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FEDERAL PRIVILEGES AND IMMUNITIES: APPLICATION TO INGRESS AND EGRESS

S. P. MEYERS*

"Feeble indeed is an attack on a statute as denying equal protection which can gain any support from the almost forgotten privileges and immunities clause of the Fourteenth Amendment. The notion that that clause could have application to any but the privileges and immunities peculiar to citizenship of the United States, as distinguished from those of citizens of states, has long since been rejected." These words from the dissenting opinion of Mr. Justice Stone in *Colgate v. Harvey*,¹ might well have been the epitaph of the "privileges and immunities" clause.

Privileges and Immunities Under 5th and 14th Amendments

The "privileges and immunities" clause was probably inserted in the Amendment to transfer the protection of the common rights of citizenship to the Federal Government, and to enable the Supreme Court to enforce a national bill of rights.² However, the clause met with disaster when first expounded by the Court; albeit the Court divided five to four in the famous *Slaughter-House Cases*.³ The litigation involved the constitutionality of a state statute creating a monopoly in the slaughtering of animals and thus withdrawing the business from approximately one thousand persons previously engaged therein. While the decision did not involve civil liberties as such, its significance upon all the relations between state and citizen motivated the conflicting interpretations developed by both sides.

The reasoning of the majority opinion was, in essence, that the wording of the clause, "privileges and immunities of citizens of the United States", limited its protection to privileges and immunities of national citizens as such. It did not protect those belonging to individuals as citizens of the

*The expressions of opinion herein contained are the personal opinions of the writer, and may not, therefore, be represented as official Department of Justice opinions.

¹296 U. S. 404, 443, 56 Sup. Ct. 252, 265 (1935). The case involved the validity of a Vermont tax statute which, in imposing an income tax on individuals, imposed a tax on dividends earned outside the state of Vermont while exempting dividends earned within the state. The statute was attacked as violative of the equal protection and the privileges and immunities clauses of the Fourteenth Amendment. The majority opinion by Mr. Justice Sutherland, concurred in by Hughes, C. J., and Van Devanter, McReynolds, Butler, and Roberts, JJ., found the statute invalid as violative of the privileges and immunities clause. Stone, Brandeis, and Cardozo, JJ. dissented.

²See FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); GUTHRIE, *LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT* (1898).

³16 Wall. 36, 21 L. ed. 394 (U. S. 1873).

states. The privileges and immunities of state citizens had been described in *Corfield v. Coryell*⁴ as those—

Which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may, however, be comprehended under the following heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.⁵

These attributes of citizenship had existed prior to, and independent of the Constitution, which commanded every state to treat citizens of other states on a basis of equality in respect to privileges and immunities.⁶ The majority opinion added the argument of expediency, namely that a contrary conclusion would set the Court up as a "perpetual censor" of all state regulation of local civil rights.⁷

The rationale for this narrow construction of the clause and the consistently exhibited reluctance of the Court to enlarge its scope has been placed upon another ground:

If its restraint upon state action were to be extended more than is needful to protect relationships between the citizen and the national government, and if it were to be deemed to extend to those fundamental rights of person and property attached to citizenship by the common law and enactments of the states when the Amendment was adopted, such as were described in *Corfield v. Coryell*, *supra*, it would enlarge Congressional and judicial control of state action and multiply restrictions upon it whose nature, though difficult to anticipate with precision, would be of sufficient gravity to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the *Slaughter-House Cases*, with the decision against enlargement.⁸

Ever since the *Slaughter-House* decision, the "privileges and immunities" clause has been construed consistently as protecting only interests, growing

⁴6 Fed. Cases 546, No. 3,230 (1823), construing U. S. Const. Art. IV, § 2.

⁵*Id.* at 551.

⁶16 Wall. 36, 77, 21 L. ed. 394, 409 (U. S. 1873).

⁷*Id.* at 78, 21 L. ed. at 409. But see CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934), c. 2.

⁸296 U. S. 404, 56 Sup. Ct. 252 (1935); Mr. Justice Stone concurring in *Hague v. C. I. O.* 307 U. S. 496, 520-521, 59 Sup. Ct. 954, 966-967 (1939).

out of the relationship between the citizen and the national government, created by the Constitution and federal laws.⁹ Since the adoption of the Fourteenth Amendment, approximately fifty cases have been brought before the Supreme Court in which statutes have been assailed as infringements of the "privileges and immunities" clause.¹⁰ In only one, the *Colgate* case, *supra*, was it held that the state legislation infringed on that clause. The *Colgate* case was expressly overruled in slightly over four years.¹¹

All efforts to extend the purview of the "privileges and immunities" clause beyond the coverage of "interests, growing out of the relationship between the citizen and the national government, created by the Constitution and federal laws"¹² have failed. Even basic privileges and immunities secured against federal infringement by the first eight amendments have been held not to be protected from state action by this clause.¹³ Reliance upon the clause became a useless attempt to revive a lost cause. The Court, however, has finally read a number of the safeguards of the Federal Bill of Rights into the "due process" clause, thus accomplishing, in effect, what it had refused to do under the "privileges and immunities" clause. Thus the "due process" clause may make it unlawful for a state to abridge, by its statutes,

⁹*In re Kemmler*, 136 U. S. 436, 448, 10 Sup. Ct. 930, 934 (1890); *McPherson v. Blacker*, 146 U. S. 1, 38, 13 Sup. Ct. 3, 12 (1892); *Giozza v. Tiernan*, 148 U. S. 657, 661, 13 Sup. Ct. 721, 723 (1893); *Duncan v. Missouri*, 152 U. S. 377, 382, 14 Sup. Ct. 570, 571 (1894).

¹⁰See cases collected in *Colgate v. Harvey*, 296 U. S. 404, 56 Sup. Ct. 252 (1935). *Cf. Hague v. C. I. O.*, 307 U. S. 496, 520-521, 59 Sup. Ct. 954, 966-967 (1939), n. 1.

¹¹*Madden v. Kentucky*, 309 U. S. 83, 60 Sup. Ct. 406 (1940). The Court at the time of this decision was composed of Chief Justice Hughes and Justices McReynolds, Stone, Roberts, Black, Reed, Frankfurter, Douglas and Murphy. Only the Chief Justice and Justices McReynolds, Stone and Roberts were also on the Court at the time of the *Colgate* decision. Hughes in a one sentence separate opinion concurred in the *Madden* result upon the ground that the classification adopted by the legislature rested upon a reasonable basis. Roberts and McReynolds dissented upon the basis of the *Colgate* case. This immediate reversal of *Colgate v. Harvey* is a striking example of the statement of Governor (later Chief Justice) Hughes, "We are under a Constitution, but the Constitution is what the judges say it is."

¹²*In re Kemler*, 136 U. S. 436, 448, 10 Sup. Ct. 930, 934 (1890); *McPherson v. Blacker*, 146 U. S. 1, 38, 13 Sup. Ct. 3, 12 (1892); *Giozza v. Tiernan*, 148 U. S. 657, 661, 13 Sup. Ct. 721, 723 (1893); *Duncan v. Missouri*, 152 U. S. 377, 382, 14 Sup. Ct. 570, 571 (1894).

