Privileges and Immunities Under the Fourteenth Amendment

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At the close of the Civil War, the federal government was faced with the serious problem of protecting the newly freed negro from restrictions which the state governments might see fit to impose upon him. The War had been won and the negro freed, but there was no power in the federal government which could insure his civil liberties against state action. The Bill of Rights formed a bulwark against invasion of personal rights by the federal government, but it had no application to other jurisdictions. It was to remedy this situation that the Fourteenth Amendment was proposed and adopted. The control which it gives over state legislation is both positive and negative in character—the negative control being the more frequently invoked. The section of this Amendment which is the source of most of the limitations on the power of state legislation provides that "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." This restriction on the exercise of the police power is, of course, given effect by the judicial arm of the federal government. The Amendment also provides that the legislative branch of the federal government shall have a power to secure the civil liberties of the people and that power is derived from the section which reads: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article".

"Due process" and "equal protection" are familiar phrases, even to the layman, but the "privileges or immunities" clause has been so interpreted by the Supreme Court as to be of considerably less practical significance. At various times, members of the Reconstruction Committee expressed the opinion that the privileges and immunities protected by this measure would be those fundamental rights of citizenship delineated by Mr. Justice Washington in Corfield v. Coryell combined

2 U. S. CONST. AMEND. XIV, § 1.
3 Id. § 5.
4 Wash. C. C. 371, 380 (1823). "The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; 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 perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following several
with the guarantees of the first eight amendments. Each word of the Amendment was carefully weighed before being used, and each had a definite duty to perform in securing that measure of protection against possible state limitations on civil rights which the Reconstruction Committee deemed necessary under the conditions resulting from the civil strife which had aroused so much animosity and desire among the Southerners to hold the negro in a position of mere nominal freedom.

Clearly the framers of the Amendment intended that it should be broadly construed, with full meaning to be given each word just as it was written. The civil rights of the citizens of the United States were thus consciously entrusted to the federal government. It is the purpose of this essay to trace the judicial history of but one of the guarantees—to determine the effectiveness of the privileges and immunities clause which, on its face, emancipates citizens from state supervision of civil rights.

I.

Before the passage of the Fourteenth Amendment there had been judicial recognition given to the existence of some rights in citizens of the federal government which could not be abridged by action on the part of the states, though the federal Constitution and statutes contained no specific guarantees with respect to these rights. The state of Nevada had passed a law imposing on transportation companies a capitation tax of $1.00 on any person leaving the state through the 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. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised."

Senator Howard, presenting the Amendment to the Senate, quoted at length from Corfield v. Coryell, supra n. 4, and then went on to say, "Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution..." He presented that definition as an intimation of "what probably will be the opinion of the judiciary" in construing the privileges and immunities clause. Cong. Globe, 39th Cong. 1st Sess., pt. 3, pp. 2764-2765. See also William D. Guthrie, The Fourteenth Amendment to the Constitution of the United States, (1859) 59 et seq., Studies in History, Economics and Public Law, Vol. 54, pp. 44-48, published by Columbia University.

facilities of a company. In 1868, the year ratification of the Fourteenth Amendment was confirmed by proclamation, this law was declared unconstitutional, in Crandall v. Nevada, the Court stating that there are certain rights inherent in citizenship which, in their nature, are "independent of the will of any state". The right upheld in the Crandall case was the right of unhampered transit among the states. Though the argument was based upon the right of a citizen to travel to the seat of the national government to assert claims upon or transact business with that government and the right of that government to demand the passage of the citizen through any state in the exercise of his public duties, there is no showing in the opinion that any of the passengers of the plaintiff company as to whom the tax was levied were actually on government business. Mr. Justice Miller quoted, with approval, from the dissent in The Passenger cases a passage which named the right to travel freely from state to state as one of the rights which the "Union was intended to obtain." This undoubtedly expands the right from one restricted to a free egress from a state when on government business to a free and unrestricted egress inherent in the citizenship itself and not dependent upon the purpose of the transit.

