REGULATION OF THE MOVEMENT OF WORKERS: FREEDOM OF PASSAGE WITHIN THE UNITED STATES*

IVAN C. RUTLEDGE†

> . . . The liberty mentioned [in the Fourteenth Amendment] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace 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 avocation, 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.[98]

The question to which this assertion was addressed did not involve the right to go from one place to another, but the right of a Louisiana resident to make a contract of insurance outside the state with a company that had not complied with Louisiana requirements. This right was upheld as against a state statute that made it a crime to engage in such a contract, on the ground that the statute deprived the person of liberty without due process of law, forbidden by the Fourteenth Amendment.

1. THE BASIC AMBIGUITIES

In the *Slaughter-House Cases*[99] another clause of the Fourteenth Amendment was closely examined: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." But an immunity from the creation of a monopoly in butchering livestock was held to be a matter for state determination; no privilege or immunity of national citizenship was involved. "[L]est it should be said that no such privileges and immunities are to be found if those we have been considering are excluded . . . ," the Court, through Mr. Justice Miller, "venture[s] to suggest some which owe their existence to the Federal government, its National character, its

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* This article is the second of two articles by Professor Rutledge on this subject. The first one was published in the April, 1953, issue of the Washington University Law Quarterly.

† Associate Professor of Law, University of Washington.

98. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

99. 16 Wall. 36 (U.S. 1873).

Constitution, or its laws."[100] The first one suggested was outlined as follows:

> One of these is well described in the case of *Crandall v. Nevada.* It is said to be the right of the citizen of this great country, protected by the implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it. . . . He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several states."[101]

This privilege exists as one of national citizenship, independent of its provision by state law, and within the protection of the federal judiciary against its invasion by state law, in contrast to the privileges and immunities of citizens of the states, who must look to their respective states for their protection. The privileges and immunities of citizens of the several states,[102] the opinion had said, are intended to be the same as those contained in the fourth article of the Articles of Confederation, which the Court quoted:

> . . . [T]he better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively.[103]

The Constitution left out the exceptions that excluded paupers and vagabonds, but provided for fugitives from justice and fugitive "persons held to labor" (or slaves). It also omitted the explanatory passages commanding free ingress and egress and equal treatment. But if Mr. Justice Miller was correct in asserting the identity of the privileges and immunities of citizens of the states under the Articles and under the Constitution, the privilege of entering and leaving a state was protected by state law only, a result seemingly inconsistent with his first-listed

100. *Id.* at 79.
101. *Ibid.*
102. "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." U. S. CONST. Art. IV, § 2.
103. Volume I, U.S.C. xxvii (1946); 16 Wall. 36, 75 (U.S. 1873).

example of the privileges and immunities of national, as distinguished from state citizenship. Furthermore, the opinion goes on to cite the leading case on privileges and immunities of citizens in the several states, *Corfield v. Coryell*,[104] decided by Mr. Justice Washington on circuit. The passage quoted holds that the privileges and immunities referred to are those that are fundamental in a free government, and Mr. Justice Washington also listed the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus. . . ."[105] But Mr. Justice Miller listed the privilege of the writ of habeas corpus as attaching to national citizenship, along with the right "to use the navigable waters of the United States, however they may penetrate the territory of the several States. . . ."[106]

In light of the primary concern of the Court in the *Slaughter-House Cases*, which was the extent of protection by the national privileges and immunities clause of citizens of a state against legislation of that state creating a monopoly, it seems likely that these apparent inconsistencies in the opinion can be reconciled. The privileges and immunities of citizens in the several states are by national authority extended to citizens of a state while in another state but not generally as against their own state by national authority. Some, like the privilege of the writ of habeas corpus, also attach to national citizenship, hence are protected by national authority on behalf of a citizen of a state against his own state. Among these are such privileges and immunities of access as are related to the transaction of federal business, and navigation and foreign commerce, which are peculiarly federal in their nature. Though a broader privilege of ingress and egress into and from the states was incorporated in the Constitution as a matter of state citizenship, the dictum simply does not say whether in its entirety it is also an incident of national citizenship.

The Court "ventured to suggest" that the quotation used to describe the first of the privileges and immunities of national

104. 6 Fed. Cas. 546, No. 3,230 (C.C.E.D. Pa. 1823).
105. *Id.* at 552. Mr. Justice Catron said that when aliens are naturalized as citizens of any state, "[t]hey may go into every state without restraint, being entitled 'to all the privileges and immunities of citizens of [*sic*] the several States.'" Passenger Cases, 7 How. 283, 451 (U.S. 1849).
106. Slaughter-House Cases, 16 Wall. 36, 79 (U.S. 1873).

citizenship was taken from *Crandall v. Nevada,*[107] decided before ratification of the Fourteenth Amendment. Mr. Justice Miller, writing for the majority in that case also, did by way of illustration contend that the functions of the federal government would be embarrassed by a tax on the right of a citizen to assert claims against the government or to engage in administering its functions, if the tax in question, levied by Nevada upon egress from the state, were valid. But these words were adopted as expressing the holding of the case:

> Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States from the most remote States or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every state in the Union. . . . For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own states.[108]

Mr. Justice Clifford, joined by Mr. Chief Justice Chase, disagreed: they would have held the tax on passengers leaving Nevada unconstitutional as an invalid regulation of interstate commerce.[109]

While it may be generally observed that within the jurisdiction of the United States there are few direct legal barriers to movement from one place to another, nevertheless it is actually a matter of speculation to a large degree what are the constitutional bases for protection and enforcement of this freedom. So far as research for this study discloses, the freedom to migrate for employment is not separately protected but is only part of the general freedom of locomotion. There are four avenues of approach to constitutional right that might include the right to migrate for employment. They are the privileges and immunities of citizens in the several states, the privileges and immunities of citizens of the United States, the power of Congress to regulate commerce, and the protections against deprivation of liberty without due process of law and against the denial of the equal

107. 6 Wall. 35 (U.S. 1867).
108. *Id.* at 48-49, quoting Mr. Chief Justice Taney in the Passenger Cases, 7 How. 283, 492 (U.S. 1849).
109. 6 Wall. 35, 49 (U.S. 1867).

protection of the laws. The full extent of the Thirteenth Amendment has not been defined, either in legislation or judicial construction,[110] but to the extent that it protects against deprivation of choice of employment it removes the initial obstacle to search for a chosen employment.

