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Consequences of Nationality in American Law

MICHAEL TERRY HERTZ*

Nationality plays its principal role in immigration matters, but it has been put to significant uses in other areas of American law. This article focuses on the consequences of application of the nationality concept in constitutional law, civil rights legislation, taxation, and securities regulation. The author examines the functions which nationality has been required to fulfill and assesses the concept's capacity for accomplishing assigned legal tasks. He criticizes overbroad uses of nationality as a legal regulator but finds that the concept can play a useful, though restricted, role in some areas.

The late Professor Bickel, commenting on the impact of nationality in constitutional law, remarked that "happily . . . the concept of citizenship plays only the most minimal role in the American constitutional scheme Citizenship is at best a simple idea for a simple government."¹ He disagreed with Chief Justice Warren who proclaimed, "Citizenship is man's basic right for it is nothing less than the right to have rights."² Bickel thought that the most significant American freedoms are accorded regardless of citizenship and that, constitutionally, citizenship is largely irrelevant. Chief Justice Warren thought that only citizenship guarantees untrammelled access to American territory³ and enjoyment of the rights which this nation offers. With-

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1. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 387 (1973).

2. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting); *accord*, *Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967).

3. *Worthy v. United States*, 328 F.2d 386, 394 (5th Cir. 1964). *But see* *United*

out citizenship, entry to and residence in the United States can be barred on virtually any grounds.⁴ Both views are valid. Unencumbered congressional power over alien immigration makes citizenship the key to avoiding the Byzantine labyrinth of American immigration laws. On the other hand, citizenship does not entail significantly greater access to basic constitutional rights.

Immigration aside, nationality continues to play an important role in American law. Of course, nationality is not as significant here as it is in Europe, where private law rights and remedies are linked to citizenship status.⁵ Still, despite erosion of state law power over the consequences of nationality, citizenship continues to be a significant factor, particularly in federal legislation and certain aspects of constitutional law. Recent developments demonstrate the vitality of citizenship as a determinant of matters of substance.

How relevant is or should nationality be in defining the scope of legal rights and obligations? When citizenship is relevant to a particular legal scheme, then it is legitimate to make a given rule applicable to citizens but not to aliens. In those situations there

States v. Laub, 385 U.S. 475, 481 (1967) (citizen entry from Cuba without U.S. passport could be made illegal).

4. Recent cases upholding exclusionary classifications that would be highly questionable in other contexts include *Fiallo v. Bell*, 430 U.S. 787 (1977) (excluding illegitimate offspring of American fathers but not those of American mothers) and *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (excluding temporary entry of Marxist speaker despite arguments that first amendment permitted U.S. residents to hear him). See also *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (deportation because of political affiliation).

5. E.g., the application of divorce laws. Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 OHIO ST. L.J. 586, 603 (1961). See generally *Silving, Nationality in Comparative Law*, 5 AM. J. COMP. L. 410 (1956).

An intriguing example is *Simons v. United States*, 452 F.2d 1110 (2d Cir. 1971). The plaintiff and her late ex-husband were Dutch by birth and became naturalized Americans in 1948, two years after their marriage. They then left the United States until 1962, when the plaintiff commenced separation proceedings in New York. She broke these off after she obtained a rapid Mexican divorce. In 1968 the husband died. The plaintiff wife then brought an action to have the original naturalization declared void on the grounds that it was illegally procured. "Her avowed purpose was to place herself in a position where Dutch law would govern their status and the legality of the Mexican divorce, the hope being that this would be declared invalid and that she would thereby become entitled to share in [the husband's] estate." *Id.* at 1112. Presumably, Dutch law would look to American nationality as determining the validity of the divorce and find that American law would recognize the validity of the Mexican divorce, something that Dutch law might not do if the spouses were Dutch and that law directly regulated the validity of a Mexican divorce. Dutch law must have looked to New York law if the citizenship of the husband and wife remained American, as only a few American jurisdictions would recognize a consensual Mexican divorce. See *Perrin v. Perrin*, 408 F.2d 107 (3d Cir. 1969); *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), *cert. denied*, 384 U.S. 971 (1966).

is a functional relationship between citizenship and the kind of obligation to be imposed or the benefit to be accorded. When there is no such direct relationship, there are still times when the "governmental purpose . . . can fairly call upon citizens for a different standard of conduct than from others . . ."⁶ Conversely, the factor of foreign nationality may inhibit the application of American law in the absence of strongly overriding principles.⁷

Nationality indicates an individual's relationship to a given state and signifies membership in a political community.⁸ That relationship may attach involuntarily by birth within the jurisdiction⁹ or to citizen parents;¹⁰ by conquest, treaty,¹¹ or annexation;¹² or by voluntary action through naturalization.¹³ In some instances, a person may actually exercise the rights of citizenship while lacking *de jure* nationality,¹⁴ and in others he may have citizenship without exercising the rights thereof or even realizing that he is entitled to do so.¹⁵ As a standard for attaching legal consequences, nationality may thus be too broad or too narrow. Under these circumstances, although international law recognizes a state's right to base legal obligations upon citizenship,¹⁶ this country correctly makes limited use of that jurisdictional basis. Moreover, when according basic rights, the spirit of equality has come to regard citizenship as irrelevant, except when allegiance, the primary characteristic of nationality, strongly justifies a distinction along citizenship lines.

Citizenship itself probably does affect the behavior of persons who have it. Citizenship undoubtedly instills in citizens greater loyalty towards American institutions and greater incentive to

6. Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 OHIO ST. L.J. 586, 610 (1961).

7. *Id.* at 603, 610.

8. E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 7 (1915).

9. U.S. CONST. amend. XIV, § 1.

10. 8 U.S.C. § 1401(a)(3) (1976).

11. *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 162 (1892).

12. *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 902 (2d Cir. 1943).

13. 8 U.S.C. § 1427 (1976).

14. *United States v. Lucienne d'Hotelle*, 558 F.2d 37, 43 (1st Cir. 1977) (use of American passport estopped holder from denying citizen's tax obligations); *Joyce v. Director of Pub. Prosecutions*, [1946] A.C. 347 (H.L.) (noncitizen holder of British passport could be charged with treason).

15. *Benitez Rexach v. United States*, 390 F.2d 631 (1st Cir.) *cert. denied*, 393 U.S. 833 (1968) (*de jure* citizenship alone was adequate basis for taxation).

16. RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES 30 (1965).

preserve and foster American traditions.¹⁷ Moreover, the legal consequences that attach to citizenship or noncitizenship may justify consequences that might not be independently supportable: if noncitizens can be deported, then noncitizens might be denied the right to participate in activities requiring guaranteed permanence within society. Noncitizenship may also affect relations between this country and other nations. American rules governing noncitizens may be used in negotiating rights for American citizens abroad.¹⁸ Finally, roles played by noncitizens within the United States may have an impact upon citizens' views of policies connected with those roles. Government may have to consider such views when making decisions for an orderly society.¹⁹

Although the preceding effects of citizenship are enumerable, their weight may be slight or uncertain in many instances. One must generally conclude that they should be given limited consideration in fashioning policy, except when directly applicable. In particular, a citizenship test for conferring domestic benefits should be employed only for compelling reasons. However, once the decision has been made to establish such a test, the manner in which it will be interpreted or constitutionally reviewed may vary greatly. The judiciary, which has the final task of reviewing many such tests, must investigate the relationship between the purpose for the citizenship requirement, the qualities attaching to citizenship supporting it, and the nature of the body formulating the rule in order to determine how the factor of citizenship will be handled. The succeeding sections of this article will explore the uses and misuses of nationality as a legal dividing line in American law.

CITIZENSHIP AND INDIVIDUAL RIGHTS

Historically, nationality has been used as a label for separating the privileged from the deprived. At common law, aliens could neither participate in the political process nor hold public office.²⁰ They could not take land by act of the law, and although their title

17. *Cf.* *Foley v. Connelie*, 435 U.S. 291, 299-300 (1978) (citizens may have greater familiarity and sympathy with American traditions); *United States v. Gordon-Nikkar*, 518 F.2d 972, 976-77 (5th Cir. 1975) (same); *Perkins v. Smith*, 370 F. Supp. 134, 141 (D. Md. 1974) (Winter, J., concurring) (same), *aff'd*, 426 U.S. 913 (1976).

18. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 104 (1976).

19. *See* text accompanying notes 99-101 *infra*.

20. At least in its early history, American rules appear to have been somewhat more lenient than English law. *See* Rosberg, *Aliens and Equal Protection: Why not the Right to Vote?*, 75 *MICH. L. REV.* 1092, 1093-1100 (1977) [hereinafter cited as *Voting*]. The English and Commonwealth approaches are described in *Rex v. Heighton* (No. 1), 69 D.L.R. 386, 393-96, 55 N.S.R. 512, 523-25 (Can. 1922).

to land taken by purchase or devise was good against third persons, the Crown could cause it to be forfeited at any time through appropriate proceedings. Alien-owned lands were not inheritable but would escheat to the Crown upon the holder's death.²¹ Alien friends did have the capacity to sue or be sued,²² although enemy aliens did not.²³

Statutes, generally on the state level, increased these disabilities to burden alien participation in economic and social activities.²⁴ "The range of state statutes limiting aliens' access to trades or professions has been extraordinarily broad."²⁵ These statutes prevailed even in the face of exclusively federal immigration policies which, in general, did not impose disabilities on aliens once they were admitted for permanent residence.²⁶

Although the fourteenth amendment has been held applicable to aliens since 1886,²⁷ state power over alien participation in local activities was largely unlimited until 1948 and was not uncontestedly truncated until the early 1970s. Although the cases have run strongly in favor of aliens since 1971,²⁸ the most recent Supreme Court decisions halted the unanimity of the trend and leave uncertain the degree to which nationality may be utilized by the states as a regulatory basis.²⁹

21. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 623 (1976); Spender, *The Alien Landowner in Canada*, 51 CAN. B. REV. 389, 390 (1973).

22. Daubigny v. Davallon, 2 Anst. 462, 467, 145 Eng. Rep. 936, 937 (Exch. 1794); accord, Disconto Gesellschaft v. Terlinden, 127 Wis. 651, 658, 106 N.W. 821, 822 (1906), *aff'd*, 208 U.S. 570 (1908). See 42 U.S.C. § 1981 (1976).

23. Johnson v. Eisentrager, 339 U.S. 763, 776 (1950).

24. For a sampling of employment restrictions under state law, see Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012, 1021-22 (1957).

25. H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 45 (2d ed. 1976).

26. See Graham v. Richardson, 403 U.S. 365, 377 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948).

In fact, since 1870 federal law has provided: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981 (1976) (originally enacted as the Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 144).

27. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

28. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971), and cases cited in notes 68 & 72.

29. Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978). See also Perkins v. Smith, 426 U.S. 913 (1976), *aff'g* 370 F. Supp. 134 (D. Md. 1974).

The following issues are related to the problem of the constitutional limits of state power over resident aliens:

- (1) Limits on state discrimination against nonresident aliens
- (2) Constitutional limits on federal power over resident aliens
- (3) Federal constitutional rights which extend to nonresident aliens
- (4) Federal legislation governing discrimination by individuals against aliens.

State Power Over Resident Aliens

Until 1948 constitutional law permitted the states broad latitude in discriminating on the basis of alienage. Details of the early cases have been developed elsewhere.³⁰ Here they are discussed only to indicate the development of constitutional weapons against state alienage legislation.

The Court first applied fourteenth amendment equal protection in favor of aliens in *Yick Wo v. Hopkins*.³¹ A San Francisco ordinance prohibited laundries in certain kinds of buildings, unless consent had been given by the city board of supervisors. Nondiscriminatory on its face, the ordinance was applied solely against laundries owned and operated by Chinese. The Supreme Court struck down the unequal application of the statute, as "no reason for it exists except hostility to the race and nationality to which the petitioners belong."³²

Aliens bore the burden of proving "hostility" as the motivating factor for discriminatory legislation, and the Court assisted them only in obvious instances such as *Yick Wo*. In *Patsone v. Pennsylvania*,³³ the defendant alien had been prosecuted for owning a shotgun, contrary to state law making it unlawful for an alien "to kill any wild bird or animal except in defense of person or property and 'to that end' [made] it unlawful for such [alien] to own

30. See generally Griffith, *Some Rights and Disabilities of Aliens*, 2 OHIO N. L. REV. 613 (1975); Rosales, *Resident Aliens and the Right to Work: The Quest for Equal Protection*, 2 HASTINGS CONST. L.Q. 1029 (1975); Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 293-98 [hereinafter cited as *Protection*]; Note, *Aliens' Right to Teach: Political Socialization and the Public Schools*, 85 YALE L.J. 90 (1975) [hereinafter cited as *Teaching*].

31. 118 U.S. 356 (1886).

32. *Id.* at 374. Although "nationality" might be read to refer to national origin and not alienage, the Supreme Court has not done so. See *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (analogizing *Yick Wo's* holding as to race in suggesting that equal protection concepts undermine discrimination on national origin basis).

33. 232 U.S. 138 (1914).

. . . a shotgun."³⁴ The Court, in finding that the discrimination did not violate equal protection, held that the prohibition of aliens' use of shotguns was a reasonable means by which to conserve wildlife for state citizens, a legitimate state purpose. The state lawmakers were permitted to decide "that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent"³⁵—that is, the slaughter of wildlife—as opposed to other persons not citizens of the state.

For similar reasons, states had the power to prohibit alien employment on public works projects³⁶ or in public service.³⁷ It was only when a state attempted to exclude aliens from virtually all gainful employment that the Court struck down the law. In *Truax v. Raich*,³⁸ the legislation did not pertain to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State."³⁹ The state could, therefore, point to no "special public interest" to justify the general prohibition of alien employment and had to indicate specific reasons for such wholesale exclusion beyond a broad declaration that such employment imperiled the public welfare. On the other hand, when the state sought to prohibit alien leasing of farm land, the state was allowed to control "the privilege of owning or controlling agricultural land within the State. The quality and allegiance of those who own, occupy, and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself."⁴⁰

Similarly, the state could prevent an alien from operating a poolhall, which the Court qualified as a "business of dangerous tendencies."⁴¹ The Court did not expressly limit state regulation to such "dangerous" businesses and did not state when regulation of individual classes of businesses might lead to the result forbidden in *Truax v. Raich*.⁴²

34. *Id.* at 143.

35. *Id.* at 144.

36. *Heim v. McCall*, 239 U.S. 175 (1915).

37. *Crane v. New York*, 239 U.S. 195 (1915).

38. 239 U.S. 33 (1915).

39. *Id.* at 39.

40. *Terrace v. Thompson*, 263 U.S. 197, 221 (1923).

41. *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392, 397 (1927).

42. See *Protection*, *supra* note 30, at 296 (explaining *Truax* in terms of freedom of contract principles).

Reliance on treaties was generally to no avail.⁴³ In only one case was an alien able to convince the Court that his business, pawn-brokering, was a “trade” within treaty language permitting Japanese in the United States “to carry on trade . . . upon the same terms as native citizens or subjects.”⁴⁴ A similar argument was rejected when the relevant treaty protected “commerce,” as the Court felt that the “owner of a [poolhall] does not necessarily buy, sell, or exchange merchandise or otherwise participate in commerce.”⁴⁵ The pawnbroker’s case was distinguished as involving a business concerned with merchandise as security and “the sale of merchandise when necessary to realize on the security.”⁴⁶

Although *Truax v. Raich* did not directly involve the exclusive federal power over immigration and naturalization, the Court there utilized the existence of that exclusive power as a means of limiting the basis upon which the state law could be justified.⁴⁷ In *Hines v. Davidowitz*,⁴⁸ the Court used federal legislation as a means, through the supremacy clause, of preventing the operation of state legislation. The Court found enforcement of a Pennsylvania statute requiring the registration of aliens foreclosed by the federal Alien Registration Act of 1940, which, together with the immigration and naturalization laws, formed a comprehensive and integrated scheme for the regulation of aliens.⁴⁹

43. See, e.g., *Terrace v. Thompson*, 263 U.S. 197 (1923); *Crane v. New York*, 239 U.S. 195 (1915); *Heim v. McCall*, 239 U.S. 175 (1915); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914).

44. *Asakura v. Seattle*, 265 U.S. 332, 340 (1924).

45. *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392, 396 (1927).

46. *Id.*

47. Although the naturalization and immigration powers are exclusively federal, “every state enactment which in any way deals with aliens is [not] a regulation of immigration and [not] *per se* preempted by this constitutional power, whether latent or exercised.” *De Canas v. Bica*, 424 U.S. 351, 355 (1976) (absent congressional action, state law prohibiting hiring of illegal aliens did not transgress federal authority).

48. 312 U.S. 52 (1941).

49. Pennsylvania’s law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. . . . And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans. . . . When [Congress] made this addition [of alien registration] to its uniform naturalization and immigration laws, it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against.

Id. at 67-68, 74.

Although federal preemption of a field is not lightly inferred, the strength of the inference varies with the subject matter. In areas traditionally associated with state power, federal law ousts state legislation only if that is the "clear and manifest purpose of Congress."⁵⁰ But when the subject matter is national, "the Court is more vigilant in striking down state incursions into subjects that Congress may have reserved to itself."⁵¹ *Hines v. Davidowitz*⁵² marked the Court's willingness to turn federal litigation into a sword against discriminatory state practices as well as the beginning of the erosion of state power over aliens.

Takahashi v. Fish & Game Commission,⁵³ the first direct attack on state alien laws, relied primarily on the equal protection clause⁵⁴ but also included the supremacy clause.⁵⁵ The California Fish and Game Code had banned the issuance of fishing licenses to any "person ineligible to citizenship." Only the Japanese remained ineligible as a national group. The Japanese petitioner was denied a license to fish off California and commenced proceedings to compel issuance. California argued that the state law fell within the rationale of the "special public interest" upheld in the earlier cases: the law reduced the number of commercial fishermen and conserved fish for its citizens. Denial of licenses only to aliens ineligible to citizenship was reasonable because California was simply following the federal naturalization classification.

The Supreme Court held for the alien petitioner. Discrimination by the federal government against petitioner's class in naturalization did not authorize the states to discriminate for wholly different purposes. The federal government has exclusive power to regulate naturalization, and the states "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States."⁵⁶ The state could rely only upon its "ownership" of off-shore fish to justify discrimination. Without overruling *Patsone*,⁵⁷ the Court nevertheless found such "ownership" too "slender a

50. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

51. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 386 (1978).

