John: This is Bound by Oath from the Institute for Justice's Center for Judicial Engagement. I'm John Ross; welcome to Episode Three of our story of the 14th Amendment, which was ratified after the Civil War to give the federal government the authority to protect civil rights. On this episode, the Privileges or Immunities Clause. But just what are privileges or immunities? The words privileges and immunities are just a synonym for rights. No state shall make or enforce any law which shall abridge the *rights* of U.S. citizens. On this episode, we'll talk about what rights the Framers of the 14th Amendment had in mind, and we'll witness the Clause's near total demise at the hands of the U.S. Supreme Court in 1873 in the Slaughterhouse Cases.

John: Many legal historians believe the 14th Amendment is so important that it should be considered a Second Founding era -- in Abraham Lincoln's words, a new birth of freedom.

Chris Green: Some people love to go visit Civil War battlefields. So they go to Gettysburg and they see these places where events of huge consequence flow from the clash of arms. The clash of ideas in the 14th Amendment during Reconstruction is far more consequential, I think, than even these Civil War battles.

John: That's Chris Green, a professor at the University of Mississippi school of law.

Chris: When we see President Johnson making arguments against equal citizenship for the freedmen we see the Republicans rebutting those and insisting yes indeed these four million people are entitled to the same privileges and immunities as are enjoyed by other citizens of the

United States. This is a titanic battle, which makes a difference in the fundamental law to which our office holders are sworn. When they are bound by an oath to support and obey the Constitution, the thing that they are bound to are these principles stated in the 14 Amendment. We don't always live up to our principles. Nobody ever lives up to any of their principles perfectly. But however imperfectly we we've lived up to them. they are our principles. And they really are genuinely attractive, beautiful principles.

John: And what are those principles? Here’s the first sentence of the 14th Amendment.

> **14A:** 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.

John: If you’re born here, you’re a citizen, with some exceptions for the children of foreign diplomats and Native Americans. And then there’s the second sentence.

Chris Green: No state shall make or enforce any law which shall abridge the Privileges or immunities of Citizens of the United States; semicolon nor shall any state deprive any person of life liberty or property without due process of law; semicolon nor deny to any person within its jurisdiction the equal protection of the laws.

John: That sentence is the beating heart of civil rights litigation in this country. At the Institute for Justice, we rely on it time and again in our cases, and it's the same story for many other civil rights organizations.

Chris Green: So the first thing you notice about this sentence, is that you have three clauses one of which applies to citizens of the United States.

John: The Privileges or Immunities Clause.

Chris Green: And two of which apply to any persons that would include aliens as well.

John: Due process and the equal protection of the laws.

Chris Green: The entire point of the Civil Rights Act of 1866 was to prevent the South from treating the freedmen as mere aliens. So it's very clear from that context that the Privileges or Immunities Clause is the chief clause that is is going to do the work in terms of guaranteeing civil rights, the rights of citizens.

John: As you'll recall from Episode 2, Republicans in Congress in 1866 first passed the Civil Rights Act to guarantee equal citizenship to blacks. But they were worried the Act would be struck down or that a later Congress would repeal it. So they pushed for the 14th Amendment to

constitutionalize the Civil Rights Act and render its protection of equal citizenship more permanent.

Chris Green: Generally in Anglo-American history, English people who are subject to the king are called subjects not citizens. In America, we are citizens. So it's clear from the Founding that we think of ourselves in terms of the idea of civil rights of citizens. This doesn't go back that far in Anglo-American history. This is relatively new in the 18th century.

John: Due process and equal protection, by contrast, are older concepts that we borrowed from English law, concepts that had to do with limiting the power of the monarchy.

Chris Green: These other two Clauses are very important. They actually have longer histories than the citizenship idea. Depriving any person of life liberty or property without due process of law. That is a very old concept. The phrase due process of law comes out of a statute from 1354 and clearly, that statute itself grows out of the Magna Carta from 1215. So we've been working with due process of law and kindred concepts for about 800 years now. They've been working on it for 650 years at the time of the Civil War.

John: And then there’s the final clause, the equal protection of the laws.

Chris Green: This I think is somewhat intermediate in terms of its age. The birth of this idea as I read it is in the early 17th century. So the idea is the king, or the government in general, gives

people protection in exchange for allegiance. So the people in a country, the people subject to its laws that includes aliens, so people who are visiting.

John: If you're just visiting a country, you're still entitled to the equal protection of its laws. If someone beats you up, you can sue for battery even if you're not a citizen. The courts have to take your claim seriously. The police can't refuse to protect you just because they don't like the cut of your jib -- or the color of your skin. Due process on the other hand means something different.

