Cornell Law Review

Volume 28
Issue 4 *June 1943*

Article 8

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LEGAL BARRIERS TO INTERSTATE MIGRATION†

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II. ATTACKS UPON THE CONSTITUTIONALITY OF THE EMIGRANT AGENCY LAWS

A. Discrimination and Unequal Protection of the Laws

A charge to the courts, early made and frequently repeated, is that the emigrant agency laws apply in a discriminatory fashion. The constitutional issues are not always clearly set forth. Nonresident seekers of labor at times invoked equal protection of the laws guaranteed by the fourteenth amendment of the federal Constitution. Since the criterion for applicability of the emigrant agency laws was the prospective location of the workers solicited and not the location of the agents seeking them,[1] the problem ultimately revolved about the differences between hiring for employment *within* and *without* the state.

The supreme court of Georgia, only twelve years after the Civil War, set the judicial tone for answering the charge in *Shepperd v. Commissioners*.[2] This is the earliest case on emigrant agency laws of which the author has record. In January, 1877, plaintiffs in error, under fear of being prosecuted and punished for unlawfully carrying on the business of emigrant agents, complied with the act of 1876[3] and paid their money into the county treasury. They then applied to the county commissioners for an order of refund, and upon a refusal, petitioned for mandamus. The superior court refused the writ and the high court, rather than consider the proposed remedy, proceeded to discuss the constitutionality of the act in view of plaintiffs' challenge. The court denied that the law was discriminatory on two grounds: (1) Hiring for employment *beyond* the state was the only business at issue and the license applied to all who engaged in it, residents as well as nonresidents; (2) Were hiring for employment *within* the state a business as well, it would be so dissimilar in effect from its out-of-state counterpart as to justify relief from equivalent licensing. The language of the court on these points follows:

> "It is said that the discrimination lies in requiring an expensive license as a condition of hiring laborers within the state to be employed beyond

†This is the second of two installments under this heading. The first part of Mr. Roback's article appeared in (1943) 28 CORNELL L. Q. 286. [Ed.]

[1]Nonresidence as a ground for discrimination is suggested by a few exemptions written into current emigrant agency laws. See Part I of this article, (1943) 28 CORNELL L. Q. 286, 300. The separate question whether the laws deny equal protection to the laborers involved has received little notice from the courts. See note 7 *infra*.

[2]59 Ga. 535 (1877).

[3]Ga. Acts 1876, p. 17.

the state, without imposing a like burden on hiring for employment within the limits of the state. But the license required is for carrying on a business; and it does not appear that hiring for internal employment has become a business here, or is pursued as such by any person or persons. This is enough to dispose of the objection. But if it were otherwise, no authority has been cited, and we know of none, that would prevent the state from acting upon occupations (carried on within the state) in a way to incumber some of them with a tax or license fee, and leave other occupations, dissimilar in tendency, though not in nature, to the free will of those who might be inclined to engage in them. Suppose two rival establishments were in active operations in our midst, one engaged in offering the laboring population inducements to leave, and the other engaged in offering them inducements to remain, could not the state discriminate between the two in police and fiscal legislation? Would she be obliged to grant the same indulgence, and show the same favor, to an instrumentality which tended to depopulate her territory, as to one of opposite tendency? It is true, that to go out of the state, for employment, is not necessarily to remove or withdraw permanently; but, doubtless, a large percentage of hirelings who go out on contracts of employment never return. Persons who make it a business to hire laborers here for employment elsewhere, may be required to procure and pay for a license."

The same court had under review a later version of the emigrant agency law in *Williams v. Fears,* decided in 1900.[4] The equal protection clause of the fourteenth amendment was there charged against the law, and the court disposed of the contention by citing and adhering to *Shepperd v. Commissioners*. When the case came before the United States Supreme Court in the same year Chief Justice Fuller also referred to the early Georgia case and added: "We are unable to say that such a discrimination, if it existed, did not rest on reasonable grounds, and was not within the discretion of the state legislature."[5] No conflict with the fourteenth amendment was seen. Subsequent state court decisions have followed this course. Thus in 1902 the South Carolina supreme court said in *State v. Napier,*[6] echoing the Georgia decision of 1877:

"The business which seeks to induce laborers to leave the State and the business which promotes the employment of laborers within the State are so different in their tendencies for good or evil to general interest, as to justify a different classification and treatment with respect to them.

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[4]110 Ga. 584, 35 S. E. 699 (1900).

[5]Williams v. Fears, 179 U. S. 270, 276, 21 Sup. Ct. 128, 130 (1900). The Court also cited *American Sugar Refining Co. v. Louisiana,* 179 U. S. 89, 21 Sup. Ct. 43 (1900), upholding a state law which imposed a license tax on sugar refiners but exempted planters and farmers grinding and refining their own sugar.

[6]63 S. C. 60, 41 S. E. 13 (1902).

> All persons falling within the class named in the statute are in all respects subject to the same requirements without any discrimination whatever."

In 1937 the Virginia supreme court of appeals observed: "It appears settled that the difference between a 'labor agent' and an 'emigrant agent' affords a reasonable basis for the classification involved in the statute under consideration."[7]

B. Prohibitory, Arbitrary or Unreasonable Classification

The emigrant agency laws have been attacked as a prohibitory exercise of state power over a legitimate business or occupation. Since the courts have rested their judgment on what they considered the source of this power to be, it is appropriate here to discuss the character of the state authority asserted to justify enactment of the emigrant agency laws.

We revert to the reasoning of the Georgia supreme court in *Shepperd v. Commissioners*.[8] The court could observe that hiring for internal employment had not yet become a business only because the legislature had not designated it a business for purposes of licensing. Obviously persons were being hired in Georgia for internal as well as for external employment, the relevant distinction being the ultimate location of the workers. The court in fact admitted that the "nature" of the two pursuits was identical though not their "tendency." If then, the state could distinguish between the two in its police and fiscal legislation, and "incumber" one with license fees, the law by such logic sought to eliminate the tendency or possible effect of this business and not to control the conduct of the business itself. Expressed otherwise, *all* consequences of hiring for external employment were considered harmful to the state, and not only *some* consequences. The law by its nature was prohibitory in intent and not regulatory; the court's use of the word "incumber" is suggestive in this regard. It is to be noted that the court justified the law in terms of the benefits accruing to the state by retention of the laborers rather than by control of the recruiting abuses to which these laborers may have been subjected. The question was not raised whether the "laboring population" and the "hirelings" themselves suffered an infringement of constitutional rights.

The court's reference in *Shepperd v. Commissioners* to "police and fiscal" legislation suggested a dual authority for enactment of the emigrant agency

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[7]Cole v. Commonwealth, 169 Va. 868, 193 S. E. 517 (1937). In this case defendant contended that the laborers as well as himself were denied equal protection of the laws because the law was vicious and partial in operation. See also *In re* Craig, 20 Haw. 483 (1911); Joseph v. Randolph, 71 Ala. 499 (1882).

[8]*Supra* note 2.

laws with which the courts have wrestled ever since. Between that decision in 1877 and the United States Supreme Court case in 1900, two adverse state court decisions were rendered which may have influenced state legislatures to designate formally their emigrant agency laws as revenue taxes on occupations rather than as police measures. The Alahama supreme court in *Joseph v. Randolph*,[9] decided in 1882, invalidated the state law either as a police or as a revenue measure. The court stated in its conclusion:

> "The legislative intent then is plain upon the face of the act. Its purpose is to prevent free egress of laborers, from the counties designated, out of the State. There is no tax upon the right of hiring or inducing them to go elsewhere. But a tax of two hundred and fifty dollars, in the form of a license, is exacted of every one who makes a contract with a lahorer, or otherwise offers him an inducement to leave the State, whether for the service of the particular employer or hirer, or for that of other persons. The license required might thus amount to twice or three times the value of the hireling's lahor. It requires no great draft upon judicial knowledge to declare that such a tax *is in its nature prohibitory,* and its natural effect, pursuant to its obvious purpose, is to seriously clog and impair the laborer's right of free emigration."

As we noted above,[10] the court plainly intimated that approval would have been given to a law taxing a business or occupation rather than the single act of hiring for outside employment.

Then, in 1893, the supreme court of North Carolina in *State v. Moore*[11] voided an emigrant agency law[12] of that state for want of uniformity as a tax and for want of regulatory features as a police measure. This law expressly excluded from its operation all counties west of a certain line, except a few specifically named. For soliciting labor in the remaining counties the emigrant agent was required to pay a fee of $1,000 into the state treasury; failure to do so constituted a criminal offense, punishable by stipulated fines or imprisonment. The defendant, without a license, hired six laborers in New Hanover County for use outside the state. A decision in his favor from the New Hanover criminal court was appealed by the state.

In the opinion of the court, if the act imposed an occupation tax, it was plainly discriminatory because some counties were excluded from its application. (The inference is plain that the court would find no objection with a law that covered all counties in the state.) But as a police measure, the law was unacceptable because it unduly or substantially prohibited a person from

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[9]*Supra* note 7.
[10]Part I, (1943) 28 CORNELL L. Q. 286, 305.
[11]113 N. C. 697, 18 S. E. 342 (1893).
[12]N. C. Acts 1891, c. 75.

pursuing a lawful occupation. To justify such legislation the business had to be inherently harmful or dangerous, and the occupation of an emigrant agent did not fall in this class. The court said further:

> "It cannot be seriously contended that a laborer under our system of government, as indicated by the unquestionable authorities to which we have referred, does not possess the right of hiring his services to anyone, either within or without the State. And if he may do this, we are unable to see, as we have just remarked, how an agent or other persons engaged in hiring him to be employed without the State, can be considered as following an occupation, which in itself, is inherently dangerous or harmful in the sense mentioned above."[13]

The court then proceeded to consider whether the license was restrictive or prohibitory, setting as the true test of police control protection of the laborer by preventing recruiting abuses rather than protection of the state by preventing removal of the laborer. The court stated:

> "While the probable harm and inconvenience of immigration to the public may not be averted by such legislation, it is of the greatest importance to all of the citizens of the State that the inexperienced and artless laborer may not be imposed upon by the false representations and other fraudulent practices of an emigrant agent, and it is one of the highest duties imposed upon the lawmakers to prevent such abuses by prescribing rigid and appropriate regulations under which the said occupation can alone be followed."

The court found an "entire absence" of police supervision and held that the police power could regulate but not indirectly prohibit.

> "In this case, however, we have no hesitation in reaching the conclusion that the act in question is not and was not intended as a mere regulation, but its object was either to tax or to restrict or prohibit that particular occupation mentioned therein. This is evident from the fact that it does not contain any of the features of a police regulation, nor is it connected in any way with any police supervision."

In 1898 Georgia embodied her emigrant agency law in tax acts providing for levies upon various occupations. Several other states followed suit around the turn of the century.[14] When *Williams v. Fears* came before the Georgia

[13]From the authorities cited, the court adduced equally the right of the laborer and of the labor agent to be free in choosing a lawful occupation. *In re* Jacobs, 98 N. Y. 98 (1885); People v. Gillson, 109 N. Y. 389, 17 N. E. 349 (1888); Butchers' Union Slaughter-House Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, 4 Sup. Ct. 652 (1884); Bertholf v. O'Reilly, 74 N. Y. 509 (1878). These authorities, it may be noted, provided the substance of the well-known definition which the Supreme Court gave to "liberty" of the fourteenth amendment in *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427 (1897), and to which the Court annexed the "right of locomotion" in *Williams v. Fears*. See note 140 *infra*.

[14]See notes 24, 26, 29, *etc. infra*.

supreme court in 1900,[15] the court noted that whereas the previous emigrant agency laws in 1876 and 1877 provided for a license, the law was now part of the tax acts—

> " . . . these acts describing the tax imposed upon emigrant agents as a specific tax, and that occupation being embraced in the act along with other occupations of various character; and the act distinctly recites that it is passed for the purpose of collecting a tax for the support of the government and the public institutions, for educational purposes, and to pay the public debt. It thus being clear that the sum required to be paid is a tax upon an occupation and not a license to do business, the question as to whether it is so excessive as to amount to a prohibition of the carrying on of the business referred to is not involved in this case, nor is such a question at all raised in the present case."

The court saw no conflict with requirements of the state constitution, adding: "The right of the legislature to tax occupations and classify the same for taxation is so well settled now, that such an objection [by accused] needs nothing more than a passing notice."

When in the same year the Supreme Court of the United States took this case on appeal, Chief Justice Fuller noted at once the observation of the state court that emigrant agents by the tax acts of 1898 were subject to a specific tax in common with many other occupations, the declared purpose of the levy being for the support of government; and that the question whether the tax was so excessive as to be prohibitory did not arise, and was not raised. The Supreme Court thereupon considered that the question before it was whether the law should be rejected because of conflict with the federal Constitution. In deciding for the state, as indicated below,[16] the Court obviously was impressed by state tax levies for numerous occupations. It noted, for example, that dealers in futures were required to pay $1,000 annually in each county of operation, that circus companies were required to pay $1,000 each day of exhibition in towns and cities of a certain size, *etc.* The Court concluded with respect to the emigrant agency provision:

> "The general legislative purpose is plain, and the intention to prohibit this particular business cannot properly be imputed from the amount of the tax payable by those embarked in it, even if we were at liberty on this record to go into that subject.
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> "It would seem, moreover, that the business itself is of such nature and importance as to justify the exercise of the police power in its regulation. We are not dealing with single instances, but with a general business, and it is easy to see that if that business is not subject to

[15] *Supra* note 4.
[16] See pp. 505, 522 *infra*.

regulation, the citizen may be exposed to misfortunes from which he might otherwise be legitimately protected."

