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# ARTICLES

## THE CONSTITUTION AS COMPACT AND AS CONSCIENCE: INDIVIDUAL RIGHTS ABROAD AND AT OUR GATES\*

LOUIS HENKIN\*\*

### I. INTRODUCTION

I have chosen to leave the paths commonly trodden by students of the United States Constitution to address several small related subjects which have been largely neglected though they continue to trouble our constitutional jurisprudence. My subjects are:

1. the extent to which the United States Constitution recognizes and protects rights of aliens in the United States;
2. the applicability of the Constitution to persons outside the United States; and
3. the constitutional principles governing immigration to, and deportation from, the United States.

The rights of various categories of aliens, and the distinctions we retain between aliens and citizens, continue to raise constitutional issues. Even "undocumented" aliens recently have established new rights for themselves and their children, including the right to free public education.<sup>1</sup> The protections of the Constitution have been claimed by persons outside the United States who are not United States nationals—by victims of terrorism attributed to United States military forces in Central America,<sup>2</sup> by women in Europe objecting to cruise missiles deployed near their homes,<sup>3</sup> by a Polish

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1. See *Plyler v. Doe*, 457 U.S. 202 (1982).

2. See *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983).

3. See *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2d Cir. 1985).

refugee tried for hijacking in a United States court convened in Berlin.<sup>4</sup> The Constitution's relevance to immigration now arises in federal courts throughout the United States—in Georgia,<sup>5</sup> New York,<sup>6</sup> and even Kansas.<sup>7</sup>

The three issues I shall address are very live. They are implicated daily when the United States takes certain measures, such as the Haitian Interdiction Program,<sup>8</sup> to control immigration outside its borders. Only recently the United States has been charged with discriminating among would-be immigrants present in the United States<sup>9</sup> and with maintaining them in detention only because there is no place to send them.<sup>10</sup> Existing law still permits deporting resident aliens on grounds that could not be a constitutional basis for criminal conviction and punishment.<sup>11</sup>

These three issues have something else in common—the Constitution provides virtually no guidance for their resolution. The Constitution is silent concerning its applicability beyond the borders of the United States. Little is said in the Constitution concerning citizens, and nothing about aliens.<sup>12</sup> As regards immigration, the courts admittedly have built a constitutional jurisprudence wholly on extra-constitutional foundations.<sup>13</sup>

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4. See *United States v. Tiede*, 86 F.R.D. 227 (1979).

5. See *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd on other grounds*, 105 S. Ct. 2992 (1985).

6. See *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982).

7. See *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

8. See Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981), *reprinted in* 8 U.S.C. § 1182 at 992-93 (1983); Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981), *reprinted in* 8 U.S.C. § 1182 at 993 (1983); see also *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *appeal pending*, No. 85-5258 (D.C. Cir. Mar. 18, 1985) (unsuccessful challenge to Haitian Interdiction Program).

9. See *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd on other grounds*, 105 S. Ct. 2992 (1985).

10. *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984), *further proceedings*, 600 F. Supp. 1500 (N.D. Ga. 1985); cf. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215-16 (1953) (detention on Ellis Island without actual entry into United States, pursuant to statutory authorization).

11. Cf. *Galvan v. Press*, 347 U.S. 522 (1954) (deportation on grounds of Communist Party membership); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (same).

12. See *infra* notes 17-21 and accompanying text.

13. See, e.g., *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *The Chinese Exclusion Case*, 130 U.S. 581, 585 (1889); *infra* notes 90-97 and accompanying text (discussing *The Chinese Exclusion Case*).

I will suggest that, in the absence of textual guidance, our jurisprudence has looked to the theory of our Constitution as a social compact creating a community of righteousness with a government of conscience. I will also suggest, however, that as to immigration and deportation the existing constitutional doctrine violates that commitment to conscience.

My exploration looks back nearly a century to when the Supreme Court planted many of the seeds from which our constitutional law of individual rights has grown. In particular, I revisit three cases decided by the Court from 1886 to 1891, a scant five years. *Yick Wo v. Hopkins*,<sup>14</sup> "a good old case," established constitutional principles of equality for aliens which still prevail. *In re Ross*,<sup>15</sup> which addressed the Constitution's applicability outside the United States, was abandoned after a reign of nearly seventy years, though its spirit lingers on. *The Chinese Exclusion Case*,<sup>16</sup> fountainhead of our constitutional law regarding immigration, is a "bad old case" crying for reexamination.

## II. CONSTITUTIONAL RIGHTS OF ALIENS IN THE UNITED STATES

The Constitution does not say whether it applies to citizens only or to aliens as well. The original Constitution refers to United States citizenship only as a qualification for the office of President<sup>17</sup> and for service as a member of Congress,<sup>18</sup> and refers to state citizenship only in the provision that requires that citizens of each state be entitled to the privileges and immunities of citizens in the several states.<sup>19</sup> The Constitution gave Congress the authority to establish a uniform rule of naturalization,<sup>20</sup> but the definition and the implications of citizenship (other than those specified)

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14. 118 U.S. 356 (1886).

15. 140 U.S. 453 (1891).

16. 130 U.S. 581 (1889).

17. U.S. CONST. art. II, § 1, cl. 5.

18. *Id.* art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.

19. *Id.* art. IV, § 2, cl. 1.

20. *Id.* art. I, § 8, cl. 4.

were uncertain even after Congress enacted the first naturalization law.<sup>21</sup>

The right to vote is perhaps the most significant implication of citizenship today, but no constitutional mandate limits that right to citizens. The original Constitution provided the right to vote only for members of the House of Representatives, and even this limited right was available only to individuals eligible to vote for the most numerous branch of their state legislature.<sup>22</sup> Whether all states originally limited voting to citizens is unclear.<sup>23</sup> The Virginia Bill of Rights, predating even the Declaration of Independence, provided for suffrage for "all men, having sufficient evidence of permanent common interest with, and attachment to the community."<sup>24</sup> On its face, such "attachment" does not necessarily imply citizenship.

