FOREIGN INVESTORS AND EQUAL PROTECTION*

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Few recent developments in the realm of multinational finance have found as raw a nerve as the flow of foreign capital into the domestic American economy. In the recent past, foreign investments here have increased at a much faster rate than U.S. investments abroad. Foreign investment in the United States stood at 15% of total U.S. investment abroad in 1972; by 1974, that ratio had increased to 18%.[1] Moreover, the mix of foreign investment has shifted from such non-manufacturing industries as insurance, petroleum, and retail trade to manufacturing, which now accounts for nearly half of all foreign investments in the United States and whose share of foreign investment here now stands at 10% more than it did ten years ago.[2] The aggregate book value of foreign direct investment in American manufacturing sectors is now about $10 billion, which amount, considering that it is leveraged up with U.S.-source debt financing on a 3:2 or 2:1 ratio, represents a considerable stake, probably accounting for 4% or more of total U.S. manufacturing assets.[3]

Small wonder, then, that we are witnessing a renaissance of the xenophobia which marked American political perspectives during the early 1900's.[4] In addition to the proposed legislation reviewed in this article, nearly three dozen bills, all overtly tailored to curb or eliminate foreign investment in the United States, had been introduced in the Congress by May, 1975.[5]

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1. Rose, *The Misguided Furor About Investments from Abroad*, 91 FORTUNE 170, 173 (May 1975).

2. *Id.*

3. *Id.*

4. State and federal cases in the late 1800's and early 1900's are indicative of these judicially protected anti-alien attitudes. *See, e.g.*, Frick v. Webb, 263 U.S. 326, 44 S.Ct. 115, 68 L.Ed. 323 (1923); Webb v. O'Brien, 263 U.S. 313, 44 S.Ct. 112, 68 L.Ed. 318 (1923); Porterfield v. Webb, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278 (1923); Terrace v. Thompson, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 225 (1923) (denying aliens the right to acquire and own land); Pastone v. Pennsylvania, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539 (1914); McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248 (1876) (limiting the right of non-citizens to exploit state's natural resources).

5. Rose, *The Misguided Furor About Foreign Investments From Abroad*, 91 FORTUNE 170 (May, 1975).

The purpose of this analysis is to explore the extent, if any, to which a state may restrict foreign investment in domestic corporations without transgressing the equal protection guarantees of the fourteenth amendment.[6] Whether distinctions between domestic corporations owned by U.S. citizens and those owned by alien interests may be upheld where they emanate from Congress is a question dealt with elsewhere in this edition. It must also be noted, that any legislative attempt by a state to regulate in this area will raise questions of federal preemption under art. VI, §2 of the Federal Constitution.[7] Except where it is impossible to avoid these issues, this discussion will be concerned solely with the effect of the equal protection clause on state legislation in this area.

I. Applicability Of The Equal Protection Clause

A. Interpretation Of Terms

The fourteenth amendment of the United States Constitution enjoins all states to extend "to any person within its jurisdiction the equal protection of the laws."[8] The operative words here are "person," "within its jurisdiction," and, of course, "equal protection." Each of these terms has caused some difficulty in the context of this discussion, and several issues remain unresolved.

It has been long established that all persons lawfully present in the United States are "persons" within the meaning of the equal protection clause,[9] including corporations.[10] But because of the important limitation

6. U.S. Const. amend. XIV, §1. *Quaere* whether the Supreme Court would seriously reach the equal protection issue. It is possible the Court would view such state legislation as purely economic, deferring to state legislative judgment as to the reasonableness of statutory restrictions. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). However, this possibility would become less likely as the arguments for the application of a strict scrutiny equal protection analysis become more effective. *See* text accompanying notes 12-16, *infra*.

7. Article 6 of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> U.S. Const. art. VI, cl. 2

See, e.g., Zschernig v. Miller, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968); Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941); Bethlehem Steel Corp. v. Board of Comm'rs, 276 Cal.App.2d 221, 80 Cal.Rptr. 800 (1969).

8. U.S. Const. amend.XIV, §1.

9. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948); Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). While the Supreme Court in *Yick Wo* stated that *all* persons within the "territorial jurisdiction," without regard to race, color, or nationality, are entitled to the protection of this clause, it is only

imposed by the phrase "within its jurisdiction," domestic corporations owned or controlled, presently or prospectively, by alien interests cause special problems. Where a state undertakes to discriminate against such corporations, an important question is whether the discrimination is against the corporation or against the shareholders themselves. The answer does not come easily.

