

A Comparative Study of the Legal Rights and Duties of Lawful Aliens in the United States and the People's Republic of China

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INTRODUCTION

The United States and the People's Republic of China are both in transition regarding their policies toward aliens. The People's Republic of China traditionally has exported its population. Famine, poverty, population growth, and an unpredictable climate have forced millions of Chinese to emigrate.¹ At the same time, China has discouraged immigration, preferring to develop its resources and culture independent from foreign influence.² The United States tradi-

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1. China has never been a country of immigrants. See Chen, *The Nationality Law of the People's Republic of China and the Overseas Chinese in Hong Kong, Macao and Southeast Asia*, 5 N.Y.L. SCH. J. INT'L & COMP. L. 281, 291 (1984). Chinese naturalization law had, until 1982, disregarded the place of birth as a factor in gaining Chinese nationality. This was one indication that China discouraged population growth by means of the admission of people from outside China who did not already hold Chinese nationality through ancestry. China could maintain its population through worldwide nationality based on lineage, not place of birth, and Chinese who emigrated were assured that their descendants could safely maintain Chinese nationality. *Id.* at 286. Of course, this may have made Chinese immigrants less acceptable to other countries that resented the immigrants' permanent nationality tie to China, especially those Chinese who did not accept dual citizenship.

2. In the past, China has isolated itself economically from foreign influence. See *infra* notes 14-23, 45-57 and accompanying text. Recent policy dramatically departs

tionally has welcomed aliens. It has relied on a constant influx of immigrant labor to expand both its industrial and agricultural bases.³ Many of these alien workers have been Chinese.

These historical positions are in the process of reversal. China's policy of opening to the world has encouraged ever larger numbers of foreign workers, educators, businesspersons and tourists to live, work, invest and travel in China.⁴ Overseas Chinese are also being encouraged to return, not just as tourists, but as permanent residents. Thousands of China's most talented and valuable intellectuals, scientists, and technical personnel are being sent abroad to study and train.⁵ Conversely, the United States is making strong efforts to restrict the flow of unlawful immigrants, to legalize its present population of long term undocumented aliens, and to reevaluate its unofficial, but largely condoned, policy of easy entry.⁶

This Article is a comparative study of the legal rights and duties of aliens residing in the United States and in the People's Republic of China. Historical patterns and practices regarding aliens are con-

from this previous isolationism and is acknowledged as a means to develop the economy rapidly. See Mu, *New Economic Developments in China's Economic Legislation*, 22 COLUM. J. TRANSNAT'L L. 61, 63 (1983), for a brief description of legislation passed to encourage reliance on the Chinese legal system in business matters and to stimulate foreign investment. See *id.* at 68-76. The current internal debate continues over whether China can import western technology without also importing attendant western values.

3. This is still the case. Even business-oriented publications recognize that aliens often benefit the United States economy by accepting employment that long term residents reject because of low wages or arduousness. The surrounding region benefits economically and low cost labor holds down inflation and helps prevent certain industries, especially the apparel industry, from emigrating. See Carlson, *A Challenge to the Argument that Aliens Hurt an Economy*, Wall St. J., Sept. 10, 1985, at 33, col. 1.

4. China's encouragement of foreign investment has been amply documented. Gu said that China was "the only country in the world, which had written into its Constitution that foreigners were allowed to invest in joint venture enterprises. This emphasized the country's wish to open to the outside world." Statement of Gu Ming, Chief of the State Council's Economic Legislation Research Center, *quoted in China Daily*, Oct. 19, 1985, at 1, col. 2.

The Constitution of the People's Republic of China states:

The People's Republic of China permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic co-operation with Chinese enterprises and other economic organizations in accordance with the law of the People's Republic of China. . . . Their lawful rights and interests are protected by the law of the People's Republic of China.

See PEOPLE'S REPUBLIC OF CHINA CONST. art. 18 [hereinafter PRC CONST.]; see also *infra* notes 263-79 and accompanying text.

5. See *People's Daily (Overseas Ed.)*, Jan. 28, 1988, at 4.

6. An example of these efforts is the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1987) (codified in scattered titles and sections) [hereinafter IRCA]. See *infra* notes 111-13 and accompanying text. Although it is too soon to determine, the policies embedded in IRCA seem to suffer from the same practical shortcomings and difficulties of implementation that plagued other attempts to restrict illegal immigration. Initial counts indicate that immigration from Mexico, after an immediate drop following the law's passage, has returned to previous levels. See N.Y. Times, July 10, 1987, at 12, col. 1.

sidered for their contribution to and influence on current law and policies. But the core of the Article focuses on the treatment of aliens under current law in both countries, how that law functions, and future perspectives. It does so primarily by contrasting the legal and practical positions of lawful aliens, as opposed to citizens, in both countries.⁷

HISTORICAL BACKGROUND

China

For many centuries ancient China was independent and open to outside interests. Since the Emperor Qin Shihuang unified China, from 221 to 206 B.C., until the Ming Dynasty (1368-1644 A.D.), China generally extended civil rights to aliens.⁸ These included the freedoms of trade, marriage, and succession. From 138 to 125 B.C., Zhang Qian, an envoy sent to explore central Asia, began trading silk with non-Chinese, which resulted in the opening of the silk route to outsiders.⁹ During this period, ancient China maintained normal and friendly relationships with other dominant countries and regional powers.

But after the establishment of the Qing Dynasty in 1644, the government embraced the traditional Chinese notion of the Emperor as the Son of Heaven.¹⁰ From that point, each Emperor governed pursuant to a "mandate from heaven" and was, therefore, divinely sanc-

7. The authors recognize that this study often compares the advantages provided to attract skilled westerners who are accustomed to higher standards of living than are generally available to Chinese citizens and who are akin, in many ways, to temporary guest workers because they do not intend to remain permanently in China, with the conditions of lawful resident aliens who have declared an intention to remain in the United States. Even so, these aliens remain in China for significant periods, and in the context of Chinese society, they are on the same footing and present similar policy questions as do lawful permanent alien residents in the United States.

8. YAO DAZHONG, *ZHONG GUO SHI JIE DE QUAN SENG* [THE FLOURISHING PERIOD OF THE WORLD OF CHINA] 155-65 (1983).

9. *CHINESE INTELLECTUALS AND THE DEVELOPMENT OF CHINESE HISTORY* 84-88 (History Soc'y of Human Province ed. 1985).

10. The ancient Chinese regarded China as the whole world (Tian Xia). There were many states in the world, but kings of these states could only be called dukes. Only the man who controlled Tian Xia was called the Son of Heaven, i.e., the Emperor, because he was regarded as the son and protected by Heaven (Tian). See *SELECTIONS OF MATERIALS OF CHINESE PHILOSOPHY HISTORY* (Han Dynasty volume) at 43-48. In fact, the so-called "world" in ancient China was within the territory of China and the states in the "world" were those vassal states in Chinese territory in ancient time. But in the Qing dynasty, Chinese emperors took the same attitude towards modern foreign countries, e.g., Great Britain, as towards the vassal states when modern foreign countries sought to establish relationships with China.

tioned in his administration of China's affairs.¹¹ This principle became the guiding force in all of China's international relations and planted xenophobic seeds within the society. As a result, China adopted a closed-door foreign policy and placed numerous restrictions on foreigners within its borders.¹² This isolationist stance insulated China from outside influence and halted its diplomatic and technological development. For example, in his reply to a request by King George III of England to establish diplomatic relations with China, Emperor Qianlong stressed the feudal concept of the Emperor as the Son of Heaven. He wrote:

You king beg me to allow one of your citizens to stay in my heavenly dynasty to oversee your trade and commerce with my country. This is not in accord with the custom of my heavenly dynasty and it cannot be allowed. . . . Since the heavenly dynasty controls a vast and broad territory I must devote myself to governing my country. I don't care much about the gifts you have brought. The heavenly dynasty has plenty of materials and products, there is nothing we lack so we needn't trade for any foreign goods.¹³

Consequently, from the establishment of the Qing Dynasty to the first Opium War in 1840, aliens in China had few civil rights.¹⁴ Foreigners could do business only in a single area of Guangzhou (Canton) and were subject to numerous restrictions. For example, foreigners were confined to designated residential areas and could not leave without permission.¹⁵ Foreign women, including wives, could not enter the country; Chinese women could not be employed as servants.¹⁶ Furthermore, foreigners were not permitted to ride in sedan chairs (*jiao*) and had to leave the country in the winter.¹⁷

The Qing government also severely restricted Chinese people in

11. See, e.g., J. FAIRBANK, *THE UNITED STATES AND CHINA* 159 (4th ed. 1983).

12. Three important regulations promulgated before 1840 imposed a series of restrictions on aliens who were traveling through, going to, or had been in China to do business with the Chinese. The regulations are Regulations on Guarding against Foreigners (*Fang Fan Wai Yi Gui Tiao*) (1579); Regulations on Communications and Trade between Chinese and Foreigners (*Min Yi Jiao Yi Zhang Cheng*) (1809); and Regulations on Guarding against Foreigners (*Fang Fan Yi Ren Zhang Cheng*) (1831). Also, the System of Public Trade was reestablished in 1760, which was a semi-executive and semi-business organization monopolizing foreign trade by the Qing government. See CHENG XUELU, *JIN DAI ZHONG GUO BA SHI NIAN [EIGHTY YEARS OF MODERN CHINA]* 13 (1983). See also, e.g., J. COHEN & H. CHIN, *PEOPLE'S CHINA AND INTERNATIONAL LAW* 506-07 (1974) (describing restrictions on aliens in Qing period).

13. This was couched in terms of an imperial order and began: "You have pledged your loyalty to my dynasty from beyond the seas and oceans, appointing a special envoy to my imperial court to express your good wishes and bring with him tribute and your letter. I very much appreciate that this shows your loyalty." Imperial Order Granted to the King of England, in *DONG HAU XU LU* 58, 118 (X. Q. Wang ed.).

14. YU HAI LAN ZHI [*SOUTH SEA BLUE RECORD*] vol. 28 at 22-28; vol. 29 at 19-27. See J. COHEN & H. CHIN, *supra* note 12, at 506.

15. G.L. CHEN, *MODERN HISTORY OF CHINA* 35-36 (1935).

16. *Id.*

17. *Id.*

their dealings with foreigners. Several commodities such as grain and metal tools could not be exported, while strict limitations were placed on the amount of other products, such as tea and silk, that could be sold abroad.¹⁸ Chinese merchants were prohibited from building ships for international travel or going overseas to conduct business without the government's permission.¹⁹

In the first Opium War, the European powers broke open China's closed door with military force, and by the conclusion of the third Opium War in 1842, China found itself entangled in a series of unequal, one-sided treaties.²⁰ The foreigners extorted countless privileges from the powerless nation. Yet, China accepted the treaties, not only because it lacked the ability to oppose them militarily, but also because it had no previous knowledge of bilateral agreements and wrongly believed that the treaties the Europeans foisted on China were the proper and correct form for international accords.²¹ Indeed, modern international law and diplomatic protocol were first introduced to China through these unequal treaties.

As a result, the western powers divided China into spheres of influence and imposed extraterritoriality. From then on foreigners were granted immunity from Chinese criminal law.²² The foreign consulates also controlled the right of railway construction, and held the power to impose tariffs and duties.²³ They obtained "most favored nation" treatment without any conditions or limitations, and required China to grant the same privileges to all foreign nations who had most favored nation provisions in their treaties.²⁴ Concessions granted to one had to be granted to all. Accordingly, the legal status of aliens quickly went from one extreme to another. China

18. D.S. HUANG, *THE RECENT AND MODERN HISTORY OF CHINA* 63-64 (1961).

19. *Id.*

20. *See, e.g.*, J. FAIRBANK, *supra* note 11, at 163-71.

21. Cohen, *Sino-American Relations and International Law*, in *DRAGON AND EAGLE* 334 (M. Oksenberg & R. Oxnam eds. 1978). "The advent of the treaty system made inevitable China's sustained exposure to, and gradual assimilation of, Western international law." T.Y. WANG, *INTERNATIONAL LAW* 17-18 (1982). *See generally* A. WALEY, *THE OPIUM WAR THROUGH CHINESE EYES* (1958).

22. *See, e.g.*, J. FAIRBANK, *supra* note 11, at 167-68 ("foreigners and their activities in China remained amenable only to foreign and not to Chinese law").

23. *See* Cohen, *supra* note 21, at 334. The author stresses that in Shanghai, the center for Sino-Western transactions, native Chinese had to bring their legal claims against American businessmen before the American consul, while Americans could bring civil claims against Chinese in a Chinese tribunal in which American consular officials sat as "assessors" and played influential roles.

24. *See* J. FAIRBANK, *supra* note 11, at 169 (labeling most favored nation clauses "the neatest diplomatic device of the century[,] by which "all foreign powers shared whatever privileges any of them could squeeze out of China.").

was forced to jettison its long standing policy of self-reliance, isolationism, and control over the presence of aliens for a universal open door policy. This state of affairs continued, in different forms, until the 1940s.²⁵

The United States

The United States, in contrast, has not been comfortable with an isolationist foreign policy that primarily stresses self-reliance. Soon after gaining strength as a nation, the United States moved to expand its territorial influence and secure commercial markets in the newly independent Latin American states.²⁶ The Monroe Doctrine of 1823 embodied American's position. It stated that the Western Hemisphere was not to be considered an area "for future colonization by any European powers," and indicated that any such attempts would be considered dangerous to the "peace and safety" of the United States.²⁷ This declaration of an expansive American foreign policy, which had the fundamental purpose of protecting potential markets for American business interests, later was echoed by the open door policy of 1899, which attempted to preserve part of the Chinese market for American business.²⁸

As a country that was settled by immigrants, the United States has welcomed aliens and professed an open attitude towards immigration, an attitude which in part continues to attract close to one-half million legal immigrants annually.²⁹ In fact, immigration is the major factor in current population growth within the United States.³⁰

Yet, in spite of outward manifestations of welcome and acceptance, some aliens within the United States have been confronted with hostility, nativism, racism and a xenophobic populace.³¹ This

25. Historical developments too numerous to explore in detail in this study affected Western intercourse with China; yet despite the end of the monarchy in 1912, the resulting "prolonged crisis of authority and central power[.]" and the advent of the Nanking government in 1927, "Chinese society was still dominated by a small ruling class, and foreigners in China by their unequal treaty privileges had become a part of this ruling class establishment." See J. FAIRBANK, *supra* note 11, at 220, 245.

26. M. KRAUS, *THE UNITED STATES TO 1865*, at 338 (1959).

27. *Id.* at 339.

28. See, e.g., K. HSIAO, *COMPROMISE IN IMPERIAL CHINA* (1979).

29. See U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES*, at 164, table No. 281 (1987).

30. The birth rate in 1986 was the lowest ever recorded. See *Wall St. J.*, May 5, 1985, at 39, col. 3. If present fertility rates remain at the current 1.8 births per woman, within 45 years immigration will account for all the population growth in the United States. See *N.Y. Times*, Dec. 14, 1986, at 1, col. 2.

31. Private discrimination against aliens in the United States and that sanctioned by federal and state laws has been marked by preferences based on race and ethnic origin. See, e.g., *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856). United States naturalization statutes prior to 1870 applied only to "free white person[s]." See, e.g., 1

has been especially true, historically, of Oriental aliens and Chinese in particular.³²

Numerous Chinese aliens emigrated to the United States in the 1860s to build railroads or to work at one of a multitude of other jobs created by California's gold rush.³³ The Chinese immigrants were especially disliked by other workers, in part because they were willing to work hard at the most arduous jobs for lower wages.³⁴ Of all ethnic groups, discrimination against Asian aliens was the most pervasive and rampant.³⁵ Riots were directed against Chinese residents, homes of Chinese were destroyed, and some Chinese were lynched in city streets.³⁶

In 1868, Congress passed the Burlingame Treaty, which granted China most favored nation treatment and its citizens superior rights, including unrestricted immigration.³⁷ However, the completion of the

Stat. 103 (1790); 1 Stat. 414 (1795); 2 Stat. 153 (1802). In 1870, following ratification of the thirteenth and fourteenth amendments, Congress extended naturalization rights "to aliens of African nativity and to persons of African descent." 16 Stat. 256 (1870).

32. See M. KRAUS, *IMMIGRATION, THE AMERICAN MOSAIC* 20 (1966) (antagonism toward Chinese immigrants was not unique: "In the Federalist era of the 1790's Irish revolutionaries who, on their arrival, became Jeffersonians, were not welcome. The Alien and Sedition Acts in 1798 expressed hostility to lenient naturalization as well as to criticism of officialdom.").

33. The Chinese also found employment in agriculture, fishing, cigar making and the garment trades, as well as employment as cooks, launderers, and housekeepers. Pan, *A History of the Chinese in the United States*, XI U.S.-CHINA REV. 16, 17 (1987). By 1880, 300,000 Chinese had entered the United States. M. KRAUS, *supra* note 32, at 83.

