Resident Aliens and the Right to Work: The Quest for Equal Protection

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> The bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions; Whom we shall welcome to a participation of all our rights and privileges, If by decency and propriety of conduct they appear to merit the enjoyment.**
>
> George Washington, 1783.

I. Historical Background

Until as recently as 1875 the United States government consistently followed the open-door policy with respect to immigration.[1] Persons from all over the world were not only welcome to enter the United States but, in many cases, were induced to enter by official and private action.[2]

An indication of the benevolent attitude toward aliens[3] is the fact that every one of the original thirteen states permitted aliens to vote.[4] During the nineteenth century the laws and constitutions of at least twenty-two states and territories granted aliens or declarant aliens (hereinafter referred to as declarants) the right to vote.[5]

This early attitude of complacency and equality towards the alien can perhaps be explained by the existing circumstances of that time. The original thirteen colonies were a "melting pot" of aliens, who had come

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** 20 U. Chi. L. Rev. 547 (1953).

1. M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 1 (1946) [hereinafter cited as KONVITZ].

2. *Id.*

3. Alien, as used in this discussion, refers to a person who has been lawfully admitted for permanent residence as defined in 8 U.S.C. § 1101(a)(20). It does not include all aliens as defined in 8 U.S.C. § 1101(a)(3) (1970).

4. *See generally* Minor v. Happersett, 88 U.S. 162, 172-73 (1874); Aylsworth; *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114 (1931).

5. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114 (1931); KONVITZ, *supra* note 1.

to this land seeking freedom and opportunity. The push westward made it increasingly necessary for midwestern states to encourage alien migration and settlement; one way of attracting aliens was by allowing them to vote.[6]

While the midwestern states were adopting constitutions allowing aliens to vote, the eastern states were legislating to eliminate aliens from the franchise. The change of heart in the East occurred as a result of the large influx of Irish immigrants during 1846-1848, which fanned anti-catholic prejudice and fear that Irish Catholics, controlled by politicians in Tammany Hall, would take over the government.[7] This tension gave rise to the Native American, or "Know-Nothing Party" which fostered the passage of the citizenship, long residency and strict literacy requirements for voting.[8]

Limitations of the franchise to citizens spread throughout the states. The last state to amend its constitution to require citizenship as a condition for voting was Arkansas in 1926.[9] To a large extent, the limitation was a product of fear that in event of war, disloyal enemy immigrants would take over the American government through the ballot box.[10]

Fear, however, was not the only motivating factor that led to the exclusion of aliens from the franchise. Racism and prejudice played an important role. As one author put it:

> The exclusion of aliens from voting was a product of xenophobic bigotry not unlike the racial hatred that so long denied the franchise to Blacks in America. "Pure blooded Americans" were committed to upholding their "race" and "pride of birth." Aliens were menaces, or imagined to be, to their control over politics, religion, and education.[11]

Another author expressed his concern this way:

> We may well ask whether this insweeping immigration is to foreignize us, or we are to Americanize it. Our safety demands the assimilation of these strange populations, and the process of assimilation becomes slower and more difficult as the proportion of foreigners increases.[12]

This sentiment found expression in court decisions:

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6. K. PORTER, HISTORY OF SUFFRAGE IN THE UNITED STATES 112-34 (1918).
7. *Id.* at 115.
8. *Id.*
9. *See* Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114 (1931).
10. J. HIGHAM, STRANGERS IN THE LAND 214 (1955).
11. *Id.* at 7.
12. H. GROSE, ALIENS OR AMERICANS 15 (1906) (Poem by J. Strong).

> The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their ihstory has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.[13]

While these feelings ran rampant throughout the states, causing some of them to pass acts affecting the entry of immigrants into their respective jurisdictions,[14] citizens expressed widespread concern over the open-door policy. The following poem exemplifies the prevailing attitude of the times:

> Unguarded Gates
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> Wide open and unguarded stand our gates,
> And through them presses a wild, motley throng—
> Men from the Volga and the Tartar steppes,
> Featureless figures of the Hoang-Ho,
> Malayan, Scythian, Teuton, Celt, and Slav,
> Flying the old world's poverty and scorn;
> These bringing with them unknown gods and rites,
> Those, tiger passions, here to stretch their claws.
> In street and alley what strange tongues are these,
> Accents of menace alien to our air,
> Voices that once the Tower of Babel knew!
> O Liberty, White Goddess! Is it well
> To leave the gates unguarded? On thy breast
> Fold Sorrow's children, soothe the hurts of fate,
> Lift the downtrodden, but with the hand of steel
> Stay those who to thy sacred portals come
> To waste the gifts of freedom. Have a care
> Lest from thy brow the clustered stars be torn
> And trampled in the dust. For so of old
> The thronging Goth and Vandal trampled Rome.
> And where the temples of the Caesars stood
> The lean wolf unmolested made her lair.[15]
>
> —Thomas Bailey Aldrich

This widespread concern led Congress to begin regulating immi-

13. People v. Hall, 4 Cal. 399, 404-05 (1854); Castro v. State, 2 Cal. 3d 223, 230 n.11, 466 P.2d 244, 248, 85 Cal. Rptr. 20, 24 (1970); Perez v. Sharp, 32 Cal. 2d 711, 720, 198 P.2d 17, 22 (1948).

14. *See* KONVITZ, *supra* note 1, at 2. Such legislation was held unconstitutional by the United States Supreme Court in Chy Lung v. Freeman, 92 U.S. 275 (1875).

15. H. GROSE, ALIENS OR AMERICANS 3 (1906) (Poem by Thomas Bailey Aldrich).

gration in 1876.[16] Its first regulation merely excluded prostitutes and convicts.[17] In 1882, other classes of aliens were excluded: lunatics, idiots, and persons unable to care for themselves without becoming public charges.[18] In the same year,[19] and in 1884 and 1888, Congress passed the Chinese exclusion acts;[20] only seven years after the first regulation of immigration, the American Congress undertook to bar a group of foreigners because of their race or color.[21]

As if the widespread xenophobia, the exclusion of aliens from the franchise, and the restrictions by Congress on immigration were not enough, existing naturalization laws denied certain groups the right to attain citizenship. From their inception, naturalization laws denied "white" indentured servants and all "nonwhite" aliens the right to attain citizenship.[22] Aliens of African descent became eligible in 1870,[23] but the native born Indian and Eskimo did not become eligible until 1940.[24] Similar barriers were removed for those of Chinese origin in 1943.[25] Those of Filipino and East Indian origin became eligible in 1946,[26] and in 1952, persons of Japanese, Korean and other races became eligible for citizenship.[27]

Racism and prejudice seem to have been the motivating factor in the exclusionary laws. The first California Constitution made similar restrictions on the basis of color. Its pertinent part provided:

> Every white male citizen of the United States, and every white male citizen of Mexico who shall have elected to become a citizen of the United States . . . shall be entitled to vote at all elections which are now or hereafter may be authorized by law . . . .[28]

Having lost their right to vote in most states, and faced with a variety of discriminatory restrictions, aliens were left to the mercy of citizens, politicians, legislators and the courts.

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16. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477.
17. *Id.* at § 5; *see also* KONVITZ, *supra* note 1, at 1-2.
18. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.
19. Act of May 6, 1882, ch. 126, 22 Stat. 58.
20. Act of July 5, 1884, ch. 220, 23 Stat. 115; Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476, 477.
21. KONVITZ, *supra*, note 1, at 2.
22. See Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103.
23. 16 Stat. 254, 256.
24. Nationality Act of 1940, ch. 876, § 303, 54 Stat. 1140.
25. Act of Dec. 17, 1943, ch. 344, § 3, 57 Stat. 600, 601.
26. Act of July 2, 1946, ch. 534, § 1, 60 Stat. 416.
27. Immigration and Nationality Act, 8 U.S.C.A. § 1422 (1952).
28. CAL. CONST. art. 2, § 1 (1849).

II. Legislative Restrictions on the Right of Aliens to Work

At the same time as aliens were losing their right to vote, local municipalities and states began enacting legislation adversely affecting aliens in their right to work. A striking example is the famous *Yick Wo v. Hopkins*[29] case. San Francisco adopted an ordinance requiring a license to operate a public laundry in a wooden building. Laundries operating in brick buildings required no license. On its face the ordinance appeared to be nothing other than a fire-protection measure. The Board of Supervisors, in whom the power to issue licenses was vested, issued eighty licenses; however, all the licenses, but one, were issued to whites; two hundred Chinese persons were denied licenses. Writing for the Court, Mr. Justice Mathews said that the facts shown:

> [e]stablish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.[30]

Although the Supreme Court did not pass upon the question of whether an alien may be prevented by legislation from engaging in the ordinary pursuits of life, its ruling was significant. It made clear for those in doubt, that the alien is a *person* and is entitled to equal treatment and protection under the Fourteenth Amendment. The fact that the Court limited its ruling to this issue was, perhaps, a blessing in disguise. Had the issue been whether a state or municipality has the right and power to pass legislation preventing aliens from engaging in certain occupations, the result doubtless would have been to uphold the statute in question.

Also significant in this case was the requirement that adequate reason be shown for any discrimination. Absent such a showing the court would find a denial of equal protection:

> No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. . . . The fact of this discrimination is ad-

29. 118 U.S. 356 (1886).
30. *Id.* at 373.

> mitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified.[31]

Whether the San Francisco measure is an illustration of the continued effort by white Californians to keep their population as white as possible, or whether it is motivated by economic reasons, is left to interpretation. The logical conclusion is that it was a combination of both. There is ample authority supporting this conclusion. Memories of the struggle with the Indians "prejudiced Californians in favor of an exclusively white population,"[32] one author concluded. The editor of the San Francisco *Californian* wrote, "The Indians amongst us are . . . a nuisance. We left the slave states because we did not like to bring up a family in a miserable condition, which . . . would be inevitable, . . . surrounded by slavery . . . . We desire only a white population in California."[33] As benign as the propounded reasons may have appeared for wanting to exclude slavery from California, the underlying reason was that the rich soil of California attracted speculators in search of land grants, and that they might develop slave colonies for the cultivation of rice, cotton and sugar. Even when California was admitted into the Union as a free state, the idea of massive, slave-supported plantations lost none of its attractiveness.[34] At the same time the Chinese created economic competition for whites engaged in similar occupations; their availability for exploitation in California posed a continued threat of competition for the rich lands by Southern speculators. The Negro slaves had been freed but the concentration of Chinese in California presented a possible substitute for lost black labor, for it had been but a little over a decade since Chinese had been used in the South as a source of cheap labor as a substitute for the slaves. In addition, employers found that importation of another racial group engaged in menial labor effectively could bring recalcitrant freedmen to terms.[35] Chinese workers were used to build the railroads[36] and to act as strike-breakers in the Eastern states.[37]

The *Yick Wo*[38] case was a direct result of the widespread xeno-

31. *Id.* at 374.
32. G. BARTH, BITTER STRENGTH—A HISTORY OF THE CHINESE IN THE UNITED STATES 1850-1870 42 (1964).
33. *Id. See also* San Francisco Californian, Mar. 15, 1849.
34. *Id.* at 43.
35. *Id.* at 188-97.
36. *Id.* at 195.
37. *Id.* at 197-98.
38. *Supra* note 29.

phobia of that time and of the threat of economic competition; it began a long list of cases that have since arisen to challenge similar legislation.

Since political influences play an important role in bringing about legislation of the nature exemplified by *Yick Wo*, once citizenship was made a requirement for voting, aliens were unable to oppose it. For example, in 1926 the Detroit City Council, apparently induced by certain labor-union cliques who had large control over elections, passed an ordinance discharging all alien employees of the city. An immediate reaction, however, combined with the great inconvenience that resulted, led to the restoration of the conditions that existed prior to the ordinance.[39]

Of special significance was a case decided by the United States Supreme Court in 1915. In *Truax v. Raich*,[40] the Court reviewed an Arizona statute which provided that when anyone employed five or more persons, not less than eighty percent, or four out of every five, had to be citizens. As in *Yick Wo*, the Court held that the equal protection clause of the Fourteenth Amendment applies to aliens as well as to citizens.[41] Furthermore, the Court observed that the state's police power does not include the authority to deny to aliens the ordinary means of earning a livelihood.[42] "It requires no argument," wrote Justice Hughes for the majority of the Court, "to show 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 Amendment to secure."[43] He pointed out that "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."[44] A denial of the right to enter the state is an invasion of the power to admit and exclude aliens, which is vested exclusively in the federal government.[45] "[Complainant] was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state of the Union,"[46] the Court reasoned. The Court not only asserted the right of aliens to work and reiterated the right of

39. *See* Note, *Constitutionality of Legislative Discrimination Against the Alien in His Right to Work*, 83 U. PA. L. REV. 74 n.4 (1934).

40. 239 U.S. 33 (1915).

41. *Id.* at 39.

42. *Id.* at 41.

43. *Id.*

44. *Id.* at 42.

45. *Id.*

46. *Id.* at 39.

equal protection, but clearly stated that the right to travel and live in any state of the Union was incidental to the privilege granted when an alien enters this country.

In distinguishing the case at bar from other cases, however, the *Truax* Court recognized the power of a state to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction.[47] The Court recognized the theory, commonly termed "proprietary," whereby citizens are favored over aliens on the rationale that the state holds its property and resources in trust for its citizens, the owners.[48] It also recognized the right of the state to favor citizens in public works.[49]

Thus, despite the favorable ruling in *Truax*, the struggle against alien discrimination in the right to earn a living was just beginning. The three state-imposed restrictions on alien employment, recognized by the *Truax* Court, will be discussed at some length.

A. State's Police Power to Regulate Occupations

Under this theory, the state may regulate occupations which it considers harmful, vicious or antisocial. Courts have not applied strict equal protection standards to these statutes because, at least on their face, they appear aimed at occupations, not individuals. In actual practice, however, the licensing requirements and statutory restrictions are manipulated with the result that aliens are virtually eliminated from employment in certain occupations. Little manipulation is needed once a statute has been passed because the limitations are specific, i.e., to citizens and to those who declare their intentions to become citizens.

Among the many occupations and professions that have been closed to aliens because they were considered potentially harmful, vicious or antisocial are the following: funeral director;[50] embalmer;[51] hairdresser;[52] cosmetologist;[53] barber;[54] veterinarian;[55] hunter or trapper;[56] pool room operator;[57] any employment related to the business

47. *Id.* at 41.
48. *Id.* at 40.
49. *Id.*
50. CONN. GEN. STAT. § 4539 (1949).
51. MICH. COMP. LAWS § 338.856 (1949).
52. CONN. GEN. STAT. § 4586 (1949); WASH. REV. CODE §§ 18, 18.050 (1952).
53. *Id.*
54. KANS. GEN. STAT. ANN. § 65-1811 (1949).
55. MASS. GEN. LAWS ANN. ch. 112, § 55 (1968).
56. CONN. GEN. STAT. § 4869 (1949); N.D. REV. CODE § 20-0110 (1943).
57. GA. CODE ANN. § 84-1603 (1955); NEV. COMP. LAWS § 3302 (owner or operator of gambling device) (Supp. 1949).

of handling alcoholic beverages[58] or "soda pop" or soft drinks;[59] real estate broker;[60] peddler;[61] pawnbroker;[62] driver of vehicles for hire;[63] and other professions which will be discussed later. In denying licenses to aliens in these occupations, the justifications used imply that the states involved consider aliens, as a class, to be lacking in necessary character qualifications. It is also reasonable to conclude that such states do not trust aliens with animals, a corpse, or even a person's hair or beard.

Some courts, in upholding these statutes, have, in fact, equated the status of an alien to that of a convicted felon. The following language is an example:

> It cannot be assumed that the legislature did not have evidence before it, or that it did not have reasonable grounds to justify the legislation, as, for instance, that *unnaturalized foreign-born persons and persons who have been convicted of a felony* (emphasis added) were more likely than citizens to unlawfully use firearms or engage in dangerous practices against the government in times of peace or war, or to resort to force in defiance of the law. To provide against such contingencies would plainly constitute a reasonable exercise of the police power.[64]

Upholding a statute restricting licenses to operate a pool hall to citizens, one court reasoned that an alien might be denied the right to operate a billiard hall because, as ordinarily conducted, the game of billiards and the places where it is played are conducive to idleness, dissolute habits and other reprehensible activities.[65] In *Commonwealth v. Hana*,[66] a peddler's license was refused to an alien because of the opportunities to swindle purchasers. The court concluded that it was a

58. ILL. ANN. STAT. ch. 43, § 102 (commissioner, secretary, or inspector of the liquor commission) (1944); IND. ANN. STAT. § 12-509 (retailer of alcoholic beverages) (Burns 1956); KY. REV. STAT. ANN. §§ 243.100, 244.090 (Baldwin 1955).

59. Miller v. Niagara Falls, 207 App. Div. 798, 202 N.Y.S. 549 (1924); *But see* George v. Portland, 114 Ore. 418, 235 P. 681 (1925).

60. N.M. STAT. ANN. § 67-24-8 (1954).

61. GA. CODE ANN. § 84-2003 (1955); MASS. GEN. LAWS ANN. ch. 101, § 22 (1954).

62. VA. CODE ANN. § 54-841 (1950).

63. Gizzarelli v. Presbrey, 44 R.I. 333, 117 A. 359 (1922).

64. *In re* Ramirez, 193 Cal. 633, 650, 226 P. 914 (1924); *But cf.* Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 298, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972); People v. Salchell, 6 Cal. 3d 28, 38-9, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971); People v. Lovato, 258 Cal. App. 2d 290, 296, 65 Cal. Rptr. 638 (1968).

65. Anton v. Van Winkle, 297 F. 340 (D.C. Ore. 1924); *Accord*, Clarke v. Deckebach, 274 U.S. 392 (1927).

66. 195 Mass. 262, 81 N.E. 149 (1907).

proper exercise of the police power to restrict licenses to those who were sufficiently attached to the principles of American law to become citizens under the naturalization laws or to native-born Americans.

Approving a statute excluding aliens from the occupation of a motorbus operator, the Rhode Island Supreme Court stated that because "aliens as a class are naturally less interested in the state, the safety of its citizens, and the public welfare, than citizens of the state, to allow them to operate motorbuses, would . . . tend to increase the danger to passengers and to the public using the highways."[67]

A New York court, upholding a statute restricting to citizens licenses to sell "soda pop", found the activity dangerous because of the possibility that the food product could be contaminated,[68] if such licenses were extended to aliens. (An Oregon court found a similar ordinance to be arbitrary.[69]) Expanding the New York court's reasoning in the "soda-pop" case would necessitate restricting the following occupations: farmworkers, housemaids, cooks, grocery clerks, sorters and packagers at warehouses and canneries, and other food processing occupations, for these offer an even greater risk of food contamination.

