

1977

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Recommended Citation

Denny Chin, *Aliens' Right To Work: State and Federal Discrimination*, 45 Fordham L. Rev. 835 (1977).
Available at: <https://ir.lawnet.fordham.edu/flr/vol45/iss4/11>

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COMMENTS

ALIENS' RIGHT TO WORK: STATE AND FEDERAL DISCRIMINATION

I. INTRODUCTION

Some 4.1 million¹ resident aliens, comprising approximately two per cent of the American population,² live in the United States today on a permanent basis.³ The pattern of their lives on American soil is evidence of the confused, bifurcated history of America's treatment of immigrants.⁴ The image of an open-armed Statue of Liberty welcoming "huddled masses yearning to breathe free"⁵ and the promise of America's unique melting-pot heritage⁶ have been marred by this country's history of prejudice and discrimination against foreigners.⁷

The earlier welcome⁸ and suffrage⁹ which had been extended to aliens

1. In 1973, 4,643,457 aliens reported to the Department of Justice as required by 8 U.S.C. § 1305 (1970). Of these, 4,127,821 were permanent residents. U.S. Dep't of Justice, 1973 Immigration and Naturalization Serv. Ann. Rep., table 34, at 98.

2. The population of the United States as of June 1, 1975 was 213,466,000. U.S. Bureau of the Census, Statistical Abstract of the United States: 1975, table 2, at 5.

3. "The term 'alien' means any person not a citizen or national of the United States." Immigration and Nationality Act, 8 U.S.C. § 1101(a)(3) (1970).

For the purposes of this Comment, the following terms shall be used in the manner prescribed: A "resident alien" is any noncitizen "lawfully admitted for permanent residence" in accordance with the immigration laws of the United States. Id. § 1101(a)(20). A "declarant alien" is one who has signed and filed a declaration of intention to become a citizen of the United States. Id. § 1445(f). A declarant alien is distinguishable from an "applicant alien," who has actually filed a petition for naturalization. Id. § 1445. For the purposes of this Comment, the terms alien and resident alien will be used interchangeably unless otherwise noted.

The process of becoming naturalized is a difficult one. An applicant for naturalization must have resided in the country for at least five years after being admitted for permanent residence. Id. § 1427(a). In addition, there are certain restrictions on ideology, e.g., id. § 1424, and other automatically disqualifying attributes. Id. §§ 1423-27. Applicant aliens also subject themselves to the possibility of personal investigations, id. § 1446, and must "renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen . . ." Id. § 1448(a).

4. See generally J. Higham, *Send These To Me* 78-87 (1975).

5. E. Lazarus, *The New Colossus*, quoted in J. Higham, *Send These To Me* 78 (1975).

6. See generally J. Higham, *Strangers in the Land* 19-23 (1973).

7. See notes 10-13 *infra* and accompanying text.

8. George Washington has been quoted as having once said, "The bosom of America is open to receive not only the opulent and respectable stranger but the oppressed and persecuted of all nations and religions; whom we shall wellcome [sic] to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment." Comment, *The Alien and the Constitution*, 20 U. Chi. L. Rev. 547 (1953); see *In re Griffiths*, 413 U.S. 717, 719 (1973) ("From its inception, our Nation welcomed and drew strength from the immigration of aliens."); J. Higham, *Strangers in the Land* 18 (1975); M. Konvitz, *The Alien and the Asiatic in American Law* 1 (1946).

9. Suffrage with respect to aliens was very liberal in the original thirteen colonies, and all the

virtually disappeared as the 19th century drew to a close.¹⁰ Both the states and Congress imposed or sought to impose a host of restrictions on the rights of aliens in the United States,¹¹ and on occasion this legislative hostility was mirrored by open violence on the part of xenophobic citizens.¹² Anti-alien legislation was particularly prevalent in the employment area, as aliens were barred from a wide spectrum of occupations ranging from constructing sewer basins to driving motorbuses.¹³

original thirteen states allowed aliens to vote. Rosales, *Resident Aliens and the Right to Work: The Quest for Equal Protection*, 2 *Hastings Const. L.Q.* 1029 (1975); see *Minor v. Happersett*, 88 U.S. 162, 172-73, 177 (1874). See generally C. Williamson, *American Suffrage 15-18* (1960). States were free, and still are, either to grant or deny aliens the privilege of voting. Declarant aliens were, in fact, allowed to vote by many states for years. D. McGovney, *The American Suffrage Medley* 49 (1949).

10. In 1875, Congress passed the first immigration statute and provided for the exclusion of prostitutes and convicts. Act of March 3, 1875, ch. 141, 18 Stat. 477. Shortly thereafter, a more general alien exclusion act followed, Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, and Congress also began excluding foreigners on the basis of nationality. Act of May 6, 1882, ch. 126, 22 Stat. 58; Act of July 5, 1884, ch. 220, 23 Stat. 115; Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476. See *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972). The states which had granted voting rights to aliens began to withdraw this privilege in 1848. Arkansas was the last state to disfranchise aliens, doing so in 1926. D. McGovney, *The American Suffrage Medley* 49 (1949). See generally J. Higham, *Send These To Me* 78-87 (1975).

11. E.g., *Patson v. Pennsylvania*, 232 U.S. 138 (1914) (Pennsylvania statute prohibiting aliens from hunting upheld); *In re Lee Sing*, 43 F. 359 (N.D. Cal. 1890) (San Francisco ordinance requiring all Chinese residents to move outside the city or to certain designated areas within the city held unconstitutional); *Juniata Limestone Co. v. Fagley*, 187 Pa. 193, 40 A. 977 (1898) (Pennsylvania statute regulating alien employment by taxing employers and allowing these taxes to be deducted from aliens' wages held unconstitutional). For a discussion of infringements upon aliens' property rights, see W. Gibson, *Aliens and the Law* 46-47 (1940). Federal legislation was also enacted limiting the rights of aliens. E.g., Act of May 5, 1892, ch. 60, § 3, 27 Stat. 25 (affirmative proof of residence required to be produced on request), upheld in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); Act of March 3, 1903, ch. 1012, § 20, 32 Stat. 1218 (deportation procedure); Act of June 29, 1906, ch. 3592, § 15, 34 Stat. 601 (denaturalization procedure).

12. For example, in Los Angeles in 1871, twenty Chinese aliens were killed by gunfire and hanging. R. Daniels & H. Kitano, *American Racism* 39 (1970). And in Wyoming in 1885, twenty-eight Chinese alien strike-breakers were massacred. V. Nee & B. Nee, *Longtime Californ'* 54 (1973). See generally J. Higham, *Strangers in the Land* 25, 48, 89-92 (1973).

13. *Ohio ex rel. Clarke v. Deckerbach*, 274 U.S. 392 (1927) (operating pool halls); *Crane v. New York*, 239 U.S. 195, aff'g 214 N.Y. 154, 108 N.E. 427 (1915) (public works contracts); *Trageser v. Gray*, 73 Md. 250, 20 A. 905 (1890) (selling liquor); *Commonwealth v. Hana*, 195 Mass. 262, 81 N.E. 149 (1907) (peddling goods); *Wright v. May*, 127 Minn. 150, 149 N.W. 9 (1914) (acting as auctioneers); *Miller v. Niagara Falls*, 207 App. Div. 798, 202 N.Y.S. 549 (4th Dep't 1924) (selling soft drinks); *Gizzarelli v. Presbrey*, 44 R.I. 333, 117 A. 359 (1922) (driving motorbuses); *Cornelius v. Seattle*, 123 Wash. 550, 213 P. 17 (1923) (collecting and removing hogfeed). Almost 50 years after it was decided, *Cornelius* was overruled by *Herriott v. Seattle*, 81 Wash. 2d 48, 59, 500 P.2d 101, 108 (1972) (en banc). See also *State v. Montgomery*, 94 Me. 192, 47 A. 165 (1900) (statute barring aliens from peddling goods held unconstitutional). See generally J. Higham, *Strangers in the Land* 46, 72-73, 161-62 (1973).

The right of aliens to hunt and fish to earn a livelihood was also abused, as many states

While some improvement has been attained over the years, the life of an alien in the United States remains in many respects a troubled one.¹⁴ Still shackled by problems with language and unfamiliarity with American customs, deprived of the right to vote¹⁵ and thus lacking "the most basic means of defending themselves in the political processes,"¹⁶ aliens continue to be denied many opportunities to work by both state and federal law. Even today, in certain states resident aliens may not be dentists, manicurists, peddlers, plumbers, or polygraph readers.¹⁷ On the federal level, the law prevents all aliens from applying for some 300,000 federal jobs which become available each year, including such positions as janitor, file clerk or clerk-typist.¹⁸

It is now well-settled that states carry a heavy burden of justification when they seek to discriminate against aliens in employment. Because alienage is a

precluded them from partaking in these activities and others required aliens alone to pay license fees. E.g., *Patson v. Pennsylvania*, 232 U.S. 138 (1914); *Lubetich v. Pollock*, 6 F.2d 237 (W.D. Wash. 1925); *Ex parte Gilletti*, 70 Fla. 442, 70 S. 446 (1915); *Alsos v. Kendall*, 111 Ore. 359, 227 P. 286 (1924) (en banc). *Contra*, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880).

For more in-depth examinations of earlier employment discrimination against aliens, see *W. Gibson, Aliens and the Law* (1940); *M. Konvitz, The Alien and the Asiatic in American Law* (1946); *Rosales, Resident Aliens and the Right to Work: The Quest for Equal Protection*, 2 *Hastings Const. L.Q.* 1029 (1975); *Note, Constitutionality of Restrictions on Aliens' Right to Work*, 57 *Colum. L. Rev.* 1012 (1957).

14. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976); *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 580, 456 P.2d 645, 654, 79 Cal. Rptr. 77, 86 (1969) (en banc). See generally *M. Konvitz, The Alien and the Asiatic in American Law* 148-89 (1946).

15. See notes 9 *supra*, 45 *infra* and accompanying text.

16. *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 580, 456 P.2d 645, 654, 79 Cal. Rptr. 77, 86 (1969) (en banc); accord, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976).