Our concern here is with individual rights, and these, we know, the original Constitution scarcely addressed. The few provisions relating to individual rights—prohibitions of bills of attainder, ex post facto laws, and the impairment of contracts,<sup>25</sup> and the jury requirement for federal criminal trials<sup>26</sup>—do not indicate whether they apply only to citizens or to everyone. The Bill of Rights, added by amendment in 1791, also does not specify whose rights it was designed to safeguard. The fourth amendment affirms "[t]he right of the people to be secure in their persons, houses, papers, and effects"<sup>27</sup> and the ninth amendment refers to rights retained by "the people."<sup>28</sup> Do these provisions protect only "the people"

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21. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414. Congress quickly drew a line between citizens and aliens, however, when it augmented the first naturalization act with the Alien Enemies Acts. Act of June 25, 1798, ch. 58, 1 Stat. 570; Act of July 6, 1798, ch. 66, 1 Stat. 577. *See generally* J. SMITH, *FREEDOM'S FETTERS* 1-155 (1956).

22. U.S. CONST. art. I, § 2, cl. 1. The seventeenth amendment, which provides for the direct election of senators, contains a similar provision. *See* U.S. CONST. amend. XVII.

23. Today, however, states generally condition the right to vote on United States citizenship. *E.g.*, Md. CONST. art. I, § 1; N.Y. CONST. art. II, § 1.

24. VA. CONST. art. I, § 6.

25. U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

26. *Id.* art. III, § 2, cl. 3.

27. *Id.* amend. IV.

28. *Id.* amend. IX.

who ordained and established the Constitution, and therefore perhaps only those who were eligible to vote to ratify the Constitution? Are the "people" protected by the fourth amendment different from the "persons" to whom the fifth amendment provides the protection of a grand jury and the guarantees against double jeopardy, self-incrimination, and the deprivation of life, liberty, or property without due process of law?<sup>29</sup> Furthermore, who enjoys the expressed freedoms of speech, religion, and assembly<sup>30</sup> and the safeguards and immunities for those accused of crime?<sup>31</sup>

Before the Civil War, none of these questions had attracted the attention of the Supreme Court. After the war, the fourteenth amendment established the criteria for United States citizenship and safeguarded the privileges and immunities of such citizenship against abridgment by the states.<sup>32</sup> The amendment also provided, however, that no state "shall deprive any *person* of life, liberty, or property without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws."<sup>33</sup>

The Supreme Court considered the constitutional rights of aliens under the fourteenth amendment in 1886, in *Yick Wo v. Hopkins*.<sup>34</sup> Yick Wo, a resident alien of Chinese descent, had been convicted of violating a San Francisco ordinance regulating laundries.<sup>35</sup> The evidence established that the ordinance had been enforced in a manner that discriminated against persons of Chinese descent.<sup>36</sup> The Court held that Yick Wo had been denied the equal protection of the laws.<sup>37</sup>

The Supreme Court did not explore the nature of our polity in *Yick Wo*. The Court did not ask who ordained and established the Constitution or whom the framers intended to protect. The Court did not ask whether the Constitution as a whole applied to aliens; the Supreme Court addressed only the rights of resident aliens

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29. Compare *id.* amend. IV (protecting "[t]he right of the people") with *id.* amend. V (stating that "[n]o person" shall have certain rights abridged).

30. See *id.* amend. I.

31. See *id.* amend. VI.

32. See *id.* amend. XIV, § 1.

33. *Id.* amend. XIV, § 1 (emphasis added).

34. 118 U.S. 356 (1886).

35. *Id.* at 357-58.

36. *Id.* at 361-63.

37. *Id.* at 374.

under the fourteenth amendment. Perhaps relying on the fact that one clause of the amendment spoke to privileges and immunities of citizens while the later clauses protected "persons," the Court stated simply and without any apparent difficulty, "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."<sup>38</sup> After quoting the amendment, the Court added, "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."<sup>39</sup>

*Yick Wo* remains the foundation of our jurisprudence concerning the rights of aliens in the United States. According to *Yick Wo*, the phrase "any person" in the fourteenth amendment's equal protection and due process clauses includes aliens.<sup>40</sup> Later, the Supreme Court also held that an alien was a "person" for the purposes of the due process clause of the fifth amendment, which safeguards life, liberty, or property against deprivation by the federal government.<sup>41</sup> According to subsequent Court decisions, aliens also are among the "people" entitled to the fourth amendment guarantee "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," the freedoms of the first amendment, and the procedural safeguards and immunities provided in other amendments.<sup>42</sup>

*Yick Wo* confirmed that the Constitution, including the equal protection clause, protects aliens. Equal protection does permit reasonable classifications, however, and no doubt some distinctions

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38. *Id.* at 369.

