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Erosion of the Strict Scrutiny Standard

Lauri Waldman

NOTE

Erosion of the Strict Scrutiny Standard as Applied to Resident Aliens: Foley v. Connelie 98 S.Ct. 1067 (1978)

Edmund Foley, a citizen of Ireland and resident alien[1] lawfully within the United States, applied for appointment as a New York state trooper but was denied permission to take the competitive service examination pursuant to a state law making United States citizenship a prerequisite to such employment.[2] Foley brought a class action suit contesting the statute on the ground that it violated the equal protection clause of the Fourteenth Amendment,[3] and asking for a declaratory judgment on its constitutionality.[4] The three judge federal district court relied on an alleged conflicts of interest problem in the non-citizen officer's performance of certain specified duties[5] and granted the state's motion for summary judgment. In upholding the statute, the court found the state to have a "substantial and compelling interest"[6] in requiring its state troopers to be United States

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1. The term "resident alien" means any noncitizen "lawfully admitted" to the United States for permanent residency under the immigration and naturalization procedures specified by federal statute. *See* 8 U.S.C. §§ 1101(a), 1255(a) (1970). The term "alien" refers to any person not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3) (1970). For the purposes of this article the two terms will be used interchangeably.

2. N.Y. EXEC. LAW § 215(3) (McKinney Supp. 1977), which states, "No person shall be appointed to the New York state police force unless he shall be a citizen of the United States . . . ."

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

4. Foley v. Connelie, 98 S. Ct. 1067 (1978).

5. The possibility of conflict arose, as stated by the Court, from the obligations of a New York state trooper "to make arrests of violators of the federal immigration laws, to participate in the Governor's Detail which provides protection for the Governor and visiting foreign dignitaries, to conduct investigations into matters having to do with government security, and to provide security at events involving foreign visitors . . . ." Foley v. Connelie, 419 F. Supp. 889, 898 (S.D.N.Y. 1976), *aff'd*, 98 S. Ct. 1067. No finding was made by the district court, however, as to why aliens would not perform these functions as competently as citizens. Instead, it chose to rely on the state's assertion that these duties would conflict with the alien's primary loyalty to the country of his nationality.

6. The state argued its interest to be, "the maintenance of public order to effect the preservation of the political structure including the prevention, detection, and prosecution of crime." *Id.* at 898.

citizens. On direct appeal, the United States Supreme Court, *held*, affirmed: A State may, in its discretion, require citizenship as a qualification for certain "'important nonelective executive, legislative, and judicial positions' held by 'officers who participate directly in the formulation, execution, or review of broad public policy'"[7] of which the occupation of state trooper is one. Such state choices will only be scrutinized by the Court to determine whether the citizen-alien distinction made bears some rational relationship to the state interest sought to be protected.[8] *Foley v. Connelie*, 98 S.Ct. 1067 (1978).

Discriminatory legislation against aliens is a comparatively recent development in the history of the United States. All of the original thirteen states permitted aliens to vote[9] and this right was written into the laws and constitutions of twenty-two states and territories during the nineteenth century.[10] The first statutory limitation on immigration was not passed by Congress until 1875; it provided for the exclusion of convicts and prostitutes from the United States.[11] More general exclusion acts, including those refusing entry to foreigners on the basis of nationality, were passed by Congress shortly thereafter.[12] States which had granted voting rights to aliens began to withdraw the privilege in 1848, with Arkansas the last to do so in 1926.[13] This trend towards withdrawal of alien rights and setting of more stringent controls on alien employment was primarily motivated by rapid industrialization, an increasing scarcity of jobs, and the high percentage of noncitizens claiming those jobs.[14] With

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7. Sugarman v. Dougall, 413 U.S. 634, 647 (1973), *cited in*, Foley v. Connelie, 98 S. Ct. at 1071.

8. *Id.* at 4240.

9. *See generally* Minor v. Happersett, 88 U.S. 162, 172-73 (1874).

10. M. KONVITZ, THE ALIEN AND ASIATIC IN AMERICAN LAW 1 (1946).

11. Act of March 3, 1875, ch. 141, 18 Stat. 477.

12. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (denying entry to Chinese laborers for a period of ten years; this act was renewed in 1892). *See also* Act of March 3, 1875, ch. 141, 18 Stat. 477; Act of July 5, 1884, ch. 220, 23 Stat. 115; Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476.