It is of more than mere passing interest to note that it was Mr. Justice Miller, writer of the Crandall opinion, who gave expression to the earliest judicial construction of the Fourteenth Amendment. Not until the Slaughter-House cases, in 1873, did the nation learn the legal effect of the privileges and immunities clause which, together with the other provisions of the Fourteenth Amendment, had the power to revolutionize the balance between national and state governments. Proponents of a strong centralized government undoubtedly thought that this measure would decrease state control over the people, but this hope was effectively smothered by the opinion upholding a Louisiana statute creating a private corporation to have a monopoly on livestock landings and slaughter houses within New Orleans and the surrounding territory. The act was purportedly for the protection of health and was conscientiously drawn to the end that the owner corporation had to allow local dealers to use the facilities for slaughtering their animals, and penalties were enacted for the infractions of this provision. Moreover, maximum charges were fixed. But the butchers objected to the creation of the monopoly even though the facilities were open to the public. Such an arrangement forced them to work for the monopoly, they argued, and deprived them of their civil liberties. The matter eventually reached the Supreme Court where the constitutionality of the

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8 Wall. 35 (1868).
8 7 How. 283 (1849).
* See the concurring opinion of Mr. Justice Douglas in Edwards v. California, 314 U. S. 160, 178 (1941).
10 16 Wall. 36 (1873).
statute was challenged on the grounds that it was a violation of the privileges or immunities clause, the due process clause and the equal protection clause, all of which were guaranteed by the Fourteenth Amendment against state abridgment. The opinion gave chief attention to the privileges or immunities clause, which it all but annihilated by the narrow construction it placed upon it.

A necessary precedent to an analysis of the privileges and immunities clause was an understanding of the term "citizens of the United States". The Fourteenth Amendment contained a definition of citizenship\(^1\) which made national citizenship primary and state citizenship secondary, but the importance of the definition in relation to the privileges or immunities of citizens of the United States was the inescapable conclusion that national and state citizenship were two separate statuses giving rise to different rights and obligations. Recognition of this fact limited, at the outset, the scope of the privileges and immunities clause, for, by its own terms, it applied only to privileges and immunities of citizens of the United States. But just what that limitation included was not easily determined. Did the clause mean that all privileges and immunities then enjoyed by United States citizens were henceforth to be inviolate? Or did it mean that the privileges and immunities of citizens of the United States, as such, were the only ones covered by the clause?

The states traditionally have had the power to protect the civil rights of their citizens. If the Fourteenth Amendment was to prevent the states from exercising their traditional power and to secure to the federal government authority to legislate in this field, the United States Supreme Court would become "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment". Such an arrogation of power, so serious in its consequences and so contrary to the fundamental ideals of the American federation, would be the natural result of the construction urged by the antagonists of the Louisiana law. Mr. Justice Miller refused to accept this construction on the grounds that "no such results were intended by the Congress which proposed these amendments nor by the legislatures of the States which ratified them". This argument is appealing to those who favor supremacy of the states, but the framers of the amendment must have had knowledge of the implications of this clause at the time they wrote it into the national law, and hence it would seem to follow that they desired a fundamental change in the distribution of power. How-

\(^{11}\) U. S. CONST. AMEND. XIV, § 1: "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."

\(^{12}\) 16 Wall. 36, 78.
ever, it is well settled that the force of this opinion is to protect from abridgment by the states only such privileges and immunities as are created by national laws. The opinion expressly precluded the possible inclusion of any of the fundamental or natural rights within the area protected by the clause, pointing out that such rights were traditionally regulated by the states. Since the fundamental or natural rights, as defined in *Corfield v. Coryell* by Mr. Justice Washington, were rights belonging to a state citizen as such, and hence were not the result of the relationship between the federal government and its citizens, the privileges and immunities clause could not be used to safeguard these rights.

Obviously, as the dissenting justices pointed out, this construction of the clause makes it mere surplusage. Before showing abridgment by a state of a privilege or immunity, one must allege the existence of the federal right being abridged. To aver the existence of the right is to expose the redundancy of the privileges and immunities clause, as the very right abridgment of which forms the basis for the action would be, in itself, a protection from state action because of the supremacy clause in the Constitution making the federal Constitution, statutes and treaties, the supreme law of the land.

