I. RIGHTS FOR FOREIGN INVESTORS

Designed by U.S. negotiators to protect U.S. investors from arbitrary treatment by Mexican authorities, Chapter 11’s substantive provisions of the North American Free Trade Agreement (NAFTA) create a wide zone of autonomy into which host states may not intrude. Thus, chapter 11 forbids the NAFTA Parties to treat each others’ investors unfairly, and there are similarities between these provisions and the liberty rights guaranteed by the principal human rights instruments, the Chapter 11 can be described as a human rights treaty or a bill of rights for foreign investors.¹

It is clear that NAFTA’s chapter eleven establishes a special privilege for other countries’ investors—in this case Mexico and Canada. And since the beginning, the NAFTA chapter eleven in its B section was designed to give foreign investments more favorable treatment than national investments, due to the expectation that doing so would attract more foreign investments to the country.

The government of the United States has ratified the NAFTA agreement and the following articles are law of the land.

Article 1101: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:

   (a) investors of another Party;
   (b) investments of investors of another Party in the territory of the Party; and
   (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party…

We have to pay special attention to section 1 of this article because here it sets forth a number of rights to investors of another party. This can be read as investors of Mexico or Canada, excluding the investors of the United States.

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.
4. For greater certainty, no Party may:

   (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or
   (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

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2 http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=160#A1101
3 http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=160#A1102
Discriminating against your own: NAFTA’s investment chapter

In this article the framers of this chapter advocate treating foreign investors no less favorably than the treatment given to its own, however they never explicitly propose giving the foreign investor a more favorable treatment.

Article 1115: Purpose

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.4

Here, we can see the concerns the framers of this chapter held regarding the equal treatment among investors of the Parties, but what about the equal treatment between the foreign investors and the national investors? We have to notice that the tribunal set forth to settle the disputes arose under this chapter is bound by the qualification of being impartial, —apparently— in contrast with the national tribunals of each Party, which often lack such impartiality.

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

   (a) Section A or Article 1503(2) (State Enterprises), or
   (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

When a Party that can means the government (Federal or State) breach an obligation under paragraph a) and b) a foreign investor has the right to submit to arbitration the dispute.5

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4 http://www.nafta-sec-ala.org/DefaultSite/index_e.aspx?DetailID=160#A1115
5 http://www.nafta-sec-ala.org/DefaultSite/index_e.aspx?DetailID=160#A1116
Article 1121: Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party…

Finally in this part, we understand that, in order to have the right to submit to arbitration the disputing foreign investor must first waive their right to proceed before a court of the Party, which follows that, the foreign investor has the right to choose the jurisdiction in which he will pursue the dispute.

Article 1123: Number of Arbitrators and Method of Appointment

Except in respect of a Tribunal established under Article 1126, and unless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

Amongst the members of NAFTA, only the United States is member of the International Centre of Settlement of Investment Disputes (ICSID). The Convention entered into full force in the U.S. on October 14th 1966; Canada signed the Convention on December 15th 2006, but the instrument is not ratified yet: Mexico, on the other hand, has not signed the Convention, that’s why the ICSID Convention can not be applied in the context of NAFTA, because this instrument only operates if the two parties in conflict are members of the ICSID. When only one of the parties in conflict is a member of ICSID, the two parties can use the Additional Facility in

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6 http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=160#A1121
7 http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=160#A1123
order to establish an arbitral tribunal. Hence, when the United States is part of an investment conflict under NAFTA, the Additional Facility or the UNCITRAL rules of arbitration are always applied; the first document establishes in its article 6 of the Schedule Rules (Arbitration Rules) that:

(1) In the absence of agreement between the parties regarding the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties, all in accordance with Article 9 of these Rules.

(2) Upon the dispatch of the notice of registration of the request for arbitration, the parties shall promptly proceed to constitute a Tribunal.

(3) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

(4) If the Tribunal shall not have been constituted within 90 days after the notice of registration of the request for arbitration has been dispatched by the Secretary-General, or such other period as the parties may agree, the Chairman of the Administrative Council (hereinafter called the “Chairman”) shall, at the request in writing of either party transmitted through the Secretary-General, appoint the arbitrator or arbitrators not yet appointed and, unless the President shall already have been designated or is to be designated later, designate an arbitrator to be President of the Tribunal.

(5) Except as the parties shall otherwise agree, no person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute or as a member of any fact-finding committee relating thereto may be appointed as a member of the Tribunal.\(^8\)

On the other hand, the article 7th the UNCITRAL rules establish that:

If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.

