THE ALIEN'S RIGHT TO WORK

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I. ADMINISTRATIVE PROCESS AND THE ALIEN

The alien population of the United States, it is now clear, is declining rapidly. According to the census of 1920, the alien population of the country was 7,430,809; the census of 1930 put the figure at 6,284,613; and the department of labor estimated our total alien population in 1936 to be about 4,316,000. This decline may be explained in terms of several rather obvious factors. For one thing, under the double impact of our quota restrictions and the depression, fewer immigrants are coming to the United States; the 23,068 immigrants admitted for permanent residence in 1933 marked the lowest figure recorded in a hundred years. Furthermore, the tide is now running out; in recent years, emigrants abandoning domicile and leaving this country with no intention of returning have outnumbered immigrants admitted. Finally, there has been a sharp increase in the number of aliens seeking naturalization. The rush for citizenship papers is probably due, to a great extent, to the economic disqualifications of alienage, and to a general anti-alien sentiment in this country.

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1936 Annual Report of the Secretary of Labor 89.

21935 Annual Report of the Secretary of Labor 78. In 1934, 29,470 immigrants were admitted for permanent residence, in 1935, 34,956. In 1936, 36,329 were admitted. 1936 Report, 93.

3“During the 6-year period 1931-36 immigration has totaled only 256,538 and emigration 359,680, a difference of 103,142 on the side of emigration.” 1936 Annual Report of the Secretary of Labor 89. See Wootcher, Jr., Races and Ethnic Groups in American Life, chs. I-III; Fields, America’s Emigrants, (1936) 45 Current History 59.

4In 1936, 148,118 declarations of intention and 167,127 petitions for citizenship were filed, and 141,265 certificates of naturalization were issued. The figures for 1933 show: 83,046 declarations of intention, 112,629 petitions for citizenship, and 113,363 certificates of naturalization. 1936 Annual Report of the Secretary of Labor 90.
which the depression has unquestionably intensified. In spite of the fact that the alien population of the country is shrinking, the legal status of the alien, particularly in reference to his right to work for a living, grows steadily more precarious. In fact, the recent flood of legislation in the states barring aliens from an ever wider field of economic activity gives the problem a touch of urgency.

That the alien has a legal status, and is not helplessly at the mercy of legislative and administrative caprice, is found in considering the body of law which has developed in reference to the exclusion and deportation of aliens. It is a well-established principle of international law that a sovereign nation has the right, by virtue of its sovereignty, to exclude or expel any classes of aliens it considers undesirable. The federal government, having charge of foreign affairs under our constitutional distribution of powers, has long exercised this right of sovereignty. Thus, in the leading

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6See Adamic, Aliens and Alien-Baiters, (1936) 173 Harpers 561; Irwin, The Pleasures of Hate, (1936) 25 Survey Graphic 368; Bremer, The Jobless Alien, (1930) 65 Survey 316; Young, American Minority Peoples, chs. III and IV; Hearings on Citizen Employment before a Subcommittee of the Committee on Labor, H. of R., 74th Congr. 2nd sess., on H. R. 12662, May 15, 1936. In the department's report for 1935, pp. 81-82, the secretary of labor wrote: "It is probable that the causes of this increase are largely economic. Aliens are commonly barred from employment on public works, private employers in increasing numbers prefer hiring citizens, proposals are frequently advanced for excluding aliens from relief rolls, only citizens can qualify for old age pensions and other benefits under social security laws."


7As a general rule, the states may not interfere with or supplement federal immigration policy. Chy Lung v. Freeman, (1875) 92 U. S. 275, 23 L. Ed. 550; In re Ah Fong, (C.C. Cal. 1874) 3 Sawyer. 144, Fed. Cas. no. 102 (state may not exclude immigrants on grounds of immorality); People v. Compagnie Générale Transatlantique, (1882) 107 U. S. 59, 2 Sup. Ct. 87, 27 L. Ed. 383; Passenger Cases, (1849) 7 How. (U.S.) 283, 2 L. Ed. 702; Henderson v. Mayor of New York, (1876) 92 U. S. 259, 23 L. Ed. 543 (state may not impose tax on alien immigrants). But state regulation under the police power is valid, until displaced by an Act of Congress, where the subject matter does not require uniformity of treatment, as in the case of quarantine laws, Morgan's Steamship Co. v. Louisiana Bd. of Health, (1886) 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237; Compagnie Francaise v. Louisiana Bd. of Health, (1902) 186 U. S. 380, 22 Sup. Ct. 811, 46 L. Ed. 1175, pilotage regulations, Cooley v. Board of Wardens, (1851) 12 How. (U.S.) 299, 13 L. Ed. 996, or the registration of aliens, New York v. Miln, (1837) 11 Pet. (U.S.) 102, 9 L. Ed. 648. As Mr. Justice Field wrote in Chae Chan Ping v. United States, (1889) 130 U. S. 581, 606, 9 Sup. Ct. 623, 32 L. Ed. 1068, Chinese Exclusion Case: "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are one people, one nation, one power."
case of *Fong Yue Ting v. United States*,8 the Supreme Court asserted that the right to exclude or expel any class of aliens, in war or peace is, "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare." Mr. Justice Gray wrote that "if it could not exclude aliens it would be, to that extent, subject to the control of a foreign power."9 In the assertion of this inherent power of self-preservation, Congress is free to choose whatever methods it desires to carry out its policies, for questions arising from our external relations fall within the familiar category of political questions, in the handling of which the courts are loath to interfere.10 The power of the national government in this field of activity is not only reserved for the political departments of the government, but it is a plenary, expansive power as well.11

In the execution of this governmental power, Congress has enacted a great deal of legislation providing for the exclusion and deportation of many classes of aliens which, in its judgment, are undesirable: the mentally unfit, paupers, diseased and immoral persons, criminals, contract laborers, illiterates and Asians.12

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12 For an exhaustive review of this legislation, see the admirable study
Going to the margin of the exertion by Congress of its constitutional power, the courts have interpreted the statutes to warrant the deportation of aliens on the grounds of mere belief in a doctrine, such as "philosophical anarchism."

For the enforcement of these laws, Congress is not required to prescribe all the legal niceties of procedure which due process of law requires in domestic affairs. Deportation is not a criminal proceeding, and an order of expulsion is not a sentence of punishment; it is therefore proper to provide for a completely administrative process, without recourse to the courts. This is in accord with the familiar doctrine that due process of law does not necessarily require judicial process. Thus, there is no impropriety in stipulating that the findings of administrative officials with respect to the fact of alienage shall be final, for in the language of Mr. Justice Holmes, "the requirement of a judicial trial does not prevail in every case." Indeed, the exclusion of an alien by administrative process alone, without judicial review, is applicable to one who had acquired a commercial domicile within the United States, but who voluntarily left the country, although for a temporary purpose, for "he is none the less an alien."
Furthermore, the technical legal rules of evidence do not apply in full force to hearings conducted by administrative officers in executing the exclusion and deportation laws. Irregularities in the warrant of arrest will not invalidate the proceedings; the hearing is proper even if the notice given was not formal, and the alien claimed he did not understand the language or meaning of the notice; formal pleadings are not required; the alien is not entitled to trial by jury; it is not improper to hold the hearing in a penitentiary; the admission of hearsay evidence is not objectionable; nor is due process lacking because the alien could not secure the compulsory attendance of witnesses; statements made voluntarily to officers before or after arrest are admissible, and it is proper to draw an inference of undesirability from the failure of the alien to answer questions; the administrative appeal may be concluded very quickly. Thus, our law admits of a great deal of informality and flexibility in the conduct of these cases by administrative officials.

In spite of all this, however, the alien is not subject to an arbitrary administrative procedure, and the courts have been willing, in many cases, to impose restraints where the general principles of fairness required by due process of law have been ignored or violated. The Supreme Court has emphasized the fact that while these are not criminal proceedings, they must be


It may be noted that, in general, the English courts require even less of an adherence to traditional rules of legal procedure. See collection of cases in Frankfurter and Davison, Cases on Administrative Law 1016-1044.
“administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race.”

Thus, many federal courts have commented on the despotic powers of the administrative agent who is at the same time “informer, arresting officer, inquisitor, and judge,” and have insisted that due process of law requires that the alien have a fair opportunity to present his case in a fair hearing. A fair hearing includes the right to have the benefit of counsel, and the right of cross-examination. In deportation cases, the alien is entitled to the constitutional protection against illegal searches and seizures. In the trenchant language of Judge Anderson, “a mob is a mob, whether made up of government officials acting under instructions from the department of justice, or of criminals, loafers, and the vicious classes.” Nor may an official extort a confession.