39. *Id.*

40. *See id.*

41. *See, e.g., Wong Wing v. United States*, 163 U.S. 228 (1896) (holding that the Constitution precludes punishment of an alien for being in the United States unlawfully except pursuant to trial in accordance with the fifth and sixth amendments); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (holding that the property of friendly aliens may not be taken for public purposes without just compensation). Aliens also are entitled to the equal protection of the laws implied in the concept of due process. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

42. *See* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 722 (Tent. Final Draft, 1985) [hereinafter cited as RESTATEMENT]; *id.* comment a.

between aliens and citizens are reasonable. Both the federal government and the states have distinguished between aliens and citizens for various purposes,<sup>43</sup> but the question of which purposes are reasonable and therefore constitutional continues to divide the Supreme Court. The Court has held that state discrimination against aliens creates suspect classifications that will be sharply scrutinized and will be upheld only if they serve a compelling state interest.<sup>44</sup> The states, therefore, cannot deny welfare benefits, public employment, or admission to the professions to persons only because they are aliens.<sup>45</sup> Discrimination against aliens is not suspect, however, when the state deals with matters "firmly within a state's constitutional prerogatives"<sup>46</sup> and excludes aliens from positions involving "discretionary decisionmaking, or execution of policy, which substantially affects members of the political community."<sup>47</sup>

Congressional distinctions between aliens and citizens apparently are ordinarily not suspect. The Supreme Court has never held that any congressional action discriminated against aliens in violation of the equal protection principles implied in the fifth amendment due process clause.<sup>48</sup> Congressional authority to regulate aliens and to treat them less favorably than citizens has been justified by invoking considerations of national sovereignty, war and peace, and international relations generally.<sup>49</sup> The Court has sanctioned congressional actions linking the treatment of particular groups of aliens in the United States to the treatment of United States nationals by the aliens' countries of nationality.<sup>50</sup>

43. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-22 (1978).

44. See *infra* note 45.

45. See *Bernal v. Fainter*, 104 S. Ct. 2312 (1984) (notary public); *In re Griffiths*, 413 U.S. 717 (1973) (practice of law); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (classified civil service); *Graham v. Richardson*, 403 U.S. 365 (1971) (welfare benefits).

46. *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973).

47. *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (state trooper); see also *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (deputy probation officer); *Ambach v. Norwick*, 441 U.S. 68 (1979) (public school teacher).

48. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954).

49. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21, 104 (1976); *Mathews v. Diaz*, 426 U.S. 67, 78-80 (1976); *Hines v. Davidowitz*, 312 U.S. 52, 62-69 (1941); *The Chinese Exclusion Case*, 130 U.S. 581, 606-09 (1889).

50. *Mathews v. Diaz*, 426 U.S. 67, 79 n.12 (1976); *National City Bank v. Republic of China*, 348 U.S. 356, 363 (1955); see *United Continental Tuna Corp. v. United States*, 550 F.2d 569 (9th Cir. 1977); *Westfal-Larsen & Co. v. United States*, 41 F.2d 550 (N.D. Cal.

*Yick Wo* assured the constitutional rights of resident aliens in the United States against the states, and against the United States. Aliens physically in the United States other than as immigrants enjoy similar safeguards,<sup>51</sup> although they generally are subject to conditions upon entry, and many of the distinctions drawn between non-resident aliens and resident aliens or citizens are reasonable and do not deny equal protection of the laws. Whether the Constitution protects aliens outside the United States requires special consideration.

### III. CONSTITUTIONAL RIGHTS OF ALIENS ABROAD

The Constitution does not state its geographic reach or, more specifically, whether it applies solely within the United States. The applicability of the Constitution outside the United States became an issue in the late nineteenth century in the case of *In re Ross*.<sup>52</sup>

*Ross* involved a seaman charged with murdering a ship's officer aboard a United States vessel lying in a Japanese harbor. Pursuant to a treaty with Japan granting the United States authority to prescribe and enforce law for its nationals in Japan, and an act of Congress implementing this authority, Ross was tried before the United States Consul General. The Consul General convicted Ross and sentenced him to be hanged. Later, the President commuted his sentence to life-imprisonment.<sup>53</sup> Ross brought a writ of habeas corpus in a United States district court claiming that his conviction was unconstitutional because he had not been indicted by a grand jury and had not been given a jury trial as required by the sixth amendment. The district court denied the writ and the Supreme Court affirmed unanimously.<sup>54</sup> The Court said:

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1930). Statutes containing reciprocity provisions include 10 U.S.C. § 7435(a) (1982) (National Petroleum Reserves Act), 28 U.S.C. § 2502 (1982) (Tucker Act (claims)), and 46 U.S.C. § 785 (1982) (Public Vessels Act). For other reciprocity provisions see Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 921 n.41 (1959).

51. See *Mathews v. Diaz*, 426 U.S. 67 (1976); RESTATEMENT, *supra* note 42, at § 722 & comment a.

52. 140 U.S. 453 (1891).

53. *Id.* at 454-59.

54. *Id.* at 480.

By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. . . . The Constitution can have no operation in another country.<sup>55</sup>

The Court concluded that constitutional safeguards were not available to Ross even though United States authorities had convicted and sentenced him to death, because Ross had committed his crime abroad and the United States had tried him abroad.<sup>56</sup>

The Constitution, the Court noted, was "ordained and established 'for the United States of America.'"<sup>57</sup> The conclusion that this meant "for the territory of the United States only" apparently was self-evident to the Court; it was neither proved nor discussed. It would have been more plausible for the Court to say that the Constitution was ordained for the political entity that it established and the institutions that it projected. *Ross* nevertheless remained a pillar of our Constitutional jurisprudence until 1957,<sup>58</sup> with no serious challenge to its basic doctrine during the intervening years.

During those years the territorial reach of the Constitution became an issue in a different sense and context—the historic controversy as to whether the Constitution "followed the flag." As a result of the Spanish-American War, the United States had achieved its "manifest destiny" and had extended its rule to Puerto Rico, Hawaii, the Philippines, and elsewhere in the Pacific. In a series of *Insular Cases*,<sup>59</sup> the Court considered whether the inhabitants of these newly acquired possessions enjoyed the full protection of the Constitution. The Court, in widely split opinions, said "yes," "no,"

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55. *Id.* at 464.

56. *Id.* at 464-65.

57. See *supra* note 55 and accompanying text.

58. *Ross* in effect was overruled in 1957 by *Reid v. Covert*, 354 U.S. 1, 12 (1957).