Chris Green: No one will be deprived of things unless they are brought in answer by due process of law. So the process of law is a method by which people answer certain accusations.

John: If the government is going to put you in jail or make you pay a fine, there have to be a fair procedures in place to for you to contest that deprivation of your liberty.

Chris Green: These are important principles that people had fought over. The barons coming up to King John at Runnymede. What they demanded from him was not a sack of money. It was not particular tangible objects. They demanded from King John principles. And those principles were written in words. Edward the Third, in 1354 and a bunch of other times in his reign, when he misbehaved Parliament came to him and demanded additional principles. And when the South misbehaved after the Civil War, Republicans came to them and demanded very very similar principles. And these principles are the 14th Amendment.

John: Due process and the equal protection of the laws for all persons. Now in addition citizens are entitled to certain privileges or immunities. But what did the Framers of the 14th Amendment mean by privileges or immunities? I sat down with Professor Randy Barnett of Georgetown Law to hear his take.

Randy Barnett: The first key to understanding the Privilege or Immunities Clause is the Civil Rights Act and the relationship between the Civil Rights Act and the Fourteenth Amendment. That's where the impetus for the 14th Amendment came. It came from those who thought that we needed a constitutional amendment because first of all the Civil Rights Act might not be constitutional. But secondly, even if it is, when Southern Democrats would come back into Congress when they're finally seated they had vowed to repeal the bill.

John: The Civil Rights Act of 1866 said that all citizens had the same rights as white citizens to quote:

> **Civil Rights Act**: make and enforce contracts, to sue, be parties, and give evidence, inherit, purchase, lease, sell, hold, and convey real and personal property

John: Holding property, making contracts; today we would call these economic rights. As we discussed on the last episode, they were widely denied to freedmen to keep them in as close to a slave-like status as possible. The Civil Rights Act was meant to do something about that.

Randy Barnett: After the 14th amendment was adopted Congress re-passed the Civil Rights Act of 1866 to ensure that it was going to be constitutional. So Congress certainly thought that the rights in the Civil Rights Act of 1866 were protected by the Fourteenth Amendment.

John: So what are the privileges or immunities of citizens? Well to start, they're the rights in the Civil Rights Act. And then there is a second key to understanding the clause.

Randy Barnett: The second thing to understand about the Privilege or Immunities Clause is Jacob Howard's explanation on the floor of the Senate. Jacob Howard was a Senator from Michigan and he was the designated floor sponsor for the 14th Amendment and gave a very comprehensive, lengthy speech which was widely disseminated about what the meaning of the 14th Amendment was.

John: You may recognize Senator Howard from Episode 2; he took testimony on violence against the freedmen in the southern states.

> **Jacob Howard:** Does a Unionist or a freedman stand much chance for justice in the state courts?

John: Now on the floor of the Senate, he introduces the 14th Amendment and talks through what it means. When he gets to the Privileges or Immunities Clause, Howard says:

> **Jacob Howard**: It would be a curious question to solve what are the privileges and immunities of citizens … it would be a somewhat barren discussion.

John: He doesn't pretend to tell you what they all are. That would be a "curious question" and a "barren discussion" to figure it out precisely. Which is too bad because 150 years later we'd all really like to know with as much precision as possible what the Framers of the Amendment thought. But Howard does give some basic ideas.

Randy Barnett: He starts with the case of *Corfield versus Coryell*.

John: A case from 1823.

Randy Barnett: That was a circuit court opinion decided by Bushrod Washington, a Justice who was the nephew of George Washington and was a very close associate of John Marshall, kind of his wingman on the court.

John: In the case, Corfield, who is a resident of Delaware, wants to gather clams in New Jersey, but New Jersey bans that unless you use a boat owned by someone from New Jersey.

And Corfield says wait, that violates the Privileges and Immunities Clause that's in the original Constitution. That's right the words privileges and immunities already appear in the Constitution -- the original Constitution. It's called the Privileges *and* Immunities Clause -- not to be confused with the Privileges *or* Immunities Clause that's in the 14th Amendment. That earlier clause, from Article 4, says:

> **P and I Clause**: The citizens of each state shall be entitled to all privileges and immunities in the several states.

John: Here's how Professor Lash, who was in the last episode, explains it.

