COMMENTS

THE ALIEN AND THE CONSTITUTION

The bosom of America is open to receive not only the opulent and respectable stranger but the oppressed and persecuted of all nations and religions; whom we shall welcome to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment.

— George Washington (1783)

Immigration into the United States has created a minority group with special legal status: the resident alien.¹ The legal position of this group has frequently been a measure of the civil rights of citizens as well.² This comment will discuss and evaluate the decisions of the courts affecting the alien’s rights under the Constitution. For purposes of analysis, the problems of the alien will be divided into five categories: (1) admission, (2) deportation, (3) naturalization, (4) loss of citizenship, and (5) the rules governing the activities of the alien during his residence here.

I

Before 1875, the federal government placed no restrictions on immigration. In that year, Congress passed an act excluding prostitutes and convicts.³ Since then, the grounds for exclusion have steadily increased,⁴ reaching a new high in the Immigration and Nationality Act of 1952.⁵

¹ The status of the nonresident alien presents special problems which are beyond the scope of this comment. See, e.g., Johnson v. Eisentrager, 339 U.S. 763 (1950) (right of enemy alien to access to United States courts); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (right of alien corporation whose property in the United States had been expropriated, to compensation under the Fifth Amendment).

² The exclusion cases do not, of course, involve resident aliens, but they are properly considered here because the aliens concerned avowedly intend to live in the United States.

³ The Sedition Act, 1 Stat. 598 (1796), the first attempt by the federal government to restrict freedom of thought and political action, is closely associated with a companion measure containing even harsher provisions for aliens, 1 Stat. 570 (1798). Significantly also, the Smith Act, relating to citizens, was passed as part of the Alien Registration Act of 1940, 54 Stat. 670 (1940). In the present period of antilibertarian activity, two laws imposing severe restrictions on aliens have been major symptoms of the general mood. Internal Security Act, 64 Stat. 987 (1950); Immigration and Nationality Act, 66 Stat. 163 (1952). It may be suggested, in explanation of this parallel, that the fears and psychological tensions which lead to a loss of the ability to cope with political unorthodoxy by the usual democratic means also cause us to distrust those whose foreign birth makes them “different.”

⁴ Restrictions on immigrants from particular countries began with the first Chinese Exclusion Act, 22 Stat. 58 (1882). The quota system, by which only a certain number are admitted, depending on the country of their origin, was first enacted in 1921, 42 Stat. 5 (1921). Exclusion for political opinions became the law in 1903, 32 Stat. 214 (1903).

From the first, the Supreme Court has held that Congress has the power to restrict immigration. Originally, the power to restrict was derived from the commerce clause.\(^6\) The Court soon declared, however, that the power to restrict was an aspect of national sovereignty, which Congress might exercise, without the necessity of relying on any specific constitutional grant.\(^7\) It is undeniable that the federal government, acting through Congress, must be able to restrict immigration in some manner. But that Congress should have unlimited power in this field is less certain. Theoretically, limitations might have been found either in treaties with foreign governments or in specific constitutional prohibitions. But although the admission of aliens affects the international relations of the United States, the congressional power to control immigration has been held not to be limited by existing treaties.\(^8\) This decision was in line with a general rule that acts of Congress will be enforced by the courts even though in contradiction to previously adopted international treaties.\(^9\)

Nor may the alien, in attacking the constitutionality of a legislative provision excluding him, call upon the Bill of Rights to support his claim. The line of cases excluding Chinese and Japanese stands for the proposition that the due process clause does not prevent Congress from excluding aliens on the basis of race.\(^10\) That the immigrant may not call upon the First Amendment is considered settled by the leading case of *Turner v. Williams.*\(^11\) In that case, the alien was excluded under the Act of March 3, 1903,\(^12\) on the ground that he was an anarchist. His counsel urged that congressional power in the exclusion field was limited in that the First Amendment prohibits exclusion based on political belief. The Court upheld the exclusion.

However, the Court's opinion leaves the ratio decidendi of the *Turner* case unclear.\(^13\) The case has been cited to support the proposition that Congress' control over aliens is not restricted by the Bill of Rights,\(^14\) but the opinion may as

---

\(^6\) Head Money Cases, 112 U.S. 580 (1884).

\(^7\) Chinese Exclusion Case, 130 U.S. 581 (1889).

\(^8\) Ibid. The alien's government may seek to enforce the treaty in an international tribunal, but he himself may not do so in the courts of the United States.


\(^10\) E.g., Japanese Immigrant Case, 189 U.S. 86 (1903); Nishimura Ekiu v. United States, 142 U.S. 651 (1892); Chinese Exclusion Case, 130 U.S. 581 (1889).

\(^11\) 194 U.S. 279 (1904).

\(^12\) 32 Stat. 214 (1903).

\(^13\) The decisive paragraph of the opinion reads: "[The act] does not abridge the freedom of speech.... It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking.... in the country, but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law. To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise." 194 U.S. at 292.

\(^14\) E.g., Zakonaitė v. Wolf, 226 U.S. 272 (1912).
easily be interpreted as holding only that, whatever the limits on Congress' power, the alien has no standing to demand admission on constitutional grounds. It is possible that the case may stand on the yet more limited ground that this particular alien had no substantive claim under the First Amendment. This supposition gains added force when it is remembered that the Turner case was decided before any law had been declared unconstitutional on the basis of the First Amendment, and even before the formulation of the "clear and present danger" test.16

Although either of the first two theories of the Turner case presents obstacles to the alien claiming admission under some applicable clause of the Bill of Rights, there is an important distinction between a holding that Congress has absolute power to restrict immigration and a holding that, although Congress has exceeded its power, the alien is not a proper person to challenge its actions. The latter theory, based upon the proposition that the alien, never having entered the United States, can claim no rights under its constitution, would leave immigration restrictions open to constitutional attack by citizens. Whether such an act could be attacked by a citizen was raised in the recent case of United States ex rel. Knauff v. Shaughnessy.16

Ellen Knauff was born in Germany. During and after World War II, she worked commendably for the allies in military and civilian capacities. She married an American soldier and came to the United States with the intention of living with her husband. Seeking admission under the War Brides Act,17 she was excluded on the ground that her admission would be "prejudicial to the interests of the United States." No facts were stated to sustain the alleged ground of exclusion. Mrs. Knauff was denied a hearing in accordance with an Act of June 21, 1941.18 Although her husband, a citizen, secured a writ of habeas corpus attacking the denial of hearing as a violation of procedural due process, the writ was dismissed on the ground that the exclusion was valid.

