Michigan Law Review

Volume 52 | Issue 8

1954

INTERNATIONAL LAW-RESERVATIONS TO COMMERCIAL TREATIES DEALING WITH ALIENS' PLIGHTS TO ENGAGE IN THE PROFESSIONS

Alan Reeve Hunt S.Ed.
University of Michigan Law School

INTERNATIONAL LAW—RESERVATIONS TO COMMERCIAL TREATIES DEALING WITH ALIENS' RIGHTS TO ENGAGE IN THE PROFESSIONS—The question of how far an alien may engage in a profession despite state requirements of citizenship which attach to many professions has not been widely litigated or discussed in this country. Recent

[22] N.Y. Civ. Prac. Act (Cahill-Parsons, 1946) §243.

* Research Assistant, University of Michigan Law School.—Ed.

action by the United States Senate, however, has created interest in problems presented by commercial treaty provisions which guarantee to alien nationals of many countries the right to engage in professions. Attention has thus been focused on law and policy questions which were formerly of little concern outside of the State Department. On July 21, 1953 the Senate gave its advice and consent to the ratification of commercial treaties with Israel, Denmark, Greece, Japan, and the Federal Republic of Germany.[1] In each of these treaties appeared a provision guaranteeing reciprocally the rights of nationals to engage in the professions.[2] Article VIII, paragraph 2 of the treaty with Israel is illustrative:

> "Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party."

The Senate Subcommittee on Commercial Treaties of the Committee on Foreign Relations had held hearings to consider the treaties on two occasions.[3] At the first of these hearings a principal point of inquiry was the legal effect of article VIII, paragraph 2 in the treaty with Israel, and similar provisions in the other treaties. It was agreed that the provisions would give the alien national of the other contracting state a right to engage in the professions upon compliance with the standards, *other than United States citizenship,* established by the states. Since a number of the states, by constitution, statute

[1] 99 CONG. REC. 9623 (July 21, 1953). The treaties were designated, respectively, as Ex. R, 82d Cong., 1st sess. (1951), Ex. I, 82d Cong., 2d sess. (1952), Ex. J, 82d Cong., 2d sess. (1952), Ex. O, 83d Cong., 1st sess. (1953), Ex. N, 83d Cong., 1st sess. (1953). The agreement with Germany, Ex. N, was a revival with certain stipulated limitations of the Treaty of Friendship, Commerce and Consular Rights concluded with that nation in 1923. 44 Stat. L. 2132, Treaty Ser. 725 (1923). Of the most recent group of commercial treaties, a treaty with Ireland entered into force on September 14, 1950, the treaty with Japan on October 30, 1953, and the treaty with Israel on April 3, 1954 (Information received in a letter from Mr. Charles I. Bevans, Assistant for Treaty Affairs, Office of the Legal Adviser, Department of State).

[2] In the treaty with Israel this provision is art. VIII, ¶2; in the treaty with Denmark, art. VII, ¶3; in the treaty with Greece, art. XII, ¶1; in the treaty with Japan, art. VIII, ¶2 (identical with the provision in the treaty with Israel); and the provision of the original treaty with Germany is art. I, set forth in the text at note 8 infra.

[3] Hearing before a Subcommittee of the Senate Committee on Foreign Relations on Treaties of Friendship, Commerce and Navigation between the United States and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece, 82d Cong., 2d sess., p. 1 (1952); Hearing before a Subcommittee of the Senate Committee on Foreign Relations on Treaties of Friendship, Commerce and Navigation with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany, and Japan, 83d Cong., 1st sess. (1953).

or court decision, require citizenship as a prerequisite to engaging in certain professions, it was further recognized that the treaty provisions would have the effect of setting aside such requirements.[4] In order to avoid this result, the Committee on Foreign Relations recommended that the Senate attach a reservation to the treaties as follows:

> "Article —, paragraph — [referring to the specific provision on citizenship requirements], shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are State-licensed and reserved by statute or constitution exclusively to the citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions."[5]

The reservations to the resolutions of advice and consent were approved by the Senate en bloc. The resolutions themselves were then approved in the same manner.[6] The Senate action suggests four lines of inquiry which it will be the purpose of this comment to explore: (1) the inclusion in prior United States commercial treaties of provisions having specific reference to professional activities; (2) the state requirements of citizenship as a prerequisite to engaging in the professions; (3) the nature of the protection previously accorded to aliens under treaties which guarantee rights to engage in professions and occupations; and (4) an appraisal of the Senate action in approving reservations to this latest group of commercial treaties.

