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ESSAY

KILLING PRECEDENT: THE *SLAUGHTER-HOUSE* CONSTITUTION

*Maeve Glass**

This Essay offers a revisionist account of the Slaughter-House Cases*. It argues that the opinion's primary significance lies not in its gutting of the Privileges or Immunities Clause but in its omission of a people's archive of slavery.*

Decades before the decision, Black abolitionists began compiling the testimonies of refugees who had fled slavery. By 1872, this archival practice had produced a published record of Black struggle and become a platform for the celebration of Black resistance and a new era of Black leadership. Although the lead compiler of this record sent a copy to the Chief Justice, the Court ignored it. Instead, the Court began the clock of constitutional time with the death of slavery, portraying Black people as helpless victims of a temporary wave of postwar rogue violence. In doing so, the Court eschewed an interpretation of the Reconstruction Constitution as one born from a Black struggle against collective wrongs in favor of one of individual rights vindication by a guiltless federal judiciary.

By placing this archive alongside the opinion, this Essay illuminates the profound gap between America's constitutional discourse of political universality and its practice of exclusion. To narrow this gap, this Essay recovers an emancipatory reading of Slaughter-House*. Developed by one of America's first Black lawmakers in 1874, this interpretation pairs the opinion's omitted histories with its plain text to reread* Slaughter-House *not as courts know it today but as an affirmation of Congress's powers to remedy past wrongs and ensure the equal protection of America's citizens.*

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* Associate Professor of Law, Columbia Law School. For comments on earlier drafts, I thank Kate Andrias, Jessica Bulman-Pozen, Eric Foner, Katherine Franke, Kellen Funk, Craig Green, Jamal Greene, Ariela Gross, Hendrik Hartog, Aziz Huq, Clare Huntington, Olatunde Johnson, Stephanie McCurry, Sarah Knuckey, Christina Duffy Ponsa-Kraus, James Liebman, Farah P. Peterson, Daniel C. Richman, Sarah Seo, and Fred O. Smith as well as participants at faculty workshops at Columbia Law School, the University of Chicago Law School, and the USC Gould School of Law. For their research assistance, I thank Avi Fixler, Amelie Hopkins, Olivia Martinez, Anahi Mendoza, and Hendy Posner. For their editorial assistance, I also thank Abigail Flanigan and the editors of the *Columbia Law Review*.

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Every one that was taken from me,
was like cutting away a piece of my heart.[1]

O, we've come black-birding again.[2]

INTRODUCTION

In the spring of 1872, a manuscript as thick as a casebook received the endorsement of the Chief Justice of the Supreme Court of the United States.[3] Newly published by official resolution of one of the nation's antislavery organizations,[4] the manuscript included transcribed testimonies, letters, and narratives of hundreds of refugees who had fled the mass atrocity we know today as slavery.[5] "No stories could be more fraught with

1. William Johnston, A Tale of Wo, Colored Am. (N.Y.C.), Mar. 20, 1841 (quoting a father's words describing how traders took four of his children and sold them).

2. Meeting of the Vigilance Committee, Emancipator (N.Y.C.), Dec. 15, 1836, at 130 (describing the act of kidnapping Black people for the domestic slave market as "black-birding").

3. See Letter from Samuel P. Chase, C.J., U.S. Sup. Ct., to William Still (Mar. 1, 1872), *in* William Still, The Underground Rail Road: A Record of Facts, Authentic Narratives, Letters, &c., at 2, 2 (Philadelphia, Porter & Coates 1872) [hereinafter Still, The Underground Rail Road] (endorsing the manuscript and rejoicing that "such narratives can never be heard again"). On the thickness of the manuscript, see Photograph of "The Under Ground Rail Road", https://www.gannett-cdn.com/-mm-/83842484d12739f0bf16607d5f30d4682769c71e/c=0-578-3350-5044/local/-/media/2016/02/16/Tallahassee/Tallahassee/635912184199139029-The-Underground-Railroad-1872.jpg (on file with the *Columbia Law Review*) (last visited Jan. 25, 2023).

4. Resolutions of the Pennsylvania Anti-Slavery Society (May 5, 1870), reprinted in Still, The Underground Rail Road, supra note 3, at 1, 1 (resolving to publish the records of its work).

5. Still, The Underground Rail Road, supra note 3. The term "refugees" is not intended to signal a formal legal status; instead, it is intended as a substitute for "fugitives" or "fugitive [enslaved people]."

interest," the Chief Justice wrote in his brief reply of thanks to the man who had compiled the records decades earlier.[6]

And yet, when it came time the following year to interpret the newly ratified Reconstruction Amendments, the Supreme Court used its institutional voice to omit the histories of slavery from its case reporters.[7] In an opinion that marked the first interpretation of the Reconstruction Amendments, the Court summarily dispensed with the fact of slavery, noting only its existence in the southern states of the Union before declaring its formal death at the hands of a magnanimous national government on the battlefield of rebellion.[8]

What was the significance of this manuscript in 1872, and why did the Court exclude its contents from the case reporters? Although historians have explored the construction of this manuscript in the antebellum era,[9] little is known about its place within the contested constitutional order that emerged in the aftermath of the Civil War.[10] Instead, much of the scholarship and commentary surrounding *Slaughter-House* has focused on the narrow question of whether the Supreme Court gutted a single line of constitutional text known today as the Privileges or Immunities Clause.[11]

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6. Chase, supra note 3, at 2.

7. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67–69 (1873).

8. Id.

9. See, e.g., Andrew K. Diemer, Vigilance: The Life of William Still, Father of the Underground Railroad 8 (2022) (describing Black abolitionist William Still's life as a "story of community struggle" that "also helps us to see the longer story of the fight for Black freedom and Black citizenship rights"); Eric Foner, Gateway to Freedom: The Hidden History of the Underground Railroad 12 (2015) (describing how Still "carefully placed the experiences of the fugitives at the center of the story while giving full credit to those who assisted them"); Andrew K. Diemer, The Business of the Road: William Still, the Vigilance Committee, and the Management of the Underground Railroad, 42 J. Early Republic 83, 83–84 (2022) (summarizing the historiography of the Underground Railroad and noting historians' insufficient attention to the "daily, sometimes mundane, antislavery work" that Still engaged in as clerk of the Anti-Slavery Society of Pennsylvania); Larry Gara, William Still and the Underground Railroad, 28 Pa. Hist. 33, 33 (1961) (analyzing Still's work on the Underground Railroad in an effort to draw attention to the two "neglected groups" in America's legend of the Underground Railroad, namely the Black members of the vigilance committees and the "fugitives themselves"); Elizabeth Varon, "Beautiful Providences": William Still, the Vigilance Committee, and Abolitionists in the Age of Sectionalism, *in* Antislavery and Abolition in Philadelphia: Emancipation and the Long Struggle for Racial Justice in the City of Brotherly Love 229, 242 (Richard Newman & James Mueller eds., 2011) (analyzing Still's publication of *The Under Ground Rail Road* as part of an effort to keep alive "the memory of the heroic antislavery crusaders"); see also Foner, supra, at 190–213 (analyzing an analogous record of refugee testimonies and narratives compiled in the 1850s by the white abolitionist Sydney Howard Gay).

10. On the scramble for "influence and authority" in the wake of the Civil War, see Gregory P. Downs & Kate Masur, Introduction: Echoes of War: Rethinking Post–Civil War Governance and Politics, *in* The World the Civil War Made 1, 7 (Gregory P. Downs & Kate Masur eds., 2015).

11. Randy E. Barnett & Evan D. Bernick, The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment, 95 Notre Dame L. Rev. 499, 507 (2019) (observing that *Slaughter-House* is "generally regarded as having rendered

And while recent work has rightfully recentered the judicial construction of history as an object of analysis,[12] much remains to be learned about the

the Privileges or Immunities a 'practical nullity'" (quoting S. Doc. No. 82-170, at 965 (1953))); Michael Kent Curtis, Resurrecting the Privileges or Immunities Clause and Revising the *Slaughter-House Cases* Without Exhuming *Lochner*: Individual Rights and the Fourteenth Amendment, 38 B.C. L. Rev. 1, 76 (1996) (declaring that the *Slaughter-House Cases* "left protections of Bill of Rights liberties to the tender mercies of the very states that had so recently made mincemeat of them"); Charles Fairman, What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court, 1870–1892, *in* The Gaspar G. Bacon Lectures on the Constitution of the United States: 1940–1950, at 423, 458 (1953) ("Justice Miller . . . construed the Amendment narrowly . . . . The privileges and immunities clause was virtually scratched from the Constitution."); Morton J. Horwitz, The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 Harv. L. Rev. 30, 84 (1993) ("Justice Miller's opinion . . . virtually emptied the Privileges and Immunities Clause of content . . . .").

For revisionist accounts of *Slaughter-House*, see Michael A. Ross, Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era 202 (2003) (tracing Justice Miller's concern for protecting Republican state legislatures); David S. Bogen, Rebuilding the *Slaughter-House*: The *Cases*' Support for Civil Rights, 42 Akron L. Rev. 1129, 1130 (2009) (accepting that *Slaughter-House* "[g]utt[ed] the Privileges and Immunities Clause" but arguing that this evisceration "compelled the Court to read the Equal Protection Clause broadly"); Kevin Christopher Newsom, Setting Incorporationism Straight: A Reinterpretation of the *Slaughter-House Cases*, 109 Yale L.J. 643, 648–50 (2000) (arguing that Justice Miller's opinion in *Slaughter-House* meant to allow for the incorporation of Bill of Rights freedoms against the states); William J. Rich, Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon, 87 Minn. L. Rev. 153, 157 (2002) (arguing that "Justice Miller's opinion for the Court directed future generations to look to federal law to identify privileges or immunities" in an admonition that has since been forgotten); Michael A. Ross, Justice Miller's Reconstruction: The *Slaughter-House Cases*, Health Codes, and Civil Rights in New Orleans, 1861–1873, 64 J.S. Hist. 649, 652 (1988) [hereinafter Ross, Justice Miller's Reconstruction] (arguing that Justice Miller's concerns for safeguarding Louisiana's newly elected biracial legislature that enacted the state law at issue in *Slaughter-House* informed the decision); Bryan H. Wildenthal, How I Learned to Stop Worrying and Love the *Slaughter-House Cases*: An Essay in Constitutional-Historical Revisionism, 23 T. Jefferson L. Rev. 241, 244–45 (2001) (concluding that "the majority in *Slaughter-House* . . . accepted as a minimum baseline consensus the notion of incorporating at least the textual guarantees of the Bill of Rights against state action"); Bryan H. Wildenthal, The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment, 61 Ohio St. L.J. 1051, 1063 (2001) (challenging the conventional view that Justice Miller's majority opinion rejected incorporation via the Privileges or Immunities Clause by noting that "*the majority's own language* [on this issue] was at worst ambiguous, [and] at best powerfully supportive of total incorporation"). For a critique of the usefulness of these revisionist interpretations, see Randy E. Barnett, The Three Narratives of the *Slaughter-House Cases*, 41 J. Sup. Ct. Hist. 295, 304–08 (2016).

12. See, e.g., Jack M. Balkin, Constitutional Memories, 31 Wm. & Mary Bill Rts. J. (forthcoming 2023) (manuscript at 19) (on file with the *Columbia Law Review*) ("Judicial opinions both depend on and amplify conceptions of constitutional memory, and thus the ideological effects of what is remembered and what is forgotten."); Justin Collings, The Supreme Court and the Memory of Evil, 71 Stan. L. Rev. 265, 274 (2019) (suggesting that the Reconstruction Court's omission of slavery from its constitutional law case reporters was part of the majority's effort to restore the federal structure of the Union); Peggy Cooper

processes by which people excluded from the law's protection created, argued from, and theorized a historical record of slavery—and how, in turn, the law's appointed elite responded.

Building on the robust body of scholarship that has illuminated the long struggle for freedom and equal citizenship in America,[13] this Essay

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Davis, Aderson Francois & Colin Starger, The Persistence of the Confederate Narrative, 84 Tenn. L. Rev. 301, 304 (2017) (arguing that a "Confederate narrative" that has "had a persistent influence in constitutional discourse . . . rests on a distorted reading of our legal history"); Eric Foner, The Supreme Court and the History of Reconstruction—And Vice-Versa, 112 Colum. L. Rev. 1585, 1585 (2012) (arguing that a historical narrative of Reconstruction that has long since been repudiated by historians continues to shape the Supreme Court's jurisprudence); Aderson Bellegarde François, A Lost World: Sallie Robinson, the *Civil Rights Cases*, and Missing Narratives of Slavery in the Supreme Court's Reconstruction Jurisprudence, 109 Geo. L.J. 1015, 1020–21 (2021) (arguing that the Reconstruction Court's omission of slavery from the case reporters was "neither an oversight nor an accident, but rather the natural—if not inevitable—consequence of the restorative arc that the law in general and courts in particular always bend toward when telling stories"); Ariela Gross, When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument, 96 Calif. L. Rev. 283, 284 (2008) (identifying "the way histories of slavery have been used in judicial opinions, legal scholarship and popular political tracts to support conflicting arguments about racial justice, affirmative action, and reparations for African Americans"); Reva B. Siegel, The Politics of Constitutional Memory, 20 Geo. J.L. & Pub. Pol'y 19, 23 (2022) (introducing the concept of "constitutional memory" to explain the Supreme Court's exclusion of centuries of suffrage arguments); see also Craig Green, Beyond States: A Constitutional History of Territory, Statehood, and Nation-Building, 90 U. Chi. L. Rev. (forthcoming 2023) (manuscript at 83–84) (on file with the *Columbia Law Review*) (arguing that the "*Slaughter-House* Court cited recently manufactured traditions about the prewar past and applied those 'traditions' to unprecedented circumstances"); Cynthia Nicoletti, The Rise and Fall of Transcendent Constitutionalism in the Civil War Era, 106 Va. L. Rev. 1631, 1702 (2020) (arguing that Justice Miller's aim in *Slaughter-House* was to halt the rise of a transcendent constitutionalism unleashed by the Civil War by returning power to the state governments).

13. See, e.g., Alejandro de la Fuente & Ariela J. Gross, Becoming Free, Becoming Black: Race, Freedom, and Law in Cuba, Virginia, and Louisiana 82 (2020) (arguing that "people of color persisted in seeking freedom and exercising rights in court in significant numbers through the first decades of the nineteenth century"); Van Gosse, The First Reconstruction: Black Politics in America From the Revolution to the Civil War 5 (2021) (describing "black men's extensive participation in partisan electioneering in the postrevolutionary era"); Martha S. Jones, Birthright Citizens: A History of Race and Rights in Antebellum America 24 (2018) (identifying constitutions and "founding texts" as one of the sources that free Black families relied on to assert their status as citizens); Martha S. Jones, Vanguard: How Black Women Broke Barriers, Won the Vote, and Insisted on Equality for All 7 (2020) [hereinafter Jones, Vanguard] (describing the rediscovery of a "many-faceted and two-centuries-long women's movement" built by Black women in their search for political power); Kelly Kennington, In the Shadow of *Dred Scott*: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America 41–67 (2017) (tracing the process by which enslaved people brought freedom suits in antebellum St. Louis); Kate Masur, Until Justice Be Done: America's First Civil Rights Movement, From the Revolution to Reconstruction xii (2021) (describing a previously overlooked "struggle for racial equality in civil rights that spanned the first eight decades of the nation's history"); Gary B. Nash, Forging Freedom: The Formation of Philadelphia's Black Community, 1720–1840, at 187–88 (1988) (summarizing how Black residents of Philadelphia challenged the Fugitive Slave

aims to reframe how we understand the constitutional significance of *Slaughter-House*. Rather than beginning with the text of the Court's opinion or the clauses of the Constitution that it interpreted, this Essay begins with the voices that it omitted.[14] In doing so, it uncovers a still only dimly understood world of constitutional argumentation, one so disruptive in its indictment of the nation's legal order and so bold in its vision for a new regime that it had to be excluded by the Court from the official body of constitutional law.

As this Essay argues, by the time the manuscript of testimonies arrived on the Chief Justice's desk in 1872, its mode of archiving the voices of slavery's survivors had become part of a distinctive legal discourse.[15] Unlike

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Act of 1793 in the 1790s by citing natural law and the federal Constitution); Benjamin Quarles, Black Abolitionists 204–22 (1969) (describing efforts by Black abolitionists to protest the Fugitive Slave Law of 1850); Patrick Rael, Black Identity and Black Protest in the Antebellum North 270–81 (2002) (analyzing how nineteenth-century Black leaders cited the founding documents and the incomplete American Revolution to challenge the institution of slavery and racial discrimination); Hannah Rosen, Terror in the Heart of Freedom: Citizenship, Sexual Violence, and the Meaning of Race in the Postemancipation South 8–9 (2009) (arguing that "[t]estimony found in [the records of congressional investigating committees and the Bureau of Refugees, Freedmen, and Abandoned Lands] offers a window . . . onto how former slaves claimed citizenship by demanding protection from violence"); Manisha Sinha, The Slave's Cause: A History of Abolition 139 (2016) (analyzing how the founders of America's first Black churches cited the Constitution in a 1799 petition to Congress to pioneer the argument that slavery was unconstitutional); Anne Twitty, Before *Dred Scott*: Slavery and Legal Culture in the American Confluence, 1787–1857, at 6 (2016) (arguing that enslaved people in the American Confluence "discovered—and employed—statutes that could effect their freedom, obtained competent counsel, and tracked down sympathetic witnesses" to argue for their freedom in court); Lea VanderVelde, Redemption Songs: Suing for Freedom Before *Dred Scott* 11 (2014) (emphasizing how "subordinate people took the lead in pressing their legal rights in suing to establish their freedom" in the courts); Kimberly M. Welch, Black Litigants in the Antebellum American South 11 (2018) (arguing that "when black people asserted their rights and pressed their claims in court, they also envisioned themselves as full members of their communities and pressed for civic inclusion"); Kidada E. Williams, They Left Great Marks on Me: African American Testimonies of Racial Violence From Emancipation to World War I, at 20 (2012) (arguing that "emancipation-era addresses, petitions, and memorials also point to black people's willingness to assert their citizenship rights by testifying about violence"); Daniel Farbman, Resistance Lawyering, 107 Calif. L. Rev. 1877, 1882 (2019) (arguing that abolitionist lawyers used cases arising under the 1850 Fugitive Slave Law to wage a "vigorous rhetorical proxy battle against slavery"); Crystal N. Feimster, "What if I Am a Woman": Black Women's Campaigns for Sexual Justice and Citizenship, *in* The World the Civil War Made, supra note 10, at 249, 250 (arguing that Black women drew "on their wartime experience and the Fourteenth Amendment's guarantee of equal protection under the law" to "renew[] their efforts to redefine citizenship to include all women"); Rebecca Scott, Public Rights, Social Equality, and the Conceptual Roots of the *Plessy* Challenge, 106 Mich. L. Rev. 777, 790–91 (2008) (explaining how men of color in Louisiana invoked the Louisiana Purchase Treaty of 1803 to argue for inclusive national citizenship).

14. See Hendrik Hartog, The Constitution of Aspiration and "The Rights That Belong to Us All", 74 J. Am. Hist. 1013, 1015 (1987) (suggesting a framework for "integrating the subjects of American social history and American constitutional history").

