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This afternoon I plan to say a few words about the original Constitution, about an important case interpreting the 14th Amendment, and about the Court's recent decision authorizing suspicionless searches for DNA evidence.

I

In the spring of 1986 Warren Burger resigned his position as Chief Justice of the United States because, as chairman of the Commission on the Bicentennial of the Constitution, he was responsible for telling the story of our great constitutional system to the American People, a task that he could not adequately perform while continuing in judicial office. While Thurgood Marshall firmly believed in the importance of

the rule of law and the power of the federal judiciary to decide contested cases in a way that can make our Union more perfect, he did not share Burger's unqualified admiration for the entire Constitution as it was originally drafted. Three imperfections in the original text must have troubled him: First, the prohibition against any regulation of the slave trade prior to 1808, together with the prohibition in Article V of any amendment to the Constitution that would have changed that rule; second, the Fugitive Slave Clause that had been part of Article IV of the original text until that clause was superseded by the 13th Amendment; and third, the provision in Section 2 of Article I providing that three-fifths of the slave population shall be counted for the purpose of determining the size of a State's Congressional delegation, as well as the number of its votes for President in the Electoral College.

That provision was offensive because it treated every African-American as three-fifths of a white

person. It was even more offensive, however, because it increased the power of the Southern States by counting three-fifths of their slaves for apportionment purposes even though the slaves were not allowed to vote. The Northern States would have been better off if the slave population had been simply omitted from the number used to measure the voting power of the slave States. The significance of the slave bonus has often been overlooked. In 1800, for example, because that bonus then gave the Southern States an extra nine or ten votes in the Electoral College, and Jefferson prevailed over John Adams by only eight electoral votes, it determined the outcome of the Presidential election. As a result of the slave bonus, Jefferson was elected and Adams served only one term as President.

The slave bonus must also have unfairly enhanced the power of the Southern States in Congress throughout the period prior to the Civil War. It was after the War that Section 2 of the 14th Amendment put an end to

the slave bonus. When the 15th Amendment was ratified during the Grant Administration, the size of the Southern States' Congressional delegations was governed by the number of citizens eligible to vote. Since that number included blacks as well as whites, during Reconstruction those States were no longer being overrepresented in either Congress or the Electoral College. During those years, while the South was divided into military districts occupied by federal troops, southern blacks enthusiastically embraced their newly acquired political freedom. As Professor Gary May has noted: "As many as two thousand served as state legislators, city councilmen, tax assessors, justices of the peace, jurors, sheriffs, and U. S. Marshalls; fourteen black politicians entered the House of Representatives; and two became U. S. Senators."

After reconstruction ended, however, the terrorist tactics of the Ku Klux Klan and other groups devoted to the cause of white supremacy effectively prevented any significant voting at all by African Americans, thus

replacing a pre-war three-fifths bonus with a post-reconstruction bonus of nearly 100% of the non-voting African Americans. For almost a century - until the Civil Rights Act was enacted during President Lyndon Johnson's administration - the Southern States' representation in Congress was significantly larger than it should have been. While the unfairness of the underrepresentation of blacks is obvious, I am not sure that the unfairness of the overrepresentation of the white supremacists in the South during that period has been fully appreciated.

II

Because there seems to be a consensus among scholars that the *Slaughter-House Cases* were incorrectly decided, and that Justice Miller's opinion for the five-Justice majority in that case was primarily responsible for the Court's unfortunately narrow interpretation of the Civil War Amendments, I shall briefly explain my disagreement with that consensus.

On March 8, 1869, the Louisiana Legislature, which was then controlled by Republicans, enacted a law regulating the slaughter of animals for the New Orleans market. In earlier years the unregulated slaughterhouses located on the banks of the Mississippi River upstream from the City had been a principal cause of pollution that made New Orleans the most unhealthy large city in the country - with a death rate more than eight times higher than any comparable American city. The new statute, which was entitled "An Act to Protect the Health of the City of New Orleans, to Locate the Stock-Landings and Slaughter-houses, and to Incorporate the Crescent City Live-Stock Landing and Slaughter-House Company," granted the new corporation the exclusive right to conduct the live-stock landing and slaughter-house business within a defined area; it imposed a duty on the company to permit any person to use its facilities on terms fixed in the statute. As Justice Miller explained, the statute did not deprive any "butchers of the right to exercise their trade, or

impose upon them any restriction incompatible with its successful pursuit, or furnishing the people of the city with the necessary daily supply of animal food." (p. 60). In essence, the Act created a new regulated monopoly, but there is nothing in the majority or the three dissenting opinions that criticizes the way the business was regulated; moreover, the pre-existing health problems were apparently solved by regulating the location of all slaughterhouses.