34. See J. CLARK, *HISTORY OF THE AMERICAN PEOPLE 273-74* (1975); V. PARRILLO, *STRANGERS TO THESE SHORES* 272 (1966).

35. Until the middle of the nineteenth century, voluntary immigrants were largely German, Irish, English, Scottish and Scandinavian. See M. KRAUS, *supra* note 26, at 392.

36. For a list of sources for materials describing violence against Chinese, see McClain, *The Chinese Struggle for Civil Rights in 19th-Century America: The Unusual Case of Baldwin v. Franks*, 3 LAW & HIST. REV. 350, 352 nn.17-21 (1985). For a more specific list of cases in California emanating from discriminatory legislation, see *id.* at 351. See also M. KRAUS, *supra* note 32, at 84.

Bret Harte expressed his horror at the death of Wan Lee in a famous obituary: "Dead, my reverend friend, dead. Stoned to death in the streets of San Francisco, in the year of grace 1869 by a mob of half-grown boys and Christian school children." H. ISSACS, *IMAGES OF ASIA* 113 (1958). Ironically, Bret Harte, editor of the *Overland Monthly*, was responsible for the phrase "heathen Chinese" which became a common anti-Chinese slogan. It originated in his 1870 poem, "Plain Language from Truthful Jones," which was intended as humor. See generally R. TAKAKI, *IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA* 222-24 (1979).

37. See The Burlingame Treaty, 16 Stat. 739 (1868). The treaty provided, in part:

Chinese subjects visiting or residing 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. But

railroads and the onset of depression in 1873 brought renewed political pressure to restrict the entry of Chinese.³⁸ The Burlingame Treaty was abrogated by the passage of the Chinese Exclusion Act in 1882.³⁹ Even though the United States Supreme Court ruled in *Yick Wo v. Hopkins*⁴⁰ that the term “persons” in the fourteenth amendment included Chinese aliens, and that they were, therefore, entitled to equal protection of the law, the Court readily succumbed to Congress concerning the question of expulsion or exclusion of aliens.⁴¹ In 1889, the Court upheld the exclusion of Chinese laborers on grounds of sovereignty.⁴² American immigration policy remained sharply skewed in favor of European immigrants until 1950,⁴³ while Chinese aliens remained ineligible for naturalization until 1943.⁴⁴

nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States.

16 Stat. at 740 (1868). This treaty was modified in 1880 to allow the United States to “limit” entry to Chinese “teachers, students, merchants or [tourists]. . . .” 22 Stat. 826, 827 (1880).

38. See Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 855-56 & nn.10-12 (1987).

39. Act of May 6, 1882, 22 Stat. 58. In May 1882, Congress implemented the treaty modification by suspending immigration of Chinese laborers, skilled and unskilled, for ten years. A laborer already in the United States could leave and return with a certificate of prior residence, to be obtained from a customs collector upon departure. A nonlaborer could enter with a certificate of nonlaborer status, to be issued by the Chinese government, which would be “prima-facie evidence” of facts it recited. See 22 Stat. at 58, 60. This was amended in 1884 to make certificate of prior residence or of nonlaborer status the “only evidence permissible to establish [a Chinese person’s] right of entry.” Act of July 5, 1884, 23 Stat. 115.

The Chinese Exclusion Act provided, in part: “in the opinion of the government of the United States, the coming of Chinese laborers to this country endangers the good order of certain localities. . . . [for the next ten years it shall] not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States.” Act of May 6, 1882, ch. 126, as amended by Act of July 5, 1884, ch. 220, 23 Stat. 115-118.

Finally, in 1888 Congress prohibited entry by any Chinese laborer, under any circumstances, and declared all certificates issued under prior legislation “void and of no effect.” 25 Stat. 504 (1888).

40. 118 U.S. 356 (1886).

41. See *The Chinese Exclusion Case*, 130 U.S. 581, 596-611 (1889).

42. The constitutionality of these statutes was upheld in *The Chinese Exclusion Case*. See generally T. ALEINIKOFF & D. MARTIN, *IMMIGRATION PROCESS AND POLICY* 1-81 (1985). The result of all these pressures was that by 1920 only 61,000 Chinese lived in the United States. See M. KRAUS, *supra* note 26, at 84.

43. See *infra* notes 99-103 and accompanying text.

44. See Nationality Act of 1940, 8 U.S.C. § 703, as amended by Act of Dec. 17, 1943, Pub. L. No. 78-200, 57 Stat. 601 (1943). This amendment completely repealed the Chinese Exclusion Act, made Chinese eligible for naturalization, and established an annual quota of 100 Chinese immigrants. It was passed largely because of the alliance between China and the United States during World War II. It stated:

The right to become a naturalized citizen under the provisions of this Act shall extend only to white persons, persons of African nativity or descent, descendants of races indigenous to the Western Hemisphere, and Chinese persons or persons of Chinese descent.

The People's Republic of China

The establishment of the People's Republic of China (PRC) in 1949 marked the end of the impotency imperial China had experienced in the area of foreign relations. The new Chinese government quickly embarked on a program to strengthen the nation, which was articulated in the "Common Program of the Chinese People's Political Consultative Convention," enacted in September 1949.⁴⁵ Yet, in spite of a stated policy of openness, in reality the country continued its closed door policy for a long period after the establishment of the PRC, by pursuing a strategy of self-sufficiency and internal economic development.⁴⁶

Two important reasons account for China's inability to internationalize. The first was the objective pressure applied by the international community that opposed the PRC, namely efforts by the United States and its allies to disrupt China's policies and "contain" it with an arc of hostile neighbors, including South Korea, Japan, Taiwan and the Philippines.⁴⁷ The new Chinese government had come to power by overthrowing the western ally Chiang Kai-shek. Because the government of the PRC espoused Communist principles, which were anathema to the United States at the time, China quickly became a natural enemy of the western world. Western nations, along with the newly formed Taiwan under Chiang Kai-shek, adopted a belligerent attitude toward China. They withheld formal recognition of the new government and imposed an economic embargo.⁴⁸ From its very beginnings, the PRC was unable to develop needed economic and political relationships with many significant and neighboring countries. The Soviet Union appeared to be China's only ally.⁴⁹

Id. Finally, in 1952, limitations on the right of naturalization based on race, sex and marital status were lifted. See Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1503, § 1422 (1982) [hereinafter INA].

45. See The Law and Regulations Used for Law Teaching, Fudan Univ. Law Dep't, Mar. 1984, at 31; J. FAIRBANK, *supra* note 11, at 362-63 (Common Program was a "general statement of aims of the new coalition government, . . . and the Organic Law of the Central People's Government, which made the working class the leader of the republic.").

46. See generally J. FAIRBANK, *supra* note 11, at 370-416.

47. See *id.* at 455-57 (discussion of United States' "containment" policy).

48. J.T.H. TSAO, CHINA'S DEVELOPMENT STRATEGIES AND FOREIGN TRADE 82-86 (1987). See G. WANG, SINO-AMERICAN ECONOMIC EXCHANGES 1-21 (1985) (describing framework and history of United States-Chinese economic relations).

49. On February 14, 1950, China and the Soviet Union entered into a 30 year treaty of friendship, alliance, and mutual assistance. W. LANGER, AN ENCYCLOPAEDIA OF WORLD HISTORY 1339 (5th ed. 1978). Just over 10 years later, the two nations be-

As China's exclusion from the noncommunist world continued, Chairman Mao Zedong concentrated the nation's efforts on internal development and suggested that within ten years China would be self-sufficient and able to function independently.⁵⁰ But in 1960, the Soviet Union unilaterally withdrew its personnel from China,⁵¹ thereby halting needed scientific and technical cooperation and assistance. Many industrial development projects were canceled, which severely set back technological development. With no other alternatives, China began to emphasize self-development, self-sufficiency, and independent building of socialism.⁵²

The second major reason for China's closed door policy was more subjective.⁵³ During the late 1960s China experienced the so-called "Cultural Revolution," which further limited its relationship with foreign economic powers.⁵⁴ In fact, from 1968-71, the importing of new technologies was almost totally interrupted. After this period, in 1972, China established diplomatic relations with Japan and the Shanghai Communique was published.⁵⁵ Formal diplomatic relations with the European Economic Community (EEC) followed in 1975.⁵⁶ With these developments, China finally was able to develop extensive foreign economic relationships.⁵⁷ Thus, from the establishment of the PRC in 1949 until the late 1970s, China's interaction with foreigners in terms of both trade and diplomacy was extremely limited.

In many ways both the United States and China have come full circle. Since the latter half of the 1970s the PRC government has reshaped both its foreign and domestic policies.⁵⁸ The new policy of opening internal economic activities to foreigners and developing cooperative relationships has greatly improved China's relations with other countries. Accordingly, China has attracted an increasing number of alien workers and investors.⁵⁹ In the same vein, by 1965,

came estranged. *Id.* at 1167.

50. See 5 MAO ZEDONG'S SELECTED WORKS 343.

51. See J. FAIRBANK, *supra* note 11, at 424. "[A]s many as ten thousand Russian technicians at a time came armed with blueprints to help renovate or build . . . the projects that led the industrial program. . . ." *Id.* at 389.

52. See J.T.H. TSAO, *supra* note 48, at 86-90.

53. Other subjective factors hindered contact from the late 1960s to the end of 1976, the period of the Gang of Four. During those years, exporting natural and energy resources was regarded as an act of national betrayal. Acceptance of foreign loans was considered a loss of power to foreign countries and evidence of foreign dominance. It was equivalent to a loss of sovereignty, and China often boasted that it had no foreign debt. Direct foreign investment in China and cooperative joint ventures were unimaginable.

54. See, e.g., J. FAIRBANK, *supra* note 11, at 436-44.

55. Joint Communique, Feb. 27, 1972, 66 DEP'T ST. BULL. 435 (1972).

56. See People's Daily (Overseas Ed.), May 11, 1975, at 1; Apr. 5, 1978, at 5.

57. China predicted that its trade with the EEC would reach \$8 billion in 1986. China Daily, Aug. 22, 1986, at 1, col. 1.

58. J. FAIRBANK, *supra* note 11, at 444-49, 479-92.

59. See People's Daily (Overseas Ed.), July 11, 1987, at 2; Mar. 4, 1988, at 1.

the United States had applied a nonrestrictive immigration quota of 20,000 to China.⁶⁰ Not incidentally, this has been accompanied by a growing recognition of Asians, especially the Chinese, with their strong family ties and respect for education, as model immigrants.⁶¹ Therefore, both China and the United States appear to be back to the point from which they started with respect to their attitudes and policies toward aliens.

SOURCES OF THE RIGHTS AND DUTIES OF ALIENS

International Minimum Standards

There is a worldwide trend toward the recognition of uniform minimum international standards for the treatment of aliens.⁶² However, the motivations behind this trend differ in capitalist and socialist countries, and especially in developing countries.⁶³ This is because of their contrasting political systems, cultural traditions, social-moral standards and stages of economic development.

From the 18th through the early 20th centuries, international law had only one basis for minimum standards in dealing with aliens. It was created by the western capitalist countries according to their own political, economic, and cultural systems to vindicate interference with the internal affairs of developing countries.⁶⁴ Minimum

60. Liberalization has reached the point where, from 1981-85, of the 2,864,406 legal immigrants, 47.6% came from Asia, 11.4% from Europe, the historical leader, followed by 11.7% from Mexico, 23.7% from other Latin American countries, 2.6% from Africa and 2.1% from Canada. N.Y. Times, Dec. 14, 1986, at 1, col. 2.

61. There are now more than five million Asians living in the United States. According to the 1980 Census, Asian-American families have the highest median annual income, \$23,600. Oxnam, *Why Asians Succeed Here*, N.Y. Times Magazine, Nov. 30, 1986, at 72. This is a far cry from the results of a study of Princeton undergraduates conducted in 1932. They labeled the Chinese as superstitious (74%), sly (29%) and conservative (29%), when asked to choose from a list of 85 characteristics. See V. PARRILLO, *supra* note 34, at 22-23.

62. See INTERNATIONAL LAW — A CONTEMPORARY PERSPECTIVE 501-08 (R. Falk ed. 1985). The content of human rights has been developed and expanded by three stages: bourgeois revolution, socialist revolution, and the independent movement of colonial countries, and recognized in the form of the Universal Declaration of Human Rights by almost all countries. Besides, many countries, including developed and developing countries, have included provisions protecting human rights in their constitutions, thus signifying a trend or process of forming a basis for unification of standards of treatment of aliens. See also I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 534-25 (3d ed. 1979); W. GIBSON, ALIENS AND THE LAW 1-18 (1940).

63. See M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 77, 89-91 (6th ed. 1987).

64. R. ANAND, INTERNATIONAL LAW AND DEVELOPING COUNTRIES 23-26 (1987).

standards have since changed dramatically.

Prior to World War II, human rights issues were generally left to the domestic jurisdiction of each state.⁶⁵ But since then, and especially since 1960, the developing countries have played important roles in making human rights an international law issue. In addition to stimulating concern for human rights, they have instigated a change in traditional conceptions of human rights from that of individual rights to a notion of collective human rights.⁶⁶ As international relations became more complicated and interaction more frequent, basic human rights became a concern of all political, economic, cultural and legal relationships.

The foundation for the international concept of human rights is twofold. It consists of the almost universally accepted Charter of the United Nations, which speaks of "human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,"⁶⁷ and the Universal Declaration of Human Rights,⁶⁸ now considered to be customary international law, and still the most widely cited document for the protection of human rights.⁶⁹

Although some countries argue that the nonexistence of express international minimum standards is fatal to that ideal, a process of defining them does exist.⁷⁰ Their source is both the domestic law and practice of nations and international law.⁷¹ In addition to reliance on documents of the United Nations, developing countries often insist on shared standards in the provisions of their bilateral and multilat-

65. See M. AKEHURST, *supra* note 63, at 70-103; see generally U.N. CHARTER arts. 55 & 56.

66. Wang, *The Third World and International Law*, CHINESE Y.B. INT'L. LAW 9, 13 (1982).

67. U.N. CHARTER, art. 55(c); see generally HUMAN RIGHTS IN INTERNATIONAL LAW (T. Meron ed. 1984).

68. *Universal Declaration of Human Rights*, G.A. Res. 217A, 3 U.N. GAOR Annexes (Agenda Item 58) at 71, U.N. Doc. A/810 (1948). See also *International Covenant on Civil and Political Rights*, adopted Dec. 16, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

69. See Lillich, *Global Protection of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW 116-17 (T. Meron ed. 1984). See *The Paquete Habana*, 175 U.S. 677, 700 (1900). The Supreme Court in that case stated:

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. at 700 (citing *Hilton v. Gugot*, 159 U.S. 113, 163-64, 214-15 (1894)).

70. See INTERNATIONAL LAW — A CONTEMPORARY PERSPECTIVE, *supra* note 62, at 501-08.

71. See W. GIBSON, *supra* note 62, at 154-56.

eral treaties giving rise to or creating customary international law.⁷² Therefore, international norms of treatment have been increasingly unified and solidified through treaties, international conventions, and a widespread willingness to comply with certain minimum standards.⁷³

China

Almost every country has national regulations concerning the treatment of aliens and their corresponding rights and duties. Chinese domestic law provides a common base from which to define minimum standards. These comply with, and usually exceed, the requirements of international treaties and conventions.⁷⁴ The rights of aliens emanate from the Constitution of the People's Republic of China (PRC Constitution), the civil law, and municipal laws concerned with lawful aliens. Generally, the standard of treatment is prescribed on the national level.⁷⁵ Aliens are entitled to rely on the four basic categories of rights written in the PRC Constitution.⁷⁶ As

72. See, e.g., M. AKEHURST, *supra* note 63, at 90, 93; I. CRUZ, INTERNATIONAL LAW 195 (1984) (stressing that speaking about an international standard of justice, rather than just minimum standards, has been accepted).

73. See I. BROWNLIE, *supra* note 62, at 524-28 (concerning standard of national treatment, i.e., equality of treatment of aliens and citizens, versus guarantee of treatment based on an international minimum standard, which exceeds that extended to citizens).

One indication of more uniform compliance with norms of treatment is the pressure that is being brought to bear on South Africa because of the injustices of apartheid. The European Community has imposed sanctions and is considering expanding them. Christian Science Monitor, Oct. 16, 1986, at 13, col. 1. Even British Prime Minister Margaret Thatcher, during a steamy Commonwealth meeting, was forced to impose limited sanctions on South Africa. N.Y. Times, Aug. 5, 1986, at A1, col. 6.

74. See, e.g., The General Principles of the Civil Law of the PRC, art. 142 (1986) [hereinafter PRC General Principles of the Civil Law].

75. PRC CONST. art. 5 states:

The State upholds the uniformity and dignity of the socialist legal system.

No law or administrative or local rules and regulations shall contravene the Constitution.

All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law.

No organization or individual may enjoy the privilege of being above the Constitution and the law.

