *15th* amendment, deprived of the victory they fairly won."[125] Then Hayes managers realized that if he gained the votes in three contested states he would be President.[126] For months the country was on edge and chaos reigned as Congress and the parties tried to work through the mess. Ultimately a Commission was appointed to resolve the matter subject to veto by both houses of Congress. Initial public reaction to the commission was not warm. The New York Times suggested "a simpler way to settle

[115] Congressional Record, 43rd Cong., 1st Sess., 5329, quoted in Gillette, supra note _ at 207.
[116] Gillette, supra note _ at 259.
[117] Gillette, supra note _ at 261-262.
[118] Gillette, supra note _ at 263.
[119] J.H. Maddox to Benjamin Butler, January 28, 1875, quoted in Gillette, supra note _at 266.
[120] Gillette, supra note _ at 264-265.
[121] Gillette, supra note _ at 265-266.
[122] Gillette, supra note _ at 269.
[123] Gillette, supra note _ at 272.
[124] American and Gazette, March 4, 1875, quoted in Gillette, supra note _ at 295.
[125] T. Harry Williams, ed., Hayes: The Diary of a President, 1875-1881 47-51 (1964) (emphasis in original), quoted in Fairman, Five Justices, supra note _ at 42.
[126] Foner, Reconstruction, supra note _ at 575.

the matter would be for Mr. Hayes and Mr. Tilden to be blindfolded on the portico of the Capitol, and 'draw cuts' for the Presidency."[127] The deciding vote was cast by Joseph Bradley, one of five Justices on the Electoral Commission. Bradley voted in all instances for the Republican electors, throwing the election to Hayes.[128] Or so it seemed. Democrats outraged by the Commission's actions, and tossing accusations of Bradley's vote being obtained by fraud, filibustered the official vote count.[129]

Although the precise terms will remain shrouded in mystery, Hayes ultimately was inaugurated following consumption of a deal that involved, at the least, the formal end to Reconstruction.[130] Early in the election chaos Garfield had written Hayes, suggesting a deal was possible "if in some discreet way" Southern moderates "could know that the South is going to be treated with kind consideration by you."[131] Responding to Garfield, Hayes replied "Your views are so nearly the same as mine that I need not say a word."[132] From that point negotiations continued, culminating in the last moments before Congress approved the Electoral Commission's work. "It was made evident by his words" Blaine reported on Hayes' Inaugural, "that he would adopt a new policy on the Southern question . . . It was plainly his determination to withdraw from the South all national protection to the colored people."[133] Hayes ordered federal troops to stand down, allowing "Redeemer" governments – committed to reinstating white rule and putting down the blacks – ultimately to take control of Southern capitols.[134] An era had come to an end.

The collapse of Reconstruction was evident in the reactions to Supreme Court decisions further undoing what Congress had done. Whereas *Slaughterhouse* had been met largely by silence, the decisions in *Cruikshank* and *Reese* were greeted with approval.[135] The Independent wrote: "To assume State powers as the method of punishing wrong in the States would be an experiment with our political system that had better be omitted. . . Southern questions . . . must be left to the States themselves . . . The General Government cannot authoritatively deal with them, without producing more evil than it will remedy."[136] The New York Times proclaimed that "The United States have

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[127] Fairman, Five Justices, supra note _ at 48.
[128] Foner, Reconstruction, supra note _ at 580.
[129] See Woodward, supra note _ at 156-65 (discussing the accusations against Justice Bradley and the filibuster).
[130] Foner, Reconstruction, supra note _ at 581-582; see also Woodward, supra note _ at 7-8 ("In effect the Southerners were abandoning the cause of Tilden in exchange for control over two states, and the Republicans were abandoning the Negro in exchange for the peaceful possession of the Presidency.").
[131] Garfield to Hayes, December 12, 1876, quoted in Woodward, supra note _ at 22.
[132] Hayes to Garfield, December 16, 1876, quoted in Woodward, supra note _ at 23.
[133] Blaine, supra note _ at 595.
[134] Foner, Reconstruction, supra note _ at 582, 589, 593; Woodward, supra note _ at 8-10; Bensel, Yankee Leviathan, supra note _ at 371. In the last few months of his administration, President Grant also played a role in the removal of federal troops from the South. Woodward, supra note _ at 10. President Hayes did not, contrary to popular belief, remove every federal soldier from the South yet his actions made clear that those remaining would have little political force behind them. Foner, Reconstruction, supra note _ at 582.
[135] Gillette, supra note _ at 297; Scaturro, supra note _ at 17; Warren, supra note _ at 604-06; Kaczorowski, supra note _ at 217.
[136] Independent, April 6, 1876, quoted in Warren, supra note _ at 605.

neither the power nor the obligation to do police duty in the States."[137] Response to the *Civil Rights Cases* was even warmer. The Independent reported that "several leading colored men have expressed great indignation and disappointment" but "the Court is clearly right."[138] The New York Times, the Nation and Harpers' Weekly all joined in applauding the Court.[139] "Finally, after eight years, in which the law has been practically a dead letter," reported the Times, the Court had done the right thing. The 1875 law, if "inoperative" was still "mischievous." Attributing perverse power to the civil rights law, the Times said it "has kept alive a prejudice against the negroes and against the Republican Party in the South, which without it would have gradually died down . . . The judgment of the court is but a final chapter in a history full of wretched blunders, made possible by the sincerest and noblest sentiment of humanity."[140] The Nation lauded the Court for settling "the point forever, that the Fourteenth Amendment merely adds new limitations upon State action . . . and does not change in any way the fundamental structure of the Government."[141]

Reconstruction crumbled for a complex of reasons, many which bear upon events that followed. An attachment to federalism and an unwillingness to turn state functions over to the federal government undoubtedly played a part,[142] though how sincere that attachment was would come into question in the next decades. Racism also undoubtedly played its ugly hand. Racism was flagrant in the South, but in the north as well "*Negrophobia*" imposed limits on how far Northern whites would take the equality idea.[143] The *Chicago Inter-Ocean*, a Radical paper, would say "no man of the Republican party has ever contended for the enforcement of social equality of the blacks and whites, for that is a question which every man regulates for himself."[144] Gideon Welles, Lincoln's and Johnson's Secretary of the Navy, captured the sentiment more bluntly when he said "Thank God slavery is abolished, but the Negro is not, and can never be the equal of the White. He is of an inferior race and must always remain so."[145]

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[137] New York Times, March 8, 1876, quoted in Warren, supra note _ at 605.
[138] Independent, October 25, 1883, quoted in Warren, supra note _ at 614.
[139] Warren, supra note _ at 613-15.
[140] The Rights of Negroes, The New York Times, October 18, 1883 at 4.
[141] Quoted in Warren, supra note _ at 613.
[142] This is a central theme of William Nelson's work on the interpretation of the Fourteenth Amendment. See Nelson, supra note _ at 104-09 (noting many critics of the amendment argued that it would destroy our basic constitutional structure of federalism) and 115 (explaining that some Republicans, in order to counter those who feared the amendment would give the federal government too much power at the expense of the states, argued that the amendment did not give the federal government the power to protect or create rights; rather, it just gave it the power to insure that states gave fundamental rights equally to citizens of both races). See also Foner, Reconstruction, supra note _ at 533 (noting that opponents of the Civil Rights Act of 1875 argued that the Fourteenth Amendment did not give the federal government the power to regulate civil rights).
[143] Independent, March 5, 1874 quoted in Gillette, supra note _ at 191. For more on racism in the North and South, see Gillette, supra note _ at 191-196.
[144] Chicago Inter-Ocean, February 2, 1875, May 30, 1874, quoted in Gillette, supra note _ at 201.
[145] Gideon Welles to Montgomery Blair, January 21, 1871, quoted in Gillette, supra note _ at 191.

Money certainly played a role. The legal authority to subdue the South was there, but Congress never came up with the money to get the job done.[146] Justice officials were constantly overwhelmed, never receiving the resources to pursue prosecutions effectively. "I am on the rack from morning till night," wrote Attorney General Akerman, "and yet, with all that, I can hardly keep down this pile of business."[147] The Nation opined that "we ought to see that going to the polls is made as safe as going to church," but decried "to pass bills providing for this, without voting the men or the money to execute them, is a wretched mockery of . . . the country."[148]

Grant and the Republican Party also seemed unable to pursue a steady strategy. Seesawing between "boldness and timidity" Grant seemed unable to maintain a firm course toward Southern violence.[149] His official messages capture the political tension he was under. In 1873 Grant was requesting more laws, and his Annual Message at the end of 1874 vowed to enforce them. Still, Grant expressed his desire "that all necessity for Executive direction in local affairs may become unnecessary and obsolete" and expressed regret that the civil rights laws "should have added one jot or tittle [sic] to Executive duties or powers."[150] An admiring New York Herald story in January of 1874 reported Grant telling some members of the Republican Party "I am tired of this nonsense . . . The nursing of monstrosities has nearly exhausted the life of the party."[151] "Reconstruction, the carpet-baggers, the usurpation of power supported by troops," continued the Herald, "all this is dead weight, a millstone, that if not speedily disengaged will carry republicanism to the bottom."[152]

Even the most hopeful of reformers lost faith in what they were seeing. Radical Joseph R. Hawley of Connecticut, in debate over civil rights measures, said "There is a social, and educational, and moral reconstruction of the South needed that will never come from any legislative halls, State or national."[153] Corruption was a paramount issue in Northern politics, and some saw it in the operation of Reconstruction governments in the South. The Nation compared South Carolina's government to the rule of Boss Tweed in New York, saying "politics in South Carolina have consisted of determined efforts on the part of a few designing men, with the aid of the negro vote, to plunder the property-holders."[154] This corruption caused The Nation to retract its approval of Congress and Reconstruction.[155] As early as 1873, the New York Times declared "Law has done all

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[146] This is the central theme of Robert Kaczorowski's excellent chronicle, The Politics of Judicial Interpretation. See, e.g., Kaczorowski, supra note _ at 27, 51, 60-61, 84-85. See also Gillette, supra note _ at 31 (noting lack of money as one reason the federal government failed to prevent violence against blacks and violations of their civil and political rights).

