Article IV, Section 2, Clause 1 is defined to have both Fundamental as well as Common Privileges and Immunities

Article IV, Section 2, Clause 1 has been defined to have both fundamental privileges and immunities as well as common privileges and immunities.

After the adoption of the Constitution of the United States of America, there were two trains of thought regarding the privileges and immunities protected under Article IV, Section 2, Clause 1 of the Constitution. The first was that the privileges and immunities protected were fundamental privileges and immunities. The second was that Article IV, Section 2, Clause 1 granted common privileges and immunities to the citizens of sister States when they were in another State.

The first case to discuss Article IV, Section 2, Clause 1, was *Campbell v. Morris*. In this case, the court viewed the privileges and immunities in Article IV, Section 2, Clause 1 as fundamental:

" . . . [T]he 4th article of the federal constitution, sec. 2. [declares] that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'

The object of the convention in introducing this clause into the constitution, was to invest the citizens of the different states with the ***general rights*** of citizenship; that they should not be foreigners, but citizens. To go thus far was essentially necessary to the very existence of a federate government, and in reality was no more than had been provided for by the first confederation the fourth article." Campbell v. Morris: 3 H & McH. 535, at 565 (Md. 1797).

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However, the next case to examine Article IV, Section 2, Clause 1, *Livingston v. Van Ingen*, took the position that clause granted common privileges and immunities:

" . . . [T]he fourth article, which in less comprehensive general terms, but more in detail then the new Constitution, secured to the citizens of the United States

common privileges and immunities." Livingston v. Van Ingen: 9 Johns 507, (*Statement of the Case*) at 515 (N.Y. 1812).

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" . . . The Constitution of the United States intends that the same immunities and privileges shall be extended to all the citizens equally, for the wise purpose of preventing local jealousies, which discriminations (always deemed odious) might otherwise produce." Livingston v. Van Ingen: 9 Johns 507, (*Opinion*) at 561 (N.Y. 1812).

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The case of *Corfield v. Coryell* followed, taking the side that Article IV, Section 2, Clause 1 of the Constitution described fundamental privileges and immunities:

"The next question is, whether this Act infringes that section of the Constitution which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States?'

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 ***fundamental***." Corfield v. Coryell: 6 Fed. Cas. (Case No. 3230) 546, at 550 (1825). **[Footnote 1], [Footnote 2]**

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After *Corfield*, came the case of the *State of Tennessee v. Claiborne*. However, this case took the other side; that common privileges and immunities were protected under Article IV, Section 2, Clause 1:

" 'The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States,' says the Constitution. The citizens here spoken of are those who are entitled to 'all the privileges and immunities of citizens.' . . .

. . . Hence, in speaking of the rights which a citizen of one State should enjoy in every other State . . . , it is very properly said that he should be entitled to all the 'privileges and immunities' of citizens in such other State. The meaning of the language is, that no privilege enjoyed by, or immunity allowed to, the most favored class of citizens in said State shall be withheld from a citizen of any other State." State of Tennessee v. Claiborne: 10 Tenn. (1 Meigs's) 255, at 261 thru 262 (1838).

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As of the year 1861, there existed no definition of the privileges and immunities in Article IV, Section 2, Clause 1 of the Constitution:

"Let us now proceed to consider briefly what is the nature of the privileges and immunities of citizenship to which the Constitution entitles the citizens of each State in every other State. The language is broad—universal—'all the privileges and immunities'; yet it is clear that such is not the true meaning of the Constitution. It could not have been the design of the framers of the Constitution to declare that a State may not allow to its residents—its inhabitants—some privileges which it may deny to the residents and inhabitants of other States. **[Footnote 3]** We have no authoritative expositions of this clause of the Constitution, giving us a full and complete definition of its terms." Baker v. Wise: 57 Va. (16 Grattan) 139, at 215 (1861). **[Footnote 4]**

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The Supreme Court of the United States eventually took up the task of defining the privileges and immunities contained in Article IV, Section 2, Clause 1.

In *Paul v. State of Virginia*, the Supreme Court stated that Article IV, Section 2, Clause 1 of the Constitution protected common privileges and immunities:

"[T]he privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are ***common*** to the citizens in the latter States under their constitution and laws by virtue of their being citizens." Paul v. State of Virginia: 75 U.S. (8 Wall.) 168, at 180 (1868).

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However, in *Ward v. State of Maryland*, the Supreme Court of the United States, took the position that Article IV, Section 2, Clause 1 described fundamental privileges and immunities:

"Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one

State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens. **[Footnote 5]**

. . . [T]he Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Ward v. State of Maryland: 79 U.S. (12 Wall.) 418, at 430 (1870).

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It was in the *Slaughterhouse Cases*, where the Supreme Court of the United States finally defined the privileges and immunities in Article IV, Section 2, Clause 1 of the Constitution:

"The first occurrence of the words 'privileges and immunities' in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares 'that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively.'

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.'

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield v. Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823.

> 'The inquiry,' he says, 'is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. . . .'

This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward v. The State of Maryland*, while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are **FUNDAMENTAL**. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.

In the case of *Paul v. Virginia*, the court, in expounding this clause of the Constitution, says that 'the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are **COMMON** to the citizens in the latter States under their constitution and laws by virtue of their citizens.'