17. The following are examples of state statutes limiting the particular occupation involved to United States citizens or citizens and declarant or applicant aliens: Ala. Code tit. 46, § 7(3) (Cum. Supp. 1973) (certified public accountants); Ariz. Rev. Stat. Ann. § 34-301 (1974) (public works employees); Ark. Stat. Ann. § 72-605 (Supp. 1975) (medical licensees), § 72-1007.1 (1957) (pharmacists); Conn. Gen. Stat. Ann. § 20-261 (Supp. 1977) (manicurists); Del. Code Ann. tit. 24, § 1151 (1974) (oral hygienists); D.C. Code Encycl. Ann. § 2-705 (1966) (podiatrists), § 2-1020 (1966) (architects); Ga. Code Ann. § 84-1411 (1975) (real estate brokers), § 84-1603 (1975) (billiard room operators), § 84-2003 (1975) (peddlers), § 84-3107 (1975) (psychologists); Ky. Rev. Stat. Ann. § 318.040 (1972), as amended, (Supp. 1976) (plumbers), § 320.250 (1972) (optometrists), § 329.030 (1972) (detection of deception examiners), § 330.070 (Supp. 1976) (auctioneers), § 334-050 (Supp. 1976) (speech pathologists or audiologists); La. Rev. Stat. Ann. § 37:761 (1974) (dentists), § 37:970 (1974) (practical nurses), § 37-1272 (Supp. 1976) (medicine practitioners); Neb. Rev. Stat. § 76-406 (1971) (executive officers, managers, majority stockholders of corporations); N.J. Stat. Ann. § 45:8-35 (1963) (professional engineers and land surveyors); N.M. Stat. Ann. § 67-11-16 (1974) (veterinarians), § 67-33-14 (1974) (private investigators); N.Y. Exec. Law § 215(3) (McKinney Supp. 1976) (state troopers); N.D. Cent. Code § 43-25-07 (Supp. 1975) (masseurs); Okla. Stat. Ann. tit. 59, § 805 (1971) (electrologists), §§ 1305, 1307 (1971) (bail bondsmen and runners); Ore. Rev. Stat. § 703.090 (1975) (polygraph examiners); Pa. Stat. Ann. tit. 63, § 642 (Supp. 1976) (poultry technicians), § 906 (1968) (landscape architects); Wash. Rev. Code Ann. § 18.18.050 (Supp. 1975) (cosmetologist).

18. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 91-92 (1976).

suspect classification with respect to states,¹⁹ statutes which bar aliens from certain types of employment are subject to strict scrutiny²⁰ and a state must demonstrate some overriding public or governmental interest to justify such a classification.²¹ In addition, a state must choose a means to pursue that purpose which does not unnecessarily burden constitutionally protected activity.²² The federal government, on the other hand, has not been required to show a compelling interest to sustain its classifications against aliens. For reasons to be discussed, it has been able to discriminate in ways which would clearly be unconstitutional if engaged in by the states.²³

Several recent decisions addressing the issue of aliens' right to work indicate that the suspect class status of alienage is slowly eroding. As a result, it is possible that state action against aliens will no longer be strictly scrutinized, an eventuality perhaps accelerated by developments on the federal level. This Comment will examine these developments and the efforts of the courts to develop a standard for reviewing the rights of aliens to work.

II. STATE DISCRIMINATION

In 1886, in *Yick Wo v. Hopkins*,²⁴ the Supreme Court ruled that aliens were "persons" within the meaning of the equal protection clause of the fourteenth amendment.²⁵ Some sixty years later, in *Takahashi v. Fish and Game Commission*,²⁶ the Court held that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."²⁷ These two landmark decisions provided a catalyst for the elevation of alienage to suspect class status;²⁸ consequently, states which discriminate

19. See notes 24-29 *infra* and accompanying text.

20. See *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948). In *Korematsu*, the Supreme Court upheld Civilian Exclusion Order No. 34, which directed the exclusion of all persons—including citizens—of Japanese ancestry from prescribed West Coast areas. Civilian Exclusion Order No. 34 was based on Exec. Order No. 9,066, 3 C.F.R. 1092 (1938-43 comp.), which remained a valid law until February 19, 1976, when it was officially repealed by Presidential Proclamation No. 4,417, 41 Fed. Reg. 7741 (1976).

21. See *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) ("overriding statutory purpose" required to sustain statute embodying racial classification).

22. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

23. See pt. III *infra*.

24. 118 U.S. 356 (1886).

25. *Id.* at 369. This concept has been extended and today aliens lawfully within the United States are "invested with the rights guaranteed by the Constitution to all people within our borders." *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring). It is also well settled that lawfully admitted aliens are "persons" within the meaning of the fifth amendment of the Constitution, and thus they may not be deprived of "life, liberty, or property without due process of law." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953).

26. 334 U.S. 410 (1948).

27. *Id.* at 420.

28. See *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a 'discrete and

on the basis of alienage must demonstrate a compelling interest to justify the classification.²⁹

The compelling interest test has proved to be a heavy burden indeed. Research has uncovered only one recent case in which a state statute limiting employment eligibility to citizens has been upheld.³⁰ In the great majority of cases, the courts struck down such statutes by holding that the states involved did not demonstrate a compelling state interest sufficient to justify a classification on the basis of alienage.³¹ In other cases, the court acknowledged the existence of a compelling state interest, but held the statutes void because the classification bore no rational relationship to achieving that interest,³² or the statute was too broad and its goals could be accomplished through less burdensome means.³³

Today, a state's interest in preserving jobs for citizen workers as opposed to

insular' minority . . . for whom such heightened judicial solicitude is appropriate.") (citation omitted).

29. See notes 20-22 *supra* and accompanying text.

30. *Foley v. Connelie*, 419 F. Supp. 889 (S.D.N.Y. 1976) (three-judge court), appeal filed, 45 U.S.L.W. 3449 (U.S. Dec. 20, 1976) (No. 76-839). See notes 62-65 *infra* and accompanying text.

31. *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 605-06 (1976) (engineers, architects and surveyors); *C.D.R. Enterprises, Ltd. v. Board of Educ.*, 412 F. Supp. 1164, 1170-71 (E.D.N.Y. 1976) (three-judge court), *aff'd sub nom. Lefkowitz v. C.D.R. Enterprises, Ltd.*, 97 S. Ct. 721 (1977) (public works employees); *Mohamed v. Parks*, 352 F. Supp. 518, 520 (D. Mass. 1973) (municipal employees); *Arias v. Examining Bd.*, 353 F. Supp. 857, 861-62 (D.P.R. 1972) (three-judge court) (refrigeration and air conditioning technicians); *Teitscheid v. Leopold*, 342 F. Supp. 299, 303 (D. Vt. 1971) (state employees); *Raffaelli v. Committee of Bar Examiners*, 7 Cal. 3d 288, 295-96, 303-04, 496 P.2d 1264, 1269-70, 1275, 101 Cal. Rptr. 896, 901-02, 907 (1972) (en banc) (attorneys).

32. *In re Griffiths*, 413 U.S. 717, 724 (1973) (attorneys); *Surmeli v. New York*, 412 F. Supp. 394, 397 (S.D.N.Y. 1976), petition for cert. filed, 45 U.S.L.W. 3588 (U.S. Feb. 22, 1977) (No. 76-1163) (physician after ten years of practice); *Miranda v. Nelson*, 351 F. Supp. 735, 739 (D. Ariz. 1972) (three-judge court), *aff'd mem.*, 413 U.S. 902 (1973); *In re Park*, 484 P.2d 690, 692-95 (Alas. 1971) (attorneys); *Arizona State Liquor Bd. v. Ali*, 27 Ariz. App. 16, —, 550 P.2d 663, 670 (1976) (liquor licensees); *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 580-81, 456 P.2d 645, 654-55, 79 Cal. Rptr. 77, 86-87 (1969) (en banc) (public works employees); *Sundram v. Niagara Falls*, 77 Misc. 2d 1002, 1005, 357 N.Y.S.2d 943, 946 (Sup. Ct. 1973), *aff'd mem.*, 44 App. Div. 2d 906, 356 N.Y.S.2d 1023 (4th Dep't 1974) (taxicab drivers); *Herriott v. Seattle*, 81 Wash. 2d 48, 61-63, 500 P.2d 101, 109-10 (1972) (en banc) (state civil service transit operators).

33. The courts have been highly critical of blanket prohibitions against alien employment, statutes neither "narrowly confined" nor "precisely drawn" which "sweep . . . indiscriminately" against aliens by restricting jobs to citizens only. *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973); accord, *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 606 (1976); *In re Griffiths*, 413 U.S. 717, 725 (1973); *Norwick v. Nyquist*, 417 F. Supp. 913, 921-22 (S.D.N.Y. 1976) (three-judge court), appeal filed, 45 U.S.L.W. 3437 (U.S. Dec. 11, 1976) (No. 76-808); *Raffaelli v. Committee of Bar Examiners*, 7 Cal. 3d 288, 292-93, 496 P.2d 1264, 1267, 101 Cal. Rptr. 896, 899 (1972) (en banc). See also *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976). Such overly broad statutes unnecessarily deny aliens their right to work because there are less burdensome means of achieving the states' goals. One of the means termed less burdensome by the courts is determining the fitness of an applicant for a particular job on a case-by-case basis through the usual application and interviewing procedures of the hiring process. *In re Griffiths*, 413 U.S. 717, 725-27 (1973); *Norwick v. Nyquist*, 417 F. Supp. 913, 921-22 (S.D.N.Y. 1976), appeal filed, 45 U.S.L.W. 3437 (U.S. Dec. 11, 1977) (No. 76-808).

resident alien "competitors" no longer seems to be a compelling interest.³⁴ The competition which alien labor presents is minimal because resident aliens constitute such a small percentage of the population.³⁵ In addition, the immigration laws already protect the American work force by requiring that aliens entering the country for the purpose of seeking employment first obtain certification that they will neither create additional competition where job scarcity exists nor adversely affect the wages and working conditions of American labor.³⁶ To allow a state to further discriminate against aliens under the guise of protection for American workers is to unnecessarily and unjustifiably subject them to a form of "double jeopardy" in employment. Aliens pay taxes to the states in which they reside. It is thus "manifestly

34. One of the theories upon which the earlier cases upheld statutory prohibitions of alien employment was that the state, as guardian and trustee for its people, had the right and duty to control the expenditure of public funds and to conserve natural resources. *Heim v. McCall*, 239 U.S. 175, 191 (1915); *Patson v. Pennsylvania*, 232 U.S. 138, 145-46 (1914); *People v. Crane*, 214 N.Y. 154, 160, 108 N.E. 427, 429-30, *aff'd*, 239 U.S. 195 (1915); *Alsos v. Kendall*, 111 Ore. 359, 371, 227 P. 286, 289 (1924) (en banc). But see *People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (1936) (en banc); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922), wherein the courts held that statutes barring aliens from possessing firearms to hunt game were unconstitutional, since the real design was to prevent aliens from bearing arms for any reason. *Accord*, *People v. Rappard*, 28 Cal. App. 3d 302, 104 Cal. Rptr. 535 (2d Dist. 1972).

In the context of welfare assistance, the Supreme Court recently held that a state's "concern for fiscal integrity" does not warrant classifications in favor of citizens against aliens, and that a state's desire "to preserve limited welfare benefits for its own citizens" is therefore not a compelling state interest. *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971). Courts have similarly held that this economic concern is not a compelling interest in the employment area. *Arias v. Examining Bd.*, 353 F. Supp. 857, 861-62 (D.P.R. 1972); *Teitscheid v. Leopold*, 342 F. Supp. 299, 303 (D. Vt. 1971); *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 581, 456 P.2d 645, 655, 79 Cal. Rptr. 77, 87 (1969) (en banc); *Herriott v. Seattle*, 81 Wash. 2d 48, 60-63, 500 P.2d 101, 109-10 (1972) (en banc).

