

## GOVERNMENTAL RESTRICTIONS ON IRANIAN ALIENS DURING THE HOSTAGE CRISIS

Iranian demonstrators invaded the United States embassy in Tehran on November 4, 1979, taking sixty-six American citizens captive.<sup>1</sup> The demonstrators refused to release captured embassy personnel until the United States Government fulfilled the captors' demands.<sup>2</sup> The Islamic Republic of Iran refused to protect the embassy personnel and essentially ratified the taking of the hostages.<sup>3</sup>

The action in Iran triggered American governmental retaliation against Iranian nationals attending school in the United States. Two instances of governmental retaliation provoked subsequent legal challenges. On November 10, 1979, President Carter instructed the Attorney General to review the status of Iranians present in the United States on student visas and to initiate deportation proceedings against those not in compliance with the statutory requirements.<sup>4</sup> In an unrelated event in the summer of 1980, the Regents of New Mexico State University attempted to bar all Iranian students from enrolling at the university.<sup>5</sup>

Iranian nationals challenged both the federal and state restrictions as violations of the equal protection provisions of the Constitution.<sup>6</sup> A

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1. For a discussion of the events comprising the hostage crisis, see *Narenji v. Civiletti*, 481 F. Supp. 1132, 1134-36 (D.D.C.), *rev'd*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). The demonstrators released the last of the hostages on January 20, 1981.

2. *Id.* at 1135. The Iranians wanted the United States to return the dethroned Shah Mohammed Reza Pahlavi and his assets to Iran.

3. *Id.*

4. Announcement on Actions to Be Taken by the Department of Justice, 15 WEEKLY COMP. PRES. DOC. 2107 (Nov. 10, 1979), *quoted in* *Narenji v. Civiletti*, 481 F. Supp. 1132, 1135 (D.D.C.), *rev'd*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). Pursuant to this authority, the Attorney General promulgated a regulation requiring Iranian students to report to the Immigration and Naturalization Service (INS) within 30 days. See 8 C.F.R. § 214.5 (1980). The Appendix contains a complete text of the regulation. To satisfy the statutory requirements for maintaining nonimmigrant student status, an alien must carry a full-time class schedule at an approved institution. 8 U.S.C. § 1101(a)(15)(F)(i) (1982). The statute also provides that proof of certain conduct, such as conviction for "a crime involving moral turpitude," will result in the loss of nonimmigrant student status. *Id.* § 1251(1). By December 31, 1979, the INS had identified 6,906 deportable Iranian nationals in the United States. See Note, *Alien Students in the United States: Statutory Interpretation and Problems of Control*, 5 SUFFOLK TRANSNAT'L L.J. 235, 246 (1981).

5. See *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1367-68 (D.N.M. 1980).

6. *Id.* at 1371 (challenging New Mexico State University's bar on enrollment); *Narenji v. Civiletti*, 481 F. Supp. 1132, 1136 (D.D.C.), *rev'd*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446

federal district court found the state restraint unconstitutional; a federal circuit court of appeal held the federal regulation constitutional. The intriguing aspect of these cases lies in the standard of review the courts employed. The court reviewing the state action applied strict judicial scrutiny.<sup>7</sup> The court considering the federal action, however, employed the rational basis test.<sup>8</sup> Use of such divergent standards produces incongruous results which allow the federal government, and the state governments in certain instances, to engage in arbitrary discrimination against aliens.<sup>9</sup>

This Note explores the standards of review courts employ when considering allegations that a governmental classification based on alienage violates the equal protection clause.<sup>10</sup> To demonstrate the consequences of utilizing inconsistent standards of review, this Note analyzes the cases arising from the American treatment of nonimmigrant Iranian students during the hostage crisis.<sup>11</sup> This Note concludes that courts should always employ strict scrutiny to prevent arbitrary discrimination against aliens.<sup>12</sup>

## I. STATE RESTRICTIONS ON ALIENS

The United States Supreme Court first used the equal protection clause of the fourteenth amendment to invalidate a state restriction on aliens within the United States in *Yick Wo v. Hopkins*.<sup>13</sup> Stating that the equal protection clause of the fourteenth amendment protected all persons within the territorial jurisdiction of the United States without regard to nationality, the Court found discriminatory enforcement of a

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U.S. 957 (1980) (challenging the Attorney General's regulation implementing President Carter's directive).

7. *Tayyari v. New Mexico State Univ.*, 495 F. Supp. at 1372. Strict judicial scrutiny allows courts to uphold statutory classifications only when they are necessary to advance compelling governmental interests. See generally 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).

8. *Narenji v. Civiletti*, 617 F.2d 745, 747, cert. denied, 446 U.S. 957 (1980). Under the rational basis test, a classification is constitutional if a court can find any rational relationship between the purpose of the statute and the classification. See generally Gunther, *supra* note 7.

9. See *infra* notes 31-52, 80-86 & 120-23 and accompanying text.

10. See *infra* notes 25-88 and accompanying text.

11. See *infra* notes 89-116 and accompanying text.

12. See *infra* notes 117-28 and accompanying text.

13. 118 U.S. 356 (1886). In *Yick Wo*, the Supreme Court used the equal protection clause to protect Chinese aliens from discriminatory administration of an ordinance that effectively put them out of the laundry business.

facially neutral ordinance against one nationality constitutionally impermissible in the absence of any valid state justification.<sup>14</sup> In subsequent decisions, however, the Court diluted the protection afforded by the equal protection clause, holding that the showing of a “special public interest” would justify a state statute that discriminated against aliens.<sup>15</sup> Using this rationale, the Court upheld statutes prohibiting aliens from owning land<sup>16</sup> or engaging in a licensed profession.<sup>17</sup>

The Court narrowed the special public interest doctrine in *Oyama v. California*<sup>18</sup> and *Takahashi v. Fish and Game Commission*,<sup>19</sup> invalidating state restraints on aliens’ access to natural resources. In both cases, the Court found the state restrictions unconstitutional despite arguments by the state that they had a special interest in preserving natural resources for their citizens.<sup>20</sup> In *Oyama*, the plurality avoided the special public interest doctrine by finding that the statute violated the equal protection clause because it prohibited only Japanese aliens from owning farm land.<sup>21</sup> Four justices concurred, but indicated that they

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14. *Id.* at 374. The Court found that:

No reason for [the discrimination] is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution.

*Id.*

15. *See, e.g.,* *Truax v. Raich*, 239 U.S. 33 (1915).

16. *Terrace v. Thompson*, 263 U.S. 197 (1923). In *Terrace*, the statute at issue established two classes of aliens: those who had not, in good faith, renounced allegiance to the sovereignty to which they were subject and announced their intention to become citizens of the United States; and those aliens who had, and thereby became eligible for citizenship. *Id.* at 219-20. Only the former were barred from owning real estate by the Washington State Anti-Alien Land Law. The Court held that the statute was not repugnant to the equal protection clause, because “[t]he quality and allegiance of those who own, occupy, and use the . . . lands within its borders are matters of highest importance, and affect the safety and power of the state itself.” *Id.* at 221. *Accord* *Cockrill v. California*, 268 U.S. 258 (1925); *Frick v. Webb*, 263 U.S. 326 (1923); *Webb v. O’Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923).