13. D. MCGOVNEY, THE AMERICAN SUFFRAGE MEDLEY 49 (1949).

14. The situation in this country at the time was described by one author as follows:

> By the early twentieth century the foreign-born formed the mass of the wage-earners in every area where manufacturing or mining was practiced. They were to be found in the textile factories of New England, in the mines, mills and factories of Pennsylvania, New Jersey, and New York, in the coal mines and factories of the Middle West, and in the iron ore and copper mines of Michigan and Minnesota. In 1910 the Dillingham Commission reported that in the twenty-one industries it studied, 57.9 per

the Depression came the reservation of more and more occupations for United States citizens and the concurrent disqualification of aliens, by states, for the same occupations.[15]

In 1886, the Fourteenth Amendment was made applicable to aliens as well as citizens in the case of *Yick Wo v. Hopkins*,[16] where the Supreme Court struck down a San Francisco ordinance making it unlawful for any person to maintain a laundry in a wooden building, because of a purported fire hazard. Although neutral on its face, the statute was enforced by authorities almost exclusively against Chinese members of the community. The Court, citing the equal protection clause, declared: "These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."[17] The door was thus opened to the initiation of two basic constitutional doctrines: (1) that the Fourteenth Amendment protection is not limited to citizens, and (2) while a statute may be legitimate on its face, the Court may still invalidate it if, in purpose and effect, it is discriminatory against any class.[18]

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cent of all employees were foreign-born . . . . In some industries, such as clothing manufacture, textiles, coal mining, and slaughtering and meat-packing, the proportion was even higher. In railroad and construction work, too, the Commission found a similar preponderance of the foreign-born.

M. ALLEN JONES, AMERICAN IMMIGRATION 218 (1960).

15. On the nature of such discrimination, one commentator wrote:

> In the United States a condition exists wherein three out of every five jobs are closed to aliens, where four out of every five memberships in labour unions are open to citizens only, and where innumerable laws in each state deter an alien from entering many occupations. Such a condition, when imposed on an alien, results in a tendency to immigrate back home.

H. FIELDS, 26 CLOSING IMMIGRATION THROUGHOUT THE WORLD 674-75 (1932). For in depth studies beyond the scope of this article as to restrictions on alien employment, *see generally* Chin, *Aliens' Right to Work: State and Federal Discrimination*, 45 FORDHAM L. REV. 835 (1977); Das, *Discrimination in Employment Against Aliens-The Impact of the Constitution and Federal Civil Rights Laws*, 35 U. PITT. L. REV. 499 (1974). *See also* note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012 (1957).

16. 118 U.S. 356 (1886).

17. *Id.* at 369.

18. Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012, 1024 (1957).

Twenty years later, in *Truax v. Raich*,[19] the Court expanded the protection of aliens to include the right to work for a living in the "common occupations of the community." On petition of an alien employee, the Court invalidated a state statute making it illegal for employers to employ aliens as more than twenty percent of their work force, reasoning that, without the ability to work, "the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."[20] Although recognizing a Constitutional right of aliens to employment, the Court, however, found such right to be limited in scope.

In dictum, it legitimized the state's power to make reasonable legislative classifications promoting the public health, safety, morals, and welfare. Thus, it determined that if the state could show that the employment of aliens in a particular business would endanger the public, and that the state therefore had a special interest in the reservation of such employment to citizens, the special state interest would be recognized.[21] The immediate result of this dictum was the advancement of several "special interest" theories to sustain discriminatory legislation. These were: (1) A state's proprietary interest in either the subject matter of the occupation,[22] or (2) the occupation

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19. 239 U.S. 33 (1915). Although couched in equal protection language, the decision was based on a finding that the state law conflicted with the federal policy governing immigration and naturalization, and was therefore violative of the Supremacy clause. However, this case laid the groundwork for subsequent decisions with the Court's declaration:

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

Id. at 42.

20. *Id.* at 41. While the Court did not attempt to define with precision what "common occupations of the community" were, it appears to have been concerned with ordinary private enterprise, for which a state could have no legitimate reason in prohibiting aliens.

21. *Id.*

22. Patsone v. Pennsylvania, 232 U.S. 138 (1914) (hunting game within the state's boundaries). *But see* Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) (rejecting the contention that a state's ownership within commercial fishing boundaries is sufficient reason to discriminate against resident aliens).

itself,[23] or (3) a state's police power, by which it could deny employment to aliens in those occupations it deemed so hazardous that it could prohibit the occupation altogether.[24]

The reversal of this trend was precipitated by the footnote in *United States v. Carolene Products Co.*,[25] in which Justice Stone suggested, "(P)rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[26] One derivative of this inquiry, termed the "new equal protection",[27] consists of judicial intervention in the protection of individual choice whenever state action abridges those rights judged to be "fundamental"[28] or a state enacts legislation regarding

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23. Ex parte Lockwood, 154 U.S. 116 (1894) (practice of law). *Contra*, In re Griffiths, 413 U.S. 717 (1973). People v. Crane, 214 N.Y. 154, 108 N.E. 427, *aff'd sub nom.*, Crane v. New York, 239 U.S. 195 (1915); Heim v. McCall, 239 U.S. 175 (1915) (employment on public works projects). *See* Sugarman v. Dougall, *supra* note 7.