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Svarney v. United States, (C. C. A. 8th Cir. 1925) 7 F. (2d) 515; In re Sugano, (D. C. Calif. 1930) 40 F. (2d) 961.
Ziang Sung Wan v. United States, (1924) 266 U. S. 1, 45 Sup. Ct.
resident alien cannot be taken into custody without a warrant, and failure to show, to an alien or his counsel, the warrant of arrest or the papers on which it was issued, will make the hearing irregular.

Furthermore, an alien who is being held by immigration officers for deportation is in custody under or by color of the authority of the United States, and he therefore has a right to apply in a federal court for a writ of habeas corpus. While the alien does not become entitled to a judicial review of the administrative finding by merely asserting the possession of citizenship, if he can set up a real and serious claim to citizenship he ought to be able to get a judicial determination of the claim. If the question is one of law and not of fact, a judicial question exists. And, of course, the interpretation given to a statute by an administrative official is always subject to judicial review. Thus, for example, aliens may be excluded on grounds of moral turpitude, and the courts have frequently revised the administrative estimate of what constitutes moral turpitude. It may be noted, further, that while an alien may be deported by administrative process, if the offense of remaining here illegally is made punishable by imprisonment a judicial trial must be provided for, in accordance with the fifth and sixth amendments. It is not consistent with the theory of our government,” Mr.

1, 69 L. Ed. 131; Jouras v. Allen, (C.C.A. 8th Cir. 1915) 222 Fed. 756.
42Ng Fung Ho v. White, (1922) 259 U. S. 276, 42 Sup. Ct. 492, 66 L. Ed. 938.
43Gonzales v. Williams, (1904) 192 U. S. 1, 24 Sup. Ct. 177, 48 L. Ed. 317.
46Wong Wing v. United States, (1896) 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140.
Justice Shiras wrote, "that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."47

The courts also have applied the familiar doctrine that while they will not pass on the weight of the evidence gathered by the inspectors, it must be clear that the evidence colorably supports the result.48

The powers of the federal government in respect to foreign or external affairs are admittedly very great. In the field of foreign relations, the federal government possesses all the attributes of sovereignty, enjoying a plenary jurisdiction in respect to ends and means, however limited its jurisdiction may be in the realm of domestic affairs. Indeed, in the recent arms embargo case, the Supreme Court declared that if the powers to declare and wage war, to conclude peace, to make treaties, and to maintain diplomatic relations with other nations had not been mentioned in the constitution, they "would have vested in the federal government as necessary concomitants of nationality."49 And yet, in executing these great powers, the agents of the federal government are required by the courts to observe well-recognized standards of legal fair play. For the sovereign is not only restrained by the sheer fact that there are other sovereignties whose nationals must be treated fairly as a matter of international comity; it has also created effective judicial agencies to correct abuses which arise in the execution of valid powers of government. In short, in a civilized world of civilized nations aliens have rights; they are not the helpless pawns of unrestrained sovereigns.

II. A General View of the Alien's Rights

What is the general status of the alien who is legally within the country?50 Broadly speaking, the alien who resides here owes a temporary and local allegiance, and is entitled to the protection of

47Wong Wing v. United States, (1896) 163 U. S. 228, 237, 16 Sup. Ct. 977, 41 L. Ed. 140.
the law. A characteristic expression of this point of view is found in the following statement by Mr. Chief Justice Fuller:

"By general international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicil of choice, or commercial domicil, is to be presumed . . ." Thus, they are fully responsible for violating our criminal codes, for it is their responsibility to obey the law.

Among other responsibilities falling upon the alien is the obligation to pay taxes, for, as a general rule, citizenship is not necessary for taxation, since the criterion is residence and not personal allegiance. A resident alien is entitled to equal taxation, and accordingly a poll tax levied on resident aliens but not on resident citizens has been held to be a denial of the equal protection of the laws. This rule, however, so far as the few cases on the subject indicate, has not been applied too rigorously. Thus, a $10 fee for the disinterment and removal of a dead body has been upheld on the ground that the statute was general in its terms, operating upon aliens and citizens alike, the court arguing that if the tax affected a larger number of Chinese

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51 The Schooner Exchange v. M'Faddon, (1812) 7 Cranch (U.S.) 116, 144, 3 L. Ed. 287; Carlisle v. United States, (1873) 16 Wall. (U.S.) 147, 154, 21 L. Ed. 426. The court said in Fisher v. Fielding, (1893) 67 Conn. 91, 104, 34 Atl. 714; "An alien friend, however transient his presence may be, is entitled to a temporary protection, and owes in return a temporary allegiance." See also Luke v. Calhoun County, (1875) 52 Ala. 115.


53 Carlisle v. United States, (1873) 16 Wall. (U.S.) 147, 154, 21 L. Ed. 426.

54 Mali v. Keeper of the Common Jail, (1887) 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565. In the famous case of People v. McLeod, (1841) 1 Hill (N.Y.) 377, 25 Wend. (N.Y.) 483, 37 Am. Dec. 328, Judge Cowen wrote: "An alien, in whatever manner he may have entered our territory, is, if he commit a crime while here, amenable to our criminal law. . . . Nay, says Locke, though he were an Indian, and never heard of our laws." People v. McLeod, (1841) 1 Hill (N.Y.) 377, 406-07, 25 Wend. (N.Y.) 483, 37 Am. Dec. 328.


56 Ex parte Kotta, (1921) 187 Cal. 27, 200 Pac. 957. A nondiscriminatory poll tax is valid when levied on a nondeclarant resident alien. Kuntz v. Davidson County, (1880) 6 Lea (Tenn.) 65.
than any other class, that was due to the peculiar customs of the Chinese and not to any legal discrimination. Furthermore, the states may discriminate against non-resident alien beneficiaries, by assessing higher inheritance taxes against them than against residents, although this power of discrimination may be limited by treaty.

Whether aliens may be compelled to perform military service goes to the margin of the law. The general common-law rule is that an alien is exempt from military service, although resident declarants have been held subject to such service. An alien who voluntarily enlists in the army has no right later to claim exemption from the consequences of his own voluntary engagement because of his alienage, even though the act of Congress provided for the enlistment of citizens only. Under the Selective Service Act of May 18, 1917, a resident non-declarant alien was not subject to military service if he claimed exemption, but it was held that such an alien was subject to the draft if he did not claim the

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57 In re Wong Yung Quy, (C.C. Calif. 1880) 2 Fed. 624.
61 In re Wehultz, (1863) 16 Wis. 443, 84 Am. Dec. 700. It was held that a foreigner domiciled in Alabama was subject to military service under the Confederate States. In re Pille, (1864) 39 Ala. 459; In re Toner, (1864) 39 Ala. 454. But, if the foreigner had not established domicile, and had specifically declared his intention of returning to his native country, he was exempt. Ex parte Barton, (1864) 39 Ala. 452; Ex Parte Blumer, (1865) 27 Tex. 734. Cf. In re Finley, (1863) 60 N. C. 191.
62 United States v. Cottingham, (1843) 1 Rob. (Va.) 615, 40 Am. Dec. 710. The court argued that by accepting the alien, the government inferentially waived the requirement of citizenship, and further, that an enlistment is not a contract, and is therefore not subject to ordinary contract law.
exemption according to the established procedure, the exemption not being automatic. But a provision of the Act requiring resident declarant aliens to serve in the army was sustained, even though the provision was contrary to prior treaties and established rules of international law. According to the Amendatory Act of July 9, 1918, alien declarants could secure exemption by withdrawing their declarations of intention, but it was provided that they were subsequently to be barred from becoming citizens. Many who claimed exemption from military service on the grounds of alienage have been denied citizenship for that reason since the World War.

Along with his responsibilities, the alien has come to enjoy many legal privileges. Thus, although national citizenship is generally a prerequisite for voting, the states are free, so far as the federal constitution is concerned, to extend to aliens the privilege of voting. Although no state now permits aliens to vote, at one time as many as twenty-two states and territories extended them this privilege. Of course, the fact that an alien could vote did not establish national citizenship, the acquisition of which depends upon the will of Congress. With respect to the privilege of holding public office, the situation is not so well defined. Several courts have ruled that the holders of elective public offices must be citizens, even in the absence of any specific constitutional or statutory requirement of citizenship, upon the

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64United States ex rel. Pfefer v. Bell, (D.C. N.Y. 1918) 248 Fed. 992; Ex parte Larrucea, (D.C. Cal. 1917) 249 Fed. 981; Gazzola v. Commanding Officer, (D.C. N. Y. 1918) 248 Fed. 1001. It was held that the declarant was subject to the draft, even if he was a native of Austria, with whom we were at war. United States ex rel. Warm v. Bell, (D.C. N.Y. 1918) 248 Fed. 1002; Halpern v. Commanding Officer, (D.C. N.Y. 1918) 248 Fed. 1003. In United States ex rel. Bartalini v. Mitchell, (D.C. N.Y. 1918) 248 Fed. 997, it was held that a declarant was subject to the draft even if he had allowed seven years to lapse after filing his declaration of intention, for, not having left the country, no presumption arises that he resumed his old allegiance to a foreign power.