This language is noteworthy. The Court validated the emigrant agency law as a taxing measure for the support of government, blinding itself to the true purpose of the law and precluding a discussion of its prohibitory character. Then the Court proceeded to voice the opinion, obviously a dictum, that the business was amenable to police regulation. As justification it advanced protection of the laborer, even though in another part of the decision it denied that the laborer's constitutional right of free egress was impaired by the law.[17] Now the state court in this case was anxious to distinguish the law from its earlier versions which referred to licensing rather than to revenue; in so doing, the state court made no mention of need to protect the laboring population by exercise of the police power. Both parties to the controversy appearing before the Supreme Court plainly took the issue, in accord with the ruling of the court below, to involve a tax or revenue act and not a police regulation.[18] The Supreme Court may have been motivated to deliver its dictum by a general awareness of abuses rampant in the conduct of private employment agencies.[19] Possibly the Court was infiuenced by the simple reference in the early Georgia case of *Shepperd v. Commissioners* to the propriety of the enactment in terms of both fiscal and police legislation; though "police" was not intended there in the sense of regulating recruitment practices.[20] The *Shepperd* case was the only emigrant agency decision cited by the Supreme Court. The Chief Justice also may have been influenced by *Joseph v. Randolph,* a full copy of which was appended to the brief of plaintiff in error; pointed reference to the "general business" now considered rather than "single instances," which were the crucial point for the Alabama court's rejection of police control,[21] is suggestive in this regard.[22] How the

[17]See pp. 521, 522 *infra.*

[18]According to plaintiff in error, "As the supreme court of Georgia holds this law to be a tax or revenue act, further authority is not needed to the effect that it cannot be sustained as a police regulation." Brief for Plaintiff in Error, p. 5. And see Brief for Defendants in Error, p. 5.

[19]According to Justice Brandeis [dissenting opinion in Adams v. Tanner, 244 U. S. 590, 600, 37 Sup. Ct. 662, 666 (1917)]: "The evils incident to private employment agencies first arrested public attention in America about 1890." In 1901 the supreme court of Illinois, reviewing an act of 1899 [ILL. REV. STAT. (Hurd, 1899) p. 848], stated: "That the public welfare demands legislation prescribing regulations and restrictions to protect against the evils of imposition and extortion which have manifested themselves in the conduct of private employment agencies is not contradicted by counsel for plaintiff in error. . . ." Price v. People, 193 Ill. 114, 61 N. E. 844 (1901). *Cf. Ex parte* Dickey, 144 Cal. 234, 77 Pac. 924 (1904).

[20]See p. 485 *supra.*

[21]See Part I, (1943) 28 CORNELL L. Q. 286, 305.

law could in fact regulate an essentially interstate activity, or even begin to regulate without a single prescription as to how the business must be carried on, the Chief Justice did not undertake to say. The North Carolina case of *State v. Moore,* which invalidated an emigrant agency law as completely devoid of police character, received no notice by the Supreme Court.[23]

With the stamp of approval from the United States Supreme Court, the states renewed or increased their levies on emigrant agents in each successive tax statute. The courts by recourse to *Williams v. Fears* explained the laws in terms of either (or both) the state taxing or police powers, and the few former decisions to the contrary were abandoned. They were unwilling to call the levies prohibitory.

A North Carolina law of 1901 in one section levied a state tax of $25 on emigrant agents and in another section prescribed that every individual conducting a business on which a specific tax was levied, should pay the required tax for every separate location in which the business was carried on. Still another section authorized the county to levy the same tax and no more.[24] One Hunt was indicted by special verdict for procuring, without payment of the tax, hands to be employed by the Norfolk and Western Railway Company in Virginia and West Virginia. On appeal, the supreme court of North Carolina in *State v. Hunt*[25] rejected, among other things, defendant's demurrer to indictment as in conflict with the state constitution. The court held that the tax was not a restriction on the business, any more than a tax on any other business, that *Williams v. Fears* put it within the exercise of the police power, and that the reasonableness of the tax was a matter for the legislature. Only when enacted solely as a police regulation, said the court, could that body consider its unreasonableness. Declaring the tax in this case to be reasonable, the court said that *State v. Moore,* on which defendant relied, had a dissimilar set of facts, and to the extent that it conflicted with *Williams v. Fears* it was overruled.

An act of 1903[26] in the same state levied upon emigrant agents an annual

[22]But Georgia officials, as defendants in error, wished to distinguish *Joseph v. Randolph* from the case at bar, as involving in the former case the police and not the taxing power. Brief for Defendants in Error, p. 5.

[23]Both the state court below and the plaintiff in error before the Supreme Court cited *State v. Moore.*

[24]N. C. Laws 1901, c. 9, §§ 84, 102, 104. Apparently the adverse decision in *State v. Moore* had inspired a drastic (though temporary) reduction from the original license tax of $1,000. However, Furches, C. J., dissenting in *State v. Hunt,* 129 N. C. 686, 691, 40 S. E. 216, 219 (1901), maintained that the ambiguous wording of the act, and the right of each county to duplicate the state tax, might make the required payment larger than under the earlier tax.

[25]129 N. C. 686, 40 S. E. 216 (1901).

[26]N. C. Acts 1903, c. 247, § 74.

tax of $100 for the state and $100 for each county in which the business was carried on. By special jury verdict one Roberson was found guilty of violating the law. The supreme court of North Carolina conceded[27] defendant's contention that the statute was an exercise of the power to tax trades and professions rather than a police regulation. According to the court, the brief of defendant seemed to suggest that the case of *State v. Moore* held a tax of $1,000 imposed by act of 1891 excessive and prohibitive. In that case, explained the court, the act was held not to be a tax measure for want of uniformity, and prohibitory only as a police measure. Pointing out that the act of 1903 under review was part of the revenue act, the court took its guiding decision to be *State v. Hunt.* In the *Hunt* case the tax was $25 and in the instant case $100, but the court was reluctant to pass on the constitutionality of the tax measure because of the amount levied, stating: "We may inquire into the question of *power,* but not as to the manner of its exercise."

In *Kendrick v. State,* decided in 1904,[28] the supreme court of Alabama held that the license upon emigrant agents[29] under review, if sustained at all, must be sustained under the general power to tax occupations. In the opinion of the court, the fact that the tax was described in the act as a license did not render it any the less a tax on occupations for revenue. Furthermore, the fact that it was contained in a special act rather than in a general revenue bill was held not material. The court considered that the legislature could provide for revenue by separate bills if it so wished. The constitutional provision as to uniformity of taxation was held inapplicable to a license tax on occupations, the court agreeing to examine into the question of constitutionality only when discrimination among members of the same class of occupations was so great as to manifest an intention to burden and crush out a particular one. In this case the court saw no data in the record to permit a judgment whether the license tax was so excessive and unreasonable. It noted that the amount of the tax was identical with that sustained by the supreme courts of Georgia and of the United States in *Williams v. Fears.*

The supreme court of South Carolina, sustaining[30] in 1902 a law of the state which imposed a $500 license upon emigrant agents for every county of operation,[31] held that the law conformed to the constitutional requirement of uniformity in taxation and suggested that issuance of the license constituted a police regulation. The court said:

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[27]State v. Roberson, 136 N. C. 587, 48 S. E. 595 (1904).
[28]142 Ala. 43, 39 So. 203 (1904).
[29]Ala. Acts 1903, p. 344.
[30]State v. Napier, 63 S. C. 60, 41 S. E. 13 (1902).
[31]S. C. Laws 1898, pp. 812, 813.

"It is easy to see that the business is of such nature that the legislature might well see fit to thus regulate it, not only for the protection of the agricultural and manufacturing interests of the State, but for the protection of the laborers themselves against the acts and solicitations of designing and irresponsible persons, who may ply such a vocation in order to levy contributions from the ignorant and allured laborers, and then not be found when the laborers, according to appointment, appear at the railroad station to take their departure with him to their fields of labor. Payment of the license fee and the issuance of the license by the proper authority, afford some guarantee or evidence of good faith in the conduct of such business."

In 1919 when the same court sustained[32] a law imposing a license of $2,000 upon emigrant agents for each county of operation,[33] it maintained that the statute was enacted in exercise of the state's police power. In support of this proposition, the court adduced the decision in *State v. Napier,* discussed immediately above, and the dictum from *William v. Fears.* Thereupon it stated:

"When the doing of an act comes within the police power, the legislature has the authority to prohibit it entirely or to enact such regulations as it may deem advisable. If it undertakes to regulate such an act by requiring a license, the object is the protection of the public, and it is not intended for the benefit of the licensee. The defendant, therefore, has no right to complain, even though the statute may be regarded as prohibitory in its effect."

The court rejected a charge that the license fee placed upon the business was not graduated but prohibitory and discriminatory in violation of a provision in the state constitution.[34] It pointed to the provision as being permissive rather than mandatory and denied that the constitution intended license taxes on occupations, falling within the police power, to be graduated. The court said:

"Such a requirement would not be of any benefit to the public, but would limit the power of police, which has been defined as the State's right of self-defense. *State v. Aiken,* 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345. It would be unreasonable to suppose that it was the intention of the Constitution to require a graduated license tax in those cases where the licenses were mere instrumentalities in the enforcement of the police power, as in the present case."

The supreme court of Mississippi, sustaining[35] in 1918 a state law which

[32]State v. Reeves, 112 S. C. 383, 99 S. E. 841 (1919).
[33]S. C. Cr. Code 1912, § 896.
[34]S. C. Const. of 1896, Art. X, § 1.
[35]Garbutt v. State, 116 Miss. 424, 77 So. 189 (1918).

imposed an annual license of $500 upon emigrant agents for each county of operation,[36] rejected appellant's charge that the amount of license was prohibitory in the following language:

> "In view of the activity of labor agents in Mississippi within the past few years, and the free emigration of laborers to other states, especially the heavy transportation of colored laborers to the Northern states—amounting the past year to a veritable 'exodus'—we are not prepared to declare the tax prohibitory. The amount of the tax is primarily a legislative question."

The only instance known to the writer when the amount of an emigrant agency tax may have been judicially disapproved occurred in connection with an initial provision of the Texas law.[37] At the first called session in May, 1929, the legislature levied an occupation tax on emigrant agents amounting to $7,500.[38] A Michigan beet sugar company, engaged in extensive recruitment of Texas-Mexican labor, applied in the federal district court of Northern Texas for an injunction against the enforcement of this act. A temporary injunction was granted, the court apparently being influenced by the excessive amount of the tax.[39] To meet this objection, the Texas legislature immediately repealed the law and enacted a new one which provided for an annual state occupation tax of $1,000 and an annual county occupation tax graduated according to the population in the county of operation.[40] The same company, in the name of a recruiting agent, again sought to enjoin enforcement of the law. Plaintiff contended in part that the new law would prevent him from following his avocation of securing employment for the unemployed because the tax was prohibitory. The state countered this charge, maintaining that

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[36]Miss. Laws 1912, c. 94.

[37]FREUND, POLICE POWER (1904) § 489, 527, makes it appear that the emigrant agency laws in *Joseph v. Randolph* and *State v. Moore* were struck down merely because "the license fee was prohibitive." See the discussion *supra* pp. 486, 487. In coding the West Virginia laws, of which Acts 1927, c. 16 and Acts 1929, c. 12 levied a $5,000 fee on emigrant agents, the code committee omitted these tax provisions "as being prohibitory and therefore unconstitutional." A legislative note in the 1937 Code (§ 921) observes that the parts omitted by the code committee are restored.

[38]Texas Gen. and Spec. Laws 1929, 1st called session, c. 104, p. 253. Section 2 stipulated a $5,000 tax for use of the state and a $2,500 tax for use of the county, both to be levied in each county of operation.

[39]The writer has found only secondary references to this order. See Dallas Morning News, June 2, 1929; San Antonio Express, June 2, 1929; LAWS RELATING TO EMPLOYMENT AGENCIES IN THE UNITED STATES AS OF JULY 1, 1937 (U. S. Dep't of Labor Bull. No. 630), p. 11; TAYLOR, MEXICAN LABOR IN THE UNITED STATES [Univ. of Cal. Pub. in Economics, Vol. 6, No. 5, (1930)], 331.

[40]Texas Gen. and Spec. Laws 1929, 41st Leg., 2d called session, c. 11, p. 16. Another law of the same legislative session (c. 96, p. 203) provided for an annual license fee of $10 and detailed regulations to be observed by emigrant agents.

six agents had duly complied with the law and paid their fees.[41] The court in *Hanley v. Moody* et al.[42] sustained the law as a valid exercise of the police power and then declared: "It having been determined that power vests in the state to regulate a court may not declare occupation taxes unreasonable when the facts show that a number of such agents have paid the taxes and complied with the law."[43] In concluding this part of the inquiry the court said: "While the tax imposed upon the emigrant agent is large, and while the plaintiff alleges that he is unable to pay it, we are not prepared to enjoin it as an illegal and oppressive exercise of the state's sovereign power."

The court seemed to rely upon *Williams v. Fears* in precluding a judgment as to the prohibitory character of the occupation tax, but justified the law under the state's police power in accordance with later decisions of the Supreme Court, for example, *Brazee v. Michigan* decided in 1916.[44] Mr. Justice Reynolds, speaking for the Court in the latter case, had stated:

> "Considering our former opinions it seems clear that without violating the Federal Constitution a State, exercising its police power, may require licenses for employment agencies and prescribe reasonable regulations in respect of them to be enforced according to the legal discretion of a commissioner. The general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the legislature can properly protect them."

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[41] *Cf.* the following statement in a report of Texas employment service officials, September, 1940, *Hearings before Select Committee to Investigate the Interstate Migration of Destitute Citizens* (hereinafter cited as *Tolan Committee Hearings*), 77th Cong., 3d Sess., part 5, 1810: "That the occupation tax provisions for emigrant agents in Texas has [*sic*] been largely inactive is apparent from the fact that, according to the records, only one company has ever paid the State occupation tax of $1,000. That was shortly after passage of the Texas emigrant agency law." If this statement is true, it suggests that the state as defendant was referring to compliance with the nominal license law rather than with the onerous occupation tax law. But the court rested the case on the alleged fact that six emigrant agents had paid occupation taxes.

[42] 39 F. (2d) 198 (N. D. Tex. 1930).

