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## Anything But Common: The Role of Louisiana's Civilian Tradition in the Development of Federal Civil Rights Jurisprudence under the Fourteenth Amendment

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**ANYTHING BUT COMMON: THE ROLE OF LOUISIANA’S  
CIVILIAN TRADITION IN THE DEVELOPMENT OF  
FEDERAL CIVIL RIGHTS JURISPRUDENCE UNDER THE  
FOURTEENTH AMENDMENT**

Jared Bianchi\*

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\* J.D., Vermont Law School, 2013; B.A., University of New Orleans, 2009. I would like to thank Professor Betsy Baker and Colin Beckman for their invaluable insight and encouragement.

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#### ABSTRACT

The famed *Slaughterhouse Cases* were the first cases to interpret the Fourteenth Amendment. Those cases arose from a Louisiana controversy. This essay suggests that Fourteenth Amendment jurisprudence, including Substantive Due Process, is rooted in the civilian private law tradition as received in Louisiana and as argued by the butchers in the *Slaughterhouse Cases*. The essay explores the civil law roots of the Privileges and Immunities Clause, beginning with the Twelve Tables and the Code of Justinian. The essay explores how those early codes were appreciated by subsequent Louisiana jurists, and how the civil law approach became an integral part of subsequent Supreme Court rulings involving the Fourteenth Amendment. Throughout this process, both the factual matters at issue in the *Slaughterhouse Cases*, and also the philosophical underpinnings that created the framework for the butchers' complaint will be examined. The essay uses French and Roman legal texts, as well as Louisiana's own legal history, to show that the Act that established the centralized slaughterhouse and stock yards was an affront to the *ius commune* and *ius cogens* of the era, but that the dissents that agree with that interpretation, and not the majority opinion, served as precedent in many subsequent Fourteenth Amendment cases. Finally, the essay shows that while the civilian approach reached its zenith with the *Lochner* era, it remains relevant, and indeed central, to an understanding of modern Substantive Due Process case-law.

## I. INTRODUCTION

If it be said that the civil law and not the common law is the basis of the jurisprudence of Louisiana, I answer that the decree of Louis XVI, in 1776, abolished all monopolies of trades and all special privileges of corporations, guilds, and trading companies, and authorized every person to exercise, without restraint, his art, trade, or profession, and such has been the law of France and of her colonies ever since, and that law prevailed in Louisiana at the time of her cession to the United States. Since then, notwithstanding the existence in that State of the civil law as the basis of her jurisprudence, freedom of pursuit has been always recognized as the common right of her citizens.<sup>1</sup>

There exists among the members of the bar of most states a popular though misguided perception of Louisiana and her legal customs. Amongst these misconceptions is that while the rest of the country developed a common law based upon the Anglo-American legal tradition, Louisianans continued to adhere to some strange legal form known as the Napoleonic Code,<sup>2</sup> causing the two systems to develop separately and having little bearing upon one another.<sup>3</sup> In fact, Louisiana's rich history has contributed a great deal to the common-law of the United States. There is perhaps no better illustration of this than the civil-rights jurisprudence that issued from the Supreme Court following the infamous Slaughterhouse Cases.

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1. Slaughterhouse Cases, 83 U.S. 36, 105 (1872) (Field, J., dissenting).

2. The term "Napoleonic Code" is a common misnomer used by some to characterize the source of the Louisiana Civil Code. In fact, the "*Code Napoléon*," or French Civil Code, was never applied in Louisiana, as it was enacted in 1804, after the Louisiana Purchase (1803). When codification took place in Louisiana (Digest of 1808), Spanish law was in force. The Digest of 1808 and the Louisiana Civil Code, which codified Spanish law, borrowed the form of the French Civil Code, and its substance wherever it appeared to be identical to Spanish law.

3. The idea that the Louisiana Civil Code is a simple continuation of the *Code Napoléon* is a misconception. Louisiana had been a Spanish colony for several years before its brief cession to Napoleon and subsequent cession to the Americans, in 1804. See Symeon Symeonides, *An Introduction to "The Romanist Tradition of Louisiana": One Day in the Life of Louisiana Law*, 56 LA. L. REV. 249 (1995).

The purpose of this essay is to illustrate three points: that the civil law of Louisiana embodies a certain conception of civil rights and individual liberties, received from the *ius commune* and *ius cogens* of its civilian forebears; that the argument undertaken on behalf of the butchers in the Slaughterhouse Cases represents that conception of privileges and immunities; and that while the butchers lost their case, the arguments advanced on their behalf have had significant impact on federal civil rights jurisprudence, reaching a zenith during the *Lochner* era.<sup>4</sup> In going through this process, it is my hope that the reader will gain a greater understanding of the evolution of the American conception of liberty. I hope that this will in turn raise awareness among members of the bar about the degree to which civilian legal thought has shaped that evolution. The purpose of this article is not to advocate for or against any conception of rights or liberties, *Lochnerian* or otherwise. That intriguing debate has produced a great deal of able research already.<sup>5</sup>

## II. THE CIVILIAN CONCEPTION OF LIBERTY: *IUS COGENS*, *IUS COMMUNE*

### A. *Economic Liberty as a Feature of Ius Cogens, and Ius Cogens as a Feature of Domestic Law*

Underlying many codified legal systems are the concepts of *ius cogens* and *ius commune*. *Ius cogens* may be best translated as peremptory norms, so normative as to be not susceptible to derogation.<sup>6</sup> Although the term is generally thought to apply to the

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4. The term “*Lochner* era” refers to a period during which substantive due process jurisprudence was characterized by an emphasis on economic rights, such as liberty of contract. The era is so named because of the landmark decision in *Lochner v. New York*, *infra* note 124, which typified the period. The *Lochner* era will be discussed in greater detail in a later section.

5. See, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (Univ. of Chicago Press 2011).

6. See, e.g., Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331:

sphere of international law, is more correctly understood as a secular, civilian iteration of natural law.<sup>7</sup> Although the subject of this paper is not specifically international, the law as received in Louisiana is the product of many centuries of dialogue between the nations who had adopted and refined a codified system of law, and those early Romanist thinkers and jurists from whom that law was received. The development of these civilian jurisdictions must therefore reflect the character of those several nations involved in these epochal dialogues. Louisiana was first the colony of a distant kingdom and, as a result, its jurisprudence is steeped in a tradition of international dealing. Specifically, the colony of Louisiana dealt extensively with its colonial masters in France and Spain respectively, but also with its common-law neighbor, the United States. Until the southern part of Louisiana became a territory (Territory of Orleans) and then finally a state (Louisiana), relations between Louisiana and her neighbors and various colonizers were necessarily international in nature. In order to have a peremptory norm as understood in the international context, that norm must be viewed as not susceptible to derogation in each individual country. *Ius cogens* can only apply internationally so long as each of the several countries upon whom it is to apply share a normative sense of the importance of the rights enshrined. For this reason there is no logic to barring *ius cogens* from the lexicon of the domestic civilian jurist.

With that in mind, our first task is to discern the nature of the civilian conception of liberty and rights. Noted contemporary

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For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

7. James S. Gifford, *Jus Cogens Fourteenth Amendment Privileges or Immunities*, 16 ARIZ. J. INT'L & COMP. L. 481, 485 (1999) (arguing that *jus cogens* is "essentially a secular articulation of natural law").

French intellectual Alexandre Kojève posits that human phenomenon generally, and *droit* specifically, arose from anthropogenic desires and the acts that accomplished the aim of those desires.<sup>8</sup> Kojève states that this process is expressed as either war or economics. The duality is the result of the “risk of the master in the struggle [on the one hand] and on the other hand, the work of the slave which results from it.”<sup>9</sup> To Kojève, justice as achieved by *droit* is a human phenomenon, and in order for a human to be fully realized, he must be a citizen who is neither a slave nor a master, “being one and the other simultaneously.”<sup>10</sup> Through this discussion, we begin to see that the idea of liberty of labor, as expressed through work, is inseparable from a certain conception of the free citizen. To Kojève, a man who has no freedom of labor cannot be a fully realized human being and is therefore denied his humanity *per se*.<sup>11</sup> Personal and economic liberty are therefore features of a legal system that cannot be abrogated if the system is to retain its legitimacy. Although Kojève’s analysis is more recent, echoes of those same concerns are seen in many early civilian texts.

That certain rights of a man are not susceptible to derogation as a proper function of legitimate law is a known feature of *ius cogens*. By applying Kojève’s conception of the actualized human,

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8. ALEXANDRE KOJÈVE, OUTLINE OF A PHENOMENOLOGY OF RIGHT 215 (Bryan-Paul Frost ed., Bryan-Paul Frost & Robert Howse trans., 2000) (dialectic concerning the source of *droit*) (“In other words, all human phenomena have as their basis War and Economics, based upon Work. It is economics and war which constitute the actuality of human reality, of the historical existence of humanity”).

