LEGISLATION

CONSTITUTIONALITY OF LEGISLATIVE DISCRIMINATION AGAINST THE ALIEN IN HIS RIGHT TO WORK—The prevalent impression that restrictions on the non-political [1] rights of aliens are steadily dwindling in number and significance is not substantiated by an examination of the statute books. On the contrary, such examination shows recent legislation the marked tendency of which is not only to retain most of the earlier forms of discrimination,[2] but to impose many additional limitations on aliens' rights. Most striking is the large body of new legislation making citizenship [3] a requisite for employment in public projects and in many professions and trades. This widespread legislation, apparently the resultant of an admixture of economic, nationalistic, and political [4] forces, raises important and interesting questions of constitutionality which, mainly because of the recency of the legislation, have not yet been fully brought before the courts.

It is well settled that the power of the state to discriminate against an alien in his capacity of potential employee does not extend to the point where the effect of the legislation would be to deprive him of substantially all opportunity to

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1. That political rights and duties do not attach to aliens follows from the very definition of citizenship. Thus aliens do not ordinarily have the right to hold office, to vote, to be jurors; nor are they subject to conscription in time of war. Some states, however, have expressly conferred upon aliens or declarants limited political rights, *e. g.*, the right to vote, or to be a juror. CLEVELAND, AMERICAN CITIZENSHIP (1927) 167.

2. The most important of the earlier forms of discrimination was in respect to aliens' property rights. Restriction upon aliens' rights to acquire, hold, and dispose of interests in realty still exist in eighteen states. Eleven others limit real property holding to perons eligible to citizenship. For a list of such statutes see STATE LAW INDEX (1925-1926) 417.

3. A large number of the statutes make it sufficient if the person seeking admission to the regulated occupation has filed a declaration of intention to become a citizen. Accountants: IOWA CODE (1931) c. 9, § 1905; MICH. COMP. LAWS (1929) § 8651; TENN. CODE (1932) § 7084. Architects: IOWA CODE (1931) § 1905-b8; N. Y. CONS. LAWS (Cahill, Supp. 1933) c. 15, § 1478. Barbers: IDAHO CODE (1932) § 53-606; IOWA CODE (1931) § 2585-b13. Cosmeticians: IDAHO CODE (1932) § 53-1205. Dentists: N. Y. CONS. LAWS (Cahill, Supp. 1933) c. 15, § 1306. Physicians and Surgeons: R. I. Laws 1927, c. 1029; Wis. Laws 1933, c. 290. Official Court Reporters: Colo. Laws 1925, c. 159. Optometrists: N. M. STAT. ANN. (Courtright, 1929) § 98-106. Pharmacists: CAL. GEN. LAWS (Deering, 1931) Act 5886, § 2; Vt. Laws 1927, c. 106; WIS. STAT. (1931) §151.02. Real Estate Brokers: WYO. REV. STAT. ANN. (1931) c. 97, § 404. Surveyors and Engineers: N. Y. CONS. LAWS (Cahill, Supp. 1933) c. 15, § 1452. Teachers in Public Schools: Tex. Laws 1929, c. 38. The right of the declarant to continue in the occupation is frequently made conditional upon his completing naturalization within a limited time. Accountants: FLA. COMP. LAWS (1927) § 3923 (license revocable if not a citizen within 6 years); Hawaii Laws 1923, No. 158 (2 years); N. Y. CONS. LAWS (Cahill, 1930) c. 15, § 1492 (8 years); N. D. Laws 1925, c. 2 (1 year). Physicians: N. J. COMP. STAT. (Supp. 1930) 968 (6 years); N. Y. CONS. LAWS (Cahill, 1930) c. 15, § 1259 (10 years). Real Estate Brokers: N. Y. CONS. LAWS (Cahill, 1930) c. 51, § 440 (5 years). Shot-firers in Coal Mines: WYO. REV. STAT. ANN. (1931) c. 23, § 165 (declarant must exercise due diligence to get final papers).

4. Political influences play an important role in bringing about legislation of this nature. Pressure to pass such legislation exerted by voters upon those who control legislation finds no compensating force in objections of the alien since, having no voice in the selection of those persons, his interests are ignored. A striking example of effective political pressure was presented in Detroit in 1926. In the course of one of the spasmodic surges of public opinion against migratory Canadian workers, the city council, induced apparently solely by certain small labor-union cliques who had large control over the outcome of elections, passed an ordinance discharging all alien employees of the city. An immediate reaction, however, combined with the great inconvenience that resulted, led to a restoration of the earlier conditions. See LITERARY DIGEST, March 22, 1930, at 16.

