THE RIGHT TO WORK OF ALIENS IN THE UNITED STATES(*)

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I — INTRODUCTION AND IMPORTANCE OF THE PROBLEM

The United States has been from the beginning of its existence a country of immigration; even now, when the flow of new comers is much more limited and reduced by the quotas, it continues to be a country of immigration.

The immigrants who come to their new land must earn a living by working or they, being unable to take care of themselves and of their familiies, become public charges and have to be supported by public assistance.

On the other hand, there is the competition of cheap foreign labor which will reduce the wages of workers or sometimes leave them unemployed. So two social policies are in conflict, one of which is to accept immigration even though on a limited scale, to increase the population of the country and the other is to protect American labor against cheap foreign competition. These two policies which seem in conflict in a superficial inquiry are in realty complementing each other. In fact, limited immigration can be used to protect native labor by excluding cheap labor from immigration.

Besides the right to work of immigrants who are in reality future citizens of the country, the right to work of other aliens

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who are either ineligible for citizenship or who are not willing to be naturalized must be considered. These too can be excluded from the United States if they want to perform cheap labor or after they are admitted the right to work can be denied.

Are such prohibions possible in the national sphere ? If so can they be accepted in international relations? Are they harmful to the spirit of international community?

There is another angel of the problem : the effect of American legislation and cases with respect to the right of aliens to work on the rights of Americans to work in various foreign countries. More then two million Americans live abroad, most of whom have to work to earn a living.

A third aspect of the right to work of aliens is the impact of alien labor in improving American life. Many provisions in immigration laws provide exceptions for persons with high education, technical training, specialized experience or exceptional abilities whose services are urgently needed in the United States.

II — HISTORICAL BACKGROUND

Until 1875 the United States government consistently followed the open-door policy with respect to immigration[1]. The first federal statute on immigration was the Act of March 3, 1875[2] which excluded prostitutes and convicts. The second act passed by Congress was the statute of August 3, 1882[3] which barred lunatics, idiots, and persons unable to take care of themselves without becoming public charges.

The first federal prohibitive legislation on the right to work of aliens is the Chinese Exclusion Act of May 6, 1882[4] which was followed by the Acts of 1884[5] and 1886[6]. So Congress, within a very short time, seven years, after starting to regulate

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1) **Milton R. Konvitz**, The Alien and the Asiatic in American Law 1946, 1

2) 18. Stat. 477 (1875)

3) 22. Stat. 214 (1882)

4) 22 Stat. 58 (1882)

5) 23 Stat. 115 (1884)

6) 25 Stat. 476, 577 (1886)

immigration excluded some foreigners who were coming with the open intention to perform labor.

The 1882 Act only suspended the immigration of Chinese laborers for ten years. In 1892[7] it was renewed for another ten years and in 1902 the suspension was converted into permanent exclusion[8]. The Chinesse Exclusions laws were repealed in 1943.

Japanese nationals' immigration was almost stopped between 1908 and 1923 with the conclusion of a Gentlemen's Agreement by Theodore Roosevelt in 1907. Then Congress passed the 1924 Quota Act which was in reality the Japanese exclusion act. It was still in force when the Second World War broke out.

The qualitative limitations which barred undesired aliens were codified in the Immigration Act of 1917[9] which for thirty-five years was one of the two major pillars of immigration regulation[10].

The Act of 1917 barred virtually all Asiatic immigration. The barred-zone provisions of the Act prohibited immigration from the following countries : India, Siam, Arabia, Indo-China, the Malay Peninsula Afganistan, New Guinea, Borneo, Java, Ceylon, Sumatra, parts of Russian Turkestan, Celebes, parts of Siberia and various other places[11]. The Chinese Exclusion Acts and the 1907 Gentlemen's Agreement with Japan had already barred the nationals of these countries. The impoverishment of Europe following the First World War increased the fear of those interests in the United States which were against unrestricted immigration. The severe post war depression coupled with the isolationist' view were other elements responsible for bringing the first numerical limitations on immigration to the United States by the Quota Law of 1921[12], which was to be a temporary measure. With very few exceptions there were quotas for each nationality totaling three

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7) 27 Stat. 25 (1892)

8) 32 Stat. 172 (1902)

9) 39 Stat. 874 (1917)

10) **Charles Gordon and Harry N. Rosenfield,** Immigration Law and Procedure, 1959, 98

11) **Maurice R. Davie,** World Immigration, with Special Reference to the United States, 1933 Revised ed. 342

12) Act of May 19, 1921, 42 Stat. 5 (1921)

per cent of the foreign born persons of that nationality residing in the United States in 1910, for an annual total of approximately 350.000. This law was scheduled to expire in 1922 but it was extended to June 30, 1924.

Numerical restrictions became permanent in the Act of 1924[13], which adopted a national origins formula according to which the quota was determined by the number of persons of their national origin in the United States. This formula cut down the huge flood of immigration from southern and eastern Europe.

The immigration acts of 1917 and of 1924 which remained substantially unchanged until 1952 governed the immigration policy of the United States government the former with respect to qualitative restrictions and the latter with respect to numerical limitations, Asiatics being excluded by both. The Immigration and Nationality Act of 1952 known as the Mc Carran Walter Act[14] ended exclusion of Asiatics.

The Contract Labor Act of 1885[15] is an early enactment which was designed to protect American workers from the competition of imported foreign laborers. The law of 1885 and the Contract Labor Act 1887[16] were enacted with the purpose of stopping the import of cheap foreign labor under labor contracts which depressed the labor market in the United States. The contract labor law and its amendments remained a cardinal feature of American immigration policy until 1952 when they were superseded[17].

III — LEGISLATIVE DISCRIMINATION

Legislative discrimination against aliens with respect to the right to work can be considered in three aspects.

1) Their exclusion from the country, 2) their expulsion 3) the denial of right to work even though their stay is permitted.

1) The United States immigration policy to exclude foreign

13) Act of May 26, 1924, 43 Stat. 153 (1924)
14) Title 8 United States Code Annotated
15) 23 Stat. 332 (1885)
16) Act of Feb. 23, 1887, 24 Stat. 414
17) **Gordon and Rosenfield**, op cit. p. 98.

laborers is explained above. " The protection of national labor against foreign competition is responsible for numerous classes of exclusion laws, such, for example, as the Chinese exclusion acts"[18] The impact of labor considerations to halt the immigration is obvious in many documents prepared by responsible leaders of American public.

The National Commission on Law Observance and Enforcement treating of Crime and the Foreign Born was composed of many distinguished Americans under the charmanship of George W. Wickersham. In the letter of transmittal of this Commission to the President of the United States, of June 24, 1951, it is plainly stated that the alien's competition as a laborer " in times of economic distress is a consideration worth to be taken " into account in the formulation of the Nation's policy toward Immigration[19].

We shall discuss its constitutionality and its standing in international law below.

2) Congress passed only two laws for the expulsion of foreign laborers. One of them was enacted in 1888[20] as an Amendment to the Contract Labor Law. The second statute was enacted in 1892 with the open purpose to expel Chinese laborers[24].

Mr. Reuben Oppenheimer, of the Baltimore Bar, in his " Report to the National Commission on Law Observance and Enforcement " on " The Enforcement of the Deportation Laws of

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18) **Edwin M. Borchard,** The Diplomatic Protection of Citizens Abroad, New York: 1915, 80

19) The passage is this "... in times of economic distress, when the last comer into competition for employment is regarded as an intruder. At such times there is grave danger of the growth of antiforeign feeling generating real and drastic discrimination which in turn breed defensive and retaliotory disorder.

Such considerations, of course, must be taken into account in the formulation of the Nation's policy toward immigration. "

National Commission on Law Observance and Enforcement, Report on Crime and the Foreign Born, p. 2.

20) Act of October 19, 1888, 25 Stat. 566

21) 27 Stat. 25 (1892)

the United States ", of April 1, 1931,[22], under the subdivision " Considerations involved " declares that " the execution of the deportation laws is one of the most important functions carried put by the United States Government. There are involved considerations fundamental to the people of the United States and to its institutions. " And in favor of deportation he cites the following considerations : enforcement of immigration laws, riding country of undesirable aliens, fairness to excluded aliens and protection of American workmen. Under this heading he writes : " The problem becomes particularly acute in times of depression and economic hardship when unemployment is great. The presence of aliens unlawfully here often results in actual deprivation to American workers and their families. " Even though Mr. Oppenheimer talks about unlawfully present aliens it is not hard to link this reasoning to lawfully admitted aliens.

Another indication is that immigration and deportation functions which remained until 1903 in the Treasury Department were transferred by Congress to the Department of Commerce and Labor and when in 1913 the new Department of Labor was established these functions were intrusted to it. They remained in the Department of Labor between 1813-1940.

3) The alien is denied right to work in the federal field and in states even though he is lawfully admitted.

Federal service is virtually closed to aliens. On the other hand the federal structure of the United States allows the states under the police power to pass laws prohibiting work to aliens who are admitted to the United States under the jurisdiction of the Federal Government. The problem here is to find out the real ends of federal and state legislation. If the main aim of federal legislation is to prohibit alien to work after he has been lawfully admitted under the authority of another or the same federal legislation then it can be declared unconstitutional. For the state legislations if they reasonably regulate the right to work for the protection of health morals, public safety and general welfare, and if they conform to the essential of equal protection of laws, they

22) This report which was kept " confidential " for a while in the libraries is available now for general public.

are constitutional. Another problem to be investigated here is the conflict of such federal and state regulations as are constitutional with existing treaties.

1. CONSTITUTIONALITY OF LEGISLATIVE DISCRIMINATION

A. Statutes to exclude foreign laborers

The Supreme Court in 1889 upheld the constitutionality of the Acts of Congress barring Chinese laborers. The Chinese Exclusion Case involved a Chinese laborer who had stayed from 1875 to 1887 in San Fransisco. He had left for China in 1887 with a permission from the United States Government to return to America. This certificate was given to him according the provisions of the Acts of 1882 and 1884. When he presented this certificate in 1888 upon his return to America his entry was refused on the ground of a new Act[23] enacted seven days before his return, though after he had left China. This new act had annulled all outstanding certificates and so his right to re-entry was abrogated. The Chinese laborer assailed the validity of the Act of 1888 as a violation of rights vested in Chinese laborers living in the United States and as a violation of treaties between China and the United States. The Supreme Court unanimously rejected this action. The Court said that Congress may exclude aliens if Congress " considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security "[24] they may be excluded, though the countries are at peace.

