Employment Rights of Resident Aliens In Arizona

Ann M. Haralambie

Resident aliens[1] in Arizona are barred from engaging in many professions and occupations by state statutes requiring citizenship for certification or licensure.[2] At common law, there were no such broad restrictions on alien employment;[3] indeed, alien labor was essential in the agricultural and industrial development of the United States.[4] Since it was a frontier state with a large territory and sparse population, Arizona, like other developing states, needed all available workers. As the population grew, however, the state sought to protect the employment opportunities of its citizens by

1. A resident alien is one lawfully admitted to the United States for permanent residence. *See* 8 U.S.C. § 1101(a)(20) (1970). The immigration laws do not impose any general restrictions on the right of resident aliens to work. *See* D. CARLINER, THE RIGHTS OF ALIENS 121 (1977). With some narrow exceptions, nonresident aliens are subject to loss of their visas if they accept employment during their stay in the United States. *See* 8 C.F.R. § 214.1(c) (1977). This Note will not deal with employment of illegal aliens, which may properly be circumscribed by the states. *See* DeCanas v. Bica, 424 U.S. 351, 361 (1976).

2. Although some of the statutory restrictions require "full citizenship," others are phrased in terms of "application for citizenship," "every effort possible for obtaining citizenship," or "the declared intention of acquiring citizenship." *Compare* ARIZ. REV. STAT. ANN. § 32-2124(A)(1) (1976) (real estate brokers), *with id.* § 32-1683(2) (dispensing opticians); *id.* § 32-1822(1) (osteopaths); *and id.* § 32-1922(A) (pharmacists). For a summary of restrictions in other states, see D. CARLINER, *supra* note 1, at 205-55.

3. 5 C. VERNIER, AMERICAN FAMILY LAWS 294, 375 (1938); Comment, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012, 1014 (1957). The only exception to this general common law freedom to work was that an alien could not hold a position which required allegiance to the sovereign. *See* 5 C. VERNIER, *supra*.

4. *See* Comment, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1886*, 63 CALIF. L. REV. 662, 697 (1975). At the 1930 convention of the American Live Stock Association, the Association passed Resolution No. 18 opposing a proposal in Congress which, by adopting a quota provision, would have greatly reduced the number of Mexican laborers permitted to immigrate to the United States. The association characterized the Mexicans as an "indispensable supply of labor." AMERICAN LIVE STOCK ASS'N, PROCEEDINGS: THIRTY-THIRD ANNUAL CONVENTION 125 (1930).

The plight of the alien who becomes a migrant farm worker has its own unique characteristics, and is not covered here. For thorough treatment of this topic, see S. LAW, THE RIGHTS OF THE POOR 155-76 (1973); C. MCWILLIAMS, ILL FARES THE LAND: MIGRANTS AND MIGRATORY LABOR IN THE UNITED STATES (1941); Note, *The Mexican Farm Labor Importation Program—Review and Reform* (pts. I-II), 30 GEO. WASH. L. REV. 84, 311 (1961); Note, *Statutory Provision for Admission of Mexican Agricultural Workers—An Exception to the Immigration and Nationality Act of 1952*, 24 GEO. WASH. L. REV. 464 (1956); Comment, *Aliens in the Fields: The "Green-Card Commuter" Under the Immigration and Naturalization Laws*, 21 STAN. L. REV. 1750 (1969).

restricting alien employment. Citizens throughout the country began to see aliens as a cheap source of labor, threatening to lower wages, and competing for a limited number of jobs.[5] Consequently, labor unions opposed the widespread use of alien labor.[6]

The depressions of the 1880's and 1890's and the identification of aliens with political radicalism added to the discrimination against aliens—even to the point of mass deportations.[7] The combination of fear of political radicalism and a hatred of "foreigners," whether immigrant citizens or aliens, was manifested against such organizations as the International Workers of the World [IWW], a radical labor union generally considered to be composed mainly of foreign born laborers.[8] The union was subjected to constant harassment, culminating in mass roundups of its members for trying to organize workers in Arizona copper mines. For example, in 1917 local businessmen under mining corporation leadership retaliated against what they thought to be a German inspired labor strike, shipping sixty-seven

5. *See* Rok v. Legg, 27 F. Supp. 243, 245 (S.D. Cal. 1939); M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 72 (1946). For discussion of the history of the economic impact of aliens on American labor, see Higham, *American Immigration Policy in Historical Perspective*, 21 Law & CONTEMP. PROB. 213 (1956); Rodino, *The Impact of Immigration on the American Labor Market*, 27 RUTGERS L. REV. 245 (1974); Spengler, *Some Economic Aspects of Immigration into the United States*, 21 Law & CONTEMP. PROB. 236 (1956).

6. *See* A. BROPHY, FOUNDLINGS ON THE FRONTIER 17 (1972). *See also* R. DIVINE, AMERICAN IMMIGRATION POLICY 1924-1952, 55 (1957).

Part of the opposition to alien labor undoubtedly was due to racial prejudice. It is clear that attitudes differed towards aliens of different nationalities. For example, in 1891, in the Report of the Acting Governor of Arizona to the President of the United States, a distinction was made between Mexican and Chinese aliens, indicating that Arizona residents of Mexican descent were acceptable, while the Chinese were not: "[T]he Mexicans are mostly naturalized citizens, law-abiding, in sympathy with and obedient to American laws and customs, and interested in the education and elevation of their race. There are comparatively few Chinese in the Territory, and although objectionable, they are not sufficiently numerous to disturb the labor question." ABRIDGMENT OF MESSAGE FROM THE PRESIDENT OF THE UNITED STATES 1891-1892, 719 (1892).

Mexicans were not so charitably regarded by others in and outside of Arizona. One argument opposing statehood for Arizona was made on the basis of its large Mexican population. *See* Comment, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1886*, 63 CALIF. L. REV. 662, 696 (1975). Congressional hearings and debates relating to immigration restrictions revealed a characterization of Mexicans as "dirty and ignorant"—"a blight on American society." *See Immigration from Countries of the Western Hemisphere: Hearings on H.R. 6465, H.R. 7358, H.R. 10955, H.R. 11687 Before the House Comm. on Immigration and Naturalization*, 70th Cong., 1st Sess. 28 (1928) (remarks of Representative Box). *See also* 72 CONG. REC. 7126 (1930) (remarks of Senator Johnson); *id.* at 7215 (remarks of Senator Heflin); *id.* at 10844 (remarks of Representative Almon). Since a large number of aliens in Arizona were Mexican, the racial prejudice towards those of Mexican descent was able to find a concrete and practical expression in the opposition to immigration and the denial of a means of livelihood to aliens already admitted to the country as permanent residents. For example, trade unions barred membership of workers of Mexican descent even before Arizona achieved statehood in 1910. *See* C. MCWILLIAMS, *supra* note 4, at 72. In addition, by the Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, Congress excluded immigration by Mexicans lacking certain personal qualifications. When World War I created the need for additional laborers for the farms, mines, and railroads, however, Mexican workers were admitted under an emergency waiver. *See* Comment, *Statutory Provision for Admission of Mexican Agricultural Workers—An Exception to the Immigration and Nationality Act of 1952*, 24 GEO. WASH. L. REV. 464, 465-66 (1956). For a discussion of politically motivated discrimination against aliens, see M. KONVITZ, CIVIL RIGHTS IN IMMIGRATION 94-105 (1953); W. PRESTON, ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS 1903-1933 (1963).

7. *See* W. PRESTON, *supra* note 6, at 4-19.

8. *Id.* at 6, 45, 64, 99.

IWW members from Jerome, Arizona to California and 1200 more from Bisbee, Arizona to New Mexico.[9] The roundups typified the attitude of many Arizonans, once immigrants themselves, who wanted no part of foreigners who had immigrated to this country more recently. This widespread hatred of foreigners[10] was finally given legal expression in the form of limitations on the employment of aliens. In 1914 Arizona voters passed a constitutional initiative measure attempting to limit private employment of aliens in virtually all areas.[11] When challenged in court, however, the limitation was declared unconstitutional.[12] More than 55 years later a requirement that resident aliens reside in the state for 15 years before qualifying for welfare benefits[13] was also declared unconstitutional.[14] Nonetheless, Arizona continues to retain old statutes and enact new provisions which deny aliens entry into various professions and occupations.[15] These statutes are subject to attack on several grounds.

The fourteenth amendment to the United States Constitution provides that states may not deny to any person the equal protection of the laws. Under a long line of Supreme Court decisions, it is firmly established that aliens are "persons" within the meaning of the constitutional provision.[16] Under the equal protection clause, a court will analyze a particular statute using one of two traditional standards—the rational basis test or the compelling state interest test. In general, the function of the court is to determine whether the state legislature had a rational or reasonable basis for enacting a statute creating a certain classification. Although the degree of deference given by the court to the state legislature will vary depending upon the test applied, where the court can ascertain a legitimate state purpose for imposing the classification, its constitutionality will be upheld.[17]

The standard of scrutiny to be applied in a particular case will turn on the characterization of the right infringed or on the type of classification

9. *Id.* at 93. Federal troops intervened to prevent further exportation of IWW members, and remained in Arizona mining camps until 1920, when they left despite the request of the Governor and the mine owners that they stay. *Id.* at 108-10.

10. The United States Supreme Court has explicitly recognized that American history has included dislike of the foreigner. In discussing the legislative history of federal civil service laws as they apply to aliens, the Court has stated: "[I]n 1883 there was no doubt a greater inclination than we can now accept to regard 'foreigners' as a somewhat less desirable class of persons than American citizens." Hampton v. Mow Sun Wong, 426 U.S. 88, 107 (1976).

11. [1915] Ariz. Sess. Laws amends., Referendum, Initiatives 12 (1914).

12. Truax v. Raich, 239 U.S. 33 (1915). See text & notes 24-42 *infra*.

13. Ch. 146, § 78, [1972] Ariz. Sess. Laws 1071.

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

15. *See* statutes cited in notes 134-48 *infra*.

16. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1947); Truax v. Raich, 239 U.S. 33, 39 (1915); United States v. Wong Kim Ark, 169 U.S. 649, 695 (1897); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

17. *See* Dandridge v. Williams, 397 U.S. 471, 485-87 (1970). For further discussion of the traditional tests of equal protection, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). For a discussion of recent Supreme Court cases introducing a new, intermediate level of scrutiny, see note 82 *infra*.

made. Where the state statute impairs the exercise of a fundamental right or is based on a suspect classification, the courts will strictly scrutinize the restriction, and its constitutional validity will be upheld only if the state can prove that it has a compelling interest in the restriction.[18] On the other hand, where the right infringed is not fundamental and the category is not inherently suspect, the judiciary will defer to the judgment of the legislature; provided the statutory classification is based on a conceivably rational or reasonable state purpose, it will be upheld.[19]

The United States Supreme Court has recently held that aliens constitute a discrete and insular minority requiring greater judicial solicitude and protection.[20] Under the equal protection clause, all state restrictions against aliens will now be subjected to strict judicial scrutiny.[21] Applying the compelling interest standard, several recent cases have struck down state restrictions on various types of employment as violative of equal protection.[22]

Aliens are also protected against state discrimination under the doctrine of federal preemption, derived from the supremacy clause of the United States Constitution.[23] Under this doctrine the states are preempted from regulating areas controlled by Congress if they do so in ways which conflict with the congressional regulation.[24] One such area preempted by Congress is that involving immigration and naturalization.[25] Therefore, state legislation and regulation concerning aliens which interferes with the constitutional authority vested in Congress is invalid.[26]

This Note will discuss the federal restrictions on state provisions denying aliens entry into various professions and occupations, specifically the doctrines of equal protection and federal preemption of immigration. It will trace the expanding protection offered by the Court's analysis of the equal protection clause and its changing concept of the appropriate test to be applied in discrimination cases involving aliens. The current Arizona statutory restrictions on alien employment will be examined in light of these Supreme Court decisions, and conclusions will be drawn regarding the legitimacy of these statutes. An analysis will also be made of the areas where such restrictions might still be constitutional.

18. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
19. *See* Dandridge v. Williams, 397 U.S. 471, 485-87 (1970). *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).
20. Graham v. Richardson, 403 U.S. 365, 372 (1971).
21. *Id.* at 376.
22. *See, e.g., In re* Griffiths, 413 U.S. 717 (1973) (admission to state bar); Sugarman v. Dougall, 413 U.S. 634 (1973) (state civil service); Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972) (state, county, or municipal public works), *aff'd*, 413 U.S. 902 (1973).
23. U.S. CONST. art. VI, cl. 2.
24. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Hines v. Davidowitz, 312 U.S. 52 (1941).
25. U.S. CONST. art. I, § 8, cl. 4.
26. Graham v. Richardson, 403 U.S. 365, 376 (1971).

FEDERAL RESTRICTIONS ON STATE DISCRIMINATION AGAINST ALIENS

Truax v. Raich—The First Protection for Alien Employees

Truax v. Raich[27] was the first case holding that there are constitutional limitations on the states's power to limit alien employment. In 1914 the citizens of Arizona passed an initiative measure[28] making it a misdemeanor for virtually any private employer in the state to employ more than 20% of its workforce from among aliens.[29] One alien employee who was discharged pursuant to the new law filed suit against his employer, alleging that the statute was unconstitutional.[30] In defense of the act the state argued that its police power[31] allowed it to protect its citizens from alien competition.[32] The Supreme Court held, however, that a state's general interest in protecting its citizens from competition is not sufficient to overcome the prima facie right to equal protection.[33] The *Truax* case established the proposition that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure."[34] The Court, declaring that the state interest, in order to overcome this right, must be a legitimate one, held that the far-reaching restrictions on alien employment attempted by the State of Arizona constituted invidious discrimination against aliens and clearly fell under the condemnation of fundamental constitutional law.[35]

The Court in *Truax* also invalidated the Arizona act on the grounds of federal preemption.[36] Congress has exclusive power to regulate naturaliza-

27. 239 U.S. 33 (1915).

28. ARIZ. CONST. art. IV, § 1 provides for citizen initiative measures, which become law upon the majority vote of qualified electors and proclamation by the governor.

29. [1915] Ariz. Sess. Laws amends., Referendum, Initiatives 12 (1914). This act applied to all employers with more than five employees. The penalty for violating the act was a fine of not less than $100 and imprisonment for not less than 30 days. *Id.*

30. 239 U.S. at 41. Since the employer was arrested for noncompliance with the act, the state attorney general and the county attorney were also made defendants in the suit. *Id.* at 36.

31. U.S. CONST. amend. X, reserves to the states powers not otherwise enumerated in the Constitution. For early cases upholding the state's right to preclude aliens from certain occupations based on the police power, see Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392, 397 (1927) (pool hall operation); Tokaji v. State Bd. of Equalization, 20 Cal. App. 2d 612, 67 P.2d 1082 (Dist. Ct. App. 1937) (liquor license); Trageser v. Gray, 73 Md. 250, 20 A. 905 (1890) (liquor license); Commonwealth v. Hana, 195 Mass. 262, 81 N.E. 149 (1907) (peddler's license); Templar v. Michigan State Bd. of Examiners, 131 Mich. 254, 90 N.W. 1058 (1902) (barber); Wright v. May, 127 Minn. 150, 149 N.W. 9 (1914) (pool hall operation); State *ex rel.* Balli v. Carrel, 99 Ohio St. 285, 124 N.E. 129 (1919) (pool hall operation); Bloomfield v. State, 86 Ohio St. 253, 99 N.E. 309 (1912) (liquor license); George v. Portland, 114 Ore. 418, 235 P. 681 (1925) (license to sell soft drinks); *In re* Trimble's License, 41 Pa. Super. Ct. 370 (1909) (liquor license).

32. 239 U.S. at 40. The title of the initiative measure also states this reasoning on its face: "An act to protect . . . citizens . . . in their employment against non-citizens . . . ." [1915] Ariz. Sess. Laws amends., Referendum, Initiatives 12 (1914).

33. 239 U.S. at 43.

34. *Id.* at 41.

35. *Id.* at 42-43.

36. *Id.* at 42.

tion and immigration;[37] therefore, Congress determines which aliens may be admitted to the United States, the terms of their stay, and the conditions of their naturalization.[38] The states have not been given any part in these constitutionally derived powers, and therefore, they cannot impose their own restrictions on the entrance or residence of aliens within the state.[39] As part of its authority to regulate immigration, Congress has granted aliens the full and equal benefit of all laws.[40] Consequently, state statutes which purport to discriminate against aliens to such an extent that the purpose behind the federal statutes is subverted must fail as being preempted by the congressional legislation.[41] On this basis a state cannot impose special residency requirements for aliens before they qualify for welfare benefits,[42] deny aliens all practical means to earn a living,[43] or preclude aliens from all public employment.[44] *Truax* discussed the reasons for preempting state action, stating:

> The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.[45]

The language of the Court in *Truax*, however, left open the possibility that states may restrict alien employment in areas involving the use of

37. U.S. CONST. art. 1, § 1, cl. 4 gives Congress the sole power to "establish a uniform rule of naturalization." *See* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1892) (authority to regulate immigration rests solely in the federal government).

38. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1947).

39. *Id.* However, since illegal aliens are not in the country in accordance with federal immigration laws, the states may prohibit the knowing employment of such individuals. *See* DeCanas v. Bica, 424 U.S. 351 (1976).

40. 42 U.S.C. § 1981 (1970) provides: "All persons within the jurisdiction of the United States shall have . . . the full and equal benefit of all laws . . . ." *See also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1885).

41. *See* Hines v. Davidowitz, 312 U.S. 52 (1941). Many alienage cases acknowledge federal preemption as a compelling argument, although the courts often base their decisions on equal protection grounds. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 377-79 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948); Truax v. Raich, 239 U.S. 33, 42 (1915); Miranda v. Nelson, 351 F. Supp. 735, 740 (D. Ariz. 1972), *aff'd*, 413 U.S. 902 (1973); Dougall v. Sugarman, 339 F. Supp. 906, 910-11 (S.D.N.Y. 1971), *aff'd*, 413 U.S. 634 (1973). *See also* Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 572, 456 P.2d 645, 649, 79 Cal. Rptr. 77, 81 (1969) (holding based jointly on federal preemption and equal protection grounds).

42. *See* Graham v. Richardson, 403 U.S. 365, 376 (1971).

43. *See* Truax v. Raich, 239 U.S. 33, 43 (1915).

44. *See* Miranda v. Nelson, 351 F. Supp. 735, 739-40 (D. Ariz. 1972), *aff'd*, 413 U.S. 902 (1973).

45. 239 U.S. at 42.

natural resources,[46] in allocating public jobs,[47] or in licensing specific occupations.[48] In these instances the Court indicated that a state might be able to show a more specific danger to the general welfare and offer a less encompassing exclusion in order to protect its citizens. The Supreme Court in *Truax* did not elaborate on this public interest exception, but other cases have established that where the state could show that aliens possessed some particular characteristic, such as proclivity toward the commission of crime, the state could deny them access to those occupations in which that characteristic could have an injurious effect on the citizens.[49] The extent and viability of these *Truax* exceptions will now be examined.