I. *Inclusion of Provisions on Professional Activities by Aliens in Prior United States Commercial Treaties*

The practice of including in commercial treaties a specific guarantee of rights to engage in professions began in 1923, when such

[4] This follows from the familiar principle of constitutional law that where a treaty conflicts with a state statute or municipal regulation, the former prevails. The basis for the principle in U.S. CONST., art. VI, cl. 2, giving to treaties a status as the supreme law of the land. Early cases clarifying and settling the principle are Ware v. Hylton, 3 Dall. (3 U.S.) 199 (1796); and Chirac v. Chirac, 2 Wheat. (15 U.S.) 259 (1817). Since the treaty guarantees were in direct conflict with state requirements of citizenship or first papers in order to engage in many of the professions, it was reasonable to anticipate that such requirements would be invalidated by the treaty provisions insofar as they applied to nationals of the other countries involved.

[5] This is the form of the reservation as it appeared in the record of the Senate proceedings. 99 CONG. REC. 9620 (July 21, 1953). It was then appended to the individual resolutions of advice and consent to ratification, with reference being inserted in each case to the appropriate treaty article and paragraph.

[6] 99 CONG. REC. 9623 (July 21, 1953). The manner of voting is significant in that arguably the desirability of the reservations should have been considered separately in relation to each of the other countries involved. See note 48 infra.

a provision was written into a treaty of friendship and commerce with Germany.[7] Since a provision identical or very similar to this one has been inserted in a number of subsequent commercial treaties, it is deserving of careful attention. The provision insofar as relevant was as follows:

> "The nationals of each of the High Contracting Parties shall be permitted to . . . engage in professional, scientific, religious, philanthropic, manufacturing and commercial work of every kind . . . and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the state of residence or as nationals of the nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established."[8]

As has been indicated, this provision served as a model for later agreements.[9] In substantially the same form it has been inserted into some eight subsequent commercial treaties.[10] In more recent years, however, there has been a tendency in drafting such treaties to provide for more limited types of guarantee. One way in which this has been done is specifically to except certain enumerated professions from the guarantee.[11] The profession of law has been excepted with the greatest frequency, although exceptions have also been made in the case of dentistry and pharmacy.[12] A more drastic type of limitation extends the rights to engage in professions only so far as such pro-

[7] 44 Stat. L. 2123, Treaty Ser. 725 (1923).

[8] It will be noted that the article provides both for "national treatment" (treatment on the same terms as nationals of the state of residence) and for treatment on a most-favored-nation basis. For a brief description and evaluation of these various forms of treaty provision, see Cutler, "The Treatment of Foreigners," 27 AM. J. INT. L. 225 (1933). The form used in this most recent group of commercial treaties is somewhat different, providing generally that "nationals of either party shall not be barred from practicing the professions . . . merely by reason of their alienage." The practical legal effect of these various forms of expression, however, is about the same.

[9] The treaty with Germany became the prototype for subsequent commercial treaties in other respects as well. See Wilson, "Postwar Commercial Treaties of the United States," 43 AM. J. INT. L. 262 (1949).

[10] Treaties containing provisions exactly or substantially identical to art. I of the treaty with Germany include agreements between the United States and the following countries: *Austria,* 47 Stat. L. 1876, Treaty Ser. 838 (1928); *El Salvador,* 46 Stat. L. 2817, Treaty Ser. 736 (1926); *Esthonia,* 44 Stat. L. 2379, Treaty Ser. 736 (1925); *Finland,* 49 Stat. L. 2659, Treaty Ser. 868 (1934); *Honduras,* 45 Stat. L. 2618, Treaty Ser. 764 (1927); *Hungary,* 44 Stat. L. 2441, Treaty Ser. 748 (1925); *Liberia,* 54 Stat. L. 1739, Treaty Ser. 956 (1938); *Norway,* 47 Stat. L. 2135, Treaty Ser. 852 (1928).

[11] This was done, for example, in the treaties with *Italy,* 63 Stat. L. 2255, T.I.A.S. 1965 (1948) (exception made in the case of law); *Ireland,* Ex. H, 81st Cong., 2d sess. (1950) (law); *Greece,* Ex. J, 82d Cong., 2d sess. (1952) (law, dentistry, and pharmacy).

