Aliens And The Federal Government: A Newer Equal Protection*

I. INTRODUCTION

Aliens,[1] with few minor exceptions, are presently excluded under a civil service regulation from employment in all federal positions which require a competitive civil service rating.[2] Recent litigation, attacking both state and federal restrictions on permanent resident aliens,[3] has severely challenged the historic premise for such an exclusion. One of those cases, *Mow Sun Wong v. Hampton*,[4] decided by the Court of Appeals for the Ninth Circuit, struck down that civil service regulation on the grounds that an exclusion based on alienage violates the equal protection clause as applied to the federal government through the Fifth Amendment.[5] The United States Supreme

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[1]The term "alien" means any person not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3) (1970).

[2]5 C.F.R. § 338.01 (1974). As of December 31, 1971, approximately 1,721,000 jobs or nearly two thirds of the 2,623,000 paid positions of the federal government required a competitive civil service rating. UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, POCKET DATA BOOK 96 (1973).

[3]The term "resident alien" refers to a non-citizen "lawfully admitted" for permanent residence under the immigration and naturalization procedures of federal statutes. 8 U.S.C. § 1101(a)(2) (1970). For the purposes of this Article, the term "alien" will be used interchangeably with "resident alien" except where otherwise noted.

[4]500 F.2d 1031 (9th Cir. 1974), *rev'g* 333 F. Supp. 527 (N.D. Cal. 1971), *cert. granted*, 42 U.S.L.W. 3678 (U.S. June 10, 1974) (No. 73-1596), *argued*, 43 U.S.L.W. 3402 (U.S. Jan. 21, 1975), *restored to the calendar*, 43 U.S.L.W. 3474 (U.S. Mar. 4, 1975).

See also Jalil v. Hampton, 460 F.2d 923 (D.C. Cir.), *cert. denied*, 409 U.S. 887 (1972) where the Court of Appeals for the District of Columbia remanded a challenge to the exclusion of aliens from the federal civil service to the lower court for further findings of fact.

[5]Although the Fourteenth Amendment is by its terms applicable only to the states, the Court has broadened the concept of "due process" so as to apply equal protection analysis to the federal government through the Fifth Amendment. As the Court explained in Bolling v. Sharpe, 347 U.S. 497 (1954):

> The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the

Court has granted certiorari in this case.[6]

This article focuses on the issues raised in the *Wong* litigation. Particular attention is placed on the analytical problems which face the Court in constructing a constitutional standard of review[7] which will adequately guarantee aliens that measure of equal protection under law due to any person within our boundaries[8] without unduly

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> states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The '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. But, as this Court has recognized, discrimination may be so unjustified as to be violative of due process. *Id.* at 499.

[6]42 U.S.L.W. 3678 (U.S. June 10, 1974) (No. 73-1596).

[7]Equal Protection analysis is traditionally divided into two distinct standards of review. If the statute creates a classification which the Court considers to be "suspect", *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (statute creating racial classification struck down), or infringes upon a "fundamental right", *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (statute infringing upon the right to travel struck down), then the statute is judged under the standard of "strict judicial scrutiny". In order to withstand challenge under the strict judicial scrutiny standard, the state must carry the burden of proof by showing that the classification serves a "compelling" or "overriding" state interest, and the restriction serving that interest is the "least restrictive alternative" capable of accomplishing that compelling interest. Statutes which do not involve a suspect classification or infringe upon a fundamental right are judged under the passive "rational basis" standard of review. The elements of this test are set forth in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961):

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Statutes which are reviewed under the "rational basis" standard of review are rarely struck down, while those falling under "strict judicial scrutiny" are rarely upheld. *See generally Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1971); Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

[8]Aliens are "persons" within the meaning of the equal protection clause of the 14th amendment. Yick Wo v. Hopkins, 118 U.S. 356 (1886). An alien is also a "person" for the purposes of the procedural due process requirements of the fifth amendment. Wong Wing v. United States, 163 U.S. 228 (1896); *see also* Ng Fung Ho v. White, 259 U.S. 276 (1922); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953). An alien may not be deprived of his property in peace time without just compensation. Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931). Nor may he be denied access to the courts. *Ex parte* Dawato, 317 U.S. 69 (1942). Nishimura Ekiu v. United States, 142 U.S. 651 (1892). Nor does the federal government have the power to authorize the individual states to violate the equal protection guaran-

restricting the federal government in carrying out its mandate to regulate aliens. Recent decisions of the United States Supreme Court in *Graham v. Richardson*[9] and the subsequent cases of *Sugarman v. Dougall*[10] and *In re Griffiths*[11] have invoked the "strict judicial scrutiny" standard of review based on the theory that alienage is an inherently "suspect classification". These cases, however, have been confined solely to a review of restrictions which the individual states have placed on aliens. The issue of federal restrictions is yet to be resolved.

We contend that the application of strict judicial scrutiny to the federal government's regulation of aliens is unworkable. It can only further confuse the meaning of the already inscrutable strict scrutiny doctrine and will open to challenge much of this country's present immigration policy. Many of these problems can be averted, however, should the Court give judicial recognition, in this area of federal regulation of aliens, to a less severe and more flexible standard of review. Such a standard has been implicit in many of the recent Court decisions in the area of equal protection.

The following section of this article reviews the Court decisions on state restrictions on aliens which form the context of the present litigation. The third section gives a more detailed treatment to the decision of the Court of Appeals for the Ninth Circuit in *Wong*. Section four suggests that the individual characteristics which attend aliens as a classification are not analogous to those attending other classifications which the Court has determined should be protected by strict judicial scrutiny. Section five examines areas where the federal government, unlike the individual states, enjoys a broad and unquestioned mandate to regulate aliens as a class. Finally, in section six, the article suggests an alternative standard of review which guarantees aliens those constitutional rights fundamental to all persons within our society while permitting the federal government sufficient discretion to conduct an active and vigorous immigration policy.

Whatever standard the Court chooses to apply, it seems likely that the total exclusion of aliens from federal competitive civil service employment will soon become a xenophobic relic of our past.

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tees of the 14th amendment as applied to aliens. Graham v. Richardson, 403 U.S. 365 (1971).

Generally, the mere lawful presence of an alien within the United States creates an implied assurance of safe conduct. *See* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).

[9]403 U.S. 365 (1971).

[10]413 U.S. 634 (1973).

[11]413 U.S. 717 (1973).

II. COURT DECISIONS INVOLVING THE REGULATION OF ALIENS

A. DECISIONS APPLYING THE EQUAL PROTECTION DOCTRINE TO STATE RESTRICTIONS OF ALIENS

The Court in *Yick Wo v. Hopkins*[12] recognized that an alien is a "person" within the protection of the 14th Amendment. Yet the Court, in striking down the ordinance involved in that case,[13] did not articulate the standard by which the violation of equal protection was triggered. By resting its conclusion on the failure of the defendants to advance any reason which justified the discriminatory administration of the ordinance,[14] the Court seemed to suggest that special restrictions on aliens would be upheld under equal protection analysis if any reasonable basis could be shown for the regulation.[15]

In *Truax v. Raich*,[16] however, the Court revealed that, at least where a fundamental right of the alien was restricted, the standard of review was more rigorous than *Yick Wo* suggested. There the Court struck down an Arizona statute which required employers of more than five employees to hire a work force consisting of at least 80% citizens. Conceding that the Arizona restriction might otherwise fall within the ordinary police powers of the state,[17] the Court, nevertheless, struck down the statute on the grounds 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 it was the purpose of the [14th] Amendment to secure".[18]

Yet the more rigorous standard applied in the *Truax* case proved to be of limited applicability.[19] Subsequent decisions, at least in the area of an alien's right to employment, consistently supported state restrictions on aliens under the lenient rational basis standard.[20] Under such a standard, the Court invoked the broad rationale of the

