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A CONSTITUTIONAL ANALYSIS OF THE ENGLISH LITERACY REQUIREMENT OF THE NATURALIZATION ACT

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I. INTRODUCTION

Pursuant to constitutional authorization that it establish a uniform rule of naturalization,[1] Congress has exercised its power at various times and has established procedures and prerequisites to the attainment of citizenship by the foreign-born.[2] One such pre-

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1. *See* U.S. CONST. art. I, § 8, cl. 4.

2. Historically, naturalization has been the subject of numerous statutes and at least 46

requisite is that a candidate for naturalization must demonstraate "an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language . . . ."[3] After an examination of its legislative history and underlying rationale, this author argues that the English literacy requirement should be declared unconstitutional because of its discriminatory intent and impact on discernible citizen groups. Although there are "common sense" overtones that an English-speaking nation can and should legitimately require foreigners it naturalizes to speak, read, and write the national language, often what is termed "common sense" contains underlying elements of xenophobia.[4] Especially in the area of immigration and naturalization, many of the attitudes that today go unquestioned are inconsistent and repugnant to principles and practices that are widely accepted under our constitutional, republican form of government. This article suggests that the literacy provision is a by-product of ideas and attitudes that are linked more to nativism and ethnocentrism rather than to the rational purposes the common sense justification readily assumes.

II. The Justiciability of Legal Objections to Naturalization Policy

The first major obstacle to a constitutional challenge to the English literacy requirement is that the Judicial branch has viewed enactments under the constitutional authority to establish a uniform rule of naturalization as being intimately related to the powers of the Executive and Legislative branches to conduct foreign affairs[5] and influenced by internationally accepted concepts of sovereignty;[6] thus, the Judicial branch has determined that as a policy

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separate treaties. *See generally* C. Hyatt & E. Avery, Laws Applicable to Immigration and Nationality (1953). Current naturalization provisions are found in the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1421-1458 (1976).

3. 8 U.S.C. § 1423(1) (1976 & Supp. V 1981).

4. *Cf.* Hull, *Resident Aliens And The Equal Protection Clause: The Burger Court's Retreat From Graham v. Richardson*, 47 Brooklyn L. Rev. 1, 38 (1980).

5. See notes 14-16 *infra* and accompanying text.

6.

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

affecting aliens, naturalization falls within the realm of the political question doctrine, warranting a judicial deference that renders legal objections to it nonjusticiable. Although practices of the Immigration and Naturalization Service (INS) in processing naturalization petitions are subject to basic procedural due process challenges, these are rare and can do little to correct substantive policies that courts regard as beyond the scope of review. The consequences of this "political question" determination are naturalization policies rooted in xenophobia which coexist, immune to court challenges, with national anti-discrimination and anti-racism safeguards that govern in all other areas of the law.[7]

This article does not examine the constitutional validity of immigration policies that discriminate on bases found objectionable in other contexts; the reader is referred elsewhere for treatment of that subject matter.[8] The focus here is the wisdom of a blanket categorization that naturalization laws, because they involve aliens, are political questions best left to political determination processes which courts are generally unwilling to review.

Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); *see also* The Chinese Exclusion Case, 130 U.S. 581, 604, 610 (1889) (congressional act excluding Chinese laborers was constitutional exercise of legislative power; not abrogated by conflicting treaty); City of New York v. Miln, 36 U.S. (11 Pet.) 102, 130-33, 143 (1837) (New York law requiring report of all passengers on vessels arriving in port held not to be regulation of commerce, but rather police power to prevent influx of people from foreign countries); 1 C. HYDE, INTERNATIONAL LAW 217 (2d ed. 1945).

7. As one commentator notes:

> Our national anti-discrimination policies and the constitutional safeguards which ensure them . . . have bypassed our immigration laws. They remain a disgraceful relic of the past nurtured in the mouldy miasma of unfounded prejudice, bias and racial discrimination.
>
> Congress and the courts with surprising regularity affirmed outrageous and blatant discriminations in our immigration and naturalization laws based upon race and national origin . . . .

Wasserman, *Reflections On The Constitutionality Of The Immigration And Nationality Act*, 1 IMMIGRATION & NATIONALITY L. REV. 51, 51 (1977).

8. *See generally* Maltz, *The Burger Court And Alienage Classifications*, 31 OKLA. L. REV. 671 (1978); Rosberg, *The Protection Of Aliens From Discriminatory Treatment By The National Government*, 1977 SUP. CT. REV. 275; Wasserman, *Reflections On The Constitutionality Of The Immigration And Nationality Act*, 1 IMMIGRATION & NATIONALITY L. REV. 51 (1977); Note, *Immigrants, Aliens, And The Constitution*, 49 NOTRE DAME LAW. 1075 (1974); Note, *Aliens—An Immigration Regulation That Distinguishes Among Aliens by National Origin Must Have a Rational Basis to Satisfy the Equal Protection Guarantee of the Fifth Amendment*, 13 VAND. J. OF TRANSNAT'L L. 857 (1980).

A. *The Political Question Doctrine*[9]

Professor Wright gives the following summary of the political question doctrine that is useful as a starting point of analysis:

> In Marbury v. Madison Chief Justice Marshall expressed the view that the courts will not entertain political questions even though such questions involve actual controversies. The nonjusticiability of a political question is founded primarily on the doctrine of separation of powers and the policy of judicial self-restraint. The relationship between the judiciary and the other branches of the federal government gives rise to the political question, and whether a matter has been committed by the Constitution to another branch of the government is decided by the Court. "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." [Coleman v. Miller, 307 U.S. 433, 454-55 (1939)].[10]

Judicial thinking on political question justiciability underwent major revision in the wake of *Baker v. Carr*,[11] a 1962 legislative reapportionment case. The turning point was an elaboration on the political question doctrine contained in Justice Brennan's majority opinion which expressly identified considerations that courts must weigh before giving a question a deference that renders it nonjusticiable.[12] These considerations are crucial to the examination undertaken in this article and provide the basis for the writer's view that naturalization challenges do not necessarily require political question deference. Justice Brennan's majority opinon stated:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which

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9. Exhaustive treatment of this topic is not attempted; rather, a presentation of the dominant features of the political question doctrine meets the needs of this undertaking. For a more thorough discussion, see generally Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Hughes, *Civil Disobedience And The Political Question Doctrine*, 48 N.Y.U. L. REV. 1 (1968); Scharpf, *Judicial Review And The Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Tigar, *Judicial Power, The "Political Question Doctrine," And Foreign Relations*, 17 U.C.L.A. L. REV. 1135 (1970).

10. C. WRIGHT, LAW OF FEDERAL COURTS, § 14, at 52 (3d ed. 1976).

11. 369 U.S. 186 (1962).

12. *See id.* at 217.

identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence . . . . The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.[13]

Professor Tribe's contribution to constitutional law analysis points out that the above-quoted passage contains strands of at least three theories of the role of federal courts with regard to the other branches of government.[14] He labels these as classicial, prudential, and functional theories and characterizes them as follows:

A *classical* view would take the Court's role as announced in Marbury v. Madison . . . quite rigidly, and would impose on the Court the requirement of deciding all cases and issues before it unless the Court finds, purely as a matter of constitutional interpretation, that the Constitution itself has committed the determination of the issue to the autonomous decision of another agency of government . . . . A *prudential* view of the Court's role would treat the political question doctrine as a means to avoid passing on the merits of a question when reaching the merits would force the Court to compromise an important principle or would undermine the Court's authority . . . . [A] *functional* approach to the role of the Court would have it consider such factors as the difficulties in gaining judicial access to relevant information, the need for uniformity of decision, and the wider responsibilities of the other branches of government, when deter-

13. *Id.* at 217.

14. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-16, at 71 n.1 (1978).

mining whether or not to decide a certain issue or case.[15]

Professor Tribe continues by suggesting that the classical theory is reflected in the first factor listed in the quoted passage from *Baker v. Carr,* "a textually demonstrable constitutional commitment to a coordinate political department." He suggests that the second two—"a lack of judicially discoverable and manageable standards for resolving [the issue]" and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"—are rooted in the functional theory. Professor Tribe categorizes the last three—"the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "an unusual need for unquestioning adherence to a political decision already made," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question"—as reflecting prudential considerations.[16]

Blanket political question categorization has been granted to congressional enactments addressed to aliens; typical is the following position taken by the Supreme Court in *Harisiades v. Shaughnessy*:[17]

> It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference.[18]

To borrow from Professor Tribe's analysis, it is clear that the Court in *Harisiades,* finding that the Constitution committed the determination of "any policy toward aliens" to the decision of "the political branches," adopts the classical theory to define its role in reviewing questions regarding laws addressed to aliens.[19] Cases in

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15. *Id.*

16. *Id.*

17. 342 U.S. 580 (1952); *accord* Kleindienst v. Mandel, 408 U.S. 753, 765-67 (1972); Fong Yue Ting v. United States, 149 U.S. 698, 711-13 (1893).

18. Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952).

