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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,
vs.
ROMEO ALDO BEORCHIA,
Defendant-Appellant.

Case No. 13729

BRIEF OF APPELLANT

Appeal from the Judgment of the 1st Judicial District Court, in and for Cache County, State of Utah
Honorable VeNoy Christensen, Judge

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FILED
OCT 7 - 1974
Clerk, Supreme Court, Utah

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH, *Plaintiff-Respondent,* vs. ROMEO ALDO BEORCHIA, *Defendant-Appellant.*	}	Case No. 13729

BRIEF OF APPELLANT

STATEMENT OF CASE

On the 17th day of January 1974, Federal and State Agents entered the premises at 155 East 3rd North, Logan, Utah, finding therein among others, Appellant, Romeo Aldo Beorchia. In the process of arresting another individual, certain fire arms were located on the premises and the Appellant was arrested under the provisions of Utah Code Annotated 76-10-503 in that the Appellant was alleged to have possessed a dangerous weapon while not a citizen of the United States. The Appellant made certain Motions to the Court, specifically that the Statute under which the Appellant was charged was unconstitutional and the Appellant further objected

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to the Jury array, arguing that selection of Jury was limited by an unconstitutional standard. The Court took the objections under advisement and a Jury Trial was had and at the close of the State's evidence the Appellant moved for a Dismissal on the ground that the State had failed to prove that there was possession in the Appellant as a matter of law. The Court took that Motion under advisement as well and the Appellant put on his case and as the close of the evidence the Jury returned a verdict of guilty. In a subsequent hearing the Court denied the Motions of the Appellant and sentenced him to 0 to 5 years in the State Penitentiary from which sentence the Appellant appealed.

DISPOSITION IN THE LOWER COURT

The Appellant was tried and convicted of Possession of a Dangerous weapon while not a citizen of the United States in the District Court in and for Cache County, before the Honorable VeNoy Christensen.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the decision of the lower court.

POINTS ON APPEAL

POINT I.

WHETHER OR NOT UTAH CODE ANNOTATED 78-46-8 CONFORMS WITH 14TH AMENDMENT STANDARDS AS TO EQUAL

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PROTECTION AND TO 5TH AMENDMENT STANDARDS OF DUE PROCESS OF LAW UNDER THE CONSTITUTION OF THE UNITED STATES IN THAT THE JURY ARRAY WAS NOT PROPERLY CONSTITUTED.

POINT II.

WHETHER OR NOT THE APPELLANT WAS ENTITLED TO A DISMISSAL AT THE CLOSE OF THE STATE'S EVIDENCE IN THAT THE STATE DID NOT SHOW POSSESSION WAS IN THE APPELLANT AS A MATTER OF LAW.

POINT III.

WHETHER OR NOT UTAH CODE ANNOTATED 76-10-503 VIOLATED APPELLANT'S RIGHTS UNDER THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES UNDER THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE OF THAT AMENDMENT.

POINT IV.

WHETHER OR NOT UTAH CODE ANNOTATED 76-10-503 AS APPLIED TO THE APPELLANT, IS VIOLATIVE OF APPELLANT'S RIGHTS UNDER THE CONSTITUTION OF THE STATE OF UTAH.

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POINT V.

THE LAWS REGULATING ALIENS HAVING BEEN PREEMPTED BY THE FEDERAL GOVERNMENT ARE THE SOLE AND SEPARATE RESPONSIBILITY OF THE FEDERAL GOVERNMENT UNDER ARTICLE I, SECTION 8 OF THE CONSTITUTION OF THE UNITED STATES AND U. C. A. 76-10-503 AMOUNTS TO AN INTERFERENCE IN THE CONDUCT OF FOREIGN POLICY OF THE UNITED STATES GOVERNMENT.

ARGUMENT

POINT I.

WHETHER OR NOT UTAH CODE ANNOTATED 78-46-8 CONFORMS WITH 14TH AMENDMENT STANDARDS AS TO EQUAL PROTECTION AND TO 5TH AMENDMENT STANDARDS OF DUE PROCESS OF LAW UNDER THE CONSTITUTION OF THE UNITED STATES IN THAT THE JURY ARRAY WAS NOT PROPERLY CONSTITUTED.

