

HARLAN, J., Concurring in Part, Dissenting in Part

SUPREME COURT OF THE UNITED STATES

383 U.S. 745

United States v. Guest 383 U.S. 745 page 763 Justice Harlan opinion

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE
DISTRICT OF GEORGIA**

No. 65 Argued: November 9, 1965 --- Decided: **March 28, 1966**

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I join Parts I and II [\[n1\]](#) of the Court's opinion, but I cannot subscribe to Part III in its full sweep. To the extent that it is there held that [18 U.S.C. § 241](#) (1964 ed.) reaches conspiracies, embracing only the action of **[p763]** private persons, to obstruct or otherwise interfere with the right of citizens freely to engage in interstate travel, I am constrained to dissent. On the other hand, I agree that § 241 does embrace state interference with such interstate travel, and I therefore consider that this aspect of the indictment is sustainable on the reasoning of Part II of the Court's opinion.

This right to travel must be found in the Constitution itself. This is so because § 241 covers only conspiracies to interfere with any citizen in the "free exercise or enjoyment" of a right or privilege "secured to him by the Constitution or laws of the United States," and no "right to travel" can be found in § 241 or in any other law of the United States. My disagreement with this phase of the Court's opinion lies in this: while past cases do indeed establish that there is a constitutional "right to travel" between States free from unreasonable governmental interference, today's decision is the first to hold that such movement is also protected against private interference, and, depending on the

constitutional source of the right, I think it either unwise or impermissible so to read the Constitution.

Preliminarily, nothing in the Constitution expressly secures the right to travel. In contrast, the Articles of Confederation provided in Art. IV:

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 . . . shall be entitled to all 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. . .

[p764]

This right to "free ingress and regress" was eliminated from the draft of the Constitution without discussion even though the main objective of the Convention was to create a stronger union. It has been assumed that the clause was dropped because it was so obviously an essential part of our federal structure that it was necessarily subsumed under more general clauses of the Constitution. *See United States v. Wheeler*, [254 U.S. 281](#), 294. I propose to examine the several asserted constitutional bases for the right to travel, and the scope of its protection in relation to each source.

I

Because of the close proximity of the right of ingress and regress to the Privileges and Immunities Clause of the Articles of Confederation, it has long been declared that the right is a privilege and immunity of national citizenship under the Constitution. In the influential opinion of Mr. Justice Washington on circuit, *Corfield v. Coryell*, 4 Wash.C.C. 371 (1825), the court addressed itself to the question -- "what are the privileges and immunities of citizens in the several states?" *Id.* at 380. *Corfield* was concerned with a New Jersey statute restricting to state citizens the right to rake for oysters, a statute which the court upheld. In analyzing the Privileges and Immunities Clause of the Constitution, Art. IV, § 2, the court stated that it confined "these expressions to those privileges and immunities which are, in their nature, fundamental," and listed among them

The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise. . . .

Id. at 380-381.

The dictum in *Corfield* was given general approval in the first opinion of this Court to deal directly with the right of free movement, *Crandall v. Nevada*, 6 Wall. 35, [p765] which struck down a Nevada statute taxing persons leaving the State. It is first noteworthy that, in his concurring opinion, Mr. Justice Clifford asserted that he would hold the statute void exclusively on commerce grounds, for he was clear "that the State legislature cannot impose any such burden upon commerce among the several States." 6 Wall. at 49. The majority opinion of Mr. Justice Miller, however, eschewed reliance on the Commerce Clause and the Import-Export Clause and looked rather to the nature of the federal union:

The people of these United States constitute one nation. . . . This government has necessarily a capital established by law. . . . That government has a right to call to this point any or all of its citizens to aid in its service. . . . The government, also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers, it has its ports of entry. In the interior, it has its land offices, its revenue offices, and its sub-treasuries. In all these, it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established.

6 Wall. at 43-44. Accompanying this need of the Federal Government, the Court found a correlative right of the citizen to move unimpeded throughout the land:

He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are [p766] conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

6 Wall. at 44. The focus of that opinion, very clearly, was thus on impediments by the States on free movement by citizens. This is emphasized subsequently when Mr. Justice Miller asserts that this approach is "neither novel nor unsupported by authority," because it is, fundamentally, a question of the exercise of a State's taxing power to obstruct the functions of the Federal Government:

[T]he right of the States in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied.

