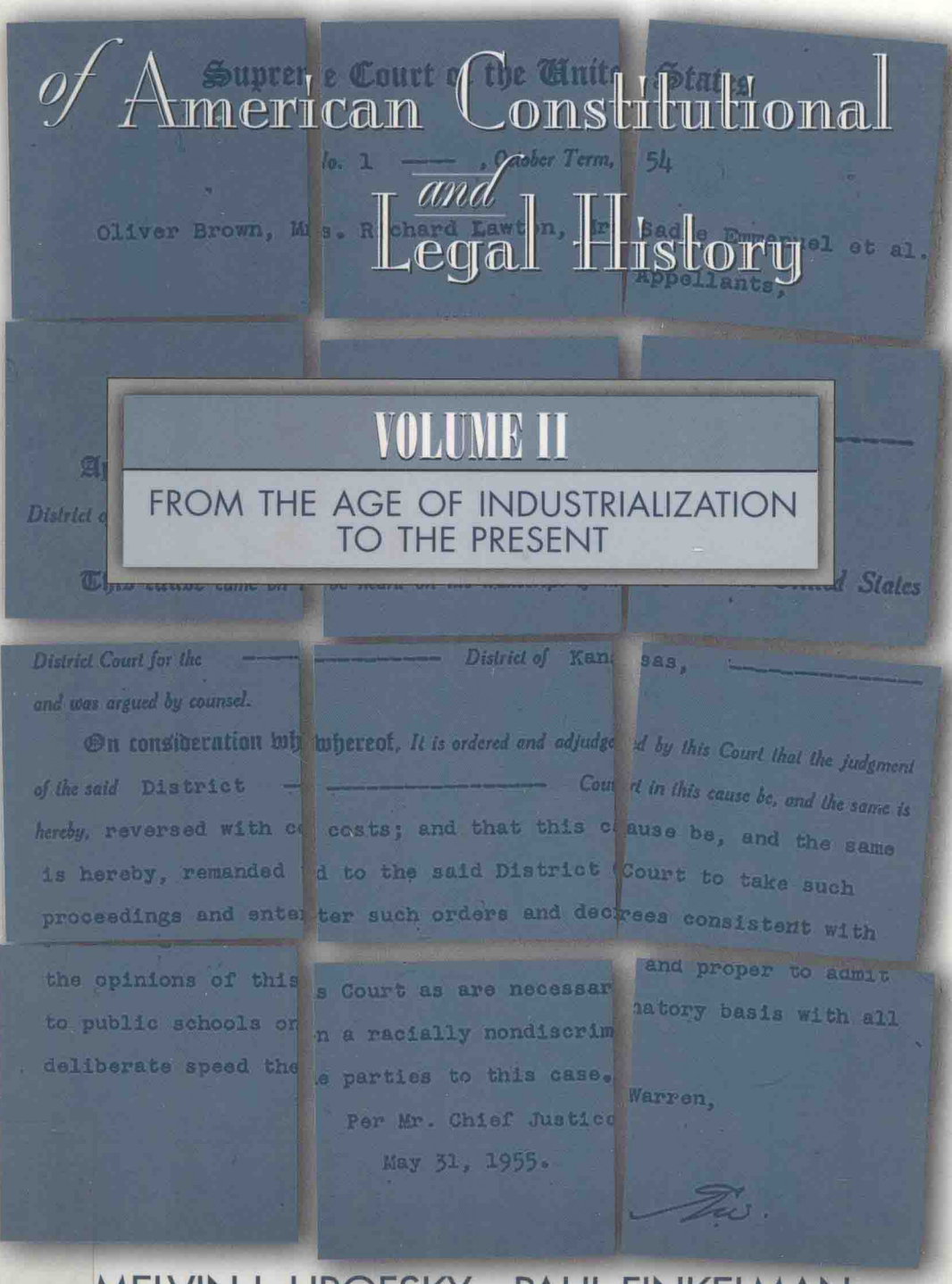
SECOND EDITION

# DOCUMENTS

## of American Constitutional and Legal History



### VOLUME II

FROM THE AGE OF INDUSTRIALIZATION TO THE PRESENT

MELVIN I. UROFSKY PAUL FINKELMAN

# *Documents of American Constitutional and Legal History*

## Volume II: From the Age of Industrialization to the Present

*Second Edition*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New York Oxford
OXFORD UNIVERSITY PRESS
2002

Oxford University Press

Oxford New York
Athens Auckland Bangkok Bogotá Buenos Aires Calcutta
Cape Town Chennai Dar es Salaam Delhi Florence Hong Kong Istanbul
Karachi Kuala Lumpur Madrid Melbourne Mexico City Mumbai
Nairobi Paris São Paulo Shanghai Singapore Taipei Tokyo Toronto Warsaw

and associated companies in
Berlin Ibadan



Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016
http://www.oup-usa.org

Oxford is a registered trademark of Oxford University Press



**Library of Congress Cataloging-in-Publication Data**

Documents of American constitutional and legal history / edited by Melvin I. Urofsky,
Paul Finkelman. — 2nd ed.
p. cm.
Includes bibliographical references and index.
Contents: v. 1. From the founding through the age of industrialization —
ISBN 0-19-512870-2 (pbk. : alk. paper) v. 2. From the age of industrialization to the present—
ISBN 0-19-512872-9 (pbk. : alk. paper)
1. Law—United States—History—Sources. 2. Constitutional history—United
States—Sources. I. Urofsky, Melvin I. II. Finkelman, Paul, 1949–

