

Senate Occasional Lecture Series 2012

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The Strange Case of Privileges and Immunities.

I would like to start with a few preliminary comments before I get to the strange case of privileges and immunities and I wanted to make a correction. I was looking over this flyer and it says 'currently he is working on a book on the American influence in the making of the Australian Constitution' and even though I have described what I am doing in that way for a long time, for the first time it occurred to me that there is really something very misleading about that. The American 'influence' in the making of the Australian Constitution sounds a little bit like a lobbyist group trying to get the Australians to do what would be in the American interest.

Now, in fact, what I am really talking about is the Australian framers, who got to the job of making a constitution and looked around to see what was available to help them. They took a very hard look at the American Constitution and found that it was influential, but influential in a lot of different ways. One was providing a sort of model for them to follow as they did, for example, in the case of Chapter III dealing with the judiciary. If you pick up Chapter III in the Australian Constitution and Article III of the American Constitution, you would see that there are places where you could put one set of words over the other and except for words like the 'United States' and the 'Commonwealth' the language would be exactly the same. So there is a real positive modeling, in this case, on the American Constitution.

At the other extreme there are a number of places where the look at the American Constitution was to tell the Australian framers 'we don't want to do that.' For example, right now I am working on an article with my daughter, who is also a law professor in the United States, about family law. When the Australian framers looked at what the Americans had done with family law and what it had caused, they said that is a 'scandalous' result and we are going to stay as far away

from that as we can. So there are warnings as well as good advice. Then there are these funny in-between cases and that's where we get to the strange case of privileges and immunities.

I have prepared a very simple outline (see Appendix 1) that will enable you to follow where I am in this talk. I will just tell you in advance that the first seven items on the list are pretty much about the American Constitution, items 8 to 15 are about the Australian Constitution, and items 16 and 17 are something special if we have time to do that.

First of all, I need to insist that you just take on faith what I am going to say about privileges and immunities. 'Privileges and immunities' is a traditional phrase used long back into English history; and it is, at the same time, very vague and yet pretty specific. It is vague in the sense that exactly which rights and freedoms are part of privileges and immunities is always something that has to be discussed and worked out. But, on the other hand, it is repeatedly clear that it is talking about *fundamental rights*. 'Privileges and immunities' means fundamental rights. Now, identifying those fundamental rights is not always easy, but that is something that I want you to accept. That will be repeatedly the case when I refer to this term as I go through my talk .

My second item in the outline is Bill of Rights. Of course I am talking about the American Constitution now, and I think it is important for me to start by saying it is the Constitution which the Americans ratified in 1788. Notice that's several years after the end of the American Revolutionary War—because right after they won independence, the Americans didn't have our current Constitution; they had a thing called the Articles of Confederation, which was pretty awful. The people we think of as the American patriots and constitutional framers like George Washington, Alexander Hamilton and James Madison said we have got to do something about this and what they did was make the American Constitution ratified in 1788. That constitution did not have any Bill of Rights. It was only later that it was added, in 1791. What happened is that in the constitutional ratification conventions in the 13 American states, the people made it pretty clear that they wanted a Bill of Rights. So, when James Madison went to the first Congress, he initiated what turned out to be the first eight amendments of the American Constitution which are commonly called the Bill of Rights.

There are two things we have to notice about those Rights: First, a Privileges and Immunities clause was not included. Second, the Bill of Rights applied only to the national government. So, for example, freedom of speech, one of the rights that was included in those eight amendments, was only a guarantee against things that the national government might do to interfere with the freedom of speech. It did not restrict state or local government at all.

So we get to the next point on the outline, item three, the United States Article IV and notice there is a little asterisk there and it says:

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

Here we have a privileges and immunities clause, but notice it is a *state* privileges and immunities clause. What it is really saying is that, in the United States, if you are a citizen of one state and you move into another state, you are entitled to these fundamental rights, or fundamental privileges and immunities, if the state provides them to its own citizens. So there is a state privileges and immunities concept that is based on non-state citizens being entitled to the fundamental rights that the state gives to its own citizens.