6 Wall. at 44-45.

Later cases, alluding to privileges and immunities, have in dicta included the right to free movement. *See Paul v. Virginia*, 8 Wall. 168, 180; *Williams v. Fears*, [179 U.S. 270](#), 274; *Twining v. New Jersey*, [211 U.S. 78](#).

Although the right to travel thus has respectable precedent to support its status as a privilege and immunity of national citizenship, it is important to note that those cases all dealt with the right of travel simply as affected by oppressive state action. Only one prior case in this Court, *United States v. Wheeler*, [254 U.S. 281](#), was argued precisely in terms of a right to free movement, as against interference by private individuals. There, the Government alleged a conspiracy under the predecessor of § 241 against the perpetrators of the notorious Bisbee Deportations.^[n2] The case was argued straightforwardly in terms of whether the right to free ingress and [p767] egress, admitted by both parties to be a right of national citizenship, was constitutionally guaranteed against private conspiracies. The Brief for the Defendants in Error, whose counsel was Charles Evans Hughes, later Chief Justice of the United States, gives as one of its main points:

So far as there is a right pertaining to Federal citizenship to have free ingress or egress with respect to the several States, the right is essentially one of protection against the action of the States themselves and of those acting under their authority.

Brief, at p. i. The Court, with one dissent, accepted this interpretation of the right of unrestricted interstate movement, observing that *Crandall v. Nevada*, *supra*, was inapplicable because, *inter alia*, it dealt with state action. 254 U.S. at 299. More recent

cases discussing or applying the right to interstate travel have always been in the context of oppressive state action. *See, e.g., Edwards v. California*, [314 U.S. 160](#), and other cases discussed *infra*.^[n3]

It is accordingly apparent that the right to unimpeded interstate travel, regarded as a privilege and immunity of national citizenship, was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union. In the one case in which a private conspiracy to obstruct such movement was heretofore presented to this Court, the predecessor of the very statute we apply today was held not to encompass such a right.

II

A second possible constitutional basis for the right to move among the States without interference is the Commerce Clause. When Mr. Justice Washington articulated [p768] the right in *Corfield*, it was in the context of a state statute impeding economic activity by outsiders, and he cast his statement in economic terms. 4 Wash. C. C., at 380-381. The two concurring Justices in *Crandall v. Nevada*, *supra*, rested solely on the commerce argument, indicating again the close connection between freedom of commerce and travel as principles of our federal union. In *Edwards v. California*, [314 U.S. 160](#), the Court held squarely that the right to unimpeded movement of persons is guaranteed against oppressive state legislation by the Commerce Clause, and declared unconstitutional a California statute restricting the entry of indigents into that State. Application of the Commerce Clause to this area has the advantage of supplying a longer tradition of case law and more refined principles of adjudication. States do have rights of taxation and quarantine, *see Edwards v. California*, 314 U.S. at 184 (concurring opinion), which must be weighed against the general right of free movement, and Commerce Clause adjudication has traditionally been the means of reconciling these interests. Yet this approach to the right to travel, like that found in the privileges and immunities cases, is concerned with the interrelation of state and federal power, not -- with an exception to be dealt with in a moment -- with private interference. The case of *In re Debs*, [158 U.S. 564](#), may be thought to raise some doubts as to this proposition. There, the United States sought to enjoin Debs and members of his union

from continuing to obstruct -- by means of a strike -- interstate commerce and the passage of the mails. The Court held that Congress and the Executive could certainly act to keep the channels of interstate commerce open, and that a court of equity had no less power to enjoin what amounted to a public nuisance. It might [p769] be argued that to the extent *Debs* permits the Federal Government to obtain an injunction against the private conspiracy alleged in the present indictment, [n4] the criminal statute should be applicable as well on the ground that the governmental interest in both cases is the same, namely to vindicate the underlying policy of the Commerce Clause. However, § 241 is not directed toward the vindication of governmental interests; it requires a private right under federal law. No such right can be found in *Debs*, which stands simply for the proposition that the Commerce Clause gives the Federal Government standing to sue on a basis similar to that of private individuals under nuisance law. The substantive rights of private persons to enjoin such impediments, of course, devolve from state, not federal, law; any seemingly inconsistent discussion in *Debs* would appear substantially vitiated by *Erie R. Co. v. Tompkins*, [304 U.S. 64](#).