76. The four basic categories of rights are political, economic, cultural and personal. These rights have been elaborated in a series of separate laws and regulations, e.g., PRC General Principles of the Civil Law, the Patent Law of the PRC, and the Law of Succession of the PRC, which are applicable to aliens in China according to relevant articles or provisions of these laws and regulations, such as article 8 of the PRC General Principles of the Civil Law. See also PRC CONST. arts. 32-50; see *infra* text accompanying note 225.

guiding principles, these are not described specifically or in detail, but they have been made generally applicable to aliens:

The provisions concerning citizens in this law are applied to aliens and stateless persons, who are in the territory of the People's Republic of China. Except for the rules stipulated in other laws, this means except for special rules of law, aliens and stateless persons in Chinese territory, have the same civil rights as Chinese citizens and enjoy civil rights and must perform civil duties according to the law.⁷⁷

This provision is construed by Chinese legal scholars to settle the question of the application of "national treatment" to aliens including those rights granted to citizens in the PRC Constitution.⁷⁸ It complies with Articles 18 and 32 of the PRC Constitution, which protect the legal rights and interests of aliens in Chinese territory.⁷⁹ The legal status of aliens is thus protected by both the PRC Constitution and the civil law.

The United States

Two recent significant cases illustrate United States acceptance of international minimum standards and corresponding incorporation into its domestic law. *Filartiga v. Pena-Irala*⁸⁰ and *Tel-Oren v. Libyan Arab Republic*⁸¹ were both brought under the Alien Tort Statute.⁸² In *Filartiga*, jurisdiction was found in a claim by an alien against a former Paraguayan official, when both were residing in the United States at the time of suit, for the torture and death of his son. The Court of Appeals for the Second Circuit concluded that torture conducted under color of law was a violation of the law of nations.⁸³ The *Tel-Oren* case found jurisdiction lacking in a suit against the Palestine Liberation Organization by survivors and rela-

77. PRC General Principles of the Civil Law art. 8.

78. See Fang, *The Provisions in the General Principles of the Civil Law of the PRC Concerning the Application of Law to Foreign Civil Relationships*, 1986 CHINESE ECON. & LAW 35.

79. PRC CONST. art. 18 (foreign investors and joint ventures protected by law); PRC CONST. art. 32 states: "The People's Republic of China protects the lawful rights and interests of foreigners within Chinese territory, and while on Chinese territory foreigners must abide by the law of the People's Republic of China. The People's Republic of China may grant asylum to foreigners who request it for political reasons."

80. 630 F.2d 876 (2d Cir. 1980).

81. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

82. 28 U.S.C. § 1350. For a thorough and scholarly consideration of its history, its applications to violations of human rights, the rights of private individuals to bring such actions, recommendations for change and proposed amendments to the statute, see Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 INT'L L. & POL. 1 (1985); Randall, *Further Inquiries Into the Alien Tort Statute and Administration and a Recommendation*, 18 INT'L L. & POL. 473 (1986). See also *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.C. 1985) (sustaining jurisdiction under the statute for claims against the Soviet Union based on the imprisonment and death of Raoul Wallenberg).

83. *Filartiga*, 630 F.2d at 880-85.

tives of persons murdered in an armed attack on civilians in Israel. The plaintiffs sued the PLO for violating international norms and committing offenses prohibited by international law; despite the court's unwillingness to entertain the claims, the set of widely varying opinions included acknowledgement that international law confers "fundamental rights upon all people."⁸⁴

Therefore, international minimum standards are based on an amalgamation of both developed and developing countries' concepts of human rights. Both China and the United States exceed minimum standards in their treatment of aliens lawfully present in their territories.⁸⁵ It will be clear from this analysis that both countries uphold international norms and seek to provide a level of dignity to all persons.

National Power Over Aliens

While international norms of state conduct provide a framework for the minimum protection of aliens, on the domestic level national powers predominate in determining their status. A skeletal discussion of the sources of national power that control immigration and naturalization in both countries is essential to a comprehensive understanding of the contemporary status of permanent resident aliens.

The United States

Restrictions on immigration in the United States began in 1875, when felons and prostitutes were barred from entering the country.⁸⁶ That list has since grown to include thirty-three delineated categories.⁸⁷ These include homosexuals⁸⁸ and those excluded on grounds of

84. *Tel-Oren*, 726 F.2d at 777 (1984) (Edwards, J., concurring, quoting *Filar-tiga*, 630 F.2d at 885).

85. An argument can be made that some aspects of procedural due process required in criminal cases in the United States, such as prompt notification of charges and the right to confront witnesses, rise to the level of international norms and that they are apparently lacking in Chinese criminal procedure. Yet, at least one comparative analysis has contended that once one looks behind the stated ideals to the operational realities of both systems they show similarities in results and often in day-to-day practice. See Pfeffer, *Crime and Punishment: China and the United States*, in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 261 (J. Cohen ed. 1971).

86. An Act Supplementary to the Acts in Relation to Immigration, ch. 141, 18 Stat. 477 (1875). For concise histories of U.S. immigration law see Abrams, *American Immigration Policy: How Strait The Gate?*, 45 LAW & CONTEMP. PROBS. 107, 108-11 (1982); Martin & Houstoun, *European and American Immigration Policies*, 45 LAW & CONTEMP. PROBS. 29, 44-46 (1982).

87. See INA § 212(a), 8 U.S.C. § 1182(a).

88. See INA § 212(a)(4), 8 U.S.C. § 1182(a)(4). See, e.g., *In re Longstaff*, 716

political affiliation and the need to protect security.⁸⁹ Power over aliens in the United States stems from the broad authority the federal government asserts over foreign affairs⁹⁰ and from the more general power of any sovereign nation "to forbid the entrance of foreigners within its dominions."⁹¹ The power of exclusion was first recognized in *Chae Chan Ping v. United States* (the *Chinese Exclusion Case*).⁹² In the *Chinese Exclusion Case* a Chinese alien, ineligible for citizenship, had resided in the United States for twelve years. He left on a visit to China on June 2, 1887, holding a valid certificate of identity issued pursuant to the Burlingame Treaty of 1868.⁹³ During his absence Congress repealed portions of the treaty, retroactively voiding his certificate. The court denied his attack on the statute as a retroactive, unconstitutional bill of attainder and an ex post facto law.⁹⁴

In addition to establishing plenary federal power over immigration, this case set forth the principle that a lawful treaty could be superseded by a subsequent conflicting federal statute.⁹⁵ The Court quickly extended this reasoning to deportation.⁹⁶ In a subsequent case, the Court stated, "the right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards

F.2d 1449 (5th Cir. 1983) (barring an alien from naturalization based on an admission of homosexuality at the time of entry to the United States). Cf. *Hill v. Immigration and Naturalization Serv.*, 714 F.2d 1470 (D.C. Cir. 1983) (barring exclusion of an avowed homosexual alien absent a medical certification of psychopathic personality, sexual deviation, or mental defect).

89. See generally Ortiz Miranda, *Rethinking the Role of Politics in United States Immigration Law: The Helsinki Accords and Ideological Exclusion of Aliens*, 25 SAN DIEGO L. REV. 301 (1988); see *infra* notes 313-15 and accompanying text.

90. The Constitution does not specifically provide for this power, but it exists as an amalgam from Congress' power to regulate foreign commerce, make a uniform rule of naturalization, and declare war, U.S. CONST. art. 1, § 8, cls. 3, 4, 11; and the President's power to make treaties, U.S. CONST. art. 11, § 2, cl. 2. The first case holding state restrictions on immigration to be unconstitutional and to declare that the federal power over foreign commerce included immigration was decided in 1875. *Henderson v. City of New York*, 92 U.S. 259 (1875).

91. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."). See also *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Fiallo v. Bell*, 430 U.S. 787, 792-93 (1977).

92. 130 U.S. 581, 603-06 (1889). For a discussion of the legislation leading to this case, see *supra* notes 37-39 and accompanying text. See also Henkin, *supra* note 38 (critical essay on *The Chinese Exclusion Case* and its progeny).

93. 130 U.S. at 584-89.

94. *Id.* at 609-10.

95. See Henkin, *supra* note 38, at 854. Henkin refers to the constitutionally unfettered power of Congress over aliens as an embarrassing "constitutional fossil." *Id.* at 862-63.

96. See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); see also *Lem Moon Sing v. United States*, 158 U.S. 538, 547-48 (1895); Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982).

becoming citizens of the country . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."⁹⁷

The Chinese Exclusion Act of 1882,⁹⁸ the basis for the exclusion of Chinese immigrants, was expanded in 1907 to include Japanese.⁹⁹ In 1921, over one-half million European immigrants crossed the Atlantic,¹⁰⁰ which stirred public outcry for some type of restriction, aimed largely at undesirable southern and eastern Europeans.¹⁰¹ The adoption of a quota system soon followed. The National Origins Act of 1924, which went into effect in 1929, set up a quota system which allocated immigrants by country of origin, based on the ethnic composition of the United States' population in 1920.¹⁰² The Act clearly disfavored southern and eastern Europeans and Orientals since few had remained in the United States because of declining employment, discrimination, and ineligibility for naturalization.¹⁰³

The Immigration and Nationality Act of 1952 (INA)¹⁰⁴ retained the system, but introduced a new modest Asian-Pacific quota of 2,000.¹⁰⁵ In 1965 the emphasis for selection changed to a preference system focusing on family relationships and essential employment skills.¹⁰⁶ Congress set an annual quota of 20,000 for each eastern hemisphere country.¹⁰⁷ Under these national quotas, which are retained in current law, potential immigrants in low preference categories and those with no preference must wait until all those above them who qualify to emigrate do so. Therefore, many persons with valid reasons for emigrating face an impossible obstacle under the INA.¹⁰⁸ The last substantial component of the immigrant mix is the

97. *Fong Yue Ting*, 149 U.S. at 707.

98. Act of May 6, 1882, ch. 126, 22 Stat. 58. *See supra* note 39.

99. Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898.

100. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 105 (1975) (for the year ending July 31).

101. *See SELECT COMM'N ON IMM. & REFUGEE POLICY, U.S. Immigration Policy and the National Interest 189-95* (1981) (history of events preceding 1924 National Origins Act).

102. *See Immigration Act of 1924*, ch. 190, 43 Stat. 153.

103. *See M. KRAUS, supra* note 26, at 84.

104. 8 U.S.C. § 1101-1503.

105. *See Pub. L. No. 82-414*, 66 Stat. 163, 176-78 (1952).

106. *See INA* §§ 201, 203, 8 U.S.C. §§ 1151, 1153.

107. *See Immigration Act of 1965*, Pub. L. No. 89-236, 79 Stat. 911 (codified in scattered sections of 8 U.S.C. §§ 1101-1503).

108. In Hong Kong, whose quota counts as part of Britain's, and therefore is separate from China's, fifth preference immigrants (brothers and sisters of citizens of the United States) are currently facing a 17 year wait; thus, apparently they never will get a chance to emigrate, since Hong Kong will revert to Chinese control in 1999. Interview

authorization made in the Refugee Act of 1980,¹⁰⁹ which incorporates the UN definition of refugee in setting an annual limit of 50,000.¹¹⁰

After years of study, the Immigration Reform and Control Act of 1986 (IRCA)¹¹¹ passed as an amendment to the INA.¹¹² The policy behind IRCA is eminently pragmatic and sensible — it acknowledges the millions of undocumented aliens permanently living in the United States by making them eligible for lawful residence and naturalization and limiting additional illegal entry by imposing criminal sanctions on employers to deter hiring of illegal workers.¹¹³ Clearly, United States immigration policy stands on the threshold of change.

For over one hundred years, despite the various changes in immigration policy and law, the Supreme Court has moved little from its position that control over immigration lies in the hands of Congress.¹¹⁴ Questions of access to procedural due process are resolved

with Staff Member of the U.S. Consulate in Shanghai, People's Republic of China, Dec. 6, 1985. In the case of Taiwan, the assignment of a separate immigration quota is one minor point of contention in the major international legal dispute between the United States and China over the United States' continued "relations" with Taiwan. See, e.g., Chen, *Some Legal Problems in Sino-U.S. Relations*, 22 COLUM. J. TRANSNAT'L L. 41, 47 n.26 (1983). See also Zhao, *The Main Legal Problems in the Bilateral Relations Between China and the United States*, 16 INT'L L. & POL. 543 (1984).

109. Pub. L. No. 96-212, 94 Stat. 102 (1980). For a description of the procedure under the Act, see Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 SAN DIEGO L. REV. 327, 330-33 (1986).

110. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 152; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6557, 606 U.N.T.S. 267. The United States ratified the Protocol on October 4, 1968. 114 CONG. REC. 29,607 (1968).

111. Pub. L. No. 99-603, 100 Stat. 3359 (1987) (codified in scattered titles and sections).

112. For a thorough consideration of the legislative alternatives that were available to Congress in terms of employer sanctions and amnesty, see Smith & Mendez, *Employer Sanctions and Other Labor Market Restrictions on Alien Employment: The "Scorched Earth" Approach to Immigration Control*, 6 N.C.J. INT'L L. & COM. REG. 19, 42-60 (1980-81). The authors conclude that the idea of sanctions against employers is inherently unsound and contrary to U.S. traditions. *Id.* at 60. Some of the findings of the Select Commission on Immigration and Refugee Policy (SCIRP), established by Congress in 1978, and proposals leading to the new law are summarized in Martin & Houstoun, *supra* note 86, at 46-53.

113. The model is clear: amnesty and opportunity for naturalization for undocumented aliens who entered the United States before January 1, 1982 and have continuously resided there since then; partial amnesty (two years "probation" as temporary residents with the opportunity afterwards to become permanent residents) for those who worked in agriculture for at least 90 days in the period from May 1, 1985, to May 1, 1986; fines and possible criminal penalties for repeat offender employers and labor contractors who knowingly hire undocumented aliens, and placement of an affirmative burden on employers to determine status of new employees. IRCA § 101(a), 100 Stat. at 3360-74 (codified at 8 U.S.C. § 1324a). IRCA does not apply to employees hired before November 6, 1986.

114. See *Fiallo*, 430 U.S. 737, refusing to grant substantive constitutional protection to citizen fathers and their illegitimate alien children, who claimed preferential immigrant status through their fathers, as opposed to their mothers, as provided for in the

on the basis of physical presence. For instance, a nonresident enemy alien, captured and tried by the U.S. Army in China, was refused access to American courts to contest the fairness of the trial.¹¹⁵ Yet, once physically present in the United States, aliens, including undocumented aliens, are "persons" protected by the Constitution and therefore entitled to procedural safeguards.¹¹⁶ "Reentering" aliens have been granted procedural due process protection to protest exclusion at deportation hearings.¹¹⁷ The same is true if an alien did not intend to interrupt permanent residence when taking a casual excursion outside the country for an afternoon trip to Mexico.¹¹⁸ And, most recently, the Court granted procedural due process protection to a returning alien, in an exclusion hearing, because it was a matter of "reentry," not "initial entry."¹¹⁹ But regardless of how fine the court's distinctions become, at exclusion hearings aliens are relegated to pressing substantive claims under existing statutes, and the bases of exclusion remain constitutionally sound.

China

China also heralds the international law doctrine that complete power over immigration and naturalization is vested as a matter of sovereignty in the national government, and allocates the paramount, almost exclusive role in regulation of aliens accordingly.

In 1980 China enacted a new comprehensive nationality law.¹²⁰

INA, on the grounds of the powers entrusted to Congress to make such distinctions based on gender and illegitimacy regarding immigrants. *See also Galvan v. Press*, 347 U.S. 522 (1954).

115. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950). "[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation. . . ." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

116. *Landon*, 459 U.S. at 32. For an impassioned plea that our social compact mandates that greater constitutional protection should be provided aliens, including heightened protection against exclusion and deportation, see Henkin, *The Constitution as Compact and As Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985).

117. *See Kaoru Yamataya v. Fisher*, 189 U.S. 86 (1903).

118. *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Johnson*, 339 U.S. 763. Of course, a resident alien has the full capacity to sue and be sued in state courts. *See Ex parte Kawato*, 317 U.S. 69 (1942).

119. *See Landon*, 459 U.S. 21.

120. Nationality Law of the People's Republic of China, reprinted in CHINA OFFICIAL ANNUAL REPORT 297 (1981) [hereinafter Nationality Law of the PRC]. For a thorough description and analysis of the new law, see Chen, *supra* note 1. *See also Ginsburgs*, *The 1980 Nationality Law of the People's Republic of China*, 30 AM. J. COMP. L. 30 (1982).

Aimed primarily at attracting overseas Chinese, especially those who possess highly needed skills and resources, it grants full citizenship to all Chinese nationals, regardless of their place of birth.¹²¹ Foreigners can also become Chinese citizens through naturalization on the basis of demonstrated loyalty or for other "legitimate reasons."¹²² Thus a foreigner who made a substantial contribution to China's economic revolution might be eligible for citizenship in the PRC.¹²³

China now clearly delineates the expanding grounds for the entry of aliens. Only six categories of individuals cannot enter Chinese territory.¹²⁴ They are: 1) aliens who have been expelled from China and remain subject to a current order of expulsion; 2) those who pursue acts of terrorism, violence, and subversion; 3) persons involved in smuggling, drug selling, and prostitution; 4) those who have mental diseases, sexual diseases, Acquired Immune Deficiency Syndrome (AIDS), leprosy, or tuberculosis that is in a contagious stage; 5) aliens who lack sufficient financial resources for the period they intend to stay in China; and 6) aliens who may do harm to the security and interests of China.¹²⁵ Those who succeed in illegally entering Chinese territory, and those who assist them, are subject to fines, imprisonment, and deportation.¹²⁶

The categories of aliens who can be excluded and deported from the United States are strikingly similar and subjective. They include aliens who write, publish, or distribute subversive materials or who entered the United States to engage in activities endangering the welfare, safety, or national security of the United States.¹²⁷

In both countries, national power emanating from sovereignty serves as the basis for the regulation of aliens. Yet, in the United States the exercise of power is shared to a greater degree with local governments. This shared regulatory power creates a myriad of legal problems, especially in the areas of employment and social welfare benefits as illustrated in the preceding section.