Justice Minton's opinion for the majority did not distinguish the absolute power of Congress to restrict immigration from the alien's inability to contest the exercise of a nonabsolute power. He declared that there is inherent power over immigration in both the legislative and executive branches of the government which is not subject to judicial review, but also stated that the alien could

16 Schenck v. United States, 249 U.S. 47 (1919), was the first case in which a standard of constitutionality in "free speech" cases was proposed. To what extent the First Amendment even now protects aliens is not clear; it would not be unreasonable to imagine that the Supreme Court would be reluctant to declare an anarchist within its protection before any other cases had been decided in which an act of Congress was held to violate the First Amendment.

17 338 U.S. 537 (1950).


19 55 Stat. 252 (1941), 22 U.S.C.A. § 223 (Supp., 1951). The act provides, in part, that an alien whose entry is found to be prejudicial to the United States may be excluded without a hearing if the Attorney General is of the opinion that the disclosure of the evidence on which the finding is based would, in itself, be prejudicial to the public interest. It should be noted that the act was specifically a wartime measure.
not enter the country under a claim of constitutional right. The *Steel Seizure*
case has since decided that, at least with regard to seizure of private property, the executive possesses no inherent powers, so the *Knauff* case may be said to rest on the alternative grounds of absolute legislative power and the alien's lack of standing to sue. The latter ground seems inappropriate since the writ was brought by a citizen and the question of his rights was specifically raised in the briefs and in the dissent. Therefore the case may rest upon the absolute power of Congress to control immigration and end the ambiguity arising from the *Turner* opinion.

But even if Congress possesses absolute power to exclude all aliens, it need not follow that it may make an unreasonable classification of those who may enter. The theory that if the sovereign may withhold a privilege (i.e., admission) from all, it may make any classification it wishes, was part of the judicial philosophy of Justice Holmes. The most famous expression of this view arose in relation to a state statute in *McAuliffe v. New Bedford*, which held that since a state need not hire a man as a policeman, it could qualify his employment any way it wanted. In a recent decision, the Supreme Court refused to apply this principle to public employees, striking down a statute depriving certain teachers of employment by a provision inconsistent with the due process clause of the Fourteenth Amendment. Justice Holmes also believed that, as a city might "forbid absolutely public speaking in the public park," it might permit speakers with some views while forbidding others. The present law is otherwise. Only in the field of alien legislation has the Holmesian doctrine survived, and even there the Court has refused to extend the doctrine to its logical extreme. In *Keller v.*

---

22 Justice Jackson wrote, "Now this American citizen is told that he cannot bring his wife to the United States but he will not be told why. He must abandon his bride to life in his own country or forsake his country to live with his bride." 338 U.S. at 550. But it does not appear whether Justice Jackson's judgment was based entirely on the War Brides Act, because that Act was intended for the citizen-husband's benefit, or whether he would consider the husband's right in the absence of that statute.
23 The absence of an explicit holding on the point leaves the matter open, however. It may be argued that, since the Court did not distinguish between inherent legislative and inherent executive powers, the striking down of the latter in the *Steel Seizure* case, places the doctrine of inherent legislative power in doubt also. The analysis of the cases is complicated by the circumstance that the opinion bases the decision on two absolutes, either of which would have been sufficient standing alone.
25 155 Mass. 216, 29 N.E. 517 (1892). "The petitioner may have a constitutional right to talk politics, but he had no constitutional right to be a policeman." 155 Mass. at 220.
United States; the Court held unconstitutional a federal statute making it illegal to run a house of prostitution containing aliens because Congress had attempted to legislate within the state police power. The mere fact that the act dealt with aliens was insufficient to sustain it. In line with his absolutist position, Justice Holmes dissented.

While the immigrant apparently is unable to invoke the protection of any constitutional right in his effort to gain admittance, he is entitled, on habeas corpus, to a judicial determination (1) that the statutory procedure has not been circumvented, and (2) that the procedure, within whatever statutory limits may have been imposed, has been administered fairly. But the purpose of this determination is not so much to protect the alien as to carry out the legislative will. Accordingly, Congress may empower an administrative official to decide whether or not the alien is a member of a class to be excluded, and may even provide for the absence of a hearing in special circumstances, as was done in the Knauff case. In addition, the substantive exclusionary provisions may be so broad that they leave little to be tested, or may give wide discretionary power to the immigration officials.2

II

The alien attempting to be admitted into this country may have burnt his bridges behind him or, if he is a political refugee, may have had no alternative to leaving his original country. Denying him admission may thus subject him to serious hardship. But the alien who arrives in accordance with the law and then establishes his home here, together with his work and perhaps a family, may, in addition, be involuntarily uprooted from all these and forced to begin life anew. The Supreme Court itself has often recognized the severity of deportation.

Nevertheless, the Court has not distinguished between exclusion and depor-
tation in reviewing the constitutionality of congressional legislation. In the leading case of *Fong Yue Ting v. United States*, the government brought deportation proceedings against three Chinese aliens who did not possess the statutorily prescribed certificate. Dismissing the aliens' constitutional objections, the Court, through Justice Gray, laid down a sweeping doctrine regarding the power of Congress to expel aliens: "The right to exclude or to expel all aliens or any class of aliens, absolutely or upon certain conditions . . . [is] an inherent and inalienable right of every sovereign and independent nation. . . ." Because the purpose of the statute involved was to deport those who entered illegally, the *Fong* case might be considered merely an extension of the exclusionary power, but the principle that Congress is as free to deport as to exclude has been upheld in many cases where the possible ambiguity of the *Fong* case was not present.

It should be noted that, while the *Fong* rule was so broadly stated that all constitutional limitations on deportation statutes were eliminated, the *Fong* line of cases involved only the legitimacy of the statutory classification under the due process clause. When questions involving the First Amendment have arisen, the answer of the Court has been less clear. In *Bridges v. Wixon*, which first raised the question, the deportation order was reversed on other grounds and the First Amendment issue was not considered in the majority opinion. But Justice Murphy, concurring, based his judgment on the belief that, since the First Amendment protects the freedom of speech of both citizens and aliens, it ought to bar deportation proceedings based on political activity. The First Amendment argument was again raised in the recent case of *Harisiades v. Shaughnessy*. There the *Fong* case was cited to support the constitutionality of deporting an alien on the grounds that he had once been a member of the Communist party. This citation was made in the discussion of the alien's claims under the due process clause and might therefore be considered only to apply thereto, particularly since the First Amendment is separately considered. But the Court's consideration of the free speech argument appears to be merely perfunctory, and the *Fong* discussion may be read as permeating the entire opinion, making additional citation of the case unnecessary.