2. ARTICLE FOUR, SECTION TWO

Primary Application

Mr. Justice Field, writing for the Court in *Paul v. Virginia*,[111] said that the clause conferring on the citizens of each state all the privileges and immunities of citizens in the several states gives them the right of free ingress into and egress from them, but he held that special privileges, such as the privilege of acting in corporate form, conferred upon citizens in one state are not by this provision secured to them in other states. In *Ward v. Maryland*[112] the Court set aside a state license tax that discriminated in favor of resident traders, as being in conflict with the constitutional protection of citizens of each state with respect to the privileges and immunities of citizens in the several states:

> . . . Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation. . . .[113]

In this case, the privileges and immunities of Article Four were applied to protect against discrimination in the state of destination, thus assuming the right of access and freedom of move-

110. Mr. Justice Field, dissenting in the Slaughter-House Cases, 16 Wall. 36 (U.S. 1873), observed:

> . . . The abolition of slavery and involuntary servitude was intended to make every one born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. . . . A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. . . . The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude.

Id. at 90-91.

111. 8 Wall. 168 (U.S. 1868).

112. 12 Wall. 418 (U.S. 1870).

113. *Id.* at 430.

ment among the several states as the object of the protection against molestation of citizens of another state. But if the Fourth Article of the Constitution does protect immunities and privileges parallel to those more explicitly laid down in the fourth article of the Articles of Confederation, the instances of its application are confined to the substance of the provision that the people of each state shall in any other state "enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."[114]

The cases do not provide instances of protection of the right to "free ingress and regress to and from any other State." They deal with protection against discrimination in the carrying on of business activities, ordinarily by differentials in taxation and sometimes by differences in regulatory requirements.[115] Of the latter class was the statute regulating use of the highways so as to render the out-of-state tourist amenable to suit in case of an automobile accident, sustained in *Hess. v. Pawloski.*[116] It was held that the special burden imposed there, no more than equalized the responsibility of the non-resident with that of the resident, conceding that among the privileges and immunities is the "right of a citizen of one state to pass through, or to reside in any other state."[117]

Interpretation

The suggestion has been made that a state violates Article Four if it limits ingress and egress of citizens of other states without a similar limitation upon its own citizens; but that Article Four, apart from other constitutional limitations, would permit a state to place a non-discriminatory limitation of this nature upon all citizens of the several states including its own.[118]

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114. See note 103 *supra.*

115. *E.g.,* Toomer v. Witsell, 334 U.S. 385 (1948); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920); Blake v. McClung, 172 U.S. 239 (1898).

116. 274 U.S. 352 (1927).

117. *Id.* at 355. The Court's quotation is from *Corfield v. Coryell.* See notes 104, 105 *supra* and text cited thereby.

118. Concurring opinion of Mr. Justice Douglas, Edwards v. California, 314 U.S. 160, 180 (1941). In United States v. Wheeler, 254 U.S. 281, 299 (1920), Mr. Chief Justice White stated:

> Nor is the situation changed by assuming that as a State has the power, by depriving its own citizens of the right to reside peacefully therein and to free ingress thereto and egress therefrom, it may, without violating the prohibitions of Article IV *against discrimination,* apply a like rule to citizens of other States, and hence engender, *outside of Article IV,* a federal right. [Italics supplied.]

This interpretation is upside down. If the purpose of the provision is to prevent states from discriminating against citzens of other states and thus to secure to them the advantages of a union of states, it follows that exclusion or expulsion from a state is a denial of its privileges and immunities (whatever they might be, in a state so isolated) regardless of similar exclusion or expulsion of its own citizens. Likewise, limitation on departure into other states is *per se* a deprivation of privileges and immunities in other states.

To take non-discrimination as the entire content of the section overlooks the end, concentrates upon the means, and ignores the succeeding sentences in the section, which provide that fugitives from justice and fugitive slaves shall be returned.[119] Apart from these exceptional cases, the state is under no duty to return a citizen of another state; on the contrary, it must let him enter into its territory and then participate in its protections. If a state may not put a citizen of another state "in a condition of alienage when he is within or when he removes to" the host state,[120] it surely cannot treat him as an alien by exclusion or expulsion. Yet the power of Congress to regulate interstate commerce was employed as the sole basis for striking down a statute that not only limited ingress to California but discriminated against citizens of other states, and Justices Douglas, Black, Murphy, and Jackson, concurring, preferred to rest the conclusion on the Fourteenth Amendment protections for national citizens, rather than on Article Four.[121]

Limitation upon Enforceability

If the Fourth Article forbids a state to infringe the right to enter, leave, or pass through its territory, it nevertheless does not give the Congress power to afford protection to this right in addition to, or in lieu of, state protection. The privileges and immunities clause of Article Four, like the Fourteenth Amendment, has been held to be directed alone against state action,[122] though the fugitive slave clause of the same section was held

119. U. S. CONST. Art. IV, § 2.

120. Blake v. McClung, 172 U.S. 239, 256 (1898).

121. Edwards v. California, 314 U.S. 160, 180, 183 (1941).

122. United States v. Wheeler, 254 U.S. 281 (1920); United States v. Harris, 106 U.S. 629 (1882). But see text cited to note 147 *infra*.

to confer upon Congress the power to provide enforcement machinery.[123]

In *United States v. Wheeler*,[124] the turbulence of the activities by and against the I.W.W. produced a controversy over the power of Congress to penalize a conspiracy to deprive citizens of the United States of privileges secured to them by the Constitution. The allegations were that the conspirators had armed themselves, seized 221 citizens residing in Arizona, by force put them aboard a train in Arizona and shipped them to New Mexico, and warned them of death or great bodily harm should they ever return to Arizona. The banishment was connected with the authority of the State of Arizona only in that the laws of Arizona had not prevented it. The Court held that federal power extended only to enforcing the restriction of Article Four against discriminatory action by the state, and that so far as action by individuals is concerned, only the states have power to protect the privileges and immunities of their respective citizens.

