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Exclusion from Within: Noncitizens and the Rise of Discriminatory Licensing Laws

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In the United States in the early twentieth century, state and local laws discriminating on the basis of alienage proliferated. Progressive reformers, nativist groups, state legislatures, and city councils sought new methods for restricting noncitizen access to the workplace and the marketplace. As this article demonstrates, the primary vehicle they utilized was state and local licensing laws. Licensing proved to be a powerful tool of exclusion; by 1930, citizenship-based licensing restrictions were present in every state and most major cities. Noncitizens challenged some of these laws, pushing for greater protection of their constitutional rights. The resulting court contests over exclusionary licensing laws led to the creation of a new branch of legal doctrine, one that redefined the relationship between noncitizens and state power. This article highlights the significant and underappreciated role played by state and local laws in shaping the immigrant experience in the Progressive Era. It furthers our understanding of the licensing power and illuminates a pivotal moment in the development of immigrant rights. Today, noncitizens are still excluded from a range of economic activities due to licensing restrictions. This article explores the roots and the spread of this little understood – and still consequential – technique of exclusion.

INTRODUCTION

> Let every state and province in America look out sharply for the bird-killing foreigner; for sooner or later, he will surely attack your wildlife. The Italians are spreading, spreading, spreading. If you are without them today, tomorrow they will be around you. Meet them at the threshold with drastic laws, thoroughly enforced; for no half way measures will answer.
>
> — William T. Hornaday, *Our Vanishing Wildlife*

When wildlife conservationist William Hornaday (1913, 102) implored his readers to meet Italian immigrants "at the threshold with drastic laws," he was not just referring to federal legislation that had the potential to drastically reduce the number of immigrants admitted to the United States, which Congress eventually passed a decade later.[1] Hornaday was also a firm supporter of different sorts of "drastic laws": those that could be passed at the state and local level to limit the rights of immigrants who were already

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1. Immigration Act of 1924, 43 Stat. 153, enacted May 26, 1924.

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within the country. He was especially pleased with a law passed in Pennsylvania in 1909 that required a license to hunt in the state and then barred noncitizens from receiving such licenses as well as prohibiting them from possessing rifles or shotguns (103).[2] Although clearly targeted at Pennsylvania's Italian immigrant community, the law applied broadly to all noncitizens from any nation.

Pennsylvania's anti-immigrant game law was one example of a new form of discrimination against noncitizens that grew exponentially during the Progressive Era. By 1930, laws that barred access to employment and public resources based on alienage were present in every state and most major cities. Citizenship was required for a vast range of jobs and activities—from barber to taxidermist, public school teacher to mine inspector, real estate agent to junk dealer (Fields 1933; Fellman 1938; Schibsby 1940). These laws targeted the immigrant's access to the workplace and the marketplace, making it more difficult for noncitizens to support themselves and their families. They hampered the development of small businesses, prevented the entry of noncitizens into important trades, and closed off commerce within immigrant communities. This discrimination was expansive, going beyond the workplace to include restrictions on various economic activities as well as access to public resources and benefits (Plasencia, Freeman, and Setzler 2003, 12).

Noncitizens could potentially escape discrimination based on alienage by becoming citizens once they had established the requisite five years of residency. But naturalization was made much more difficult during this period with the introduction of the English language test in 1906 as well as with the zealous enforcement of the "good moral character" and "attachment to the principles of the Constitution" requirements, which were used to weed out alleged immigrant radicals (Preston 1963; Smith 1997, 446–48). Furthermore, naturalization was completely prohibited for noncitizens of Asian descent, due to the racial prerequisites for naturalization as well as an explicit statutory ban on naturalization for Chinese immigrants (Ngai 2004, 37–50). For many noncitizens, then, citizenship discrimination was inescapable.

Economic discrimination against foreigners was, of course, not a new phenomenon. There were many precedents for using state and local laws to restrict noncitizen civil rights prior to the twentieth century. In the eighteenth century, for example, states made it harder for noncitizens to become economically self-sufficient by restricting property ownership to citizens only or to those who had declared their intent to become citizens (Price 1999; Tirres 2013). In the nineteenth century, California lawmakers infamously turned to various forms of economic regulation in an attempt to terrorize Chinese residents and discourage Chinese migration to the state. This included efforts to prohibit the hiring of Chinese migrants, bar them from certain industries, and curtail their property rights (McClain 1994; Colbern and Ramakrishnan 2021, 216–31).

Most of the state and local efforts to discriminate against noncitizens in the nineteenth century, including anti-Chinese ordinances, state immigrant head taxes, and hiring bans, were struck down by the courts.[3] In several landmark cases, the US

2. *Laws of the General Assembly of the Commonwealth of Pennsylvania* (Harrisburg: Harrisburg Publishing, State Printer, 1909), 466.

3. See, for example, *Chy Lung v. Freeman*, 92 U.S. 275 (1875); *In Re Tiburcio Parrott*, 1 F. 481 (9th Cir. 1880); *Fraser v. McConway & Torley Co.*, 82 F. 257 (1897). Property restrictions were an exception to this trend; courts routinely upheld alienage property disabilities (Tirres 2012).

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Supreme Court affirmed federal primacy in immigration matters, noting that the states had no role to play in regulating immigrants.[4] The court also affirmed, in *Yick Wo v. Hopkins*, that immigrants were entitled to the safeguards of the Fourteenth Amendment's Equal Protection Clause.[5] By 1900, legal scholar Christopher Tiedemann (1900, 331) could declare approvingly that the courts had pushed back on state efforts to "protect native labor from alien labor," ensuring that there was no "unconstitutional interference with the rights of aliens."

But the Progressive Era witnessed the rise of a new technology of alien exclusion. These twentieth-century alienage laws drew on earlier precedents but were different in significant ways. Unlike California's nineteenth-century anti-alien laws, which discriminated explicitly against the Chinese, these regulations were of wide applicability, barring any immigrant who was not a citizen from the activity in question. Although racial animus was oftentimes a motivating factor for passage of these restrictions, the laws themselves were written in a race-neutral fashion. These citizenship-based restrictions became far more commonplace and widespread than their nineteenth-century predecessors. Whereas prior anti-alien laws tended to be clustered in certain states, the economic restrictions introduced in the 1890s and 1900s eventually appeared in every state, in varied and diverse formulations (Fields 1933, 214).

As this article demonstrates, Progressive reformers and lawmakers took advantage of the burgeoning growth in state and municipal regulation to find new ways to limit noncitizen economic access in furtherance of their other social and political aims. They were joined by trade associations and professional organizations, whose members sought to limit competition from immigrants in particular occupations and fields of practice.[6] This phenomenon was part of what Kunal Parker calls the "new politics of alienage," as older forms of alien legal disabilities were replaced by these novel forms of economic discrimination based on citizenship (Parker 2015, 159). This shift was fostered by the turn to new forms of governance during an era that was characterized by increased government regulation of the marketplace, the expansion of police powers, and a new emphasis on national citizenship (Novak 2022). Reformers and lawmakers relied, in particular, on a method of regulation that gained popularity in this period: state and local licensing. Licensing laws were one of the "robust regulatory technologies" that were characteristic of this era, and they proved to be distinctly powerful tools for advancing an anti-immigrant agenda, gradually circumscribing the choices that noncitizens could make to earn a living (3). The license became the primary sub-federal legal vehicle for the exclusion of noncitizens from the workplace, the marketplace, and hunting grounds.

Although this form of legal discrimination based on lack of citizenship grew quickly to become a major factor in the immigrant experience by the 1930s, it has not been the subject of significant study for legal historians. Most histories of immigrants and the law in the late nineteenth and early twentieth centuries have focused on the supplanting of state and local involvement with immigration by the growth of the

4. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

5. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

6. On professional organizations, trade associations, and occupational licensing generally during this time period, see Friedman 1965.