Chief Justice Chase and Justices Swayne and Bradley concurred in the dissenting opinion of Mr. Justice Field which set forth the theory that the fundamental rights, privileges and immunities belonging to a free man, which the majority expressly left in the control of the states, were now to belong to him by virtue of his national citizenship and were not to be dependent on the states. The purpose of the Amendment, according to these judges, was not to add any new privileges or immunities to those already conferred by former political concepts, but the Amendment was to change jurisdiction over the “fundamental” or “natural” rights from the state governments to that of the federal government. Examining the Amendment in the light of history, it is not improbable that the framers of the instrument had this in mind. Though broad in its terms, the Amendment was conceived for the protection of the negro. It would have been little aid to him to have the privileges and immunities created by national laws protected against state impairment while all of the fundamental rights “which belong to him as a free man and a free citizen”—those rights which affected his whole manner of living—were left to the unfettered discretion of the local governments.

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13 16 Wall. 36, 96. See also D. O. McGovney, *Privileges or Immunities Clause of the Fourteenth Amendment*, 4 Iowa L. Bull. 219, 230 (1918) for his discussion.

14 Article VI, § 2: “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....”

15 *Supra* n. 5.
Approximately two dozen times during the next quarter century, the clause was invoked and found wanting in the authority within it to protect and preserve a citizen's rights from impairment by state legislation.14 The most famous exclusionary pronouncement to follow the Slaughter-House cases, which excluded from consideration under this clause all privileges and immunities except those which owed their existence specifically to the relationship between the federal government and its citizens, was the opinion in Maxwell v. Dow.15 This case arose on a petition for habeas corpus, alleging, among other charges, that a trial by a jury of eight abridged the privileges guaranteed a citizen by the Fourteenth Amendment, the privilege being the right to a jury of twelve under the provisions of the Sixth Amendment to the Constitution of the United States. The petition was denied by the state court and a writ of error was sued out to take the case to the United States Supreme Court. Thus, it was necessary for the court to decide whether or not the Bill of Rights was to be read into the Fourteenth Amendment, which question had been decided negatively as pertaining to other guarantees16 but was considered here for the first time as regards the privileges or immunities clause. The majority opinion presented several cases decided subsequent to 1865 which sanctioned state trespassing upon the rights in the first eight amendments.17 Such being the case, the privileges and immunities clause very evidently was not construed to have absorbed the Bill of Rights intact. Moreover, though the Slaughter-House decision and In re Kemmler18 both contained numerous examples of privileges and immunities deemed by the court to be encompassed by the Fourteenth Amendment, neither mentioned the right to trial by jury, which fact Mr. Justice Peckham found somewhat persuasive in deciding the Dow case. The opinion holds, in more straightforward language than that of the Slaughter-House case, that if a privilege or immunity does not result exclusively and expressly from national citizenship, it is not one reserved from state regulation:

"In none are they privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the Federal Government, entirely irrespective of such citizenship. As the indi-

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14 Some of the cases during this period excluded from the privileges and immunities clause the right to sell intoxicating liquor as well as the right to manufacture it, Bartmeyer v. Iowa, 18 Wall. 129, 133 (1873); Crowley v. Christensen, 137 U. S. 86 (1890); the right to practice law in a state court, Bradwell v. State, 83 U. S. 130 (1873); the right to vote in an election, Minor v. Happersett, 88 U. S. 130 (1873); the right to be hanged instead of electrocuted, In re Kemmler, 136 U. S. 436 (1890); the right to practice medicine, Dent. v. West Va., 129 U. S. 114 (1889).
15 176 U. S. 581 (1899).
16 Conviction upon information rather than indictment held not a violation of the due process clause, Hurtado v. California, 110 U. S. 516 (1883).
17 176 U. S. 581, 584 et seq.
18 136 U. S. 436, 448.
individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgment by the States of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say 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."