19. *Harisiades* involved a provision of the Alien Registration Act of 1940 which authorized the deportation of resident aliens who either were or had been members of the Communist Party. *See id.* at 581. The provision was enacted as a result of growing alarm about a Communist conspiracy movement which seemed to include a great number of aliens. *See id.*

the federal courts show that primary reliance has been placed on the classical theory to refuse consideration of legal objections to laws dealing with immigration and naturalization.[20] Recently one court, seeing a functional theory as defining its role in entertaining objections to exercises of Congress' naturalization power, concluded that there are no judicially manageable standards for reviewing such congressional actions.[21]

B. *The Political Question Doctrine and Naturalization Law*

Only to the extent that naturalization affects foreign relations can any of the theories identified by Professor Tribe apply, for only that factor serves to distinguish naturalization from other textually demonstrable commitments of power that courts do find justiciable. For example, questions arising out of textually committed congressional exercises of power to regulate interstate commerce[22] or to establish uniform bankruptcy laws[23] are not given blanket political question treatment. On the other hand, courts do generally grant political question deference to exercise of the war power[24] or the power to regulate foreign commerce[25] because these powers do involve textual commitments to a political branch that courts are generally not free to second-guess. What distinguishes these powers is their foreign relations character. If naturalization involves foreign affairs—and the conventional assumption holds that it al-

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at 590. In refusing to find the provision unconstitutional or to "equate our political judgment with that of Congress," the Court in a telling moment stated: "Judicially we must tolerate what personally we may regard as a legislative mistake." *Id.* at 590.

20. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 81-82 (1976) (standard of judicial review accorded decisions by Executive and Legislative branches regarding regulation of benefits to aliens narrow because of implication of relations with foreign powers); Terrace v. Thompson, 263 U.S. 197, 201 (1923) (Congress' decision as to which aliens eligible for naturalization is political decision); Pedroza-Sandoval v. INS, 498 F.2d 899, 900 (1974) (congressional power in immigration and naturalization broad with limited judicial review); Gonzalez de Lara v. United States, 439 F.2d 1316, 1317 (5th Cir. 1971) (court refused to declare residency requirement unconstitutional since promulgated under Congress' authority to regulate naturalization); *In re* Quintana, 203 F. Supp. 376, 378 (S.D. Fla. 1962) (congressional grant of privilege of naturalization to certain persons not subject to modification by courts).

21. Trujillo-Hernandez v. Farrell, 503 F.2d 954, 955 (5th Cir. 1974) (per curiam) (class action challenging section 1423(1), English language requirement of naturalization statute), *cert. denied*, 421 U.S. 977 (1975).

22. U.S. CONST. art. I, § 8, cl. 3.

23. *Id.* cl. 4.

24. *Id.* cl. 11.

25. *Id.* cl. 3.

ways does—then the textual commitment of this power to Congress should render this area of law as within the political question doctrine. Likewise, a foreign relations element might render naturalization nonjusticiable for functional or prudential theory considerations. As a vehicle to conduct foreign affairs, there would be a lack of judicially discoverable and manageable standards to deal with naturalization; furthermore, there could conceivably be difficulties with deciding questions that would require improper policy determinations by the Judicial branch. If major or predominant foreign relations implications exist, courts can find it impossible to deal with naturalization due to fears that constitutionally required deference would not be paid to political branches. The political question doctrine ensures that the judiciary will be bound by political decisions already made in order to avoid embarrassing situations arising out of multifarious pronouncements by separate governmental branches.

The obvious question to address, therefore, is whether naturalization contains foreign relations elements of a degree and character that warrant political question treatment. This requires initially a proper understanding of the two areas of law that conventional wisdom treats as a single body—immigration and naturalization. A proper understanding of these separate areas of law is crucial to the underlying theme of this article: that naturalization can be largely a domestic policy concern, and that to the extent that it is, it should not be treated as a political question.

The term "immigration law" includes all laws, conventions, and treaties of the United States relating to the initial entry, conditions governing the stay, and the exclusion, deportation, or expulsion of those aliens previously admitted or otherwise found within the nation's territorial jurisdiction.[26] Unlike the naturalization power that is expressly conferred in the Constitution, the congressional power to enact immigration law is indirectly conferred in article I, section 8, clause 3 of the Constitution, which provides in part that Congress "regulate Commerce with foreign Nations."[27]

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26. *See Ex parte* Palo, 3 F.2d 44, 45 (W.D. Wash. 1925); 8 U.S.C. § 1101(17) (1976).

27. U.S. CONST. art. I, § 8, cl. 3. As an indication of the confusion that exists in treating immigration and naturalization, there appears to be a lack of agreement on the constitutional source of congressional authority to regulate immigration. One commentator has opined, "Indeed, the Constitution does not even expressly grant the federal government the power to regulate immigration, much less to regulate it without regard to the dictates of the

The authorization to enact naturalization policy is found in article I, section 8, clause 4, which provides that Congress shall have power "to establish an uniform Rule of Naturalization."[28] Congress has defined naturalization as "the conferring of nationality of a state upon a person after birth, by any means whatsoever."[29] The courts, however, are somewhat more eloquent, describing naturalization as "the act of adopting an alien and clothing him with the privileges of citizenship."[30]

A historical review of congressional action in naturalization matters reveals that the Legislative branch has employed various methods to confer nationality on persons after birth, some of which required participation by the Executive branch. The work of a prominent citizenship law scholar treats these various methods as falling into one of the following seven categories:

Category 1: Naturalization in Pursuance of the General Laws of the United States
Category 2: Naturalization by Naturalization of Parent
Category 3: Naturalization by Marriage
Category 4: Naturalization by Treaty
Category 5: Naturalization by Conquest
Category 6: Naturalization by Special Act of Congress
Category 7: Naturalization by Admission of Territory to Statehood[31]

Constitution." Rosberg, *The Protection Of Aliens From Discriminatory Treatment By The National Government*, 1977 SUP. CT. REV. 275, 320. In a footnote, Rosberg adds, "The closest the Constitution comes to granting such a power is in Article I, § 8, cl. 4, which empowers Congress to 'establish an Uniform Rule of Naturalization.' " *Id.* at 320 n.171. This writer does not agree, but rather prefers authority that attributes congressional power over immigration to clause 3 authorizing regulation of commerce with foreign nations. *Accord* Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 334 (1909) (upheld constitutionality of fine imposed by Congress on transportation companies bringing alien immigrants with contagious diseases into country; based on Congress' authority to regulate foreign commerce); Edye v. Robertson, 112 U.S. 580, 595-96 (1884) (congressionally authorized tax imposed on vessel owners for each passenger from foreign port brought to country; upheld as valid exercise of power to regulate commerce with foreign nations). As subsequent discussion will stress, the source of authority is an important point. For further support of this position, see F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 4 (3d ed. 1975).

28. U.S. CONST. art. I, § 8, cl. 4.

29. 8 U.S.C. § 1101(23) (1976).

30. *In re* Bishop, 26 F.2d 148, 148 (W.D. Wash. 1927); *see also* Boyd v. Nebraska, 143 U.S. 135, 162 (1892) ("the act of adopting a foreigner, and clothing him with the privileges of a native citizen").

31. F. VAN DYNE, CITIZENSHIP OF THE UNITED STATES 54-248 (1904). Category 1 is what is commonly understood as naturalization, and it embodies the conditions imposed on the class of aliens eligible under the immigration laws to petition for naturalization. The "cate-

Each category[32] can be understood as involving either predominant domestic policy concerns or predominant foreign policy concerns. For example, Categories 4 and 5 may be clearly identified as involving exclusive foreign policy considerations since powers under these categories can only be exercised in direct contact with foreign nations. Category 1 is the focus of this article, and under it naturalization is best understood as a system of conditions and prerequisites imposed by Congress to govern the attainment of citizenship by aliens holding an immigration status making them eligible for naturalization, i.e., a permanent resident status.[33] Only this class of alien may file a naturalization petition, and then only after a period of five years' continuous residence in the United States.[34] With limited exception,[35] resident aliens applying for citizenship must be eighteen years of age or older.[36] Applicants are required to demonstrate that they are "a person of good moral character"[37] and that they are "attached to the principles of the Constitution,"[38] as well as "disposed to the good order and happiness of the United States."[39] Again with limited exceptions,[40] the permanent resident petitioner must demonstrate an ability to read, write, and speak the English language and display an understanding of United States government and history.[41]

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gory" label given each is made by this writer and not Professor Van Dyne.

32. Categories 2 through 7 are not discussed in this article outside distinctions drawn between these six and Category 1 since the features of each are self-evident.

33. A concise statement of the various classes of aliens is given in Mathews v. Diaz, 426 U.S. 67, 79 n.13 (1976). Generally, a resident alien is a person admitted for permanent residence who has the right to live and work anywhere in the United States and is also the only alien eligible for naturalization. *Cf.* 8 U.S.C. § 1429 (1976). A nonresident alien is a visitor, admitted into the country for a period of fixed duration and with restrictions on the activities he may engage in while in the United States. *Cf.* 26 C.F.R. § 1.871-2 (1982) (definition of nonresident alien for income tax purposes). Nonresident aliens, despite the length of their stay, are never eligible for naturalization. *Cf.* 8 U.S.C. § 1429 (1976).