Further occupations restricted under state police power are: physician[70] and other medical-related professions,[71] certified public accountant,[72] pharmacist,[73] teacher[74] and lawyer.[75] Of these professions, the

67. Gizzarelli v. Presbrey, 44 R.I. 333, 335, 117 A. 359, 360 (1922).

68. Miller v. Niagara Falls, 207 App. Div. 798, 202 N.Y.S. 549 (1924).

69. George v. Portland, 114 Ore. 418, 235 P. 681 (1925).

70. ARK. STAT. ANN. § 72-611 (1947); COLO. REV. STAT. ANN. § 91-1-7 (1)(c)(iv) (1953); FLA. STAT. ANN. § 458.05 (Supp. 1956); MONT. REV. CODES ANN. § 66-1003 (Supp. 1957).

71. ALA. CODE tit. 46, § 197 (optometrist) (1940); ARI. REV. STAT. ANN. § 32-1232 (dentist) (1956); ARK. STAT. ANN. § 72-718 (registered nuruse) (1947); CONN. GEN. STAT. §§ 4371 (osteopath), 4402 (Physio-therapy technician), 4828 (nurse), 4508 (mechanical optician), 4556 (chiropodist), 4635 (certified psychologist), 348 (custodian of institutional patients) (1949); DEL. CODE ANN. tit. 24, § 1151 (oral hygienist) (1953); D.C. CODE ANN. § 2-705 (podiatrist) (1951); MINN. STAT. ANN. § 150.04 (dentist) (Supp. 1955); N.M. STAT. ANN. §§ 67-3-3 (chiropractor), (physical therapist) (1954); N.Y. EDUC. LAW § 6905 (registered professional nurse) (McKinney 1953); N.C. GEN. STAT. § 90-171.3 (practical nurse) (Supp. 1955); OKLA. STAT. ANN. tit. 59 § 805 (licensed electrologist) (1949); R.I. GEN. LAWS ANN. ch. 277, § 2 (optometrist) (1938); S.C. CODE § 56-983 (nurse) (1952); TENN. CODE ANN. § 63-817 (optometrist) (1955); UTAH CODE ANN. § 58-20-3 (registered sanitarian) (1953); WIS. STAT. § 149-04 (registered nurse) (1955).

72. ALA. CODE tit. 46, § 1 (1940); ARI. REV. STAT. ANN. § 32-721 (1956); ARK. STAT. ANN. § 71-601 (1947); COLO. REV. STAT. ANN. § 2-1-9(2) (1953); IOWA CODE ANN. § 116.9 (1949); WYO. COMP. STAT. ANN. § 37-204 (1945).

73. CONN. GEN. STAT. § 4465 (1949); ME. REV. STAT. ANN. ch. 68, § 6 (1954); OHIO REV. CODE ANN. § 4729.08 (Baldwin 1953).

one most litigated appears to be that of a lawyer.[76] In *Raffaelli v. Committee of Bar Examiners*,[77] a California court declared such a statutory prohibition void as abridging the equal protection clauses of the United States and California Constitutions.[78] The Committee of Bar Examiners advanced five traditional reasons to justify the distinctions drawn between citizens and aliens:

(1) a lawyer must appreciate the spirit of American institutions;
(2) a lawyer must take an oath to support the Constitution of the United States and California;
(3) a lawyer must remain accessible to his clients and subject to the control of the bar;
(4) the practice of law is a privilege, not a right;
(5) and a lawyer is an officer of the court and therefore should be a citizen.[79]

Justice Mosk, writing for a unanimous court refuted each of the committee's arguments:

(1) The federal district courts have approached unanimity in finding that there is "no rational relationship between 'fitness or capacity to practice law' and the knowledge of 'local customs'." The United States Supreme Court has affirmed that a state is prohibited "from excluding a person from a profession . . . solely because he is a member of a particular political organization or because he holds certain beliefs."[80] Even where this is held a valid prerequisite for bar membership, an overly inclusive classification results in presuming an alien incapable of meeting the test:

> . . . Nor has it been established that aliens as a class are incapable of possessing such understanding. Knowledge of this kind is acquired in many ways, both formal and informal. It comes not so much from the accident of birth as from the experience of the daily life of the community and the role of government in that life.[81]

(2) As to the oath requirement based on the maxim that "no man can serve two masters,"[82] the court said "an alien *can* take this oath,

74. IDAHO CODE ANN. § 33-1303 (Supp. 1957); TEX. REV. CIV. STAT. ANN. art. 28916 (Supp. 1956).

75. N.H. REV. LAWS ch. 311, § 2 (1955); LA. REV. STAT. § 37:7 (Supp. 1955); *But see* Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972).

76. *See* 4 ST. MARY'S L.J. 181, 185 (1972).

77. 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972).

78. *Id.* at 292, 496 P.2d at 1267, 101 Cal. Rptr. at 899.

79. *Id.* at 296-301, 496 P.2d at 1269-73, 101 Cal. Rptr. at 901-05.

80. *Id.* at 296; Baird v. State Bar of Arizona, 401 U.S. 1, 6 (1971).

81. Raffaeli v. Committee of Bar Examiners, 7 Cal. 3d 288, 296, 496 P.2d 1264, 1270, 101 Cal. Rptr. 896, 902 (1972).

82. 2 BLACKSTONE'S COMMENTARIES 366-75.

both legally and as a matter of fact . . . [T]o inquire into the 'loyalty' of the prospective lawyer is . . . to skate on very thin constitutional ice indeed." Furthermore, "we cannot say that aliens as a class are incapable of honestly subscribing to this oath."[83] The court compared the oath to that required of all inductees into the armed forces, in which resident aliens may be conscripted.[84] "Such an oath," the court said, "is an even more explicit declaration than the simple affirmation required of California lawyers."[85]

(3) As to inaccessibility to clients, the court reasoned that it can occur to both citizens and noncitizens, either through death or sickness. If an alien, because of internment during a time of war with whatever country, becomes inaccessible to his clients he has more opportunity to settle his pending legal problems in an orderly manner than during sickness or death, which are more likely to occur.[86]

(4) Concerning the question of privilege, the court said that the practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character.[87]

(5) "The traditional expression," the court said, "that a lawyer is an 'officer of the court' . . . [does not mean that he] is a public officeholder in the literal sense."[88]

Before the *Raffaelli* decision, California had, through legislation and court challenges, done away with the citizenship requirement for many professions.[89] The *Raffaelli* decision is important not only because it allowed aliens to practice law, but because of its rejection of the many traditional justifications that have been used to bar aliens from certain professions.

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83. 7 Cal. 3d at 297, 496 P.2d at 1270, 101 Cal. Rptr. at 902 (1971).

84. 50 U.S.C.A. App. § 454.

85. 7 Cal. 3d at 297, 496 P.2d at 1271, 101 Cal. Rptr. at 903.

86. *Id.* at 299, 496 P.2d at 1271-72, 101 Cal. Rptr. at 903-04.

87. *Id.* at 299-300, 496 P.2d at 1272-73, 101 Cal. Rptr. at 904-05.

88. *Id.* at 301, 496 P.2d at 1273, 101 Cal. Rptr. at 905.

89. *Id.* at 303; The law of California today permits an alien to earn his livelihood within our state as a doctor, nurse, banker, certified public accountant, engineer, architect or a contractor. Moreover, after Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969), the attorney general formally concluded that citizenship may not constitutionally be required of those wishing to pursue such occupations as teacher or peace officer (53 CAL. ATTY. GEN. OPS. 63 (1970), pharmacist, psychologist, psychiatric technician, clinical social worker, private investigator, or insurance broker (55 CAL. ATTY. GEN. OPS. 80 (1972).

B. The State's Proprietary Interest in Regulating Certain Occupations

Under this theory the state has advanced two justifications: (1) it has an interest in the subject matter of the occupation (for example, the taking of fish and game, or the receiving of aid from public funds, which the state holds in trust for its citizens); or (2) the state has an interest in the position itself (for example, government employment or public works).

1) State Acting as Trustee

This justification enjoyed firm judicial acceptance at one time. In 1876 in *McCready v. Virginia*,[90] a state statute allowed only state citizens to take or plant oysters in two specific rivers. The United States Supreme Court, in an opinion by Chief Justice Waite, held the act constitutional. Though the statute did not differentiate per se between United States citizens and aliens, aliens were automatically excluded since they were not citizens of any state. The declaration of constitutionality provided a precedent for later cases involving challenges to legislation specifically designed to discriminate against aliens. During the seventy years following the *McCready* case, thirty-three states passed statutes discriminating against aliens or nonresidents with respect to fishing; thirty-seven passed statutes similarly restricting hunting.[91]

In 1913 the United States Supreme Court upheld a Pennsylvania statute which prohibited aliens from killing any wild bird or animal except in defense of person or property, and to that end making it unlawful for aliens to own or possess a shotgun or rifle.[92] Examining the motive behind the legislation, M. Konvitz, a legal commentator, said that one might question the evil the legislature sought to eliminate. Putting it differently he said: "Did the Pennsylvania legislature have its eye on the wild bird or on the alien?"[93] It is reasonable to assume that if the legislature had as its purpose the preservation of wild life, it would have adopted an act prohibiting such killing without singling out the alien. By upholding the statute the court sanctioned the implication by Pennsylvania legislature that aliens are more likely than citizens to kill wild life. Konvitz concluded that the most obvious purpose of the legisla-

90. 94 U.S. 391 (1876).
91. KONVITZ, *supra* note 1, at 214 nn. 4 and 5.
92. Patsone v. Pennsylvania, 232 U.S. 138 (1914).
93. KONVITZ, *supra* note 1, at 216.

tion was to favor citizens over aliens in the enjoyment of the state's natural resources.[94]

Courts in other states have taken a dim view of similar restrictions. In 1922 the Michigan Supreme Court[95] held that the state may not deprive aliens of the right to possess arms under the guise of protection of game; and in 1936 the Colorado court of last resort[96] held a similar act unconstitutional.

