STATE MAY EXCLUDE ALIENS FROM POLICE FORCE
Foley v. Connelie, 435 U.S. 291 (1978)

In *Foley v. Connelie*,[1] the Supreme Court signaled the erosion of judicial recognition of alienage as a suspect classification in determining the constitutionality of state employment statutes discriminating against aliens.[2]

Plaintiff, a lawfully admitted resident alien,[3] challenged the constitutionality of a New York statute restricting the appointment of members of the state police force to United States citizens.[4] A three-judge district court[5] denied plaintiff's claim that the statute violated the equal protection clause of the fourteenth amendment,[6] finding a compelling and substantial state interest in limiting membership in its police force to citizens.[7] The United States Supreme Court affirmed and *held*: the rational basis test is the appropriate equal protection standard of review for state employment statutes excluding aliens from positions requiring the discretionary execution of public policy.[8] Accordingly, the New York state police employment statute is constitutional because "citizenship bears a rational relationship to the special demands" of the position.[9]

The fourteenth amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[10]

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

2. "The term 'alien' refers to any person not a citizen or national of the United States." Immigration and Nationality Act, § 101, 8 U.S.C. § 1101(a)(3) (1976).

3. The term, "resident alien," refers to a noncitizen lawfully residing in the United States in accordance with the procedures established by federal statutes regulating immigration and naturalization. *See id.* §§ 101, 245, 8 U.S.C. §§ 1101(a), 1255(a) (1976).

4. N.Y. EXEC. LAW § 215(3) (McKinney Supp. 1978) provides in pertinent part: "No person shall be appointed to the New York state police force unless he shall be a citizen of the United States . . . ."

5. 419 F. Supp. 889 (S.D.N.Y. 1976).

6. U.S. CONST. amend. XIV, § 1.

7. 419 F. Supp. at 898.

8. 435 U.S. at 296.

9. *Id.* at 300.

10. U.S. CONST. amend. XIV, § 1. *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 519 (1978); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

Traditionally, judicial review of statutory classifications challenged as violative of the equal protection guarantee has proceeded along a two-tiered analytical path. Legislation that discriminates against classes particularly burdened is subject to strict judicial scrutiny. *See* United States

Historically, courts have accorded resident aliens the protection of the equal protection clause.[11] Originally, this required that statutory classifications based on alienage bear a rational relationship to a legitimate legislative end.[12] Thus, by the early twentieth century, states

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v Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (Stone, C.J.) ("prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a correspondingly more searching judicial inquiry"). These classifications, considered to be "suspect," must serve a "compelling," "overriding," or "substantial" state interest to withstand an equal protection challenge to their validity. *See, e.g., In re* Griffiths, 413 U.S. 717, 722 (1973) ("substantial" state interest required to prohibit aliens from membership in the bar); Graham v. Richardson, 403 U.S. 365, 376 (1971) ("compelling" interest required to sustain classification based on alienage); McLaughlin v. Florida, 379 U.S. 184, 196 (1964) ("overriding statutory purpose" required to sustain racial classification). *See generally* Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976); Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); Knoppke-Wetzel, *Employment Restrictions and the Practice of Law by Aliens in the United States and Abroad*, 1974 Duke L.J. 871, 879-80; Tussman & tenBroek, *supra*, at 356; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1088 (1969); Note, *Equal Protection Review of State Statutes Restricting Alien Employment*, 8 CORNELL INT'L L.J. 92, 93 (1974) [hereinafter cited as *Equal Protection Review*]; Comment, *Aliens' Right to Work: State and Federal Discrimination*, 45 FORDHAM L REV. 835, 839 (1977); Note, *Wandering Between Two Worlds: Employment Discrimination Against Aliens*, 16 VA. J. INT'L L. 355, 363-67 (1976) [hereinafter cited as *Employment Discrimination Against Aliens*]; 1977 WASH. U.L.Q. 140, 141-43.

The Court has also given heightened judicial solicitude to legislative classifications that impair fundamental rights. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right to privacy); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Board of Elections, 383 U.S. 663 (1966) (right to vote); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy).

