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General Law, 14th Amendment, Privileges Immunities, Equal Protection, Due Process, Legal History, Constitutional Law, Federalism, Originalism, Scholarship, Civil Rights, Natural Rights, Social Compact, State Sovereignty, Historical Research

SPEAKERS

Anthony Sanders, Will Baude

A

Anthony Sanders 00:14

"To solve these puzzles, we need to recover a missing piece. 14th Amendment rights need not be defined solely by federal law or by state law. Americans in the 1860s recognized a third option, what we now call general law." Those words suggesting a third way of constitutional law were from a article that came out a couple years ago in the Stanford Law Review, General Law and the 14th Amendment, it is co-authored or tri-authored, you might say, by Judd Campbell, Steve Sachs, and Will Baude, and we have Will here on our very first episode of law office history,. So this is a new podcast. Welcome everyone. My name is Anthony Sanders. I'm the director of the Center for Judicial Engagement at the Institute for Justice. We are very excited to bring you this new podcast. But you may be asking, if you are a regular listener of IJ podcasts, why are you doing yet another podcast? And I will address that at the end of this episode. We won't keep Will around for that. We will just give you a little explanation of where we're going with this show, what we're doing, and why we're doing yet another podcast. To give a very short summary at the beginning, this podcast is about the latest scholarship in legal history. Now we already have a podcast about constitutional history Bound By Oath, and that is a deep dive documentary podcast that takes a lot of time and work to interview scholars, but also interview people who have been just plaintiffs in famous civil rights cases. Do some deep dive analysis, historical work that that we do ourselves, and that's done by my colleague John Ross. That's really hard to do, which is why we don't have Bound By Oath episodes all that often. This is going to be a little bit of an easier lift, where instead we focus on the latest in legal history, and we talk to the authors of that scholarship. And of course, it's going to be legal history that intersects with what we do here at the Institute for Justice, because if you haven't noticed, history seems to be important with constitutional law, especially these days, especially recently, and so we're going to give some illumination to some of that legal history that we think is pretty important. And so, what could be more important than the 14th Amendment for what we do here at IJ? Especially the privileges or immunities clause, which the Supreme Court buried in 1873, and part of our mission, part of our DNA, really, since we were founded in 1991, is to reinvigorate the privileges or immunities clause. So a couple years ago, when we saw this article come out, General Law and the 14th Amendment, which is, I mean, a lot of it is really about how to interpret the privileges or immunities clause, and it's by our friend Will Baude and also Judd Campbell, who's been on our Short Circuit podcast, and and Steve Sachs, who we enjoy his work too. We thought, you know, this would be a good one for this new podcast. So we'll get to that in a moment. But first, Will, welcome to Law Office History.

W

Will Baude 03:42

Thank you for having me. Honored to be your inaugural voyage.

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Anthony Sanders 03:46

Yes, we'll see what what seas we encounter, whether they're they're choppy or not. So Will is a professor at the University of Chicago. He is the Harvey Calvin Jr. Professor of Law at University of Chicago Law School. He's also the faculty director of the Constitutional Law Institute. Of course, many of you know him as the co-host of Divided Argument, the podcast. But for people I work with, Will is actually better known as a former summer clerk at the Institute for Justice, which we are very proud to tell people about whenever Will's name comes up. So, Will, when when were you a clerk? Was

W

Will Baude 04:28

It was Kelo

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Anthony Sanders 04:29

So it was that summer.

W

Will Baude 04:32

It was the summer Kelo came down, and wow, yeah, I was in the office, you know, when the Kelo decision came down, and obviously, people were pretty bummed about the ruling, although also, you know, there there was the dissents were stronger, and there were more of them than maybe some of the pessimists believed. And then what I remember is just then the I think people were frankly caught a little off guard by the groundswell of opposition. Kelo and people just started, you know, calling IJ like government officials who were like, "I oppose this. What can I do?" And so all of a sudden, like everybody, including the clerks, were all hands on deck. You know, we need to write legislation. We need to, you know, figure out how to. So all those,

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Anthony Sanders 05:15

All those kind of like boring memos on, you know, some jurisdictional question in some random case, those got shoved aside, and it was all eminent domain all the time that summer?

W

Will Baude 05:25

I squeaked in some boring memos about state constitutional law, which one of state constitutional law was one of my early loves. So there was some time for that.

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Anthony Sanders 05:35

Well, good. Well, we will get to a little state constitutional law here as I previewed to to Will with some of the questions I might ask, but really we just want to hear about this as a third way of constitutional law that Will and his colleagues put out there a couple years ago. So tell us an overview. What are you getting at with general law and the 14th Amendment?