121. See Nationality Law of the PRC, art. 7; Sheng Yu, *Chinese Nationality Law and Principles of International Law*, 1982 CHINESE Y.B. INT'L L. 205-15; Wang Keju, *Basic Principles of the Nationality Law of the P.R.C.*, 1982 CHINESE Y.B. INT'L L. 216-30.

122. Nationality Law of the PRC, art. 7.

123. See M. JIN & F. CAI, *ZHONGHAU RENMIN GONGHEGUO GUOJI JIANHUA [LECTURES ON NATIONALITY OF THE PRC]* 19 (1983).

124. Detailed Rules for Implementation of the Law of the PRC for Control of Foreign Nationals Entering and Leaving the Country, art. 7 (1986).

125. *Id.*

126. See, e.g., The Criminal Law of the PRC, art. 30 ("Deportation may be applied in an independent or supplementary manner to a foreigner who commits a crime.").

127. See 8 U.S.C. § 125(a)(6), (7).

ACCESS TO EMPLOYMENT AND PUBLIC BENEFITS

The United States

American society, particularly the judicial system, has struggled to define the limitations that can be placed on the employment opportunities available to lawful aliens and their access to benefits such as public assistance, government-financed medical care, and free public education.¹²⁸ The legislative justifications for such restrictions and the rationale of courts often reflect an underlying tension between a purely territorial conception of entitlement, based only on lawful admission for permanent residence in the United States, and an opposing viewpoint that requires some additional demonstration of commitment to and membership in the political community. This additional connection is sometimes measured only by permanent residence combined with durational presence, but more often by the further indicium of citizenship, which serves as a surrogate for loyalty and for acceptance of prevailing values, the political system, and membership in the society.¹²⁹

The territorial approach emphasizes equal protection of the law¹³⁰ — a belief that all lawful permanent residents should share equally

128. See, e.g., *Toll v. Moreno*, 458 U.S. 1 (1982) (education); *Ruiz v. Blum*, 549 F. Supp. 871 (S.D.N.Y. 1982) (daycare); for a sociological analysis of employment and its relation to immigration laws from a Marxist perspective, see K. CALAVITA, *U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820-1924* (1984).

129. It is often acknowledged that aliens must blend into the society to be accepted and reap its benefits. "We see evidence that if the newcomers to a community do not excessively disrupt or change the attributes of the community which make it familiar to its residents and uniquely their 'home' . . . then the newcomer may well be welcome, especially if they make positive contributions to the community's economic and general well-being." S. REP. NO. 62, 98th Cong., 1st Sess. 4 (1983).

130. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). "There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty or property without due process of law." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950) ("an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here some time even if illegally."); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). See also *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931), extending this protection to include the just compensation guarantees of the fifth amendment. It would appear that in the area of due process protections in expulsion hearings, the matter of physical presence, seen as a question of "entry" after a departure, has reached strained proportions. See, e.g., *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), as compared with the more realistic bent of *Landon*, 459 U.S. 21, which granted due process protection to a returning resident alien who sought admission to the United States after departing to participate in the illegal smuggling of aliens, emphasizing her "ties that go with permanent residence," and "her right to rejoin her immediate family." *Id.* at 32-34.

in the benefits and opportunities provided by the society and that once federal approval for admission is obtained it must remain unburdened by state restrictions.¹³¹ The opposing view stresses that the ease of gaining entry, the large numbers of new admittees,¹³² and the great political, cultural and ethnic variation of those admitted make it essential and proper to condition full participation in economic benefits on some further substantiated tie to American society. Citizenship is the standard chosen to demarcate membership in the political community.

From a theoretical standpoint the foundations of this view are that aliens are ineligible to vote, hold elected political office, or be employed in various positions which are sensitive because of military or obvious political functions.¹³³ Since federal power over foreign affairs includes "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, and the regulations of their conduct before naturalization" the federal government has extensive power to regulate the conditions under which aliens may reside in the United States.¹³⁴ This authority has been held to continue after they have gained permission to reside here permanently and are physically present in the United States.¹³⁵ As the Supreme Court has unanimously stated, lawful aliens are "guests" and in deciding how much of the national "bounty" they are entitled to share with citizens, Congress "may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence."¹³⁶ Therefore, citizenship, sometimes further refined in terms of durational residence or declared, avowed intent to become a citizen once durational eligibility is satisfied, has become the proxy for demonstrated political loyalty and acquiescence in community values. Citizenship is required to share fully in employment and government benefits.¹³⁷

131. This is the approach of many courts in striking down state legislation on the grounds of federal preemption and interference of the federal scheme regarding immigration. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971); *Traux v. Raich*, 239 U.S. 33 (1915).

132. *See supra* note 60 (statistics of U.S. immigration).

133. Certain provisions of the United States Constitution are limited to "citizens." For example: U.S. CONST. art. IV, § 2, cl. 1 and amend. XIV, § 1 ("privileges and immunities"); amends. XV, XIX, XXIV, and XXVI (the right to vote); art. 1, § 2, cl. 2 (eligibility for election to the House of Representatives); art. 1, § 3, cl. 3 (eligibility to be elected to the Senate); art. II, § 1, cl. 5 (eligibility to be elected President).

134. *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948); *Graham*, 403 U.S. at 382 (1971); *see also* U.S. CONST. art. 11, § 2; U.S. CONST. art. 8; *Pan, supra* note 33, at 17. *See also supra* notes 90-96 and accompanying text.

135. *See supra* notes 90-93 and accompanying text.

136. *Mathews*, 426 U.S. at 80 (1975).

137. *See, e.g.*, *Ambach v. Norwick*, 441 U.S. 68 (1979); *Graham*, 403 U.S. at

The historical frequency with which citizenship has been used for this purpose has proved a particularly onerous barrier for Chinese aliens in America, who were not even eligible for naturalization until 1943.¹³⁸ Not surprisingly, much of the legislative effort restricting employment to citizens has emanated from states which were the natural debarcation points for immigrants, and, at least until recently, the place where most immigrants remained for the majority of their lives.¹³⁹ They were also states with strong labor union movements which pressed for laws restricting employment to citizens, largely in an effort to preserve employment opportunities for union members and reduce the low-wage impact of recent immigrants who were viewed as being willing to work long hours, for low wages, and under substandard conditions.¹⁴⁰

As a result of this continued restrictive legislation, Chinese and other aliens have contributed extensively to the development of civil rights law as they repeatedly turned to the courts for redress.¹⁴¹ What has emerged after more than one hundred years is a crazy-quilt of Supreme Court decisions that are patently inconsistent both as factual conclusions and legal doctrine.

States cannot deny lawful resident aliens permits to own and operate laundries in the private sector,¹⁴² licenses to operate fishing vessels in coastal waters,¹⁴³ or the right to become notaries public.¹⁴⁴ States may not preclude them from entering the legal profession,¹⁴⁵ becoming resident engineers,¹⁴⁶ or seeking most state civil service po-

367-68 (1971) (Arizona had 15 year minimal residence period for receipt of public welfare assistance by aliens).

138. See *supra* note 44 and accompanying text.

139. Studies show that many recent immigrants, almost half of the 4.7 million Asians, Hispanics, and non-Hispanic Blacks who moved to the United States from abroad during the 10 year period 1975-85, settled in suburban and nonmetropolitan areas rather than in the central cities. See N.Y. Times, Dec. 14, 1986, at 1, col. 2.

140. See *supra* note 34 and accompanying text. See generally J. HIGHAM, STRANGERS IN THE LAND (2d ed. 1963). "These New York statutes, for the most part, have their origin in the frantic and overreactive days of the First World War when attitudes of parochialism and fear of the foreigner were the order of the day." *Ambach v. Norwick*, 441 U.S. 68, 82 (1979) (Blackmun, J., dissenting).

141. For a list of nineteenth-century Chinese civil rights cases, see Hudson Janisch, *The Chinese, The Courts And The Constitution* (unpublished J.S.D. dissertation, Univ. of Chicago, 1971), cited in McClain, *supra* note 36, at 351 n.16.

142. See *Yick Wo* 118 U.S. 356.

143. *Takahashi* 334 U.S. 410.

144. See *Bernal v. Fainter*, 467 U.S. 216 (1984).

145. See *In re Griffiths*, 413 U.S. 717 (1973).

146. See *Examining Bd. of Eng's v. Flores de Otero*, 426 U.S. 572 (1976).

sitions,¹⁴⁷ and employers cannot be required to limit their number on private or public projects.¹⁴⁸ Yet, states may prohibit them from holding positions as state police officers,¹⁴⁹ as “peace officers” (specifically, assistant probation officers),¹⁵⁰ as elementary and secondary public school teachers,¹⁵¹ and in those civil service jobs whose functions “go to the heart of representative government.”¹⁵² On the federal level lawful resident aliens are generally excluded from civil service positions.¹⁵³

Access to public benefits on the state level is just as factually incongruous. Aliens cannot be precluded from state public assistance¹⁵⁴ or obtaining low-interest higher educational loans;¹⁵⁵ G-4 visa holders — those officers and employees of various international organization who, together with their immediate families, are permitted to enter the country and establish domicile in the United States¹⁵⁶ — are entitled to preferential tuition fees equal to citizens domiciled in their states,¹⁵⁷ a right which the Supreme Court has refused to grant to citizen-students domiciled in other states.¹⁵⁸ And children, even those of undocumented alien workers, cannot be

147. See *Sugarman v. Dougall*, 413 U.S. 634 (1973).

148. See *Traux*, 239 U.S. 33.

149. See *Foley v. Connelie*, 435 U.S. 291 (1978).

150. See *Cabell v. Chavez-Salido*, 454 U.S. 432, 433 (1982).

151. See *Ambach*, 441 U.S. 68.

152. See *Dougall*, 413 U.S. at 647.

153. See Exec. Order No. 11,935, Office of Personnel Management Rule 7.4, 5 C.F.R. § 7.4 (1980), issued by President Gerald Ford in reaction to *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), which held that the federal Civil Service Commission could not act to bar aliens from the competitive federal civil service unless it had specific congressional or Presidential authorization to do so. President Ford's order has been upheld. See *Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980), *aff'g* *Mow Sun Wong v. Hampton*, 435 F. Supp. 37 (N.D. Cal. 1977), *cert. denied*, 450 U.S. 959 (1981); *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

For an excellent discussion of the restrictions on federal public employment of aliens and the arguments pro and con, see Smith & Mendez, *supra* note 112, at 30-42.

154. See *Graham*, 403 U.S. 365.

155. See *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

156. See 8 U.S.C. § 1101(a)(15)(G)(iv).

157. See *Toll*, 458 U.S. at 17. Left open was whether other nonimmigrant aliens could gain such protection. But this seems unlikely since that Court relied on a distinction made in *Elkins v. Moreno*, 435 U.S. 647 (1978), between nonimmigrants who are capable of establishing a domicile in the United States and those who are not. Thirty-two states have special eligibility rules for aliens in regard to obtaining resident tuition status. See Comment, *Should Undocumented Aliens Be Eligible for Resident Tuition Status at State Universities?*, 23 SAN DIEGO L. REV. 467, 470 (1986).

158. See *Vlandis v. Kline*, 412 U.S. 441 (1973). See also *Baldwin v. Fish & Game Comm'n*, 435 U.S. 371 (1978) (upholding higher hunting fees for nonresidents). *Cf.* *Piper v. New Hampshire*, 470 U.S. 274 (1985) (holding that the privileges and immunities clause of art. IV of the Constitution precludes a state from denying admission to the state bar of residents of other states); *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (applying the privileges and immunities clause to strike down the requirement of an employment preference for state residents over citizen residents of other states).

barred from free public education.¹⁵⁹ Yet the federal government may limit eligibility for federal Medicare benefits¹⁶⁰ and presumably other federal benefits.

The legal theories applied in these cases have culminated in equally uncertain messages. This is partially because the Supreme Court relies on applications of differing equal protection concepts from the fifth and fourteenth amendments, along with both offensive and defensive thrusts of federal preemption, when examining the interplay of national power and state restrictions. The decisions are further complicated by the Court's use of these theories in isolation, in combination, and by its shifting level of equal protection scrutiny.

The states also have shown remarkable flexibility in adapting to these changing Supreme Court notions. Equal protection analysis of state restrictions on alien employment first took form in *Yick Wo v. Hopkins*,¹⁶¹ which applied a literal reading of the fourteenth amendment to enable Chinese aliens to claim equal protection. The Supreme Court ruled that they were entitled to relief from an ordinance, neutral on its face, that permitted purposeful discriminatory application in a racially biased and blatant manner.¹⁶² The pithy decision can be viewed as holding unconstitutional an unconstrained delegation of standardless powers exercised in a racially discriminatory manner, or as a neophyte's recognition of the equal protection rationales of a latter age — a recognition that no rational justification existed for treating this racial group differently from non-Chinese who were invariably granted exemptions when they applied for permits to continue operating businesses.¹⁶³

State arguments then shifted to the contention that a special pub-

159. See *Plyler v. Doe*, 457 U.S. 202 (1982). The Supreme Court recited the list of federal programs from which undocumented aliens are excluded, including the food stamp program, old age assistance, aid to families with dependent children, aid to the blind, aid to the permanently and totally disabled, Medicaid, Medicare, and Supplemental Security Income. *Id.* at 251. In spite of this implicit warning that *Plyler* might be limited to education and not applicable to other state programs, and in spite of the ruling in *Mathews*, 426 U.S. 67, which included undocumented as well as legal aliens as Medicare applicants, litigants are in the process of testing the limits of the protection granted the children of undocumented aliens. See, e.g., *Darces v. Wood*, 35 Cal. 3d 871, 679 P.2d 458, 201 Cal. Rptr. 807 (1984) (applying *Plyler* to hold unconstitutional a state rule which excluded undocumented aliens for purposes of determining the number of members of family units, which included citizens, used to compute AFDC family budgets and benefits).

160. See *Mathews*, 426 U.S. at 78.

161. 118 U.S. 356 (1886).

162. *Id.* at 373-74.

163. *Id.*

lic interest existed which justified favoring citizens over aliens in the distribution of state resources.¹⁶⁴ This argument was severely battered in *Takahashi v. Fish and Game Commission*,¹⁶⁵ where the Court held that federal laws granting admission to aliens had constitutionally preempted the states from placing further “conditions” upon aliens in addition to those imposed by Congress.¹⁶⁶ California’s assertion of its need to preserve the fish in its coastal waters for citizens, by means of denying fishing permits to those not eligible for citizenship — a law fostered by anti-Japanese animosity — was rejected as an adequate “special public interest,” although the Court did so, in part, because it questioned the extent to which the fish were “capable of ownership” by California.¹⁶⁷ The special interest doctrine was finally interred, at least as a basis for reserving employment and public benefits for citizens, in *Graham v. Richardson*,¹⁶⁸ where states sought to condition receipt of state-funded public assistance on citizenship or long term residence.

This case, decided in a decade of concern for the poor and underprivileged and in a national atmosphere of expanding entitlement to federal and state welfare benefits, still represents the peak of Supreme Court solace for aliens. Rather than merely rely on a single footing — preemption — and hint at the denial of equal protection as a secondary justification, as it had done in *Takahashi*,¹⁶⁹ the Court held that aliens constituted a “discrete and insular minority,” and that classifications based on alienage were “inherently suspect” and “subject to close judicial scrutiny.”¹⁷⁰ It also ruled that preemption barred the limitation of this resource.¹⁷¹ The state justification of preserving scarce resources for its citizens was expressly rejected.¹⁷² Once *Graham* prescribed “strict scrutiny” for classifications involving aliens it appeared that plaintiffs in such cases invariably would succeed, since this test, with its almost insurmountable, corresponding state burden of demonstrating a “compelling state interest,” is usually outcome-determinative.¹⁷³

164. See, e.g., *Takahashi v. Fish & Game Comm’n*, 30 Cal. 2d 719, 185 P.2d 805 (1947), *rev’d*, 334 U.S. 410 (1948).

165. 334 U.S. 410 (1948).

166. *Id.* at 419-20. Supreme Court analysis of classifications that indirectly affected race had not been sharply developed. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (antimiscegenation laws).

167. *Takahashi*, 334 U.S. at 420-22.

168. 403 U.S. 365, 374 (1971).