[12] Ibid.

fessions are not "reserved exclusively to nationals of the country."[13] This has the effect, in the United States, of permitting continued validity to all state-imposed requirements of citizenship to engage in professions. Of similar legal effect is the limitation of the treaty guarantees by the attachment of reservations such as those employed by the Senate in approving this most recent group of commercial agreements. An interesting legal by-product of the Senate reservations is the new light shed on the meaning and extent of prior unlimited guarantees which follow the pattern set in the treaty with Germany. Any lingering doubts on the question of whether these provisions give to aliens an unequivocal right to engage in all professions which is paramount to state requirements of citizenship can now be taken as removed, for the Senate action was based on the premise that without the reservations these treaty guarantees would indeed be effective to give alien nationals broad rights which would override state legislation and policy.[14] In judging the net effect of the Senate action, then, it is worth noting that of the twenty treaties concluded to date which have provisions respecting the professions, the largest single group provide unlimited guarantees of the right to engage in a profession.[15]

II. *State Citizenship Requirements for Engaging in Professions*

Since it is sought here to draw attention only to problems arising with respect to the professions, the presentation of state citizenship requirements will constitute only a small portion of the totality of

[13] Treaties having broad general limitations of this type imposed upon the rights to engage in professional activities include agreements with *Latvia,* 45 Stat. L. 2641, Treaty Ser. 765 (1928); *Poland,* 48 Stat. L. 1507, Treaty Ser. 862 (1931) (limited to laws excluding aliens from the professions in force at the time of the signature of the treaty); *China,* 63 Stat. L. 1299, T.I.A.S. 1871 (1946) (despite the limitation, nationals of either country to receive treatment "in no case less favorable than nationals of any third country"); *Denmark,* Ex. I, 82d Cong., 2d sess. (1952).

[14] See 99 CONG. REC. 9620 (July 21, 1953). The view of the State Department, however, at the time the reservations were under consideration by the Senate subcommittee, was that the national-treatment provisions in the treaties would only be effective to nullify state laws respecting professions not of a public character and that state requirements of citizenship for the legal profession or public-school teaching would not be affected. Senate Executive Report No. 5, 83d Cong., 1st sess. (July 17, 1953).

[15] See the listing in note 10 supra. Unlimited guarantees in a form unlike art. I of the treaty with Germany of 1923 appear in treaties with *Thailand,* 53 Stat. L. 1731, Treaty Ser. 940 (1937); *Uruguay,* Ex. D, 81st Cong., 2d sess. (1950); *Israel,* Ex. R, 82d Cong., 1st sess. (1951); and *Japan,* Ex. O, 83d Cong., 1st sess. (1953). The Senate reservations, of course, have limited the two latter agreements so that they now fall within the class of agreements set out in note 13 supra.

state legislation discriminating against the alien.[16] The variety of occupations from which the alien is excluded, apart from the professions, has come to resemble a comprehensive list of all occupations engaged in by Americans. Further, it has become an almost universal practice on the part of state to exclude aliens from employment on state and municipal public works.[17] Nor are state legislatures the sole source of citizenship requirements. It is very common for municipalities, in connection with the issuance of licenses for various trades and occupations, to exclude the alien.[18] State administrative tribunals in prescribing qualifications for applicants have in the exercise of this authority introduced citizenship requirements.[19] Courts acting pursuant to their rule-making power have required citizenship for admission to the bar.[20] In summary, from a far more extended survey of state and municipal legislation than is made here two generalizations may be drawn which do have real significance. First, every state in the United States has on its statute books measures that withhold from the alien the right to engage in some occupations, and secondly, such prohibitions are most common in the field of the professions.[21]

From a recent tabulation of limitations upon aliens' rights to engage in occupations and professions,[22] an approximate idea of the alien's status regarding the professions may be gained. The two basic types of requirement are either full citizenship or declaration of in-

[16] This presentation of state citizenship requirements is drawn primarily from KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW, c. 6 (1946). Mr. Konvitz' study is thorough and comparatively recent, but does not include citations to the statutes. For a compilation of state legislation with respect to certain of the professions, see 53 HARV. L. REV. 112 (1939). Other compilations may be found in Fields, "Where Shall the Alien Work?" 12 SOCIAL FORCES 214 (1933), reprinted in 78 CONG. REC. 7120 (1934); 5 VERNIER, AMERICAN FAMILY LAWS, part X (1938); Branse, "State Laws Barring Aliens from Professions and Occupations," 3 IMM. AND NAT. SERV. MO. REV. 281 (1946) (no citations). Many statutes are cited in Fellman, "The Alien's Right to Work," 22 MINN. L. REV. 137 (1938).

