DISCRIMINATION ON THE BASIS OF STATE RESIDENCE IN AUSTRALIA AND THE UNITED STATES

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Section 117 of the Australian Constitution provides as follows:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

It is one of the few provisions of the Constitution which is couched in a form that resembles a guarantee of personal rights or freedoms. The others are section 116, which prevents the Commonwealth from interfering with religious freedom;[1] section 80, which guarantees trial by jury in certain limited cases;[2] and section 51 (xxxi), which limits the Commonwealth's power of eminent domain by insisting that it can only acquire property on 'just terms'.[3]

Section 117 differs from these other provisions in that it has a distinctively federal purpose. Indeed it would be more appropriate to classify section 117 together with section 92[4] and section 118[5] as comprising a group of provisions which are fundamental to our federalism than with the others which constitute odd exceptions to its basic character.[6] Section 118 made it clear that within the federation the relationship between the legal systems of the States was to be far closer than that which exists between independent countries and

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1 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.' See generally: Pannam, 'Travelling Section 116 with A U.S. Road Map' (1963) 4 *M.U.L.R.* 41.

2 'Trial on indictment of any offence against any law of the Commonwealth shall be by jury. . . .'

3 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:— (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.'

4 'On the imposition of uniform duties of customs, trade, commerce, and intercourse among the Sates, whether by means of internal carriage or ocean navigation, shall be absolutely free. . . .'

5 'Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.'

6 'The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and insofar as it might be necessary for the purpose of distributing between the states and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself.' Sir Owen Dixon, 'Two Constitutions Compared' (1942) 28 *American Bar Association Journal* 733, 734. See also Pannam, *op. cit.* 43-56.

which had previously existed between the Australian colonies. Section 92 broke down the internal barriers which had previously existed at the borders of each colony. It welded the country together by providing for freedom of commercial and non-commercial intercourse between the States. Section 117 for its part recognized that a new common citizenship had been created. After federation Victorians, for example, could trade and move about in other States as Australians. It was important therefore to ensure that they would not be discriminated against in the other States simply because they were resident in Victoria or Queensland or wherever. Section 117 was designed to prevent this kind of discrimination which was basically inconsistent with the common citizenship created by the Constitution.

The United States Constitution contains a provision which has a similar purpose. Article IV, section 2, which was the model for section 117, provides: 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.' It is interesting to note that this provision was a part of the original Constitution and was not one of the personal freedoms guaranteed by the first ten amendments which were adopted a few years after the Constitution came into effect. This underlines its distinctly federal character.

The purpose of this paper is to explore the history and meaning of section 117. It also attempts to give an outline of the American experience with Article IV, section 2 and to assess whether that experience is of any value in the interpretation of section 117.

I

The history of section 117 in the Constitutional Conventions is interesting. It can be traced back to the following provision in the draft Constitution which was adopted by the 1891 Convention.

> A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws.[7]

The clause was not debated and no explanation was given of its significance or meaning. It reappeared as clause 110 of the tentative draft Constitution which was put before the Convention of 1897-98.[8] This clause was the subject of extensive debate during the third session of the Convention which was held in Melbourne early in 1898.[9] The

[7] Ch. V, s. 17. A copy of the draft Constitution appears in an Appendix to the *Official Report of the National Australasian Convention Debates* (1891).

[8] This draft was prepared by a committee consisting of Edward Barton, Sir John Downer and Richard O'Connor during the first session of the Convention which met in Adelaide in 1897.

[9] The debates are published in two volumes under the title: *Official Record of the Debates of the Australasian Federal Convention, Third Session* (1898). Hereinafter these volumes are referred to as 1 *Debates* and 2 *Debates* respectively.

debate is interesting not only for the purpose of understanding what was intended to be achieved by section 117 and how it comes to be in its present form but also because it gives us a glimpse of some constitutional provisions that might have been.

On the first day that the clause was debated it came under such a barrage of criticism that it was struck out of the draft. Many members of the Convention objected to its uncertainty and vagueness, especially the 'privileges and immunities' limb. It was feared that this provision might operate to drastically restrict the legislative powers of the States. One possible interpretation was that a Victorian, for example, would carry with him the privileges and immunities he enjoyed under Victorian law wherever he went in Australia. No justification could be given for such a result.[10] Furthermore there was confusion as to what legal rights could be described as the 'privileges and immunities' enjoyed by a State citizen. No one could answer the question satisfactorily. In view of this uncertainty it was felt that there was a real risk that the High Court, when established, might 'torture' the clause 'into an effect which this Convention never contemplated'.[11] It was especially feared by some members that the clause might interfere with the States' power to prevent the admission of Asian and coloured migrants and to invalidate the discriminatory legislation which already applied to such persons.[12] There were others who saw a threat to the powers of the States over taxation,[13] especially in regard to the validity of the so-called 'absentee taxes', which were being experimented with in South Australia.[14]

[10] 'No citizen of a state can take his privileges and immunities into another state. When he divests himself of the jurisdiction of a state and takes upon himself the jurisdiction of another state the laws of the former will have no force and effect outside of its boundaries. Once a man comes within a state boundary he is surely liable to be under the jurisdiction of the laws of that state, and that state should not be limited in its powers over the privileges and immunities of persons who voluntarily place themselves within the jurisdiction of its laws.' Joseph Carruthers (N.S.W.), 1 *Debates* 666.

[11] Joseph Carruthers (N.S.W)., 1 *Debates* 666.

[12] Sir John Forrest, the Premier of Western Australia, pointed out that in his colony 'no Asiatic or African alien' could get a miner's right or go mining on a gold field. 'It is of no use', he said, 'for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.' 1 *Debates* 665.

[13] George Reid, the Premier of New South Wales, made this point forcibly. 'The states are supposed to be left in absolute independence of the Commonwealth as to their many powers of internal taxation. Now [some people] want, by vague words in this Constitution, to bridle the powers of the states in connexion with that matter . . . But really, if we go on as we are doing, I shall have to employ some antiquarian to discover where the rights of the states are.' 1 *Debates* 675. See also his remarks at 682.

[14] Bernhard Wise (N.S.W.) argued that absentee taxes would be invalidated by this provision and that this would be a good thing. *Ibid.*, 674-675. His view of the legal effect of the privileges and immunities clause was challenged by Henry Bournes Higgins (Vic.): *Ibid.* 684. There was quite a rift in the South Australian delegation on the question. See: *Ibid.* 676, 677, and 681.

Isaac Isaacs argued that the origin of clause 110 was to be found in the XIVth Amendment to the United States Constitution which had been adopted after the Civil War in 1868. Section 1 of the Amendment, which is the relevant part of it, provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

On the assumption that this provision was the inspiration for clause 110 Isaacs made two points. The first was that an understanding of the history behind the adoption of the XIVth Amendment would make it clear that none of its provisions were relevant, or appropriate, to Australian conditions. He pointed out that it was designed to secure the rights of negroes in the Southern States. It defined who were to be citizens of the United States and protected the rights attaching to that *national* citizenship against interference by State governments. He noted that existing legislation of the Australian colonies discriminated against coloured persons and that it would be both undesirable and politically impossible to get a Constitution approved if it contained a provision which would abolish these discriminations. His second point was that not only was the clause politically inappropriate but it was also illogical. The XIVth Amendment protected the rights of national citizenship and if it were decided to adopt some part of it then it was: 'illogical to provide that a state should not make or enforce any law abridging any privilege or immunity of citizens of other states. We ought to take out the words "other states", and say that no state should abridge any privilege or immunity of any citizen of the whole Commonwealth.'[15] However, he went on to say that even if this change were made the clause would still be vague and uncertain because it was difficult to know what was comprehended by the phrase 'privileges or immunities' of national citizens.[16]

For once the Convention's fount of all knowledge on matters of American constitutional law seems to have been mistaken.[17] It is

[15] 1 *Debates* 669-670.

[16] Isaacs read to the Convention an extract from the judgment of Miller J. in the *Slaughter-House Cases* (1873) 16 Wall. 36 where an attempt was made to list the kind of rights which were protected by the privileges or immunities clauses of the XIVth Amendment. 1 *Debates* 668.

[17] 'His command of history and the fullness of his knowledge of law and of judicial decisions, especially of the United States, while trying to non-legal delegates and to his opponents, carried weight and conviction. His erudition no doubt joined with the necessities of the debates in stimulating a close study of American legislation and court decisions, fields in which Barton, Deakin, Symon, and Higgins were able to follow him closely.' Hunt, *American Precedents in Australian Federation* (1930) 31-32. Sometimes the non-lawyers lost all patience. 'We have had the

reasonably clear that the origin of clause 110 was not to be found in the XIVth Amendment but in Article IV, section 2 of the original United States Constitution. There it is provided that:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

This provision was designed to protect State citizenship, not national citizenship. It operated to prevent a State from discriminating against the citizens of other States.[18] To be sure the draughtsman of clause 110 had jumbled the language of the two provisions together. Furthermore, the equal protection limb of the XIVth Amendment was incorporated into the clause, but this is comprehensible enough. The addition would make it clear that not only was a State legislatively incompetent to discriminate against the citizens of other States, but also that they were entitled to the same treatment as its own citizens in the administration of its laws.[19] The change of style from the language of personal rights used in Article IV, section 2, to that of State legislative incompetence is also comprehensible enough, as this clause had to take its place in the Constitution in a chapter which dealt with the powers of the States, not with the rights of individuals.[20]

For the moment, however, Isaacs' arguments prevailed and it became clear that the 'privileges or immunities' limb of clause 110 would be struck out. At this point Richard O'Connor made the following proposal which, if it had been accepted, might have changed the basic character of our federation. He wanted to keep the equal protection part of the clause and to make certain additions so that it would read:

American Constitution, and the Swiss Constitution, and slabs of the Canadian Constitution hurled at us from all sides *ad nauseam*. We have had nothing else but this American Constitution from all sides of the House, and to bolster up every kind of opinion, and I have come to the conclusion that the American Constitution is such a many-sided one that it can be used to back up every argument on every possible side of the federation question. . . . before we commenced this Convention . . . we should have arranged for an exploration party to go through the various libraries of the Colonies, and burn all the works of reference on the American, Canadian, and Swiss Constitutions. We should at least have been saved some hours of very eloquent dissertation, accompanied by enormous extracts from the works of writers who did not write with a knowledge of our present circumstances . . .' Vaiben leaves open the possibility that it applies to the Commonwealth as well. See *infra*, pp.

[18] *Infra* Part II.

[19] Isaacs' view of the origin of clause 110 was challenged by Mr B. R. Wise but he was not very convincing. He seems to have been caught unprepared. 1 *Debates* 670-671. His speech is interesting because he referred to a memorandum of Andrew Inglis Clark in which the purpose and function of clause 110 was explained. Unfortunately he did not have the memorandum with him. But he did rely on it for his view that clause 110 meant: 'You cannot impose exceptional treatment upon the citizens of another state. . . .' *Ibid.* 671. Clark, together with Sir Samuel Griffith, Kingston and Barton had been responsible for the drafting of the 1891 draft Constitution from which clause 110 was taken verbatim. It is interesting that both Barton and Kingston expressed this limited view of clause 110 but were not prepared to cross swords with the formidable Isaacs. *Ibid.* 665, 673, 678.

[20] Although clause 110 as originally drafted was clearly only applicable to the State governments it seems that the general language used in later amendments clearly leaves open the possibility that it applies to the Commonwealth as well. See *infra*.

> A state shall not deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.[21]

His argument in support of this proposal was a little bewildering. He began by agreeing with Isaacs' view of the background of, and difficulties involved in, clause 110 as drafted. O'Connor suggested that this example should make the Convention very careful about following 'too slavishly the provisions of the United States Constitution or any other Constitution'.[22] He then stated his view that it was essential to:

> be very careful of every word that we put in this Constitution, and that we should have no word in it which we do not see some reason for. Because there can be no question that in time to come, when this Constitution has to be interpreted, every word will be weighed and an interpretation given to it; and by the use of what I may describe as idle words which we may have no use for, we may be giving a direction to the Constitution which none of us now contemplate. Therefore, it is incumbent upon us to see that there is some reason for every clause and every word that goes into this Constitution.[23]

After expressing these views O'Connor proceeded to propose the clause which is set out above! It was copied directly from section 1 of the XIVth Amendment. It was pregnant with vast uncertainty. It was capable of operating as a drastic limitation on the powers of the State governments. It would have given our High Court the opportunity of playing a role in the protection of civil liberties similar to that played by the Supreme Court of the United States. O'Connor, however, seemed to have little conception of the implications of his proposal. He was content to state that the clause would operate 'so that any citizen of any portion of the Commonwealth would have the guarantee of liberty and safety in regard to the processes of law, and . . . of the equal administration of the law'.[24] It was 'clearly necessary for the protection of the citizens of the Commonwealth in regard to the legislation of the states'.[25] The following passage in the Debates states O'Connor's view most clearly.