52. 312 U.S. 52 (1941).

53. 334 U.S. 410 (1948).

54. U.S. CONST. amend. XIV, § 1.

55. *Id.* art. VI, § 2.

56. 334 U.S. at 419.

57. *Patsone v. Pennsylvania*, 232 U.S. 138 (1914).

reed" to justify the exclusion of the Japanese from fishing when all others were permitted.⁵⁸ "Assuming the continued validity of [the alien land cases],"⁵⁹ the Court found them limited to the peculiar institution of real property.

Thereafter, the highest courts in three Western states struck down alien land laws as violations of the fourteenth amendment.⁶⁰ However, it was not until 1969 that California took the lead in ending state prohibitions against public employment of aliens. Relying on both federal immigration legislation and fourteenth amendment equal protection, the California Supreme Court declared that the state could not deny aliens the right to employment on public works projects.⁶¹ The Supreme Court of Washington agreed with respect to municipal employment,⁶² and the federal district court for the Virgin Islands, applying "equal protection" notions inherent in fifth amendment due process to the island government, held unconstitutional discrimination against aliens in the availability of public educational resources.⁶³

In 1971 the Supreme Court returned to the issue of state discrimination against aliens, reviewing welfare cases in which states had imposed nationality restrictions on eligibility for welfare assistance. The Court in *Graham v. Richardson*⁶⁴ used both equal protection and the supremacy clause in reasoning that the

58. 334 U.S. at 421.

59. *Id.* at 422. Just prior to *Takahashi*, *Oyama v. California*, 332 U.S. 633 (1948), distinguished on narrow grounds one of the older land cases, *Cockrill v. California*, 268 U.S. 258 (1925). California law voided transfers of real property to persons ineligible for citizenship and established a presumption of intent to evade the law if the land was held in the name of an eligible person but the consideration for the transfer was paid by an ineligible person. *Cockrill* had upheld the presumption under due process and equal protection attacks that focused on discrimination against the alien who had paid the consideration. In *Oyama*, title was held by the alien's six-year-old, American citizen son. The Court ruled that the law unconstitutionally discriminated against the son because it presumed that he was holding the land in trust for his parent, a presumption which would not be made if the parent were an alien eligible for citizenship. 332 U.S. at 641. Four of the seven justices voting to strike down the law would have reexamined *Cockrill* and overruled it.

60. *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952); *State v. Oakland*, 129 Mont. 347, 287 P.2d 39 (1955); *Kenji Namba v. McCourt*, 185 Or. 79, 204 P.2d 569 (1949). The Supreme Court has never overruled the alien land cases, although it would doubtless do so if the occasion presented itself. Lowe, *The Arizona Alien Land Law: Its Meaning and Constitutional Validity*, [1976] ARIZ. ST. L. J. 253, 272; Morrison, *supra* note 21, at 644; Sullivan, *Alien Land Laws: A Re-evaluation*, 36 TEMP. L.Q. 15, 53 (1962).

61. *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

62. *Hsieh v. Civil Serv. Comm'n*, 79 Wash. 2d 524, 488 P.2d 515 (1971).

63. *Chapman v. Gerard*, 341 F. Supp. 1170 (D.V.I. 1970), *aff'd*, 456 F.2d 577 (3d Cir. 1972). See also *Williams v. Williams*, 328 F. Supp. 1380 (D.V.I. 1971) (deportable alien must be given access to divorce court).

64. 403 U.S. 365 (1971).

laws were unconstitutional. For the first time, the Court declared that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."⁶⁵ The state relied on the "special public interest" doctrine favoring local citizens over aliens in the distribution of limited state resources. The Court, however, noted the doubt that *Takahashi* had cast on the continuing vitality of the doctrine, as well as rejection of the "right/privilege" distinction upon which citizenship-based discrimination is grounded. "There can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of the State."⁶⁶ As an independent basis, the Court found that Congress had provided in immigration legislation for the exclusion of aliens who are or are likely to become public charges, but had not imposed any burden on aliens who became indigent after entry. The state restrictions impermissibly encroached on exclusive federal power.⁶⁷

Graham loosed a torrent of lower court decisions, almost all ruling against local ordinances or statutes discriminating against aliens.⁶⁸ Then, in 1973, the Supreme Court applied *Graham*'s equal protection reasoning in *In re Griffiths*⁶⁹ to end a state prohibition against the practice of law by aliens and again in *Sugarman v. Dougall*⁷⁰ to end a state prohibition against employment of aliens in the state civil service. The Court specifically noted in *Dougall* that it was not holding

that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office . . . [as] "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen . . ." Such power inheres in the State by virtue of its obligation . . . "to preserve the basic conception of a political community. . . ." And this power and responsibility of the State applies

65. *Id.* at 372.

66. *Id.* at 376.

67. *Id.* at 380.

68. *E.g.*, *Sailer v. Tonkin*, 356 F. Supp. 72 (D.V.I. 1973) (compensation under Criminal Victims Compensation Act); *Lopez v. White Plains Hous. Auth.*, 355 F. Supp. 1016 (S.D.N.Y. 1972) (eligibility for public housing); *Arias v. Examining Bd. of Refrig. & Air Cond. Tech.*, 353 F. Supp. 857 (D.P.R. 1972) (air conditioning technician's license); *Mohamed v. Parks*, 352 F. Supp. 518 (D. Mass. 1973) (municipal employment); *Teitscheid v. Leopold*, 342 F. Supp. 299 (D. Vt. 1971) (state employment); *Raffaelli v. Committee of Bar Examiners*, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972) (bar admission); *People v. Rappard*, 28 Cal. App. 3d 302, 104 Cal. Rptr. 535 (1972) (possession of concealable firearm).

69. 413 U.S. 717 (1973).

70. 413 U.S. 634 (1973).

. . . [to] officers who participate directly in the formulation, execution, or review of broad public policy [,] perform[ing] functions that go to the heart of representative government.⁷¹

Although the courts continued to end state limitations on alien participation in various economic and social activities,⁷² they began to examine matters that could be said to involve "the basic conception of a political community."⁷³ Aliens could, of course, be denied the right to vote in a state election.⁷⁴ But what of a local school election?⁷⁵ What of participating in jury duty?⁷⁶ The *Dougall* dictum opened a fresh field of inquiry and fresh difficulties.

The Supreme Court followed the *Graham* line of cases in striking down a Puerto Rico law licensing only citizens as private engineers⁷⁷ and a New York law limiting disbursement of educational scholarships to citizens.⁷⁸ It found its first explicit application for the *Dougall* exception in a statute providing that "[n]o person shall be appointed to the [state] police force unless he shall be a citizen of the United States."⁷⁹ *Foley v. Connelie*⁸⁰ characterized the Court's earlier decisions as involving "exclusions [which] struck at the non-citizens' ability to exist in the community, a position seemingly inconsistent with the congressional determina-

71. *Id.* at 647.

72. The following cases are illustrative of the range of decisions: (1) Professions: Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (civil engineer); Surmeli v. New York, 412 F. Supp. 394 (S.D.N.Y.) (physician), *aff'd*, 556 F.2d 560 (2d Cir. 1976); Wong v. Hohnstrom, 405 F. Supp. 727 (D. Minn. 1975) (pharmacist). (2) Occupational Licenses: Arizona State Liquor Bd. v. Ali, 550 P.2d 663 (Ariz. Ct. App. 1976) (liquor license); Sundram v. City of Niagara Falls, 77 Misc. 2d 1002, 357 N.Y.S.2d 943 (Sup. Ct. 1973) (taxi driver license), *aff'd*, 44 App. Div. 2d 906, 356 N.Y.S.2d 1023 (1974).

(3) Public Employment: Mendoza v. City of Miami, 483 F.2d 430 (5th Cir. 1973); C.D.R. Enterprises v. Board of Educ., 412 F. Supp. 1164 (E.D.N.Y. 1976), *aff'd*, 429 U.S. 1031 (1977).

(4) Education: Nyquist v. Mauclet, 432 U.S. 1 (1977) (scholarships); Moreno v. University of Md., 420 F. Supp. 541 (D. Md. 1976) (tuition; uses due process clause); Jagnandan v. Giles, 379 F. Supp. 1178 (N.D. Miss. 1974) (tuition), *aff'd on other grounds*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977); Buckton v. National Collegiate Athletic Ass'n, 366 F. Supp. 1152 (D. Mass. 1973) (sports regulations).

(5) Miscellaneous: Frolov v. Delo, 86 Misc. 2d 485, 383 N.Y.S.2d 470 (Sup. Ct. 1976) (hunting and fishing licenses).

73. *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972).

74. *Park v. State*, 528 P.2d 785 (Alaska 1974).

75. *Skaftte v. Rorex*, 553 P.2d 830 (Colo. 1976) (constitutionality upheld), *appeal dismissed*, 430 U.S. 961 (1977).

76. *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974) (constitutionality upheld), *aff'd*, 426 U.S. 913 (1976).

77. *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976).

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

79. N.Y. EXEC. LAW § 215(3) (McKinney 1972).

80. 435 U.S. 291 (1978). *See also* Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977), *judgment vacated*, 436 U.S. 901 (1978).

tion to admit the alien to permanent residence."⁸¹ Although the Court would treat "certain restrictions on aliens with 'heightened judicial solicitude,'" not every statutory exclusion of aliens would have to "clear the high hurdle of 'strict scrutiny,' because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.'"⁸²

The *Foley* Court thus shifted the post of police officer into a category in which "[t]he State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."⁸³ In finding a lesser need to justify a citizenship requirement for this occupation than for others, the Court reasoned that

the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals A policeman vested with [his] plenary discretionary powers . . . is not to be equated with a private person engaged in routine public employment or other "common occupations of the community" who exercises no broad power over people generally In short, it would be as anomalous to conclude that citizens may be subjected to the broad discretionary powers of noncitizen police officers as it would be to say that judicial officers and jurors with power to judge citizens can be aliens. It is not surprising . . . that most States expressly confine the employment of police officers to citizens, whom the State may reasonably presume to be more familiar with and sympathetic to American traditions. Police officers very clearly fall within the category of "important nonelective . . . officers who participate directly in the . . . execution . . . of broad public policy. . . ." In the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position.⁸⁴

Facially, the issue in *Foley* is whether or not a policeman falls within the *Dougall* exception. If he does, strict scrutiny is not required and the law is constitutional. The reasons advanced by the Court are minimally rational ones for a citizenship test. If, on the other hand, the policeman were to be treated as the lawyer was in *Griffiths*, strict scrutiny is not satisfied. As the *Foley* dissent indicates, relying on the *Dougall* exception requires inquiry into whether policemen directly participate "in the formulation, execution, or review of broad public policy."⁸⁵ It is hard to disagree with Mr. Justice Stevens when he argues that front-line police-

81. 435 U.S. at 295. This characterization refers to an interweaving of equal protection and supremacy clause arguments found in earlier cases. See *Protection, supra* note 30, at 315-16. *Foley*, however, is purely an equal protection case.

82. 435 U.S. at 295.

83. *Id.* at 296.

84. *Id.* at 298-300.

85. *Id.* at 310 (Stevens, J., dissenting). See also *In re Griffiths*, 413 U.S. 717, 729

men have nothing to do with policy-making, even in its execution.⁸⁶ At least one Justice decided that he could not reconcile *Griffiths*, *Foley*, and the *Dougall* exception and concurred because of doubts about earlier decisions in which he had joined.⁸⁷

In the term after *Foley*, the Court again reversed a federal court⁸⁸ which had struck down a New York alien law.⁸⁹ *Ambach v. Norwick*⁹⁰ sustained legislation denying noncitizens the right to teach in public elementary and high schools. "The decisions of this Court regarding the permissibility of statutory classifications involving aliens have not formed an unwavering line over the years," the Court reported.⁹¹ Reviewing those decisions up through *Foley*, the majority found that "[t]he distinction between citizens and aliens . . . is fundamental to the definition and government of a State."⁹² Governmental functions may be reserved for citizens. And the role of the public school teacher, like that of the policeman, "'go[es] to the heart of representative government'"⁹³ by virtue of "the role of public education and . . . the degree of responsibility and discretion teachers possess in fulfilling that role."⁹⁴

Before engaging in a strictly doctrinal analysis of the cases, let us reexamine the justifications for the exclusion of aliens from employment as policemen or teachers.⁹⁵ Take three persons born in Mexico, who lived there until age twenty-one and then in the United States for five years. One may remain a Mexican citizen; one may be a recently naturalized American; and one may be an American from birth. Citizenship is not a convincing test for the traditions, heritage, or training that each has received, for they may be very much the same. One can, of course, argue that the citizen from birth is more *likely* to know about American traditions than the noncitizen, but then what of the newly naturalized citizen? His experience in the United States is no greater than

(1973) (lawyer not "so close to the core of the political process as to make him a formulator of government policy").

86. 435 U.S. at 310.

87. *Id.* at 300 (Stewart, J., concurring). He found no such difficulties in *Ambach v. Norwick*, 441 U.S. 68 (1979), joining in the opinion of the Court.

88. *Norwick v. Nyquist*, 417 F. Supp. 913 (S.D.N.Y. 1976).

89. N.Y. EDUC. LAW § 3001(3) (McKinney 1970).

90. 441 U.S. 68 (1979).

91. *Id.* at 72.

92. *Id.* at 75.

93. *Id.* at 75-76 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

94. *Id.* at 75 (citing *Foley v. Connelie*, 435 U.S. 291, 297 (1978)).

95. Forbidden justifications include treating public employment as a resource limited to state citizens, *Sugarman v. Dougall*, 413 U.S. 634, 635-45 (1973), or imposing a citizenship limitation to encourage naturalization, *Nyquist v. Mauclet*, 432 U.S. 1, 9-11 (1977).

that of his noncitizen counterpart. Although it is true that citizens as a class are more likely to be familiar with American language, customs, and laws than aliens as a class, those attributes vary so widely among the members of each class that the overall conclusion is suspect.⁹⁶ The paramount feature of citizenship is that it is perhaps our best measure of the immeasurable⁹⁷ quality of personal commitment to America and its values.⁹⁸

Regardless of whether alienage fairly stands as a hallmark for lack of knowledge about American political customs and mores, a state may view the lack of personal commitment to the customs and mores from two perspectives. First, other members of the local community may react negatively to the fulfillment of a particular role by an alien. General knowledge that noncitizens are policemen may cause a negative public reaction to all policemen of foreign descent and reduce their effectiveness as symbols of an orderly society.⁹⁹ Then, too, lack of personal commitment to American ideals by individual aliens may undermine police authority with the public. To be effective role models for their students, teachers must also be esteemed.¹⁰⁰ Although the Supreme Court has uniformly held that "the State's need or desire to engender political support for its . . . programs cannot by itself justify an otherwise invidious classification,"¹⁰¹ the right of the state to employ a classification in defining a function vital to the security of the local political community differs from a purported right to justify an otherwise impermissible classification in distributing social and economic benefits.

96. *Perkins v. Smith*, 370 F. Supp. 134, 139-40 (D. Md. 1974) (Winter, J., concurring), *aff'd*, 426 U.S. 913 (1976). *See also Voting*, *supra* note 20, at 1117-25 (citizenship constitutionally inadequate measure of familiarity with language and knowledge for vote denial). *Contra*, *United States v. Gordon-Nikkar*, 518 F.2d 972, 976-77 (5th Cir. 1975) (quoting *Perkins v. Smith*, 370 F. Supp. at 138; *semble*, familiarity with custom measured by citizenship); *Teaching*, *supra* note 30, at 105.

97. 370 F. Supp. at 141 (Winter, J., concurring).

98. *Id.* at 140-42; *Voting*, *supra* note 20, at 1126-27 (acceptance of values). *Cf. Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 8-9 (1977) (citizen as responsible member of society).

99. *Cf. Teaching*, *supra* note 30, at 104 (alien teacher's attitude may have negative impact on political socialization of students). *See also Hall, Police and Law in a Democratic Society*, 28 IND. L.J. 133, 156 (1953) (public support essential to police effectiveness).

100. *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979).

101. *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 391 n.24 (1978). *Accord, Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 266 (1974). *See also Palmer v. Thompson*, 403 U.S. 217, 226 (1971).

Secondly, both the policeman and the teacher, to perform their jobs properly, must appreciate the values important to the American system, must integrate themselves into that system by adopting American habits and customs, and must be loyal to and sacrifice personal interests for that system. The noncitizen may have the same knowledge concerning these matters as a citizen, but he may lack the motivation that citizens have to appreciate, integrate, and sacrifice. These are difficult criteria for a mechanical investigative process to weigh, and yet they are important. Therefore, local authorities may be justified in using citizenship as a hallmark for these attributes.

Emphasis on the public's negative reaction to an alien's fulfillment of a given role and on that alien's ability to discharge duties inherent in that role derives from the argument that the particular function is intertwined to such an extent with the concept of a political community that, to the extent that citizenship is relevant in defining the latter, it may be used to define eligibility for the former. To make the argument, though, one must examine the "concept of a political community"¹⁰² and its relationship to citizenship.

The states have no control over the definition of federal citizenship. Why, therefore, may they utilize federal citizenship as a defining rule for determining participation in local political life? Take the right to vote in a state election. Although that right is fundamental, the Supreme Court will not require the showing of a compelling state interest to sustain voting restrictions based on bona fide residence, age, and citizenship.¹⁰³ The same is undoubtedly true of high public office.¹⁰⁴ It has been argued that if alienage is a suspect category, the state should not only be required to submit the denial to review under strict scrutiny but should also be required to show a compelling interest for denying the vote. If the critical factor of constitutional "suspectness" is political powerlessness, runs the argument, then "the invalidation of a statute that excludes the members of a suspect class from participation in the political process is itself a way of eliminating . . .

102. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972).

103. *Hill v. Stone*, 421 U.S. 289, 297 (1975); *Dunn v. Blumstein*, 405 U.S. 330, 349 (1972). See also *Nyquist v. Mauclet*, 432 U.S. 1, 11 (1977) (citizenship); *Skafte v. Rorex*, 430 U.S. 961, 961 (1977), *dismissing appeal from* 553 P.2d 830 (Colo. 1976) (citizenship).

104. See, e.g., *Chimento v. Stark*, 353 F. Supp. 1211 (D.N.H.) (three judge court) (seven-year residency requirement for governor upheld), *aff'd*, 414 U.S. 802 (1973); *id.* at 1218-19 (Campbell, J., concurring) ("compelling interest test" not necessarily appropriate with respect to residency duration for high office).

the need for strict scrutiny."¹⁰⁵ The argument, however, is circular, relying on the prohibited practice to support its own invalidation.¹⁰⁶ Moreover, it fails to recognize that citizenship, like age and residence, may play an indispensable, though not easily quantifiable,¹⁰⁷ role in defining eligibility for participation in a political community.