Kurt Lash: Privileges and immunities under Article 4 of the original Constitution gave a certain set of rights -- equal access to visitors coming from out of state. If a state let its own citizens sell shoes if a visitor came from another state in the United States, and they wanted to sell shoes -- well, they should be granted that equal privilege and immunity. It's kind of a way of us treating each other as a family of states and not as foreign countries. But it only granted a degree of equal protection. If a state wanted to deny its own citizens the right to sell shoes, it could also deny visitors from other states the right to sell shoes. It was only if a state secured that right among their own citizens that you would be granted equal access to it if you were visiting from another state.

John: Corfield says he has a right to harvest clams in New Jersey because New Jersey allows its own residents to harvest clams. But he loses. Justice Washington says the right to harvest clams or other natural resources is not one of the privileges and immunities. And that's not outrageous; it can't be right that visitors get *all* the rights that residents get. People from out of state don't get to vote in local elections. But there are rights, fundamental rights, that Justice Washington says visitors do get. And he goes on to list some of them.

> **Justice Washington**: What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate.

John: Please go ahead and be tedious. There is a lot riding on this.

> **Justice Washington**: They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, 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 justly prescribe for the general good of the whole.

John: Enjoying life. Pursuing happiness. And any restriction on freedom needs to be just.

> **Justice Washington:** The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state. … These, and many others which might be mentioned, are, strictly speaking, privileges and immunities."

John: On the Senate floor, Jacob Howard quotes the language you just heard from Bushrod Washington's opinion in *Corfield*.

Randy Barnett: That was what Senator Jacob Howard used as his definition of what privileges or immunities meant in the 14th Amendment.

John: But Howard isn't simply restating rights that were already in the Constitution. There's a big change.

Randy Barnett: So the protection of those rights offered by the privileges and immunities clause in Article 4 was simply protection against discrimination against out-of-staters. The protection of those same rights offered by the Privileges or immunities clause was not limited to lack of discrimination.

John: Now those protections in the privileges and immunities clause don't just protect visitors, they protect in-state residents from their own state governments. Now states have to respect certain fundamental rights -- whether it's selling shoes or owning property -- for their own citizens. And what are those fundamental rights? As Professor Barnett says, it's the rights Congress spelled out in the Civil Rights Act and those rights in Bushrod Washington's opinion in *Corfield*. And that's not all. Senator Howard says the Privileges or Immunities Clause protects even more.

Randy Barnett: And then he says to these rights -- because they cannot be fully ever be fully specified -- should be added the personal guarantees to be found in the first eight amendments of the Constitution.

> **Jacob Howard**: To these privileges and immunities, whatever they may be -- for they are not and cannot be fully defined in their entire extent and precise nature -- to these should be added the personal rights guaranteed and secured by the first eight Amendments of the Constitution.

John: Courtesy of the 14th Amendment, the Bill of Rights now applies to the states. Which is a huge deal. Even though we associate the freedoms and protections in the Bill of Rights with Founding Era, it wasn't until the 14th Amendment that they could actually be invoked against state and local governments.

Jacob Howard: The great object of the first section of this Amendment, is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

John: There's a common theme in the way people talk about this stuff at the time, which is everyone just knows what privileges or immunities are; it would just take too long to list them all. There are the rights that are enumerated in the Bill of Rights, but there are also rights that are not enumerated in the text, so-called unenumerated rights. You have a right to enter into a contract to sell corn, but you also have a right to enter into a contract to sell butter. Anybody who starts listing privileges or immunities seems to end up saying "You know what I mean." And, for the most part, people seem like they did. And that's the prevailing scholarly view of privileges or immunities today. Most people you talk to agree with Jacob Howard that the Clause protects unenumerated rights. Most people except for federal judges. Because in 1873, just five years after the Amendment was adopted, the Supreme Court gave the Privileges or Immunities Clause a beating that it still hasn't recovered from. That’s coming up after the break.

Break==

Randy Barnett: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Now if you came down to earth

from another planet, and you were studying our Constitution, and I read you that you might think that was pretty important.

John: That's Randy Barnett again. He's giving a talk at the U.S. Supreme Court Historical Society, which you can find on C-SPAN. We'll put up a link on shortcircuit.org.

Randy Barnett: No State shall make or enforce any law which shall abridge the Privileges or immunities of citizens of the United States. That sounds like a big deal.

John: It should be a big deal. It was to the Framers of the 14th Amendment. It was to the millions of Americans who voted to ratify it. But today, for civil rights plaintiffs, for civil rights lawyers, for almost anyone else, it's almost as if the clause does not exist.

Randy Barnett: It has been all but redacted from the text of the Constitution.

John: And that story starts in New Orleans. New Orleans was a unique place in the 19th century. Before the Civil War there was a thriving community of well-educated, commercially successful free African-Americans, which was obviously very unusual in the South. When the Civil War ended and Reconstruction arrived, blacks began to serve on juries and on the police force. And African-Americans are elected to the state legislature.

