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Aliens, Employment, and Equal Protection

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I. INTRODUCTION

The resident alien traditionally has been accorded many of the protections guaranteed citizens by the United States Constitution, including the rights of criminal defendants, the right to "just compensation" for property "taken" by the government, and the right to invoke the writ of habeas corpus. Despite those measures of equal treatment, the non-citizen has faced substantial legislative restrictions in employment opportunities, due largely to fear of economic competition on the part of pressure groups of particular trades, businesses, and professions. The equal protection clause of the fourteenth amendment previously was thought not to be a barrier to such legislation since the states needed only to justify the discrimination by demonstrating that a "rational basis" existed for the legislation. Recently, however, the Supreme Court, in Graham v. Richardson, announced that alienage was an inherently suspect

1. The term "resident alien" refers to a non-citizen lawfully residing in the United States in accordance with procedures established by federal statutes regulating immigration and naturalization. The statutory language describing such a person is one "lawfully admitted for permanent residence." 8 U.S.C. § 1101(a) (1970). See id. § 1255(a).

2. Wong Wing v. United States, 163 U.S. 228, 238 (1896); Shinyu Noro v. United States, 148 F.2d 696, 698 (5th Cir. 1945).


5. It is beyond the scope of this Comment to comprehensively compile and describe the many statutes which directly or indirectly restrict alien employment opportunities. For a general compilation of such statutes, see M. Konvitz, The Alien and the Asiatic in American Law 190–211 (1946); Ohira & Stevens, Alien Lawyers in the United States and Japan — A Comparative Study, 39 Wash. L. Rev. 412, 413 (1964); Note, Constitutionality of Restrictions on Aliens' Right to Work, 57 Colum. L. Rev. 1012 (1957).

6. M. Konvitz, supra note 5, at 172.

7. U.S. Const. amend. XIV, § 1. The clause provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Id. (emphasis added).

8. Equal protection analysis has been divided along two distinct planes. Legislative classifications considered to be inherently "suspect," such as race, or those distinctions infringing a "fundamental right" can be sustained only after withstanding strict judicial scrutiny. These classifications must serve a "compelling" or "overriding" state interest and be necessary to effectuate the state's statutory purpose in order to withstand equal protection attack. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (fundamental right of interstate travel infringed); Loving v. Virginia, 388 U.S. 1, 9 (1967) (classification based on race). Statutory distinctions neither inherently suspect nor affecting fundamental rights need only have a reasonable or rational basis to be found constitutional. In these cases, the usual presumption of a statute's constitutionality applies. See Dandridge v. Williams, 397 U.S. 471, 486–87 (1970). See generally Developments in the Law — Equal Protection, 82 Harv. L. Rev. 1065 (1969).

classification, and hence a discriminatory state law had to be able to pass the test of strict judicial scrutiny in order to withstand an equal protection challenge. Then, in the 1973 companion cases Sugarman v. Dougall and In re Griffiths, the Supreme Court, with broad strokes, brushed away much of the states' power to condition employment on United States citizenship.

This Comment will consider the evolving position of the alien vis-à-vis the equal protection clause and will emphasize case law which delineates the state's power to restrict the alien's right to work. Detailed treatment will be given to the effect of the alien's new "suspect class" status through close examination of Dougall and Griffiths. In addition, discrimination by the federal government and the question of whether any restriction of federal employment to United States citizens is so unjustified as to be violative of the due process clause of the fifth amendment will be considered through a discussion of the effect of Graham, Dougall, and Griffiths upon federal employment standards.

II. EARLY PRECEDENT AND THE RATIONAL BASIS TEST

The common law created no general barrier to the alien's ability to secure employment. However, as the United States underwent rapid industrialization and shifted from a rural to an urban society, new limitations on employment opportunities gave rise to a policy of preferring citizen labor. As a result, numerous statutory limitations on the alien's right to work were developed. Despite this xenophobic attitude, as far back as 1886 it was settled that the protections of the fourteenth amendment were not restricted to United States citizens. In Yick Wo v. Hopkins, the Supreme Court decided that the equal protection clause was of universal application, extending to all persons "within the territorial jurisdiction, without regard to nationality." The Court, in finding an ordinance to have been administered in a discriminatory manner against the alien petitioner, did not expressly state the standard by which an equal protection violation was to be found, but stated that no reason had been
advanced to justify the alleged discrimination.\textsuperscript{20} Hence, it appeared after \textit{Yick Wo} that a classification based upon alienage having a basis in reason would pass muster under the equal protection clause.

The Court squarely faced the issue of the alien's right to work in \textit{Truax v. Raich},\textsuperscript{21} a case involving a state statute which dictated that at least 80 per cent of the employees of any given employer had to be citizens. While recognizing the state's power to make reasonable legislative classifications to protect the public health, safety, and welfare, the Court voided the statute, emphasizing that a state cannot deny its inhabitants "the ordinary means of earning a livelihood."\textsuperscript{22} Furthermore, the Court opined that the "right to work for a living in the common occupations of the community" struck to the core of the fourteenth amendment.\textsuperscript{23} Although a "common occupation" could not be denied to aliens, the \textit{Truax} majority expressly approved classifications based upon alienage when the statute concerned (1) the common property or resources of the people of the state, (2) the regulation of the public domain (the police power), or (3) persons employed in public work.\textsuperscript{24} Thus, while \textit{Truax} delineated a seemingly broad area in which the state could not classify on the basis of alienage, it simultaneously recognized three justifications for state statutory limitations regarding non-citizen employment. These justifications will be briefly examined.

\textbf{A. Common Property}

At early common law, the sovereign held title to all fish and game and, consequently, the use of such "common property" was subject to governmental authority and regulation.\textsuperscript{25} In \textit{McCready v. Virginia},\textsuperscript{26} the question was raised as to whether a state could prohibit citizens of other states from planting oysters in its tidal waters. Finding that the statute did not conflict with Congress' exclusive power to regulate interstate commerce, the Supreme Court recognized that the state owned the beds of its tidewaters and all the natural resources therein. Hence, the state, in exercising its

\begin{footnotesize}
20. \textit{Id.} \textit{Yick Wo} involved an ordinance which required the licensing of public laundries operating in wooden buildings. \textit{Id.} at 357. While the statute did not discriminate on its face, the conviction of the alien petitioner was reversed because the Court found the ordinance was administered in a discriminatory manner. \textit{Id.} at 373-74.


22. \textit{Id.} at 41.

23. \textit{Id.} (citations omitted). While the Court did not define a "common occupation," it was concerned with the "ordinary private enterprise," within which the state could provide no good reason for limiting employment to citizens. \textit{Id.} at 40-41. The theory on which the \textit{Truax} Court ultimately rested its opinion is not entirely clear. Aside from equal protection considerations, the Court noted that denying aliens the ability to earn a living is equivalent to denying them the right to enter and live in a particular state because "they cannot live where they cannot work." The statute, therefore, would also be void as an interference with Congress' exclusive control over the admission and expulsion of aliens. \textit{Id.} at 42. \textit{See} \textit{Fong Yue Ting v. United States}, 149 U.S. 698, 713 (1893).


26. 94 U.S. 391 (1876).
\end{footnotesize}
proprietary rights, could grant to its citizens the exclusive use of its common property.27

This reasoning was utilized in *Patsone v. Pennsylvania*28 wherein the Court upheld a statute which barred aliens from the possession of rifles for the purpose of killing any wild game except in defense of person or property. The Court's opinion is most instructive in its approach to the petitioner's fourteenth amendment argument.29 Mr. Justice Holmes, writing for the majority, began with the premise that a state may make reasonable classifications with reference to the evil which the statute is designed to prevent.30 The Court then foreclosed any real analysis of the statutory discrimination and the state's justification therefore by noting that the issue was one dependent upon practical experience and local conditions. Hence, the Court opined that it "ought to be very slow to declare that the state legislature was wrong in its facts."31 Since the Court admitted that it had no knowledge of local conditions, it could not help but conclude that the statute was not unreasonable.32 Thus the Court appears to have taken the position that a state's interest in its common property is a per se rational basis for such legislation. A more complete analysis would have revealed first, that the statute did not prevent citizens from other states from hunting and, hence, the common property theory was inapplicable; and, second, that the statute was not in fact aimed at the preservation of wild game, for if it were, the legislature certainly would have directed its prohibitions to a larger group than aliens.33 Thus, it is apparent that the statute was aimed at the alien, not at the preservation of the state's property.34 Once that conclusion is reached, it becomes difficult to support the position that the statutory classification was reasonable.

Fortunately, the "common property" rationale has been all but nullified by subsequent Court decisions.35 In *Takahashi v. Fish & Game Com-

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27. Id. at 396–97.
29. Petitioner argued first that the statute deprived him of property without due process of law, and second, that aliens were being discriminated against as a class in violation of the equal protection clause. The Court merged the two arguments into one, stating that if the deprivation of property was justified by the legislative goal (the protection of wild life), then discriminatory means might also be utilized. Id. It appears that the Court did not recognize the possibility of the imposition of an unjustifiable classification notwithstanding the existence of a lawful state objective.
30. Id. at 144.
31. Id.
34. Id.
35. In a case involving discrimination between citizens of different states, the Supreme Court asserted that the common property theory rested on a legal fiction. *Toomer v. Witshall*, 334 U.S. 385, 402 (1948).
mission, for example, the Court invalidated a California statute which banned the issuance of commercial fishing licenses to aliens ineligible for citizenship. Among other things, the state had argued on the authority of McCready and Patsone that it had a "special public interest" in the protection of its citizens' ownership rights of the fish swimming within the three-mile limit. The Court, while not expressly rejecting that claim, stated that to whatever extent California "owned" fish within its waters, that ownership was inadequate to justify the exclusion of lawfully residing aliens from the chance to earn a living while allowing all others to fish commercially. Thus, the "special public interest" in common property, by itself, does not provide a sufficient rational basis on which to ground discriminatory legislation — at least where the statute involves employment.