9. *Id.*

10. *Id.* at 216 (“And if he is man, and not animal, as warrior, worker, or citizen, it is not only as such that he is so. He is just as human as a ‘religious subject’ or a ‘moral subject’ and so on, or finally as a ‘subject of *droit*’”).

11. *See id.* at 231:

Just as the Slave can only free himself by synthesizing mastery with his servitude, his *Droit* can only be actualized by being synthesized with the *Droit* of his master. And just as the freed slave (by resumption of the struggle and an acceptance of the risk) is neither Master or Slave, but Citizen, actualized slavish *Droit* is neither slavish nor aristocratic: it is the synthetic *Droit* of the Citizen based upon the Justice of equity.

we are shown that the nature of those fundamental rights requires that freedom of labor run to the citizens governed by valid law. In the French legal tradition, liberty and equality are both necessary to the proper operation of justice. It is the emphasis on equality that requires a high degree of economic liberty, as liberty and equality are seen as inseparable features of a just legal system.<sup>12</sup> Indeed, amongst the French, whose Civil Code served as the model for the Louisiana Civil Code, inequality is an “infringement” of common rights that results from unjust distinctions between the rich and poor.<sup>13</sup> In the French tradition, the absence of privileges granted to a given caste is an imperative feature of a just civilian society and was a feature of the *ius cogens* which formed the opinions of the early Louisiana codifiers.

*B. Ius Commune, Private Law, and the Presumptions of the Louisiana Civil Code*

As rights and liberties belong to people, codification of private law places people on equal footing with respect to those rights. These rights, connected to peremptory norms within the *ius cogens*, are given force within the *ius commune* by way of the codified private law. That private law should be seen as a protection for the equal status of all citizens subject to the *ius commune* was so central to early French codifiers that in the case of the *Code Napoléon*, the general grant of rights to all French citizens falls under Title I, Chapter I.<sup>14</sup> That the recognition of civil rights as a birthright for all Frenchmen precedes a code that is largely concerned with how those citizens structure their dealings under private law is relevant in two ways. Structurally, the

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12. ALFRED FOULLÉE ET AL., Vol.VII MODERN LEGAL PHILOSOPHY SERIES: MODERN FRENCH LEGAL PHILOSOPHY 37 (Committee of the Association of American Law Schools ed., Franklin W. Scott & Joseph P. Camberlain trans., 1916) (“Yet for the French this is only the first foundation-stone of law; they do not comprehend liberty apart from *equality*. . .”).

13. *Id.* (“To the French, what is inequality, if not privilege for one man and servitude for another, and consequently a lack of liberty?”).

14. CODE CIVIL [C. CIV.], Title 1, chapter 1 (Fr.).



placement of these provisions reveals that the codifiers intended to place civil rights at the fore of any discussion of private law. Substantively, the *Code Napoléon* was promulgated in order to cement the legitimacy of the law.<sup>15</sup> By placing these rights so prominently, the codifiers put the people of France on notice that the rights so enshrined should be expected and respected in their private dealings, allowing the citizen to take an individualized possession of, and responsibility for, his own rights. The promulgation of these early codes served to place all French citizens on equal footing with respect to the exercise of their rights, and in so doing secured those rights from abuse. An individualized realization of the protection of economic liberty is necessary to ensure the citizens' sense of security in their economic rights.<sup>16</sup> Security is necessary to the development of wealth and democratic character, and that security is in turn protected as a function of the private law within the *ius commune*.<sup>17</sup> The *ius commune* as expressed in the civil code, running from the Twelve Tables, through France and Spain, and ultimately to Louisiana, acts to promulgate these private rights, and serves to publicize the fact that each citizen has been put on equivalent footing with respect to rights against third parties.<sup>18</sup>

### *C. The Civil Law as Received in Louisiana*

In 1806, the Louisiana Territorial Legislature attempted to pass an Act declaring the continued applicability of the civilian authorities, until such time as “the Legislature may form a civil

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15. *Id.* at art. 1.

16. FOUILLÉE ET AL., *supra* note 12, at 420 (“neither wealth nor character can develop where the feeling of [moral and economic] security do not exist”).

17. *Id.* at 423–25 (discussing the features of private law “necessary to assure the validity of a right as against a third person”).

18. *See, e.g.*, JEREMY BENTHAM, *Of Promulgation of the Laws and Promulgation of the Reasons Thereof*, in THE WORKS OF JEREMY BENTHAM, PUBLISHED UNDER THE SUPERINTENDENCE OF HIS EXECUTOR, JOHN BOWRING 157, 157–58 (Simpkin, Marshal & Co. 1893) (discussing the importance of promulgating law in order to teach men how to live together without causing one another injury).

code for the territory.”<sup>19</sup> The Act to Preserve the Civil Law was a direct rebuke to the American President, Thomas Jefferson, who had installed Governor C.C. Claiborne with direct instructions to implement the common law.<sup>20</sup> Although this Act was eventually repealed, it is useful as it specifies the authorities and customs that formed the Louisiana *ius commune*. Among those authorities mentioned explicitly within this Act were: (1) the “Roman Civil Code [sic], as being the foundation of the Spanish law,” described as being composed of the Code of Justinian, the work of the commentators and particularly Domat’s treatise on the civil law; (2) the Spanish law, consisting of recompilations and books listed in the Act.<sup>21</sup> Louisianans of the period feared that the common law’s instability would result in a usurpation of property rights.<sup>22</sup> The Act to Preserve the Civil Law was born out of a fear of the perceived uncertainty of the common law, and offers insight into precisely what civil law was received by the people of Louisiana.<sup>23</sup> The *Corpus Iuris Civilis* and the Twelve Tables upon which it was built, do describe a conception of the privileges and immunities

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19. An Act declaring the laws which continue to be in force in the Territory of Orleans, and authors which may be recurred to as authorities within the same (1806), *reprinted in* 1 LOUISIANA CIVIL CODE at xxv (A.N. Yiannopolous ed., 2013) [hereinafter “The Act to Preserve the Civil Law” or “this Act”].

20. Edward F. Haas, *Louisiana’s Legal Heritage: An Introduction, to LOUISIANA’S LEGAL HERITAGE* 3 (Edward F. Haas ed., Perdido Bay Press 1983) (describing Gov. Claiborne and Pres. Jefferson’s stated goal as “assimilation” of the Louisiana Territory).

21. *See* The Act to Preserve the Civil Law, *supra* note 19, at 6.

22. The Act to Preserve the Civil Law was passed by the House of Representatives and the Legislative Council, but was vetoed by Governor William C.C. Claiborne. John A. Lovett, *On the Principle of Legal Certainty in the Louisiana Civil Law Tradition: From the Manifesto to the Great Repealing Act and Beyond*, 63 LA. L. REV. 1397, 1403 (2003).

23. *See id.* at 1408:

Because the authors of the Manifesto linked the survival of their land titles, and their closely interrelated property rights in the slaves who exploited those lands, to the survival of pre-cession Spanish (and French) law governing those property rights, it is hardly surprising that the Manifesto spoke with such intensity about the consequences of ‘overthrowing received [civil law].’

(quoting 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS 1803-1812 652–53 (Clarence E. Carter ed., U.S. Gov’t Printing Office 1940)).

afforded to a Roman of that period. That conception is rooted in the language of equality before the law. Using characteristically direct language, Law I of Table IX tells us that in ancient Rome, “[N]o privileges, or statutes, shall be enacted in favor of private persons, to the injury of others, contrary to the law common to all citizens, and which all individuals, no matter of what rank, have a right to use.”<sup>24</sup> The civilian tradition of enshrining those rights as a function of private law seems to have origins in the Roman characterization of law as being either public or private. It borders on the tautological to point out that in order for a right to run to an individual, it must have an individualized expression. Under the Roman approach, this could only be accomplished through the use of private law, as public law was only concerned with the welfare of the state.<sup>25</sup>

This fundamental truth would have been understood by the drafters of the *Code Napoléon* and the subsequent Digest of the Civil Laws drafted by attorneys Louis Casimir Moreau Lislet and John Brown.<sup>26</sup> Whether the drafters of the “Old Code” (as the Digest was later called) intended to adopt a French or Spanish conception of the *ius commune* was the topic of a rollicking academic debate between two noted professors of law at Tulane University and Louisiana State University.<sup>27</sup> Professor Robert Pascal of Louisiana State University, and Professor Rodolfo Batiza

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24. SAMUEL PARSONS SCOTT, *THE CIVIL LAW* 73 (AMS Press 1973).

