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Discrimination Against Resident Aliens: Diminishing Expectations of Equal Protection

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CASENOTES

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Vargas v. Strake 710 F.2d 190 (5th Cir. 1983), *cert. granted*, *Bernal v. Fainter*, 52 U.S.L.W. 3440 (U.S. Dec. 5, 1983) (No. 83-630)

The United States District Court for the Southern District of Texas[1] found that the United States citizenship requirement for notaries public in article 5949(2) of the Texas Statutes[2] violated the plaintiffs' equal protection guarantee under the fourteenth amendment of the Constitution.[3] At the time the action was brought, plaintiffs Margarita Vargas and Efrem Bernal were Mexican citizens lawfully residing in Texas. They sought a judgment declaring[4] that article 5949(2) was unconstitutional because it discriminated against aliens and thus violated the equal protection clause. The United States Court of Appeals for the Fifth Circuit, *held*, reversed: Article 5949(2) of the Texas Statutes does not violate the plaintiffs' equal protection guarantee because the citizenship requirement for the notary public position serves a legitimate political interest of the State of Texas.[5] *Vargas v. Strake*, 710 F.2d 190 (5th Cir. 1983), *cert. granted*, *Bernal v. Fainter*, 52 U.S.L.W. 3440. (U.S. Dec. 5, 1983) (No. 83-630).

In 1978, Efrem Bernal, a resident alien living in Texas, applied to become a notary public in that state. The Secretary of State

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1. The district court's opinion is not reported.

2. TEX. STAT. ANN. art. 5949(2) (Vernon Supp. 1982); the article provides: "To be eligible for appointment as a Notary Public, a person shall be a resident citizen of the United State and of this state, and at least eighteen (18) years of age."

3. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

4. Plaintiffs sought declaratory judgment pursuant to 28 U.S.C. §§ 2201, 2202 (1948).

5. The court additionaly held that the action was not moot because one of the plaintiffs was still a Mexican citizen, and it also held that plaintiff Bernal was not required to exhaust state administrative remedies.

denied his application because he did not fulfill the citizenship requirement of article 5949(2). The Secretary's decision was upheld at a state administrative hearing. In 1979, Margarita M. Vargas also applied to become a notary public in Texas. Her application was held in abeyance until she could become a United States citizen. She finally obtained her citizenship after the present action was initiated.

When their applications for the notary public positions were made, both Vargas and Bernal were Mexican citizens permanently residing in Texas. Vargas was employed as a secretary/receptionist in a real estate firm, having completed much of her education in the United States. Bernal was a paralegal assistant to a legal aid firm in Texas. Prior to that, he was employed in another legal aid program in Indiana. He had been a notary public from 1974 to 1978 in Indiana.

When the plaintiffs' applications to become notaries were denied, they brought an action in federal district court seeking a declaratory judgment to invalidate the citizenship requirement in article 5949(2). Vargas and Bernal both claimed that, as Mexican citizens lawfully residing in the United States, they were being denied equal treatment of the laws solely by virtue of their status as aliens. The district court agreed with the plaintiffs and declared that the citizenship requirement of article 5949(2) was unconstitutional because it violated the fourteenth amendment of the Constitution.[6] The plaintiffs also sought and obtained injunctive relief to compel the Texas Secretary of State to consider their notary public applications in spite of their alienage (i.e. their status as aliens).

The Secretary of State appealed the district court's decision, raising four issues: a) whether the action was moot as to Vargas; b) whether Bernal was required to exhaust state administrative remedies; c) whether the plaintiffs were entitled to an award of attorney's fees and court costs; and d) whether the district court applied the correct standard in reviewing the constitutionality of the statute in question.[7] The court of appeals summarily dealt with the first two issues holding that: the action was moot as to Vargas,[8] but that Bernal had a valid claim which he was entitled to bring di-

6. *See supra* note 3.