A contrary view was expressed by Mr. Justice Harlan, who, without enumerating the privileges and immunities individually, generalized to the effect that the clause under consideration "embraces at least those expressly recognized by the Constitution of the United States and placed beyond the power of Congress to take away or impair". He detailed the history of the Anglo-American jury and the place it had held in the political philosophies giving birth to the Constitution, the Bill of Rights and other sources of law in this country. Rights, such as the right to trial by a jury of twelve, which are so firmly rooted in Anglo-American political and jurisprudential concepts were suggested by Mr. Justice Harlan as being the subject of protection afforded by the privileges or immunities clause.

II.

Numerous times the Supreme Court was asked to decide the question as to whether or not the privileges or immunities of a citizen of the United States were being abridged, but the Court answered very summarily in most instances, not in any case extending the doctrine beyond the Slaughter-House limitation confining it to abridgment of rights affirmatively established by national law, further limited by the express exclusion of the Bill of Rights from the sphere of guarantees immunized against impairment by the states. The history of the decisions in point from 1873 to 1908 is well summarized in the majority opinion to Twining v. New Jersey\(^2\) which, in orthodox terms, held that exemption from compulsory self-incrimination is not within the terms of the Fourteenth Amendment so as to be protected against abridgment by the states.

Before the adoption of the Fourteenth Amendment this right, in common with those other fundamental liberties which are guaranteed by the first eight amendments, was clearly not protected from state action; the Bill of Rights being applicable only to the federal govern-

\(^{21}\) 176 U. S. 581, 595.
\(^{22}\) 211 U. S. 78 (1908).
ment, there was no provision in the national Constitution or laws which could bring the states' regulations under federal surveillance. Adopting the premises rejected in the Dow case, counsel for Twining reasoned that the Fourteenth Amendment incorporated in the privileges and immunities clause the personal rights which were contained in the first eight amendments. To refute this argument, the decisions from the Slaughter-House cases onward were outlined to show that the Court had uniformly met this contention with a decided negative. Mr. Justice Moody, declining to go into the merits of the former decisions and even admitting that it was undoubtedly the view of the framers of the Fourteenth Amendment to extend the protection of the first eight amendments as contended," declared that nevertheless the question was no longer an open one and cited Maxwell v. Dow, as well as the cases cited therein, to indicate that the Court was now concluded from deciding that the Fifth Amendment was absorbed by the Fourteenth so as to protect citizens of the United States against compulsory self-incrimination in a state court.

Again, as in Maxwell v. Dow, Mr. Justice Harlan interposed a dissent which, consistent with his former view, urged that the Bill of Rights should be a part of the Fourteenth Amendment. "Even if I were anxious or willing to cripple the operation of the Fourteenth Amendment by strained or narrow interpretations, I should feel obliged to hold that when that Amendment was adopted all these last-mentioned exemptions [i.e., those enumerated in the first eight amendments] were among the immunities belonging to citizens of the United States, which, after the adoption of the Fourteenth Amendment, no state could impair or destroy." Because feeling against compulsory self-incrimination is so strong, so much a part of the fundamental philosophy upon which this nation was founded, the justice reasoned that it was surely one which was in the "mind of the country" when the Fourteenth Amendment was adopted. Such being the case, effect must be given it. The majority decision recognized that the Bill of Rights was in the minds of the promulgators of the Amendment, but it sanctioned the "construction" of the Amendment by the several former decisions which had refused to include the first eight amendments within the scope of the Fourteenth.

In several decisions the Court points out that to have accepted the words of the privileges or immunities clause at their face value would have overthrown the delicate balance of power between state and federal governments. Such would have been the case to some extent at least, but if Congress and the states saw fit to adopt an amendment which would deflect some of the state power into national channels,
should the Supreme Court take upon itself the burden of "construing" that amendment so that the evident intent of the measure will be denied effect? This point arose in *Maxwell v. Dow* as counsel included in his brief excerpts from speeches and other material expressing the views of those who urged the adoption of the Fourteenth Amendment. The Court refused to be persuaded by such argument and explained that judicial recognition will not be given to the words used to promote the passage of a measure. Rather, the Court will examine the history and temper of the times which gave it birth and meaning. A mosaic of social, political and economic data is no doubt essential to a proper interpretation of a statute, but the contemporary utterances of the legislators should be included as part of the pattern. The Court would appear to disregard the best evidence of the meaning intended to be written into a measure when it refuses to consider the explanations of it made by its framers. The social and economic data serve to explain the problem, but the words and politics of the men making the law contain the key to their solution of it.