59. *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901).

and "not quite."<sup>60</sup> The answer depended on whether Congress had decided to "incorporate" the territory into the United States or merely to govern it while leaving it outside the Union as *a territory* of but not part of *the territory* of the United States. A congressionally incorporated territory was United States territory for all purposes, and the Constitution applied and governed official federal action there just as it did in the District of Columbia or New York. If Congress did not incorporate a territory, however, federal actions affecting individuals there would be subject to considerations of fairness, but would not be governed by the specific provisions of the Constitution.<sup>61</sup>

The issue in *Ross* was not the issue in the *Insular Cases*, but the spirit of the earlier case pervaded the later ones. In *Ross*, the United States claimed no sovereignty over either the territory in which Ross murdered the officer, or the territory in which his trial took place. The United States applied its laws to Ross on the basis of his status as a seaman on a United States vessel, and the agreement between the United States and Japan.<sup>62</sup> The Court refused to apply constitutional restraints<sup>63</sup> because the United States had acted in a foreign country, not within the United States.<sup>64</sup>

In the *Insular Cases*, on the other hand, the United States had imposed its laws upon, and conducted criminal trials in, territories over which it claimed sovereignty. The Court held that congressionally incorporated territories became a part of the United States, therefore the federal government could not operate there free of constitutional limitations. Congress could, however, apparently determine that the rights guaranteed by the Constitution, including the freedoms of speech and religion, the right to privacy, security from unreasonable search and seizure, and the rights to counsel and a jury trial, were not appropriate for the inhabitants of a newly acquired territory. In that event, Congress could choose

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60. See *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Downes v. Bidwell*, 182 U.S. 244 (1901).

61. *Downes v. Bidwell*, 182 U.S. 244, 343 (White, J., concurring).

62. *In re Ross*, 140 U.S. 453, 472 (1891).

63. *Id.* at 464.

64. *Id.* at 464-65.

not to incorporate the territory and, in the spirit of *Ross*, the Constitution would not apply.<sup>65</sup> Because the United States would continue to govern that territory, however, federal officials could not shed conscience completely. Officials governing under the authority of the United States had to be fair and decent.<sup>66</sup>

The doctrine of *Ross* remained untested during the following decades. In time, the exercise of extraterritorial jurisdiction in foreign countries became unacceptable to those countries and to international mores, and it steadily disappeared.<sup>67</sup> During later wars, the United States did exercise jurisdiction over its armed forces in allied and occupied countries. In the special circumstances of war and occupation, however, those cases implicated only the Uniform Code of Military Justice and the laws of war, not the Constitution.<sup>68</sup>

The end of World War II brought the United States a new destiny, perhaps equally manifest; it became a superpower. For the first time, the United States occupied foreign countries and remained for decades.<sup>69</sup> Our government forged peacetime alliances, and acquired military bases in territories of friendly countries which were, and which remain, sovereign states. In both NATO and non-NATO countries, the United States jurisdiction over its armed forces has been governed by special regime, not by general constitutional principles. Pursuant to the North Atlantic Treaty and similar arrangements, the United States also has exercised jurisdiction over military dependents and over the civilian component of the defense establishment.<sup>70</sup>

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65. *Downes v. Bidwell*, 182 U.S. 244, 343 (White, J., concurring).

66. *Id.* at 343-44.

67. Pursuant to a joint resolution of Congress, the United States relinquished its last extraterritorial ("capitulation") rights in 1956. See Act of Aug. 1, 1956, ch. 807, 70 Stat. 773 (1956) (repealing 22 U.S.C. §§ 141-43, 145-75, 176-81, 183).

68. Cf. *Madsen v. Kinsella*, 343 U.S. 341 (1952) (jurisdiction over criminal matters given to military government district courts).

69. The United States still has the authority of an occupying power for some purposes in Germany today. See Quadripartite Agreement on Berlin, Sep. 3, 1971, 24 U.S.T. 283, T.I.A.S. No. 7551. For an exercise of such authority, see *United States v. Tiede*, 86 F.R.D. 227 (1979).

70. See Agreement Between the Parties of the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67; see also *Reid v. Covert*, 354 U.S. 1 (1957) (wife of Air Force sergeant tried for husband's murder pursuant to congressional authorization).

A case involving one of these civilian citizens, *Reid v. Covert*,<sup>71</sup> signaled the death knell of *In re Ross* and heralded a new constitutional jurisprudence. As authorized by Congress, a military court tried and convicted the wife of a United States Air Force sergeant for the murder of her husband at an air base in England.<sup>72</sup> The accused sought a writ of habeas corpus in federal district court, challenging her conviction because she was not given a jury trial as required by the sixth amendment.<sup>73</sup> The district court issued the writ and the government appealed directly to the Supreme Court.<sup>74</sup> The Supreme Court first rejected the claims on the ground that the constitutional provisions did not apply, but then granted a rehearing and reversed itself.<sup>75</sup>

Justice Black, writing for four of the justices in the majority, declared:

At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. . . .

. . . .

The language of Art. III, § 2 manifests that constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home. . . .

This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has

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71. 354 U.S. 1 (1957).

72. *Id.* at 3-4. A similar case, involving the wife of a United States Army officer who was tried and convicted for her husband's murder by a military court in Japan, was consolidated with this case on appeal. *Id.* at 4-5.

73. *Id.* at 4.

74. *Reid v. Covert*, 351 U.S. 487, 488 (1956).