engage in any legitimate occupation,[5] since this would result in the effective exclusion of aliens from the jurisdiction, the sole power to do which is impliedly vested in Congress [6] and is embodied in its immigration and deportation enactments. This objection does not exist where there is exclusion from only certain types of occupations, and the validity of such restrictive measures depends, in the last analysis, upon whether the basis for discrimination between citizens and aliens in such occupations is of sufficient social desirability [7] to satisfy the requirements of the Fourteenth Amendment. Since an alien is a "person" within the meaning of that Amendment, he is entitled to the protection afforded by the "due process" and "equal protection" clauses [8] and a restriction upon his right to work which cannot be justified by the doctrines applicable to those clauses must fail. The factors determining the "reasonableness" of classifying aliens separately are different where the work to which the alien is not given access is done for the state as employer, and where the occupation is one in which the state is not an employer, even though it may have the right under its police power to regulate the business according to standards deemed socially necessary. Separate consideration of the constitutionality of the statutes discriminating against aliens in each class of cases is therefore desirable.

It is generally stated that since the extension of the right of ownership, or beneficial use of public property, or the opportunity to be employed in public enterprises is a privilege which the state in its capacity of proprietor or employer may grant or withhold as it pleases, the exclusion of aliens is legally sustainable. Thus statutes prohibiting the employment of aliens, or giving preference to citi-

5. Such statutes have uniformly been held to be unconstitutional. Truax v. Raich, 239 U. S. 33 (1915) (statute provided that every employer of more than five persons should not employ less than 80% citizens); *In re* Tiburcio Parrott, 1 Fed. 481 (C. C. D. Cal. 1880) (statute prohibiting corporations from employing any Mongolians); Fraser v. McConway & Torley Co., 82 Fed. 257 (D. Pa. 1897); Juniata Limestone Co. v. Fagley, 187 Pa. 193, 40 Atl. 977 (1898) (statute imposing tax on employers of adult male aliens); *In re* Case, 20 Idaho 128, 116 Pac. 1037 (1911) (statute prohibited corporation from employing any non-declarant alien).

6. Fong Yue Ting v. U. S., 149 U. S. 698 (1893); Truax v. Raich, 239 U. S. 33 (1915); Arrowsmith v. Voorhies, 55 F. (2d) 310 (E. D. Mich. 1931). Although no statutes or decisions have been found which involve the right of Congress itself to impose blanket occupational restrictions on aliens who are admitted to this country, it would seem that such enactment would be valid as to aliens coming into the country after its passage, since it would be an exercise of Congress' right to impose conditions of admission. As to those already admitted, however, it could be objected that such legislation would be a deprivation of liberty without due process of law, contrary to the Fifth Amendment, which extends its protection to aliens, they being "persons" within the contemplation of that Amendment. See Wong Wing v. U. S., 163 U. S. 228 (1896); *Ex parte* Orozco, 21 Fed. 106 (W. D. Tex. 1912).

7. Whether a given classification is "reasonable" is based ultimately upon the value that the court places on the social and economic considerations that prompted the legislature to make it. It is this judicial appraisal of social necessity and social justice that determines the limits of the police power. See Harper, *Due Process of Law in State Labor Legislation* (1928) 26 MICH. L. REV. 599, 614.

8. Yick Wo v. Hopkins, 118 U. S. 356 (1885); Truax v. Raich; *In re* Case, both *supra* note 5. But an alien who is not a resident of this country does not, of course, come within the protection of the Fifth or Fourteenth Amendments. See City Bank Farmers' Trust Co. v. Bowers, 68 F. (2d) 909 (C. C. A. 2d, 1934). Thus workmen's compensation statutes which prohibit or restrict benefits to be paid to non-resident alien dependents are generally upheld. See Note (1926) 11 MINN. L. REV. 57.

An alien who is illegally in the country does not appear to be afforded any rights under the Federal Constitution, since his presence here is in defiance of the ability of this country to enforce its own immigration laws. See Turner v. Williams, 194 U. S. 279 (1904); Coules v. Pharris, 212 Wis. 558, 250 N. W. 404 (1933). Even if such person were entitled to the protection of the "due process" and "equal protection" clauses, any occupational legislation discriminating against him would seem clearly sustainable as creating a "reasonable" classification.

zens,[9] in public positions and on public works, have been held valid regardless of the fact that no greater efficiency is sought to be effected thereby, on the ground that since the citizens of the state constitute the state, they are entitled to the opportunities for work that its common resources afford.[10] Likewise, statutes prohibiting aliens from fishing [11] or gaming [12] or from obtaining licenses to drive vehicles for hire [13] have been sustained as a proper refusal by the state to extend to non-citizens [14] a use of common property belonging to the citizens which would give them an opportunity to earn a livelihood in competition with citizens.[15]

