



The *Slaughterhouse* Cases at 150

Thursday, February 16, 2022

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[00:00:00] Jeffrey Rosen: Hello, friends, I'm Jeffrey Rosen, president and CEO of the National Constitution Center and welcome to *We The People*, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan and nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. Last summer, when the Supreme Court overturned *Roe v. Wade* and the *Dobbs* Case, Justice Clarence Thomas wrote a concurring opinion calling for the court to overturn other substantive due process cases, including decisions protecting contraception and gay marriage. But he left open the possibility that those rights might be protected by a different clause of the 14th Amendment, the Privileges or Immunities Clause.

[00:00:44] Jeffrey Rosen: This is the 150th anniversary of the *Slaughterhouse* case that was a controversial 1873 case that read the Privileges or Immunities Clause out of the Constitution. To mark the anniversary, we're joined today by two leading scholars to understand what the case was about, why many liberal and conservative judges think it was wrongly decided and what would happen if *Slaughterhouse* were overturned. Kurt Lash is the E. Claiborne Robins Distinguished Professor of Law at the University of Richmond. His books include *The 14th Amendment and the Privileges or Immunities of American Citizenship*. Kurt, it's an honor to welcome you to *We the People*.

[00:01:22] Kurt Lash: Jeff, it's great to be here. Thank you for having me.

[00:01:25] Jeffrey Rosen: And Kermit Roosevelt is the David Berger Professor for the Administration of Justice at the University of Pennsylvania Carey School of Law. His latest book is *The Nation that Never Was: Reconstructing America's Story*. Kim, it is always wonderful to have you at the National Constitution Center.

[00:01:41] Kermit Roosevelt: Thanks. Yes, it's a pleasure to be with you.

[00:01:44] Jeffrey Rosen: Professor Lash, tell us about the *Slaughterhouse* cases? What was going on and what did the court decide?

[00:01:50] Kurt Lash: Well, the *Slaughterhouse* Cases were decided in 1872. This is about four years after the ratification of the 14th Amendment and it involved the decision by the Supreme Court that was, uh, the earliest attempt by the Supreme Court to interpret Section 1, in particular provisions of Section 1 of the 14th Amendment. The facts have brought it about came out of Louisiana. You had the legislature who chartered a private corporation, you know, the

Crescent City Livestock Landing and Slaughterhouse Company and they were chartered to run a slaughterhouse on the city's south side. The new corporation would rent out space to other butchers in the city for a fee and the statute granted a monopoly. It granted the "sole and exclusive privilege of conducting and carrying on the livestock landing and slaughterhouse business."

[00:02:37] Kurt Lash: Well, that left local butchers in alert because that meant they would have now have to use the new monopoly and so they sued. They brought their case before the federal courts claiming that this monopoly was a violation of their 13th and 14th Amendment rights, including the rights under the Privileges or Immunities Clause of the 14th Amendment. In a decision that has been criticized ever since it was handed down Justice Miller for the Supreme Court rejected their claims, ruling that the right to carry on a trade was not a privilege or immunity of citizens of the United States and that the attempt to transform that right into a national right that could be protected by federal courts was a misreading of the new amendment. It led to some dissents and maybe I'll let my colleague, Professor Roosevelt, deal with the dissenting's position.

[00:03:27] Jeffrey Rosen: That sounds great. Professor Roosevelt tell us about the dissents in *Slaughterhouse*. What do they hold?

[00:03:32] Kermit Roosevelt: Well, the way that *Slaughterhouse* is now understood, and maybe we'll talk about this in more detail later, is that the Privileges and Immunities Clause basically protects nothing. So, it's sort of read it out of the Constitution as a practical matter. And the two dissents offered two different theories of what privileges or immunities might mean if you think it actually does something. So, the first, which came from Justice Field, was an antidiscrimination idea. And Field said, "The Founders realized that states might discriminate against other states." So in the original Constitution, there's a provision that says, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," meaning when the out of state or visits your state, you have to give them the same rights you give locals.

[00:04:21] Kermit Roosevelt: "And the Reconstruction Congress," Field says, "understood that discrimination within a state was a problem too." So, they intended basically to give the same antidiscrimination rights to everyone, to the citizens of the United States, so that if a state discriminates among its own citizens, now that is viewed as suspiciously as discrimination against other states used to be viewed. Then there's another reading from Justice Bradley, which says, "It's not about antidiscrimination so much as it's about fundamental rights." But the basic idea here is similar. He's saying, "The Founders saw one danger and they gave her protection against it. Reconstruction Congress sees a different danger and they give a different protection against it."

[00:05:06] Kermit Roosevelt: So, the founders thought the national government might become a tyrant. They protected individual's fundamental rights against the national government, most notably with the Bill of Rights. Reconstruction Congress sees states might behave tyrannically.

So they give people fundamental rights against the states. Which rights? Well, the same ones that were supposed to protect you against the federal government, notably the Bill of Rights.

[00:05:30] Jeffrey Rosen: So we've put on the table the *Slaughterhouse*, majority and the dissent. Let's talk about its implications. Professor Lash, the dissent accused the majority of reading the Privileges or Immunities Clause out of the 14th Amendment and reducing it to a nullity. And one of the results of the majority's opinion was to refuse to apply the Bill of Rights against the states and also to foreclose the opportunity to read into the Privileges or Immunities Clause rights that weren't written down in the Constitution. Tell us about the effects of Justice Miller's majority opinion.

[00:06:05] Kurt Lash: Of course, and how you've just described the opinion is how it is commonly understood that, uh, one of the reasons why Justice Miller's opinion has been criticized, you know, for more than a century, is because he, he rendered the Privileges or Immunities Clause, I think Justice Field in his dissent said this, he rendered it a vain and the idle enactment that had accomplished absolutely nothing. And, and it's additionally criticized as refusing to apply the Bill of Rights against the states and despite the fact that there seems to be significant historical evidence that is what the Framers and the ratifiers were, were trying to do.

