CHAPTER III

THE POLICE POWER AND THE PUBLIC HEALTH

SALUS *populi suprema lex.* That the safety of the people is the supreme law is an ancient Roman maxim. It is a maxim that applies with equal force to modern government, for the sovereignty always has had, now has, and always will have the inevasible duty of safeguarding its citizens against disease, disorder, poverty, and crime.[1]

The power inherent in the State, or sovereignty, to enact and enforce laws to protect and promote the health, safety, morals, order, peace, comfort, and general welfare of the people is known as the police power. It means the power of advancing the public welfare by restraining and regulating the use of liberty and property.[2]

Long before the Federal Constitution was adopted, the colonies in North America possessed the police power, and with it they possessed the undeniable and exclusive right of control over their own internal affairs. This power was not surrendered by the States to the Federal Government, and never has been relinquished, although sometimes encroached upon. The States cannot divest themselves of their police power, but it may be limited to a certain extent by federal and state constitutions, and by acts of Congress passed under constitutional authority. In recent years the Federal Government has developed a considerable police power of its own.

"That power," said the United States Supreme Court in 1878 in discussing the police power, "belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. . . . It rests upon the fundamental principle that every one shall so use his own as not to wrong or injure another."[3]

The Nature of the Police Power

In the exercise of the police power the States have complete control, within their own jurisdictions, over the public health. By virtue of this fact, "it is not only the right, but the bounden and solemn

1. *Leisy* v. *Hardin* (1890), 135 U.S. 100, 10 S. Ct. 681, 34 L. Ed. 128.

2. E. Freund, *The Police Power,* Chicago, Callaghan, 1904.

3. *Northwestern Fertilizing Co.* v. *Hyde Park* (1878), 97 U.S. 659, 24 L. Ed. 1036.

duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained . . . ; that all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police,* are not thus surrendered or restrained; that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive; and that, among these powers, are inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the State, and to prevent the introduction or enforce the removal of prohibited articles of commerce."[4]

A classic commentary on the nature of the police power is that of Chief Justice Shaw of Massachusetts, who wrote in 1851 that:

> We think it is a settled principle, growing out of the nature of well-ordered civil society, that every owner of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the general enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and such reasonable restraints, and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain—the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefore. The power we allude to is rather the police power; the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties, or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and the sources of this power than to mark its boundaries, and prescribe the limits to its exercise.[5]

4. L. Parker and R. H. Worthington, *The Law of Public Health and Safety,* Albany, Bender, 1892. *City of New York* v. *Miln* (1837), 11 Pet. (U.S.) 102, 9 L. Ed. 648.

5. *Commonwealth* v. *Alger* (1851), 7 Cush. (Mass.) 53.

The Scope of the Police Power

The police power is "universally conceded to include everything essential to the public safety, health, and morals."[6] This is a broad and inclusive definition, but the police power is very broad in scope, extending to every aspect of the public welfare. It has been said, in fact, to be the most extensive of all governmental powers, which is all the more reason why it must be exercised in a reasonable and equitable manner.

The scope of the police power has been the subject of numerous decisions of the United States Supreme Court.[7] More than a century ago, Chief Justice Marshall pointed out in the celebrated case of *Gibbons* v. *Ogden*[8] that state laws coming under the police power include inspection laws, quarantine laws, and health laws of every description, mentioning in the course of his decision "the acknowledged power of a State, to provide for the health of its citizens." Again, in 1827, in the case of *Brown* v. *Maryland*,[9] holding invalid a state law requiring licenses of importers and wholesalers dealing in interstate commerce, Chief Justice Marshall said, "Indeed the laws of the United States expressly sanction the health laws of a State." The *License Cases*[10] in 1847, upholding state laws requiring licenses for the sale of liquor as valid under the police power, provoked some discussion of health laws by the court, Chief Justice Taney saying, "A State . . . is not bound . . . to abstain from the passage of any law which it may deem necessary or advisable to guard the health . . . of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenues of the general government." In this decision Mr. Justice McLean also stated that, "Everything prejudicial to the health and morals of a city may be removed."

The scope of the police power extends to the persons and the property of every natural person and corporation within the jurisdiction of a State. It extends to the conduct of business and the conduct of all private affairs. While the power cannot be divested by the States, it can be delegated to its political subdivisions, such as counties,

6. *Lawton v. Steele* (1894), 152 U.S. 136, 14 S. Ct.499, 38 L. Ed. 338.

7. J. A. Tobey, *The National Government and Public Health,* Baltimore, Johns Hopkins Press, 1926, chapter V.

8. *Gibbons* v. *Ogden* (1824), 9 Wheat. 1, 6 L. Ed. 23.

9. *Brown* v. *Maryland* (1827), 12 Wheat. 419, 6 L. Ed. 678.

10. *License Cases* (1847), 5 How. 504, 12 L. Ed. 256.

municipal corporations, boards of health, boards of education, and the like.

