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The Alien Meets Some Constitutional Hurdles in Employment, Education and Aid Programs

ELWIN GRIFFITH*

Aliens have encountered legal obstacles in attempting to take advantage of some of the opportunities available to United States citizens. As a result courts have had to examine some constitutional issues raised within this context. In this article, the author examines the major decisions affecting aliens in several areas and finds some inconsistency. The author suggests that the Supreme Court is beginning to take a harder look at the role of aliens in the political community and is restricting to citizens the functions of representative government.

INTRODUCTION

The United States is a land of immigrants. Every year thousands of aliens enter this country to begin a new life as permanent residents.¹ However, the transition has frequently been difficult. Some early governmental restrictions proved burdensome to aliens.² The restrictions in the area of employment were in some respects a product of fear and anxiety about rising unem-


¹ Between 1961 and 1970, 3,321,677 immigrants were admitted. [1977] INS ANN. REP. 33. The immigration law imposes no restrictions on such aliens who seek employment. A nonimmigrant cannot work unless he has been granted permission by the Immigration and Naturalization Service or he is in a classification that authorizes employment. 8 C.F.R. § 214.1(b) (1980).

ployment among citizens. But there was also a feeling that citizens should somehow have first claim on public resources. Aliens had to be rather patient, therefore, until their acquisition of citizenship could qualify them for full participation in the labor market.

The restrictions in public employment were supported in part by the theory that citizen employees were more familiar with the institutions of government and that, therefore, citizenship was a logical requirement for public service. Furthermore, it was argued not only that the state's resources should be retained for the use of citizens, but also that public employment should be similarly restricted because it was a privilege, rather than a right, to work for the state. But even in private employment, there were some reservations about the ability of aliens to become assimilated into the customs and traditions of this country. Those reservations extended even to basic queries about the loyalty of aliens. Thus, in a very real sense the employment rights of aliens became enmeshed in a variety of controversial issues.

It was quite fashionable for the state to justify its discriminatory actions by asserting a proprietary interest in its own resources or in its public service positions. After all, it believed itself obligated to exercise its discretion in favor of citizens and to exclude others who were considered strangers in the community. Furthermore, the state exercised its police power to protect its citizens from allegedly unqualified aliens who wanted to dabble in certain activities that required strict governmental regulation.

There were restrictions in other areas. States occasionally rejected aliens' applications for loans, scholarships and welfare benefits because of a belief that the limited resources of the government budget should be reserved for citizens or, in certain cases, for those aliens who either had fulfilled certain residency

requirements\textsuperscript{11} or had declared an intention to become citizens.\textsuperscript{12} As time went on, states eventually found it difficult to defend the validity of these restrictions. Courts began to look more closely at alienage classifications.\textsuperscript{13} For a while it looked as if the pendulum had swung in favor of aliens.\textsuperscript{14} However, recent judicial decisions have dealt aliens some setbacks.\textsuperscript{15}

In light of these developments, this article will review how courts have struck the balance between governmental interests and aliens' rights. A discussion of the most recent judicial pronouncements in these areas will reveal the distinctions that have been made in cases dealing with alienage discrimination.

**Aliens and Employment**

Although the Supreme Court held in *Yick Wo v. Hopkins*\textsuperscript{16} that aliens were entitled to the protection of the fourteenth amendment, that did not result in an immediate solution to the problems of discrimination against aliens. Courts continued to recognize the efficacy of the special public interest doctrine which permitted states to preserve their resources for their own citizens. Thus, in *Crane v. New York*,\textsuperscript{17} the Supreme Court sanctioned a statute which forbade the employment of aliens on public works projects. The Court sustained other statutes that prevented

\textsuperscript{11} In *Graham* the Arizona statute conditioned eligibility for benefits on the alien's 15 year residence in the state. \textit{id.} at 367.

\textsuperscript{12} In *Nyquist v. Mauclet*, the New York statute required the alien to declare his intent to file for citizenship as soon as he was eligible. After the aliens had filed their complaints, the statute was amended to allow refugees paroled into the United States to qualify for tuition assistance awards without even declaring an intent to become citizens. That amendment weakened the state's argument about the importance of citizenship or of the intent to assume citizenship. 432 U.S. 1, 3-4 & n.4 (1977).

\textsuperscript{13} In *Graham v. Richardson*, 403 U.S. 365 (1971), the Supreme Court held that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." \textit{id.} at 372. \textit{See also} Purdy & Fitzpatrick v. State, 71 Cal. 2d 556, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).


\textsuperscript{16} 118 U.S. 356 (1886).

\textsuperscript{17} 239 U.S. 195 (1915).
aliens from owning land or exploiting a state's natural resources.

Very soon, though, the Supreme Court recognized that a state's interest in preserving its resources or in protecting the health and welfare of its citizenry did not justify much of the unfavorable treatment of aliens. In *Truax v. Raich*, the Court invalidated an Arizona statute that required an employer having five or more persons on his staff to employ not less than eighty percent native-born Americans or qualified voters. The Court recognized that the federal government had exclusive control over immigration and naturalization and emphasized that it would be impermissible to restrict the access of aliens to common occupations in the community. Otherwise, states could effectively deny aliens the right to settle in the place of their choice even after the federal government had granted them the privilege of immigrating to the United States. Although the Court found that the Arizona statute violated the equal protection clause of the fourteenth amendment, it recognized the state's power to make reasonable classifications that affect the distribution of the state's resources or promote the health and welfare of residents in the community. It was evident, therefore, that statutes would be sustained if there was some rational basis for their enactment. This rational basis approach clearly highlighted the challenge that awaited those who wanted to question the constitutionality of these classifications.

As time went on, the special public interest doctrine began to wane. In *Takahashi v. Fish & Game Commission*, the Supreme Court denounced a state statute that prevented aliens from fishing in the water off the shores of California. The statute in question provided that anyone who was ineligible for citizenship would be unable to obtain a fishing license. The Court held that no special public interest justified the exclusion of any or all aliens from fishing in California's coastal waters. The Court

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20. 239 U.S. 33 (1915).
21. Id. at 35.
22. Id. at 42.
23. Id.
24. Id. at 39.
27. Id. at 415-16.
28. Id. at 421.
hinted that closer scrutiny might be appropriate in certain circumstances because "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." Until then, the Court had been content to restrict itself to rational basis language and had given no indication that a state's power to discriminate against aliens was narrowly limited. It was the first sign that the traditional equal protection test articulated by the Court as recently as Clarke v. Deckebach was on its decline. In a sense, the Court began to take a harder look at these alienage classifications.

The real shift came in Graham v. Richardson, when the plaintiffs challenged statutes that permitted states to discriminate against aliens in the distribution of welfare benefits. Once again the Court had to determine the level of review it wished to follow in dealing with statutory discrimination against aliens. If the statute dealt with a suspect classification or a fundamental right, then the Court would apply strict judicial scrutiny in determining the statute's constitutionality. Such an approach would ensure the statute's survival only if it was necessary to accomplish an overriding state interest. In the absence of a suspect classification or a fundamental right, the Court would sustain the statute if it bore a rational relationship to a legitimate state objective. The Court in Graham examined the status of aliens in American

29. Id. at 420.
30. Clarke v. Deckebach, 274 U.S. 392 (1927), upheld a statute that forbade the issuance to an alien of a license to operate a pool hall.
35. See, e.g., Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961). The rational basis test carries with it a strong presumption about a statute's constitutionality. An intermediate level of review, lying somewhere between minimal review and strict review, has sometimes been used. See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977); Craig v. Boren, 429 U.S. 190 (1976);
society and confirmed that they were “a prime example of a ‘discrete and insular’ minority” and that, therefore, classifications based on alienage should be characterized as suspect and subject to strict judicial scrutiny. The Court then decided that the statutes in question had failed to meet the appropriate test, inasmuch as they did not further a compelling state interest. The equal protection challenge had wrought a change in the Court’s approach to classifications based on alienage. It would no longer be sufficient for such classifications to have merely a reasonable basis.