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federal immigration bureaucracy, the embedding of plenary power in Congress and the executive branch, and the eventual adoption of restrictive racial quotas in the 1920s (Salyer 2000; Ngai 2004; Kanstroom 2007). State and local governments do not feature prominently in this historiography, taking a back seat to the main narrative of federal primacy. To be sure, state and local laws are noted in important historical works on nativism and anti-immigrant politics but rarely explored in greater detail.[7]

There is also a lacuna in the scholarship on licensing when it comes to noncitizens. Generally speaking, a license is a privilege granted by an authority to do something that would otherwise be prohibited. As legal scholar Ernst Freund (1904, 32) described in 1904, "[l]icenses or permits are administrative acts authorizing the doing of a thing which is subject to police regulation or restraint. The license or permit is given if the proper authority is satisfied that the imposed regulations have been or will be complied with."[8] The licensing power was an acknowledged power of government at the founding, but it did not become commonplace as a tool of governance until the early twentieth century. Licensing laws then and today take a variety of forms—from limitations on types of establishments (for example, business licenses), to restrictions on ownership or sale of certain goods (for example, liquor licenses), to prohibition of certain types of work (for example, occupational or professional licenses), to state sanctioning of particular types of relationships (for example, marriage licenses). The lines between these different categories are not always clear—for example, a denial of a liquor license can effectively end an applicant's prospects of running a certain kind of business.[9]

Historians, economists, and legal scholars have written about licensing from a variety of perspectives. Economists and sociologists have measured the impact of professional and occupational licensing restrictions on the economy and society (Friedman and Kuznets 1945; Redbird 2017; Blair and Chung 2019). Legal scholars have assessed the scope of the licensing power and its relationship to other legal rights, like freedom of contract (Friedman 1965). Historians have examined the rise of licensing laws as part of the expanding police powers of state governments or the rise of the professions (Novak 1996; Hatch 1988; Law and Kim 2005). Scholars have also highlighted the discriminatory impact of licensing laws, particularly the ways in which they have worked, either intentionally or unintentionally, to exclude women and racial minorities from various professions and trades or to bar interracial marriage (Gross 1984;

7. In his seminal work *Strangers in the Land*, for example, historian John Higham (2002) spends only two paragraphs discussing the rise and spread of these new forms of economic discrimination. As Higham describes briefly, "[l]icensing acts in many states barred aliens from practicing medicine, surgery, chiropractic, pharmacy, architecture, engineering, and surveying, from operating motor buses, and from executing wills" (301). In his survey of immigration and citizenship law, Kunal Parker (2015, 233–34) notes the absence of scholarship on alienage, writing that "when it comes to the way citizenship has functioned 'negatively' vis-à-vis resident aliens, it is fair to conclude that much more work is needed."

8. As the Supreme Court of Ohio stated in 1912, "[t]he object of a license is to confer a right that does not exist without a license. It is a permission to do something which without the license would not be allowed." *Bloomfield v. State*, 99 N.E. 309, 310 (1912).

9. Historian William Novak (1996, 90) notes that, as licensing gained popularity, "[t]he goals of particular license laws were mixed and sometimes confused, including prohibition, regulation, administration, and revenue."

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Witz 1990; Bernstein 1994; Law and Marks 2009; Pascoe 2009; Mills 2013). But few scholars have examined licensing specifically in terms of noncitizen exclusion.[10]

As this article demonstrates, there is much to learn when we examine the relationship between alienage and licensing law. Licensing laws were a flashpoint in the development of constitutional rights arguments for noncitizens. Noncitizens and their lawyers challenged licensing laws in court, forcing a new consideration of the scope of the Fourteenth Amendment and the extent of state power in the realm of immigration and citizenship. They made powerful arguments about their constitutional rights, calling upon court precedents, particularly the 1886 Supreme Court decision in *Yick Wo v. Hopkins*, to protect them from state discrimination.[11]

But such arguments failed to gain traction during this period. Instead, courts in this era largely sided with states, upholding expansive state powers to discriminate on the basis of alienage. This form of discriminatory licensing produced its own branch of legal doctrine. As the article describes, in response to litigation over licensing, courts posited two distinct but interrelated ideas about immigrants: that they were potentially dangerous, requiring the use of the state police power to protect the public from them, and that they were outsiders to state citizenship, which meant that they were not entitled to share in the public resources of the state because they did not belong as "people of the state." These two arguments about police power and state ownership provided the prime rationales for exclusion. Both of these rationales were novel in this period, and both spread rapidly to justify other kinds of state-based discrimination against noncitizens.

The article begins by identifying the origins of these novel citizenship licensing restrictions and proceeds to examine their increasing popularity from just a few isolated jurisdictions in the 1890s to every state and most major cities by 1930.[12] The two earliest loci for this type of discrimination—liquor licenses and game laws—were highly influential in shaping the doctrine that gave states wide latitude to discriminate in other areas. As the first section of the article explains, this twentieth-century brand of alienage regulation first took root in liquor licensing. Especially significant here were the efforts of the Women's Christian Temperance Union (WCTU), an advocacy organization that was highly influential in the passage of the first citizenship restriction in state liquor law. Other states soon followed suit. The first court case upholding a citizenship exclusion in liquor regulation, *Trageser v. Gray*, was widely influential and cited in every other alienage case that followed.[13] Courts largely justified such restrictions based on an expansive definition of state police powers. It is in the liquor license cases that we see the first robust arguments for using citizenship, as opposed to race or ethnicity, as a category of exclusion in state and local governance.

10. Scholars are beginning to fill this gap. For recent work that explores the connections between licensing laws and alienage discrimination, see especially Plasencia, Freeman, and Setzler 2003; Fette 2012; Chin and Ormonde 2018; Shanahan 2021.

11. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

12. Marc T. Law and Sukkoo Kim (2005, 725) note that "[b]y the mid-twentieth century, there were more than 1,200 state occupational licensing statutes, averaging 25 per state, for at least 75 occupations ranging from physicians to embalmers."

13. *Trageser v. Grey*, 73 Md. 250 (1890).

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The second section of the article explains the development of the other major doctrinal justification for alienage exclusion—the so-called "state ownership doctrine"—in state game laws. Progressive reformers, lawmakers, and courts primarily relied on a concept of state ownership of public resources to justify the exclusion of noncitizens from licenses to hunt, fish, and own guns. Pennsylvania's 1909 hunting licensing law gave rise to the first US Supreme Court case to address this twentieth-century wave of alienage discrimination: *Patsone v. Pennsylvania*.[14] Like *Trageser* before it, this decision was highly influential, cited in decisions supporting citizenship discrimination in a wide range of economic activities, well beyond guns and game. This "state ownership doctrine" eventually justified the exclusion of noncitizens from public employment.

Liquor licenses and game laws provided the opening wedges for further expansion of discriminatory licensing law. The third section of the article describes lawmakers' and courts' use of these police power and state ownership rationales to justify other types of limitations on economic activity. It demonstrates the surprising reach of these laws, the variety of different proponents and challengers, and the costs of these restrictions to noncitizens and immigrant communities generally. One of the underappreciated aspects of the history of immigrant civil rights is just how enduring this form of citizenship discrimination has been. As the fourth section explains, most states to this day still have licensing restrictions that bar noncitizens, even lawful permanent residents, from a range of professions and activities (Calvo-Friedman 2014; Calvo 2017; Olivas 2017). Looking more closely at the roots of this phenomenon in the early twentieth century can help us understand why this civil rights struggle remains alive and well today.

LIQUOR LICENSES AND THE "IMMIGRANT PROBLEM"

Controlling commerce in spirits has been a focus of governments since the colonial era and, well before that, in England and parts of Europe. Courts in the antebellum period repeatedly affirmed the power of the state to drastically curtail or completely prohibit the possession, consumption, or sale of alcoholic beverages (Novak 1996, 171–89). Regimes of liquor control were oftentimes explicitly racialized, such as laws in the federal territories that specifically barred the sale of liquor to Native Americans or laws that restricted access to alcohol for enslaved persons and free Blacks prior to the Civil War (Unrau 1996; Adams 2019). Immigration policies also incorporated a consideration of alcohol use when Congress added "chronic alcoholism" to the list of excludable classes in 1917.[15] But regulating access to alcohol based on citizenship status, rather than on race or tribe, was a new legal technique in the late nineteenth century. It was one forcefully promoted by temperance advocates, who linked immigrant identity to alcohol consumption early in the movement. Anti-immigrant rhetoric was a staple of the movement, starting in the 1880s and lasting into the 1930s. As argued in *The Cyclopedia of Temperance, Prohibition and Public Morals* in 1917, "[t]herefore the saloon is the keystone in the arch of the immigrant problem. Destroy the keystone and the problem will crumble" (Board of Temperance, Prohibition and Public Morals of the Methodist Episcopal Church 1917, 216). Reformers blamed European

14. *Patsone v. Pennsylvania*, 232 U.S. 138 (1914).
15. Immigration Act of 1917, 39 Stat. 874 (1917).

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immigrant groups—in particular, Germans, Irish, and Italians—for fostering a "saloon culture" and contributing to a significant increase in consumption of light liquors like beer and wine. Blaming foreigners turned out to be a potent recruiting tool (McGirr 2016, 13–21).

Citizenship moved from a rhetorical rallying cry to an explicit legal qualifier in the 1880s, when states began passing what were known as "high license" laws that made it exceedingly difficult and costly to obtain a license to sell alcoholic beverages. Nebraska, Missouri, and Illinois all passed such laws in the 1880s, but Pennsylvania appears to be the first to include citizenship as a legal qualifier in its 1887 legislation known as Brooks Law (Meader 1891, 340). Pivotal in the adoption of this citizenship-based restriction was the Pennsylvania chapter of the WCTU. The WCTU is credited with remarkable achievements in prohibition and other social reform movements generally, but the organization was also the first to lobby successfully for a citizenship restriction in licensing by turning eyes toward immigrants as an alcohol problem. Founded in 1873 in Cleveland, Ohio, the WCTU quickly spread to other states. The first president of the organization, Annie Wittenmeyer, hailed from Philadelphia, and the Pennsylvania WCTU was one of the most active branches (Szymanski 2003, 164–69). Union members took a wide range of approaches to temperance reform, including using moral suasion and education reform (singing hymns, kneeling, and praying outside saloons, creating temperance education programs in the public schools, distributing tracts) as well as pushing for legislative action and state prohibition.