[00:06:45] Kurt Lash: So, the, so the common criticism of *Slaughterhouse* in Miller's opinion is that he just eviscerated right there at its birth of the Privileges and Immunities Clause. And you have a similar rendering of the case on one of the sites that's associated with the National Constitution Center. There's a blogpost that describes Miller's opinion this way, "Through this narrow reading, Justice Miller effectively rendered the Privileges or Immunities Clause impotent. Despite the fact that it's drafter, Representative John Bingham of Ohio, had explained on the House floor that the clause was meant to give Congress the power to enforce the Bill of Rights against the states."

[00:07:29] Kurt Lash: And again, I love the National Constitution Center, but I think that's quite wrong and I think the criticism and description of Justice Miller's opinion and its effect on the Bill of Rights is simply incorrect. The issue as to whether or not the brand-new Privileges or Immunities Clause included the rights listed in the first 10 amendments and made them applicable against the states was not before the court. He couldn't have ruled on that. The issue before the court in the Slaughter-House Case was whether or not among these new privileges or immunities was an unenumerated right to pursue a trade.

[00:08:09] Kurt Lash: And the butchers who were bringing the claim, we're reading older cases like *Corfield v. Coryell*, which interpreted Article IV's Privileges and Immunities Clause. And in an earlier, in that decision, *Corfield*, Justice Bushrod Washington had ruled that among the many privileges and immunities that should be equally bestowed on visiting citizens would be the right to pursue, pursue a trade. So, if a state was letting their citizens pursue a trade they would have to allow visiting citizens from other states the right to pursue a trade.

[00:08:47] Kurt Lash: And so according to the butchers, if that was part of the privileges and immunities under Article IV that was given equal protection, now that we have a new Privileges or Immunities [laughs] Clause in the 14th Amendment, it should be viewed as transforming what

was once just a right of equal protection into an absolute right to pursue a trade. And it's that particular claim that Justice Miller rejected. He distinguished the state secured rights of Article IV from the new national privileges or immunities of citizens of the United States. And according to Justice Miller, your national privileges or immunities were those which were actually listed in the Constitution, either those which were given to you by federal law through the enumerated powers of the national government or those which were declared in the Constitution as particular rights, rights of habeas corpus or First Amendment rights to assemble and petition the government for redress of grievances.

[00:09:49] Kurt Lash: So according to Miller, there was no national unenumerated right to pursue a trade that emerged, um, just through this language of privileges or immunities in the 14th Amendment and it's that particular issue that he rejected, and not the incorporation of the Bill of Rights. So, I think the criticism against *Slaughterhouse* has been false. You simply rejected and unenumerated rights and he was right to do so.

[00:10:14] Jeffrey Rosen: Excellent. So, we have the debate squarely joined. As you note, the National Constitution Center was channeling what some scholars have called the conventional wisdom about the *Slaughterhouse* Cases. Professor Akhil Amar says, "Virtually no serious modern scholar left, right and center thinks that *Slaughterhouse* is a plausible reading of the amendment." You reject that Professor Lash and I'm going to ask ...

[00:10:39] Kurt Lash: [laughs]

[00:10:39] Jeffrey Rosen: ... Professor Roosevelt, whether you agree or not that the unenumerated right to pursue a trade or the right to engage in the ordinary occupations of life, which was noted by Justice Bushrod Washington in the *Corfield v. Coryell* case as one of the quintessential privileges and, and immunities of, of state citizenship is or is not also a right of national citizenship protected by the Privileges and Immunities Clause of the 14th Amendment.

[00:11:06] Kermit Roosevelt: I think I would probably say, yes, it is. So, you know, I think this is a, a difficult question and the whole question of whether *Slaughterhouse* was wrongly decided, is a difficult and complicated question. Because in terms of the outcome, I think it's probably right. I think there was a serious health problem in Louisiana and this is a reasonable response to it and it's something that states should be allowed to do. So, on the question of what I uphold or strike down this Louisiana statute, I would uphold it. The objection that people have and the interesting point here is this is an objection to the way that the *Slaughterhouse* decision has been interpreted and the way it's been characterized in later cases.

[00:11:46] Kermit Roosevelt: And you can say, "Actually, that's not what Justice Miller meant," and you can say, "Actually, if you read the decision very carefully, that's not what he says," which might be true. But *Slaughterhouse*, the conventional wisdom about it, is the way that it's understood by the Supreme Court now and it's based on the consequences that it's had for constitutional doctrine. And if you take that perspective, then I think it's clearly wrong because it gives you a very bizarre reading of the Privileges or Immunities Clause under which it really does nothing. So what sort of rights does Justice Miller say it protects? Some very strange ones, although I should point out some of these are unenumerated.

[00:12:30] Kermit Roosevelt: So, if we're really interested in the enumerated or unenumerated question, there's no justice there who says, "This is limited to enumerated rights." Because Miller comes up with the right to access the seaports and subtreasuries of the national government. He comes up with the right to get the protection of the federal government on the high seas and those are not enumerated rights. They're also not the rights that the Civil War was fought for, which is why people say it's strange to get those as examples of privileges and immunities of national citizenship.

[00:13:02] Kermit Roosevelt: So, he gives you a couple of sort of irrelevant rights, and then bizarrely, he starts talking about the 13th Amendment, the 15th Amendment, the other provisions of Section 1, the due process and Equal Protection Clause and calling those privileges or immunities of national citizenship is even weirder because those are already protected against state interference. Those are rights that you could assert against the states if the Privileges and Immunities Clause didn't exist. So, Miller gives you some irrelevant rights. He gives you some redundant rights. He gives you ultimately nothing at all and the general reaction against *Slaughterhouse* is, "That can't be right. The Privileges and Immunities Clause was supposed to do something," and that reaction, I think, is completely correct. Whether or not it's a totally fair understanding of Miller's opinion is a different and more complicated question.