The Court took another opportunity to deal with a challenge to alienage discrimination in Sugarman v. Dougall. It was asked to pass on a statute that prohibited the employment of aliens in the New York civil service. In applying the strict scrutiny test, the Court found that the New York statute offended the equal protection clause of the fourteenth amendment. The statute swept too broadly because it affected lower-level as well as policy-making positions and, therefore, it did not meet the test of precision that was a peculiar ingredient of strict scrutiny. The Court also took this opportunity to discredit the special public interest doctrine, which had already been looked upon with disfavor in Graham v. Richardson. The Court saw no reason to resurrect it in an employment case. Furthermore, the concept that constitutional rights could turn on the classification of a governmental benefit as a right, rather than a privilege, was once again re-

37. Id. at 376.
38. Id. at 374-75.
40. 413 U.S. 634 (1973).
41. The statute provided: “Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States.” N.Y. CIV. SERV. LAW § 53(1) (McKinney 1973).
42. U.S. CONST. amend. XIV, § 1.
43. 413 U.S. at 643.
44. One expression of this doctrine can be found in Truax v. Raich, 239 U.S. 33, 39-40 (1915), where the Court found that the statute there did not fit within the doctrine: The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states. See also Clarke v. Deckebach, 274 U.S. 392 (1927); Crane v. New York, 239 U.S. 195 (1915); Heim v. McCall, 239 U.S. 175 (1915).
46. 413 U.S. at 645.
In *Sugarman*, the statute in question imposed a blanket prohibition against the employment of aliens. The statute did not require citizenship as a qualification for specific positions in the civil service. This would have evoked a different judicial response. There was no doubt that the statute was overbroad and imprecise. The Court acknowledged that the state had the power to define its own political community and to restrict to its citizens those important executive, legislative and judicial positions that required direct formulation, execution and review of broad public policy. The Court conceded that there could be occasions when the rational basis test would apply to classifications based on alienage. It was evident that there would be no automatic stringency in every case. The Court's scrutiny would not be so searching when it dealt with questions falling within the state's constitutional prerogatives. Those prerogatives included the state's right to decide on a person's eligibility for voting, political office, and jury service. Thus, although the Court confirmed alienage as a suspect classification, it explained that the "political community" exception would give rise to less demanding scrutiny.

The Court in *Sugarman* reiterated the basic requirement of strict scrutiny: a state must demonstrate a substantial interest if alienage discrimination is to be sustained. Furthermore, the statutory classification used must be necessary for the accomplishment of that interest. On the other hand, minimal judicial scrutiny calls for only some rational basis on which the statute can be related to a legitimate state objective. Because strict

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48. 413 U.S. at 639.
49. Id. at 647.
54. The Court said in *Sugarman*: "A restriction on the employment of noncitizens, narrowly confined, could have particular relevance to this important state responsibility, for alienage itself is a fact that reasonably could be employed in defining 'political community'." 413 U.S. at 649.
55. Id. at 642.
tiny is not required in every case of alienage discrimination, the difficulty lies in identifying those situations in which less scrutiny is in order because the state is either exercising its constitutional prerogatives or defining its political community.

The difficulty in identifying such cases was certainly apparent in another case decided on the same day as Sugarman. In In re Griffiths, the Court held unconstitutional a Connecticut rule that prevented aliens from practicing law. The state emphasized that attorneys were entrusted with heavy responsibilities and were in fact officers of the court, having the authority to sign writs and administer oaths. The state suggested that aliens should not have the power to engage in such activities because that would be an exercise of citizenship. However, the Court did not view the attorney's role as governmental in nature and, therefore, it did not think that this case should be included within the "political community" exception discussed in Sugarman. Thus, although the Court recognized the importance of the lawyer's function within the community, it applied strict judicial scrutiny to invalidate the Connecticut rule because less scrutiny would have been appropriate only if lawyers could be regarded as part of the governmental or policy-making framework.

Even after Sugarman and Griffiths, other attempts were made to restrict aliens in their employment endeavors. In Examining Board of Engineers v. Flores de Otero, Puerto Rico attempted to ban aliens from private engineering practice. Among the reasons advanced for the ban was Puerto Rico's interest in preventing an influx of Spanish-speaking engineers. This justification had lost its appeal after Takahashi and Graham. The statute curtailed the employment opportunities of lawful resident aliens who were in Puerto Rico pursuant to federal immigration laws. That curtailment could not be tolerated in view of the exclusive responsibility of the federal government for immigration.

57. Id. at 723-24.
58. Id.
59. Id. at 729.
60. The Court recognized the importance of the lawyer's functions:
Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers.

62. Id. at 605.
63. Id. In DeCanas v. Bica, 424 U.S. 351 (1976), the Court upheld the constitutionality of a state statute that forbade employers from employing illegal aliens.
Other justifications were advanced to support the restriction against alien engineers. The desire to raise the standard of living of Puerto Ricans and to assure the financial responsibility of alien engineers could not survive searching scrutiny. In effect, the statute commanded private contractors to employ only American citizens. That mandate could not survive because it was based on economic motives that had been rejected long ago as a basis for alienage discrimination. It was also clear that there was not even a rational relationship between Puerto Rico's desire to assure the financial responsibility of engineers and its total ban on alien practitioners. If there was a concern about an engineer's ability to remain answerable for his professional negligence, that concern could be reflected by a narrow statutory approach. Moreover, there was no evidence that aliens would be any more disposed than citizens to engage in shoddy work. Thus, it was not necessary to isolate alien engineers by imposing such a sweeping restriction against them. Like so many other statutes designed to restrict aliens, this one went beyond the objectives enumerated by its supporters. A less painful way of assuring the financial responsibility of engineers could be obtained with statutory precision. Although the Court indicated that an application of even the rational basis test would have invalidated the statute, it found the statute unconstitutional by applying strict scrutiny.

Just as one was becoming accustomed to the strict scrutiny approach in alienage discrimination cases, the Supreme Court decided *Foley v. Connellie*. In that case, a New York statute requiring state policemen to be citizens of the United States withstood a constitutional challenge under the equal protection clause of the fourteenth amendment. Because the Court regarded the

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64. 426 U.S. at 605. In *Truax v. Raich*, 239 U.S. 33 (1915), the attempt to require the employment of only American citizens did not survive.

65. 426 U.S. at 605-06. The economic justification could be used to ban aliens from nearly all lawful employment.

66. The Court did not decide whether the fifth amendment or the fourteenth amendment applied to the Puerto Rico statute. The Court found that the statute was unconstitutional under either amendment once it was examined under strict scrutiny. *Id.* at 601-02. Justice Rehnquist, in dissent, took the view that the equal protection guarantees of the fifth and fourteenth amendments do not apply to Puerto Rico. *Id.* at 606-09.


68. *N.Y. Exec. Law § 215(3)* (McKinney Supp. 1979) provides in part: “No person shall be appointed to the New York state police force unless he shall be a citizen of the United States . . . .” The challenge was based on the equal protection clause of the fourteenth amendment.
police function as one of the basic functions of government, it found that the citizenship requirement bore a rational relationship to the unique demands of the position and that the alien's equal protection rights were not violated.⁶⁹

It is important to ask whether the police functions performed by state troopers place them within the narrow exception discussed in Sugarman.⁷⁰ In one sense every state employee is involved to some extent in the execution of public policy.⁷¹ Yet Sugarman prohibited the blanket exclusion of aliens from all state positions. That would suggest that the Court perceived differences among the various civil service functions. In the same vein, it may be suggested that the various ranks of the constabulary perform different functions. The slightest participation in the execution of public policy should not sanction the requirement of citizenship. It is submitted that the participation should be direct and not merely contributory.