The Truax Exceptions Revisited

Allocation of state resources. State restrictions on alien employment and activities were once upheld under the theory that a state has a proprietary interest over the property within its borders.[50] Under this holding the resources of the state could be protected against outside interests and preserved for the enjoyment of state citizens.[51] Thus, statutes restricting alien activities in areas which deplete the state's natural resources, such as hunting or fishing, had been held constitutional.[52] However, in *Takahashi v. Fish & Game Commission*[53] the United States Supreme Court declared unconstitutional a California statute denying commercial fishing licenses to those ineligible for citizenship. The state had sought to justify the statute as a reasonable wildlife conservation measure.[54] The equal protection clause, as applied by the Court in this case, requires that a discriminatory statute be upheld so long as the restriction has a rational or reasonable basis. The Court, although not stating the test to be applied, implicitly applied the rational basis test to the statute and found that in light of the *Truax* reasoning, whatever proprietary interest California might have in its coastal waters was inadequate to justify the exclusion of all aliens.[55] In failing to find such a rational basis for the statute, *Takahashi* implicitly rejected the argument that a state's proprietary interest over the subject matter of an occupation could ever constitute the "special public interest" exception

46. *Id.* at 39-40.
47. *Id.*
48. *Id.* at 43. The Court stated: "No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for, as we have said, it relates to every sort." *Id.*
49. See cases cited note 31 *supra*.
50. *See* Patsone v. Pennsylvania, 232 U.S. 138, 145-46 (1914) (hunting); McCready v. Virginia, 94 U.S. 391, 396 (1877) (oyster planting).
51. See cases cited note 50 *supra*.
52. *Id.*
53. 334 U.S. 410 (1948).
54. *Id.* at 418.
55. *Id.* at 421. Even though the statute excluded only aliens ineligible for citizenship, the Court indicated that the proprietary interest was "inadequate to justify California in excluding *any or all* aliens who are lawful residents of the State." *Id.* (emphasis added).

reserved in *Truax*.[56] Later Supreme Court cases supported the view that this *Truax* exception is exceedingly narrow.[57]

In *Graham v. Richardson*[58] the Court rejected Arizona's contention that its proprietary interest in disbursing welfare benefits allowed it to discriminate against aliens. Holding unconstitutional an Arizona statute requiring aliens to reside in the state for 15 years to become eligible for welfare benefits, the Court indicated just how heavy a burden the state would have to bear to justify discrimination against aliens.[59] The Court in *Graham* for the first time declared alienage to be a suspect classification;[60] state restrictions on alien rights are, therefore, subject to strict judicial scrutiny, by which the state is required to demonstrate a compelling interest in enforcing the restriction.[61] The *Graham* Court found that alienage is a suspect classification because "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."[62] Aliens pay taxes and contribute to the economic welfare of the state in which they live to the same extent that citizens do.[63] Therefore, under the compelling interest test, the Court held that a state's proprietary interest in its money—in this case funds allocated for welfare payments—was not sufficient to justify the discriminatory residency requirements.[64]

56. *See* Truax v. Raich, 239 U.S. at 43. The Court in *Takahashi* discussed several earlier cases which upheld the exclusion of noncitizens from the enjoyment of fish and game resources within the state, but adopted the reasoning of Missouri v. Holland, 252 U.S. 416, 434 (1920), that to "put the claim of the State upon title is to lean upon a slender reed." Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 421 (1947).

57. See text & notes 58-64 *infra*.

58. 403 U.S. 365 (1971).

59. *Id.* at 376.

60. *Id.*

61. *Id.* In Shapiro v. Thompson, 394 U.S. 618, 634 (1969), the Supreme Court first attempted to articulate fully the strict scrutiny test, whereby a state must prove a compelling interest to override the exercise of a fundamental right or discrimination based on a suspect classification. *See* Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 495-97 (1973).

62. 403 U.S. at 372.

63. *Id.* at 376.

64. *Id.* The *Graham* holding was also based on the ground of federal preemption. *Id.* at 380. The Court specifically declined to decide whether the federal government itself could impose a durational residency requirement for the receipt of welfare benefits, *id.* at 382 n.14, but that question was answered in the affirmative by Mathews v. Diaz, 426 U.S. 67 (1976). The Supreme Court in *Mathews* held that the federal government could impose a five year residency requirement on aliens before they could qualify for the Medicare supplemental medical insurance program. The Court noted that while aliens must be afforded due process, such a position

> does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. . . .
>
> . . . The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious."

Id. at 78, 80. The Court justified its holding by showing that Congress could make reasonable distinctions between aliens and citizens because of national policy:

> Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country:

After *Graham*, there is little or nothing of the state interest in preserving its resources referred to in *Truax* remaining viable. It is submitted that a state may no longer justify discrimination against resident aliens on the grounds that the state is fulfilling its interest in the preservation of state resources for the benefit of its citizens. For this reason states have attempted to argue special interests justifying discrimination against aliens in the area of public employment.

Public Employment. In addition to claiming a proprietary interest over their natural and fiscal resources, states have asserted a governmental interest over public employment. They have asserted that when acting in the role of proprietor states should have the same discretion in hiring as a private employer, free from equal protection restrictions.[65] Some states have considered public employment to be a privilege rather than a right. As such, in determining what use should be made of its own money, they have argued that they could legitimately promote the welfare of their own citizens, rather than that of aliens.[66] Two early United States Supreme Court cases, *Heim v.*

Congress may decide that as an alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence.

Id. at 81 (emphasis in original). The Court distinguished *Graham* by saying that the states have no authority to divide persons not citizens of that state into subclassifications of United States citizens and aliens, but such a classification is a routine and normally legitimate part of the federal government's business. *Id.* at 85.

65. *See* Sugarman v. Dougall, 413 U.S. 634 (1973); Purdy & Fitzpatrick v. State, 71 Cal. 2d 556, 456 P.2d 645, 79 Cal. Rptr. 77 (1969). *Cf.* State v. Caldwell, 170 La. 851, 129 So. 368 (1930) (non-voter excluded from employment in construction of public buildings); Scopes v. State, 154 Tenn. 105, 112, 289 S.W. 363, 365 (1927) (teacher may be forbidden to teach evolution in public school); People v. Warren, 13 Misc. 615, 617, 34 N.Y. Supp. 942, 944 (Super. Ct. 1895) (dictum) (a state may deny employment in the construction of public works to whomever it will). These cases relied heavily upon dictum in Atkin v. Kansas, 191 U.S. 207 (1903), to the effect that the state has the right to "prescribe the conditions upon which it will permit public work on its behalf or on behalf of its municipalities," *id.* at 222-23, based on the premise that there is no general right to work for the state.

Since the fourteenth amendment applies only to state action, private employers are not bound by its requirements. *See* Shelley v. Kraemer, 334 U.S. 1 (1948), in which the Court declared: "The 14th Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Id.* at 13. In challenging discrimination in private employment, aliens briefly relied on title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1970), which prohibits discrimination on various grounds, including national origin. The Equal Employment Opportunity Commission [EEOC], which administers this portion of the Act, issued a ruling which provided that because "discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship." 35 Fed. Reg. 241 (1970). However, the alien's automatic remedy under title VII has now been foreclosed by the Supreme Court. In Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973), the Court held that alienage was not included in the statutory protection against national origin discrimination. The Court based its decision on a reading of the legislative history of the Civil Rights Act, which had at one time included alienage as a category, but which explicitly excluded it in further drafts. *Id.* at 89. The EEOC now interprets the Act as protecting against discrimination against aliens only if it can be shown that the citizenship requirement has the purpose or effect of discriminating on the basis of national origin. 29 C.F.R. § 1606 (1976).

Nevertheless, there is arguably a private remedy for all employment discrimination against aliens under the Civil Rights Act of 1966, 42 U.S.C. § 1981 (1970). *See also* Guerra v. Manchester Terminal, 350 F. Supp. 529, 536, 538 (S.D. Tex. 1972); League of Academic Women v. Regents of Univ. of Cal. 343 F. Supp. 636, 638 (N.D. Cal. 1972). *But see* Waters v. Pascher Contractors, Inc., 227 F. Supp. 659 (N.D. Ill. 1964).

66. *See, e.g.*, Heim v. McCall, 239 U.S. 175, 192 (1915); Truax v. Raich, 239 U.S. 33, 41 (1915); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 577, 456 P.2d 645, 655, 79 Cal. Rptr. 77, 87 (1969).

McCall[67] and *Crane v. New York*,[68] upheld a New York statute[69] denying aliens employment in public works. The Court reasoned that public employment was a privilege, not a property right protected by the fourteenth amendment.[70] Therefore, when acting in its capacity as an employer, the state was free from federal constitutional restrictions.[71] Recently, however, the California Supreme Court, in *Purdy & Fitzpatrick v. State*,[72] held that a similar statute excluding aliens from public employment was unconstitutional. The court indicated that the statute involved in *Heim* was premised upon the assumption that state regulation of alien employment was within the *Truax* special public interest exception because it was legitimate to control the flow of state money.[73] The *Purdy* court rejected this rationale, stating that "*Takahashi* suggests the demise of the proprietary rationale as a basis upon which to sustain any wholesale exclusion of aliens from pursuit of a particular occupation or type of employment."[74] Applying the compelling state interest test, the court emphasized that limitations on employment opportunities impede the attainment of economic security, which is an essential part of the pursuit of life, liberty, and happiness protected by the fourteenth amendment.[75] Since aliens do not have the right to vote, they are unable to influence legislation by their political input. Therefore, the court felt that any legislation discriminating against aliens must be approached by the courts with "special solicitude."[76] The court also said that *Truax* had specifically forbidden a state's reliance on a motive of protecting its citizens against competition as a justification for discriminatory employment practices,[77] and that "since aliens support the State of California with their tax dollars, any preference in the disbursement of public funds which excludes aliens seems manifestly unfair."[78] The court was not persuaded by the argument that public employment is a privilege, and therefore, not a protectible interest.

The technical right-privilege distinction used in *Heim* is no longer dispositive of what interests are protected by the fourteenth amendment.[79] In

67. 239 U.S. 175 (1915) (civil action to void a contract).
68. 239 U.S. 195 (1915) (criminal prosecution for illegally employing aliens).
69. Ch. 36, § 14, 1909 (current version at N.Y. LABOR LAW § 222 (McKinney 1954)).
70. 239 U.S. at 192.
71. *Id.*
72. 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).
73. *Id.* at 573-74 n. 10, 456 P.2d at 650 n. 10, 79 Cal. Rptr. at 82 n. 10.
74. *Id.*
75. *Id.* at 579, 456 P.2d at 654, 79 Cal. Rptr. at 86.
76. *Id.* at 580, 456 P.2d at 654, 79 Cal. Rptr. at 86.
77. *Id.* at 581, 456 P.2d at 655, 79 Cal. Rptr. at 87.
78. *Id.*, 456 P.2d at 656, 79 Cal. Rptr. at 88 (footnotes omitted).
79. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.12-.13, at 178-79 (3d ed. 1972); Comment, *Towards a Property Right in Employment*, 22 BUFFALO L. REV. 1081 (1973); "Public Officials' Discretion to Dismiss State Employees," 17 ARIZ. L. REV. 639, 652, 654-55 (1975). Traditional case law held that employment was a privilege rather than a right and, therefore, did not merit protection under the fourteenth amendment. *See, e.g.*, Tyler v. Beckham, 178 U.S.

