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WHAT ARE THE PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES?*

By Stanley C. Morris**

An investigation of the privileges and immunities of citizens of the United States requires, perhaps, a preliminary inquiry. Who may call themselves citizens of the United States? The first words of our national charter are: "We, the People of the United States . . . do ordain and establish this Constitution . . ." State governments were already in existence at the time the Constitution was drafted and adopted. Whether "the people" referred to were the people of all the states taken collectively or the people of the several states, the Constitution, as first adopted, left in doubt. Nor do the writings of the political pamphleteers of the time make clear what "the Fathers" meant by the phrase. It appears, however, that in the political theory of the time it was conceived that the ultimate authority was to reside, after, as before, the adoption of the new form of government, in "the people," thus vaguely defined, and that sovereignty was somehow being divided between the several states and the Union. Upon the coming into being of the new or Federal government the theory was that the individual American, domiciled in any one of the existing states, became a citizen of the new government, just as he already was of the state government.4

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* The James F. Brown Prize Thesis, 1920-1921. In 1919 Mr. James F. Brown, of the Class of 1873, gave $5,000.00 to the University, the proceeds to be invested by it and the income used as a prize for the best essay each year on the subject of the individual liberties of the citizen as guaranteed by the Constitution. Any senior or any graduate of any college of the University, within one year after receiving any bachelor's degree, may compete for this prize. This was the first award of this prize.

** LL.B., West Virginia University, 1921, of Clarksburg, W. Va.

1 See THE FEDERALIST, Nos. 33, 45, 82.
2 A statesman of the day said: "Our new government is an attempt to divide a sovereignty—a fresh essay at imperium in imperio." JOHN ADAMS, WORKS, 564. See MERIAM, AMERICAN POLITICAL THEORIES, 252-256.
3 Probably the best definition of citizenship ever propounded from the American viewpoint is to be found in Minor v. Happersett, 21 Wall. 162 (U. S. 1875).
4 "The Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several States, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes his allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance."
When slavery vaulted into the political arena, clad in the armor of states’ rights, the question of the relationship of the national and state governments to each other and, consequently, of both to the individual citizen, became the gage of battle. The states’ rights contention was that in so far as there was a Federal citizenship it grew out of state citizenship and was subordinate to it. Came then the Dred Scott decision. Its effect was to deny that national citizenship was a necessary concomitant of state citizenship; and that no state could confer citizenship upon one of African blood, at birth or later, so as to bring him within the protection of the Constitutional provision for the enjoyment of privileges and immunities in the several states on a par with those enjoyed in the state of his citizenship. The Dred Scott decision stood until the harsh logic of

"For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words ‘subject,’ ‘inhabitant,’ and ‘citizen’ have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation and nothing more.

It is true that the Constitution, as adopted, did not in terms recognize this dual citizenship. But it was recognized inferentially. The Constitution recognized state citizenship when it declared in Art. IV, sec. 2 that "citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." Federal citizenship was nowhere defined but seems to have been recognized in Art. II, sec. 1, which provided that the president shall be "a natural born citizen, or a citizen of the United States at the time of the adoption of the Constitution;" in Art. I, sec. 3, which provided that a Senator shall have been "nine years a citizen of the United States;" in Art. I, sec. 2, which provides that a representative in Congress shall have been "seven years a citizen of the United States;" and also in Art. I, sec. 8, which put it within the power of Congress to pass naturalization laws. The actual existence of this dual citizenship seems never to have been seriously questioned. The only dispute was as to the relation between state and Federal citizenship. And prior to the flaring up of the slavery question there seems to have been surprisingly little discussion of the matter.

In debate on the "Force Bill" Mr. Calhoun said in the Senate:

"If by citizen of the United States he [another Senator] means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some State or Territory, a sort of citizen of the world, all I have to say is that such a citizen would be a perfect non-descript; that not a single individual of this description can be found in the entire mass of our population. Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all the privileges and immunities of citizens in the several states; and it is in this and no other sense that we are citizens of the United States."—Mr. Calhoun's argument on the "Force Bill." See his Works, II, 242.


Note the following language in the syllabus of this case:

"7. Since the adoption of the Constitution of the United States, no state can by any subsequent law make a foreigner or any other description of persons citizens of the United States, nor entitle them to the rights and privileges secured to citizens by this instrument.

"8. A State, by its laws passed since the adoption of the Constitution, may put a foreigner or any other description of persons upon a footing with its own citizens as to all the rights and privileges enjoyed by them within its dominion and by its laws. But that will not make him a citizen of the United States, nor
war intervened to write the law anew. President Lincoln’s Emancipation Proclamation operated directly upon the negroes of the land to change their status. The inference from this was easy and natural that if the national government had power to act directly upon individuals and could regulate their legal status, national citizenship ought to be paramount to state citizenship and its prerogatives ought to be of overruling importance. The animus of civil conflict and the bitterness which was the aftermath of the great struggle made it only natural that such doctrines should be insisted upon and, further, that the occasion of reconstruction should be seized upon for a determined attempt to reduce the individual states, particularly those which lately had been in rebellion, to the condition of mere provinces. This attempt first took form in Congress in the famous “Civil Rights Bill.” Later, and, it is believed with a like purpose on the part of some, at least, of its proponents, came the Fourteenth Amendment.