35. See notes 1 and 2 *supra* and accompanying text. With respect to illegal aliens, however, concern over their impact on the American economy has been expressed. The commissioner of the Immigration and Naturalization Service estimates that there are six to eight million illegal aliens presently in the United States holding perhaps more than two million jobs, costing the economy billions of dollars annually. U.S. Dep't of Justice, Statement of Leonard F. Chapman, Jr., Commissioner, Immigration and Naturalization Service, Before the Select Committee on Small Business Concerning Employment of Illegal Aliens, at 2, 6 (Nov. 23, 1976) (on file with the Fordham Law Review). Consequently, legislation has been proposed to regulate the employment of illegal aliens. See note 182 *infra* and accompanying text. See generally Chapman, *A Look at Illegal Immigration: Causes and Impact on the United States*, 13 San Diego L. Rev. 34, 37 (1975).

36. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) (1970), as amended, Immigration and Nationality Act Amendments of 1976, Act of Oct. 20, 1976, Pub. L. No. 94-571, § 5, 90 Stat. 2703. For further elaboration of the labor certification requirement, see E. Harper, *Immigration Laws of the United States* 191-204 (3d ed. 1975).

One of the statute's major purposes is to protect American workers from the potential competition of incoming foreign labor. *Silva v. Secretary of Labor*, 518 F.2d 301, 310 (1st Cir. 1975); see S. Rep. No. 748, 89th Cong., 1st Sess. 10 (1965). The statute sets up "a presumption that aliens should not be permitted to enter the United States for the purpose of performing labor because of the likely harmful impact of their admission on American workers." *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 761 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974). The burden is thus on the alien seeking admission to prove his entry will not adversely affect the American economy. *Silva v. Secretary of Labor*, 518 F.2d

unfair"³⁷ for the states to then economically discriminate against them in favor of citizens. This is particularly true if one considers that the term "citizen" includes persons who have recently moved into a state and who are not yet paying taxes.³⁸

While the right of a state to regulate employment for the public well-being is still recognized as a compelling state interest, it is no longer held that the fact of alienage bears any rational relationship to concern for the public community.³⁹ At one time it was felt that aliens had a greater propensity for committing crime and a lesser sense of responsibility for the interests of the community.⁴⁰ However, such sentiments have become far less prevalent.⁴¹

Despite the positive changes in their attitudes toward aliens, courts are still reluctant to extend the rights of aliens into areas that can be considered "politically tinged." This concept has been the primary rationale for alien/citizen distinctions outside the employment area. Courts have stressed that citizens, as members of the " 'political community,' "⁴² have certain political

301, 309-10 (1st Cir. 1975); *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 762 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974). But see *First Girl, Inc. v. Regional Manpower Adm'r*, 361 F. Supp. 1339 (N.D. Ill. 1973), aff'd per curiam, 499 F.2d 122 (7th Cir. 1974).

37. *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 581-82, 456 P.2d 645, 656, 79 Cal. Rptr. 77, 88 (1969) (en banc).

38. See generally *id.*

39. See note 22 *supra* and accompanying text.

40. Many of the earlier decisions upheld statutory prohibitions on alien employment on the theory that the state could regulate occupations which it considered harmful or dangerous under its police power. Typical of this reasoning was the court's statement in *Gizzarelli v. Presbrey*, 44 R.I. 333, 335, 117 A. 359, 360 (1922): "[Since] aliens as a class are naturally less interested in the state, the safety of its citizens, and the public welfare than citizens of the state, to allow them to operate motorbuses would on the whole tend to increase the danger to passengers and to the public using the highways." See also *Anton v. Van Winkle*, 297 F. 340, 342 (D. Ore. 1924); *Trageser v. Gray*, 73 Md. 250, 253, 20 A. 905, 906 (1890); *Miller v. Niagara Falls*, 207 App. Div. 798, 799-800, 202 N.Y.S. 549, 550-51 (4th Dep't 1924).

41. For example, in response to a claim that aliens " 'may be more inclined than citizens to avail themselves of the opportunity to partake or promote criminal activities,' " a New York lower court stated that "such speculation [was] reminiscent more of the ethnic and religious biases of the [early] 1900's than of this [era]," and held that an ordinance limiting the licensing of taxicab drivers to citizens was unconstitutional. *Sundram v. Niagara Falls*, 77 Misc. 2d 1002, 1005, 357 N.Y.S.2d 943, 946 (Sup. Ct. 1973), aff'd mem., 44 App. Div. 2d 906, 356 N.Y.S.2d 1023 (4th Dep't 1974). See also *Raffaelli v. Committee of Bar Examiners*, 7 Cal. 3d 288, 291, 496 P.2d 1264, 1266, 101 Cal. Rptr. 896, 898 (1972) (en banc).

42. *Sugarman v. Dougall*, 413 U.S. 634, 648-49 (1973); *United States v. Gordon-Nikkar*, 518 F.2d 972, 978 (5th Cir. 1975); *Perkins v. Smith*, 370 F. Supp. 134, 137 (D. Md. 1974) (three-judge court), aff'd mem., 426 U.S. 913 (1976); *Herriott v. Seattle*, 81 Wash. 2d 48, 61, 500 P.2d 101, 109 (1972) (en banc).

Aside from this political concept, there are no real differences in terms of the responsibilities which resident aliens share with citizens. As the Supreme Court has observed, "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. 717, 722 (1973); see *Sugarman v. Dougall*, 413 U.S. 634, 645 (1973); *Graham v. Richardson*, 403 U.S. 365, 376 (1971). But see *Foley v. Connelie*, 419 F. Supp. 889, 897-98 (S.D.N.Y. 1976) (three-judge court), appeal filed, 45 U.S.L.W. 3449 (U.S. Dec. 20, 1976) (No. 76-839).

rights which aliens, who are excluded from membership in the political community by definition,⁴³ do not possess. Political rights include the right to hold public office,⁴⁴ to vote⁴⁵ and to serve on juries.⁴⁶ Such functions go to "the heart of our system of government,"⁴⁷ since they involve the formulation of public policy and social standards and active participation in the operation of governmental affairs.⁴⁸ Accordingly, courts have upheld restrictions on the rights of aliens by reasoning that a state has a compelling interest in preserving its concept of a " 'political community,' "⁴⁹ a conceptual community which would inevitably disintegrate if not restricted to those familiar with America's social and political mores.⁵⁰

In the employment context, the nature of certain professions requires that characteristics of citizens not shared by aliens be considered in hiring. Thus teachers,⁵¹ lawyers⁵² and state troopers,⁵³ for example, are occupations which skirt the border between purely political functions such as holding public office and purely apolitical positions such as driving taxi cabs.⁵⁴ These political distinctions between aliens and citizens were discussed by the Su-

43. *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973); *Foley v. Connelie*, 419 F. Supp. 889, 901 (S.D.N.Y. 1976) (three-judge court) (Mansfield, J., dissenting), appeal filed, 45 U.S.L.W. 3449 (U.S. Dec. 20, 1976) (No. 76-839).

44. *Sugarman v. Dougall*, 413 U.S. 634, 648 & n.13 (1973). The U.S. Constitution specifically limits the offices of senator, U.S. Const. art. I, § 3, cl. 3, and representative, id. art. I, § 2, cl. 2, to citizens, and the presidency to natural born citizens, id. art. II, § 1, cl. 4.

45. *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973). The six constitutional amendments concerning the right to vote extend their protection only to citizens. U.S. Const. amends. XIV, XV, XIX, XXIV, XXV, XXVI. See *Sugarman v. Dougall*, 413 U.S. 634, 651-52 (1973) (Rehnquist, J., dissenting).

46. *United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975); *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974) (three-judge court), aff'd mem., 426 U.S. 913 (1976). See *Foley v. Connelie*, 419 F. Supp. 889, 896 (S.D.N.Y. 1976) (three-judge court), appeal filed, 45 U.S.L.W. 3449 (U.S. Dec. 20, 1976) (No. 76-839); *Herriott v. Seattle*, 81 Wash. 2d 48, 61-62, 500 P.2d 101, 110 (1972) (en banc).

47. *Perkins v. Smith*, 370 F. Supp. 134, 137 (D. Md. 1974) (three-judge court), aff'd mem., 426 U.S. 913 (1976).

48. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *United States v. Gordon-Nikkar*, 518 F.2d 972, 976-78 (5th Cir. 1975); *Foley v. Connelie*, 419 F. Supp. 889, 895 (S.D.N.Y. 1976) (three-judge court), appeal filed, 45 U.S.L.W. 3449 (U.S. Dec. 20, 1976) (No. 76-839); *Perkins v. Smith*, 370 F. Supp. 134, 137 (D. Md. 1974) (three-judge court), aff'd mem., 426 U.S. 913 (1976).

49. *Sugarman v. Dougall*, 413 U.S. 634, 648-49 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972); *United States v. Gordon-Nikkar*, 518 F.2d 972, 976-77 (5th Cir. 1975); see *Surmeli v. New York*, 412 F. Supp. 394, 397 (S.D.N.Y. 1976).

50. *Foley v. Connelie*, 419 F. Supp. 889, 895 (S.D.N.Y. 1976) (three-judge court); see id. at 901 (Mansfield, J., dissenting), appeal filed, 45 U.S.L.W. 3449 (U.S. Dec. 20, 1976) (No. 76-839).

51. *Norwick v. Nyquist*, 417 F. Supp. 913 (S.D.N.Y. 1976) (three-judge court), appeal filed, 45 U.S.L.W. 3437 (U.S. Dec. 11, 1977) (No. 76-808).

52. *In re Griffiths*, 413 U.S. 717 (1973); *In re Park*, 484 P.2d 690 (Alas. 1971); *Raffaelli v. Committee of Bar Examiners*, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972) (en banc).

53. *Foley v. Connelie*, 419 F. Supp. 889 (S.D.N.Y. 1976) (three-judge court), appeal filed, 45 U.S.L.W. 3449 (U.S. Dec. 20, 1976) (No. 76-839).