17. *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927). Justice Stone, writing for the Court, stated that the facts adduced “do not preclude the possibility of a rational basis for the legislative judgement” that aliens were “not as well qualified as citizens to engage in [the licensed] business” of running pool or billiard rooms. *Id.* at 397.

18. 332 U.S. 633 (1948).

19. 334 U.S. 410 (1948).

20. These decisions followed *Korematsu v. United States*, 323 U.S. 214 (1944), which set the stage for strict scrutiny of “suspect” classifications. In *Korematsu*, the Court upheld a military order which excluded both citizens and aliens of Japanese ancestry from parts of California. *Id.* at 224.

21. *Oyama v. California*, 332 U.S. 633, 644-45 (1948). The Court also evaluated the state’s

would have found that the state had no special public interest in preventing aliens from owning farm land.<sup>22</sup> In *Takahashi*, a majority of the Court rejected the state's asserted special public interest in its natural resources and struck down a statute which reserved commercial fishing to persons eligible for citizenship.<sup>23</sup> The Court declared that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."<sup>24</sup> Although the Court appeared to impose a higher standard of review than mere rationality in both cases, granting less deference to the findings and judgments of the state legislature, it did not explicitly declare classifications based on alienage to be "inherently suspect"<sup>25</sup> until 1971 in *Graham v. Richardson*.<sup>26</sup>

In *Graham*, the Court invalidated two state statutes that denied welfare benefits to aliens.<sup>27</sup> Justice Blackmun, writing for the majority, reasoned that aliens constitute an insular minority with no political representation and, therefore, classifications based on alienage warrant strict judicial scrutiny.<sup>28</sup> He also relied in part on *Takahashi* as author-

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rationale for the discrimination but found it was not a "compelling justification." *Id.* at 640, 646-47. This follows the analysis used by the Court in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). *See supra* notes 13-14 and accompanying text.

22. *Id.* at 649 (Black, J., concurring); *id.* at 672 (Murphy, J., concurring). Justice Douglas joined in Justice Black's concurrence; Justice Rutledge joined in Justice Murphy's concurrence. These Justices found that the law on its face violated the fourteenth amendment, necessitating the overruling of *Terrace v. Thompson*, 263 U.S. 197 (1923). *Oyama v. California*, 332 U.S. at 649 n.3 (Black, J., concurring); *id.* at 672 n.31 (Murphy, J., concurring). For a discussion of *Terrace* see *supra* note 16.

23. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 421-22 (1948).

24. *Id.* at 420. The Court found the statute at issue in *Oyama* distinguishable, thereby avoiding the need to overrule *Terrace*. *Id.* at 422 n.8. Justice Reed, joined by Justice Jackson, dissented, arguing that this statute was analogous to that upheld in *Terrace*, and was therefore constitutional. *Id.* at 428, 431 (Reed, J., dissenting). *See supra* notes 16 & 22.

25. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

26. 403 U.S. 365 (1971).

27. *Id.* at 376. One of the statutes denied state welfare benefits to aliens who had been state residents fewer than 15 years. The other denied state welfare benefits to aliens in general. *Id.* at 367-70.

28. *Id.* at 372. The Court stated that aliens exemplify a "discrete and insular" minority which under footnote four of *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938), "may call for a . . . more searching judicial inquiry." 403 U.S. at 372. When Justice Stone wrote the *Carolene Products* footnote, he may have had aliens in mind. He referred to "national" minorities along with religious and racial minorities as examples of groups which might receive heightened judicial scrutiny. One of the cases he cited to support this proposition, *Farrington v. Tokushige*, 273 U.S. 284 (1927), gave Japanese aliens the right to educate their children in Japanese language schools in the territory of Hawaii. *See also infra* note 30.

ity for elevating alienage to a suspect classification.<sup>29</sup> Applying the strict scrutiny standard, the Court concluded that the state failed to prove that it had a compelling interest in reserving welfare benefits to its citizens.<sup>30</sup>

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29. Justice Blackmun quoted the *Takahashi* Court's statement that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." 403 U.S. at 372. This language hardly mandates strict scrutiny of a suspect classification. See *Sugarman v. Dougall*, 413 U.S. 634, 655 (1973) (Rehnquist, J., dissenting); G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 887 n.2 (10th ed. 1980). *Takahashi*, however, does call for more than the deferential rational basis test in alienage controversies. Under the two tier approach, therefore, *Takahashi* favored strict scrutiny over mere rationality review. See generally G. GUNTHER, *supra*, at 671-75 (a discussion of the two tier approach and its problems).

30. *Id.* at 376-77. Although Justice Blackmun devoted only one paragraph of his opinion to elevating the level of scrutiny for alienage classifications, *id.* at 371-72, seven other justices joined this part of the opinion.

In *Frontiero v. Richardson*, 411 U.S. 677 (1973), a plurality of the Court considered four factors to determine whether a minority—in that case women—is in need of heightened judicial protection from governmental prejudice: historic disadvantages, high visibility, lack of political representation and immutable characteristics. *Id.* at 685-86. Aliens have historically been the subject of discriminatory state and federal legislation. See, e.g., Act of Sept. 13, 1888, ch. 1015, 25 Stat. 477, 479 (act of Congress calling for imprisonment at hard labor after a conviction for the status of being an illegal Chinese alien, subsequently invalidated in *Wong Wing v. United States*, 163 U.S. 228 (1896), on procedural due process grounds); 1921 Cal. Stat. lxxxiii (statute barring aliens from owning farm land, subsequently invalidated in *Oyama*). Aliens have not gained political representation, as generally they have not had the right to vote or hold elective office. See, e.g., *Skaft v. Rorex*, 430 U.S. 961 (1977) (decision of state court dismissing equal protection attack on state statute denying permanent resident aliens right to vote in school elections presents no substantial federal question), *dismissing appeal from* 191 Colo. 399, 533 P.2d 830 (1976). See generally Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977) (argument for aliens' right to vote). On the other hand, not all aliens are "highly visible" or easily identified as aliens, and alienage is usually alterable through naturalization. Cf. 8 U.S.C. § 1427 (1982) (naturalization requirements after admission as an immigrant alien).

Aliens' political powerlessness and the tradition of prejudicial treatment, by themselves, would appear to be adequate grounds to require the application of heightened scrutiny to alienage classifications. The *Carolene Products* footnote mainly drew attention to minorities' limited access to "political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4. See also *Foley v. Connellee*, 435 U.S. 291, 294 (1978) ("[A]liens . . . have no direct voice in the political processes.").

Justice Harlan, without comment, merely joined in that part of the *Graham* opinion which used federal preemption as an alternative ground to strike down the state statutes. 403 U.S. at 383 (Harlan, J., concurring). Preemption has played an important role in federal courts' review of state legislation affecting aliens. See, e.g., *Examining Bd. of Eng'rs v. Flores De Otero*, 426 U.S. 572 (1976) (state restrictions on lawfully admitted aliens contrary to federal immigration laws invalid); *De Canas v. Bica*, 424 U.S. 351 (1976) (no preemption of state regulation of employment of illegal aliens). See also Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069 (1979) (preemption theory underlies alienage cases); Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L.J. 940 (1980) (proposed presumption test for alienage cases).