As this famous amendment for the first time incorporated into the Constitution a definition of national citizenship, and more especially for the reason that it provides against the abridgment of the privileges and immunities of those who enjoy such citizenship, the language of it must be carefully considered. So far as material to our inquiry, it reads:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

It seems clear that the effect of the first sentence of this amend-
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ment is to overrule effectively the Dred Scott decision. Apparently it has never been doubted that this sentence makes any person born or naturalized within the United States a citizen thereof, and, if born to parents domiciled within a given state, or if domiciled within a state at naturalization, a citizen of such state. With, what seems, then, to be a final and authoritative statement of who are citizens of the United States, we may proceed to inquire what privileges and immunities they may claim.

The Fourteenth Amendment is not self-interpreting. It is true that many of its terms were at the time of its adoption, of great antiquity. But few of them had precise meanings even to the legal scholar. This is true of the phrase "privileges and immunities." This term does not appear to have been used in English

Note the language of the majority opinion in the Slaughter-House Cases, supra, 73:

"It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overrules the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States."

Again, in the minority opinion of Mr. Justice Bradley, ibid., 112, it was said:

"The question is now settled by the fourteenth amendment itself, that citizenship of the United States is the primary citizenship of this country; and that state citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence."


Of course children born to ambassadors and others not subject to the jurisdiction of the United States, even within its territory, do not become citizens. Indians living within tribes come within this class.

This is true of the words "privileges" and "immunities," WEBSTER, NEW INTERNATIONAL DICTIONARY, defines "privilege," inter alia, as follows: "2. A right or immunity granted as a peculiar benefit, advantage or favor . . . " Note, however, that there immediately follows this a legal definition which is substantially the "fundamental rights" definition as set forth in the present article, which see. The word "immunity" is defined in the same work: "1. Freedom or exemption from any charge, duty, obligation, office, tax, imposition, penalty or service; also a particular privilege."

But in the investigation of the meaning of a legal term which, if not a precise expression of art, is at least a technical term, it is of little value to take the dictionary meaning of the words and, a priori, conjuncture what effect the courts will allow them to have in law.

"What constitutes the law? You will find some text writers telling you . . . that it is a system of reason, that it is a deduction from principles . . . The prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." O. W. HOLMES, COLLECTED LEGAL PAPERS, 172-173.

For an example of "natural and obvious" construction of the language of the Fourteenth Amendment, see Charles R. Pence, "The Construction of the Fourteenth Amendment," 25 AM. L. REV. 556, 558. The construction contended for in this article was afterwards definitely rejected by the Supreme Court. Twining v. New Jersey 211 U. S. 78 (1911).

Note for instance, that "due process of law" may be traced back to the "per legem terrae" of Magna Carta. H. D. Hazeltine, "The Influence of Magna Carta on American Constitutional Development," 17 COLUM. L. REV. 1, 36.

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14 Even "due process" with its long history was not then and is not now conclusively defined: " . . . It is familiar that what is due process of law depends on circumstances." Moyer v. Peabody, 212 U. S. 78, 84 (1909).

15 It is submitted that the phrase "privileges and immunities" is properly one legal term. As shown, supra, note 12, the two words, if not synonymous, are very similar in elementary meaning and are interchangeable in common usage. The two are apparently linked together wherever they occur in constitutional documents. Apparently they have become when so linked a conventionalized expression much like "goods and chattels," "wares and merchandise," "work and labor," "rents and profits." In practically every case where used by the courts the two words appear thus linked

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constitutional documents.16 Apparently it occurs in none of the col-

17 ionary coinage. 17 It may, then, at least tentatively, be claimed as of

American coinage. And it is believed to have been first used, in a
document of constitutional dignity in the Articles of Confedera-
tion. 18 From there it was carried over into the Federal Constitu-
tion as originally adopted,19 and was there used in connection with
state citizenship. So used it was not without its interpretations
when the Fourteenth Amendment was adopted in 1868,20 but it may
be said, fairly, not to have had a precise signification.21

When therefore the term was seized upon, placed in a new con-
text, and given an entirely different connection, as it was in the
Fourteenth Amendment, it was only natural that great doubt
should exist as to what was to be its interpretation in the new set-
ing. 22 The political animus which inspired its passage has already
been hinted at. It was therefore to be expected that its proponents
would be very jealous of anything they might consider its emas-
culation by interpretation, should such a thing be attempted. And
when a case came before the Supreme Court in which the meaning
of the phrase had to be considered, that body fully realized the

15 A search of the English digests reveals no use of the term in connection with

16 civil rights in any decided case. Neither is it noticed in such standard texts on En-

17 glish constitutional history as Stubbs, May or Hallem, in such treatises as Bagot's or

18 Lowell's nor in such sources-books on English constitutional history as Stubbs or

19 Medley. An authoritative British publication, after referring to "privilege" of clergy

20 but making no mention of any use of the term in connection with the civil rights of

21 citizens, says: "In the United States the term privilege is of considerable political

importance." 22 ENCyc. BRITANNICA 371.