24. Asakura v. Seattle, 265 U.S. 332 (1924) (pawnbrokers); Clarke v. Deckebach, 274 U.S. 392 (1927) (denial of license to operate a pool and billiard hall); Trageser v. Gray, 73 Md. 250, 20 A. 905 (1890) (sale of liquor); Commonwealth v. Hana, 195 Mass. 262, 81 N.E. 149 (1907) (hawking and peddling); Wright v. May, 127 Minn. 150, 149 N.W. 9 (1914) (auctioneering); Miller v. City of Niagara Falls, 207 App. Div. 798, 202 N.Y.S. 549 (1924) (sale of soft drinks prohibited aliens because of a possibility of contamination); Gizzarelli v. Presbrey, 44 R.I. 333, 117 A. 359 (1922) (motorbus operators). Some courts equated the character of the alien and his treatment in law with that of a convicted felon in order to justify the discrimination:

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

Ex parte Ramirez, 193 Cal. 633, 650, 226 P. 914 (1924).

25. 304 U.S. 144, 152 n.4 (1938).

26. *Id.*

27. Analysis under the new equal protection is divided into a rigid two tier approach which is often determinative of results—"strict-scrutiny invalidation" and "minimal scrutiny-non-intervention." Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). For an analysis of the doctrine and its applicability to aliens, *see generally* note *Wandering Between Two Worlds: Employment Discrimination Against Aliens*, 16 VA. J. INT'LL. 355 (1976).

28. The rights held to be fundamental by the Supreme Court are, to date, very few in number. They are: procreation, Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535 (1942); voting, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966);

certain "suspect classifications"[29] and cannot justify those actions in terms of a "compelling state interest."[30] Statutes which do not infringe a fundamental right or do not involve a suspect classification are judged under the more deferential "rational basis" test.[31]

The initiation of more stringent guidelines for judicial review of alien-citizen distinctions, in accord with *Carolene Products*, came with the 1971 decision of *Graham v. Richardson*[32] which termed alienage a "suspect classification." Much to the surprise of Constitutional scholars, this decision was made, not by the liberal Warren Court, but by the more philisophically conservative Burger Court. In *Graham*, the Supreme Court unanimously held unconstitutional an Arizona law which conditioned the receipt of state welfare benefits on United States citizenship, declaring for the first time that classifications based on alienage were "[i]nherently suspect and subject to close judicial scrutiny."[33] The Court quickly followed *Graham* with the invalidation of state statutes making citizenship a prerequisite to employment by the state civil service,[34] acceptance to the state bar association,[35] private practice as a civil engineer,[36] and the receipt of

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access to the criminal process, Griffin v. Illinois, 351 U.S. 12 (1956); privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); and right of interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969).

29. Suspect classifications are, as follows: race, McLaughlin v. Florida, 379 U.S. 184 (1964); Loving v. Virginia, 388 U.S. 1 (1967); national origin, Hernandez v. Texas, 347 U.S. 475 (1954); and alienage, Graham v. Richardson, 403 U.S. 365 (1971). Classes such as sex, Craig v. Boren, 429 U.S. 190 (1976); illegitimacy, Trimble v. Gordon, 430 U.S. 762 (1977), and wealth, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973), have been suggested to the Court, and though rejected, may have initiated a third, middle level of scrutiny for those classes on the periphery, although not quite suspect.

30. The standard demanded as a result of Carolene Products and subsequent decisions is much more difficult to meet than the showing of any rational reason. The state must assert a state interest so compelling as to warrant discrimination.

31. The deferential nature of this test is apparent from the decision in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) where Chief Justice Warren stated:

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Prior to the Carolene Products footnote, this was the primary standard used for reviewing discriminatory treatment of aliens—a standard which led to minimal interventionism by the Court.

32. 403 U.S. 365 (1971).

33. 403 U.S. at 372.

34. Sugarman v. Dougall, 413 U.S. 634, 648.

35. In re Griffiths, 413 U.S. 717 (1973).

state financial aid to higher education.[37] In all of these cases, the Court required the state to show a compelling interest justifying the distinction and, when none was forthcoming, overturned the legislation. Following the *Graham* guidelines, state and federal courts invalidated even more state legislation.[38] Those decisions applied the equal protection clause to forbid such discrimination, premised on the assumption that aliens were entitled to some, if not all, of the rights of citizens because, "[l]ike citizens, (they) pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society."[39]

The courts have not, however, held the Fourteenth Amendment to indicate blanket equal treatment in every instance. The right to vote,[40] hold public office,[41] and serve on petit or grand juries,[42] are those reserved to citizens, who are participants in the political process. In *Sugarman v. Dougall*,[43] the Court prescribed a limited exception from strict scrutiny: the power to determine the qualifications of its officers, both elected and nonelected, is reserved to the states by virtue of the Tenth Amendment, when those officials are "engaged directly in the formulation, execution, or review of broad public policy, perform[ing] functions that go to the heart of representative government."