B. Public Work

Related to the common property theory is the proposition that the conditions of public work, including what class of persons may be employed, are also within the state's power to control. This theory was upheld by the Supreme Court in Heim v. McCall, a case in which a statute restricting eligibility for participation in public work projects to United States citizens was found not to violate the equal protection clause. Underlying the statute was the state's desire to prevent the pauperization of its citizens and one means available was the exclusion of aliens from sharing in the distribution of state tax revenues. Two general principles

37. Id. at 420. The Court cited another of its decisions which had sustained the federal treaty-making power as supreme in the face of the state's claim of ownership of birds regulated by the treaty, Missouri v. Holland, 252 U.S. 416 (1920). In that case, Mr. Justice Holmes, who wrote the Patsone opinion, stated that when matched against the federal treaty power, "[t]o put the claim of the State upon title is to lean upon a slender reed." Id. at 434. Hence, the "ownership" theory, while arguably sufficient to override the alien's right to use natural resources for any reason, was but a "slender reed" when compared with federal power.
38. 334 U.S. at 421.
39. Id.
40. No opinion is expressed with respect to the validity of the "special public interest" in common property as a justification for discriminatory legislation outside the area of employment.
42. 239 U.S. 175 (1915).
43. 239 U.S. at 193. See also Lee v. Lynn, 223 Mass. 109, 111 N.E. 700 (1916); Cornelius v. Seattle, 123 Wash. 550, 213 P. 17 (1923).
44. This was stressed by Judge Cardozo in People v. Crane, 214 N.Y. 154, 164, 108 N.E. 427, 430 (1915), which was affirmed by the Supreme Court on the same day and on the same authority as Heim. Crane v. New York, 239 U.S. 195 (1915). In Heim, the Court did not expressly rely upon the state's interest in preventing the pauperization of its citizens but instead rested its holding on the prior decision of Atkin v. Kansas, 191 U.S. 207 (1903), wherein it had sustained a statute which limited to eight the number of hours per day an employee of the state could work in its behalf. In reply to the argument that the Kansas statute denied the alien due process of law, the Atkin Court had answered: "[I]t belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf." Id. at 222-23. The distinction that the statute at issue in Heim was concerned with who could work and not
emerged: first, that public employment was a "privilege;" and second, that a state's license to prefer citizens over aliens in the distribution of state money provided the necessary rational basis for the statutory discrimination.

While the McCready-Patsone line of cases had focused upon the state as property owner, the Heim approach was to view the state as employer. The Court implied that any time the state acted in its capacity as employer or disbursed its revenues, sufficient reason existed for limiting the benefits of governmental action to citizens. Therefore, it appears that by equating the state with the private employer, the Heim Court created an exception to the fourteenth amendment's proscription of discriminatory state action: like the private employer, the state could condition employment on any basis.

C. Police Power

Under its general police power, a state may absolutely prohibit occupations which are dangerous or susceptible to abuse. A corollary of this power is that the state also has the ability to reasonably regulate any aspects of those enterprises. The Supreme Court relied upon this rationale in Ohio ex rel. Clarke v. Deckebach in upholding a statute which permitted licenses for the operation of pool halls to be issued only to citizens. The pattern of the Court's analysis was familiar. While reaffirming the fourteenth amendment's prohibition of "plainly irrational discrimination against aliens," the Court considered conclusive the state's assertions that pool rooms were filled with undesirables and were centers of criminal activity; that non-citizens as a class were less familiar with the laws; and, merely how long one could work was recognized by the Heim Court, but the public nature of the work and the state's rights as private employer was deemed controlling. See Note, supra note 5, at 1017.

45. Public employment was labelled a "privilege" in People v. Crane, 214 N.Y. 154, 164, 108 N.E. 427, 430, aff'd sub nom. Crane v. New York, 239 U.S. 195 (1915), wherein the criminal sanction of the statute at issue in Heim was upheld. See also People v. Warren, 13 Misc. 615, 34 N.Y.S. 942 (Super. Ct. 1895).

Historically, a distinction had been drawn between constitutionally protected rights of citizens and unprotected privileges granted by the government. When governmental activity was characterized as the bestowing of a privilege upon the public, any arbitrary aspects of the activity were held to be beyond constitutional protection. See generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1440 (1968). Thus, in Crane, Judge Cardozo, although he recognized that an alien had a right to the equal protection of the laws, by classifying governmental work project employment a privilege found no fourteenth amendment violation. 214 N.Y. at 164, 108 N.E. at 430.

46. See Note, supra note 5, at 1017.

47. However, when the state hires an independent contractor to work on its public projects, it cannot dictate the conditions to which the independent contractor must adhere in his hiring practices. Thus, a New York law prohibiting any contractor with a municipal corporation to employ aliens on public work projects was held to violate the privileges and immunities clause of the fourteenth amendment. People v. Warren, 13 Misc. 615, 34 N.Y.S. 942 (Super. Ct. 1895).

48. On its face this "exception" was not eroded by the Court's decision in Takahashi v. Fish & Game Commission, 334 U.S. 410 (1968).


50. 274 U.S. 392 (1927).

51. Id. at 396, citing Truax v. Raich, 239 U.S. 33 (1915), and Yick Wo v. Hopkins, 118 U.S. 356 (1886). (Other citations omitted).
therefore, that maintenance of billiard rooms by aliens was injurious to the public welfare. As in *Patsone*, the Court would not balance the equal protection argument with the police power. It was sufficient that the legislative aim had a possible rational basis — the occupation was subject to possible abuse — in order for the statute to be constitutionally valid.

Many states have utilized this rationale to support the exclusion of aliens from various "private" occupations. The courts sanctioned this exercise of the police power provided the particular occupation was subject to some possible abuse, but rejected the state's reasoning if the statute placed limitations on one of the "common occupations." In all cases, the focus was upon the relationship between the occupation and the state, not upon the alien and his right to work. The distinction between a "common" occupation and one "subject to abuse" was far from clear and the cases reflect little more than the judicial attitude of the particular court toward alien employment in the particular activity at bar.

In summary, a state legislature could constitutionally restrict alien employment opportunities whenever it could characterize the state as the employer or show that the occupation was dangerous or subject to abuse. In either case, there existed an almost irrebuttable presumption that the statutory discrimination rested on a rational basis.

### III. STRICT JUDICIAL SCRUTINY

Obviously, the "reasonable relation" test set forth in the *Yick Wo*, *Heim* and *Clarke* cases — focusing on the right of the state but not on the alien's right — was wholly inadequate in protecting the right of the alien to secure employment. Requiring an alien to prove the negative proposition that a legislative classification was not rational placed a burden upon him.
that was nearly impossible to bear.\textsuperscript{58} However, the state's impenetrable position against equal protection arguments began to yield after several notable decisions in which the focus was upon the rights of the individual alien rather than the state's power.

The seed of the application of the strict scrutiny test to judicial review of alien discrimination was subtly planted in a footnote to the Supreme Court's opinion in \textit{United States v. Carolene Products Co.},\textsuperscript{59} a case in which the Court upheld, against due process and equal protection arguments, a federal statute regulating the shipment of milk in interstate commerce.\textsuperscript{60} After stating the presumption of the rationality and constitutionality of legislation affecting commercial transactions, Mr. Justice Stone opined that the presumption may have less force when a statute affects specific constitutional prohibitions. In listing several prohibitions, the Court stated:

\begin{quote}
[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, \textit{and which may call for a correspondingly more searching judicial inquiry.}\textsuperscript{61}
\end{quote}

While not expressly mentioning the \textit{Carolene Products Co.} footnote, the Court, in \textit{Takahashi v. Fish & Game Commission}\textsuperscript{62} gave further evidence of its willingness to provide "more searching judicial inquiry." In addition to seriously damaging the common property rationale, Mr. Justice Black's majority opinion further restricted state power to legislate against the alien. The state urged that since the federal government could discriminate on the basis of race and color in exercising its regulatory power over immigration and naturalization,\textsuperscript{63} the state could condition eligibility for commercial fishing licenses on grounds of eligibility for citizenship because, in doing so, it was merely following the national government's lead.\textsuperscript{64} The Court characterized the state's argument as a \textit{non sequitur}, stating that the immigration and naturalization of aliens lay within the exclusive jurisdiction of the federal government, and that the states had no grant of similar power.\textsuperscript{65} The Court added: "[T]he power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."\textsuperscript{66} \textit{Takahashi} is thus important not only...
because it clearly affirmed the proposition that federal supremacy over the regulation of immigration and naturalization restricts the use of those powers by the state, but also because it underscored, by way of dicta, the judicial attitude toward state discrimination against aliens.

Both *Takahashi* and *Carolene Products Co.* were specifically relied upon in *Purdy & Fitzpatrick v. State*, wherein the Supreme Court of California struck down a provision of the state Labor Code which prohibited alien employment on public work projects. Using as groundwork the notion that restrictions on employment opportunities limit one's ability to achieve the economic security "essential for the pursuit of life, liberty and happiness," the court held that classifications based on alienage are subject to a strict standard of review. Two general explanations for the use of the "strict scrutiny test" were offered: (1) alien groups and aliens have consistently been subject to prejudice, and (2) aliens do not have the right to vote and thus are denied the most basic means of defending themselves. Hence, any classification, in order to be found constitutional under the equal protection clause, had to serve a compelling state interest and be necessary to accomplish that compelling legislative aim. In a thorough and well-reasoned analysis, the California court did not find the requisite state interest and the statute was held violative of the fourteenth amendment.