While the federal government has seen fit to exclude or regulate foreign ownership of U.S. property in a number of areas,[11] the Supreme Court has still held that state action which discriminates on the basis of alienage is "suspect;" *i.e.*, it cannot be upheld unless it is demonstrated to be necessary to the accomplishment of a substantial state interest.[12] If the state action discriminates against the corporation, it may be vulnerable to equal protection objections since the corporation is a person within its jurisdiction. On the other hand, such a decision may not be reached where the state action affects nonresident aliens.

In placing alienage discrimination in the "suspect" category, the Supreme Court was concerned only with resident aliens. *Graham v. Richardson*[13] and *Sugarman v. Dougall*,[14] for example, generally involved welfare benefits and public employment respectively, while *In re Griffiths*[15] considered the admission of resident aliens to the state bar. In *Griffiths*, an argument advanced by the State of Connecticut was that citizenship was a proper prerequisite for admission to the Bar because of the close connection between the practice of law and all facets of government. The Supreme Court rejected the argument, stressing that a lawyer essentially

more recently that the Court has given meaningful effect to that statement with respect to resident aliens. *Compare* Terrace v. Thompson, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255 (1923) *with In re* Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973); Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 543 (1971).

10. Liggett Co. v. Lee, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929 (1933); Frost v. Corp. Comm'n, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929).

11. *See* U.S. CONST. art.VI, §2, *supra* at note 7. Examples of federal regulations in this area are legion; *See, e.g.*, 17 C.F.R. §240.12g 3-2 (1975) (offers made to U.S. shareholders of registered corporations subject offeror to registration, reporting, proxy, and insider trading provisions of Securities and Exchange Act of 1934); United States v. Minnesota Mining & Mfg. Co., 92 F.Supp. 947 (D. Mass. 1950) (antitrust subject matter jurisdiction over cartels formed outside of the U.S.); United States v. CIBA Corp., 1970 Trade Cas. ¶73269 at 89,065 (S.D.N.Y. 1970) (antitrust); 47 U.S.C.A. §310 (Supp. 1976) (licensing of radio and television stations probhited where applicant is foreign-owned or controlled U.S. corporation or foreign corporation); 42 U.S.C.A. §222(d) (Rev. 1962) (licensing of telegraph and telephone companies); 42 U.S.C.A. §2133(d) (Rev. 1973) (licensing for atomic energy utilization).

12. *In re* Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973); Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

13. 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

14. 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973).

15. 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973).

is engaged in a private occupation and is not ipso facto a government official. These cases move toward establishing firmly the right of resident aliens to equal protection, but extending their applicability to nonresident aliens is still questionable.[16]

A critical distinction between resident aliens and nonresident aliens is implicit in the phrase "within its jurisdiction," for it is on the strength of that limiting language that broad lines have been drawn. While several cases have interpreted this phrase to limit equal protection to those physically present within the territorial jurisdiction of a particular state,[17] the trend has been that the phrase encompasses the territorial jurisdiction of the United States. In *De Tenorio v. McGowan*,[18] for example, the Court of Appeals for the Fifth Circuit held that Mississippi's restriction of the ownership of land by certain nonresident aliens after inheritance was not a denial of equal protection under the fourteenth amendment. The court reasoned that while resident aliens are entitled to equal protection based on *Graham v. Richardson*[19] and its progeny,[20] the clause does not apply to "aliens not within the jurisdiction of the *United States*."[21] This national territorial notion has been applied in *Sailer v. Tonkin*[22] to extend equal protection to aliens "lawfully present in the United States and its territories."[23] without regard to residency.

16. While it appears that any state action discriminating against resident aliens is "suspect," *quaere* whether a sufficiently compelling state interest can be shown in the area of investments, in contrast to employment. It must be noted that even the United States Supreme Court has not invalidated all employment discrimination in this area. In Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973), the Court held that a private employmer's refusal to hire an individual because he was not an American citizen was not employment discrimination based upon "national origin." In the face of Mr. Justice Douglas' dissenting opinion that the result was incongruous with *Sugarman* and *Griffiths*, the majority reasoned that it would be inconsistent to deny a private employer the right to discriminate on grounds of citizenship while a federal agency did so. If this decision marks a reversal in the *Griffiths* trend toward the further extension of equal protection, it certainly facilitates an ultimate conclusion that discrimination against nonresident aliens in the area of investments will be constitutionally tolerated.

17. *See, e.g.*, State v. Travelers' Ins. Co., 70 Conn. 590, 600, 40 A. 465, 467 (1898), wherein the court stated that the equal protection clause "is only for the benefit of persons who are physically present within the territorial jurisdiction of the state, the protection of whose laws they invoke." While this interpretation can be explained by the fact that notions of jurisdiction other than territorial were not developed at that time, its presence in later cases cannot be similarly explained. *See, e.g.*, People v. Rappard, 28 Cal.App.3d 302, 104 Cal.Rptr. 535 (1972).

