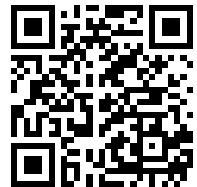


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THE PRIVILEGES AND IMMUNITIES  
OF STATE CITIZENSHIP



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JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

Under the Direction of the

Departments of History, Political Economy, and  
Political Science

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THE PRIVILEGES AND IMMUNITIES  
OF STATE CITIZENSHIP

BY

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Second Lieutenant, 17th Infantry, U. S. A.

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BALTIMORE  
THE JOHNS HOPKINS PRESS  
1918

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## PREFACE

The following study was undertaken at the suggestion of Professor Westel W. Willoughby. So far as is known, no previous attempt has been made to treat the subject comprehensively, or to enumerate the rights which the citizens of the several States are entitled to enjoy, free from discriminatory legislation, by virtue of the so-called Comity Clause. To Professor Willoughby and Professor John H. Latané, under whose direction the work was carried on, I am indebted for both advice and inspiration; and I am especially under obligation to President Frank J. Goodnow, who was kind enough to read the manuscript and to offer much valuable advice. I desire, also, to express my appreciation to Mr. Eben Winthrop Freeman, President of the Greenleaf Law Library of Portland, Maine, for his courtesy in extending to me the use of that library during the summer of 1916, when the greater part of the material for this piece of work was collected.

R. H.





# THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP

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## CHAPTER I

### HISTORY OF THE COMITY CLAUSE

It is provided by the Federal Constitution<sup>1</sup> that: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This clause (hereafter called for the sake of convenience the Comity Clause<sup>2</sup>), it was said by Alexander Hamilton, may be esteemed the basis of the Union.<sup>3</sup> Its object and effect are outlined in *Paul v. Virginia*<sup>4</sup> in the following words:

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States and egress from them. It insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of the laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.<sup>5</sup> Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

The words "privileges" and "immunities," like the greater part of the legal phraseology of this country, have been carried over from the law of Great Britain, and recur

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<sup>1</sup> Art. 4, sec. 2, cl. 1.

<sup>2</sup> Willoughby, *Constitutional Law*, vol. i, p. 213.

<sup>3</sup> *The Federalist*, No. LXXX.

<sup>4</sup> 8 Wall. 168, 19 L. ed. 357.

<sup>5</sup> Citing *Lemmon v. People*, 20 N. Y. 607.



constantly either as such or in equivalent expressions from the time of Magna Charta. For all practical purposes they are synonymous in meaning, and originally signified a peculiar right or private law conceded to particular persons or places whereby a certain individual or class of individuals was exempted from the rigor of the common law. A privilege or immunity is conferred upon any person when he is invested with a legal claim to the exercise of special or peculiar rights, authorizing him to enjoy some particular advantage or exemption.<sup>6</sup>

The Comity Clause, as is indicated by the quotation from *Paul v. Virginia*, was primarily intended to remove the disabilities of alienage from the citizens of every State while passing through or doing business in any of the several States. But even without this removal of disability, the citizens of the several States would have been entitled to an enjoyment of the privileges and immunities accorded to alien friends; and these were by no means inconsiderable at the English law. In the early period of English history practically the only class of aliens of any importance were the foreign merchants and traders. To them the law of the land afforded no protection; for the privilege of trading and for the safety of life and limb they were entirely dependent on the royal favor, the control of commerce being a royal prerogative, hampered by no law or custom as far as concerned foreign merchants. These could not come into or leave the country, or go from one place to another, or settle in any town for purposes of trading, or buy and sell, except upon the payment of heavy tolls to the king. This state of affairs was changed by Magna Charta, chapter forty-one of which reads:

All merchants shall have safe and secure exit from England and entry to England, with the right to tarry there and move about by land as by water, for buying and selling by the ancient and right

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<sup>6</sup> See *Magill v. Browne*, Fed. Cas. No. 8952, 16 Fed. Cas. 408; 6 Words and Phrases, 5583, 5584; A. J. Lien, "Privileges and Immunities of Citizens of the United States," in *Columbia University Studies in History, Economics, and Public Law*, vol. 54, p. 31.

customs, quit from all evil tolls, except, in time of war, such merchants as are of the land at war with us. And if such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief justiciar, how the merchants of our land found in the land at war with us are treated; and if our men are safe there, the others shall be safe in our land.<sup>7</sup>

Whatever may have been the motives of the barons in securing the adoption of this chapter (and since they had no particular love for the merchants of the town, it may well be that these were not entirely disinterested), it was not regarded with much favor by the latter class. The right to exact tolls and place restrictions upon all rival traders who were not members of their guilds, whether foreigners or not, was a cherished privilege of the chartered boroughs; and chapter thirteen of Magna Charta had guaranteed to these the full enjoyment of all their "ancient liberties and free customs."<sup>8</sup> The result was a continual struggle on the part of the English merchants to put restrictions on foreign traders. The latter, however, enjoyed the royal favor, and by the Charta Mercatoria of 1303 the provisions of Magna Charta in this respect became a reality, various privileges and exemptions being conferred in order to offset increased rates of duty.

During the reigns of Edward II and Edward III a varying policy was pursued by the Crown with respect to alien merchants. The statute of 1328 abolishing the "staples beyond the sea and on this side" provided "that all merchants, strangers and privy may go and come with their merchandises, after the tenor of the Great Charter";<sup>9</sup> and seven years later this privilege was further confirmed by an act which, in considerable detail, placed strangers and

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<sup>7</sup> This provision is commented upon with admiration by Montesquieu, who says: "La grande chartre des Anglois defend de saisir et de confisquer en cas de guerre les marchandises des negociants étrangers, à moins que ce ne soit pas repréailles. Il est beau que la nation Angloise ait fait de cela un des articles de sa liberté" (*L'Esprit des Lois*, book xx, ch. 14).

<sup>8</sup> See Pollock and Maitland, vol. i, pp. 447-448, with respect to the inconsistency between these two chapters.

<sup>9</sup> 2 Edward III, c. 9.

residents upon an exact equality in all branches of trade, wholesale and retail, under the express declaration that no privileged rights of chartered boroughs should be allowed to interfere with its enforcement.<sup>10</sup> The provisions of these statutes do not seem to have been strictly enforced; and under Richard II the privileges of the boroughs were restored, although freedom of trade with respect to alien merchants was, in theory at least, still recognized.<sup>11</sup>

Not only with respect to trading, but also in regard to several other privileges, did alien friends enjoy many important rights. According to Blackstone,

An alien born may purchase lands or other estates; but not for his own use, for the king is thereupon entitled to them. If an alien could acquire a permanent property in lands he must owe an allegiance, equally permanent with the property, to the king of England, which would probably be inconsistent with that which he owes to his own natural liege lord; besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences, Wherefore, by the civil law such contracts were also made void; but the prince had no such advantage of forfeiture thereby as with us in England. Among other reasons which might be given for our constitution, it seems to be intended by way of punishment for the alien's presumption, in attempting to acquire any landed property; for the vendor is not affected by it, he having resigned his right and received an equivalent in exchange. Yet an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation; for personal estate is of a transitory and movable nature; and besides this indulgence to strangers is necessary for the advancement of trade. Aliens, also, may trade as freely as other people; only they are subject to certain higher duties at the custom-house; and there are also some obsolete statutes of Henry VIII, prohibiting alien artificers to work for themselves in this kingdom; but it is generally held that they were virtually repealed by statute 5 Eliz., c. 7. Also an alien may bring an action concerning personal property, and make a will; and dispose of his personal estate; not as it is in France, where the king at the death of an alien is entitled to all he is worth, by the *droit d'aubaine* or *jus albinatus*, unless he has a peculiar exemption. . . . No denizen<sup>12</sup> can be of the privy council or either house of Parliament or have any office of trust, civil or military, or be capable of any grant of lands, etc., from the Crown.<sup>13</sup>

<sup>10</sup> See 9 Edward III, c. 1, and cf. 25 Edw. III, stat. 4, c. 7.

<sup>11</sup> See 2 Richard II, stat. 1, c. 1, and 11 Richard II, c. 7.

<sup>12</sup> An alien to whom letters patent had been issued so as to make him a British subject.

<sup>13</sup> Blackstone, Commentaries, vol. i, pp. 372-374.

Aliens also had no inheritable blood and were incapable of taking or transmitting property by descent.<sup>14</sup>

It may thus be seen that, independently of any constitutional provision, the citizens of the thirteen original States were entitled to the enjoyment of a considerable class of privileges upon removal from their own to another State. There was, on the other hand, much room for discrimination as well; and the jealousy which existed between the States, coupled with the fact that each of these was now fully capable of changing the rules of the English common and statute law to suit its own purposes, left no guarantee as to the length of time during which the citizens of the several States would be capable of enjoying even such privileges as were accorded to alien friends. Moreover, it was generally felt that Americans should be regarded as more closely related to one another than to citizens of foreign countries, and that something more than an alien status was needed if the inhabitants of the several States were to constitute one people.

It was with this idea of securing a stronger bond than had previously existed between the States that the Fourth Article of the Articles of Confederation was adopted. This, the immediate precursor of the Comity Clause, reads:

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 egress 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, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant; and provided also that no imposition, duty, or restriction, shall be laid by any State on the property of the United States, or either of them.

Madison says:<sup>15</sup>

There is a confusion of language here which is remarkable. Why

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<sup>14</sup> Blackstone, Commentaries, vol. ii, p. 249.

<sup>15</sup> The Federalist, No. XLII.

the terms *free inhabitants* are used in one part of the Article, *free citizen* in another, and *People* in another; or what was meant by superadding to "all privileges and immunities of free citizens," "all the privileges of trade and commerce," cannot easily be determined. It seems to be a construction scarcely avoidable, however, that those who come under the denomination of *free inhabitants* of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of *free citizens* of the latter; that is, to greater privileges than they may be entitled to in their own State; so that it may be in the power of a particular State, or rather every State is laid under a necessity, not only to confer the rights of citizenship in other States upon any whom it may admit to such rights within itself, but upon any whom it may allow to become inhabitants within its jurisdiction.<sup>16</sup>

This article was proposed in its final shape on November 13, 1777, and adopted by the Continental Congress. In spite of its disconnected and loose structure, it must have been regarded as satisfactory, for the only amendments proposed were of little importance. On June 22, 1778, the delegates from Maryland proposed that the word "paupers" be omitted, and the words "that one State shall not be burthened with the maintenance of the poor who may remove into it from any of the others in the Union," added. On June 25, 1778, the delegates from South Carolina moved to insert the word "white" between the words "free inhabitants," so that the privileges and immunities granted should be definitely secured to the white race only; they also suggested certain other verbal changes. A similar proposal was embodied in the order of ratification of Georgia, in which it was suggested in addition that after the word "vagabonds" there should be inserted "all persons who refuse to bear arms in defense of the State to which they belong, and all persons who have been or shall be attainted of high treason in any of the United States." None of these alterations was adopted.<sup>17</sup>

In the Journal of the Constitutional Convention the present clause of the Constitution is credited with appearing, in the form in which it now reads, in the plan laid

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<sup>16</sup> See also Story on the Constitution, sec. 1799.

<sup>17</sup> Journal of the Continental Congress, vol. ii, pp. 326, 598, 606, 615; Elliott's Debates on the Federal Constitution, 2d ed., pp. 72-92.

before the Convention by Charles Pinckney of South Carolina;<sup>18</sup> and in a speech delivered in the House of Representatives on February 13, 1821, with respect to the admission of Missouri, he specifically laid claim to its authorship.<sup>19</sup> But in the "Observations on the Plan of Government Submitted to the Federal Convention in Philadelphia, on the 28th of May, 1787, by Mr. Charles Pinckney," printed by Francis Childs in October, 1787, the Fourth Article of the Articles of Confederation is recommended for adoption practically untouched;<sup>20</sup> and in view of the historical doubt as to the identity of the so-called Pinckney Draft printed in the Journal of the Convention with that actually submitted by Mr. Pinckney and afterward turned over to the Committee on Detail, it does not seem probable that Pinckney's claim can be sustained. However this may be, the clause as it now reads was submitted to the Convention by the Committee on Detail on August 6, 1787, as Article XIV of the proposed constitution. The only alteration suggested was that some provision should be included in favor of property in slaves; but upon the question being put it was passed in the affirmative, South Carolina being the only State voting against it, and Georgia being divided. It was later placed in its present position in the Constitution by the Committee on Style.<sup>21</sup>

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<sup>18</sup> See Elliott's Debates, 2d ed., pp. 245, 249.

<sup>19</sup> Annals of Congress, 16th Cong., 2d sess., p. 1134.

<sup>20</sup> M. Farrand, Records of the Federal Convention, vol. iii, p. 50.

<sup>21</sup> Farrand, vol. i, pp. 173, 443, 577.

## CHAPTER II

### GENERAL SCOPE OF THE COMITY CLAUSE

The wording of the Comity Clause is obviously very general; and standing by itself, it might be construed in such a way as to obliterate state lines entirely, since the citizens of every State in the Union might be regarded as entitled by it to identically the same privileges and immunities. The first reported case bearing upon the clause is *Campbell v. Morris*,<sup>1</sup> which was decided in 1797. This case is rather remarkable in some ways, in that it recognizes that the provisions of the clause are to be given a limited operation, and indicates fairly accurately the line of demarcation which has been generally adopted by the courts since that time. The language of the court, speaking through Judge Chase, is as follows:

By the second section of the fourth Article of the Constitution of the United States, the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. Privilege and immunity are synonymous, or nearly so. Privilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege. The peculiar advantages and exemptions contemplated under this part of the Constitution, may be ascertained if not with precision and accuracy, yet satisfactorily. By taking a retrospective view of our situation antecedent to the formation of the first general government, or the confederation, in which the same clause is inserted *verbatim*,<sup>2</sup> one of the great objects must occur to every person, which was the enabling the citizens of the several States to acquire and hold real property in any of the States, and deemed necessary, as each State was a sovereign, independent State, and the States had confederated only for the purpose of general defense and security, and to promote the general welfare. It seems agreed, from the manner of expounding the words immunities and privileges, by the counsel on both sides, that a particular and limited operation is to be given to these words, and not a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding offices, the right of being

<sup>1</sup> 3 Harr. and McHen. (Md.) 535.

<sup>2</sup> This is obviously a misstatement.

electd. The Court are of opinion it means that the citizens of all the States shall have the peculiar advantages of acquiring and holding real as well as personal property and that such property shall be protected and secured by the laws of the State in the same manner as the property of the citizens of the State is protected. It means, such property shall not be liable to any taxes, or burdens which the property of the citizens is not subject to. It may also mean that as creditors, they shall be on the same footing with the state creditor, in the payment of the debts of a deceased debtor. It secures and protects personal rights.

The latitude for difference in construing the Comity Clause is well exemplified by the peculiar interpretation put upon it by the supreme court of Tennessee in the case of *Kincaid v. Francis*,<sup>3</sup> decided in 1811. The court there denied that the clause was intended to prevent discrimination by a State in according privileges to its own citizens as against those of other States; on the contrary, it regarded the clause as intended to compel the Federal Government to extend the same privileges and immunities to the citizens of every State, and to prevent that government from granting privileges or immunities to citizens of some of the States which were not likewise granted to those of all the others. This ingenious interpretation, though fully capable of application as far as the words of the clause itself are concerned, can, of course, be viewed in no other light than as erroneous if the history of the adoption of the clause, its position in the Constitution, and the wording of the similar article in the Articles of Confederation are taken into account. And, as a matter of fact, this is the only case in which such an interpretation occurs.<sup>4</sup>

An interpretation for the most part similar to that given

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<sup>3</sup> 3 Cooke (Tenn.) 49.

<sup>4</sup> A somewhat similar view is, however, taken in *Chapman v. Miller*, 2 Speers (S. C.) 769, in which it was said by Butler, J.: "I cannot find that any of the writers or commentators on the constitution have ever undertaken to expound this article, either by explanation or definition; and I shall not quit the concrete of this case by resorting to any abstract disquisitions on the subject,—or attempt to do that which others have avoided. This much may be said on the subject with entire confidence—that it is not in the power of Congress to give privileges to citizens of one State over those of another, by any measure which it can constitutionally adopt; nor can it give to a State a power to do a thing which it could not do itself."



in *Campbell v. Morris*, but going somewhat farther than the decision in that case, is afforded in *Corfield v. Coryell*.<sup>5</sup> This case, reported in 1825, is the first federal authority upon the question of the construction of the clause; and it is of particular importance in any examination of the general scope of the clause in that the language used in that connection, though obiter, has been made the basis of numerous decisions since that time, and is even now cited occasionally with approval. That part of the decision dealing with the privileges and immunities of state citizenship reads:

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, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. 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; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and to an exemption from higher taxes or impositions than are paid by the other citizens of the State; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State, in every other State, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the union. But we cannot accede to the proposition . . . that, under this provision of the constitution, the citizens of the several States are entitled to participate in all the *rights* which belong exclusively to the citizens of any other particular State merely upon the ground that they are enjoyed by those citizens.

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<sup>5</sup> 4 Wash. C. C. 371.

The most casual examination of the reasoning in this decision shows that it is based almost entirely upon the prevalent political theory of natural rights. Judge Washington evidently took the view that this clause of the Constitution was meant to be simply a condensation in less awkward phraseology of the corresponding article in the Articles of Confederation; and, acting upon this principle, in his enumeration of the rights secured to the citizens of the several States he merely elaborates the rights specifically there set forth. In so doing he follows much the same line of reasoning as the Maryland court in *Campbell v. Morris*. But in addition he takes the stand that these rights are the rights which are fundamental and are necessarily to be enjoyed by the citizens of all free States. This view would lead logically to the conclusion that the rights secured to the citizens of each State were the same. There would result, accordingly, a sort of general citizenship in common throughout the entire country, by virtue of which certain defined rights were guaranteed to every one of its members as against legislation on the part of any of the States. This interpretation, in spite of the general acceptance given it, is not borne out by the intentions of the framers of the Constitution. In the selection from the *Federalist* before quoted, it was said that those coming under the denomination of free inhabitants of a State were to be regarded as entitled in every other State to the privileges which the latter might see fit to accord to its own citizens; "that is, to greater privileges than they may be entitled to in their own State."<sup>6</sup>

In point of fact, although the various privileges named in *Corfield v. Coryell* have practically all been since held to be secured to the citizens of the several States, this result has been attained not because these were fundamental privileges by their nature necessarily inherent in citizenship, but because they were privileges which each State actually

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<sup>6</sup> The *Federalist*, No. LXII.

granted to its own citizens. ¶The settled construction of the Comity Clause has therefore come to be that, in any given State, every citizen of every other State shall have the same privileges and immunities which the citizens of that State possess; and where the laws of the several States differ, a citizen of one State asserting rights in another must claim them according to the laws of the latter State. The view that a citizen of one State carries with him into any other State certain fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the first-mentioned State, has been definitely abandoned.<sup>7</sup>

The result has been that it is impossible to set forth any particular rights and privileges which are merely as such appurtenant to citizenship. If any right whatsoever is denied by a State to its own citizens, it may be denied fully as properly to citizens of other States. ¶The test as to whether any particular state law is in contravention of the Comity Clause is not whether it denies some certain right to citizens of other States, but whether it denies them this right while at the same time extending it to its own citizens. In other words, it is discriminatory legislation aimed by a State against the citizens of other States that is regarded as prohibited; and if the legislation is in fact not discriminatory, it is entirely valid as respects this provision of the Constitution. "It is only equality of privileges and immunities between citizens of different States that the Constitution guarantees."<sup>8</sup>

This change in the interpretation of the Comity Clause has been the basis of several decisions which would be

<sup>7</sup> See *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 499; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Downham v. Alexandria*, 10 Wall. 173, 19 L. ed. 929; *Detroit v. Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012; *Slaughterhouse Cases*, 16 Wall. 36, 21 L. ed. 304; *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716; *Kimmish v. Ball*, 129 U. S. 217, 32 L. ed. 695, 9 Sup. Ct. Rep. 277; *Chambers v. Baltimore and Ohio R. Co.*, 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34; *Lemmon v. People*, 20 N. Y. 607; *Allen v. Negro Sarah*, 2 Harr. (Del.) 434.

<sup>8</sup> *Field, J.*, in *Downham v. Alexandria*, 10 Wall. 173, 19 L. ed. 929.

difficult of justification under the old theory of fundamental privileges belonging to the citizens of all free governments. Thus it is settled that a citizen of one State is not entitled to carry with him into another State privileges which he enjoys in the place of his citizenship.