The butchers' challenge to the constitutionality of the new statute was rejected by the Louisiana courts. In their appeal to the United States Supreme Court they were represented by John Campbell, a former Member of the Court who had joined the Court's judgment in the infamous Dred Scott case and who, after the war started, had resigned to accept a position in the Confederate Government. One of the four constitutional arguments that Campbell advanced was his claim that the statute abridged the privileges and immunities of citizens of the United States. The majority's

rejection of that argument has been criticized for drawing a distinction between the privileges and immunities of state citizens and those of federal citizens. But whether or not that distinction is valid, the holding that the statutory grant of a monopoly did not abridge the butchers' privileges or immunities because the statute did not prevent them from continuing their work as butchers seems clearly correct.

Perhaps the most remarkable part of Campbell's argument - and of each of the three dissenting opinions, as well as most scholarly discussions of the case - is the failure to provide the reader with a precise description of the constitutional privilege at issue. Justice Field, in his dissent, made the interesting argument that "All monopolies in any known trade or manufacture are an invasion [of a constitutionally protected privilege], for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at

common law in the great *Case of Monopolies*, decided during the reign of Queen Elizabeth." (pp. 101-102). Perhaps if he had picked up a 5th vote for that argument, there would have been no need to enact the Sherman Act to prohibit the monopolization of interstate commerce.

Or if the Elizabethan *Case of Monopolies* had involved candle-stick makers instead of playing cards, the analogy between the unsuccessful challenge to Louisiana's regulation of butchers in 1869 and the later successful challenge to New York's regulation of bakers upheld in the *Lochner* case might have been more apparent. Economic regulation of butchers, bakers, and candlestick makers may all be supported by the same rational basis. Indeed, the debate within the five-justice majority in the *McDonald* case over whether substantive due process or the privileges and immunities clause provided the better rationale for invalidating Chicago's gun control ordinance might have been avoided.

While the majority opinion in the *Slaughter-House Cases* is often identified as the principal source of the Court's failure to construe the 14th Amendment as generously as its sponsors intended, I am persuaded that another case in which John Campbell represented white supremacists from Louisiana was even more important. In *United States v. Cruikshank*, the Supreme Court set aside the convictions of the only three defendants who had been found guilty among the many participants in the massacre of dozens of African-Americans at Colfax on April 13, 1873. The trial judge in the *Cruikshank* case was William Burnham Woods, a Fifth Circuit Judge who was later appointed to the Supreme Court. He had previously written an important opinion on which lawyers in the Grant administration had relied when they successfully prosecuted members of the Ku Klux Klan for their use of violence to prevent black citizens from voting. After quoting the text of the Equal Protection Clause and the final section of

the 14th Amendment authorizing Congress to enforce the provision, Judge Woods wrote:

"From these provisions it follows clearly, as it seems to us, that congress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. *Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for the protection of his fundamental rights, as well as the enactment of such laws.*" 26 F. Cas. 79, 81 (No. 15,282) (CC SD Ala.1871) (emphasis added).

Under Judge Woods' reading of the Equal Protection Clause as covering state inaction as well as state

action, the police would violate federal law not only when they actively participated in race riots, as they did in New Orleans during the riot of 1872, but also when they merely stood by and watched the Ku Klux Klan massacre blacks as they did in Memphis in 1866. I think the Supreme Court's erroneous reversal of Judge Woods' rulings in the *Cruikshank* case and its rejection of his interpretation of the 14th Amendment did much more harm to the new class of citizens than Justice Miller's opinion in the *Slaughter-House Cases*. The title of Charles Lane's excellent book about the Colfax riot - "The Day Freedom Died" - refers not to the date of the riot, but to March 27, 1876, the date the *Cruikshank* decision was announced.

