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*Slaughter-House Cases Re-Argument Memorandum*¹

by Nicholas Mosvick,² Josh Adler,³ & Elizabeth Samios⁴

QUESTIONS PRESENTED

Does Louisiana Act No. 118--which granted an exclusive, 25-year monopoly to a Company and 17 statutorily-identified individuals to control all butchering in the city of New Orleans--violate the Privileges or Immunities Clause of the Fourteenth Amendment by abridging the Petitioners' right to earn a living, subject to reasonable regulation?

FACTUAL BACKGROUND

This section describes the key features of the Louisiana legislation at issue in the case, and describes the four factual narratives that scholars most frequently propose to explain the passage and features of the slaughterhouse statute, and to explain the Supreme Court's ruling: *first*, the city's public health and sanitation crisis; *second*, the widespread corruption in the Louisiana state legislature,

¹ Explanatory Note: This bench memo is not intended to be a legal memo nor is it exhaustive of the issues found therein. This is a case that has been controversial since nearly the day it was decided. Rather, its purpose is to help familiarize you with key facts, and to help you understand what types of arguments were originally raised and have been made since with some principal examples. Finally, because the purpose of the re-argument is pedagogical, this brief is less heavy on case citations to support particular propositions. After all, when the Supreme Court originally decided this case in 1873, it relied on first principles and reasoning rather than an extensive body of precedent, and the original briefs in *Slaughter-House* did the same.

² Nicholas Mosvick is a PhD candidate at the University of Mississippi, where he studies 19th-century American legal history. At Ole Miss, he is affiliated with The Center for Civil War Research. Previously, he earned his J.D. and Master's degree in history from the University of Virginia joint-degree program.

³ Josh Adler is a J.D. candidate at Georgetown University Law Center.

⁴ Elizabeth Samios is a J.D. candidate at New York University Law School.

including bribes to legislators who supported this legislation; *third*, the act’s proponents’ animus against French immigrant butchers, who comprised the majority of the butchers displaced by the law; and *fourth*, the Reconstruction-era racial politics, including the bi-racial composition of the Louisiana legislature, the anti-Reconstruction views of the advocates arguing for and against the law, and the Reconstruction politics of the Justices in the majority and dissent.⁵

The Statute

In March of 1869, Louisiana’s State Legislature passed “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’” (“Act”).⁶ The Act, which is reproduced in the Addendum, included seven key features:

First, it granted the Crescent City Company, comprised of seventeen individuals named in the statute, the sole authority to establish the location at which animals for food could be landed and slaughtered in the City of New Orleans.

⁷ Second, the Act gave the Company and the seventeen named incorporators the “exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business.”⁸ Third, the Act obligated the Company to pay for and build the infrastructure needed for the slaughter of at least 500 animals per day.⁹

⁵ For a discussion of the health and sanitation, public corruption, and racial politics narratives, see Randy Barnett, *The Three Narratives of the Slaughter-House Cases*, 41 *Journal of Supreme Court History* 3, 295-309 (2016).

⁶ *The Slaughter-House Cases*, 83 U.S. 36, 38 (1873).

⁷ *Id.* at 38–39.

⁸ *Id.* at 39.

⁹ *Id.* at 39–40.

Fourth, the Act ordered that all other slaughter-houses within the city limits be closed.¹⁰ Fifth, butchers had to pay the Company to use the state-sanctioned facility to slaughter animals at prices specified in the statute.¹¹ Sixth, off-site butchering carried a 250 dollar fine.¹² Seventh, the state Governor was given power to appoint an inspector clothed with police powers and to be paid a fee for every animal inspected.¹³ Eighth, the Act expires after twenty-five years.¹⁴

New Orleans Public Health & Sanitation

The Legislature's purpose in adopting the Act was a question of significant public debate and disagreement at the time. Historian Jonathan Lurie argues the Act's proponents saw the Act as the culmination of a years-long effort to deal with New Orleans' significant sanitation problems and national movement for better sanitary conditions.¹⁵ A combination of humid weather, poor drainage, and the lack of a sewage system made it difficult to keep the city clean.¹⁶ According to Michael Ross, the numerous slaughterhouses scattered across the city exacerbated New Orleans' sanitation problems, as they dispelled waste into the Mississippi River and into streets adjacent to hospitals, schools, and businesses.¹⁷ In 1804, the city attempted but failed to move all slaughterhouse facilities beyond the city limits.¹⁸

¹⁰ *Id.* at 41.

¹¹ *Id.* at 42

¹² *Id.* at 38–39.

¹³ *Id.* at 41–42.

¹⁴ *Id.* at 43.

¹⁵ Jonathan Lurie, *Reflections on Justice Samuel F. Miller and the Slaughter-House Cases: Still a Meaty Subject*, 1 N.Y.U. J. L. & LIBERTY 355, 356 (2005). See also Michael A. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era 189–91* (2003).

¹⁶ Lurie, *Reflections on Justice Miller*, *supra* note 14, at 356.

¹⁷ Ross, *Justice of Shattered Dreams*, *supra* note 14 at 190.

¹⁸ Lurie, *Reflections on Justice Miller*, *supra* note 14, at 356.

Over the next four and a half decades, the city created eight different health boards, all of which had minimal success.¹⁹ Prior to the Civil War, a physician denounced the city's sanitary conditions and described the city as having "gutters sweltered with the blood and drainings of slaughter-pens."²⁰ In 1862, Union General Benjamin Butler took control of New Orleans and led a clean-up effort. However, he left for another assignment seven months later and the city's enforcement of sanitation regulations waned.²¹ Due to the return of poor sanitation conditions, the city experienced outbreaks of cholera and yellow fever, which killed three thousand New Orleans citizens in 1867.²²

Before the Act, most of the slaughterhouses were located on the east bank of the Mississippi River.²³ The slaughterhouses brought cattle into Louisiana from Texas and other states.²⁴ These well-populated areas were only one and a half miles upstream from the two large intake pipes that were the basis of the city's water supply.²⁵ A health officer reported that the amount "of filth thrown into the river above the source from which the city is supplied water, and coming from the slaughterhouses, is incredible," with barrels "filled with entrails, livers, blood, urine, dung" and other refuse been thrown in the river at all times and "poisoning

¹⁹ *Id.* at 357.

²⁰ *Id.*

²¹ *Id.* at 357–58.

²² *Id.* at 358; Ross, *supra* note 14 at 193. Significantly, Justice Miller had been a physician who oversaw witnessed cholera epidemics in antebellum America before joining the Court. Some have argued that he was thus predisposed to be sympathetic to the movement and law. *See Id.*, at 202.

²³ Brief of Petitioner, *The Benevolent Butchers Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company*, In Error to the Supreme Court of the State of Louisiana, *Slaughter-House Cases*, 83 U.S. 36 (1873), 1870 WL 12597, at *1.

²⁴ *Id.*, at *2.

²⁵ Ronald M. Labbe & Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment: Abridged Edition* 39 (2005).

the air with offensive smells and necessarily contaminating the water near the banks for miles.”²⁶

During the debates over the statute, opponents argued that the city’s health-and-safety objectives could have been achieved without granting a monopoly to the Crescent City group--and that the monopoly itself does not further any health or safety interest. For example, an editorial in *The Daily-Picayune* argued the legislature could have assigned the metropolitan police, a pre-existing city health board, or the “commissary of the market” (a city food inspection entity) to regulate slaughtering in the city and to conduct safety inspections, rather than grant a monopoly to a single corporation run by 17 persons designated by statute, and outsourcing to those private individuals the authority to establish whatever safety and health regulations they deemed appropriate for their slaughterhouse.²⁷ In other words, the opponents claimed, the State had improperly delegated its police powers to protect health and sanitation to a private party, rather than exercise those police powers itself.

Public Corruption

A number of the Act’s principal legislative proponents received secret shares of stock in the new Crescent City corporation. The company’s secretary testified that Franklin Pratt, the company’s President, had created a means to allow stock to

²⁶ *Id.* (Similarly, the presiding judge of the grand jury which pushed for removal of the slaughterhouses testified to seeing carts of “bloody fetid matter” dumped into the river above the waterworks, while other witnesses testified that animal carcasses were “routinely thrown overboard” at the stock landing)

²⁷ “Sole and Exclusive,” *The Times-Picayune*, June 23, 1869, p. 4 (arguing that the metropolitan police could have been ordered to prevent stock landings and slaughtering above the water works instead of paying extra to the monopoly).

be delivered to members of the legislature without their names appearing in the stock book and that “a great many hundred shares” of stock were owned by legislators.²⁸ Records for suits by William Durbridge and other stockholders showed that the six principal organizers of the Act formed a board themselves. When the Act was passed, only half of the \$2 million in stock was offered to the public, with the other half divided among seventeen incorporators, with \$100,000 in stock going to the six principal organizers.²⁹

Even as historians have well-documented the public corruption in the years since the *Slaughter-House Cases* were decided, the public corruption was not lost on contemporary critics of the Act. For example, *The Daily-Picayune* reported that “no sensible man” could deny bribery was practiced for the creation of monopolies “designed to enrich a few.” And the plaintiffs challenging the Act explicitly argued that the monopoly was “procured” by “by the use of corrupt, fraudulent, and illegal applications of bribes and other seductive & criminal means with & among the members of the said legislature.”³⁰ Indeed, the slaughter-house monopoly was only one of many similar monopolies created by the same legislature and that were also the result of rampant bribery.³¹

²⁸ *Id.* at 63.

²⁹ Labbe & Lurie, *The Slaughterhouse Cases*, *supra* note 24, at 62.

³⁰ Brief of Petitioner, *supra* note 22, at *3.

³¹ *See* Barnett, *supra* note 4, at 299-301.

Animus Against Ethnic French Butchers

Some historians have noted the “ethnic and class” “overtones” of the dispute.