So now we get to item four and what I have written down on my outline is: 'Race and citizenship—Dred Scott.' The first 60 years under the American Constitution were very bogged down in arguments about slavery and race and one of the big issues was whether black people—and not just slaves, but free black people—were citizens entitled to these privileges and immunities. The Supreme Court gave an answer in the Dred Scott case, which was *Dred Scott v. Sandford* of 1857, probably the most infamous case in the history of American constitutional law. The Supreme Court said, No; black people were always understood not to be fit to be citizens and indeed the Chief Justice said, 'why, if they were citizens they would have these fundamental rights and that is unthinkable'.

Let me just read a partial quote from Chief Justice Roger B. Taney's Dred Scott opinion describing the fundamental rights of people, including black people, if they had citizenship rights to privileges and immunities. They would be able to move freely to another state, Taney said, and 'to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without

molestation' and they would have 'full liberty of speech in public and in private upon all subjects . . . to hold public meetings upon political affairs, and to keep and bear arms wherever they went'.¹ So, he said, these are the kinds of things that it is inconceivable that the framers of the American Constitution would have wanted black people to have. That is not a very happy message from the highest court in the United States, and it helped to bring about the American Civil War.

The 14th Amendment came along in the United States after the Civil War and the first sentence of the 14th Amendment makes it clear (see the two asterisks) that all persons born in the United States, of whatever race, are citizens of the United States and of the state in which they reside. So that was good news.

Then, in the 14th Amendment, we have a second privileges and immunities clause. This is a privileges and immunities clause that seems to make up for the gap that was created by the original Bill of Rights. Remember I said the Bill of Rights was only applicable to the national government? Notice that the 14th Amendment says (three asterisks) '*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*'. That certainly sounds as though whatever was included in 'privileges and immunities' was protected from interference by state governments. Now I will give you another one of those statements where I am telling you to accept something on faith: The consensus of American scholars today is that the privileges and immunities clause in the 14th Amendment was clearly intended to include the Bill of Rights of the first eight amendments.

That happy news lasted only as long as it took to get to the case called the *Slaughter-House Cases* (1873), a case with an all-too suggestive name. The *Slaughter-House Cases* held that the 14th Amendment privileges and immunities clause did not make state governments abide by the fundamental rights in the Bill of Rights. All it did was make applicable to the states certain rights which were already in the Constitution. The dissenting opinion in the *Slaughter-House Cases* said that's crazy; if that's all it does, then the 14th Amendment privileges and immunities clause has done nothing. It is a dead letter; it adds nothing to the Constitution. That has been the understanding in the United States ever since. The *Slaughter-House Cases*, in effect, read the 14th Amendment privileges and immunities clause out of the Constitution.

¹ *Dred Scott v. Sandford*, 60 U.S. 393 at 417.

I want to emphasise the significance of that conclusion about the *Slaughter-House Cases*. It may be a little bit technical-sounding, perhaps, to say these fundamental rights only apply to the national government. But what it meant then, and for a long time after, is that the fundamental rights of black citizens were left to the protection of the states and the states, particularly in the south in the United States, were not protecting them. So, for a very long period there was discrimination, lynching, murders that were un-remedied, a very unhappy result. It would be a little bit strong to say that the *Slaughter-House Cases* decision did this damage all by itself; but it certainly played a very significant role.

So, on that unhappy note I am going to move on to the eighth point and talk about Australia, starting with Andrew Inglis Clark, who brought a full constitution to the 1891 Australasian Federal Convention. Accompanying that draft of a constitution ready to go for Australia, he wrote a memorandum that said his draft was expressly based on the Constitution of the United States of America. What does that have to do with the privileges and immunities clause? Well, it turns out, nothing at first because Clark did not include the two American privileges and immunities clauses. In fact, he did not include even one privileges and immunities clause. And that is the way things stayed for a while.

The drafting committee of which Sir Samuel Griffith was the chair, met before Easter in 1891 and began editing Clark's draft. Then, over the Easter weekend, Griffith took the drafting committee on a working voyage on a steamship called the *Lucinda*, which Griffith (as Premier of Queensland at that time) brought to the Convention in Sydney. The most significant drafting of the 1891 convention took place on the *Lucinda* on Easter Saturday, 1891, almost exactly 121 years ago today. This occurred on what Professor John La Nauze called the beautiful Hawkesbury River, which I think is the same river that Kate Grenville calls 'the secret river' in her novel by that name. When they sailed out of the Hawkesbury River on Easter Sunday, to return to Sydney, there was still no privileges and immunities clause in the draft of the Australian Constitution that then existed.

