THE ALIEN AND THE ASIATIC IN AMERICAN LAW

By Milton R. Konvitz

And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself. —LEVITICUS 19:33, 34

Cornell University Press

ITHACA * NEW YORK * 1946

CORNELL UNIVERSITY PRESS

LONDON: GEOFFREY CUMBERLEGE

OXFORD UNIVERSITY PRESS

PRINTED IN THE UNITED STATES OF AMERICA BY THE

VAIL-BALLOU PRESS, INC., BINGHAMTON, NEW YORK

Preface

TWO CLASSES of persons are covered by this study; namely, (1) the alien, and (2) the American citizen of Asiatic (for example, Chinese, Japanese) ancestry. The Filipino, who occupied the unenviable position of being neither a citizen nor an alien, is also considered. The book is, therefore, in part a study of the "race problem" in the United States. As a study of this problem, however, the book is incomplete, for the status of the Negro receives no consideration.

The book is chiefly a study of how the United States Supreme Court has reacted to problems relating to the alien and to the American citizen of Asiatic descent. It is also a study of the past and present legal status of these groups, and an attempt to make a contribution to the field of legal and political sociology. While the book is, then, a study in constitutional law, or a study of Supreme Court decisions and opinions, it is at the same time a presentation of pertinent legislative and background materials. It is intended that the reader, without needing to resort to other works (unless he is a specialist), shall get the rather full statement of the status of the alien and the American citizen of Asiatic ancestry under American constitutional law. In the past several attempts were made by other writers to cover parts of the subject matter presented in this book, but I believe this is the first

attempt to present the subject matter fully and critically.

Although the number of aliens is fast diminishing (in 1945 there were only 3,400,000 in the United States), and a relatively high death rate among them, combined with a greatly increased rate of naturalization, will lead to a further decrease, there will probably always be an "alien problem." And although there are in the United States only 126,000 persons of Japanese ancestry, 77,500 persons of Chinese ancestry, and about 45,000 persons of Filipino ancestry, it is none the less likely that there will always be with us an "Asiatic problem."

The intensity of these problems is not likely to become weaker in the postwar period; for many elements in our society will continue to demand uncompromising conformity, will seek to eliminate all traces of unlikeness, will express a passion for homogeneity, and will compel races, nationalities, and religious groups to play the role of antagonistic classes in the American social and economic structure.

That the smallness of a minority group is not always a factor tending to eliminate prejudice or intolerance is shown tragically by the history of the Jews in Germany under Hitler; for the fact that the Jews constituted only 1 per cent of the total population did not save them from the wrath of the Nazis.

It is sometimes said that we are not friendly to newcomers, that we are prejudiced against the Negro, the Chinese, the Japanese, the American Indian, and other "colored" persons, because this country has been built by only a few generations of pioneers of different backgrounds, so that our social structure lacks the unifying memories of a common past, and we are subject to the unconscious fear of disintegration. But a people who have lived through two World Wars, fought ostensibly for democracy and freedom, should have unifying memories, a sense of integration and social identity, and the roots of a mature nation. We are no longer a loosely composed people; Americans make up an organic, integrated society,

molded by a common history and common ideals. Some of the recent opinions by Justice Frank Murphy, discussed in this volume, point to the broader social attitudes of America in her maturity. Unfortunately, however, Mr. Justice Murphy frequently speaks in these opinions only for himself, not for the Supreme Court; yet he does not speak for himself only—he speaks for millions of Americans who believe, with him, that "the strength of this nation is weakened more by those who suppress the freedom of others than by those who are allowed to think and act as their consciences dictate," and that "only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land."

Late 1946 statutory changes affecting eligibility of aliens for admission and naturalization had to be noted after the book went to press. Some of the changes are indicated in the text, some in footnotes.

I appreciate the kindness of the following publishers in granting permission to quote from their publications as listed: the Princeton University Press, *The Constitution and World Organization* by Edward S. Corwin; the Ronald Press Company, *Human Migration: A Study of International Movements* by Donald R. Taft; the Macmillan Company, *World Immigration: With Special Reference to the United States* by Maurice R. Davie; the Commonwealth Fund, *Administrative Control of Aliens* by William C. Van Vleck; Little, Brown and Company, *Brothers under the Skin* by Carey McWilliams; and the Stanford University Press, *Japanese in the United States* by Yamato Ichihashi.