W

Will Baude 05:59

Okay, so general law is a kind of law that used to exist, and we were told in a case called *Erie Railroad versus Tompkins*. Usually, it sort of like ends the civil procedure class. That there is no such thing as general federal common law. That all law is supposed to be either state law or federal law, because after all, those are the two sovereigns in our system. And you know it was sort of a silly illusion or fallacy that people used to believe there was something else, some kind of brooding omnipresence in the sky. I have many grievances with *Erie*, and you know one day I'll ask to come back on and talk about a book Steve Sachs and I are writing about about burying *Erie*. But for now, let's just say let's even assume that's true, for better or worse. The framers of the 14th Amendment were part of that era who believed in this fallacy, and so the question we set up in the paper is: Well, given that they believed in this kind of thing, did that actually inform how they wrote the 14th Amendment? Right,

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Anthony Sanders 06:53

And this is not that unusual for interpreting, well, not just the Constitution, but any old law you might say, because you have to take what the people at that time believed. Like even if you believe that rights themselves are nonsense on stilts, the Bill of Rights kind of assume this kind of natural rights background. So you have to at least roll with it to interpret them. And you're just saying that the 14th Amendment kind of has that too.

W

Will Baude 07:19

Yes, exactly. And so this-I mean, this my participation in this paper grew in part out of a seminar I taught here at Chicago on the original meaning of the privileges of immunities clause, which was just something I, you know, there've been a lot of books by you know Randy Barnett and Chris Green and Kurt Lash, all said different things, and I said, well, what if we just get together, try to read them all, and figure out what's going on, and you know one. I mean, there are several fascinating things about just trying to dive into this, all of which you know you know well. Which is, you know, everybody kind of recounts a lot of the same pieces and then emphasizes different parts of them, and there are sort of weird contradictions. But one of the contradictions that really baffled me for a while was that you had on the one hand people saying it's really really important that we pass the 14th Amendment among other things because of the privileges immunities clause because we need it to constitutionalize the Civil Rights Act and establish a basis of rights especially for the newly freed African Americans like the you know people talked about this in urgent terms they were they were right you know at the same time, people would say things in response to objections, like, "Oh, don't worry. This won't destroy federalism. This isn't actually changing that much. This is just taking what the principles we think were already there in the Constitution and making them explicit. And sometimes they were the same people, saying both, "It's critically urgent that we pass this to create these new constitutional rights, and also we're not creating new constitutional rights, and so the general law, I think, is a way to explain how they could think both those things. They could think roughly there already was an unwritten law of rights and liberties that people had by virtue of being citizens in the American system, and you saw this in state constitutional cases even before the 14th Amendment. You would see state courts sometimes enforcing unwritten rights. Most famously, the Georgia Supreme Court enforced the right to keep and bear arms, even though there was no right to keep and bear arms provision in the Georgia Constitution, and even though the Second Amendment didn't apply to the states, they just started enforcing the right to keep and bear arms, as if that was the thing. We all know it was.

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Anthony Sanders 09:23

Do they do they reference the Second Amendment itself in that case?

W

Will Baude 09:27

They briefly reference it, although they seem to acknowledge like that they're not like enforcing it. But it's I think that they're just like an

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Anthony Sanders 09:34

example of this background principle, right?

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Will Baude 09:36

It's evidence that this is a fundamental right, but it's not. And again, to to our modern textualist ways of thinking about things-it's really weird, but that's that's what they did. And so the 14th Amendment, on this view, took that stuff that was kind of already out there and said, you know, it's unconstitutional to abridge that stuff, whatever it is, which then created for the first time a hook for this. Court to review those cases and for Congress to enforce those rights,

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Anthony Sanders 10:03

and so you discuss how there wasn't, as these the framers of the 14th Amendment see it, at least the ones you were just talking about, they say there's no we can't enforce these rights in federal court right now, except there was a a limited way you can do that basically through diversity jurisdiction, right? So talk about that as like evidence that this kind of existed before the 14th Amendment.

W

Will Baude 10:27

Exactly. So this is an amazing article by Michael Collins at the Virginia goes through it the most, but that in diversity cases, so where a citizen from one state is suing a citizen from another state, federal courts could hear those cases even if there's no federal law, you know, nowadays those are like contract and tort claims and class actions or whatever. But at the time, sometimes in those cases, we actually would see federal courts then having to get into general principles of constitutional law, and then have to resolve, you know, some transaction or dispute between citizens or the states. And and it turns out, sort of, a lot of early, almost proto Lochner type cases we found in this in this era, where they're like they're enforcing fundamental rights. Again, in without really talking about where they come from, without saying their federal law, just as a form of of general law. And again, because this is the era before Erie, where when a federal court sat in diversity, now in diversity when a federal court sits in diversity, their job is to be a potted plant and sort of like ask themselves what would the state court do here and then just do nothing any different than the state court would do. Makes you wonder why, right? And then diversity jurisdiction seems

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Anthony Sanders 11:30

like a lot of the time these days just certify the question anyway.

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Will Baude 11:33

Yeah, exactly. Where at the time diversity jurisdiction was important because there were thought to be cases that state courts couldn't be trusted with, and you needed a neutral arbiter to apply general principles, so federal courts would apply general principles, and that included general principles of constitutional law. So, so they'd come up in diversity cases, but it wouldn't come up in you know many of the cases people care about, where it's citizens of a state mad at their own state for abridging their rights.