A presumption of constitutionality applies to statutory classifications that do not trigger strict scrutiny. Such statutes need only bear a rational relationship to a legitimate legislative end. *See, e.g.*, Village of Belle Terre v. Boras, 416 U.S. 1, 7-8 (1974); Dandridge v. Williams, 397 U.S. 471, 483-87 (1970); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); McGowan v. Maryland, 366 U.S. 420, 426 (1961); Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955); Railway Express Agency v. New York, 336 U.S. 106, 109-10 (1949); Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

11. *See In re* Griffiths, 413 U.S. 717, 719-20 (1973); Sugarman v. Dougall, 413 U.S. 634, 641 (1973); Graham v. Richardson, 403 U.S. 365, 371 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419-20 (1948); Truax v. Raich, 239 U.S. 33, 39 (1915); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). *See generally* Comment, *The Constitutionality of Employment Restrictions on Resident Aliens in the United States*, 24 BUFFALO L. REV. 211, 212 (1974); Comment, *supra* note 10, at 838; Comment, *Aliens, Employment, and Equal Protection*, 19 VILL. L. REV. 589, 590 (1974) [hereinafter cited as *Aliens, Employment, and Equal Protection*].

Lawfully admitted resident aliens are "persons" within the meaning of the fifth amendment, U.S. CONST. amend. V, and may not be deprived of "life, liberty, or property without due process of law." Mathews v. Diaz, 426 U.S. 67, 77 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953).

12. *See, e.g.*, Clarke v. Deckebach, 274 U.S. 392 (1927); 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); Terrace v.

effectively limited aliens' access to employment. The courts upheld statutory prohibitions on alien employment because of the state's proprietary interest in the public domain[13] and as a legitimate exercise of the state's police power to regulate harmful or dangerous occupations.[14] By 1915, however, the Supreme Court recognized that the state's interest in the conservation of its resources and the protection of its citizens did not justify the deprivation of aliens' rights to work in

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Thompson, 263 U.S. 197 (1923); Patsone v. Pennsylvania, 232 U.S. 138 (1914); Blythe v. Hinckley, 180 U.S. 333 (1901); Hauenstein v. Lynham, 100 U.S. 483, 486-87 (1879).

13. *See* Heim v. McCall, 239 U.S. 175, 191 (1915) (preference to citizens for public works contracts); Patsone v. Pennsylvania, 232 U.S. 138, 145-46 (1914) (prohibiting aliens from killing wild game); Blythe v. Hinckley, 180 U.S. 333, 341 (1901) (restriction on devolution of property to aliens); Hauenstein v. Lynham, 100 U.S. 483 (1879) (same); McCready v. Virginia, 94 U.S. 391, 396 (1876) (restricting oyster planting to citizens); People v. Crane, 214 N.Y. 154, 108 N.E. 427 (Cardozo, J.) (prohibiting alien employment on public works), *aff'd sub nom.* Crane v. New York, 239 U.S. 195 (1915). "The state in determining what use shall be made of its own moneys may legitimately consult the welfare of its own citizens rather than that of aliens." *Id.* at 164, 108 N.E. at 429. *See generally* Tussman & tenBroek, *supra* note 10, at 376; Note, *Constitutionality of Restrictions of Aliens' Right to Work*, 57 COLUM. L. REV. 1012, 1014-19 (1957) [hereinafter cited as *Aliens' Right to Work*]; *Equal Protection Review*, *supra* note 10, at 95-97; Comment, *supra* note 10, at 839-40 & n.34; *Aliens, Employment, and Equal Protection*, *supra* note 11, at 591-94; *Employment Discrimination Against Aliens*, *supra* note 10, at 361.

Several state courts reached similar conclusions. *See, e.g.*, Commonwealth v. Hilton, 174 Mass. 29, 54 N.E. 362 (1899) (upheld statute prohibiting aliens from obtaining fishing license); Alsos v. Kendall, 111 Ore. 359, 227 P. 286 (1924) (same); State v. Kofines, 33 R.I. 211, 80 A. 432 (1911) (same); Bondi v. Mackay, 87 Vt. 271, 89 A. 228 (1913) (upheld discriminatory fees for aliens' hunting and fishing licenses).