The justification that the state acts as trustee for its citizens has been eradicated by more recent cases. In *Takahashi v. Fish and Game Commission*,[97] the United States Supreme Court held that California's purported ownership of fish in the ocean off its shores was not sufficient special public interest to justify prohibiting aliens from fishing its waters while permitting others to do so:

> The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws.[98]

An Arizona statute which required aliens to reside in the United States fifteen years before qualifying for public assistance was held unconstitutional by the Supreme Court in *Graham v. Richardson*.[99] The Court, dealing with cases not involving aliens, had previously rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege."[100] In overruling the statute the Court reasoned that "[a]liens like citizens pay taxes and may be called into the armed forces."[101] Unlike the short-term residents in the other welfare cases, the Court said, "aliens may live within a state for many years, work in the state and contribute to the economic growth of the state."[102] Thus, there can be no special "public interest" in tax revenues to which aliens have contributed on an equal basis with American citizens who reside in the state.[103] Accordingly, the

94. *Id.* at 218.
95. People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922).
96. People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (1936).
97. 334 U.S. 410 (1948).
98. *Id.* at 420.
99. 403 U.S. 365 (1971).
100. Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963).
101. Graham v. Richardson, 403 U.S. 365, 376 (1971).
102. *Id.* at 377; Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419 (1948).
103. Graham v. Richardson, 403 U.S. 365, 376 (1971).

Court held that a state that denies welfare benefits to resident aliens, or to aliens who have not resided in the United States for a specified number of years, violates the equal protection clause. The Court in *Graham* held that the challenged statute impinges on the exclusive federal power to regulate immigration:

> The National Government has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." [Citations omitted]. Pursuant to that power, Congress has provided, as part of a comprehensive plan for the regulation of immigration and naturalization, that "[a]liens who are paupers, professional beggars, or vagrants" or aliens "who are likely at any time to become public charges" shall be excluded from admission into the United States, 8 U.S.C. §§ 1182(a)(8) and 1182(a)(15), and that any alien lawfully admitted shall be deported who "has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry . . . ." 8 U.S.C. §1251(a)(8). Admission of aliens likely to become public charges may be conditioned upon the posting of a bond or cash deposit. 8 U.S.C.: §1183. But Congress has not seen fit to impose any burden or restriction on aliens who become indigent after their entry into the United States. Rather, it has broadly declared: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981. The protection of this statute has been held to extend to aliens as well as to citizens.[104]

In *Truax v. Raich*,[105] a case challenging an Arizona statute requiring employers of five or more employees to hire eighty percent citizens before hiring aliens, the United States Supreme Court considered the reasonableness of the state restriction on the employment of aliens in terms of its effect on the right of a lawfully admitted alien to live where he chooses:

> It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government . . . . 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 policy were

104. *Id.* at 377.
105. 239 U.S. 33 (1915).

> permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying 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.[106]

The Court in *Graham* cited *Truax* with approval and concluded:

> The same is true here, for in the ordinary case an alien, becoming indigent and unable to work, will be unable to live where, because of discriminatory denial of public assistance, he cannot "secure the necessities of life, including food, clothing and shelter."[107]

Furthermore, the *Graham* court concluded that state residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency amount to the assertion of a right, to deny entrance and abode, which is inconsistent with federal policy.[108] The *Graham* decision dealt the death blow to the first proprietary interest justification—that of the state acting as trustee for its citizens.

2) State's Proprietary Interest in the Occupations

This proprietary interest justification is an outgrowth of the first justification.[109] In the latter, the state equated its position to that of a trustee, and as such, it became an employer. As an employer, it had a proprietary interest in the occupations it offers.

This justification has been accepted by some courts, which reason that since the state has the absolute right of ownership or beneficial use of public property, the opportunity to be employed in public enterprises is a privilege which the state may, in its discretion, grant or withhold.[110]

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106. *Id.* at 42.

107. Graham v. Richardson, 403 U.S. 365, 379-80 (1971).

108. *Id.* at 380. The principle of the exclusive federal power to regulate and control immigration had been reiterated before *Graham* in several United States Supreme Court decisions: Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419 (1948); Hines v. Davidowitz, 312 U.S. 52, 66 (1941); Truax v. Raich, 239 U.S. 33, 42 (1915); *See also,* Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Turner v. Williams, 194 U.S. 279 (1904); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893); Chinese Exclusion Case, 130 U.S. 581 (1889).

109. *See* Note, *Constitutionality of Restrictions on Aliens' Right to Work,* 57 COLUM. L. REV. 1012, 1016 (1957).

110. *Id.*; Heim v. McCall, 239 U.S. 175 (1915); Rok v. Legg, 27 F. Supp. 243 (S.D. Cal. 1939); Lelande v. Lowery, 26 Cal. 2d 224, 157 P.2d 639 (1945); Lee v. City of Lynn, 223 Mass. 109, 111 N.E. 700 (1916); People v. Crane, 214 N.Y. 154, 108 N.E. 427, *aff'd,* 239 U.S. 195 (1915).

111. 214 N.Y. 629, 108 N.E. 1095, *aff'd,* 239 U.S. 175 (1915).

In *Heim v. McCall*[111] and *People v. Crane*[112] the New York Court of Appeals affirmed a statute restricting employment on public works projects to United States citizens. Several state courts[113] had voided statutes discriminating against aliens in public employment. The *Heim* and *Crane* decisions reversed this trend.

The *Heim* case challenged Section 14 of the Labor Act of 1909 of New York which barred aliens from public employment. Petitioner contended that the statute in question abridged the privileges and immunities of the contractors and those of their alien employees in depriving them of their right of contracting for labor, and that the State of New York, by enacting and enforcing the law, deprived employers and employees of liberty and property without due process and denied both the equal protection of the law. Petitioner also argued that the law was in violation of the provisions of Articles I and II of the Treaty of 1871 with Italy. The Court reiterated its view that no one has an absolute right to work for the state. It concluded that the state, like a private employer, is unrestricted by the Fourteenth Amendment in the area of public employment.[114]

Crane was decided on the authority of *Heim*. In *Crane* Judge Cardozo stated that since state tax money is the common property of its citizens, an alien has no grounds to question the manner of its disposition. He further noted that a state may prevent pauperization of its citizens by discriminating against aliens in granting relief.[115] The court applied similar logic to discrimination against aliens in the area of public employment.[116]

Although for a time courts upheld the rationale, recent court decisions have been to the contrary.[117] The decisions rejecting this theory have cited two reasons: (1) State statutes in this area encroach on the overall federal immigration scheme by regulating movement of

112. 214 N.Y. 154, 108 N.E. 427, *aff'd*, 293 U.S. 195 (1915).

113. *See Constitutionality of Restrictions on Aliens' Right to Work, supra* note 109, at 1017 nn.34, 35.

114. Heim v. McCall, 214 N.Y. 629, 108 N.E. 1095, *aff'd*, 239 U.S. 175, 187-88 (1915).

115. People v. Crane, 214 N.Y. 154, 164, 108 N.E. 427, 430 (1915).

116. *Id. But see* the dissenting opinion by Collin, J., 214 N.Y. at 186-99, 108 N.E. at 438-42.

117. Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365, 370-80 (1971); Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419 (1948); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 572-73, 81-82, 456 P.2d 645, 649-50, 79 Cal. Rptr. 77 (1969); Department of Labor and Indus. v. Cruz, 45 N.J. 372, 212 A.2d 545 (1965).

aliens within the United States; (2) such statutes are repugnant to the Fourteenth Amendment in that they create discriminatory classifications which cannot be justified by an overriding public interest.

C. Federal Employment

United States v. Lovett[118] was one of the first cases that raised the question of whether an individual has a right to work for the federal government. Lovett and other petitioners had been working for the government for several years. The government agencies which had carefully selected them for employment were fully satisfied with the quality of their work and wished to keep them in their jobs. Petitioners were among a long list of persons whom Congressman Martin Dies publicly had accused of affiliating with "Communist front organizations." He urged Congress to refuse to appropriate monies for their salaries. Congress complied with Dies' request by passing Section 304 of the Urgent Deficiency Appropriation Act of 1943 which cut off petitioners' compensation through regular disbursing channels and permanently barred them from government employment. Petitioners were not afforded an opportunity to challenge Dies' accusations.

