

Comment on Petitioner's Brief: McDonald v. City of Chicago

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In the Brief filed with the Supreme Court of the United States (No. 08-1521)

(Brief: <http://www.docstoc.com/docs/16650220/Petitioners-Brief-filed-in-McDonald-v-Chicago>) also

(Brief: <http://www.chicagocase.com/wp-content/uploads/2009/11/08-1521-ts.pdf>) You may have to reload or refresh your browser for this link.

Petitioners, in the case of *McDonald v. City of Chicago* presented the following question for consideration:

“Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment’s Privileges or Immunities or Due Process Clauses.” (Brief, page i)

In the outline of their argument (Brief, page iv), it is stated that “the right to keep and bear arms is among the privileges or immunities of American citizenship that States may not abridge.”

In their argument, the Petitioners advance the position to overturn the *Slaughterhouse Cases* (Brief, page 42 “II. The Slaughterhouse Cases . . . must be overruled.”)

They write (Brief, pages 43, 44):

“The earliest federal court decisions interpreting the Fourteenth Amendment correctly interpreted the Privileges or Immunities Clause. . . .

Yet when this Court first passed on the Fourteenth Amendment, it announced a theory of the Privileges or Immunities Clause never apparently considered by anyone during the framing and ratification process, standing diametrically opposed to every statement of intent and understanding related to the Privileges of Immunities Clause.

SlaughterHouse first observed that while individuals held both federal and state citizenship, the Clause at issue protects only privileges and immunities of national citizenship. SlaughterHouse, 83 U.S. at 74. It then purported to quote Article IV as securing ‘the privileges and immunities of citizens of the several States.’ Id., at 75. Reading these asserted rights of state citizenship broadly, in line with *Corfield*, *SlaughterHouse* declared Article IV ‘did not create those rights, which it called privileges and immunities of citizens of

the States.' Id. “

What Petitioners failed to see in their references to the *Slaughterhouse Cases* was that there were two citizens the Court was referring to, and not one.

Prior to this case there was in the 5th Judicial Circuit the case of *The Insurance Company v. The City of New Orleans*. In this case, Judge Woods examined if a corporation was a citizen of the several States, under Article IV, Section 2, Clause 1 of the Constitution of the United States (of America) or if it was a citizen of the United States under the first section of the Fourteenth Amendment. He wrote the following:

“The first question presented for adjudication is: Admitting the tax to be unequal, is the ordinance providing for its levy and enforcement in violation of the 1st section of the 14th amendment to the constitution of the United States, especially the last clause of the section? The section reads as follows: ‘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 privilege 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.’

The complainant, to be entitled to the protection of this constitutional provision, must be either a citizen of the United States or a person in the sense in which that term is used in this section.

It has been repeatedly held, by the supreme court of the United States, that corporations were not citizens of the several states in such sense as to bring them within the protection of that clause in the constitution of the United States (section 2, article IV), which declares that ‘the citizens of each state shall be entitled to all the privileges and immunities of citizens **OF** the several states;’ *Bunk of Augusta v. Earle*, 13 Peters, 586; *Paul v. Virginia*, 8 Wallace, 177. [[Footnote 1](#)]

Are corporations citizens of the United States within the meaning of the constitutional provision now under consideration? It is claimed in argument that, before the adoption of the 14th amendment, to be a citizen of the United States, it was necessary to become a citizen of one of the states, but that since the 14th amendment this is reversed, and that citizenship in a state is the result and consequence of the condition of citizenship of the United States.

Admitting this view to be correct, we do not see its bearing upon the question in issue. Who are citizens of the United States, within the meaning of the 14th amendment, we think is clearly settled by the terms of the

amendment itself. '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 words could make it clearer that citizens of the United States, within the meaning of this article, must be natural, and not artificial persons; for a corporation cannot be said to be born, nor can it be naturalized. I am clear, therefore, that a corporate body is not a citizen of the United States as that term is used in the 14th amendment." [\[Footnote 2\]](#), [\[Footnote 3\]](#) The Insurance Company v. The City of New Orleans: 1 5th. Jud. Cir. 85, at 86 thru 88 (1870)." For case click link below:

http://books.google.com/books?id=jjW3AAAAIAAJ&printsec=titlepage&source=gbs_summary_r&cad=0#PPA85,M1