In Pennsylvania, WCTU members took note of the various nationalities of liquor dealers and formed a subcommittee that was tasked with taking the temperance message into immigrant communities. This committee made sure that materials were published in multiple languages, including French, German, Italian, and Chinese, and distributed to various immigrant neighborhoods (Kaylor 1963, 217; Noon 2005, 105). The WCTU effectively put pressure on the state legislature to greatly reduce access to alcohol. The resulting Brooks Law, named for state representative William H. Brooks, made significant changes to the extant regulation. Prior to its passage, judges could grant a license to any person, in their sole discretion, for a fee of fifty dollars (or three hundred dollars for Allegheny County, where Pittsburgh is located). The new law not only increased the fee, to as much as five hundred dollars in most counties, but also added a new list of eligibility criteria, including citizenship and moral character. Applications had to be accompanied by references from twelve voters and the names and signatures of two bondsmen (*Friends' Intelligencer and Journal* 1889, 237).

This focus on foreigners as an alcohol problem would prove enduring in the WCTU. As its founder, second president, and most influential leader, Frances Willard, argued in 1890, "[a]lien illiterates rule our cities today; the saloon is their palace; the toddy stick their scepter" (*The Voice* 1890, 8). Progressive reformers sought to destroy the saloon by refusing to license immigrant proprietors. There is some indication that this strategy worked, at least initially.[16] A year after the passage of Pennsylvania's law,

16. Not surprisingly, one result of the high license law was to push more alcohol sale and consumption underground. As Frederick Howard Wines (1897, 251) noted, "[a]fter the introduction of the high license law, the 'speak-easy' became a regular institution in Philadelphia. At the present time, liquor is sold without license at the 'speak-easies' or 'kitchen bars' proper, at chartered and unchartered clubs, at houses of ill fame, and by some druggists."

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the press reported courts granted only 7,728 licenses, almost a 50 percent reduction from the prior year's grant of 14,704. One commentator attributed this reduction to the citizenship restriction, noting that much of the decrease was attributable to the fact that "a very large proportion of those already holding licenses were neither native born nor naturalized" (*Friends' Intelligencer and Journal* 1889, 237).

Excluding noncitizens from the sale of liquor had immediate economic effects since it barred them from an entire industry that might provide a steady and profitable livelihood. John Adams Trageser was one such noncitizen negatively affected by the new turn to exclusion in the industry. Trageser was born in Prussia in 1826 and emigrated to the United States sometime after. By 1870, he was married and living in Baltimore, plying his trade as a shoemaker, with eight children, ages two to fifteen.[17] It was likely exceedingly difficult to support a family of ten on a shoemaker's wages, and Trageser opened a saloon at the corner of Boston and Streeper streets, along the city's waterfront. The location was directly across the harbor from Locust Point, an immigrant-receiving point known as "Baltimore's Ellis Island." Over the course of almost fifty years of operation—from 1868 to 1914—the port would see the arrival of more than 1.2 million European immigrants. In the early years of the port, these immigrants were almost exclusively from Germany, contributing to a burgeoning community of German speakers that was already in place prior to the Civil War (Cassie 2016; n.d.).

Given these factors, a saloon on the waterfront was a good investment, with plenty of clientele. But Trageser was met with a major obstacle in operating his saloon when he was denied a license to sell "spiritous liquors" by the city clerk. In 1890, the Maryland legislature passed a high license law that raised licensing fees from $50 to $250 and, for the first time, barred noncitizens from receiving licenses at all. In the city of Baltimore, the law created a board consisting of three commissioners who would oversee the granting of licenses and ensure the application of the new criteria.[18] Trageser had his "first papers," which indicated his intent to apply for naturalization once he had met the residency requirements, but declarants were not included in the law: one had to be naturalized in order to be eligible for a license.

Rather than waiting until he met the five-year residence requirement to pursue naturalization, Trageser decided to challenge the denial of a license, first before the court of common pleas and then the Baltimore city court.[19] When he failed in both, he appealed to the court of appeals. Trageser's lawyers argued that requiring citizenship for a license was in direct contravention of the Fourteenth Amendment, particularly its guarantees of due process and equal protection. In the 1886 case of *Yick Wo v. Hopkins*, the US Supreme Court had affirmed that aliens, as persons protected by the Fourteenth Amendment, were entitled to bring equal protection challenges to discriminatory state and local laws, such as the laundry regulations at issue in that case. Trageser argued that refusing to grant him a license based on his alienage was a direct violation of his rights.

17. "John A. Trageser," *1870 Federal Census*, Microfilm publication no. M593_573, National Archives and Records Administration, Washington, DC.

18. *Trageser*, 73 Md., 251–52.

19. *Trageser*, 73 Md., 252.

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Yick Wo, issued by the US Supreme Court just four years earlier, appeared to be a supportive precedent for that view.[20]

The clerk of the court of common pleas, John Gray, was represented by a young attorney, William Shepard Bryan Jr., who had recently been elected to the board of election supervisors of the city of Baltimore and would soon go on to become city attorney and eventually the attorney general of the state of Maryland.[21] Bryan Jr.'s father, William Shepard Bryan, had been appointed to the Maryland Court of Appeals in 1883.[22] Despite a clear conflict of interest, Judge Bryan issued the opinion in the case, siding with his son in upholding the law. Bryan declared that the state has the power to regulate to protect "public morals, public health, public order, [and] peace and tranquility." When it came to alcohol, a state could prohibit its sale entirely. In a move that would be repeated in other alienage discrimination cases, Judge Bryan argued that, because the state could prohibit the activity entirely, then it had more or less free reign to regulate that activity however the legislature saw fit. As the opinion stated, "[n]o one can claim as a right the power to sell; either at any time, or at any place, or in any quantity. If he is allowed to sell under any circumstances, it is simply by the free permission of the Legislature, and on such terms as it sees fit to impose."[23]

But what about discrimination between persons—in this case, between citizens and aliens—in the terms of this legislation? Bryan acknowledged *Yick Wo* as a leading precedent, but he constrained the holding to its facts, arguing that the Fourteenth Amendment applies when a state acts explicitly to prevent all means of livelihood of one group. The discriminatory laws passed in California, according to Bryan's interpretation, "were enactments to take away from the Chinese the right to labor for a living." In comparison, "the statute now before us oppresses no one, and was intended to oppress no one. It does not take from any man a solitary right, privilege or immunity. It subjects no one to penalties for its violation which are not imposed equally on all offenders."[24] Perhaps realizing the illogic of this statement (given that the law in fact was not "imposed equally on all offenders"), Bryan then doubled down on the police power: "It does not, it is true, make an equal partition of the privilege of liquor selling among classes of persons. But there is no warrant for supposing that legislative control over this traffic must conform to any such standard. It is not crippled by any such restraint. It overrides all private interests and embraces all means which are necessary and proper to protect the public from evils connected with the subject."[25]

As if this statement were not enough, Bryan ended with a coda ("a few more words may be added"), supporting absolute state power against any possible treaty claims from noncitizens: "We are unable to conceive that anyone, citizen or alien, can acquire rights which could in any way control, impair, impede, limit or diminish the police power of a

20. *Yick Wo*, 118 U.S. 356 (1886).

21. "William Shepard Bryan, Jr.," *Maryland State Archives Biographical Series*, Doc. MSA SC 3520-1513, https://msa.maryland.gov/msa/speccol/sc3500/sc3520/001500/001513/html/msa01513.html.

22. "William Shepard Bryan," *Maryland State Archives Biographical Series*, Doc. MSA SC 3520-13786, https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/013700/013786/html/13786bio.html; *Baltimore News* 1914.

23. *Trageser*, 73 Md., 253.

24. *Trageser*, 73 Md., 259.

25. *Trageser*, 73 Md., 259.

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State. Such power is original, inherent and exclusive; it has never been surrendered to the General Government, and never can be surrounded without imperiling the existence of society."[26] Judge Bryan was not an outlier in his remarkably boundless support for state police power. Deference to the power of the state to regulate for the "public welfare" was a core element of Gilded Age jurisprudence, and this deference to state police powers continued unabated in the Progressive Era, amidst the regulatory fervor of that period (Novak 1996, 9; 2022, 157–60).

The number of state statutes and local ordinances exploded between 1900 and 1930.[27] Rather than resisting this explosion in social legislation, judges were remarkably deferential to it, notwithstanding the US Supreme Court's decision in *Lochner v. New York* (Urofsky 1985; Kens 1991).[28] In some instances, this deference inured to the benefit of vulnerable populations, serving as a check on corporate greed, instituting workplace laws that protected against exploitation and consumer protection laws that kept the public safe. But deference to state police power in this period was by no means an unalloyed good for the powerless. As Christopher Tomlins (2008, 51) notes, police power in this period also meant "segregation statutes, state eugenics statutes, state criminalization of interracial marriage, state sodomy laws—all passed in the name of the people's health, morals, and general welfare." It was no coincidence that one of the most prominent proponents of the broad use of police powers—legal scholar and Pulitzer Prize winner Charles Warren—was also a founder of the Immigrant Restriction League (IRL), a highly influential nativist organization that lobbied successfully for the introduction of racial quotas in immigration law (Lee 2019, 113–46). Progressive reformers, like those with the IRL or the WCTU, were supporters of immigration restriction but also saw opportunities in state and local regulation to limit the rights of those who might challenge their social aims.