2. If within thirty days after the receipt of a party’s notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:

\(^8\) [http://www.worldbank.org/icsid/facility/partD-chap03.htm#a06](http://www.worldbank.org/icsid/facility/partD-chap03.htm#a06)
(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or
(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.  

As we can see in article 1123 of NAFTA, in article 6 of the Schedule Rules (Arbitration Rules), and in article 7th of the UNCITRAL rules, a more democratic system is established, having a clear interest in achieving justice through a representative and impartial tribunal. The arbitration is a forum of dialogue where the parties can argue one on one in a horizontal relation, something that never occurs in a regular Court.

Sometimes, the claimants can be seen as villains who have pushed Chapter 11 beyond its intended scope, transforming a defensive tool into an offensive weapon that threatens the capacity of governments to regulate in the public interest. Although certain claims may strain the bounds of legitimacy, the problem lies not in the perverse appetites of investors but in the treaty’s indeterminate text.

The broad, vague, or uncertain provisions of chapter 11 leave abundant room for interpretive debate about the jurisdiction of tribunals, the scope of the chapter's coverage and the type of conduct prohibited or required by substantive disciplines.

Faced with this degree of textual indeterminacy, chapter 11 claimants have predictably, and quite rationally, interpreted ambiguities to their greatest advantage. Chapter 11 creates uniquely high levels of legal protection for cross-border investment, wrapped into a single package. This argument suggests that chapter 11 provides unlimited access to an international forum for attacking all democratically-adopted measures that interfere with the performance of investments. The NAFTA’s investment chapter has given foreign investors direct access to

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binding denationalized adjudication of any governmental measure that interferes with their ample rights. The NAFTA’s major innovation in the service of corporate empowerment was to extend investors’ rights to include the capacity of a firm to challenge a host government’s legislation for virtually any measure that jeopardizes the company’s profitability. Chapter 11 embraces all measures relating to investors and investments.

To depoliticize investment disputes and to level the playing field between foreign investors and host states, chapter 11 commits investment disputes to the process of international commercial arbitration under the additional facility rules or the UNCITRAL rules, which is a mechanism more politically and procedurally neutral than either host state courts or foreign gunboats.10

On the other hand, NAFTA’s investment chapter set forth ad hoc tribunals to settle a dispute, and these ones are determined by the commercial arbitration model, which implies that the hearings and documents of the processes are confidential. This secrecy principle is against more democratic processes guided by principles of transparency. That’s why chapter 11’s ad hoc tribunals may seem illegitimate because they do not serve the fundamental values of accountability, transparency, and democratic participation, but in the view of the corporations, this is one more right established in its own Bill of Rights. Even if the scope of this document is not to establish the convenience of one or other sort of tribunal, whether jurisdictional or arbitral, this secrecy of the ad hoc tribunals is another ground to state that the treatment given under the NAFTA to the foreign investors is different from the treatment for the national investors, and therefore unequal and discriminatory.

II. THE BILL OF RIGHTS

In U.S. society, liberty represents the primary need, and governmental interference represents the principal threat. While the Declaration of Independence recognizes that all men are created equals, the concept of equality does not appear in the original constitution or the bill of rights. To the contrary, it appeared only in the reconstruction amendments and then applied only to the states. Much more time passed before women received the franchise, later still, the Supreme Court formally abolished racial segregation and, by sleight of hand, extended the constitutional requirement of equal protection to the federal government.

The constitution contains two sources of equal protection theory: the equal protection clause of the Fourteenth Amendment and the due process clause of the Fifth Amendment. The essence of the guarantee of equal protection is that, while government may, of necessity, classify people and activities in order to promote the general welfare, those persons and activities which are similarly situated must be similarly treated by law. Under the Constitution, state actions or classifications deemed to violate equal protection standards are challenged under the Fourteenth Amendment, while actions of the federal government are challenged under the Fifth Amendment. The Court has taken the position that equal protection analysis under both of the amendments is substantially the same.