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Anthony Sanders 11:57

So, something I hadn't really thought deeply about. I mean, I read about the general law in the past, of course, and I remember Erie from we did it Mike Paulsen's class actually Erie in law school. But I hadn't really appreciated how the general law was not really the same thing as the common law. It was actually bigger than that, right? Because it had like law of nations, equity, kind of everything was in this general law. Tell us what that means.

W

Will Baude 12:26

Yeah, and this is, I mean, figuring out what's in it is hard because it's a brooding omnipresence in the sky. And so one way to do it is sort of by example. So there were things like admiralty, right, which is not the common law, almost by definition, it's admiralty. But there were general principles of admiralty. Federal courts got jurisdiction in admiralty cases, and everybody just expected to apply these general principles. There was the law of nations. This is an era, you know, when the law of nations was more like the fundamental principles contained in Vattel and Groschus and Pufendorf. But these were sort of unwritten principles that lawyers were familiar with, that sometimes could get into Admiralty or related things. There was the law of the the law merchant was another important category like this. That was sort of a form of international commercial law that had rules about commercial paper and you know all sorts of just like basic transactions. And these were sometimes just described as like sort of a body of law. Almost, you could find it in Blackstone. You expect any Anglo-American jurisdiction to interact with it, but then it can include a lot of other principles too. So, you know, one of the places that sort of get controversial is that the general law did sometimes speak to questions of contracts or torts or all sorts of other things.

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Anthony Sanders 13:40

Right, and so most of us today think of that as well, like Erie Railroad. It was a negligence lawsuit, or whatever that whatever the the cause of action actually was in that case. But it can include all these other things. Just to take a little bit of a side quest here. You said the law merchant was that considered not part of the common law. Then even up to that time, it was kind of this separate, almost arbitral body of law?

W

Will Baude 14:10

Well, okay, so this is where people disagree about this. Okay, I think some some people who are maybe I'll say there are some people who think of the general law as mostly being these like limited bodies of things that have like a fancy name, like Admiralty, the Law of Nations, the Law of Marine Insurance, the Law Merchant, but not most contracts, torts, etc. I think that that's one view. I don't think that's right. I do think those were kind of like important bodies of General Law that were easy to see and name as being distinct from from state law, but I think it was more like the law merchant was part of the general law because it related to a lot of other common law topics. Okay, okay. The crucial thing is that even in this era, they knew that states could have their own common law that was different. So, like Swift versus Tyson is a Joseph Story case applying the law merchant. That Erie overrules that came into stand for everything people didn't like about the 19th century general law era, and in this case he applies the general law of negotiable instruments to decide if it's enforceable. But he says, look, if the state had its own law, like there was evidence that they knew there was a general rule and said, like ah, we just don't do things that are out here like that around here, we have our own special usage or our own special rule. Fine, you know we would enforce that. But if they don't, if they've just sort of decided to go with the flow, then we enforce general principles.

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Anthony Sanders 15:32

So, as part of this whole area of general law, we have what you-I can't remember exactly how you put it, but fundamental liberties, essentially what we would call constitutional law. So there's, you know, freedom of speech, right to keep and bear arms. You mentioned an example of that. There's also though, beyond just what you might call natural rights, there's things like a right to trial by jury, maybe other principles of procedure that are maybe even a right to a counsel, right, which wasn't part of English common law. Those are part of this general law thing too, and courts can enforce them. Is that basically the story?

W

Will Baude 16:21

Yeah, that's basically the story. So there's, I mean, there's a way in which the general law might seem like a really fancy way of just talking about the kind of fundamental rights interpretation of the 14th Amendment. So people have long said, you know, maybe the 14th Amendment just protects unenumerated fundamental rights, and maybe the general law is a way of getting at that. I think and I think that there's something to that. I mean, so some of this is just trying to figure out how that could work and how you could think that you were constitutionalizing a bunch of fundamental rights while also recognizing something already implicit in the system. That said, here are I mean, and some of this I'll say this paper swiping long opens up a lot of questions that we have not totally ironed out, and also I should say the three authors of the paper don't always don't always agree about among ourselves, even even as we don't necessarily know the answers.

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Anthony Sanders 17:11

And you're really artful, by the way, in the footnotes sometimes of saying two of us believe this and have written it.

W

Will Baude 17:16

Yeah,

A

Anthony Sanders 17:17

implying maybe the third doesn't, which is probably inherent in when you have three three co-authors.

W

Will Baude 17:22

Well, just as an example, so Judd Campbell is not an originalist particularly. He sort of sees himself as more of an intellectual historian. So he's very committed to trying to describe how people thought about it in the past. And then, you know, when we started getting into questions like, but you know, but how would you do this now, right? In a world of Erie, I remember at one point, he said, "That sounds like a really interesting problem for you to worry about, Will, because he's not committed to the view that we have to do it that way now, and you know, so just he's just committed to try and tell us what happened happened then. So there's that. the The thing about general law is, like other branches of unwritten law, it could potentially change, you know. So, so the common law or the unwritten law did not change in these days the way it does now, where we think like a judge can just say, "Okay, I think this is the new rule, and we're

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Anthony Sanders 18:11

right,

W

Will Baude 18:12

you know, we're creating a new tort because we want to. But they were aware it could change. Like they could read 14th century English cases and notice they said different things than 18th century English cases, and have to say, well, gosh, I guess we go with 18th century one, not the 14th century one, even though they're they're different. So it does raise an interesting question about whether the privileges or immunities could evolve. Could there be things that that have become part of the general law in 2026, even if they were more inchoate in 1866, and vice versa,

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Anthony Sanders 18:44

and so say if Erie had never happened, and we still had Swift v. Tyson today, it could be that courts today you're saying would just you know look to whatever today's general law is, and maybe they'd apply that even if it wasn't the general law in 1868.