[147] Akerman to John N. Montgomery, August 21, 1871, quoted in Kaczorowski, supra note _ at 60.

[148] The Nation, March 23, 1871, quoted in Gillette, supra note _ at 31.

[149] Gillette, supra note _ at 166; see also Foner, Reconstruction, supra note _ at 528 (arguing that Grant could not construct a consistent Southern policy during his second term).

[150] Grant, Sixth Annual Message, December 7, 1874, in Richardson, supra note _ at 298-99

[151] Grant, quoted in New York Herald, January 20, 1874.

[152] New York Herald, January 20, 1874, supra note _ .

[153] Cong. Rec., 43rd. Cong., 2nd Sess., 1853, quoted in Gillette, supra note _ at 287.

[154] The Nation, April 16, 1874, Vol. 459 at 247.

[155] Kaczorowski, supra note _ at 162.

that it can for the negroes, and the sooner they set about securing their future for themselves the better it will be for them and their descendants."[156]

When all was said and done, the country was simply tired and ready to move on. Enacting grand principles had proven one thing; subduing the South another. There simply was not the will to get the job done. "We have tried . . . constant partisan intermeddling from Washington and bayonets *ad lib*. The malady," sighed the *Springfield Republican*, "does not yield to the treatment. Let us now try . . . a little vigorous letting alone."[157]

"much legislation hostile to corporations"

Reconstruction crumbled as America's economy underwent a dramatic transformation. Inevitably such revolutionary change dislocates lives and alters ways of living. In response, the states adopted a variety of measures to protect the well-being of their citizens. These measures erected barriers to the free flow of capital and interstate trade, posing a challenge to businesses operating in the newly invigorated commercial environment. In its first outing, the Supreme Court sided with the states, nestling in its new-found alliance with popular opinion.

The tip of the industrial spear was the railroads.[158] Growing at an astonishing pace, some 9,000 miles of track in 1850 became 200,000 miles by century's end.[159] The federal government encouraged growth, granting the railroads over 158 million acres of land.[160] By 1891 the Pennsylvania Railroad employed three times the number of men in all branches of America's armed services. In 1895 some 800,000 men worked for the railways, roughly three percent of the nation's workforce.[161] Communication followed the rails. Telegraph and then telephone traveled alongside the rail cars, the mails inside them.[162]

The growth of the railroads fueled industrialization. The gross national product grew almost 15% per year from 1870 to 1900.[163] Steel came to replace iron and wood in the building of machinery.[164] The railroads encouraged economic specialization as goods for production could easily be transported from source to factory. Firms integrated

[156] The New York Times, December 1873, quoted in The Rights of Negroes, The New York Times, supra note _ at 4. See also Foner, Reconstruction, supra note _ at 497-99 for a discussion of reformers losing faith in Reconstruction.
[157] Springfield Republican, January 11, 1875, quoted in Gillette, supra note _ at 280.
[158] Ballam, supra note _ at 599; Bensel, Political Economy, supra note _ at 291, 303.
[159] Purcell, supra note _ at 16; see also Ballam, supra note _ at 599 (noting that between 1860 and World War I, railroad track miles increased from 30,000 to 240,000).
[160] Ballam, supra note _ at 599.
[161] Bensel, Political Economy, supra note _ at 295.
[162] Bensel, Political Economy, supra note _ at 305.
[163] Purcell, supra note _ at 16.
[164] Ballam, supra note _ at 599.

vertically and grew to unfathomable size. "The day of combination is here to stay," declared John D. Rockefeller famously. "Individualism has gone, never to return."[165]

The agrarian economy gave way to an urban and industrial one. 1870 was the last census to show a majority of Americans engaged in agriculture. The average firm in 1870 was 8 people, often family members; by 1900 over 1500 firms employed more than 500 people.[166] Four million immigrants came to America each decade from 1870 to 1900.[167] Industrialization provided economic opportunity as millions moved from the farms and foreign shores to urban centers of production. Agrarian "island communities" came apart as the people flocked to the cities.[168]

As firms consolidated, and population centralized, the very nature of doing business changed. In a disparate and agrarian economy, goods were provided by local purveyors of general merchandise. Centralization required a means to get the goods to market, and economies of scale once there fostered specialization. The general merchant gave way to the middlemen and then to the corporate form.[169] By 1900 some 70% of those working in industry were employed by corporations.[170]

The boom fed both easy credit and speculation. In the aftermath of the Civil War, credit began to move from the financiers of the East to the farmers and business people of the South and West.[171] "The West, as a new country, destitute of capital, has looked to the East for assistance" and led it "to agree to terms rather hard."[172] Looking only to mortgages, one economist estimated that "Indiana must make to non-resident capitalists an annual payment greater than the entire tax levy of the state."[173] Cities and towns in the West sold their souls in the form of municipal bonds to attract the railroads. The debt was incurred "by the influences of the railway corporations . . . and a great part of it was doubtless fraudulently contracted through the bribing of local officers."[174] Railroad investment was "a simple craze . . .madness has ruled the hour."[175]

Then, the Crash. In September of 1873 the financial empire of Jay Cooke and others collapsed when it proved impossible to sell further bonds to finance the Northern Pacific Railroad.[176] The country entered into a severe economic downturn, what until

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[165] Allan Nevins, John D. Rockefeller 622 (1940), quoted in Mendelson, supra note _ at 53; see also Purcell, supra note _ at 16; Wiebe, supra note _ at 23.
[166] Ballam, supra note _ at 598.
[167] Ballam, supra note _ at 600.
[168] Wiebe, supra note _ at xii; see also Purcell, supra note _ at 16 (noting that in the second half of the nineteen century, the nation became "urbanized, industrialized, and centralized."). By the end of World War I, a majority of Americans lived in cities or towns. Ballam, supra note _ at 599.
[169] Freyer, Harmony, supra note _ at 56.
[170] Ballam, supra note _ at 598; see also Purcell, supra note _ at 16.
[171] Bensel, Political Economy, supra note _ at 15.
[172] Haynes , supra note _ at 86.
[173] Dunn, supra note _ at 80.
[174] Sterne, Simon, Railway Legislation and Management, quoted in Fairman, Reconstruction, supra note _ at 291.
[175] The Nation, September 24, 1874, Vol. 482 at 206.
[176] Gillette, supra note _ at 186; Foner, Reconstruction, supra note _ at 512; Wiebe, supra note _ at 1.

1929 was called *the* Great Depression.[177] The "mania of railroad investment" that had "swept through the country like a first-class epidemic," explained the Nation, came to a halt "occasioning not less quiet suffering."[178] A year later Grant would report in his Annual Message to Congress: "Since the convening of Congress one year ago the nation has undergone a prostration in business and industries such as it has not been witnessed with us for many years."[179]

The response to the Crash was a shift in politics and priorities. The strong Democratic showing in 1874 reflected disgust with the corruption of Republican officials. The Democratic platform of 1874 was "a very remarkable document" which in a "string of short, clear" positions advocated a hard money policy and "State supervision of corporations."[180] Thousands of farmers in the West joined the Grange, an insurgent political movement that sought to restrict the rates charged by railroads and grain elevators.[181]

With times hard and citizens discontented, the States began to adopt a series of measures to protect local wealth against foreign investors and local businesses from outside competition.[182] This continued throughout the remainder of the century. The result was "much legislation hostile to corporations . . . It takes the form of discriminating taxation, of the regulation of rates to be charged . . . and sometimes of the direct deprivation of vested rights."[183]

States regularly repudiated their debts. In the South it was antebellum debt and bills rung up by Reconstruction governments. The conservative elements in the southern states saw hard choices: schools or paying bonds. "Free schools are not a necessity. They are a luxury . . . to be paid for, like any luxury, by the people who wish their benefit."[184] Yet others were less willing to make these choices: "raising taxes and re-paying debts issued by carpet-baggers for the benefit of ex-slaves had minimal appeal."[185] "The whole country is in disgrace by reason of this horrid spectacle," said the Independent, commenting on Southern repudiation.[186]

Westerners ran away from their railroad debts.[187] While, during the boom, law served as little obstacle to new debt, now legal irregularities loomed large. Western issuers of municipal debt sought to repudiate in light of "errors and irregularities in the