While it is true that the common law principal that a Defendant was entitled to a "Judgment of his peers" referred to in the Magna Carta this principle is not necessarily still the proper criteria for jury selection, see *Glasser* v. *United States*, 315 U. S. 60, P. 85, 86 L. Ed.

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680, P. 707, 62 S. Ct. 457 (1942). In the *Glasser* case the Court said that the proper functioning of the Jury system, and indeed, of democracy itself, requires that a Jury be "a body truly representative of the community and not an organ of any special group or class". It is not the Appellant's position that he was necessarily entitled to have an alien or aliens sit on his jury but rather that he was entitled to a constitutional jury under the standard laid down in the *Glasser* case. Under Utah Code Annotated 78-46-8, applicable portions are:

> 78-46-8. WHO IS COMPETENT TO SERVE. A person shall be competent to sit as a Juror:
>
> (1) Who is a citizen of the United States over the age of twenty-one years;
>
> (2) Who can read and write the English language;
>
> (3) Who resides in and has resided in the country for six months next preceding the time he is selected; . . . required shall be residence in the city or precinct for six months next preceding the time actually called to serve;
>
> (4) Who is a taxpayer in the State, and,
>
> (5) Who is of sound mind and discretion, and not so disabled in body as to be unable to serve.

It can be seen that in no way does the Statute provide for a representative cross section of the community. In fact, the very jury selection process in Cache County precludes any possibility of getting a cross section of the community because the jury is selected from the rolls

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of the registered voters which in itself would exclude important classes of people, to-wit; people who do not meet the residency requirement under voters registration statutes and people under eighteen. But the Statute itself goes even farther than the selective process in excluding segments of the community. The Statute also excludes people who do not pay taxes and excludes persons on the basis of citizenship, as well as the age and residency bar which is actually imposed through the jury selection system as practiced in Cache County. In the Utah case of *Reese, et al.* v. *Knott*, at 24 P. 757, 3 U. 466, the Utah Supreme Court held that a Utah Statute providing that only a taxpayer shall be eligible to sit on the Jury is in violation of the United States Constitution Article VII, which declares that "The right of trial by jury shall be preserved." Although this a somewhat ancient case it has never been overruled and would appear to be good law and would therefore be conclusive in favor of Appellant's position in this case. We need not rely exclusively on the Utah case, however, in the case of *Duncan* v. *Louisiana*, 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), the United States Supreme Court held that in serious criminal cases the Defendant shall have the right to trial by Jury. Implicit in the holding of the Court, is the proposition that the Defendant shall have the right to trial by a constitutional jury which, the Appellant contends, was not the case here. It matters not that the Appellant cannot show that there was damage resulting from the fact that the jury excluded certain classes of persons. The Appellant could contend that the

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fact that aliens were precluded from serving on his jury by action of the Statute worked to his detriment but he need not go that far. In the case of *Peters* v. *Kiff*, 407 U. S. 493, 33 L. Ed. 2d 83, 92 S. Ct. 2163 (1972), the United States Supreme Court held that, whatever his race, a State criminal Defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race and thereby denies him due process of law. It not being necessary that Appellant show actual harm or bias; as in *Peters* v. *Kiff*, supra, where a white Defendant claimed that a practice whereby negroes were systematically excluded from the jury service, particularly where congress had made such exclusion by public officials a crime, give the Appellant standing to invoke his claim. In the instant case we have the same factual basis in that 42 U. S. Code § 1981, which was originally enacted to protect the rights of negroes also applies to aliens. In *Roberto* v. *Hartford Fire Insurance Company*, 177 Fed. 2d 811, Cert. Den., 339 U. S. 929 (1949), the Federal Circuit Court construed that Statute in holding that:

> "Although enacted primarily to insure equal civil rights to negroes, it has been held that the protection of this Section extends to Aliens as well as citizens."