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[12]118 U.S. 356 (1886).
[13]*Id.* at 373-74. The ordinance involved in *Yick Wo* granted discretion to local administrators for issuing licenses to operate public laundries in wooden buildings. While the statute on its face was fair, the Court found that it had been administered in a discriminatory manner, and therefore struck down the statute.
[14]*Id.* at 374.
[15]*Id.* at 373-74.
[16]239 U.S. 33 (1915).
[17]*Id.* at 41.
[18]*Id.*
[19]The Court in *Truax* expressly distinguished the statute in question from statutes which "pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State" or which provide for the receipt of "public moneys". *Id.* at 39-40.
[20]The Court did display disfavor with state statutes that placed wholesale restrictions on aliens who were legally within the country by striking down such statutes on the grounds that they interfered with the federal government's mandate to control immigration and naturalization. *See* notes 111-16 and accompanying text *infra*.

state's police powers[21] or the state's interest in preserving its common property[22] to sustain many state statutes restricting the alien's right to work. Under the related rationale that a state had a "special public interest" in controlling the public largess, the Court also rejected a challenge to the exclusion of aliens from public employment.[23]

In 1971, however, in *Graham v. Richardson*,[24] the Court revitalized the equal protection challenge, and reversed a trend of nearly half a century, when it placed principal reliance on the Fourteenth Amendment in striking down a state statute which required aliens, but not citizens, to meet a durational residency requirement before receiving public assistance payments. The Court brought new life to the equal protection challenge by declaring that aliens, like racial minorities, represent a "discreet and insular minority" deserving of increased judicial solicitude.[25] Such classifications are inherently suspect. Therefore, the Court applied the strict judicial scrutiny test and struck down the statute on the grounds that the state had failed to show that the statute served a compelling state interest and utilized the least restrictive alternative.

B. RECENT DECISIONS

Two recent Supreme Court decisions confirm that all state statutes which restrict the rights of aliens will now be subjected to the application of the rigorous equal protection analysis of the strict judicial scrutiny standard. The first of these cases, *Sugarman v. Dougall*,[26] squarely presented the issue of the constitutionality of the exclusion of aliens from state civil service employment. The Supreme Court in *Dougall* again applied the strict scrutiny test. It predicated this application on a finding that the New York statute created a

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[21]*See* Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392, 397 (1927) upholding a statute which permitted local authorities to restrict the issuance of licenses to operate pool halls to citizens on the basis that the regulation of pool halls fell within the police powers of the state.

[22]*See* Patsone v. Pennsylvnia, 232 U.S. 138 (1914) upholding a statute prohibiting aliens from possession of firearms for the purpose of killing any wild game except in defense of life or property on the basis that the state could restrict access to its common property to its citizenry. *Cf.* McCready v. Virginia, 94 U.S. 391 (1876). *But see* Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948).

[23]*See* People v. Crane, 214 N.Y. 154, 162, 108 N.E. 427, 429 (1915), *aff'd*, 239 U.S. 195 (1915). For a discussion of the analysis in these cases *see* Comment, *Aliens, Employment and Equal Protection*, 19 VILL. L. REV. 589 (1974).

[24]403 U.S. 365 (1971).

[25]The Court in categorizing aliens as a "discreet and insular minority" cites as precedent United States v. Carolene Products Co., 304 U.S. 144, 151-53 n. 4 (1938). That decision involved an economic classification, and it is interesting to note that the *Carolene Products* Court did not mention aliens as a "discreet and insular minority".

[26]413 U.S. 634 (1973).

classification based on alienage.[27] The Court cited *Graham v. Richardson* as authority for holding that alienage is an inherently suspect classification which requires the invocation of the higher standard of review.[28]

The Court scrutinized the broad exclusion of aliens from New York's civil service by looking to the substantiality of the state's interest involved and to the preciseness of the restriction serving that interest.[29] It rejected the traditional arguments of "special public interest" on the grounds that such a doctrine was based on the now discredited theory that the government can discriminate in extending benefits which can be characterized as a privilege and not a right.[30] The Court concluded that the citizenship requirement was overbroad because it was not confined to policy-making positions. Therefore, it could not withstand close judicial scrutiny.[32]

In re Griffiths,[33] a companion case decided on the same day as *Dougall*, took a similar stance when it applied close judicial scrutiny to Connecticut's blanket exclusion of aliens from the practice of law in that state. *Griffiths* held that such an exclusionary classification was inherently suspect.[34] The Court conceded that the State does have a substantial and constitutionally permissable interest in determining whether an applicant possesses the requisite attributes of a qualified attorney.[35] It emphasized, however, that the denial of admission to the bar in the case was not based on an assessment of the petitioner's capabilities to practice law, but solely on her alien status.[36]

Although the Court in *Dougall* and *Griffiths* invoked the rhetoric of the traditional compelling interest test applicable to suspect classifications, at least in *Dougall*, the Court did not use a standard which is insurmountable. It acknowledged that under some circumstances exclusion would be proper if it "rests on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee".[37] Thus the Court focused on the method the state utilized in reaching its allegedly permissible purpose and

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[27]N.Y. CIV. SERV. LAW § 53(1) (McKinney 1973):

> Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States.

[28]413 U.S. at 642.
[29]*Id.*
[30]*Id.* at 644.
[31]*Id.* at 643.
[32]*Id.*
[33]413 U.S. 717 (1973).
[34]*Id.* at 721.
[35]*Id.* at 722-23.
[36]*Id.* at 723.
[37]Sugarman v. Dougall, 413 U.S. at 647.

stated that "the *means* the State employs must be precisely drawn in light of the acknowledged purpose".[38] The total ban on the employment of aliens from the New York Civil Service was neither narrowly confined nor precise in its application[39] and therefore violated the equal protection guarantee of the Fourteenth Amendment.

III. WONG V. HAMPTON: THE COURT OF APPEALS DECISION

The Supreme Court in *Dougall* expressly left open the issue of the constitutionality of the exclusion of aliens from federal civil service employment.[40] The case of *Mow Sun Wong v. Hampton*[41] squarely presents that issue.

The plaintiffs, five resident aliens,[42] suing on behalf of all similarly situated non-citizens,[43] brought suit for injunctive relief to prevent further enforcement of the civil service regulation which excludes aliens[44] on the grounds that the regulation violated their constitu-

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[38]*Id.* at 643 (emphasis added).
[39]*Id.*
[40]*Id.* at 646 n.12.
[41]500 F.2d 1031 (9th Cir. 1974).
[42]Before their termination from federal employment, plaintiffs, Mow Sun Wong and Sui Hung Mok, had been employed as file clerks for the General Services Administration. Plaintiff, Francene Lum, had sought a position as a reviewer of educational programs in the Department of Health, Education and Welfare, but was informed that she did not qualify for a rating test due to her alienage. Plaintiff, Anna Yu, who did not appeal the District Court decision, had sought a position as a clerk-typist with the federal government but was informed that she could not take the typing test because she was not a citizen.

Kae Cheong Lui had worked for the former Post Office Department loading and unloading mail before his termination. Under THE POSTAL REORGANIZATION ACT, 39 U.S.C. § § 101 *et seq.* (1970), the United States Postal Service has replaced the Post Office and is now removed from the purview of the Civil Service Commission. Under the new Postal Service regulations, aliens are no longer disqualified from most lower and middle level positions in the Service. *See* § 317.3, PERSONNEL HANDBOOK P-11, U.S. POSTAL SERVICE, as amended on May 2, 1974 (Postal Bulletin, May 2, 1974, p.2). Brief for the Petitioner at 4-6, Wong v. Hampton, ____U.S.____(1975).
[43]Presumably this class consists of all resident aliens within the United States. However, it is interesting to note that the District Court decision, the Court of Appeals decision and the injunction issued by the District Court on remand have failed to make a class determination. Brief for the Petitioner at 10, Wong v. Hampton, ____U.S.____(1975).
[44]At issue in the *Wong* case is 5 C.F.R. § 338.101 (1971) of the Civil Service Commission regulations, which requires that applicants, for almost all positions in the competitive civil service, be citizens of the United States. This regulation was promulgated under the authority delegated to the Civil Service Commission by Executive Order No. 10577, 3 C.F.R. § 2.1(a) (1954-58 Comp.):

> The [Civil Service] Commission is authorized to establish standards, with respect to citizenship, age, education, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

This order, in turn, rests on the authority of the PENDLETON CIVIL SERVICE ACT OF 1883, 5 U.S.C. § § 3301 *et seq.* (1970) which, while containing no

tional and statutory rights to pursue such employment.[45]

The case came to the Ninth Circuit on appeal from a decision of the United States District Court of Northern California which granted the government's motion for summary judgment.[46] In the lower court, the aliens argued that the administrative regulation violated their constitutional rights as guaranteed by the Fifth Amendment[47] and was inconsistent with Executive Order No. 11,478[48] which banned discrimination on the basis of national origin in federal employment.