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[177] Foner, Reconstruction, supra note _ at 512.
[178] The Nation, September 24, 1874, Vol. 482 at 206.
[179] Grant, Sixth Annual Message, December 7, 1874, in Richardson, supra note _ at 284.
[180] The Nation, Septmeber 24, 1874, Vol. 482 at 195.
[181] Foner, Reconstruction, supra note _ at 516; Wiebe, supra note _ at 8; Bensel, Political Economy, supra note _ at 225; Keller, supra note _ at 179.
[182] See, e.g., Freyer, Federal Courts, supra note _ at 347-349; Scheiber, Southern Regional Economy, supra note _ at 82.
[183] Taft, Charges, supra note _ at 397.
[184] Governor F. W. M. Holliday, quoted in Orth, supra note _ at 108.
[185] Cameron, supra note _ at 204.
[186] Independent, May 3, 1883, quoted in Warren, supra note _ at 663.
[187] Freyer, Federal Courts, supra note _ at 347; Scheiber, Xenophobia, supra note _ at 654.

manner in which such bonds have been issued."[188] As Justice Field explained in one case, "[i]n many instances the road, in aid of which the bonds were issued, was never constructed, and as no benefit resulted to the counties and cities, their inhabitants naturally felt impatient under the burdens which their officers had improvidently imposed."[189]

States sought protection of their citizens facing mortgage foreclosure. "[C]onsidering the total volume of foreclosure, where the mortgagees are non-residents it is apparent that the money brought in by loans has in some way disappeared, and that the financial parasite which before sucked the blood is now swallowing the flesh."[190] Landowners were forced to pay mortgages on land, the value of which had dropped enormously. "No wonder some Easterners thought mortgages were the most important crop produced in the Middle West."[191] Annoyed at mortgage companies hailing citizens to Indianapolis federal court for foreclosures, the state passed a law requiring foreclosure "in the counties where the mortgaged land was located, on penalty of forfeiting the right to transact business in the state."[192]

Insurance companies came in for special ire. Looking for new investments, life insurance companies had become huge mortgage holders.[193] When some states began to tax the insurance companies, home states retaliated. One lawyer asked was "retaliation, -- in other words, is redress or revenge, partiality or hate, toward a sister State,-- a proper factor in State legislation?"[194]

Traveling salesmen and interstate transactions also became targets. Where once goods were sold to the hometown merchant who resold them to the locals, national firms began to send agents – derogatorily called "drummers" – to sell directly to consumers.[195] The Singer Sewing Machine Company decided early on to adopt this business model.[196] States responding by enacting "anti-drummer" laws, which imposed business taxes on the salespeople, often exorbitant ones.[197] Such laws were considered necessary because without them, as W.S. Hastie of the Charleston Board of Trade argued, "New York, Boston and Philadelphia will absorb the whole business of the country."[198]

The ugly side of the times became deeply apparent in the great railway strike of 1877. Triggered by the Baltimore and Ohio Railroad's July decision to roll back wages,

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[188] Holt, supra note _ at 169.
[189] Jarrolt v. Moberly, 103 US 580, 585 (1880), quoted in Fairman, Reconstruction, supra note _ at 290.
[190] Dunn, supra note _ at 69-70.
[191] Mendelson, supra note _ at 61.
[192] Dunn, supra note _ at 71.
[193] Dunn, supra note _ at 70, 78-80; see also Bensel, Political Economy, supra note _ at 57; Freyer, Federal Courts, supra note _ at 349.
[194] Whitney, supra note _ at 67.
[195] See generally Hollander, supra note _; McCurdy, supra note _ at 636-637.
[196] McCurdy, supra note _ at 637.
[197] Ballam, supra note _ at 605; Hollander, supra note _ at 483; Scheiber, Southern Regional Economy, supra note _ at 81-82; Freyer, Federal Courts, supra note _ at 350.
[198] Proceedings of the Second Annual Meeting of the National Board of Trade, Held in Cincinnati, December 1860, 43, quoted in Scheiber, Southern Regional Economy, *supra* note _ at 82.

riots broke out all along the line, from Baltimore to Chicago. Stations were looted and railroad cars burned. President Hayes called out the troops, leaving many workers dead.[199] Grant noted the irony in using troops to suppress workers when the nation had refused to do so "to protect the lives of negroes." When he had used troops "the sound of indignation belched forth" but now "there is no hesitation about exhausting the whole power of the government to suppress a strike on the slightest intimation that danger threatens."[200]

About eight months before the strike, the Supreme Court, in *Munn v. Illinois*,[201] made its first important foray into the new economic waters. At issue in *Munn* were the so-called Granger laws. The Granger movement, made up primarily of small, Mid-Western farmers, fought against the abuses of the railroads and large corporations, such as the outrageous prices they charged for storing and shipping crops and for manufactured goods.[202] "The outraged popular feeling" at "the unquestionable extortions of the railways" took political action "in the way of public meetings, conventions, and organizations, which in due time resulted in legislative enactments."[203] States passed laws, named for the movement that lobbied for them, regulating the rates charged by railroads and grain elevators.[204] In this contentious environment the Court was forced to rule on whether such rate regulation was unconstitutional under the Fourteenth Amendment's Due Process Clause.

Munn was a transitional decision. Under *Slaughterhouse*, one might wonder precisely how the corporate plaintiffs could possibly have a chance. Had not the Court made perfectly clear it would not permit the Fourteenth Amendment to be drawn it into such controversies? Though the business plaintiffs did in fact lose, the Court took a change of direction that suggested the centerpiece of Reconstruction was not quite the dead letter one might have supposed.

Rather than rejecting the claim as beyond the scope of the Fourteenth Amendment, the *Munn* Court indicated that it would scrutinize some state laws under the amendment. Dissenting in Slaughterhouse, Justice Field had suggested the correct question was whether a given law was a proper exercise of the state's "police power" – "regulations affecting the health, good order, morals, peace, and safety of society . . . [U]nder the pretence of prescribing a police regulation," Field explained, "the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgement."[205] Meeting Field half-way, the *Munn* Court upheld the particular regulations because the affected business was clothed in the "public interest." The *Munn* Court adopted an extraordinarily deferential standard of review of state regulations. "When . . . one devotes his property to a use in which the

[199] Foner, Reconstruction, supra note _ at 583-84; Wiebe, supra note _ at 10.
[200] Grant to Daniel Ammen, August 28, 1877, quoted in Gillette, supra note _ at 348.
[201] 94 U.S. 113 (1876).
[202] See, e.g., Foner, Reconstruction, supra note _ at 474.
[203] The Granger Decisions, Chicago Tribune, March 3, 1877.
[204] Ballam, supra note _ at 604; Foner, Reconstruction, supra note _ at 516; see also Munn, 94 U.S. at 115-117.
[205] The Slaughter-House Cases, 83 U.S. 36, 87 (1872) (Field, J., dissenting).

public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good."[206]

Field also dissented in *Munn* because he felt the Court's public interest test was far too broad – "there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion."[207] For the Court, however, the legislature was the "exclusive judge" of the "propriety of legislative interference within the scope of legislative powers."[208] In a sentence time would soon prove false, the Court boldly declared, "For protection against abuses by legislatures the people must resort to the polls, not to the courts."[209]

The *Munn* decision undoubtedly satisfied the current of public opinion deeply troubled by corporate power in hard economic times. The Chicago Tribune exulted "The Granger business was a result and not a cause. The railroads had become oppressors."[210] James Bryce, British diplomat and savvy chronicler of American politics and culture, observed that public opinion "is stronger in America than anywhere else in the world, and judges are only men." The Granger decisions were a "remarkable example." Noting how the decisions "represent a different view of the sacredness of private rights and of the powers of a legislature from that entertained by Chief-Justice Marshall and his contemporaries," Bryce fingered the reason: "They reveal that current of opinion which now runs strongly in America against what are called monopolies and the powers of incorporated companies."[211]

In any event, the Chicago Tribune noted, the Granger decisions did not really matter. The heat that gave rise to the laws preceded the Crash. "The panic had altered the complexion of the railroad monopoly" the Tribune explained. "The rates have so fallen that the popular complaint which led to State legislation no longer exists."[212]

"The real anxiety of these [business] people is with reference to the Supreme Court"

Reading *Munn* as squarely within the center of public opinion would be a mistake. Politics in the late nineteenth century were extremely complex, and outcomes often rested on a knife's edge. There was another force in American politics at the time that was extremely disenchanted with *Munn*. This was the business interest, and it had an entirely different idea of the role the federal judiciary should be playing. Business also had the means to ensure it got its way.

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[206] *Munn*, 94 U.S. at 126.
[207] *Munn*, 94 U.S. at 141 (Field J., dissenting).
[208] *Munn*, 94 U.S. at 132-33.
[209] *Munn*, 94 U.S. at 134.
[210] The Granger Laws, Chicago Tribune, March 13, 1877.
[211] Bryce, Vol. 1, supra note _ at 274.
[212] The Granger Decisions, Chicago Tribune, supra note _.