31 149 U.S. 698 (1893).
32 Ibid., at 711. Justices Brewer, Field, and Fuller dissented in separate opinions.
33 There is language to support yet another interpretation of the case—that it applies only to those aliens who have not made a declaration of intention to become citizens. 149 U.S. at 707. And see Boudin, *The Settler Within Our Gates*, 26 N.Y.U. L. Rev. 266, 451, 634 (1951). But the Supreme Court has held that even an alien who had filed a declaration of intention may be deported. *United States ex rel. Claussen v. Day*, 279 U.S. 398 (1929).
36 Ibid., at 157.
38 Justice Douglas, dissenting, quoted at length from the dissenting opinion in *Fong*, and urged that that decision be explicitly overruled. Ibid., at 598.
The strongest reason for doubting that the Harisiades case undercuts the absolute rule in the free speech area is that otherwise the interpretation of the First Amendment would have been drastically changed with slight discussion. The court's opinion cites only Dennis v. United States in dismissing the free speech objection. But that case, while upholding the constitutionality of the conviction of top communist leaders for their party activities, specifically declared that the seriousness of the activities was relevant to the constitutional result. In the Harisiades case, on the other hand, there was no finding whatever concerning the nature of the alien's activities. If Harisiades is to be taken as a statement of the present law under the First Amendment, it would not be unwarranted to conclude that a statute making mere membership in the Communist party unlawful would necessarily be constitutional.

The reasoning in Fong Yue Ting v. United States appears to be but a form of the Holmesian absolute power doctrine. The arguments against the application of that doctrine would seem stronger in deportation than in exclusion proceedings because of the serious hardship caused by deportation. On the other hand, two arguments justifying the Fong rule which refuses constitutional review of deportation laws are made in the majority opinion in Harisiades v. Shaughnessy. One of these is that the alien's status differentiates him from citizens because the country of his origin may obtain certain privileges in his favor. The notion is that, since the alien is favored to some extent, Congress may properly impose liabilities concomitant with these privileges. But the point is more formal than real; after extended residence here, the alien is completely tied to the United States, and it is doubtful whether the country of his origin will give him succor, nor will he feel himself obligated to it in any way.

The more serious argument in favor of absolute congressional power over deportation is that its absence might impair the government's effectiveness in dealings with other nations. This is closely related to an understandable reluctance

\[341\text{ U.S. 494 (1951).}\]

\["Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution."\] Ibid., at 516.

\[47\text{ And see the description of the activities of Mascitti and Coleman, whose deportation was also upheld. 342 U.S. at 582.}\]

\[149\text{ U.S. 698 (1893).}\]

\[342\text{ U.S. 580 (1952).}\]

\[50\text{ See The Supreme Court, 1951 Term, 66 Harv. L. Rev. 89, 104 at 106 (1952). The most persuasive aspect of Justice Jackson's argument is that the alien has made no attempt to accept the political responsibilities of citizenship, nor performed the one act by which he could most clearly show that he extends his allegiance to the United States. It is not to be doubted that aliens should be encouraged to become citizens, and a willingness to do so is a justified prerequisite for admission. See 66 Stat. 163, \S 235(a) (1952). But whether the harshness of deportation should be grounded on a failure to become a citizen is another matter, particularly as the concept of citizenship has an entirely different meaning to many an immigrant than to us. In those countries where political liberty is either nonexistent or a sham, citizenship is not a privilege but, if anything, the source of additional burdens; one not trained in the value of citizenship may see no reason to apply for it.}\]
on the part of the judiciary to interfere in "political matters." But the argument that deportation is a convenient device does not necessarily establish its constitutionality. Irrespective of the wisdom of permitting an alien to contest the reasonableness of the statutory classification under the due process clause, the considerations for extending to him the protection of the First Amendment appear perusasive. A purpose of the amendment is to protect political unortho-
doxy on the assumption that free discussion is a benefit to all members of the society. Deprived of constitutional protection, aliens may feel reluctant to express themselves politically even within bounds that could not be considered "subversive."

A special instance of legislation authorizing deportation on political grounds is the Alien Enemy Act, which was passed together with the Alien and Sedition Acts in 1798. The Alien Enemy Act empowers the President, during a period of declared war, to "apprehend, restrain, secure and remove" all alien enemies. The Alien and Sedition Acts expired soon after their passage, but the Alien Enemy Act is still in effect. It was enforced only recently by the Supreme Court, which held that judicial review of the grounds for deportation was not authorized except for a determination that the petitioner was an enemy alien, because Congress placed no restrictions on which enemy aliens could be deported.

Speaking for the majority, Justice Frankfurter dismissed the constitutional questions by saying that the "Act is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights." But the Alien and Sedition Acts were enacted at the same time as the Alien Enemy Act, and there is wide agreement that these acts did violate the First Amendment. The Alien Enemy Act may be distinguished from the Alien and Sedition Acts in view of the fact that enemy aliens occupy a particularly ill-favored position in international law, but the question deserves a bit more consideration than that accorded it by Justice Frankfurter, particularly because of the Act's severity. Any national of a country at war with the United States may be deported, regardless of the fact that he has committed no act of disloyalty to this country or aided the enemy.

Political activity is one of four major categories for which deportation is authorized under the present general statute. Also deportable are (1) aliens

See opinion of Justice Frankfurter, concurring, 342 U.S. at 596.


See note 2 supra.


Ibid., at 171.

Justice Frankfurter, in a note, cites James Madison in support of the distinction between the Alien Enemy Act and the Alien and Sedition Acts. But it is arguable that Madison himself made the distinction for reasons of political convenience, since he and his friends were most closely affected by the Alien and Sedition Acts and the Alien Enemy Act was the most defensible from the standpoint of national security.

The statute in the Harisiades case was only one of several in which deportation for political activity has been authorized by Congress. The idea of deporting "subversive" aliens
who entered illegally or helped others to enter illegally; (2) prostitutes, narcotic
addicts, or "pushers"; and (3) aliens guilty of a crime involving moral turpitude
within five years after entry, or of two or more such crimes at any time after
entry.58 The first two of these categories raise no constitutional issues, but the
third provision presents the problem whether the phrase "crime involving moral
turpitude" is sufficiently vague as to render that section unconstitutional.

In a recent case, the Supreme Court held that the phrase was sufficiently pre-
cise, although not excluding the possibility that "peripheral" cases might arise
in which its application would be unconstitutional.59 Since the crime here in-
volved was defrauding the government on liquor taxes, it is not easy to predict
what the Court would consider "peripheral" cases.60 Justice Jackson, dissenting,
believed that the phrase "has no sufficiently definite meaning to be a constitu-
tional standard for deportation."61 Since, as he points out, the phrase "to com-
mitt acts injurious to public morals" was held to be unconstitutionally vague,62
a similar holding might well have been called for in this case. This is less because
the statute's vagueness does not make it a proper warning, than because, in ap-
plication by administrative agencies or courts, it necessarily results in a purely
personal judgment which "is not government by law."