15. See infra section I.B.

mainstream modes of antislavery and abolitionist constitutional argumentation that began with the text of the founding documents or principles of natural law to insist on the rights of individual states or people, this tradition of constitutional argumentation began with the brutal record of human suffering and struggle in the face of institutionalized, collective wrongs. Crucially, the aim of reciting and arguing from this record of suffering was not to solicit pity from white audiences or to persuade them of the original evil of the Constitution. Instead, by reworking principles of civic republicanism that dated back to the American Revolution, the aim was to reveal the corruption and moral bankruptcy of a monarchical republic, which had forfeited its right to rule, while also celebrating a Black struggle deemed to be protected by a higher law of God.[16] By 1872, this mode of arguing from a record of atrocity as told by its survivors had become a basis for a radical vision of America's future as a constitutional democracy, one rooted in a shared history of white oppression and aimed at realizing Black self-determination and liberation—including, for some, the promise of Black female leadership of America's public institutions.[17]

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16. See infra section I.B.

17. See Leslie M. Alexander, African or American? Black Activism and Political Activism in New York City, 1784–1861, at 130 (2008) (identifying the 1850s as a moment of "increasing urgency" for Black leaders to renew efforts with "a strong determination to create unity among their people"); Brandon R. Byrd, The Black Republic: African Americans and the Fate of Haiti 21 (2020) [hereinafter Byrd, The Black Republic] (describing nineteenth-century Black nationalism as "a malleable ideology centered on the belief that people of African descent were a distinct nation that had to unite on the principles of racial pride, political and economic self-determination, and civilized progress"); Kathy L. Glass, Courting Communities: Black Female Nationalism and "Syncre-Nationalism" in the Nineteenth-Century North 1–15, 101 (2006) [hereinafter Glass, Courting Communities] (tracing how nineteenth-century Black women activists endeavored to build a Black community that operated "primarily at the ideological, rather than the geographical or juridical level" while cautioning that Black nationalism was not a "monolithic concept"); Wilson Jeremiah Moses, The Golden Age of Black Nationalism, 1850–1925, at 16 (1978) (tracing the origins of Black nationalism to the shared experience of slavery); Rael, supra note 13, at 211–33 (arguing that a nascent Black nationalism originated not among enslaved people but among a Black intelligentsia in the urban antebellum North that celebrated a shared pan-African and Haitian history and depicted Anglo-Saxon history as one of barbarism and despotism); Michael Stancliff, Frances Ellen Watkins Harper: African American Reform Rhetoric and the Rise of a Modern Nation State 6 (2011) (arguing that Watkins Harper "sought to instill a new brand of race-national allegiance"); Sterling Stuckey, The Ideological Origins of Black Nationalism 5 (1972) (arguing that Black nationalist theorists used the shared experience of white oppression and the example of the Haitian Revolution to forge a shared collective identity bound by an obligation to pursue self-liberation); Craig Wilder, In the Company of Black Men: The African Influence on African American Culture in New York City 156 (2001) ("The best measure of antebellum nationalism was not how fully one sought to integrate or escape white America but how committed one was to the self-determination of Africans in the Diaspora."); Brandon R. Byrd, "We Are Negroes!" The Haitian Zambo, Racial Spectacle, and the Performance of Black Women's Internationalism, 1863–1877, *in* To Turn the Whole World Over: Black Women and Internationalism 15, 23 (Keisha Blain & Tiffany Gill eds., 2019) [hereinafter Byrd, "We Are Negroes!"] ("Nineteenth-century black nationalism, a

It was this constitutional tradition of argumentation, tied to a movement for Black political power, that the Court implicitly rejected when it omitted the people's archive of slavery from its history of the Reconstruction Amendments. Instead of integrating a history of state-sanctioned mass atrocity that had become a basis for celebrating Black resistance, the Court chose to construct its history using a different set of records.[18] In passages of *Slaughter-House* that have gone overlooked for a century and a half, the Court used language that paraphrased a letter from a former human-trafficker turned Union military officer that had been published and circulated in a 1865 report compiled by Congress.[19] Known as the Schurz Report, this compilation of letters from military officers and federal employees framed the central problem facing America not as one of centuries of white oppression but as a temporary wave of postwar violence by rebellious states and rogue bad men who preyed on helpless Black victims.[20] Relying on this official narration of the past, the Court eschewed an interpretation of the Reconstruction Constitution as one born from a Black struggle against collective wrongs in favor of one of individual rights vindication by a guiltless federal judiciary.[21]

By placing the omitted archive of slavery alongside the *Slaughter-House* opinion for the first time,[22] this Essay illuminates the profound gap that separates America's constitutional discourse of political universality and its

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malleable ideology closely related to Pan-Africanism, stressed that people of African descent possessed a common heritage, historical oppression, and political and cultural destiny."); see also Alexander, supra, at 162 (emphasizing the importance of preserving the history of slavery as a reminder of "the Black community's history and struggle").

18. See infra section II.B.

19. See infra section II.B, especially notes 228–230 and accompanying text.

20. See infra section II.A.

21. See infra section II.B.

22. In recounting the histories that the Court excluded from the case reporters in Part I, the aim is not to subject readers to the trauma of slavery for the sake of spectacle. As Saidiya Hartman reminds us, academics who read into the archives of slavery must take seriously the ethics of historical representation. "[T]o what end," she asks, "does one open the casket and look into the face of death? . . . Why subject the dead to new dangers and to a second order of violence?" Saidiya Hartman, Venus in Two Acts, Small Axe, June 2008, at 1, 4–5 [hereinafter Hartman, Venus in Two Acts]. Here, the Essay's justification for "opening the casket" is to both underscore the egregious scale of erasure that the Court committed in *Slaughter-House* and advance a particular historical claim—namely, that this mode of preserving accounts of human suffering became a basis for a distinct form of constitutional argumentation, one enlisted by Black dissidents in the 1850s to justify Black resistance and that evolved into post-emancipation calls for Black power. For these purposes, this Essay risks the fraught ethical issues raised by publishing accounts of people who did not consent to their stories being retold in the pages of a law review. See, e.g., Eileen Pittaway, Linda Bartolomei & Richard Hugman, 'Stop Stealing Our Stories': The Ethics of Research With Vulnerable Groups, 2 J. Hum. Rts. Prac. 229, 231–35 (2010) (summarizing the ethical challenges in research with refugee communities); see also Kidada E. Williams, I Saw Death Coming: A History of Terror and Survival in the War Against Reconstruction xxiii (2023) ("But listening—really listening—to survivors of racist violence in the past holds lessons for our current moment.").

practices of exclusion.[23] The constitutional significance of the *Slaughter-House Cases*, the Essay concludes, lies not in the gutting of a single line of constitutional text that has captured the legal academy's attention for a century and a half.[24] Rather, the significance of the case lies in the judicial gutting of a people's history of atrocity by a Court seeking to assert its own authority in the contests for power in post-Civil War America. Far from a story unique to the United States and its era of "Reconstruction,"[25] this foundational act—the judicial erasure of sovereign violence following the formal abolition of slavery—is consistent with patterns that critical scholars of transitional justice and postcolonial regimes have observed in legal institutions across the globe.[26]

While narrowing this gap between constitutional law's discourse of universality and its practices of exclusion will surely require far more than doctrine,[27] this Essay proposes one modest step forward for those working within the existing structures of American constitutional law: the revival of

23. I am grateful to Aziz Huq for this formulation.

24. See supra note 11.

25. On the limits of the term "Reconstruction" see Downs & Masur, supra note 10, at 3–5 (inviting scholars to analyze the era across national borders in an effort to "shed presumptions of American exceptionalism").

26. See generally Stewart Motha, Archiving Sovereignty: Law, History, Violence (2018) (charting how courts have functioned to archive violence and thereby legitimize sovereignty in the Chagos Archipelago, Australia, and South Africa); Philip Alston & Sarah Knuckey, The Transformation of Human Rights Fact-Finding: Challenges and Opportunities, *in* The Transformation of Human Rights Fact-Finding 3, 16 (Philip Alston & Sarah Knuckey eds., 2016) (identifying the "politics and value assumptions that inform specific [human rights fact-finding] investigations" and may privilege one set of harms at the expense of others); Dan Edelstein, Stefanos Geroulanos & Natasha Wheatley, Chronocenosis: An Introduction to Power and Time, *in* Power and Time: Temporalities in Conflict and the Making of History 2, 20–21 (Dan Edelstein, Stefanos Geroulanos & Natasha Wheatley eds., 2020) (arguing that law creates a "circumscribed time scale of moral culpability" that advocates have challenged by positing a "virtual, elongated ethical temporality"); see also Lyndsey Stonebridge, The Judicial Imagination: Writing After Nuremberg 3 (2011) (describing how, for survivors of the Holocaust who testified in court in 1961, it was difficult if not impossible to "put[] the experience of the camps into the language demanded by the law"); Caroline Elkins, Looking Beyond Mau Mau: Archiving Violence in the Era of Decolonization, 120 Am. Hist. Rev. 852, 853 (2015) ("Archives are loaded sites that produce realities as much as they document them."); Brigitte Herremans & Tine Destrooper, Stirring the Justice Imagination: Countering the Invisibilization and Erasure of Syrian Victims' Justice Narratives, 15 Int'l J. Transitional Just. 576, 580–82 (2021) (exploring, through a case study of Syria, how justice narratives can "crowd out narratives with different epistemic underpinnings" through erasure and invisibilization); Tshepo Madlingozi, On Transitional Justice Entrepreneurs and the Production of Victims, 2 J. Hum. Rts. Prac. 208, 212 (2010) (noting "how transitional justice actors often rob victims of their agency in ways that are inimical to victims' empowerment, let alone active citizenship"); Ann Laura Stoler, Colonial Archives and the Arts of Governance, 2 Archival Sci. 87, 97 (2002) ("Colonial archives were both sites of the imaginary *and* institutions that fashioned histories as they concealed, revealed, and reproduced the power of the state.").

27. See, e.g., Ryan D. Doerfler & Samuel Moyn, Democratizing the Supreme Court, 109 Calif. L. Rev. 1703, 1706 (2021) (summarizing the "widest range of imaginable statutory reforms" with which to democratize the Supreme Court).

an emancipatory, and now long-since forgotten, reading of *Slaughter-House*. First put forward in 1874 by the prominent Black lawyer and congressman Robert Elliott, this reading of *Slaughter-House* is directly at odds with the interpretation that currently travels through America's law schools, courtrooms, and halls of power.[28] Echoing Frederick Douglass's theory of constitutional interpretation, this reading of precedent dismissed the intentions of the men who wrote the opinion. Instead, it paired the decision's omitted histories of slavery with a plain reading of the opinion's text to interpret the decision not as a gutting of the Privileges or Immunities Clause but as an affirmation of Congress's broad powers to remedy past wrongs and ensure the equal protection of the law for America's citizens.[29]

Initially celebrated by several fellow radical lawmakers in Congress, this reading of *Slaughter-House* was soon killed off by the Supreme Court in a series of subsequent decisions. In what some might describe as an extended game of "Scrabble Board precedentialism,"[30] the Court selectively cited *Slaughter-House*. Most notably, the Court ignored several passages in the opinion in which the *Slaughter-House* Court, perhaps in pursuit of a Constitution of individual rights,[31] had described a new federal power to protect American citizens from private acts of violence and oppression and recognized Congress's role in defining, through federal law, the substance of a national citizen's privileges and immunities.[32] By bringing these passages back into view, if only to watch them disappear in the hands of the Court, this Essay underscores the Court's selective reading of its own decisions and thus problematizes the foundations of key

28. See, e.g., Paul Brest, Sanford Levinson, Jack M. Balkin, Akhil Reed Amar & Reva B. Siegel, Processes of Constitutional Decisionmaking: Cases and Materials 372 (7th ed. 2018) (noting that the case is "infamous for its narrow reading of the Privileges or Immunities Clause, which . . . became virtually a dead letter following the decision"); Richard D. Friedman & Julian Davis Mortenson, Constitutional Law: An Integrated Approach 1306 (2021) (describing the work of the *Slaughter-House Cases* as a "demolition job" on the Privileges or Immunities Clause); see also Courtney v. Danner, 801 Fed. App'x 558, 559 (9th Cir. 2020) (mem.) (citing *Slaughter-House* for the proposition that the Privileges or Immunities Clause secures only a very narrow class of rights—those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws" (internal quotation marks omitted) (quoting McDonald v. City of Chicago, 561 U.S. 742, 754 (2010))); Johnson v. Brown, 567 F. Supp. 3d 1230, 1254 (D. Or. 2021) (same); McLemore v. Gumucio, No. 3:19-cv-00530, 2020 WL 7129023, at *21 (M.D. Tenn. Dec. 4, 2020) (same); Truesdell v. Friedlander, Civil No. 3:19-cv-00066-GFVT, 2020 WL 5111206, at *9 (E.D. Ky. Aug. 31, 2020) (same); Fitisemanu v. United States, 426 F. Supp. 3d 1155, 1169 (D. Utah 2019) (same); Sears v. Mooney, No. 1:17-cv-50, 2019 WL 6726839, at *15 (M.D. Pa. Dec. 11, 2019) (same); Talley v. Clark, Civil No. 18-5316, 2019 WL 331313, at *6 (E.D. Pa. Jan. 24, 2019) (same).

29. See infra section III.A.

30. On "Scrabble Board precedentialism" and the challenges that it poses for the Court's legitimacy, see Thomas W. Merrill, Legitimate Interpretation—or Legitimate Adjudication?, 105 Cornell L. Rev. 1395, 1450–56 (2021).

31. See infra section II.B.

32. See infra section III.B.

Fourteenth Amendment doctrines that continue to limit Congress's role in protecting and defining constitutional rights today.[33]

Part I begins by tracing the creation of a people's archive of slavery that, by the time of the *Slaughter-House* decision, had become a key part of a constitutional argument for Black resistance and political power. Part II then explains how the Supreme Court implicitly rejected this archival practice in *Slaughter-House* by constructing a history that recast Black people from survivors seeking collective political power into the helpless wards of a guiltless national government, whose individual rights would be vindicated by the federal courts. Part III explores how recovering this history of omission counsels in favor of reviving a now-forgotten historical interpretation of *Slaughter-House*: one that sought to ensure that the history of suffering and survival would remain within the records of constitutional law and that the meaning of the Amendments would be determined not only by the Court but also by the people.

I. PRECEDENTS: RECORDKEEPERS

To a reader encountering it for the first time, the book titled *Journal C of Station No. 2*[34] gives no hint of its significance. It appears as simply another aged volume from the nineteenth century: worn corners that give way to water marks; faint traces of dirt from the loft in the office building in the cemetery in Philadelphia where its author interred it for safe-keeping.[35] And yet, there within its pages in carefully scripted cursive, one finds a distinctive text in American history. Compiled in the 1850s by Philadelphian aid workers—including the Black abolitionist William Still, who later submitted it to the Chief Justice in 1872—this unassuming journal holds within it the carefully recorded testimonies and narratives of hundreds of individuals who fled the atrocities of state-sanctioned violence. By the eve of the Civil War, people who helped record these voices had transformed its recitation of collective wrongs into a blistering critique of America's legal institutions, one deployed to indict the national government for its complicity and to justify the people's right to resistance and, if needed, to armed revolution.

Building on the work of legal historians who have illuminated how Black abolitionists and their allies used the nation's courtrooms and its formal legal texts to make arguments for freedom and equality,[36] this Part analyzes the journal as an effort by the disenfranchised to create a record outside of the formal institutions and texts of law.[37] Designed originally to

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33. See infra section III.B.

34. William Still, Journal C of Station No. 2 (1852–1857), *in* Pennsylvania Abolition Society Papers (on file with the Historical Society of Pennsylvania) [hereinafter Still, Journal C].

35. James P. Boyd, William Still: His Life and Work to This Time, *in* William Still, Still's Underground Rail Road Records i, xxxiv (Philadelphia, William Still rev. ed. 1886) (describing the hiding of the journal in a loft in Lebanon Cemetery in Philadelphia).

36. See supra note 13.

37. On the use of violence as an abolitionist strategy, see Kellie Carter Jackson, Force and Freedom: Black Abolitionists and the Politics of Violence 8 (2019). For a classic

help with family reunification efforts,[38] the journal served as part of a broader archival practice upon which leading abolitionist Black dissidents, including Frances Ellen Watkins Harper, argued for a new constitutional order. This Part begins by mapping the construction of this journal, before exploring how Black dissidents used its contents to mount a direct critique of America's legal order and institutions that justified the return of power to the people.

A. *Constructing a People's Record of Slavery*

When William Still opened the first page of *Journal C* in December of 1852 to begin recording the words of the person who sat across from him in an office in Philadelphia, he was no stranger to violence against Black people. His grandfather had been shot dead by a white man.[39] His mother, Charity, had been kidnapped by white men who called their actions "black-birding."[40] They had led his mother up to an attic room in a house on the Chesapeake, locked the door, and left her four children—William's sisters, Mahala and Kitturah, and his two brothers, Levin and Peter—in the cabin outside.[41] When his mother emerged some time later and decided she

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statement of the coexistence of legal orders that lie beyond the sovereign's command, see Hendrik Hartog, Pigs and Positivism, 1985 Wis. L. Rev. 899, 934 ("[D]efining law as the command of the sovereign . . . allows us to maintain our valued vision of law as a (single) text. But in doing so it represses the existence and the relative autonomy of competing and conflicting socially constituted visions of legal order."). For a brief and recent historiography of legal pluralism, see, e.g., Aziz Z. Huq, What We Ask of Law, 132 Yale L.J. 487, 501–02 (2022); see also Saidiya Hartman, Wayward Lives, Beautiful Experiments: Intimate Histories of Riotous Black Girls, Troublesome Women, and Queer Radicals 224 (2019) (describing the act of living "outside and athwart the law").

38. See, e.g., William Still, Speech at the Final Meeting of the Pennsylvania Anti-Slavery Society (May 5, 1870), *in* Exit!: The Pennsylvania Anti-Slavery Society a Thing of the Past., Press (Phila.), May 6, 1870, at 2, 2 ("I confess, however, I did firmly believe that the records I was preserving might be used effectively in a somewhat private way in Canada and other parts, towards preventing all traces of relationship being lost, at least in some of the cases coming under my personal knowledge.").

39. Lurey Khan, One Day, Levin . . . He Be Free: William Still and the Underground Railroad 1 (1972).

40. Letter from William Still to James Miller McKim (Aug. 8, 1850), *in* 4 The Black Abolitionist Papers: The United States, 1847–1858, at 53, 56, 58 n.2 (C. Peter Ripley, Roy E. Finkenbine, Michael F. Hembree & Donald Yacovone eds., 1991) (describing the kidnapping of his mother, Charity); see also supra note 2 and accompanying text.