Politics during the Gilded Age was a grand affair.[213] Turnout was extraordinary and voters were well-informed.[214] Insurgent campaigns were frequent, and the margins of victory often were extremely close.[215] Public opinion was extremely important. Joining Bryce in noting this fact was James Blaine, who said "If the scholarship of the few is not so thorough as in certain European countries, the intelligence of the many is far beyond that of any other nation."[216]

With turnout high and margins close, victory often rested in not offending one's voters, lest they simply stay home on election day.[217] This held for issues and candidates both. Voters at the time were intensely interested in economic issues like gold and silver, or the tariff, but often turned off by regulatory and reform matters.[218] It was important to choose a candidate who held the party together without losing any of the electorate. Harper's Weekly, expressing hope that Chief Justice Waite would not agree to run for President, said "he would be selected because being unknown, he had made no enemies. He would be urged as a negative candidate, and, for that reason as what is called available."[219]

The Republican Party, dominant throughout the Gilded Age, was a motley alliance held together by the tariff and the gold standard.[220] To win elections, the Grand Old Party needed voters in large numbers. These it often found in farmers and Civil War veterans.[221] The tariff raised money to provide side payments to these groups.[222] The Grand Army of the Republic, organizational home of many Northern war veterans and their families, was a prominent interest group.[223] "Voting as they had shot," the GAR supported the Republican Party in exchange for generous pensions.[224] War pensions were often the greatest single item in the federal budget.[225]

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[213] Marcus, supra note _ at 5.

[214] See Marcus, supra note _ at 5; Bensel, Political Economy, supra note _ at xvii, 101. Turnout approached 80% in presidential elections from 1876 to 1896. Marcus, supra note _ at 5.

[215] Bensel, Political Economy, supra note _ at xvii, 102; Marcus, supra note _ at 5-6.

[216] Blaine, supra note _ at 477.

[217] See Marcus, supra note _ at 8-9 (noting that because voters often voted along party lines, they would simply not vote if they did not like the candidate nominated by their party).

[218] See Bensel, Political Economy, supra note _ at 124-143 (noting that the tariff and monetary policy were two of the major policy issues in party platforms); Foner, Reconstruction, supra note _ at 557 (discussing the importance of the currency issue in Hayes' 1875 victory in the Ohio gubernatorial election); Marcus, supra note _ at 10.

[219] Harper's Weekly, The Chief Justice and The Presidency, November 27, 1875 at 959.

[220] Gillman, supra note _ at 516; Bensel, Political Economy, supra note _ at 8-9.

[221] Many veterans actually moved west and became farmers. Dearing, supra note _ at 52. Yet the Party also depended upon Northern financial elites whose views on sound economic policy directly contradicted those of Western farmers. See Mendelson, supra note _ at 55-58.

[222] See Bensel, Political Economy, supra note _ at 457 (noting that money earned from the tariff was used for pensions for Union Army veterans).

[223] See Dearing, supra note _ at vii.

[224] Bensel, Political Economy, supra note _ at 457.

[225] See Dearing, supra note _ at vii ("[a]t the height of their influence . . . former soldiers were able to command benefits which cost the federal government more than one-fifth of its total revenue.").

Winning elections in this environment took money, and one group that had it to spare were America's new corporate tycoons. The Civil War had created a financier class, who took over the party during Grant's administration.[226] After the war they had their own priorities. Business interests may have had as much to do with the collapse of Reconstruction as any group. Keeping the South under control required vast sums of money, and those who had it were simply unwilling to invest it in such a risky venture.[227] The Compromise of 1876 was brokered in part by moneyed interests, and much more was on the table beside removal of troops. The South also sought patronage, which it received in the form of the Postmaster General in Hayes' Cabinet.[228] Less successful was a guarantee of finance capital for internal improvements.[229] (On the other hand, there was no flood of Southern conservatives into the Republican party either.)[230]

The Republicans' problem was that conservative business people could be extremely fickle in their politics.[231] The cosmopolitan historian Henry Adams (descendant of the two Presidents) wrote his brother Charles in 1867, presciently forecasting "a struggle for gold combined with a panic, a crash in banks . . . and a howl of agony from the whole country." Disapproving, he said "As for politics I care not a damn whether the South rules us or not. In the worst of times they have never ruled us so badly as Congress rules us now."[232] Writing fifteen years later, prominent constitutional law professor John Pomeroy complained about the Republicans' unwillingness to protect property rights (he had in mind bond repudiations). "There are tens and hundreds of thousands of the most intelligent Republican voters, who would rather intrust the public administration to the Democrats, than see it still controlled by a party which is practically abandoning the high principle of nationality that first gave it political life."[233]

What moneyed interests cared about was a good environment for doing business, and this necessarily included reliable courts. America during the Gilded Age had little in the way of a bureaucracy to regulate the markets.[234] Courts were available to fill the void, and perfect for the job given their relative unaccountability.[235] Andrew Carnegie

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[226] Mendelson, supra note _ at 55.
[227] See Bensel, Yankee Leviathan, supra note _ at 10, 348-353, 362-365.
[228] Bensel, Yankee Leviathan, supra note _ at 371.
[229] Foner, Reconstruction, supra note _ at 582; Bensel, Yankee Leviathan, supra note _ at 371.
[230] Foner, Reconstruction, supra note _ at 582.
[231] Marcus, supra note _ at 50.
[232] Levenson et al., eds., Letters of Henry Adams 519, quoted in Bensel, Yankee Leviathan, supra note _ at 353.
[233] Pomeroy, Supreme Court, supra note _ at 683.
[234] Ballam, supra note _ at 596-597. Ballam notes two different reasons other scholars have offered as to why there was no centralized state mechanism in place to regulate the market after the Civil War. Richard Bensel argues that Northern financiers did not support Radical Reconstruction and helped to bring about its defeat, which ended any possibility of a strong central government. Ballam, supra note _ at 597; see also Bensel, Yankee Leviathan, supra note _ at 348-365. Morton Keller accounts for the lack of a strong national government by pointing to a resurgence in traditional American values such as federalism, laissez-faire, racism and sexism. Ballam, supra note _ at 597; see also Keller, supra note _ at 85, 161.
[235] See Bensel, Political Economy, supra note _ at xx, 7, 10, 117 (arguing that the Supreme Court played the main role in construction a national market, largely because of its political isolation); Gillman, supra note _ at 516 (noting that federal judges were isolated from public opinion, and therefore they could further

pretty much summed it up in The Gospel of Wealth when he said of business: "We demand of the State protection of property. For this purpose we ask an adequate police, a sound banking system, a sound currency based on gold, and court decisions to nullify social legislation confiscatory in character."[236]

Business looked with alarm at state legislatures and courts alike. State legislation, some believed, increasingly took on a "communistic" cast, including rate regulation and bond repudiation.[237] Varying state laws proved a problem to nationalizing businesses, who complained about it volubly. Even before the Civil War there was concern about "discordance in the fundamental laws of the several states, by which the rights and obligations of the citizens of a commercial country are defined."[238] State judges were no help. Elected to office, the judges could be counted on to favor local interests.[239] Even worse were state juries. "The prejudice of juries against corporations and the difficulty with which the latter can obtain what is their due, even when justice is on their side, is often commented upon."[240]

Looking for relief, corporations increasingly were turning to the federal courts.[241] This held true whether they were seeking relief in the Supreme Court for state court decisions, or trying to flee the state courts in the first instance.[242] "That corporations are desirous of having all their causes removed to the Federal courts is a fact so well established that one would have great temerity to deny it," observed the Central Law Journal.[243] William Howard Taft, later Chief Justice and President, observed that out of

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the unpopular agenda of a national economy and obviate the need for state Republican Party leaders to include these unpopular positions in their platforms).

[236] Ralph H. Gabriel, The Course of American Democratic Thought 163 (1956), quoted in Mendelson, supra note _ at 54.

[237] Pomeroy, The Supreme Court, supra note _ at 712, 718-19; see also Mendelson, supra note _ at 57 (referring to the Granger laws as "hayseed socialism"); Commercial and Financial Chronicle, March 29, 1890, quoted in Bensel, Political Economy, supra note _ at 335 (lauding a Supreme Court case which struck down a state railroad rate regulation and referring to the regulation as "Socialistic legislation"); Taft, Charges, supra note _ at 396 (commenting on the "socialistic" nature of legislation supported by Southern and Western farmers, seeking to cripple corporations, especially railroads, and redistribute some of their wealth).

[238] "The Law of Debtor and Creditor in Louisiana," Hunt's, XV (July 1846), 71quoted in Freyer, Forums, supra note _ at 11. Business interests claimed that a uniform national commercial law promulgated under *Swift* would be good for business. Gordon, supra note _ at 224. Professor Gordon disagrees with Professor Freyer that uniformity was actually necessary for business to flourish, but what matters is that business interests asserted the need for uniformity and judges listened. Gordon, supra note _ at 224.

[239] Freyer, Forums, supra note at 128; see also Purcell, supra note _ at 24.

[240] Current Topics, 10 Central L. J., supra note _ at 17. Not only were the jury pools better in federal court, but also superior were the procedural mechanisms by which federal judges were able to control their juries. For example, federal judges were allowed to comment on the evidence and direct or set aside verdicts. Gillman, supra note _ at 519; Purcell, supra note _ at 24.

[241] See Collins, Unhappy History, supra note _ at 739 (noting that a reduction in lower federal court jurisdiction would send out-of-state or federal corporations back to state courts); Gillman, supra note _ at 519 (detailing how corporations increasingly went to the federal courts for decisions in their favor); Purcell, supra note _ at 22-27. The federal bench, most of whom were pro-business Republicans, shared an ideology in favor of a national economy with the corporations. Gillman, supra note _ at 519.

[242] Scheiber, Federalism, supra note _ at 116.

