THE EXTRATERRITORIAL APPLICATION OF THE *CHARTER* TO VISA APPLICANTS

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In two recent judgments, the Federal Court of Canada has held that visa applicants who are not physically present in Canada are not protected by The Charter of Rights and Freedoms. *The author argues that this is an erroneous conclusion, since it is not in harmony with most illuminating and justifiable interpretation of the Constitution. The author examines five different approaches to the question of whether constitutional protections apply extra-territorially to citizens and non-citizens. He locates these approaches in American jurisprudence, and shows that each has received some measure of approval from the United States Supreme Court. The author argues that four of these approaches are unsound and concludes that Canada ought to adopt a position according to which a non-citizen's encounters with the Canadian legal system ought to be regulated by the* Charter, *whether or not they transpire within the country.*

Dans deux décisions récentes, la Cour fédérale du Canada a conclu que les personnes demandant un visa qui ne se trouvent pas au Canada ne sont pas protégées par la Charte canadienne des droits et libértés. *L'auteur soutient que cette conclusion est fausse, car elle est en contradiction avec l'interprétation la plus éclairante et la plus légitime de la Constitution. L'auteur examine cinq approches différentes de la question à savoir si les protections constitutionnelles ont une application extra-territoriale à l'endroit des personnes qui sont titulaires de la citoyenneté et de celles qui ne le sont pas. L'auteur repère ces approches dans la jurisprudence américaine et il démontre que chacune d'elles a été approuvée dans une certaine mesure par la Cour suprême des États-Unis. L'auteur maintient que quatre de ces approches sont peu valables et il conclut que le Canada devrait adopter une position selon laquelle la* Charte *devrait s'appliquer aux personnes qui ne sont pas titulaires de la citoyenneté canadienne lorsqu'elles ont des rapports avec le système juridique canadien, qu'elles se trouvent au Canada ou non.*

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The 1985 decision of the Supreme Court of Canada in *Singh* v. *Minister of Employment and Immigration*[1] appeared to offer a beacon of light and hope for non-Canadians who find themselves subject to the authority of the Canadian government. The fear of government decision-makers arbitrarily dispensing with the niceties of due process, or capriciously determining their fate according to inappropriate or unwarranted standards was substantially quelled by the decision; it also encouraged optimism that, in the future, Canada would treat aliens with much the same respect that it accorded to its own citizens and permanent residents. The specific source of this optimism was the opinion of Wilson J.,[2] in which she asserted categorically that the word "everyone" in section 7 of the *Canadian Charter of Rights and Freedoms*,[3] "includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law".[4] With these words, Wilson J. authoritatively rejected the possible argument that the *Charter* exists only for the benefit of Canadians and those who permanently reside in the country.[5]

More recently, this beacon has begun to flicker and dim. The broad sweep of Wilson J.'s inclusive holding has been circumscribed significantly by two immigration decisions in the Federal Court of Canada. First, in *Canadian Council of Churches* v. *Canada*,[6] MacGuigan J.A. asserted that non-citizens outside Canada, who have no claim to admission, are beyond the scope of the *Charter*. According to MacGuigan J.A., a claim by a non-citizen outside Canada that her right to counsel has been denied by various sections of the *Immigration Act*[7] would not constitute a reasonable cause of action, since this *Charter* right does not extend to such a person.[8] This stark assertion by MacGuigan J.A. is grounded neither in authority nor in argument. Conspicuous by its absence is any attempt to align this holding with Wilson J.'s dictum. He

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[1] [1985] 1 S.C.R. 177, 12 ADMIN. L.R. 137 [hereinafter *Singh* cited to S.C.R.].

[2] *Ibid.* at 184. Written on behalf of herself and two other justices, including the Chief Justice. Another opinion was written by Beetz J., in which two other justices concurred.

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

[4] *Singh*, *supra*, note 1 at 202.

[5] In the United States, the question of whether the Constitution protected only citizens was debated vigorously shortly after it was adopted. However, the Supreme Court did not address this question, and denied the contention until the case of *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) [hereinafter *Yick Wo*]. *See also* G.L. Neuman, *Whose Constitution?* (1991) 100 YALE L.J. 909 at 927-43 [hereinafter Neuman].

[6] [1990] 2 F.C. 534, 10 IMM. L.R. (2d) 81 (C.A.) [hereinafter *Canadian Council of Churches* cited to F.C.], *aff'd on other grounds* [1992] No. 21946 (S.C.C.) (full text available through QL Systems).

[7] 1985 R.S.C., c. I-2.

[8] *Canadian Council of Churches*, *supra*, note 6 at 563.

made no reference to the case of *Singh* in his opinion, and, in fact, cited no precedent on this point.[9]

The second case is *Ruparel* v. *Minister of Employment and Immigration*.[10] Unlike the appellants in *Singh*, the applicant in *Ruparel* was not physically present in Canada. He had applied for permanent residence in Canada from the United Kingdom. A negative decision was made initially by a visa officer in London. The denial of admission to Canada was based on a finding that Ruparel had been convicted of an offense that, if committed in Canada, would constitute an offense that may be punishable by way of indictment for which a maximum term of imprisonment of less than 10 years may be imposed. Except in special circumstances covered by an exception, section 19(2) of the *Immigration Act* proscribes admission to such individuals. Ruparel did not deny that he had committed such an offense, in this case, drunk driving. However, he adverted to the exception built into section 19(2) and based his claim on the discriminatory provisions contained therein. The exception built into the section exempts persons who have satisfied the Minister that they have rehabilitated themselves and that:

> (i) in the case of persons who were convicted of any such an offense when they were twenty-one or more years of age, at least five years have elapsed since the termination of the sentence imposed for the offense, or
> (ii) in the case of persons who were convicted of any such an offense when they were less than twenty-one years of age, at least two years have elapsed since the termination of the sentence imposed for the offense.[11]

Ruparel's application for review pivoted on the points that these clauses were contrary to section 15(1) of the *Charter*, insofar as they discriminated on the basis of age, and that this discrimination was not demonstrably justifiable under section 1.

Muldoon J. of the Federal Court, Trial Division, accepted these points but held that the applicant had no cause of action, since he was not physically present in Canada. Muldoon J. identified this as one of the requirements stipulated by Wilson J. for the application of the *Charter*. His conclusion was based on the assumption that Wilson J. was not affirming that physical presence in Canada is *sufficient* for the *Charter* to apply, but that she was declaring that it was a *necessary* pre-requisite for its application. While he offered no argument for this interpretation, Muldoon J. was able to rely on MacGuigan J.A.'s

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[9] The issue whether the *Canadian Bill of Rights* has extraterritorial application is discussed in earlier cases. *See, e.g.*, *Dolack* v. *Minister of Manpower and Immigration*, [1982] 1 F.C. 396 (T.D.), in which Nitikman J. held that ss 1(a), (b), and 2(e) apply only to persons in Canada. On appeal, Thurlow C.J. explicitly rejected this "broad statement" of the trial judge. *See* [1983] 1 F.C. 194 at 195, 45 N.R. 146 at 147 (C.A.).

[10] [1990] 3 F.C. 615, 36 F.T.R. 140 (C.A.) [hereinafter *Ruparel*].

[11] *Supra*, note 7, s. 19(2).

judgment in *Canadian Council of Churches*[12] as an independent authoritative source.

There are good reasons to reject Muldoon J.'s interpretation of Wilson J.'s judgment. First, Wilson J. couched her holding in inclusive terms. Her purpose was to make it clear that the *Charter* does apply to individuals such as Singh, who find themselves subject to a variety of legal processes in Canada. She was not concerned with the delineation of the *Charter*'s limits. The case before her did not require her to advert to the question of the extraterritorial application of the *Charter*. She should not be read as authoritatively deciding an issue which was not raised in the case.

Second, physical presence in Canada was not presented by Wilson J. in *Singh* as a factor which is important in itself. Her precise words should be noted. The word "everyone" was held to include "every human being who is physically present in Canada *and by virtue of such presence amenable to Canadian law*"[13]. Wilson J. raised the issue of physical presence only because those who are in Canada are amenable to Canadian law. It was this latter factor that was the salient one. Singh had a cause of action because he was subject to Canadian law. The more reasonable extrapolation from her precise words is that everyone who is amenable to Canadian law, whether or not they find themselves in Canada, is embraced by the relevant sections of the *Charter*.[14]

However, the question of the extraterritorial application of the *Charter* should not be approached merely as an interpretive issue focusing on the intent of the author of one of the opinions in *Singh*. It should be faced head on.[15] Regardless of whether Wilson J. should be read as adverting to the issue, it is important to identify and examine with more rigour than has yet been applied by any Canadian court, the reasons for applying the *Charter* beyond Canada's territorial boundaries and the countervailing reasons for restricting its scope. I attempt such an examination in the following pages. I shall try to show that the reasons for a territorial restriction on the *Charter*'s application lack force and ought not to carry the day. In the past, visa applicants have been accorded judicial review of a visa officer's decisions on administrative law

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[12] *Supra*, note 6.

[13] *Singh, supra*, note 1 at 202 (emphasis added).

[14] *See Dacayanan* v. *Canada (Minister of Employment and Immigration)* (1987), 3 IMM. L.R. (2d) 161 at 171-72 (App. Bd), where Vice-Chair Chambers points to other clues in Wilson J.'s judgment which suggest she rejects the idea that the *Charter* does not apply extraterritorially. At one point she admits reluctance to accept the position that the *Charter* does not protect those seeking to enter the country, and at another, she makes the unqualified assertion that immigration is a federal power and "the *Immigration Act 1976* itself and the administration of it by the Canadian government are subject to the provisions of the *Charter*": *Singh, supra*, note 1 at 201.

[15] *See R.* v. *A, B and C*, [1990] 1 S.C.R. 995, 55 C.C.C. (3d) 562 [hereinafter cited to S.C.R.] where the Supreme Court declined the opportunity to probe in depth the issue of extraterritoriality.

grounds,[16] without any argument of territoriality being raised. I believe that *Charter* arguments should also be available to such applicants. Although my primary concern is to show that the *Charter* embraces applicants for visas to enter Canada, my conclusions have a wider ambit; all people outside Canada who are subject to Canadian law are protected by some provisions of the *Charter*.

Rather than re-invent the wheel, I shall draw heavily on American sources. In the United States, the related questions of whether the *Bill of Rights*[17] has an extraterritorial application, and whether visa applicants are protected by the Constitution have been faced squarely by the judiciary. In fact, the first issue has reached the United States Supreme Court with regularity over the past 100 years. The cases which the Court has decided contain a variety of arguments and evaluations, many of which, while presented as forming a coherent whole, contradict or are otherwise incompatible with each other. Although some decisions issue from the precise terminology of the American document, others are sufficiently abstract to be transferable north of the border. It is on the latter that I will concentrate.