54. *Sundram v. Niagara Falls*, 77 Misc. 2d 1002, 357 N.Y.S.2d 943 (Sup. Ct. 1973), aff'd mem., 44 App. Div. 2d 906, 356 N.Y.S.2d 1023 (4th Dep't 1974).

preme Court in two 1973 decisions striking down state restrictions on the rights of aliens to employment. In *Sugarman v. Dougall*,⁵⁵ the Court ruled that the New York civil service law, which provided that only citizens could hold permanent positions in the competitive class of the state civil service, was unconstitutional as violative of the equal protection clause.⁵⁶ In dictum, the Court noted that a limitation on the employment of aliens, narrowly confined, would be valid where alienage was relevant in defining and maintaining a state's " 'political community.' "⁵⁷

Handed down the same day as *Sugarman*, however, was *In re Griffiths*,⁵⁸ a case which indicated that this proposition is to be strictly limited.⁵⁹ *Griffiths* held unconstitutional, also on equal protection grounds, a Connecticut court rule which limited the practicing of law to citizens.⁶⁰ The Court noted: "[L]awyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy."⁶¹

The political distinction between aliens and citizens in employment became the basis of a court's decision for the first time in *Foley v. Connelie*,⁶² a case recently decided by a three-judge panel in the Southern District of New York. In *Foley*, an Irish resident alien applied for a position as a New York state trooper. Pursuant to a statute restricting appointment of state police officers to American citizens,⁶³ he was denied permission to take the competitive examination. Despite his claim that the statute violated the equal protection clause, a divided court upheld the statute and refused to grant relief.⁶⁴

We find that the state has a substantial and compelling interest in requiring the members of the state police force to be citizens and that interest is the maintenance of public order to effect the preservation of the political structure including the prevention, detection and prosecution of crime.

. . . Thus this court believes there is no less drastic alternative available. . . [and] finds that the statutory scheme . . . is as precisely drawn as the state interest requires.⁶⁵

55. 413 U.S. 634 (1973).

56. *Id.* at 646.

57. *Id.* at 647.

58. 413 U.S. 717 (1973).

59. See *id.* at 728-29.

60. *Id.* at 729.

61. *Id.* (footnote omitted). The Court was discussing lawyers in their capacities as private practitioners. It is obvious that a different situation exists for district attorneys and United States attorneys who are certainly involved in formulating government policy. Cf. *Cammer v. United States*, 350 U.S. 399, 405-08 (1956).

62. 419 F. Supp. 889 (S.D.N.Y. 1976) (three-judge court), appeal filed, 45 U.S.L.W. 3449 (U.S. Dec. 20, 1976) (No. 76-839).

63. N.Y. Exec. Law § 215(3) (McKinney Supp. 1976), which reads in pertinent part: "No person shall be appointed to the New York state police force unless he shall be a citizen of the United States. . . ."

64. 419 F. Supp. at 899.

65. *Id.* at 898-99 (footnote omitted).

The *Foley* court's decision was grounded on the belief that the "highly sensitive and delicate"⁶⁶ functions of a state trooper elevated the position far enough into the political realm to warrant restricting it to citizens.⁶⁷ Relying on language in *Sugarman* that a state may require citizenship as a qualification for "holding state elective or important nonelective executive, legislative, and judicial positions,"⁶⁸ and distinguishing the "common occupations" at issue in other cases,⁶⁹ the *Foley* court held that "citizenship bears a vital and essential relationship to the proper performance of the duties of a state trooper."⁷⁰

The court supported its decision by citing cases which dealt with the rights of aliens to serve on juries.⁷¹ "[T]here is a strong similarity between the role played by the juror and the policeman in our society," wrote the majority, "and it has been often recognized that states and the federal government have a compelling interest which justifies excluding aliens from jury service."⁷²

The fact that the court chose to analogize state troopers to jurors is puzzling in view of the fact that there is precedent which seems to be more apposite. The right of aliens to practice law, which was upheld in *In re Griffiths*,⁷³ would seem to be a more fitting model for purposes of comparison.⁷⁴ Being an attorney or a state trooper is a full-time form of employment—a means of earning a living which reaches out into all aspects of a person's life. Serving on a jury, on the other hand, is a duty—or a right—which may occupy only

66. *Id.* at 896.

67. See text accompanying notes 51-57 *supra*.

68. 413 U.S. at 647.

69. 419 F. Supp. at 895; see *Truax v. Raich*, 239 U.S. 33, 41 (1915).

70. 419 F. Supp. at 895.

71. *Id.* at 896.

72. *Id.*

73. 413 U.S. 717 (1973); see notes 58-61 *supra* and accompanying text.

74. This is particularly so in view of the fact that many of the considerations asserted by the defendants in *Foley* were at issue before the Supreme Court in *Griffiths*. The state in *Griffiths* raised the question of the possibility of a resident alien lawyer's conflict of loyalties: "[A] resident alien lawyer might in the exercise of his functions ignore his responsibilities to the courts or even his clients in favor of the interest of a foreign power." 413 U.S. at 724. To this the Court flatly responded: "We find these arguments unconvincing." *Id.* at 724. Nevertheless, the majority in *Foley* relied on a very similar argument as a basis for its opinion. 419 F. Supp. at 897-98. See *In re Griffiths*, 413 U.S. 717, 722-29 (1973).

The *Foley* court's conclusions also differ from those of the Supreme Court of Alaska, *In re Park*, 484 P.2d 690 (Alas. 1971), and the Supreme Court of California, *Raffaelli v. Committee of Bar Examiners*, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972) (en banc). The majority in *Foley* argued that a state police officer must be committed to the proper application and enforcement of the laws of the United States. 419 F. Supp. at 897. Both the Alaska court and the California court could not see why an alien, solely because of his alienage, was incapable of understanding American law or appreciating American institutions, or being loyal and committed to the United States. *In re Park*, 484 P.2d 690, 693-94 (Alas. 1971); *Raffaelli v. Committee of Bar Examiners*, 7 Cal. 3d 288, 296-98, 496 P.2d 1264, 1269-71, 101 Cal. Rptr. 896, 901-03 (1972) (en banc.). The *Raffaelli* case was noted with approval by the Supreme Court in *In re Griffiths*, 413 U.S. 717, 729 n.22 (1973).

two weeks out of every two years of a person's life. The failure of the *Foley* court to discuss *In re Griffiths* in greater detail is even more puzzling when the opinion is compared with *Norwick v. Nyquist*,⁷⁵ another Southern District case decided less than two weeks after *Foley*. *Norwick* held unconstitutional a New York statute limiting the certification of public school teachers to citizens and those who had applied for citizenship.⁷⁶ The *Norwick* court recognized the political aspects of teaching and acknowledged the "strong nexus between the classroom and the political community,"⁷⁷ but held that the undoubted state interest in sustaining that political community did not warrant excluding *all* aliens from the teaching profession.⁷⁸

Instead of applying the overbreadth analysis to the state trooper statute, the *Foley* majority chose instead to focus on the issue of political rights.⁷⁹ Because of the political distinctions between citizens and aliens, the court claimed that alienage was perhaps not a suspect class for all purposes: "The classification of alienage, suspect for some purposes, may be permissible when the state is dealing with democratic government and its participants."⁸⁰ The court then asserted that the position of state trooper requires the execution of broad public policy and "necessarily entails participation in state government."⁸¹ Accordingly, the court held, aliens could be excluded.

The duties of a state trooper, as the dissent in *Foley* pointed out, are "neither political nor policy-making" in nature. "[His] task is not to elect or legislate but to enforce the law."⁸² A state trooper, who carries out the orders he is given, implements rather than formulates public policy. He is no more involved in the political process than lawyers, who litigate the merits of the law and often seek to bring about changes in governmental policy.⁸³ In the dissent's view, the Supreme Court in *Sugarman* was speaking of high government officials such as governors, cabinet members, heads of agencies—positions which include broad political powers to make basic policy decisions.⁸⁴

The *Foley* majority discussed the "awesome responsibilities" of state troopers,⁸⁵ outlining their duties in detail.⁸⁶ There can be little doubt that a state

75. 417 F. Supp. 913 (S.D.N.Y. 1976) (three-judge court), appeal filed, 45 U.S.L.W. 3437 (U.S. Dec. 11, 1976) (No. 76-808).

76. N.Y. Educ. Law § 3001(3) (McKinney 1970).

77. 417 F. Supp. at 920.

78. *Id.* at 921-22. The *Norwick* court directly applied *In re Griffiths* by quoting a portion of the latter, substituting "New York" and "the teaching profession" for the corresponding references of "Connecticut" and "attorneys" in *Griffiths*. *Id.* It is submitted that the majority in *Foley* should have done the same.

79. See notes 42-50 *supra* and accompanying text.

80. 419 F. Supp. at 895.

81. *Id.*

82. *Id.* at 901 (Mansfield, J., dissenting).

83. Compare *id.*, with *In re Griffiths*, 413 U.S. 717, 727-29 (1973).

84. 419 F. Supp. at 900-01 (Mansfield, J., dissenting).

85. *Id.* at 896.

86. *Id.* at 896-97.

does indeed have a compelling interest in maintaining a highly qualified police force. The issue, however, is whether a statute barring *all* aliens from being state troopers has any rational relation to this state interest.⁸⁷ Perhaps the strongest argument in support of the proposition that there is some relation is the potential for conflict of interest or loyalties.⁸⁸ The fact that a person is a citizen, however, is no assurance that there will be no conflict of interest, for a person's heritage and background remain with him whether he is a citizen or not.⁸⁹

The clear mandate of the Supreme Court in *Griffiths* and *Sugarman* was that any statute distinguishing aliens from citizens must be precisely drawn and narrowly confined.⁹⁰ It is submitted that despite the majority's claim to the contrary, the New York statute here in question⁹¹ is overly broad and thereby unnecessarily imposes a burden on the basic right to have access to employment. Undoubtedly, some aliens are not qualified to be state troopers, but this would result more from their personal qualities than their alienage per se. As the Supreme Court stated in *Griffiths*: "Nor would the possibility that some resident aliens are unsuited to the practice of law be a justification for a wholesale ban."⁹²

Moreover, there are alternative, less burdensome means to ensure that a person's alienage will not affect his ability to act as a state trooper.⁹³ State troopers, like most law enforcement officers, must first pass an examination and then go through a thorough interviewing and training process.⁹⁴ A determination of whether a person's alienage would deter him from performing effectively could then be more rationally made. Once an alien has undergone proper training, there is still the alternative, as the dissent noted, of giving him assignments where no conflict of interest would arise.⁹⁵ These procedures would enable the state to achieve its objectives without undue

87. See note 32 *supra* and accompanying text.

88. 419 F. Supp. at 897. It was argued that because of an alien's possible allegiance to a foreign sovereign, he might lack impartiality in enforcing the laws. The majority cited as possible areas of conflict the enforcement of the federal immigration laws, the protection of foreign dignitaries, and the securing of events involving foreign visitors such as the 1980 Winter Olympics to be held in Lake Placid, New York. *Id.* at 898.