W

Will Baude 18:59

Right, exactly. Now, you you can make a case that the 14th Amendment should be seen as sort of like freezing things in amber a little more or making it hard to change. And again, this is one of the things we haven't totally worked out. But it but it might well be that way. Like if I mean, if you imagine a constitutional provision that said no state should violate the law of nations, just said like you know from now on, states stop violating international law. It's not crazy to think. Well, we would ask about the law of nations now. We'd want to know. The point would be states don't do anything that'll put us in violation of our international obligations, and so we would say, like, does the law of nations currently forbid whatever this thing is?

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Anthony Sanders 19:34

Right.

W

Will Baude 19:35

That's not crazy.

A

Anthony Sanders 19:36

So here's a question I have, just with my background in the state constitutional area here, you equate to some extent general law, or you encompass kind of fundamental liberties understandings within general law. That seems to make a lot of sense, and you give one example that's often given, and you mentioned in the case. Justice Chase's view in *Calder versus Bull* in 1798 that there could be things that are just so outrageous, like taking from A to give the B just because the government likes B better, that would be ruled to be invalid, even if they're not strictly speaking against the letter of the Constitution, right? And then Justice Iredell says that's crazy. That would be too much. We have enough by just applying to the state and federal constitutions. That is a view that was around definitely through the 14th Amendment, and and some judges would would articulate at times. And there are examples of these cases where judges just rule something unconstitutional, even though they're not really using the Constitution. But usually, they would point to something in the federal or state constitution, and usually, this if it's federal constitution, and these days would be the the contracts clause. But there's all kinds of you know state constitutional cases, and so the the kind of *Calder versus Bull* type case is a little unusual, and you would think it would be more usual if general if this general common law was the thing that judges were doing, particularly in state court where they could enforce general common law because they didn't have the diversity jurisdiction problem. Yet usually it seems like they're they're enforcing the actual constitutional clauses. You, agree with that?

W

Will Baude 21:24

I I do. Although maybe this is maybe I mean so because the actual constitutions usually did comport with our fundamental principles, it wasn't that common that you would say, oh well, the Constitution says we should do this terribly unjust unAmerican thing. Should we do it? Like you know that just doesn't come up. And and indeed, because constitutions often contain these broad principles, it was just easy to ignore the kind of or to skirt the hardest jurisprudential question by saying, "Well, look, the Constitution says you know all laws have to respect the natural rights of man, and we're going to interpret that to mean like they respect the natural rights of man, or even they just sometimes would say, "Well, the legislative power, the police power, doesn't include these things because that that would be crazy.

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Anthony Sanders 22:07

All free governments recognize so and so,

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Will Baude 22:10

right? You see a

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Anthony Sanders 22:11

lot, yeah,

W

Will Baude 22:11

yeah. So I mean, I guess the point is like those things naturally kind of line up, and so there's a way in which the the Chase Iredell debate was one I think a lot of lawyers knew about, but I mean, you know, in the same way, it's amazing how often judges find they don't need to overrule a precedent because the precedent could be understood reasonably. Now, maybe again, to just strain a little too hard to do that sometimes, and it's not that they never have to, but but in the same way, it wouldn't be that often that you'd have that kind of sheer conflict.

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Anthony Sanders 22:41

So I guess a critic might say to that, though I don't know exactly where I come down, but a critic might say that what you just said is a little unfalsifiable. That the general law was in the background, but these judges were, you know, they they liked it, but they just used the Constitution, and so by the time you get to 1868, is it is it really this general on the background, or is it they just understand the Constitution to mean certain things, and therefore they needed the 14th Amendment to federalize what was in mostly in state constitutions?

W

Will Baude 23:13

Yeah, I mean, so so I don't. It might be that it's really hard to prove whether we're right. The I mean, the methodology we have is more to say: here are all the kind of fixed points. There's a huge literature about this. Here are all the kind of like fixed points and puzzles everybody else has. Here's something drawing on the legal theory of the era era that we think kind of lines things up a little better than anything anybody's called it so far. So it's a little bit like you know fitting a model or something, and then yeah,

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Anthony Sanders 23:47

yeah. Well, and and certainly the quotes that you take from the debates fit with that model, and and you know these framers of the 14th Amendment, some of them said all kinds of things, and especially Bingham, but they do seem to line up with the the dots that that you put out there,

W

Will Baude 24:05

right? I mean, it is just true that at the time the 14th Amendment was framed, Swift versus Tyson was the law, and Erie was not. And so, I know most people don't think about that very much because again, Erie and Swift are over in the Fed Courts Civ Pro world, and the 14th Amendment is over in the Con Law world. So, you know, you could start by just almost seeing us as a thought experiment about, like, well, gee, given that that fact we do know, like, was that important? Does that does that cause us to reread the debates differently at all with this piece of legal technology, you know, in hand?