169. See 334 U.S. at 419-20.

170. *Graham*, 403 U.S. at 371-72. Contemporary strict scrutiny analysis is usually traced to *United States v. Carolene Prods.*, 304 U.S. 144, 152-53 & n.4 (1938).

171. “State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies and in an area constitutionally entrusted to the Federal Government.” *Graham*, 403 U.S. at 378.

172. *Id.* at 367-68, 374.

173. See Lines, *Tuition Discrimination: Valid and Invalid Uses of Tuition Differ-*

Even after the Supreme Court decided *In re Griffiths*¹⁷⁴ and *Sugarman v. Dougall*¹⁷⁵ on the same day, it seemed that protection from state imposed restrictions was secure. Read in tandem, these decisions imply that the "governmental function" language of *Dougall* was a narrow caveat necessary to ensure that citizenship could be retained only as a prerequisite for state elected positions such as judge and mayor.¹⁷⁶

But change was in the wind. In 1976, in *Mathews v. Diaz*,¹⁷⁷ the Court unanimously upheld a federal statute which conditioned eligibility for Medicare benefits on lawful permanent residence in the United States for five years. The Court held that the traditional power of Congress and the President in regulating the admission, deportation, and naturalization of aliens permitted distinctions between aliens and citizens, that this power and the need for "flexibility of the political branches of government to respond to changing world conditions"¹⁷⁸ required application of the narrow rational basis test to fifth amendment equal protection claims, and that this particular residency requirement was reasonably related to determining "affinity with the United States."¹⁷⁹ As the opinion stated, "In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not."¹⁸⁰ The Court, in effect, dispensed with the strict scrutiny analysis of *Graham* and equated the constitutional power to regulate aliens vested in the federal government and the charged political nature of this power with the compelling interest needed to justify all but the most arbitrary of distinctions between aliens and citizens.¹⁸¹

The weakened "strict scrutiny" theory was quickly applied to state cases. The narrow "governmental functions" exception of *Dougall* soon eclipsed the rule. State police officers were held to be "officers who participate directly in the formulation, execution, or review of broad public policy,"¹⁸² exercising discretionary powers.¹⁸³ Public school teachers were found to be "inculcating fundamental values

entials, 9 J. COLL. & U.L. 241, 244 (1982).

174. 413 U.S. 717 (1973).

175. 413 U.S. 634 (1973).

176. See 413 U.S. at 647.

177. 426 U.S. 67 (1976).

178. *Id.* at 81.

179. *Id.* at 83.

180. *Id.*

181. *Id.* at 84-85.

182. *Foley v. Connelie*, 435 U.S. 291, 296 (1978).

183. *Id.* at 298-300.

necessary to the maintenance of a democratic political system.”¹⁸⁴ And assistant probation officers were held to “exercise, and therefore, symbolize this [sovereign] power of the political community over those who fall within its jurisdiction.”¹⁸⁵ The inquiry now focuses on the nature and function of the job in question, not the class of individuals excluded from obtaining employment.¹⁸⁶ If the position involves a governmental function, then the rational basis test applies; if not, then some as yet unclear level of intermediate review attaches.¹⁸⁷ The Court has exchanged protection of aliens as a class, based on the unique hardship they have suffered and their lack of political power, for an ad hoc examination of job classifications.

Current equal protection analysis is clouded not only by the ambiguities of the government functions test, but also by the pragmatically sensible, probably aberrational, decision in *Plyler v. Doe*.¹⁸⁸ Swayed by sympathy and concern for the innocence and helplessness of undocumented alien school children,¹⁸⁹ the fear of establishing an uneducated, stigmatized underclass,¹⁹⁰ and with the prescience of the passage of the new immigration law permitting amnesty for many of the families of these children,¹⁹¹ the Court carved out an intermediate equal protection standard and struck down the Texas law denying them free public education.¹⁹²

It also is unclear how the Court will apply preemption reasoning in the future.¹⁹³ In *Plyler*, unlike *Graham*, the Court resolved this by its express refusal to discuss preemption.¹⁹⁴ Plainly, the federal government may subject aliens to broad restrictions concerning employ-

184. *Ambach*, 441 U.S. at 77.

185. *Cabell v. Chavez-Salido*, 454 U.S. 432, 447 (1982).

186. “This Court, however, has never deemed the source of a position — whether it derives from a State’s statute or its Constitution — as the dispositive factor in determining whether a State may entrust the position only to citizens. Rather, this Court has always looked to the actual *function* of the position as the dispositive factor.” *Bernal v. Fainter*, 467 U.S. 216, 223 (1984) (emphasis original).

187. See generally Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516 (1979) (analyzing the apparent inconsistency of such a dual standard).

188. 457 U.S. 202 (1982).

189. *Id.* at 223-24.

190. *Id.* at 222.

191. The horizon was murky, but threatening. See Chief Justice Burger’s dissent, urging restraint on the grounds of likely legislative action. *Id.* at 253-54.

192. The state was required to show that the denial furthered a “substantial goal of the State.” *Id.* at 224.

193. It has been suggested that the Court dispense with equal protection analysis and rely solely on preemption. See Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?* 31 STAN. L. REV. 1069 (1979), which is critical of these equal protection decisions and concludes that a better rationale can be found in the preemption approach. See also Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L.J. 940 (1980), which offers a slightly different preemption standard.

194. *Plyler*, 457 U.S. at 210 n.8.

ment and the receipt of benefits.¹⁹⁵ Recent decisions regarding state prohibitions have demonstrated that preemption will still be used offensively to strike down offending state restrictions which burden federally imposed qualifications for entry,¹⁹⁶ and defensively to permit states to strengthen the efforts of the federal government in restricting illegal immigration by prohibiting employers from knowingly hiring undocumented aliens.¹⁹⁷

China and the United States

Contemporary China's view toward the provision of employment opportunities and benefits to aliens is extremely pragmatic. In China's effort to modernize it seeks the most qualified and skilled workers, regardless of citizenship. No doubt the PRC would agree with Justice Blackmun, considering it "absurd" and "irrational" to have a government policy that precluded a Frenchman from teaching French and an Englishwoman from teaching the grammar of the English language, just because they were aliens who desired to retain that status.¹⁹⁸ On the contrary, native speakers of foreign languages are encouraged to teach and do research in Chinese universities, in part through the provision of benefits that are in limited supply for

195. In *Mathews*, 426 U.S. at 85, the Court indicated that the preemption analysis in *Graham* supported its position regarding the strength of federal powers. "Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business." *Id.*

196. *Toll*, 458 U.S. at 7, contains extremely broad language stressing that the preemption analysis of *Graham* and *Takahashi* precluded any "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted . . . if it imposes additional burdens not contemplated by Congress."

197. See *De Canas v. Bica*, 424 U.S. 351 (1976); IRCA expressly preempts state action in this area. It provides instead for federal penalties. See *supra* note 113. See generally *Dolores Canning Co. v. Howard*, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974) (holding California Labor Code section 2805 unconstitutional based on preemption.).

198. "It seems constitutionally absurd, to say the least, that in these lower levels of public education a Frenchman may not teach French or, indeed, an Englishwoman may not teach the grammar of the English language." *Ambach*, 441 U.S. at 84 (Blackmun, J., dissenting).

[T]he New York classification is irrational. Is it better to employ a poor citizen teacher than an excellent resident alien teacher? Is it preferable to have a citizen who has never seen Spain or a Latin American country teach Spanish to eighth graders and to deny that opportunity to a resident alien who may have lived for 20 years in the culture of Spain or Latin America? The state will know how to select its teachers responsibly, wholly apart from citizenship, and can do so selectively and intelligently.

Id. at 87.

Chinese citizens.¹⁹⁹

Many conveniences are supplied to aliens who assist Chinese economic development. Besides famed Chinese hospitality, the Chinese government and individual work units supply housing, food, and related services and permission to travel in China, so that aliens can live comfortably.²⁰⁰ Once approved for employment by the Labor and Personnel Department, aliens who live permanently in China perform the same work, receive the same salary, and are entitled to the same treatment as Chinese nationals when they work in Chinese enterprises.²⁰¹

The trend is to engage aliens as directors and consultants and to allow aliens to work in a wider range of positions.²⁰² As employees of local governments, schools, or universities or as part of other work units, aliens are entitled to labor insurance, coverage for health care, retirement benefits and pensions.²⁰³ They also are eligible for prizes and recognition for exceptional contributions to the modernization of China, such as inventions or the improvement of technology.²⁰⁴ In fact, as a practical matter, alien workers in China are often treated more favorably than Chinese workers.²⁰⁵ The one primary condition aliens face is that they must comply with Chinese law.²⁰⁶

Alien employees in the United States are entitled to protection under health and safety laws, once they have obtained private employment.²⁰⁷ Additionally, undocumented aliens are entitled to the coverage of the National Labor Relations Act, and it has been held

199. See generally K. TURNER-GOTTSCHANG & L. REED, CHINA BOUND, A GUIDE TO ACADEMIC LIFE AND WORK IN THE PRC (1987) (general information about long term living in China and the preparation and rigors of academic positions and activities).

200. This has been proved by the experience of many foreigners working in China, including one of the authors, James Kraus, who taught American law at Suzhou University in 1985 and currently teaches at Fudan University in Shanghai.

201. See Detailed Rules of Implementation of the Law of the PRC for the Control of Foreign Nationals Entering and Leaving the Country, art. 44.

202. For example, aliens now work in the foreign language bureaus, including the Ministry of Culture Foreign Language Publishing Bureau. People's Daily (Overseas Ed.), Jan. 1, 1987, at 4, col. 4. A former vice director of the Ford Motor Company in the United States has been engaged as a director by a Chinese automobile company and Mark Smith, of the Smith Company in Switzerland, is employed as the factory director of the Harbin Watch Factory. See *id.*, Feb. 11, 1987, at 1, col. 2. Also, a retired West German engineer has been the director of the Wuhan Diesel Engine Factory since 1984; he was the first foreign director of a state-owned factory. *Id.*, Jan. 22, 1987, at 2; China Daily, Sept. 3, 1986, at 2, col. 1.

203. X.W. Lui, F. Li, S.Y. Gao, *Residents Under International Law*, in INTERNATIONAL LAW 258-60 (Wang Tieya ed. 1981).

204. *Id.*

205. *Id.*

206. PRC CONST. art. 18.

207. See 29 U.S.C. § 653. The federal occupational health and safety provisions apply "with respect to employment performed in a workplace" within the United States or its territories. No provisions allow employers to skirt the laws in the case of alien employees.

to be an unfair labor practice to report them to the Immigration and Naturalization Service (INS) in retaliation for engaging in protected activities.²⁰⁸

The Supreme Court has held that discrimination by private employers in the hiring of noncitizens, as long as such practices are unrestricted as to national origin, does not violate title VII of the Civil Rights Act of 1964.²⁰⁹ This decision has apparently been superseded by IRCA. IRCA makes it an "unfair immigration practice" to discriminate in respect to hiring or employment because of "national origin" or "in the case of a citizen or intending citizen . . . because of such individual's citizenship status."²¹⁰ The legislative history indicates that this was intended to close the gap that exists in title VII.²¹¹ But it leaves some questions. It does not apply to aliens who are not "intending citizens"; therefore, long-term permanent residents who do not intend to become citizens would not be protected from discrimination when seeking private employment.²¹²

And of course many government and private positions still remain expressly closed to aliens, besides those already discussed. For instance, they may not work, without specific military approval, for private manufacturers of military aircraft,²¹³ obtain commissions in

208. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). In *Sure-Tan*, the alien employees voluntarily left the country to avoid deportation. *Id.* at 887. The Court emphasized the Board's long practice of holding that undocumented aliens were "employees" and therefore covered by 29 U.S.C. § 152(3). *Id.* at 891. This appears to be a toothless remedy since the Court reversed the back pay and reinstatement orders of the NLRB and the Court of Appeals. *Id.* at 898-906. See generally Note, *Rights Without A Remedy — Illegal Aliens Under the National Labor Relations Act: Sure-Tan, Inc. and Surak Leather Company v. N.L.R.B.*, 27 B.C.L. REV. 407 (1986).

209. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). The Court said that the term "national origin" in the statute refers to birthplace or ancestry, not to citizenship. *Id.* at 88; see Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17. The question is also unsettled as to 42 U.S.C. section 1981, since the language in *Graham*, 403 U.S. at 377-78, and *Takahashi*, 334 U.S. at 419-20, holds that section 1981, along with the fourteenth amendment, protects all persons against state legislation bearing unequally upon them because of alienage. See also Smith & Mendez, *supra* note 112, at 27-28 (proposing an amendment to section 1981 that would reach private discrimination based on citizenship).

210. IRCA § 102(a), 100 Stat. at 3374 (codified at 8 U.S.C. § 1324(a)(1)).

211. See H.R. REP. No. 682, 99th Cong., 2d Sess. 69, 70, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5673-74, 5761.

212. The "intending citizen" requirement is aimed at the amnesty provisions of the new law and aliens granted refugee status. IRCA § 102(a), 100 Stat. at 3374-75 (codified at 8 U.S.C. 1324b(a)(3)(B)(i)). See also Note, *The Unfair Immigration-Related Employment Practices Provision: A Modicum of Protection Against National Origin and Citizenship Status Discrimination*, 41 U. MIAMI L. REV. 1025, 1032-39 (1987).

213. 10 U.S.C. § 2279.

the military branches,²¹⁴ or become directors of a national bank.²¹⁵ These positions are specifically exempted from being actionable as unfair immigration related employment practices.²¹⁶

Alien workers in China are afforded all rights except the rights to engage in political activities that are reserved to citizens. They are denied the right to vote and to stand for election.²¹⁷ They cannot become members of the military or hold government positions such as party leader and executive leader.²¹⁸ They cannot engage in political activities against the Chinese government or in nonbusiness activities upon the request of other persons.²¹⁹ Given the broad and encompassing restrictions on political participation by aliens in other socialist countries, such as Romania and the Soviet Union, those existing in China are limited. And, as mentioned above, foreigners can direct factories in China, a practice not allowed in other socialist countries.²²⁰

Not surprisingly, as the number of aliens in China has increased so has the number of marriages between aliens and Chinese citizens. Aliens are free to marry Chinese citizens with few exceptions. Soldiers, diplomatic personnel, persons in public security positions, people with access to state secrets and those who are in prison or being reformed through labor cannot marry aliens.²²¹ The legality of marriages and divorces is governed by the law of the place where the marriage or divorce takes place.²²² This rule resembles the approach generally taken in most countries and is consistent with international practice.²²³

The number of marriages involving foreigners has increased rapidly. For instance, in Shanghai, from January 1986 to November 1986, there were 716 such couples who registered for marriage while sixteen applied for divorce.²²⁴

The overall trend in China is to expand the variety and level of employment opportunities for aliens and to provide them social welfare rights on a par with citizens. Meanwhile, the United States continues to waver under a cloud of unclear constitutional doctrine and

214. *Id.* § 532(a)(1).

215. 12 U.S.C. § 72. Under this statute, however, a waiver may be obtained from the Comptroller of the Currency. For a list of further federal prohibitions and exemptions, see Smith & Mendez, *supra* note 112, at 33-36.

216. IRCA § 102(a), 100 Stat. at 3374 (codified at 8 U.S.C. § 1324b(a)(2)(C)).

217. PRC CONST. art. 34 limits these rights to citizens.

218. See X.W. Lui, F. Li, S.Y. Gao, *supra* note 203.

219. People's Daily (Overseas Ed.), Jan. 4, 1987, at 5, col. 3.

220. See *supra* note 202 and accompanying text.

221. Chinese Regulations on Marriage Between Chinese Citizens and Foreigners, art. 4, in CHINESE Y.B. INT'L LAW 441 (1984).

222. *Id.*

223. See Fang, *supra* note 78, at 36.

224. See People's Daily, Feb. 18, 1987, at 1, col.2.

state experimentation with restrictive legislation that despoils its model of equality and stimulates nativism and prejudice.

PROPERTY AND INHERITANCE RIGHTS

The PRC Constitution assures four basic categories of rights: political rights, economic rights, the right to engage in cultural activities and to receive an education, and personal rights.²²⁵ The civil law also describes certain rights as "civil rights." While there is a dispute among Chinese legal scholars about the demarcation between "civil rights" and "economic rights," there is little argument about the existence of these rights and their breadth. Personal rights include the right to own and exercise extensive legal control over property.²²⁶ They include the right to own, transfer and otherwise control, a house, a savings account, personal effects, domestic animals, earned income, securities and bonds, and any other kind of property which can be legally owned by individuals.²²⁷ An owner of property, including residential housing and commercial property, has the right to occupy, use, or sell his property and may retain any appreciation in its value. Such an owner also may devise property, according to the procedures called for in the law.²²⁸

In China, certain forms of property cannot be held by private individuals; as a socialist country, the state retains ownership of all real property. The land, forests, mountains, deserts, beaches, grasslands, as well as water, mineral and other natural resources are owned by the state and individuals have no right, without permission, to own or exploit them.²²⁹

In the United States, while aliens have been free to own and transfer personal property, there is a long history of attempts to restrict the purchase, ownership, and/or use of real property to citizens or those eligible for citizenship.²³⁰ Scattered laws on the federal level restrict the right to graze animals and raise forage crops on federal

225. See PRC CONST. arts. 32-50.

226. PRC General Principles of the Civil Law, arts. 71-83.

227. *Id.*

228. *Id.* arts. 72-76.