¹³The right to trial by jury in civil cases guaranteed by the Seventh Amendment, *Walker v. Savinet*, 92 U. S. 90, 23 L. ed. 678 (1875); the right to bear arms guaranteed by the Second Amendment, *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. 580 (1886); the guarantee against prosecution, except by indictment of a grand jury, contained in the Fifth Amendment, *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111 (1884); the right to be confronted with witnesses contained in the Sixth Amendment, *West v. Louisiana*, 194 U. S. 258, 24 Sup. Ct. 650 (1904); the right to a jury trial in criminal cases, *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448 (1900); the exemption from compulsory self-incrimination, *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14 (1908).

the freedom of speech protected by the First Amendment;¹⁴ or the like freedom of the press;¹⁵ or the freedom of religion;¹⁶ or the right of peaceable assembly, without which speech would be unduly trammelled;¹⁷ or the right of an accused to the benefit of counsel.¹⁸ It should also be noted that the refusal to include immunity from compulsory self-incrimination¹⁹ among the privileges and immunities of a citizen of the United States does not allow the extortion of confessions through brutality or torture.²⁰

Federal Privileges and Immunities Listed

Despite the consistently exhibited reluctance of the Court to enlarge the scope of the "privileges and immunities" clause, it has, of necessity, recognized that there are a few privileges and immunities of federal citizenship, as such. While it has never seen fit to list the recognized privileges and immunities of national citizens—as early as the *Slaughter-House Cases* the Court held itself "excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving these privileges may make it necessary to do so"²¹—the Court did gratuitously "venture to suggest some which owe their existence to

¹⁴*De Jonge v. Oregon*, 299 U. S. 353, 364, 57 Sup. Ct. 255, 259-260 (1937); *Herndon v. Lowry*, 301 U. S. 242, 259, 57 Sup. Ct. 732, 739-740 (1937).

¹⁵*Grosjean v. American Press Co.*, 297 U. S. 233, 56 Sup. Ct. 444 (1936); *Near v. Minnesota*, 283 U. S. 697, 51 Sup. Ct. 625 (1931).

¹⁶*Hamilton v. Regents*, 293 U. S. 245, 262, 55 Sup. Ct. 197, 204 (1934); *Cf. Pierce v. Society of Sisters*, 268 U. S. 510, 45 Sup. Ct. 571 (1925); *see also Lovell v. Griffin*, 303 U. S. 444, 450, 58 Sup. Ct. 666, 668 (1938); *Schneider v. Irvington*, 308 U. S. 147, 160, 60 Sup. Ct. 146, 150 (1939); *Cantwell v. Connecticut*, 310 U. S. 296, 303, 60 Sup. Ct. 900, 903 (1940); *Jamison v. Texas*, 318 U. S. 413, 63 Sup. Ct. 669 (1943); *Largent v. Texas*, 318 U. S. 418, 63 Sup. Ct. 667 (1943); *Murdock v. Pennsylvania*, 319 U. S. 105, 63 Sup. Ct. 870 (1943); *Martin v. Struthers*, 319 U. S. 141, 63 Sup. Ct. 862 (1943); *Jones v. Opelika*, 319 U. S. 103, 63 Sup. Ct. 890 (1943); *Douglas v. Jeannette*, 319 U. S. 157, 63 Sup. Ct. 877 (1943); *cf. Chaplinsky v. New Hampshire*, 315 U. S. 568, 62 Sup. Ct. 766 (1942). *See also Rotnem and Folsom, Recent Restrictions Upon Religious Liberty* (1942) 36, *Am. Pol. Sci. Rev.* 1053.

¹⁷*De Jonge v. Oregon*, 299 U. S. 353, 57 Sup. Ct. 255 (1937). *Herndon v. Lowry*, 301 U. S. 242, 57 Sup. Ct. 752 (1937). *Cf. Hague v. C. I. O.*, 307 U. S. 496, 59 Sup. Ct. 954 (1939).

¹⁸*Powell v. Alabama*, 287 U. S. 45, 53 Sup. Ct. 55 (1932); *Glasser v. United States*, 315 U. S. 60, 62 Sup. Ct. 457 (1942); *cf. Betts v. Brady*, 316 U. S. 455, 62 Sup. Ct. 1252 (1942).

¹⁹*Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14 (1908).

²⁰*Brown v. Mississippi*, 297 U. S. 278, 56 Sup. Ct. 461 (1936); *Chambers v. Florida*, 309 U. S. 227, 60 Sup. Ct. 472 (1940); *Conty v. Alabama*, 309 U. S. 629, 60 Sup. Ct. 612 (1940); *White v. Texas*, 310 U. S. 530, 60 Sup. Ct. 1032 (1940); *Ward v. Texas*, 316 U. S. 547, 62 Sup. Ct. 1139 (1942). *Cf. McNabb v. United States*, 318 U. S. 332, 63 Sup. Ct. 608 (1942); *Anderson v. United States*, 318 U. S. 350, 63 Sup. Ct. 599 (1942); *United States v. Mitchell*, Nos. 514-515, Oct. term, 1943, decided April 24, 1944.

²¹16 Wall. 36, 78-79, 21 L. ed. 394, 409 (U. S. 1873).

the Federal government, its national character, its Constitution, or its laws."²²

The first of such privileges and immunities suggested by the *Slaughter-House Cases* is the right of a citizen of the United States, protected by implied guarantees of the Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States."²³ Of this, we shall speak later.

Another of the suggested privileges and immunities is "to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."²⁴ Of this there can be no doubt.

"The right to peaceably assemble and petition for redress of grievances" was also offered as an example of privileges and immunities of national citizenship as such.²⁵ This so-called right was squarely before the Court in several later cases.²⁶

Other such privileges and immunities suggested by the decision are "the right to use the navigable waters of the United States, however they may penetrate the territory of the several states" and "all rights secured to our citizens by treaties with foreign nations."²⁷

Still another such privilege and immunity suggested by the decision is the privilege of *habeas corpus*. And the Court very pointedly indicates that the Fourteenth Amendment itself confers a privilege and immunity upon citizens of the United States: "It is that a citizen of the United States can, of his own volition, become a citizen of any State, of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."²⁸ This is a recognition of the fact that, since the adoption of the Fourteenth Amendment, national citizenship is the primary citizenship and that state citizenship is derivative, depending upon citizenship of the United

²²*Id.* at 79, 21 L. ed. at 409.

²³*Ibid.*

²⁴*Ibid.*

²⁵*Ibid.*

²⁶U. S. v. Cruickshank, 92 U. S. 542, 23 L. ed. 588 (1875); Hague v. C. I. O. 307 U. S. 496, 59 Sup. Ct. 954 (1939).

²⁷16 Wall. 36, 79, 21 L. ed. 394, 409 (1873).

²⁸*Id.* at 80, 21 L. ed. at 409.