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Anthony Sanders 24:33

So you mentioned how you might do this today if if this became the law. The Slaughterhouse Cases were overturned, and this became the law of the land, or what have you. And there are difficulties with that because we have Erie. But say we're say we're back in 1868, and someone was trying to put together a case like the Slaughterhouse Cases. You know, if say IJ was operating in 1869, and we're trying to do a constitutional lawsuit about the right to earn a living. How would we think about it differently than, say, people who you know support us perhaps today, but think about it in terms of a natural rights standpoint?

W

Will Baude 25:15

I mean, so I'll say I don't know that we have anything to add to Justice Fields' dissent, which in some ways, I mean, some ways is drawing on this a lot. This kind of general law approach, I think one, but maybe one thing is, you know, one of the arguments the Slaughterhouse majority makes is, well, this can't be right because this would destroy federalism and force federal courts to be in charge of everything, and we don't like that. Now, you know, of course, in con law we debate a lot. Like, is that a method of is it a valid method of interpretation to say, boy, if I interpreted this constitutional amendment to mean what it says, it would do a lot of things, and I would have to do them. Arguably, arguably that's asking the wrong question. But, but you know, I do think in some ways the general law is designed to answer that question somewhat. Is to say, look, we're not asking you to do anything new. We're asking you to do what every other judge already does, but currently federal courts have not done, and even you've done in occasional diversity cases. So we're asking you to take, you know, to take these general principles that you know are out there, and that you know that state jurists are applying now, and we're asking you to do it too. Now, obviously, that does open up a can of worms because you know now we have to set like there is a federalism question in saying we used to let North Carolina judges decide you know what the fundamental principles of government North Carolina are, and now a federal judge is going to second guess them. But but you know you're all judges you all read some of the same books like that you know you could probably figure it out,

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Anthony Sanders 26:40

right? Well, it's almost like the jump to federalism, the jump to this wider jurisdiction is smaller if you have general law principles in the background, because it's normal for federal judges to do different things about state law than state judges are doing.

W

Will Baude 26:56

Right. Now, I think the other tricky thing is just that you know, in in general law principles, I mean, there were a lot of unenumerated rights and liberties, fundamental rights and liberties, but there were also a lot of recognitions of the police power and the ability of the state to reasonably regulate those fundamental rights and liberties. And so, the more you move these cases to federal court, the more you the more you're going to really put pressure on the question of when is a regulation reasonable, and who decides? And one way that leads you is to *Lochner*, which some people think is very bad. Other people think, you know, maybe it's very necessary. But that's and there's a way in which you know they were thinking of the easiest case. They were thinking the black codes, which created second class rights for freed African Americans, and which you know Southern states would defend as a regulation of rights and liberties. They would say, "Yes, we recognize that the freed slaves have rights, but they need to be regulated, and we think it's reasonable for these reasons. And the whole point of the 14th Amendment say, "Well, obviously not. That's not a reasonable regulation." And then the question is, how far does that go? You know, can you? Is it surely it's not just about race discrimination because the 14th Amendment is not doesn't just say it's about race discrimination, but at some point it does put federal courts in the position of having to second guess everything, and you know that's a big deal.

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Anthony Sanders 28:13

And and Justice Miller saw that on the horizon perhaps and thought we're just not going to do that.

W

Will Baude 28:19

Yeah, I mean as you know, and as many listeners also, you know, the the setup of slaughterhouse does also have some weird racial politics, where the you know, in many ways, the people who are seen as the you know the plaintiffs are seen as the the bad guys, or people who, and the defendants and the regulators are seen as more in sympathy with the, you know, the Reconstruction government, and so there was some sort of talk at the time. Is the case some kind of trick?

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Anthony Sanders 28:48

Although the plaintiffs themselves at Slaughterhouse, interestingly, are these kind of French minority, right? And you know the background about that a little bit.

W

Will Baude 28:56

Yeah, go ahead. So there's

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Anthony Sanders 28:56

a lot of layers there,

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Will Baude 28:57

right? I mean, this is like with *Lochner*, like with any of these things, figuring out who who is the big guy and who is the little guy. If that's really the question, actually, it's very complicated because people are individuals. So, so I mean, there may be a lot that was keeping them from from you know totally thinking clearly about it. But but there is a way in which I mean, there's a way in which Justice Miller was right that it would be a really big deal to to second guess every area of of general law, fundamental rights, and liberties.

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Anthony Sanders 29:24

So you bringing up the black codes lead us to. We've been mostly talking about the privileges or immunities clause, but you do discuss a little bit about what this would mean for the equal protection clause. If you can say a little bit about that,

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Will Baude 29:36

yeah. And here, I mean, you know, this this is going to quickly get in a quickly get into a lot of things, but I mean I think much of the work that was supposed to have been done by the privileges or immunities clause has of course in doctrine now been pushed over to the equal protection clause and the due process clause.