These cases represented significant progress but, as precedent, each decision was subject to the claim that it was not controlling on questions of the alien's status under the equal protection clause. The *Carolene Products Co.* footnote had been criticized as a poor method of establishing a new constitutional mandate; *Takahashi* could be distinguished as involving a classification based not on alienage, but on race; and *Purdy*,...
however convincing, was controlling law in only one state. However, all
doubt as to the validity of the position adopted in those cases was dispelled
by the Supreme Court in Graham v. Richardson. While the classifica-
tion in Graham did not pertain to alien employment, the Court asserted
that any discrimination against non-citizens was inherently suspect and
thus had to withstand strict judicial scrutiny. In making this determina-
tion, the Court was quite terse. Mr. Justice Blackmun's majority opinion
flatly stated that "[a]liens as a class are a prime example of a 'discrete
and insular minority'" and that more intense judicial review was appro-
priate. The attitude of the Graham majority concerning the appropriate
standard of review was quite conclusory, interpreting prior decisions as
having already established alienage as a suspect class. Actually, Graham
was the first Supreme Court case to formally acknowledge alienage as a
suspect class and reverse the presumption of constitutionality of statutory
classifications affecting the non-citizen. At the very least, Graham clarified
what was left implicit in the Carolene Products Co. and Takahashi opinions.
The current law, therefore, requires the state to show affirmatively that
the classification serves a compelling or overriding state interest. The
mere rationality of the legislation is no longer sufficient to support its
validity under the equal protection clause.

It is submitted that the imposition of a more demanding standard of
review was a clear step in the proper direction. Since the alien effectively
has been without the franchise since 1928, a presumption of the constitu-
tionality of discriminatory legislation would impose severe limitations
upon the alien in his most important forum — the courtroom. Analogiz-
tion. 334 U.S. at 412-13. The Court left unanswered the question of whether the
amendment to the California statute was merely an indirect way to discriminate
against persons of Japanese ancestry, but noted that the Japanese were one of the
few racial groups ineligible for citizenship and that the 1940 census revealed that
Japanese aliens comprised the great majority of ineligible aliens then residing in the
United States. Id. at 412 n.1, 418. Mr. Justice Murphy devoted his entire concurring
opinion to the argument that the amended state statute was a "thin veil used to con-
ceal a purpose being too transparent." Id. at 422, 426 (Murphy, J., concurring). See also Oyama v. California, 332 U.S. 633, 650 (1948).

74. 403 U.S. 365 (1971).
75. The case involved two statutes: one making citizenship a requirement for
the receipt of welfare benefits and another imposing a residency requirement for aliens
otherwise eligible for similar benefits. Id. at 366.
76. Id. at 371-72.
77. Id. citing United States v. Carolene Products Co., 304 U.S. 144, 152-53
n.4 (1938).
78. Id. The statutes in Graham were found unable to withstand the compelling
state interest test and were held violative of the equal protection clause. Id. at 376.
79. 403 U.S. at 376.
80. See Aylesworth, The Passing of Alien Suffrage, 25 AM. POL. SCI. REV. 114
(1931).
81. Mr. Justice Frankfurter noted that when the legislative processes are freely
accessible, fighting the wisdom of law in the public forum and before the legislature
itself, rather than before the judiciary, "serves to vindicate the self-confidence of a
free people." Minersville School Dist. v. Gobitis, 310 U.S. 586, 600 (1940). This
observation throws into sharp relief the plight of the alien, who cannot bring his
case before the legislature. Hence, the judicial branch must be the protector of the
ing to the suspect nature of racial classifications, the condition of alienage, while subject to change, is congenital. Thus, classification on that basis tends to relegate a minority to an inferior social and economic position. It also appears incongruous as a matter of policy, for Congress to provide the alien with the right to reside in the United States, only to have the courts permit the states to erect substantial barriers to the alien's ability to remain in the country. It would appear that Congress did not contemplate that the lawfully admitted alien would be forced to live only in those states with a "liberal" policy toward alien rights — hence, the supremacy of federal power underscores equal protection principles affecting all states.

IV. Dougall and Griffiths: The Alien and the Right to Employment

No longer satisfied with a showing of a "rational basis" as justification for a state's limitation of certain benefits and opportunities to citizens, it was inevitable that the Court should be called upon to provide a serious analysis of the interplay between the alien, his right to employment, and the equal protection clause. The Court seized an opportunity to provide such an analysis in two recent cases in which the state could not show the requisite compelling interest to justify discrimination against non-citizens.

A. Sugarman v. Dougall

Appellees, four aliens, sought injunctive and declaratory relief against the operation of a New York statute which restricted to citizens permanent positions in the competitive class of that state's civil service scheme. They had resided in the United States an average of almost five years, but had made no attempt to attain citizenship. A three-judge federal court in the Southern District of New York upheld the appellees' challenge that the civil service law's discrimination violated the equal protection and supremacy clauses. The Supreme Court affirmed, holding that the statute, in the context of the entire civil service scheme, was too broadly discriminatory to be supported by the state's substantial interest in limiting government participation to those who were in "the basic conception of a

82. There are various methods by which the alien can become a naturalized citizen. See 8 U.S.C. §§ 1435 et seq. (1970).
83. See Developments in the Law, supra note 8, at 1126-27; 4 SETON HALL L. REV. 210, 219 (1972).
84. See note 23 supra. For a pre-Graham suggestion that alienage should not be a suspect class, see Note, Protection of Alien Rights Under the Fourteenth Amendment, 1971 DUKE L.J. 583, 595.
85. 413 U.S. 634 (1973).
87. 413 U.S. at 636.
88. 413 U.S. at 637-38. This is somewhat significant to the argument that since an alien can alter his status, he is not encumbered with an immutable position, that a classification on that basis is thus not as damaging as a classification based on race, and that a less severe standard of review might, therefore, be constitutionally permissible.
political community." Further, the Court found that, standing alone, the special public interest doctrine espoused in Heim v. McCall and Ohio ex rel. Clarke v. Deckebach was not a compelling interest sufficient to justify state discrimination against the alien as civil servant.

The appellant civil service commission argued that a state, when creating a civil service system, realizes that the civil servant often directly participates in governmental policy-making and, therefore, must have undivided loyalty to the state in order to support two fundamental government interests: absolute freedom in the exercise of judgment and public confidence in the objectivity of governmental workers. Hence, went the argument, the alien, who may still owe allegiance to his native country, is a poorer candidate to fulfill the state's needs than is a citizen. In analyzing this claim, the Dougall Court placed the New York statute in its proper context by considering all the state's statutes and constitutional provisions pertinent to government employment. This inquiry revealed that certain classes of civil service employees, including those holding state executive positions, certain municipal officers, and judicial employees, were not subject to a citizenship requirement. The statute which defined unclassified civil service — legislative appointee positions, other legislative employees, and officers surrounding the Governor — also imposed no ban on aliens. Yet the statute at issue was applicable to many positions from the menial to the policy-making. Hence, many appointive and sophisticated jobs seemingly of a policy-making nature were not restricted to citizens while aliens, including the appellees, were excluded from such jobs as typist, general office worker, and even sanitation men. Applying equal protection principles, the Court stated: “Our standard of review of statutes

90. 413 U.S. at 642-43. See also Dunn v Blumstein, 405 U.S. 330, 344 (1972). The state's ability to define its political community was applied to exclude aliens from participation in the state's political institutions in Pope v. Williams, 193 U.S. 621, 632-34 (1904). The basis of that power was the state's right to establish and operate its own government and to determine the qualifications of its public office holders. See Boyd v. Thayer, 143 U.S. 133, 161 (1892). Cf. U.S. Const. art. IV, § 4; id. amend. X.


93. 413 U.S. at 645. In reaching its conclusion on equal protection principles, the Court found it unnecessary to discuss the supremacy clause argument. Id. at 646.


95. 413 U.S. at 639-40.


97. Id. § 44. This section defines the “competitive class” but it is § 53(1) which imposes the citizenship requirement. There are also two other classes of civil service workers. The first is the noncompetitive class which utilizes a noncompetitive examination. N.Y. Civ. Serv. Law § 42 (McKinney 1973). The other is a class for positions involving unskilled labor. Id. § 43. There is no alienage exclusion in either class. Also pertinent to the Dougall Court's consideration of the broad statutory context of New York's civil service system were several state constitutional provisions limiting to citizens high elective offices. 413 U.S. at 640. Further, the Court noted a statute which required any person holding a “civil office” to be a United States citizen. N.Y. Pub. Officers Law § 3 (McKinney 1973).

98. 413 at 643. Of the four instant appellees, two were previously employed by New York City as clerk-typists, one as an “administrative assistant,” and one as a "human resources technician." Id. at 638.
that treat aliens differently from citizens requires a greater degree of precision." In concerning itself not only with the state's interest, but also with the breadth of the statutory discrimination, the Court placed emphasis on the means the state employed in achieving its goal of having citizens occupy governmental policy-making roles. While discrimination against aliens only in policy-making positions would reflect a compelling state interest, an across the board restriction could not be justified. Finding the discrimination insufficiently tailored to be supported by the apparently legitimate legislative purpose, the Court concluded that the classification did not withstand strict scrutiny.

The Court took a very sensitive approach to alien discrimination. If the state's interest is not substantial, no analysis of the means taken to effectuate the state legislative aim will be necessary. Moreover, a state's interest in legislative classification may be substantial; indeed, it may even approach the level of "compelling," yet the Court will scrutinize the proposed classification to determine if the limitations imposed on the non-citizen are necessary to achieve the justified result. The approach in Dougall is therefore somewhat analogous to the Court's method of ascertaining constitutional infirmities in the area of freedom of speech: even if the state has a valid reason for suppressing activities connected with speech, the means taken must be drawn precisely so as not to include any protected speech within its proscriptions.

The appellants in Dougall asserted that not only did the state have an interest in excluding aliens from policy-making positions, but also that it had the right to confine all public employment to citizens. Reliance was placed on the reasoning of Heim v. McCall wherein the Court accepted the "special public interest" doctrine based on the theory that a state, in distributing its resources, can favor its citizens. Thus, the appellant argued that this special public interest was a compelling state interest justifying the discrimination. The Graham Court had answered that argument by recognizing that such a theory had as its basis the distinction between right and privilege, a distinction which the Court properly asserted as having been clearly discredited by a number of cases which had refused to base constitutional doctrine on the determination of whether a govern-

100. Id. at 642.
101. Id. at 642-43.
102. By way of contrast, under the rational basis approach to discriminatory legislation, any interest will serve to sustain the statute. Thus, in Dandridge v. Williams, 397 U.S. 471 (1971), the Court stated:

[A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.