> MR O'CONNOR. . . . In the ordinary course of things such a provision at this time of day would be unnecessary; but we all know that laws are passed by majorities, and that communities are liable to sudden and very often to unjust impulses—as much so now as ever. The amendment is simply a declaration that no impulse of this kind which might lead to

[21] 1 *Debates* 673.
[22] 1 *Debates* 672.
[23] *Ibid.*
[24] 1 *Debates* 673.
[25] *Ibid.* Barton briefly expressed his support of O'Connor's suggestion. He also agreed that 'it is an absolute necessity that we should see that in this Constitution we do not insert any words about the meaning of which we are no quite sure'! 1 *Debates* 674.

the passing of an unjust law shall deprive a citizen of his right to a fair trial.
MR ISAACS. That is a very dangerous proposal—that the Supreme [High] Court should control the Legislatures of the states within their own jurisdiction.
MR O'CONNOR. It only provides that each citizen of the Commonwealth shall be tried by due process of law. Why should a state be allowed to pass a law depriving a citizen of this right?
MR KINGSTON. What does the honorable and learned member mean by the term 'due process of law'?
MR O'CONNOR. The amendment will insure proper administration of the laws, and afford their protection to every citizen . . . It is a declaration of liberty and freedom in our dealing with citizens of the Commonwealth. Not only can there be no harm in placing it in the Constitution, but it is also necessary for the protection of the liberty of everybody who lives within the limits of any state. . . .[26]

The debate on O'Connor's proposal was brief. Dr Cockburn delivered a scathing speech in which he declared that none of the Australian colonies had ever been guilty of conduct which would make such a provision necessary. In his view it would be 'a reflection on our civilization' to insert it in the Constitution.[27] The XIVth Amendment to the United States Constitution had as its background a civil war which was fought to secure the rights of negroes who had been subjected to legal discrimination by the Southern States. It had meaning and purpose in that context but was completely inappropriate in Australia.[28]

It was Isaacs, however, who delivered the *coup de grace*. He pointed out that the equal protection clause would certainly invalidate the existing colonial legislation which discriminated against coloured and Asian labourers. 'I put that one simple statement before honorable

[26] 1 *Debates* 683. Later in the debate O'Connor said: 'This provision simply assures that there shall be some form by which a person accused will have an opportunity of stating his case before being deprived of his liberty. Is not that a first principle in criminal law now? I cannot understand anyone objecting to this proposal . . . I think that the reason [for it] is obvious. So long as each state has to do only with its own citizens it may make what laws it thinks fit, but we are creating now a new and larger citizenship. We are giving new rights of citizenship to the whole of the citizens of the Commonwealth, and we should take care that no man is deprived of life, liberty and property, except by due process of law.' *Ibid.* 689.

[27] 1 *Debates* 688. His fellow South Australian, Charles Kingston, the Premier, made the same point. '[T]here is no necessity for it. It seems to me to be a matter of purely state concern, and which, at this period of the nineteenth century, it is seriously suggested may be necessary, in order to prevent some high-handed and monstrous action on the part of the states, for which our past history gives no grounds for expectation . . . a provision of that character is in no way necessary.' *Ibid.* 678. So too George Reid the Premier of New South Wales: 'It is quite novel in Australia to hear any talk upon this point, because I think this has been universally conceded here.' *Ibid.* 682.

[28] Cockurn seems to have spoken with great passion. He disapproved of the XIVth Amendment even in its American context. In his view it was 'the grossest outrage which could be inflicted upon the Southern planters' and 'was simply forced on a recalcitrant people as a punishment for the part they took in the Civil War'. He even doubted that the amendment was 'ever legally carried. I believe it was only carried by force of arms, by placing voting places practically under martial law'; 1 *Debates* 685-686.

members, and I would ask them how they can expect to get for this Constitution [*i.e.* if it contained O'Connor's clause] the support of the workers of this colony[29] or of any other colony, if they are told all our factory legislation[30] is to be null and void, and that no such legislation is to be possible in the future?'[31] Furthermore, in Isaacs' view the phrases 'equal protection of the law' and 'due process of law' were fraught with uncertainty. The language 'at once commands approbation, but when it came to be practically applied it rouses up almost unsuperable difficulty'.[32] He agreed with Dr Cockburn that there was no need for such a clause. 'If anybody could point to anything that any colony had ever done in the way of attempting to persecute a citizen without due process of law there would be some reason for this proposal.'[33]

This was the end of a due process clause for the Australian Constitution. By a vote of 23 to 19—only a majority of 4—O'Connor's proposal was rejected by the Convention.[34] It failed for the essential reason that it was not responsive to any real problem. The members of the Convention believed that none of the colonies had ever denied anyone due process of law or the equal protection of its laws. Even O'Connor could only point to vague future possibilities and not to past realities.[35] To be sure there were discriminations against coloured people—especially the Chinese and the Pacific Islanders, but almost all of the members supported and approved of them. They had long been in force in most of the colonies and had overwhelming popular support. The atmosphere in Australia at the end of the nineteenth century was just not conducive to constitutional guarantees of this kind.[36]

During the debate there was an attempt to change the thrust of clause 110. As drafted it purported to deny State governments the power to abridge the privileges or immunities of the citizens of other States. It was suggested that the clause should be altered to protect

29 The Convention was sitting in Victoria.

30 This legislation discriminated against Chinese and other Asian workers.

31 1 *Debates* 687.

32 *Ibid.*

33 1 *Debates* 688.

34 The other New South Wales members all voted with O'Connor and the Victorian members led by Isaacs all voted against the proposal.

35 'We do not know when some wave of popular feeling may lead a majority in the Parliament of a state to commit an injustice by passing a law that would deprive citizens of life, liberty, or property without due process of law. If no state does anything of the kind there will be no harm in this provision . . . Surely we are not to be prevented from enacting a guarantee of freedom in our Constitution simply because imputations may be cast upon us that it is necessary. We do not say that it is necessary. All we say is that no state shall be allowed to pass these laws.
MR ISAACS. Who asks for the guarantee?
DR COCKBURN. The only country in which the guarantee exists is that in which its provisions are most frequently violated.
MR O'CONNOR. . . . We need not go far back in history to find cases in which the community, seized with a sort of madness with regard to particular offences, have set aside all principles of justice. . . .' 1 *Debates* 688-689.

36 Pannam, 'Travelling Section 116 with a U.S. Road Map' (1964) 4 *M.U.L.R.* 41, 43-56.

the privileges or immunities attaching to *national* citizenship in the new Commonwealth which was being created by the Constitution.[37] The debate on this proposal was quite confused. It got mixed up with the other issues which have already been mentioned and was rejected on, it seems, two main grounds. One was the uncertainty of what was comprehended by the 'privileges or immunities' of a citizen in the Commonwealth, and the other was the undesirability of using the word 'citizens' without defining what it meant. This was related to a larger issue which was much debated by the Convention—whether the Constitution was to contain a definition of the Commonwealth citizenship. The Commonwealth Government could be vested with legislative power to formulate a definition, or alternatively the Constitution could be silent on the matter in which case it would be resolved by general principles of law.[38] The latter alternative was eventually adopted. This constituted a serious objection to an undefined usage of the word 'citizen'. The net result at this stage of the debate was that clause 110 was struck out of the draft Constitution.

It came as no surprise, however, when some three weeks later Josiah Symon[39] moved to reintroduce it in a slightly different form. During the earlier debate many members had expressed the view that some provision was needed to prevent a State discriminating against the citizens of another State. Such discrimination was thought to be inconsistent with the basic principle of a federal system, but clause 110 in its original form, as expounded by Isaacs, seemed to go too far. After the first debate it seems that Symon had a closer look at the differences between Article IV, section 2 and the XIVth Amendment of the United States Constitution, and he found that they had two very different historical backgrounds and functions. He agreed that the XIVth Amendment was not relevant to Australian conditions but

37 This debate took place on the following amendment which had been suggested by the Tasmanian House of Assembly: 'The citizens of each state, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all the privileges and immunities of citizens of the Commonwealth in the several states, and a state shall not make or enforce any law abridging any privilege or immunity of citizens of the Commonwealth, nor shall a State deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.' 1 *Debates* 667.

38 See especially the debate on Dr Quick's proposal to give the Commonwealth an affirmative legislative power over 'Commonwealth citizenship'. 2 *Debates* 1750-1768. This proposal was rejected because the Convention felt that the States should retain the power to determine their own citizenship and that State citizenship should automatically confer national citizenship.

39 As Symon can claim to be the father of section 117 a contemporary pen picture of him might be of interest. 'J. H. Symon Q.C., the leader of the Bar of South Australia, above the medium height, blonde, well-poised and so nearly absolutely bald that what little hair he had was invisible, had passed through but a short parliamentary experience and still retained more of the traditions of the court than of the legislature. . . . . Thoroughly well-informed . . . endowed with a rich and powerful voice and an impressive manner and a great command of language, he was if not the best, decidedly one of the best set speakers in the Convention.' Deakin, *The Federal Story* (Posthumously, 1944) 59.

was convinced that Article IV, section 2, or a provision like it, was a basic requirement of a federal system.

Symon moved that the precise words of Article IV, section 2 be inserted in the Constitution.

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

This form of words, he argued, was not open to one of the serious objections that had been made to the original clause 110. This was that a citizen would carry with him any special privileges or immunities he enjoyed under the law of his own State wherever he went in Australia. It was Symon's view that '. . . a citizen going from one state to another state ought not to take with him or have recognized in that other state the privileges and immunities of the state from which he goes. That should not be the measure. The measure should be the privileges and immunities of the citizens of the state to which he goes'.[40] He viewed the principle as a very important one:

> The principle is what I am contending for: The principle that our labours will be incomplete unless we make the rights of citizens or subjects in one state to extend to the citizens of another state who may go from one state to another. There ought be no possibility of any state imposing a disqualification on a person in the holding of property, or in the enjoyment of any civil right, simply because he happens to belong to another state. That would give us the uniformity of citizenship we all desire.[41]

Without such a protection against discrimination Symon thought that 'the Constitution would not be completed',[42] and that 'to place persons going from one state to another on exactly the same footing as the persons in the other state . . . lies at the very foundation of what we are trying to do under this Constitution'.[43]

Symon spoke with clarity and persuasiveness and there was general support for the principle he was putting forward. The only substantive question that was raised was whether such a clause would prevent a State imposing a residence requirement as a condition of granting some right. Isaacs, who never really seems to have understood the principle involved in Article IV, section 2, raised objections to the clause on this ground. He pointed out that a period of residence was required in

[40] 2 *Debates* 1782.

[41] *Ibid.* 1787. 'Unless you have this [clause] . . . Victoria might impose an income tax on its own citizens of 10 per cent, and a tax of 50 per cent on people resident in Western Australia who derived income from Victoria.' *Ibid.* 1800.

[42] *Ibid.* 1782.

[43] *Ibid.* 1794.

[44] 'What is the use of talking about the Federation if a citizen in one part of the Commonwealth may be treated differently from a citizen in another part of the Commonwealth. Unless the true spirit of federation is infused into this Constitution, we had better have no federation at all, and the sooner we depart to our respective homes the better.' Douglas (Tas.), 1 *Debates* 679.

Victoria as a condition of such rights as the right to vote and to select land. Under this provision, he argued, residence in some other State would satisfy the requirement. Symon pointed out the fallacy of this argument:

> A state would be able to say that persons desiring certain privileges should have to reside within its territory for six months in a year, but not that residents from other states should be obliged to reside for twelve months whilst their own residents had to reside for only six. What we want is uniformity of law, so that the privileges of a citizen of one state shall be applicable to the subjects of another state, and be neither greater nor less than those that apply to the other states . . . Of course, you cannot prevent any State levying an absentee tax, or prevent it imposing conditions with regard to taking up land, but you should prevent it imposing differential conditions with regard to the citizens of one state as compared with the conditions which you apply to the citizens of another state.[45]

Although there was general support for the principle embodied in Symon's new clause, there were several criticisms of the language in which it was formulated. The most serious of these involved the use of the word 'citizens' which was not defined. Barton, for example, expressed his warm support for the proposal but continued:

> My only doubt is whether we should not rather cumber the Constitution by using the word 'citizens', and requiring a definition of citizens when we use it here, and when the ordinary term to express a citizen of the Empire might be used. We are subjects in our constitutional relation to the Empire, not citizens. 'Citizens' is an undefined term, and is not known to the Constitution. The word 'subjects' expresses the relation between citizens of the Empire and the Crown . . . The expression 'resident subjects of the Queen' would avoid the necessity of having a definition of a term which only occurs in one place in the Constitution.[46]

Some debate took place as to whether it might be better to use the word 'citizens' and incorporate a specific definition of what persons it comprehended.[47] The feeling of the Convention, however, seemed to be that it was unwise to freeze the meaning of citizenship by a constitutional definition. It was thought that the criteria of State citizenship were pecularily the concern of each of the States. On the other hand, if the word 'citizens' were used without a definition, there would be a risk of uncertainty. Both O'Connor and Isaac pointed out

[45] 2 *Debates* 1800. See also O'Connor at 1799 where he pointed out that: 'The use of the word "resident" cannot satisfy any condition of a state law regarding a period of residence.' Later on in this paper it is argued that if a discrimination amounts in substance to a discriminaton based upon residence it is invalid under 117. *Infra* at pp. ??. It may be that the example given by Symon in the text above would amount, in substance, to a discrimination based upon residence.

[46] *Ibid.* 1786 and 1787. See also 1764-1765.

[47] See the remarks of Dr Quick, 2 *Debates* 1784-5, 1788-90. As pointed out *supra* note 38 Dr Quick had earlier attempted to have a specific power vested in the Commonwealth Government to legislate with regard to 'Commonwealth Citizenship'.

that the word had been interpreted in several different senses in the United States.[48] In view of these difficulties it was finally decided to use the phrase a 'subject of the Queen resident in any State'.[49]

The other matter which had troubled members at all stages of the debate was the phrase 'privileges and immunities'. There had been considerable confusion as to what the phrase meant. It seemed a clumsy method of expressing the principle which Symon had explained so clearly. The difficulty was resolved by Sir George Turner, the Premier of Victoria, whose sole contribution to the debate was the following anguished question: 'Cannot you reverse the mode, and say that the person outside the state shall not be subject to greater disabilities than a person in such state?'[50] As Higgins quickly pointed out Turner had 'exactly hit the nail on the head'.[51] This negative method of expressing the principle appealed to the Convention especially as it set at rest the fears felt by some members that the other way of expressing the principle might fetter the States in discriminating against Asians and other coloured persons. Higgins put the matter bluntly. In his view this negative form:

> . . . would attain the purposes exactly and it would allow Sir John Forrest[52] at the same time to have his law with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply upon colour and race . . . We want, as I understand it, to prohibit any discrimination which is based upon false principle . . . We want a discrimination based on colour.[53]

With these two alterations the clause was finally agreed to without division in the following form:

> No subject of the Queen resident in any state shall be subject in any other state to any disability or discrimination not equally applicable to the subjects of the Queen in such other state.[54]

After final polishing by the Drafting Committee this clause became section 117 of the Australian Constitution.