I. Immigration and Extraterritorial Application of the Constitution in American Law

Gerald Neuman has concluded a recent study by noting that:

> [T]he history of debates over the scope of American constitutionalism illuminates the Supreme Court's continuing inability to settle upon a single perspective toward the persons, places and circumstances to which constitutional rights apply.[18]

This general indecisiveness can be brought into sharp focus by examining the broad diversity of perspectives adopted in a representative selection of cases. I identify five strands of argument which have been promoted forcefully and which have maintained longlasting support: a) the argument of executive and legislative sovereignty, which requires absolute or near absolute judicial deference in immigration matters; b) the argument of territoriality, which stipulates that the Constitution's ambit is circumscribed by the borders of the United States; c) the "levels of membership" argument, which holds that the measure of protection provided by the Constitution varies according to the level of a person's participation in the community; d) the argument of universal application, according to which every person is protected by the Constitution, regardless of their citizenship, place of residence or physical location on the globe; and, finally, e) the authority argument, according to which a

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[16] *See, e.g., Hui* v. *Canada (Minister of Employment and Immigration)*, [1986] 2 F.C. 96, 65 N.R. 69 (C.A.); *Muliadi* v. *Canada (Minister of Employment and Immigration)*, [1986] 2 F.C. 205, 66 N.R. 8 (C.A.).

[17] Namely, the first Ten Amendments to the United States' Constitution, 1787.

[18] Neuman, *supra*, note 5 at 990.

person is protected by the Constitution when subject to the authority of the government. It is to these that I now turn.

A. *The Nonreviewability of Immigration Decisions*

The Chinese Exclusion Case[19] exhibits what is perhaps the most extreme judicial response, or lack of response, to legislative measures relating to immigration. Although the case did not specifically address the issue of extraterritorial application of the *Bill of Rights*, it did focus on a more basic question — whether immigration legislation in general (with no distinction being drawn between that which has internal and that which has external application) is reviewable by the judiciary.

In 1887, Chae Chan Ping, an immigrant labourer from China, residing in the United States, was granted a re-entry certificate which would entitle him to re-enter the United States after a temporary sojourn in China. However, before he had the opportunity to use the certificate, and while he was out of the country, Congress passed an act which prohibited the entry into the United States of all Chinese labourers, including those who possessed re-entry certificates.[20] On his return to the United States, the appellant was not permitted to land, and was detained on board the ship on which he had crossed the Pacific. His application for *habeas corpus* was refused and it was against this refusal that he appealed to the Supreme Court. One of the grounds of his appeal was that Congress did not have the constitutional authority to pass laws relating to immigration, since such a subject matter was not enumerated in the United States Constitution. This argument was rejected by Justice Field, who delivered the opinion of the Court. He held that it is not open to controversy that:

> [T]he Government of the United States, through the action of the legislative department, can exclude aliens from its territory....Jurisdiction over its own territory to that extent is an incident of every independent nation. It is part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.[21]

To the extent that he connected the power over immigration to the government's sovereignty, Justice Field's judgment is unexceptional. A similar decision was reached by the Privy Council in 1906 with reference to Canada. In *A.G.(Canada)* v. *Cain*,[22] Lord Atkinson noted that:

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[19] *Chae Chan Ping* v. *United States*, 130 U.S. 581 (1889) [hereinafter *The Chinese Exclusion Case*].

[20] *Ibid.* at 582.

[21] *Ibid.* at 603-04.

[22] [1906] A.C. 542 (P.C.) [hereinafter *Cain*]. The issue raised in *Cain* was whether an act of the Dominion Legislature, which delegated to the Attorney General the power to order the deportation of an immigrant, was *ultra vires*. The ground for the attack on the act was that it purported to authorize the Attorney General to constrain a person outside the territorial boundaries of the colony. The Privy Council rejected this argument, holding that extraterritorial constraint was a necessary effect of the power of expulsion and that the government clearly had the power to expel.

> [O]ne of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests.[23]

Lord Atkinson cited Vattel's LAW OF NATIONS[24] as authority for this proposition, and made it clear that he is making a point about international law, rather than the domestic law of Canada. However, Justice Field's judgment did not contain the same clarity. He appeared to break new ground by asserting that the independence of the United States hinges on Congress having unreviewable authority over immigration. But the issue of reviewability relates not to the international status of the United States, but to the domestic question of the relationship between the judiciary and the other branches of government. Justice Field apparently recognized this when he stated:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated....The Government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth;....its determination is conclusive upon the judiciary.[25]

Thus, the opinion is an unstable amalgam of two arguments, one relating to national independence, the other relating to limitations of the judicial power in matters of national security. There are problems with each argument. As I have already noted, the direct move from recognition of national sovereignty to the conclusiveness of legislative determination is unwarranted. The United States does not become less independent in the international community by allowing judicial review of immigration decisions. The question which Justice Field ignored when addressing the issue of national sovereignty was whether the United States had limited its own sovereignty in this field by adopting the Constitution.[26] If it had, this does not mean that it had subjected itself to the sovereignty of another nation or jeopardized its independence.

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[23] *Ibid.* at 546.

[24] E. De Vattel, THE LAW OF NATIONS, trans. J. Chitty (Philadelphia: T. & J.W. Johnson, 1852).

[25] *Supra*, note 18 at 606.

[26] *See* S.H. Legomsky, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA (Oxford: Clarendon Press, 1987) at 185 [hereinafter Legomsky]. For a trenchant analysis of the ideological, metaphorical and fictional basis of sovereignty arguments which specifically critiques *The Chinese Exclusion Case*, *see* I.J. Wani, *Truth, Strangers and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law* (1989) 11 CARDOZO L. REV. 51 [hereinafter Wani]. For a brief, critical history of the argument that immigration power belongs to the federal government by virtue of national sovereignty, *see* R.F. Hahn, *Constitutional Limits on the Power to Exclude Aliens* (1982) 82 COLUM. L. REV. 957.

Conversely, the absence of an international law impediment[27] would not entail the absence of internal restrictions on the United States government.

However, this counterargument is not decisive against the holding in *The Chinese Exclusion Case*,[28] if one accepts Justice Field's other conclusion, that immigration decisions are non-justiciable on the ground that they are political questions.[29] The safety of the people is the highest law, and it is a law which must be controlled by the legislature or executive.[30] It is this line of thought which is explicitly developed in two cases decided shortly after *The Chinese Exclusion Case*.[31] In each case, the power over immigration was presented as a necessary characteristic of a sovereign and independent nation, engaged in interacting with foreign nations. Judicial supervision would hamper legislative and executive attempts to conduct international relations effectively.[32] However, the non-justiciability argument is ultimately a weak one.[33] It is difficult to imagine how a decision to accord constitutional rights to aliens could prejudice foreign relations. Furthermore, even if exceptional situations did arise, it would, as Stephen Legomsky notes:

> ....ignore reality to hold that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy considerations that the usual scope of judicial review would hamper the effective conduct of foreign relations.[34]

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[27] *See* Wani, *ibid.* at 68 and J.A.R. Nafziger, *The General Admission of Aliens under International Law* (1983) AM. J. INT'L L. 804, for arguments that the international law concept of sovereignty is not as absolute as suggested by Justice Field.

[28] *Supra*, note 19.

[29] *Ibid.* at 629.

[30] *See* H. Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation* (1990) 100 YALE L.J. 545 at 552. *See also* Legomsky, *supra*, note 26 at 193. While Motomura identifies the issue of non-justiciability to be a central part of the judgment, Legomsky has argued that the Court in *The Chinese Exclusion Case* never intended to preclude judicial review.

[31] *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1891); *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893) [hereinafter *Fong Yue Ting*].

[32] In his majority opinion in *Fong Yue Ting*, *ibid.* at 711, Justice Gray stated, "The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective".

[33] *See* Wani, *supra*, note 26 at 78-82. *See also* L. Henkin, *Is There a 'Political Question' Doctrine?* (1976) 85 YALE L.J. 597 [hereinafter Henkin].

[34] Legomsky, *supra*, note 26 at 307-8. *See also* Wani, *supra*, note 26 at 80 (arguing for a case-by-case analysis of whether a political question is raised); and P.H. Schuck, *The Transformation of Immigration Law* (1984) 84 COLUM. L. REV. 1 at 17 [hereinafter Schuck]. Schuck argues that the Court has since disclaimed the link between foreign policy and immigration matters, citing *Fiallo* v. *Bell*, 430 U.S. 787 (1977) [hereinafter *Fiallo*]. However, *see United States* v. *Verdugo-Urquidez*, 110 S.CT. 1056 at 1065-66 (1990) [hereinafter *Verdugo-Urquidez*], where the Court denied aliens abroad the protection of the Fourth Amendment for reasons of foreign policy. With great prescience, Schuck, *supra*, at 17, goes on to state that even if one is skeptical about the disclaimer, "that rationale can hardly explain the striking pattern of judicial deference in cases decided as late as the 1970's in which daunting questions of that kind were either inconsequential or wholly absent."

It is beyond the ambit of this paper to undertake a detailed examination of the American "political question" doctrine. Since my ultimate goal is to assess the applicability to the Canadian context of arguments raised in the American, I need do no more than refer to the analysis of the issue offered by Wilson J. in *Operation Dismantle Inc.* v. *The Queen*.[35] Citing articles by Tigar[36], and Henkin[37], Wilson J. wrote:

> It seems to me that the point being made....is that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power.[38]

In contrasting appropriate and inappropriate grounds for judicial review, Wilson J. distinguished between, on the one hand, second-guessing the executive on matters of defence (inappropriate) and, on the other hand, deciding "whether any particular act of the executive violates the rights of the citizens"[39] (appropriate). Wilson J. claimed that a rights-based claim is justiciable, while a policy-based claim is not. When a court decides that an issue of constitutional right is at stake, it will not use a "political question" doctrine to determine that the issue is non-justiciable. In the light of such a holding by the Supreme Court of Canada, it is highly unlikely that in Canada an argument that visa applicants (and other non-Canadians who are not physically present in Canada) have no constitutional rights could be grounded on the political question doctrine. For the purposes of this paper I need not make the claim that challenges to visa refusals will never be held to be non-justiciable.[40] My present

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[35] [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 [hereinafter *Operation Dismantle* cited to S.C.R.]. Writing the judgment of the majority, Dickson C.J.C. explicitly approves of this analysis. He adds, at 459: "I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts."

[36] M.E. Tigar, *Judicial Power, The "Political Question Doctrine", and Foreign Relations* (1970) 17 U.C.L.A. L. REV. 1135.

[37] Henkin, *supra*, note 33.

[38] *Operation Dismantle*, *supra*, note 35 at 471.

[39] *Ibid.* at 472. Nothing rests on the choice of the word "citizens" in this context. As I note, the Court has frequently referred loosely to the individual in whom constitutional rights vest as "the citizen": *see infra*, note 149 and accompanying text.