18. 510 F.2d 92 (5th Cir. 1975). Mississippi had a statute allowing nonresident aliens of Syria and the Lebanese Republic to freely inherit real property, yet denied the right to all other nonresident aliens.

19. 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

20. *See In re* Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973); Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973).

21. 510 F.2d at 101 (emphasis added).

22. 356 F.Supp. 72 (D.C.V.I. 1973).

23. *Id.* at 73. The court held the Criminal Victims Compensation Act, which barred

However, these courts do not reach the more recent view of jurisdiction which rests on the juxtaposition of benefit and duty.[24] The ensuing argument would be that the amenability of a foreign party defendant to judicial jurisdiction in the United States, resting on its having exacted some benefit therefrom, would support its claim to equal protection under the laws sought to be imposed upon it. Yet, in spite of considerable erosion in territorial notions of jurisdiction,[25] there has been little extension of the equal protection clause to nonresident aliens.

B. Succession Cases

The distinction between resident and nonresident aliens has been applied with somewhat similar results in succession cases. Statutes have been passed limiting the ability of nonresident aliens to inherit both real and personal property.[26] The recent Supreme Court decision of *Zschernig v. Miller*[27] disapproved of state efforts to limit inheritance by nonresident aliens except where American citizens have reciprocal rights and/or where it has been proven that the nonresident heirs would receive the benefit, use, and control of the inheritance without confiscation, but this decision was based on federal preemption rather than equal protection grounds. Some courts addressing this problem have followed the *Zschernig* approach.[28] But the United States Supreme Court itself has left ample room for state-imposed restrictions in this area, and there have been numerous subsequent decisions upholding such state efforts.[29]

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nonresident aliens from collecting under it, to be a denial of equal protection.

24. *See* International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Actual physical presence of the defendant in the state is not necessary to acquire jurisdiction over him. For example, "doing business" in the state may be sufficient.

25. *See, e.g.*, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952); International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945); Buckeye Boiler Co. v. Superior Ct., 71 Cal.2d 893, 458 P.2d 57, 80 Cal.Rptr. 113 (1969).

26. An important case which has not been explicitly overruled by the United States Supreme Court is Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947). A 1923 treaty with Germany provided that German heirs may inherit *real* property bequeathed to them by a person holding it in the United States, provided the heirs sell it within three years. The Supreme Court upheld a California statute to the extent it did not overlap with this treaty. Therefore, the state could constitutionally prohibit nonresident aliens from taking personal property by testamentary disposition as provided in the statute. *Cf.* Estate of Kraemer, 276 Cal.App.2d 715, 81 Cal.Rptr. 287 (1969), in which the court held this statute was an intrusion into the federal government's domain of foreign affairs. *See* note 7, *supra*. *Clark*, however, was distinguished.

27. 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968). Oregon's nonresident alien inheritance law as applied was overturned as an intrusion into foreign affairs.

28. *See* Estate of Kraemer, 276 Cal.App.2d 715, 81 Cal.Rptr. 287 (1969) *discussed in* note 26, *supra*.

29. In *Zschernig*, the Supreme Court distinguished Clark v. Allen, note 26, *supra*. The Court reasoned that while *Clark* involved merely "a routine reading of foreign laws," 389 U.S. at 433, 88 S.Ct. at 667, 19 L.Ed.2d at 688, application of the Oregon statute would require

C. *Aliens With Property Interests In The United States*

The distinction between resident aliens and nonresident aliens has been blurred where other property rights are involved. It has been suggested that the equal protection doctrine should be applied to include nonresident aliens physically present in the United States[30] and nonresident aliens not present in the United States but having property interests in the United States.[31] It is the latter group which is particularly relevant to this discussion since, by definition, it would include nonresident aliens owning shares in domestic U.S. corporations. Judge Van Pelt, in his dissent in *Shames v. Nebraska*,[32] suggested that nonresident alien heirs have a vested property right, thereby placing them "within the jurisdiction" for equal protection purposes. A similar analysis had appeared previously in *Russian Volunteer Fleet v. United States*,[33] but the case rested on the application of fifth amendment due process protection. During World War I, the United States Shipping Board Emergency Fleet Corporation had requisitioned contracts held by a Russian corporation for the construction of two ships. The Supreme Court held that at the time of the expropriation, Russia was an "alien friend"[34] and therefore not barred from claiming compensation.[35]

