AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 7: The Republican Era—Equality/Race/Basics

Ex parte Virginia, 100 U.S. 339 (1879)

J.D. Coles, a state judge in Virginia, was indicted by a federal district court for excluding all African-Americans in his jurisdiction from service on grand and petit juries. His actions violated the provision of the Civil Rights Act of 1875 which declared, "no citizen, possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude." Coles and the state of Virginia asked the Supreme Court of the United States for a writ of habeas corpus, on the ground that Congress had no authority under the post–Civil War amendments to pass the relevant provision of the Civil Rights Act of 1875.

The Supreme Court by a 7–2 vote refused to issue the writ of habeas corpus. Justice Strong's majority opinion ruled that Congress had the power to forbid state justices from engaging in race discrimination when selected juries. How did Justice Strong understand federal power to enforce the post–Civil War amendments? Compare Ex parte Virginia *to the* Civil Rights Cases *(1883). Are they different applications of the same principle or did the governing principles change? What might explain that change? Compare Strong and Field's understanding of constitutional federalism. Who best describes the post–Civil War constitutional order? Why did Justice Field believe the Constitution does not give persons of color the right to serve on state juries? Is this a plausible reading of the constitutional text? Compare Field's dissent to his dissent in the* Slaughter-House Cases *(1873)? Are those dissents consistent? In particular, how did Field explain the differences between those areas of constitutional law he maintained in* Slaughter-House *were fundamentally changed by the post–Civil War Amendments and those areas of constitutional law he maintained in* Strauder *remained unchanged?*

JUSTICE STRONG delivered the opinion of the court.

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One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended 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. They are to some extent declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation. . . .

All of the amendments derive much of their force from [section 5 of the Fourteenth Amendment]. It is not said the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the

enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. This extent of the powers of the general government is overlooked, when it is said, as it has been in this case, that the act of March 1, 1875, interferes with State rights. It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

. . . The constitutional provision must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

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. . . That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the act of Congress is unconstitutional because it inflicts penalties upon State judges for their judicial action. It does no such thing.

JUSTICE FIELD, with whom concurred JUSTICE CLIFFORD, dissenting.

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The [Virginia] law, in providing for the preparation of the list of persons from whom the jurors are to be taken, makes no discrimination against persons of the colored race. The judge of the county or corporation court is restricted in his action only by the condition that the persons selected shall, in his opinion, be "well qualified to serve as jurors," be "of sound judgment," and "free from legal exception." Whether they possess these qualifications is left to his determination; and, as I shall attempt hereafter to show, for the manner in which he discharges this duty he is responsible only to the State whose officer he is and whose law he is bound to enforce.

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. . . [T]he fourth section of the act of 1875, so far as it applies to the selection of jurors in the State courts, is unconstitutional and void. Previous to the late amendments, . . . it would have been conceded that the selection of jurors was a subject exclusively for regulation by the States that it was for them to determine who should act as jurors in their courts, from what class they should be taken, and what qualifications they should possess; and that their officers in carrying out the laws in this respect were responsible only to them. . . .

The government created by the Constitution was not designed for the regulation of matters of purely local concern. The States required no aid from any external authority to manage their domestic affairs. They were fully competent to provide for the due administration of justice between their own

citizens in their own courts; and they needed no directions in that matter from any other government, any more than they needed directions as to their highways and schools, their hospitals and charitable institutions, their public libraries, or the magistrates they should appoint for their towns and counties. It was only for matters which concerned all the States, and which could not be managed by them in their independent capacity, or managed only with great difficulty and embarrassment, that a general and common government was desired. . . .

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Nothing, in my judgment, could have a greater tendency to destroy the independence and autonomy of the States; reduce them to a humiliating and degrading dependence upon the central government; engender constant irritation; and destroy that domestic tranquility which it was one of the objects of the Constitution to insure,—than the doctrine asserted in this case, that Congress can exercise coercive authority over judicial officers of the States in the discharge of their duties under State laws. It will be only another step in the same direction towards consolidation, when it assumes to exercise similar coercive authority over governors and legislators of the States.

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The history of the [post–Civil War] amendments is fresh in the recollection of all of us. They grew out of the late civil war and the events which followed it. They were primarily designed to give freedom to persons of the African race, prevent their future enslavement, make them citizens, prevent discriminating State legislation against their rights as freemen, and secure to them the ballot. The generality of the language used necessarily extends some of their provisions to all persons of every race and color; but in construing the amendments and giving effect to them, the occasion of their adoption and the purposes they were designed to attain should be always borne in mind. Nor should it be forgotten that they are additions to the previous amendments, and are to be construed in connection with them and the original Constitution as one instrument. They do not, in terms, contravene or repeal anything which previously existed in the Constitution and those amendments. Aside from the extinction of slavery, and the declaration of citizenship, their provisions are merely prohibitory upon the States and there is nothing in their language or purpose which indicates that they are to be construed or enforced in any way different from that adopted with reference to previous restraints upon the States. The provision authorizing Congress to enforce them by appropriate legislation does not enlarge their scope, nor confer any authority which would not have existed independently of it. No legislation would be appropriate which should contravene the express prohibitions upon Congress previously existing, as, for instance, that it should not pass a bill of attainder or an ex post facto law. Nor would legislation be appropriate which should conflict with the implied prohibitions upon Congress. They are as obligatory as the express prohibitions. The Constitution, as already stated, contemplates the existence and independence of the States in all their reserved powers. If the States were destroyed, there could, of course, be no United States. . . . Legislation could not, therefore, be appropriate which, under pretense of prohibiting a State from doing certain things, should tend to destroy it, or any of its essential attributes. To every State, as understood in the American sense, there must be, with reference to the subjects over which it has jurisdiction, absolute freedom from all external interference in the exercise of its legislative, judicial, and executive authority. Congress could not undertake to prescribe the duties of a State legislature and the rules it should follow, and the motives by which it should be governed, and authorize criminal prosecutions against the members if its directions were disregarded; for the independence of the legislature is essential to the independence and autonomy of the State. Congress could not lay down rules for the guidance of the State judiciary, and prescribe to it the law and the motives by which it should be controlled, and if these were disregarded, direct criminal proceedings against its members; because a judiciary independent of external authority is essential to the independence of the State, and also, I may add, to a just and efficient administration of justice in her courts. Congress could not dictate to the executive of a State the bills he might approve, the pardons and reprieves he might grant, or the manner in which he might discharge the functions of his office, and assume to punish him if its dictates were disregarded, because his independence, within the reserved powers, is essential to that of the State. Indeed, the independence of a State consists in the independence of its legislative, executive, and judicial officers, through whom alone it acts. If this were not so, a State would cease to be a self-existing and an