14. *See, e.g.*, Clarke v. Deckebach, 274 U.S. 392 (1927) (operating pool halls); Crane v. New York, 239 U.S. 195, *aff'g* 214 N.Y. 154, 108 N.E. 427 (1915) (public works contracts); Anton v. Van Winkle, 297 F. 340 (D. Ore. 1924) (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); Wright v. May, 127 Minn. 150, 149 N.W. 9 (1914) (auctioneers); Wormsen v. Moss, 177 Misc. 19, 29 N.Y.S.2d 798 (Sup. Ct. 1941) (massage parlor operator); Miller v. Niagara Falls, 207 App. Div. 798, 202 N.Y.S. 549 (4th Dep't 1924) (soft drink sales); State v. Ellis, 181 Ore. 615, 184 P.2d 860 (1947) (barbers); Gizzarelli v. Presbrey, 44 R.I. 333, 117 A. 359 (1922) (motor bus operators); Cornelius v. City of Seattle, 123 Wash. 550, 213 P. 17 (1923) (collecting and removing hogfeed), *rev'd sub nom.* Herriot v. City of Seattle, 81 Wash. 2d 48, 500 P.2d 101 (1972) (en banc). *But see* State v. Montgomery, 94 Me. 192, 47 A. 165 (1900) (statute barring aliens from working as peddlers held unconstitutional); Sundram v. Niagara Falls, 77 Misc. 2d 1002, 357 N.Y.S.2d 943 (Sup. Ct. 1973) (ordinance limiting licensing of taxicab drivers to citizens held unconstitutional), *aff'd mem.*, 44 App. Div. 2d 906, 356 N.Y.S.2d 1023 (Sup. Ct. 1974). *See generally Aliens' Right to Work*, *supra* note 13, at 1021-27; *Equal Protection Review*, *supra* note 10, at 97; Comment, *supra* note 10, at 841 nn.40-41; *Employment Discrimination Against Aliens*, *supra* note 10, at 361-63. *See also* Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972) (en banc) (statute requiring citizenship as prerequisite for admission to bar held unconstitutional).

"the common occupations of the community."[15]

With these public interest doctrines substantially discredited, the Supreme Court in *Takahashi v. Fish & Game Commission*[16] signaled judicial recognition of alienage as a suspect classification.[17] Twenty-three years later, in *Graham v. Richardson*,[18] the Court dispelled all doubts about the "suspect" nature of state statutes classifying solely on the basis of alienage.[19] Accordingly, "aliens as a class constitute a prime example of a 'discrete and insular minority' for whom heightened judicial solicitude is appropriate."[20] State statutes classifying on

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15. Truax v. Raich, 239 U.S. 33, 41 (1915). The Court held invalid an Arizona statute requiring that 80 percent of all employees in businesses with more than five employees be citizens.

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure . . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

Id. (citations omitted).

16. 334 U.S. 410 (1948).

17. In *Takahashi*, the Court struck down a California statute prohibiting aliens ineligible for citizenship to obtain a commercial fishing license, holding that congressional dominance in the field of immigration and naturalization precluded the state from enacting conflicting legislation. *Id.* at 418-19. The Court's language also indicated the seed of a stricter scrutiny of legislative classifications based on alienage: "[T]he power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Id.* at 420. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971); Kramer v. Union Free School Dist., 395 U.S. 621, 628 n.9 (1969). *See generally* Comment, *supra* note 10, at 838-39.

18. 403 U.S. 365 (1971).

19. *Id.* at 371-76.

20. *Id.* at 372 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938)). *See generally* Das, *Discrimination in Employment Against Aliens—The Impact of the Constitution and Civil Rights Laws*, 35 U. PITT. L. REV. 499 (1974); Rosales, *Resident Aliens and the Right to Work: The Quest for Equal Protection*, 2 HASTINGS CONST. L.Q. 1029 (1975); *Equal Protection Review*, *supra* note 10; Comment, *supra* note 10; *Aliens, Employment, and Equal Protection*, *supra* note 11; *Employment Discrimination Against Aliens*, *supra* note 10; 2 SUFFOLK TRANSNAT'L L.J. 101 (1978). For a general discussion of the case law before 1971, see M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW (1946); *Aliens' Right to Work*, *supra* note 13; Note, *Protection of Aliens' Rights Under the Fourteenth Amendment*, 1971 DUKE L.J. 583; 1970 UTAH L. REV. 136.