[40] Should the appropriate case arise, it would not be beyond the bounds of possibility for the Supreme Court to narrow Wilson J.'s analysis by holding that the dimension of foreign policy raised in the case is so sensitive that the courts ought not to intervene, even if a matter of rights is at stake. As Legomsky notes, *supra*, note 26 at 313, such an exceptional case should give rise to a certain amount of balancing – between the importance of the principles that underlie deference in matters of foreign policy on the one hand, and the importance of the right and the severity of the sanction suffered on the other. However, it is more likely that in Canada, such balancing will be undertaken under the aegis of s. 1 of the *Charter* rather than at the preliminary stage of determining justiciability.

claim is narrower: the concept of non-justiciability cannot be used as the ground for a blanket denial of constitutional rights to non-Canadians who are not present in Canada.

In the 100 years following *The Chinese Exclusion Case*,[41] Field J.'s words have continued to echo frequently, and, until recently, with only sporadic interference. Thus, in 1953, in *Shaughnessy* v. *United States ex rel. Mezei*[42], the United States Supreme Court held that "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute....largely immune from judicial control."[43] More recently, in 1976, the Court stated that "the power over aliens is of a political character and therefore subject only to narrow judicial review".[44]

Legomsky has summarized the continuing impact of *The Chinese Exclusion Case* as follows:

> When regulating immigration, Congress may discriminate on the basis of race. It may discriminate on the bases of gender and legitimacy. It may restrict aliens' political speech without having to establish a clear and present danger. With some qualifications, Congress may disregard procedural due process when excluding aliens. In each of these cases, the Court has held itself powerless to judge the constitutionality of Congressional acts.[45]

The case has also shaped judicial opinion on the reviewability of the decisions of consular officers denying visas. The issuance of a visa by an American consular official is normally a prerequisite to entry, but it does not in itself guarantee entry. Visa holders may be excluded from the country by immigration officers at the border.[46] While decisions to exclude or deport aliens have been subject to administrative review under the *Administrative Procedure Act*,[47] decisions by consular officers

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[41] *Supra*, note 19.

[42] 345 U.S. 206 (1953) [hereinafter *Mezei*].

[43] *Ibid.* at 210, Clark J. In *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S 537 (1950) [hereinafter *Knauff*], the Court held that the power to exclude was shared by the executive and the legislature.

[44] *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 at 101 n. 21 (1976). *See also Fiallo*, *supra*, note 34.

[45] Legomsky, *supra*, note 26 at 178-79. Similarly, Aleinikoff in *Citizens, Aliens, Membership and the Constitution* (1990) 7 CONST. COMM. 9 at 10-11 [hereinafter *Citizens*], describes the current United States situation as follows:

> Congress acts essentially free from any constitutional limits when it defines the categories of aliens entitled to enter, designates categories of excludable aliens, establishes admission and detention procedures at the border, mandates the deportation of aliens residing in the country, denies resident aliens benefits and federal employment, permits the interdiction on the high seas of aliens seeking to come to the United States, and defines classes of aliens ineligible for U.S. citizenship.

[46] *See* Note, *Judicial Review of Visa Denials: Reexamining Consular Non-reviewability* (1977) 52 N.Y.U. L. REV. 1137 at 1138-39 [hereinafter *Note on Consular Nonreviewability*].

[47] 5 U.S.C. ss 551-59, 701-06 (1966).

have been held to be unreviewable on both statutory and constitutional grounds.[48]

Arguments based on sovereignty and on a broad approach to justiciability (such as that adopted in Canada) are unable to sustain such a state of affairs. Peter Schuck agrees that the reason for judicial deference in the immigration field is elusive. Having noted that "[t]he Immigration and Naturalization Service (INS), whose administrative competence and fairness have often been harshly criticized, would seem an odd repository for judicial trust"[49] and that the congressional record does not inspire confidence, Schuck looks for symbolic explanation:

> In a constitutional system marked by an extraordinary degree of political, institutional and social fragmentation, manifestations of solidarity and nationhood can exercise a potent hold over the judicial, as well as the lay, imagination. The flag, the President, the American moon landings — these are compelling symbols of our national spirit and collective will....The idea of sovereignty....may come closest to being reified and recognizable when a unified national government deploys its laws against one who is plausibly seen as an outsider — as, quite literally, alien.[50]

While the failure of Canadians to put great stock in the development of symbols which can lend cohesion to the nation has often been lamented, Schuck's dark deconstruction casts a shadow over the process which makes it appear less desirable. If we define ourselves as "us" merely by distinguishing ourselves from "them", we will not have created an identity, but will have only denied an identity with a group from whom we wish to feel distinct. Such would not be a very fertile ground in which to plant the seeds of national unity. Further, the suggestion that we should not seek our identity through examination and general application of our constitutional values, but should look for it instead in the uncontrolled exercise of executive and legislative sovereign powers against aliens smacks of xenophobia. The judiciary should not be encouraged to believe that national cohesion demands that the law is premised on an "us-them" distinction in which the "them" defines the "us", that it requires judicial deference on matters relating to the admission of new residents or visitors, or that the American way is the only way by which we can understand our national selfhood.

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[48] *See United States ex rel. London* v. *Phelps*, 22 F.2d 288 (2d Cir. 1927), and *United States ex rel. Ulrich* v. *Kellogg*, 30 F.2d 984 (D.C. Cir. 1929) [hereinafter *Ulrich*]. *See also* Legomsky, *supra*, note 26 at 142-76. The authors of the *Note on Consular Nonreviewability*, *supra*, note 46, trace the holding in *Ulrich*, *supra*, directly to *The Chinese Exclusion Case*, *supra*, note 19. *See also Constitutional Limits on the Power to Exclude Aliens*, *supra*, note 26 at 957.

[49] Schuck, *supra*, note 34 at 16-17.

[50] *Ibid.* at 17.

B. *The Limitations of Territoriality*

The United States Supreme Court also addressed the broad question whether the Constitution's scope should be limited to the territorial borders of the United States, such that neither aliens nor citizens can claim its protection when outside the country. Although the Court in *Ross* v. *McIntyre*[51] generalized in *obiter* that "[t]he Constitution can have no operation in another country," it is probably accurate to say that the Court has never fully embraced this position.[52] It has, however, clearly adopted the view that territorial borders are a relevant consideration in determining the ambit of the Constitution.

In *Dorr* v. *United States*,[53] the question arose whether the Constitution mandated a trial by jury as a necessary incident of judicial procedure in the Philippines, which had been ceded by a treaty with Spain to the United States. The Court held that it did not. In the course of delivering the opinion of the Court, Day J. approved two statements; first, that the right to a jury trial is:

> [N]ot fundamental in....nature, but concern[s] merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands.[54]

and second, that:

> Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution....than by any express and direct application of its provisions.[55]

Day J. was satisfied that the judicial process in the Philippines was an adequately fair one, although it did not match exactly the American model. In reaching this decision, he was willing to recognize the ethnocentric nature of some of the rights protected by the Constitution. These he distinguished from "fundamental rights" which are presumably universal in their application within American territories.

In *Reid* v. *Covert*,[56] however, the Court voiced its suspicions about the relevance of territoriality. In this case, an American citizen claimed that her court martial, conducted by a American tribunal in the United Kingdom violated her right to a jury trial. The Court found in her favour.

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[51] 140 U.S. 453, 464 (1891) [hereinafter *Ross*].

[52] Note, *The Extraterritorial Application of the Constitution – Unalienable Rights?* (1986) 72 VA. L. REV. 649 at 654-56 [hereinafter *Note on Unalienable Rights*].

[53] 195 U.S. 138 (1904) [hereinafter *Dorr*].

[54] *Ibid.* at 144-45, quoting Brown J. in *Territory of Hawaii* v. *Mankichi*, 190 U.S. 197 (1903).

[55] *Ibid.* at 146, quoting Bradley J. in *Church Of Jesus Christ of Latter Day Saints* v. *United States*, 136 U.S. 1 (1890).

[56] 354 U.S. 1 (1957).

Black J., for a plurality of four, noted that the *Ross*[57] approach had been repudiated by a long line of cases, and "should be left as a relic from a different era".[58] Likewise, he rejected the distinction between types of constitutional right, enunciated in *Dorr*:[59]

> While it has been suggested that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shall nots" which are explicitly fastened on all....agencies of the Federal Government by the Constitution and its Amendments.[60]

While Black J. was willing to recognize that there may be some scope to create lax procedures for territories with different traditions, he was adamant that:

> [T]he concept that the Bill of Rights....[is] inoperative....when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution....[61]

Throughout his opinion, however, Black J. emphasized the citizenship of the appellant, and restricted his general claims about limitations on government actions to those measures taken against United States citizens. His holding, therefore, is limited to the view that the United States Constitution is not bound by territorial limits in its protection of citizens. It does not explicitly require the United States, as imperial power, to abide by the Constitution when dealing with those subjected to its imperialism. Black J.'s premise is that the law is not "The Law of the Land", but is, rather, the law of a people. While the law of the constitution may have, as one of its general purposes, the protection of territory and the promotion of order therein, it also has a broader, more humanistic aim — the promotion of the citizens' welfare, wherever they happen to be situated. But if territoriality is irrelevant when a citizen is the subject of government action, why should it be relevant in the case of an alien? Rehnquist C.J.U.S. recently tackled this question in delivering the opinion of the Court in *United States* v. *Verdugo-Urquidez*.[62]

In this case, the Court held that the Fourth Amendment — the Constitutional requirement prohibiting unlawful search and seizures — did not apply to a search and seizure by United States Drug Enforcement agents of property in Mexico owned by a person who had earlier been brought to the United States involuntarily, but who was not a permanent resident. To reach this conclusion, Chief Justice Rehnquist relied on a

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[57] *Supra*, note 51.
[58] *Ibid.* at 12.
[59] *Supra*, note 53.
[60] *Ibid.* at 8-9.
[61] *Ibid.* at 14.
[62] *Supra*, note 34.

number of arguments, of which three are relevant in this context.[63] First, he explicitly endorsed the decision of the Court in *Dorr*,[64] that only "fundamental" constitutional rights are guaranteed to inhabitants of foreign territories, and hence it is not open to the Court to adopt "the view that every constitutional provision applies wherever the United States Government exercises its power".[65] The Chief Justice concluded that if inhabitants of territories governed by Congress are only guaranteed "fundamental" rights then the "respondent's claim that the protections of the Fourth Amendment extend to aliens in foreign nations is even weaker".[66] This argument does not properly heed the context in which the distinction between fundamental and non-fundamental rights was developed, namely, a case in which the Court was faced with a conflict between local and American standards of fairness. Where the United States is not engaged in governing a country, this conflict does not arise. Hence, the position of an alien in such a country will not be weaker, as suggested by the Chief Justice. It will be stronger, since the influence of local standards will not be felt.