25. See J. INST. 1.1.4 (INSTITUTES OF JUSTINIAN (John Baron Moyle trans., Oxford Univ. Press, 7th prtg. 1967)):

The study of law consists of two branches, law public, and law private. The former relates to the welfare of the Roman State; the latter to the advantage of the individual citizen. Of private law then we may say that it is of threefold origin, being collected from the precepts of nature, from those of the law of nations, or from those of the civil law of Rome.

26. See Haas, *supra* note 20, at 4 (stating that the Digest of 1808 was divided into three books dealing separately with persons, with estates and things, and with the acquisition of property, and describing the code’s drafters).

27. See A.N. Yiannopoulos, *Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in *LOUISIANA’S LEGAL HERITAGE*, *supra* note 20, at 87.

of Tulane University locked horns in 1972, with Professor Batiza arguing that the sources of the Louisiana Code were largely French;<sup>28</sup> both Professors contributed a great deal to the literature on this matter. Some within the academy did concur with Professor Batiza's approach for a time.<sup>29</sup> More recently, the view that the Louisiana Civil Code was inspired primarily by French law has faded from prominence as a result of further research and discovery.<sup>30</sup> Either approach is sufficient to establish that the drafters, and the Louisiana Digest of 1808, were rooted in the civilian notion of private law. The fact that the Digest is not illustrative of the French revolutionary ideas did not prevent French legal culture from being pervasive in Louisiana: the French notion of liberty through equality under the law would later prosper in doctrinal and court arguments.

*D. The Constitution & Civil Code of Louisiana, circa 1870*

Confusion about which earlier laws were to survive, as only those contradicted by the Digest had been abrogated, made clear the need for Louisiana's Digest to be re-codified.<sup>31</sup> The redactors included Lislet, Edward Livingston, and others, who went about the task of crafting a coherent and complete civil code, this time

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28. *Id.* at 98 (citing Batiza for the proposition that 70% of the provisions of the Louisiana Civil code of 1808 were derived from the *Projet du Gouvernement* and the *Code Napoléon*, and another 15% was Spanish and Roman and doctrinal works) ("Thus 1,837 of 2,160 articles (or about 85% of the whole) were derived from French sources while most of the remaining sources were derived from Spanish sources") (*internal quotes omitted*).

29. *Id.* at 101–2.

30. See Olivier Moréteau, *De Revolutionibus: The Place of the Civil Code in Louisiana and in the Legal Universe*, 5 J. CIV. L. STUD. 31, 37 (2012) (discussing the evidence that the substance of the Louisiana Civil Code was not derived primarily from French law); see also Thomas J. Semmes, *History of the Laws of Louisiana and of the Civil Law*, 5 J. CIV. L. STUD. 313 (2012) (first published as a book in 1873; Semmes discusses the largely-Spanish sources for the Louisiana Civil Code).

31. See A.N. Yiannopoloulos, *The Civil Codes of Louisiana*, 1 CIV. L. COMMENT. 1, 11 (2008) (citing *Cottin v. Cottin*, 5 Mart.(o.s.) 93 (La. 1817) as representative of the problems that had thrown the system into an unworkable state of tumult).

abrogating the ancient laws on points addressed in the code.<sup>32</sup> Many of those involved with the re-codification were in fact the same individuals who had clashed with President Jefferson over the original Act. Although the code was distinctly Louisianan, in that Roman and Spanish sources were used, these drafters brought a distinctly French conception of the civil law to their task, allowing us to infer the continued application of the principles discussed *supra*,<sup>33</sup> in doctrinal and court arguments. The Code was revised yet again after the Civil War. The Code of 1870 is largely the same as the Code of 1825, but for the removal of those parts dealing with slavery and the incorporation of other statutes passed subsequent to the 1825 Code.<sup>34</sup> This Code of 1870 is, in turn, applicable to the facts of the *Slaughterhouse Cases*.

*E. Public and Private Law as Expressed in the Louisiana Constitution*

Economic rights do not appear in any of the many revisions of Louisiana's Constitution until the most recent iteration, which was adopted in 1974.<sup>35</sup> The statement of economic rights appears in the preamble, which is an addition to the otherwise-similar preamble

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32. *Id.*

33. *Id.* at 12:

The redactors of the 1825 Code followed the French Civil Code closely and relied heavily on French doctrine and jurisprudence . . . . They drew freely from the treatises of Domat, Pothier, and Toullier, but, at the same time, paid attention to the Digest of Justinian, the Siete Partidas, Febrero, and other Spanish materials. Even so, the Code of 1825 contains for the most part provisions that have an exact equivalent in the French Civil Code.

34. *Id.* at 14:

The Civil Code of 1870 is substantially the Code of 1825. The changes made relate merely to the elimination of provisions concerning slavery, the incorporation of amendments made since 1825, and the integration of acts passed since 1825, which dealt with matters regulated in the Code without officially amending it. These changes necessitated renumbering the articles of the Code, but they did not affect its structure, underlying theory, or the substance of most of its provisions.

35. LA. CONST. pmbl. ("We, the people of Louisiana, grateful to Almighty God for the civil, political, economic, and religious liberties we enjoy. . . .").

to the Louisiana Constitution of 1921.<sup>36</sup> Instead, the early constitutions appear to have followed the Justinian approach, treating the constitution as an instrument of public law and eschewing any mention of private rights or liberties.<sup>37</sup> The marked shift in approach coincides with the end of the Civil War and the beginning of the Radical Republican and carpetbagger<sup>38</sup> rule, which held sway over the State of Louisiana during the early reconstruction period.<sup>39</sup> With the influx of carpetbaggers and with minority suffrage militarily ensured, the Louisiana Constitution of 1868 reflects the Radical Republican ideals and echoes language found in the Thirteenth Amendment to the United States Constitution.<sup>40</sup> This 1868 document sees the first use of the Louisiana Constitution to enumerate individual rights and liberties, thereby blurring the once neat distinction between public and private law.<sup>41</sup> Even though Louisiana had been weakened by a civil war and subjected to the importation of northern political actors, only some of the assimilation intended by Thomas Jefferson nearly seventy years prior was possible. It is a testament to the depth of the civil law importance to the Louisianans of the day that

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36. LA. CONST. pmbl. (repealed 1972) (“We, the people of Louisiana, grateful to Almighty God for the civil, political, and religious liberties we enjoy....”).

37. *See, e.g.*, LA. CONST. pmbl. (repealed 1861) (“We the people of Louisiana, do ordain and establish this Constitution”).

38. “Carpetbagger” is a derogatory term used by Southerners for those Northerners who moved south after the Civil War. They were viewed as outsiders and opportunists in search of personal financial gain at the expense of the local population.

39. *See e.g.*, LEE HARGRAVE, *THE LOUISIANA STATE CONSTITUTION* 11–12 (Oxford Univ. Press 2011). The post-Civil War Reconstruction period in the former Confederate (southern) states lasted from 1863–1877. By 1876, only three of the eleven states subject to Reconstruction were still occupied by the federal military: Florida, Louisiana, and South Carolina; *see* ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877* (Harper & Row 1988).

40. LA. CONST. Title I Art. 3 (repealed 1879) (“There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of a crime, whereof the party shall have been duly convicted”).

41. LA. CONST. pmbl. (repealed 1879) (“We the people of Louisiana, in order to establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity. . .”).

the civilian distinction between public and private law persisted as long as it did. It follows that, because the constitutions drafted under self-rule reflect the Roman distinction between public and private law, those pre-war instruments were a more true reflection of the civilian approach and, as a result, they are a more accurate reflection of the deeply held convictions of butchers of the era and their lawyers.

To those tradesmen and their attorneys, the right of self directed labor and economic liberty was so rooted in the civil law, and eventually in the Louisiana Civil Code, that there was no need to specify that right, as any act in contravention of those liberties would be repugnant to legitimate governance, and in derogation of the *ius cogens* and *ius commune*. There was no bill of rights in the original Louisiana Constitutions, not because the civilians had not considered rights at all, but because their approach was fundamentally different. A bill of rights was familiar to common law jurisdictions and would have been familiar to jurists in Louisiana. That such an enumeration was absent from the Louisiana Constitution until its addition by a reconstruction government, shows that it was previously omitted by choice; a fact that further supports the contention that the Civil Code, while private in nature, was intended to secure the liberties of the governed by way of equality before the law.