The alien is entitled to procedural due process of law in his deportation hear-

60 Justice Jackson in his dissenting opinion wrote, "I have never discovered that disregard
of the Nation's liquor taxes excluded a citizen from our best society and I see no reason why
it should banish an alien from our worst." Ibid., at 241.
61 Ibid., at 232.
ing under the Fifth Amendment. Congress may, however, constitutionally pro-
vide that the hearings be administrative, provided that there is judicial review of its fairness. Whether the Administrative Procedure Act applies to deportation proceedings has been a subject of recent controversy. The Supreme Court, on the basis of statutory interpretation, held that the Act did apply. But Congress, in the Supplemental Appropriations Act for 1951, declared that "[p]roceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act." In Wong Yang Sung v. McGrath, Justice Jackson suggested that if the APA did not apply to deportation hearings these might be unconstitu-
tional, but the Supreme Court denied certiorari in a case which presented the question.

A constitutional question closely related to procedural due process is whether an alien may be deported for acts which were not grounds for deportation at the time he committed them. It has been urged that the ex post facto clause prohibits such retroactive legislation, but this contention has been repeatedly re-
jected by the Supreme Court on the ground that deportation is not punish-
ment. However, when the severity of deportation is considered, the distinction seems artificial.

III

The alien's great privilege is that he may become a citizen of the United States through naturalization. The framers of the Constitution, planning a growing nation, were eager to attract new people to help build it, and were willing to offer them complete political equality with those who had come before. But as they were building a federal union, they were anxious lest each of the different states make different requirements for citizenship. The Constitution therefore provides that "The Congress shall have Power . . . to establish an uniform Rule of Naturalization." But naturalization is a mere "privilege," not a constitutional right of the alien, and from the first naturalization act in 1790

65 E.g., Ng Fung Ho v. White, 259 U.S. 276 (1922).
69 339 U.S. at 49. The purpose of the Act is to separate the functions of enforcing regulations and judging of individual guilt. Cf. Morgan v. United States, 304 U.S. 1 (1938); In re Oliver, 333 U.S. 257 (1948).
71 U.S. Const. Art. 1, § 9(3).
73 U.S. Const. Art. 1 § 8 (4).
74 1 Stat. 103 (1790).
until the recent Immigration and Nationality Act, Congress has established a set of qualifications for applicants to citizenship.

The 1790 act provided for the naturalization of white persons only. Although it was argued that the exception was intended only for Negroes and Indians, the Supreme Court held that it applied also to Japanese, Hindus, and Filipinos. The restrictions caused large groups of American residents to be ineligible for citizenship, and were condemned by many writers. The 1952 Immigration and Nationality Act eliminates these racial disqualifications.

Apart from residence, knowledge of English and understanding of the principles and form of government of the United States, there are three other important qualifications for naturalization: First, the applicant must not teach or advocate opposition to all organized government, must not be dedicated to the violent overthrow of the United States government, and must not be a member of any organization which so advocates. Second, he must be a person of good moral character, and have acted as such for a period of five years prior to naturalization. Third, he must be attached to the principles of the Constitution and favorably disposed to the United States.

On their face, these requirements seem reasonable. For example, there is no reason to extend the privilege of American citizenship to one opposed either to organized government in general or our form of government in particular. Such a person can hardly be expected to fulfil the obligations of citizenship. But an important line of Supreme Court cases indicates that exclusion from citizenship on the basis of the applicant's opinions may raise difficult problems. These cases involved the eligibility of candidates with religious or other scruples against bearing arms.

In the first of these cases, Rosika Schwimmer was denied citizenship by the district court on the grounds that she could not take the oath of allegiance in good faith, since she declared that she was a pacifist and would not bear arms for the United States. The Supreme Court affirmed, declaring that her pacifism and antinationalism showed that "she was liable to be incapable of the attachment for and devotion to the principles of our Constitution that is required of aliens seeking naturalization." In response, Justice Holmes delivered one of his most

76 In 1870, Congress authorized the naturalization of Negroes. 16 Stat. 256 (1870).
78 United States v. Thind, 261 U.S. 204 (1923).
80 E.g., Konvitz, The Alien and the Asiatic in American Law (1946); McGovney, Race Discrimination in Naturalization, 8 Iowa L. Rev. 129, 211 (1923).
famous dissents, denying that a person with Mme. Schwimmer's views could not be a good citizen. Shortly afterwards, the Court decided two similar cases, and again denied citizenship. These cases were widely criticized and, fifteen years later, were overruled, the Court having decided that refusal to bear arms of itself does not indicate lack of allegiance to the United States.

Because these cases were based on statutory interpretation rather than on the Constitution, they now have little more than historical importance. Congress has since made specific provision in the naturalization law requiring a promise to bear arms but exempting those whose "religious training and belief" is opposed to service in the armed forces. The cases represent an acceptance by the Court of the principle that a wide range of opinions may be consistent with good citizenship; and this principle has been ratified by Congress. There is no way of knowing whether the requirement would have been upheld against a First Amendment attack, had Congress refused to allow the exemption for conscientious objectors.

The qualification that the applicant must be a person of "good moral character" and have behaved as such prior to his application, presents problems of statutory construction rather than constitutional interpretation. At the outset, however, it should be realized that in the overwhelming proportion of petitions for naturalization, the question of applicant's moral character is not raised, once the statutory requirement of two witnesses is fulfilled. It is only when adverse suspicion is raised in the immigration official's mind, usually by some prior act of the applicant, that the citizenship application is opposed on that ground.

The burden of proving good moral character is on the applicant and, involving as it does the application of a somewhat nebulous standard, is rather difficult to meet. Thus, whether or not the question of good moral character is raised may itself be decisive of the applicant's success in obtaining naturalization. The immigration official who is in a position to decide whether the quality of character is to be contested is therefore in a position to exercise an unusually wide discretion. It is not certain what the result would be if the United States representative, with no evidence against the applicant, were to insist upon an actual proof.

84 "Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved... [I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate. I think we should adhere to that principle with regard to admission into, as well as life within this country." Ibid., at 654.