Although the Court in *Graham v. Richardson*<sup>31</sup> questioned the continued vitality of the special public interest doctrine, it refused to reject the doctrine completely.<sup>32</sup> In the next alienage case to reach the Court, *Sugarman v. Dougall*,<sup>33</sup> the Court rejected the argument of the City of New York that it had a special interest in excluding aliens from civil service employment. The Court held that the special public interest doctrine was inapplicable to a law absolutely excluding aliens from any civil service employment.<sup>34</sup> Relying on *Graham*, it applied strict scrutiny<sup>35</sup> and found the statute unconstitutional.<sup>36</sup>

Justice Blackmun, again writing for the majority, defined which interests would justify barring aliens from state public employment.<sup>37</sup> He declared that the Court would not use strict scrutiny when the state's interest in protecting positions essential to the maintenance of a republican form of government would justify such a restriction.<sup>38</sup> Thus, the Court molded the special public interest doctrine into a new form,<sup>39</sup> known as the *Dougall*, or governmental functions, exception.<sup>40</sup>

31. 403 U.S. 365 (1971).

32. *Id.* at 374. Although the Court found that the state's desire to save money was not a special public interest, it stated that the doctrine may be appropriate "in other contexts." *Id.*

33. 413 U.S. 634 (1973).

34. *Id.* at 645. Justice Blackmun noted that the doctrine relied on the outdated rights-privileges distinction. He also had to sidestep three earlier decisions in which the Court, on similar facts, had accepted the state's special public interest argument. *See Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392, 396-97 (1927); *Crane v. New York*, 239 U.S. 195, 198 (1915); *Heim v. McCall*, 239 U.S. 175, 192 (1915). Justice Blackmun considered these cases "weakened" by *Takahashi* and *Graham*. 413 U.S. at 645.

35. 413 U.S. at 642. Justice Rehnquist dissented from the use of heightened scrutiny for alienage classifications. *Id.* at 649-57 (Rehnquist, J., dissenting).

36. The Court stated that "[i]n view of the breadth and imprecision of [the statute] in the context of the State's interest, we conclude that the statute does not withstand close judicial scrutiny." *Id.* at 643.

37. *Id.* at 646-49.

38. *Id.* at 648.

[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a state's constitutional prerogatives . . . . This is no more than a recognition of a state's historical power to exclude aliens from participation in its democratic political institutions, . . . and a recognition of a state's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders.

*Id.* (citing U.S. CONST. art. IV, § 4). *See also id.* at 647.

39. The Court noted recently that the *Dougall* exception, "rests on firmer foundations than the old public/private distinction" of the special public interest doctrine. *Cabell v. Chavez-Salido*, 434 U.S. 432, 440 (1982).

40. *E.g.*, *Ambach v. Norwick*, 441 U.S. 68, 75 (1979) (the governmental functions exception); G. GUNTHER, *supra* note 29, at 889 (the *Dougall* exception). Courts have also called it the

Although the Justices subsequently debated the scope of the *Dougall* exception in *Foley v. Connelie*,<sup>41</sup> a plurality concluded that a state regulation barring aliens from the position of state trooper fell within its ambit.<sup>42</sup> The plurality reasoned that the exception applied because a trooper enforces governmental policy.<sup>43</sup> The Court then upheld the classification,<sup>44</sup> concluding that citizenship bore a rational relationship to performance of a state trooper's duties.<sup>45</sup> Three dissenting Justices argued that the *Dougall* exception should apply only when a state excludes aliens from positions which involve policymaking.<sup>46</sup> The dissenters warned that the majority's approach would permit states to exclude aliens from positions as fire fighters and sanitation workers which involve only policy enforcement.<sup>47</sup> Several recent decisions have to some extent substantiated the dissenters' fears. The Court has used the *Dougall* exception to justify excluding aliens from positions as deputy probation officers<sup>48</sup> and public school teachers,<sup>49</sup> even though these

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*Sugarman* exception. *E.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 n.6 (1982); *Foley v. Connelie*, 435 U.S. 291, 304 (1978) (Marshall, J., dissenting).

41. 435 U.S. 291 (1978).

42. *Id.* at 300.

43. *Id.*

44. Justice Stewart concurred in the judgment and opinion of the Court. *Id.* at 295 (Stewart, J., concurring). Justice Blackmun concurred in the result. *Id.* (Blackmun, J., concurring). *See infra* note 46.

45. *Id.* After quoting *Dougall*, Chief Justice Burger concluded:

In the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position. A State may, therefore, consonant with the Constitution, confine the performance of this important public responsibility to citizens of the United States.

*Id.*

46. *Id.* at 304-05 (Marshall, J., dissenting); *id.* at 309-10 (Stevens, J., dissenting). Justice Brennan joined in both dissenting opinions. The dissenters noted that in *In re Griffiths*, 413 U.S. 717 (1973), the Court struck down a statute prohibiting aliens from the analogous profession of practicing law. 435 U.S. at 306 (Marshall, J., dissenting); *id.* at 312 (Stevens, J., dissenting). Justice Stewart found *Griffiths* difficult to reconcile with the plurality's holding. *Id.* at 300 (Stewart, J., concurring). He concurred in the Court's opinion, however, because he believed that the dissenters relied on prior Court decisions, in which strict scrutiny was employed, that were no longer valid. *Id.* (Stewart, J., concurring). Justice Blackmun also concurred but attempted to reconcile the alienage decisions applying strict scrutiny, such as *Graham*, *Dougall* and *Griffiths*, with the mere rationality approach of the *Foley* plurality. Justice Blackmun relied on the dicta in *Dougall* to blunt Chief Justice Burger's statement for the plurality that "we have never suggested that state legislation [restraining aliens] is inherently invalid, nor have we held that all limitations on aliens are suspect." *Id.* at 294 (Blackmun, J., concurring).

47. 435 U.S. at 304 (Marshall, J., dissenting). *See* G. GUNTHER, *supra* note 29, at 889.

48. *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982).

49. *Ambach v. Norwick*, 441 U.S. 68 (1979).

positions generally are not considered to constitute cornerstones of a republican form of government.

Dissenting in *Foley*, Justice Marshall observed that the majority's application of the *Dougall* exception does more than delineate a class of positions in which a state government has such a compelling interest that a restriction reserving these positions to citizens will survive strict scrutiny. Instead, he argued, the majority's analysis allows courts to scrutinize such restrictions more leniently.<sup>50</sup> Thus, the Court's choice of strict scrutiny or mere rationality review depends on which governmental function the state tries to limit to American citizens.<sup>51</sup> This analysis creates a double standard for examining state laws which discriminate on the basis of nationality.<sup>52</sup>

## II. FEDERAL RESTRICTIONS ON ALIENS

The Supreme Court's determination that the fourteenth amendment does not require strict scrutiny of state classifications excluding aliens from vital government positions limits aliens' constitutional rights.<sup>53</sup> The Court's review of federal regulations of aliens under the equal protection component of the fifth amendment,<sup>54</sup> however, affords the fed-

50. 435 U.S. at 303 n.1 (Marshall, J., dissenting).