The Court in *Graham* also held that the state law encroached upon exclusive federal power and was thus invalid. 403 U.S. at 376-80. Courts have recognized the plenary federal power over immigration and naturalization. *See* Hines v. Davidowitz, 312 U.S. 52 (1941): "[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot inconsistently with the purpose of Congress . . . interfere with . . . the federal law . . . ." *Id.* at 66-67. *Accord*, Hampton v. Mow Sun Wong, 426 U.S. 88, 95-105 (1976); Mathews v. Diaz, 426 U.S. 67, 81-84 (1976); De Canas v. Bica, 424 U.S. 351, 354-56 (1976); U.S. CONST. art. I, § 8, cl. 4; *id.* cl. 3; *id.* art. VI, § 2. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 269 (1972); Comment, *supra* note 10, at 848-55; 10 DUQ. L. REV. 280, 280-81 (1971).

the basis of alienage thus bear a heavy burden of justification;[21] courts have held such statutes invalid for failure to demonstrate a compelling interest[22] or to choose a less burdensome means of achieving that interest.[23]

In resolving public employment discrimination issues, courts seek an accommodation between the substantial state interest in defining its "political community"[24] and the equal protection doctrine of strict judicial scrutiny for classifications based on alienage.[25] The Court, facing the issue squarely in *Sugarman v. Dougall*,[26] recognized in dictum the states' substantial interest in restricting to citizens "an appropriately

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21. *See* note 10 *supra*.

22. *See, e.g.*, Lefkowitz v. C.D.R. Enterprises, Ltd., 429 U.S. 1031 (1977), *aff'g* C.D.R. Enterprises, Ltd. v. Board of Educ., 412 F. Supp. 1164, 1170-71 (E.D.N.Y. 1976) (public works employee); Examining Bd. v. Flores de Otero, 426 U.S. 572, 605-06 (1976) (engineers); Mohamed v. Parks, 352 F. Supp. 518, 520-21 (D. Mass. 1973) (municipal employees); Arias v. Examining Bd., 353 F. Supp. 857, 861-62 (D.P.R. 1972) (refrigeration and air conditioning technicians); Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 294-96, 303-04, 496 P.2d 1264, 1269-70, 1275, 101 Cal. Rptr. 896, 901-02, 907 (1972) (attorneys).

23. *See, e.g., In re* Griffiths, 413 U.S. 717, 725-27 (1973) (fitness for practice of law can be determined on a case-by-case basis through interviewing and administration of loyalty oaths); Sugarman v. Dougall, 413 U.S. 634, 643 (1973) (court critical of statutes neither "narrowly confined" nor "precisely drawn" that exclude all aliens from all classes of the state competitive civil service). *See also* Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976).

24. Dunn v. Blumstein, 405 U.S. 330, 344 (1975) (state has power to preserve conception of political community by limiting voting franchise to residents). For further discussion of this identity between a state and its citizens, see Sugarman v. Dougall, 413 U.S. 634, 642-43 (1973); Afroyim v. Rusk, 387 U.S. 253, 268 (1967); Harisiades v. Shaughnessy, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring); United States v. Cruikshank, 92 U.S. 542, 549 (1876); United States v. Gordon-Nikkar, 518 F.2d 972, 978 (5th Cir. 1975); Perkins v. Smith, 370 F. Supp. 134, 137 (D. Md. 1974), *aff'd mem.*, 426 U.S. 913 (1976); Appellee's Brief at 10, Foley v. Connelie, 435 U.S. 291 (1978). *See generally* Das, *supra* note 20, at 519-24; Comment, *supra* note 10, at 841-42; *Employment Discrimination Against Aliens*, *supra* note 10, at 360.

25. Graham v. Richardson, 403 U.S. 365 (1971). *See* notes 16-23 *supra* and accompanying text.

26. 413 U.S. 634 (1973). In *Sugarman*, the Court held invalid a New York statute providing that "no person shall be eligible for appointment for any position in the competitive class unless he is a citizen." N.Y. CIV. SERV. LAW § 53(1) (McKinney 1973). The Court held the statute overbroad, "neither narrowly confined nor precise in its application" and thus a violation of the equal protection clause. 413 U.S. at 643.