The right and duty of a State to exercise the police power in the interests of the health and general welfare has been sustained on hundreds of occasions by the courts of last resort in this country.[11] Whether the exercise of the police power is constitutional and reasonable in a particular instance is, however, a matter for specific determination in that case by the judiciary.

Eminent Domain and Taxation

Along with the police power, the States enjoy the vested rights of eminent domain and taxation. Eminent domain is the right of the sovereignty to take private property for a public purpose without the consent of the owner. The State must, however, make adequate compensation for the property so taken.

Under the police power, private property may be seized or destroyed without the necessity of compensation by the State. If, for example, a disastrous conflagration requires the destruction of houses in the path of the flames, they may be justifiably destroyed for the common good. Similarly, property that might cause the spread of disease may be destroyed without thought of compensation to the owner.[12] In actual practice, compensation is sometimes given voluntarily by the State when property is destroyed under the police power.

The police power, said the United States Supreme Court, "is universally conceded . . . to justify the destruction or abatement, by summary proceedings of whatever may be regarded as a public nuisance."[13]

If property is desired and needed for a public water works, incinerator, sewage disposal plant, or for any other civic purpose which may affect the public health, it must, nevertheless, be taken only under the power of eminent domain, since the operation of public works of this nature by a political subdivision of a State is a proprietary or corporate function for the benefit of the community, and not a governmental function for the benefit of the State.[14]

Under the police power an individual cannot, as a rule, be required to devote his property to a particular purpose, but he may be compelled to refrain from using it for any purpose that is or may be detri-

11. See 25 *American Jurisprudence* 285-321 and cases cited.

12. *Dunbar* v. *Augusta* (1892), 90 Ga. 390, 17 S.E. 907.

13. *Lawton* v. *Steele* (1894) 152 U.S. 136, 14 S. Ct. 499, 38 L. Ed. 338.

14. *In re New Haven Water Co.* (1912), 86 Conn. 361, 85 A. 636.

mental to the public health. Thus, a nuisance may be abated or dealt with, or pollution of a stream may be prohibited or enjoined, even though property rights may be involved. The theory here is that the owner of the property may suffer some individual loss, but is compensated for it by sharing in the general benefits to the public health. His injury is what is legally known as *damnum obsque injuria,* or damage without injury.[15] In times of great emergency, such as an epidemic, private property may be required to be used for a special public purpose, such as an isolation hospital.

The taxing power of the State is used for the purpose of raising revenue to carry out its governmental duties. The police power cannot be employed for the purposes of taxation, although reasonable fees may be charged under the police power to cover the costs of the administration of inspection, the issuance of licenses and permits, the issuance of copies of vital statistics, and other legitimate purposes. When such fees are excessive, they become taxes and are invalid as not proper under the police power.

Limitations on the Police Power

Broad as is the scope of the police power, it must be exercised within constitutional limitations. As early as 1849 the United States Supreme Court held in the *Passenger Cases*[16] that a state law imposing a tax on vessels, which was collected by the health commissioner but was not used for quarantine, was unconstitutional as an interference with the federal powers over commerce.

The operation of the police power frequently comes in conflict with provisions of the Federal Constitution, such as the power of the Federal Government over interstate and foreign commerce; the guarantees that no person shall be deprived by the Federal Government or by the States of life, liberty, or property without due process of law, or denied the equal protection of the laws by the States; the requirement that no State shall pass any law impairing the obligation of contracts; and the requirements that Congress shall make no law prohibiting religious freedom, the freedom of speech, and the right of the people peaceably to assemble, and that no State shall abridge the privileges and immunities of citizens of the United States.

Despite these constitutional provisions, the police power of the State will usually prevail when it is exercised in a reasonable manner for the common welfare. In its operation over public health matters,

15. *Mugler* v. *Kansas* (1887), 123 U.S. 664, 8 S. Ct. 273, 31 L. Ed. 205.

16. *Passenger Cases* (1849), 7 How. 283, 12 L. Ed. 702.

the police power will be upheld in all instances where action is undeniably necessary to protect the health of the people, but it will not be sustained when its exercise is unreasonable, frivolous, capricious, or equivocal, or is palpably an abuse of the police power. What is reasonable and what is not in public health procedures and other actions under the police power may give rise to some nice legal distinctions which only the courts can determine.

Necessary precautions in the use of the police power were set forth by Mr. Justice Harlan of the Supreme Court of the United States in these words:

> In determining the validity of the ordinances in question it may be taken as firmly established in the jurisdiction of this court that the States possess, because they have never surrendered the power—and therefore municipal bodies, under legislative sanction, may exercise the power—to prescribe such regulations as may be reasonable, necessary and appropriate, for the protection of the public health and comfort; and that no person has an absolute right "to be at all times free from restraint"; but "persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health, and general prosperity of the State"—the public, as represented by its constituted authorities, taking care always that no regulation, although adopted for those ends shall violate rights secured by the fundamental law nor interfere with the enjoyment of individual rights by the necessities of the case. Equally well settled is the principle that if a regulation, enacted by a competent public authority avowedly for the protection of the public health, has a real and substantial relation to that object, the courts will not strike it down upon the grounds merely of public policy or expediency.[17]

Interference with Interstate Commerce

A state law which, in its essential nature, is a legitimate exercise of the police power is not rendered invalid because of some incidental interference with interstate commerce. But a state law that merely purports to invoke the police power will not be permitted to interfere with the right of the Federal Government to regulate interstate commerce. Legitimate police measures of the States are always proper and valid, but when they go beyond the bounds of public necessity such laws become *ultra vires,* or invalid.

