Priveleges, Immunities, and Free Enterprise

*Richard Epstein & Mark Graber**

PROFESSOR EPSTEIN: This is a very strange debate because I don't know which side I'm on, nor do I know which side Mark is on. I'd like to think of myself on the side of truth and enlightenment, but it would be rather inappropriate to cast my opponent under such a cloud before we start to speak—if he is an opponent, which I don't think he will be.

I wrote a paper on the Privileges or Immunities Clause of the Fourteenth Amendment [*Of Citizens and Persons: Reconstructing The Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU Journal of Law & Liberty 334 (2005); see also *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU Journal of Law & Liberty 1095] mainly because I was asked to teach *The Slaughter-House Cases* once at Brooklyn Law School as a visitor for one day. I decided to do something extremely daring in light of the modern styles of constitutional interpretation—reading the entire 14th Amendment, first clause, first section, which is not that long, from beginning to end in an effort to figure out both substantively and structurally what it accomplished and what it was meant to do.

Using this very simple canon, let us begin with the first sentence, which says that all persons born and naturalized in the United States are citizens of the United States, and citizens of the state in which they reside. The purpose there, as Mark can tell you much better than I, was to overrule the decision *Dred Scott*, which said that former slaves could not become citizens of the United States. This decision partly led to the Civil War, which tells you that Supreme Court decisions really matter. It should also tell you that citizenship matters, as much now as it certainly did in the nineteenth century. There was no question then that citizens were thought to have had certain advantages that were denied to other individuals who, nonetheless, were not thought to be without any rights.

Knowing something of the general background, I read the Clause, and here's what I found. It said, "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." Then we have the Due Process and Equal Protection Clauses, neither of which applies only to citizens; both apply consciously to all persons in the United States. At least one of the questions one wants to answer in reading a clause like Privileges and Immunities is why the first clause of Section 1 of the 14th Amendment defines who is a citizen; the second clause gives the payoff of being a citizen; and the third and fourth clauses (on equal protection and due process) take a somewhat different tack and start talking about protections that are given to all persons.

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There's an important little moral here. One of the great tensions every legal system has to face is that between the claims of natural law and positive law. The traditional account of natural law refers to those rules, practices, ordinances and instructions that apply commonly everywhere to everyone and therefore are not to be a gift or preference which is conferred on you by the sovereign. In contradistinction stands the highly positivist tradition, in which the sovereign has citizens who owe and must demonstrate allegiance, but in exchange receive special benefits that aren't given to all persons. So there is a built-in tug-of-war in the 14th Amendment if you look at it this way—between the special positions that citizens have under the Privileges or Immunities Clause and the more generalized protections that are given to everyone, citizen and alien alike, in the Equal Protection and Due Process Clauses.

I wondered why they drew this kind of distinction, and this is what I came up with. First, you have to be able to make sense of a clear structural distinction that is built into the Amendment, but which gets completely elided and forgotten in modern interpretations. Because if you forget the Privileges or Immunities Clause when you talk about persons, then you don't think about it in opposition to citizenships; you just simply treat them as persons and protect everyone.

Second, it is a clause whose key phrase "privileges or immunities" you'd like to be able to define with reference to ordinary meaning, but cannot. Many words in the Constitution like "religion" and "private property" and "freedom of speech" provide some particular sense of meaning. At least you think they do when you start out, even though you know you're going to get beaten to a pulp when you try to work out the implications of grand terms for particular cases. These are not what you'd call words of conventional meaning, however. They're essentially words of natural meaning used in the Constitution in more or less the same way they're used in ordinary language. When you get to privileges or immunities, you can't give rely on that particular interpretive history. The word "privilege" taken alone often means that somebody is going to be privileged *vis à vis* somebody else. The word "immunity" generally means that you're exempt from certain kinds of lawsuits. Yet if you put the words "privileges and immunities" together, you can't parse them by saying, first of all, find out what the privilege is and then we'll find out what's immunity. You need some sense of the meaning a particular phrase has in ordinary usage. This exercise is extremely dangerous because whenever you have a conventional term inside the Constitution, to some extent you're forced to rely on some extrinsic sources to find out exactly what that particular term means and how it ought to be construed.