Sugarman v. Dougall,[80] the United States Supreme Court used reasoning similar to that employed in *Purdy* and, applying the compelling interest test, weakened the proprietary interest exception to the point of implicitly abandoning it. In holding unconstitutional a New York law[81] precluding aliens from employment within the classified state civil service, the Court stated that the special public interest doctrine,

> rooted as it is in the concepts of privilege and of the desirability of confining the use of public resources, has no applicability in this case. To the extent that *Crane* . . . [and] *Heim* . . . intimate otherwise, they were weakened by the decisions in *Takahashi* and *Graham*, and are not to be considered as controlling here.[82]

---

548 (1900); *Ex parte* Sawyer, 124 U.S. 200 (1880); Bailey v. Richardson, 182 F.2d 46, 57 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951), *noted in* 33 B.U.L. REV. 176 (1953). This reasoning, however, has been specifically discredited and the distinction rejected in Board of Regents v. Roth, 408 U.S. 564, 571 (1972). For cases discrediting the right-privilege distinction in contexts other than employment, see Bell v. Burson, 402 U.S. 535, 539 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (welfare benefits); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (unemployment compensation). Employment is now held to constitute property protected by the fourteenth amendment when there is more than a unilateral expectation of continued employment: where there is entitlement to it. Board of Regents v. Roth, 408 U.S. at 577. This entitlement may be established by contract, statute, or custom and usage. *Id.*; *accord*, Arnett v. Kennedy, 416 U.S. 134, 151-52 (1974). Where such entitlement is present, a state may not discriminate in public employment using the rationale that the job is a mere gratuity. Board of Regents v. Roth, 408 U.S. at 577. *See generally* Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89 (1974); "Public Officials' Discretion to Dismiss State Employees," *supra* at 655-56.

80. 413 U.S. 634 (1973).

81. Ch. 767, § 1 [1939] Laws of N.Y. 1814.

82. 413 U.S. at 645. The federal counterpart to *Sugarman* is Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), which struck down a United States Civil Service Commission regulation barring aliens from employment in the federal civil service. In *Hampton*, the Court stated by way of dictum that "overriding national interests may provide justification for a citizenship requirement in the federal civil service even though an identical requirement may not be enforced by a State." *Id.* at 101. The Court, speaking through Mr. Justice Stevens, did not apply the strict judicial scrutiny test of *Graham* and *Sugarman*; rather, it said that "some judicial scrutiny" was required by the Constitution, and that "a legitimate basis" must be found for the challenged rules. *Id.* at 103. The opinion then outlined what federal interests would be required to override "a discriminatory rule which would violate the Equal Protection Clause if adopted by a State." *Id.* An example of such a legitimate interest given by the Court was the President's interest in facilitating the negotiation of treaties with foreign powers by enabling him to offer employment opportunities by way of treaty. *Id.* at 104. The Court also pointed out that a legitimate factor to be considered is that requiring citizenship as a condition of employment may serve as an incentive, encouraging aliens to become naturalized citizens and participate more effectively in society. *Id.* The Court in *Hampton* also cited the need for undivided loyalty in certain sensitive employment positions, a requirement more easily administered by a broad exclusionary policy. *Id.* However, the Court pointed out that the Civil Service Commission could not, in the course of its ordinary business, foster the policies represented by the first two interests. *Id.* at 105. Exclusions based on those grounds could be properly justified only if expressly imposed by Congress or the President. In deciding on the loyalty interest, the Court seemed to say that aliens may not be presumed to be disloyal: "Congress has regularly provided for compensation of any federal employee owing allegiance to the United States. Since it is settled that aliens may take an appropriate oath of allegiance, the statutory category, though not precisely defined, is plainly more flexible and expansive than the Commission rule." *Id.* at 109 (footnote omitted). *See also In re* Griffiths, 413 U.S. 717, 725 & nn. 14 & 15 (1973).

The *Hampton* Court utilized a weighing process, whereby it concluded that the administrative convenience prompting the classifications could not withstand the rational basis test it applied:

> Any fair balancing of the public interest in avoiding the wholesale deprivation of employment opportunities caused by the Commission's indiscriminate policy, as op-

The *Sugarman* Court left open the question of whether the state could deny aliens employment if there were "legitimate state interests that relate to qualifications for a particular position."[83] While the Court did not elaborate on what types of employment might be foreclosed, it appears that exclusion may be permissible if the state can prove that something inherent in the employment of an alien in a particular occupation would endanger the achievement of legitimate state interests, since this rationale has never been rejected.[84] Arguments of this type have been advanced to justify preclusion of aliens from certain political jobs[85] or sensitive security positions.[86] In

posed to what may be nothing more than a hypothetical justification, requires rejection of the argument of administrative convenience in this case.

. . . The impact of the rule on the millions of lawfully admitted resident aliens is precisely the same as the aggregate impact of comparable state rules which were invalidated by our decision in *Sugarman* . . . . [D]ue process requires that the decision to impose that deprivation of an important liberty be made either at a comparable level of government or, if it is to be permitted to be made by the Civil Service Commission, that it be justified by reasons which are properly the concern of that agency.

426 U.S. at 115-16. Based on the exception outlined in *Hampton* for decisions made at the executive level, President Gerald R. Ford issued an Executive order generally prohibiting the employment of aliens in the competitive federal civil service. Exec. Order No. 11935, 5 C.F.R. § 7.4 (1976), *reprinted in* 5 U.S.C. § 3301 app., at 344 (Supp. 1977). Until this order is challenged, it appears that aliens are now excluded from the federal civil service but may not be excluded from state civil service employment.

83. 413 U.S. at 647.

84. For example, the Court in Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927), did not reject the state's contention that aliens, who lack the commitment to American ideals that citizens are presumed to have, were inherently unfit to operate a "dubious business" such as a pool hall.

85. For example, in *In re* Griffiths, 413 U.S. 717 (1973), one of the arguments set forth by the state to justify exclusion of aliens from the practice of law was based on the status of lawyers as "officers of the court," *id.* at 718, an argument rejected by the Court. *Id.* at 719. The argument was based on the fact that aliens do not possess purely political rights. The federal right to vote is given to citizens only. U.S. CONST. amend. XV, § 1. Prior to 1928, aliens possessed a statutory right to vote in at least 22 states and territories, but by that year every state had passed laws disenfranchising resident aliens. M. KONVITZ, *supra* note 5, at 1. While the Federal Constitution requires citizenship for public office, the states may prescribe their own qualifications. It is permissible for states to require citizenship for these rights to accrue without violating the fourteenth amendment right to equal protection. *See* Sugarman v. Dougall, 413 U.S. 634 (1973), where the Court stated that individual states may constitutionally require citizenship of "persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Id.* at 647. Arizona has imposed such restrictions, which are contained in ARIZ. CONST. art. 4, pt. 2, § 2 (legislature); *id.* art. 5, § 2 (Governor, Attorney General, Secretary of State, Supervisor of Public Instruction, State Auditor, and State Treasurer). For a discussion of political rights and aliens, *see* N. ALEXANDER, RIGHTS OF ALIENS UNDER THE FEDERAL CONSTITUTION 88-92 (1931). Where aliens are unable to vote in political elections, there is an implicit policy determination that aliens should not have direct input into the political structure and decisions of government, since these are basic privileges of citizenship. *See id.* at 88. Aliens may also be denied employment of a political nature, since it would consist of making and implementing political policy, which has been denied the alien by disenfranchisement. *See* Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

Arizona law, ch. 146, § 78 [1972] Ariz. Sess. Laws 1071, provided that public officers must be citizens and that "[n]o person is eligible to any office, employment or service in any public institution in the state, or in any of the several counties thereof, of any kind or character, whether by election, appointment or contract, unless he is a citizen of the United States." *Id.* Certain educators were exempted from the statute. *Id.* Insofar as this statutory restriction applied to any state employment, and not merely to the types of employment suggested as subject to state limitation in *Sugarman*, this statute was held unenforceable in Miranda v. Nelson, 351 F. Supp. 735, 740 (D. Ariz. 1972), *aff'd*, 413 U.S. 902 (1973).

86. The argument in favor of not allowing aliens to hold jobs in sensitive security areas is

such cases the state can arguably show a compelling interest in maintaining the classification.[87]

States have attempted, however, to exclude aliens from much broader areas of employment. Aliens in Arizona were recently precluded from most public employment by the state constitution[88] and a companion statute.[89] Even more encompassing than the New York statute [90] struck down by the *Sugarman* decision, the Arizona provisions precluded aliens from employment in connection with any state, county, or municipal works.[91] Relying on several United States Supreme Court cases[92] the Attorney General of Arizona in 1973 issued an opinion that both of these provisions were unenforceable.[93] That same year, in *Nelson v. Miranda*,[94] the Supreme Court affirmed a lower court's determination that these provisions were unconstitutional. The district court had held that a resident alien could not be denied a federally funded work-study position, nor denied an application for employment in the Arizona state service.[95] The lower court indicated that the "special public interest" doctrine,[96] while allowing the states to limit fiscal outlay to protect its resources, does not permit them to "accomplish such purposes by invidious distinctions and discrimination between classes of its inhabitants."[97] Finding that Arizona had not shown a compelling interest for

based primarily on the idea that aliens are more likely to be disloyal than citizens. However, in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), the Court implied that aliens may not be presumed to be disloyal. *Id.* at 109. See discussion note 82 *supra*.

87. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 104 (1976). *See also* discussion note 82 *supra*.

88. ARIZ. CONST. art. 18, § 10.

89. Ch. 146, § 78, [1972] Ariz. Sess. Laws 1071.

90. N.Y. CIV. SERV. LAW § 53(1) (McKinney 1973) (prohibiting aliens from employment in the competitive classified civil service).

91. Prisoners and certain teachers, instructors, and professors were excepted. ARIZ. CONST. art. 18, § 10; ch. 146, § 78, [1972] Ariz. Sess. Laws 1071.

92. *See* Sugarman v. Dougall, 413 U.S. 634 (1973); *In re* Griffiths, 413 U.S. 717 (1973).

93. Opinion No. 73-19, 1973 OP. ARIZ. ATT'Y GEN. 44-45.

94. 413 U.S. 902 (1973), *aff'g* 351 F. Supp. 735 (D. Ariz. 1972).