41. Letter from William Still to James Miller McKim, supra note 40, at 56 (describing how his mother was "kept confined of nights in a garret"). For the location of the house on the Eastern Shore, see Bettie Stirling Carothers, 1778 Census of Maryland 4 (n.d.) (listing "Saunders Griffith" as a resident of Choptank Hundred in Caroline County, Maryland). Alexander "Saunders" Griffith, whom Still references in his letter to McKim as "S.G.," was the man who enslaved Still's family; Alexander Griffith appears in the 1850 Census as a farmer in Caroline County. See Schedule for Caroline County, Maryland, microformed on Seventh Census of the United States, 1850, Microfilm M432, 288 (Nat'l Archives Microfilms Publ'ns). An Alexander Griffith also appears in the 1820 Census. See Schedule for Caroline County, Maryland, microformed on Fourth Census of the United States, 1820, Microfilm M33, 40 (Nat'l Archives Microfilms Publ'ns). For a recent effort to reconstruct the "slave cabin" where

would not leave her daughters to the near-certain fate of repetition, she lifted them up and left in the cover of the night, leaving her boys she could not carry with prayers offered up to God above.[42] The boys were sold soon afterwards, shipped down to a man who owned a 480-acre cotton plantation in Bainbridge, Alabama, where William's brother Levin died at the age of twenty-nine, beaten and evidently broken by an overseer who believed "there was nothing so good for a n— as frequent floggings."[43]

And now, as William Still sat at the table across from the strangers who had come through the night following a hope against hope that something would be at the end of the roads and waterways that led northward, he planned to keep a record. It likely began with a question, *What is your name?* Perhaps a pause. "John Henry Rickets."[44] And again, on another day. *What is your name?* A response. "Maria Jane Houston."[45] *Where are you coming from?* An answer, ink on paper. "Charlotte Harris, from Wilmington, Delaware."[46] For those who came with family, a question. *What is the name of your son?* "Thomas Garrison."[47] *And how old is he?* "Nine years of age."[48] *And your baby?* "William Henry, 10 months old."[49] Those who came alone were asked whom they had left behind, and the present tense could give way in a sentence to the past. "The wife's name was Ann Maria, and the children as follows: Ellen, Ann Maria & Isabella."[50] Those who could not tell their exact age would later detail without apparent hesitation the entirely plausible prospect of an early death. "I can't tell my exact age; I guess I am about 25," Jane Johnson later told a court. "I was born in Washington City," she continued. "Lived there this New-Years, if I shall live to see it, two years."[51]

And then the question. *Who claimed you? What did they do to you?* To judge from the record, the answers varied in length and detail. A few people spoke for minutes, perhaps watching their words become ink that filled pages. Some offered up fragments of their lives, fragments that could

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the children may have lived, see William Still Interpretive Center, Harriet Tubman Underground R.R. Byway, https://harriettubmanbyway.org/william-still-interpretive-center/ [https://perma.cc/C3EN-TK42] (last visited Jan. 25, 2023).

42. Letter from William Still to James Miller McKim, supra note 40, at 56.

43. William C. Kashatus, William Still: The Underground Railroad and the Angel at Philadelphia 25 (2021) (slur omitted) (internal quotation marks omitted) (quoting Kate E.R. Pickard, The Kidnapped and the Ransomed. Being the Personal Recollections of Peter Still and His Wife "Vina" After Forty Years of Slavery 39 (Syracuse, William T. Hamilton 1856)).

44. Still, Journal C, supra note 34, at 109. The journal only includes the responses; I have used italics here to signal what I speculate, based on these responses, was the likely order of questions.

45. Id. at 204.

46. Id. at 12.

47. Id.

48. Id.

49. Id.

50. Id. at 320.

51. See Narrative of the Facts in the Case of Passmore Williamson 14 (Philadelphia, Pa. Anti-Slavery Soc'y 1855).

be brought up out of a pocket and laid down on the table before the stranger now looking them over and asking his questions: three carefully wrapped locks of hair, the remains of a wife, their child, their newborn infant, all taken.[52] Still others, perhaps traumatized, exhausted, enraged, terrified, could not or would not speak to the well-dressed stranger who had asked to hear their story.[53] Perhaps wary of a man who could share in their loss at a high enough level of abstraction but whose pressed jacket bore the markings of a life lived far from poverty and imprisonment, some declined to speak, and the space under their recorded names was left blank.[54]

As Still and others who collected the testimonies were keenly aware, this seemingly simple act of asking questions and recording the answers of people whose names might otherwise have been steamrolled into a single anonymized category of "slaves" was no ordinary undertaking. For centuries, slavery's existence in the place they called the Americas had rested on the law's systematic silencing of the people whose collective labor and suffering would eventually produce intergenerational white wealth and political power.[55] Dating back to the age when European colonizers had hauled out across the waters and plied the western coasts of Africa, this silencing was at first near total.[56] Of the millions of women subjected to the atrocities of the transatlantic slave trade, only a few autobiographical accounts exist[57] in what has been likened to an archive of the dead.[58]

In that regime of deliberate silencing that later made it a crime to teach Black people to read and write,[59] even ostensibly radical white abolitionists who had set out to compile records describing the lived experience of slavery had often declined to include the voices of the enslaved. When, for example, the white abolitionist Theodore Weld set out to create what he declared to be the first collection of testimonies about American slavery in 1839, he only included the voices of enslavers. As he

52. Still, Journal C, supra note 34, at 245; Still, The Underground Rail Road, supra note 3, at 120–22 (recording the testimony of Robert Brown, alias Thomas Jones, from Martinsburg, Virginia, who presented the locks of hair that belonged to his wife and two children, "the oldest 11 & the youngest 8 weeks old").

53. See, e.g., Still, Journal C, supra note 34, at 91 (describing the arrival of Sarah Johnson from Norfolk without any biographical details).

54. On William Still's relative prosperity, see Kashatus, supra note 43, at 30. For an example of a blank sheet in the Journal, see, e.g., Still, Journal C, supra note 34, at 394–95.

55. Jennifer L. Morgan, Accounting for "The Most Excruciating Torment": Gender, Slavery, and Trans-Atlantic Passages, 6 Hist. Present 184, 192–93 (2016).

56. Id. at 193.

57. Id. at 201 (noting that autobiographical accounts are "exceedingly rare" and that actual accounts of the passage are "rarer still").

58. See Hartman, Venus in Two Acts, supra note 22, at 1.

59. See Heather Andrea Williams, Self-Taught: African American Education in Slavery and Freedom 7 (Waldo E. Martin Jr. & Patricia Sullivan eds., 2005) (detailing the rise of anti-literacy legislation in colonial America); see also Gelsey G. Beaubrun, Talking Black: Destigmatizing Black English and Funding Bi-Dialectal Education Programs, 10 Colum. J. Race & L. 196, 202 (2020) (same).

explained in the introduction to *American Slavery as It Is: Testimony of a Thousand Witnesses*, "A MAJORITY of the facts and testimony contained in the work rests upon the authority of SLAVEHOLDERS."[60] In constructing this archive, Weld presented the enslaved as an object of study, catalogued as if livestock according to the food they ate, the number of hours they worked, the inflictions they suffered.[61]

So when, on that day in 1852 in Philadelphia, the abolitionist Still began by asking the question, *What is your name?*, it marked a distinct rupture from the law's formal regime of silencing. As Still might have explained, his was a project of recordkeeping that traced its roots back to the early nineteenth century, when Black communities along the Atlantic seaboard had begun forming volunteer organizations in response to the rapidly growing domestic market for Black labor.[62] Fueled by the taking of Indigenous lands in the southeast and the expansion of the plantation economy, this domestic market manifested itself in the terrifying disappearance of loved ones: a child sent to deliver a note on Broadway in New York who did not return;[63] a husband seized from working on a cargo ship in New Orleans, imprisoned for life;[64] families everywhere, separated and sold.[65]

60. Theodore Dwight Weld, American Slavery as It Is: Testimony of a Thousand Witnesses, at iii (New York, Am. Anti-Slavery Soc'y 1839).

61. Id. at iv ("Facts and testimony respecting the condition of slaves, in *all respects*, are desired; their food, (kinds, quality, and quantity,) clothing, lodging, dwellings, hours of labor and rest, kinds of labor, with the mode of exaction, supervision, &c. . . . .").

62. See, e.g., Letter from William C. Parker (Aug. 11, 1836), *in* First Annual Report of the Committee of Vigilance for the Protection of the People of Color 55, 55–56 (New York, Piercy & Reed 1837) (recounting the testimony offered by Hester Jane Carr); see also Jesse Olsavsky, Runaway Slaves, Vigilance Committees, and the Pedagogy of Revolutionary Abolitionism, 1835–1863, *in* A Global History of Runaways: Workers, Mobility, and Capitalism 1600–1850, at 216, 217 (Marcus Rediker, Titas Chakraborty & Matthias van Rossum eds., 2019) (tracing the rise of vigilance committees and interviewing of refugees as early as the mid-1830s).

63. See Important Meeting of the New York Committee of Vigilance, Colored Am. (N.Y.C.), Mar. 11, 1837 (reporting that a family was seeking information about an eight- or nine-year-old boy who had been missing since February of that year).

64. Id. (reporting that a man named Thomas Oliver had been sold into slavery in New Orleans).

65. See Walter Johnson, River of Dark Dreams: Slavery and Empire in the Cotton Kingdom 5 (2013) (explaining how enslaved Black people "were brought in [to the Mississippi Valley] to cultivate the land expropriated from Native Americans"); see also The Man Jobbing Land Pirates of Baltimore, *in* First Annual Report of the Committee of Vigilance for the Protection of the People of Color, supra note 62, at 57, 57 (listing an advertisement for Austin Woolfolk's purchase of Black people for "*cash*, and the *highest prices*"). On the shift from imported enslaved labor to the taking of the reproductive labor of Black women, see Daina Ramey Berry, The Price for Their Pound of Flesh: The Value of the Enslaved, From Womb to Grave, in the Building of a Nation 12–13, 32 (2017) (noting the increased reliance on the reproduction of enslaved women while cautioning that domestic trade in enslaved peoples dated back to the seventeenth century).

Initially intended as a means of keeping track of people to help with family reunification efforts,[66] *Journal C* rested on an archival practice that sought to capture the biographical details of individual people. Building on a much older tradition by which enslaved peoples had published autobiographical narratives of their experiences and shared their stories with abolitionist biographers,[67] *Journal C* sought to preserve and record the voices of people excluded from the protections of the law.[68] Consider, to begin with, the detail of the bibliographic information that the aid workers who interviewed the refugees collected. Instead of simply listing the conditions of slavery in the abstract, as prior abolitionists like Weld had done, the recordkeepers asked questions that rooted the speaker in time and space. The people who were interviewed appeared not as commodities on the bills of lading in a cargo ship, nor as anonymous beings on a farm to be watered and fed. Instead, each person appeared with a full name, an arrival date, the names and ages of any children or kin, the names of places where they had been born and raised, and the names of the white people who had claimed violent ownership rights over their bodies and loved ones.[69]

Then there was the actual substance of the testimonies. The carefully transcribed words of people who were willing to speak described the institution of slavery not in the law's abstraction as a set of formal property rights in persons but as an act of ongoing and continual theft—from the harvesting of women's reproductive lives and the removal of children, to the severing of families and extraction of labor—sustained by the interlocking federal and state laws that produced a relentlessly inescapable system of surveillance and policing.

At the core of *Journal C*'s account of state-sanctioned theft lay the systematic taking of women's reproductive labor through the laws of race-based hereditary slavery.[70] In interviews with women who were willing to

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66. Still, The Underground Rail Road, supra note 3, at 4.

67. For a compilation of biographies and autobiographies of enslaved persons, see North American Slave Narratives, Documenting Am. South, https://docsouth.unc.edu/neh/chron.html [https://perma.cc/YXK3-F44U] (last visited Jan. 26, 2023).

68. For a discussion of the power and limits of published narratives as historical sources, see Slave Testimony: Two Centuries of Letters, Speeches, Interviews, and Autobiographies, at xvii–xlii (John Blassingame ed., 1977); see also Walter Johnson, Soul by Soul: Life Inside the Antebellum Slave Market 8–9 (1991) (describing the historiography of use of enslaved narratives); Toni Morrison, The Site of Memory, *in* Inventing the Truth: The Art and Craft of Memoirs 85, 91 (William Zinsser ed., rev. & expanded 2d. ed. 1995).

69. See generally Still, Journal C, supra note 34 (listing the biographical information of people interviewed).

70. See, e.g., Daina Ramey Berry & Kali Nicole Gross, A Black Women's History of the United States 86 (2020) ("Black women's reproductive labor became the lifeblood of the institution [of slavery], as rape and forced breeding fueled the domestic slave trade."); Adrienne Davis, "Don't Let Nobody Bother Yo' Principle": The Sexual Economy of American Slavery, *in* Sister Circle: Black Women and Work 103, 117 (Sharon Harley ed., 2002) ("[E]lite members of antebellum society characterized enslaved women's reproductive capacity in the language of capital assets."); Jennifer L. Morgan, *Partus Sequitur Ventrem*: Law, Race, and Reproduction in Colonial Slavery, Small Axe, March 2018, at 1, 1 (centering the control of women's reproductive lives as the core of hereditary slavery).

speak, refugees recounted being forced to give birth to children only to watch them be taken away. People had regarded her "as if she had been a cow," Still later observed of Cordelia Loney.[71] They had taken her first child, then her second child, then her third child, then her fourth child, until there were no more children to take.[72] "[T]hey were mere articles of merchandise," Elizabeth Castle explained.[73] Fifteen children, Mary Epps recounted, four of whom they took and she never saw again. After they took one child, her words went away too, and when at last the words began to come back, her body began to shake and had not stopped shaking since.[74]

Some named the violence, quoting the words of the men who claimed their bodies. "He declared if I made a noise he would cut my throat," Nancy Grantham recounted.[75] Others remembered the way the skin of a woman's back had looked before it began. "I have seen women stretched out just as naked as my hand, on boxes, and given one hundred and fifty lashes, four men holding them."[76] After carrying to term the child that the laws of slavery stripped from them, there was the fear of permanent loss: an experience some likened to being butchered alive. "Every one that was taken from me, was like cutting away a piece of my heart," a father later recalled.[77] Some carried the pieces with them. Robert Brown, for example, named the white man who had tried to rape his wife—"Col. John F. Hamtsance of Martinsburg"—and who had sold her and the children when she refused and fought back.[78] "The oldest 11 & the youngest 8 weeks old," leaving the man now telling his story with locks of their hair, laid down on the table.[79] The children, for their part, did not always tell stories of what had happened to them. Two brothers, who were sold at the age of five, in the words of the transcriber, spent "[t]hirteen of their youthful years . . . passed away in Kentucky, in a manner that I have no need of describing."[80]

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71. Still, The Underground Rail Road, supra note 3, at 115; see also Jesse Olsavsky, Women, Vigilance Committees, and the Rise of Militant Abolitionism, 1835–1859, 39 Slavery & Abolition 357, 361 (2018) [hereinafter Olsavsky, Women] ("All four of Cordelia Loney's children were sold south before she fled.").

72. Still, The Underground Rail Road, supra note 3, at 114.

73. Jesse Olsavsky, The Most Absolute Abolition: Runaways, Vigilance Committees, and the Rise of Revolutionary Abolitionism, 1835–1861, at 28 (2022) (quoting Letter from C.S. Brown Spear to Wilbur Siebert (n.d.) (on file with the Wilbur H. Siebert Collection, Ohio History Connection)).

74. Still, Journal C, supra note 34, at 163; see also Letter from Thomas Garrett to William Still (June 9, 1857), *in* Still, The Underground Rail Road, supra note 3, at 394, 394–95 ("We have here in this place . . . the mother of twelve children, one half of which has been sold South.").

75. Still, The Underground Rail Road, supra note 3, at 460.

76. Id. at 134.

77. Johnston, supra note 1.

78. Still, Journal C, supra note 34, at 232–33.

79. Id.

80. Letter from William Still to James Miller McKim, supra note 40, at 56–57.

In almost all instances, individuals who recounted these acts of violence named the perpetrators, beginning first with the particular actors. John Haywood, for example, named the lawyer from Raleigh, North Carolina, who had killed his brother, Caswell.[81] "Edward Hayward," he told the reporter.[82] Edward Hayward had come home one day, taken down his gun, and gone out and shot and killed Caswell.[83] Josiah Bailey, likewise, named the man who had stripped him down naked and assaulted him: "Wm. R. Hughlett, a farmer & Dealer in Ship Lumber."[84] Samuel Fall named the man who strung him up by the hands and flogged him.[85] "Anthony Ryebold, Sassafras Neck, Md."[86] Joseph Grant named the farmer who had sliced his skin so many times, it left his flesh as if a piece of raw beef.[87]

Alongside this naming of individual perpetrators, the archive also named the fear that followed the refugees as they traveled through the open roads of America. "I find that the whole country fifty miles round is inhabited only by Christian wolves," wrote one recordkeeper's friend of his experience in Illinois. "It is customary, when a strange negro is seen, for any white man to seize the negro and convey such negro through and out of the State of Illinois to Paducah, Ky., and lodge such stranger in the Paducah jail, and there claim such reward as may be offered."[88] For Black people who traveled through this landscape, the bordered land of states and jurisdictions gave way to endless persecution sanctioned by the law. Some remembered how, after crossing over into the nominally free state called Pennsylvania, an old man had told them to keep moving down the road.[89] Not heeding his advice, the men awoke the next morning to the sounds of the voices outside of the barn where a Quaker farmer had offered the men refuge and then called the police instead.[90] "The constable seized me by the collar," the man told the recordkeeper, and then the clubs came down and the guns fired and he awoke sometime later to see the cell door of a jail rolling to locked, to open only after his skin had grown into scars that could be hidden on the auction block.[91]

In these testimonies that ended with the closing of a jail cell, the refugees' experiences of constant surveillance collapsed the legal distinctions between free states and slave states. Winny Patson, for example, remembered the carpet and the bed that stood over the trapdoor in the floor, where she and her three-year-old daughter lived for five

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81. Sydney Howard Gay, Record Entry (July 11, 1856), *in* 2 Record of Fugitives (1856) (on file with the *Columbia Law Review*) [hereinafter Gay, July 11, 1856] (unpublished manuscript).

82. Id.

83. Id.

84. Still, Journal C, supra note 34, at 306–07.

85. Id. at 243–44.

86. Id.

87. Still, The Underground Rail Road, supra note 3, at 133.

88. Letter from Seth Concklin to William Still (Feb. 3, 1851), *in* Still, The Underground Rail Road, supra note 3, at 27, 27.

89. Still, Journal C, supra note 34, at 15.

90. Id. at 16–17.

91. Id. at 18–21.

months.[92] Mary Jeffers remembered the date upon which the officer appeared at her door in Philadelphia: Monday, January 20, 1855.[93] The officer, who had come with a white man, broke through the door and the privacy of her home.[94] "They searched the house, Mr. Craig saying that Mary and the daughters were his property, and he meant to take them."[95] Jeffers, who had heard the men speaking, took her daughters through the back door in the kitchen and sought refuge with neighbors, her old home constantly watched.[96]

Those who sought justice in the courtrooms could encounter a profound sense of absolute invisibility. When, for example, a man who appeared in the records only as J.S. described trying to buy his family back from a white man to whom he had paid money for their recovery, he found no protection from the law.[97] "[T]hey were still the slaves of Mr. T in the eye of the law," the man said of his family.[98] When he went to a lawyer, he learned that the courts were for protecting the property of white people. The lawyer told him it was "useless to contend the point at law."[99] Others recalled the sheer senselessness of judicial decisions. John Haywood recalled that the courts had sentenced a boy to death for playing soldiers in the woods. Haywood remembered how children had been running free in the woods by his house, until "some white persons, who rushed in, secured them. They were taken to the Court house and confined for some time."[100] One of the boys was "tried and condemned to be hanged, the sentence executed." Two thousand people, he remembered, came to watch the boy's killing.[101]

For the people who recorded these testimonies, the histories were at best an approximation of what had happened. No doubt, there was a wide gulf between the interviewer and interviewee; no doubt, there was unequal power between those who were fleeing persecution and those who were there to provide aid. For all its potential limitations, however, the archive was without obvious precedent. Initially collected to help create a record for reuniting fragmented families, these testimonies and the archival practice they represented soon produced a searing critique of America's legal order: one that began not by reciting individual or state rights drawn from the nation's founding documents but by enumerating collective wrongs.