Article IV, Section 2, Clause 1 of the Constitution is now the location for a citizen of the several States:

"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 thru 114 (1890). For case click link below:

<http://books.google.com/books?id=oGYUAAAAYAAJ&pg=PA113#v=onepage&q=&f=false>

In addition, privileges and immunities of a citizen of the several States are now those described in *Corfield*:

"In the *Slaughter House Cases*, 16 Wall. 36, 76, in defining the privileges and immunities of *citizens of the several States*, this is quoted from the opinion of Mr. Justice Washington in *Corfield v. Coryell*, 4 Wash. Cir. Ct. 371, 380." Hodges v. United States: 203 U.S. 1, at page 15 (1906). For case click link below:

<http://books.google.com/books?id=HuEGAAAAYAAJ&pg=PA15#v=onepage&q=&f=false>

The Petitioners also failed to see that Section 1, Clause 1 and Section 1, Clause 2 of the Fourteenth Amendment were treated differently by the *Slaughterhouse* court. The case of *Cory v. Carter* will serve as a guide. It is written:

"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.'

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.

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.'

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 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. [Footnote 4](#) 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 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; at pages 85 thru 87. For case click link below:

http://books.google.com/books?id=VQ48AAAAIAAJ&pg=PA73&source=gbs_toc_r&ad=0_0#v=onepage&q=&f=false

The purported quote of Article IV, Section 2, Clause 1 (OF) was nothing unusual in *Slaughterhouse*. The *Slaughterhouse* court was simply giving legal effect of the Fourteenth Amendment on the Constitution. That effect was the creation of another citizen under the Constitution at Article IV, Section 2, Clause 1. [\[Footnote 5\]](#)

So because of the Fourteenth Amendment, there are now two citizens under the Constitution of the United States (of America); a citizen of the several States, under

Article IV, Section 2, Clause 1 and a citizen of the United States, under Section 1 of the Fourteenth Amendment. [\[Footnote 6\]](#)

The Petitioners also make the erroneous conclusion about a citizen of a State being the same as a citizen of the several States. However, a citizen of a State, before the Fourteenth Amendment, was not a citizen of the several States. Article IV, Section 2, Clause 1 of the Constitution stated:

"The citizens of each State shall be entitled to all privileges and immunities of citizens **IN** the several States."

It did NOT state:

"The citizens of each State shall be entitled to all privileges and immunities of citizens **OF** the several States."

Since a citizen of a State was not entitled to all privileges and immunities of citizens **OF** the several States, before the Fourteenth Amendment, then a citizen of a State was not a citizen of the several States. [\[Footnote 7\]](#) And, as shown, in the *Slaughterhouse Cases* a citizen of a State; in contradistinction to a citizen of the United States, was covered by the court in its treatment of Section 1, Clause 1 of the Fourteenth Amendment whereas a citizen of the several States; in contradistinction to a citizen of the United States; was covered by the *Slaughterhouse* court in its treatment of Section 1, Clause 2 of the Fourteenth Amendment.

Footnotes:

1. Paul v. State of Virginia: 75 U.S. 168, 178 (1868)

“But in no case which has come under our observation, either in the State or Federal courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens **OF** the several States.”

For case click this link:

<http://books.google.com/books?id=-bwGAAAAYAAJ&pg=PA168#v=onepage&q=&f=false>

2. On this point of law there is the following:

Waters-Pierce Oil Company v. Texas: 177 U.S. 28, 45 (1900)

“And (in *Paul v. Virginia*, 8 Wall. 168) it was also decided that a corporation did not have the rights of its personal members, and could not invoke that provision of Section 2,

Article IV, of the Constitution of the United States, which gave to the citizens of each state the privileges and immunities of citizens OF the several states. See also *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181; *Ducat v. Chicago*, 10 Wall. 410. And it has since been held in *Blake v. McClung*, 172 U.S. 239, and in *Orient Insurance Company v. Daggs*, 172 U.S. 557, that the prohibitive words of the Fourteenth Amendment have no broader application in that respect.”