Second, the Chief Justice offered a restricted reading of the holding in *Reid* v. *Covert*,[67] claiming that it applies only to acts against citizens. Third, he claims that an extension of the Fourth Amendment to foreign activities would embrace the activities of armed forces:

> Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.[68]

Furthermore, the extension of the Fourth Amendment would "plunge....[the legislature and executive] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad".[69]

These arguments do not explain why territory is a relevant factor. The concerns about uncertainty and about undue interference with the

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[63] The two arguments which I do not consider at this point are as follows: first, the Fourth Amendment refers to "the right of the *people* to be secure": *see supra*, note 17 (emphasis added). The language of this amendment contrasts with the language of the Fifth and Sixth Amendments, which use the words "person" and "accused". While admitting that it is not conclusive, the Chief Justice noted that his textual evidence suggests " 'the people' protected by the Fourth Amendment, and by the First and Second Amendments,....refers to a class of persons who are part of a national community or who otherwise developed sufficient connection with this country to be considered part of this community": *see supra*, note 34 at 1061. Second, there is no historical data to indicate that the Fourth Amendment was understood by contemporaries of the Framers to apply to searches and seizures in foreign countries, *ibid.*

[64] *Supra*, note 53.

[65] *Supra*, note 34 at 1062.

[66] *Ibid.*

[67] *Supra*, note 56.

[68] *Supra*, note 34 at 1065.

[69] *Ibid.* at 1066.

activites of the armed forces, apply equally to actions against citizens. Conversely, it is conceivable that action by the armed forces against aliens within the United States may be needed to protect the national interest.[70] Ultimately, the Chief Justice's conclusion rests solely on his argument that only those who have sufficient ties with the United States, whether or not they are present in the United States, can be protected by the Constitution. This argument, that the Constitution follows the person rather than applying to a fixed territory, merits separate examination. It ought not to be confused with the territorial argument, which in the Chief Justice's hands, does not fly.

C. *Limited Judicial Review: Substance and Procedure, and the Importance of Membership*

While the United States Supreme Court has continued to express approval of Justice Field's opinion in *The Chinese Exclusion Case*,[71] it has not exhibited absolute deference to the legislature and executive in decision-making over immigration. An early incursion was made in 1903 in *Yamataya* v. *Fisher*.[72] In this case, the Court held that a statute which allowed for the deportation of illegal aliens, ought not to be interpreted in a way which would give the deporting officer the power to ignore due process. The appellant had not entered the country in a clandestine manner but his permission to land was contrary to law. Justice Harlan continued the tradition of deference insofar as he refused to consider the constitutionality of the substantive provisions of the act, stating:

> The constitutionality of the legislation in question, in its general aspects, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers without judicial intervention, — are principles firmly established by the decisions of this court.[73]

However, Justice Harlan made much of the difference between the power to exclude an immigrant and the power to deport. The former power is exercised against those who seek to enter the country, whereas the latter is exercised against those who are in the country and who seek to stay.[74] According to Justice Harlan, the power of exclusion is never subject to constitutional review:

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[70] *See* Neuman, *supra*, note 5 at 974 n. 387.

[71] *Supra*, note 19.

[72] 189 U.S. 86 (1903) [hereinafter *Yamataya*].

[73] *Ibid.* at 97.

[74] One difference between Canadian immigration law and its American counterpart is that Canadian law recognizes that those who appear at the border are physically present in the country, whereas in the United States such individuals, since they seek to enter, are deemed not to be physically present in the country.

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil [*sic*] or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of national government. As to such persons, the decisions of executive or administrative officers acting within powers expressly conferred by Congress, are due process of law.[75]

However, because the power to deport involves the curtailment of an individual's liberty, it would be improper for the Court not to ensure respect for *procedural* safeguards, *i.e.* due process of law "as understood at the time of the adoption of the Constitution".[76] Justice Harlan concluded:

> [I]t is not competent for....any executive officer....arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.[77]

Thus one can see that, unlike Justice Field's approach of absolute deference, Justice Harlan was willing to recognize that constitutional rights can vest in aliens, but he suggested that this can happen only if the aliens have integrated themselves, in some meaningful way, into American culture. This suggestion is implicit in a point which he took pains to make, namely, that he was not addressing the question:

> [W]hether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population....[78]

The three themes in Justice Harlan's judgment — that courts should review immigration decisions only for procedural irregularities, that they should do so only when an individual's liberty has been curtailed, and that an alien's constitutional rights depend on the ties which he or she has formed and the roots which he or she has planted — have been developed in later cases and continue to be promoted today.

The first two themes have become well entrenched in American jurisprudence. Aleinikoff[79] notes that current laws which permit "the deportation of aliens who 'advocate or teach....opposition to all organized government'....or who 'knowingly circulate....any written or printed

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[75] *Supra*, note 73 at 98.
[76] *Ibid.* at 100.
[77] *Ibid.* at 101.
[78] *Ibid.* at 100.
[79] T.A. Aleinikoff, *Federal Regulation of Aliens and the Constitution* (1989) 83 AM. J. INT'L L. 862 at 868-89 [hereinafter Aleinikoff].

matter....teaching....the economic, international, and governmental doctrines of world communism"[80] would not stand First Amendment scrutiny outside the immigration context. Citing *Fiallo* v. *Bell*,[81] he also points out that "[e]qual protection challenges to immigration rules have failed in the face of strong judicial statements about the broad scope of Congress's power to exclude and remove aliens".[82]

As noted above in passing, aliens who are resident in the United States have fared better in having substantive constitutional rights recognized, when their claims do not relate to immigration decisions. In *Yick Wo*[83] the United States Supreme Court held that aliens in the United States are protected by the Fourteenth Amendment from state discrimination which would ensue from the operation of a statute which granted administrative officers unfettered discretion.[84] However, in the immigration context, or more precisely, the deportation context, the distinction between procedural and substantive rights is maintained rigorously.[85] The recognition of procedural rights is an exception to the absolute deference to the legislature and executive otherwise accorded by the judiciary in immigration matters, but it is an isolated and unexplained

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[80] *Ibid.* at 868.

[81] *See supra*, note 34.

[82] *Supra*, note 79 at 869. *See also* A.E. Shacknove, *American Duties to Refugees: Their Scope and Limits* in M. Gibney, ed., OPEN BORDERS? CLOSED SOCIETIES?: THE ETHICAL AND POLITICAL ISSUES (Westport, Conn.: Greenwood, 1988) at 131.

[83] *Supra*, note 5.

[84] The statute made it unlawful for anyone to run a laundry without first getting consent from a board of supervisors. *See also Graham* v. *Richardson*, 403 U.S. 365 (1971), where the Court ruled unconstitutional a law which allocated welfare benefits only to citizens, and *Plyler* v. *Doe*, 457 U.S. 202 (1982) [hereinafter *Plyler*], in which a statute permitting school authorities to bar the children of illegal aliens was ruled unconstitutional. However, aliens have been singularly unsuccessful in attempts to have alienage declared a "suspect classification" in federal law. *See* G.M. Rosberg, *The Protection of Aliens From Discriminatory Treatment by the National Government* (1977) SUP. CT. REV. 275 at 336 [hereinafter *Protection*], who argues that "the reasons for treating alienage as a suspect classification apply as forcefully to the federal government as to the states." Gibney has pointed out that the Court has attempted to balance "the need to maintain the essence of our political communities" with concern for basic rights of aliens. In doing so, it has recognized communities to have two spheres — one economic, the other political. In the economic sphere, aliens' challenges have been more successful. In the political sphere, aliens have been excluded from voting, holding elected political office and have been denied the opportunity to hold civil service positions by state as well as federal law. *See* M. Gibney, STRANGERS OR FRIENDS: PRINCIPLES FOR A NEW ALIEN ADMISSION POLICY (Westport, Conn.: Greenwood, 1986) at 60-62 [hereinafter Gibney]. *See also* G.M. Rosberg, *Aliens and Equal Protection: Why not the Right to Vote?* (1977) 75 U. MICH. L. REV. 1092.

[85] *But see* D. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond* (1983) 44 U. PITT. L. REV. 165 [hereinafter Martin], where he points to lower court decisions in which procedural safeguards have been accorded to those seeking political asylum, apparently on constitutional grounds.

concession.[86] If the reason for the general deference is rejected, as I have suggested in the previous section that it should, then explaining why protection should be only procedural in nature becomes a fruitless exercise. If no reason grounds the rule, it is impossible to find a solid foundation for the exception to the rule.

More interesting is Justice Harlan's third and broadest theme — that those within the country deserve some protection while those who are seeking entry merit none. This theme has attracted a significant amount of judicial and scholarly attention in the United States. It is clearly related to the more general argument raised by Chief Justice Rehnquist in *Verdugo-Urquidez*,[87] that only those with sufficient connection to the United States can claim the protection of the Constitution. While Justice Harlan was willing to allow that illegal aliens who have entered the country clandestinely may not have acquired constitutional rights, Chief Justice Rehnquist asserted that a person who has entered the country involuntarily, having been transported and held by the police against his will, has insufficient ties with the country.[88]

Two questions, in particular, have dominated the discussion of the issue. The first is as to how much protection is owed to those within the country. The second and more basic question is what are the grounds for justifying differences in the amount of protection owed to citizens and the amount owed to others? One of the more common answers to this second question presents a model of the community in terms of levels of membership, with citizenship being equated with full, paradigmatic membership and with other statuses, such as permanent resident, visitor and even illegal alien, being understood to embrace lesser degrees of belonging to the body politic.[89] The model is one of concentric circles

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[86] *See Developments in the Law: Immigration Policy and the Rights of Aliens* (1983) 96 HARV. L. REV. 1286 at 1294-1300 [hereinafter *Rights of Aliens*], for an explanation, but no justification, of the concession to procedural rights by suggesting that the Supreme Court was governed by a deep concern for individual liberty, and an equally deep distrust of aliens. It is argued that the Court, in *Yick Wo*, *supra*, note 5, was more interested in the integrity of government institutions and the general risks of allowing schemes of unfettered discretion than in the protection of aliens' interests. "Both alien and citizen enjoyed the Court's solicitude in the areas in which the Court found it most important to constrain the exercise of governmental power in order to preserve individual liberty": *Rights of Aliens*, *supra* at 1298-99. The Court never went as far as recognizing alienage as an improper ground of discrimination. The distrust of aliens translated into a willingness to recognize legitimate state policies operating when aliens' interests were substantially ignored. The translation is not so smooth in cases of abuse of process.

[87] *Supra*, note 34.

[88] *Ibid.* at 1064-66.