[43] By setting this criterion the court shuts out from the business of recruiting all but the wealthiest operators, who usually represent large corporations. The U. S. Department of Agriculture, recommending revisions in H. R. 5510, a bill to regulate private employment agencies engaged in interstate commerce (77th Cong.), so as to insure that the small agent or contractor would not be driven out of business, has stated: "In the agricultural field, many of the private employment agencies, labor contractors, and group leaders are very small operators, representing only a very small group of workers. In some instances they may function for only one specific crop operation. The employment agent, contractor, or group leader may himself be employed in some phase of the crop operation and his remuneration in the form of fees in some cases may actually be very small, and little more than the overhead costs involved in contacting employer and employees and transporting employees to the area of employment. . . ." *Hearings before Subcommittee of the Committee on Labor on H. R. 5510,* 77th Cong., 1st Sess. (1941) (hereinafter cited as *Hearings on H. R. 5510*) 179.

[44] 241 U. S. 340, 36 Sup. Ct. 561 (1916).

The last sentence quoted was clearly adapted from the two-sentence dictum in *Williams v. Fears* holding emigrant agencies amenable to police regulation.[45] And indeed *Williams v. Fears* was cited as the first of several supporting cases appended to this statement in the *Brazee* case.[46] We do not take issue with the propriety of the ruling in *Brazee v. Michigan* which placed hiring for internal employment within the exercise of the police power. We note, however, that "the general nature of the business" cited by the Court in 1916 was not identical with the "general business" mentioned by the Court in 1900. Hiring for internal employment was considered in the earlier decision to be either non-existent or else so dissimilar in tendency from hiring for external employment as to justify a sharp difference in tax classification.[47]

By the second decade of the twentieth century, the prevalence of improper hiring practices left no doubt that hiring for internal employment had become a "business."[48] In a number of states, regulatory laws were enacted. With these developments, if we assume according to the dictum in *Williams v. Fears* and the subsequent decisions of state courts that emigrant agents are subject to police regulation for the protection of job applicants, we may find two laws within a state which claim to protect persons from irresponsible and exploitive practices of labor agents. The one levies a prohibitive fee of several thousand dollars upon emigrant agents and the other a relatively nominal fee upon ordinary employment agents. But the disparity cannot be related to the expenses incident to administration of each law and has never been so explained. In exercise of the police power the means employed must be "reasonably necessary for the accomplishment of the purpose."[49] Clearly the two laws are not directed to the same purpose.[50] It

[45]*Supra* pp. 488, 489.

[46]*Supra* note 44 at 343, 36 Sup. Ct. at 562 (1916). The court below [People v. Brazee, 183 Mich. 259, 263, 149 N. W. 1053, 1054 (1914)] had also cited the *Williams v. Fears* dictum as affirming the power of the legislature to regulate private employment agencies.

[47]Chief Justice Fuller had cited *Shepperd v. Commissioners* as "approved and followed in this case." Williams v. Fears, *supra* note 5 at 275, 21 Sup. Ct. at 130 (1900).

[48]See the factual summary in dissenting opinion of Justice Brandeis in *Adams v. Turner, supra* note 19.

[49]Lawton v. Steele, 152 U. S. 133, 137, 14 Sup. Ct. 499, 501 (1894).

[50]An illustration of a law which seeks to regulate emigrant agents as well as employment agents is the recent comprehensive employment agency law of Pennsylvania (Pa. Laws 1941, Act No. 261, p. 622). Section 14 provides as follows:

"No person shall enter this Commonwealth and attempt to hire, induce, solicit or take from this Commonwealth any labor, singly or in groups, for any purpose without first filing in the office of the department a statement as to where the labor is to be taken, for what purpose, for what length of time, and whether transportation is to be paid to and from destination, if temporary, also a statement of the financial standing of the company desiring the labor and an affidavit of authority to represent such company in this Commonwealth, and such other information as the department may require.

"The department shall thereupon determine whether the person desiring such labor

may be argued that only by prohibitive fees can the state control a business where transactions are initiated within the state but always completed outside. This does not mean that the business is incapable of regulation; it merely signifies that the state is incompetent to regulate in a field which requires uniform, national action.

The Supreme Court has sanctioned prohibition of a business by its very nature harmful to the public interest,[51] but it has flatly refused to place employment agencies in this class. When the state of Washington sought to make it unlawful for private employment agents to receive fees from job applicants, the Supreme Court stated in *Adams v. Turner* after acknowledging the validity of police regulation: "But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representatives of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand."[52] If, instead of an outright prohibition, the state had levied an extremely large fee upon the business of an employment agency, the Court undoubtedly would

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from this Commonwealth is an employment agent and, if so, whether such person is qualified to be licensed under this act. After such investigation the department may refuse to license or may grant a license upon compliance with the provisions of this act. Such person shall in the event of unfavorable action by the department have the right of appeal as in other cases under this act. If such person shall be exempted from license he shall pay for registration a fee of five ($5.00) dollars and receive therefor from the department a certificate recognizing his right to do business in this Commonwealth."

Waiving the question whether the state labor department has valid jurisdiction over the operations of an out-of-state agent, we may note that the law does not discriminate against such agent in the matter of license fees, and in fact may exempt him from payment. There is the administrative possibility of discrimination by refusing to grant licenses to out-of-state agents, although internal agencies are subject to the same refusal (§ 7) and the right of appeal obtains in both cases. For comment on the interstate features of the Pennsylvania law, see testimony of Lewis G. Hines, Secretary of Labor and Industry, *Hearings on H. R. 5510,* 175.

Louisiana has a provision [LA. GEN. STAT. (1939) tit. 34, c. 3, § 4304.2] substantially similar to Section 14 of the Pennsylvania law, but discrimination against the out-of-state labor agent is made effective by another section (4304) of the Louisiana law, which requires a $500 license of all agents and then permits an alternative license of $50 for those who maintain regular offices and transact all business from such offices, and who do not solicit labor "except by written, telegraphic or telephonic communication." The effect of this qualification is to make out-of-state agents mainly subject to the higher fee. Strictly considered, the Louisiana law should be classed with those listed in Part I, (1943) 28 CORNELL L. Q. 286, n. 6.

[51]See *Lottery Case,* 188 U. S. 321, 23 Sup. Ct. 321 (1903) for discussion on this point.

[52]Adams v. Turner, *supra* note 19 at 593, 37 Sup. Ct. at 664 (1917). The California supreme court had said a dozen years earlier in Ex parte *Dickey, supra* note 19: "The business in which this defendant is engaged is not only innocent and innocuous, but is highly beneficial, as tending the more quickly to secure labor for the unemployed. There is nothing in the nature of the business, therefore, that in any way threatens or endangers the public health, safety, or morals." See also Spokane v. Macho, 51 Wash. 322, 324, 98 Pac. 755 (1909).

have decreed likewise.[53]

It should be noted that state regulation of employment agencies is devoted to the purpose of protecting, not alone the unemployed worker, but also the employer who may suffer from the practices of unscrupulous labor agents. Obviously the emigrant agency laws extend no protection to employers dealing with these agents, since by definition such employers are located beyond the limits of the state. When police regulation of emigrant agents is put forth, as in *State v. Napier* and *State v. Reeves*,[54] for protection of the "agricultural and manufacturing interests," as well as of the "ignorant and allured laborers," the police power is conceived to embrace measures designed to retain and immobilize the internal labor supply.[55] This application of the police power must be carefully distinguished from that envisaged by the Supreme Court in *Brazee v. Michigan*, namely, control of abusive practices by employment agents.[56] Whatever merits may be adduced in behalf of the

[53]With an eye on the dissenting opinion of Justice Brandeis in *Adams v. Turner*, the writer holds no brief for the preservation of the fee-charging private employment agency, but he observes (1) that the Justice founded his dissent on the assumption that "no question of interstate commerce is involved" and (2) that if the state would prohibit with the intent that the Justice envisaged it would not confine the prohibition to emigrant agents alone.

[54]*Supra* notes 30, 32.

[55]Besides deriving general benefit from immobilization of the labor supply, resident employers are accorded pecuniary protection by some emigrant agency laws. In Alabama, for example, a $5,000 bond must be filed as prerequisite to issuance of the license and, among other things "said bond shall be conditional on the payment of such damages as any person may sustain by reason of his servant or employee having been enticed away or caused to leave employment by said person [applying for license], his representative or employee or by reason of his advertising matter, circulars, letters and the like, or of the solicitation of such agent or his emissaries." ALA. CODE (1940) tit. 51, § 519. The Georgia law requires that emigrant agents, before taking or attempting to take any person from the state, shall give bond to be accepted and approved by the Commissioner of Commerce and Labor, conditioned to pay any valid debt owing by said person to any citizen of the state. GA. CODE (1933) § 92-506.

[56]The emigrant agency laws, except those that require simply a license tax of designated amount, make some show of protecting the job applicant by requiring the agent to file periodic information on wage rates, place of destination, conditions of employment, *etc.* In several laws provision is also made for inspection of the agent's records and premises. Alabama requires the agent to file a $5,000 bond conditioned, among other things, "on the payment of such damages as any person may sustain by reason of any false representations or misrepresentations made to such person by such person applying for such license, or any of his agents, representatives, or in any advertisement or where such laborer is to be sent for employment, or the written or printed matter, as to the nature of the place and surroundings thereat, duration, or any other feature of the prospective employment, together with such damages as may be sustained by failure to secure the promised employment." ALA. CODE (1940) tit. 51, § 519.

Regarding regulatory provisions of the emigrant agency laws, it is clear from their context that they are designed to hinder and harass the operations of the agent rather than to protect his client. In Georgia, for example, the agent must report his emigrant activities daily to the Commissioner of Commerce and Labor. GA. CODE (1933) § 54-110, par. 3. The bonding requirement in Alabama, to repair damages suffered by a laborer

former application, it cannot be sustained at the price of limiting fundamental personal rights and federal prerogatives under the Constitution of the United States.

The Supreme Court originally sustained the emigrant agency law as a revenue measure for the support of government.[57] State legislatures have not been willing to realize an equivalent revenue from the business of hiring for internal employment. Thus the power of taxation is used as an instrument of the state police power in impounding the labor supply for the advantage of resident employers. Decisions of the Supreme Court approving joint exercise of state police and taxing powers to enhance the general prosperity of a state or to "adjust economic differences" in competition with other states[58] never could have contemplated that the rights of one economic class be sacrificed to the interests of another within the same state.

The dual source of authority offered in justification of the emigrant agency laws has enabled the courts to shuttle between the police and revenue powers in affirming the power of the legislature to designate onerous fees. In *Hanley v. Moody* et al.,[59] for example, the court said in effect that the police power justified enactment of the law, and the taxing power justified the large amount of the levy. While the South Carolina supreme court in *State v. Reeves* judged the police power sufficient to preclude judicial consideration of the amount of the levy, other state courts have preferred to shift their ground for this stand to the revenue side of the laws.[60]

The distinction between police and revenue powers presents a nice case of multiple fee collection when the same person solicits laborers for employment both within and without the state. As employment agent he may come under the police power, and as emigrant agent he may come under the police and/or revenue powers. Accordingly he may be called upon to pay two or three

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in outside employment, would require that the laborer return home to institute action—which achieves in part the original purpose of the law. In general the locus of effective administration and enforcement of these laws in behalf of the worker is largely in other states and so beyond the jurisdiction of the licensing state.

[57]Williams v. Fears, *supra* note 5.

[58]Atl. and Pac. Tea Co. v. Grosjean, 301 U. S. 412, 57 Sup. Ct. 772 (1937). See also Gundling v. Chicago, 177 U. S. 183, 20 Sup. Ct. 633 (1900). The claim that measures designed to discourage out-migration of laborers enhance the general prosperity of the southern states is of course controverted by numerous studies of population and migration. These states have the highest birth rates and are most heavily overpopulated in relation to economic resources. See the testimony of Dr. Rupert P. Vance, *Tolan Committee Hearings,* part 2, pp. 406 *et seq.* The salient population literature is noted in Supplement to Brief of John H. Tolan, *amicus curiae,* Edwards v. California, 314 U. S. 160, 62 Sup. Ct. 164 (1941), reprinted in *Tolan Committee Hearings,* part 26, pp. 10118 *et seq.*

[59]*Supra* note 42.

[60]State v. Hunt, *supra* note 25; State v. Roberson, *supra* note 27; Kendrick v. State, *supra* note 28.

separate fees, one of which is certain to be the burdensome occupation tax.

In 1915 Tennessee passed an act[61] prescribing a privilege tax for employment agencies. In 1917 the state passed two more acts: chapter 70 levied a tax of $500 per annum on the privilege of conducting an emigrant agency; chapter 78 provided for the regulation and supervision of employment agencies, requiring the payment of a license fee to the department of factory inspection; details of regulation and reporting were set forth and a penalty prescribed on failure to comply. In the same year, the city of Knoxville by ordinance also made the business of emigrant agent a privilege and required such agents soliciting in the city to pay $500 per annum. One McMillan, who held an unexpired license under the employment agency act of 1915, was found guilty of violating the 1917 city ordinance applying to emigrant agents. When the case came to the state supreme court on appeal, a number of related questions were considered: (1) whether the last act (chapter 78) operated to repeal by implication the other act or acts; (2) whether appellant was liable for the emigrant agency tax of $500; and (3) whether license held by appellant as operator of an employment agency protected him in doing the acts complained of, which were done after passage of the city ordinance but before his license had expired.

The court distinguished first between a license in the "truer sense" issued under the police power, and a license issued on payment of an "occupation tax" levied under the taxing power embodied in the constitution, with revenue as the primary object and regulation as a possible incident. "The two charges and licenses are distinct things, but confusion of thought arises at times, due to the fact that a license may be issued in either case. In the one case the power exercised is that to license, and in the other to tax and to license." The court thereupon held it competent for the legislature to provide a regulatory license for, and also levy an occupational tax upon, the business. The two taxes were held not to be inconsistent nor to impinge upon each other; therefore the enactment of chapter 78 (employment agency) did not repeal chapter 70 (emigrant agency). Whatever regulation was manifest in the imposition of the occupation tax could be increased by the more detailed policing regulations set forth in chapter 78, and a fee fixed therefor. The court observed that a true license fee, as distinguished from an occupation tax, should be fixed to cover the expense of issuing it, the service of officers, and other expenses directly or indirectly incident to supervision of the particular business or vocation; it was also noted that no question arose as to whether the license fee was so excessive or unreasonable as to partake of the nature of a tax.