89. See *id.* at 904 (Mansfield, J., dissenting); *Raffaelli v. Committee of Bar Examiners*, 7 Cal. 3d 288, 298, 496 P.2d 1264, 1271, 101 Cal. Rptr. 896, 903 (1972) (en banc), citing *Sei Fujii v. State*, 38 Cal. 2d 718, 732-33, 242 P.2d 617, 627 (1952) (en banc) ("Just as eligibility to citizenship does not automatically engender loyalty or create an interest in the welfare of the country, so ineligibility does not establish a lack of loyalty or the absence of interest in the welfare of the country.").

90. See note 33 *supra* and accompanying text.

91. N.Y. Exec. Law § 215(3) (McKinney Supp. 1976); see note 63 *supra*.

92. 413 U.S. at 725.

93. See note 33 *supra* and accompanying text.

94. N.Y. Exec. Law § 215(3) (McKinney Supp. 1976) provides that persons appointed to the state police force must have "fitness and good moral character and shall have passed a physical and mental examination . . ." Such appointments are made for a probationary period of one year. *Id.* See also 419 F. Supp. at 904 (Mansfield, J., dissenting).

95. 419 F. Supp. at 902 n.2 (Mansfield, J., dissenting).

burden to itself or to aliens interested in serving as state troopers. It is clear that no one has an absolute right to be a state trooper;⁹⁶ undoubtedly, however, everyone has a right to try.

Aside from the alleged "political aspects" of being a state trooper, there is arguably no connection between citizenship and the performance of the duties of a state trooper.⁹⁷ It is highly unlikely that alienage would affect one's ability to detect or prosecute crime.⁹⁸ The fact of citizenship has "no particular or rational relationship to skill, competence, or financial responsibility,"⁹⁹ and has little to do with a person's need for employment.¹⁰⁰ A person's right to work is more akin to his rights to public housing,¹⁰¹ property¹⁰² and welfare assistance¹⁰³—which the courts have held cannot be denied noncitizens solely because of their alienage—than to his rights to vote, hold office or serve on juries.¹⁰⁴ While the right to work has not been expressly declared a "fundamental right" so as to require strict scrutiny,¹⁰⁵ the Supreme Court has deemed it to be "the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."¹⁰⁶

96. See *Faxon v. School Comm.*, 331 Mass. 531, 536, 120 N.E.2d 772, 775 (1954) ("no constitutional right to be a public school teacher"); *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892) ("no constitutional right to be a policeman"). Cf. *Arizona State Liquor Bd. v. Ali*, 27 Ariz. App. 16, —, 550 P.2d 663, 667 (1976) (no constitutional right to sell liquor). See also *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

97. See note 32 *supra* and accompanying text.

98. But see text accompanying notes 65 and 70 *supra*.

99. *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 606 (1976).

100. *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 581, 456 P.2d 645, 655, 79 Cal. Rptr. 77, 87 (1969) (en banc).

101. *Lopez v. Housing Auth.*, 355 F. Supp. 1016 (S.D.N.Y. 1972).

102. *Oyama v. California*, 332 U.S. 633 (1948); *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952) (en banc); *State v. Oakland*, 129 Mont. 347, 287 P.2d 39 (1955).

103. *Graham v. Richardson*, 403 U.S. 365 (1971).

104. See notes 44-48 *supra* and accompanying text. Cf. *Younis v. Shabat*, 336 F. Supp. 1137 (N.D. Ill. 1971) (denial of tenure to professors solely because of alienage held unconstitutional); *United States v. Valentine*, 288 F. Supp. 957 (D.P.R. 1968) (requirements that court proceedings be conducted in English and that jurors speak English sustained); *People v. Rappard*, 28 Cal. App. 3d 302, 104 Cal. Rptr. 535 (2d Dist. 1972) (statutory prohibition of aliens from owning or possessing concealable firearms held unconstitutional). Compare *Chapman v. Gerard*, 456 F.2d 577 (3d Cir. 1972) (Virgin Islands statute barring aliens from participating in territorial scholarship fund held unconstitutional), with *Friedler v. University of St. of N.Y.*, 70 Misc. 2d 416, 333 N.Y.S.2d 928 (Sup. Ct. 1972) (statute restricting state scholarships to citizens or applicant aliens upheld). But see *Mauclet v. Nyquist*, 406 F. Supp. 1233 (W.D.N.Y. 1976) (three-judge court), review granted, 45 U.S.L.W. 3321 (U.S. Nov. 2, 1976) (No. 76-208), which held unconstitutional the same statute upheld by the New York lower court in *Friedler*.

105. For examples of rights which have been declared fundamental, see *Dunn v. Blumstein*, 405 U.S. 330, 336-39 (1972) (voting, travel); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (travel); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy). The Burger Court has been disinclined to expand the list of fundamental rights. *Gunther*, The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 12-13 (1972). Consequently, it is unlikely that the right to work will be accorded this status soon.

106. *Truax v. Raich*, 239 U.S. 33, 41 (1915); see *Greene v. McElroy*, 360 U.S. 474, 492

Despite the overbreadth problem with the New York state trooper statute, and the tenuous nature of the relationship between the classification and its goals, the court nevertheless upheld the statute. By doing so, and in reasoning as it did, *Foley v. Connelie* contributed to the recent erosion of alienage as a suspect class,¹⁰⁷ a movement further spurred by developments with respect to federal discrimination.

III. FEDERAL DISCRIMINATION

A. *A Double Standard*

The ability of the federal government to impose restrictions on noncitizens is based in part on its plenary power over immigration and naturalization.¹⁰⁸

(1959); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957); *Ferrell v. Independent School Dist.*, 392 F.2d 697, 703-04 (5th Cir.), cert. denied, 393 U.S. 856 (1968); *Birkenfield v. United States*, 369 F.2d 491, 493 (3d Cir. 1966). See also *In re Parrott*, 1 F. 481, 506 (C.C.D. Cal. 1880) ("The right to labor is, of all others, after the right to live, the fundamental, inalienable right of man . . ."); U.S. Const., amend. IX. At one time it was held that public employment was not a right but a privilege, and thus states could deny aliens access to public jobs. E.g., *People v. Crane*, 214 N.Y. 154, 164, 108 N.E. 427, 430, aff'd, 239 U.S. 195 (1915). Over the years this privilege-right doctrine has dissipated, and today is no longer accepted in this context. *Sugarman v. Dougall*, 413 U.S. 634, 643-45 (1973); *Graham v. Richardson*, 403 U.S. 365, 373-74 (1971); *C.D.R. Enterprises, Ltd. v. Board of Educ.*, 412 F. Supp. 1164, 1169 (E.D.N.Y. 1976) (three-judge court), aff'd sub nom. *Lefkowitz v. C.D.R. Enterprises, Ltd.*, 97 S. Ct. 721 (1977). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

Statutes infringing on the right to work also limit the freedom of aliens to own property by restricting their income. The right to acquire, own and dispose of property is protected from discriminatory state action by the fourteenth amendment. See *Sei Fujii v. State*, 38 Cal. 2d 718, 728, 242 P.2d 617, 624 (1952) (en banc). Employment proscriptions also inhibit a person's fundamental right to travel from state to state; in order for such a statute to pass constitutional muster a compelling state interest must be demonstrated. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). Durational residency requirements for state employment have been held unconstitutional as violative of the right to travel (*State v. Wylie*, 516 P.2d 142 (Alas. 1973)), and of the right to work (*York v. State*, 53 Hawaii 557, 498 P.2d 644 (1972)). Contra, *Town of Milton v. Civil Serv. Comm'n*, — Mass. —, 312 N.E.2d 188 (1974) (residency requirement for policemen upheld). See *Truax v. Raich*, 239 U.S. 33, 42 (1915); *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 573, 456 P.2d 645, 650, 79 Cal. Rptr. 77, 82 (1969) (en banc). See also *Mohamed v. Parks*, 352 F. Supp. 518, 521 (D. Mass. 1973).

107. See notes 187-91 *infra* and accompanying text.

108. This is evidenced by the cases which have invalidated state prohibitions of alien employment on a preemption theory. Because Congress has implemented a federal scheme to regulate the existence of aliens in the United States, 8 U.S.C. § 1101 *et seq.* (1970), which includes regulation to some extent of alien employment, 8 U.S.C. § 1182(a)(14) (1970), as amended, Immigration and Nationality Act Amendments of 1976, Act of Oct. 20, 1976, Pub. L. No. 94-571, § 5, 90 Stat. 2703, see note 36 *supra* and accompanying text, any state law limiting the rights of aliens to work potentially comes into conflict with Congress' intent, in violation of the supremacy clause of the Constitution (art. VI, cl. 2). States can "neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitu-

By virtue of article I, section 8 of the Constitution, Congress is vested with the exclusive power to regulate immigration and naturalization throughout the United States.¹⁰⁹ Thus, the federal government may set conditions upon which aliens will be admitted to this country and dictate the requirements for naturalization.¹¹⁰ Furthermore, while equal protection, as required of the states by the fourteenth amendment, has been "reversely incorporated" into the due process clause of the fifth amendment, this concept has only been applied to the federal government with respect to the suspect classifications of race and national origin,¹¹¹ and has never been expressly extended to alienage.¹¹² The combination of these factors enables the federal government to discriminate in certain situations where the states may not.¹¹³

Moreover, because they are responsible for national concerns, the executive and legislative branches of the federal government have great flexibility in regulating the affairs of aliens. As the Supreme Court recently noted: "[T]here may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State."¹¹⁴ Control of aliens is in many respects a political question involving foreign policy considerations.¹¹⁵ Due to the reluctance of the courts to hear political questions,¹¹⁶ judicial

tionally derived federal power to regulate immigration, and have accordingly been held invalid." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948); see, e.g., *C.D.R. Enterprises, Ltd. v. Board of Educ.*, 412 F. Supp. 1164, 1171-72 (E.D.N.Y. 1976), *aff'd sub nom. Lefkowitz v. C.D.R. Enterprises, Ltd.*, 97 S. Ct. 721 (1977); *Mohamed v. Parks*, 352 F. Supp. 518, 521 (D. Mass. 1973); *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 572-78, 456 P.2d 645, 649-53, 79 Cal. Rptr. 77, 81-85 (1969) (en banc); *Hsieh v. Civil Serv. Comm'n*, 79 Wash. 2d 529, 536-40, 488 P.2d 515, 519-21 (1971) (en banc).

109. *Graham v. Richardson*, 403 U.S. 365, 376-78 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).

110. *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948).

111. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Korematsu v. United States*, 323 U.S. 214 (1944); see *Richardson v. Belcher*, 404 U.S. 78, 84 (1971) (Douglas, J., dissenting); *Schneider v. Rusk*, 377 U.S. 163, 168-69 (1964).

112. The Supreme Court has never extended alienage as a suspect class to federal discrimination. The trilogy of alien equal protection cases, *Graham*, *Griffiths* and *Sugarman*, as well as the earlier cases of *Yick Wo* and *Takahashi*, involved state actions against aliens. See notes 24-29 *supra* and accompanying text. At least one circuit court, however, has held the federal government to a compelling interest standard with respect to aliens. *United States v. Gordon-Nikkar*, 518 F.2d 972, 976 (5th Cir. 1975).