[89] *See, e.g., Citizens, supra*, note 45 at 12, in which Aleinikoff attacks the notion that deference has been accorded by the judiciary to the legislature and executive in immigration decisions because immigration is part of foreign policy: "The vast bulk of the immigration code has little to do with foreign policy....While "foreign policy" has provided a convenient excuse, it hardly seems to capture the deep structure of our thinking about the Constitution. This underlying structure is better explained by the model of citizenship-as-membership." *See also* Martin, *supra*, note 85 at 193-208.

with the citizen standing at the centre, and others standing further out as their bonds with the community, and hence claims of membership, become more attenuated. According to this model, constitutional bills of rights should be understood as documents which identify the benefits which full members have negotiated for themselves and for "associate" members. Hence, the further a person is located from the paradigm example of full membership, the fewer benefits of membership need be accorded to him or her. While an alien may be more or less a stranger, nevertheless duties may be owed to him or her by the state, much as common law duties are owed by property owners to guests and trespassers.[90]

The United States Supreme Court has articulated this model explicitly (but has refrained from attempting to render it compatible with its endorsement of a model based on absolute and unreviewable legislative and executive authority in immigration matters, discussed above). For example, in *Johnson* v. *Eisentrager*,[91] the Court, in holding that a nonresident alien enemy was not entitled to seek *habeas corpus* in a U.S. court, stated *per* Jackson J.:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country....gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.[92]

The justification for granting particular rights to an alien, according to this approach, is rooted in the finding that the alien's position is sufficiently similar to that of the citizen, the archetypical member. The more the alien participates[93] in societal life, the easier it will be to justify the comparison. By placing the citizen at the core of concern, this approach promotes the idea that it is his or her "Americanness" which provides the reason for constitutional protection, rather than his or her humanity, that people matter in the eyes of the Constitution only when they have to some extent become Americans. On the international stage, the United States may be called to account for egregious inhumane

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[90] *Citizens*, *supra*, note 45 at 19.

[91] 339 U.S. 763 (1950).

[92] *Ibid.* at 770. *See also Mathews* v. *Diaz*, 426 U.S. 67 (1976).

[93] The authors of *Rights of Aliens*, *supra*, note 86, propose at 1304 that in the Twentieth Century immigration decision-making has been based on a participation model. "The alien enters the United States, finds employment, settles down, and has a family; with each successive step her assimilation into society becomes more complete. The participation model recognizes this process and bases on it the gradual grant of rights to the alien." The authors cite *Plyler*, *supra*, note 84 as exemplifying the participation model in action. The participation on which authors focus is participation in the economic sphere. Participation in political activities may yet be statutorily curtailed, suggesting that the model has not been fully adopted. *See* Gibney, *supra*, note 84.

treatment of strangers; domestically, it may create statutory protections which prohibit its agents from engaging in such actions, but constitutionally, strangers have no recourse.

Aleinikoff contends[94] that the arguments which underlie the "levels of membership" approach cannot explain why the courts have held that constitutional protections do not operate in the immigration context, invalidating laws which, for example, allow for the deportation of aliens for speech that would be protected if imprisonment were at stake. But this contention is false. The citizen, as full member, never has to apply for membership and is not subject to deportation. Hence, the comparison between citizen and alien will never be apt when membership itself is at stake. The alien can never claim that he or she should be treated more like a citizen in these contexts, since the citizen never appears in these contexts. The "levels of membership" approach, however, is suspect for other reasons.

Two premises underlie the "levels of membership" approach: the first is that the Constitution exists for the benefit of "the people"; the second is that a generous account should be given of exactly who the people are — the term embraces citizens and permanent residents, and also expands to encompass those who are similarly situated. I shall examine each of these in turn. My critique shall focus on the way in which this approach denies the moral and constitutional standing of the stranger who, because he or she does not have any connection with the community, does not figure on the political agenda.

The first premise fits snugly with the idea that has dominated modern constitutional theory, namely, the social contract. The image of a group of people establishing an independent social entity, and, as a way of promoting the welfare of the organization's members, establishing a government with defined and limited powers, has persevered and flourished. The details of the image tend to vary in different versions; I shall briefly outline two. Unlike the group in the second version, the group of people presented in the first is not so much a cohesive group of like-minded, community-oriented people who share a vision of a utopia and are motivated by similar ideals and substantive values, as a motley aggregation of unconnected, self-interested, somewhat paranoid, and strongly anarchic[95] individuals who come together to promote their own safety and security.[96] Schuck captures the inward-looking paranoia in the following remark:

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[94] *Citizens*, *supra*, note 45 at 19.

[95] *See* B.R. Barber, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (Berkeley: University of California Press, 1984) at 6-11.

[96] John Locke expresses the image thus: "The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in secure enjoyment of their properties, and a greater security against any, that are not of it": *see* J. Locke, SECOND TREATISE OF GOVERNMENT, ed. by C.B. Macpherson (Indiana: Hackett Publishing Co., 1980) at 52.

> For all its universality, liberalism essentially views society as a contrivance animated solely by individuals' self-interest, by their need for protection against strangers and against each other.[97]

There is good reason to reject the image of a constitution which this outlook projects, even if one is committed to the heuristic value of the idea of a social contract. First, it commits us to living in a climate of fear; the spectre of the unknown — whether it be a nefarious stranger within the community or the alien outsider — dominates the consciousness of those who promote this vision. In unsettled social situations, such fears may be justifiable and reasonable. They are not justifiable and reasonable in established constitutional democracies which have attained a high measure of social stability, economic wealth and defensive strength. Anti-immigration advocates have played on these fears, suggesting that our economy, and hence our personal security, is threatened by floods of immigrants who will overrun us unless our borders are closed. The fear is pervasive, and like all fears it threatens to immobilize us and silence our better instincts.

Second, this view adopts too readily the model of commercial bargaining as a means of understanding the process by which constitutions are framed. As a result, it identifies the interests of individual community members to be the fundamental issues with which moral and political debate should be concerned. In other words, it pushes us toward being unmitigated individualists. In the commercial market, we expect players to make deals which focus primarily on their own interests; the process of negotiation and bargaining is not structured to ensure results that are the most advantageous to everyone — both the parties and strangers. The market is essentially private, because it affords opportunities to individuals and groups to pursue their self-interest with little external constraint.

The adoption of market imagery by social contract theorists has been subject to widespread attack from communitarian critics. Those who promote the "levels of membership" constitutional model tend to be theorists who wrongly believe that contracts can only be properly understood in their commercial setting. The communitarian version does not make this error. It rightly presents the market as an institution which exists against a background of external constraints — considerations of public policy which prevent the commercialization of all relationships and status. The market retains its veneer of "privacy" by operating within a context in which shared values and shared outlooks structure interactions. The existence of this background can help justify the existence of the market, since it ensures that self-interest is not the only force which directs social life. Market relations and activities and the scope which they offer for unrestrained pursuit of self-interest form but one sphere of life, and a narrowly circumscribed one at that. This sphere does not define our mutual co-existence, although it certainly forms a central part.

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[97] *Supra*, note 34 at 86.

Other spheres in which market forces do not operate — spheres of friendship and family relations, for example — are equally central. In these spheres, contracts and bargains can be completed, but they will not represent the interplay of players whose concerns are delimited by self-interest alone. An agreement between friends will be one which always takes account of the value of the friendship; the other party will not be seen merely as an instrument by which one can fulfil one's desires. Instead, the other party will be someone whose interests must be represented in the final accord. Likewise, in a community where there are strong social bonds among all parties, agreements between two parties will always take account of the interest of any third party who may be affected by the agreement.

Communitarians understand political agreements to be much more like friendships and familial relationships than like private economic interactions. As Michael Walzer sees it:

> Politics (as distinct from mere coercion and bureaucratic manipulation) depends upon shared history, communal sentiment, accepted conventions — upon some extended version of Aristotle's "friendship".[98]

Thus, while Lockean versions of contract theory emphasize the protection of individual interests, those versions influenced by Rousseau emphasize the interests of the community. In the latter versions, the social contract is formed not only to protect the individual's property holdings, but also to enhance the well-being of the community — to make it a wealthier, richer, more educated, more tolerant place. Such a version, while more community-oriented, still tends to be self-centred, in that it focuses on the interests of the collectivity, to the exclusion of outsiders or those of other communities. Thus, political theorists who accept that politics arises in a communal setting may neglect the fact that part of the fabric of this setting is a commitment to a humanistic moral philosophy. By emphasizing the interests of our community and by defining them apart from the interests of humanity in general, communitarians forget a central thread in our political morality, that *all* people matter.

If we identify a humanistic philosophy[99] to be an essential part of our social fabric, we shall have a happier, more idealistic image of our community. Such a self-image contrasts forcefully and starkly with the essentially cynical image of politics as power-mongering and self-aggrandizement. We may profitably use the latter image to understand

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[98] M. Walzer, *The Moral Standing of States: A Response to Four Critics* (1980) 9 PHIL. AND PUB. AFF. 209 at 228.

[99] As articulated by Joseph Raz, humanism "is not a moral theory. It merely sets a necessary condition for the acceptability of moral theories, a condition which can be satisfied by many different moral principles". He articulates the 'humanistic principle' as follows: "[T]he humanistic principle....claims that the explanation and justification of the goodness or badness of anything derives ultimately from its contribution, actual or possible, to human life and its quality." *See* J. Raz, THE MORALITY OF FREEDOM (Oxford: Clarendon Press, 1986) at 194.

our past and present political interactions when we adopt an external point of view — distancing ourselves from our community to see it from an outsider's vantage point. It helps us to see how shabby our political structures can be. From the internal point of view, however, we cannot afford to be cynics; our future interactions will be determined by our present self-understanding; our future interpretations of our constitutional commitments can reflect ideals and positive value rather than egoistic conceit.

From the internal point of view, politics is about making commitments *for* the community, not just commitments *about* the community; it involves asking what sort of community we should be constructing, and thus, necessarily embraces the moral point of view. While self-interest and self-absorption can lead to neglect of the interests and needs of strangers, the moral point of view does not circumscribe its vision so narrowly. How the community treats strangers is a crucial aspect of its moral identity; it manifests the community's commitment to humanism and hence is a central question for politics.

Admittedly, politics is also about give and take. It would be rash to overestimate the degree of consensus to be found in social interaction. Our society is not composed of like-minded people who share one moral and political outlook. Where moral visions collide or contradict each other, there will have to be compromise and negotiation about the end product, but this does not entail self-interest as the defining political drive. Politics, and especially the politics of constitution-making, is essentially a public activity in which multi-dimensional values are at play.

The constitutional theories underlying the "levels of membership" approach are founded on principles of self-interest, rather than on a humanistic moral outlook. The approach appears to be generous since it explicitly advocates adopting the second premise which defines membership broadly. It is also exclusive, however, in that it attempts to define who is a stranger, and then excludes that person from the framework of values which defines the nation. It presents what amounts to a morally bankrupt, or at least a neurotically self-protective and xenophobic, vision of the process of constitution-making.

The thrust of my argument is that the "levels of membership" approach warps the principle behind the social contract, by excluding the stranger from moral and political calculation. The contract is a device used in an attempt to justify the authority of government. As such, it operates in the field of moral argument. But if legitimate authority is a moral concept, it should not be accorded to a government which only uses a lexicon of self-interest. The reason for obedience to the law of such a government will not be moral, but merely prudential. Unless we are willing to accept that self-interest should be our dominant motivation, government assertions that it can provide for an individual's (or community's) interest better than the individual himself or herself will ring hollow as a foundation for legitimacy. Delegating decision-making to government can be morally justified only if the government is better

able than the individual to do the right thing,[100] and the government will only be able to do this if it takes into account the effects of its decisions on strangers who are not a part of the community.