[00:13:51] Jeffrey Rosen: Well, Professor Lash described the debate today about whether or not the Privileges or Immunities Clause protects unenumerated rights. In the *McDonald* case involving the right to bear arms there was a dramatic interchange at the oral argument about whether or not the Privileges or Immunities Clause should be resurrected and Justice Scalia dismissed the possibility. Let's listen to that clip now.

[00:14:19] Justice Antonin Scalia: What, what you argue was the darling of, of the professoriate, for sure, but it's also contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process, which, as much as I think it's wrong, I have, even I have acquiesced in it."

[00:14:38] Audience: [laughs]

[00:14:39] Jeffrey Rosen: So, Professor Lash you heard Justice Scalia dismissed the possibility of resurrecting the Privileges and Immunities Clause as a kind of law professor's exercise, but Justice Clarence Thomas has signaled his openness to resurrecting the Privileges or Immunities Clause both in the *McDonald* case, in a, in a case called *Sams* and more recently in the *Dobbs* case. Tell us about the different positions of, of Justices Scalia and Thomas about the Privileges or Immunities Clause.

[00:15:07] Kurt Lash: Well, of course, in the *McDonald* case Justice Thomas encouraged the court to take the Privileges or Immunities Clause more seriously [laughs] than Justice Scalia suggested the court should. Justice Scalia's concern, I imagine, is that since no one is, there's no consensus right now, regarding the historical understanding of the Privileges or Immunities Clause to move the jurisprudence of the Supreme Court's Substantive Due Process Clause in into the Privileges or Immunities Clause would have, um, unknown effects, right? And Justice Scalia was kind of a rule-bound guy. He liked to have specific doctrines that would cabin the court from

having, uh, too much room to run in developing their particular preferences. So, he resisted opening, what he viewed would be a kind of Pandora's box in revisiting the Privileges or Immunities Clause.

[00:16:01] Kurt Lash: Justice Thomas is more open and I think Justice Thomas is, is right, uh, to be more open. I think that the court can, uh, move to the Privileges or Immunities Clause without opening a Pandora's box and that, in, in doing so, they would justify their incorporation of the Bill of Rights and do so on the basis of the people's actual decision to incorporate the Bill of Rights against the states back in 1868. And, and it would not, not open the door to unenumerated rights and, and here's why. Professor Roosevelt has talked about how, how Miller's opinion, you know, rendered, rendered the amendment, um, or the Privileges or Immunities Clause without any effect. And that's a that's a very common view.

[00:16:45] Kurt Lash: But in fact, when you, even if you just look at the Privileges or Immunities Clause as referring to the rights listed in the first 10 amendments, it does remarkable new work, revolutionary work. It would mean for the first time the Bill of Rights would now be applicable against the states. And then more than that, when you add it to Section 5, for the first time, it would give Congress power to enforce the Bill of Rights against the states and that was a concern and a desire by the Republicans and the Reconstruction Congress. They talked about this all the time.

[00:17:24] Kurt Lash: In particular, John Bingham, the man who framed the Privileges or Immunities Clause specifically noted during the debates there in 1866 that what he was trying to do was to make the Bill of Rights applicable against the states and give Congress power to enforce it when states didn't want to provide freedom of speech or freedom of religion or basic due process, basic due process rights. So, I think the idea that Miller's opinion left the Privileges or Immunities Clause without effect, it isn't...I think that's misleading and actually it misses the really revolutionary aspect of the Privileges or Immunities Clause.

[00:18:04] Kurt Lash: And then finally, as far as unenumerated rights, what the court including Justice Miller thought about unenumerated rights, Professor Roosevelt talks about this very odd listing of potential privileges or immunities. It was all dicta in the case, but Professor Roosevelt is right. He [laughs] gives his very odd listing of, of a number of rights that might be protected by the Privileges or Immunities Clause and he talks about all the protection by the government on the high seas, the ability to move within the waterways of, of the United States. And it seems odd to cite all those things until you look at the case that he cites in support of this proposition.

[00:18:47] Kurt Lash: He cites his own opinion in an earlier case called *Crandall* against Nevada. And if you go back to that case, he's talking about the right of the federal government to exercise its enumerated powers and to be free of interference from the States. And that, of course, is *McCulloch v. Maryland* kind of idea. So, in this listing of rights, what Justice Miller has done is he said, "Listen, the privileges or immunities of citizens of the United States are those secured either by the enumerated powers of Congress that states cannot interfere with or by the enumerated rights in the Constitution," and here he lists not just those in the First Amendment, but he also lists the rights secured by the 13th and 15th Amendments. So, he really

is limiting privileges or immunities to just those rights secured either by enumerated powers or enumerated rights and I think that's exactly right.

[00:19:43] Jeffrey Rosen: Professor Roosevelt what do you think would happen if the, the Court accepted Justice Thomas' invitation to resurrect the Privileges or Immunities Clause? Professor Lash has said it wouldn't be revolutionary because Justice Miller was correct. Essentially, it would allow the incorporation of the Bill of Rights through the Privileges or Immunities Clause as well as the enforcement of a, a narrow set of other either enumerated rights or rights secured by enumerated powers, but it wouldn't open up a Pandora's box. You've argued powerfully that it wouldn't make that much of a difference because much of the work of privileges and immunities was in fact on by the Due Process Clause. Tell us more about your argument?

[00:20:24] Kermit Roosevelt: Well first, I should say, I was a little bit puzzled by what Kurt was saying to the extent that he was defending Justice Miller's opinion by saying, "Privileges or immunities is meaningful if you incorporate the Bill of Rights." I think everyone agrees with that, but the opinion in *Slaughterhouse* that people say gives you that reading of privileges or immunities is the, the Bradley dissent. So, the question of whether Miller intended to incorporate the Bill of Rights is a very interesting question about Miller's opinion, but in terms of how the *Slaughterhouse* case has been understood, it's been understood to stand for the proposition, the Privileges or Immunities Clause does not incorporate the Bill of Rights.