34. 8 U.S.C. § 1427(a) (1976 & Supp. V 1981).

35. Certain alien children may be naturalized before they reach sixteen. 8 U.S.C. §§ 1431-1432 (1976 & Supp. V 1981).

36. *Id.* § 1445(b)(1).

37. *Id.* § 1427(a)(3).

38. *Id.*

39. *Id.*

40. *See id.* § 1423(1) (persons physically unable to comply are exempted, as are certain elderly persons); *see also In re* Blasko, 466 F.2d 1340, 1341-42 (1972) ("physically unable" limited to disabilities such as deafness and blindness); *In re* Vazquez, 327 F. Supp. 935, 936 (1971) (totally deaf petitioner entitled to citizenship when met other qualifications).

41. 8 U.S.C. § 1423 (1976 & Supp. V 1981).

A central thesis of this article is that conferral of citizenship under Category 1 can involve little if any foreign policy concerns. As a recognized sovereign power of the United States,[42] Category 1 naturalization policy is removed from international ramifications because the conferral of citizenship occurs after foreign policy concerns can no longer be effectively raised. Put another way, it is not citizenship per se that gives rise to foreign relations considerations; it is the conferral of an alien status that severs the relationship between the alien and his country of origin. This point draws support from a proper understanding[43] of what it means to be a permanent resident alien of the United States, the most important prerequisite to naturalization. The following discussion presents the viewpoint necessary for the argument herein formulated:

> The relationship between the resident alien and the national government consists of mutual obligations. The resident alien is required to give *obedience* and *allegiance* to the government; in return, he is entitled to *protection* from the government. [United States v. Wong Kim Ark, 169 U.S. 649, 694 (1898)] This type of reciprocity, furthermore, has been used by the Supreme Court to define the relationship of man to state known as "citizenship." Citizens, like resident aliens, are entitled to protection from the government in return for their assumption of the obligations of obedience and allegiance. It would seem, therefore, that a judgment concerning the protection to which resident aliens are entitled, relative to the protection afforded citizens, should depend on the extent of the resident alien's obligations, relative to those of citizens.
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> Resident aliens are required to obey all valid laws of the federal and state governments, and are fully taxed and fully liable to be drafted to fight for the United States. Further, resident aliens can be convicted of treason, indicating that they owe the government full allegiance. In short, resident aliens, as permanent members of the population, have the same obligations to the national government as do citizens. Therefore, if persons who are similarly situated with respect to their duties to government should be entitled to similar treatment from government, resident aliens should be able to enjoy the same protection from adverse government action as citizens.[44]

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42. See note 6 *supra*.

43. The words "proper understanding" are used because the logic and assumptions of conventional wisdom are unsupportable, yet enjoy widespread acceptance. See note 45 *infra*.

44. Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769,

This analysis does not propose that there are no distinctions between the resident alien and the citizen, but it must be emphasized that the difference is one of inequality of rights, privileges, and benefits conferred by the Government. Insofar as the duties and obligations owed to the Government are concerned, both groups are largely indistinguishable. The position taken here is that by becoming aliens of a class owing full obedience and allegiance to this country, i.e., by becoming aliens of a class qualifying for Category 1 naturalization, nationals of other countries have already effected a significant and substantial break from their former homelands. The reciprocal relationship between the permanent resident alien and the United States government has effectively removed that alien from the domain of any other political community; furthermore, the protection afforded the resident alien by the United States means that, like the citizen, no other foreign sovereign has an enforceable obligation against the permanent resident in the United States. International controversy can occur only at the point at which one government strips the citizen of another government of the enforceable allegiance and obedience owed it. That point is not the conferral of citizenship, but rather the conferral of resident alien status—the alienage classification that makes the individual eligible for citizenship.[45]

The following hypothetical case helps to illustrate this argument. Suppose that the United States and Nation X accept that each has the sovereign right to naturalize aliens under a Category 1 scheme. If Nation X wishes to no longer have its nationals naturalized as citizens of the United States (or vice versa), the negotiation of this

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778-79 (1971).

45. It must be noted that this perspective of the role of the resident alien is not part of the traditional thinking. As discussions in *Perkins v. Smith* bear out, that thinking holds that resident aliens are creatures of divided loyalties "who owe allegiance not to any state or to the federal government, but are subjects of a foreign power . . . ." Perkins v. Smith, 370 F. Supp. 134, 138 (D. Md. 1974) (disqualification of aliens from jury service does not violate Equal Protection Clause), *aff'd*, 426 U.S. 913 (1976). A lengthy critique of *Perkins* will not be given here; suffice it to say that the analysis given the issue is unsound because it fails to draw appropriate distinctions between a "permanent resident alien" as that term is understood in United States immigration law and an "alien residing in the United States." Bordering on the comical, the court in *Perkins* squarely grounds its thinking on this matter on the definition given "alien" in Black's Law Dictionary; its comical overtones disappear, however, when Shepardization reveals that the Supreme Court summarily affirmed the holding, and thus did not question the assumptions regarding the role of resident aliens underlying it.

desire could occur either in an immigration law context or through a treaty on the subject. Because each respects the other's right to naturalize through a Category 1 process, the desire can best be fulfilled by not having the United States admit nationals of Nation X under terms that would qualify them for naturalization. Either through an immigration law provision or a treaty between the two countries, aliens from Nation X would be allowed entry under terms that would deny them access to a Category 1 naturalization.

The common ground of sovereignty between the two countries makes this analysis work. It is beyond question that nations have sovereign power to naturalize because they agree on the desirability of having qualifying aliens become citizens. It is perhaps an overstatement of the obvious, but citizenship is the eventual goal of immigration policies creating a permanent resident class of aliens. Those immigration policies involve a reciprocal desire that the aliens come to stay. The critical point of this argument is that once they are permanent members of the political community, qualifications are imposed on those seeking naturalization for domestic policy objectives: the nation wants to ensure that the permanent resident alien will function properly in the role of a citizen. Irrespective of the logic or merits of the individual prerequisites imposed through a Category 1 process, they are each imposed to meet purely domestic objectives, be they internal security, a universally enlightened citizenry, a well-functioning government, or a happier society. For these reasons, no Category 1 naturalization policy can properly be said to be connected with foreign affairs or any foreign relations activity of a country.[46]

That Category 1 naturalization is the exercise of sovereign power for domestic policy considerations is evident on the face of the constitutional language granting Congress this authority. In its entirety, clause 4 of article I, section 8 reads that Congress shall have power "[t]o establish an uniform Rule of Naturalization, and uni-

46. This analysis is not undermined by the argument that a permanent resident alien has the option to terminate his status and his reciprocal relationship with the United States, for that option does not materially differ from that held by all citizens, as the flight to Canada by United States citizens during the Vietnam War demonstrates. As a permanent resident alien, or as a citizen, the relationship exists and obligations are enforceable. That circumstances exist which could alter the relationship does not appear relevant; both the permanent resident alien and the citizen can exercise options and suffer consequences for so doing.

form Laws on the subject of Bankruptcies throughout the United States."[47] In light of the Constitutional Convention debates, it is clear that the major concern of clause 4 was *uniformity*; thus, this concern can only be properly linked to domestic policy objectives. The concerns outlined by James Madison when he urged passage of a document providing for uniform naturalization laws had nothing to do with the conduct of foreign affairs,[48] nor did the delegates need much persuasion to adopt such a uniform rule.[49] As one commentator summarized,

> No uniform rule of naturalization existed prior to the Constitution. One State conferred citizenship whenever a foreigner landed on its shores. Other states required waiting periods of varying lengths. The lack of national uniformity imposed hardships; a person might lose his citizenship merely by moving to another state.[50]

Moreover, the inclusion of a power to establish uniform bankruptcy laws in the same clause granting naturalization powers to Congress is significant, for it supports the suggestion that the dominant concern was truly a domestic one. It can be assumed that uniformity in both of these areas was viewed as a crucial element in the successful operation of the United States as a true republic, rather than as the amorphous collection of state governments it amounted to under the Articles of Confederation. This constitutional interpretation offers at least a strong indication that domes-

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47. U.S. CONST. art. I, § 8, cl. 4.

48. *James Madison: Preface to Debates in the Convention of 1787* in 3 THE RECORD OF THE FEDERAL CONVENTION OF 1787, at 548 (M. Farrand rev. ed. 1966).

49. *See* 1 *id.* at 245, 247; 2 *id.* at 144, 158, 167, 182.

50. Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 770 n.3 (1971). Another scholar, reviewing the history of naturalization, has noted: "Under article 4 of the Articles of Confederation adopted in 1778 the citizens of each state were made citizens of every other state, but each state retained its own naturalization and immigration laws and standards. This resulted in continued confusion and ineffective legislation concerning immigration." M. BENNETT, AMERICAN IMMIGRATION POLICIES: A HISTORY 9 (1963). Another writer has also summarized the existing situation under the Articles of Confederation to emphasize the confusion. In Rhode Island, naturalization was granted by petition. Connecticut passed no naturalization laws between 1776 and 1790. The New York Constitution authorized the legislature to naturalize foreigners, and ten special acts were passed under the Confederation. New Jersey was silent on naturalization. Pennsylvania required a one-year residency and good moral character, while Maryland passed a naturalization act that provided that every person who signed a declaration of belief in a Christian religion was a citizen. *See* J. CABLE, DECISIVE DECISIONS OF UNITED STATES CITIZENSHIP 15-16 (1967).

tic policy objectives, and not foreign affairs consequences,[51] were uppermost in the minds of the delegates and rebuts the view that the naturalization power is somehow inherently intertwined with foreign relations.

It is doubtless true that the separate areas of immigration and naturalization law have an overlap: they both affect aliens. Before naturalization, the resident alien, like every class of alien, is subject to the immigration laws and their powerful consequences, most notably deportation or expulsion. It should be noted, however, that any alien who can be deported or expelled under the immigration laws can never qualify for Category 1 naturalization. For example, a deportable alien is one found within the political jurisdiction of the United States in violation of immigration laws, either because of fraudulent entry or violations of the conditions imposed upon legal entry.[52] Such an alien can never meet the residency requirements of the naturalization laws.[53] The permanent resident alien is subject under immigration law to revocation of his status and expulsion under certain circumstances, for example, involvement in subversive activities[54] or criminal actions.[55] These activites would render the permanent resident alien ineligible for naturalization, in the first instance for failure to possess an attachment to constitutional principles and in the latter for failing to meet the good moral character requirement. Thus, both areas of

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51. It should not be troubling that an exercise of sovereign power technically affecting immigrants can occur without having international ramifications. True, some common exercises of this sovereign power are intricately interwoven with foreign affairs, such as foreign commerce regulation or the war power. But if the arguments made herein are accepted, naturalization is not such an exercise. Moreover, the Constitution contains a separate example of a sovereign power exercise for clearly domestic policy reasons. Clause 1 of article I, section 9 provides: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year [1808], but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. CONST. art. I, § 9, cl. 1.

The relationship of this provision to the institution of slavery is common knowledge, indicating that it addressed domestic concerns, including perhaps objections to slavery itself, but certainly addressing the population count of each state for House of Representatives seat apportionment. Regardless, it cannot be seriously contended that this provision had foreign relations overtones, yet it does involve the exercises of sovereign power in an immigration context.

52. *See* 8 U.S.C. § 1251 (1976).

53. *See id.* § 1427(a).

54. *See id.* § 1251(a)(6).

55. *See id.* § 1251(a)(4), (11).

the law are mutually exclusive despite their overlap.[56] Naturalization may amount to a relinquishment of governmental power to subject an alien to immigration laws since as a naturalized citizen he would no longer be the subject of those laws and would enjoy substantially all rights and privileges of the native-born.[57] Naturalization can therefore be said to affect immigration; but because of the mutual exclusivity of the two areas, such an impact cannot be said to create foreign relations concerns.

The naturalization policies in the other six categories contain both obvious and subtle foreign policy relationships. Whether these should be regarded as necessarily involving political questions is beyond the scope of this inquiry; however, it is accepted that to the extent that they do, any of Professor Tribe's theories of the role of the courts would warrant determinations of nonjusticiability. The position of this author is that unlike Categories 2 through 7, Category 1 contains no foreign affairs implications; but even allowing that Category 1 might have implications which escaped this analysis, it is questionable whether this fact alone is enough to make all challenges to Category 1 naturalization laws nonjusticiable. Conceivably, many matters can have both domestic and international repercussions, e.g., United States antitrust policy or interstate commerce policy could easily have ramifications on foreign relations. Likewise, a treaty between the United States and a foreign country could have significant domestic impact.[58] In ei-

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56. Of course, a permanent resident alien could fail to meet certain naturalization requirements and still be free from expulsion. An illustrative case is *In re Matz* where a Jehovah's Witness resident alien, because of her religious training, could not take the oath to bear arms nor to vote, serve on a jury, or participate in governmental functions. *See In re* Matz, 296 F. Supp. 927, 929 (E.D. Cal. 1969). The court found that because the resident alien was unwilling to perform basic duties of citizenship, she was not eligible for naturalization; however, she was not expelled. *See id.* at 931; *see also* 8 U.S.C. § 1251 (1976) (failing to meet naturalization requirements not grounds for deportation).

57. *See* Schneider v. Rusk, 377 U.S. 163, 165 (1964). In *Schneider* the court held that section 352(a)(1) of the Immigration and Nationality Act of 1952 was discriminatory and, therefore, violative of due process under the fifth amendment because it provided for the revocation of the American citizenship of a naturalized citizen who had continually resided for three years in the country of his or her origin. *See id.* at 164, 168-69. Such holding was based on "the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." *Id.* at 165. There is, of course, one notable exception: only a natural born citizen can hold the office of the Presidency. *See* U.S. CONST. art. II, § 1, cl. 4.

58. *See* Kolovrat v. Oregon, 366 U.S. 187, 188-89 & n.1 (1961) (reversed state court finding that Yugoslavian citizens could not inherit under state descent and distribution stat-

ther case, it is clear that the foreign flavor present in both situations is not enough to make challenges to such actions nonjusticiable political questions. Assuming for the sake of argument that Category 1 naturalization can impact foreign affairs, it is wise to bear in mind dicta from Justice Brennan's opinion in *Baker v. Carr*:[59]

> There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.[60]

The conclusion offered here is that unlike immigration, naturalization does not warrant automatic political question deference. Although a confusion exists, naturalization law should not be assumed to carry foreign relations consequences. The major exercise of naturalization power, i.e., Category 1 situations, involves only domestic concerns. If a foreign relations element can be demonstrated not to exist, no rationale or theory of the role federal courts must assume when faced with political questions can, or should, be brought into play.

In concluding that policies toward aliens fall within the political question doctrine, the courts have failed to draw the distinctions urged in the above discussion or to follow Justice Brennan's thinking on the justiciability of certain foreign relations questions.

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utes because Yugoslavia did not provide reciprocal inheritance policy for American citizens; held Treaty of 1881 and other international agreements controlled); Whitney v. Robertson, 124 U.S. 190, 191, 194-95 (1888) (plaintiffs argued sugar from Dominican Republic should be duty free because under terms of treaty with Hawaii like goods were; held congressional act authorizing collection of duties passed after treaty with Dominican Republic and act, therefore, controls).

59. 369 U.S. 186 (1962).

60. *Id.* at 211.

Rather, the approach has been to classify all substantive law dealing with aliens as exercises of power by the Legislative branch that are beyond the scope of judicial competence. Note the language in *Harisiades*: "*any* policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . ."[61] Courts fail to distinguish between immigration and naturalization because they are blinded by their common feature—the fact that each deals with aliens. Because of this similarity, courts have failed to recognize the differing policy objectives and societal concerns underlying each. Category 1 naturalization is geared to concerns involving the alien's ability to perform the duties and responsibilities of citizenship; at stake is the proper functioning of a government that in theory depends on a viable relationship with the citizenry. A naturalization process where an alien must exhibit attributes that demonstrate an ability and desire to assume a certain role is motivated by policy objective and societal concerns not present in immigration law. Courts misapply theories defining their role when they treat Category 1 naturalization challenges as beyond the scope of their competence.

C. *The Misapplication of the Political Question Doctrine to Naturalization Law*

Although there is a common-sensical attractiveness in treating both as one body of law, scrutiny of this common sense justification proves it inadequate. Ignoring what is argued here to be significant differences between immigration and naturalization, courts have mistakenly attributed congressional power over naturalization matters to the congressional power over immigration; naturalization has been viewed as a political question for reasons that only support the view of treating immigration as a political question.

A reading of the Supreme Court cases reveals that the Court recognizes some of the distinctions drawn here, although it has at times demonstrated its confusion. Some of the cases speak of naturalization and immigration as a single body of law because they stem from one common source: the inherent sovereign powers of the United States.[62] But the Court frequently commits the error of

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61. Harisiades v. Shaughnessy, 342 U.S. 580, 588 (1952) (emphasis added). See note 14 *supra* and accompanying text.

62. See note 6 *supra*. The sovereignty concept as a source of both immigration and

grouping both and commenting that they stem from congressional immigration powers. In *Mathews v. Diaz*,[63] the Court reaffirmed the thinking displayed in *Harisiades* that *any* policy toward aliens must be viewed as outside judicial competence. Justice Stevens stated for a unanimous Court:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.[64]

Up to this point, it is clear from the statement that it solely addresses immigration law; note the "regulation of visitors" language and bear in mind that naturalization involves permanent residents, not visitors. Justice Stevens, however, continued with the following: "The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration *and naturalization.*"[65] The inclusion of the last two quoted words reveals the tendency to group the two areas of law and to attribute a political question character to both because of the political question character of one. Nothing in Justice Stevens' comments touched on naturalization concerns, and all of the cited authority dealt with purely immigration law questions; yet, the statement concluded with the gratuitous inclusion of the entire body of naturalization law as a political question.