A

Anthony Sanders 29:56

Right.

W

Will Baude 29:57

But at the time, one of the things the equal protection clause was supposed to do was, you know, recognize a duty of protection of the laws, a general duty of of government to sort of like give you protection in your rights and liberties, possibly from private violence, from various other things, and that, of course, then raises a bunch of questions about state action because one of the big threats to people's. I mean, one one of the big threats to people's rights and liberties at the time came from things like the Ku Klux Klan, which is not a formal government entity. And we talk some again. There's a there's a deeper historical literature on this about ways in which thinking about recognizing that the general law ultimately protecting these kind of general law fundamental rights might help you understand why they sometimes thought about state action differently than we did. Like if you think because the general law doesn't necessarily have a state action requirement, right? You have a general right to make and enforce contracts to hold property, and when someone comes and steals your stuff or burns down your house, they're violating your general law rights of you know security and your property and so on. Now, when the state then fails to protect that, they are now being guilty of a you know a failure to give protection to these general law rights.

A

Anthony Sanders 31:11

So is there is there some understanding that there is a there is a general law right to some level of state protection?

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Will Baude 31:19

Yeah, I think I guess the way I think of it more is there was a general law right just in general. Like you have you know you have your body of rights that you're hooked in against everybody, and then the 14th Amendment says and the state's supposed to equally protect those general law rights. I mean, even stepping back more, they believed in the social compact, right? They believed like fundamentally that governments were created, you know, that we gave up a portion of our rights in the state of nature to create government to come to better protect our rights even better, and so a big part of the social compact, the thing the state was supposed to be giving you, right, was that it would protect your rights against other people's violations of them,

A

Anthony Sanders 31:57

right. So one thing we aim to discuss on this show, in addition to legal history itself, is how people come up with that history and they research it, and how a practitioner out there doing maybe their own constitutional lawsuit would ever find materials relevant to their case, like like we're talking about here. So one one thing that just really caught my eye in the paper was you discuss the oral arguments in Barron versus Baltimore, not just at the Supreme Court, but like in the trial court even I think. How did how did you find that stuff? Do you remember?

W

Will Baude 32:40

Oh boy!

A

Anthony Sanders 32:40

Now I get it, you wrote this a few years ago with two other people, so who knows? But it's just it's it seemed like some neat archival work.

W

Will Baude 32:47

Yeah. So my memory is my memory is we found some of this in some of the literature on Barron versus Baltimore, and then you know saw references to the literature that started digging into it. And Judd has also written an earlier article about sort of general fundamental law before the 14th Amendment and the ways it informed Article Four, and so some of the article also builds on you know some of his earlier work as well. But yeah, once I mean once you get into this, there are a ton of of weird wrinkles. I should say I you know I I don't have a PhD in history, and I I majored in math in college. I went to Chicago, so we had we had Western Civ as part of the as part of the core, and I took some actually I took some legal history classes in law school that were extremely helpful.

A

Anthony Sanders 33:35

Did you read any like ancient math mathematicians, by the way, like Pythagoras or whatever, as part of that core,

W

Will Baude 33:41

you know. No, it's always interesting. Well, we don't. Some places do that, but no, we we did not do that. But I view my comparative advantage not so much in finding new sources, although every once in a while you come across something important, but in trying to read the sources with the right legal lens, so that's you know I think a big part of what I saw is my my ability here was to you know read the same 14th Amendment debates that everybody else has read a million times, but thinking about framing the question differently and seeing if that turns something up.

A

Anthony Sanders 34:16

So we want to turn to as I warned Will to historians and law professors in a moment, but is there is there some so for these debates, the 14th Amendment that have been read many many times, these speakers sometimes seem to contradict themselves again, especially I think John Bingham at least over the years. What, doing this project, what did you other than you know, matching the general law to it, is there something that you came away with maybe people miss usually when they read these debates, or or something that you should keep in mind when you're trying to figure out figuring out what was going on?

W

Will Baude 34:55

I'd say so. I mean, we we talked some about these kinds of these funny contradictions, and you know the other funny. One which I've mentioned is just the the times that somebody says you know what does this mean or what does privileges and immunities mean and people like oh you know we all know what it means and you know first of all we don't know if that's true or not or that was a dodge but even if they did you're kind of like man you know would have been helpful if they'd known more I think the other thing, and this actually dovetails with some other work I was doing with Mike Paulsen around the same time, is people nowadays Section One of the 14th Amendment, you know, equal protection, due process, privileges and immunities, and birthright citizenship, and like a slight dash of Section Five, congressional enforcement, is like the only part of the 14th Amendment anybody reads, cares about, or litigates. And at the time, I think it's fair to say those were the least important parts of the 14th Amendment. They were not unimportant; like they were very important, especially to John Bingham. But a lot of members of the Congress thought that they didn't need the 14th Amendment. They thought the 13th Amendment's abolition of slavery was sufficient basis to enforce the Civil Rights Act, and other people were just opposed to it altogether. So the like the swing caucus, so to speak, of people who were pro Civil Rights Act but thought they needed a new amendment was not large. Some people have claimed it was literally only John Bingham. We conclude that's not true, but it was not. You know, and they might be the the swing caucus. So it is the other thing that, like, as you read all the debates, is just clear is like they got a lot going on. Things like Section Two, which is supposed to guarantee black voting rights and didn't really work very well, and had to be supplemented by the 15th Amendment. Section Three, which is supposed to forbid former Confederates from you know retaking office until Congress decides they can be given amnesty and be trusted, like Section Four, dealing with the the war debts. Those are really important, and so Section One is in some ways along for the ride, and of course it's very frustrating and confusing because now it's what we really care about. It's the especially because we apparently don't care about Section Three, but you know they it just wasn't as important to them as it is to us, and that's I mean and that's always true of doing constitutional history. Of course, is that turns out the questions we really care about. It's not that there's nothing you could find there, but just sometimes it turns out they didn't care about it in the same way we care about it.