M. R. K.

School of Industrial and Labor Relations
Cornell University

June 18, 1946

Contents

CHAPTER 3

THE RIGHT OR PRIVILEGE OF BECOMING A CITIZEN

CHAPTER 4

THE RIGHT TO REMAIN A CITIZEN

CHAPTER 5

THE RIGHT OF ALIENS TO OWN LAND

CHAPTER 6

THE RIGHT OF ALIENS TO WORK

CHAPTER 1

The Right to Exclude Aliens

HISTORICAL BACKGROUND

UNTIL as recently as 1875 the United States government consistently followed the open-door policy with respect to immigration.[1] Any person from any part of the world was welcome. Foreigners were not merely suffered to come to our shores, but, in many cases, were induced to do so by official and private action. The warmth of the welcome may be gauged by the fact that during the nineteenth century the laws and constitutions of at least twenty-two states and territories granted aliens or declarant aliens the right to vote. It was not until 1928 that a national election was held in which no alien in any state had the right to cast a vote for a candidate for office.[2] An act of 1875 [3] constituted the first federal statute on the subject of immigration. Through this law Congress merely provided for the exclusion of prostitutes and

[1] For a discussion of historical background of American immigration policy see W. C. Van Vleck, *The Administrative Control of Aliens* (New York, 1932), ch. I; M. R. Davie, *World Immigration: with Special Reference to the United States* (rev. ed., New York, 1933), ch. VIII; M. L. Hansen, *The Atlantic Migration, 1607–1860* (Cambridge, Mass., 1940); and other books listed in the Bibliography at end of this volume.

[2] Aylsworth, "The Passing of Alien Suffrage," *Am. Pol. Sci. Rev.*, XXV (1931), 114. See *New York Times*, February 14, 1946, p. 1; *The Lamp*, XIV (April, 1945). A constitutional amendment to exclude aliens from census counts for fixing the number of Congressmen has been recommended by the Senate Judiciary Committee (*New York Times*, February 14, 1946). This would leave the alien without moral, as well as without political, representation.

[3] 18 Stat. 477 (1875).

convicts. In 1882, however, Congress passed a more general immigration law,[4] by which other classes of aliens (lunatics, idiots, and persons unable to take care of themselves without becoming public charges) were excluded. In the same year,[5] and in 1884 and 1886, the Chinese exclusion acts [6] were passed. From the decade of the 1880's on Congress frequently enacted legislation in the field of immigration. The complete story of such legislation cannot be told here; [7] all we wish to point out here is that Congress, only seven years after it began to regulate immigration, undertook to bar a group of foreigners *because of their race or color.*

Before 1875 some states passed acts affecting the entry of immigrants into their respective jurisdictions. Such legislation was held unconstitutional by the United States Supreme Court. In a case before that court in 1875,[8] Mr. Justice Miller said:

> The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the states. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government.

The states claimed that, in the absence of national legislation on the subject, they had the right to protect themselves against undesirable aliens. As to this, the Supreme Court, in another case before it in 1875,[9] said:

[4] 22 Stat. 214 (1882).

[5] 22 Stat. 58 (1882).

[6] 23 Stat. 115 (1884); 25 Stat. 476, 477 (1886).

[7] See books cited note 1 *supra;* also, J. P. Clark, *Deportation of Aliens* (New York, 1931); R. L. Garis, *Immigration Restriction* (New York, 1927); S. Kansas, *United States Immigration and Deportation and Citizenship of the United States of America* (2d ed., Albany, 1941).

[8] Chy Lung v. Freeman, 92 U.S. 275 (1875).

[9] Henderson v. New York, 92 U.S. 259 (1875). Note that the court spoke of "actual" paupers and not of persons likely to become paupers or public

Whether, in the absence of such action by Congress, the states can, or how far they can, by appropriate legislation protect themselves against actual paupers, vagrants, criminals, and diseased persons, arriving in their territory from foreign countries, we do not decide.

It appears, then, that while the court would not state the limits on state legislation barring aliens, preferring to keep that question open, it gave the "green light" to Congress; and before long national legislation filled the void.