One commentator has suggested that despite the strict scrutiny applied, the absence of the term "suspect" classification from the Court's analysis suggests an intermediate standard of review or "demonstrable basis standard." The Court's reliance upon an overbreadth analysis to defeat the statute indicates an examination of both the means and the ends of the statute. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1097-99 (1974). For a general discussion of overbreadth analysis, see Tussman & tenBroek, *supra* note 10.

defined class of positions"[27] necessary to preserve the "basic conception of a political community."[28] A companion case, *In re Griffiths*,[29] indicated the limited scope of the *Sugarman* dictum. Though lawyers perform an important public and political role,[30] they are not "so close to the core of the political process" as to fall within the *Sugarman* exception.[31]

Numerous federal court decisions followed or anticipated the Supreme Court's decisions in *Sugarman* and *Griffiths*. Consequently, courts invalidated similar statutes barring aliens from a variety of occupations.[32] These decisions reflect the narrow reading given the

27. 413 U.S. at 647. The Court defined this class as comprising "state elective or important nonelective executive, legislative, and judicial positions [and] officers who participate directly in the formulation, execution, or review of broad public policy [or] perform functions that go to the heart of representative government." *Id.*

28. *Id.* (quoting Dunn v. Blumstein, 405 U.S. 330, 344 (1975)). *See* note 24 *supra*.

29. 413 U.S. 717 (1973).

30. *Id.* at 729. Justice Rehnquist dissented in both *Sugarman* and *Griffiths*, noting that the purpose of the fourteenth amendment is to prevent discrimination on the basis of race or other immutable characteristics. Alienage, on the other hand, is alterable by naturalization. 413 U.S. at 657. Justice Rehnquist also found a rational basis for statutory classifications based on alienage: "It is not irrational to assume that aliens as a class are not familiar with how we as individuals treat others and how we expect 'government' to treat us." *Id.* at 662. *See* notes 57-58 *infra* and accompanying text.

31. 413 U.S. at 729. *Accord*, *In re* Park, 484 P.2d 690, 695 (Alas. 1971); Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 296, 496 P.2d 1264, 1270, 101 Cal. Rptr. 896, 902 (1972). *Contra*, *Ex parte* Thompson, 10 N.C. (1 Hawks) 355, 363 (1824). *See generally* Comment, *supra* note 10, at 835, 844.

The underlying premise of *Griffiths* is that an alien, like a citizen, may be unfit for the practice of law. There are more precise ways, however, of determining fitness than a complete exclusion of *all* aliens from admission to the bar. 413 U.S. at 725-27. *Accord*, Norwick v. Nyquist, 417 F. Supp. 913, 921-22 (S.D.N.Y. 1976), *prob. juris. noted*, 436 U.S. 902 (1978) (No. 76-808).

32. *See* Mendoza v. City of Miami, 483 F.2d 430 (5th Cir. 1973) (municipal civil service); Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977) (probation officer), *vacated and remanded*, 436 U.S. 901 (1978); Norwick v. Nyquist, 417 F. Supp. 913 (S.D.N.Y. 1976) (public school teacher), *prob. juris. noted*, 436 U.S. 902 (1978) (No. 76-808); C.D.R. Enterprises, Ltd. v. Board of Educ., 412 F. Supp. 1164 (E.D.N.Y. 1976) (public contractors), *aff'd sub nom.* Lefkowitz v. C.D.R. Enterprises, Ltd., 429 U.S. 1031 (1977); Surmeli v. New York, 412 F. Supp. 394 (S.D.N.Y. 1976) (physicians), *cert. denied*, 436 U.S. 903 (1978); Wong v. Hohnstrom, 405 F. Supp. 727 (D. Minn. 1975) (pharmacists); Taggert v. Mandel, 391 F. Supp. 733 (D. Md. 1975) (notaries public); Ramos v. Civil Serv. Comm'n, 376 F. Supp. 361 (D.P.R. 1974) (federal employment), *vacated as moot*, 426 U.S. 916 (1976); Mohamed v. Parks, 352 F. Supp. 518 (D. Mass. 1973) (municipal employees); Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972) (state civil servants), *aff'd*, 413 U.S. 902 (1973); Teitscheid v. Leopold, 342 F. Supp. 299 (D. Vt. 1971) (state employees); Younus v. Shabat, 336 F. Supp. 1137 (N.D. Ill. 1971) (college professors); *In re* Parks, 484 P.2d 690 (Alas. 1971) (attorneys); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969) (public works employees); Herriot v. City of Seattle, 81 Wash. 2d 48, 500 P.2d 101 (1972) (city transit employees).

Sugarman dictum in defining positions within the political community that "participate directly in the formulation, execution, or review of broad public policy" from which states may exclude aliens.[33] Federal courts have recognized the nexus between the political community and employment as a teacher,[34] notary public,[35] lawyer,[36] and probation officer vested with the discretionary powers of a peace officer.[37] Yet,

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33. Sugarman v. Dougall, 413 U.S. 634, 647 (1973). *See, e.g., In re* Griffiths, 413 U.S. 717, 729 (1973) (footnote omitted):

> [L]awyers have been leaders in government throughout the history of our country. Yet, they are not officials of the 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.