3. Privileges and Immunities of National Citizenship

But is not the privilege to go and come or to reside in any state a privilege of national citizenship? The dictum in the *Slaughter-House Cases*[125] appeared to accept the position of the majority, led by Mr. Justice Miller, in *Crandall v. Nevada*,[126] but the passage selected for quotation, as has been pointed out, contains qualifications upon the examples of access, so that they are all in some way related to functions or powers otherwise vested in the federal government. Before the *Wheeler* case, however, the right to enter and leave or remain in the various states was said to be among the privileges and immunities of national as well as state citizenship, notwithstanding this apparent contraction of the privilege of access. In *Twining v. New Jersey*,[127] the author of the majority opinion, Mr. Justice Moody, said, citing the *Crandall* case: "Thus among the rights and privileges of National citizenship recognized by this court are [*sic*] the right to pass freely from State to State. . . ."[128] The *Wheeler* case dis-

123. Prigg v. Pennsylvania, 16 Pet. 539 (U.S. 1842). And see text cited to note 163 *infra*.
124. 254 U.S. 281 (1920).
125. 16 Wall. 36, 79 (U.S. 1872).
126. 6 Wall. 35 (U.S. 1867).
127. 211 U.S. 78 (1908).
128. *Id.* at 97.

missed the suggestion of the *Twining* case, reading the *Crandall* case as applicable only to rights of access related to carrying on functions of the federal government and thus following the leadership of the majority in the *Slaughter-House Cases.*

The idea of a national right to pass freely from state to state was not dead. The upsurge of the privileges and immunities clause of the Fourteenth Amendment in *Colgate v. Harvey,*[129] though concerned with a tax exemption to encourage local investment, brought reiteration that the right of free passage from one state to another is "undoubtedly" among the privileges and immunities protected by the Fourteenth Amendment.[130] But Mr. Justice Stone, joined by Justices Brandeis and Cardozo, specifically attacked the dictum:

> . . . In no case since the adoption of the Fourteenth Amendment has the privileges and immunities clause been held to afford any protection to movements of persons across state lines or other form of interstate transactions.
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> . . . If its restraint upon state action were extended more than is needful to protect relationships between the citizens and the national government, and it did more than duplicate the protection of liberty and property secured to persons and citizens . . . , it would enlarge judicial control of state action and multiply restrictions upon it to an extent . . . sufficient to cause serious apprehension for the rightful independence of local government. . . .
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> . . . If protection of the freedom of the citizen to pass from state to state were the object of our solicitude, that privilege is adequately protected by the commerce clause, even though the object of his going be to effect insurance or transact any other kind of business which is in itself not commerce.[131]

Colgate v. Harvey was overruled a little over four years later but without intimation as to that Court's opinion of the freedom of ingress and egress as a national privilege.[132] In the meantime *Hague v. C.I.O.*[133] had been decided. There was no majority opinion. Mr. Justice Roberts, joined by Mr. Justice Black and

129. 296 U.S. 404 (1935).
130. *Id.* at 429.
131. *Id.* at 445, 446.
132. Madden v. Kentucky, 309 U.S. 83 (1940). The opinion, however, contains at page 92 the citation from *Twining v. New Jersey* supported by note 127 *supra.* The *Crandall* case was not cited. It was said to have been properly decided only on the commerce power in Helson v. Kentucky, 279 U.S. 245, 251 (1929), as Mr. Justice Stone pointed out in Colgate v. Harvey, 296 U.S. 404, 444 (1935).
133. 307 U.S. 496 (1939).

Mr. Chief Justice Hughes, held that the right to assemble and discuss the Wagner Act is a privilege of national citizenship protected against interference under color of state law. Mr. Justice Stone, joined by Mr. Justice Reed and Mr. Chief Justice Hughes, held that defendants had interfered with rights of speech and assembly protected by the due process clause. He was unwilling to experiment with the privileges and immunities clause and revive the contention rejected in the *Slaughter-House Cases* that national privileges and immunities extend "beyond those which arise or grow out of the relationship of United States citizens to the national government."[134] The decree sustained by the Court prohibited the defendants from excluding or removing the plaintiffs from Jersey City or interfering with their free access to the streets, parks, or public places of the city. But the liberty protected under the due process clause, or the privilege of national citizenship protected under the privileges and immunities clause was a narrow one: the right to assemble and discuss national legislation.[135]

The suggestion of Mr. Justice Stone in 1935 that the commerce clause provides adequate protection of the freedom of the citizen to pass from state to state was accepted by a majority of the Court in 1941 in *Edwards v. California.*[136] The statute challenged in that case made it a misdemeanor for any person to bring an indigent person into the state. It was used as a means of bringing pressure to bear upon indigents who had come into the state to return to their former homes in other states. That is, the sentence would be suspended on condition that the indigent and his family would go back where they came from.[137] The case presented to the Court was taken to involve only the question whether a state can prohibit bringing or transporting into the state indigent persons, that is, persons who are presently destitute of property and without resources to obtain the necessities of life, and who have no relatives or friends able and willing to support them. The classification, however, includes

134. *Id.* at 520.

135. This privilege is not protected by an action for damages against individuals not acting under color of state authority, under the Ku Klux Act, 8 U.S.C. § 47(3) (1946). Collins v. Hardyman, 341 U.S. 651 (1951).

136. 314 U.S. 160 (1941).

137. Exhibit 6, Supplement to Brief of the Attorney General of California, in *Hearings before Select Committee Investigating National Defense Migration,* 77th Cong., 2d Sess., pt. 26, 10052-10062 (1942).

persons who are mentally and physically fit, that is to say, persons who may be seeking employment. Although the statute was held to be an unconstitutional burden on interstate commerce, in the majority opinion written by Mr. Justice Byrnes, only four of his brethren were content to base the conclusion upon the commerce clause. They were Mr. Chief Justice Stone, as would be expected, and Justices Roberts, Reed, and Frankfurter. To them, it was of significance that if the California statute were valid, migrants and those who transport them would find it almost impossible to learn rules of admission to the several states. Justices Douglas, Black, Murphy, and Jackson were for confirming the right of free movement as one of national citizenship, protected by the privileges and immunities clause of the Fourteenth Amendment. Mr. Justice Douglas pointed out the error of the dictum in *United States v. Wheeler* that the *Crandall* holding was restricted to a statute that burdens the performance by the United States of its governmental functions,[138] and disagreed with the dicta in *Helson v. Kentucky* and *Colgate v. Harvey*[139] that Mr. Justice Miller and the majority in the *Crandall* case were wrong and that the concurring justices were right.

Mr. Justice Jackson wrote a separate concurring opinion in which he agreed with Mr. Justice Douglas that the precedents show the national right of the citizen to migrate from state to state. He pointed out some limitations upon that right, without benefit of reference to authority, though they are fairly obvious. One is the fact that all constitutional limitations by the federal government are applicable, really a circular statement. Others are within state power: fugitives from justice and persons carrying contagion that would endanger others. But the state of being without funds is "constitutionally an irrelevance, like race, creed, or color."[140]

After three quarters of a century the same issue divided the Court, though the result was different. That issue is whether to protect the transportation of persons across state lines from local legislation as a matter of protecting interstate commerce or as a protection of a national privilege and immunity with respect to a citizen passenger. Stated another way, it is whether

138. Text cited to notes 125, 126, 127 *supra*.
139. See note 132, *supra*.
140. Edwards v. California, 314 U.S. 160, 185 (1941).

to focus upon the regulation of the transportation or the freedom of the passenger. In both the *Crandall* and the *Edwards* cases there was the fact that the person immediately involved was one who transported another interstate, but in the former case the majority were concerned primarily with the right of the passenger while in the latter a scant majority were concerned with the right of the transporter. (Two of that majority and three of the concurring minority now remain on the Court.)