7. Vargas v. Strake, 710 F.2d 190, 192 (5th Cir. 1983).

8. The action was moot as to Vargas because she was already a citizen by the time of the appeal.

rectly in federal court.[9] Because the court of appeals reversed and held for the defendants, it did not have to consider the issue relating to court costs and attorney's fees. Most of the *Vargas* opinion deals with the question of what standard of review should be used in the evaluation of a statute which undeniably discriminates against aliens.[10]

When a group of people complain that a state statute discriminates against them, it is usually because the effect of the statute is to impose hardships upon them while not imposing such hardships upon others. In such situations, the aggrieved class will allege that it is not receiving the equal protection of the laws because the particular discriminatory classification serves no legitimate state objective. The courts traditionally have shied away from these cases, leaving it up to the legislature and the voting constituency to resolve these problems. At most, the courts have merely inquired whether the discriminatory classification in the statute bears some rational relation to the purpose of the statute. The answer to this inquiry is usually in the affirmative, and the allegedly discriminatory statute is upheld.

There are, however, certain statutes which are subjected to a more probing scrutiny because of the nature of the classifications they make. For example, there are statutes which directly or indirectly affect the rights of a class of people who comprise minority groups, such as blacks, hispanics or American Indians. These statutes receive a "strict" scrutiny by the courts. The rationale is that minorities do not have sufficient voting power to vindicate their rights at the voting booth. Therefore, they need special protection by the courts to guard against statutes which would disenfranchise them from their rights.

Courts carefully examine this type of discriminatory statute under a strict scrutiny standard of review. Under this standard of review, there *must* be a compelling state interest justifying the purpose of the statute and the means by which the purpose is accomplished must be so narrowly drawn that there is no less restrictive alternative. If there appears another way to achieve the same end without making a discriminatory classification, the statute will not be upheld.[11]

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9. *See* Public Utilities Comm'n v. United States, 355 U.S. 534, 539-40 (1958).

10. 710 F.2d 190, 192 (5th Cir. 1983).

11. For more information on this subject *see generally*, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 689-601 (1978), L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-

Aliens, as a class, present special problems. For the last century, the Supreme Court has encountered difficulty in determining what standard to use when reviewing a state statute which allegedly discriminates against aliens. Should the courts treat them as a special class which deserves heightened protection because they are ineligible to vote? On the other hand, legally resident aliens are not citizens, thus, should not the states be allowed to make certain preferential distinctions in favor of United States citizens? After all, most legally resident aliens are entitled to become citizens after they meet the federal naturalization requirements.

One of the first major decisions in this area was an 1886 decision, *Yick Wo v. Hopkins*.[12] The Supreme Court found that discrimination based on alienage was impermissible under the equal protection clause of the fourteenth amendment.[13] Aliens were deemed "persons" for equal protection purposes. Therefore, any statute which arbitrarily discriminated against persons on the basis of their alienage could not stand.

Following *Yick Wo* (and until 1946), the Supreme Court applied a standard of review based on a public/private interest distinction. The Court catalogued statutes as affecting either the public interest of the state or the private interests of the individual. Statutes which discriminated against aliens in the private sector were found unconstitutional on the grounds that the state had no legitimate interest in classifying persons in this area. For example, in *Truax v. Raich*[14] the Court invalidated an Arizona law which forced all employers with a workforce of more than five people to make sure that at least eighty percent of their employees were United States citizens. The statute's effect was to substantially reduce the number of jobs available to aliens residing in Arizona and to interfere with the policies of private employers. The Court held that a state can not deny aliens the opportunity to work because "the right to work for a living in the common occupations of the community, is of the very essence of the personal freedom and op-

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1136 (1978). *See also*, Barret, *Judicial Supervision of Legislative Classifications — A More Enlightened Role for Equal Protection?*, 1976 B.Y.U.L.REV. 89; Gunther, *The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV.L.REV. 1 (1972); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA.L.REV. 945 (1975).

12. 118 U.S. 35 (1886).

13. *See supra* note 3.