³² Most of the butchers who challenged the monopoly were immigrants from or descendants of immigrants from Gascony, France. These ethnic French butchers predominated the New Orleans slaughtering market. Many of the law’s proponents derogatorily referred to these butchers as “Gascons.” One of the seventeen incorporators referred to them as “French carpetbaggers.”³³ Many of the law’s proponents argued that the new slaughterhouse law was necessary to drive these butchers out of business. *The New Orleans Times-Democrat*, considered the principal mouthpiece for the monopoly, was noted for its strident anti-Gasconism.³⁴ For example, *The Times-Democrat* editorialized that the plaintiffs who challenged the Act were hundreds of “garlic-scented” “Gascons,” and defended the monopoly on the grounds that the State was justified in putting ethnic French butchers out of business because “Gascons never spend their money [in Louisiana]. As soon as they wring enough from our overtaxed people, they retire and return to France.”³⁵

In response to these and other anti-Gascon arguments in support of the law, *The Daily Picayune* argued that the law was irrationally aimed at ethnic French butchers and not truly motivated by health and safety concerns. For example, *The Times-Picayune* editorialized that ethnic French butchers “have a right” to earn a living in Louisiana and then “invest their means in France” so long as they “make

³² Jane L. Scarborough, *What if the Butchers in the Slaughter-House Cases Had Won?: An Exercise in “Counterfactual” Doctrine*, 50 Me. L. Rev. 211, 216fn20 (1998).

³³ *Id.*

³⁴ *Id.*

³⁵ “The Slaughterhouse Question,” *The New Orleans Times*, June 22, 1869, p. 4

their money honestly.”³⁶ In the same editorial, the paper argued that the monopoly made little sense as a means to achieve purported health and safety objectives: the task of enforcing health and safety laws could have been assigned to the police; the slaughter-houses could have been moved away from the water utility; the market commissary could have been tasked with inspecting meat, as it already did for other food products; and inspection rates need not have been as high as those the monopolists were permitted to charge.³⁷

The ethnic French butchers themselves argued that the law could not be supported by the the proponents’ health and safety justifications, and they criticized the anti-French arguments in favor of the bill. For example, in an anonymous letter-to-the-editor to *The Times-Picayune*, a displaced butcher argued that the current butchering location near the city’s water works was already slated to be shut down in November of the same year the legislation was passed. The letter also claimed that the displaced butchers (“the Gascons included”) supported health and safety regulations, including moving the location of butchering: “If its present location or use is injurious to public health or to the purity of the water, these gentlemen all say (Gascons included) ‘Away with it!’” The ethnic French butcher argued that “the privilege of earning our daily bread” “in the only manner many of us know” so long as it they are not “injurious to public health” is a “common right of humanity.”³⁸

³⁶ “Sole and Exclusive,” *The Times-Picayune*, June 23, 1869, p. 4 (“as to their being Gascons, we would ask what this has to do with” where the butchers invest their earnings and whether they are honest).

³⁷ *Id.*

³⁸ “What the Butchers Intend to Do,” *The Times-Picayune*, July 2, 1869, p. 9.

Louisiana Racial Politics

Other scholars have highlighted the post-Civil War racial politics to explain the legislation and the case outcome--and, in particular, to the politics of the plaintiffs' lawyer as well as the politics of the Justices in majority and dissent in the case. Following the Civil War and the imposition of military Reconstruction in 1867, approximately one-third of the Louisiana state legislature were African-American, pro-Reconstruction Republicans,³⁹ making it one of the most biracial legislatures in the country. This legislature adopted a host of Reconstruction reforms. For example, Louisiana passed a new constitution that desegregated education, prohibited racial discrimination in public places, and prohibited former Confederates from voting. It also guaranteed newly freed blacks' rights with Louisiana's first bill of rights.⁴⁰ But many white New Orleans residents strongly opposed these Reconstruction developments. They attacked the biracial legislature's School Integration Bill in 1868 and the Social Equality Bill in February 1869.⁴¹ Similarly, weeks later, they opposed the new slaughterhouse law.

The butchers' did not claim that they challenged the statute because it was the product of a biracial legislature. But historians like Michael Ross have speculated that white New Orleans residents "formed an alliance of convenience with the butchers" to oppose the legislation.⁴² As evidence of the suspected racial motivations of the plaintiffs, Ross notes that the plaintiffs were represented by

³⁹ Ross, *Justice of Shattered Dreams*, *supra* note 14, at 196.

⁴⁰ *Id.* at 195.

⁴¹ *Id.* at 197.

⁴² *Id.* at 198. *See also* Labbe & Lurie, *The Slaughterhouse Cases*, *supra* note 24, at 5.

former Supreme Court Justice James Campbell, who resigned from the Supreme Court in 1865 to serve as the Assistant Secretary of War for the Confederacy. Ross argues that Campbell “ardently believed that Reconstruction governments” must be “destroyed at all costs.”⁴³ Ross’s inference is that Campbell argued for an expansive interpretation of the Fourteenth Amendment in order to undermine Louisiana’s biracial legislature--in other words, Campbell’s litigation strategy was a stealth effort to weaponize the Fourteenth Amendment *against* Reconstruction rather than in support of it.

Whether Campbell had a secret intent to thwart Reconstruction, the Supreme Court attorney for the monopolist defendants--Jeremiah “Jere” Black--had an explicit intent to thwart Reconstruction through litigation. Black--the former Chief Justice of the Pennsylvania Supreme Court and former U.S. Attorney General under pro-slavery president James Buchanan--was an ardent, prominent, and frequently successful opponent of Reconstruction. For example, before representing the Corporation at the Supreme Court in *The Slaughter-House Cases*, Black successfully challenged military tribunals in *Ex Parte Milligan* in 1866; wrote President Johnson’s veto message against Congress’s two Reconstruction bills in 1867⁴⁴; represented President Johnson in his impeachment proceedings for a period; and in 1871, led a constitutional challenge to the Civil Rights Act of 1866.⁴⁵ In his

⁴³ Ross, *Justice of Shattered Dreams*, *supra* note 14, at 198. Ross argues that despite his “lofty rhetoric” and “bluster about liberty,” Campbell revealed his “true fears and base motivations” by displaying his dread over the development of a democratic system open to blacks and immigrants. *Id.*, at 199.

⁴⁴ Barnett, *The Three Narratives*, *supra* note 4.

⁴⁵ Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 21 N. Ky. L. Rev. 151, 166 (1993).

later years, Black claimed that along with *Ex Parte Milligan*, his victory in *The Slaughter-House Cases* was his greatest achievement in his fight against Reconstruction.⁴⁶

PROCEDURAL HISTORY

District Courts

About a thousand butchers—mostly French immigrants—filed hundreds of lawsuits in Louisiana state courts against the State of Louisiana and the Company. The first suit was filed on May 26, 1869 by Paul Esteben, President of the Butchers Benevolent Association (“the Association”), a group of about 400 ethnic French butchers.⁴⁷ In addition to state-law claims, the plaintiffs’ lawsuits included a number of federal claims: first, that the Act violated the Thirteenth Amendment by making the plaintiff butchers “involuntary” servants of the Corporation by requiring them to exclusively deal with the Company to engage in butchering; second, that the Act violated the Commerce Clause because the new monopoly interfered with commerce from other States by interfering with the manner of import of animals from other states for the purpose of slaughtering--a type of dormant Commerce Clause argument; third, the Act violated the Fourteenth Amendment’s Equal Protection Clause because it enriched seventeen individuals while depriving a thousand others of the same right; fourth, the Act violated the Fourteenth Amendment’s Due Process Clause because it deprived them of property--including the right to one’s own labor--without due process of the law; and

⁴⁶ Barnett, *The Three Narratives*, *supra* note 4, at 303; William N. Brigance, Jeremiah Sullivan Black 201-202 (1971).

⁴⁷ Labbe & Lurie, *The Slaughterhouse Cases*, *supra* note 24, at 71.

fifth, that the statute violated the Fourteenth Amendment's Privileges or Immunities Clause by depriving them of their right to earn an honest living, subject to reasonable government regulation.⁴⁸

Judge William H. Cooley of the Sixth District Court granted the Association's request for a preliminary injunction. Cooley commanded that the company restrain from setting up, maintaining, or erecting any exclusive right, privilege, or pretension under the act and that they not harass, threaten, or disturb the plaintiffs' right to conduct business and trade.⁴⁹ The Company asked Judge Cooley to substitute bonds for the injunction imposed, which he granted after finding that the butchers would not suffer irreparable injury.⁵⁰ The Association sought permission to immediately appeal the ruling but Judge Cooley denied the request.⁵¹ When Cooley ruled on the issue of irreparable injury, he found the Slaughterhouse Act invalid because it was signed by the governor four days after the legislature had adjourned and thus constituted prohibited "legislative action."⁵²

Hours after the Association filed its first lawsuit challenging the Act, the Crescent City Company filed its own lawsuit seeking a preliminary injunction to block the Association from interfering with the Company's authority granted under the Act. Judge Charles Leaumont granted an injunction against the Association.⁵³

⁴⁸ *The Slaughter-House Cases*, *supra* note 5, at 43.

⁴⁹ Brief of Petitioners, *supra* note 22, at 7.

⁵⁰ Labbe & Lurie, *The Slaughterhouse Cases*, *supra* note 24, at 75.

⁵¹ *Id.* at 76.

⁵² *Id.* at 82 (Labbe and Lurie claimed that this was a "patently incorrect interpretation that would failed in the state supreme court and was only done so Cooley could "express his disapproval of the radical slaughterhouse measure without embracing that grander radical project, the Fourteenth Amendment").

⁵³ *Id.* at 74.