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92. Sydney Howard Gay, Record Entry (May 16, 1856), *in* 2 Record of Fugitives, supra note 81.

93. Sydney Howard Gay, Record Entry (Jan. 28, 1855), *in* 1 Record of Fugitives (1855) (on file with the *Columbia Law Review*) (unpublished manuscript).

94. Id.

95. Id.

96. Id.

97. Johnston, supra note 1.

98. Id.

99. Id.

100. Gay, July 11, 1856, supra note 81.

101. Id.

B. *Reasoning From a People's Record*

In the spring of 1858, a few years after the last entries appeared in *Journal C*, a woman named Frances Ellen Watkins Harper, who had become a key figure in the Philadelphia Vigilance Committee, took to the podium to address a crowd in New York.[102] At the time, abolitionists in America had long since perfected the art of weaving arguments from the text of the nation's founding documents, whether by invoking concepts of natural law and a plain reading of the Constitution to make a bid for citizenship and equal individual rights[103] or by seizing upon the electric language of the states and their rights.[104]

In contrast, Watkins Harper had no interest in deliberating the meaning of a document drafted by white men who claimed to speak for the whole. Her aim was to broadcast a record of the people, reasoning from their shared testimonies to lay bare the moral bankruptcy and corruption of a feigned republic while simultaneously celebrating the struggles and power of Black people who were protected under a higher law of God. Reworking strands of civic republicanism that had been deployed to help justify the overthrow of the British monarchy more than half a century earlier,[105] Watkins Harper called for a restoration of power to the people as sovereigns. In doing so, she articulated a theory of collective resistance that by the 1870s had evolved into calls for an inclusive democracy in which Black people—including Black women—would govern a virtuous citizenry as leaders.[106]

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102. See Frances Ellen Watkins Harper, Speech at the Twenty-Fifth Annual Meeting of the American Anti-Slavery Society (May 11, 1858), *in* Nat'l Anti-Slavery Standard (N.Y.C.), May 22, 1858 [hereinafter Watkins Harper, Speech, May 11, 1858]. For more information about Watkins Harper's role in the Philadelphia Vigilance Committee, see Olsavsky, supra note 70, at 364 (summarizing Watkins Harper's work on the Vigilance Committee and concluding that she, along with Mary Ann Shadd Cary, became one of the committee's "most effective propagandists").

103. See supra note 13; see also Justin Buckley Dyer, Natural Law and the Antislavery Constitutional Tradition 187 (2012) ("[T]he antislavery movement in America . . . originated with, and was sustained by, the natural-law tradition. In the rhetoric and imagination of antislavery constitutionalists, the Declaration of Independence thus attained a revered status . . . ."); Frederick Douglass, The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?, Speech Delivered in Glasgow, Scotland (Mar. 26, 1860), *in* 2 The Life and Writings of Frederick Douglass: Early Years, 1817–1849, at 467, 467–68 (Philip S. Foner ed., 1950).

104. See Maeve Glass, Citizens of the State, 85 U. Chi. L. Rev. 865, 894 (2018) (tracing the limits of moral discourse and the turn by Garrisonians to a form of states' rights abolitionism).

105. See Gordon Wood, The Creation of the American Republic, 1776–1787, at 47–74 (1998) (summarizing the core features of an ideology of republicanism that American revolutionaries developed in the 1770s).

106. This reading of Watkins Harper's political thought—as a reworking of civic republicanism grounded in a peoples' history of Black suffering and struggle—draws upon and contributes to a substantial body of literature exploring Watkins Harper's political vision, activism, and rhetorical strategies. See, e.g., Melba Joyce Boyd, Discarded Legacy: Politics and Poetics in the Life of Frances E.W. Harper 1825–1911, at 11 (1994) (arguing that Watkins Harper's vision "evolved from complex multifaceted oppression and her

To trace this genre of constitutional argument and its relationship to the record of Black suffering and survival preserved in *Journal C,* this Essay begins with the corpus of texts that Watkins Harper published in response to *Dred Scott*.[107] In keeping with America's earlier revolutionaries, Watkins Harper believed that diagnosing governmental pathologies required a wide-ranging inquiry into the science of politics. While John Adams had called for inquiring into the "histories of ancient ages,"[108] for example, Watkins Harper premised her study of American government on a historical analysis that ranged from the Norman conquest of England to the Ottoman Empire.[109] Unlike Adams, however, Watkins Harper sought

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relentless intellectual and political involvement with the black American dilemma and progressive human rights movements"); Glass, Courting Communities, supra note 17, at 101–18 (analyzing one of Watkins Harper's novels as a work that critiqued the "contradictions of U.S. democracy" and advanced a vision of racial and sex equality); Jones, Vanguard, supra note 13, at 113 (arguing that Watkins Harper "condition[ed] her listeners—from veteran Black activists to newly freed slaves—to expect that women would impart astute insights into politics"); Stancliff, supra note 17, at xii (arguing that Watkins Harper's "rhetorical pedagogy—the material practice of teaching movement principles and training audiences for reform work—was a central force driving African American reform politics"); Eric Gardner, Frances Ellen Watkins Harper's Civil War and Militant Intersectionality, 70 Miss. Q. 505, 508–13 (2017) (arguing that Watkins Harper's lived experiences of mob violence and dispossession during the 1860s, including the near lynching of her sister-in-law and loss of property to creditors for her husband's death, led her to expand arguments emphasizing the intersection of racism and sexism); Michele Goodwin, Poetic Reflections on Law, Race and Society, 10 Griffith L. Rev. (Law's Cultural Mediations) 195, 200 (2001) (referencing Watkins Harper's work as an example of themes of retribution for injustice); Cheryl I. Harris, Finding Sojourner's Truth: Race, Gender, and the Institution of Property, 18 Cardozo L. Rev. 309, 389–90 (1996) (noting that Watkins Harper, unlike Sojourner Truth, was "well-educated and highly literate . . . and thus . . . too complex and threatening to be readily received"); Shirley Wilson Logan, Black Speakers, White Representations: Frances Ellen Watkins Harper and the Construction of a Public Persona, *in* African American Rhetoric(s): Interdisciplinary Perspectives 21, 32–33 (Elaine B. Richardson & Ronald L. Jackson II eds., 2007) (emphasizing Watkins Harper's use of rhetoric, particularly elocution, as key to her persuasiveness); Charles Lewis Nier III, Sweet Are the Uses of Adversity: The Civil Rights Activism of Sadie Tanner Mossell Alexander, 8 Temp. Pol. & C.R.L. Rev. 59, 59 (1998) (referencing Watkins Harper as part of an "intellectual tradition"); Courtney L. Thompson, "If There Is Common Rough Work to Be Done, Call on Me:" Tracing the Legacy of Frances Ellen Watkins Harper in the Black Lives Matter Era, Africology, March 2019, at 93, 97 (summarizing Watkins Harper's political vision as one aimed at realizing "self-determination, political autonomy, racial equality, gender parity, and economic freedom").

107. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party), superseded by constitutional amendment, U.S. Const. amend. XIV.

108. See John Adams, Dissertation on the Canon and the Feudal Law, *in* 3 The Works of John Adams 447, 462 (Boston, Charles C. Little & James Brown 1851).

109. See, e.g., Letter from Frances Ellen Watkins to Elizabeth Jones (Sept. 21, 1860), *in* Anti-Slavery Bugle (Salem, Ohio), Sept. 29, 1860 ("It is the same feeling that Norman had against his Saxon Slave . . . ."); Frances Ellen Watkins, Speech at the Fourth Anniversary of the New York City Anti-Slavery Society (May 13, 1857), *in* Nat'l Anti-Slavery Standard (N.Y.C.), May 23, 1857 [hereinafter Watkins Harper, Speech, May 13, 1857] (comparing the legal system of the United States to that of the Ottoman Empire).

to foreground the voices and struggles of people who were systematically excluded from the protections of law on account of their race. Casting aside the sanitized units of time and space derived from the birth and life of the nation,[110] Watkins Harper instead anchored her vision for America in the time and space of mass atrocity, as told by its survivors.

Consider, for example, the poem that Watkins Harper presented to the audience who assembled in Boston in 1858 to protest the *Dred Scott* decision.[111] Set to a familiar tune that could be widely shared among people who had been prohibited from learning to read or write,[112] Watkins Harper began by naming the suffocating weight on people's chests, trading talk of individual rights with scenes of Black people pinned to the ground and gasping for breath.[113] "Onward, O ye Sons of Freedom," her speech began, and immediately audience members who had been inundated with arguments about the particular composition of the nation's armed forces in 1770 and the authenticity of George Washington's signature were asked to shift their gaze from the past to the future.[114] "See Oppression's heel of iron Grinds a brother to the ground," she continued, as the celebratory history of the Revolutionary War that the event's organizers had so carefully constructed gave way instead to the present, one defined by the visceral immediacy of people suffocating under collective oppression.[115]

By foregrounding these records of suffering and struggle, Watkins Harper rejected linear chronologies of the nation. Instead, she portrayed a repeating cycle of theft, describing generations of children who had been, were, and would be conscripted by the laws of hereditary racial slavery. "A hundred thousand new-born babes are annually added to the victims of slavery; twenty thousand lives are annually sacrificed on the plantations of the South," she declared, translating the stories of the taking of reproductive labor into demographic statistics.[116] "[F]earful alchemy," she continued, "by which this blood can be transformed into

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110. See supra note 109.

111. Frances Ellen Watkins, Freedom's Battle, *in* Program of Boston Massacre Commemorative Festival 3, 3 (1858), *in* The Black Abolitionist Papers 1830–1865 (1981), ProQuest 2522671465 (on file with the *Columbia Law Review*) [hereinafter Watkins Harper, Freedom's Battle].

112. See supra note 59 and accompanying text.

113. Compare Watkins Harper, Freedom's Battle, supra note 111, at 3 (describing "[o]ppression's heel of iron" that "[g]rinds a brother to the ground"), with Hosea Easton, Extract from Treatise, *in* Program of Boston Massacre Commemorative Festival, supra note 111, at 2, 2 (asserting that the claims of citizenship "are founded in an original agreement of the contracting parties [to the Constitution]"); see also Program of Boston Massacre Commemorative Festival, supra note 111, at 3 (noting that among the relics to be displayed included "CERTIFICATE (in Gen. Washington's own handwriting,) of honorable discharge of Brister Baker, a colored soldier in the Connecticut Regiment"); Attucks Commemoration, Liberator (Bos.), Mar. 25, 1859, at 46 (reporting that the organizers of the protest displayed a certificate of military service for a Black man).

114. Watkins Harper, Freedom's Battle, supra note 111, at 3.

115. Id.; see also supra note 113.

116. Watkins Harper, Speech, May 13, 1857, supra note 109.

gold."[117] In this landscape of theft and plunder, the states appeared not as localized entities at the periphery of a central government, but as interconnected suppliers enmeshed in the political economy of the plantation.[118] "Ask Maryland" to abolish slavery, she wrote, "and hear her answer: 'I help supply the coffle-gangs of the South.'" She continued, "Ask Virginia . . . and hear her reply: . . . '[O]ne of my chief staples has been the sons and daughters I send to the human market and human shambles.'"[119]

In offering this indictment, Watkins Harper was not seeking pity, nor was she focused on revealing the evil compromises of the Constitution. Instead, her aim was to expose the corruption of a government that was only a republic in name, thereby justifying civil disobedience and, if needed, an armed revolution of the people. This indictment began by juxtaposing the fictions and abstractions of the nation's founding texts against the silences and voices of the persecuted body of the people. As she told the Manhattan audience in May of 1858, "Amid your declamations about liberty, your Fourth of July speeches, amid the darkness of the Dred Scott decision, I see the mournful light that flashes from the eye of the fugitive as he steps cautiously through your boasted Republic, to gain his personal freedom in a Monarchical land."[120] Amidst the political debates over the institution of slavery, she heard the shrieks of women separated from their children.[121] It was these voices of the people, Watkins Harper insisted, that the nation's governing institutions had ignored.[122] "Instead of listening to the cry of agony," she had declared in 1857, "they listen to the ring of dollars and stoop down to pick up the coin."[123]

Following a line of critique that traced back across the decades,[124] Watkins Harper used this juxtaposition to lambast the federal judiciary for its failure to recognize the suffering of Black people that the law's appointed elites had condoned. "I stand at the threshold of the Supreme Court and ask for justice, simple justice," she declared.[125] "Upon my tortured heart is thrown the mocking words, 'You are a negro; you have no rights which white men are bound to respect.'"[126] Rather than debating the historical accuracy of the Supreme Court's formal interpretation of

117. Id.

118. Id.

119. Id.

120. Watkins Harper, Speech, May 11, 1858, supra note 102, at 1.

121. Id.

122. Watkins Harper, Speech, May 13, 1857, supra note 109, at 3.

123. Id.

124. First Annual Report of the Committee of Vigilance for the Protection of the People of Color, supra note 62, at 9 ("[W]hen judges wield the power of law to subvert and destroy the welfare of their fellow men, then . . . the foundation on which the social fabric rests trembles and affords no support to the superstructure. Yet such is the state of . . . our courts . . . when the colored man appeals for justice . . . .").

125. Watkins Harper, Speech, May 13, 1857, supra note 109, at 3.

126. Id.

the founding documents,[127] those who subscribed to this line of critique could simply drop the name of the Supreme Court's opinion into a footnote buried beneath a passage of scripture—*How Long, O Lord, How Long!*—thereby privileging the voices that had sounded in Black churches over the words of men who had desecrated the meaning of justice.[128]

This mode of critique extended from the nation's courts to the state and federal laws that collectively denied Black people their humanity. Consider, for example, Watkins Harper's challenge to the personal liberty laws that began to appear in the nominally free states, promising that a Black person claimed by a white person as property could secure a writ of habeas corpus from a judge and go before a jury to prove their "freedom."[129] Rather than litigating the question of whether this type of law provided sufficient process, Watkins Harper emphasized the absurdity of the laws by foregrounding her own personhood. "Some, perhaps, would have said, 'Give her a fair trial; the right of trial by jury, and the benefit of the writ of habeas corpus,'" she said.[130] Such recitals of legal formalism, she continued, were an affront to her humanity. She declared:

> Well, bring me to trial, to prove—what? Whether I have a right to breathe heaven's pure air? The structure of my lungs has long since proved that. Whether I have a right to gaze on the glorious creation of God, and feast my eyes on the beauties of our universal Father? The formation of my eyes has proved that. What then? To prove whether I have a right to be a free woman or am rightfully the chattel of another . . . .[131]

This indictment of America's courts and laws underpinned calls for civil disobedience and, if needed, armed revolution. In newspaper editorials, for example, Watkins Harper modeled what it would look like to refuse to abide by an unjust law, including refusing to rise from a

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127. See, e.g., Letter from William C. Nell to Gerrit Smith (June 7, 1860), *in* The Black Abolitionist Papers 1830–1865, supra note 111, ProQuest 2522675161 (on file with the *Columbia Law Review*) ("[I]t occurred to me . . . to issue at once a cheap pamphlet edition of the Revolutionary and other Military services of the Colored Men of the Empire State, together perhaps with an abstract statistical chapter . . . ."); see also Attucks Commemoration, supra note 113, at 46 (reporting that the organizers of the protest displayed "the original certificate of General Washington" for the military service of a Black man).

128. The Colored American Heroes of 1776, *in* Program of Boston Massacre Commemorative Festival, supra note 111, at 4, 4. For similar citations to Psalm 13 by Black activists, see, e.g., Sojourner Truth, Lecture, *in* Nat'l Anti-Slavery Standard (N.Y.C.), Dec. 10, 1853 (citing a banner that quoted Psalm 13, "How Long, O Lord, How Long"); see also From Our Canadian Correspondent, Frederick Douglass' Paper (Rochester, N.Y.), Mar. 3, 1854; Walker's Appeal. No. 3, Liberator (Bos.), May 28, 1831.

129. Watkins Harper, Speech, May 11, 1858, supra note 102 (commenting that while in Vermont, she had been told "they had a Personal Liberty Bill"). For the text of the Vermont statute that Watkins Harper specifically critiqued, see Rights of Persons Claimed as Fugitive Slaves, Vt. Comp. Stat. tit. 27, ch. 101, §§ 9–11 (1850) (Burlington, Chauncey Goodrich 1851).

130. Watkins Harper, Speech, May 11, 1858, supra note 102.

131. Id.

segregated car seat.[132] "There is an army in our land," Watkins Harper warned in a speech, "an army which has been gathering for long and weary years."[133] This was an army, she continued, from whom everything had been taken: an army that included not only the men who worked the fields but the women whose bodies had been violently harvested for profit.[134]

Behind this invocation of an army rising up in America lay the outlines of a vision for a new political order, one grounded not in the corruption of the past, but in the creation of a new virtuous citizenry whose members would be treated by the state as equals. In a letter written for *The Anti-Slavery Bugle* in the summer of 1859 during a lecture tour through Ohio and Indiana, for example, Watkins Harper described her hope for the dawning of a new day on the free soil of Indiana.[135] "Here are more than eleven thousand colored people," she observed, noting that many were farmers who owned among them hundreds of acres of land.[136] And yet, she continued, the members of this independent Black community were "taxed without being represented, denied their testimony and proscribed the common schools."[137] Rather than building "prisons, penitentiaries, and gallows to punish them for their crimes," she continued, "how much more humane . . . it would be . . . to build for them schools and academies, to educate them in virtue and in morality, and teach them to add to the productive industry of a commonwealth which *would treat them as citizens*."[138] In that envisioned future, the state legislature would be compelled to change its laws, such that "justice and right shall be not merely . . . mottoes, but . . . living, practical principles, interwoven with . . . life."[139]

For this vision to be realized and for justice to become something more than an empty motto, the nation would need to repent for its crimes. As Watkins Harper declared in 1862, long after the armies had begun to march on the battlefields: "[I]f I can read the fate of this republic by the lurid light that gleams around the tombs of buried nations, . . . I see no palliation of her guilt that justifies the idea that the great and dreadful God will spare her in her crimes . . . . Heavy is the guilt that hangs upon the neck of this nation, and where is the first sign of national repentance?"[140]

This genre of reasoning up from a record of Black peoples' suffering in order to indict the nation for its complicity and to call for a return of

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132. Frances Ellen Watkins, Extracts From a Letter to a Friend, *in* Liberator (Bos.), Apr. 23, 1858, at 67, 67.