The great first principle of constitutional interpretation is pay close attention to the text, and the second is how you find out what terms mean when they have only conventional

meanings. There is an informal structure between professional historians. On the one hand, you're anxious to trace down every use of a particular phrase as it existed in the original debates over the 14th Amendment and the ratification debates that took place in the states, and on the other hand, those of us who are more lawyer-like say the text has to be self-contained if it's going to be the source of authority for future decisions. To cite what a person in the New Hampshire debates said and treat it as justification for interpreting something one way or another is most unsatisfactory because you will find that many people said many different things, and there's no way to reconcile all the disparate private explications of a given text into a single coherent whole.

What are we to do? It's like parole evidence; you don't accept slippery memory of individual statements. You try to find stable and customary meanings that were widely known and publicized by all so you don't have these credibility and interpretive problems that you have with the testimonial evidence of the supporters and detractors of particular provisions. You start by looking backwards in time to see where these phrases appear.

With respect to the Privileges or Immunities Clause, you can trace some version of it to the Middle Ages, because when people were anxious about their status, the King would grant them a charter which says he preserved to them as to all other Englishmen their liberties, franchises, and privileges of one sort or another. You never quite knew what that phrase meant either, but in its original form, it was a guarantee of nondiscrimination. Whatever you do to your other citizens, you're going to do to me—nothing worse and definitely nothing better. One of the great protections that people have is to make sure that if they are put in a boat, other people are in the same boat with them; if they go down, they're not alone. Singling out is a very effective way in which to impose either special privileges that people don't earn or special burdens they don't deserve. There's some sense of parity very much associated with the early use of privileges and immunities.

When it comes into the American context, chiefly through the Articles of Confederation, we're starting to talk about mutual intercourse and comity between the various states. Here 'privileges and immunities' seems to take on a somewhat different meaning, in which the major objective is to make sure that the United States will operate more or less like a free trade zone across state boundaries. The argument here, in perfect consistency with the basic nondiscrimination theme that we've talked about, is that everyone knows that protectionism is a great vice in a country made up of competitors in a political common market, which they hoped the United States would be.

At the same time, nobody—certainly no one at the constitutional level—knows what the ideal set of rules ought to be with respect to commercial transactions in any particular state. So rather than try to specify in great detail what state A or state B or state C must do with respect to their commercial regulations, the basic principle is one which is still adopted under the World Trade Organization today: Whatever particular roles you have with respect to your own citizens you must also extend to outsiders, so that the tinge of favoritism will no longer darken the political landscape. In the United States Constitution, Article IV, Section 2, what we have in the Privileges and Immunities Clause is a pretty clear statement that the citizens of one state are entitled to the privileges and immunities of the citizens of several states. The theory here is that once you travel to another place, you're not going to be put at a competitive disadvantage.

Is there any limit to what the Privileges and Immunities Clauses of Article IV covers? This issue was addressed in a case in 1823 called *Corfield v. Coryell*, which had to do with a very interesting problem. The state passed a rule which said that only citizens of the state of New Jersey were entitled to use the extensive oyster beds in that state, and all other persons were excluded from their use. Some fishermen from outside the state challenged the statute, claiming that it deviated from the standards associated with the Privileges and Immunities Clause and, therefore, ought to be struck down.

How did the courts respond to this? The Court in this case was Bushrod Washington, justice of the United States Supreme Court, who was riding on circuit. And he denied the claim. In so doing, however, he gave an extremely broad definition of what constitutes a privilege and immunity. These included the right to contract, the right to own property, the right to testify, and other things. After he gives a series of capacity rights like the ability to enter into voluntary and associational transactions with other individuals, and to hold property (very much in the Lockean tradition), he adds that we also have the right under local law to have the elective franchise in accordance with its established rules. This is a little incongruous because one of the things that we do know is that citizens of one state are not normally entitled to vote in elections of another state. They will be entitled if they decide to become citizens of that second state, and indeed one of the functions of the Privileges and Immunities Clause seems to have been to allow people not only to trade and return to their own countries but also to decide to pick up shop in one place and then move to another state and become citizens of that state by establishing residence alone. The Clause was extremely important because it meant that residential freedom, which we all take for granted today, was in fact an integral part of the original Constitution.

There is a great deal of confusion as to how the Privileges or Immunities Clause associated with the 14th Amendment ought to be read, for a couple of reasons. The first point is that there is no explicit nondiscrimination provision in that clause. It is treated now as a categorical guarantee. It is good against state interpretation or enforcement and also against state legislation. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." One of the longest historiographical debates is whether it is a nondiscrimination principle. Anyone who spends time reading the ratification debates and beyond might be inclined to conclude that such was the design, even if the details were not worked out. Yet when you read the text as it stands, it cannot support that particular meaning, for it looks like a substantive guarantee.