113. In addition, the interests protected by the fourteenth amendment are not equal to those protected by the fifth amendment. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 (1976); *Truax v. Corrigan*, 257 U.S. 312, 331-32 (1921). The language of the two amendments differs in that the due process clause appears in both while the equal protection clause appears only in the fourteenth. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 n.17 (1976).

114. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

115. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952); see U.S. Const. art. I, § 8, cls. 3, 11; *id.* art. II, § 2, cl. 2.

116. See *Baker v. Carr*, 369 U.S. 186, 217-18 (1962); accord, *Kleindienst v. Mandel*, 408 U.S. 753, 766-67 (1972). See also *Hampton v. Mow Sun Wong*, 426 U.S. 88, 126-27 (1976) (Rehnquist, J., dissenting).

interference in the federal government's exercise of control over aliens has been kept to a minimum.¹¹⁷

This double standard which places a lesser burden on the federal government can be seen by comparing *Graham v. Richardson*¹¹⁸ with the recent decision of *Mathews v. Diaz*.¹¹⁹ The plaintiffs in the latter case were three aliens over the age of 65 who had been lawfully admitted to the United States, but had resided in the country for less than five years. Their applications for assistance under a federal medical insurance program were denied¹²⁰ because eligibility was statutorily restricted to citizens and only those aliens who had resided in the United States for at least five years.¹²¹

The Supreme Court, reversing the decision of a three-judge district court,¹²² upheld the constitutionality of the statute. The Court distinguished what it recognized as the plaintiff's strongest support,¹²³ *Graham v. Richardson*, which had held that the state statutes denying welfare benefits to resident aliens or to aliens not meeting a durational residence requirement were unconstitutional.¹²⁴ Despite the similarity of the benefits involved, *i.e.*, some form of welfare assistance, the fact that Congress was classifying was determinative: "[I]t is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens."¹²⁵

The Court unanimously refused to second-guess Congress' reasons for limiting the program to citizens and certain aliens.¹²⁶ Without expressly

117. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101-02 & n.21 (1976); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893).

118. 403 U.S. 365 (1971).

119. 426 U.S. 67 (1976).

120. *Id.* at 69-70.

121. In addition, eligibility is restricted to persons, otherwise qualified, over 65 years of age. *Id.* at 70; see 42 U.S.C. § 1395o(2) (Supp. V, 1975).

122. *Diaz v. Weinberger*, 361 F. Supp. 1 (S.D. Fla. 1973) (mem.). In a unanimous decision, the court found the statute unconstitutional as violative of the fifth amendment's due process guarantee. *Id.* at 16.

123. 426 U.S. at 84.

124. 403 U.S. 365 (1971).

125. 426 U.S. at 84.

126. *Id.* The Court's deference toward Congress and the President is illustrated by the fact that the three earlier cases striking down state prohibitions against alien employment were decided by relatively large margins. In *re Griffiths*, 413 U.S. 717 (1973) (7-to-2 decision) (Burger, C.J., and Rehnquist, J., dissenting); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (8-to-1 decision) (Rehnquist, J., dissenting); *Graham v. Richardson*, 403 U.S. 365 (1971) (9-to-0 decision). This is borne out by a case handed down shortly after *Mathews* and *Hampton* were decided wherein a Puerto Rico statute limiting the licensing of civil engineers and others to citizens was invalidated. *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976) (7-to-1 decision) (Rehnquist, J., dissenting). Thus, aside from Justice Rehnquist, almost every Justice agreed that a state statute restricting alien employment rights was unconstitutional. Where a federal agency regulation was involved, however, the vote was much closer, a 5-to-4 decision invalidating the regulation. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). When an act of Congress was involved, the Court upheld the prohibition unanimously. *Mathews v. Diaz*, 426 U.S. 67 (1976).

stating the reasons for doing so, the Court applied a rational basis test¹²⁷ and held that it was "unquestionably reasonable" for Congress to predicate an alien's eligibility for the program on both the character and the duration of his residence in the country.¹²⁸ Thus, because of Congress' "broad power over naturalization and immigration,"¹²⁹ the Court held that Congress could indeed treat aliens differently from citizens, and, in addition, treat some aliens¹³⁰ differently from others.¹³¹ To what extent this power is limited by the requirements of due process and equal protection is unclear.¹³²

Handed down the same day as *Mathews v. Diaz* was *Hampton v. Mow Sun Wong*,¹³³ a case which specifically dealt with federal discrimination against aliens in employment. The plaintiffs in *Hampton* were five permanent resident aliens who were barred from federal employment¹³⁴ by a Civil Service Commission regulation limiting the competitive examination to citizens and noncitizen nationals.¹³⁵ In an ambiguous five-to-four decision, the Court

127. See 426 U.S. at 83. The traditional rational basis test requires that the person challenging a statute prove that no rational basis for the classification exists. It prohibits a state from dividing people into arbitrary classifications, for to do so would be violative of the fourteenth amendment's equal protection clause. *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155, 159 (1897); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

128. 426 U.S. at 83.

129. *Id.* at 79-80.

130. See notes 146-48 *infra* and accompanying text.

131. 426 U.S. at 78-80.

132. "The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification." *Id.* at 78. Compare *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("discrimination may be so unjustifiable as to be violative of due process").

133. 426 U.S. 88 (1976). Shortly after *Hampton* and *Mathews* were decided, the Supreme Court summarily affirmed the judgment of a three-judge district court which had held that the exclusion of aliens from employment in the federal civil service was unconstitutional. *Ramos v. United States Civil Serv. Comm'n*, 376 F. Supp. 361 (D.P.R. 1974) (three-judge court), *aff'd in part*, 426 U.S. 916 (1976) (mem.).

The district court did not attack the problem in the same manner as the Supreme Court did in *Hampton*, failing to distinguish between a federal agency regulation and a congressional or presidential mandate. In fact, the lower court treated the civil service regulation as if it had been ordered by Congress: "We conclude that Congress itself, when legislating generally on matters not related to the furtherance of its naturalization responsibilities, may not single out aliens for discriminatory treatment forbidden to the states. Any other result would lead to a peculiar hierarchy of rules, in which the federal government would enjoy a license to engage in practices condemned by the courts as unfair and discriminatory when done by the states." 376 F. Supp. at 366. The court went so far as to apply the suspect classification test to the federal government, holding that the Government did not demonstrate a compelling interest for excluding aliens from federal service. *Id.* at 365-68.

In its summary disposition of the case, the Supreme Court affirmed the district court's judgment insofar as the civil service regulation, 5 C.F.R. § 338.101 (1976), was involved, thus offering no opinion on the lower court's reasoning for its judgment. 426 U.S. at 916. See generally Comment, *Aliens and the Civil Service: A Closed Door?*, 61 *Geo. L.J.* 207 (1972).

134. 426 U.S. at 90-91.

135. 5 C.F.R. § 338.101 (1976). A noncitizen national is a person not a citizen who owes

struck down the regulation, holding that it "deprived these [plaintiffs] of liberty without due process of law" ¹³⁶ For purposes of the opinion, the Court assumed that Congress or the President could exclude virtually all noncitizens from federal service. ¹³⁷ Absent an express congressional or presidential mandate to that effect, the Court held that a federal agency could not do so on its own initiative. ¹³⁸ But whether such a regulation could be sustained even if Congress or the President were to so order, the Court left unresolved. ¹³⁹

In effect, the Court treated the federal agency as if it were a state by requiring it to show more than a rational basis for excluding aliens from federal employment. ¹⁴⁰ The Court held that the Civil Service Commission could not interfere with Congress' national scheme for regulating immigration and naturalization. ¹⁴¹ The Court recognized that the Commission had "no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies."¹⁴²

permanent allegiance to the United States. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(2)(B) (1970). This term apparently includes only natives of American Samoa. 426 U.S. at 90 n.1.

Except for the fact that they were aliens, each of the plaintiffs was otherwise qualified for an available civil service job. *Id.* at 91. Plaintiff Mow Sun Wong, for example, had been an electrical engineer in China but was ineligible for federal employment as a janitor. Plaintiff Siu Hung Mok was ineligible for a position as a file clerk despite 18 years experience as a businessman in China. Plaintiff Francene Lum had 15 years of teaching experience, a master's degree in education, and had done graduate work at four universities; yet she was barred from applying for a position with the Department of Health, Education, and Welfare. *Id.* at 91.

The District of Columbia Circuit was faced with the same issue of the constitutionality of the Civil Service Commission regulation in 1972, but it failed to come to a conclusion. In *Jalil v. Hampton*, 460 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 887 (1972), the court remanded the case to the district court to make factual determinations of certain questions. *Cf. Rok v. Legg*, 27 F. Supp. 243 (S.D. Cal. 1939). The dissent in *Jalil* maintained that remand was both unnecessary and improper because the regulation was clearly unconstitutional. The dissent's argument was based on the conclusion that aliens were indeed a suspect class even with respect to the federal government, and because the federal government could not demonstrate a compelling interest, it argued that the regulation should have been struck down. *Id.* at 930 (Bazelon, C.J., dissenting). See Comment, *Aliens and the Civil Service: A Closed Door?* 61 *Geo. L.J.* 207 (1972).

136. 426 U.S. at 116-17.

137. *Id.* at 114, 116; see also *id.* at 117 (Brennan, J., concurring).

138. *Id.* at 116.

139. Because the Court reserved decision on whether Congress or the President could exclude all aliens from federal service, it is clear that the Court reserved judgment on whether congressional or presidential authorization would allow a federal agency to do the same. If Congress or the President had indeed authorized the exclusion of all citizens from federal service, it is likely that at least one of the members of the five-justice majority would have gone the other way.

In *Sugarman*, the Court expressly reserved judgment on the constitutionality of federal citizenship requirements for civil service employment while holding unconstitutional the same requirement for state civil service employment. 413 U.S. at 646 n.12.

140. See notes 20-22 *supra* and accompanying text.

141. 426 U.S. at 114, 116.

142. *Id.* at 114.