[17] KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 207 (1946).

[18] For a discussion of some of the earlier cases involving municipal ordinances, see Kneier, "Discrimination Against Aliens by Municipal Ordinances," 16 GEO. L. J. 143 (1928).

[19] With reference particularly to the actions of state medical licensing boards, see 53 HARV. L. REV. 112 (1939).

[20] Fields, "Where Shall the Alien Work?" 12 SOCIAL FORCES 214 (1933), reprinted in 78 CONG. REC. 7120 (1934), cites a number of such court requirements. See also in general on the question Chamberlain, "Aliens and the Right to Work," 18 A.B.A.J. 379 (1932); Kohler, "Legal Disabilities of Aliens in the United States," 16 A.B.A.J. 113 (1930); KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 190-211 (1946).

[21] These generalizations are among the conclusions drawn by Fields, "Where Shall the Alien Work?" 12 SOCIAL FORCES 214 (1933), reprinted in 78 CONG. REC. 7120 (1934).

[22] KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 190-211 (1946).

tent to become a citizen. In the case of architects, six states require citizenship, and fifteen states and the District of Columbia require first papers. Eighteen states require citizenship of certified public accountants, and twenty-eight states and the District of Columbia require first papers. Dentists must be citizens in eighteen states; they must be declarants in seven states and the District of Columbia. In seven states the alien must show first papers in order to be an engineer; in seven other states he must have attained full citizenship. Sixteen states require that pharmacists be citizens; six states require that they be declarants. The practice of medicine is limited in thirteen states to citizens, and in twelve states to declarants. For teaching, ten states and the District of Columbia have a citizenship requirement, and seven states require first papers. Five states require that veterinarians be citizens; one state restricts the profession to declarants. Finally, with regard to the legal profession, it may be said that every state exacts a requirement of citizenship or first papers, the requirement being variously imposed by statute, administrative decision, or court rule or decision. As has been seen, treaties have frequently reflected a particular concern for the legal profession, and it is commonly stated by courts that the practice of law is a profession which peculiarly requires that the practitioner be a United States citizen.[23]

III. *Protection Accorded to Aliens under Treaties*

Cases have not been numerous in which an alien has asserted rights under a treaty to pursue a profession in this country. It has been held, however, that a treaty provision drawn in terms of rights to carry on "trade" does not give a right to engage in a profession.[24] Thus it appears that the traditional type of commercial treaty provision guaranteeing trade and commercial rights offers the alien professional man little in the way of protection. Treaty provisions of the type common since 1923, which make specific reference to the professions, appear to be necessary if it is desired to enlarge alien rights in this respect. Even under provisions of this latter type, of

[23] Statements of this nature appear in decisions which have upheld state citizenship requirements for admission to the bar as against the contention that such requirements denied to aliens the equal protection of the laws under the Fourteenth Amendment. See Large v. State Bar, 218 Cal. 334, 23 P. (2d) 288 (1933); State v. Rosborough, 152 La. 945, 94 S. 858 (1922); In re Yamashita, 30 Wash. 234, 70 P. 482 (1902); In re Admission to Bar, 61 Neb. 58, 84 N.W. 611 (1900); Ex parte Thompson, 3 Hawks (10 N.C.) 355 (1824).

[24] Sashihara v. State Board of Pharmacy, 7 Cal. App. (2d) 563, 46 P. (2d) 804 (1935) (holding the practice of pharmacy to be a profession and hence beyond the scope of the treaty of 1911 with Japan).

course, the question of what are properly to be deemed "professions" will have to be determined by the courts, and conceivably in marginal cases this may cause some difficulty.

Rights under treaties to engage in various businesses and common occupations have been much more frequently asserted and litigated in the courts than have rights to engage in the professions. Cases involving assertion of these rights have a real bearing on the question of the professions. They serve to illustrate the manner in which courts have typically reconciled conflicting claims to precedence of state police power and federal policy as written into treaties. The initial rule of law underlying all of these cases is the principle that where a treaty conflicts with a state statute the former prevails. The basis for the principle is article VI, clause 2 of the Constitution, which expressly gives to treaties a position as the supreme law of the land, thus capable of overriding state legislation to the contrary. Numerous Supreme Court decisions have reinforced the point.[25] The issue remaining to be fought in the courts is whether or not the treaty and the state statute are actually in conflict. This often involves a fairly extensive interpretation of treaty language, and since in the area under consideration rights are most frequently invoked under commercial treaties, the critical language in the majority of instances has been the terms "trade" or "commerce" or both. Consideration of questions arising under treaties should be prefaced with the observation that the Supreme Court has on a number of occasions declared that treaty provisions should be liberally construed so as to favor rights being asserted thereunder.[26]