22 See MACDONALD, SELECT CHARTERS OF AMERICAN HISTORY.

15 "The better to secure and perpetuate mutual friendship and intercourse among

16 the people of the different states in this union, the free inhabitants of each of

17 these states, paupers, vagabonds, and fugitives from Justice excepted, shall be

18 entitled to all privileges and immunities of free citizens in the several states...

19 ARTICLES OF CONFEDERATION, Art. IV.

20 Madison referred to this article as "a confusion of language truly remarkable.

21 THE FEDERALIST, No. 42.

19 "The Citizens of each State shall be entitled to all Privileges and Immuni-

20 ties of Citizens of the several States," CONSTITUTION, Art. IV, Sec. 2.

20 Corfield v. Coryell, 4 Wash. C. C. 371 (U. S. 1825); Allen v. Sarah, 2 Harr.

22 434 (Del. 1838); Commonwealth v. Griffin, 3 B. Mon. 208 (Ky. 1842).

21 For the effect which the courts had then allowed and have later allowed the
term to have, as used in ART. IV, sec. 2, see W. J. Meyers, "The Privileges and

22 See 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 5 Ed.,

637-638. The passage cited is from a chapter on the Fourteenth Amendment, written
not by Story but by T. M. Cooley and inserted in the third edition of Story, which
Cooley edited. It appears to have been written in the interval between the adoption of
the amendment and its first authoritative exposition by the Supreme Court in the
Slaughter-House Cases. If so, the analysis there is in a high degree creditable to the
learned author of it.

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political significance and the gravity of the decision it had to make.

The question was first fairly presented in the famous Slaughter House Cases. A Louisiana statute had granted to a certain corporation the exclusive right to maintain cattle-landings and slaughter-houses in New Orleans. It was contended, inter alia, that this abridged "privileges and immunities" of citizens of the United States, specifically that butchers in New Orleans were thereby deprived of the right to pursue their lawful vocation. The argument of counsel for the butchers was to the effect that the Fourteenth Amendment vastly extended the power of the United States, and delivered over to Congress the protection of those rights of the citizens "forming the basis of the institutions of the country.

The majority of the court found itself unable to accept this view.

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23 Note the language of Mr. Justice Swayne in his dissenting opinion, 16 Wall. 36, 130 (U. S. 1873): "I earnestly hope that the consequences to follow may prove less serious and far reaching than the minority fear they will be.

24 Note the language of the majority of the court, 16 Wall. 36, 87 (U. S. 1873): "We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now purpose to announce the judgments which we have formed in the construction of those articles so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go."

25 Supra, notes 9, 23 and 24.

26 "The Fourteenth Amendment . . . seems to have been made under an apprehension of a destructive faculty in the State governments. It consolidated the several 'integers' into a consistent whole . . . By it the national principle has received its efficient expression. The tie between the United States and every citizen . . . has been made intimate and familiar . . . The States in their closest connection with the members of the State have been placed under the oversight and restraining hand of Congress. The purpose is manifest, to establish through the whole . . . United States one people . . . It is an act of Union . . . His [a citizen's] privileges . . . must not be impaired, and all the privileges of the English Magna Carta in favor of freemen are collected upon him and overshadow him as derived from this amendment . . . ."

27 The Fourteenth Amendment is not confined to the population that had been servile . . .

"Now what are 'privileges' . . . in the sense of the Constitution? They are undoubtedly the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of the people have recognized as forming the basis of the institutions of the country." 16 Wall. 36, 52-55 (1873).

"Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? * * *

"All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the extent of those rights by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. * * *

"We are convinced that no such results were intended by the Congress which
Referring to the history of the times, in which the post-war amendments were passed the court found in them only the unified purpose of protecting the freedmen and not an intention widely to extend the Federal power at the expense of that of the several states. Despite "the pressure of all the excited feeling growing out of the war" the court could find in the reconstruction amendments no purpose to alter "our complex form of government" with "States with powers for domestic and local government, including the regulation of civil rights." It therefore found that dual citizenship still existed, indeed was expressly recognized, for the first time, each branch thereof with different privileges and immunities. Privileges and immunities of citizens of the United States which no state may abridge it considered to be only such as owe their existence to the Federal government, its national character, its Constitution, its treaties, or its laws. The majority considered that the cases then before it concerned none of such privileges and immunities and held the court excused from defining the same until the incidence of a proper case. The court went on, however, to declare

28 proposed these amendments, nor by the legislatures of the States which ratified them.

29 . . . we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

30 But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws.

31 One of these is well described in the case of Crandall v. Nevada, 6 Wall. 36. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may upon that government, to transact any business he may have with it, to seek its protection, to go into its courts, to serve 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 subtreasuries, land offices, and courts of justice in the several States."

32 "Another privilege of a citizen of the United States 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. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. 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. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth next to be considered." 16 Wall. 36, 77-80 (U. S. 1873).