14. 239 U.S. 33 (1915).

portunity that it was the purpose of the fourteenth Amendment to secure."[15] The Court in *Truax* also decided that the Arizona statute conflicted with federal law which permits aliens to reside and earn a living in any state. Consequently, the Arizona law had to be subordinated to federal policy.

On the other hand, the Supreme Court was less strict when reviewing state laws which imposed restrictions based on alienage where the statutes dealt with the regulation of state property or resources or the public domain. Discrimination against aliens on such grounds was justified because the state had a legitimate interest in regulating property and resources for the welfare of its own United States citizens.[16]

In 1948, the public/private distinction was debilitated with the *Takahashi v. Fish and Game Commission*[17] decision. The Supreme Court held that the State of California could not lawfully deprive an alien of his means of livelihood even if his occupation necessarily involved the depletion of one of California's resources, i.e. its fishing banks. The California Game Commission had refused to issue the plaintiff, an alien, a commercial fishing license because of a state statute which prohibited licensing individuals ineligible for citizenship under federal law. The Court found that although the state had an interest in maintaining its fishing banks for the benefit of its citizens (a "public interest"), it still could not discriminate against aliens so as to deny them the right to earn a living.

In 1971, in *Graham v. Richardson*[18] the public/private distinction was put to rest. The Supreme Court held that states could not withhold welfare benefits to aliens who otherwise qualified for such benefits. The Court noted that Congress had permitted aliens to become permanent residents of the United States and that they are therefore entitled as such residents "to the full and equal bene-

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15. *Id.* at 41.

16. For example, in Patsone v. Pennsylvania, 232 U.S. 138 (1914) the Court found valid a state statute which made it unlawful for aliens to kill wild animals for game. The state could lawfully discriminate against aliens in the management of its resources (game) for the welfare of its citizens. Heim v. McCall, 239 U.S. 175 (1915) approved of a New York statute which permitted only United States citizens to be employed on public works. The state had the right to distribute its resources only to its citizens. Terrace v. Thompson, 263 U.S. 197 (1923) involved the constitutionality of the so-called anti-alien land laws. Aliens were not permitted to hold farm land under a Washington statute. The Court found this discrimination permissible because the distribution of land falls within the state's right to determine its own public policy.

17. 334 U.S. 410 (1948).

18. 403 U.S. 356 (1971).

fit of all state laws for the security of persons and property."[19] The Court declared that classifications based on alienage were inherently suspect, meaning that where such classifications are made there is an implicit presumption of a violation of the Constitution. Therefore, any statute which discriminates on the basis of citizenship would be subject to strict judicial scrutiny.[20] The Court in *Graham* sanctioned a strict scrutiny standard of review for statutes which classified on the basis of alienage, because "[a]liens as a class are a prime example of a 'discrete and insular' minority."[21] Consequently, aliens should be given extra protection by the courts from statutes which would tend to prevent noncitizens from exercising their constitutionally protected rights.

In 1973, the Supreme Court announced two decisions in which statutes which classified on the basis of alienage were struck down as being violative of the fourteenth amendment equal protection clause. The majority opinion in *Sugarman v. Dougall*[22] found a New York statute which flatly prohibited the employment of aliens in the state's competitive civil service class to be invalid. The Court applied a strict scrutiny standard of review in "look[ing] at the substantiality of the state's interest in enforcing the statute in question, and the narrowness of the limits within which the discrimination is confined."[23] The Court noted that because the state has the power and responsibility to define its own political community, it therefore inherently has a legitimate interest in requiring United States citizenship of those people who hold certain governmental positions. Consequently, the state may condition employment on citizenship only of those "officers who participate directly in the formulation, execution or review of broad public policy [because they] perform functions that go to the heart of representative government."[24] Nonetheless, the New York statute in *Sugarman* was held to be so broad that it was overinclusive be-

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19. *Id.* at 378.

20. As already noted, under the strict scrutiny standard of review, there must be a compelling state interest justifying the statute, and the means by which the purpose is accomplished must be closely tailored. *See supra* note 11 and accompanying text.