The treaty which has been interpreted with the greatest frequency in litigation involving alien rights to engage in occupations and professions is the treaty of commerce and navigation concluded between the United States and Japan in 1911.[27] Article I of this treaty provided:

> "The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own

[25] Ware v. Hylton, 3 Dall. (3 U.S.) 199 (1796); Chirac v. Chirac, 2 Wheat. (15 U.S.) 259 (1817); Hauenstein v. Lynham, 100 U.S. 483 (1879); Asakura v. Seattle, 265 U.S. 332, 44 S.Ct. 515 (1924); Jordan v. Tashiro, 278 U.S. 123, 49 S.Ct. 47 (1928).

[26] Hauenstein v. Lynham, 100 U.S. 483 (1879); Geofroy v. Riggs, 133 U.S. 258, 10 S.Ct. 295 (1889); Tucker v. Alexandroff, 183 U.S. 424, 22 S.Ct. 195 (1902); Asakura v. Seattle, 265 U.S. 332, 44 S.Ct. 515 (1924); Jordan v. Tashiro, 278 U.S. 123, 49 S.Ct. 47 (1928).

[27] 37 Stat. L. 1504, Treaty Ser. 558 (1911).

> or lease and occupy . . . shops, . . . to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. . . ."

In *Asakura v. City of Seattle,*[28] the leading case construing this language, a municipal ordinance requiring a license to engage in pawnbroking and providing that licenses should be granted only to citizens was declared in conflict with the treaty on the basis that pawnbroking was a "trade" within the meaning of article I. Consequently the municipal ordinance was held invalid as applied to plaintiff in error, a Japanese national. Such a treaty may be regarded as establishing a bilateral rule of equal protection as to those occupations within the purview of its provisions. In *Asakura,* for example, it was not doubted that insofar as the treaty was concerned the business of pawnbroking might be prohibited outright. Such a prohibition would operate on the alien and the citizen alike, and would not involve the discrimination which the treaty forbids. In *Jordan v. Tashiro*[29] the question was the relationship between the same treaty and the California "Alien Land Law," section 2 of which provided that aliens of the class of respondents might acquire real estate "in the manner, and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."[30] This provision is noteworthy in that it suggests one way in which conflicting federal and state policies with respect to the alien may be reconciled. It represents, of course, a state concession to federal policy as expressed in treaties, whereas the recent Senate reservations represent a federal concession to state policy as expressed in state constitutions and statutes. The problem for the Supreme Court in *Tashiro* was whether or not the proposed use of land fell within a class which was permitted under a treaty. Respondents were seeking to construct a hospital and to lease land for that purpose. The Court, recognizing that the terms "trade" and "commerce" may connote forms of business which do not necessarily involve trading in merchandise, upheld respondents' contention that they had the right to make use of land for this purpose. Other decisions have given a similarly liberal con-

[28] 265 U.S. 332, 44 S.Ct. 515 (1924).
[29] 278 U.S. 123, 49 S.Ct. 47 (1928).
[30] 1 Cal. Gen. Laws (Deering, 1923) Act 261, §2.

struction to the terms of the 1911 treaty with Japan.[31] Decisions may also be cited, however, which illustrate the approach of courts in working out restrictive interpretations of this same treaty language. In *Tokaji v. State Board of Equalization*[32] the statute called into question permitted aliens to sell beer and wine for consumption on the premises, but denied them a license of this type for distilled spirits. The California district court of appeal found no conflict between the statute and the treaty, reasoning that the word "generally" in the treaty phrase "and generally to do anything incident to or necessary for trade upon the same terms as native citizens" was an escape clause limiting the guarantee so as to exclude cases where the subject of state regulation was peculiarly within the police power. It seems clear, however, that the word "generally" was used to signify a broad category of permitted acts not susceptible of detailed enumeration and was not intended to furnish a means of avoiding the effect of the treaty.