The Court in *Lovett* reasoned that legislative acts, no matter what their form may be, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.[119] The Court concluded that Section 304 operates as a legislative decree of perpetual exclusion from a chosen vocation, and that such permanent proscription from any opportunity to serve the government is punishment, and of the most severe type.[120] The *Lovett* case, while conceding that permanent proscription from government service is punishment, requiring the safeguard of the Sixth Amendment, did not hold that an individual has a right to work for the federal government.

Even though the petitioners in *Lovett* were citizens, its holding can be used to challenge existing legislation barring aliens from government employment. Aliens are a "ready identifiable group of persons" who are subject to blanket discrimination in government employment, both state and federal. Such legislation barring aliens from government employment operates as a "legislative decree of perpetual exclusion from a

118. 328 U.S. 303 (1946).
119. *Id.* at 315; U.S. CONST. art. I, § 9, cl. 3.
120. *Id.* at 315.

chosen vocation;" and, as in the *Lovett* case, such permanent proscription from an opportunity to work for the government is punishment. The government may argue that unlike petitioners in the *Lovett* case, who were already working for the government, aliens do not have a vested right. In view of the reasoning used by the courts to invalidate state statutes in this area, this argument must be rejected. Aliens serve in the armed forces,[121] pay federal taxes,[122] and are entitled to equal protection of the laws like all citizens.[123]

Eisler v. United States[124] involved an Austrian national who arrived in this country as a political refugee. He was summoned by the House Committee on Un-American Activities to appear as a witness before the committee. The committee cited him for contempt of Congress when he refused to testify. In denying this appeal, the Supreme Court noted that although appellant was an alien, he stood before the Committee in much the same position as any citizen of the United States and was equally subject to congressional sanctions.[125] The Court added:

> Once an alien lawfully enters and resides in this country he becomes invested with the rights, except those incidental to citizenship, guaranteed by the Constitution to all people within our borders . . . Correlatively, an alien resident owes a temporary allegiance to the Government of the United States, and he assumes duties and obligations which do not differ materially from those of native-born or naturalized citizens; he is bound to obey all the laws of the country, not immediately relating to citizenship, and is equally amenable with citizens for any infraction of those laws.[126]

The Constitution contains only three restrictions with respect to aliens: (1) only a natural-born citizen of the United States may be president of the United States; (2) no person shall be a representative who shall not have . . . been seven years a citizen of the United States; and (3) no person shall be a senator who shall not have . . . been nine

121. The 1971 amendments to the Military Selective Service Act of 1967, 50 U.S.C.A. APP. §§ 453, 454 (1972). *See generally* Roh & Upham, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L L.J. 501 (1972); Graham v. Richardson, 403 U.S. 365, 376 (1971).

122. 26 U.S.C.A. § 871 et seq. (1967); Graham v. Richardson, 403 U.S. 365, 376 (1971).

123. U.S. CONST. amend. XIV, § 1; Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

124. 170 F.2d 273 (D.C. Cir. 1948).

125. *Id.* at 279.

126. *Id.*

years a citizen of the United States.[127] The right to pursue a lawful occupation is neither limited nor specifically established by the Constitution.

In *Meyer v. Nebraska*[128] the Supreme Court defined the term "liberty" as follows:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, *to engage in any of the common occupations of life*, (emphasis added) . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[129]

The *Meyer* case overruled a state law forbidding, under penalty, the teaching, in any school, of any modern language other than English. While the Court recognized a valid state interest in trying to Americanize foreigners, it ruled that the statute, as construed and applied, unreasonably infringed the liberty guaranteed to Meyer by the Fourteenth Amendment, namely, that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."[130]

Prior to the ruling in *Meyer*, other cases had made similar declarations that an individual has the right to engage in any of the common occupations of life.[131] *Purdy & Fitzpatrick v. State*[132] involved a challenge to California Labor Code section 1850 limiting the employment of aliens on public works. The California Supreme Court held, *inter alia*, that employment in a particular occupation is a significant if not fundamental interest. In the court's view, a state may not arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation.[133] In *Greene v. McElroy*[134] the United States Supreme Court, in reversing an administrative determination which deprived the petitioner of

127. U.S. CONST. art. II § 1, cl. 5 (president); *id.* art. I, § 2, cl. 2 (representative); *id.*, § 3, cl. 3 (senator).

128. 262 U.S. 390 (1923).

129. *Id.* at 399.

130. *Id.*

131. Adkins v. Children's Hospital, 261 U.S. 525 (1923); Truax v. Corrigan, 257 U.S. 312 (1921); New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918); Adams v. Tanner, 244 U.S. 590 (1917); Truax v. Raich, 239 U.S. 33 (1915); Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549 (1911); Twining v. New Jersey, 211 U.S. 78 (1908); Lochner v. New York, 198 U.S. 45 (1907); Allgeyer v. Louisiana, 165 U.S. 578 (1897); Minnesota v. Barber, 136 U.S. 313 (1890); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884); Slaughter-House Case 83 U.S. (16 Wall.) 36 (1872).

132. 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

133. *Id.* at 579, 456 P.2d at 654, 79 Cal. Rptr. at 86.

134. 360 U.S. 474 (1959).

his security clearance, and therefore of his job, referred to employment as a cherished right.[135] The view that the right to pursue a chosen occupation is a fundamental right also finds some support in language in the Declaration of Independence and in the United States Constitution which imply that such a right exists. The Declaration of Independence states that all persons should enjoy certain inalienable rights: life, liberty and the pursuit of happiness. The Thirteenth Amendment of the Constitution declares that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States. . . ."[136]

Since life cannot exist without the means of sustenance, implicit in the right to life is the right to pursue the means to support life. For most people employment is the only source of sustenance. If, because of legislative restrictions, aliens, otherwise qualified to enter certain occupations, are forced to work in the least desirable jobs in order to survive, the situation is tantamount to slavery. Thus, one can argue that, implicit in the right to live, to be free and to pursue happiness is the right to pursue the occupation of one's choice, as the Court declared in *Meyer v. Nebraska*.[137]

In the civil service area the recent trend, despite early discrimination, has been favorable toward aliens. In 1971, for example, a group of Chinese residents of the United States sought to overturn the Civil Service Commission's regulation excluding aliens from competitive civil service in the case of *Mow Sun Wong v. Hampton*.[138] The district court held that civil service regulations excluding aliens who do not owe permanent allegiance to the United States from competitive civil service do not violate Executive Order No. 11478 prohibiting discrimination based upon race, color, religion, sex or national origin, within the federal government.[139] The Court granted the government's motion to dismiss.

In *Jalil v. Hampton*,[140] the circuit court was presented with the following questions: (1) Whether the Civil Service Commission, consonant with the Fifth Amendment, may deny to a resident alien the opportunity to take the competitive examination for federal civil service employment, and (2) Whether appropriation acts may prohibit the use

135. *Id.* at 507.
136. U.S. CONST. amend. XIII, § 1.
137. 262 U.S. 390 (1923).
138. 333 F. Supp. 527 (N.D. Cal. 1971).
139. *Id.* at 532-33; *see* 3 C.F.R. 207 (Supp. 1974).
140. 460 F.2d 923 (D.C. Cir.), *cert. denied*, 409 U.S. 887 (1972).

of appropriated funds to pay aliens employed in the civil service of the United States. The court noted that this case did not involve a discharge of an employee already appointed to a federal position. In such cases it has been held that the due process clause of the Fifth Amendment circumscribes arbitrary dismissals.[141] The court refused to rule on the questions presented and remanded the case to the lower court. Chief Judge Bazelon strongly dissented. He considered the remand unnecessary. In his dissent, he said:

> The Civil Service regulation which excludes all aliens from admission to competitive examination violates the Constitution under the principles announced by the Supreme Court in *Graham v. Richardson* . . . . The principles announced in *Graham* apply fully to the federal government. . . .[142]

In *Sugarman v. Dougall*,[143] the United States Supreme Court found a New York statute excluding noncitizens from state civil service employment unconstitutional as violative of the Fourteenth Amendment. The Court limited the holding to the case at bar, however, stating that, while it ruled the statute in question unconstitutional, it did not invalidate all refusals to hire or discharge for noncitizenship; such actions, if based on *legitimate* state interests that relate to the qualifications for a particular position or to the characteristics of the employee would be adjudged on a case-by-case basis.[144] The Court said: "We hold only that a flat ban on the employment of aliens in positions that have little, if any, relation to a State's legitimate interest cannot withstand scrutiny under the Fourteenth Amendment."[145]

This limited holding extends somewhat the decision in *Greene v. McElroy*,[146] wherein the United States Supreme Court found that administrative agencies have no authority to make decisions of constitutional import.[147] The Court ruled that agencies are empowered to conduct routine administrative business but, without formal authorization, they may not deal with areas affecting basic human rights.[148] Where "substantial restraints on employment opportunities of numerous

141. *Id.* at 925; *accord*, Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

142. Jalil v. Hampton, 460 F.2d 923, 930 (D.C. Cir.), *cert. denied*, 409 U.S. 887 (1972). *Accord*, Nielson v. Secretary of Treasury, 424 F.2d 833, 846 (D.C. Cir. 1970).

143. 413 U.S. 634 (1973).

144. *Id.* at 646-47.

145. *Id.* at 647.

146. 360 U.S. 474 (1959).

147. *Id.* at 506-07.