21. *Graham*, 403 U.S. at 372 (quoting United States v. Carolene Products Co., 304 U.S. 144, 152 n.5 (1938)). The relevant part of the footnote in *Carolene Products* states: "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, . . . may call for a correspondingly more searching judicial inquiry."

22. 413 U.S. 634 (1973).

23. *Id.* at 642.

24. *Id.* at 647.

cause citizenship was a prerequisite for employment as even the most menial office worker or typist. The Court found that the arbitrarily broad sweep of the statute did not meet the purpose of the statute: to ensure that important state decision — and policy-makers would be United States citizens. The court therefore, declared the New York statute unconstitutional.

In *In re Griffiths*[25] the plaintiff challenged a rule promulgated by the Connecticut state supreme court which required that all applicants for the state bar examination be United States citizens. The Court recognized that a state *does* have a legitimate interest in ensuring that state bar applicants have the requisite qualifications, but found that there are other more appropriate means to achieve this end. A flat ban on permitting aliens to take the examination, therefore, was impermissibly overinclusive. The Court also indicated that the restriction deprived aliens of the right to engage in a lawful profession which did not relate in any way to the state's right to manage its own political processes.[26]

In 1976, in *Examining Board v. Flores de Otero*, [27] the Supreme Court struck down a Puerto Rican law which prohibited resident aliens from practicing civil engineering privately. The Court found the alienage-based classification unsustainable because it was discriminatory and therefore violated the alien's equal protection guarantee. A year later, in *Nyquist v. Mauclet*[28] the Court applied a strict scrutiny standard of review to a New York statute which prohibited certain resident aliens from receiving financial aid from the state for their higher education. In the Court's view, the state failed to reasonably justify the discrimination, therefore, aliens were being denied equal protection of the laws for no apparent motive. The Court held that the statute was unconstitutional.

In 1978, in *Foley v. Connelie*[29] the Court refused to invalidate a New York statute which limited elegibility for appointment to the state police force to United States citizens. Plaintiff, a resident alien, was denied appointment to the state police force. When his application was refused on the grounds of alienage, the plaintiff sought a judgment declaring that the New York statute was an un-

25. 413 U.S. 717 (1973).

26. As noted in *Sugarman*, 413 U.S. 634 (1973), the Court has consistently found that the states have a valid interest in defining their own political processes and policies.

27. 426 U.S. 572 (1976).

28. 432 U.S. 1 (1977).

29. 435 U.S. 291 (1978).

constitutional violation of his right to equal protection. The Supreme Court did not apply a strict scrutiny standard of review.[30] It looked first to the *type* of profession the state was regulating, namely, state troopers. The Court determined that the police had a wide range of discretionary power and responsibility in the *execution* of state policy,[31] therefore, the state had the prerogative to impose discriminatory restrictions on prospective applicants to the police force. The Court required only that the state demonstrate some rational basis for the citizenship requirement.[32] The state complied by indicating that United States citizenship was rationally related to the function of the police in the community because citizen-police officers are presumed to be familiar with the constitutional framework in which they are required to operate.[33]

In *Ambach v. Norwick*,[34] the Court used a similar analysis to that employed in *Foley*. The statute in question in *Ambach* barred elementary and secondary school teachers from taking positions with the New York State educational system if they were not United States citizens and had not manifested an intention to become citizens. The plaintiffs, who were resident aliens, sought to have the statute declared unconstitutional because it violated their right to equal protection of the law by impairing their ability to seek lawful employment. The Court first inquired into the nature of the profession being regulated by the state and found that public school teachers play a necessary role in the development of democratic and civic values in children. Consequently, educators have to be well acquainted with American politics and democratic institutions to be able to achieve such a goal. The Court agreed with New York's argument that the best way to achieve this educational goal is to require United States citizenship of public school teachers.

In *Cabell v. Chavez-Salido*,[35] a 1982 decision, the Court announced a formal standard of review of state statutes which discriminate against aliens. The plaintiffs in *Cabell* sought a judg-

30. The Court summarized its reasoning by stating that: "[t]he essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens." *Id.* at 297.