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the state to consider the actual administration of foreign laws, *i.e.*, "foreign policy attitudes" and "the freezing or thawing of the 'cold war.' " *Id.* at 437, 88 S.Ct. at 669, 19 L.Ed.2d at 690. Subsequently, in Bjarsch v. DiFalco, 314 F.Supp. 127 (S.D.N.Y. 1970); Shames v. Nebraska, 323 F.Supp. 1321 (D.Neb. 1971), and *In re* Estate of Leikind, 22 N.Y.2d 346, 292 N.Y.S.2d 681, 239 N.E.2d 550 (1968), *appeal dismissed*, 397 U.S. 148, 90 S.Ct. 990, 25 L.Ed.2d 182 (1970), the courts distinguished *Zschernig* by stressing the manner in which the relevant statutes were worded and applied. *See also* Halperin, *The Regulation of Foreign Banks in the United States*, 9 INT'L LAWYER 661 at 676-77 (Fall, 1975), and *In re* Estate of Horman, 5 Cal.3d 62, 75-76, 485 P.2d 785, 794-95, 95 Cl. Rptr. 433, 442-43 (1971), wherein the California Supreme Court stated:

> We recognize that a stricter standard is applied in testing legislation involving "suspect classifications" such as classifications based on race, nationality or alienage or involving "fundamental interests" such as the right to vote, the right to interstate movement and the right to seek employment . . . . However, the distinction in the statutory scheme in question is not, strictly speaking, based upon alienage. Resident aliens are treated the same as citizens. The point of distinction is residency as opposed to nonresidency. Nor is the distinction based on race or nationality. The statutory scheme applies to all nonresident aliens alike, regardless of their race or nationality. Neither can the interests here involved be classified as fundamental. [Citations omitted.]

30. Sailer v. Tonkin, 356 F.Supp. 72 (D.C.V.I. 1973). *See* note 23, *supra and* accompanying text.

31. Shames v. Nebraska, 323 F.Supp. 1321, 1336-44 (D.Neb.1971) (dissent); *Cf.* Russian Volunteer Fleet v. United States, 282 U.S. 481, 51 S.Ct. 229, 75 L.Ed. 473 (1931).

32. 323 F.Supp. 1321, 1336-44 (D.Neb. 1971).

33. 282 U.S. 481, 51 S.Ct. 229, 75 L.Ed. 473 (1931).

34. This term is defined as a "subject is a foreign state at peace with the United States." BLACK'S LAW DICTIONARY 95 (4th ed. 1951).

35. The Supreme Court stated: "The petitioner . . . as such [an alien friend with prop-

Although the Court in *Russian Volunteer Fleet* never reached the issue of equal protection, it at least raised the interesting prospect of the possible extension of equal protection to nonresident aliens having property interests in the United States. There is ample authority establishing that denial of equal protection violates the due process clause of the fifth amendment.[36] If due process protection under the fifth amendment can be equated with equal protection under the fourteenth amendment, equal protection will have to be accorded to nonresident alien property holders.

There are several obvious limitations to this argument. First, since fifth amendment rights do not turn on being within a particular jurisdiction, a determination that a nonresident alien is entitled to claim fifth amendment equal protection would not necessarily affect the "within its jurisdiction" problem under the fourteenth amendment.[37] Second, if nonresident aliens were completely barred from acquiring U.S. assets, they would have no property interest through which they could assert a right to equal protection.[38]

Where discriminatory treatment is accorded nonresident aliens already having property interests in the United States, equal protection could become a more formidable weapon if the extension of that doctrine, as discussed in the context of the *Shames* dissent and *Russian Volunteer Fleet*, is adopted. As reflected in bills introduced in Congress[39] and state legislatures,[40] the goal has been merely to limit (generally to less than a

erty interests in the United States] was entitled to the protection of the Fifth Amendment of the Federal Constitution." 282 U.S. at 489, 51 S.Ct. at 231, 75 L.Ed. at 476.

36. Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *See also* Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917), wherein the Supreme Court held that a statute which limited the right to convey property to a person of another race was, as an unreasonable discrimination, a denial of due process to the owner of the property. Accordingly, in Schneider v. Rusk, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218, 222 (1964), the Court stated: "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'"

37. U.S. CONST. amend. V merely states: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." *Compare with* U.S. CONST. amend. XIV, §1. *See* text accompanying note 8, *supra*.