The Supreme Court declared that the power to exclude aliens is an incident of sovereignty, part of the powers delegated by the Constitution. The United States Government was free to revoke at any time, at its pleasure, the licences issued for the return of the alien laborers.

The Supreme Court conceded that the Act was in contravention of the express stipulations of the treaties existing between China and the United States, but as treaties are not superior to

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23) 25 Stat. 476 (1888)
24) 130 U. S. 583. (1889)

Acts of Congress but their equals, the last expression of the sovereign will controls thus the act is valid.

After the Chinese Exclusion Case, the Supreme Court " whenever this legislation was challenged sustained in the broadest language the absolute power of Congress to suspend immigration or permanently exclude all aliens, or the members of a particular race. "[25] However, it is intersting to note that the Supreme Court in two cases before the Chinese Exclusion case sustained the right to re-enter of two Chinese laborers who did not have the required certificate for re-entry. In fact in *Chew Heong v. United States*[26] decided in 1884 the Supreme Court sustained the right to re-enter of a Chinese laborer who was absent from the United States temporarily when the Act of 1882 suspending immigration of Chinese laborers for ten years but preserving the rights of those Chinese laborers who were in the United States since 1880 or who were to come within ninety days after the passage of the act to depart from the United States and re-enter, had been passed. Chew Heong did not have the certificate required by this Act. But the Supreme Court upheld his right to re-enter declaring that the Act of 1882 was not intended to contravene the Treaty of 1880.

In *United States v. Jung Ah Lung*[27] the Supreme Court dedided in 1888 that a Chinese laborer who was lawfuly in the United States in 1880 and who had left in 1883 taking with him a certificate of re-entry which was stolen from him in China was entitled to re-entry. The 1884 Act making the certificate the only permissible evidence was enacted when he was absent and therefore was not applicable.

There is first a general question : Does an alien have constitutional protection under the Federal Constitution? The answer to this question is yes. The Fourteenth Amendment covers aliens

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25) **Konvitz**, op. cit. p. 9. To sustain Konvitz' statement the following cases can be cited : Nishimura Ekin v. United States 142. U.S. 651 (1892); **Chae Chan Ping** v. United States, 185 U.S. 296 (1902) Japanese Immigration Case, 189 U.S.J 86 (1903); Turnr v. Williams 194 U.S. 279 (1904); Keller v. United States, 213 U.S. 138 (1909).

26) 112 U.S. 536 (1884)

27) 124 U.S. 621 (1887)

as well as citizens. A clause of that Amendment reads : " No state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of laws ". There was never doubt that an alien is a person under the Fourteenth Amendment. The Supreme Court quickly answered this question in *Yick Ve v. Hopkins*[28]. Thus an alien, being a person, has the equal protection of laws.

But it seems that an alien who is not legally admitted to the country cannot enjoy this right. The power of Congress to exclude aliens is accepted by all major writers on constitutional law in the United States. The Supreme Court has many times asserted this right. *In Fong Yue Ting* v. *United States*[29] the Supreme Court has said :

> " The right to exclude or expel aliens or any class, absolutely or upon certain conditions, in war or peace (is inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare. "

In *United States ex rel. Volpe v. Smith*[30] the Supreme Court reaffirmed this power of Congress in the following words : " the power of Congress to prescribe the terms and conditions upon which aliens may enter or remain in the United States is no longer open to serious question. "

B. Statutes to expel foreign laborers

Congress in 1888 enacted a law for the deportation of alien contract laborers within one year after entry. The law of 1892, the second statute enacted on the deportation of laborers was aimed at all Chinese laborers resident in the United States. Every Chinese was required to prove at least by one credible white witness that he was a resident of the United States at the time of the passage of the Act. Upon challenge of constitutionality, the Supreme Court sustained the Act. The Court said : " The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the coun-

28) 118 U.S. 356 (1886)
29) 149 U.S. 698 (1893)
30) 289 U.S. 422 (1933)

try... is absolute and unqualified as the right to prohibit and prevent their entrance into the country"[31]. The Court declared also that the determinations of Congress in this area were political and not subject to scrutiny. The conception of the Supreme Court is that an alien, laborer or not, remains in the United States on sufferance, his reception and stay are matters of permission or simple tolerance and create no obligation[32]. The Court in *Fong Yue Ting* said that expulsion is not the same thing as banishment, it is not punishment for crime. However later the same Court characterized deportation as " a drastic measure and at times the equivalent of banishment or exile... It is the forfeiture for misconduct of a residence in this country. Such forfeiture is penalty"[33].

Mr. Justice Brewer wrote a dissent in *Fong Yue Ting*. He said that persons legally in the United States were under the protection of the constitution and that the statute of 1892 deprives them of liberty without due process of law.

In the Federal Constitution there is no direct recognition of the power to deport as there is no direct mandate dealing with the power to regulate immigration. As for the power to regulate immigration the Supreme Court upheld the measures of the general immigration Act of 1882 as a regulation of foreign commerce[34]. But the Supreme Court later broadened the era of federal power. In fact in *Chinese Exclusion Case (Chae Chan Ping v. U.S.)*[35] and in *Ekiu v. United States*[36] the Court remarked to the possibility to imply the power to regulate immigration from the provisions of the Constitution on regulation of foreign commerce, declaration of war, making of treaties, establishing a uniform rule

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31) In Fong Yue ing, supra p. 10, N. 2.

32) Ibid. and Harisiades v. Shaughnessy, 342 U.S. 580, (1952) where again the Supreme Court asserted that the resident alien's stay in this country " is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted by this Court since the question first arose. "

33) Justice Douglas speaking for the Court in Tan v. Phelan, 333 U.S. 6, 10.

34) he Head Money Cases, 112 U.S. 580.

35) Cited supra note 24.

of naturalization, prohibition the importation of persons and making all necessary and proper laws. But the Court pointed out that even the possibility for implied power to regulate immigration was strong, this power existed as an incident of national sovereignty and without regard to any specific provision in the Constitution. The Court said in *Ekiu* v. *United States*:[37]

> " It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may se fit to prescribe. "

The same conception of inherent power in national sovereignty and resting on an identical constitutional base as the power to bar entry was applied to the expulsion of aliens. The Supreme Court in *Fong Yue Ting* declared that the power to expel aliens " rests upon the same grounds... as the right to prohibit and prevent their entrance into the country. " The Supreme Court did not feel changing or overruling this decision in 1952 when the opportunity arose. In fact in *Harisiades v. Shaughnessy*[38] the Court after pointing out that the Supreme Court always sustained the right of the Government's power to expel or " to terminate its hospitality " in the Court's words since the question first arose, came to the conclusion that " Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it. "

Recently it has been suggested that there should be a distinction between the ejection of aliens who are lawfully admitted and have established deep roots here during long periods of residence and those who have entered unlawfully[39]. But the courts and Congress did not take this suggestion into consideration.

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36) 142 U.S. 651 (1892)

37) Ibid.

38) Cited Supra note 32.

39) See **Maslow**, Recasting Our Deportation Law, 56 Col. Law Review, 309, 323 (1956), " Immigration and Nationality ", 66 Harvard L. Review 643, 681 (1953).

The Supreme Court still insists on the absolute and "plenary" authority of Congress to deport undesirable aliens in a recent case *Carlson* v. *Landon*[40]. Beside the absolute and plenary nature of the authority of Congress on the subject, the Supreme Court still holds the early view expressed in *Fong Yue Ting* that the determinations of Congress in this era are political in nature and not subject to judicial scutiny[41]. This view was strongly put out in an early case, *Oceanic Steam Navigation Co. v. Stranahan*[42] which declared on deportation that " over no conceivable subject is the legislative power of Congress more complete. "

There is no decision of the Supreme Court directly supporting any limitations to the power of Congress to legislate for the expulsion of aliens. However some writers have disputed the assumptions underlying the traditional concept of absolute powe[43]. " And the soul searching doubts displayed by the Supreme Court have encouraged continued jousts by litigants questing a weak point in the protective armor of precedent " [44].

In the near future with changes in the membership of the Supreme Court one may envision possible situations in which the Court might find that a legislative mandate conflicts with some safeguard of the Constitution. But until now the Supreme Court and other courts did not declared unconstitutional any deportation statute. So the acts of 1888 and 1892 which are the only two laws enacted for the purpose of expelling foreign laborers are constitutional.

We can thus conclude that the statutes to expel foreign laborers are constitutional.

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40) 342 U. S. 524.

41) In Harisiades v. Shaughnessy, cited supra note 32.

42) 214 U.S. 320, 339.

43) **Milton R. Konvitz**, Civil Rights in Immigration, (1953), ch. 2., Note, " Constitutional Restraints on the Expulsion of Aliens ", 37 Minn. L. Rev. 440 (1953); Note, " The Alien and the Constitution ", 20 U. Chi. L. Rev. 547 (1953) **Maslow** " Recasting our Deportation Law " cited supra. note 38.

44) **Charles Gordon** and **Rosenfield**, op. cit. p. 400-401.

C. Statutes denying the right to work to aliens who are legally admitted

Liberty as used in Fourtheenth Amendment means more than freedomservitude[45]. This word was interpreted by the Supreme Court as a guarantee that any person may use his powers of mind and body in pursuing any lawful calling, in *Mc Cready v. Virginia*[46] Aliens being u nder the protection of Fourteenth Amendment, then can pursue any lawful calling. The reality is not in conformity with this doctrine, federal employment as well as many lawful callings in states are almost closed to aliens.

a. Federal Statutes

Aliens have very limited opportunities for employment in Federal government. The General Government Matters Appropriation Act of 1959 has a general prohibition clause to which there are some exceptions.

Section 202: "Unless otherwise specified and during the current fiscal year no part of any appropriation contained in this or any other Act shall be used to pay compensation of any officer or employee of the government of the United States (including any agency the majority of stock of which is owned by the government of the United States) whose post of duty is in continental United States unless such person (1) is a citizen of the United States (2) is a person in the service of the United States on the date of enactment of this Act who being eligible for citizenship, had filed a declaration of intention to become a citizen of the United States prior to such date, (3) is a person who owes allegiance to the United States or (4) is an alien from the Baltic countries lawfully admitted to the United States for permanent residence[47].