Under early equal protection theory, a reviewing court would uphold a law against an equal protection attack if the classifications created by it were not arbitrary or wholly irrelevant to the achievement of a legitimate governmental objective, for example, in *Royster Guano Co. v. Commonwealth of Virginia*\(^\text{11}\), the Court held that classifications must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Early judicial analysis was extremely deferential to legislative pronouncement. If any state of facts could be reasonably conceived by the reviewing court to justify a law’s classification, the law was held to be rationally related to the achievement of the governmental purpose and was upheld. Because the courts came to describe the required congruence between the government objectives and the means chosen to attain those objectives as a rational relationship, the analysis came to be known as the rational basis test. A second category of equal protection analysis appears when equal protection claims involve racial classifications. In this case, the claims must be examined under a more stringent standard of review due to the fact that such classifications were generally irrelevant to any legitimate governmental objective. In *Korematsu v. United States*\(^\text{12}\) the Court stated that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect and courts must subject them to the most rigid scrutiny. Government actions creating suspect classifications based upon race or ethnic origin, or classifications thought by the Court to impinge upon the exercise of fundamental constitutional rights will trigger the strict scrutiny test. Upon the invocation of strict scrutiny, legislative classifications are upheld only if necessary.

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\(^{11}\) 253 U.S. 412; 40 S. Ct. 560; 64 L. Ed. 989; 1920 U.S.

\(^{12}\) 323 U.S. 214; 65 S. Ct. 193; 89 L. Ed. 194; 1944 U.S.
to achieve a compelling governmental objective. It will be upheld only if no less restrictive alternative is available to reach the governmental end.

During 1970’s the Justice Marshall court developed the so-called spectrum or sliding analysis where three factor were taken into account in order to upheld or not the challenged legislation: the character of the classification in question; the relative importance to the individuals in the class discriminated against the government benefit they do not receive due to the operation of the challenged act; and the asserted state interests offered in support of the classification. It is necessary, for the analysis of legislation against the equal protection clause, to have into account the level of scrutiny that the court will use, what means, how the principles of equality will become reality in a practical level.\textsuperscript{13}

\textbf{III. THE FIFTH AMENDMENT}

The Fifth Amendment States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.\textsuperscript{14}

In \textit{Bolling v. Sharpe}\textsuperscript{15} the Supreme Court cut from whole cloth the doctrine that the due process clause of the Fifth Amendment has an equal protection component that renders principles of equal protection applicable to the federal government. Maybe because \textit{Bolling} was decided the same day as \textit{Brown v. Board of Education}\textsuperscript{16}; the one time coexistence of slavery with the Fifth Amendment’s Due process Clause, and the weak reasoning of the Court based on the fact that the Constitution would impose lesser duty upon the federal government with respect to racial discrimination than it does upon the States were unthinkable;


\textsuperscript{14} \url{http://caselaw.lp.findlaw.com/data/constitution/amendment05/}

\textsuperscript{15} 347 U.S. 497 S. Ct. 693; 98 L. Ed. 884; 1954 U.S.

\textsuperscript{16} 347 U.S. 483; 74 S. Ct. 686; 98 L. Ed. 873; 1954 U.S.
the conventional account is that the decision was therefore essentially political rather than judicial.\footnote{Rubin, Peter, “Taking its proper place in the constitutional canon: Bolling v. Sharpe, Korematsu, and the equal protection component of Fifth Amendment due process”, Virginia Law Review, Virginia, vol. 92, 2006, pp. 1879-1897.}

The Supreme Court has concluded that the Fifth Amendment’s due process clause prohibited arbitrary discrimination by the federal government, in 1975 the Court announced in the context of the treatment of aliens by the federal government:

> Although the fifth and fourteenth amendments require the same type of analysis… the two protections are not always coextensive. Not only does the language of the two amendments differ, but more importantly there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.\footnote{Hampton v. Mow Sun Wong, 426 U.S. 88, 100; 1976 U.S.}

The \textit{Bolling v. Sharpe} case didn’t create the doctrine of the equal protection component in the Fifth Amendment but ratified it. In \textit{Truax v. Corrigan}\footnote{257 U.S. 312; 42 S. Ct. 124; 66 L. Ed. 254; 1921 U.S.}, the Chief Justice Taft recognizes that the whole system of law in the United States is predicated on the general, fundamental principle of equality of application of the law, federal discrimination, if completely unjustified, might violate the due process clause of the Fifth Amendment. In \textit{Bolling v. Sharpe} the Chief Justice Warren stated that the Fifth Amendment prohibits arbitrary federal discrimination, the Chief Justice announced that discrimination may be so unjustifiable as to be violative of due process, and he added: In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the federal government.

Once the textual omission of an equal protection clause in the Fifth Amendment was seen as a serious anomaly, then, the Court supplied its interpretive remedy.

What we can see is that the decision, and the principle of Fifth Amendment equal protection on which it rests, are amply justified by text, by structure and by history.