In 1877, for example, a law of the State of Missouri prohibiting the entry of Texas cattle between the months of March and November was held by the United States Supreme Court to be an unconsti-

17. *California Reduction Co.* v. *Sanitary Reduction Works* (1905), 199 U.S. 306, 26 S. Ct. 100, 50 L. Ed. 204. *Gardner* v. *People* (1905), 199 U.S. 325, 50 L. Ed. 212.

tutional restriction upon interstate commerce.[18] In this decision, it was stated by Mr. Justice Strong:

> While we unhestitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious and infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through a State, beyond what is absolutely necessary for self-protection.

To the same effect was a decision of this court in 1890, holding that a state law prohibiting the sale of meat for human consumption unless taken from an animal certified to be healthy was inapplicable to meat shipped in interstate commerce.[19]

Reasonable quarantine and health laws of the States, operating without discrimination and prohibiting the entry into a State of diseased persons or animals or of commodities that are dangerous to health, have been upheld in numerous instances by the United States Supreme Court.[20] Where, for example, one State placed an embargo upon persons and things coming from another State, because of an epidemic, the Supreme Court held that there was no justifiable controversy between the States, saying:

> While it is true that the power vested in Congress to regulate commerce among the States is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the States in the exercise of their reserved powers come into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the Government.[21]

In a more recently decided case,[22] in which was sustained an order

18. *Railroad Co.* v. *Husen* (1877), 95 U.S. 465, 24 L. Ed. 527.

19. *Minnesota* v. *Barber* (1890), 136 U.S. 313, 10 S. Ct. 862, 34 L. Ed. 455. *Schollenberger* v. *Pennsylvania* (1897), 171 U.S. 1, 18 S. Ct. 757, 43 L. Ed. 49.

20. *Rasmussen* v. *Idaho* (1901), 181 U.S. 198, 21 S. Ct. 594, 45 L. Ed. 820. *Smith* v. *St. Louis R. Co.* (1901), 181 U.S. 248, 21 S. Ct. 603, 45 L. Ed. 847. *Reid* v. *Colorado* (1902), 187 U.S. 137, 23 S. Ct. 92, 47 L. Ed. 108. *Compagnie Française de Navigation à Vapeur* v. *Louisiana State Board of Health* (1902), 186 U.S. 380, 22 S. Ct. 811, 46 L. Ed. 1209. *Asbell* v. *Kansas* (1908), 209 U.S. 251, 28 S. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101.

21. *Louisiana* v. *Texas* (1900), 176 U.S. 1, 20 S. Ct. 251, 44 L. Ed. 347.

22. *Mintz* v. *Baldwin* (1933), 289 U.S. 346, 53 S. Ct. 611, 77 L. Ed. 1245.

of a state commissioner of agriculture, made pursuant to law, prohibiting entry of cattle into the State unless they were shown to be free of Bang's disease, the United States Supreme Court declared that:

> The order is an inspection measure. Undoubtedly it was promulgated in good faith and is appropriate for the prevention of further spread of disease among dairy cattle and to safeguard public health. It cannot be maintained therefore that the order so unnecessarily burdens interstate transportation as to contravene the commerce clause.

On the other hand, the Supreme Court decided in 1942 that seizure of renovated butter by state officials in a plant which was producing the butter for shipment in interstate commerce was in conflict with the powers of the Federal Government.[23] Under the terms of federal law, the Internal Revenue Code (Secs. 2320-2327), the Secretary of Agriculture is required to cause to be made a rigid sanitary inspection of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. He cannot, however, condemn the packing stock butter, but only the finished product when it has entered interstate commerce.

"The test to be applied to the action of the state in seizing material intended solely for incorporation into a product prepared for interstate commerce," said Mr. Justice Reed for a bare majority of the Court, "is the effect of that action upon the national regulatory policy declared by the federal statute. Not only does Congressional power over interstate commerce extend, the 'Laws of any State to the Contrary notwithstanding,' to interstate transactions and transportaion, but it reaches back to the steps prior to transportation and has force to regulate production 'with the purpose of so transporting' the product. *United States* v. *Darby,* 312 U.S. 100, 117."

In this case there was a strong dissenting opinion by Chief Justice Stone, who pointed out that the decision appears to depart radically from the salutary principle that Congress, in enacting legislation within its constitutional authority, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless the state act, in terms of its practical application, conflicts with the act of Congress or plainly and palpably infringes its policy.

23. *Cloverleaf Butter Co.* v. *Patterson* (1942), 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 754.