4. The National Commerce Power

Early Applications to Movement of Persons

Restrictions imposed by states upon movement of persons into their territories have been held unconstitutional by virtue of the federal power over foreign commerce. For example, in *City of New York v. Miln*[141] the issue was considered to be whether a New York statute was an unconstitutional infringement of the federal power to regulate interstate commerce. It called for information concerning passengers on incoming ships to be reported. In the *Passenger Cases,*[142] the head tax on immigrants levied by New York and Massachusetts was found to be an unconstitutional regulation of foreign commerce. The cases[143] that finally confirmed the power of Congress to regulate immigration as exclusive of any state power (except perhaps as to "paupers, vagrants, criminals, and diseased persons"[144]) consistently referred the conclusion to the commerce power. As with the *Edwards* majority, so in *Henderson v. Mayor of New York* there is the focus on the constitutional protections of the carrier rather than the passenger:

> The argument has been pressed . . . that inasmuch as this statute does not come into operation after the passenger has . . . mingled with . . . the mass of the population, he is . . . remitted to the laws of the State as its own citizens are. It might be a sufficient answer to say that this is a mere evasion of the protection . . . from the Federal government. . . .
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> But the branch of the statute which we are considering . . . operates directly on the ship-owner. . . . He is to give

141. 11 Pet. 102 (U.S. 1837).
142. 7 How. 283 (U.S. 1849).
143. People v. Compagnie Générale Transatlantique, 107 U.S. 59 (1882); Chy Lung v. Freeman, 92 U.S. 275 (1875); Henderson v. Mayor of New York, 92 U.S. 259 (1875).
144. *Id.* at 275.

> the bond or pay the money because he *has* landed the passenger, and he is given twenty-four hours' time to do this before the penalty attaches.
> . . . The case does not even require us to consider at what period after his arrival the passenger himself passes from the protection of the constitution, laws, and treaties of the United States, and becomes subject to such laws as the State may rightfully pass, as was the case in regard to importations of merchandise. . . .[145]

Congressional Exercise of Power

Congress has exercised power under the commerce clause to regulate the movement of persons from one state to another as well as to and from foreign countries, in addition to regulating the instrumentalities of transportation. Under the power to regulate interstate commerce it has specifically safeguarded interests which the *Wheeler* case[146] held were not included under rights or privileges secured under the Constitution or laws of the United States. That is, if the right to remain peacefully in a state is invaded by kidnaping, and if the kidnaping can be presumed, or shown, to have been followed by carrying the victim away in interstate commerce, the statute constitutes a protection.[147] This protection affords penalties much more severe than under the Civil Rights Acts[148] and extends beyond citizens as such to any person.[149] There is no specific liability under the

145. *Id.* at 273-274.

146. 254 U.S. 281 (1920). The indictment was under what is now § 241 of the Criminal Code, 18 U.S.C. (Supp. 1951). The history of the section is traced in United States v. Williams, 341 U.S. 70, 73-75, 79-81, 83, 88-91 (1951). This decision leaves it in doubt, because there is no opinion of the Court, whether the section protects only rights of citizens "which arise from the relationship of the individual and the Federal Government" from private rather than state invasion (Frankfurter, J.), or protects all federal rights that may be federally protected by the federal criminal code (Douglas, J., dissenting) or is too vague to afford due process (Black, J., the fifth man of the majority).

147. The purpose of the abduction is practically immaterial. Gooch v. United States, 297 U.S. 124 (1936). See Finley, *The Lindbergh Law*, 28 GEO. L. J. 908 (1940).

148. Kidnaping draws up to life imprisonment and death under certain conditions. Robinson v. United States, 324 U.S. 282 (1945); 18 U.S.C. § 1201(a) (Supp. 1951). The Civil Rights Acts have a maximum of $5,000 fine and ten years' imprisonment for conspiracy against the federal rights of citizens. *Id.* § 241. For deprivation of federal rights (of "inhabitants") under color of law, the maximum penalty is $1,000 fine and one year's imprisonment. *Id.* § 242.

149. The protection of § 241 [18 U.S.C. § 242 (Supp. 1951)] is limited to "citizens" as used in the Fourteenth Amendment. Baldwin v. Franks, 120 U.S. 678 (1887). There may be an alternative between a charge of kidnap-

federal criminal law, however, for merely obstructing a person in his attempt to cross a state line, though it is a felony to obstruct by threats of violence the movement of any article or commodity in interstate commerce.[150]

The assertion of state authority to prevent entry into or to require departure from a state probably does not come within any criminal statute for the protection or regulation of interstate commerce. If, for example, an officer should transport a family out of the state under threat of criminal prosecution of the person who brought the family in, under such assertion of authority as that in the *Edwards* case, there probably would not be the restraint necessary to constitute kidnaping.[151] The right to enter or remain could ordinarily be vindicated by litigation in the state courts, with resort to the United States Supreme Court, against a statute or application of a statute placing an unconditional burden upon interstate commerce.[152]

Limitations on State Power

Relations to commerce clause. There are other instances of exercise of the commerce power by Congress to regulate the movement of persons. In addition to the prohibitions against taking females in interstate commerce for prostitution and other

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ing, and deprivation of rights of citizens under § 241 or of federal rights on account of color or race under § 242 [18 U.S.C. § 242 (Supp. 1951)]. The United States recently obtained a conviction of defendant under § 242 for transporting Negro men and women from Florida to Alabama to force them to work for him. United States v. Gantt, N.D. Ga., REP. ATT'Y GEN. 239 (1950).

150. 18 U.S.C. § 1951 (Supp. 1951). The Sherman Act appears to afford no remedy, because of lack of effect on the market for goods or services from obstructing access to the labor market. See Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940). The Ku Klux Act remedy of damages in the federal courts [8 U.S.C. § 47(3) (1946)] would not apply to a conspiracy of private persons to prevent access to a state. Collins v. Hardyman, 341 U.S. 651 (1951). As to criminal prosecution under § 241 of the Criminal Code, color of state authority is required. United States v. Williams, 341 U.S. 70 (1951).