But the doctrine that a state may withhold from aliens privileges, such as the opportunity to work, which arise out of common property and resources is not without limitation. There must be some relation between exclusion from public works and property and the protection of public welfare. Although separate classification of aliens is justified because of the absence of proprietary interest of aliens in the resources and property of the state, the state probably could not arbitrarily and in the absence of strong social desirability single out any one class of aliens or individuals and deny them the right to work for it or use its property.[16] This is the same principle which forbids unreasonable discriminations between different classes of citizens. In In re *Ah Chong* [17] a statute prohibiting aliens incapable of becoming citizens from fishing for the purposes

9. Alaska Laws 1929, c. 30; Ariz. Laws 1931, c. 31; CAL. GEN. LAWS (Deering, 1931) Act 6430, § 1 (no aliens on public works except in emergency); CONN. GEN. STAT. (Supp. 1931) § 1117b (preference to citizens on public building construction); MASS. GEN. LAWS (1932) c. 149, § 26 (citizens preferred in all state, county, and city positions); MICH. COMP. LAWS (1929) § 7620 (only citizens may be teachers); MONT. REV. CODE (Choate, Supp. 1927) § 5653 (no aliens in public works unless necessary); N. J. COMP. STAT. (Supp. 1930) § 185-1962 (only citizens may teach); N. J. Laws 1930, c. 76, 1931, c. 27 (only citizens on public works, but declarants on state institution projects if necessary); N. Y. CONS. LAWS (Cahill, 1930) c. 32, § 222 (citizens of N. Y. State only on state projects); ORE. CODE ANN. (1930) §§ 19-201, 19-202 (no Chinese or draft-dodging aliens on public works); PA. STAT. ANN. (Purdon, 1931) tit. 43, § 151 (only citizens on public works unless funds derived from assessments of benefits); TENN. CODE (Williams, Shannon, Harsh, 1932) § 2513 (teachers must be citizens); TEX. STAT. (Vernon, Supp. 1931) art. 2880a (teachers in public schools must be citizens or declarants).

10. Heim v. McCall, 239 U. S. 175 (1915); People v. Crane, 214 N. Y. 154, 108 N. E. 427 (1915); Lee v. Lynn, 223 Mass. 109, 111 N. E. 700 (1915).

11. *E. g.*, Mass. Laws 1932, c. 272; ORE. CODE ANN. (1930) § 40-512; PA. STAT. ANN. (Purdon, 1930) tit. 30, § 240.

12. *E. g.*, Mass. Laws 1932, c. 272; N. M. STAT. ANN. (Courtright, 1929) § 57-401; PA. STAT. ANN. (Purdon, 1930) tit. 34, § 902.

13. Georgia: Public Service Commission Regulation, October 1, 1929. New Jersey: Ordinance of Nov. 12, 1917. Rhode Island: Ordinance of Providence, c. 93, § 4-1920.

14. Not only are statutes which exclude aliens from the benefits of public property valid, but ones which exclude citizens who are not residents of the state are held not violative of Art. 4, § 2 ("privileges and immunities" clause), or the Fourteenth Amendment. McCready v. Virginia, 94 U. S. 391 (1876); State v. Gallop, 126 N. C. 979, 35 S. E. 180 (1900). See Note (1929) 61 A. L. R. 337.

15. Patsone v. Pennsylvania, 232 U. S. 138 (1914) (statute making it unlawful for aliens to kill game and to that end making possession of shot guns and rifles by them unlawful upheld); *cf.* Commonwealth v. Cosick, 36 Pa. Co. 637 (1909); Lubetich v. Pollock, 6 F. (2d) 237 (W. D. Wash. 1925); Commonwealth v. Hilton, 174 Mass. 29, 54 N. E. 362 (1899); Alsos v. Kendall, 111 Ore. 359, 227 Pac. 286 (1924) (fishing statutes valid). The use of the public highways for driving vehicles for hire is a privilege which may properly be denied to aliens. Morin v. Nunan, 91 N. J. L. 506, 103 Atl. 378 (1918); Gizzarelli v. Presbrey, 44 R. I. 333, 117 Atl. 359 (1922); *cf.* State v. Ames, 47 Wash. 328, 92 Pac. 137 (1907) (alien could not get pilotage license for navigable waters of the state).

16. See People v. Crane, 214 N. Y. 154, 167, 108 N. E. 427, 431 (1915); Powell, *The Right to Work for the State* (1916) 16 COL. L. REV. 99; Smith v. Texas, 233 U. S. 630 (1914), *semble*.