It would therefore seem that under the Federal Legislation not only of the 42 U. S. Code § 1981 cited above, but also under 18 U. S. C. § 243, the Appellant would enjoy

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the same protection as if he were a minority race. Under Utah Law as well as Federal Law all of the rights of the Constitution are reserved to "The people" or "To all persons" which would then necessarily include the Appellant although he is a citizen of Italy. See also *Strauder* v. *West Virginia,* 100 U. S. 303, 25 L. Ed. 664, in which the Court held that:

> "Prejudices often exist against particular classes in the community, which sway the Judgment of the Jurors, and which, therefore, operate in some cases to deny persons of those classes the full enjoyment of that protection which others enjoy.' '

Such is the case with aliens as so aptly observed in *Purdy and Fitzpatrick* v. *State,* 456 P. 2d 645, 79 Cal. Rptr. 77 (1969). The Court noted that the concept of equal protection of the laws compels recognization of the proposition that persons similarly situated with respect to the Legislative purpose of the law receive equal treatment thereunder and then went on to say:

> "Aliens . . . denied the right to vote, lack the most basic means of defending themselves in the political processes."

See also, *Whitus* v. *Georgia,* 385 U. S. 545, 17 L. Ed. 2d 599, 87 S. Ct. 643 (1967), and other cases cited in the Annotation accompanying *Peters* v. *Kiff,* at 33 L. Ed. 2d 783, P. 791. Another recent United States Supreme Court case, *In Re Griffiths,* 413 U. S. 717, 37 L. Ed. 2d 910, 93

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S. Ct. 2851 (1973), the United States Supreme Court held that a Citizenship may not be prescribed by a state as a requirement for practice of law. The Courts recognized that the fact that a person is an alien does not necessarily mean that he would be unqualified as a practitioner of law and by analogy the fact that a person is not a citizen or that a person is not a taxpayer would not preclude him from sitting on a jury. It is true that the cases hold that the State has no requirement to include aliens in its democratic political institutions and that the right to vote and the right to hold high public office is not necessarily violative of an alien's rights. See *Sugarman* v. *Dougall,* 413 U. S. 634, 37 L. Ed. 2d 853, 93 S. Ct. 2842 (1973), but these cases are not controlling as this issue is presented.

POINT II.

WHETHER OR NOT THE APPELLANT WAS ENTITLED TO A DISMISSAL AT THE CLOSE OF THE STATE'S EVIDENCE IN THAT THE STATE DID NOT SHOW POSSESSION WAS IN THE APPELLANT AS A MATTER OF LAW.

Appellant submits that under the instructions given to the Jury and based on the record at trial, the Appellant was not in possession of the fire arms as a matter of law and the verdict was therefore not supported by the evidence.

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POINT III.

WHETHER OR NOT UTAH CODE ANNOTATED 76-10-503 VIOLATED APPELLANT'S RIGHTS UNDER THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES UNDER THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE OF THAT AMENDMENT.

The Appellant does not feel that this is a second Amendment issue under the United States Constitution for the purpose of this argument. The State can cite many cases decided by the Supreme Court of the United States, most of great antiquity, which hold that the restrictions upon the control of guns in the Constitution of the United States, as set forth in the 2nd Amendment thereto, apply only to the congress of the United States and not to the Legislatures of the several states. It would seem then that we are only to consider the U. S. Constitution and the Laws of the State of Utah applied to the control of guns and the limitations therein as set forth in the Constitution of the State of Utah. We may consider then, the Constitution of the United States in so far as the control prescribed by Utah law violates the protection of the 14th Amendment as set forth in the Due Due Process Clause and Equal Protection Clause of that Amendment. Article I, Section 6 of the Constitution of the State of Utah reads as follows:

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> "*RIGHT TO BEAR ARMS.* The people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law."