Now the next thing that happened is slightly controversial but I have to go back a step. Andrew Inglis Clark was a member of the 1891 drafting committee but he didn't make the cruise to the Hawkesbury River. He was sick in bed with the flu. So, as the story goes, when the *Lucinda* came back into the harbour in Sydney,

they picked up Clark and at that point he added a privileges and immunities clause. It is a great story.



QGSY *Lucinda* at Farm Cove, 2004, by Don Braben (1937–). Courtesy of Don Braben, FASMA.

Here is a painting that was done of the event a few years ago. At the time the picture was painted no one knew where this happened, so they did some consultation with people who might have had some idea and they finally concluded that the most likely place was where the Sydney Opera House is now. So the painting is supposed to be of that location. If you see the people over there in the row boat, I think the picture is intended to show Inglis Clark being rowed out to the *Lucinda*.

One final problem is that Clark himself, in anything I have ever read, never claimed that he was the author of the 1891 privileges and immunities clause. I think everyone who writes about this assumes that he was and it is hard not to

assume that he was the one because it is hard to imagine who else it would have been. But, in any event, at that point there was a privileges and immunities clause in the draft of the Australian Constitution. Remember, now, we have Clark who was very aware of the American Constitution and we have these two privileges and immunities clauses in the American Constitution. Which one did Clark put in the 1891 draft on the Lucinda? Well, most people say it is a mixture of the two and indeed when you look at it carefully it is a little bit unclear which of the two it was. But if the Australian Constitution that was drafted at that time had been approved, that clause would have been in there; but, as you probably know, in 1891 the proposed constitution was not adopted and the Australian constitution was put on the back burner for a while.

In 1897 and 1898 the constitution came back into the picture and was finally approved in 1898 by the framers and became a British statute in 1900. But an interesting thing happened along the way to approval. In 1891 no one had raised any questions about, let's call it, 'Clark's clause'; but in 1897 *Clark* raised a question about Clark's clause. That is, he was not a member of the Australasian Federal Convention in 1897-98 but he was very active and in touch with the convention and he had a new proposal, another privileges and immunities proposal, and he basically said that the 1891 proposal isn't very good. He didn't say it was 'my proposal'; he just said that it wasn't very good. Then there was a big debate in the Australian constitutional convention. In that debate, the clause that Clark then preferred -- that is the one he wrote in 1897 --, was voted down; and then finally the one that he arguably had written in 1891 but repudiated in 1897 was voted down. So at that point there was no privileges and immunities clause in the Australian Constitution.

A short time later, Josiah Symon, the chair of the Judiciary Committee, introduced another privileges and immunities clause and this one, Symon said expressly, is exactly Article IV of the American Constitution -- that's that first asterisk. That proposal was subjected to further extensive debate, and it was finally approved (and is section 117 in the Australian Constitution); but only after they took out the privileges and immunities words and simply said a state couldn't discriminate against a non-state resident. So is it a privileges and immunities clause, without privileges and immunities language? Some of you are familiar with the great constitutional treatise by John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth*, published in 1900, before the

Constitution even became official. Quick and Garran take an interesting view on this. They say, of course it is unthinkable that all discrimination against out-of-state residents would be prohibited; it is only those things involving privileges and immunities to which non-residents are entitled to equal access. Quick and Garran specifically quoted an American Supreme Court Justice who, in the case from which they were quoting, was interpreting the privileges and immunities language in Article IV of the American Constitution.

One more thing from Quick and Garran—they also said there is this other privileges and immunities clause in the American Constitution and that is in the 14th Amendment . We don't have one in our Constitution but don't worry because it does not make any difference. Quick and Garran said that because, they pointed out, ever since the *Slaughter-House Cases* the American 14th Amendment privileges and immunities clause doesn't mean anything. And so, Quick and Garran concluded, we are just as good as they are; we have nothing like the 14th Amendment in the Australian Constitution, but the Americans have nothing either even though they have some words in there.

Now I have on my list, item 12, the following statement, 'the racial factor: positive, negative and American.' The negative factor is represented by a statement made by Quick at the convention (that's the same Quick who was the co-author of the treatise when he was talking as a convention delegate about the rejection of the privileges and immunities clauses):

We have already eliminated interstate citizenship upon the ground that it might interfere with the right of each state to impose disabilities and disqualifications upon certain races.²

In other words, we don't want anything in our constitution that will prevent the states from discriminating on the basis of race.