65See Note, Denial of Citizenship to Aliens Who Sought Exemption from Military Service during War, (1925) 34 Yale L. J. 548.


68See Aylsworth, Passing of Alien Suffrage, (1931) 25 Am. Poli. Sci. Rev. 114. The last state to give up alien voting was Arkansas in 1926.

basis of the general theory of popular government. The Indiana court recently held, however, that in such circumstances, an alien may serve as a member of a city council, even though the right to vote is restricted to citizens. Furthermore, some courts have ruled that although an alien may not hold a public office, he may remove his alienage after the election, if this is accomplished before the date when he must qualify for the office. As a general rule, aliens may not serve as jurors, although some states permit declarants to do so. The great weight of authority holds that although alienage is good cause for challenge before trial, it is too late to complain after trial and conviction, for the defect is not considered fundamental.

A brief examination of the alien's right to sue in the courts will further illustrate his general status. As a rule, aliens, whether resident or nonresident, may sue in court without special statutory permission. An alien, Circuit Judge Woodbury has written, "is not now regarded as 'the outside barbarian' he is considered in China, and the struggle in all commercial countries for some centuries, has been to enlarge his privileges and powers as to all matters of property and trade. . . . Indeed, by the very nature of our institutions encouraging emigration here and naturalization,

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7State ex rel. Of v. Smith, (1861) 14 Wis. 539 (sheriff); Opinion of the Justices, (1877) 122 Mass. 594 (member of state legislature). There is always the question of what constitutes a public office. See People ex rel. Attorney General v. Wheeler (1902) 136 Cal. 652, 69 Pac. 435 (alien may hold position of physician in county hospital, since it is not a public office).

71Connell v. State, (1924) 196 Ind. 421, 144 N. E. 882.


and filling up our waste lands with the industrious of all nations, a more liberal course has always been entertained here in respect to foreigners than in England.\textsuperscript{77}

Nor does the right to sue depend upon the quality of justice dispensed in the alien’s home country.\textsuperscript{8}

"The cannibal of the Fejees may sue here in a personal action, though having no courts at home for us to resort to."\textsuperscript{77}

In respect to workmen’s compensation actions, it has been held that an alien may sue for compensation,\textsuperscript{60} and that it is not contrary to public policy to permit nonresident alien dependents to receive benefits.\textsuperscript{81} It is clear that resident aliens may bring actions for damages, under a statute authorizing suit for damages due to injuries causing death (Lord Campbell’s Act).\textsuperscript{62} Indeed, it may be noted that nonresident aliens are generally permitted to bring such a suit;\textsuperscript{82} to hold otherwise, it has been argued, would en-

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\textsuperscript{78}Pearson v. City of Portland, (1879) 69 Me. 278, 31 Am. Rep. 276.


\textsuperscript{80}Pocahontas Collieries Co. v. Rukas’ Adm’r, (1905) 104 Va. 278, 51 S. E. 449.

courage negligence on the part of employers, and would be a departure from the liberal policy which modern, enlightened governments seek to foster with respect to foreigners, according to which the alien ought to be protected in every reasonable way. In any event, considering the very large amount of foreign labor employed in this country, no exception as against the claims of nonresident dependents could be silently read into the law.

A rather novel question has recently arisen with reference to the alien's right to sue where the alien is found to be within the United States unlawfully. The Wisconsin court held, in 1933, that such an alien was not competent to bring suit in an action for personal services on the ground that he is "a defiant person challenging the ability of this country to enforce its own laws," arguing that the protection of the fourteenth amendment cannot be extended so as to give an alien the right to demand the help of the courts in frustrating the plain purpose of acts of Congress regulating immigration. The Massachusetts court has refused to accept this view, in an automobile accident case, holding that the illegal entry was not a contributing cause of the injury, and a New York court, in an action involving false imprisonment and malicious prosecution, has reached the same conclusion, stating that "even the meanest outcast is entitled to protection against unlawful restraint of his person." This would appear to be the better and more liberal view.


Coultes v. Pharris, (1933) 212 Wis. 558, 250 N. W. 404.


See Bell, Unlawful Entry as a Bar to Maintaining Suit, (1934) 29 Ill. L. Rev. 101; (1934) 68 U. S. L. Rev. 178; (1934) 47 Harv. L. Rev. 520; (1934) 33 Mich. L. Rev. 292; (1934) 18 MINNESOTA LAW REVIEW 214.
The alien may assert in the courts the constitutional guarantees of due process and equal protection of the laws set forth in the fifth and fourteenth amendments. The constitution extends these guarantees to "persons" and not merely to citizens, and these words, it has been held, apply to aliens as well as to citizens. "The fourteenth amendment to the constitution," the Supreme Court has declared, "is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."91 Thus, a statute or regulation which discriminates against aliens, or treats them separately as a class, is not per se a proper classification; the classification or special treatment must be justified as a reasonable one, and as advancing some special or particular public interest.92 The classification must be justified as a proper means of accomplishing a legitimate end.

Apparently, the alien should be entitled to the protection of all the guarantees of the Bill of Rights, including freedom of religion, speech and press, and the procedural safeguards pertaining to criminal cases.93 There seems to be, however, some confusion, and some doubt, as to how much freedom of speech the alien enjoys. He has a right to use his own language, as is illustrated in the case of the Philippine Bookkeeping Act, which prevented Chinese merchants from keeping their books in Chinese, and which the court declared to be a denial of the equal protection of the laws.94 And it has been held that the alien has a right "to comment, fairly, upon governmental policies and actions."95 But some courts

91Yick Wo v. Hopkins, (1886) 118 U. S. 356, 369, 6 Sup. Ct. 1064, 30 L. Ed. 220, Matthews, J. The enjoyment by an alien of these constitutional guarantees does not depend upon the fact that we have not recognized his home country, nor does it have anything to do with the standards of justice of that country. Russian Volunteer Fleet v. United States, (1931) 282 U. S. 481, 51 Sup. Ct. 229, 75 L. Ed. 473; Silosberg v. N. Y. Life Ins. Co., (1927) 244 NY. 482, 155 N. E. 749.
92Truax v. Raich, (1915) 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131. See, for example, the interesting case of Ho Ah Kow v. Nunan, (C.C. Calif. 1879) 5 Savy. 552, Fed. Cas. No. 6,546, where the court held that an ordinance which provided that every male imprisoned in jail was to have his hair cut to a uniform length of one inch from the scalp was aimed at the removal of the Chinese queue, and was therefore a denial of the equal protection of the laws. Apparently, religious and racial sensibilities are entitled to judicial protection.
maintain that the alien's freedom to express political opinions is something less than that of the citizen. Thus it has been held that the alien has no constitutional right to share in the privilege or responsibility of attempting to change our form of government.\(^9\) Furthermore, it may be noted that the act of Congress\(^9\) providing for the deportation of alien anarchists has been held not to be a denial of freedom of speech, since Congress is free to exclude or deport any class of aliens it desires to keep out.\(^9\) Communists have been deported on the ground that no alien has the right to preach revolution.\(^9\) and naturalization orders have been cancelled in cases of political radicalism, the courts taking the view that such persons could not have meant what they said when they took the oath of allegiance.\(^10\)

Another source of legal protection for the alien is found in the treaty-making power of the federal government. Treaties are declared to be, by the constitution, the supreme law of the land. The federal government, under its treaty power, may confer rights on aliens, as against the state governments, which aliens would not otherwise have without the states' consent, as, for example, the right of inheritance,\(^1\) or the right to conduct a certain kind of business.\(^2\) Furthermore, the national government has the power to provide for the punishment of those who are guilty of depriving


\(^{9b}\)Alien Immigration Act of March, 1903, 32 Stat. at L. 1213.


\(^{9d}\)Kjar v. Doak, (C.C.A. 7th Cir. 1932) 61 F. (2d) 566: "Revolution presupposes an antagonism between a government and its nationals, not between a government and aliens."