Days later, Judge T. Wharton Collens granted an injunction against the Crescent City Company from interfering with the Butchers Benevolent Association's business holding that the act unconstitutionally created a monopoly which violated the Fourteenth Amendment and state constitution which recognized an equality of civil rights.⁵⁴ The Crescent City Company filed a motion to dissolve the injunctions, which Collens upheld in November. In the interim, other stock dealers and a "crowd of angry individual butchers" followed filed in Judge Collen's Seventh District Court. By the end of June 1869, butchers had filed at least 170 new suits to enjoin the company, leading to a total of around 500 injunctions to be issued against the company.⁵⁵ The actions followed a consistent form of attacking the Slaughterhouse Act for violated both the state and national constitution and "specifically the Fourteenth Amendment."⁵⁶

The explosion of legal action made it necessary for the state supreme court to ultimately decide of the merits of the cases. A formal agreement by both sides in November allowed the parties to select six principal actions and submit them to the district courts, provided that these decisions would then be appealed as a single consolidated action to the state supreme court. Suspensive appeals in all cases were ordered December 14th and the state supreme court heard oral argument in January 1870 before issuing their decision in April.⁵⁷

⁵⁴ *Id.* at 77-82.

⁵⁵ *Id.* at 78 (At the same time, the Company looked to Judge Leamount's friendly Fifth District Court to file two dozen suits and around 200 new injunctions against individual butchers, stock dealers, and steamship operators. *Id.* .

⁵⁶ *Id.*

⁵⁷ *Id.* at 83-86.

Louisiana Supreme Court

The Louisiana Supreme Court agreed to review six different cases addressing the constitutionality of the Company's monopoly.⁵⁸ In a consolidated ruling, the court sided with the Company in all six cases, ruling that the plaintiffs' claims should be dismissed. In an opinion by Chief Justice Ludeling, the court made three key holdings:

First, the Act was an "eminently proper" use of the state's "absolute and uncontrolled power of legislation" to correct a public nuisance.⁵⁹ Whether the Act is the best way to achieve the government's valid health objectives is not relevant because members of the General Assembly are the "sole judges as to the instruments by which they should enforce their police regulations."⁶⁰ Second, the allegations of bribery, fraud, and deceit were too vague and indefinite.⁶¹ Third, the Fourteenth Amendment offered no protection to the butchers, as the state could offer "privileges" to specific individuals, but not others.

In dissent, Justice William Wyly agreed that the State had the authority to change the stock landing location and the slaughtering location for public health reasons.⁶² But, Wyly argued, the police power is not unlimited: the legislature cannot by "eminent domain" take the property of one person to give to another.⁶³

⁵⁸ *The Slaughter-House Cases*, *supra* note 5, at 57.

⁵⁹ *State ex rel. Belden v. Fagan*, 22 La. Ann. 545, 550-555 (1870) (The court was also unwilling to inquire into the motives of the legislature generally).

⁶⁰ *Id.* at 554.

⁶¹ *Id.*

⁶² *Id.*, at 560 (Wyly, J., dissenting) ("But it is said that, as the Legislature had the right, for sanitary reasons, to confine the business of slaughtering animals to certain limits, or inasmuch as they can protect the public health by the exercise of police power, they are the sole judges of the means to accomplish the object, they are the sole judges of the legitimate exercise of their police power.").

⁶³ *Id.*, at 560.

Wyly argued that the plaintiffs had a property interest in their pre-existing butchering businesses, and the state transferred that interest to the Company. Wyly argued that even if the Act included legitimate “public” elements to address health and sanitation, those interests were mixed with an illegitimate “private” element: the creation of the monopoly abridging the freedom of trade and labor for the gain of a private corporation.⁶⁴ The improper grant of monopoly privileges was not a legitimate use of the police power and was a “flagrant” violation of the plaintiffs’ civil rights.⁶⁵

Fifth Circuit Appeals Court

The plaintiffs in three of the cases appealed the Louisiana Supreme Court decision to the Fifth Circuit federal appeals court.⁶⁶ In 1870, Supreme Court Justice Joseph Bradley, riding circuit, ruled in favor of the butchers and granted a temporary injunction until the Supreme Court could issue a decision.⁶⁷ Bradley agreed with Judge Wyly that the public health regulations in the statute specifying the location of the stock landing and slaughter-house were “mere police regulation” and proper.⁶⁸ The remaining act’s grant of privileges to a private corporation were

⁶⁴ *Id.* at 558-59 (Wyly, J., dissenting).

⁶⁵ *Id.*, at 559 (“Whatever legislation is necessary for the public health must be endured by these citizens, however detrimental to their individual interests, but legislation beyond this legitimate purpose, imposing restrictions upon their occupations in favor of a private corporation, violates their civil rights, their liberty, their property, and their pursuit of happiness, to secure which the government was instituted”).

⁶⁶ The other plaintiffs dropped out of the litigation after receiving shares in the Company. *See* Plaintiffs’ Brief Upon Reargument, *Fagan*, at *32-33.

⁶⁷ *Live-Stock Dealers’ & Butchers’ Ass’n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649 (C.C.D. La. 1870); *See also* Scarborough, *supra* note 31, at 216–17; Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 632 (1994).

⁶⁸ *Live-Stock Dealers*, *supra* note 66, at 650. (“The legislature has an undoubted right to make all police regulations which they may deem necessary (not inconsistent with constitutional restrictions) for the preservation of the public

an illegitimate monopoly. Bradley initially determined that the Civil Rights Act of 1866 did not apply to the case, later amending his order to stipulate that the Civil Rights Act and Fourteenth Amendment covered the same ground. The “Privileges or Immunities” clause meant the privileges and immunities of all citizens shall be absolutely unbridged, unimpaired, including the right to pursue a lawful industrial pursuit.⁶⁹ There was “no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner” and the court could think of a “more flagrant violation of the fundamental rights of labor” than this statute.⁷⁰ Therefore, the Act violated one of the fundamental privileges of citizens in establishing a monopoly which violated the fundamental right to lawful employment.

U.S. Supreme Court

The *Slaughter-House Cases* presented one of the first opportunities for the Court to interpret a provision of the newly-enacted Amendment. At the Supreme Court, the Petitioners argued the Act was unconstitutional because first, “it creates an involuntary servitude forbidden by the thirteenth article of amendment”; second, “it denies to the plaintiffs the equal protection of the laws”; third, “it deprives them of their property without due process of law, contrary to the provisions of the first section of the fourteenth article of amendment”; and fourth, “it abridges the

health, good order, morals, and intelligence; but they cannot [interfere with liberty of conscience, nor with the entire equality of all creeds and religions before the law.” *Id.*, at 653).

⁶⁹ *Id.* at 652 (Bradley noted that the Article IV, Section II “Privileges and Immunities” Clause, or “Comity” Clause, was not the same, as the “Privileges or Immunities” clause embraced “much more”).

⁷⁰ *Id.*, at 652-53 (“These privileges cannot be invaded without sapping the very foundations of republican government....any government which deprives its citizens of the right to engage in any lawful pursuit, subject only to reasonable restrictions....(was) tyrannical and un-republican”).

privileges and immunities of citizens of the United States. To limit the scope of this Re-argument, advocates will only address the last claim--that the Act violates the Privileges or Immunities Clause. Additionally, even though Respondents argued that only African American could bring claims under the Fourteenth Amendment, given the short amount of time for the Re-argument, we would recommend against spending much time on that argument.

Petitioners argued that the Act violated the Privileges or Immunities Clause by creating a “pure” government monopoly that deprived the plaintiffs of their their right to earn an honest living in order to confer an exclusive privilege upon a small number of individuals.⁷¹ The plaintiffs claimed that the “Privileges or Immunities” Clause protects the personal and civil rights which “usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country.”⁷² They also argued the State deprived a thousand people of their valuable property interests in their existing “honest and necessary” businesses by creating a monopoly conferring “ the right to labor in such business [slaughtering], to seventeen other persons.”⁷³ The U.S. Supreme Court upheld the Act in a 5-4 ruling written by Justice Miller.⁷⁴ Justices Field, Bradley, and Swayne each wrote dissents.⁷⁵ The briefing and the opinions are included in the Addendum. For the purposes of this Re-argument, the advocates

⁷¹ *Slaughter-House Cases*, *supra* note 5, at 43.

⁷² *Id.* See also Appellate Brief, Fagan et. al v. State of Louisiana, Benevolent Butchers Association, *Slaughter-House Cases*, 83 U.S. 36 (1873), 1872 WL 15118, at, *20.

⁷³ *Slaughter-House Cases*, 1872 U.S. LEXIS 1139, at *36-37 (1873).

⁷⁴ *Slaughter-House Cases*, *supra* note 5, at 57.

⁷⁵ *Id.* at 83, 111, 124.

and judges will assume the Court has not yet decided the challenges, although the advocates and judges may rely on the reasoning in the original Supreme Court briefs and opinions.

FOUR BROAD THEORIES OF THE SCOPE OF THE PRIVILEGES OR IMMUNITIES CLAUSE

Contemporary scholars present essentially four overarching theories for the scope of the rights protected by the Privileges or Immunities Clause.

Federal Powers Theory

The narrowest and most controversial theory is, as the Supreme Court determined in *The Slaughter-House Cases*, that the Clause only protects rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws.”⁷⁶ And as the Supreme Court further clarified in *Cruikshank v. United States*, under this theory, individual rights that pre-date the Constitution--such as the right to peaceably assemble or the right to bear arms--do not “owe their existence to the Federal government” and as such are not protected by the Clause.⁷⁷

As Associate Justice Clarence Thomas wrote in his concurrence in *McDonald v. City of Chicago*, the one-two punch of *Slaughter-House* and *Cruikshank* essentially erased the Privileges or Immunities Clause, and nearly every modern scholar has rejected this combined *Slaughter-House Cases/Cruikshank* approach.⁷⁸

⁷⁶ *Id.* at 79.

⁷⁷ *Cruikshank v. United States*, 92 U.S. 542, 566 (1875).

⁷⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 808-09 (2010) (Thomas, J., concurring). For a contrary view, see Kevin Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 Yale L. J.