Once you decide, however, that it is a substantive provision and parity is not enough, you have to figure out what it means. In *The Slaughter-House Cases*, Justice Miller's interpretation was clearly understood to be wrong, as ingenious as it was. Justice Miller said, in effect, this is an Amendment that was designed to trump in some way the relationships between the federal and state governments. There's no question the people who understood the way in which the Constitution was put together in the Antebellum period, tended to lament—(if they lamented anything at all)—the absence of direct federal checks on state conduct which might infringe the ordinary liberties and rights of property that people in the several states enjoy. Slavery triggered that. The 14th Amendment starts to put powerful restrictions on what the state can do. It calls for judicial enforcement, but under Section 5 it also allows the Congress to enforce these restrictions on state behavior by appropriate legislation.

To Miller, if you gave the term "privileges or immunities" a very broad construction, it meant in effect that the federal government would not become "the perpetual censor" of all the activities that took place inside all the states. What he did not want to accept, for all sorts of institutional and structural reasons, was the thought that the entire 14th Amendment could work such a massive transformation over state and federal government. If you just read it and you're not worried about political consequences but fidelity to constitutional text, it has those massive consequences because that's the way it was written.

How does Miller avoid the textual conclusion? He doesn't read the second clause of Section 1 in the same way he reads the first clause. He says, in effect, When it refers to citizens of the United States, it doesn't mean those persons who were born and naturalized in the United States, who are now subject to protection against various kinds of abuses of their states. Rather it refers only to these people in their role as federal citizens, and the only thing governed by the Privileges and Immunities Clause is the right, for example, to travel across state lines to petition for a redress of grievances in Washington, which is protected under the First Amendment.

A vanishingly small interpretive sphere is created by this very artificial convention of saying that it's not the people that it's protecting; it's the people in their particular role. When this same clause is used in the 15th Amendment, it's talking about citizens of the United States who cannot be abridged of their right to vote because of race and color and so forth. It is perfectly clear that it's referring to people, not to roles. Nobody would have ever said that states could, under the 15th Amendment, abuse the rights of ordinary citizens on the ground of color in state elections, but could not do so with respect to federal elections. You take the parity between the various clauses and the whole Miller construct makes no sense at all.

The question, then, is what happens when you get the Privileges or Immunities Clause right? In effect you import for the substantive rights the ones that were on the list referenced by Bushrod Washington, and the Clause is going to be much bigger with respect to what it does. It's clearly going to have commercial implications, but it might also be possible that things that were not in the original Privileges and Immunities Clause of Article IV would be read back in, like the right to conscience, the right to marry, and so forth. Are these going to be covered or are they not? Are they privileges or immunities? There's going to be a lot of hard work to do because when you go back to the tradition, Bushrod Washington cannot be the sole person to give content to an amendment. If some sorts of associational liberties are going to be protected, there's going to be a very natural tendency to try to expand that list of associations to cover things that are not commercial. That's the first point.

The second point is whether these rights will be absolute. I think the answer to that particular question is, They are not going to be. Anybody looking at the interpretive tradition that goes back to Biblical or Roman law understands the following: Every major proposition which protects liberty or property, or provides equality of religion and so forth is always going to be subject to a series of implied exceptions. Nobody can use the rights that are therein conferred upon them in ways that systematically derogate from the parallel rights that are given to other individuals. I may have freedom of action. It doesn't mean that I can beat you to a pulp, because under those circumstances your freedom of action is necessarily denied. The state in its police power is supposed to intervene where self-defense leaves off, and therefore provide protection to people against the aggressions of other individuals, limiting the use other people make of their property, all in the name of the health, safety, general welfare, and public morality, which was the traditional nineteenth-century formulation.

To some people, that means you take away with the police power everything you give with the basic grant. That was not the view of the nineteenth-century judges, who on this point were more astute than many of the twentieth-century judges. Rather, they construed the police power as modern judges construe it with respect to the First Amendment, where they actually care about the basic liberty and would never want that to go. Force and fraud are clearly out. Control of a monopoly and the allowance of certain forms of taxation are okay, but they must be circumscribed because the mere indication that there is some police power virtue is not sufficient to sustain the Amendment. You need the legislatures to show that it's narrowly tailored; other means are not available; and all the rest of it, which becomes modern constitutional interpretation very quickly.

