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Abstract

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KEYWORDS: protection, aliens, equal

Equal Protection for Aliens: The Sliding Scale of Judicial Review: Foley v. Connelie

Recently the Supreme Court, in the case of *Foley v. Connelie*,[1] upheld a New York statute which limited the appointment of members of the state police force to citizens of the United States.[2] Foley, an Irish resident alien, brought a class action seeking a declaration that the New York statute in question[3] violated the equal protection clause of the fourteenth amendment. After Foley was certified as representative of a class of those similarly situated, a three-judge district court granted a summary judgment to the defendants,[4] from which the plaintiff appealed to the Supreme Court of the United States. A divided Court upheld the statute and refused to grant relief.[5]

Historically, aliens have often suffered discrimination of various economic and social kinds. Starting long ago, states enacted legislation discriminating against aliens in a wide range of activities[6] and, prior to World War II, the Supreme Court displayed a great deal of tolerance toward those state laws.[7] During this period of non-interference by the Court, the sole decision striking down a discriminatory state law against aliens was *Truax v. Raich*.[8] In *Truax*, the Court invalidated a state law

1. 435 U.S. 291 (1978).

2. N.Y. Exec. Law §215(3) (McKinney Supp. 1976), which reads in part: "No person shall be appointed to the New York state police force unless he shall be a citizen of the United States. . . ."

3. *Id.*

4. Foley v. Connelie, 419 F. Supp. 889 (S.D. N.Y. 1976).

5. 435 U.S. 291.

6. Terrace v. Thompson, 263 U.S. 197 (1923) (aliens forbidden to own land for the purpose of farming); Heim v. McCall, 239 U.S. 175 (1915) (public works contracts); Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927) (operating pool halls); Trageser v. Gray, 73 Md. 250, 20 A. 905 (1890) (selling liquor); Commonwealth v. Hana, 195 Mass. 262, 81 N.E. 149 (1907) (peddling goods); Wright v. May, 127 Minn. 150, 149 N.W. 9 (1914) (acting as auctioneers).

A more detailed description of earlier discrimination against aliens especially in the employment area is provided in Rosales, *Resident Aliens and the Right to Work: The Quest for Equal Protection*, 2 HASTINGS CONST. L.Q. 1029 (1975).

7. *Id.*

8. 239 U.S. 33 (1915).

requiring employers of five or more persons to hire at least 80% of their employees from among qualified electors or native-born United States citizens. However, the Supreme Court asserted in dicta that the "special public interest" in state regulation of a wide variety of governmental concerns could justify less favorable state treatment of non-citizens.[9] This proposition became known as the "special public interest" doctrine[10] and later became the basis upon which the Court upheld a broad range of discriminatory practices against aliens. The decision in *Truax* is best understood as an expression of the Court's devotion to the employers' liberty of contract and property during the *Lochner* era.[11] However, *Truax* did not prove to have a substantial impact on the continued trend of discrimination against aliens in the area of employment. *Truax* stood alone among many contrary decisions.[12]

The Court's indulgence in discrimination against aliens quickly dissipated after World War II.[13] Later cases greatly reduced the scope of the "special public interest" doctrine[14] as a result of a broadened interpretation of Congress' plenary authority over immigration[15] and a judicial recognition that alienage itself constituted a suspect classification.[16] The former practice of upholding discriminatory statutes was rapidly replaced by a new trend of decisions striking down such legislation.[17] By the 1970's, the Supreme Court was insisting that states were generally powerless to treat aliens as a distinct class for reasons of federal supremacy[18] and, further, that such treatment also amounted to

9. *Id.* at 39.

10. Graham v. Richardson, 439 U.S. 365 (1971).

11. In Lochner v. New York, 198 U.S. 45 (1905), a statute which prohibited employers from requiring employees of bakeries to work more than sixty hours a week was held unconstitutional at the behest of a bakery owner, on the grounds that it interfered with the liberty of contract of his employees. *See also* Hires v. Davidowitz, 312 U.S. 52 (1940).