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36. Examining Board of Engineers v. Flores de Otero, 426 U.S. 572 (1976).

37. Nyquist v. Mauclet, 432 U.S. 1 (1977).

38. Chapman v. Gerard, 456 F.2d 577 (3d Cir. 1972) (participation in territorial scholarship funds). *Contra*, Friedler v. Univ. of New York, 70 Misc. 2d 446, 333 N.Y.S.2d 928 (1972). Miranda v. Nelson, 351 F. Supp. 735 (D.Ariz. 1972) (employment as teacher or social service worker); Jen Cuk v. Brian, 355 F. Supp. 133 (N.D. Cal. 1972) (health and medical aid); Mohamed v. Parks, 352 F. Supp. 518 (D. Mass. 1973) (municpal employment forbidden except as doctors or nurses); Lopez v. White Plains Housing Authority, 355 F. Supp. 1016 (S.D.N.Y. 1972) (public housing eligibility); Arias v. Examining Board of Refrigerator and Air Conditioning Technicians, 353 F. Supp. 857 (D.P.R. 1972) (limiting issuance of refrigeration and air-conditioning technicians' licenses to citizens); Sailer v. Tonkin, 356 F. Supp. 72 (D.V.I. 1973) (conditioning compensation to victims of criminal acts on residency status); Teitscheid v. Leopold, 342 F. Supp. 299 (D. Vt. 1971) (state employment); Application of Park, 484 P.2d 690 (Alaska 1971); Raffaelli v. Committee of Bar Examiners, 7 Cal.3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972) (state bar associations); Herriott v. City of Seattle, 81 Wash.2d 48, 500 P.2d 101 (1972) (civil service examination).

39. In re Griffiths, 413 U.S. at 722.

40. Sugarman v. Dougall, 413 U.S. at 648.

41. *Id.* at 648 n.13.

42. Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974) (three judge court', *aff'd mem.*, 426 U.S. 913 (1976).

43. 413 U.S. at 647.

In itself, this exclusion from state political processes is not unusual. Although there exists opinion to the extent that international law obligates a nation to permit aliens lawfully within its jurisdiction to pursue gainful employment,[44] there is substantial authority to the contrary.[45] Even those who contend that the right exists, explain that it is exceptionally limited in scope; a state may still exclude aliens from the exercise of enumerated professions and trades, as it deems necessary. In doing so, a nation incurs no sanctions under international law as long as the exclusion was not "patently arbitrary and manifestly unreasonable."[46] The treatment accorded aliens in the United States is unique in two respects: (1) the applicability of the Equal Protection clause of the Fourteenth Amendment to aliens within its jurisdiction[47] and (2) the broad guaranty of other rights to aliens by the Constitution,[48] and judicial interpretation of it. It is therefore unusual, once the Supreme Court has established such broad protection and declared distinctions based on alienage suspect, to find it creating an exemption from strict scrutiny without spelling out the nature of this exemption with specificity.

FOLEY V. CONNELIE: LIMITED EXEMPTION OR RETREAT?

Edmund Foley applied for and was refused permission to take the New York competitive service examination to qualify for the occupation of state trooper. He was denied this permission on the sole ground that he was an alien and that his duties as a trooper would conflict with the allegiance owed his country of nationality. In affirm-

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44. W. GIBSON, ALIENS AND THE LAW 115-16 (1940).

45. A. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 156-57 (1949).

46. GIBSON, *supra* note 44, at 16.

47. One critic has praised the Fourteenth Amendment as both a unique achievement and one desirable of emulation:

> The absence of such beneficial provisions easily may lead to considerable hardship, to which the national state of the suffering alien is very likely to react by discrimination against aliens within its own jurisdiction. A better example of the fallacy of the so-often advocated principle of reciprocity could hardly be found.

ROTH, *supra* note 45, at 157-58.

48. An alien has been held a "person" for purposes of the Fifth Amendment Due Process clause, Mathews v. Diaz, 426 U.S. 67, 77 (1976), and cannot be deprived of his property, in times of peace, without just compensation, Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931). Finally, the common law rule barring suits by aliens has been abrogated by judicial decision, Ex parte Kawato, 317 U.S. 69 (1942).