II

As has been pointed out above section 117 was modelled on the provisions of Article IV, section 2 of the United States Constitution

[48] 2 *Debates* 1795-6.

[49] It is important to point out that no special importance was given to the word 'resident'. During the debate the members of the Convention used the words 'inhabitant', 'citizen', 'subject' and 'resident' interchangeably when they were identifying a person with a state. They also used the more general form 'a Victorian', 'a New South Welshman' and so on. As Richard O'Connor pointed out during the debate: 'All we mean now is a member of the community or of the nation, and the accurate description of a member of the community under our circumstances is "a subject of the Queen resident within the Commonwealth".' 2 *Debates* 1796.

[50] *Ibid.* 1800.

[51] *Ibid.*

[52] *Supra* note 12.

[53] *Ibid.* 1801.

[54] *Ibid.* 1802.

which provides that: 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'[55] The language is strange. Professor Crosskey, who has made a detailed study of the language and usages in vogue at the time the Constitution was drafted, finds the provision couched in 'peculiar terms'.[56] The problem it endeavoured to grapple with can, however, be readily appreciated.[57] After federation the various States would have still retained legislative power to treat the citizens of other States differently to their own. The possibility of such discrimination was thought to be inconsistent with the nature of the federal system which was being created, this Article IV, section 2 was designed to ensure that such discrimination did not take place. It transformed a person who otherwise would have been an alien into a fellow citizen of a new nation. In 1868 Field J. explained the policies embodied in the provision as follows:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminatory legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of this kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have consisted little more than a league of States; it would not have constituted the Union which now exists.[58]

The policy of Article IV, section 2 may have been reasonably clear

[55] This provision must not be confused with the privileges or immunities clause of the XIVth Amendment: '. . . No State shall made or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .' This protects the incidents of *national* citizenship. Art. IV, s. 2 protects *state* citizenship. See: *The Slaughter-House Cases* (1873) 16 Wall. 36. Miller J. explains the difference at 76-78. See also *Colgate v. Harvey* (1935) 296 U.S. 404, 431 *per* Sutherland J.

[56] 2 Crosskey, *Politics and The Constitution* (1953) 1096. It is based on Article 4 of the earlier Articles of Confederation which was not as terse. 'The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitant thereof respectively . . .' Madison criticized the drafting of this Article in *The Federalist* No. 42.

[57] The history and background of Art. IV, s. 2 is set out at length in Watson, *The Constitution of the United States* (1910) ii 1205-1221.

[58] *Paul v. Virginia* (1868) 8 Wall. 168, 180.

but its language was not. It may have been seen as a restraint on State governments. In form, however, it was a personal guarantee to the 'Citizens of each State' that they would be entitled to what were described as 'all Privileges and Immunities of Citizens in the several States'. These words gave rise to many difficult questions of interpretation.

Corfield v. Coryell[59] was the first federal decision on the clause.[60] It was a decision of Bushrod Washington J., a member of the Supreme Court of the United States, whilst on circuit in Pennsylvania in 1823. The case is quite famous and is cited in most discussions of Article IV, section 2. It involved an attack on the validity of a New Jersey statute which provided that: 'it shall not be lawful for any person who is not at the time an actual inhabitant and resident in this state, to take or gather clams, oysters and shells, in any of the rivers, bays or waters of this state . . .'

Washington J. upheld the validity of the statute for reasons which are noted later on.[61] What is of interest at this point, however, is his general interpretation of Article IV, section 2. The relevant passage in his judgment is as follows:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times been enjoyed by the citizens of the several states which compose this union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate.[62]

His Honour then proceeded to risk tedium by setting out a long catalogue of these 'fundamental' privileges and immunities. They included the right to acquire and hold real and personal property, to enjoy life and liberty and to be protected by the government. Then there was the freedom to move among the States and to carry on business in them; to maintain actions in the State courts; and, to be free from discriminatory taxes.

[59] (1823) 4 Wash. C.C. 371 (E.D. Pa).

[60] The first reported State case was *Campbell v. Morris* (1797) 3 Harr. and McHen. 535. It is interesting that Judge Chase, who wrote the opinion of the Maryland court, accurately stated what was to become the accepted interpretation of the clause. 'The Court are of opinion that it means that the citizens of all the States shall have the peculiar advantages of acquiring and holding real as well as personal property and that such property shall be protected and secured by the laws of the State *in the same manner as the property of the citizens of the State is protected. It means, such property shall not be liable to any taxes, or burdens which the property of the citizens is not subject to.*' *Ibid.* 540. Italics supplied.

[61] See note 34 *infra*. It is interesting to note that the discrimination in this provision is based on residence and not citizenship. As pointed out hereafter this distinction was to become important. Washington J. did not treat it as having any relevance.

[62] (1823) 4 Wash. C.C. 371, 378.

These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union'.[63]

This reasoning would give a sweeping operation to the privileges and immunities clause. Washington J. seems to suggest that there is a basic core of rights which are secured to the citizens of the States. These rights are guaranteed to all citizens against legislative interference by any of the States. In effect Article IV, section 2 would create a kind of general national citizenship and attach to it certain fundamental rights which could not be abridged by any governmental authority.[64] As Professor Charles Fairman has pointed out it 'sounds like pure natural law'.[65] The interpretation of Washington J., however, has not been followed. The received interpretation of the clause is very different, so it is thus very curious to find continuous reference to this opinion in the leading cases on the subject.

Several basic limitations on the scope of the clause can be stated at once. To begin with it has no application to corporations. In 1839 the Supreme Court held in *Bank of Augusta v. Earle*[66] that the word 'citizens' in Article IV, section 2 did not include corporations. This is somewhat surprising in view of the fact that corporations were held to be 'citizens' for the purposes of federal diversity jurisdiction.[67] Nevertheless the holding was affirmed in *Paul v. Virginia*[68] and has not been questioned since.[69]

Reference to the form of the clause shows that it confers certain rights on the 'Citizens of each State' in 'the several States'. The first of these phrases makes it clear that the clause does not extend its protection to aliens[70] or to the inhabitants of a United States territory.[71] It is settled that the use of the second phrase means that the clause does

[63] *Ibid. The* relevant provision of the Articles of Confederation is set out in note 56 *supra.*

[64] 'In effect he [Washington J.] revised the sentence to read "The citizens of each state shall be entitled to all privileges and immunities of citizens of the United States in the several States".' Pritchett, *The American Constitution* (1959) 372.

[65] Fairman, 'Does the Fourteenth Amendment Incorporate The Bill of Rights?' (1949) 2 *Stanford Law Review* 5, 12.

[66] (1839) 13 Peters 586.

[67] Article III, s. 2. See: *Bank of United States v. Devaux* (1809) 5 Cranch. 61; *Louisville, Cincinnati and Charleston Railroad Co. v. Letson* (1844) 2 How. 497.

[68] (1868) 8 Wall. 168.

[69] Indeed it has been held that a 'Massachusetts' trust, which is like one of our unit trusts, is not a 'citizen' within Art. IV, s. 2. *Hemphill v. Orloff* (1928) 277 U.S. 537.

[70] Or indeed even to negroes in those States where they were not citizens prior to the adoption of the XIVth Amendment. See *infra,* p. 123. There is, thankfully, authority for the proposition that women can be citizens. *Minor v. Happersett* (1874) 21 Wall. 162, 165-170.

[71] *Anderson v. Scholes* (1949) 83 F. Supp. 681.

not bind either the United States Government[72] or that of one of its territories.[73] Furthermore even in the State sphere it is established that it only applies to governmental and not private actions.[74]

Another limitation is that Article IV, section 2 does not enable a citizen to carry with him into other States the rights he enjoys under the law of his own State. Stating the point another way the clause does not invest a State citizen with a kind of personal law which follows him around the country. This was settled in *Detroit v. Osborne*.[75] There a woman, who was a citizen of Ohio, commenced an action against the City of Detroit alleging that she had suffered injury due to its failure to properly maintain a sidewalk. Under the law of Michigan the City was not liable in these circumstances. Under the law of Ohio it would have been liable. The Supreme Court of the United States rejected the plaintiff's argument that to apply the law of Michigan would deny her the protection of Article IV, section 2. Brewer J. said:

> A citizen of another State going into Michigan may be entitled under the Federal Constitution to all the privileges and immunities of citizens of that State; but under that Constitution he can claim no more. He walks the streets and highways in that State, entitled to the same rights and protection, but none other, than those accorded by its laws to its own citizens.[76]

Finally it has been held that the clause does not enable a citizen to enjoy within his own State the rights or privileges which may be enjoyed by the citizens, in even an overwhelming majority, of other States under the laws of those States.[77] *McKane v. Durston*[78] is the leading case. McKane, a citizen of New York, was convicted of a crime and given a six year gaol term. He appealed. In most States a person convicted of a similar crime would be entitled to bail pending the appeal, but New York law only allowed bail in such cases within very narrow limits. McKane could not bring himself within them. He contended that the denial of bail to which he would be entitled in most States violated his rights under Article IV, section 2. Harlan J., speaking for the Supreme Court, rejected the contention out of hand.

[72] *U.S. v. Hirabayashi* (1942) 46 F. Supp. 657. Neither does it give the United States any affirmative legislative power to implement or secure the protection conferred by the clause. *U.S. v. Wheeler* (1920) 254 U.S. 281.

[73] *Haavick v. Alaska Packers Associaton* (1924) 263 U.S. 510; *McFadden v. Blocker* (1900) 3 Ind. Terr. 224; 54 S.W. 873; *Sutton v. Hayes* (1856) 17 Ark. 462; *In re Johnson's Estate* (1903) 139 Cal. 532; 73 Pac. 424. However, in some instances Congress has directed in the organic law of the territory that the various constitutional protections will apply. *Mullaney v. Anderson* (1951) 342 U.S. 415.

[74] *U.S. v. Wheeler* (1920) 254 U.S. 281.

[75] (1890) 135 U.S. 492.

[76] *Ibid.* 498.

[77] This was in effect the view of Washington J. set out above. If this view had been accepted the Supreme Court could have exercised a reviewing power over restrictive State legislation under Art. IV, s. 2 as broad as that it later came to exercise under the XIVth Amendment.

[78] (1894) 153 U.S. 684.

> Whatever may be the scope of section 2 of article IV . . . the Constitution of the United States does not make the privileges, and immunities enjoyed by the citizens of one State under the Constitution and laws of that State, the measure of the privileges and immunities to be enjoyed, as of right, by a citizen of another State under its constitution and laws.[79]

Another way of formulating the principle involved in this case is that a State is not in any way limited by Article IV, section 2 in its dealing with its own citizens,[80] except when it discriminates between them on the basis of a previous citizenship in another State.

The unsuccessful arguments in the cases cited above were not outrageously untenable as possible constructions of the actual language used in the clauses. Once they are put aside, however, the general interpretation which has been given to the clause becomes much easier to understand. The outlines of that interpretation may be sketched as follows. The clause does not itself create any general rights of citizenship nor does it protect any existing rights under the law of any particular State. What it does is to prevent a State from discriminating against citizens of other States. Article IV, section 2 has nothing to do with the nature of the rights and duties, or the privileges and immunities, which a State may create. Instead it insists that whatever these rights or duties may be they must apply equally to its own citizens and to the citizens of the other States. In general it can be said that the clause has been interpreted as if it read: 'The Citizens of each State, when they are in the other States, shall be entitled to the same Privileges and Immunities as the Citizens of those other States.' As Miller J. put it in the *Slaughter-House Cases*:

> Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.[81]

[79] *Ibid.* 690.

[80] It was so stated by the Supreme Court in *Bradwell v. Illinois* (1873) 16 Wall. 130. In that case it was by a married woman who was a citizen of Illinois that an Illinois statute restricting the practice of law to males violated Art. IV, s. 2. This argument was summarily dismissed by the Court on the basis that as a citizen of Illinois she could not raise the question. See also: *Hudson Water Co. v. McCarter* (1908) 209 U.S. 349.

[81] (1872) 16 Wall. 36 at p. 77. 'The Privileges and Immunities Clause . . . proscribes discrimination by a State against a citizen of another State.' *New York v. O'Neil* (1959) 359 U.S. 1, 15 *per* Frankfurter J. 'The purpose of the pertinent clause in the Fourth Article was to require each state to accord equality of treatment to the citizens of other states in respect of the privileges and immunities of state citizenship. It has always been so interpreted.' *Colgate v. Harvey* (1935) 296 U.S. 404, 431 *per* Sutherland J. See also *McKnett v. St Louis & S.F. Ry. Co.* (1934) 292 U.S. 230, 240 *per* Brandeis J.; *Downham v. Alexandria* (1869) 10 Wall. 173, 175 *per Field J.*; *Conner v. Elliot* (1856) 18 How. 591, 594 *per Curtis J.* Two leading State decisions should perhaps be referred to as well: *Douglas v. Stokes* (1821 1 Delaware Ch. 465; *Lemmon v. People* (1860) 20 N.Y. 607. 'In my opinion the meaning is, that in a given State, every citizen of every other State shall have the same privileges and immunities—that is, the same rights—which the citizens of that State possess.' *Lemmon v. People* (1860) 20 N.Y. 607, 608 *per* Denio J.

