Herbert Roback

Constitutional rights of citizens and mobilization of manpower for war production are threatened with serious interference by state legislation designed to restrict the removal of workers to other states for employment. Wide publicity was given recently to the action of a Georgia superior court judge who imposed a fine of $1,000 on the personnel agent of a Newark scrap steel firm for attempting to recruit workers without a license required under the state emigrant agency law.[1] The company representative later reported that the judge "gave him a suspended sentence of six months on a chain gang, placed him on probation for eighteen months and gave him twenty-four hours to get out of Georgia."[2] When an official of the War Production Board attempted to intercede in his behalf, stressing the need for workers to maintain the company's delivery schedules, the judge was quoted as saying: "The WPB isn't running this court."[3]

The Georgia emigrant agency law[4] has been on the statute books in one form or another, and for varying periods, since 1876.[5] Nine other States of the South have similar laws.[6] Municipal ordinances frequently supplement the state statutes. License or tax fees, excessive in amount and often duplicated for each county of operation,[7] are levied for the privilege of soliciting workers to be employed beyond the limits of the state. Failure of the agent to obtain a license as stipulated in the law generally constitutes a misdemeanor punishable by a heavy fine or by imprisonment. The clear intent is to discourage a removal of negro workers, and thereby to prevent temporary or permanent depletions of a labor force which occupies a certain institutional position in the economy of the South.[8] Enforcement of these laws is not apparent in some states but is active in others, particularly during periods of accelerated outmigration. An area of acute overpopulation and widespread underemployment, the South has provided a fertile field for recruiting agents from other parts of the county seeking low-wage labor.[9]

The constitutionality of the emigrant agency laws has not been successfully challenged in the state courts.[10] In 1900, the Supreme Court of the United States validated the Georgia statute,[11] and subsequent decisions by state or other courts have followed this ruling without elaborate argument.[12] In recent years, the constitutional issues have been obscured and withheld from re-examination by a tendency to identify emigrant agency statutes with laws regulating private employment agencies.[13] Abuses associated with the operations of private employment agencies have compelled judicial recognition that such agencies are subject to public control,[14] even to the extent of fee regulation,[15] under the police power of the state. The emigrant agency laws, enacted to immobilize the internal labor supply rather than to eliminate abuses practiced by private employment agents, have been cited as instruments of state regulation directed toward the latter end.[16] The emigrant agency laws first were enacted many years prior to, and remain separate from, the employment agency laws in their states.[17] A wide disparity exists in the

the emigrant agency laws, by their very nature, cannot effectively regulate the operations of private employment agents, and that these laws are in conflict with the federal Constitution.

The case for the unconstitutionality of the emigrant agency laws is strengthened by the celebrated decision of the Supreme Court in Edwards v. California.[19]...

The Wagner-Peyser Act of June 6, 1933,[21] re-created the United States Employment Service in the Department of Labor[22] and charged the Service with developing a national system of employment offices...

The state public employment services set up in conformity with the Wagner-Peyser Act established a rather unique federal-state relationship.[23] The state services received most of their operating funds from the federal government, enjoyed the privilege of the federal frank, and were subject to rigid federal supervision. In accepting the purposes of the federal Act, the state services were necessarily involved in "a system for clearing labor between the several States." Possible collision with the state emigrant agency laws appeared at this point...

In April, 1941, a North Carolina farmer applied at his local employment service office for strawberry pickers. Unable to fill this request, the local office referred it to the central state office which in turn relayed it to the employment service in South Carolina. A local office in South Carolina was found with the requisite number of workers, and the farmer was advised through regular employment service channels to report at the local office in South Carolina on a certain date. This office rounded up the workers and turned them over to the farmer for transportation to his farm in North Carolina. The South Carolina Unemployment Compensation Commission, which operated the state employment service, requested an opinion of the attorney general as to whether this activity was prohibited under the emigrant agency law of the state. The attorney general held[30] that "the South Carolina Unemployment Compensation Commission is without authority to recruit laborers in South Carolina to be transported to some other State for employment." Citing the provisions of the emigrant agency law,[31] he added:

> "Both of these sections were enacted to prevent the sending of laborers from the State of South Carolina, to work in some other State, and thus to make it more difficult for the farmers and others in this State to secure needed help. It is a well known fact that because of various government activities, and demand for increased production the urge for laborers to quit their regular jobs and seek easier money elsewhere is great, and that the lot of those endeavoring to carry on the work of the farm and other State activities is more discouraging at this time because of the shortage of labor. It would certainly, in my opinion, violate the spirit if not the letter of the quoted section of our State law, for the Unemployment Commission to foster and direct the hiring of laborers in South Carolina

direct the Unemployment Commission to function in this matter it has not yet so enacted." (Italics in original).