[00:21:04] Kermit Roosevelt: And the question of what would happen if we shifted incorporation over to privileges or immunities, my view is the two dissents, Bradley and Field, give you very sensible readings of what the Reconstruction Congress was trying to achieve. Because they both say, "At the founding, we had a certain understanding about the relationship between the states, the people and the national government and that turned out to be wrong or it turned out to be incomplete. The states turned out to be threats to liberty, and now after Reconstruction, we've got constitutional provisions that protect people against the states too. And how do you do that? Do you do it with antidiscrimination? Do you do it with fundamental rights?" Well, it turns out, we've done both of those things.

[00:21:52] Kermit Roosevelt: So, the two dissents in *Slaughterhouse* cases, of course, they don't become law in that case because they're dissents, but they do become our law under the different provisions of Section 1 because the Justice Bradley fundamental rights dissent comes to life through the Due Process Clause and the Justice Field antidiscrimination dissent comes to life through equal protection. And what people are asking for generally speaking now is, "Keep doing the same thing we're doing under the Due Process Clause. So that is apply the Bill of Rights against the states and protect maybe some unenumerated fundamental rights. Just do it through privileges or immunities instead."

[00:22:34] Kermit Roosevelt: And if that's what you do, there's really no change there. There's no practical consequence. You don't open a Pandora's box that hasn't already been opened. You'll have the same debate, "How do we identify unenumerated fundamental rights?" and people will say the same things. Some people will say, "Judges have to decide because they're philosophers,"

and some people will say, "No, we should define the right narrowly and look at our history and tradition," but practically speaking, nothing will change. And that's actually I think the source of a lot of the judicial resistance and Justice Scalia's, in particular, it doesn't seem like it will make a difference.

[00:23:10] Jeffrey Rosen: Professor Lash let's focus on, on that important point. If Justice Thomas' invitation to resurrect privileges or immunities were accepted, you'd still have to decide what privileges or immunities are protected by history and tradition, "Should the rights be protected more broadly and so forth?" At the very least though, it seems the privileges or immunities would include the rights identified by Justice Washington in *Corfield v. Coryell* including the right to pursue a trade, the right to engage in the ordinary occupations of life. Does that seem correct to you and, and would it make a difference if the court recognized the right to pursue a trade or the right to engage in the ordinary occupations of life today under the Privileges or Immunities Clause, rather than under the discredited doctrine of *Lochner* and substantive due process?

[00:23:56] Kurt Lash: Right. No, I don't think that would be a correct reading of the, of the Privileges and Immunities Clause and, and I, Professor Roosevelt is right, I want to clarify an earlier point because he might have misunderstood what I would, what I was saying about, um, about incorporation the Bill of Rights. In terms of what would happen if the court turned its, uh, incorporation jurisprudence away from the Due Process Clause and into the Privileges or Immunities Clause, my point is simply that they could do so without having to overrule *Slaughterhouse*, because there's nothing in *Slaughterhouse* which rejects the idea of incorporation of the Bill of Rights.

[00:24:36] Kurt Lash: And then in fact, you can read him as leaving, specifically leaving the door open to the incorporation of the Bill of Rights because he listed among other privileges or immunities of citizens of the United States rights listed in the, in the First Amendment. So, my only point is that we could embrace the Privileges or Immunities Clause and incorporate the Bill of Rights through that clause and it wouldn't require overruling *Slaughterhouse*. But then, Professor Roosevelt, and you then raised the question, "Okay, we'll get incorporation of the Bill of Rights, but will we, will we get anything more and will we also get unenumerated rights?" well, that entire aspect of substantive due process, which includes both enumerated and unenumerated rights now simply chugged along, in the [laughs] Privileges or Immunities Clause.

[00:25:22] Kurt Lash: And I think no, not if you're going to take the original understanding of the Privileges or Immunities Clause seriously that it was not intended to open the door to later judicial identification and enforcement of laws or a judicial identification of ideas that are somehow emerging on a state level, that, that the people haven't yet decided to place in their constitution, but they've thought about it enough, so we're just going to add them, to the Constitution. I think that that is a serious intrusion about the general federalist construction of the Constitution, whereby you have unenumerated matters that are reserved to the states until such time as the people decide to entrench them as national rights in the Constitution.

[00:26:08] Kurt Lash: And this, of course, takes us to another very common criticism of Miller's opinion. Miller resisted, um, embracing and nationalized in the entire panoply of unenumerated common law rights into the Privileges or Immunities Clause because he said that would transform the very nature of the Federalist Constitution and basically transform the federal government into a government of police power. And he said he's not going to do that, the, uh, despite the fact that there were, um, concerns about radical states rights that led to the Civil War. And even though there's new national sentiment about the need for greater powers among the national government, um, he does, he did not believe that the people in adopting these amendments meant to eradicate the basic federalist structure of the Constitution. They simply wanted to reconfigure it in a way that it would apply certain enumerated rights.

[00:26:59] Kurt Lash: So, he's, that's been called a perverse, um, embrace of federalism given that we just decided a Civil War against, against states' rights, but I think he's absolutely right. He's absolutely right to rely on federalism in resisting the idea of national construction and application of unenumerated rights against the states. And, and again, just to, um, just to quote the man who, who drafted the Privileges or Immunities Clause, if you're wondering, why would Republicans have any interest in federal, federalism, here's John Bingham in 1867, uh, "Sir, I'm not to be thus driven into a violation of a letter and spirit of the constitution of this country. Under it, the rights of the states are as sacred as those of the nation. Its expressed provision is that the power is not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the States respectively or to the people.

[00:27:57] Kurt Lash: In strange conflict with this is the proposition of this bill, that if the state organized and admitted under it exercise the essential powers of local state governments, thus reserved to them, contrary to the provisions of this act, then the state would lose its right to be represented in Congress. But the equality of the states and the equality of men in the rights of person before the law is what the Constitution enjoins and the people demand." This was just one example of many examples of moderate Republicans throughout these debates, even after they've sent the 14th Amendment to the states for ratification of continuing to insist on the maintenance of constitutional federalism and the reserve rights of the states to regulate matters that are not listed in the Constitution.