Further, if the agency were permitted to regulate the existence of aliens in the country consistently with Congress' federal plan, any classification on the basis of alienage would require more than merely a rational basis for the discrimination.¹⁴³ The Court found that the only interest the Commission might legitimately assert for excluding all noncitizens from federal service was the administrative convenience gained by foregoing the need to determine on a case-by-case basis whether a person's alienage disqualified him for a particular job.¹⁴⁴ Because an aspect of the liberty of millions of persons was thereby violated, the Court held that such a justification was unacceptable.¹⁴⁵

The Supreme Court in *Mathews v. Diaz* discussed another factor affecting the extent of protection required. Since aliens, as a heterogeneous group, are legally divided into subcategories,¹⁴⁶ what may be termed the "degree of alienage"¹⁴⁷ becomes significant. As the *Mathews* Court noted, the closer an alien comes to being a citizen, the more rights he may acquire.¹⁴⁸ This is evidenced by the many statutes which limit certain employment to citizens and declarant or applicant aliens.¹⁴⁹ Furthermore, it is clear that an illegal alien has less rights than an alien lawfully admitted via a student or tourist visa, and it is equally clear that the latter has less rights than an alien admitted for permanent residence.¹⁵⁰

143. While the Court acknowledged a rational basis for the classification, it held this was unacceptable. *Id.* at 115.

144. *Id.*

145. *Id.* at 115-16.

146. Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15), (16), (20), (21), (22), (26), (27) (1970). See *Mathews v. Diaz*, 426 U.S. 67, 78-79 & n.13 (1976); E. Harper, *Immigration Laws of the United States* 517-33 (3d ed. 1975).

147. It may be helpful to visualize a "scale of alienage." On one end of the scale is the illegal alien, who has very few basic rights. See note 150 *infra* and accompanying text. On the other end of the scale is the alien who has become a citizen via naturalization, 8 U.S.C. § 1421 *et seq.* (1970), and thereby has all the rights of a citizen. *Afroyim v. Rusk*, 387 U.S. 253, 261-62 (1967); *Schneider v. Rusk*, 377 U.S. 163, 168-69 (1964). In between the two extremes are "nonimmigrant aliens"—persons temporarily in the United States (8 U.S.C. §§ 1101(a)(15), 1184 (1970)), permanent resident aliens—persons admitted for permanent residence in the United States (8 U.S.C. § 1101(a)(20) (1970)), and declarant aliens—noncitizens in the United States who have filed declarations of intent to become naturalized (8 U.S.C. § 1445(f)). As an alien progresses from the extreme of illegal aliens to the other extreme of naturalized citizen, his rights increase accordingly.

148. 426 U.S. at 80 ("Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence."); *id.* at 83 ("[C]itizens and those who are most like citizens qualify [for medicare]. Those who are less like citizens do not.")

149. E.g., Ala. Code tit. 46, § 7(3) (Cum. Supp. 1973); Ark. Stat. Ann. § 72-605 (Supp. 1975), D.C. Code Encycl. Ann. § 2-705 (1966); Ky. Rev. Stat. Ann. § 318.040 (1972); N.J. Stat. Ann. § 45:8-35(3)a (1963).

150. Perhaps one of the best illustrations of this proposition is the case of *De Canas v. Bica*, 424 U.S. 351 (1976). The Supreme Court there upheld a California statute which prohibited any employer from knowingly hiring an illegally admitted alien when such employment would adversely affect lawful resident workers. Without any discussion whatsoever of the constitutional rights of illegal aliens, the Court held that the federal scheme over immigration and naturalization did not preempt California from legislating against the hiring of illegal aliens. *Id.* at 357. See also *Rogers v. Larsen*, 411 F. Supp. 122 (D.V.I. 1976) (statute requiring the termination and replacement of

This distinction can be illustrated by comparing *Mathews v. Diaz*, where the classification based on alienage was upheld, with *Hampton v. Mow Sun Wong*,¹⁵¹ where the opposite result was reached. In *Mathews*, none of the plaintiffs had been in the United States for long, and only one had been admitted for permanent residency.¹⁵² *Hampton*, however, provided a more difficult case because the aliens were much closer to becoming citizens. All five were permanent residents, two had filed declarations of intent to become citizens, and one had lived in the United States for approximately 25 years at the time the action was commenced.¹⁵³ Thus, one could infer that the plaintiffs in *Hampton* were entitled to a greater degree of protection because of their lesser "degree of alienage."

The cases also indicate that the propriety of federal regulation depends on the particular activity or right involved.¹⁵⁴ Although any classification based on alienage must be supported by at least a rational basis, it is well settled that if a fundamental right is restricted, the federal government must demonstrate a more persuasive rationale to justify its infringement.¹⁵⁵ For example, an alien in a foreign country has no constitutional right to enter this country,¹⁵⁶ and without explicit permission from Congress or its authorized agent, no alien may lawfully do so.¹⁵⁷ The right of an alien legally in this country to earn a living, however, is more basic and accordingly must be afforded greater protection.¹⁵⁸ Since the government possesses plenary powers to regulate immigration and naturalization, it has been suggested that the less an activity is related to these powers, the less it may be limited.¹⁵⁹ Once an

nonresident workers with qualified resident workers upheld); *Alonso v. State*, 50 Cal. App. 3d 242, 248-49, 123 Cal. Rptr. 536, 540-41 (2d Dist. 1975), cert. denied, 425 U.S. 903 (1976) (aliens unlawfully in the United States do not have the same rights enjoyed by legal aliens and have no right to work).

151. 426 U.S. 88 (1976).

152. 426 U.S. at 69-70.

153. 426 U.S. at 91-92.

154. It is well settled that the more basic a right is, the greater the rationale behind a government infringement on that right must be. *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626-28 (1969) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (right to travel); see *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

155. History has demonstrated that certain rationales, such as national defense in a time of war, may be so compelling as to justify what would ordinarily be blatantly unconstitutional actions. E.g., *Korematsu v. United States*, 323 U.S. 214, 219-20 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 93-95 (1943).

A tangential consideration is the requirement of a reasonable relationship between the rationale and the classification. See note 32 *supra* and accompanying text.

156. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *Boutillier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123 (1967).

157. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); see E. Harper, *Immigration Laws of the United States* 486-90 (3d ed. 1975).

158. See note 106 *supra* and accompanying text.

159. *Aliens and the Federal Government: A Newer Equal Protection*, 8 U. Cal. Davis L. Rev. 1, 26 (1975); see also *United States v. Gordon-Nikkar*, 518 F.2d 972, 977-78 (5th Cir. 1975); *Ramos v.*

alien is lawfully in the United States on a permanent basis, to subject him to employment discrimination under the guise of immigration and naturalization regulation would be questionable.

The degree of scrutiny to which a classification is subjected also depends on the extent of its geographical reach.¹⁶⁰ Thus where a federal rule is applicable only to a limited territory, such as the Philippines¹⁶¹ or the District of Columbia,¹⁶² the federal government's responsibility under the due process clause is essentially the same as that under the equal protection clause of the fourteenth amendment.¹⁶³ In such instances, because the federal rule has no nationwide impact, the federal government's powers as the national representative do not apply.¹⁶⁴ But where important national interests are involved, federal action is subjected to less severe judicial scrutiny.¹⁶⁵

Another consideration affecting the legitimacy of both state and federal discrimination is the practical extent of the classification. The broader the prohibition or the less precise the regulation, the greater the justification must be. The courts have looked upon blanket prohibitions and wholesale bans harshly.¹⁶⁶

B. *The Validity of Executive Order No. 11,935*

Despite the many limitations on the federal government's ability to classify on the basis of alienage, such a classification may be upheld under appropriate circumstances. One of the issues left open in *Hampton* was the significance of congressional or presidential authorization of such restrictions. It appears that this issue will be shortly resolved. On September 2, 1976, President Ford issued an executive order reinstating the general ban against aliens in the federal service.¹⁶⁷ In doing so, the former President cited *Hampton* and concluded that it was "in the national interest to preserve the long-standing policy of generally prohibiting the employment of aliens from positions in the competitive service"¹⁶⁸

Thus, despite the Supreme Court's invalidation of the civil service regulation in *Hampton*, aliens are once again barred from federal service. President Ford's executive order stands on firm ground because it has both a constitu-

United States Civil Serv. Comm'n, 376 F. Supp. 361, 366 (D.P.R. 1974) (three-judge court), *aff'd in part*, 426 U.S. 916 (1976) (mem.).

160. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

161. *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926).

162. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

163. *Id.* at 500; *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 524-25 (1926).

164. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

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

166. See note 33 *supra* and accompanying text.

167. Exec. Order No. 11,935, 41 Fed. Reg. 37301 (1976), amending Civil Service Commission Rule VII, 5 C.F.R. § 7.1 et seq., by adding § 7.4, which reads in part: "No person shall be admitted to competitive examination unless such person is a citizen or national of the United States."

168. Presidential Letter of Sept. 2, 1976, Citizenship Requirements for Federal Employment, 41 Fed. Reg. 37303 (1976).

tional and a statutory basis.¹⁶⁹ Pursuant to his duty to "faithfully execute" the laws and to oversee the formulation and application of foreign policy,¹⁷⁰ the President may regulate the lives of aliens to some extent. In addition, Congress has by statute delegated to the President the authority to prescribe regulations for the admission of individuals to the federal civil service.¹⁷¹ Thus, by deciding that citizenship is a valid criterion for federal service, it is conceivably within the President's congressionally delegated powers to require that all applicants for the competitive examination be citizens.

The constitutionality of such a requirement, however, is a question which has yet to be decided. President Ford's executive order can be criticized on several grounds. First, it indiscriminately prohibits *all* aliens from *all* federal civil service positions, thus constituting a "wholesale ban."¹⁷² It affects applicant aliens and declarant aliens as well as permanent resident aliens regardless of how close an alien is to becoming a citizen.¹⁷³ Second, the President is treading in an area unrelated to immigration and naturalization,¹⁷⁴ which instead involves the basic right of a person to earn a living.¹⁷⁵ For this reason, the federal government's plenary powers over aliens should

169. Presidents have historically issued orders which may be described as executive orders. See Special Senate Comm. on National Emergencies and Delegated Emergency Powers, 93d Cong., 2d Sess., report on Executive Orders in Times of War and National Emergency 2 (Comm. Print 1974) [hereinafter cited as Senate Report]; Comment, Presidential Legislation by Executive Order, 37 U. Colo. L. Rev. 105, 109 (1964) [hereinafter cited as U. Colo. L. Rev.]; Comment, Executive Orders and the Development of Presidential Power, 17 Vill. L. Rev. 688, 689 (1972) [hereinafter cited as Vill. L. Rev.]. Executive orders have been used to withhold a judicial commission, as in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (see U. Colo. L. Rev., *supra* at 109, Vill. L. Rev., *supra* at 688 n.4), to purchase the Louisiana Territory (see U. Colo. L. Rev., *supra* at 109), to withdraw land from public sale (see *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915); U. Colo. L. Rev., *supra* at 109-10; Vill. L. Rev., *supra* at 690), to exclude persons of Japanese descent from prescribed military areas (see *Korematsu v. United States*, 323 U.S. 214 (1944)), and more recently to institute a wage-and-price freeze (see Exec. Order No. 11,615, 36 Fed. Reg. 15727 (1971)).