See Nyquist v. Mauclet, 432 U.S. 1 (1977): "*In re* Griffiths . . . reflects the narrowness of the [*Sugarman*] exception." *Id.* at 11; Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977), *vacated and remanded*, 436 U.S. 901 (1978): "We read the reference in *Sugarman* to the 'political community' for which the State may prescribe citizenship as a requisite of office as being confined to high policy making officers." *Id.* at 170. The court held that a citizenship requirement for deputy probation officers did not fall within the *Sugarman* exception. *Id.* at 171; *see* Appellant's Reply Brief at 3, Foley v. Connelie, 435 U.S. 291 (1978). *See generally Employment Discrimination Against Aliens*, *supra* note 10, at 365-66.

34. Norwick v. Nyquist, 417 F. Supp. 913 (S.D.N.Y. 1976), *prob. juris. noted*, 436 U.S. 902 (1978) (No. 76-808). The *Norwick* court recognized the "strong nexus between the classroom and the political community." *Id.* at 920. Preservation of the conception of the political community, however, did not justify the exclusion of all aliens from teaching in public schools. *Id.* at 921-22.

35. Taggart v. Mandel, 391 F. Supp. 733 (D. Md. 1975). The court indicated that an oath of office administered to notaries, rather than a complete exclusion of aliens, would satisfy the state's interest in insuring that notaries remain impartial public officers. *Id.* at 740.

36. *In re* Griffiths, 413 U.S. 717 (1973). *See* note 32 *supra* and accompanying text.

37. Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977), *vacated and remanded*, 436 U.S. 901 (1978). In *Chavez-Salido*, a three-judge court unanimously held invalid a California law requiring citizenship as a prerequisite for appointment to any position designated as a peace officer. *Id.* at 171. The statute defines approximately 80 different jobs as peace officers, ranging from deputy fire wardens and college campus police to inspectors for the Bureau of Furniture and Bedding Inspection. *Id.* at 169 n.22.

The court examined the powers of a deputy probation officer to determine if the statutory classification restricting aliens fell within the *Sugarman* exception. *See* notes 24-31 *supra* and accompanying text. A probation officer has discretionary power to recommend sentences, prepare presentence investigation reports, and determine custody questions involving juveniles. *Id.* at 171. The court determined, however, that it is not the kind of executive or policymaking position from which *Sugarman* allows the exclusion of aliens:

> Important as those duties are, we cannot characterize a deputy probation officer as an employee who participates "directly in the formulation, execution, or review of broad public policy . . . ." [citing Sugarman v. Dougall, 413 U.S. 634, 647 (1973)] Since a compelling state interest appears only when the requirement of citizenship is confined to positions of that type, the statute must be condemned. . . . As in *Griffiths*, we would find that the duties of a deputy probation officer "hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens."

Id. at 171 (citation omitted). *See* Appellant's Reply Brief at 3, Foley v. Connelie, 435 U.S. 291 (1978). *Contra*, Foley v. Connelie, 435 U.S. 291 (1978); Appellee's Motion to Affirm at 4: "Nor is it apparent how the voter, legislator, or high executive performs a more important function in

none of these positions is so close to the core of representative government[38] to justify the exclusion of aliens. On the other hand, aliens are lawfully excluded from jury service[39] and certain elective offices[40]—positions commonly identified with the notion of a "political community."[41]

In *Foley v. Connelie*,[42] the Supreme Court opined that the exclusion of aliens from positions in the state police force[43] was a matter "firmly within the state's constitutional prerogatives."[44] The Court reasoned that although the state police function does not include policy formulation per se,[45] it does require the exercise of a variety of discretionary powers that significantly affect members of the political community.[46] The discretion in making an arrest,[47] conducting a search and seizure,[48] and otherwise invading the privacy of individuals[49] represents the delegation of important public policy responsibilities to police officers.[50] The police function, therefore, includes responsibilities that strike at the core of the political process.[51] Thus state police officers fall within the *Sugarman* exception of positions from which states may lawfully

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representative government than does the State police officer who investigates subversion and decides when to make an arrest, an act that necessarily results in the deprivation of individual liberty."