This was the decision in the case of *Detroit v. Osborne*.<sup>9</sup> The plaintiff in that case had brought a suit for damages against the city of Detroit to recover for injuries received as the result of a defect in a sidewalk within the city limits. In the State of which she was a citizen the circumstances would have been sufficient to entitle her to a verdict; and a similar rule prevailed in a majority of the States. The Michigan law, however, was to the contrary; and this being so, it was held that she was not entitled, by virtue of her right to recover in her own State, to recover in Michigan contrary to the law of that State, the court saying: "A citizen of another State going into Michigan may be entitled under the Federal Constitution to all the privileges and immunities of citizens of that State; but under the Constitution he can claim no more. He walks the streets and highways in that State, entitled to the same rights and protection, but none other, than those accorded by its laws to its own citizens."

By a similar mode of reasoning, the Constitution is not to be regarded as giving a right to a citizen of any State to enjoy within his own State the privileges and immunities which may be granted by the laws of other States to their citizens. The contrary of this was asserted by the plaintiff in error in *McKane v. Durston*.<sup>10</sup> He was a citizen of New York who had been found guilty of violating the state laws concerning elections and the registration of voters, and he had prayed and had been granted an appeal from the judgment ordering his imprisonment. By the law of New York a defendant who had appealed from conviction of a crime not punishable with death might in certain instances

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<sup>9</sup> 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012.

<sup>10</sup> 153 U. S. 684, 38 L. ed. 867, 14 Sup. Ct. Rep. 913.

be admitted to bail, but only when there was a stay of proceedings; and the stay in proceedings was granted only upon the filing with the notice of appeal of a certificate of the trial judge that there was in his opinion reasonable doubt whether the judgment should stand. It was insisted that these statutory regulations were unconstitutional as denying privileges and immunities of citizens of the States, since in most of the other States a defendant convicted of a criminal charge other than murder had the right, as a matter of law, upon the granting of an appeal from the judgment of conviction, to give bail pending such appeal. This argument was summarily dismissed by the Court, it being held that whatever might be the scope of the clause in question, the privileges and immunities enjoyed by the citizens of one State under its constitution and laws could not possibly be regarded as the measure of the privileges and immunities to be enjoyed, as of right, by a citizen of another State under the constitution and laws of the latter.<sup>11</sup>

In a few cases it has been claimed by a citizen of one State that a statute was unconstitutional because it denied an equality of privileges and immunities to citizens of other States. It has been uniformly held that the constitutionality of a state statute cannot be attacked upon this ground by a citizen of that State.<sup>12</sup> An exception to this rule and to the holding in *McKane v. Durston* is to be noted in the case of *In re Flukes*.<sup>13</sup> Here, on the petition of a citizen

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<sup>11</sup> Similarly a state statute is not unconstitutional as denying equal privileges and immunities for the reason that it prohibits the importation of certain kinds of property by its own citizens, while allowing this to citizens of other States. "The clause was intended to secure the citizens of one State against discrimination made by another State in favor of its own citizens, and not to secure the citizens of any State against discrimination made by their own State in favor of the citizens of other States, nor to secure one class of citizens against discrimination made between them and another class of citizens of the same State." *Commonwealth v. Griffin*, 3 B. Monr. (Ky.) 208. See also *Murray v. McCarty*, 2 Munf. (Va.) 393.

<sup>12</sup> *Bradwell v. Illinois*, 16 Wall. 130, 21 L. ed. 442; *Hudson Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529.

<sup>13</sup> 157 Mo. 125, 57 S. W. 545, 51 L. R. A. 176.

of the State, a statute was held unconstitutional which penalized the sending of any chose in action out of the State for collection by garnishment or attachment against the wages of any debtor resident within the State. The ground of the decision was that the statute could not by its terms be enforced against the wages of non-resident debtors, so that "a citizen of New York or California could bring just such a suit as the petitioner has brought and be held wholly blameless." In other words, any statute which does not put residents of the State upon an equally good footing with non-residents is to be regarded, according to the decision of the Missouri court, as unconstitutional. Such a doctrine is so absolutely opposed to the weight of authority that it would seem necessarily erroneous; and it is not believed that the reasoning advanced in this case can properly be supported.

From what has been said it will be seen that the element of discrimination is the controlling factor in determining whether a state law is a violation of the privileges and immunities of citizens of the several States. If there is no discrimination in favor of citizens of the domestic State, there is no unconstitutionality, however much the citizens of other States may be deprived of the enjoyment of any right enumerated in the various lists which have been drawn up from time to time in the decisions of the courts. Furthermore this discrimination must be substantial; and a mere difference in the method of applying state legislation in the cases of residents and non-residents will not necessarily invalidate the statute in question. Thus, where the mode of collecting a tax on liquor brought in from another State differed from that used with regard to liquor manufactured in the State, it was nevertheless held that there was no discrimination, since the amount paid was the same in both cases.<sup>14</sup>

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<sup>14</sup> *Hinson v. Lott*, 8 Wall. 148, 19 L. ed. 387. See also *Travelers' Insurance Co. v. Connecticut*, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673.

A question of considerable interest prior to the Civil War was with respect to the extent to which negroes were protected by the Comity Clause. Slaves, being property, admittedly did not come within its provisions; but differences of opinion existed with regard to free negroes to whom the privileges of citizenship had been extended by any one State. The state courts were not at all in accord upon the matter. Those which regarded the free negro as entitled to an equality of privileges and immunities usually based this belief upon the ground that the amendments to the Fourth Article of the Articles of Confederation, limiting its operation to the white race, had been rejected; and also upon the ground that prior to the adoption of the Constitution, free negroes were looked upon as citizens by the States in which they lived.<sup>15</sup> In other cases the courts regarded the negroes as not entitled to the benefit of this clause, but accorded them a citizenship of a lower order than that of the whites.<sup>16</sup> The majority of the courts, however, held that the clause was not intended to have reference to negroes in any case, and that they were entirely incapable of becoming citizens of any State in a constitutional sense.<sup>17</sup>

<sup>15</sup> *Smith v. Moody*, 26 Ind. 229; *State v. Manuel*, 4 Dev. and Bat. (N. C.) 20.

<sup>16</sup> Thus in *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70, the Court says: "Although free persons of color are not parties to the social compact, yet they are entitled to repose under its shadow."

<sup>17</sup> *Amy v. Smith*, 1 Litt. (Ky.) 326; *Crandall v. State*, 10 Conn. 339; *State v. Claiborne*, 1 Meigs (Tenn.) 331; *Pendleton v. State*, 6 Ark. 509. In the last-mentioned case the general trend of this class of decisions is well set forth in the following words: "Are free negroes or free colored persons citizens within the meaning of this clause? We think not. In recurring to the past history of the constitution, and prior to its formation, to that of the confederation, it will be found that nothing beyond a kind of quasi-citizenship has ever been recognized in the case of colored persons. . . . If citizens in a full and constitutional sense, why were they not permitted to participate in its formation? They certainly were not. The constitution was the work of the white race, the government for which it provides and of which it is the fundamental law, is in their hands and under their control; and it could not have been intended to place a different race of people in all things upon terms of equality with themselves. Indeed, if such had been the desire, its utter impracticability is too evident to admit of doubt. The two races differing as they do in complexion, habits, conformation, and intellec-

The last view of the matter was substantially upheld by the Supreme Court in the celebrated Dred Scott Case.<sup>18</sup> After considerable investigation with respect to the status of the negro at the time of the Revolution and of the adoption of the Constitution, as well as with respect to state legislation upon that subject, Chief Justice Taney came to the conclusion that the negro race at the time and long afterwards was in an inferior and subject condition; and that therefore it could not be supposed that it was intended by the framers of the Constitution to secure to that race rights and privileges throughout the Union which were denied by the majority of the constituent parts of that Union within their own limits. This opinion, it was pointed out, would apply with particular emphasis to the slave-holding States, since a contrary interpretation would exempt the negro from the special laws and police regulations adopted by those States with respect to him and deemed by them to be necessary for their own safety. For the States had no power to limit or restrict those persons entitled to the protection of the clause, or to place them in an inferior position before the law. "It [the Comity Clause] guaranties rights to the citizen," says the chief justice, "and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States."<sup>19</sup>

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tual endowments, could not nor ever will live together upon terms of social or political equality. A higher than human power has so ordered it, and a greater than human agency must change the decree. Those who framed the constitution were aware of this, and hence their intention to exclude them as citizens within the meaning of the clause to which we referred."

<sup>18</sup> *Scott v. Sandford*, 19 How. 393, 15 L. ed. 691.

<sup>19</sup> This argument was disputed at some length by Mr. Justice Curtis. In his dissenting opinion he took the ground that it was the conviction of the makers of the Constitution and subsequently of

Another question relating to the privileges and immunities of citizens of the several States which caused much interest at one time was with regard to the effect of the Fourteenth Amendment. A wide difference of opinion prevailed in this connection. The exact meaning of the privileges and immunities of citizens of the United States secured by the amendment was unsettled, in the minds both of members of Congress and of the judiciary. Thus Senator Poland thought that the amendment secured "nothing beyond what was intended by the original provision in the Constitution that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."<sup>20</sup> There was a well-defined opinion among the judiciary also that the privileges and immunities protected by the Fourteenth Amendment were the same "fundamental" rights inherent in citizenship as had been outlined by Judge Washington in *Corfield v. Coryell*. This was the view taken in one of the earliest attempts to define the privileges and immunities of citizens of the United States which the States were forbidden to abridge. This was in the case of *United States v. Hall*,<sup>21</sup> in which it was said: "What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign."

This view was repudiated by the Supreme Court in the *Slaughterhouse Cases*.<sup>22</sup> Here Mr. Justice Miller, deliver-

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the legislative power of the United States, that free negroes, as citizens of some of the States, might be entitled to the privileges and immunities of citizens in all the States.

<sup>20</sup> Congressional Globe, 39th Cong., 1st sess., part iv, p. 2061. See also the remarks of Senator Henderson, *ibid.*, 39th Cong., 1st sess., part iii, p. 2542; Mr. Stevens, *ibid.*, 39th Cong., 1st sess., part iii, p. 2459; Mr. Shanklin, *ibid.*, 39th Cong., 1st sess., part iii, p. 2500.

<sup>21</sup> Fed. Cas. No. 15282, 26 Fed. Cas. 79.

<sup>22</sup> 16 Wall. 36, 21 L. ed. 394.

ing the opinion of the Court, drew a sharp distinction between citizenship in the United States and citizenship in a State. "It is quite clear," he says, "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"; and he goes on to point out that the argument of the plaintiffs in the case rested wholly upon the assumption that the citizenship was the same, and that the privileges and immunities to be enjoyed were the same. The description of the privileges and immunities of state citizenship given in *Corfield v. Coryell* is quoted with approval, as embracing those civil rights for the establishment and protection of which organized government is instituted, and which the state governments were created to establish and secure; no additional security of national protection was given them by the Fourteenth Amendment. While clinging somewhat to the idea of fundamental rights, Justice Miller says specifically that the sole purpose of the Comity Clause 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." The case firmly established the rule that, in consequence of the duality of citizenship in this country, there exists in correspondence to each class of citizenship a separate class of privileges and immunities, both protected against state violation, but entirely distinct in their character.

The exact scope and the momentous consequence of this decision, as is pointed out in *Twining v. New Jersey*,<sup>28</sup> are more clearly recognized by an examination of the views of the minority justices in the case. Mr. Justice Field was of the opinion that the privileges and immunities of state

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<sup>28</sup> 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14.

citizenship, which had been held by the majority of the Court to relate exclusively to state citizenship and to be protected solely by the state governments, had been guaranteed by the Fourteenth Amendment as privileges and immunities of citizens of the United States. He said:

The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. . . . The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by state legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any state legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.<sup>24</sup>

If this opinion of the minority justices had prevailed, a change of the utmost importance would unquestionably have been introduced into the system of government in this country. The authority and independence of the States would have been diminished to a practical nullity, in that all their legislative and judicial acts would have been rendered subject to correction by the legislative and to

<sup>24</sup> This opinion was concurred in by Justices Bradley and Swaine and Chief Justice Chase. In a separate opinion Mr. Justice Bradley says: "I think sufficient has been said to show that citizenship is not an empty name, but that, in this country at least, it has connected with it certain incidental rights, privileges, and immunities of the greatest importance. And to say that these rights and immunities attach only to State citizenship, and not to citizenship of the United States, appears to me to evince a very narrow and insufficient estimate of constitutional history and the rights of men not to say the rights of the American people." See also the concurring opinions of Justices Field and Bradley in *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929, and *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

review by the judicial branch of the National Government.<sup>25</sup> With relation to the privileges and immunities of state citizenship, the result would have been the abandonment of the doctrine that the controlling factor in the application of the Comity Clause is discrimination on the part of the States, and a return to the earlier and necessarily vague idea of fundamental and inherent rights. This is shown in the dissenting opinion of Mr. Justice Bradley, where he says:

It is true that the courts have usually regarded the clause referred to as securing only an equality of privileges with the citizens of the State in which the parties are found. Equality before the law is undoubtedly one of the privileges and immunities of every citizen. I am not aware that any case has arisen in which it became necessary to vindicate any other fundamental privilege of citizenship; although rights have been claimed which were not deemed fundamental, and have been rejected as not within the protection of this clause. Be this, however, as it may, the language of the clause . . . seems fairly susceptible of a broader interpretation than that which makes it a guarantee of mere equality of privileges with other citizens.

As a result of the duality of citizenship and the attendant privileges, it has been held that the citizens of a territory are not within the provisions of the Comity Clause. And a state law may validly discriminate against residents of territories or Indian reservations, while conversely a law of a territory may constitutionally grant to residents of the territory privileges and immunities which are denied to non-residents.<sup>26</sup> This would seem somewhat contrary to the spirit, if not to the letter, of the constitutional provision; and it should be noted that by congressional enactment it has been declared that "all citizens of the United States shall have the same right in every State and territory as is enjoyed by white citizens therein to inherit, purchase, lease, sell, hold, and convey real and personal property."<sup>27</sup>

<sup>25</sup> *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14.

<sup>26</sup> *McFadden v. Blocker*, 3 Ind. Terr. 224, 54 S. W. 873, 58 L. R. A. 894; *Sutton v. Hayes*, 17 Ark. 462; in re *Johnson's Estate*, 139 Cal. 532, 73 Pac. 424.

<sup>27</sup> Revised Statutes, sec. 1978.



There has been an attempt upon the part of some courts to hold constitutional statutes discriminating against non-residents, on the ground that such statutes by their terms make no discrimination against citizens of other States, but only between residents and non-residents.<sup>28</sup> Such decisions usually argue that the requirements of such a statute would apply with as much force to a citizen of the domestic State who was at the time a non-resident as to a citizen of another State; while the latter, if resident in the State, would be entitled to the benefit of the statute equally with citizens of the State. These decisions for the most part are based upon insufficient and specious reasoning, and are not to be regarded as controlling. It is true that in several cases the Supreme Court has held that citizenship and residence were not necessarily synonymous.<sup>29</sup> These cases, however, were in connection with the right to sue in the federal courts on the ground of diversity of citizenship, and have no direct bearing upon the right to enjoy privileges and immunities as citizens of a State. In a great majority of the cases which have held statutes void as denying such privileges and immunities, no distinction of this kind has been attempted; and in a large part of these the statutes under consideration related by their terms to non-residents. Only once in the Supreme Court has a distinction between citizenship and residence been drawn in connection with the Comity Clause. This was in the dissenting opinion of Justice Brewer in *Blake v. McClung*.<sup>30</sup> The fact that in

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<sup>28</sup> *Cummings v. Wingo*, 31 S. C. 427, 10 S. E. 107; *Central R. R. Co. v. Georgia Company*, 32 S. C. 319, 11 S. E. 192; *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 626; *Welsh v. State*, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; *Olmstead v. Rivers*, 9 Neb. 234, 2 N. W. 366; *Frost v. Brisben*, 19 Wend. (N. Y.) 11; *Baker v. Wise*, 16 Gratt. (Va.) 39; *Worthington v. District Court*, 37 Nev. 212, 142 Pac. 230.

<sup>29</sup> *Parker v. Overman*, 18 How. 137, 15 L. ed. 318; *Robertson v. Cease*, 97 U. S. 646, 24 L. ed. 1057; *Grace v. Insurance Co.*, 109 U. S. 278, 27 L. ed. 932; *Menard v. Goggin*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873.

<sup>30</sup> 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165. See also the opinion of Justice Daniels in *Scott v. Sandford*, 19 How. 393, 15 L. ed. 691.

this case the majority opinion was against the constitutionality of a Tennessee statute discriminating purely between residents and non-residents, would seem to constitute at least a tacit denial of the validity of such a distinction. Moreover the provision of the Fourteenth Amendment that "all persons born or naturalized within the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside," would appear to operate still more strongly against any differentiation between citizenship and residence in a State.<sup>31</sup>

A complete list of the privileges and immunities secured to the citizens of the several States has never been worked out. In the cases in which an enumeration of these has been attempted the result usually has not differed essentially from the list of Judge Washington in *Corfield v. Coryell*, already quoted. In *Ward v. Maryland*<sup>32</sup> it was said:

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.<sup>33</sup>

The Supreme Court, however, has usually deemed it preferable to decide each case arising in this connection upon the special circumstances involved.<sup>34</sup>

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<sup>31</sup> Nevertheless, recent decisions in state courts have been based upon this distinction. *La Tourette v. McMaster*, — S. C. —, 89 S. E. 398; *Worthington v. District Court*, 37 Nev. 212, 142 Pac. 230. See also *Commonwealth v. Wilcox*, 56 Pa. Super. Ct. 244.

<sup>32</sup> 12 Wall. 418, 20 L. ed. 449.

<sup>33</sup> See also in *re Watson*, 15 Fed. 511; *Van Valkenburgh v. Brown*, 43 Cal. 43; *Cooley*, *Constitutional Limitations*, 7th ed., p. 37, n. 1. The subject is treated in some detail in two very instructive articles by Mr. W. J. Meyers, entitled "Privileges and Immunities of Citizens," in *Michigan Law Review*, vol. i, pp. 286, 364.

<sup>34</sup> *Conner v. Elliott*, 18 How. 591, 15 L. ed. 497; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248.



It must be constantly borne in mind in the further discussion of this subject that the privileges and immunities spoken of as secured to the citizens of the several States are not absolutely secured. In thus referring to them, it is meant simply that, with regard to the exercise of such privileges and immunities, the several States cannot constitutionally discriminate in favor of their own citizens as against the citizens of other States; whereas, in respect to certain classes of privileges that are not secured by this clause, the States are at full liberty to discriminate as they see fit. In general it may be said that such discriminatory legislation on the part of any State is permissible in the following cases: (1) with respect to the exercise of public rights, such as the enjoyment of political and quasi-political privileges and the utilization of property in which the State has a proprietary interest; (2) in the legitimate exercise by a State of its police power; (3) with respect to corporations of other States. The rights which the citizens of each State are entitled to share upon equal terms with the citizens of other States are, generally speaking, private or civil, as opposed to public rights; but with respect to these also there are certain limitations to the extent to which equality of treatment may be demanded. An examination in detail of these general principles forms the basis for the following chapters.

## CHAPTER III

### RIGHTS PROTECTED AGAINST DISCRIMINATORY LEGISLATION

In discussing the general scope of the Comity Clause, it was said that the class of rights covered by that provision consists in general of "private" as opposed to "public" rights. While this classification is substantially adopted in every case dealing with this clause of the Constitution and making any attempt to define the privileges and immunities of state citizenship, it is obviously of a somewhat vague character, and leaves a wide field for discussion with respect to just what rights are to be included as "private." A review of the cases upon this point reveals two main classes of privileges and immunities which the citizens of the several States may enjoy without fear of discriminatory legislation. The first class includes the exercise of the general rights of property and contract; the second, the protection of substantive rights. Under one of these two heads every important privilege or immunity secured by virtue of state citizenship will properly fall.

*Property and Contract Rights.*—In both *Corfield v. Coryell*<sup>1</sup> and *Ward v. Maryland*<sup>2</sup> there are dicta to the effect that the right to acquire and possess property of every description is one secured to the citizens of the several States by virtue of the Comity Clause. Taking up first the right to acquire property, one may conveniently divide the modes of acquisition into two classes; namely, acquisition by operation of law, and acquisition by act of the parties concerned in the transaction.