12. *See* note 6 *supra.*

13. In two decisions in 1948, the Supreme Court began to reformulate its position on the equal protection doctrine as it applied to discrimination against aliens. *See* Oyama v. California, 332 U.S. 633 (1948) (striking down a provision of the California Alien Land Law); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) (invalidating a California state law denying fishing licenses to aliens ineligible for United States citizenship).

14. 439 U.S. 365.

15. *Id.*

16. *Id.*

17. *Id. See also* note 13 *supra;* In Re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973).

18. 403 U.S. at 378: "State laws that restrict the eligibility of aliens for welfare

an invidious discrimination.[19] Thus, in *Graham v. Richardson,*[20] the Court declared invalid state statutes denying welfare benefits to resident aliens and, in *Sugarman v. Dougall,*[21] the Court invalidated a statutory prohibition against employment of aliens in the state competitive civil service.[22] Similarly, the Court has ruled that resident aliens may not be excluded from practicing law[23] or from practice as licensed civil engineers.[24] The Court became highly critical of blanket prohibitions against the employment of aliens and other legislation which was neither "narrowly confined" nor "precisely drawn" and "swept indiscriminately" against aliens in the area of employment.[25]

Today, aliens in the United States are still deprived of the right to vote[26] and, consequently, are lacking "the most basic means of defending themselves in the political processes."[27] This is one of the major reasons why alienage has been elevated to "suspect classification."[28] The usual objection to judicial intervention (*i.e.,* that the popularly-elected legislature is the more democratic arena for deciding public issues) is absent, and the courts have deemed it necessary to offer their special protection to those who are not adequately represented in the legislature. This political powerlessness, when combined with the historical discrimination which aliens have suffered, makes it readily arguable that alienage should be treated as a suspect classification. However, the

benefits merely because of their alienage conflict with overriding national policies in an area constitutionally entrusted to the Federal Government."

19. For a definition of invidious discrimination, *see* Levy v. Louisiana, 391 U.S. 68 (1968).

20. 403 U.S. 365.

21. 413 U.S. 634 (1973).

22. *Id.* While the statute rested on a legitimate state interest in having loyal employees and in establishing the states' own form of government, the statute was neither narrowly confined nor precise in its application, and therefore failed.

23. In Re Griffiths, 413 U.S. 717, 729 (1973), rejecting as insufficiently substantial the state interest in maintaining high professional standards, and disagreeing with the argument that "status of holding a license to practice law places one so close to the core of the political process as to make [one] a formulator of government policy."

24. Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976).

25. Sugarman v. Dougall, 413 U.S. at 643; *accord,* Examining Bd. v. Flores de Otero, 426 U.S. at 605-606.

26. *See* Minor v. Happersett, 88 U.S. 163 (1874).

27. Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 580, 456 P. 2d 645, 654 (1969) *(en banc).*

28. To determine what criteria the Supreme Court employs in deciding whether a class is to be deemed suspect, *see* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).

concept of suspect classifications is a modern phenomenon; thus, it is not surprising that the decisions which seem to place alienage in this category date from the 1970's.

It has been well settled by the Burger Court that states carry a tremendous burden of justification when attempting to legitimize discrimination against aliens in the employment arena.[29] This is a result of the recent extension of the equal protection doctrine to the Supreme Court's finding that alienage is a suspect classification. However, suspect classifications are not forbidden classifications. Instead, the courts merely indicate that such classifications will be subject to close judicial scrutiny. Whether all suspect classifications will receive the same level of close judicial scrutiny has been the subject of great controversy in recent years. The term "strict scrutiny" has come to mean that certain kinds of government-imposed inequalities must be justified as necessary for the achievement of a compelling state interest.[30] Because alienage is a suspect classification with respect to the states,[31] statutes which preclude aliens from certain types of employment are subject to strict scrutiny[32] and a state must show some overriding "special public interest"[33] in order to justify such a classification. Further, a state must select a means to pursue that purpose which does not unnecessarily burden constitutionally protected conduct.[34] However, this standard, at best, has been difficult to comprehend. This is due in part to the notion of a rigid "compelling state interest" standard of review in suspect classification cases. In reality, the level of judicial scrutiny applied by the Supreme Court varies along a continuum depending upon the interest at stake. The more the Court feels the interest at stake to be fundamental or the more the legislative classification approaches being suspect, the higher the degree of judicial scrutiny the Court will apply.