95. Miranda v. Nelson, 351 F. Supp. 735, 739-40 (D. Ariz. 1972), *aff'd*, 413 U.S. 902 (1973). This decision was based on the consolidated complaints of Miranda, a high school student, and Huxtable, a social worker and teacher. Although the district court did not treat the two situations differently, the decision as it relates to Huxtable sets a broader precedent because there was no bar to her having obtained citizenship had she wanted to. Miranda, however, was under 18 years of age and, therefore, could not file a petition for citizenship. 8 U.S.C. § 1445(b) (1970). Conceivably, a future court might see such a temporary bar to obtaining citizenship as an extenuating circumstance requiring greater judicial solicitude in striking down employment barriers. Since Huxtable could have become eligible for the employment she sought by becoming a naturalized citizen, the decision invalidating the restriction on federal preemption grounds covers all aliens excluded from public employment, not just those who cannot become naturalized. *See* Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting) (discussing question of temporary status).

96. *See* Truax v. Raich, 239 U.S. at 43. *See generally* text & notes 46-49 *supra*.

97. 351 F. Supp. at 739. The court noted:

> The mainstays of that concept of "special public interest" [in protecting and preserving a state's wealth and resources for its citizens] have been eroded to splinters by *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948); *Purdy & Fitzpatrick* v. *California*, 71 Cal. 2d 566, 456 P.2d 645 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618 . . . (1969); and *Graham* v. *Richardson*, 403 U.S. 365 . . . (1971).

Id. (parallel citations omitted).

its classification, the Court held that the state had strictly foreclosed the lawful pursuit of a livelihood by a class "otherwise fully qualified to perform the state employment and contribute to society and its needs."[98] While a complete ban on public employment has failed under both equal protection and federal preemption analysis,[99] states continued to assert the right to restrict certain types of employment to citizens by statutorily denying aliens licenses for particular occupations and professions.

Specific Occupations. States have historically been permitted to preclude aliens from particular occupations where citizenship was deemed to be required by the nature of the occupation itself. For example, early cases held that aliens could be statutorily denied employment in occupations which directly touched on public morals.[100] Under this rationale, *Ohio ex rel. Clarke v. Deckebach*[101] upheld a city ordinance precluding aliens from operating a pool hall. The Court noted that it is not irrational for a city to presuppose that aliens in that city are not as qualified as citizens to engage in "the conduct of a dubious business."[102] The city had argued that pool halls are frequented by "lawbreakers and other undesirable persons," that crimes are often committed in pool halls, and that aliens as a class are less likely to be familiar with the local laws which might be broken.[103] The Supreme Court was persuaded by these arguments, at least so far as necessary for application of the rational basis test, and therefore upheld the ordinance as supported by a legitimate governmental purpose:

> The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business. It is not necessary that we be satisfied that this premise is well founded in experience. We cannot say that the city council gave unreasonable weight to the view admitted by the pleadings that the associations, experiences and interests of members of the class disqualified the class as a whole from conducting a business of dangerous tendencies.[104]

There are two factors that denigrate the precedential value of the *Deckebach* decision for the proposition that aliens can be excluded from certain businesses or occupations due to their inherent moral weaknesses. The first is a factual one: in *Deckebach*, it was conceded that aliens as a

98. *Id.* at 739-40.
99. *See* Miranda v. Nelson, 351 F. Supp. 735, 740 (D. Ariz. 1972), *aff'd*, 413 U.S. 902 (1973) (decided on the grounds of equal protection and preemption); Dougall v. Sugarman, 339 F. Supp. 906, 909-10 (S.D.N.Y. 1971) (decided on the grounds of equal protection and federal preemption), *aff'd*, 413 U.S. 634 (1973) (decided on the ground of equal protection without reaching the federal preemption issue).
100. See cases cited note 31 *supra*.
101. 274 U.S. 392, 397 (1927).
102. *Id.*
103. *Id.* at 394.
104. *Id.* at 397.

class lacked moral qualities required for the occupation in question.[105] The second factor, clearly of more significance, is the evolution of equal protection doctrine to the point that strict scrutiny is now given to state and local classifications based upon alienage.[106] In light of these factors, it is extremely unlikely that a state could successfully rely on *Deckebach* to justify exclusion of aliens from particular businesses or occupations. In fact, the recent trend of judicial decisions indicates that there must be a very close nexus between the state interests in establishing citizenship requirements and the particular occupation involved.

The Supreme Court indicated the extent of the state's burden in *In re Griffiths*,[107] in which it struck down a Connecticut rule[108] precluding aliens from the practice of law. The state had argued that alien lawyers might have divided loyalties which would conflict with their duties to their clients and to the courts.[109] Connecticut also contended that since attorneys are "officers of the court," the need for public confidence in the American legal system justifies their exclusion.[110] However, the Supreme Court rejected both arguments,[111] noting that the state's ultimate interest was in having qualified attorneys, an interest that could be served without the wholesale ban on

105. *See id.*

106. *See, e.g.*, Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971); text & notes 20-22 *supra*.

107. 413 U.S. 717 (1973).

108. Rule 8(1) Connecticut Practice Book (1963), promulgated by Superior Court judges pursuant to Conn. Gen. Stat. Rev. § 51-80 (1958).

109. 413 U.S. at 724.

110. *Id.* at 723-24.

111. *Id.* at 722. Chief Justice Burger took a different position in this case than he had in Sugarman v. Dougall, 413 U.S. 634 (1973) (striking down citizenship requirement for city civil service), and Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976) (striking down citizenship requirement for engineering license), where he joined the majority opinions invalidating discriminatory state legislation. In *Griffiths*, however, he wrote a dissenting opinion, in which Justice Rehnquist concurred. In his opinion Chief Justice Burger stressed two points distinguishing his position on occupations from that on professions: first, the states had specifically reserved to themselves the authority to regulate professions; and second, attorneys, as officers of the court, need to have the understanding of the American system that citizens are presumed to have. 413 U.S. at 732-33. The Chief Justice stated that he approved the policy behind the Court's decision but was reluctant to implement that policy of relaxing restraints on alien employment because "the States reserved, among other powers, that of regulating the practice of professions within their own borders. If that concept has less validity now than in the 18th century when it was made part of the'bargain' to create a federal union, it is nonetheless part of that compact." *Id.* at 730.

The most surprising feature of the dissent was that Chief Justice Burger rejected the concept of "suspect classification" and recommended that the Court return to the rational basis test. *Id.* He criticized the usefulness of the "suspect classification" tag as a convenience, one which "tends to stop analysis" and not properly considered "a reasoned constitutional concept." *Id.* This may indicate that the Chief Justice is abandoning his former support of strict scrutiny in alien employment situations. *See* Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976); Sugarman v. Dougall, 413 U.S. 634, 642 (1973). The second ground of the Chief Justice's dissent in *Griffiths* may have been strictly limited to the legal profession. He felt that the Court's decision represented "a denigration of the posture and role of a lawyer as an 'officer of the court' " and as an advocate who owes the highest standard of ethics to both court and client. 413 U.S. at 730-31. He found a "reasonable, rational basis" for denying aliens admission to the bar: "Persons owing first loyalty to this country will grasp traditions and apply our concepts more than those who seek the benefits of American citizenship while declining to accept the burdens of citizenship in this country." *Id.* at 733.

aliens; the state "has wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law."[112] Therefore, the Court found that the only legitimate interest of the state is to ensure that individual applicants possess the particular attributes required to practice the profession, a particularity not addressed by a blanket preclusion of aliens from the practice of law.

The Court has not retreated from the position announced in *Griffiths*. In 1976 it held, in *Examining Board of Engineers v. Flores de Otero*,[113] that a Puerto Rican statute[114] permitting only United States citizens to practice privately as civil engineers was unconstitutional. The Court noted that to be licensed, an engineer must have a specified education, pass an examination, and possess a minimum amount of practical experience.[115] The Court also reiterated that strict judicial scrutiny was the appropriate standard for reviewing state or territorial statutes discriminating against aliens.[116] The suit was based on the Civil Rights Act of 1871,[117] which provides a private cause of action for deprivation of rights, privileges, and immunities secured by the Constitution and laws. The Court held that the Puerto Rican statute did deprive resident aliens of their rights under the Constitution.[118] In so doing, the *Flores de Otero* Court outlined a test which supersedes the previous *Truax* categories—allocation of resources, public employment, and specific occupations invoking a special public interest. The new two-step analysis requires careful examination of the discrimination "in order to determine whether [the claimed governmental] interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are

112. 413 U.S. at 725.

113. 426 U.S. 572 (1976). *But cf.* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (court used test of "some judicial scrutiny," rather than "strict judicial scrutiny," presumably because case involved federal instead of state discrimination).

114. P.R. Laws Ann. Tit. 20, §§ 681-710 (1951).

115. 426 U.S. at 576.

116. *Id.* at 602.

117. Ch. XXII, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1970)). Section 1983 currently provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

118. 426 U.S. at 601.

The Court did not indicate which provision—the equal protection clause of the fourteenth amendment or the due process clause of the fifth amendment—was applicable in this case. This question arises because of the special status of Puerto Rico as a territory. *Id.* at 599. The majority viewed this question as unnecessary to the decision, holding that the statute would fail under either clause. *Id.* at 601. It can be argued, however, that the Court was applying the fourteenth amendment, thus treating Puerto Rico as if it were a state. Although the Court has consistently applied the "strict scrutiny" test to state classifications, *see* cases cited note 106 *supra*, a lesser standard of judicial review seems to be applied to federal discrimination based upon alienage. *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). It is possible that the statute challenged in *Flores de Otero* would have survived if it had been enacted by Congress, since a more lenient standard of review would have been invoked. *See* 426 U.S. at 608 (Rehnquist, J., dissenting).

necessary and precisely drawn."[119] The Court then applied this analysis to Puerto Rico's arguments in support of its legislative classification.