51. See *supra* notes 42-49 and accompanying text; *infra* note 52.

52. See G. GUNTHER, *supra* note 29, at 889; Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516, 1518 (1979).

53. See *supra* notes 31-52 and accompanying text.

54. The phrase "equal protection of the laws" is unique to the fourteenth amendment, which applies only to the states. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added). The Supreme Court has employed the fifth amendment's due process clause to strike down unreasonably discriminatory actions by federal officials. The fifth amendment due process clause, which applies to the federal government, states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the companion case to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the Court used the fifth amendment's due process clause to strike down racial discrimination in the District of Columbia public schools. In *Brown*, the Court declared the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), inapplicable to state-funded public education. The District of Columbia's segregated public schools, however, were unaffected by *Brown*, which the Court decided on fourteenth amendment grounds. Thus, in order to avoid an obvious incongruity, the Court in *Bolling* created an equal protection component of the fifth amendment. *Bolling v. Sharpe*, 347 U.S. at 499.

In *Bolling*, the Court cautioned that "[t]he 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of the law,' and, therefore, we do not imply that the two are always interchangeable phrases." *Id.* The Court, however, found it "unthinkable" that the Constitution would permit the federal government to discriminate while it prohibited the states from doing so. *Id.* at 500.

eral government even greater latitude in imposing restrictions on aliens.<sup>55</sup> For over twenty years the Court intimated that the fifth amendment's equal protection component and the fourteenth amendment's equal protection clause mandated the same intensity of review.<sup>56</sup> Although most state alienage classifications trigger strict scrutiny under the fourteenth amendment's equal protection clause,<sup>57</sup> three Supreme Court cases demonstrate that the fifth amendment's equal protection component does not similarly mandate strict judicial scrutiny of federal restrictions on aliens.<sup>58</sup>

In *Mathews v. Diaz*,<sup>59</sup> the Court upheld a federal statute requiring aliens to reside continuously in the United States for five years before becoming eligible for Medicare benefits.<sup>60</sup> A few years earlier, in *Graham v. Richardson*,<sup>61</sup> the Court invalidated a similar Arizona statute as violative of the fourteenth amendment's equal protection clause.<sup>62</sup> In *Diaz*, the Court distinguished *Graham* on the ground that Congress, rather than a state legislature, had enacted the eligibility requirement.<sup>63</sup> The *Diaz* Court exhibited a general reluctance to hinder either Congress or the President in their dealings with international problems.<sup>64</sup>

55. See *infra* notes 57-88 and accompanying text.

56. In *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975), the Court stated that its analysis of equal protection controversies "has always been precisely the same" whether the charges were brought under the fourteenth or fifth amendment. See also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

57. See *supra* notes 26-30 and accompanying text.

58. See *infra* notes 59-88 and accompanying text. Before the Court began applying strict scrutiny in alienage cases, see *supra* notes 28-30 and accompanying text, it gave great deference to federal laws concerning aliens. See, e.g., *Fleming v. Nestor*, 363 U.S. 609, 611 (1960) (review for "a patently arbitrary classification, utterly lacking in rational justification").

59. 426 U.S. 67 (1976).

60. *Id.* at 69. See 42 U.S.C. § 13950(2)(B) (1976).

61. 403 U.S. 365 (1971). See *supra* notes 25-30 and accompanying text.

62. 403 U.S. at 376. The *Graham* decision left open the issue of whether the federal government could constitutionally require aliens to maintain residency in the United States for a certain number of years before becoming eligible for federal welfare benefits. *Id.* at 382 n.14.

63. 426 U.S. at 84.

64. "Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Id.* at 81.

The Court also quoted from *Harisiades v. Shaughnessey*, 342 U.S. 580, 580-89 (1952):

[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

The Court applied the rational relationship test,<sup>65</sup> stating that “equal protection analysis . . . involves significantly different considerations” if a case concerns federal, rather than state, restrictions on aliens.<sup>66</sup>

In *Hampton v. Mow Sun Wong*,<sup>67</sup> five aliens challenged a Civil Service Commission regulation which excluded aliens from employment in the federal competitive civil service.<sup>68</sup> Justice Stevens, writing for a plurality, held that the regulation violated the due process clause of the fifth amendment.<sup>69</sup> He stated that a federal agency cannot invoke the rationale of “overriding national interests” to enact regulations in the absence of a clear directive from Congress or the President.<sup>70</sup> Justice Stevens concluded that these entities should have the sole power to control foreign relations.

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426 U.S. at 81 n.17. *Haristades* was criticized by Professor Hart in his Dialogue for its abdication to Congress on deportation matters. Professor Hart labelled the Court's approach “doctrinaire.” Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1391 n.87 (1953), reprinted in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 352 n.40 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

65. 426 U.S. at 83. In addition to the duration requirement, the Court found the permanent residency requirement “unquestionably reasonable” in determining aliens' eligibility for federal medical benefits. *Id.* at 82-83. Professor Gunther called the Court's scrutiny in *Diaz* “extremely deferential.” G. GUNTHER, *supra* note 29, at 896.

66. 426 U.S. at 84-85. The Court reiterated this observation in the concluding portion of the opinion, stating that “[c]ontrary to appellees' characterization, it is not ‘political hypocrisy’ to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.” *Id.* at 86-87. The Court observed that it was not the concern of a state to distinguish aliens from citizens of another state because both belong to the larger group of noncitizens of that state. *Id.* at 85. This argument implicitly relies on a preemption theory. *See supra* note 30.

67. 426 U.S. 88 (1976). Although Justice Stevens wrote for a unanimous Court in *Diaz*, he wrote for only a plurality in *Mow Sun Wong*, decided the same day. Justices Brennan and Marshall concurred; Chief Justice Burger and Justices White and Blackmun joined Justice Rehnquist's dissent.

68. *Id.* at 98-99, 114.

69. *Id.* at 103. The plurality noted that the Civil Service Commission's sole responsibility is to make the competitive service efficient. The regulation barring aliens lacked any “legitimate basis” to serve that end. *Id.*

70. *Id.* at 105, 115-16. The Civil Service Commission offered three justifications for the regulation: promoting naturalization; withholding a foreign relations “barbaining chip”; and insuring individual loyalty in important positions. The Court found that only the third justification was of any concern to the Commission but found it overinclusive. *Id.* at 115-16.

Justice Brennan, in a concurrence joined by Justice Marshall, felt that the Court should wait until the Executive or Congress acted to preclude aliens from federal employment before it ruled on the regulation's validity. *Id.* at 117 (Brennan, J., concurring). The dissent, on the other hand, found the Commission's regulation to be a proper delegation of authority and consonant with “national interests.” *Id.* at 126-27 (Rehnquist, J., dissenting).