[00:28:41] Jeffrey Rosen: Professor Roosevelt, what's your response to Professor Lash's claim that, uh, Justice Miller was right to invoke principles of federalism, to resist a reading of the Privileges or Immunities Clause that would transform the relationship between the faith states and federal government and his invocation of John Bingham on behalf of that proposition?

[00:29:00] Kermit Roosevelt: Well, I think that Justice Miller is a little bit perverse in invoking federalism as the key to understanding the 14th Amendment. That's like saying censorship is the key to understanding the First Amendment or something like that. Because as Professor Lash pointed out, the 14th Amendment comes to us because of the Civil War and the Reconstruction Congress is not trying, I think, to destroy our system of dual sovereignty, it's not trying to eradicate the states, it's not trying to give the national government completely unlimited power, but obviously, Reconstruction is a rethinking and a recalibration of the relationship between the states, the national government and the people.

[00:29:46] Kermit Roosevelt: And so, to say, we can't read this expansively because it would fundamentally alter that relationship, which is what Miller says, is to fundamentally deny the meaning and purpose of Reconstruction. And I think that persistently we underplay the radicalism of Reconstruction. And as we teach this in our high schools and even in our colleges, we downplay and try to tell a story of continuity where we still really have the founding Constitution with the founding assumptions about the relative roles of the states and the national government. But what happened in Reconstruction, the way that the 14th Amendment was actually ratified, did kind of involve the destruction of the states.

[00:30:32] Kermit Roosevelt: Because with the Reconstruction Act, Congress said, "No legitimate government exists in 10 of the former Confederate states." It wiped out those governments. It made new governments with a new political community. So, it declared who would be the citizens of those states. It included the formerly enslaved. It gave them political power. And in the reconstitution of these states and the constitutional conventions that drafted their new reconstruction constitutions, the formerly enslaved were guaranteed the right to participate. Former Confederates were not. Some of them were excluded. Some members of Congress and these are the radicals, it's not the moderates that Professor Lash was talking about, but some members of Congress said, "These states are dead. So, the former Confederate states have been destroyed and now we're making new ones."

[00:31:19] Kermit Roosevelt: And I do think that we need to understand Reconstruction to an extent that we really don't today. We need to understand it as the creation of, I would say, a new nation, but at the least, a new governing framework, a new recalibration of the relationship between the states and the national government.

[00:31:38] Jeffrey Rosen: Thank you for that important, uh, debate about the meaning of the Civil War and its effects on federalism. Professor Lash, John Bingham and other Reconstruction Republicans embraced what they called an ellipsis theory of the Privileges and Immunities Clause. This is kind of technical, but the gist of it was that even before the Civil War, they claimed that the Article IV of the Constitution said, "The citizens of each state shall be entitled to all privileges and immunities of citizens of the United States in the several states." In other words, there were certain privileges of citizens of the United States that were uniform from state to state and available as a matter of right rather than privilege. And these included the rights identified by Justice Washington in *Corfield v. Coryell* like the right to engage in the ordinary occupations of life and pursue a trade.

[00:32:26] Jeffrey Rosen: And at least, some of them said that the Privileges or Immunities Clause of the 14th Amendment protected a citizen of his own state against infringement by that state, uh, of the same rights that he was protected against when he went to other states. That's at least a conventional view. Professor McConnell and Professor Amar have embraced it. What's your response to the claim, their claim essentially that John Bingham thought that the Privileges or Immunities Clause protected the right to pursue a trade?

[00:32:58] Kurt Lash: Yes, the, the fact that we have two Privileges/Immunities Clauses in the Constitution has, has driven scholars to distraction in trying to determine, uh, whether or not

there's a distinction between the privileges and immunities of citizens in the States under Article IV and the privileges or immunities of citizens of the United States, um, which is the text in, in the 14th Amendment. And John Bingham had a particular theory of Article IV that he believed allowed him to read it in a way that would make the Bill of Rights at least morally applicable against the states, um, and we just needed to clarify that it needed to be especially applicable through the adoption of the 14th Amendment.

[00:33:47] Kurt Lash: And I'll, I'll describe how that worked. It takes us a little bit into the weeds. I'll describe how that works, uh, here in a moment. But first, I, I want to say in, in response to what, uh, Professor Roosevelt just described about the radicalism of the Reconstruction amendments, he's done, Professor Roosevelt has done extraordinary work on this issue and he's just published a book that I think is, is very important in stressing the radicalism and the extraordinary explosion and shift in our understanding of who we were as, as a nation. And, and I wanted to, I wanted to commend his work and commend that book because I think he makes a number of excellent points that we need to grapple with in, in terms of just how big a change and how much the nature of the Constitution shifted at the time of Reconstruction.

[00:34:40] Kurt Lash: And I'm in agreement with him, and in a number of things. I don't go as far as Professor Roosevelt does, but, but again I just want to commend his work. Now my reading is, is, is more moderate, right [laughs], in terms of the impact of the Privileges or Immunities Clause. And here's Bingham's ellipsis theory and he did talk about this just prior to the, to the Civil War. In Article IV, you have a statement about privileges and immunities of citizens in the several states and that clause had been described by just a story in his commentaries as impliedly including a reference to citizens of the United States.

[00:35:20] Kurt Lash: According to Joseph Story in this very influential text on the Constitution, when you read privileges and immunities of citizens in the states, you should read it as if it included an unstated clause citizens of the United States in the several states. And so that's the extra ellipsis clause that even though it's unstated, Story believed was implied in Article IV, John Bingham took everyone knew Story's commentaries and Bingham cited them all the time. And Bingham said, "Well, if Article IV references not just citizens of the states going from state to state, but also impliedly speaks of the rights of citizens of the United States, then we should read that clause as obligating the states to respect all of the rights of citizens of the United States."