38. *See In re* Griffiths, 413 U.S. 717, 729 (1973). *See* notes 29-31 *supra* and accompanying text

39. Carter v. Jury Comm'n, 396 U.S. 320, 322 (1970); United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975); Perkins v. Smith, 370 F. Supp. 134, 138 (D. Md. 1974), *aff'd mem.*, 426 U.S. 913 (1976); Foley v. Connelie, 419 F. Supp. 889, 896 (S.D.N.Y. 1976), *aff'd*, 435 U.S. 291 (1978). *See* 28 U.S.C. § 1865 (1976) (grand and petit jurors must be chosen from citizen population).

40. U.S. CONST. art. I, § 2, cl. 2 (citizenship for seven years required for holding office in the House of Representatives); *id.* § 3, cl. 3 (citizenship for nine years required for office of Senator); *id.* art. II, § 1, cl. 5 (President must be natural born citizen). *See* note 67 *infra*.

41. *See* note 67 *infra*.

42. 435 U.S. 291 (1978).

43. *See* note 3 *supra*.

44. 435 U.S. at 296.

45. *Id.* at 297.

46. *Id. See* Appellee's Motion to Affirm at 3. "He [police officers] must . . . make decisions which are political, social, and psychological in character and 'very much affected by the democratic nature of American society.'" *Id.* (quoting Remington, *The Role of Police in a Democratic Society*, 56 J. CRIM. L.C. & P.S. 361, 365 (1965)).

47. 435 U.S. at 297-98.

48. *Id.*

49. *Id.* at 297.

50. *Id.*

51. *Id.* at 297-300.

exclude aliens.[52]

The Court found it unnecessary for the New York statutory classification to "clear the high hurdle of strict scrutiny" because of the special nature of the police function.[53] The suspect status accorded legislation discriminating solely on the basis of alienage is limited to legislation striking at the aliens' ability to exist in the community.[54] Consequently, New York's legislative scheme did not employ a suspect classification[55] and therefore need only bear a rational relationship to a legitimate legislative purpose.[56] Because states may presume citizens are more familiar and sympathetic to American traditions,[57] the exclusion of aliens is a rational means to ensure the right to be governed by one's citizen peers.[58]

In dissent, Justice Marshall urged that the *Sugarman* exception applies only to policy-shaping positions and therefore the *execution* of policy inherent in the police function does not bring officers within its ambit.[59] State troopers have no role in shaping policy, but instead merely apply predetermined policy to specific factual settings.[60]

Justice Stevens concurred with this narrow reading of the scope of the *Sugarman* exception.[61] Moreover, he asserted an individual deter-

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52. "The office of policeman is in no sense one of 'the common occupations of the community' . . . ." *Id.* at 298.

53. *Id.* at 295.

54. *Id.*

55. *Id.* at 295-96.

56. *Id.*

57. *Id.* at 299-300.

58. *Id.* at 298.

59. *Id.* at 302-07 (Marshall, J., dissenting). Justice Marshall noted that *Sugarman* should not be read as defining classifications of employment positions that trigger a standard of judicial scrutiny less demanding than normally accorded classifications requiring strict scrutiny. Rather, the narrow exception may be read as describing those positions that further a compelling or overriding state interest. *Id.* at 303 n.1. The Court's inquiry, therefore, focused on a determination of whether the state police function involved direct participation in "the formulation, execution, or review of broad public policy" within the *Sugarman* dictum. Sugarman v. Dougall, 413 U.S. 634, 647 (1973). For further discussion of whether the police function is largely discretionary or ministerial, see notes 32-40 *supra* and accompanying text; note 70 *infra*. *See generally* Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703 (1974); Finch & Thomas, *Exercise of Discretionary Decision Making by Police*, 54 N.D.L. REV. 61 (1977); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); Tieger, *Police Discretion and Discriminatory Enforcement*, 1971 DUKE L.J. 717.

60. 435 U.S. at 303-05 (Marshall, J., dissenting). "Their [police] discretion when utilized involves the application of factual judgments; they apply the law's requirements to their perceptual judgments." Brief for Appellant at 11.