Id. at 485.
103. 413 U.S. at 642-43.
105. 413 U.S. at 643.
107. See notes 41-43 and accompanying text supra.
mental benefit was characterized as a right or privilege. Although the Graham Court had only opined that the special public interest doctrine was not applicable in justifying the discriminatory grant of welfare benefits, the Dougall Court did not hesitate to apply Graham's reasoning to the context of government employment. In both instances, the alien was being discriminated against in the state's disbursement of its revenues. Yet, the non-citizen pays taxes, is subject to military conscription, and generally bears the same burdens as the citizen. Thus, "he assumes duties and obligations which do not differ materially from those of native-born or naturalized citizens."

The vitality of the "special public interest" doctrine thus has been eroded by Takahashi and further weakened by Graham and Dougall. It would appear clear that aliens no longer can be discriminated against on the ground that the government may properly prefer its citizens in the distribution of its resources. Dougall's ultimate conclusion is that, as an

108. 403 U.S. at 374. In Sherbert v. Verner, 374 U.S. 398 (1963), the Court had before it a state statute which provided that if a claimant for unemployment benefits would not accept suitable work, he or she would be ineligible for any compensation. When appellant was considered not to have accepted suitable work because she would not work on the sabbath day of her faith, the Court held the statute violative of the first amendment's guarantee of freedom of religion. Id. at 410. The state argued that unemployment benefits were not the claimant's right, but were merely a privilege. In rebutting that argument, the Court stated: "It is too late in the day to doubt that... liberties... may be infringed by the denial of or placing of conditions upon a benefit or privilege." Id. at 404. See also Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969).

The right-privilege distinction was also argued as a justification for exclusion of alien students from a public scholarship fund. This claim was held violative of the equal protection clause on the authority of Graham. Chapman v. Gerard, 456 F.2d 577 (3d Cir. 1972).

109. 403 U.S. at 374.
110. 413 U.S. at 645.
111. Id.
113. Eisler v. United States, 170 F.2d 273, 279 (D.C. Cir. 1948), cert. granted, 335 U.S. 857, cert. dismissed, 338 U.S. 883 (1949). In Eisler, an alien attempted to utilize his lack of citizenship as a bar to a congressional committee's attempt to subpoena him for testimony. In upholding his contempt conviction for failure to testify, the court stated:

[A]n alien resident owes a temporary allegiance to the government of the United States and he assumes duties and obligations which do not differ materially from those of native-born or naturalized citizens; he is bound to obey all the laws of the country... .

Id. at 279.

114. See notes 36-40 and accompanying text supra.
115. The California Supreme Court, in Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969), in holding that limiting eligibility for participation in public work projects to citizens was violative of the fourteenth amendment, recognized that the Heim "special interest doctrine" was no longer viable. The court noted that aliens contribute to the community and relied heavily upon Takahashi as confirming new developments in equal protection analysis. Takahashi was interpreted (1) to establish a stricter standard of review of classifications based on alienage; (2) to reject the common property rationale in the natural resources context; and (3) to imply that employment in the common occupations is a fundamental right. Id. at 581-85, 456 P.2d at 656-58, 79 Cal. Rptr. at 88-90. If a legislative classification affects a fundamental right, the court will apply the strict scrutiny test. See note 8 supra.

In the civil service context, it could be argued that Dougall recognized that a non-citizen could not fulfill the state's goals when working in a policy-making role, 413 U.S. at 642-43, although the Court appears to have foreclosed any state
alien, lawfully residing in a state, carries the burdens of citizenship, a strict judicial review of a government's withholding of benefits which would accrue to a citizen will rarely reveal the now-necessary compelling state interest for singling out the non-citizen as a class.\textsuperscript{118}

The instant case does not foreclose all limitation on alien employment. Certainly an individual alien may be excluded from a particular position or even class of positions on the basis of his alienage if their nature demands a serious relationship to citizenship.\textsuperscript{117} Surely a state can limit its political offices to citizens, however, the \textit{Dougall} Court provided few concrete examples of what types of government service demand a relationship to citizenship. The Court did note that in the civil service area those jobs which clearly involve policy-making involved "functions that go to the heart

classification restricting alien employment in non-policy-making roles. The \textit{Purdy} court stated that alienage bears absolutely no relationship to the ability of those who work on public projects and that the state asserted no "intrinsic difference between the alien and the citizen which would render the latter the more proper subject for the employment advantages bestowed . . . ." 71 Cal. 2d at 581, 456 P.2d at 655, 79 Cal. Rptr. at 87.

Thus, the \textit{Dougall} Court deemed the cases which espoused the "special public interest doctrine" not controlling in the area of civil service employment, and it would appear that they have even less vitality in the public works context. The doctrine may retain some viability in areas where the state's discrimination may be justified on a rational basis. However, it would appear dead in cases involving alien discrimination since a suspect class would then be involved, thus requiring the state's justification to be a compelling state interest. The "special public interest doctrine" has been invoked to uphold decisions limiting the non-citizen's ability to inherit and to own real property. \textit{See} Blythe v. Hinckly, 180 U.S. 333 (1910); Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923). \textit{But see} Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952). Eventually, the doubtful constitutional foundation upon which these decisions rest will be recognized as belonging to an era past. With respect to the ability of the \textit{federal} government to discriminate against aliens, \textit{see} part V infra.

\textsuperscript{116} 413 U.S. at 645-47. Mr. Justice Rehnquist, in dissent, opined that the "rational basis" standard of review is more appropriate when analyzing classifications based on alienage. He distinguished \textit{Takahashi} as having involved a racial discrimination, and criticized Graham as relying too heavily on the \textit{Caroleene Products Co.} footnote which did not expressly mention alien discrimination. Further, he pointed out, the alien's "status" can be changed by the affirmative acts provided for by the naturalization laws; hence alienage did not deserve the same strict standard of review which the Court provided in cases involving discrimination based upon race or national origin. 413 U.S. at 657. (Rehnquist, J., dissenting). Finding it "clear cut" that the state interest required the competitive class of civil servants to be citizens, Justice Rehnquist pointed out that as a result of the tremendous expansion of public administration, many "low level" civil servants had a great deal of policy-making authority. Therefore, the state's desire for efficient government was reasonably related to the requirement of citizenship for government employment, since citizens as a class may be considered more familiar with the social and political structure of the society. \textit{Id.} at 661-62.

Mr. Justice Rehnquist's dissent reflects the same basic tones worn by Court decisions of fifty years ago: first, the focus on the state's powers rather than on any concern for the alien, who like any other person, must work to live; and second, the insistence that, since an alien can become a naturalized citizen, he must follow the prescribed procedures before he can become "one of us" and share the benefits that citizens enjoy.

\textsuperscript{117} For example, in a non-employment context, a federal district court has held (after \textit{Dougall}) that federal and state laws excluding aliens from grand and petit jury service served a compelling state interest and were thus constitutional. \textit{See} Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), appeal filed, 43 U.S.L.W. 3001 (U.S. June 21, 1974) (No. 73-1915). In this situation, the court opined that citizens as a class are more likely to make informed factual decisions on issues of personal property and personal liberty due to their greater familiarity with our form of government, history, traditions, and political mores. \textit{Id.}
of representative government" and thus could be limited to citizens. It is the indiscriminate denial of a spectrum of jobs which Dougall prohibits.

In the state government service area alone, Dougall will have far-reaching impact. Presently, at least 17 states have broad statutory restrictions on the alien's eligibility to work for the government. Those restrictions in many ways mirror the blanket proscription imposed by New York in the instant case. Considering the fact that there are approximately 9.5 million state and local governmental employees, the Dougall decision may be the impetus for opening an enormous number of positions presently unavailable to the non-citizen.

B. In re Griffiths

Appellant, a citizen of The Netherlands, had arrived in the United States in 1965 and, after graduation from law school, applied to take the Connecticut bar examination. The state bar examining committee, following a court-made rule, refused to allow appellant to take the examination solely on the ground that she was not a United States citizen. Appellant sought a decree in the state court that the equal protection and supremacy clauses dictated that she be permitted to take the bar examination and that she be declared eligible for bar admission. The decree was denied, and, on appeal the Supreme Court of Connecticut affirmed. After noting probable jurisdiction, the Supreme Court reversed, holding that the citizenship requirement, despite the state's substantial interest in assuring the fitness of its attorneys, did not meet the strict standard of review.

118. 413 U.S. at 647.
119. Id.
121. U.S. Dep't of Commerce, Bureau of the Census, Pocket Data Book 95 (1971). Two district court cases prior to Dougall, in rather brief opinions, invalidated state statutes with broad statutory restrictions against aliens in government employment. The rationale of both cases was founded upon the equal protection and supremacy clauses, with strong reliance upon the holdings of Graham and Takahashi. Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972); Teitscheid v. Leopold, 342 F. Supp. 299 (D. Vt. 1971). It is puzzling that the Dougall opinion never mentioned these cases.
One state case also ignored by the Dougall Court held invalid state restrictions on civil service employment of aliens solely on supremacy clause grounds. Hsieh v. Civil Serv. Comm'n, 79 Wash. 2d 529, 488 P.2d 515 (1971).
123. Conn. Practice Book, R. 8(1).
124. 413 U.S. at 718.
125. The decision of the Connecticut Superior Court for New Haven County is unreported. See In re Griffiths, 162 Conn. 249, 250, 294 A.2d 281, 282 (1972).
126. Id. at 268, 294 A.2d at 289-90.
128. 413 U.S. at 722-23.
applicable to classifications based on alienage and was thus violative of the fourteenth amendment.\textsuperscript{129}

The great majority of American jurisdictions specifically require United States citizenship for admission to the bar.\textsuperscript{130} In several states, an otherwise qualified alien who has formally declared his intention to become a citizen is eligible for admission\textsuperscript{131} and in only two states is there no citizenship requirement.\textsuperscript{132} Early cases decided that the citizenship requirement presented no constitutional problems for three reasons: (1) an alien, owing loyalty to a foreign power, was incapable of taking the oath required of attorneys;\textsuperscript{133} (2) the practice of law is a privilege the state could withhold from whom it pleased;\textsuperscript{134} and (3) an attorney is an officer of the court and such a power should be given only to citizens.\textsuperscript{135} While it is well settled that the states have the power to impose qualifications for bar admissions, the Supreme Court has noted that these qualifications must be related to an applicant's fitness or capacity to practice law.\textsuperscript{136}

Recently, several state courts have re-examined the reasoning behind the exclusion of aliens from legal practice. In Application of Park,\textsuperscript{137} the Alaska Supreme Court analyzed the relationship between citizenship and bar admission and concluded that if an otherwise qualified bar applicant demonstrated the "sincere intention" to become a United States citizen, he

\textsuperscript{129} Id. at 729.