States and the citizen's place of residence.²⁹

In *United States v. Cruikshank*³⁰ it was held that the right of people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution; that it was, and always has been, one of the attributes of citizenship under a free government; that it derived its source "from those laws whose authority is acknowledged by civilized man throughout the world";³¹ that it was not, therefore, a right granted by the Constitution. However, there is strong dictum in the opinion that the right to peaceably assemble for the purpose of petitioning Congress for a redress of grievances, or for any other purpose connected with the powers or duties of the national government is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by the United States. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."³² This dictum would seem to be contradicted by *Maxwell v. Dow*.³³ However, in *Hague v. C. I. O.*,³⁴ the right is expressly recognized. The opinion of Mr. Justice Roberts states:

Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgement, it is clear that the right peaceably to assemble and to discuss these topics (the provisions of the National Labor Relations Act and the opportunities and advantages offered by it), and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects.³⁵

and

Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom.³⁶

True, Mr. Justice Stone weakens this recognition by his separate opinion, concurred in by Mr. Justice Reed, but he finds that the record and briefs show that this argument was an afterthought without adequate support in

²⁹*Hague v. C. I. O.* 307 U. S. 496, 510, 59 Sup. Ct. 954, 956 (1939); *Selective Draft Cases*, 245 U. S. 366, 389, 38 Sup. Ct. 159, 165 (1918).

³⁰92 U. S. 542, 23 L. ed. 588 (1875).

³¹*Id.* at 551, 23 L. ed. at 591.

³²*Ibid.*

³³176 U. S. 581, 595, 20 Sup. Ct. 448, 454 (1900).

³⁴307 U. S. 496, 59 Sup. Ct. 954 (1939).

³⁵*Id.* at 512, 59 Sup. Ct. at 961.

³⁶*Id.* at 513, 59 Sup. Ct. at 961.

the record. He preferred to rest jurisdiction on the "due process" clause. Chief Justice Hughes concurred with Mr. Justice Roberts' opinion that the right to discuss the National Labor Relations Act was a privilege of a citizen of the United States; but, not being satisfied that the record adequately supported the resting of jurisdiction upon that ground, concurred in the basis for jurisdiction set out in Mr. Justice Stone's opinion.³⁷

*Ex Parte Yarbrough*³⁸ established the right to vote for national officers as a privilege and immunity of national citizenship. In the earlier case of *Minor v. Happersett*³⁹ the Court had said that the Constitution of the United States does not confer the right of suffrage upon any one, and this was seized upon by the petitioners in the *Yarbrough* case, which involved a prosecution of election officials for conspiring to intimidate a citizen of African descent in the exercise of his right to vote for a member of Congress. The Court took great pains to distinguish the two cases and to indicate that the Court in the *Minor* case did not intend to say that, when the class of voters had been determined in a given state, the right of each member of the class to vote for representatives in Congress was not fundamentally based upon the Constitution. The decision of the *Yarbrough* case, that the right to vote for a member of Congress is secured by the Constitution, was most recently approved in *United States v. Classic*:

The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right.⁴⁰

The opinion also recognizes that in a loose sense the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states; but points out that this is true only in the sense that the states are authorized by the Constitution to legislate on the subject as provided in §2, Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under §4, and its more general power under Article I, §8. The *Classic* opinion goes even further and points out that the constitutional command is without restriction or limitation and therefore the right, unlike those guaranteed by the Fourteenth or

³⁷*Id.* at 532, 59 Sup. Ct. at 964.

³⁸110 U. S. 651, 4 Sup. Ct. 152 (1881).

³⁹21 Wall. 162, 22 L. ed. 627 (U. S. 1874).

⁴⁰313 U. S. 299, 314, 61 Sup. Ct. 1031, 1037 (1941).

Fifteenth Amendments, is secured against the action of individuals as well as of states.⁴¹

*United States v. Waddell*⁴² recognized a privilege and immunity of national citizenship dependent not upon the Constitution, but upon a federal statute. The defendants were indicted under the Civil Rights Statute⁴³ for conspiring to injure, oppress, intimidate, and threaten a citizen of the United States in the free exercise and enjoyment of the statutory right of perfecting a homestead.⁴⁴ Although the Homestead Act⁴⁵ granted a right of entry to an alien who had declared his intention to become a citizen, as required by the naturalization laws, as well as to a citizen, the conspiracy was held to be within the purview of Section 51 of Title 18 of the United States Code, which by its express terms extends only to citizens.⁴⁶ This case seems to indicate that where a right or privilege is conferred upon a large group of persons, it is a privilege and immunity of national citizenship whenever any one of such persons happens to be a citizen of the United States. It is not necessary that the right be conferred upon the citizen as such.⁴⁷

In *Logan v. United States*⁴⁸ it was held that a citizen of the United States in the custody of a United States marshal under a lawful commitment to answer for an offense against the United States, had a right to be protected by the United States against lawless violence and that this right is one secured by the Constitution and laws of the United States. This right does not stem from any of the amendments, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme in its sphere of action. Any government which has power to indict, try, and punish for crime, and to arrest the accused, and hold him in safekeeping until trial, is held to have the power and the duty to protect its prisoners so held against lawless interference. From this duty flows a correlative right of protection.⁴⁹

*In re Quarles and Butler*⁵⁰ is another "civil rights" case wherein the defendants were indicted for conspiring to injure, oppress, threaten, and intimidate a citizen of the United States in his free exercise and enjoy-

⁴¹*Id.* at 318, 61 Sup. Ct. at 1039.

⁴²112 U. S. 76, 5 Sup. Ct. 35 (1884).

⁴³REV. STAT. § 5508 (1875), 35 STAT. 1092 (1909), 18 U. S. § 51 (1940).

⁴⁴REV. STAT. § 2289 (1875), 12 STAT. 392 (1891), 43 U. S. C. § 161 (1940).

⁴⁵*Ibid.*

⁴⁶*Baldwin v. Franks*, 120 U. S. 678, 7 Sup. Ct. 656 (1887).

⁴⁷See note 60 *infra*.

⁴⁸144 U. S. 263, 12 Sup. Ct. 617 (1892).

⁴⁹See Rotnem, *The Federal Civil Right "Not To Be Lynched"* (1943) 28 WASH. UNIV. L. Q. 57.

⁵⁰158 U. S. 532, 15 Sup. Ct. 959 (1895).

ment of one of the rights and privileges secured by the Constitution and laws of the United States, namely the informing of a deputy marshal of violations of federal criminal statutes. One of the grounds of demurrer to the indictment, *inter alia*, was that there is no such right or privilege secured to citizens of the United States, *qua* citizen, as that set forth therein. It was held that the right of a citizen to inform of violations of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. Both are held to be within the concise definition of privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States.

*Motes v. United States*⁵¹ is a similar holding that in return for the protection received by a citizen under the Constitution and laws of the United States, the citizen has the right and privilege to aid in the execution of the laws of his country by giving information to the proper authorities of violations of those laws. That right and privilege was held to be secured by the Constitution and laws of the United States.

To this meager list of judicially recognized privileges and immunities⁵² of a citizen of the United States, there probably can be added the privilege of expatriation;⁵³ the right and privilege to enter the country and prove one's citizenship;⁵⁴ the privilege of resorting to the federal courts;⁵⁵ the right and privilege to be protected in the enforcement of a decree of a federal court;⁵⁶ the right to appear and testify as a witness before a Land Office;⁵⁷ the right, privilege and immunity of freedom from slavery or

⁵¹178 U. S. 458, 20 Sup. Ct. 993 (1900).

