Slaughterhouse Cases, Up Close

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Author's Note:

This is the second in a series of articles on the *Slaughterhouse Cases* and Citizenship under the Constitution of the United States. The first article is "Slaughterhouse Cases, Two Citizens." The third, "Two Citizens Under The Constitution." The last in this series is "Privileges and Immunities of a Citizen of the several States."

A companion completes the set. Entitled "Mistake in the Syllabus" it shows a mistake in the Syllabus to the Slaughterhouse Cases with a footnote to the Slaughterhouse Cases opinion itself.

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There appears to be a misunderstanding by some in reading the *Slaughterhouse Cases* between a citizen of a state and a citizen of the several states (or states). This is understandable since you have to read more than the opinion of the court.

They are not, however, the same. Privileges and immunities of state citizenship, in general, are to be found in the constitution and laws of the individual state. On the other hand, privileges and immunities of citizenship of the several States are designated in Article IV, Section 2, Clause 1 of the Constitution of the United States. To clarify this lets begin with the Fourteenth Amendment.

> Section 1, Clause 1 of Amendment 14 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."

> Section 1, Clause 2 of Amendment 14 provides:
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> "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 to deny to any person within its jurisdiction the equal protection of the laws."

The following is from the *Slaughterhouse Cases* at pages 73 thru 74:

> "To remove this difficulty primarily, and to establish clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States and also citizenship of a State, the first clause of the first section (of the Fourteenth Amendment) was framed:
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> > '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.'
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> The first observation we have to make on this clause is that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the *Dred Scott* decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.
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> The next observation is more important in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. . . .
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> It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.
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> We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section (the second clause of the first section), which is the one mainly relied on by the plaintiffs in error, speaks only of **privileges and immunities of citizens of the United States**, and does not speak of **(privileges and immunities of) citizens of the several States.** The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.
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> The language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and, with a purpose.
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> Of the **privileges and immunities of the citizen of the United States**, and of the **privileges and immunities of the citizen of the State**, and what they respectively are, we will presently

consider; but we wish to state here that it is only the former which are placed by this clause (the second clause of the first section) under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment."

The following terms from this opinion have been emphasized:

privileges and immunities of citizens of the United States
privileges and immunities of citizens of the several States
privileges and immunities of the/(a) citizen of the United States
privileges and immunities of the/(a) citizen of the/(a) State

The *Slaughterhouse* court makes the observation that the term citizen of a state is in Section 1, Clause 1 of the Fourteenth Amendment but not in Section 1, Clause 2 of the Fourteenth Amendment:

> " . . . 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and, with a purpose." (footnote 1)

Therefore, Section 1, Clause 2 of the Fourteenth Amendment does not relate to a citizen of a state.

However, the *Slaughterhouse* court uses the term privileges and immunities of citizens of the several states in reference to Section 1, Clause 2 of the Fourteenth Amendment:

> "We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section (the second clause of the first section), which is the one mainly relied on by the plaintiffs in error, speaks only of **privileges and immunities of citizens of the United States**, and does not speak of **(privileges and immunities of) citizens of the several States.** *The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same."*
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> The language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.'"

The *Slaughterhouse* court refers to the argument of the plaintiff in error, and remarks that the brief rests on the wrong citizenship (and provision of the Constitution). In this case, before this opinion, there is the following, starting at the bottom of page 45, then to pages 55 thru 56:

> "Mr. John A. Campbell, and also Mr. J. Q. A. Fellows, argued the case at much length and on the authorities, in behalf of the plaintiffs in error. The reporter cannot pretend to give more than such an abstract of the argument *as may show to what the opinion of the court was meant to be*

responsive. . . . "

"Now, what are 'privileges and immunities' 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 people have recognized as forming the basis of the institutions of the country. The first clause in the fourteenth amendment does not deal with any interstate relations, nor relations that depend in any manner upon State laws, nor is any standard among the States referred to for the ascertainment of these privileges and immunities. It assumes that there were privileges and immunities that belong to an American citizen, and the State is commanded neither to make nor to enforce any law that will abridge them.

The case of *Ward v. Maryland* bears upon the matter. That case involved the validity of a statute of Maryland which imposed a tax in the form of a license to sell the agricultural and manufactured articles of other States than Maryland by card, sample, or printed lists, or catalogue. The purpose of the tax was to prohibit sales in the mode, and to relieve the resident merchant from the competition of these itinerant or transient dealers. This court decided that the power to carry on commerce in this form was 'a privilege or immunity' of the sojourner. 2. The act in question is equally in the face of the fourteenth amendment in that it denies to the plaintiffs the equal protection of the laws. By an act of legislative partiality it enriches seventeen persons and deprives nearly a thousand others of the same class, and as upright and competent as the seventeen, of the means by which they earn their daily bread."

However, *Ward v. Maryland* did not deal with the Fourteenth Amendment and privileges and immunities of citizens of the United States, but rather, with Article IV, Section 2, Clause 1 and privileges and immunities of citizens of the several States:

"Comprehensive as the power of the states is to lay and collect taxes and excises, it is, nevertheless, clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and inasmuch as the Constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the state might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents.

Grant that the states may impose discriminating taxes against the citizens of other states, and it will soon be found that the power conferred upon Congress to regulate interstate commerce is of no value, as the unrestricted power of the states to tax will prove to be more efficacious to promote inequality than any regulations which Congress can pass to preserve the equality of right contemplated by the Constitution among the **citizens of the several states**." Ward v. State of Maryland: 79 U.S 418, 430-431 (1870).