229. PRC CONST., art. 9; PRC General Principles of the Civil Law, arts. 84-93.

230. In *Porterfield v. Webb*, 263 U.S. 225 (1923), the Supreme Court upheld a California statute aimed at Orientals, especially Japanese, which prohibited landholding by "aliens ineligible for citizenship under the law of the United States." INA section 311 extended the right of naturalization to Orientals, eliminating the impact of laws phrased in terms of eligibility for citizenship. INA § 311, 8 U.S.C. § 1422. See also *supra* note 44.

lands to "citizens or those who have applied to become citizens."²³¹ And as recently as 1980, twenty-three states had laws restricting land ownership by aliens.²³²

The courts upheld these laws on the basis of the special public interest doctrine, usually articulated in terms of the necessity to preserve resources for citizens,²³³ and more generalized concepts of lack of allegiance, lack of permanent attachment to the community, and the untrustworthiness of aliens.²³⁴

As a practical matter, these laws are fairly easy to circumvent through purchase by a relative who is a citizen or by a corporation in which an alien holds a controlling interest.²³⁵ These circumvention strategies were judicially sanctioned when the Supreme Court held in *Oyama v. California*²³⁶ that a California law created an unconstitutional presumption that the purchase of land, made by any person, with consideration supplied by a person ineligible for citizenship, constituted prima facie evidence of intent to evade the California prohibition against ownership of land by persons not eligible for citizenship.²³⁷

Today these state laws would have a difficult time passing constitutional muster.²³⁸ Their total practical effect, at most, "is to prevent aliens from countries not covered by [bilateral treaties of Friendship, Commerce and Navigation] from investing in agricultural land in five western states."²³⁹ Even so, they stand as an embarrassment to an open society which values the ownership of private property, and they are of little benefit in fostering any legitimate state purpose.

231. See, e.g., Taylor Grazing Act, 43 U.S.C. § 315b, limiting these rights to "citizens of the United States or to those who have filed the necessary declaration of intention to become such." See also 30 U.S.C. § 181, limiting the disposition of United States mineral and oil lands to citizens. For a discussion of the spreading international restrictions on alien land acquisition, see Weisman, *Restrictions on the Acquisitions of Land by Aliens*, 28 AM. J. COMP. L. 39 (1980).

232. See Note, *State Laws Restricting Land Purchases by Aliens: Some Constitutional and Policy Considerations*, 21 COLUM. J. TRANSNAT'L L. 135 (1982) [hereinafter *State Laws Note*] (citing Note, *Our Land is Your Land: Ineffective State Restriction of Alien Land Ownership and the Need for Federal Legislation*, 13 J. MARSHALL L. REV. 679, 689 (1980)).

233. See *Crane v. New York*, 239 U.S. 195 (1915); *Heim v. McCall*, 239 U.S. 175 (1915).

234. See *Terrace v. Thompson*, 263 U.S. 197, 220-21 (1923); *Porterfield*, 263 U.S. 225.

235. As to circumvention through use of corporations, see Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 631-34 (1976).

236. 332 U.S. 633 (1947).

237. *Id.* at 640-47. The California Supreme Court, soon thereafter, also ruled that these restrictions were unconstitutional. *Fuji v. California*, 38 Cal. 2d 718, 242 P.2d 617 (1952).

238. Application of the equal protection and preemption standards developed in the employment and benefits area would almost certainly cause their downfall. See *supra* notes 165-200 and accompanying text.

239. *State Laws Note*, *supra* note 232, at 156.

In the United States, except for federal estate taxes, questions of inheritance and succession are left to state law and states retain freedom to condition inheritance by aliens abroad on corresponding rights in foreign statutes.²⁴⁰ Many states have reciprocity statutes in which the right of a nonresident alien to inherit depends on a reciprocal right in the alien's country of domicile.²⁴¹ The Supreme Court restricted state options somewhat in *Zshering v. Miller*²⁴² when it held that a state inheritance law could be declared unconstitutional if it "impair[s] the effective exercise of the Nation's foreign policy."²⁴³ The Court ruled that a state statute required a showing that the claimant's country afforded reciprocal rights to United States citizens, that American citizens have the right to receive payment in the United States of funds from estates in the foreign country, and that the claimant would have the right to receive the property without confiscation, necessarily required inquiries into the governments of foreign nations and therefore had a direct impact upon foreign relations which could interfere with functions of the federal government.²⁴⁴

Chinese citizens have the right to inherit all lawful private property.²⁴⁵ Private property includes benefits from private contracts, including performance, which survives death.²⁴⁶ Inheritance is specifically authorized and governed by the rules of intestacy or devise by will.²⁴⁷ Aliens also have the rights of inheritance and succession which are equal, in terms of property, to those of natural Chinese citizens.²⁴⁸

240. The Supreme Court has treated succession as a proper matter for state control. See *Clark v. Allen*, 331 U.S. 503, 517 (1947); *Lyeth v. Hoey*, 305 U.S. 188, 193 (1938).

241. See generally Note, *Alien Inheritance Statutes: An Examination of the Constitutionality of State Laws Restricting the Rights of Nonresident Aliens to Inherit From American Decedents*, 25 SYRACUSE L. REV. 597 (1974).

242. 389 U.S. 429 (1968).

243. *Id.* at 440.

244. *Id.* at 430-41. The Court held that in interpreting the statute calling for escheat, the Oregon courts had engaged in examination of the types of governments that exist in particular countries and their actual practices regarding parallel succession laws. *Id.* at 434. For a discussion of the conflict between a state alien land laws and the federal foreign affairs power, see Note, *Alien Land Laws: Constitutional Limitations on State Power to Regulate*, 32 HASTINGS L.J. 251, 273-81 (1980).

245. Law of Succession of the People's Republic of China, arts. 1-3 (1985), reprinted in *People's Daily*, Apr. 14, 1985, at 3, col. 1.

246. *Id.* art. 4.

247. *Id.* arts. 9-22.

248. *Id.* arts. 71-83; PRC CONST. art. 35 (implies equality of inheritance and succession rights by providing choice of law rules for foreigners who inherit estates of Chi-

According to the law of inheritance, aliens have the right of succession in property of a father or mother, which is situated in Chinese territory, as long as Chinese law is applied to determine the validity of the succession.²⁴⁹ Under the marriage and inheritance law the right to inherit property cannot be denied because the parents and children have different nationalities.²⁵⁰ Even an alien who has lived abroad and has not satisfied the constitutional duty to support his or her parents because of some mitigating factor, such as financial inability, loss of contact, or laws in his or her place of residence that make it illegal to send money to China, has the right to inherit.²⁵¹

Chinese law also provides familiar choice of law rules for the application of law to Chinese citizens who inherit estates outside of China or estates of foreigners inside China, and to foreigners who inherit estates inside China or the estates of Chinese citizens outside China: "if it is movable property, the law of the place of domicile of the deceased shall apply; or if it is immovable property, the law of the place where the immovable property is situated shall apply."²⁵²

Effort has also been made to afford aliens legal protection in their personal rights and in the profits they accumulate when they invest in China. Any profits earned through an alien's investment in China can be retained and passed through inheritance.²⁵³ Estates may include "productive materials," which are invested in China, or copyrights, patents, stocks, bonds and other types of legal securities.²⁵⁴

In order to protect the safety and property of its nationals in foreign countries, a state has the right to seize and ultimately expropriate assets of foreigners residing within its territory as one means of securing compensation for its own nationals, assuming all other methods fail.²⁵⁵ While both China and the United States acknowledge the existence of this right, they have established two separate

nese citizens).

249. See Law of Succession of the PRC, art. 36 (1985).

250. See People's Daily (Overseas Ed.), Sept. 5, 1985, at 4; PRC General Principles of the Civil Law, arts. 8, 149.

251. People's Daily (Overseas Ed.), Sept. 5, 1985, at 1. The duty to support and assist parents is placed on adult children. PRC CONST. art. 49. The Law of Succession of the People's Republic of China, article 13, provides: "An inheritor who had the ability to care for and maintain the person whose estate is to be inherited and yet failed to perform his/her duties should not take or should take a smaller share from distribution of an estate." Additionally, "special consideration should be given to inheritors who experience exceptional difficulty in maintaining their livelihood and have no ability to work." *Id.* art. 13.

252. Law of Succession of the PRC, art. 36.

253. *Id.*

254. *Id.*; PRC General Principles of the Civil Law, arts. 75, 76, 94, 95 & 97.

255. L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 745 (8th ed. 1955). See *Sardino v. Federal Reserve Bd.*, 361 F.2d 106 (2d Cir. 1966) (upholding the freezing of a Cuban national's funds in the United States).

and distinct legal procedures for expropriation.²⁵⁶

The Chinese government has promised not to nationalize foreign investment or to expropriate the property of foreign aliens, except under special circumstances when it proves necessary to do so for the public interest. It has agreed to follow proper legal procedures and to make reasonable compensation.²⁵⁷

On the other hand, United States policy is constitutionally ordained. The Supreme Court has held that the fifth amendment applies to aliens and that just compensation must be paid when their property is taken.²⁵⁸ The right applies even when the United States no longer recognizes the government of the alien.²⁵⁹

Aliens in China also have rights as creditors and are subject to obligations as debtors. Chinese law permits aliens to enter into debtor-creditor relationships and enforce them in the courts.²⁶⁰ The rights to preserve one's dignity and reputation and to marry are also expressly recognized.²⁶¹ Aliens also are protected under the newly refined intellectual property rights law that permits them to hold patent rights, protect brand names, trademarks, and copyrights.²⁶²

The result of these innovative changes in Chinese law is that aliens now enjoy a panoply of property rights equivalent to those of citizens. In fact, as discussed below, when investing in China, aliens often have advantages over citizens and state enterprises in accumulating earnings and gaining preferential access to the factors of pro-

256. The two countries have bilaterally settled a 30 year dispute over property claims involving diplomatic property and the property of nationals of both countries that had been expropriated or frozen by both governments. Agreement Concerning the Settlement of Claims, May 11, 1979, United States v. People's Republic of China, 30 U.S.T. 1957, T.I.A.S. No. 9306. The government of the PRC paid \$80.5 million to the United States government in final settlement.

257. The Law of the People's Republic of China Concerning Enterprises Operated Exclusively with Foreign Capital, art. 5 (1986), provides: "Except under special circumstances . . . the state shall not nationalize or expropriate a wholly-owned foreign enterprise. Should it prove necessary to do so in the public interest, legal procedures will be followed and reasonable compensation will be made." Bilateral treaties between China and France, Belgium, Great Britain and Luxembourg contain similar guarantees. See CHINESE Y.B. INT'L L. 551, 544, 587 (1985). See also Jing, *Legal Guarantee for Foreign Investors*, Beijing Rev., June 2, 1986, at 4.

258. See *Russian Volunteer Fleet*, 282 U.S. at 489, 491-92 (expropriation of ships owned by a Russian corporation); *Sardino v. Federal Reserve Bd.*, 361 F.2d 106, 111 (2d Cir. 1966); *United States v. Pink*, 315 U.S. 203, 228 (1942). See also the decision of the Iran-U.S. Claims Tribunal, *Starret Housing Corp. v. Islamic Rep. of Iran*, 23 I.L.M. 1090 (1984); *American Int'l Group v. Islamic Rep. of Iran*, 23 I.L.M. 1 (1983).

259. See, e.g., *Russian Volunteer Fleet*, 282 U.S. 481.

260. See PRC General Principles of the Civil Law, ch. 5, § 2.

261. *Id.* arts. 98-105.

262. *Id.* arts. 94-98.

duction. By contrast, the United States still retains some restrictions on alien ownership of real property, but these are dying out slowly.

FOREIGN INVESTMENT

China's rush to modernize is the driving force behind the extensive expansion of its legal rules and regulations regarding aliens. The need for new technology has been an impetus for the introduction of investment incentives, the spread of bilateral commercial treaties, the strengthening of China's legal institutions,²⁶³ and the promulgation of sweeping and comprehensive laws and regulations.²⁶⁴ Many of these changes are intended to portray a favorable business climate to encourage foreign investment and dispel negative perceptions about doing business in China. Concerns about political stability,²⁶⁵ vague legal rules,²⁶⁶ unfamiliar negotiating techniques, arbitrari-

263. The new emphasis on the stability of the legal system has brought a surge in the education of new lawyers and in the status of the profession. See, e.g., Herman, *The Education of China's Lawyers*, 46 ALB. L. REV. 789 (1982); Wang, *Teaching and Research of International Law in Present Day China*, 22 COLUM. J. TRANSNAT'L L. 77 (1983).

264. See, e.g., list of 36 Foreign Economic Regulations issued in 1986, INTERTRADE, Mar. 1987, at 54-55. See generally Mu, *supra* note 2.

265. See, e.g., ECONOMIC AND SOCIAL COMM'N FOR ASIA AND THE PACIFIC, GUIDEBOOK FOR TRADING WITH THE PEOPLE'S REPUBLIC OF CHINA 167 (1984) [hereinafter GUIDEBOOK FOR TRADING] ("The Chinese Government has repeatedly emphasized that the open economic policy is a long-term development strategy included in China's new Constitution."); Jing, *Legal Guarantee for Foreign Investors*, Beijing Rev., June 2, 1986, at 4 ("Opening to the outside world is a long-term, basic state policy, and China will never return to its past isolation.").

266. Preciseness is partially a matter of legal training and tradition.

In its form and structure, the [nationality] law may be criticized for vagueness and incompleteness by Western lawyers who in their meticulous legal environment may consider the law devoid of detailed rules and procedural regulations. Moreover, the broad scope of discretionary power given to China's public security agencies in the administration of the law may also cause uneasiness to some outsiders. These characteristics, however, are not uncommon to both China's traditional and current socialist legal system, where the purpose of administrative law is simply to provide guidelines for authorities to flexibly apply the law in a particular context.

Chen, *supra* note 1, at 324-25. The position of many Chinese legal scholars is also that, at least in the early stages of development, China's socialist legal system needs to mature slowly. "It is perfectly normal for an incomplete legal system to exist for a certain period in a newly established state." Wu, *Building New China's Legal System*, 22 COLUM. J. TRANSNAT'L L. 1, 17 (1983).

The new Joint Venture Income Tax Law, for example, confuses, rather than simplifies, joint venture planning. From the Western perspective, the most obvious flaw in the new law is its ambiguous phraseology. The Chinese favor short, broadly worded tax statutes: together, the 1950 Income Tax Law and the 1958 Consolidated Tax Law represent little more than a skeletal regulatory framework. Perhaps as with the Joint Venture Law, the Chinese anticipate that foreign participants will "fill in the gaps" via the negotiation process. Although this system of ad hoc contracting may typify the Chinese penchant for experimentation, uncertainties regarding tax liability may lessen investor confidence and slow China's modernization. Note, *Taxation of Joint Ventures in the People's Republic of China: A Legal Analysis in the Context of Current Chinese Economic and Political*

ness,²⁶⁷ and lack of traditional comforts have frequently influenced investment decisions as much as rate of return.²⁶⁸

China's success in countering these attitudes is now legendary. Hardly a day passes without assurance that high earnings,²⁶⁹ managerial autonomy,²⁷⁰ long-term protection from expropriation,²⁷¹ preferences in obtaining raw materials,²⁷² discounted land use fees,²⁷³

Conditions, 15 VAND. J. TRANSNAT'L L. 513, 546-47 (1982).

267. Since 1978 China has been actively adopting new measures to attract foreign investment to promote its foreign trade and economy. In foreign trade and economic activities, it no longer relies only on simple procedure and sales contracts with cash payment and loans from foreign financial institutions, but has agreed to accept common international trade practices and absorb foreign investment. These new measures have opened up new channels for economic cooperation and provide more trade opportunities between Chinese and foreign companies.

GUIDEBOOK FOR TRADING, *supra* note 265, at 167.

268. See, e.g., N.Y. Times, June 25, 1987, at A26, col. 5. (letter to editor) ("Yet some American and other foreign businessmen interviewed in Shanghai insist that serious problems exist for investors, mainly involving the fact that the Chinese Government sometimes breaks a contract it doesn't like. The foreign businessmen call for stricter enforcement and an improvement in Chinese laws protecting foreign investors."). See, e.g., Mu, *supra* note 2, at 61, 68 ("some unnecessary, but understandable, concerns among foreign capitalist investors have slowed development in [investment ventures].").

Deng Xiaoping recently intoned: "We cannot ask foreign investors to come and then not let them make money. But high rent and other expenses are making profits difficult for them. . . . This issue must be addressed." China Daily, Sept. 6, 1986, at 1, col. 1. He Chunlin, director of the Special Economic Zone Office under the State Council, noted the complaints of investors from abroad about insufficient credit funds, short supply of raw materials and energy shortages. China Daily, Sept. 4, 1986, at 1, col. 1.