This provision setting forth the right of the people of the State of Utah to bear arms differs from the comparable Federal Provisions and the provisions in the Constitutions of many of the other states in significant respects. In the first place, the Utah Constitution does not limit the bearing of arms to citizens as do the Constitutions of some states, see *Patsone* v. *Pennsylvania,* 232 U. S. 138, 34 S. Ct. 281, 58 L. Ed. 539 (1914). Further, Article I, Section 6 of the Utah Constitution cited above does not purport to give unlimited right to all persons to bear arms and sets forth therein the limitation that the legislature may regulate this right. It remains then, only to inquire as to whether the invoking of the provisions of Utah Code Annotated 76-10-503, as to the Appellant herein is violative of his rights to due process and equal protection under the laws. It is well established that the legislature may single out a class of person and place special burdens on that class, provided that that class manifests characteristics which, to a real and substantial extent, distinguish that class from all other persons and justify an imposition of the burden. It is also well established that the police power of the State is for the purpose of protecting the health, safety, morals and general welfare of the people but, the legislature, acting under such power, must have such purpose in classification of a group in imposing burdens on that group and with-

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holding the same burden from other classes. The distinction made by the legislature must be based on a real and substantial difference of the classes, and such difference must be relevant to the purpose which the legislation is intended to achieve. The Appellant submits that he has been lawfully admitted in the Country under Federal law, and therefore he has a Federal privilege to enter and abide in any state in the union and thereafter under the 14th Amendment of the Constitution of the United States to enjoy equal protection of the laws in any State in which he abides. See *Truax* v. *Raich,* 239 U. S. 33, 36 S. Ct., 60 L. Ed. 131 (1915), in the *Truax* decision, the Court noted that it has on occasion sustained State Legislation that did not apply equally to citizens and noncitizens, the grounds for this distinction being that such laws were necessary to protect a special interest either of the State or the citizen of the State. A special interest of the citizens of the State of California was asserted in the case of *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410, 92 L. Ed. 1478, 68 S. Ct. 1138 (1948). In that case the Court held that under the United States Constitution, the power is withheld from the several states to determine what aliens should or should not be admitted to the United States, the period that aliens may remain in the United States, the regulation of alien conduct before naturalization and the terms and conditions of alien naturalization. The Court then held that the States can neither add nor take from the conditions lawfully imposed by congress upon admission to or naturalization and residence in the United States

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and in the several states. The Court went on to state that the 14th Amendment and the law adopted under its authority embody a policy that all persons lawfully in this country may abide in any state with equality of legal privilege to that of the citizens of the state of residence under nondiscriminatory laws. The *Takahashi* case seems controlling in determining the Appellant's rights under the laws of Utah. The Appellant does not, by this argument, state that under no condition may any alien be precluded from owning a fire arm or possessing the same, but only argues that the fact that he is an alien alone is not enough to impose this burden upon him. In Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by Title III of the Gun Control Act of 1968, 18 U. S. C. § 1201, 1202 (1968), the Federal Government set forth Federal Prohibitions on the possession of fire arms as to certain classes of persons.

> Sec. 1202. The congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship constitutes —
>
> (1) a burden on commerce or threat affecting the free flow of commerce,
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States,
>
> (3) an impediment or a threat to the exercise of free speech and the free exercise of a

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religion guaranteed by the first amendment to the constitution of the United States, and

(4) a threat to the continued and effective operation of the Government of the United States and of the government of each state guaranteed by article IV of the Constitution. Sec. 1202. (a) Any person who —

(1) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a state or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States, and who receives, possesses, or transports in commerce, or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000.00 or imprisoned for not more than two years, or both . . .

It is noted that there are restrictions placed on certain classes of aliens based on special facts and circumstances just as there are restrictions placed on various classes of citizens based on special facts and circumstances. Appellant submits that the Court, upon finding that the legislature considered the group and found that the group, as a whole or to a large extent, contained spe-