Even more troubling was the Court's view in Foley that it would be anomalous to conclude that citizens should be subjected to the discretionary powers of alien policemen in light of past holdings that judges and jurors must be citizens.⁷² As Justice Marshall noted in his dissent,⁷³ New York State had already granted to any person the power of arrest in certain circumstances.⁷⁴ It was anomalous, therefore, that private persons, aliens and citizens alike, had the power to arrest, but the state police force was restricted to citizens.

It is clear that Sugarman did not intend to impose the citizenship requirement on all state employees and, therefore, one should be especially careful that the Sugarman exception dealing

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⁷⁰. That exception recognizes that citizenship may be an acceptable requirement for "officers who participate directly in the formulation, execution, or review of broad public policy." Sugarman v. Dougall, 413 U.S. 634, 647 (1973).


⁷². Id. at 299.

⁷³. Id. at 306 (Marshall, J., dissenting).

⁷⁴. N.Y. Crim. Proc. Law § 140.30 (McKinney 1971) provides that:

1. Subject to the provisions of subdivision two, any person may arrest another person (a) for a felony when the latter has in fact committed such felony, and (b) for any offense when the latter has in fact committed such offense in his presence.

2. Such an arrest, if for a felony, may be made anywhere in the state. If the arrest is for an offense other than a felony, it may be made only in the county in which such offense was committed.
with the execution of public policy be read in context; if not, the exception "would swallow the rule." To misinterpret that exception is to ascribe to all state employees the same privilege of executing broad public policy. This is not to suggest that such positions are not important in the ordinary scheme of things. But the line between policy-making positions and other positions must be drawn as consistently and intelligibly as possible.

The Court in Foley did not think it surprising that most states required their police officers to be citizens. The fact is that most of those state statutes were enacted before the Sugarman decision and thus the Court should not have relied on them to bolster its own position on the requirement of citizenship. But the Court further observed that such state statutes might require police officers to be citizens because of the presumption of a citizen's familiarity and sympathy with American traditions. That point had been raised with little success on other occasions. Familiarity with American traditions should be important only if it is an essential ingredient of the function to be performed. The concept of familiarity with American traditions should not have been used to sustain the citizenship requirement for the state trooper's position. That permitted a diversion from the basic question whether policemen are involved in the execution of broad public policy. Some citizens are themselves more familiar and sympathetic to such traditions than are other citizens. Thus, even among citizens themselves, there are degrees of knowledge about American institutions. Surely an alien applicant for the police force who has lived most of his life in the United States may be more familiar with American traditions than a natural-born citizen who has lived overseas for a long time. In view of this, the question should be asked again in the words of Justice Stevens: "What is the group characteristic that justifies the unfavorable treatment of an otherwise qualified individual simply because he

76. Id. at 310 (Stevens, J., dissenting).
77. Id. at 299.
80. Id. at 299-300 & n.9.
is an alien?"\textsuperscript{82}

Although the majority in \textit{Foley} did not discuss the question, Justice Stevens in his dissent raised the possibility that the disqualifying characteristic was the alien's allegiance to a foreign power, which might bring the alien's loyalty into question.\textsuperscript{83} Perhaps Justice Stevens' observation was related to the statement of the Court that American citizens would be more familiar with the traditions of this country.\textsuperscript{84} The loyalty question was discussed in \textit{Griffiths}\textsuperscript{85} and was not accepted as a basis for denying an alien the right of admission to the Bar. Justice Stevens noted in \textit{Foley}\textsuperscript{86} that the disloyalty of aliens as a class could be accepted only if the Court was willing to repudiate its decision in \textit{Griffiths}. If the Court wanted to question the loyalty of aliens, the \textit{Griffiths} case had provided an appropriate opportunity. The outcome there did not lend credibility to the theory of alien disloyalty. Surely \textit{Foley} did not provide any more fertile ground for the propagation of that concept. However, the Court in \textit{Foley} had a lurking suspicion that an alien policeman might be unable to understand the basic tenets of our democracy and that his sympathy and understanding could best be exemplified by a formal declaration of support for the institutions of government.\textsuperscript{87}

It is remarkable that the Court in \textit{Griffiths} did not think that only citizens could take an oath in support of the Constitution,\textsuperscript{88} but then in \textit{Foley} it seemed to rely on citizenship as an element of loyalty.\textsuperscript{89} It should be observed that the question of loyalty might have been more relevant in \textit{Griffiths}, where the alien was indeed eligible to apply for citizenship and had steadfastly declined to do so.\textsuperscript{90} The question might then be asked whether the alien in \textit{Griffiths} was unwilling to swear allegiance to her country of residence. But even if the alien had conceded that unwillingness, it should not necessarily have reflected unfavorably on her loyalty to the United States. It is difficult to understand how the Court in \textit{Foley} could even raise the question of the alien's loyalty without dealing with its previous disposition in \textit{Griffiths}. In any

\begin{footnotes}
\footnote{82. Foley v. Connelie, 435 U.S. 291, 308 (1978) (Stevens, J., dissenting).}
\footnote{83. Id.}
\footnote{84. Id. at 299-300.}
\footnote{85. 413 U.S. 717, 723-24 (1973).}
\footnote{86. 435 U.S. at 308 (Stevens, J., dissenting).}
\footnote{87. Id. at 299-300.}
\footnote{88. 413 U.S. at 725-26.}
\footnote{89. 435 U.S. at 300 & n.9.}
\footnote{90. The alien was eligible to apply for naturalization because she was married to a citizen of the United States and had fulfilled the three-year residency requirement. 413 U.S. at 718 n.1. Generally, the residency requirement prior to application for naturalization is five years. 8 U.S.C. § 1427(a) (1976).}
\end{footnotes}
event, it is problematic whether a state should exclude all aliens from the job market on this basis. The loyalty determination can be made on an individual basis and should not lead to the wholesale exclusion of aliens. In some respects the issue of loyalty represents a diversion from the main question at hand, and on previous occasions the Court did not allow itself the luxury of that diversion. Perhaps it is because of the peculiar definition of the policeman's function that the loyalty question would be relevant. The Foley Court certainly thought so. But there was no evidence to suggest that aliens could be discredited on that basis.

It was thought that aliens should be excluded from the state police force in the same way that they are excluded from voting and from juries. The considerations that apply to voting or jury service do not necessarily apply to the area of employment. Citizens should participate in the definition of their own political community, and the state should regard it as within its constitutional prerogatives to restrict these rights accordingly. But that is a far cry from the ordinary police function of enforcing laws in particular situations. The designation of the police function as "ordinary" by no means underestimates its importance. As a matter of fact, it is true that enforcement of the law frequently requires the exercise of discretion and good judgment. But no one has suggested that citizens are able to exercise any better discretion and judgment than aliens who are residents of the community. If the importance of the police function may be measured by its impact on society in order to justify the restriction to citizens, then the same argument can be made for other workers whose functions

91. The Court noted in Griffiths that the alien:
    has indicated her willingness and ability to subscribe to the substance of both oaths, and Connecticut may quite properly conduct a character investigation to insure in any given case that an applicant is not one who "swears to an oath pro forma while declaring or manifesting his disagreement with or indifference to the oath."
413 U.S. at 726 (citations and footnote omitted). The Court found no difficulty with an alien taking both the attorney's oath and the commissioner's oath.