[61]Tenn. Acts 1915, c. 101.

The court then considered contention of appellant that since he had a privilege license to operate an employment agency until October 8, 1917, he could not be required by the city, in order to continue his emigrant business, to take out a license under chapter 70 of the acts of 1917. This act, together with the ordinance thereunder, was passed while his license was current. The city claimed *per contra* that after the passage of the 1917 act and its own ordinance, appellant exercised a separate privilege from that formerly exercised under his license as employment agent. The court held that any definition of "employment agency" in the absence of restrictive words would include the employment of laborers to work for another either in or beyond the state, and that the act of 1915 should be so construed.[62] "The phrase 'employment agency' does not imply the placing of laborers and domestic servants in the borders of the State only." The question then resolved itself into "whether it lay in the power of the city under legislative authority to carve out of the broader privilege of conducting an employment agency, one of its elements, employment of emigrant labor, and impose an occupation tax on the conduct of it." The court observed "that the attempt to create by subdivision a distinct privilege of conducting emigration agencies was the state's under its power; and that the city did not undertake without precedent and specific legislative power to make two privileges out of the business formerly conducted as an employment agency." The privilege tax in this case was held to be levied not merely for revenue, but with regulation as an incidental purpose; in such a case the state and city could change the privilege and deny appellant the right to continue the emigrant feature of his business under his unexpired license.

In Texas the attorney general of the state was asked to rule upon a similar case of multiple obligation.[63] It appeared that in San Antonio and other areas of the state with large Mexican-American populations, agencies acting principally in an emigrant capacity were also assisting persons to secure employment within Texas. The state commissioner of labor statistics had collected from each of these agencies two sets of fees: an annual state license fee of $150 for each county of operation, levied upon them as employment agencies; and an annual state license fee of $10 for each county of operation, levied upon them as emigrant agencies. Now came the tax assessor-collectors in counties where these agencies operated, demanding that they pay two sets of taxes: a state tax of $1,000 and a graduated county tax for each county of

[62]In support of this construction, the court pointed to a stipulation in the 1917 employment agency act (chapter 78) that operators of employment agencies could not ship applicants to any point outside the state without first advising them as to the existence of strikes, *etc.*

[63]Opinion No. 0-2120, April 23, 1940, contained in *Law Supplement* to TEXAS STATE EMPLOYMENT SERVICE REPORTS ON MIGRATORY LABOR, Supplement C (November 1941).

operation, both levied upon the occupation of emigrant agent. The state controller of public accounts thereupon requested an opinion whether agencies hiring and soliciting labor for employment both within and beyond the state were liable for all the licenses and taxes mentioned above. The attorney general of Texas stated in his opinion:

> "A distinction should be pointed out between a license fee collected under the general police power of the State, and an occupation tax levied under the general powers of taxation and revenue residing in the Legislature, except as prohibited by the Constitution of Texas or of the United States. . . ."

In accordance with this distinction, the attorney general allotted to the police power the license fees levied on employment agents and emigrant agents by the commissioner of labor statistics, and to the revenue power the occupation taxes levied on emigrant agents by the county tax assessor-collectors. That emigrant agents were required to pay one of the license fees was explained as follows:

> "The Legislature was not content merely to realize revenue from the occupation or business of 'Emigrant Agent', but deemed such occupation or business sufficiently affected with a public interest to warrant its regulation and require, in the interests of the public welfare, certain conditions prerequisite to engaging in such business. . . ."

(Thus a detailed set of regulations was prescribed relative to the filing of information with the commissioner of labor statistics, and payment of the occupation taxes was made a prerequisite to issuance of the license to emigrant agents). But an emigrant agent acting also as an employment agent must pay two licenses for regulation, in addition to the occupation taxes, because:

> "By comparison of the statutory definition of the terms 'Emigrant Agent' and 'Employment Agent', it is apparent that two distinct and dissimilar occupations or businesses were contemplated—the first term embracing the business of hiring persons to be worked or employed only outside the State of Texas, while the latter term includes purely internal or intrastate transactions in the bringing together of employers and employees into relations of employment."

C. Burden upon Interstate Commerce

Whether presented as police or as revenue measures, the emigrant agency laws must fall if they constitute a burden or restriction upon interstate commerce. These laws must fall likewise if they interfere with free egress as a privilege or immunity of national citizenship. The writer does not incline to the position that migrating Americans have a single source of constitu-

tional protection from state interference.[64] The commerce power is considered first, however, because the problem extends beyond protection of the right of egress.[65] Affirmative action by the federal government to regulate interstate employment agencies, a field in which the states are incompetent, is most feasible under the commerce power.[66]

Possible conflict of the emigrant agency laws with the interstate commerce clause of the federal Constitution was not broached in the early cases. The issue was squarely put to the supreme court of Georgia in 1900.[67] The court said:

> "If the act imposes a tax upon persons engaged in commerce among the States, it is a regulation of such commerce and is void.. Such a tax is in effect a tax upon the business itself. This has been so repeatedly ruled by the Supreme Court of the United States that it will not at this day be questioned. [cases cited]."

From a review of cases[68] the court deduced that commerce embraced traffic, intercourse, navigation, transportation of persons and property, and the means and instrumentalities to effectuate these four things.[69] Applying the criteria

[64]See Colgate v. Harvey, 296 U. S. 404, 56 Sup. Ct. 252 (1935); Edwards v. California, 314 U. S. 160, 62 Sup. Ct. 164 (1941).

[65]Regarding the relative merits of the commerce power and the fourteenth amendment in protecting the right of ingress or egress, it is frequently pointed out that the privileges and immunities clause applies only to citizens whereas aliens can be reached by the longer arm of the commerce clause. See oral argument before the Supreme Court of attorney for appellant in *Edwards v. California, supra* note 64, reproduced in *Tolan Committee Hearings,* part 26, 10212; also (1942) 40 MICH. L. REV. 711, 724; (1942) 9 U. OF CHI. L. REV. 334, 337; (1942) 42 COL. L. REV. 139, 141; (1942) 14 ROCKY MT. L. REV. 77, 84, 85. The citizenship qualification, however, does not apply to the due process and equal protection clauses of the fourteenth amendment, for which a case can be made in protecting the right of movement. Thus in *Truax v. Raich,* 239 U. S. 33, 36 Sup. Ct. 7 (1915), the Court said in effect that aliens admitted under federal law could pursue the ordinary means of livelihood anywhere in the Union without state interference. See also *Geiow v. Uhl,* 239 U. S. 3, 36 Sup. Ct. 2 (1915), where the Court refused to sanction denial of entry to aliens by immigration officers who decided that the city of putative destination had an overcrowded labor market.

[66]*Cf.* (1942) 42 COL. L. REV. 139, 140. This raises the question, of course, to what extent the right of ingress or egress can be curtailed by federal action. *Id.* at 141. It should be noted that the possibility of affirmative federal action is not ruled out under the privileges and immunities clause. The fourteenth amendment by section 5 provides that "The Congress shall have power to enforce by appropriate legislation the provisions of this article." For a judicial evaluation of this section, see *Civil Rights Cases,* 109 U. S. 3, 3 Sup. Ct. 18 (1883).

[67]Williams v. Fears (Ga.), *supra* note 4.

[68]Gibbons v. Ogden, 9 Wheat. 1 (U. S. 1824); Brown v. Maryland, 12 Wheat. 419 (U. S. 1827); Railroad Co. v. Fuller, 17 Wall. 560 (U. S. 1873); Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826 (1885); Mobile Co. v. Kimball, 102 U. S. 691 (1880); Wabash, *etc.,* Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4 (1886).

[69]Counsel for plaintiff in error, arguing the case before the Supreme Court of the United States, contended for a fifth category, "emigration," to embrace the occupation of emigrant agent, and he observed as to the six cases cited by the state court (*supra* note

in this sequence to the law under consideration the court said regarding the first:

> "We do not think the business of procuring labor contracts to be performed in another State can be properly denominated 'traffic'. Labor is not an article of merchandise or a commodity. It is toil, mental and physical. It is part of the person himself, which he may dispose of it is true, but which is not severable from him, and which accompanies him wherever he goes. It will not be pretended that persons are the subjects of commerce."

Under the heading of intercourse as a branch of commerce the court placed the free passage of citizens of the United States through the several states. Citing *Crandall v. Nevada* and other cases,[70] the court considered that a tax on the right of a citizen to enter or leave the state would be a regulation of commerce and therefore void.

> "But the law under consideration in the present case neither regulates nor restricts the right of citizens of this State to leave its territory at will, or to hold free communication with the citizens of other States. The citizen may leave when he pleases, but the person who makes it a business of inducing him to go to perform labor elsewhere must pay an occupation tax. This is certainly no infringement upon the right of the citizen. Nor does the law impose any burden upon any instrumentality by which his free intercourse with the citizens of other States is effectuated."

Further the court held that the law had no reference to navigation and was not a regulation of transportation among the states.

> "But this law imposes no burden upon transportation companies or their agents. Its connection with transportation is exceedingly remote. That the business of hiring laborers to go beyond the State may increase the business of those engaged in interstate transportation is true, but it is not interstate transportation itself, and consequently a law imposing a tax upon a person engaged in such a business is not contrary to the interstate commerce clause of the federal constitution."

The Supreme Court of the United States, when it took *Williams v. Fears* on appeal, set for itself the following definition of commerce contained in *Mobile County v. Kimball*:[71]

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68): "The cases cited are no authority that this business is not an occupation connected with interstate commerce. In none of them was the present question involved, and for it to have been decided, therefore, would be nothing short of unwarranted." Brief for Plaintiff in Error, pp. 6, 7, 11.

[70]Crandall v. Nevada, 6 Wall. 35 (U. S. 1867); Henderson v. Mayor, *etc.*, 92 U. S. 259 (1875); People v. Compagnie Generale Transatlantique, 107 U. S. 59, 2 Sup. Ct. 87 (1882); Passenger Cases, 7 How. 283 (U. S. 1849).

[71]*Supra* note 68.

"Commerce with foreign nations and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation of persons and property, as well as the purchase, sale, and exchange of commodities."[72]

It thereupon proceeded to judge the activities of emigrant agents in relation to transportation as follows:

"These agents were engaged in hiring laborers in Georgia to be employed beyond the limits of the State. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation or that the tax on his occupation was levied on transportation."

The Court then cited five cases on interstate commerce to support its decision that emigrant agents were not engaged in interstate commerce. We list them here briefly to indicate the framework of the Court's reasoning:

(1) *McCall v. California,* 136 U. S. 104, 10 Sup. Ct. 881 (1890), where the agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route or receiving or paying out money on account of it, was held an agency engaged in interstate commerce and therefore not subject to a municipal ordinance tax. Chief Justice Fuller, who had dissented from this opinion, nevertheless in *Williams v. Fears* distinguished the railroad agency from the emigrant agency as follows: "But there the business was directly connected with interstate commerce, and consisted wholly in carrying it on. The agent was the agent of the transportation company, and he was acting solely in its interests."

(2) *Norfolk and Western Railroad Company v. Pennsylvania,* 136 U. S.

[72]This definition, it should be noted, was originally formulated as a denial of the proposition that the mere grant of the commerce power, anterior to any act of Congress, was exclusive of all state authority. The Court felt impelled in the *Mobile County* case to explain the divergences of some judges upon the issue of exclusive authority because of alleged failure to distinguish between commerce as "strictly defined" and the local aids or auxiliaries to commerce. The Court did not say that the auxiliaries were necessarily removed from commerce; it held merely that the national authority was exclusive in the matters "strictly defined" as above—matters admitting of but one system of rules and one authority. It is of some interest, therefore, that in *Williams v. Fears* the Court decided that broad as was the import of the word "commerce" in the Constitution, "this [strict] definition is quite comprehensive enough for our purposes here."

In so deciding the Court followed the state court below. The latter suggested that the language of individual Supreme Court justices might be broad enough to include the emigrant agency business within the scope of the commerce clause; but it saw no decision extant, and therefore it refused to broaden construction of the clause to include emigrant agents; "this being so, the law will be held valid notwithstanding it may place a burden upon a business which may be an aid to, but not a part of, commerce among the states." William v. Fears (Ga.), *supra* note 4.

114, 10 Sup. Ct. 958 (1890), where the tax imposed by a state on a corporation owning a link of railroad on an interstate through line, for the privilege of keeping an office in the state, was held a tax on interstate commerce, and therefore void.

(3) *Nathan v. Louisiana,* 8 How. 73 (U. S. 1850), where a broker dealing in foreign bills of exchange was held not engaged in commerce, and a state tax on money and exchange brokers was not void as a regulation of commerce, merely taxing an instrument of commerce.

(4) *Paul v. Virginia,* 8 Wall. 168 (U. S. 1868), where the issuing of an insurance policy was held not a transaction of commerce, but a simple contract of indemnity against loss by fire, entered into by the corporation and the assured for a consideration paid by the latter. A state law requiring a foreign insurance corporation to obtain a license by payment of a stipulated sum was not in conflict with the commerce power.

(5) *Hooper v. California,* 155 U. S. 648, 15 Sup. Ct. 207 (1894), where a section of the penal code of California making it a misdemeanor for a person in that state to procure insurance for a resident of the state from an insurance company not incorporated under its laws, unless such company had filed a bond required by the laws of the state relative to insurance, was not a regulation of commerce.

Chief Justice Fuller quoted from the last case the "real distinction" between the general rule and its exceptions—

> "and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude state control over many contracts purely domestic in nature."

Applying the standard to the issue in *Williams v. Fears,*

> "The imposition of this tax falls within the distinction stated. These labor contracts were not in themselves subjects of traffic between the States, nor was the business of biring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax on that occupation constituted a burden on such commerce."