The Puerto Rican government offered three justifications for the statute: The need to prevent an "uncontrolled" influx of Spanish-speaking aliens; a desire to raise the prevailing standard of living; and the necessity of providing financial accountability for damage done by engineering mistakes.[120] The first justification was rejected on the basis that states may not restrict the liberty of lawfully admitted aliens in order to control the impact of federal immigration laws.[121] The Court saw the second justification, based on economic grounds, as one which "would permit any State to bar the employment of aliens in any or all lawful occupations."[122] The *Flores de Otero* statute was aimed at substantially the same group as the *Truax* measure,[123] since it restricted private employment of aliens. The Court stated firmly that such broad economic justification is no more permissible today than it was more than 50 years earlier.[124] In rejecting the territory's final contention, the Court indicated that the statutory classification was unnecessarily broad because Puerto Rico had other tools that would adequately ensure financial responsibility.[125] The Court stated that citizenship "bears no particular or rational relationship to skill, competence, or financial responsibility."[126]

---

119. 426 U.S. at 605.
120. *Id.*
121. *Id.* The Court expressed its dissatisfaction with this rationale very clearly: "The first justification amounts to little more than an assertion that discrimination may be justified by a desire to discriminate." *Id. See also* DeCanas v. Bica, 424 U.S. 351 (1976).
122. 426 U.S. at 605.
123. See text & notes 32-35 *supra*.
124. 426 U.S. at 605.
125. *Id.* at 606.
126. *Id.* Mr. Justice Rehnquist dissented in this case, consistent with his previous opinions in alien discrimination cases. *Id.* at 605; *see, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 117 (1976) (Rehnquist, J., dissenting); Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting); *In re* Griffiths, 413 U.S. 717, 730 (1973) (Burger, J., dissenting). In Sugarman v. Dougall, 413 U.S. 634 (1973), he noted that the equal protection clause of the fourteenth amendment was designed to prohibit invidious discrimination because of race. *Id.* at 649. *See also* Slaughter-House Cases, 83 U.S. (16 Wall) 36,.70-73 (1873). Rehnquist stated that the framers of the Constitution never intended to protect any "discrete and insular minorities" other than racial minorities, and that therefore, aliens were not entitled to any special solicitude. 413 U.S. at 650.

Rather than protecting aliens, Justice Rehnquist cites 11 instances in which the Constitution recognizes differences between aliens and citizens. *Id.* at 651-52. *See* U.S. CONST. art. I, § 2, cl. 2 (Representatives must be citizens); *id.*, § 3, cl. 3 (Senators must be citizens); *id.* § 8, cl. 4 (Congress has the authority to establish rules of naturalization to enable aliens to become members of American society); *id.* art. II, § 1, cl. 5 (the President must be a natural-born citizen); *id.* art. III, § 2, cl. 1 (judicial authority of the federal courts extends to suits involving citizens of the United States and foreign states, citizens, or subjects); *id.* amends. XI, XV, XIX, XXIV, and XXVI (all drawing the distinction between citizens and aliens); *id.* amend. XIV, § 1, cl. 1 (natural-born and naturalized citizens are citizens of the states in which they live). Because the Constitution makes alienage a separate category, Justice Rehnquist sees no justification for the Court's strict scrutiny of discriminatory legislation, which he sees as a " 'ward of the Court approach.' " 413 U.S. at 657.

In response to the argument that it is objectionable to discriminate against aliens because alienage is a status, and it is unfair to penalize people for having a certain status, Rehnquist stated:

Even where the occupation in question does not require the amount of formal qualification that a recognized profession does, the states are still not free to discriminate against aliens without showing a compelling interest. The recent trend of cases[127] indicates that only when alienage itself affects the actual qualifications for the job sought can the state preclude alien employment in that area. *Takahashi* and *Graham* have effectively eliminated the allocation of resources exception of *Truax* by placing a heavy burden on the state to justify denying aliens use of state resources,[128] especially since aliens themselves contribute to the state's economy to the same degree that citizens do. *Sugarman* and *Miranda* have eliminated the public employment exception, at least where the state cannot show a legitimate interest bearing on the qualifications for the particular position,[129] by rejecting the notion that public employment is merely a privilege; there is a constitutionally protected right to be treated equally in regard to public employment.[130] *Griffiths* and *Flores de Otero* have virtually eliminated the exception for licensed occupations by requiring a state to show that it cannot ensure job qualification by imposing educational requirements, testing, and other more narrowly drawn procedures.[131] The Supreme Court has struck down all modern state attempts to discriminate against aliens in the area of employment, based on the equal protection clause and the doctrine of federal preemption.[132] Federal restrictions on state preclusion of alien em-

---

> [T]here is a marked difference between a status or condition such as illegitimacy, national origin, or race, which cannot be altered by an individual and the "status" of appellant in [*Griffiths*] or of the appellees in [*Sugarman*]. There is nothing in the record indicating that their status as aliens cannot be changed by their affirmative acts.

Id. Because the classification is not suspect, he feels that the rational basis test is the appropriate standard. *Id.* at 658. In applying that test to the facts of *Griffiths*, he found that a state could rationally require attorneys to have the understanding of the American political and social experience which is gained from growing up in the United States or going through the naturalization process. *Id.* at 663. As applied to the facts of *Sugarman* he found that a state could rationally require employees of city government to be "familiar with how we as individuals treat others and how we expect 'government' to treat us," and that these characteristics are more likely to be present in a citizen than an alien. *Id.* at 662.

Rehnquist's dissents from the majority opinions in the recent alien employment cases reflect a deep philosophical disagreement: He feels that citizenship is a special status, which commands special privileges, and that the Constitution should not be used to give particular preference to those who have chosen to remain aliens. *See* Sugarman v. Dougall, 413 U.S. 634, 659 (1973) (Rehnquist, J., dissenting). Since he does not believe that alienage is a suspect classification, his application of the rational basis test allows him to sustain discrimination when the state can assert no more than a broad argument that aliens are not fully integrated into the American way of life.

127. *See e.g.*, Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 606 (1976) (civil engineering license); Sugarman v. Dougall, 413 U.S. 634, 646-47 (1973) (employment in city civil service); Miranda v. Nelson, 351 F. Supp. 735, 740 (D. Ariz. 1972), *aff'd*, 413 U.S. 902 (1973) (employment in school district).

128. See text & notes 50-64 *supra*.

129. See text & notes 80-83 *supra*.

130. *See* Sugarman v. Dougall, 413 U.S. 634, 644 (1973).

131. *See* Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S., 572, 606 (1976); *In re* Griffiths, 413 U.S. 717, 725-27 (1973).

132. Although courts have not always carefully distinguished preemption, many decisions upholding alien employment rights have implicitly been based on the right to travel, or have at least recognized that the right to travel could be effectively infringed by discriminatory employment laws. *See, e.g.*, Truax v. Raich, 239 U.S. 33, 42 (1915) (discrimination tantamount to

ployment place a heavy burden on the state to prove a compelling interest in maintaining discriminatory employment classifications.[133] It remains to be

denying entrance and abode); Miranda v. Nelson, 351 F. Supp. 735, 740 (D. Ariz. 1972) (to the same effect), *aff'd*, 413 U.S. 902 (1973); Dougall v. Sugarman, 339 F. Supp. 906, 911 (S.D.N.Y. 1971) (discrimination discouraging residence within state), *aff'd*, 413 U.S. 634 (1973). This right to travel, although clearly recognized, is not expressly guaranteed in the Constitution. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). For a discussion of the source of the right to travel, see Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145, 148-59 (1975).

The right to travel is infringed whenever the effect of the law is to "impede or prevent the exercise of the right of interstate travel." United States v. Guest, 383 U.S. 745, 760 (1966). It can be argued that the alien employment cases, citing federal preemption of control over immigration as the reason for restricting state action, really deal with the right to travel. Employment restrictions would rarely conflict with the federal right to regulate the immigration and naturalization of aliens once they were lawfully admitted to the United States. Rather, the cases actually deal with the frustration of the alien's right to travel freely among the states because of the discriminatory employment restrictions they would face in certain states. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 377-79 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948); Truax v. Raich, 239 U.S. 33, 42 (1915); Miranda v. Nelson, 351 F. Supp. 735, 740 (D. Ariz. 1972), *aff'd*, 413 U.S. 902 (1973); Dougall v. Sugarman, 339 F. Supp. 906, 910 (S.D.N.Y. 1972), *aff'd*, 413 U.S. 634 (1973). *See also* Purdy & Fitzpatrick v. State, 71 Cal.2d 566, 576, 456 P.2d 645, 647, 79 Cal. Rptr. 77, 79 (1969) (holding jointly on federal preemption and equal protection grounds). What *Truax* really opposes is the state's attempt to keep aliens out of the state, not out of the country. Truax v. Raich, 239 U.S. at 42. That attempt is actually an infringement of the right to travel freely among the various states, segregating the aliens "in such of the States as chose to offer hospitality." *Id.*

With Mathews v. Diaz, 426 U.S. 67 (1976), upholding a federal law conditioning an alien's right to receive Medicare payments on residence for five continuous years, and admission for permanent residence, the importance of the right to travel among the states may increase. In distinguishing its holding from *Graham* the Court stated that "whereas the Constitution inhibits every State's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States." *Id.* at 85. The Court reiterated its support of *Graham* on the right to travel ground. *Id.* n.25.

133. Some jobs which require security clearance or deal with sensitive matters of national policy, however, may still be denied to aliens. In such cases there is arguably a sufficiently clear relationship between the citizenship requirement and the particular job to bear the burden of judicial scrutiny. In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), the Court stated that there were clearly federal positions which could be denied aliens on the ground that the position was a sensitive one. *Id.* at 115. *See also* Sugarman v. Dougall, 413 U.S. 634, 645 (1973). In *Flores de Otero* it was indicated that where the state has a substantial and legitimate interest in requiring citizenship for certain employment, and where the restriction is narrowly drawn, a state may discriminate against aliens. 426 U.S. at 605. The Court does not elaborate on what types of interest might pass judicial scrutiny. A state might argue that since security checks for sensitive positions require investigating a person's entire background, it might be difficult to acquire adequate information about an alien who has spent much of his life in a foreign country. However, a restriction based on such a justification might sweep too broadly. The questionability of a blanket denial of such sensitive positions to aliens is emphasized by comparing the situation of a resident alien who was born in another country but who was raised in the United States, with the situation of a United States citizen raised in a foreign country. The former would be precluded from employment, while the latter, with weaker ties to this country and a more difficult history to check, would be eligible. Rather than the status of alienage or citizenship, the seemingly important issue is the availability of accurate security information and the quality of the potential employee's ties to the country. A case by case determination would be more compatible with the spirit behind the equal protection clause. *Cf. In re* Griffiths, 413 U.S. 717, 725 (1973) (holding that since an individualized determination of qualification to practice law is available, aliens as a class may not be denied the opportunity to take the bar examination). Similarly, it might be argued that in security positions the alien would pose an intrinsic risk because of a fundamental loyalty to the country of his national origin. *Cf.* Sugarman v. Dougall, 413 U.S. 634, 659-64 (1973) (Rehnquist, J., dissenting) (arguing that aliens may have a conflict of loyalty). However, the Supreme Court has indicated that aliens may not be presumed disloyal. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 109 (1976).