At this stage, it bears explicitly mentioning that thus far we have followed a clearly delineated path from the Twelve Tables and the *Corpus Iuris Civilis*, the foundational texts of civilian jurisprudence, to the French civil law, and now to the Louisiana law and custom, which would have been the custom and law governing those involved in the *Slaughterhouse* litigation.

## III. THE SLAUGHTERHOUSE CASES

*A. Historical Context: A Brief Detour through Corruption, a Monopoly and Reconstruction Politics*

On March 8, 1869 the Louisiana legislature passed a bill prohibiting the slaughter of livestock within what are now known as Orleans, Jefferson, and St. Bernard Parishes.<sup>42</sup> The ability to maintain livestock and butchering facilities was instead assigned to the seventeen-person Crescent City Live-Stock Landing and Slaughter-House Company.<sup>43</sup> The Act, entitled “An act to protect the health of the city of New Orleans, to locate the stock landings and slaughter-houses and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company” served to divest over 1000 local butchers and related workmen from their livelihoods.<sup>44</sup> While slaughtering operations in New Orleans had at one time been limited to a spit of land, now known as Algiers, on the opposite bank of the Mississippi river, the practice of *boucherie* spread quickly as the city grew.<sup>45</sup> This fast, unrestricted growth in a manifestly unsanitary trade led to some obvious risks and waste disposal issues. So acute was this problem, that not only was slaughtering sometimes done in the city streets, but improperly discarded livestock waste and butchering offal was left to fester in the streets and on the banks of the river.<sup>46</sup> The descriptions of those present at the time are predictable but shocking, as they describe a situation so putrid and unhealthy as to be unimaginable

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42. JULIUS J. MARKE, VIGNETTES OF LEGAL HISTORY 170 (Fred B. Rothman & Co. 1965).

43. Referred to hereinafter as “the Company.”

44. Act of Mar. 8, 1869, No. 117, 1869 La. Acts 170 [hereinafter “the Act”]; MARKE, *supra* note 42, at 170.

45. RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 38 (Univ. Press of Kansas 2003) (“Early in the century, slaughtering in New Orleans had been confined to a small area located directly across the Mississippi from the city and known as ‘Slaughterhouse Point’”).

46. *Id.* at 40.



and ultimately raising the question: why was the Act so vociferously opposed?<sup>47</sup>

### *1. Bribery*

The Slaughterhouse Act was not a new endeavor. The idea that the city ought to return to a centralized butcher model had been brought before the legislature, and was rejected and derided. The butchers had become a genuine political force, both organized and numerous.<sup>48</sup> To that end, it was difficult to pass effective regulation. Soon after the passage of the Act, it became clear that the various political roadblocks to regulatory reform had been cleared by the use of a well-established tactic: bribery. The legislators responsible for the passage of the Act had been given the opportunity to buy significant stock holdings in the new monopoly.<sup>49</sup> That pecuniary interest was sufficient to secure the passage of the Act. The question of the validity of an Act secured through bribery was central to the butcher's arguments at the state level.<sup>50</sup> Although the butchers argued that the Act was the result of a conspiracy to enrich private citizens, secured through deceit, fraud and bribery, an unfriendly Louisiana bench refused to rule on that issue.<sup>51</sup> The butchers argued that as "an act for the emolument

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47. *Id.* at 61:

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

(quoting testimony of a health officer of the third district, Louisiana House of Representatives Special Committee on the Removal of the Slaughterhouses, *Minute Book* (1867)).

48. *Id.* at 40–41 (discussing the butchers' considerable political influence, and explaining this as the cause for why reform failed).

49. MARKE, *supra* note 42, at 170.

50. *See, e.g.*, State ex rel. Belden v. Fagan, 22 La. Ann. 545, 547–48 (La. 1870).

51. *Id.*

of private individuals,” the Act was a private statute.<sup>52</sup> As the Court saw it, the Act was a valid exercise of police powers, and as such was a matter of public law, not private, as the butcher’s had urged.<sup>53</sup> While there have been attempts by some more recent scholars to rescue the reputation of the legislators and the Courts who ruled that the exclusion of the evidence was proper, bribery in the legislature generally, and with respect to the Act specifically, was common knowledge at the time.<sup>54</sup>

2. “[A] monopoly of a very odious character”<sup>55</sup>

The public resentment generated by the Act also grew from the nature of the power granted to the Company. Because the monopoly was seen as a benefit granted to a cabal of corrupt profiteers, and secured through graft, the monopoly lacked the intrinsic fairness apparent in other exceptions to the rules against monopolies.<sup>56</sup> Justice Bradley, riding circuit in Louisiana at the time, wrote in his decision that it seemed difficult “to conceive of a more flagrant case of violation of the fundamental rights of labor than” the monopoly granted to the Company.<sup>57</sup> This “odious”<sup>58</sup>

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52. *Id.*

53. *Id.*

54. Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1306 (1984) (describing the evidence of bribery as the result of southern obsession with corruption and as having little evidentiary basis) *contra* LABBÉ & LURIE, *supra* note 45, at 97–99 (citing litigation records of the stockholders in the company for numerous clear examples of specific occasions of bribery connected to the passage of the Act).

55. *Live-Stock Dealer’s & Butcher’s Ass’n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F.Cas. 649, 652 (C.C.D. La. 1870) *rev’d sub nom. Slaughterhouse Cases*, 83 U.S. 36 (1872).

56. Michael Conant, *Anti-Monopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 823–24 (1982) (discussing *Live-Stock Dealer’s Ass’n*, 15 F.Cas. 649 (1870)).

57. *Live-Stock Dealer’s Ass’n*, 15 F.Cas. at 653:

So far as the act of the legislature of Louisiana is a police regulation, it is, of course, entirely within its power to enact it. It is claimed to be nothing more. But this pretense is too bald for a moment’s consideration. It certainly does confer on the defendant corporation a monopoly of a very odious character. . . . But it is not sufficient to

monopoly would have been seen as especially egregious to citizens in a civil law jurisdiction, where the preferential treatment granted to the members of certain social castes resulted in the strong protection of those rights within the ambit of private law.

In a brief submitted to the United States Supreme Court, lead attorney for the butchers, John Campbell argues this same point.<sup>59</sup> Citing Thierry and De Tocqueville, Campbell points out that it was precisely the eradication of preferential privileges in labor that was credited with the rise, and indeed the very existence, of civil liberty for all.<sup>60</sup> Campbell's brief makes clear that the monopoly granted to the company was a privilege that was expressly forbidden in the French civil law as received by Louisianans a generation earlier.<sup>61</sup> The brief casts the monopoly as offensive to French and international history and human nature, arguing that what is now called *ius cogens* forbade unlawful servitude and restriction on the free practice of labor, and that the Constitution of the United States had adopted this peremptory norm through the ratification of the

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show that it is a monopoly and void at common law, for the legislature may alter the common law, and may establish a monopoly, unless that monopoly be one which contravenes the fundamental rights of the citizen protected by the constitution. . . . [T]he fourteenth amendment of the constitution was intended to protect the citizens of the United States in some fundamental privileges and immunities of an absolute and not merely of a relative character. And it seems to us that it would be difficult to conceive of a more flagrant case of violation of the fundamental rights of labor than the one before us.

58. *Id.*

59. Plaintiffs' Brief upon the Re-argument at 5 Slaughterhouse Cases, 83 U.S. 36 (1872) (Nos. 470, 476, 480), 1872 WL 15118.

60. *Id.* (tracing unjust labor privileges from ancient times to *banalités* (payments from peasants to lords) paid to the French lords, and the eradication of *banalité* by the French legislative assembly in 1791):

These rights of Banalite (sic) were all suppressed in the 23d section of the decree of 1791 of the legislative assembly. It declares that all rights of Banalite (sic) of the oven, mill, winepress, slaughter house, forge, and the like, whether founded on custom, prescription, or recognized by judicial sentence, should be abolished without indemnity. Historical writers attribute to this legislature,(sic) the suppression of castes in France, and the existence of civil liberty for all.

61. *Id.*

Thirteenth Amendment.<sup>62</sup> In an earlier supplemental brief to the Supreme Court, Campbell points out that much like the *ius cogens*, the assumptions that a worker could not be deprived of a right to apply their labor or craft to their own benefit “were recognized in the American customs and habitudes, and were assumed as valid in written law and judicial decisions, and in all the intercourse of society.”<sup>63</sup>

Campbell uses that historical background to argue that the monopoly granted to the Company was an affront to the butchers and was no different than the hated *banalité*, or the involuntary servitude, prohibited under the Thirteenth Amendment.<sup>64</sup> Although there is a clear irony, as detailed below, in Campbell making these arguments, they do indeed reflect an understanding of the Louisianan civilian tradition. This is evidenced by the swift repeal of all monopolies in Louisiana, including the Company’s monopoly, by the new Louisiana Constitution of 1879.<sup>65</sup> This new Louisiana Constitution passed as the reconstruction influence in the south dwindled, allowing the civilian impulse to again assert itself. Notably, the Company sued the State, and again found itself in front of Justice Miller’s Supreme Court.<sup>66</sup> There, the Company argued that articles 248 and 258 of the new Constitution of

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62. *Id.* at 6–8.