Popular rule, which Americans consider to be the very essence of their political communities, assumes at a minimum that the voter has sufficient understanding and maturity to consider matters presented for his decision and that he has a sufficient nexus to the community concerned to partake in decisionmaking. Age and bona fide residence¹⁰⁸ are used as factors with respect to these concerns. They are not subject to attack under the "compelling state interest" test even though neither is closely tailored to meet the problems addressed, because both provide "the best available way of drawing a boundary for purposes of the franchise."¹⁰⁹ Citizenship may play a subsidiary role with respect to the understanding of issues,¹¹⁰ but if that were its only role it would be obviously deficient. Yet the state can utilize the criteria of federal citizenship as a factor for establishing political participation.

Reference to federal citizenship would appear to be sufficiently adapted to defining certain state political functions because local political entities bear an important relationship to our national whole. The locale is part of the national community, and adherence to national purposes and interests affects political decisionmaking at all levels. A local school board official may be faced with questions involving the political socialization of school children,¹¹¹ or a local water board member may have to deal with allocation problems having regional or national impact. Loyalty to the national body is thus relevant to the local body politic. Citi-

105. *Voting*, *supra* note 20, at 1105-06.

106. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1053 (1978).

107. *Perkins v. Smith*, 370 F. Supp. 134, 141 (D. Md. 1974) (Winter, J., concurring), *aff'd*, 426 U.S. 913 (1976).

108. Such bona fide residence in a state constitutes state "citizenship." U.S. CONST. amend. XIV, § 1.

109. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 766 (1978) (referring to residence).

110. *See* note 96 *supra*.

111. *Cf. Teaching*, *supra* note 30, at 99-105 (instilling American values a state interest).

zenship is the only yardstick available by which to measure loyalty with any degree of realistic efficiency.

Citizenship can therefore be used to define the right to participate in functions of a local political community. But any close examination of the reasons for that conclusion ultimately confronts our inability to measure certain human qualities and perceptions and our need for an arbitrary concept, "citizenship," to take account of them. The "special significance" that the *Norwick* majority finds in citizenship¹¹² justifies limits to the participation of noncitizens, but the ultimate questions are "how much significance?" and "how much limitation?" Those questions cannot be answered merely by showing that the term enjoys multiple mention in the Constitution.¹¹³ The fact that one must be a citizen to hold certain constitutional offices does not measure the scope for which the status may be used in defining eligibility for other offices. It is through an understanding of the concept's importance to the framers of the Constitution that one can determine the ramifications that it should be accorded. The preceding examination of citizenship demonstrates that it has qualities which should be given only limited weight.

Given the limited practical meaning of citizenship, the concept of "governmental function" which is used to test a citizenship requirement should be narrowly circumscribed. Even in that light, *Foley* was a difficult case and the result defensible. But *Norwick* is riddled with hair-splitting distinctions and needlessly expands the *Dougall* exception.

In *Griffiths* the Court decided that aliens may not be barred from becoming lawyers; *Foley* held otherwise for policemen. As the *Foley* dissenters placed heavy emphasis on the difficulty in distinguishing the two cases,¹¹⁴ a comparison of the cases will test the preceding analysis. If one looks first at the attitude that

112. *Ambach v. Norwick*, 441 U.S. 68, 75 (1979).

113. *Id.* (citing *Sugarman v. Dougall*, 413 U.S. 634, 651-52 (Rehnquist, J., dissenting)). The distinction has significance with respect to certain public offices, U.S. CONST. art. I, § 2, cl. 2 (representatives), art. I, § 3, cl. 3 (senators), art. II, § 1, cl. 5 (President); voting rights, amends. XV (equality on basis of race), XIX (sex), XXIV (abolishing poll tax), XXVI (age); judicial authority, art. III, § 2, cl. 1 (authority over both U.S. and foreign citizens), amend. XI (limiting authority over actions against states); and congressional authority, art. I, § 8, cl. 4 (naturalization). It is also used to define enjoyment of privileges and immunities, art. IV, § 2, cl. 1, amend. XIV, § 1. The latter have limited constitutional significance. See 413 U.S. at 652 (Rehnquist, J., dissenting). Cf. *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371 (1978) (access of nonresidents to hunting in state not protected by privileges and immunities clause). The only other constitutional consequences of citizenship involve constitutional offices and the vote.

114. *Foley v. Connelie*, 435 U.S. 291, 306 (1978) (Marshall, J., dissenting); *id.* at 308 (Stevens, J., dissenting).

others have toward the role, it is clear that the policeman symbolizes the state. The private lawyer, although technically an "officer of the court,"¹¹⁵ is not to the public a representative of the state or even a primary symbol of law in society. He is a private professional, whereas the policeman is a public servant. Looking then at the importance of American tradition in fulfilling this role, one can argue, as did the Court,¹¹⁶ that policemen have peculiar discretion with strong impact upon individuals over whom they exercise authority when they operate outside the direct control of higher officials. In contrast, lawyers acting on their own authority merely advise; when exercising functions likely to have the most severe impact on our traditions, they operate under the scrutiny of judges and other authorities.

Many of the above arguments may appear to apply to the public school teacher. However, the New York education law is both over and underinclusive and for that reason should have been found to deny equal protection.¹¹⁷ First, New York applied its citizenship rule only to public school teachers and not to private school teachers who performed identical functions. The majority argued that "the State has a stronger interest in insuring that the schools it most directly controls, and for which it bears the cost, are as effective as possible in teaching these courses."¹¹⁸ But if the role of teachers in "influenc[ing] the attitudes of students toward government, the political process, and a citizen's social responsibilities . . . is crucial to the continued good health of a democracy,"¹¹⁹ the stated distinction between public and private schools appears irrelevant. Second, the rule applies to all teachers, whether or not they are concerned with courses connected with the politicization process. The Court emphasized that all New York teachers *may* be called upon to teach such subjects,¹²⁰ but that should not justify the inclusion of all teachers in the prohibited group unless the state can demonstrate that they do, in fact, tend to teach them. Although teachers function as role mod-

115. *In re Griffiths*, 413 U.S. 717, 723, 728-29 (1973).

116. *Foley v. Connelie*, 435 U.S. at 297-99. See also Hall, *Police and Law in a Democratic Society*, 28 *IND. L.J.* 134, 155 (1953) (police must understand own limited function, as opposed to broader powers of foreign police).

117. *Ambach v. Norwick*, 441 U.S. 68, 86-87 (1979) (Blackmun, J., dissenting).

118. *Id.* at 78 n.8.

119. *Id.* at 79. See *id.* at 86 (Blackmun, J., dissenting).

120. *Id.* at 80.

els of civic virtue for students,¹²¹ many other persons do as well. If a public school gym teacher must be a citizen, then what of a village playground director? Or a state park ranger whose principal occupation is guiding children on nature walks?¹²²

Taken alone, *Foley* suggested no more than the extension of the *Dougall* exception to the unique role of policeman. *Norwick*, going much further, points toward the progressive encroachment on *Dougall's* opening of public employment to aliens. If public education and the police function are fundamental obligations of government and if teachers and police have the requisite responsibility and discretion, the *Dougall* exception threatens to engulf *Dougall* itself. Firefighters, public health officers, inspectors of every type, and any middle level administrator vested with minimal discretion in a program of "fundamental" importance may well meet the *Norwick* test.¹²³ At the beginning of the 1980s, it is discouraging to see parochial state laws retain so much influence in this area and constitutional doctrine remain so unsettled and so unpredictable.

Equal Protection, State Power, and the Nonresident Alien

The fourteenth amendment requires that a state not "deny to any person within its jurisdiction the equal protection of the laws."¹²⁴ The "plain meaning" of the limiting phrase "within its jurisdiction" has been relied on in at least two recent lower court cases to deny the application of the equal protection clause to aliens who reside outside the United States. In one, an action was brought to enjoin enforcement of state laws providing that no nonresident alien could inherit land more than three miles outside a city or town. Only one member of the three-judge court reached the equal protection issue, holding that "a state is not constitutionally required to accord the equal protection of its laws to [nonresident] aliens."¹²⁵ In a similar case involving the inheritance of land by a nonresident alien, two members of a Fifth Cir-

121. *Id.*

122. *Cf. id.* at 88 (Blackmun, J., dissenting) (lawyer in *Griffiths* was civic role model also).

123. It has been suggested that alienage differs from other suspect categories and should be subject to a different standard of judicial review. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1098-99 (1974). See also Note, *Wandering Between Two Worlds: Employment Discrimination Against Aliens*, 16 VA. J. INT'L L. 355, 397 (1976). *Foley* and *Norwick* may thus represent a transition to a downgrading of alienage to an intermediary standard of review.

124. U.S. CONST. amend. XIV, § 1.

125. *Shames v. Nebraska*, 323 F. Supp. 1321, 1333 (D. Neb.), *aff'd*, 408 U.S. 901 (1971). The concurring judge thought that the issue of equal protection was not before the court; the third dissented.

cuit panel stated that "[i]t is . . . obvious that the Fourteenth Amendment, by its own terms, has no application to aliens not within the jurisdiction of the United States."¹²⁶

The Supreme Court has never decided a case applying equal protection to a nonresident alien individual. Nor, indeed, has it ever unequivocally stated that fourteenth amendment due process applies to such aliens,¹²⁷ but the due process clause lacks the limiting language appended to the equal protection clause. On the other hand, the Court decided in *Blake v. McClung* that foreign corporations may be deemed outside state jurisdiction and not entitled to equal protection.¹²⁸ Professors Currie and Schreter argued in a 1960 article¹²⁹ that *Blake* has been overruled *sub silentio*. Be that as it may, the Court recently cited and distinguished this aspect of *Blake* without disapproval.¹³⁰ Other Supreme Court dicta point both towards¹³¹ and away from¹³² a territorial limitation on equal protection, with one Justice specifically noting that application of equal protection to nonresident individuals, as opposed to corporations, has never been reviewed.¹³³

The commentators have split between a literal reading of the clause and one that would in essence require its territorial application to any subject matter within a state's legislative jurisdiction. The literalist commentators, like the literalist judges, do not

126. *De Tenorio v. McGowan*, 510 F.2d 92, 101 (5th Cir.), *cert. denied*, 423 U.S. 877 (1975). *See also* *Cermeno-Cerna v. Farrell*, 291 F. Supp. 521, 528 (C.D. Cal. 1968); *In re Estate of Horman*, 5 Cal. 3d 62, 74, 485 P.2d 785, 793, 95 Cal. Rptr. 433, 441-42 (1971), *cert. denied sub nom.* *Gumen v. California*, 404 U.S. 1015 (1972).

127. *See* *Shames v. Nebraska*, 323 F. Supp. 1321, 1333 (D. Neb.), *aff'd*, 408 U.S. 901 (1971). But clearly there is no territorial limitation to the due process clause, *see, e.g.,* *Home Ins. Co. v. Dick*, 281 U.S. 397, 411 (1930), and there is little to suggest that nonresident aliens cannot benefit from it. *See* *Pfizer, Inc. v. Lord*, 522 F.2d 612, 619 n.10 (8th Cir. 1975), *cert. denied*, 424 U.S. 950 (1976). *But cf.* *Reyes v. Secretary of Health, Educ. and Welfare*, 476 F.2d 910, 915 n.8 (D.C. Cir. 1973) (doubting fifth amendment due process applies to nonresident aliens); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976) (nonresident alien could not charge federal government with extraterritorial violations of the Constitution).

128. 172 U.S. 239, 260-61 (1898).

129. Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1, 10 (1960).

130. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 n.21 (1976).

131. *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950); *Terrace v. Thompson*, 263 U.S. 197, 216 (1923); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

132. *Hillsborough v. Cromwell*, 326 U.S. 620 (1946) (discussing the application of equal protection to nonresident without intimating territorial limitations).

133. *Zschernig v. Miller*, 389 U.S. 429, 459 n.29 (1968) (Harlan, J., concurring).

go beyond the words of the amendment.¹³⁴ The constructionists argue that literalist logic should fail “because the alien is in fact being subjected to the jurisdiction by implementation of the prohibition [against land ownership].”¹³⁵ This approach may have some support on the Court. In *Hughes v. Alexandria Scrap Corp.*,¹³⁶ out-of-state scrap dealers had to meet more onerous requirements than in-state dealers in order to participate in a Maryland program offering a “bounty” for the destruction of old automobiles. Maryland argued that *Blake* applied to the nonresident plaintiff, but the Court held that the latter was “within [Maryland’s] jurisdiction.” The dealer did no active business within Maryland but had paid a Maryland license fee, had a Maryland registered office, and was subject to Maryland “long-arm” jurisdiction.¹³⁷

The court in *Hughes* indicated that the impact of the territorial restrictive language may be minimal but did not indicate that it is meaningless. If a nonresident is “within the jurisdiction” whenever a state has legislative jurisdiction to affect his interests, then the phrase is being read to have no restrictive meaning at all. The due process clause already restricts the reach of state legislative authority, and it would have been pointless to exclude application of the equal protection clause only in instances when the due process clause would already prevent the operation of state law.¹³⁸

134. *E.g.*, Avins, *The Equal ‘Protection’ of the Laws: The Original Understanding*, 12 N.Y.L.F. 385, 425 (1966).

135. Morrison, *supra* note 21, at 642; *accord*, Boyd, *The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents’ Estates*, 51 GEO. L.J. 470, 484-85 (1963); Note, *Property Rights of Aliens Under Iowa and Federal Law*, 47 IOWA L. REV. 105, 115 (1961).

136. 426 U.S. 794 (1976).

137. *Id.* at 810 n.21.

138. *Cf.* *Blake v. McClung*, 172 U.S. 239, 260-61 (1898) (“within the jurisdiction” qualifies “equal protection” but not “due process”). Examination of the fourteenth amendment’s legislative history supports the view that no importance should be attached to the absence of jurisdictional language in connection with the due process clause and the presence of “within the jurisdiction” in the equal protection clause. In its antecedents, article I of the amendment was a grant of legislative power, stating that: “Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, *in every State*, the same political rights and privileges; and to all persons *in every State* equal protection in the enjoyment of life, liberty and property.” B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION*, 39TH CONGRESS, 1865-67, at 51 (1914) (emphasis added). In the Joint Committee on Reconstruction, the proposal received various modifications, but with emphasis in each case that rights were secured “in each state” or “in every state.” *Id.* at 52, 54-56, 60-61. Congressman John A. Bingham, principal draftsman of article I, successfully moved for the following version:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immu-

There certainly are circumstances that might justify a state rule barring nonresident aliens from particular activities. Assuming that the rule did not contravene federal power,¹³⁹ a state might deny nonresident aliens the capacity to purchase local businesses on the ground that they lacked loyalty to the economic concerns of the United States and hence would tend to ignore the concerns of the state as a unit thereof.¹⁴⁰ Such reasoning would not satisfy judicial strict scrutiny requirements, if they were applicable, but should meet a minimum rationality test.

Even if giving the states a constitutionally freer hand with non-

nities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).

Id. at 61. Minus the constitutional references, the Committee presented this version to Congress in February 1866. I STATUTORY HISTORY OF THE UNITED STATES 193 (B. Schwartz ed. 1970). When it was apparent that the February draft would not receive a two-thirds majority in Congress, the matter was returned to the Joint Committee, where the language of the present article I, also drafted by Congressman Bingham, was adopted. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS, 1865-67, at 87, 91, 106 (1914).

Besides the "equal protection" language, all the language in article I already existed in the Constitution in article 4, § 2, and the fifth amendment. CONG. GLOBE, 39th Cong., 1st Sess. 2539 (1866) (Rep. Farnsworth). Yet Congressman Bingham, in his February draft, evidently intended by his "equal protection" language nothing more than an application of the fifth amendment's principles to the states. The language of article I, with separate due process and equal protection clauses, can thus be viewed as an elaboration on the earlier version; therefore, the lack of jurisdictional language in the one should have no more importance than its presence in the other.

But would this not mean that *both* clauses should be territorially limited? Congressman Bingham proposed the various versions of article I to alleviate his grave doubts about the constitutionality of the Civil Rights Act of 1866. H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 76 (1908); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 113 (1956). Of course, it was later held that those fears were groundless; Congress had the power to enact the 1866 legislation under the thirteenth amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968). For our purposes, though, Bingham's goal is important. The 1866 Act in its first section, Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, granted to all citizens broad rights "in every State . . . in the United States," including the right "to inherit . . . real and personal property" and "to full and equal benefit of all laws and proceedings." This language lacks territorial limitations. If Congressman Bingham was right and the fourteenth amendment was needed to vindicate the 1866 Act, then arguably the Act would remain unconstitutional. If article I did not authorize Congress to enact civil rights legislation without geographic limitations, the 1866 Act could still be attacked because it prevented states from discriminating against nonresident U.S. citizens.

139. *Graham v. Richardson*, 403 U.S. 365, 376-80 (1971) (federal statute); *Zschernig v. Miller*, 389 U.S. 429 (1968) (federal power over foreign affairs).