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cial characteristics by which the group might be reasonably precluded from possession of fire arms, then the Court could conclude that legislation would entail a reasonable and valid classification. It seems apparent from the law itself, that the legislature of the State of Utah has made no reasonable classification, there is no more basis for prohibiting alien possession of a dangerous weapon than precluding the possession of a fire arm by any other person or group unless the Court is willing to accept the proposition that persons from other nations are inherently more lawless, that aliens are not subject to the same laws of the State of Utah as are others, that noncitizens are less controlled in their egress or ingress or that in some significant respect aliens are less wholesome as a group than are citizens. The Appellant submits that there is not reasonable basis for any of these conclusions and challenges the State to produce one piece of evidence or case that so holds. Further the appellant challenges the State to show one special interest that could be claimed by the people of the State of Utah in having noncitizens precluded from possession of any fire arms within state borders that does not apply equally to other classes. In support of the Appellant's view, attention is respectfully invited to recent United States Supreme Court cases and sister state cases construing the equal protection clause of the 14th Amendment of the United States constitution as applied to classification. In *Purdy and Fitzpatrick* v. *State,* 456 P. 2d 645, 79 California 77, (1969), the California Supreme Court held that a state statute providing that:

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> "No contractor or subcontractor or agent or representative thereof shall knowingly employ or cause to or allow to be employed on public works an alien . . ."

is violative of the 14th Amendment under the Due Process Clause of that amendment in that it "Encroaches upon the congressional scheme for immigation and naturalization and interferes with provisions of The Immigration and Naturalization Act of 1952, 8 U. S. C. A. § 1011 (1952), it was further held that the Statute

> "Offends the equal protection clause of the 14th Amendment of the United States Constitution."

In support of this proposition the Court cited *Fong Yue Ting* v. *United States*, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905 (1893). In adopting this view the California Court adopted the recent line of thinking in equal protection cases by the Supreme Court of the United States and noted that the concept of equal protection of the laws compels recognization of the proposition that persons similarly situated with respect to a legitimate purpose of the law receive like treatment. The Court went on to point out that in cases involving "Suspect Classification" as defined in *Korematsu* v. *United States*, 323 U. S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), or "Fundamental Interests" as defined in *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966). The United States Supreme Court has prescribed a strict standard for the review of a particular

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enactment under the Equal Protection Clause. Not only must a classification reasonably relate to the purpose of the law, *F. S. Royster Guano Company* v. *Virginia,* 253 U. S. 412, 40 S. Ct. 560, 64 L. Ed. 989 (1920), but also the state must bear the burden of establishing that the Classification constituted a necessary means of accomplishing the legitimate State interest, *Loving* v. *Virginia,* 383 U. S., 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). According to 82 Harvard Law Review 1065 (1972), Developments in the Law, equal protection cases were discussed as follows:

> "In cases involving suspect classifications or fundamental interest of those discriminated against however the Court has adopted an attitude of vigorous scrutiny of the law."

One of the reasons for this vigorous scrutiny was enunciated in *Purdy and Fitzpatrick* v. *State,* supra, when the Court said that

> "Aliens, denied the right to vote, lack the most basic means of defending themselves in the political process."

In *Shapiro* v. *Thompson,* 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), the Court said:

> "Absent compelling state interest, residency requirements classifying welfare applicants violates the equal protection clauses of the 14th Amendment, in that it precludes the right of indigents to travel from state to state."

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In the case of *Dunn* v. *Blumstien,* 405 U. S. 330, L. Ed. 2d 774, 92 S. Ct. 955 (1972), at page 345, the Court discusses the State of Tennessee's contention that a durational residency statute is necessary to control the evils of immigrant stuffing of ballot boxes. The Court pointed out that the fallacy in such an argument is that:

> "Durational residence law bars newly arrived residents from the franchise along with non residents."

This is the evil of the Utah Statute as it is applied to the Appellant. There is no distinction between deserving aliens and undeserving aliens or any other standard independant of citizenship and therefore the classification is invidious and suspect and the State of Utah has not and cannot satisfy the requirements as enunciated in the controlling classification cases; that being that the State must bear the burden of justifying the classification. See also *Levy* v. *Louisiana,* 391 U. S. 68, 20 L. Ed. 2d 436, 88 S. Ct. 1509 (1969), another recent United States Supreme Court case, *In Re Griffiths,* 413 U. S. 717, 37 L. Ed. 2d, 91 S. Ct. 2851 (1973), the Supreme Court held that citizenship may not be prescribed by a State as a requirement for the practice of law. The Court recognized that the fact that a person is an alien alone does not necessarily mean that he would be unqualified as a practitioner of law.