38. Assuming *arguendo* that a state statute limiting foreign investment could be framed to avoid federal preemption problems, as noted in Zschernig v. Miller, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed. 2d 683 (1968), the only argument remaining to the hopeful foreign investor is that but for such a ban, a property interest would have been acquired. Cases such as Shames v. Nebraska, 323 F.Supp. 1321 (D.Neb. 1971), counsel us that this position also would not be tenable. *Quaere* however, whether a purported U.S. *seller* of American stock could raise *due process* objections to his inability to sell to whomever he wishes. Today, it seems doubtful a court would hold that a seller has been denied *equal protection* because of discrimination based not on any characteristic of his, but on that of someone with whom he has chosen to deal. All sellers would be treated alike—all would be barred from selling to non-resident aliens.

39. H.R. 3424, 94th Cong., 1st Sess. (1975). *See* note 68, *infra and* accompanying text.

40. Mo. H.B. 972, 78th Gen. Assy., 1st Sess. (1975).

"controlling interest") rather than to bar foreign investment.[41] Arguably then, if nonresident aliens are limited by the states in the amount of U.S. property they may own, they are denied equal protection because they are unable to protect their investment by transferring or augmenting it as freely as a resident owner.[42]

II. Assuming Applicability Of The Equal Protection Clause

Assuming *arguendo* that nonresident aliens having property interests in the United States are "within the jurisdiction" for equal protection purposes, we do not suggest that all nonresident aliens fall into the category of a "discrete and insular minority"[43] requiring strict scrutiny of discrimination against them. Indeed, as Justice Rehnquist observed in his dissenting opinion in *Sugarman v. Dougall* and *In re Griffiths*:

> [T]here is no language used in the [Fourteenth] Amendment, or any historical evidence as to the intent of the Framers, which would suggest to the slightest degree that it was intended to render alienage a "suspect" classification, that it was designed in any way to protect "discrete and insular minorities" other than racial minorities. . . .[44]

351.306. A corporation organized and characterized in Missouri or licensed to do business in this state shall annually report to the Secretary of State the names and addresses of all natural persons not citizens of the United States and all foreign governments or corporations owned or controlled by a foreign government who are shareholders in such corporation, either directly or beneficially. When the Secretary of State shall determine that a corporation is controlled by natural persons not citizens of the United States or a foreign government or corporation owned or controlled by a foreign government, he shall suspend the charter or license of said corporation until such time as the non-citizen natural person or foreign government or corporation owned or controlled by a foreign government shall have divested itself of each controlling ownership. . . .

See text accompanying notes 55, 65-68, *infra*.

41. Other states have taken different approaches. For example, Hawaii had a bill introduced which would impose prior hearing and approval requirements on corporate takeovers by nonresident aliens. Hawaii H.B. 2553-74, 7th Leg. (1974). Another bill purports to establish a tourist industry commission which is empowered to license all persons operating any tourist industry activity. Hawaii S.B. 1124, 8th Leg. (1975).

42. The applicability of the suspect classification—compelling state interest test of Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971), and its progeny, *supra* at note 12, would be dependent upon the court's making two key decisions: First, whether nonresident aliens having property interests in the United States are "within the jurisdiction" as framed by the equal protection clause; and, second, whether such persons are also "residents" within the purview of *Graham*. The second part of the test seems to be insurmountable by definition. However, its absence would not be tantamount to giving free rein to the states since nonresident aliens, being "within the jurisdiction," could still impose a "rational basis" test upon the states in regard to any limiting legislation.

43. United States v. Carolene Productions Co., 304 U.S. 144, 152-53, n.4, 58 S.Ct. 778, 783-84, 82 L.Ed. 1234, 1241-42 (1938).

44. 413 U.S. at 649-50, 93 S.Ct. at 2861, 37 L.Ed.2d at 864.

While the majority opinions did hold that alienage was a "suspect" classification, thereby providing support for an argument that restriction of ownership and control in U.S. corporations by resident aliens must be justified by a compelling state interest,[45] the same cannot so easily be said of nonresident aliens. A state or the federal government may contend that nonresident aliens are less likely to be loyal to the United States, in the sense of American economic and political interests being of primary concern to them. As noted by the California Supreme Court in *Sei Fujii v. State*,[46] resident aliens have made their homes here, and so have regard for the nation's strength and security.[47] Nonresident aliens are less likely to have such interests.

The possibility that these state concerns about nonresident aliens may be sufficient to meet a rational basis test is somewhat dissipated when nonresident aliens are completely barred from investing in American companies. Where foreign interests are restricted to a minority status in a U.S. enterprise, it is difficult to contend that potential loyalty and conflict of interests problems are presented, since management of the enterprise reposes in the United States. In contrast, where control passes to interests outside of the United States, a state can more easily contend that loyalty problems exist, thereby strengthening its rationale for discriminatory treatment.