140. Liebman & Levine, *Foreign Investors and Equal Protection*, 27 MERCER L. REV. 615, 623 (1976).

resident aliens is a desirable objective, it is nonetheless undesirable to utilize a territorial limitation on the equal protection clause as the means by which to achieve it. Equal protection transcends nationality matters; a territorial limitation on the concept would permit state discrimination against nonresidents on the basis of race, religion, sex, legitimacy, and so on. A better approach would be to limit the analytical effect of alienage as a suspect class to resident aliens alone.¹⁴¹

The Supreme Court of Wisconsin took this approach recently in *Lehndorff Geneva, Inc. v. Warren*.¹⁴² The plaintiff attacked on equal protection grounds a Wisconsin law¹⁴³ limiting nonresident alien land ownership. The "plain meaning" view of the scope of equal protection was inapplicable. Although plaintiff was a corporation owned by nonresident aliens and was a general partner in a limited partnership with nonresident aliens, plaintiff was incorporated in Texas and qualified to do business in Wisconsin. The court noted that decisions protecting resident aliens recognized that although these aliens bore the burdens of living in American society, they were denied the benefits and a political outlet to seek redress. Nonresident aliens carried none of the burdens shared by citizens and resident aliens and did not suffer the inequities felt by resident aliens. This distinction served to take nonresident aliens out of the class for which demanding judicial

141. The constitutional definition of a "resident alien" may be rather broad, as the Supreme Court has read fifth and fourteenth amendment protection to include even persons whose presence "in this country is unlawful, involuntary, or transitory." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). See also *Sailer v. Tonkin*, 356 F. Supp. 72 (D.V.I. 1973). However, the issue has not been resolved. For example, CAL. EDUC. CODE §§ 68076-68077 (West 1978) deny resident tuition privileges at state supported colleges and universities to aliens who have not been permanent residents in the United States for at least one year. The constitutionality of the provision was upheld in *Wong v. Board of Trustees*, 125 Cal. Rptr. 841 (Ct. App. 1975) (hearing denied and nonpublication of official report ordered by Cal. Sup. Ct., Jan. 15, 1976). Likewise, the University of Maryland denied resident tuition rights to the children of aliens present under nonresident visas. The case was argued as involving a denial of due process by the creation of an irrebuttable presumption of nondomicile for such aliens. As such, the matter was certified by the United States Supreme Court to Maryland's highest court on questions of state law. *Elkins v. Moreno*, 435 U.S. 647 (1978). After the state court's reply and clarification of university policy, the issue became one of balancing numerous factors, including immigration status rather than a pure presumption of nondomicile. The Supreme Court remanded for consideration of new constitutional issues raised by these changes. *Toll v. Moreno*, 441 U.S. 458 (1979). See generally Comment, *An Alien's Constitutional Right to Loan, Scholarship, and Tuition Benefits at State Supported Colleges and Universities*, 14 CAL. W. L. REV. 514, 599-61 (1979) (commenting on *Wong*).

142. 74 Wis. 2d 369, 246 N.W.2d 815 (1976).

143. Wis. STATS. § 710.02 (1979).

scrutiny was required.¹⁴⁴ The long tradition of alien land laws, the nonracial cast of the Wisconsin statute, and the rationale of protecting the state from absentee ownership justified the less exacting equal protection standard.

The problem faced by the Wisconsin court may become more common because of the Supreme Court's decision in *Shaffer v. Heitner*,¹⁴⁵ requiring quasi-in-rem jurisdiction to meet the *International Shoe*¹⁴⁶ "minimum contacts" test. Prior to *Shaffer*, American plaintiffs could invoke quasi-in-rem jurisdiction to obtain an American forum against nonresident aliens with American investments. The *Shaffer* court left open the question "whether the presence of a defendant's property in a state is a sufficient basis for jurisdiction when no other forum is available to the plaintiff."¹⁴⁷ If the question were decided in the negative, then state courts might try to follow Justice Stevens' *Shaffer* concurrence¹⁴⁸ and charge foreign investors with the burden of defending claims unrelated to their investments should they decide to bring capital into the United States. Justice Stevens did not specify whether "foreign investors" includes all nonresident investors, regardless of citizenship, or only non-Americans. As his analysis emphasized the atypicality of foreign investment as a good reason to impose a weightier burden upon the investor, the chances are that he would not extend his distinguishing rule to expatriate Americans. If so, a rule directed at "foreign investors" would squarely raise the question of equal protection for nonresident aliens subjected to pre-*Shaffer*, quasi-in-rem jurisdiction.

The Supreme Court has held alienage a suspect classification because "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."¹⁴⁹ Traditional indicia of suspectness are present if "the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political proc-

144. 74 Wis. 2d 369, 379-83, 246 N.W.2d 815, 820 (1976). See Morrison, *supra* note 21, at 642-43.

145. 433 U.S. 186 (1977).

146. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

147. 433 U.S. at 211 n.37.

148. *Id.* at 218 (Stevens, J., concurring). See, e.g., *Louring v. Kuwait Boulder Shipping Co.*, 455 F. Supp. 630 (D. Conn. 1977).

149. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

ess.”¹⁵⁰ The most significant disability suffered by aliens is the serious stigma affixed to them on the basis of an involuntary class characteristic. Presumably, that stigma attaches whether or not the affected individuals are within or without the jurisdiction. It goes without saying that unequal treatment of aliens, whether resident or not, has a long history. Yet for the nonresident alien, the detrimental effect of the classification is demonstrably less than it is for the resident. Unlike the resident alien, the alien physically absent from the state does not have to live with the daily consequences of the stigma. He is outside the community, and even if he temporarily resides within the state, the impact is temporally less. Heightened judicial scrutiny has also been advanced as a means of protecting the politically powerless: persons who cannot participate in the political process but who ought to have its benefits because the imposition of powerlessness is illegitimate. Nonresidence, however, is a constitutionally recognized basis for the denial of political participation¹⁵¹ and applies no less to aliens than to others. The nonresident alien’s inability to participate flows not from his alienage but from his nonresidency.¹⁵²

The problem here is one of classification and is analogously similar to that in *Foley v. Connelie*.¹⁵³ If all aliens are a suspect class, then strict scrutiny must be employed to determine whether the state can justify distinguishing between nonresident aliens and all other persons. If, however, the suspect class is limited to resident aliens, then distinctions made between nonresident aliens and citizens and resident aliens is judged by a relaxed standard. As was argued above, the stigmatic impact upon nonresidents may be minimal. If, on the other hand, the function of establishing suspect classes is broad—to prevent a violation of a national sense of decency rendered by classifications on the basis of involuntary status¹⁵⁴—then the focus is on a moral conception of government and not the specific impact on the particular class. Furthermore, the stigma placed on nonresident aliens may well carry over to resident aliens. For similar reasons the Court would

150. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *accord*, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

151. *Carrington v. Rash*, 380 U.S. 89, 91 (1965).

152. The California Supreme Court made a similar argument in *In re Estate of Horman*, 5 Cal. 3d 62, 75-76, 485 P.2d 785, 794-95, 95 Cal. Rptr. 433, 442-43 (1971), *cert. denied sub nom. Gumen v. California*, 404 U.S. 1015 (1972). That court, however, evaded the suspect classification by focusing on the distinction between residency and nonresidency. If alienage is a generally suspect class, then splitting the class along residential lines must be subjected to the strict scrutiny test.

153. 435 U.S. 291 (1978). See text accompanying notes 83-94 *supra*.

154. Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 668, 672 (1975).

doubtless look askance at racial discrimination aimed solely at nonresidents. However, like residence, alienage deals with ties between individuals and geographical units, quite unlike race, religion, and other suspect classifications. Nonresidency and noncitizenship reinforce each other.

Many intangibles are involved in striking a balance. On the one hand, there is the risk that state laws directed towards nonresident aliens reflect a broader prejudice against aliens generally. There is the risk of a carry-over stigma to resident aliens. Finally, there may be some concern about leaving states free to operate in an area that has an impact upon American foreign affairs. On the other hand, one can start with the proposition that states are free to act unless clearly prohibited by national law. A limited reading of the purpose for establishing suspect classes may justify cleaving alienage along residency lines. And alienage, unlike race or religion, contains at least a few functions of real substance. Coupled with nonresidency, the classification may be a subject that one might leave to political rather than judicial processes.

Resident Aliens and the National Government

As alienage is a "suspect" category in terms of fourteenth amendment equal protection, alienage should fall within a similar rubric in connection with the "equal protection" limitations inherent in fifth amendment due process.¹⁵⁵ Concerns about discriminatory federal legislation,¹⁵⁶ however, have collided with the federal government's plenary powers¹⁵⁷ over immigration and nationality. The judiciary has been wary of disturbing federal legislative prerogatives in a field so closely connected with international dealings and has employed self-restraint in separating legitimate from constitutionally impermissible rulemaking.

155. In *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 601-02 (1976), the Court applied to Puerto Rican legislation strict scrutiny tests developed for suspect classes under the fourteenth amendment. The Court specifically avoided deciding whether it was applying the fifth or fourteenth amendment to Puerto Rico, holding that there would be a violation of either.

156. Such discrimination can be found, *inter alia*, in the following legislation: 7 U.S.C. §§ 1922, 1941, 1961 (1976) (agricultural loans); 16 U.S.C. § 742c(b)(7) (1976) (fishing loans); *id.* § 831a(e) (T.V.A. directorships); 30 U.S.C. § 181 (1976) (mineral land leases); 38 U.S.C. § 4105(1) (1976) (appointment to V.A. Dept. of Medicine & Surgery); 42 U.S.C. § 221 (officers on U.S. flag vessels); 48 U.S.C. §§ 1501-1508 (1976) (land ownership in territories and District of Columbia).

157. *E.g.*, note 4 *supra*; Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1007 & n.4 (1976).

The Supreme Court's traditional reluctance to disturb immigration legislation is reflected in two nonimmigration cases, thus underscoring its decision to give a lesser role to equal protection for aliens as against federal rules. *Hampton v. Mow Sun Wong*¹⁵⁸ questioned a Civil Service Commission rule excluding all aliens from federal civil service employment. The Court struck down the rule, not on grounds congruent with its treatment of state employment rules, but because the Commission's function was too limited for due process to validate its blanket exclusion. Dicta in earlier cases implied that any classification invalid under the equal protection clause of the fourteenth amendment would also be inconsistent with the due process requirement of the fifth amendment.¹⁵⁹ In *Mow Sun Wong*, the Court for the first time indicated that the congruence between the two provisions might not exist if a "special national interest" were involved,¹⁶⁰ distinguishing cases in which notions of equal protection were applied when Congress had legislated for limited purposes. By implication, fifth amendment "equal protection" for aliens might be less for federal than for state employment, although the Court did not need to reach that question.¹⁶¹ "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest."¹⁶² Although the Government could assert a number of possible grounds to justify the exclusionary rule, only one was within the mandate of the Commission.¹⁶³ The latter's sole concern was to promote an efficient federal service, and administrative convenience was an inadequate justification for the blanket prohibition against hiring aliens.¹⁶⁴

The practical impact of the decision seems negligible. Within a few months of the Court's decision, President Ford issued an executive order barring aliens from civil service in most in-

158. 426 U.S. 88 (1976).

159. *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975); *Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974).

160. 426 U.S. at 100.

161. *Id.* at 103.

162. *Id.*

163. Possible grounds are: facilitating the President's negotiation of foreign treaties by enabling him to offer American employment opportunities to foreign citizens in return for reciprocal concessions, encouraging naturalization, and avoiding the expenses of classifying positions when undivided loyalty is essential. *Id.* at 104. The latter was the only purpose falling within the Commission's mandate. *Id.* at 115.

164. *Id.* at 115.

stances.¹⁶⁵ Lower courts have upheld the efficacy of this order from constitutional attack.¹⁶⁶

The hollowness of the victory in *Mow Sun Wong* was confirmed in its companion case, *Mathews v. Diaz*.¹⁶⁷ Aliens challenged a federal statute denying them Medicare benefits unless they were admitted to the United States for permanent residence and had resided here continuously for at least five years.¹⁶⁸ The Court upheld the statute against a due process attack. It found that Congress had no duty to provide all aliens with the benefits granted to citizens. Therefore, the only issue was whether Congress was permitted to make the statutory discrimination within the class of aliens. Even assuming that the exclusion was broader than necessary to protect the fiscal integrity of the program, Congress could limit participation in the program based on the degree of affinity to the United States. Petitioners had suggested no "principled basis for prescribing a different standard than the one selected by Congress."¹⁶⁹

The reasonableness of the decision depends on the link between "affinity" to the United States and Medicare benefits. Although the *Diaz* Court did not explain "why the alien's degree of affinity is relevant to his right to participate in the insurance program,"¹⁷⁰ the Court in *Mow Sun Wong* had listed a number of plausible reasons for the rule: as a "bargaining chip" for negotiating similar rights for Americans working abroad and as a means by which to encourage aliens to qualify for citizenship by residing continuously in the United States for five years.¹⁷¹

If one utilizes a "rational basis" test or some other form of relaxed scrutiny, these reasons can pass constitutional muster.¹⁷²

165. 41 Fed. Reg. 37,303 (1976).

166. *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979); *Mow Sun Wong v. Hampton*, 435 F. Supp. 37 (N.D. Cal. 1977), *on remand from* 426 U.S. 88 (1976); *Santin Ramos v. United States Civil Serv. Comm'n*, 430 F. Supp. 422 (D.P.R. 1977), *on remand from* 426 U.S. 916 (1976).

167. 426 U.S. 67 (1976).

168. 42 U.S.C. § 1395o(2) (1976).

169. 426 U.S. at 84.

170. *Protection*, *supra* note 30, at 285.

171. *See* note 163 *supra*.

172. *See Mow Sun Wong v. Hampton*, 435 F. Supp. 37, 45 (N.D. Cal. 1977) (presidential order barring aliens from civil service upheld as encouraging naturalization of eligible aliens and, for those not eligible, preventing disruption by discharges for failure to obtain citizenship when eligible); *Santin Ramos v. United States Civil Serv. Comm'n*, 430 F. Supp. 422, 425 (D.P.R. 1977) (regulation barring alien disaster loan applications encourages naturalization and strengthens bor-

If, however, one demands more compelling reasons for the rule, it would be difficult to justify the discrimination. The problem occurs in trying to justify a more relaxed approach¹⁷³ when dealing with the federal power.

Professor Gerald Rosberg has recently written in detail on this problem, and it would be redundant to retrace the ground he has covered. Rosberg asserts that the Court should exercise less caution in scrutinizing federal legislation divorced from immigration matters, and he argues that it is worthwhile to draw a line between immigration and nonimmigration matters and deal with the latter under a "strict scrutiny" test analogous to the one used for state alien legislation.¹⁷⁴ The Court has chosen not to do so and has chosen to avoid the difficulties of linedrawing in an area in which it feels that political decisionmaking must be freed from judicial backbenching.

Justices Brennan and Marshall, at least, did not think that all federal legislation dealing with aliens is now free from judicial tampering: although they voted with the Court in *Diaz*, they expressly held open the equal protection issue in *Mow Sun Wong*.¹⁷⁵ For them, a bar to federal employment for all aliens is a different question from that of a limited exclusion of aliens from Medicare benefits.

Would a new *Mow Sun Wong* turn out differently from *Diaz*? Applying a relaxed standard of scrutiny, the federal district court on remand easily upheld the presidential order reiterating the alien exclusion from federal jobs,¹⁷⁶ as did the Seventh Circuit in *Vergara v. Hampton*.¹⁷⁷ Yet the result could be reversed consistently with *Diaz*.

In *Mow Sun Wong*, the Court distinguished between fifth

rower ties to government). See also *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978), cert. denied, 441 U.S. 905 (1979) (civil service); *United States v. Gordon-Nikkar* 518 F.2d 972, 976-77 (5th Cir. 1975) (federal jury service).

173. The Court has since described *Diaz* as employing a "relaxed" standard. *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977). Lower courts have also employed that standard of review. *Mow Sun Wong v. Hampton*, 435 F. Supp. 37, 45 (N.D. Cal. 1977) (presidential order barring aliens from civil service is a rational means of encouraging naturalization for those eligible; for those not yet eligible, contrary rule would disrupt civil service as aliens who had met residency requirement would have to be fired if not naturalized); *Santin Ramos v. United States Civil Serv. Comm'n*, 430 F. Supp. 422, 425 (D.P.R. 1977) (citizenship requirement for disaster loans encouraged aliens to take out citizenship and strengthened ties between borrower and government). One court has stated that strict scrutiny will never be applied to federal alienage laws. *Lopez v. Bergland*, 448 F. Supp. 1279, 1282 (N.D. Cal. 1978).

174. *Protection*, supra note 30, at 337.

175. 426 U.S. at 117.

176. *Mow Sun Wong v. Hampton*, 435 F. Supp. 37 (N.D. Cal. 1977).

177. 581 F.2d 1281 (7th Cir. 1978), cert. denied, 441 U.S. 905 (1979).

amendment "equal protection" when dealing with locally oriented congressional legislation and federal legislation having nationwide impact,¹⁷⁸ indicating that the fifth amendment's impact closely resembles that of the fourteenth's equal protection clause only in the local situation. Yet laws with national impact can also run afoul of fifth amendment "equal protection" when they deal with matters akin to "fundamental rights," such as citizenship.¹⁷⁹ Clearly, the mere fact that aliens are the subject of legislation does not insulate the federal government from judicial scrutiny any more than does the designation of legislation as involving "foreign affairs."¹⁸⁰ But the difficulty in distinguishing between the "pure" immigration cases and the ones not intended to have a direct impact on immigration policy¹⁸¹ might persuade the Court to follow a more relaxed rule of scrutiny for legislation distinguishing among aliens but a stricter scrutiny when a federal rule divides all aliens from all citizens. This, combined with classification on the basis of the types of rights involved,¹⁸² could well justify a different result between *Diaz* and an appeal against the Presidential order barring all aliens from federal employment.

A second approach would focus on the fact that *Mow Sun Wong* involved a flat ban on all alien participation in federal employment, whereas *Diaz* denied benefits only to aliens who had either resided for less than five years in the United States or were non-immigrants. Even for purposes not directly linked to immigration, Congress should be freely permitted to distinguish between non-

178. 426 U.S. at 103. See also *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 601 (1976) (Puerto Rican discrimination against aliens falls within similar analysis in both fifth and fourteenth amendments).

179. *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

180. *Cf. Reid v. Covert*, 354 U.S. 1 (1957) (treaty must be consistent with fifth and sixth amendments).

181. *Compare Fiallo v. Bell*, 430 U.S. 787 (1977), with *Protection*, *supra* note 30, at 325.

182. Professor Rosberg, *Protection*, *supra* note 30, at 288, suggests but rejects the notion that "suspect classification" analysis exists under the fifth amendment only for rights of "life, liberty, and property." Establishing differing tests based solely on that classification could be roughhewn. Nevertheless, the Court will certainly intervene to protect the fundamental rights of aliens, despite the importance of federal legislative supremacy over immigration, although it would not for lesser rights. Congress could not, for example, punish aliens without trial merely to give the President a bargaining chip. See, e.g., *Wong Wing v. United States*, 163 U.S. 228 (1896). Federal employment is neither a right so critical as the right to trial nor a matter clearly falling within the "life, liberty, and property" triumvirate. At the same time, exclusion from employment in a significant economic sector is arguably of far greater magnitude than a limited barrier to social security benefits.

immigrant aliens, who enter the United States for temporary purposes, and immigrant aliens, who have permanent resident status. Congressional legislation drafted along that axis concentrates on the temporary nature of the nonimmigrant's stay, not on his alienage. Strict scrutiny might be reserved for legislation that distinguishes among permanent residents or between citizens and permanent resident aliens, but not between permanent residents and temporarily resident aliens.