[243] Current Topics, supra note _ at 281.

state companies "all carry their litigation into the Federal courts . . . and, in view of the deep-seated prejudice entertained against them by the local population, it is not surprising that they do."[244] An insurance company lawyer explained that "you get a better class of citizens on the juries in Federal courts."[245]

Munn, then, was an important test of where the Supreme Court stood. Prior to the decision the Nation, sarcastic, had looked to the courts for relief. "Last winter," the Nation wrote, "the Grangers came to the conclusion that what they wanted was a reduction of the rates; next winter, their fancy may take another turn, and they may think that each passenger ought to have a car for himself, with meals along the route furnished gratis by the company."[246] It predicted the Supreme Court would say, "Your law is illegal; we have wiped it from your statute-book."[247] After the decision held just the opposite, the Nation's deeply critical tone was taken to task by the Chicago Tribune. "The people of the West will gladly compromise, that, if the railroads will not corrupt the Legislature, the people will not do so."[248]

Little surprise the reaction to *Munn* among the business class was an angry one. The New York Times reported that "it will be idle to expect that foreign capitalists will invest money in corporations that may at any time be subjected to its [state legislature's] arbitrary operation . . . Upon this point American capitalists are quite as sensitive, quite as decided."[249] The Times called it "poetic justice" that the immediate impact of the decision "will fall most heavily" upon the Westerners: "They can hope for no more money . . . until the investor is protected from the results of their vexatious legislation."[250] John Pomeroy, the constitutional spokesperson for corporate interests, said the "doctrine involves the *very essence* of the destructive theories maintained by the socialists and communists of France and Germany."[251] Pomeroy compared *Munn* to *Dred Scott*: the latter "indirectly struck at the stability of our political fabric; the Elevator Case directly strikes at the stability of private property."[252]

The priority of business became ensuring a federal bench, particularly the Supreme Court, that was "sound" on the issues that mattered.[253] Charles Elliot Perkins, head of the Burlington Railroad, would write to J.M. Forbes, his brother-in-law as late as 1894, "[t]here are so many jack-asses about nowadays who think property has no rights, that the filling of the Supreme Court vacancies is the most important function of the Presidential office."[254] The Central Law Journal aptly noted the "indisputable fact, that

[244] Taft, Criticisms, supra note _ at 651.
[245] 72 Cong. Rec., 1st Sess (1932) 30, quoted in Purcell, supra note _ at 24.
[246] The Nation, September 24, 1874, supra note _ at 200.
[247] The Nation, September 24, 1874, supra note _ at 201.
[248] The Granger Law, Chicago Tribune, supra note _.
[249] Legislation and Credit, The New York Times, March 29, 1877 at 4.
[250] Legislation and Credit, The New York Times, *supra* note _ at 4.
[251] Pomeroy, The Supreme Court, supra note _ at 712.
[252] Pomeroy, The Supreme Court, supra note _ at 712.
[253] Bensel, Political Economy, supra note _ at 7.
[254] Letter to J.M. Forbes, Feb 21, 1894, quoted in Kirkland, supra note _ at 135.

the corporations look with displeasure upon any incumbent of the Federal bench, whose feelings are with the people."[255]

After *Munn*, moneyed interests withheld contributions to the Republican Party desperately needed to assure Garfield's election until they were assured Garfield would put the right sort of men on the Court.[256] Whitelaw Reid, the managing editor of the New York Tribune, wrote Garfield that "The real anxiety of these people is with reference to the Supreme Court. All monied men, and especially all corporations, regarded the course of the Supreme Court in the Granger cases . . . as bad law and bad faith . . . These people hesitate because they say they are unwilling to elect a President unless they are sure that he disapproves what they call the revolutionary course of the majority of the court."[257] A party manager wrote Garfield asking him to send "privately, for my own personal use . . . your general views on this question of the rights of corporations so that I could show it to" financiers.[258]

Garfield danced around the issue, ultimately effectively yielding a veto on Court appointments. Garfield bridled at letting donors name Court appointees as this would "appear to be a delegation of the power vested in the Chief Executive." Yet, he promised to appoint Justices "entirely sound on these questions" based "upon evidence . . . satisfactory to you as well as me."[259]

What is clear is that after 1880 business got the judges it wanted. For most of the balance of the century, the Republicans controlled the White House as well as the Senate, and could appoint the judges business wished. Even the only Democratic President of the era, Grover Cleveland, was dependable to business.[260] When labor strikes hit Chicago during his first term, he sent federal troops to enforce a federal court injunction, saying "If it takes the entire army and navy of the United States to deliver a post card in Chicago, it will be delivered."[261] Cleveland appointed to the Supreme Court some of the most conservative Justices that ever sat there.[262]

Following *Munn*, the Supreme Court becomes solidly pro-business.[263] "Such changes have been made in the Supreme Court by death and resignation," Pomeroy wrote in 1883, "that all its members, with the single exception of Mr. Justice Field, are now,

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[255] Current Topics, supra note _ at 281.
[256] See Marcus, supra note_ at 50-53, 153, 256-257; Kirkland, supra note _ at 135; Freyer, Federal Courts, supra note _ at 345.
[257] Reid to Garfield, Aug. 31, 1880, Garfield Papers, quoted in Marcus, supra note _ at 50.
[258] Jewell to Garfield, Aug. 30, 1880, Garfield Papers, quoted in Marcus, supra note _ at 51.
[259] Garfield to Reid, Sept. 23, 1880, Garfield Papers, quoted in Marcus, supra note _ at 53.
[260] Gillman, supra note _ at 517.
[261] http://www.whitehouse.gov/history/presidents/gc2224.html (last visited April 7, 2006).
[262] Bensel, Political Economy, supra note _ at 344-346. President Cleveland appointed Justices Lucius Q. Lamar, Melville Fuller, Edward White, and Rufus Peckham. Bensel, Political Economy, supra note _ at 345.
[263] See Gillman, supra note _ at 518 (detailing the pro-business leanings of the men appointed from 1870-1893); Freyer, Forums, supra note _ at 108 (same); Bensel, Political Economy, supra note _ at 344-347 (same).

and for some time have been, Republicans."[264] Field, of course, was staunchly against regulations that interfered with business.[265] From 1881-87 the Court was comprised only of Republican appointees.[266] If anything, Cleveland's appointees out-did their Republican compatriots. Lucius Lamar, who had represented many corporations in private practice, strongly opposed free silver as a Senator and dissented from few of the Court's most conservative opinions.[267] Melville Fuller, who becomes the Chief Justice in 1888, left the Democratic Party when William Jennings Bryan was nominated on a Free Silver platform in 1896.[268] Rufus Peckham, another Cleveland appointee, was the architect of many conservative, pro-business decisions and close friend of Morgan, Rockefeller, and Vanderbilt.[269] Edward White was conservative enough that when Taft was President he named him to succeed Fuller as Chief.[270] "[T]here is a well founded suspicion that men have been elevated to the supreme judicial tribunal in the land," opined the Central Law Journal in 1884, "if not at the behest of corporate interests, certainly with notice that their prejudices were naturally with those interests, and that they might be expected to care for their protection."[271]

"questions of jurisdiction were questions of power"

Business having assured appointments "sound" on business questions, the Supreme Court in the following years obliged. Stated concerns about "federalism" as a reason for abandoning Reconstruction proved disingenuous in the face of the Supreme Court's nationalizing burst.[272] Central authority was needed not to protect blacks, it seems, but to safeguard property rights and big business.[273]

Commentary on the Supreme Court typically focuses on the substance of constitutional law, to the exclusion of more technical questions such as jurisdiction. While understandable, this is regrettable. "Let it be remembered," said former Justice Benjamin Curtis on the occasion of Taney's death in 1864, "for just now we may be in some danger of forgetting it, that questions of jurisdiction were questions of power as between the United States and the several States."[274] Marking the growing importance of federal court jurisdiction, Harvard invited Curtis in the early 1870s to give a series of lectures to its students on the subject.[275]

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[264] Pomeroy, The Supreme Court, supra note _ at 688.
[265] See supra notes **.
[266] Bensel, Political Economy, supra note _ at 345.
[267] Bensel, Political Economy, supra note _ at 345-346.
[268] Gillman, supra note _ at 518; Bensel, Political Economy, supra note _ at 346.
[269] Gillman, supra note _ at 518; Bensel, Political Economy, supra note _ at 346.
[270] Bensel, Political Economy, supra note _ at 346.
[271] Current Topics, supra note _ at 282.
[272] See Warren, supra note _ at 625 (noting that in 1880 the Court began a "distinctly Nationalistic era").
[273] See Gillman, supra note _ at 516 (pointing to the Republican's party waning interest in protecting civil rights and increasing desire to nationalize the economy).
[274] Curtis, Notice of the Death of Chief Justice Taney, Proceedings in Circuit Court of the United States for the First Circuit, 9, quoted in Frankfurter and Landis, supra note _ at 2.
[275] B. Curtis, supra note _ at 1.