17. 2 Fed. 733 (C. C. D. Cal. 1880).

of selling the fish caught was held unconstitutional as denying such persons equal protection of the laws since they were no more dangerous than other aliens. However, the large body of modern statutes excluding aliens incapable of attaining citizenship from holding property would seem to be valid since eligibility to citizenship can well be said to be a reasonable basis of classification, a non-eligible alien having a lesser interest in the welfare of the country.[18]

A further limitation on the "common property" argument has received its classic expression by Cardozo, C. J., in *People v. Crane:*

> "Because the state may thus discriminate in favor of the citizen in regulating employment on its public works, it does not follow, however, that it may exclude aliens from the enjoyment of those works after they have been completed. Aliens may use the public highways as freely as citizens. Aliens may use railroads and other agencies as freely as citizens. The reason is that the right to move about from place to place within the state is incidental to the right to live within the state. There are probably many other public works so intimately related, if not to life, at least to health and comfort, that merely arbitrary or oppressive discrimination against the alien in regulating their use would be a denial by the state of the equal protection of the laws. To attempt to draw the line in advance is futile. The question must in each case be whether the use is one that is reasonably incidental to life under modern conditions in a civilized state, or whether it is rather a privilege which the state may grant or withhold." [19]

This principle appears to be closely akin to the one that it is improper to deprive an alien of substantially all opportunity to work since this would amount to exclusion: the test here is that if the use of the public property in question is such that if denied it would strongly tend to force the alien to leave by making life in the state burdensome, it may not be denied to aliens even though such use incidentally has the effect of giving the alien an opportunity to earn a livelihood along with citizens. This rule, though not a well-defined one, would properly preclude the application of the "common property" argument to private occupations, even though in those occupations also the opportunity to work profitably is derived ultimately from the existence of an organized and developed state. However, the statutes hitherto enacted restricting the alien's participation in public resources have kept within the limits of the states' power and although many of them are far-reaching and often harsh in their human aspect,[20] their legality does not seem to be subject to serious question.

Greater uncertainty exists as to the constitutionality of discrimination against the alien in occupations in which the state is neither the employer or proprietor.[21] Granting the "quasi-public" nature of the occupation—so that

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18. Porterfield v. Webb, 263 U. S. 225 (1923); Webb v. O'Brien, 263 U. S. 313 (1923); Frick v. Webb, 263 U. S. 326 (1923).

19. 214 N. Y. 154, 169, 108 N. E. 427, 432 (1915).

20. An increasing number of statutes deny to alien dependents benefits under old age pension and other public aid provisions. CAL. GEN. LAWS (Deering, 1931) § 5846; N. Y. PUB. WELFARE LAW (1929) § 123; UTAH REV. STAT. ANN. (1933) § 19-12-3; Wash. Laws 1933, c. 29, § 3; WIS. STAT. (1929) § 49.22; WYO. REV. STAT. ANN. (1931) § 84-205 (applicant for old age pension must be citizen). ILL. REV. STAT. (Cahill, 1929) c. 23, § 361; N. Y. GEN. MUNICIPAL LAW (1917) § 153; N. D. COMP. LAWS ANN. (Supp. 1925) § 163 (citizenship required under Mothers' Pension Laws). COLO. STAT. ANN. (Mills, 1930) § 5046; ILL. REV. STAT. (Cahill, 1933) c. 23, § 111 (aliens excluded from benefits for adult blind).

21. Citizenship or declaration of intention to become a citizen has been made a requisite to engaging in many private occupations. Accountants: ALA. CODE (Michie, 1928) § 16; FLA. COMP. LAWS (1927) § 3923; HAWAII REV. LAWS (1925) § 3676; IDAHO CODE ANN. (1932) § 53-202; ILL. REV. STAT. (Cahill, 1933) c. 110a, § 1; IND. ANN. STAT. (Burns, Supp.

the state may under its police power legally impose reasonable regulations upon it—the further question arises as to when economic and social conditions make the exclusion of aliens from such occupations "reasonable", and not "arbitrary", and therefore not in conflict with the Fourteenth Amendment.