88 The burden of proof in naturalization cases is always on the applicant under the theory that citizenship is a privilege and not a right. See e.g., Tutun v. United States, 270 U.S. 568 (1926).
by him of good moral character. The best solution might be to declare that the
applicant may sustain his burden of proof with the statutory two witnesses in
the absence of government testimony to the contrary. 89

The difficulty of applying the "good moral character" test consistently may
be seen in an examination of the treatment given the test in the Second Circuit. 90
There, the court has used "community sentiment" as its criterion in deciding
whether a given act was consistent with "good moral character." Perhaps the
most dramatic instance in which this test was applied was presented by Repouille v. United States, 91 in which case the applicant had put to death one of his
five children, a deformed idiot from birth. In deciding against the petitioner,
Judge Learned Hand balanced the favorable reaction of the jury when the ap-
plicant was on trial for the homicide with the opposite reaction of a Massachu-
setts jury in a similar case. He then declared that at the present only a minority
would consider euthanasia morally justifiable. 92

In other cases, the court has held that the continuation of an incestuous mar-
rriage did not sufficiently conflict with the accepted mores of the community to
prevent naturalization, 93 but that adultery did, 94 in the absence of extenuating
circumstances. 95 Thus, living in "incest" 96 is considered less objectionable to
the public than adultery. Yet, in practice, there is considerably more of the latter, 97
and the psychological roots for opposition to incest go far deeper. 8 The difficul-
ties with this type of "Gallup Poll" standard are apparent at once.

Judge Frank, dissenting in the Repouille case, asserted that judges, in at-
ttempting to declare what public opinion is, are more than prone to equate the
public judgment with their own. This may well be, but Judge Frank's counter-

89 This procedure was followed in Krausse v. United States, 194 F. 2d 440 (C.A. 2d, 1952).
90 The specific holdings of the various courts in the cases raising this problem are collected
in 22 A.L.R. 2d 244 (1952).
91 165 F. 2d 152 (C.A. 2d, 1947).
92 "Left at large as we are, without means of verifying our conclusion, and without authority
to substitute our individual beliefs, the outcome must needs be tentative; and not much is
gained by discussion. We can say no more than that, quite independently of what may be the
current moral feeling as to legally administered euthanasia, we feel reasonably secure in
holding that only a minority of virtuous persons would deem the practice morally justifiable,
while it remains in private hands, even when the provocation is as overwhelming as it was in
this instance." Ibid., at 153.
95 Petitions of Rudder, 159 F. 2d 695 (C.A. 2d, 1947). The court has also stated that an
unmarried alien need not remain celibate in order to qualify for naturalization, Schmidt v.
United States, 177 F. 2d 450 (C.A. 2d, 1949).
96 "Not all incest is considered equally abhorrent in our society. The classic examples, mother-
son, father-daughter, and brother-sister, are universally condemned, but lesser degrees of
consanguinity, such as first or second cousins, rather constitute statutory incest. The relation-
ship in United States v. Francioso, 164 F 2d. 163 (C.A. 2d, 1947), was uncle-niece.
98 Freud, Totem and Taboo, in Basic Writings of Sigmund Freud 807–20 (Modern Lib. ed.,
1938).
proposal, although intriguing, is probably no more satisfactory. He suggested that the "ethical leaders" of the society be called into court to decide what acts imply bad moral character. It is unlikely whether a determination of who the ethical leaders are could be made, and even then they might be in disagreement in a difficult case, so that each side would bring in its own ethical "experts" and the judges would usually be forced to resolve the problem in terms of their own views.

Why then, if the courts are bound to decide largely on their own beliefs, should they not do so frankly by declaring that this is what they are doing? The reasons opposed to this approach are decisive: the statutory provision is suggestive of a general rather than a personal standard; indeed, the Constitution requires a "uniform rule" of naturalization. This policy would not be effectuated if the personal convictions of the judges were to come into play.

As long as the standard of "good moral character" remains the law, the procedure of the Second Circuit, attempting to discover community feeling, is to be preferred. The grounds for such a provision are easily understood: nobody wants to extent the privilege of citizenship to "immoral" people. But since the judgment of character is based on the applicant's activities, it might be possible for Congress to spell out those acts which are inconsistent with the type of character which breeds good citizenship. However, the concept "good citizenship" is itself so vague and subjective that its outlines may not admit of adequate delineation by a listing of particular acts.

If the applicant for citizenship is found qualified for naturalization, he must still take an oath renouncing his allegiance to all foreign sovereigns and pledge his support to the United States. This oath is an absolute prerequisite for naturalization. Thus an atheist with scruples against taking any sort of oath may have difficulty in obtaining naturalization.

IV

It has been held repeatedly that once an alien is naturalized, he stands on an equal footing with natural-born citizens, with some exceptions specified in the Constitution regarding eligibility to elective federal offices. The express wording and purpose of the constitutional grant to Congress regarding naturalization leaves no doubt that Congress was not intended to have the power to grant a second-class citizenship. It has been suggested that the language of the Fourteenth Amendment strengthens this view. Nevertheless, Congress, though not

99 Congress' delegation of the power to naturalize to state courts was held not to violate this requirement. Holmgren v. United States, 217 U.S. 509 (1910).
100 See 66 Stat. 163, § 337 (1952).
101 The Macintosh, Bland, and Girouard cases all involved attempted qualifications of the oath.
formally bestowing second-class citizenship on those it has naturalized, differentiates between natural-born and naturalized citizens by making it easier for the latter to lose their citizenship and by authorizing proceedings for declaring that they never acquired it.

Congress may provide that, under circumstances where the actions of a citizen—naturalized or native—in relation to a foreign government have been such as to create the issue of dual citizenship, he loses his American citizenship. To what extent this power is confined to voluntary expatriation is not clear. But in one situation, Congress has declared that a naturalized citizen loses his citizenship whereas a native citizen does not. Under present law, if a naturalized citizen resides continuously for three years in the country of his origin or for five years in any other country or countries, he loses his nationality. This provision is the only instance in which granted citizenship has been declared easier to lose than that acquired at birth. While the Supreme Court has not yet considered the issue, it has been raised in one Court of Appeals case, and another case challenging the statute is now in progress. In *Lapides v. Clark*, the constitutionality of the loss of nationality was upheld, one judge dissenting. The court in the *Lapides* case declared that the distinction between naturalized and native citizens was a reasonable classification in relation to Congress' aim to avoid controversies with foreign governments over dual citizenship.

The only reason that has appeared in the cases to justify the reasonableness of the classification is that Congress believed it would avoid controversies with foreign countries over dual citizenship. However, the State Department appears to have refuted the notion that this discrimination is necessary. Such provisions may well be founded upon a belief that one who is naturalized and then

---


105 Originally, expatriation was considered desirable in permitting a person to avoid the obligations of citizenship and to change his allegiance, and was therefore termed a matter of "right." 15 Stat. 223 (1868). But because of the common-law rule that expatriation could not be had without the consent of the sovereign, the courts hesitated to grant it without specific congressional action. Such action came in the statutes of 1907, 34 Stat. 1228; 1940, 54 Stat. 1168; and 1952, 66 Stat. 163, which specified that certain acts would result in expatriation. The cases cited in note 104 supra, upheld the application of the two earlier statutes. In these cases, the persons performed the acts voluntarily, but did not desire to give up their citizenship. The decisions do not settle the question of whether Congress has the right to authorize expatriation where not only does the person not desire to lose his citizenship, but his performance of the act is also not voluntary. Indeed, Perkins v. Elg, 307 U.S. 325 (1939), held that the act upon which expatriation is predicated must be voluntary. This voluntariness may not be imputed to an infant who, soon after reaching maturity, indicates an intent to remain an American citizen.


elects to reside elsewhere, even for a time, was something less than a good choice for citizen to begin with. The implication of this doctrine is that the new citizen is on continuing probation—in effect, a permanent second-class citizen.