Following *Munn*, the Supreme Court made important changes to the substance of constitutional law, but its greatest impact may have been in throwing open the doors of the federal courts to corporations. This provided a choice of forums, one corporations often made in favor of the federal courts. In 1888 George Holt published a volume devoted solely to the "concurrent jurisdiction" of the state and federal courts. "A party to a legal controversy has frequently an election to resort to one of several tribunals" Holt explained. "The exercise of such election will, in many cases, exert an important influence upon the progress or result of the litigation."[276]

Jurisdiction in the federal courts comes in two kinds. "The civil jurisdiction, as there conferred, is given in certain specified cases by reason of the *subject-matter* . . .and in other cases by reason of *citizenship*."[277] Over the course of the few years after *Munn*, the Supreme Court saw to it that both sorts of jurisdiction were made readily available to corporations.

Central to the subject-matter jurisdiction of the federal courts was the Act of 1875. Recall that in 1875, Congress passed the last civil rights measure. At the same time it greatly expanded the jurisdiction of the lower federal courts to encompass any case in which there was a "federal question." "Congress . . . appears to have intended in the Act of 1875 to confer . . . as complete a jurisdiction as was in the power of the general government to grant."[278] Critics at the time believed the expansion to benefit blacks seeking to vindicate rights, and attacked it as such. Former Attorney General Ebenezer Hoar, serving one term in the House of Representatives, said "I cannot be in favor of extending all over this country a system which takes from State tribunals and from State domination what properly belongs to it, for the purpose of remedying what I hope is to be a temporary evil."[279]

Though the records are sparse, there is evidence that the Act of 1875 was all along intended as a vehicle for increasing corporate access to the federal courts.[280] In the House the measure was introduced by Representative Luke P. Poland, who referred to "difficulties in the state courts in 'other portions' of the country," quite possibly a reference to the Granger legislation sweeping the West at the time.[281] Yet the House only passed a narrow removal bill; the Senate significantly broadened it and the Senate's version became the law.[282] Senator Matthew Hale Carpenter, chair of the Judiciary

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[276] Holt, supra note _ at 1.
[277] Dillon, supra note _ at 297 (emphasis in original).
[278] Holt, supra note _ at 54.
[279] 2 Cong. Rec. 4303 (1874), quoted in Frankfurter and Landis, supra note _ at 67.
[280] See Gillman, supra note _ at 516-517 ("[T]he main purpose of the Judiciary and Removal Act of 1875 was to redirect civil litigation involving national commercial interests out of state courts and into the federal judiciary."); Kutler, supra note _ at 157 ("It is clear that the removal legislation involved something more than countering southern obstructionism."); Frankfurter and Landis, supra note _ at 64-65 ("The clash of economic interests in the North, the risks to which absentee capital was exposed in the state legislation of the Granger Movement, furnished new occasions for federal protection against adverse state action.").
[281] Kutler, supra note _ at 157.
[282] Kutler, supra note _ at 154-155.

Committee, brought the measure to the floor. Though he would later change his allegiance, Carpenter was then and had been a railroad man.[283]

Whatever Congress' original intent, the Supreme Court soon enough turned the federal question jurisdiction into a great vehicle for corporate access to the federal courts. In 1886, in *Santa Clara Co. v. Southern Pacific Rwy Co.*,[284] the Supreme Court held that corporations were persons within the meaning of the Fourteenth Amendment and could sue to protect rights of due process and equal protection.[285] Remarkably, this conclusion was reached by the Court without any argument, the Chief Justice waving off counsel and telling them the Justices already were decided on the issue. "The court does not wish to hear argument on the question" whether the Fourteenth Amendment covers corporations, he said. "We are all of opinion that it does."[286] As a noted legal historian subsequently explained, this turned corporations into "flesh-and-blood people" and in a string of cases, the federal courts "turned the due-process clause into a kind of great wall against populist onslaughts."[287]

Similarly, in the *Pacific Railroad Removal Cases*,[288] the Court held that any suit involving a federally-chartered corporation – this included most railroads – could be brought in federal court or removed there from the state courts.[289] Holt in his treatise noted this decision went "much further" than existing law.[290] Representative David Culberson of Texas would become the great enemy of corporate use of federal jurisdiction, introducing many a bill to curtail it. "In nine hundred and ninety-nine cases out of every thousand removed into the circuit courts . . . from the State courts," Culberson complained, "there is not the semblance, even, of an element of Federal jurisdiction involved."[291] The fact of the federal charter itself was enough for federal jurisdiction.[292]

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[283] Kutler, supra note _ at 156 n.22, 157. Senator Carpenter stated during the debates that the bill was necessary because "[t]he whole circumstances of the people, the necessities of our business, our situation, have totally and entirely changed" since 1789. Cong. Rec. 43rd Cong., 1st Sess., at 4986 (June 15, 1874), quoted in Kutler, supra note _ at 158.

[284] 118 U.S. 394 (1886).

[285] Corwin, supra note _ at 664; Ballam, supra note _ at 607; Miller, supra note _ at 54.

[286] *Santa Clara*, 118 U.S. at 396. See also Corwin, supra note _ at 664(noting that the Chief Justice told counsel during oral argument that the Justices had already decided the issue); Miller, supra note _ at 54(same).

[287] L. Friedman, supra note _ at 521; see also Ballam, supra note _ at 607. Professor Friedman notes that the due-process "wall had been built, or had seemed to be built, for the protection of blacks; by irony or design, it became a stronghold for business corporations." L. Friedman, supra note _ at 521.

[288] 115 U.S. 1 (1885).

[289] *Pac. Railroad*, 115 U.S. at 11; see also Fallon, supra note _ at 858; Kutler, supra note _ at 157; Frankfurter and Landis, supra note _ at 69.

[290] Holt, supra note _ at 106; see also Fallon, supra note _ at 858 (stating that the decision goes "further than any decision before or since"); Frankfurter and Landis, supra note _ at 69 (noting that "Congress thus vastly extended the domain of the federal courts. The Supreme Court still further widened this domain by the construction it placed upon the legislation.").

[291] 14 Cong. Rec., Part 2, 2nd Sess. (1883), 1248, quoted in Freyer, Forums, supra note _ at 132.

[292] *Pac. Railroad*, 115 U.S. at 11; see also Fallon, supra note _ at 858; Kutler, supra note _ at 157.

Even more dramatic, if possible, was the Supreme Court's machinations to open the federal court doors to corporations on the basis of citizenship. The "diversity" clause of the Constitution permits suits between citizens of different states. Long ago the Supreme Court held that there must be "complete diversity:" all parties on one side of a case must be from different states than all parties on the other side.[293] Early on, the Supreme Court held that corporations were like partnerships: they had the citizenship of every single shareholder.[294] Obviously this served to bar many corporate cases from federal court.

Overruling its prior decision, the Supreme Court adopted a "fiction" that all the shareholders were citizens of the state in which the corporation had its home. In his lectures to the Harvard students, Curtis explained the use of such a fiction with reference to Roman practice, a reference that proved allegorical. Under Roman law, "it was necessary, in order to give their important courts jurisdiction, to allege that the plaintiff was a Roman citizen." This became a problem as "the commerce of the city and the empire so extended" and "a number of foreigners had important rights and interests to be vindicated in the courts." The Romans then invented a "fiction" that anyone with an otherwise proper legal complaint "might allege that he was a Roman citizen, and that allegation should not be denied."[295] So it was, said the United States Supreme Court, with corporations: "[A] suit by or against a corporation in its corporate name *may be presumed* to be a suit by or against citizens of the State which created the corporate body, and *no averment* or denial to the contrary is admissible."[296]

The corporate citizenship decisions greatly expanded the business of out of state corporations and federal courts. Taft claimed these decisions were "directly in the interest of the new States who were thirsting for foreign capital, because it removed one of the hindrances to its coming."[297] States did not necessarily see it this way. Over time, the Supreme Court invalidated one after another endeavor by States to defeat this jurisdiction, including claiming corporations as their own to defeat diversity.[298] Out of

[293] Strawbridge v. Curtis, 7 U.S. 267 (1806).
[294] Holt, supra note _ at 110.
[295] B. Curtis, supra note _ at 130.
[296] Holt, supra note _ at 110(emphasis added); see also Purcell, supra note _ at 17-18; Freyer, Federal Courts, supra note _ at 354.
[297] Taft, Criticisms, supra note _ at 659.
[298] See *St. Louis and San Francisco Railway*, 161 U.S. 545, 562-563 (1896) (refusing to change the irrebutable presumption that a corporation is a citizen of the state in which it is incorporated to a broader rule that if a corporation does business in a second state it also becomes a citizen of that state); see also Purcell, supra note _ at 18 (noting how the Supreme Court's decisions prevented state legislation that took on foreign corporations as their own in order to prevent diversity jurisdiction between those corporations and citizens of the state); L. Friedman, supra note _ at 521 (arguing that the constitutional doctrine of due process was used to invalidate state statutes that negatively affected business); McCloskey, supra note _ at 88 (same); Freyer, Federal Courts, supra note _ at 351-52 (discussing how the Commerce Clause, the doctrine of unconstitutional conditions, and the general commercial law developed under *Swift v. Tyson* were all used by federal courts to prevent state interference with business interests).

state incorporations boomed, though.[299] Corporations would be formed simply to create diversity jurisdiction for the purposes of a lawsuit.[300]

