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SHOULD A CORPORATION BE CONSIDERED A CITIZEN UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FEDERAL CONSTITUTION*

R. PAUL HOLLAND **

Subject to the exceptions pointed out in the foregoing analysis the state may prohibit the entrance of the foreign corporation to do business within the state. As has been demonstrated, this power of exclusion is not available against the individual of another state. From the power of exclusion the power of admission upon terms and the power of regulation after admission are deduced.[92] The various forms of regulation and restriction practised against the corporation by another state than that of its creation, and which could not be used against the individual, may be divided into four groups.[93] They are: (a) *As to service of process.* Under this head we find the requirement that the foreign corporation appoint an agent within the state to accept process served against it. No very weighty argument may be made against this for it is the means of saving the residents of the state much trouble and expense. Still, the resident of another state, doing business within the state, is not subject to this sort of regulation, if an individual. (b) *As to taxation.* Taxation may be used for at least two purposes. The first, that of equalizing the burdens of the domestic and foreign corporation, is strictly legitimate and is not objected to. The second use of the tax power is extremely bad. Its common manifestation is in the very high license or privilege fees exacted as a charge for admission, and the later periodical demands which must be met. The

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92 BEALE, *op. cit., supra,* n. 12, § 133.

93 ISAACS, "An Analysis of Doing Business", 25 COL. L. REV. 1018.

principle relied upon in such exactions is the old one—"what the traffic will bear". The situation is critical now when we find every state spending furiously. Available tax sources are inadequate. Bonded debt is increasing tremendously.[94] The need of such Constitutional protection as the privileges and immunities clause would give is felt here perhaps more than in any other place. Of course, if corporations were admitted on the same terms as individuals their businesses and properties would be subject to much the same taxation as local concerns are. (c) *As to regulation by qualification.* The commonly found requirements, such as filing charter, taking license, giving bond or other security, and making periodical reports to state officers, are found under this head. No serious objection is made to such regulation as is necessary for the safety and protection of the public which is dealing with the foreign corporation. Fraud and unfair practices should be prevented. Extension of the meaning of the privileges and immunities clause to cover the corporation would not mean that such protective regulation would be impossible. It would be impossible, however, for the state to hamper unduly or unfairly the foreign corporation. To the regulation of this nature which is carried to an unwise or unreasonable extreme there is a very strong objection. At present the only thing which the corporation may do when it is unfairly discriminated against is to leave the state. Leaving the state may not work such a hardship upon the insurance or loan company, with no great amount of tangible property, but it will ruin the industrial enterprise. (d) *Preference of local creditors in the distribution of the assets of a foreign corporation.*

To these may be added the effects of non-compliance with requirements. The courts of the states differ

[94] In 1880 the bonded debt of civil divisions within the states was $848,533,000.00, or $16.92 per capita, in the same year the bonded debt of the states themselves was $274,746,000.00. In 1922 the debt of the civil divisions was $7,754,196,000.00, or $71.61 per capita, while that of the states had risen to $1,479,981,000.00, or $12.77 per capita. See Statistical Abstract of the U. S., pp. 220, 221.

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as to the treatment of the non-complying foreign corporation. Some hold that the acts of the corporation, contracts, for example, are utterly void and of no effect.[95] No action may be maintained upon a *void* contract. On the ground that to refuse to allow the resident of the state to sue the foreign corporation which has not complied would be to promote fraud, the courts sometimes hold that suit may be brought by the person but not by the corporation.[96] Some courts take the sensible view that if the corporation has offended at all it has offended against the state, and that the state is the one to object, in a separate action. Therefore the parties to the contract are equally entitled to sue upon it.[97] This is similar to the rule held by the majority in the analogous situation of the domestic corporation which has exceeded its charter powers in some way. (*Ultra vires* acts.) It is held that the state may bring quo warranto to dissolve the offending corporation, but that the private suitor takes nothing from the excess of corporate authority.[98] Quo warranto is the remedy of the state against the non-complying foreign corporation.