Cases which have involved a consideration of treaties with China,[33] Great Britain,[34] and Italy[35] are further suggestive of the extent of protection which may be accorded to the alien under commercial treaties. In *Poon v. Miller*[36] the Texas Court of Civil Appeals held that a Texas statute denying to aliens licenses to engage in the wholesale fish business conflicted with a most-favored-nation provision in the immigration treaty of 1880 concluded between the United States and China. It was recognized that under treaties with Italy and other favored nations rights to carry on wholesale trade were granted, and that accordingly the immigration treaty made it imperative that similar rights be granted the appellant, a Chinese subject. In *Ohio ex rel. Clarke v. Deckebach*[37] the treaty of 1815 between the United States and Great Britain was invoked in a petition for writ of mandamus to compel the issuance of a municipal license for the operation of a pool room. An ordinance of the city of Cincinnati forbade the issuance of such licenses to aliens. Article I of the treaty, which con-

[31] See State v. Tagami, 195 Cal. 522, 234 P. 102 (1925); Yoshida v. Security Ins. Co., 145 Ore. 325, 26 P. (2d) 1082 (1933). But cf. Cornelius v. Seattle, 123 Wash. 550, 213 P. 17 (1923); In re Naka's License, 9 Alaska 1 (1934); Gonzales v. Ito, 12 Cal. App. (2d) 124, 55 P. (2d) 262 (1936).

[32] 20 Cal. App. (2d) 612, 67 P. (2d) 1082 (1937).

[33] Treaty between the United States and China concerning immigration, 22 Stat. L. 826, Treaty Ser. 49 (1880).

[34] Convention to Regulate Commerce and Navigation, 8 Stat. L. 228, Treaty Ser. 110 (1815).

[35] Treaty between the United States and the Kingdom of Italy of Commerce and Navigation, 17 Stat. L. 845, Treaty Ser. 177 (1871).

[36] (Tex. Civ. App. 1921) 234 S.W. 573.

[37] 274 U.S. 392, 47 S.Ct. 630 (1927).

tained the guarantees asserted by the alien, was drawn in the usual terms of rights to engage in "commerce." In an opinion which has become a leading decision on the rights of aliens to engage in occupations both under commercial treaties and under the Fourteenth Amendment, the Supreme Court held that the treaty language could not be read so as to include the operation of a pool room.[38] *Asakura v. Seattle* was distinguished on the basis that the language of the Japanese treaty was broader, and that pawnbroking involves the sale of merchandise to realize on security, whereas the poolroom operator does not buy or sell goods of any sort. In *Bobe v. Lloyds*[39] article I of the British treaty was held equally ineffective to give aliens rights to engage in the business of insurance. The court reached this result on the basis of its conclusion that insurance was not "commerce."[40] A similar result was reached in *Pearl Assur. Co. v. Harrington,*[41] involving a Massachusetts statute which required an alien insurance corporation to have an American citizen as its resident manager. While the court was willing to assume without deciding that insurance was within the terms of the treaty, it relied upon what it conceived to be express and implied reservations in the treaty of 1815 and the earlier treaty with Britain of 1794.[42] The critical language was a provision that the

[38] The Fourteenth Amendment, particularly the equal protection clause, has been of far more importance in protecting and upholding rights of aliens than have treaties. The decisions under the equal protection clause turn on the question whether a classification based upon alienage, i.e., a measure discriminating against aliens as such, is reasonable, regard being had for the purposes and nature of the particular regulation. Thus a sweeping exclusion of aliens from the "common occupations of the community" has been held unconstitutional. Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7 (1915). The decision in Truax went upon the additional ground, seen also in other decisions, that the power of the federal government over immigration is exclusive, with the result that a state may not condition the entry of an alien into its borders so rigorously as to deny him entry for practical purposes. With the exception of the legal profession (see note 23 supra) the constitutionality of state requirements of citizenship in the field of the professions has not been tested with any frequency. It has been urged, however, that such requirements with respect to professions, a fortiori with respect to less highly skilled occupations, should be held unconstitutional. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 188 (1946). See also 53 HARV. L. REV. 112 (1939); O'Connor, "Constitutional Protection of the Alien's Right to Work," 18 N.Y. UNIV. L.Q. REV. 483 (1941).

[39] (2d Cir. 1926) 10 F. (2d) 730.

[40] If the decisions of the Supreme Court interpreting the commerce clause are to be taken as a guide, this proposition would no longer be tenable. United States v. South-Eastern Underwriters Association, 322 U.S. 533, 64 S.Ct. 1162 (1944). Judge Hand, dissenting in Lloyds, expressed doubt that commerce clause interpretation should be carried over into the field of treaty interpretation. He himself arrived at a contrary conclusion in United States and Cuban Allied Works Engineering Corp. v. Lloyds, (D.C. N.Y. 1923) 291 F. 889.