\(^{10a}\)United States v. Tapolcsanyi, (C.C.A. 3d Cir. 1930) 40 F. (2d) 255.


foreigners of rights and privileges guaranteed to them by treaty. The treaty protection is heightened a bit by the familiar rule of construction that treaties are to be liberally construed to carry out the apparent intention of the parties. The construction of a treaty, Mr. Justice Paterson wrote in a famous case, ought to be "liberal and benign." And, in the language of Mr. Justice Swayne, "where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. Such is the settled rule in this court."

III. THE RIGHT TO WORK FOR A LIVING

In a general way, what right to work for a living in the common occupations of the community does the alien enjoy? In the leading case of *Truax v. Raich*, the Supreme Court declared unconstitutional an Arizona statute which required that not less than 80 per cent of those who are employed in establishments having five or more workers, "regardless of kind or class of work," must be qualified electors or native-born citizens. The court held that this statute was a violation of the fourteenth amendment, asserting that the police power does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. For the right to work for a living in the common occupations of the community, Mr. Justice Hughes stated, is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure. Furthermore,
it was held that while the state clearly has a wide power of classification, the classification must be reasonable, and consistent with the legitimate interests of the state; in this case, it was asserted that no special public interest with respect to any particular business is shown that could possibly justify the legislation. Finally, it was pointed out that the authority to admit or exclude aliens is vested solely in the federal government, and that the assertion of the power to deny aliens the opportunity of earning a livelihood when lawfully admitted to the state amounts to an assertion of the right to exclude them altogether, "for in ordinary cases they cannot live where they cannot work."

Other cases have strengthened this point of view. Thus a statute which made it unlawful for any corporation to employ nondeclarant aliens was held to deny both due process and the equal protection of the laws, the court asserting that a state legislature "has no authority to deprive a person of the right to labor at any legitimate business." A state constitutional provision, implemented by a penal statute, which forbade all corporations formed under the laws of the state to employ Chinese or Mongolians, "directly or indirectly in any capacity," was held to be invalid as being contrary to the treaty with China, a denial of the constitutional rights of the owners of corporate property to employ whatever labor they choose, and a denial of the equal protection of the laws. Judge Sawyer wrote, in that case:

"The right to labor is, of all others, after the right to live, the fundamental, inalienable right of man, wherever he may be permitted to be, of which he cannot be deprived, either under the guise of law or otherwise, except by usurpation and force."

And Judge Hoffman declared, in the same case, that the right to work for a living "is as inviolable as the right of property. for property is the off-spring of labor. It is as sacred as the right to life, for life is taken if the means whereby we live be taken."

In line with this doctrine, a Pennsylvania statute, imposing on every employer of foreign-born unnaturalized male persons a tax of three cents a day for every alien so employed, was declared by the courts to be invalid, because the classification made by the statute was obviously arbitrary. Similarly, a recent Michigan

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109 Ex parte Case, (1911) 20 Idaho 128, 116 Pac. 1037.
110 In re Tiburcio Parrott, (C.C. Cal. 1880) 1 Fed. 481.
111 In re Tiburcio Parrott, (C.C. Cal. 1880) 1 Fed. 481, 506, 498.
statute which required aliens to obtain certificates of legal residence as a prerequisite for any employment or business within the state, and which provided that aliens who entered the country illegally, or who are "undesirable" as defined by the laws of the United States should not be entitled to such certificates, was held unconstitutional as an invasion of a field of regulation in which the power of the federal government is "paramount and exclusive."  

The general rule, then, is that an alien is permitted to work in the common occupations of the community, and that the federal constitution will protect his right to work. But general rules do not decide specific cases, and in many different situations this basic right of the alien has been called into question. This problem has arisen in legislation dealing with the professions. Most states demand citizenship as a prerequisite for the practice of law, and this requirement has been universally sustained as a proper classification. It has been argued that this profession requires an appreciation of and a desire to maintain our political institutions; it is closely related to the maintenance of the civil rights of the citizen. Furthermore, it is said that the alien cannot very well take the oath required of lawyers. There is the possibility, also, that the alien may put himself outside of the jurisdiction of the state courts, in cases of unprofessional conduct requiring the invocation of the disciplinary power of the court; at least, there is the possibility of removal to the federal courts. Finally, the lawyer is considered to be an officer of the court, and the constitution does not require the state to confer upon the alien an

114 For recent statutes see: California, Gen. Laws (Deering, 1931) Act 591, sec. 24; Maine, Laws 1931, ch. 176, sec. 26. In New York, Consol. Laws (Cahill, 1930) ch. 66, sec. 24-a, no one may represent any claimant before the industrial board under the workmen's compensation act unless he is a citizen. Several states prohibit aliens from acting as executors. See Arizona, Rev. Code 1928, sec. 3925; Maryland, Ann. Code (Bagby 1924) art. 93, sec. 53.  
125 In re Yamashita, (1902) 30 Wash. 234, 70 Pac. 482, 59 L. R. A. 671, 94 Am. St. Rep. 860; In re Hong Yen Chang, (1890) 84 Cal. 163, 24 Pac. 156; In re O'Neil, (1882) 90 N. Y. 584; Ex parte Thompson, (1824) 3 Hawks (N.C.) 355; In re Admission to Bar, (1900) 61 Neb. 58, 84 N. W. 611. Where the state law permits alien declarants to practice law, and the petition for naturalization of a particular declarant is later denied, he is not eligible for membership in the bar, since it may be assumed that alien declarants should be admitted only where the declared intention will in due course ripen into citizenship. In re O'Sullivan, (D.C. Mont. 1920) 267 Fed. 230.  
116 Ex parte Thompson, (1824) 3 Hawks (N.C.) 355; In re Admission to Bar, (1900) 61 Neb. 58, 84 N. W. 611.
official status. Disqualification for the bar because of alienage is in accord with the general doctrine that the right to practice law is not a privilege or immunity of a citizen of the United States, but a privilege subject to the control of the state legislature.\footnote{Ex parte Lockwood, (1894) 154 U. S. 116, 14 Sup. Ct. 1082, 38 L. Ed. 929; State v. Rosborough, (1922) 152 La. 946, 94 So. 858; In the Matter of Charles Taylor, (1877) 48 Md. 28.}

There has been a great deal of legislation in recent years affecting the alien’s right to engage in various other professions where the justification is not so clear. A number of states now limit the practice of medicine to citizens or declarants,\footnote{See, for example, Florida, Comp. Laws 1927, sec. 3408 (1); Nevada, Laws 1931, ch. 206; Wisconsin, Stats. 1935, sec. 147.15.} and several states admit declarants who complete their citizenship within a certain period of years.\footnote{New Jersey, Comp. Stat., Supp. 1925-1930, sec. 127-31 (citizenship must be completed within 6 years of making the declaration of intention); Rhode Island, Laws 1927, ch. 1029, sec. 3 (citizenship must be completed within five years after examination by the board of health).} Florida requires citizenship for osteopaths and podiatrists,\footnote{Florida, Comp. Laws 1927, secs. 3422, 3465.} while New York permits aliens or declarants to become osteopaths or dentists,\footnote{New York Consol. Laws (Cahill, 1930) ch. 15, secs. 1256 (1), 1259 (osteopaths must complete citizenship within ten years after declaration of intention); New York, Consol. Laws (Cahill, Supp. 1933), ch. 15, sec. 1306 (3) (dentists must complete citizenship within six years of the date of the license).} but flatly requires citizenship for veterinarians.\footnote{New York, Consol. Laws (Cahill, 1930) ch. 15, secs. 1256 (1), 1259 (osteopaths must complete citizenship within ten years after declaration of intention); New York, Consol. Laws (Cahill, Supp. 1933), ch. 15, sec. 1306 (3) (dentists must complete citizenship within six years of the date of the license).} A number of states have in recent years passed legislation requiring citizenship for optometrists,\footnote{New York Consol. Laws (Cahill, 1930) ch. 15, sec. 1353g (must complete citizenship within time prescribed by law); Wisconsin, Stats. 1935, ch. 151.02 (1).} and many states now demand that pharmacists be citizens\footnote{Florida, Comp. Laws 1927, secs. 3422, 3465.} or at least declarants.\footnote{New York Consol. Laws (Cahill, 1930) ch. 15, sec. 1353g (must complete citizenship within time prescribed by law); Wisconsin, Stats. 1935, ch. 151.02 (1).} Recent legislation in several states now re-
quires citizenship for undertakers and embalmers. A number of states have, in the past few years, provided that architects must be citizens or at least declarants, and so, too, with reference to engineers and surveyors. Furthermore, a great many states now require, by legislation, that accountants possess citizenship, or that they have filed their declarations of intention. Finally, recent legislation has been enacted requiring citizenship for membership on state trade and professional boards having general supervisory powers over trades and professions, particularly in reference to the granting and revocation of licenses.
It is not at all clear that the reasoning in the cases dealing with exclusion from the legal profession would justify exclusion from medicine, engineering, accountancy and the like, for the legal profession is sufficiently unique to be differentiated. The lawyer is an officer of the court, and has an unusually close connection with the laws of the land and the civic rights of the individual.\textsuperscript{133} But what public interest is promoted by requiring citizenship of doctors and embalmers? In what respect is a citizen, merely because he is a citizen, likely to be a better pharmacist or engineer or accountant than an alien? The power of the state to classify is conceded by all courts to be very great, and since government is not an exact science, it is sufficient if the classification is roughly adapted to proper ends, but the power of classification is not an arbitrary power, and its exercise must be reasonably related to the advancement or protection of legitimate public interests.