33 The court speaks of "events almost too recent to be called history," 16 Wall. 36, 71 (U. S. 1873).

34 It has been the unvarying policy of the Supreme Court to pass upon constitutional questions only when actually and of necessity involved in actual litigation. By taking this attitude in the Slaughter-House Cases the court left it to a process of exclusion and inclusion, when actual cases arise, to determine what are privileges and immunities of citizens of the United States as contemplated in the clause
by way of *dictum*, various privileges and immunities it considered as coming within the protection of the clause in question.\(^{30}\)

Mr. Justice Field in a minority opinion,\(^{31}\) concurred in by Mr. Chief Justice Chase, held that the effect of the amendment was to do, for the protection of citizens of the United States against hostile legislation by any state, what the earlier clause for the protection of privileges and immunities did, for the citizens of each state, against hostile legislation on the part of any other state or states. Mr. Justice Bradley\(^{32}\) in a dissenting opinion held that there were certain "fundamental privileges and immunities of citizens of the United States which would be no less real and inviolable if not mentioned in the Constitution at all; that these pre-existing fundamental privileges and immunities were the ones secured against state action by the Fourteenth Amendment. He indicated his approval of a definition of such "fundamental" privileges and immunities as put forward by Judge Bushrod Washington: \(^{33}\) that they are those "which belong of right to the citizens of all free governments." Mr. Justice Swayne in a dissenting opinion\(^{34}\) reasoned much along the same lines contended that without the power claimed for the Federal government it was "glaringly defective," conceded that "the power conferred is novel and large," but averred that "the novelty was known and the measure deliberately adopted," and ended by hinting at serious consequences likely to follow the majority construction.

The effect of this famous decision, which has been paraphrased thus fully because of the fact that no subsequent case has carried the analysis farther, was to hold merely that no state may deny or take away from even one of its own citizens the privileges and immunities which have been conferred upon him by the Constitution, the laws of Congress, or the treaties of the United States. The holding of the court was only arrived at by vote of five Justices to four. And when we comprehend the exact antithesis of the ma-

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under consideration in the present article. The court has remitted parties to the same method of determining what is "due process of law" under the Fourteenth Amendment.

For an excellent summary of the progress made in the first forty years in reducing the amendment to certainty by this method, see Charles W. Collins, "*Stare Decisis* and the Fourteenth Amendment," 12 Col. L. Rev. 603.

\(^{30}\) See note 27, supra.

\(^{31}\) 16 Wall. 36, 83-111 (U. S. 1873).


\(^{33}\) Corfield v. Coryell, supra, note 20.

\(^{34}\) 16 Wall. 36, 124-130 (U. S. 1873).
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Jointy and minority opinions, the tremendous implications for all our subsequent existence as a nation of a choice between them, we realize the critical importance in our constitutional history of the hour of that decision.

In a study of the judicial exposition of the term “privileges and immunities,” as used in the Fourteenth Amendment, the next phase, proceeding logically, but not chronologically, with the case of Spies v. Illinois, where the argument, later a commonplace, seems first to have been advanced that “though originally the first ten” Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights . . . they make them privileges and immunities of . . . a citizen of the United States, . . . and the Fourteenth Amendment as to such rights limits state power, as the ten amendments had limited Federal power.” As conceived by its proponents, this argument was merely a recrudescence in a slightly different garb of the old “fundamental rights” theory as put forth by the minority of the court in the Slaughter-House Cases. Actually and in its implications, however, it involved the holding that the Fourteenth Amendment created a whole group of new privileges and immunities. For it is one thing to guarantee a citizen of the United States that he shall not “be held to answer,” in a court of the United States, “for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury” and quite another thing to guarantee him also that he shall not be so held to answer in a state court. One

35 The case of Bradwell v. State, 10 Wall. 130 (U. S. 1872), follows immediately in the reports the Slaughter-House Cases. As stated later in the present article, the effect of it if followed would be to still further circumscribe the operation of the “privileges and immunities” clause. The opinion in that case was written by Mr. Justice Miller as was the majority opinion in the Slaughter-House Cases and it is believed the narrower interpretation of the clause was inadvertent.

36 123 U. S. 131, 166 (1887). The case seems not to have passed upon the point directly, however.

37 The first ten amendments are often grouped together and referred to as a “bill of rights.” It is believed that only the first eight really belong in such a category.

38 This had been undisputed since the case of Barron v. Mayor of Baltimore, 7 Pet. 243 (U. S. 1833), decided by Mr. Chief Justice Marshall, and so holding.