The exceptions to the prohibition are stated a little further:

" This section shall not apply to citizens of the Republic of Phillipines or to nationals of those countries allied with the

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45) **Norman Alexander**, Rights of Aliens under United States Constitution 1931, p. 104.

46) 94 U. S. 391 (1876).

47) Public Law 85-468, 72 Stat. 220 (1958)

United States in the current defense effort or to temporary employment in the field service (not to exceed sixty days) as a result of emergency[48].

However the aliens eligible under these exceptions cannot be appointed for any position in the competitive service which form " most of the positions in the United States Civil Service"[49] because all positions in the competitive Civil Service are closed to aliens.

The vacancies in this service are filed from registers of eligibles established as a result of competitive civil -service examinations when the vacancies are filled through original appointment. Persons admitted to competitive civil service examinations are either citizens of the United States or non-citizens who owe allegiance to the United States are natives of American Samoa. Then we can say that the equality of opportunity and the opportunity to apply for the competitive service in federal employment, which exist for American citizens and natives of American Samoa, do not exist for aliens. The equality of opportunity and the opportunity to apply are defined as follows by Harris Ellsworth, Chairman of the United States Civil Service Commission : Equality of opportunity : " All citizens of our country regardless of their politics, religious beliefs, race or creed have the right to compete for employment on the basis of their ability and fitness for the work to be done. " Opportunity to apply : " Citizens who are interested must have a chance to make their interest known and to receive consideration"[50].

The only exception to the prohibition of aliens in the competitive service is the admission of the citizens of the Republic of Panama to examinations for employment by the Canal Zone Government and the Panama Canal Company in the Canal Zone[51].

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48) Ibid.

49) United States Civil Service Commission, " The Employment of non-Cicizens in the United States Civil Service " Pamphlet 24, October 14, 1952, p. 1.

50) Charles Cooke, Biography of An Ideal, The Diamond Anniversary, History of the Federal Service, Foreward by Harris Ellsworth, p v-vi.

51) Pamphlet no : 24 cited supra note 49.

The appointment of non-citizens through non-competitive examination is possible under the civil service rules, provided that no citizens who had qualified under civil service standards are available for appointment.

Objections to the federal employment of aliens started as early as 1930's.. However the existence of these objections to the use of federal funds as compensation of Federal employees who were not citizens during the depression years of 1930's was not strong enough to bring restrictions. The first specific restrictions were introduced by the Treasury and Post Office Appropriation Act of 1939[52].

Since it has been a custom of most appropriation acts to have similar restrictions. However exceptions were to be made mostly in cases of scientific foreign personel " non citizens of outstanding ability who where perhaps the only persons qualified to perform specific tasks"[53].

With the Second World War the number of exceptions increased. Many noncitizens who were nationals of United States' allies were employed in many Departments. After the war " the number of noncitizens in the Federal service, and the number of positions available to noncitizens have greatly decreased"[54].

The due process clause of the Fifth Amendment protects the alien[55]. However two importants factors condition this due process clause. They are 1). the plenary control over aliens of the federal government and the recent Supreme Court cases recognizing the broad discretion of the government in determining personnel policy[56]. The power of oCngress to deny admission to the country to any or all aliens implies the power of a considerable control over the alien after he has been admitted. However decisions supporting this view are against special and unfavorable treatment of aliens, they rather stress " the belief that inconve-

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52) Ibid.

53) Ibid.

54) Ibid.

55) Galvan v. Press, 347 U. S. 522 (1954), Shaughnessy v. Mezei, 345 U.S. 206 (1953); Kwong Haichew v. Colding, 344 U.S. 590 (1953).

56) Note, Constitutionality of Restrictions on Alien's Right to Work 57 Col. L. Review, 1012, 1015 (1957).

nience to the alien must give way to reasonable concomitants of the exclusionary power[57]. Now it is a settled principle that the due process clause of the Fifth Amendment protects the alien[58], although this Amendment does not contain an equal protection clause, it embodies the test of reasonable relation as much as does the Fourteenth Amendment. Inspite of the Government' claims that government employment is a privilege and not a right the courts declared that the power o hire and fire the government employees could not be used arbitrarily and consistently have decide upon the soundness of the factual justification urged in support of governmental discrimination against any class.

b. State Statutes

States in one way or another under their police powers have prohibited many lawful calling to foreigners, In fact the following statement made in 1941 is still true: "But there is not one state in the country that does not withold from the alien the right to engage in certain private occupations"[59].

The question to be solved here is : can states deny the right to work to aliens under their police power ? If so, is there a limitation on their power.

aa. Validity of statutes denying aliens the right to work when the state is proprietor:

The State owns private property and the common property. The latter can be described as property which is not under private ownership. Such common property includes beds of all tidewater unless granted away[60] and wildgame.

The state as a proprietor is given authority to restrict the enjoyment of the common property to residents and to exclude aliens and non-residents from the use of that property. This prin-

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57) Ibid. 1020

58) See the cases, cited supra, note 55.

59) **Basil O'Connor,** Constitutional Protection of Alien's Right to Work, New York University Law Ouarterly Review, 1941, p. 485.

60) Patsone v. Pennsylvania, 232 U.S. 138 (1914)

ciple was recognited as early as 1855 when a statute of the State of Rhode Island prohibiting the taking of oysters and other shell fish within the waters or on the shores of the state by persons not domiciled therein was held valid[61]. Under the same principle legislation excluding aliens from fishing in state waters in Oregon was held valid[62].

The principle of exclusion of aliens from state property was stated in *Heim v. McCall*[63] by Chief Justice Cardozo. His analysis was that since the property of the state belongs to the citizens of the state, the citizens may, speaking through their legislators, keep the state's bounty for their own use.

Aliens being under the equal protection of laws, the courts looked for an argument to sustain the statute denying aliens the right to work on state-owned property. They came forward with the notion of " reasonableness ". Their view is that a person can be excluded from an occupation because his qualities reasonably convince that his occupation adversely affects the public. In other words, there must be some relationship between the qualities of the excluded person and the occupation. In *Bondi* v. *Mackay*[64] the Court said:

> "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 belongs 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 obligation of citizenship. "

Some courts held valid statutes after the application of the test of " reasonableness ". But the considerations of the events prior to the passage of such acts puts some doubts in the mind on their constitutionality. For example the Pennsylvania law prohibiting any unnaturalized foreign born citizen to kill any wild bird or animal except in defense of person or porperty was held

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61) State v. Arnold Medbury,) R.I., 138 (1855)
62) Alsos v. Kendall, III Ore. 359, 227 Pac. 286 (1925)
63) 239 U.S. 175 (1915)
64) 87 Ver. 271 (1913)

constitutional in *Patsone* v. *Pennsylvania*[65]. The same law provided that such foreign born persons could not own or possess a shotgun or rifle, the contravention being punished with a penalty of 25 dollars and a forfeiture of the gun or guns. Mr. Justice Holmes ruled the following in this case :

> " A state may classify with reference to the evil to be prevented, and that if the class discrimintaed against is or reasonably might be considered to define those from whom the evil mainly is to be feared it properly may be picked out."

The question in this case was the reasonableness of the method employed : Prohibition to own and possess shotguns or rifles. The court found it reasonable in the following words : " It is so peculiarly appropriated to the forbidden use that if such a use may be denied to this class, the possession of the instruments desired chiefly for that end also may be"[66].

This statement overlooks one other aspect of use of weapons : they are means of defense too. The Pennsylvania law has thus contradictory provisions. In one place it allows the killing of wild bird and animals for defense, in another place it prohibits "the possessing of the instruments desired chiefly for that end " Eventhough it is possible to kill an animal without firearms, when one visualize a person attacked by a wild boar and defending himself with a knife or a stick the importance to carry firearms in defense of person at least appears. Is the life and person of an alien less valuable than state owned wild birds and animals? We fully agree with Mr. Alexander when he says " A law which has this effect should hardly be construed as a reasonable one in carrying out an awoved purpose of the act despite the finding of the court " [67].

The real purpose of the Pennsylvania Legislature seems to have been to apply some effective measures of control to the out-

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65) Cited Supra, note 60.
66) Ibid.
67) **Alexander,** Op. cit. p. 106.

breaks and disorders manifested during the anthracite coal strike which occured shortly before the passage of the bill.

In a recent case the Supreme Court held unconstitutional a California statute forbidding fishing in its waters on the basis of ownership. In *Takahashi* v. *Fish and Game Comission*[68] the Supreme Court held that " ownership is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so. " In 1943 the California Fish and Game Code was enacted prohibiting issuance of licences to alien Japanese. In 1945 this provision was amended to read " person ineligible to citizenship " because where a state singled out a group of aliens, as Japanese here, the legislation had been held unconstitutional as being denial of " equal protection of the laws "[69]. Because of this clause, Torao Takahashi who had been a lawful resident of California since 1907 was denied the licence and the right to fish. Takahashi brought an action for mandamus in the Superior Court of Los Angeles County, California, to compel the California Fish and Game Comission to issue a licence to him. This court granted the petition for mandamus but still preserved the test of state ownership. In fact the court held that " the lawful alien inhabitants of California, despite their ineligibility to citizenship, were entitled to engage in the vocation of commercial fishing on the high seas beyond the three mile belt on the same terms as other lawful state inhabitants, and that the California code provision denying them this right violated the equal protection clause of the Fourteenth Amendment"[70].

The State Supreme Court reversed this decision holding that: "California had a proprietary interest in fish in the ocean waters within three miles of the shore, and that this interest justified the State in barring all aliens in general and aliens ineligible to citizenship in particular from catching fish within or without the

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68) 334 U.S. 410 (1948)
69) In re Ah Chong, 2 F. 733 (1880)
70) In Takahashi U. Fish and Game Commission, supra note 68.

three-mile coastal belt and bringing them to California for commercial purpose"[71].

California claimed that it owns all the fish within the three miles belt of its coasts as a trustee for all California citizens as distinguished from its non-citizens inhabitants. The State has a right, claimed California, if not a duty, to bar first of all aliens who have no community interest in the fish owned by the State. A second argument of California was that denial of licence to aliens ineligible to citizenship was a reasonable calssification. California claimed that it had borrowed that classification from the naturalization laws of the United States.