Several weeks later the chairman of the Unemployment Compensation Commission requested that the attorney general modify this opinion and give "official concurrence" to the Commission's view that in accepting the Wagner-Peyser Act the state legislature specifically authorized the Commission to make interstate referrals of labor through the mechanism of the employment service.[32] In a second opinion,[33] the attorney general stood his ground, preferring to rest the case on the section of the Unemployment Compensation Law which charged the Commission with finding employment for workers throughout the state.[34] He stated in part:

> "...It was the prime purpose of setting up free employment service offices--to improve the conditions of workers in South Carolina wanting work. The division may by posting bulletins, and otherwise making available 'results of investigations' bring to the attention of the people of our State that there is great need for workers in other states and what kind of labor is needed and when it will be needed, but the division is not, in my opinion, authorized to round up or corral workers, in South Carolina, to be sent to work in other States. To hire the workers for employers residing in other states, to assemble the workers at the local office in South Carolina on a certain date, and when the foreign employers come for the workers--for your division to turn the requested number of South Carolina workers over to such foreign employer--would be doing effectively the forbidden work of an 'emigrant agent', It would, by direct Act of the division, tend to deplete the farms and other activities in South Carolina of needed workers--and I cannot find any legislative expression indicating the desire that your Commission, or any of its divisions, were created for such purpose. The Unemployment Compensation Commission was created to advance the cause of the workers of South Carolina, by informing idle workers where they can find work in the State, and what the need elsewhere is for workers--but there is no duty or authority to hire or corral such labor and bodily deliver it to employers of other states." (Italics in original).

Participation of the South Carolina employment service in "a system for clearing labor between the several States" as provided in the Wagner-Peyser Act thus was construed in the narrow sense of informing workers as to employment opportunities in other states. Workers seeking employment presumably were free to act upon this information and migrate with their own resources and upon their own initiative. If, however, they were assembled at a convenient gathering point or otherwise recruited within the state, the South Carolina employment service, unlike its sister service in Alabama, would be judged to carry on the business of soliciting labor for employment outside the state.

A wartime directive by President Roosevelt consolidating all the state services in the United States Employment Service as one federal agency[35] apparently caused no change of heart in South Carolina. Governor Jefferies, then in office

The United States Employment Service to date has not developed all the mechanisms necessary to bring men and jobs together. In seasonal agriculture and related pursuits, where jobs are changed frequently, giving rise to large-scale migrations, interstate operation of the Service is extremely primitive. Workers in these occupations frequently are recruited and hired in gangs. Facilities for their transportation must be arranged, and supervision exercised over the moving work crews. Commonly these tasks are performed by private labor contractors or agents acting for one or more employers. Transportation difficulties and growing shortages of agricultural labor in some areas have prompted the Department of Agriculture, in cooperation with the United States Employment Service, to undertake directly the recruitment and transportation of agricultural workers.[53] As instruments of the federal government these agencies are not lawfully subject to interference by state emigrant agency laws. The bulk of employment in seasonal agriculture, however, is handled through intermediaries who are not agents of the federal government. Does federal immunity from state emigrant agency laws extend to these persons who recruit and transport workers after clearing with the Employment Service?

The assumption that federal immunity extends to private persons cooperating with the Employment Service appears to be taken for granted by the Service. When the personnel agent for a Newark scrap metal firm mentioned above was penalized by a Georgia superior court for recruiting labor in violation of the state emigrant agency law, Employment Service representatives were reported as saying that the recruitment should have been cleared through the Service.[54] By contrast, when the attorney general of South Carolina held the state employment service liable under the emigrant agency law, the employer who came to interview and transport the workers assembled for him would seem to have placed himself under the same alleged liability.