Randy Barnett: The House was comprised of 65 Republicans, 35 of which were black, to 36 Democrats.

John: If you missed the last episode, the Democrats are the party of white supremacy during this period. The Republicans are the party of abolition and the force behind the 14th Amendment.

Randy Barnett: The Senate held 23 Republicans, 7 of which were black, and 13 Democrats. This legislature was a product of a new state constitution that desegregated education, prohibited racial discrimination in public places, and denied former Confederates the right to vote. It also included a Bill of Rights -- the first in Louisiana history -- that voided the Black Codes, outlawed slavery and guaranteed trial by jury, the right to assemble peaceably, and the freedom of religion and the press.

John: If there was any place in the South where the soaring ideals of the 14th Amendment had any chance of catching hold, it's New Orleans. But the city was disgusting. The air was filthy; the streets were filthy; the river was filthy. According to historians Ronald Labbé and Jonathan Lurie, New Orleans was far dirtier than other major cities at that time.

Randy Barnett: Eleven epidemics of cholera descended on the Crescent City between 1832 and 1869.

John: Part of that was because of the city's bad infrastructure and a lack of adequate sewers. But a big part of it was because of the city's slaughterhouses. Butchers were notorious for leaving animal carcasses decomposing in the streets or even in their own yards. And when remains disposed of properly, they went to what was called a nuisance wharf and just dumped into the river -- upstream of the city's supply of drinking water. According to a city health officer:

> **Randy Barnett**: The amount of filth thrown into the river above the source from which the city is supplied with water, and coming from the slaughterhouses, is incredible. Barrels filled with entrails, livers, blood, urine, dung, and other refuse portions in advanced stage of decomposition, are being constantly thrown in the river, but a short distance from the banks, poisoning the air with offensive smells and necessarily contaminating the water near the banks for miles.

John: And it's not as if the city hadn't tried to clean things up.

> **Randy Barnett**: Although public health advocates had advocated and even enacted health measures as early as the 1820s, political resistance and corruption prevented their effective implementation.

John: So in 1869, Louisiana legislators pass a law requiring that all butchering be done in one facility, downstream of the water supply. And that facility is owned by a single company, a monopoly. It doesn't put the butchers out of business -- they were still allowed to have their own

shops -- but they had to do all their butchering at the one facility. And they had to pay rates to the monopoly that were set by the legislature.

> **Randy Barnett**: Now two years earlier the legislature had formed a special committee to address the slaughterhouse issue… The committee took evidence from 9 physicians, including all 4 of the City's health officers; the superintendent of the Waterworks; a representative of the Board of Health; several Wharf managers; and a number of individuals with knowledge of or special interest in operations or the conditions of the river.

John: Over a thousand butchers file hundreds of lawsuits, and those cases are consolidated into what became known as *The Slaughterhouse Cases*. And they argue that the 14th Amendment protects a right to pursue a trade. It's not an unlimited right. You can still have reasonable regulations. You can require slaughterhouses to be moved downstream of the city, but there's no justification for giving one company a monopoly. Here's how one butcher puts it in a letter to *The Times-Picayune* newspaper:

> **Butcher**: The privilege of earning our daily bread … in the only manner many of us know … is a common right of humanity.

John: But with that said, the butcher agrees:

> **Butcher**: If its present location or use is injurious to public health or to the purity of the water, these gentlemen all say … Away with it!

John: The butchers go out and they hire one of the most prominent attorneys of the time, John Archibald Campbell, a former justice on the U.S. Supreme Court who is now in private practice and arguing multiple cases before the Supreme Court each year. Now there are a few things to know about John Archibald Campbell. For starters, when he was on the Supreme Court, he sided with the majority in *Dred Scott*, and he wrote his own concurring opinion that it was up to the states to determine their own laws about slavery. When the Civil War broke out, he resigned from the Court.

> **Randy Barnett**: Campbell, an Alabama Democrat resigned as a Justice to return to the Confederacy. There he was named assistant Secretary of War by Confederate President Jefferson Davis, a position he held until the end of hostilities.

John: And then he's promptly arrested, and he spent several months in jail because he was suspected of being part of the conspiracy behind the assassination of Abraham Lincoln. Eventually he's released, and he moves to New Orleans to practice law. Some scholars think that Campbell was still a Confederate in his heart, and that he had made it his mission to undermine Reconstruction.

> **Randy Barnett**: According to this narrative … it was Campbell's litigation objective to turn the Republicans' 14th Amendment against the Republicans' program of Reconstruction.