The issue has been drawn by the courts more clearly in reference to the "garden variety" trades and callings. The Massachusetts court has sustained a statute requiring citizenship or a declaration of intention for the granting of a peddler's license as a proper exercise of the police power.\textsuperscript{134} The court argued that the regulation is justifiable because of the opportunities for fraud in the business, on the analogy of similar laws in connection with liquor dealers, and expressed the belief that the possession of domicile and citizenship might be important to those seeking remedies for wrongs done. On the contrary, a Maine statute providing that peddler's licenses be granted to citizens only was declared unconstitutional as a denial of equal protection, the court asserting the familiar doctrine that an alien has a right to pursue a business or occupation, and to acquire and enjoy property, on equal terms with citizens.\textsuperscript{135} In accordance with the current anti-alien tendency of state legislation, it may be noted that several states have recently adopted a statutory requirement of citizenship trade—must have been citizens for at least three years); North Carolina, Code Ann. 1931, sec. 5168 (ss) (board of examiners of plumbing and heating contractors); Ohio, Laws 1935, ch. 24, art. 22(4) (board of professional engineers).

\textsuperscript{133}In Templar v. State, (1902) 131 Mich. 254, 90 N. W. 1058, the court said, in a dictum: "But the practice of medicine is no more an incident of citizenship than the practice of the trade of a barber."


\textsuperscript{135}State v. Montgomery, (1900) 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386.
or a declaration of intention as a prerequisite for engaging in the business of peddling.\textsuperscript{136}

The Minnesota court has reached the conclusion that it is proper to require citizenship for auctioneers.\textsuperscript{137} In its opinion, the court pointed out that the courts ought to go slowly in declaring the legislature wrong as to the facts, and that the evil against which the statute is directed may be that aliens, lacking the interest in the welfare of state and country which the citizen has, were acting as auctioneers to the harm of the public. Furthermore, the court expressed the belief that the auctioneer may be considered as an administrative officer of the state, like the lawyer or certified public accountant. The courts of New Jersey and Rhode Island have sustained municipal ordinances prohibiting the issuance of licenses to aliens to operate buses or "jitneys," on the ground that the use of the public highways by common carriers is a privilege and not an inalienable right of the individual and that therefore the state may grant or withhold the privilege on its own terms.\textsuperscript{138} In declaring that this is a proper classification, the Rhode Island court asserted that it fairly may be said that "aliens as a class are naturally less interested in the state, the safety of its citizens, and the public welfare than citizens of the state. . . ." Likewise, a statute requiring an applicant for a pilot's license to be an American citizen and a legal voter has been upheld.\textsuperscript{139} Similarly, statutes and ordinances prohibiting aliens from conducting pool rooms have been sustained,\textsuperscript{140} the courts

\textsuperscript{137}Wright v. May, (1914) 127 Minn. 150, 149 N. W. 9. See Mason's Minn. 1927 Stats. sec. 7322.
\textsuperscript{139}State v. Ames, (1907) 47 Wash. 328, 92 Pac. 137. For a recent statute providing that pilots must be citizens, see Oregon Code, Supp. 1935, sec. 65-316.
leaning heavily on the doctrine that because of the harmful and vicious tendencies associated with public pool rooms, the state may go so far in regulating them as to forbid completely their operation. The Supreme Court took the position that it was not necessary for the Court to be satisfied that the premise of the statute is founded in experience; it is enough to say that in the light of facts admitted or generally assumed, there is the possibility of a rational basis for the legislative judgment. The Court asserted that it had no such knowledge of local conditions that would enable it to say that the legislature was clearly wrong in making this discrimination.

A similar conclusion has been reached in reference to statutes which deny aliens licenses to sell liquor. It has been argued that because of the many evils connected with the liquor business, it has always been subjected to an extraordinary amount of state regulation, even to the point of prohibition, and that not even the citizen has an inherent right to sell liquor. As to the discrimination against aliens, it is maintained that citizens of this country "might reasonably be supposed to have a regard for its welfare" which aliens do not have. There has been a difference of opin-

142Ohio ex rel. Clarke v. Deckebach, (1927) 274 U. S. 392, 47 Sup. Ct. 666, 71 L. Ed. 1156. In Anton v. Van Winkle, (D.C. Or. 1924) 297 Fed. 340, Judge Wolverton was more direct: "It may be judicially known ... that aliens coming into this country are without the intimate knowledge of our laws, customs, and usages that our own people have. So it is likewise known that certain classes of aliens are of different psychology from our fellow countrymen. Furthermore, it is natural and reasonable to suppose that the foreign born, whose allegiance is first to their own country, and whose ideals of governmental 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 United States, as those who, by citizenship, are a part of the government itself."
ion as to the propriety of refusing licenses to aliens to sell soft drinks, one court taking the view that this is a reasonable exercise of the police power because of the possibilities of violating the law which inhere in the soft drink business; it is therefore in the public interest to bar "such persons as are not so attached to the institutions of our country as to be in the class of its citizenship."

On the other hand, another court could not find in this classification that any benefit would accrue to the community. The rule, however, that aliens may be denied licenses to sell intoxicating liquor, qua alien, is now well established, and it operates to shut aliens out of a vast area of business activity, now that the eighteenth amendment has been repealed, for it is the overwhelming tendency today, in the new legislation on the subject of the liquor traffic, to prohibit the issuance of licenses to aliens.

There is another side to this picture, for the right of the alien to engage in a wide variety of common callings has been affirmed in many cases. The Michigan court has decided that a statute which prevents aliens from being licensed as barbers is a denial of the equal protection of the laws which the fourteenth amendment assures to all persons regardless of nationality. Barbering, the court said, is in no way injurious to the morals, health or even the convenience of the community, so long as the barber is technically competent. Nevertheless there has been some recent legislation requiring citizenship or a declaration of intention for barbers and cosmetologists. An ordinance of San Francisco court said that these statutes "are based upon 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 entire social fabric." For a criticism of this point of view, see Note, (1912) 12 Col. L. Rev. 737.

147George v. City of Portland, (1925) 114 Or. 418, 235 Pac. 681.
151Idaho, Code Ann. 1932, sec. 53-1205 (cosmetologists must be citizens or declarants); Wisconsin, Stats. 1935, sec. 159.08 (a) (managers of beauty parlors must be citizens).
requiring all Chinese to live and do business, after a certain date, in a designated part of the city, was held to be both an arbitrary confiscation of property contrary to due process of law, and an illegal discrimination denying the equal protection of the laws.\textsuperscript{152} The same result was reached in the case of municipal quarantine orders which required all Chinese to submit to an inoculation because of an alleged bubonic plague, and which restrained the Chinese within the city and county until they submitted to inoculation, the courts holding that, in the absence of evidence showing a special need for inoculating the Chinese, this constituted a discriminatory interference with personal liberty and the right to pursue lawful business.\textsuperscript{153}

The alien has a right to engage in the hotel and restaurant business, and therefore a statute prohibiting Chinese from employing girls under twenty-one in hotels and restaurants is unconstitutional.\textsuperscript{154} So, also, the exclusion of orientals from the laundry business by arbitrary administrative fiat is a denial of the equal protection of the laws, even though the statute, on its face, makes no discrimination at all.\textsuperscript{155} A laundry is not a nuisance per se, and an ordinance requiring the recommendation of not less than twelve citizens and taxpayers in the block, in order to obtain a license, is contrary to the constitution, for the alien is free to pursue a lawful business, and the licensing power cannot be used to prohibit "any of the avocations of life which are not injurious to public morals nor offensive to the senses, nor dangerous to the public health and safety."\textsuperscript{156} Although the laundry business may be singled out for rather drastic regulation under the police power,\textsuperscript{157} an ordinance making it unlawful to operate a laundry within the habitable portions of the city was held to be, not a

\textsuperscript{152}In re Lee Sing, (C.C. Cal. 1890) 43 Fed. 359.