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<sup>1</sup> 4 Wash. C. C. 371.

<sup>2</sup> 12 Wall. 418, 20 L. ed. 449.



With respect to the acquiring of property of any kind by the first of these methods, discriminatory legislation on the part of any State against the citizens of other States is emphatically declared unconstitutional in the leading case of *Blake v. McClung*.<sup>8</sup> This case involved a statute of Tennessee, by which it was provided that resident creditors of foreign corporations doing business in that State should be entitled to a priority in the distribution of assets, or the subjection of the same to the payment of debts, over all simple contract creditors who were residents of any other State or countries. The defendant, who was a resident of Tennessee, had, together with other residents of Tennessee, filed an original general creditors' bill against the Embreeville Company, an English corporation doing business in that State, asking for the appointment of a receiver to administer the affairs of the company, on the ground of insolvency. Blake, together with other non-resident creditors, filed intervening petitions, alleging that the plaintiffs in the general creditors' bill claimed a priority in the distribution of the assets of the corporation and that the statute, as far as it authorized this priority in distribution, was unconstitutional. The Tennessee court upheld the statute and awarded resident creditors the priority of payment out of the assets of the company claimed by them; the case was then carried to the Supreme Court. Mr. Justice Harlan, who rendered the decision, said in part:

Beyond question, a State may through judicial proceedings take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But may it exclude citizens of other States from such distribution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation by the courts of the State in which it is doing business, will the Constitution of the United States permit discrimination against individual creditors of such corporations because of their being citizens of other States, and not citizens of the State in which such administration occurs? . . . The courts of that State [Tennessee] are forbidden, by the statute in question, to recognize the right in equity of citizens residing in other States to participate upon terms of equality with

<sup>8</sup> 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

citizens of Tennessee in the distribution of the assets of an insolvent foreign corporation lawfully doing business in that State. . . . In other words, so far as Tennessee legislation is concerned, while this corporation could lawfully have contracted with citizens of other States, those citizens cannot share in its general assets upon terms of equality with citizens of that State. If such legislation does not deny to citizens of other States, in respect of matters growing out of the ordinary transactions of business, privileges that are accorded to it by citizens of Tennessee, it is difficult to perceive what legislation would effect that result.

We adjudge that when the general property and assets of a private corporation lawfully doing business in a State are in course of administration by the courts of such State, creditors who are citizens of other States are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such State.<sup>4</sup>

In *Belfast Savings Bank v. Stowe*, 92 Fed. 100, 34 C. C. A. 229, it was held that a foreign assignment by an insolvent debtor will operate upon property in the State so as to defeat an attachment procured by a resident creditor.

It should be noticed that in the decision in *Blake v. McClung* the Court observes that the objections to the statute under consideration would not necessarily be applicable to state laws requiring foreign corporations, as a condition of coming into the State, to deposit with a designated state official funds sufficient to secure resident stock- or policy-holders. Such a deposit would be regarded as in the nature of a trust, and the corporation would be deemed to have consented that in case of insolvency the fund should be distributed according to the terms of the statute. This specific decision was made in *People v. Granite State Provident*,

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<sup>4</sup> On the case being remanded for further proceedings, the Tennessee court ordered a computation to be made of the aggregate indebtedness of the company to all its creditors, and the rest of the estate to be applied first to the payment of the indebtedness due to creditors resident in Tennessee. On the case being brought before the Supreme Court again, it was held that this decree still gave a decided advantage to resident creditors, and that non-residents were entitled to share in the distribution of the assets of the insolvent corporation upon terms of equality in all respects with creditors who were citizens of Tennessee. *Blake v. McClung*, 176 U. S. 59, 44 L. ed. 371, 20 Sup. Ct. Rep. 307. See also for like holdings, *Sully v. American National Bank*, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935; *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716; *American and British Manufacturing Co. v. International Power Co.*, 159 N. Y. Supp. 582; *Maynard v. Granite State Provident Association*, 92 Fed. 435, 34 C. C. A. 438; *Miller's Administrators v. Cook's Administrators*, 77 Va. 806.

Association,<sup>5</sup> in the case of a foreign building and loan association. Why this distinction should be drawn is not clear. It may indeed be said that creditors in other States know that those particular funds are segregated from the mass of property owned by the company, and that they cannot look to such funds to the prejudice of those for whose special benefit the deposit was made. But nevertheless there would certainly exist a discrimination in favor of residents in so far as the distribution of the assets of the insolvent corporation was concerned. And non-resident creditors could as easily be presumed to know the provisions of a statute similar to that in *Blake v. McClung* as a record in the registry of deeds. If the State cannot endow resident creditors with a priority in the distribution of the assets of a foreign corporation, why should it be able to compel that corporation to accomplish the same result by pledging a portion—or possibly all—of its property to that purpose? Lacking the power to accomplish an end directly, it should surely equally lack the power to accomplish the same end by indirect means.

The protection accorded to citizens of the several States does not necessarily prevent a State from granting special privileges to certain classes of its own citizens in respect to the acquisition of property. Statutes granting such privileges have from time to time been held constitutional, particularly in the case of state inheritance tax laws, from whose operation certain classes of its citizens were exempted. Such an exemption need not render the law invalid as discriminating against non-residents of the same class, unless there is an express prohibition against investing them with a similar right of exemption. Otherwise there is no burden imposed by the State upon the citizens of other States, but rather an extension of a particular privilege to certain of its own citizens which, by virtue of the constitutional provision, would be impliedly granted as well

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<sup>5</sup> 161 N. Y. 492, 55 N. E. 1053.

to citizens of other States falling within the same classification.<sup>6</sup>

The second method of acquiring property—by act of the parties—needs little attention, since, for the purposes of this examination, it differs in no important particular from acquisition by operation of law; and what has been said in connection with the latter will apply with equal force here. In the early case of *Ward v. Morris*,<sup>7</sup> decided in 1799, in which it was held that a deed to non-residents was valid as against a subsequent attachment by a resident creditor of the grantor, the rule was well laid down in the following words:

If a deed is good as to a creditor or person residing within the State, all creditors or persons residing in any of the other States, as to the means of acquiring and holding real and personal property, are to be considered on the same footing, and as enjoying the same immunities and privileges. . . . The privilege or capacity of taking, holding, conveying, and transmitting lands lying within any of the United States, is by the general government conferred on and secured to all the citizens of any of the United States, in the same manner as a citizen of the State where the land lies could take, hold, convey, or transmit the same.<sup>8</sup>

Where the acquisition of property rights is incident to a status, the cases hold that a State may properly discriminate in favor of its own citizens as against those of other States. This is on the theory that such status is not an incident of citizenship, but is under the absolute control of the state legislature, which may modify it at pleasure. For this reason, statutes granting greater dower rights to women resident in the State than to non-residents, and prohibiting the granting of divorces to parties not citizens of the State, have been upheld.<sup>9</sup>

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<sup>6</sup> *In re Johnson's Estate*, 139 Cal. 532, 73 Pac. 424.

<sup>7</sup> 4 Harr. and McHen. (Md.) 330.

<sup>8</sup> See also *Magill v. Brown*, 16 Fed. Cas. 408, Fed. Cas. No. 8952 (the right to take by devise or bequest); *Farmers' Loan and Trust Co. v. Chicago and Atlantic Ry. Co.*, 27 Fed. 146 (the right to take and hold property in trust).

<sup>9</sup> *Buffington v. Grosvenor*, 46 Kan. 730, 27 Pac. 137, 13 L. R. A. 262; *Bennett v. Harms*, 51 Wis. 251, 8 N. W. 222; *Worthington v. District Court*, 37 Nev. 212, 142 Pac. 230.

The right to hold and enjoy property free from discriminatory legislation necessarily follows, if the right to acquire is once granted; and there are dicta to this effect in many cases.<sup>10</sup> Nevertheless some rather interesting questions have been afforded with respect to the validity of state taxation as to the exercise of this right.

A citizen of another State, as a general rule, may be forced to pay taxes upon personal property actually situated within the boundaries of the domestic State, even though taxes may have been assessed and paid upon such property under the laws of his own State. If he desires the protection of the state laws to be extended to his property, he may be made to pay therefor; and the provisions of the Comity Clause cannot be extended so as to give a right to demand exemption from such taxation, and place the burden of paying for such protection upon the resident citizen.<sup>11</sup> But a non-resident cannot constitutionally be taxed at a higher rate upon his personal property situated in the State than a resident owning like property under like circumstances; nor can he be compelled to pay taxes on such property if like property under similar circumstances is exempt from taxation in the hands of a resident.<sup>12</sup> When a non-resident observes laws enacted with the purpose of regulating the conduct and actions of citizens of the State, it is his right to have his property within the limits of that State protected under its laws as effectually as the property of a resident. Otherwise, as was pointed out in *Wiley v. Parmer*,<sup>13</sup> a State would have the power to exempt its own citizens from taxation, and to support the government and pay its debts by taxing the property of non-residents. Thus a state statute requiring domestic corporations to pay into the state treasury a certain percentage of all dividends de-

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<sup>10</sup> See, e. g., *Corfield v. Coryell*, 4 Wash. C. C. 371; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357.

<sup>11</sup> *Battle v. Mobile*, 9 Ala. 234; *Duer v. Small*, 4 Blatch. C. C. 263.

<sup>12</sup> *Sprague v. Fletcher*, 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840.

<sup>13</sup> 14 Ala. 627.

clared on the shares of non-resident stockholders was held unconstitutional, since citizens of the State were exempted from the payment of a similar tax upon the shares held by them.<sup>14</sup> Similarly a statute denying to non-residents the right to deduct from their taxable personal property certain debts owed by them, and according this right to residents, was invalid.<sup>15</sup>

Nevertheless the general rule by which non-residents are entitled to be taxed upon their property at the same rate as residents is not free from exceptions. An interesting case in this connection is that of the *Travelers' Insurance Company v. Connecticut*,<sup>16</sup> which arose out of the method adopted by the State of Connecticut for taxing local corporations. The stockholders were divided into two classes, one composed of residents of the State, who were subject to municipal taxation, and the other of non-residents, who were subject to a special state tax. The rules for fixing the valuation of the stock were different for the two classes, so that in actual practise the non-resident stockholders were forced to pay at a higher rate than the resident. Upon its face this would seem to constitute a clear case of discrimination against the non-resident shareholders. The Supreme Court, however, held that the discrimination was only apparent, saying in part:

<sup>16</sup> This apparent discrimination against the non-resident disappears when the system of taxation prevailing in Connecticut is considered. By that system, the non-resident stockholder pays no local taxes. He simply pays a state tax, contributes so much to the general expenses of the State. While, on the other hand, the resident stockholder pays no tax to the State, but only to the municipality in which he resides. The rate of the state tax upon the non-resident stockholder is fixed, while the rate of local taxation differs in the several cities and towns. . . . Obviously the varying difference in the rate of the tax upon the resident and non-resident stockholders does not invalidate the legislation. How then can it be that a difference in the basis of assessment is such an unjust discrimination as nec-

<sup>14</sup> *Oliver v. Washington Mills*, 11 Allen (Mass.) 268.

<sup>15</sup> *Sprague v. Fletcher*, above. See also *Wiley v. Parmer*, 14 Ala. 627; *Union National Bank v. Chicago*, 3 Biss. 82; *Farmington v. Downey*, 67 N. H. 441, 30 Atl. 345.

<sup>16</sup> 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673.

essarily vitiates the tax upon the non-resident. . . . The legislature with these inequalities before it, aimed, as appears from the opinion of the Supreme Court [of Connecticut] to apportion fairly the burden of taxes between the resident and the non-resident stockholder, and the mere fact that in a given year the actual workings of the system may result in a larger burden on the non-resident was properly held not to vitiate the system, for a different result might obtain in a succeeding year, the results varying with the calls made in the different localities for local expenses. . . . The validity of the legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. . . . It is enough that the State has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against non-residents.

The effect of the holding in this case, unless it is modified in the future, is necessarily to open up a means by which the State may discriminate through taxation against non-residents. The language of the opinion is such as to legitimize such discriminatory legislation, unless it is clearly aimed directly against citizens of other States with the express intent of denying or limiting a clearly defined civil right. There also seems to be in the mind of the Court an idea, though not specifically so stated, that when, by the laws of any State, its own inhabitants are not secured an equality of taxation, its non-residents may be taxed by still a different method from that applied to any class of residents. If this view should be definitely upheld, it would clearly recognize in the several States a considerable power to discriminate against non-residents. Yet there seems to be no reason why it should not be sustained, provided the method adopted as to non-residents did not result in actual operation in imposing upon this class a tax rate very much higher than that imposed on any resident property-owner.<sup>17</sup>

Non-resident property-owners in a State are also secured the right to import and export their property on equal terms with the residents. The majority of cases dealing with state legislation upon this point have held such legislation invalid as regulation of interstate commerce and within the exclusive control of the Federal Government. Neverthe-

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<sup>17</sup> See *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *State v. Frear*, 148 Wis. 456, 134 N. W. 673.

less this right is clearly guaranteed by the Comity Clause, and it is so stated in some cases. Thus, in *Minnesota v. Barber*<sup>18</sup> a state statute requiring as a condition to the sale of certain fresh meats for food that the animals be inspected in the State before being slaughtered, was held unconstitutional, both as a regulation of interstate commerce and also, since its effect was to prohibit the importation of animals slaughtered in other States, as a restriction of the slaughtering of animals to slaughterers in Minnesota, and thus a discrimination against the products and citizens of other States in favor of the products and citizens of Minnesota.<sup>19</sup> Such a right to import property into a State does not operate to exempt the importer from responsibility for damage to others that may follow from such importation. The contrary of this was asserted in *Kimmish v. Ball*,<sup>20</sup> with respect to a statute of Iowa relative to allowing cattle infected with the Texas cattle fever to run at large, but the law was upheld, it appearing that citizens of other States stood upon the same footing as citizens of Iowa so far as concerned their liability under the statute.

This right of non-residents to import and export property upon terms of substantial equality with residents of a State may be derived very properly from the right to free ingress and egress, which is spoken of as secured to the citizens of the several States in all the principal cases attempting to give any enumeration of the privileges and immunities appertaining to state citizenship.<sup>21</sup> In *Julia v.*

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<sup>18</sup> 136 U. S. 313, 34 L. ed. 455, 10 Sup. Ct. Rep. 862.

<sup>19</sup> See also *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 11 Sup. Ct. Rep. 213.

<sup>20</sup> 129 U. S. 217, 32 L. ed. 695, 9 Sup. Ct. Rep. 277.

<sup>21</sup> See for cases on the right of free ingress and egress: *Ex parte Archy*, 9 Cal. 147; *Willard v. People*, 4 Scam. (Ill.) 461; *Julia v. McKinney*, 3 Mo. 270; *Smith v. Moody*, 26 Ind. 299; *Commonwealth of Massachusetts v. Klaus*, 130 N. Y. Supp. 713, 145 App. Div. 708. In *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745, the Court quotes with approval the following language of Chief Justice Taney in his dissenting opinion in the *Passenger Cases*, 7 How. 283, 12 L. ed. 702: "A tax imposed by a State for entering its territories or harbors is inconsistent with the rights which belong to citizens of other States."

McKinney,<sup>22</sup> for instance, the Court says: "We are of opinion that all persons who are citizens of any of the States have a right by the Constitution of the United States to pass through Illinois with any sort of property that they may own."<sup>23</sup> This broad statement is, however, open to criticism; and the right of free ingress and egress does not carry with it the right to import or export property, either where such property relation is opposed to the public policy of the State, so as to be prohibited to its own citizens, or where the importation of the property in question is prohibited by the State in the legitimate exercise of its police power.

The first of these limitations—namely, that citizens of other States may validly be prohibited from bringing into the State any sort of property the ownership of which is in contravention of the public policy of that State—may be regarded as having been definitely settled by the case of *Lemmon v. People*.<sup>24</sup> A statute of New York was involved which automatically freed slaves who were not fugitives, but were brought into the State by the voluntary act of their owner. The appellant was on a voyage from Virginia to Texas, where he intended to make his home, and while he was passing through New York his slaves were taken from him and freed under the statute. The case came up for hearing in 1860 just before the outbreak of the Civil War, and naturally aroused much interest because of the existing state of public feeling. The point involved was argued at great length and was very carefully considered by the Court, which finally held in favor of the constitutionality of the statute, three justices dissenting. Although the peculiar circumstances giving rise to the suit were such as to cause this decision to seem somewhat unjust to the appellant, nevertheless there would appear to be

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<sup>22</sup> 3 Mo. 270.

<sup>23</sup> To the same effect are *Willard v. People* and *ex parte Archy*, above.

<sup>24</sup> 20 N. Y. 607.

no question as to its correctness. As has before been pointed out, the well-established construction of the Comity Clause is that it operates to endow citizens of other States with substantially the same privileges and immunities as enjoyed by the citizens of the domestic State, but no more. They cannot complain of any discrimination in a case where they are deprived of a right which the laws of the State do not permit its own citizens to enjoy. Therefore, if a State prohibits to its own citizens the enjoyment of some privilege on grounds of public policy, citizens of other States may not complain if, on coming within the jurisdiction of that State, they are likewise deprived of a similar privilege, though this may be fully accorded to them by the laws of their own State.<sup>25</sup>

It may also be said to be well established that in the exercise of its police power a State may prohibit the entrance within its borders of persons and property detrimental to the welfare of its inhabitants. In the absence of any action upon the same subject by Congress, a State may protect its people and their property against the dangers resulting for them from the entrance of the prohibited classes of persons or property, provided only the means employed to that end do not go beyond the necessities of the case so as unreasonably to burden the exercise of privileges secured by the Federal Constitution.<sup>26</sup> A State may, for instance, legitimately restrict the free ingress and egress of persons or property by quarantine regulations, or by regulations concerning the importation of animals, provided these are not repugnant to similar regulations on the part of the Federal Government.<sup>27</sup>

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<sup>25</sup> See for similar holdings, *Allen v. Negro Sarah*, 2 Harr. (Del.) 434; *ex parte Kinney*, 3 Hughes C. C. 9; *Sweeney v. Hunter*, 145 Pa. St. 363, 22 Atl. 653, 14 L. R. A. 594; *Keyser v. Rice*, 47 Md. 203.

<sup>26</sup> *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92.

<sup>27</sup> *Morgan Steamship Co. v. Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *Rasmussen v. Idaho*, 181 U. S. 198, 45 L. ed. 820, 21 Sup. Ct. Rep. 594; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527.



The right to import and export property is closely connected with the general power to contract and to engage in commercial transactions in relation thereto. As was said in *Brown v. Maryland*,<sup>28</sup> "the object of importation is sale." All the early cases dealing with the privileges and immunities of state citizenship included among these the right to enter into contracts upon equal terms with citizens of the domestic State; and in *Ward v. Maryland*<sup>29</sup> it was specifically held 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 . . . and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens." In this case the Court held void a statute which required a larger license fee of non-resident than of resident traders engaged in selling certain specified commodities in the city of Baltimore, on the ground that this was a clear discrimination against the citizens of other States, who were entitled to sell those goods without being subjected to any higher license fees than were required of residents.<sup>30</sup>

Almost all of the cases on this point deal with state statutes concerning license fees required of peddlers and drummers. Statutes regulating such occupations and requiring those following them to take out licenses in order to practice their trade, have existed from early times in both England and America. The general power of a State to impose such taxes upon all pursuits and occupations

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<sup>28</sup> 12 Wheat. 419, 6 L. ed. 678.

<sup>29</sup> 12 Wall. 418, 20 L. ed. 449.

<sup>30</sup> See also *Hoxie v. New York, New Haven, and Hartford R. Co.*, 82 Conn. 352, 73 Atl. 754, in which it was said: "The right to engage in commerce between the States is not a right created by or under the Constitution of the United States. It existed long before the Constitution was adopted. It was expressly guaranteed to the free inhabitants of each State by the Articles of Confederation and impliedly guaranteed by Article IV, sec. 2 of the Constitution of the United States as a privilege inherent in American citizenship."

within its limits is unquestionable, but like all other powers must be exercised in conformity with the requirements of the Federal Constitution.<sup>81</sup> Without entering into any consideration of the question as to how far such regulations are in conflict with the federal control over interstate commerce, it may be said that under the ruling in *Ward v. Maryland* it has been uniformly held that such a method of carrying on business is a privilege within the meaning of the Comity Clause; and that a denial of it to citizens of other States or a requirement of a heavier license tax from them than from residents of the State would be an act of unconstitutional discrimination.<sup>82</sup> On the other hand, where, by the terms of a law or ordinance regulating the sale of goods by peddlers or drummers, the privilege is equally open to all on the same terms, and the license fees imposed are the same regardless of the citizenship of the peddler or the place of origin of his wares, such law or ordinance is a legitimate exercise of power and will be upheld.<sup>83</sup>

There is some doubt in the case of city ordinances imposing a license tax upon peddlers or drummers not residents of the city whether these are in effect unconstitutional discriminations against citizens of other States; and the state courts in the past have entertained different views with respect to this question. On the one hand it is argued that the citizens of other States are entitled to no greater privileges than are accorded by the State to its own citizens.