"Several recent decisions addressing the issue of aliens' right to work indicate that suspect class statutes of alienage is slowly eroding. As a result, it is possible that state action against aliens will no longer

29. *See* note 17 *supra.*

30. *See* McLaughlin v. Florida, 379 U.S. 184 (1964).

31. *See* In Re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

32. Graham v. Richardson, 403 U.S. 365 (1971); Korematsu v. United States, 323 U.S. 214 (1944).

33. 379 U.S. 184 (overriding statutory purpose is required to uphold a statute having a racial classification).

34. Dunn v. Blumstein, 405 U.S. 330 (1972).

be strictly scrutinized."[35] This gradual erosion has been caused by the reluctance of the Supreme Court to equate the rights of aliens with those of United States citizens in areas that are possibly considered "politically tinged." The idea of the "political community" has been the basis for the Court's distinction between citizen and alien rights both in and out of the employment area.[36] Citizens, as members of the "political community,"[37] possess many political privileges to which aliens have no constitutional right. The courts have recognized that some state interests might justify a disqualification of non-citizens from employment[38] and, therefore, have never held that aliens have a "constitutional right to vote or hold high public office."[39] The rights to vote,[40] hold high public office,[41] and serve on juries,[42] are seen as political rights that go to "the heart of our system of government."[43] This is so because these rights entail the formulation of public policy and community standards in addition to participation in the operation of governmental affairs. Using this conception of a "political community,"[44] the courts have upheld restrictions on the rights of aliens by reasoning that a state has a compelling interest in sheltering its concept of a "political community."[45] The courts evidently feel that a state's "political community" would slowly dissipate if it were not restricted to those who are familiar with this country's political and social standards.[46] Whether this theory has any basis in either fact or reason is questionable.

35. D. Chin, *Aliens' Right to Work: State and Federal Discrimination,* 45 FORDHAM L. REV. 835, 838 (1976) (hereinafter referred to as Chin).

36. 413 U.S. at 648-49; 405 U.S. at 334; United States v. Gordon-Nikkar, 518 F. 2d 972 (5th Cir. 1975).

37. *Id. See also* Surmeli v. New York, 412 F. Supp. 394 (S.D. N.Y. 1976).

38. 413 U.S. 634. The Court's reservations expressed in *Sugarman* show that the implications are that the principle of alienage as a suspect classification is far from being fully developed. Accordingly, the Court left the door open for a remission in the principle that alienage will continue to be a suspect classification.

39. *Id.* at 717.

40. *Id.* at 648.

41. *Id.* at 658.

42. 518 F. 2d at 975.

43. Perkins v. Smith, 370 F. Supp. 134, 137 (D. Md. 1974) (three-judge court), *aff'd. mem.*, 426 U.S. 913 (1976).

44. 405 U.S. at 344; 413 U.S. at 648-49; *see* Surmeli v. New York, 412 F. Supp. 394, 397 (S.D. N.Y. 1976).

45. 405 U.S. at 344.