\textsuperscript{130} See Ohira & Stevens, supra note 5, at 413-14.

\textsuperscript{131} Id. at 414 nn.9-11. (Georgia, Massachusetts, Montana, Oklahoma and Oregon). In Massachusetts and Montana, bar admissions will not be granted until the applicant has in fact become a citizen while in Oregon, admission to the bar will be voided if the attorney does not become a citizen within six months after he is eligible. A formal declaration of the intent to become a citizen is merely evidence of such intent and is not a condition precedent to the filing of the formal petition for naturalization. 8 U.S.C. § 1445(4) (1970).

\textsuperscript{132} See Ohira & Stevens, supra note 5, at 415 n.12 (Tennessee and Virginia).

\textsuperscript{133} Id. at 414 nn.9-11. (Georgia, Massachusetts, Montana, Oklahoma and Oregon). In Massachusetts and Montana, bar admissions will not be granted until the applicant has in fact become a citizen while in Oregon, admission to the bar will be voided if the attorney does not become a citizen within six months after he is eligible. A formal declaration of the intent to become a citizen is merely evidence of such intent and is not a condition precedent to the filing of the formal petition for naturalization. 8 U.S.C. § 1445(4) (1970).

\textsuperscript{134} See, e.g., In re Admission to Bar, 61 Neb. 58, 84 N.W. 611 (1900). See note 139 infra.


\textsuperscript{136} See, e.g., In re Yamashita, 30 Wash. 234, 70 P. 482 (1902). Speaking generally to the reasons behind the citizenship requirement for bar admission, the North Carolina Supreme Court, in a case decided prior to the adoption of the fourteenth amendment, stated:

There is no profession relative to which the public good more imperiously requires that its members should duly appreciate . . . the genuine spirit of our political institutions. These are so blended and interwoven with the civil rights of the citizen . . . that it is difficult to conceive how a professional advocate, owing foreign allegiance and cherishing alien prejudices, can usefully vindicate principles in the abhorrence of which he may have been nurtured; how . . . the most brilliant forensic talents can be successfully exerted, unless they are sustained and inspired by an ardent patriotism.

\textit{Ex parte} Thompson, 10 N.C. 355, 363 (1824).

\textsuperscript{137} Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). The Supreme Court has also decided that the right to practice law is not a "privilege or immunity" of citizenship within the fourteenth amendment. Bradwell v. State, 83 U.S. 130 (1872).

\textsuperscript{138} 484 P.2d 690 (Alas. 1971). The petitioner in Park had passed the bar examination but was denied admission to the bar because the applicable Alaska statute and bar rule required that bar applicants be citizens. Id. at 691. See ALASKA STAT. § 8.05.130(a), ALASKA BAR R. 11.
could not be denied admission to the bar. Considering the state's interest, and the interest of the public in having qualified, competent, and reliable attorneys, the court found none to be directly served by the requirement that all practicing lawyers be citizens. Also rejected by Park was the assertion that a non-citizen cannot appreciate "the spirit of American institutions" requisite to the practice of law. The court explicitly stated that its decision did not in any way depend upon the equal protection guarantee, simply holding that when an alien sincerely declares his intention to become a citizen, none of the proposed arguments had a reasonable relation to one's fitness to practice law. The Supreme Court of California, in Raffaelli v. Committee of Bar Examiners overruled a prior decision and found the state's statutory exclusion of aliens from bar admission violative of the equal protection clause. The court relied on Purdy & Fitzpatrick v. State and Graham v. Richardson as establishing a strict standard of review of discrimination based upon alienage and rejected the major arguments that had been raised in Park. Finding that the citizenship requirement had no rational connection with the applicant's capacity to practice law, the Raffaelli court concluded a fortiori that the bar examiners could not meet the burden of establishing that the classification reflected the compelling state interest required to justify the discrimination.

It was against this backdrop that the Supreme Court was called upon for the first time, in Griffiths, to test the citizenship requirement for bar

138. 484 P.2d at 695-96. This "sincere intention" is to be distinguished from the formal filing of a declaration of intention to become a citizen. See note 131 supra.
139. 484 P.2d at 692. The court also rejected the arguments that an alien was incapable of taking the oath to support the Constitution, and was not qualified to be an officer of the court. Id. at 693-95. The court stressed that an applicant who sincerely intends to become a United States citizen reflects the intent to renounce his loyalty to his native country and thus may honestly and meaningfully take an oath to support the Constitution. It noted that an alien serving in the armed forces must take a similar oath. Id. at 694. As to the "officer of the court" argument, the Park opinion stated that no case had ever really explained this reason for excluding aliens from the bar, and it therefore rejected the argument as being devoid of merit. Id. at 695.
140. Id. at 693. Noting that the petitioner had resided in the United States for 14 years, the court opined that this "vague" rationale was valid only to the extent it reflected the applicant's understanding of the role of law in our system. It was asserted that the applicant's unfamiliarity could be better determined by testing his general competence, not by looking at his nationality. Id.
141. Id. at 695. The Park court derived its standard of review for judging the validity of qualifications for the practice of law from a prior decision in which it had held that the court will accept legislative standards and rules if they have a "[r]easonable tendency to determine whether an applicant has a sufficient knowledge of law in Alaska..." Application of Brewer, 430 P.2d 150, 152 (Alas. 1967).
142. 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972).
144. 7 Cal. 3d at 304, 496 P.2d at 1275, 101 Cal. Rptr. at 907.
147. Id. at 292, 496 P.2d at 1267-68, 101 Cal. Rptr. at 899.
148. 7 Cal. 3d at 296-301, 496 P.2d at 1269-73, 101 Cal. Rptr. at 901-05.
admission against the equal protection clause. The Court underscored its analysis, as it did in *Graham* and *Dougall*, by emphasizing the various contributions the alien makes in our society. It was because of these contributions that the state, in justifying its discrimination against the alien as a class, had to "bear a heavy burden." Broadly stated, the state's interest in the instant case was to insure that its attorneys were fit for the practice of law. In attempting to magnify this interest as much as possible, the appellees in *Griffiths* initially stressed that a Connecticut attorney had more authority than do lawyers in other states. A Connecticut statute labeled the attorney as a "commissioner of the Superior Court" and vested the lawyer with the authority to "sign writs and subpoenas, take recognizances, administer oaths, and take depositions and acknowledgements of deeds." The bar examiners also contrasted the citizen's individual allegiance to the United States with the possibility of an alien's favoring the interests of his native country. Hence, it was submitted by the government that the alien attorney, considering his divided loyalty and the greater responsibility provided by Connecticut law, might be less suited to fulfill his obligation to the courts and his clients. Mr. Justice Powell, author of the majority opinion, found nothing so distinctive about the Connecticut attorney's powers that would justify bestowing them only to citizens. Moreover, no nexus was found between the citizenship requirement and the ability of an alien to protect the interests of the national government or his client. It was recognized that in any situation which presented a conflict of interest, "[a]n honorable person, whether an alien or not, would decline the representation."

*Griffiths* underlying premise was similar to that expressed in its companion case, *Dougall*. An alien, like any other person, may be unfit

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150. 413 U.S. at 722. The Court also expressed its opinion of the alien's place in our history:

> From its inception, our Nation welcomed and drew strength from the immigration of aliens. Their contributions to the social and economic life of the country were self-evident, especially during the periods when the demand for human resources greatly exceeded the native supply. This demand was by no means limited to the unskilled or the uneducated. *Id.* at 719.

151. *Id.* at 722-23.

152. *Id.*

153. *Id.*; CONN. GEN. STAT. REV. § 51-85 (1958). Another statute provides that a Connecticut lawyer, in exercising these powers, may "command" the assistance of county sheriffs or town constable. *Id.* § 52-90.

154. 413 U.S. at 724.

155. *Id.*

156. *Id.* Moreover, the Court mentioned that these powers did not include matters of government policy. *Id.* This is consistent with the *Dougall* analysis which stated that aliens could be restricted, as a class, from policy-making positions. See note 117 and accompanying text supra.

157. 413 U.S. at 724. Quite often, attorneys represent foreign countries or persons from such countries in the United States Courts. In this situation, the Court noted, the role of the attorney mandates that he further the interests of his client, whether government or individual, even in the face of a conflicting federal or state interest. This situation is to be distinguished from the case where an alien practicing in the United States represents his native country against the United States. The latter situation presents a true conflict of interest. *Id.* at 724 n.14.
for the practice of law. However, there exist more precise methods by which that determination can be made. Every state devises its own standards for training and expertise in the law, and all bar applicants must take oaths pertaining to the honest performance of the attorney's function and the support of the state and federal constitutions. The state is capable of utilizing these procedures, applicable to citizens, to judge the alien's fitness on a case-by-case basis rather than doing so by using a totally exclusionary rule. While the Dougall opinion recognized that aliens as a class might not be suited to policy-making positions, the Griffiths decision went further, indicating that it has not been established that there exists any intrinsic distinction between the ability of an alien and a citizen to function effectively as an attorney. In Dougall, government employment was at issue and therefore governmental interests were more directly involved; Griffiths, however, concerned mere government licensing of private employment and, hence, justification for the discrimination was more difficult.

The Court also laid to rest the notion that the attorney, being an officer of the court, is given actual governmental power which should be limited to citizens. In Cammer v. United States, the Supreme Court

159. A prior Supreme Court decision affirmed the state's power to investigate, within first amendment limits, the possibility that an applicant who swears to an oath might in reality disagree with its spirit. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 163-64 (1970). See also Bond v. Floyd, 385 U.S. 116, 132 (1966).