In addition to cases involving loss of nationality, acquired citizenship differs from native citizenship in another respect—it may be revoked by the process of denaturalization. Denaturalization deprives an individual of his citizenship retroactively to the time he was naturalized; it is, in effect, a declaration that the individual is not now, and has never been, a citizen. Prior to 1906, denaturalization without specific congressional legislation was possible, but now statutory authorization is required.

The 1906 statute defined the power of the United States to bring an action for the revocation of citizenship as existing only on the grounds that it was obtained by "fraud" or "illegal procurement." In 1952, these grounds were changed to "concealment of a material fact" or "wilful misrepresentation." The significance of this change turns on an analysis of the meaning of the term "illegal procurement" in the old stature. The notion appears to be that the applicant had to meet all the statutory requirements for naturalization, including, for example, length of residence, certificate of arrival, final hearing in open court, and attachment to the principles of the Constitution. The failure to meet any of these requirements was treated as an "illegal procurement" of citizenship. This type of reasoning approximates the "jurisdictional fact" doctrine carried to its furthest extreme. Not only are "fundamental" questions of fact opened to subsequent judicial redetermination, but all facts which the statute requires to be established, even those which rather clearly do not have any "fundamental" bearing on the requisites for good citizenship, are also open to such judicial redetermination. It thus appears that the deletion of the phrase "illegal procurement" reflects a congressional intent to limit the grounds for denaturalization solely to cases where the applicant has himself been guilty of violating a standard of honesty and full disclosure in the original naturalization proceeding.

Even in these cases, however, difficult problems of proof are encountered when an attempt is made to determine whether the applicant has concealed or

---

111 Compare the distinction between loss of nationality and denaturalization with that between divorce and annulment.

112 See Roche, Pre-statutory Denaturalization, 35 Cornell L.Q. 120 (1949). The same author’s Statutory Denaturalization, 13 U. of Pitt. L. Rev. 276 (1952), is an extensive discussion of the subject matter of this section.

114 34 Stat. 601 (1906).
116 Maney v. United States, 278 U.S. 17 (1928).
120 For a discussion of the "jurisdictional fact" doctrine, see Davis, Administrative Law (1951).
misrepresented such intangible facts as good moral character, attachment to the principles of the Constitution, or good faith in taking the oath of allegiance to the United States. Some of these difficulties are illustrated in the cases of Schneiderman v. United States,1 Baumgartner v. United States,2 and Knauer v. United States.2

In the Schneiderman case, the government attempted to revoke Schneiderman's citizenship, acquired over ten years previously, because he had not behaved as a person "attached to the principles of the Constitution" in the five years previous to his naturalization. It appeared that Schneiderman, at that time, had been a member of the Communist party and the Young Communist League. Although these organizations officially advocated principles contrary to the government of the United States, membership did not prove that Schneiderman himself believed in those noxious doctrines or that he was not attached to the principles of the Constitution. Moreover, the proof was insufficient to show that the organizations' principles were definitely hostile to the United States. In requiring "clear, unequivocal, convincing" proof, the Court showed that it was aware of the dangers of denaturalization on the basis of opinion, and the possibility that changing political notions might put acquired citizenship in jeopardy.

The same standard of proof was applied in the Baumgartner case. The government introduced evidence that Baumgartner, a native of Germany, had considerable admiration for Hitlerism, the German people, and Germany's national aspirations. On the basis of this evidence, it was alleged that at the time of taking his citizenship oath (1932), he did not fully renounce his allegiance to Germany. A large part of the government's case was based on statements made after citizenship had been granted. This evidence the Court found particularly suspect. It held that Baumgartner's opinions as he expressed them were not sufficient to show disloyalty at the time of his application, and he was permitted to remain a citizen.

In the Knauer case, the Court reiterated the importance of strict proof and the reasons therefore. Knauer, originally a German national, was naturalized in 1937. Before and after that date, he made much the same type of statements as Baumgartner's, though perhaps more vehemently pro-German and particularly pro-Nazi. But in addition, prior to and after his naturalization, he was active as a leader in the German-American Bund, which worked as propaganda agency for the German government and taught allegiance to Hitler and the Reich. On this evidence, the Court held that Knauer had taken the oath of allegiance with reservations and affirmed his denaturalization. Knauer's activities as a leader and spokesman in the organization distinguished his case from Schneiderman's, and because he did more than speak, he was different from Baumgartner. The Court also pointed out that the case was not merely based on Knauer's activities

1 320 U.S. 118 (1943).
2 322 U.S. 665 (1944).
3 328 U.S. 654 (1946).
after naturalization: "The evidence prior to his naturalization, that which clusters around that date... conforms to the same pattern."124

The rule of these cases would seem to be that the government must show overt acts on the part of the individual to be denaturalized inconsistent with loyalty to the United States or with renunciation of loyalty to a foreign power, and probably, at least some of these overt acts must have been prior to the naturalization. It is not clear whether these evidentiary requirements are constitutionally mandatory or whether they are simply judicial rules which may be altered by statute. This question takes on particular importance when one considers the provisions of the present law declaring membership in certain organizations to be "prima facie evidence that such person was not attached to the principles of the Constitution,"125 and therefore cause for denaturalization. This provision goes into the teeth of the Schneiderman decision. Moreover, the present act declares that certain activities are prima facie evidence that the naturalization was procured by "concealment of a material fact or wilful misrepresentation." These activities include refusal to testify before congressional committees concerning his allegedly subversive activities.126

It is not unreasonable, in determining whether a person was a good choice for a citizen, to base one's judgments on the person's actions after he became a citizen. In effect, however, the consideration of later activities in determining whether the grant of citizenship was originally valid is to make the grant good only on a condition subsequent that the recipient will not do certain things which are considered evidence of bad citizenship. Such a statutory scheme restricts the new citizen's freedom of action, and, as compared with the native, makes him a "second-class" citizen. As Justice Rutledge, dissenting in the Knauer case, pointed out, "any process which takes away... citizenship for causes or by procedures not applicable to native-born citizens [creates] a separate and an inferior class."127 It may appear plausible that a naturalized citizen who subsequently commits a disloyal act should lose his citizenship. It cannot be denied that bestowing citizenship on those not born here involves a risk that some may prove disloyal or unworthy. But in reply it may be suggested that that risk was foreseen by the founders when they gave Congress the power to naturalize. They felt that our country had far more to gain than to lose by permitting newcomers to join fully and freely in American citizenship.