It might appear, at first sight, that the results of the failure to protect the foreign corporation are not serious enough to warrant such agitation over it. As bearing upon this point we quote at length some very apt words of an eminent author, appearing in 1904. "The corporate property and shares are usually subjected to as many different methods of valuation and taxation, as there are states in which they are located, and in the case of intangible property and shares, are not infrequently subjected to double, triple, or quadruple taxation. Reports and fees are required, terms and conditions of the police control are as diverse as the places in which business is done. Every session of the legislature in each of the

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[95] Pittsburgh Const. Co. *v.* Belt R. Co., 154 Fed. 929 (1907).

[96] Pennypacker *v.* Capitol Ins. Co., 80 Iowa 56, 45 N. W. (1890); *In Re* Naylor Mfg. Co., 135 Fed. 206 (1905).

[97] 24 L. R. A. 315; 38 L. R. A. 545; see also, Toledo T. & L. Co. *v.* Thomas, 33 W. Va. 566, 11 S. E. 37 (1890).

[98] Person may not object: MacGinnis *v.* Boston etc. Co., 29 Mont. 428 75 Pac. 89 (1904). But state may use quo warranto: State *v.* Standard Oil Co., 61 Neb. 28, 84 N. W. 413 (1900); State *v.* Am. Book Co., 65 Kan. 847, 69 Pac. 563 (1902).

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forty-five states, and many of the decisions of courts of last resort, tend to increase, rather than diminish, the diversity. Those who wish to engage in productive industry, not of a purely local character, and in an honorable way, are inordinately inconvenienced and unduly hampered by the conflicting provisions of the state laws. The policy of the states will never be in harmony. Situation, local pride, political bias, party policy, peculiar industries, or financial interest will produce and increase the differences."[99] The same general impression of the situation was in the mind of Isaacs when he wrote, much later, that, "The problems of a foreign corporation doing business arise for the greater part as the result of a general policy adopted by the various states by which they attempt to exclude all outsiders from engaging in commercial activities in their boundaries. This policy remains as a tradition from the time when this country was composed of separate sovereignties and is one of the characteristics of an independent state which neither the Articles of Confederation nor the Constitution was able to eradicate."[100]

The mantle of judicial sanction early fell upon the sort of distrust of corporations which is responsible for the ill treatment complained of by the two preceding writers. In the case of *Paul* v. *Virginia* the court said, "And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restriction, it is easy to see that with the advantages thus possessed, the most important business in those states would soon pass into their hands. The principal business of every state

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[99] WILGUS, "Need of a National Incorporation Law," 2 MICH. L. REV. 358.
[100] ISAACS, *op. cit.*, *supra*, n. 93.

would, in fact, be controlled by corporations created by other states."[101]

True enough, the corporation has been looked upon with merited suspicion during most of its short history. So great was this disfavor in the early part of the nineteenth century that two-thirds vote of the legislature was necessary to incorporate, in many states.[102] It is the same power that was spoken of as "enormous" and "threatening" by Cooley at a somewhat later date.[103] The discovery of the secrets of combination and of the trust form of organization led to such male practices that it resulted in the Anti-Trust legislation of the federal government and the several states. Necessity made possible the "Trust-Busting" campaign of President Roosevelt which ended in placing the huge corporation under the control of the law. It dispelled forever the idea that the corporation could get too big to handle.[104] Public animosity, aroused by bad treatment at the hands of "Big Business", was found difficult to placate. Corporations are still striving to rehabilitate their character in the public estimation. A Rockefeller ousts a Stewart to "clean house". Public service corporations have made "service" the watchword. Whatever may be the attitude of the public to the corporation justice will not be done by hating, by jealousy, or by unfair discrimination. The remedy is in the sane and impartial treatment of the situation with due regard to equality of privilege and the national welfare.

