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CONSTITUTIONAL LAW - FOURTEENTH AMENDMENT - PRIVILEGES AND IMMUNITIES CLAUSE - CIVIL LIBERTIES - THE HAGUE CASE

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COMMENTS

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — PRIVILEGES AND IMMUNITIES CLAUSE — CIVIL LIBERTIES — THE HAGUE CASE — The decisions of the United States Supreme Court in recent years, interpreting the first section of the Fourteenth Amendment,¹

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. 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."

have manifested two striking changes in trend. The first is towards less judicial restraint on governmental regulation of business; that is, towards tolerance of diminished "business liberty."² The other is towards greater judicial restraint on governmental interference with individual liberty, commonly called civil liberty.³ A recent case,⁴ which upheld freedom of speech and assembly and invalidated a city ordinance requiring the obtaining of a permit as prerequisite to a public meeting, not only illustrates the latter of these trends, but is unusual in that it extends the application of the "privileges and immunities clause" as a basis for the decision.

When the first section of the Fourteenth Amendment was framed in 1866, its proponents stated in Congress that its purpose was to enforce against the states⁵ the Bill of Rights contained in the first eight amendments, which had been held to apply only to the Federal Government.⁶ It is believed that this was the concensus of opinion in Congress and in the country at large.⁷ The various drafts of the section began

² E.g., *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231 (1934) (mortgage moratorium upheld); *Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505 (1934) (state regulation of milk industry); *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 57 S. Ct. 578 (1937) (state minimum wage law); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615 (1937) (Wagner Act upheld); *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 57 S. Ct. 857 (1937) (state labor code upheld); *Steward Machine Co. v. Davis*, 301 U. S. 548, 57 S. Ct. 883 (1937) (Social Security).

³ It is interesting to consider how far these trends reflect changing mores. Cf. Borchard, "The Supreme Court and Private Rights," 47 *YALE L. J.* 1051 (1938).

⁴ *Hague v. Committee for Industrial Organization*, (U. S. 1939) 59 S. Ct. 954, modifying and affirming (C. C. A. 3d, 1939) 101 F. (2d) 774, which modified and affirmed (D. C. N. J. 1938) 25 F. Supp. 127. The lower courts held that the ordinance was arbitrarily, hence unconstitutionally, enforced. The Supreme Court held that the ordinance itself was unconstitutional and void, because it permitted arbitrary and discriminatory enforcement. The ordinance had been upheld in *Thomas v. Casey*, 121 N. J. L. 183, 1 A. (2d) 866 (1938). For discussion of the district court decision, and of the merits of the case, see 37 *MICH. L. REV.* 609 (1939); 52 *HARV. L. REV.* 320 (1938); 7 *GEO. WASH. L. REV.* 1026 (1939); 25 *A.B.A.J.* 7 (1939); and Williams, "Civil Liberty in Jersey City," 1 *NAT. LAWY. GUILD Q.* 363 (1938). An excellent comment on all phases of the case is found at 48 *YALE L. J.* 257 (1938), which also discusses the basis for federal jurisdiction, under the Judicial Code, 28 U. S. C. (1934), § 41 (14), over causes of action defined by the Civil Rights Act of 1871, 8 U. S. C. (1934), § 43. See, on the general subject of the right of assembly, 47 *YALE L. J.* 404 (1938).

⁵ Bingham, in *CONG. GLOBE*, 39th Cong., 1st sess., part 2, pp. 1090 ff. (1866); Howard, *ibid.*, part 3, pp. 2765-2766.

⁶ *Barron v. Baltimore*, 7 Pet. (32 U. S.) 243 (1833).

⁷ See Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," 47 *YALE L. J.* 371 at 400 and 48 *YALE L. J.* 171 (1938); Boudin, "Truth and Fiction about the Fourteenth Amendment," 16 *N. Y. UNIV. L. Q. REV.* 19 at 70 ff. (1938); FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 57, 80-97 (1908).

by using the phraseology of the "equal protection" and "privileges and immunities" clauses, while the "due process" clause was not added until later.⁸ It appears that the privileges and immunities clause was considered to be the most important part of the section. Its framer, John Bingham of Ohio, stated that he took it from the privileges and immunities clause of article 4, section two.⁹ He believed that the latter was intended to proclaim the "fundamental rights" of the citizen of a state.¹⁰ This view of the privileges and immunities clause of article 4, section two, is not the one which has prevailed,¹¹ but it was current in 1866, and explains the inclusion of this clause in the Fourteenth Amendment. Bingham's view thus was that the Constitution had already proclaimed the rights of the citizen against state action, but that there was no sanction to enforce the protection. This sanction was to be supplied by section five of the new amendment.¹²