⁵²The words "rights," "privileges" and "immunities" are loosely used as interchangeable in various decisions. "Privileges and immunities" does not appear to have been used in English constitutional documents and probably originated in a constitutional sense in Art. IV of the Articles of Confederation. From there it was carried over into the Constitution as originally adopted (Art. IV, Sec. 2). These words had no precise legal definition at the time of the adoption of the Fourteenth Amendment.

For a discussion as to the legal definitions of all three words see Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE L. J. 16; Corbin, *Legal Analysis and Terminology* (1919) 29 YALE L. J. 163; Corbin, *Jural Relations and Their Classification* (1920) 30 YALE L. J. 226; Corbin, *Rights and Duties* (1924) 33 YALE L. J. 501.

⁵³Talbot v. Jansen, 3 Dall. 133, 1 L. ed. 540 (U. S. 1795).

⁵⁴Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201 (1908).

⁵⁵Terral v. Burke Construction Co., 257 U. S. 529, 42 Sup. Ct. 188 (1922).

⁵⁶United States v. Lancaster, 44 Fed. 885 (C. C. W. D. Ga. 1890).

⁵⁷Foss v. United States, 266 Fed. 881 (C. C. A. 9th, 1920).

involuntary servitude,⁵⁸ and the rights secured by the "due process" clause of the Fourteenth Amendment.⁵⁹

Narrowing of "Privileges and Immunities" clause

Even a most cursory consideration of the privileges and immunities of a national citizen, suggested by the *Slaughter-House Cases* or recognized by later cases, makes it clearly evident that they include both privileges and immunities conferred by national law upon citizens *eo nomine*, and privileges and immunities conferred upon citizens in common with all other persons. It would seem that a privilege and immunity enjoyed by a citizen of the United States is no less his because it is enjoyed in common with other people.⁶⁰ Yet, in at least two decisions, the Court seems to indicate a tendency to carry the emasculation of the "privileges and immunities" clause even further than did the definition or construction pronounced in the *Slaughter-House Cases*.

In *Bradwell v. State*,⁶¹ the very next case decided by the Court after the *Slaughter-House Cases*, Mr. Justice Miller used the following language:

We agree . . . that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not

⁵⁸*Smith v. United States*, 157 Fed. 721 (C. C. A. 8th, 1907), *cert. denied*, 208 U. S. 618, 28 Sup. Ct. 567 (1907).

⁵⁹16 Wall. 36, 80, 21 L. ed. 394, 409 (U. S. 1873). *Cf.* *Hamilton v. Regents*, 293 U. S. 245, 261-262, 55 Sup. Ct. 197, 204 (1934), where the Court, in a case involving the validity of an order of the Regents of the University of California requiring every able-bodied male student who, at the time of his matriculation, is under the age of twenty-four, to enroll in a course in military science and tactics, dismissed the argument that such order violated the privileges and immunities clause with this amazing statement: "If the regents' order is not repugnant to the due process clause, then it does not violate the privileges and immunities clause. Therefore, we need only decide whether by state action the 'liberty' of these students has been infringed."

⁶⁰In *United States v. Berke Cake Co. et al.*, 50 F. Supp. 311 (1943), the District Court sustained a demurrer to an indictment under 18 U. S. C. § 51, charging a conspiracy to deprive citizens of the United States of rights granted by the Fair Labor Standards Act. The demurrer was sustained upon the ground that the rights involved had not been granted to federal citizens *qua* citizens, but had been granted to citizen and non-citizen alike. It is clear that this opinion is clearly wrong under all of the cases discussed herein. A direct appeal to the Supreme Court (No. 329, October Term, 1943) was subsequently dismissed by the government when jurisdictional questions were raised.

See Schweinhaut, *Civil Liberties Section of the Department of Justice* (1940) 1 BILL OF RIGHTS REV. 206; Rotnem, *Clarifications of the Civil Rights Statutes* (1941) 2 BILL OF RIGHTS REV. 252; Rotnem, *Federal Criminal Jurisdiction of Labor's Civil Rights* (Sept. 1942) LAWYERS GUILD REV. 21; Rotnem, *Criminal Enforcement of Federal Civil Rights* (May 1942) LAWYERS GUILD REV. 18.

⁶¹16 Wall. 130, 21 L. ed. 442 (U. S. 1873).

one of them. This right in no sense depends on citizenship of the United States.⁶²

Taken literally this language would limit the "privileges and immunities" clause not to privileges and immunities conferred by national law, but only to privileges and immunities conferred by national law upon national citizens *eo nomine*. The construction placed upon the clause by the *Slaughter-House Cases* reduced it to mere surplusage as an unnecessary reiteration of a principle already clearly announced in the Constitution. Article VI, Section 2, already provided that:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, . . . anything in the Constitution or Laws of any State to the contrary notwithstanding.

This declaration of supremacy of national law contains all and more than does the "privileges and immunities" clause as construed. In making national law superior to state law, this Section protects against state law any person, citizen or non-citizen, in the enjoyment of any privilege conferred upon him by national law, whether it be conferred upon him *qua* citizen or otherwise. Why then a narrower and more emasculating definition or construction under the "privileges and immunities" clause? It is doubtful if Mr. Justice Miller was aware of the disparity between his statements in the two cases.⁶³

In *Maxwell v. Dow*⁶⁴ we find another example of this narrowing of the construction placed upon the "privileges and immunities" clause. The case presented this issue: "May a State provide for criminal trials in its courts by a jury of less than twelve."⁶⁵ Mr. Justice Peckham, speaking for the entire court with the exception of Mr. Justice Harlan, pointed out that the rights granted by the Fifth, Sixth, and Seventh Amendments were not privileges and immunities conferred upon an individual as a citizen of the United States, but are secured to all persons as against the Federal Government, irrespective of their citizenship.

As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgement by the States of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say

⁶²*Id.* at 139, 21 L. ed. at 445.

⁶³See McGovney, *Privileges and Immunities* (1918) 4 IOWA L. BULL. 219.

⁶⁴176 U. S. 581, 20 Sup. Ct. 448 (1900).

⁶⁵*Cf.* Patton v. United States, 281 U. S. 276, 50 Sup. Ct. 253 (1930).

that it covers and extends to certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against Federal governmental powers. The nature or character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen. . . .

In this case the privilege or immunity claimed does not rest upon the individual by virtue of his national citizenship, and hence it is not protected by a clause which simply prohibits the abridgement of the privileges or immunities of citizens of the United States. Those are not distinctly privileges or immunities of such citizenship, where every one has the same as against the Federal Government, whether citizen or not.⁶⁶

Maxwell v. Dow and *Bradwell v. State* cannot be reconciled with the dictum in the *Slaughter-House Cases*. The construction of the "privileges and immunities" clause in that case is narrow enough to avoid any fundamental alteration in our constitutional system. There seems to be no compelling need for further narrowing of the construction. Moreover, the suggestion of these two cases is inconsistent with dicta and language in more carefully reasoned cases. For example, in *Twining v. New Jersey*⁶⁷ the Court stated:

Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or *persons* by the Constitution of the United States.⁶⁸

Twining v. New Jersey which post-dates both *Maxwell v. Dow* and *Bradwell v. State*, makes it safe to assume that the rule of the *Slaughter-House Cases* is the law, without the narrowing embellishments of the *Maxwell* and *Bradwell* cases.