While a State may prevent the entry of diseased persons, it may not prevent the interstate migration of persons who are merely seeking opportunities for labor or who come to the State for climatic or other reasons. Mass migrations may, however, present special health problems, which are subject to control by the public health authorities of the State under the police power.

Due Process of Law

The Fourteenth Amendment to the Federal Constitution requires that no State shall 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 the laws. Under these clauses, health laws and the actions of public health officials frequently have been challenged in the courts.

Since the public welfare demands that the rights of the individual must yield on occasion to the rights of the people as a whole, valid policing regulations of a State that may actually deprive a person of liberty and property are not void because of the Fourteenth Amendment. Said the United States Supreme Court in discussing these rights:

> But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industry of the State, develop its resources, and add to its wealth and prosperity.[24]

Due process of law means, furthermore, not only an orderly procedure before a court of justice, but also a summary proceeding by an administrative official, such as a health officer, where the public interest requires immediate action. As stated by Pomeroy:

> Due process of law implies primarily that regular course of judicial proceeding to which our fathers were accustomed at the time the Constitution was framed; and, secondly, and in a subordinate degree, those more summary measures, which are not strictly judicial, but which had long been known in the English law, and which were in

24. *Barbier* v. *Connolly* (1885), 113 U.S. 27, 5 S. Ct. 357, 28 L. Ed. 923. *Sentell* v. *New Orleans R. Co.* (1897), 166 U.S. 698, 17 S. Ct. 693, 41 L. Ed. 1169. *New York Tenement House Dept.* v. *Moeschen* (1904), 179 N.Y. 325, 72 N.E. 231, 103 A.S.R. 910, 70 L.R.A. 704; affirm. (1906) in 203 U.S. 583, 27 S. Ct. 781, 51 L. Ed. 328 (memo.). *Laurel Hill Cemetery* v. *San Francisco* (1910), 216 U.S. 358, 30 S. Ct. 301, 54 L. Ed. 515. *Hutchinson* v. *Valdosta* (1913), 227 U.S. 303, 33 S. Ct. 290, 57 L. Ed. 520. *Northwestern Laundry Co.* v. *Des Moines* (1916), 239 U.S. 486, 36 S. Ct. 206, 60 L. Ed. 396.

familiar use when the Constitution was adopted. These summary measures generally, though not universally, form a part of that mass of regulations which many writers term Police, and which relate to the preservation of public quiet, good order, health, and the like. . . . The summary measures which may form a part of due process of law are those which have been admitted from the very necessities of the case, to protect society by abating nuisances, preserving health, warding off imminent danger, and the like, when the slower and more formal proceedings of the courts would be ineffectual.[25]

Compulsory vaccination and eugenical sterilization laws are illustrations of public health measures that represent a constitutional exercise of the police power without infringing upon the due process clause.[26] When such laws apply equally to all persons, they cannot be condemned either as class legislation or as a deprivation of life and liberty without due process of law.

Class Legislation

In order that equal protection of the laws may be assured, all legislation must operate without discrimination. Statutes passed in the interests of the public health are void as class legislation, however, only when they make an unreasonable discrimination between persons and classes, or apply in an arbitrary manner only to certain persons or types of persons or things.

Where a municipal ordinance required that all persons desiring to establish laundries in frame houses must secure licenses, and the only persons affected by the ordinance were Chinese laundrymen, the law was declared by the United States Supreme Court to be unconstitutional as class legislation, which denied to a particular group the equal protection of the laws.[27] Similarly, an ordinance requiring licenses of the owners of milk wagons but not requiring licenses of other milk dealers was held void as class legislation.[28] So, too, where

25. J. N. Pomeroy, *Constitutional Law*, Hurd and Houghton, 1868.

26. *Lawton* v. *Steele* (1894), 152 U.S. 136, 14 S. Ct. 499, 38 L. Ed. 338. *Jacobson* v. *Massachusetts* (1905), 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. *Zucht* v. *King* (1922), 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194. *Buck* v. *Bell* (1927), 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000. See Chapter XIV, on Vaccination.

27. *Yick Wo* v. *Hopkins* (1886), 118 U.S. 366, 6 S. Ct. 1064, 30 L. Ed. 220.

28. *Read* v. *Graham* (1907), 31 Ky. L.R. 569, 102 S.W. 860. *Mobile* v. *Orr* (1913), 181 Ala. 308, 61 So. 920, 45 L.R.A. (N.S.) 575. In *State ex rel F. W. Woolworth Co.* v. *State Board of Health* (1941), 237 Wis. 638, 298 N.W. 183, a state law requiring the partitioning off of kitchens in new restaurants, but providing for exemption of existing business, was held void as class legislation.

a board of health required Chinese to be vaccinated against plague, regardless of previous residence or contact with the disease, and did not make the same requirements for other persons, the regulation was unconstitutional as class legislation.[29]