The President took advantage of the option left open by the plurality and ordered the Civil Service Commission not to employ aliens.<sup>71</sup> This Executive Order amended the regulation formerly found unconstitutional.<sup>72</sup> Subsequently, the plaintiffs in *Mow Sun Wong* moved for an order implementing the Supreme Court's decision.<sup>73</sup> The district court denied the plaintiffs injunctive relief, finding the amended regulation constitutional.<sup>74</sup> Ultimately, the decision in *Mow Sun Wong* neither helped the plaintiffs nor forced the President or Congress to justify discrimination against aliens in the federal civil service.<sup>75</sup>

As in *Diaz*, the Court in *Mow Sun Wong* easily distinguished an earlier decision<sup>76</sup> invalidating a similar state law. It found that the fifth amendment's protection of aliens did not extend as far as that afforded by the fourteenth amendment because the former lacked an equal protection clause.<sup>77</sup> Justice Stevens, writing for the plurality, reasoned that the federal government, unlike the state governments, may invoke "overriding national interests" to justify federal legislation<sup>78</sup> identical

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71. Exec. Order 11,935, 3 C.F.R. 146 (1976), *reprinted in* 5 U.S.C. § 3301, at 521 (1982).

72. In a letter accompanying the order, President Ford referred to *Mow Sun Wong* and maintained that the Court would uphold the fiat of the Executive or Congress on this issue. "In [*Mow Sun Wong*], the Court stated that either the Congress or the President might issue a broad prohibition against the employment of aliens in the civil service, but held that neither the Congress nor the President had mandated the general prohibition contained in the regulations of the Commission." 3 C.F.R. § 147 (1976). The President would have preferred that Congress amend the rule because "Congress has the primary responsibility with respect to the admission of aliens into, and the regulation of conduct of aliens within, the United States." *Id.* See Comment, *Procedural Due Process and the Exercise of Delegated Power: The Federal Civil Service Employment Restriction on Aliens*, 66 GEO. L.J. 83, 110-11 (1977) (arguing that the executive order was improper because of improper delegation of power). The citizenship requirement is still in effect. See 5 C.F.R. § 7.4 (1982).

73. *Mow Sun Wong v. Hampton*, 435 F. Supp. 37, 38-39 (N.D. Cal. 1977), *aff'd sub nom. Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (Brennan, Marshall & White, JJ., voting to grant certiorari).

74. *Id.* at 46. *Accord* *Jalil v. Campbell*, 590 F.2d 1120, 1123 n.3 (D.C. Cir. 1978); *Vergara v. Hampton*, 581 F.2d 1281, 1287 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979); *Santin-Ramos v. United States Civil Serv. Comm'n*, 430 F. Supp. 422, 424 (D.P.R. 1977).

75. President Ford simply stated in his letter that the blanket ban on aliens from the competitive civil service was "in the national interest." 3 C.F.R. § 147 (1976).

76. *Sugarman v. Dougall*, 413 U.S. 634 (1973). See *supra* notes 33-40 and accompanying text.

77. "[T]he two protections are not always coextensive." 426 U.S. at 100. Cf. *supra* note 52 (Court's discussion in *Bolling* of scope of two provisions).

78. "Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." 426 U.S. at 100. The Court noted the difference in the language of the two amendments in a footnote, stating that "it is quite clear that [the equal protection

to unconstitutional state restrictions.<sup>79</sup>

The Court demonstrated the severity of the *Mow Sun Wong* "overriding national interests" test during the next Term in *Fiallo v. Bell*.<sup>80</sup> In *Fiallo*, the Court examined a federal statute regulating the preferential admission of aliens whose immediate relatives had become United States citizens.<sup>81</sup> The Court required the federal government to demonstrate a "facially legitimate" basis for the statute,<sup>82</sup> a standard of review the dissent called "toothless."<sup>83</sup> Although courts traditionally have allowed Congress broad power in the area of alien admissions,<sup>84</sup> the Court in *Fiallo* repeatedly cited *Mow Sun Wong* and *Diaz*, cases which dealt with aliens already admitted to the United States, as authority for its choice of a deferential standard of review.<sup>85</sup> Read together, *Mow Sun Wong*, *Diaz*, and *Fiallo* compel the conclusion that the Court will employ an extremely deferential equal protection standard when either congressional or executive action discriminates

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clause] differs from, and is additive to, the protection guaranteed by [the due process clause]." *Id.* at 100 n.17.

The opinion also limited *Bolling v. Sharpe* by stating that "when a federal rule is applicable only to a limited territory, such as the District of Columbia . . . and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause." *Id.* at 100. By confining *Bolling* to its geographical facts, Justice Stevens attempted to confine the application of equal protection under the fifth amendment. In cases challenging gender discrimination in the military under the equal protection component of the fifth amendment, however, the Court did not discuss geographic limitations even though the legislation had a "nation-wide impact." See *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

79. 426 U.S. at 100-01.

80. 430 U.S. 787 (1977).

81. 8 U.S.C. §§ 1101(b)(1)(D), 1151(b) (1982). The statute gave mothers, but not fathers, of illegitimate children preferential treatment. See 430 U.S. at 800-04 (Marshall, J., dissenting) (analysis of the statutes and the claims).

82. 430 U.S. at 794 (quoting *Kleindienst v. Mandel*, 408 U.S. 753 (1972)). Justice Powell, writing for the majority, hypothesized justifications for the statutory discrimination against fathers of illegitimate alien children, stating that "perhaps [Congress] perceived [an] absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations." *Id.* at 799 (emphasis added and footnote omitted).

83. *Id.* at 805 (Marshall, J., dissenting).

84. A distinction can be drawn between aliens legally admitted to the United States and aliens seeking entry. Once admitted to the country aliens receive at least procedural due process rights. Compare *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (excludable alien's first amendment interests immaterial) with *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (resident alien has fifth amendment rights upon reentry). See also Hart, *supra* note 64, at 1388-96, reprinted in HART & WECHSLER, *supra* note 64, at 348-56 (discussion in the Dialogue of the lack of due process in admission cases as opposed to deportation cases).

85. 430 U.S. at 792, 796, 798.

against aliens.<sup>86</sup>

The Court has explained that Congress' "broad power over immigration and naturalization" necessitates this lenient standard of review.<sup>87</sup> Judicial review of federal alienage restrictions is so deferential, however, that aliens legally within the United States are subject to arbitrary discriminatory treatment under the cloak of these broad federal powers. This was made evident by the recent decision upholding the constitutionality of President Carter's actions against Iranian students during the hostage crisis.<sup>88</sup>

### III. EQUAL PROTECTION, IRANIAN ALIENS AND THE HOSTAGE CRISIS

#### A. Federal Action

Shortly after Iranian demonstrators took embassy personnel hostage in Tehran,<sup>89</sup> the Attorney General, pursuant to a presidential directive, promulgated a regulation requiring Iranian students to report to the Immigration and Naturalization Service within thirty days to document their student status.<sup>90</sup> Iranian nationals challenged the constitu-

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86. The Court itself later recognized "the relaxed scrutiny" used in *Diaz* and *Mow Sun Wong*. See *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) (applying strict scrutiny to a state restriction on aliens seeking financial aid for higher education). See also J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 599-601 (1978) (skeptical analysis of the *Nyquist* footnote).