This is not an isolated slip of the tongue; in fact, this thinking is reaffirmed in separate parts of the opinion.[66] Nor is the confusion limited solely to this case.[67] This "any policy toward aliens is a

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naturalization law is not challenged here; a point to raise, however, is that an unfortunate consequence of seeing sovereignty as the common source is a tendency to fail to recognize the distinctions between the two.

63. 426 U.S. 67 (1976).

64. *Id.* at 81.

65. *Id.* at 81-82 (emphasis added).

66. *See id.* at 79-80, 87.

67. The characterization of naturalization law as warranting political question defer-

political question" view surfaced also in *Pedroza-Sandoval v. INS*.[68] The case involved deportation, an immigration law concern.[69] Yet in concluding that the alien was deportable, the court also stated: "[I]t is long established doctrine that Congress has broad powers, subject only to very limited judicial review,[70] in legislating on the matter of immigration law and naturalization policies."[71] Even when immigration precedent is properly applied to immigration issues, "and naturalization" language surfaces needlessly to perpetuate confusion.

A third case, *Trujillo-Hernandez v. Farrell*,[72] involved a class action instituted by a naturalization petitioner challenging the English literacy requirement of the naturalization statute. The per curium opinion of the Fifth Circuit Court of Appeals stated:

> The question for decision is nonjusticiable. The naturalization power is conferred on Congress in Article I, Section 8, along with . . . the foreign relations responsibilities committed to the Congress.[73] It has never been supposed that there are any judicially manageable standards for reviewing the conduct of our nation's foreign relations by the other two branches of the federal government.[74]

As authority for this view, the *Trujillo* court cited *Harisiades* and the other familiar cases in accord which dealt solely with immigration questions.[75]

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ence was reiterated in Fiallo v. Bell, 430 U.S. 787, 790-91 (1977) (fathers of illegitimate children challenging denial of special preference immigration status to illegitimate children). There, Justice Powell repeated the error contained in *Mathews* by citing with approval the analysis in that case which improperly included naturalization. Like *Mathews, Fiallo* involved only questions of immigration law, but the term "and naturalization" was used to give naturalization characteristics that should properly be reserved to immigration and which the Category 1 process cannot properly be said to possess. *Cf.* Fiallo v. Bell, 430 U.S. 787, 796 (1977).

68. 498 F.2d 899 (7th Cir. 1974).

69. *See id.* at 899-900.

70. On the strength of this same logic, one could argue that because the naturalization power is conferred on Congress in section 8 of article I along with interstate commerce and bankruptcy powers, naturalization is part of the *domestic* relations responsibilities committed to Congress. That the court failed to see the path of its logic is another sad commentary on the judicial confusion that exists when dealing with immigration and naturalization.

71. *Id.* at 900.

72. 503 F.2d 954 (5th Cir. 1974) (per curiam).

73. The context makes clear that "very limited judicial review" refers to procedural due process review.

74. Trujillo-Hernandez v. Farrell, 503 F.2d 954, 955 (5th Cir. 1974) (per curiam).

75. *See id.* at 955.

These cases support the contention that courts, due to inadequately articulated distinctions between the two areas of law and the confusion arising out of joint treatment, can easily be persuaded to treat challenges to naturalization policies as nonjusticiable. To do so is to misapply the political question doctrine, for no theory of the roles courts must assume when faced with political questions explains the exercise of judicial restraint in a naturalization matter totally lacking foreign relations implications. To close the courtroom doors to naturalization policy challenges through semantic cataloguing is itself inexcusable; the situation is made worse by the injustices such a judicial attitude allows to stand.

III. A Legal Objection to the English Literacy Provision of the Naturalization Statute

A. *Limitations on the Exercise of Naturalization Powers*

This article necessarily questions the legitimacy of the attitude that any kind of regulation dealing with aliens and the conferral of citizenship is permissible. Perusal of court opinions uncovers explicit articulation of this view, which is based on reasoning that citizenship is a privilege granted only when governmental interests are met and even then solely as a matter of benevolence on the part of the Government.[76] Thus, one finds cases stating that Congress is free to attach any precondition it deems fit and proper to the attainment of citizenship[77] and that Congress may grant or withhold naturalization upon any ground or without any reason.[78] The accepted view is that an alien does not have a constitutional right to citizenship and that the Government may confer citizenship as a matter of grace and is presumed to have interests in ensuring that aliens are admitted to citizenship solely on the Government's terms.[79] In an extreme application of this view, the court in

76. *See* United States v. Bergmann, 47 F. Supp. 765, 766 (S.D. Cal. 1942) ("Naturalization is a privilege."), *rev'd on other grounds*, 144 F.2d 34 (9th Cir. 1944).

77. *See In re* Thanner, 253 F. Supp. 283, 285-86 (D. Colo. 1966) ("status of citizenship of the United States is a privilege" to which Congress can attach any prerequisites it deems proper).

78. *See In re* Quintana, 203 F. Supp. 376, 378 (S.D. Fla. 1962) (once Congress sets prerequisites to naturalization, courts have no authority to modify them).

79. *See, e.g.*, Berenyi v. INS, 385 U.S. 630, 637 (1967) ("Government has a strong and legitimate interest in ensuring that only qualified persons are granted citizenship" and any

In re Matz[80] held that where religious beliefs preclude a naturalization petitioner from voting, serving on juries, or otherwise participating in governmental affairs, that person is not entitled to citizenship because "Congress did not intend to grant citizenship to those unwilling to assume the responsibilities of citizenship, no matter how fervent their abstract beliefs."[81] This view is divorced from any justiciability argument and stands firmly on a rationale that presupposes the naturalization petitioner to have virtually no substantive rights or protected interests when he enters the naturalization process. *In re Matz* illustrates that this viewpoint goes beyond mere statements that courts are generally incompetent to review legislation governing citizenship attainment and embraces the concept that the Government enjoys unbridled discretion in conferring citizenship. Thus, the background to any challenge to a naturalization provision is at best discouraging. Not only must a court be persuaded that it is competent to hear the challenge; but once the courtroom doors open, one must argue against traditional notions that congressional power over this area is virtually unrestrained and that those seeking citizenship have no substantive rights in the process.

Commentators have recently provided strong counter-arguments to the view that the naturalization powers enjoy unrestricted exercise.[82] Their position is that this nation's Category 1 naturalization process can be understood as a set of conditions which all applicants must fulfill to demonstrate their worthiness to assume the role of citizen. The commentators urge that since the permanent

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doubts "should be resolved in favor of the United States" and against person applying for citizenship); Hein v. INS, 456 F.2d 1239, 1240 (5th Cir. 1972) ("alien has no constitutional right to citizenship which is a privilege conferred as a matter of grace by Congress"); *In re* Cardines, 366 F. Supp. 700, 708 (D. Guam 1973) ("Persons are admitted to citizenship only when it is to the interest and advantage of the nation and not at all to gratify persons' desire or serve their interest"); *In re* Quintana, 203 F. Supp. 376, 378 (S.D. Fla. 1962) ("Naturalization is a matter of grace, not of right"); *In re* Dobric, 189 F. Supp. 638, 640 (D. Minn. 1960) ("An alien has no inherent right to naturalization, as citizenship is a gift from the conferring government and a privilege to the applicant . . .").

80. 296 F. Supp. 927 (E.D. Cal. 1969).

81. *Id.* at 930.

82. *See generally* Hull, *Resident Aliens And The Equal Protection Clause: The Burger Court's Retreat from Graham v. Richardson*, 47 BROOKLYN L. REV. 1 (1980); Rosberg, *The Protection Of Aliens From Discriminatory Treatment By The National Government*, 1977 SUP. CT. REV. 275; Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769 (1971).

resident alien is the only class of alien eligible for naturalization and since the resident alien is in a reciprocal relationship with the Government prior to naturalization, the scope of congressional power to establish naturalization prerequisites must be brought into question. Because the resident alien owes the same allegiance and obligations that a citizen owes to the nation[83] and because the resident alien is entitled to numerous protections despite his lack of citizenship,[84] the commentators and legal scholars have suggested that congressional power over naturalization is limited. The argument is that constitutional rights enjoyed by resident aliens prevent the Government from forcing him to choose between the exercise of those rights and naturalization.[85] Put another way, a naturalization prerequisite cannot operate as an unconstitutional condition. Under this analysis, the holding in *In re Matz* is erroneous, for the applicant cannot be forced to choose between the exercise of first amendment rights and citizenship. The existing literature gives the framework for resolutions of conflicts between the rights of resident aliens and the governmental interest of conferring citizenship on the most worthy and offers arguments to support the view that they should be resolved in favor of the resident alien.