Some examples will illustrate the operation of the clause. *Ward v. Maryland*[82] was one of the first cases in which the Supreme Court invalidated State legislation on the ground that it violated Article IV, section 2. Under a Maryland statute all traders were required to take out licences as a condition of carrying on business within the State. Residents were charged a fee on a scale between $12 and $150 depending upon the value of their stock in trade. Non-residents on the other hand had to pay a flat fee of $300 irrespective of the value of their stock. The Court invalidated the provision requiring a higher fee for non-residents on the ground that the clause 'plainly and unmistakably' enables them to carry on business 'without being subjected to any higher tax or exercise than that exacted by law of . . . permanent residents'.[83] The clause thus operates to produce equality of commercial opportunities between the citizens of the various States. On the same basis the Court struck down a Tennessee statute which imposed an annual tax of $100 on persons engaged in railway construction work within the State if their 'chief office' or residence was outside the State. The fee was only $25 if the person's chief office or residence was located within the State.[84] A similar fate befell another Tennessee statute which provided that resident creditors of foreign corporations doing business in the State should be entitled to priority in the payment of debts over non-resident creditors in the same class.[85]

The leading modern case on Article IV, section 2 is *Toomer v. Witsell*.[86] This case involved an attack on the constitutionality of a South Carolina statute which required the payment of a $2500 licence fee on each boat owned by a non-resident which was used for shrimping in the State's marginal sea. The fee for boats owned by residents was $25. In the result the Court invalidated the higher licence fee on the ground that it worked a prohibited discrimination. As Vinson C.J. pointed out:

[82] (1870) 12 Wall. 418.

[83] *Ibid.* 430. The opinion of Clifford J. is a curious mixture of the interpretation given to the clause by Washington J. in *Corfield v. Coryell* (*Supra* note 59) and a straight forward no-discrimination interpretation. This blend characterizes many of the Supreme Court opinions on Art. IV, s. 2.

[84] *Chalker v. Birmingham & N.W. Ry. Co.* (1919) 249 U.S. 522. McReynolds J. stated the reason thus: 'Under the Federal Constitution a citizen of one State is guaranteed the right to enjoy in all other States equality of commercial privileges with their citizens. . . .' *Ibid.* 527.

[85] *Blake v. McClung (1898) 172 U.S. 239.* 'We adjudge that when the general property and assets of a private corporation, lawfully doing business in a State, are in course of administration by the courts of such State, creditors who are citizens of other States are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such State and cannot be denied equality of right simply because they do not reside in that State, but are citizens residing in other States of the Union.' *Ibid.* 258 *per* Harlan J. See also *Williams v. Bruffy* (1877) 96 U.S. 176 where the Supreme Court invalidated a statute of the Confederate States, enforced in Virginia, which sequestrated debts owed by its citizens to citizens of the 'loyal' States.

[86] (1948) 334 U.S. 386.

> The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to ensure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.[87]

There are several strands in the Court's approach to this case which may be usefully explored. They will take us into some of the uncertainties and difficulties that lie on the fringes of the general interpretation of the clause which has been set out above.

It will be noticed that the crucial factor upon which the discrimination worked by the South Carolina statute depends is the residence of the boat owner. Article IV, section 2 on the other hand is couched in the terminology of citizenship. Having regard to this distinction it would seem to be possible to argue that the statute did not violate Article IV, section 2 because it does not discriminate between citizens but between residents. This possibility was adverted to by the Court but was tersely rejected without any discussion.[88] Nevertheless in view of earlier Supreme Court decisions there are serious problems involved in this citizenship/residence dichotomy.

The XIVth Amendment has an important bearing on the matter. It was adopted after the Civil War in 1868. One of its objects was to confer both national and State citizenship on negroes.[89] The Supreme Court had previously denied that they were citizens in *Dred Scott v. Sandford*.[90] At any rate the Amendment provides, *inter alia*, that: 'All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside*. . . .'[91] After 1868 therefore residence and citizenship in a State were to some degree overlapping concepts. This fact certainly led the authors of the two leading treatments of Article IV, section 2, both of which were written early this century, to ridicule the possibility of avoiding the thrust of the clause by drawing such a distinction. One of them found the reasoning 'specious', 'forced and almost entirely theoretical, resting upon a play of words'.[92] The other said that it passed his 'comprehension how such a contention can for a moment be considered sustainable'.[93]

[87] *Ibid.* 345 *per* Vinson C.J. *Toomer v. Witsell* was followed in *Mullaney v. Anderson* (1951) 342 U.S. 415. This case involved an Alaskan licence fee of $50 on non-resident fishermen whereas the fee for resident fishermen was $5.

[88] 'Such an argument . . . would be without force in this case.' *Ibid.* 397 *per* Vinson C.J.

[89] *United States v. Wong Kim Ark* (1898) 169 U.S. 649.

[90] (1857) 19 How. 393. Hence they were not within the protection of Art. IV, s. 2.

[91] Italics supplied. Prior to the adoption of this Amendment, Marshall C.J. had said that: 'A citizen of the United States, residing in any state of the Union, is a citizen of that State.' *Gassies v. Ballon* (1832) 6 Pet. 761, 762.

[92] Howell, *Privileges and Immunities of State Citizenship* (1918) 30, 54.

[93] Meyers, 'The Privileges and Immunities of Citizens in the Several States' (1902) 1 *Michigan Law Review* 286 and 364, 383.

Despite these academic aspersions upon the validity of the distinction between citizenship and residence the Supreme Court decisions on the point leave the precise nature of the relationship between the two in considerable uncertainty. None of the decisions before *Blake v. McClung*[94] in 1898 make any reference to the point. Many of the statutes which were passed upon by the Court during this period couched their discriminations in terms of residence. It was assumed that Article IV, section 2 applied.[95] In *Blake v. McClung* the Supreme Court was pressed with the argument that this provision of the Constitution did not prevent a State from enacting discriminatory laws based upon residence. The statute in this case, which has already been referred to,[96] discriminated between residents and non-residents of Tennessee in regard to the payment of debts. The Court rejected the argument. Harlan J. found the answer in the proper construction of the statute in question.

> Looking at the purpose and scope of the Tennessee statute, it is plain that the words 'residents of this State' refer to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there without any present intention of removing therefrom, and having the intention, when absent from that State, to return thereto; such residence as appertained to or inhered in citizenship . . . . It is impossible to believe that the statute was intended to apply to creditors of whom it could be said that they were only residents of other States, but not to creditors who were citizens of such States. The State did not intend to place creditors, citizens of other States, upon an equality with creditors, citizens of Tennessee, and to only give priority to Tennessee creditors over creditors who resided in, but were not citizens of, other States. The manifest purpose was to give to all Tennessee creditors priority over all creditors residing out of that State, whether the latter were citizens or only residents of some other State or country. Any other interpretation of the Statute would defeat the object for which it was enacted.[97]

Brewer J., with whom Fuller C.J. concurred, dissented. He argued that there was a clear distinction between residence and citizenship. A citizen of Tennessee could be resident in Ohio and a citizen of Ohio could be resident in Tennessee. In his view since neither was 'synonymous with the other, and neither includes the other' a discrimination based upon residence was valid.[98] Furthermore he argued that the contrary view would prevent necessary, desirable and reasonable discriminations being drawn. For example, it was reasonable to require an out-of-State resident to give security for costs as a condition of bringing an action in the State's courts.[99] It seemed to Harlan J.

[94] (1898) 172 U.S. 239.
[95] *E.g. Ward v. Maryland* (1870) 12 Wall. 418; *Chemung Canal Bank v. Goodwin Lowery* (1876) 93 U.S. 72.
[96] The terms of the statute appear in the text at note 85, *supra*.
[97] (1898) 172 U.S. 239, 247. [98] *Ibid.* 263. [99] *Ibid.* 266.

that the practical operation of the Court's decision would be 'not that the State may not discriminate in favor of its own residents as against non-residents, but that the State must discriminate in favor of non-residents and against its own residents'.[1]

The later decisions are difficult to reconcile. Some of them follow the majority opinion in *Blake v. McClung*. In one, a New York income tax law was invalidated insofar as it purported to deny substantial exemptions to non-residents which were allowed to residents.[2] Pitney J. pointed out that a general taxing scheme which discriminated 'against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other States'.[3] In another a Tennessee tax was invalidated on the ground that it imposed a higher licence fee on non-residents to that imposed on residents.[4] McReynolds J. looked at the 'practical' operation of the law and found that it 'would produce discrimination against citizens of other States by imposing higher charges against them than citizens of Tennessee'.[5] *Toomer v. Witsell*[6] is an example of the same approach.

On the other hand there are decisions which seem to be sympathetic with the view put forward in the dissent of Brewer J. *La Tourette v. McMaster*[7] involved a question as to the validity of a South Carolina statute dealing with the licensing of insurance brokers. It provided that only such persons as were residents of South Carolina and who held insurance agent's licences for two years could obtain a licence as an insurance broker. The Supreme Court upheld the statute because 'its requirement applies as well to citizens of the State of South Carolina as to citizens of States, residence and citizenship being different things'.[8] This decision was followed later in the same term in *Maxwell v. Bugbee*.[9] There a New Jersey death tax operated differently in regard to residents and non-residents. Day J. found it unnecessary to deal with an attack on it based upon Article IV, section 2 because, in his view, it was 'not strictly applicable to this statute because the difference in method of taxation rests upon residence and not upon citizenship'.[10]

[1] *Ibid.* 268.
[2] *Travis v. Yale & Towne Mfg. Co.* (1920) 252 U.S. 60.
[3] *Ibid.* 79. 'This is not the case of occasional or accidental inequality due to circumstances personal to the taxpayer . . . but a general rule operating to the disadvantage of all non-residents, including those who are citizens of the neighboring states, and favoring all residents, including those who are citizens of the taxing state.' *Ibid.* 80.
[4] *Chalker v. Birmingham & N.W. Ry. Co.* (1919) 249 U.S. 522. *Supra* note 84.
[5] *Ibid.* 527.
[6] (1948) 334 U.S. 386.
[7] (1919) 248 U.S. 465.
[8] *Ibid.* 470.
[9] (1919) 250 U.S. 525. See also: *Haavik v. Alaska Packers Association* (1924) 263 U.S. 510. In this case the Supreme Court upheld the validity of an Alaskan statute which imposed an arrival fee of $5 on every non-resident fisherman and none on residents. McReynolds J. said: 'It applies only to non-resident fishermen; citizens of every State are treated alike.' *Ibid.* 514. The decision was overruled in *Mullaney v. Anderson* (1951) 342 U.S. 315. *Supra* note 73.
[10] *Ibid.* 538.

These two decisions prompted Holmes J. in *Douglas v. New Haven Rly Co.*[11] to express the view that the authority of *Blake v. McClung* had been seriously impaired. The case involved the validity of a New York statute which gave residents and non-residents different rights in regard to actions commenced against foreign corporations based upon torts committed out of the State. The Court upheld the validity of the statute. Holmes J. pointed out that there was a clear legal distinction between citizenship and residence and that 'the statute applies to citizens of New York as well as to others and puts them on the same footing'.[12]

This apparent conflict in the decisions is not easy to resolve. It is clear that in the great majority of cases the non-resident will be a non-citizen. As a practical matter the distinction is largely verbal.[13] Yet there are indications in the decisions which indicate that the Supreme Court has decided these and other cases by reference to more substantial and meaningful criteria. Return for a moment to *Toomer v. Witsell.*[14] There Vinson C.J. pointed to another basic strand in the interpretation of Article IV, section 2:

> Like many other constitutonal provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them.[15]

This is fundamental to the current interpretation of Article IV, section 2. It recognizes that there are many circumstances in which factors such as residence and even citizenship provide a justification for reasonable legislative discriminations which should not result in invalidity. On this basis Vinson C.J. suggested that the Court would uphold a differential fee in the licensing of non-resident shrimp boats which was designed to compensate the State for 'any added enforcement burden they may impose or for any conservation expenditure from taxes which only residents pay'.[16]

None of this however was new with *Toomer v. Witsell.* The majority of the Court in *Blake v. McClung* had made the same point.[17] There were many decisions which had actually applied this

[11] (1929) 279 U.S. 377.
[12] *Ibid.* 387.
[13] Of course a citizen of one State can have a temporary residence in another. But this does not mean that he becomes a citizen of that other State. For the purposes of the XIVth Amendment, *supra* at note 91, residence is really what we would understand as domicile. See generally: 3 Am. Jur. 2d, 'Aliens and Citizens' § 115 *et seq.* (1962).
[14] *Supra* at pp.122-123.
[15] (1948) 334 U.S. 386, 396.
[16] *Ibid.* 399.
[17] (1898) 172 U.S. 239, 256-258.

reasoning to uphold the validity of discriminations based upon residence even assuming that these discriminations operated in effect against the citizens of other States. A Massachusetts statute was upheld which provided that if a non-resident used its highways then that use operated as an appointment of the Registrar of Motor Vehicles as an agent upon whom process could be served in respect of any legal proceedings arising out of any accident which occurred in the State.[18] As Butler J. pointed out: 'It makes no hostile discriminations against non-residents, but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required.'[19]

There is authority supporting the validity of the common practice of State universities to charge out-of-State residents higher fees than those demanded of residents.[20] This discrimination is designed to take account of the fact that these universities are financed by revenues raised within the State and are maintained primarily for the benefit of the State's citizens and their children. Differential taxes have even been upheld if the legislation reflects a reasonable attempt to deal with the separate problems associated with resident and non-resident taxpayers.[21] The Court has examined 'the practical effect and operation of the respective taxes as levied' and has not been concerned to pay 'too much regard to theoretical distinctions'.[22]

In *Travellers Insurance Co. v. Connecticut*,[23] for example, non-resident shareholders of corporations carrying on business in Connecticut were required to pay an annual tax of 1½ per cent on the value of their shares. The secretary of each corporation was required to deliver a list of such shareholders and the value of their shares to the State Comptroller's Office and to pay the tax. Resident shareholders on the other hand paid no tax to the State but were required to pay taxes on their shareholdings to the various local governments where they lived. These local taxes varied from year to year and from locality to locality sometimes going above 1½ per cent and sometimes

[18] *Hess v. Pawloski* (1926) 274 U.S. 352. The statute required that the defendant actually receive and receipt a notice that service had taken place on the Registrar and that he receive a copy of all documents so served. See: *Anderson v. Scholes* (1949) 83 F. Supp. 681.