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<sup>81</sup> *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

<sup>82</sup> See in *re Watson*, 15 Fed. 511; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 15 Sup. Ct. Rep. 367, and cases cited; *Marshalltown v. Blum*, 58 Ia. 184; *State v. Furbish*, 72 Me. 493; *Bliss's Petition*, 63 N. H. 135; *Rodgers v. Kent Circuit Judge*, 115 Mich. 441, 73 N. W. 381; *Bacon v. Locke*, 42 Wash. 215, 83 Pac. 721.

<sup>83</sup> *Graffy v. Rushville*, 107 Ind. 502, 8 N. E. 609; *Howe Machine Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754. The contrary is held in *re Schechter*, 63 Fed. 695, apparently on the ground that the practical effect of the legislation in question was to discriminate against citizens of other States; but this decision is believed to be erroneous, and is certainly opposed to the weight of authority. See *Singer Manufacturing Co. v. Wright*, 33 Fed. 121, where it was held that a statute taxing a certain class of dealers was not invalidated on the ground that there were no domestic dealers engaged in that line of business.

An ordinance of this character, it is said, discriminates against citizens of the domestic State not living within the city fully as much as against citizens of other States; and therefore there is no right in the claim of the latter to equality of treatment with residents of the city itself, since this would be to put them on a better footing than that of the majority of the citizens of the domestic State. Moreover such an ordinance is not aimed at citizens of other States as such, but purely against all who are not residents of the particular locality in question.<sup>84</sup> An opposite conclusion is reached by other cases dealing with similar ordinances, which hold that the existence of a discrimination which may apply to a citizen of another State is unconstitutional as to him, and that in effect he is entitled to an equality of treatment with the most favored class of the citizens of the State.<sup>85</sup> The latter view seems to be the more generally accepted one, but there is much to be said in favor of the first line of argument. Ordinances of this character are usually aimed as much at citizens of the home State as at those of other States, and far from discriminating against the latter class, as a matter of fact put them upon exactly the same basis as the majority of the members of the former. The Comity Clause is generally accepted as applicable only in cases in which the discrimination made is drawn upon state lines, which is ordinarily not the condition of affairs in ordinances of the character under consideration. To say that the citizens of other States may not be deprived of privileges enjoyed by any of the citizens of a State would seem to be stretching the construction of that clause beyond its natural purport. If they are accorded a substantial equality with the citizens of the State, the general trend of the decisions would seem to show that this privilege is the utmost that can be demanded. Of

<sup>84</sup> *Rothermel v. Meyerle*, 136 Pa. St. 250, 20 Atl. 583, 9 L. R. A. 366; *Mount Pleasant v. Clutch*, 6 Ia. 546.

<sup>85</sup> *Fecheimer v. Louisville*, 84 Ky. 306, 2 S. W. 65; *McGraw v. Marion*, 98 Ky. 673, 34 S. W. 18; *in re Jarvis*, 66 Kan. 329, 71 Pac. 576; *State v. Nolan*, 128 Minn. 170, 122 N. W. 255.

course the practical effect of such city ordinances must be taken into account; and if it can be shown that they actually operate on, and were intended to operate on, the citizens of other States in the majority of instances then their unconstitutionality would probably not be contested. Otherwise it would seem proper to uphold their validity upon the grounds stated.<sup>36</sup>

As with other rights secured to the citizens of the several States, the right to contract and to carry on commercial transactions in general, free from discriminatory legislation, must be exercised subject to the police power of the States. This wide and ill-defined power, however, is apparently somewhat limited in this connection, both because it is capable of infringing too far upon the constitutional rights of citizens, and because in the majority of instances it necessarily comes into conflict with the transaction of interstate commerce.<sup>37</sup>

Finally, it should be said that rights attached by the law to contracts by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed privileges of state citizenship within the meaning of the Constitution. In *Conner v. Elliott*<sup>38</sup> certain provisions of the Louisiana code were examined which enacted that marriages contracted in the State should superinduce, of right, "partnership or community of *acquêts* or gains" in the absence of any stipulation to the contrary, but that marriages contracted out of the State should not superinduce these rights of marital community unless the parties afterwards came into the State to live. It was claimed that as these provisions gave a Louisiana widow the right of marital com-

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<sup>36</sup> This conclusion is quite apart from any question of their unconstitutionality as attempts on the part of the States to regulate interstate commerce. Such ordinances should probably be held unconstitutional on this ground if they discriminated in any way against goods the products of other States or countries.

<sup>37</sup> See *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

<sup>38</sup> 18 How. 591, 15 L. ed. 497.



munity, a widow of a citizen of another State, who did not live in Louisiana, was entitled to similar rights as to property there situated. This contention was denied by the Court, which held that these rights were not rights of citizenship, but merely incidents grafted by the law of the State upon the contract of marriage.

The law does not discriminate between citizens of the State and other persons; it discriminates between contracts only. Such discrimination has no connection with the clause . . . now in question. If a law of Louisiana were to give to the partners *inter sese* certain peculiar rights, provided they should reside within the State, and carry on the partnership trade there, we think it could not be maintained that all copartners . . . residing and doing business elsewhere, must have those peculiar rights.

*Protection of Substantive Rights.*—That the citizens of every State are entitled by virtue of the Comity Clause to institute and maintain actions of any kind in the courts of the several States has been declared from the very beginning by the decisions discussing the general scope and operation of that clause.<sup>89</sup> Indeed, if the rights to acquire and hold property and to enter into contracts upon an equal footing with the citizens of other States are regarded as among the privileges appertaining to all citizenship, the right to sue and be sued in the courts of other States upon a similar equality with their citizens would necessarily follow; for unless there is a right to resort to legal proceedings in order to obtain redress for wrongs done to property or to enforce contracts which have been made, these property and contract rights are rendered so far valueless as to be practically nullified. It is true that the point has never been before the Supreme Court for adjudication; but in view of the numerous dicta upon the question in former decisions, there would seem to be no doubt as to the nature of their holding in a case directly involving the right to sue.

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<sup>89</sup> See, e. g., *Corfield v. Coryell*, 4 Wash. C. C. 371; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *Slaughterhouse Cases*, 16 Wall. 36, 21 L. ed. 394; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Chambers v. Baltimore and Ohio R. Co.*, 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34. Specifically so held in *State v. Grimm*, 239 Mo. 135, 143 S. W. 483; *Paine v. Lester*, 44 Conn. 196.

An interesting case in this connection is that of *Chambers v. Baltimore and Ohio Railroad Company*,<sup>40</sup> which involved a statute of Ohio providing that a right of action might be enforced in that State because of the death of a citizen of Ohio caused by wrongful act, neglect, or default in another State for which the law of the latter State gave a right to maintain an action. The statute was construed by the Ohio courts as giving no right of action except in the case that the deceased was a citizen of Ohio; and it was claimed that this decision was an abridgment of the right of citizens of other States to resort to the state courts on terms of equality with the citizens of the State. The court recognizes that this right is secured by the Constitution, saying in part:

The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. . . . The State policy decides whether and to what extent the States will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different States may have different policies, and the same State may have different policies at different times. But any policy the State may choose to adopt must operate in the same way on its own citizens and those of other States. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other States is void, because in conflict with the supreme law of the land.

It was held, however, that the Ohio statute was valid, since the discrimination was based solely on the citizenship of the deceased, and the courts were open to plaintiffs who were citizens of other States if the deceased was a citizen of Ohio.<sup>41</sup> The decision, accordingly, although recognizing that a statute barring citizens of other States from the state courts would be unconstitutional, has a distinctly narrowing effect upon the extent of the right to sue and de-

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<sup>40</sup> 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34.

<sup>41</sup> A similar holding was given in *Dougherty v. American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619.

pend; and this was pointed out at some length by Mr. Justice Harlan in a dissenting opinion in which Justices White and McKenna concurred. The opinion denies in effect that citizens of other States have an equal right with citizens of the domestic State to have secured to them, in case of their death through the negligence of third parties, a remedy for the wrong done to them in their lifetime, by means of a suit brought in the name and for the benefit of their widows or personal representatives. The courts may be closed to a widow or to the estate of a citizen of another State. Although the Supreme Court looked upon the statute in question as operating only upon the beneficiaries of the deceased, its clear intent was to grant to citizens of Ohio, even though after death, a privilege not accorded to citizens of other States. Unquestionably, also, in actual practice, statutes similar to the one here held constitutional would have the effect of discriminating against non-resident widows, in spite of the fact that in a minority of the cases in which the deceased was a resident of another State, the widow might be a citizen of the domestic State. It may happen, too, as was pointed out in the majority opinion in this case, that the death action may be given by law to the person killed, at the time when he was "vivus et mortuus," so that it would survive and pass to his representatives.<sup>42</sup> Such a question was not at issue in the case; but from the language used by the court, it may fairly be presumed that in this event a statute giving a right of action for wrongful death only when the deceased was a citizen of the domestic State would be regarded as resulting in an unconstitutional discrimination.

It has been suggested<sup>43</sup> that, in spite of the numerous dicta to the contrary, the right of a citizen of one State to sue in the courts of another State upon an equal footing with the latter's own citizens should not be regarded as a constitutional privilege secured by the Comity Clause; that though the privilege to seek redress in the courts is funda-

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<sup>42</sup> See *Higgins v. Railroad*, 155 Mass. 176, 29 N. E. 534.

<sup>43</sup> See *Harvard Law Review*, vol. 17, p. 54.

mental, the right to seek redress in one particular set of courts is an incident of local, and not of general, citizenship; and that a privilege belonging to the citizens of a State by virtue of citizenship which is confined to a particular locality is not secured to the citizens of the several States according to the ruling in *McCready v. Virginia*.<sup>44</sup> This reasoning, though novel, is hardly convincing; and the analogy to *McCready v. Virginia* is somewhat fanciful. In that case, which is elsewhere discussed, the statute in question forbade non-residents to take oysters from Virginia waters, and was held constitutional on the ground that the tide-waters and the fish in them were the property of the State and were held in trust by it for its people; that through its proprietary interest the State had the right to exclude any except its own citizens from the use of these waters. It can be readily seen that no similar basis of justification can be utilized for the action of a State in excluding all except its own citizens from the use of its courts; and the analogy attempted to be discovered rests apparently upon a misconception of the proper meaning of the rather unfortunate phrase of Chief Justice Waite with respect to "privileges of special" as opposed to "general" citizenship. Aside from this, as was pointed out above, unless the right to sue without discrimination is to be regarded as a right appurtenant to state citizenship, there can be no means by which the rights undoubtedly appurtenant can be so enforced as to be of material value to the holder.

When both plaintiff and defendant in a suit are non-residents of the State in which the case is brought for trial, there is a difference of opinion in the state courts; and the authorities are in conflict as to whether the Court may be required to assume jurisdiction of the case in such a contingency. If the Court is willing to assume jurisdiction and there is no statute providing against its so doing, there would seem to be no question that a citizen of one State may sustain an action against a citizen of another in a

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<sup>44</sup>94 U. S. 391, 24 L. ed. 248.

State where neither lives. To hold otherwise would necessarily cause grave injustice in many cases.

It would be strange indeed if a citizen of Georgia meeting his debtor, a citizen of Massachusetts, in the State of New York, should not have a right to demand what was due him, nor be able to enforce his demand by a resort to the courts of that State. It is said that the Federal court is open to him; that is so, provided the sum claimed is to an amount authorizing the interference of the latter court, to wit, \$500.00. What is to become of those numerous claims falling short of that amount? Must a citizen of California, to whom one, a citizen of Maine, owes a debt of \$480, go to Maine, and bring his suit there, or wait until he catches him in California? We hold not: but that the courts of every State in the Union, where there is no statutory provision to the contrary, are open to him to seek redress.<sup>45</sup>

It has sometimes happened, however, that there has been a statutory provision to the contrary, or that the Court has refused to take jurisdiction of the case solely because of the non-residence of both parties to the suit. Probably the better opinion as to the constitutionality of such a statute or the rightfulness of such action on the part of the Court is represented by the holding in *Cofrode v. Gartner*,<sup>46</sup> in which a writ of mandamus was granted to compel the lower state court to hear and decide a case in which neither party was a resident of the State, the judge in the lower court having stricken the case from the docket because of this fact. If the right to sue without discrimination be admitted as one of the rights secured to the citizens of the several States, it is difficult to see how a different conclusion could be reached. The resident citizen has the right to sue upon a transitory cause of action arising in another State, and against a citizen of still a third State, provided only he can obtain jurisdiction over the person of the defendant. To deny a citizen of another State a similar right to bring suit in related circumstances is to deny him the same right to employ legal remedies as is possessed by resident citizens; and it is extremely difficult to see that this

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<sup>45</sup> Nash, C. J., in *Miller v. Black*, 53 N. C. 341.

<sup>46</sup> 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 54.

action would not be a discrimination of an unconstitutional nature as to such a person.<sup>47</sup>

The courts which hold the opposite view have arrived at their conclusions by a rather specious and unsatisfactory method of reasoning, usually with reference to statutory provisions limiting the right to sue as respects non-resident parties to causes of action arising within the limits of the domestic State. They hold, in general, that such statutes make no discrimination between citizens of the different States, but between residents and non-residents; and therefore that the provisions of the Comity Clause are not applicable.<sup>48</sup> Such a distinction between citizenship and residence in a State, if a legitimate interpretation of the meaning of the words of the Constitution, would have justified the holding valid of the majority of state statutes that have been declared unconstitutional by both state and federal courts; and the whole trend of judicial decisions in this country has been against such a construction. Apart from this, moreover, by the express words of the Fourteenth Amendment all persons born or naturalized in the United States are to be regarded as citizens of the State in which they reside, thus making state citizenship dependent upon residence.<sup>49</sup> Viewed in this light, it seems as though the courts adopting a distinction between citizenship and residence have been led, by their desire to prevent "a construction which would strike down a large body of laws which have existed in all the States from the foundation of the government," to adopt instead an interpretation which is

<sup>47</sup> See also, *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664; *Steed v. Harvey*, 18 Utah 367, 54 Pac. 1011; *State v. District Court*, 126 Minn. 501, 146 N. W. 403; *Davis v. Minneapolis, St. Paul, and Sault Ste. Marie Ry. Co.*, — Minn. —, 159 N. W. 1084.

<sup>48</sup> *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315, 19 N. E. 625; *Central R. R. v. Georgia Company*, 32 S. C. 319, 11 S. E. 192; *Collard v. Beach*, 81 N. Y. App. Div. 582; *Adams v. Penn. Bank*, 35 Hun. (N. Y.) 393; *Morris v. Missouri Pacific Ry. Co.*, 78 Tex. 17, 14 S. W. 228.

<sup>49</sup> And prior to the passage of this amendment, it was said: "A citizen of the United States residing in any State of the Union is a citizen of that State" (*Marshall, C. J.*, in *Gassies v. Ballou*, 6 Pet. 761, 8 L. ed. 573).

forced and almost entirely theoretical, resting upon a play of words rather than upon the obvious meaning of the provisions of the Constitution, and which is entirely insufficient to support their decisions.<sup>50</sup>

It seems, then, to be fairly well established that the right to sue in the courts of the several States on the same footing with their own citizens is a privilege of state citizenship. But this right, as well as all those of similar nature, is subject to certain limitations and exceptions. One which is rather surprising and somewhat difficult of explanation is that a State may validly deny to non-residents equal benefit with residents under the Statute of Limitations. Why a law to this effect does not discriminate against the citizens of other States so as to be unconstitutional is most difficult to understand. Nevertheless, such a statute of Wisconsin was upheld by the Supreme Court in *Chemung Canal Bank v. Lowery*,<sup>51</sup> which declared: "If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the times herein respectively limited, after the return of said person into this State. But the foregoing provision shall not apply to any case where, at the time the cause of action shall secure, neither the party against or in favor of whom the same shall accrue are residents of this State." In other words, it provided that while the defendant in a suit was out of the State, the Statute of Limitations should not run against a resident plaintiff, but should run against a non-resident. The Court, in holding the statute valid, said by Mr. Justice Bradley:

The argument of the plaintiff is that . . . the law refuses to non-residents of the State an exemption from its provisions which is accorded to residents. . . . This seems, at first view, somewhat plausible; but we do not regard the argument as a sound one. There is, in fact, a valid reason for the discrimination. If the statute does not run as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the State where the parties reside; and yet, if the defendant should be found in Wisconsin, it may be only in a

<sup>50</sup> See before, Chapter II.

<sup>51</sup> 93 U. S. 72, 23 L. ed. 806.

railroad train, a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. This would be inequitable and unjust.

This reasoning seems hardly clear or convincing; it would surely seem that if resident creditors of the State may sue their non-resident debtors at any time within a certain number of years after their return to the State, non-resident creditors should be entitled to the same privilege. The plaintiff in this case was a foreign corporation, but the Court did not base the decision in any way upon this fact.<sup>52</sup>

That the right to sue upon terms of equality, although required to be granted to non-residents by the several States, is nevertheless a right in which the citizens of other States are not entitled to participate except in conformity with such reasonable regulations as may be established by the domestic State, is further shown by the fact that non-residents may be required to give security for costs before having their case heard. This point seems to be well settled, both through dicta of the Supreme Court<sup>53</sup> and through specific holdings of the state courts. The latter, however, though agreeing in their conclusions, reach them by rather different methods of reasoning. It has been argued by some that a rule requiring such security does not interfere with the privileges and immunities of non-residents, but simply places them on a basis in relation to the payment of costs similar to that on which the citizens of the domestic State stand; that as the costs may be secured from the latter class by seizure of their property, so requiring prepayment of costs by non-residents with no property within the jurisdiction of the Court does not amount to a discrimination as to the former.<sup>54</sup> The costs being required equally of both

<sup>52</sup> To the same effect are: *Higgins v. Graham*, 143 Cal. 131, 76 Pac. 89; in *re Colbert's Estate*, 44 Mont. 259, 119 Pac. 791; *Commonwealth v. Wilcox*, 56 Pa. Super. Ct. 244.

<sup>53</sup> *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. ed. 806.

<sup>54</sup> *Kilmer v. Groome*, 19 Pa. Co. Ct. Rep. 339.

classes, it is hard to make out any discrimination in such proceedings, or any flaw in this reasoning.

Other grounds, however, have been presented for defending similar requirements which are not so capable of justification. For instance, a statute containing such provisions has been held valid on the sole ground that it had been in operation for a considerable length of time, during which its validity had never been questioned by either bench or bar.<sup>55</sup> It is certainly true that this fact would lend considerable strength to the argument in favor of the constitutionality of the statute; but it can hardly be regarded as raising a conclusive presumption to that effect. Another case bases its decision on a distinction between citizenship and residence, saying that there was no discrimination made against citizens of other States, but only against non-residents, who might or might not be such citizens.<sup>56</sup> That this distinction cannot properly be drawn has been already pointed out. It is purely verbal and is insufficient to support any decision based upon it. A more satisfactory reason for upholding a requirement of prepayment of costs on the part of non-residents is that this is a proper exercise of the police power of the State.<sup>57</sup> It would seem certain that the State may very properly avail itself of such a requirement in regard to non-residents in order to protect itself against fraud. It is obviously a matter of considerable public interest that effective means should be adopted in order to insure that the costs of legal proceedings within the State shall be paid; and inability on the part of the State to collect them from non-residents would react to the detriment of the public.

A more striking limitation on the right to sue as secured to citizens of the several States is that no equality of treatment as respects particular forms of process is required, as a general rule, with regard to non-residents. This was the

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<sup>55</sup> *Haney v. Marshall*, 9 Md. 194; *Holt v. Tennallytown and Rockville Ry. Co.*, 81 Md. 219, 31 Atl. 809.

<sup>56</sup> *Cummings v. Wingo*, 31 S. C. 427, 10 S. E. 107.