One of the main purposes of the Constitution was to form a new social contract among all the people of the nation. It would trivialize the principle of equal national
citizenship to limit its use to the correction of abuses by the states; the heart of the principle is that citizens have a right to equal treatment by the national government, and the primacy of national citizenship means that in the absence of special concerns about the place of the Congress and the President in the structure of government, the Fifth Amendment’s guarantee of equal protection must be no less protective than the equal protection clause of the Fourteenth Amendment. The Court has noticed that the Fifth Amendment’s due process clause contains an equal protection component prohibiting the United States from invidiously discriminating between individuals and groups.

The decisions on sex discrimination and on illegitimacy illustrate the Court’s consistent practice of treating the Fifth and Fourteenth amendments’ guarantees of equal protection as interchangeable, even when the challenged federal law has nationwide impact. In *Johnson v. Robison*\(^20\) the Court stated that a classification invalid under the equal protection clause of the fourteenth amendment, it is also inconsistent with the due process requirement of the Fifth Amendment.\(^21\)

Much of the growth of our constitutional liberty has resulted when the down-trodden and the disadvantaged have called the rest of us to account, insisting that we live up to our stated principles.

### IV. FOURTEENTH AMENDMENT

On the other hand, the American Constitution establishes in its fourteenth article that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where in they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws…\(^22\)

Before developing our argument we have to examine the historical conditions from which this amendment arose. In doing so, we can better understand the

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\(^{20}\) 151 F.3d 256; 1998 U.S.  
implications and the context of this article, which contains the important equal protection clause. The Thirteenth Amendment, the Black Codes and the Civil rights Act of 1866, gave origin to the Fourteenth Amendment. This amendment was proposed by the thirty-ninth Congress in June 1866 and ratified two years later in July 1868.

It is interesting to see the developmental process of the amendment to the Constitution, especially when considering some author’s claims regarding the diminished legitimacy that the amendment had since its inception. These authors suggest the crisis times that followed the Civil War were determinant in order to avoid some dispositions of the Article V of the American Constitution.

The politic capitis deminutio of the confederate states gave moderates and radicals the unique opportunity to upgrade the Civil Rights Act of 1866 to a constitutional level because this kind of reform needed two thirds of the congress to be approved.

With the implementation in the American courts of the Fourteenth Amendment since the reconstruction period the question of the legitimacy of the Fourteenth Amendment has been buried because in a democratic country the existence of the Equal Protection Clause is necessary in order to defend the citizens against possible abuses by their own government.

School desegregation was a time when a political minority, armed with the prestige of the victory in the Civil War and with military control over the political apparatus of the rebel states, imposed constitutional change on the Nation is the price of reunion, with little regard for popular opinion.23

In another example, the Cold War definitely played an important role in the Brown case, due to the Communists using racism in democratic systems as a platform for garnering more allies, which wasn’t good for the image of the U.S. In other words, political pressure, and societal perception can play and important but not determinant role in the resolutions of the Court.

Brown was made possible by the changes in the interest of white elites, nowadays the things have not changes too much, because the groups of economic power have interest in maintain first class rights for the economics agents, and second class rights for the rest of the humans. We have the opportunity to see if the principle in dubio pro homine will be embraced by the judicial power.

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The Section 1 of the Fourteenth Amendment deals not only with racial discrimination, as in the Brown case, but also with discrimination not pertaining to color. The phrase equal protection of the law is plainly capable of being applied to all subjects of state legislation.

The moderates and radicals reached a compromise permitting them reasonable future advances in the empowerment of human rights. The Fourteenth Amendment looks for giving a practical effect to the declaration of 1776 on inalienable rights, rights which are a gift from the creator, which the law doesn't confer but recognizes. The phrase equal protection of the laws is plainly capable of being applied to all subjects of state legislation.²⁴

Courts always operate within a larger, political, social and cultural context, which makes of the right of chose jurisdiction a non realistic judicial possibility. The Americans must be entitled to all rights and freedoms guaranteed by constitution and exists an illegitimacy of national-origin discrimination per se. In Yick Wo v. Hopkins²⁵ the court explained:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens its provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, color or nationality; and the equal protection of the laws is a pledge of the protection of equal laws. The term person in the Fourteenth Amendment encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both, citizens and aliens to the equal protection of the laws of the State in which they reside.

Under Equal Protection principles, a state retains broad discretion to classify as long as its classification has a reasonable basis but the Court’s decisions have established that classifications based on alienage like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a discrete and insular minority; since an alien as well as a citizen is a person, we hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not reside in the US for a specific number of years violate the Equal Protection Clause. The Court hold that and alien is not really different from a citizen, and that any legislative classification on the basis of alienage is inherently suspect.