Yet in the 1890s, when Trageser brought his appeal, it was not certain that his individual constitutional rights claims would fail. Up until 1900, the courts had struck down more anti-alien economic legislation than they had upheld. These primarily took the form of attempts to tax or register immigrants or to bar their labor entirely. Legal scholar Christopher Tiedeman (1900, 331) noted this trend with approval in 1900 when he observed that "[s]tates have, by legislation, undertaken to protect native labor against alien labor; but in each case the legislation has been declared to be an invasion of the jurisdiction of the United States government, and an unconstitutional interference with the rights of aliens."

Such arguments about "unconstitutional interference" succeeded in the Supreme Court of Michigan in 1902 when the court upheld the right of a Canadian barber to practice his trade in the state, striking down a provision passed by the legislature in 1899 requiring citizenship to receive a barber's license.[29] The court made the striking acknowledgment that discriminating based on alienage was akin to discriminating based on race, both of which were constitutionally questionable under the equal protection

26. *Trageser*, 73 Md., 260.

27. The period between 1866 and 1932, as William Novak (2022, 91) writes, witnessed a "veritable explosion of legislation." Between 1909 and 1914, for example, sixty-two thousand statutes were added at the state and federal levels.

28. *Lochner v. New York*, 198 U.S. 45 (1905).

29. *Templar v. State Bd. of Examiners of Barbers*, 131 Mich. 254 (1902).

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clause. The state might require licenses for particular activities or professions, the court acknowledged; doctors, for example, could be required to submit to examination and licensure. But even in the case of the medical profession, the legislature had to have a valid reason to limit eligibility. As Justice Robert Morris Montgomery noted, "the practice of medicine is no more an incident of citizenship than the practice of the trade of a barber. All persons are entitled to enjoy the equal protection of the law, and while it may be competent for the legislature, in the exercise of its police powers, to provide for an examination and licensing of barbers, . . . would it be contended that the legislature might provide that only white persons should be licensed?" The court answered in the negative, concluding that the legislature did not have the "right to require citizenship" in this case.

To be sure, cutting hair and selling alcohol were two quite differently situated activities in the view of the courts of this period. While owning a saloon and serving alcohol were ways to make a living, the courts did not treat these as "common occupations" that received constitutional protection. Trageser, in contrast to the barber in Michigan, faced an uphill battle based in part on the activity in question. And, in fact, this was precisely what the Michigan court found. Despite holding Michigan's law unconstitutional, Judge Montgomery cited the *Trageser* case favorably. As he wrote, "this is a business peculiar to itself, which might be wholly prohibited by the legislature."[30]

The exclusion of noncitizens from this "business peculiar to itself" continued apace after the *Trageser* ruling. In 1909, the state of Ohio passed what was known as the "Dean character law," a liquor regulation that required anyone selling intoxicating liquors to answer five questions relating to their criminal background and immigration status. The first question was "Are you, or if a firm, is any member of your firm an alien or an unnaturalized resident of the United States?"[31] A "yes" to this question would disqualify the applicant. The law had the specific, and intended, effect of "excluding from the business gamblers, felons and foreigners." Attorneys for resident Benton Bloomfield, who challenged the law, argued that it was a violation of the Fourteenth Amendment since it unlawfully discriminated between aliens and citizens.[32] They, like Trageser's lawyers, drew specifically on *Yick Wo*, pointing out that this case showed that "the word 'person' as used in this article meant everybody, whether a citizen of the United States or a subject of the emperor of China." Furthermore, they argued, the distinction based on alienage in the law was "a perfectly arbitrary distinction and discrimination."[33]

The Supreme Court of Ohio upheld Bloomfield's conviction against a constitutional challenge, citing *Trageser*. Unlike the law at issue in *Yick Wo*, the court argued, the character law in Ohio did not grow out of "a spirit of race hatred or inhospitality, or a purpose to deny the equal protection of our laws or equal opportunity under our institutions." Instead, such liquor laws "are based on the belief, that an alien cannot be sufficiently acquainted with our institutions, and our life to enable him to

30. *Trageser*, 73 Md., 258.

31. Ohio Gen. Code § 13219 (1909).

32. In 1911, Benton Bloomfield was convicted of violating the law by falsely answering the fourth question on sales to minors or intoxicated persons. *State v. Bloomfield*, 25 Ohio Dec. 689 (1912). Although Bloomfield was not himself an alien, the lower court allowed the challenge to proceed on this ground.

33. *Bloomfield v. State*, 99 N.E. 309 (1912).

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appreciate the relation of this particular business to our entire social fabric."[34] In both *Bloomfield* and *Trageser*, the courts severely circumscribed the holding of *Yick Wo*, confining its constitutional limitations on state and local governments to instances of specific discrimination involving "race animus."[35] This left discrimination based on the more general category of alienage, which could apply to persons of any race, as constitutionally permissible, despite the wording of the equal protection clause that guaranteed equal treatment to all "persons." In this interpretation, state police powers to discriminate based on lack of citizenship were practically boundless.[36]

The decision in *Trageser* had the narrow effect of upholding the state statute barring noncitizens from the liquor trade. But that was not the extent of its legacy. The court ruling had a much broader effect in providing a precedent for other jurisdictions. The legacy of the case would go far beyond the individual. The rationale developed in *Trageser* received favorable citation by subsequent courts and was cited in almost every published case of alienage licensing discrimination for the next two decades, not just in liquor licensing but also in other restrictions of noncitizen economic rights. As time would soon tell, the exception of what the Michigan Supreme Court called the "business peculiar to itself" would begin to swallow the rule as more and more jurisdictions introduced licensing laws requiring citizenship—in areas far afield from alcohol regulation—and more courts upheld these laws against constitutional challenge.

GAME, GUNS, AND "ALIENS TO THE STATE"

As with the regulation of alcohol, there were long-standing precedents for excluding access to hunting, fishing, and gun ownership based on the types of marginalized status. State and local regulations had limited or barred Native Americans, enslaved persons, and free Blacks from access to guns, for example, through various legal mechanisms in the eighteenth and nineteenth centuries (Gulasekaram 2012, 620–22). But the idea of restricting hunting and fishing licenses and gun ownership based on citizenship status was new in the early twentieth century. The modern era of fish and game laws gained steam after the US Supreme Court's decisions in *McCready v. Virginia* in 1876 and *Geer v. Connecticut* in 1892. In *McCready*, the court declared that the state could limit the planting of oysters based on state citizenship.[37] In *Geer*, the court upheld a Connecticut law prohibiting hunters from selling or transporting game outside the state boundaries.[38] The "state ownership doctrine," as it came to be known, affirmed a state's ownership of its public resources and common property in trust for the benefit of

34. *Bloomfield*, 99 N.E., 312.

35. Other courts would continue this characterization. See, for example, the New Hampshire Supreme Court's ruling in *State v. Rheaume*, 116 A. 758, 763 (N.H. 1922) (noting that the exclusionary provision at issue in the case "did not have its birth in hostility to any race," unlike the law at issue in *Yick Wo*).

36. Shortly after the court issued its opinion, the people of the state voted to amend the Constitution on a wide variety of grounds, including a provision providing that "license to traffic in intoxicating liquors shall not be granted to any person who at the time of making the application thereof is not a citizen of the United States and of good moral character." From that point forward, no unnaturalized foreigners would be granted liquor licenses as a matter of state constitutional law. Ohio St. Constitution (1912), Art. XV, s. 9.

37. *McCready v. Virginia*, 94 U.S. 391 (1876).

38. *Geer v. Connecticut*, 161 U.S. 519 (1892).

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the people of the state. In essence, the doctrine posited that "the people" are the owners of the common property and that the state is the trustee, given powers to dispose of the property in line with the public trust.[39]

After *Geer*, a growing number of states created comprehensive fish and game laws, meant to protect the game within state borders and to limit access, and they created new agencies to enforce them. Efforts at increased regulation were backed by various parties, including coalitions of gentlemen hunters who wanted to preserve a "sportsmen's paradise" for recreational hunting and wealthy rural landowners who wanted to keep neighbors from trespassing on their land in search of small game to eat. New attitudes toward wildlife conservation and recreational sportsmen's hunting collided with much older, more traditional, and widespread forms of subsistence hunting in rural America. Throughout the country, poor laborers and farmers—both citizens and noncitizens—relied on subsistence hunting to supplement low wages or a meager harvest. Derided as "pot hunters," they hunted mainly small game like squirrels, groundhogs, rabbits, and birds. Leaders of the fledgling wildlife conservation movement—many of them hunters themselves—blamed subsistence hunters for a range of ills, particularly when it came to the killing of birds, which they claimed were essential for the eradication of insects and the success of crops (Warren 1997). Reformers were explicit in blaming immigrants, particularly Italians, for the destruction of wildlife. To be sure, immigrants were not the only source of the evil, according to conservation leaders. William Hornaday's (1913) influential book devoted chapters to "poor whites and Southern negros" and to women (who were blamed for decimating bird populations in their thirst for feathered hats) as well as to Italian immigrants.