ing New York's right to exclude Foley from the position, the Supreme Court barely made reference to *In re Griffiths*,[49] a completely analogous decision of five years earlier in which the Court rejected similar state-proferred arguments and reiterated that distinctions based on alienage were inherently suspect. Justice Powell, writing for the majority in *Griffiths*, held that there was no compelling state interest which would legitimize Connecticut's requirement that all members of the state bar association be citizens. He took recognition of the fact that an attorney's role as an "officer of the court" has traditionally been considered one close to the process of government, but rejected, as without merit, the state's contention, *inter alia*, that, because of his alien status, an attorney might ignore his responsibilities. Powell took the position[50] that "a lawyer's high responsibilities . . . hardly involve matters of state policy or acts of such unique responsibility to entrust them only to citizens."[51] Only two members of the Court dissented,[52] despite the fact that, in Connecticut, a member of the bar has a rather unique status; he is a commissioner of the superior court with the authority, per statute, to sign writs, issue subpoenas, take recognizances and administer oaths, and by virtue of his position can even command sheriffs to issue orders "by authority of the State of Connecticut."[53]

In *Foley*, the Court skirted the issues raised in *Griffiths*, distinguishing the case on the basis that the profession of attorney was one of the "common occupations of the community," appointment to which an alien could not be refused without a substantial governmental reason.[54] The Court appears to have equated those "common occupations" with functions performed by "private person(s) engaged in routine public employment"[55] and made the determination of which

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49. 413 U.S. 717.

50. Chief Justice Burger disagreed so strongly with the majority that, in dissent, he recommended to the states that they adopt statutes allowing alien admission to the bar only if the aliens came from countries practicing reciprocity. Together with Mr. Justice Rehnquist, he accused the Court of denigrating the process of acquiring citizenship by rendering it meaningless. 413 U.S. at 733.

51. In re Griffiths, 413 U.S. at 724.

52. Justices Burger and Rehnquist. The majority opinion was written by Mr. Justice Powell.

53. In re Griffiths, 162 Conn. 249, 252, 294 A.2d 281, 284 (1972).

54. 98 S. Ct. at 1070. The Court wrote, "These exclusions struck at the noncitizens' ability to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence." *Id.*

55. *Id.* at 1072.

analytical standard to use dependent on the amount of power exercised by the official over the public.[56] The validity of this distinction is questionable since an attorney, especially when granted the broad range of powers as those in *Griffiths*, must deal with the public and exercise a great deal of discretion in doing so. Moreover, there is more of a similarity between the functions of an officer and an attorney, which are both permanent means of earning a living, than between the former and the position of juror (an analogy the *Foley* Court made) which is only temporary in nature.

The Court's failure to either follow or adequately distinguish previous cases based on the strict scrutiny standard is an indication of its growing hesitance to use categorical distinctions. Recently, in invalidating discriminatory state legislation, the Burger Court has used an approach markedly different from the traditional minimum rationality test[57] or even that of "strict scrutiny" which it purports to follow. Gunther[58] terms this approach "minimum rationality with bite" because, he argues, it allows the Court to use the equal protection clause as an "interventionist tool" while still being able to avoid the strict scrutiny language of the new equal protection, thereby avoiding the appearance of intervening.[59] An examination of *Foley* and the line of cases preceding it shows the inclination of at least four members of the Court towards this standard of review and away from the strict scrutiny standard in alienage cases.[60]

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56. *Id.*

57. The traditional "minimum rationality" test grants a large range of deference to the political process, and in actuality, results in little, if any, judicial interference with legislative policy choices because:

> A decision to aid artists rather than oilmen is defensible in terms of promoting the arts; punishing battery more harshly than burglary is defensible in terms of the safe-guarding of physical security. And so is any choice thus defensible, because the courts are prepared to credit as acceptable any goal the political branches view as contributing to the general welfare. Thus each choice will import its own goal . . . and the requirement of a "rational" choice-goal relation will be satisfied by the very making of the choice.

Ely, *Legislative and Administrative Motivation in Constitutional Law*, 70 YALE L.J. 1205, 1247 (1970). *See also* note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

58. Gunther, *supra* note 26, at 18-19.

59. *Id.*

60. In Nyquist v. Mauclet, 432 U.S. 1 (1977), Justice Powell dissented, joined by Chief Justice Burger and Mr. Justice Stewart. The Chief Justice also joined Mr. Justice Rehnquist in a separate opinion, dissenting.

The position of Justice Rehnquist is exemplified by his combined dissenting opinion in *Sugarman* and *Griffiths*. Rehnquist protests that the distinction between citizens and aliens is one recognized in both the Constitution and the Fourteenth Amendment itself. He opposes any attempt to enlarge the theory of "suspect classifications" to encompass more than race.[61] His dissents are reminiscent of Supreme Court decisions of half a century ago in that they focus on the powers of the state to enact such legislation rather than on a concern for individuals, "persons" within the meaning of the Fourteenth Amendment, who are unable to work to support themselves in their chosen fields. Moreover, he insists that since aliens have the means of becoming naturalized they must "follow the prescribed procedures before (they) can become 'one of us' and share the benefits that citizens enjoy."[62] In *Nyquist v. Mauclet*,[63] Mr. Justice Rehnquist made a revealing comment on the issue:

> I am troubled by the somewhat mechanical application of the Court's equal protection jurisprudence to this case. I think one can accept the premise of *Graham* (citations omitted) and therefore agree with the Court that classifications based on alienage are inherently suspect but nonetheless feel that this case is wrongly decided . . . .
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> Here, unlike with the other cases, the resident alien is not a member of a discrete and insular minority for purposes of the classification even during the period that he must remain an alien, because he has at all times the means to remove himself immediately from the disfavored classification.[64]

Despite language couched in the terminology of close judicial scrutiny, these passages suggest uncertainty as to the premise on which all prior decisions were based. The dissent, led by Mr. Justice Rehnquist, intimated that there is a paradox in treating alienage as a classification "inherently suspect" because members of the class, unlike the members of classes based on immutable characteristics, such as race, national origin, sex, or illegitimacy, can change their status voluntarily and so move out of the class.

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61. Sugarman v. Dougall, 413 U.S. at 660.

62. Comment, *Aliens, Employment, and Equal Protection*, 19 VILL. L. REV. 589, 603 n.116 (1974).

63. 432 U.S. at 10.

64. *Id.* at 20.

This uncertainty as to the appropriate standard of judicial review to use when dealing with alienage culminates in the *Foley* decision. In a footnote, the Court, per Chief Justice Burger, recognizes that, because of its decision, many naturalized citizens will be precluded from becoming New York state troopers since the process of naturalization takes five years and the New York police force has a fixed age requirement.[65] Nonetheless, the Court articulates that a distinction must of necessity be drawn between citizens and aliens when the latter indicate a desire to participate in the political process in which they have no voice. In doing so, the Court purports to rely on the *Sugarman* exception to the strict scrutiny rule.[66] Burger writes that it would be inappropriate for the Court to require the state to meet the heavy burden of close judicial scrutiny in every instance because "to do so 'would obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.'"[67] Arguably, the Court's opinion has done more than carve out and redefine a narrow exception to the close scrutiny.[68] In lowering the standard for the state to meet, the Court legitimizes the distinction, heretofore rejected,[69] between citizens and aliens in public service positions. The Court fails to recognize that the history granting benefits based on United States citizenship is relatively short and, in emphasizing that citizenship must "mean something" the Court thereby skirts the issue of which characteristics make aliens ineligible for those positions.[70] Moreover, although the majority opinion attempts to distinguish its prior decision in *Griffiths*, both concurring and dissenting opinions argue it cannot be done.[71]

65. 98 S. Ct. at 1069 n.1.

66. *Id.* at 1070.

67. *Id.*

68. The Court attemts to keep its holding within the narrow confines of the Sugarman dictum, "The essence of our holdings to date is that although we extend the 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 1071.

69. These distinctions were rejected not only by the Supreme Court in Griffiths and Sugarman, but also in several state court decisions, the most noteworthy of which are, Purday & Fitzpatrick v. State, 71 Cal.2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969) (en banc), and Rafaelli v. Committee of Bar Examiners, 7 Cal.3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972). In these cases, the California Supreme Court rejected many of the same arguments made by the Court in Foley.

70. At least Mr. Justice Stevens, together with Justice Brennan, accuses the Court of doing so in dissent.

71. In a concurring opinion, Mr. Justice Stewart states that he would be unable to reconcile the Court's opinion in Foley with the Court's prior decisions had he not recapitulated his old position. Justice Blackmun's concurrence is noticeably narrower—he relies on the limitations intimated in Sugarman to conclude with the

If this case signifies a Supreme Court retreat in the area of equal protection, what are the judicially enforceable standards to which lower courts may look for guidance? Arguably, the opinion evidences a lack of precision and clarity in establishing these. In dissent, Justice Marshall criticizes the absence of guidelines and attempts to formulate his own. Marshall emphasizes that the exemption in *Sugarman* is a narrow one, necessarily limited to those officials who have "responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature."[72] Marshall also distinguishes between those positions involved with the formulation of public policy, and those which are further removed from the political process, having only to do with its execution.[73] He concludes that the former only are exempted by *Sugarman*, and that the job of a state trooper is by nature one of the latter category, and subject to close judicial scrutiny. Marshall is able to reach this conclusion by an examination of New York statutory and case law[74] which authorizes citizens of the community to exercise the same discretionary powers as policemen under certain circumstances, thereby countering the majority's exemption of state troopers because of their "authority to exercise an almost infinite variety of discretionary powers."[75]

A somewhat different approach is taken by Mr. Justice Stevens.[76] He first attempts to define the reason for and nature of the unfavorable treatment of aliens within states, surmising, "Aliens do not vote. Aliens and their families were therefore unlikely to have been beneficiaries of the patronage system which controlled access to

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Court that the activities of state troopers are "basic to the function of state government." Foley, 98 S. Ct. at 1074. This is important in light of the fact that Blackmun wrote the majority opinion in three of the major alienage decisions: Sugarman v. Dougall, 413 U.S. 634 (1973), Examining Board of Engineers v. Flores de Otero, 426 U.S. 572 (1976), and Nyquist v. Mauclet, 432 U.S. 1 (1977). In light of this concurrence, Justices Blackmun may very well be the swing vote on the Court in the future. In dissent, Justices Stevens and Brennan agree with Stewart that the Foley opinion may serve to repudiate Griffiths.