46. Foley v. Connelie, 419 F. Supp. 889, 895 (S.D. N.Y. 1976), 435 U.S. 291.

The political distinction between aliens and citizens has resulted in a series of cases which, if not conflicting, are at the very best confusing. It is clear that the nature of some professions requires that citizenship be considered before hiring.[47] However, the degree of consideration which will be permitted and the occupations for which it will be allowed is where the confusion lies. The perplexity is a result of certain professions "skirting the border between purely political functions such as holding public office and purely apolitical positions such as driving taxi cabs."[48] Thus, lawyers,[49] civil servants,[50] teachers[51] and state troopers,[52] for example, engage in occupations that lie on the uncertain line; they are awaiting the stamp of judicial approval permitting citizenship to be included in the many criteria required for the particular position. In 1973, the Supreme Court rendered two key decisions on the same day, each dealing with the political distinctions between citizens and aliens.[53] Both decisions dealt with state restrictions on the rights of aliens to employment. *Sugarman v. Dougall*[54] addressed the validity of a New York civil service law[55] which made citizenship a requisite to holding any permanent position in the competitive class of the state civil service. In striking down the New York law as violative of the equal protection clause, the Court stated:

> We recognize a State's interest in establishing its own form of government, and in limiting participation in the government to those who are within "the basic conception of a political community." But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the state employs must be precisely drawn in light of the acknowledged purpose.[56]

47. *See* text accompanying notes 41 and 46 *supra.*
48. Chin, *supra* note 35.
49. 413 U.S. 717.
50. 413 U.S. 634.
51. Norwick v. Nyquist, 417 F. Supp. 913 (S.D. N.Y. 1976) (three-judge court), appeal filed, 45 U.S.L.W. 3437 (U.S. Dec. 11, 1977) (No. 76-808).
52. Foley v. Connelie, 435 U.S. 291.
53. Sugarman v. Dougall, 413 U.S. 634 (1973); In Re Griffiths, 413 U.S. 717 (1973).
54. 413 U.S. 634 (1973).
55. N.Y. Civil Service Law §53(1)(1976), reads in part: "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."
56. 413 U.S. at 642.

Evidently the Court has recognized that some employees "who participate in the formulation and execution of government policy"[57] are permissibly vulnerable to discrimination based on alienage because it is within a state's power to define and limit its "political community."[58] However, any such limitation must be "precisely drawn" and not overly broad. The Court specifically noted in dicta that a limitation on the employment of aliens, when narrowly confined, would be valid where alienage was relevant in maintaining a state's conceptual "political community."[59]

In *Sugarman,* the Court left the door open to discrimination against aliens by recognizing that some state interests might justify a disqualification of non-citizens from employment.[60] However, that door was closed to but a crack on the same day when the Court decided *In Re Griffiths.*[61] *Griffiths* made it quite clear that the proposition set forth in *Sugarman* would be strictly construed by invalidating a Connecticut court rule which limited the practice of law to citizens.[62] The Court noted: "Lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy."[63] Thus, aliens are protected from discrimination in the legal field because lawyers are not sufficiently connected with the "political community" so as to justify a state's interest in excluding aliens from this type of employment. What the Court seems to be seeking in order to sustain discriminatory statutes against aliens in the employment area is a kind of loyalty to the United States as an important requisite to faithful performance of the occupation in question. Holding high public office is an example of such an occupation.[64] However, it is doubtful that this standard can be applied extensively beyond the holding of high office since the Court has rejected the so-called "membership in the political community" argument

57. *Id.*
58. 405 U.S. at 344.
59. 413 U.S. at 649.
60. *Id.* at 647.
61. 413 U.S. at 717.
62. *Id.*
63. *Id.* It is unclear whether the Court is referring to state attorneys and United States attorneys as distinguished from those who practice privately.
64. 413 U.S. at 648.

in both the civil service employment[65] and bar admission[66] contexts. Perhaps other forms of state employment are sensitive to a possible conflict of national loyalties. The Court, in *Foley v. Connelie,*[67] raised the political distinctions between aliens and citizens which, for the first time, became the basis of the Court's decision to uphold an anti-alien statute in the employment area.