The perfunctory role of the United States Employment Service in interstate job clearance makes it unlikely that private persons who solicit workers for employment beyond a state without an emigrant agency license but with approval of the Service will acquire federal immunity with court sanction. A government referral slip could hardly confer an immunity which the Supreme Court refused to extend to a government contractor[55] or lincensee.[56] Use of Employment Service facilities may promote a national purpose but the cooperating employer is pursuing a private business for profit.[57] Wartime requirements of manpower mobilization, however, may work drastic changes in policy. Powers of the President as commander-in-chief and under the First War Powers Act,[58] and of the War Manpower Commission chairman under his newest executive order,[59] are broad and untested. Individual state opposition to the dictates of national war policy can not be suffered.

C. Labor Unions

Labor unions in well-organized trades and industries have developed procedures for interstate job placement of their members. Frequently these placements are arranged in cooperation with the United States Employment Service.[60] Strong labor union opposition has been registered to the restrictive effects of //

organization is virtually non-existent among the unskilled laborers whose retention is sought by exercise of the emigrant agency laws...

D. Persons Soliciting Labor in Their Own Behalf

Employers who solicit labor for their own use beyond the limits of a state ordinarily do not engage in soliciting labor as a business in itself but as an incident to some other business. Emigrant agency fees ostensibly are levied on the conduct of a business, but the wording of the statutes does not always conform to this proposition,[65] and the early laws contained no exemptions. The Alabama statute in its latest formulation, specifically excludes railroad companies transporting their own workmen.[66] The Virginia Code exempts resident contractors temporarily engaged on contracts in other states who may solicit labor for their own work.[67] In Georgia, the commissioner of commerce and labor is vested with discretionary authority to decide whether persons soliciting labor for their own use outside the state come within the purview of the emigrant agency law.[68] Some large corporations making recurrent seasonal demand for out-of-state workers have placed labor agents on company payrolls presumably to avoid the appearance of a separate business and to facilitiate recruitment without the payment of onerous fees.[69]...

The elaborate emigrant agency law in Texas specifies that persons, corporations, etc., soliciting labor for their own use and employment outside the state, who do not maintain an office in Texas for this purpose, are relieved from payment of the heavy occupation tax.[82] (They are required, however, to pay to the labor commissioner a nominal yearly license fee and to conform to other provisions of the statutes). The attorney general of Texas was called upon to determine whether an agent soliciting labor in Texas for an association of Ohio sugar-beet producers came within the above exemption.[83]

The agent, one Julio de la Pena, was employed by the Great Lakes Growers' Employment Committee, Inc., of Findlay, Ohio. Though under contract to act as recruiting agent for the Employment Committee, de la Pena was paid a straight monthly salary and received no other remuneration for his work. He maintained no regular office in Texas, operating from his private residence and employing one assistant paid from his own salary. The attorney general, by recourse to the terms of the agreement between de la Pena and the Great Lakes Growers' Employment Committee, established a distinction between this method of recruitment and employer solicitation which was exempt from the occupation tax. He noted that de la Pena had contracted to solicit sugar-beet workers in Texas for work in the fields of grower members of the Great Lakes Sugar Company and not for his principal, the Employment Committee. It was also pointed out that the Employment Committee undertook to present to the employers of such workers, or to the sugar processors, wage deduction orders for transportation, etc., but not to assume responsibility for collection of such orders. The attorney general stated in part:

> "It is thus apparent, from the face of the contract, that the Great Lakes Growers' Employment Committee, Inc. of Findlay, Ohio, is not the 'employer' of the sugar beet field workers desired to be solicited in Texas, but rather appears in the independent capacity of a separate

that Mr. Julio de la Pena, for himself, or as agent for the Great Lakes Growers' Employment Committee, Inc. of Findlay, Ohio, is either an 'emigrant agent', or the employee of an 'emigrant agent', so as to make him, or the Great Lakes Growers' Employment Committee, Inc., liable for the occupation tax levied by subdivision 40, Art. 4047, V.A.C.S."

The fact that Julio de la Pena received a straight salary and was under obligation to represent the Employment Committee exclusively in recruiting labor was held not determinative of the issue. According to the opinion, "A person, firm or corporation may be an 'emigrant agent,' although he or it represents only one client in procuring employees for it, rather than many clients who desire his services in procuring employees"[84]...