72. 98 S. Ct. at 1075.

73. *Id.*

74. *Id.* at 1076. N.Y. CRIM. PROC. LAW § 140.30 (McKinney 1972) which reads, "[A]ny person may arrest another person (a) for a felony, and (b) for any offense when the latter has in fact committed an offense in his presence." The New York case law relied on establishes that, under these specified circumstances, private individuals can make a lawful search incident to arrest. United States v. Swarovski, 557 F.2d 1977 (2d Cir. 1977); United States v. Rosse, 418 F.2d 38 (2d Cir. 1969); United States v. Viale, 312 F.2d 595 (2d Cir. 1963).

75. 98 S. Ct. at 1071.

76. Dissenting together with Mr. Justice Brennan. *Id.* at 1076-79.

public employment during so much of our history."[77] Such reasons, he concludes, may explain but do not justify discriminatory treatment. Stevens, like Marshall, is concerned with the standards the Court has used, writing that it should, "draw the line between policymaking and nonpolicymaking positions in as consistent and intelligible a fashion as possible;"[78] the result of its failure to do so, evident in *Foley*, is that "inexplicably, every state trooper is transformed into a high ranking, policymaking official."[79] Stevens makes a distinction between the formulation of public policy, which is "the essence of individual citizenship"[80] giving "dramatic meaning to the naturalization ceremony,"[81] and its execution, which has already been allowed aliens, and from which they cannot now be excluded "without a good and relevant reason."[82] Yet Stevens's real disagreement with the Court is that it does not attempt to answer fundamental questions raised by an opinion which, at the least, is inconsistent with those directly preceding it. He concludes:

> Even if the Court rejects this analysis, it should not uphold a statutory discrimination against aliens, as a class, without expressly identifying the group characteristic that justifies the discrimination. If the unarticulated characteristic is concern about possible disloyalty, it must equally disqualify aliens from the practice of law, yet the Court does not question the continuing vitality of its decision in *Griffiths*. Or if that characteristic is the fact that aliens do not participate in our democratic decision making process, it is irrelevant to eligibility for this category of public service. If there is no group characteristic that explains the discrimination, one can only conclude that it is without any justification that has not already been rejected by the Court.[83]

The reasoning of Mr. Justice Stevens was followed recently by a three judge federal district court in California in striking down a state statute making citizenship a prerequisite to employment in any gov-

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77. *Id.* at 1077.
78. *Id.* at 1078.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 1078-79. The questions asked by Stevens remain unanswered by the Court, "If the integrity of all aliens is suspect, why may not a State deny aliens the right to practice law? Are untrustworthy or disloyal lawyers more tolerable than untrustworthy or disloyal policemen? Or is the legal profession better able to detect such characteristics on an individual basis than is the police department?" *Id.* at 1077.

ernment position declared by law to be a peace officer.[84] The court noted that each of the three plaintiffs was willing to take the loyalty oath prescribed in the California constitution, which included an agreement to support and defend the federal and state constitutions.[85] It read the references to a "political community" in *Sugarman*, for which the state might prescribe citizenship, as being "confined to high policy making officers."[86] If, as has been stated, "it is the indiscriminate denial of a spectrum of jobs which Dougall prohibits,"[87] this case is certainly more consistent in achieving those ends than in *Foley*. The opinion is noteworthy in that the Court explicity rejected the State's ability to define its own political community as a compelling interest. The decision in *Foley*, on the other hand, evinces an erosion of the strict scrutiny standard as applied to aliens. It does so by failing to discuss why aliens would be less fit for appointment as state troopers and by failing to address viable alternatives to the statutory scheme.[88]

With respect to laws discriminating against aliens, there is little if any scope for the application of deference towards legislative acts. An alien cannot be compelled to show and prove that discrimination against him is unreasonable, for in doing so he would have to prove the negative—that there is no correlation between his exclusion from employment and the public welfare—an almost impossible task. Instead, the burden should lie with the State in attempting to close its doors to him.[89] The Supreme Court's decisions in *Sugarman* and

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84. Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977), *appeal filed sub nom.*, Los Angeles County v. Chavez-Salido, 45 U.S.L.W. 2388 (U.S. May 17, 1977) (No. 76-1616).