92. The Court referred to the policeman's authority to enter a dwelling, to stop vehicles, and to arrest people. 435 U.S. at 297-98.


95. Sugarman v. Dougal, 413 U.S. 634, 647 (1973). In Dunn v. Blumstein, 405 U.S. 330, 344 (1972), the Court pointed out that a state may take necessary steps "to preserve the basic conception of a political community."

affect the basic framework of society. Would this not open the floodgates once again to alienage restrictions which have little to do with the functions to be performed? One cannot tell whether the Court in *Foley* was led astray by the power of policemen to make arrests and searches in the execution of their duties. While those powers are not to be regarded lightly, they do not convert the policeman into a high-ranking official who formulates or executes broad public policy.

In *Foley*, the Court restated the position it had taken in *Sugarman*: that its scrutiny would not be so demanding when it was dealing with matters within a state’s constitutional prerogatives.97 One of the constitutional prerogatives was the state’s power to describe citizenship qualifications for those persons holding important nonelective executive, legislative, and judicial positions.98 The Court went on to say that it has never upheld an alien’s constitutional right to hold “high public office” under the fourteenth amendment.99 Perhaps the reference to “important non-elective executive positions” might be equated with the “high public office” referred to in the same opinion.100 The Court was by no means discussing the state’s power to prescribe citizenship qualifications for all state positions, regardless of their importance or policy-making power. If it is admitted that the state’s power to exclude aliens relates only to important positions involving broad, public policy functions, then the Court’s reliance in *Foley* on the *Sugarman* dictum is all the more perplexing. The Court had upheld the narrowness of the *Sugarman* exception in refusing to apply the exception in *Griffiths*, while conceding that lawyers played a vital and significant role in society. The Court forsook its narrow approach after *Foley*. It seems that the exception will suffer a further expansion. In an attempt to stem the tide, the Court will find itself including more and more functions within the exception. Thereafter, the exception may cease to have the force of an exception.

It may be that the nature of the inquiry should be adjusted to suit the type of position that is subject to restriction. The *Sugarman* concept of demanding less judicial scrutiny in some cases101 led the Court in *Foley* to apply minimal scrutiny. However, should not cases like *Sugarman* be regarded in fact as highlighting the circumstances under which it would further the

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97. *Id.* at 296.
99. *Id.* at 648-49.
100. *Id.* at 647-49.
101. The Court applies a less stringent test to matters within a state’s constitutional prerogatives. *Id.* at 648.

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state's compelling interest to exclude aliens from certain positions? That is somewhat different from suggesting when less scrutiny should be tolerated. The approach that suggests the existence of a compelling interest would obviate the difficulty associated with the application of minimal scrutiny. At least there would not be such a dramatic deviation from the principles underlying suspect classifications.

Furthermore, it would seem that the Court in Foley did not deal with the problem of the statute's overbreadth. Although dealing with a state's constitutional powers in Sugarman, the Court acknowledged that in the quest to achieve a substantial purpose, the state must employ means which are "precisely drawn in light of the acknowledged purpose." This was confirmed in Griffiths, where the Court found that lawyers could be tested individually to determine competence. Thus, the appropriate query is whether that system of individual examination could be applied successfully to the police force. Is it not possible that the Court's earlier concern for avoiding wholesale exclusion of aliens from certain jobs has now given way to a concern for the alien's proximity to the law enforcement arm of government? It is submitted that the Court's inclusion of police officers in the basic conception of the political community is a dramatic and unjustifiable expansion of the Sugarman idea. The police function is an occupation and thus comes closer to civil service than to governing. It would be more palatable, therefore, to maintain strict scrutiny of alienage classifications in such cases than to accept minimal scrutiny on the basis of an expanded, political community doctrine.

The Sugarman doctrine sanctioned a citizenship requirement for persons holding "elective or important non-elective executive, legislative, and judicial positions." The use of that language indicates that the Court regarded all elective positions to be at the heart of representative government. But it was necessary for nonelective positions to be designated as "important" in order to come within the citizenship requirement espoused by the Court.

103. Sugarman v. Dougall, 413 U.S. at 643.
104. In re Griffiths, 413 U.S. at 725-27.
106. 413 U.S. at 647.
Therefore, the basic question really revolves around the importance of a particular position in the scheme of things and the responsibility for the formulation, execution, or review of broad public policy. It may be that the Court in *Sugarman* used the term "important" to refer to high-ranking positions. In that event, the *Foley* Court did not pick up the lead because not all policemen are in such positions. There was a perceived shift in *Foley* from the concept of rank to the impact of the particular function. It is much more meaningful, however, to make a distinction on the basis of the authority and the policy-making function of the particular position, rather than on the basis of its impact. However, such impact may, indeed, be a relevant consideration in determining whether a particular position is of high rank. Pursuant to this approach, it is easy to see the distinction between a superintendent of the state police and a state policeman in the ranks over whom the superintendent exercises control. By denying aliens access to the ranks of the state police, the Court in *Foley* impliedly adopted the views of Justice Rehnquist in *Sugarman* that policy-making functions have permeated the entire administrative scheme of the civil service and that, therefore, there is really no difference in authority between the top-level administrators and employees in the ranks. Justice Rehnquist's views on this attracted no supporters among the other justices, for the Court in *Sugarman* obviously felt that there was a difference between those employees who "apply facts to individual cases" and those "who write the laws or regulations." However, Justice Rehnquist's observations accentuated the dilemma which the Court in *Sugarman* caused by introducing an inadequate standard. It is not always clear when the alien is participating in government. In this respect the articulated guidelines of the Court require more refinement before it can truly be said that the government's legitimate interests have been vindicated.

If *Foley* is to be understood, it must be regarded as accepting a state restriction on alien employment because of the uniqueness of the police function. The *Foley* Court was more impressed with

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107. The *Foley* Court said: "Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals." 435 U.S. at 298 (footnote omitted). This is not the same thing as saying that the proper discharge of duties will have a serious impact. Most abuses of power can have this effect but that should not necessarily suggest a stronger case for minimal scrutiny.

108. *Sugarman* v. Dougall, 413 U.S. at 661 (Rehnquist, J., dissenting). Justice Rehnquist made an interesting observation when he said that "as far as the private individual who must seek approval or services is concerned, many of these 'low level' civil servants are in fact policymakers." *Id.*
the impact of the policeman’s action on individual liberty\textsuperscript{109} than the policeman’s position in the state hierarchy. Because the execution of the police function could result in a deprivation of liberty for some members of society, the Court was convinced that such a function should be restricted to citizens, as they are a part of the political community. The Court viewed it as a question of the right of citizens to be governed by citizens. However, it must be suggested here that aliens should not be excluded from law enforcement simply because their participation would affect citizen members of the political community. Because policemen are not involved in the execution of broad public policy, aliens should have the right to enforce the law even though they have not yet become members of the political community through the assumption of American citizenship.

If there was any doubt about the Court’s position in \textit{Foley}, it was removed by the decision in \textit{Ambach v. Norwick}\textsuperscript{110}. In that case, the Court upheld the constitutionality of a New York statute requiring public school teachers to be citizens of the United States. The Court made it quite clear that the rational basis test was applicable in \textit{Norwick} just as in \textit{Foley}, because public school teaching was a governmental function that invoked an exception to the general rule applicable to alienage classifications\textsuperscript{111}. If the general rule were applied, the statutory classification would be subject to strict judicial scrutiny.

The Court’s division on the issues revealed the difficulty of fitting the \textit{Norwick} case into the exception. A bare majority viewed the functions of the teacher as essential to the “preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests...”\textsuperscript{112} Thus, an underlying theme of the decision was the Court’s appreciation of the influence that teachers have on students’ attitudes towards government and the political process.\textsuperscript{113} As a result, the Court believed that the opportunity to teach at the public school level should be restricted to citizens or intending citizens.