63. Supplemental Brief and Points of Plaintiffs in Error at 3 Slaughterhouse Cases, 83 U.S. 36 (1872), 1871 WL 14607.

64. Plaintiffs Brief upon the Re-argument, *supra* note 59, at 8–9.

65. *See* LA. CONST. art. 248 (repealed 1898):

The police juries of the several parishes, and the constituted authorities of all incorporated municipalities of the state, shall alone have the power of regulating the slaughtering of cattle and other live-stock within their respective limits: Provided, no monopoly or exclusive privilege shall exist in this state, nor such business be restricted to the land or houses of any individual or corporation: provided, the ordinances designating places for slaughtering shall obtain the concurrent approval of the board of health or other sanitary organization.

*See also* LA. CONST. art. 258 (repealed 1898) (“[T]he monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies, are hereby abolished”).

66. *Butchers’ Union Slaughter-House & Live-Stock Landing Co., v. Crescent City Live-stock & Slaughter-House Co.*, 111 U.S. 746 (1884).

Louisiana were void as an impermissible infringement of their contract with an earlier legislature.<sup>67</sup> In that case, Justice Miller, again writing for the majority, deferred to the State and allowed the articles in question to stand.<sup>68</sup>

*3. The Politics of Reconstruction: Attorneys and Justices in the Slaughterhouse Cases*

All of the foregoing discussion appears to be a principled debate over sound legal principles. Had the *Slaughterhouse Cases* arisen in a vacuum, this certainly would have been the case. Instead, the litigation arose while the dust of the American Civil War still hung in the air. The case featured some of the keenest and most influential legal minds of the day. Even more than today, the bar of the reconstruction era was an exclusive guild, and, especially at such a high level, its members could be expected to have interacted frequently. In the years surrounding the Civil War, this familiarity understandably bred some personal acrimony among the members of the bar. These pre-eminent legal minds were quick to involve themselves in the cause not out of a sincere interest in the appropriate setting for live-stock slaughter, but out of deep and divisive disagreements about the role of the federal government in the Deep South following the Civil War.

The chief attorney for the butchers, John Campbell, was a son of the South and had served as a United States Supreme Court Justice for several years before resigning upon Alabama's secession from the Union.<sup>69</sup> After a return to the practice of law in his adopted home of New Orleans, Campbell became disenchanted, even bitter, at the state of affairs in the

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67. *Id.* at 749–50 (discussing the Company's argument that the Louisiana Constitution of 1879 included articles that were an impermissible infringement of a contractual obligation under U.S. CONST. Art. 1 § 10).

68. *Id.* at 754.

69. Jonathan Lurie, *Reflections on Justice Samuel F. Miller & the Slaughter-House Cases: Still a Meaty Subject*, 1 N.Y.U. J. L. & LIBERTY 355, 359–60 (2005) [hereinafter Lurie, *Reflections on Justice Miller*].

reconstruction South.<sup>70</sup> Campbell's ire eventually led him into the ironic position of arguing that federal law, in the form of a Constitutional Amendment passed for the benefit of blacks and former slaves, precluded the legislature of the State of Louisiana from enacting certain laws.<sup>71</sup> Chief Justice Miller, author of the *Slaughterhouse* decision, had joined the Court the year after Campbell's resignation. In his correspondence, Miller had initially offered faint praise in support of Campbell.<sup>72</sup> He had apparently changed his opinion of the man when he wrote of Campbell: "I have neither seen nor heard of any action of Judge Campbell's since the rebellion . . . which was aimed at healing the breach he contributed so much to make."<sup>73</sup> In addition, there was significant concern that the argument forwarded by Campbell would dilute the protections granted to the freed-men under the Fourteenth Amendment.<sup>74</sup> Miller's skepticism grew in part from the very real debates concerning federalism.<sup>75</sup> It was into this environment of

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70. *Id.* at 360–61 (recounting Campbell's path from the Supreme Court, to Assistant Secretary of the War for the Confederacy, to prison and ultimately to New Orleans, as well as describing Campbell as bitter at the state corruption and racial integration in the South).

71. *Id.* at 361 ("Here the ex-Confederate official who had glorified states' rights now repudiated the idea 'that the Legislatures of the States have powers ... limited only by the express prohibitions of the [state and federal constitutions], or by necessary implication'") (citing LABBÉ & LURIE, *supra* note 45) (alteration in original).

72. LABBÉ & LURIE, *supra* note 45, at 108–09. ("I esteem him very highly and look upon him as a man of honor and an unfortunate one") (citing CHARLES FAIRMAN, MR. JUSTICE MILLER & THE SUPREME COURT 1862-1890 at 113 (Harvard Univ. Press 1939)).

73. *Id.* (calling Campbell a partisan and a leader of "the worst branch" of New Orleans politics).

74. Lurie, *Reflections on Justice Miller*, *supra* note 69, at 367.

75. See e.g., James W. Fox Jr., *Re-Readings & Misreadings: Slaughterhouse, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 86 (2002/2003):

For Miller, the only option other than his restrictive view of the Clause was one that destroyed federalism and dangerously empowered the Court. The very starkness of the alternatives, argued Miller, enabled him to accept what he considered an otherwise weak ('not always the most conclusive') argument: the parade of anti-federalism horrors. He saw no middle ground.

(quoting *Slaughterhouse Cases*, 83 U.S. 36, 78 (1872)).

war, graft, and personal strife that Campbell brought his arguments on behalf of the butchers.

*B. The Arguments Advanced*

*1. By the Company*

The Company maintained its simple yet effective argument at each level of appeal. First, they argued that the butcher's assertion that the legislature was bribed was unsupported by evidence.<sup>76</sup> The Company and the State maintained that the Act was a fair and legal application of the State's police power over the area of public health.<sup>77</sup> Lastly, these defendants also argued that the Privileges and Immunities clause of the Fourteenth Amendment was intended to extend only to the protection of rights received as the result of national citizenship, such as voting, *habeas corpus*, and other rights explicitly spelled-out in the Constitution.<sup>78</sup> This simple yet effective three part argument, while ultimately successful, finds little support in Louisiana's civilian jurisprudence. The continental understanding of the term "privileges and immunities" may even be couched in the Twelve Tables and its abolition of the

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76. Transcript of Record at 18–19, *Slaughterhouse Cases*, 83 U.S. 36 (1872) (No. 466), 1870 WL 12597 (“That the allegations of said petition are impertinent (sic), scandalous, & criminous (sic); that it contains general, loose, & railing accusations against these defendants, without certainty, specification, or detail . . .”).

77. Brief of Counsel of Defendant in Error at 6–7, *Slaughterhouse Cases*, 83 U.S. 36 (1872) (No. 479), 1871 WL 14608:

In order to promote the health and comfort of the people, the State of Louisiana possesses all the power of sovereignty; the legislature might direct State officers to be appointed to inspect and superintend stock landings and slaughter-houses, as well as direct where such should be established. Laws of this character have been respected by Congress from the earliest period of the Government.

78. Brief of Counsel of Defendant in Error, *supra* note 77, at 5:

This amendment seeks to protect two classes of individuals: First, citizens of the United States; second, all persons whatever, whether citizens or aliens. The first portion plainly refers to political privileges, and shields only such privileges and immunities as individuals may have in their peculiar character as citizens of the United States . . .

*privilegium* and *immunitas* granted by royal edict.<sup>79</sup> This understanding was known in French law, and was reflected in the fact that the civil code, as a system of private law, understood rights and privileges to belong in first instance to the people.<sup>80</sup> The offense to that understanding is therefore two-fold: First, it is repugnant to the civilian jurist that the law would only protect those privileges granted by a sovereign, instead of those naturally belonging to the citizen as a matter of *ius cogens*. Second, that a private company consisting of seventeen private citizens, and not the government itself, would exercise privileges and recognize profits that rightfully belonged equally to the citizens of Louisiana. To this point, the state asserted that the right to engage in the profession of butchering was not infringed, but simply its place and manner was restricted.<sup>81</sup> This ignores the fact that, properly read, the butchers' argument was not simply that their physical labor rights were infringed, but that the very granting of the privilege of operating a slaughterhouse to the Company was a violation of the equality of men before the civil code.