133. Watkins Harper, Speech, May 11, 1858, supra note 102.

134. Id.

135. Frances Ellen Watkins, Letter (June 29, 1859), *in* Anti-Slavery Bugle (Salem, Ohio), July 9, 1859.

136. Id.

137. Id.

138. Id. (emphasis added).

139. Id.

140. Mrs. Frances E. Watkins Harper on the War and the President's Colonization Scheme, Christian Recorder, Sept. 27, 1862, *in* The Black Abolitionist Papers 1830–1865, supra note 111, ProQuest 2522677816 (on file with the *Columbia Law Review*).

power to the people was by no means limited to the writing and activism of Watkins Harper.[141] A similar logic coursed through the writings of others who, like Watkins Harper, privileged the daily experience of oppression's survivors over the nation's founding texts. "[W]hile it may suit white men who *do not feel the iron heel*[] to please themselves with such theories," Robert Purvis declared of arguments that the Constitution had an antislavery nature, "it ill becomes the man of color whose *daily experience refutes the absurdity*, to indulge in any such idle phantasies."[142]

This emphasis on the daily experience of physical violence likewise appeared in the writings of Sarah Remond, a Black abolitionist who, like Watkins Harper, had also worked with refugees. In a speech delivered in January of 1859 before an audience in Warrington, England, for example, Remond named individual perpetrators and victims. "[T]he Rev. Dr. Taylor had shot one of his wife's negroes for insubordination," Redmond told her audience.[143] "[Margaret Garner] had *suffered in her own person* the degradation that a woman could not mention," she continued.[144] Like Watkins Harper, Remond presented these accounts of murder and sexual violence not as romantic spectacle, but as an indictment of the American legal order. "The courts decided that Margaret Garner must be returned to slavery," Redmond declared.[145] "Black men and women were treated worse than criminals for no other reason than because they were black," she continued.[146] The problem, she concluded, was not limited to individual perpetrators. Rather, the problem lay with a legal system that deemed her race "stripped of every right and debarred from every privilege—*a race which was deprived of the protection of the law*."[147]

Beyond these individual writings, this logic of argumentation also appeared in a paper trail left behind by organized conventions. Consider, by way of example, the resolutions adopted by the Convention of Colored People of Indiana in 1858, where Watkins Harper was one of only two Black women to speak.[148] Following the same rhetorical logic that reasoned up from a record of enumerated collective wrongs, the Convention's preamble began with grievances of the people:

> We have to complain that . . . [despite] the grand principles of the Declaration of 1776, millions of our brethren are publicly sold, like beasts in the shambles, that they are robbed of their

141. See Byrd, The Black Republic, supra note 17, at 21 (defining nineteenth-century Black nationalism as a malleable ideology rooted in a shared history of oppression).

142. The Voice of the Colored People of Philadelphia, Anti-Slavery Bugle (Salem, Ohio), Apr. 11, 1857 (emphasis added).

143. Speech by Sarah P. Remond, Warrington Times (Warrington, Eng.), Jan. 29, 1859, reprinted in 1 The Black Abolitionist Papers 435, 439 (C. Peter Ripley, Jeffery S. Rossbach, Roy E. Finkenbine, Fiona E. Spiers & Debra Susie eds., 1985).

144. Id. at 437 (emphasis added).

145. Id. at 438.

146. Id.

147. Id. at 435 (emphasis added).

148. Convention of Colored People for the State of Ohio, Anti-Slavery Bugle (Salem, Ohio), Dec. 4, 1858.

> earnings, denied the culture of their children, forbidden to protect the chastity of their wives and daughters, debarred an education and the free exercise of their religion; and if they escape by flight from such a horrible condition, they may be hunted like beasts from city to city, and dragged back to the hell from which they had fled . . . .[149]

This enumeration of wrongs was explicitly tied to a critique of the failings of America's governing bodies. "[T]he Government which should protect them, [had] prostitute[d] its powers to aid the villains who hunt them," the resolutions declared.[150] The state government, meanwhile, had excluded its Black citizens from the political process and thrust them into the jail,[151] while the nation's Supreme Court had withdrawn all protection. The inevitable conclusion from this abdication of duty, it followed, was to relieve "colored men" from their duty of allegiance to the existing government, paving the way for the oppressed people of America to rise up and form a government anew, one true to the power of the people.[152]

Constructed from a record of human suffering and survival that could not be heard in the nation's courtrooms, this was a mode of argumentation that steadfastly refused to abide by mainstream forms of antislavery discourse. Instead of beginning with the nation's founding documents and parsing the text for clues as to the scope of individual and state rights, this was a critique that began with the enumeration of collective wrongs. Preserved by those who were barred on account of their race and gender from arguing in the courts of law, this was a mode of dissent that hearkened back to the power of the people: one that would soon flourish in the writings of those who witnessed the formal end of slavery and began to assert a claim to power in the postwar contests for authority.

II. ERASURES

Two decades after the last entry was added to *Journal C*, and a year after its lead compiler had published it as a revised manuscript for public consumption, the men who constituted the Supreme Court offered their first interpretation of the Reconstruction Amendments.[153] According to Justice Samuel Miller, such a task required that the Court take judicial notice of the "history of the times."[154] And yet, rather than look to these readily available accounts of state-sanctioned violence as told by its survivors, the Court constructed a history that began the clock of constitutional time with the formal death of slavery.

149. Id.
150. Id.
151. Id.
152. Id.
153. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
154. Id. at 67.

To see the stakes of this judicial construction of history, this Part first turns to the making of the specific official record on which the Court relied to narrate the relevant past of the Reconstruction Amendments: a well-known and frequently cited congressional report known as the Schurz Report.[155] In sharp contrast to the archival practice of *Journal C*, this official report relied primarily on the voices of white federal officers, whose testimonies detailed a postwar landscape defined by a wave of temporary rogue violence wrought by rebellious states and anarchists against helpless Black victims said to be in need of the protection of a benevolent national government.[156]

By privileging this report and excluding the much longer history of slavery as told by its survivors, the Court tied an account of a temporary wave of rogue violence to a celebratory vision of robust federal power.[157] Although the Court did not specify how it envisioned that this newly acquired federal power was to be deployed to protect the Black people who appeared as silent, helpless wards, its language closely tracked contemporaneous federal statutes—including, most notably, the Ku Klux Klan Act of 1871 and its revision in 1874—that deployed congressional power to expand the jurisdiction of the (all white, male) federal courts.[158]

A. *Constructing the Schurz Report*

From the earliest days of the Civil War, Black abolitionists who had helped to construct and reason from a people's record of slavery embarked on a project to construct a record that would help define the new age of freedom. As early as 1861, for example, William Still helped to organize the Social, Civil, and Statistical Association of the Colored People of Pennsylvania.[159] The Association's goal was to collect information concerning the present economic condition of the Black population and gain recognition of Black people's social and civil rights. By 1865, the Association had begun protesting the closure of Philadelphia schools where Black families had sent their children.[160] Within the decade, these efforts had crystalized into a proposal from the National Equal Rights Convention calling for the appointment of a national historical and statistical association, one with powers to tell the "true history of what our life-long opponents have conceded to be the most remarkable race . . . our country has produced."[161]

155. See S. Ex. Doc. No. 39-2 (1865) [hereinafter Schurz Report].

156. See infra section II.A.

157. See infra section II.B.

158. See infra section II.B.

159. A Good Movement, Weekly Anglo-African (N.Y.C.), Mar. 23, 1861 ("[W]e have received from the corresponding secretary . . . a circular from the executive committee of the 'Social, Civil, and Statistical Association of the Colored People of Pennsylvania.'").

160. City Intelligence, Phila. Inquirer, Jan. 11, 1865, at 3 (noting that the Association submitted a communication protesting the discontinuance of "colored" schools in one of the city's sections).

161. See Janette Hoston Harris, Woodson and Wesley: A Partnership in Building the Association for the Study of Afro-American Life and History, 83 J. Negro Hist. 109, 109

As this work of compiling a historical record in the new age of freedom began in earnest, Black activists continued to draw upon it to build claims for Black political power and self-determination. In 1865, for example, the Convention of Colored People in Norfolk explicitly rejected offers of extended federal military protection. At a time when Union soldiers had been found guilty of sexual violence,[162] the Convention instead asked for political power.[163] "[W]e ask for no expensive aid from military forces," the Convention declared. "[G]ive us the suffrage, and you may rely upon us to secure justice for ourselves."[164] That same year, the Freedmen's Aid Association of Philadelphia invited a federal bureaucrat to describe the condition of formerly enslaved people in the South.[165] Echoing Watkins Harper's earlier line of argument, the speaker used the fact of suffering to argue for a redistribution of lands to those whose labor had been stolen: "[I]f there is any class of people in the country who have priority of claim to the confiscated lands of the South, it certainly is that class who have by years of suffering and unrequited toil given to those lands . . . ."[166]

Beginning in 1867, meanwhile, Frances Ellen Watkins Harper traveled through the southern states to record the stories of people who had "gone through this weary night of suffering."[167] As before the war, she recorded these stories of suffering not to solicit the pity of white audiences but to foreground the survival of the Black community. "I met with a woman in Tennessee who had been the mother . . . of five children," she recalled. "All were absent from her except one. I don't know that she could say in what part of the world her children were."[168] As before, Watkins Harper used these stories to insist on the need for a fundamental change in the political order, one that began not with a recitation of individual

(1998) (quoting Charles Harris Wesley, Neglected History: Essays in Negro-American History by a College President 18 (1969)).

162. See, e.g., Feimster, supra note 13, at 259 (discussing a military commission in which a Union soldier was found guilty of rape).

163. See Address (June 26, 1865), *in* Equal Suffrage: Address From the Colored Citizens of Norfolk, Va., to the People of the United States (New Bedford, Mass., 1865), reprinted in 5 The Black Abolitionist Papers: The United States, 1859–1865, at 334, 338 (C. Peter Ripley, Roy E. Finkenbine, Michael F. Hembree & Donald Yacovone eds., 1992).

164. Id.

165. See id.

166. The Freedmen of Port Royal: Testimony of R. Tomlinson, Esq., 1 Pa. Freedmen's Bull. 18, 20 (1865); see also Katherine Franke, Repair: Redeeming the Promise of Abolition 37 (2019) (describing how formerly enslaved people saw land ownership as "part of a longer-term plan toward independence from white people").

167. Frances Ellen Watkins Harper, National Salvation, Lecture Delivered at National Hall (Jan. 31, 1867), *in* Evening Tel. (Phila.), Feb. 1, 1867, at 8, 8 [hereinafter Watkins Harper, National Salvation]; see also Eric Gardner, Frances Ellen Watkins Harper's "National Salvation": A Rediscovered Lecture on Reconstruction, Commonplace (2017), http://commonplace.online/article/vol-17-no-4-gardner/ [https://perma.cc/4LT8-G3UE].

168. Watkins Harper, National Salvation, supra note 167, at 8.

rights, but an enumeration of collective wrongs. As Watkins Harper later explained, "You white women speak here of rights. I speak of wrongs."[169]

To at least some observers, this systematic effort by people of color to compile and argue from a history of collective wrongs presented a threat to efforts to reconstitute a white patriarchy. "The negroes . . . evidently think themselves about to assume the position of public instructors," declared one commentator in August of 1865.[170] "They have an organization entitled the social, civil, statistical association of colored people . . . which has entered upon the work of publishing political documents. They say they have forty thousand dollars raised from negroes alone to spend in this new society for the diffusion of sound political information this year."[171] As this commentator's editorial made clear, the problem for those committed to restoring the old order was not simply that Black people were constructing and publishing history—they were constructing and publishing a history that had long served as a basis for political arguments for self-determination.

It was in this context of contested histories that members of the federal government set out to create a record of their own.[172] In 1865, President Andrew Johnson dispatched to the southern states a man called Carl Schurz, whom W.E.B. Du Bois would later sardonically refer to as a "fine liberal."[173] According to Schurz, his official assignment that summer of 1865 was best described as that of a neutral investigation. "I am to visit the Southern States," he wrote to his wife, "in order to inform myself thoroughly on the conditions prevailing there, give my opinion of them to the Government and make certain suggestions."[174] In practice, radical Republicans in Congress quickly seized upon Schurz's mission as an opportunity to discredit the Johnson Administration's policies, including the pending withdrawal of federal troops from the former Confederacy.[175]

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169. Frances Ellen Watkins Harper, Speech (May 10, 1866), *in* Proceedings of the Eleventh National Woman's Rights Convention 90, 91 (New York City, Robert J. Johnston 1866).

170. Second Dispatch, Daily Mo. Democrat, Aug. 11, 1865.

171. Id.

172. See, e.g., Yael A. Sternhell, The Afterlives of a Confederate Archive: Civil War Documents and the Making of Sectional Reconciliation, 102 J. Am. Hist. 1025, 1030–36 (2016) (describing the federal government's efforts to collect an archive of the rebellion and the Civil War).

173. Sarah Papazoglakis, A "Fine Liberal" in Black Radical History: W.E.B. Du Bois's Strategic Citation of Carl Schurz, 58 Am. Stud., no. 4, 2019, at 97, 110.

174. Letter from Carl Schurz to Mrs. Schurz (June 16, 1865), *in* 1 Speeches, Correspondence and Political Papers of Carl Schurz 264, 264 (Frederic Bancroft ed., 1913) [hereinafter Papers of Carl Schurz].

175. On the broader political context of the Report and the conflict between Schurz and Andrew Johnson, see Carl Schurz: Rebuffed Radical, *in* 1 Advice After Appomattox: Letters to Andrew Johnson, 1865–1866, at 61, 71–74 (Brooks D. Simpson, LeRoy P. Graf & John Muldowny eds., 1987).

As Senator Charles Sumner urged Schurz in June of 1865, "[B]efore you go, make one more effort to arrest the policy of the President."[176]

The result, upon Schurz's return, was a mammoth report that included hundreds of reports from military officers, physicians, and Freedmen's Bureau officers, compiled to advance a particular set of political arguments.[177] On a superficial level, there were at least some obvious overlaps between Schurz's report and that compiled by William Still.[178] Perhaps the most common theme was the sheer fact of the brutal and far-reaching violence against Black people. Readers who paged through the report would find an extensive accounting of what appeared to be an all-out slaughter.[179] In the military hospital set up outside of Montgomery, for example, doctors reported the victims, guessing at ages. "A girl about twelve years of age . . . lies in No. 1 hospital now with her back perfectly raw . . . ."[180] The doctors recorded the names when they could. "Nancy . . . ears cut off . . . . Mary Steel, one side of her head scalped . . . . Jacob Steel, both ears cut off . . . . Amanda Steel, ears cut off . . . ."[181] A young girl named Ida, "struck on the head with a club by an overseer, about thirty miles from here; died of her wound at this hospital June 20."[182] A man named "James Taylor, stabbed about half a mile from town; had seven stabs that entered his lungs, two in his arms, two pistol-shots grazed him, and one arm cut one-third off, on the 18th of June."[183] A man named "Amos Whetstone, shot in the neck by John A. Howser."[184] By the numbers, one officer estimated that one-third of the Black people in a single community had been hospitalized.[185]

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176. Letter from Sen. Charles Sumner to Carl Schurz (June 22, 1865), in Papers of Carl Schurz, supra note 174, at 265, 265.

177. See Schurz Report, supra note 155.

178. Indeed, the Statistical Association invited Carl Schurz, along with Frederick Douglass and Frances Ellen Watkins Harper, to deliver lectures in the mid-1860s. See, e.g., Press (Phila.), Feb. 22, 1865 (naming Watkins Harper as an invited lecturer); Press (Phila.), Feb. 8, 1865 (naming Douglass as an invited lecturer); Carl Schurz, The City: Lecture by General Schurz, *in* Press (Phila.), Feb. 23, 1866, at 6, 6 (summarizing Schurz's lecture before the Social, Civil, and Statistical Association of the Colored People of Pennsylvania).

179. See Letter from W.B. Stickney to Thomas W. Conway (Aug. 1, 1865), *in* Schurz Report, supra note 155, at 87, 88 ("Reports are constantly brought to this office by the negroes from the interior that freedmen have been kidnapped and summarily disposed of.").

180. Letter from J.H. Weber to Samuel Thomas (Sept. 28, 1865), *in* Schurz Report, supra note 155, at 77, 78.

181. J.M. Phipps, List of Colored People Killed or Maimed by White Men and Treated at Post Hospital, Montgomery (Aug. 21, 1865), *in* Schurz Report, supra note 155, at 70, 70–71.

182. Id.

183. Id.

184. J.E. Harvey, List of Colored People Wounded and Maimed by White People, and Treated in Freedmen's Hospital Since July 22, 1865 (Aug. 21, 1865), *in* Schurz Report, supra note 155, at 71, 71.

185. See Letter from W.A. Poillon to Carl Schurz (Sept. 9, 1865), *in* Schurz Report, supra note 155, at 72, 73.

And yet, despite the harrowing similarity in the sheer scale of violence, there were crucial differences between Schurz's archival practice and Still's. Most consequently, the Schurz Report did not include a single recorded testimony of any of the Black people who had witnessed or survived the slaughter that the report described with such lurid detail. To the contrary, at a time when mainstream Republicans still clung to ideologies of white superiority,[186] Schurz assembled this first official record by seeking out the voices of former enslavers and employees of the federal government.[187] While traveling by ship down the coast of North America to Hilton Head Island, for example, Schurz ascended to the open deck of the steamer and struck up a conversation with a fellow passenger. As he later reported, the man whom he interviewed was a former enslaver and now-retired military officer of the Confederate States of America who was then traveling home to his plantation in the Carolinas. In Schurz's words, this man who became the first witness was, by all accounts, a "fine, stalwart fellow."[188] Schurz also gathered the reports of former human traffickers, including Captain William Poillon, an agent of the Freedmen's Bureau at Mobile who was once accused of sinking a slave ship carrying hundreds of chained Black people in order to avoid his own capture.[189]

In assembling these interviews, Schurz's objectives also differed markedly from those of abolitionist fact-finders. In keeping with the broader political aim of discrediting President Johnson's withdrawal of federal troops, Schurz interviewed witnesses not simply to document violence but also to detail the asserted urgent threat to law and order in the South and the corresponding need for a continuing military presence. As one critic put it in Charleston, "Every thoughtless speech of a planter, . . . every bitter utterance of a returned soldier broken down in the wars and suffering from a mortified spirit, is seized upon to show that there is still danger of rising rebellion."[190] Indeed, Schurz devoted the first fifteen pages of the report's executive summary to an analysis of the prospects for restoring the rule of law and securing loyalty oaths from former rebels. Only on page fifteen did Schurz address what he called "the negro question," linking the question of violence against Black people to the need for a strong federal presence that could restore law and order and reconcile the sections.[191] Only then, on page eighteen, did Schurz begin to enumerate the slaughter,[192] in a prelude

186. Pamela Brandwein, Rethinking the Judicial Settlement of Reconstruction 3 (2011) [hereinafter Brandwein, Rethinking the Judicial Settlement] ("Republicans believed in white superiority and rejected what was termed the 'social equality' of blacks, often scorning the public accommodation provisions of the Civil Rights Act of 1875.").