The District Court rejected the argument that the regulation violated the executive order on the ground that the circumstances surrounding the issuance of the order indicated that it was not intended to initiate a new policy for federal employment. Consequently, the court held that the executive order should not be read as limiting the specific authority and discretion of the Executive to ascertain the fitness of applicants for employment[49] as granted by the civil service enabling legislation.[50]

Turning to the constitutional challenge, the District Court gave

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express Congressional authorization to bar non-citizens from federal employment, grants in § 3301 authority to the President to:

> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
> (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and
> (3) appoint and prescribe the duties of individuals to make inquiries for purpose of this section.

For a thorough discussion of the possible challenges to the Civil Service Commission's regulation on the grounds that it exceeds its statutory authority *see* Comment, *Aliens and the Civil Service: A Closed Door?*, 61 GEO. L.J. 207, 209-12 (1972).

[45]500 F.2d at 1032.

[46]333 F. Supp. 527 (N.D. Cal. 1971).

[47]*Id.* at 529.

[48]Executive Order No. 11478 has been superceded by § 11 of THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 42 U.S.C. § 2000e-16(a) (Supp. II 1973) which provides:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in Section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in Section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds) in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be free from any discrimination based on race, color, religion, sex or national origin.

[49]333 F. Supp. at 531.

[50]*See* note 44 *supra.*

little more than summary treatment to the aliens' contention that the regulation should be subject to strict judicial scrutiny.[51] The District Court pointed to the long history of Supreme Court decisions holding that the political branches of the federal government enjoy broad powers over aliens and that such power has often been held immune from judicial review.[52] Instead, the District Court chose to scrutinize the regulation under the lenient "rational basis" standard.[53] It concluded that the government had the right to provide for the economic security of its citizenry through such employment and that the government had a rational basis to contend that the exclusion of aliens will permit government agencies to function smoothly and efficiently.[54]

On appeal,[55] the Ninth Circuit affirmed the holding of the lower court on the non-constitutional challenges. It noted that the recent Supreme Court decision in *Espinoza v. Farah Manufacturing Co.*[56] foreclosed further discussion of the possibility that "national origin" might be interpreted to include permanent resident aliens. Moreover, the court held that even if the regulation was inconsistent with the executive order, such an inconsistency would not be reviewable because, in this case, the executive order merely declared general policy.[57]

On the constitutional challenge, however, the Court of Appeals

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[51]The aliens argued that the regulation should be subject to the "compelling interest" test on the grounds that it involved a suspect classification and that it impinged upon a fundamental right. 333 F. Supp. at 531.

[52]*Id.* The court cited cases involving the plenary power of the Congress and the Executive over the exclusion and deportation of aliens. Harisiades v. Shaughnessy, 342 U.S. 580 (1951); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1949); Carlson v. Landon, 342 U.S. 524 (1951).

[53]333 F. Supp. at 532.

[54]*Id.* at 532-33. Implicit within this line of reasoning is the doctrine of "special public interest" which has been the historic rationale for supporting the restriction of public employment to citizens. *See* note 23 and accompanying text *supra.*

[55]500 F.2d 1031 (9th Cir. 1974).

[56]414 U.S. 86, 87-88 (1973). The Court in *Espinoza* held that THE EQUAL EMPLOYMENT OPPORTUNITY ACT, 42 U.S.C. § 2000e-2(a)(1) (1970), which makes it unlawful to refuse to hire an employee because of his or her race, color, religion, sex, or national origin, did not make it unlawful to discriminate on the basis of citizenship or alienage since such discrimination is not discrimination on the basis of "national origin".

[57]500 F.2d at 1036. The Ninth Circuit distinguished Jalil v. Hampton, 460 F.2d 923 (D.C. Cir. 1972), *see* note 4 *supra*, which specifically stated that an executive order is judicially reviewable. In *Jalil*, plaintiffs challenged the same civil service regulation at issue in *Wong*, 5 C.F.R. § 338.101 (1974), as inconsistent with Executive Order No. 10577, 3 C.F.R. § 2.1 (1954-58 Comp.). The *Wong* Court stated, 500 F.2d at 1036:

> [T]he executive order referred to in *Jalil* as being reviewable was not one declaring general policy, but was the same Executive Order 10577 which was the authority upon which the regulations were based.

reversed the lower court. Relegating the District Court's argument that the federal government enjoyed broad powers over aliens to a footnote, the court declared:

> With its plenary power, Congress can prevent or limit the number of aliens entering the country, and thus, can decrease or eliminate the problem raised in this case. But once legally within our country's borders, there are constitutional limitations as to how aliens can be treated by the government, vis-a-vis citizens of this country.[58]

Citing Supreme Court precedents applying equal protection standards to the federal government through the Fifth Amendment,[59] the Court of Appeals found persuasive authority in the recent decisions in *Dougall* and *Griffiths* which applied the compelling state interest test to state classifications based on alienage.[60]

The court rejected the lower court's argument that promoting the economic security of citizens and the efficiency of the civil service presented legitimate interests sufficient to uphold the restrictive regulation. It noted that the Supreme Court in the *Dougall* decision had rejected both of these arguments.[61] Further, the Ninth Circuit went on to hold that no universal ban on federal employment could be supported merely because certain federal jobs required special loyalty of its employees.[62]

Failure to delineate the specific positions where federal government service might vastly differ from ordinary employment[63] rendered the classification so sweepingly overbroad in the court's mind as to violate the due process requirement of the Fifth Amendment.[64] The Court of Appeals, therefore, reversed the judgment with instructions to the lower court to issue the injunction. The United States Supreme Court granted certiorari in the *Wong* case; the Court heard arguments on January 13, 1975, but restored the case to the calendar for reargument next term.[65]

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[58]500 F.2d at 1036 n.10a.
[59]*Id.* at 1038.
[60]*See* notes 26-39 and accompanying text *supra.*
[61]500 F.2d at 1039-40. The court notes with solicitude that aliens pay taxes, serve in our armed forces and have contributed to the growth and welfare of this country.
[62]Like the Supreme Court in the *Dougall* decision, the Court of Appeals seems to accept the proposition that the government may have a compelling interest in excluding aliens from "specific positions where security, loyalty, and policy-making require that the citizenship requirement be essential for employment". *Id.* at 1040.
[63]The court seems to suggest that federal employment should be considered among the common occupations of the community. *See* notes 16-18 and accompanying text *supra.*
[64]500 F.2d at 1040-41.
[65]*Cert. granted,* 42 U.S.L.W. 3678 (U.S. June 10, 1974) (No. 73-1596), *argued,* 43 U.S.L.W. 3402 (U.S. Jan. 21, 1975), *restored to the calendar,* 43 U.S.L.W. 3474 (U.S. Mar. 4, 1975).

IV. RATIONALE FOR SUSPECT CLASSIFICATION

Members of the Court[66] and legal commentators[67] have noted the inherent weaknesses in a rigid two-tier approach to Equal Protection. The Burger Court has stated that some classifications do not fit neatly into "the conventional mosaic of constitutional analysis under the Equal Protection Clause".[68] There are classifications which are *sui generis* and, therefore, cannot be approached in the simplistic manner[69] of placing the classification, for all purposes, into the pigeon-holes of suspect or non-suspect categories.