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79. See Eberhard P. Deutsch, *Civil Liberties Under the Civil Law*, 12 TUL. L. REV. 331 (1938) (arguing that the foundation for American civil liberties is found in the civilian traditions of French and Roman law).

80. *Id.* at 335:

In Great Britain, in other words, privileges vested in the crown in the first instance, and the demand, never questioning the royal prerogative, sought simply a grant or concession. In France, however, the declaration was boldly made that rights and liberties belong in the first instance to the people; that privileges and immunities are attributes of citizenship, not of nobility.

81. Brief of Counsel of State of Louisiana, and of Crescent City Live Stock Landing & Slaughter House Co., Defendants in Error at 4, *Slaughterhouse Cases*, 83 U.S. 36 (1872) (Nos. 60, 61, 62), 1872 WL 15119:

The owner of the animal passed by the health inspector may then slaughter it for the market; he may do this either with his own hands, or by those of his own servants. The act of the legislature does not compel the owner of the animal to employ any State agent or corporation servant to slaughter the animal. All the act does is to say where it must be slaughtered.



## 2. *By the Butchers*

John Campbell had argued initially in the lower courts that the Act should be rescinded on the basis of it having been secured through graft, and improperly passed for not having been signed by the governor within the required time period. These arguments, while important, have been discussed above to the necessary extent, and will be, perhaps unfairly, de-prioritized so that the focus may be on the arguments before the Supreme Court. In arguments regarded by all of his contemporaries as masterful, Campbell retained his arguments that the Act was the product of bribery, but he also shifted his focus to what he saw as a violation of the civil rights of the butchers; rights that, as it happened, were now protected by the Thirteenth and Fourteenth Amendments to the United States Constitution.

In his oral arguments before the Supreme Court, Campbell invoked the Thirteenth Amendment and argued that the butchers were being compelled into specific performance on behalf of the company.<sup>82</sup> He drew parallels between the newly-freed slaves, the butchers, and examples from French history. French history, he said, included “a number of instances of persons [whose servitude consisted of] their performance of ludicrous and debasing acts on particular days of the year for the entertainment of their masters.”<sup>83</sup> He posited that if “a legislature of a state were to pass a law that the emancipated slaves should appear before their masters, sing some of their native songs, or dance their country [sic] dances, it would at once be pronounced as a restoration of some remnant of their ancient servitude.”<sup>84</sup> This illustration highlights a key distinction. In the civilian tradition, involuntary servitude had been abolished by the civil code, and the protections of the private law

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82. Transcript of the Oral Argument at 3, *Slaughterhouse Cases*, 83 U.S. 36 (1872), reprinted in 6 LANDMARK BRIEFS & ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 733, 736 (Philip B. Kurland & Gerhard Casper eds., Univ. Pubs. of America 1975).

83. *Id.* at 5.

84. *Id.*

were thought to extend to any unjustly compelled act, especially those required by an edict of the sovereign. Campbell sought to cement this notion in the Court's understanding, when he argues that there are several forms of servitude that have little to do with any requirement of labor or production.<sup>85</sup> He supports his argument that the prohibition of involuntary servitude should be applied broadly, with a direct appeal to civilian tradition, saying that, upon the abolition of the feudal system at the time of the French Revolution, such honorific acts intended to assert the superiority of the lords over the inferior vassals had been abolished.<sup>86</sup> In this we see the clear parallel between an act imposed by an illegitimate feudal government, and an offense prescribed by an illegitimate corrupt legislature.

To the civilian it was not simply a matter of being required to undertake butchering in some particular manner, but that he was being compelled to engage in an act, by a sovereign using tyrannical means, which caused the act to become involuntary servitude. Campbell urged the Court to consider that the civilian tradition of the idea of servitude sounds in property law.<sup>87</sup> According to Campbell, the very use of the term servitude carries with it an invitation to consider property rights in oneself and one's

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85. *Id.* at 6 (stating that the conditions of caste are a form of servitude; describing the servitude inherent in the Hindu caste system).

86. *Id.* at 15 (quoting Phillippe-Antoine Merlin de Douai).

87. Plaintiffs Brief upon the Re-argument, *supra* note 59, at 4–5:

What was involuntary servitude? The servitude (*servitus*) of the Roman law, and the continental law founded on it are relations of property. A right of one [sic], to deal with [sic], or to use the property of another, as an incident or accessory to his ownership of another property is a servitude. In strictness, the relations are those of immoveable property. The estate owing the servitude is Servient. The estate benefitted and the creditor is Dominant. When slaves become immoveable [sic], by destination and bound to the soil (*coloni, adscriptitii*) the servitude lost something of its strict character, and acts and duties were imposed upon the estate. Tythes are spoken of [sic], as a servitude combined with an obligation. There was a right to a part of the produce *adversus quemcunque* [sic], with a charge on the owner to set it apart, so in Scotland the teind. So the *Thirlage* which is classed as a servitude, and imposes the specific duty upon the inhabitant of the thirl to carry his grain to the mill to be ground.

labors. These were, he argued, liberties protected by the Constitution. In so doing, Campbell engages in an argument similar to that argued years later by Kojève.<sup>88</sup> Campbell argued that the butcher, bound to the soil of the Company, was no longer free as a result of the violation of his privileges of citizenship. Kojève would argue that the unequal status with respect to rights in labor denied the butcher his humanity.

The butchers' position was that the Fourteenth Amendment barred any state from passing any law abridging any privilege or immunity of a citizen.<sup>89</sup> They include in these privileges and immunities those protected by the civil code, including "life, liberty, property, or title of the plaintiffs to equal protection."<sup>90</sup> In his supplemental brief, Campbell, writing to the Court, points out that according to Turgot, privileges to rights of labor ran to every Frenchmen, and privileges to the contrary were abolished as far back as 1776.<sup>91</sup> In the more expansive application of the Fourteenth Amendment urged by Campbell:

The State is commanded neither to make nor to enforce any law that deprives, or even abridges, any citizen of his enjoy-joyment [sic] of his privileges or immunities. To limit him in the choice of a trade, to deprive him of a business he has pursued, and to give to others the sole and exclusive right to follow that trade or to prosecute that business, violates this Constitution.<sup>92</sup>

Throughout this brief there is the suggestion that the "enslaving" act of the Louisiana legislature was not just an affront

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88. See *supra* Part II.A.

89. Supplemental Brief and Points of Plaintiffs in Error, *supra* note 63, at 2: The Constitution of the United States speaks to the State in the imperative. The State shall not make or enforce a law, nor pass a law, that shall work evil to any in the manner and in the particulars set forth.... The Government of the United States necessarily acquires a dominion over the State corresponding to the duty it has to perform.

90. *Id.* at 3.

91. *Id.* at 4 ("Therefore, every person was authorized to exercise his art, trade, or profession; and the privileges of corporations, guilds, and trading companies, to the contrary, were abolished").

92. *Id.*

to the Constitution, but to the centuries of civil law jurisprudence that had come together to protect the equality of men through an individually applicable code of private law.<sup>93</sup> Campbell even goes so far as to cite the *Recueil Dalloz*, a French law review in circulation at the time, for specific regulations pertaining to the slaughter of livestock.<sup>94</sup> He argues that these regulations, unlike the Act, accomplish the appropriate health protections without creating a monopoly and without infringing on the right of men to employ their services as a butcher.<sup>95</sup>

Campbell goes on to cast the meaning of privileges and immunities as growing from the Roman tradition, as discussed above.<sup>96</sup> He argues that in Louisiana's cession to the United States, Louisianans were guaranteed the privileges and immunities inherently belonging to the citizens of the United States. These, he argued, are civil, not merely political rights.<sup>97</sup> To Campbell, and therefore to the butchers, the Fourteenth Amendment was intended to secure in every citizen all natural rights implied by the history of the civilian conception of liberty. Campbell's argument was, in essence, an appeal to the *ius cogens* of the era. His reliance on the civilian basis of privileges and immunities may be best understood

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93. *See id.*:

The emancipating edict of Turgot, and the enslaving act of the Louisiana Legislature, in different ways, manifest the aim of the amendment to the Constitution. The spirit of the edict pervades the amendment, and it was framed to suppress all institutions of the kind. The Louisiana statute creates a corporation having all the odious features of those suppressed by the edict.

94. *Id.* at 4–5.

95. *Id.*

96. *Id.* at 6–7 (describing the genesis of the term “privileges and immunities” as a Roman reference to benefits or exemptions, and asserting that this remained the correct interpretation).