269. See, e.g., Note, *The Patent Law of the People's Republic of China in Perspective*, 33 UCLA L. REV. 331, 333 (1985) for a complete analysis of China's new patent law and the observation that the motivation for its passage goes beyond the need to encourage foreign investment through promises of control over and retention of earnings from new inventions.

270. "Unlike a joint venture or a cooperative business, which are run by managements made up of both Chinese and foreign personnel, a wholly foreign-owned company enjoys total managerial autonomy." China Daily, Apr. 29, 1986, at 4, col. 1. "The enterprise shall be free from interference in its operations and management so long as these are conducted in accordance with the approved articles of association." The Law of the People's Republic of China on Enterprises Operated Exclusively with Foreign Capital, art. 11 (1986).

271. See *supra* note 257 and accompanying text.

272. In China, all State-owned and collective enterprises procure their production materials at the State-set domestic allocation prices, which are generally higher than the international market prices. In general, when the joint ventures and co-operation enterprises buy their production materials from China's domestic market, the payment is made in yuan renminbi at the domestic prevailing prices. . . . This preferential treatment in procuring prices is only for production materials being made into export products.

GUIDEBOOK FOR TRADING, *supra* note 265, at 172.

273. See, e.g., Provisions of the State Council of the People's Republic of China for the Encouragement of Foreign Investment, art. 4(2) (1986), which provides for ex-

flexibility in employing workers,²⁷⁴ tax benefits,²⁷⁵ advantages in obtaining foreign exchange,²⁷⁶ eased entry and exit procedures for personnel,²⁷⁷ and hospitality are forthcoming. The results have been positive. By the end of 1985 the volume of United States investment in China exceeded \$1 billion,²⁷⁸ there were more than 2,300 joint ventures, 3,700 Sino-foreign cooperatives, and 120 wholly foreign-owned companies.²⁷⁹

emption from land use fees at the "discretion of local people's governments." Jiangsu Province has quickly taken advantage of its options. Preferential land use fees are granted foreign investment enterprises in Jiangsu if they use land for: 1) agriculture, fisheries, forestry, herding or stock raising; 2) cooperative or joint ventures in the Province's villages and towns; 3) developing basic equipment and communications; 4) exploring the sea or reclaiming land from the sea or desert; 5) engaging in nonprofit activities of an educational, cultural, scientific, technological, health related or other beneficial nature. Jiangsu Province Regulations Controlling Foreign Merchant Investment Enterprises' Use of Land, art. 10 (1987).

274. See *supra* notes 7-9 and accompanying text.

275. See, e.g., Income Tax Treaty Between the People's Republic of China and the United States, Treaty Doc. 97-24, 97th Cong., 2d Sess.; Treaty Doc. 98-30, 98th Cong., 2d Sess., reprinted in 1 Tax Treaties (CCH) 1421 (1984). Instruments of ratification were exchanged on October 22, 1986. The treaty became effective on January 1, 1987. The comprehensive treaty allocates the power to tax all forms of income, in both countries, and grants tax credits for income taxes paid in the other country. Treaty Doc. 98-30 at art. 21. Up to \$5,000 of the income of students and trainees studying in the other country is exempt from taxation. *Id.* art. 20. Chinese tax law has been established under the principles that the burden of taxes on aliens should be slight, the preference for aliens broad, and the procedures simple. M. GU, JOURNAL OF THE STATE COUNCIL ECONOMIC LEGISLATION RESEARCH CENTER 20 (1986). See, e.g., The Law of the People's Republic of China on Enterprises Operated Exclusively with Foreign Capital, art. 19 (1986) (stating in part: "Wages, salaries and other legitimate income earned by foreign employees in the enterprise may be remitted abroad after the payment of personal income tax in accordance with Chinese law.").

Foreign investors in China are taxed at progressive rates of 20% to 40%, plus a local surcharge of 10% of taxable income. "Where a foreign enterprise needs reduction in or exemption from local income tax on account of the small scale of its production or business, or its rate of profit, this shall be decided by the people's government of the province, municipality or autonomous region in which that enterprise is located." The Income Tax Law of the People's Republic of China Concerning Foreign Enterprises, art. 3 (1981). By comparison, in India, the rate of tax on foreign enterprises is 68.2% of net income; in Sri Lanka, 66%; in Ghana, 65%. M. YAO, INTERNATIONAL INVESTMENT LAW 76 (1983).

Foreign investors who reinvest distributed profits for at least five years are entitled to a refund of enterprise taxes paid on those profits. Provisions of the State Council of the People's Republic of China for the Encouragement of Foreign Investment, art. 10 (1986).

For a thorough and insightful summary of joint venture taxation in China, see Note, *supra* note 266. See generally Castleman, *Taxation in the People's Republic of China: The System and Its Function*, 46 ALB. L. REV. 776 (1982).

276. See, e.g., Provisions on the Purchase and Export of Domestic Products by Foreign Investment Enterprises to Balance Foreign Exchange Accounts, art. 1 (1987): "These provisions are formulated for the purpose of facilitating enterprises with foreign investment to balance their foreign exchange accounts. Upon the approval of their application, the above mentioned enterprises are allowed to purchase and export non-resultant domestic product to make up for their foreign exchange deficiencies."

277. See *supra* notes 124-26 and accompanying text.

278. China Daily, Dec. 3, 1985, at 2, col. 4.

279. China Daily, Apr. 29, 1986, at 4, col. 1.

The United States also encourages investment by nonresident aliens through INA regulations.²⁸⁰ A foreigner from a country having a treaty of commerce with the United States who invests at least \$40,000 in a commercial enterprise under his or her direction and intends to depart the United States at the conclusion of the investment is eligible for an investor exemption from the labor certification requirement and can enter the United States as a nonimmigrant.²⁸¹ The alien does not need to obtain certification from the Department of Labor that he or she is not taking the job of an American.

China has provided joint ventures with flexibility in seeking employees. They are free to hire unemployed workers in the local area, and with permission of the Labor Management Department, they also can hire engineers, technicians, and managerial staff from other areas when their needs cannot be satisfied locally.²⁸² Joint ventures must sign labor contracts with individual workers or enter into collective agreements with trade unions.²⁸³ Workers may be laid off for lack of work during the term of the contract, after consultation with the labor union and one month's notice, and dismissed upon completion of a contract with appropriate severance pay.²⁸⁴ In addition to

280. See 8 C.F.R. § 212.8(B)(1987).

281. *Id.*; see also Synopsis, *Significant Developments in the Immigration Laws of the United States 1981-1982*, 20 SAN DIEGO L. REV. 191, 223 (1982).

282. See *infra* note 283; see generally Provisions of the Ministry of Labor and Personnel of the People's Republic of China on the Right of Autonomy of Enterprises with Foreign Investment in the Hiring of Personnel and on Wages, Insurance and Welfare Expenses of Staff and Workers (1986).

283. See *Joint-Ventures' Hiring Rights Explained*, China Daily, Mar. 4, 1986, at 4, col. 1. In accord with production operation needs, joint foreign-Chinese enterprises may determine their own organizational structure and personnel system, employ or dismiss senior management personnel, increase or dismiss staff and workers. "They may recruit and employ technical personnel, managerial personnel and workers in their locality. The unit to which such employed personnel belong shall provide its support and shall permit their transfer." Provisions of the State Council of the People's Republic of China for the Encouragement of Foreign Investment, art. 15 (1986). "Workers and administrative staff in the employment of the wholly-owned foreign enterprise may set up trade unions in accordance with the law, and such unions may conduct activities to protect the lawful rights and interests of the employees." The Law of the People's Republic of China on Enterprises Operated Exclusively with Foreign Capital, art. 12 (1986). Provisions of the State Council of the People's Republic of China for the Encouragement of Foreign Investment, art. 3 (1986), provides: "Export enterprises and technologically advanced enterprises shall be exempt from payment to the State of all subsidies to staff and workers, except for the payment of or allocation of funds for labor insurance, welfare cost and housing subsidies for Chinese staff and workers in accordance with the provisions of the State." See also *Trade Union Role in Joint Ventures*, China Daily, Dec. 24, 1985, at 4, col. 1.

284. *Joint-Ventures' Hiring Rights Explained*, *supra* note 283, at 4, col. 1. There also may be pressures on workers created by conflicts of interest between loyalty to

efforts by the national government, many provinces have their own programs to attract foreign companies. These programs often include flexible procedures for employee recruitment. For instance, in Jiangsu Province, foreign companies can independently seek employees and their present units are required to allow them to transfer.²⁸⁵ Foreign investors who cannot find qualified local technical and engineering personnel can recruit persons from outside Jiangsu Province, once approval is sought from the Provincial Office.²⁸⁶ Foreign investment enterprises can use Chinese currency to pay for supplies, postage, transportation, food, and housing; moreover, they must be charged the same price as Chinese firms.²⁸⁷

Foreign employers in the United States do not possess arbitrary freedom in selecting employees. They are subject to title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment based on sex or ethnic origin.²⁸⁸ Even if a treaty exists between the home country of a foreign employer, permitting it to hire executive employees of its choice, subsidiaries incorporated in the United States are still bound by title VII.²⁸⁹ In a unanimous opinion, the Supreme Court reasoned that a subsidiary of a foreign company, as a locally-incorporated entity, is deemed to be a company of the country of incorporation, and therefore subject to its domestic law.²⁹⁰

The converse is not true. Title VII does not apply to American employers outside any state,²⁹¹ and therefore it provides no protection against discrimination to alien employees of American firms in China or other foreign countries. However, title VII does apply to American firms in their employment of American citizens abroad.

China and the pressure to obtain the most beneficial business terms for their foreign employers. *China Daily*, Aug. 27, 1986, at 6, col. 1.

285. Jiangsu Province Regulations Controlling Investment and Employment by Foreign Companies, art. 5 (*published* Feb. 21, 1987).

286. *Id.* Chinese local governments also have promulgated their own provisions to encourage foreign investment. In so doing, they have given aliens broad rights in conducting their own enterprises. For example, in 1986, Shanghai published rules to protect and stimulate foreign investment and then established a Foreign Investment Affairs Office to provide services for foreign companies and to eliminate some of the red tape that often accompanies transactions in China. *People's Daily (Overseas Ed.)*, Jan. 23, 1987, at 3. In just two months, the office redistributed \$4.7 million and helped to import goods and materials that were in great shortage. *Id.*

Recently, Shanghai Shi Gui Bao (Sino-American Shanghai Drug Making Company) was not able to sell its product by the date provided for in its contract because testing of its drug had not been completed by the American party to the joint venture. Its foreign exchange was in short supply, but the Shanghai Foreign Economic and Trade Committee arranged for the company to buy drugs in China for export as a means of alleviating its shortage of foreign exchange. *People's Daily (Overseas Ed.)*, Jan. 23, 1987, at 3.

287. Jiangsu Province Regulations for the Encouragement of Foreign Investment (*issued* Nov. 11, 1986).

288. *See* *Sumimoto Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).

289. *See id.*; *see also* 42 U.S.C. § 2000e-2.

290. *Sumimoto Shoji Am., Inc.*, 457 U.S. at 184-89.

291. *See* 42 U.S.C. §§ 2000e-2001.

Modernization of China's Legal System: Three Examples

China is making tremendous strides in the development of its legal system and the expansion of its legal infrastructure. It has expended considerable effort in establishing a court system that is impartial, predictable, and above all, consistent with generally accepted international standards.²⁹² Three recent cases published by the Supreme Court of China provide examples of the fairness, swiftness, and impartiality that exist within the Chinese judicial system. Such opinions send a clear message that commercial litigation is no longer a taboo activity in China, even if it has not yet been fully accepted.²⁹³ They demonstrate that Chinese courts do not favor the interests of Chinese companies over those of foreign concerns and that foreigners can have confidence in the remedies available in Chinese courts and in the just application of Chinese law.

The first case, *Marinaviva Compania Naviera v. Chinese Metal and Mineral Products Import and Export Company, The Kefalonia Hope and Hugo New & Sons International Sales Corp.*,²⁹⁴ grew out of a contract between a Chinese company and an American firm for the importing of scrap iron. The defendant, Hugo New & Sons International Sales Corp., rented a ship, the Kefalonia Hope, from a Panamanian company (Marinaviva Compania Naviera) to transport the iron. The agreement stipulated damages of \$4,600 for every day the Chinese company delayed unloading the ship. In addition, the shipping company had the right to retain the iron as security in the event of nonpayment. The ship waited to be unloaded in Dalian Bay from January 18 to March 14, 1985. Finally, the plaintiff applied to the Tsingdao Maritime Court for the right to attach the iron and for accrued damages of \$395,600.²⁹⁵

The court found that the Chinese defendant was not a party to the shipping contract.²⁹⁶ However, since it held the certificate to receive the goods, the defendant was held liable. The court granted the application to attach the iron and ordered the defendant to provide an

292. "With the development of procedural codes, commercial law, taxation, and foreign exchange laws, the role the lawyer in China is expected to expand greatly especially that of advisor and interpreter of the laws." Hudspeth, *The Nature and Protection of Economic Interests in the People's Republic of China*, 46 ALB. L. REV. 691, 719 (1982).

293. This runs counter to a view expressed a short time ago that "litigation is out of the question" in commercial disputes involving foreign interests in China. *Id.* at 723.

294. See *Communique of the Supreme Court of China* at 30-31 (Mar. 3, 1986).

295. *Id.*

296. *Id.*

indemnification bond.²⁹⁷ The Supreme Court of the PRC examined the ruling and concluded that the lower court had correctly decided the case and properly taken into consideration the dignity of the law of China and the legal rights and interests of both parties.²⁹⁸

The second case, *Shanghai Bureau of Electrical Supply v. Proteua Shipping Co. S.A. Panama and M.V. Agamemnon*,²⁹⁹ concerned damage by a foreigner's ship to an electrical cable under the Huangpu River in Shanghai, after the ship had been warned about the presence of the cable. This left fourteen factories without power and they sued for recovery in the Shanghai Maritime Court. The defendant contended there was no evidence that it damaged the wire. But the Maritime Court investigated the case and concluded that the ship had damaged the wire. However, the amount sought was found to be unreasonable and it was reduced from the amount of 300,000 renminbi to 230,265 renminbi.³⁰⁰

The Supreme Court affirmed the decision, finding that the investigation had been done promptly, the blame had been correctly assigned, and the amount of the remedy was reasonable and just.³⁰¹ It referred the decision to all the People's Courts in China.

In the third case a West German company sued the Shanghai General Foreign Trade Company in the Middle People's Court.³⁰² After entering into a contract to purchase a ship but before taking title, the Shanghai company was notified of an unpaid lien held by the plaintiff. The Chinese purchaser contacted the seller, who disputed the validity of the lien, but agreed to post an indemnification bond for 44,000 West German marks, as compensation for any loss suffered by the defendant. After transfer of title the plaintiff requested payment but the Chinese defendant denied the existence of a debt between the defendant and plaintiff. The Shanghai Middle People's Court ruled that the defendant's acceptance of the ship, with knowledge of the lien, after it received the bank guarantee, showed that a debtor-creditor relationship had come into existence and that it had assumed the debt. The Chinese Supreme Court stated that the lower court's opinion was correct and just according to Chinese law.³⁰³

In all, these cases reflect China's increasing concern that its legal

297. *Id.* On May 14, 1985 the defendant obtained the bond through the Bank of China, and the Maritime Court ordered the iron released. Finally, on May 28, 1985, the parties settled the case for \$451,506, 9.6% below the total amount of damages that had accumulated. The court reviewed and approved the settlement.

298. *Id.*

299. *Communique of the Supreme Court of China* at 28-29 (Mar. 3, 1986).

300. *Id.*

301. *Id.*

302. *Id.* at 41-44.

303. *Id.*

system be improved and that court decisions be uniform and consistent at all levels. Clearly, China recognizes that for modernization to succeed, foreigners must be comfortable with its legal system. It is not enough to provide a beneficial investment environment through rules and regulations without a reliable and accessible enforcement mechanism.

CONTEMPORARY TREATMENT

Legal rights and duties are one thing; their practical application is another. The actual contemporary treatment of aliens in both countries does not always resemble the theoretical rights and duties that are articulated in laws and regulations. On the surface, both groups of aliens are receiving favorable treatment. Chinese aliens have been successful and ultimately accepted in the United States, and China certainly has made exceptional efforts, through preferential treatment, to attract foreigners to assist in modernization.

A number of recent incidents in China have generated extensive publicity and often are viewed as signposts to the application of China's laws and regulations to aliens. The first of these is seen by many as a test of China's professed openness to foreigners.³⁰⁴ It involved the detention and expulsion from China of John F. Burns, the New York Times bureau chief in Beijing from 1984 until his expulsion on July 23, 1986. Mr. Burns, a British citizen, has given the following account of the incident.³⁰⁵ Along with an American lawyer and a Chinese citizen recently returned from four years of study in the United States, he traveled 1,000 miles by motorcycle through closed, remote parts of China inaccessible to foreigners since the 1930s. His somewhat romantic, unauthorized trip was taken partially because of frustration over restrictions on his freedom to travel. Burns felt such restrictions were not placed on noncorrespondents who traveled beyond the 244 officially open cities and towns. The trip led him to conclude that well off, content, apolitical

304. "A separate law issued by the Beijing Public Security Bureau has made it legal for Chinese citizens to provide board and lodging for foreign friends and relatives, making ordinary Chinese families accessible to outsiders." *China Daily*, Mar. 14, 1986, at 4, col. 1. Many rules concerning travel and living in China for aliens have been liberalized. Aliens can stay in hotels, schools, institutes and private homes. Aliens may travel to open areas of the country and to unopen areas by obtaining a travel permit from the local public security office. From the authors' experience these permits are routinely obtainable.