John: Professor Barnett is just describing what other scholars think about Campbell by the way, not expressing his own view. Anyhow, Campbell also challenged one of the other signature pieces of legislation to come out of the state's Reconstruction legislature, a law that banned racial discrimination in bars, hotels, and other places of public accommodation.

> **Randy Barnett:** Indeed at the very moment Campbell was contending that the Fourteenth Amendment had a broadest possible meaning he had also filed suit claiming that in the newly enacted Louisiana public accommodations law violated the Privileges or immunities of New Orleans Opera House owners who wish to segregate their black patrons.

John: But here's the thing. Even as he's doing that, Campbell is also trying to use the 14th Amendment, and specifically the Privileges or Immunities Clause, to overturn a Tennessee law banning interracial marriage. One of his clients was a black Union army veteran who married a white woman and got sent to the state penitentiary for two years. When he was released, he moved back in with his wife and was promptly re-arrested. For Campbell's efforts to free his client, a Nashville newspaper called Campbell quote "a favorite lawyer with the miscegenationists." Still, it's no small irony that one of the lawyers arguing for a broad reading of the protections of the 14th Amendment was on the wrong side of *Dred Scott* and much else. And just to pile irony on top of irony, it turns out that one of the lawyers opposing Campbell and defending the slaughterhouse law also has a checkered past. That lawyer was Jeremiah Black. When Andrew Johnson vetoed a series of laws that Congress had passed to protect civil rights it was Jeremiah Black who drafted one of his veto messages.

> **Randy Barnett:** Then in 1867 Congress passed two reconstruction bills that abolished all Southern state governments and replaced them with military districts …. President Andrew Johnson, a fellow Democrat, called upon Black to draft his veto message on the grounds that both bills unconstitutionally interfered with, what the veto message described as, the unspeakable blessing of local self-government.

John: Those would be the local governments that had re-imposed slavery in all but name and turned a blind eye to the Ku Klux Klan.

> **Randy Barnett**: When Andrew Johnson was impeached by the House of Representatives, he retained Jerry Black as one of his team of defense lawyers for the Senate trial. Although he was advised that so ardent a Democrat could hurt his chances before a Republican Senate, Johnson doggedly insisted on keeping Black on the team -- only a conflict of interest caused him eventually resign before the trial commenced.

John: Why did Louisiana's Republican legislature hire a Democrat who had opposed Reconstruction to argue their case? Why did the butchers hire John Campbell, also a Democrat, to argue before the Supreme Court, which was full of Justices who were Republican appointees? Maybe because they were good lawyers, lawyers who would use whatever bit of doctrine or law on behalf of their clients' interests. History is a twisted, tangled web, and there is one more tangle to talk about before we get to the legal arguments.

> **Randy Barnett**: Now we have very good reason to believe that the Slaughterhouse Act was indeed the product of corruption.

John: The private investors who owned the monopoly slaughterhouse probably bribed just about everybody.

> **Randy Barnett**: In one of the lawsuits that surrounded the statute, state court Judge William Cooley ruled that stock in the corporation had been issued quote “in order to bribe the members of the general assembly and the other men who stood in their way in order to obtain final passage of the bill and its signature by the governor.” He found quote “that members of the House of Representatives had been bribed for their votes and members of the Senate were also bribed for their votes.” The evidence further showed, he ruled, quote “that other parties occupying official positions in the City of New Orleans were also bribed and that the governor's signature was corruptly obtained.”

John: Which is bad. Corruption is bad. We do not like corruption. It is unfortunate that the Reconstruction legislature, the first in one in the state’s history to not be composed entirely of whites, was corrupt. But, on the other hand, in the 19th century, corruption was simply a part of American government.

> **Randy Barnett:** In fairness, corruption of state legislatures and in Congress associated with economic development schemes was commonplace in the 19th and 20th centuries. As Eric Foner has observed ...

John: Eric Foner, the elder statesman of Reconstruction scholarship,

Randy Barnett: bribery, fraud, and influence peddling have been endemic to American politics. And nor did the governments in the Reconstruction North offer a model of probity.

John: To sum up, lawyers on both sides conceivably opposed Reconstruction. Also, there's corruption involved, and it's plain the law is going to enrich a handful of private investors and politicians while hurting hundreds of small and independent businesses. But there is also a public health crisis that regularly wipes out huge numbers of people, and maybe, given that the butchers have a history of evading less burdensome sanitation regulation, a monopoly really was the most reasonable regulatory option that was available. Maybe. If the Supreme Court had narrowly focused on that issue, the reasonableness of the regulation, Slaughterhouse would not be the titanically, colossally infamous case that it is. But that's not what the Court did. When we come back from the break, the butchers of New Orleans lose big, and so does everybody else.