39 CONSTITUTION, Fifth Amendment.

40 A perception of the truth of this statement is fundamental, and it is believed that many of the mistaken contentions founded upon the “privileges and immunities” clause come from a failure to recognize it. Consider the following language: “It does not take away the character of a privilege or immunity . . . enjoyed by a citizen under the laws of his government . . . that such citizen is at the same time subject to some other jurisdiction under which he may . . . not enjoy such right to its full extent. Such conditions may affect its value to the citizen but not . . . its . . . existence,” Charles R. Pence, “The Construction of the Fourteenth Amendment,” supra, note 12. It is believed that back of such language is some sort of “natural law” or “natural right” conception such as is so well deprecated by Mr. Justice Holmes. O. W. HOLMES, COLLECTED LEGAL PAPERS, 167-179, 310-316. Apparently the idea is that there is some sort of trans-substantiation of the “right” into the personality of the
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might go through the whole of the first eight amendments in this way and show that if privileges and immunities, in terms identical with those therein guaranteed against the Federal government, were guaranteed against state action likewise, such privileges and immunities, notwithstanding their superficial likeness to those guaranteed in the first eight amendments, would be an entirely different and additional group of privileges and immunities. As heretofore shown, American citizenship has a double aspect and it would be axiomatic to point out that a privilege or immunity attaching to it in both aspects would be a greater and substantively more desirable privilege or immunity than one attaching to it in a single aspect. And the argument from intention for this modified "fundamental rights" doctrine falls down, when examined in the light of the circumstances of the adoption of the Fourteenth Amendment. Had it been intended to place inhibitions upon the states analogous to those put upon the Federal government by the so-called Federal Bill of Rights, the amendment could very easily have been framed to do just that thing. And, as the majority opinion in the Slaughter-House Cases very well pointed out, if it had been intended to protect the citizen of the state against his own state the words "or of the state" could have been attached to the end of the "privileges and immunities" clause. Again, the "due process of law" clause of the Fifth Amendment had always been construed to apply only to the Federal government as had the limitations of each of the first eight amendments. Had the first half of the second sentence of the Fourteenth Amendment been intended and expected to place upon the states a "due process" limitation correlative to that imposed upon the nation by the Fifth Amendment, why would the framers of the amendment have gone on to add in the very same sentence the words: "nor shall any State deprive any person of life, liberty, or property, without due process of law?" These and like arguments prevailed with the court from the first

beneficiary of it and it thereafter is his and ought to be exercisable in any aspect of his life but is believed that a civil "privilege" or "immunity" is really a much more relative thing—a thing which can only be violated by the very act which it is supposed to give immunity against. In such a view an immunity against a certain action by the Federal government is quite a different thing from an immunity against an act of the same general type on the part of a state government.

41 By implication before, and expressly after, the Fourteenth Amendment.

42 An immunity against both the state and nation would be substantially a greater right than the like immunity against either.

43 Some such form of words as: "Restrictions are hereby imposed upon the several states like those imposed by the first eight amendments upon the Federal government."
against the contention noted. And in a line of decisions ending with the case of *Twining v. New Jersey*, the hallucination of "fundamental rights" may be considered to have been finally dispelled.

Our endeavor to understand the privileges and immunities of citizens of the United States should now, perhaps, take note of what appears to have been an unwitting circumscription of the field of operation of the "privileges and immunities" clause of the Fourteenth Amendment. In the case of *Bradwell v. State*, decided immediately after the *Slaughter-House Cases*, Mr. Justice Miller, who wrote the majority opinion in the earlier cases, said: "There are privileges and immunities belonging to citizens of the United States, in that relation and character, and . . . it is these and these alone which a State is forbidden to abridge." Again Mr. Justice Peckham, as late as 1900, said in *Maxwell v. Dow*; "In this case the privilege or immunity claimed does not rest upon the individual by virtue of his national citizenship, and hence is not protected by a clause which simply prohibits the abridgement of the privileges or immunities of citizens of the United States . . . The Fourteenth Amendment . . . did not add to those privileges or immunities."

These two quotations might reasonably mean either, (1) that the "privileges and immunities" clause of the Fourteenth Amendment secured no rights to citizens of the United States not concomitants of such citizenship *per se*, or, (2) that it guaranteed no rights not thus concomitant, or not granted by the Constitution, national laws, or treaties, to citizens of the United States exclusively and *sub nomine*. It is submitted that the first of these possible meanings would be entirely too narrow an interpretation of the "privileges and immunities" clause. It would include no privilege or immunity enjoyed by citizens of the United States in common with all others subject to the territorial jurisdiction of the United States. It is believed that a privilege or immunity enjoyed by a citizen of the United States because of his citizenship *per se*, and by
no others, will hardly be found guaranteed within the four corners of the Constitution. It is probable that the language used was not intended to have such a narrow meaning; rather, that the second explanation above is correct. Even so, such an interpretation of the "privileges and immunities" clause is irreconcilable with the dictum in the Slaughter-House Cases. For some of the privileges and immunities therein enumerated as being within the protection of the Fourteenth Amendment are also guaranteed to others than citizens of the United States. A privilege or immunity enjoyed by a citizen of the United States is, however, no less his because it is enjoyed by him in common with other people. It is submitted that the Slaughter-House Cases gave to the "privileges and immunities" clause an interpretation narrow enough to avoid any fundamental alteration of our constitutional system and that no compelling reasons for further narrowing the interpretation exist in logic or in expediency. Indeed, it is believed that the expressions noted were used inadvertently and may be safely ignored in estimating the privileges and immunities of citizens of the United States.