A federal district court in Texas, in *Texasgulf, Inc. v. Canada Development Corp.*,[48] went further and permitted nonresident aliens to gain control over Texasgulf, a U.S. corporation.[49] A Texas statute[50] required that all "international trading corporations" be majority-owned by U.S. citizens. Since it found that Texasgulf was not an international trading corporation, the court never reached defendant Canada Development's argument that

45. Even with respect to resident aliens, the Supreme Court has acknowledged that the compelling state interest test is not insurmountable. In *Sugarman*, for example, where a New York provision that only U.S. citizens may hold permanent positions in the competitive class of state civil service was held a denial of equal protection, the Court noted that a more precisely drawn statute may be acceptable. 413 U.S. at 649, 93 S.Ct. at 2851, 37 L.Ed.2d at 864 (New York's provision was overinclusive since it did not consider whether such undivided loyalty was necessary to perform adequately in all positions.)

46. 38 Cal.2d 718, 242 P.2d 617 (1952). The case held California's Alien Land Law unconstitutional.

47. In *Graham*, *Sugarman*, and *Griffiths*, the United States Supreme Court stressed the factor of American residency, pointing out that resident aliens pay taxes, may be drafted, may have contributed to the economic growth of the state, and may be as loyal to the United States as citizens. *See, e.g.*, Graham v. Richardson, 403 U.S. at 376, 91 S.Ct. at 1854, 29 L.Ed.2d at 544.

48. 366 F.Supp. 374 (S.D.Tex. 1973).

49. The court refused to grant a preliminary injunction regarding a take-over board by Canada Development Corp., a foreign multi-national corporation closely associated with the Canadian government, of Texasgulf.

50. TEX. REV. CIV. STAT. ANN. art. 1527 (1962).

the statute was an unconstitutional denial of equal protection. Nonetheless, the court rejected plaintiff's argument that defendant should not be allowed to acquire a controlling interest in the corporation because of potential conflicting loyalties. While it is possible that the court's holding implicitly supports an assumption that the equal protection clause will cover nonresident aliens,[51] it is clear that a state may permit such investment or grant other rights to nonresident aliens independently of equal protection clause limitations.[52]

III. Discrimination Against Corporations

It was suggested earlier[53] that a key determinant of the constitutionality of discriminatory action was whether the target is the corporation itself or the foreign shareholders. Having dwelt on the latter at length, it is now necessary to consider the status of U.S. corporations controlled by nonresident aliens. Corporations are entitled to equal protection in the same sense as individuals.[54] Where legislation, such as that attempted in Missouri H.B. 972,[55] provides for the suspension of the corporate franchise in cases where a corporation is found to be controlled by non-U.S. citizens, a foreign government, or a corporation owned or controlled by a foreign govern-

51. It is interesting to note that defendant's assumption that the equal protection clause would even be applicable to it as a nonresident alien was in no way counteracted by the court.

52. *See, e.g.*, McConville v. Howell, 17 F. 104 (C.C.D. Colo. 1883), wherein the court stated that even though such rights were not guaranteed by the state constitution, Colorado may still pass a law permitting nonresident aliens to own and convey property in the state. Aside from any equal protection issue, the court in *Texasgulf*, pointed out that it may in fact be in the United States' national interest to permit the take-over through a tender offer, since Canada could have resorted to "more egregious expropriation" of its natural resources under Texasgulf's control. *See* Note, *International Business—Corporate Acquisition—The Takeover of a United States Corporation by a Foreign Multinational Corporation with Governmental Association Will Not Be Enjoined Either as a Violation of United States National Interest or for Potential Conflict of Interest. Texasgulf, Inc. v. Canada Development Corp., 366 F. Supp. 367 [sic] (S.D. Tex. 1973)*, 9 Tex. Int'l L.J. 242 (1974).

53. *See* text accompanying notes 10-12, *supra*.

54. *See* note 10, *supra*. It must be noted, however, that valid classifications may be made between corporations and individuals. That a statute is unlawful as to individuals will not necessarily affect its validity as to corporations. As stated in Hammond Packing Co. v. Arkansas 212 U.S. 322, 343-44, 29 S.Ct. 370, 377, 53 L.Ed. 530, 542 (1909) (wherein the Court upheld the right of a state to prohibit a foreign corporation from doing business therein based upon acts done by the corporation in another state):

> [T]he difference between the extent of the power which the State may exert over the doing of business within the State by an individual and that which it can exercise as to corporations furnishes a distinction authorizing a classification between the two.

This distinction may affect the extent to which non-U.S. corporations may assert equal protection claims as non-resident alien persons.