[00:36:17] Kurt Lash: And then Bingham went further and said, "Those rights include the rights of the United States citizens listed in the Bill of Rights." So, he took this, this idea that there's implied references to citizens of the United States in Article IV and he insisted that that impliedly [laughs] bound the states to respect all of the rights of citizenship from, listed in the Bill of Rights. It was not an effective argument. He drafted his first version of what became Section 1 of the Privileges or Immunities Clause using the language of Article IV and he tried to describe his Article IV-based amendment as applying the Bill of Rights against the states.

[00:36:58] Kurt Lash: Here's what he said about that first Article IV attempt to amend the Constitution, "The proposition pending before the House is simply a proposition to arm the

Congress of the United States by the consent of the people of the United States with the power to enforce the Bill of Rights as it stands in the Constitution today. It has, that extent no more." And then he publishes that as a separate pamphlet in support of the proposed amendment to enforce the Bill of Rights. Well, his colleagues weren't all that enamored with his use of language in this first draft and so they sent it back to the joint committee. And when it came back out of the joint committee in the final version of the 14th Amendment, he had completely abandoned the language of Article IV and now just straight up announced what had been implied in Article IV.

[00:37:46] Kurt Lash: Now, he says, "No state shall make or enforce any law abridging the privileges or immunities of citizens of the United States." And again, that's still part of his effort to enforce the Bill of Rights against the states. Never during these early months of 1866 did he ever say he was trying to transform or nationalize the rights of *Corfield* against *Coryell*. And even though Professor Amar, who I love and respect, and others have made that argument including Professor McConnell, Bingham, himself, always talks about the Bill of Rights. He did not talk about *Corfield* against *Coryell* while he's presenting these drafts to the people in 1866.

[00:38:26] Kurt Lash: And I think trying to use *Corfield* to inform the Privileges or Immunities Clause is not what he was trying to do and it's not what the public would have thought he was doing.

[00:38:36] Jeffrey Rosen: Fascinating. Okay, just to restate where we're at this point in the very illuminating conversation, Professor Lash you've said that John Bingham intended to incorporate the Bill of Rights against the states through the Privileges or Immunities Clause, but he did not intend also to incorporate unenumerated rights like those listed in *Corfield* and *Coryell* such as the right to pursue a trade. Professor Roosevelt, on this point, do you agree with Professor Lash or not that these unenumerated *Corfield* rights were ones that Bingham intended to incorporate that's an important question about original understanding? And then more broadly, why is it that Professor Amar and Professor McConnell and many other liberal and conservative scholars think that those *Corfield* rights were so deeply rooted in history and tradition that they should be protected as unenumerated privileges or immunities?

[00:39:32] Kermit Roosevelt: Well, so there's a lot of different questions there. And the first thing I want to do actually is thank Professor Lash for his very kind words about my book. And in return, I should say, if you're interested in understanding the background to the Reconstruction amendments and what people were saying and what people were thinking at the time, Professor Lash has the best collection of materials out there. And then having said that, I want to say something slightly different, which is it's very interesting to talk about the original understanding and how the public would have interpreted things and what the different theories, different proponents of different bills mentioned in different speeches.

[00:40:13] Kermit Roosevelt: But I do want to say one sort of larger methodological thing, which is, when I was in law school and when I was a young professor, I sort of thought of constitutional interpretation as like a treasure hunt and maybe even like ...

[00:40:26] Kurt Lash: [laughs]

[00:40:27] Kermit Roosevelt: ...*National Treasure*, the Nicolas Cage movies, where you figure out the code and no one has seen this before and there's this very complicated web of meaning that you can decide and then you get the answer. And it's there and undeniable, you know? It's the Holy Grail, the gleaming gold chalice. You've got the meaning in your hand and you're right. And as I got, I guess in some ways more sophisticated or maybe more cynical, I started coming to think that there simply is no objectively right meaning there. There are different plausible interpretations and different people put forward different interpretations at different times.

[00:41:07] Kermit Roosevelt: And sometimes they say what they believe and sometimes they say what they think will get an amendment ratified and there just is no right answer on a lot of these questions, I think, that that's not to diminish the importance of historical scholarship because I think historical scholarship does an important job in setting out the boundaries of plausible interpretation, maybe. And it helps us understand what the evidence for and against different interpretations is. But if you look at the history of constitutional interpretation, it ebbs and flows. And arguments that seem implausible at one moment are taken very seriously at another. And there's probably no single correct interpretation that you can find in any objective sense by mining and sifting through the historical materials.

[00:41:59] Kermit Roosevelt: Now, having said that, I'm going to try to give you an answer to the specific question too, which is I think it makes perfect sense to say that the right to pursue a lawful trade or calling is one of the rights that supposed to be protected by the Privileges or Immunities Clause. And I think you could say that even if you think it's only supposed to incorporate the Bill of Rights because the Bill of Rights, of course, includes the Ninth Amendment. And the Ninth Amendment says, "The enumeration of certain rights shall not be construed to deny or disparage others retained by the people." So, the Bill of Rights through the Ninth Amendment itself tells you, I think, that it is not an exhaustive list of rights.

[00:42:38] Kermit Roosevelt: There's a question still about how to identify unenumerated rights, but if you think about the rights that are common to all three governments, maybe, or the rights that are common to all citizens are the rights that are deeply embedded in our history and tradition, the right to pursue a lawful trade or calling is certainly there. And then I want to say just one more thing about the consequences of this reading, which is it's not the case in 1789 or 1791 or 1868 that justices think that saying that a right is fundamental means it can never be infringed or it means the government must meet strict scrutiny or this very demanding standard of judicial review in order to regulate that right because earlier generations of Americans have a different understanding of how judicial review operates and a different understanding of how central judicial review is to the enforcement of rights.

[00:43:35] Kermit Roosevelt: So, one problem that we have persistently, I think, is we take earlier understandings about the meaning of certain constitutional provisions and the rights that they protect and we take those out of a whole set of institutional presuppositions and understandings about how judicial review is going to be exercised and how rights will be protected. And we try to transport our substantive understanding into a different institutional context where we're very court standard, we're very judge centered, we have kind of rigid

doctrinal tests that courts are supposed to apply once you decide something as a fundamental right. And I think that that maybe misleads us and, and gets us the wrong answer sometimes.