<sup>57</sup> *Nease v. Capehart*, 15 W. Va. 299; *White v. Walker*, 136 La. 464, 67 So. 332; *Bracken v. Dinning*, 140 Ky. 348, 131 S. W. 19.

point at issue in the first reported case dealing with the privileges and immunities of state citizenship, *Campbell v. Morris*.<sup>58</sup> The state statute involved permitted an attachment warrant to be issued against the lands of a non-resident debtor in all cases, but against those of a resident debtor only in case of fraud or abscondence. The Court, after a general discussion of the scope and purpose of the Comity Clause, came to the conclusion that this statute denied no constitutional right to the non-resident.<sup>59</sup> Similarly it has been held that statutes requiring an undertaking in attachment proceedings against non-residents, but not in similar proceedings against residents, were not unconstitutional.<sup>60</sup> The grounds upon which these decisions apparently are based, though not specifically so stated, would seem to be that the privilege of recourse to the courts is granted to non-residents for the purpose of protecting the exercise of the other rights secured to them; consequently, if a substantial equality of protection is afforded, there is no discrimination in favor of resident citizens and against non-residents, citizens of other States. It is the protection of substantive rights which is guaranteed to the citizens of the several States; and the procedural forms adopted for enforcing such rights may validly differ in respect to non-residents, provided only the difference is not such as to defeat their enjoyment of some substantive right accorded by a State to its own citizens.<sup>61</sup>

Provisions such as those in the attachment laws in the cases cited above may very well be justified also on grounds

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<sup>58</sup> 3 Harr. and McHen. (Md.) 535.

<sup>59</sup> See to the same effect *Manley v. Mayer*, 68 Kan. 377, 75 Pac. 550; *Pyrolusite Manganese Co. v. Ward*, 73 Ga. 491; *Hilliard v. Enders*, 196 Pa. St. 587, 46 Atl. 839; *Baker v. Wise*, 16 Gratt. (Va.) 139; *Burton v. New York Central and Hudson River R. Co.*, 132 N. Y. Supp. 628; *Lee v. Lide*, 111 Ala. 126, 20 So. 410.

<sup>60</sup> *Marsh v. State*, 9 Neb. 96, 1 N. W. 869; *Head v. Daniels*, 38 Kan. 1, 15 Pac. 911.

<sup>61</sup> It is apparently for this reason that a statute discriminating in favor of citizens with respect to the issuing of a writ of *capias ad respondendum* was held unconstitutional in *Black v. Seal*, 6 Houst. (Del.) 541. See also *Johnstone v. Kelly*, 7 Penn. (Del.) 119, 74 Atl. 1099.

similar to those supporting a requirement of the payment of security for costs on the part of non-residents; that is to say, they may be regarded merely as tending to place the resident and the non-resident on an equal footing, or they may be upheld as an exercise of the police power of the State. It is apparent, however, that a discrimination against non-residents with respect to the forms of process granted to them for the protection of any substantive right may be such as practically to nullify in actual fact the protection theoretically accorded. If it could be shown that this was either the purpose or the necessary effect of the state statute authorizing such discrimination, the statute would necessarily be held unconstitutional. Thus, after prescribing the order in which the debts of a deceased person should be paid by his representatives, a State may not require that priority of payment be always accorded to debts due its own citizens over debts due citizens of other States. The recovery of a debt is a privilege, and such a policy on the part of the State has the effect of preventing citizens of other States from enjoying this privilege as fully as its own citizens. The debt being property in the hands of the creditor, he has the same right to enforce its payment through legal proceedings, and in the same order of priority, as have citizens of the domestic State.<sup>62</sup>

In connection with the ability of the State to discriminate between its own citizens and those of other States in respect to particular forms of process, it might be noticed that there is some conflict of the authorities with regard to the constitutionality of statutes authorizing substituted service upon non-residents and a personal judgment thereon. It was clearly laid down by the Supreme Court in *Pennoyer v. Neff*<sup>63</sup> that a statute authorizing constructive service by publication upon a non-resident and the rendition of a per-

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<sup>62</sup> *Stevens v. Brown*, 20 W. Va. 450; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Opinion of the Justices*, 25 N. H. 537; *Mr. Chancellor Ridgely in Douglass v. Stephens*, 1 Del. Ch. 465.

<sup>63</sup> 95 U. S. 714, 24 L. ed. 565.

sonal judgment thereon is unconstitutional as a denial of due process of law. But in order to prevent misapplication of its reasoning, the Court in that case goes on to say that the State may validly authorize certain kinds of proceedings, such as those affecting the personal status of the non-resident, or his status *in rem* as to actions to enforce liens, or to quiet title, or to recover possession of property, or for the partition thereof, or to obtain judgment enforceable against property seized by attachment or other process. In doing so, it makes use of the following language, which has occasioned a diversity of opinion in subsequent cases bearing upon the point:

Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide upon their failure to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. As was said by the Court of Exchequer in *Vallee v. Dumerque*, 4 Exch. 290, "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed; even though he may not have actual notice of them."

In spite of this express exception, the majority of cases have held, upon the authority of this case, that statutes authorizing the recovery of a personal judgment against a non-resident upon process served on his representative within the State are unconstitutional, both as a denial of due process of law and an invalid discrimination against the citizens of other States. It is said that since citizens of the domestic State have entire immunity from being subjected to personal judgments upon such service of process, it must necessarily follow that the citizens of other States are entitled to equal immunity, and that there is an essential difference in the conditions and methods of the two

modes of service upon residents and non-residents such as amounts to an unconstitutional discrimination. These decisions further declare that the fact of an individual's doing business within a State by an agent cannot affect the question of the jurisdiction of the courts of that State over him personally; that he submits his property which he sends into the State to the jurisdiction of its courts, but not his person.<sup>64</sup>

On the other hand, it was held in *Guenther v. American Steel Hoop Co.*<sup>65</sup> that a statute containing such provisions was in conflict with no provision of the Federal Constitution, the qualification set forth in *Pennoyer v. Neff* being quoted, and regarded as controlling upon this point. The decision draws a distinction, which is not found in the cases holding differently, between constructive and substituted service of process. While admitting the unconstitutionality of the former as applied to this case, the Court strenuously argues that there are legal remedies which may be allowed against those who are domiciled without the State, but which are not to be applied to those who are domiciled within it; in the latter class the substituted service of process is included. The Court seems inclined in this case to group the whole right of non-residents to legal remedies under one head with rights such as that of voting or of taking fish in the waters of the State, as a right not incident to citizenship, but local in its nature and not secured to the citizens of the several States. This classification, as is pointed out elsewhere, is far from being one that is either satisfactory or generally acceptable in the light of other decisions. Nevertheless, it is submitted, it may well be urged that the non-resident is entitled to no more under the Comity Clause than a mode of service which is as effective, just, and fair as the statutory mode of service by copy upon residents; that any mode of service by which he

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<sup>64</sup> See, for instance, *Moredock v. Kirby*, 118 Fed. 180; *Cabanne v. Graf*, 87 Minn. 510, 92 N. W. 461; *Caldwell v. Armour*, 1 Penn. (Del.) 543, 43 Atl. 317; *Brooks v. Dun*, 51 Fed. 138.

<sup>65</sup> 116 Ky. 580, 76 S. W. 419.

is given notice of the suit pending against him meets fully this requirement since the object of the personal service is to give him such notice; and that if he is doing business in the State by an agent, service of process upon the latter would be as effective notice to his principal as if the service were made directly upon the person of the latter. The question cannot be regarded as definitively settled either one way or the other at the present time.

## CHAPTER IV

### RIGHTS NOT PROTECTED AGAINST DISCRIMINATORY LEGISLATION

From the earliest times in the judicial interpretation of the Comity Clause it has always been affirmed that there are certain kinds of public or political rights which do not come within its operation. With regard to those rights the States have always been considered as constitutionally able to make such regulations as they may see fit; and it is held that no one is entitled to exercise them except in accordance therewith. They may be said generally to include two classes of rights: (1) political or municipal privileges, such as the right to vote, to hold public office, and to follow certain professions or occupations invested with a particular public interest; (2) the right to make use of those things in which the State is vested with a proprietary interest. By acceptance of Judge Washington's dictum in *Corfield v. Coryell* to the effect that the rights of the citizens of the several States secured by the Constitution were those in their nature fundamental, belonging to the citizens of all free governments, rights of the special character above described were necessarily excluded. And although the basic idea of this decision is no longer to be regarded as authoritative, nevertheless the distinction drawn has been so generally followed as to be now firmly established.

*Political Privileges.*—The two main political privileges granted by the States to their own citizens are the right to vote and the right to hold public office. At the time of the adoption of the Constitution there seems to have been a well-defined and generally entertained feeling that, whatever rights were included by the Comity Clause, these two at least were of an entirely different nature; this fact is

evidenced by the dicta to that effect in several of the early cases.<sup>1</sup> It was apparently never supposed that the citizens of any State, upon their removal to any other State, might lawfully claim, by virtue of the Comity Clause, the right to exercise such privileges because they had enjoyed them in the State from which they had originally come. As a consequence there are few cases in which the question was a subject of litigation; and the courts themselves apparently deemed the whole matter so self-evident that they were usually content merely to state the fact without going into any discussion of the reasons for their conclusions. Indeed it may reasonably be supposed that they regarded as axiomatic and in no need of supporting arguments the fact that political rights were entirely within the power of the several States to regulate.

This feeling of the courts was most probably based upon the universally prevailing and accepted doctrine of "natural rights." As a consequence of this doctrine there was a widespread belief in certain "fundamental" rights, to be enjoyed by the members of any body politic of necessity, because demanded by the "law of nature." In so far as these rights had assumed definite shape in the mind of any one, they consisted of the rights to acquire and hold property and to contract with relation to the same. These rights, being conceived of as inherent in the idea of citizenship, were, as a matter of course, those which were commonly regarded as guaranteed by the Comity Clause; but any others, not being inherently possessed by the citizens of every political society, were to be considered as for the individual States to grant to or withhold from whomsoever they pleased. In view of the fact that the so-called "natural rights" theory was at the time accepted practically without question, it is not to be wondered at that the judges in the early cases were so positive in their statements as to

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<sup>1</sup> See, for instance, *Campbell v. Morris*, 3 Harr. and McHen. (Md.) 535; *Abbott v. Bayley*, 6 Pick. (Mass.) 89; *Murray v. McCarty*, 2 Munf. (Va.) 393.

the exclusion of political privileges from the list of rights to be shared equally by the citizens of all the States, while at the same time feeling no necessity for giving their reasons for so thinking. As has been elsewhere pointed out,<sup>2</sup> the accepted view of the courts is now that, generally speaking, whatever privileges are extended by a State to its own citizens must be extended likewise to the citizens of other States. With this in mind, it becomes necessary to find more stable ground than the now obsolete theory of inherent rights upon which to base any class of privileges as entirely within the regulatory power of a State.

The whole relationship of the right of suffrage to citizenship is reviewed at some length by Chief Justice Waite in *Minor v. Happersett*.<sup>3</sup> The Court says in that case:

It is clear, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was coextensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

Passing on to a consideration of the regulations of the various original States, the Court finds that in each of these only a restricted number of the inhabitants of the State were allowed to exercise the franchise, from which fact it is deduced that there was no thought in the minds of the framers of the Constitution but that the right to vote was one entirely dependent upon the pleasure of each State. As further proof of this, it is said:

By Article 4, section 2, it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." If suffrage is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. This is more than asserting that they may change their residence and become citizens of the State and thus be voters. It goes to the extent of insisting that, while retaining their original citizenship, they may vote in any State. This, we think, has never been claimed.

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<sup>2</sup> See before, Chapter II.

<sup>3</sup> 21 Wall. 162, 22 L. ed. 627.

Although it is by no means asserted that the right to vote is not one which every State may regulate at its pleasure, nevertheless it is not believed that the reasons given in this, the leading case on the subject, are particularly substantial. The Court admittedly decides the question on the ground that, as people have acted with substantial uniformity for a considerable time upon a certain idea—to wit, that citizenship does not confer the right of suffrage—this fact in itself is sufficient reason upon which to base a decision. But, as has been pointed out, the idea upon which the people had acted in this instance was based mainly upon the unstable foundation afforded by the theories of the Natural Rights school of political philosophy with respect to the inherent and fundamental rights appertaining to citizenship. As a result we have the anomalous condition of affairs that the Supreme Court in effect bases its holding upon a theory that has been, tacitly at least, entirely abandoned. Nevertheless the fact that the right to vote is not a right which the citizens of the several States may exercise free from discriminatory legislation must be regarded, in the light of judicial decision, as firmly established. It is certain that the States may prescribe conditions precedent to the exercise of the franchise, such as attaining a certain age, belonging to a particular sex, a residence within the State for a specified length of time. But what if a State should discriminate between its own citizens and those of other States in the exaction of such requirements? This is a question which has never arisen and which it is not probable would ever arise, but it is sufficient to show the possibility that the Comity Clause might be applicable in certain instances even to the exercise of political rights. The Supreme Court has said in another case that a state statute in regard to voting might conceivably be regarded as a violation of the privileges and immunities of a citizen of the United States, which was the precise point at issue in



*Minor v. Happersett*.<sup>4</sup> It would seem that a statute might as conceivably be a violation of the privileges and immunities of the citizens of the several States.<sup>5</sup>

The right to hold public office links itself naturally with the right to vote, upon which it may be said, partially at least, to be founded. The comments which have been made upon the exclusion of the right of suffrage from the operation of the Comity Clause, apply with equal validity to the majority of cases under this head.<sup>6</sup> In the case of the right to hold public office, however, much stronger and more satisfactory reasons may be adduced as to why this right is entirely within the control of each State. One who holds public office is the agent of the State; the office itself is nothing more than a mere delegation of authority from the State to be exercised in its behalf. In choosing those who are to act in its employ, the State is at no greater disability than any private individual entering into a similar contract of employment. An exactly analogous question presents itself with respect to the power of the State to provide that only certain classes of workmen shall be employed to labor on public buildings and other improvements, a power which has been upheld in recent years as against several rather

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<sup>4</sup> In *Pope v. Williams*, 193 U. S. 621, 48 L. ed. 817, 24 Sup. Ct. Rep. 573. The exact language of the Court was: "It is unnecessary in this case to assert that under no conceivable state of facts could a state statute in regard to voting be regarded as an infringement upon or a discrimination against the individual rights of a citizen of the United States removing into the State and excluded from voting therein by state legislation. The question might arise if an exclusion from the privilege of voting were founded upon the particular State from which the person came, excluding from that privilege, for instance, a citizen of the United States coming from Georgia and allowing it to a citizen of the United States coming from New York or any other State. In such case an argument might be urged that . . . the citizen from Georgia was by the state statute deprived of the equal protection of the laws. Other extreme cases might be suggested."

<sup>5</sup> See for cases to the same effect as *Minor v. Happersett*, *United States v. Anthony*, 11 Blatch. C. C. 200; *Van Valkenburgh v. Brown*, 43 Cal. 43; *People v. Barber*, 48 Hun. (N. Y.) 198; *United States v. Petersburg Judges*, 1 Hughes C. C. 493.

<sup>6</sup> See besides the cases cited under the right to vote, *People v. Loeffler*, 175 Ill. 585, 57 N. E. 785; in re *Mulford*, 217 Ill. 242, 75 N. E. 345, 1 L. R. A. [N. S.] 341.

unfavorable earlier decisions.<sup>7</sup> "It belongs to the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit work to be done on its behalf or on behalf of its municipalities."<sup>8</sup> In order, then, to justify discrimination by a State in favor of its own citizens with respect to the holding of public office, it is possible to get away from the vague grounds upon which the courts have been content to rest the power of the State to regulate the exercise of the franchise. Instead recourse may be had to the proprietary power of the State, in accordance with which, as will be seen presently, the State may take measures to reserve public property for the use of its own citizens. This power of the State rests upon a well-established principle of English and American law, and is therefore eminently more satisfactory than a power based upon fundamental rights and the general feeling of the public for any given length of time. Whether the same principle could be applied to state regulation of the suffrage, however, is not clear.

The power of the State to discriminate in favor of its own citizens in respect to the holding of public office may be pushed to a considerable extent. For instance, it has been held that the right to act as executor or administrator of the estate of a decedent may be entirely restricted by a State to its own citizens.<sup>9</sup> This is upon the ground that the holder of such a position receives his powers only by the active consent of the courts, and is at all times subject to their control and direction; acting under the control of the agents of the State, he thereby becomes an officer of the State in a public, or at least quasi-public, capacity.

The power to control property of a deceased person to the end that it shall be applied to the payment of the just debts of the de-

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<sup>7</sup> See *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *Heim v. McCall*, 239 U. S. 175, 60 L. ed. 206, 36 Sup. Ct. Rep. 78.

<sup>8</sup> *Atkin v. Kansas*, above.

<sup>9</sup> In *re Mulford*, 217 Ill. 242, 75 N. E. 345. See also *Gallup v. Schmidt*, 183 U. S. 300, 46 L. ed. 207, 22 Sup. Ct. Rep. 162.

cedent, for the protection of those who were peculiarly dependent upon him, and who may otherwise become burdens on the public, and the remainder be transmitted to the persons or to the purposes the testator desired it to go or be applied to, rests in the State in its sovereign capacity. In exercising this governmental function the State has the clear right to call to its aid and to invest with official power only such persons as are residents within its territorial limits.<sup>10</sup>

It should be noticed that, although the functions of executors and administrators are in many ways analogous to those of trustees, it has been held unconstitutional for a State to discriminate against the citizens of other States with regard to the right to act as trustee.<sup>11</sup> This distinction seems a just one, for trustees derive their powers directly from the voluntary creators of the trust, and are in no sense officers of the law or of the courts.<sup>12</sup>

That any person holding even a quasi-public office and in any way responsible to the State for his actions may be required to be a citizen of the State is further substantiated by a recent decision holding that a city may properly restrict the business of a private detective to citizens of the State, as being a business of a quasi-official character.<sup>13</sup>

In several early cases the right to follow certain professions or occupations affected with a public interest was declared to be dependent entirely upon the will of the State, and subject to whatever regulations it should think proper to impose; and this decision was based upon a similarity of reasoning with the right of the State to extend the franchise or to grant public office to certain favored classes only.<sup>14</sup> Thus state statutes restricting the practice of medicine or law or the selling of liquor were upheld on this ground. For reasons similar to those previously mentioned, the right of the States to do this was not seriously questioned; and the courts did not endeavor especially to

<sup>10</sup> In re Mulford, above.

<sup>11</sup> Roby v. Smith, 131 Ind. 342, 30 N. E. 1093, 15 L. R. A. 792.

<sup>12</sup> Woerner, American Law of Administration, 2d ed., vol. i, sec. 10.

<sup>13</sup> Lehon v. City of Atlanta, 16 Ga. App. 64, 84 S. E. 608.

<sup>14</sup> See Austin v. State, 10 Mo. 591; Lockwood v. United States, 9 Ct. of Claims 346.

find any particular ground for their decisions beyond saying that such privileges were political in their nature and not dependent on citizenship. At a later period, however, there was considerable litigation upon this question, and the state laws involved were then justified under the police power. A discussion of the cases arising in that connection and the principles laid down by them is entered into elsewhere.<sup>15</sup>

*Proprietary Interests.*—Besides what have been termed by the courts political privileges, it has been settled that the citizens of the several States are not entitled by virtue of the Comity Clause to enjoy upon equal terms with the citizens of any State the use of property in which that State is vested with a proprietary interest and which it holds for the general benefit of its own citizens. The legal theory upon which the idea rests that certain kinds of property are held by the State in trust for its citizens, runs far back into the law of England. As in all countries where the feudal system prevailed, the title to all property within the country was originally in the king, who could grant it away to whomsoever he pleased. "The king," says Blackstone, "is the universal lord and original proprietor of all the lands in his kingdom, and no man doth or can possess any part of it but what has, mediately or immediately, been derived as a gift from him, to be held upon feudal services."<sup>16</sup> By Magna Charta a restraint was imposed upon his freedom with respect to granting rights of fishery in running waters;<sup>17</sup> and although the effect of this limitation upon the king's power of grant was a matter of some dispute, it seems to have been generally conceded that since that time the royal prerogative did not include the power to grant exclusive fishery rights in navigable waters.<sup>18</sup> In such rivers, said Lord Mansfield, "the fishery is common;

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<sup>15</sup> See below, Chapter V.

<sup>16</sup> Commentaries, vol. ii, p. 52.