When Privileges and Immunities Resorted to by Petitioner

At the risk of repeating one of the platitudes of the many articles written

⁶⁶176 U. S. 581, 595-596, 20 Sup. Ct. 448, 454 (1900).

⁶⁷See note 13 *supra*.

⁶⁸211 U. S. 78, 97, 29 Sup. Ct. 14, 18 (1908). (Italics added) Cf. *United States v. Classic*, 313 U. S. 299, 314, 61 Sup. Ct. 1031, 1937 (1941): "The right of the people to choose . . . is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and *inhabitants* of the state entitled to exercise the same." (Italics added).

on the "privileges and immunities" clause, it might be well, in passing to point out the language in *Presser v. Illinois*.⁶⁹

If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred.

This may well account for the fact that in all the years which have passed since the adoption of the clause no true example of infringement of a privilege and immunity of the kind contemplated has been brought to the attention of the Supreme Court. It is true that many of these are secured by express provisions of the Constitution. When such rights are involved, the aggrieved party complains of the violation of such specific provisions. He could in such cases also cite the "privileges and immunities" clause, but usually does not. Only when the aggrieved party can find no federal guaranty of the right alleged to have been infringed upon, based on a specific provision of the Constitution or implied within the four corners thereof, does he fall back upon the "privileges and immunities" clause in his desperation.⁷⁰ Surely, in words of such promise, there must be some substance! Or perhaps such reliance is in ignorance that these glittering words have lost their luster. But be that as it may, the "privileges and immunities" clause may now be paraphrased: No State shall make or enforce any law which shall abridge the privileges and immunities conferred by the Constitution, statutes, or treaties of the United States upon any person who is a citizen of the United States.

Demise of "Privileges and Immunities" Clause

At the inception of this article it was stated that Mr. Justice Stone might well have written the epitaph of the "privileges and immunities" clause. This appeared almost certain after *Palko v. Connecticut*,⁷¹ which sustained a state statute permitting the prosecution to appeal in a criminal case. This decision is significant primarily for its attempt metaphysically to rationalize previous adjudications and to present them as component parts of a harmonious pattern. The Court approved past decisions which had divided various safeguards of the first eight amendments into a superior and an inferior class in respect to their protection under the "due process" clause.

⁶⁹116 U. S. 252, 266, 6 Sup. Ct. 580, 584 (1886).

⁷⁰The extent to which this desperation may sometimes go is typified by *Connell v. State*, 153 Ga. 151, 111 S. E. 545 (1922), where an attack was made upon a statute prohibiting sexual intercourse with any female under the age of fourteen, as abridging privileges and immunities of a national citizen.

⁷¹302 U. S. 319, 58 Sup. Ct. 149 (1937).

Those which had been excluded "are not of the very essence of a scheme of ordered liberty."⁷² Others, such as freedom of speech and of the press, freedom of religion, and the right of peaceable assembly, are protected because "neither liberty nor justice would exist if they were sacrificed."⁷³

This attempt to rationalize the decisions and to present them as component parts of a harmonious pattern serves only to indicate that the Court, on occasions, uses natural law terms in two senses as descriptive of civil liberties. It highlights the dangers of placing too much emphasis on the "tyranny of labels."⁷⁴ For example, trial by jury was described by the Court as "justly dear to the American people" and a "fundamental guarantee of the rights and liberties of the people."⁷⁵ In *Ex Parte Milligan*⁷⁶ this right was hailed as "one of the most valuable in a free country" and "an inestimable privilege." Yet, *Maxwell v. Dow*, *supra*, indicates that in so far as the states are concerned, this is not necessarily so. Again, in construing the Fourth and Fifth Amendments, the Court declared that the practices forbidden by these Amendments are "contrary to the principles of a free government," are "abhorrent to the instincts of an Englishman," and "to the instincts of an American," and "cannot abide the pure atmosphere of political liberty and personal freedom."⁷⁷ And in *Gouled v. United States*⁷⁸ the Court evaluated both amendments as "indispensable to the 'full enjoyment of personal security, personal liberty, and private property,' they are to be regarded as of the very essence of constitutional liberty;" Taken literally these expressions by the Court are irreconcilable with *Twining v. New Jersey*. It would seem that the Court says different things with the same words; otherwise, the *Twining* decision permits states to deprive individuals of a guarantee which would appear to be of the very essence of a scheme of ordered liberty.

Any doubts as to the demise of the "privileges and immunities" clause, which may have arisen as a result of the momentary resurgence of the

⁷²*Id.* at 325, 58 Sup. Ct. at 152.

⁷³*Id.* at 326, 58 Sup. Ct. at 152.

⁷⁴*Snyder v. Massachusetts*, 291 U. S. 97, 114, 54 Sup. Ct. 330, 335 (1934).

⁷⁵*Parsons v. Bedford*, 3 Pet. 433, 445, 7 L. ed. 732, 736 (U. S. 1830).

⁷⁶4 Wall. 2, 123, 18 L. ed. 281, 296 (U. S. 1866).

⁷⁷*Boyd v. United States*, 116 U. S. 616, 632, 6 Sup. Ct. 524, 533 (1886).

⁷⁸255 U. S. 298, 304, 41 Sup. Ct. 261, 263, (1921). The Court also states that the guaranties of the two amendments are "as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen, the right to trial by jury, to the writ of habeas corpus and to due process." Again, taken literally this language would place trial by jury on the same constitutional plane as the guaranties of the First Amendment and should have been carried over into "due process" as was freedom of speech, etc.

clause through *Hague v. C.I.O.*, *supra*, should have been put to rest by the almost immediate overruling of *Colgate v. Harvey*, *supra*, by *Madden v. Kentucky*.⁷⁹ The *Colgate* case was the lone exception to the consistently exhibited reluctance of the Court to enlarge the scope of the clause. *Hague v. C. I. O.* came close to being a second exception, but it must be remembered that the privilege there involved, to assemble peaceably to discuss national legislation, had been suggested by the *Slaughter-House Cases*, *supra*, as a privilege and immunity of a national citizen and had been recognized by the dictum of the *Cruikshank* case, *supra*. Then came *Madden v. Kentucky*, followed shortly thereafter by the case of *Edwards v. California*.⁸⁰

The *Edwards* case involved a conviction under a state statute declaring it to be a misdemeanor for any person to bring, or assist in bringing, into the State, any non-resident, knowing him to be an indigent person. A majority of the Court held the statute invalid as an unconstitutional burden on interstate commerce.⁸¹ However, Mr. Justice Douglas, in an opinion concurred in by Mr. Justices Black and Murphy, and Mr. Justice Jackson in a separate opinion, found the state statute invalid without recourse to the "commerce" clause. They placed their reliance entirely upon a privilege and immunity of national citizenship, the right to pass freely from state to state, the right of ingress and egress.

Ingress and Egress: A Federal "Privilege"

As already indicated, the first of the privileges and immunities which the *Slaughter-House Cases* "ventured to suggest" was the right of the citizen to come to the seat of government, *etc.* This right was bottomed on *Crandall v. Nevada*,⁸² decided prior to the adoption of the Fourteenth Amendment. The legislature of Nevada had enacted a capitation tax of one dollar upon every person leaving the state by railroad, stage coach, or other means of transportation for hire. Crandall, who was an agent of a stage coach company carrying passengers through the State of Nevada, was arrested for refusing to report the number of passengers carried by his company and for refusing to collect and pay the tax imposed. His defense was the unconstitutionality of the statute. The state defended the statute before the Supreme Court as not being in conflict with either the constitutional provision con-

⁷⁹See note 11 *supra*.