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83. *See, e.g.*, Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154-55 (1872) (alien while domiciled in United States owes allegiance for duration of visit and must obey all laws); 50 U.S.C. app. § 453 (1976) (every male person residing in United States must register for draft except those of nonimmigrant status); 26 C.F.R. § 1.871-1 (1982) (resident aliens taxable same as citizens of United States); Note, *Treason, A Brief History With Some Modern Applications*, 22 BROOKLYN L. REV. 254, 266-67 (1956) (resident alien charged with treason). *See generally* 2 A. MUTHARIKA, THE ALIEN UNDER AMERICAN LAW (1981) (chapters on tax and military obligations of resident aliens); Comment, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L L.J. 501 (1972) (examination of categorization of aliens under Military Selective Service Act of 1967).

84. *See* United States v. Wong Kim Ark, 169 U.S. 649, 694 (1898) (noncitizens entitled to protection of United States so long as United States permits them to reside there); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens"; amendment applies to all persons within jurisdiction of United States).

85. *See* Rosberg, *The Protection Of Aliens From Discriminatory Treatment By The National Government*, 1977 SUP. CT. REV. 275, 330-36; Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 778-79, 783-84 (1971).

B. *A Theory of the Unconstitutionality of the English Literacy Requirement*

The task undertaken here is necessarily a different one. No claim is made that the English literacy provision operates as an unconstitutional condition within the framework of the existing legal commentary; rather, the claim is made that the English literacy provision should be the subject of a constitutional challenge because of the effect it has on protected minority group citizens. While the previously discussed unconstitutional condition analysis is grounded on the impact felt by the resident alien petitioning for naturalization, this analysis focuses on the impact felt by specific ethnic groups that are permanent members of the population, made up of both aliens and citizens. Although the naturalization statute only directly affects the resident alien members of any given ethnic group, it has a significant stigmatizing impact on the citizen members of that ethnic group. The theory presented relies on congressional history evidencing an intent to discriminate against specific ethnic groups and on the view that the literacy provision is having its intended impact on entire ethnic groups, constituting in large measure discrimination against ethnic group citizens on the basis of ethnicity. Thus, serious questions of the constitutionality of the provision arise—questions which have heretofore not been addressed. This analysis rests on the following set of assumptions.

1. *Assumptions Underlying the Theory*

a. First—The English Literacy Requirement Has a Disproportionate Impact

The requirement favors permanent resident aliens from national origins and ethnic groups that speak the English language. It is assumed than the immigrant from England or Scotland finds this requirement less burdensome than the immigrant from Eastern Europe, Japan, or Mexico. True enough, the requirement nonetheless applies to the Scot and Englishman, but the advantage of being able to speak the language is itself significant. This disproportionate impact feature is in line with what is argued here to be a stigmatizing intent and impact in the law. This view is developed further in subsequent discussion.

b. Second—The English Literacy Requirement Has a Stigmatizing Impact on Citizen Ethnic Groups

This crucial assumption is an extension of an idea presented in an examination of the rights of aliens vis-a-vis the state and national governments. Professor Rosberg of the University of Michigan Law School, in discussing the powers of the federal government over immigration, suggested:

> [W]hat if Congress were instead to order the exclusion from the United States of any alien of [a] race or national origin? In my view, such a classification would also require strict scrutiny, not because of the injury to the aliens denied admission, but rather because of the injury to American citizens of the same race or national origin who are stigmatized by the classification. When Congress declares that aliens of Chinese or Irish or Polish origin are excludable on the grounds of ancestry alone, it fixes a badge of opprobrium on citizens of the same ancestry. The point is not that aliens have a right to enter the United States or to have their eligibility for admission determined without regard to race. But Congress does have a duty to its own citizens. Except when necessary to protect a compelling interest, Congress cannot implement a policy that has the effect of labeling some group of citizens as inferior to others because of their race or national origin.[86]

The assumption is that in enacting the English literacy requirement of the naturalization process, Congress intended to disadvantage persons of non-English speaking national origins or ethnic groups and that this fixes a "badge of opprobrium on citizens of the same ancestry."[87] For example, in the view of this writer an obstacle to citizenship that affects resident aliens of Mexican ancestry because of their mother tongue is necessarily a reflection on the value the government places on Chicano citizens with the identical mother tongue. The English literacy requirement is an embodiment of a governmental attitude that Chicano citizens, because Spanish is their primary language, are less worthy citizens than those whose native tongue is English. The intent and impact of this requirement must be documented and demonstrated, for it is facially neutral, while Professor Rosberg's hypothetical presup-

86. Rosberg, *The Protection Of Aliens From Discriminatory Treatment By The National Government*, 1977 SUP. CT. REV. 275, 327.

87. *Id.*

posed a classification evident on the face of the statute. Finally, given that this can be demonstrated, an argument must be made that no compelling interest exists to justify it.

An implicit element in this second assumption bears emphasis. Unlike the requisites of a five-year residency, good moral character, and knowledge and acceptance of our form of government, the English literacy requirement is the only condition that takes account of an inherent cultural trait present in many citizens. The point is that with the exception of the literacy provision, the other requirements represent neutral, unobjectionable policies. The residency requirement is easily supportable, as is a national policy of having citizens of good moral character who understand and accept our form of government. But the literacy requirement must be defended as a pronouncement that citizens, in order to exercise political rights, should be literate in the English language. The merits of this pronouncement will be debated here by posing questions concerning the consistency of this view with others also expressed by Congress in more recent legislation.

c. Third—The English Literacy Requirement Is an Obstacle Imposed in the Political Process on Groups That Have Traditionally Been the Subjects of Discriminatory Treatment

Because naturalization translates into the ability to exercise political rights, it must be viewed as an obstacle to the attainment of political strength by the citizen group members of the same ethnic group to which the alien belongs. This assumption makes more sense when given a definite context; accordingly, it is presented against the background of the ethnic group most familiar to the writer, the Chicano experience. For example, every resident alien of Mexican heritage who is prevented from being naturalized because of the literacy requirement is one less element in the political strength of the nation's second largest minority citizen group. For this group, the English literacy requirement works very much like gerrymandering, which was held to be violative of the fifteenth amendment in *Gomillion v. Lightfoot*[88] where its purpose was to limit the voting power of a protected class.[89] In *Hernandez v.*

88. 364 U.S. 339 (1960).
89. *See id.* at 347.

Texas[90] and *White v. Regester*[91] the Supreme Court identified persons of Mexican ancestry as a discernible class for equal protection purposes, i.e., a protected class. Under a gerrymandering scheme directed against Chicanos, the political strength of persons of Mexican ancestry is diluted through geographic boundry manipulation. Under the naturalization statute, every person of Mexican ancestry in a reciprocal relationship with the Government may be prevented from becoming an element in the political strength of the group, thus weakening the voting strength of a protected class. The Court has made clear in *Gomillion* that voting strength is a constitutionally protected interest which cannot be artificially altered by governmental action.

Obviously, the drawing of geographic lines is not the only method of limiting the political power of a protected group of voters. Resident aliens of Mexican ancestry live and work among citizen counterparts, equally affected by local, state, national, and private sector policies that affect the entire community. If the Mexican-American community is to respond adequately to such policies at the voting booth, practices which limit its voting strength should be strictly scrutinized under an equal protection analysis or tested against the spirit of the fifteenth amendment.

d. Fourth—The Role of Data in the Theory

A final assumption, and a crucial element in a case against the naturalization literacy requirement, involves data. Given that the challenge would be based on the discriminatory purpose of the legislation, data must be assembled to prove discriminatory impact. The stigmatizing impact need not be subjected to scientific proof since a court may find itself a competent judge of this argument. The impact on political participation, however, would require scientific proof.

This challenge can only be brought to rectify the harm imposed on a particular ethnic group, e.g., the Mexican-Americans. Information must be gathered in two areas: the number of Mexican resident aliens that have failed to pass the literacy requirement and

90. 347 U.S. 475, 476, 479, 482 (1954) (claim that those of Mexican ancestry were systematically excluded from jury service).

91. 412 U.S. 755, 756, 767 (1973) (challenge of Texas reapportionment scheme as to multimember districts in Bexar and Dallas counties).

the number of those who have failed to file a naturalization petition because of a belief that they could not meet the requirement. The latter, in the view of this writer, is the most crucial yet most difficult information to assemble.

The article does not present the statistics that would lend support to the arguments that follow. The writer has neither the time nor resources to conduct the scientific research that would produce this data. What the writer does possess is the confidence that the findings of such research are predictable. In the case of the Mexican resident alien, the English literacy requirement is the only significant barrier to naturalization. In barrios throughout the Southwest, one finds families with resident alien parents and citizen children who fulfill all obligations to their government and particpate fully in community affairs. The parents in many cases are not citizens because although they can, to one degree or another, speak and understand the English language, they cannot read or write it. These individuals consider the United States their only homeland and give it full allegiance. Their sons and daughters assume the citizenship roles they were born into, or, through childhood education in United States schools, were able to acquire in a naturalization process that did not pose the literacy obstacle that it does for their parents. This situation can be easily demonstrated in Southern California and South Texas through raw data and would provide support for the discriminatory impact argument which follows.