55. Mo. H.B. 972, 78th Gen. Assy., 1st Sess. (1975). *See* note 40, *supra*.

ment,[56] arguably the discrimination is against certain corporations. Since these corporations are present in that state, the equal protection clause would apply to prevent invidious discrimination. The question remains whether a state can go behind the corporate entity within the constitutional framework of the equal protection clause to regulate the compositon of the corporation's shareholders.

Corporations are separate legal entities apart from their members, officers, and directors.[57] The states have inherent plenary power to create them and to determine and prescribe the mode of their organization, the purposes for which they may be created, the powers which are to be conferred upon them, and the conditions under which such powers may be exercised.[58] While corporations are entitled to equal protection, as such, the states nonetheless reserve plenary power (within constitutional limitations) over their corporate franchises, including the power to control the nature of the corporations' shareholders.[59]

The United States Supreme Court, in *Frick v. Webb*,[60] did not hesitate to go behind the corporate entity and regulate the shareholder composition of certain corporations. A California statute limited the ability of aliens, ineligible for citizenship, to acquire shares in companies, associations, or corporations which were authorized to acquire, hold, enjoy, or transfer agricultural land except as prescribed by treaty. Shares sold in violation of this statute escheated to the state. The argument was advanced that the shares were personal property, thereby obviating the common law disability of aliens to hold realty. The Court failed to address this point, instead assuming that the statute was intended to govern the ownership of agricultural lands rather than to regulate corporate ownership of real property.[61]

56. Interestingly, the Missouri bill omits any reference to foreign corporations owned or controlled by alien individuals who, presumably, would be free to acquire a controlling interest in a Missouri corporation or other U.S. corporation licensed to conduct business in Missouri. Whether or not this distinction was inadvertent, the distinction finds little rational basis or compelling interest for its validity. Additionally, the bill bars resident aliens from controlling such corporations. *See* text accompanying note 68, *infra*, for further discussion.

57. 18 C.J.S. *Corporations* §6 (1939); Chestnut Securities Co. v. Oklahoma Tax Comm'n, 173 Okla. 369, 48 P.2d 817 (1935).

58. 18 C.J.S. *Corporations* §26 (1939); Prudential Ins. Co. v. Cheek, 259 U.S. 530, 42 S.Ct. 516, 66 L.Ed. 1044 (1922).

59. "A state . . . may bar nonresident aliens from holding stock in its corporations, or admit them to that privilege only on such terms as the state may prescribe. . . ." 18 C.J.S. *Corporations* §35 (1939). *See also* 7 R.C.L. *Corporations* 272 (1915). For example, in State v. Travelers' Ins. Co., 70 Conn. 590, 40 A. 465 (1898), the court held that a state could impose a flat-rate tax initially chargeable against a corporation based upon the number of nonresident shareholders in the corporation by reasoning that the equal protection clause applied only to those within the territorial jurisdiction of the state.

60. 263 U.S. 326, 44 S.Ct. 115, 68 L.Ed. 323 (1923).

61. The Court stated: "As the state has the power . . . to prohibit [ineligible aliens from having the benefit of agricultural lands], it may adopt such measures as are reasonably

In light of the trend against alien land laws,[62] as well as the successful attacks which have been mounted against discrimination based upon alienage,[63] the efficacy of *Frick* must certainly be questioned. It seems more doubtful today that a court would proceed as did the Supreme Court in *Frick*, simply finding that a state has the power to use *any* "reasonably appropriate" means to regulate the evil of excessive alien investment. More thoughtful acknowledgment would be made of the corporation's equal protection rights. If, in the exercise of its inherent regulatory power, a state discriminates unlawfully against a class of actual or potential shareholders, the concurrent discrimination against the corporation would likewise be vulnerable since the target of the regulation (alien investment) would not be a valid object of discrimination.[64] But the real question is whether discrimination against nonresident aliens, which might otherwise be permissible, could be held violative of the equal protection clause *as applied to corporations.*

Let us re-examine the proposed Missouri legislation which purports to restrict all corporations with an alien shareholder constituency.[65] Since the discrimination would apply equally to Missouri and other U.S. corporations, it would be argued that there is no denial of equal protection.[66] However, certain corporations are being singled out for special treatment where they are controlled by aliens. Accordingly, whether such discrimination is valid is a question which probably should be answered in light of the "rational basis" test. No suspect classification is involved and, as pointed out above, the right to do business as a corporation is not a fundamental right.[67]

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appropriate or needful to render exercise of that power effective." *Id.* at 333, 44 S.Ct. at 117, 68 L.Ed. at 326, *quoting from* Crane v. Campbell, 245 U.S. 304, 307, 38 S.Ct. 98, 99, 62 L.Ed. 304, 309 (1917).