Since the amending process includes affirmative action by each of the states, amendments, when adopted, are an expression of the will of the majority and should be given effect as such—judicial interpretation may nullify the spirit of an amendment and render meaningless the democratic process from which it results. It is hardly more detrimental to the fundamental concepts of the Union to make the federal government sovereign over all personal rights, and thus to deprive the states of a measure of power, then to deny most of the desired effect to the wishes of three-fourths of the members of that Union, expressed in a constitutional amendment.

Perhaps, practically speaking, neither course is too drastic in the effect it has had or would have had on this democracy. Since the Court, in the last analysis, consists of men subject to the same psychological factors that influence the growth and development of law generally, a law is usually interpreted in the light of conditions and feelings at the time of interpretation rather than passage of the law. And this would seem to be true in the case of the privileges and immunities clause as well as of other measures, even though *Maxwell v. Dow* claimed that interpretation was based on the state of the nation at the time the Fourteenth Amendment was adopted. Looking back, it would seem that the American form of government would have been no more changed by the adoption of the argument that the privileges and immunities clause embraced the fundamental personal liberties which had been in the hands of the states, or at least those, as urged by Mr. Justice Harlan, which were set forth in the Bill of Rights. The due process clause has been used to protect many personal rights and it may be said to have revolutionized the interaction of state and federal
power in that field but few would argue that the clause should be emasculated to prevent such a result.

III.

The Slaughter-House cases had relegated the privileges and immunities clause to a position of no consequence and for approximately sixty years, though it was invoked nearly fifty times, no state laws were struck down on the strength of this provision. It was not before 1935 that this chain of decisions was broken by Colgate v. Harvey. The litigation involved the validity of a tax statute of Vermont which imposed a tax of 4 per cent on income from interest-bearing securities but granted an exemption with respect to interest received on account of money lent within the state not exceeding 5 per cent. The plaintiff’s income, to a large extent, consisted of interest on notes and mortgages representing money lent outside the state at interest not exceeding 5 per cent, on which the 4 per cent tax was levied. Among other contentions, the plaintiff included the charge that the act violated the privileges and immunities clause of the Fourteenth Amendment. It was struck down as a violation of this provision, and the language contained in the opinion indicated it probably could have been struck down on the equal protection clause as well.2

The opinion reviewed the premise that under the Fourteenth Amendment there is a duality of citizenship in the United States. Starting from this point, Mr. Justice Sutherland arrived at the conclusion that “under the Fourteenth Amendment therefore, the simple inquiry is whether the privilege claimed is one which arises in virtue of national citizenship. If the privilege be of that character, no state can abridge it.” To demonstrate the rights which he had in mind, he referred to the Crandall case. Throughout his analysis, the Justice emphasized that the right protected in the Crandall case was predicated upon the “essential character of national citizenship” and that this right, in common with unnamed others, owed its existence “to the Federal government, its National character, is Constitution, or its laws”. In the opinion of the majority, the power to tax income in the manner attempted by Vermont could have prevented loans outside of the state altogether by being carried a step further. Therefore it was held to be an abridgment of the privilege of a citizen of the United States:

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26 For list see dissent of Mr. Justice Stone to Colgate v. Harvey, 296 U. S. 404, note 2 on page 445.
27 But equal protection was expressly declared not to be violated by a Kentucky statute imposing a tax five times as great on money deposited in banks outside the state as it did on money deposited within the state. The difference in taxation was justified because of “the difference in the difficulties and expenses of tax collection.” Madden v. Kentucky, 309 U. S. 83, 88 and 89 (1939).
"The right of a citizen of the United States to engage in business to transact any lawful business, or to make a lawful loan of money in any state other than that in which the citizen resides is a privilege equally attributable to his national citizenship. A state law prohibiting the exercise of any of these rights in another state would, therefore, be invalid under the Fourteenth Amendment."