In passing, another point should be noticed. Whatever the substantive nature of the prohibition of the "privileges and immunities" clause of the Fourteenth Amendment, such prohibition, or congressional legislation under it, can only apply to attempted action by the various states through some of their instrumentalities. But it was early attempted to apply the prohibition to cases where it was contended rights had been denied or abridged by private persons. The cases which arose, known as the Civil Rights Cases, grew

40 The privilege already referred to, supra, note 47, seems to come nearest to answering this description. There is also the privilege or right of protection abroad which approaches to being a right which may be said to be enjoyed by a citizen of the United States because of his citizenship per se, and by no other persons. But it is not expressly mentioned in the Constitution and may be said to have been imported into our law by the international law. For example, freedom from slavery and involuntary servitude, mentioned in the dictum in the Slaughter-House Cases as a privilege or immunity of citizens of the United States, is guaranteed not only to American citizens co nomine but to all persons who come within the territorial jurisdiction of the United States. Again the dictum mentions the right "to peaceably assemble" to "petition for redress of grievances" and "the privilege of the writ of habeas corpus." It would seem that the language of Art. I, sec. 9, and the First Amendment, dealing with these matters, is broad enough to extend the rights therein secured not only to citizens but to others as well.

41 Many well considered cases subsequent to the Slaughter-House Cases apply the rule therein propounded:

"If the plaintiff in error has any such privileges, he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred." Pennsylvania v. Illinois, 116 U.S. 292, 296 (1886).

"The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its constitution, or its laws and treaties made in pursuance thereof . . . " McPherson v. Blacker, 146 U.S. 1, 38 (1892).

"The privileges and immunities of citizens of the United States, protected by
out of attempts to enforce the Civil Rights Act of 1875. It would seem that Congress in this legislation had taken much the same view of its powers under the "privileges and immunities" clause as was contended for by the minority in the Slaughter-House Cases and had proceeded to legislate directly upon matters "of municipal law regulative of... private rights," ignoring whatever state enactments might have existed on such matters, and in no wise shaping its legislation so as to make it merely corrective of these state laws. The legislation was held unconstitutional. It is true that the rights attempted to be secured by this legislation were in no wise within the protection of the "privileges and immunities" clause of the Fourteenth Amendment. But the Civil Rights Cases are authority to the effect that even in defense of the privileges and immunities protected by the Fourteenth Amendment, Congress may not pass laws operative directly upon offending individuals, but only corrective of offending state laws.

The rule of the Slaughter-House Cases, then, may be said to be the law. It remains perhaps to consider its quality from the standpoint of logic, its expediency when promulgated from the standpoint of statesmanship, its subsequent effect, and its present defensibility.

An examination of the logic of the decision must not go forward like an exercise in mathematics. This is true of any reasoning upon legal problems, but it is especially so of an investigation of a constitutional question. It would be a simple process to look at the language of the amendment, take up a dictionary, hazard an interpretation, and set our shibboleth up against the decision. But a priori reasoning of the sort has no place in constitutional interpreta-

the Fourteenth Amendment, are privileges and immunities arising out of the nature and essential character of the Federal government, and granted or secured by the Constitution..." Duncan v. Missouri, 152 U. S. 377, 382 (1894).

the Civil Rights Act, supra, note 9.

109 U. S. 3, 13 (1883).

An interesting recent case applies the analogous rule to the "privileges and immunities" clause of Art. 4, sec. 2, holding that the Federal courts can only take cognizance of violations of it on the part of the various states, being unable to protect against the abridgment by private individuals of the rights therein intended to be secured. United States v. Wheeler, 254 U. S. 281 (1920).

"The fallacy to which I refer is the notion that the only force at work in the development of the law is logic," says Mr. Justice Holmes. Again, "... the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless." O. W. Holmes, COLLECTED LEGAL PAPERS, 180, 126. Speaking of "irritatingly mechanical" legal reasoning, Dean Roscoe Pound says: "Jurisprudence is the last in the march of the sciences away from the method of deduction from predetermined conception." Roscoe Pound, "Liberty of Contract," 18 YALE L. J. 454, 464.

See supra, note 12, on this point.
By such a simple method the court might well have concluded that the several states were forbidden by the Fourteenth Amendment to abridge any privileges or immunities of citizens of the United States theretofore enjoyed from whatever source derived. The court very properly, and as established rules of interpretation require, construed the language in the light of, (1) the former state of the laws, (2) the evil sought to be remedied or forestalled, and (3) the remedy. So doing, it found the former law in the shape of the first eight amendments guaranteeing privileges and immunities only against the Federal government. Looking then to the evil intended to be forestalled it saw it to be not a further denial of the paramount importance of national citizenship nor a second attack upon the national life by the several states, but the fitful, though sometimes effective, denial of rights to the freedmen. Looking to the remedy, it saw that to give it an effect most drastically preventive of the evil would be to make it in another aspect revolutionary. It is submitted that the decision is quite defensible in its aspect as a piece of constitutional interpretation.

Again, in the Slaughter-House Cases the Supreme Court had before it the exigencies of statesmanship. To restate the situation in terms of the political life of the day, we find it a complex of conflicting forces. There were the new freemen, of slight economic and political capability, and more or less bewildered in their new status. There were the late masters, cowed, but secretly determined to maintain white supremacy by overawing the blacks and sullenly

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67 "Legal systems have their periods in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence. . . . Concepts are fixed. The premises are no longer to be examined . . . social progress is barred by barricades of dead precedents." Roscoe Pound, "Liberty of Contract," supra, note 55.