187. Letters From the South, No. 1, The Sea Islands and Free Labor (July 17, 1865), *in* Bos. Daily Advertiser, July 31, 1865.

188. Id.

189. A Valuable Freedmen's Bureau Man, Richmond Whig & Pub. Advertiser, Apr. 20, 1866.

190. Carl Schurz's Report, Cin. Daily Enquirer, Jan. 20, 1866.

191. Schurz Report, supra note 155, at 15 ("Hence the importance of the negro question as an integral part of the question of union in general, and the question of reconstruction in particular.").

192. See id. at 18.

to the compiled letters and reports that described a landscape where "all is anarchy and confusion."[193]

The result was an official government report that, despite the superficial similarity of cataloguing brutal acts of violence, bore little resemblance to the archival practice of *Journal C* and the mode of constitutional argumentation that its records of human suffering had inspired. Whereas the goal of *Journal C* had been to preserve, in their own words, the humanity and dignity of people who had survived a federally sanctioned crime against humanity, Schurz portrayed people of color as anonymous victims of a rogue wave of postwar violence by rebellious states and bad men. Moreover, whereas the aim of speakers like Watkins Harper who privileged these histories of enumerated wrongs had been to critique the nation and national government and call for a return of power to the people, here the recitation of violence was designed to celebrate the nation-state and call for a doubling down of law and order to ensure the economic reunification of the North and South.

To be sure, the publication of this official report in 1865 did not end the labors of those who had been at the helm of the project of preserving and reasoning from a peoples' history of slavery. Throughout the late 1860s and into the early 1870s, Watkins Harper and other Black feminists continued to travel through the former Confederacy, interviewing the formerly enslaved while also giving lectures, writing editorials, and publishing poetry that wove together personal histories of slavery with calls for a return of power to the people.[194] When, for example, Watkins Harper made a case for the ratification of the Fifteenth Amendment in May of 1869, she began not with the wave of postwar violence and anonymous Black victims that Schurz had recorded with such care but with the time of slavery and the site of her mother's grave.[195] "[U]nder the laws of that State a few years ago," a local paper described her telling a crowd in Wilmington, Delaware, "[she would] have been liable to be arrested and sold into slavery, if, having left that State, she had returned to visit her mother's grave."[196] Reasoning from this record, Watkins Harper then made a bid for political equality: one in which Black women would be given the vote.[197]

For Watkins Harper, the time of slavery to which she anchored the Amendments was a source of Black power. As she told an audience in June

193. Letter from W.A. Poillon to Carl Schurz, supra note 185, at 72–73; see also Letter from J.P. Houston to Carl Schurz (Aug. 22, 1865), *in* Schurz Report, supra note 155, at 71, 72 (describing a "condition of anarchy").

194. See, e.g., Byrd, "We Are Negroes!", supra note 17, at 24–25 (describing a lecture by a "Madame Parque" in St. Louis that celebrated the Fifteenth Amendment by invoking a history in which the nation "had never given them anything but stripes" and urging that what "we want now is to be let alone" (internal quotation marks omitted) (quoting The Colored Lecturess, Courier-J. (Louisville, Ky.), Mar. 28, 1870)).

195. Mrs. Harper's Lecture, Wilmington Daily Com., May 18, 1869.

196. Id.

197. See id. ("[Watkins Harper] alluded to the probability of woman suffrage and the effect it would have of introducing a higher regard for humanity into our politics.").

of 1869, "We have among us three forces besides the ballot, which, rightly used, will give a place and *standing among the nations*—brain power, muscle power, and moral power."[198] This power, she continued, came from two hundred years of bondage: "What has sustained the colored race through the horrors and degradations of more than two centuries of bondage but the ever present conviction that some time, some where, justice would be done to them[?]" she asked.[199] This was a struggle, she explained, that would be fought by a people led by a higher law; a people, she wrote in 1870, who were beginning to strike back.[200]

Indeed, by 1871, a time when politicians in Washington continued to cite the Schurz Report's description of lawless anarchy[201] and convened a congressional committee to investigate the "safety of the lives and property of the citizens of the United States,"[202] Watkins Harper traveled southward to the very heart of the former Confederacy.[203] Writing on the day after the anniversary of the nation's independence—July 5, 1871—Watkins Harper addressed a letter to her old friend William Still, the compiler of *Journal C*.[204] In that letter that soon appeared in the national press, Watkins Harper recounted how she had stayed with a family of formerly enslaved people for several days at what was once the plantation of Jefferson Davis.[205] The land that they had worked in the age of slavery was now owned and operated by a man named Montgomery and his family, she wrote.[206] The old "baronial possession," she continued, was now the site of a school, a post office, and thousands of acres managed by young Black women.[207] And in that letter that described a thriving Black community who had claimed ownership of the property of the former President of the Confederacy, the past appeared not as something to be feared, but as a source of power, one that would soon be severed from the official body of constitutional law.

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198. Mrs. Harper's Lecture, N.Y. Trib., June 1, 1869, at 8 (emphasis added).

199. Id.

200. Exit!: The Pennsylvania Anti-Slavery Society a Thing of the Past., supra note 38, at 2 (quoting Watkins Harper's poem celebrating the passage of the Fifteenth Amendment and her speech describing the lesson of "striking back").

201. See, e.g., Henry Wilson, U.S. Senator, Enforcement of Fourteenth Amendment, Speech at the First Session of the Forty-Second Congress (Apr. 13, 1871), *in* Daily Globe (D.C.), Apr. 27, 1871, at 5, 5 (quoting the Schurz Report).

202. See S. Rep. No. 42-41, pt. 1, at 1 (1872) (describing the 1871 appointment of a congressional committee to investigate the conditions in the former Confederacy "so far as regards the execution of the laws and the safety of the lives and property of the citizens of the United States").

203. See Letter from F.E.W. Harper to Wm. Still (July 5, 1871), *in* Republican Progress, New Nat'l Era (D.C.), July 20, 1871 (describing her experience as a guest staying at the old plantation of Jefferson Davis).

204. Id.

205. See id. ("[I]f in ten years since some one had entered my humble log house . . . and said that in less than ten years . . . you will be a welcome guest under the roof of the President of the Confederacy . . . would you not have smiled incredulously?").

206. Id.

207. Id.

B. *Reasoning From the Schurz Report*

When Justice Samuel Miller began drafting his majority opinion in the *Slaughter-House Cases*, the immediate question before the Court was straightforward: whether the plaintiffs, a group of white butchers in New Orleans, could claim the protection of the Thirteenth and Fourteenth Amendments to strike down a Louisiana state law that required them to butcher their animals in a designated, state-chartered slaughterhouse.[208] As careful historical research has since revealed, the stakes of this case were far greater than this legal question suggested.[209] Perhaps most notably, the Louisiana state law at issue was the work of one of the first biracial legislatures in America.[210] Elected after a new constitution was ratified in Louisiana, this legislature that included Black lawmakers swiftly enacted a series of civil rights laws designed to desegregate schools and public accommodations throughout the state.[211]

Almost immediately, resistance to the new laws appeared in the New Orleans press as editorialists lambasted the legislature and its grant of a monopoly requiring butchers to slaughter their cattle in a particular location.[212] Using language that echoed that of *Dred Scott*, one commentator likened the state legislature's creation of the slaughterhouse monopoly to a fraudulent agreement that "*deserves the respect of nobody*."[213] The law, the Butchers' Association protested, "deprives us as a class of the hitherto unquestionable right of *killing our beeves in our own way*."[214] To enshrine this "unquestionable right," the butchers hired none other than the white supremacist and former high-ranking member of the Confederacy, John A. Campbell, to represent them; Campbell, a former member of the Supreme Court, had concurred in the *Dred Scott* decision denying that Black people could ever be citizens.[215]

To resolve this question that pitted the former author of *Dred Scott* against Black lawmakers, the Supreme Court could have chosen to analyze the law in question by citing the testimonies of enslaved people that America's abolitionists had compiled, preserved, and recently published. Alternatively, it could have relied on the few voices of Black people that had begun to appear in the federal government's growing archive of official reports detailing the conditions in the South, including the

208. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 43 (1873).

209. See generally Ross, Justice Miller's Reconstruction, supra note 11 (explaining the historical context in which Justice Miller analyzed the constitutionality of the Louisiana Slaughter-House law).

210. Id. at 664.

211. Id. at 663–64 (summarizing laws passed by the Louisiana legislature in February and March of 1869).

212. Id. (summarizing the resistance to the 1869 civil rights laws, as evidenced in editorials and by an increase of membership in white terrorist organizations).

213. Gov. Warmoth's Slaughter-House Veto Message, New Orleans Bee, Feb. 28, 1871 (emphasis added).

214. The Butchers' Ass'n, Resolutions Adopted June 21, 1869, *in* New Orleans Bee, June 22, 1869 (emphasis added).

215. Ross, Justice Miller's Reconstruction, supra note 11, at 666.

handful of voices of Black women who had testified in the 1871 Ku Klux Klan congressional hearings detailing the relentless continuation of assault.[216] Instead, the Court began by simply announcing the death of slavery, relying on language that it borrowed from the Schurz Report to narrow the problem to be solved by the Reconstruction Amendments: from one of centuries of state-sanctioned assault requiring repair through an inclusive political process to one of a temporary wave of postwar anarchy and rebellion to be resolved through the federal vindication of individual rights.

To observe how the Court accomplished this reframing, it is useful to begin by looking at how the Court defined the appropriate methodologies of constitutional interpretation. Notice first the importance that the Court attached to its own version of history. As Justice Miller explained, "Nor can such doubts [concerning the meaning of the Amendments] . . . be safely and rationally solved without a reference to that history . . . ."[217] Justice Miller took pains to emphasize that there was only one version of history that mattered for the purposes of constitutional law: that which belonged to an imagined homogenous public mind, for which the Court was the exclusive and authoritative transcriber. "That history is fresh within the *memory of us all*," Justice Miller observed, creating an "us" that denied the existence of any countervailing memories of the people.[218] "[I]ts leading features, as they bear upon the *matter before us*, [are] free from doubt," he continued, asserting the Court's role as the sole chronicler of the nation's past.[219] To observers, this judicial reliance on history was by no means foreordained. Indeed, according to one commentator, the closest analogue to the historical methods was that of Chief Justice Robert B. Taney in *Dred Scott*.[220]

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216. See, e.g., Feimster, supra note 13, at 258–59 (listing and quoting from testimonies of Black women submitted during military commissions of Union soldiers charged with rape); see also Rosen, supra note 13, at 8–9 (arguing that "[t]estimony found in [the records of congressional investigating committees and the Bureau of Refugees, Freedmen, and Abandoned Lands] offers a window . . . onto how former slaves claimed citizenship by demanding protection from violence"); Kidada E. Williams, The Wounds That Cried Out: Reckoning with African Americans' Testimonies of Trauma and Suffering From Night Riding, *in* The World the Civil War Made, supra note 10, at 179 n.15 (noting that "[t]he committee was charged with investigating election-related violence, which informed the witnesses they called, the scope of their investigation . . . and the questions they asked"); Tiffany R. Wright, Ciarra N. Carr & Jade W.P. Gasek, Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983, 126 Dick. L. Rev. 685, 705–06 (2022) (detailing the testimonies of Black women who testified in the Ku Klux Klan Hearings of 1871).

217. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67 (1873).

218. Id. at 68 (emphasis added).

219. Id. (emphasis added).

220. See Henry G. Connor, John Archibald Campbell: Associate Justice of the United States Supreme Court, 1853–1861, at 221 (1920) ("It is interesting to note that Justice Miller follows the line of thought resorted to by Chief Justice Taney in the *Dred Scott* case. He adopted the historical method for interpreting the sense in which the language was used by the framers of the Amendment . . . .").

Having proclaimed the existence of a single historical narrative of the Reconstruction Amendments and asserted itself as the sole transcriber of that history, the Court then assembled the units of constitutional time and space in a way that effectively excised the history of slavery told by its survivors. Consider, for example, how the Court defined the geographic boundary and temporality of slavery. In the lone paragraph that the Court devoted to the antebellum era, slavery appeared as a Southern institution that had died with the march of Northern armies. "The institution of African slavery," the Court observed, "existed in about half the States of the Union,"[221]—and with that, the abolitionists' carefully kept records of policing that extended along the backroads of America fell to the cutting room floor. It was during the Civil War, the Court continued, that the institution of "slavery, as a legalized social relation, perished . . . as a necessity of the bitterness and force of the conflict."[222]

In this account of slavery as an institution that was tightly confined to a particular time and space, the federal government appeared in a single, unchanging role: as the benevolent protector of helpless Black people from wayward violence. Speaking of the antebellum era, the Court cast the federal government not as an underlying infrastructure that had sustained the institution of slavery but as a consistent supporter of those "who desired [slavery's] curtailment."[223] Instead of detailing federal officers' role in policing and arresting Black people, the Court characterized the federal government as the savior of Black people. It was the federal government, the Court continued, whose "armies of freedom . . . could do nothing less than free the poor victims."[224] In the Court's narration, the federal government was the harbinger of freedom. "Wherever the Federal government succeeded in that purpose," Justice Miller observed, "slavery was at an end."[225]

Within this history of bounded slavery and benevolent federal governance, the Court drew upon the language of the Schurz Report to reinterpret the true threat facing America's constitutional democracy. The danger, the Court warned, was that of disloyal states and rogue individuals, whose anarchy had rendered the South a lawless den of murderers. Following the logic of the Schurz Report, the Court traded the abolitionists' searing indictment of the collective wrongs for a celebration of the nation's beneficial powers to protect individuals from the villainy of bad men. Indeed, Justice Miller appears to have paraphrased the Schurz Report directly. When Justice Miller observed that "[i]t was said that *[the lives of the freedmen] were at the mercy of bad men*,"[226] it was one of the first times in history that the Court used the term "bad men."[227] The full

221. *Slaughter-House*, 83 U.S. at 68.

222. Id.

223. Id.

224. Id.

225. Id.

226. Id. at 70 (emphasis added).

227. For earlier uses of the term, see Agawam Woolen Co. v. Jordan, 74 U.S. (7 Wall.) 583, 592 (1868); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 131 (1866).

sentence echoed the language of a letter from a former human trafficker that Schurz had included in his report and that, in turn, had recently been read aloud on the Senate floor by former Vice President Henry Wilson, then a senator from Massachusetts.[228] As this original version read, "*[T]he life of the freedmen is at the mercy of any villain whose hatred or caprice incites to murder*."[229] By swapping the language of "villain" for the term of art "bad men," the Court redefined the threat to Black lives from a state-sanctioned regime of exploitation to one of bad actors, while echoing the language of a former human trafficker to interpret the Fourteenth Amendment.[230]

Having constructed the relevant history of the Amendments as one of lawless violence against helpless Black people whom the state governments had failed to protect, the Court had little difficulty reaching its conclusion as to the interpretive lesson to be derived from this history: a judicial recognition of the additional, broad powers that the Reconstruction Amendments had conferred upon the federal government for the protection of the individual rights of America's citizens. As Justice Miller declared, in the case of any doubt as to the meaning of the Amendments, future constitutional interpreters should look to the "the history of the times."[231] It was in that history, he continued, that one would find "the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for *additional guarantees of human rights, additional powers to the Federal government*, additional restraints upon those of the States."[232]

The Court paired this celebratory recognition of the additional federal powers created by the Reconstruction Amendments with an equally capacious description of the type of conduct that the federal government could reach. Precisely because the Court had used the official archive of the federal government, as reflected in the Schurz Report, to recast the problem to be solved by from one of state-sanctioned atrocity to one of individual bad actors, the Court explicitly contemplated a role for Congress in protecting American citizens from private acts of violence and oppression. As Justice Miller put it, "*In the light of this recapitulation of events* . . . no one can fail to be impressed with the one pervading purpose found in [the Amendments:] . . . the protection of the newly-made freeman and citizen from the *oppressions of those who had formerly exercised unlimited dominion over him*."[233] Indeed, by choosing to use the term "bad men," the Court used a term of art that had already begun to appear in federal Indian treaties as a dismissive category of rogue private actors.[234]

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228. See, e.g., Wilson, supra note 201, at 5.

229. Letter from W.A. Poillon to Carl Schurz, supra note 185, at 72 (emphasis added).

230. See id. (describing Poillon's role as a human trafficker).

231. *Slaughter-House*, 83 U.S. at 67.

232. Id. at 67–68 (emphasis added).

233. Id. at 71 (emphasis added). Note the gendered language.

234. Id.; see also Treaty Between the United States of America and Different Tribes of Sioux Indians, art. 1, Apr. 29, 1868, 15 Stat. 635, 635 (referring to "bad men among the whites"); Richard v. United States, 677 F.3d 1141, 1142 (Fed. Cir. 2012) (holding that the

In addition to describing this newly ascendant federal enforcement power that could protect citizens from the private acts of violence and oppression that had been detailed in the Schurz Report, the Court also explicitly contemplated a role for Congress in defining the substance of a national citizen's privileges or immunities. After announcing that the butchers' asserted right to pursue their trade was protected by state citizenship and hence not protected by the Privileges or Immunities Clause, the Court offered a straightforward formula for determining whether an asserted right *did* come within the scope of the Clause. According to the Court, the inquiry was simply whether the asserted right "*owe[d] [its] existence to the Federal government*, its National character, its Constitution, *or its laws*."[235] In laying out this formula, the Court listed a whole host of rights that traced their existence to the federal government, including rights secured by federal legislation and international treaties, rights enumerated in the Constitution, including the Fourteenth Amendment, as well as "[t]he right to peaceably assemble and petition for redress of grievances," and "the privilege of the writ of *habeas corpus*."[236]

Justice Miller did not specify which, if any, federal laws he had in mind when he wrote these passages celebrating the Amendment's creation of additional federal powers and asserting Congress's role in defining the privileges or immunities of national citizenship. But the language he chose, paired with the specific histories of violence that he privileged, offers a powerful clue. As Professor William Rich has noted, Justice Miller's formulation of the privileges or immunities of national citizenship closely tracked the formulation that Congress adopted the following year when it modified the Ku Klux Klan Act of 1871.[237] Under this revised statute, Congress deployed its newly acquired Enforcement Power to target the wave of postwar violence that Schurz had detailed—and that the Court had placed at the center of the Reconstruction Amendments' relevant history—to create a federal cause of action for citizens who had been deprived of "any rights, privileges or immunities secured by the Constitution *and laws*" of the federal government.[238]

This judicial recognition of Congress's power to expand federal jurisdiction in order to prosecute private acts of violence against individual citizens, paired with the Court's reliance on the Schurz Report's history of a temporary wave of anarchy and disorder, reveals the hidden logic of Justice Miller's opinion. Rather than telling a people's history of slavery that had become the basis for claims to political power for Black men and women, Justice Miller's history of temporary violence by "bad men" paved the way for the Court to assert its supreme role as the guiltless adjudicator

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"bad men" provision of this treaty—commonly known as the Laramie Treaty of 1868—was not limited to governmental actors).

235. *Slaughter-House*, 83 U.S. at 79.

236. Id. at 79–80.

237. See Rich, supra note 11, at 187 (noting that "the language which became a permanent part of federal law in 1874 tracked Justice Miller's language from the previous year").