Using this interpretation, the *Lochner* decision comes out the same, in many ways, as it actually was in 1905, with one key exception. Since it's dealing with privileges and immunities, it's only citizens, not all persons, who are protected. You can discriminate against aliens with respect to things that would otherwise be privileges and immunities. The history was very odd on this particular point, however. The dissenters in *The Slaughter-House Cases* were not amused by the fact that "privileges or immunities" was construed into nothingness. In the 1880s and the 1890s when the same issue started to come up again, they said to their opponents, "you may have won on privileges and immunities, but there's still 'liberty' insofar as it relates to the Due

Process Clause, and we're going to give it a very broad and capacious meaning so that it covers not only freedom from arrest and imprisonment but also the right to engage in various kinds of economic liberties." Ironically, that interpretation, along with the interpretation of substantive due process, seems to me to be clearly wrong-headed if "privileges or immunities" is construed in its proper fashion, against what many people, including myself, have thought in the past.

The entire two-tier structure of the 14th Amendment is, in effect, that there are certain basic rights given to all persons and that there are additional rights that are given preferentially to citizens. The line that is convenient to draw is essentially the one used today with regulatory takings on the one hand and physical dispossessions on the other. Citizens are the only ones who enjoy the rights of going into markets and having various kinds of contractual opportunity. Other people, aliens, are given a basic set of rights: you can't throw them in jail or strip them of their property without trial. Then the Due Process Clause really is about process, and it extends universally to all individuals. It would be indefensible to distinguish between, for example, men and women with respect to the due process of law and all the other kinds of things. Equal protection gets exactly the same meaning.

What's left out? First, the alien protections are gone, and this was not a trivial issue in the period between 1890 and 1920, because of the huge influx of aliens into the United States. There were many explicit statutes which simply said that aliens could not engage in various kinds of activities within a state, which were struck down on the strength of the Due Process Clause. Would they be permitted under Privileges or Immunities? It would be much more difficult to use, because you'd have to argue that when you restrict the ability of an alien to contract with a citizen, you're also restricting the right of the citizen, and so therefore the only thing that you could prohibit are contracts between two aliens, not between citizens and aliens. We never tried to develop that line of jurisprudence, because we never had to.

The second, more important point is that if you go back to the *Corfield* case, one of the striking things about nineteenth-century constitutional law is that, while it's pretty good in protecting individuals against various kinds of interventions by the state, it is notoriously weak in answering the question of how the state ought to distribute various forms of public largesse. For example, because of *Corfield* states can give fisheries whomever they want, within their situational limitations. Maybe they can't distinguish among citizens, but they can certainly knock out the farms. When you're trying to figure out how public benefits are going to be supplied, the Privileges and Immunities Clause doesn't give you much purchase. When you get to a case like *Brown v. Board*, it is much more difficult to argue that it's correctly decided if in fact the state provision of education is something exclusively within its province. That's heretical today but it's probably consistent with the historical evidence, which cut both ways. There were both explicit black preference programs, forty acres and a mule, and segregated galleries at the time it was being debated.

Would all this be able to last? My answer embraces a form of constitutional fatalism. When you start to think about constitutional law, there are basically two levels. In international law, people usually follow the ordinary rules until their vital interests are at stake, and then they go to war. When you're dealing with constitutional issues, in all the mid-level questions that one routinely faces, generally judges will show a certain degree of fidelity to text and basic structure. With an issue as important as *de jure* racial segregation, however—which you think will eat out the guts of a country unless you do something about it—the attitudes start to shift a little bit. Some degree of legerdemain is probable with respect to the way in which the Amendments work. Much of what happened in the Warren Court with segregation, the voting cases and so forth, relied on a very aggressive reading of equal protection and due process, which in fact would not be possible if they were only concerned with the standard rules associated with criminal trials. Equal protection would mean that I couldn't put heavier sanctions on you than on me in a criminal case. I would have to give everyone, regardless of race, sex, or anything else, the same kinds of criminal protection.

How do I know that's right? I don't know. But let me make this simple observation. On the Equal Rights Amendment and making sex characterizations explicit in the Constitution . . . they don't use Equal Protection anymore. They say the "equality" of the law shall not be abridged. Why are they shifting it around? Intuitively, they sense that the word "protection" was used in its night-watchman sense, and the word "equality" is in fact a much broader form of guarantee. This is a controversial history in which much of what I believe myself is called into question. But the reason I'm not sure it's a debate is because when you're of two minds, you never quite know which side of the world you stand on. With that happy note, I will now turn things over to Mark. Thank you.