Enumerated Rights Theory

The second theory is that the Clause protects individual rights that are incidental to *national* citizenship and expressly declared in the “four corners of the Constitution.”⁷⁹ This theory would exclude any rights incidental to state citizenship or natural rights not expressly enumerated in the Constitution’s text. Professor Kurt Lash is one of the chief proponents of this theory, and argues that the “paradigmatic” example of such rights are the individual rights enumerated in the first eight Amendments.⁸⁰ Under Lash’s theory, the Clause would not necessarily “incorporate” the original meaning of the first eight amendments when they were ratified in 1791, but rather, protects the “common understanding” in 1868 of the scope of those rights.⁸¹

Traditional and Deeply-Rooted Rights Theory

The third theory is that the Clause protects individual rights, whether enumerated or not, that are deeply-rooted in the nation’s history and traditions. These would likely include the first eight amendments in the Bill of Rights, but could also include some finite set of unenumerated rights. For example, Professor Michael Stokes Paulsen has argued that these would include the first eight amendments as well as certain federal statutory rights recognized at the time the 14th Amendment was adopted, some well-settled treaty rights, and certain traditional common law privileges like those identified by Justice Bushrod

643 (2000) (arguing that scholars and judges have misread the *Slaughter-House Cases* and *Cruikshank* as gutting the Privileges or Immunities Clause).

⁷⁹ Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* 288 (2014)

⁸⁰ *Id.* at 290.

⁸¹ *Id.* at 293.

Washington in *Corfield v. Coryell*.⁸² Professor Josh Blackman and Ilya Shapiro argue that the Clause was meant to protect “both more and less than the Bill of Rights,” and that courts could apply the *Washington v. Glucksberg* test to identify protected rights.⁸³ Finally, Professor Akhil Amar claims that “English common law offers a crude but helpful test to sort out” what pre-1866 rights are protected by the Clause.⁸⁴

Evolving Consensus Theory

And the fourth theory is that the Clause protects a broad range of unenumerated and evolving individual and collective rights. For example, Professor Jack Balkin argues that the Clause protects an evolving set of rights, those “expected” by large majorities as reflected in the “national consensus” among the states.⁸⁵ Under this theory, the Clause might evolve to protect rights clearly not protected as privileges or immunities in 1868. And, conversely, the Clause might cease to protect once-recognized rights--so, for example, with the rise of the administrative state and extensive regulation of labor relations, even if the right to contract would have been a privilege or immunity in 1868, it would likely not be privilege or immunity today.⁸⁶ Professor Balkin’s “evolving standards” theory of the Clause enjoys very little support in the academy.

⁸² See, e.g. Michael Stokes Paulsen, *Kevin Newsom’s Insightful Take on the Slaughter-House Cases*, National Review Online, May 24, 2017, available at <https://www.nationalreview.com/bench-memos/newsom-slaughter-house-cases/>. See also Michael Stokes Paulsen and Luke Paulsen, *The Constitution: An Introduction* (2015).

⁸³ Josh Blackman and Ilya Shapiro, *Keeping Pandora’s Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending The Right to Keep and Bear Arms To The States*, 8 Geo. J.L. & Pub. Pol’y 1, 7-8

⁸⁴ Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 225 (2000).

⁸⁵ Jack Balkin, *Abortion and Original Meaning*, 24 Conat. Comment. 291, 313-18 (2007).

⁸⁶ See Blackman & Shapiro, *Keeping Pandora’s Box Sealed*, *supra* note 82.

Petitioners' claims failed under the first theory. The Petitioners' claim that the Clause protects "the right to earn a living" would fail under the second theory because the right is not expressly and specifically enumerated in the Constitution's text. Petitioners' vocational rights claim could prevail under one of the various versions of the third theory if they can establish that this right is deeply rooted in history and tradition. And Petitioners could prevail under the fourth theory if they could establish that there is a current "national consensus" that citizens enjoy the right to earn a living. Because this appears unlikely to succeed, it is not addressed in this memo.

ARGUMENTS

I. DOES THE FOURTEENTH AMENDMENT PROTECT UNENUMERATED INDIVIDUAL RIGHTS?

A. Petitioners' Arguments

Yes. Proponents of this theory begin with the argument that in the Reconstruction era, "privileges" and "immunities" were synonymous with "rights"--specifically, natural rights.⁸⁷ Because the scope of recognized natural rights in 1868 exceeds the scope of expressly enumerated rights, the Clause must encompass unenumerated rights. Proponents of this theory argue that to determine the scope of those rights, courts should look to (1) the meaning of its textual parallel in Article IV; (2) the capacious meaning of the phrase as used in state constitutions of the era; (3) statements by the Amendment's framers that one purpose of the

⁸⁷ *McDonald*, *supra* note 77, at 815 (Thomas J., concurring).

Clause was to constitutionalize the Civil Rights Act of 1866, which protected rights beyond those enumerated in the Bill of Rights; and (4) statements by the Amendment’s framers that privileges and immunities include deeply-rooted natural and common law rights beyond those included in the Bill of Rights.

1. In 1868, the public meaning of “privileges or immunities” would have been informed by its textual parallel in Article IV, Section 2 of the Constitution.⁸⁸ The Privileges and Immunities Clause reads:

“The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”⁸⁹

Some members of Congress explicitly said that they were influenced by Article IV Section 2 when it added Privileges and Immunities Clause to the Fourteenth Amendment.⁹⁰ For example, Senator Jacob M. Howard, a Republican from Michigan, said the clause was difficult to define,⁹¹ but includes “the personal rights guaranteed and secured by the first eight amendments of the Constitution,”⁹² as well as the “range of fundamental rights falling within the scope of the old Article IV Privileges and Immunities Clause.”⁹³ The Boston Daily Advertiser wrote

⁸⁸ Brief of the United States Conference of Mayors as *Amicus Curiae* Supporting Respondents, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521), 2010 U.S. S. Ct. Briefs LEXIS 6, at *48.

⁸⁹ U.S. Const. art. IV, § 2.

⁹⁰ Aynes, *Constricting the Law of Freedom*, *supra* note 66, at 629-634.

⁹¹ Brief *Amicus Curiae* of Center for Constitutional Jurisprudence in Support of Petitioners, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521), 2009 U.S. S. Ct. Briefs LEXIS 1214; John Harrison, *Reconstructing the Privileges or Immunities Clause*, Yale L. J. 1385, 1387 (1992) (Harrison writes that Reverdy Johnson had a point about the Privileges or Immunities Clause--it “mystifies us.”).

⁹² Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

⁹³ Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio St. L.J. 1509, 1563 (2007). Most major newspapers, including the New York Times, wrote on the speech, including the Philadelphia Inquirer, Washington D.C. National Intelligencer, the front page of the New York Herland and the Boston Daily Advertiser. *Id.*, at 1564.

that Mr. Howard explained that the Privileges or Immunities Clause “was intended to secure to the citizens of all the States the privileges which are in their nature fundamental, and which belong of right to all persons in a free government.”⁹⁴

2. State constitutions going back to the founding, including during the era of the Articles of Confederation referenced “privileges” and “immunities.” In the antebellum period, state “privileges” and “immunities” fell into four categories: Judicial and personal benefits; special benefits of office; corporate or special-use benefits; and rules regarding the process by which future privileges could be granted or taken away.⁹⁵ The third category reflected that nineteenth-century constitutions limited legislatures’ powers to award privileges to corporations, while the fourth mirrored anti-discrimination provisions.⁹⁶ In 1868, two-thirds of States declared as a matter of positive state constitutional law the existence of natural, inalienable, inviolable, or inherent rights, covering 71% of Americans in 1868.⁹⁷ A majority of state constitutions specifically guaranteed “equality” or equal protection of the laws, affecting 37% of citizens in 1868.⁹⁸ 13 state constitutions had an explicit prohibition of the deprivation or unequal provision of “privileges” and “immunities.”⁹⁹ And five state constitutions in 1868 expressly banned monopolies as contrary to the spirit of a free state and for being “odious, contrary to the spirit of a free

⁹⁴ David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 Whittier L. Rev. 695, 716 (2009).

⁹⁵ *Congress’s Power to Define the Privileges and Immunities of Citizenship*, 128 Harv. L. Rev. 1206, 1213 (2015).

⁹⁶ *Id.* at 1214-15.

⁹⁷ Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?* 87 Tex. L. Rev. 7, 88 (2008).

⁹⁸ *Id.* at 95.

⁹⁹ *Id.* at 108.

government and the principles of commerce.”¹⁰⁰ All but one state recognized a fundamental state constitutional duty to provide an education, while 11 out of 38 states protected the right to immigrate into their state, only six protected the right to emigrate, and only three protected property of citizens temporarily out of state.¹⁰¹

3. Many of the Fourteenth Amendment’s framers argued the Amendment was necessary to give Congress authority to protect the rights identified in the Civil Rights Act of 1866. Justice Field argued in his *Slaughter-House* dissent that the amendment was adopted “to obviate objections to the act,” giving Congress the power to protect the rights in the Act.¹⁰² The Civil Rights Act of 1866 protected fundamental rights *beyond* those enumerated rights in the Bill of Rights. For example, the Civil Rights Act defined “what the rights of a citizen of the United States are--that they may make and enforce contracts, sue and be parties, give evidence, purchase, lease, and sell property, and be subject to like punishments.”¹⁰³ Similar statements were seen not only in the press, but from notable Republicans Lyman Trumbull, Zachariah Chandler, and Thaddeus Stevens.¹⁰⁴ The Civil Rights Act of 1866 banned racial discrimination in regard to rights including those to

¹⁰⁰ *Id.* at 73.

¹⁰¹ *Id.* at 92-93, 108.

¹⁰² *Slaughter-House Cases*, *supra* note 5, at 96 (Field, J., dissenting).