A certain amount of reasonable classification is, however, allowable, provided that the law operates equally and without discrimination upon all persons within the classification. Thus, sellers or vendors of foodstuffs may be classified for purposes of regulation as dairymen, butchers, bakers, restaurant keepers, etc., and different standards of operation and varying inspection fees may be applied to each. There may be, furthermore, reasonable classification within a group. Milk dealers, for example, may be classified as those producing raw market milk, certified milk, pasteurized milk, or milk for conversion into dairy products, such as butter, cheese, and ice cream, with a different set of reasonable regulations in force equally for those within each of these proper classifications.[30]

Regulation of Professions and Occupations

Whenever the conduct of a business, occupation, or profession is a matter of public interest and concern and the manner of its operation may affect the public health or general welfare, the State under its police power may properly require that all persons entering, undertaking, or practicing such business or profession shall possess certain necessary and desirable educational, technical, and moral qualifications. The State may likewise impose reasonable and uniform standards and specifications for the conduct of various occupations and callings, and may require that all persons engaged in them shall secure from the State, or its political subdivisions, appropriate licenses or permits, which the State, acting through proper administrative agencies, may issue, withhold, or revoke at its discretion.

In accordance with this power, the State may regulate and license the practice of medicine, osteopathy, chiropractic, dentistry, veterinary medicine, nursing, physiotherapy, chiropody (podiatry), midwifery, optometry, optics, pharmacy, dental hygiene, laboratory practice, engineering, embalming, plumbing, and any other branch of the healing art or any professional, sub-professional, or occupational group, the activities of which may in any way affect the public health. A requirement that one healing group, such as chiropractic, be licensed

29. *Wong Wai* v. *Williamson* (1900), 103 F. 1.

30. *St. John* v. *New York* (1906), 201 U.S. 633, 26 S. Ct. 554, 50 L. Ed. 896. *Stephens* v. *Oklahoma* (1931), 150 Okla. 199, 1 P. (2d) 367. *Coleman* v. *Little Rock* (1935), 191 Ark. 844, 88 S.W. (2d) 58.

by a State Board of Medical Examiners before being permitted to practice the healing art, is not class legislation.[31]

The right of the States to prescribe reasonable standards for, and to control the practice of, medicine, osteopathy, dentistry, and other branches of the healing art has been upheld as constitutional by the United States Supreme Court in a number of decisions.[32] The right of the State to regulate other occupations, callings, and businesses in the interests of the general welfare likewise has been sustained by this court.[33] Refusal of the State to issue a license, for proper cause, is not a deprivation of liberty or property without due process of law. When such a license is refused or revoked, the person so denied may have recourse to an action in court to compel its issuance, but the courts will seldom disturb such administrative decisions when they are sanctioned by law and are undertaken in good faith. A license is not a contract, but permits the enjoyment of a privilege granted by the State.

Freedom of Contract

Freedom of contract is one of the rights guaranteed to individuals by the Federal Constitution, but it is not an absolute right and must yield whenever the public health requires. Freedom of contract, said the Supreme Judicial Court of Massachusetts, "is subject to reasonable

31. *Jackson* v. *State* (1924), 19 Ala. App. 633, 99 So. 826.

32. *Dent* v. *West Virginia* (1889), 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623. *Hawker* v. *New York* (1897), 170 U.S. 189, 18 S. Ct. 573, 42 L. Ed. 1002. *Reetz* v. *Michigan* (1903), 188 U.S. 505, 23 S. Ct. 390, 47 L. Ed. 563. *Watson* v. *Maryland* (1910), 218 U.S. 73, 30 S. Ct. 644, 54 L. Ed. 987. *Collins* v. *Texas* (1911), 223 U.S. 288, 32 S. Ct. 286, 56 L. Ed. 439. *Crane* v. *Johnson* (1916), 242 U.S. 339, 37 S. Ct. 176, 61 L. Ed. 348, Ann. Cas. 1917 B 796. *State ex rel. Hurwitz* v. *North* (1926), 271 U.S. 40, 46 S. Ct. 384, 70 L. Ed. 406. *Graves* v. *Minnesota* (1926), 272 U.S. 425, 47 S. Ct. 122, 71 L. Ed. 331. *Lambert* v. *Yellowley* (1926), 272 U.S. 581, 47 S. Ct. 210, 71 L. Ed. 422, 49 A.L.R. 575. *Hayman* v. *City of Galveston* (1927), 273 U.S. 414, 47 S. Ct. 363, 71 L. Ed. 714. *Semler* v. *Ore. State Bd. Dental Exam.* (1935), 294 U.S. 608, 55 S. Ct. 570, 79 L. Ed. 1086. *Polhemus* v. *Am. Med. Assn.* (1944), 145 F. (2d) 357. Sustaining a State Basic Science Law, as applied to a naturopath. See also *Ellestad* v. *Swayze* (1942), 15 Wash. (2d) 281, 130 P. (2d) 349.