There are many reasons for not acquiring citizenship, some of which involve a statutory disability beyond the alien's control. For example, a person cannot become a naturalized citizen until he has resided in the United States continuously for five years, 8 U.S.C. § 1427(a) (1970), or three years if the person is a veteran of the United States armed forces or the spouse of a

seen whether Arizona will be able to show such a compelling interest to rebut constitutional attacks on its discriminatory legislation. The final section of this Note will explore that question.

ARIZONA'S RESTRICTIONS ON ALIEN EMPLOYMENT

While *Truax* and subsequent decisions preclude states from enacting complete bans on alien employment, over the years the Arizona legislature has passed a series of statutes denying aliens employment in specified occupations and professions. While some statutory citizenship requirements have been repealed in recent years,[134] the requirement has been added in others.[135] Aliens are currently precluded by Arizona statutes from becoming veterinarians,[136] physicians,[137] chiropractors,[138] osteopaths,[139] pharmacists,[140] psychologists,[141] dispensing opticians,[142] members of the Board of

citizen, *id.* §§ 1430, 1439, nor can he file a petition to become a citizen prior to reaching age 18, *id.* § 1445(b). Therefore, it should not be presumed that an alien who is not yet a naturalized citizen is any less loyal to the United States than other persons. Rather, this is only one factor that might be investigated as a part of the security check. It has been argued that aliens differ from citizens in that they lack familiarity with the language, laws, and customs of the jurisdiction, and that they lack commitment to the laws. Perkins v. Smith, 370 F. Supp. 134, 139 (D. Md. 1974) (Winters, J., concurring) (holding that aliens may be precluded from serving on juries); *see* Carter v. Jury Comm'n, 396 U.S. 320, 332 (1970) (dictum). While this might arguably be more likely true for aliens as a class than for citizens as a class, it is not intrinsically true. It is not enough that it is more convenient to exclude the class than to make individual determinations of commitment to American laws. Since alienage is a suspect classification, the assertion of administrative convenience in categorizing all aliens as ineligible does not withstand judicial scrutiny. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 115-16 (1976). *See also* Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974).

134. *See, e.g.*, Ariz. S. Ct. R. 28(c)(IV)(3) (amended 1974) (lawyer) [note, however, that Ariz. S. Ct. R. 28(c)(III)(1) still requires citizenship papers,probably due to an oversight]; ch. 15, § 7, [1955] Ariz. Sess. Laws 25 (amended 1970) (public accountant); ch. 39, § 4, [1952] Ariz. Sess. Laws 65 (amended 1973) (graduate nurse); ch. 39, § 5, [1952] Ariz. Sess. Laws 67 (amended 1973) (practical nurse); ch. 24, § 18, [1935] Ariz. Sess. Laws 51 (amended 1974) (dentist); ch. 45, § 2, [1933] Ariz. Sess. Laws 178 (amended 1970) (certified public accountant).

135. *See* ARIZ. REV. STAT. ANN. § 32-2071(1)(b) (1976) (psychologist); *id.* § 32-2124(A)(1) (1976) (real estate broker).

136. *Id.* § 32-2215(1).

137. *Id.* § 32-1423(1). This statute was amended in 1972, replacing the requirement that an applicant for a license be "taking every action provided by law to become a citizen" with the stricter requirement that the applicant have become a naturalized citizen prior to applying for the license. Ch. 158, § 1, [1972] Ariz. Sess. Laws 1152. The Arizona Attorney General has since concluded that this requirement is unenforceable. Opinion No. 74-7-L, 1974 OP. ARIZ. ATT'Y GEN. 87-89.

138. ARIZ. REV. STAT. ANN. § 32-921(B)(1) (1976).

139. *Id.* § 32-1822(1). Citizenship or the declaration of an intention to become a citizen has been required for oesteopaths since 1951, but in 1970 the statute was amended to require citizenship or the taking of all steps to obtain citizenship. The statute still provides that a license may be revoked "if the physician's final petition for naturalization is denied, and, after hearing, [the board] shall revoke such license if it appears after a reasonable time that such physician has not secured or is not diligently attempting to secure his certification of citizenship." *Id.* There seems to be no justification for this provision, since it does not relate to the alien's ability to perform his duties with competence, a determination which was presumably made when the license was issued.

140. *Id.* § 32-1922(A). The statute provides for termination of an alien's license "at the end of seven years from the date of issuance if such person has not then become a citizen. . . . If citizenship is later denied to any person registering under this chapter, then such denial of citizenship shall automatically cancel all such registration and privileges." *Id.*

141. *Id.* § 32-2071(1)(b).

142. *Id.* § 32-1683(1).

Nursing Registration and Nursing Education,[143] real estate brokers,[144] owners of security guard agencies,[145] security guards,[146] owners of collection agencies,[147] or holders of spiritous liquor licenses.[148]

It is difficult to know exactly why such citizenship requirements have been established, since Arizona, like most states, does not have a codified legislative history. It appears, however, that perhaps the major reason for these citizenship requirements is to restrict competition,[149] the same reasoning that was specifically found insufficient in *Truax*.[150] The licensing boards which draft the qualifications for particular occupations are concerned with professional quality, but they also appear to be interested in limiting competition.[151] At least one state legislator has indicated that most legislators do not have time to read all of the bills which are voted on, so many rely on prepared resumes,[152] which often do not include the reasoning behind the citizenship requirements.[153] A former committee chairman in the Arizona Senate, whose committee introduced many of the bills adding or deleting the citizenship requirement, was under the impression that "evidently, our legislature must have the right to set up citizenship requirements for employment."[154] The constitutionality of this conclusion and the Arizona statute is doubtful at best, and one has already been struck down.[155]

The statutory[156] preclusion of aliens from holding spirituous liquor licenses has recently been declared unconstitutional by an Arizona Court of Appeals. In *Arizona State Liquor Board v. Ali*,[157] the court held that such a restriction was a denial of equal protection.[158] The state had argued that the

143. *Id.* § 32-1603(A)(1).
144. *Id.* § 32-2124(A)(1).
145. *Id.* § 32-2612(1).
146. *Id.* § 32-2622(A)(1). A recent case has held that a state may not flatly require citizenship for "peace officers." See Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977).
147. *Id.* § 32-1023(A)(1).
148. *Id.* § 4-202(A) (1974).
149. Former Arizona State Senator Douglas Holsclaw, whose Committee on Public Health and Welfare sponsored several of the statutes discussed, indicated in an interview with the author that the bills were backed by the professions involved (osteopathy, dentistry, graduate nursing, and practical nursing), whose main intent was to restrict competition. Telephone interview with Douglas Holsclaw, former Arizona State Senator, in Tucson, Arizona, (Jan. 30, 1976) (transcript of interview on file at *Arizona Law Review* office).
150. Truax v. Raich, 239 U.S. 33, 40-41 (1915). See text & notes 32-35 *supra*.
151. Members of the licensing boards are appointed by the Governor. *See* ARIZ. REV. STAT. ANN. § 32-1602 (Supp. 1977-78) (Board of Nursing); *id.* § 32-1607 (Practical Nurse Committee). The licensing boards respond to lobbying efforts by members of the licensed professions and occupations. Telephone interview with Douglas Holslaw, *supra* note 128.
152. *Id.*
153. *Id.*
154. *Id.*
155. See text & notes 157-72 *infra*.
156. ARIZ. REV. STAT. ANN. § 4-202(A) (1974).
157. 27 Ariz. App. 16, 550 P.2d 663 (1976), *review granted*, Sept. 28, 1976.
158. *Id.* at 23-24, 550 P.2d at 670-71. The case arose when appellee Cosmo Luigi Ali applied to the State of Arizona Department of Liquor Licenses and Control for a series # 7 spiritous liquor license. *Id.* at 17, 550 P.2d at 664. Ali was a 38 year-old permanent resident alien, who had already been a resident of the State of Arizona for approximately six years and had

restriction was necessary to protect substantial interests of its citizenry and to protect the state's limited resources—the spirituous liquor licenses themselves.[159] While the court acknowledged that because of the twenty-first amendment the state's police power over intoxicating liquor is broad,[160] it indicated that this power was limited by the fourteenth amendment and could not be used to stifle the clear purposes of the equal protection clause.[161] In discussing the Supreme Court's rejection of the appropriateness of the right-privilege distinction in *Graham v. Richardson*,[162] the court defined the issue: "[W]e are not determining whether [the alien] has a constitutionally protected fundamental right to hold a liquor license. Rather, we are determining whether he has a fundamental right to be free from discrimination based solely upon his status as a resident alien."[163] The *Ali* court determined that the alien did have such a right and that the restriction imposed by the Arizona legislature was not supported by compelling state interests.[164] The court indicated that it would take a specific showing of alien unsuitability, which was not forthcoming, to sustain the law.[165] Despite the state's assertions the court was "unable to comprehend . . . why aliens cannot appreciate American institutions. Resident aliens, like citizens, pay taxes, support the economy, serve in the armed forces and contribute in myriad other ways to our society."[166] Therefore, the police power argument, allowing the state to protect the health, morals, and safety of its citizens, was not persuasive.[167]

Although making only passing mention of *Takahashi v. Fish & Game Commission*,[168] the Arizona court rejected the argument that the state had a compelling interest in protecting its spirituous liquor licenses as limited state resources.[169] In fact, the court found that the state had not been able to sustain any interest whatsoever.[170] In addition to holding that the statute was

declared an intention to become an American citizen. *Id.* The state liquor board denied the application solely on the grounds that Ali was not a citizen of the United States, based on ARIZ. REV. STAT. ANN. § 4-202(A) (1974). 27 Ariz. App. at 17, 550 P.2d at 664. Ali appealed to the superior court, alleging the unconstitutionality of the statute. The superior court reversed the board, declaring the statute unconstitutional. *Id.*

159. 27 Ariz. App. at 23, 550 P.2d at 670. The state also argued that the twenty-first amendment to the United States Constitution gives states powers over intoxicating liquors which are not limited by the fourteenth amendment. *Id.* at 19, 550 P.2d at 666.