⁸⁰314 U. S. 160, 62 Sup. Ct. 164 (1941).

⁸¹It should be noted that the briefs for both the appellant and the appellee in this case recognized that the issue ultimately involved the constitutional rights of the migrant Duncan and not those of Edwards himself.

⁸²6 Wall. 35, 18 L. ed. 745 (U. S. 1867).

ferring on Congress the power to regulate interstate commerce, or the provision forbidding any State, without the consent of Congress, to lay any imposts or duties on imports or exports.

Mr. Justice Miller wrote the majority opinion. After determining that the tax in question was one levied upon the passenger for the privilege of leaving the state or passing through it by the ordinary mode of passenger travel, the Court next proceeded to determine that the tax was not in conflict with the constitutional provision against state levies on exports; and as to the "commerce" clause, it was held that the legislation was permissible as Congress had not yet legislated on this matter. However, the majority opinion did not concede that the question before the Court was determinable solely by these two clauses of the Constitution. The opinion pointed out that the people of the United States constitute one nation; that they have a national government which had certain rights which the states could not infringe upon. From these rights there flowed correlative rights to the citizens of that national government. These were stated to be the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it; to seek its protection, to share its offices, to engage in administering its functions. Also included were the rights to free access to its seaports, to the sub-treasuries, the revenue offices, and the courts of justice in the several states. All of these were said to exist independent of the will of any State over whose soil the citizen must pass in the exercise thereof.⁸³ There is little question but that the opinion as written was based upon the proposition that the statute directly burdened the performance by the United States of its functions, and also limited rights of its citizens growing out of such functions.⁸⁴

The right of ingress and egress was next before the Court in *Williams v. Fears*,⁸⁵ involving an attack upon a Georgia statute which imposed a specific

⁸³Art. IV, §2 cannot explain this decision as the statute in question applied to citizens of Nevada as well as to citizens of other states. There was no discrimination against citizens of other states in favor of citizens of Nevada. See *Hague v. C. I. O.*, 307 U. S. 496, 511, 59 Sup. Ct. 954, 963 (1939).

⁸⁴"The views here advanced are neither novel nor unsupported by authority. The question of the taxing power of the States, as its exercise has affected the functions of the Federal Government, has been repeatedly considered by this court, and the right of the States in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied." 6 Wall. 35, 44-45, 18 L. ed. 745, 748 (U. S. 1867). It should be noted that the position of the majority of the Court on the commerce question has been overruled by subsequent decisions. It is now well recognized that the passage of state lines by human beings constitutes interstate commerce. See *Helson & Randolph v. Kentucky*, 279 U. S. 245, 251, 49 Sup. Ct. 279, 281 (1928).

⁸⁵179 U. S. 270, 21 Sup. Ct. 128 (1900).

tax upon many occupations, *inter alia*, that of emigrant agent. The statute was squarely attacked as an interference with the right of a citizen to move from one state to another, abridging the "privileges and immunities" clause; and the Court first considered this argument. The language of the opinion appears to recognize the principle, though the effect of the decision was to destroy it.

Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.⁸⁶

After this recognition of the principle, the Court found the law under review to be a taxing statute, levied upon occupations, including that of emigrant agent.

If it can be said to affect the freedom of egress from the State, or the freedom of contract, it is only incidentally and remotely. The individual laborer is left free to come and to go at pleasure, and to make such contracts as he chooses, while those whose business it is to induce persons to enter into labor contracts and to change their location, though left free to contract, are subjected to taxation in respect of their business as other citizens are.⁸⁷

* * *

In fine, we hold that the act does not conflict with the Fourteenth Amendment in the particulars named.⁸⁸

After a gentle pat on the back in *Twining v. New Jersey* the right of ingress and egress ran afoul of the *Slaughter-House Cases* doctrine in *Wheeler v. United States*.⁸⁹ More properly, however, this case involved the right to remain in a state. The case came before the Court on direct appeal from a judgment below, quashing an indictment under the civil rights statute alleging a conspiracy to injure, oppress, threaten, and intimidate citizens of the United States "of rights or privileges secured to them by the Constitution or laws of the United States, the right and privilege peaceably to

⁸⁶*Id.* at 274, 21 Sup. Ct. at 129.

⁸⁷*Id.* at 274-275, 21 Sup. Ct. at 129. *Cf.* same case in court below, *Williams v. Fears*, 110 Ga. 584, 591, 35 S. E. 699, 701-702: "But the law, under consideration in the present case neither regulates nor restricts the right of citizens of this state to leave its territory at will, nor to hold free communication with the citizens of other states. The citizen may leave when he pleases, but the person who makes it a business of inducing him to go to perform labor elsewhere must pay an occupation tax. This is certainly no infringement upon the right of the citizen."

⁸⁸*Id.* at 276, 21 Sup. Ct. at 130.

⁸⁹254 U. S. 281, 41 Sup. Ct. 133 (1920): the so-called *Wobbly Deportation case*.

reside and remain in the State of Arizona and to be immune from unlawful deportation from that State to another."⁹⁰ The lower court quashed the indictment on the ground that no power had been delegated by the Constitution to the United States to forbid and punish the wrongful acts complained of, as the right to do so was exclusively reserved by that instrument to the several states.

Recognizing that the right relied upon arose, if at all, by implication from the Constitution as a whole and the consequences inevitably produced from the creation by it of the National Government,⁹¹ the Court laid down certain doctrines which were said to be so well founded in reason and so conclusively sustained by authority as to be indisputable. First, in all the States, from the beginning down to the Articles of Confederation, the citizen thereof possessed the fundamental right peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the States to forbid and punish violations of this fundamental right. Second, the Articles of Confederation secured uniformity by reserving in the States the authority they had theretofore enjoyed, but subjected such authority to a limitation inhibiting the power from being used to discriminate. And third, the Constitution plainly intended to preserve and enforce the limitation as to discrimination imposed upon the States by Article IV of the Articles of Confederation, and thus necessarily assumed the continued possession by the States of the reserved power to deal with free residence, ingress and egress. This last doctrine became a foregone conclusion "because the text of Article IV, §2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations; . . ."⁹² Accordingly, the judgment below was sustained because "no basis is afforded for contending that a wrongful prevention by an individual of the enjoyment by a citizen of one State in another of rights possessed in that State by its own citizens was a violation of a right, afforded by the Constitution."⁹³ This was held to be a necessary result of Art. IV, §2, which was held in the *Slaughter-House Cases* to be directed solely against state action.

⁹⁰*Id.* at 292, 41 Sup. Ct. at 133.

⁹¹*Cf.* *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588 (1875); *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617 (1892); *In re Quarles and Butler*, 158 U. S. 532, 15 Sup. Ct. 959 (1895); *Motes v. United States*, 178 U. S. 458, 20 Sup. Ct. 993 (1900).