The Court has recognized three classifications[70] as constitutionally suspect: race,[71] nationality,[72] and state classifications based on alienage.[73] The Court has not held that federal classifications based on alienage are suspect. It is submitted that such classifications are so fundamentally different from state classifications that they should not be subjected to the formidable test of strict scrutiny.

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[66]*See, e.g.*, Marshall v. United States, 414 U.S. 417, 430-40 (1974) (Marshall, J., dissenting); *In re* Griffiths, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting); Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring); San Antonio School District v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

[67]*See, e.g.*, Nowak, *Realigning The Standards Of Review Under The Equal Protection Guarantee — Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Note, *Protection Of Alien Rights Under The Fourteenth Amendment*, 1971 DUKE L.J. 583; Note, *The Decline And The Fall Of The New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489 (1972); 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).

> The Warren Court embraced a rigid two tier attitude. Some situations involved the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact; in other contexts, the deferential 'old' equal protection reigned with minimal scrutiny in theory and virtually none in fact.

[68]San Antonio School District v. Rodriguez, 411 U.S. at 18.

[69]*Id.*

[70]In Frontiero v. Richardson, 411 U.S. 677 (1973), a plurality of the Court, four Justices, held sex to be a suspect classification.

[71]*See* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

[72]*See* Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944).

Although the Court distinguishes between classifications based on race and national origin, the Court has used these classifications interchangeably. *See* McLaughlin v. Florida, 379 U.S. at 192 and Loving v. Virginia, 388 U.S. at 11 where the Court refers to the classification in *Korematsu* as a racial classification, whereas the Court in Graham v. Richardson, 403 U.S. 365, 372 n.5 (1971), refers to the same classification as one based on nationality.

[73]Sugarman v. Dougall, 413 U.S. 634 (1973); *In re* Griffiths, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365 (1971). The Court, in these cases, held that state classifications based on alienage are constitutionally suspect and did not resolve the question of whether federal classifications based on alienage would be deemed suspect.

The Court has fashioned the standard of strict scrutiny as its tool for implementing the legislative intent of the Fourteenth Amendment: to eliminate "racial discrimination emanating from official sources in the States"[74] because "[d]istinctions [made] between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[75] This concern for equal protection of the laws to all persons[76] within the jurisdictional boundaries of the United States has caused the Court to take a stance of judicial protectiveness. This position is evidenced by the invocation of strict judicial scrutiny in cases where a classification affects a "discrete and insular minority"[77] which exhibits the following characteristics:

> The class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[78]

Upon a finding that the classification is constitutionally suspect, the Court will subject it to "the most rigid scrutiny"[79] and allow it to stand only under "the most exceptional circumstances".[80] In order to sustain the classification, the state must carry the burden of proving that a legitimate state objective, which can be characterized as "compelling,"[81] is furthered by the classification. In addition, the state must show that it has utilized the "least restrictive alternative"[82] for the accomplishment of the objective.

The Court has placed this heavy burden on the state because, in most instances,[83] classifications based on race or nationality are "irrelevant"[84] to any permissible state objective. Thus, the Court has

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[74]McLaughlin v. Florida, 379 U.S. at 192; *see also,* The Slaughterhouse Cases, 83 United States (16 Wall.) 36, 81 (1872).

[75]Hirabayashi, v. United States, 320 U.S. 81, 100 (1943).

[76]*See* notes 12-15 *supra.*

[77]*See* note 25 *supra.*

[78]San Antonio School District v. Rodriguez, 411 U.S. at 28.

[79]Korematsu v. United States, 323 U.S. at 216.

[80]Oyama v. California, 332 U.S. at 646.

[81]The Court stated in *In re* Griffiths, 413 U.S. at 722 n.9:

> The State interest required has been characterized as 'overriding,' [McLaughlin v. Florida, 379 U.S. at 196]; Loving v. Virginia, 388 U.S. 1, 11 (1967); 'compelling,' Graham v. Richardson, *supra* at 375; 'important,' Dunn v. Blumstein, 405 U.S. 330, 343 (1972), or 'substantial,' *ibid.* We attribute no particular significance to these variations in dictum.

[82]*See, e.g.,* Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

[83]The Court has upheld racial-nationality classifications only twice, and in these cases, the infringement on civil liberties was temporary and based on the exigencies of war. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943) involving restrictions on persons of Japanese ancestry during World War II.

[84]*See* McLaughlin v. Florida, 379 U.S. at 192; Hirabayashi v. United States, 320 U.S. at 100.

constructed a judicial standard which in almost all cases removes classifications based on race or nationality from further judicial analysis. The Court has, in effect, issued an edict that such classifications will not stand when attacked under the Equal Protection Clause.

Although the Court has invoked the rhetoric of strict scrutiny when dealing with classifications based on alienage, it has limited these holdings to classifications promulgated by the individual states. It cannot be contended that federal classifications based on alienage are irrelevant to any permissible federal objective. Indeed, the federal government is affirmatively mandated to make such classifications.[85] While the states do not enjoy a similar constitutional mandate to make classifications based on alienage, the Court has stated, that even on the state level, there may be situations where it is legitimate to distinguish between citizens and aliens.[86] The judicial standard applied in these cases suggests that the validity of the classification rests on a requirement that the means utilized be precisely and narrowly drawn to accomplish the legitimate state objective.[87] On the other hand, the Court has not given the states a similar rationale to rely upon in distinguishing between persons based on race or nationality; thus, the functional effect of almost per se invalidity for such traditional suspect classifications remains untouched.

We contend that the Court's less strict approach to classifications based on alienage is a result of the differential characteristics of aliens. The classification of "alien" lacks the usual badge or opprobrium of inferiority historically associated with race and nationality classifications.[88] In addition, race and nationality are inherently unalterable and immutable traits, whereas the classification of permanent resident alien is a temporary political classification.[89] It is alterable to that of a naturalized citizen[90] by the affirmative acts of the alien.[91] Likewise, alien status is not inherited by the children of aliens who are born within the United States.[92] Alienage defies description in other than political terms because it is a direct result of the legitimate exercise of the sovereign power in defining its po-

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[85]U.S. CONST. art. I, § 8, cl. 4.
[86]Sugarman v. Dougall, 413 U.S. at 647; *In re* Griffiths, 413 U.S. at 732.
[87]Sugarman v. Dougall, 413 U.S. at 642-43.
[88]Note, *Protection Of Alien Rights Under the Fourteenth Amendment*, 1971 DUKE L.J. 583, 595-97.
[89]8 U.S.C. § 1101(a)(3) (1970). *See* notes 1, 3 *supra*.
[90]Once an alien becomes a naturalized citizen, he has the same basic rights and privileges accorded a natural born citizen. *See* Afroyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163 (1964).
[91]8 U.S.C. § § 1401-1459 (1970).
[92]U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

litical community.

In the recent case of *Morton v. Mancari*,[93] the Court reviewed a similar political classification involving American Indians. The Court recognized that, under special circumstances, the federal government may make distinctions between groups of persons even though the individual states are precluded from making similar classifications. This deference to the federal government was based on the political nature of the classification.

Mancari involved an action by several non-Indian employees of the Bureau of Indian Affairs (BIA) who claimed that employment and promotional preferences for qualified Indians[94] in the BIA were in violation of the Equal Opportunities Employment Act of 1972, and that such preferences deprived them of property rights and equal protection of the laws.[95] Regarding the plaintiffs' contention that the preference was racially motivated in contravention of the Equal Protection Clause, the Court emphasized that the preference did not constitute racial discrimination. Indeed, the Court noted that a racial classification was not even involved because the preference applied only to members of federally recognized Indian tribes and held that the preference was a political classification.[96] Focusing "on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress,"[97] the Court noted that "[t]he plenary power of the Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."[98] Thus, the Court analyzed the equal protection allegation under the rational basis standard of judicial review and upheld the employment preference as "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups".[99]

It is suggested that, for similar reasons, the Court should consider federal classifications based on alienage as political in nature. Such a classification, as noted in *Mancari*, should not be reviewed under strict scrutiny.