148. *Id.* at 507.

persons are imposed in a manner which is in conflict with our long-accepted notions of fair procedures," the Court demands a showing of explicit congressional authorization.[149] It has been suggested that "there is no express congressional authorization permitting discrimination against aliens in the competitive civil service."[150] As a result a new development questioning the authority of the Civil Service Commission in the area of employment, growing out of the *Dougall* and the *Greene* decisions, has opened the door to aliens in civil service employment.

In a recent decision, *Wong v. Hampton*,[151] the Ninth Circuit Court of Appeals ruled that the U.S. Civil Service Commission regulation excluding resident aliens from employment in federal competitive civil service violates the due process clause of the Fifth Amendment.[152] In *Wong* the government set forth various arguments in support of its position that there is a compelling governmental interest offsetting any discrimination on the basis of alienage. These arguments are:

(1) the Government has a right to provide for the economic security of its citizens before its resident aliens;
(2) resident aliens have no constitutional right to make or carry national policy or partake in any of the institution of Government;
(3) considerations of loyalty and security prevent the Government from hiring aliens;
(4) the constitutional qualifications for high political office support the proposition that control of the Government should be in the hands of citizens only; and
(5) the universal practice of other nations is to require civil servants to be citizens.[153]

Some of these same arguments were rejected by the Supreme Court in *Sugarman*[154] wherein it considered whether New York had shown a compelling interest justifying its discriminatory classification. When applied to federal discrimination, the arguments broke down for similar reasons.[155] The Ninth Circuit Court of Appeals specifically rejected the Government's arguments and concluded that the regulations unreasona-

149. *Id.* at 506-07.
150. Note, *Aliens and the Civil Service: A Closed Door?* 61 GEO. L.J. 207, 209 (1972).
151. 500 F.2d 1031 (9th Cir. 1974), *cert. granted*, — U.S. —, 94 S. Ct. 3067 (1974).
152. *Id.*
153. *Id.* at 1039-40.
154. Sugarman v. Dougall, 413 U.S. 634 (1973).
155. Wong v. Hampton, 500 F.2d 1031 (9th Cir. 1974).

bly discriminated against aliens solely on the basis of their alienage.[156] Furthermore, the court pointed out that "there is no logical or persuasive reason advanced as to why aliens should be excluded from all federal civil service employment. . . . The broad sweep [of the regulations] is the vice. It could be saved only by a compelling governmental interest."[157] This decision is the most recent example of the gradual trend toward eradication of alien discrimination in civil service employment.

D. Discrimination by Private Employers

Title VII of the Civil Rights Act of 1964 forbids employment discrimination on the basis of race, color, religion, sex, and national origin.[158] The statute itself did not define "national origin", and left the question of whether citizenship discrimination constitutes national origin discrimination to the Equal Employment Opportunity Commission (EEOC) and the courts. The EEOC in 1972 issued a "guideline" stating that "[b]ecause discrimination on the basis of citizenship has the effect of discrimination 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. . . ."[159]

The Fifth Circuit Court in *Culpepper v. Reynolds Metals Co.*,[160] faced with the issue of whether petitioner's action was barred by the statute of limitations in a case involving employment discrimination on the basis of race, stated:

> It is, therefore, the duty of the courts to make sure that the [Civil Rights] Act [of 1964] works, and the intent of Congress to outlaw racial discrimination in employment is not hampered by a combination of a strict construction of the statute and a battle with semantics.[161]

In *Griggs v. Duke Power Co.*,[162] another case involving racial discrimination in employment, the United States Supreme Court stated that EEOC guidelines are entitled to "great deference."[163] However, in a more recent decision by the Court, *Espinoza v. Farah Manufacturing*

156. *Id.* at 1040.
157. *Id.* at 1041.
158. 42 U.S.C. § 2000e-2 (1964).
159. 29 C.F.R. § 1606.1(d) (1972).
160. 421 F.2d 888 (5th Cir. 1970).
161. *Id.* at 891.
162. 401 U.S. 424 (1971).
163. *Id.* at 433-34.

Co.,[164] the EEOC guideline issued on the question of alien discrimination, and other relevant court interpretations on the subject, were disregarded.

Espinoza involved the interpretation of the phrase "national origin" in Title VII of the Civil Rights Act of 1964. Petitioner was a lawfully admitted resident alien married to a United States citizen. She sought employment with the Farah Company and her application was rejected on the basis of a longstanding company policy against the employment of aliens. Since persons of Mexican ancestry made up more than 96 percent of the employees at the company's San Antonio division (97 percent of those doing the work for which petitioner applied), it was clear to the Court that Farah's refusal to employ petitioner was solely on the basis of citizenship.[165] The Court recognized two dangers in allowing employers to discriminate on the basis of citizenship:

> (1) In some instances, a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination;
>
> (2) [I]n other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national-origin discrimination.[166]

The Court acknowledged that Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[167] But, in an attempt to answer the question before it, the Court said that the term "national origin" on its face refers to the country where a person was born, or more broadly, the country from which his or her ancestors came.[168] The Court found compelling reasons to believe that Congress did not intend the term "national origin" to embrace citizenship requirements:

> Since 1914, the Federal Government itself, through Civil Service Commission regulations, has engaged in what amounts to discrimination against aliens by denying them the right to enter competitive examination for federal employment.[169]

164. 414 U.S. 86 (1973).
165. *Id.* at 92.
166. *Id.*
167. *Id.*; Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
168. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973).
169. *Id.* at 89; Exec. Order No. 1997, H.R. Doc. No. 1258, 63d Cong., 3d Sess., 118 (1914); *see* 5 U.S.C. § 3301; 5 C.F.R. § 338.101 (1972).

The Court also found that the legislative history revealed no mention of any intent on Congress' part to reverse the longstanding practice of requiring federal employees to be United States citizens. "To the contrary," the Court said, "there is every indication that no such reversal was intended. Congress itself has on several occasions since 1964 enacted statutes barring aliens from federal employment."[170] The Court concluded: "To interpret the term 'national origin' to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. This Court cannot lightly find such a breach of faith."[171] The Court reasoned that while the EEOC guidelines are entitled to great deference, "that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question." Furthermore, the Court said that "[c]ourts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong'."[172]

If the *Espinoza* Court had wished to include citizenship discrimination within Title VII coverage, it could have found ample precedent to justify its action. Previous court decisions have touched upon the issue, using the term "nationality" interchangeably with "alienage." In *Truax v. Raich*,[173] speaking of the state's authority to make reasonable classifications, the Court said in relevant part: "But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their *race or nationality*, the ordinary means of earning a livelihood."[174] The case involved the issue of citizenship discrimination. Before *Truax*, in *Yick Wo v. Hopkins*,[175] the Court used similar language in referring to Chinese aliens: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of *race*, of *color*, or of *nationality*."[176]

170. *Id.* at 90; *See also* The Treasury, Postal Service, and General Government Appropriation Act of 1973 Pub. L. 92-351, § 602, 86 Stat. 487; Pub. L. 91-144, § 502, 83 Stat. 336; Pub. L. 91-439, § 502, 84 Stat. 902.

171. *Id.* at 90-91.

172. *Id.* at 94-95.

173. 239 U.S. 33 (1915).

174. *Id.* at 41 (emphasis added).

175. 118 U.S. 356 (1886).

176. *Id.* at 369 (emphasis added).

It is quite natural to think of national origin discrimination as discrimination against a more or less clearly defined class of people identified with some foreign nation. Other characteristics that are almost exclusively associated with national origin are surname, language, and accent. On the other hand, when one thinks of racial discrimination, it is natural to associate with race such characteristics as facial features, hair color and texture, height, and skin color. Aliens necessarily possess one or more of the characteristics associated with national origin. Consequently, they automatically fall within the scope of national origin discrimination. On the basis of the *Espinoza* decision, any employer wishing to discriminate against a certain group of people having any of these characteristics may do so if the victims of discrimination are aliens. The employer is only prohibited from arbitrarily discriminating against those members of the group who are citizens.

Blanket discrimination against aliens by private employers, permitted by the *Espinoza* court, can have very serious consequences. In California, for example, farmers who oppose efforts by farmworkers and their leaders to organize and join a union, may use the authority, granted to private employers by *Espinoza*, to regain control over dissident farmworkers, most of whom are noncitizens. Farmers may begin hiring solely on the basis of citizenship. So far, some have used illegal aliens as their main weapon against the farmworkers who engage in strikes and boycotts. What is there to stop them from using one more weapon, citizenship, against the farmworkers?

Another example of the possible consequences of the *Espinoza* ruling arises in the case of the Vietnamese refugees. Even though they are here at the grace of the federal government, as were the Cuban refugees, the private employer may legally discriminate against them. If every private employer in the nation were to utilize this type of discrimination to threaten or control workers, the effect on labor-management relations could be severe.

The national consequences of the *Espinoza* decision in the private labor market might be more serious than similar discrimination by state and federal government. Government discrimination can be overcome by the aliens who are otherwise qualified for the restricted occupations, for they tend to be better qualified for citizenship due to their training and education. The bulk of the alien population hired by private employers generally are less literate and may never acquire the proficiency in English necessary to qualify for citizenship.

A refusal by private employers to hire aliens would be tantamount to voiding the privileges accorded by Congress to aliens upon entry into

this country. In *Espinoza* the Court seems to extend to private employers what it prohibits to the states—regulation and control over immigration.