160. Id. at 726-27. It must also be noted that there are various methods by which an attorney can be judged after bar admission. See generally ABA CODE OF PROFESSIONAL RESPONSIBILITY (1970).

161. Id. at 725.

162. Mr. Justice Rehnquist, dissenting in Dougall, was of the opinion that the citizenship requirement involved more than the state's desire to ensure the technical proficiencies required for legal practice. Additionally, the attorney, being involved in the shaping of social relationships and political institutions, should be learned in the American experience. In Justice Rehnquist's view, that could be accomplished in two ways: either by being born and maturing in this country, or by the process of naturalization. Therefore, for a state to ensure that attorneys had this experience by excluding the non-citizen was not irrational. 413 U.S. at 663 (Rehnquist, J., dissenting). While the Griffiths majority would probably agree with this analysis, its result is different due to the fact that it instead applied the strict scrutiny test. Recall that Justice Rehnquist opined that the rational basis test is the more appropriate standard of review of the alien's fourteenth amendment rights than the strict scrutiny test. See note 116 supra.

163. However, it should be noted that Dougall would control in the case of a government attorney since the issue then would be more one of employment than licensing. The appellee took a new approach to this argument by emphasizing that several constitutional provisions restrict aliens from holding office. See, e.g., U.S. CONST. art. 1, § 2, cl. 2. It was also pointed out that every state denies aliens the right to vote. The point to be made was that these lawful provisions reflect the recognition that government participation in the form of office-holding and voting is an inevitable aspect of citizenship. It is not quite clear precisely how the appellee arrived at its conclusion, but it argued that the lawyer, being more than an officer of the court, is actually an office-holder and hence the equal protection clause is totally inapplicable. Since the Court rejected the claim that the lawyer is an officer-holder, it reached no decision as to the argument's general merit. 413 U.S. at 728-29 n.21.
had spoken, at least in the negative, of the lawyer as an "officer of the court." The attorney was determined to be primarily a private professional who conducts his own affairs as opposed to the marshalls, bailiffs, court clerks, and judges who work directly for the judicial system. Precisely what the word "officer" means remains largely unexplained. The Griffiths Court relied on Cammer and concluded that the mere status of being licensed to practice law does not place the attorney sufficiently close to government processes to justify the wholesale exclusion of that license to the non-citizen.

It is submitted that the Court's realistic approach to the analysis of the attorney's role is an appropriate one, for it is becoming increasingly apparent that the attorney serves his client's and his own ends far more than serving the judicial system or the government. In briefly illuminating the development of applicable equal protection standards, the Court, in the instant case, mentioned the alien's right to work in the "common occupations" of the community, and generally made no distinction between state restrictions on alien employment in trades, businesses, or professions. Hence, it was implicit in the Griffiths opinion that to deny aliens the opportunity to practice law is the equivalent of denying that class any other common occupation opportunity. However, the basis of the holding was not that the practice of law was a common occupation, but that a state could not preclude aliens from such an occupation without showing a compelling state interest for doing so.

In some respects, Griffiths represents an extreme case. In both Park and Raffaelli, the bar applicants clearly appeared to have the intention of becoming citizens. In Griffiths, the applicant refused to file a sworn...
declaration of intention and expressly stated her desire to remain a citizen of The Netherlands. 171 Second, the powers accorded attorneys in Connecticut were considered insignificant to the Supreme Court’s decision in Griffiths while the Raffaelli court distinguished the Connecticut Supreme Court’s denial of Miss Griffiths’ bar application on that very point. 172 The Griffiths Court’s lack of concern over the factual distinctions from the Park and Raffaelli decisions indicates its unwillingness to accept any assertion that non-citizens, as a class, are less deserving of admission to the bar or less capable of fulfilling the attorney’s obligations than are citizens.

In answering the narrow question presented, Griffiths effectively invalidated statutes and court rules of practice in over 35 states. 173 Among the professions, it is submitted that of the attorney, traditionally more often associated with government office holding and policy-making positions than any other identifiable group, presents the strongest case for alien exclusion from government licensing. In the case of the medical profession, for example, there is no apparent bona fide reason justifying a state’s limitation of licenses for medical practice to citizens, under present equal protection principles. Likewise, the nature of the teaching profession, while often raising questions of a constitutional dimension, 174 does not justify a total exclusion of the non-citizen. In either case, the implication of Griffiths is that the state’s power to prescribe qualifications is limited to qualities of an educational or moral nature.

From Dougall and Griffiths it is clear that the state must now bear a very heavy burden in order to justify a statutory classification based on alienage. In the area of government employment, the court will entertain a functional analysis, judging the ability of the alien to perform the position from which he is excluded and whether the position involved is of such a nature that the undivided loyalty of the employee is required. In the case of governmentally regulated businesses, trades, and professions, the state’s task of showing a compelling interest for its discrimination will be even more difficult. Unless the vital nexus between citizenship and the employment at issue can be established, the alien will be treated the same as the citizen.

171. 413 U.S. at 718 n.1. 172. 7 Cal. 3d at 303, 494 P.2d at 1274, 101 Cal. Rptr. at 906. 173. See Ohira & Stevens, supra note 5, at 413-14. These commentators’ personal investigations indicated that some states, while having no specific statutory rule requiring that attorneys be citizens, discriminated de facto against aliens. Id. at 414 n.8. After Griffiths, if these practices are still in effect, it would be appropriate for an alien denied bar admission to file suit in federal court under statutes prohibiting the denial of one’s constitutional rights. See, e.g., 42 U.S.C. § 1983 (1970). 174. See, e.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960). See generally Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 Duke L.J. 841.
V. Federal Government Employment

A question expressly left unanswered by the Dougall Court is whether the federal government can constitutionally impose citizenship requirements on those who work in federal service. Current federal statutes and civil service regulations place broad restrictions on the alien's ability to secure federal civil service employment. While Dougall foreclosed the state from broadly limiting the non-citizen's employment opportunities in state government service, several factors, at least on their face, preclude the wholesale application of the case to the citizenship requirement for federal government employment. First, the equal protection clause, embodied as it is in the fourteenth amendment, is of unique applicability to the states. Thus, strict judicial scrutiny of alien discrimination may not be appropriate when judging the constitutional limitations of federal discrimination, which lie within the fifth amendment's due process guarantee. Second, since the fifth amendment would be the basis for the alien's claim, he may be called upon to demonstrate that the discrimination deprives him of "life, liberty or property." Finally, the federal government, more specifically the executive branch, has traditionally been accorded great latitude in determining the qualifications for its personnel.

175. 413 U.S. at 646 n.12.
176. 5 U.S.C. § 3301 (1970), permits the executive to prescribe regulations to ascertain the general fitness of civil service applicants. Pursuant to the Civil Service Act, an executive order delegated to the Civil Service Commission the responsibility for administering competitive examinations to test the fitness and capacity of applicants for civil service positions. Exec. Order No. 10577, § 2.1(a), 3 C.F.R. 84 (Supp. 1954). Under this order, the Civil Service Commission promulgated a regulation imposing citizenship requirements for the competitive civil service. 5 C.F.R. § 338.101(a) (1972). If an applicant is deemed to owe "permanent allegiance to the United States," he may be admitted to take the competitive examination. Id. § 338.101(b). However, this phrase has been interpreted to apply only to natives of American Samoa. See Jalil v. Hampton, 460 F.2d 923, 927 n.9 (D.C. Cir. 1972). Another statute excludes all aliens from the federal payroll except "nationals of those countries allied with the United States in the current defense effort ..." Public Works Appropriation Act of 1969, Pub. L. No. 91-144 § 502, 83 Stat. 335.

177. Most of the decisions denying to the states the power to discriminate against aliens have relied not only on the equal protection clause but also on Congress' exclusive power to regulate alien activity, i.e., the statutes in issue interfered with Congress' power and hence violated the supremacy clause. See note 23 supra. Hence, it has been suggested that when analyzing the constitutional validity of federal discrimination, the alien's use of these cases is less persuasive since it could not be argued that the government had interfered with a power within its exclusive control. See Comment, Aliens and the Civil Service: A Closed Door? 61 Geo. L.J. 206, 213-15 (1972). However, since Dougall and Griffiths rested solely on equal protection principles in limiting the state's power to discriminate with respect to employment, the fact that an alien challenging federal discrimination could not utilize the supremacy clause argument is not particularly significant. These two decisions emphasize the evil in the state statutes was their discriminatory impact rather than their interference with exclusive federal power. Neither decision makes mention of the supremacy clause argument.

179. See Bailey v. Richardson, 182 F.2d 46, 57 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951).
180. See Note, supra note 5, at 1020.
Two circuit courts recently have dealt with this issue in cases which may portend the end of broad discrimination against aliens by the federal government in the civil service area.181 The first case, Jalil v. Hampton,182 involved resident aliens seeking to overturn the federal regulations which excluded them from the competitive civil service.183 The United States Court of Appeals for the District of Columbia Circuit reversed the district court's grant of the government's motion to dismiss184 and remanded for further findings of fact on the issue of whether either the President or the Civil Service Commission had the statutory authority to promulgate the regulations at bar.185 Despite the court's refusal to decide the merits of the constitutional issues, its recognition of developments in equal protection analysis indicated the direction in which that circuit is heading. At the time Jalil reached the Court of Appeals, the Supreme Court had decided Graham but not Dougall. While the Jalil court acknowledged that the import of Graham's pronouncement on the suspect nature of alien classifications was confined to the fourteenth amendment, it considered the decision "quite significant" to an analysis of the limits on discriminatory legislation as set down in the fifth amendment's due process clause.186 While the court opined that "the state's power over aliens is more limited than that of the federal government,"187 Judge Adams' majority opinion indicated that it was nonetheless the government's burden to "demonstrate that its interests justify the discrimination against aliens."188 Thus, Jalil stands for the proposition that aliens seeking to have discriminatory federal legislation held unconstitutional under the fifth amendment need not face the difficult task of proving the irrationality of the legislation; rather it is the government which must justify its classification. Precisely how this justification is to be made out and what standards must be met,

181. An early case had considered the validity of a federal statute which prohibited alien employment on projects under the Emergency Relief Act of 1938, 15 U.S.C. § 728 (1970), Rok v. Legg, 27 F. Supp. 243 (S.D. Cal. 1939). The court relied on the Supreme Court's decision in Heim v. McCall, 239 U.S. 175 (1915), and reasoned that if the state could prefer citizens in paying for public works with public funds, the federal government could not be prohibited from enacting a similar preference. 27 F. Supp. at 244-46.
183. Id. See note 176 supra.
184. 460 F.2d at 928. The district court's opinion was not reported.
185. Id. at 929. The Jalil court remanded for specific findings as to the number and types of positions in federal civil service for which citizenship might be a "bona fide" qualification, and the availability of any lesser restrictions that would guard the government's interest. Id. The Court of Appeals also directed the district court to determine the actual impact of the restrictions on aliens and the number of aliens who might apply for civil service positions. Id. The purpose of remand was to create a more complete record by which the court could determine if all or a portion of government employment is a "common occupation" of this country. Id. at 929-30 n.15.
186. Id. at 929.
187. Id. at 930 n.16. Judge Adams, writing for the Jalil majority, was referring to Congress' plenary power over immigration and naturalization, impliedly noting that the three-judge court deciding Dougall had rested its holding on equal protection and supremacy clause grounds. Since Dougall was affirmed by the Supreme Court solely on equal protection grounds, it is suggested that Judge Adams' statement will have little impact on the court considering Jalil on remand.