The Court holds that a citizen-alien classification is suspect in the eyes of the American Constitution. The statute that classifies aliens on the basis of country

²⁴ Ibidem, p. 960.
²⁵ 118 U.S. 356; 6 S. Ct. 1064; 30 L. Ed. 220; 1886 U.S.
of origin is much more likely to classify on the basis of race. An alien is a person and each aspect of the Fourteenth Amendment reflects an elementary limitation on state power. The equal protection clause was intended to work nothing less than the abolition of all caste and invidious class based legislation.

The phrase within its jurisdiction was intended in a broad sense to offer the guarantee of equal protection to all within a State’s boundaries, and to all upon whom the State would impose the obligation of its laws. Indeed it appears from the debates that congress by using the phrase within its jurisdiction sought expressly to ensure that the equal protection of the laws was provided to the alien population.

Senator Howard said in the 39th Congress in the first session:

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the U.S., but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another… It will, if adopted by the States forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the US and to all persons who may happen to be within their jurisdiction.

Justice Brennan has sustained that:

Use of the phrase *within its jurisdiction* thus does not detract from, but rather confirms the understanding that the protection of the fourteenth amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory

When a categorical preference for American citizens, can’t be justified in terms of immigration and naturalization policy, or as an adjunct to the international bargaining posture, the basis for relaxing the scrutiny otherwise applicable to discrimination against aliens as a class, should not be applied.

Justice Breyer said:

It is well established that certain constitutional protections available to persons inside the US are unavailable to aliens outside of our geographic borders. But once an alien enters the country the legal circumstance changes, for the Due Process Clause applies to all persons within the US, including aliens, whether their presence here is
lawful, unlawful, temporary, or permanent. Indeed, this court has held that the due process clause protects an alien subject to a final order of deportation, through the nature of that protection may vary depending upon status and circumstances\textsuperscript{26}

The U.S. investors are now a groups seeking suspect class status\textsuperscript{27} under the equal protection clause. An equal protection standard provides some guidance as to how much protection must be furnished by looking to the benefits enjoyed by others in society.

\textit{Strauder v. West Virginia}\textsuperscript{28} declared that the Fourteenth Amendment required the law in the states to be the same for the Blacks as for the Whites and that all persons should stand equal before the laws of the states and that no legal discrimination should be made against the colored race because of color. Discrimination \textit{qua} discrimination is not proscribed by the Fourteenth Amendment, merely state action which results in discrimination, but what constitutes state action is not always easy to determine.

The equal protection of the laws provided for in the Fourteenth Amendment operates not only between groups as such but between individuals at large. What is imperative is that the imposition of any disadvantages should be done on a rational, teleological basis which is not constitutionally prohibited; differences in treatment are permissible if based on reasoned considerations.

The equal protection clause prevents states from arbitrarily treating people differently under their laws. Whether any such differing treatment is deemed to be arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected.

At the heart of the American equal protection doctrine, whatever its surface twists and turns, there has always been a recognition of the simple truths that numerical equality is usually impossible and often undesirable, that laws must accordingly differentiate and classify, and that the central question in evaluating them is always whether the classifications are reasonable. Denial of equal justice is still within the prohibition of the Constitution, what is clear is that the purpose of the equal protection clause is to secure every person against distinctions which are arbitrary, irrelevant, unreasonable, irrational or invidious.

\textsuperscript{26} Brest, Paul, et al., nota 23, pp. 1158-1174.
\textsuperscript{27} In \textit{University of California Regents v. Bakke}, Justice Brennan enumerated the traditional indicia of suspectness 1) a class saddled with disabilities, or 2) subjected to a history of purposeful unequal treatment, or 3) relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.
\textsuperscript{28} 100 U.S. 303; 25 L. Ed. 664; 1879 U.S.
It has been held that there can be no equal justice where the kind of trial a man gets depends on the amount of money he has (Harper v. Virginia State Board of elections\textsuperscript{29}/Williamson v. Lee Optical\textsuperscript{30}/Skinner v. Oklahoma\textsuperscript{31})\textsuperscript{32} and in the discrimination against U.S. nationals the American government is discriminating a group of people that have no access to foreign markets, they are little or medium size enterprises which don’t export capital. Thus, we sustain that the amount of capital that a person has, shouldn’t be correlative with the amount of rights.