An appropriate query is why there are certain legislative exceptions permitting aliens to teach in the public schools if this is in-

\textsuperscript{109} 435 U.S. at 298.
\textsuperscript{110} 441 U.S. 68 (1979).
\textsuperscript{111} \textit{Id.} at 80.
\textsuperscript{112} \textit{Id.} at 76.
\textsuperscript{113} \textit{Id.} at 78.
deed a basic governmental function. Allowing an alien to teach when he cannot obtain an immigrant visa because of an oversubscribed quota\textsuperscript{114} militates against the importance of the citizenship requirement in the first place. The state's willingness to ignore the lack of citizenship in such an instance points up the weakness of the state's assertions that citizens alone can discharge the fundamental obligation of educating public school students. The situation becomes even more delicate when it is recognized that an alien who lacks an immigrant visa because of an oversubscribed quota cannot be regarded as a lawful permanent resident.\textsuperscript{115} The equities are not, therefore, on his side when he is compared with an alien lawfully admitted for permanent residence. Furthermore, a state's willingness to grant a waiver of the citizenship requirement in certain cases again defeats the contention that teachers are exercising some governmental power which gives rise to the exception first articulated in Sugarman. Interestingly enough, the statute in Norwick recognizes that some alien teachers may indeed possess talents that are not readily available among citizen teachers. In such instances, the citizenship requirement is waived by the appropriate city regulation. This concession raises basic doubts about the relevance of citizenship in public school assignments.

The Court's decisions in Foley and Norwick herald a retreat from the strict scrutiny used in other cases. It appears that the Court has taken a rather broad approach to the "political community" doctrine. This represents a contrast to the narrow approach taken in Griffiths, where the Court stated that a lawyer's important functions do not put him close enough to the political process to make him a "formulator of government policy."\textsuperscript{116} It would seem that the Court looked for a convenient place to draw the line because it feared a gradual obliteration of the distinction between aliens and citizens.\textsuperscript{117} But that concern has produced new

\textsuperscript{114} An alien may be unable to obtain an immigrant visa because the quota for the area or country has been oversubscribed. For those subject to the quota, the maximum number of visas available worldwide for each fiscal year is 270,000. Refugee Act of 1980, Pub. L. No. 96-212, § 203, 94 Stat. 106. If an alien is an "immediate relative" of a United States citizen, he is exempt from the numerical limitations. An immediate relative is a child, spouse, or parent of a citizen, but in the case of parents seeking a visa, the citizen child must be at least 21 years old. 8 U.S.C. § 1151(b) (1976).

\textsuperscript{115} 8 U.S.C. § 1101(a)(20) (1976) provides: "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."

\textsuperscript{116} In re Griffiths, 413 U.S. at 729 (footnote omitted).

\textsuperscript{117} In Nyquist v. Mauclet, 432 U.S. 1 (1977), Chief Justice Burger took the dissenting view that strict scrutiny was not required in every case of alienage discrimination because that would "obliterate all the distinctions between citizens
results that do not account satisfactorily for the old. If the Court has consciously taken a new turn in assessing alienage classifications, then a further explanation is necessary about the viability of *Griffiths*.

The recent relaxation of the usually strict standard of review was based to some extent on the special nature of the positions involved. It would have been understandable for the Court in *Foley* and *Norwick* to hold the states to a strict accounting for their discriminatory policy, rather than to erode a true exception to the compelling interest test. When it seemed that the state's chances of passing that test looked dim, there was a reversion to the "political community" concept. It is true to say that when the concept was introduced initially, it was not regarded as a haven for states whose policies could not survive strict review. But the Court's subsequent approaches to the problem of alienage discrimination have so expanded the concept that a statute's failure to survive such strictness might not necessarily spell defeat. It might be possible to show that the classified position affects the community just enough to give it a governmental gloss. By these recent pronouncements, the Court has opened the way to further expansion of the political community. As a result, a real exception to strict scrutiny may have lost some of its force.

**Aliens and Benefits**

Aliens have had difficulty in other areas. In *Graham v. Richardson*, Arizona denied welfare benefits to several applicants because they were neither citizens of the United States nor fifteen-year residents of the state. The state attempted to sustain its dis-

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and aliens, and thus depreciate the historic values of citizenship." *Id.* at 14 (Bur- ger, C.J., dissenting). The Chief Justice later wrote the majority opinion in *Foley* and quoted from his *Mauclet* dissent. *Foley v. Connelie*, 435 U.S. at 295.

118. *Foley* involved the police function and *Norwick* involved public school teaching. In the former case, a policeman by his acts could deprive citizens of their liberty, and in the latter case, the teachings of the instructor would indoctrinate young minds. It has been observed in another context that teachers shape "the attitude of young minds towards the society in which they live." *Adler v. Board of Educ.*, 342 U.S. 485, 493 (1952). *See also Note, Aliens' Right to Teach: Political Socialization and the Public Schools*, 85 YALE L.J. 90 (1975).

119. One commentator has suggested that "to include police officers in the category of office-holders who govern, or whose identity determines the community's basic conception is to expand that category dramatically and unjustifiably." *L. Tribe, American Constitutional Law* 97 (Supp. 1979).

120. 403 U.S. 365 (1971).
criminatory policy through its proprietary interest in disbursing welfare benefits. In restricting its funds to the privileged citizenship class, the state completely ignored the fact that a citizen of another state could receive aid even though such a citizen had no greater claim to Arizona's resources than an alien. Arizona's scheme resulted in differing treatment of citizens of another state and citizens of another country. The former could lay claim to welfare benefits while the latter were excluded solely on the basis of their alienage. But both classes of people could be classified as foreigners with respect to Arizona. This unequal treatment violated the fourteenth amendment of the Constitution.

Such unequal treatment has been the failing of many statutes affecting the rights of aliens. Such statutes have also had the effect of creating impermissible inroads into the immigration powers of the federal government. If the government alone enjoys the right to prescribe immigration and naturalization requirements, states cannot impinge on that right through discriminatory alienage classifications. This federal preemption of immigration powers restricts a state's freedom to impose certain limitations that would effectively nullify aliens' rights.

It may be different, however, when federal restrictions come into play, for in the exercise of its immigration powers Congress may impose restrictions and limitations on aliens. It is because of the exclusive power granted to Congress in this area that there is such narrow judicial review of congressional actions. Thus, although the state of Arizona encountered insuperable difficulty in meeting the constitutional challenges to its welfare scheme, the federal government in Matthews v. Diaz was able to sustain its durational residency requirement for aliens in its medical insur-

121. Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).
122. U.S. Const. art. I, § 8, cl. 4.
123. Matthews v. Diaz, 426 U.S. 67, 81 & n.17 (1976). In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), the Supreme Court overturned a federal civil service regulation restricting federal employment to citizens. The Court recognized that a legitimate basis for requiring citizenship for federal employment might exist but that such a restriction could be imposed only by Congress or the President. Such a restriction might have as its basis the President's interest in negotiating treaties with other nations or the congressional interest in providing an incentive for aliens to become naturalized. Id. at 104. President Ford subsequently confined the competitive federal service to citizens by Executive Order No. 11,835, 5 C.F.R. § 7.4 (1980), which was sustained in Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978), cert. denied, 441 U.S. 905 (1979). A due process challenge recently failed in Mow Sun Wong v. Campbell, 49 U.S.L.W. 2193 (9th Cir. 1980).
124. "The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." Matthews v. Diaz, 426 U.S. 67, 81-82 (1976).
The government's conferral of welfare benefits on citizens would not constitutionally require similar treatment for all aliens. Further, the Court did not subject the federal statute considered in *Diaz* to strict scrutiny as it did the state statute in *Graham*. It is the business of the federal government to make distinctions between aliens; that is normally of no concern to states. It was quite reasonable, said the Court in *Diaz*, for Congress to prescribe a residence requirement for aliens to be eligible for medical insurance.\(^{126}\) As aliens showed a closer affinity to the country, they would establish eligibility for the program.\(^{127}\)