31. *See Sugarman*, 413 U.S. at 647.

32. *Foley*, 435 U.S. at 296.

33. *Id.* at 297-300.

34. 441 U.S. 68 (1979).

35. 454 U.S. 432 (1982).

ment declaring a California statute which required United States citizenship of probation officers unconstitutional because it discriminated against aliens and was therefore in violation of the equal protection clause. The Court, relying in part on *Sugarman v. Dougall*,[36] determined that the statute *was* constitutional because "although citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political community."[37] In effect, the Court articulated a new standard of review: if the statute in question imposes a restriction upon aliens to the detriment of their lawful *economic* interests, then the statute would be subject to strict judicial scrutiny.[38] If, however, the statute falls within the state's power to define its own *political* community, the Court will keep judicial inquiry to a minimum.[39]

In *Cabell*, the Court formulated a two-step process to determine on which side of the economic/political equal protection continuum a discriminatory citizenship requirement is situated:

> First, the specificity of the classification will be examined: a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends. . . . Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to 'persons holding state elective or important nonelective executive, legislative, and judicial positions,' those officers who 'participate directly in the formulation, execution or review of broad public policy.'[40]

Under California law, probation officers fall under the general category of peace officers. All peace officers are required by statute to be United States citizens. Even though this mandate is very broad because it encompasses a large class of state governmental positions, the Court found the classification sufficiently tailored to the purpose of the statute. The Court noted that peace officers, in

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36. The Court in *Sugarman* had applied a strict scrutiny standard of review, but limited its holding considerably. *See Sugarman*, 413 U.S. at 646-9.

37. *Cabell*, 454 U.S. at 438.

38. *See supra* notes 18-28 and accompanying text.

39. *Cabell*, 454 U.S. at 438-41.

40. *Id.* at 440 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)). The Court went on to inquire, with reference to the second step: "whether the 'position in question . . . involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community.'" *Id.* at 440-1 (quoting Foley v. Connelie, 435 U.S. 291, 296 (1978)).

their capacity as probation officers, have a broad discretionary role in the execution of state policy. Therefore, California can require citizenship of its probation officers because their duties are within the political interests of the state.

Vargas v. Strake[41] presents the issue of the constitutionality of requiring United States citizenship of persons wishing to become notaries public in Texas. The district court found the restriction unconstitutional under both the strict scrutiny and rational relationship standards of review. It rendered its opinion, however, prior to the *Cabell* decision. The court of appeals in *Vargas* noted this point and proceeded to apply the *Cabell* test to determine whether the discrimination falls on the economic or political side of the equal protection continuum. "[O]ur inquiry . . . should be whether the citizenship requirement imposed by Texas on the position of notary public serves political or economic goals, applying the two-step process . . ." formulated in *Cabell*.[42]

The court of appeals looked first to the specificity of the statutory requirement of citizenship.[43] Because the particular statute deals only with notaries public, the citizenship restriction extends only to notaries. The court found this level of discrimination to be sufficiently narrow to meet the first step of the *Cabell* process. The court next inquired into the role of the notary public within the political processes of the state by considering whether: "a notary public in Texas exercise[s] discretion in making decisions which substantially affect members of the political community?"[44]

To answer this question, the court reviewed the duties of the notary as provided by the Texas statutes. It noted that, in Texas, a notary has the power to acknowledge written instruments such as wills, leases, deeds and mortgages. Notaries may take depositions out of court, they may administer oaths and, at their discretion, may refuse to perform these acts if there is some uncertainty as to the identification of the persons with whom they are dealing.[45] Documents certified by a notary, such as wills, are, in certain cases, admissible as evidence without further proof.[46] The court in *Vargas* found that notaries public in Texas perform a variety of discre-

41. 710F.2d 190 (5th Cir. 1983).
42. *Id.* at 194.
43. *See supra* note 2.
44. 710 F.2d at 195.
45. TEX. STAT. ANN. art. 5954 (Vernon Supp. 1982).
46. TEX. PROB. CODE ANN. art. 59 (Vernon 1971).

tionary activities which affect the functioning of the state government. The court concluded that the discriminatory restriction passed the *Cabell* test because: a) an examination of the Texas statute reveals that the discrimination against aliens is narrowly confined, and b) the role of the notary public in the political community of the state is substantial enough to warrant the statutorily imposed citizenship requirement.