[41] (D.C. Mass. 1941) 38 F. Supp. 411, affd. per curiam 313 U.S. 549, 61 S.Ct. 1120 (1941).

[42] This agreement is generally known as the Jay Treaty, 8 Stat. L. 116, Treaty Ser. 105 (1794).

mutual protection to be accorded was to be "subject always to the laws and statutes of the two countries, respectively." In using this language to uphold a statute which discriminated against aliens, it can be argued that the court misconceived both the meaning of the language and the broader purposes of the treaty. Reciprocal guarantees of rights in commercial treaties are intended to create a rule of equal protection applicable to nationals of the treaty state. A proviso of this sort should properly be interpreted as meaning only that aliens are subject to all police regulations which apply equally to the alien and to the citizen. Courts have so held,[43] though such proviso clauses have not often been seriously urged as supporting the validity of discriminatory legislation. Finally, a series of decisions involving the commercial treaty of 1871 between the United States and Italy have established that under the old type of commercial treaty the alien will not be successful in asserting rights to engage in employment on public works.[44]

IV. *Conclusions*

The traditional type of commercial treaty did not provide in terms for the rights of aliens to engage in professions. While the courts were on the whole liberal in their construction of these treaties, they were unwilling to extend provisions relating to "commerce" to include the professions. Some courts, moreover, were astute in finding ways to ensure that treaties did not impinge too closely on state police power.[45] Beginning in 1923 specific guarantees of rights to engage

[43] United States and Cuban Allied Works Engineering Corp. v. Lloyds, (D.C. N.Y. 1923) 291 F. 889.

[44] Heim v. McCall, 239 U.S. 175, 36 S.Ct. 78 (1915); Crane v. People of the State of New York, 239 U.S. 195, 36 S.Ct. 85 (1915) (upholding the criminal features of the same statute). The rationale of these cases, briefly put, is that the state acting as a proprietor may exclude the alien without inhibition stemming either from treaties or from the Fourteenth Amendment. The decisions and their various progeny have been sharply attacked. Powell, "The Right to Work for the State," 16 COL. L. REV. 99 (1916); KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 181 et seq. (1946). A similar result was reached under the treaty of 1911 with Japan in Cornelius v. Seattle, 123 Wash. 550, 213 P. 17 (1923). In Gizzarelli v. Presbrey, 44 R.I. 333, 117 A. 359 (1922), the Rhode Island Supreme Court held that an ordinance denying to aliens a license to operate a motor bus was not in conflict with the Italian treaty of 1871, 17 Stat. L. 845, Treaty Ser. 177 (1871). A New York court, however, decided that the Jay Treaty and the treaty of 1815 between the United States and Great Britain did not permit New York to deny chauffeurs' licenses to aliens. Magnani v. Harnett, 257 App. Div. 487, 14 N.Y.S. (2d) 107 (1939).

[45] It is possible to sense a none too subtle change in the judicial climate when a court is called upon to consider the validity of state regulation of the trade in liquor, or of other occupations deemed contrary to good morals. An extreme example of this type of thinking is to be found in Trageser v. Gray, 73 Md. 250, 20 A. 905 (1890), where the court took the position that even if treaties were in effect under which an alien could claim rights, such treaties could not impair the power of the state to regulate the sale of intoxicating liquor.

in professional activity were included in commercial treaties. Most of these guarantees were unlimited in that they applied to all of the professions and did not exclude professions reserved by states to citizens. During these same years an increasing amount of legislation closing occupations and professions to aliens was enacted by the states.[46] Conflicts between the treaties and the state legislation appeared likely to produce litigation in which treaty rights would be held paramount. It was in such a context that the most recent group of commercial treaties was considered by the Senate last summer. While not all of these treaties contained unlimited guarantees of rights to engage in professions,[47] the Senate in giving its advice and consent to ratification deliberately and effectively nullified whatever effect the guarantees would normally have had. This result was achieved by means of reservations which were attached to each of the treaties.