For case click this link:

<http://books.google.com/books?id=qOAGAAAAYAAJ&pg=PA28#v=onepage&q=&f=false>

In Re Speed's Estate: 74 N.E. 809, 811 (1905)

“It has frequently been declared to be a well-established principle of constitutional law that a corporation is not a 'citizen,' within the meaning of the first clause of section 2 of article 4 of the Constitution of the United States, which declares the citizens of each state shall be entitled to all privileges and immunities of citizens OF the several states. *Ducat v. City of Chicago*, 48 111. 172, 95 Am. Dec. 529; *Same v. Same*, 10 Wall. 410, 19 L. Ed. 972; 10 Cyc. 150; *Tatem v. Wright*, 23 N. J. Law, 429; *Pembina Con. Silver Mining Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; *Humphreys v. State (Ohio)*, 70 N. E. 957. . . . [The first sentence of the first section of said fourteenth amendment] declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States. The subsequent declaration, preserving unabridged the privileges and immunities of citizens of the United States, has reference only to the natural persons declared to be citizens by the preceding sentence. . . . A corporation is a mere creature of the local law whereby it has its existence. It is not a citizen of the United States, and has no right, because of its chartered powers, to exercise corporate power beyond the territorial limits of the state which created it.”

For case click this link:

<http://books.google.com/books?id=3AELAAAAYAAJ&dq=editions%3ALCCN01030922&lr=&pg=PA809#v=onepage&q=&f=false>

Therefore, a corporation is not a 'citizen' within Const. U. S. art. 4, §2, providing that the “citizens of each state shall be entitled to all the privileges and immunities of citizens OF the several states,” nor within the Fourteenth Amendment, §1. providing 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, and that no state shall abridge the privileges or immunities of citizens of the United States.”

3. There is also the following:

Loverin & Browne Company v. Travis: 115 N.W. 829, 831 (1908)

“Section 1770b has been several times considered by this court, and upheld to the full extent of its terms. It is enacted under the undoubted power of every state to impose conditions in absolute discretion upon granting the privilege of doing business in this state to any foreign corporation. *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357; *Chicago T. & T. Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940. That power is not restrained by section 2, art. 4, of the federal Constitution, providing that the citizens of

each state shall be entitled to all the privileges and immunities of citizens OF the several states, nor by section 1, Amend. 14, to that Constitution, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, because foreign corporations are not citizens. *Paul v. Virginia*, supra; *Chicago T. & T. Co. v. Bashford*, supra.”

For case click this link:

<http://books.google.com/books?id=hjs8AAAAIAAJ&dq=editions%3ALCCN42012503&lr=&pg=PA829#v=onepage&q=&f=false>

4. The term “citizens of the states” is equivalent to the term “citizens of the several states.”

“Fortunately we are not without judicial construction of this clause of the Constitution (that is, Article IV, Section 2, Clause 1). 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. 4 Wash C. C. 371.

‘The inquiry,’ he says, ‘is, what are the privileges and immunities of CITIZENS OF THE SEVERAL STATES? ...’

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. Maryland*. ...

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.” *Slaughterhouse Cases*: 83 (16 Wall.) U.S. 36, 75-76, 78-79 (1873).

For case click this link:

<http://books.google.com/books?id=DkgFAAAAYAAJ&pg=PA36#v=onepage&q=&f=false>

5. There is the following, decided before the Fourteenth Amendment:

“Consequently, one who is created a citizen of the United States, is certainly not made a citizen of any particular State. It follows, that as it is only the citizens of the State who are entitled to all privileges and immunities of citizens of the several States, . . . , then a distinction both in name and privileges is made to exist between citizens of the United States, ex vi termini, and citizens of the respective (several) States.” *Ex parte Frank Knowles*: 5 Cal. 300, at page 304 (1855).

For case click this link:

<http://books.google.com/books?id=0p4WAQAAIAAJ&pg=PA304#v=onepage&q=&f=false>

6. A citizen of the United States can become also a citizen of a State, under Section 1, Clause 1 of the Fourteenth Amendment, by residing in a State. A citizen of the several States, under Article IV, Section 2, Clause 1 of the Constitution, is also a citizen of a State in which he or she is domiciled in. Therefore, in any State of the Union, there are two state citizens; a citizen of the United States, under Section 1 of the Fourteenth Amendment and a citizen of the several States, under Article IV, Section 2, Clause 1.

7. One was a citizen "of" the several states, before the Fourteenth Amendment, in the sense that he or she was eligible to be a citizen in all the States of the Union, under Article IV, Section 2, Clause 1 of the Constitution. So a citizen of the several States did not exist before the Fourteenth Amendment.