<sup>17</sup> Blackstone, Commentaries, vol. ii, p. 39.

<sup>18</sup> *Duke of Somerset v. Fogwell*, 5 Barn. and Cress. (K. B.) 875; *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997.

it is *prima facie* in the King, and is public."<sup>19</sup> The title to the waters and the soil under them was still in the king, but he held it as a representative of and a trustee for the people of the realm. On the settlement of the colonies, similar rights passed to the grantees in the royal charters in trust for the communities to be established. At the American Revolution these rights, charged with a like trust, became vested in the original States within their respective borders, subject only to the rights surrendered by the Constitution to the Federal Government. The same theory was extended to the case of the acquisition of territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement; the same title and dominion passed to the United States for the benefit of the whole people and in trust for the several States to be ultimately created out of such territory. On the creation of these new States and their admission into the Union, the same rights vested in them as were already possessed by the original States in this respect.<sup>20</sup>

Very early in their history the various colonies passed acts with regard to fisheries and oyster dredging and planting, which prohibited non-residents from taking fish or oysters from their territorial waters. These laws remained in force after the Revolution, and the question was quickly raised with respect to their constitutionality. It was claimed that since these fisheries were held by the State for the common use of all of its citizens, the right to enjoy them was a privilege of all such citizens; and that a citizen of another State could no more be excluded from the exercise of this privilege than he could be prohibited from enjoying any other privilege or immunity accorded by the State to its own citizens. The first case in which this

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<sup>19</sup> *Carter v. Murcot*, 4 Burr. (K. B.) 2162.

<sup>20</sup> *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565.

claim was raised is *Corfield v. Coryell*.<sup>21</sup> Judge Washington, after giving his often-quoted outline of the privileges and immunities protected by the Comity Clause, goes on to say:

We cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the Constitution, the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all the other States the same advantages as are secured to their own citizens. A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the State against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the State. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use.

This decision was regarded as controlling by the various state and federal courts in all the similar cases arising in the following fifty years.<sup>22</sup> They are a unit in declaring that the denial of the right of each State to regulate the use of the common property of its citizens in any manner which it might see fit would be to annihilate the sovereignty of the States and in effect to establish a consolidated government. This opinion was carried so far that in one case it was held that a State could properly prohibit its own citizens from employing citizens of other States to gather oysters for them.<sup>23</sup> This would seem to have been rather a forced interpretation of the rule laid down in *Corfield v. Coryell*, since such a holding in effect restricts the right of citizens of other States to contract upon equal terms with

<sup>21</sup> 4 Wash. C. C. 371.

<sup>22</sup> See *Bennett v. Boggs*, Baldwin C. C. 60; *State v. Medbury*, 3 R. I. 138; *Dunham v. Lamphere*, 3 Gray (Mass.) 268; *Haney v. Compton*, 36 N. J. L. 507.

<sup>23</sup> *Haney v. Compton*, 36 N. J. L. 507.

citizens of the domestic State; and the propriety of this decision seems somewhat questionable, particularly since the non-resident was not engaged in gathering oysters for his own use but for that of his employer.<sup>24</sup> Nevertheless, in spite of the uniformity of these decisions, there seems to have existed some doubt as to the correctness of Judge Washington's reasoning. For example, in *Dunham v. Lamphere*,<sup>25</sup> in which the Massachusetts law regarding fisheries on the sea-coast was involved and was upheld on the ground that it made no discrimination between citizens of Massachusetts and citizens of other States, Chief Justice Shaw was somewhat dubious with regard to the decision in *Corfield v. Coryell*, and went no further than to say that it was based upon grounds "which appear plausible, if not satisfactory."

All doubt on the question was finally put at an end by the decision of the Supreme Court in *McCready v. Virginia*,<sup>26</sup> in which was involved a statute of Virginia prohibiting citizens of other States from taking or catching oysters or shell-fish or planting oysters in any of the waters of the State. The Court said, by Chief Justice Waite:

The States own the tidewaters . . . and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. . . . The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tidewaters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship. . . .

. . . Looking only to the particular right which is here asserted, we think we may safely hold that the citizens of one State are not

<sup>24</sup> See *Booth v. Lloyd*, 33 Fed. 593.

<sup>25</sup> 3 Gray (Mass.) 268.

<sup>26</sup> 94 U. S. 391, 24 L. ed. 248.

invested by this clause of the Constitution with any interest in the common property of the citizens of another State. If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious; the right thus granted is not a privilege or immunity of general but of special citizenship. It does not "belong of right to the citizens of all free governments," but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality.

The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone.

The reasoning upon which the Court bases its holding is in places somewhat confused, and the chief justice has gone to what seem rather unnecessary lengths in some parts of the decision; as for example, in his distinction between general and special citizenship. The regarding of the privileges and immunities appurtenant to the former class of citizenship as "those belonging of right to the citizens of all free governments" is also open to criticism, as has elsewhere been pointed out. But whatever may be thought of these parts of the reasoning, the decision itself has ever since been followed absolutely in similar cases; and it is now established beyond the shadow of a doubt that a citizen of one State is not, of constitutional right, entitled to share upon equal terms with the citizens of another State those proprietary interests belonging generally to the State as such. And, indeed, there would seem to be no question respecting the propriety of the limitation thus laid down, if

the nature of the interest possessed in this type of property by the State and its citizens is kept in mind. The interest of the latter is in nowise to be differentiated from their interest in that property over which they have actual rights of ownership. From the enjoyment of such property they may, of course, validly exclude all other persons. It would not be contended that a citizen of any State would have a constitutional right to share, equally with citizens of another State, land or its products in which the latter were tenants in common. And in property of the character now under consideration the situation is, to all intents and purposes, the same. The people of any State, therefore, acting through the State as their agent, may restrict the use of such property to a few of their own number, or license citizens of other States to use it, or they may absolutely exclude all but themselves from its enjoyment. In short, it is their own property, and they may take what measures they will to preserve it for their own use.<sup>27</sup>

The general rule upon this matter is now clearly settled. But with respect to the question as to the kinds of property in which the State is to be regarded as invested with a proprietary interest, no definite agreement has been reached so that one may set up a standard by which to be guided in making a decision. The cases which have been hitherto examined dealt with running waters and the soil under them, together with the fish swimming in them and the beds of shell-fish. Later cases, however, have extended the idea to other sorts of property, and the subject is at the present time in some confusion.

A leading case in this connection is *Geer v. Connecticut*,<sup>28</sup> in which a statute of Connecticut was under consideration which made it unlawful for any one to kill certain varieties

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<sup>27</sup> An interesting example of the power of the States in this connection is their ability to enforce the payment of a license fee for fishing in public waters from members of Indian tribes to whom the free use of such waters had been guaranteed by treaty with the Federal Government. *Kennedy v. Becker*, 241 U. S. 556, 60 L. ed. 1166, 36 Sup. Ct. Rep. 705; *Ward v. Race Horse*, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076.

<sup>28</sup> 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600.

of game birds for the purpose of conveying them out of the State. In rendering the decision Justice White goes into a very careful examination of the nature of the interest which the State has in *ferae naturae* as a general class. He finds that both at Roman and civil law it was recognized that such animals, having no owner, were to be considered as belonging in common to all the citizens of the State; and after citing the Code Napoleon to the same effect, he goes on to say:

Like recognition of the fundamental principle upon which the property in game rests has led to similar history and identical results in the common law of Germany, in the law of Austria, Italy, and indeed it may be safely said in the law of all the countries of Europe. . . . The common law of England also based property in game upon the principle of common ownership, and therefore treated it as subject to governmental authority.

Blackstone, whilst pointing out the distinction between things private and those which are common, rests the right of an individual to reduce a part of this common property to possession, and thus acquire a qualified ownership in it, on no other or general principle from that upon which the civilians based such right. . . . The practice of the government of England from the earliest times to the present has put into execution the authority to control and regulate the taking of game.

Undoubtedly this attribute of government to control the taking of animals *ferae naturae*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the States with the separation from the mother country, and remains in them at the present day. . . . Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State, . . . represents its people, and the ownership is that of the people in their united sovereignty.<sup>29</sup>

The Court went on to hold the statute under consideration constitutional, upon the ground that the common owner-

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<sup>29</sup> It was also said that the statute was possible of being upheld as a valid exercise of the police power, following from the duty of the State to preserve for its people a valuable food supply. See *Silz v. Hesterberg*, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; the *Abby Dodge*, 223 U. S. 166, 56 L. ed. 390, 32 Sup. Ct. Rep. 310.



ship of game implied the right to keep the property, if the sovereign so chose, always within its jurisdiction.<sup>30</sup> Although the case involved no question of discrimination against the citizens of other States, it definitely places wild game within the class of property which, under the ruling in *McCready v. Virginia*, the State may validly reserve for its own citizens entirely; and on this authority it has been specifically so held in several cases.<sup>31</sup> The power to preserve the game for the use of the citizens of a State carries with it the right to make this restriction effective by prohibitive regulations. Accordingly the State may deny to citizens of other States the privilege of buying shot-guns or other weapons for use in killing such game.<sup>32</sup>

In *Hudson Water Company v. McCarter*<sup>33</sup> a statute of New Jersey prohibiting the transportation of water into other States was upheld on similar grounds to those relied upon in *Geer v. Connecticut*. The privilege of acquiring rights in such property was regarded as qualified by the power of the State to insist that its natural advantages remain unimpaired by its citizens; so that it might validly prohibit the removal of these out of the State. The Court, however, does not go to the length of saying that a State may validly exclude citizens of other States from reducing water in its natural condition to possession within the State, though this result would logically follow; but contents itself with saying that since citizens of other States were left by the statute under consideration as free to purchase water within the boundaries of New Jersey as its own citizens, they were not in a position to complain of a

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<sup>30</sup> Upon the strength of the holding in this case, two lower federal courts have declared the Migratory Bird Act of 1913 unconstitutional. *United States v. Shauver*, 214 Fed. 154; *U. S. v. McCullagh*, 221 Fed. 288.

<sup>31</sup> See in re *Eberle*, 98 Fed. 295; *State v. Gallup*, 126 N. C. 979, 35 S. E. 180.

<sup>32</sup> *Patsone v. Pennsylvania*, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281.

<sup>33</sup> 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529.

deprivation of any privileges belonging to them by virtue of their state citizenship.<sup>84</sup>

By these decisions the State was regarded as possessing a proprietary interest in animals *ferae naturae* and in certain products of nature while still in their natural condition, and as capable, therefore, of regulating by whom and upon what conditions such property might be reduced to possession. On the other hand, there is a line of decisions with regard to certain other products of nature which hold that these may properly be reduced to possession while in their natural condition and are not the subject of any proprietary interest on the part of the State.

In *Ohio Oil Co. v. Indiana*,<sup>85</sup> for example, it was held that the surface proprietors within a gas field have the right to reduce to possession the gas and oil beneath. To the ordinary observer there would not seem to be a very essential difference between water flowing above ground and oils and gases seeping through the earth below. The Court, however, after citing several state cases in which an analogy had been drawn between gas and oil and animals *ferae naturae*, and these deposits had been termed minerals *ferae naturae*, says by Mr. Justice White :

If the analogy between animals *ferae naturae* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end to the case. This follows because things which are *ferae naturae* belong to the "negative community"; in other words are public things subject to the absolute control of the State, which, although it allows them to be reduced to possession, may at its will not only regulate but wholly forbid their future taking. But whilst there is an analogy between animals *ferae naturae* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has

<sup>84</sup> See also *Kirk v. State Board of Irrigation*, 90 Neb. 627, 134 N. W. 167. It would seem that where a river runs through more than one State, the upper State, in spite of its sovereign rights over the water, cannot use these to such an extent as to work material injury to the lower State. *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655. Two States so situated are, then, in a position very similar to that of individual riparian owners at common law.

<sup>85</sup> 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576.

the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas as it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals *ferae naturae* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists to the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce them to possession. . . . The enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath.<sup>36</sup>

The language here used has been made the basis of the decisions in *Lindley v. Natural Carbonic Acid Gas Company*<sup>37</sup> and *West v. Kansas Natural Gas Company*,<sup>38</sup> the one holding that mineral waters sifting underground through porous rock were not property held by the State for the common benefit of the public; the other that a State may not constitutionally prohibit natural gas and oil from being transported out of the State.

A review of the cases upon this whole question leads to the belief that the sorts of property in which the State is to be regarded as vested with a proprietary interest, and in the use of which it may accordingly discriminate in favor of its own citizens, are comparatively limited in number; and that this number will not be extended beyond its present compass. Over the animals *ferae naturae* within its borders; the waters running upon its surface and their beds, together with the fish in them; the public lands, including possibly the public roadways; the employment upon public

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<sup>36</sup> And, *semble*, that residents of other States who may be surface proprietors within the gas field may not.

<sup>37</sup> 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337.

<sup>38</sup> 221 U. S. 229, 55 L. ed. 716, 31 Sup. Ct. Rep. 564.

buildings and probably the appointment to public office; possibly over the atmosphere and the forests within its territory,<sup>89</sup> the State has full control and power to restrict their use to whomsoever and in whatsoever way it sees fit, without contravening any constitutional provisions. Beyond this, it is not believed that such a power extends. Nevertheless, it is a power which contains within it great possibilities of extension even within the boundaries outlined; and the increasing hold which the idea of public ownership is acquiring at the present time over popular fancy may very easily serve to bring out its potentialities in a more striking manner than any in which they have so far been developed.

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<sup>89</sup> See *Kansas v. Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 51 L. ed. 1038, 27 Sup. Ct. Rep. 618.

## CHAPTER V

### DISCRIMINATORY LEGISLATION UNDER THE POLICE POWER

It has been stated in a previous chapter that one of the rights secured by the Comity Clause to the citizens of the several States is the right to import and export property, and also the right to free ingress and egress personally upon terms of substantial equality with the citizens of the other States. It has never been questioned to any considerable extent, however, that a State may adopt proper quarantine and other police regulations with a view to the safeguarding of the health and welfare of its own citizens, although such regulations very evidently operate as restrictions upon the enjoyment of the privilege above named. So far as is known, there are no cases in which state regulations of this nature were concerned which expressly discriminated against citizens of other States. The cases involving this point are for the most part concerned with the question as to whether state laws of this character are unconstitutional as regulations of interstate commerce. In this connection there has been a line of cases dealing with state laws relative to the introduction of diseased cattle or cattle coming from districts in which a disease was prevalent.

These cases make no discrimination between citizens of different States, but rather against goods which are the products of different States. Properly speaking, therefore, they afford no ground for legislative enactments making personal residence a basis of classification, such as that residents of a State would thereby be permitted to introduce their property into the State, while a similar privilege would be denied to non-residents with respect to similar property. There have been no instances of state statutes having such an effect; but it is believed that they might

very possibly be upheld.<sup>1</sup> If the danger against which they seek to guard is one with respect to which residence or non-residence within the State might become a factor of some importance in determining the likelihood of its presence or absence, then such a law would be a proper means of protection upon the part of the domestic State. A statute of this character, then, would be constitutional, provided the fact of residence or non-residence bore some necessary relation to the evil guarded against. As will be seen later, the courts in some cases have taken the position that a police regulation to which non-residents were obliged to conform but from which residents, or at least certain classes of residents, were exempted, is not to be regarded as discriminating in any way against citizens of other States. This conclusion rests upon the ground that as to the exempted classes, the fact of their residence within the State is in itself sufficient to raise the presumption that they may safely be permitted freedom from conformity to the police regulations. The distinction drawn appears somewhat forced, and it would seem preferable to admit the existence of a discrimination, made, however, upon justifiable grounds.

The power of the State to exclude citizens of other States from its borders through quarantine laws hardly seems capable of doubt. It was said in *Railroad Company v. Husen*:<sup>2</sup>

The police powers of a State justify the adoption of precautionary measures against social evils. Under it, a State may legislate to prevent the spread of crime or pauperism or disturbances of the peace. It may exclude from its limits, convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases, a right founded on the sacred law of self-defense.<sup>3</sup>

It would probably not be questioned that a State would have the power to deny entrance within its limits to citizens

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<sup>1</sup> See *State v. Smith*, 71 Ark. 478, 75 S. W. 1081.

<sup>2</sup> 95 U. S. 465, 24 L. ed. 527.

<sup>3</sup> See also *Morgan Steamship Co. v. Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *Compagnie Française v. State Board of Health*, 186 U. S. 350, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811.



of another State, except under certain quarantine regulations, when the facts might show the prevalence of an epidemic of some contagious disease in the latter State. In such a case mere non-residence would be sufficiently indicative of danger to the citizens of the domestic State to justify the adoption of such a basis of distinction; and an equality of treatment could not properly be demanded upon the part of citizens of the State in which the disease in question prevailed. Although the citizens of every State may be regarded as possessing the right to free ingress to and egress from any other State upon equal terms with the citizens of the latter, they cannot be regarded as possessing any right to come into a State when suffering from "a contagious, infectious, or communicable disease," or when the fact of their non-residence would lead to the probability that their entrance into the State would result in injury to its people. If the means adopted are reasonable, there can properly be no question of the right of a State under its police power to discriminate against citizens of other States upon the grounds which have been outlined above, although this ruling may have the effect of denying to them privileges which the State grants to its own citizens.

An interesting phase of the power of a State to discriminate against the citizens of other States is afforded by the right, which has been sustained, of a State to exclude other than inhabitants of the State from the right to retail intoxicating liquors. In the earlier state cases the right of liquor selling was regarded as one which was public in its nature, and therefore not one inherent in citizenship so as to be guaranteed to the citizens of the several States.<sup>4</sup> The Supreme Court, also, in certain of its decisions bearing upon this point, sanctioned such discrimination upon the ground that this right is not one of those protected by the Comity Clause. Thus it was said in *Crowley v. Christensen*:<sup>5</sup> "There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen

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<sup>4</sup> See *Austin v. State*, 10 Mo. 591.

<sup>5</sup> 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

of the State or of a citizen of the United States."<sup>6</sup> This view is not capable of being squared with the now settled construction of this clause of the Constitution; namely, that, in general, citizens of other States may not be denied the enjoyment of any rights which a State may grant to its own citizens. If the power of the State to restrict the selling by retail of intoxicating liquors can be sustained, it must be upon the theory that such a business is one requiring police regulation, and that a resident of the State can be held liable more easily than a non-resident for the violation of the regulation imposed. The fact of non-residence must be regarded as constituting a special objection or danger.<sup>7</sup>

This whole question was considered at some length in the case of *Kohn v. Melcher*,<sup>8</sup> in which was involved a statute of Iowa forbidding any person to sell spirituous liquors within the State without a license, and providing that licenses should be granted to citizens of the State only. The claim was directly made in this case that the statute in question abridged the privileges and immunities of citizens of other States. With reference to this contention the Court said, speaking through Judge Shiras:

If the provisions of the statute . . . are intended to control the commerce in liquors to be used for mechanical and other legal purposes, so as to secure the traffic therein to citizens of Iowa, and exclude all others from participation therein, thus intentionally discriminating in favor of the citizens of Iowa, it would seem clear that the sections of the statute providing for the exclusion of all, save citizens of Iowa, from the right to engage in such traffic, would be unconstitutional and void. . . . Laws regulating trade and commerce and which are intended to secure to the citizens or products of one State exclusive or superior rights and advantages at the expense of the citizens of other States cannot be sustained. . . . That the States, for the purpose of restricting and eradicating the evils arising from the traffic in intoxicating liquors as a beverage,

<sup>6</sup> Similar dicta are to be found in *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Leisy v. Harden*, 135 U. S. 100, 34 L. ed. 128, 10 Sup. Ct. Rep. 681. See also *Foster v. Kansas*, 112 U. S. 205, 28 L. ed. 606, 5 Sup. Ct. Rep. 97; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 9 Sup. Ct. Rep. 6; in re *Hoover*, 30 Fed. 51; *Cantini v. Tillman*, 54 Fed. 969.

<sup>7</sup> See *Freund, Police Power*, sec. 710.