The first issue which the majority confronted in *Foley* was whether citizenship may be a relevant qualification for fulfilling important non-elective executive, legislative and judicial positions held by officers who participated directly in the formulation, execution or review of broad public policy. Relying on language used in *Sugarman,* the Court upheld this narrow exclusion[68] and recognized "a State's historical power to exclude aliens from participation in its democratic political institutions,"[69] as part of the sovereign's obligation "to preserve the basic conception of a political community."[70] The Court next focused upon the question of whether the occupation of state trooper fit into this narrow exclusion. In holding that it does, the Court noted:

> The police function fulfills a most fundamental obligation of government to its constituency. Police officers in the ranks do not formulate policy, per se, but they are clothed with authority to exercise an almost infinite variety of discretionary powers. The execution of broad powers vested in them affects members of the public significantly and often in the most sensitive areas of daily life.[71]

The Court reasoned that "a policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment or other 'common occupations of the community'[72] who exercises no broad power over people generally."[73] Therefore, police officers fall within the category of

65. *Id.* at 634.
66. 413 U.S. 717 (1973).
67. 435 U.S. 291 (Upholding N.Y. Exec. Law §215(3) (McKinney Supp. 1976)). *See* note 2 *supra.*
68. 435 U.S. at 300. *See* In Re Griffiths, 413 U.S. 717 (1973). This decision qualified the exception stated in Sugarman v. Dougall, 413 U.S. 634 (1973), and shows that this exception was to be construed within narrow limits.
69. 435 U.S. at 295.
70. *Id.*
71. *Id.* at 297.
72. *See* Truax v. Raich, 239 U.S. at 41.
73. 435 U.S. at 298-99.

"important non-elective. . .officers who participate directly in the . . . execution . . . of broad public policy."[74] The Court concluded that "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."[75]

The final question addressed by the Court was the degree of scrutiny to be applied in assessing the validity of the statute in question.[76] The majority first acknowledged that recent cases generally reflect a "close scrutiny of restraints imposed by States on aliens."[77] Nevertheless, the majority states in dicta that it has never suggested that "such legislation is inherently invalid, nor that all limitations on aliens are suspect."[78] The rationale is that it would be inappropriate "to require every statutory exclusion of aliens to clear the high hurdle of 'strict structiny', because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.'"[79] Consequently, the Court stated: "Our scrutiny will not be so demanding where we deal with matters firmly within a State's constitutional prerogatives."[80] The Court then went on to say: "The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."[81] According to the Court, this lessened degree of scrutiny is no more than a "recognition of the fact that a democratic society is ruled by its people."[82]

Justice Stewart, in his concurring opinion, found it difficult to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of past decisions. "It is only because I have become increasingly doubtful about the validity of these decisions (in at least some of which I concurred) that I join the opinion of the Court in the case."[83] Justice Blackmun had no problem in agreeing with the result reached in *Foley.* Citing *Sugarman v. Dougall,* he wrote, when a state is acting in accordance with dictates as set out in that case, "it need

74. *Id.* at 300; *see also* Sugarman v. Dougall, 413 U.S. at 647.
75. *Id.* at 300.
76. *See* note 2 *supra.*
77. 435 U.S. at 294.
78. *Id.*
79. *Id.*
80. *Id.* at 296, citing 413 U.S. 647, 648.
81. *Id.*
82. 435 U.S. at 296.
83. *Id.* at 300.

justify its discriminatory classifications only by showing some rational relationship between its interest in preserving the political community and the classification it employs."[84]

Justice Marshall, with whom Justices Brennan and Stevens joined dissenting, disagreed with the majority opinion that state troopers perform functions placing them within the narrow exception as set out in *Sugarman*,[85] preferring instead to follow the usual rule that discrimination against aliens is presumptively unconstitutional:

> In one sense, of course, it is true that state troopers participate in the execution of public policy. Just as firefighters execute public policy that fires should be extinguished, state troopers execute the public policy that persons believed to have committed crimes should be arrested. But this fact simply demonstrates that the *Sugarman* exception, if read without regard to its context, "would swallow the rule."[86]