POINT IV.

WHETHER OR NOT UTAH CODE ANNO-

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TATED 76-10-503 AS APPLIED TO THE APPELLANT, IS VIOLATIVE OF APPELLANT'S RIGHTS UNDER THE CONSTITUTION OF THE STATE OF UTAH.

As stated in the case of *Untermire* v. *State Tax Commission,* 102 Utah 214, 129 P. 2d 881 (1942), the Supreme Court noted that Article I, Section 7 of the Constitution of the State of Utah was substantially a summary of the 5th and 14th Amendments of the Federal Constitution and the decisions of the Federal Supreme Court are highly persuasive in the construction and application of Article I, Section VII of the Utah State Constitution. The Appellant therefore submits that, to a large extent, what has been held violative of due process and equal protection of the laws by the Supreme Court of the United States is also adopted and approved by the Supreme Court of the State of Utah. In the case of *State* v. *J. D. Walker and R. E. Walker, Inc.,* 100 Utah 323, 116 P. 2d 766 (1941), the Supreme Court said that where some persons or transactions, excluding from operation of the law are, to the subject matter of the law, indistinguishable from classes included in those operations then the law is discriminatory in the sense of being arbitrary and unconstitutional. If a reasonable basis to differentiate can be found, the law will be held constitutional. In *Gronlund* v. *Salt Lake City,* 113 Utah 284, 194 P. 2d 464 (1948), the Utah Court said that in determining whether classifications made by the legislature are unconstitutional, discrimination is the very essence

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of classification and is not objectionable unless founded upon an unreasonable distinction. It would therefore appear that the Appellant must show not only that there has been a discrimination but that the discrimination is based on citizenship alone and using the criteria of citizenship alone is an unreasonable distinction. The Supreme Court of the State of Utah has not approached this precise issue. It would, however, appear that *Takahashi* v. *Fish and Game Commission*, supra, has, and it appears that the Utah Court might follow that case as has its sister states. Classification on the basis of non-citizenship alone is just as odious as classification based upon race, creed, or color. See *Fugii* v. *State*, 242 P. 2d (1952) and *Namba* v. *McCourt*, 204 P. 2d 569 (1949). It is interesting to note that these cases, the former issuing out of California and the later issuing out of Oregon, rely on *Takahashi* in overthrowing statutes in which it would appear that the people of those states might have some special interest land ownership. Assuming that land ownership is strictly a function of the state, the restrictions placed on state legislation in that area should be less than restrictions placed on state legislation affecting a person's individual rights protected by United States and State Constitutions. The Appellant submits that the whole reason for the conferred constitutional right to bear arms is for one's self protection against tyranny of government and neighbors. The Appellant submits that the legislature of the State of Utah has passed a law which precludes him, without a rational basis therefore, of enjoying the

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safety and security granted to other persons within this state.

POINT V.

THE LAWS REGULATING ALIENS HAVING BEEN PREEMPTED BY THE FEDERAL GOVERNMENT ARE THE SOLE AND SEPARATE RESPONSIBILITY OF THE FEDERAL GOVERNMENT UNDER ARTICLE I, SECTION 8 OF THE CONSTITUTION OF THE UNITED STATES AND U. C. A. 76-10-503 AMOUNTS TO AN INTERFERENCE IN THE CONDUCT OF FOREIGN POLICY OF THE UNITED STATES GOVERNMENT.

In the case of *Purdy & Fitzpatrick* v. *State*, 456 P. 2d 645, 89 Cal. 77 (1969), the Californit Supreme Court held that a California statute providing that:

> "No contractors or subcontractor or agent or representative thereof shall knowingly employ or cause to be employed on public work an alien . . ."
>
> "Encroaches upon the congressional scheme for immigration and naturalization . . . interferes with . . . provisions of the 'Immigration and Naturalization Act of 1952' as set forth in 8 U. S. Code § 1011, et seq."

and further that the Statute:

> "Offends the equal protection clause of the . . . the 14th Amendment to the U. S. Constitution."