Soon the Supreme Court was called upon to pass on the constitutionality of congressional legislation relating to immigration. In 1884, in the *Head Money Cases,*[10] the court approved the immigration act of 1882 as a valid exercise of the powers of the national government under the commerce clause. Five years later it had to pass upon the constitutionality of the acts of Congress barring Chinese laborers. The opinion of the court, written by Mr. Justice Field, in the *Chinese Exclusion Case,*[11] must receive careful consideration: it was one of the first cases [12] involving race relations to come before the court after the Civil War and after the adoption of the Civil War amendments to the Constitution.

Before turning to this case, however, it might be well to point out that while in the *Head Money Cases* the Supreme Court placed the power of Congress over immigration

charges. See Passenger Cases, 48 U.S. 282 (1849); People v. Compagnie Générale Transatlantique, 107 U.S. 59 (1883); Compagnie v. State Board, 186 U.S. 380 (1902). See E. S. Corwin, *National Supremacy: Treaty Power v. State Power* (New York, 1913).

[10] 112 U.S. 580 (1884).

[11] 130 U.S. 581 (1889).

[12] See Civil Rights Cases, 109 U.S. 3 (1883); Railroad Co. v. Brown, 84 U.S. 445 (1873); Hall v. De Cuir, 95 U.S. 485 (1877); Pace v. Alabama, 106 U.S. 583 (1882); United States v. Reese, 97 U.S. 214 (1875); United States v. Cruikshank, 92 U.S. 543 (1875); Neal v. Delaware, 103 U.S. 370 (1880); *Ex parte* Yarbrough, 110 U.S. 651 (1884). These cases brought the "race problem" as it involved Negro-white relations before the Supreme Court and in a sense may have prepared the way for dealing with cases involving the Chinese and Japanese.

squarely on the commerce clause, in later cases the court left out reference to the commerce clause or failed to base the decision squarely upon it.[13]

THE CHINESE EXCLUSION CASE: DECISION AND OPINION

The *Chinese Exclusion Case* involved a Chinese laborer who had lived in San Francisco from 1875 to 1887. In the latter year he left for China, having in his possession a certificate from the government entitling him to return to the United States. This certificate was issued to him pursuant to acts of Congress adopted in 1882 and 1884. A short time later, in 1888, he returned to the United States and presented his certificate. But he was refused admission, because, seven days before his return, though after he had left China, Congress had passed an act [14] by which outstanding certificates were annulled and his right to re-enter was abrogated. He applied for a writ of *habeas corpus,* to test the legality of his detention for deportation, and in this proceeding he assailed the validity of the 1888 act as being in effect an expulsion in violation of treaties between the United States and China, and in violation of rights vested in Chinese laborers living in the United States.

[13] Nishimura Ekin v. United States, 142 U.S. 651 (1892); Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fok Yong Yo v. United States, 185 U.S. 296 (1902); Japanese Immigration Case, 189 U.S. 86 (1903); Turner v. Williams, 194 U.S. 279 (1904); Keller v. United States, 213 U.S. 138 (1909); Lapina v. Williams, 232 U.S. 78 (1914); United States v. Portale, 235 U.S. 27 (1914). There are two lower court decisions sustaining immigration laws solely under the commerce clause; namely, United States v. Craig, 28 Fed. 795 (1886); and In re Florio, 43 Fed. 114 (1890). Cf. B. C. Gavit, *The Commerce Clause of the United States Constitution* (Bloomington, 1932), 236–237.

[14] 25 Stat. 476 (1888).

Mr. Justice Field,[15] speaking for a unanimous court, traced the history of the diplomatic relations between the United States and China and pointed out that treaties between the two countries were made in 1844 and 1858, which were confined to declarations of peace and friendship and to stipulations for commercial intercourse at certain ports in China. In 1868 a change was made; the new treaty contained the following significant statement:

> The United States of America and the Emperor of China cordially recognize *the inherent and inalienable right of man to change his home and allegiance,* and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as permanent residents.[16]

The treaty provided that American subjects resident in China and Chinese subjects resident in the United States "shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation."

It should be noted that the 1868 treaty did not purport to give the Chinese the right to enter the United States; no treaty was needed for this purpose; for, as we have seen, it was not until 1875 that Congress restricted immigration and not until 1882 that it closed the doors on Chinese laborers. The intent of the treaty was only to provide for most-favored-nation treatment by each country of the subjects of the other.