¹⁰³ Christopher Green, *Incorporation, Total Incorporation, and Nothing But Incorporation?* 24 Wm. & Mary Bill Rts. J. 93, 119 fn178 (2015).

¹⁰⁴ *See Id.* (Trumbull in April responded to Andrew Johnson’s veto by equating the privileges of citizens of the United States with the rights in the Civil Rights Act, which were those “inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill.” *Id.* at 120)

“make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property.”¹⁰⁵

Because the Civil Rights Act protected the rights of “citizens,” only the Privileges or Immunities Clause--not the Due Process Clause or Equal Protection Clause--could serve as the basis for the constitutional authority for the Civil Rights Act.¹⁰⁶ The Act was framed around the protection of citizens, and the Privileges or Immunities Clause is the only clause providing specifically for “citizens,” instead of “any person.”¹⁰⁷ The framers of the amendment also made “extremely clear statements that the Privileges or Immunities Clause protected rights like those in the Civil Rights Act.”¹⁰⁸

B. Respondents’ Arguments

No. Proponents of a narrow interpretation of the Clause argue that the Fourteenth Amendment only protects rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws,” and that natural rights that pre-date the Constitution do not “owe their existence to the Federal government” and as such are not protected by the Clause. Proponents of this approach argue that this narrow reading of the phrase is supported (1) by the

¹⁰⁵An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication, 14 Stat. 27, § 1 (1866); *See also* Christopher R. Green, *Equal Citizenship, Civil Rights, and the Constitution* 43 (2015).

¹⁰⁶ Green, *Equal Citizenship*, *supra* note 104, at 44.

¹⁰⁷ *Id.*; U.S. Const. amend. XIV, § 1. The Reconstruction plan generally was meant to “define and enforce the fundamental rights of United States citizens against state and private action.” Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 Vand. L. Rev. 409, 413 (1990).

¹⁰⁸ Green, *Equal Citizenship*, *supra* note 104, at 46.

Clause's internal textual distinction between national citizenship and state citizenship; (2) the narrow interpretation given to Article IV in *Corfield v. Coryell*; (3) the far-reaching consequences of nationalizing every state-law "common right" and giving the Federal Government authority over those subject matters through Section 5 of the Act; and (4) at most, the Clause protects enumerated rights such as those in the Bill of Rights, as many of the Amendment's framers argued during the congressional debates.

1. The plain text of the Amendment supports the conclusion that the rights associated with state citizenship and national citizenship are different, and the Amendment only protects the rights associated with national citizenship. The Amendment's first sentence states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."¹⁰⁹ The first sentence's differentiation between State and Federal citizenship is significant because the subsequent sentence, the Privileges or Immunities Clause, refers only to national citizenship. By leaving out language that refers to State citizenship in the second sentence, Congress made clear that the scope of the protected "privileges or immunities" extended strictly to Federal citizens, not State citizens.¹¹⁰ The privileges and immunities of national citizenship must be distinct from the privileges and immunities of state

¹⁰⁹ U.S. CONST. amend. XIV.

¹¹⁰ *The Slaughter-House Cases*, *supra* note 5, at 74. See William J. Rich, *Why "Privileges or Immunities"?: An Explanation of the Framers Intent*, 42 Akron L. Rev. 1111, 1114 (2009) (Rich argues that while Congress gained the authority to enforce the Article IV Privileges and Immunities Clause when non-residents of a state were discriminated against, it was granted no power to rewrite those state laws and the clause only extended federal authority to rights directly linked to the national government).

citizenship--they must be those rights that are distinctly federal in nature and origin.

2. Contra the Petitioners, *Corfield v. Coryell* supports a narrow interpretation of “privileges” and “immunities.” Justice Bushrod Washington interpreted Article IV to describe “those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and *which have at all times been enjoyed by citizens of the several States which compose this Union.*”¹¹¹ (emphasis added). Washington could not have had in mind rights that did not exist among all States from 1791 through 1823. These rights included, but were not limited to, “protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to *such restraints* as the government may prescribe for the general good of the whole.”

¹¹² All of these rights belonged to individuals and citizens of a State. They also always have been the class of rights which State governments were created to protect.¹¹³

3. The potential far-reaching consequences of a broad view of the Privileges or Immunities Clause further supports the view that the Privileges or Immunities Clause is limited in scope.¹¹⁴ If Petitioners are correct that the clause extended all

¹¹¹ *Slaughter-House Cases*, *supra* note 5, at 76. *But see* Aynes, *Constructing the Law of Freedom*, *supra* note 66 at 646 (Aynes looks to Louis Lusky, who notes that Miller “deliberately misquoted” Article IV, Section II. Miller wrote out the section as, “The citizens of each State shall be entitled to all *the* privileges and immunities of citizens of the several states,” whereas the original text states, “all Privileges and Immunities of Citizens *in* the several states.”).

¹¹² *Slaughter-House Cases*, *supra* note 5, at 76.

¹¹³ *Id.*

¹¹⁴ *See* Brief of Charles Allen, Esq., One of the Counsel of the Crescent City Live-Stock Landing and Slaughter-House Company, Defendants in Error, *12–15.

state-level “common rights” to all national citizens, it would mean the Federal Congress has dramatic power under Section 5 of the Amendment to limit and restrict States’ legislative powers in response to – or just in anticipation of – perceived State abridgement of any state-law common right.¹¹⁵ It also would force the Supreme Court to be a “perpetual censor upon all legislation of the States, on the civil rights of their own citizens,” with the power to nullify State actions it views as violating the amendment.¹¹⁶ This shift in power would have been a significant departure from “the structure and spirit of our institutions” and would have significantly degraded state government’s authority.¹¹⁷

4. Alternatively, Respondents might argue that if the Clause protects more than that narrow set of exclusively-national rights, it only protects enumerated rights already included in the Constitution. Statements by the Fourteenth Amendment’s framers support the view that the Clause enforces only the Bill of Rights against the States. For example, in a February 28 speech, Representative Bingham said that the Amendment’s purpose was “to arm the Congress of the United States ... with the power to enforce the bill of rights as it stands in the Constitution today. It ‘hath that extent--no more.’”¹¹⁸ The Addendum includes an article by Professor Kurt Lash, *The Origins of the Privileges or Immunities Clause, Part II*, advancing this theory.

¹¹⁵ *Slaughter-House Cases*, *supra* note 5, at 77–78.

¹¹⁶ *Id.* at 78.

¹¹⁷ *Id.*

¹¹⁸ Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 *Geo. L.J.* 329, 353 (2011). See also *Cong. Globe*, 39th Cong., 1st Sess. 1089-91 (1866) (Representative Bingham: “Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights.”).

II. IS THE RIGHT TO EARN A LIVING, SUBJECT TO REASONABLE REGULATION, A PRIVILEGE OR IMMUNITY OF CITIZENSHIP?

A. Petitioners' Arguments

Yes. Proponents of this theory argue that the right to earn a living, subject to reasonable regulation, is deeply-rooted in the Anglo-American legal tradition. To support this claim, they generally point to (1) centuries of English common-law hostility toward monopolies; (2) Justice Bushrod Washington's explanation of the scope of privileges or immunities in *Corfield v. Coryell*; (3) the Amendment's purpose to prohibit Black Codes and anti-Unionist laws that restricted labor freedom; and (4) the types of economic and labor rights protected by the Civil Rights Act of 1866, which the Amendment constitutionalized. Two modern scholarly articles in support of the first two arguments are included in the Addendum: Timothy Sandefur's *Right to Earn a Living* and Steven Calabresi and Larissa Price's *Monopolies and the Constitution: A History of Crony Capitalism*.

1. English common law supports the argument that the right to earn a living is a well-established natural right. Petitioners cited Adam Smith's *Wealth of Nations* that "The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property."¹¹⁹

That natural right has long been protected under English common law. For example, Sir Edward Coke's 1603 report on *Darcy v. Allen* (commonly referred to as

¹¹⁹ See Addendum, Supplemental Brief and Points of Plaintiff in Error, *The Butchers' Benevolent Association v. Crescent City Live Stock Landing and Slaughter-House Company*, 1871 WL 14607 (U.S.), at *5.

“The Case of the Monopolies”), Coke claimed that the Magna Carta and English common law protect the natural right of “any many to use any trade thereby to maintain himself and his family.”¹²⁰ Elsewhere, Coke claimed that government monopolies are opposed to the “ancient and fundamental laws of [England],” and they “taketh away a man’s trade, taketh away his life.”¹²¹ According to Coke, the common law disfavored monopolies because they only benefit the interests of those who receive the monopoly, while harming the entire public by raising prices.¹²²

Nor was Coke alone among his contemporaries in condemning monopolies. For example, in 1614, Parliament rescinded King James’s subsidies to force him to stop granting monopolies.¹²³ And one of Coke’s contemporaries, Parliament member Robert Bell, argued that government-created monopolies were improper because they enriched “a few only” while they “impoverished” the “multitude.”¹²⁴

2. The English common law hostility to monopolies not only made its way to the colonies, but was amplified in America. Historians have observed that the state ratification debates over the new Federal Constitution, “revealed a widespread commitment to free trade and economic opportunity.”¹²⁵ *Corfield v. Coryell* supports

¹²⁰ *Darcy v. Allen*, 11 Co. Rep. 84b, 86a 77 Eng. Rep. 1260 (K.B. 1603) (holding unlawful the King’s grant of a monopoly to a private party to print playing cards). Timothy Sanderfur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 215 (2003).

¹²¹ Edward Coke, *The Third Part of the Institutes of the Laws of England* 181 (William S. Hein Co. 1986) (1797). See also Sanderfur, *The Right to Earn a Living*, *supra* note 126 at 216 (Sanderfur notes that the King’s Bench protected the right against monopolies in several other cases, including *Colgate v. Bachelier*, where the court held that, “[T]his condition is against law, to prohibit or restrain any to use a lawful trade at any time... for as well as he may restrain him for one time..., he may restrain him for longer times..., being freemen, it is free for them to exercise their trade in any place.... [A party] ought not to be abridged of his trade and living).