Although Congress has established the statutory classes of immigrants and nonimmigrants for the purposes of the immigration laws,¹⁸³ Congress classifies aliens according to permanency for other purposes as well. For example, Congress usually requires that an immigrant have five years' residence in the United States to be eligible for naturalization.¹⁸⁴ The statute attacked in *Diaz* was consistent with the congressional view, as exemplified by the naturalization standard, that immigrant status plus five years' residence is sufficient permanence to be eligible for many of the federal benefits accorded citizens. This suggests that for the purposes of applying strict scrutiny, the dividing line between "permanent" and "nonpermanent" alien residents might be drawn from norms established by Congress. Once those norms are established, the Court would apply strict scrutiny to federal legislation discriminating between citizens and "permanent" alien residents (or among the latter) and a relaxed standard of scrutiny for other legislation affecting aliens.

Under the fourteenth amendment, strict scrutiny applies, at a minimum, to state laws directed at aliens even temporarily or illegally present in the United States.¹⁸⁵ But the federal government has virtually untrammelled power to classify aliens between those with permanent and temporary status and to decide which shall become citizens and which shall not. Strict scrutiny should apply to congressional legislation treating those aliens most like citizens in a manner different from the way citizens are treated. The government could show that a regulation affecting such aliens was genuinely concerned with immigration matters or foreign affairs, but it would be the government's burden to do so. Aliens temporarily here would not get the benefit of strict scrutiny. Although division between the classes would be left to Congress, if Congress presented no coherent line by which to distinguish between the classes, the Court could draw an arbi-

183. 8 U.S.C. § 1101(a)(15), (32), (33) (1976).

184. *Id.* § 1427(a). See *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) (emphasizing this point with respect to *Diaz* residency requirement).

185. See note 141 *supra*.

trary line or apply strict scrutiny to all federal alien laws or to none of them. The problem is unlikely to arise.

A third but related approach would focus on the apparent contradiction between admitting an alien for a stated purpose and then denying him substantial means for the accomplishment of that purpose. For example, an alien admitted to permanent residence must almost of necessity derive employment income from within the United States in order to remain here. Congress has recognized this by permitting immigrants to be employed once they have been admitted. Not so nonimmigrants, who are admitted for temporary purposes which, in many cases, are inconsistent with employment or, if employment is involved, it relates to specific employment limited as to type and duration.¹⁸⁶ By admitting an alien to permanent residence and then denying him the right to employment in government, a substantial employment sector, Congress has established a contradiction. The contradiction can be explained as either being rationally based on a need for barring aliens generally from government jobs or on discrimination based purely on nationality. Given the apparent contradiction between the bar to employment and the status that requires that employment opportunity be maintained, the reasons for creating the contradiction should be closely scrutinized.¹⁸⁷ Not so the social security benefits in *Diaz*, as residence is not normally dependent on government assistance, whereas employment is generally a necessity.

This approach would require classification of particular kinds of matters—employment, housing, and so on—as essential to fulfill the purposes of the granted admission. Notice, for instance, that federal denial of admission to broad sectors of housing might be viewed as a contradiction of alien admission on all but the most temporary nonimmigrant basis. Given *Diaz*, even if the Court accepted this approach, one would expect to see its application emphasizing latitude to Congress and a narrow definition of matters essential to aliens. But both this approach and the preceding one would at least provide the means to deal with significant types of

186. C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 1.34 (1978). See, e.g., 8 C.F.R. § 214.2(h)(11) (1979) (temporary worker must petition to change employer).

187. Cf. *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 433 n.36 (D.C. Cir. 1977) (despite *Diaz*, regulation refusing to permit permanent resident to change jobs would present serious constitutional question).

federal alien discrimination without opening the door to intensive judicial scrutiny of immigration policy generally.

Nationality is not a terribly convincing classification instrument for determining when social and economic benefits should be accorded. For that reason alone, the Court might well require a legislative or executive finding of a connection between the denial of a benefit to aliens and the gaining of an advantage for the United States in foreign affairs or immigration matters.¹⁸⁸ Such a requirement might elicit more political honesty from decisionmakers; the decision in *Mow Sun Wong* does not appear to have extracted any.¹⁸⁹ Beyond that, and unconvincing though nationality may be as a classification, its proximity to the problem of constitutional control over immigration and foreign affairs dictates judicial prudence and a large measure of freedom to Congress and the President.

Nonresident Aliens and the National Government: Constitutional Rights and Standing

The nationality distinction applied in *Berlin Democratic Club v. Rumsfeld*¹⁹⁰ is far more difficult to criticize. Recent cases establish that the United States Constitution governs acts abroad by American federal¹⁹¹ and state¹⁹² officials affecting citizens¹⁹³ and aliens.¹⁹⁴ In *United States v. Toscanino*,¹⁹⁵ the Second Circuit applied this principle to reject judicial jurisdiction over a nonresi-

188. *Protection*, *supra* note 30, at 337.

189. See text accompanying notes 165 and 166 *supra*.

190. 410 F. Supp. 144 (D.D.C. 1976).

191. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957); *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966). In many cases the problem is determining whether the acts complained of are those of American officials, as the independent acts of foreign officials cannot be invoked. *E.g.*, *Stonehill v. United States*, 405 F.2d 738, 743-45 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969); *Birdsell v. United States*, 346 F.2d 775, 782 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965). There is a question, however, whether evidence might not be so tainted by foreign officials' methods in obtaining it as to make it inadmissible in the United States. *United States v. Nagelberg*, 434 F.2d 585, 587 n.1 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971). *Cf.* *Cooley v. Weinberger*, 518 F.2d 1151, 1155 (10th Cir. 1975) (use of Iranian murder conviction to deny social security benefits would not violate due process unless procedure used to obtain convictions would shock the conscience of U.S. community).

192. *State v. LeMay*, 27 Or. App. 447, 556 P.2d 688 (1976).

193. *Reid v. Covert*, 354 U.S. 1 (1967); *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966).

194. *United States v. Cotroni*, 527 F.2d 708 (2d Cir. 1975) (*semble*), *cert. denied*, 426 U.S. 906 (1975); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

195. 500 F.2d 267 (2d Cir. 1974). The court felt that the strict application of the *Ker-Frisbie* rule had weakened and jurisdiction should be rejected when American officials had employed "shocking" methods to bring the defendant into the jurisdiction. See generally *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886).

dent alien illegally seized by federal officials abroad.¹⁹⁶ Yet in *Berlin*, the court agreed to adjudicate an action by American citizens based upon the illegal wiretapping of United States officers abroad but dismissed a nonresident alien's action alleging the same facts. The plaintiffs requested injunctive, declaratory, and monetary relief for significant violations of constitutional rights by the officials and sought to sustain jurisdiction, *inter alia*, under the broad terms of 28 U.S.C. § 1331(a).¹⁹⁷ The court did not pass on the substance of the alien's claim but ruled that he lacked standing¹⁹⁸ to bring it.¹⁹⁹

Although the alien plaintiff was suing to protect an interest of his own²⁰⁰ and the *Berlin* court gave no specific reasons why judicial relief would be improper, the court relied on cases which suggest that nonresident aliens lack standing to challenge governmental action. In part, the court was influenced by doubts that the constitutional guarantees involved in the complaint extend to nonresident aliens.²⁰¹ Although standing is not determined by the ultimate outcome,²⁰² the difficulty of the decision and the context in which it was raised perhaps justified the court's dismissal of the action.

Precedent for the general proposition that nonresident aliens lack standing is traceable to *Johnson v. Eisentrager*,²⁰³ holding

196. The Second Circuit has tempered *Toscanino* but appears to adhere to a modified view of *Ker-Frisbie*. *Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1971). Other jurisdictions adhere strictly to *Ker-Frisbie*. *E.g.*, *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974). See generally Note, *The Short-Lived Death of the Ker-Frisbie Doctrine*, 9 VAND. J. TRANS. L. 131 (1976).

197. "The district courts shall have original jurisdiction of all civil actions . . . [arising] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1976).

198. The issue of standing is "whether the litigant is entitled to have the court decide the merits of the dispute of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

199. *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 152-153 (D.D.C. 1976).

200. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *Barlow v. Collins*, 397 U.S. 159, 164 (1970).

201. 410 F. Supp. at 152 (citing, *e.g.*, *Reyes v. Secretary of Health, Educ. and Welfare*, 476 F.2d 910, 915 n.8 (D.C. Cir. 1973)) (doubting that due process applies to nonresident alien).

202. Cf. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 651-52 (1973) (plaintiff must have merely a sufficient interest to justify standing).

203. 339 U.S. 763 (1950).

that a nonresident enemy alien convicted and incarcerated by the military outside the United States could not obtain habeas corpus. Although the case contains dicta about nonresident aliens generally, that language must be read in the context of a case centered on the petitioner's enemy alien status and the petitioner's plea for habeas corpus, which then required the prisoner to be before the court.²⁰⁴ Nevertheless, the *Berlin* court, following certain authorities,²⁰⁵ read *Eisentrager* for the broad proposition that a nonresident alien lacks standing to challenge government action, unless his claim involves a "res" held by the government within the United States or a specific statutory scheme interpreted to accord standing to nonresident aliens.²⁰⁶

The precedents do not establish this broad proposition. As a general matter, nonresident aliens are permitted to sue in American courts in the absence of disabling legislation.²⁰⁷ In early Supreme Court cases in which nonresident aliens challenged governmental acts on fifth amendment grounds, the disputes involved property within the United States.²⁰⁸ However, the cases themselves never insisted that property within the United States was a crucial factor; that "res" explanation appears to originate in a lower court decision written by Judge (later Chief Justice) Burger.²⁰⁹ In fact, *Russian Volunteer Fleet v. United States*,²¹⁰ the leading "res" case, broadly stated that "[t]he petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution,"²¹¹ rejecting the Court of Claims' ruling that it lacked jurisdiction because the pe-

204. *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972); *Estrada v. Ahrens*, 296 F.2d 690, 694 (5th Cir. 1961). See also *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 n.5 (1953). The "presence of the prisoner" doctrine has been eroded significantly. *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973) (presence of jailer within jurisdiction sufficient).

205. *Kukatush Mining Corp. v. S.E.C.*, 309 F.2d 647, 650 (D.C. Cir. 1962); *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir.), cert. denied, 364 U.S. 835 (1960); *Braude v. Wirtz*, 350 F.2d 702, 706 (9th Cir. 1965); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 267 (1972).

206. 410 F. Supp. at 152.

207. *Sliosberg v. New York Life Ins. Co.*, 244 N.Y. 482, 492, 155 N.E. 749, 752-53 (1927); accord, *In re Rugh's Estate*, 211 Iowa 722, 728, 234 N.W. 278, 280 (1931) (application to be administrator); *Disconto Gesellschaft v. Umbreit*, 127 Wis. 650, 651, 106 N.W. 821, 822 (1906), aff'd, 208 U.S. 570 (1908). See also *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794) (British subjects could sue to recover on debts); see generally *Berger v. Stevens*, 197 N.C. 234, 235-37, 148 S.E. 244, 245 (1929) (discussing historical background).

208. E.g., *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931); *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908). See *Sardino v. Federal Reserve Bank*, 361 F.2d 106, 111 (2d Cir.), cert. denied, 385 U.S. 898 (1966).

209. *Kukatush Mining Corp. v. S.E.C.*, 309 F.2d 647, 650 (D.C. Cir. 1962).

210. 282 U.S. 481 (1931). See also *Guessefeldt v. McGrath*, 342 U.S. 308, 318 (1952) (giving broad reading to *Russian Volunteer Fleet*).

211. 282 U.S. at 489.

tioner's country of nationality was unrecognized by the American government. At least one case relied upon by the Court in *Russian Volunteer Fleet* is virtually impossible to squeeze into the "res" mold, although it also involved the property rights of a nonresident alien corporation.²¹²

The precedents dealing with nonresident aliens fall into three general categories:

- (1) Immigration cases: Even under the broad language of the Administrative Procedure Act (APA),²¹³ nonresident aliens lack standing to challenge governmental refusal to certify them for visas²¹⁴ although resident aliens may do so.²¹⁵ This result rests on an interpretation of the immigration laws finding congressional intent to vest nonreviewable discretion in administrative authorities. "[Immigration cases have] always stood on a special footing."²¹⁶
- (2) The "Res" cases:²¹⁷ These have already been discussed.
- (3) Statutory schemes: Distinguishing two of its earlier

212. *Id.* (citing *Home Ins. Co. v. Dick*, 281 U.S. 397, 411 (1930)). *Dick* held that fourteenth amendment due process forbade application of Texas public policy in disregard of a time limitation in an insurance policy written by a Mexican corporation on Mexican property in favor of a Texas resident in Mexico. There was nothing within Texas justifying the application of Texas law. See generally Hertz, *The Constitution and the Conflicts of Laws: Approaches in Canadian and American Law*, 27 U. TORONTO L.J. 1, 14 (1977). *Dick* cannot be viewed as a "res" case.

213. 5 U.S.C. §§ 551(2), 702 (1976).

214. *Cobb v. Murrell*, 386 F.2d 947 (5th Cir. 1967); *Braude v. Wirtz*, 350 F.2d 702 (9th Cir. 1965).

215. *Reddy, Inc. v. United States Dep't of Labor*, 492 F.2d 538 (5th Cir. 1974). The Ninth Circuit has evaded the result of its *Braude* decision, see note 205 *supra*, by conferring on the employer standing to sue. *Yong v. Regional Manpower Adm'r*, 509 F.2d 243 (9th Cir. 1975); accord, *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 760 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974); *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973). But see *Intercontinental Placement Serv., Inc. v. Shultz*, 461 F.2d 222 (3d Cir. 1972) (no standing for employment agency locating positions for aliens). Compare *Chinese Am. Civic Council v. Attorney General*, 396 F. Supp. 1250 (D.D.C. 1975) (nonresident alien never in U.S. lacked standing to challenge denial of entry), *aff'd on other grounds*, 566 F.2d 321 (D.C. Cir. 1977), with *Jaimenz-Revolla v. Bell*, 598 F.2d 243 (D.C. Cir. 1979) (alien who voluntarily departed to pursue readmission request did not lack standing to challenge denial of reentry).

216. *Kukatush Mining Corp. v. S.E.C.*, 309 F.2d 647, 650 (D.C. Cir. 1962) (per Burger, J.).

217. *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931); *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908); *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972); *Kukatush Mining Corp. v. S.E.C.*, 309 F.2d 647, 650 (D.C. Cir. 1962).

cases,²¹⁸ the court in the *Concica* case²¹⁹ allowed standing under the APA for a nonresident alien corporation to challenge a decision by the Agency for International Development (AID) refusing the plaintiff's low bid to construct a road in Nicaragua. The court, in interpreting the broad language of the Act,²²⁰ saw no reason to construct an exception barring nonresident aliens from challenging an arbitrary AID decision and found for the plaintiff. Although *Concica* substantially erodes the nonresident alien exception to standing in APA cases, there is no reason to believe, as the *Berlin* court seems to say, that *Concica* is inapplicable to all constitutional challenges by nonresident aliens.

As the alien plaintiff in *Berlin* had a "personal stake"²²¹ in the outcome, denial of standing presumably rested on a "concern about the . . . properly limited . . . role of the courts."²²² Professor Scott has discussed the calculated confusion that courts create by blending standing with other doctrines justifying their refusal to decide cases.²²³ Scott maintains that although plaintiffs' access to the courts has been liberalized, it would be wrong to abandon the notion of voluntary judicial abstention from policymaking as to particular issues.²²⁴ He calls this second type of standing "decision standing,"²²⁵ which may require a greater degree of plaintiff injury or interest in the outcome to convince the court that a difficult matter should be judicially determined.²²⁶

"[W]here Congress has authorized judicial review of a particular set of government actions or decisions, there is less difficulty

218. *Kukatush Mining Corp. v. S.E.C.*, 309 F.2d 647 (D.C. Cir. 1962), was distinguished as involving "an alleged evildoer" who was acting only for his own benefit. *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960), involved "nonresident aliens who [did] not [allege] specific threatened injury." *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1191 & n.13 (D.C. Cir. 1972).

219. *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183 (D.C. Cir. 1972).

220. 5 U.S.C. § 551(2) (1976).

221. *Barlow v. Collins*, 397 U.S. 159, 164 (1970). Under earlier developed doctrine, still relied upon today, plaintiff has standing if there would be a common law remedy for the same acts committed by a private party. Scott, *supra* note 202, at 650. Under either German or American law, the wiretapping complained of should constitute an invasion of privacy. Krause, *The Right to Privacy in Germany—Pointers for American Legislation?*, [1965] *Duke L.J.* 481, 500.

222. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

223. Scott, *supra* note 202, at 684. See generally *Barlow v. Collins*, 397 U.S. 159, 176 (1970) (Brennan, J., dissenting); Scott, *supra* note 202, at 683-90.

224. Scott, *supra* note 202, at 690.

225. *Id.* at 685 n.153.

226. *Id.* at 684-85.

[for the courts] as to . . . [their] policymaking role."²²⁷ *Berlin* may, therefore, be correct in limiting the liberalization of *Concica* and other APA cases when considering certain constitutional claims by nonresident aliens. In challenges to administrative actions, the court must construe the statute underlying the administrative decision to see whether judicial review is available. This still permits judicial selectivity when facing statutory matters in which challenges by nonresident aliens would be inappropriate. In a constitutional case such as *Berlin*, such selectivity is less easily divisible by subject matter.

Particularly relevant to cases involving the application of constitutional rights to nonresident aliens is the caution with which the Supreme Court approached the issue of overseas application of constitutional guarantees with respect to citizens. In rejecting the blanket argument that such application would encumber the American government in foreign affairs,²²⁸ the Court found that obligations imposed by the government because of citizenship required a concomitant limitation of government action within constitutional guarantees.²²⁹ Moreover, Americans abroad cannot rely upon foreign governments for protection but aliens at home can expect protection in their own land.²³⁰ Finally, although the freedoms guaranteed in the Constitution may outweigh foreign policy interests in cases involving citizens, the issue is far more doubtful in cases involving persons lacking any substantial connection with the United States.