⁹²254 U. S. 281, 294, 41 Sup. Ct. 133, 134 (1920).

⁹³*Id.* at 298, 41 Sup. Ct. at 135.

The entire decision in the *Wheeler* case revolves around Article IV, §2,⁹⁴ and quotes at length from the *Slaughter-House Cases* and from the cases quoted therein: *Corfield v. Coryell*,⁹⁵ *Paul v. Virginia*⁹⁶ and *Ward v. Maryland*.⁹⁷ In all of these cases there are expressions to the effect that the right of free movement of persons is an incident of state citizenship which is protected against discriminatory state action by Article IV, §2. But it is significant that, after referring to and quoting from these cases, Mr. Justice Miller's opinion in the *Slaughter-House Cases* did "venture to suggest" the right as one of the privileges and immunities of national citizenship, and not as an attribute of state citizenship.

It is surprising, to say the least, that the argument for the Government in this case is that the Fourteenth Amendment has had no effect upon the question presented in this case, except incidentally in so far as it has, perhaps, enlarged and constitutionally fixed the status of a citizen of the United States, which status, the government contends, was fully recognized before the Amendment. It would seem that a sound argument could have been made around the words of Mr. Justice Bradley's dissent in the *Slaughter House Cases*:

The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right.⁹⁸

National citizenship results from the mere circumstance of birth within the territory and jurisdiction of the United States. State citizenship depends

⁹⁴Mr. Chief Justice White's almost deliberate effort to avoid committing either himself or the Court on the issue whether the rights involved were attributes of national citizenship seems difficult to understand after his vigorous declaration only a year earlier in the Selective Draft Law Cases, 245 U. S. 366, 389, 38 Sup. Ct. 159, 164 (1918): "We briefly direct attention to the Amendment for the purpose of pointing out . . . how completely it broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and, therefore, operating as it does upon all the powers conferred by the Constitution, leaves no possible support for the contentions made"

⁹⁵See note 4 *supra*.

⁹⁶8 Wall. 168, 180, 19 L. ed. 357, 360 (U. S. 1868).

⁹⁷12 Wall. 418, 430, 20 L. ed. 449, 452 (U. S. 1870).

⁹⁸16 Wall. 36, 112-113, 21 L. ed. 394, 420 (U. S. 1873). See also Mr. Justice Miller's majority opinion, *id.* at 80, 21 L. ed. at 410: "One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State."

on the additional factor of residence, and is obtained or lost therewith. If the national citizen has a right to enter the State of his choice and obtain state citizenship by residence therein,⁹⁹ he has an equal right to remain in a State in order to retain that citizenship. An alien admitted to the United States under the Federal law was declared in *Truax v. Raich*¹⁰⁰ to have been admitted "with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State of the Union."¹⁰¹ It is incomprehensible that a citizen should have any lesser right to enter and abide in any state. Any lawless interference with either the right to enter to obtain state citizenship or the right to remain in the state to retain such citizenship is an abridgment thereof.

After stating the basis for its decision in *United States v. Wheeler*, the Court points out that *Crandall v. Nevada*, *supra*, is inapplicable, not only because it involved state action, but because the statute considered in that case was held to burden directly the performance by the United States of its governmental functions and also to limit the right of citizens growing out of such functions. It was stated as a *sequitur* that the observation made in *Twining v. New Jersey*, *supra*, to the effect that the *Crandall* case had held that the privilege of passing from state to state was an attribute of national citizenship might be disregarded in the *Wheeler* case as inapposite.¹⁰²

Since *Colgate v. Harvey* was so soon overruled, the case is worthy of mention here only to point out that notwithstanding the *Wheeler* case, *Crandall v. Nevada* is still cited for the proposition that the right to pass freely from one State to another is undoubtedly among the privileges and immunities of a national citizen.¹⁰³

In the *Edwards* case, *supra*, appellant's brief stressed the passage of persons from State to State as being interstate commerce and argued that the statute in question invaded the power of the national government over such commerce. As a further argument, it was claimed that the statute deprived the migrant of "liberty without due process of law." No effort was made

⁹⁹See WILLOUGHBY, THE U. S. CONSTITUTION (2d ed. 1929) 345, "By the mere act of taking up residence within a state, which that state cannot prevent, a federal citizen, *ipso facto*, becomes a state citizen. . . . The federal Constitution fixes that once for all."

¹⁰⁰239 U. S. 33, 36 Sup. Ct. 7 (1915).

¹⁰¹*Id.* at 39, 36 Sup. Ct. at 9.

¹⁰²The Court was very careful, however, to confine its decision to the case actually before it, and clearly indicated that nothing said in the case was to be construed as "implying a want of power in the United States to restrain acts which, although involving ingress or egress into or from a State, have for their direct and necessary effect an interference with the performance of duties which it is incumbent upon the United States to discharge, as illustrated in the *Crandall* case."

¹⁰³296 U. S. 404, 429, 56 Sup. Ct. 252, 258 (1935).

to prove the invalidity of the statute as abridging privileges and immunities of a national citizen.¹⁰⁴ The brief *amicus* filed by the Select Committee of the House of Representatives of the United States¹⁰⁵ claims in its opening paragraph that the statute "contravenes the privileges and immunities clauses of the Constitution, Article IV, §2; Fourteenth Amendment." The brief then argues, "Article IV, §2, like Article IV of the Article of Confederation, was intended to insure to each of the citizens of the several States the fundamental right to move about freely and easily from State to State in search of opportunity."¹⁰⁶ But no argument was made that the right was a privilege and immunity of citizens of the United States and that the state statute, abridging the right, was invalid under the "privileges and immunities" clause. The brief *amicus* also stressed the "commerce" clause and further claimed that the statute violated the "equal protection" clause of the Fourteenth Amendment. The majority opinion of the Court rested squarely on the "commerce" clause, and it was stated, "In the view we have taken, it is unnecessary to decide whether this Section is repugnant to other provisions of the Constitution."¹⁰⁷

In light of the arguments made in appellant's brief and in the brief *amicus*, it seems significant that Justices Douglas, Black, and Murphy declined to express a view on whether or not the statute ran afoul of the "commerce" clause, and based their opinion upon the premise that the right to move freely from state to state is an incident of national citizenship protected by the "privileges and immunities" clause of the Fourteenth Amendment. Mr. Justice Jackson concurred in the result reached by the Court, and, agreeing that the grounds of its decision are permissible ones under applicable authorities, indicated his objection to resting the conclusion on the "commerce" clause. He also based his opinion upon the "privileges and immunities" clause.

Mr. Justice Douglas' opinion is of particular interest because, after quoting the *Twining v. New Jersey* doctrine that "privileges and immunities of citizens of the United States . . . are only such as arise out of the nature and

¹⁰⁴"Freedom of movement and of residence must be a fundamental right in a democratic State. Whether within the privileges and immunities clause of the Fourteenth Amendment or within the term liberty in the due process clause, it is a basic constitutional right, the more valuable to those who migrate because of economic compulsions." This is the only mention of the privileges and immunities clause in appellant's brief, *Edwards v. California*, 314 U. S. 160, 163, 62 Sup. Ct. 164, 165 (1941).

¹⁰⁵Appointed pursuant to House Resolution No. 63, 76th Cong., 2d Sess. (April 22, 1940), to investigate migration of destitute citizens.