The fears expressed in *Paul* v. *Virginia* now appear to us to be nonsense. The states are powerless to prevent the doing of interstate business. Foreign corporations may engage in that, and to the extent that their business is interstate they are free from unfair discrimination. This follows even though it is often impossible to tell where the line is to be drawn between interstate and intrastate commerce. It is a distinction without a supporting difference in fact. As to

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[101] Paul *v.* Virginia, *supra* n. 36.
[102] 2 KENT, COMM. 271.
[103] COOLEY, CONSTITUTIONAL LIMITATIONS, 2d ed., p. 279-280.
[104] BISHOP, THEODORE ROOSEVELT, Vol. I, p. 182 *et. seq.*

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purely intrastate business, when that is determined, there is again a distinction—but no difference. It does not seem that a real difference can be found in fact. Suppose a resident citizen of Ohio wishes to write insurance in West Virginia. He may do so, and he is not subject to hurtful discrimination as a condition precedent, for that would be to deny him a "privilege" guaranteed him by the Constitution. The same condition prevails if he is a member of a partnership, organized in Ohio, for the purpose of writing insurance in this state. The firm may claim the privilege and immunities of its members. But let that firm incorporate and their right, as citizens, to do business in West Virginia ceases at that moment. They become subject to the complete control of the state of West Virginia. Where is the fact difference? The business has not changed, the persons are the same in fact, everything is the same except the law. What magic is there in the rite of incorporation which denies the incorporator the rights of a citizen in another state? These differences exist by force of law, they are firmly entrenched. Should these two discriminations be removed, and if so, what reasons exist for removing them? Finally, what means are available for remedying the situation?

It cannot be denied that the framers of the Constitution made every effort to free commerce and trade between the states and the people of the states. At that time the corporation was in its infancy. What business or industry there was which was carried on beyond local borders was adequately protected. Business was almost entirely in the hand of the individual. In fact, intercommunication between the states was at the very minimum. Soon this became larger, especially in the banking and transportation fields. Now the nationalization is complete, not only of transport, but also of industry, commerce, banking, insurance, and the other activities of the business world. The Constitution may be looked at as protecting the whole of trade and commerce or in the more restricted view that only those parts specifically named are protected. It is submitted that the former view is more consistent with our ideas of the course of constitu-

tional interpretation. Mr. Justice Bradley has said that, "In the matter of interstate commerce the United States are but one country."[105] Likewise, in the matter of intrastate business or industry, *done by individuals,* we are but one country. As to the business done by foreign corporations we are many nations. This is a result not foreseen by the framers of the Constitution and one which is repugnant to the central idea of the great framework of our government. The discriminations should be removed, if it be possible.

Various legal reasons are urged as being sufficient to justify the power of the states. The corporate being is not capable of bodily entering the foreign state. Neither is it capable of "bodily" existence in the creating state. Let us examine this contention. Morawetz has pointed out the danger of the dogmatic way of regarding the corporate entity. He shows that even though the corporation may contract with its stockholders, sue them, be sued by them, own property in which they have no legal or equitable existence, that still the corporation remains a mere association of individuals. They, as individuals, have the right to privileges and immunities of citizens of the several states. In such a case as this, where to refuse to look behind the corporate "veil" results in hardship to the owners of the corporation we have a practical demonstration of misapplication of a rule of law. In certain cases the corporate entity is disregarded. The United States Supreme Court did so in a case where the corporate entity was a mere cloak to cover a fraud upon the government.[106] In that case it was admitted that the corporation was a mere association of individuals. If this can be done against the stockholders, why can it not be done for them? When it was urged that the corporation of a foreign state did not have commercial immunity under the commerce clause the Supreme Court said, "To carry on interstate commerce is not a franchise or privilege granted by the state; and the *accession of mere corporate facilities,*

[105] Robbins *v.* Taxing Dist., 120 U. S. 489, 494, 30 L. ed. 694 (1887).
[106] U. S. *v.* Trinidad Coal Co., 137 U. S. 160. 34 L. ed. 640 (1890).