Mr. Justice Douglas wrote a strong dissenting opinion in *Espinoza.* He said that the construction placed upon the "national origin" provision is inconsistent with the construction the Court had placed upon the same Act's protections for persons denied employment on account of race or sex.[177] "In connection with racial discrimination," he said, "we have said the Act prohibits 'practices, procedures, or tests neutral on their face, and even neutral in terms of intent,' if they create 'artificial, arbitrary, and unnecessary barriers to employment when the barriers operate insidiously to discriminate on the basis of racial *or other impermissible* classifications."[178] Comparing *Griggs v. Duke Power Co.*[179] with the case at bar, Justice Douglas noted, "[t]he tests involved in *Griggs* did not eliminate all applicants of foreign origin. Respondent here explicitly conceded that the citizenship requirement is imposed without regard to the alien's qualifications for the job."[180] He concluded that the protection enunciated in *Griggs* extended a fortiori to the case at bar. The same principle applies to cases on sex discrimination.[181] Furthermore, he stated that the construction placed upon the statute in the majority opinion is an extraordinary departure from prior cases, and was opposed by the Equal Employment Opportunity Commission, the agency charged by law with the responsibility of enforcing the act's protections.[182] He concluded his dissent:

> The majority decides today that in passing sweeping legislation guaranteeing equal job opportunities the Congress intended to help only the immigrant's children excluding those "for whom there [is] no place at all." I cannot impute that niggardly intent to Congress.[183]

In *Guerra v. Manchester Terminal Corp.*,[184] the Fifth Circuit Court of Appeals was faced with deciding whether Section 1981 of the 1866 Civil Rights Act[185] extends its protection to aliens and whether it applies to private employers. The court answered both questions

177. 414 U.S. 86, 96 (1973) (Douglas, J., dissenting).
178. *Id.* at 96-7.
179. 401 U.S. 424(1971).
180. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 97 (1973).
181. *Id.*; *see* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
182. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 97 (1973).
183. *Id.* at 99.
184. 498 F.2d 641 (5th Cir. 1974).
185. 42 U.S.C. § 1981 (1970).

affirmatively. It observed that although the original enactment was limited to remedying racial discrimination, the section was subsequently broadened to include "all persons" in order to bring aliens within its coverage.[186] Furthermore, the United States Supreme Court had explicitly stated that Section 1981 applies to aliens.[187]

The offending employer and union argued that a suit based on Section 1981 requires a showing of state action. The court said that its prior decisions foreclosed this argument.[188] In *Sanders v. Dobbs Houses, Inc.*,[189] the Fifth Circuit Court of Appeals held that Section 1981 extends to private discrimination in employment, and the court has reaffirmed *Sanders* many times since.[190]

Although *Guerra* granted relief under Section 1981, it relied on *Espinoza* in denying relief under Title VII of the Civil Rights Act of 1964. It also held that denying relief under Title VII does not preclude petitioner from alleging violations under both. In view of the holding in *Guerra*, would *Espinoza*[191] have been decided differently if petitioner had also alleged violation of Section 1981? On the basis of the two recent United States Court of Appeals decisions, *Wong v. Hampton*[192] and *Guerra v. Manchester Terminal Corp.*,[193] one may conclude that the authority of *Espinoza* is under serious challenge, despite the following of *Espinoza* by the *Guerra* Court.

The Supreme Court's reasoning in *Espinoza* relied heavily on federal Civil Service discrimination against aliens. Now that the Court of Appeals in *Wong* has upheld a challenge to U.S. Civil Service Commission regulations excluding resident aliens from employment in federal competitive civil service, the pillar supporting *Espinoza* appears to be crumbling about the base.

III. Consequences of Legislative Restrictions on the Right of Aliens to Work

Legislation which restricts aliens from engaging in the occupation of their choice forces them to work in the most undesirable and low

186. Guerra v. Manchester Terminal Corp., 498 F.2d at 653-54.

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

188. Guerra v. Manchester Terminal Corp., 498 F.2d 641, 654 (5th Cir. 1974).

189. 431 F.2d 1097 (5th Cir. 1970).

190. Guerra v. Manchester Terminal Corp., 498 F.2d 641, 654 (5th Cir. 1974).

191. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

192. 500 F.2d 1031 (9th Cir. 1974).

193. 498 F.2d 641 (5th Cir. 1974).

paying jobs. Indirectly it forces aliens to resort to public assistance or criminal activities in order to survive in the "land of the free." As W.H. Auden wrote:

> Hunger allows no choice
> To the citizen or the police;
> We must love one another or die.[194]

California, with its large agricultural industry, provides a good example of how aliens are utilized to do the most undesirable jobs. Farmwork is not only in the minimum or subminimum wage category, but is also a hard, dirty, and hazardous job. As Father Day described the farmworkers in Stockton:

> Many of the workers came from Mexico and were exploited both on the job and by the merchants in the town. . .[195]

The author is a priest, who worked with farmworkers in Stockton. He was assigned to St. Mary's Church, which is in the heart of what is commonly known as "skid row." He portrays the "shape-up" as the place "where farmworkers were recruited by farm labor contractors and herded into buses like animals in the wee hours of the morning. The strong were taken, the weak were left behind."[196] His description of the place is very limited, but he is correct in describing the people being herded into buses in the "wee hours of the morning."[197]

Another writer described the Stockton farmworker in the 1960's as follows:

> People work ten-, eleven-, and twelve-hour days in temperatures over one hundred degrees. Sometimes there is no drinking water; sometimes big common barrels of it are used. Women and children work on ladders and with hazardous machinery. (The Industrial Welfare Commission was told in 1961 that 500 children are maimed each year). Babies are brought to the fields and are placed in "cradles" of wood boxes.[198]

His estimate of migrants in the Stockton area are: one third "Anglos," another third Mexican-American; about fifteen percent Filipinos, and the rest Blacks.[199] Of the one third who are Mexican-American,

194. M. HARRINGTON, THE OTHER AMERICA 2 (1962).

195. M. DAY, FORTY ACRES 16 (1965).

196. *Id.* The earlier the workers showed up at the "shape-up", the better their chances of getting recruited and of getting a better choice of jobs, e.g., working with a long-handled hoe instead of with a short-handled hoe.

197. This author's initiation into California occurred at this very same location. Father Day omitted from his description the dilapidated buildings, the odor of urine, liquor, tobacco and greasy food which, combined, added to the already depressing state of the farmworkers.

198. M. HARRINGTON, THE OTHER AMERICA 50 (1962).

199. *Id.*

it is not clear how many are resident aliens because statistics are inaccurate. Father Day states that about forty per cent of the harvest hands in the Delano area are "green-carders," or resident aliens from Mexico.[200] Neither of these estimates accounts for those who were born of alien parents in the poverty trap and have followed their parents' footsteps.[201]

As a further illustration of the farmworkers' plight, a recent petition for writ of review filed with the California Supreme Court in San Francisco by a group of farmworkers, adequately describes one of the hazards of the occupation. Petitioners challenged the arbitrary refusal by the Industrial Safety Board to prohibit the use of the short-handled hoe.[202] The Board held public hearings in San Francisco, El Centro, and Salinas to determine whether the use of the short-handled hoe falls within the prohibited practices described in Sections 6400, 6401 and 6403 of the California Labor Code.[203] The Board heard extensive testimony from farmworkers and growers regarding the pain and discomfort caused by the widespread use of this type of hoe; and heard testimony from five physicians on the effects of the extended use of the short-handled hoe. The testimony of the physicians was unanimous that the use of this tool causes severe pain and results in permanent back injury.[204] One petitioner who has been working with the short-handled hoe for ten years, feels that it is the most difficult and lowest paying job in the state. He stated:

> We farmworkers who make our living out working in the fields find ourselves having to return to work everyday with backs, necks, and legs that still hurt from working the day before. I do not wish to work with the short handle hoe. It is not a human type of job. No one should be expected to work bended down for that length of time. Short handle hoe work is too hard to do. The short handle

200. M. DAY, FORTY ACRES 29 (1965).

201. M. HARRINGTON, THE OTHER AMERICA 21 (1962).

202. Brief for Petitioner at 36; Carmona v. Division of Indus. Safety, 13 Cal. 3d 303, 530 P.2d 161, 118 Cal. Rptr. 473 (1975).

203. *Id.* at 35; CAL. LAB. C. § 6400, provides: "Every employer shall furnish employment and a place of employment which are safe for the employees therein;" CAL. LAB. C. § 6401 provides in pertinent part: "Every employer shall . . . adopt and use practices, means, methods, operations, and processes, which are reasonably adequate to render such employment and place of employment safe. Every employer shall do every other thing reasonably necessary to protect the life and safety of employees;" and CAL. LAB. C. § 6403 provides in pertinent part: "No employer shall fail or neglect: . . . . (b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe; (c) To do every other thing reasonably necessary to protect the life and safety of employees."

204. Brief for Petitioner at 36, Carmona v. Division of Indus. Safety, 13 Cal. 3d 303, 305 P.2d 161, 118 Cal. Rptr. 473 (1975).