<sup>8</sup> 29 Fed. 433.



have the right to enact laws prohibitory thereof, cannot be questioned. If, however, in such acts, provisions are inserted which discriminate in favor of liquors manufactured in the State as against those manufactured in other States, or which protect the home dealer, by exacting a tax or license fee from the non-resident dealer, and not from the home dealer, then such provisions would be contrary to the Federal Constitution. . . . There is no doubt that the result of the statute is to entirely deprive citizens of other States of the right to sell in Iowa intoxicating liquors to be used for mechanical and the other legal purposes. It also practically confines the right to sell to a small part of the citizens of the State. Was it the intent of the legislature in enacting these provisions of the statute to grant greater privileges to the citizens of the State than are granted to those of other States in carrying on the business of buying and selling liquors for legal purposes, or were these provisions enacted as safeguards against violation of the law prohibiting sales of liquors to be used as a beverage. The difficulty of preventing evasion of the prohibitory laws is well known, and it is apparent that the permission to sell for medical and other legal purposes, unless carefully guarded and restricted, might prove to be a ready means for defeating the object and purpose of the statute. The State has the right to adopt all proper police regulations necessary to prevent evasions or violations of the prohibitory statute, and to that end, and for that purpose, has the right to restrict the sale for legal uses to such places, and by such persons, as it may be deemed safe to intrust with the right to sell. In cases in which it has been held that the state legislation could not be upheld, it will be found that the provisions of the statute were not intended to guard the community against evils arising from some traffic deemed injurious to the common weal, but were intended to secure to the citizens or products of the State an undue advantage; or in other words, under the pretext or guise of a police regulation, the true intent of the legislation was to place the products of citizens of other States at a disadvantage in carrying on commerce or business, and thereby secure the profits thereof to the citizens of the State enacting the particular law complained of. . . . Although, in effect, the citizens of other States, as well as the larger part of the citizens of Iowa, are debarred from selling in Iowa liquors to be resold for legal purposes, . . . yet this is but an incidental result; and as the intent and purpose of the restrictions, i. e., preventing violations of the prohibitory law, are within the police power of the State, it cannot be held that the sections of the statute under consideration violate any of the provisions of the Federal Constitution.<sup>9</sup>

It will be seen from the decision in *Kohn v. Melcher* that the controlling factor in the determination as to whether a law restricting the right of selling intoxicating liquors to residents of the domestic State is a valid regulation or an unconstitutional discrimination against citizens

<sup>9</sup> A similar holding was made in *Mette v. McGuckin*, 18 Neb. 323, 25 N. W. 338, affirmed without opinion in *Mette v. McGuckin*, 149 U. S. 781, 37 L. ed. 934, 13 Sup. Ct. Rep. 1050.

of other States, is the intent and purpose of the state legislature in passing the enactment. In other words, if this intent is to prevent violations of the state laws with regard to the sale of liquor, the law will be upheld; if its underlying purpose is to show a favoritism to home dealers, it will be declared invalid. How the intent and purpose is to be determined, or how far the action of the state legislature in passing the law will be controlling, are questions which the Court does not attempt to answer. The solution of such a question will manifestly depend largely upon the circumstances of each case. But in general it would seem that when, as in *Kohn v. Melcher*, there is present a prohibitory law of the State, this fact would in itself raise a *prima facie* presumption that the law restricting the sale of liquor to residents of the State was intended to render the prohibitory law enforceable; whereas, in the absence of a law of this nature, the presumption as to the validity of a statute restricting the sale of liquor to residents of the State would be reversed. Thus, in Arkansas, an act has been held unconstitutional which prohibited the sale of wine in certain districts by non-residents, but allowed any person growing or raising grapes or berries in such districts to sell wine of his own make upon the premises where the grapes or berries were grown and the wine was made.<sup>10</sup>

A rather difficult question in connection with the police power of the States is that raised by the laws of some States relative to the exercise of certain professions, such as law, medicine, and dentistry. It is not to be doubted that the State may validly require a certain degree of skill and professional learning in those engaged in these pursuits, since they obviously are closely related to the health and safety of the citizen of the State. For this purpose it may properly pass laws requiring those entering such professions to take out a license, which is granted only upon evidence being shown that the applicant is possessed of the amount

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<sup>10</sup> *State v. Deschamp*, 53 Ark. 490, 14 S. W. 653; *State v. Marsh*, 37 Ark. 356.

of skill deemed requisite by the state legislature. Many States, however, have passed laws which require residence in the State for specified periods of time before the license will be granted, irrespective of the previous training or experience of the applicant; and in others the laws relating to the pursuit of these professions have provided for the issuance of licenses to practitioners who have practiced within the State for a certain number of years prior to the enactment of the law requiring a license, while practitioners who have practiced in other localities during that time have been required to undergo an examination as a condition precedent to being granted a license. Such laws plainly discriminate in favor of residents, but have nevertheless been generally upheld as valid police regulations.

An early and leading case in this connection is *Ex parte Spinney*,<sup>11</sup> in which was upheld a statute exempting persons who had practiced medicine or surgery in the State for a period of ten years preceding the passage of the act from the penalties imposed for the practice of medicine by unqualified persons. The Court, in holding the law valid, says:

This law makes no distinction in terms between our own citizens and citizens of other States. It merely prescribes the qualification that practitioners are required to possess and admits all to practice who can bring themselves within the rule, whether they are citizens of this State or other States. But it is argued that one of the sorts of qualifications recognized is such that of necessity none but citizens of this State can possess it. This is so, but it does not follow, therefore, that the law is unconstitutional; for if the qualification is in itself reasonable, and such as tends to subserve the public interests, the legislature had the right to exact it, and the circumstance that citizens of other States cannot possess it may be a misfortune to them, but is no reason why a precaution proper in itself should be dispensed with. Thus it appears that the solution of this question also involves a preliminary inquiry into the policy of the law.

This, the Court goes on to say, is to be decided by the legislature.<sup>12</sup>

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<sup>11</sup> 10 Nev. 323.

<sup>12</sup> To the same effect are: *Harding v. People*, 10 Colo. 387, 15 Pac. 727; *State v. Greene*, 112 Ind. 462, 14 N. E. 352; *People v.*

This case seems to base the validity of the statute in question upon two grounds; namely, that the act was not in its terms discriminatory; and that even if made discriminatory by one of its requirements, this would not be sufficient to render it unconstitutional, provided the requirement in question was reasonable, its reasonableness as determined by the legislature being binding upon the Court. The first ground is clearly not sustainable: a State cannot validly pass a law, though by its terms constitutional, if its necessary effect is to contravene a prohibition imposed upon the State by the Federal Constitution.<sup>13</sup> The holding must rest entirely upon the second ground named; and, in point of fact, this ground forms the basis for the decisions in most of the cases cited. The view ordinarily taken by which this argument is justified is well set forth in *State v. Randolph*,<sup>14</sup> with reference to a similar enactment, as follows:

The act does not grant privileges or immunities to any citizen or class of citizens either within or without the State; it only establishes a rule of evidence by which qualification to practice medicine and surgery is to be determined. It makes the fact of a person being engaged in the practice when the law took effect sufficient evidence of his fitness to continue the practice of his profession without an examination in the same way that the diploma of the student is accepted as sufficient evidence of his fitness to commence the practice without an examination.

But the fact that, in prescribing this rule of evidence, the

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*Phippin*, 70 Mich. 6, 37 N. W. 888; *Craig v. Board of Medical Examiners*, 12 Mont. 203, 29 Pac. 532; *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *State v. Rosenkranz*, 30 R. I. 374, 75 Atl. 491; *State v. Randolph*, 23 Ore. 74, 31 Pac. 201, 17 L. R. A. 470; *Driscoll v. Commonwealth*, 93 Ky. 393, 20 S. W. 431; *People v. Hasbrouck*, 11 Utah 201, 38 Pac. 118; *State v. Currans*, 111 Wis. 431, 87 N. W. 561; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 172; *People v. Griswold*, 213 N. Y. 92, 106 N. E. 929; *Gosnell v. State*, 52 Ark. 228, 12 S. W. 392; *State v. Vandersluis*, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119; *State v. Creditor*, 44 Kan. 565, 24 Pac. 346; *Eastman v. State*, 109 Ind. 278, 10 N. E. 97; *Orr v. Meek*, 111 Ind. 40, 11 N. E. 787; *Richardson v. State*, 47 Ark. 562, 2 S. W. 187; *State v. State Medical Examining Board*, 32 Minn. 324, 20 N. W. 238; *Fox v. Territory*, 2 Wash. Terr. 297, 5 Pac. 604; *Logan v. State*, 5 Tex. App. 306; *People v. Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923.

<sup>13</sup> *Henderson v. Mayor of New York*, 92 U. S. 259, 23 L. ed. 543.

<sup>14</sup> 23 Ore. 74, 31 Pac. 201.

State may discriminate against the citizens of other States, seems to be carrying the power of the State to provide for the public welfare and interests to a considerable extent.

[It might well be asked upon what grounds the State may regard the fact of a person's being engaged in practice within its limits for a certain period as endowing him with more satisfactory qualifications for continuing the practice than one similarly engaged elsewhere; and why a person engaged in such practice during the same period in another State, or even licensed to practice in that other State, should not be entitled to demand equality of treatment with his more fortunate fellow-practitioner living within the domestic State.] It may be said that local conditions, climate, and similar circumstances peculiar to the domestic State and the familiarity with them possessed by the local practitioner, are sufficient to warrant the drawing of the distinction. This basis hardly seems a very satisfactory one, nor is any such offered by the cases upholding statutes of the character under consideration. But in view of the practical unanimity with which the distinction mentioned has been sustained, the power of the States to draw such a line may properly be regarded as settled, in the absence of any authoritative ruling to the contrary from a higher source. It should be noticed, however, in this connection, that the rule in New Hampshire is directly contrary to the majority of decisions on this point.<sup>15</sup>

A case has never been before the Supreme Court in which this question was considered from the point of view of discrimination against the citizens of other States. But in *Dent v. West Virginia*<sup>16</sup> the Court uses language which seems to sustain the construction adopted by the majority of the state courts. In this case a statute similar to those in question in the cases cited above was involved, it being claimed that the law was in violation of the Fourteenth

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<sup>15</sup> *State v. Hinman*, 65 N. H. 103, 18 Atl. 194; *State v. Pennoyer*, 65 N. H. 113, 18 Atl. 878.

<sup>16</sup> 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.

Amendment. The opinion of the Court upholding the statute reads in part as follows:

It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in some respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can thus be taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained by an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

It will be seen from the cases bearing upon this point that the power of the States to prescribe qualifications required to be met in order to practice medicine and allied professions is limited only by the requirement that such qualifications must not be arbitrary, but must bear a reasonable relation to the subject-matter of the legislation. That requirements of the character reviewed are not arbitrary, even though discriminatory, is stated affirmatively by the courts of all the States that have ruled upon the matter,

with the exception of those of New Hampshire.<sup>17</sup> There are no cases in which similar requirements have been expressly held to be so unreasonable as to be invalid; and it is difficult to determine the extent to which the States may properly go in this direction. It has been suggested that although a certain period of residence in the State may be a proper requirement, in order that the applicant's moral character and general attainments may be learned, yet if this required period be made unnecessarily long, an unconstitutional discrimination against non-residents might result.<sup>18</sup> On the other hand, it has been said that the States could possibly deny entirely to non-residents the right to practice medicine and similar professions.<sup>19</sup> There have been no cases in which either of these positions is taken; but the language of the courts in some decisions would seem to lean more strongly to the side of the latter.<sup>20</sup> At all events, it is to all practical purposes well settled that a State has the right to discriminate against the citizens of other States in this respect; and that to render such legislation invalid, the mere fact of discrimination alone will not suffice.

The question as to the power of the State to exclude non-residents from the practice of law upon equal terms with

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<sup>17</sup> See, e. g., *State v. Vandersluis*, 42 Minn. 129, 43 N. W. 789; *State v. Creditor*, 44 Kan. 565, 24 Pac. 346; *People v. Griswold*, 213 N. Y. 92, 106 N. E. 929.

<sup>18</sup> Willoughby, *Constitutional Law*, vol. i, p. 216.

<sup>19</sup> Freund, *Police Power*, sec. 711.

<sup>20</sup> In *State v. Creditor*, above, for instance, it is said: "The legislature saw fit to permit those practising in the State when the act was passed to continue to practice without diploma or other evidence of competency. It may be, as contended, that the fact of being in the practice is not the best test or evidence of skill and capability, but the courts have nothing to do with the expediency or wisdom of the standard of qualification fixed, nor with the tests adopted for ascertaining the same. The legislature proceeded upon the theory that the fact that they have been engaged in the practice within the State was sufficient evidence of their proficiency in that profession. This fact is made by the legislature an evidence of skill and competency equivalent to a diploma from a dental college, and the wisdom of either test is a question for the legislature and not for the courts." This seems to approach closely to a declaration that the courts will accept the determination of the legislature that a given requirement is not arbitrary.

residents, does not appear to have directly arisen in any case. In *Bradwell v. Illinois*<sup>21</sup> the claim was made that a state statute restricting the practice of law to licensed attorneys infringed the privileges and immunities of citizens of other States. This contention was dismissed summarily by the Court, it appearing that the plaintiff in error was a citizen of the State, and as such not in a position to put forward this claim. In the concurring opinion of Justice Bradley, Justices Swayne and Field assenting, it is said, however: "It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State." The practice of law is not so closely related to the public health, safety, or morals as the practice of professions such as medicine or dentistry; but it has been generally recognized that the police power of the State, even when restricted to the narrow sense of the term, includes the power to protect its citizens against fraud. As a protection of this nature, as well as a measure tending to the interests of the public morals, it has been generally recognized that the States have the right to regulate the qualifications for admission to the bar as they may deem most advisable; and the same arguments by which the statutes relative to the practice of medicine and dentistry have been justified in the cases examined above, would be equally applicable to similar statutes with respect to the practice of law.<sup>22</sup>

Under its power to prevent fraud from being practiced upon its own citizens, the State may also pass laws requir-

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<sup>21</sup> 16 Wall. 130, 21 L. ed. 442.

<sup>22</sup> But see in *re Day*, 181 Ill. 73, 54 N. E. 646, in which, while admitting the right of the legislature to prescribe reasonable conditions, excluding from the practice of law persons through whom injurious consequences might result to the State, the court nevertheless cites with approval *State v. Pennoyer*, 65 N. H. 113, 18 Atl. 878, as authority for the statement that the place of residence cannot furnish a proper basis of distinction and would constitute an arbitrary discrimination, making an enactment based upon it void.

ing non-residents to give security for costs before the right to sue in the state courts is granted them, although such security may not be required of its own citizens.<sup>23</sup> Plainly, the fact of non-residence in this case is in itself sufficient to constitute a danger to the citizens of the State. With regard to its own citizens the State may proceed against their person or property in order to meet the costs of a case, if these are not paid. With respect to non-residents, on the contrary, the State may be unable to resort to such means. A requirement, therefore, that the latter class should pay the costs in advance, or give sufficient security for their payment, is a measure of self-protection and entirely valid. Similarly, it has been recently held that a State may require non-residents taking out licenses to drive automobiles in the State to appoint an agent within the State upon whom process may be served.<sup>24</sup>

In *Geer v. Connecticut*<sup>25</sup> it was pointed out that the right of the State to reserve the property held in trust by it for the benefit of its citizens to its own citizens, or to admit the citizens of other States to the enjoyment thereof only upon the fulfillment of certain conditions, may very well be based upon the police power of the State to conserve its natural resources.<sup>26</sup> This right would not apply, however, with equal force to all the kinds of property coming under the decision in *Geer v. Connecticut*; and it seems preferable to rest this power of the State upon the proprietary character of its relationship to such property.

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<sup>23</sup> *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. ed. 806; *Nease v. Capehart*, 15 W. Va. 299; before, Chapter III, and cases there cited.

<sup>24</sup> *Kane v. New Jersey*, 242 U. S. 160. In *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140, it was held that the movement of motor vehicles over highways, being attended by constant and serious danger to the public, and also being abnormally destructive to the highways, is a proper subject of police regulation by the State. It is possible, then, that the State could discriminate between its own citizens and those of other States in granting licenses to drive automobiles within it.

<sup>25</sup> 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600.

<sup>26</sup> In *State v. Kofines*, 33 R. I. 211, 80 Atl. 432, the decision was based squarely on this ground.

An interesting question with regard to the power of the States to protect their citizens from fraud is afforded by the so-called "blue sky" laws in force in many States, and recently sustained as constitutional in the Supreme Court.<sup>27</sup> These laws as a general rule provide that no foreign corporation, partnership, or individual shall sell or negotiate for the sale of stock, bonds, debentures, and other securities except upon being licensed by state authorities. In two of the cases in the lower federal courts in which such laws were held unconstitutional, one of the grounds relied upon was that there was a denial to the citizens of other States of an equality of treatment with citizens of the domestic State in respect to doing business there, so as to discriminate against them in their general rights of contract.<sup>28</sup> In the state laws before the Supreme Court there was no question involved of discrimination against the citizens of other States, the prohibitions imposed being operative with equal force upon home and foreign dealers. The decision of the Court, however, is based upon grounds sufficiently broad to justify such discrimination if it had existed. The measures were held proper means of protection on the part of the States in behalf of their citizens. Any regulation of the character bearing a reasonable relation to the subject-matter of legislation would be proper; and there would be little doubt that regulations based upon a question of residence would be regarded as bearing such a reasonable relation. The Supreme Court, while admitting that such statutes may curb and burden legitimate business, holds that the interests of legitimate business are not paramount to the police power of the States to protect their citizens from fraud.

The intangibility of securities, they being representatives, or purporting to be representatives of something else, of property, it may be, in distant States and counties, schemes of plausible pretensions,

<sup>27</sup> *Hall v. Geiger-Jones Co.*, *Caldwell v. Sioux Falls Stock Yards Co.*, *Merrick v. Halsey*, October term 1916, No. 438, 386, and 413, decided January 22, 1917.

<sup>28</sup> *Bracey v. Darst*, 218 Fed. 482; *Compton v. Allen*, 216 Fed. 537.

requires a difference of provision and the integrity of the securities can only be assured by the probity of the dealers in them and the information which may be given of them. This assurance the State has deemed necessary for its welfare to require; and the requirement is not unreasonable or inappropriate. It extends to the general market something of the safeguards that are given to trading upon the exchanges and stock boards of the country, safeguards that experience has adopted as advantageous. Inconvenience may be caused and supervision and surveillance, but this must yield to the public welfare.

It will be seen that, with the possible exception of the "blue sky" legislation, the statutes which have been held constitutional as valid exercises of the police power, although discriminatory in effect as regards the citizens of other States, are all examples of the exercise of the police power in the narrow sense of the word, as relating to the public health, safety, or morality. It has been sometimes contended that the police power ought properly to be always confined to subjects of this nature;<sup>29</sup> and it has been argued that by so doing a definite limit would be placed upon this power so that the uncertainty which now surrounds it would be in large measure removed. Irrespective of the advantages or disadvantages of this scheme, it is not possible of adoption at the present time. In view of the liberal interpretation which has been extended to the term by both state and federal courts in recent years, it may well be said that in scope the police power has no definite limits, but extends beyond questions of the public health, safety, and morality to those of the public prosperity and convenience.

This widened operation of the police power does not seem to have encroached as yet to any appreciable extent on the equality of privileges and immunities secured to citizens of other States.<sup>30</sup> Can it possibly be so extended here? Could a State validly pass laws granting privileges and immunities to its own residents, but denying them, or limiting them, with respect to non-residents, not upon the ground

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<sup>29</sup> See L. D. Mallonee, "Police Power: Proper and Improper Meanings," in *American Law Review*, vol. 50, p. 861.

<sup>30</sup> But see *Commonwealth v. Shaleen*, 215 Pa. St. 595, 64 Atl. 797, in which was upheld a statute restricting to residents the granting of licenses to work as miners in anthracite coal mines.

that such discrimination was necessary in order to protect its people from danger to their health, safety, or morals, but upon the ground that the measure would subserve the public convenience or prosperity, or that the strong and preponderant opinion of its citizens demanded it? It is not believed that this can be done. As respects discriminatory legislation against citizens of other States, it is submitted that this should be regarded as valid only under the exceptional circumstances which call for the exercise of the police power in its restricted sense. To hold otherwise would be to render this part of the Constitution practically valueless. It might be very much to the convenience and prosperity of the citizens of a State that the citizens of other States should be prohibited from holding property, entering into contracts, or suing in the courts, upon terms of equality with themselves; the preponderant voice of the population of the State might very conceivably urge such measures as being in the nature of a public benefit. Yet they would almost certainly be unconstitutional.