As stated above, the second premise of the approach is that a generous view should be taken of who counts as a member. This is not a necessary premise, as one can imagine an illiberal version in which there are only two levels of membership — citizenship and permanent residence. Such a version becomes difficult to maintain, however, when a multitude of benefits are accorded to people who do not belong to either of these groups. David A. Martin has developed the most generous version of this second premise when defending a sophisticated variation of the "levels of membership" approach,[101] a variation which does not appear to connect membership with "participation" in societal life. Martin notes that lower courts, in dealing with due process arguments raised by lawyers representing some of the thousands of Cubans, Haitians and Salvadoreans seeking political asylum in the United States since the early 1980s, have ignored or evaded the harsh Supreme Court decisions in *Mezei*[102] and *Knauff*[103] and have begun to grant procedural protections to aliens seeking political asylum. He suggests that an immigration law which demands the same constitutional protection for aliens seeking entry as for citizens will lack the flexibility required to cope with the realities of the modern immigration process, in particular, the large number of applicants. Moreover, Martin alleges that "[d]ue process as a concept, and as a judicially enforced norm or set of practices, is inherently difficult to cabin."[104] Once recognized, the move towards higher degrees of formality is difficult to resist, especially when much is at stake for the individual applicant, as it is for the person seeking political asylum. But excessive formality is problematic in situations where many vexatious claims, which are difficult to identify in the early stages, are raised.

Martin's solution is to recognize different degrees of due process reflecting the level of membership attained by the applicant. He founds this solution on the intuition that we "....somehow *owe less* in the coin

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[100] *Ibid.* at 53. I have adopted Raz's thesis ("the normal justification thesis") about the type of argument which could be used to establish the legitimacy of an authority, which he describes as follows:

> *[T]he normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.* (emphasis in original)

My major point is that reasons for action which apply to individuals are not merely reasons of self-interest, but also other-regarding reasons, even where the other is a stranger.

[101] *Supra*, note 85.

[102] *Supra*, note 42.

[103] *Supra*, note 43.

[104] *Supra*, note 85 at 188.

of procedural assurances to the first-time applicant for admission than we do to our fellow citizens or to permanent resident aliens, or even to regular nonimmigrants [*sic*] who have been among us for awhile [*sic*]."[105] Much as we owe more to neighbours than to people who are not in our immediate community, or as we owe employers an explanation for our decision to move to another town[106], we owe more, procedurally, to citizens than we do to first-time applicants. Martin locates the source of this obligation in a concept of community which gives rise to the "....recognition and fulfillment of reciprocal obligations....".[107] He suggests that even excludable aliens:

> [E]njoy some measure of shared membership in a relevant community, simply by virtue of their common humanity and physical presence in our territorial jurisdiction....The excludable alien is not a constitutional stranger, but he is not quite intimate family, either.[108]

Martin concentrates his gaze on applicants for political asylum who are physically in the country, insofar as they are "at the gates", waiting for entry. He does not consider the case of visa applicants, who presumably would only be able to rely on the factor of common humanity when making the case that they are not constitutional strangers. But this reveals one of the serious difficulties with Martin's position. By suggesting that we can all rely on common humanity, Martin commits us to the view that, to some extent, we are all members of the American community. The concentric circles of membership which centre on the United States citizen spread out to embrace us all — and maybe even further; what of extraterrestrials? The American empire stretches *ad infinitum*. Because everyone (and maybe everything) is to some extent a *member* of the United States polity, the concept of membership becomes hopelessly diluted.[109] The image which Martin projects is of the refugee trying to get to a more central level of membership, rather than trying to become a member. This misrepresents the refugee's claim. He or she does not claim to be owed due process by virtue of being an American or an associate member of the American community. The refugee's claim is that the American process is committed to dealing with strangers fairly.

When considering the case of the illegal alien, Martin treats him or her as a member of the polity on the ground that she shares a common residence with citizens and permanent residents. This sounds very much like the idea, promoted by less generous theorists, that you count as a

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[105] *Ibid.* at 191 (emphasis in original).

[106] *Ibid.* at 194.

[107] *Ibid.* at 195.

[108] *Ibid.* at 216 (footnotes omitted).

[109] Aleinikoff suggests that Martin is not talking about membership at all. Aleinikoff distinguishes "community" and "community ties" and suggests that a community can owe obligations that are not rooted in membership. *See* T.A. Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin* (1983) 44 U. PITT. L. REV. 237 at 244. I develop this theme in the text.

member if you have participated in the same societal life. Unlike the illegal alien, the newly-arrived refugee cannot be said to be a participant. Martin is on shaky ground when he tries to go beyond participation as a criterion of membership. His use of presence within a territory as a criterion of membership is particularly unpersuasive. By suggesting that presence alone can attach a person to a community, he projects an image of community as a mere aggregation or random conglomerate.

I want to spend only a little time commenting on the participant approach to membership. After *Singh*,[110] it would be hard to argue that Canada has committed itself to this vision. If a political refugee who is merely present in Canada can be protected by the Constitution, the reason for the protection cannot be the refugees' participation in Canadian life.

Nevertheless, the approach does carry some intuitive weight: do we not owe more to those who have contributed to social interaction than we do to strangers? Our neighbours and friends do have claims on us not shared by others with whom we are related more tenuously. Can one not extrapolate this truth in the realm of political morality? In the context of constitutional law, would this differentiation justify according different degrees of due process to visa applicants than to residents for a benefit of equal value? Would it justify discriminating against applicants on the basis of a criterion that would be illegitimate if applied to residents, such as race or religious affiliation? Would it justify excluding aliens on the ground that they have expressed ideas which are tolerated but not condoned?

Martin provides an affirmative answer to at least some of these questions. He suggests, for example, that the difference in the moral obligation owed to strangers and to citizens translates into providing more formal levels of due process when citizens' interests are being determined than when aliens' interests are at stake.[111] While agreeing with Martin that a difference exists, I challenge his extrapolation of this generalization into the specifics of constitutional law.

As I argued above, a stranger is a person whose interests should count in any determination about what sort of community we wish to create. But that does not entail that a stranger's interests should count to the same extent as those of someone who has participated in societal life. As I indicate in the next section, this is the mistake to which the universalist subscribes. Michael Walzer has provided cogent reasons for differential treatment of aliens. According to Walzer:

> The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life. If this distinctiveness is a value,....then closure must be permitted somewhere. At some level of political organization, something like the sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants.[112]

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[110] *Supra*, note 1.

[111] *Supra*, note 85 at 208-35.

[112] M. Walzer, SPHERES OF JUSTICE (New York: Basic Books Inc., 1983) at 39.

But it would be rash to take into account a person's ties to a community when determining what counts as due process, as Martin suggests. Due process clauses define the humane way to treat individuals when decisions affecting their interests are being made. They do not state an ideal about how to achieve the best decision; rather, they state the moral minimum which determination of the particular interest demands, and thereby ensure respect for the person who is subject to the process, whoever that may be. It may be justifiable to grant citizens more than the minimum and retain the minimum for strangers, if one can afford to do so. But the due process standard is not variable according to the vagaries of the economy. It stipulates the moral minimum, which must be respected.

Moreover, to exclude immigrants on grounds which discriminate according to criteria (such as race, age or sex) which would be inappropriate in application to citizens is equally unjustifiable. As Schuck observes, a commitment to liberal principles and values — what I referred to earlier as our commitment to humanism — rules out this option.[113] Liberal communities are founded on the principle that it is not only wrong for us to treat ourselves in that manner, it is also wrong to treat others thus. Moreover, indirect injury from such discrimination pervades the community itself. A racial classification used to exclude aliens also "....fixes a badge of opprobrium on citizens of the same ancestry."[114]

Regulations which deny entry to applicants on the ground that they have expressed ideas of which the government disapproves, but which it is willing to tolerate from residents, provide a harder case, because the grounds for recognizing freedom of expression are not so clear. If one connects self-expression with self-fulfilment, then any such regulation would be characterized as an attack on the very person of the applicant. A humanist would not tolerate such an attack. On the other hand, if one connects the right of free speech to the workings of the democratic institutions of one's community — that they will not function in an atmosphere of censorship and propaganda — then perhaps the right need only be accorded to those who are already resident in the country.

Moreover, it does not follow from the claim that the government has the constitutional right not to admit any aliens,[115] that it can therefore admit aliens according to any criteria or impose any condition for entry

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[113] *Supra*, note 34 at 88.

[114] *Protection, supra*, note 84 at 327. Rosberg appears to adopt the position that it is only because residents suffer harm that discriminatory immigration laws are constitutionally suspect. This commits him to the view that were there no residents who shared the characteristic which is the ground for the exclusion, there would be no breach of the Constitution. This suggests, therefore, that were there no Indonesians resident in the United States, it would be acceptable to exclude all Indonesian applicants. (The counterargument would be that such a racist measure harms all members of minority races resident in the United States.) According to this view, racial tolerance is not, *per se*, a governmental virtue mandated by the Constitution.

[115] This is a claim that I do not accept, but which I shall not challenge here.

that it chooses. Having taken responsibility for the treatment of aliens, the government is committed to ensuring that the treatment is proper, much as the Good Samaritan who offers treatment to an injured party is held legally liable for his or her negligence, but is under no obligation to intervene in the first place.[116]

In sum, if some constitutional provisions reflect the liberal commitment to humanism, their wholesale dilution when applied to strangers is unjustifiable.

D. *Universalism*

The rejection of the "levels of membership" model of constitutional rights might be thought to lead to a universalist approach, according to which, as Neuman states, "constitutional provisions that create rights with no express limitations as to the persons or places covered should be interpreted as applicable to every person and at every place."[117] However, Neuman persuasively counsels against such a move.[118] He relies on two arguments: one historical, the other normative. In pursuing the former, he states:

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[116] *Protection, supra*, note 84 at 331. An interesting side issue is whether the willingness of an applicant to accept a restrictive condition on entry has any bearing on the condition's constitutionality. Rosberg argues forcefully (at 328-30) that a person's willingness to accept as a condition of entry a provision which denied him the right of a fair trial in any future criminal proceedings would not justify withholding that right. One cannot be confident that such a position would be adopted in Canada. In *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1316, 69 C.R. (3d) 97 at 114 [hereinafter *Turpin*], Wilson J. for the Court contrasts statutory and constitutional rights and states:

> I believe, however, that in the case of individual constitutional rights the priorities are different and that an accused cannot be compelled to take advantage of rights intended for his or her benefit even if such rights may have a public interest aspect. I conclude, therefore, that an accused is entitled to waive the benefit of the s. 11(f) right if it is [*sic*] his or her interests to do so.