33. *Fischer* v. *St. Louis* (1904), 194 U.S. 361, 24 S. Ct. 673, 48 L. Ed. 1018 (milk). *Leiberman* v. *Van de Carr* (1905), 199 U.S. 552, 26 S. Ct. 144, 50 L. Ed. 305, 108 A.S.R. 781 (milk). *Schmidinger* v. *Chicago* (1913), 226 U.S. 578, 33 S. Ct. 182, 57 L. Ed. 364 (bread). *Baccus* v. *Louisiana* (1914), 232 U.S. 334, 34 S. Ct. 439, 58 L. Ed. 627 (itinerant drug vendors). *Nebbia* v. *New York* (1934), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 563, 89 A.L.R. 1469 (price of milk). *Roschen* v. *Ward* (1929), 279 U.S. 337, 49 S. Ct. 336, 73 L. Ed. 722 (sale of spectacles). *Bourjois* v. *Chapman* (1937), 301 U.S. 183, 57 S. Ct. 691, 81 L. Ed. 1027 (cosmetics).

legislative regulation in the interest of the public health, safety, and morals and, in a sense not resting merely on expediency, the public welfare. Valid statutes imposing limitations upon freedom of contract find numerous illustrations in our own decisions and those of the United States Supreme Court."[34]

In the *Slaughter House Cases*,[35] decided in 1872, the United States Supreme Court upheld a state law regulating slaughterhouses as a public health measure, even though the law granted one company the exclusive right to maintain such establishments. Although this was an infringement of the freedom of contract of other persons, the law was sustained as valid under the police power. Again, in 1878, this court ruled that a municipal ordinance regarding the abatement of nuisances was superior in effect to a charter granting certain privileges to a corporation.[36] It was declared by the United States Supreme Court in another case[37] that, "No legislature can bargain away the public health or the public morals."

In 1904, however, the Supreme Court of the United States held void a municipal ordinance fixing limits of an area in which gas works might be erected, such action being considered as beyond the scope of the police power.[38] The liberality with which the courts will construe proper health regulation was, however, expressed by the court in these words:

> It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of the courts except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community.

Zoning laws usually represent a constitutional exercise of the police power, but health laws usually are not subordinate to zoning laws.

Freedom of Religion

In the First Amendment to the Federal Constitution, Congress is prohibited from making any law respecting an establishment of reli-

34. *Commonwealth* v. *Boston Transcript Co.* (1924), 249 Mass. 477, 144 N.E. 400.

35. *Slaughter House Cases* (1872), 16 Wall. 36, 21 L. Ed. 394.

36. *Northwestern Fertilizing Co.* v. *Hyde Park* (1878), 97 U.S. 659, 24 L. Ed. 1036.

37. *Stone* v. *Mississippi* (1879), 101 U.S. 814, 25 L. Ed. 1079.

38. *Dobbins* v. *Los Angeles* (1904), 195 U.S. 223, 25 S. Ct. 18, 49 L. Ed. 169.

gion, or prohibiting the free exercise thereof. The Federal Constitution nowhere directly places a similar limitation upon the States, but state constitutions generally do so.

The constitutional guarantee of religious freedom does not sanction the exemption of any person from the reasonable operation of public health laws and procedures. Religious beliefs of minority groups which happen to conflict with or differ from the sciences of medicine and public health cannot be permitted to interfere with the welfare of the great majority of the people, who recognize and approve the established principles and precepts of medical and sanitary science. Religious belief is never an excuse for an unlawful act.

Conflicts between the right of religious freedom and the exercise of the police power usually arise in cases of persons who believe in or practice some form of faith healing. Christian Science, for example, is recognized by law in some States and its adherents are permitted to practice as healers, but they are always subject to public health laws, either by legislative enactment or under the general authority of the police power of the State.[39] They are also restricted to the healing use of prayer and may not employ any other means of healing.

On the occasions when public health laws or procedures have been challenged on the grounds of interference with the right of religious freedom, almost invariably they have been upheld by the courts. Thus, requirements that physical examinations of school children shall be made at certain times by licensed physicians have been sustained as not violating the religious scruples or conscientious objections of Christian Scientists,[40] and physical examinations as prerequisite to the issuance of marriage licenses have likewise been upheld.[41] The conviction of faith healers who have sought to cure or treat cancer and other dangerous diseases by the use of medicines and other physical measures has likewise been upheld on the grounds that it was a violation of medical practice acts.[42] Where a city by charter amendment provided a system of health service for city employees and teachers, but exempted from it persons believing in the healing power

39. *People* v. *Cole* (1916), 219 N.Y. 98, 113 N.E. 790, L.R.A. 1917 C 816. *People* v. *Vogelsang* (1917), 221 N.Y. 290, 116 N.E. 977.

40. *Streich* v. *Board of Education* (1914), 34 S.D. 169, 147 N.W. 779, L.R.A. 1915 A 632, Ann. Cas. 1917 A 760. *Stone* v. *Probst* (1925), 165 Minn. 361, 206 N.W. 642.

41. *Peterson* v. *Widule* (1914), 157 Wis. 641, 147 N.W. 966, 52 L.R.A. (N.S.) 778, Ann. Cas. 1916 B 1060.