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[93] ___ U.S. ___, 94 S. Ct. 2474 (1974).

[94] The preference did not apply to all Indians, but only to members of federally recognized tribes. *Id.* at 2484 n.24.

[95] *Id.* at 2477.

[96] The Court emphasized:

> The preference is not directed towards a 'racial' group consisting of 'Indians'; instead it applies only to members of 'federally recognized' tribes. This operates to exclude individuals who are racially to be classified as 'Indians'. In this sense, *the preference is political rather than racial in nature.* *Id.* at 2484 n.24 (emphasis added).

[97] *Id.* at 2483.

[98] *Id.*

[99] *Id.* at 2484.

V. THE PROBLEMS OF APPLYING THE TWO-TIER EQUAL PROTECTION ANALYSIS TO THE FEDERAL GOVERNMENT'S POWER OVER ALIENS

The Ninth Circuit based its application of strict judicial scrutiny in *Wong*[100] on decisions holding that state laws which discriminate against aliens create a suspect classification.[101] This approach offers little insight into the far-reaching dimensions which such a judicial standard is likely to have on this nation's policy toward aliens. Unlike the individual states, whose powers "to apply its laws exclusively to aliens as a class is confined within narrow limits",[102] the federal government is invested with a special responsibility for the regulation of aliens in our society.[103] This responsibility can hardly be dismissed, as one commentator suggests, by focusing concern on the alien's rights as opposed to the government's interests.[104] Nor can the exercise of this power be confined, as the Ninth Circuit suggested in *Wong*, to federal regulations which deal solely with the admission and exclusion of aliens at our borders.[105]

A. FEDERALISM LIMITATIONS ON THE POWER OF THE INDIVIDUAL STATES OVER ALIENS: INTRUSIONS INTO IMMIGRATION POLICY

The Court has often contrasted the broad nature of the federal responsibility over aliens within our society to the limited nature of state power over aliens. The Court has noted this contrast in decisions voiding state regulations, which restrict the rights of aliens, on the grounds that such statutes infringed upon the constitutional mandate of the federal government to control the admission and sojourn of aliens within the country. On the basis of this state intrusion doctrine, the Court has struck down state statutes which restrict the alien's right to work in the "common occupations of the community"[106] or which deprive a non-resident alien of the right to inherit

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[100]500 F.2d 1031, 1037 (9th Cir. 1974).

[101]The Court of Appeals in *Wong* places principal reliance on the Supreme Court's holding in *Graham v. Richardson* which declared alienage a "suspect classification". *See* notes 24-25 and accompanying text *supra.*

[102]Takahashi v. Fish and Game Commission, 334 U.S. 410, 420 (1948).

[103]While the boundaries of the federal government's power to regulated aliens may be unclear, the existence of such power has never been doubted. *See* HENKEN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972).

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

[105]*See* text accompanying note 58 *supra.*

[106]Truax v. Raich, 239 U.S. 33, 42 (1915). The Court struck down state restrictions on the alien's right to work in the "common occupations of the community" on the ground that such restrictions violated the 14th amendment. The Court noted as supporting rationale that such state restrictions would deny aliens the full scope of the privileges extended to them by federal immigration statutes.

real property absent a showing that his own nation extends reciprocal probate privileges to United States' citizens.[107] On a similar rationale, the Court has voided statutes which deprive aliens of the right to fish in state waters[108] or which require aliens to register with a state official.[109] The Court has used this intrusion doctrine most recently in *Graham*[110] as supporting rationale for voiding a state statute which deprived aliens of the right to receive public assistance payments.

In each of the state intrusion cases, the Court focused on the effect the state statute would have in depriving the alien of the "full scope of privileges"[111] the Congress had conferred upon the alien pursuant to its immigration admission policies. Because the state regulations had abridged these rights, they could not stand.

B. JUDICIAL RESTRAINT IN THE REVIEW OF FEDERAL IMMIGRATION AND NATURALIZATION POLICIES

The federal government's power over aliens flows primarily from its constitutional mandate to "establish an Uniform Rule of Naturalization".[112] Implicit within this authority to set the standards for naturalization is the mandate to formulate this country's immigration policies and to provide the standards for exclusion and deportation of aliens.[113] Historically, judicial review of this mandate has been marked with special deference because the Court has recognized that the power over immigration requires broad latitude in adapting our policies to changing international and domestic conditions.[114]

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[107]Zschernig v. Miller, 389 U.S. 429 (1968). The Court in striking down an Oregon statute which required judicial inquiry into the administration of foreign inheritance laws held that such a statute required an unlawful state intrusion into foreign affairs and international relations. *But see* Clark v. Allen, 331 U.S. 503 (1947) where the Court upheld a California statute which required reciprocal probate rights for U.S. citizens, but did not allow judicial inquiry beyond the face of the foreign statute.

[108]Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

[109]Hines v. Davidowitz, 312 U.S. 52 (1941). The Court struck down a Pennsylvania statute which required aliens to register with the state and carry identification cards on the grounds that the federal requirement for registration of aliens pre-empted any power the state might have in that area.

[110]403 U.S. 365, 378 (1971).

[111]Truax v. Raich, 239 U.S. at 42.

[112]U.S. CONST. art. I, § 8, cl. 4. Also mentioned as a constitutional source of the federal government's power to regulate aliens is the mandate "to regulate Commerce with the foreign nations." U.S. CONST. art I, § 8, cl. 3.

An alternative source of power supporting the federal government's regulation of aliens flows from the extra-constitutional powers of a national sovereign to exclude an alien national from its borders. *Cf.* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). *See also* Fong Yeu Ting v. United States, 149 U.S. 698 (1893).

[113]Hines v. Davidowitz, 312 U.S. 52, 69-70 (1941).

[114]Carlson v. Landon, 342 U.S. 524, 534 (1952).

The Court described the limited nature of the review process in *Harisiades v. Shaughnessy*[115] where it upheld the deportation of an alien on the grounds that he had been a communist some years prior to entering the United States:

> It is pertinent to observe that any 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.[116]

In exercising this broad power over immigration, the federal government may exclude aliens from the country for any rational reason,[117] and no alien may question the reasonableness of the government's standards.[118] Similarly, the Congress enjoys a "very broad power" to prescribe the conditions upon which aliens may remain in the United States.[119] To enforce the terms and conditions placed upon the alien while within our country, the federal government is granted considerable authority to deport all aliens the Congress deems undesirable.[120] And, even though an alien may have established deep roots during long periods of residence in the country, in a deportation proceeding he is entitled only to a fair hearing during which the government must prove by clear and unequivocal evidence that he is subject to deportation on the grounds that Con-

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[115]Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

[116]*Id.* at 588-89.

[117]Kleindienst v. Mandel, 408 U.S. 753, 767 (1971). *See also* Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967) (upholding the exclusion of homosexuals); Rosenberg v. Fleuti, 374 U.S. 449 (1963); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

The Court has even upheld admission policies which discriminated on the basis of race. *See* the Chinese Exclusion Cases, 130 U.S. 581 (1889).

Aliens seeking admission to the United States need not be accorded due process beyond consideration and decision by the designated administrative officer. Nishimura Ekiu v. United States, 142 U.S. 651 (1892); United States v. Ju Toy, 198 U.S. 253 (1905). An alien who leaves the United States may be similarly excluded. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). But an entrant is entitled to a fair hearing on a claim that he is a citizen. Kwock Jan Fat v. White, 253 U.S. 454 (1920).

[118]Unless he is returning to a previously established residence within the United States, aliens seeking entrance lack a sufficiently firm stake in this country to challenge the exclusion in our courts. Knauff v. Shaughnessy, 338 U.S. 537 (1950). It is clear that an unadmitted and non-resident alien has no constitutional right to enter this country. *See* Kleindienst v. Mandel, 408 U.S. 753 (1971).

[119]Galvan v. Press, 347 U.S. 522, 530 (1954).