The strongest argument consistent with this holding but against the attachment of restrictive conditions to admission would be that any consent to such conditions would not be voluntarily given. In *Clarkson* v. *R.*, [1986] 1 S.C.R. 383, 66 N.R. 114, the Supreme Court emphasized that waivers of constitutional rights would not be recognized unless they were voluntary and informed. A second argument would be that rights such as those contained in ss 2, 7 and 15 of the *Charter* cannot be traded or bartered. Unlike the protections relating to the criminal process, which exist for reasons of strategy and are alienable if strategy so requires, the rights in these sections are inalienable, either because they are fundamental to the individual's well-being or because the collectivity has an interest in ensuring that they continue to be respected. Wilson J.'s explicit rejection of reasons of public interest (unless s. 1 is being invoked) in *Turpin* severely limits this form of argument. Furthermore, the paternalism of non-consensual imposition of rights runs counter to the individualistic tone of her judgment.

[117] Neuman, *supra*, note 5 at 916

[118] *Ibid.* at 982-84.

> The universalist's interpretation would transcend the concerns of a single social contract and bind the government to the rules of a just world order, regulating the international use of armed force and injustices arising from the global distribution of wealth. A constitution could serve that function, but nothing in the text or history of the United States Constitution suggests that it offers itself as a solution to this broader problem.[119]

He summarizes the normative argument as follows:

> One may concede that a human being has moral rights against coercion or manipulation by other persons or groups that are not asserting sovereignty over her, and still decline to adopt a universalist approach to the interpretation of constitutional rights. The individual rights provisions of the Constitution do not purport to state moral duties that are owed by all persons and groups; rather, they state more exacting requirements that American citizens considered necessary constraints on the government's exercise of sovereignty.[120]

Neuman seems to be saying that one needs to develop a theory of the scope of moral and political responsibility when interpreting the provisions of a constitution. One must establish, first, the body or bodies on whom duties are imposed. Second, one must determine whether the duties only attach to acts of commission or also to acts of omission. Neuman's solution, that the Constitution only protects individuals against the exercise of the government's sovereignty, is based on a theory of the scope of responsibility which does not embrace acts of omission. The Constitution does not bind the United States to a humanitarian aid policy because the individuals who would benefit from such a policy cannot claim to be subject to an exercise of government sovereignty. Much the same perspective is adopted by those who argue that individuals have no moral duty to provide for strangers who are less well-off, since they fall outside the ambit of one's responsibility.[121] The law of torts is premised on this principle of responsibility. According to this view, there is no moral duty on the rich to redistribute all their wealth to the poor, since the ambit of one's responsibility for providing for others (as opposed to one's responsibility for not harming others) is formed by the personal bonds that one has formed, prior commitments that one has made, or the relationships which one has developed voluntarily or perhaps involuntarily.

As I argued in the preceding section, the stranger, whatever her or his needs, is, by definition, not a person to whom one owes the same

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[119] *Ibid.* at 983.

[120] *Ibid.*

[121] This moral opinion is contentious. For a discussion of moral theories which promote the provision of goods to strangers, *see* Gibney, *supra*, note 84. For an argument that a system of closed borders is morally unjustifiable, *see* J.H. Carens, *Aliens and Citizens: The Case for Open Borders* (1987) 49 REV. OF POLITICS 251. *See also generally* H. Shue, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY (Princeton, New Jersey: Princeton University Press, 1980).

responsibility as one owes to a friend, associate or child. If one accepts that this differentiation exists, then one can reject the universalist's demand that governments provide the same treatment to everyone, without endorsing Neuman's moral stance that there is no moral or constitutional duty to provide goods to strangers. Because it insists on principles of global responsibility which demand that strangers be granted the same treatment as non-strangers, the universalist's approach is as unattractive as the "levels of membership" exclusion of the stranger. Instead of giving a *carte blanche* to governments in their dealings with aliens, it places overwhelming burdens on them. In the next section, I shall develop a more palatable account of government responsibility which avoids these two extremes.

E. *The Authority Argument*

The authority argument can take many forms, some of which are more persuasive than others. Neuman's formulation, which he calls the "municipal law approach", is a clear example:

> To apply a municipal law model, one must specify the sphere of municipal law. The nineteenth century equated this sphere with the territory of the United States, but over time, expanded concepts of United States lawmaking power have led to an expansion in the reach of the municipal law approach. The modern form of this approach presumes the applicability of constitutional rights in three contexts: (i) within United States territory, to all persons, (ii) to citizens of the United States everywhere in the world, and (iii) to aliens outside United States territory *only* in those circumstances in which the United States seeks to impose obligations upon them under United States law.[122]

And further:

> The municipal law approach....extend[s] constitutional rights to aliens abroad only in those situations in which the United States claims an individual's obedience to its commands on the basis of its legitimate authority....[T]he municipal law approach would not limit the seizure of French vessels during a state of limited war; nor would it restrict an ideologically-based policy of aid to foreign political parties.[123]

Neuman explains the rationale of this approach as follows:

> The rationale of the municipal law approach has been the presumption that American constitutional rights and the obligation of obedience to American law go together;....in the absence of contrary indications, the rights and obligations are co-extensive.[124]

One of the more obvious manifestations of Neuman's version of the authority argument, although it has been clothed in the language of

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[122] Neuman, *supra*, note 5 at 919.
[123] *Ibid.* at 982.
[124] *Ibid.* at 977.

"sufficient connection", is the denial of standing to aliens outside the United States who are seeking judicial review of decisions denying them entry.[125] One explanation for the denial of standing is that such individuals differ from, say, the accused in *Verdugo-Urquidez*[126] in that they are making offensive rather than defensive constitutional assertions; that is, the claims of unconstitutional conduct are not made in the course of an action brought against them by the United States government; the applicants are themselves initiating the action.[127] The importance of this distinction was stressed in *Berlin Democratic Club* v. *Rumsfeld.*[128]

In that case the Court held that an Austrian who alleged that the United States Army had illegally wiretapped his telephone in West Berlin had no standing to sue. The Court first distinguished the earlier case of *United States* v. *Toscanino*,[129] which held that non-resident aliens have standing to challenge the constitutionality of government's action abroad "at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States."[130] The Court held that the plaintiff in the case at bar, unlike the accused in *Toscanino*, lacked sufficient connection to the legal system of the United States. This holding is explained as follows:

> [Where]....the United States has the power to, or has in fact imposed the framework of its government process on the non-resident alien....the non-resident alien should be entitled to the advantages of the legal process with which he is forced to deal. When the non-resident alien....is not subjected to its courts....he cannot and should not expect entitlement to the advantages of a United States court....[He] can utilize the laws of his own country to protect himself....He has not been thrust into American courts, or denied application for a benefit which a United States statute provides him. His lack of contact with the American legal system minimizes any expectation or hope that he could utilize that legal system for his protection.[131]

The correlations between this account and Neuman's version of the authority argument are evident. Clearly, this approach to the scope

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[125] *See Chinese American Civic Council* v. *Attorney General*, 396 F. Supp. 1250 (D.D.C. 1975). *See also Note on Consular Nonreviewability*, *supra*, note 46 at 1150-55.

[126] *See supra*, note 34.

[127] *See generally Note on Unalienable Rights*, *supra*, note 52. There, Hunter cites three variables as governing the decisions of lower courts concerning constitutional rights: the status of the individual (whether he or she is a citizen or an alien), the locus of government, and the posture of the claim (whether it is defensive or offensive). Hunter concludes that both aliens and citizens who make defensive claims about government action abroad are likely to receive diluted constitutional protection. This conclusion needs to be re-examined in light of the decision in *Verdugo-Urquidez*, *supra*, note 34. Hunter also states that aliens who make offensive claims about government action abroad will not receive constitutional protection.

[128] 410 F. Supp 144 (D.D.C. 1976) [hereinafter *Berlin Democratic Club*].

[129] 500 F.2d 267 (2d Cir. 1974).

[130] *Ibid.* at 280.

[131] *Berlin Democratic Club*, *supra*, note 128 at 152-53.

of constitutional protection, which emphasizes the coercive nature of a criminal trial, would not bring visa applicants within its ambit. The United States does not claim a visa applicant's obedience to its commands.

But the example of the visa applicant exposes the central problem with this approach, namely, that it is founded on a "command model" of sovereignty, a model which is unjustifiably narrow. Neuman suggests that when a country exerts sovereignty, it must do so by issuing commands which create obligations. This analysis ignores the crucial distinction identified by H.L.A. Hart between primary rules, which create obligations, and secondary rules, which have a host of other functions, including the granting of powers.[132] One can experience the authority of a sovereign when the sovereign makes available benefits but stipulates an application process. This is exactly what happens when an individual is faced by the visa application process. Authority would not be experienced if the application process did not exist — if, for example, the United States made gifts of visas. However, in the application process the individual submits to an inquiry and interview and the application of standards of admission to his or her case. The burden of application is not the burden of obedience; no one is obligated to apply, or having applied, to pursue the application to completion. The United States does not coerce the individual applicant. Nevertheless, the applicant is subject to legal decision-making by an American official; it is this submission to official treatment by a legal process which grounds the recognition of rights.

The alien who has been denied entry is unlike the plaintiff in *Berlin Democratic Club*.[133] Although the United States has not imposed the framework of its government process on the alien, it has ensured that the alien who chooses to seek entry shall experience part of this process — the consular officer's interview and decision. The classification of the visa applicant's constitutional challenge as either offensive or defensive is difficult to make. It seems to fit both categories. On the one hand, it is made in response to a negative decision which has been made against the applicant. On the other, it has not been raised in a case brought by the government against the applicant. The distinction between offensive and defensive challenges is premised on the view, which I have just criticized, that one is only subject to authority when a claim to obedience is being made. The judicial framework is imposed on an individual when the Government contends that the requisite obedience has not been forthcoming. In all other situations, it will be the individual who raises the judicial action.

Furthermore, unlike the plaintiff in *Berlin Democratic Club*, the visa applicant cannot seek protection from his or her own country for administrative abuse which does not amount to a wrongdoing in that country. While the availability of protection from one's own country is

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[132] H.L.A. Hart, THE CONCEPT OF LAW (Oxford: Clarendon Press, 1961).
[133] *Supra*, note 128.

an important point to make, emphasizing as it does the fact that responsibility for remedying all forms of wrongdoing may not lie in the first instance on the judicial branch of the government which did the wrongdoing, it has no bearing on the case of the visa applicant.

Also, the visa applicant has already had contact with the legal system (although not the judicial process) of the country to which he is applying. His or her expectations of protection and fair treatment will be high. These arguments show that the reasons for not allowing standing in *Berlin Democratic Club* do not apply to the visa applicant.

The main thrust of my arguments in this section has been that a broad version of the authority argument can ground an alien's constitutional rights. The argument looks for a nexus between the alien and the relevant government and finds it, not in the limited conception of sovereignty adopted by Neuman, but in the fact that the government makes a process available to the alien. While such a process is non-coercive, there is no reason to suppose that rights can only spring from the exercise of coercive power.

II. Developing a Canadian Doctrine

At this point I would like to take stock and summarize my assessments of the positions that have been adopted by the United States Supreme Court, with a view to developing an approach for adoption in Canada.