This view of the new amendment was not adopted by the Supreme Court. In 1873, in the *Slaughterhouse Cases*,¹³ the Court held without much discussion that the due process and equal protection clauses did not apply to a case of alleged state deprivation of the right to pursue a common calling (by reason of a state-authorized monopoly). The privileges and immunities clause received a more extended discussion. It was held to protect only those rights which are *peculiar* to citizenship of the

⁸ See Graham, "The Conspiracy Theory of the Fourteenth Amendment," 48 *YALE L. J.* 171 at 182 (1938); Boudin, "Truth and Fiction about the Fourteenth Amendment," 16 *N. Y. UNIV. L. Q. REV.* 19 at 38 ff. (1938).

⁹ *CONG. GLOBE*, 39th Cong., 1st sess., part 2, pp. 1034-1035 (1866). That clause is, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

¹⁰ Boudin, "Truth and Fiction about the Fourteenth Amendment," 16 *N. Y. UNIV. L. Q. REV.* 19 at 35 (1938). This view derives from a dictum of *Corfield v. Coryell*, (C. C. Pa. 1823) 4 *Wash. C. C.* 371, 6 *Fed. Cas.* 546, No. 3,230, and was held by Bingham as early as 1859. See *CONG. GLOBE*, 35th Cong., 2d sess., p. 984 (1859).

¹¹ It is now held that this section protects the citizen only from discriminatory denial of "fundamental rights," i.e., from denial to citizens of other states of those rights which it grants to its own citizens. *Paul v. Virginia*, 8 *Wall.* (75 *U. S.*) 168 (1869); *Downham v. Alexandria*, 10 *Wall.* (77 *U. S.*) 173 (1870); *Slaughterhouse Cases*, 16 *Wall.* (83 *U. S.*) 36 at 77 (1873); *Blake v. McClung*, 172 *U. S.* 239 at 256, 19 *S. Ct.* 165 (1898). But in 1866 the question had not been settled, although the decided cases generally involved problems of discrimination. Cf. *United States v. Hall*, (C. C. Ala. 1811) 26 *Fed. Cas.* 79 at 81, No. 15,282, overruled by the *Slaughterhouse Cases*. See HOWELL, *THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP* 18-21 (1918); McGovney, "Privileges or Immunities Clause—Fourteenth Amendment," 4 *Iowa L. BULL.* 219 at 229 (1918).

¹² "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

¹³ 16 *Wall.* (83 *U. S.*) 36 (1873).

United States,¹⁴ that is, rights given to the citizen by the Constitution, and by statutes and treaties made pursuant thereto.¹⁵ This result was reached by saying that the framers must have meant something by guaranteeing only the privileges and immunities of citizens of the United States, rather than those of citizens of the states, since the two kinds of citizenship had just been carefully distinguished in the preceding sentence of the section. As a matter of fact, the privileges and immunities of each citizenship were considered synonymous by the framers,¹⁶ and the sentence defining citizenship was not inserted until the amendment went to the Senate, after having been passed by the House.¹⁷ As the dissenting judges pointed out, this construction rendered the privileges and immunities clause of no effect, since this kind of rights was already protected by the supremacy clause.¹⁸

In the course of time, "fundamental rights" were protected against state action, by invocation of the due process clause, a doctrine which reached its culmination around the turn of the century.¹⁹ Thus the result of the *Slaughterhouse Cases* was overturned. But the construction given to the privileges and immunities clause in that case remained

¹⁴ There is an attempt to enumerate the privileges and immunities of citizenship of the United States in the *Slaughterhouse Cases*, 16 Wall. (83 U. S.) 36 at 79 ff. (1873).

¹⁵ The doctrine is stated in *Duncan v. Missouri*, 152 U. S. 377 at 382, 14 S. Ct. 570 (1894), as follows: "the privileges and immunities of citizens of the United States, protected by 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. . . ."

¹⁶ See notes 9 and 10 above.

¹⁷ FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 83, 88-97 (1908).

¹⁸ Article 6, section 2. See also dissent of Justice Fields in *Slaughterhouse Cases*, 16 Wall. (83 U. S.) 36 at 96 (1873). Cf. McGovney, "Privileges or Immunities Clause—Fourteenth Amendment," 4 IOWA L. BULL. 219 (1918). Apparently the Court did not consider the language of the amendment sufficiently ambiguous to warrant an examination of the debates in Congress. Cf. *United States v. Wong Kim Ark*, 169 U. S. 649 at 699, 18 S. Ct. 456 (1898): "doubtless, the intention of the Congress which framed and of the States which adopted this Amendment of the Constitution must be sought in the words of the Amendment; and the debates in Congress are not admissible as evidence to control the meaning of the words."