The significance of the Court's minimal scrutiny in *Diaz* can be underscored by suggesting that similar treatment of aliens by a state would have evoked strict scrutiny by the Court.\(^{128}\) One justification asserted for the lenient standard was that the statutory discrimination occurred not between aliens and citizens but rather within the class of aliens.\(^{129}\) This ground had been advanced previously to the Court as a pretext for state discrimination against aliens, but without success.\(^{130}\) In *Diaz* it was apparently different because the Court was dealing with a federal, rather than a state, classification. But if it was true in *Nyquist v. Mauclet* that the discrimination was not merely within the class of aliens, then the same observation could be made about the situation in *Diaz*.\(^{131}\) A durational residency requirement was imposed on aliens but not on citizens; and, however one looks at it, this feature crystallized the difference between the eligibility of citizens and the eligibility of aliens for participation in the program.

The Court's view that Congress need not provide all aliens with the benefits accorded to citizens did not strengthen the case for minimal, rather than strict, scrutiny.\(^{122}\) Nor was *Diaz* converted

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126. *Id.* at 83.
127. *Id.*
on that basis into a case of discrimination within the alien class only.\textsuperscript{133} A state is usually called to strict account for its discrimination against resident aliens, a class very much akin to citizens in many respects. In \textit{Diaz} the federal interest was sustained on a mere reasonable interest even though the plaintiffs included some resident aliens. Even if the Court believed that minimal scrutiny was all that was required in dealing with the nonimmigrant plaintiffs, that rule should not have been applied to immigrant plaintiffs,\textsuperscript{134} for immigrants had been regarded previously as "a prime example of a 'discrete and insular' minority for whom \ldots heightened judicial solicitude is appropriate."\textsuperscript{135} Perhaps the Court did not think it necessary to search for a distinction between the nonimmigrant plaintiffs and the immigrant plaintiffs.\textsuperscript{136} But in avoiding that difficulty the Court deprived the resident aliens of the judicial deference they had come to expect, particularly in the context of state classifications.

Aliens have also encountered difficulties in obtaining state financial assistance. Occasionally such benefits are restricted to citizens, or to persons who have declared their intention to become citizens. One of the latest challenges in this area came in \textit{Nyquist v. Mauclet},\textsuperscript{137} in which the Court declared a statute unconstitutional because it violated the equal protection clause of the fourteenth amendment and could not survive the strict scrutiny test. The state argued that the statute did not discriminate on the basis of alienage because aliens who had declared an intention to become citizens were entitled to share in its largesse. The state thus suggested that the statute\textsuperscript{138} distinguished only

\begin{itemize}
\item \textsuperscript{133} Rosberg, \textit{supra} note 131, at 290-91.
\item \textsuperscript{134} The recent challenges to statutory classifications were all made by lawful permanent residents and the Court applied the usual strict scrutiny. But the challenged statutes also excluded nonimmigrants. However, that did not affect the application of strict scrutiny. \textit{See}, \textit{e.g.}, \textit{In re Griffiths}, 413 U.S. 717 (1973).
\item \textsuperscript{135} Graham \textit{v. Richardson}, 403 U.S. 365, 372 (1971) (citing the famous footnote in United States \textit{v. Carolene Prod. Co.}, 304 U.S. 144 (1938), where the Court said that it would invalidate any legislation that was affected by prejudice against "discrete and insular minorities." \textit{Id.} at 152-53 n.4).
\item \textsuperscript{136} The nonimmigrants in \textit{Diaz} were Cuban refugees whom the Attorney General paroled into the United States without their being subject to normal numerical limits. 8 U.S.C. \textsection 1182(d)(5) (1976). However, these parolees were not deemed to be lawful permanent residents under the statute. Nevertheless, because of the Attorney General's discretionary power, these refugees could stay indefinitely. The Refugee Act of 1980 no longer allows the parole power to be used to admit groups of refugees. The Attorney General must have compelling reasons to parole an alien as a refugee rather than admit him as a refugee under the normal flow provisions. \textit{Refugee Act of 1980}, Pub. L. No. 96-212, \textsection 203(f), 94 Stat. 107.
\item \textsuperscript{137} \textit{432 U.S.} 1 (1977).
\item \textsuperscript{138} The statute provides in pertinent part:
\begin{quote}
\textit{Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified...}
\end{quote}
\end{itemize}
within the alien class and not between citizens and aliens. That argument had met with little success in *Graham v. Richardson*, where the statute in question restricted the grant of welfare benefits to those aliens who had met the durational residency requirement. In following *Graham*, the Court reiterated that it was not necessary to have an absolute ban against all aliens provided aliens as a class were subject to discrimination.

The state offered other novel arguments to sustain the statute. It suggested that the statute provided an incentive to aliens to become citizens and that the restriction of aid to those who were, or who would become, voters was meant to raise the educational standards of the electorate. If it was important to the state to provide an incentive to aliens to seek naturalization, that concern should not have been reflected in discriminatory state legislation because the federal government possesses exclusive power over immigration and naturalization.

The justifications proffered were particularly significant because they related to the development of the political community, a feature discussed in cases as recent as *Sugarman* and *Foley*. But the Court could not fit the *Mauclet* situation within the narrow exception of *Sugarman*, which allowed the state to take alienage into account in defining the qualifications of voters or of "elective or important non-elective officials who participate directly in the formulation, execution or review of broad public policy." The *Sugarman* limitation which had proved so troublesome in *Foley* was artfully used this time to put the state's objectives in proper perspective. Although it was desirable to have an informed and educated electorate, that objective could be accomplished without subjecting the aliens in *Mauclet* to such discrimination. It was easy for the Court to conclude that there was no unfairness in permitting resident aliens to share in the same aid programs to which they had contributed their taxes.

Chief Justice Burger seemed somewhat troubled in *Mauclet* that the Court was depriving the state of an opportunity to ensure that only those persons who had given a commitment to the state

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140. *Id.* at 11 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).
would share in its financial awards. Unfortunately, that argument seemed to relate too closely to the state's desire to provide an incentive for aliens to become naturalized. The Chief Justice's suggestion that the state had a right to deny assistance to "transients" who were not willing to become citizens somewhat misstated the position of resident aliens. Such aliens cannot in any sense be termed "transients" because they normally intend to establish a continuing and lasting relationship with their new homeland and they are admitted on that basis. Thus, it was an unfortunate use of the term because it suggested that resident aliens have no roots in the community.

The required declaration of intent to assume American citizenship did not really involve the question of the aliens' intent to remain in the state. The likelihood that such aliens would continue to reside there was only tenuously related to their becoming citizens of the United States. If the state had rested its restrictions on a desire to help those persons who were likely to make valuable contributions as residents of the community, the state statute should probably have dealt with domicile rather than citizenship. In that event, the state would have had to apply the restriction generally to aliens and citizens alike.