¹²² Steven G. Calabresi and Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism* 36 Harv. J. of Law & Pub. Pol’y 983, 992-94 (2013).

¹²³ *Id.*, at 994-95.

¹²⁴ *Id.*, at 995 .

¹²⁵ James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* 53 (2008).

the argument that the right to earn a living is a deeply-rooted fundamental right recognized by the American colonies and then by the new States. In *Corfield*, the State of New Jersey seized the vessel of Mr. Corfield, a Delaware citizen, for dredging for oysters in the Maurice river. Among other claims, Mr. Corfield claimed that New Jersey violated Article IV, Section 2 of the U.S. Constitution, which states that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” Mr. Corfield argued that because New Jersey permitted its own citizens the privilege of dredging for oysters, he was “entitled” to the same privilege, even though he was from Delaware.

In an opinion by Justice Bushrod Washington--riding circuit--the court ruled that New Jersey could had wide latitude to regulate the “common property” of the State, and could deny access to out-of-state persons without violating the Privileges and Immunities Clause.¹²⁶ Even though the court rejected Mr. Corfield’s specific claim, in *dicta* in *Corfield v. Coryell*, Justice Bushrod Washington addressed what he considered the scope of rights protected by the Privileges and Immunities Clause. Washington wrote that the privileges and immunities of citizens of the several states are “in their nature, fundamental; which belong, or right, to the citizens of all free government.”¹²⁷ Although he said it would be difficult to enumerate what all these rights are, he identifies several, including the “right to acquire and possess property,” “to pursue and obtain happiness” and to travel to

¹²⁶ *Corfield v. Coryell*, 6 F. Cas. 546, 550-551 (C.C.E.D. Pa. 1823).

¹²⁷ *Id.*, at 551.

other states for “professional pursuits,” subject to “such restraints as the government may justly prescribe for the general good of the whole.”¹²⁸

Other distinguished jurists of the era also interpreted the Privileges and Immunities Clause as protective of economic liberties, such as the right to pursue a living. For example, the “Steamboat Monopoly” case that would later result in *Gibbons v. Ogden*, New York Chancellor John Lansing refused to enforce a steamboat monopoly after finding no example of an English grant of an exclusive right to navigation. And in dicta, Lansing speculated that the monopoly would violate the the Privileges and Immunities Clause of Article IV.¹²⁹

Several legislators repeatedly referenced *Corfield v. Coryell* to explain the meaning of privileges and immunities in Article IV and, by extension the meaning of the phrase in the 14th Amendment.¹³⁰ For example, on January 29, 1866, Senator Trumbull invoked *Corfield* to explain the scope of rights protected by the Privileges and Immunities Clause.¹³¹ Senator Howard agreed, citing the same passage as giving the best definition of “privileges and immunities,” even if they could not be fully defined in “their entire extent and exact nature.”¹³²

3. By 1868, a number of state courts--including Connecticut, Illinois, New York, Massachusetts, Tennessee and Maine--had ruled that state-granted

¹²⁸ *Id.*

¹²⁹ Morton Horwitz, *The Transformation of American Law, 1780-1860* 123 (1977) (noting that Lansing found that there was no history of English grants of exclusive rights to navigation and even if the grant was valid, he asked whether this could abridge common rights and comport with the Privileges and Immunities Clause of Article IV.). See also *Livingston v. Van Ingen*, 1811 N.Y. LEXIS 212, at **37-38 (1811)(counsel for appellant monopoly argued that the Court of Chancery found its doubt upon “an erroneous construction of the privileges supposed to be granted by the Confederation, or the present federal Constitution, to the citizens of the respective states).

¹³⁰ Harrison, *Reconstructing the Privileges or Immunities Clause*, *supra* note 89, at 1407-16.

¹³¹ Cong. Globe, 39th Cong., 1st Sess. 474-75 (1866).

¹³² *Id.*, at 2765.

monopolies are illegitimate exercises of the state’s police powers because they confer a private benefit on some will depriving others the right to earn a living.¹³³ Thomas Cooley’s influential *Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union*, first published in 1868, claims that, based on a survey of state constitutional decisions throughout the country, state-granted monopolies in one of the “ordinary and necessary occupations of life” are “as clearly illegal in this country as in England” and “would be impossible to defend and sustain,” except where the monopoly would take “nothing” away from citizens that they already enjoyed as a common right.¹³⁴

4. Interpreting the Privileges or Immunities Clause as encompassing a right to earn a living is consistent with the purposes of the Fourteenth Amendment. The Amendment’s framers argued that the Amendment was necessary to prohibit southern States’ Black Codes, post-Civil War laws that severely restricted the rights of freedmen.¹³⁵ For example, Representative Bingham said the Amendment was necessary “to empower Congress to deal with the subject” of Black Codes.¹³⁶ The Amendment’s framers also claimed the Amendment was necessary to block former

¹³³ See Addendum, Supplemental Brief and Points of Plaintiff, *supra* note 118, at *6.

¹³⁴ Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon upon the Legislative Power of the States of the American Union*, 5th Ed. 345 (1998). See also Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* 30 (2009) (describing how, in later editions of his treatise, Cooley “was forced” to change his section on the authority of states to grant monopolies after *Slaughter-House*, but that he nonetheless read the decision “extraordinarily narrowly” on the scope of state police powers to grant monopolies).

¹³⁵ Harrison, *Reconstructing the Privileges or Immunities Clause*, *supra* note 90 at 1388 (Freedmen were restricted from freedom of contract, property ownership, and the right to bear arms.”).

¹³⁶ Wildenthal, *Nationalizing the Bill of Rights*, *supra* note 91 at 1552.

Confederate states from interfering with the labor rights of pro-Union white Republicans.¹³⁷

Many of these Black Codes were economic in nature, targeting African Americans' right to work. Legislatures sought to protect white Southerners from economic competition from newly-freed African Americans by imposing occupational barriers to entry for African Americans, such as expensive licenses, or by effectively granting white southerners exclusive authority to engage in some professions.

Examples of Black Codes that interfered with the right to earn an honest living include:

- In 1865, Alabama imposed a \$5 dollar licensing fee for African Americans to become laundresses, and made it a crime to clean laundry without a license.¹³⁸
- In 1866, Marengo County, Alabama imposed a barbering license which appears to have been designed to block African Americans from the occupation. For example, Davy Cutler pleaded guilty to owning a barber shop without a license, was fined \$31, and racked up \$30 in legal fees.¹³⁹
- In 1865, South Carolina required all freedmen to obtain a special license, costing from \$10 to \$100, to enter any non-agricultural occupation.¹⁴⁰

¹³⁷ In the original *Slaughter-House Cases* litigation, Respondents argued that the Fourteenth Amendment was meant only to secure equality for blacks in response to these laws. Brief of Counsel of State of Louisiana, and of Crescent City Life Stock Landing and Slaughter House Company, Defendants in Error, *Slaughter-House Cases*, 83 U.S. 36 (1873) (No. 60, 61, 62), 1872 WL 15119, at *8-15. In their supplemental brief, Petitioners argued that the text broadly applies to all citizens, and that Congress was also trying to protect the rights of white, pro-Union Republicans.

¹³⁸ Mary Ellen Curtin, *Black Prisoners and Their World, Alabama, 1865-1900* 46 (2000).

¹³⁹ *Id.*

¹⁴⁰ Christopher R. Adamson, "Punishment After Slavery: Southern Penal Systems, 1865-1890," in *Social Problems: Thematic Issue on Justice*, 558 (1983). See also Peggy Lamson, *The Glorious Failure: Black Congressman Robert Brown Elliott and the Reconstruction in South Carolina* 30 (1973).

- From 1865 through 1866, Mississippi laws barred freedmen from renting land, and obligated them to hire themselves out by the 10th day of every year.¹⁴¹

Given Congress's objective to provide constitutional authority to block the Black Codes, it is unsurprising that the Amendment's framers repeatedly said the Clause protects property rights and the right to earn an honest living. For example, on January 29, 1866, Senator Trumbull argued that "privileges" and "immunities" protect "fundamental rights as belong to every free person," and mentioned property rights as among those rights.¹⁴² In 1871, Representative Bingham said that the Privileges or Immunities Clause protects "the liberty ... to work in an honest calling and contribute to your toil in some sort to support of yourself, to the support of your fellowmen, and to be secure in the fruits of your toil."¹⁴³ The Supreme Court has shown the same understanding on numerous occasions, most notably in *Meyer v. Nebraska*, where Justice McReynolds stated the Fourteenth Amendment did not merely protect "freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."¹⁴⁴

¹⁴¹ Adamson, "Punishment After Slavery," *supra* note 137, at 559.

¹⁴² Cong. Globe, 39th Cong., 1st Sess. App. 475 (1866).

¹⁴³ Cong. Globe, 42d Cong. 1st sess., App. 86 (1871).

¹⁴⁴ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *See also Truax v. Raich*, 239 U.S. 33, 41 (1915) (It required "no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity").

B. Respondents' Arguments

No. Even if the Privileges or Immunities Clause protects unenumerated rights, the right to earn a living is not among those rights. Proponents of this theory argue that (1) the common law has never recognized an absolute right to a vocation, notwithstanding select quotations by Sir Coke and others; and (2) the Supreme Court has recognized that state police powers extend to regulation for the purposes of health and welfare. The Respondents' Joint Re-argument Brief, included in the Addendum, advances these arguments in detail.