I cannot find in any of this past case law any solid support for a conclusion that the Commerce Clause embraces a right to be free from private interference. And the Court's opinion here makes no such suggestion.

III

One other possible source for the right to travel should be mentioned. Professor Chafee, in his thoughtful study, "Freedom of Movement," [n5] finds both the privileges and immunities approach and the Commerce Clause approach unsatisfactory. After a thorough review of the history [p770] and cases dealing with the question, he concludes that this "valuable human right," *id.* at 209, is best seen in due process terms:

Already, in several decisions, the Court has used the Due Process Clause to safeguard the right of the members of any race to reside where they please inside a state, regardless of ordinances and injunctions. Why is not this clause equally available to assure the right to live in any state one desires? And unreasonable restraints by the national government on mobility can be upset by the Due Process Clause in the [Fifth Amendment](#). . . . Thus, the "liberty" of all human beings which cannot be taken away

without due process of law includes liberty of speech, press, assembly, religion, and also liberty of movement.

Id. at 192-193.

This due process approach to the right to unimpeded movement has been endorsed by this Court. In *Kent v. Dulles*, [357 U.S. 116](#)] [357 U.S. 116](#), the Court asserted that "The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the [Fifth Amendment](#)," *id.* at 125, citing *Crandall v. Nevada, supra*, and *Edwards v. California, supra*. It is true that the holding in that case turned essentially on statutory grounds. However, in [357 U.S. 116](#), the Court asserted that "The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the [Fifth Amendment](#)," *id.* at 125, citing *Crandall v. Nevada, supra*, and *Edwards v. California, supra*. It is true that the holding in that case turned essentially on statutory grounds. However, in *Aptheker v. Secretary of State*, [378 U.S. 500](#), the Court, applying this constitutional doctrine, struck down a federal statute forbidding members of Communist organizations to obtain passports. Both the majority and dissenting opinions affirmed the principle that the right to travel is an aspect of the liberty guaranteed by the Due Process Clause.

Viewing the right to travel in due process terms, of course, would clearly make it inapplicable to the present case, for due process speaks only to governmental action

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IV

This survey of the various bases for rounding the "right to travel" is conclusive only to the extent of showing that there has never been an acknowledged constitutional right to be free from private interference, and that the right in question has traditionally been seen and applied, whatever the constitutional underpinning asserted, only against governmental impediments. The right involved being as nebulous as it is, however, it is necessary to consider it in terms of policy as well as precedent.

As a general proposition, it seems to me very dubious that the Constitution was intended to create certain rights of private individuals as against other private individuals. The Constitutional Convention was called to establish a nation, not to reform

the common law. Even the Bill of Rights, designed to protect personal liberties, was directed at rights against governmental authority, not other individuals. It is true that there is a very narrow range of rights against individuals which have been read into the Constitution. In *Ex parte Yarbrough*, [110 U.S. 651](#), the Court held that implicit in the Constitution is the right of citizens to be free of private interference in federal elections. *United States v. Classic*, [313 U.S. 299](#), extended this coverage to primaries. *Logan v. United States*, [144 U.S. 263](#), applied the predecessor of § 241 to a conspiracy to injure someone in the custody of a United States marshal; the case has been read as dealing with a privilege and immunity of citizenship, but it would seem to have depended as well on extrapolations from statutory provisions providing for supervision of prisoners. The Court in *In re Quarles*, [158 U.S. 532](#), extending *Logan, supra*, declared that there was a right of federal citizenship to inform federal officials of violations of federal law. *See also United States v. Cruikshank*, [92 U.S. 542](#), 552, which announced in dicta a federal right to assemble to petition the Congress for a redress of grievances.