85. *Id.* at 161.

86. *Id.* at 170.

87. Comment, *supra* note 62, at 604.

88. Besides the citizenship requirement, N.Y. EXEC. LAW § 215(3) (McKinney Supp. 1977) provides that persons appointed to the police force must have "fitness and good moral character" and must have passed physical and mental examinations. Appointments are made for a probationary period of one year, and it is only after satisfactory completion of the probationary period that the appointment is considered permanent. Thus, if the alien is unfit for the position at issue, there are procedures which would reveal it on an individualized basis.

89. Emphasizing the state's burden in such cases, Konvitz wrote,

> Courts should face realistically the fact known to everyone that laws are frequently enacted because pressure groups want them; and pressure groups want discrimination against the alien because they would be more comfortable (or so they assume) without his competition. The alien is without remedy except in the courts; the courts should, therefore, afford him a measure of relief equal to the handicaps under which he lives.

M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 181 (1946).

Griffiths recognized the inequity in forcing an alien to prove his own competency. Its recent decision in *Foley* shows a departure from those standards. The Court fails to explain why the "cloak of authority" singles out a state trooper for exemption from the strict scrutiny standard of judicial review.[90] nor does it successfully explain why this officer is closer to the political process than is an attorney.[91] Apart from asserted "political aspects" in the occupation of a state trooper, there is little connection between alienage and the performance of an officer's duties. It has yet to be demonstrated that citizenship has an effect on the ability of an individual to detect or prosecute crime.

The *Foley* opinion threatens the status of alienage as a suspect class, and with it, the progressive attitude of the United States, offering more protection to persons within its jurisdiction than any country in the world.[92] It marks a return to the incompetency-criminality decisions of fifty years ago which created an almost irrebutable presumption of ineptitude and untrustworthiness on the part of the alien.[93] The Supreme Court itself has already recognized that citizenship has "no particular or rational relationship to skill, competence, or financial responsibility."[94] Moreover, the absence of carefully drawn, judicially manageable standards may pose further problems for the Court in the near future,[95] for at least one justice has

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90. The Court merely relies on the discretionary nature of a state trooper's duties in making arrests and searches, which, in light of Justice Marshall's dissent is questionable.

91. Although the Court rejected citizenship as a qualification for the profession of attorney in Griffiths, it affirmed the right to exclude aliens from jury service. Perkins v. Smith, 370 F. Supp. 134 (D.Mc. 1974) (three judge court), *aff'd mem.*, 426 U.S. 913 (1976). It does not indicate what quality makes a state trooper more similar to a juror than he is to an attorney.

92. A. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 156-58 (1949).

93. "It is common knowledge that several million aliens are living in this country and that the vast majority are peaceful and law-abiding . . . . (A) person does not demonstrate instability, nor does he show a tendency towards crime, simply because he is not a citizen of this country." Raffaelli v. Committee of Bar Examiners, 7 Cal.3d 288, 298, 496 P.2d 1264, 1271, 101 Cal. Rptr. 896, 903 (1972).

94. Examining Board of Engineers v. Flores de Otero, 426 U.S. 572, 606 (1976).

95. Three cases are currently pending disposition: Norwick v. Nyquist, 417 F. Supp. 913 (S.D.N.Y. 1976), *appeal filed*, 45 U.S.L.W. 3437 (U.S. Dec. 11, 1977) (No. 76-808) (New York education law prohibiting employment of aliens as public school teachers); Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977), *appeal filed sub nom.*, Los Angeles County v. Chavez-Salido, 45 U.S.L.W. 2388 (U.S. May 17, 1977) (No. 76-1616) (Peace officer with state, county, or local government); Surmeli v. State of New York, 412 F. Supp. 394 (S.D.N.Y. 1976) *aff'd* 556 F.2d 560 (2d Cir. 1976) *cert. filed sub nom.*, Nyquist v. Surmeli, 45 U.S.L.W. 3588 (1977) (No. 76-1163) (physician's license).

argued that all low level government employees are part and parcel of the political process.[96] Finally, this case violates the Court's own principles, for it has stated, "Our standard of review of statutes that treat aliens differently from citizens requires a greater degree of precision,"[97] a precision nowhere to be found in the instant case.

Lauri Waldman*

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96. Mr. Justice Rehnquist in Sugarman v. Dougall, 413 U.S. at 661-62. At one point, Rehnquist goes even farther than the rest of the Court by stating, "*Native-born citizens* (emphasis added) can be expected to be familiar with the social and political institutions of our society; with the society and political mores that affect how we react and interact with other citizens." *Id.* Up until the present time, he is the only justice on the bench to move in such a direction.

97. *Id.* at 642.

* J. D. Candidate 1980, University of Miami School of Law. Ms. Waldman is an Associate Editor of the Lawyer of the Americas.