61. 435 U.S. at 310-11 (Stevens, J., dissenting).

mination of each applicant's qualifications would satisfy the state's interest in maintaining a loyal police force sympathetic to American traditions and mores.[62]

Foley portends the abandonment of recognition of alienage as "suspect" for a growing number of state employment statutory classifications. The New York statute[63] imposes a blanket exclusion of all aliens from all positions within the state police force.[64] The state has a compelling interest in defining those positions essential to the preservation of the political community.[65] The state can constitutionally protect that interest by enacting a narrowly drawn statute excluding aliens from positions properly within the *Sugarman* exception.[66] That state policemen, because of their discretionary powers, fall within this rubric is doubtful.[67] In any event, regardless of the equal protection standard used to review similar statutes, the exclusion of *all* aliens on the basis of nonjob-related characteristics is overbroad.[68] The Court's conclusion that it is rational to assume citizens are more sympathetic to American traditions and mores[69] indicates the exclusion of aliens is merely a proxy for disloyalty. In the past, however, the Court has recognized that concern for disloyalty does not justify exclusion of aliens as a class

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62. *Id.* at 308 (Stevens, J., dissenting).

63. *See* note 4 *supra.*

64. There are three units in the New York state police force, each charged with different responsibilities. *See* N.Y. EXEC. LAW §§ 215-216 (McKinney Supp. 1978).

65. *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); *see* note 24 *supra.*

66. Sugarman v. Dougall, 413 U.S. 634 (1973); *see In re* Griffiths, 413 U.S. 717 (1973).

67. *See* 435 U.S. at 302-07 (Marshall, J., dissenting); Chavez-Salido v. Cabell, 427 F. Supp. 158, 169-72 (C.D. Cal. 1977), *vacated and remanded*, 436 U.S. 901 (1978); Foley v. Connelie, 419 F. Supp. 889, 899 (1976) (Mansfield, J., dissenting), *aff'd*, 435 U.S. 291 (1978); note 37 *supra.*

68. *See* 435 U.S. at 300 (Stewart, J., concurring); Nyquist v. Mauclet, 432 U.S. 1 (1977).

> [A]s *Sugarman* makes quite clear, the Court had in mind a State's historical and constitutional powers to define the qualifications of voters [citing Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), *aff'd*, 426 U.S. 913 (1976)] or of "elective or important nonelective" officials "who participate directly in the formulation, execution, or review of broad public policy" . . . . *In re* Griffiths . . . reflects the narrowness of the exception.

Id. at 11. *See* notes 29-31, 32-37 *supra* and accompanying text. *Cf.* Foley v. Connelie, 419 F. Supp. 889, 899 (S.D.N.Y. 1976) (Mansfield, J., dissenting) ("There is not a shred of evidence in the record of this case to indicate, much less prove, that a properly tested, selected, and trained resident alien would be less competent to perform the duties of a New York state trooper."), *aff'd*, 435 U.S. 291 (1978). *See generally* Nowak, *supra* note 26, at 1093-94 (If alienage is considered a neutral classification, rather than a suspect one, a statute that classifies on the basis of alienage would only be valid if there is a factually demonstrable rational relationship to a legitimate legislative end).

Professor Tribe suggests that the nature of the police function will limit the application of *Foley* to other occupations. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 97 (Supp. 1979).

69. 435 U.S. at 299-300.

from the opportunity to seek employment.[70] Citizenship is no assurance of loyalty; similarly, alienage, by itself, is no guarantee of disloyalty.[71]

The state has available constitutionally less burdensome means to achieve its legitimate end. Administration of oaths of allegiance, individual testing, interviewing, and careful selection of qualified candidates[72] would protect the state's interest and the aliens' right to work—the essence of freedom and opportunity.[73] The Court's decision in *Foley v. Connelie*, therefore, represents an injudicious broadening of the definition of those positions from which states may lawfully exclude aliens and a concomitant constriction of aliens' employment rights.

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70. *In re* Griffiths, 413 U.S. 717 (1973). "Nor would the possibility that some resident aliens are unsuited . . . be a justification for a wholesale ban." *Id.* at 725. *See* notes 14-17 *supra* and accompanying text.

71. *See generally* Tussman & tenBroek, *supra* note 10, at 346-51.

72. *See In re* Griffiths, 413 U.S. 717, 725 (1973); Foley v. Connelie, 419 F. Supp. 889, 899 (S.D.N.Y. 1976) (Mansfield, J., dissenting), *aff'd*, 435 U.S. 291 (1978).

73. *See* Truax v. Raich, 239 U.S. 33, 41 (1915).