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

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 the privileges and immunities of citizens of the States, AS ABOVED DEFINED, lay within the constitutional and legislative power of the States, and without that of***

the Federal government." Slaughterhouse Cases: 83 U.S. (16 Wall.) 36, at 75 thru 77 (1873).

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The *Slaughterhouse* Court defined privileges and immunities under Article IV, Section 2, Clause 1 of the Constitution of the United States of America to include fundamental privileges and immunities AS WELL AS common privileges and immunities.

In addition, there is the following from the dissenting opinion of Justice Fields:

"The terms, privileges and immunities, are not new in the [Fourteenth] amendment; they were in the Constitution before the amendment was adopted. They are found in the second section of the fourth article, which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,' and they have been the subject of frequent consideration in judicial decisions. In *Corfield v. Coryell*, Mr. Justice Washington said he had 'no hesitation in confining these expressions to those privileges and immunities which were, in their nature, **FUNDAMENTAL**; which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose the Union, from the time of their becoming free, independent, and sovereign. . . .

The privileges and immunities designated in the second section of the fourth article of the Constitution are, then, according to the decision cited, those which of right belong to the citizens of all free governments, and they can be enjoyed under that clause by the citizens of each State in the several States upon the same terms and conditions as they are enjoyed by the citizens of the latter States. No discrimination can be made by one State against the citizens of other States in their enjoyment, nor can any greater imposition be levied than such as is laid upon its own citizens. It is a clause which insures equality in the enjoyment of these rights between citizens of the several States whilst in the same State.

Nor is there anything in the opinion in the case of *Paul v. Virginia*, which at all militates against these views. . . . [T]he court observed, that the privileges and immunities secured by [Article IV, Section 2, Clause 1] were those privileges and immunities which were **COMMON** to the citizens in the latter States, under their constitution and laws, by virtue of their being citizens; that special privileges enjoyed by citizens in their own States were not secured in other States by the provision; that it was not intended by it to give to the laws of one States any operation in other States; that they could have no such operation except by the permission, expressed or implied, of those States; and that the special privileges

which they conferred must, therefore, be enjoyed at home unless the assent of other States to their enjoyment therein were given. . . .

The whole purport of the decision was, that citizens of one State do not carry with them into other States any special privileges or immunities, conferred by the laws of their own States, of a corporate or other character. That decision has no pertinency to the questions involved in this case. The ~~common~~ (*should be*, fundamental) privileges and immunities which of right belong to all citizens, stand on a very different footing. These the citizens of each State do carry with them into other States. This equality in one particular was enforced by this court in the recent case of *Ward v. The State of Maryland*, reported in the 12 th of Wallace." Slaughterhouse Cases: 83 U.S. (16 Wall.) 36, at 97 thru 100 (*dissenting opinion of Justice Fields*) (1873).

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Thus, Article IV, Section 2, Clause 1 of the Constitution of the United States of America has both fundamental privileges and immunities as well as common privileges and immunities.

Footnotes:

1. The opinion in the case of *Corfield v. Coryell* was delivered in the year of 1825. The paragraph preceding the opinion states:

"This case was argued, on the points of law agreed by the counsel to arise on the facts, at the October term 1824, and was taken under advisement until April term 1825, when the following opinion was delivered." Corfield v. Coryell: 6 Fed. Cas. (Case No. 3230) 546, at 550 (1825).

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2. It is to be noted that *Campbell*, *Livingston*, and *Corfield* were cited by later cases in tandem. Refer to "The Origins of the Privileges or Immunities Clause, Part I: 'Privileges and Immunities' as an Antebellum Term of Art,' " Kurt T. Lash, The Georgetown Law Journal, Volume 98, page 1266 and footnote 122.

http://georgetownlawjournal.org/files/pdf/98-5/Lash.pdf

3. This was confirmed in the case of *Paul v. State of Virgina*:

" . . . Special privileges enjoyed by citizens in their own States are not secured in other States by this provision (Article IV, Section 2, Clause 1)." Paul v. State of Virginia: 75 U.S. (8 Wall.) 168, at 180 (1868).

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4. In this case, only the cases of *Campbell* and *Corfield* are cited. Unfortunately, the cases of *Livingston* and *Claiborne* are not. Otherwise, the court may have come to a different conclusion. That is, Article IV, Section 2, Clause 1 of the Constitution had both fundamental as well as common privileges and immunities.

5. ". . . [I]n *Ward v. Maryland*, 12 Wall. 418, 430, the court, after referring to *Corfield v. Coryell*, above citied, and speaking by Mr. Justice Clifford, stated that the right 'to maintain actions in the courts of the State' was ***fundamental*** and was protected by the constitutional clause in question (Article IV, Section 2, Clause 1) against state enactments that discriminated against citizens of other States." Chambers v. Baltimore & Ohio Railroad Company: 207 U.S. 142, 151, at 154-157 (*Justice Harlan, Justice White and Justice McKenna;* ***concurring*** *in part, dissenting in part*) (1907). **[Footnote 6]**

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6. At page 151, it states that the opinion of "Mr. Justice Harlan (with whom concurred Mr. Justice White and Mr. Justice McKenna)" is dissenting. However, this is wrong. In the opinion Justice Harlan writes, at page 154:

" . . . I cordially assent to what is said upon this point in the opinion just delivered for the majority of the court."

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