The legality of executive orders is most certain when they are issued on the basis of authority delegated to the President by Congress. Senate Report, *supra* at 7; Vill. L. Rev., *supra* at 702. The President may, however, issue executive orders solely on the basis of his executive powers under the Constitution. U.S. Const. art. II; see Senate Report, *supra* at 2; Vill. L. Rev., *supra* at 693-702. It has been suggested that the President's actions based on express or implied statutory authorization are "virtually unassailable in the courts." Vill. L. Rev., *supra* at 702. The combination of the courts' reluctance to establish limits on presidential power and the steady growth over the years of that power has led to some concern. Senate Report, *supra* at 1-2; U. Colo. L. Rev., *supra* at 117-18; Vill. L. Rev., *supra* at 711-12. For a discussion of the conflicts between Congress and the President in general, see E. Corwin, *Presidential Power and the Constitution* 112-20, 121-37 (R. Loss ed. 1976).

170. U.S. Const. art. II, § 3.

171. Government Organization and Employees Act, 5 U.S.C. §§ 3301, 3302 (1970). Section 3301 reads in pertinent part, "The President may . . . prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service"

172. See note 33 *supra* and accompanying text.

173. See notes 147-49 *supra* and accompanying text.

174. See note 159 *supra* and accompanying text.

175. See note 106 *supra* and accompanying text.

be less of a factor. In sum, both the Supreme Court and lower court would be hard pressed to find any state interests sufficient to sustain similar regulations as to state civil services.¹⁷⁶ Similarly, there seems to be little justification for the federal civil service blanket prohibition.¹⁷⁷ It has been suggested that such a restriction on the national level would provide incentive for aliens to become naturalized.¹⁷⁸ However, it is submitted that this could be more effectively done if declarant or applicant aliens were allowed to participate in the federal service, for a greater incentive would thus be provided for aliens to file applications or declarations of intent to become citizens. Under the present ruling, even those aliens who most ardently desire to become citizens are precluded from federal employment during the requisite five-year waiting period.¹⁷⁹

A second justification offered in support of excluding all aliens from the federal service is that such an exclusion provides the President with some leverage in negotiating treaties with other countries by allowing him to offer federal employment opportunities to citizens of a particular foreign power in exchange for reciprocal concessions.¹⁸⁰ It is submitted that the right of over four million people to work should not be used as diplomatic ammunition. Practically speaking, there are fewer American citizens residing in other countries than there are aliens in the United States; it is thus the aliens in America, many of whom are here for economic reasons, who would be harmed. In addition, if employment preference were to be given citizens of a particular foreign country, this would amount to discrimination on the basis of national originage, a clear violation of federal policy.¹⁸¹

IV. CONCLUSION

Legislation has been recently passed, and proposed legislation is pending, which imposes limitations on the rights of certain aliens and prospective immigrants.¹⁸² The issuance of Executive Order No. 11,935 has seriously

176. *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Mohamed v. Parks*, 352 F. Supp. 518 (D. Mass. 1973); *Miranda v. Nelson*, 351 F. Supp. 735 (D. Ariz. 1972) (three-judge court), *aff'd mem.*, 413 U.S. 902 (1973); *Teitscheid v. Leopold*, 342 F. Supp. 299 (D. Vt. 1971); *Herriott v. Seattle*, 81 Wash. 2d 48, 500 P.2d 101 (1972) (en banc); *Hsieh v. Civil Serv. Comm'n*, 79 Wash. 2d 529, 488 P.2d 515 (1971) (en banc).

177. Compare text accompanying note 78 *supra* with text accompanying notes 91-92 *supra*.

178. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1976).

179. See 8 U.S.C. § 1427(a) (1970).

180. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 104 (1976).

181. E.g., *Oyama v. California*, 332 U.S. 633, 640 (1948); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); see Equal Employment Opportunities Act, 42 U.S.C. § 2000e-2 (1970), as amended, (Supp. V, 1975).

182. The Immigration and Nationality Act Amendments of 1976 has amended 8 U.S.C. § 1182(a)(14) (1970) to provide that any alien, other than an immediate relative of a citizen, who continues in or accepts unauthorized employment prior to filing for an adjustment of status to permanent resident is barred from having his status so adjusted. See H.R. Rep. No. 1553, 94th Cong., 2d Sess. 14-15 (1976). See also Immigration and Nationality Act Amendments of 1976, Act of

undermined what had been gained in *Hampton v. Mow Sun Wong* after six years of litigation, and once again all aliens are barred from applying for some 300,000 federal jobs. In *Foley v. Connelie*, in sustaining a statute barring the employment of aliens as state troopers, the appropriateness of the suspect class status was threatened. Thus, the positive, progressive trend of cases expanding the rights of aliens has been slowed if not completely halted.

These setbacks come at a time when the traditional two-tiered approach to equal protection has been questioned and criticized.¹⁸³ In the last several years, the Supreme Court has applied standards¹⁸⁴ which lie between the extremes of the compelling interest test—which has been strictly scrutinizing in theory and fatal in fact—and the rational basis test—which has been minimally scrutinizing in theory and virtually impotent in fact.¹⁸⁵

The inadequacies of the traditional approach have been particularly conspicuous in the area of government restrictions on the rights of aliens. Alienage does not fit neatly into the two-part scheme but instead falls somewhere in between. Although deserving of some heightened judicial scrutiny, it is clear alienage does not warrant the same judicial protection accorded race or national origin.¹⁸⁶ Aliens are legally discriminated against in ways which

Oct. 20, 1976, Pub. L. No. 94-571, §§ 4(3), (4), 90 Stat. 2703; 20 C.F.R. §§ 422.104, .104a, .105 (1976); see also N.Y. Times, Jan. 5, 1977, at 1, col. 1.

Legislation has been proposed which would apply civil and/or criminal penalties to employers who knowingly employ illegal aliens. See Mailman, "Illegal Aliens"—A View of Employers' Rights and Risks, N.Y.L.J., Sept. 1, 1976, at 1, col. 1. See also Chapman, A Look at Illegal Immigration: Causes and Impact on the United States, 13 San Diego L. Rev. 34, 39-40 (1975); Manulkin & Maghame, A Proposed Solution to the Problem of the Undocumented Mexican Alien Worker, 13 San Diego L. Rev. 42, 55-61 (1975).

183. See *Marshall v. United States*, 414 U.S. 417, 430-40 (1974) (Marshall, J., dissenting); *In re Griffiths*, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting); *Vlandis v. Kline*, 412 U.S. 441, 458-59 (1973) (White, J., concurring); *Independent School Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973); *Gunther*, The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8-10, 17 (1972) [hereinafter cited as *Gunther*]; *Nowak*, Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications, 62 Geo. L.J. 1071, 1072-75 (1974) [hereinafter cited as *Nowak*]. See generally *Gunther*, *supra* at 18-24; *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1076-132 (1969) [hereinafter cited as *Developments*].

184. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Gomez v. Perez*, 409 U.S. 535 (1973) (per curiam); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). See also *Nowak*, *supra* note 183, at 1093-94.

185. *Gunther*, *supra* note 183, at 8.

186. See *Mathews v. Diaz*, 426 U.S. 67, 77-80 (1976); *Sugarman v. Dougall*, 413 U.S. 634, 649-50 (1973) (Rehnquist, J., dissenting); *Palmer v. Thompson*, 403 U.S. 217, 220 (1971) (primary purpose of fourteenth amendment was to end racial discrimination); *Developments*, *supra* note 185, at 1124; *Aliens and The Federal Government: A Newer Equal Protection*, 8 U. Cal. Davis L. Rev. 1, 13 (1975) [hereinafter cited as *U. Cal. Davis L. Rev.*]. See also *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (equal employment provisions of Civil Rights Act do not bar discrimination on the basis of alienage). Moreover, alienage is an alterable status, unlike the immutable characteristics of race and national origin. *Forum: Equal Protection and the Burger Court*, 2 Hastings Const. L.Q. 645, 668-69 (1975). Aliens may change their status and become

would unquestionably be unconstitutional if similarly applied to persons on the basis of race or national origin. Moreover, alienage holds the position of being at the same time both suspect and not: suspect for state discrimination but not for federal.¹⁸⁷ And even within the state level, it has been recently suggested that alienage is not always a suspect classification.¹⁸⁸

Legal analysts have recognized the problems with the strict scrutiny test as applied to alienage.¹⁸⁹ One commentator has suggested that alienage achieved its suspect class status only because the Supreme Court was shackled by the rigid two-tiered approach which did not allow any intermediate standards. In order to avoid giving legislatures virtually unrestrained freedom in classifying on the basis of alienage, it is suggested that the Court was forced to nudge alienage into the suspect category along with race.¹⁹⁰

It is unlikely that alienage as a suspect class will ever be extended to federal actions; in fact, it is probable that the suspect status which alienage does enjoy with respect to states will erode with time.¹⁹¹ In its place, it is evident a flexible standard is emerging which requires less than strict scrutiny. In order to compensate for this lesser standard, it has been suggested that the burden in such actions be shifted to the government involved to prove the validity of the classification.¹⁹² Such an approach would enable the courts to conduct a more meaningful examination to prevent legislatures from excessively or inappropriately infringing upon the rights of aliens. Instead of insignificant, academic comparisons between political and non-political distinctions, instead of inconsistent, irrational shifts in the standard of review according to who is discriminating, the courts would then scrutinize the purpose of the classification to see whether there is a strong enough reason to justify discrimination. In any event, in searching for more effective and practical standards of review, the Supreme Court must not allow the rights of an American minority to be compromised.*

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citizens through the process of naturalization. In addition, the children of aliens born in the United States are citizens. See U.S. Const. amend. XIV, § 1.

187. See notes 111-12 *supra* and accompanying text.

188. See note 80 *supra* and accompanying text.

189. See Nowak, *supra* note 183, at 1097-99; U. Cal. Davis L. Rev., *supra* note 186, at 15.

190. Nowak, *supra* note 183, at 1099.

191. See Nowak, *supra* note 183, at 1099 ("Alienage should be considered a neutral classification . . ."); Note, Protection of Alien Rights Under the Fourteenth Amendment, 1971 Duke L.J. 583, 594-95 ("[T]he recognition that alienage is not a 'suspect' classification . . . must be applauded.").

192. See Nowak, *supra* note 183, at 1098; U. Cal. Davis L. Rev., *supra* note 186, at 25.

* *As this Comment went to press, a three-judge panel in the Central District of California struck down a state statute prohibiting the employment of aliens as deputy probation officers. In contrast to Foley v. Connelie, the court ruled that deputy probation officers were not "high level" officials participating "directly in the formulation, execution or review of broad public policy" as contemplated by the Supreme Court in Sugarman. In refusing to accept the justification advanced by the state as a compelling interest—its power to define its political community—the court held that the statute violated the fourteenth amendment. Chavez-Salido v. Cabell, 45 U.S.L.W. 2388 (C.D. Cal. Feb. 2, 1977).*