[00:44:19] Jeffrey Rosen: Professor Lash, Professor Roosevelt just made the important argument that regardless of whether the Reconstruction Republicans viewed the right to pursue a lawful trade as a privilege or immunity, the Ninth Amendment allows future courts to recognize unenumerated rights. And you, once you pick a methodology like whether the right is deeply rooted in history or tradition or it's common to all three governments, then it's a perfectly legitimate interpretation of the Privileges or Immunities Clause to recognize the right to pursue a lawful trade. This is obviously central to Justice Thomas' question about what would happen if the court reexamined substantive due process cases under the Privileges or Immunities Clause. Do you agree or disagree with Professor Roosevelt that the Privileges or Immunities Clause, properly interpreted, does allow for the recognition of unenumerated rights that the framers may not have anticipated?

[00:45:15] Kurt Lash: Well, Professor Roosevelt is setting me up there since I've written an entire book on the, on the Ninth Amendment. It's very common, and obviously since the 1965 case of *Griswold v. Connecticut* and Justice Goldberg's sighting of the Ninth Amendment as justifying judicial recognition and enforcement of rights beyond those actually listed in the Constitution. And so the, the Ninth Amendment seems to stand as a direct refutation of the idea [laughs], that we're only protected by those rights listed in the Constitution. But the Ninth Amendment again speaks of the rights retained by the people. And the rights retained by the people, of course, is a very capacious term. We tend to think of rights as individual rights, rights that can just be exercised by a single individual.

[00:46:16] Kurt Lash: But of course, the Constitution creates all kinds of rights collect, collective rights of representation, and in particular, it creates a federalist government where you have a right to have certain matters regulated at a national level and then certain, and certain matters regulated at the state level. And that was the original purpose of the Ninth Amendment, to maintain that federalist division. Madison wrote the Ninth Amendment in order to maintain this idea that even though we're adding a Bill of Rights restricting the federal government in certain ways, that should not be read, uh, or, or be construed to deny the existence of other restrictions, um, on the federal government. And that was put there due to the danger of adding a Bill of Rights and creating this implied police power on the part of the, part of the federal government.

[00:47:06] Kurt Lash: The Ninth Amendment was meant to work with attempt, uh, to limit the construction of federal power. And, and when you limit the construction of federal power, then that leaves additional powers in the hands of who? Well, according to the 10th Amendment, in the hands of the people in the several States. And so, for the first century and a half, the Ninth and 10th Amendments in judicial opinions and in any treatise that talked about the Ninth Amendment, well, we spoke of it as a federalism provision. And that's why the southern states cited both the Ninth and 10th Amendments as part of their justification for seceding from the union and it's also probably why neither Jacob Howard nor John Bingham cited the Ninth or 10th

Amendments as the rights they meant to enforce against the states. Both Bingham and Howard spoke of the need to enforce the first eight amendments, um, against citizens in the United States.

[00:47:58] Kurt Lash: So rather, the Ninth Amendment, rather than being an invitation for the court to create additional restrictions on the people's authority to local self-government, the Ninth Amendment was meant to maintain the right of local self-government in all matters that were not given into the hands of the, of the federal government. I know you can read the Ninth Amendment in a different direction, but if you're attentive and you're attempting to enforce, uh, that amendment as, um, understood by the people who placed it there, it actually has quite the opposite, quite the opposite meaning.

[00:48:31] Jeffrey Rosen: Fascinating. Well, it's such an important point. Professor Roosevelt, your response to Professor Lash's federalism-based reading of the Ninth Amendment?

[00:48:40] Kermit Roosevelt: Well, I think that Professor Lash's book is fascinating and great and I commend it to everyone. I just think that there is a reading of the Ninth Amendment that's related to federal power and the scope of federal power and you can hear that from James Wilson, you can hear that from Alexander Hamilton in *Federalist 84*. But there's also a reading of it that says, "It is about individual rights." And when Madison introduces the Bill of Rights or the amendments that will become the Bill of Rights, he doesn't talk about powers. He doesn't talk about avoiding implication that the federal government has power over these things, which is what Hamilton is talking about. He talks in terms of rights.

[00:49:20] Kermit Roosevelt: And I think there's a real distinction between rights of the people and powers of the federal government and I think there's a distinction between rights of the people and powers of the state. And yes, sure, some people's rights are rights to collective self-governance and so on, but some of the rights that you see in the Bill of Rights are very clearly what we now understand as individual rights like free speech and free exercise of religion and protection against unreasonable searches and seizures. And when you introduce amendments that protect those clear individual rights and you say, "We need something else," because by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration. And it might follow by implication that those rights which were not singled out like free speech, right, like free exercise of religion, it might follow by implication that those rights that were not, which were not singled out, were intended to be assigned into the hands of the general government and were consequently insecure.

[00:50:21] Kermit Roosevelt: And again, "Secure these rights," that's the language of the Declaration of Independence. And there, we're talking again about individual rights to life, liberty and property. So, the idea that the Ninth Amendment is just about collective self-governance and that's about federalism, seems very contrary to the language, the context and what people said when introducing it.

[00:50:44] Jeffrey Rosen: Wonderful. Well, one last question in this very rich discussion, which is a constitutional law seminar in miniature and really raises the deepest questions about a constitutional interpretation and, and that is this. If the Privileges or Immunities Clause were resurrected, some have argued, that the right to pursue a lawful trade or the right to engage in the

ordinary occupations of life should be recognized as a privilege or immunity and restrictions on abortion, which impose burdens on women that are not imposed on men, uh, make it harder for women to pursue a lawful calling or engage in an ordinary occupations life than men and therefore should be struck down as a violation of the privileges or immunities of women. Professor Lash, what do you think of that argument?