Break 2 ==

John: Welcome back. It's 1869; the butchers have sued the state and the monopoly. When they reach the Louisiana Supreme Court, the butchers lose. The court says whether or not the monopoly is reasonable is a matter for legislators and not judges to decide. Legislators are the quote "sole judges as to the the instruments by which they should enforce their police regulations." So the butchers appeal to federal court. And, at first, they win. Supreme Court Justice Joseph Bradley, who's riding circuit, rules that while there was nothing improper about forcing the slaughterhouses to relocate downstream of the city's water supply, giving a

monopoly to a private company was illegitimate and in violation of the Civil Rights Act and the Fourteenth Amendment, and in particular the Privileges or Immunities clause. Bradley looked at the Privileges *and* Immunities Clause in the original Constitution, and said that this new Privileges *or* Immunities Clause in the Fourteenth Amendment protected quote "much more," including a right to earn a living.

> **Joseph Bradley**: "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… [is] tyrannical and unrepublican."

John: But in a 5-4 decision the Supreme Court reverses. Justice Samuel Miller, author of the majority opinion, writes that 14th Amendment was meant to provide a remedy against the Black Codes, and while it didn't just protect African-Americans, the quote "one pervading purpose" of the Amendment, as well as the 13th and 15th Amendments, was the protection of the newly freed slaves. In the opinion, Justice Miller spends a little time on whether the monopoly was a reasonable restriction.

> **Randy Barnett**: He wrote the following: "it cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city the noxious slaughterhouses and to locate them where the convenience, health, and comfort of the people require they shall be located.

John: Ultimately though it didn't really matter if the monopoly was a reasonable regulation of the butchers' rights. Because the Court ruled that the right to pursue a lawful occupation was not a privilege or immunity of citizenship.

> **Randy Barnett:** Once the court decided that the privileges or immunities of citizens did not include the right to pursue a lawful occupation, there was no longer any reason for the Court to consider whether the slaughterhouse law was a rational health and safety regulation or was instead an arbitrary restriction on the butchers' liberty. Indeed under the majority's approach, everything in Justice Miller statement about the rationality of the act is legally irrelevant to the outcome of the case. The statute would be just as constitutional if it had been solely a product of political corruption as it would be if it had been a good faith effort to protect the public health. … Under the majority's approach, the legislature need not have held a single hearing or sworn a single witness.

John: If there's no right to protect, there's no need for an inquiry into whether restrictions on that right are reasonable or not. That's the tragedy of *The Slaughterhouses Cases*. It's not that the butchers lost. It's how they lost.

Randy Barnett: I think the main takeaway is that the 14th Amendment posed a structural threat to a system of federalism that many Republicans and Democrats still valued after the 14th Amendment was enacted.

John: Federalism. It's a key concept in American government, the idea that power is carefully divided between different levels of government, federal state and local, and that the division serves as a check on one level becoming too powerful. Since 1787, the protection of civil rights had been considered the proper domain of state governments; and the source of civil rights was state constitutions. Justice Miller writes that if the butcher's interpretation had won the day:

> **Justice Miller**: The effect is to fetter and degrade the state governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them … it radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people.

John: Miller and the rest of the majority say that if the Framers of the Amendment had really meant to transfer all this power to the federal government they would have been a lot more clear about it.

Randy Barnett: They don't really fully agree with the 14th Amendment and try to figure out a way to limit its scope -- limit its scope to rights that couldn't possibly have been the reason why the 14th Amendment had been enacted, such as the right to have one's life liberty or property protected while traveling on the high seas.

John: What the majority settles on is this. Instead of radically altering the Constitution, the Privileges or Immunities Clause instead protects rights that quote “owe their existence to the federal government, its national character, or its laws.” Civil rights flow from state citizenship. So those are out. Instead, Miller makes a list of what he thinks the Clause does protect, a list of rights that flow from national citizenship. And those rights are:

> **Justice Miller:** to come to the seat of government to assert any claim he may have… to seek its protection, …. free access to seaports, ... to the subtreasuries, land offices, and courts of justice in the several states.To demand the care and protection of the federal government … when on the high seas …. To peaceably assemble [and] … the right to use the navigable waters of the United States.

John: And that list has been widely mocked ever since. The country had just fought a Civil War and the fight to ratify the 14th Amendment nearly started a second Civil War. There’s just no way people had fought for a right to come to the seat of government and assert claims, as important as that might be.