238. See 24 Rev. Stat. § 1979, 18 Stat. 348 (1874) (emphasis added).

and vindicator of individual rights in America.[239] This reading of Justice Miller's vision for the future deployment of federal power unleashed by the Reconstruction Amendments is consistent with his other writings.

To begin with, although Justice Miller had spoken out against the reports of brutal racial violence in the aftermath of the Civil War,[240] he harbored no ill will against his colleagues on the bench who had stripped Black people of their national citizenship. "I more than liked him," Justice Miller once observed of Chief Justice Taney, the author of *Dred Scott*. "I loved him."[241]

As Justice Miller later explained, he viewed the source of America's strength as the bloodline that it had inherited from the Anglo-Saxon race—which brought with it America's love for law and order. "The Anglo-Saxon race," he observed, "from whom we inherit so much that is valuable in our character, as well as our institutions, has been remarkable in all its history for a love of law and order."[242]

It was by protecting this inherited Anglo-Saxon love of law and order, he intimated, that the true engine of happiness—global commerce—would flourish and bring happiness to the world. "[T]he progress of trade, the demands of wide-spread commercial relations, and the intercourse brought about by these incitements to human enterprise have done more to civilize the world, to push it forward, and to minister to the happiness of mankind than all other instrumentalities put together," he insisted.[243]

For Justice Miller, the threat to this Anglo-Saxon inheritance of law and order was not the federal government. To the contrary, he explained,

239. See generally Brandwein, Rethinking the Judicial Settlement, supra note 186, at 135 (describing the Republican view of a narrow federal role tied to eliminating racial political violence and federally prosecuting racially motivated offenses against rights); Morton Keller, Affairs of State: Public Life in Late Nineteenth Century America (1977) (tracing the discovery of state capacity to both act and redress as a consequence of the violent power unleashed by the Civil War war machine, as well as the subsequent retreat from this discovery).

240. See Michael A. Ross, Melancholy Justice: Samuel Freeman Miller and the Supreme Court During the Gilded Age, 33 J. Sup. Ct. Hist. 134, 141 (2008) (quoting an 1867 letter from Justice Miller to his brother-in-law, William Pitt Ballinger, a former Confederate military officer, enslaver, and lawyer, in which Miller protested the lack of punishment for racial violence).

241. William H. Rehnquist, Chief Just., U.S. Sup. Ct., Remarks on the Rededication of the Roger Brooke Taney House and Museum (Apr. 7, 2004), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-07-04 [https://perma.cc/TG3N-RPZB] (quoting a statement by Justice Miller in which Miller expressed his love for Chief Justice Taney).

242. Samuel F. Miller, Just., U.S. Sup. Ct., Address Delivered at the Celebration of the One Hundredth Anniversary of the Constitution: The Formation of the Constitution (Sept. 17, 1887), *in* Charles Noble Gregory, Samuel Freeman Miller 85, 118 (1907) [hereinafter Miller, The Formation of the Constitution].

243. Samuel F. Miller, Just., U.S. Sup. Ct., Address Delivered at the Commencement of the State University of Iowa: The Conflict in This Country Between Socialism and Organized Society (June 19, 1888), *in* Samuel Freeman Miller, supra note 242, at 143, 160–161 [hereinafter Miller, The Conflict in This Country].

"the late civil war teaches unmistakably that those who believed the source of danger to be in the strong powers of the Federal Government were in error, and that those who believed that such powers were necessary to its safe conduct and continued existence were in the right."[244] Rather, the true threat came from outside the halls of power: the people who accused the government of privileging certain classes over the other. As he later observed of the labor activists and dissidents who called for a revolution of the working people of America: "They may address crowds collected upon the street corner, and in . . . speeches or in the public prints, they can abuse, to their heart's content, all government in which one man may be found to be prosperous another man poor . . . ."[245]

To be sure, Justice Miller never explicitly explained why he chose to leave out the people's archive of slavery that had appeared in the public domain, much less why he emphasized the broad powers that the Reconstruction Amendments had conferred upon the federal government. But the effect was clear. By privileging a history of postwar violence that centered the voices of former enslavers and human traffickers and enlisting the language of federal statutes aimed at expanding federal courts' jurisdiction, the Court had implicitly rejected the promise of an abolitionist constitution of collective wrongs in favor of a modern constitution of individual rights vindication by a guiltless federal government. Going forward, those who returned to the case reporters in search of the Amendment's original meaning would find not a single voice of the enslaved people. There would be no reference to the systemic extraction of the physical and reproductive labor upon which the American political economy had come to depend. Nor would there be any mention of the state and federal governments' complicity in perpetuating legalized atrocity, much less the bid for Black political power that originated in a history of suffering and resistance by a people said to be protected under a higher law. And yet, in the plain reading of the text, creative lawyers committed to the work of repair would soon find a different way of reading *Slaughter-House*, one that deserves to be remembered and revived today.

III. IMPLICATIONS

For nearly a century, generations of aspiring lawyers have learned that when the Supreme Court interpreted the Reconstruction Amendments for the first time in 1873, it eviscerated the Privileges or Immunities Clause.[246] As the preceding analysis has suggested, this relentless focus on the fate of the Privileges or Immunities Clause has led us to miss the full significance of the decision. The significance of *Slaughter-House*, this Essay has argued, was not the gutting of a single line of constitutional text. Rather, its significance was the gutting of a people's history of slavery, one that allowed the Court to assert and legitimize its own authority.

244. Miller, The Formation of the Constitution, supra note 242, at 110.

245. Miller, The Conflict in This Country, supra note 243, at 168.

246. See supra note 11 and accompanying text.

This concluding section explores the implications of this revised understanding of *Slaughter-House*. It argues that the scale of the Court's omission counsels in favor of reviving a now-forgotten historical interpretation of *Slaughter-House*: one that has the potential to reintegrate omitted histories of slavery into America's national jurisprudence and begin the work of reinvigorating Congress's role in enforcing the promises of the Reconstruction Amendments. First put forward by the prominent Black lawyer and congressman Robert Elliott in 1874, this approach to interpreting *Slaughter-House* looked to the plain text of the opinion and paired it with the histories of atrocity that the Court had omitted.[247] The result was to read *Slaughter-House* not as a decision that returned power to the states, but as one that recognized a broad congressional power to protect citizens from acts of oppression. By tracing how the Supreme Court then excised this broad language, this Part shows how the Court's selective reading of its own precedents problematizes the foundations of key strands of Fourteenth Amendment doctrine today.

A. *Reading* Slaughter-House

The first time that Congressman Robert Elliott publicly articulated his interpretation of *Slaughter-House*, he heralded the decision as a recognition of federal power.[248] Speaking to a gallery in Congress that included many members of the Black elite in the nation's capital, and well aware that many of his white colleagues believed he had no right to speak—much less participate in the act of governance—the lawyer offered a careful reading of the opinion. Hewing closely to its text, Congressman Elliott lauded the opinion as one that recognized in the Fourteenth Amendment a robust power for Congress to pass the Civil Rights Bill under consideration[249]—a reading, he concluded, that was compelled by the histories of Black suffering and struggle that deserved to be inscribed into the nation's official records.[250]

Although much remains uncertain about Elliott's early life,[251] the lawyer was no stranger to the legacies of slavery. According to information he gave to the federal census taker who stopped by his door in 1870 in South Carolina, his father had been born in Jamaica,[252] where the Elliott

247. 2 Cong. Rec. 407–08 (1874) (statement of Rep. Elliott).

248. See id. at 410.

249. Id. at 407 (declaring that the opinion recognized a congressional power to enact the Civil Rights Bill under consideration).

250. See id. at 410 (arguing that the history of Black suffering was part of the official record).

251. On the uncertainties surrounding Robert B. Elliott's early life, see Peggy Lamson, The Glorious Failure: Black Representative Robert Brown Elliott and the Reconstruction in South Carolina 22–23 (1973).

252. The U.S. Federal Census of 1870 lists Robert Elliott as a lawyer who was born in Massachusetts; the 1880 census adds that Elliott's father was born in Jamaica and his mother in Massachusetts. See Schedule for Richland County, South Carolina, microformed on Tenth Census of the United States, 1880, Microfilm T9, 1238–39 (Nat'l Archives Microfilm Publ'ns); Schedule for Richland County, South Carolina, microformed on Ninth Census of the United States, 1870, Microfilm M593, 1507 (Nat'l Archives Microfilm Publ'ns).

family who carried his last name still appear in the records of enslavers seeking people who had been branded and locked in iron neck collars.[253] Following a three-year service in the U.S. Navy, Elliott had moved to Charleston, where he was admitted to practice law in South Carolina and "took a prominent part in the organization of the constitutional convention, and afterwards of the State house of representatives."[254] By 1871, he had become the first Black person to represent the district that had long sent John C. Calhoun to Congress.[255]

As one of the first Black representatives in Congress, Elliott saw it as part of his role to ensure that the archive of suffering was not lost from the nation's records. "The sufferings and wrongs we have endured on this continent have been indeed great," he had declared in Congress.[256] "The taunts, insults, and bitter cruelties to which we have been subjected have ascended even unto the uppermost heaven," he described.[257] Following the logic of constitutional argumentation that had first sounded decades earlier, Elliott tied the history of exclusion and exploitation to calls for a remaking of the political order. The system of caste, he declared, "had allowed us no voice in the passing of the laws that were to govern us, or hand in disposing of the proceeds of our labor taken from us as taxes for the support of the government of our respective states."[258] And in the opening months of 1874, as he reviewed the Court's first interpretation of the Reconstruction Amendments, Elliott had no intention of letting the Court's omission of history go unanswered.

At the time, white supremacists in Congress had already begun to insist that the Court's opinion in *Slaughter-House* had done nothing more than restore the old way of things. Perhaps the most outspoken advocate of what would eventually become the conventional reading of *Slaughter-House*, which now travels so easily through our law schools and courtrooms, was the former Vice President of the Confederacy, Alexander Stephens of Georgia. As Stephens declared, *Slaughter-House* stood only for the proposition that the rights secured by the Constitution were to be enforced "not by municipal acts of Congress operating over the people of the several States, but by the judgment of all courts declaring that all such

253. See, e.g., Runaway Slaves in Jamaica (II): Nineteenth Century 141 (Douglas B. Chambers ed., 2013), https://ufdcimages.uflib.ufl.edu/AA/00/02/11/44/00002/Jamaica RunawaySlaves-19thCentury.pdf [https://perma.cc/MU87-QKLL] (listing "Bessy, a creole, to Miss Nancy Elliot, marked GC on her left shoulder" and "Mary-Ann, a creole, says she belongs to Mr. Daniel Elliot . . . she has fastened around her neck a large iron collar").

254. Bos. Semi-Weekly Advertiser, Dec. 3, 1870.

255. Negro Orator in Congress: Hon. Mr. Elliott of South Carolina on the Civil Rights Bill, Troy Daily Times, Jan. 8, 1874.

256. Robert B. Elliott, Speech in the House of Representatives (May 30, 1872), *in* Daily Globe (D.C.), June 11, 1872.

257. Id.

258. R.B. Elliott, Address in the Convention of the Colored People of the Southern States (Oct. 18, 1871), *in* Semi-Weekly Louisianian (New Orleans), Oct. 29, 1871.

hostile State legislation is null and of no effect."[259] Others who shared Stephens's racist views had followed suit. Consider, for example, the words of Congressman John DeWitt Clinton Atkins of Tennessee. According to Atkins, slavery was best forgotten. "I would that these memories [of our former peculiar institutions] were forever buried in the deep ocean of the unremembered past."[260] Those who had endeavored to keep the memory alive, Atkins made clear, were best told to sit down and be quiet. Indeed, in the very same speech in which he insisted *Slaughter-House* had done no more than restore the federal order, Atkins told one of the newly elected Black representatives to take a seat. "*I am speaking to white men, not to you. You sit down, sir.*"[261]

It was in this context that Elliott rose from his seat in the House of Representatives to offer a radically different view of the opinion, one that began with what he took to be its main features: the plain language of dicta that was central to the logic of the holding. As Elliott argued in a widely published speech, Stephens's interpretation of *Slaughter-House* as a gutting of the Amendment rested on not only a deeply selective reading of the opinion but also a reprehensible analogy of white supremacy: one that compared Black people to noxious animals to be slaughtered, and hence, like animals, subject to state regulation.[262]

To make this case, Elliott drew upon a method of constitutional interpretation articulated by Frederick Douglass. As Douglass had argued years earlier, the proper mode of interpreting the Constitution—and presumably, by extension, its case law—was not to parse the records for its authors' intentions. As Douglass had declared, "What will the people of America a hundred years hence care about the intentions of the scriveners who wrote the Constitution?"[263] Instead, the key to a mode of interpretation that was predictable and legitimate was to read the plain text with a thumb on the scale of justice. As Douglass explained, "If the South has made the Constitution bend to the purposes of slavery, let the North now make that instrument bend to the cause of freedom and justice."[264]

Applying this method to the opinions of the Supreme Court, Elliott urged a reading of *Slaughter-House* that began with the plain language of the opinion and incorporated the history of atrocity that the Court had

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259. Washington Foreshadowing of the Possible Political Issue of 1876, N.Y. Herald, Jan. 4, 1874.

260. 2 Cong. Rec. 452 (1874) (statement of Sen. Atkins).

261. Memorable Scenes, Christian Reg. (Bos.), Jan. 10, 1874 (emphasis added).

262. See 2 Cong. Rec. 407–10 (1874) (statement of Rep. Elliott).

263. Douglass, supra note 103, at 469.

264. Id. Douglass's view later became part of the argumentative strategy for lawyers who applied it to read *Prigg v. Pennsylvania*'s recognition of a broad Article IV power to protect slavery, 41 U.S. (16 Pet.) 539, 611–13 (1842), as an argument in favor of the Court's duty to recognize a broad Fourteenth Amendment power to protect freedom. See Brief of Plaintiff in Error at 27, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210) ("Shall this court which was so ready to commit the government to the perpetuation of wrong, hesitate to apply the same rule to secure the rights of its citizens?").

excised. Listen, for example, to how Elliott framed his speech. Directing his audience's attention to the text of the opinion, he began by asking whether those who insisted that *Slaughter-House* had simply restored power to the state governments had even *read* the opinion. "The honorable gentleman from Kentucky . . . rushes forward and flaunts in our faces the decision of the Supreme Court of the United States in the Slaughter-house cases," he observed.[265] "We are told that we are barred by a decision of that court, from which there is no appeal."[266] The claim, he intimated, was utterly at odds with the text. "If it were not disrespectful, I would ask, *has he ever read the decision which he now tells us is an insuperable barrier to the adoption of this great measure of justice*?"[267] After reading the passages that conferred upon Congress the power to protect America's citizens from acts of oppression, Elliott asked again: "Has the gentleman from Kentucky *read these passages which I now quote*? . . . [H]as the gentleman from Georgia considered well the *force of the language therein used*?"[268]

For Elliott, the answer was obvious: a resounding no. As he declared, "the doctrines of the Slaughter-house cases . . . [were] worthy of the Republic, worthy of the age, worthy of the great tribunal which thus loftily and impressively enunciates them."[269] Far from a winnowing of the Amendments, Elliott proclaimed *Slaughter-House* to be a recognition of a broad federal power to ensure equal protection of America's citizens:

> I venture to say here . . . in the presence of the whole country, that there is not a line or word, not a thought or dictum in the decision of the Supreme Court in the great *Slaughter-house cases* which casts a shadow of doubt on the right of Congress to pass the pending bill, *or to adopt such other legislation as it may judge proper and necessary to secure perfect equality before the law to every citizen of the Republic*.[270]

To make the point, Elliott directed his audience's attention to the passages in the opinion that spoke of the wrongs that had been inflicted on Black people and the broad purposes that the Amendments were designed to remedy. "Upon this question," he reasoned, "the Court held that the leading and comprehensive purpose of the thirteenth, fourteenth, and fifteenth amendments was to secure the complete freedom of the race, which by the events of war, had been wrested from the unwilling grasp of their owners."[271] For Elliott, the Court's recognition of two categories of federal and state citizenship was entirely consistent with a broad reading of Congress's power to protect its citizens from discrimination and oppression. "No matter, therefore, whether his rights

265. 2 Cong. Rec. 407 (1874) (statement of Rep. Elliott).
266. Id.
267. Id. (emphasis added).
268. Id. (emphasis added).
269. Id. at 408.
270. Id. (emphasis added).
271. Id.

are held under the United States or under his particular State, he is equally protected by this amendment."[272]

And yet, Elliott was not simply reciting the Court's language; he was also reintegrating the archive of slavery that the Court had excised. In a speech later celebrated for its sharp use of sarcasm,[273] Elliott proclaimed of the Court's construction of history: "I know no finer or more just picture, *albeit painted in the neutral tints of true judicial impartiality,* of the motives and events which led to these amendments."[274] The history that the Court had painted, Elliott made clear, had been whitewashed under the feigned banner of judicial impartiality. He could remember a time, he announced, "when press, pulpit, platform, Congress, and courts felt the fatal power of the slave oligarchy."[275] The history of state-sanctioned suffering that the Court had excluded, he continued, was as deserving as the history of aspirational rights it had detailed. As Elliott declared of the "members of the race I have the honor in part to represent[,] . . . [t]heir sufferings, assistance, privations, and trials in the swamps and in the ricefields, their valor on the land and on the sea, is a *part of the ever-glorious record which makes up the history of a nation preserved.*"[276]

This record of sufferings and trials, Elliott continued, was not simply of antiquarian interest. Drawing on the same logic of enumerated wrongs that Watkins Harper had deployed decades earlier, Elliott argued that the fact of human suffering had created an obligation on Congress to act. "Their sufferings," he concluded, "*[should] . . . incline you to respect and guarantee their rights and privileges as citizens of our common Republic.*"[277] Moreover, he intimated, this history of chattel slavery revealed the stakes of the analogy that his opponents had drawn in comparing the power of a state to regulate the slaughter of cattle in Louisiana to the power of a state to regulate the rights of Black people in Louisiana. If this analogy was true, Elliott wanted it on the record. "If we are to be likened in legal view to . . . 'large and offensive collections of animals,'" he declared, "let it be avowed. If that is still the doctrine of the political party to which the gentlemen belong, let it be *put upon record.*"[278]

According to the news reporters in attendance, Elliott's speech that read *Slaughter-House* as the basis for a federal power to protect the equal rights of the nation's citizens was nothing short of electrifying. "When [Elliott] sat down the applause was deafening, and so many members rushed forward to shake his hand and congratulate him that they actually formed in line in the aisle and moved up to his seat . . . ."[279] Indeed, among those who had heard the speech and rose to shake Elliot's hand for the

272. Id. at 409.

273. See, e.g., infra note 282.

274. 2 Cong. Rec. 407, 408 (1874) (statement of Rep. Elliott) (emphasis added).