We submit that by a highly artificial and forced distinction the interstate

business of an emigrant agent was resolved into a series of incidents. Isolating formation of the labor contract as the primary element in the transaction, the Court judged that such a contract was essentially local and incidental. To what then was it incidental? To the interstate transportation which "must eventually take place"? But transportation was regarded as a somewhat remote consequence of the contract which might be incidental to it. In other words, a void was created between labor contracts, which like bills of exchange or insurance contracts were considered not to be subjects of interstate traffic, and interstate transportation, which was considered not to be the business of an emigrant agent.

The deficiencies in the reasoning of the Court may be examined relative to the following issues: (1) the proper subject of interstate commerce in the case at bar; (2) the relationship between this interstate commerce and its intrastate counterpart; (3) the relationship between this interstate commerce and transportation.

(1) The Court denied that labor contracts were the subject of interstate traffic. This may be conceded but it is beside the point. The Court fell into error by arguing from the imperfect analogy of an insurance contract. The interstate feature of the contracts considered in *Paul v. Virginia* and *Hooper v. California* involved at most their transmission or delivery from one state to another.[73] In the emigrant agency business, the labor contract does not become an autonomous item to be transmitted like an insurance contract or bought and sold like a bill of exchange. The subject of commerce is properly the laborer who agrees to move out of the state for employment.[74] The state

[73]Argument of plaintiffs in these cases rested on the fact that the insurance corporations were not domiciled in the states where the insurance was purchased. Neither goods nor persons moved across state lines to effect the transactions, but, at most, paper forms to be processed by the company of the local agent. Pieces of paper are transmitted through the mails, of course, and the Court obviously was reluctant to let the scope of commerce be defined by the easy workings of our postal system. This sentiment was clearly manifest in *Nathan v. Louisiana*, 8 How. 73 (U. S. 1850), involving the bill of exchange. "It is not transmitted through the ordinary channels of commerce, but through the mail." Later in *N. Y. Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495, 509, 34 Sup. Ct. 167, 172 (1913), approving all the insurance decisions initiated by *Paul v. Virginia*, the Court said: "The effort has been to give a special locality to the contracts and determine their applicatory law, and, indeed, to a centralization of control, to employ local agents but to limit their power and judgment. To accomplish the purpose there is necessarily a great and frequent use of the mails, and this is elaborately dwelt on by the insurance company in its pleading and argument, it being contended that this and the transmission of premiums and the amounts of the policies constitute a 'current of commerce among the States'. This use of the mails is necessary, it may be, to the centralization of the control and supervision of the details of the business; it is not essential to its character."

[74]*Cf.* Ware & Leland v. Mobile County, 209 U. S. 405, 412, 28 Sup. Ct. 526, 529 (1908) where the Court said in regard to the insurance cases: "These cases are not in conflict with those in which it is held that the negotiation of sales of goods in a State by a person employed to solicit for them in another State, the goods to be shipped from the

court below in *Williams v. Fears* at least came to grips with the issue when, refusing to dissociate labor from the person of the laborer, it denied that persons were the subjects of commerce.[75] In support of this denial the state court cited a United States Supreme Court decision of 1841 which upheld a provision in the Mississippi constitution of 1832 prohibiting introduction of slaves into the state "as merchandise or barter." In that case it was a matter of some debate among the justices whether slaves were persons and whether Mississippi was interfering with the commerce power of the national government.[76] Today the argument is no longer entertained that persons "are not the subject of commerce."[77]

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one State to the other, is interstate commerce. Robbins v. Shelby County Taxing District, 120 U. S. 489; similar cases are Rearick v. Pennsylvania, 203 U. S. 507, and Caldwell v. North Carolina, 187 U. S. 622. In these cases goods in a foreign State are sold upon orders for the purpose of bringing them to the State which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject-matter of the dealing is goods to be shipped in interstate commerce; to be carried between States and delivered from vendor to purchaser by means of interstate carriage."

Comparison of the drummer for the nonresident firm with the emigrant agent is apropos, because Georgia officials as defendants in error in *Williams v. Fears* adduced in support of their position *Ficklen v. Shelby County,* 145 U. S. 1, 12 Sup. Ct. 810 (1892). This case had been decided by Chief Justice Fuller in favor of the taxing state and therefore out of line with decisions in similar cases. Counsel for plaintiff in error in *Williams v. Fears* observed that the *Ficklen* case actually was against defendants, because the general commission business taxed had the interstate feature as an incident and not as an object of the law. Supplemental Brief for Plaintiff in Error, p. 3. And the court later took this position, reverting to *Robbins v. Shelby County Taxing District* as the leading case and as decisive of the issue before it. Stockard v. Morgan, 185 U. S. 27, 22 Sup. Ct. 576 (1902).

[75]See *supra* p. 503.

[76]Groves *et al.* v. Slaughter, 15 Pet. 448 (U. S. 1841). The court also referred to *Commonwealth v. Kentucky,* 42 Ky. 208 (1842), which was likewise inconclusive on the applicability on the commerce clause to the importation of slaves into a state.

[77]Edwards v. California, *supra* note 64; Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192 (1917); Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281 (1913); United States v. Hill, 248 U. S. 420, 39 Sup. Ct. 143 (1919); Covington Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087 (1894); Bailey v. United States, 74 F. (2d) 451 (C. C. A. 10th, 1934); Whittaker v. Hitt, 285 Fed. 797 (App. D. C. 1925); Gowling v. United States, 269 Fed. 215 (C. C. A. 9th, 1920); United States v. McClure, 15 F. Supp. 931 (D. C. E. D. Tenn. 1936); United States v. Burch, 226 Fed. 974 (D. C. N. D. Cal. 1915). Justice Stone, dissenting in *Colgate v. Harvey,* 296 U. S. 404, 56 Sup. Ct. 252 (1935), stated at 444, 56 Sup. Ct. at 265: "This court has many times pointed out that movements of persons across state boundaries are a part of interstate commerce, subject to the regulation and entitled to the protection of the national government under the commerce clause." Again he referred to the citizen moving interstate as "an acknowledged subject of the commerce clause." 296 U. S. at 449, 56 Sup. Ct. at 268.

In *Hoke v. United States,* 227 U. S. 308, 314, 33 Sup. Ct. 281 (1913), the assistant attorney general for the United States observed that Justice Barbour's statement in *New York v. Miln,* 11 Pet. 102, 136 (U. S. 1837), that persons "are not the subject of commerce," has never received the sanction of the Court but has been expressly refuted. Mr. Justice Wayne, analyzing the *Miln* decision in *Passenger Cases,* 7 How. 283, 430 *et seq.* (U. S. 1849), emphasized that Justice Barbour received little support from his own colleagues for exclusion of persons from commerce.

(2) The Court denied that the business of hiring laborers was *immediately* connected with interstate commerce. This denial came naturally from the false premise that a labor contract and an insurance contract were "cognate." Ever since *Paul v. Virginia* insurance contracts have been generically excluded from interstate commerce.[78] Insurance today is a great interstate enterprise[79] far different from the predominantly local activity that the Court knew in 1868; but admittedly the Court has preferred to take the easy way out via *stare decisis*[80] or to seek other constitutional sources of protection for participants in the business.[81] Inclusion of the emigrant agency business within the distinction quoted from *Hooper v. California* between interstate commerce and its domestic components expresses the usual concern of the Court that a line must be drawn somewhere, lest "the entire sphere of mercantile activity" be engulfed by the national government. That construction is not applicable in the instant case. The key to the business of the emigrant agent is that he is an intermediary[82] in a transaction, the completion of which *necessarily* involves the movement of persons across state lines. Interstate passage is the indispensable condition and not a derivative or occasional consequence in the performance of the contract. By that clear-cut test the business of hiring for external employment is interstate commerce,[83] distinguished from hiring for internal employment. If the two businesses can be separated for purposes

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Chief Justice Marshall earlier appeared to assert the authority of the commerce clause over the movement of persons by inference from the constitutional limitation on Congress (U. S. CONST. Art. I, § 9, cl. 1) regarding "the migration or importation" of slaves prior to the year 1808. See Gibbons v. Ogden, 9 Wheat. 1, 206, 207 (U. S. 1824); The Wilson v. United States, 30 Fed. Cas. 239, 243 (C. C. D. Va. 1820). For a brief discussion of the early reach of the commerce power over persons, see Grant, *State Power to Prohibit Interstate Commerce* (1937) 26 CAL. L. REV. 34, 49.

[78]Hooper v. California, 155 U. S. 648, 653, 15 Sup. Ct. 207, 209 (1895); N. Y. Life Ins. Co. v. Deer Lodge County, *supra* note 73 at 510, 34 Sup. Ct. at 172 (1913).

[79]See STUDY OF LEGAL RESERVE LIFE INSURANCE COMPANIES [T. N. E. C. Monograph No. 28, § 2, (1940)].

[80]"For over forty-five years they [insurance cases reviewed] have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws." N. Y. Life Ins. Co. v. Deer Lodge County, *supra* note 73 at 502, 34 Sup. Ct. at 169 (1913).

[81]Colgate v. Harvey, *supra* note 64 at 432, 56 Sup. Ct. at 260 (1935).

[82]"The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker, that is, of an intermediary . . . that business does not differ in substantial character from the business of a real estate broker, ship broker, merchandise broker or ticket broker." Brazee v. Michigan, *supra* note 44 at 356, 36 Sup. Ct. at 562 (1916).

[83]*Cf.* Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 17 (C. C. A. 8th, 1907): "Importation from one state into another is the indispensable element, the test of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce."

of tax classification, they can be identified with respect to the areas of state and federal control. Denial to the state of control over the operations of emigrant agents does not entail any diminution of control over the intrastate business of employment agents. The states have been guaranteed their control in the latter sphere.[84]

Failure to recognize that interstate movement is requisite to performance of the labor contract in the emigrant agency business has led to a persistent misapplication of *Williams v. Fears.* Chief Justice Fuller, dissenting in the *Lottery Case,*[85] tried to put it within the principle of the insurance cases and his decision in the emigrant agency case. He dissented again in *International Textbook Co. v. Pigg,*[86] where the majority held that contracts with a correspondence school were a part of interstate commerce because they entailed necessarily the movement of textbooks and related instruments of learning across state lines. Later in *N. Y. Life Ins. Co. v. Deer Lodge County,*[87] the Court refused to place an insurance contract in interstate commerce according to the old line of decisions, and it considered *Williams v. Fears* as "cognate" while distinguishing its decision from the *Lottery* and *Pigg* cases which "were concerned with transactions which involved the transportation of property and were not mere personal contracts." In *Blumenstock Bros. v. Curtis Pub. Co.,*[88] where the subject under consideration was the making of contracts for insertion of advertising matter in certain periodicals, the Court cited *Williams v. Fears* in line with its decision but differentiated the *Pigg* case because "The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce."

In *Puget Sound Co. v. Tax Commission,*[89] the Court decided that a stevedoring company was engaged in interstate commerce while loading and unloading but not while supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading. To the latter extent the company was held subject to a state tax. Supplying of longshoremen was likened to the work of a "labor bureau" such as that considered in *Williams v. Fears,* where the business was found not to partake of interstate commerce though it increased the transactions of commerce. Now this, as with other applications of the emigrant agency decision, is only seemingly plausible. Without debating the merits of the *Puget Sound* decision we may

[84]Brazee v. Michigan, *supra* note 44; Olsen v. Nebraska, 313 U. S. 236, 61 Sup. Ct. 862 (1941).
[85]*Supra* note 51.
[86]217 U. S. 91, 30 Sup. Ct. 481 (1910).
[87]*Supra* note 73.
[88]252 U. S. 436, 40 Sup. Ct. 385 (1920).
[89]302 U. S. 90, 58 Sup. Ct. 72 (1937).

note that the employment referrals did not necessitate the movement of longshoremen across state lines. Performance of the longshore labor contract took place wholly within the state, and the business of the stevedoring company raised only the question where the line should be drawn in separating local incidents of the interstate or foreign commerce carried on by a merchant vessel. The emigrant agent by contrast is not a local auxiliary to, but is himself engaged in, interstate commerce.

In *Western Live Stock v. Bureau,* decided in 1938,[90] the Court similarly cited *Williams v. Fears* in support of the proposition that taxation of a local business or occupation was not forbidden merely because in the ordinary course interstate transportation was induced or occasioned by the business. A state law attempted to tax the receipts of a business engaged in selling advertising space in a published journal, and the Court was called upon to decide the "vexed question whether the tax is invalid because the performance of the contract, for which the compensation is paid, involves *to some extent* the distribution, interstate, of *some* copies of the magazine containing the advertisements." (Italics supplied). In upholding the state law the Court decided that the business of preparing, printing, and publishing magazine advertising was peculiarly local and distinct from its circulation, whether or not that circulation went in interstate commerce. If it be argued by analogy that the making of labor contracts is peculiarly local and distinct from the "circulation" of the laborers, then the definitive character of the emigrant agent is eliminated. The Court rightly stressed in the *Western Live Stock* case that performance of the contract was as essential as its formation in determining the protective scope of the commerce clause, but there interstate distribution was an occasional rather than an indispensable factor in conduct of the business.[91]

(3) The Court denied that the emigrant agent was engaged in transportation or that the tax upon his business was levied on transportation. Had the Court identified persons contracting rather than labor contracts as the subject of commerce in the case under review, the relationship between the emigrant agency business and transportation might have been made more clear. In the *Lottery Case* control by the national government under the commerce power

[90] 303 U. S. 250, 58 Sup. Ct. 546 (1938).

[91] In general, the Court in this and related cases is concerned to strike a balance between the demands (1) that interstate commerce shall "pay its own way" locally and (2) that interstate commerce shall not be subject to discriminatory and multiple tax burdens. With regard to the business of emigrant agency, clearly the prohibitive taxes levied by states do not conform to either of these demands. *Cf.* South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177, 185, 186, 58 Sup. Ct. 510, 514 (1938); Gwin *etc.* Inc. v. Henneford, 305 U. S. 434, 439, 59 Sup. Ct. 325, 327 (1939); and see (1942) 42 COL. L. REV. 139, 141.

was justified because there was involved "actual carriage in interstate traffic of the tickets themselves." The same power extended where persons were involved.[92] The involvements in either case did not signify necessarily that the persons carrying on the reprehensible practices were themselves engaged in transportation.[93] And in the *Pigg* case, the correspondence school judged to be in interstate commerce did not itself transport the textbooks which followed the contracts with prospective scholars. Similarly the emigrant agent to be in interstate commerce does not have to transport prospective jobholders. The scope of the commerce power is determined by that which is transported as well as by that which transports.