75. *Reid v. Covert*, 354 U.S. 1, 41 (1957), *rev'g* *Kinsella v. Krueger*, 351 U.S. 470 (1956) and *Reid v. Covert*, 351 U.S. 487 (1956).

been suggested that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shall nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.<sup>76</sup>

The Court dismissed the declaration in *Ross* that the Constitution had no operation in a foreign country. "At best," the Court said, "the *Ross* case should be left as a relic from a different era."<sup>77</sup>

Since *Reid*, no court has suggested that any constitutional provision is inapplicable because the challenged conduct occurred in a foreign country.<sup>78</sup> For example, several circuit courts have subjected government actions on the high seas to constitutional limitations.<sup>79</sup> Recently, the United States Court of Appeals for the District of Columbia Circuit has held that a citizen's claim that his constitutional rights were violated when United States military authorities seized or authorized seizure of his property in Honduras without just compensation states a justiciable claim for relief.<sup>80</sup>

*Reid* does not tell us whether the Constitution applies abroad only to citizens or also to aliens. Although the Supreme Court stressed that *Reid* involved the constitutional rights of a United States citizen,<sup>81</sup> the Court did not limit its holding or its reasoning to citizens. Wherever the United States acts, Justice Black said, it "can only act in accordance with all the limitations imposed by the Constitution."<sup>82</sup> If constitutional limitations apply wherever the

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76. *Id.* at 5-9 (footnotes omitted).

77. *Id.* at 12.

78. In *United States v. Belmont*, the Supreme Court acknowledged that "our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens." 301 U.S. 324, 332 (1937) (citations omitted). In context, however, the Court was asserting merely that our Constitution, laws, and policies do not govern the acts of *other governments*.

79. See, e.g., *United States v. Hensel*, 699 F.2d 18 (1st Cir.), *cert. denied*, 461 U.S. 958, *cert. denied*, 464 U.S. 823, *cert. denied*, 464 U.S. 824 (1983); *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980); *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978). See generally Henkin, *The Constitution at Sea*, 36 ME. L. REV. 201 (1984).

80. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1505 (D.C. Cir. 1984) (en banc), *rev'd* 724 F.2d 143 (D.C. Cir. 1983), *vacated mem.*, 105 S. Ct. 2353 (1985).

81. See *Reid v. Covert*, 354 U.S. 1, 5, 32 (1957).

82. *Id.* at 6.

United States exercises authority, why not when governmental actions abroad affect aliens there? If constitutional provisions apply to both aliens and citizens at home, why not to both aliens and citizens abroad?

Although the Supreme Court has not addressed these questions since *Reid*, lower courts have recognized constitutional protections for aliens outside the United States in various contexts. For example, in *United States v. Toscanino*,<sup>83</sup> federal officials allegedly had kidnapped and tortured an alien in a foreign country and brought him to the United States for criminal proceedings.<sup>84</sup> The United States Court of Appeals for the Second Circuit held that these acts violated the Constitution, and it invalidated the victim's subsequent trial in the United States.<sup>85</sup> Courts have entertained objections by aliens aboard foreign flag vessels to unreasonable searches and seizures at sea.<sup>86</sup> A few years ago, a Polish national successfully claimed the right to a jury trial in a United States court specially convened in Berlin to try him for hijacking a plane to escape his country.<sup>87</sup> In the summer of 1984, the women of Greenham Common, Great Britain urged a federal district court to rule that the deployment of United States cruise missiles near their homes violated the fifth and ninth amendments.<sup>88</sup> In that case, the court refused to consider their claims because it concluded that they raised political, non-justiciable questions, not because the plaintiffs, non-United States citizens in Great Britain, could not invoke the protections of the Constitution.<sup>89</sup> Apparently, in the spirit of these cases, a foreign national held under United States authority abroad could seek release on habeas corpus in a United States court.

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83. 500 F.2d 267 (2d Cir. 1974).

84. *Id.* at 269-70.

85. *Id.* at 281.

86. *See, e.g., United States v. Demanett*, 629 F.2d 862, 866 (3d Cir. 1980).

87. *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979).

88. *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2d Cir. 1985).

89. *Id.* at 1339-40.

## IV. CONSTITUTIONAL RIGHTS AND IMMIGRATION

The Supreme Court has considered claims of constitutional safeguards by aliens outside the United States only in the context of immigration laws, most notably in *The Chinese Exclusion Case* of 1889.<sup>90</sup> Initially, immigration to the United States essentially was free of restrictions and, in fact, the United States actively encouraged immigration. Late in the nineteenth century, however, Congress began to limit immigration from some countries. In the *Chinese Exclusion Case*, a person of Chinese origin had been admitted to the United States lawfully, and had lived here for about twelve years. He left the United States with a valid document from immigration authorities authorizing his return. Later, the authorities denied him re-entry because an intervening act of Congress excluded him despite his prior residence and the promise that he could return.<sup>91</sup>

The Constitution says nothing about immigration. The power to control immigration is not one of the enumerated powers of Congress. In an earlier case, the Supreme Court had held that control of immigration was within the congressional power to regulate commerce with foreign nations.<sup>92</sup> In *The Chinese Exclusion Case*, however, the court substituted a radical innovation in constitutional jurisprudence. The Court concluded that, notwithstanding the principle of enumerated powers,<sup>93</sup> the United States has powers not mentioned in the Constitution—powers inherent in its national and international sovereignty. According to the Court, these powers include the rights of the sovereign to control its territory and safeguard its security. Congress can control immigration pursuant to this authority.<sup>94</sup>

The Court did not consider whether, or suggest why, these inherent powers differed from the enumerated powers of the federal government, which also are rooted in sovereignty. The Court could have held that the inherent powers, like the enumerated powers,

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90. 130 U.S. 581 (1889).

91. *Id.* at 582.

92. *See* *Head Money Cases*, 112 U.S. 580 (1884).

93. *See* U.S. CONST. art. I, § 1; *cf. id.* amend. X (any powers not delegated to the federal government are reserved to the states).