97. *Id.* at 7:

The terms are found in the fourth of the Articles of Confederation, and the second section of the fourth article of the Constitution of the United States; and evidently apply not to political, but civil rights. These rights are protection to life, personal freedom, property, religion, reputation; and, in the Treaty of Paris of 1803, providing for the cession of Louisiana, the United States promise to grant the natives of that territory the rights, advantages and immunities of citizens.

as an attempt to point out that the peremptory norms in operation at the time of the formation of the Fourteenth Amendment would have presumed those liberties recognized by the continental approach; namely, the liberty of labor, property, and self-direction.

### *C. The Decisions*

#### *1. The Majority Opinion*

Unfortunately for Campbell, he was not arguing in a French court, and Justice Miller's opinion reflected this in no uncertain terms. The opinion holds that the Thirteenth and Fourteenth Amendments were intended to secure the rights and freedoms of newly-freed slaves.<sup>98</sup> Miller's opinion, as any first year law student will attest, quickly and assuredly limits the application of the privileges and immunities clause of the Fourteenth Amendment to granting the newly freed slave the right of citizenship and those other rights explicitly guaranteed by the Constitution.<sup>99</sup> Central to this limitation is Miller's contention that the privileges and immunities of the United States are distinguishable from those granted by operation of state citizenship. To Miller, the Fourteenth Amendment protects only the former, and not the latter.<sup>100</sup> It is

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98. *Slaughterhouse Cases*, 83 U.S. 36, 71-72 (1872):

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

99. *Id.*

100. *Id.* at 75:

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such the latter must rest for their security

unnecessary to undertake a full criticism of the opinion of the majority in this case. Such criticism is nearly universal, and was at the time as well.<sup>101</sup> What is more important is to discern what the effect of that criticism has been on subsequent civil rights jurisprudence. This paper adopts and aims to support that body of scholarship which suggests that the rejection of the majority opinion invited subsequent courts to adhere to the reasoning of the dissenting opinions by Justices Field and Bradley.<sup>102</sup>

## 2. *The Dissenting Opinions*

Three of the four Justices in the minority wrote dissenting opinions. Justices Field, Bradley, and Swayne each adopted and added upon the dissents of the other. Space is given here to the dissents of Justices Field and Bradley, while the dissent of Justice Swayne is respectfully omitted.<sup>103</sup>

### a. *Justice Field's Dissenting Opinion*

Justice Field's dissent is notable in that it adopts a great deal of the arguments forwarded by Campbell. To Field, the question at hand was nothing less than whether the Fourteenth Amendment protected the citizens of the several states from state legislation

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and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

101. David S. Bogen, *Slaughter-House Five: Views on the Case*, 55 HASTINGS L.J. 333, 336 (2003) (stating that distaste for the opinion is shared by a range of jurists, including Justice Clarence Thomas and Professor Lawrence Tribe).

102. See, e.g., Hovenkamp, *supra* note 54, at 1292 (crediting Justice Field's dissent in the Slaughterhouse Cases as championing the view that developed into substantive due process); see also Wendy Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST. 476, 481 (1996) (calling the majority opinion in the Slaughterhouse Cases a "trivialization" of the privileges and immunities clause, and crediting the dissent with "enunciating" the theory of substantive due process).

103. While all three dissents should be read together, only the first two are directly relevant to the purpose at hand.

that curtailed their rights.<sup>104</sup> While Field was not willing to apply the Thirteenth Amendment as broadly as the butchers had hoped, he adopted and indeed embellished the argument that privileges and immunities extended to those rights seen as innate.<sup>105</sup> Justice Field began his dissent by agreeing that the state police power does indisputably extend to regulations of health and safety.<sup>106</sup> According to Field however, there were only two provisions of the Act that pertained to an exercise of police power.<sup>107</sup> Under his reading, only the pronouncements that the animals be inspected and that the slaughtering must occur below the City of New Orleans were proper exercises of police power.<sup>108</sup> What is notable about Justice Field's dissent is his extensive reliance, not just upon case law, but on the history of the common law of England, and on the civil law of France. Engaging in a sort of comparativism, Justice Field argues that monopolies of the sort granted in the Act were long held to be repugnant to the rights and privileges of a citizen.<sup>109</sup> In a lengthy discussion of the English *Case of Monopolies* that arose during the rule of Queen Elizabeth I, Field asserts that the courts of England would have invalidated the Act as being "void at common law as destroying the freedom of

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104. *Slaughterhouse Cases*, 83 U.S. 36, 91 (1872) (Field, J., dissenting).

105. *Id.*

106. *Id.* at 87 ("That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways").

107. *Id.*

108. *Id.* at 87–88:

The health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle, but no such object could possibly justify legislation removing such buildings from a large part of the State for the benefit of a single corporation. The pretense of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice.

109. *See id.* at 104:

The common law of England, as is thus seen, condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I, to which I have referred, only embodied the law as it had been previously declared by the courts of England, although frequently disregarded by the sovereigns of that country.

trade....”<sup>110</sup> Field points out that the rights in question were seen as fundamental, inalienable rights under both the common law and civil law.<sup>111</sup> According to Field, the Fourteenth Amendment was intended to give operation to those inalienable rights recognized by the Constitution, but in fact conferred by “the Creator.”<sup>112</sup> What should be immediately apparent is that Field’s analysis did not only adopt the civilian view of economic rights and privileges; he argued that those rights were properly understood to be a peremptory norm in the English and French legal systems, and were therefore part of the *ius cogens* informing the creation of the American common law.<sup>113</sup>

*b. Justice Bradley’s Dissenting Opinion*

Justice Bradley not only adopts the dissent of Justice Field, but writes to dissent separately, saying that the rights in question are among the most inherent, fundamental rights protected by the Constitution.<sup>114</sup> In making this argument, Justice Bradley engages in an analysis that looks a great deal like an early iteration of what will become substantive due process analysis. He argues that preservation of the rights to labor, property and self-determination are so fundamental that they are necessary to the operation of the liberty protected by the Constitution.<sup>115</sup> That analysis asks the

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110. *Id.* at 102.

111. *Id.* at 105.

112. *Id.*

113. *Id.* at 106:

So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocations of life, been regarded, that few instances have arisen where the principle has been so far violated as to call for the interposition of the courts. But whenever this has occurred, with the exception of the present cases from Louisiana, which are the most barefaced and flagrant of all, the enactment interfering with the privilege of the citizen has been pronounced illegal and void.

114. *Slaughterhouse Cases*, 83 U.S. at 112–14 (Bradley, J., dissenting).

115. *Id.* at 116:

Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can



reader to understand that without the power to exercise dominion over one's own labor, one cannot be free.<sup>116</sup> This sounds like nothing if not the argument, advanced by Campbell, that where one man or company has been granted a privilege, to the detriment of another, the party who holds the privilege becomes dominant, resulting in the servient party's inability to exercise their own freedom. According to Campbell, and now to Justices Bradley and Field, this was repugnant to the idea of equality before the civil code, and also to the Constitution of the United States.<sup>117</sup> Notably, both Justice Field's and Justice Bradley's dissents display a marked sense of incredulity. The reader notices a sense of either shock or surprise, as well as a modicum of indignation, that such foundational concepts are being challenged. Put another way, the dissents evince an understanding of the law that sees individual rights to labor as being indistinguishable from any other fundamental individual rights. They view these rights as peremptory norms, fundamentally presumed in the laws of the day. The depth of this belief stands out in greater relief upon reading Justice Bradley's opinion below. In his opinion, Justice Bradley regards the Act as being antithetical to a republican form of

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only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.

116. *Id.*:

For the preservation, exercise, and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

117. *See id.* at 119 (Bradley, J., writing that the right to follow the profession of one's choosing is the most fundamental of the privileges and immunities); *see also*, Plaintiff's Brief Upon Re-argument, *supra* note 59, at 1,10, 49 (calling liberty of profession, including that of *boucherie*, a fundamental principle of law).

government.<sup>118</sup> These dissents, as well as the opinion below, display an adoption of the civilian sense of equality and economic liberty, as reflected in the *ius cogens* and *ius commune*. They supplement that understanding with support from natural law theory, and find that both systems require respect for economic liberty as being necessary for the law to operate in fidelity with fair and democratic governance.