1. Petitioners exaggerate the case for a common-law right to earn a living. Despite Sir Coke's lofty rhetoric against monopolies, English kings and queens continued to grant monopolies in the years following the *Darcy* case.¹⁴⁵ For instance, English precedents had an "unchallenged tradition" that the grant of common carrier privileges necessarily implied the right to exclude all competition.¹⁴⁶ American courts commonly found in the 19th century that this was part of the sovereign power retained by states under the Constitution.¹⁴⁷

The right to "earn an honest living" is an ordinary common-law right, or civil right, and not among the enumerated rights in the Bill of Rights or in the

¹⁴⁵ See Horwitz, *Transformation of American Law*, *supra* note 128, at 124 ("It appears that nobody had ever doubted the power of Parliament to issue exclusive grants; opposition to the power to create monopolies had arisen entirely in the context of challenges to the royal prerogative.")

¹⁴⁶ See *Id.*, at 116.

¹⁴⁷ See *Livingston v. Van Ingen*, *supra* note 128, at 559-560 (the power of granting exclusive privileges "must necessarily exist somewhere, as the legitimate source from whence the encouragement and extension of useful improvements is derived; and from its nature, it is generally exercised by the sovereign authority of every civilized country" and every state "unquestionable" held this power pre-Constitutionally)

Constitution.¹⁴⁸ Counsel for the Petitioner Butchers, John Campbell, admitted in oral argument that that there was no specific textual basis in the Constitution for the right he claimed on behalf of his clients the butchers and that there was not a “grant of this right nor a prohibition of its violation in direct terms.”¹⁴⁹

The Congressional Debate over the Civil Rights Act only further proves that the right the butchers’ claim is not protected by the Fourteenth Amendment. Representative Samuel Shellabarger said that it was self-evidence that the first section of the Civil Rights Act was to secure to all races who are citizens “equality of protection in those enumerated civil rights which the States may deem proper to confer upon any raes.”¹⁵⁰ (1293) Senator Lot M. Morill claimed that the principle of equality before the law was “as old as civilization,” but it did not “prevent the state from qualifying the rights of the citizen according to the public necessities.”¹⁵¹ Congressman James F. Wilson claimed the word “immunities” used in the Civil Rights Act and “Privileges or Immunities” Clause merely “secured to citizens of the United States equality in the exemptions of the law,” giving states plenary power to grant “whatever equal exemptions they wanted.”¹⁵² In the Congressional debates, the idea that Section One of the Fourteenth Amendment did not direct states to either adopt or not adopt particular legislation, but only treat all people equally, was constantly reiterated.¹⁵³

¹⁴⁸ Newsom, *Setting Incorporationism Straight*, *supra* note 77, at 685.

¹⁴⁹ *Id.* at 658-59.

¹⁵⁰ Cong. Globe, 39th Cong., 1st Sess. 1293 (1866).

¹⁵¹ William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 116 (1988).

¹⁵² *Id.*

¹⁵³ *Id.*, at 116-124 (if there was one thing Republican congressmen agreed upon, it was that no distinction based on race could be “fair and equal” legislation).

The Civil Rights Act of 1866 was a purely anti-discrimination provision to place black and white citizens on equal footing. Neither it nor the Fourteenth Amendment provided absolute protection to the civil rights claimed by the butchers, but merely equality. The Supreme Court held this in *Ex Parte Virginia*, ruling that, the “one great purpose” of the Civil War Amendments was to secure to newly freed blacks the “perfect equality of civil rights with all other persons within the jurisdiction of the States.”¹⁵⁴

2. The Supreme Court has recognized that among the police powers that States never surrendered to the National Government the power to regulate when it would benefit “the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.”¹⁵⁵ This included the power to establish markets and to provide for the cleanliness and salubrity of the city.¹⁵⁶ In *Buffalo v. Webster*, New York Chief Justice Savage noted the difference between illegal restraints of trade and legitimate public regulations, as a “by-law that no meat should be sold in the village would be bad” and a general restraint, but a

¹⁵⁴ *Ex Parte Virginia*, 100 U.S. 339, 344-45 (1879) (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....They were intended to take away all possibility of oppression by law because of race or color.”).

¹⁵⁵ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹⁵⁶ See *State ex. Rel. Belden v. Fagan*, *supra* note 58, at 555 (citing *Morand v. Mayor*, 2 La. 218 (1869)); William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* 83-84, 95-104 (1996) (Noting that Early Americans understood the economy as “simply part of their well-regulated society, intertwined with public safety, morals, health, and welfare and subject to the same kinds of legal controls” and that public markets were created for the public welfare to protect from the dangers of the unregulated marketplace). See also *Id.* at 99 (Chief Justice Black found that under Pennsylvania common law, all cities had power to “promote the general welfare and preserve the peace” and could “fix the time or places of holding public markets for the sale of food, and make such other regulations concerning them as may conduce to the public interest).

“regulation of that right” over a restraint of the *right to sell meat* would be legitimate, as “laws relating to public markets must necessarily embrace the power to require all meats to be sold there.”¹⁵⁷ In *Commonwealth v. Rice*, Massachusetts Chief Justice Lemuel Shaw similarly found that Boston’s 1843 market ordinance “inhibiting forestalling” was not a restriction on resale and secondhand goods that were “contrary to common right” and “in restraint of trade,” but that the city had provided at “great expense” accommodations and they had a right to control them “as best to promote the welfare of all citizens.”¹⁵⁸ As Justice Taliaferro found in his concurrence at the Louisiana Supreme Court, while these fundamental rights could not be arbitrarily or irrationally infringed,” the “overriding principle of government was that its legitimacy lay with the will of the people, as the natural liberty of the individual is necessarily sacrificed to the general welfare of the community.”¹⁵⁹

III. DOES THE ACT UNREASONABLY INTERFERE WITH THE PETITIONERS’ RIGHT TO EARN A LIVING?

A. Petitioners’ Arguments

Yes. Petitioners might argue that (1) the Act’s monopoly excludes the Petitioners from performing most of the core functions of the trade of butchering; (2) the Act unreasonably restricts the Petitioners’ rights without furthering the State’s health or safety objectives; (3) there is ample reason to suspect that the State’s purported justifications for the monopoly are pretextual; (4) because the State’s

¹⁵⁷ Novak, *People’s Welfare*, *supra* note 155, at 100.

¹⁵⁸ *Id.* at 101.

¹⁵⁹ *State ex Rel. Belden v. Fagan*, *supra* note 58, at 557 (Taliaferro, J., concurring).

means do not further the State's purported ends, the regulation is an unreasonable and illegitimate exercise of police power. Justice Wyly's dissent to the Louisiana Supreme Court's decision articulates most of these arguments, and is included in the Addendum.

1. The Petitioners argued that the trade of butchering is more than just slaughtering animals. Traditionally, it has consisted of raising or purchasing animals for slaughter, care of those animals before slaughter, butchering the animal, and selling the meat at a price dictated by the butcher. But the Act grants to the Company the exclusive authority to engage in nearly every feature of the trade of butchering:

- preparing animals for market
- keeping animals for sale,
- preparing animals for market,
- exhibiting animals for sale,
- purchasing land or property for any of the above purposes, and
- setting their own prices for butchered meats.¹⁶⁰

What's more, the Act prohibits the Petitioners from engaging in any of these acts for the next *generation*--25 years.

2. The grant of the monopoly to the Company does not further the State's health or safety objectives. Section One of the Act addresses the State's concerns about the health problems caused by butchering animals near water supplies, and

¹⁶⁰ See Addendum, Supplemental Brief and Points of Plaintiff, *supra* note 118, at *8.

addresses the State's objective to simplify inspections by consolidating them in one location. As one of the displaced butchers explained in a letter to the New Orleans Daily Picayune, "If it does not endanger the public health for the Slaughterhouse Company to carry on the business of butchers in the localities prescribed in the act, how would it endanger the public health for other persons, in the same localities, to pursue, independently, the same avocation?"¹⁶¹

3. As Justice Wyly argued in his dissenting opinion in the case at the Louisiana Supreme Court, the State may "prohibit the exercise of a lawful occupation in certain localities, and designate others in which it may be pursued" to further its health objectives. But the State's object must not be pretextual.¹⁶² In addition to the mismatch, described above, between the State's purported health objectives and the grant of a monopoly to the Company to achieve that ends, there is other strong evidence that the State's health and safety justifications for the monopoly are pretextual: first, as described in the Factual Background, a number of legislators were bribed with stock in the Company in exchange for their votes. And second, as described in the Factual Background, many of the Act's most ardent defenders championed the law as a means to put ethnic French butchers out of work.

4. Because the monopoly does not further the State's purported ends, the regulation is an unreasonable and illegitimate exercise of police power. Where a law restricts an individual's protected right, the State's police power extends only as far

¹⁶¹ *State ex rel. Belden*, *supra* note 58, at 560 (Wyly, J., dissenting).

¹⁶² *Id.*

as necessary to protect the rights of others. And a regulation that benefits some at the expense of others is not a legitimate exercise of the State's police powers. As Thomas Cooley stated, "any accurate statement of the theory upon which the police power rests, will render it apparent that a proper exercise of it by the State cannot come in conflict with the provisions of the Constitution of the United States."¹⁶³

B. Respondents' Arguments

No. Respondents might argue that even if the Privileges or Immunities Clause recognizes a right to earn a living, (1) the Act does not interfere with the butchers' right to pursue their trade, as any citizen who wishes may butcher, subject only to the Act's regulations; (2) even if the Act interferes with the Petitioners' rights to earn a living, such a right is not absolute; (3) the State's health objectives are sufficient to justify any abridgement of the Petitioners' rights; whether the Act is the best way to achieve those objectives is irrelevant because the Legislature is the sole arbiter of how to achieve the State's legitimate objectives; (4) the State's decision to give the Company a monopoly is a conceivable means to further the State's health objectives; and (5) even if it were appropriate for the Court to consider whether the State's health claims are pretextual, the Petitioners' evidence of pretext is insufficient.