Berlin's invocation of a preclusionary doctrine on a nationality basis is justifiable. To the extent that injunctive or declaratory relief was proper, the citizen plaintiffs' case would carry relief for the alien plaintiff. As for the alien's monetary claim, in the context of the larger injuries suffered by the citizens and the importance of the decision on applicability of rights to nonresident aliens, the injury may have been viewed as too inconsequential for judicial action.²³¹

Whatever limitations are placed on the "decision standing" of

227. *Id.* at 686.

228. *Reid v. Covert*, 354 U.S. 1, 14 (1957). See Reply Brief for United States, *Reid v. Covert*, 1 L. Ed. 2d 2137-38 (1957).

229. *Reid v. Covert*, 354 U.S. 1, 14 (1957).

230. See *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 152-53 (D.D.C. 1976). *Accord*, *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 600 n.31 (1976).

231. See *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 153 (D.D.C. 1976); Scott, *supra* note 202, at 684-85.

nonresident aliens, these limitations should not be determined on a "res" theory. Although the expropriation in *Russian Volunteer Fleet* took place within the United States, should the place of expropriation be relevant? If it took place on the high seas and the ships were moored in a friendly haven outside the United States, that should not preclude the plaintiff from standing. Similarly, if the defendant in *Toscanino* were incarcerated outside the United States, that should not preclude American courts from hearing a claim for habeas corpus.²³² Rather, the question of "decision standing" must rest on the gravity of the claim. For instance, incarceration or expropriation might be viewed as more consequential than the wiretapping in *Berlin*. Given the undoubted collision between governmental foreign policy interests and constitutional freedoms, the courts might well avoid decisions on the less compelling claims and wait for congressional directives.

Beyond the standing issue remains the question of the substantive applicability of constitutional protections to aliens abroad. *Reid v. Covert*²³³ can be read broadly for the proposition that constitutional guarantees operate outside American territory in favor of American citizens. *Reid* did not decide whether the rights of Americans overseas are as extensive as those at home.²³⁴ The *Berlin* court resolved that issue in favor of parity, and other courts have created no distinction based on locale.²³⁵ Nonresident aliens, on the other hand, clearly have procedural due process rights in American courts²³⁶ as well as the right to just compensation for the taking of their American property.²³⁷

The Court of Claims has held that just compensation is also due for takings by American officials of foreign property owned by nonresident aliens,²³⁸ and fourth amendment rights have been accorded to a nonresident alien, at least when the government sought to exploit the fruits of a foreign search in an American

232. The "jailer" would be the federal agency holding him abroad. *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973).

233. 354 U.S. 1, 6 (Black, J., for four justices), 56 (Frankfurter, J., concurring), 74 (Harlan, J., concurring).

234. Compare *Reid v. Covert*, 354 U.S. 1, 6 (1957) (Black, J.), with *id.* at 74 (Harlan, J., concurring) (same guarantees not necessarily applicable).

235. 410 F. Supp. at 155, 157 n.6. *Accord*, *Williams v. Blount*, 314 F. Supp. 1356, 1363-64 (D.D.C. 1970) (first amendment).

236. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 416 n.7 (9th Cir. 1977) (due process "minimum contacts" test applies to foreign defendants); *United Continental Tuna Corp. v. United States*, 550 F.2d 569, 574 (9th Cir. 1977) (denial to alien of right to sue U.S. government met due process rationality requirements).

237. *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931).

238. *Camacho v. United States*, 494 F.2d 1363, 1368 (Ct. Cl. 1974); *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953), cited with approval in *Reid v. Covert*, 354 U.S. 1, 8 n.10 (1957) (Black, J., for four justices).

trial.²³⁹ Yet doubt surely remains as to whether all constitutional rights semantically applicable to noncitizens would be accorded to nonresident aliens even if accorded to citizens abroad.

The problem goes a step further: although resident aliens may have a general group of rights offered them within American borders, what happens when they are abroad? If the concept of citizenship plays a minimal role in dealing with rights at home,²⁴⁰ should resident aliens nevertheless be treated differently abroad? In matters which are basically domestic but about which the government fortuitously acts abroad, surely no distinction should be made. But as soon as a matter touches upon foreign affairs, it may well follow that locale and citizenship are relevant factors in determining limitations on government action and that government may need more latitude in dealing with noncitizens abroad, whether or not they have a connection with the United States. Such issues, however, remain to be raised.

Individual Discrimination Against Aliens

The issue of individual discrimination against aliens on the basis of nationality arose in an action²⁴¹ brought under the Civil Rights Act of 1964, prohibiting discrimination in the area of employment on the basis of "race, color, religion, sex or national origin."²⁴² Although federal regulations subsumed discrimination on the basis of "nationality" within the term "national origin,"²⁴³ the Supreme Court rejected this ruling in an almost purely semantic discussion.²⁴⁴

The matter has not rested there, for the issue of discrimination by individuals has been pursued under 42 U.S.C. § 1981.²⁴⁵ In

239. *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974); *accord*, Note, 88 HARV. L. REV. 813, 824-25 (1975); 17 VA. J. INT'L L. 131, 133 n.10 (1976). *But see* *United States v. Orman*, 417 F. Supp. 1126, 1131 (D. Colo. 1976) (citing *Toscanino* dissent with approval).

240. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 387 (1973).

241. *Espinoza v. Farah Mfr. Co.*, 414 U.S. 86 (1973).

242. 42 U.S.C. § 2000e(a)(1) (1976).

243. 29 C.F.R. § 1606.1(d) (Supp. 1972), *amended post-Espinoza* by 39 Fed. Reg. 10,123-24 (1974).

244. 414 U.S. 86 (1973). The House of Lords reached the same conclusion in interpreting the same words in an English civil rights statute. *Ealing London Borough Council v. Race Relations Bd.*, [1972] A.C. 342 (H.L.).

245. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to

Guerra v. Manchester Terminal Corp.,²⁴⁶ the Fifth Circuit held that section 1981 applied to discrimination by nongovernmental units against aliens on the basis of nationality. The court reasoned that section 1981 had its origin in section 1 of the Civil Rights Act of 1866, as did section 1982. The Supreme Court has on a number of occasions suggested that section 1981 "extend[s] to aliens as well as to citizens."²⁴⁷ And, the Fifth Circuit ruled, it had already held that Section 1981 applied to private discrimination in employment.²⁴⁸ Consequently, the law would reach private discrimination in employment against aliens.

Both courts²⁴⁹ and commentators²⁵⁰ have attacked this decision on the bases of constitutional law and statutory interpretation. There is general agreement that section 1981 applies to aliens. There is disagreement as to whether it applies to nonracial private discrimination. Clearly, the thirteenth amendment supports legislation against racial discrimination, private or otherwise, but not laws that do not constitute "badges of slavery."²⁵¹ The fourteenth amendment is broader but has always been interpreted to require state action. Thus discrimination purely on the basis of citizenship probably cannot be attacked constitutionally on the basis of the thirteenth amendment and legislation dealing with purely private action could not meet the state action requirement of the fourteenth amendment. However, the *Guerra* court also relied on the "necessary and proper" clause in addition to federal power over immigration and nationality. Although Congress in its 1870 reenactment of the 1866 legislation focused on the fourteenth amendment, the immigration power can be fairly asserted as a

sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,

42 U.S.C. § 1981 (1976).

246. 498 F.2d 641 (5th Cir. 1974). See also *N.L.R.B. v. International Longshoremen's Ass'n, Local 1581*, 489 F.2d 635 (5th Cir.) (alienage discrimination for job referrals with union "unfair labor practice"), *cert. denied*, 419 U.S. 1040 (1974).

247. *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948).

248. *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 654-55 (5th Cir. 1974). *Accord*, *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975).

249. *DeMalherbe v. International Union of Elevator Contractors*, 438 F. Supp. 1121, 1141-42 (N.D. Cal. 1977).

250. Brousseau, *Alienage and the Constitution: The Requirement of State Action Under Section 1981*, 30 ARK. L. REV. 1, 12-18 (1976); Note, 6 CAL. W. INT'L L.J. 172, 185 (1975). *Contra*, Note, *Wandering Between Two Worlds: Employment Discrimination Against Aliens*, 16 VA. J. INT'L L. 355, 397 (1976).

251. That the "badge of slavery" need not be racial is shown by cases striking down the criminalization of labor contract violations, *Pollock v. Williams*, 322 U.S. 4 (1944), and upholding the federal Anti-Peonage Act, *Clyatt v. United States*, 197 U.S. 207 (1905).

constitutional foundation for the legislation.²⁵²

Of greater concern to the critics is the finding of congressional intent to benefit aliens suffering private discrimination. Section 1981 plainly states that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."²⁵³ This section, derived from section 16 of the 1870 Act, is substantially identical to section 1 of the 1866 Act except for these particulars: it accords rights to "all persons," while the 1866 Act applied to "citizens," and it does not deal with the right to hold and convey real and personal property.²⁵⁴ In fact, much of the essential language in sections 16 and 17 of the 1870 Act tracks that of sections 1 and 2 of the 1866 Act.

There is scattered language in the debates over the 1870 Act referring to "state laws" and to section 16 as designed to enforce the fourteenth amendment.²⁵⁵ On the other hand, Senator Stewart, who introduced sections 16, 17, and 18 into the final version of the Act,²⁵⁶ qualified section 16 as a "requirement that all *citizens* shall

252. See *Usery v. Charleston County School Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977) (legislative history need not refer to fourteenth amendment in order to sustain statute under it); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976) (same), *cert. denied*, 430 U.S. 946 (1977); Note, *Applying the Equal Pay Act to State and Local Governments: The Effect of National League of Cities v. Usery*, 125 U. PA. L. REV. 665, 679-80 (1977) (failure to articulate constitutionally adequate basis does not jeopardize its use). Compare *National League of Cities v. Usery*, 426 U.S. 833, 852 & n.17 (1976) (Fair Labor Standards Act unconstitutional as applied to state and local governments under commerce clause; expressing no opinion as to whether a different result might occur if Congress sought to achieve same end by exercising other powers), with *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976) (distinguishing *National League of Cities*; Congress intended to exercise powers under fourteenth amendment, § 5; legislation constitutional as applied to state governments).

In *Collins v. Hardyman*, 341 U.S. 651 (1951), the Court construed 1871 civil rights legislation narrowly to avoid a constitutional question on congressional power. In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Court reinterpreted the same legislation broadly and upheld it, *inter alia*, under the "right to interstate travel," a doctrine the roots of which were barely extant in 1871. See *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867). See also Nimmer, *A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875*, 65 COLUM. L. REV. 1394 (1965) (1875 Act constitutional under commerce clause, although *The Civil Rights Cases*, 109 U.S. 3 (1883), treated Act as being passed under thirteenth and fourteenth amendments).

253. 42 U.S.C. § 1981 (1976).

254. CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870) (Sen. Stewart) (commenting on S.B. 365, which later became §§ 16 and 17 of the 1870 Act).

255. *E.g., id.*; *id.* at 3701 (Sen. Casserly).

256. *Id.* at 3561-62.

obey the fourteenth amendment and shall not violate the provisions of that amendment while it is in force.”²⁵⁷ Section 17 was more clearly directed against government-related discrimination. Discussing section 1 of Senate Bill 365, from which section 16 was derived, Senator Stewart said, “[I]t extends the operation of the [1866] civil rights bill . . . to all persons within the jurisdiction of the United States,”²⁵⁸ with the exception of certain property and inheritance rights.

Although the Senate appeared to qualify section 16 as a measure to enforce the fourteenth amendment, the Supreme Court has held that 42 U.S.C. § 1981, as derived from section 16, “affords a federal remedy against discrimination in private employment on the basis of race.”²⁵⁹ The cases so deciding were brought by citizens, but the statute and the cases themselves do not limit the remedy to citizens. Although the Supreme Court’s finding of a remedy against private discrimination might appear to conflict with the Senate’s description of section 16 as a fourteenth amendment measure, the “meager legislative history”²⁶⁰ certainly should not be read as any limitation on the broad language of the statute. It is equally clear that aliens have a right of action under section 16 for denial of equal protection of the law under color of state law.²⁶¹ In sum, section 16 is a remedy for public and private denials of rights on the grounds of race and for public denial of rights because of alienage. Having gone that far, where in the broad language of section 16 is there language to deny a remedy for *private* discrimination on the grounds of alienage? “Section 1981 was enacted to protect the rights of two groups of people—non-whites and non-citizens who were not afforded equal treatment to white citizens The standard against which the rights of protected individuals must be matched remains the rights of white citizens.”²⁶² Senator Stewart was clearly concerned with discrimination against the Chinese, which entwined

257. *Id.* at 3658 (emphasis added).

258. *Id.* at 1536.

259. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975). *See also Runyon v. McCrary*, 427 U.S. 160, 173 (1976).

260. *United States v. Classic*, 313 U.S. 299, 327 & n.10 (1941). Although *Classic* was referring to § 17 of the 1870 Act, its remark applies equally well to § 16. So little were §§ 16 and 17 discussed that two opponents of the provisions argued that the Senate had not even understood that they were included in the final version of the Bill. CONG. GLOBE, 41st Cong., 2d Sess. 3701-02 (1870). A motion for clarification was withdrawn only after the Vice-President read from the record, *id.* at 3703, to demonstrate that §§ 16 and 17 had, indeed, been properly submitted as part of the final version.

261. *Graham v. Richardson*, 403 U.S. 365, 377 (1971).

262. *League of Academic Women v. Regents of Univ. of Cal.*, 343 F. Supp. 636, 638-39 (N.D. Cal. 1972) (dictum). *Accord*, *Rackin v. University of Pa.*, 386 F. Supp. 992, 1009 (E.D. Pa. 1974) (dictum).

concepts of race and citizenship.²⁶³ Surely he would be surprised to learn that the rights of Chinese were limited to questions of race, not alienage.²⁶⁴

In criticizing *Guerra*, one commentator remarked that "reason ought [to] tell us that a Congress which itself in federal employment engages in massive alienage discrimination never for a moment considered prohibiting the merchant and the farmer in his choice of citizen-employees."²⁶⁵ Whether or not that was true in 1870,²⁶⁶ it is not clear that Congress would not deny to individual employers what it did itself. National security, encouragement of naturalization, and other acceptable federal policies can outweigh the desirability of equal employment opportunities for aliens. Moreover, section 16 covers many private contractual and other relationships for which there is no equivalent public analogy or, if there is, no actual citizenship discrimination. Congressional decisions to bar aliens from federal jobs should not be read as a congressional attitude towards any activity involving aliens and certainly not as a willingness to tolerate private discrimination on a citizenship basis.

TAXATION

A major assumption of both international and municipal law is that the state of nationality "has jurisdiction to prescribe a rule of law attaching legal consequences to *conduct of national[s]*, wherever that conduct occurs."²⁶⁷ Thus, the United States may punish a citizen's commission of conspiracy to defraud a government

263. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (discrimination against Chinese based on hostility to race and nationality).

264. See CONG. GLOBE, 41st Cong., 2d Sess. 3658 (1870).

265. Brousseau, *Alienage and the Constitution: The Requirement of State Action Under Section 1981*, 30 ARK. L. REV. 1, 18 (1976). The writer also comments on the risk of an alien's suing the Secretary of a federal department for barring him from federal employment. That risk, of course, is obviated now that § 1981 has been held inapplicable to federal employment discrimination on citizenship grounds. *Vergara v. Hampton*, 581 F.2d 1281, 1285 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

266. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 107 (1976) (spoils system prior to 1883 probably reserved government jobs to citizens because they were voters). In 1870, however, a number of states still permitted aliens to vote. *Voting*, *supra* note 20, at 1099. One cannot, therefore, assume that in 1870 the federal government generally excluded aliens from employment.

267. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 30 (1965) (emphasis added).

agency,²⁶⁸ treason,²⁶⁹ murder,²⁷⁰ or trademark infringement,²⁷¹ as long as the regulating rule is adopted according to constitutionally delegated powers. Federal courts may be empowered to subpoena witnesses, and the citizen must respond under his duty to the nation “to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.”²⁷² Citizenship provides a nexus sufficient to require the attendance of a citizen, but it is insufficient to require the presence of a nonresident alien who has done nothing to subject himself to United States process.

These views have been extended to the tax area.²⁷³ The Supreme Court has held that American citizens may be made liable for taxes on a global basis.²⁷⁴

[The power of] the Government of the United States so far as its admitted taxing power is concerned . . . is coextensive with the limits of the United States . . . and . . . embraces all the attributes which appertain to sovereignty in the fullest sense. [The taxpayer argued that cases involving state taxation decided “that the power to tax was limited by the capacity of the taxing government to afford that benefit and protection which is the true basis of the right to tax . . .” and that where that capacity did not exist, the tax was arbitrary and unconstitutional.] But here again the confusion of thought consists in mistaking the scope and extent of the sovereign power of the United States as a nation and its relation to its citizens and their relations to it [G]overnment . . . , by its very nature, benefit[s] the citizen and his property wherever found [T]he argument . . . belittles and destroys . . . [the] advantages and blessings [of citizenship] by denying the . . . government . . . an essential power required to make citizenship completely beneficial.²⁷⁵

The Court noted that the Constitution does not have “the effect of destroying obvious powers of government” but rather preserves and distributes them.²⁷⁶ Taken together with the statement that federal taxing power “embraces all the attributes which appertain to sovereignty in the fullest sense,”²⁷⁷ one could argue that, like the English parliament, the federal government could tax without

268. *United States v. Bowman*, 260 U.S. 94 (1922).

269. *Kawakita v. United States*, 343 U.S. 717 (1952) (by dual national); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950).

270. *United States v. Flores*, 289 U.S. 137 (1933) (murder by U.S. citizen aboard U.S. vessel in foreign waters).

271. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282 (1952).

272. *Blackmer v. United States*, 284 U.S. 421, 438 (1932).

273. Compare *United States v. Bennett*, 232 U.S. 299 (1914) (constitutional to tax foreign property belonging to U.S. citizen), with *Burnet v. Brooks*, 288 U.S. 378, 406 (1933) (national power to tax determined by applying international law principles). See Wurzel, *Foreign Investment and Extraterritorial Taxation*, 38 COLUM. L. REV. 809, 831-32 (1938) (U.S. tax on transaction wholly without U.S. connection would violate fifth amendment as being “without compensation” whatever).

274. *Cook v. Tait*, 265 U.S. 47 (1924); *United States v. Bennett*, 232 U.S. 299 (1914).

275. *United States v. Bennett*, 232 U.S. 299, 306-07 (1914).

276. *Id.* at 306.