> hoe ruins the farmworker's back, and before he is 50, he is so disabled he must go on welfare.[205]

The other petitioners gave similar declarations.[206] Dr. David Flanagan, an orthopedic surgeon in San Francisco, testified *inter alia*, that he spent more than two years in a clinic for migrant and seasonal farmworkers in the Imperial Valley of California.[207] He further testified:

> From the very outset I began to see what I considered an inordinately high percentage of low back conditions. . . .
>
> My contention is that if the farmworker is able to stand erect using a tool which does not require the hyperflexion of the spine that much of the pathology which I see at the clinic could be eliminated or delayed by changing the stresses which when applied to this region of the spine create a progressive degeneration or wearing out of the structure of the low back region.[208]

Another specialist in orthopedic surgery, Dr. Robert Murphy, also testified at length and concluded that the use of the short handle hoe, which

> [p]laces great stresses on the intervertebral disc of the spine . . . accelerates the development of degenerative disease of the spine which occur secondary to the disc degeneration. As the disc degenerates, they can no longer tolerate this stress. The stress is transmitted to the bones and to the other joints which is the disease we call arthritis. The degeneration occurs in the joints and the bones as well as in the intervertebral disc. Performance of even simple activities while in the bent position adds further stress, which are magnified many times over what they would be in an erect position. The result of this is a worker whose spine ages more rapidly than the rest of his body until a point is reached where he is no longer able to work because of low back pain.[209]

In addition to the oral testimony by the five physicians, the Board received written statements from six doctors.[210] Evidence was also presented to the effect that an alternate tool exists, the long handle hoe, to do the same jobs.[211]

Despite all the evidence presented, the Board rejected the petition.[212] An appeal to the California Supreme Court followed. The Court

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205. *Id.* at 5-7.
206. *Id.* at 10-11.
207. *Id.* at 15.
208. *Id.* at 10-11.
209. *Id.* at 15.
210. *Id.* at 18.
211. *Id.* at 7-9.
212. *Id.* at 21; The reasons for denying the petition were as follows:

1. Testimony failed to prove the tool unsafe.
2. Some workers have been found quite resistant to back deterioration even after many years of short-hoe usage.
3. Safety orders are not ideally suited to control of body deterioration problems, in part

held that the agency erred in confining the regulations' ban of "unsafe tools" to improperly manufactured or improperly maintained implements.[213] It ordered a broader definition of "unsafe tools", more in keeping with the liberal construction of safety legislation for the purpose of achieving a safe working environment. The Court rejected the petitioners' urgings that it determine the short-handled hoe to be unsafe as a matter of law, taking the view that such determination is properly a judgment to be made in the first instance by the agency applying the proper legal standard.[214] It ordered issuance of a writ of mandate directing the agency to set aside its decision and reconsider the matter in accordance with the views expressed in the opinion.

Farmwork has been used as an example of one of the few menial occupations that have not been restricted by any of the states. It should shed some light on the real motive behind the legislation barring aliens from many occupations.

IV. Conclusion

A careful examination of the existing immigration laws leads to the conclusion that the concerns and justifications expressed by government officials and courts in upholding discriminatory legislation are unfounded.

To begin with, aliens are carefully screened prior to entry and the screening process continues after entry. Before entering the United States, the prospective immigrant is required to disclose almost all of his or her background and to substantiate it with documentation, including birth and marriage certificates, if married; if male, a military record; occupation; letters from appropriate police authorities from every place he or she has resided prior to application; place of destination after entry and purpose for coming to this country.[215] All this information is on the application he or she must sign under oath and in the presence of a consular officer.[216] In addition, the alien is registered and fingerprinted, and must submit to a physical and mental examination.[217] If he or she

because any acceptable regulation would require built-in exceptions to adjust for wide variations in individual susceptibility to damage.

4. Back deterioration is a widespread problem associated with so many activities and operations both on and off the job, that effective control depends mainly upon far-reaching changes in established attitudes and modes of living.

213. Carmona v. Division of Indus. Safety, 13 Cal. 3d 303, 313, 530 P.2d 161, 167-68, 118 Cal. Rptr. 473, 479-80 (1975).

214. *Id.*

215. 8 U.S.C. § 1202(a), (b), (c) (1970).

216. *Id.*

217. *Id.* at 1201.

fails the examination, an affidavit of support and or a bond is usually required before entry is allowed.[218] This ensures that no alien will become a public charge immediately upon entry into the country.

On the long list of excludable aliens are those seeking to enter the United States for the purpose of performing skilled or unskilled labor. They are not admitted unless the Secretary of Labor determines and certifies to the Secretary of State and the Attorney General that (a) there are not sufficient workers where the alien is going, who are able, willing and qualified at that time to do the work in question, and (b) employment of such alien(s) will not adversely affect the wages and working conditions of the workers in the United States similarly employed.[219]

After entry, the alien continues to undergo a screening through the following: (1) mandatory notification within ten days to the Immigration Service of any change of address;[220] (2) compulsory yearly registration with the Immigration Department;[221] (3) arbitrary stopping and questioning by immigration or border patrol officers, if the alien is unfortunate enough to "fit the mold" the officers have set of what an illegal alien looks like.[222]

Congress encourages professionals to enter the country by giving them high priority in visa granting and allocation.[223] The reason given for such priority is that because of "their exceptional ability in the sciences or the arts [t]hey will substantially benefit prospectively the national economy, cultural interests or welfare of the United States."[224] Given Congress' attitude, as expressed in the aforegoing statute, it would appear that state legislation which seeks to bar aliens from professional occupations is contrary to the intent of Congress.[225]

Furthermore, several Supreme Court decisions indicate that legislation by the states restricting the right of aliens to earn a living encroaches on the exclusive federal power to regulate and control immigration.[226]

218. 8 U.S.C. § 1182(a)(7), (g).
219. *Id.* at § 1182(a)(14).
220. *Id.* at § 1305.
221. *Id.* at § 1302.
222. *Id.* at § 1357(a). The attorney general has empowered the officers of the Immigration and Naturalization Service to enforce section 1357(a); 8 C.F.R. § 287.1(c) (1971). *See* Note, *Temporary Detention of Aliens*, 72 COLUM. L. REV. 593 (1972).
223. 8 U.S.C. § 1252(a) - (h) (1970).
224. *Id.* at § 1153 (a)(3).
225. *Id.*
226. *See* Graham v. Richardson, 403 U.S. 365, 379-80 (1971).

This type of legislation is also in violation of provisions in commercial treaties between the United States and other countries.[227]

The xenophobic fear of aliens' potential criminal propensities is irrational because there is no proven correlation between alienage and criminality.[228] As the California Supreme Court observed: "It is common knowledge that several million aliens are living in this country and that the vast majority are peaceful and law-abiding. Undoubtedly, many are serving or have children serving in the armed forces. . . . [A] person does not demonstrate instability, nor does he show a tendency towards crime, simply because he is not a citizen of this coutry."[229] It has been demonstrated that the reasons propounded for excluding aliens from certain occupations and professions are anachronisms born in a period of racial prejudice combined and flamed by a fear of competition in the labor market.[230] Many of these statutes have been declared to be unconstitutional because they fall short of their "meritorious" rationales.

The authorities cited throughout this article lend support to the conclusion that legislative discrimination against aliens in their right to

227. For discussion of commercial treaties between the United States and other countries having specific reference to professional activities, i.e., treaties guaranteeing rights to engage in professions and occupations, see 52 MICH. L. REV. 1184 (1954).

228. *See* Note, *Constitutionality of Legislative Discrimination Against the Alien in His Right To Work*, 83 U. PA. L. REV. 74, 79 n.28 (1934).

229. Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 298, 496 P.2d 1264, 1271, 101 Cal. Rptr. 896, 903 (1972); People v. Satchell, 6 Cal. 3d 28, 38, 489 P.2d 1361, 1368, 98 Cal. Rptr. 33 (1971).

230. Mr. Justice Field, commenting on the validity of certain California statutes excluding Chinese from citizenship and occupational endeavors, explained the forces which produced such laws:

> The discovery of gold in California in 1848 . . . was followed by a large immigration thither from all parts of the world, attracted not only by the hope of gain from the mines, but from the great prices paid for all kinds of labor. The news of the discovery penetrated China, and laborers came from there in great numbers. . . . These laborers readily secured employment. . . . For some years little opposition was made to them except when they sought work in the mines, but, as their numbers increased, they began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field.
>
> The competition steadily increased as the laborers came in crowds on each steamer that arrived from China. . . . [T]hey were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts. . . .
>
> . . . .
>
> In December, 1878, the convention which framed the present constitution of California . . . took this subject up . . . setting forth, in substance, that the presence of Chinese laborers had a baneful effect upon the material interests of the State, and upon public morals . . . and was a menace to our civilization. . . .

Chinese Exclusion Case, 130 U.S. 581, 594-95 (1889).

work is unconstitutional. While court decisions have reached similar conclusions and made dicta accordingly, the task of eradicating this type of discrimination is far from finished.

The piecemeal treatment by the courts has eliminated many statutes and federal regulations in this area but many more remain on the books. The case-by-case method is slow and incomplete in its coverage. What is needed is legislation either in the form of an amendment to the United States Constitution, or an act by Congress that would prohibit discrimination against aliens in employment. Congress could amend Title VII to specifically cover aliens. Of the two possibilities, the latter is preferable. This author seriously doubts that an amendment to the United States Constitution could gain enough support to be ratified. Despite the many sympathizers to the alien cause, when change may bring about competition in employment, support would either vanish or be insufficient to effect ratification of such an amendment. Moreover, aliens are not allowed to vote; they have no political power to affect the outcome of any measure that is determined by voters. Consequently the fate of the aliens lies in the hands of Congress.