These reformers turned to law as the answer for controlling these "alien hunters." The president of the Audubon Society called for immigrant licensing restrictions and harsh penalties for violations (Taylor 2016, 214). The first iterations of these discriminatory laws charged a higher license fee for those who were either noncitizens or were citizens from another state. Pennsylvania passed such a law in 1903, known as the "Non-Resident License Law," influenced in part by a state Game Commission report in 1902 that blamed "the unnaturalized foreigner" for most game violations (Warren 1997, 28). The 1903 law required non-residents, defined to include unnaturalized foreigners, to buy a ten-dollar license in order to hunt. The law also made it a crime for an immigrant who did not buy a license to carry a gun "in the fields or in the forests or on the waters" of the state. State residents who were citizens, by contrast, were not required to get a license at all, either to hunt or to carry a gun (28–29).

By 1910, close to half the states had game laws charging a significantly higher license fee for noncitizens, even if those noncitizens were long-time residents of the state. Sometimes the fees were the same as that charged to an out-of-state citizen, but, oftentimes, they were considerably more. The so-called "alien license" could range in amount from fifteen dollars in Maine, Louisiana, and Connecticut, to fifty dollars in Wyoming, to one hundred dollars in Utah and Alaska. This was not an insignificant sum at a time when workers typically made less than eight hundred dollars per year (Painter 2008, xvi). By comparison, state citizen resident licenses cost a nominal sum,

39. This was a variant of the perhaps more familiar public trust doctrine for shorelines, which was also developing during this period (Kearney and Merrill 2004).

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typically around two dollars in most states that required them (Oldys, Brewster, and Earnshaw 1910).

In cases upholding game laws during this period, arguments were often blurred between general police powers and the more specific idea of state ownership. In *Geer* itself, for example, the court identified both rationales:

> Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end. . . . Indeed, the source of the police power as to game birds flows from the duty of the State to preserve for its people a valuable food supply.[40]

Yet, notwithstanding this blurring, the state ownership cases posed a distinct and particular question that was not present in those cases justified based on police power alone. Who, exactly, were the "people of the state"? Routinely, courts determined that state legislatures had the power to answer that question and that they could exclude noncitizens from state membership for these purposes.

This determination could lead to some tortured and strange reasoning as lawmakers and courts tried to decide what rights belonged to noncitizens who were long-term residents of a state. In Florida, for example, two Italian immigrants were held in custody for taking oysters from a public oyster bed without a license, for which they would have had to pay ten dollars as "alien[s] of the state of Florida," a phrase that seems nonsensical given that "aliens" are admitted nationally, not state by state.[41] Abramo Bondi was an Italian immigrant who had lived lawfully in the city of Barre, Vermont, for fourteen years. In 1912, he challenged Vermont's game law, which had been adopted that year, that required higher hunting license fees for noncitizens. Under that law, those who were "bona fide residents" of the state were required to pay a license fee of seventy-five cents, while those who were not bona fide residents were required to pay a fee of ten dollars plus a fifty-cent clerk fee—a more than tenfold increase. The statute defined bona fide residents as "all citizens of the United States who have lived in this State for not less than six months prior to date of making application for a license."[42]

Bondi easily met the six-month residence requirement, given that he had lived in the state for fourteen years, but he failed the citizenship requirement. Bondi sued, arguing that the law violated both the state and federal constitutions as well as the US treaty with Italy. In deciding his case, the Supreme Court of Vermont acknowledged that, based on his fourteen years of residence in the state, he was a "bona fide resident" but then stated that this was "immaterial in this case because of his want of United States citizenship." The court equated national citizenship with state citizenship, concluding that Bondi, "although by the agreed statement a resident of Barre, is not entitled to a resident hunter's license, because not a citizen of the United States *and of*

40. *Geer*, 161 U.S., 534–35.
41. *Ex Parte Gilletti*, 70 Fla. 442, 446 (1915).
42. *Bondi v. MacKay*, 87 Vt. 271, 273 (1913).

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this state."[43] The court was also quick to dispense with Bondi's Fourteenth Amendment claim, based on state ownership: "We think the distinction between residents who are citizens and those who are not, made with reference to the acquirement of individual interests in property which belong to the State, affords a just basis for classification, and that a reasonable discrimination may properly be made against an alien who becomes a permanent resident without taking upon himself the full obligations of citizenship."[44]

Bondi also brought a challenge based on the Vermont state Constitution since the law was in direct violation of a provision that all "inhabitants" of the state could "hunt and fowl" on their own lands as well as on lands not enclosed. Despite Bondi's long residence, the court held that the state's police power to regulate for the common welfare trumped any guarantees of liberty provided to all "inhabitants" in the state constitution. As to Bondi's treaty claims, the court opined that the treaty did not protect Italian citizens from "the minor discriminations incident to the ordinary exercise of the police power."[45]

The so-called "minor discriminations" of higher license fees quickly began to add up, as more and more jurisdictions added citizenship restrictions. In 1909, Pennsylvania amended its law from charging a higher fee to prohibiting noncitizen hunting licenses completely.[46] This time, gun possession alone was enough to convict. The law made it "unlawful for any unnaturalized foreign-born resident within this commonwealth to either own or be possessed of a shotgun or rifle of any make." Simply "the presence of a shotgun or rifle in a room or house" occupied by the alien was sufficient to find a violation.[47] In October 1909, Joseph Patsone, an Italian immigrant living in the rural town of Hillsville, was arrested, convicted, and fined for possessing a shotgun. Patsone was one of eight Italian immigrants arrested and convicted on the same day, in what newspapers reported was a coordinated and intentional show of force by the state game commission (*New Castle News* 1909, 1). (It was no coincidence that the arrests happened on the same day as the execution by hanging of an Italian immigrant who had been convicted, under suspicious circumstances, for the murder of a state game warden a few years prior.) Patsone was charged a fine of twenty-five dollars, or twenty-five days in jail, and his gun was confiscated.

Patsone was the only one of the eight to challenge his arrest. Marcel Alphonse Viti, an Italian American lawyer, represented Patsone before the Superior Court of Pennsylvania. Viti came from a reputable family in Philadelphia; his grandfather immigrated from Italy in 1816 and established a successful import and trade business. Viti received his law degree from the University of Pennsylvania in 1893 and went on to serve in a wide range of organizations and positions, including as legal advisor to the Italian embassy in Washington, DC (*General Alumni Catalogue of the University of Pennsylvania* 1917, 129; D'Andrea 2013, 10–13). Viti argued that the law violated the Fourteenth Amendment's guarantee of equal protection, but the court held that citizenship was an acceptable mode of classification in the exercise of the state's police power. As the court stated, "[Patsone] is one of a very large class of aliens, whose sojourn

43. *Bondi*, 87 Vt., 278 (emphasis added).
44. *Bondi*, 87 Vt., 277.
45. *Bondi*, 87 Vt., 278.
46. *Patsone*, 232 U.S. 138, 143 (1914).
47. *Laws of the General Assembly of Pennsylvania*, 466.

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in this country is but temporary and whose place of abode is capricious and uncertain, who cannot speak our language nor understand our customs or laws, who pay no taxes and share no part of the public burden. Under all our decisions his right to remain among us is subject to limitations imposed upon all of his class," citing then to the *Trageser* case prohibiting alien liquor licenses.[48] Despite seeming to single out Italian immigrants itself, the court defended the law by noting that it was "not directed against any particular nationality or special class of aliens."[49] In other words, the law did not violate equal protection because all aliens were discriminated against equally.

As it happened, Patsone's case was the first instance of twentieth-century alienage discrimination to make it to the US Supreme Court. On appeal to the high court, Viti acknowledged the state's power to regulate hunting but argued that the state could not confiscate personal property—that is, the guns—on this basis. He also sought to draw attention to the realities of immigrant communities in Pennsylvania, which were far more diverse than the appeals court acknowledged. Viti reminded the justices that not all Italian immigrants were poor laborers of short residence in the state: "An alien merchant or manufacturer who may have spent most of his life in Pennsylvania, adding to its wealth as well as his own, not only may not shoot game upon his own land . . . but he is not allowed the possession of a shotgun or rifle upon such property for the protection thereof."[50] As Viti emphasized, the law infringed on a key stick in the bundle of property rights, which included the right to hunt on one's own land.