277. *Id. Accord*, *Burnet v. Brooks*, 288 U.S. 378, 404-05 (1933).

regard to citizenship, despite the international repercussions. On the other hand, it has generally been supposed that citizenship,²⁷⁸ residence,²⁷⁹ a source of income within the United States,²⁸⁰ or other minimum contact²⁸¹ is a sine qua non for a tax to avoid violating fifth amendment due process.

Reliance on citizenship as the sole basis for tax jurisdiction raises difficulties when citizenship is unclear. The *Rexach*²⁸² cases illustrate the complexities that occur when citizenship is lost and then regained during a period of legal uncertainty. Felix Benitez Rexach ("Felix") was born in Puerto Rico and became an American citizen under the Puerto Rico Organic Act of 1917. Felix and his wife, Lucienne d'Hotelle de Benitez Rexach ("Lucienne"), a French citizen, were married in 1927. She became a naturalized American in 1942. The couple went to the Dominican Republic in 1949, where Felix engaged in harbor construction projects for the Trujillo regime.

In July 1958, Felix executed a written renunciation of his American citizenship. The State Department approved a certificate of loss of nationality, and Felix became a citizen of the Dominican Republic. After Trujillo's assassination in 1961, Felix applied for an American passport, claiming that his 1958 renunciation was compelled by economic pressure and physical threats and was thus involuntary. The State Department Board of Review on Loss of Nationality accepted his testimony, cancelled the certificate of loss of nationality, and issued the passport.

Lucienne reestablished her residence in France in 1946, residing there until 1952 when the State Department determined that she had lost her citizenship as of 1949 because she had lived in her

278. *E.g.*, Levitt, *Income Tax Predicated on Citizenship*: Cook v. Tait, 11 VA. L. REV. 607 (1925); Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 OHIO ST. L.J. 586, 604 (1961).

279. See Treas. Reg. § 1.871-1(a), T.D. 7332, 39 Fed. Reg. 44,218 (1974).

280. I.R.C. §§ 864, 871.

281. The exact line between constitutionally permissible and impermissible taxation of nonresident aliens is unclear. Wurzel, *Foreign Investment and Extra-territorial Taxation*, 38 COLUM. L. REV. 809, 831 (1938).

282. United States v. Lucienne d'Hotelle, 558 F.2d 37 (1st Cir. 1977), *rev'g* United States v. Rexach, 411 F. Supp. 1288 (D.P.R. 1976); Benitez Rexach v. United States, 390 F.2d 631 (1st Cir.), *cert. denied*, 393 U.S. 833 (1968). In the text, *Lucienne d'Hotelle* is referred to as "Lucienne's case." Benitez Rexach v. United States, 390 F.2d 631 (1st Cir.), *cert. denied*, 393 U.S. 833 (1968), is referred to as "Felix's case." The extensive litigation reported in other *Rexach* cases, footnoted in *Lucienne d'Hotelle*, 558 F.2d at 38 n.1, need not concern us here.

native France for more than three years.²⁸³ Lucienne travelled on American passports until May 20, 1952, when the State Department made its determination. She never attempted to regain her American citizenship nor did she officially renounce it. In October 1952, the Dominican Republic extended her citizenship retroactively to January 2, 1952. This citizenship was revoked by the provisional government succeeding the Trujillo regime. She obtained a French passport in June 1962 and used it until her death in 1968.

From 1944 onwards, Felix earned millions of dollars in the Dominican Republic. The American government sued for back taxes pertaining to those earnings. As the source of the earnings was the Dominican Republic and Lucienne had a vested one-half interest in the earnings under that country's community property laws, each of the spouses could be sued for only half of Felix's earnings.²⁸⁴

Felix was clearly a citizen until 1958, but the Government also assessed him on his global earnings for the period between 1958 and 1962 when his citizenship renunciation was in effect, on the ground that he continued to be a de jure citizen during that period. Felix conceded that, on the record, he was a citizen at all times as his renunciation was null and void ab initio but he argued that he was not a de facto citizen because "the United States was freed of its obligations to him as a citizen [during that period] and he in fact lived and existed as an alien to the United States during the period in question."²⁸⁵ As the United States owed him no obligations, he owed the United States no taxes.

Although *Cook v. Tait*²⁸⁶ indicated that the right to tax nationals was based on reciprocal obligations between the state and the citizen,²⁸⁷ the *Rexach* court denied that the obligations had to be mutual in the manner Felix contended: "It is sufficient that the government's [obligations] stem from its de jure relationship without regard to the subjective quid pro quo in any particular case."²⁸⁸ The court rejected estoppel arguments, presumably because there was no impropriety by the State Department in accepting the 1958 renunciation of citizenship. Difficulties with this de jure relationship theory will be explored in conjunction with Lucienne's case, which turned out somewhat differently.

283. Nationality Act of 1940, ch. 876, § 404(b), 54 Stat. 1170.

284. *United States v. Rexach*, 185 F. Supp. 465, 478 (D.P.R. 1960).

285. *Benitez Rexach v. United States*, 390 F.2d 631, 632 (1st Cir.), *cert. denied*, 393 U.S. 833 (1968).

286. 265 U.S. 47 (1924).

287. *Id.* at 56.

288. *Benitez Rexach v. United States*, 390 F.2d at 632.

In response to Supreme Court decisions invalidating various sections of the expatriation laws, the Internal Revenue Service ruled that reinstatement to citizenship would, in certain cases, be given prospective effect only. After *Schneider v. Rusk*²⁸⁹ invalidated the law under which Lucienne lost her American citizenship, the IRS decided that naturalized persons who had lost their citizenship by residing in their native land for three years or more would nevertheless not be taxed as citizens prior to 1971, unless the person "prior to . . . 1971, but after the time of specific conduct which was mistakenly deemed to have resulted in loss of citizenship, affirmatively exercised a specific right of citizenship."²⁹⁰ Under the exception, liability for taxes would begin with the tax year in which the specific citizenship right was exercised. A similar ruling, likewise prospective, was made for women who lost their citizenship by marriage to aliens under the Expatriation Act of 1907.²⁹¹ Neither ruling applied to Felix, who lost his citizenship under voluntary relinquishment principles.²⁹²

Analysis of Lucienne's tax liability can be divided into three parts: 1944 through 1949, the date at which the State Department deemed her citizenship lost; 1949 through May 1952 when her American passport was taken away; and the period subsequent to May 1952. Lucienne's estate did not appeal the district court's finding against it for the first period. The lower court found in her estate's favor for the other periods, and the Government appealed the judgment relating to the second period only.²⁹³

The Government's position before the First Circuit was that section 404 of the Nationality Act of 1940, under which Lucienne had lost her citizenship, had been retroactively voided by *Schneider v. Rusk*²⁹⁴ and *Afroyim v. Rusk*,²⁹⁵ thereby restoring Lucienne's nationality as of 1949 and rendering her liable for tax. In 1952, of course, section 404 would almost certainly have been upheld.²⁹⁶ The issue became one of retroactive application of the constitutional invalidation and its tax consequences.

289. 377 U.S. 163 (1964).

290. Rev. Rul. 70-506, 1970-2 C.B. 2.

291. Rev. Rul. 75-357, 1975-2 C.B. 5.

292. 8 U.S.C. § 1481(a)(7) (1976).

293. *United States v. Lucienne d'Hotelle*, 558 F.2d 37 (1st Cir. 1977).

294. 377 U.S. 163 (1964).

295. 387 U.S. 253 (1967).

296. *See, e.g., Perez v. Brownell*, 356 U.S. 44 (1958).

In *Rocha v. INS*,²⁹⁷ the First Circuit had applied *Afroyim v. Rusk* retroactively in order to declare the petitioner's mother a citizen and consequently to find that the petitioner had obtained citizenship by descent.²⁹⁸ *Rocha* raised no issues that required a determination of the time at which citizenship vested; that is, at petitioner's birth or only at the date of judgment. Lucienne's case, though, required a decision as to whether her citizenship would be deemed restored for the 1949-52 period and thus subject her to tax.

The court found that, although citizenship generally required the payment of taxes, it would be inequitable to use *Schneider* and *Afroyim* "to compel payment of taxes by all persons who mistakenly thought themselves to have been validly expatriated."²⁹⁹ In Lucienne's case, the court followed the IRS' ruling³⁰⁰ and held Lucienne's estate liable for back income taxes because she had affirmatively exercised citizenship rights during the 1949-52 period.³⁰¹

The situation was otherwise for the post-1952 period. First, Lucienne could be treated as having renounced her citizenship herself after 1952. Even if she had not, when the government treated her as an alien de facto as well as de jure, it would have

297. 450 F.2d 946 (1st Cir. 1971), *withdrawing prior opinion* 351 F.2d 523 (1st Cir. 1965).

298. Angela Rocha's mother lost her American citizenship under the Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228, because she married an alien and thus acquired his nationality. *MacKenzie v. Hare*, 239 U.S. 299 (1915), sustained the constitutionality of this statute which was later repealed by the Cable Act, ch. 411, § 7, 42 Stat. 1022 (1922). Until 1934 only male Americans could pass their citizenship on to their children born outside the United States. See *Weedin v. Chin Bow*, 274 U.S. 657 (1927). In 1934 American women acquired the right as well. Presumably, Congress was aware in 1934 that children born to alien fathers and American mothers married between 1907 and 1922 would still not derive American citizenship through their mothers if the mothers had lost their citizenship through marriage. When the *Rocha* court found the 1907 Act unconstitutional, it assumed that Angela must automatically obtain the benefits of the 1934 Act because the Constitution made her mother a citizen once again. However, only Congress could make Angela a citizen, and Congress had never decided that she should be one. One can argue that, as Congress could never have anticipated a case like *Rocha*, the 1934 Act was never intended to cover the question of Angela's citizenship and, for lack of any law affirmatively granting her citizenship by descent, she should not have obtained it. Although such a reading of the 1934 Act plainly discriminates between children whose mothers married aliens between 1907 and 1922 and those whose mothers did not, that distinction is arguably permissible under *Rogers v. Bellei*, 401 U.S. 815 (1971). In any event, the interpretation of the 1934 Act is a substantial issue which ought to have been discussed at some point.

299. *United States v. Lucienne d'Hotelle*, 558 F.2d 37, 42 (1st Cir. 1977).

300. Rev. Rul. 75-357, 1975-2 C.B. 5; Rev. Rul. 70-506, 1970-2 C.B. 1.

301. The quid pro quo existed: "Fairness dictates that the United States recover income taxes for the [1949-52] period. . . . Lucienne was privileged to travel on a United States passport; she received the protection of its government." 558 F.2d at 43.

been estopped to reverse itself. "Lucienne cannot be dunned for taxes to support the United States government during the years in which she was denied its protection."³⁰²

If the government was estopped in Lucienne's case, why was it not in Felix's?³⁰³ Lucienne's citizenship was restored through constitutional decision, but Felix's was restored through interpretation; Felix requested restoration and Lucienne did not; and Felix specifically renounced his citizenship in the first instance. But why are these factors critical? The "duress"³⁰⁴ in a case such as Felix's might well rise to a level such that, under *Afroyim v. Rusk*,³⁰⁵ Congress could not as a constitutional matter disregard such duress in defining a "voluntary relinquishment" of citizenship. The position taken by government officials in Lucienne's case was no less bona fide than in Felix's,³⁰⁶ and both were only

302. *Id.*

303. The interrelationship between the two cases on this point was not raised in Lucienne's case, even in the briefs, as the government did not appeal her post-1952 tax liability, and the court discussed the matter on its own motion.

304. The Dominican government pressured Felix to see if his citizenship had been lost because of his position as commercial advisor to the Dominican Embassy in Paris in 1952 or 1953. Record Appendix to Brief for Appellant at 10, *Benitez Rexach v. United States*, 390 F.2d 631 (1st Cir.), *cert. denied*, 393 U.S. 833 (1968). That government wanted to show that Felix was no longer a U.S. citizen in order to quash the IRS investigation of Felix's affairs and to "prevent [the] worsening of external international relations growing out of practices of that Government" which the investigation was uncovering. *Id.* at 9. When it appeared that Felix's employment with the Dominican government did not jeopardize his American citizenship, that government pressed for his renunciation. Felix alleged that "his formal renunciation of United States citizenship was an act compelled by not only fear of financial loss or ruin, but also that he was, in fact, in fear of his personal safety if he refused to obey the . . . commands of the Dominican Government to divest himself of his American status." *Id.* at 11-12. The record tends to substantiate the degree to which Trujillo was willing to go to punish persons who disobeyed him as well as actual measures which were taken against Rexach and his business. One should not assume that the duress experienced by Rexach was merely the minimum entitling him to call his renunciation involuntary.

305. 387 U.S. 253 (1967).

306. The Government argued in Felix's case: "While it is true, as later determined, that taxpayer's action was involuntary, it is also true that only he and not the State Department knew such to be the case." Brief for Appellee at 15, *Benitez Rexach v. United States*, 390 F.2d 631 (1st Cir.), *cert. denied*, 393 U.S. 833 (1968). Ordinarily, consent under duress remains valid consent to persons unaware of the duress. *Cf. Roper v. Harper*, 4 Bing. (N.C.) 20, 132 Eng. Rep. 696 (C.P. 1837) (defendant not liable for conversion as unaware that plaintiff's consent to taking had been extracted under duress). If, however, Congress could not constitutionally refuse to return Felix's citizenship because of duress, it is at least arguable that given that Felix was unable to reveal that he was under duress, the State Department's understanding is irrelevant. The argument is not one of estoppel; rather, it is that, even as the Government could not ignore the duress and fail to reinstate

de jure citizens during the periods in question.

The most likely difference between the cases is that Felix, although not acting completely without duress, renounced his citizenship at least in part to escape taxation. As a matter of statutory interpretation, renunciation had not been voluntary, but it was not unfair to subject him to the tax consequences that flowed from the invalidation of the loss of nationality. If, however, the duress had been such that Congress could not constitutionally disregard it, one would think that the court would treat Felix no differently from the way it treated Lucienne.

Voluntary renunciation of citizenship likewise creates tax issues. In *United States v. Matheson*,³⁰⁷ the decedent, Mrs. Burns, never lived in the United States after the age of fifteen. She married a second time at the age of forty to a Mexican national. Under Mexican law, her marriage made her a citizen by naturalization. As a prerequisite to obtaining a certificate of Mexican nationality, she submitted to the Mexican government a declaration of allegiance to Mexico and renunciation "of all protection foreign to" its laws, agreeing "not to invoke with respect to [Mexico] any right inherent in [her] nationality of origin."³⁰⁸ Throughout the remainder of her life, the decedent and Matheson, her lawyer and executor, acted as though the 1944 renunciation did not constitute an act of expatriation. She obtained American passports, affirming in her applications that she had never sworn allegiance to a foreign state. The State Department found that she had dual nationality. Despite later Mexican interpretations of her 1944 statement as a renunciation of American citizenship,³⁰⁹ the Second Circuit held that it was merely a declaration that she would not look to the United States for protection as a national while she was in Mexico, a reading consistent with a dual national's ob-

Felix as a citizen, so it could not ignore the duress and treat him as a citizen during the renunciation period.

The Government further argued that Felix said nothing about duress even when he was present in Puerto Rico for tax litigation and thus "seemingly removed from the impact of alleged threats of physical violence." Brief for Appellee at 17. But Felix remained domiciled in the Dominican Republic until such time as he did reveal the duress that he had experienced. Moreover, he quite plausibly showed that Trujillo's wrath could transcend international boundaries.

307. 532 F.2d 809 (2d Cir.), cert. denied, 429 U.S. 823 (1976).

308. *Id.* at 816.

309. *Id.* at 817. In 1949 the Mexican naturalization law was modified to require explicit renunciation of other citizenship in applying for a certificate of Mexican nationality. Testimony was introduced to show that this change was merely a legislative recognition of the existing Mexican practice and that the oath taken by Mrs. Burns in 1944 was meant to be a renunciation. The Second Circuit did not accept this interpretation, taking the view that it was Mrs. Burns' understanding that was determinative and that the evidence showed clearly that she did not treat it as a renunciation.

ligations. The court held that the not unequivocal declaration be read against renunciation, as in other cases "it would be unfair to strip an individual of his American birthright when he honestly but mistakenly believed that his conduct did not compromise his legal status as a United States citizen or as a dual national."³¹⁰ In the alternative, the court would have held against the taxpayer through application of the doctrines of estoppel and laches.

Prior to 1966, persons in Mrs. Burns' situation could escape United States taxation by voluntary expatriation. For instance, in *Dillin v. C.I.R.*,³¹¹ the taxpayer in 1958 entered into an agreement under which he would receive compensation from 1963 through 1965 for services rendered in 1958. Shortly before he was to receive the first payment, the taxpayer renounced his citizenship and moved permanently to the Bahamas. Because he was a cash method taxpayer, he was held to be taxable as a nonresident alien on the amounts received after his expatriation, even though the sole purpose of his renunciation was to avoid taxation. Congress enacted legislation in 1966 providing that nonresident aliens who, within the ten-year period immediately preceding the close of the taxable year, lost United States citizenship must pay an alternative tax, unless the loss did not have as one of its principal purposes the avoidance of tax.³¹² The tax was imposed in a case quite similar to *Dillin*, arising shortly after the effective date of the new law.³¹³

This legislation may create certain difficulties with tax treaties. One writer has drawn attention to the fact that expatriates would be treated as noncitizens and yet subjected to tax.³¹⁴ Federal law specifically provides that the expatriation provision will not apply if it is contrary to a treaty.³¹⁵ Although the United States preserves the right in treaties to tax its own citizens, the expatriate would presumably fall within a new class, not covered by the saving clause, and would consequently benefit from treaty protection if a resident within the other treaty state.³¹⁶

310. *Id.* at 815.

311. 56 T.C. 228 (1971).

312. I.R.C. §§ 877(b) (income tax), 2107, 2501(a)(3) (estate and gift taxes).

313. Kronenberg v. C.I.R., 64 T.C. 428 (1975).

314. Ness, *Federal Tax Treatment of Expatriates Entitled to Treaty Protection*, 21 TAX. LAW. 393, 395-96 (1968).

315. Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, § 110, 80 Stat. 1575.