275. Id. at 407.

276. Id. at 410 (emphasis added).

277. Id. (emphasis added).

278. Id. at 408.

279. A Negro Orator in Congress, supra note 255.

power unleashed by *Slaughter-House* was none other than the former Commanding General of the Union Army, William Tecumseh Sherman.[280] Others declared the speech to be "magnificent and unanswerable,"[281] comparing it to a blade that had annihilated the Southern opponents,[282] while the Chair of the Committee of the Judiciary, who introduced the Civil Rights Bill, proclaimed the speech to be the authoritative reading of the Court's precedent.[283]

Far from remaining in a silo, Elliott's interpretation soon began to echo among radical Republicans who also insisted that the case stood for a robust federal power sufficient to create the Civil Rights Act. Speaking approvingly of the decision, Elliott's colleague Joseph Rainey of South Carolina declared that "[a]ll that the colored people desired was that they should be secured in their rights, and that they never could consider themselves secure so long as they were merely *at the mercy of legislation in the States*."[284] The day after Elliott's speech, meanwhile, Congressman Benjamin Butler of Massachusetts announced that he could not improve upon the speech. "Congressman Elliott," he declared, "has given the full strength and full power of that decision of the Supreme Court,"[285] a sentiment echoed by Representative William Lawrence of Ohio.[286]

By April, these arguments had sounded in the Senate. As Senator Frederick Frelinghuysen argued in late April, "The [*Slaughter-House*] court thus clearly hold[s] that equality, or freedom from discrimination in the law, is a privilege of a citizen of the United States, and that Congress may by legislation protect that right."[287] As he later explained, "As I understand the Slaughter-house cases, the majority of the Court hold that it is one of the privileges of a citizen of the United States to have the benefit of the provision of the fourteenth amendment . . . ."[288] Senator James Alcorn, meanwhile, generalized beyond the specific facts of the case to focus instead on the underlying logic of protection. "Justice Miller in delivering the opinion of the Supreme Court in the Slaughter-house case sets forth the fact that the citizen of the United States is entitled to the protection of the Government, and that it is the duty of the Congress of the United

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280. See Our Washington Letter, Little Rock Daily Republican, Jan. 15, 1874.

281. 2 Cong. Rec. 412 (1874).

282. See Marie Le Baron, Colored Congressmen: How the Enfranchised Race Is Represented in Washington, Weekly Louisianan (New Orleans), May 2, 1874 ("[W]hen he made his speech on the civil rights question[,] [t]he blade of sarcasm with which he annihilated his rude Southern opponent was wielded as one would wield a knife . . . ."); see also Morning Republican (Scranton, Pa.), Mar. 26, 1875 (referring to Elliott's speech as "brilliant").

283. See 2 Cong. Rec. 416 (1874) (statement of Rep. Tremain) (stating that the interpretation of new Constitutional amendments "may be more appropriately and properly left in the hands" of Black representatives).

284. House of Representatives, Nat'l Republican (D.C.), Dec. 20, 1873 (emphasis added).

285. 2 Cong. Rec. 455 (1874) (statement of Rep. Butler).

286. See id. at 414 (statement of Rep. Lawrence) ("The Slaughter-house cases concede the power to pass this bill.").

287. Id. at 3454 (statement of Sen. Frelinghuysen).

288. Id. at 4087.

States to give that protection," Senator Alcorn proclaimed.[289] This duty to protect, he continued, gave Congress the power to determine when privileges were invaded and how best to protect them:

> Who is left to judge when these privileges are invaded or denied by the States? The Congress of the United States. This is the tribunal. The power belongs to Congress; it rests with Congress; and whenever Congress in its judgment may decide that the citizen is deprived of any of his liberties, rights, privileges, and immunities, Congress can step in under this article of the Constitution, guarantee them to him by enactment, and enforce the enactment by calling on the power of this nation, its Army and its Navy.[290]

Celebrated by prominent congressmen as doctrines "worthy of the Republic, worthy of the age, worthy of the great tribunal,"[291] this plain reading of *Slaughter-House* clearly contemplated a role for the democratically accountable branches of America's national government in defining the substance of constitutional rights and exercising its discretion to protect them, including by protecting citizens from private acts when state governments failed in their duty. Methodologically, this was a proposed approach to reading judicial precedent that eschewed the inscrutable intentions of the authors and focused instead on the opinion's objectively knowable features: its plain language and omissions. By pairing this language with the history that the Court had omitted, these lawmakers endeavored to reclaim a place for the people's branches in protecting the equality of their citizens. And yet, rather than becoming the reading of *Slaughter-House* we know and teach today, this reading would soon disappear as the Court quietly excised the language of federal power from its precedent, leaving behind the carcass of the opinion we now know.

B. *Gutting* Slaughter-House

The work of gutting the language of federal power in *Slaughter-House* began almost as soon as the legislation that it had helped bring into existence—the Civil Rights Act of 1875—appeared in the statute books. As this concluding section shows, in a series of decisions across the closing decades of the nineteenth century, federal judges began to claw back at Congressman Elliott's opening reading by selectively quoting from *Slaughter-House*. Today, by tracing the moves by which the Court distanced itself from this original reading put forward by Congressman Elliott and his allies, we can see with greater clarity the flaws in the line of late-nineteenth-century cases that continue to cabin and confine Congress's role in remedying wrongs and protecting rights.

Consider, for example, one of the earliest federal judges to reject Elliott's reading. In a Memphis courtroom in the spring of 1875, a federal district judge began to craft a set of instructions for an (all white and all

289. Id. at app. 304 (statement of Sen. Alcorn).

290. Id.

291. Id. at 408 (statement of Rep. Elliott).

male) jury. At issue was whether a white owner of a theater could be prosecuted under the Civil Rights Act, passed only two weeks earlier, for excluding Black patrons from entering the premises.[292] Under Elliott's emancipatory reading of *Slaughter-House*, the answer was clearly yes: The *Slaughter-House* opinion had recognized the federal government's power to define the privileges and immunities of citizenship and protect the principle of racial equality through its Section Five enforcement power. And yet, rather than heeding Elliott's interpretation of the case, the federal district court instead followed Congressman Stephens's understanding, interpreting *Slaughter-House* as restoring the power of the states.

Repeating the words of the former Vice President of the Confederacy, Judge Halmer Hull Emmons advised the jury that there was no basis in law for the Act, which he deemed to be "an almost grotesque exercise of national authority."[293] In doing so, Judge Emmons tweezed a single definition from *Slaughter-House*, interpreting the case to mean that "the privileges and immunities which a state could not abridge were only that limited class which *depended immediately upon the constitution of the United States*."[294] But in offering this reading, he effectively erased the Court's definition of the Clause in *Slaughter-House*, one that had defined the privileges and immunities of national citizenship as not only those that depended on the Constitution but also those that "*owe their existence to the Federal Government, its National character, its Constitution, or its laws*."[295]

Perhaps even more strikingly, the judge also rewrote the scope of the harms to be remedied. Whereas *Slaughter-House* had explicitly described the harms that the Fourteenth Amendment aimed to solve as including nonstate actors—including "the oppressions *of those who had formerly exercised unlimited dominion over [Black people]*" and the violence of "bad men"[296]—the judge now declared that *Slaughter-House* stood only for the proposition that the federal government could legislate against state actors. *Slaughter-House*, he declared, made clear that the Fourteenth Amendment "prohibited the action of the state alone, and gave congress no power to legislate against the wrongs and personal violence of the citizen."[297]

This whittling away of *Slaughter-House* that began in the lower courts continued in the halls of the Supreme Court. In a series of subsequent cases, the Court made clear that the language Congressman Elliott had cited as central to the meaning of the opinion was in fact irrelevant. Consider, for example, the Court's treatment of the precedent in two early landmark decisions: *Cruikshank v. United States*[298] and *Strauder v. West Virginia*.[299] In *Cruikshank*, the Court overturned the convictions of nine

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292. See The White Man and the Black, St. Louis Republican, Mar. 29, 1875, at 4.

293. Charge to Grand Jury—Civil Rights Act, 30 F. Cas. 1005, 1007 (W.D. Tenn. 1875) (No. 18,260).

294. Id. (emphasis added).

295. See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873) (emphasis added).

296. Id. at 71 (emphasis added).

297. Charge to Grand Jury, 30 F. Cas. at 1006.

298. 92 U.S. 542, 549 (1875).

299. 100 U.S. 303, 306 (1879).

white men whom federal prosecutors had charged under the Enforcement Act of 1870 for their involvement in the brutal massacre of Black men who had defended a parish courthouse in Louisiana during the contested elections of 1872.[300] Crucially, the Court did not question the constitutionality of the underlying statute—a statute that Justice Miller would likely have endorsed in keeping with his view in *Slaughter-House* that federal courts should be the enforcement mechanism targeting Klan violence.[301] The Court did, however, continue the work of culling the problematic language that had allowed the Civil Rights Act to be enacted by citing *Slaughter-House* only for the narrow proposition that the Constitution created two categories of citizenship.[302]

This initial reading of *Slaughter-House* that excluded the history of postwar violence that had centered so prominently in the decision continued four years later in *Strauder*. The case began with what seemed to be a straightforward recitation of the rule: "The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases*, cannot be understood without keeping in view the history of the times which they were adopted, and the general objects they plainly sought to accomplish."[303] And yet, in defining what constituted the "history of the times," the Court followed *Cruikshank* in omitting the history of private violence and then added a flourish of its own. In doing so, the Court framed the Amendment's purpose in explicitly racist terms. As the Court explained, "The Fourteenth Amendment is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated . . . all the civil rights that *the superior race enjoy*."[304] The implication was clear. Instead of recounting a history of state-sanctioned atrocities, the Court now spoke of the "superior intelligence" of the white race. "The colored race, as a race, was abject and ignorant," the Court wrote, "and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves."[305]

This judicial evisceration of the *Slaughter-House* opinion culminated in 1883 when the Court in the *Civil Rights Cases* overturned the Civil Rights

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300. See James Gray Pope, Snubbed Landmark: Why *United States v. Cruikshank* (1876) Belongs at the Heart of the American Constitutional Canon, 49 Harv. C.R.-C.L. L. Rev. 385, 387–88 (2014) (discussing the "pitched battle between black Republicans and white supremacist Democrats" leading up to the ruling).

301. See Pamela Brandwein, Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth 79–83 (1999) ("Miller's history in *Slaughter-House* and the view of national citizenship it supported made it relatively easy for the Court in *Cruikshank* to dismiss indictments against Klansmen brought under the authority of the Fourteenth Amendment.").

302. *Cruikshank*, 92 U.S. at 549.

303. *Strauder*, 100 U.S. at 306.

304. Id. (emphasis added).

305. Id.

Act of 1875.[306] Unlike the Enforcement Act that Justice Miller had preserved intact in *Cruikshank*—a statute that was consistent with his vision of a constitution of individual rights—the Civil Rights Act represented an attempt to force private property owners to open their doors to people of all races. To strike down the legislation that Congressman Elliott had grounded in the plain language and omissions of *Slaughter-House*, the Court's move was simple: to erase the precedent altogether.[307] Indeed, the only person to mention *Slaughter-House* was the dissenting Justice John Marshall Harlan.[308] Incorporating the overt appeals to white supremacy that had appeared in *Strauder*, the former enslaver explained,

> I hold that since slavery, as this court has repeatedly declared, was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly *upon the inferiority, as a race, of those held in bondage,* their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.[309]

By the end of the century, this pummeling of the possible meanings of *Slaughter-House* was complete, as the Court sanctioned a new era of racial apartheid in *Plessy v. Ferguson*.[310] Surveying the arguments developed by a cohort of lawyers from New Orleans challenging the laws of segregation, the Court began with a dutiful recital of the *Slaughter-House* rule. "The proper construction of this amendment was first called to the attention of this court in *Slaughter-house Cases*."[311] And yet, with a butchery made possible by the precedents that had come before, the Court then dispensed with the case as irrelevant to the matter at hand. *Slaughter-House*, the Court declared, "involved, however, not a question of race, but one of exclusive privileges."[312] Having dispensed with the precedent by insisting that race was not involved, the Court then presented the purpose of the Fourteenth Amendment not by quoting *Slaughter-House*'s account but by offering a slightly revised definition of its own. The Amendment's purpose, the Court concluded, was "to establish the citizenship of the negro, to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States."[313] In doing so, the Court effectively neutralized the opinion's language. By excluding the opinion's language of federal power, the Court created the version of *Slaughter-House* we know

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306. The Civil Rights Cases, 109 U.S. 3 (1883).
307. Id.
308. Id. at 36–37 (Harlan, J., dissenting).
309. Id. at 36 (emphasis added).
310. 163 U.S. 537 (1896).
311. Id. at 543.
312. Id.
313. Id.

today: the case known simply for having gutted the Privileges or Immunities Clause.

By tracing this judicial game of "Scrabble Board precedentialism"[314] across the closing decades of the nineteenth century, we can see with new clarity the problematic reasoning of these decisions that continue to inform the Court's current approach to the Enforcement Power.[315] It is not simply that the Court in these decisions ignored the "emancipatory spirit" of the "Reconstruction Era" and trespassed upon some knowable, original meaning of the constitutional text. It is that the Court explicitly chose to erase the plain language of a foundational precedent, while repeating the original judicial omission of a people's history of slavery. In doing so, it paved the way for a Fourteenth Amendment that, by the dawn of the twentieth century, had become untethered from the histories of slavery,[316] and soon to be subject only to the Court's own determination of the nation's asserted histories and traditions.[317]

To be sure, the Court's selective reading of *Slaughter-House* did not go unnoticed. In 1889, for example, a Baltimore-based civil rights organization composed of Black lawyers, clergymen, and businessmen published a 600-page treatise that indicted the Supreme Court for having "imperiled" the promise of equal citizenship through its "judicial interpretation."[318] Notably, in offering this indictment, the authors did not cite *Slaughter-House* as the lamentable evisceration of the Reconstruction Amendments. Instead, *Slaughter-House* appeared in *Justice & Jurisprudence* in the same posture that Congressman Elliott had left it in 1874: a foundational precedent that had gutted the history of Black struggle, but held within it language that could be marshalled for a new alternative jurisprudence.

"It is a curious matter of judicial history," the authors of the treatise observed after tracing the fight for freedom by Black Americans, "that the Supreme Court of the United States [in *Slaughter-House*] use[d] the

314. See supra note 30 and accompanying text.

315. See, e.g., U.S. v. Morrison, 529 U.S. 598, 620–21 (2000) (citing the *Civil Rights Cases* for the rule that Congress may only use its Enforcement Power against state actors, without reconciling *Slaughter-House*'s assertion that the purpose of the Reconstruction Amendments was to protect citizens from "bad men" and "the oppressions of those who had formerly exercised unlimited dominion over [them]"); City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (citing the *Civil Rights Cases* for the rule that Congress lacks the power to decree the substance of the Fourteenth Amendment's restrictions on the states, but failing to reconcile the cases with *Slaughter-House*'s formula recognizing Congress as a source of privileges or immunities of citizenship).

316. See, e.g., Lochner v. New York, 198 U.S. 45, 53 (1905) (stating that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment" without reference to *Slaughter-House*).

317. See, e.g., Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 15 n.22 (U.S. June 24, 2022) (arguing that a privilege or immunity "would need to be rooted in the Nation's history and tradition").

318. Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution 125–27 (2019) (describing the Brotherhood of Liberty and analyzing the significance of its treatise, *Justice & Jurisprudence*).

following language: 'When the armies of freedom found themselves upon the soil of slavery, they could do nothing less than free the poor victims whose enforced servitude was the foundation of the struggle.'"[319] Having flagged the Court's problematic and paternalistic history of slavery's fall, the treatise authors then cited the same plain language of *Slaughter-House* that Congressman Elliott had heralded a decade earlier. The case, they wrote, stood for the proposition that the Amendments "have one purpose."[320] That purpose, they continued, now citing *Ex Parte Virginia*, was "to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress."[321]

In the long decades since the publication of this treatise, the few members of the Supreme Court who have followed Congressman Elliott's approach have likewise found in *Slaughter-House* a foundational precedent with which to invoke the Amendments' broad purposes of remedying past evils. Consider, for example, the argumentative strategy put forward in 1978 by Justice Thurgood Marshall in his dissent in *Regents of the University of California v. Bakke*.[322] Unlike the majority, Justice Marshall grounded his analysis of the constitutionality of affirmative action by beginning with the long history of slavery that the Court in *Slaughter-House* excluded before citing *Slaughter-House*'s recognition of a broad power to remedy evil.[323] Justice Marshall made a similar move a decade later when dissenting in *City of Richmond v. J.A. Croson Co.*, which held that the former capital of the Confederacy could not take race into consideration in its public contracting.[324] Once again, Justice Marshall dissented by citing *Slaughter-House* for the proposition that states could work alongside the federal government in their fight against discrimination.[325]

As these cursory examples suggest, there is no reason to think that recovering this reading of *Slaughter-House* would change the outcome of any given case. But they do suggest that the solution to the Court's omission of history need not be confined to integrating excluded stories of enslaved peoples into the national jurisprudential landscape or invoking the emancipatory spirit of the "Reconstruction Era." Rather, recovering this lost reading of *Slaughter-House* hints at the possibilities embedded within a close, contextual reading of the Court's own precedents. At the very least, such arguments could shift the burden to the

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319. Brotherhood of Liberty, Justice & Jurisprudence: An Inquiry Concerning the Constitutional Limitations of the Thirteenth, Fourteenth, and Fifteenth Amendments 117 n.1 (Philadelphia, J.B. Lippincott Co. 1889) (quoting The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 68 (1873)).

320. Id. at 531.

321. Id. at 532 (citing Ex parte Virginia, 100 U.S. 339, 344–45 (1879)).

322. 438 U.S. 265, 391 (1978) (Marshall, J., dissenting).

323. Id. at 396 ("This Court long ago remarked that 'in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy . . . .'" (alterations in original) (quoting *Slaughter-House*, 83 U.S. at 72)).

324. 488 U.S. 469, 511 (1989).

325. See id. at 560 (Marshall, J., dissenting). For a similar use of *Slaughter-House*, see Parents Involved v. Seattle Sch. Distr. No. 1, 127 U.S. 701 (2007) (Stevens, J., dissenting).

Court to explain the tensions and inconsistencies in its own treatment of precedents. More ambitiously, such arguments could press the Court to assume accountability for its winnowing of a decision that, on its face, contemplates that the Enforcement Power could be deployed against private acts of violence and oppression, recognizes a congressional role in defining the privileges and immunities of national citizenship, and reminds us, in the end, that the Amendments emerged from a history of atrocity that the Court gutted from the case reporters of our law.

CONCLUSION

At a time when the Fourteenth Amendment appears to some observers to have become a text whose meaning is frozen in time and discernible only by the Supreme Court, this Essay looks to the past. It does so not to conjure the spirit of the "Reconstruction Era" nor to relitigate the original meaning of the constitutional text. Rather, it steers a different course, one that uses the specific language and silences of the Court's own founding precedent to reveal the sheer scale of the Court's omission of history and its post-hoc culling of the opinion's emancipatory language. Drawing on records long overlooked by conventional accounts of *Slaughter-House*, it shows that when the Supreme Court began the clock of constitutional time with the death of slavery, it set aside not only a history of atrocity but also a vision for Black power and self-determination. Today, those who attend to these silences will find in this precedent not simply the lamentable gutting of a single strip of text in the Constitution but the raw elements with which we can begin to imagine and re-read *Slaughter-House* anew. This is a history, then, that invites us to turn to the past to hold the Court accountable for its precedents and listen to those whom it excluded from the law.