Privileges and immunities of citizens of the several states therefore relate to a citizen of the several states.

There is also the following:

> "The intention of section 2, Article IV (of the Constitution), was to confer on the **citizens of the several States** a general citizenship." Cole v. Cunningham: 133 U.S. 107, 113-114 (1890).

Thus, from the *Slaughterhouse Cases*, there are three citizens (citizenships):

a citizen of the United States,
a citizen of the several States,
and a citizen of a state. (footnote 2)

In addition, the *Slaughterhouse* court stated the following

> "Of the **privileges and immunities of the citizen of the United States**, and of the **privileges and immunities of the citizen of the State**, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause (the second clause of the first section) under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment."

Therefore, privileges and immunities of a citizen of the United States are in the Fourteenth Amendment. Privileges and immunities of a citizen of a state are not.

A citizen of a state is recognized in Article IV, Section 2, Clause 1 of the Constitution of the United States:

> "**The Citizens of each State** shall be entitled to all Privileges and Immunities of Citizens in the several States."

However, privileges and immunities of a citizen of a state are not. (footnote 1) Instead they are to be found in the constitution (for example, "Declaration of Rights") and laws of the individual State.

Footnotes:

1. If Clause 2 of Section 1 of the Fourteenth Amendment did apply to a citizen of a state it would have stated:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the State," or
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> "No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States or citizens of the State."

2. That there is a citizen of a State, a citizen of the several States (or states), and a citizen of the United States, since the *Slaughterhouse Cases*, is shown by the following:

> "The expression, Citizen of a State, is carefully omitted here. In Article IV, Section 2, Clause 1, of the Constitution of the United States, it had been already provided that 'the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.' The rights of Citizens of the States (under Article IV, Section 2, Clause 1) and of citizens of the United States (under The Fourteenth Amendment) are each guarded by these different provisions. That these rights are separate and distinct, was held in the *Slaughterhouse Cases*, recently decided by the Supreme court. The rights of Citizens of the State, as such, are not under consideration in the Fourteenth Amendment. They stand as they did before the adoption of the Fourteenth Amendment, and are fully guaranteed by other provisions." United States v. (Susan B.) Anthony: 24 Fed. Cas. 829, 830 (Case No. 14,459) (1873).

And so, this:

(Page 85) . . .

> "The fourteenth amendment to the federal Constitution was proposed by Congress, July 16, 1866, and declared by the secretary of state to have been ratified July 28, 1868. It consists of several sections; but section 1 is the only one necessary to this examination. It declares that '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.'
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> This section can better be understood or construed by dividing and considering it in four paragraphs, or clauses, the last, however, being a mere restatement of what precedes it.
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> First. '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.'
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> In the *Slaughter-house Cases*, the Supreme Court of the United States say this is a declaration, ´that persons may be citizens of the United States without regard to their citizenship of a particular state, and it overturns the *Dred Scott* decision, by making all persons born within the United States, and subject to its jurisdiction, citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction," was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born

within the United States.' It recognizes and establishes a 'distinction between citizenship of the United States and citizenship of a state. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must **(page 86)** reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics and circumstances in the individual.' Hence a negro may be a citizen of the United States and reside without its territorial limits, or within some one of the territories; but he cannot be a citizen of a state until he becomes a *bond fide* resident of the state.

Second. 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.'

This clause does not refer to citizens of the states. It embraces only citizens of the United States. It leaves out the words 'citizen of the state,' which is so carefully used, and used in contradistinction to citizens of the United States in the preceding sentence. It places the privileges and immunities of citizens of the United States under the protection of the federal Constitution, and leaves the privileges and immunities of citizens of a state under the protection of the state constitution. This is fully shown by the recent decision of the supreme court of the United States in the *Slaughter-house Cases*, supra.

Mr. Justice Miller, in delivering the opinion of the court, and in speaking in reference to the clause under examination, says: —

'It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the word citizen of the state should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.'

'Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.'

'If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.'

The same learned judge in the further examination of the second clause, says: —

'It would be the vainest show of learning to attempt to prove by citations of authority that up to the adoption of the recent amendments no claim or pretence was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the states — such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligations of contracts. But with the exception of these and a few other restrictions, the entire domain of **(page 87)** the privileges and immunities of citizens of the states as above defined, lay within the constitutional and legislative power of the states, and without that of the federal government. 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? And when it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?'

'All this and more must follow, if the position 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 exercise of legislative power by the states, in the most ordinary and useful functions, as in its judgment it may think proper on all such subjects. And still further, such a construction, followed by the reversal of the judgments of the supreme court of Louisiana in these cases´ (these judgments sustained the validity of the grant, by the Legislature of Louisiana, of an exclusive right guarded by certain limitations as to price, &c., to a corporation created by it, for twenty-five years, to build and maintain slaughter-houses, &c., and prohibited the right to all others, within a certain locality), ´would constitute this court 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.'

'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 institutions; 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 relation 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. We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them.' " Cory v. Carter; Vol. II, The Am Law Times Rep 73; February 1875; pages 85-87.

(This case, Cory v. Carter, can be seen online at http://books.google.com/books?id=VQ48AAAAIAAJ&pg=PA49&source=gbs_toc_r&cad=0_0#PPA73,M1 , then scrolling to page 85.)

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