Although the privileges or immunities clause had had such an unsuccessful career, Mr. Justice Sutherland did not feel that it was mere surplusage:

"The purpose of the pertinent clause in the Fourth Article was to require each state to accord equality of treatment to the citizens of other states in respect of the privileges and immunities of state citizenship. It has always been so interpreted. One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in the light of this interpretation, was to bridge the gap left by that article so as also to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other states. A provision which thus extended and completed the shield of national protection between the citizen and hostile and discriminating state legislation cannot be lightly dismissed as a mere duplication, or of subordinate value, or as an almost forgotten clause of the Constitution."

Mr. Justice Stone, supported by Mr. Justice Brandeis and Mr. Justice Cardozo, interposed a vigorous dissent which reiterated the previous decisions allegedly vitiating the clause now relied upon. The position of the dissenters is orthodox indeed and is supported by all of the former decisions in point. But as the majority pointed out, no case on these precise facts had previously been presented to the Court, so that the former decisions were not conclusive in the instant case. Having held that there are privileges or immunities belonging to citizens of the United States as such, the Court must examine each new situation separately to determine whether or not it falls within the charmed circle.

The Colgate holding, had it not come to an early end, would have substantially increased the sphere of national protection afforded to economic activities across state lines. The Commerce Clause is still the historic safeguard against state action discriminating in favor of local and against interstate commerce. The privileges and immunities clause of Article IV, Sec. 2 prevents discrimination in favor of local citizens and against citizens of other states even in the field of local activities,
and the Colgate doctrine would have made the same activities immune from discrimination on the ground of their intrastate or extrastate character. Thus, the opinion itself intimated that the taking out of insurance in another state, even where the insured acts from and in his own state, would be the exercise of a right of national citizenship protected against abridgment under the Fourteenth Amendment.

But this decision was not to last long. After only four years, during which time it had not been able to make any real extension of the applicability of the privileges and immunities clause, Colgate v. Harvey was supplanted by Madden v. Kentucky which ruled that a higher tax on out-of-state than on intrastate bank deposits is constitutional and not in violation of the Fourteenth Amendment. The privilege urged as the subject of national protection against state abridgment was the right to carry on business beyond the lines of the state of one's residence. This right, claimed as being inherent in national citizenship, had been recognized by Colgate v. Harvey, and would have been upheld on the basis of the former decision by Justices Roberts and McReynolds. But the right to carry out an incident to trade or business, the majority declared, does not spring from national citizenship; it is saved to the citizen by virtue of state citizenship. Interference with the state's power of taxation is so important and far-reaching in its consequences that the Constitution must clearly and unequivocally create the power to interfere before the Court can reach a conclusion permitting it.

The Madden case relied on the language of the decision in Hague v. C.I.O., decided the preceding year. The C.I.O. case is very interesting in that Mr. Justice Roberts and Mr. Justice Black saw fit to place their decision on the privileges and immunities clause whereas the due process clause was equally capable of bearing the burden and it had been the fashion of the Court to avoid the privileges and immunities clause, Colgate v. Harvey being a notable exception to this. In fact, Mr. Justice Stone wrote a concurring opinion based on the due process clause in which he was joined by Mr. Justice Reed. Further differences of opinion on the Court were indicated in a brief concurring opinion by Mr. Chief Justice Hughes, who agreed with Justice Roberts on the merits and with Justice Stone on the question of record being insufficient...
to support a decision on the privileges or immunities basis, in Mr. Justice McReynolds' dissent placed on the ground that intimate local affairs are beyond the reach of the federal courts, and in Mr. Justice Butler's dissent on the basis of a former decision. The unaccounted for members of the Court, Mr. Justice Frankfurter and Mr. Justice Douglas, did not participate in the decision.