Preoccupation of the Court with the business of transportation in interstate commerce *as conducted directly* by a common carrier is evident from the cases contrasted[94] with *Williams v. Fears.* It would be interesting to speculate as to the Court's decision if the plaintiff in error were the agent of a railroad company recruiting section hands for employment directly by the company. Such persons have been held liable as emigrant agents.[95] Possibly the case then might have been brought into accord with *McCall v. California,* which the Court cited as inapplicable. A latter-day perspective destroys even the Court's opinion that emigrant agents were not themselves engaged in transportation. The automobile was not a well-developed American institution in 1900 when Chief Justice Fuller decided *Williams v. Fears.* In those days physical means of conveyance for emigrants were provided chiefly by railroad. Today motor truck transportation of migrant workers directly by labor agents is a common practice. The Interstate Commerce Commission subjected one phase of this transportation to intensive investigation[96] and finally caught up with a labor agent whom Texas authorities, we have seen, were at pains to designate an emigrant agent.[97]

Julio de la Pena was charged by the United States on forty-five counts with transporting passengers in interstate commerce for compensation without conforming to the regulations of the Interstate Commerce Commission.[98]

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[92]See note 77 *supra.*

[93]The fact that these cases dealt mainly with affirmative federal action in the field of crime prevention does not alter the logic of the argument.

[94]McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881 (1899); Norfolk & Western Railroad Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958 (1890).

[95]State v. Bates, 113 S. C. 129, 101 S. E. 651 (1919).

[96]The investigations of the Interstate Commerce Commission are reported in *Tolan Committee Hearings,* part 5, pp. 1878-1883; part 11, pp. 4773-4822; part 19, pp. 7796-7855.

[97]Part I, (1943) 28 CORNELL L. Q. 286, 304.

[98]The scope of interstate commerce in this field is not limited, of course, to the jurisdiction of the Interstate Commerce Commission. See Whitaker v. Hitt, *supra* note 77 at 798 (App. D. C. 1925). The Motor Carrier Act of 1935 [49 STAT. 543, 49 U. S. C. §§ 301-327 (1940)] applies to certain classes of common and contract carriers but

On every one of these counts the Great Lakes Sugar Company, and its intermediary, the Great Lakes Growers' Employment Committee, were found guilty of "having knowingly and wilfully aided and abetted the defendant Julio de la Pena in committing the violation alleged." The latter was ordered to pay $1,000 and costs, and the court agreed that upon payment of $2,000 and costs by the Employment Committee, a *nolle prosequi* would be entered as to the Sugar Company proper.[99]

The Supreme Court recently has made it clear by the decision in *Edwards v. California*[100] that a state law which seeks to restrict the entry of persons into a state is an unwarranted interference with interstate commerce. If Edwards, driving his indigent brother-in-law Duncan in a jalopy across the California border, was adjudged to be within the sphere of interstate commerce, it will not be pretended that emigrant agents who transport or arrange for the transportation of laborers out of a state are excluded from this sphere. In both circumstances the determining factor is the movement of persons across state lines, not the manner of conveyance[101] nor indeed the commercial status of the conveyor.[102]

Edwards was neither a common carrier nor the agent of a common carrier, and the state sought to minimize application of the law to carriers.[103] The grasp of the state law did not even hinge upon whether Edwards directly and alone undertook the transportation.[104] The fact that the law could act upon him only after he arrived in the state did not make any less "intended

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excludes from its operation by Section 303 (b) (9) the casual or occasional transportation by motor vehicle of passengers in interstate commerce by persons not engaged in such transportation as a regular occupation or business. The chairman of the Commission reported to the Tolan Committee that this section would keep many interstate truckers of labor outside the purview of the Motor Carrier Act. *Tolan Committee Hearings,* part 5, 1879.

[99]" . . . apparently upon the theory that the committee was its alter ego and the fine of one was the fine of both." Testimony of Jack G. Scott, Chief attorney, Bureau of Motor Carriers, Interstate Commerce Commission, *Hearings on H. R. 5510,* 37. See also *Tolan Committee Hearings,* part 11, pp. 7833 *et seq.* for record of court judgment.

[100]*Supra* note 64.

[101]Even walking across a state line, be the mover animal or person, satisfies the commerce requirement. Kelley v. Rhoads, 188 U. S. 1, 23 Sup. Ct. 259 (1902); Covington Bridge Co. v. Kentucky, *supra* note 77.

[102]"And the transportation of persons has long been held to be commerce. Interstate commerce then is, among other things, the passage of persons or property from one state to another. It does not necessarily, or indeed at all, involve the idea of a common carrier, or the payment of freight or fare." United States v. Burch, *supra* note 77 at 975, 976.

[103]Oral argument of W. T. Sweigert, assistant attorney general of California, before the Supreme Court of the United States, recorded in *Tolan Committee Hearings,* part 26, 10218.

[104]CAL. WELFARE AND INSTITUTIONS CODE (Deering, 1937) § 2615, makes it a misdemeanor to knowingly bring or *assist in bringing* an indigent person into the state.

and immediate"[105] the burden upon interstate commerce. Similarly the fact that the emigrant agency law can act upon the agent only before he leaves the state does not make the law local in nature and incidental to commerce.

The extension of the *Edwards* case to the emigrant agency issues need not rest on our construction. Though the criminal statute under which Edwards was apprehended can be traced back to an early California poor law,[106] the attorney general of California, in his brief submitted to the Supreme Court on behalf of the state as appellee, maintained that the law was directed chiefly at curtailing the "promotional" activities of "labor contractors, private employment services and other recruiting agencies."[107] In a supplemental statement filed with the Court he pointed to *Williams v. Fears* as holding emigrant agents "a proper subject of police power," and he observed a "striking analogy" between such agents and those who induced the entry of indigent persons into his state.[108] The assistant attorney general of California, appearing before the Supreme Court in oral argument for the state, also likened the attempted exercise of the police power, retarding ingress of indigent persons, to the emigrant agency laws, retarding egress of laborers. Said he of the appellant:[109]

> "He has committed an act that is well within the purview of the power of the State of California to denounce as a crime on police grounds, and in that sense involves a matter of local police power and not any more an interference with interstate commerce than, let us say, the statute involved in the case of *Williams v. Fears.*"

We submit that the emigrant agency laws of some ten states[110] must fall with the California penal statute and similar penal statutes in twenty-seven other states[111] as exceeding the appropriate limits of state action. By restricting the interstate movement of underprivileged groups in the working population, the emigrant agency laws, in keeping with other anti-migration statutes,[112] display the characteristics which moved the Court to its decision in the *Edwards* case: (1) they are isolative; (2) their real victims have no effective recourse to the ballot box;[113] (3) they invite retaliatory action and

[105]Justice Byrnes in *Edwards v. California, supra* note 64 at 174, 62 Sup. Ct. at 167 (1941).
[106]Cal. Stat. 1860, p. 213.
[107]Reprinted in *Tolan Committee Hearings,* part 26, 10021.
[108]*Id.* at 10089.
[109]*Id.* at 10225.
[110]See Part I, (1943) 28 CORNELL L. Q. 286, n. 6.
[111]For a list of these state laws which have been struck down by the *Edwards* decision, see Supplement to Brief of John H. Tolan, *amicus curiae,* Edwards v. California, reprinted in *Tolan Committee Hearings,* part 26, pp. 10188 *et seq.*
[112]See FREUND, POLICE POWER (1904) c. 23, §§ 485-491.
[113]For reasons less transitory, of course, than the exclusion involved in the *Edwards* case.

make burdens cumulative; (4) their subject-matter admits of regulation only by a single authority. Mr. Justice Byrnes, speaking for the Court in *Edwards v. California,* after acknowledging state efforts to cope with internal problems, said:

"But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' *Baldwin v. Seelig,* 294 U. S. 511, 523.

"It is difficult to conceive of a statute more squarely in conflict with this theory than the Section challenged here. Its express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border. The burden upon interstate commerce is intended and immediate; it is the plain and sole function of that statute. Moreover, the indigent non-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy. *South Carolina Highway Department v. Barnwell Bros.,* 303 U. S. 177, 185, n. 2. We think this statute must fail under any known test of the validity of State interference with interstate commerce.

. . . . . .

" . . . The prohibition against transporting indigent non-residents into one State is an open invitation to retaliatory measures, and the burdens upon the transportation of such persons become cumulative. Moreover, it would be a virtual impossibility for migrants and those who transport them to acquaint themselves with the peculiar rules of admission of many States. 'This Court has repeatedly declared that the grant [the commerce clause] established the immunity of interstate commerce from the control of the States respecting all of those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority.' *Milk Control Board v. Eisenberg Farm Products,* 306 U. S. 346, 351. We are of the opinion that the transportation of indigent persons from State to State clearly falls within this class of subjects. The scope of Congressional power to deal with this problem we are not now called upon to decide."

"The scope of the Congressional power to deal with this problem," upon which Justice Byrnes was silent, has been delineated in part by the Honorable

John H. Tolan, chairman of the Select Committee Investigating National Defense Migration. He introduced into the seventy-seventh Congress H. R. 5510, "A bill to regulate private employment agencies engaged in interstate commerce."[114] The hearings on H. R. 5510 held by a subcommittee of the House Committee on Labor make it clear that abusive practices of interstate labor agents, visited upon employer as well as employee, demand regulation by a single controlling authority.[115] In summarizing the findings of his Committee on Migration before the subcommittee holding hearings on the bill, Chairman Tolan stated:[116]

> "The committee has concluded that Federal regulation of private employment agencies and labor contractors engaged in interstate commerce is imperative. While it is true that a few States have enacted effective and well-administered laws for the licensing or registration of employment agencies, State action on the whole does very little to curb the practices of the unscrupulous private agent or contractor. Even were State laws to be extended and improved they could not cope with a problem so largely interstate in character.

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[114]Earlier drafts of this bill were introduced by Mr. Tolan during the 77th Congress as H. R. 3372 and H. R. 4675. In the 78th Congress this bill appears with changes recommended by the House Labor Committee as H. R. 809. The Senate duplicate of H. R. 5510 was introduced in the 77th Congress as S. 2333 by the Honorable Elbert D. Thomas of Utah.

[115]The report of the subcommittee to the House Committee on Labor, dated January 13, 1942, stated in part as follows [H. R. REP. No. 1709, 77th Cong., 2d Sess. (1942) pp. 2-3]:

> "The record of these hearings has convinced your subcommittee of the need for this proposed legislation. The results of abuse among employment agencies in interstate commerce have been alarming. . . .
>
> "Your subcommittee is of the further opinion that the State laws, where they exist, are practically ineffective to remedy abuse arising from interstate operations. There are four reasons for this. First, the agency may not be subject to regulation because employment agency laws vary greatly in effectiveness and do not exist in every State. Second, the law of one State cannot reach agencies situated in another. Third, those persons who are sent some distance away across State lines have no real opportunity to complain to the proper authority of violations of the law of the State where the placement agency may be operating. Fourth, many labor agents continually move from one State to another, making control impossible."

However, H. R. 5510 contains an unfortunate provision, which one opponent of the bill referred to as "rather slipshod legislative drafting." *Hearings on H. R. 5510,* 225; and see p. 254. Section 16 provides: "No provision of this Act or of any rule, regulation, or order thereunder shall excuse noncompliance with any State law or municipal ordinance regulating employment agencies." Labor Department officials who gave the Tolan Committee technical assistance in drafting the bill, apparently wished to encourage enforcement of state employment agency laws. ("It is designed to care for the interstate aspects of labor recruiting and to supplement the state laws"—testimony of Clara M. Beyer, Division of Labor Standards, U. S. Dep't. of Labor, *Hearings on H. R. 5510,* 161). If H. R. 5510 sanctions compliance with state emigrant agency laws it goes contrary to its avowed purposes. Properly the proposed legislation should supersede state emigrant agency laws. Support given to the bill by Texas authorities would seem to be predicated upon the idea of its compatibility with their emigrant agency law.

[116]*Hearings on H. R. 5510,* 18.

"It is true that not all private employment agents and labor contractors prey on the defenseless job seeker. Many are efficient and honest. The prohibition of reprehensible practices should do much to protect these agencies from their unfair competitors.

"At the present time there is no specific Federal legislation which regulates the practices of interstate labor agents. Clearly engaged in interstate commerce, these agents could be brought under the authority of the Federal Government, which alone is equipped and empowered to protect interstate commerce from origin to destination. Many witnesses appearing at the committee hearings, in every section of the country, testified to the desirability of specific Federal legislation in this field."

The intent of this bill is clearly to regulate and not to prohibit.[117] The annual license is fixed at $100. Interstate employment agents also are required to file a bond with the Secretary of Labor and to conform to other prescribed regulations for the protection of their clients. Among the authorities giving hearty endorsement to the bill appeared the commissioner of the Texas Bureau of Labor Statistics. He testified that he had the responsibility for enforcing the emigrant agency law of his state and explained that this law was enacted because the employment agency law[118] failed to protect employees who were exploited in other states.[119] Obviously the emigrant agency law could protect employees only by keeping them at home, because inability of the state to regulate an interstate activity was clearly admitted. The commissioner testified in part:[120]

"I believe that the State of Texas has gone as far as possible with State regulations in an attempt to correct this problem. I have been a State law-enforcement officer since 1933, and I believe that I am qualified to state that this legislation can be improved very little as far as State

[117]The report on H. R. 5510 by the subcommittee of the House Committee on Labor stated: "It is realized that the responsible agency, of which there are many, will be regulated along with the irresponsible agency. This is necessary to protect both the good agency and the public. It is felt that those who are honest and efficient have nothing to fear from this legislation, designed solely to curb dishonest practices." H. R. REP. No. 1709, 77th Cong., 2d Sess. (1942) 3. A representative of the United States Department of Agriculture testified on H. R. 5510: "Since the legislation proposes to regulate the practices of these employment agencies so as to eliminate recognized abuses and detrimental effects, without unduly hindering the necessary migration of agricultural workers across state lines and without eliminating or abolishing those services of private employment agents and labor contractors which are beneficial to both agricultural workers and agricultural employers, the Department of Agriculture endorses the general statements of policy of the proposed H. R. 5510." Testimony of William J. Rogers, Office of Agricultural Defense Relations, U. S. Dep't. of Agriculture, *Hearings on H. R. 5510,* 179. It should be noted, however, that this witness recommended a lowering of the minimum fee and bond provisions of the bill in favor of the small operator. *Id.* at pp 179, 181.