\textsuperscript{153}Wong Wai v. Williamson, (C.C. Cal. 1900) 103 Fed. 1; Jew Ho v. Williamson, (C.C. Cal. 1900) 103 Fed. 10.

\textsuperscript{154}In re opinion of the Justices, (1911) 207 Mass. 601, 94 N. E. 558, 34 L. R. A. (N.S.) 604: "The fact that a man is white, or black, or yellow is not a just and constitutional ground for making certain conduct a crime in him when it is treated as permissible and innocent in a person of a different color." In Carvallo v. Cooper, (N.Y. App. Div. 1930) 239 N. Y. S. 436, it was held as a matter of statutory construction, that an alien may operate a lodging house.


\textsuperscript{156}In re Quong Woo, (C.C. Cal. 1882) 13 Fed. 229.

regulation, but a prohibition of a useful and necessary occupation, the real purpose of which was to get rid of the Chinese.\textsuperscript{158} In accordance with this point of view, it has been held that a statute (Philippine Bookkeeping Act of 1921) which prevents Chinese from keeping their account books in the Chinese language unconstitutionally curtails their liberty of action in preserving their property and earning a livelihood.\textsuperscript{159} The business of newsdealing has been held to be a matter of private concern in which aliens have an "inherent right" to engage.\textsuperscript{160}

A number of cases have come before the courts in which the right to engage in a common calling was premised upon the provisions of commercial treaties. Thus, while a state may deny aliens the right to form or participate in a corporation,\textsuperscript{161} the general rule may be modified by treaty. It has been held that a treaty guaranteeing the right "to carry on trade," liberally construed, gives the protected alien the right to do business on the same terms as native citizens, and therefore assures him the right to establish a hospital under a corporate form of organization.\textsuperscript{162} The same trade treaty was construed to authorize the alien to engage in the business of conducting a pawnshop\textsuperscript{163} and a seaside sanitarium.\textsuperscript{164} A treaty, however, which provided for reciprocal "commerce" between Great Britain and the United States was held not applicable to the insurance business, on the ground that insurance is not "commerce."\textsuperscript{165}

\textsuperscript{158} In re Tie Loy, (C.C. Cal. 1886) 26 Fed. 611, Sawyer, J.: "The right to labor in this or any other honest, necessary, and in itself harmless calling, where it can be the most conveniently, advantageously and profitably carried on without injury to others, is one of the highest privileges and immunities secured by the constitution to every American citizen, and to every person residing within its protection." But an ordinance making it a punishable offense for anyone to visit any gambling place in that section of the town known as the "Chinese Quarter" has been sustained on the ground that it applies to all who visit gambling houses in the area, and that whites as well as Chinese own property there. In re Ah Kit, (C.C. Cal. 1890) 45 Fed. 793.


\textsuperscript{160} State v. Sinchuk, (1921) 96 Conn. 605, 115 Atl. 33, 20 A. L. R. 1515.

\textsuperscript{161} State v. Travelers' Ins. Co., (1898) 70 Conn. 590, 40 Atl. 465.


\textsuperscript{164} State v. Tagami, (1925) 195 Cal. 522, 234 Pac. 102.

\textsuperscript{165} Bobe v. Lloyds, (C.C.A. 2d Cir. 1926) 10 F. (2d) 730. The court relied upon the definition given to the insurance business in Paul v. Vir-
There has been a great deal of legislation in the past few years extending the disqualification of alienage to an ever wider area of common callings, which has not yet been tested in the courts. A few examples of this legislation may be given. Real estate brokers and salesmen in Pennsylvania and Wyoming must now be citizens, while in New York a declarant is eligible for such employment provided he completes his citizenship within five years after his declaration of intention is filed. In several states it is now necessary to be a citizen in order to operate an employment agency or act as an employment agent, and the same requirement has been provided for private detectives. Bankers in New Jersey, insurance agents in Ohio, and pawnbrokers in Virginia and plumbers in Kentucky must possess American citizenship. So also, it is necessary to be a citizen in order to be employed as a mine foreman in the coal mines of West Virginia and Wyoming. The states generally require citizenship before granting an aviation pilot's license, or they provide that the applicant must have a federal license from the United States Department of Commerce.
department of Commerce.\footnote{Alabama, Code Supp. 1932, sec. 6070 (12); Idaho, Laws 1933, ch. 203; New Jersey, Laws 1932, ch. 51; Oklahoma, Stats. 1931, sec. 10133. See Uniform Air Licensing Act, sec. 7.} Under the rules of the department, a commercial pilot must either be a citizen of the United States, or a citizen of a foreign country which grants reciprocal commercial pilot privileges to American citizens; but declarants may secure licenses provided they diligently and successfully prosecute the naturalization proceedings, under penalty of revocation of the license.\footnote{Air Commerce Bulletin, No. 20, p. 516 (Washington, April 15, 1931). The parent statute is the Air Commerce Act of 1926, 44 Stat. at L. 568.} Finally, it should be noted that several states have recently adopted, as a statutory rule, the principle of construction that in any action, civil or criminal, involving a denial or claim of a right or privilege which turns on the question of alienage, the burden of proof to establish citizenship rests upon the individual who alleges citizenship.\footnote{See Arizona, Laws 1933, ch. 58; California, Gen. Laws (Deering, 1931) Act 261, sec. 9b.}

While most of the legislation excluding aliens from the common callings has been enacted by the states, Congress has, during the past few years, done a little discriminating on its own behalf. Liquor licenses in the District of Columbia are granted only to citizens,\footnote{Stat. at L. 26, sec. 5(a) (3); 48 Stat. at L. 328, sec. 14 (a) (2).} and licenses to operate radio stations are similarly restricted.\footnote{48 Stat. at L. 1167, sec. 12.} Citizenship is also required for directors of national banks,\footnote{48 Stat. at L. 1233, sec. 17.} customhouse brokers,\footnote{Stat. at L. 759, sec. 641 (a).} and radio station operators.\footnote{Stat. at L. 160, ch. 192.} According to a statute enacted in 1928, all officers of vessels employed in the ocean mail service must be citizens; for the first four years after the enactment of the statute, one-half of the crew must be citizens, and after that two-thirds.\footnote{Stat. at L. 693, sec. 405(c).} A statute adopted in 1936 provides that all licensed officers of vessels documented under the laws of the United States must be citizens, and that all members of the crew must be citizens, if working on a cargo vessel to which a construction or operating subsidy has been granted.\footnote{Stat. at L. 1992, sec. 302(a).} As to passenger vessels of this description, for a period of one year after the adoption of the act, 80 per cent of the crew must be citizens, and then the percentage is to be increased 5 per cent a
year until 90 per cent of the crew possess American citizenship, and all aliens employed must either be declarants or possess other evidences of legal admission into the United States for permanent residence.\textsuperscript{186}

A particularly sweeping exception to the rule that aliens are entitled to equal treatment has been recognized by the courts where statutes bar aliens from employment on public works, or stipulate that citizens be given preference in such employment. Thus the Supreme Court sustained, in \textit{Heim v. McCall},\textsuperscript{187} a New York law which provided that only American citizens could be employed on state or municipal public works, and the statute was held valid in reference to contractors engaged by New York City to construct subways. The theory of the case was that the state, as employer, has the same freedom in selecting its employees that any private employer enjoys, and that the state may therefore prescribe whatever conditions it sees fit under which it will permit its work to be done. The Court leaned heavily, in its opinion, on the precedent of \textit{Atkin v. Kansas},\textsuperscript{188} where a statute was sustained which provided that all contractors doing work for the state must observe an eight-hour day, on the theory that, as guardian for its people, and having control of their affairs, the state may prescribe the conditions under which it will permit public work to be done on its behalf.

Though there are several early precedents to the contrary,\textsuperscript{189} this discrimination against aliens is clearly the law of the land.

\textsuperscript{186} Stat. at L. 1993, secs. 302(b), 302(c).


\textsuperscript{188} (1903) 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148.