¹⁹ The expansion of due process was foreshadowed in *Dred Scott v. Sanford*, 19 How. (60 U. S.) 393 at 450 (1856) (on due process under the Fifth Amendment); *Loan Association v. Topeka*, 20 Wall. (87 U. S.) 655 (1875); fulfilled in *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U. S. 418, 10 S. Ct. 462, 702 (1889); *Allgeyer v. Louisiana*, 165 U. S. 578, 17 S. Ct. 427 (1897); *Smyth v. Ames*, 169 U. S. 466, 18 S. Ct. 418 (1898); and reached its extreme in *Lochner v. New York*, 198 U. S. 45, 25 S. Ct. 539 (1905); *Adair v. United States*, 208 U. S. 161, 28 S. Ct. 277 (1908). See HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 143-165 (1930); Edgerton, "The Incidence of Judicial Control over Congress," 22 CORN. L. Q. 299 (1937); Howard, "The Privileges and Immunities of Federal Citizenship and *Colgate v. Harvey*," 87 UNIV. PA. L. REV. 262 at 268, notes 15 and 16 (1939).

the law, and the clause became virtually a dead letter. It has long been settled that this clause does not cover the privileges and immunities comprised in the Bill of Rights of the first eight amendments.²⁰ Of the fifty-odd cases in which counsel have since invoked this clause against state action,²¹ only two have seen the contention accepted by the Supreme Court. One was *Colgate v. Harvey*,²² in which a Vermont statute imposing a discriminatory tax on loans made to persons outside Vermont was held unconstitutionally to abridge the privilege of a United States citizen of doing business throughout the nation. This was deemed a part of the privilege of free passage from state to state, "inherent" in federal citizenship.²³

The second case is *Hague v. C.I.O.*,²⁴ decided at the Court's last term. In the lower courts, freedom of speech and assembly were upheld on the basis of the due process clause,²⁵ and this view was taken in concurring opinions in the Supreme Court by Justices Stone (with whom Justice Reed joined) and Hughes. The opinion first reported, however, written by Justice Roberts (with whom Justice Black concurred), grounds the decision on the privileges and immunities clause.²⁶

²⁰ See cases cited in Howard, "The Privileges and Immunities of Federal Citizenship and *Colgate v. Harvey*," 87 UNIV. PA. L. REV. 262 at 270 (1939).

²¹ These cases are cited in Justice Stone's dissent to *Colgate v. Harvey*, 296 U. S. 404 at 445, note 2, 56 S. Ct. 252 (1935); and in his dissent to the instant case, (U. S. 1939) 59 S. Ct. 954 at 967, note 1. To these should be added *Ferry v. Spokane, P. & S. Ry.*, 258 U. S. 314, 42 S. Ct. 358 (1922). Howard, "The Privileges and Immunities of Federal Citizenship and *Colgate v. Harvey*," 87 UNIV. PA. L. REV. 262 at 272, note 50 (1939).

²² 296 U. S. 404, 56 S. Ct. 252 (1935).

²³ See *Slaughterhouse Cases*, 16 Wall. (83 U. S.) 36 at 79 (1873); *Crandall v. Nevada*, 6 Wall. (73 U. S.) 35 (1868) (before the adoption of the Fourteenth Amendment).

²⁴ *Hague v. C.I.O.*, (U. S. 1939) 59 S. Ct. 954. See discussions cited in note 4, *supra*.

²⁵ This view is in accord with a line of cases holding that civil liberties are protected as part of the "liberty" guaranteed against deprivation without due process. *Gitlow v. New York*, 268 U. S. 652, 45 S. Ct. 625 (1925); *Whitney v. California*, 274 U. S. 357, 47 S. Ct. 641 (1927); *Fiske v. Kansas*, 274 U. S. 380, 47 S. Ct. 655 (1927); *Stromberg v. California*, 283 U. S. 359, 51 S. Ct. 532 (1931); *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 51 S. Ct. 625 (1931); *Grosjean v. American Press Co.*, 297 U. S. 233, 56 S. Ct. 444 (1936); *DeJonge v. Oregon*, 299 U. S. 353, 57 S. Ct. 255 (1937); *Herndon v. Lowry*, 301 U. S. 242, 57 S. Ct. 732 (1937); *Lovell v. Griffin*, 303 U. S. 444, 58 S. Ct. 666 (1938).