Justice Marshall evidently felt that *Sugarman* unambiguously holds that a blanket exclusion of aliens from state jobs is unconstitutional. He further expressed, in what appears to be the most cogent argument of the entire case, his view that the phrase "execution of broad public policy,"[87] as enunciated in *Sugarman,* cannot be read to mean "simply the carrying out of government programs, but rather must be interpreted to include responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature."[88]

Justice Stevens, with whom Justice Brennan joined, dissenting, found a rule which disqualifies an entire class of persons from professional employment "doubly objectionable."[89] He was particularly concerned with identifying the "group characteristic that justifies the unfavorable treatment of an otherwise qualified individual simply because he is an alien."[90] Justice Stevens felt the disqualifying charcteristic to be a foreign allegiance[91] which raised a doubt concerning loyalty and trustworthiness so pervasive that a flat ban against the employment of

84. *Id.* at 302.
85. *Id.* at 303.
86. *Id.* at 303-304.
87. *Id.* at 304.
88. *Id.*
89. *Id.* at 307.
90. *Id.* at 308.
91. *See* In Re Griffiths, 413 U.S. at 726 (persons, other than citizens, can in good conscience, take an oath to support the constitution); Hampton v. Mow Sun Wang, 426 U.S. 88, 111 (1976).

any alien in "any law enforcement position"[92] would be justified. "But if the integrity of all aliens is suspect, why may not a State deny aliens the right to practice law?"[93] The dissenters here felt that, unless the Court repudiates its holding in *In Re Griffiths*,[94] it had to reject any "conclusive presumption that aliens, as a class, are disloyal or untrustworthy."[95] The dissenting members of the Court charged that, should the majority reject its analysis, it should not uphold "a statutory discrimination against aliens, as a class, without expressly identifying the group characteristic that justifies the discrimination."[96] The dissenters reasoned that, "[i]f 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."[97]

As a result of the majority's holding in *Foley v. Connelie*,[98] the standard enunciated in *Massachusetts Board of Retirement v. Murgia*,[99] for reviewing legislation which is to "the peculiar disadvantage of a suspect class,"[100] is severely weakened, as is *Graham*,[101] which held state classifications based on alienage, nationality or race, inherently suspect and subject to close judicial scrutiny. The Supreme Court has refused to treat New York's classification as suspect and apply the degree of scrutiny which past decisions seem to have mandated. These past decisions of the Court have expressly held that any statute distinguishing aliens from citizens be "precisely drawn and narrowly confined."[102] It is apparent that the statute in question[103] is neither "precisely drawn" nor "narrowly confined."[104] To the contrary, it is overly broad and thereby imposes an unnecessary burden on the basic right to have access to employment. It will be difficult, indeed, for the Court to reconcile the decision in *Foley* with past holdings which have been highly critical

92. 435 U.S. at 308.
93. *Id.*
94. 413 U.S. 717 (1973); *see also* text accompanying note 62 *supra.*
95. 435 U.S. at 308.
96. *Id.* at 311-12.
97. *Id.* at 312. "The Court has squarely held that a state may not treat employment as a scarce resource to be reserved for its own citizens."
98. 435 U.S. 291.
99. 427 U.S. 307 (1976).
100. *Id.*
101. 403 U.S. 365 (1971).
102. 413 U.S. at 644.
103. N.Y. Exec. Law §215(3) (McKinney Supp. 1976).
104. 413 U.S. at 644.

of blanket prohibitions against employment of aliens and of statutes which "sweep indiscriminately against aliens by restricting jobs to citizens only."[105] To attempt to predict the future course of the Supreme Court on this subject would be to engage in pure speculation. Past inconsistencies clearly demonstrate that only the Court itself is equipped to explain the parameters of the *Foley* decision.

Douglas A. Blankman

105. *Id.; accord,* Examining Bd. v. Flores de Otero, 426 U.S. 527 (1976).