indestructible member of the Union, and would be brought to the level of a dependent municipal corporation, existing only with such powers as Congress might prescribe.

I cannot think I am mistaken in saying that a change so radical in the relation between the Federal and State authorities, as would justify legislation interfering with the independent action of the different departments of the State governments, in all matters over which the States retain jurisdiction, was never contemplated by the recent amendments. The people in adopting them did not suppose they were altering the fundamental theory of their dual system of governments. . . .

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The second clause of the first section of the amendment declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In *Slaughter-House Cases* (1873), it was held by a majority of the court that this clause had reference only to privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States, and, therefore, did not apply to those fundamental civil rights which belong to citizens of all free governments, such as the right to acquire and enjoy property and pursue happiness, subject only to such just restraints as might be prescribed for the general good. If this construction be correct, there can be no pretense that the privilege or duty of acting as a juror in a State court is within the inhibition of the clause. Nor could it be within that inhibition if a broader construction were given to the clause, and it should be held, as contended by the minority of the court in *Slaughter-House Cases*, that it prohibits the denial or abridgment by any State of those fundamental privileges and immunities which of right belong to citizens of all free governments; and with which the Declaration of Independence proclaimed that all men were endowed by their Creator, and to secure which governments were instituted among men. These fundamental rights were secured, previous to the amendment, to citizens of each State in the other States, by the second section of the fourth article of the Constitution, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Among those privileges and immunities it was never contended that jury duty or jury service was included.

The third clause in the first section of the amendment declares that no State "shall deprive any person of life, liberty, or property without due process of law." . . . The existence of this clause in the amendment is to me a persuasive argument that those who framed it, and the legislatures of the States which adopted it, never contemplated that the prohibition was to be enforced in any other way than through the judicial tribunals, as previous prohibitions upon the States had always been enforced. If Congress could, as an appropriate means to enforce the prohibition, prescribe criminal prosecutions for its infraction against legislators, judges, and other officers of the States, it would be authorized to frame a vast portion of their laws; for there are few subjects upon which legislation can be had besides life, liberty, and property. In determining what constitutes a deprivation of property, it might prescribe the conditions upon which property shall be acquired and held, and declare as to what subjects property rights shall exist. In determining what constitutes deprivation of liberty, it might prescribe in what way and by what means the liberty of the citizen shall be deemed protected. In prescribing punishment for deprivation of life, it might prescribe a code of criminal procedure. All this and much more might be done if it once be admitted, as the court asserts in this case, that Congress can authorize a criminal prosecution for the infraction of the prohibitions. It cannot prescribe punishment without defining crime, and therefore must give expression to its own views as to what constitutes protection to life, liberty, and property.

The fourth clause in the first section of the amendment declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Upon this clause the counsel of the district judge chiefly rely to sustain the validity of the legislation in question. But the universality of the protection secured necessarily renders their position untenable. All persons within the jurisdiction of the State, whether permanent residents or temporary sojourners, whether old or young, male or female, are to be equally protected. Yet no one will contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests. The equality of protection intended does not require that all persons shall be permitted to participate in the government of the State and the administration of its laws, to hold its

offices, or be clothed with any public trusts. As already said, the universality of the protection assured repels any such conclusion.

The equality of the protection secured extends only to civil rights as distinguished from those which are political, or arise from the form of the government and its mode of administration. . . . Civil rights are absolute and personal. Political rights, on the other hand, are conditioned and dependent upon the discretion of the elective or appointing power, whether that be the people acting through the ballot, or one of the departments of their government. The civil rights of the individual are never to be withheld, and may be always judicially enforced. The political rights which he may enjoy, such as holding office and discharging a public trust, are qualified because their possession depends on his fitness, to be adjudged by those whom society has clothed with the elective authority. The Thirteenth and Fourteenth Amendments were designed to secure the civil rights of all persons, of every race, color, and condition; but they left to the States to determine to whom the possession of political powers should be intrusted. This is manifest from the fact that when it was desired to confer political power upon the newly made citizens of the States, as was done by inhibiting the denial to them of the suffrage on account of race, color, or previous condition of servitude, a new amendment was required.

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The position that in cases where the rights of colored persons are concerned, justice will not be done to them unless they have a mixed jury, is founded upon the notion that in such cases white persons will not be fair and honest jurors. If this position be correct, there ought not to be any white persons on the jury where the interests of colored persons only are involved. That jury would not be an honest or fair one, of which any of its members should be governed in his judgment by other considerations than the law and the evidence; and that decision would hardly be considered just which should be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other. To be consistent, those who hold this notion should contend that in cases affecting members of the colored race only, the juries should be composed entirely of colored persons, and that the presiding judge should be of the same race. . . .

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