151. *Cf.* Chatwin v. United States, 326 U.S. 455 (1946) (willingly accompanying another not kidnaping). Whether officers of the law acting as such are covered by the act has been expressly left unanswered. Frisbie v. Collins, 342 U.S. 519, 522 (1952). See Exhibit 6, *supra* note 137, for instances of use of a criminal statute to induce return to the former residence.

152. The *Edwards* case is an example. Habeas corpus is another possible remedy. 28 U.S.C. § 2241 (Supp. 1951). If only an infringement of federal authority over interstate commerce is involved, but no "right secured by the Constitution and laws of the United States," the jurisdictional amount requirement would probably prevent the use of the federal injunction. See Douglas v. City of Jeannette, 319 U.S. 157 (1943); Hague v. C.I.O., 307 U.S. 496, 530-532 (1939).

immoral purposes[153] and against travelling in interstate commerce to avoid giving testimony in a criminal case or to avoid prosecution or confinement after conviction,[154] the code prohibits travel or transportation of another in interstate commerce as a strikebreaker.[155] But no act of Congress was inconsistent with the California statute in the *Edwards* case. It seems to stand for the immunity of persons from state interference with ingress or egress as a by-product of denial of power to the state by the very existence of the commerce clause. The majority opinion says that a state may not, by the expedient of closing its gates to the outside world, gain momentary respite from the pressure of events, though the Court has not the function of passing upon the wisdom or appropriateness of legislation, and appreciates the staggering proportions of the California migrant problem. The opinion did not need to point to any inconsistent federal regulation, but, as it says, the burden upon interstate commerce was intended and immediate; the statute must fail under "any known test of the validity of State interference with interstate commerce."[156]

Indigents. The problems of poverty and unemployment are not

153. 18 U.S.C. § 2421 (Supp. 1951).
154. *Id.* § 1073.
155. *Id.* § 1231. § 1231 provides as follows:

> Whoever wilfully transports in interstate or foreign commerce any person who is employee or is to be employee for the purpose of obstructing or interfering by force or threats with (1) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor, or (2) the exercise by employees of any of the rights of self-organization or collective bargaining; or
>
> Whoever is knowingly transported or travels in interstate or foreign commerce for any of the purposes enumerated in this section—
>
> Shall be fined not more than $5,000 or imprisoned not more than two years, or both.
>
> This section shall not apply to common carriers.

156. Edwards v. California, 314 U.S. 160, 174 (1941). Baldwin v. Seelig, 294 U.S. 511 (1935), cited in the opinion, seems to be one test to which the Court adverted: "the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the States." *Id.* at 522. But in this instance, competition for what? Public benefits? The Court implies that the relief problem admits of diverse treatment by the several states. Edwards v. California, 314 U.S. 160, 176 (1941). Transporting indigent non-residents is likely to be subjected to cumulative burdens, because of interstate retaliation. Variation in the rules of admission to the various states would make them hard to learn! This seems to be a length-of-train-law test. "The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are aparent." Southern Pacific Co. v. Arizona, 325 U.S. 761, 775 (1945).

subject to attack by the determination of a state not to admit citizens of other states, citizens of the United States without residence in any state, or aliens coming from elsewhere in the United States. Migrants for employment thus will not be impeded by state laws excluding them. The Elizabethan poor law system cannot be perpetuated by limitations that make it a crime to bring a person into the state. It is doubtful that although the intent element of the crime were made more specific by

Relation to commerce clause. There are other instances of requiring intent to charge the local authorities with the support of the migrant, such a statute would escape the condemnation of unconstitutional interference with commerce. This kind of control was commonly sustained in the last century by state courts.[157] A closely related control, imposing civil liability upon the transporter, also appears to be unconstitutional.[158]

Communicable diseases. A closer problem is presented in connection with state quarantine laws. In *Compagnie Francaise v. Louisiana Board of Health,*[159] the Court held that until Congress acts a state may prohibit the introduction of persons and property into a district infested with contagious or infectious diseases. Mr. Justice Brown, dissenting, pointed out the distinction between detention to ascertain the existence of disease, and a general exclusion. He relied upon *Railroad Co. v. Husen*[160] for the proposition, asserted in connection with a general ban on the importation of cattle, that a state may not interfere with trasportation into or through a state any more than absolutely necessary for its own protection. It is probable that a state is now required not to discriminate against persons entering its

157. *E.g.*, State v. Cornish, 66 N.H. 329, 21 Atl. 180 (1890); Dover v. Wheeler, 51 Vt. 160 (1878). In Winfield v. Mapes, 4 Denio 571, 573 (N.Y. 1847), it was said:

> . . . We had abandoned the practice which at one time prevailed, of sending paupers who had gained no settlement here, to the state where they had a legal settlement: and as the legislature had determined to provide in future for all the poor within our limits, they intended that other states, so far as we are concerned, should do the same.

158. Judgment for the town of $67 per head was affirmed against a defendant who brought in a woman and her three children from Massachusetts to a Connecticut town where they were not "inhabitants." Barkhamsted v. Parsons, 3 Conn. 1 (1819). *Contra:* City of Bangor v. Smith, 83 Me. 422, 22 Atl. 379 (1891), (federal commerce power excludes state power).

159. 186 U.S. 380 (1902). *Cf.* Morgan's S.S. Co. v. Louisiana Board of Health, 118 U.S. 455 (1886).

160. 95 U.S. 465 (1877). See RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE 93 (1937).

borders in excluding persons from areas of communicable diseases. Otherwise the "plain and sole function" of the statute would be to hamper the transportation of persons into the state, in the words of the majority in the *Edwards* case. In that case too, by the distinction made between poverty and immorality, there is a faint implication that a state can exclude "moral pestilence." At any rate, it is likely that a state can detain persons suspected of having a communicable disease though they are on an interstate journey, unless in so doing there is discrimination against interstate passage.[161]

Limitation upon ingress to a state by its laws has extended primarily to the exclusion of persons who have violated some other law, persons who are suffering from dangerous, contagious diseases, and persons who are dependent upon the public for support or assistance. Fugitives from justice have since the Articles of Confederation been the subject of special constitutional provision. They were at one time classified with fugitives from slavery and the states were under no duty to extend the rights of ingress and egress to them under the Articles. The new Union required cooperation of the states, to return them where they were wanted.[162] This cooperation of the states has been reinforced by federal exercise of the commerce power.[163] On the other hand, the problems of poverty and disease have been for the most part handled in the subterranean regions of municipal authorities, welfare and police administrators, with few watermarks registering the extent of their authority, the duties of interstate comity, or the rights of individuals.