316. Ness, *Federal Tax Treatment of Expatriates Entitled to Treaty Protection*, 21 TAX. LAW. 393, 398-99 (1968).

Two arguments might be made against the constitutionality of the tax on expatriates. First, there remains the unresolved issue of whether, legislation aside, Americans have a right of voluntary expatriation or are bound to perpetual allegiance.³¹⁷ The Act of 1868,³¹⁸ the first legislative declaration of a right of expatriation, purported on its face to be no more than an acknowledgement of existing rights. It might be argued, therefore, that Congress may not impinge on this right by imposing a tax burden, either because the right is one of the innominate rights protected by the ninth amendment³¹⁹ or because the original understanding that such a right existed means that Congress has always lacked the power to undercut it.³²⁰ Secondly, even if legislative assistance is needed to permit citizens to sever their allegiance, it might be contended that Congress can do no more than acquiesce and refrain from imposing conditions subsequent to the acceptance of the renunciation. In other words, Congress could well refuse to permit the renunciation for the purpose of tax avoidance, but once it decided to accept the expatriation it could not attach conditions subsequent. The status of the naturalized citizen is clearly analogous to this contention.³²¹ Although Congress may

317. *MacKenzie v. Hare*, 239 U.S. 299, 309 (1915) (leaving issue unresolved). See generally Gordon, *The Citizen and the State: Power of Congress to Expatriate American Citizens*, 53 GEO. L.J. 315, 317-22 (1965). Compare Slaymaker, *The Right of the American Citizen to Expatriate*, 37 AM. L. REV. 191, 204-05 (1903) (perpetual allegiance doctrine repudiated), with Dutcher, *The Right of Expatriation*, 11 AM. L. REV. 447, 474 (1877) (expatriation requires legislation). See also Afroyim v. Rusk, 387 U.S. 253, 264-66 (1967); *Savorgnan v. United States*, 338 U.S. 491, 497-98 (1950).

318. R.S. § 1999, 15 Stat. 223 (1868) (current version at 8 U.S.C. § 1481 (1976)).

319. Cf. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715-16 (1975) (ninth amendment embodies concept of "higher law").

320. These arguments are diminished by the fact that in the 1907 Act, Congress prohibited expatriation during wartime. *In re Peterson*, 33 F. Supp. 615, 616 (E.D. Wash. 1940) (Congress has power to permit or prohibit expatriation during wartime). See also 9 OP. ATT'Y GEN. 62 (1857); 8 OP. ATT'Y GEN. 139, 157, 162, 167 (1856) (noting that no legislation restricts voluntary expatriation). Under current law expatriation during wartime may be prevented if contrary to the national interest. 8 U.S.C. § 1481(a)(7) (1976). Of course, the power to prevent expatriation during wartime may not be equivalent to a power to inhibit expatriation for fiscal or other reasons.

321. See *Schneider v. Rusk*, 377 U.S. 163, 166 (1964); Note, *Constitutional Limitations on the Naturalization Process*, 80 YALE L.J. 769, 781-82 & nn. 56-57 (1972). *Schneider* advances the view that citizenship by naturalization can be no different from native-born citizenship, except for the lack of qualifications to be President, U.S. CONST. art. II, § 1, cl. 5, and the possibility of denaturalization, 8 U.S.C. § 1451 (1976). See also *Faruki v. Rogers*, 349 F. Supp. 723 (D.D.C. 1972) (naturalized citizens could not be barred from Foreign Service for 10 years after naturalization). Expatriation was an entirely separate matter and required justification lacking in *Schneider*. *Rogers v. Bellei*, 401 U.S. 815, 835 (1971), indicates that citizens by descent may be subject to requirements that native-born citizens could not suffer. For the moment, however, it appears that Congress may not attach conditions subsequent to citizenship by naturalization within the United States.

attach virtually any set of conditions to the granting of citizenship, it may grant no less than full citizenship once it agrees to naturalize and may not impose conditions enforceable afterwards.³²²

Even assuming a constitutional defect in the expatriation tax, another route could achieve the same result. The purpose of the tax is to discourage the taxpayer's divesting himself of the link upon which his assessability is based in order to avoid taxation on income which, under the tax rules, would not accrue until after the link was severed. The same problem exists with aliens, who are taxable on their global income when domiciled in the United States but only on their United States source income when non-resident aliens.³²³ As the United States cannot prevent aliens from changing their status and may not tax nonresident aliens globally, any attempt to prevent an evasion of tax through a change in residence must focus on events taking place prior to the change. For example, cash basis taxpayers, such as the one in *Dillin*,³²⁴ who had rights to future payment could be deemed to have accrued the right to payment and the liability for taxes and yet be required to pay the tax in the year in which the income was physically received. This would mean that normal cash basis taxpayers would see no practical change in their tax obligation, but both resident aliens and citizens who became nonresident aliens would be liable on the equivalent of the present accrual basis. The federal government must then define, within reasonable limits, which events constitute the receipt of income prior to a change of residence or citizenship so as to deter tax evasion by that change.

The *Rexach* cases, involving the problems of involuntary expatriation, posed a genuine conflict between the constitutional power to tax and the consequences of an unconstitutional involuntary expatriation. Although the court of appeals in *Lucienne's*

322. Congress has required citizenship candidates to swear a willingness to bear arms as a prerequisite to naturalization. Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 781 n.56 (1972). It has never been determined whether this oath could be enforced once citizenship has been granted or what consequences would attach for failure to live up to it.

323. Compare I.R.C. § 1 (taxing all individuals globally), with *id.* § 871 (taxing nonresident aliens on U.S. source income). See Langer, *The Need for Reform in the Tax Treaty Area*, in INCOME TAX TREATIES 746-47 (J. Bischel ed. 1978).

324. See note 311 *supra*.

case founded part of its decision on estoppel,³²⁵ that estoppel would appear to be of constitutional magnitude. If Congress unconstitutionally deprived Lucienne of her citizenship during a particular period, it should not be able to tax her on the basis of the de jure citizenship discovered when the congressional enactment was found invalid. In international law terms, there may be a significant question as to whether a State can declare an individual a noncitizen and then reverse its decision, attaching ex post facto consequences. Even if that were not so, the reasoning in *Cook v. Tait*³²⁶ poses a due process problem to global taxation of a person declared to be a noncitizen and outside American responsibility. Felix's case is more difficult, as the government would have had no way of knowing its mistake; it could have ascertained its error in Lucienne's situation. But the fact remains that the tax was imposed on the basis of citizenship existing only in name, when the government would have rejected any responsibility for the individual during the period of de jure citizenship.

SECURITIES LAWS

*Bersch v. Drexel Firestone, Inc.*³²⁷ is one of a line of cases defining the extraterritorial reach of the federal securities laws. Earlier decisions had applied those laws to foreign transactions by nonresident aliens adversely affecting the American stock exchange price of shares held by nonresident American citizens³²⁸ and misrepresentations made in the United States by aliens to Americans to effect their participation in a foreign transaction.³²⁹ *Bersch* involved the common stock of I.O.S., Ltd., a Canadian corporation operating wholly outside the United States. The plaintiffs sued because of activities by American and alien defendants both abroad and in the United States that affected I.O.S. shareholders in three categories: Americans resident in the United States,³³⁰ Americans resident abroad, and nonresident aliens.

325. 558 F.2d 37, 43 (1st Cir. 1977).

326. 265 U.S. 47 (1924).

327. 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

328. *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.), *rev'd*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied sub nom.*, *Manley v. Schoenbaum*, 395 U.S. 906 (1969).

329. *See, e.g., Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

330. The court stated that "losses to foreigners from sales to them within the United States, are not before us." 519 F.2d at 993. Many of the "American purchasers" bought bearer shares, *id.* at 992 n.42, and the citizenship of such shareholders might be obscure. Either the court was confident that resident aliens were not among the resident Americans, *id.* at 990, or it was treating such aliens as "American purchasers."

While "freely acknowledg[ing]"³³¹ the lack of a statutory basis for doing so, the *Bersch* court formulated a different jurisdictional test for each shareholder. The court held that the antifraud provisions of the securities laws applied to losses from sales of securities (1) to American citizens resident in the United States regardless of whether the defendants' acts or omissions occurred in the United States and (2) to nonresident Americans only if "acts (or culpable failures to act) of material importance in the United States have significantly contributed" to those losses.³³² But the provisions would not apply to the losses from sales (3) to aliens "outside the United States unless acts (or culpable failures to act) within the United States *directly* caused those losses."³³³

In *Bersch* the defendants' "merely preparatory activities" in the United States met the "material importance" test for Category II, but did not meet the "directly caused" test for Category III. Equal protection notions inherent in fifth amendment due process probably do not prohibit such a distinction,³³⁴ but such discrimination violates the spirit of equality and may conflict with American treaty obligations.³³⁵ Moreover, if one considers the purpose of the securities laws, a nationality test is difficult to justify on any basis other than ease of application when considering these laws.

When activities prohibited by the securities laws have a significant impact on American securities or exchanges, those laws ap-

331. *Id.* at 993.

332. *Id.*

333. *Id.* (emphasis added); *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1017-18 (2d Cir. 1975); Note, *Extraterritorial Application of § 10(b) of the Securities Exchange Act of 1934—The Implications of Bersch v. Drexel Firestone, Inc. and ITT v. Vencap, Ltd.*, 33 WASH. & LEE L. REV. 397, 412-13 (1976). For other cases applying this test to nonresident aliens, compare *F.O.F. Proprietary Funds, Ltd. v. Arthur Young & Co.*, 400 F. Supp. 1219 (S.D.N.Y. 1975) (only U.S. link was defendants' American nationality and preparation of offering circular in U.S.; no jurisdiction to losses of nonresident aliens), with *Straub v. Vaisman & Co.*, 540 F.2d 591, 595 (3d Cir. 1976) (where scheme conceived in U.S. by U.S. citizen involved stock in U.S. companies traded over the counter within U.S. plus omissions by U.S. broker, sufficient connection for jurisdiction although plaintiffs nonresident aliens). See also *Des Brisay v. The Goldfield Corp.*, 549 F.2d 133 (9th Cir. 1977) (Canadian company listed on U.S. exchanges injured by fraud involving U.S. corporation stock listed on U.S. exchange); *S.E.C. v. Kasser*, 548 F.2d 109 (3d Cir. 1977) (use of U.S. mails, offices in U.S., other contacts; only victim was foreign corporation).

334. *Mathews v. Diaz*, 426 U.S. 67 (1976) (resident aliens could be denied social security benefits on basis of length of residence).

335. Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553, 569 (1976).

ply even if the plaintiffs are all nonresident aliens.³³⁶ *Bersch* involved neither American securities nor exchanges. Rather, the complaint maintained that the United States was being used as a staging ground for economic injury to residents and nonresidents through the purchase of foreign securities. In such cases the courts have sought to relate the significance of the activities within American territory to the injury produced, borrowing from and adapting international law limitations to determine the extra-territorial scope of national regulation. The judicial goal has been to avoid overinjecting American regulation into essentially foreign transactions and overburdening American courts with matters lacking substantial American concern.

The Second Circuit initiated adherence to the *Restatement (Second)*, *Foreign Relations Law of the United States* as a guideline to jurisdictional interpretation.³³⁷ *Restatement* sections 17 and 18 justify *Bersch's* Category I test, as there was not only conduct within the United States but also substantial effects upon persons within the United States directly and foreseeably caused by all conduct, within and without the United States. *Restatement* section 17 alone also supports jurisdiction in the Category II and III cases,³³⁸ as conduct took place within the United States and the United States had a sufficient interest to prohibit the use of its territory as a staging ground for antisocial behavior. In addition, some foreign states view the protection of nonresident nationals against even extraterritorial conduct as a viable, if secondary, basis for regulatory jurisdiction.³³⁹ Although the United States has not adopted this "passive personality" principle, this doctrine together with section 17, supports the conclusion that the United States has a greater interest in protecting nonresident citizens than nonresident aliens from injury caused by activities within American territory.³⁴⁰

Although international law can be used as a guideline to support the *Bersch* Category III test, is the distinction justifiable in terms of the purposes of the securities laws? Those laws are meant to protect economic interests—American, to be sure, but in

336. *Des Brisay v. The Goldfield Corp.*, 549 F.2d 133 (9th Cir. 1977).

337. See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968), *cert. denied sub nom. Manley v. Schoenbaum*, 395 U.S. 906 (1969).

338. *S.E.C. v. Kasser*, 548 F.2d 109, 112-13 (3d Cir. 1977).

339. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 30, Comment e (1965).

340. Cf. *Uravic v. Jarka Co.*, 282 U.S. 234, 239 (1931) (American stevedore working on German ship protected by American law where German seaman might not be); Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 OHIO ST. L. J. 586, 609-10 (1961) (discussing *Uravic*).

the sense of protecting the American securities system rather than protecting citizens as such. Those laws applied in the *Bersch* situation, either because the investor has a right to expect American protection (Category I investors fall into that class) or because the American securities system requires that protection (Categories II and III).

The issue is whether nationality is functionally adequate to set limits on the protection American securities law can provide. If one attempts to provide limits by looking to factors such as the securities involved, the connection between impugned activities and American territory, and other matters unrelated to particular investors, then the factor of plaintiff's nationality is irrelevant. If the relevant limiting factor involves qualities in the investors, then which investors? The law is designed to regulate the American securities system; therefore, the plaintiffs to be protected should be persons actually or potentially involved in that system and consequently deserving the protection of United States laws when injured by United States based activities. If that is the purpose, nationality is still a poor guideline. True, American citizens are more likely to participate in the American securities system than are nonresident aliens, but past or present economic activity by individual plaintiffs provides a more tailored measure of nexus and one that is not administratively burdensome. Nationality, in any event, says nothing about an individual's connection with the American securities system.

The *Bersch* nationality distinction can be justified on only three grounds: (1) American nationals are worthier of American legal protection than aliens in situations in which the courts find the applicability of American legislation to be tangential, (2) American nationality can be read to indicate a greater likelihood of economic participation in the American securities system and consequently justifies greater protection, or (3) the distinction results in administrative convenience or economy. Each argument can be answered by focusing on the political function of citizenship, which is its primary attribute. First, although chauvinistic protection of the citizen is permissible under international law, it is contrary to our tradition, which quite properly appears to be narrowing citizenship to its political role. The broad economic purposes of the securities laws do not suggest any congressional policy favoring nationalistic zeal in doling out protection. Second, the law of averages undoubtedly shows that nonresident citi-

zens as a group are more inclined to be involved with United States securities than nonresident aliens. But the breadth of the group will inevitably create unjust results. Third, administrative convenience does not necessarily require such an arbitrary test. Overall, such consequences from the use of nationality as a test are undesirable.³⁴¹

CONCLUSION

Citizenship is thus deficient as a standard for legal decision-making. Citizenship may be acquired by disparate and unrelated methods, including birth in the United States,³⁴² voluntary naturalization,³⁴³ accelerated naturalization because a parent³⁴⁴ or spouse³⁴⁵ is a citizen, birth abroad to American parents,³⁴⁶ or birth abroad to an American parent plus residence in the United States.³⁴⁷ The effect of citizenship upon members of each group may be very different because of its acquisition by such different routes. The assumption that those differences are not significant should not be made when important legal consequences attached to citizenship might be measured by more objective means.

Citizenship cannot be lost without individual acquiescence. Although there plainly is merit in preventing involuntary expatriation, that ruling has its greatest logic when linked to the immigration laws and the power to deport. To the extent that citizenship might play a role as a surrogate for attachment to American customs and traditions, the concept is overinclusive because it assumes that all de jure citizens have such attachment.

Citizenship says little about any actual quality in the individual. Other statuses generally signal some real quality in the individual that justifies the legal consequence. The status of marriage tends to engender and reflect emotional ties, as does close family relationship. Domicile suggests continuing connection to a place, at least to the extent that there is no intent to go elsewhere. Citizenship, on the other hand, only marks a past event.

Many of those who have American citizenship may feel a loyalty to American institutions and culture. Moreover, we have no more accurate means than citizenship by which to determine the

341. Tenney, *The Second Circuit Review: Securities*, 42 BROOKLYN L. REV. 1197, 1205 (1976) (no reason to distinguish between protected persons on nationality basis).

342. 8 U.S.C. § 1401(a)(1) (1976).

343. *Id.* § 1427.

344. *Id.* §§ 1431 (one citizen parent), 1432 (alien parents).

345. *Id.* § 1430(a).

346. *Id.* § 1401(a)(3).

347. *Id.* § 1401(a)(7), (b).

existence of such an attachment. To the extent that such qualities are important to particular legal consequences, the use of the citizenship standard can be applied as the only one that measures the immeasurable. But such use should be made sparingly.

The most defensible justification for attaching a consequence to citizenship is that other consequences traditionally attach already. For instance, lack of citizenship means that the individual may be deported. Potential deportability may justify attaching consequences such as denial of the right to hold public office. But as the courts use constitutional tools to cut down rules attaching legal consequences to citizenship, they eliminate reasons that indirectly support still other consequences.

The use of citizenship as a standard has been shrinking, as it should. What we will probably see is a virtual elimination of power in the individual states to attribute consequences to citizenship, except as it affects their definition of a political community. Further, states should ignore distinctions between resident and nonresident aliens. Although the Supreme Court equal protection cases involve only resident aliens, there is no particular reason why the states should be permitted to regulate the rights of nonresident aliens in a manner different from their regulation of the rights of American citizens resident abroad.

The federal government, of course, is a different matter. Although the linedrawing in *Mathews v. Diaz* appears a bit too broad, it is difficult to decide where to encroach upon the federal government's political discretion to regulate matters interwoven with foreign affairs and to suggest a test that strikes a proper balance between individuals and the public weal. On the other hand, when such paramount rights come into conflict with even federal authority, there should be a reluctance to say that aliens have no protection merely because they are nonresidents. Courts must draw a distinction between government action which involves national security and that which does not. Citizenship is a tenuous basis for distinctions, and bald use of it should not be favored. Thus, the concept of naked de jure citizenship in *Rexach* should not have been an acceptable tax basis; the government's disavowal of citizenship should in all cases be sufficient to break the tax link. *Espinoza v. Farah Manufacturing Co.* is likewise an unfortunate decision because it permits private discrimination against national origins to be cloaked by citizenship discrimination. To extend that reasoning to section 1981 would be doubly

unfortunate. The utilization of citizenship as a guideline for the interpretation of the securities laws is completely misplaced in legislation that looks toward economic impact and bears no relationship to political status. Rather, any test used to distinguish among potential plaintiffs should focus on the existence of an economic connection between the United States and the protected person, given that the prohibited act takes place within the United States.

Citizenship may be used effectively for political distinctions and is a necessary tool for the federal government's regulation of matters involving international relations and the entry of foreign individuals into our society. Given the imprecise nature of citizenship, other uses of the standard are usually not justifiable.