KF350 .D633 2002
342.73′029—dc21

2001021142

Printing number: 9 8 7 6 5 4 3 2 1

Printed in the United States of America
on acid-free paper

*Documents of American Constitutional and Legal History*

*For our children*

*Abby*
*Isaac*
*Philip and Melissa*
*Robert and Leslie*

# *Preface*

At one time little could be found in books on constitutional history other than Supreme Court decisions. If an important constitutional issue did not appear in one of the Court's cases, then essentially there would be no trace of it in the materials. We now understand that often important constitutional decisions take place outside the Marble Palace, and this second edition of *Documents,* like the first, has a fair sprinkling of these other records—founding documents of the colonial era, state law and court decisions, presidential proclamations, articles of impeachment and occasional private writings as well. Like *A March of Liberty,* for which this collection is a companion, we have tried to take as broad a view of constitutional and legal history as possible.

Given the broad nature of the subject, we could have easily doubled or even trebled the size of these volumes, and no doubt teachers using this set will at one point or another say "Why isn't that statute—or case—or proclamation in here?" The short answer is that it probably ought to be, but the economics of publishing make it impossible to put together a collection that included everything and still make it affordable to the student. So we have tried to include a sampling from as many different areas and topics as we can, leaving it to the individual user to fill in with supplemental materials when and if necessary.

We have been guided by our own sense of what is important, and our own understanding of the type of materials we think need to be included. Just as in *A March of Liberty* we tried to be as inclusive as possible within the boundaries of space provided to us, so we have tried to create a reader that addresses the same broad concerns.

*Documents of American Constitutional and Legal History*

# Contents

# 127 *Slaughterhouse Cases (1873)*

In 1869, Louisiana chartered the Crescent City Live-Stock Landing and Slaughter-House Company, and gave it a twenty-five-year monopoly in an area comprising three parishes with a population of two hundred thousand, including the city of New Orleans. Butchers not included in the monopoly, many of them identified with the Confederate rebellion, argued that they had been deprived of the important "right" to ply their trade, and they challenged the statute under the Thirteenth and Fourteenth amendments. (The plaintiffs were, in fact, not completely deprived of their livelihood, but only inconvenienced; they could continue to butcher animals, but only at the facilities of the company, which was owned by Republican allies.)

The suit raised for the first time in the Supreme Court the issue of substantive due process; that is, whether the Due Process Clause of the Fourteenth Amendment protected certain nonarticulated property rights from state interference. Although there had been some prewar references to such rights, the Court by a five-to-four majority ruled that the Civil War amendments had no other purpose than to protect the rights of the former slaves. That four justices dissented from this conclusion and supported the idea of substantive due process led corporate attorneys to keep bringing the question back to the Court, which finally gave formal approval to the doctrine in 1897 (Document 142).

One should note that the plaintiffs, former Confederates, were represented in the Supreme Court by John Campbell, who had resigned his seat to become a Confederate judge.

See Edward S. Corwin, "The Supreme Court and the Fourteenth Amendment," 7 *Michigan Law Review* 643 (1909); Loren Beth, "The Slaughterhouse Cases," 23 *Louisiana Law Review* (1963); William Nelson, *The Fourteenth Amendment* (1988); and William Wiecek, *The Lost World of Classical Legal Thought* (1998).

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Justice Miller delivered the opinion of the Court:

The regulation of the place and manner of conducting the slaughtering of animals is among the most necessary and frequent exercises of the police power. The 1869 law is aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses; and large and offensive collections of animals necessarily incident to them, and to locate them where the convenience, health, and comfort of the people

*Source:* 16 Wallace 36 (1873)

require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges—privileges which it is said constitute a monopoly—the legislature has exceeded its power. . . .

The most cursory glance at [the three post-Civil War Amendments] discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. . . . Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

. . . The overshadowing and efficient cause [of the war] was African slavery. In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. . . . But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the [13th Amendment].

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it. That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. [The] word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. . . .

. . . Notwithstanding the formal recognition by those [southern] States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity. They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly [proposed the 14th Amendment].

A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and the property without the right of suffrage. Hence [the 15th Amendment].

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. . . .

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. . . .

Up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States,* to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by a reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is

not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them. . . .

Unquestionably [the civil war] added largely to the number of those who believe in the necessity of a strong National government. But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence; we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to the subject.

Affirmed.

Justice Field, joined by Chief Justice Chase and Justices Swayne and Bradley, dissented:

Upon the theory on which the exclusive privileges granted by the act in question are sustained, there is no monopoly, in the most odious form, which may not be upheld. The question presented is, therefore, one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation. In my judgment the fourteenth amendment does afford such protection. . . .

The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by [the majority], to such privileges and immunities as were before its adoption specifically designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain

and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance. . . .

The terms, privileges and immunities, are not new in the amendment; they were in the Constitution before the amendment was adopted. . . . The privileges and immunities designated are those *which of right belong to the citizens of all free governments.* Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint that such as equally affects all persons. . . .

What [Art. IV, § 2] did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States. . . .

This equality of rights, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The fourteenth amendment, in my judgment, makes it essential to the validity of the legislation of every State that this equality of right should be respected. It is to me a matter of profound regret that the validity [of the Louisiana law] is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated. Grants of exclusive privileges are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.