87. *Nyquist v. Mauclet*, 432 U.S. at 7 n.8. This position was reiterated by Chief Justice Burger in his dissent in *Plyler v. Doe*, 457 U.S. 202, 246-47 n.7 (1982) (Burger, C.J., dissenting) (Texas law barring undocumented alien children from receiving free public education unconstitutional under fourteenth amendment). See also *Cervantes v. Guerra*, 651 F.2d 974, 980 n.17 (5th Cir. 1981) ("appreciably narrower" protection for aliens under the fifth amendment).

In general, commentators have criticized this double standard and its justification. See Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541, 552-58 (1977); Rosenberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 316-36. See also J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 86, at 599-600. See generally Maltz, *The Burger Court and Alienage Classifications*, 31 OKLA. L. REV. 671 (1978) (unconventional equal protection analysis in alienage cases).

88. See *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). See also *infra* notes 89-102.

89. See *supra* note 1 and accompanying text.

90. See *supra* note 4 and accompanying text. The regulation applied only to *nonimmigrant* Iranian aliens. Nonimmigrant aliens have not been admitted for permanent residence. Most of the cases discussed above involved discrimination against immigrant aliens. Only immigrant aliens, those that have been admitted for permanent residence, are eligible for naturalization. 8 U.S.C. § 1401(a)(5) (1982). The Supreme Court recently held in *Plyler v. Doe*, 457 U.S. 202

tionality of the regulation in *Narenji v. Civiletti*.<sup>91</sup> Following the reasoning of *Mow Sun Wong*, the district court searched for an "overriding national interest";<sup>92</sup> finding none, it declared the regulation unconstitutional.<sup>93</sup>

On appeal, the Court of Appeals for the District of Columbia adopted a different approach to the equal protection claim.<sup>94</sup> It found that the classification based on nationality was not subject to strict scrutiny because it was a federal restriction on immigration.<sup>95</sup> The court concluded, therefore, that the appropriate test was whether the admin-

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(1982), that aliens who had chosen to enter the United States illegally lacked the criterion of immutability necessary to be considered a suspect class. *Id.* at 219 n.19.

Nonimmigrant aliens may enter the United States temporarily for pleasure, business, work or education. 8 U.S.C. § 1101(a)(15) (1982). In *Toll v. Moreno*, 102 S. Ct. 2977 (1982), a state university raised the issue whether nonimmigrant aliens are a suspect class. Although the district court found the classification suspect, concluding that "the Supreme Court cases . . . have in principle wrapped all resident aliens, both immigrant and nonimmigrant, in the suspect classification blanket," *Moreno v. Toll*, 489 F. Supp. 658, 664 (D. Md. 1980), *aff'd*, 645 F.2d 217 (4th Cir.), *aff'd*, 102 S. Ct. 2977 (1982), the Court majority was able to avoid the issue. The Court affirmed solely on the ground that the state statute violated the supremacy clause. 102 S. Ct. at 2982. Only Justice Rehnquist, in a dissent joined by the Chief Justice, reached the issue. He argued that nonimmigrant aliens were not similarly situated to permanent resident aliens and hence deserved only the protections afforded by rationality review. *Id.* at 3000-01 (Rehnquist, J., dissenting).

91. 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). For commentary on *Narenji*, see Note, *Aliens—Constitutionality of Discrimination Based on National Origin*, 21 HARV. INT'L L.J. 467 (1980); 7 BROOKLYN J. INT'L L. 135 (1981); 31 CATH. U.L. REV. 101 (1981); 20 SANTA CLARA L. REV. 993 (1980); 11 SETON HALL L. REV. 230 (1980); 13 VAND. J. TRANSNAT'L L. 857 (1980).

92. 481 F. Supp. 1132, 1144 (D.D.C.), *rev'd*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). The district court examined the government's asserted justifications for the regulation. Of the three justifications presented by the government, the court found only the interest in keeping domestic peace and thereby protecting the hostages from retaliation could constitute an overriding interest. It found the connection between potential violence against Iranian students in the United States and protection of the hostages from their possibly recalcitrant captors to be "dubious." *Id.* It inferred the purpose of the rule to be an attempt to vent American frustrations by taking some visible actions against Iranian nationals. *Id.* at 1144-45. See also *supra* note 14 (similar inference drawn in *Yick Wo*).

93. 481 F. Supp. at 1145.

94. 617 F.2d 745, 747 (D.C. Cir. 1979), *rev'g*, 481 F. Supp. 1132 (D.D.C. 1979), *cert. denied*, 446 U.S. 957 (1980).

95. *Id.* at 747. The court cited three cases to support the proposition that "[d]istinctions on the basis of nationality may be drawn in the immigration field by Congress or the Executive." Two of the cases, *Diaz* and *Fiallo*, dealt with permissible distinctions within the class of aliens, but in neither case was the distinction based on nationality. The third case cited, *Saxbe v. Bustos*, 419 U.S. 65 (1974), upheld the INS practice of treating commuter aliens who worked in the United States as immigrants lawfully admitted for permanent residence. The INS has limited this preferential treatment to Canadian and Mexican nationals because of geography, not nationality.

istrative regulation was “wholly irrational.”<sup>96</sup> It held that a rational basis for the regulation existed and reprimanded the district court for weighing the Attorney General’s asserted justifications for the regulation against the rights of the individual students.<sup>97</sup> On the facts of this case, the court stated that the judiciary should not judge presidential foreign policy decisions.<sup>98</sup> The court of appeals, therefore, approved the regulation without any meaningful review.

Upon a motion for a rehearing en banc, four judges suggested yet another approach for assessing the regulation’s constitutionality.<sup>99</sup> They contended that “close scrutiny” was appropriate.<sup>100</sup> While acknowledging that federal courts usually will not interfere with congressional exclusion of aliens, these four judges argued that the Constitution imposes greater restraints when congressional action affects aliens legally admitted to the United States.<sup>101</sup> Although the judges of the circuit court disagreed about how strictly courts should scrutinize federal regulation of resident aliens, the most lenient test prevailed.<sup>102</sup>

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96. 617 F.2d at 747, 748 (citing *Fiallo v. Bell*, 430 U.S. 787 (1977); *Mathews v. Diaz*, 426 U.S. 67 (1976)).

97. “[T]he District Court undertook to evaluate the policy reasons upon which the regulation is based. In doing this the court went beyond an acceptable judicial role.” 617 F.2d at 748.

98. *Id.* While the court of appeals did not label this a nonjusticiable political question, it did stress the plenary and distinct power of the President in foreign affairs. The court cited language in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), to this effect. *Curtiss-Wright*, however, involved the respective roles of the President and Congress, not the President and the Judiciary. Furthermore, the Supreme Court in *Curtiss-Wright* put one limitation on the presidential power, namely, that it “must be exercised in subordination to the applicable provisions of the Constitution.” *Id.*

99. 617 F.2d at 753 (joint statement of Wright, C.J., Robinson, Wald & Mikva, JJ.). These judges were in the minority. They found the fifth amendment issue raised by the selective enforcement of laws against aliens of a particular nationality to be “novel and serious.” *Id.* at 754.

100. *Id.* at 755. The judges quoted from *Foley v. Connelie*, 435 U.S. 291 (1978), which refers to “close scrutiny” in alienage cases in general. 617 F.2d at 754 n.6. In *Graham v. Richardson*, the Court used the words “close judicial scrutiny.” 403 U.S. 365, 372 (1971). This language, coupled with the declaration that aliens form a suspect class, has been interpreted to mean strict scrutiny. See G. GUNTHER, *supra* note 29, at 886-88.