68 As a recent writer puts it, extreme conservatives would now be celebrating the anniversary of the enactment of the amendment as "Static Day." D. O. McGovney, "Privileges or Immunities Clause, Fourteenth Amendment," 4 T. L. Bull., 213.

69 As the court said in 16 Wall. 36, 78 (U. S. 1873).

"The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our Institution, when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt."

70 One recalls the famous dictum of a great property law teacher, John Chipman Gray, when called upon late in life to teach constitutional law and after he had taught it for a year: "This is not law, but politics."
obstructive of the program of reconstruction. There were the pious-
ly self-constituted tribunes of the people, the carpet-baggers, dis-
comfited and ineffective. There was the Fourteenth Amendment, in
one view a mighty weapon which would not only have battered
down the citadels of white supremacy in the South, but would also
have wiped out state guardianship of civil rights throughout the
land. But the Supreme Court, in the exercise of its high preroga-
tive, saw fit to make it rather a wooden lance, as a political weap-
fit only for the carpet-bagger, in his somewhat Quixotic battles in
behalf of the new citizens.

It may be admitted that, as Mr. Justice Field complained in his
opinion in the Slaughter-House Cases, the doctrine of those cases
reduced the "'privileges and immunities' clause to "'a vain and idle
enactment which accomplished nothing.'" But it by no means fol-
low that the construction adopted was therefore bad. There was al-
ready in the Constitution at the time language fully assuring to
citizens of the United States all rights "'which owe their existence
to the federal government, its national character, its Constitution,
or its laws.'" That provision was that the "'Constitution, the laws of
the United States, and all Treaties . . . of the United States, shall
be the Supreme Law of the Land . . . Constitution or Laws of any
State to the contrary notwithstanding.'" It is believed that there
was no real reason for the creation of additional privileges and im-
munities at the time nor any real need for any additional safe-
guards for "'fundamental rights.'"

Forgetting the momentous implications of possible interpreta-
tions of the "'privileges and immunities' clause, from the stand-
point of national policy, and putting aside the political origins of
the Fourteenth Amendment, let us now consider the practical oper-
ation of the rule of the Slaughter-House Cases, how far it has been
successfully invoked in actual cases. It appears that up to April,
1921, forty-one cases had come before the Supreme Court in

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61 16 Wall. 36, 96 (U. S. 1873).
62 CONSTITUTION, Art. VI.
63 As was well pointed out in the majority opinion in the Slaughter-House Cases,
the clear, major purpose behind the Fourteenth Amendment seems to have been to de-
clare who are citizens of the United States, to make Federal citizenship paramount
and bestow a full measure of this citizenship on the negroes. It is believed that the
purpose was to broaden citizenship, rather than to deepen it, to extend its benefits
to greater numbers rather than to change its quality. Of course as in any political
movement prompted by partizans, there was no doubt "the insanity fringe" of radic-
als whose purpose may have gone much farther. See, supra, note 9.
64 Slaughter-House Cases, 16 Wall. 36 (U. S. 1873); Bradwell v. State, 16 Wall.
130 (U. S. 1873); Batey v. Iowa, 18 Wall. 129 (U. S. 1873); Minor v. Hap-
Peretz, 21 Wall. 162 (U. S. 1874); Walker v. Sauvinet, 92 U. S. 90 (1875); Kirt-
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which litigants relied upon the "privileges and immunities" clause in the Fourteenth Amendment. In cases subsequent to the Slaughter-House Cases we may consider the parties to have been charged with knowledge that the court would apply the guaranty only to cases of abridgment by the states of the privileges or immunities "which owe their existence to the federal government, its national character, its Constitution, or its laws." Yet in not one of these cases did the court find a true example of the abridgment of a privilege or immunity of the protected class. Of course many of the cases made claims exceedingly grotesque. But if the "privileges and immunities" clause added anything to the substantive rights of citizens of the United States, it may seem strange that in all these years of exceedingly active state lawmaking on every conceivable subject, no true example of the infringement of a privilege or immunity of the kind contemplated should have been brought to the notice of the Supreme Court. For it is true that "valuable rights and privileges almost without number are granted and secured to citizens by the Constitution and laws of Congress." But the truth is that many of these are secured to citizens by express provisions of the Constitution. And when such rights are invoked, the aggrieved party complains of the violation of such provisions specifically. He might cite a violation of the "privileges and immunities"


This is the language of the case most lately reiterating the rule of the Slaughter-House Cases, Maxwell v. Bugbee, supra, note 64.

65 "The Supreme Court has had to point out that:—it is not a privilege of a citizen of the United States to use the American flag as an advertisement on a bottle of beer; it is not a privilege of a citizen of the United States when sentenced to capital punishment to be hanged rather than electrocuted; nor is any sacred immunity of the citizen invaded by a State law abolishing Greek letter fraternities in a university maintained by the State; nor is it a privilege of a citizen to sell intoxicating liquor or to possess it for personal use, non obstante State prohibition thereof." D. O. McGovney, "Privileges or Immunities Clause, Fourteenth Amendment," 4 Ia. L. Bull, 219, 224.