An ordinance of Jersey City, New Jersey, forbade the leasing of any hall for the purpose of holding public meetings unless a permit had been granted by the Chief of Police; another ordinance forbade the distribution of printed matter on the streets or other public places. The C.I.O., desirous of discussing certain issues under the National Labor Relations Act, was repeatedly denied permission to hold a meeting and was prevented, through arrest and prosecution of its members, from distributing printed matter. An injunction was sought to restrain the enforcement of these ordinances which were alleged to be in violation of the constitutional rights of free speech and of assembly.

The issue discussed by Mr. Justice Roberts narrowed down to the question whether or not the dissemination, by speech and by the written word, of information concerning national legislation is a privilege secured by the Fourteenth Amendment against state abridgment. Not much authority was needed for the proposition that the right to assemble and to discuss these topics is a privilege inherent in citizenship of the United States and hence protected. Classification of this as a privilege within the Fourteenth Amendment was predicated upon the nature of the matter to be discussed. The opinion did not approach the right of free speech or assembly in general terms but properly confined itself to the facts at hand, viz., matters pertaining to the federal government.

Though perhaps the Crandall case would today be decided on the interstate commerce clause, the rationale that was used in 1868 might be a possible approach to obtain the C.I.O. decision even without reliance on the Fourteenth Amendment, as freedom to discuss national issues is an inseparable part of the concept of democratic national government. The right to leave a state for the purpose of traveling to the seat of the national government to deal with that government is no more sacred than is the right of discussion of legislative or other governmental matters. In holding that the ordinances contravened the privileges and immunities clause, the opinion indicated that use of the streets and public places for the purpose of spreading information of a national character has long been considered a privilege of national citizenship. A state, even without the Fourteenth Amendment, could not be permitted to prohibit the spreading of information about the national government without impinging upon the supremacy of that government.
Mr. Justice Stone concurred in the result but he traveled the well-worn path of due process. The due process clause was more apt in the instant case because the privileges and immunities clause is confined specifically to the protection of rights of citizens of the United States, and there seemed to be some question as to whether or not the persons here claiming its protection were citizens.

As noted above, the *Madden* case overruled *Colgate v. Harvey*, but even if the *C.I.O.* case had followed the *Madden* decision instead of preceding it, Mr. Justice Roberts might still have made the same approach to the case for it was the factual situation in the *Colgate* case which was taken out from under the classification of protected privileges. The test as to what is or is not a privilege—whether a right is inherent in national citizenship—was not repudiated by the later ruling.

The bluntness of the *Madden* decision in overruling the only clear-cut case that had overthrown state legislation on the grounds of being a violation of the clause under consideration had an air of finality which would make most men chary of resorting again to that particular guarantee of the Fourteenth Amendment. But, like Truth, though crushed to earth, it rose again; whether the “eternal years of God” shall be given the clause, time alone can tell. Two years after banishing the *Colgate* case, Mr. Justice Douglas, who took no part in the *C.I.O.* decision, joined by Mr. Justice Black, who decided the C.I.O case on the basis of privileges and immunities, and Mr. Justice Murphy, who was not on the Court at the time of that decision, all of whom had participated in the *Madden* case, wrote a concurring opinion invoking the privileges and immunities clause where the majority found the interstate commerce clause sufficient grounds on which to overthrow the California statute prohibiting the migration to that state of “indigent persons” and making it a misdemeanor knowingly to assist such persons to enter the state. Mr. Justice Jackson wrote a separate concurring opinion based on the privileges clause also but acknowledging the validity and competency of the decision based on the interstate commerce clause.

The majority reasoned that since transportation of persons is commerce, therefore the prohibition was in derogation of the interstate commerce clause. Mr. Justice Douglas, expressing no view as to the validity of the application of the commerce clause, was fastidious about placing the rights of persons to move freely from state to state on a level no higher than the movement of cattle, fruit and other commodities of commerce. He claimed the right of free transit to be an incident to national citizenship protected by the privileges and immunities clause. To show judicial recognition of this fact, he cited the *Crandall* case, as well as the *Slaughter-House* decision and others since the Fourteenth Amendment.