In order to applied correctly the principles established under the equal protection clause, the Supreme Court developed a rigid two-tiered method of analysis, under this methods statutory language which employed a suspect classification, including those based on race and national origin as we can see in Korematsu v. United States, or which affected a fundamental right was subject to strict judicial scrutiny. To survive the strict scrutiny test, a statutory scheme had to be absolutely necessary to further a compelling state interest; that is, the scheme had to constitute the least drastic means of satisfying that interest and had to be precisely drawn in light of its purpose, in contrast, statutory language which neither employed a suspect classification nor affected a fundamental right was upheld if it conceivably bore a rational relationship to any constitutionally permissible governmental objective. Legislation rarely withstood the rigors of strict scrutiny, but almost always satisfied the limited criteria of rational basis review. It’s important to notice that Court has applied the rational relationship test particularly in the social and economic fields not affecting Bill of Rights guarantees.

In five decisions since 1971 the Burger Court held that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny, regardless of whether or not a fundamental right is impaired. The rationale for making alienage a suspect classification was that aliens as a class are a prime example of a discrete and insular minority for whom such heightened judicial solicitude is appropriate. In Griffiths\textsuperscript{33} the Court reiterated that alienage was a suspect classification and employed strict scrutiny.

In Examining Board of Engineers v. Flores de Otero\textsuperscript{34} seven Justices again relied on the strict scrutiny test and invalidated a Puerto Rico statute which ex-

\textsuperscript{29}383 U. S. 663; 86 S. Ct. 1079; 16 L. Ed. 2d 169; 1966 U.S.
\textsuperscript{30}348 U.S. 483; 99 L. Ed. 563, 75 S. Ct. 461; 1955 U.S.
\textsuperscript{31}316 U.S. 535; 62 S. Ct. 1110; 86 L. Ed. 1655; 1942 U.S.
\textsuperscript{33}96 Cal. App. 4\textsuperscript{th} 757; 117 Cal. Rptr. 2\textsuperscript{nd} 445; 2002 Cal. App.
\textsuperscript{34}426 U.S. 572; 96 S. Ct. 2264; 49 L. Ed. 2d 65; 1976 U.S.
cluded aliens from private practice as civil engineers, although a Puerto Rico statute was involved, the Court did not resolve the question of whether Fifth or Fourteenth Amendment equal protection was at issue, holding that regardless of which amendment was applicable, the statute was blatantly unconstitutional. An equal protection analysis under the Fifth Amendment, while similar to one under the Fourteenth Amendment, may differ from a Fourteenth Amendment equal protection analysis because of the different interests of the state and federal governments.\footnote{Holland, Robert, “Fourteenth amendment equal protection and alienage-based discrimination in the appointment of state police officers”, \textit{Southwestern Law Journal}, Estados Unidos, vol. 32, Noviembre de 1978, pp. 1027-37.}

Also in \textit{Nyquist v. Mauclet}\footnote{432 U.S. 1; 97 S. Ct. 2120; 53 L. Ed. 2d 63; 1977 U.S.}, the majority reasserted that classifications based on alienage were inherently suspected and subject to strict scrutiny regardless of whether or not a fundamental right was impaired. In \textit{Foley v. Connelie}\footnote{435 U.S. 291; 98 S. Ct. 1067; 55 L. Ed. 2d 287; 1978 U.S.} the majority decided that the state requirement limiting eligibility for employment as a state trooper to American citizens didn’t violate the equal protection clause of the Fourteenth Amendment, which shows us that in the field of the arguments any statement can be taken as truth if its contextual conditions say so.

\section*{V. FEDERAL LEGISLATION}

“It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may, is caught upon the broad shield of our blessed constitution and our equals laws”.\footnote{Ho Ah Kow v. Nunan. 12 F. Cas. 252; 1879 U.S. App}

\textit{42 U. S. C. Section 1981} provides, in relevant part:

\begin{quote}
All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens…\footnote{http://www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00001981——000-.html} 
\end{quote}
This passage is derived from section 1 of the Civil Rights Act of 1866.

All persons born in the United States... are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude,... shall have the same right... to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings... as is enjoyed by white citizens.

And section 16 of the voting rights Act of 1870.

All persons within the jurisdiction of the United States shall have the same right... to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

These two acts were consolidated in the 1874 codification of federal statutes to form section 1977 of the revised statutes, which eventually became the text of the modern section 1981. Senator William Steward of Nevada introduced the bill, S. 365, to prohibit states from denying to any class of persons the equal protection of the law, in violation of treaty obligations with foreign nations and of section one of the Fourteenth Amendment to the Constitution, the original civil rights bill protected all persons born in the United States in the equal protection of the laws. Thus bill extends it to aliens.