42. *State* v. *Verbon* (1932), 167 Wash. 140, 8 P. (2d) 1083. See *Regulation of the Practice of Medicine*, Chicago, American Medical Association, 1915.

of prayer, it was held by the court that this was not an improper or invalid classification, even though the persons involved in this exemption were required to reveal their religious beliefs.[43]

Hours of Labor and Minimum Wages

Statutes fixing or restricting the hours of labor of industrial employees are valid under the police power of the States. In 1898 the United States Supreme Court sustained as constitutional and as a proper health measure a state law restricting the labor of miners to eight hours a day,[44] and several years later this court upheld a state law creating an eight-hour day for state and municipal employees.[45] In 1905, however, a state law limiting the working hours of bakers was held unconstitutional by a divided court, as exceeding the limits of the police power and as a violation of freedom of contract.[46]

This decision has been virtually overruled by subsequent opinions of the United States Supreme Court, which have upheld state laws regulating hours of labor for women,[47] and hours of labor generally.[48]

State laws fixing minimum wages have presented a more difficult legal problem. In 1923 the United States Supreme Court held that an act of Congress setting minimum wages for women in the District of Columbia was unconstitutional as a violation of the Fifth Amendment to the Federal Constitution,[49] and in 1936 a state law fixing

43. *Butterworth* v. *Boyd* (1938), 12 Cal. (2d) 140, 82 P. (2d) 434, 126 A.L.R. 838. *People ex rel State Medical Examiners* v. *Pacific Health Corp.* (1938), 12 Cal. (2d) 156, 82 P. (2d) 429, 119 A.L.R. 1284.

44. *Holden* v. *Hardy* (1898), 169 U.S. 366, 18 S. Ct. 383, 42 L. Ed. 780.

45. *Atkin* v. *Kansas* (1903), 191 U.S. 207, 24 S. Ct. 124, 48 L. Ed. 148.

46. *Lockner* v. *New York* (1905), 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133.

47. *Muller* v. *Oregon* (1908), 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 597. *Riley* v. *Massachusetts* (1914), 232 U.S. 671, 34 S. Ct. 469, 58 L. Ed. 788. *Miller* v. *Wilson* (1915), 236 U.S. 373, 35 S. Ct. 342, 59 L. Ed. 628, L.R.A. 1915 F 829. *Bosley* v. *McLaughlin* (1915), 236 U.S. 385, 35 S. Ct. 345, 59 L. Ed. 632. *Wilson* v. *New* (1917), 243 U.S. 332, 37 S. Ct. 298, 61 L. Ed. 755, L.R.A. 1917 E 938, Ann. Cas. 1918 A 1024. *Radice* v. *New York* (1924), 264 U.S. 292, 44 S. Ct. 325, 68 L. Ed. 690.

48. *Bunting* v. *Oregon* (1917), 243 U.S. 426, 37 S. Ct. 435, 61 L. Ed. 830, Ann. Cas. 1918 A 1043. *Stettler* v. *O'Hara* (1917), 243 U.S. 629, 37 S. Ct. 475, 61 L. Ed. 937; affirm. 69 Ore. 519, 139 P. 743.

49. *Adkins* v. *Children's Hospital* (1923), 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785, 24 A.L.R. 1238.

minimum wages for women was declared to be invalid.[50] Both these cases were, however, definitely overruled by the United States Supreme Court in 1937 in a notable decision upholding a state minimum wage law as a valid exercise of the police power in the interests of the health and welfare of women and minors.[51] Four of the nine justices dissented from the majority opinion of Chief Justice Hughes in this case.

State workmen's compensation laws were upheld by the United States Supreme Court in 1916 and subsequent years.[52]

Eugenical Sterilization Laws

Since 1907 many of the States have adopted laws for the sexual sterilization of certain classes of degenerate persons, such as the feeble-minded, the criminally insane, and mental defectives. Many of the earlier statutes, including the first of them, the Indiana law of 1907, were declared to be unconstitutional by state courts, chiefly on the ground that they inflicted cruel and unusual punishment, contrary to the provisions of state constitutions.[53] There is a similar provision regarding cruel and unusual punishment in the Eighth Amendment to the Federal Constitution, but it applies only to the Federal Government. Some of these laws were also held to be unconstitutional because they denied due process of law.

When later statutes of this nature were so framed as to avoid the defects of class legislation, and were predicated upon the police power of the States, not as punitive measures but as necessary for the general

50. *Morehead* v. *New York ex rel. Tipaldo* (1936), 298 U.S. 587, 56 S. Ct. 918, 80 L. Ed. 1347, 103 A.L.R. 1445.

51. *West Coast Hotel Co.* v. *Parrish* (1937), 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330.