In attempting an appraisal of the Senate action three principal objections to the elimination of these treaty guarantees should be considered. First, such guarantees are offered and accepted on a reciprocal basis. If they are eliminated by the United States, it is only sensible to expect that they will be disavowed by the other parties to the treaties in which we engage. Should other nations in fact match the Senate action by sanctioning discrimination against United States nationals seeking to engage in professions abroad, the net result of an erection of barriers on both sides might be to the distinct disadvantage of the United States. Actual figures or estimates on the number of United States nationals who might from time to time wish to practice professions in other countries do not appear to be available. Information of this nature would, of course, be invaluable in reaching conclusions as to sound policy in this respect, but even in the absence of such information it has been persuasively suggested that in the light of present heavy foreign commitments and investments, this country has more to lose than to gain in permitting continued exclusion of noncitizens from the professions.[48] The second objection is that control

[46] Depression conditions during the 1930's provided a powerful impetus to the enactment of such legislation. The accepted fact that these years produced a great outpouring of discriminatory legislation is a principal argument for those who contend that economic and political pressure rather than reasoned judgment lie behind the enactment of these statutes.

[47] Of the five treaties considered, those with Greece and Denmark contained limitations in the treaty text itself. See notes 11 and 13 supra.

[48] See letter from the acting legal adviser, Department of State, Hearings before a Subcommittee of the Senate Committee on Foreign Relations on Treaties of Friendship, Commerce, and Navigation, 82d Cong., 2d sess., pp. 39-40 (1952). See also statement by H. F. Linder, Assistant Secretary of State, before the same committee, reprinted in Treaties of Friendship, Commerce, and Navigation, 26 DEPT. OF STATE BUL. 881 (1952).

and regulation of aliens as a class is a matter best left to the federal government in view of the serious international consequences which may flow from discriminatory practices.[49] The final objection is the one commonly urged against all forms of legislation and practice which impose disabilities upon aliens, viz., that such discrimination does not accord either with the American tradition or with democratic principles generally. In this view it is a tragic paradox that aliens lawfully admitted to the country must continue to be handicapped by reason of their alienage, instead of being judged by the measure of what they are able to produce or to contribute.

The purpose underlying the Senate reservations reflects a political judgment which seeks to ensure full freedom of action to the states in prescribing qualifications and standards for the professions. It is thought by many to be a mistake to contract international obligations which give promise of conflicting with the practices and policies of states. The Senate reservations appear to be well conceived to avoid such conflicts.[50] Undeniably under the American scheme of government primary responsibility and power to regulate occupations and professions resides in the states. Undeniably the power of the states in this respect may be limited by means of treaty guarantees. The record of the Senate proceedings, however, seems to indicate some misconception of what the actual effect of the treaty guarantees would

The Committee on Foreign Relations itself, in the report it submitted to the Senate which recommended the attachment of the reservations, noted that: "Moreover, it seems likely that, since these treaties are reciprocal in nature, more American citizens practicing professions in foreign countries would benefit by this type of provision than aliens practicing professions in this country, simply because of the scale of American enterprise in foreign countries. In this connection, the committee has received information from some American law practitioners in foreign countries indicating their objections to specific language exempting the legal profession from the provisions of these clauses because such a provision would put them out of business. The committee also understands that a number of special groups, such as public accountants, seek national treatment provisions in these commercial treaties so they can practice abroad." Senate Executive Report No. 5, 83d Cong., 1st sess. (July 17, 1953).

[49] This point was made and emphasized in the opinion of Justice Black in Hines v. Davidowitz, 312 U.S. 52 at 64, 65-66, 61 S.Ct. 399 (1941), holding invalid the Pennsylvania Alien Registration Act on the basis that the Federal Alien Registration Act precluded state legislation in the field.

[50] Examination of the reservations leads to the conclusion that they will be effective in preventing the assertion by aliens of rights to engage in professions under these treaties. It is not likely that a court would substitute its own judgment for that of the state in determining whether professions "involve the performance of functions in a public capacity" or "in the interest of public health and safety, are State-licensed." Nor does it seem likely that in the teeth of the Senate action a court would uphold the right to engage in professions under some other treaty clause, such as those guaranteeing rights to engage in "commercial" activities.

be.[51] Such guarantees are effective only to remove the power of the states to discriminate against aliens. It is very much worth noting that no fundamental shift in the distribution of authority over occupations and professions is involved. The right of the states to impose standards in order to ensure competence in the professions would not have been impaired by these treaties as they stood before the reservations were attached by the Senate.

Alan Reeve Hunt, S.Ed.

[51] During the consideration of the treaties Senator Hickenlooper, in referring to objections raised to the treaty provisions, stated: "There was a question of the destruction of the constitutional power of certain States or the destruction of their right to legislate in matters of public health and public interest within their States." 99 CONG. REC. 9620 (July 21, 1953). Surely this is an overstatement of the effects reasonably to be anticipated from these treaty guarantees.