62. *See, e.g.*, Sei Fujii v. State, wherein the California Supreme Court, in overturning the state's alien land law, noted that although earlier cases such as Terrace v. Thompson, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 225 (1923) and Porterfield v. Webb, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278 (1923) (denying aliens the right to acquire and own land) had not been explicitly overruled by the United States Supreme Court, "the authority of an older case may be as effectively dissipated by a later trend of decision as by a statement expressly overruling it." 38 Cal.2d 718, 728, 242 P.2d 617, 624 (1952).

63. *See, e.g., In re* Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973); Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

64. *See, e.g.*, Lelande v. Lowery, 26 Cal.2d 224, 157 P.2d 639 (1945).

65. Mo. H.B. 972, 78th Gen. Assy., 1st Sess. (1975). *See* text accompanying notes 55-56, *supra*.

66. *See, e.g.*, Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909), *discussed in* note 54 *supra*. The Court found no discrimination between foreign and domestic corporations since the statute in issue applied to both.

67. The United States Supreme Court stated in Prudential Ins. Co. v. Cheek:

> [T]he right to conduct business in the form of a corporation . . . is not a natural or fundamental right. It is a creature of the law; and a state in authorizing its own

The solution would appear to lie in the manner in which the legislation is drafted. If, for example, the legislature sought to impose across-the-board exclusions or limitations of resident and nonresident alien ownership, with or without sanctions against the corporate entities, equal protection would certainly become an issue. A fatal flaw appears in this respect in the Missouri bill in that it effectively prevents *resident* aliens from controlling Missouri corporations or those licensed to do business in Missouri.[68] Absent a showing of a compelling state interest in their exclusion, the proposed legislation must fall. On the other hand, a more precisely drawn statute could be drafted which would neither subject the corporate entity itself to discrimination nor exceed the bounds of permissible discrimination against aliens. A statute prohibiting *nonresident* alien interests from acquiring more than a certain percentage of stock in a corporation and creating machinery for the retransfer or further transfer of any shares acquired in violation of the statute may pass equal protection scrutiny, if indeed the clause even applies to non-resident aliens.[69]

IV. SUMMARY

1. Resident aliens clearly come under the equal protection umbrella. Discrimination against them is subject to strict scrutiny. Subject to its showing of a compelling interest, a state will not be permitted to limit stock ownership by resident aliens.

2. Nonresident aliens physically present within the territorial jurisdiction of the United States probably are also protected by the equal protection clause. However, the applicability of a compelling interest test is still questionable since the United States Supreme Court cases have generally involved *resident* aliens.

3. Nonresident aliens outside the United States and with no property interests in this country will present little problem since the equal protection clause would likely not apply to them. Little strength can be put in the argument that the equal protection clause applies on the ground that nonresident aliens would have acquired property interests (stock) but for statutory prohibitions.

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corporations or those of other states to carry on business . . . within its borders may qualify the privilege. . . .

295 U.S. 530, 536, 42 S.Ct. 516, 619, 66 L.Ed. 1044, 1051 (1922).

See text accompanying notes 57-59, *supra*.

68. *See* notes 40 *and* 56, *supra*. Similarly, a congressional bill has failed to distinguish between resident and nonresident aliens in limiting acquisition of securities by non-U.S. citizens. H.R. 3424, 94th Cong., 1st Sess. (1975).

69. Considering that a bill founded on factors militating to different treatment for foreign owned U.S. corporations would only have to meet rational basis scrutiny, a state might still be successful in this approach. For example, Hawaii legislators meet the task on an industrial basis, *i.e.*, the tourist industry in the state requires the imposition of regulations. Hawaii S.B. 1124, 8th Leg. (1975).

4. There is some support for the proposition that the equal protection clause would apply to nonresident aliens with some property interest, but equal protection would apply only to the extent of that particular interest. It would not, for example, entitle them to claim equal protection to acquire other property interests. Of course, there is still the problem of whether citizen or resident alien sellers of their stock to nonresident aliens are denied due process because they cannot sell to whom they wish.

5. Whether the equal protection issue appears as to certain corporations would seem to depend on the language of the particular statute. If the restriction were an impermissible discrimination against aliens, then the statute would not stand regardless of the statutory language. If the restriction were otherwise permissible against the aliens, then the equal protection argument would receive serious consideration only if the corporate entity is affected. However, the corporation equal protection problem could then be avoided by rewording the statute to penalize the aliens and not the corporation.

Once again, it must be emphasized that this discussion has concerned the extent and limitations *only* of the equal protection clause. The states also must overcome such other constitutional difficulties as federal preemption before its restrictive legislation in this area will stand.