52. *New York Central R. Co.* v. *White* (1916), 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667, L.R.A. 1917 D 1, Ann. Cas. 1917 D 629. *Hawkins* v. *Bleakly* (1916), 243 U.S. 210, 37 S. Ct. 255, 61 L. Ed. 678. *Mountain Timber Co.* v. *Washington* (1916), 243 U.S. 219, 37 S. Ct. 250, 61 L. Ed. 685, Ann. Cas. 1917 D 642, 13 N.C.C.A. 927. *Middleton* v. *Texas Power and Light Co.* (1918), 249 U.S. 152. *Arizona Employees Liability Cases* (1919), 250 U.S. 400, 39 S. Ct. 553, 63 L. Ed. 1058, 6 A.L.R. 1537.

53. H. H. Laughlin, *Eugenical Sterilization*, New York, American Eugenics Society, 1926. H. H. Laughlin, Further studies on the historical and legal development of eugenical sterilization in the United States, *Proceedings of the American Association on Mental Deficiency* 60:96, 1936. J. E. Hughes, *Eugenic Sterilization in the United States*, Supplement No. 162 to *Public Health Reports*, Washington, Federal Security Agency, 1940.

welfare, they have been upheld by the United States Supreme Court[54] and by many state courts[55] as a constitutional exercise of the police power and as not denying due process of law. In some instances laws have been held to be invalid for failure to provide notice and hearing for the person whom it was proposed to sterilize.[56] It is said that about 20,000 persons were operated upon under the state sterilization laws in force between 1907 and 1938.

"We have seen more than once," said Mr. Justice Holmes in the *Buck* v. *Bell* case decided by the United States Supreme Court, "that the public welfare may call upon its best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring of crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson* v. *Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough."

A state law requiring sterilization of habitual criminals, or persons convicted two or more times for crimes amounting to felonies involving moral turpitude, was, however, held to be invalid by the United States Supreme Court in 1942, on the grounds that it was class legislation because the law applied to some crimes, or felonies, but did not apply to others.[57] In a concurring opinion Chief Justice Stone called attention to the fact that the law in question was also defective for want of due process.

"While the state may protect itself from the demonstrably inheritable tendencies of the individual which are injurious to society," said the Chief Justice, "the most elementary notions of due process would seem to require it to take appropriate steps to safeguard the liberty of the individual by affording him, before he is condemned to an

54. *Buck v. Bell* (1927), 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000.

55. *State v. Troutman* (1931), 50 Id. 673, 299 P. 668. *State ex rel. Smith* v. *Schaffer* (1928), 126 Kan. 607, 270 P. 604. *Smith* v. *Command* (1925), 231 Mich. 409, 204 N.W. 140. *Re Salloum* (1926), 236 Mich. 478. *In re Clayton* (1931), 120 Neb. 680, 234 N.W. 630. *In re Main* (1933), 162 Okla. 65, 19 P. (2d) 153. *Davis* v. *Walton* (1929), 74 Utah 80, 276 P. 921.

56. *Brewer* v. *Valk* (1933), 204 N.C. 186, 167 S.E. 638. *In re Opinion of the Justices* (1935), 230 Ala. 543, 162 So. 123. *In re Hendrickson* (1942), 12 Wash. (2d) 600, 123 P. (2d) 322.

57. *Skinner* v. *Oklahoma* (1942), 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655.

irreparable injury in his person, some opportunity to show that he is without such inheritable tendencies. The state is called on to sacrifice no permissible end when it is required to reach its objective by a reasonable and just procedure adequate to safeguard rights of the individual which concededly the Constitution protects."

State Versus State

A citizen of one State may not, under the terms of the Eleventh Amendment to the Federal Constitution, bring suit in law or equity against another State. One State may sue another, bringing an original action in the United States Supreme Court, and a citizen may sue the administrative officers of a State in the courts of the State and sometimes in the federal courts.

On a number of occasions one State has brought action against another State for infringement of the public health rights of its citizens, usually in connection with stream pollution, atmospheric pollution, other nuisances, or because of the danger of introduction of an epidemic disease.

While recognizing the principle that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them," the United States Supreme Court usually has refused to take drastic action and has suggested that cooperation and arbitration are much to be preferred in such cases to court action.[58] In one instance an injunction was granted to restrain a manufacturing plant in one State from discharging noxious fumes to the detriment of the health of the people of another State.[59] The United States Supreme Court will not interfere in purely political conflicts between the States.

58. *Louisiana* v. *Texas* (1900), 176 U.S. 1, 20 S. Ct. 251, 44 L. Ed. 347. *Missouri* v. *Illinois* (1901), 180 U.S. 208, 21 S. Ct. 331, 45 L. Ed. 497. *New York* v. *New Jersey* (1921), 256 U.S. 296, 41 S. Ct. 492, 65 L. Ed. 937. *Sanitary District of Chicago* v. *U.S.* (1925), 266 U.S. 405, 45 S. Ct. 176, 69 L. Ed. 352. *New Jersey* v. *City of New York* (1931), 283 U.S. 473, 51 S. Ct. 519, 75 L. Ed. 1176, 290 U.S. 237, 54 S. Ct. 136, 78 L. Ed. 291.

59. *Georgia* v. *Tennessee Copper Co.* (1907), 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038.