The case of *Truax v. Raich*[72] first appeared to give weight to the common property reasoning, but later on the Supreme Court in *Takahashi v. Fish and Game Commission*[73] analogizing from the same case used the criterion of reasonable relation rejected the " ownership theory " as the basis for such relation. The trend of the Supreme Court was made clear in *Toomer v. Witsell*[74], a case which did not involve aliens and where free-swimming fish in coastal waters was held not subject to the state's proprietary right. The Court declared that ownership theory rested solely on fiction. This view is widely accepted in later decisions rendered by lower courts[75].

In *Takahashi* case the Supreme Court assumed a valid legislative purpose : " We find it unnecessary to resolve this controversy concerning the motives that prompted enactment of the legislation. Accordingly, for purposes of our decision we may assume that the code provision was passed to conserve fish in the California coastal waters, or to protect California citizens engaged in commercial fishing from competition by Japanese aliens, or for

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71) Ibid.
72) 239 U.S. 33 (1915)
73) Supra note 68.
74) 334 U.S. 385 (1948).
75) Steed v. Dodgen, 85 F. Supp. 956 (W. D. Tex. 1949), Lobard v. State, 149 Tex. 332; 233 S.W. 2d. 435 (1950), Edwards v. Leaver, 102 F. Supp. 698 (D.R.I. 1952)

both reasons"[76]. However, Mr. Justice Murphy in a concurring opinion was in favour of invalidating the statute because according to him it was impossible to have a valid classification based on racial elements.

The Supreme Court after assuming a valid legislative purpose looked for a substantial and reasonable relationship between that purpose and the classification. The Court rejected the argument that the classification was valid merely because Congress in its regulation of aliens had made a similar classification in denying Orientals the privilege of citizenship, and made it clear that such classification was unrelated to the public welfare in the following words :

> "It does not follow as California seems to argue, that because the United States regulates immigration and naturalization in part of the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its border from earning a living in the same way that the other state inhabitants earn their living.

Further the Court stated that a statute enacted in disregard of the plenary power of Federal Government could not be held valid :

> "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization and the terms and conditions of their naturalization. See **Hines v. Davisowitz**, 312 U.S. 52, 66. Under the Constitution the states are granted no such powers ; they can neither add nor take from the conditions lawfully imposed by Congress upon admission, naturalization, and residence of aliens in the United States or the several states[77].

On the ownership of state property argument, the Supreme Court held that ownership alone was not enough to establish the reasonable relationship. The Court said :

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76) In Takahashi v. Fish and Game Commission, cited supra note 68.

77) Ibid.

> "... the Federal Migratory Bird Treaty Act of 1918 40 Stat. 775, was sustained as within federal power despite the claim of Missouri of ownership of birds within its boun daries based on prior statements as to state ownership of game and fish in the **Geer** case. **Missouri** v. **Holland**, 252 U.S. 416. The Court was of opinion that " o put the claim of the State upon title is to lean upon a slender reed. " p. 434. We think that the same statement is equally applicable here"[78].

We can conclude that in this case the Supreme Court partly[79] overruled the old principle that the state as a proprietor may exclude aliens and non-residents from enjoyment and use of the common property. So the equal protection clause covers now the right to work of aliens on state-owned property, at least in so far as wild game and fish are concerned. Aliens cannot be denied this right in these fields because of state ownership.

Before this case, it was only possible to discriminate against all aliens on state-owned property, but to single out a group of aliens for special treatment was considered as a denial of equal protection of the laws. (*In re Ah Chong*, 1880). Sometimes the states argued that in their capacity as proprietors, they are not bound by the equal protection of the laws limitation of the Fourteenth Amendment. In support of this argument they advanced the view that the power to exclude all aliens includes the power to exclude a part of them. But as we pointed out above this contention was not accpeted by the courts. Before the *Takahashi* v. *Fish and Game Commission* case, equal protection meant equal but different treatment of aliens. In fact, as the dissenting judge Mr. Justice Reed pointed out in the last case, " Citizens have righis superior to those of aliens in the ownership of land and in exploiting natural resources"[80].

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78) Ibid. p. 412.

79) We say partly overruled because eventhough the diminution in strenght of the common property theory is obvious in this decision there is also reference to the still operative nature of that doctrine.

80) In Takahashi v. Fish and Game Commission, supra note 68.

81) **Konvitz** op. cit. p. 180.

bb. Validity of statutes denying aliens right to work when the state is employer.

There is no doubt that when the qualifications of an employee are important the State can choose its officers. Citizenship is a requirement for state officers such as lawyers and jurors. Usually aliens do not have political rights in the United States eventhough once twenty two of the states and territories permitted aliens to vote and hold office[81]. So it is possible that the State should insist on citizenship of its employees which are executing the state policies. This is not a denial of equal protection of laws in our opinion. The relationship between exclusion of aliens and the public welfare is evident here. And this exclusion is a reasonable one, because " specific public interest " is present here. The same thing is true of municipalities which are governments units below the state level. They too can require qualificatio of citizenship; even municipal corporations formed to execute the policies of the state may prohibit the employment of aliens.

How broad are these powers? May an alien be prohibited from digging ditches in the construction of a publicly owned subway? The Supreme Court upheld, though for another reason, the holding of the New York Court of Appeals sustaining a New York Statute prohibiting the employment of aliens by any person contracting with the state or any of its municipalities. The work involved was just ditch digging. The New York Court of Appeals upheld the law, advancing the " ownership " basis. The money used in the construction being property of the people of the state, held Mr. Justice Cardozo, aliens who have no interest in the common property of the state can be excluded. *Heim* v. *Mc Call*[82] was decided on the authority of *People* v. *Crane*[83]. In the latter case Justice Cardozo declared that since the tax money of the state was the common property of its citizens, an alien could not question the manner of its disposal. Another argument advanced by Justice Cardozo in this case was that since discrimination against aliens in the distribution of relief was a reasonable measure to

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82) Cited supra, note 63.

83) 214, N. Y. 154, 161, 108 N.E. 427 (1915).

prevent pauperization of its citizens discrimination against aliens in the public work could be sustained for same reason.

The Supreme Court did not base its opinion on the common property theory. The Court ruled that a state could " prescribe the conditions upon which it will permit public work to be done on its behalf or on behalf of its municipalities"[84].

The Supreme Court in reaching this decision relied upon holding in *Atkins* v. *Kansas*[85] where the Kansas statute prescribing eight hours of work for the employees of the state and its municipalities was upheld. The Supreme Court said that while the Kansas statute prescribed the number of hours, the New York act prescribed the kind of laborers to be employed.

Prof. Powell sharply critized this decision of the Supreme Court on New York Legislation. He said :

> " By ' conditions' the Court clearly had in mind restrictions on the desire of contractors to determine for themselves how they shall perform work for the state. It is an unwarranted extension of the meaning of the word' conditions' as used in **Atkins** v. **Kansas**, to make it include an absolute denial of the right to contract at all. There is however a fundamental distinction between a statute conferring benefits on laborers on public works leaving every one an equal opportunity to obtain such employment and one absolutely prohibiting a fixed class of persons from obtaining such employment. In the former there[86] is no discrimination from which any laborer suffers.

We do not see any reasonable relationship between the employment of alien and the public welfare to justify the prohibition for aliens to engage in ditchdigging.

Prior to *Atkins* v. *Kansas* some state courts held unconstitutional the statutes prohibiting aliens to work in public employment[87]; though it was possible to find once ina a while a case

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84) In Heim v. Mc Call, cited supra, note 63.

85) 191, U.S. 207 (1903)

86) **Thomas Reed Powell**, The Right to Work for state, 16 Col. L. Review, 99, 114 (1916)

87) Clover v. People, 201, III, 545, 66 N.E. 820 (1903) (Statute

where the court upheld discriminatory statute declaring that the siate has same right in this regard as private employer[88].

The trend of state courts to declare the unconstitutionality of legislation prohibiting the right to work of aliens was reversed by *Heim* v. *Mc Call*. Afterwards the courts declared that employment in public enterprises is a privilege rather than a right, which can be granted or witheld at the pleasure of the state on the basis of ownership of public property by the state[89].

There is no requirement in the Constitution for an individual to give equal treatment to his fellows, but there is such a requirement for a state which cannot deny equal protection of laws to a person within its jurisdiction. Thus despite the Court's contrary conclusion in these cases the state's freedom of action is more restricted than that of the individual[90]; and that the existence of a reasonable relation between the classification made by the state and a valid legislative purpose should be the object of judicial inquiry.

Although in *Gianatasio* v. *Kaplan*[91], New York Court ruled that " It must be clear that by its decision in *Heimv. Mc Call* the Supreme Court did not intend to hold that the state as an employer might commit a clear violation of the express constitutional restrictions such as... the guaranty of equal protection of the laws ", the Supreme Court did not overrule its decsions on the subject.

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restricts free and unrestricted bidding for public works contract thereby raising ultimate cost to public.) People v. Warren, I Misc. 615, 34N. Y. Supp. 942 (Super Ct. 1895) (state may discriminate against alien when it is employer but cannot force contractor on public projects so to limit himself.)

88) Scopes v. State, 154, Tenn. 105, 112, 289 S. W. 363 (1927); State v. Caldwell, 170 La, 851, 129 So. 368 (1930).

89) Rok v. Legg, 27 F. Supp. 243 (1939); Lelande v. Lowery, 26 Cal. 2d. 224, 157 P. 2 d. 639 (1945); Lee v. City of Lynn, 223, Mass 109, III N.E. 700 (1916).

90) Note, 57 Columbia Law Review, p. 1018 quoting Heim v. Mc Call.

91) Gianatasio v. Kaplan. 142 Misc. 611, 255, N.Y. Suppl. 102 (Sup. Ct Spec T.) affirmed without opinion, 257 N.Y. 531, 178 N.E. 782 (1931) appeal dismissed 284 U.S. 595 (1932).

cc. Validity of statutes denying aliens right to work when the state is a regulator of business or employment

aaa. Occupations that the state can prohibit

Occupations of a dangerous or anti-social nature may be prohibited under the police power of the states. But for this prohibition, a special public interest must be in relation between the particular business undertaken by alien and the public welfare being imperiled by him. The Supreme Court recognized the police power of a state to prohibit occupations of a dangerous or anti-social nature within the limitation of reasonable classification in *Truax* v. *Raich*[92].