Of the various causes which gave rise to the present system of government in this country, none was more important than the desire to do away with discrimination by one State against another. Now, at this late date, should the States be given permission to resume this power of discrimination under the guise of benefit to their own citizens? It is true that it has been frequently held that a State may validly pass laws granting special privileges to certain classes of persons without this being such a discrimination as will constitute a denial of the equal protection of the laws and a violation of the Fourteenth Amendment. The great majority of labor legislation is so justified. But there are not present in that case certain special elements which enter into the case now under consideration. There are not present the aligning of one State against another, the possibility of retaliatory legislation, the resulting bad feeling between the States, the revival of sectional-

ism with its attendant evils, all of which would very possibly, or even very probably, come to pass if the States are to be allowed a practically free rein in passing discriminatory legislation aimed at the citizens of other States, which the widened scope of their police powers in this connection might conceivably give to them. Moreover, such legislation, though perhaps for the benefit of the people of any particular State, is to the positive detriment of the people of the country at large; no such element presents itself in any other sort of valid police legislation. In view of the questionable benefits and probable evils which would result from any discriminatory legislation or action based upon the citizenship of the parties affected, it is urged that the fact of non-residence must constitute a positive danger or threat of danger to the inhabitants of the domestic State in order that the legislation in question may be upheld as constitutional.

## CHAPTER VI

### POWER OF THE STATES OVER FOREIGN CORPORATIONS

By a foreign corporation is meant, briefly, a corporation organized under the laws of another State or country. The term includes as well those associations which, though they may be declared by the laws of the country of their origin to be not corporations, are possessed of the peculiar features generally attributed to those bodies by the law of the State in which the question may come up. Thus, in *Liverpool Insurance Company v. Massachusetts*<sup>1</sup> the question at issue was whether the plaintiff in error could be regarded as a foreign corporation. Though what is generally known as a joint-stock company, and by Act of Parliament expressly declared not to be a corporation, it was nevertheless held that the possession by the association of the majority of the essential characteristics of a corporation as understood by the law of this country was sufficient to cause it to be regarded as one in fact; and as such it was held to come within the provisions of a statute of Massachusetts regulating foreign corporations.

In the case of *Bank of Augusta v. Earle*<sup>2</sup> the question arose whether a bank incorporated by the laws of Georgia, with a power, among other things, to purchase bills of exchange, could lawfully exercise that power in the State of Alabama. It was contended that a corporation composed of citizens of other States was entitled to the benefit of the Comity Clause, on the ground that the Court should look behind the act of incorporation and see who were the members of the corporation; and that if these were found to be citizens of other States, the privileges and immunities of

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<sup>1</sup> 10 Wall. 566, 19 L. ed. 1029.

<sup>2</sup> 13 Pet. 586, 10 L. ed. 274.

citizens of Alabama relative to the purchase of bills of exchange should be extended to them. The Court, while holding that the bank could lawfully exercise the power to purchase bills of exchange, reached this conclusion, not by the above course of reasoning, but through the application of the principles of comity. The contention that the members of the corporation were to be regarded as individuals carrying on business in the corporate name, and therefore entitled to the privileges of citizens in matters of contract, would have the result, the opinion goes on to say, of extending to them the privileges of citizens of the other State, while their membership in the corporation would exempt them from the liabilities entailed by the exercise of the same privileges upon the citizens of that State. This result, says the Court, "the clause of the Constitution referred to certainly never intended to give."

In *Paul v. Virginia*<sup>8</sup> the question was definitely settled respecting the constitutionality of a statute regulating foreign corporations and discriminating against them by the imposition of conditions not required to be met by local corporations. The Court says, speaking through Mr. Justice Field:

A grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual and exempting them (unless otherwise especially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. . . . The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States,—a comity which is never extended when the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States; but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

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<sup>8</sup> 8 Wall. 168, 19 L. ed. 357.

The Court goes on to show that if such special privileges as those secured to the incorporators in their own State by a grant of corporate existence were likewise to be secured to them in other States, an extra-territorial operation would be given to local legislation, in no way intended by the Comity Clause, and subversive of the independence and harmony of the several States; and proceeds to point out the evils which such an interpretation of this clause would cause by the indiscriminate admission of foreign corporations, with no possibility of limiting their number, or of requiring them to give publicity to their transactions, to submit their affairs to proper examination, to render them subject to forfeiture of their corporate rights in case of mismanagement, or to hold their officers to a strict accountability for the manner in which the business of the corporation was managed by making them liable to summary removal.<sup>4</sup>

Since the decision in *Paul v. Virginia*, the rule there laid down has become firmly established, and has been affirmed in a long line of cases in both state and federal courts; such parts of the decision as were not strictly necessary to the settling of the point at issue have also received judicial confirmation upon repeated occasions.<sup>5</sup> The power to ex-

<sup>4</sup> The same conclusion had previously been reached in several lower courts. See *Commonwealth v. Milton*, 12 B. Monr. (Ky.) 212; *Slaughter v. Commonwealth*, 13 Gratt. (Va.) 767; *Warren Manufacturing Co. v. Etna Insurance Co.*, 2 Paine C. C. 501; *State v. Lathrop*, 10 La. Ann. 398; *Tatem v. Wright*, 23 N. J. L. 429; *People v. Imlay*, 20 Barb. (N. Y.) 68.

<sup>5</sup> See, e. g., *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972; *Liverpool Insurance Co. v. Mass.*, 10 Wall. 566, 19 L. ed. 1029; *Philadelphia Fire Association v. New York*, 119 U. S. 110, 20 L. ed. 342, 7 Sup. Ct. Rep. 108; *Pembina Mining Co. v. Penn.*, 125 U. S. 181, 31 L. ed. 650, 8 Sup. Ct. Rep. 737; *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92; *National Mercantile Co. v. Mattson*, 45 Utah 155, 143 Pac. 223; *Norfolk and Western R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 10 Sup. Ct. Rep. 958; *Cumberland Gaslight Co. v. West Virginia and Maryland Gas Co.*, 186 Fed. 385; *Home Insurance Co. v. Davis*, 29 Mich. 238; *Phinney v. Mutual Life Insurance Co.*, 67 Fed. 493; *State v. Hammond Packing Co.*, 110 La. 180, 34 So. 388; *Ulmer v. First National Bank*, 61 Fla. 460, 55 So. 405; *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *People v. Wemple*, 131 N. Y. 64, 29 N. E. 1002.

clude carries with it the power to prescribe regulations regarding the carrying on of business by the corporation after admission by the State<sup>6</sup> and also the power to make these regulations effective by the enactment of penal laws.<sup>7</sup> The general rule, however, that foreign corporations may be so regulated by the several States leads at times into somewhat perplexing situations. Most of these situations, however, it is not within the province of this study to discuss.

In the case of *Cook v. Howland*<sup>8</sup> a rather nice point was raised in this connection. A state statute authorized foreign corporations to do business in the State after meeting certain required conditions, but by means only of agents who were citizens of the State. The United States Life Insurance Company, a New York corporation, after having complied with the conditions mentioned and having been licensed to carry on its business within the State, constituted Cook, who was a resident and citizen of New York, one of its agents, and asked the insurance commissioners to issue him a license authorizing him to act as their agent in Vermont. This the commissioners refused to do, in accordance with the provisions of the statute. Cook then filed a petition for a writ of mandamus to compel the issuance of such a license, claiming that his privileges and immunities as a citizen of New York were infringed. The Court held in effect, relying chiefly on *Hooper v. California*, that a refusal of such a license to a non-resident did not deprive him of any rights guaranteed to him by the Federal Constitution, basing this on the ground that the State, having full power to regulate the admission of foreign corporations, may properly require them to do business by resident agents only; and that to license a non-resident

<sup>6</sup> *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518.

<sup>7</sup> *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. Rep. 207; *Moses v. State*, 65 Miss. 56.

<sup>8</sup> 74 Vt. 393, 52 Atl. 973.

agent to conduct the business of a foreign corporation in the State would be to give him a right to manage the business of his agency in a way prohibited to his principal, a position incompatible with the governing principles of the law of agency.

The propriety of this decision seems somewhat questionable, although the point is an extremely close one. It may indeed be argued that a State can validly impose any conditions which it may think proper upon the doing of business within its limits by a foreign corporation. But it would not seem that this power of the State permits it to deny to citizens of other States the right to engage in a lawful occupation within it upon equal terms with its own residents. In *Hooper v. California* the prohibition against acting as agent for a foreign corporation was directed against all persons within the State, so that the two cases may easily be differentiated. It would seem, indeed, that a much closer resemblance is borne by this case to that of *Blake v. McClung*,<sup>9</sup> elsewhere discussed. Here, in holding void a statute of Tennessee setting forth the conditions to be fulfilled by foreign corporations, whereby it was provided that creditors who were residents of the State should be accorded a priority in the distribution of assets to the payment of debts over all simple contract creditors who were residents and citizens of other States, the Court said:

We hold such discrimination against citizens of other States to be repugnant to the second section of the fourth article of the Constitution of the United States, although, generally speaking, the State has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several States by the supreme law of the land. Indeed, all the powers possessed by a State must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States.<sup>10</sup>

<sup>9</sup> 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

<sup>10</sup> See, also, for limitations upon the general language used in *Paul v. Virginia*, the dissenting opinion of Harlan, J., in *Philadelphia Fire Association v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Ducat v. Chicago*, 10 Wall. 410, 415, 19 L. ed. 972, 973.

*Constitutional Guaranties of Protection to Foreign Corporations.*—Although foreign corporations are not entitled to the protection of the Comity Clause, they enjoy that of the Fourteenth Amendment; and therefore no State may deprive them of their property without due process of law or deny them the equal protection of the laws.<sup>11</sup> A discussion of what is included under the term “due process of law” would be out of place here; and it will be sufficient to say that corporations are entitled to as full protection under this clause of the Fourteenth Amendment as are natural persons.

The clause according them the equal protection of the laws while within the limits of any one State is of peculiar interest in that its effect is to invest foreign corporations with the equality of treatment in respect to many rights which it was decided they could not claim under the Comity Clause. In general it may be said that the State still retains absolutely the power to exclude foreign corporations from doing business within its limits, except in the case of corporations in the employ of the Federal Government or engaged in interstate commerce. But if the corporation has once entered the State and is doing business there, a discrimination against it on the part of the State in favor of local corporations engaged in the same sort of business is an unreasonable classification and a denial of the equal protection of the laws. This exact point was at issue in *Southern Railway Company v. Greene*.<sup>12</sup> In that case the plaintiff in error had been doing business for several years in the State of Alabama, having complied with all the conditions prescribed for its admission; and from year to year had paid the license tax required of every corporation engaged in the same sort of business, whether domestic or foreign. Subsequently the State enacted a law, applying

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<sup>11</sup> See *Santa Clara County v. Southern Pacific Ry. Co.*, 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 8 Sup. Ct. Rep. 737.

<sup>12</sup> 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287.

only to foreign corporations, by which the plaintiff in error was assessed a large amount upon its capital. The argument was made on behalf of the State that this statute was capable of justification as an exercise of the right of classification of the subjects of taxation, entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It was said that there was a distinction between the tax imposed on domestic and that imposed on foreign corporations, since in the one case the tax was for the privilege of being a corporation, while in the other it was for the privilege of doing business in the State. This argument of Court dismissed rather summarily, calling the distinction fanciful; and went on to hold specifically that to tax a foreign corporation for carrying on business by a different and more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws.

The effect of this clause of the Fourteenth Amendment is, then, to prevent discriminatory legislation on the part of a State against a foreign corporation, at least as fully as such legislation in respect to non-resident natural persons is prohibited by the Comity Clause, in the case where the foreign corporation has become a person within the jurisdiction of that State. What is necessary on the part of the corporation to bring it within this classification cannot be stated conclusively. The ruling in *Southern Railway Company v. Greene* makes it clear that when the corporation has entered the State under an express license to do business, and has acquired tangible property there, it has become such a person. Probably the same would hold true in the case that it had entered the State and acquired tangible property under an implied license.<sup>13</sup> The mere ownership of business good-will, on the other hand, has been held not suffi-

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<sup>13</sup> See the concurring opinion of White, J., in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

cient to entitle a foreign corporation to the protection of this part of the Fourteenth Amendment.<sup>14</sup>

Foreign corporations are also protected to some extent against discriminatory legislation in that the obligation of contracts entered into by them with a State cannot be impaired by subsequent action on the part of the State. Thus, where a state statute provided that foreign corporations after entering the State should be subject to all the liabilities of domestic corporations, this was tantamount to saying that they should be subjected to the same liabilities as domestic corporations; and such a statute would constitute a contract on the part of the State that the same treatment should be accorded to both classes as long as a foreign corporation which had availed itself of the right to enter under it should have the right to continue in the State as a corporation. A subsequent statute would be invalid and unenforceable, therefore, which differentiated between the two classes of corporations by imposing heavier liabilities upon the foreign than upon the domestic.<sup>15</sup>

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<sup>14</sup> *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 58 L. ed. 127, 34 Sup. Ct. Rep. 15.

<sup>15</sup> *American Smelting Co. v. Colorado*, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198. See also *Chicago, Rock Island, and Pacific R. Co. v. Ludwig*, 156 Fed. 152, affirmed in 216 U. S. 146.

## CHAPTER VII

### CONCLUSION

In the chapter on the general scope of the Comity Clause it was pointed out that the privileges and immunities commonly spoken of as secured by the Constitution to the citizens of the several States are, as a matter of fact, in no way guaranteed by any provision of that instrument; that the utmost that can be said in this connection is that no State may grant those privileges and immunities to its own citizens and refuse them to those of other States. Properly speaking, therefore, there exists only one privilege or immunity of which it can be said that it may be demanded as of right by the citizens of every State in the Union. That one is equality of treatment, freedom from discriminating legislation. That this is so is far from being clearly recognized or stated by the courts, even at the present time.

It is true that in practically all cases dealing with this general subject it is recognized that discriminating legislation by a State in favor of its own citizens and adverse to those of other States is forbidden by virtue of the Comity Clause. At the same time, however, the language of Judge Washington in *Corfield v. Coryell* is again and again cited with approval and set up as the authority upon which some state statute is adjudged constitutional or unconstitutional. The list of privileges and immunities given in that case is, in the first place, purely obiter, since the sole point at issue was with respect to the right of a State to reserve the privilege of fishery in its public waters to its own citizens. But, disregarding this fact, the language of Judge Washington is absolutely incompatible with the settled construction of the clause in question; namely, that the utmost that a

citizen of any State can claim by it is as favorable treatment in any other State as is accorded by the latter to its own citizens.

This incompatibility is the necessary result of the basic idea of the whole decision in *Corfield v. Coryell*. This rests upon the idea that every person has vested in him certain natural rights, which attach of themselves, with no need for any further justification. The State itself has as one of the primary purposes for its organization the securing of these natural rights as against the attempts of other men to deprive the holder of their exercise; for in a state of nature, in which each man is without restraint, there would be no way in which to preserve to every individual those natural rights which he should properly enjoy. Since a primary object of the social body known as the State is to protect its members in the free exercise of these fundamental rights, such rights are to be regarded as inherent in the idea of citizenship. No State may properly deny them to its own citizens. Therefore, in Judge Washington's opinion, a constitutional provision that the citizens of each State should be entitled to all privileges and immunities of citizens in the several States, meant simply an extension of the principle that no State could deny to its own citizens these fundamental principles so as to include the citizens of the other States of the Union. In its final analysis, then, the language in *Corfield v. Coryell* means that there are certain definite rights "which belong of right to the citizens of all free governments," and which may "be all comprehended under the following heads: the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." These rights each State must extend to its own citizens and, by virtue of the Comity Clause, to the citizens of other States. Beyond these there would necessarily be no rights which a citizen of one State could claim in another.

It is evident that there is nothing in common between this

idea of a number of defined rights which are absolutely secured to citizens of each State in every other State, and the idea that the most the citizens of one State can claim in another is the same treatment as that State affords its own citizens, except with regard to the exercise of public rights and in so far as the safety and the welfare of the citizens of the State demand police legislation to the contrary. As it happens, the private rights with regard to which the citizens of each State may demand a freedom from discriminatory legislation, and the "fundamental" rights spoken of by Judge Washington, are largely identical. Probably it is for this reason that the courts of the present day still cite the case of *Corfield v. Coryell* so frequently with approval. Nevertheless there is an essential difference between them; for if these rights are conceived of as fundamental, they are absolutely guaranteed, while according to the correct view they are secured only in so far as they are granted by each State to its own citizens. According to the proper interpretation of *Corfield v. Coryell*, no State may deny these rights to its own citizens, and consequently no State may deny them to citizens of other States; according to the accepted construction of the Comity Clause, any State may deny them to its own citizens, and, if it does so, may deny them to citizens of other States. Such differing conclusions cannot be harmonized; and yet, as far as is known, no court has commented upon the incompatibility between them. The often-quoted definition of the privileges and immunities of citizens of the several States given in *Corfield v. Coryell* is most misleading, and has been practically overruled by the decisions which are based upon a proper interpretation of the clause.

¶ A very necessary result of the older doctrine of fundamental rights would have been to render identical the privileges and immunities of citizens of the several States and the privileges and immunities of citizens of the United States, with the consequent subjection of every act of any

State to the legislative discretion and judicial review of the Federal Government. It is true that in the Slaughterhouse Cases, Justice Miller cites *Corfield v. Coryell* with approval, and says that the rights secured to the citizens of the several States are the fundamental rights of citizenship, embracing nearly every civil right known to man. But he also says expressly that the Comity Clause declares no more than that each State must grant such privileges to citizens of other States as it grants to its own citizens. He thus falls into the same error of confusion as has just been described.

In the dissenting opinions of Justices Field and Bradley there is, on this point at any rate, a much more logical argument; and, granting the correctness of their premises, the conclusions which they draw would necessarily follow and should have prevailed. They except as correct the definition in *Corfield v. Coryell* by which the privileges and immunities of citizens of the several States are to be regarded as the fundamental privileges inherent in citizenship in all free countries. Now if it be admitted that there are certain inherent rights of citizenship which belong as such to the citizens of all free countries, then these must necessarily attach to citizens of the United States, for the United States is undoubtedly a free country in this sense. Also these rights are the same for the citizens of every free country, since they are those natural rights for the protection of which the State is established. Therefore, argued the dissenting justices, there can be no difference between the privileges and immunities of citizens of a State and those of citizens of the United States. This line of reasoning is perfectly logical, but it rests entirely on the idea that there are these fundamental rights of citizenship, such as are described in *Corfield v. Coryell*. The fact that the decision of the majority of the Court was opposed to the conclusion drawn necessarily negatives the soundness of the premises upon which this is based. And the fact that it is no longer an open question as to the distinction between the

privileges and immunities of state and federal citizenship, must have as a direct consequence the result that the idea of fundamental, inherent, natural rights is abandoned; and that the whole basis of Judge Washington's definition of the privileges and immunities of citizens of a State can no longer be regarded as valid.

[It cannot be too strongly emphasized, in dealing with this clause of the Constitution, that its whole purpose and its only effect are to prevent discrimination by one State against the citizens of another. To leave each State with the power to visit all but its own citizens with the disabilities of alienage would be to render any idea of an effective Union and a feeling of community of interests among the citizens of the United States an utter impossibility.] Such discrimination was in part provided against by entrusting the Federal Government with the exclusive power to enact regulations of interstate commerce, except such as are local in their character and do not demand a uniformity throughout the country. It was early held by the courts that discrimination by a State against the right of citizens of other States to import goods and sell them, or in any way against the products of other States, constituted a regulation of interstate commerce which the States were without power to enact. The part of the Fourteenth Amendment prohibiting the denial by any State of the equal protection of the laws to any person within its jurisdiction, is also a provision operating in a field similar to, though more inclusive than, that of the Comity Clause. But the latter, by its express denial of the right of any State to make citizenship alone a basis of discrimination, is still a most valuable aid in preserving the feeling of nationality which is essential to the preservation of this country as a united whole. It is for this reason that in another chapter it has been argued that the police power of the States should be restricted to a narrow field when residence or non-residence is made the occasion for its exercise. If the States should

be regarded as capable of passing laws discriminating against citizens of other States in cases other than where the fact of this difference in citizenship constitutes a positive danger to their people, then the wide extent to which such power could go would in large measure destroy the efficacy of the Comity Clause entirely, and might easily lead to retaliation upon the part of other States. There would almost certainly ensue a pitting of locality against locality such as would result in the bitterness of feeling and the jealousy between the States which the Comity Clause was primarily intended to prevent. It is believed that such a state of affairs is still guarded against by this provision of the Constitution; that today, as at the time of the founding of this government, this clause may be esteemed "the basis of the Union."

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