101. “[O]nce an alien has taken up residence in the United States, even temporarily, he or she derives substantial protection from the Constitution and laws of this land.” 617 F.2d at 754. This premise echoed a statement in the district court’s opinion that “aliens lawfully admitted to this country are entitled to a panoply of substantive and procedural rights under the Constitution.” 481 F. Supp. at 1139 n.5. See *Shaughnessy v. United States*, 345 U.S. 206, 212 (1953) (due process guarantees attach upon entry into United States). See also *supra* note 84.

102. The court of appeals’ “wholly irrational” test stands because the Supreme Court denied certiorari. 446 U.S. 957 (1980).

Other cases dealing with Iranian aliens cite the court of appeals’ decision with approval. See

### B. State Action

In a similar response to the Iranian hostage crisis,<sup>103</sup> the Regents of New Mexico State University adopted a motion barring Iranian students from enrolling at the university.<sup>104</sup> Iranian students brought suit against the university in *Tayyari v. New Mexico State University*,<sup>105</sup> claiming the Regent's action violated the equal protection clause of the fourteenth amendment.<sup>106</sup> The federal district court applied strict scrutiny to the state restriction.<sup>107</sup> Observing that university students neither make nor implement government policy,<sup>108</sup> the court rejected the university's argument that the more lenient standard of the *Dougall*

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Nademi v. INS, 679 F.2d 811, 813-14 (10th Cir. 1982); Sadegh-Nabari v. INS, 676 F.2d 1348, 1351 (10th Cir. 1982); Malek-Marzban v. INS, 653 F.2d 113, 116 (4th Cir. 1981); Yassini v. Crosland, 618 F.2d 1356, 1362 n.7 (9th Cir. 1980); Shamsian v. Ilchert, 534 F. Supp. 178, 182 (N.D. Cal. 1982); Akbari v. Godshall, 524 F. Supp. 635, 642-43 (D. Colo. 1981). See also Ghajar v. INS, 652 F.2d 1347, 1349 n.1 (9th Cir. 1981) (Narenji's equal protection issue not before court); Najafi v. Civiletti, 511 F. Supp. 236, 240 n.2 (W.D. Mo. 1981) (Narenji's equal protection issue not before court). In *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980), the district court drew the distinction between federal and state actions, see *infra* notes 110-11 and accompanying text; otherwise, it apparently would have followed *Narenji*. See *supra* notes 95-98 and accompanying text.

Other courts have utilized *Narenji*'s hands-off approach in other foreign relations matters unrelated to Iran or any national crisis. See *Olegario v. United States*, 629 F.2d 204, 232-33 (2d Cir. 1980) (President had power to withdraw Philippine naturalization examiner); *Yuen v. Internal Revenue Serv.*, 497 F. Supp. 1023, 1039 (S.D.N.Y. 1980) (nationals of allied states eligible for federal employment). See also *Mow Sun Wong v. Campbell*, 626 F.2d 739, 743 (9th Cir. 1980) (President, not Civil Service Commission, responsible for foreign affairs); *Alliance to End Repression v. Chicago*, 91 F.R.D. 182, 201-02 (N.D. Ill. 1981) (illegality of FBI surveillance of nonresident aliens uncertain). But cf. *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1309 (9th Cir. 1982) (scrutiny of foreign policy decision when constitutional rights involved); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 452-53 (S.D. Fla. 1980) (*Narenji* distinguishable as presidential action during "national emergency").

103. See *supra* notes 1-4 & 89-102 and accompanying text.

104. See *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980). The Regent's motion was not explicitly directed at Iranians but rather at all students whose "home government" permitted the holding of United States citizens as hostages. *Id.* at 1368. The court, however, found that the Regent's action was "designed to rid the campus of Iranian students." *Id.* at 1367.

105. 495 F. Supp. 1365 (D.N.M. 1980). Two of the 15 plaintiffs were immigrant aliens. The remaining plaintiffs entered the United States on student visas and therefore needed to maintain their student status or risk deportation. *Id.* at 1368. The parties stipulated that all of the plaintiffs were "eligible for reenrollment but for the Motion adopted by Regents." *Id.* at 1371.

106. *Id.* at 1371. The plaintiffs also claimed violations of the due process clause, the supremacy clause and Title VI. *Id.* at 1375-76.

107. *Id.* at 1372. The court relied on *Graham v. Richardson*, 403 U.S. 365 (1971), as authority for applying strict scrutiny to alienage classifications. 495 F. Supp. at 1372. The court also found the classification based on nationality suspect. *Id.* at 1373.

108. 495 F. Supp. at 1372-73.

exception applied.<sup>109</sup> The university also argued that *Narenji* mandated the use of the deferential rational basis test, rather than strict scrutiny.<sup>110</sup> The court, however, found that the restriction at issue in *Narenji* involved an exercise of the presidential power over foreign affairs and, therefore, required more lenient scrutiny than the state action challenged in *Tayyari*.<sup>111</sup>

The district court carefully evaluated the university's asserted justifications for excluding Iranian students to determine whether they constituted a compelling state interest.<sup>112</sup> It rejected the university's argument that the state had a financial interest in barring Iranians because they were a credit risk and therefore a burden on the New Mexico taxpayer.<sup>113</sup> After considering the minutes of the Regents' meeting, the court found the actual motivation for the regulation was that "Americans [were] angry and fed up with Iranians."<sup>114</sup> The court also rejected as overbroad and arbitrary the university's contention that the restriction was necessary to insure the safety of Iranian students at the university.<sup>115</sup> In the absence of a compelling state interest, the district court held that the state action against aliens violated the fourteenth amendment's equal protection clause.<sup>116</sup>

#### IV. CONCLUSION

The Supreme Court has carved out two exceptions to the strict scru-

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109. *Id.* at 1372-73. The court distinguished *Foley v. Connelie*, 435 U.S. 291 (1978), *see supra* notes 41-49 and accompanying text, and *Ambach v. Norwick*, 441 U.S. 68 (1979), *see supra* text accompanying note 49, and found *Graham v. Richardson*, 403 U.S. 365 (1971) and *Nyquist v. Mauclet*, 432 U.S. 1 (1977), *see infra* note 113, controlling. 495 F. Supp. at 1372-73.

110. For discussion of the *Narenji* case, *see supra* notes 91-102 and accompanying text.

111. 495 F. Supp. at 1373. The court observed that only in alienage cases do courts apply "different levels of scrutiny for federal actions as opposed to actions by states." *Id.* at 1373 n.8.

112. *Id.* at 1373-74.

113. *Id.* In denying the economic justification the court also relied on *Nyquist v. Mauclet*, 432 U.S. 1 (1977), in which the Supreme Court held New York could not discriminate against resident aliens when distributing financial aid for post-secondary education. 495 F. Supp. at 1374.