[118]TEX. ANN. REV. CIV. STAT. (Vernon, 1939) c. 13, arts. 5208-5221.

[119]*Hearings on H. R. 5510,* 172.

[120]*Id.* at pp. 172, 173.

enforcement is concerned. The various States would have to be given authority to regulate interstate commerce to really become effective. We know that many of our investigations regarding violations of this bill have led us to the State line, where our investigation had to be terminated. The very nature of this business makes it impractical for any State to regulate.

"Many, many times violations have been reported to this office, and despite the fact that our investigators were on the job within a matter of hours, the violators were then across the State line and completely beyond our jurisdiction.

. . . . . .

"May I conclude by saying that it is my opinion that our State has done everything within its police power to stop the abuses and the exploitation of employees going from one State to another, and we are still unable to handle this problem as it should be. Coming from a State where most everyone believes in States' rights and are reluctant to surrender any of these rights to the Federal Government, yet we recognize there are some problems, the very nature of which prohibit us from properly regnlating them as they should be. This is one of those problems, and as commissioner of the Texas Bureau of Labor Statistics, I earnestly urge that H. R. 5510 be enacted into law in order to give us the needed relief in connection with this problem. I have made a careful study of H. R. 5510, and while I believe that is by no means a complete solution to the emigrant workers problem, it will go a long way in correcting the evils which are so common at this time."

D. Interference with the Privileges and Immunities of Citizens of the United States

The right to pass freely from state to state is an incident of national citizenship protected from state interference by the fourteenth amendment of the Constitution.[121] The right is not articulated by the Constitution in so many words,[122] but its implicit character does not weaken the constitutional guarantee. As an incident of national citizenship the right should be distinguished from the narrower concept embodied in state citizenship and referrable to

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[121]Mr. Justice Douglas, concurring in *Edwards v. California, supra* note 64 at 178, 179, 62 Sup. Ct. at 169 (1941). He maintained that free ingress and egress as a right of national citizenship already had been established by *Crandall v. Nevada, supra* note 70, prior to enactment of the fourteenth amendment. On this view, it has been argued, the fourteenth amendment protects no privilege or immunity that is not already guaranteed by the supremacy clause (U. S. CONST. Art. VI). The redundancy of the fourteenth amendment follows from the restricted interpretation given to the privileges and immunities clause ever since the *Slaughterhouse Cases,* 16 Wall. 36 (U. S. 1872). See dissenting opinion of Justice Field at 97; also McGovney, *Privileges or Immunities Clause, Fourteenth Amendment* (1918) 4 IOWA L. BULL. 219, 230.

[122]ARTICLES OF CONFEDERATION, Art. IV, expressly stipulated that "the people of each state shall have free ingress and regress to and from any other state." Note that the stipulation was absolute and not confined to citizens.

the privileges and immunities clause of Article IV, section 2 of the Constitution.[123] Again it should be distinguished from the incidents of free movement and intercourse protected from state interference by the national commerce power.[124] The divided opinion of the Supreme Court in the early case of *Crandall v. Nevada* has not smoothed the path for judicial consideration of the right of free ingress and egress. Mr. Justice Douglas prefers to rest the *Crandall* decision not upon the commerce clause but upon the more basic ground of national citizenship.[125] He holds "that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines."[126]

The right of laborers to depart freely from a state has been urged in arguments against the emigrant agency laws, but the constitutional source of protection has not always been clearly identified. When *Joseph v. Randolph*[127] came before the supreme court of Alabama in 1882, counsel for appellant described the law as "a vicious species of class legislation."[128] "It is a naked attempt to tax a constitutional right out of existence." "Its purpose is to make the laborer a mere thing—a fixture of the soil."[129] Opposing counsel noted that the counties embraced in the act were mainly agricultural and exposed to the depopulating effects of the "Kansas exodus" movement and the recruiting activities of railroad contractors and other industries,

[123]The right of egress under consideration in this paper has only the narrowest relation to Art. IV, § 2. The courts have interpreted that section as intending to relieve citizens "from the disabilities of alienage in other states," to give them "the right of free ingress into other states, and egress from them," *etc.* Paul v. Virginia, 8 Wall 168, 180 (U. S. 1868). The emigrant agency laws, contrary to the expected situation, inhibit mainly the egress of their own citizens. Presumably but a limited number of emigrants under the laws could claim state citizenship in other states, and so invoke Art. IV, § 2. The ambiguous wording of this section, of course, suggests the possibility that citizens of a state, while in their own state, could demand for themselves the privileges and immunities accorded citizens of all other states. See (1942) 40 MICH. L. REV. 711, 718, n. 36.

[124]See dissenting opinion of Justice Stone in Colgate v. Harvey, and concurring opinion of Justice Douglas in Edwards v. California, *supra* note 64.

[125]*Cf.* Helson and Randolph v. Kentucky, 279 U. S. 245, 251, 49 Sup. Ct. 279, 280 (1929); Colgate v. Harvey, note 64 at 444, 56 Sup. Ct. at 265 (1935).

[126]Edwards v. California, *supra* note 64 at 177, 62 Sup. Ct. at 168 (1941). Similarly Justice Jackson said (*Id.* at 182, 62 Sup. Ct. at 171): "To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights."

[127]*Supra* note 7.

[128]The identical description was later applied by a district court to the law involved in the *Peonage Cases*, 123 Fed. 671, 689 (D. C. M. D. Ala. 1903).

[129]Counsel for appellant attacked the law on several constitutional grounds; apparently he rested the right of egress on Art. IV, § 2 of the United States Constitution. (See note 123 *supra*). The fourteenth amendment was invoked for equal protection of the laws to the laborers affected by the state law.

"thus endangering the farming interests. This is the *reason* of; and hence arose the *necessity* for the statute." Defendant argued that the legislature must be sole judge of the necessity for the law.

The court took the primary question to be the following:

> "It is insisted, among other things, that the plain intent and natural effect of this statute is to tax, by indirection, the constitutional right of the citizen to have free egress, at all seasonable times, by emigration from the State. If this view be correct, it is clear that the validity of the act cannot be sustained."

The court recognized that free transit from or through the territory of any state was an attribute of personal liberty, "guaranteed to all by the clearest implications of the Federal as well as the State constitution." This right was held referrable to many clauses in the federal Constitution.[130] The court also noted a provision in the Alabama constitution that "emigration shall not be prohibited."[131] Free ingress and egress being an undoubted constitutional right, the state could qualify it only by legitimate exercise of the police or taxing powers. In striking down the emigrant agency law as an unwarranted exercise on either ground, the court said:

> "A law, as we have seen, would certainly be void which exacted tribute of a citizen as the price of crossing a State line. Does the license in question operate manifestly as a tax, by indirection, upon the right of the citizen to leave the State, or does it so burden this right as to effectually impair it? No principle of construction is sounder than the common sense and cardinal rule, that 'what cannot be done directly cannot be done indirectly'—*Ex parte Hardy,* 68 Ala. 303; *Cummings v. Missouri,* 4 Wall. 277. If the law should act upon any other theory, it would subject itself to the just challenge of catching *at shadows and not substances.* Hence, a constitutional right, though subject to regulation, 'cannot be impaired, or destroyed, under the device or guise of being regulated'. *South & North Ala. R.R. Co. v. Morris,* 65 Ala. 193.
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> "It is easy to see the application of this principle in construing the statute now under review. Every person, including every laborer, has the right of egress from the State—the right to emigrate at his option, and in the unobstructed exercise of his free will. He has, therefore, the clear right to contract to exercise such right, because it may become a necessary and only means of its successful exercise. If the right itself exists and is lawful, it cannot become unlawful to agree to exercise it."

[130]The court referred to *Ward v. Maryland,* 12 Wall. 418, 430 (U. S. 1870), as placing it within the privileges and immunities of citizens of the several states guaranteed by Art. IV, § 2; to the *Passenger Cases,* 7 How. 283 (U. S. 1849), as placing it within the scope of the commerce clause; and to *Crandall v. Nevada,* 6 Wall. 35 (U. S. 1867), as recognizing it to have "an undoubted existence," despite the difference of opinion as to its constitutional ground.

[131]ALA. CONST. of 1875.

The argument that no license was required of the laborer to contract was held "patently fallacious." Every contract, said the court, required two parties; a law against one affected the other, just as a law forbidding the purchase of any article was in effect a law to prohibit the sale,[132] or a tax upon a carrier for each passenger was a tax upon the passenger.[133]

Considering this vigorous affirmation of the "laborer's right of free emigration," it is difficult to see why the court judged that a tax upon the single act of hiring for outside employment would "seriously clog and impair" the right while a tax upon the business would make it but "remotely affected." The obvious purpose and intent in both circumstances was the same; by cloaking the law in a general tax act, as many states subsequently did, the ban on free movement of laborers was invested with the dubious dignity of a profession. We noted elsewhere[134] that application of the law has tended to wait, not upon the conduct of a business, but upon any instance in which laborers were being hired for employment beyond the state. The distinction made by the Alabama court was purely verbal from the standpoint of preserving free ingress and egress, and it has afforded other courts the opportunity to differentiate their decisions.[135]

The supreme court of North Carolina in 1893, we also noted,[136] struck down the emigrant agency law of that state as an unwarranted application of the police power to an occupation which gave effect to the undoubted right of a laborer to offer his services in hire and pursue any lawful calling, whether inside or beyond the state.

The Georgia law was squarely challenged before the supreme court of that state in *Williams v. Fears* as an interference with the right of a citizen to move from one state to another, abridging the "privileges and immunities of citizens of the United States" within the meaning of the fourteenth amendment. The court held the contention without merit on the basis of its denial that the law conflicted with the national commerce power.[137] It will be

[132]Citing Brown v. Maryland, 12 Wheat. 419 (U. S. 1827) and Welton v. Missouri, 91 U. S. 275 (1875).

[133]Citing Passenger Cases and Crandall v. Nevada, *supra* note 130.

[134]See the discussion in Part I (E), (1943) 28 CORNELL L. Q. 286, 304.

[135]Williams v. Fears (Ga.), *supra* note 4; Williams v. Fears (U. S.), *supra* note 5; State v. Napier, *supra* note 30; *In re* Craig, *supra* note 7.

[136]State v. Moore, *supra* note 11.

[137]The court said in this connection: "But the law under consideration in the present case neither regulates nor restricts the right of citizens of this state to leave its territory at will, nor to hold free communication with the citizens of other states. The citizen may leave when he pleases, but the person who makes it a business of inducing him to go to perform labor elsewhere must pay an occupation tax. This is certainly no infringement upon the right of the citizen." Williams v. Fears (Ga.), *supra* note 4, at 591, 35 S. E. at 701, 702 (1900).

remembered that the court there considered the right of persons to enter and leave the state freely as an incident of intercourse comprehended within the term "commerce."[138] In taking exception to *Joseph v. Randolph,* the court assumed that the Alabama decision voided the law under review as contrary to the commerce clause of the federal Constitution.

The Supreme Court of the United States, taking *Williams v. Fears* on appeal, gave first consideration to the insistence of plaintiff that the law conflicted with the fourteenth amendment by impairing the right of free movement. The language of the Court is often quoted in affirmation of this principle,[139] though the effect of the decision was to destroy it. The Court said:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution."

The Court associated with the right of locomotion the attributes of personal liberty which had been earlier set forth in *Allgeyer v. Louisiana* as protected by the due process clause of the fourteenth amendment.[140] But, said the Court,

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[138]See *supra* p. 503.

[139]For example, Justice Douglas concurring in Edwards v. California, note 64 at 179, 62 Sup. Ct. at 169 (1941).

[140]The language in *Williams v. Fears* is as follows: "And so as to the right to contract. The liberty, of which the deprivation without due process of law is forbidden, 'means not only the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avoeation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned; . . . although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in its statutes'. Allgeyer v. Louisiana, 165 U. S. 578, 589, 591; Holden v. Hardy, 169 U. S. 366."

Warren comments that Chief Justice Fuller's "locomotion" adds nothing to the definition of "liberty" in the *Allgeyer* case, because it "may well be treated as part of freedom of restraint of the person." Warren, *The New Liberty under the Fourteenth Amendment,* (1926) 39 HARV. L. REV. 431, 450. The Chief Justice was merely expounding Blackstone's definition of "personal liberty" which "consists in the power of locomotion, of changing situation, of moving one's person to whatever place one's inclination may direct, without imprisonment or restraint, uuless by due course of law." 1 BL. COMM. 72 (Gavit ed. 1941). From its origin and context, the assertion as to right of movement in *Williams v. Fears* appears to be based on the due process clause rather than on the privileges and immunities clause. The Chief Justice did not specify the clause, but he proceeded to hold against plaintiff's objections "in the particulars named," and one of these was the contention that the right of movement was restricted in violation of the privileges and immunities clause. Justice Douglas, concurring in *Edwards v. California,* quotes from *Williams v. Fears* in support of his position that the right of movement is protected by the privileges and immunities clause. *Supra* note 64 at 179, 62 Sup. Ct. at 169 (1941). Justice Stone, dissenting in *Colgate v. Harvey,* assumes that *Williams*

the law under review was a taxing act, levied on occupations, including that of emigrant agent.

> "If it can be said to affect the freedom of egress from the State, or the freedom of contract, it is only incidentally and remotely. The individual laborer is left free to come and to go at pleasure, and to make such contracts as he chooses, while those whose business it is to induce persons to enter into contracts and to change their location, though left free to contract, are subjected to taxation in respect of their business as other citizens are."