\textsuperscript{189} In \textit{People v. Warren}, (1895) 34 N. Y. S. 942, the superior court of Buffalo held a statute unconstitutional which made it unlawful for one contracting with a municipal corporation for the construction of public works to employ aliens. The court argued that the relation of the paving contractor to the city is that of an independent contractor who is entitled to the same privileges that all other employers possess, including the right to employ whatever labor he desires. The statute was also held to contravene our treaty with Italy. In \textit{Baker v. Portland}, (C.C. Or. 1879) 5 Sawy. 566, Fed. Cas. No. 777, an act prohibiting the employment of Chinese laborers on public works, whether directly by governmental agencies or by contractors working under government contracts, was held to contravene a treaty guaranteeing to Chinese residing here the privileges and immunities enjoyed by subjects of the most favored nation.
today. It is extremely doubtful whether *Atkin v. Kansas* is a precedent for these cases, since it did not involve a discrimination. It is one thing to limit the hours of labor for all to eight hours a day, and another to discriminate against a whole class. Furthermore, it is questionable whether the state is the same as a private employer, for the state cannot divest itself of its public character. Nevertheless, under the impact of the depression, more and more legislation has been passed shutting aliens out from employment on public works. Generally, these statutes provide that preference for such employment shall be given to citizens, and that aliens shall be employed only if a sufficient number of citizens is not available, or in case of emergency. The Federal Emergency Relief Appropriation Act of 1936 merely prohibits the employment on public works of aliens illegally within the United States.

The rule with relation to public works is illustrated in the decision of the supreme court of Washington upholding a Seattle ordinance which provided that swill may be removed from eating places only by citizens having a contract therefor with the city. The court argued that the collecting of garbage, concerning which the police power is very great, does not fall within the classification of common occupations and businesses; this is a public service, and the contractor becomes in effect a public employee. Nor is this statute contrary to a trade treaty, for a trade treaty does not confer a right to engage in public work. This case further

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101 Arizona, Laws 1931, ch. 31; California, Gen. Laws (Deering, 1931) Act 6430, secs. 1-4 (no aliens "except in cases of extraordinary emergency"); Connecticut, Gen. Stat. Supp. 1935, sec. 1603c; Idaho, Code Ann. 1932, sec. 43-603 (citizens or declarants); Iowa, Code 1935, sec. 1171-d1, d2; Massachusetts, Ann. Laws (Michie, Cum. Supp. 1936) ch. 149, sec. 26 (preference to citizens); Nevada, Comp. Laws 1929, sec. 6173; New Jersey, Laws 1931, ch. 27, as amended, Laws 1932, ch. 226 and Laws 1934, ch. 92 (preference to citizens, and must be citizens of New Jersey, who have been domiciled in the state continuously for one year immediately prior to such employment); New York, Consol. Laws (Cahill, 1930) ch. 32, sec. 222; Oregon, Code Ann. 1930, sec. 19-201, 202 (no Chinese or draft-dodging aliens); Pennsylvania, Stats. (Purdon, 1936) tit. 43, sec. 151 (citizens only); Texas, Ann. Stats. (Vernon, 1936) sec. 6674p. It has been held, in Massachusetts, that it is the duty of a city street department to discharge alien employees, where citizens are eligible for employment, although their employment commenced prior to the enactment of the statute. 4 Op. Atty. Gen. 300. It has also been held that such preference must be given even if the work is performed outside the state. 4 Op. Atty. Gen. 140.
103 Cornelius v. City of Seattle, (1923) 123 Wash. 550, 213 Pac. 17.
illustrates the fact that these statutes which prohibit or limit the right of aliens to participate in public works employment tend to whittle down the alien’s opportunities to make a living in the very fields of unskilled or semi-skilled labor where he is so frequently compelled to look for employment.

In accordance with this doctrine, the states bar aliens from many other types of public employment. Thus, it is the common thing today to require citizenship for school teachers. In Oklahoma, the heads of departments may not employ aliens “in any way,” while in Florida all heads of departments must give preference to citizens in any public employment, and in Montana no alien may be employed by any public agency in any capacity, “if competent American labor is available.” California provides that aliens may not be employed in any governmental service, except that declarants may teach school, and foreigners may be employed in the universities, as specialists, or in case of emergency. In New Jersey the civil service is open only to citizens, except that declarants may be employed in state institutions, not including penal or reformatory institutions, if a sufficient number of qualified citizens is not available, and they may be employed where unskilled or semi-skilled labor is needed under the same circumstances.

Another widely accepted exception to the general rule that aliens have a right to work in the common callings of the community is found in connection with those in which the state has a proprietary interest. This exception is akin to the principle in—
herent in the capacity of the state to refuse to employ aliens on public works. In the leading case of *Patsone v. Pennsylvania*, the Supreme Court sustained a statute which made it unlawful for an alien to kill game, except in defense of person and property, and which therefore made it illegal for an alien to possess a shotgun or rifle. The case was decided on the general theory that the state may reserve the common property of the state, such as wild bird and animal life, fish and oysters, for the use of its own citizens, the enjoyment of which it may deny to non-residents. The state, Mr. Justice Holmes argued, has wide powers of classification, and "a lack of abstract symmetry" does not matter. This is a matter of local experience, and this court, he asserted, cannot say that the state is wrong.

There have been a number of similar cases in the state courts. A Vermont statute denying a hunter's license to an alien has been sustained on this theory, that since wild game is the common property of the citizens of the state which the state may preserve for their use under the police power, it is reasonable to make this distinction between resident citizens and resident aliens. By the same token, state laws barring aliens from engaging in commercial fishing in the waters of the state have been found to be constitutional. Accordingly, since the state may bar them altogether, it has been held proper to require payment of a special license tax on the part of aliens in order to engage in commercial fishing. Thus, also, the power of the state to forbid aliens to own or possess firearms, without a written permit, or to own weapons that may be concealed, has been found to be within the reasonable limits of the police power. In defense of this point

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204 Ex parte Gilletti, (1915) 70 Fla. 442, 70 So. 446; Curry v. Moran, (1918) 76 Fla. 373, 79 So. 637.
205 State v. Rheaume, (1922) 80 N. H. 319, 116 Atl. 758
206 Ex parte Ramerez, (1924) 193 Cal. 633, 226 Pac. 914.
of view, it was argued that the legislature has grounds to believe that aliens are more likely to use firearms unlawfully or unpatriotically than citizens. A similar result was reached in the upholding of a statute which exacted a special and rather high license fee ($20 a month) from aliens who work the gold mines of a state.\(^{207}\)

There have been no decisions running contrary to this great weight of opinion. A federal circuit court once held a California statute invalid which prohibited ineligible aliens from fishing in the waters of the state, on the ground that while a state may bar all aliens from fishing, it may not exclude certain classes of aliens and extend the privilege to others.\(^{208}\) The Texas court held a statute unconstitutional which prevented aliens from securing licenses to act as wholesale dealers in fish, arguing that there is a difference between a discrimination in regard to the right to sell fish after they are caught and have become private property, and the right to take fish from the waters of the state.\(^{209}\) It is obvious that these two cases do not deny the general rule which sanctions exclusion.

Legislation excluding aliens from using the natural resources of the state which are considered the common property of its citizens goes on apace. For example, among recent statutes one finds that aliens may not be issued hunting or fishing licenses in several states,\(^ {210}\) or they are required to pay a higher license fee than citizens.\(^ {211}\) Recent statutes have been adopted which forbid aliens to own firearms of any character.\(^ {212}\) In Oregon, licenses for water power projects may be issued only to citizens,\(^ {213}\) In Nevada

\(^{207}\)People v. Naglee, (1850) 1 Cal. 232, 52 Am. Dec. 312.

\(^{208}\)In re Ah Chong, (C.C. Cal. 1880) 2 Fed. 733. The statute was also held to contravene a treaty with the most favored nation clause.


\(^{210}\)Massachusetts, Ann. Laws (Michie, 1933) ch. 131, sec. 74; New Mexico, Laws 1921, ch. 113; New Mexico, Stat. Ann. 1929, sec. 57-401 to 406; Oregon, Code Ann. 1930, sec. 40-809 (aliens may not take oysters from natural or artificial beds); Oregon, Code (Supp. 1935) sec. 40-511 (declarants who have resided in the United States five years may get fishing licenses); Pennsylvania, Stats. (Purdon, 1936) tit. 30, sec. 240, tit. 34, sec. 902; South Dakota, Laws 1921, ch. 243; West Virginia, Code Ann. 1932, sec. 2218 (3).

\(^{211}\)Oklahoma, Stats. 1931, sec. 4809.