2. The Theory Applied: Is the English Literacy Requirement Justified?

There is, of course, an argument that regardless of the disadvantages imposed by an English literacy requirement, it is founded on reasonable objectives and purposes. One justification may be that in an English-speaking nation, the naturalized citizen finds himself required to understand the English language. As a citizen, rights and privileges will be available that are denied to resident aliens; the assumption must be that there is a connection between full enjoyment of citizenship rights and literacy. It is, therefore, in the alien's own interest that he be literate in the English language.

Secondly, the same reasons for viewing literacy as something in the alien's own interest support the view that literacy also serves the general welfare—that is, it is better for the nation if natural-

ized citizens are literate. These two readily apparent views make charges of invidious discrimination appear ludicrous, for they are certainly reasonable and legitimate governmental interests.

This author's purpose is not to sound ludicrous but to question the reasonableness and soundness of these arguments and to explore other explanations of the literacy provision in the naturalization statute. Two themes are developed. First, that since Congress has seen fit to confer naturalization without regard to literacy in other categories and since the interests of the alien are largely immaterial in the naturalization process, the two justifications outlined above do not adequately explain this national policy. Second, the legislative history reveals that the motivation behind the provision and the benefits the Government sees itself receiving through such a policy are based on national origin/ethnic stereotypes whose current viability is open to serious question.

a. Justification: English Literacy for the Alien's Own Good

The question is not whether English literacy works as an advantage or disadvantage to the naturalized citizen. It is conceded that every citizen finds it advantageous to be as literate as possible. The question is whether the perceived advantages to the alien are adequate grounds to deny citizenship to those who are assumed to be unable to enjoy them because of an inability to speak English.

Actions of Congress speak against granting the resident alien's personal interest this level of importance. Naturalization under Category 4 (naturalization by treaty), Category 6 (naturalization by special act of Congress), and Category 7 (naturalization by admission of territory to Statehood) show that citizenship has been repeatedly conferred without regard to the English literacy of the naturalized.[92] Moreover, naturalization under any category has al-

92. *See* J. CABLE, DECISIVE DECISIONS OF UNITED STATES CITIZENSHIP 63-67 (1967). When France ceded Louisiana to the United States in 1803, the treaty provided that the inhabitants of the ceded territory should be admitted to all the "rights, advantages and immunities of citizens of the United States." *Id.* at 64-65. Thus, it is reasonable to presume that French-speaking persons with no knowledge of the United States national language were nonetheless admitted to citizenship. Further, the admission to Texas into the Union in 1845 conferred citizenship on everyone who was a citizen of Texas. This collective naturalization applied to Spanish-speaking Texas citizens who likewise had no knowledge of the English language. *See id.* at 65. Finally, special acts of Congress dealing with Indian tribes prior to and including the 1924 Indian Citizenship Act conferred citizenship with no explicit

ways disregarded the interest of the alien. Speaking directly about the Category 1 process, courts have repeatedly pointed out that it is the interests of Government, not the alien, which are the sole considerations.[93] Arguments that the English literacy requirement is justified because it promotes the interests of the naturalized citizen are therefore without firm basis: not only has Congress acted in a manner inconsistent with these arguments, but courts have stressed that the particular interests of the alien are immaterial. If the English literacy provision has a basis, it must lie in a general governmental or societal interest.

b. Justification: English Literacy As a Governmental Interest

In general there is a governmental interest in having a universally literate citizenry; the Government may feel that the reciprocal relationship between it and the citizenry functions better if the citizens can speak, write, and read the English language. The legislative history of this naturalization provision reveals that Congress was in fact motivated by a notion that having English-literate naturalized aliens would be beneficial to the nation. But the circumstances surrounding the enactment of this requirement bring into serious question the current viability of the congressional thinking and the validity of the requirement.

The English literacy provision became part of the Category 1 naturalization process in 1950, as part of the Internal Security Act[94] of that year. Prior to the 1950 amendment, the naturalization statute required only that the petitioner speak English.[95] In urging passage of the legislation containing this revision of the Immigration and Nationality Act of 1940, the Senate Judiciary report offered the following reasons for the amendment:

> The subcommittee has taken considerable testimony on the general problems relating to subversive activities in this country. That testimony is discussed and evaluated in great detail in another portion of this report, but the subcommittee feels that it is pertinent here to restate that this testimony conclusively shows that anti-

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provision making English literacy a prerequisite. *See id.* at 67.

93. *See* cases cited note 79 *supra.*

94. Internal Security Act of 1950, ch. 1024, § 30, 64 Stat. 987, 1018 (1950) (codified at 8 U.S.C. § 1423 (1976)).

95. Nationality Act of 1940, Pub. L. No. 853, § 304, 54 Stat. 1137, 1140 (1940).

> American and subversive activities are more easily carried on among non-English-speaking groups of aliens than among those who are thoroughly conversant with our language.
>
> . . . At the present time many of the courts are arbitrarily requiring that applicants appearing for citizenship shall be able to read simple English. They are taking this stand on the ground that where an alien has lived in the United States for a considerable number of years and has made no effort to read even simple English words he has failed to satisfy the requirement that he has been "attached" to the principles of the Constitution, and that he is "well disposed" to the good order and happiness of the United States. As a practical matter it is difficult for the subcommittee to understand how a person who has no knowledge of English can intelligently exercise the franchise, especially in states which use the initiative and referendum. It is also difficult to understand how a person who does not understand, or read, or write English can keep advised and informed on the political and social problems of the community in which he lives.[96]

Thus, the governmental interests sought to be served by requiring aliens to be literate in the English language if they are to be naturalized are first, internal security and second, a better functioning reciprocal relationship between the naturalized citizen and his government.

The internal security argument lends direct support to the view that the government has embodied suspect criteria in the literacy requirement. This governmental purpose reflects the irrational fears and stereotypical thinking that reigned during the McCarthy era. The perceived Communist threat led this nation down a path which, in retrospect, all agree to have been unfortunate. Even assuming that there is in fact some correlation between subversive activity and the inability to speak, read, and write English, it is seriously doubted that the correlation is of such significance as to justify the literacy requirement. Moreover, it is highly unlikely that the Government would assert such a "conclusive" argument today, let alone attempt to prove it. Additionally, other naturalization requirements are better suited to prevent aliens who oppose our governmental system from becoming citizens, particularly the "attachment to constitutional principles" prerequisite. An alien

96. S. Rep. No. 1515, 81st Cong., 2d Sess. 701 (1950).

who in fact is not "attached" but literate is better able to deceive a naturalization examiner: he can lie emphatically in the examiner's language. However real the internal security interest may be, it is suggested that the literacy requirement does nothing to meet it. To believe that it does is to rely on degrading stereotypes based on thinking which is hopefully outdated, never again to gain widespread support.

The merits of the general welfare argument will not be disputed here, not because the writer embraces them, but because it is largely beside the point. It may be observed that life in the United States has undergone extensive technological changes since 1950, changes which support the view that the committee report's findings in this area are equally dated. Specifically, the growth of the television industry has had profound impact on American politics, to the extent that it occupies the major role in informing and debating political issues and candidates. It must be pointed out that for Hispanics, the television industry can adequately inform them of political issues in their native tongue. In New York, Miami, San Antonio, Los Angeles, San Francisco, Houston, Chicago and other cities with Hispanic populations, local Spanish programming keeps viewers informed and up-to-date on community issues to the same extent as their English sister stations. Likewise, ballots are printed in Spanish in areas of large concentration of the Spanish-speaking population. Assuming that the printed media no longer dominates the discussions citizens must follow to exercise political rights intelligently, it is no longer viable to believe that those not literate in English will be ill-informed.

Even assuming that it is impossible for a person not literate in English to exercise the franchise intelligently or keep abreast of the political and social issues in a community, the question remains whether the manner in which Congress has seen fit to meet this general welfare interest is permissible. Apart from the stigmatizing attitude inherent in the provision, is the mechanism provided by Congress to enforce the provision and carry out its policy constitutionally adequate? The question can perhaps be answered by examining more recent actions in areas where English literacy examinations were linked to the exercise of political rights.

The Supreme Court has established that a state has wide discretion in setting voting qualifications, and that it may set literacy as a prerequisite to the exercise of the franchise. In *Lassiter v. North-*

ampton County Board of Elections[97] a unanimous Court rejected a constitutional attack on a literacy requirement, holding that:

> The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex . . . . [I]n our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.[98]

Clearly, the holding in *Lassiter* would be applicable to a similar scheme followed by the national government. Literacy examinations per se are not unconstitutional, whether they are voting prerequisites of the states or prerequisites to the exercise of political rights imposed by the national government. But just as the Court was aware that literacy examinations hold great potential for abuse, Congress too has shown this awareness in dealing with state literacy requirements and has acted to minimize that potential. Congressional legislation requires that a state not employ any literacy test or device as a voting qualification unless "such test is administered to each individual and is conducted wholly in writing, and a certified copy of the test and of the answers given by the individual is furnished within twenty-five days" of the request.[99] Further, the Voting Rights Act gives the Attorney General broad powers to institute actions to suspend a literacy test in any state whenever it is reasonably concluded (a detailed determination is not necessary) that it is operating to prevent the exercise of the right to vote. The affected state must then shoulder the burden of proving that no discrimination in fact exists.[100] This can only be interpreted as a congressional attitude of disfavor toward literacy examinations that are linked to the exercise of political rights because of the inherent potential for abuse.