Mr. Justice Field went on to say that free migration led to the creation of a race problem in California; for the Chinese "remained strangers in the land, residing apart by themselves,

[15] For a biography of Field, see C. B. Swisher, *Stephen J. Field, Craftsman of the Law* (Washington, 1930). For a shorter treatment, see E. S. Corwin, "Stephen Johnson Field," *Dict. of Amer. Biography,* VI (1931), 372–376.

[16] Italics supplied.

and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living." California petitioned Congress to stop further immigration.

In 1870 another treaty was made, in which China agreed that the United States "may regulate, limit, or suspend" the immigration of Chinese laborers, "but may not absolutely prohibit it." It was provided that "the limitation or suspension shall be reasonable."

The Chinese Exclusion Act of 1882 was intended to carry into effect the treaty of 1870. It *suspended* immigration of Chinese laborers for ten years. It preserved the rights of Chinese laborers who were here since 1880, or who were to come within ninety days after passage of the act, *to depart from the United States and re-enter.* These persons were given certain identifying certificates. An act of 1884 made these certificates the only evidence permissible to establish the right of re-entry. It was one of these certificates that the appellant in the case possessed when he left for a short visit to China.

But the 1888 act, passed a week before appellant's attempt to re-enter, *barred from re-entry all Chinese laborers who departed and did not return before passage of the act.* It declared null and void all outstanding certificates and provided that "the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States."

The court conceded that this act was in contravention of the express stipulations of treaties, but held that "it is not on that account invalid or to be restricted in its enforcement." Treaties, said the court, are not superior to acts of Congress; they are equal to such acts; and the last expression of the sovereign will controls. A treaty, then, like a statute, may be repealed or modified at the pleasure of Congress, and it is

not the business of the court to inquire if Congress has departed from a treaty, or if it had good or bad reasons for such departure.

Congress, said the court, may exclude aliens. If Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security," they may be excluded, though the countries are at peace. China, if it is so minded, can protest to the President "or resort to any other measure which, in its judgment, its interests or dignity may demand."

The court said that the power to exclude foreigners is an incident of sovereignty, part of the powers delegated by the Constitution. And this power is not subject to barter or trade: "whatever license" Chinese laborers may have obtained, previous to the 1888 act, to return to the United States, was held "at the will of the government, revocable at any time, at its pleasure."

The court, not wishing that its statement concerning the absolute right of Congress to abrogate treaties be construed as applicable to property rights as well as to non-property or personal rights arising out of treaties, concluded the opinion with the *obiter dictum* that treaties do protect rights of property. On the expiration or abrogation of a treaty, vested property rights are unaffected: " 'if real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate.' " This constitutional protection extends not merely to real estate, but to all rights of property which are capable of sale and transfer or other disposition.

The decision in the *Chinese Exclusion Case* represents in part a victory for Mr. Justice Field, for in two previous cases before the Supreme Court he was the sole dissenter from a more liberal position taken by his colleagues; but in the

end the members of the court joined him in upholding the constitutional power of Congress to pass the exclusion acts.

The first exclusion case to reach the court was *Chew Heong v. United States*,[17] decided in 1884, in which it appeared that a Chinese laborer, lawfully here at the time the treaty of 1880 was made, was temporarily absent from the United States when the act of 1882 was passed: he could not, obviously, have had in his possession a certificate of re-entry, as required by the act. The court sustained his right to re-enter, saying that the act was not intended to contravene the treaty. Field, however, disagreed with this interpretation of the act and, in his dissenting opinion, vigorously upheld the absolute right of Congress to exclude Chinese persons. In commenting upon the reasons which led Congress to pass the exclusion acts, he was probably stating his own opinion when he said:

> They have remained among us a separate people, retaining their original peculiarities of dress, manners, habits and modes of living, which are as marked as their complexion and language. They live by themselves; they constitute a distinct organization with the laws and customs which they brought from China. Our institutions have made no impression on them during the more than thirty years they have been in the country . . . They do not and will not assimilate with our people . . . They are for the time the bond thralls of the contractor; his coolie slaves . . . the Chinese cannot assimilate with our people, but continue a distinct race among us . . . competition with them tended to degrade labor and thus to drive our laborers from large fields of industry . . . there went up from the whole Pacific Coast an earnest appeal to Congress to restrain the further immigration of Chinese. . . . A restriction upon their further immigration was felt to be necessary, to prevent the degradation of white labor and to preserve to ourselves the inestimable benefits of our Christian civilization.

[17] 112 U.S. 536 (1884).