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as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."[107] It is difficult to see how the "accession of mere corporate facilities" should have the effect of depriving citizens, the stockholders, of their constitutional privileges and immunities, any more than their rights under the commerce clause.

A second objection to a change which may be advanced is that the state to which the corporation seeks admission has an absolute power over the creation and the life of all the "domestic" corporations created by it. There is no vested right to incorporate in the people of the state. While at first this objection may appear valid it is not really of any great force. The corporation is such a necessary adjunct of modern business activity that this necessity may be depended upon to prevent any wholesale prohibition of incorporations by any state legislature. Since the privileges and immunities clause does not give to the stranger anything except the ordinary rights accorded the citizen of the state the foreign corporation would not be permitted, under the clause, to do anything in the state which a similar domestic corporation could not do.

It may be urged that there are practical reasons which demand that the state be allowed to exercise the control over foreign corporations which it now exercises. If the foreign corporation were totally free from regulation it would be possible to subject the citizens of the state to very serious danger of fraud and unfair dealing. The foreign corporation, if free of regulation, would be able to evade the inspection and publicity laws enacted for the protection of the public from the domestic and foreign corporation alike. It may be said that some states have such lax incorporation laws that those who deal with them are unsafe. This may be said of the states which bargain for the chartering business, as Nevada does for the divorce business. Loose laws

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[107] Crutcher *v.* Kentucky, *supra,* n. 45 (italics are ours.)

and low requirements are used to entice the incorporator. The fact that the corporation may reside elsewhere may prejudice local creditors. All of these objections have considerable merit. Most of the weight is taken from them, however, by the admitted power of the state to regulate, wisely and fairly, so far as its police power extends. Admission under the privileges and immunities clause would not do away with the power of regulation, wherever fairly exercised. It would merely place the Federal courts in supervision—to see that commercial equality and fair treatment obtained everywhere. What minor disadvantages remain may be borne for the sake of commercial uniformity. Moreover, cannot it be said that the same small disadvantages exist with reference to the admission of true "citizens" as at present allowed?

None of the reasons which can be given in support of the present condition can hope to outweigh the advantages of the contrary result. How, then, may the change be accomplished? The constitutional interpretation is firmly entrenched in our law. "Person" is held to include the corporation, generally, while "citizen" is held to exclude it. It is unfortunate that the framers of the Constitution could not foresee the time when the corporation would seek to carry on business in other states. It was impossible that they should foresee this—and yet, the situation now demands remedial action. The truth is that a corporation is neither citizen nor person, but is an organization made up of those who are. How may their rights be secured to them?

A constitutional amendment might be suggested which would cure the difficulty. This is an expedient often tried but rarely successful. It might be suggested that the states pass uniform incorporation and admission laws. This, too, is suggesting a practice often desired but not so often fulfilled. The second solution would be a very effective one, and an admirable way to handle the matter, as one may realize from a consideration of the Uniform Negotiable Instruments Act, and other similar legislation. Both of these suggestions are too difficult to carry into effect. They are

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opposed to the self-interest of the states and they would deprive the state governments of part of their power. For these reasons they must be abandoned.

A third method of change would place it in the hands of the judiciary. This is the only feasible method. The judiciary, then, must be convinced that there is a serious wrong being done, and that there is an avenue whereby it may be escaped without doing violence to fundamental law. Roosevelt, writing to Philander C. Knox, his attorney general, after the successful government fight against the Northern Securities Company, spoke of the possibility of educating courts, as well as laymen, to the changing needs of the times.[108]