114. 495 F. Supp. at 1374. The court termed the financial rationale "a wobbly afterthought." *Id.*

115. *Id.* at 1375. The Regents were concerned that if demonstrations occurred, they could not insure the safety of Iranian students. The court, however, required a showing of "substantial interference with the conduct of school activities" to justify an infringement upon the rights of the Iranian students by the university. The court noted that the analogous presence of blacks in white schools had also provoked disturbances, but had not deterred court ordered racial integration. *Id.*

116. *Id.* The court also found that the federal government had preempted the state action by occupying the fields of immigration and foreign affairs. *Id.* at 1380. *See also supra* note 30. The United States, as *amicus curiae*, argued for this conclusion. 495 F. Supp. at 1376.

tiny standard required by *Graham*.<sup>117</sup> The first, the *Dougall* exception, requires use of the rational basis test when states exclude aliens from employment in positions essential to governmental functions.<sup>118</sup> The second, the *Diaz-Mow Sun Wong* exception, mandates application of the rational basis test to equal protection claims under federal legislation discriminating on the basis of alienage.<sup>119</sup>

Courts' use of these exceptions has produced incongruous results. Under the *Dougall* exception, an alien has the right to practice law,<sup>120</sup> but cannot enforce the law as a state trooper.<sup>121</sup> Under the *Diaz-Mow Sun Wong* exception, the federal government can restrict aliens' access to welfare benefits;<sup>122</sup> a state may not.<sup>123</sup>

Although a state has an interest in maintaining loyalty among its governmental employees, the Court has expanded the *Dougall* exception until it now encompasses almost all state government positions. As a result, the Court's relaxed scrutiny allows states to restrict aliens' access to positions devoid of policy making functions and not essential to the operation of state government. The Iranian cases highlight a severe flaw in the courts' application of strict scrutiny. They demonstrate that under the *Diaz-Mow Sun Wong* exception the Court will summarily approve any congressional or presidential action effectively establishing a classification based on alienage if the federal government is able to postulate an interest that the classification might further.

The framers of the Constitution contemplated a balance of power among the three branches of government. The Supreme Court traditionally has held the constitutional reins on the other branches. In the area of alienage, however, the Court has essentially ceded unlimited discretion to Congress and the President.<sup>124</sup>

As Chief Justice Burger has noted, some distinctions between aliens and citizens must exist.<sup>125</sup> But aliens' limited political rights should not

117. See *supra* notes 26-30 and accompanying text.

118. See *supra* notes 37-52 and accompanying text.

119. See *supra* notes 59-88 and accompanying text.

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

121. *Foley v. Connelie*, 435 U.S. 291 (1978).

122. *Mathews v. Diaz*, 426 U.S. 67 (1976).

123. *Graham v. Richardson*, 403 U.S. 365 (1971).

124. Rather than deference, Justice Marshall referred to this approach as "abdication." *Fiallo v. Bell*, 430 U.S. 787, 805 (1977) (Marshall, J., dissenting). See also *supra* note 82.

125. "A new citizen has become a member of a Nation, part of a people distinct from others. [Such a person] is entitled to participate in the processes of democratic decisionmaking." *Foley v. Connelie*, 435 U.S. at 295. Chief Justice Burger further argued that strict scrutiny would "obliter-

result in deprivation of their civil rights. Courts should protect aliens legally admitted to the United States from arbitrary discrimination<sup>126</sup> regardless of subsequent foreign policy decisions of their home countries. In particular, courts should preclude the federal government from transgressing constitutional limitations merely by invoking Congress' power over immigration<sup>127</sup> or the President's power over foreign affairs.<sup>128</sup> The federal courts should apply strict scrutiny to both state and federal alienage restrictions to avoid baseless discrimination against aliens.

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ate all distinctions between citizens and aliens" and, therefore, exceptions to that rigorous standard are necessary. *Id.* This argument assumes strict scrutiny to be fatal in every case.

126. *See supra* notes 84 & 101 and accompanying text.

In his dissent in *Korematsu v. United States*, 323 U.S. 214 (1944), Justice Jackson pointed out the consequences of relaxed judicial scrutiny:

[O]nce a judicial opinion . . . rationalizes the Constitution to show that the Constitution sanctions [a temporary government action], the Court for all times has validated the principle of . . . discrimination. . . . The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

*Id.* at 246 (Jackson, J., dissenting). Similarly, District Judge Green in her *Narenji* opinion stated that a decision against the Iranian students "would create a precedent of alarming elasticity from which future extreme assertions of executive power could readily springboard." *Narenji v. Civiletta*, 481 F. Supp. 1132, 1147 (1979).

127. In *Mow Sun Wong* and *Fiallo*, the Supreme Court rejected the government's argument that courts did not have the power to review immigration matters. *Fiallo v. Bell*, 430 U.S. 787, 794 n.5 (1977); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 99-102 (1976). *See also* *Schneider v. Rusk*, 377 U.S. 163, 166 (1964) ("The constitution does not authorize Congress to enlarge or abridge [the rights of a naturalized citizen.]"); *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953) ("[T]he Immigration Act of 1917 clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution.").

128. The Constitution limits the Executive's power over foreign affairs. *See supra* note 98.

## APPENDIX

### PART 214—NONIMMIGRANT CLASSES

§ 214.5 Requirements for maintenance of status for nonimmigrant students from Iran.

(a) An alien admitted as an F-1 or J-1 nonimmigrant student to attend a post-secondary school, including a vocational school, who is a native or citizen of Iran must report to the INS District Office or suboffice having jurisdiction over his or her school or to an INS representative on campus before December 14, 1979, and provide information as to residence and maintenance of nonimmigrant status. Each student must have in his or her possession at the time of reporting:

- (1) Passport and Form I-94;
- (2) Evidence from the school of enrollment and payment of fees or waiver of payment of fees for the current semester;
- (3) A letter from school authorities attesting to the course hours in which presently enrolled and the fact that the student is in good standing; and
- (4) Evidence of current address in the United States. Students must provide such other information as INS may request in order to verify maintenance of status and residence.

(b) Failure by a nonimmigrant student to comply with the provisions of paragraph (a) of this section or willful provision of false information to the INS will be considered a violation of the conditions of the nonimmigrant's stay in the United States and will subject him or her to deportation proceedings under Section 241(a)(9) of the Act.

(c) A condition of the admission and continued stay in the United States of a nonimmigrant covered by paragraph (a) of this section is obedience to all laws of United States jurisdictions which prohibit the commission of crimes of violence and for which a sentence of more than one year imprisonment may be imposed. A nonimmigrant's conviction in a jurisdiction in the United States for a crime of violence for which a sentence of more than one year imprisonment may be imposed, (regardless of whether such sentence is in fact imposed) constitutes a failure to maintain status under Section 241(a)(9) of the Act.

The foregoing actions are taken in accordance with the Presidential directive of November 10, 1979, issued in the course of, and in response to, the international crisis created by the unlawful detention of American citizens in the American Embassy in Tehran. Accordingly, the no-

tice and comment and delayed effective date provisions of Section 553 of Title 5 of the United States Code are hereby waived as impracticable and contrary to the public interest. Effective date. The amendments contained in this order become effective on November 13, 1979.

Dated: November 13, 1979  
Benjamin R. Civiletti,  
Attorney General of the United States.