188. 460 F.2d at 929.
was left unclear. Judge Bazelon, dissenting in Jalil, opined that, on the authority of Graham and the district court's decision in Dougall, remand was unnecessary and improper. He urged that Graham's strict scrutiny approach to state discrimination on the basis of alienage applied fully to the federal government, and thus concluded that it was inconceivable that the government, on remand, could proffer the compelling governmental interest necessary to justify the exclusion of aliens, as a class, from all competitive civil service positions. 189

Judge Bazelon's rationale was followed by the Court of Appeals for the Ninth Circuit in Mow Sun Wong v. Hampton. 190 There, a resident alien challenged the identical regulation involved in Jalil, and the Mow Sun Wong court found them unconstitutional as violative of the fifth amendment's due process clause. 191 The district court, which granted the government's motion to dismiss, had heard the case prior to the Supreme Court's decision in Graham. Despite that, the plaintiff aliens had argued that the classification at issue was subject to the strict scrutiny standard of review. 192 The district court, however, found the traditional "rational basis" test more appropriate, asserting that the broad executive power over aliens militated against a strict judicial inquiry. 193 In this regard, federal policy with respect to aliens was deemed to be almost inevitably involved with areas of executive control 194 such as foreign relations 195 and the war power. 196 These areas, the court urged, so involved political policy as to be, at least partially, beyond the limits of judicial review. Further, it was noted that Congress has broad power over the alien deriving from the constitutional provision empowering that branch "to establish a Uniform

189. Id. at 930 (Bazelon, C.J., dissenting). Paralleling the Dougall Court's analysis, Judge Bazelon pointed out that the justification for the total exclusion of aliens from policy-making positions or jobs involving national security was weak because in areas of civil service other than the competitive class there are positions of a similar nature for which there is no alien exclusion. Id. at 930-31. See generally 5 C.F.R. §§ 213.3101-3394 (Supp. 1973).

It might be argued that the strict judicial approach to state classifications based on alienage was the motivation for the Dougall Court's analysis of the state's entire constitutional and statutory scheme in testing the validity of one state civil service regulation. Logically, then, if a lesser standard of review of federal discrimination is appropriate, the judiciary might not be compelled to consider the broad statutory scheme as did Judge Bazelon in Jalil. However, it is submitted that no court should wear blinders when analyzing a constitutional claim. It would hardly serve the judiciary's responsibility for aliens' rights, which it holds in such high esteem when concerning itself with the states' power to discriminate, to ignore the realities of the entire federal government's civil service organization. 190. ___ F.2d at ___.

190. ___ F.2d at ___.

191. ___ F.2d at ___.

192. 333 F. Supp. at 531. The plaintiffs urged that the stricter standard of review was appropriate because the classification was inherently suspect or, alternatively, because it infringed upon a fundamental right. The district court's opinion in Mow Sun Wong did not specify upon what authority the plaintiffs relied.

193. Id. at 531-32.


rule of Naturalization." 197 Dismissing the plaintiff's complaint, the district court put forth two bases of rationality for the discriminatory regulations: (1) the executive's conclusion that policy-making at whatever level should be entrusted only to the citizen, and (2) the economic security of the citizen may be enhanced by preferring them over aliens in filling government employment positions.198

On appeal, the Ninth Circuit reversed, analyzing the issues in a fashion quite similar to the Supreme Court's approach in Dougall. While noting that Dougall's rationale and holding were not controlling, the Mow Sun Wong court found them "instructive and significant when applied to the case at hand." 199 It was obvious that the statute struck down in Dougall and the regulations at issue in Mow Sun Wong were precisely the same in that both indiscriminately excluded "all aliens from all positions requiring the competitive civil service examination." 200

The court decided upon the strict scrutiny test as the appropriate standard of review under the fifth amendment's limitations on the federal government's ability to classify on the basis of alienage, 201 although it never quite made clear precisely how that decision was reached. The court disposed of the district court's conclusion that Congress' plenary power over aliens compels the judiciary to apply a rational basis standard of review of federal legislative classifications, stating that even congressional plenary power has its constitutional limits.202 More specifically, while Congress has broad power in this area in regulating the flow of aliens entering and leaving the country, the court noted that once an alien is legally within the United States, the Constitution limits the government's ability to deal with him. 203 It is submitted that the Ninth Circuit properly disposed of this issue. While Congress may freely regulate the procedures by which an alien may enter this country and those steps necessary for attaining citizenship, it by no means follows that the fifth amendment permits broad legislative discrimination against the non-citizen's opportunity to secure employment with the federal government.204

197. 333 F. Supp. at 532. See U.S. CONST. art. 1, § 8, cl. 4. The district court in Mow Sun Wong bolstered its argument that the federal government has plenary power with respect to the regulation of alien conduct by utilizing those cases which struck down state statutes discriminating against aliens on the ground that they interfered with exclusive federal control over aliens and, hence, violated the supremacy clause. 333 F. Supp. at 532. See, e.g., Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1947). It is ironic that the Takahashi decision, which formed the groundwork for those decisions striking down alien discriminations, was used against the alien by the lower court in Mow Sun Wong.
199. 333 F. Supp. at 532. See, e.g., Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1947). It is ironic that the Takahashi decision, which formed the groundwork for those decisions striking down alien discriminations, was used against the alien by the lower court in Mow Sun Wong. 
200. Id.
201. Id. at.
202. Id. at, citing United States v. Thompson, 452 F.2d 1333, 1338 (D.C. Cir. 1971).
203. Id. at. n.10(a).
204. It has been repeatedly held that as an aspect of national sovereignty, Congress has complete control over the terms and conditions upon which aliens may enter this country, uninhibited by constitutional limitations and judicial intervention. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 765-66 (1972); Boultilier v. Immigration &
Although no federal case had squarely confronted the question as to the standard of review in this context, prior cases provided some authority for the Mow Sun Wong court. The Supreme Court had stated that while discrimination may be so unjustifiable as to violate due process, the equal protection guarantee is not necessarily interchangeable with the fifth amendment's due process clause. However, in Nielson v. Secretary of the Treasury, the same court that decided the Jalil case spoke of the relationship between the equal protection and due process clauses with respect to aliens' rights as being one in which:

The courts stand ready to safeguard aliens against unreasonable discriminations, and to invoke the equal protection clause of the Fourteenth Amendment as to actions by states, or the due process clause of the Fifth Amendment which provides equivalent standards against unreasonable action by the Federal Government.

In this regard, the Nielson court recognized, prior to Graham and Dougall, that the federal government, like the state, bears the burden of justifying, by a showing of "special reasonableness," any discrimination against aliens. Utilizing those precedents and Dougall as authority for the proposition that a compelling state interest is appropriate to test classifications based on alienage "[i]n the field of public employment," the Mow Sun Wong court concluded that:

A flat prohibition against aliens obtaining employment in the civil service is such discrimination to be a denial of due process unless the government can show a compelling interest for maintaining its classification.

While the Supreme Court has yet to speak on this issue and Mow Sun Wong's conclusion is narrowly stated, it is clear in at least the
Ninth Circuit and District of Columbia Circuit that a showing of more than mere "rationality" is now necessary to sustain discrimination by the federal government under the fifth amendment's due process clause. It is submitted that this is the correct position, for every reason which exists to place the burden on state governments to justify discrimination against aliens applies with equal force to the federal government.213

After establishing the standard of review, the Mow Sun Wong court had little difficulty finding that there existed no compelling interest justifying the exclusion of aliens from competitive federal civil service positions. In so doing, the court rejected most of the same arguments which had been raised by the state in Dougall. First, as to the lower court's assertion that the government can prefer the economic security of citizens over aliens in this context, the court correctly noted that this doctrine had been discredited in Graham and rejected in the employment area in Dougall.214 In this manner the Mow Sun Wong court recognized the alien's contribution to United States society and implicitly concluded that these contributions bear no less significance when it is the federal government, as opposed to the state, which discriminates in the distribution of its resources. Second, as in Dougall, it was argued that because civil service positions require policy-making duties and involve issues of national security, the civil service will function more smoothly if competitive positions are filled only with citizens. The court precisely followed Dougall's reasoning, opining that although some positions do involve policy-making and national security, this fact is simply not justification for an automatic exclusion of aliens from all competitive civil service.215 Thus, the discriminatory regulations were too broad to serve their purpose and, while rational, they could not withstand the compelling interest test.216 Further, it was again recognized that there are many individual positions — those involving policy-making or national security — for which non-citizens would not be suited.217 What is prohibited by the due process clause, as it is by the equal protection clause, then, is the blanket prohibition of aliens, as a class, from any level of federal employment.