[19] *Ibid.* 356.

[20] *Landwehr v. Regents of the University of Colorado* (1964) 156 Col. 1; 396 P. 2d. 451.

[21] *Shaffer v. Carter* (1920) 252 U.S. 37; *Travellers' Insurance Company v. Connecticut* (1902) 185 U.S. 364.

[22] *Ibid.* 56. In *Shaffer* the taxing act enabled residents to deduct all losses wherever incurred whereas non-residents could only deduct losses incurred within the State. Pitney J. pointed out that this 'cannot be regarded as an unfriendly or unreasonable discrimination' because it arises 'from the extent of the jurisdiction of the state' which only enabled it to tax non-residents on the income derived within the State whereas it could tax its residents on their income from all sources. *Ibid.* 57.

[23] (1902) 185 U.S. 364.

going below, but 1½ per cent was about the average. Non-residents paid no local taxes. The Supreme Court held that this system was not invalidated by Article IV, section 2. It held that the mere fact that the taxes were calculated on a different basis by separate authorities and might result in a non-resident paying more tax in a given year was not determinative of the question.[24] Brewer J. pointed out that: 'It is enough that the State has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against non-residents.'[25]

Similarly although Article IV, section 2 requires that each State give the citizens of other States access to its courts there is no compulsion to allow that access on precisely the same terms as those which it allows to its own citizens. A non-resident, for example, may be required to give security for costs.[26] The Supreme Court has even found a 'valid' reason justifying a Wisconsin statute which discriminated against non-resident plaintiffs with regard to the running of the limitation period on debts of owed by non-resident defendants.[27] The principle upon which these holdings rest has been explained by the Court as follows:

> . . . the constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms.[28]

State legislation regulating professions such as the law, medicine, dentistry and architecture often discriminates against non-residents. This is usually in the form of a requirement that an applicant for admission to practice must have resided in the State for a fixed period

[24] It could happen that in another year the non-resident shareholder would pay less than the resident shareholder.

[25] (1902) 185 U.S. 364, 371. In *Travis v. Yale & Towne Manufacturing Co.* (1920) 252 U.S. 60 the validity of a tax withholding provision which only applied to non-residents was upheld. 'That provision does not in any wise increase the burden of the tax upon non-residents, but merely recognizes the fact that as to them the state imposes no personal liability [which it did on residents] and hence adopts a convenient substitute for it.' *Ibid.* 76 *per* Pitney J.

[26] *Bank of Augusta v. Earle* (1839) 13 Peters 519, 254-255; *Canadian Northern Rly. Co. v. Eagan* (1920) 252 U.S. 553; *Chemung Canal Bank v. Goodwin Lowery* (1876) 93 U.S. 72, 82.

[27] *Chemung Canal Bank v. Goodwin Lowery* (1876) 93 U.S. 72. The limitation period did not run against resident plaintiffs but did against non-resident plaintiffs. See also *Canada Northern Rly. Co. v. Eagan* (1920) 252 U.S. 553. In this case the validity of a Minnesota limitation statute was upheld. It provided that if a cause of action arose outside the state and was statute barred by the law of the *lex loci* then it was barred in Minnesota unless the plaintiff was a citizen of Minnesota in which case the local limitation period would apply.

[28] *Canadian Northern Rly. Co. v. Eagan* (1920) 252 U.S. 553, 562 *per* Clarke J. See also: *Miles v. Illinois Central Rly. Co.* (1942) 315 U.S. 698.

of time.[29] Such a residence requirement is in addition to the general tests or evidences of professional competence that the State is entitled to insist upon.[30] No cases involving the validity of these residence requirements have ever reached the Supreme Court. All of the many decisions on the point in the State courts have upheld them.[31] These decisions are based upon the view that the States have a legitimate interest in requiring a period of residence for the purposes of investigating and establishing the applicant's general fitness and character. It seems, however, that the period must not be arbitrary or unreasonably long so as to be, in effect, a discrimination based upon citizenship. There must be a reasonable relationship between the nature of the discrimination involved and the legitimate interests of the State in regulating and policing the professions.[32] Similar reasoning has been applied to legislation restricting the grant of liquor sale licences to residents. In this situation an additional reason in the form of an argument that such a restriction makes it easier to police violations of the liquor laws has also been put forward by the courts.[33]

What emerges from a study of these decisions is the impression that the critical factor in applying Article IV, section 2 is not whether the legislation is couched in terms of residence or citizenship. It is instead whether the particular discrimination sought to be imposed by a State can be reasonably justified. A reasonable discrimination based upon residence will be upheld; an unreasonable one will be invalidated. The same is true of citizenship, although it will be very difficult to demonstrate the reasonableness of a discrimination on this basis.[34] One such direct discrimination on the basis of citizenship is

29 When the regulatory legislation was first introduced during the nineteenth century the discrimination took a different form. Most States granted licenses to persons who had been practising their profession in the State for the previous ten years whereas others who had practised elsewhere had to undergo an examinaton. The State Courts were almost unanimous in upholding these requirements against attacks based upon Article IV, s. 2. These decisions are, however, open to some question. What relationship does a period of practise within a State bear to professional competence that is not true of a similar period of practise elsewhere? See generally: Howell, *Privileges and Immunities of State Citizenship* (1918) Ch. 5. The only State in which a different result was reached was New Hampshire. See: *State v. Hinman* (1889) 65 N.H. 103, 18 Atl. 194; *State v. Pennoyer* (1889) 65 N.H. 113, 18 Atl. 879.

30 It is clear that a State has a free hand in regard to the standard and content of such general tests. See: *Dent v. West Virginia* (1888) 129 U.S. 114; *Bradwell v. Illinois* (1873) 16 Wall. 130. However if different standards were required of its own citizens to the citizens of other Sates then such a discrimination would seem to violate Article IV, s. 2.

31 Howell, *op. cit.* note 70.

32 1 Willoughby, *Constitutional Law* (2d. ed 1929) 286.

33 The Supreme Court has frequently recognized the right of the States so to limit liquor selling licenses. See *Crowley v. Christensen* (1890) 137 U.S. 86; *Bartmeyer v. Iowa* (1873) 18 Wall. 129; *Beer Co. v. Massachusetts* (1877) 97 U.S. 25; *Mugler v. Kansas* (1887) 123 U.S. 623. The best explanation of basis of this exception to Article IV, s. 2 is in the opinion of Judge Shiras in *Kohn v. Melcher* (1887) 29 Fed. 433.

34 One discrimination squarely based upon citizenship has a good deal of judicial authority to support it. This relates to the reservation of the right to hunt game and other wildlife and to engage in clam and oyster fishing to the citizens of a State.

well established. A State may limit the right to vote or hold public office to its own citizens.[35] This has never been doubted and constitutes a basic exception to the operation of Article IV, section 2.[36] It has no effect on the right of each State to determine its own franchise and to establish the conditions of election to public office.[37] The only possible operation it might have in this area would be if a State discriminated between its own citizens upon the basis of a previous citizenship in another State;[38] or, possibly, if it granted the right to vote or hold office on a basis other than citizenship and then imposed differential conditions based upon residence.[39] In general then it can be said that the Supreme Court has recognized that there are many legitimate reasons which might justify a State differentiating between the rights of its citizens or residents and those from other States. Absolute equality is not required. As long as those differential laws are not hostile and reflect a reasonable attempt to secure a substantial equality between the two groups or to protect a legitimate State interest they will not violate Article IV, section 2.[40] In short the clause operates to prevent hostile discriminations against the citizens of other States whether those discriminations are formulated either in direct terms or in the language of residence but it does not prevent the differential treatment of such persons where there are reasonable grounds upon which the differentiation can be justified. As Clarke J.

In *Corfield v. Coryell*, *supra* note 59, Washington J. held that New Jersey could validly prohibit anyone not 'an actual inhabitant or resident' of the State from gathering oysters and clams in its 'rivers, bay or waters'. The Supreme Court followed this decision in *McCready v. Virginia* (1876) 94 U.S. 391. There the validity of a Virginia statute was upheld which prohibited planting oysters in soil covered by her tidewaters. See also *Geer v. Connecticut* (1896) 161 U.S. 519. These decisions were based on a theory that all game, wildlife and fish are the common property of the citizens of each State and can be reserved for their sole enjoyment or only made available to the citizens of other States on such terms as they see fit. In the light of *Toomer v. Witsell*, *supra* at note 22, these decisions are now of uncertain authority. Vinson C.J. said: 'The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not be discriminate without reason against the citizens of other States.' *Op. cit.* 402. See, however, Frankfurter J. at 410. There is a useful annotation on the point in (1952) 96 L. Ed. 463-468. It is not at all clear whether *Toomer v. Witsell* will be applied to non-commercial fishing and hunting. See *e.g.* *State v. Kemp* (1950) 44 N.W. 2d. 214 (Supreme Court of South Dakota).

[35] *Minor v. Happersett* (1874) 21 Wall. 162.

[36] The early cases treat the point as being too obvious to warrant much discussion. See *e.g.* *Campbell v. Morris* (1797) 3 Harr. & McHen. (Md) 535, 554; *Abbott v. Bayeley* (1827) 6 Pick. (Mass.) 89, 96.

[37] *Minor v. Happersett*, *supra*.

[38] *Cf.* *Pope v. Williams* (1904) 193 U.S. 621, 634 *per* Peckham J.

[39] *Blake v. McClung* (1898) 172 U.S. 239, 256 *per* Harlan J.

[40] See generally: Note, (1928) 28 *Columbia Law Review* 347: Comment, (1929) 18 *California Law Review* 159. 'Whatever the specific form the differences may have assumed, the courts have tended to test their validity by whether the differences in treatment in favor of a state's own citizens could be justified on any reasonable basis.' Rottschaefer, *Handbook of American Constitutional Law* (1939) 125.

has put it, it is the Supreme Court that has the ultimate responsibility in determining 'the adequacy and reasonableness of such terms'.[41]

This approach has been made possible by the vagueness of the language of Article IV, section 2, which in Professor Pritchett's words is 'perhaps the vaguest of all the civil rights language in either the original Constitution or the amendments'.[42] This has enabled the Supreme Court to approach its interpretation in a very flexible manner. The Court has been able to enforce the policies that it has identified as being the purpose of the clause without too close an examination of the words actually used in it.

III

Section 117 has not been a very important provision of the Australian Constitution. Whatever potential significance it may have had was quickly undermined by very narrow and literalistic interpretations of its language. The High Court found little assistance in the United States experience with Article IV, section 2. The general attitude was expressed in the following passage from the judgment of Higgins J. in *The King v. Smithers*:

> The cases which have arisen under the United States Constitution tend rather to perplex than to assist us; for there are no such words in that Constitution as in the Australian. It is our duty meekly to ascertain the meaning and application of the words used in our Constitution, as they stand, as the words of an instrument complete in itself, and which has to be construed, as a will is construed, by an examination of its own language within its four corners.[43]

Surprisingly there have been some envious glances back the other way. In 1919 an anonymous note writer in the *Yale Law Journal* was sharply critical of the distinction between citizenship and residence which the Supreme Court had used to avoid the thrust of Article IV, section 2 in *La Tourette v. McMaster*.[44] He set out the text of section 117 and said: 'Americans may profitably compare the ambiguity of our Constitution upon this point with the clarity of the corresponding provision in the fundamental law of Australia.'[45] His comment illustrates one of the many dangers of comparative constitutional law. The author of the note did not know that the High Court had somewhat clouded the 'clarity' he found in secton 117 by drawing a similar

[41] *Supra* note 28. It should be pointed out that the general welfare of the citizens of a State does not constitute a reasonable ground for such discrimination. 'If such were the case it would be possible to couch a legislative Act in such words as to regulate almost all types of endeavour on the sole basis of welfare.' *Brown v. Anderson* (1962) 202 F. Supp. 96, 102 *per* Powell D.J.

[42] The American Constitution (1959) 82.

[43] (1912) 16 C.L.R. 99, 118.

[44] (1919) 248 U.S. 465. See *supra* note 7.

[45] Comment, (1919) 28 *Yale Law Journal* 601, 602.

distinction between residence and domicil. This had happened some fifteen years earlier in *Davies and Jones v. Western Australia*.[46]

That case involved an attack upon the validity of section 86 of the Administration Act 1903 (W.A.) which imposed a tax on the final balance of deceased's estates at rates which were set out in a schedule. A proviso to the section purported to halve the rate of tax payable on the interests of beneficiaries who were '*bona fide* residents of and domiciled in Western Australia'. The plaintiff executors sought to recover half the full amount of the tax they had been forced to pay on the beneficial interest of the testator's son who was domiciled and resident in Queensland. The tax had to be paid as a condition of obtaining probate. They contended that section 86 worked a discrimination which was forbidden by section 117 of the Constitution. The Court dismissed the action and upheld the validity of the proviso to section 86 of the Act.