94. *The Chinese Exclusion Case*, 130 U.S. 581, 603-04 (1889). Congress could control immigration even in violation of a United States treaty. *Id.* at 600.

were subject to constitutional limitations and safeguards despite their extra constitutional origin.<sup>95</sup> *Yick Wo* might have supported the constitutional claims of a returning alien, but the Court apparently considered *Yick Wo* irrelevant, perhaps because Congress, not a state government, was involved.<sup>96</sup> Perhaps the Court believed that aliens stopped at the border are physically outside the United States and therefore are not protected by the Constitution.<sup>97</sup>

*The Chinese Exclusion Case* remains the foundation of our constitutional jurisprudence concerning immigration. In subsequent court decisions and congressional acts, judges and legislators have interpreted the case as holding that immigration and immigration laws are not subject to constitutional restraints. Following this doctrine, Congress has been permitted not only to impose restraints on the number of immigrants and to choose among would-be immigrants according to reasonable criteria such as family ties or needed skills, but even to discriminate among potential immigrants on the basis of their national origin.<sup>98</sup> Congress thus may discriminate among potential immigrants, in effect, on the basis of race or religion without any judicial scrutiny, let alone strict scrutiny. Congress could exclude not only persons who had been convicted of a crime, suffered from a communicable disease, or posed a plausible danger to national security, but also persons who had engaged in radical political activities or had held radical political

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95. Later, in non-immigration cases, the Court said that the extra constitutional powers inherent in sovereignty were subject to constitutional limitations. *Perez v. Brownell*, 356 U.S. 44, 58 (1958); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). In *Perez*, the Court said:

Broad as the power of the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.

356 U.S. at 58.

96. See *The Chinese Exclusion Case*, 130 U.S. 581, 605-06 (1889).

97. The Court explicitly held the Constitution inapplicable abroad two years later in *In re Ross*, 140 U.S. 453 (1891), *overruled*, *Reid v. Covert*, 354 U.S. 1, 12 (1957). See *supra* notes 52-58 and accompanying text.

98. Such limitations have been reflected in successive Immigration Acts. See *infra* note 112. They never have been challenged successfully because of the principle deemed to have been laid down in *The Chinese Exclusion Case* that the power of Congress with respect to immigration is plenary and not subject to constitutional restraint. See *supra* note 94 and accompanying text.

opinions that would be protected for persons already in the United States.<sup>99</sup> Congress could assert such grounds to exclude not only persons who had never been here, but also those who had lived here peacefully for many years and had left the country temporarily, as in *The Chinese Exclusion Case*.<sup>100</sup>

In 1952, the Supreme Court held in *Shaughnessy v. United States ex rel. Mezei*<sup>101</sup> that immigration authorities could exclude a returning alien based on undisclosed evidence without a hearing.<sup>102</sup> The Court also held that immigration authorities could detain an excludable alien indefinitely if no country would accept him.<sup>103</sup> Even if an alien had been a long-term resident of the United States, the Court said Congress could exclude him at will.<sup>104</sup> Congress can exclude or deport an alien even for political activity that could not support a criminal conviction because it would constitute deprivation of liberty without due process of law.<sup>105</sup>

#### V. THE NEED FOR A NEW DOCTRINE

Individual rights have flourished in the United States since World War II, but they have not shaken the legacy of *The Chinese Exclusion Case*. Since *Ross* died, aliens abroad apparently receive the same protections against unconstitutional actions by United States officials as do citizens. Aliens abroad, however, and even those physically in the United States but not lawfully admitted, are not protected against the enforcement of unfair immigration laws because to date these laws have been beyond the reach of the

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99. 8 U.S.C. § 1182(a)(28) (1982); see *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (exclusion based on "information of a confidential nature, the disclosure of which would be prejudicial to the public interest").

100. 130 U.S. 581 (1889).

101. 345 U.S. 206 (1953).

102. *Id.* at 214-15; see also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (upholding a decision, based on confidential information, to deny entry to the wife of an American serviceman).

103. *Mezei*, 345 U.S. at 215-16.

104. *Id.* at 216. The Court had an opportunity in 1985 to reconsider and disown *Mezei*, but only the dissenting justices seized it. See *Jean v. Nelson*, 105 S. Ct. 2992, 3005-12 (1985) (Marshall & Brennan, JJ., dissenting).

105. *Galvan v. Press*, 347 U.S. 522 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

Constitution. Even aliens lawfully resident in the United States, although they enjoy the rich heritage of *Yick Wo* and the same safeguards as citizens, under cases still in effect can be deported for little or no reason. As a result, failure to seek and obtain naturalization leaves an alien forever vulnerable to deportation.

Lower federal courts have extended this pernicious anomaly. They have construed *The Chinese Exclusion Case* as holding not only that aliens have no constitutional rights regarding admission, but also that they cannot challenge immigration procedures that discriminate without reason among persons of different races or nationalities, and that they cannot challenge decisions to intern them indefinitely even when the only reason for the internment is the lack of a country willing to accept them.<sup>106</sup> A federal district court recently rejected a challenge to the Haitian Interdiction Program, under which United States Coast Guard vessels not only prevent persons from coming to the United States to seek asylum, but also forcibly return them to the authorities of the country from which they fled.<sup>107</sup>

More than seventy years ago, in a case involving the deportation of an alleged prostitute who had lived in the United States for more than five years, Justice Holmes wrote: "The attempt to reopen the constitutional question must fail. It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful."<sup>108</sup> Almost forty years later, Justice Frankfurter asked: "If due process bars Congress from enactments that shock the sense of fair play—which is the essence of due process—one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party."<sup>109</sup> Frankfurter continued:

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106. Cf. *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd on other grounds*, 105 S. Ct. 2992 (1985); *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984), *further proceedings*, 600 F. Supp. 1500 (N.D. Ga. 1985). *But see Jean v. Nelson*, 105 S. Ct. at 3005 n.8 (Marshall, J., dissenting) (citing *Augustin v. Sava*, 735 F.2d 32 (2d Cir. 1984), *Yiu Sing Chun v. Sava*, 708 F.2d 869 (2d Cir. 1983), and *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981)).