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In support of the ruling the California Court cited *Fong Yue Ting* v. *United States*, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905 (1893), and the United State Constitution, Article I, § 8, Clause 4.

In the case of *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410, 92 L. Ed. 1478, 68 S. Ct. 1138 (1948), the United States Supreme Court held that a State,

> "Can neither add nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several States."

In the case of *Hines* v. *Davidowitz*, 312 U. S. 66, 61 S. Ct. 399, 85 L. Ed. 581 (1941), the United States Supreme Court held that a state law requiring registration of aliens was unconstitutional in that it stood as:

> "An obstacle to the accomplishment and execution of the full purposes and objectives of congress."

and further stated that,

> "Experience has shown that International Controversy of the greatest moment, sometimes even leading to war, may arise from real or imagined wrongs to another subject inflicted or permitted by a government."

As stated by the United States Supreme Court and the Supreme Court of California in the above cited cases under the authority granted in the U. S. Constitution,

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Article I, Section 8, the Congress of the U. S. has provided an elaborate scheme for the supervision of aliens within this Country, including the Immigration and Naturalization Act of 1952, supra. As previously noted in the Argument on another issue, Congress has also seen fit to regulate the possession of firearms by aliens, 7 U. S. C. A. 1201, et seq. (1968). These sections provide that an alien who is illegally or unlawfully within the United States or any alien having been a citizen of the United States and having renounced this citizenship shall not possess certain prescribed groups of firearms. In so providing, it would seem clear that the congress of the United States has completely preempted the several states in the area of control of possession of firearms by aliens by prescribing the exact limitations which apply to aliens an dto which aliens these limitations apply. In *Hines* v. *Davidowitz*, supra, the Court observed,

> "Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the State also acts on the same subject, 'The act of congress, or the treaty, is supreme; and the power of the State, though enacted in the exercise of powers not controverted, must yield to it.' And where the Federal Government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for registration of aliens, states cannot inconsistently with the purpose of congress, conflict or interfere with, curtail or compliment,

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> the Federal Law, or enforce additional or auxiliary regulations . . ."

An interesting case handed down by United States Supreme Court, that being *Zschernig* v. *Miller*, 389 U. S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968), the Court held that certain portions of the probate law of Oregon encroach upon the province of congress in the area of alien rights and stated that a statute conditioning inheritance by aliens on the alien's government reciprocacation of right or the alien's government agreeing to reciprocate is invalid as

> "An intrusion of the State into the field of foreign affairs . . . would make unavoidable judicial crticism of nations established on a more authoritarian basis than the U. S."

The Supreme Court also held that the probate law of Oregon was in conflict with the 1923 Treaty with Germany. And stated that,

> "The Probate law of Oregon . . . affects international relations in a persistent, subtle way. The practices of State Courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious."

The Court then cites *Berman, Soviet Heirs in American Courts,* 62 Col. L. Rev. 257 (1962) and *Chaitkin, The Rights of Residents of Russia and its Satellites to Share in Estates of American Decedents,* 25 S. Cal. L. Rev. 297 (1952). The Court then went on to state that

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> "The several states, of course, have traditionally regulated the descent and distribution of estates, but those regulations must give way if they impair the effective exercise of the Nation's foreign policy."

It seems clear to Appellant that if statutes governing such traditional subjects of stat regulation as probate law fall when they encroach on the area of foreign policy then the cases above appear to leave no doubt that this principle would also apply to the instant case and render the Utah Statute invalid as it applies to aliens.

There are other statutory provisions of the United States Code which apply to the instant situation and which appear to preempt Utah's right to subject aliens to special limitations. 42 U. S. Code § 1981, was originally enacted to protect the rights of negroes, but it has been held in *Roberto* v. *Hartford Fire Insurance Company*, 177 F. 2d 811 (C. A. 111), Cert. Den., 339 U. S. 929 (1949), that:

> "Although enacted primarily to insure equal civil rights of negroes, it has been held that the protection of this section extends to aliens as well as citizens."