These provisions indicate a more current congressional attitude than that which prevailed during the McCarthy era when the naturalization provision was enacted. Under this provision, the literacy test is "administered" to each alien, but it is not in writing. The practice appears to be that the literacy determination is part of the

97. 360 U.S. 45 (1959).
98. *Id.* at 51-52.
99. 42 U.S.C. § 1971(a)(2)(C) (1976).
100. *Id.* § 1973b.

oral examination of knowledge of United States government to which the applicant is required to respond in English. The applicant may or may not be asked to read or write English words; this is left largely to the discretion of the naturalization examiner.[101] An applicant who fails the literacy "examination" is very unlikely to appeal and faces little chance of success if he does. The dominant feature of the literacy determination is total, unchecked discretion vested in the examiner.

The question to which the preceding discussion was directed was whether the manner in which Congress has attempted to meet the interest in having literate naturalized aliens is permissible. In the view of this author, the current literacy requirement is inconsistent with congressional action forbidding the states to engage in the very practices that the INS follows. Clearly, there is room for a constitutional challenge on procedural due process grounds, but realistically this will be unavailable to aliens who fail to pass the literacy test. They either will not have the resources to appeal or would fail to meet the literacy requirement even if the utmost in procedural due process were afforded them. The fact remains that the interest in controlling subversive activities has as much to do with enactment of the provision as did the general welfare interest. The requirement remains a product of outmoded thinking which

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101. The INS describes the process as follows:

> An alien can only become a naturalized citizen through the judicial process before a Federal or State court which exercises naturalization jurisdiction. Directly concerned are the general attorneys (nationality), or naturalization examiners as they are commonly known, of the Naturalization Division of the Service who play an important and significant role. These officers exercise statutory authority to conduct formal hearings to determine the alien's eligibility for naturalization and to make recommendations to the courts and, in effect, act as hearing examiners for the courts. Thus, the courts and their officials are saved much valuable time in examining the applicants and their witnesses regarding eligibility for naturalization. The naturalization examiners generally develop a close working relationship with the courts and, in a vast majority of cases, the courts accept their recommendations. As a part of the naturalization process, the Service assists with and encourages citizenship education as well as naturalization ceremonies with emphasis on making them a more meaningful and significant event for the new citizen . . . . For many aliens the greatest hurdle in attaining naturalization is passing the literacy and Government examinations. Naturalization examiners endeavor to use the utmost tact, courtesy, and consideration and exercise common sense in administering these examinations as their depth and scope should be commensurate with the alien's educational, cultural, and social background.

IMMIGRATION AND NATURALIZATION SERVICE ANNUAL REPORT 21-25 (1975).

has a stigmatizing impact on all non-English-speaking citizen groups. Congress could apply the requirements of the civil rights legislation to the INS, and the requirement would lose some of its objectionable elements. But a major objectionable element would remain, just as a state literacy test administered according to exacting procedural standards would remain objectionable if it operated to stigmatize members of certain minority groups.

3. The Appropriate Standard of Review

The theory of the unconstitutionality of the English literacy provision begins with the argument presented in Part II of this article: that questions arising out of this nation's Category 1 naturalization process are justiciable despite the fact they they involve aliens. The foreign policy considerations that generally warrant judicial deference toward national policies addressed to aliens disappear when the Category 1 naturalization process is understood to involve predominantly domestic considerations. A proper understanding of the differences between immigration and naturalization law allows the view that naturalization questions are justiciable, and the "settled" body of law that holds to the contrary is more a product of confusion than sound analysis.

The discussions in Part III of this article comprise the various elements in the theory that the naturalization literacy requirement is constitutionally impermissible. It remains for these elements to be applied—to be put to the test—against the standard of review the Government would insist upon and a court would probably be inclined to grant.

Most likely the Government would argue that the standard of review to be applied in a challenge to the naturalization statute should be identical to that applied in *Washington v. Davis*.[102] The case lends itself to this analysis because it involved the federal Government and an equal protection claim under the Due Process Clause of the fifth amendment. An identical fifth amendment violation claim would be made in any constitutional challenge to the literacy provision of the naturalization statute. *Davis* involved black police candidates who alleged that a written verbal communication examination given by the police department of the Dis-

102. 426 U.S. 229 (1976).

trict of Columbia discriminated against blacks.[103] The core of their argument was that the examination's disproportionate impact violated the equal protection guarantee implicit in the due process requirement of the fifth amendment in that four times as many blacks as whites failed the test.[104] The Court found the test to be facially neutral and, applying a minimal rationality standard, declined to rule the police department's practice unconstitutional on a theory that it was rationally related to a governmental interest in having police officers with good verbal communication abilities.[105] The case, however, contained no allegation of discriminatory intent. This appears to be the basis of the relaxed standard of review employed by the Court in that the Court held both a racially discriminatory intent and a disproportionate impact must be present to trigger strict scrutiny, a standard of review which few governmental actions survive.[106]

Without conceding the soundness of the Court's thinking in formulating the review standard in *Washington v. Davis*,[107] it is suggested that a challenge to the literacy provision in the naturalization statute meets the more rigid strict scrutiny test. One element in the legislative history, the internal security argument, is clearly based on xenophobic thinking that must be viewed as intending to have a discriminatory impact on persons of non-English-speaking backgrounds. The other element in the legislative history, the general welfare argument, is outdated given technological changes that do allow a non-English-speaking person to function as a fully participating citizen. Additionally, congressional civil rights legislation must be viewed as an announcement that its 1950 views on the necessity of having English literacy as a requirement to the exercise of political rights are no longer viable. It is difficult to see how practices that would not be viewed as rationally related to state interests can be upheld as rationally related to national government interests. A state could not justify a literacy provision that operates like the naturalization provision, nor should the national government be able to justify it even under the relaxed standard of

103. *See id.* at 233.

104. *See id.* at 237.

105. *See id.* at 241.

106. *See id.* at 241-42.

107. For an argument that the obstacles to a challenge of discrimination created by the case are unsound, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-18, at 1030 (1978).

review; however, because both a discriminatory purpose and impact appear to be present, the Government should be held to the more rigid standard of review.

III. CONCLUSION

> [E]very law which originated in ignorance and malice, and gratifies the passions from which it sprang, we call the wisdom of our ancestors . . . .
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> —Sydney Smith,
> *The Letters of Peter Plymley* (Letter V)[108]

The English literacy provision of the naturalization statute was enacted to address internal security concerns and notions that English literacy is indispensable to the fulfillment of citizenship responsibilities, motivations which in operation may be destructive of personal rights. In this analysis, the author has suggested that the provision has impacts that are not isolated to individual aliens petitioning for citizenship. No attempt has been made to question the detrimental impact on resident aliens' having to comply with the statute because given settled law which holds that the alien has virtually no substantive rights in the naturalization process, there appears to be no room for a serious challenge based on the direct impact of the provision. Congressional history, however, suggests that the purpose behind the statute encompassed more than the effects on petitioning aliens since it can reasonably be inferred that the congressional thinking applied to all persons of non-English literacy backgrounds. This analysis proceeds on the assumption that there are significant numbers of citizens of non-English literacy backgrounds that suffer measurable consequences from a statute that denies citizenship to resident aliens of identical backgrounds. Those consequences include a stigmatizing impact and an obstacle imposed to the attainment of voting strength of particular ethnic groups. To the extent that these consequences can be proved, a case is made that both a discriminatory impact and purpose are present. Accordingly, the Government should be held to a compelling state interest standard of review.

A challenge to the naturalization literacy provision is also neces-

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108. S. SMITH, THE LETTERS OF PETER PLYMLEY 35-36 (1972) (Letter V).

sary to erode the unwarranted and legally unsound judicial tendency to leave congressional actions dealing with aliens unquestioned. Part II of this work examined this tendency, and the conclusion is offered that courts are too willing to forego exercise of their role. Given the history and the attitude that has prevailed in this area of law, courts must recognize that legislation dealing with alien residents is often based on racial, ethnic, or religious generalizations that impact entire discernible groups, made up of both citizens and non-citizens. If the courts open the doors to these challenges, they may see that protected interests of both citizens and non-citizens are being violated. This author recogizes the perhaps insurmountable hurdle of convincing a court that an alien has protected interests in the naturalization process and has, therefore, focused on interests of citizens that are being violated through the English literacy provision. Those interests warrant protection; thus, the courts should declare that the literacy provision of the naturalization statute can no longer be enforced.