PROFESSOR GRABER: Following Professor Epstein is particularly difficult because he has done a thing extraordinarily rare in scholarship. Most of us inherit stock positions. We spend our academic lives developing new arguments for these stock positions. When I was in law school, everyone knew *Lochner* was wrongly decided. It was simply beyond the pale to say the case was correctly decided. If you said so, you flunked the exam. All you could do was develop a new justification for thinking *Lochner* and the freedom of contract wrong. Thanks to Professor Epstein, that is no longer the case. He has almost single-handedly made constitutional arguments for economic liberties respectable. He has added to the stock of ideas we debate. One person has literally created new forms of argument that the academic world regards as respectable. Now when you say *Lochner* was correctly decided, you get graded fairly.

One problem with casting this as a debate, as Professor Epstein said, is that legal historians think differently than academic lawyers, and my background is in legal/political history. People commonly make assertions that have unintended legal consequences. The 21st Amendment may illustrate this phenomenon. The plain text of that Amendment

seems to indicate that states may discriminate on behalf of the state alcohol industry, although as an historical matter, no framer had this outcome in mind. As a legal historian, I'm mostly interested in what people were trying to do, while an academic lawyer like Professor Epstein is mostly interested in what people legally did. We look at the proverbial elephant and reach very different conclusions because people may try to do something legally, and fail, or do other things.

A good example of our differences is in the structure of his talk. He says here are four sentences in Section 1; let us find the distinct meaning of each and how they all fit together. John Marshall and others similarly assumed that the Constitution has no superfluous passages. Indeed, one of the claims Justice Field makes in *The Slaughter-House Cases* is that Justice Miller must be wrong because if he's right, the Privileges and Immunities Clause is superfluous. An historian might take a different view. In practice, people repeat themselves. Let me say this again: People repeat themselves. Is that clear? Is anyone going to go home tonight and take the past four sentences and try to figure out if each of them has a different meaning? There is a good deal of evidence that constitutionally we repeat ourselves. The 11th Amendment tells the Supreme Court that the decision in *Chisholm v. Georgia* wrongly held that citizens of one state could sue a different state in federal court. The framers of the 11th Amendment believed the original Constitution did not vest federal courts with jurisdiction over such cases; the matter just needed to stated clearly for the benefit of the justices. We might call the 11th Amendment the "Constitution for Dummies." The same is true for the 16th Amendment, if you believe the Income Tax Cases of 1895 were wrongly decided. If you believe James Madison's speech introducing the Bill of Rights, the entire Bill of Rights is already in the Constitution.

The Constitution may mean something else from a lawyer's perspective after the Bill of Rights was added. As an historian I want to say maybe the Bill of Rights did not legally change the Constitution. Maybe the Framers simply made the constitutional obligation to protect certain liberties more explicit. More important for present purposes, this same kind of analysis may help us understand the purpose and meaning of the Civil War Amendments. I start not with the text, but with what people were trying to do. I ask what were the regional differences between the sections that caused the Civil War? What were the problems Reconstruction Republicans were trying to address? We begin where Justice Miller began, by asking about the central purposes of the post-Civil War Amendments. First, I want to ask, what is slavery?

Justice Miller and Richard Epstein, in his paper, read slavery very narrowly, as did the civil rights cases: slavery as bondage. Did Republicans in 1866 read slavery that narrowly? Interestingly, American thought about slavery evolved. When Americans in the 1780s spoke of slavery, they spoke of political slavery, being unable to vote. Taxation without representation. When Americans in 1850 spoke of slavery, they spoke of economic and family relationships. The defining element of slavery was that slaves had no right to enjoy the fruit of their labors, and that slaves could not control their families. It's important for understanding the 14th Amendment that the lack of family rights was as much a defining element of slavery as the lack of economic rights. What economic rights, however, is unclear. The Republican Party before and after the Civil War celebrated free labor. Is there a difference between free labor and free enterprise? How does knowing that the Republican Party was composed 80 percent of Whigs who supported a tariff and internal improvements affect our analysis of what free labor meant in 1866?