These conclusions place the notary public position within the political interests of the state. The court in *Vargas* upheld the constitutionality of the statute by applying a rational relationship test. It stated that "[t]he citizenship restriction in art. 5949(2) bears a rational relationship to the state's interest in the proper and orderly handling of a countless variety of legal documents of importance to the state."[47]

The dissenting judge took issue with the majority opinion's characterization of the role the notary plays in the functioning of the state government. The dissent pointed out that a lawyer performs duties similar to those of a notary, and yet the states cannot require lawyers to be citizens but can impose the restriction with respect to notaries.[48] The dissent also found that because notaries perform nothing more than ministerial functions, it is by a stretch of the imagination to hold that they perform discretionary decisionmaking or execute broad public policy. Because a notary's duties do not affect the political goals of the state, the dissent concluded that there is no justifiable reason to require a notarial applicant to be a citizen.

Conclusion

The Supreme Court, in *Cabell v. Chavez-Salido*,[49] has set out a standard of review somewhere between strict scrutiny and rational relationship tests. The initial and ultimately decisive determination is whether a discriminatory statute affects either the *economic* interest of the individual or the *political* interests of the state. The *Vargas* case is an excellent example of the *Cabell* process at work. The court of appeals noted that there is no personal economic advantage to being a notary public.[50] This observation

47. 710 F.2d at 194.
48. *See In re* Griffiths, 413 U.S. 717 (1973).
49. 454 U.S. 432 (1982).
50. 710 F.2d at 191.

appeared to automatically place the notary public position within the political interests of the state. After a perfunctory analysis of the statute and of the notary's duties, the court held that a state may discriminate against aliens who wish to become notaries public.

Vargas pinpoints one of the problems with the *Cabell* test. It is true that a notarial position is not a viable way of earning a living, consequently, the discrimination against aliens does not affect their economic interests. Nevertheless, as noted in the *Vargas* dissent, it cannot be said that notaries perform any essential governmental tasks that further the political interests of the state. This is true especially in light of *In re Griffiths*, which held that a state cannot prohibit legal resident aliens from taking the bar examination. If an alien can become a lawyer, there is no reason why he or she should not be allowed to become a notary public as well. Many of the notarial tasks can be performed by lawyers. Concededly, there is a greater economic interest in becoming an attorney than in becoming a notary. The focus of the *Cabell* test, however, is on the political aspect, if any, of the classification which "may be applied . . . only to . . . those officers who 'participate directly in the formulation, execution or review of broad public policy.'" Where does this leave a resident alien, such as the plaintiff in *Vargas*, who can not show that a discriminatory statute will adversely affect his economic welfare? The *Cabell* test leaves no room for additional considerations.

Another problem with the *Cabell* test is that the economic/political distinction will seldom be a clear one. In *Vargas*, the discriminatory classification did not affect the economic interests of resident aliens, thus, the difficulty of making the determination did not really arise. The *Vargas* court nonetheless alluded to the problem by specifically mentioning the fact that the plaintiffs would not be economically disadvantaged by the restriction.[51]

The application of the *Cabell* test, as demonstrated in *Vargas*, places resident aliens in an insecure position. As shown, there are various difficulties with this new standard of review. New problems will undoubtedly arise as more courts begin to apply the test, and other problems will be solved. Yet, one can not help but question the viability of this test when the federal immigration laws are considered. Federal law permits lawful resident aliens to reside and

51. *Id.*

seek employment wherever they wish. Has the Supreme Court preempted the federal government in this area of the law? If the states can now refuse aliens "political" positions (i.e., notaries public), will aliens be forced to acquire citizenship to protect their rights?

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