[120]The right to deport aliens has been held to be a sovereign right limited only by treaty obligations. Mahler v. Eby, 264 U.S. 32 (1924). THE IMMIGRATION AND NATIONALITY ACT OF 1952, 8 U.S.C. §1251 (1970), lists some 700 grounds for deportation. *Hearings Before the Senate Appropriations Comm. on the Department of Justice for 1954*, 83d Cong. 1st Sess. 250 (1953).

gress stipulated.[121]

In reviewing all such manifestations of immigration policy the Court has uniformly exercised this high degree of judicial restraint. Without exception, the Court has sustained the exercise of the Congress' plenary power to make rules for the admission and exclusion of aliens.[122] The Court has recognized that often such actions may have harsh results on the alien.[123] But even when the effect of a statute has been to deport an alien on grounds non-existent at the time the alien was granted admission, the Court has given the broadest latitude to the political branches in determining immigration policies.[124] The Court has explained:

> So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.[125]

C. PROBLEMS WITH THE APPROACH TAKEN BY THE COURT OF APPEALS IN *WONG*

The Court of Appeals in *Wong* offers little guidance for determining which federal statutes involving aliens will now be reviewed under the strict scrutiny standard as opposed to the traditional broad deference usually shown federal regulation of aliens. Presumably, the court's suggestion that the federal government's plenary powers over aliens are limited to admission and exclusion[126] envisions a bifurcated system of review. Under such a system, all federal classifications involving immigration would apparently enjoy broad latitude under the traditional rational basis standard of review. All other federal classifications involving alienage would fall within the rubric of strict scrutiny applied in the *Wong* case. The weakness of such a rigid approach is that it fails to recognize the difficulty in classifying all federal regulation of aliens into two simplistic categories: one containing statutes serving immigration interests; the other containing statutes serving purely domestic concerns.

While the admission or deportation of aliens is the most frequently

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[121]Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 285 (1966).

[122]GORDON & ROSENFIELD, 1 IMMIGRATION LAW AND PROCEDURE, § 4.3.

[123]Galvan v. Press, 347 U.S. 522, 530 (1953).

[124]Deportation is not considered a "punishment", but rather a civil action; therefore, the *ex post facto* doctrine is inapplicable. Thus, an alien may be deported for violating statutes which were enacted after he entered the country even though the prohibited conduct occurred prior to his admission. Galvin v. Press, 347 U.S. 522 (1954). For a criticism of this policy, *see* Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 69 YALE L.J. 262 (1959).

[125]Carlson v. Landon, 342 U.S. 524, 534 (1952).

[126]*See* text accompanying note 58 *supra.*

cited example of the exercise of the federal government's power over aliens, the implementation of immigration policy has not been confined to these two extreme actions. Changing world conditions and domestic needs have led the Congress to adopt the flexible approach of conditioning an alien's admission on his surrender of certain prerogatives that would otherwise become his rights upon admission.

For example, under the conditional admission of a "nonimmigrant",[127] an alien may enter this country with the limited rights applicable to a visa status.[128] For the duration of his stay within this country, the alien may not accept employment unless he first obtains permission from the Immigration and Naturalization Service.[129] This condition remains in effect as long as the alien remains within the country. Should he violate its terms, he may be subject to deportation.[130]

Historically, such conditional admissions have been integral parts of immigration policy and have been accorded the same deference due any policy involving deportation or exclusion.[131] The Court has recognized that such restrictions merely represent a middle approach in the continuum between exclusion and full citizenship, and that such an approach is essential to maintaining a flexible immigration policy. As the Court explained in an early case involving a federal restriction on Chinese workers within the country:

> The right to exclude or expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare.[132]

The adoption of the test suggested in *Wong* will open to challenge many of these conditional forms of admission. The effect of a conditional admission is often indistinguishable from a restriction imposed on an alien by a more direct federal classification serving a purely domestic interest. The Court implicitly recognized in *Graham* the difficulty of differentiating between regulations which fall within immigration policy and those which protect a domestic concern. In that case, the Court struck down a state classification which denied welfare benefits to an alien until she had met a durational residency requirement which was not applicable to citizens. The Court justified this decision, in part, on state intrusion grounds. It noted that the Immigration and Nationality Act of 1952 contains a similar federal

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[127]8 U.S.C. § 1101(a)(15) (1970).
[128]*See, e.g.*, 8 U.S.C. § 1101(a)(15)(F) (1970), providing for admission of an alien, who is a *bona fide* student, to study in the United States.
[129]8 C.F.R. § 214.1(c) (1970).
[130]*See* Pilapil v. Immigration and Naturalization Service, 424 F.2d 6 (10th Cir. 1970); Wei v. Robinson, 246 F.2d 739 (7th Cir. 1957).
[131]Pilapil v. Immigration and Naturalization Service, 424 F.2d at 11.
[132]Fong Yeu Ting v. United States, 149 U.S. 698, 711 (1893).

durational residency requirement which subjects an alien to deportation if he becomes a public charge within five years of entering the country.[133] The effect of the federal regulation is identical to the state regulation which was invalidated by the Court: the alien is denied welfare benefits for a certain period of time.[134] Presumably, both the state and the federal restrictions were designed to insure that our domestic resources are not overtaxed by non-citizens. Yet, the federal regulation is an integral part of immigration policy and, according to the standard implicit in the *Wong* decision, would be tested under rational basis analysis.

The problem of differentiating between federal classifications of aliens which are to be reviewed under the traditional judicial deference shown immigration policies and those which are to be subjected to strict scrutiny under the *Wong* holding is not alleviated by shifting the focus from the effect of the statute to the interest served by the statute. A primary concern underlying the civil service regulation at issue in *Wong* is the protection of employment opportunities for citizens. This same concern has been central to this nation's immigration system for nearly 100 years. Indeed, one commentator has called the 1965 amendments to the present immigration act "The Workers Exclusion Act of 1965".[135] Under the terms of that statute, for example, aliens in skilled professions often gain admission through the labor certification program.[136] This program requires an alien seeking admission to affirmatively show that a particular geographic region of the country requires his services, and that his entrance will not have an adverse impact on the wages of citizen workers in the region. Both this regulation and the more direct restriction at issue in *Wong* serve the same interest. Both regulations are intended to protect citizen workers. Yet under the test promulgated in *Wong*, restrictions within the labor certification program will continue to be reviewed under the rational basis test because it provides for enforcement through the Immigration and Naturalization Service.

It is no more feasible for the Court to distinguish between immigration and domestic policy on the basis of the impact the regulation has on the life of the alien after the alien has entered the country. Most visas must be renewed annually during the alien's stay even if his residence here is an extended one.[137] Similarly, some occupations

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[133]THE IMMIGRATION AND NATIONALITY ACT OF 1952, 8 U.S.C. § 1251(a)(8) (1970).

[134]Graham v. Richardson, 403 U.S. 365 (1971).

[135]Wasserman, *The Twenty-Fourth Amendment to the McCarran-Walter Act*, 43 INT. REL. 1, 3 (1966).

[136]The scope and application of this prohibition against the entry of certain aliens coming to perform skilled and unskilled labor is explained in GORDON & ROSENFIELD, 1 IMMIGRATION LAW AND PROCEDURE, § 2.40.