The basis of the decision was that the only discrimination forbidden by section 117 was one based squarely on residence and residence alone. As Barton J. put it: 'It is discrimination on the sole ground of residence outside the legislating State that the Constitution aims at in the 117th section.'[47] If some other discriminatory element is super-added to residence so that the privilege is not conferred upon all of the residents of the legislating State then there is no conflict with section 117. Thus in section 86 of the Administration Act residence in Western Australia was not of itself enough to enable a beneficiary to claim the benefit of the proviso. The beneficiary was also required to establish that he was legally domiciled in Western Australia.[48] This meant, in the words of Griffith C.J., that: '. . . the discrimination effected by the Act is not a discrimination as between residents of Western Australia and others, but as between persons having their legal domicil in Western Australia and others. . . .'[49] Such a discrimination was not inconsistent with section 117. The following passages from the judgment of O'Connor J. state the principle upon which the decision rests most clearly:

> . . . [I]t is not every discrimination that is prohibited. Section 117 of the Constitution contemplates that there may be a disability or discrimination, the imposition of which would be legal, that is to say a disability or discrimination which would be equally applicable to the person complaining if he were a resident of the State complained against. . . .[50] In

[46] (1904) 2 C.L.R. 29.

[47] *Ibid*. 47.

[48] It was argued by the plaintiffs that the words '*bona fide*' qualified not only the word 'residents' but also the word 'domiciled' in s. 86. Thus before the proviso could operate the beneficiaries would have to be both *bona fide* residents of, and *bona fide* domiciled in, Western Australia. The consequence of this construction, it was urged, would be to make it clear that s. 86 was not concerned with the technical legal meanings of the concept of domicil but with a domicil which was actually linked to residence. The High Court rejected the argument. It held that the word 'domiciled' was used in its technical legal sense unqualified by the words '*bona fide*'.

[49] (1904) 2 C.L.R. 29, 43.

[50] *Ibid*. 49.

> my opinion the Constitution does not prohibit a State from conferring special privileges upon those of its own people who, in addition to residence within the State, fulfil some other substantial condition or requirement such as that which is made the condition of the concession allowed in this enactment.[51]

At the formal level there is considerable force and an attractive logic in these arguments. It is trite law that domicil and residence are very different legal concepts. A domicil of origin and the dependent domicil of wives and children have no necessary relationship to the place of residence. Even a domicil of choice, which needs to be established by some period of residence at its inception is not lost by residence elsewhere. Residence is a finding of fact based upon a person's continued presence in a particular place. Domicil is the legal connecting factor between a person and the legal system of the place which he considers to be his home or which is imputed to him as such. Thus when the High Court points out the discrimination worked by section 86 is based upon domicil and not residence the conclusion that section 117 has not been violated seems to follow.

The difficulty is that there seems to be a tension between these formal distinctions and the factual context in which they operate. There may be clear theoretical differences between the concepts of residence and domicil but as a practical matter they overlap to a marked degree. Indeed it is probably true to say that most people are domiciled in the place where they are resident. This is acknowledged by both Barton[52] and O'Connor, JJ.[53] If it is assumed that this overlapping does exist then the decision in *Davies and Jones v. Western Australia* makes it fairly easy for a draftsman to avoid section 117 and yet impose a discrimination which will substantially operate on the basis of residence. All he has to do is to formulate the discriminating factor in terms of a dual requirement of residence and domicil. The policy of section 117 is thus frustrated by a very technical and narrow interpretation. It is clear that section 117 was designed to ensure that a Queenslander, for example, would not be treated any differently in Western Australia merely because he was not a Western Australian.[54]

51 *Ibid.* 53.

52 'Residence in the place of domicil is the normal condition . . .' *Ibid.* 47.

53 'Generally speaking the country in which a man permanently resides is his domicil, but that is not always so.' *Ibid.* 50.

54 The Convention debates clearly show that the word 'resident' was not intended to bear any narrow technical sense. The original draft of section 117 contained the word 'citizen' but it was deleted for the reasons that have already been given. 'A subject of the Queen resident in any State' was thought to be a more constitutionally correct description. The delegates would have otherwise been content with the word 'citizen'. They would have been amazed to learn that section 117 as drafted did not apply to the domiciliaries of a State. As Richard O'Connor pointed out during the debate. 'All we mean now is a member of the community or of the nation, and the accurate description of a member of the community under our circumstances is "a subject of the Queen resident within the Commonwealth".' 2 *Debates* 1796. See generally *supra* note 49; 2 *Debates* 1786-1788.

Section 83 of the Administration Act 1903 (W.A) did precisely that and yet was upheld by the High Court.

The decision was strongly criticized by F. L. Stow in an article in the old *Commonwealth Law Review*.[55] He pointed out that 'the bulk of the residents of a State are in fact domiciled there' and continued:

> The effect, therefore, of the decision is that section 117 is practically abrogated. Any State legislature can work what discrimination it likes. It can simply say that persons domiciled in the other States shall be subject to any special disabilities it pleases, and this disability will attach, in spite of section 117, to the great bulk of the residents in the other States. The section is gone.[56]

As Stow pointed out not the least curious consequence of the decision is that the only persons who could derive any benefit from section 117, as thus interpreted, in relation to section 86 would be those persons who were domiciled in Western Australia but resident in another State.[57] They would be discriminated against on the sole ground of residence. Thus a provision which was designed to protect the people of each State against discrimination in other States would actually only operate to protect them against discriminations made against them by their own State!

There are other possible readings of section 117 which would allow it greater scope and which seem to be more consistent with the policies it embodies. One would be to interpret the word 'resident' as including domicil. This view was put forward by Stow in the article referred to above. Indeed he went further. He suggested 'that a man must be domiciled in a State in order to be entitled to the protection afforded by this clause'.[58] This argument is open to several objections. To begin with it would give the word 'resident' a completely different meaning to that which it bears in other parts of the Constitution where it is clear that it does not mean or include domicil.[59] Then again it would have several curious consequences. Such an interpretation would enable persons to claim the protection of section 117 in the case where the only contact they have with an Australian State other than the legislating State is the fact that they are technically domiciled in it. Thus a married woman or a child might have a technical domicil in a State where they have never resided. Or a person might have a

[55] Stow, 'Section 117 of the Constitution' (1906) 3 *Commonwealth Law Review* 97.

[56] *Ibid.* 99.

[57] Griffith C.J. found it unnecessary to consider this point (1904) 2 C.L.R. 29, 43. It would however seem to be correct.

[58] *Op. cit.* 102.

[59] Section 34 provides that the qualifications of a member of the House of Representatives shall include the requirement that he 'must have been for three years at the least a resident within the limits of the Commonwealth'. Section 75 (iv) provides that the High Court shall have original jurisdiction, *inter alia*, 'between residents of different States'. Section 100 provides that the Commonwealth cannot abridge the rights of 'a State or the residents therein' to the reasonable use of river water for irrigation.

domicil of origin or choice in a State where he has not resided for some time. Even though these would constitute a small number of cases there seems no justification for the results they produce. Finally, if the protection of section 117 is only extended to persons who are domiciled in States other than the legislating State then discriminations based upon simple residence without domicil would appear to be valid. This would be quite fantastic because section 117 is formulated in terms of residence and its policies are geared to the fact of residence in a State. Therefore the argument that 'resident' included or means domicil is not at all persuasive. This does not mean that the decision in *Davies and Jones* is to be supported, but it does seem that the High Court was correct to insist upon the legal differences between the two concepts.

The difficulty with the *Davies and Jones* decision is that it is too formalistic and overlooks the factual overlapping between these concepts. It seems to place too much weight on the purely theoretical differences between residence and domicil. The Court restricts itself to these formal differences and pays little attention to the factual context in which they operate and the practical consequences that such an interpretation inevitably produces. A much better approach to the interpretation of section 117 would be to ask whether the impugned legislation produces a substantial discrimination against non-residents irrespective of the legal form in which the legislation couches the discriminating factor. A discrimination based upon domicil does produce a substantial discrimination based upon residence and thus it should be held to be forbidden by section 117.

There is some support for this approach, although of course not the conclusion, in *Davies and Jones* itself. Griffith C.J. suggests in his judgment that if 'domiciled' in section 86 were interpreted to mean having a domicil of choice in Western Australia it would have been caught by section 117. This was because, in his view, 'the essential quality of domicil of choice is permanent residence'.[60] He interpreted the word 'resident' as used in section 117 in the following way:

> The word 'resident' is used in many senses. As used in section 117 of the Constitution, I think it must be construed distributively, as applying to any kind of residence which a State may attempt to make a basis of discrimination, so that, whatever that kind may be, the fact of residence of the same kind in another State entitles the person of whom it can be predicted to claim the privilege attempted to be conferred by the State law upon its own residents of that class.[61]

If the legislature had intended to use 'domiciled' in the sense of a domicil of choice then, according to Griffith C.J., such a domicil:

60 (1904) 2 C.L.R. 29, 42.
61 *Op. cit. Ibid.* 39.

> . . . being residence of a particular kind or quality, would entitle all persons of whom residence of the same kind or quality in another State can be predicated to claim those privileges.[62]

Thus even though a legislative discrimination was formulated in terms of a person's domicil of choice rather than his residence, His Honour indicated that he would have been prepared to take account of the factual overlapping between the two concepts and hold that the discrimination was forbidden by section 117.

In the result, however, Griffith C.J. held that 'domiciled' was used in the Administration Act (W.A.) 1903 in its broader, technical legal meaning which included other types of domicil as well. Although His Honour did not argue the point, he seems to have assumed that there was not a sufficient factual overlapping between residence and this broader meaning of domicil. The question thus becomes one of fact—does a discrimination based upon domicil produce a substantial factual discrimination against non-residents? The assumption that it does not is, to say the least, questionable.

There is also some support for the approach put forward here in the judgment of O'Connor J. In a passage from his judgment which is set out above[63] O'Connor J. stated his opinion that section 117 does not prevent a State conferring special privileges on its residents who 'in addition to residence within the State, fulfill some other substantial condition or requirement'.[64] In the opinion of O'Connor J. the added requirement of domicil in section 86 was 'substantial'. This would seem to be a question of fact which it is suggested should be given a different answer to that given by His Honour.

The present submission is that the future interpretation of section 117 should not be restricted by the technical distinction between residence and domicil which was adopted by the High Court in the *Davies and Jones* case. Attention should be directed to the factual effects of discriminatory legislation and not to the legal form in which the discrimination is couched. If the legislation produces a substantial discrimination against non-residents of a State then it should be held to violate section 117. The consequence of applying this approach to section 86 of the Administration Act 1903 (W.A.) would be to reach a different result to that reached by the High Court in the *Davies and Jones* case. Residence and domicil overlap to such a degree as a factual matter that a discrimination based upon domicil inevitably produces a substantial discrimination based upon residence.

If this view is accepted then there is no need for the constitutional amendment which was recommended in the 1929 Report of the Royal Commission on the Constitution. The Commissioners found that 'it is

[62] *Op. cit. Ibid.* 42.
[63] *Supra* note 51.
[64] (1904) 2 C.L.R. 29, 53.

not within the spirit of section 117 that a State should be permitted to impose discriminatory taxation on the ground of domicil in any other part of the Commonwealth'. They recommended the insertion of the following clause at the end of the present section 117:

> For the purpose of any law of a State imposing taxation a person resident or domiciled in any part of the Commonwealth shall not be subject to any discrimination which shall not be equally applicable to him if he were resident or domiciled in that State.[65]

This would be an unfortunate amendment. The problems of discriminatory legislation are far wider than the area of taxation. What is needed is an end of the régime of *Davies and Jones* and not a solution to just one of the particular problems it creates.

It is interesting to contrast the formalism of the High Court's approach to the distinction between residence and domicil with its approach to another problem which arose in the same case. As pointed out above[66] section 86 of the Administration Act 1903 (W.A.) first imposed a general rate of tax on the final balance of the deceased's estate and then, in a proviso, reduced the rate of tax payable by its own residents and domiciliaries by one half. The Commissioner had demanded tax at the full rate of 9 per cent on the Queensland beneficiary's share and this had been paid. The executors were trying to recover one half of the sum so paid.

It was argued by the Commissioner that even assuming that section 117 invalidated the discrimination, the Court should merely strike out the proviso and leave the general obligation standing. Thus the executors could not recover anything. This contention was rejected by Griffith C.J. who pointed out that:

> The substance of section 117 is, in short, that whatever privileges are conferred upon residents of a State by its laws are to be taken to be equally conferred upon the residents of other States, and that every enactment conferring privileges is to be construed as including residents of other States. . . . The only way in which practical effect can be given to the provisions of section 117 of the Constitution is by allowing residents of other States to claim the same privileges as are formally given to residents of the particular State.[67]

The Commissioner also argued that the proviso to section 86 did not impose a 'disability or discrimination' within the meaning of section 117 but rather conferred a privilege upon Western Australians. It met a similar fate. Barton J. rather scornfully pointed out that the point was one of form and not of substance. 'Constitutional safeguards

[65] Report of the Royal Commission on the Constitution (1929) 260. Many of the States impose substantial discriminations in the field of death duty on the basis of domicil. *E.g.* Stamp Duties Act 1920-1965 (N.S.W.) ss. 101A-101E; Death Duties (Taxing) Act 1934-1961 (W.A.) s. 4.

[66] *Supra* p. 132.

[67] (1904) 2 C.L.R. 29, 38-39.

could be evaded with impunity if any other view were taken, and the matter is too clear to justify extended discussion.'[68] O'Connor J. was just as emphatic:

> In determining the question raised regard must be had to the substance and not to the form of the enactment. Although section 117 of the Constitution uses the words 'shall not be subject in any other State to any disability or discrimination', a State enactment will be equally invalid whether it imposes the unconstitutional 'disability' or 'discrimination' by direct prohibition against the residents of other States, or by granting a privilege applicable only to residents of a particular State.[69]

It is unfortunate that this regard for substance instead of form did not carry over into the Court's interpretation of the word 'resident'.