Under this police power the state legislatures prohibited entirely some classes of business which are deemed dangerous to health, morals and general welfare of the people. However under this power the state cannot prohibit or even control all forms of endeavor. The holding of *Truax* v. *Raich* stated this principle. Arizona under the authority given by the State Constitution passed a law which required all Arizona employers of more than five workers to hire not less than eighty per cent qualifed electors or native born citizens. Employers hiring less than five workers were free to hire aliens. This law was to limit the alien workers in the expanding industries which were becoming more and more the ordinary occupations of the workers.

The State of Arizona sought to uphold the statute by declaring that the employment of aliens was a peril to the public welfare. The Supreme Court of the United States had two questions before it : first, whether a state could enact this law under the exercice of its police power ; second, whether by doing so the state denied aliens the " equal protection of the laws ".

The answer of the Supreme Court to these questions was delivered by Mr. Justice Hughes who speaking for the Court said :

> "That reasonable classification implies action consistent with the legitimate interests of the state and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive federal power. The authority

92) Cited supra, note 72.

> to control immigration to admit or exclude aliens is vested solely in the Federal Government[93].

Since there was no reasonable classification, the Supreme Court said that Arizona could not enact this law and prohibit Raich, an alien lawfully admitted to the country under the federal law who was working as a cook in a restaurant wich had more than five employees, from earning his living. The Court held that any alien lawfully admitted to the country had a federal privilege to enter and abide in " any state in the Union ". The Court said that the alien therefater enjoyed equal protection under the Fourteenth Amendment.

> "The assertion of an authority to deny to 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, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission would be segregated in such of the States as chose to offer hospitality"[94].

The effect of this decision of the Supreme Court was to check legislation of this character. Since this case the States have not seriously attempted to restrict alien employment in the unskilled occupations.

Even before the adoption of the Eighteenth Amendment a State claimed the right to outlaw the saloon business[95]. There is no doubt of the power of the state to prohibit aliens from participation in businesses of this kind. However many states passed different laws which were sustained later by the courts as within the police power of the states although We think that there was no legitimate objective of the police power. Thus a Texas court sus-

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93) Ibid.
94) Ibid.
95) Mugler v. Kansas, 123 U.S. 623 (1887)

tained a statute denying to aliens licences to sell fish[96]. A Massachusetts court affirmed the constitutionality of the licensing of peddlers[97], a New York court sustained an ordinance prohibiting the ussuance to an alien of a license to sell soft drinks[98] a New Jersey court sustained an ordinance prohibiting the issuance of licenses to aliens to operate buses[99], a Rhode Island court sustained prohibition of licensing aliens to be drivers of automobiles for hire and of buses[100].

Our objections to the reasonableness of classification are the following : to prohibit an alien from selling fish in 1921 is to oust him from an unskilled occupation, which is against the holding of *Truax v. Raich* which was decided in 1915. Fish selling is neither a dangerous nor an anti-social occupation. The only possible objection to fish selling can be doubt about the freshness of the fish, which can be dangerous if spoiled. The same line of opinion was expressed in the sodapop or softdrink case[101]. The court found the activity dangerous because of the possibility that the soft drink would be contaminated. This reasoning can limit all activities of aliens in food-handling. Our objection is sustained by the decision of the Supreme Court in *Takahashi* v. *Fish and Game Commission* where even state " ownership " which had been traditionally upheld against the right to work of aliens was considered as " inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so. "

The Rhode Island court sustained the statute prohibiting aliens to drive buses because of public safety. It reasoned that driving for hire was dangerous enough to exclude the alien. The dangerous activity test was not properly used here, as there was no prohibition for aliens to drive their own cars and in many states

96) Poon v. Miler, 234 S. W. 573 (Tex. 1921)
97) Commonwealth v. Hana, 195 Mass. 262, 81 N.E. 149 (1907)
98) Miller v. Niagara Falls, 202 N. Y. Supp. 549 (1924).
99) Corin v. Nunan, 91, N. J. L. 506 (1918).
100) Gizarelli v. Presbrey, 44 R. I. 333 (1922).
101) Miller v. Niagara Falls, cited supra, note 98.

the only requirement to be the chauffeur of a bus is the capacity to drive a private car.

In other cases the mere fact of alienage was found enough to exclude aliens from the occupations, in other words the courts based the justification of reasonable classification on the fact of alienage. For example, in the New York soft drink case another argument to sustain the statute was that : " the welfare of the community will be best served by excluding from licences such persons as are not so attached to the institutions of our country as to be in the class of its citizenry. "

There is an argument advanced by some courts : They say that power to regulate carries the power to regulate arbitrarily, thus the state is not bound by the equal protection clause of the Fourteenth Amendment. A Maryland statute prohibited the selling of liquor at retail without a license, and only citizens could obtain this license. The statute was upheld by the Maryland court which saw no limitation upon the police power, the reason behind this decision was that if the state can prohibit the occupation, there are no limitations upon the police power as to the method employed. The court said :

> "It does not it is true, make an equal partition of the privilege of liquor selling among all 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 the evils connected with 102.

The Supreme Court adopted this view- power to regulate or abolish includes the power to regulate arbitrarily-,in *Clarke* v. *Decebach*[103] where it upheld an ordinance prohibiting aliens from operating billiard parlors. The reasoning was that already prevalent anti-social tendencies of poolrooms would be enhanced by the ignorance of aliens of American laws. And as the legislative power

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102) Trageser v. Gray, 73 Maryland 250 (1890).
103) 274, U.S. 392 (1927).

had power to prohibit completely this activity, the issuance of the ordinance was constitutional.

The attitude of the Supreme Court in this case later became the prototype of what was termed as the " rule of reason ".

As it is mentioned above, the type of activities such as operation of pool rooms[104] or the sale of liquor[105] which can be considered of dangerous or anti-social nature, are subject to reasonable regulation by the state. *Deckebach* followed the pattern of most cases upholding such statutes. No factual showing of a reasonable relationship between alienage and a propensity toward crime was before the court.

It is interesting to note that eight years previous to the Supreme Court decision in *Deckebach*, an Ohio court insisted on the application of the equal protection clause when it was passing on the legality of a statute denying to aliens licences to operate poolrooms[106]. However the court held that equal protection clause was not violated by exclusion of aliens. The reasoning was the following :

> "It is natural and reasonable to suppose that the foreign born whose allegiance is first to their own country and whose ideals of government, environment and control have been engendered and formed under entirely different regimes and political systems have not the same inspiration for the public weal nor are they as well disposed toward the US as those who by citizenship are a part of the government itself[107].

The court relied also on " the belief that an alien cannot be sufficiently acquainted with our institutions and our life to enable him to appreciate the relation of this particular business to our social fabric"[108].

The Ohio court stressing first the equal protection clause's application to aliens did show that the power to exclude in toto

104) Murphy v. California 225 U.S. 623 (1912).
105) Crowley v. Christensen, 137 U.S. 86 (1890).
106) State v. Carrel, 99, Oh. St. 285 (1919).
107) Ibid.
108) Ibid.

does not include the power to exclude without a reasonable relation. However we do not agree with the position of the court that there is a relationship between knowledge of the country's laws and customs and concern for the people's welfare. So aliens are not considered as reliable custodians of the public welfare as citizens are. There is fallacy in this reasoning of the Supreme Court in *Deckebach*. Modern sociological studies show that there is no such a relationship between the alien and the crime[109]. " If

109) National Commission on Law Observance and Enforcement, Report no : 10. Crime and Foreign Born. In this report one of the Associates Miss Bowler after checking the nativity of the individual offenders in some 4.000.000 cases arrives to this conclusion : " that in proportion to their respective numbers, the foreign born commit considerably fewer crimes than the native born. " ibid. p. 195 The theory that aliens are mainly responsible for crime,, " that all newcomers should be regarded with an attitude of suspicion, is a theory that is almost as old as the colonies planted by Englishment on the New England coast. " p. 23 in Part 1 written by **Edith Abboth.** The organized traffic of convicts is the main basis of this theory. In fact it is common knowledge that Maryland and Virginia, as colonies, imported large number of convicts because of labor shortage. However later colonies tried to resist to transportation of convicts by passing statutes which were disregarded in England. Parliament, without taking into consideration the public opinion in the colonies passed a transportation act in 1717 which created a new mode of punishment for offenses of robbery, larceny, and other felonious acts. The naw punishment was the transportation of such offenders for space of seven years to His Majesty's colonies and plantations in America. Even the persons sentenced to death might be pardoned by royal merci upon the condition of transportation to any part of America, " An Act for further preventing robbery, burglary and other felonies and for the more effectaul transportation of felons ", 4 George, I, c. II,. Large scale transportation of convicts from British jails to the colonies until the time of revolution was result of this act of 1717. The constant demand for labor increased the commerce of the convicts to colonies where " transports were quickly sold to the owners of plantations. **J. D. Butler,** " British Convicts Shipped to American Colonies, ii The American Historical Review, 11, 12-33 (October, 1896). Many people in England during the seventeenth and eighteenth centuries believed that no one would emigrate from " England's green and pleasant land " unless he were a fugitive from justice. " Emigration " wrote Sheffield in 1793 " is the natural resource of the culprit ". **Edith Abbott,** cited supra. The in-

a person is disposed to be lawless and flaunts the public welfare, the fact of citizenship will not halt his wrongful deeds. An alien disposed to act justly, will not yield to wrong doing because his allegiance is foreign"[110].

bbb. Occupations that the state can license

The nature of some occupations may require special qualifications then the state can license these occupations. Here danger to peace, order and morality of the people is not as great as in the previous case where the state can prohibit the occupations of a dangerous or anti-social nature. The persons of questionable character or of notoriously bad reputations, ex-convicts may be refused license to operate business which are deemed injurious to public morals, dangerous to the public health and safety. A driver with a long record of traffic law violations may be denied license to operate a bus, similarly persons involved in smuggling of forbidden drugs may be refused license to be druggists.

First case ever raised from the licensing occupations in which aliens were making a living and where licensing was direc-

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dependence of the United States ended the transportation of English convicts, but after the Napoleonic wars the flow of immigration to the United States increased and among it many criminals came. Upon investigation it was found that convicts or potential criminals in Germany were persuaded and given aid to go to the United States. For example the German State of Mecklenburg-Schwerin to save the expenses of keeping up prisons, had established a custom to pay the passage of its convicts to the United States, which was cheaper.