The argument that the aliens were able to redeem themselves simply by declaring their intent to become citizens did not obviate the constitutional infirmity of the statute discussed in *Mauclet*. Although aliens can usually become citizens after fulfilling a prescribed residence requirement, they do not cease being a "discrete and insular minority" by virtue of their ability to assume a status which shields them from the state's discrimination. There is something to be said for not allowing a statute to avoid the "suspect classification" treatment simply on the basis of

141. *Id.* at 14 (Burger, C.J., dissenting). The Chief Justice also said that the state should be allowed to act in any reasonable manner if a fundamental interest is not involved. *Id.* If alienage is a suspect classification, then it should not matter whether a fundamental interest is affected for strict scrutiny to apply.


144. Justice Rehnquist saw a distinction between the situation in *Mauclet*, where the aliens could remove themselves from their disabling status by declaring their intent to become citizens, and the situation in *Griffiths*, *Sugarman*, and *Graham*, where the aliens were for a time unable to do anything about their status. He could not agree that the aliens in *Mauclet* were a "discrete and insular" minority. *Nyquist v. Mauclet*, 432 U.S. at 20 (Rehnquist, J., dissenting). His ultimate position would be that, unlike race or nationality, alienage is an alterable trait and therefore would not give rise to a suspect classification. See *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).
the alien's ability to alter his status in this way. The reality is that the intent to assume citizenship does not negate the discrimination against the alien. A restriction is placed upon him that is not placed upon citizens. The apparent coercion to change one's status does not change the basis of the discrimination.

In *Griffiths*, the Court found unconstitutional a Connecticut rule because it discriminated against aliens generally; the Court did not distinguish between aliens who had resided in the United States less than five years and those who were eligible for citizenship because they had fulfilled the five-year residence requirement. Thus, the Court did not seek to restrict the suspect class to those who were unable to remove themselves from the alienage disability. The scrutiny should be no less searching if the discrimination is against aliens only, even if such aliens are able to bring themselves outside the affected class by affirming their intention to become citizens as soon as possible. It is submitted that strict scrutiny is mandated if a classification is based simply on alienage and reaches aliens as a class even though they may not all be subject to the restrictions imposed. Although it is true that there is no constitutional requirement that states should dispense their financial resources to aliens, once the state makes such awards, it should accord citizens and resident aliens similar treatment unless there is some compelling reason that it should be otherwise. The basic question ought to be whether the state has a substantial interest in promulgating the classification in question and whether that classification concerns aliens only, even though it may not cover all aliens.

Moreover, the state's burden is in no way alleviated by a justification based on economic incentives to its citizens. That approach comes perilously close to the special public interest doctrine which has been long discredited. Assuming that the state's resources are not limitless, the state should nevertheless be called upon to demonstrate the necessity of preserving them solely for citizens of the United States and of withholding them from resident aliens who themselves contribute to the same program. It is for these reasons, therefore, that the Court strictly scrutinized the statute in *Mauclet* and found it wanting.

145. The alien in *Griffiths* was eligible for citizenship, but she did not intend to apply for it. 413 U.S. 717, 718 n.1 (1973).
It is not unusual for aliens to miss certain benefits because a particular state has classified all aliens as nonresidents. The situation arises more frequently when an alien student in a state university seeks the benefits of the lower tuition rate accorded to state residents. The objectionable feature of the classification in such cases is the irrebuttable and conclusive presumption that all aliens are nonresidents, even though many of them may be lawfully admitted aliens who have in fact established residence in the state. That presumption works a violation of due process under the fourteenth amendment because the alien is denied the opportunity to establish his status as a state resident. The presumption of nonresidency is somehow intertwined with the state's interest in allocating its limited resources to its own citizens. But it is difficult to sustain this policy in view of Graham's holding that a state's fiscal integrity cannot be used as a justification for invidious discrimination against aliens. Such objectionable treatment of aliens requires strict judicial scrutiny, not because of the involvement of any basic constitutional right, but because of the suspect nature of the classification.

Other considerations may come into play if a nonimmigrant alien asserts rights to benefits. If state law does not preclude a nonimmigrant from establishing domicile within the state, then a denial of benefits to him would rest on some basis other than nonresidence. For example, if a state university refuses in-state tuition benefits to nonimmigrants even if they are able to establish domicile, the state may predicate that refusal on a desire to

147. See Vlandis v. Kline, 412 U.S. 441 (1973). The presumption of nonresidence for aliens had previously caused mischief in Jagnandan v. Giles, 379 F. Supp. 1178 (N.D. Miss. 1974), aff'd, 538 F.2d 1166 (5th Cir. 1976), cert. denied, 422 U.S. 910 (1977). The statute there had branded all aliens as nonresidents without giving them an opportunity to rebut the presumption. The statute was sweeping because it applied the presumption to immigrants and nonimmigrants alike. It was difficult for the state to justify its fiscal concerns in the face of this invidious discrimination against aliens. There was no compelling interest that could support the exclusion of all aliens from resident tuition benefits.

148. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), where the Supreme Court held that education is not a fundamental right. In Mauclet, Chief Justice Burger said: "Where a fundamental personal interest is not at stake—and higher education is hardly that—the State must be free to exercise its largesse in any reasonable manner." He found the strict scrutiny test inapplicable. 432 U.S. at 14 (Burger, C.J., dissenting).


150. In Elkis v. Moreno, 435 U.S. 647 (1978), the nonimmigrant aliens held visas (G-4) that were available to employees of international organizations and their families. They were denied in-state tuition because they were not regarded as domiciliaries of the state. The Supreme Court certified the following question to the Maryland Court of Appeals: "Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as
equalize educational costs between those who pay state taxes and those who do not. However, many classes of nonimmigrants do contribute to state programs by the payment of taxes. The question remains whether this is a reasonable place to draw the line between the beneficiaries and the nonbeneficiaries of a particular state program.\textsuperscript{151} If a nonimmigrant has established domicile within a state, then it would be difficult to separate him from other state residents on the basis of cost equalization. That motive should dictate that the state deny benefits to all persons who have not borne the cost burden. Therefore, immigrant status would be irrelevant.

There may be other bases for distinguishing the eligibility of immigrants and nonimmigrants for certain state benefits, such as in-state tuition rates, which do not involve fundamental rights. The state may have a legitimate interest in assuring that such benefits be conferred on students who, having abandoned their former domicile, intend to live indefinitely within the state. Most nonimmigrants cannot legally form that intent under federal law by virtue of their visa status.\textsuperscript{152} The question of intent cannot be avoided by the fact that no congressional restriction was placed on certain nonimmigrants, such as employees of international organizations.\textsuperscript{153} The absence of restrictions in such cases may be explained in part by a congressional objective to facilitate the functioning of the officials in these nonimmigrant classes, rather than by any attempt to belittle the intent requirement. Moreover, a matter of state law of becoming domiciliaries of Maryland?" 435 U.S. at 668-69. The Maryland Court of Appeals answered that question in the negative in Toll v. Moreno, 284 Md. 425, 397 A.2d 1009 (1979). The Attorney General of Maryland then requested the Supreme Court to take up the case again. However, the Court remanded the case to the district court for further consideration of the new constitutional issues in light of the university's decision to exclude the nonimmigrants from in-state tuition benefits regardless of their ability to become domiciliaries of the state. Toll v. Moreno, 441 U.S. 458 (1979).

151. For example, nonimmigrant students can work with the proper permission. Intra-company transferees, professors, and diplomats are among those who can come to the United States to work. See 8 U.S.C. § 1101(a)(15)(A), (L) (1976); 8 U.S.C.A. § 1101(a)(15)(H), (J) (West Supp. 1980).

152. A student visa is issued only to someone who wants to enter the United States temporarily to pursue a course of study. 8 U.S.C. § 1101(a)(15)(F) (1976).