The next question which arises concerns the nature of the relationship that a person must have with a State in order to be properly described as a 'resident' of that State. Here the authorities dealing with the meaning of the word 'residents' in section 75 (iv) of the Constitution are helpful. That provision confers original jurisdiction on the High Court, *inter alia,* in all matters 'between residents of different States'. To be a resident for this purpose usually involves continued physical presence within the State. Mere temporary presence for business or pleasure is not enough.[70] The transient visitor is not a resident. As Isaacs J. pointed out: 'Every Australian is, when all the facts are known, residentially identifiable pre-eminently with some one State.'[71] Some of the relevant facts have been stated by Dr Lane as follows:

> I suggest that a party resides in that State in which he not infrequently does some of the following acts: owns or rents a house . . . lives as a lodger . . . sleeps and eats . . . keeps most of his belongings . . . uses as his address, receives mail and telephone calls . . . is employed or has his business . . . has his family . . . sends his children to school . . . has his name on the electoral roll . . . uses services (doctor, dentist, service station for example) . . . has his car registered.[72]

An interesting question concerning whether a man could properly be regarded as 'resident in a State' arose in *Commissioner of Taxes v. Parks.*[73] There the defendant Parks was a master mariner in command of ships engaged in the Australian coastal trade. He had a home

[68] *Ibid.* 45. See also 38 *per* Griffith C.J.

[69] *Ibid.* 48.

[70] *Coates v. Coates* [1925] V.L.R. 231, 235. A resident 'means a person who permanently lives in a State; one who is not a mere visitor or sojourner; one who by his continued residence in a State has become identified with it and is regarded as one of its people'. Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 960.

[71] *Australian Temperance and General Mutual Life Insurance Soc. Ltd v. Howe* (1922) 31 C.L.R. 290, 308.

[72] Lane, *Australian Constitutional Law* (1964) 154. See also *Reg. v. Oregan; Ex parte Oregan* (1957) 97 C.L.R. 323.

[73] [1933] St. R. Qd. 306.

in Marrickville, New South Wales, where he lived with his wife and children when his ships were in port in Sydney or when he was on holiday. He averaged about four days at home in each three week period and his annual holidays amounted to between four and six weeks each year. This had been the pattern of his life for about twenty years.

The Commissioner had assessed Parks for Queensland income tax purposes on the income he had earned during the period he was working within Queensland territorial waters. This assessment, however, did not give Parks the benefit of certain exemptions because the Commissioner assumed the relevant legislation limited those exemptions to persons who ordinarily resided in Queensland.[74] The Full Court of the Supreme Court of Queensland dealt with the case on the assumption that the Commissioner's view was correct. In these circumstances the Court held that if Parks could be regarded as a resident of New South Wales then section 117 enabled him to claim the exemption that was given to Queensland residents. This would result in him not having any taxable income and so the claim of the Commissioner would fail.

Counsel for the Commissioner argued that the evidence showed that Parks was absent from New South Wales for the greater part of each year. It was conceded that he was probably domiciled in that State. Nevertheless it was argued that he could not be regarded as resident there because residence involved physical presence. The argument was rejected. Henchman J. who delivered the joint judgment of the members of the Court said:

> We cannot accept this contention, the result of which might be to deprive a considerable number of Australians, whose varied occupations take them from time to time to other States, of the constitutional safeguard admittedly given to those who stay at home. The word 'resident' as Griffith C.J. said in *Davies and Jones v. Western Australia* is used in many senses, but we cannot think that in a fundamental instrument such as the Australian Constitution it excludes a person, who though in other respects residentially identifiable with one State, is compelled by the exigencies of his avocation to be bodily absent from that State, whether in other States or elsewhere during the greater part of the year.[75]

[74] The report is somewhat confusing on the point but the Queensland Supreme Court seems to have held that Parks was entitled to this exemption under the terms of the Act itself. The Court was not content however to decide the case on the simple ground that the Commissioner had made an error in the interpretation of the Act.

[75] [1933] St. R. Qd. 306, 315. There was another interesting point in the case. The relevant legislation provided that objections to tax assessments, including objections based upon s. 117 of the Constitution, had to be raised in a special Court of Review. Parks had not done this and it was argued that he could not raise an objection based upon s. 117 in the present enforcement proceedings. It was argued that this requirement of submitting objections to the validity of an assessment applied equally to residents and non-residents. The Court rejected this argument holding that no State law could qualify, abridge, or limit the rights conferred by s. 117. *Ibid.* 322-323.

It is submitted that this decision is correct. If the facts of the case are analyzed by reference to the factors listed by Dr Lane it will be seen that a person in Park's position would probably satisfy most of them. The decision is an interesting one because it shows that reasonably continuous physical presence within a State is not always necessary to establish residence.

It is not every Australian resident, however, that can claim the protection of section 117. The section only applies in terms to 'a subject of the Queen resident in any State'. This means that section 117 does not protect a resident of federal territory[76] or even of the Australian Capital Territory.[77] These areas cannot be described as 'States'. It is also reasonably clear that companies are not as such protected by the clause.[78] They cannot be regarded as subjects of the Queen because they are incapable of personal allegiance.[79] Nevertheless, even though a discrimination purported to attach, for example, to non-resident private companies, it might be possible to argue that section 117 applies if it can be shown that in point of fact the discrimination substantially operated against the residents of other States.

The reason why the phrase 'a subject of the Queen' was used in section 117 instead of 'citizen' has already been dealt with.[80] Basically the use of the word citizen was thought to be constitutionally improper because of its republican overtones.[81] Because of this the Constitution uses the words 'people' and 'subjects' in various phrases to describe various groups of the population. There are the 'people of the Commonwealth',[82] the 'people of the States'[83] and 'subjects of the Queen'. The embarrassment that was felt in the use of the word 'citizen' at the turn of the century no longer exists. There have been important changes in England and throughout the Commonwealth in the constitutional law relating to nationality and citizenship.[84] Under

[76] '. . . sec. 117 does not prevent a State from imposing disabilities on subjects resident in the Territories. . . .' *Australian Temperance Soc. Ltd. v. Howe* (1922) 31 C.L.R. 290, 330 *per* Higgins J.

[77] *Cf. Spratt v. Hermes* (1965) 39 A.L.J.R. 368.

[78] *Australian Temperance Soc. Ltd. v. Howe, op. cit.*; Wynes, *Legislative, Executive and Judicial Powers in Australia* (2nd ed. 1962) 143; Kerr, *The Law of the Australian Constitution* (1925) 73; Quick and Garran, *op. cit.* 961; *Cf. Concrete Engineering and Contracting Co. Ltd. v. Hardie Trading Pty. Ltd.* [1928] S.A.S.R. 132, 136.

[79] 1 Blackstone, *Commentaries*, Ch. 10. This seems to be a far better reason than to say that a company cannot be regarded as a 'resident' as the High Court did in *Australian Temperance Soc. Ltd v. Howe, op. cit.* That of course was in the context of s. 75 (iv) of the Constitution.

[80] *Supra* pp. 115-116.

[81] Quick and Garran, *op cit.*, 957. In *Australian Temperance Soc. Ltd. v. Howe, op. cit.*, Higgins J. pointed out that the change was made to avoid 'the republican implication' of the word citizen. *Ibid.* 327. See also: *Davies and Jones v. Western Australia, op. cit.* 52-53 *per* O'Connor J.

[82] They choose the members of the House of Representatives in s. 24. See also ss. 25 and 127.

[83] They choose the senators for each State in s. 7. See also s. 24 (ii).

[84] See generally: Jones, British Nationality Act, 1948 (1948) 25 *British Yearbook of International Law* 158; Hood Phillips, *Constitutional and Administrative Law* (3rd ed. 1962) Ch. 22.

the Australian Nationality and Citizenship Act 1948-1960, Australian citizenship is in general conferred by birth, descent, registration or naturalization. Every person who is an Australian citizen automatically becomes a British subject. This is also true of many other Commonwealth countries. The link is that their citizens share a common British nationality.[85] In view of these changes it is necessary to determine who is a 'subject of the Queen' within the meaning of section 117.

To begin with it is clear that resident aliens are excluded. They are neither Australian citizens nor are they British subjects. But what about the citizens of the United Kingdom or other Commonwealth countries who are also British subjects? If they are resident in an Australian State, are they protected by section 117? It is submitted that they are not. At the time the Constitution was adopted each of the Australian colonies had the power to determine who could become one of its citizens or, in a different language, a subject of the Queen in right of that colony.[86] The delegates at the 1897-98 Convention refused to hand over this power to the Federal government.[87] Unless a person was a subject of the Queen in one of the Australian colonies prior to federation or one of the States afterwards, it seems clear that he could not claim the protection of section 117. The phrase 'a subject of the Queen' was not used in the general sense of a subject of the Queen of England but in the narrow sense of a subject of the Queen in right of one of the Australian States.[87a] At the present time it would seem to follow that a person who is not an Australian citizen is excluded from section 117. The fact that he is a British subject is not in itself enough. He must now be a 'subject of the Queen' in right of the Commonwealth of Australia.[88]

A further matter which needs to be considered in relation to section 117 is whether it only operates in regard to State legislation or whether it applies to the Commonwealth Government as well. The width and generality of the language of the section gives no indication that it is limited to State legislation. It is more concerned with a description of the nature of the prohibited discrimination than with the identification of the government to which the prohibition attaches. The section forms part of Chapter V of the Constitution which is headed 'The States'. This is equivocal, however, because section 116 in the

[85] The exceptions are of course those countries which have become republics within the Commonwealth.

[86] See generally: 2 *Debates* 1750-1768. The Colonies could not however affect the status of a person as a subject of the Queen in right of Great Britain. As Blackstone said: 'Natural born subjects are such as are born within the dominions of the Crown of England; that is within the ligeance, or, as it is generally called, the allegiance of the king.' 1 *Commentaries* 366.

[87] See *supra* at pp. 113, 115, 116. The Commonwealth *Nationality and Citizenship Act* 1948 was valid federal legislation because it implemented an international agreement.

[87a] *Supra* n. 49.

[88] This result is stated without argument in Wynes, *op. cit.* 142, and Kerr, *op. cit.* 73.

same chapter is directed specifically at the Commonwealth not the States. In the light of the verbal differences between Article IV, section 2 of the United States Constitution and section 117, not much assistance can be derived from the fact that the Supreme Court has held that the American provision only applies to the States.[89]

There is some clear academic authority for the view that the section applies to both State and Federal governments.[90] There is also some not so clear judicial authority.[91] It is submitted that this view is correct. There is nothing in the language of section 117 which would suggest that it is limited to State legislation.[92] The policy it contains is just as applicable to the Federal government as it is to the State governments. The only difference is perhaps that the Federal government's power to discriminate is more limited than the States because of the existence of other prohibitions against discrimination which the Constitution expressly attaches to it.[93] Those prohibitions do not cover the whole field, however, and thus there is room for section 117 to operate in relation to the Federal government.[94]

The technical approach of the High Court to the interpretation of section 117 which characterized the *Davies and Jones* case is also evident in its decision in *Lee Fay v. Vincent*.[95] There the appellant had been convicted in a Court of Petty Sessions of a violation of the provisions of section 46 of the Factories Act 1904 (W.A.). The section provided that no person of the Chinese or other Asiatic race was to be employed in a factory unless the employer could show that such person was so employed on or immediately before the 1st November 1903. The appellant had employed one Lee New who was a resident of Western Australia at the time of the prosecution. Lee New was

[89] *Supra* p. 120.

[90] Wynes, *op. cit.* 144-145; Moore, *The Constitution of the Commonwealth of Australia* (2nd ed. 1910) 287.

[91] In *James v. Commonwealth* (1928) 41 C.L.R. 442 counsel for the plaintiff argued that regulations made under a Commonwealth Act violated the provisions of s. 117. Both Higgins and Starke JJ. adverted to the argument and dismissed it because the regulations did not discriminate on the basis of residence. Both however assumed that s. 117 was otherwise applicable. *Ibid.* 457, 464. *Cf, Baxter v. Commissioner of Taxation (N.S.W.)* (1907) 4 C.L.R. 1087, 1128; Quick, *The Legislative Powers of the Commonwealth and the States of Australia* (1919) 910.

[92] It is also submitted that s. 117 would apply to executive or judicial action as well. There is support for the view that it limits the executive in the judgment of Griffith C.J. in *Davies and Jones v. Western Australia, op. cit.* His Honour adverted to the possibility that a State executive might use its dispensing power to produce a discrimination in favour of its own citizens but pointed out that such action 'would be unwarranted by law'. (1904) 2 C.L.R. 29, 39.

[93] For example s. 51 (ii) forbids the Commonwealth to discriminate between States in its tax laws. Bounties must be uniform under s. 51 (iii) as must customs duties under s. 88. Section 99 prohibits a preference being given to one State over another State by law relating to trade, commerce or revenue. Then of course there is s. 92.

[94] It would seem that the Commonwealth could validly enact legislation which only applies to one or more of the States provided that no express provision of the Constitution were violated. Thus the conditions for the application of s. 117 could be met in regard to Commonwealth legislation. See: Wynes, *op. cit.* 144; Kerr, *op. cit.* 70; and Moore, *op. cit.* (2nd ed. 1910) 283.

[95] (1908) 7 C.L.R. 389.

of Chinese ancestry but had become a naturalized British subject. He had not been employed in a Western Australian factory before the 1st November 1903. At that time he was resident in Victoria and was employed in a local factory.