It is clear that the language of the 1870 act, granting its protection to all persons within the jurisdiction of the Unites States, was meant to encompass aliens. While the Supreme Court has never addressed this issue, it has cited section 1981 on three separate occasions while invalidating state laws that discriminated against aliens.

In *Yick Wo v. Hopkins* the Court noted the Fourteenth Amendment applied to aliens and cited what is now section 1981 as implementation of that amendment. In 1874, Congress authorized the codification of federal statutory law, bringing together all statutes and part of statutes which, from similarity of subject ought to be brought together, omitting redundant or obsolete enactments.

Section 1981 codifies the holding in *Runyon v. McCrory* that section 1981 prohibits both private and public discrimination, in *Anderson v. Convoy*, the Court

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40 427 U.S. 160; 96 S. Ct. 2586; 49 L Ed. 2d 415; 1976 U.S.
found that the judiciary committee’s use of the term racial discrimination was not
determinative of congressional intent to exclude aliens from coverage under the
statute. The legislative history makes no mention of alienage discrimination, refer-
ing only to race and national origin discrimination, Congress originally intended
and continues to intend that section 1981 cover national origin groups.

In *Bandhari v. First National Bank of Commerce* the Fifth Circuit upheld that
section 1981 forbids only state discrimination based on alienage, despite the
fact that the same language forbids only both public and private discrimination
based in race; less than two years latter, in *Patterson v. McLean Credit Union*,
the Supreme Court reaffirmed *Jones* and *McGrary*, holding that private racial
discrimination is prohibited under section 1981. The fourth circuit concluded in
*Duane v. GEICO* that section 1981 prohibits private discrimination on the basis
of alienage; in *Anderson v. Convoy* the Court set forth four reasons why section
1981 applies to alienage discrimination: the language, history, and structure of
the statut, as well as the case law addressing alienage discrimination; and in
*Graham* and *Takanashi* the Court set forth that section 1981 prohibits state laws
discriminating on the basis of alienage.

In *Takahashi*, the Supreme Court noted that the protection of section 1981
has been held to extend to aliens as well as to citizens. Consequently the sec-
tion and the fourteenth amendment on which it rests in part protect all persons
against state legislation bearing unequally upon them either because of alien-

age or color.

The Supreme Court has noted that under nineteenth century definitions:

Arabs, Englishmen, Germans, and certain other ethnic groups were not perceived
as members of the same race. Thus, the idea of racial discrimination was much
broader in 1870. This could explain why congress did not feel the need to clarify
more fully its intend to protect aliens from discrimination based on citizenship, as
opposed to its intend to protect aliens against discrimination based on race.41

In *Thomas v. Rohner-Gehrig & co.*, the United States District Court for the
Northern District of Illinois held that 42 U.S.C section 1981 and 1982 afforded no
remedy for national origin discrimination and that Title VII of the Civil Rights Act
of 1964 prohibited employment discrimination against individuals solely because
they were born in the United States.

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41 Ford, Angela, “Private Alienage Discrimination and the reconstruction amendments: the constitutionality of 42
Employees were all born in the United States and were replaced by individuals born in Switzerland or Germany. The Thomas Court defined alienage strictly in terms of legal citizenship status, without regard to ancestry. If the plaintiffs could show they were United States citizens and their replacements were not United States citizens and if 42 U.S.C section 1981 prohibited alienage discrimination, they might have a claim for reverse alienage discrimination under section 1981. The employer’s acts would be considerate reverse discrimination in the sense that most alienage discrimination is in favor of United States citizens and against aliens.

Conceding that Jones limited the scope of sections 1981 and 1982 to racial discrimination, the district court next addressed the plaintiffs’ argument that there can be no distinction between race and national origin in the application of section 1981, although the court dismissed the portions of the complaint based on 42 U.S.C. section 1981 and 1982, it did review cases holding that section 1981 provides a remedy for alienage discrimination.

In Takahashi v. Fish and Game Commission the Supreme Court ruled in favor of Takahashi, holding that section 1981 protected the civil rights of aliens to the same extend that it protected the rights of United States citizens. In Espinoza v. Farah manufacturing Co. the Supreme Court held that the term national origin refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came. Furthermore, the district court noted that the legislative history of Title VII regarding the meaning of national origin indicated that discrimination based solely on birthplace, United States or otherwise, is prohibited.

Based on the Supreme Court definition of national origin and the purpose of title VII, the Thomas court held that the plaintiffs’ complaint was sufficient to state a Title VII cause of action based on national origin discrimination.