[137]*See, e.g.*, the annual renewal requirements applicable to student visas. 8 C.F.R. § 214.2(f) (1970).

under the labor certification program require that the alien make an annual showing that his services are needed and impose restrictions which continue indefinitely.[138] Both programs impose conditions far more severe than the exclusion from government employment at issue in *Wong*. The holder of a student visa is excluded from all forms of employment.[139] Entrants under some provisions of the labor certification program may be limited to a particularly occupation and geographic region.[140] The conditions of the visa and the labor certification program are enforced by the severe sanction of deportation.[141]

One distinguishing factor between immigration policies, such as the nonimmigrant visa program, and other more direct federal restrictions on aliens, such as the regulation in *Wong*, is that immigration policies are normally imposed upon the alien with full notice at the time he enters the country. The exclusion of aliens from the civil service, on the other hand, confronts an alien only after he has entered the country under a status in which he otherwise enjoys full rights. Such a distinction, however, ignores the reality that the alien who enters this country has ample notice from the over one hundred years such an exclusion has existed.[142] Further, the fact that all civil law countries, and apparently most of the rest of the world, restrict civil service employment to citizens certainly offers implied notice that such a restriction is likely to exist in this country as well.[143]

Because it is not feasible to define the boundary between immigration and domestic policy by analyzing the effect of the statute or the interest served by the statute, the Court may be forced to adopt a formalistic approach. Such an approach is likely to differentiate on the basis of whether the classification is promulgated by the Immi-

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[138]While most workers entering under this program are free to move throughout the country after they have been certified for admission, some occupational admissions require that the alien, during the entire duration of his stay within the country, make an annual showing of the need for his services. 29 C.F.R. § § 60.5(a)-(c) (1974). Should the alien fail to make that showing, he must leave or face deportation. 29 C.F.R. § § 60.5(b)(c), 60.6 (1974).

A similar status is accorded to "Treaty Aliens" who come here to work in enterprises related to our trade treaties with the alien's home nation. Such aliens, however, are treated under the nonimmigration program and, therefore, are required to make an annual showing that their employer is a foreign person or organization of the same nationality as the nonimmigrant and that the employer is involved in substantial trade pursuant to the treaty conditions. 8 C.F.R. § 214.2(e) (1970). Prior to 1954, "Treaty Aliens" were admitted without time limitations but were required to make an annual showing that they were maintaining their treaty trader status. *See* GORDON & ROSENFIELD, 1 IMMIGRATION LAW AND PROCEDURE § 2.11b.

[139]8 C.F.R. § 214.1(c) (1970).

[140]*See* note 135 *supra*.

[141]*See* Pilapil v. Immigration and Naturalization Service, 424 F.2d 6 (10th Cir. 1970).

[142]*See* First Report of the United States Civil Service Commission 47 (1884).

[143]*See* UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, PUBLIC ADMINISTRATION BRANCH, HANDBOOK OF CIVIL SERVICE LAWS AND PRACTICES (1966).

gration and Naturalization Service or by a purely domestic agency. Such a categorization is constitutionally untenable. It provides no adequate constitutional standard which can be used to determine which regulations should be subject to the test of rational basis and which should be reviewed under strict scrutiny. It merely distinguishes regulations on the basis of which agency promulgated them. The folly of such an approach is illustrated by the government's contention in *Wong* that it could impose, through the Immigration and Naturalization Service, a condition on all entering aliens that they waive all claims to federal civil service employment.[144] Such a policy would serve the same governmental interest as the broad exclusion effected by the present civil service regulation. Yet, as "immigration policy", such a regulation would hardly be distinguishable from the conditions imposed under the present nonimmigrant or labor certification conditional entrance programs, and presumably, would be subject only to the rational basis test. If such a standard is adopted, one could well imagine that many of the present federal statutes distinguishing between aliens and citizens would soon be incorporated into the immigration act. A similar problem would face the Court if it tried to distinguish on the basis of whether an alien is a permanent resident or of temporary status, for that too is merely an administrative decision and not a constitutional standard.

The terse suggestion of the Court of Appeals that the application of strict scrutiny to federal classifications of alienage can be confined to policies which lie outside the federal government's power over the admission or exclusion of aliens ignores the difficulties inherent in defining the boundaries of immigration. As every alien is reminded during the month of January, when he has to report his address,[145] the federal government's immigration powers remain a part of his life, in a myriad of ways, long after the initial decision concerning his admission or exclusion. Indeed, an alien will remain subject to the special powers of the federal government's immigration policy until the day he obtains citizenship.[146] The wide variety of classifications and regulations that implement this policy do not lend themselves to rigid segregation into simplistic categories of immigration versus domestic policies. Yet, should the Court apply the strict scrutiny standard to the federal regulation in *Wong*, it must be prepared to establish such a rigid bifurcated system and a boundary line marking the heretofore undefined limits of federal immigration policies. Absent such clear guidelines, the pressures for consistency are likely to force the Court into an anomalous position: applying to immigration policies a rigid standard of judicial review which lacks the flexibility essential to the immigration policy of a national sovereign.

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[144]Brief for the Petition at 13-14, Wong v. Hampton, ___U.S. ___(1975).
[145]8 U.S.C. § 1305 (1970).
[146]Carlson v. Landon, 342 U.S. 524, 534 (1952).

D. OTHER FEDERAL CLASSIFICATIONS INVOLVING ALIENAGE

Even if the Court is able to construct a standard of review which will distinguish between those classifications serving federal immigration policies and those which serve other interests, it would still face difficulties in determining which federal classifications involving alienage are permissible. The broad scope of the federal government's responsibility for protecting our national interests results in the use of the classification of alienage and citizenship in many areas other than immigration policies. Exclusive of the Immigration and Nationality Act of 1952, the classification of alienage is used in over 240 federal statutes.[147] The objects of these statutes range from the requirements that the directors of national banks[148] and the members of the Executive Board of the Boy Scouts of America[149] be composed entirely of citizens to an authorization that the President assist only citizens in obtaining just compensation for losses suffered in the course of international trade.[150] While many of these statutes serve an obvious and legitimate national interest, few would withstand a challenge under the strict scrutiny standard.

International law and the Constitution grant the federal government the power to make a classification which, in all but the most compelling cases, is forbidden to the states.[151] To place every federal restriction involving alienage, which has not crossed some imperceptible boundary defining immigration and naturalization policy, under the rubric of strict scrutiny is to shackle the Court to a rigid and formalistic standard.

VI. THE SUBSTANTIAL MEANS APPROACH: AN INTERMEDIATE STANDARD OF EQUAL PROTECTION

The Court has maintained the rhetoric of a two-tier standard of equal protection; but, in actuality, it has moved to a more realistic approach of utilizing flexible standards of review.[152] Such a standard was invoked in the recent case of *Kahn v. Shevin.*[153] In that case, the

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[147]Brief for the Petitioner at Appendix, Wong v. Hampton, ____U.S. ____(1975).
[148]12 U.S.C. § 72 (1970).
[149]36 U.S.C. § 25 (1970).
[150]22 U.S.C. § 2351 (1970).
[151]*See* 1 OPPENHEIM, INTERNATIONAL LAW (8th Ed., LauterPacht, 1955) 574-96. *See also* note 112 and accompanying text *supra.*
[152]The Court has used a standard of review under the equal protection clause which falls short of strict scrutiny, but requires more than a mere showing of any rational basis to uphold its validity. *See, e.g.*, Kahn v. Shevin, ____U.S. ____, 94 S. Ct. 1734 (1974); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). *See generally, The Supreme Court, 1972 Term,* 87 HARV. L. REV. 1, 105-33 (1973).
[153]____U.S.____, 94 S. Ct. 1734 (1974).

Court upheld a state statute which gave widows a property tax exemption but did not allow a similar exemption for widowers. The Court did not apply a standard of judicial review which gave total deference to legislative findings and cited *F.S. Royster Guano Co. v. Virginia*,[154] a 1920 case, as authority for its standard of review. The standard invoked in *F.S. Royster Guano Co.* required that:

> [T]he classification must be reasonable, not arbitrary, and rest upon some ground of difference *having a fair and substantial relation to the object of the legislation*, so that all persons similarly circumstanced shall be treated alike.[155] (emphasis added)

The Warren Court embraced the rigid two-tier approach to equal protection as a mechanism for permitting judicial activism, i.e., strict scrutiny, in reviewing those classifications which the Court deemed suspect.[156] For all classifications falling outside strict scrutiny the Court invoked a standard which gave almost total deference to the legislature.[157] In applying this lenient standard in *McGowan v. Maryland*, the Court explained:

> State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.* (emphasis added)[158]

The Burger Court has noted in recent cases that the Warren Court's two-tier standard cannot be applied mechanically to all classifications,[159] and thus, has invoked an intermediate standard which falls somewhere within the extremes of rational basis and strict scrutiny. The *Wong* case offers the Court an excellent opportunity to step forward and enunciate in clear and precise terms a flexible intermediate standard of review applicable to federal classifications based on alienage.