V

Apart from questions dealing with admission, deportation, naturalization, and loss of citizenship, the rules governing the alien's activities during his residence in the United States operate to set him off from his citizen neighbors.

The first question that may be asked is to what extent the alien is protected

124 Ibid., at 668. The difference in the dates of Baumgartner's and Knauer's naturalization was considered significant, because, at the latter time, Hitler was already in power.
126 Ibid.
127 328 U.S. 654, 677.
by the Bill of Rights in his normal activities as a resident. There are few cases on this problem, probably because the alien's equality with citizens in this regard is generally unquestioned. In *Bridges v. California*, an alien invoked the protection of the First Amendment in defense of a conviction for contempt of court. The Supreme Court held in his favor on First Amendment grounds, making no mention of his alienage. Nor, although the case was vigorously litigated, was the question of whether his alienage deprived him of the protection of the First Amendment raised in any of the briefs. Several years later, however, when an attempt was made to deport this alien, the Supreme Court cited the contempt case on behalf of the dictum that "[f]reedom of speech and press is accorded aliens residing in this country." Even the *Harisiades* case, though handling the point inadequately, seemed to go on the assumption that the First Amendment was valid for aliens.

Ever since *Wong Wing v. United States*, there has been no doubt that the resident alien is entitled to procedural due process and trial by jury. In that case, the alien attacked a statute which permitted him to be imprisoned at hard labor without trial, prior to deportation. The Supreme Court, while upholding the government's right to deport him, declared that the alien could not also be subjected to punishment at hard labor or confiscation of his property. The court did not hold that the alien could not be confined in prison after the deportation order was made, prior to its enforcement, because this was necessary to effectuate the order. But the allowable detention differs from that which was upheld recently in *Carlson v. Landon*, a case which seriously limits the Fifth Amendment in its protection of the liberty of aliens. The Court there upheld a statute which authorized the detention without bail of aliens against whom deportation proceedings are pending, at the discretion of the Attorney General. As a result of this decision, any alien may be imprisoned for months or years if a charge is brought against him under which he may be deported, even if the charge may later prove to be unfounded. It is significant that, in arriving at this extreme result, the Supreme Court was obliged to interpret the bail amendment of the Bill of Rights in a manner which drastically curtails the benefits of that amendment for aliens and citizens alike.

Two famous cases have firmly established the principle that the Fourteenth Amendment refers to aliens in commanding that no state shall "deprive any person of life, liberty or property without due process of law; nor deny to any per-

---

128 314 U.S. 252 (1941).
130 See page 553 supra.
131 163 U.S. 228 (1896).
133 Internal Security Act of 1950, 64 Stat. 1010 (1950). The Eighth Amendment declares that "excessive bail shall not be required . . ." (Emphasis added.) In upholding the denial of bail against an attack based on this amendment, the Supreme Court held that it only forbade too high bail, but did not forbid its total denial. Justices Black and Burton dissented emphatically on this ground. Justices Frankfurter and Douglas also dissented.
son within its jurisdiction the equal protection of the laws." In *Yick Wo v. Hopkins*, an ordinance which permitted certain officials arbitrarily to forbid the running of laundries by aliens was declared to be in violation of the Amendment. And, in *Truax v. Raich*, an act forbidding the employment of aliens as more than twenty per cent of the working force on any job was held to deny aliens the equal protection of the laws.

It is well settled, however, that the prohibitions of the Fourteenth Amendment are inapplicable to "reasonable" discriminations. In applying this doctrine to state statutes discriminating against aliens, the Supreme Court has in the past been quite willing to find that the discriminatory classification was a reasonable one. Thus the Court has upheld the exclusion of aliens from the proprietorship of poolrooms. All states have some statutes forbidding aliens to practice certain professions. In some instances, the restrictions are only against nondeclarants, i.e., persons who have not filed a declaration of their intention to become citizens. The reasonableness of some of these prohibitions may be justified because they concern jobs involving public responsibility. But the large majority were undoubtedly due to pressure on the legislature by those already in the profession to prevent competition by aliens. For example, some states require citizenship of registered nurses. These same states have no such restrictions on aliens seeking to become and act as unregistered nurses; they only prevent the alien from receiving a license which affords the opportunity for better and higher paid work. It is doubtful whether there is any foundation in the public interest which would justify such a discrimination under the Fourteenth Amendment. The statute seems rather a more subtle form of that struck down in *Truax v. Raich*, its only apparent purpose being to benefit the citizen in economic competition at the expense of the alien.

It has also been decided that a state may prevent aliens from hunting and fishing. In *Patsone v. Pennsylvania*, the Supreme Court declared that a prohibition against aliens was reasonable in order to protect the state's wild life. But as one writer has put it, "Did Pennsylvania have its eye on the wild bird or on the alien?" The authority of the *Patsone* case was considerably weakened, for it has also been held that a state may forbid aliens to own property. In *Kidd v. Pearson*, the Court held that a state may enact a statute prohibiting the sale of real estate to aliens, because it was intended to promote the public good.

118 118 U.S. 356 (1886).
119 239 U.S. 33 (1915).
121 A complete list of these restrictions is compiled in Konvitz, *The Alien and the Asiatic in American Law* 190-207 (1946).
122 This automatically excludes aliens ineligible for citizenship.
124 239 U.S. 33 (1913).
125 132 U.S. 138 (1913).
126 Konvitz, op. cit. supra note 137, at 216.
although not specifically repudiated, by *Takahashi v. Fish & Game Commission*, which involved a California statute prohibiting the issuance of fishing licenses to aliens ineligible for citizenship. Declaring that there was no "special public interest" to justify the statute, the Supreme Court held that it denied the aliens the equal protection of the laws.

Even when the state does not discriminate against the alien by statute, private employers often do so. This raises the question whether fair employment practices legislation might not be applicable in preventing this type of discrimination. It would certainly be consistent with the aim of such legislation to extend the kind of protection embodied in the Fourteenth Amendment to the relations of private parties. In this regard, it is worthwhile to note that during the war, when the President's Committee on Fair Employment Practices was created, and discrimination in jobs involving government contracts was forbidden, aliens were protected until, due to the problems of wartime, this provision became too difficult to enforce.