160. *Id.* at 21, 550 P.2d at 668.

161. *Id.* at 22, 550 P.2d at 669; *accord*, Craig v. Boren, 429 U.S. 190, 208-10 (1976).

162. 403 U.S. 365, 374 (1971).

163. 27 Ariz. App. at 22, 550 P.2d at 669.

164. *Id.* at 23, 550 P.2d at 670.

165. *Id.*

166. *Id.*

167. *Id.*

168. 334 U.S. 410 (1947). See text & notes 53-56 *supra*.

169. *See* 27 Ariz. App. at 21, 23, 550 P.2d at 668, 670.

170. *Id. Ali* also cited with approval a 1973 Arizona Attorney General opinion, Opinion No. 73-19, 1973 OP. ARIZ. ATT'Y GEN. 44-45, based on the Supreme Court's holdings in *In re* Griffiths, 413 U.S. 717 (1973) and Sugarman v. Dougall, 413 U.S. 634 (1973), which stated that "the Arizona Constitution and statutes which prohibit the employment of aliens by public agencies are unconstitutional and have no force and effect." Opinion No. 73-19, 1973 OP. ARIZ.

a denial of equal protection under the fourteenth amendment, the court also held that it violated a provision in the Arizona constitution[171] protecting persons similarly situated from unreasonably different treatment.[172]

The state might still attempt to prove a compelling interest by showing that alienage itself was linked to unfitness for a particular occupation.[173] Such unfitness might be found where the position was a sensitive one or involved the national security.[174] Arizona might advance the argument that its restrictions in the areas of security guard agencies[175] and collection agencies,[176] because they sometimes deal with confidential matters of a sensitive nature, are justified under the compelling interest test. However, if the rationale were based on an assumption that aliens are more likely to have divided loyalties than citizens, and that they are, therefore, not fit for employment in sensitive areas, the argument would not pass constitutional muster. The Supreme Court has already stated in *Griffiths* that a state cannot sustain the presumption that aliens are more likely to be disloyal than citizens.[177]

In addition to the loyalty argument, states have advanced the position that they may exclude aliens from policy-making employment situations where there is a legitimate state interest involved.[178] Perhaps the preclusion of aliens from the Board of Nursing Registration and Nursing Education[179] might be sustained on the basis that such board members formulate policy relating to the qualifications for nurses, a legitimate state interest in protecting the health of Arizona citizens. The Supreme Court has never ruled on a case with similar facts. A constitutional determination would probably

---

ATT'Y GEN. 44-45, *quoted at* 27 Ariz. App. at 23 n.3, 550 P.2d at 670 n.3. Since Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972), *aff'd*, 413 U.S. 902 (1973), held that Arizona's preclusion of aliens from public employment was unconstitutional, and since the *Ali* court supported the Attorney General's opinion, it appears that Arizona statutes banning aliens from public employment will not be able to withstand judicial scrutiny. The Supreme Court has never found a state to have a compelling interest sufficient to justify denying aliens equal protection with regard to public employment.

171. ARIZ. CONST. art. 2, § 13.

172. 27 Ariz. App. at 24, 550 P.2d at 671.

173. The court of appeals in *Ali* indicated that the possibility of a state statute surviving strict scrutiny is exceedingly small:

> We hold that the classification created by [ARIZ. REV. STAT. ANN. § 4-202(A) (1974)] is invidious and wholly arbitrary. The discrimination inherent in [the statute] denies arbitrarily to appellee, merely because of his status as an alien, the right to pursue an otherwise lawful occupation. The statutory classification operates irrationally without reference to any legitimate state interest except that of favoring United States citizens over citizens of other countries. Since citizenship, under the circumstances here, cannot be made a prerequisite for obtaining a liquor license, the latter objective does not reflect such a compelling state interest that it would permit us to sustain this kind of discrimination.

Id. at 23-24, 550 P.2d at 670-71.

174. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 101, 104 (1976).

175. ARIZ. REV. STAT. ANN. §§ 32-2612(1),-2622(A)(1) (1976).

176. *Id.* § 32-1023(A)(1).

177. *In re* Griffiths, 413 U.S. 717, 724-26 (1973).

178. *See* Sugarman v. Dougall, 413 U.S. 634, 648 (1973).

179. *See* ARIZ. REV. STAT. ANN. § 32-1603(A)(1) (1976).

depend on how political the function of the board was deemed to be, since a compelling interest may be shown where the position involves broad policy-making functions.[180]

The Seventh Circuit has ruled squarely on the issue of preclusion of aliens from holding real estate licenses, such as that required by Arizona Revised Statutes section 32-2124.[181] In *Satoskar v. Indiana Real Estate Commission*[182] the court, basing its decision on *Griffiths*, held unconstitutional a statute precluding aliens from applying for or obtaining real estate licenses. There does not seem to be a compelling state interest which would overcome the denial of equal protection inherent in Arizona's real estate licensure statute. *Flores de Otero*,[183] with its extension of *Griffiths*, seems to be dispositive of occupational and professional licensing where the licensing boards have other means of testing the qualifications of its applicants. Real estate brokers seem to fall clearly within this limitation on state discriminatory practices.

Professional licenses in particular have been traditionally controlled by the individual professions, which have been allowed a great deal of latitude.[184] In declaring unconstitutional the preclusion of aliens from the practice of law, *Griffiths* has apparently foreclosed the possibility of other professions maintaining their bans on alien licensure. Based on the reasoning of that case, the attorneys general of at least four states, including Arizona, have written opinions indicating that citizenship requirements for state medical licenses are also unconstitutional.[185] The Arizona Attorney General determined[186] that the Arizona citizenship requirement for physicians[187] is unconstitutional. The Arizona opinion relied also on analogies to cases otherwise restricting the state's right to reject applicants for the bar[188] and on *Purdy & Fitzpatrick v. State*.[189] Since the medical and legal professions both involve substantial educational requirements and extensive test-

180. See discussion note 85 *supra*. A recent case declaring unconstitutional a California statutory preclusion of aliens from employment as probation officers said that a compelling state interest appears only where the employment requires direct participation in "the formulation, execution, or review of broad public policy." Chavez-Salido v. Cabell, 427 F. Supp. 158, 171 (C.D. Cal. 1977), *quoting* Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

181. ARIZ. REV. STAT. ANN. § 32-2124(A)(1) (1976).

182. 517 F.2d 696 (7th Cir.), *aff'd*, 417 U.S. 938 (1974).

183. Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976).

184. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

185. Opinion No. 74-7-L, 1974 OP. ARIZ. ATT'Y GEN. 87-89; Opinion No. 4755, 1972 OP. MICH. ATT'Y GEN.; Opinion No. 276, 1970 OP. MO. ATT'Y GEN.; Opinion R-2247, 1950 OP. TEX. ATT'Y GEN.

186. Opinion No. 74-7-L, 1974 OP. ARIZ. ATT'Y GEN. 87-89.

187. ARIZ. REV. STAT. ANN. § 32-1423(1) (1976).

188. Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Rafaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972).

189. 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

ing prior to licensure, there is ample opportunity within the licensing procedure itself for individual evaluation of the fitness of the applicants.[190] If the purpose of licensure is to assure a certain level of competence and integrity,[191] then a case by case determination of those qualities will sufficiently achieve that end without completely excluding aliens. If medical licenses cannot be denied to aliens, then it would appear that licenses in the quasi-medical professions similarly may not be denied on the basis of alienage. The current Arizona restrictions for veterinarians, chiropractors, osteopaths, pharmacists, psychologists, and dispensing opticians,[192] appear to be no more justifiable than the statutory restriction on physicians. In each case there is opportunity for thorough individual determinations, precluding the use of a broad discriminatory net. In light of the Supreme Court's two-step analysis in *Flores de Otero*,[193] it appears that no such discrimination could withstand judicial scrutiny, since the classification of alienage is not intrinsically related to skill, competence, or financial responsibility to such a degree that citizenship automatically indicates the required qualifications.

CONCLUSION

Arizona attempted in 1914 to exclude almost all alien employment through an initiative measure. That attempt, rejected in *Truax*, does not become more valid today merely because the restrictions have been spread over several statutes prescribing requirements for specific occupations and professions. The United States Supreme Court has consistently applied the compelling interest test to recent state restrictions on the activities of resident aliens. The Arizona Court of Appeals has indicated in *Ali* that it will follow the Supreme Court's lead and will search out the real intent of discriminatory legislation. In light of *Miranda, Griffiths*, and *Flores de Otero*, the essence of the unconstitutionality of such restrictions lies in their attempt to single out a class of residents as ineligible to secure employment in given areas. Since an Arizona court has already taken a strong stand in support of alien employment rights, it seems likely that any future court action will result in a determination of the unconstitutionality of the existing statutes. Therefore, the Arizona legislature should take the initiative in repealing statutory bans on alien employment,[194] replacing them with stat-

190. *See In re* Griffiths, 413 U.S. 717, 725-27 (1973).
191. *See* Holland Realty Inv. Co. v. State Dep't of Commerce, 84 Nev. 91, 98, 436 P.2d 422, 426 (1968).
192. See statutes cited in notes 136-42 *supra*.
193. See text & notes 119-26 *supra*.
194. Since the remaining discriminatory Arizona statutes do not purport to rely on an intrinsic relationship between alienage and the requirements of the particular employment, they should be repealed by the Arizona Legislature. Failing this, it is likely that any court challenge will result in the statutes being declared unconstitutional. In the early 1970's the California Legislature repealed citizenship requirements in statutes dealing with civil service employment, ch. 123, § 1, [1945] Cal. Stats. 552 (repealed 1972), and licensed private occupations. *See, e.g.*, ch. 338, § 9, [1951] Cal. Stats. 772 (citizenship requirement repealed 1972) (cemetary brokers);

utes requiring individual evaluation of the applicant's ability and qualifications.

---

ch. 550, § 3, [1955] Cal. Stats. 1035 (citizenship requirement repealed 1970) (pharmacists); ch. 1508, § 1, [1945] Cal. Stats. 2818 (citizenship requirement repealed 1972) (social workers); ch. 1543, § 2, [1947] Cal. Stats. 3178 (citizenship requirement repealed 1972) (private investigators). Arizona should follow the lead of the California Legislature and repeal its discriminatory employment requirements.