²⁶ The opinion relies on a dictum in *United States v. Cruikshank*, 92 U. S. 542 at 552 (1875), which stated that freedom of assembly is not as such protected from state invasion by the Privileges and Immunities clause, but "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government [italics supplied], is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government,

The opinion states that the plaintiffs (respondents) were holding public meetings to discuss the National Labor Relations Act, and that peaceable assembly to discuss a federal act is a privilege or immunity of a citizen of the United States, secured against abridgement by the Fourteenth Amendment. While this view would not place freedom of speech and of assembly generally under the protection of the privileges and immunities clause, it is perhaps an opening wedge in that direction. As Justice Stone pointed out, it was not necessary to place the decision on the privileges and immunities clause, since there is good precedent for protection of freedom of speech and of assembly under the due process clause. Justice Hughes conceded that discussion of the NLRA would come under the protection of the privileges and immunities clause, but did not agree that jurisdiction on that ground was supported by the record, since the primary purpose of plaintiffs was the organization of labor unions. Justices McReynolds and Butler dissented briefly, while Justices Frankfurter and Douglas did not take part in the decision.

Justice Stone pointed out the better protection afforded by the due process clause, which applies to all persons (including aliens), while the privileges and immunities clause protects only citizens (not aliens or corporations).²⁷ He agreed that one of the plaintiffs, a corporation, should not be protected by the decree, since the liberty guaranteed by the due process clause does not extend to the "personal liberty" of corporations, as contrasted with the guarantee of property found in that clause.²⁸ Aside from the greater efficacy of the due process clause, Justice Stone's objection to the use of the privileges and immunities clause was the same as that set forth in the *Slaughterhouse Cases*, that the opposite construction would extend national judicial and congressional power over the states to an unknown degree.²⁹ In view of the precisely similar extension of judicial power which *has* taken place under the due process clause, and in view of the decision in the *Civil Rights Cases*,³⁰ that the congressional power granted in section five of

republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."²⁷ This ground was first raised on argument to the Supreme Court, says Justice Stone. Principal case, 59 S. Ct. 954 at 967.

²⁷ Paul v. Virginia, 8 Wall. (75 U. S.) 168 (1869); Selover, Bates & Co. v. Walsh, 226 U. S. 112, 33 S. Ct. 69 (1912).

²⁸ Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243 at 255, 27 S. Ct. 126 (1906); Western Turf Assn. v. Greenberg, 204 U. S. 399, 27 S. Ct. 384 (1907).

²⁹ Principal case, 59 S. Ct. 954 at 966, note 1. See *Slaughterhouse Cases*, 16 Wall. (83 U. S.) 36 at 78 (1873), where it was said that the opposite construction "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. . . ."

³⁰ 109 U. S. 3, 3 S. Ct. 18 (1876).

the Fourteenth Amendment is confined to correction of state action, and does not permit general legislation on the subject, this reasoning cannot now be deemed weighty. However, the great number of precedents on the interpretation of this clause are not lightly to be overturned, especially when the same purposes can be achieved under the due process clause.

Since Justices Black and Roberts must have had some reason, other than intellectual ingenuity, for thus unnecessarily invoking the privileges and immunities clause, the conjecture suggests itself that they may be inclined to narrow the scope of the due process clause,³¹ perhaps eventually limiting it to procedural guarantees,³² while broadening the privileges and immunities clause to protect civil liberties. This would withdraw constitutional protection in the substantive sense from corporations and aliens in all situations, leaving citizens protected in their individual rights.³³ Obviously, such a doctrinal development is highly speculative. It is always easy to read too much into a new decision on constitutional law. If there is any likelihood of such a course, its wisdom is open to serious doubt. Apart from the debatable problem of protecting corporations and aliens, the protection to civil liberties which has slowly been won in the last fifteen years under the due process clause would have to be completely relitigated under the privileges and immunities clause. It would be better, it is submitted, should the Court continue its present policy of self-restraint in determining whether laws are "arbitrary" under the due process clause, while leaving the well-established power of review under that clause intact.

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³¹ Justice Black believes that a corporation is not to be deemed a person within the protection of the due process clause. Dissent to Connecticut Gen. Life Ins. Co. v. Johnson, 303 U. S. 77, 58 S. Ct. 436 (1938).

³² This was the early doctrine. Murray's Lessee v. Hoboken Land Co., 18 How. (59 U. S.) 272 (1855).

³³ Cf. Borchard, "The Supreme Court and Private Rights," 47 YALE L. J. 1051 at 1077 (1938): "A more natural interpretation of the 'privileges and immunities' clause would have avoided the temptation to inflate the due process clause, and even now points the way out."