The *Edwards* case has emphasized a limitation upon state power to deal with the particular problem of poverty at the risk of damage to unity among the several states. The conflict of laws, Article Four, and the commerce power are all sources of legal technics towards a more perfect union of states. The problem of control of contagion in plant and animal diseases has

161. This would be a protection-of-state-highways kind of test. South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938). The Court in the *Edwards* case called attention to the idea that lack of political representation of those affected by a regulation is a factor in identifying it as subject to scrutiny though Congress has not acted to regulate commerce in the field. A non-discriminatory regulation is therefore less likely to be invalidated.

162. Kentucky v. Dennison, 24 How. 66 (U.S. 1860).

163. 18 U.S.C. § 1073 (Supp. 1951).

been solved, so far as the federal difficulties are concerned, by various distributions of responsibility among federal and state officers. Similarly, the control of human diseases is probably moot as a constitutional issue of state power, with no more limitation upon freedom to move from one place to another interstate than intrastate, and that degree restricted to a direct relationship between the inspection or quarantine and the hazard to the public.[164]

Persons protected. Whatever may be the limits of immunity from state regulation of the transportation of persons, it is clear from the *Edwards* case that transportation of able-bodied persons seeking employment is within it.[165] It seems that the reasoning of the majority applies to restraints imposed directly upon the migrants, who are "the real victims of the statute" and who along with those who transport them, would find it a "virtual impossibility" to learn the "peculiar rules of admission of many States."[166] Furthermore, there was no evidence of any commercial relationship. Edwards brought his brother-in-law, Duncan, from Texas to California, apparently as a family arrangement to take care of Mrs. Duncan during confinement, and to give Duncan an opportunity to seek employment in California. Treating the case as one of regulating the facilities of interstate travel does not make it any less a case of regulating the travel itself, when the reason for invalidity of the regulation is the burden placed upon the traveller as well as the transporter.

Accordingly, cases like *Williams v. Fears*[167] present a different problem. The state imposed a tax upon emigrant agents, or agents in the business of hiring labor within the state for employment in other states. No distinction was made by the statute between local agents and agents from other states.[168] The Court held that there was no discrimination forbidden by

164. See TOBEY, PUBLIC HEALTH LAW 29-34, 45-48, 131 (3d ed. 1947). *But see* Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).

165. "Poverty" (from whatever cause: age, disease, or defect) is contrasted with "immorality." Edwards v. California, 314 U.S. 160, 177 (1941).

166. *Id.* at 176.

167. 179 U.S. 270 (1900).

168. The California statute did not discriminate among the immediate subjects, the transporters of indigents: "Every person, firm or corporation, or officer or agent thereof that brings . . . into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor." CAL. WELF. AND INST. CODE § 2615 (Deering, 1937).

Article Four, that the freedoms of egress from the state and of contract were affected only incidentally and remotely, that the movement of persons out of the state is not an export, that the distinction between intrastate and extra-state employment was a reasonable one for purposes of the due process and equal protection clauses, and that the tax was not a regulation of interstate commerce, because emigrant agents are not engaged in interstate commerce.[169] The labor-hiring business is not so immediately connected with interstate traffic or transportation as to be within the scope of interstate commerce. In the characterization of Mr. Justice Stone, it is a "local business", "separate and distinct from the transportation and intercourse which is interstate commerce," which "in the ordinary course" induces such transportation or intercourse.[170] A regulation by the state, like a tax, receives the benefit of such a distinction where Congress has not acted. Mr. Justice Stone again, writing for the Court in unanimous agreement, held that licensing of transportation agents, who are not themselves engaged in the transportation, but act as brokers, is valid, when it does not obstruct or restrict or prohibit interstate commerce. State regulation of a facility to encourage travel may be valid, where it does not restrict the travel itself. Negotiation for transportation interstate, if treated differently than negotiations for transportation otherwise classified, is of more doubtful validity.[171]

5. Limitations on Congressional Power

Nature of the Power

The Court forbids state regulation of transportation that restricts interstate travel, and in so doing necessarily forbids state regulation that prohibits ingress to a state. If the source of the prohibition is the commerce clause, the power of Congress

169. *Compare* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), *with* Paul v. Virginia, 8 Wall. 168 (U.S. 1868).

170. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 253 (1938). Even supplying laborers for employment in interstate commerce may be taxed. Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90 (1937).

171. California v. Thompson, 313 U.S. 109 (1941), *overruling* Di Santo v. Pennsylvania, 273 U.S. 34 (1927). But as to emigrant agents, courts have not found the classification obnoxious to the commerce clause. Hanley v. Moody, 39 F.2d 198 (N.D. Tex. 1930) (taxation of $1,000 state fee and $100 to $300 in each county); Kendrick v. State, 142 Ala. 43, 39 So. 203 (1905); State v. Napier, 63 S.C. 60, 41 S.E. 13 (1902).

to provide for similar regulation must be examined. The emergence of the "consent" of Congress as an instrument of federalism demands attention. We are told that it is "assured doctrine" that "Congress, legislating for the people as a whole, may formulate its own policies and establish its own laws, or so devise its action as to enable the states to effectuate their own policies through their own laws."[172] Could Congress authorize the states to renew their separate policies of protecting themselves from an influx of indigents from other states?[173] What policies are open to Congress itself?

"Congress may keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the States."[174] The majority in the *Edwards* case merely found it unncessary to decide whether such a regulation of the movement of persons as were there involved would be repugnant to other provisions of the Constitution and expressly noted that they were not called upon to decide the scope of congressional power to deal with the problem. Congress has in only a few instances, as previously noted, prohibited the free movement of persons interstate. The instance most carefully considered by the Court has been the prohibition against taking females across a state line for immoral purposes. Starting from the convenient comparison of persons to articles of commerce, the court sustained the statute as a proper exercise of the commerce power.[175] The statute is valid, even though it is interpreted to include trips of a non-commercial nature for purposes

172. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COL. L. REV. 547, 560 (1947).

173. Six states besides California (Alabama, Florida, Kansas, Minnesota, Vermont, and Wyoming) imposed criminal liability; nine states (Colorado, Georgia, Illinois, Massachusetts, Mississippi, Nebraska, Rhode Island, Vermont, and Wisconsin) imposed civil liability; five relied on both (Kentucky, Michigan, Nevada, New Jersey, and Washington); Connecticut added deportation to civil liability, while this device was added to criminal liability in Indiana; and all three forms of protection against the poor were authorized in Iowa, Maine, New Hampshire, and New York (a total of 27 states). *Hearings, supra* note 137, at 10188-10203.

174. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946).

175. 18 U.S.C. § 2421 (Supp. 1951); Hoke v. United States, 227 U.S. 308 (1913). The prohibition of fugitives from justice has been sustained against attack based upon Art. IV. § 2, and other constitutional limitations. Hemans v. United States, 163 F.2d 228, 238 (6th Cir.), *cert. denied*, 332 U. S. 801 (1947).

regarded as moral by a minority that adheres to polygamy as a religious practice. "The power of Congress over the instrumentalities of interstate commerce is plenary, it may be used to defeat what are deemed to be immoral practices. . . ."[176] Too few pronouncements in the field of regulating the movement of persons are available to make it possible to say what weight attaches to the Congressional determination that the purpose of the journey is immoral or so related to its power to regulate commerce as to justify prohibiting the transportation of such persons.

The transportation of others has been made the center of attention by the Court in all questions of the constitutional allocation of power in the commerce clause as applied to regulating the movement of persons. Nevertheless, though the female went as a passenger it has been held that she could be convicted of conspiracy to take her in interstate commerce for immoral purposes.[177]

The further question is whether Congress has the power to prohibit a person from travelling interstate because he intends to engage in immoral practices, or do any other criminal act, or any act contrary to a policy established in the statute. This kind of regulation would, it seems, amount to an expansion of the area of conduct that can be made criminal considerably beyond the traditional limits of criminal attempts. Yet the statute against strikebreakers not only prohibits transportation but forbids one to travel if he is employed or "is to be employed" for the purpose of obstructing or interfering by force or threats with peaceful picketing or the exercise of employees' rights of self-organization or collective bargaining.[178] This statute has not been subjected to constitutional challenge under any of its possible applications, but it seems to constitute an assertion of Congressional power to prohibit a person from entering a state if he intends while there to engage in certain activities. It is conceivable that the statute is applicable though the intended

176. Cleveland v. United States, 329 U.S. 14, 19 (1946); Caminetti v. United States, 242 U.S. 470 (1917).

177. Mr. Justice Holmes, who was especially learned in the field of criminal law, wrote for the Court. United States v. Holte, 236 U.S. 140 (1915). Later, it was held that the woman must do more than acquiesce in the planned trip to incur liability. Gebardi v. United States, 287 U.S. 112 (1932).

178. 18 U.S.C. § 1231 (Supp. 1951). This section was quoted in note 155 *supra*.

activities are lawful under the law of the state, as for example, taking employment in a North Carolina plant that is strikebound because the employees demand a union shop.[179]

Article Four, Section Two

The act of Congress that prohibits one from traveling in interstate commerce to avoid criminal prosecution or giving testimony is directed primarily at the passenger or traveller, and the transporter is not mentioned as such.[180] It met a challenge directed at it on the ground of violation of Article Four, Section Two, with success, but without any judicial explanation.[181] The right to pass from state to state, whether under one or another constitutional protection, is not unlimited. Article Four, Section Two, as previously suggested, should be read in its entirety, excluding the fugitive slave provision. It will be seen that it expressly provides for the return of fugitives from justice, thus removing them from the remitting state and to that extent providing an exception to its duties to accord its privileges and immunities to the person.

That is not to say, however, that Congress has the power under the commerce clause to remove the protection extended by Article Four to citizens of each state, to enjoy the privileges and immunities of citizens in the several states. No judicial authority, but the text of the Constitution, establishes this limitation, which should be considered to exist as a limitation upon federal as well as state action. The language of the Article is inconsistent with a general limitation of the right of citizens of any state to have access to and residence in any state.[182]

Privileges and Immunities of National Citizenship

It may be questioned whether the privileges and immunities clause of the Fourteenth Amendment has any vitality, in view of the prestige of the late Chief Justice, and the weight of his opinion in favor of application of the commerce clause to prob-

179. See Whitaker v. North Carolina, 335 U.S. 525 (1949).

180. 18 U.S.C. § 1073 (Supp. 1951).

181. Hemans v. United States, 163 F.2d 228, 238 (6th Cir. 1947), *cert. denied*, 332 U.S. 801 (1947).

182. Bowman, *The United States Citizen's Privilege—State Residence*, 10 B.U.L. REV. 459 (1930). Art. IV, § 2 has been preferred to Art. I, § 8 in protecting migratory fishing. Toomer v. Witsell, 334 U.S. 385 (1948).

lems of interstate passage.[183] Yet the narrowing of privileges of access to those related to the business of the federal government that occurred by dictum in the *Slaughter-House Cases* does not exhaust Mr. Chief Justice Stone's category of those that arise or grow out of the relationship of United States citizens to the national government. It was perceived in the *Crandall* case that the nature of our federal government required freedom of mobility of citizens, whether to attend in a federal court or in a state court, whether to pay federal or state taxes. The more so, when the Fourteenth Amendment was to assure national citizenship to all persons born in any state and state citizenship to those residing in the state. The *Edwards* case does not stand in the way of a determination that the privileges and immunities of national citizenship also assure freedom to enter and leave any state, that no state may impair "that mobility which is basic to any guarantee of freedom of opportunity."[184] As Mr. Justice Jackson pointed out, the privileges and immunities clause is vague, but no vaguer than the due process clause, or even the commerce clause.

If the privileges and immunities clause of the Fourteenth Amendment includes the privilege to pass from state to state, that privilege, but for Article Four, presumably could be limited by Congress, as the states may limit the privileges and immunities of their citizens.[185] Article Four, combined with the definition of national and state citizenship in the Fourteenth Amendment, may be a limit upon Congressional power. But it hardly withholds from Congress the power to interdict freedom of movement of citizens from state to state in cases other than those of fugitives from justice. The prohibition of transportation of females for immoral purposes provides an instance to the contrary. Nevertheless, none of the national limitations upon interstate movement of persons thus far sustained is inconsistent with the mobility basic to freedom of opportunity anywhere in the United States.