Thomas is the precedent that can give to American national investors, seen as a nonminority group, the possibility of claim before the Court or exercise their political influence in the Congress in order to obtain the right to settle their disputes before an arbitral tribunal established by the American laws, because until this moment they are suffering reverse alienage discrimination.

42The Equal Employment Opportunity Commission defined national origin discrimination broadly to mean 1) discrimination based on the country from where an individual or his forebears come, and 2) discrimination against an individual who possesses the cultural or linguistic characteristics common to an ethnic national group.
VI. FINAL CONSIDERATIONS

The textual puzzle of *Bolling* is in fact evanescent. It evaporates when one realizes that societies evolve, and that what once may have seemed or have been said to be rational or legitimate may come to be understood otherwise. Indeed, this ordinary process of societal development presumably underpins the largely unremarked use of the due process clause to evaluate the racial discrimination at issue in *Hirabayashi* and *Korematsu*. And this realization is of course necessarily central to any progressive jurisprudence of the American Constitution.

Only when the legal culture reaches the point of internalizing the legitimacy of interpretive methods that account for the evolution of society’s understanding of what is required by the foundational principles enshrined in the Constitution. Such a change in legal culture would reshape, too, the constitutional canon. *Bolling*, then, might take its place in the canon for the proper reason: not for some supposedly textually insupportable, and hence obviously politically motivated, doctrinal innovation, but for the substance, importance, and correctness of the decision itself.

Thomas grants United States citizens a cause of action under 42 U.S.C. section 1981 for reverse alienage discrimination, thus providing the same protection to white United States citizens who suffer employment discrimination at the hands of foreign management as it does to aliens who suffer employment discrimination at the hands of American employers. Moreover, it gives individuals born in the United States a remedy under Title VII for national origin discrimination.

It is possible to conclude, however, that the court’s continued inability or reluctance to speak in a unified manner regarding claims of reverse discrimination, presents lower courts, program planners and administrators without Supreme Court guidance, an active arena of social change and litigation. It is indeed difficult to find a majority position and rationale in either *Bakke* or *Fullilove*, and anyone bringing or defending a reverse discrimination suit on constitutional grounds is left to pick and choose among the conflicting majority opinions for a position lending support to his own particular case.

The requirement of a compelling governmental interest is, however, necessary to ensure that Congress does not trample the rights of nonminorities to equal protection under the Fifth and Fourteenth Amendments. If nonminorities are to enjoy equal protection under the law, any program that employs a race-based classification must be narrowly tailored. It defies logic to suggest that congress should not be required to use the least intrusive means reasonably available to remedy the identified discrimination.
The Fifth and Fourteenth Amendments command that the rights of nonminorities must be protected from precisely these intrusions by governmental bodies. Strict scrutiny, however, will ensure a proper balancing of the rights of the injured parties against the rights of innocent nonminorities, the Court should also perform its constitutional function of maintaining a check on congress’ power to repress the Amendments’ rights of nonminorities.44

Discrimination is not only an act upon an individual victim, but a set of en-grained institutional preferences that operate to continue to exclude the previously excluded. This exclusion operates not just only individuals, but against individuals as members of a group.

The Nation-State is really the first absolute power in the world and that’s why the creation of systems of power division was needed, as was the creation of the checks and balances system and federalism. Once structured, the State automatically creates a principal system of inclusion and exclusion, in essence, the national-aliens system. The State had to protect the interest of its own nationals but also might give certain minimum standards of juridical security to aliens who were not its subordinates and thus, have minimum responsibilities toward them.

United States has ratified the General Agreement on Tariffs and Trade (GATT), this trade agreement opened the door to NAFTA by establishing article XXIV which allows the possibility of giving preferential treatment to investments and products of some countries without requiring the extension of the same preferences to all the members of the Agreement.

Equality is a complex principle that guarantees that everyone is equal before the law and the spirit of the law itself should reflect this. Someone can argue that the national courts give the American investors access to justice, but this is not the solution, because the foreign investors have access to that forum as well as access to the arbitral panel. It’s true that establishing an arbitral panel under the NAFTA’s chapter eleven for American citizens in a dispute against its own government is not possible, hence the American State must implement a separate but equal arbitral way to settle the dispute against its own nationals in case of expropriation or equivalent measures.

The Congress have the power to enforce the amendments that contain the principle of equal protection by appropriate legislation, treatment of aliens is analogous to treatment of racial minorities. Alienage discrimination may very well be the next topic dominating the constitutional arena concerning civil rights.

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