107. *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *appeal pending*, No. 85-5258 (D.C. Cir. Mar. 18, 1985). For an indication of the issues raised by the Program, see Henkin, *The Constitution at Sea*, 36 ME. L. REV. 201, 216-18 (1984).

108. *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913).

109. *Galvan v. Press*, 347 U.S. 522, 530 (1954).

[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* clause, even though applicable only to punitive legislation, should be applied to deportation.

But the slate is not clean.<sup>110</sup>

Since Justice Frankfurter's statement, many other slates have been cleaned, including *Ross*, of the same vintage and spirit as *The Chinese Exclusion Case*.<sup>111</sup> Individual rights have become our hallmark and our pride. Official racial discrimination has been uprooted in all other contexts. Congress itself has eliminated the racism of an immigration policy based on national origin.<sup>112</sup> Alien rights in the United States have flourished, and the Supreme Court has recognized alienage as a suspect classification requiring strict scrutiny when state action is involved.<sup>113</sup> *The Chinese Exclusion Case*—its very name an embarrassment—should join the relics of a bygone, unproud era.

The three cases I have explored, and their different legacies, became part of our constitutional jurisprudence. These doctrines, however, differ from most of the law the Supreme Court has promulgated. The Court does not seem to rely upon interpretation and construction of constitutional text. In *Yick Wo*, the Court arguably relied on the fourteenth amendment language protecting "persons," not merely citizens,<sup>114</sup> and in *Ross* it purported to rely

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110. *Id.* at 530-31 (footnote omitted).

111. *See Reid v. Covert*, 354 U.S. 1 (1957).

112. The Immigration and Nationality Act of 1952 abolished the "national origins" system of the Act of 1924, and gave every country at least a modest quota, but the differences in the quotas themselves may suggest ethnic and racial considerations. *See Immigration and Nationality Act*, ch. 477, 66 Stat. 163, 175-78 (1952). The 1965 Amendment to the Act of 1952 abolished all quotas and gave preferences for immigration purposes on other grounds, such as concern for family reunification and needed skills. *See Act of Oct. 3, 1965*, Pub. L. No. 89-236, 79 Stat. 911, 911-12.

113. *See supra* notes 44-45 and accompanying text.

114. *See supra* note 38 and accompanying text.

on the statement in the preamble that the Constitution was ordained and established "for the United States of America."<sup>115</sup> The other cases cite nothing in the Constitution. *Reid v. Covert*, rejecting *Ross*, rested on an assertion that the United States government "has no power except that granted by the Constitution."<sup>116</sup> In *The Chinese Exclusion Case*, the Court insisted that its holding had no basis in the Constitution.<sup>117</sup>

The inescapable conclusion is that despite some nod to language, this jurisprudence does not derive from particular constitutional provisions. Instead, it depends on the Constitution as a whole, its political theory, and its status and character in our polity. These bases cannot be found in the text of the Constitution. The Constitution itself gives few hints of the political philosophy of the framers, perhaps because the Constitution descended directly from the Articles of Confederation, not from the Declaration of Independence, and the framers were concerned with the issues of union, not the issues of governance and the relationship of the individual to society. The framers' political philosophy is more clearly reflected in our national birth certificate, the Declaration of Independence, and in the early state constitutions established pursuant to the Declaration.<sup>118</sup>

The framers were committed to the social compact. Man is "endowed with . . . unalienable Rights," and "to secure these rights Governments are instituted among Men."<sup>119</sup> Jefferson's statement moved from the rights of men to the sovereignty of the people, but it did not define who "the people" were. Jefferson did not intimate what his theory implied for persons living in society who did not meet the indicia of membership in it, or for persons who remained outside society or lived in other societies. The Virginia Bill of Rights provides that "all men, having sufficient evidence of permanent common interest with, and attachment to the community,

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115. See *supra* notes 57-58 and accompanying text.

116. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (footnote omitted).

117. See *supra* notes 92-94 and accompanying text.

118. See generally Henkin, *Constitutional Fathers—Constitutional Sons*, 60 MINN. L. REV. 1113 (1976); Henkin, *Rights: American and Human*, 79 COL. L. REV. 405 (1979) [hereinafter cited as Henkin, *Rights*].

119. The Declaration of Independence para. 2 (U.S. 1776).

have the right of suffrage.”<sup>120</sup> None of the state constitutions, however, addressed whether the people could deny entry to the society and the compact when they instituted government, or after government is instituted, or whether their elected representatives could deny entry later. These constitutions also did not address which reasons, if any, could justify such exclusions.

More importantly for our purposes, neither the Declaration of Independence nor the early state constitutions articulated the character of the social compact. The Declaration of Independence declared that “to secure these rights, Governments are instituted among Men.”<sup>121</sup> Was the Constitution only a compact establishing a government to secure the individual rights of the people creating it? Or, since they believed that all men, everywhere, “are endowed by their Creator with certain unalienable Rights,”<sup>122</sup> did the framers intend to create a government that would secure and respect the unalienable rights of all human beings, including those in their midst not party to the contract, and human beings in other societies upon whom their new government might impinge?

The constitutional history sketched above suggests that the Supreme Court has answered these questions inconsistently. *Yick Wo* supports the proposition that the compact was not only for the citizens who made it, but also for aliens in their midst.<sup>123</sup> Later cases have shown that the compact applies not only to residents, but to all who become subject to the authority of the government.<sup>124</sup> *Reid* and its progeny abandoned the territorial view of the compact, affirming that individual rights must be respected wherever federal officials act.<sup>125</sup> The lower courts, combining *Yick Wo* and *Reid*, have held that the compact undertakes to secure the rights of all who are, or who become, subject to the jurisdiction of the government, whether aliens or citizens, here or abroad.<sup>126</sup>

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120. VA. CONST. art. I, § 6.