Relying on the 13th Amendment, these Republicans passed a rash of legislation. The Civil Rights Act of 1866 was passed under the 13th Amendment. The Freedmen's Bureau, which was a welfare law giving positive rights, was passed under the 13th Amendment. Many Republicans insisted that Section 1 of the 14th Amendment was legally superfluous. Ratification was necessary only because President Johnson failed to comprehend the broad scope of the 13th Amendment when vetoing the above bills. Prominent Republicans believed everything they wanted to do under the 14th Amendment could be justified under the 13th Amendment, but new language had the virtue of removing any constitutional taint from their program. They passed the 14th Amendment for a second reason. Justice Miller was wrong when he said the post-Civil War Amendments were only about slavery. They were also about the Southern states' violations of the rights of white people.

In 1798, a law passed in Georgia criminalized efforts to enforce the Supreme Court decision in *Chisholm v. Georgia*. Black seamen laws were passed by many Southern states, imprisoning any person of color who came aboard a ship to port. Northern states protested, sending a delegation led by Samuel Hoar to South Carolina and another to Louisiana. The governors of both states told each delegation to leave immediately; or be lynched or imprisoned.

We know about nullification. We know that James Buchanan claimed he had no constitutional authority to enforce federal law in the states that had seceded. What did the Radical Republicans say on the floor of Congress when the Privileges and Immunities Clause was debated? They condemned nullification and Buchanan; they condemned these examples of southern insolence; and they insisted that the federal government must have the power to defend federal law in recalcitrant states. It is perhaps true that the dormant Commerce Clause protected the right of black seamen, but the dormant Commerce Clause had not provided that protection before the Civil War. During the years immediately after the Civil War, Republicans concluded that more language was needed. The Privileges and Immunities Clause was probably that language. To understand why, we need to know about privileges, immunities, and rights.

An important distinction existed in nineteenth century constitutionalism: citizens have privileges and immunities; persons have rights. The natural law jurisprudence in the years before the Civil War was far more extensive than Professor Epstein describes in his paper. The first invocation of substantive due process in a Supreme Court opinion was not in the late nineteenth century. It was not even in *Dred Scott*, a case in which both sides invoked substantive due

process. It was actually in a patent case, *Bloomer v. McQuewan*, which condemned under due process legislation that transferred property from A to B.

Due process rights are moreso natural rights than are privileges and immunities of citizens, because, as every good American knew in 1866, you had no natural right to be a citizen. This was central to Thomas Jefferson,'s political thought. He maintained that slavery violated the natural rights of slaves, but that slaves had no natural right to be citizens. Colonization violated no rights, because free blacks have no natural right to be citizens of the United States. Southern courts, when talking about the rights of blacks, insisted that blacks had no natural rights, but that all communities may vest them with certain statutory *privileges*. These are matters of legislative discretion, but if the legislation exists and free blacks have such a positive right, the court must respect that right as a matter of law.

This is the meaning of the 14th Amendment. It is not an Amendment that says citizens get greater rights, perhaps even more natural rights, than aliens. Rather, the Due Process Clause is to some degree a natural rights clause. The Privileges and Immunities Clause is a nationalism clause directed at violations of federal law like those that took place in the South before the Civil War. That's how it was introduced in Congress, and the language makes sense.

To summarize where our differences are and where they aren't: Professor Epstein and I agree that the 14th Amendment probably protects certain natural rights. He tends to locate them primarily in the Privileges and Immunities Clause; I locate them primarily in the Due Process Clause. Another reason I think due process is historically the correct location is the antislavery movement made extensive use of natural laws arguments, and they consistently invoked the due process clause when doing so. They did not, by comparison, make many privileges and immunities arguments. In short, we disagree primarily on location.

We probably also disagree on one clause that Professor Epstein left out. If we're going to read the 14th Amendment, we should read all of it, including Section 5: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Supreme Court was not very popular among many Republicans in 1866. They hated the justices who decided *Dred Scott*, and feared with good reason that the judicial majority was hostile to congressional Reconstruction. Most historians believe the crucial provision of 14th Amendment was Section 5, which empowered Congress to determine how best to enforce the post-Civil War Constitution. Section 1 was somewhat vague because Republicans left for future Republican congressional majorities the task of figuring out what liberties needed national protection. In short, future Republicans officials were constitutionally charged with the responsibility of determining the rights of Americans on the basis of circumstances before them, and not simply the circumstances of 1866. This strongly suggests that, at least with respect to legislatures, the Fourteenth Amendment constitutionalizes the possibility that understanding of natural rights may evolve, that we may have better knowledge of morality and natural rights than our ancestors. Thank you very much.