Sheldon Gilbert: it's ridiculous to say that we fought a Civil War for the right to access sub treasuries

John: That’s Sheldon Gilbert, from Episode One.

Sheldon Gilbert: What the heck is these subtreasury anyway?

John: We looked it up. They don’t exist anymore. Here’s Josh Blackman, a law professor at the South Texas College of Law in Houston.

Josh Blackman: We didn't fight a civil war for access the subtreasuries. We didn't ratify an amendment so that people in the high seas are being protected. This is a rare decision where left, right, and center people agree this was wrongly decided. There are a few scholars to defend it, but the overwhelming majority the consensus is that this did not get the 14th Amendment correct.

Aderson Francois: I think we can agree that it was wrongly decided and I don't necessarily agree with the entirety almost of Justice Thomas's judicial philosophy, but I do agree with his critique of *Slaughterhouse*.

John: Supreme Court Justice Clarence Thomas says *Slaughterhouse* was wrong. Professor Francois, from the last episode who agrees with Thomas on virtually nothing, does agrees with him on that.

Martha Jones: this is a severe cutting back or limitation on the applicability of the 14 Amendment's provisions to the circumstances of most former slaves who are creatures if you will of state law as are all Americans much more so than federal law in this period.

John: And that's Martha Jones, who was also in Episode One.

Martha: We can think of Slaughterhouse as the beginning of a story that takes us all the way to *Plessy versus Ferguson* at the end of the 19th century.

John: There are some scholars who defend the ruling. One of them is Professor Kurt Lash.

Kurt Lash: I believe that Justice Miller in his conclusion and in some of his reasoning was not far from the truth, but I am an outlier and I recognize that I'm an outlier.

John: Kurt's a smart guy. We like Kurt. We don't have time to properly explore his views. But the short version is that he thinks the Privileges or Immunities Clause was only meant to protect rights enumerated in the Bill of Rights. But anyway, nearly everyone thinks the decision is wrong. Including the four justices who dissent from Justice Miller's opinion. One of them is Justice Bradley.

> **Joseph Bradley**: In my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of his most valuable rights, and one which the legislature of a state cannot invade whether restrained by its own constitution or not.

John: Justice Stephen Field writes what is probably the most famous dissent, where he accuses the majority of rendering the Privileges or Immunities Clause

> **Justice Field**: a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.

Randy Barnett: By and large what the dissent was saying is that the majority has read the Privileges or Immunities clause out of the Constitution and the dissent proved to be right about that.

John: If you're a lawyer today or a lawyer a hundred years ago, and you're trying to bring a civil rights case against a state or local law, the Clause may as well not exist. And that's because it's not just the butchers who tried and failed to use the Clause to protect their rights. The very next day after the Supreme Court released its opinion in *Slaughterhouse*, it released another opinion, in which a woman tried to use the Clause to protect her right to earning a living as a lawyer. That went worse.

Justice Ginsburg: My client Myra Bradwell seeks the privilege of appearing any day before the courts of Illinois.

John: That of course is Supreme Court Justice Ruth Bader Ginsburg at a mock hearing of the case put on by Georgetown law school. Justice Ginsburg played the part of the lawyer for Myra Bradwell. We cut it a bit; the full version is on shortcircuit.org.

Justice Ginsburg: She's of the proper age, of good moral character, and she has performed successfully on the bar examination. She runs a highly prized law journal, the Chicago Legal News. And legions of lawyers depend on that publication to stay au courant with developments in the law.

John: Justice Ginsburg argues that Illinois is violating the Privileges or Immunities Clause as well as the Equal Protection Clause by not allowing a woman who is clearly qualified to be a lawyer.

Justice Ginsburg: In all candor I must say that the Constitution had until 1868 nothing to support Myra Bradwell's claim…. And our case rests on the 14th Amendment -- in particular two clauses in it. No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States. Nor shall any state

deny to any person the equal protection of the laws. Illinois's refusal to admit Myra Bradwell to the practice of the law violates both commands.

John: So that’s a mock argument; you can’t read too much into it. Justice Ginsburg said the Privileges or Immunities Clause forbids discrimination on the basis of sex; maybe she would say the monopoly in *Slaughterhouse* was reasonable because it applied equally to male and female butchers. I don’t want to put words in her mouth. The key point is that starting with *Slaughterhouse*, and continuing virtually unbroken to this day, when plaintiffs have sought to use the Clause to overturn state and local laws, the Supreme Court has ruled against them. And that’s what happened to Myra Bradwell. But unlike *The Slaughterhouse Cases*, which was decided 5 to 4, Bradwell loses by a vote of 8 to 1.