A

Anthony Sanders 37:08

Did that process make you more of a public meaning originalist than you already were? By the way, in saying, "Gosh, I wish they had said more, but they didn't." And so, does that mean we just gotta? We shouldn't rely too much on these debates, or did it change your mind in any way?

W

Will Baude 37:26

A little. Well, so I guess another thing to think about is though is also like that the the decision to phrase the 14th Amendment the way it is was intentional. Like, I mean, so you know, obviously they knew they were enacting an amendment that was partly about protecting the rights of freed black people, and like in some you know narrow sense, that was a big part of the original intent. But they thought about writing an amendment that said that and decided not to on purpose. Right? They decided no, no. We it's actually important that the Constitution contain general principles, that the Constitution not be seen as special interest legislation for one race, or even just special traditional legislation from race altogether, and so sometimes some intent people like to say, "Well, look, you know, the 14th Amendment was about the rights of freed black people. It was not about education. It was not about same-sex marriage. It was not about you know the right to earn a living or whatever. And that might be true, although again it's complicated. But but one thing we know is that, like, they decided not to do that. They decided to enact more general principles, and so, and this is, I think, one of the the hard tasks, especially for originalists who want originalism to provide kind of like tidy answers in a package, is you know sometimes you go back and you're like, no, no, no, they intentionally untied the answer, right? They intentionally enacted a broader principle and took the risk that something would happen to that in the future.

A

Anthony Sanders 38:46

Do you think that's ever strategic ambiguity, as the speaker would say?

W

Will Baude 38:51

Absolutely. I mean, you know, and that's like again, they had to get an amendment passed in a political situation that would make today's politics look easy,

A

Anthony Sanders 39:01

right?

W

Will Baude 39:01

And but they did, right? They did. They put the words in the Constitution, and now they're the law of the land. And so we have to interpret, enforce them, and take them seriously.

A

Anthony Sanders 39:11

Okay, you got to go soon. So we're gonna turn to the the area I asked you about at the before we started, which is the long running debate between law, certain law professors and historians, right? A lot of people listening probably know this whole debate. So there's law professors, especially originalists, but also just I think people who are looking to history to do their cases, who have one view of history, and then there are historians who say no, you're not doing it right. Basically, I think there's a lot of good faith on both sides, but it seems like they are often talking past each other. So, get give us your kind of very quick summary of what this debate is about, and maybe what each side is missing from.

W

Will Baude 40:00

Yeah, so I guess I think the big divide is the big way in which people talk past one another is whether or not you think law is a thing. So I mean, look, there's a way in which a historian can read a historical debate and can say, look, you know, Bingham made these kinds of arguments, and later he changed his position to these kinds of arguments, and we have, you know, theories about why, and these people made these kinds of arguments, and like those are all facts, and you can sort of try to understand why they made the arguments and what else they are part of, and so on. The difference is that in law school, like from the first semester, first quarter, we start getting trained to say, yeah, yeah, but who was right? You know, like whose arguments were better, and there's a way in which historians are sensibly often say, "Well, that's just like a weird question, you know, right about what, right to who, you know, normatively most attractive now, you know. But but that's one of the features of law, right? Is that the arguments exposed to ones where we can, you know, we can read them and applying law have a view which ones work better and which ones don't, and lawyers can do that even with an old case, right? We can read, you know, McCulloch versus Maryland and you know Jefferson's critique, and we can say like Jefferson's argument's actually pretty good or not, whatever it is we think. And if you if you develop that skill, then you read legal materials very historical materials very differently. You can read them and say, okay, here's the argument, and here's the argument that's correct. And if you approach them as a historian, I think you're just much less likely to do that. Now, I think the historians are right, of course, that you know the the answers to those questions are not always objective. Like we might find we might think somebody's right for a lot of reasons that are hard to prove, or sometimes unfalsifiable, or something like that, and the historians are also right that frequently, if you just are are diving into the debate for the first time, you can really miss what's going on if you don't have a lot of broader context, right? So if you just like pick up some debates in the 14th Amendment, start quoting them in a brief, you know, they may well be using words in a way you don't understand

A

Anthony Sanders 42:00

The control F approach to history, they sometimes say

W

Will Baude 42:03

And that's like the law office history that gives law office history a bad name. Obviously, are like litigators trying to win, and so you control F the Congressional Globe for whatever, and and put in all the good quotes you can find, and then the other side puts in all the good quotes they can find, and instead of a battle of the control F, right? That's that's probably not a great way to get the truth.