121. The Declaration of Independence para. 2 (U.S. 1776).

122. *Id.*

123. 118 U.S. at 368-69.

124. Even *Ross* recognized the obligation of the government to respect the rights of non-citizens in the United States, and even of non-citizens residing abroad if the government brought them here. See *supra* text accompanying note 55.

125. See *supra* notes 71-77 and accompanying text.

126. See *supra* notes 83-89 and accompanying text.

The social compact, then, is not merely an arrangement for mutual protection; it is a compact to establish a "community of righteousness." It declares that a government instituted to secure rights must respect those rights. The United States must secure and respect not only the rights of the people who were party to the compact, but also of all others who come within its jurisdiction. If, in a world of states, the United States is not in a position to secure the rights of all individuals everywhere, it is always in a position to respect them. Our federal government must not invade the individual rights of any human being. The choice in the Bill of Rights of the word "person" rather than "citizen" was not fortuitous; nor was the absence of a geographical limitation. Both reflect a commitment to respect the individual rights of all human beings.

The compact recognizes the rights of all men and women everywhere and creates a government that must respect these rights. The United States may not deprive a person, whether a citizen or foreign national, of his life, liberty, or property without due process of law. Our government may not take anyone's property without just compensation—citizen or alien, abroad or at home. I do not suggest that the Constitution "applies" throughout the world or that it gives "rights" to all human beings everywhere. The Constitution does not give rights, not even to us. Our rights and the rights of people everywhere, do not derive from the Constitution; they antecede it. The effect of the Constitution, however, is to require the United States government to respect these human rights, with which all men and women are endowed equally.<sup>127</sup>

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127. See Henkin, *Rights*, *supra* note 118.

Whether an alien abroad has access to the courts of the United States is a different question. No reasons exist why an alien held by United States authorities abroad should not have the right to bring a writ of habeas corpus in a United States court, or seek compensation through our courts for any taking of property by the United States government. *But see Johnson v. Eisentrager*, 339 U.S. 763 (1950) (denying alien enemies access to courts in time of war). Whether a non-resident alien has a remedy under a particular statute depends upon statutory interpretation. *See, e.g., Construcciones Civiles de Centro-america, S.A. v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972).

See also *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976), in which the court denied access to an Austrian national who was a co-plaintiff with United States nationals challenging United States Army wiretapping in Europe. The court declared a general rule denying access to United States courts for aliens resident abroad subject to three possible exceptions. According to the court, none of these exceptions applied to a plaintiff who had "no contact with the United States other than his meetings with private United

This interpretation of our compact also should guide the application of our concept of equal protection. For those who live in the United States, alienage essentially ought to be irrelevant. The Supreme Court was right when it declared alienage a suspect classification. The states are entitled, though not required, to restrict the right to vote to citizens; the compact does not necessarily entitle states to deny resident aliens equal rights to be public school teachers or deputy probation officers.<sup>128</sup>

Even more questionable are the remnants of *The Chinese Exclusion Case* reflected in our jurisprudence concerning congressional treatment of aliens. The Supreme Court never has invalidated any congressional act regulating aliens on constitutional grounds. Unlike state legislatures, Congress can exclude aliens from Civil Service employment<sup>129</sup> and it even can deny welfare benefits, at least to some aliens.<sup>130</sup> Whatever the merits of particular regulations or distinctions, the attitude remains redolent of *The Chinese Exclusion Case*. Aliens, as a class, are here by sufferance, grace, and charity, according to this view. Their presence implicates national security, and their rights are subject to international barter.

Nothing in the compact excludes immigration issues from its concerns and principles. Doubtless, the compact and our society are not necessarily open to all comers at all times. The people, parties to the compact, may limit the numbers of new adherents and may exclude those who would endanger security or seriously disrupt order. The rhetoric of *The Chinese Exclusion Case*, however, identified any restriction on immigration with national security. Such rhetoric is empty. Discrimination because of race or religion bears little relation to security. Nor does national security require the detention of thousands of orderly, non-threatening aliens to encourage them to leave and to discourage others from coming. A

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States citizens and his alleged electronic surveillance by United States Army personnel." *Id.* at 153. The basis for the court's general rule is unclear, and its application to deny a remedy in that particular situation is open to question. Even applying the court's own rule, an alien who had been subjected to government surveillance seemingly had sufficient "contact with the United States."

128. See *supra* notes 44-45 and accompanying text. But see *supra* notes 46-47 and accompanying text.

129. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103-05 (1976) (national interests may justify congressional exclusion of aliens from Civil Service employment).

130. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

people committed to equality and inalienable rights for all men and women should not permit its government to apply invidious criteria for admission. We should not allow our government, for example, to discriminate between Haitians and Cubans in immigration procedures, to detain aliens merely because they cannot be deported, or to interdict boats on the high seas and compel their passengers to return to the countries from which they fled.<sup>131</sup> A compact of conscience should not exclude or deport permanent residents who have demonstrated "common interest with, and attachment to the community."<sup>132</sup>

The people of the United States ordained a compact which established a community of conscience and righteousness. The compact applies to everything done by the community and its officials, in the United States and elsewhere, affecting citizens and aliens alike, and concerning immigration no less than other matters. The rights our ancestors recognized as inherent and unalienable knew neither bounds nor state boundaries. Their polity should respect these rights with no invidious inequalities, no arbitrary limitations on liberty, and no unnecessary interferences with those who risk all in the pursuit of some happiness.

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131. See Justice Marshall's dissent in *Jean v. Nelson*, 105 S. Ct. 2992, 3005-12 (1985), and authorities cited therein at 3005 n.8, 3009 n.9.

132. VA. CONST. art. 1, § 6.