Thus, it appears that the Ninth Circuit's decision in Mow Sun Wong was correct. Any "special power" the federal government has over aliens

213. It is not contended here that the Constitution dictates that the standard of review under a fifth amendment analysis of federal government classifications must parallel the judicial approach to discriminatory state legislation under the equal protection clause. However, it is submitted that the federal government should have no greater power to discriminate, constitutionally or otherwise, than do the states in the absence of special justifying circumstances.

214. ___ F.2d at ___. See notes 105-110 and accompanying text supra. The Mow Sun Wong court also used a California Supreme Court case to support this conclusion. See Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

215. ___ F.2d ___. The court noted that the majority of positions in the civil service do not involve policy-making matters. Id.

216. Id. at ___. It is to be noted that the named appellants in Mow Sun Wong included a janitor, file clerk, clerk typist, and mail clerk. Id. at ___.

217. Id. at ___.
is limited primarily to the regulation of immigration, naturalization, and deportation. In the area of government employment, the federal government should stand on no different footing than the states. In analyzing which interests a discriminatory statute might serve, federal-state distinctions exist, but judicial analysis in either case should be directed toward the question of whether the classification reflects a compelling governmental interest and the necessity of the classification to effectuate that interest.

Generally, the similarities and distinctions between fourteenth amendment protection against state discrimination and fifth amendment limits on federal discrimination have never been set out definitively. If the Supreme Court ultimately decides either the Mow Sun Wong or Jalil case, it will have the opportunity to provide some clarification in this area. If the Supreme Court were to review the Mow Sun Wong decision, two additional issues might present difficulties. First, in utilizing the fifth amendment to find an unjustifiable discrimination violative of due process, it generally must be established that the classification deprives the complainant of life, liberty, or property. In Bolling v. Sharpe, the Supreme Court took an expansive view of "liberty" in finding that racial segregation in the District of Columbia's public schools violated due process. It defined liberty as "the full range of conduct which the individual is free to pursue." While it had been held that government employment was not "life, liberty and property," that conclusion was found to be of doubtful validity by the Jalil court because of subsequent decisions holding that discharged employees were entitled to some procedural due process protection. The Mow Sun Wong court, citing its own precedent found that while there is no "right" to public employment, "there is a constitutional right to be free from unreasonably discriminatory practices with respect to such employment." Further, several Supreme Court decisions imply that one of the most basic of all liberties is the right of a person, alien or citizen, to be free to secure employment, with equal opportunity, in order to supply his family and himself with the necessities of life. Therefore, it is safe to conclude that a broad denial to the alien of the opportunity to work in the

219. Id. at 500.
220. Id. at 499.
223. F.2d ..., quoting Whitner v. Davis, 410 F.2d 24, 30 (9th Cir. 1969).
224. See, e.g., Graham v. Richardson, 403 U.S. 365, 379-80 (1971); Truax v. Raich, 239 U.S. 33, 41 (1915); Smith v. Texas, 233 U.S. 630, 636 (1914). In Smith, the Court stated:
Life, liberty and property and the equal protection of the laws, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work.
federal civil service is a denial of "liberty," well within the broad definition set forth in **Bolling v. Sharpe**.

The second possible barrier to the upholding of **Mow Sun Wong** and the application of the **Dougall** analysis to the discriminating aspects of the federal civil service scheme is the longstanding tradition of according the executive branch broad discretion in defining qualifications for government employment, a point the **Mow Sun Wong** court unfortunately did not address. In **Bailey v. Richardson**, a former federal civil service employee sought reinstatement after being discharged on grounds of disloyalty. The court of appeals, upholding the discharge, indicated that the "ability, integrity and loyalty of purely executive employees is exclusively for the executive branch . . . to determine. . . ." At first blush, it does appear that a most fundamental internal function of a branch of government is the selection of its employees, however, even the **Bailey** court recognized that broad discrimination by Congress (and apparently also by the executive) was not beyond judicial review. The appellant in **Bailey** argued that the Supreme Court's decision in **United Public Workers v. Mitchell** limited the government's ability to prescribe qualifications for its employees. The **Mitchell** court, in upholding a federal statute prohibiting federal employees from engaging in certain political activity while in the government's employ, stated that qualifications for the public employment based on race, religion, or political party preference were improper. The **Bailey** court interpreted this to prohibit only "permanent, blanket proscription by the Congress." As **Mow Sun Wong** recognized, the federal civil service regulations as they stand are precisely that—a "permanent blanket proscription" against the employment of all aliens—and a strict standard of review would, therefore, not necessarily be inconsistent with **Bailey**. It is submitted that the executive's traditional latitude in powers of appointment, regulation, and removal of government employees should not be controlling in the **Mow Sun Wong** context. In **Dougall**, the Court recognized that the state had a strong interest in defining the "political community," and in **Griffiths** it was recognized that, traditionally, the state prescribed the qualifications of its attorneys. Nevertheless, in both cases, the indiscriminate denial of employment opportunities was found to be unjustifiable. For the Supreme Court now to hold that it is permissible for the federal government to engage in such broad discrimination, while ex-

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226. Id. at 49-50.
227. Id. at 51.
228. Id. at 63.
230. 182 F.2d at 62.
232. 182 F.2d at 63.
233. 413 U.S. at 643.
234. 413 U.S. at 722-23.
pressly prohibiting the same action by the states, would be anomalous, to say the least. Certainly, as recognized in *Mow Sun Wong*, the spirit, if not the precise legal analysis, of *Dougall* and *Griffiths* applies to the federal government as well as to the states. The alternative to affirming *Mow Sun Wong* would be to permit the Congress simultaneously to allow an alien to lawfully reside within the United States, and impose restrictions on him which would seriously hamper his ability to live in this country. The xenophobic effect of such a practice is obvious when one recalls the Supreme Court's simple statement of almost 60 years ago: a man cannot live where he cannot work.235

Hopefully, the ultimate result of the *Jalil-Mow Sun Wong* litigation will be the Supreme Court's declaration of the invalidity of the civil service regulations as an impermissible discrimination violative of the fifth amendment's due process guarantee.236 Presently, there are nearly three million positions in the federal employment scheme,237 and among them are many positions appropriate for resident aliens to fill. In addition, it is hoped that any Supreme Court decision will limit the federal government's ability to unjustifiably discriminate to the same extent as the states have been limited through the equal protection clause.

VI. CONCLUSION

The Supreme Court's decisions in *Dougall* and *Griffiths* represent no abrupt change in the law, but rather a culmination of over two decades of developments in the Court's analysis of aliens' equal protection claims. Previously, the alien had to show the invalidity of a statute by attempting to demonstrate that it was without a rational basis which was presumed to exist. The categorization of alienage as a "suspect class" truly has placed the shoe on the other foot: not only may the state no longer rely upon a presumption of the constitutionality of its legislation, it must also bear a heavy burden in justifying distinctions between citizens and non-citizens. This development in equal protection has the immediate result of invalidating a plethora of discriminatory state statutes in the employment area, and, as there are approximately four million resident aliens now within the United States238 proves to be of both practical and analytical significance.

Of course, finding an equal protection violation requires an element of "state action" and the judicial decisions examined in this Comment do not affect discrimination in employment against the alien by the private em-

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235. See note 23 and accompanying text supra.
236. It is also quite possible that the result in *Jalil* and *Mow Sun Wong* will be that the Civil Service Commission has no statutory authority to promulgate a regulation conditioning employment on the holding of citizenship, since the applicable statutes and executive order do not expressly authorize such an exercise of power. See note 176 supra. In that case, there will be no need to decide the constitutional issues raised. See 460 F.2d at 931 (Bazelon, J., dissenting).
238. Id., at 75.
ployer. A federal statute mandating equal employment opportunities in
the private sector\textsuperscript{239} has been construed not to include refusals to hire non-
citizens because of that status,\textsuperscript{240} and it is obvious that the equal protection
clause cannot obliterate all traces of discrimination. However, the spirit
of Dougall and Griffiths easily could be incorporated into federal legislation
designed to combat discrimination against aliens by the individual employer.
At present, however, the proper course for an alien victimized by private
discrimination is to bring an action under the Federal Civil Rights Act
of 1870 which guarantees to "all persons," equal rights under the law.\textsuperscript{241}

As far as the constitutional guarantee of equal protection of the laws
is concerned, the two cases, Dougall and Griffiths, rightfully recognize and
declare the alien to be no less competent than the citizen to fill a state
position for which he is otherwise qualified. In the event of an outbreak
of armed hostilities or heightened world tensions, different considerations
may arise, with respect to residing "alien enemies," sufficient to meet the
compelling interest standard.\textsuperscript{242} The decisions recognize that in the absence
of that contingency, however, the alien, like any other person, must make
a living to support his family, and that only when the nature of a particular
position directly involves sensitive state or national interests such as the
formulation of governmental policy or problems of national security, is it
appropriate to exclude him. It is hoped that the Court, as it did in Dougall
and Griffiths, will continue to guard against legislation which utilizes over-
broad methods to "protect" government interest. It is suggested that, as
the federal government has no greater right to discriminate against the
alien in employment than do the states, the Supreme Court will eventually
hold federal legislative restrictions also violative of due process.

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\textsuperscript{239} 42 U.S.C. § 2000e-2(a)(1) (1970). This statute makes it unlawful for an
employer to refuse to hire an individual because of the individual's national origin.

\textsuperscript{240} Espinoza v. Farah Mfg. Co., --- U.S. --- (1973). This case held that the
the basis of lack of citizenship.

\textsuperscript{241} 42 U.S.C. 1981 (1970) provides in part: "All persons within the jurisdiction
of the United States shall have... the full and equal benefits of all laws..." In
Guerra v. Manchester Terminal Corp., 350 F. Supp. 529 (S.D. Tex. 1972), the court
held that the term "all persons" included aliens, and that even absent state action, suit
was maintainable to enjoin an employer's discriminatory practices. \textit{Id.} at 536, 538.

\textsuperscript{242} See \textit{In re Griffiths}, 413 U.S. 717, 722 n.11 (1973).