1929) § 13696; IOWA CODE (1931) § 1905, c. 9; KY. STAT. (Carroll, 1930) § 3941e-4; LA. GEN. STAT. (Dart, 1932) § 9335; MD. ANN. CODE (Bagby, 1924) art. 75a, § 6; MASS. GEN. LAWS (1932) c. 112, § 87B; MICH. COMP. LAWS (1929) § 8651; MONT. REV. CODE (Choate, 1921) § 3241; NEV. COMP. LAWS (Hillyer, 1929) § 252; N. H. PUB. LAWS (1926) c. 270, § 3; N. M. STAT. ANN. (Courtright, 1929) § 108-101; N. Y. CONS. LAWS (Cahill, 1930) c. 15, § 1492; N. C. CODE ANN. (Michie, 1931) § 7024b; N. D. COMP. LAWS ANN. (Supp. 1925) § 557a-8; OKLA. STAT. (1931) § 4310; S. C. CODE (Michie, 1932) § 7090; TENN. CODE ANN. (Michie, 1932) § 7084; UTAH REV. STAT. (1933) § 79-2-1; Vt. Laws 1931, No. 132; VA. CODE (Michie, 1930) § 567. Airplane Pilots: Fed. Air Commerce Reg. (1929) c. 5, § 49; CONN. GEN. STAT. (1930) § 3061; ORE. CODE ANN. (1930) § 65-316. Architects: GA. CODE ANN. (Michie, 1926) § 1754(58); IDAHO CODE ANN. (1932) § 53-402; IOWA CODE (1931) § 1905-b8; Ky. Laws 1930, c. 168, § 5; MICH. COMP. LAWS (1929) § 8658; N. Y. CONS. LAWS (Cahill, Supp. 1933) c. 15, § 1478; ORE. CODE ANN. (1930) § 68-305; S. D. COMP. LAWS (1929) § 8194g; VA. CODE (Michie, 1930) § 3145g; WASH. REV. STAT. (Remington, 1932) § 8271; W. VA. CODE ANN. (Michie, 1932) § 2958. Auctioneers: MINN. STAT. (Mason, 1929) § 7323. Barbers: IDAHO CODE (1932) § 53-606; IOWA CODE (1931) § 2585-613; WIS. STAT. (1931) § 158.08. Boiler Inspectors: N. J. Laws 1933, c. 168. Cosmetologists: IDAHO CODE (1932) § 53-1205; WIS. STAT. (1931) § 159.08. Members of Cosmetology Board: MICH. COMP. LAWS (Supp. 1933) § 8714-5. Court Stenographers: Colo. Laws (1925) c. 159. Dentists: N. Y. CONS. LAWS (Cahill, Supp. 1933) c. 15, § 1306. Embalmers and Undertakers: N. Y. CONS. LAWS (Cahill, 1930) c. 46, §§ 293, 295; PA. STAT. ANN. (Purdon, 1933) tit. 63, § 478c; S. D. Laws 1931, c. 216, § 3; WIS. STAT. (1931) § 156.02; WYO. REV. STAT. ANN. (Courtright, 1931) § 37-104. Employment Agency Operators: IOWA CODE (1931) § 1551c-2; ORE. CODE ANN. (1930) § 49-802; TEX. STAT. (Vernon, Supp. 1931) § 5221a-1; W. VA. CODE ANN. (Michie, 1932) § 2324. Engineers and Surveyors: IND. ANN. STAT. (Burns, Supp. 1929) § 13886; MISS. CODE ANN. (1930) § 4666; N. Y. CONS. LAWS (Cahill, 1930) c. 15, § 1452; S. C. CODE (Michie, 1932) § 7070; WYO. REV. STAT. ANN. (Courtright, 1931) § 114-106. Insurance Agents: OHIO CODE ANN. (Throckmorton, 1930) § 654(3). Persons representing Self-insurers under Workmen's Compensation Act: N. Y. CONS. LAWS (Cahill, 1930) c. 66, § 24a. Executors: MD. ANN. CODE (Bagby, 1924) art. 93, § 53. Junk Canvassers and Pawnbrokers: VA. CODE (Michie, 1930) § 182. Mine Foremen and assistants in Coal Mines: W. VA. CODE ANN. (Michie, 1932) § 2426; WYO. REV. STAT. ANN. (Courtright, 1931) § 23-128. Fire-bosses in Coal Mines: W. VA. CODE ANN. (Michie, 1932) § 2421. Shot-firers in Coal Mines: WYO. REV. STAT. ANN. (Courtright, 1931) § 23-165. Optometrists: MICH. COMP. LAWS (1929) § 6783; MONT. REV. CODE (Choate, Supp. 1927) § 3159; N. M. STAT. ANN. (Courtright, 1929) § 98-106; R. I. Laws 1928, c. 1235, § 2; TENN. CODE ANN. (Michie, 1932) § 7032; WASH. REV. STAT. (Remington, 1932) § 10150. Osteopaths: FLA. COMP. LAWS (1927) § 3422. Peddlers: MASS. GEN. LAWS (1932) c. 101, § 22. Persons selling beer and other alcoholic beverages: Iowa Laws 1933, c. 37; Neb. Laws 1933, c. 93, § 5; N. C. Laws 1933, c. 319; N. Y. CONS. LAWS (Cahill, Supp. 1933) c. 2a, § 84; Okla. Laws 1933, p. 342; Ore. Laws 2d Spec. Sess., 1933, c. 17; PA. STAT. ANN. (Purdon, 1933) tit. 47, § 95; Tex. Laws 1933, c. 116; Wis. Laws 1933, c. 207. Pharmacists: CAL. CODES & GEN. LAWS (Deering, Supp. 1933) § 5886(2); COLO. STAT. ANN. (Mills, 1930) § 5503; CONN. GEN. STAT. (1930) § 2825; ME. REV. STAT. (1930) c. 23, § 7; N. H. PUB. LAWS (1926) c. 210, § 18; N. J. COMP. STAT. (Supp. 1930) p. 1367; N. Y. CONS. LAWS (Cahill, 1930) c. 15, § 1353; OHIO CODE ANN. (Throckmorton, 1930) § 1304; R. I. Laws 1925, c. 794; UTAH REV. CODE (1932) § 79-12-1; Vt. Laws 1931, No. 131; WIS. STAT. (1931) § 151.02. Dealers in Poisons who are not Pharmacists: S. D. COMP. LAWS (1929) § 7846. Physicians: FLA. COMP. LAWS (1927) § 3408; N. J. COMP. STAT. (Supp. 1930) 966, § 127-31; N. Y. CONS. LAWS (Cahill, 1930) c. 15, § 1256; R. I. Laws 1927, c. 1029; Wis. Laws 1933, c. 290. Pool Room Operators: GA. CODE ANN. (Michie, 1926) § 1762(22). Podiatrists: FLA. COMP. LAWS 1927, § 3465. Private Bankers: N. J. COMP. STAT. (Supp. 1930) 86. Private Detectives: CAL. GEN. LAWS (Deering, 1931) § 2070 (3); MICH. COMP. LAWS (1929) § 8716; N. Y. CONS. LAWS (Cahill, 1930) c. 21, § 71; WIS. STAT. (1931) § 175.07. Professional Men from other states: Neb. Laws 1933, c. 122, § 2. Real Estate Brokers: N. Y. CONS. LAWS (Cahill, 1930) c. 51, § 440a; WYO. REV. STAT. ANN. (Courtright, 1931) § 97-404. Members of Real Estate firms and corporations: PA. STAT. ANN. (Purdon 1933) tit. 63, § 436. Veterinarians: N. Y. CONS. LAWS (Cahill, 1930) c. 15, § 1326.