66 United States v. Cruikshank, supra, note 64.

67 Supra, note 50.
clause as well. But having made out a good case on another ground he does not do so. It is only when the party aggrieved by a state law can find no Federal guaranty of right based upon a specific provision of the Constitution and feels, nevertheless, that some "in-alienable right" is being violated, that he falls back upon the "privileges and immunities" clause, thinking that surely in words of such glittering promise there must be some substance of civil rights not elsewhere found. But in every case to date he has grasped for substance and found only shadow.69

Let it be conceded that the rule of law is clear. Our investigation in chief, then, ends here. But still we may well consider, by way of supplemental inquiry, whether we would have the rule otherwise if we could. It is believed that perhaps the only alternative which would be seriously urged is that put forward by the minority in the Slaughter-House Cases.70 Under that rule no state after 1868 could have withdrawn from even its own citizens any civil right which it had theretofore given them, expressly or by acquiescence, or which such citizens had derived from any source whatever, if, in the opinion of the Federal judiciary when regularly invoked in a proper case, the right were a "fundamental" one. Such a rule would have given the passage of the Fourteenth Amendment, by virtue of its containing the "privileges and immunities" clause, the effect of "an act of Union,"71 changing fundamentally the relations of nation and state to the citizens thereof, and of each to the other. It would have enabled Congress to "take the place of the state legislatures and to supersede them."72 And in the Federal statutes of today there would no doubt be found "a code of municipal law regulative of all private rights."73 The "Supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain and establish"74 would today be the ultimate arbiters of civil

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69 As said in Maxwell v. Dow, supra, note 46, it is believed that practically no new privileges or immunities were created by the Fourteenth Amendment. But see, supra, note 47.

70 It is believed, at least, that no one would insist that all privileges and immunities, from whatever source derived, and theretofore enjoyed, were thereby made inviolable. See supra, note 58.

71 This term was used by counsel in the Slaughter-House Cases, supra, note 25.

72 This is the language of the court in the Civil Rights Cases, 109 U. S. 3, 18 (1883).

73 Civil Rights Cases, supra.

74 CONSTITUTION, Art. III, Sec. 1.
rights. And in a much larger measure than they now are they
would also be the arbiters of all private rights. 16

Admittedly the tendency of things economic in America today
is toward centralization. In the words of an acute observer
of our economic and social life, 16 "The improvement in
the means of communication between the states of the Union
through the digging of waterways and the building of railways has
caused the geographical isolation of the once separated states
to disappear." It is also true that "At the present time . . .
we have for the economic and social basis of our political system a
series of closely connected communities inhabited by a reasonably
homogeneous population . . ." and that arbitrary political bound-
daries have from the viewpoint of the economic life of man lost
much of their significance." As he well points out, too, "classes of
industrial workers have arisen which in numbers and in minute dif-
ferentiation of occupation surpass anything which the world's his-
tory has hitherto exhibited . . . classes whose position in the state
cannot be defined in accordance with the rubrics of a once almost
universal legal lore . . ." From all this he contends that "political
centralization is necessary if political systems are to be in accor-
d with recognized economic facts." 17 Of the Constitution he says that
it "is now commonly believed to have laid its emphasis upon the
necessity of preserving for all time the same degree of state sov-
ereignty and independence as was recognized to exist in the latter
part of the eighteenth century." And he asks: "Is the kind of pol-
tical system which we commonly believe our fathers established one
which can with advantage be retained unchanged in the changed
conditions which are seen to exist?"

It is not the purpose here to do more than raise such questions.
It is believed that the passages quoted from Professor Goodnow
perhaps reflect faithfully expressions quite common on the part

16 There are grave objections to this from the standpoint of the overcrowding of
the Supreme Court. As to the relative tendencies of state and United States courts
in passing on modern social legislation, see Roscoe Pound, "Liberty of Contract,"
supra, note 55.
17 FRANK J. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION, 7-11.
See to the same effect: WALTER E. WEYL, THE NEW DEMOCRACY, 314. It is be-
lieved that recent writers on political topics have quite commonly expressed such
views. But see Walter Clark, "Some Defects in the Constitution of the United
States," 62d cong., 1st sess., senate doc. 87, page 13:
"The preservation of the autonomy of the several States and of local self-
government is essential to the maintenance of our liberties, which would ex-
pire in the grasp of a consolidated despotism. Nothing can save us from this
centripetal force but the speedy repeal of the fourteenth amendment, or a re-
casting of its language in terms that no future court can misinterpret it."
of thinkers on social and economic problems at the present day. And it is with such problems for their pawns that the statesmen of the future will play the game of our national life. Perhaps the centralization foreseen will come. But it is believed that if it comes it will come by the operation of a complex of social and economic forces, rather than as a result of the fomentation of questions of civil rights. As has been said by the court of a leading state:78 "Under a judicial system which has for centuries magnified individual rights, there is much less danger of doing injustice to the individual than there is in overlooking the obligations of those in authority to organized society."

And it is submitted that at any rate the Supreme Court properly refused to make the "privileges and immunities" clause in the Fourteenth Amendment a pivot, upon which to turn the American constitutional system through a revolution of one hundred eighty degrees.

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