\(^{212}\)Massachusetts, Acts 1922, ch. 485, sec. 7 (aliens must have permit to carry firearms); Nebraska, Comp. Stats. 1922, sec. 9836; New Mexico, Stats. Ann. 1929, sec. 57-401 to 406; Oregon, Code Supp. 1935, sec. 72-202; West Virginia, Code Ann. 1932, sec. 6050(8).

water appropriation certificates may be issued only to citizens,214 and in Alaska prospectors must be citizens.215 Only citizens may, since 1931, purchase school lands in California.216

Similar legislation has been enacted by the states, presumably on the same theory, in reference to public assistance. A good example is found in the case of the current old age pension legislation. All the old age pension laws examined provide that the pensioners be American citizens,217 and most of them require the possession of citizenship for a period of fifteen years prior to the granting of a pension.218 State aid to tubercular patients in California,219 to the blind in Maryland,220 and to mothers in New York221 now depends upon citizenship.

The right of the alien to own land may be considered here briefly, inasmuch as it affects his chances of making a living in agricultural pursuits. Originally, under the early common law, aliens could not own land at all,222 and since they could not take land by operation of law, they could not transmit land by inheritance.223 But this law of land ownership, coming down from very

215Alaska, Comp. Laws 1933, sec. 2267.
216California, Gen. Laws (Deering, 1931) Act 6287, sec. 1. Federal public lands which have been withdrawn in connection with reclamation, and which no longer needed, may be sold to citizens only. 41 Stat. at L. 606, ch. 192, sec. 2. So also, mineral lands belonging to the United States are open to occupation by citizens and declarants only. 30 U. S. C. A. sec. 22, Mason's U. S. Code, tit. 30, sec. 22. Nonmetallic mineral deposits on United States public lands are to be disposed of only to citizens. 41 Stat. at L. 437, ch. 85.
217New Jersey, Laws 1931, ch. 219, sec. 2(c); New York, Consol. Laws (Cahill 1930) ch. 493/2, sec. 123 (3); Oregon, Code Supp. 1935, sec. 27-3701; Wisconsin, Stats., 1935, ch. 49.22(2).
219California, Gen. Laws (Deering 1931) Act 6258a, sec. 2.
221New York, Consol. Laws (Cahill 1930) ch. 26, secs. 153(1a), 157(2a).
early times, has been changed by treaty, statute, and constitutional provision, the general result of which has been to give aliens equal rights with citizens in connection with the ownership of land. But in 1913, California started a retrogressive movement in this field of law by passing a statute prohibiting aliens ineligible to citizenship from owning land in the state, and other states soon fell into line. In the leading case of *Terrace v. Thompson*, decided in 1923, the Supreme Court sustained the constitutionality of such legislation in upholding a Washington statute which forbade any kind of legal or equitable ownership of land by aliens other than those who in good faith have declared their intention of becoming citizens, as against the claims of an alien Japanese. The Court argued that, in the absence of treaty provisions to the contrary, each state has the power to deny aliens the right to own land within its borders, for not only was an alien, under the common law, unable to acquire real property by operation of the law, but the state also has, under its police power, a wide discretionary authority to classify, since the equal protection clause does not forbid the making of every distinction between citizens and resident aliens. There is a substantial difference, it was maintained, between an alien and a citizen, and also between a declarant and a nondeclarant, for the former has

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227 See, for example, Wisconsin, constitution, art. I, sec. 15: "No distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment or descent of property."


220 (1923) 263 U. S. 197, 44 Sup. Ct. 15, 68 L. Ed. 255.
renounced his allegiance to a foreign sovereign, and has declared his intention of becoming an American citizen. That such a distinction exists is further reflected in the fact that some states have given declarants the right to vote and hold office, and the United States has subjected them to military service. Furthermore, the distinction between aliens eligible for citizenship and those who are ineligible is fixed by statutes of Congress, and thus establishes a reasonable basis for so classifying them in state legislation. Finally, this classification was sustained as a reasonable one, in this particular situation. The statement of the court below was quoted with approval: "It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries."230

And the Court went on to say: "The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself."231 Finally, it held that a treaty of commerce which guaranteed the right "to carry on trade" did not include the right to own, lease or have any other interest in land for agricultural purposes.

Subsequent decisions of the Court reiterated and expanded the scope of this doctrine. A California statute which prohibited not only the ownership of land by ineligible aliens, but also the leasing of land on a share-cropping contract basis was upheld on the ground that a cropping contract is more than a mere contract of employment.232 Similarly, the Supreme Court has sustained statutes forbidding ineligible aliens to lease agricultural lands,233 or to acquire stock in a corporation holding land for agricultural purposes,234 for the state may prevent indirect as well as direct forms of ownership.

230(D.C. Wash. 1921) 274 Fed. 841, 849.
231(1923) 263 U. S. 197, 221, 44 Sup. Ct. 15, 68 L. Ed. 255.
234Frick v. Webb, (1923) 263 U. S. 326, 44 Sup. Ct. 115, 68 L. Ed. 323. In Cockrill v. California, (1925) 268 U. S. 258, 45 Sup. Ct. 490, 69 L. Ed. 944, sec. 9 of the Calif. Alien Land Law, which provided that every transfer of property to an ineligible alien was to be void and escheat to the state, and that if any conveyance is made in which transaction an ineligible alien puts up the money, a prima facie presumption arises of intent to avoid escheat, was upheld. The Court ruled that the presumption is
Thus, one may conclude that the states are not prevented by the federal constitution from shutting aliens out of land ownership, for apparently they can be denied the right to acquire any interest in land, at least for agricultural purposes; they can therefore be forbidden to become farmers, if the states so desire. This exclusion has been justified by a chain of reasoning which is not altogether clear. The mere fact that federal laws distinguish between citizens and aliens, and between declarants and nondeclarants, does not warrant using this classification for every other purpose. The matter of classification should be decided with reference to the particular ends any particular classification is designed to achieve. This differentiation should be sustained only on the ground that it promotes some public interest, and not merely for the reason that for some unrelated purpose the same differentiation is made. And it is not at all clear or obvious that nondeclarant aliens lack an interest in the community, or are necessarily bad farmers. To the contrary, there is reason to believe that the true grievance against the Japanese or Chinese farmer on the Pacific Coast is his ability to farm too competently.

IV. A WORD IN CONCLUSION

It is safe to conclude, from this survey of the alien's right to work, that there is a strong tendency in the country to narrow his economic opportunities. Under the stringencies of the depression, aliens as a class have been a convenient and rather helpless target of discriminatory legislation. Nevertheless, a great deal of this legislation has been in derogation of what we profess to be the constitutional law of the land. This is not an abstract question of the theoretically absolute sovereign. Under our dual system of government, and with our theory of written constitutions as limitations on governmental power, no governmental unit in the United States possesses power in the absolute sense. As Mr. Justice Matthews wrote, speaking for a unanimous court in *Yick Wo v. Hopkins*,

"Sovereignty itself, is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty not fanciful or arbitrary, and that this rule of evidence is based upon a reasonable classification.

For a biting criticism of the Alien Land Cases, see Powell, Alien Land Cases in United States Supreme Court, (1924) 12 Calif. L. Rev. 259. (1886) 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.
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itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. . . . The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws. . . ."

Even though it may be conceded that in the field of foreign relations the federal government possesses great authority, nevertheless it is clear that it is a government of limited powers, restricted to the exercise of those powers which are delegated to it. Even its power of deportation is limited to the extent that it may not invade the reserved governmental powers of the states.237 Most of the legislation, as a matter of fact, which discriminates against aliens, has emanated from the states, for the regulation of ordinary trades and callings is largely within the jurisdiction of the states. As against such legislation, the chief constitutional protection of the alien is the equal protection clause of the fourteenth amendment. Measured by the terms of the fourteenth amendment, it would appear that much of the recent legislation, hitherto untested in the courts, might prove to be inconsistent with our fundamental law. For, while the power of classification is necessarily very great, and, in the words of the Supreme Court, is "the most inveterate of our reasoning processes," nevertheless, "it must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand."238

It is no defense of the drift of American policy to say that other nations treat their aliens shabbily.239 The fact is that the civilized world has been trying to get away from narrow, tribal manifestations of nationalism such as are illustrated here. In article XXIII of the Covenant of the League of Nations, the member states agree "to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all members of the League." The well-attended International Conference on the Treatment of Foreigners, held in Paris late in the

year 1929, emphasized the more advanced concept of modern times, that foreigners ought to be permitted to conduct commercial transactions of every kind, to pursue all occupations except public functions, and to acquire and dispose of land, freely and without discrimination. Such is the aspiration, at least, of a truly modern civilization.