III

Last week, in a five-to-four decision, the Supreme Court upheld Maryland's requirement that the police collect a DNA sample from every person charged with a violent crime. The sample that was obtained from the defendant after his arrest for menacing a group of

people with a shotgun matched the DNA specimen obtained ten years ago in an unsolved rape case. The match provided the basis for the defendant's conviction of rape, but the Maryland Court of Appeals set aside his conviction after deciding that the Maryland police had violated the defendant's constitutional rights when they took his DNA sample. In his opinion for the Court reinstating the rape conviction, Justice Kennedy concluded that the procedure, which admittedly constituted a "search" within the meaning of the Fourth Amendment, was reasonable as a part of the routine identification process followed when taking arrested persons into custody.

In his dissenting opinion, Justice Scalia argued that the real purpose for the search was to solve crimes, rather than to identify persons that the State had taken into custody, and that the Fourth Amendment categorically forbids searching anyone for evidence of a crime if there is no basis for believing the person is guilty of a crime or is in the possession of

incriminating evidence. He colorfully stated that the Court's assertion "that DNA is being taken, not to solve crimes, but to *identify* those in the State's custody, taxes the credulity of the credulous." He ended his opinion expressing the "hope that today's incursion on the Fourth Amendment, like an earlier one, will some day be repudiated." In a footnote to that conclusion, he wrote: "*Compare, New York v. Belton*, 453 U. S. 454 (1981) (suspicionless search of a car permitted upon the arrest of the driver) with *Arizona v. Gant*, 556 U. S. 332 (2009) (on second thought, no)."

I particularly enjoyed reading that footnote because I had dissented from Potter Stewart's opinion in the *Belton* case and was the author of the Court opinion in *Gant*, which Justice Scalia had joined four years ago. Reflecting about those cases has persuaded me that even if Justice Scalia has correctly rejected Justice Kennedy's identification justification for taking DNA records from persons arrested for violent

felonies, other considerations may well support the majority's holding.

First, unlike the evidence that may be obtained by examining the contents of containers and clothing during the search of an automobile, taking a DNA sample reveals no information about the private, non-criminal conduct of the object of the search. In the *Belton* case, I remember being particularly offended because the majority's rule allowed an arresting officer making a traffic stop to search through the driver's briefcase. It seems to me that taking a DNA sample - or a fingerprint sample - involves a far lesser intrusion on an ordinary person's privacy than a search that allows an officer to rummage through private papers.

Second, the proven accuracy of DNA samples in both establishing guilt and exonerating the innocent who have been mistakenly convicted or accused, favors greater rather than lesser use of DNA evidence. Rules that unnecessarily preclude the use of such evidence may impede the search for truth without providing any

meaningful protection for privacy interests. In the Maryland case, for example, the only interest in privacy that was implicated was the defendant's interest in not being convicted of a serious crime that he in fact committed.

Third, the public interest in creating accurate databases about individuals who are reasonably believed to have been engaged in significant criminal behavior should not be ignored. The Maryland system did not apply indiscriminately to the entire population, but only to those for whom there was probable cause to justify their arrest for a violent crime. It is not entirely accurate to characterize the taking of a DNA sample from members of that class as a "suspicionless search" even though they may not be convicted of any crime. More complete and more accurate databases may be useful, not only for the purpose of solving crimes, but also for the purpose, for example, of identifying persons who should not be permitted to purchase handguns.

Fourth, expanding DNA data-bases will certainly have an increasingly significant deterrent effect on potential rapists. The deterrent value of increasing punishment for crimes is always qualified by the criminal's confidence in his ability to avoid detection. But every potential rapist whose DNA is already available to the law enforcement community will surely know that his identity will be known to the police if he commits a rape. In sum, although I commend Justice Scalia's characteristically lucid opinion to you, and admittedly have not read the briefs in the case, I think I would have voted with the majority if I were still on the Court.

Thank you for your attention.