The court's decision in *Patsone*, issued by Justice Oliver Wendell Holmes, is remarkably deferential to the legislature, even by the standards of the day. Justice Holmes declared that "a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil is mainly to be feared, it properly may be picked out." Echoing his writings in *The Common Law*, he noted that "the question is a practical one depending on experience." As he explained, "experience is supposed to have shown to mark the class. . . . The question therefore narrows itself to whether this court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent." Not surprisingly, he found no good reason to assume that the legislature was wrong. As he opined, "the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts . . . it is enough to say that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong."[51] Justice Holmes did not specify what "local conditions" or "local experiences" he had in mind. As to the criminalization of gun possession, even without evidence of any hunting, Justice Holmes posited that the means are justified if the ends are legitimate—in other words, that, as long as it is lawful for the state to discriminate in preventing the "evil," it is lawful for the state to adopt regulations that are in furtherance of that goal, such as criminalizing the possession of a firearm. As Justice Holmes biographer G. Edward White (1993, 347) would later note,

48. *Commonwealth v. Papsone* [sic], 44 Pa. Super. 128, 136 (1910).
49. *Commonwealth v. Papsone* [sic], 44 Pa. Super., 133–34.
50. *Patsone*, 232 U.S., 142.
51. *Patsone*, 232 U.S., 144–45.

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in *Patsone*, "Holmes appears to have transcended deference, even to the point of abdication of judicial responsibility."

EXPANDING EXCLUSION

The laws at issue in the *Trageser* and *Patsone* cases—and the court rulings upholding them—were highly influential. In game laws, states were quick to follow Pennsylvania's lead, encouraged by progressive reformers who drew attention to these legislative innovations.[52] Hornaday (1913, 103) wrote in his influential book that Pennsylvania's anti-alien gun law was "the best" and should be "taken as a model for every state and province in America." By 1920, twenty-three states charged noncitizens a higher hunting license fee (Lawyer and Earnshaw 1920). By 1933, thirteen states banned aliens outright from access to hunting licenses, and twelve barred them from fishing licenses (Fields 1933, 218). Several states conditioned gun ownership on citizenship. California, for example, passed a law in 1923 requiring gun permits for pistols and revolvers and barred noncitizens from receiving such permits. As an attorney challenging that law noted, "there is no provision in the law whereby an unnaturalized foreign-born person, not matter what his status may be, can secure a license or permit to own or possess any firearms or stock in trade consisting of firearms."[53]

States also followed Pennsylvania's lead on liquor licenses. On the eve of the passage of the Eighteenth Amendment, which established Prohibition, a majority of states had liquor licensing laws that excluded noncitizens.[54] As one immigrant advocate noted with frustration, "[t]he rule … that aliens may be denied licenses to sell intoxicating liquor, qua alien, is now well established, and it operates to shut aliens out of a vast area of business activity" (Fellman 1938, 148). Citizenship became firmly embedded as a requirement for liquor and hunting licenses. But the impact of these initial licensing laws went well beyond liquor, guns, and game. The *Patsone* case provided support for other exclusionary game laws as well as state attempts to block noncitizens from public employment. Just one year after handing down the *Patsone* decision, the US Supreme Court upheld New York's law limiting employment on public works projects to citizens only, based in part on the state ownership doctrine.[55] In his ruling for the lower court, Judge Benjamin Cardozo made a similar connection, noting

52. The legislature in New Hampshire, for example, passed a law that required noncitizens who had not declared their intent to naturalize to acquire a permit to possess any type of firearm, not just rifles. No such permit was required for citizens. Violations were punishable by a fine of up to two hundred dollars, up to two years in prison, or both. In upholding the law against a challenge from a noncitizen, the Supreme Court of New Hampshire connected gun ownership to allegiance, arguing that it was reasonable for the legislature to require permits of noncitizens and not of citizens because aliens were transitory and potentially disloyal. Aliens "as a class do not understand our customs or laws, or enter into the spirit of our social organization." It was justifiable for a state to make such a classification based on "domicile, allegiance, duty, habit, temperament, and other characteristics which distinguish the citizen and applicant for citizenship from the alien who has manifested no desire or intention to binds himself to support the government." *State v. Rheaume*, 116 A. 758, 763 (N.H. 1922).

53. *Ex Parte Ramirez*, 226 P. Rep. 914, 915 (Cal. 1924).

54. The exclusion of noncitizens from liquor licenses continued unabated after the end of Prohibition; in 1960, forty-three states required citizenship in order to obtain a liquor license (Levin 1964, 786).

55. *Heim v. McCall*, 239 U.S. 175 (1915).

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that "[t]o disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful." Judge Cardozo, like other judges at the time, was little troubled by the notion that aliens, although admitted lawfully, did not merit state membership until such time as they became naturalized citizens. The exclusion, in Cardozo's opinion, was categorial: "The people, viewed as an organized unit, constitute the state. The members of the state are its citizens. Those who are not citizens, are not members of the state."[56] In affirming this view, the US Supreme Court supported efforts in other states to equate public jobs with common property or wild game: as a resource that could constitutionally be restricted to citizens only.

In a similar way, the police power rationale for the limitation of individual economic rights in one industry—the sale of liquor—soon bled into a wide range of restrictions on other forms of immigrant economic activity. Courts across the country cited *Trageser* in upholding provisions that restricted noncitizen licenses in areas unrelated to alcohol—for example, from the operation of certain types of establishments, including pool halls, billiard rooms, and bowling alleys, to selling soft drinks and driving buses and motor cars, among other activities. As the restrictions appeared in areas that were further and further afield from the widely acknowledged social scourge of alcohol, those defending the laws—and the judges ruling on behalf of the state—made even more implausible arguments about the relationship between alienage and the economic activity in question. Driving while a noncitizen provides a good example. In 1917, the municipality of Weehawken, New Jersey, passed an ordinance that required citizenship to obtain a license to operate a vehicle for hire. Russian immigrant Samuel Morin found himself out of a job, and fined ten dollars, for driving without this new chauffeur's license. Morin appealed his conviction to the Supreme Court of New Jersey, which held for the township. The court relied on police powers to argue for wide latitude for municipalities to regulate motor vehicles given the "danger of accident and damage arising from [their] use."[57] But the court made no attempt to explain why citizenship was relevant to safe driving, instead pointing to cases in other areas, like *Trageser*, that had affirmed state power to discriminate on the basis of alienage.

In contrast, the Supreme Court of Rhode Island drew the connection between driving and citizenship directly when reviewing a similar ordinance passed by the city of Providence in 1920. An Italian immigrant who was denied a license under the ordinance sued the city. The court held for the city and supplied a rationale for the discrimination as well: "We think it fairly may be said that as aliens as a class are naturally less interested in the state, the safety of its citizens and the public welfare, then citizens of the state, to allow them to operate motor buses would on the whole tend to increase the danger to passengers and the public using the highways."[58] Since there was, therefore, a basis for the discrimination between citizens and aliens, the ordinance was not unconstitutional. Of course, there is no reason that a lack of citizenship would affect one's driving abilities. As one commentator noted critically, "the court appears to

56. *People v. Crane*, 108 N.E. 427, 429 (N.Y. App. 1915).
57. *Morin v. Nunan*, 103 A. 378 (N.J. Sup. Ct. 1918).
58. *Gizzarelli v. Presbrey*, 117 A. 359 (R.I. 1922).

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assume the point at issue, that is, that there is a causal relationship between allegiance and careful driving" (Alexander 1931, 113). Despite the lack of a rational connection, courts gave wide latitude to legislatures and city councils to make this determination.

By the late 1910s, anti-immigrant sentiment was at a new high, driven by the country's entry into and exit from the First World War, fears of immigrant communist radicalism, and the growing obsession with restricting immigrant admissions to the country. The doctrinal groundwork had already been laid, through the regulation of alcohol and hunting, for the increasing use of state and local laws as tools of economic discrimination. Other nativist groups took up the licensing mission. Chief among these was the Ku Klux Klan, which heavily influenced state legislatures in Colorado and Oregon and cities throughout the Northeast and Midwest (Toy 1962; Lay 2004). The Klan may have had somewhat more extreme viewpoints than the Audubon Society or the WCTU, but the group found legal recourse in the same place—by limiting noncitizen access to business and industry.

In Oregon, the Ku Klux Klan was influential in the adoption of a law by the state legislature in 1923 that barred cities from granting licenses to noncitizens in a wide range of occupations and activities, including operating pool halls and selling soft drinks.[59] A Greek owner of a billiard room challenged this law. In its opinion upholding the state law, the district court, like others before it, hastened to first demonstrate that legislatures had the power to prohibit noxious industries. The court then posed a direct question about the alienage discrimination itself: "Is the classification without any real or substantial relation to the object to be served?" Here, the court provided its own answer since it could not find one in the law's preamble or in the explicit legislative history: "It may be judicially known, however, that aliens coming into this country are without the intimate knowledge of our laws, customs, and usages that our own people have. So it is likewise known that certain classes of aliens are of different psychology from our fellow countrymen." Because, therefore, the legislature likely had a "plausible reason," the court refused to strike down the provision.[60]

Another Greek immigrant, Peter Miller, was barred from selling soft drinks at his restaurant in the city of Niagara Falls, New York, which had also seen a rise in Ku Klux Klan activity (Lay 1995). Miller applied for a license to sell soft drinks at his restaurant, but the city denied his application based on a 1923 ordinance that barred noncitizens from this trade. Miller challenged the law but lost in the New York Court of Appeals, which declared that "it may reasonably be said that the welfare of the community will be best served by excluding from licensees such persons as are not so attached to the institutions of our country as to be in the class of its citizenry."[61] Greek immigrant Charles Balli was forced to shut down his business after he lost his challenge to Cincinnati's 1918 ordinance denying noncitizens the rights to operate billiard halls, pool rooms, and bowling alleys. The Supreme Court of Ohio wasted little ink in denying Balli's appeal.[62] The court gave wide latitude to local police powers: "The authorities of Cincinnati are presumed to be more familiar with such local conditions

59. *General Laws and Resolutions of the State of Oregon* (1923), 232.
60. *Anton v. Van Winkle*, 297 F. 340, 342 (D. Ct. Or. 1924).
61. *Miller v. Niagara Falls*, 207 A.D. 798, 800 (N.Y. 1924).
62. *State ex rel. Balli v. Carrel*, 124 N.E. 129 (Ohio 1919).