F. Persons Soliciting Labor for Temporary Employment outside the State

Recruitment of low-wage labor in the South is frequently undertaken in response to seasonal demands elsewhere for workers in agriculture and related pursuits. Through long-distance migrations from home, these workers attempt to increase the amount of their employment within the working year and to take advantage of opportunities for better pay. Between employers in the areas of origin and in the areas of temporary destination intense competition prevails for seasonal allocation of the available low-wage labor supply. Opposition of the former employer groups is engendered in part by seasonal withdrawals at the time when their own demands are forthcoming and in part by the fear that their workers, whether immediately employed or not, will fail to return. This fear is voiced frequently, and in application of the emigrant agency laws, persons soliciting temporary recruits generally are not distinguished from those soliciting permanent ones. As far back as 1877, the Georgia supreme court, in elaborating reasons why an instrumentality tending to withdraw population from the state was subject to police and fiscal legislation stated: "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."[102]

Variations in the wording of the law have impelled the courts on occasion to distinguish between temporary and permanent soliciting for outside employment. The Georgia act of 1876,[103] upheld in the dicision just referred to, declared that any person carrying on the business of emigrant agent in the state without first having obtained a license therefor from the ordinary, for which he should pay the sum of $100, was guilty of a misdemeanor. In 1877, another act was passed[104] declaring it unlawful for an emigrant agent to solicit or procure emigrants to leave the state without procuring a license from the tax collector in each county where such agent proposed to do business, for which he should pay the sum of $500. The court later distinguished between the acts of 1876 and 1877 as imposing, in the former, a tax on persons hiring laborers to leave the state, and in the latter, an additional tax on such persons if they should also be engaged in soliciting or procuring individuals to change their residence from this state to another.[105] Neither of these acts was carried in the Georgia Code of 1895, but Section 601 of the Penal Code provided: "Any persons who shall solicit or procure emigrants, or shall attempt

of a misdemeanor." In 1900 the Georgia supreme court had under consideration[106] the appeal of one Varner who had been charged with violating Section 601 and convicted. Itappeared that the accused had arranged for two persons to proceed to Florida and work at cutting turpentine boxes. They did not take their families along and the court saw no evidence that they intended to acquire domicile in Florida. In declaring the accused not guilty, the court observed that Section 601 of the Code simply prohibited the soliciting or procuring of emigrants without a license. An emigrant was defined as one who intended to quit his country and settle elsewhere. The court found it unnecessary in this case to determine whether there was " a license required by law" so as to make one who solicited emigrants amenable to section 601. Had the accused been charged with violating the emigrant agency law enacted in the Tax Act of 1898,[107] said the court, the evidence in the record would have warranted his conviction...

In Texas, where employers have sought vigorously to discourage the seasonal migration of Mexican-American workers to the beet fields of the north, the law at one time imposed on emigrant agents, in addition to heavy license fees, a $5,000 bond for the return of laborers to the state.[110] A recruiting agent, engaged in supplying workers to sugar-beet producers in the middle west, brought suit in federal district court[111] to enjoin the governor and other officials of Texas from enforcing the act. The plaintiff contended in part that the giving of bond and the provisions relating thereto in Section 4 of the act were unconstitutional in that they deprived him of the right to contract and also interfered with interstate commerce. The court upheld the main provisions of the act but declared Section 4 repugnant to both the state and federal constitutions:

> "Under its terms one who furnishes transportation to eleven or more unemployed inhabitants of Texas, that they may work in some other state, is not permitted to make his own contract. He is required to give a bond that he will furnish to each of such laborers return transportation. This not only applies to the employment agent, but it likewise applies to the employer. We know of no power in either the national or state legislative bodies to compel an individual citizen to make any particular sort of contract."

...

Note: The legality of restrictions on the movement of agricultural migrants has come up in discussions from time to time. This article explores legal barriers at the time of World War II. HLJ

LEGAL BARRIERS TO INTERSTATE MIGRATION

Herbert Roback

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.[1] 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, 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]...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 the state, without imposing a like burden on hiring for employment within the limits of the state...Persons who make it a business to hire laborers here for employment elsewhere, may be required to procure and pay for a license."...

The question was not raised whether the "laboring population" and the "hirelings" themselves suffered an infringement of constitutional rights...

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 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

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."...

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 constitutional 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]...

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]

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 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]
...

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]...

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 "over-influenced"[148] by unscrupulous emigrant agents, couple their concern with 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 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] ...