¹⁰⁶314 U. S. 160, 62 Sup. Ct. 164 (1941).

¹⁰⁷*Id.* at 177, 62 Sup. Ct. at 168.

essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States,"¹⁰⁸ it cites *Crandall v. Nevada* as an authority, ante-dating the Amendment, for the proposition that the right to pass freely from state to state was recognized as a right fundamental to the national character of the federal government. It recognizes that the *Crandall* case emphasized that the Nevada statute would obstruct the right of a citizen to travel to the seat of national government, *etc.*, but points out that there was not a shred of evidence in the record of that case that the persons there involved were en route on any such mission. It is stated that the point which Mr. Justice Miller made was merely illustrative of the damage and havoc which would ensue if the states had the power to prevent the free movement of citizens from one state to another. Accordingly, the dictum in the *Wheeler* case, attempting to limit the *Crandall* case to a holding that the statute there in question directly burdened the performance by the United States of its governmental functions and limited the rights of citizens growing out of such functions, was disapproved as not bearing analysis.

Mr. Justice Jackson in his opinion, without attempting to ignore or belittle the difficulties of the almost forgotten "privileges and immunities" clause, points out that the difficulty of the task does not excuse the Court from giving general and abstract words "whatever of specific content and concreteness they will bear as we mark out their application, case by case."¹⁰⁹ He advocates that the Court should hold squarely that it is a privilege and immunity of national citizenship to enter any State either for a temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. "If national citizenship means less than this, it means nothing."¹¹⁰

In further support of this premise, the opinion sets forth an additional argument on the basis of the obligations of such citizenship: Every national citizen, under the Constitution, owes a duty to render military service.¹¹¹ His right to migrate to any part of the Union he must defend is a right that must be respected under that instrument. "Unless this Court is willing to say that citizenship of the United States means at least this much to the citizen, then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."¹¹²

¹⁰⁸314 U. S. 160, 178, 62 Sup. Ct. 164, 169 (1941).

¹⁰⁹*Id.* at 183, 62 Sup. Ct. at 171.

¹¹⁰314 U. S. 160, 183, 62 Sup. Ct. 164, 171 (1941).

¹¹¹Selective Draft Law Cases, 245 U. S. 366, 378, 38 Sup. Ct. 159, 161 (1918).

¹¹²314 U. S. 160, 186, 62 Sup. Ct. 164, 172 (1941).

Recent Interest in Ingress and Egress

And that is the present status of the "right of ingress and egress"—to be or not to be a privilege and immunity of a citizen of the United States, that is the question. Ever since the onset of the depression, the right has become one of major importance. Many states, in an effort to limit the migration of indigent workers and farmers, passed statutes similar to the California statute overthrown in the *Edwards* case.¹¹³ With the transition from the depression years to a war-time economy, the migration of war workers has reversed the process. Now, with the manpower shortage, states are endeavoring to prevent the egress of workers to more profitable war jobs. In some states this has resulted in renewed efforts to enforce immigrant Agent License Acts,¹¹⁴ efforts which involve the right of egress indirectly rather than directly.

Recently a case arose in Florida under such an Act, which is practically the *Edwards* case in reverse. A C.I.O. union official was held on the ground that he failed to secure the license required by the recently enacted Florida statute¹¹⁵ before recruiting a number of agricultural laborers for work in New Jersey during the canning season there. Necessary clearance for these laborers had been secured from the United States Employment Service of the War Manpower Commission, and the union official was expected to refer the workers to the Employment Service which was to act as the recruiting agency. It is not clear whether he went beyond this limited activity and engaged in active recruiting. In any case, the laborers were allowed to depart, but the union official was held for violation of the state law. Just as *Edwards*, in *Edwards v. California*, was arrested for aiding Duncan in the exercise of his right of ingress, it may be said that this union official was arrested for aiding the laborers in their right of egress. If this case or a similar one reaches the Supreme Court, the wealth of material available in the hearings of the committee investigating defense migration, commonly known as the Tolan Committee,¹¹⁶ may make possible the writing of a "Brandeis brief," which will lead the Court to overrule *Williams v. Fears*.¹¹⁷

¹¹³For lengthy discussion of contemporary significance of ingress and egress with reference to the migration of war workers, and analysis of pertinent statutes, see Roback, *Legal Barriers to Interstate Migration*, 28 CORNELL L. Q. 286 and 483.

¹¹⁴*Ibid.*

¹¹⁵LAWS OF FLA. 1943, Gen. Laws, Vol. 1, ch. 22068, p. 833.

¹¹⁶Roback, *op. cit. supra* note 113.

¹¹⁷See note 85 *supra*.

Conclusion

The interest shown by the War Manpower Commission in the Florida emigrant agent case, and the general overall problem of manpower make it clear that the Federal Government has a stake in the final determination of the issue. Since the *Edwards* case there is no question but that state action to limit labor migration runs afoul of the "commerce" clause. But what of those situations where private individuals act to prevent either ingress or egress? Such activities can be reached criminally only under the Civil Rights Statute,¹¹⁸ provided, of course, that the right is a privilege and immunity of a citizen of the United States. If the right of ingress and egress is formally recognized as a privilege and immunity of national citizenship, it arises out of the creation by the Constitution of a national government, paramount and supreme in its sphere of action. Like the right to vote, the right to protection while in the custody of the United States, and the right to inform of violations of law, the constitutional command is without restriction or limitation; and the right is secured against the action of individuals as well as of states.¹¹⁹

It was inevitable that the Federal Government would, upon the occurrence of the necessary acts, make a test case under Section 51, Title 18¹²⁰ and present the Court with an opportunity to pass directly on this all important question. The proper case will present to the Court the sole issue: Is the right of ingress and egress a privilege and immunity of a citizen of the

¹¹⁸Rev. Stat. §5508 (1875); 35 Stat. 1092 (1909) 18 U. S. C. §51 (1940): "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, . . . they shall be fined not more than \$5000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

¹¹⁹The interference by state officers with the recognized right of ingress and egress comes clearly within the purview of 18 U. S. C. §52: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, . . . shall be fined not more than \$1000, or imprisoned not more than one year, or both."

As to what constitutes state action under "color of law," see *Ex Parte Virginia*, 100 U. S. 339, 347, 25 L. ed. 676, 679 (1879); *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278, 287, 33 Sup. Ct. 312, 314 (1913); *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 246, 52 Sup. Ct. 133, 136 (1931); *United States v. Classic*, 313 U. S. 299, 326, 61 Sup. Ct. 1031, 1043 (1941); *Culp v. United States*, 131 F. (2d) 93 (C. C. A. 8th, 1942); *Catlette v. United States*, 132 F. (2d) 902, 906 (C. C. A. 4th, 1943); *United States v. Sutherland*, 37 F. Supp. 344 (N. D. Ga. 1940).

¹²⁰35 STAT. 1092 (1909), 18 U. S. C. §51 (1940).

United States, secured by the Constitution and laws of the United States? The Court must then, of necessity, review the merry-go-round of present opinions and make a clear-cut decision. Until then, we need not decide whether or not Mr. Justice (now Chief Justice) Stone wrote the epitaph of the "privileges and immunities" clause.