Two ideas which have gained widespread support in the United States are non-starters in Canada: the idea that the immigration power is an exercise of sovereign power which is unreviewable on constitutional grounds, and the idea that immigration decisions are non-justiciable. Each of the other arguments which I have canvassed, (the territoriality argument, the "levels of participation" argument, the universality argument and both versions of the authority argument, including the argument about aliens' lack of standing) could be transplanted into Canadian law more or less with ease. However, the criticisms which I have developed reveal all but one version of the authority argument to be unattractive candidates.

Perhaps the most difficult doctrine to transplant is the idea that aliens who are directly affected by a government decision or by the application of a Canadian statute which they believe is contrary to the Constitution, do not have standing to seek a remedy. The American approach of denying standing to aliens such as the plaintiff in *Berlin Democratic Club*[134] is unlikely to be adopted in Canada in the light of recent holdings which have suggested that the initial question to be answered when standing is at issue is whether the plaintiff has a sufficient personal interest in the legality of the action, or has suffered special damage.[135] The visa applicant has an obvious personal interest in the

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[134] *Ibid.*

[135] For a detailed discussion of these holdings, *see Finlay* v. *Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, [1987] 1 W.W.R. 603.

legality of the denial of a visa. The issue of constitutionality is not raised as an abstract question. Instead, it is introduced as part of a claim that an illegal decision has been taken against the applicant. Thus, constitutionality can be used to neutralize the Canadian standing doctrine, although in both *Canadian Council of Churches*[136] and *Ruparel*[137] the judges avoided application of the doctrine altogether and referred instead to the applicant not having a cause of action. There is a clear doctrinal difference between the claim that a person does not have a personal interest or has not suffered special damage, and the claim that the law does not protect this person's interest or does not recognize the damage.

Canada could adopt a territorial standard for the ambit of the *Charter*, but if we did so we would face the irresolvable paradox with reference to citizens who reside abroad which has stymied the United States courts. Either citizens are not protected by the *Charter*, or we abandon the strict territorial standard. The former option promotes a way of looking at the Constitution as a set of guidelines which governs the government's stewardship of a territory. It ignores the existence of Canadian military and consular activities abroad, and renders even citizens susceptible to abuse from these government branches. In rejecting this option, the United States Supreme Court has justifiably concluded that the Constitution regulates the relations between the government and the people. The government's commitment to decency does not end at its borders. Moreover, the very terms of the *Charter* suggest an extraterritorial application. Section 32(1) stipulates that:

> This Charter applies
>
> > (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament.

By connecting this to the holding in *Cain* that there can be extraterritorial jurisdiction,[138] one can conclude that the *Charter* is not limited by the boundaries of Canada.

The idea that citizens outside the country are not protected by the *Charter* was canvassed and dismissed (at least in the circumstances of the case) in *R.* v. *A, B and C.*[139] A was subpoenaed to testify at a criminal trial in Canada. There was a perceived danger from A's testimony to B and C who were Canadian citizens situated outside Canada. An application was brought for a remedy pursuant to section 24(1) of the *Charter*, which would provide some physical protection to B and C. The judge at first instance held that *Charter* remedies were not available to persons living outside the country. In the Supreme Court, Cory J., for the majority held that this decision was an error in the special circumstances of the case. One of these special circumstances was that "[i]t was due

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[136] *Supra*, note 6.
[137] *Supra*, note 10.
[138] *Supra*, note 22.
[139] *Supra*, note 15.

in part to the decision of the R.C.M.P. that B and C found themselves outside Canada when the application was brought."[140] Cory J. is silent on the hypothetical issue of what would be the appropriate decision had this circumstance not existed. As a result, the general question of citizen's rights outside Canada is unaddressed.[141]

In the alternative, the territorial argument could be developed to suggest that a person within the borders of Canada had sufficient connection to the community to be part of that community, and hence was a member of the collective to which the *Charter* applied. Conversely, an alien outside the country would lack such connection and hence lack membership status. As argued above, while this is not a nonsensical argument, it lacks persuasive force. The suggestion that the *Charter* exists only for the benefit of the community denies the humanist aspirations of liberalism. The suggestion that the person who is present within the territory is covered but the person outside is not, implies that only visible victimization by the government is improper. Victimization beyond the country's borders is unseen and therefore, extra-legal. Furthermore, it is difficult to explain how the tie of physical presence without further social interaction is sufficient to justify the grant of membership.

Nothing that I have said in developing this argument in contrast to the "levels of membership" approach entails that the stranger has the same constitutional rights as a citizen or permanent resident. The *Charter* sometimes stipulates that certain rights are guaranteed only to citizens and permanent residents. Furthermore, it is arguable that certain general rights which are granted to "everyone" only apply in the community. The rationale which grounds the right needs to be examined before its ambit can be determined. Thus, in light of the Supreme Court determination that the right of freedom of expression is recognized (among other reasons) as a critical factor in human self-fulfilment,[142] it would be hard to justify immigration laws which excluded aliens who have expressed particular views. Such a holding would have been more coherent had the Supreme Court offered a narrow rationale of the right, emphasizing only the importance of the right to the functioning of Canadian institutions or to the environment of free debate within Canada. Again I stress, my argument is not that some parts of the *Charter* are not self-oriented. Rather, it is that we should not regard them to be fully circumscribed by selfish concerns.

The universalist argument could likewise be borrowed, with Canada adopting the approach that *Charter* rights are vested in everyone whatever their country of origin. As noted, however, such an approach

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[140] *Ibid.* at 998.

[141] In her dissenting opinion, McLachlin J. makes an interesting point. She states that "the issue is not whether Canadians' *Charter* rights exist outside Canada, but the much narrower question of whether the particular remedies sought in this case can be provided outside the country": *ibid.* at 1001.

[142] *See Irwin Toy Ltd* v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577.

ignores the idea that there are limits to the Canadian government's responsibility for problems faced by individuals. Most obviously, the Canadian government is not responsible for violations of the legal rights enunciated in *Charter* sections 10 and 11 arising in foreign proceedings which it has not initiated.[143] Also, where an individual can seek a remedy in his or her own jurisdiction for actions taken by agents of the Canadian government, there is good reason to allow such a solution to eclipse that of seeking a remedy in Canada.

The authority argument, when expressed in broad terms which encompass more than the idea of being obligated by a government's commands, is, I believe, the most persuasive account of the extraterritorial ambit of constitutional protection. It succeeds in holding a middle position between the "levels of membership" argument, which relies on a diluted conception of community, and a universalist argument, which relies on a utopian conception of the global responsibility of each state government. This version of the authority argument is the most compatible with the wording of section 32(1). By recognizing that the

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[143] This point is articulated clearly by the Supreme Court of Canada in the Extradition Trilogy. *See Canada* v. *Schmidt*, [1987] 1 S.C.R. 500, 76 N.R. 12 [hereinafter *Schmidt* cited to S.C.R.]; *Argentina* v. *Mellino*, [1987] 1 S.C.R. 536, 52 ALTA. L.R. (2d) 1; *United States* v. *Allard*, [1987] 1 S.C.R. 564, 40 D.L.R. (4th) 102. In each of these cases, the majority held that s. 11 of the *Charter* does not apply to extradition hearings. In *Schmidt*, La Forest J., for the majority writes at 518: "There can be no doubt that the actions undertaken by the Government of Canada in extradition as in other matters are subject to scrutiny under the *Charter* (s.32). Equally, though, there cannot be any doubt that the *Charter* does not govern the actions of a foreign country;....In particular the *Charter* cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted."

Extradition cases pose the fascinating question of when the Canadian government is implicated in the actions of another government. In the recent case of *Kindler* v. *A.G. (Canada)*, [1991] S.C.J. No. 21321 (full transcript available through QL Systems), McLachlin J. addressed this issue directly. One of the questions before the court was whether the decision to surrender a fugitive to the United States under s. 25 of *The Extradition Act*, constituted the imposition of cruel and unusual punishment if the fugitive could be sentenced to capital punishment. McLachlin J. stated,

> The punishment, if any, to which the fugitive is ultimately subject will be punishment imposed not by the government of Canada, but by the foreign State. To put it another way, the effect of any Canadian law or government act is too remote from the possible imposition of the penalty complained of to attract the attention of s.12 [of the *Charter*].

See ibid at 54-55. This response, while imposing a clear and certain test, does not reflect the criteria of responsibility found in the *Criminal Code* by which is determined who is a party to a criminal offence. One can question whether there is inconsistency (or perhaps even hypocrisy) in holding that the government is not implicated in the imposition of punishment inflicted by another state on a surrendered person, while at the same time holding that a person can be guilty of a criminal offence in Canada when he or she does something for the purpose of aiding the person who actually commits the offence. I would suggest that McLachlin J. too readily grasps onto the concept of remoteness, and should have considered instead the legal principles of group and relational responsibility.

authority of the Canadian government can penetrate beyond the boundaries of the country, the argument is firm in its contention that it is to the exercise of that authority that *Charter* protections apply.

This version of the argument clearly grants a cause of action to the visa applicant who is confronted with allegedly unconstitutional authority by a visa officer in the denial of a visa. If the *Charter* proscribes the use of a criterion in making this determination, the applicant who is subject to the operation of the Canadian legal process should have access to judicial review. Having established a formal process of application, the government has bound itself to ensuring that the process adheres to the substantive and procedural standards enunciated in the *Charter*. Unlike the other arguments which I have considered, and unlike the position which has recently been articulated in the Federal Court of Appeal in *Canadian Council of Churches*[144] and *Ruparel*,[145] the authority argument not only takes seriously the benefit that is at stake, it also takes account of the seriousness of that benefit for the individual.

III. Conclusion

When attempting to articulate the constraints which the *Charter* has placed on government decision-makers, the Supreme Court has frequently vacillated between talking about the rights of the individual and talking about the rights of the citizen. For example, in *McKinney* v. *University of Guelph*,[146] Wilson J. states that "those who enacted the *Charter*....[set] out basic constitutional norms rooted in a concern for individual dignity and autonomy which government should be compelled to respect when structuring important aspects of citizens' lives."[147] Such vacillation is of little import when nothing rests on it. In *Singh*,[148] where the distinction counted, the Court was attuned to it. Nevertheless, *Singh's* ambiguous emphasis on the location of the appellant, left hanging some loose threads which may be woven together in different ways to form very different constitutional patterns. In this paper, I have argued that the weaving which presents the Canadian constitutional project in its best light is one which recognizes that the responsibility of its government is unbounded by international borders and driven by concern for people, not just "*the* people". I have attempted to promote the idea that a foreigner's experience of the Canadian legal system, wherever it may occur, should be blanketed in protection. When the blanket is unavailable from his or her own country, it is the responsibility of the Canadian government to provide it.

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[144] *Supra*, note 6.
[145] *Supra*, note 10.
[146] [1990] 3 S.C.R. 229, 76 D.L.R. 545 [hereinafter cited to D.L.R.].
[147] *Ibid.* at 583.
[148] *Supra*, note 1.