This statute was also cited in *Oyama* v. *California*, 332 U. S. 633, 92 L. Ed. 249, 68 S. Ct. 269 (1948), the wording of the statute is:

> "EQUAL RIGHTS UNDER THE LAW"
> "All persons within the jurisdiction of the U. S. shall have the same right in every state and territory to make and enforce contracts, to sue,

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be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed to white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other."

The Charter of United Nations, Department of State Pub. 2368, pp. 1-20, which document both the U. S. and Italy are signatory to, there are many provisions relating to Human Rights Significant in this Area are:

ARTICLE 55

With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. Higher Standard of Living, full employment, and conditions of economic and social progress and development;

b. Solutions of international economic, social, health and related problems; and international cultural and educational cooperation; and

c. Universal respect for, and observance of, Human Rights and Fundamental Freedoms for all without distinction as to race, sex, language or religion.

ARTICLE 56

All members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55.

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In *Universal Declaration of Human Rights*, Resolution 217 A (111) Gen. Assy. (10 Dec. 1948) as set forth in *The United Nations and Human Rights, Infra.*,

ARTICLE 2

> Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, National and Social origin, property, birth or other status.

Although the declarations are not binding on the members of the United Nations, *The United Nations and Human Rights, Infra.* at P. 5, they represent the ideals and goals of the nations signatory to the chapter.

In 1966, the *Covenants on Human Relations*, U. S. Dept. of State Pub. 2368 (1945), pp. 1-20, were accepted by the general assembly of the United Nations and it was provided that they become binding upon the Nations upon acceptance thereby. The United States Congress has not seen fit to accept or reject the covenants and are still, in fact, considering them. Utah purports to reject the United Nations Chapter, Universal Declaration of Human Rights and the Universal Covenants on Human Rights. This, Appellant maintains, the State of Utah may not do in that it would and does encroach upon the foreign relations of the United States which is reserved to the Federal Government and further that the Utah statute operates to reject the Covenants on Human Relations now before congress and subject to their ratifica-

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tion. According to *Eighteenth Report of the Commission to Study the Organization of Peace, The United Nations and Human Rights,* Oceana Pub. 1968 at page 15, the United States Senate has taken no formal action on these covenants but that of the special conventions on Human Rights drafted by the United Nation, five have been submitted to congress and one has been ratified as of 1968. As stated in Henkin, Foreign Affairs and the Constitution, the Foundation Press, Inc., (1972) at Page 155.

> "For the United States parallel human rights undertakings have obvious foreign relations purposes. In part she is concerned to maintain leadership in international affairs by proving that she deserves it, by her behavior at home and her willingness to join in cooperative international efforts. In large part, she is concerned to see that minimum standards observed in other countries in order to safeguard her own standards, to promote conditions that are conducive to American Prosperity and to American interests in international peace and security. Of obvious, 'International Concern' to this country, for example would be an international convention fixing high labor standard or outlawing slavery or forced labor. If it were adopted by the nations with which the United States competes to sell, manufacture goods in world markets. Other human rights are also of authentic international concern for the United States, witness apartheid in South Africa, events not long ago in communist countries . . ."
>
> "The United States, then does not adhere to human rights covenants in order to distort or circumvent our constitutional system, to leg-

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> islate greater human rights for its own citizens by treaty rather than act of congress or to take additional matters from States into Federal domain; she adheres to such covenants in order to modify the behavior of other governments and the ways it effect the American interest. To get other nations to undertake to observe higher standards and to give the United States the right to request compliance with those standards, the United States is prepared to pay the price of undertaking to apply similar standards in the United States and to recognize other nations request American appliance."

This scholarly statement supports the holding in *Zschernig* v. *Miller*, supra. That the laws of Oregon effect international relations "in a persistent and subtle way" and cannot stand if they impair the effect exercise of of the Nation's foreign policy; the same is true of the Laws of Utah.

CONCLUSION

Appellant submits that the Jury array was improperly assembled, that the verdict was not supported by the evidence and that the Defendant was convicted under an unconstitutional statute and therefore the Judgment of the Lower Court should be reversed with instructions for the Lower Court to set aside the jury verdict and dismiss the complaint.

Respectfully submitted,

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