The dogma is that if there is a substantial causal relationship between the requisite of citizenship in the particular occupation and public health, safety or morals, the exclusion of non-citizens is justified. In many occupations some degree of dependence of public welfare upon the restriction of the right to engage in them to citizens is apparent. The businesses of selling intoxicating beverages,[22] pawnbrokerage, [23] or the operation of pool-rooms [24] are so dependent upon practice by persons who have the best interests of the community at heart and who will not engage in the undesirable or criminal practices which are frequently attendant upon or associated with such businesses that exclusion of aliens from them has been held to be valid on the ground that aliens as a class do not have the necessary character qualifications. Similar reasoning has been applied to the occupations of auctioneering,[25] and peddling,[26] the classification of citizenship being deemed a proper method of checking the evils connected with those businesses. But in the latter business as in those of barbering and selling fish and soft-drinks, some courts, with keener insight into the sociological problem involved, have held statutes excluding aliens to be unconstitutional as arbitrary discriminations,[27] there being no necessary causal connection between alienage and criminality in the regulated businesses.[28] However, in spite of the fact that the courts may be fully convinced of the existence of such causal relationship, most of them are loath to hold such discriminatory legislation unconstitutional if there seems to be any possible correlation between alienage and the particular local evil at which it is aimed. As was stated by Mr. Justice Stone in *Clarke v. Dekebach:*

22. Trageser v. Gray, 73 Md. 250, 20 Atl. 905 (1890); Bloomfield v. State, 86 Ohio 253, 99 N. E. 309 (1912); De Grazier v. Stephens, 101 Tex. 194, 105 S. W. 992 (1907); see Trimble's License, 41 Pa. Super. 370 (1909); *cf.* Miller v. City of Niagara Falls, 207 App. Div. 798, 202 N. Y. Supp. 549 (1924) (ordinance prohibiting issuing of licenses to retail soft-drinks to aliens sustained).

23. Asakura v. Seattle, 265 U. S. 332 (1923), *rev'g* 122 Wash. 81, 210 Pac. 30 (1922), and holding statute, though constitutional, in conflict with treaty, providing for reciprocity in "commerce". See *infra* note 31, as to treaty conflict questions.

24. Clarke v. Dekebach, 274 U. S. 392 (1927); Anton v. Van Winkle, 297 Fed. 340 (D. Ore. 1924); State *ex rel.* Balli v. Carrel, 99 Ohio 285, 124 N. E. 129 (1919).

25. Wright v. May, 127 Minn. 150, 149 N. W. 9 (1914). The court held the statute valid "with some hesitation".

26. Commonwealth v. Hana, 195 Mass. 262, 81 N. E. 149 (1907).

27. State v. Montgomery, 94 Me. 192, 47 Atl. 165 (1900) (peddling); Templar v. Board of Barbers, 131 Mich. 254, 90 N. W. 1058 (1902) (barbering); Poon v. Miller, 234 S. W. 573 (Tex. Civ. App. 1921) (selling fish); George v. City of Portland, 114 Ore. 418, 235 Pac. 681 (1925) (soft drinks). *Contra:* Miller v. City of Niagara Falls, 207 App. Div. 798, 202 N. Y. Supp. 549 (1924).