305. Burns, *A Reporter's Odyssey in Unseen China*, N.Y. Times Magazine, Feb. 8, 1987, § 6, at 28. For an account of another unauthorized journey with a similar ending, see S. MOSHER, *JOURNEY TO THE FORBIDDEN CHINA* (1985).

people, moved by the spirit of private enterprise, and experiencing a revival of religion, existed in rural China and that their conditions were the result of recent reforms following the death of Mao Zedong. His trip ended when he and his companions attempted to rouse a sleeping clerk by blowing their horns. Instead, the noise awoke a county police officer who detained them, required them to write self-criticisms, and forced them to return to Beijing. Ten days later Burns was imprisoned, questioned at length, and accused of espionage and traveling in restricted military areas. He was held six days and then immediately deported.³⁰⁶

The case stirred considerable controversy and caused both nations much embarrassment.³⁰⁷ The strong, emotional reactions of the Chinese reflect the submerged, ethnocentric, cultural differences of the two societies. The correspondent contended that the trip had been "a legitimate journalistic venture," no doubt because of the sanctified position of the press in the United States and the assumption that reporters are entitled to more freedom and access to information than average individuals.³⁰⁸ Yet the Chinese place great emphasis on the preservation of sovereignty, dignity, "face," and the need to punish foreigners who intentionally violate Chinese rules. Thus, China's response to the incident symbolizes the ambivalence it felt in first officially charging Burns with an "act of spying and intelligence gathering" and then mitigating the penalty because of a desire for friendly bilateral relations.³⁰⁹

306. Burns, *supra* note 305, at 28. Although hardly a disinterested party, the *New York Times* provides details of the incident. See N.Y. Times, July 18, 1986, at A3, col. 1-3; N.Y. Times, July 23, 1986, at A1, col. 1.

Of course, this is not the only expulsion case. A Japanese reporter, Bian Jian Xiu Eyi, was accused of using an illegal method to steal secret documents of the Central Committee of the Communist Party of China, which were then printed in a Japanese newspaper. His action violated Chinese law and regulations, and he was ordered to leave Chinese territory. He left on May 11, 1987, without a trial. People's Daily, May 13, 1987, at 1.

Four foreign teachers, American and Australians, "members of the pseudo-religious sect known as "the Children of God," were fined, had "obscene" material in their possession confiscated, and were expelled for recruiting Chinese members and spreading "licentious ideas among them." China Daily, Aug. 30, 1986, at 3, col. 4.

307. Soon thereafter China made a special effort to alter and publicize more liberal and convenient travel rules for foreigners, as well guarantees that foreigners would be protected from arrest without a warrant. China Daily, Mar. 14, 1986, at 4, col. 1.

308. See N.Y. Times, July 23, 1986, at A1, col. 1.

309. See China's official statement accompanying Burns' release, *reprinted in* N.Y. Times, July 24, 1986, at A3, col. 5.

The expulsion ultimately may be regretted for another reason. Edward A. Gargan, the current New York Times bureau chief in Beijing, began a highly critical recent article as follows: "Harshly, and with a dramatic suddenness, the climate of free expression that blossomed last summer and developed throughout the fall in China has chilled. Nearly all intellectual and creative life has been stifled by a renewed compulsory obeisance to Marxist and Maoist dogma." Gargan, *China's Cultural Crackdown*, N.Y. Times Magazine, July 12, 1987, § 6, at 25. But it appears that Gargan may have obtained access to a small village and the village life that Mr. Burns had sought. See Gargan's article on the

Widespread and divergent reactions to this incident in the United States illustrate the fragile relationship, differences, and mistrust that some still perceive as existing between the two nations. It was seen as showing "that a modernizing China in many ways is also still a conservative and suspicious China."³¹⁰

Yet the outcry over China's response to the Burns incident is somewhat unjustified in light of the law and policy that the United States itself steadfastly adheres to with respect to such situations. Diplomats and journalists stationed in the United States, especially those from Communist countries, often are restricted from visiting certain cities and government installations. Moreover, a series of Supreme Court rulings have upheld the exclusion of specific United States citizens from domestic military bases, even at times when these bases were open to the general public and did not involve any military activity. For instance, in *United States v. Albertini*³¹¹ the Supreme Court upheld the criminal conviction and forceable removal of a citizen from a military base during an open house because he had reentered the base after being issued a letter barring him from the base nine years earlier. Objections that the first amendment protected his peaceful expressive activity were dismissed on the ground that the military base had not been temporarily transformed into a public forum during the open house, so that the bar letter provided reasonable grounds for his exclusion on the basis of the governmental interest in assuring security, even though doing so placed an incidental burden on speech.³¹²

Additionally, pursuant to the INA, the United States can prevent aliens from entering the country on a temporary basis solely because of their political beliefs, activities, and/or membership in proscribed organizations.³¹³ The impact of the INA has been somewhat tem-

success and changes in Lolam as Maoist notions wane and land is re-allocated to private households: N.Y. Times, July 26, 1987, at 12, col. 1.

310. Kreisberg, *Don't Misread China*, N.Y. Times, July 30, 1986, at A23, col. 4. "A lesson for Americans is that the overall environment in China is touchier and less predictable than even experienced China hands may sometimes think." *Id.*

311. 472 U.S. 675 (1985). The Court distinguished *Flower v. United States*, 407 U.S. 197 (1972), on the ground that *Flower* involved a specific factual conclusion that a portion of that military post had become a public street through its extensive use by civilians, and therefore a civilian who previously had been barred from that military post was protected by the first amendment when distributing leaflets on that street. *Id.* at 684-85. Cf. *Greer v. Spock*, 424 U.S. 828 (1976) (upholding military regulations banning speeches and distribution of literature on the military post against first amendment attacks on the basis of the commanding officer's historical power to exclude civilians).

312. *Flower*, 472 U.S. at 686-89.

313. The ideological exclusion provisions of the INA were enacted during the hey-

pered by amendments in 1977 requiring the Secretary of State to certify to Congress that an applicant, ineligible solely because of membership in a proscribed organization, would harm the national security.³¹⁴ Even so, it is still applied to exclude a broad range of distinguished visitors.³¹⁵

In spite of the manner with which the Chinese dealt with Burns, it is commonly acknowledged by the Chinese that foreigners within the PRC sometimes receive special treatment. For instance, in April 1985, Richard S. Ondric, an American working in China as the business development manager of the Energy Company Project Ltd., fell asleep while intoxicated with a lit cigarette in a Harbin hotel room. The resulting fire killed ten people and caused extensive property damage to the hotel.³¹⁶

Ondric was tried and sentenced on August 13, 1985. The Harbin Intermediate People's Court found him guilty and sentenced him to prison for eighteen months and imposed a fine of 150,000 renminbi as compensation to the hotel for damage. The case was appealed to the Hei Long Jian Provincial High People's Court on the grounds that Ondric did not usually smoke in bed, that the sentence was too harsh, and that the ordered compensation was excessively high. The appeals court retried the case in a closed hearing on September 5, 1985, and ruled that the judgment was correct and the amount of compensation proper because the investigation of the fire had been conducted thoroughly and scientifically, the evidence left no doubt as to the cause of the crime, and the ruling by the lower court had adequately taken into account the needs of the hotel staff.³¹⁷ Ondric

day of "McCarthyism" in the 1950s, a period of virulent anticommunism. *See, e.g.*, Ortiz Miranda, *supra* note 89, at 305-06; *Abourezk v. Reagan*, 785 F.2d 1043, 1054 (D.C. Cir. 1986) (remanding for a determination that persons excluded intended to engage in activities prejudicial to the United States beyond their status as members of a listed Communist or anarchist organization, and requiring that exclusion be based on more than the perceived bent or proclivities of members), *aff'd*, 108 S. Ct. 252 (1987) (*per curiam*).

314. McGovern Amendment, 22 U.S.C. § 2691(a) (requires a finding that the person's entry "must be contrary to the security interests of the United States"). *See also* Kalven, *U.S. Visa Policy: The Machinery of Exclusion*, 43 BULL. OF ATOMIC SCIENTISTS 21, 27 (1987).

315. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753 (1972), upholding a decision to exclude a Marxist scholar, over the claims and interests of United States citizens in associating and exchanging ideas under the first amendment. For a short list of some of those excluded, including Nobel Laureate Gabriel Garcia Marquez, *see* Kalven, *supra* note 314, at 17. *See also* N.Y. Times, Aug. 16, 1986, at 25, col. 4, detailing the arrest and imprisonment upon entry of Choichire Yatani, a Japanese citizen who had lived in the United States for nine years as a student and a teacher, on the unsubstantiated ground that he had belonged to "a Communist Party or an organization affiliated with a Communist Party." "Finally, two days before [Yatani] was to be deported — and 44 days after he was detained — the government, confronted with massive negative publicity and a lawsuit, agreed to waive its objections and admit him to the country." Kalven, *supra* note 314, at 22.

316. *People's Daily (Overseas Ed.)*, Sept. 13, 1987, at 2.

317. It appears that the charge and sentence could have been much more severe.

was given the decision, signed it, and was imprisoned. On November 28, 1985, he was released and placed "on probation for good behavior."³¹⁸

In theory, aliens that violate Chinese law are subject to the same punishment that Chinese citizens face for committing the unlawful act. They are subject to both criminal and civil penalties, including fines, imprisonment, expulsion, and execution.³¹⁹ If an alien as an artificial person (such as a corporation or organization) commits a crime, then the natural person who directs the artificial person can be held responsible.³²⁰ In addition, a director or a worker who commits a crime in the name of an artificial person can be held responsible. The Chinese criminal law affords justices great discretion in sentencing; for example, it requires that deportation "may" be applied, not that it "should" or "must" be applied, when a foreigner commits a crime.³²¹

Consequently, as a matter of practice, as Pei Xing, Chief Judge of the Harbin Intermediate People's Court has said:

If the defendant is an alien, who has come to China for the purpose of working with a Chinese enterprise in a way which is beneficial to both economies, and his crime was not done willfully or intentionally, but recklessly, and afterwards the defendant shows remorse and regret and obeys Chinese law, the court should take this into account when deciding the penalty and the punishment should be lenient and the fine a reasonable one.³²²

Some aliens who committed crimes have not been as fortunate. For instance, Dai Wen Xuan and Yu Xi Kuan, Hong Kong residents, and Wen Yuan He, a citizen of Thailand, were arrested for transporting drugs through Chinese territory.³²³ They were tried by

The Criminal Law of the People's Republic of China, *reprinted in* Spring 1982 J. CRIM. L. & CRIMINOLOGY. Article 106 provides: "Whoever sets fires . . . that lead to people's serious injuries or death or cause public or private property to suffer major losses is to be sentenced to not less than ten years of fixed-term imprisonment, life imprisonment or death."

"Whoever commits the crimes in the preceding paragraph negligently is to be sentenced to not more than seven years of fixed-term imprisonment or criminal detention." Article 133 states: "Whoever negligently kills another is to be sentenced to not more than five years of fixed-term imprisonment. . . ."

318. China Daily, Nov. 29, 1985, at 3, col. 3.

319. The Law of the People's Republic of China for Control of Foreigners Entering and Leaving the Country and The Detailed Rules for Implementations of the Law of the PRC for Control of Foreign Nationals Entering and Leaving the Country, arts. 40-48.

320. See PRC General Principles of the Civil Law, art. 110.

321. The Criminal Law of the People's Republic of China, art. 30.

322. People's Daily, Aug. 15, 1985, at 1.

323. *Id.*, Feb. 18, 1987, at 1.

the Kunming Intermediate People's Court on January 5, 1987. Wen and Dai were both sentenced to death as major criminals, and Yu also was sentenced to death as an accessory, but his sentence was suspended for two years, on the condition of good behavior, with the understanding that the sentence would then be reduced to life in prison. The defendants appealed to the Yunnan Province Higher People's Court, and after review the judgment was affirmed on February 17, 1987, and the execution was ordered to be carried out immediately.³²⁴

Some aliens in China are treated more leniently than Chinese citizens, not because they have superior rights and privileges, but because of Chinese domestic and foreign policy. They are perceived as guests of the Chinese people that come to China with a friendly purpose and warrant special consideration.³²⁵

But there are daily trade-offs in return for favorable treatment. Foreign teachers were among the first group of foreigners to live in China in large numbers after it began a policy of opening itself to the world. A summary of the conclusions of five teachers who wrote in detail about their experiences teaching in China provides some insight:

As foreigners, these Americans led very privileged lives in China, but they were also more subject to restrictions than any Chinese. They had access to the best physical comforts of the PRC, yet they certainly did not control their own lives in the manner to which they were accustomed at home. They operated in restricted capacities, and the degree of restrictions fluctuated according to local conditions. One must realize, however, that in experiencing this controlled existence, they were sharing a common bond with their Chinese colleagues, who know such strictures all too well, albeit in different forms from the foreigners.³²⁶

CONCLUSION

United States policy toward aliens continues as a compromise between vision and intolerance. The vision of opportunity, sanctuary, and equality remains clouded by discrimination and an unwillingness to fully share the bounty of the society. While attracting desirable immigrants remains a primary goal, it is marred by granting only conditional membership in the political community and by limiting the availability of employment, property rights, and social welfare benefits. Moreover, this is accomplished through legal rules which

324. *Id.* The article included a warning that aliens who sell drugs or transport them through Chinese territory will be punished seriously.

325. See *supra* note 34 and accompanying text.

326. Thorpe, *Teaching in China: What We Give, What We Get*, 22 *ASIAN SURVEY* 1184 (1983) (introduction). Another teacher, Herman Mast, cautioned those who followed: "My final qualification: Caveat emptor! Teaching in China is utterly subjective and idiosyncratic. Unit politics and a hundred other elusive contingencies influence every foreigner's destiny." *Id.* at 1194.

are often obtuse, contradictory and unpredictable, and by retaining citizenship as the ultimate determinant for undiluted economic and political participation. Extraordinary behavior and loyalty of aliens is justified because continued permanent residence and, ultimately, citizenship are presumed as the goals for aliens.

China, on the other hand, primarily is concerned with aliens as workers. The number of aliens living in China is rapidly growing as it seeks the assistance of foreigners in its drive to modernize. Most are viewed as temporary visitors, useful residents who should be extended hospitality and benefits; permanent residence, citizenship, and full political participation are mutually unanticipated. Confronted with having to provide sufficient legal protection and material guarantees to attract and maintain foreign expertise and investment, China's regulations and practices have evolved rapidly. They provide aliens material comfort, financial incentives, and latitude, combined with a pragmatically lenient approach to cultural *faux pas*, and, at times, even to outright violations of the law.

Each system is actually a product of the current needs and demands of the countries' social and political situations. The United States is a nation currently brimming with citizens and the need for more laborers or persons simply does not exist. Thus, its immigration policy is tight-fisted and less than accommodating. Conversely, China is desperate for modern technology and western know-how, which it can obtain only by encouraging foreign visitors. Thus, its immigration policy is excessively welcoming. But both systems could learn from each other. Excessive preferences granted to foreigners, even if essential for national policy, often breed resentment and envy, just as the retention of excessive hurdles to complete participation in society fosters frustration and perpetuates prejudice. Demanding model behavior of aliens should be balanced by corresponding provision of economic opportunities and benefits, not their curtailment.

National control over aliens in China guarantees uniform regulation, a method the United States would do well to emulate, through a more homogenous national policy to eradicate vestiges of historical layers of discrimination against noncitizens. Rather than serving as a partner with the states by preserving their own anachronistic rules, which accomplish little besides tarnishing the United States' image of a just and egalitarian society, the federal government should act to eliminate state restrictions on alien employment, benefits, and certainly, ownership of real property. The recognition that even unlawful aliens who can demonstrate durational residence are entitled to

permanent residence status is a step towards such a policy.

Both societies would benefit from an emphasis on long term policies. Too often internal inequalities in treatment between aliens and citizens are the result of short term issues of insensitivity, changing domestic and international political pressure, and the necessities of having to recruit and hold foreign workers. At times aliens are viewed as commodities, not as people who bring cultural variety and energy to a society. As the initial success of China's policy of opening to the world continues and the country nears the end of its path to economic development, and as its citizens return from studying abroad to accelerate this growth with western knowledge, China will need to better equalize the balance between the rights and duties of aliens and those of citizens.

United States policy appears at a crossroads; yet it is doubtful whether the new immigration law will substantially alter the life of lawful resident aliens. That requires more vision and less intolerance.