#### IV. *ALLGEYER*, *LOCHNER*, AND THE DISTINCTLY CIVILIAN FLAVOR OF ECONOMIC LIBERTY AND SUBSTANTIVE DUE PROCESS

If the majority opinion in the *Slaughterhouse Cases* gave a *coup de grâce* to the privileges and immunities clause, the dissents articulated a clear path for the legion of jurists who would have decided the case differently. That path led plaintiffs seeking to vindicate their economic rights to assert them under the Due Process clause of the Fourteenth Amendment.<sup>119</sup> This in turn led to the almost immediate development of substantive due process jurisprudence.<sup>120</sup> The opinion in *Allgeyer* is dually notable: first

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118. *Live-Stock Dealers' and Butchers' Ass'n. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F.Cas. 649, 652 (C.C.D. La. 1870) *rev'd sub nom.*, *Slaughterhouse Cases*, 83 U.S. 36 (1872):

These privileges cannot be invaded without sapping the very foundations of republican government [a republican government is a free government]. Without being free, it is republican only in name, and not republican in truth, and any government which deprives its citizens of the right to engage in any lawful pursuit, subject only to reasonable restrictions . . . is tyrannical and un-republican. And if to enforce arbitrary restrictions made for the benefit of a favored few, it takes away and destroys the citizen's property without trial or condemnation, it is guilty of violating all the fundamental privileges to which I have referred, and one of the fundamental principles of free government. There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.

119. *See Munn v. Illinois*, 94 U.S. 113, 123 (1876) (applying the Due Process clause of the Fourteenth Amendment to regulations promulgated by the State of Illinois, and upholding those regulations as constitutional).

120. *See Allgeyer v. Louisiana*, 165 U.S. 578, 589–90 (1897) (citing Justice Bradley's concurring opinion in *Butchers' Union Slaughter-House & Live-Stock Landing Co., v. Crescent City Live-Stock & Slaughter-House Co.*, 111 U.S. 746, for the proposition that liberty under the Fourteenth Amendment is meant to include economic liberty).

because it is authored by Justice Peckham, who would go on to write the controversial *Lochner* opinion, and second, because it adopts Justice Bradley's civil law inflected privileges and immunities analysis from the *Slaughterhouse Cases* and applies them to the due process clause instead. This judicial sleight of hand is responsible for what would come to be known as "liberty of contract."<sup>121</sup> Justice Peckham's reliance on Justice Bradley's description of economic liberty is deft in citing to the more recent case as good law, while relying on the concurring opinion which had essentially recapitulated the dissent from the original *Slaughterhouse Cases*. *Lochner*, in turn, cites *Allgeyer* for the proposition that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14<sup>th</sup> Amendment of the Federal Constitution."<sup>122</sup>

This broader understanding of the scope of rights protected by the Fourteenth Amendment has its basis in the arguments submitted to the Court by John Campbell. His analysis of the scope of the Fourteenth Amendment protections grew from his knowledge of the civilian tradition, and was adopted by Justice Bradley. Bradley's re-affirmation had in turn allowed Justice Peckham to author an opinion that, while based in the same jurisprudential tradition, accomplished those aims by way of the Due Process clause, all while avoiding the fatally hobbled privileges and immunities clause. Peckham's decisions in *Allgeyer* and *Lochner* are responsible for injecting the civil law and its approach to private law into American constitutional law. It seems at least worth mentioning that much of the subsequent debate over *Lochner* and *laissez faire* economic jurisprudence stems in part from the application of this distinct portion of the civilian private law, absent the context that served as a limiting principle to the

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121. BERNSTEIN, *supra* note 5, at 41 (calling *Allgeyer* the first case to invoke liberty of contract while invalidating a state law for violating the Due Process clause of the Fourteenth Amendment).

122. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

economic interests of the individual. Seen in this light, there seems to be support for plaudits and the criticisms leveled against the *Lochner* decision, and those that followed it during the so-called *Lochner* era. Justice Peckham's approach in *Lochner* vindicated the full throated defense of the civil code offered by John Campbell and recognized that the liberties protected by the Fourteenth Amendment were the full range of rights represented in the *ius cogens*.

However well supported the *Lochner* decision was, it arose in a system vastly different than the one the butchers belonged to. In the absence of a unifying civil code, the opinion served to exacerbate inequalities laid bare by the growth of corporate interests in a newly industrialized economy. Where the Louisiana Civil Code had served to equalize dealings between individuals given equal standing through other parts of the code, *Lochnerian* jurisprudence would lack an equivalent leash until at least 1937.<sup>123</sup>

The use of the Due Process clause to protect economic rights had begun its decline with the decisions in *West Coast Hotel*, and *Carolene Products*.<sup>124</sup> Perhaps fearing that laws protecting individual and civil rights would become vulnerable as a result of their decision, the Court in *Carolene* included the much discussed "Footnote Four" which bifurcated the standards of review for economic regulations from the more stringent review that is undertaken when a regulation may be an infringement on rights.<sup>125</sup>

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123. See *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937); see also *United States v. Carolene Products*, 304 U.S. 144 (1938) (both cases upheld regulatory limitations on liberty of contract as permissible under the Due Process clause, in order to protect public health and welfare).

124. *Id.*

125. See, e.g., Helen Garfield, *Privacy, Abortion, & Judicial Review*, 61 WASH. L. REV. 293, 301 (1986):

Having clothed economic legislation with so strong a presumption of constitutionality, Justice Stone recognized that he might be diluting the constitutional protection afforded individual rights. In the now-famous footnote four, he conceded that '[t]here may be narrower scope for operation of the presumption of constitutionality' when legislation (1) 'appears on its face to be within a specific prohibition of the Constitution,' or (2) 'restricts those political processes which can

That footnote helped to ensure that the substantive due process analysis that Campbell and the *Slaughterhouse* butchers helped elucidate would continue to be brought to bear on cases relating to individual rights. With the exceptionally consequential decision in *Griswold v. Connecticut*, the Court laid out its now controversial “penumbral” understanding of the rights ensured by the Constitution.<sup>126</sup> This expansive understanding of individual rights was central to the laudable decisions in *Roe v. Wade*<sup>127</sup> and *Lawrence v. Texas*,<sup>128</sup> all but guaranteeing that substantive due process will continue to feature heavily in the Court and in the culture wars.

#### V. CONCLUSION

*Lochner* has long been presumed dead, given the rise of the deferential rational basis review and the New Deal legislation that it permitted, but this does not mean that the civilian tradition that served as its incubator has been equally shunted aside. The rhetoric of Campbell, Bradley, and Peckham has become thoroughly enmeshed in any debate over the scope of governmental power. While the flood of cases governing the ebb and flow of economic due process have slowed, the past century has born witness to the renewed influence of the civilian tradition in the form of increased codification at the federal level, and with it, a new-found place for the doctrine of judicial restraint. The development of substantive due process remains central in the protection of individual civil

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ordinarily be expected to bring about repeal of undesirable legislation,’ or (3) discriminates against minorities, since ‘prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.’ Thus the Court’s dual standard of review was born.

126. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.

127. 410 U.S. 113 (1973).

128. 539 U.S. 558 (2003).

rights.<sup>129</sup> That such a formidable body of jurisprudence, on such important issues, is founded on ideas rooted in civilian legal thought is a testament to the salience of those ideas.

The close relationship between substantive due process and the butchers' arguments under the privileges and immunities clause continues to be relevant. The arguments advanced in support of substantive civil rights under the due process clause were just as comfortably made by John Campbell in support of economic rights under the privileges and immunities clause. Indeed, the operation of the Due Process clause and the Privileges and Immunities clause are now seen as effectively synonymous within the world of legal academia.<sup>130</sup> The rulings in *Lochner v. New York*, *Griswold v. Connecticut*, *Roe v. Wade* and *Lawrence v. Texas* all rely on the doctrine of substantive due process, which in turn owes its existence to the civilian butchers and the *ius commune* and *ius cogens* as reflected in the Louisiana Civil Code. It is impossible to know how Campbell would feel about the current iteration of his argument. One might think that he would feel vindicated but perplexed. To a civilian scholar like Campbell, the distinction made in "Footnote Four"<sup>131</sup> would seem tortured and unnecessary. Then again, maybe that distinction lends us the context necessary to employ civilian privileges and immunities analysis, absent the context of the *ius commune*. In either case, it is clear that substantive due process is an appeal to the peremptory norms of our time, and that the civil law tradition of Louisiana has played a significant role in informing how those norms, in the form of individual rights, are protected.

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129. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965) (discussing the importance of penumbral rights protected by the Due Process clause of the Fourteenth Amendment).

130. Kermit Roosevelt III, *What if Slaughter-House Had Been Decided Differently?*, 45 IND. L. REV. 61, 62–63 (describing the academic consensus that the *Slaughter-House Cases* were wrongly decided but that "overruling it would not change much about the current state of constitutional law").

131. *Carolene Products*, 304 U.S. at 152.