1. The Act does not deprive the Petitioners of their ability to practice the vocation of butchering--it only restricts the place and manner of butchering. Indeed, the Act *requires* the Crescent City Company to permit individual butchers to use its

¹⁶³ Cooley, *A Treatise on the Constitutional Limitations*, *supra* note 133, at 709.

facilities to slaughter and prepare their own meats, which those butchers could then sell. In return, these non-incorporated butchers need only pay a reasonable compensation to the Company for the use of the accommodations. Every butcher could labor in selling meat just as before the Act's passage.

2. To the extent a right to earn a living exists, it is not an absolute right. Congress could not have intended to protect absolute rights at the expense of state police power.¹⁶⁴ The State's police power extends to regulation of practices that the legislature rationally considers could be injurious to the public.¹⁶⁵ This power includes "the protection of the lives, limbs, health, comfort, and quiet of all persons. . . within the State." and necessitated that people and property be "subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State."¹⁶⁶ The Supreme Court has, on numerous occasions, recognized states' power to take actions to protect the welfare of their citizens.¹⁶⁷ State courts also routinely uphold strong police powers to deal with the health and

¹⁶⁴ See William Nelson, *Fourteenth Amendment*, *supra* note 150, at 119 (Republicans who gave an "absolute rights" reading of the amendment had a difficult time countering Democratic claims this would undermine states, as the economic rights claimed were coextensive with rights under state power and if Congress had absolute power to legislate over them, it was "difficult" to see what state power remained).

¹⁶⁵ See Brief of Charles Allen, *supra* note 113, at *2–3, *The Slaughter-House Cases*, *supra* note 5.

¹⁶⁶ *Slaughter-House Cases*, *supra* note 5, at 62; See also *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 149 (1854) ("This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim. is which being of universal application, it must of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure other.").

¹⁶⁷ *Slaughter-House Cases*, *supra* note 5, at 63–65 (citing *Gibbons v. Ogden*; *The License Tax*; *United States v. De Witt*; *McCulloch v. Maryland*).

safety of state citizens.¹⁶⁸ The authority to establish this new public health policy was squarely within those police powers.

3. The public health and safety risks identified by the State are sufficient to justify the abridgment of the Petitioners' vocational rights. Like many urban centers, New Orleans struggled to maintain sanitary conditions for its 200,000 to 300,000 residents.¹⁶⁹ The unique combination of humid weather, poor soil drainage, and lack of a sewage system made the issue particularly severe. Moreover, the city's hundreds of butchers, who slaughtered animals at numerous locations throughout the city and caused byproducts to enter the water supply, exacerbated the city's cleanliness and public health problems. For more than half a century, New Orleans tried – and failed – to mitigate its sanitation problems with unsuccessful legislation and ineffective boards of health. Just three years prior to the Act's promulgation, yellow fever and cholera swept through the city.¹⁷⁰ The sanitary conditions were so pervasive and serious that railroads and steamboats chose to bypass the city, hurting the city's trade.¹⁷¹ The cooperative system created by the Act enables butchers to conduct their business while limiting the geographic spread of unsanitary practices.¹⁷²

¹⁶⁸ See Novak, *People's Welfare*, *supra* note 155, at 191-234 (At midcentury, through nuisance law courts remained willing to issue injunctions, grant damages, and imprison citizens for "fouling community health and environment."); Labbe & Lurie, *The Slaughterhouse Cases*, *supra* note 23 at 27-28 (citing *Commonwealth v. Alger*, the 1851 Massachusetts Supreme Court decision, as the "prototype" for strong police powers).

¹⁶⁹ Lurie, *Reflections on Justice Miller*, *supra* note 14, 356; *Slaughter-House Cases*, *supra* note 5, at 43.

¹⁷⁰ Lurie, *Reflections on Justice Miller*, *supra* note 14, 356–58; Ross, *Justice of Shattered Dreams*, *supra* note 14, 189–91.

¹⁷¹ Labbe & Lurie, *The Slaughterhouse Cases*, *supra* note 24 at 14-19 (New Orleans' active medical community acted to push for reform to deal with the epidemics after the city became a "great Golgotha.")

¹⁷² *Slaughter-House Cases*, *supra* note 5, at 60–62. See also Brief of Counsel of State of Louisiana, *supra* note 136, at *3–4.

4. Louisiana’s decision to grant a monopoly to the Company is a rational means to achieve the State’s health and safety objectives for the city. The State rationally concluded that concentrating the slaughtering of animals at a single location – away from densely populated areas – could control the spread of illness. It also was significantly easier and more efficient to enforce sanitation laws in a single location.¹⁷³ Once the State determined that a new, single slaughter-house facility would further the State’s sanitation objectives, it was rational for the State to outsource the construction of that facility to a private entity rather than have the State pay for the facility itself. And it was rational for the State to grant a monopoly to that private entity in exchange for assuming the costs to build and operate the facility.

State-created occupational monopolies have long existed, even though such monopolies necessarily curtail the vocational opportunities of others. The power of state to create exclusive grants was unquestioned until the New York steamboat monopoly case of *Gibbons v. Ogden*.¹⁷⁴ In the Nineteenth Century, many state courts supported the power of states to freely divest their legislative powers to corporations.¹⁷⁵ For example, in *Sharpless v. Mayor & Citizens of Philadelphia*, the

¹⁷³ *Slaughter-House Cases*, *supra* note 5, at 64–65.

¹⁷⁴ See Horwitz, *Transformation of American Law*, *supra* note 128, at 122-23 (pointing out that otherwise, challenges to state monopoly power was only renewed in 1833 after Roger Taney’s private legal opinion as attorney general).

¹⁷⁵ See Novak, *People’s Welfare*, *supra* note 155, at 95-104 (In the antebellum period, public market regulations proliferated and were almost never deemed unconstitutional....”It was simply assumed that the state and community had the inherent power to restrict and prohibit private individuals from selling meat and produce”). Novak notes that the 1866 Louisiana Law legalizing private stores--requiring private law to do so--evidence of the “prevalent early American view that selling, trades, and occupations were not natural rights or constitutionally protected ‘pursuits of happiness.’” The New Orleans law maintained a licensing regime and a ban on any sales or stores outside within 12 miles of a public market house, a law upheld by the Supreme Court of Louisiana against a “Privileges or Immunities” challenge in 1875 as a valid police power measure. *Id.*, at 103-104.

Pennsylvania Supreme Court found that granting a municipal corporation the power of subscribing to the stock of a railroad company was a valid use of state police power and taxing power.¹⁷⁶ Chief Justice Jeremiah Black--who went on to represent the Respondent Company in the *Slaughter-House Cases*-- wrote that he was “not aware that any State Court has ever yet held a law to be invalid, except where it was clearly forbidden.”¹⁷⁷ Although Black was considering the taxing power and eminent domain, he made general statements about the sweeping nature of state sovereignty. According to Black, “It being the duty of the state to make such public improvements, if she happen to be unable or unwilling to perform it herself to the full extent desired, she may accept the voluntary assistance of an individual, or a number of individuals associated together and incorporated into a company.”¹⁷⁸ The same was true in Louisiana even before the Act: under pre-existing Louisiana law, members of the General Assembly are the sole judges as to the instruments by which they enforce their police regulations and could freely do so through a corporation.¹⁷⁹

5. The Court should not second-guess the State’s stated purposes for the legislation.¹⁸⁰ But even if the Court were to do so, the allegations of bribery are “too

¹⁷⁶ *Sharpless v. Mayor & Citizens of Philadelphia*, 21 Pa. 147 (1853).

¹⁷⁷ *Id.*, at 163-64 (Citing Supreme Court precedent *Fletcher v. Peck* and *Calder v. Bull*, among others, and declaring that legislative acts should be found unconstitutional “only when it violates the constitution clearly, palpably, plainly; and in such manner as to leave no doubt or hesitation on our mind”).

¹⁷⁸ *Id.* at 170, 175 (“The state having the constitutional power to create a state debt by a subscription on behalf of the whole people to the stock of a private corporation engaged in making a public work, it follows from what has been before said, that she may authorize a city or district to do the same thing.”).

¹⁷⁹ *See In re New Orleans Draining Co., etc.*, 11 La. Ann. 338, 352-360 (1856).

¹⁸⁰ *State ex rel Belden v. Fagan*, *supra* note 58, at 548 (And we are of opinion that courts are without warrant in law to go behind an enrolled and duly authenticated and promulgated public statute to inquire into the motives which may have influenced or actuated the members of the General Assembly in enacting laws.”).

vague and indefinite to admit of proof,” and would be inadmissible under Louisiana evidentiary rules, as the Louisiana Supreme Court held.¹⁸¹ Nor are anti-Gascon statements made by members of the general public or even some of the incorporators relevant to the question of the *legislature’s* purposes. Finally, as a general rule, as the Louisiana Supreme Court stated, acts of the General Assembly were not only presumed to be constitutional, but that the authority of courts to declare them void would “never be resorted to, except in a clear and urgent case, one which requires no nice critical acumen to decide on its character, but which is obvious to the comprehension of any person.”¹⁸² The Court should defer to the rational, stated purposes of the Louisiana legislature.

¹⁸¹ *Id.* at 547.

¹⁸² *Id.* at 557. *See also* *Edwards v. Dupuy*, 21 La. Ann. 694 (1869) (courts will never declare a solemn act of the Legislature void unless its unconstitutionality is established beyond all reasonable doubt); *Fletcher v. Peck*, 10 U.S. 87, 128 (1810) (“The question whether a law shall be void for its repugnancy to the Constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.”); *Ogden v. Sanders*, 25 U.S. 213, 270 (1827) (“It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed *to presume* in favor of its validity, until its violation of the constitution is proved *beyond a reasonable doubt*.”).

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ADDENDUM

Text of the Act

State ex rel. Belden v. Fagan, Louisiana Supreme Court Opinion

The Slaughter-House Cases, U.S. Supreme Court Opinion

Justice Thomas's Concurrence in *McDonald v. City of Chicago*

Briefing

The Slaughter-House Cases Briefing before the U.S. Supreme Court

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