However the later studies show that these convicts did not mostly continue their life of vice. Many of them reformed and became respectable citizens. Edit Abbott, drawing up the general conclusions in the report on Crime and Foreign Born declares : " For more than a century there has been continusly in this country a clamorous group who have tended to emphasize only the difficulties connected with immigration and to lose sight of all its beneficial effects. Unfortunatley these attacks on the alien have frequently laid stress on the popularly supposed relations between immigration and crime. Statistics have never justified their assumptions and Miss Bowler's Report shows that the most recent official statistics fail to substantiate their charges. Ibid. p. 416.

110) **Alexander**, op. cit. p. 112.

ted to oust aliens is *Yick Wo* v. *Hopkins*[111]. San Fransisco, under growing anti- Chinese feelings, enacted an ordinance which ordered a licence for all public laundries located in wooden buildings. This ordinance which was enacted as a fire prevention and protection measure aimed to close the public laundries owned by Chinese. In fact two hundred Chinese did not obtain this license in spite of their application for it. However they continued to operate their laundries, at least most of them, in the wooden buildings and consequently they were arrested for violation of the ordinance. The Supreme Court found the ordinance unconstitutional. The court said : " The facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration ... with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendmen to the Constitution of the United States"[112]. The Court also declared that administrative discrimination is a denial justice too. So a law which is " fair on its face and impartial in appearance " if " is applied and administered by public authority with en evil eye and unequal hand " may produce unjust and ilegal discriminations which are in fact the denial of equal justice.

In spite of this early case which held administrative discrimination invalid and unconstitutional, in later cases the courts used the licensing power of the state as the test to exclude aliens[113]. But these courts " have applied the license test blindly. Since

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11) 118. U.S. 356 (1886).

112) Ibid.

113) **O'Connor**, op. cit, p. 488 " State regulation of businesses and occupations in the public interest has expanded greatly in recent years (Nebbia v. New York, 291, U.S. 502, 54 Sup. Ct. 505 (1934) Much regulation has taken the form of licensing. To say that the aliens may be excluded from any occupation which is subject to licensing simply because it is subject to licensing is to apply an artificial classification which ignores the constitutional requirement of reasonable relatonship. Ibid.

the business or occupation may be licensed, they say, aliens may be excluded. They have failed to apply the latter part of the rule that a relationship between the public welfare and the alien must exist"[114].

In *Agg Large* v. *State Bar*[115] a state court made a distinction between occupations to which engagement is a matter of right and the others to which engagement is a matter of privilege. The alien while may not be excluded from those occupations to which engagement is a matter of right, he can be prohibited from making a living in the other occupations to which engagement is only a privilege.

Licensing of occupations conducive to fraud was held constitutional by courts. So the licensing of peddlers and hawkers who are usually transient was upheld[116]. Misrepresentation and fraud is possible by such venders and if they do not have residence within the state their prosecution for their crimes can not be possible in most of the cases. Some professions have a vital public interest such as legal profession and citizenship may be made a qualification to practice law. The cases and legal writers do agree that this exclusion is right and just for the followings reasons : that alien can not take the necessary oath to support the Constitution; that in case of a war between the alien's country and the United States he may be detained and so injuries may result from this detention to his clients, that alien does not have a fair appreciation of the spirit of American institutions, that lawyers trained in civil law countries cannot adopt themselves to the American law without further training which is quite difficult ; that practice of law is not a right but a privilege, that the lawyer is an officer of the court and such should be a citizen.

Some of these arguments are weak such as further training of lawyers trained in civil law system or that legal profession requires an fair appreciation of the spirit of American institutions, because an American LL.B. degree may be required from those lawyers interested to practice here and when they have it they

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114) Ibid.
115) 218 Calif. (1933).
116) Commonwealth v. Hana, 195 Mass. 262. (1907).

are more informed on the text and the spirit of laws and about American institutions than any other man on the street. However as a whole these arguments have strong merit to exclude the alien from the legal practice. The acts excluding alien physicians from the practice of medicine can not be sustained as constitutional, to our opinion, even if they have been defended as measures inspired to protect the rights of American physicians. Here there is no necessity to know the spirit of American institutions but a good knowledge of medicine is enough. If the public health and safety are to be safeguarded it is more logical to have more doctors than few. They may be required some examinations before coming to the United States or in the United States on their knowledge and ability in English and medicine. In fact this has been practice for some time now. Because of shortage of interns and resident physicians more and more foreign doctors are invited to work on American hospitals, they are given such examinations before or after coming to the United States. But still there are several states which while they permit these foreign physicians to work in the hospitals as interns and residents they do not allow them to practice on their own without requirement of citizenship. That situation is abnormal and there is no relationship between the evil attacked and the remedy adopted, so such statutes may be declared unconstitutional.

A Michigan court held invalid a statute which made citizenship a requirement for getting a license to be a barber, in *Templar* v. *Michigan State Board o fExaminers of Barbesr*[117]. While the court recognized the power of the state to license this occupation, declared that the statutute failed to accord equal protection to all under the same conditions and circumstances, so the statute was unconstitutional Citiziens and tax payers may not be given power to exclude a class of persons from an occupation. The California Legislature enacted the Act of March 3, 1872, under which the Board of Supervisors was given power "to license and regulate all such callings, trades and employments as the public good may require to be licensed and reguated and as are not prohibited by law"[118]. This Board adopted an ordinance

117) 131, Mich. 254 (1902).

requiring the recommendation of twelve citizens and tax payers in order that a person might run a laundry in that block. A law limiting the laundry business to persons other than Orientals, said the Court in *In re Quong Woo*[118a] *is* unconstitutional failing to accord the " equal protection of laws ".

ccc) Occupation that the State cannot interfere with.

The State cannot interfere with unskilled occupations which are not subject to licenses. The Fourteenth Amendment protects the alien in this area. The state acting in its capacity as a regulator of occupations cannot forbid employment of aliens or impose burdens upon such employment.

The first state restrictions against employment of aliens were included in the Constitution of California in 1879. This was the result of the rapid influx of Mongolians in this region. The Constitution provided : " No Corporation now existing or herefater formed under the laws of this state shall, after the adoption of this Constitution, employ directly or indirectly, in any capacity any Chinese or Mongolians. The Legislature shall pass such laws as may be necessary to enforce this provision"[119]. This constitutional provision was implemented by a penal statute. The Federal court held this provision unconstitutional in *In re Tiburcio Parrot*[120]. The court said that the provision violated the equal protection of laws clause, rejecting the contention of California that the state has an absolute power over a corporation incorporated in that state.

The states are further forbidden to exclude aliens from ordinary unskilled occupations in an indirect way. Thus the extra burdens upon employers of alien labor or upon the alien labor are unconstitutional. Pennsylvania enacted in 1897 a law imposing some extra burdens on employers of foreign labor : " That all persons, firms, associations or corporations employing one, or more foreign born unnaturalized male persons over twenty one years of age within this Commonwealth shall be and are hereby taxed at

118) 13 F. 229 (1882).
118a) 13 F. 229 (1882).
119) The Constitution of the State of California of 1879.
120) 1 Fed, 481, 498 (1880).

the rate of three per cent per day for each day of such foreign born unnaturalized male persons may be employed"[121]. This was on its face a tax measure. However the court in *Fraser v. McConway and Torley Co*[122] held this act unconstitutional. In this case John Fraser, a subject of Great Britain brought suit against McConway and Torley Company. The Court after considering that the tax in reality had to pe payed by the employé and not the employer, declared :

> "The tax is of an unusual character and is directed against and confined to a particular class of persons. Evidently the act is intented to hinder the employment of foreign born unnaturalized male perons over 21 years of age. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocations to which others underlike circumstances are not subjected. It imposes upon these persons burdens which are not laid upon others in the same calling and condition. The tax is an arbitrary deduction from the daily wages of a particular class of persons. Now, the equal protection of laws declared by the Fourteenth Amendment to the Constitutions secures to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances. The Railroad Tax Cases, 13, Fed. 722, 733..... It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis which is lacking here"[123].

The State of Pennsylvania made a second attempt to impose a similar tax. The court held unconstitutional this second attempt too, in *Limestone Co. v. Fagley*[124]. The court said : " We think it is equally clear that the act offends against our own constitutional mandate " All taxes shall be uniform upon the same class of subjects " etc. This sufficiently appears from the authorities above cited. It is very apparent from the act itself that the pretended clas-

121) Act of June 15, 1897. P.L. No : 166. Laws of the General Assembly o fthe Commonwealth of Pennsylvania. Session of 1897.

122) 82 Fed. 257 (1897).

123) Ibid, 260.

124) 187 Penn. 193 (1898).

sification of the subjects of taxation is arbitrary and illegal, but in addition to that it directly and intentionally discriminates against members of the same class, and creates an inequality among them"[125].

The State of Idaho in 1911 enacted a statute forbiding any municipality or private corporation organized under the laws of this state or organized under the laws of another state or territory or in a foreign country and doing business in Idaho to give employment to non declarant aliens. The Idaho court held that the statute was invalid because it denied both due process and equal protection of law[125]. The Court held that a state legislature has no authority to deprive a person of the right to labor at any legitimate business.

2. INTERNATIONAL LAW AND LEGISLATIVE DISCRIMINATION

An alien is often a national of a foreign state, he may be stateless too. If he has a nationality, his state extends its diplomatic protection in cases when according to the criteria established by international law there is an infraction of the rights of aliens. " The failure of a state to respect and protect the rights of aliens may be the cause of its responsibility under international law to the state of which the alien is a national"[127]. The stateless person does not have the protection of his state.

The Federal statutes on the admission and deportation of foreigners and the federal and state statutes denying them the right to work while they are legally admitted may cause conflict with international law.

A. Statutes to exclude foreign laborers

In international law there are two views as to the right of the state to exclude the aliens. The first one, which has more adherents, basing its claim on the sovereignt of the state and its rights of self preservation says that there is an inherent right of the state

125) Ibid. p. 197.

126) Ex pârte Case, 20 Idaho, 128, 116 Pac. 1037.

127) **William W. Bishop Jr.**, International Law, Cases and Materials, 1453, 465.

to exclude aliens at its pleasure[128]. The second view, which is based on the assumption that there is a fundamental right of international intercourse between states, is that no state can absolutely forbid entrance to aliens although it may exclude those whose presence is a menace to the welfare of the state[129].

Diplomatic papers have uniformly upheld the sovereign right of exclusion[130]. The United States Supreme Court stated in *Nishimura Mkiu* V. *United States* :

> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self- preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe[131].