Particularly contentious was the use by corporations of the power to "remove" cases from state courts. Under existing jurisdictional grants, many cases involving federal questions or corporate citizenship could be removed from the state courts to the federal courts after a plaintiff had sued the corporation. One scholar termed expansion of this jurisdiction after 1875 a "radical change of policy"[301] and a treatise on the *Law of Insurance* actually listed removal as among the "remedies" that insurance companies had against policyholders.[302] During the many Democratic attempts to cut back on corporate jurisdiction, removal would be a constant source of complaint. Why, wondered Democratic representatives, should a corporation "that goes into every hamlet and almost every household in the land" have "the right to remove its causes to a distant court" in cases that are no different than many others in the state courts?[303]

It was not just jurisdiction: the very substance of the law came to serve corporate interests. An article in the 1890 *Political Science Quarterly* discussed "Recent Centralizing Tendencies of the Supreme Court." The author noticed a string of increasingly frequent overrulings in favor of business interests. Among them, it was only "eight years after the court held that the state of Tennessee *could* tax a drummer from Connecticut, it held the same state could *not* tax a drummer from Ohio."[304] Soon federal law in many areas would come to trump state rules that interfered with national business.[305]

Later "anti-Granger" cases stand as a testimonial to the Supreme Court's shift. In 1876, just ten years after the initial *Granger* decisions, the Court decided in the *Wabash* case that states lacked the power to regulate interstate railroad rates. Waite, the author of Munn, dissented. The Nation said the "decision is of the highest importance . . . It utterly demolishes the pretension of State Legislatures and railroad commissions."[306] Then, in an 1890 decision, the Court held that the question of railroad rates "is eminently a question for judicial investigation, requiring due process of law for its determination."[307]

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[299] Purcell, supra note _ at 19.
[300] Freyer, Forums, supra note _ at 123.
[301] Dillon, supra note _ at 298.
[302] John Wilder May, The Law of Insurance, as Applied to Fire, Life, Accident, Guarantee, and Other Non-Maritime Risks, 2nd ed. (Boston 1882) 886, quoted in Purcell, supra note _ at 20-21.
[303] 10 Cong. Rec., supra note _ at 723.
[304] Powers, supra note _ at 397.
[305] The constitutional doctrines of substantive due process, McCloskey, supra note _ at 88 and L. Friedman, supra note _ at 521, and unconstitutional conditions and the Commerce Clause, Freyer, Federal Courts, supra note _ at 352, protected business from state legislation, as did the "general commercial law" that developed after *Swift v. Tyson*, Freyer, Federal Courts, supra note _ at 351-52.
[306] Nation, October 26, 1886, quoted in Warren, supra note _ at 634.
[307] Chicago M. & St. P. Ry. Co., v. State of Minnesota *ex rel.* Railroad and Warehouse Commission, 134 U.S. 418, 458 (1890).

So much for "resort to the polls."[308] Dissenting, Justice Bradley said the decision "practically overrules Munn v. Illinois."[309]

Nothing, though, caused consternation like the Supreme Court's encouragement that federal courts develop a uniform common law no matter what the law in the states. The trend began in the antebellum era. Since 1789 there had been a statute that required federal courts deciding cases in the "diversity" jurisdiction to rely on state law as the "rule of decision."[310] In the 1842 decision of *Swift v. Tyson*, the Court held that only state legislative acts, not state common law court decisions, governed in the federal courts.[311] In the absence of a clear state statute the federal courts could fashion a "federal common law" to govern commercial transactions.[312] The motive behind *Swift* had been the smooth facilitation of interstate commerce, the hope being state courts would come to agree with the federal common law rules, creating one uniform law all over the United States.[313] As it happened, though, the state courts did not fall into line.

Critics would point to the injustice of the different outcomes depending on whether a case was tried in state or federal court. This was just the sort of thing Holt's treatise discussed, with many examples of varying state and federal rules.[314] "If I can take one side of a given case and succeed in it by going into the United States courts," one critic wrote, "or take the other and succeed in the State court, it is too clear for argument that there is something wrong."[315] "The establishment of a Federal commercial law is conceived to be an excrescence on the Federal system," allowed one commentator otherwise sympathetic to the Court's nationalizing tendencies.[316]

What really raised ire was the Supreme Court expansion of the doctrine to allow federal courts to ignore a state's highest court's ruling on what *state* law said. If any principle was firm, it was that the last say as to state law rested with the state courts. This was the "Strader" principle that might have resolved the Dred Scott case on narrow grounds. The Court repeated the principle in *Slaughterhouse*: "If any such restraint is supposed to exist in the constitution of the State, the Supreme Court of Louisiana having

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[308] Munn v. Illinois, 94 U.S. 113, 134 (1876)
[309] *Chicago*, 134 U.S. at 462.
[310] 28 U.S.C. § 1652 (as amended in 1948).
[311] 41 U.S. 1 (1842).
[312] *Swift*, 41 U.S. at 18-19; see also Freyer, Harmony, supra note _ at xi.
[313] See Freyer, Harmony, supra note _ at xiii.
[314] See Holt, supra note _ at 6-7, 161-188 for examples of different state and federal rules.
[315] Heiskell, supra note _ at 759. The *Swift* doctrine gave rise to the highly criticized doctrine of "forum shopping" by which out-of-state litigants would choose to sue in state or federal court depending on which forum's law benefited them, a luxury in-state citizens did not have. Freyer, Forums, supra note _ at 121; see also Hornblower, supra note _ at 223 ("What is to be said of a civilized society where, upon precisely the same state of facts, a court on one side of the street will decide in favor of plaintiff, and a court on the other side of the street will decide in favor or defendant?"). The decision also created much uncertainty, for one would be unable to predict what principle of general commercial law a federal judge would choose to apply in a given case. See Hornblower, supra note _ at 223. Finally, it was seen as an encroachment on states rights. See, e.g., Hornblower, supra note _ at 224("[I]t is *contrary to the spirit of the Constitution* . . . It necessarily *subverts the true relations of the State and the general government*.")(emphasis in original).
[316] Wintersteen, supra note _ at 733.

necessarily passed on that question, it would not be open to review in this court."[317] Deeply distrustful of elected state judiciaries when property rights were at issue, even this sacred rule went by the wayside.[318] Rejecting not one, but two, decisions of the Supreme Court of Michigan on a state law question, the Supreme Court simply said "With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds . . . The question before us belongs to the domain of general jurisprudence."[319]

The Supreme Court's most famous foray into running roughshod over a state Supreme Court was in *Gelpcke v. City of Dubuque*.[320] Curtis explained to the Harvard students that Iowa municipalities had issued bonds, but that "[t]hey finally became very burdensome to the people of Iowa." Although prior state judges had approved the bonds, "there was a great change in the popular sentiment of the State; and in consequence of that, their judges being elective, new judges were elected, and a different decision made."[321] The Supreme Court of the United States took the case and reversed the Iowa Supreme Court on the state law question. Justice Swayne's opinion captured the Court's mood toward what it viewed as Iowa's chicanery: "We shall never immolate truth, justice, and the law."[322]

Following *Gelpcke*, the federal courts went on a binge of pushing aside state judgments when necessary to protect federal rights. By 1900 the Court had taken over 350 of these cases from over twenty states, involving $100-150 million in debt.[323] "Gelpcke *v*. Dubuque was unquestionably a most radical departure from precedent and principle," wrote constitutional historian William Meigs, who then explained it as "probably caused by a desire to prevent what was thought to be an effort on the part of the community concerned to evade the payment of its debts."[324]

Only in state debt repudiation cases did the Supreme Court seem occasionally to back away from protecting property rights. That federal courts would not allow suits against states over their debt should hardly have been surprising: the Eleventh Amendment was ratified precisely to immunize states from federal court jurisdiction in such debt cases.[325] Even the Constitution did not stump angry investors entirely, though. In many cases the Supreme Court sanctioned debt recovery suits through another fiction, that State officials were not the same as the state.[326] Indeed, the Governor of Missouri would write his state legislature to complain that the federal courts had

[317] The Slaughter-House Cases, 83 U.S. 36, 66 (1872).
[318] Collins, Before, supra note _ at 1265.
[319] Township of Pine Grove v. Talcott, 86 U.S. 666, 677, quoted in Collins, Before, supra note _ at 1275.
[320] 68 U.S. 175 (1863).
[321] B. Curtis, supra note _ at 209.
[322] Gelpcke v. City of Dubuque, 68 U.S. 175, 206 (1863).
[323] Purcell, supra note _ at 62.
[324] Meigs, Decisions, supra note _ at 478. Some charged that the judges who decided the case "were guilty of plain usurpation." Notes, supra note _ at 396.
[325] See, e.g., Fallon, supra note _ at 978-79.
[326] Orth, supra note _ at 110-111.

imprisoned state judges for refusing to levy taxes to pay defaulted debt.[327] When the federal court backed away in repudiation cases, the probable reason was a concern they could not enforce any orders that would have issued.[328] Remarkably, this perturbed conservatives who declared: "We do not believe in the wisdom or justice of this Amendment at all . . . It ought to be amended out of the Constitution."[329]

"the serious and immediate consideration of Congress"

Supreme Court decisions opening the doors of federal courts to corporations and striking down state laws interfering with the free flow of business and capital had the predictable effect. The federal courts were swamped. Although Congress knew relief was needed, it deadlocked for years over the remedy. Democrats, especially from the South and West, wanted to limit the jurisdiction of the federal courts severely. Republicans and Easterners favored adding capacity. Ultimately the latter prevailed, creating the court structure that remains today.