153. Such employees hold "G-4" visas and are not asked whether they intend to live permanently in the United States. Thus, these nonimmigrants can determine what they want to do about their domicile without putting their visa status in jeopardy, provided they remain employees of an international organization recognized in the statute. 8 U.S.C. § 1101(a)(15)(G)(iv) (1976). See also Elkins v. Moreno, 435 U.S. 647, 666 (1978).
even if such officials do not run afoul of federal law by harboring an intent to remain indefinitely within the country, they are not normally required to pay the full panoply of state taxes.\textsuperscript{154} Thus, while they may indeed intend to become residents of the state, they can legally avoid some of the responsibilities that would normally flow from that alliance. The state's legitimate interests in cost equalization would not be fulfilled, therefore, by granting equal benefits to this nonimmigrant class. However, if the state determines that a nonimmigrant is not precluded from establishing state residence, then its interest in cost equalization would have to be met not by determining immigrant status, but rather by reaching the various classes of contributors. And while there is a very small class of nonimmigrants not subject to the usual state assessments, many nonimmigrants do contribute in one way or another to the programs in which they want to share.\textsuperscript{155}

If a state statute denies a benefit to all nonresidents, whether they be aliens or citizens, the important criterion seems to be the nonresidence rather than the alienage of the persons excluded. In that case, the courts should not subject the statute to strict scrutiny.\textsuperscript{156} The alien's assumption of permanent residence in the United States would not automatically result in the establishment of residence for state purposes. Once the state sets its own residence standards, it would apply to both citizens and aliens alike. Therefore, the exclusion of nonresident aliens in this context would have a logical relationship to the state's objective of assuring that certain benefits be dispensed to those who have chosen to settle within its jurisdiction.

There is a slight problem of overinclusiveness with respect to the exclusion of all nonresident aliens from the category of state residents.\textsuperscript{157} However, if a rational basis approach is taken towards the exclusion, it can be seen that the state's dependence on

\textsuperscript{154} This was one of the issues raised in Elkins v. Moreno, 435 U.S. 647 (1978). The university's Intercampus Review Committee denied the aliens' appeal for in-state tuition in part because neither the aliens nor their parents were subject to the "full range of Maryland taxes." \textit{Id.} at 653. That view was sustained by the university's president. \textit{Id.} at 653-54.

\textsuperscript{155} If a nonimmigrant alien has worked and lived in the community, he has paid some kind of taxes. Sometimes an alien qualifies for certain benefits without being lawfully admitted. In Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), \textit{cert. denied sub nom.} Shang v. Holley, 435 U.S. 947 (1978), an alien plaintiff was able to qualify for benefits under the Aid for Dependent Children (AFDC) program because the Immigration and Naturalization Service permitted her to stay indefinitely because of her citizen children. She was deemed to be in the United States under color of law and qualified therefore under a federal regulation granting benefits to "an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law. . . ." 553 F.2d at 848-49.

\textsuperscript{156} \textit{See} Rosberg, \textit{supra} note 131, at 313.

\textsuperscript{157} \textit{Id.}
the federal categorization of nonimmigrants is supportable. Permanent resident aliens enter the United States with some expectation of staying indefinitely. The same cannot be said for nonimmigrants. Although some of them are not required to give any assurance of maintaining their foreign domicile, still, nonimmigrants are admitted for a specific purpose and a limited time. Furthermore, once admitted, they do not have the same responsibilities as resident aliens. This difference has not escaped the Supreme Court, which has emphasized in its decisions dealing with alienage classifications that resident aliens share many of the duties and responsibilities imposed on citizens. Thus, although nonresident aliens may be disadvantaged to some extent by a statutory scheme that excludes them from participation in state benefits, a court should look only for a rational basis that supports such treatment. If the state chooses to rely on the federal benchmark that constitutes lawful permanent residence, then that reliance should not be upset by the possibility that some nonimmigrants may in fact reside in the state for an extended period. The state’s approach to the determination of residence need not take into account every conceivable class of nonimmigrant. If only a rational approach is required, the existence of some unfairness in the statutory scheme should not by itself prove its unconstitutionality.

The result should be otherwise if the statute denies benefits to all aliens. In that case the disabling feature is alienage and the statute would be suspect immediately. The statute would be constitutionally unacceptable because of its reliance on alienage rather than nonresidence for a denial of the benefit. However, if the nonresident alien is isolated because of other statutory requirements which he cannot meet, including residence, then the statute should not fall victim to strict scrutiny.

158. Most nonimmigrants must show that they have a residence in a foreign country that they do not intend to abandon. See, e.g., 8 U.S.C. § 1101(a)(15)(B) (1976) (temporary visitors for business or pleasure); Id. § 1101(a)(15)(F) (students).
160. See Rosberg, supra note 131, at 313 & n.144.
161. Id. at 314. It may be different though where a statute absolutely deprives illegal aliens of educational opportunities. See In re Alien Children Educ. Litigation, 49 U.S.L.W. 2088 (S.D. Tex. 1980).
CONCLUSION

There is no doubt that aliens have made great strides in their quest for equal opportunity. They have had to dispel certain legal myths about their loyalty, competence, and disposition. Now that the special public interest doctrine is no longer fashionable, aliens have found it easier to counteract the other arguments that have been made in favor of alienage restrictions.

States have had no success in preempting the federal role in immigration. This notable lack of success should not be distressing because lawfully admitted aliens should not be subject to the harassment of local laws that curtail their right to earn a living. In addition, such local intervention cannot be permitted to nullify the alien’s right to travel freely around the country. That right is infringed upon to the extent that aliens are denied access to many benefits provided by the states.

It is also encouraging that the Court has been rather strict in requiring not only that the governmental interest supporting discrimination be legitimate and substantial, but also that the classification designed to further that interest be necessary and precise. The adherence to this requirement has produced discomfort for those who vainly espouse the relevance of the alien’s loyalty and allegiance. The loyalty question bears no substantial relationship to the ends sought to be achieved by the classification, and a call for preservation of the American heritage has not produced any widespread sympathy for alienage restrictions. Thus, attention is now focused on the qualifications for a particular position. Such qualifications can normally be ensured through testing or some other appropriate procedure. However, if the state is involved in the classification of important nonelective positions that require the formulation, execution, or review of broad public policy, the discriminatory classifications need meet only the rational basis test. The same may be said for the qualifications of voters, elected officials, and other positions which go to the heart of representative government.


163. The Court said in Sugarman v. Dougall: “But our scrutiny will not be so demanding where we deal with matters resting firmly within a state’s constitutional prerogatives.” 413 U.S. 634, 648 (1973). In Foley v. Connelie, the Court used this language: “In the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position. A state may, therefore, consonant with the Constitution, confine the performance of this important police responsibility to citizens of the United States.” 435 U.S. 291, 300 (1978) (footnote omitted).

The difficulty lies in identifying those functions which are at the core of representative government. Before Foley the Court seemed destined to construe the political community concept rather narrowly. Perhaps these earlier cases are distinguishable because they involved the curtailment of rights that were necessary for the alien to function in the community. Thus, although the Court conceded the right of aliens to pursue an education and to earn a living, it restricted the right to govern to citizens.\textsuperscript{165} The Court will, therefore, examine each position to determine whether “it involves discretionary decision making, or execution of policy, which substantially affects members of the political community.”\textsuperscript{166}

\begin{footnotesize}
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\item[166.] Foley v. Connelie, 435 U.S. 291, 296 (1978) (footnote omitted). This test is not particularly helpful because it is rather broad. The “political community” exception is not sufficiently precise for a proper balancing of the alien’s rights and the state’s interests. See Comment, \textit{The Constitutional Status of State and Federal Governmental Discrimination Against Resident Aliens}, 16 HARV. INT’L L. J. 113, 125 (1975).
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