[00:51:31] Kurt Lash: Well, so unenumerated rights, I think that's a natural transition from the idea that unenumerated rights includes the right to pursue a trade and then and then as you just, Jeff, as you just did you extend that to any difficulties that would stand in the way of equal participation in the economy, which has been part of, uh, the courts arguments, um, in the abortion rights, abortion rights cases. It...I think that if you, if you embrace that reading of the Privileges or Immunities Clause, I think that, that you can. First of all, you'll immediately get *Lochner*, a case from the early 20th century which invalidated attempts to regulate local contracting wages and hours and things along, along those lines.

[00:52:18] Kurt Lash: And then I think that you can, by extension, at least by use of analogy, move from there into protecting the abortion rights, not as a matter of substantive due process, but as a matter of, of equal participation or equal protection. I think that, um, the late Justice Ginsburg was interested in developing that kind of idea, but, I don't think that either extension is a proper reading the Privileges or Immunities Clause. Again, I think that when it comes to, uh, uh, regulation of the economy, as we decided at the time of, um, the New Deal and rejecting *Lochner* and as the court just decided in the Dobbs case, these are very difficult, crucial, crucially important issues, but not issues that have reached such super majoritarian agreement that we've placed these particular economic or abortion rights in the Constitution itself.

[00:53:07] Jeffrey Rosen: And Professor Roosevelt, same question to you, what do you think of the argument that the Privileges or Immunities Clause includes the right to engage in the ordinary occupation of life that restrictions on abortion discriminatorily deny those opportunities to women and not to men, and therefore, thus, they violate both the Equal Protection Clause and the Privileges or Immunities Clause?

[00:53:30] Kermit Roosevelt: I think I would say that's unnecessarily complicated. Uh, you know what I mean? To have this sort of end run through the right to pursue a lawful trade or calling, I think it, it gets that a bit of what is offensive about an abortion restriction and that it has this disparate impact on women and it harms women's ability to pursue economic or political careers and it reduces their ability to participate equally in the civic and economic life of the nation. But I think there's probably a more straightforward way to do it. And I think I would probably just go through the Due Process Clause, not thinking about fundamental rights in the modern sense as things that trigger strict scrutiny, but thinking about it in the sense that I think is more the original understanding, actually, and the *Lochner* understanding, which is that sometimes the legislature will justify what it's doing in terms of protecting the rights of citizens or members of the political community.

[00:54:31] Kermit Roosevelt: And that's one head of state legislative power. And sometimes it will justify what it's doing by saying, "This is in the public interest. This is a good idea, right?"

The benefits of this law outweigh its burdens basically." And the real question for the *Lochner* court, I think, and under the Due Process Clause generally, is how deferential should courts be in reviewing a legislator's determination that a particular law is in the public interest. And in the *Lochner* era, the court was pretty aggressive because it thought it had some categorical rules about what was in the public interest and what wasn't. And it thought that redistribution to promote equality, for instance, was not in the public interest.

[00:55:14] Kermit Roosevelt: But the court realized that the categorical lines that was drawing didn't really stand up to scrutiny and it back down, it back down famously and *Carolene* products. But in *Carolene* products, the famous Footnote 4 sets out circumstances under which judges don't have to defer. And one of the things it says is prejudice against discrete and insular minorities is going to halter, uh, the political processes that can ordinarily be counted on to protect them. And if you take that perspective, so you say, "The legislature thinks this law is a good idea and we as judges have limited ability to second guess them, but under some circumstances, when we think the political process won't weigh everyone's interests fairly, then we will do it."

[00:56:03] Kermit Roosevelt: If you look at an abortion restriction, then you say, "Here's a law and it balances life against liberty or potential life against liberty," and those are both important values and maybe the legislature can r- resolve that conflict however it wants, but it can't count women's liberty less. And we think it might because there's historical discrimination against women. There are stereotypes and traditional attitudes about women's proper role. Women are underrepresented in state legislatures, lots of reasons for suspicion, then I think you do get an argument for something like heightened scrutiny.

[00:56:34] Kermit Roosevelt: And you could even go further as Guido Calabresi suggested a long time ago and you could look at how the legislature resolves life, liberty conflicts in other contexts, so, "Do we have mandatory blood donation? Do we have mandatory postmortem organ donation? Do we even have an opt-out rather than opt-in postmortem organ donation system?" And the answer is almost always when life and liberty conflict, we pick life. We say, "You don't have to take even a very modest restriction on your liberty to protect other people's lives." And abortion comes out different, the balancing there. We say, "To protect potential life, women must accept this massive intrusion on their liberty and their bodily autonomy."

[00:57:15] Kermit Roosevelt: **And that I think could easily be taken by a judge to suggest that women's liberty is being impermissibly discounted in a discriminatory way and that's what I think due process protects against.**

[00:57:27] Jeffrey Rosen: Thank you so much, Professor Kurt Lash and Professor Kermit Roosevelt for a deep, vigorous and extremely illuminating discussion of *Slaughterhouse*, whether or not it was wrong and what the consequences of overturning it would be. Uh, Kurt, Kim, thank you so much for joining.

[00:57:43] Kurt Lash: A pleasure. Thank you so much for having us.

[00:57:46] Kermit Roosevelt: Thanks so much for having us.

[00:57:50] Jeffrey Rosen: Today's show was produced by Lana Ulrich and Bill Pollock. It was engineered by Kevin Kilburn. Research was provided by Emily Campbell, Sophia Gardell, Liam Kerr and Sam Desai. Please rate, review and subscribe to *We The People* on Apple Podcasts and recommend the show to friends, colleagues or anyone anywhere who's eager for a weekly dose of constitutional debate. And always remember that the National Constitution Center is a private nonprofit. We rely on the generosity of people from across the country who are inspired by our nonpartisan vision of constitutional education and debate. You can support the mission by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support our work, including this podcast at constitutioncenter.org/donate. You can designate your donation of \$1, \$5, \$10 or more either to celebrating the anniversary of Slaughter-House or its overturning and make sure you let me know which you prefer. On behalf of the National Constitution Center, I'm Jeffrey Rosen.