The federal courts now had their constituency. Corporations seeking relief from state laws and courts flooded into the federal judiciary. This was "[o]wing to the great increase in the wealth and population of our country, in its inter-state as well as foreign commerce, in the means of locomotion," observed Benjamin Curtis, opening his Harvard lectures.[330] Professor Felix Frankfurter of Harvard, who early in the twentieth century became the country's first great scholar of federal jurisdiction, explained the "swelling of the dockets" as a function of "the growth of the country's business, the assumption of authority over cases heretofore left to state courts the extension of the field of federal activity."[331] "Certain it is that of late years the importance of the Federal courts has rapidly increased," concluded legal scholar John Dillon, "and that much, perhaps most, of the great litigations of the country are now conducted in them."[332]

Growing caseloads quickly threatened to overwhelm the Supreme and lower federal courts, to a rising tide of complaints. "[T]he small tide of litigation that formerly flowed in Federal channels has swollen into a mighty stream," declared Dillon.[333] The situation was intolerable. Between 1873 and 1890 the caseloads of the lower federal courts grew from just below 30,000 to over 50,000 cases, and this after much of the bankruptcy litigation was eliminated. In roughly the same period, the Supreme Court's docket at the beginning of the Term tripled from some 600 cases in 1870 to over 1800 in 1890.[334] "The present condition of business in the Supreme Court of the United States demands the serious and immediate consideration of Congress," declared the Washington Post.[335] Words like "unmanageable,"[336] and "evil,"[337] were the fodder of articles about

[327] Stone, supra note _ at 397.
[328] Orth, supra note _ at 111.
[329] Independent, February 1, 1883, quoted in Warren, supra note _ at 665.
[330] B. Curtis, supra note _ at 2.
[331] Frankfurter and Landis, supra note _ at 60.
[332] Dillon, supra note _ at 284.
[333] Dillon, supra note _ at 284.
[334] Frankfurter and Landis, supra note _ at 60.
[335] The Federal Judiciary, Washington Post, February 5, 1878 at 1.

the federal court caseloads. The American Law Review documented the "constantly repeated complaints" about the Supreme Court's docket and how "the arrears . . . are now so great that two years at least will be required to hear the cases already on its list."[338]

Congress considered the matter repeatedly, but could not come to a solution. The political dynamic was a simple one. For most of the period the House was in Democratic hands, the Senate in Republican, and the two could not agree what was to be done.[339] Reviewing the legislative debates, Frankfurter concluded "there was a fierce clash over remedies, because of differences over the purposes which federal courts should subserve."[340]

Democrats in the House, led for most of the period by David Culberson, favored sharply curtailing the jurisdiction of the federal courts.[341] Four times the House passed Culberson's measure, which severely limited jurisdiction by raising jurisdictional amounts, treating corporations as citizens of the states in which they did business, and eliminating the right of removal.[342]

Some of Culberson's supporters cited state prerogatives.[343] The Washington Post favored the measure, in part on the ground that "statutes authorizing the removal of cases from State Courts, are an encroachment upon the domain of State sovereignty."[344] One feels "his State pride offended" at the flow of business to the federal courts, opined the Central Law Journal: "The State courts and the jurisprudence of the State have ample power and justice to mete to every one his dues and be governed by no sinister motive or prejudice."[345] Due to the increase in federal jurisdiction, the state had become "mere skeletons of what they were."[346] Corporations "come into a State for the purpose of making money," insisted Representative James Weaver of Iowa, "why should they not be compelled to go into the State courts?"[347]

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[336] Book Notes, supra note _ at 271.
[337] Meigs, Decisions, supra note _ at 490.
[338] The Supreme Court, supra note _ at 668; see also Collins, Unhappy, supra note _ at 738 (noting expansion in federal court dockets in the last quarter of the nineteenth century); Gillman, supra note _ at 520 (same); B. Curtis, supra note _ at 2 (same); Freyer, Federal Courts, supra note _ at 350, 353 (same).
[339] Collins, Unhappy History, supra note _ at 738-39; Gillman, supra note _ at 517.
[340] Frankfurter and Landis, supra note _ at 88.
[341] Collins, Unhappy History, supra note _ at 738-39.
[342] Collins, Unhappy History, supra note _ at 739-741; Freyer, Federal Courts, supra note _ at 357-358; Scheiber, Southern Regional Economy, supra note _ at 75; Frankfurter and Landis, supra note _ at 90, 136. Most corporations got to federal court through diversity of citizenship; treating corporations as citizens of the states in which they did business would eradicate this option. Freyer, Federal Courts, supra note _ at 357.
[343] Most Democrats in the House represented Southern and Western constituents who abhorred the transfer of business from state tribunals. Collins, Unhappy History, supra note _ at 739.
[344] The Federal Judiciary, Washington Post, February 5, 1878 at 1.
[345] Current Topics, supra note _ at 282.
[346] 10 Cong. Rec. 817 (statement of Rep. McMillin), quoted in Scheiber, Southern Regional Economy, supra note _ at 75.
[347] 10 Cong. Rec., supra note _ at 725(statement of Rep. Weaver).

For most, though, the complaint was that corporations used federal litigation to harass litigants without means. Memorializing the Senate in 1884, the General Assembly of Iowa complained that removing cases to federal court caused "great inconvenience, unreasonable delay, and unnecessary expense" – all resulting in many cases in "a denial of justice."[348] Why should persons who are poor, asked Culberson, "be compelled to litigate a cause of action with a national corporation in a Federal court, often hundreds of miles away from his residence?"[349] Examples were given of ordinary people forced to forego or settle claims because they could not afford the time and money to litigate in federal court.[350] Other litigants would lower their claims for damages to just below the federal threshold jurisdictional amount to avoid removal.[351] "A wealthy corporation or wealthy litigant under the present law, can so harass a poor competitor residing at a remote point from the Federal Courts, as to compel him to abandon a just and meritorious claim."[352]

Culberson's measures were opposed vehemently by Republicans who threatened a loss of credit would follow. A Chicago congressman noted that the bill was a "dangerous proposition" because if Eastern financiers could not seek redress in the federal courts they would no longer lend money to the Southern and Western states. He attributed "the wondrous wave of progress which has swept across this country like the swelling tide of the ocean" to Eastern money and asked, "Do you want to tell the merchants of the West and Southwest that . . . mercantile credits . . . are to be obtained in the East with difficulty?"[353] George Robinson of Massachusetts said capital "will not be risked in the perils of sectional bitterness, narrow prejudices, or local indifference to integrity and honor."[354]

The most Culberson got was a watered-down version of his bill, in 1887, which raised the jurisdictional amount from $500 to $2000 and curtailed removal somewhat.[355] Senator Edmunds of Vermont told the Senate "The bill as it came from the House of Representatives was altogether extreme" and so it had been whittled down. "[T]he general benefit of the bill" as he described it, "will be greatly to the interests of the people who have merely local controversies with corporations, and so on, that ought fairly to be tried in the local tribunals."[356] Even yet, the Railway and Corporation Law Journal reported that credit to the west dropped off rapidly because the creditor "has no recourse,

[348] 15 Cong. Rec., supra note _ at 2917.
[349] 10 Cong. Rec., supra note _ at 702(statement of Rep. Culberson).
[350] See, e.g., Powers, supra note _ at 402; see also 10. Cong. Rec., supra note _ at 724 (statement of Rep. Weaver) ("Litigants . . . often yield to the grossest injustice rather than incur the expense and inconvenience of attending court at remote points from their homes.").
[351] See Purcell, supra note _ at 90-91.
[352] The Federal Judiciary, Washington Post, February 5, 1878 at 2.
[353] 10 Cong. Rec., supra note _ at 820(statement of Rep. Barber).
[354] 10 Cong Rec. 850 (Feb. 12, 1880), quoted in Frankfurter and Landis, 92.
[355] Collins, Unhappy History, supra note _ at 741-42; Gillman, supra note _ at 517; Purcell, supra note _ at 15; FF. The Senate agreed to the elimination of plaintiff removal, Collins, Unhappy History, supra note _ at 741, and a decrease in the time allowed to file a removal petition, Gillman, supra note _ at 517.
[356] 18 Cong. Rec., supra note _ at 2544 (statement of Sen. Edmunds).

as he used to have, to the United States court, where the procedure is regular, businesslike, and easy."[357]

When relief came, it was to the Republican's liking. In 1891, in a measure ever after called the Evarts Bill, the Congress restructured the federal courts.[358] The lower courts were expanded by creating a federal Court of Appeals. The Supreme Court's docket was eased by making these new appellate courts in many cases the court of last resort. [359] Review by the Supreme Court would now be discretionary – in cases coming from the federal courts, at least, the Court could pick and choose what it ought to hear.[360] The Supreme Court's backlog dropped quickly,[361] and corporations retained their access to the federal courts.[362]

[357] Railway and Corporation Journal, II, (Nov. 1887), 456, quoted in Freyer, Forums, supra note _ at 133.
[358] At the time the bill passed, Republicans had regained control of the House. Gillman, *supra* note _ at 520.
[359] Gillman, supra note _ at 521.
[360] Gillman, supra note _ at 521.
[361] Gillman, supra note _ at 521; Frankfurter and Landis, supra note _ at 101-02.
[362] Gillman, supra note _ at 521.