Whatever the validity of these cases on their own terms, they are hardly persuasive authorities for adding to the collection of privileges and immunities the right to be free of private impediments to travel. The cases just discussed are narrow, and are essentially concerned with the vindication of important relationships with the Federal Government voting in federal elections, involvement in federal law enforcement, communicating with the Federal Government. The present case stands on a considerably different footing. It is arguable that the same considerations which led the Court on numerous occasions to find a right of free movement against oppressive state action now justify a similar result with respect to private impediments. *Crandall v. Nevada, supra*, spoke of the need to travel to the capital, to serve and consult with the offices of government. A basic reason for the formation of this Nation was to facilitate commercial intercourse; intellectual, cultural, scientific, social, and political interests are likewise served by free movement. Surely these interests can be impeded by private vigilantes as well as by state action. Although this argument is not without force, I do not think it is particularly persuasive. There is a difference in power between States and private groups so great that analogies between the two tend to be misleading. If the State obstructs free

intercourse of goods, people, or ideas, the bonds of the union are threatened; if a private group effectively stops such communication, there is, at most, a temporary breakdown of law and order, to be remedied by the exercise of state authority or by appropriate federal legislation.

To decline to find a constitutional right of the nature asserted here does not render the Federal Government [p773] helpless. As to interstate commerce by railroads, federal law already provides remedies for "undue or unreasonable prejudice," 24 Stat. 380, as amended, [49 U.S.C. § 3](#)(1) (1964 ed.), which has been held to apply to racial discrimination. *Henderson v. United States*, [339 U.S. 816](#). A similar statute applies to motor carriers, 49 Stat. 558, as amended, [49 U.S.C. § 316](#)(d) (1964 ed.), and to air carriers, 72 Stat. 760, [49 U.S.C. § 1374](#)(b) (1964 ed.). See *Boynton v. Virginia*, [364 U.S. 454](#); *Fitzgerald v. Pan American World Airways*, 229 F.2d 499. The Civil Rights Act of 1964, 78 Stat. 243, deals with other types of obstructions to interstate commerce. Indeed, under the Court's present holding, it is arguable that any conspiracy to discriminate in public accommodations having the effect of impeding interstate commerce could be reached under § 241, unaided by Title II of the Civil Rights Act of 1964. Because Congress has wide authority to legislate in this area, it seems unnecessary -- if prudential grounds are of any relevance, see *Baker v. Carr*, [369 U.S. 186](#), 258-259 (CLARK, J., concurring) -- to strain to find a dubious constitutional right.

V

If I have succeeded in showing anything in this constitutional exercise, it is that, until today, there was no federal right to be free from private interference with interstate transit, and very little reason for creating one. Although the Court has ostensibly only "discovered" this private right in the Constitution and then applied § 241 mechanically to punish those who conspire to threaten it, it should be recognized that what the Court has in effect done is to use this all-encompassing criminal statute to fashion federal common law crimes, forbidden to the federal judiciary since the 1812 decision in *United States v. Hudson*, 7 Cranch 32. My Brother DOUGLAS, dissenting in *United States v. Classic*, *supra*, [p774] noted well the dangers of the indiscriminate application of the predecessor of § 241:

It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated, and then to particularize it as a crime because it is highly offensive.

313 U.S. at 331-332.

I do not gainsay that the immunities and commerce provisions of the Constitution leave the way open for the finding of this "private" constitutional right, since they do not speak solely in terms of governmental action. Nevertheless, I think it wrong to sustain a criminal indictment on such an uncertain ground. To do so subjects § 241 to serious challenge on the score of vagueness, and serves in effect to place this Court in the position of making criminal law under the name of constitutional interpretation. It is difficult to subdue misgivings about the potentialities of this decision.

I would sustain this aspect of the indictment only on the premise that it sufficiently alleges state interference with interstate travel, and on no other ground.

1. The action of three of the Justices who join the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in Part II seems to me, to say the very least, extraordinary.

2. For a discussion of the deportations, see The President's Mediation Comm'n, Report on the Bisbee Deportations (November 6, 1917).

3. The Court's reliance on *United States v. Moore*, 129 F. 630, is misplaced. That case held only that it was not a privilege or immunity to organize labor unions. The reference to "the right to pass from one state to any other" was purely incidental dictum.

4. It is not even clear that an equity court would enjoin a conspiracy of the kind alleged here, for traditionally equity will not enjoin a crime. See *Developments in the Law -- Injunctions*, 78 Harv.L.Rev. 994, 1013-1018 (1965).

5. In *Three Human Rights in the Constitution of 1787*, at 162 (1956).