Historically, a major form of discrimination against aliens has been in regard to their right to own real property. Under common law, an alien could not inherit land, and if it was granted to him, the King could demand that it be forfeited to the crown. As ownership of land during the feudal period involved important military obligations to the state and was, to a great extent, like ownership of part of the country, there was some justification for this rule. But although this justification never existed in the United States, the rule was adopted here together with the rest of the common law. In most states, the common-law rule has been abrogated largely or entirely by statute. But a considerable number of states limit the right to own land to aliens who have made a declaration of intention of citizenship or are eligible for citizenship.

A number of decisions by the Supreme Court, in 1923, upheld these restrictions against attacks based on the Fourteenth Amendment.

The leading 1923 case was *Terrace v. Thompson*, involving a Washington statute which restricted the right to own real property to citizens and declarants. The Court upheld the statute, in general, on the grounds that it was reasonable for the state to desire that ownership of land within its boundaries be only in the hands of those who have the responsibilities of citizenship or who have shown interest in accepting those responsibilities. And the statute's automatic application to aliens ineligible for naturalization under acts of Congress was considered reasonable because the state might adopt the congressional dis-

---

142 334 U.S. 410 (1948).
144 Illinois adheres more closely than any other state to the common law. Ill. Rev. Stat. (1951) c. 6, §§ 1-6; there is no discrimination against aliens in the right to hold personal property. Ibid., § 7.
145 Cf. 5 Vernier, American Family Laws §§ 288-92 (1938).
146 263 U.S. 197 (1923).
tinction. On the same day, and on the basis of the Washington decision, the Supreme Court, in *Porterfield v. Webb*,\(^1\) upheld the constitutionality of a California statute which prohibited ineligible aliens from acquiring land. Both of these statutes were upheld, despite the fact that they affected the rights of citizens to dispose of their land, citizens being parties in both cases.

But twenty-five years later, in *Oyama v. California*,\(^2\) these decisions were considerably weakened. One provision of California’s alien land law was that not only would land owned by ineligible aliens escheat to the state, but land transferred with the intent to evade this provision would escheat. Moreover, intent was presumed if the ineligible alien paid the consideration. An ineligible father bought land for his minor son, a native American and citizen. As a result of the presumption\(^3\) raised by the statute, the land was awarded to the state in escheat proceedings. The Supreme Court declared that the act discriminated against the son because it made it easier for him to lose the land than for those whose fathers were not ineligible aliens. The Court looked behind the wording of the act and declared that it actually was a discrimination against Japanese. Discrimination on the basis of racial descent is always seriously questioned;\(^4\) here the court found it unwarranted and declared the particular provision unconstitutional. The Court had been asked to declare the whole alien land law invalid, and several justices urged this holding. The Court refused to do so because it was unnecessary to the disposition of the case, but explicitly held it open, although there was square precedent in favor of constitutionality. This left little doubt that if the question were properly presented, it would be considered anew, without reliance on the *Terrace* and *Porterfield* cases.

At the same term of court, *Takahashi v. Fish & Game Commission*,\(^5\) already referred to, was decided. The Court, holding the discriminatory statute invalid, entered into an extensive discussion of the rights of the states to enact laws under which aliens or groups of aliens are given less rights than citizens. The following points were specifically made: (1) There must be a reasonable justification for discriminating against aliens. (2) If there is a distinction made among classes of aliens (i.e., eligible or ineligible for citizenship), that classification must also be related to the public interest. (3) It is not sufficient to validate a classification by asserting that Congress, in its regulation of aliens, has made a similar classification in some other context. (4) State laws discriminating against aliens may conflict unconstitutionally with Congress’s plenary power over aliens.

The least that the extended discussion in the majority opinion would indicate is that the rule of *Truax v. Raich* should be more strictly applied. But it also sug-

\(^1\) 263 U.S. 225 (1923).
\(^2\) 332 U.S. 633 (1948).
\(^3\) This presumption was rebuttable, but the court considered it an “onerous burden of proof.” Ibid., at 644.
\(^5\) 334 U.S. 410 (1948).
gests a repudiation of the Holmesian doctrine in one segment of the law of aliens; even if the state may discriminate against all aliens, it may not discriminate against a class of aliens, without constitutional review of this secondary classification. Hitherto, we have seen that the Holmesian doctrine was repudiated in all other fields of the law.\textsuperscript{145} Retention of the doctrine in just one part of the one field in which it had previously survived would seem to rest on extremely tenuous grounds.

Even more important is the intimation in the opinion that state legislation discriminating against aliens might be unconstitutional because the field is entirely in the domain of the federal government, or at least that Congress by specific legislation\textsuperscript{146} might conclusively pre-empt the field. There would appear to be strong arguments in support of this contention. Primary among these is the possibility that discriminations against the nationals of a foreign country are likely to create international difficulties, with which the federal government is exclusively empowered to deal.\textsuperscript{155} Furthermore, after Congress has admitted the alien to the United States, individual states which discriminate against him are limiting the value of the privilege extended by Congress. No state may place an embargo on aliens,\textsuperscript{156} yet these discriminations are arguably an embargo pro tanto. Finally, there are strong precedents to support the theory that, even if regulation by the states is not per se unconstitutional, Congress may pre-empt the field. A state may not require aliens to register if there is a federal alien registration statute, even though the provisions may differ and the state is asserting its "police power."\textsuperscript{157}

The Takahashi case presents a hopeful prospect for future judicial protection respecting the alien's right to work. Already it has been applied (together with the Oyama case) by the supreme courts of two states to declare their alien land laws unconstitutional.\textsuperscript{158} The American tradition of judging individuals by their own merits rather than by the accident of their birth could well find expression in permitting aliens and citizens to stand on equal footing in their common effort to earn a living.

\textsuperscript{143} See page 550 supra.

\textsuperscript{144} E.g., an act forbidding discrimination against aliens regarding ownership of land.

\textsuperscript{145} The alien land laws created serious difficulties between the United States and the Japanese government. See Justice Murphy, concurring, in Oyama v. California, 332 U.S. 633, 650 (1948).


\textsuperscript{156} Hines v. Davidowitz, 312 U.S. 52 (1941). Congress may pre-empt the field in other parts of the law in the exercise of its powers. See e.g., Hill v. Florida, 325 U.S. 538 (1945) (National Labor Relations Act held to prevail over conflicting state statute).

\textsuperscript{157} Sei Fujii v. State, 38 Cal. 2d 718, 242 P. 2d 617 (1952); Kenji Namba v. McCourt, 185 Ore. 579, 204 P. 2d 569 (1949). Congress, by ending racial restrictions on citizenship, 66 Stat. 163, § 311 (1952), has made the remaining similar laws a dead letter.