28. Although complete statistics and studies of the relationship between foreign nativity and extraction and criminality have been made, there is a striking absence of material on the correlation between alienage and criminality. However, some statistics are available. In 1930 aliens constituted 4.8% of the total adult male population, and in 1920, 7%. In the ten-year period of 1920-30, aliens comprised 19% of all the prisoners in Sing Sing prison, and in 1929, they composed 14.2% of the total inmates. These figures might seem to indicate some causal relationship between alienage and crime. However, certain factors strongly point away from such an inference. The poverty of aliens is probably attended by an inability to secure proper legal defense, and convictions may for that reason be more numerous than among citizens of equal guilt. And any of the numerous other important factors of environment and heredity which lead to individual aberration, may well be the real cause of such criminality, rather than the incident of alienage.

Negroes made up 8.7% of the total adult male population in 1920 and 8.9% in 1930, and constituted 16.8% of the inmates of Sing Sing prison in the period 1920-1930, and 22.2% in 1929, yet no legislative occupational discrimination has been deemed advisable. For statistics of the composition of the criminal population and an analysis of the causes of crime see *Report on the Causes of Crime* (National Commission on Law Observance and Enforcement, 1931).

> " . . . The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business. It is not necessary that we be satisfied that this premise is well founded in experience. . . . It is enough for present purposes [of testing its constitutionality] that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong. Some latitude must be allowed for the legislative appraisement of local conditions and for the legislative choice of methods for controlling an apprehended evil. It was competent for the city to make such a choice, not shown to be irrational, by excluding from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods." [29]

The test used by the courts would thus seem to be that if there is a *possible* relation between exclusion of aliens from a particular business and the public welfare, the exclusion is sustainable, while if it is a manifestation merely of class feeling and aimed at depriving an alien of opportunities simply because he is not a citizen as are the rest, it is illegal. But an examination of the recent legislation shows most of it to be of a nature which could not be sustained even on the very liberal principles that have been laid down. A statute requiring citizenship for doctors or embalmers is hardly sustainable on the ground that aliens as a class might be more inclined to engage in the abuses made possible in the course of such occupations, in view of the compelling fact that thorough qualifications and requirements are imposed as conditions to entrance into such callings. Likewise, it is hard to conceive of any possible impairment of social efficiency or stability which would result were aliens who fulfilled all other legislative and administrative requirements permitted to practice barbering, or podiatry, or shot-firing in mines. Such statutes can be seen only as arbitrary discriminations against persons who are felt to be undeserving of work which involves a degee of skill or prestige and as manifestations of nationalistic and economic forces which make themselves felt particularly in times of unemployment.

Since only a few of the discriminatory acts and none of the more arbitrary statutes have been brought before the courts as yet,[30] their constitutionality can for the most part only be the subject of speculation. Following strictly the rules and language of previous cases, it would seem that if challenged they must fall. However, the unwillingness of the courts in the past to hold statutes excluding aliens from certain occupations invalid, even at the expense of deliberately overlooking forceful objections to constitutionality, strongly indicates the existence of a social attitude toward the question from which an extension of protection to the new statutes may perhaps be anticipated.

In upholding such a statute as one which limits the granting of licenses to practice auctioneering to citizens by saying that the extension of the privilege to engage in such occupation may be denied to aliens so that apprehended evils may be avoided, the court seems to be motivated by an appreciation that very little harm will result from the existence of such restriction, regardless of the fact that according to strict principles of Constitutional Law it does deprive aliens of liberty without due process of law and of equal protection of the laws. On the other hand declaring the law invalid and thus disturbing the subtle but powerful nationalistic and social feeling-tones which have gained expression

29. 274 U. S. 392, 397 (1927).

30. Notes 22 to 27, *supra*, contain all the cases that have been found testing the validity of such statutes.

in the discriminatory legislation might result in more serious ill-feeling and administrative discrimination. While it might seem that an important balancing consideration in favor of scrupulously avoiding arbitrary discriminations against aliens would be the fear of creating international ill-will, actually the role played by this factor is apparently very minor, for if the legislation does not violate any governing treaty stipulations,[31] it does not create problems of international friction. Moreover, there is a lack of sympathy with the alien of long standing who has not deemed it worth while to undertake the slight formalities involved in taking out citizenship papers, or who is thinking of returning to his native land with earnings accumulated in this country in competition with citizens. Also the attitude exists that any economic hardship imposed on the alien by such legislation would in most cases be only temporary, since if he is of the capabilities and character which would make him a desirable member of the calling from which he is excluded, he may take out papers to become a citizen and acquire the right to work that he desires. These elements add to the incentive to find "talking grounds" on which to avoid outlawing the legislation in question.