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than any foreign tribunal or court," likening the city to an independent entity free to regulate however it sees fit. According to census data, by 1920, Balli had turned to a different line of work—namely, running a confectionary. (Fortunately for him, the city did not determine that the sale of candy required a showing of citizenship.)

The same attorney who represented Balli, George Hawke, tried again a few years later with a new client, George Clarke, who was a British citizen. Clarke, like Balli, was a noncitizen who sought a license to continue to operate a business—in his case, a billiard hall. Hawke argued that the city ordinance was in violation of the US treaty with Great Britain. This time, the case made it all the way to the US Supreme Court, which heard the case of *Clarke v. Deckebach* in 1927.[63] Justice Harlan Fiske Stone noted that states and municipalities were permitted to regulate such places of amusement due to their "harmful and vicious tendencies" and that "alien race and allegiance" may bear sufficient relevance to the legislation to make it a permitted classification. Once again, as in *Patsone* and other alienage cases in this era, the court acted in a remarkably deferential manner: "It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong."[64] In other words, it was enough that the state or local government might have some plausible reason, without even having to give one.

As Justice Lewis Powell of the US Supreme Court would critically remark decades later of the expansive reasoning in *Clarke v. Deckebach*, "[t]his easily expandable proposition supported discrimination against resident aliens in a wide range of occupations."[65] By the 1930s, restrictive licensing regimes were ubiquitous; every state had laws that restricted activities and occupations based on citizenship (Fields 1933, 214). The initial efforts of progressive reformers to limit access to alcohol and guns spread not only to other forms of public work and the regulation of places of amusement but also to a wide range of other licensed trades and occupations; by 1933, Michigan, for example, barred noncitizens from professions as accountants, architects, engineers, lawyers, surveyors, teachers, members of the board of cosmetology, private detectives, promotors of boxing or wrestling matches, and salesmen in international firms. One had to be a citizen to be a real estate agent in New York and New Jersey, a taxidermist in Maine, a mining inspector in Illinois, Kansas, Montana, West Virginia, and Wyoming, and a boat puller in Oregon (Fields 1933). State variation was common. Despite Michigan's strongly worded condemnation in the *Templar* case of the restriction on barber's licenses, for example, eight other states adopted citizenship-based restrictions for barbers, with no comparable push back from their courts.[66]

Even the cases that pushed back most strongly against this tide of alienage restrictions still left plenty of room for economic exclusion. In the 1915 case of *Truax v. Raich*, for example, the US Supreme Court struck down Arizona's state-wide ballot initiative known as the "Alien Labor Act," which required any employer of more than

63. *Clarke v. Deckebach*, 274 U.S. 392, 397 (1927).

64. *Clarke v. Deckebach*, 274 U.S., 397.

65. *In Re Griffiths*, 413 U.S. 717, 721 (1973).

66. *Templar v. Michigan State Board of Examiners of Barbers*, 131 Mich. 254 (1902). Five states had laws requiring citizenship for barbers, and three others allowed them only for declarant noncitizens (Schibsby 1940, 360).

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five workers to employ at least 80 percent native-born or naturalized citizens.[67] The majority opinion criticized the problematic breadth of the law, noting that it "covers the entire field of industry" and that it "is imposed upon the conduct of ordinary private enterprise." Because of its breadth, the law encroached upon the "ordinary means of earning a livelihood" and was therefore unconstitutional. The court drew a direct connection between the federal power to control immigration and the application of state employment laws, noting that "the assertion of an authority to deny aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode."[68] The court acknowledged the nexus between the immigration power and alienage discrimination, highlighting the fact that regulations that are purportedly about state resources and state police power can function as restrictions of movement—that is, as immigration law.

Yet, at the same time, the US Supreme Court was careful to list out various areas where state action implicating alienage would be constitutional, such as in the distribution of the public domain or in regulating health and safety. The decision, while striking down the law at hand, reinforced what it called "the broad range of legislative discretion" in the area. As a result, the *Truax* decision had little impact on the licensing cases that followed. In fact, it was commonly cited by later courts in support of state police powers rather than as a limitation on them. While the court held therefore to the outer bound of no broad employment bans, it left wide latitude for states and municipalities to create strikingly different economic regimes for noncitizens using the tool of licensing. Despite the holding of *Truax*, this state variation was supported explicitly by the court in later cases. As Justice Pierce Butler stated in the 1923 alien land law case of *Porterfield v. Webb*, "[i]n the matter of classification, the states have wide discretion. Each has its own problems, depending on circumstances existing there. It is not always practical or desirable that legislation shall be the same in different states."[69] Such a statement made it clear that noncitizens would continue to be subject to variations in their rights depending on what state they lived in, despite the fact that they were admitted to the nation through a federal process that was supposed to have preemptive power over such state variation.

THE PERSISTENCE OF A DIFFERENCE

By 1930, it was clear even to casual observers that noncitizens faced a wide range of limitations on their access to the marketplace and the workplace, most of which had not been in place just a few decades before. Those assisting immigrants learned that they had to warn them about the expansive panoply of laws. In the *Handbook for Immigrants to the United States*, published by the Foreign Language Information Service in 1927, Marian Schibsby (1927) described the complex web of licensing restrictions new immigrants were bound to encounter when trying to find work. Noting that "the regulations vary in the different states and cities," she cautioned immigrants to "inquire about the license regulations of the community in which he has settled, or plans to

67. *Truax v. Raich*, 239 U.S. 33 (1915).
68. *Truax*, 239 U.S., 42.
69. *Porterfield v. Webb*, 263 U.S. 225 (1923).

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settle" so that he may avoid the possibility of arrest or fine (95). By 1939, New York City alone, Schibsby (1940) noted in a later study, barred aliens from multiple lines of work, including "junk dealers, dealers in second-hand clothing, organ grinders and other street musicians, peddlers, public porters, locksmiths and key makers, massage operators, expressmen, drives of public carts, drivers of dirt carts and taxicab drivers." In addition, noncitizens were barred from operating "a bathing establishment, a bowling alley, a laundry, a shooting gallery, a newsstand," among other related business (363).

Such laws had direct impacts on individual immigrants as well as on immigrant communities more generally. Regulations such as these not only prevented noncitizens from entering a particular line of work, but they also pushed current proprietors out of business since they did not include any sort of grandfather clause to allow current business owners to operate under the new licensing scheme. Social scientist and immigrant advocate Harold Fields (1933, 220) noted that these laws "create unwarranted hardships: aliens are thrown upon the charities for their support and often, their carefully built plans, so often constructive and economically advantageous, are shattered." Some lost their businesses; some had to pay stiff fines; still others spent time in jail, like Gevino Ramirez, a forty-four-year-old Mexican laborer, who was sentenced to a year in the state penitentiary at San Quentin for possession of a small semi-automatic weapon, in violation of California's law requiring citizenship for gun licenses.[70]

Some immigrants could escape the operation of these laws by becoming citizens, but, for many, this path was made much more difficult, if not impossible, during the Progressive Era. In the early twentieth century, the federal government made significant moves to tighten up and control the process of naturalization, starting with the Naturalization Act of 1906.[71] The 1906 Act added for the first time an English language requirement to naturalization, significantly reduced the number of courts eligible to adjudicate applications, mandated that naturalization decisions be heard in open court (so that the government or others could challenge the judge's decision), and required courts to record and investigate any discrepancies in the affidavits of the applicant and their required American citizen witnesses. These were added to the preexisting requirements that the applicant be at least eighteen years of age, have lived continuously in the United States for five years, be of good moral character, demonstrate attachment to the Constitution, take an oath of allegiance, and pay a fee. The 1906 Act also added statutory grounds for denaturalization, the process of stripping naturalization from an immigrant due to allegations of fraud or lack of allegiance. Due to these changes, naturalizations plummeted from an estimated one hundred thousand per year prior to 1906 to only 7,953 in 1907. The numbers eventually rebounded as the federal naturalization bureaucracy became more efficient, but it took years for them to return to prior levels (Weil 2013, 15–21).