Randy Barnett: Writing for the majority Justice Miller tersely dismissed her challenge. Quote “the opinion just delivered in *The Slaughterhouse Cases*,” he wrote, “renders elaborate argument in the present case unnecessary.” Justice Miller felt no need whatsoever to justify this outcome by reciting any reasonable basis for Myra Bradwell’s exclusion.

John: Justice Bradley on the other hand, he ruled for the butchers and he thought that the right to practice a trade was protected -- and not only protected but that quote “there is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful

manner." So when he and two other Justices who ruled for the butchers but against Myra Bradwell's right to practice a trade, they had to give reasons.

> **Randy Barnett**: The dissenters in *Slaughterhouse*, however, had a different burden. When three of the four dissenters sided with the majority in Bradwell, their approach to the Privileges or Immunities Clause required them to explain why such a restriction on Bradwell's pursuit of a lawful occupation was not arbitrary.

John: And so Justice Bradley writes this notorious concurring opinion giving his reasons, which were, among other things, that women belong in the home.

> **Justice Bradley:** The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.

John: Which is wrong, but it does turn out to be useful.

> **Randy Barnett**: But at least the approach of the dissenters in *Slaughterhouse* forced Justice Bradley to articulate the basis for restricting this right before finding it to be constitutional. And this articulation helped feminists object to, and very very soon thereafter, defeat such restrictions.

John: Reasons matter. If a court rules that a restriction is justified based on particular facts, future litigants can prove those facts don't exist or don't apply to them. But if a court rules that a restriction doesn't need to be justified by a reason, future litigants are out of luck. It's the difference between a court saying that *this* restriction is okay and a court effectively saying that *any* restriction would be okay. Of course, there was one Justice who dissented in both *Slaughterhouse* and *Bradwell*, and it's a great loss that he didn't write an opinion explaining his reasons for dissenting.

> **Randy Barnett**: One dissenter in *Slaughterhouse* also voted to invalidate the Illinois restriction on the right of women to practice law. That dissenter was Chief Justice Salmon Chase. By the time of this decision, Chase was too incapacitated by a series of strokes to write a dissent. Indeed, he died a mere three weeks after the decisions and *Slaughterhouse* and *Bradwell* were announced.

John: *Slaughterhouse* and *Bradwell* put the Supreme Court on a path that we're still on today where the Privileges or Immunities Clause is essentially not a part of the Constitution. The Clause has come up a couple of times at the Supreme Court in modern years but that's obviously a far cry from what it was meant to do. Ultimately, *Slaughterhouse* and *Bradwell* stand for the idea that the Clause does not protect unenumerated rights. But soon after those cases, the Supreme Court ruled that the Clause does not even protect rights that *are* enumerated in the Bill of Rights. In that case, the *Cruikshank* case, the Supreme Court confronted what Justice Miller wrote in Slaughterhouse was the one pervading purpose of the Reconstruction

Amendments, the protection of the lives and rights of African-Americans. In *Cruikshank*, a mob of white Democrats murdered 60 to 150 black Republicans who had barricaded themselves inside a courthouse in Colfax, Louisiana. Louisiana authorities did nothing, so the federal government stepped in and eventually convicted three white men of conspiring to violate the victims' First and Second Amendment rights to peaceably assemble and to bear arms. But in 1876, the Supreme Court struck those convictions down and ruled that the Privileges or Immunities Clause, as well as other sections of the 14th Amendment, did not apply. The ruling set off a wave of coordinated terrorist violence against African-Americans and laid the groundwork for Jim Crow. Today, there is plaque outside the courthouse that was put up in the 1950s. It reads...

> **Colfax memorial**: On this site occurred the Colfax riot in which three white men and 150 negroes were slain. This event on April 13, 1873 marked the end of carpetbag misrule in the south.

John: The Fourteenth Amendment, and especially the Privileges or Immunities Clause was a sweeping declaration of individual rights. Except when people tried to use it, the Supreme Court ruled against them, enabling state and local governments to impose or overlook outrageous abuses of civil rights. To this day, the Privileges or Immunities Clause remains lost in the constitutional wilderness. In the next episode, we'll go searching for the Clause in the literal wilderness of the Pacific Cascades mountains in north central Washington.

Credits: Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Goat Rodeo. Writing and narration by John Ross. Vision and expert guidance by Sheldon Gilbert. Project management by Rachel Hannabass. Research and fact checking by Nicholas Mosvick. With voice work by Keith Irby, Chip Watkins, Dave Knepper, Richard Komer, and Sam Gedge.