Event the second view which believes in a fundamental right of international intercourse accepts that some aliens whose presence is a menace to the welfare of the state can be excluded. The State alone is to judge when there is a menace to its welfare by the aliens. Many classes of aliens are excluded for political, social and economic reasons.

When the liberal principles were in vogue towards the end of last century the Institute of International Law has declared that the protection of national labor is not alone a sufficient reason for exclusion[132].

When a treaty exists between two states their rights and responsibilities have to be interpreted in the light of this treaty.

In the *Chinese Exclusion case*[133] decided in 1889, the Chinese laborer contended that the Act of 1888 enacted by Congress was in contravention of the express stipulations of the Treaty of 1868 with the Emperor of China. Treaty ratified by the Senate is considered part of the law of the land. Then the question arises what is the place of a treaty in American legal hierarchy of rules?

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128) **Borchard,** op. cit. p. 45 and bibliography there cited.

129) **Bluntschli,** Droit International Codifié, parag. 381 and **Liszt,** Völkerrecht, 9th ed. 1912, parag. 25, p. 187 cited by **Borchard,** Ibid.

130) Ibid, 46.

131) 142 U.S. 659.

132) Annuaire, 13 p. 220.

133) Cited Supra, note. 27.

Is a ratified treaty above federal Constitution because it embodies international obligations? This question arose at a very early date of the history of the United States. Alexander Hamilton believed that a treaty was superior to the Federal Constitution. The question arose in 1796, the House of Representatives was considering an appropriation to carry the Jay Treaty into effect. President Washington was requested by the House to submit a copy of Jay's instructions. President Washington asked Hamilton to prepare a memorandum to this request. Hamilton wrote the following denying that the House had the right to ask for the instructions : " That the Constitution emprowered the President and Senate to make treaties ; that to make a treaty as between nations means to conclude a contract obligatory on their good faith ; that a contract could not be obligatory to the validity of which the assent of another body was constitutionally necessary; that the Constitution declared a treaty made under the authority of the United Staes to be a supreme law, but that that could not be as supreme law to the validity of which the assent of another body in state was constitutionally necessary... Hence it follows that the House of Representatives has no moral power to refuse the execution of a treaty which is not contrary to the Constitution because it pledges the public faith : and has no legal power to refuse its execution because it is a law- until at least it ceases to be a law by a regular act of revocation of the competent authority"[134].

But most of American publicists think differently from Hamilton. They state that a treaty " is not vested with the supremacy of the Constitution as Hamilton asserted, but stands constitutionally on a level with an act of Congress of even date and is, consequently, subject to repeal, just as the latter is, by a later act of Congress[135]. This view was not only adopted by publicists but by the Attorney Generals who were frequently called upon to instruct the President as to his duty when an act of Congress conflicted with an earlier treaty. The United States Supreme Court too adopted this view in *Head Money Cases, Chinese Exclu-*

134) S. B. Crandall, Treaties, Their Making and Enforcement, 2d ed. 170-171.

135) 112 U.S. 580 (1884)

sion *Case* and in subsequent cases. *In Chinese Exclusion Case* the Supreme Court admitted that the Act of 1888 was " in flat contravention of express stipulations of the Treaty of 1864 "[136]; however, Mr. Justice Field speaking for the Court said : " It is not on that acount invalid or to be restricted in its enforcement. The treaties are of no gretaer legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations and is often merely promissory in its chracter, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress In either case the last exjression of the sovereign will must control."[137].

The Federal Constitution has no express provision as regard to the effect of a conflict between a prior treaty and a later statute. The holding of the Supreme Court is valid as internal law. However it is regrettable that this paramount Court did not also point out to the responsibility of the United States in denouncing unilaterally and without justification the treaty. While the United States Congress representing full sovereignty of the Nation may enact laws, the Executive is bound to act according to concluded treaties. And any act against a rule of international law, any breach or violation of a rule of international law is an illegal act by unanimous consent[138]. " A treaty may be denounced by a party only when such denunciation is provided for in the treaty or consented to by the other party or parties[139]. This rule was very well established at the time of decision of the *Chinese Exclusion Case*.

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136) 130 U.S. at 600.

137) **Konvitz**, cited supra, 9.

138) **Pierre André Bissonnette**, La Satisfaction comme mode de réparation en droit international, 1952 Thèse, p. 10.

139) **Harvard Law School**. Reserach in International Law, 1935, p. 117.

Nineteenth years before this decision Prince Gortchakoff of Russia had issued his circular dispatch of October 1870 which denounced unilaterally the Paris Treaty of 1856. This led to international negotiations and to the London Protocol of 1871 on the inviolability of treaties and prohibition of signatory parties from withrawing from any stipulations without the consent of the parties[140].

We find regrettable the silence of the Supreme Court as to the international responsibility of the United States in the *Chinese Exclusion case* because few years earlier in *Head Money Cases* Justice Miller had made clear that while a later federal statute repeals a prior treaty, the rights of the other party at international law continue to be in effect. Dealing with this point in the *Head Money Cases* Justice Miller wrote : " A treaty is primarily an international compact between independent nations and depends for its enforcement on the interest and power of the governments which are parties to it. If these fail, its infractions becomes the subject of international negotiations by the disadvantaged state which may in the end be enforced by actual war"[141].

The United States Supreme Court whenever the immigration legislation " was challenged sustained in the brodaest language the absolute power of Congress to suspend immigration or permanently exclude all aliens or the members of a particular race"[142].

We do agree with Hyde that international law " has not yet forbidden a state to exercice the largest discretion in establishing tests of the undesirability of aliens seeking admission to its territory, and to that end to enforce discriminations of its devising[143].

We do believe that there is a fundamental right of international intercourse, without intercourse international existence would be impossible. Even these who claim that the state has an inherent right to exclude aliens at its pleasure note that there are some limitations. For example Hall remarks : " The exercice of

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140) For the text of the Protocol See. **Herbert W. Briggs.** The law of Nations, 1947 p. 476 or **Yılmaz M. Altuğ** Turkey and Some Problems of International Law, 1958, 69-70.

142) **Konvitz,** Op. cit. 9.

1493 **C. C. Hyde,** International Law (2 d. ed. Boston, 1945), I, 217.

the right is necessarily tempered by the facts of modern civilization. For a state to exclude all aliens would be to with draw from the brotherhood of civilized people"[144].

In spite of the assertion of the absolute right of Congress to exclude all aliens by the Supreme Court on several occasions Congress never passed such a law, and with the last Immigration Law of 1952 all races and religions are aligible for immigration.

On the other hand, while the Gentlemen's Agreement concluded in 1907 between the United States and Japan kept the Japanese immigration very low, the 1924 Quota Act excluded them altogether. This led to bitter Japanese feelings which ended in the unfortunate events of the Second World War.

Here the Japanese protest against this Act has in its text an important declaration on international discrimination based grounds :

> "It is perhaps, needless to state that international discriminations in any form and on any subject, even based on purely economic reasons, are opposed to the principles of justice and fairness upon which the friendly intercourse between nations must in its final analysis depend[145].

We think that the arbitrary legislative limitation will cause retaliation which is permitted under international law[146].

The states must refrain themselves against arbitrary legislative limitations as much as possible and refer to it only when the national interest orders.

B. Statutes to expel foreign laborers :

In international law, the power to expel aliens is justified on the basis of the sovereignty of the state, its right to self-preservation and its public interests. However it cannot be exercised indiscrimniately, but is limited and restricted by the obligations imposed upon by the state by international law[147]. So we do not

144) **William N. Hall,** A. Treatise on International Law, 6th. Ed. 1909, 211.

145) **Y. Hchihashi,** Japanese in the United States, 1932, p. 314.

146) **Bissonnette,** Op. cit. p. 10.

147) **Borchard,** Op. cit. p. 49.

agree with the Supreme Court opinion in *Fong Yue Ting* v. *United States*[148] when it stated : " The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country... is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. "

The Institute of International Law at its Geneva meeting in 1892 passed a resolution condemning the expulsion of workers or aliens in general because of competition with the nationals.

In the light of international law allowing the deportation within one year of aliens who had come to the United States in violation of the Contract Labor Act can be sustained. This statute set forth as the ground of expulsion illegal entry to the country. Illegal entry is a ground universally recognized for expulsion of foreigners.

C. Statutes denying the right to work to aliens legally admitted.

In international law the power of state to confine certain professions to its nationals is recognized[149]. The state can also condition the practice in some professions to the requirement of a national diploma[150]. The exercice of certain occupations may be subjected to reciprocity. But the prohibition of all kinds of employment to all foreigners is contradictory to international law if the foreigner who applied for a visa made clear his intent to work in the country of his destination and received it, is denied any employment after he is legally admitted in that country. However

148) supra, p. 16, n. 2.

149) **Green Haywood Hackworth,** 3, Digest of International Law, 616 (1942) **Borchard,** Op. cit. 80, **Bishop Jr.** Op. cit. 466 As an example of a state's restrictions the practice of some professions we chose to give Brazilia's prohibitions, " Certain activities of a public nature are restricted to Brazilian citizens ; brokers and expediter, public translators and professional journalists. " **Paul Griffith Garland,** American-Brazilian Private International Law, 1959, 15.

150) Or sometimes as in Brazil the holder of a foreign diploma is required to pass an examination of revalidation of his diploma which is recognized, after the successful examintion, the equivalent of national diploma. Ibid.

the best means to secure the right to work to the nationals of foreign sates is to establish a reciprocal treaty relationship between the states involved. The work of International Labor Organization and of other associations in the gradual abolishment of discrimination against foreign labor has been satisfactorily, yet still a great amount of effort is needed to really improve the position of foreign labor legally admitted but restricted in its right to work.

An interesting diplomatic document on this subject is the letter written by the Assistant Secretary of State Wilson, to the Portuguese Minister De Bianchi in Washington[151]. In this letter the Assistant Secretary of State in 1937 pointed out the position of the United States in following words :

> "Aliens who have been legally admitted to the United States for permanent residence stand, in general, on the same footing as American citizens insofar as the national labor market is concerned, exceptions being made only in cases of employment on public works or occupations of a special character, where it seems necessary for the public health, safety or morals to require that the workers be citizens of the United States. It is understood that this requirement does not apply to engineers except in a very few States of Union."

a. Right being secured by a treaty.

In two cases the right to work of aliens were claimed to be secured by a treaty.