A

Anthony Sanders 42:24

The critiques that historians have of you know what the court has done or what some lawyers do or even law professors do, of course, if someone's just cherry picking and not taking the history seriously, that's bad history. That is what kind of law office history means, right? But if a historian is saying, "Well, I don't deal with what's right, I hear historians say that a lot. I just do the history. If you're a judge, that's not an answer because we live in a world where the judge has to come. You know, it reminds me of I once had a discussion with a friend of mine who was big, you know, philosophy religion type fellow, and I was like, well, you know, the idea is there's an original meaning, and he said, well, you know, Derrida teaches us that there's original meanings, plural,

W

Will Baude 43:13

right,

A

Anthony Sanders 43:14

and and that's true, and I was like, well, sure, but like, if you're a judge and you're interpreting a contract, it doesn't do you much good to say there are original meanings of this contract. You have to rule on what it means. So, I wish that I wish some of these historians would say, "I get you have to come to an answer and and try to give us you know what they think a judge should do. Not that like the answer in that particular case, but like how do we do deal with history when a judge needs to come to an answer,

W

Will Baude 43:42

right now again, so one answer might be, look, history just doesn't always answer the question. Like history can tell you there were there were original meanings. Maybe there were seven, and as between those seven, you know, history one might think just like isn't supposed to privilege one. At that point, you got to do something else, whether that's normative analysis or you know deference. Yeah, that's that's like a plausible view. On the other hand, that may not be what they did at the time, right? They had original meanings, and they didn't just say, "Oh, we got seven arguments on the table, so we all got to go home. You know, we all got to resort to something other than law. They would say, "Yeah, but this argument's you know better because yours leads to this and leads to that. And so, one of the questions is, to what extent is that something we can do? There's a sort of realist view, a soft realist view, maybe that like when the law is ambiguous, at that point it kind of runs out. And a different view that like even in ambiguities, you know, in first year law school, you get asked like, does no vehicles in the park, you know, forbid a child on a bicycle? And it's a fun question because it's like, well, it's ambiguous, right? But then at least part of you're supposed to learn in law school is, yeah, but but you gotta you gotta work with it anyway. Like a lot of laws, like no vehicles in the park, and judges say, well, okay, but the purpose of the ordinances do this, and the context is this, and in light of that, it does it doesn't include you know kids' bikes.

A

Anthony Sanders 44:57

Well, I don't think we're going to conclude that debate today, but I thank you for bringing it up, and I thank you for everything else you've had to say. Go check out. We'll put a link in the show notes. General law and the 14th Amendment. Will, thank you so much for joining us.

W

Will Baude 45:13

Thank you for having me.

A

Anthony Sanders 45:15

Okay, Will has now left, and at a later time, I am now recording this for everyone else, so thanks again to him for joining us for our first episode. We have another episode coming up already recorded that I hope all of you will enjoy soon. But I promised that I would address a little bit more about why we are doing this podcast here at IJ and what to expect from us. So basically, it's twofold why we're doing this podcast. So first of all, as I said at the beginning of this episode, history is pretty important these days if you are doing constitutional law. It's always been important, but it's only more important. So we at IJ are doing all kinds of history stuff these days. Litigators, us at the Center for Judicial Engagement, our Strategic Research team. History comes up in all kinds of ways. We're going to continue doing the Bound by Oath podcast, and we're going to continue to dig into the Constitution and its past in the way we've already done it there, but we also thought we could more dig into legal history scholarship and have those scholars in conversation with us about what the past has to offer and what the law of the past has to offer, and this is as it intersects with what we do at the Institute for Justice, and just more broadly about the project of classical liberalism, which IJ is a part of. So we look forward to having other scholars on, and the way that we just had that conversation with Will about what they have to say about history and how it affects us today, and what lawyers and judges can learn from that history. So another reason for the podcast is this controversy that Will and I discussed at the end about historians and law professors and originalist law professors, especially, but also judges of that bent, about the disagreements they're having about what is relevant in history, and by that I don't mean debates about, say, why originalism is true. That's not going to be part of this podcast. But how is history relevant and should be relevant to what we do with the law today, and how can judges use that history, or should judges use that history in making their decisions today? Those are extremely important subjects that are, of course, influenced by what's the latest in legal history, especially legal history that is done really well, which is the the kind of thing we want to have here on the podcast. I will say the the title law office history that's it's a pretty provocative title if you know some of the debates in in this area. It is not a title that we picked at the outset, we just thought it was a fun title for the podcast. We already were planning on doing a legal history podcast, and we were sitting around one day, and someone said, "How about law office history? And the rest of us went, "Oh my goodness, that's it. That's got to be it." So that's the reason for the title. We hope you have a little fun with it, like we have, and we also look forward to you enjoying our future episodes. So that's it for now. All I have to say is a great many things keep happening, some of them good, some of them bad.