The positive factor is based on a quote from Henry Bournes Higgins which he made right before the approval of the non-discrimination clause that became part of the Australian constitution: 'We want a discrimination based on colour'.³ That

² Australasian Federal Convention, 2 March 1898, p. 1767, http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/Records_of_the_Australasian_Federal_Conventions_of_the_1890s.

³ Australasian Federal Convention, 3 March 1898, p. 1801.

is, it is OK to discriminate on the basis of race as long as you don't discriminate on the basis of state residence.

Finally, for the American factor, I will just read one quote from William Trenwith, who was the only Labour representative in the convention: 'The Americans made a mistake by declaring that the negroes should be citizens',⁴ so we don't want to go down that road. Trenwith was saying concisely what was said a lot in the course of 45 pages of the convention transcript. The Americans didn't really provide racial equality, and they were misguided in trying to do so.

I do want to mention one last thing about Clark, as a way of capturing the difficulty, sometimes, in understanding what is happening when you have one group of people looking at one constitution and then advocating something related for their own constitution. Remember, Clark was the advocate of these privileges and immunities provisions and they were voted down. He thought that was a terrible result because he thought what the Americans had done was so wonderful. But he then also wrote a treatise in 1901 and in his treatise he praised the *Slaughter-House Cases*. I have never been able to understand why he praised the case that, in the United States, undermined the clause he advocated. So there is a mystery at the end of the Clark connection to privileges and immunities in the United States.

Briefly, item 16, 'the end of racism' in the United States and Australia? Well, we all know not quite. We don't have at all the same racial climate now that we had at the end of the Nineteenth Century, but we haven't quite got to the perfect racially neutral time. The Americans have partly improved their situation by finding another provision in the Constitution that did protect blacks against discrimination and did incorporate the Bill of Rights so that now it does apply to the states and local government as well as to the federal government. The Australians have reached a better world, if you will, not through a Bill of Rights, not through anything in the Constitution that is binding on the government, state or national, but through statutes, common law and international treaties.

Finally, the last item, 'BOR or not?' I am not going to end this talk by telling you who is right and who is wrong. I will simply say that the question whether there should be a Bill of Rights in Australia is one that continues to be debated and a Bill

⁴ Australasian Federal Convention, Third Session, 3 March 1898, p. 1792.

of Rights is always rejected when it is proposed. There is even a view that the 'Australian Exceptionalism' is the way to describe the fact that Australia is the only one of the English-speaking democracies (compared to Canada, New Zealand, the United Kingdom, South Africa, and the United States) which doesn't have anything like a Bill of Rights. At least at this time that is the way things are. Perhaps it should be remembered that those Nineteenth Century decisions that provided the foundation for Australian Exceptionalism were heavily influenced by racial considerations.

Thank you very much.

Appendix 1

William G. Buss (O.K. Patton Professor Emeritus, University of Iowa College of Law) 'The Strange Case of Privileges and Immunities' (simple outline)

1. 'Privileges and Immunities' (P&I)
2. Bill of Rights (BOR)
3. US Article IV P&I*: Citizens of another state
4. Race and citizenship: Dred Scott
5. US 14th Amendment 'Citizens'**
6. US 14th Amendment P&I***
7. US Supreme Court: the *Slaughter-House Cases* (race again).
8. Andrew Inglis Clark, US Constitution, Easter on the *Lucinda*
9. At last: P&I for Australia
10. A.I. Clark (1891) v. A.I. Clark (1897)
11. Last gasp: US Article IV and Australia s 117

12. The racial factor: positive, negative, American

13. Odd twists and turns: Quick & Garran on s 117 and P&I

14. Odd twists and turns: Quick & Garran on P&I, 14th Amendment and Slaughter-House

15. Odd twists and turns: Clark on Slaughter-House

16. The end of racism?

17. BOR or not?

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

**14th Amendment (1st sentence) All persons born or naturalized in the United States ... are Citizens of the United States and of the State wherein they reside.

***14th Amendment (2nd sentence) No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States [nor deprive any person of life, liberty, or property without due process of law; nor deny any person equal protection of the laws].