First case is *In re Tiburcio Parrott*[152] where the constitutional provision of California in 1879 which was implemented by a penal statute forbiding all corporations formed under the laws of California to employ Chinese or Mongolians " directly or indirectly in any capacity " was held to be invalid among other reasons as being contrary to the Treaty with China[153].

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151) **Hackworth**, Op. cit. 614 quoting this letter of September 10, 1937 from M.S. Department of State, file 853, 504/34.

152) Cited supra, note 120.

153) Ibid and, **David Fellman**, Alien Rights. 22 Minnesota Law Rev. (1938), 137, 153.

The second case is *Clarke v. Deckebach*[154] where a British subject required to get a poolroom licence under an ordinance of Cincinnati attacked this instrument as a violation of the Treaty with Great Britain of July 3, 1815 and of the Fourteenth Amendment. The Supreme Court rejected this argument saying that the conduct of a poolroom was a trade and not commerce while the treaty provided that " the merchants and traders of each nation... shall enjoy the most complete protection and security for their commerce"[155].

Gread Britain did not make any subsequent diplomatic claim. Theses cases show clearly the constitutional rule that the determination of rights of aliens claimed under treaty is within the jurisdiction of the judiciary. " As a treaty is the supreme law of the land, an alien invoking a right under a treaty must plead it in the usual course of judicial proceedings, the diplomatic interhas been denied to him in those proceedings, the diplomatic interposition his government is regarded as premature"[156]. Then the Executive waits until the judgment is rendered and if it is against the alien the American government feels justified in rejecting any subsequent diplomatic claim in favor of the right of alien. To this position an American writer refers in the following words: " Foreign governments, however, may with justice answer that no government can rightfuly claim to be final judge of its compliance with international obligations, or shield itself behind its municipal law or decisions to escape international liability"[157].

The position of the United States Government sometimes is difficult when states of the Union legislate with reference to aliens and curb the rights provided for them in the treaties concluded between their countries and the United States. In *Baldwin v. Franks*[158] the Supreme Court ruled that the Congress has power to legislate for the protection of aliens in their treaty rights.

The Supreme Court too in the field of foreign relations is inclined to interprete broadly the constitutional powers of the fe-

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154) cited supra, note 103.

155) Ibid.

156) **Borchard,** Op. cit. p. 108 citing **Bradford,** Atty. Gen., in 1Op. Atty. Gen., July 26, 1794, 2 nd ser. 24.

157) Ibid.

deral government. There is a case in connection with the right to work of an alien provided in a treaty on this matter. This is *Asakura v. City of Seattle* [159] where Seattle sought to exclude Japanese from being pawnbrokers although this right was secured to japanese by treaty. Seattle passed an ordinance prohibiting the granting of licences as pawnbrokers to aliens. Asakura attacked the ordinance as violating a provision that guarantees to Japanese the right to carry on a trade on the same terms as American citiziens. The Washington court ruled that the treaty was an encroachment upon the police powers of the state and therefore invalid. On appeal, the United States Supreme Court reversed this decision on the ground that the business of a pawnbroker was deemed to be a trade. The Court said that while the treaty making power could not authorize what the Constitution forbids, it was not limited by any express provision of the Constitution.

Thus the treaty making power is permitted to extend federal protection to aliens in the enjoyment of a trade.

b. Right not secured in a treaty

While in municipal law the acts of legislation are valid until they are held unconstitutional, a statute cannot be a defense against a breach of international obligations. Foreign governments have not accepted the theory of the non-liability of the state when acts of legislation- including decrees and ordinances having the force of law- violated the rights of aliens under local or international law and enforced claims for injuries sustained by their subjects[160].

" Aliens enjoy the benefits of the United States " Bill of Rights and the Fourteen Amendment to the United States Constitution"[161] and " through such Constitutional gurantees the United States performs its international law duties towards other states"[162].

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158) 120 U.S. 678
159) 265 U.S. 332 (1924).
160) Borchard, Op. cit. p. 181.
161) Bishop Jr. Op. cit. p. 465.
162) Ibid. p. 467.

A point which led to confusion among American lawyers needs clarification. Some American lawyers " have apparently assumed that the standard of individual rights set by the United States Constitution applies throughout the world as a part of international law"[163]. This is not so. One must remember " that the substantive content of the alien's rights under the Constitution and laws of the United States, as interpreted by our courts, is far from identical with the " international standard " required of a state which seeks to avoid violating the rights of other states in the former's treatment of the latters' national"[164].

The Preliminary Draft Convention on the International Responsibility of States for injuries to Aliens adopts international responsibility of a state for deprivation of means of livelihood without a reasonable period of time and just compensation. Article 11 on Deprivation of Means of Livelihood reads[165].

> 1. To deprive an alien of his existing means of livelihood by excluding him from a profession or occupation which he has hitherto pursued in a State, without a reasonable period of time in which to adjust his affairs, by way of obtaining other employment, disposing of his business or practice at a fair price, or otherwise, is wrongful if the alien is not accorded just compensation, promptly paid in the manner specified in Article 39, for the failure to provide such period of adjustment.
> 2. Paragraph 1 of this Article has no application if an allien
>
> (a) has, as a result of professional misconduct or of conviction for a crime, been excluded from a profession or occupation which he has hitherto pursued or,
>
> (b) has been expelled or deported in conformity with international standards relating to expulsion and deportation and not with the purpose of circumventing paragraph 1. "

IV — CONCLUSION

The alien whose right to work suffered and still suffers many

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163) Ibid.

164) Ibid.

165) Convention on the International Responsibility of States for Injuries to Aliens Preliminary Draft with Explanatory Notes Harvard Law

restrictions in the United States, is suspiciously regarded upon as an undesirable element within the country. He is in the United States only on sufferance.

In spite of steady improvment of rights of aliens in the United States in last fifty years their legal status in some respects is still in contrast with American ideals of tolerance, equality and hospitality which are so estimated all over the world. These cherished ideals must bar statutes inspired by too much nationalistic feelings and economici competition. If the following considerations are before the eyes of legislators, we think there will be less restrictions on the rights of aliens :

> "In exploring the rights of aliens and their proper place in our system it is frequently forgotten that this country was settled by aliens, that it was developed by aliens and that al our people, if not aliens at one time are descended from aliens"[166].
>
> "The first hundred years of our national existence was a period of unimpeded immigration. New settlers were important to the young nation and immigrants were wellcomed. The gates were open and ungarded and all were free to come. This national policy paid rich dividends as the immigrants and their descendants contributed heavily to the growth of our nation"[167].

Beside legislators the courts have an important task too, the classification of a statute as a reasonable one by them must be done with great care. For while the power of classification is necessarily very great[168] and according to the Supreme Court is " the most inveterate of our reasoning process " neverthless "it must regard real ressemblances and real differences between things and persons and class them in accordance with their pertinence to the purpose in hand"[164].

School, May 1, 1959, p. 8, prepared by Professors **Louis B. Sohn** and **Rr. R. Baxter.**

166) **O'Connor,** Op. cit. 482

167) **Gordon and Rosenfield,** Op. cit. 5

168) **Fellman,** Op. cit. 137.

BIBLIOGRAPHY

NORMAN ALEXANDER, Rights of Aliens under United States Constitution, 1931

YILMAZ ALTUĞ, Turkey and Some Problems of International Law, 1958

PIERRE ANDRE BISSONNETTE, La satisfaction comme mode de Réparation en Droit international, 1952.

EDWIN M. BORCHARD, The Diplomatic Protection of Citizens Abroad, 1910.

HERBERT W. BRIGGS, The Law of Nations, 1947.

J. D. BUTLER, " British Convicts Shipped to American Colonies ", The American Historical Review, 1896, 12-33.

CHARLES COOKE, Biography of An Ideal, The Diamond Anniversary History of the Federal Service.

S. B. CRANDALL, Treaties, Their Making and Enforcement, 2d. Ed.

MAURICE R. DAVIE, World Immigration, with Special Reference to the United States, Rev. Ed.

DAVID FELLAN, Alien Rights, 22. Minn. L. Rev. 137 (1938).

FAUL GRIFFITH GARLAND, American-Brazilian Private International Law, 1959.

CHARLES GORDON and HARRY N. ROSENFIELD, Immigration Law and Procedure, 1959.

WILLIAM E. HALL, A Treatise on International Law, 6th ed. 1909.

HARVARD LAW SCHOOL, Research in International Law, 2d. Ed. 1945.

Y. ICHIHASHI, Japanese in the United States, 1932.

MILTON R. KONVITZ, The Alien and the Asiatic in American Law, 1946.

MILTON R. KONVITZ, Civil Rights in Immigration, 1953.

NIEL MASLOW, " Recasting our Deportation Law ", 56 Col. L. Rev. 643

NATIONAL COMMISSION on Law Observance and Enforcement, Report on Crime and Foreign Born.

Note, Immigration and Nationality, 66 Har. L. Rev. 643

Note, Constitutional Restraints on the Expulsion and Exclus of Aliens, 37 Minn. L. Rev. 440 (1953)

Note, The Alien and the Constitution, 20. Chi. U.L. Rev. 547

Note, Constitutionality of Restrictions on Aliens Right to Work, 57 Col. L. Rev. 1012.

BASIL O'CONNOR, Constitutional Protection of Alien's Right to world, New York U. L. Quarterly Rev. 1941, 485.

THOMAS REED POWELL, The Right to Work for the State, 16 Col. L. Rev. 99, (1916).

LOUIS B. SOHN and R. R. BAXTER, Convention on the International Responsibility of States for Injuries to Aliens. Preliminary Draft with Explanatory Notes Harvard Law School, May 1, 1959.

UNITED STATES CIVIL SERVICE COMMISSION, The Employment of Non-Citizens in the United States Civil Service, Pamphlet 24 October 14, 1952.

TABLE OF STATUTES

Federal Acts

18. Stat. 477 (1875)
22. Stat. 58 and 214 (1882)
23. Stat. 115 and 332 (1884-1885)
24. Stat. 414 (1887)
25. Stat. 476 (1888) and 566 (1888)
27. Stat. 25 (1892)
32. Stat. 172 (1902)
39. Stat. 874 (1917)
42. Stat. 5 (1921)
43. Stat. 153 (1924)
72. Stat. 220 (1958)

United States Code Annotated Title 8

State Acts

The Constitution of the State of California of 1879.
Public Law No : 166 of the Commonwealth of Pennsylvania Session of 1897.