Even more drastically, naturalization was barred completely for immigrants of Asian descent. Chinese immigrants were explicitly barred from naturalization starting in 1878 (Parker 2015, 151). Other Asian migrants were denied naturalization under the

70. Department of Corrections, San Quentin State Prison Records, 1850–1950, file R135, California State Archives, Sacramento, California.

71. President Theodore Roosevelt assigned a commission to make recommendations on reforming the naturalization process (House of Representatives 1905). Many of these were adopted in the resultant legislation. Naturalization Act of 1906, 34 Stat. 596.

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Naturalization Act of 1870, which limited the right to those who were either white or of African descent (López 1996, 37–46).[72] Challenges to the racially discriminatory naturalization law failed to gain traction in the courts, and Asian immigrant claims to the status of whiteness were similarly denied.[73] Thus, for Asian immigrants—as well as for those from other parts of the world who struggled with learning English, were accused of crimes or radical tendencies, lacked financial resources, or were not supported by citizen witnesses—naturalization was unobtainable, meaning that alienage discrimination was inescapable. They may have been admitted to the country, but they were never able to become full members of the polity, economy, and society.

To immigrants and their advocates, this disconnect between national admission and state discrimination proved highly frustrating. As Harold Fields (1933, 213) noted, "[t]hese foreigners are being denied the opportunity to work, despite the fact that they were legally admitted to this country and with the foreknowledge by the government, in most instances, that they would seek to earn their own living." The editorial board of the *Immigrants in America Review* (1915, 5) referred to these laws as an "underhand method of discrimination," a sort of bait and switch, as they described it: "We say to [the immigrant] when he comes in: These are the bars you must pass, this is the standard we set. Take them and make them and you are free to enter the land of liberty and opportunity. In reality we are not so sincere and are becoming each year less and less so. In our right hand we hold a welcome; in our left hand a club." Fields implored lawmakers to take a different approach: "The philosophy of caring for one's own—upon which tenet this form of discrimination is founded—must be modified, in occupational opportunities, to caring for all who are legally in our midst" (Fields 1933, 221).

The idea of expanding the scope of those entitled to share in the goods of the workplace and marketplace did not take hold as a matter of federal constitutional law until the 1970s, when the US Supreme Court finally abandoned the "special public interest" doctrine and declared that noncitizens were a "discrete and insular minority," meaning that any state or local laws that discriminated against them would be subject to strict scrutiny in the courts (Tirres, forthcoming). In the mid-1970s, the court declared unconstitutional two discriminatory licensing schemes: Connecticut's law barring noncitizen attorneys and Puerto Rico's prohibition on noncitizen engineers.[74] It would seem, based on these holdings, that the courts had finally put a stop to using licensing laws to discriminate against noncitizens without a compelling interest.

Yet despite this significant turnabout in the doctrine, discriminatory licensing laws persist today. As recent work by legal scholars demonstrates, dozens of states still have citizenship-based occupational restrictions across a range of areas, despite their apparent unconstitutionality (Calvo-Friedman 2014, 1597; Calvo 2017, 33; Olivas 2017, 65). These laws limit a wide range of professions and trades to citizens only, including animal breeder (Delaware), commercial fisher (South Carolina), pharmacist (Pennsylvania), psychologist (Tennessee), and video lottery operator (West Virginia), among many others (Olivas 2017, 154–64). More than twenty states contain alienage restrictions in

72. Naturalization Act of 1870, 16 Stat. 254.

73. *Ozawa v. United States*, 260 U.S. 178 (1922); *United States v. Thind*, 261 U.S. 204 (1923).

74. *In Re Griffiths*, 413 U.S. 717 (1973); *Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572 (1976).

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their firearms laws (Gulasekaram 2012, 622). Other jurisdictions have limited access to occupational licenses to legal permanent residents only, barring those who are lawfully within the country on temporary visas (also known as "nonimmigrant visas") from accessing certain jobs. Circuits are split on whether this type of discrimination against temporary workers is constitutional (Seipp 2012, 1389).[75]

A significant number of jurisdictions have drawn the line not at citizenship or legal permanent resident status but, instead, at legality (Tirres, n.d.). Under these eligibility criteria, immigrants can only access those licensed activities if they can demonstrate that they are in the country with authorization. This turn to legal status as a licensing limitation raises a whole set of additional problems since state and local definitions of who is "legal" can vary widely, and immigration law is highly complex. As Justice Harry Blackmun noted in his concurrence in *Plyler v. Doe*, "the structure of immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported."[76] Yet this has not prevented states and municipalities from inserting this new qualification into a range of licensing provisions. Some of them—like anti-immigrant housing ordinances that require proof of legal status for an "occupancy license"—have been struck down by the courts as a violation of the Supremacy Clause, but others—like Arizona's law withholding business licenses from those who are alleged to hire unauthorized immigrants—have withstood court challenge.[77] These controversies demonstrate that the problems of discriminatory licensing continue, in forms both old and new.

CONCLUSION

This article furthers our understanding of the proliferation of alienage discrimination in the twentieth century by revealing the deep roots of these restrictions in liquor and hunting licenses and tracing their growth over time to many other areas of state and local regulation. Although these laws were commonly justified as a means to protect public safety or conserve fiscal resources at the local level, they were also a powerful tool in the arsenal of immigration enforcement. Immigrants, lawmakers, activists, and judges all understood that exclusionary state and local laws had immigration law repercussions. As one temperance advocate noted in 1891, a federal bar on immigrant admissions was ideal, but, barring that, these other forms of exclusion would suffice: "Incidental discriminations and not arbitrary and sweeping prohibitions against alien immigration and suffrage are the most that may be reasonably hoped for" (Meader 1891, 182).

These so-called "incidental discriminations" were anything but minor to those faced with losing a livelihood, forfeiting a business, or being barred from a profession due to state or local laws. This method of immigrant exclusion was less visible, and more mundane and bureaucratic, than the major federal restrictions on immigrant admissions

75. See *Dadamundi v. Tisch*, 686 F.3d 66 (2d Cir. 2012); *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005); *LULAC v. Bredesen*, 500 F.3d 523 (6th Cir. 2007).

76. *Plyler v. Doe*, 457 U.S. 202, 236 (1982) (Blackmun, J., concurring).

77. US Const. art. VI, cl. 2; Hazleton, Pennsylvania, *Illegal Immigration Relief Act*, Ordinance 2006-18, § 2(C) (enacted September 21, 2006); *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011).

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that eventually succeeded in Congress in the 1920s; as Lawrence Friedman (1965, 489) quips, licensing is a "quieter, blander area of constitutional law." Yet it was precisely this quality of licensing laws that made them so effective: they reached into aspects of the daily lives of immigrants in ways that no federal regulations could.[78] Through licensing laws, state and local governments became gatekeepers in their own right, enforcing immigrant exclusion from the interior rather than at the borders.

Taking this history seriously forces a reconsideration of the dynamics of immigration federalism. The standard narrative characterizes the early twentieth century as a break from the past, a time when the federal government stepped in to usurp the power of the states in immigration enforcement.[79] Yet the break was not so clean. As this examination of licensing laws demonstrates, the courts allowed a continuation of an earlier tradition of state and local involvement in the regulation of immigration to continue into the twentieth century by consistently deferring to "local conditions" and allowing states to define "the people" as excluding resident noncitizens, despite the supposed centralization of immigration functions in the federal government. State and local governments did not disappear from the regulatory landscape but, instead, focused their exclusionary efforts in new directions. For immigrants, the Progressive Era represented both a consolidation of federal immigration powers at the gates and a splintering world of state and local restrictions in the interior, which only served to highlight the tenuousness of their admission.

This history further illuminates the wide cast of characters in American history who have shaped access to the economy and society by deploying the legal category of citizen in particular ways. The Constitution granted Congress the power to define the criteria and the procedures to become a citizen through naturalization, but state and local governments gave meaning to that category, deciding which rights adhered for citizens only and which were available for all residents. It was an attempt to carve out a "space of legal privilege," in Barbara Welke's (2010, 21) apt phrasing, that would clearly delineate a bright line between citizen and alien. But this form of categorical gatekeeping did not go uncontested. Immigrants themselves pushed back, seeking to widen the rights available to those without citizenship and thereby to establish more robust constitutional protections for all of those residing within the territorial boundaries. This study provides a prime example of how immigrants have, as Rachel Ida Buff (2008, 10) notes, "challenged the boundaries of citizenship, in many cases transforming them and in other cases forcing the state to publicly articulate its justification for their ongoing exclusion." The contest over licensing laws is part of this long-standing—and ongoing—discursive struggle over who belongs in the American polity, economy, and society.

78. Historian Peggy Pascoe (2009, 139) notes this paradox in her study of the history of miscegenation laws: "The issuance of marriage licenses was, on the one hand, a seemingly minor, almost invisible, process carried out by local officials who ordinarily attracted little public attention. On the other hand, it reached deeply into the livres of ordinary citizens."

79. For a more accurate and updated treatment of this transition from the nineteenth to the twentieth centuries in immigration federalism, see Gulasekaram and Ramakrishnan 2015, 13–27.

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