The history of the interpretation of our Constitution is a fascinating one. The rules of that interpretation do not preclude possibility that this method of changing our legal stand upon the question under discussion would succeed. Blackstone inaugurated the still potent doctrine that laws (or constitutions) are not to be interpreted so as to reach an absurd result, for that could not be said to be the intent of the ones responsible for the document. Is it not approaching the absurd to hold that the foreign corporation, of all business organizations of the United States, alone has not constitutional protection, especially when the national policy is that commerce shall be untrammeled, and when the corporation is, after all, a mere organization of citizens? A more recent author has said that, "The whole law is in flux from age to age, and decade to decade."[109] By this is meant that the apparent present status of the law is but the particular stage of the gradual movement from that law which fitted the conditions of yesterday, to the law which will fit the conditions of tomorrow. The growth of the law never ends, and should never end. Lest it be thought that this theory of change will not apply to a written constitution let us quote from the work of Prentice and Egan: "The construc-

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108 BISHOP, *op. cit. supra*, n. 104.
109 PARSONS, LEGAL DOCTRINE AND SOCIAL PROGRESS, p. 101.

tion of the commerce clause cannot be limited to the accomplishment of the particular objects which the framers sought, but must broaden with the extending needs of commerce, so as to accomplish wider purposes. The words of the Constitution still remain, and the purpose to protect national and international commerce from burdensome, conflicting or discriminating state legislation still remains; but the application of the clause to particular conditions is changed. In the course of time, and in greater or less degree, such must be the result of the interpretation of any written constitution."[110] This doctrine applies as well to the privileges and immunities clause as to the commerce clause. The same reasons are present in each case. It is the changing interpretation of the Constitution which saves it to us as a living thing, and prevents its becoming a mere object of historical interest.

The power of change in circumstances is recognized by the Supreme Court of the United States. Chief Justice Waite has described the changes which have overtaken the postal authority, and their effect. He says: "Postoffices and postroads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because being national in their operation, they should be under the protecting care of the National Government. The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with his rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times

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[110] PRENTICE AND EGAN, *op. cit., supra*, n. 49, p. 35.

and under all circumstances."[111] Under such language it would not be unreasonable to ask that the judicial interpretation of the citizenship of corporations be altered in such a way as to admit the citizens of other states, under the burden of "corporate facilities", to do business within the state. We have seen business and industry carry on the later stages of its tremendous nationalization, and we have seen the tremendous importance of the corporation in this movement. Surely, it has become entitled to protection. To quote again from Prentice and Egan, "* * * to deny their admission (corporations) from one state to another in ordinary cases, at the present day, (1898) would go far to neutralize that provision in the Fourth Article of the Constitution which secures to the *citizens* of one state all the privileges and immunities of citizens in another, and that provision in the Fourteenth Amendment which secures to all *persons* the equal protection of the laws."[112]

In the foregoing statement of the case the point of view of the stockholder has been primarily considered. There are, however, others to whom this present view of the law of foreign corporations is an injustice. In *Hooper* v. *California* the dissenting judges pointed out the fact that in denying the foreign corporation the power to write insurance binding in California the rights of the New York broker, the California agent, and the California insured were impaired.[113] In other words, the exercise of the power of the state to exclude carries with it various affiliated wrongs. Similarly, it cannot be doubted that the denial of the right to set up an establishment within the state may have at least an indirectly hampering effect upon that which might well be considered interstate commerce. So long as the exclusive power of the state over foreign corporations is allowed to overshadow these "minor" rights of citizens neither justice nor uniformity will be achieved.

With increased facilities for transportation and communi-

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[111] Pensacola Tel. Co. *v.* W. U. Tel. Co., 96 U. S. 1, 9, 24 L. ed. 708 (1878).
[112] PRENTICE AND EGAN, *op. cit., supra,* n. 49, p. 190.
[113] 155 U. S. 648, 39 L. ed. 297 (1895).

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cation every person and every corporation finds opportunities to extend activity into other states than the one of actual residence. With every increase in the volume of corporate business, and with the increased number of incorporations, the need for protection increases. Now, more than ever before, we need to be one, and only one, nation in the vital matters of commerce and industry. A restatement of the principles involved, a judicial recognition of the real citizenship behind the corporate entity, and the work of making commercial and industrial regulation more uniform will have been accomplished by the courts. The corporation, representing the associated stockholders, should be given the protection of the privileges and immunities clause.

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