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Amendment, which list this right as one inherent in citizenship. Clearly there is judicial *dicta* enough to indicate that this is one of the rights of citizenship, but the *Edwards* decision is the first since the passage of the Amendment to be placed by the concurring justices on this specific point. The *Crandall* holding decided the right of freedom of egress from a state, and the question here involved was a right of free ingress, but the principle behind either question is the same.

IV.

The significance of the *Colgate* decision is not apparent to the casual reader of the opinion. Mr. Justice Sutherland used the language which has been used in most of the cases on this point, but it is straining the meaning of the language to bring the result of the case in as a right arising out of the nature or essential character of citizenship. That is, if one examines the alleged rights which have been expressly excluded from the scope of the clause, it should become apparent that the right to lend money and carry on other business across state lines must also be beyond the pale. If the unity of the United States, social and economical, gives rise to the privilege as apparently Mr. Justice Sutherland thought it did, then the proper classification of the privilege should be as a fundamental right and not one based upon national citizenship, so that the effect of the *Colgate* decision is to repudiate the traditional test employed since the first judicial exposition of the applicability of the clause.

Most of the law review writers favor the narrow construction of the privileges and immunities clause and infer that had any other construction been put upon it, dire results would have followed. It is a little hard to imagine now what control over state legislation the national government would have secured through a more literal interpretation of this clause than it has secured through the due process clause. The due process clause has been used as a restraint upon substantive as well as procedural legislation of the states. In many respects it has given the Court an even broader basis than the privileges and immunities clause would have given because it is not confined merely to citizens of the United States. If the same result is obtained by another means,

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36 The right to trial by jury in a criminal prosecution or the right to be safeguarded against compulsory self-incrimination are more within the spirit of the clause than is the right to carry on business across state lines. Pendleton Howard, *Privileges and Immunities of Federal Citizenship and Colgate v. Harvey*, 87 Univ. of Pa. L. Rev. 262, 276 (1939).


why should the privileges and immunities clause not be given its literal interpretation?

The *Colgate v. Harvey* opinion seemed to indicate a new trend in Court decisions, and the *C.I.O.* case, since it invoked the privileges and immunities doctrine, gave the trend some impetus, though the factual situation itself did not extend the applicability of the doctrine. The concurring opinions in the case of *Edwards v. California* indicate a possible reinstatement of the trend. They are the first judicial expressions since the passage of the Amendment that freedom of ingress into a state is a right of citizenship, which is some evidence that the clause is not altogether without meaning and potential vitality. Mr. Justice Black has consistently arrayed himself on the side of the clause and it has been suggested that this fact indicates a constitutional strategy to develop the potentialities of this clause. Whether or not "strategy" is the proper terminology may be questioned, but it is not open to doubt that he has gone far to rank himself with the proponents of the clause. The reading of the opinions themselves, none of which he has written, does not shed much light on his reasons for upholding the use of the "almost forgotten clause" because each of the recent cases has been of such different subject matter that no clear line of reasoning can be drawn from them.

If the privileges and immunities clause is going to be invoked more frequently, as would seem to be the case, the due process clause may perhaps be given correspondingly less prominence in the field of constitutional decisions pertaining to civil rights. But it is not here suggested that the due process clause will be confined to procedural guarantees, thus increasing the permissible scope of state action where civil liberties are not involved, by the simple expedient of extending the scope of the privileges and immunities clause. Substantive due process decisions are so numerous and of such long standing that a wholesale retrenchment by the Court from this field would appear most unlikely.

The cases during the past decade have not served to broaden the interpretation of the privileges and immunities clause but they serve to indicate that some members of the Supreme Court are thinking of that clause as a purposeful phrase—which fact many had begun to doubt. The present Court is a strong and jealous protector of the individual against infringement of his personal freedom, and the time seems propitious for an extension of the application of the privileges and immunities clause, though perhaps the basis of its applicability will not reach to the fundamental rights, as suggested by Mr. Justice Field, but will be manifested in a liberal construction of the time-honored test—the rights inherent in national citizenship as such.

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35 *Harv. L. Rev.* 874.

36 As was suggested in a note, *Harv. L. Rev.* 874.