The appellant had contended at the trial that the word 'factory' in section 46 included a factory outside Western Australia and, if it did not, then the provision violated section 117 of the Constitution. The magistrate stated a case for the consideration of the Supreme Court of Western Australia which in turn transmitted the case to the High Court. The Supreme Court assumed that the case raised an *inter se* question and thus fell within the provisions of section 40A of the Judiciary Act which requires the removal of such cases into the High Court. This assumption was incorrect. The High Court held that an attack upon the validity of State legislation under section 117 did not raise an *inter se* question.[96] Nevertheless as the case was before the Court it dealt with the constitutional question which had been raised.[97]

Griffith C.J. delivered the judgment of the Court. Referring to the argument based upon section 117 he said:

> That section only applies to a person who, being resident in one State, is seeking to assert rights in another. In the present case the person in respect of whom the rights are asserted is a resident in Western Australia, not in another State, and the rights are asserted in Western Australia. The section has therefore no application . . .[98]

This view has been echoed by most of the text writers.[99] The consequences of this interpretation are surprising. It means that a State can impose discriminations on its own residents by reference to their previous residence in other States. Thus a differential tax rate could be imposed upon all residents who had previously been resident in another State.

Such a result limits the scope of section 117. In terms of the policy that section 117 was designed to effectuate there seems to be no differ-

[96] *Ibid.* 391-392. As Dixon J. pointed out in *Ex parte Nelson* (No. 2) (1927) 42 C.L.R. 258, a provision like s. 117 is 'not designed to accomplish that distribution of powers among the respective governments of the Federal system which gives rise to . . . [*inter se* questions] . . . but to serve . . . to give a unity to Australia for the purposes of commercial and civil intercourse and common citizenship'. *Ibid.* 272. In other words s. 117 does not raise questions about the respective boundaries of Commonwealth and State powers. This is true whether it is held to be applicable only to the States or to both the Commonwealth and the State.

[97] The other point involving the interpretation of the word 'factory' in s. 86 was remitted to the Supreme Court on the basis that it was not a question of federal jurisdiction.

[98] *Op. cit.* 392. 'Section 117 refers to residents of one State endeavouring to assert their rights in another. But Lee New was a resident of Western Australia at the time of the prosecution.' *Ibid.* 391 *per* Barton J. *arguendo.*

[99] E.g. 'The protection of s. 117 has no application to a resident of the State whose laws are complained of.' Wynes, *op. cit.* 143. See also Kerr, *op. cit.* 72; Moore, *op. cit.* 333.

ence between the situation where an out-of-State resident is discriminated against on the basis of residence in another State and the situation where a resident is discriminated against on the basis of such a previous residence. The basic objection to both discriminations is that they are simply based upon residence in another State of the federal system. Such discriminations are inconsistent both with the relationship which should exist between the States of a federal system and with the common citizenship that is created by it. Section 117 was inserted in the Constitution for the very purpose of making it clear that residence in one of the States of the Australian federation could not be used as a basis for differential treatment in one of the other States.

In the present submission Griffith C.J.'s reading of section 117 is far too narrow and is insensitive to the significance of the policies embodied in the provision. It should not be followed. His Honour's approach is to break section 117 into several constituent elements. To begin with you must find 'A subject of the Queen resident in one State'. Then 'in any other State' he must not be subjected to a discrimination 'which would not be equally applicable to him if he were a subject of the Queen resident in such other State'. He concludes that this must mean that there has to be a residence in a State other than the one imposing the discrimination *at the time* the discrimination is imposed. In the present submission, however, the language is quite equivocal. It is just as susceptible to an interpretation which prohibits discrimination on the ground of residence in another State irrespective of when that residence took place. Such an interpretation avoids the results produced by the contrary view put forward by Griffith C.J. and is more consistent with the significant policies that explain the presence of section 117 in the Constitution.

It should be pointed out that a rejection of the reasoning of Griffith C.J. in *Lee Fay v. Vincent* does not necessarily lead to the conclusion that the decision was incorrect. Even if discrimination on the basis of a previous residence comes within the protection of section 117, it might still not involve the invalidity of section 46 of the Factories Act 1904 (W.A.). As submitted above the applicability of section 117 is dependent upon a finding that the impugned legislation works a substantial discrimination on the ground of residence in another State irrespective of its form. The discrimination worked by section 46 only operates in regard to people of the Chinese and other Asiatic races and then only to such of them who worked in Western Australian factories at a particular date. Such persons would only constitute a minuscule proportion of the residents of Western Australia. It might be possible to argue therefore that section 46 does not work a substantial discrimination on the basis of residence in Western Australia.

The only other occasion when this question came before the High

Court was in *The King v. Smithers.*[1] That case involved an attack upon the provisions of section 3 of the Influx of Criminals Prevention Act 1903 (N.S.W.). It was there provided that persons, other than residents of New South Wales, who had been convicted of certain crimes in other States[2] could not enter New South Wales for three years after the termination of any term of imprisonment which had been imposed upon them. The appellant was convicted of one of the relevant crimes whilst he was a resident of Victoria. He was released from prison on November 11th, 1911 and went to Sydney to find a job at the end of the month. On January 25th, 1912 he was convicted in Sydney of the offence created by section 3 of the Act referred to above.

In the High Court the validity of section 3 was attacked on several grounds. One of the arguments put forward was that it violated section 117. This was answered by the saying that the appellant had become a resident of New South Wales the moment he crossed the border and thus section 117 had no application in view of *Lee Fay v. Vincent.*[3] The appellant on the other hand argued that section 117 covered any kind of discrimination based upon residence irrespective of when that residence took place.[4] Although Griffith C.J. found 'much weight' in the respondent's answer, the Court found it unnecessary to deal with the point. Griffith C.J. and Barton J. held that section 3 was invalid because it violated a fundamental principle implicit in the Constitution which guaranteed the right of freedom of movement within a federal system.[5] Isaacs and Higgins JJ. held that it violated section 92 of the Constitution in that it interfered with the freedom of intercourse among the States.

The validity of section 3 was not affected, it is submitted, by the provisions of section 117 of the Constitution. The offence created by section 3 did not produce a substantial discrimination based upon residence in another State. It discriminated against non-residents who had been convicted of certain crimes in other States. This would amount to a very small percentage of the persons resident in the other States of Australia. The facts of the case do show, however, the absurdity of limiting section 117 in the manner suggested by Griffith C.J. If it be assumed that the appellant became a resident of New South Wales as soon as he crossed the border at that point he would lost the protection of section 117.[6]

In the first edition of his book on the Australian Constitution Pro-

1 (1912) 17 C.L.R. 99.

2 The crime had to carry a possible penalty of either death or more than one year's imprisonment.

3 (1912) 17 C.L.R. 99, 102-103 *arguendo.*

4 *Ibid.* 102 *arguendo.*

5 Their Honours based their decision on *Crandall v. Nevada* (1867) 6 Wall. 35. The validity of this basis for the decision is now doubtful.

6 The assumption which was made during the argument in *The King v. Smithers* is questionable.

fessor Harrison Moore surveyed the American cases on Article IV, section 2 and seems to have assumed that they would apply to section 117. In the light of the American experience he expressed the view that the apparently absolute terms of section 117 would yield where there were valid reasons for the imposition of a discrimination based upon residence. He did, however, find that it was 'easier to see that some limit will be put upon section 117, than to lay down any single principle on which it can be established'.[7] By the time the second edition of his book was published some eight years later Professor Harrison Moore had changed his mind. He there ventured the opinion that we are 'saved from the perplexing questions that arise under the American provision by the absolute prohibition of discrimination against residents in other States'.[8] It is submitted that the latter view is the correct one.

As was pointed out in the previous section of this paper, the Supreme Court of the United States has adopted a very flexible approach to the interpretation of Article IV, section 2. This has been made possible by the vagueness of the language of that provision. As a result the Court has upheld discriminations based upon citizenship or residence where it considered that there were legitimate reasons justifying the particular discrimination imposed. The language of section 117 on the other hand is reasonably clear. It seems to forbid absolutely all discriminations which are based upon residence in other States. There would thus appear to be little room for carrying over the approach of the American cases to the solution of problems arising under section 117. It is true that section 117 was modelled upon Article IV, section 2. The language it uses is, however, very different. It is also true that the American courts have adopted a general interpretation of Article IV, section 2 which is rather like the actual wording of section 117. American cases which are based on that general interpretation are of great value in relation to section 117 because they provide illustrations of its possible scope and operation. The fact is, however, that it is only a general interpretation which does not immediately appear from the words of Article IV, section 2. Furthermore it is a general interpretation which the Supreme Court has indicated will not be followed where there are legitimate reasons to discard it. The wording of section 117 cannot be so easily ignored when it leads to what are considered inconvenient results.

There is a possible argument to the contrary which must be noticed: It could be contended that the words 'any disability or discrimination' have a hostile flavour and do not cover a case where a non-resident has been merely dealt with differently to a resident. Put simply this argument is that differential treatment is not necessarily

[7] Moore, *The Constitution of the Australian Commonwealth* (1902) 295.
[8] Moore, *op. cit* (2nd ed. 1910) 332.

discriminatory treatment. It is true that 'disability' carries overtones of adverse and unfavorable treatment. It is also true that the word 'discriminate', especially in the phrase 'discriminate against' is capable, in certain contexts, of having the same overtones. It is submitted, however, that it does not have this meaning in section 117. The usual meaning of the word is given as follows in the *Oxford English Dictionary*: 'To make or constitute a difference in or between; to distinguish, differentiate.' This is certainly the meaning that the word has been given in other parts of the Constitution. In section 51 (ii) for example, it is provided that the Commonwealth Parliament shall have power to make laws with respect to: 'Taxation; but so as not to discriminate between States or parts of States.' The High Court has held that the proviso prevents differential tax laws.[9] The word 'discrimination' should bear the same meaning in section 117. The contrary view would mean that the otherwise unrestricted language of section 117 would be subject to the qualification that a differential treatment based upon residence would be valid if the High Court considered that it was reasonable. A natural reading of the words, however, would suggest that the section forbids all differential treatment which is substantially based upon residence in another State no matter how reasonable or unreasonable the differentiation might appear to be.

There are of course many discriminations which can be made between Australian citizens which are not affected by section 117 even though residence in a particular State might be an ingredient of the discriminatory legislation in question. As O'Connor J. said in the *Davies and Jones* case a State can confer special privileges on its own residents who 'in addition to residence within the State, fulfill some other *substantial* condition or requirement'.[10] The sole effect of section 117 is to guarantee that non-residents, or residents who once resided in other States, are treated in the same way as the residents of the State whose laws are in question or to which the particular law of the Commonwealth government applies. They obtain no other rights of any kind. To put it another way, section 117 enables the person who is claiming its protection to ignore the requirement of simple residence within the State contained in the law in question. He must, however, comply with the other substantial requirements and conditions which it lays down.

It is a very different question, however, if a State law makes a substantial period of residence within the State, for example three years, the condition upon which a discrimination operated rather than just simple residence. Such a requirement would be equally applic-

[9] See *e.g. Cameron v. Deputy Federal Commissioner of Taxation* (1923) 32 C.L.R. 67; *Elliot v. Commonwealth* (1935) 54 C.L.R. 657; *Deputy Federal Commissioner of Taxation v. W. R. Moran Pty. Ltd.* (1939) 61 C.L.R. 735.

[10] (1904) 2 C.L.R. 29, 53. Italics supplied.

able to all of the residents of the State in question. Non-residents would not seem to be able to complain. If they are treated as residents of the State then this additional requirement relating to the duration of their residence would still be applicable to them. Unless it is fulfilled there would appear to be no reason why they should not be just as much subject to the discrimination as are the residents of the State themselves. Of course if the duration of the residence required was so short, for example, one month, that the discrimination would in substance operate on the basis of simple residence along then, as submitted above, it would seem to be forbidden by section 117.

There is a final matter to be considered. Can a State validly restrict the right to vote in its elections or to hold public office to its own residents? This is one of those questions which one answers, 'Of course!', and then looks for the legal reason. When confronted by the text of a provision like section 117 which seems to suggest that a State can condition the right to vote or hold office on a substantial period of residence within its boundaries but not upon simple residence, the temptation is to react by saying, 'That can't be right!' Dr Wynes solves the problem by simply stating that political rights are not affected by section 117[11] citing the American case *Minor v. Happersett* which has been referred to earlier.[12] The text of section 117, however, does not seem to admit of exceptions. The way out of the difficulty may be to treat section 117 as being confined to the contents of laws which are enacted by the various State legislatures and as having no operation to the way in which those legislatures are themselves constituted. In other words section 117 assumes the existence of State legislatures and has nothing to say about how they are created or composed. This approach may be supported by pointing out that the control over the right to vote and hold office is of such a fundamental nature that it should only be qualified by clearly expressed language. The broad terms of section 117 should therefore be restricted so as not to interfere with it.

It is difficult to resist the general conclusion that the High Court has practically read section 117 out of the Constitution. If *Davies and Jones* and *Lee Fay* are followed in the future it is left with very little scope and what there is can easily be avoided by any reasonable skilled draftsman. One may speculate that if an equal protection and a due process clause had been inserted in section 117, as almost happened, they would have probably met a similar fate. The narrow approach that the Court has adopted to other guarantees of freedom in the Constitution such as those in section 116[13] and section 80[14] seem to confirm this view. To be sure none of these provisions—section 117

[11] Wynes, *op. cit.* 145.
[12] *Supra* note 70.
[13] *Supra* note 1.
[14] *Supra* note 2.

included—are models of precise or elegant draftmanship. The Court has been only too willing, however, to take advantage of this imprecision and by giving very technical interpretations has robbed them of much of the significance that they might otherwise have had.

The central contention of this paper has been that section 117 operates to prevent discrimination which is substantially based upon the simple fact of a present or past residence in one or other of the Australian States. Insofar as both *Davies and Jones* and *Lee Fay* impair the generality of that proposition it is submitted that they should not be followed.