The Court apparently took the cue from *Joseph v. Randolph* in judging that the revenue label of the emigrant agency law transformed a primary right into an incidental one. But the Court ignored the substantive opinion in the Alabama case, which exposed the hollowness of the argument that the right of the laborer himself was untouched by the law. To contract in exercise of the right "may become a necessary and only means of its successful exercise."[141] Labor agents act as intermediaries in low-wage occupations and perform services for which no adequate substitute machinery has yet been devised.[142] Even the Employment Service has been unable to dispense with these agents.[143]

Aside from the effect on instruments which facilitate the movement of laborers, infringement of the constitutional right is established by the intent of the law. The courts as well as administrative officers and employers in the states affected have frequently declared that the purpose of their emigrant agency laws was to prevent the removal of laborers considered necessary for employing interests within these states. Almost as frequently they have declared that the laws were directed toward the protection of these laborers.[144]

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v. Fears considered egress in relation to the privileges and immunities clause, but then seems to draw an improper inference—that the emigrant agency decision rejected *in principle* protection of interstate movement by the privileges and immunities clause. *Supra* note 64 at 448, 449, 56 Sup. Ct. at 268 (1935).

[141]Joseph v. Randolph, *supra* note 7 at 506, 507 (1882). Counsel for appellant said at 502: "Contracts to labor in another state are the ordinary and usual modes for a laborer's obtaining means to move. . . . The tax is a prohibition. It prevents advances to enable him to leave, on the faith of his promise to labor in his new home. Its purpose is to make the laborer a mere thing—a fixture to the soil."

[142]See *Hearings on H. R. 5510,* pp. 177, 178; also Farm Labor Program, 1943, *Hearings before Subcommittee of Committee on Appropriations on H. J. Res. 96,* U. S. Senate, 78th Cong., 1st Sess. pp. 107, 108.

[143]See, for example, *Tolan Committee Hearings,* part 5, 1826; part 28, 10758; part 33, 12492.

[144]A typical two-sided declaration is the following: "The occupation taxes in Texas, as in other States, were intended to be a deterrent to the exploitation of migratory laborers. They were established to discourage invasions from outside on the State's labor market and mobile workers." Report of Texas State Employment Service, *Tolan Committee Hearings,* part 5, 1810.

It need not be denied that the legislature and law enforcement officials are more familiar than resident workers with the possibilities of abuse and exploitation in out-of-state employment.[145] But the logic of the emigrant agency law, we have said, is anticipatory and prohibitive;[146] all outside employment *a priori* is made harmful,[147] and would-be jobholders are automatically denied their fundamental rights under the guise of protecting their welfare. Texas officials, for example, who fear that their workers may be "overinfluenced"[148] by unscrupulous emigrant agents, couple their concern with

[145]"We have many cases on record where employers in other states enticed laborers from Texas and then refused to give them employment." Testimony of Texas Commissioner of Labor Statistics, *Hearings on H. R. 5510,* 172.

[146]*Supra* p. 485.

[147]When the state of Florida attempted by an emigrant agency law to restrict the movement of laborers among counties within the state, the supreme court of Florida said [*Ex parte* Messer, 87 Fla. 92, 101, 99 So. 330, 333 (1924)]:

". . . to the extent that opportunities and avenues of employment are, by the restraining influences of the statute, arbitrarily or unreasonably denied or closed to persons who exchange their services for money or other forms of property, which includes a large proportion of the residents of the state, the statute is an unwarranted interference with an essentially innocent exercise of liberty of contract. It in no sense deals with hours of labor or payment of wages. It has no relation to contracts of employment that may be immoral. It is not concerned with whether the place of employment is safe or sanitary. No such basis can be found for it. It attempts to deal with ordinary business relations of individuals which have heretofore been regarded as free from arbitrary governmental restriction because of constitutional limitations. It is, we think, clearly within the inhibitions of the constitutional guaranties of liberty of persons to contract, as construed by the cases cited which are binding upon this court, and therefore transgresses legislative power."

[148]This word occurs in the emergency clause appended to Senate Bill No. 127 which was passed by the Texas 41st legislature, second called session. Texas Gen. and Spec. Laws 1929, 2d and 3d called sessions, c. 96, p. 203. Section 11 of the bill reads:

"The fact that the State of Texas has come to be recoguized as a fruitful field for the activities of emigrant agents, and the further fact that a large percentage of the individuals solicited by said agents are uneducated and not fully cognizant of their rights and are susceptible of being overinfluenced, and the further fact that there exists no law providing for a reasonable regulation of said business, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three separate days be suspended, and the same is hereby suspended, and that this act become effective from and after its passage, and it is so enacted."

According to the Texas Commissioner of Labor Statistics this clause "very clearly expresses the legislative intent." *Hearings on H. R. 5510,* 172. A more explicit expression of legislative intent is given in the emergency clause to House Bill No. 207 passed by the first called session of the same legislature (Texas Gen. and Spec. Laws 1929, 1st called session, c. 104, p. 253), which bill was soon after repealed when a federal court enjoined its enforcement. Section 10 of this bill read:

"The fact that the State of Texas has come to be recognized as fruitful field for the activities of emigrant agents who by their efforts cause seasonal depletion of the essential labor supply of the State for the needs of the agricultural, ranch and other industries of Texas, and the fact that the effect of the continuous operations of such agents have become a source of periodical unrest among the laborers of the State and that the number of such agents has increased to an extent affecting the economical welfare of the State in its essential farm, ranch and industrial development and the fact that the necessary supply of labor in Texas is by reason

an admission that higher wages in the beet fields of the North offer an inducement to annual worker migration from the state.[149] The Texas employment service since its inception has championed enforcement of the emigrant agency law, and in accord with the spirit of the law has consistently refused to refer workers to outside employment[150] despite a heavy surplus of labor at the harvesting peak within the state.[151] In commenting on the attitude of Texas employment service officials, the counselor to the general consul of Mexico located at San Antonio stated to a Congressional investigating committee in the fall of 1940:[152]

> "It is contended by some people that the cotton kings of Texas are responsible for the legislation in Texas, the effect of which is to force laborers to stay in Texas and pick cotton for 50 cents a hundred pounds

of natural conditions subject to fluctuations that periodically curtail adequate labor supply, and the fact that the vocation of emigrant agent, by reason of the foregoing facts, requires State regulation create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby, and this Act shall take effect and be in force from and after its passage, and it is so enacted."

Incidentally the emergency clause appears to be something of a routine. We find it also appended to an early Texas employment agency law passed before the first World War (Texas Gen. Laws 1915, § 9, p. 165) and to any emigrant agency law enacted in 1917 (Texas Gen. Laws, 2d called session, 35th Leg., c. 36, § 9, p. 108).

[149] *Tolan Committee Hearings,* part 5, 1845. The natural effect of this migration opportunity is to make the laborers less contented with low wages in the home state. The following claim is interesting in juxtaposition: "Incidentally this movement of workers without regulation each season has a tendency to break down wage standards in other states." Testimony of Texas Commissioner of Labor Statistics, *Hearings on H. R. 5510,* 172.

[150] "We are not going to recruit 500 or 100 or any Mexicans for Michigan if that doesn't follow the law on our statute books. . . . " Testimony of Texas Farm Placement Supervisor, Texas Employment Service, *Tolan Committee Hearings,* part 5, 1840. See also *Id.* at part 33, pp. 12484, 12485; MENEFEE, MEXICAN MIGRATORY WORKERS OF SOUTH TEXAS [Work Projects Administration, Division of Social Research (1942)] pp. 30, 31.

[151] A memorandum to the Labor-Management Advisory Committee of the War Manpower Commission submitted by the director of the U. S. Employment Service on August 20, 1942, estimated a surplus of 200,000 Texas agricultural workers above harvesting requirements in September of 1942. At the same time growers in Texas and elsewhere were clamoring for the importation of Mexican workers. It is instructive to note this observation in the summer of 1942 by the director of the legal department, National Catholic Welfare Conference (*Tolan Committee Hearings,* part 33, 12419):

> "It seems to me after this recent visit to San Antonio, what we have is exploitation, rather crude and sordid, of an oversupply of labor—labor that is worth so little that very little effort is made to conserve it. So that you have a great residue of labor that through malnutrition, unsanitary conditions, lack of education is being reduced to uselessness. The residue of that labor, perhaps as many as 20,000 or 30,000 people in San Antonio alone, are living in swamps in miserable huts; they can't even rent a room in the buildings constructed by the Housing Administration. I think that rather than bring new labor from Mexico the effort should be made by the agricultural interests to conserve the labor that has been brought from Mexico and I don't think anything at all worth while has been done along that line."

[152] *Tolan Committee Hearings,* part 5, 1863.

instead of being permitted to leave the State freely at the request of large concerns in other States of the Union where they might earn three and four times more money."

Vigorous attempts of South Carolina and Georgia to enforce their emigrant agency laws[153] acquire added significance when it is considered that these states have the lowest agricultural wage rates in the country.[154]

The right to move freely in search of economic betterment is a mark of national citizenship and fundamental in our system of constitutional guarantees. So say Justices Douglas and Jackson in the *Edwards* case as they raise anew the banner of the "almost forgotten privileges and immunities clause."[155] The restrictions imposed by the emigrant agency laws fall squarely within the principle of the California penal statute which these concurring opinions reject. In both laws the restrictions would act upon those instrumental in effecting the movement of citizens and not upon these citizens directly. The original parties to the controversy in the *Edwards* case were in complete accord[156] that the issue ultimately involved the constitutional rights of the migrant Duncan and not those of Edwards himself. The attorney general of California, appearing in behalf of the state at the request of the Supreme Court, and entering the case in its later stage, insisted that the statute making it a misdemeanor to bring, or assist in bringing, an indigent person into the state did not affect the right of the indigent to enter at his own option.[157] The Court did not deem the distinction worthy of consideration in its opinion.[158] And the following language[159] of Justice Douglas, concurred

[153]See Part I, (1943) 28 CORNELL L. Q. 286, 293.

[154]The U. S. Dep't. of Agriculture reported that daily farm wages without board in South Carolina and Georgia were $1.40 and $1.55 respectively on April 1, 1943. Release dated April 14, 1943. These farm wage rates were approximately half the national average and less than a quarter of those in the best-paying states. For a survey of legal measures designed to tie workers to a low-wage agricultural economy, see Zeichner, *The Legal Status of the Agricultural Laborer in the South,* (1940) 55 POL. SCI. Q. 412.

[155]Phrase of Justice Stone in Colgate v. Harvey, *supra* note 64 at 443, 56 Sup. Ct. at 265 (1935). The overruling of *Colgate v. Harvey* by *Madden v. Kentucky,* 309 U. S. 83, 93, 60 Sup. Ct. 406, 411 (1940) does not, in our opinion, constitute a serious setback for application of the privileges and immunities clause to issues such as those under review in this paper. Even Justice Stone might have been willing to grant protection of the fourteenth amendment to the right of egress.

[156]Brief for Appellant and Brief for Appellee and Respondent, both reprinted in *Tolan Committee Hearings,* part 26, pp. 9998, 10004.

[157]Brief of the Attorney General of California on behalf of the Appellee, reprinted in *Tolan Committee Hearings,* part 26, pp. 10012, 10020.

[158]However, the fact that the majority opinion rested the case on the commerce clause has evoked the judgment that the rights of the migrant Duncan were ignored. Silverman, *Human Cargo Still on the Move,* (1942) 10 GEO. WASH. L. REV. 528, 538. This raises the question whether the Court would have permitted Duncan to invoke protection of the commerce clause in the event that the California law were aimed at barring him directly. Such laws have been proposed in the California legislature. See Supplement

in by Justices Black and Murphy, we hold to be conclusive of the question whether the constitutional rights of citizens are infringed by the emigrant agency laws:

> "The conclusion that the right of free movement is a right of *national* citizenship stands on firm historical ground. If a state tax on that movement, as in the *Crandall* case, is invalid, *a fortiori* a state statute which obstructs or in substance prevents that movement must fall. That result necessarily follows unless perchance a State can curtail the right of free movement of those who are poor or destitute. But to allow such an exception to be engrafted on the rights of *national* citizenship would be to contravene every conception of national unity. It would also introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the rights of *national* citizenship, a serious impairment of the principles of equality. Since the state statute here challenged involved such consequences, it runs afoul of the privileges and immunities clause of the Fourteenth Amendment."

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to Brief of John H. Tolan, *amicus curiae,* reprinted in *Tolan Committee Hearings,* part 26, pp. 10118, 10119. In the *Chirillo* case, 283 N. Y. 417, 435, 28 N. E. (2d) 895, 902 (1940), involving compulsory removal of an indigent, Judge Finch, who discussed the substantive issues of the case in his dissent, suggested that the aggrieved had no cause to raise the question of the commerce power.

With regard to the privileges and immunities clause, Justices Douglas and Jackson, concurring in *Edwards v. California,* judged that the privileges or immunities of Duncan were abridged by a law ostensibly pointed at Edwards. In a territorial emigrant agency case (*In re* Craig, *supra* note 7), however, the supreme court of Hawaii refused to consider the contention of an alleged emigrant agent that the law abridged the laborer's right of free egress under the privileges and immunities clause of the fourteenth amendment (aside from the court's unwillingness to decide whether that amendment applied to the Territory). The adverse opinions take their lead from *Hatch v. Reardon,* 204 U. S. 152, 160, 27 Sup. Ct. 188, 190 (1907), where Justice Holmes said: " . . . unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all." See also Clark v. Kansas City, 176 U. S. 114, 20 Sup. Ct. 284 (1900); Cronin v. Adams, 192 U. S. 108, 24 Sup. Ct. 219 (1904). *Cf.* Truax v. Raich, 239 U. S. 33, 38, 36 Sup. Ct. 7, 9 (1915), where the law made the master subject to prosecution, but the servant was permitted to complain because the law in effect curtailed his own rights.

[159]Edwards v. California, *supra* note 64 at 181, 62 Sup. Ct. at 170 (1941).