Limitations of that mobility have occurred under the war power. A military exclusion order applicable to all persons of

183. See Meyers, *Federal Privileges and Immunities: Application to Ingress and Egress*, 29 CORNELL L.Q. 489 (1944).

184. Mr. Justice Douglas in Edwards v. California, 314 U.S. 160, 181 (1941).

185. Slaughter House Cases, 16 Wall. 36 (U.S. 1873).

Japanese ancestry, executed in the first year of the last war on the West Coast, was sustained.[186] But after the panic had somewhat abated, the Court at least construed the authority of the War Relocation Authority not to include the power to "subject citizens who are concededly loyal to its leave procedure" and set the prisoner free without restriction upon where she might go.[187] The military power of governors of states, too, has been employed in Florida and Colorado, at least, and in California a city chief of police assumed to set up a patrol of the state borders. These phenomena occurred in 1936 and 1937 under what was assumed to be the great public hazard from jobless transients. In Colorado, the governor was reminded by Senator Chavez of New Mexico that that state had in the past been giving jobs to graduates of Colorado institutions (miners and agriculturists), and Senator Hatch called his attention to Article Four, Section Two of the Constitution.[188] So long as the courts are open and functioning, any dispute as to the right of a person to enter a state or remain therein is referable to the courts, regardless of assertions of the military power of the executive.[189]

Due Process and Equal Protection

Whether the privilege of free migration within the United States extends to non-citizens has received attention by obiter dictum in at least one case, *Truax v. Raich*.[190] Although it exceeds the scope of this study to explore the permissible state and federal limitations upon employment opportunities, the facts of the case may be indicated briefly. An Arizona statute required any employer of more than five employees to use not less than eighty per cent of native-born persons. The plaintiff was of Austrian birth, and his employer, in order to comply, was required to let him go. The petition of the employee for an injunction against enforcement of the statute was the device whereby its validity was called in question. The Court held the statute to be in contravention of the equal protection clause of the

186. Korematsu v. United States, 323 U.S. 214 (1944).
187. *Ex parte* Endo, 323 U.S. 283, 297 (1944). Mr. Justice Murphy, concurring, alluded to the right to pass freely from state to state. *Id.* at 307. See Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L. J. 489 (1945).
188. *Hearings*, *supra* note 137, at 10159-10173.
189. See Sterling v. Constantin, 287 U.S. 378 (1932).
190. 239 U.S. 33 (1915).

Fourteenth Amendment. In the course of the opinion, Mr. Justice Hughes said that an alien, by admission to the territory of the United States, has the privilege of entering and abiding in any state in the Union. In the *Edwards* case, Mr. Justice Jackson said of this declaration:

> . . . Why we should hesitate to hold that federal citizenship implies rights to enter and abide in any state of the Union at least equal to those possessed by aliens passes my understanding. The world is even more upside down than I had supposed it to be, if California must accept aliens in deference to their federal privileges but is free to turn back citizens of the United States unless we treat them as subjects of commerce.[191]

6. SUMMARY

The freedom of opportunity to look for employment that depends upon access to any state is part of the growth of the nation. Most of the settlement of the successive western areas of land from the Alleghenies to the Pacific was accomplished by migration for settlement initially, but the consolidation of the territory took place in a second phase by migration for employment.[192] This migration consisted in substantial part of aliens. No internal restriction of their mobility was ever sanctioned by fundamental law, in spite of virulent attacks of anti-Oriental fever. In addition to the privileges and immunities clauses of the Fourth Article and Fourteenth Amendment, it is not unreasonable to conjecture that the equal protection and due process clauses may finally, if necessary, be called to the protection of this traditional mobility on behalf of people as "persons" rather than as "citizens." A prohibitive tax imposed upon emigrant agents recruiting from certain counties for employment outside the state was held unconstitutional in an old state case.[193] The court, relying upon a provision of the state constitution that emigration should not be prohibited, went further and declared that every *person* has the undoubted constitutional right to enjoy free egress from or transit through the state. The tax was held to be a serious clog on this right. Without reference to any specific constitutional provision, a court in a more recent case construed a welfare statute as not requiring a person to be sent

191. Edwards v. California, 314 U.S. 160, 184 (1941).
192. UNITED STATES, NATIONAL RESOURCES COMMITTEE, PROBLEMS OF A CHANGING POPULATION 83 (1938).
193. Joseph v. Randolph, 71 Ala. 499 (1882).

back to another county where he had "settlement," though he was found to be a public charge. Otherwise, he would be confined to a single county in the state without his consent.[194] The personal interests involved in restrictions upon movement, intrastate as well as interstate, are plain: the narrower the circle of inclusion, or the more intensive the exclusionary regulations, the nearer the approach to a suspension of habeas corpus, which is expressly forbidden to the federal government, with qualifications,[195] and is ordinarily a violation of state constitutional provision.

The necessity for the power to direct the distribution of the labor force by immediate legal compulsion can be imagined only as a part of a more nearly total war than has yet been experienced. The official information and enforcement mechanisms to make it effective could be organized only on a quasi-military scale, in which the denial of opportunity to choose employment would be insignificant among other limitations of freedom.

CONCLUSION

The central theme of this paper has been the constitutional protection surrounding the right to change work. The two most important threats to that right have been the demand for unskilled and poorly qualified workers to fill jobs as sharecroppers or farm laborers and pressures to avoid the burden of unemployed strangers. Against both of these threats the Supreme Court of the United States has opposed constitutional barriers.

These barriers are a jerry-built structure, failing as they do to draw in bold lines a national protection of all inhabitants of the land to live and work where they choose, free from legal compulsion binding them to a master as a serf is to his land or directing them where they may work. Nevertheless there is an outline of fundamental national policy that withholds from government the power to enforce private involuntary servitude and gives both federal and state governments a good measure of power to impose sanctions against it. On this foundation, there is a superstructure that at least restricts the states from gross exclusions from opportunities for employment. If its blueprint

194. Custer County v. Reichelt, 67 S.D. 471, 293 N.W. 862 (1940). *Contra:* Lovell v. Seeback, 45 Minn. 465, 48 N.W. 23 (1891).

195. U. S. CONST., Art. I, § 9, cl. 2.

has been correctly appraised from Article Four and the Fourteenth Amendment it provides a large measure of freedom to change locality in pursuit of employment.

Public planning for direction of distribution of the labor force must continue to respect these limitations. That is, non-coercive strategies for minimizing unemployment and underemployment will supplement the intelligence and initiative of the people most likely to move to an area where workers are needed. The problem of excessive transiency in connection with seasonal occupations requires a solution within the same limitations. How far this kind of policy is consistent with the importation of foreign workers is the subject of another study, but it may be suggested here that any accession to the working force from immigration, so far as its members are subjected to limitations upon freedom to seek employment, produces an erosion of the fundamental policy of a labor force free of restrictions upon the mobility of its members.