Opposed to these considerations, however, are those of fairness and the inescapable necessity of conformance with the rigid constitutional safeguards which form the ultimate check upon state power. To discriminate as to the ways of earning a livelihood appears to be a gesture that is inconsonant with the vaunted American ideals of tolerance and equality. American citizenship becomes a mere "job ticket" instead of a privilege to be sought as worthy in itself. Moreover, no pressing necessity for such nationalistic measures is present and the economic wisdom of the legislation is doubtful, since society is thereby deprived of the work of persons who may be well-fitted for the regulated occupations, and the likelihood of aliens becoming public charges is increased.

Legally, there seems to be no proper basis on which the statutes can be upheld. Resort has been made to the reasoning that a license to engage in a calling which is affected with a public interest is, like the opportunity to work in public enterprises, a privilege which is in the control of the state as the trustee for all the citizens and which may therefore be denied to all others.[32] This argument, however, does not appear valid in the teeth of the clearly proper limi-

31. The general rule is that where a statute is in conflict with the terms of a treaty, the treaty takes precedence. Missouri v. Holland, 252 U. S. 416 (1920). Although there are legalistic arguments that may be presented both ways (for opposing views *cf.* Mikell, *The Extent of the Treaty-Making Power of the President and Senate of the U. S.* (1909) 57 U. OF PA. L. REV. 435, 528, with Anderson, *Extent and Limitations of the Treaty-Making Power,* 1 AM. J. INT. LAW (Part 2, 1907) 636), the actual decisions of the courts show a firmness in refusing to permit the treaty-making power to have the effect of encroaching upon the police power of the state, and where a conflict between the two arises, the treaty is held subservient to the state police regulation. Patsone v. Pennsylvania, 232 U. S. 138 (1914); People v. Cannezzaro, 31 P. (2d) 1066 (Cal. App. 1934). Thus it has been held that statutes excluding aliens from certain callings were not contrary to the usual treaty provisions that each contracting nation will accord equal rights and privileges to citizens of the other contracting nation as it accords its own citizens. Heim v. McCall, 239 U. S. 175 (1915); Trageser v. Gray, 73 Md. 250, 20 Atl. 905 (1890); People v. Crane, 214 N. Y. 154, 108 N. E. 427 (1915). But it has been held that where a treaty provides that neither contracting party will deny to citizens of the other rights in regard to "trade" and "commerce", the state may not exclude such persons from any calling that comes within the definition of those words. See Asakura v. Seattle, 265 U. S. 332 (1923), *rev'g* 122 Wash. 81, 210 Pac. 30 (1922); Poon v. Miller, 234 S. W. 573 (Tex. Civ. App. 1921); *cf.* Clarke v. Dekebach, 274 U. S. 392 (1927); Webb v. O'Brien; Frick v. Webb, both *supra* note 15. See ALEXANDER, RIGHTS OF ALIENS UNDER THE FEDERAL CONSTITUTION (1931) 119.

32. Askura v. Seattle, 122 Wash. 81, 210 Pac. 30 (1922); see dissent in George v. City of Portland, 114 Ore. 426, 235 Pac. 684 (1925).

tations on the "common property" argument which have been enunciated [33] and the settled principle that an alien is a person entitled to due process. Except in the cases of denial of opportunities to work which arise out of public property or resources or which are so closely allied with the workings of government that, although private enterprises, they are quasi-political in nature,[34] valid occupational discriminations against aliens as a class must be directed against evils connected with the occupation. Where there is no substantial causal relation between citizenship and the proper performance of the private occupation, the statute cannot be upheld. In the statutes under consideration the really slight, if any, causal connection [35] between alienage and the types of criminality attendant upon the regulated businesses does not seem to afford more than merely a verbal ground for sustaining blanket legislative rather than selective administrative exclusion of aliens. The present statutes restricting the alien's right to work in private callings are not based on the existence of such causal relationship and when brought before the courts must perforce be held invalid as contrary to the guarantees accorded to aliens as persons under the Federal Constitution.

L. H.

33. See *supra* p. 76.

34. Such as the profession of attorney at law, which is generally made conditional upon citizenship. State v. Rosborough, 152 La. 946, 94 So. 858 (1922); *In re* Admission to the Bar, 61 Neb. 58, 84 N. W. 611 (1900); *In re* O'Neill, 90 N. Y. 584 (1882). Typical statutes are: CAL. GEN. LAWS (Deering, 1931) § 591(24); Me. Laws (1931) c. 176, § 26.

35. See *supra* note 28.