A. A FLEXIBLE STANDARD OF REVIEW: THE SUBSTANTIAL MEANS TEST

This article proposes a model[160] for an intermediate standard of review applicable to all federal classifications based on alienage. It

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[154]253 U.S. 412 (1920).
[155]*Id.* at 415.
[156]This article recognizes, but does not focus on, the use of strict scrutiny in situations where the classification penalizes a "fundamental right". *See, e.g.*, Shapiro v. Thompson, 395 U.S. 618 (1969) where the Court struck down a statute which penalized the fundamental right to travel.
[157]Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).
[158]366 U.S. 420, 425-26 (1961); *see also* McDonald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969).
[159]*See* text accompanying notes 66, 68-69 *supra*.
[160]This model is a composite of the theories espoused by the following:
See generally Gunther, *The Supreme Court, 1971 Term, Foreword: In Search*

would accord the federal government adequate flexibility in devising immigration and naturalization policies, yet it would accord aliens sufficient protection of their constitutional rights.

This intermediate standard would place the burden on the government to come forth with factually demonstrable reasons which would substantially support the classification and the means used to effectuate a legitimate end. Thus, the Court would not be called upon to engage in mental gymnastics in search of support for the classification.

The government would not have to prove that it was employing the least restrictive alternative, nor would the government have to show that the classification served a compelling interest. Instead, the focus would be on the *means* utilized by the government in furtherance of its legitimate governmental interest. The government's quantum of proof in sustaining its means would be based on the balancing

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Of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection, 86 HARV. L. REV. 1, 20-24 (1972). Professor Gunther proposes a two tier approach to equal protection. The standard of strict scrutiny is retained for classifications which are constitutionally suspect or infringe upon "fundamental rights"; and a flexible revitalized standard of rational basis is invoked for all other classifications. The primary focus of this flexible standard is on the means utilized by the government rather than on the ends. Applying this standard, the government is permitted to select any means that substantially furthers the objective, but the government must bear the burden of showing that the means has substantial basis in actuality and not merely in conjecture.

See generally Nowak, *Realigning The Standards Of Review Under The Equal Protection Guarantee — Prohibited, Neutral, and Permissive Classifications, 62* GEO. L.J. 1071, 1092-1093 (1974). Professor Nowak proposes a three tier approach to equal protection based on three classifications: Prohibited-Suspect, Neutral, and Permissive. Classifications based on race or nationality are placed in the prohibited-suspect category. Such classifications trigger the full burden of strict scrutiny. Neutral classifications are defined as the treatment of persons in a dissimilar manner on the basis of some inherent human characteristics or status (other than race or nationality), or as limitations on the exercise of fundamental rights. Such neutral classifications will be invalidated unless the state can show that the means used bears a factually demonstrable relationship to the state objective. Permissive classifications is a catch-all category which encompasses all classifications which do not fall into prohibited or neutral. The standard used for permissive classifications is similar to the traditional rational basis standard. The state is not called upon to show independent factual bases in support of the means or ends and it will be upheld if there is any conceivable basis upon which the classification could bear a rational relationship to a state objective.

Justice Marshall proposes a flexible standard of review in which the burden on the state reflects a balancing of the interests being asserted by the state in support of the classification. As Justice Marshall stated in his dissenting opinion in San Antonio School District v. Rodriguez, 411 U.S. 1, 102-03 (1973):

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

of four factors:[161] the character of the classification; the individual interests affected; the government interests asserted in support of the classification; and, the proximity of these governmental interests to the constitutional mandate of the Congress to control immigration and naturalization policies.

In balancing these factors, the initial emphasis would be placed on the proximity of the classification to immigration and naturalization policies. The closer the classification is to immigration and naturalization, the more deference the Court will give to the government's rationale. And conversely, the further the classification is from immigration and naturalization, the higher the burden will be on the government to come forth with factually demonstrable reasons which substantially support the means in terms of the ends. It is the balancing of the proximity of the classification to immigration and naturalization policies which provides the necessary flexibility to the government while affording sufficient protection to the constitutional rights of aliens. The present two-tier approach to equal protection does not provide this flexibility.

Emphasis on the means differs from the analysis developed by the Warren Court which focused on the compelling nature of the ends.[162] But it is similar to the analysis developed by the Burger Court in *Dougall* which did focus on the means used by the state in obtaining its objective.[163]

The application of *substantial means* in the area of federal classifications based on alienage would not sound the death knell for the tests of strict scrutiny or rational basis. The Court would still employ strict scrutiny for classifications based on race, nationality, and state classifications based on alienage.[164] In addition, the test of rational basis would be invoked for classifications in the area of socio-economics where the Court has traditionally deferred to legislative wisdom.[165]

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[161]The Court enunciated in Dunn v. Blumstein, 405 U.S. 330, 335 (1972), that three factors are scrutinized under equal protection analysis:

> [T]he character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.

[162]*See* Justice Harlan's critical dissent of the Warren Court's approach to strict scrutiny in Shapiro v. Thompson, 394 U.S. 618, 658-62 (1969).

[163]The Court stated that a state classification based on alienage which excluded aliens from the state civil service might have been upheld if the means utilized was precisely and narrowly drawn to meet the state objective. Sugarman v. Dougall, 413 U.S. at 642-43.

[164]Strict scrutiny would also be applicable where a fundamental right is penalized. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[165]*See, e.g.*, San Antonio School District v. Rodriguez, 411 U.S. at 31-33 (education); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (housing); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (welfare benefits).

B. APPLICATION OF SUBSTANTIAL MEANS TO *WONG*

The application of the *substantial means* test to *Wong* reveals that the government must carry a substantial burden in sustaining the means utilized, i.e., the almost total exclusion of aliens from federal employment. This conclusion is based on several factors. First, the exclusion of aliens from the federal competitive civil service is not closely related to immigration and naturalization policies. Second, the character of the classification creates an irrebutable presumption that all aliens are not qualified to be employed by the federal civil service. And third, a very important basic right is being denied to aliens: the right to compete for such federal employment on the same basis as citizens.

In weighing such factors against the interests asserted by the government, the substantial means test requires a close analysis of the actual arguments presented to the Court. In its brief, the Government, the petitioner, asserted four arguments in support of its classification and the use of its exclusionary means.

The first two justifications asserted by the Government attempted to illustrate the basic rationality of the classification. These arguments were premised on the propositions that (1) for one hundred years, the Congress and the Executive have given deference to the exclusion of aliens from the federal competitive civil service,[166] and that (2) similar exclusions are employed by other nations.[167]

The "continued use" rationale espoused in the first proposition carries little weight under substantial means scrutiny. As the Court noted in *Walz v. Tax Commissioner of New York*,[168] a case involving a First Amendment question: "no one acquires a vested or protected right in violation of the Constitution by long use, even where that span of time covers our entire national existence and indeed predates it."[169]

The second proposition also fails because a policy that is consistent with international practice, but in contravention of our Constitution, cannot withstand judicial inquiry, even under the most relaxed standards. The Court has stated that "[o]ther nations are governed by their own constitutions, if any, and we can draw no support from theirs."[170] The issue presented in *Wong* is whether the exclusionary legislation is in violation of the implicit safeguard of equal protection found in the Fifth Amendment's Due Process

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[166]Brief for the Petitioner at 52, Wong v. Hampton, ___U.S. ___ (1975).
[167]*Id.* at 54.
[168]397 U.S. 664 (1970). The Court upheld the tax exempt status of religious institutions.
[169]*Id.* at 678.
[170]Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

Clause,[171] and not whether the classification violates the constitution of some other country.

The Government's third justification was based on Congress' plenary power to regulate matters concerning aliens.[172] Indeed, the federal government has a constitutional mandate to regulate immigration and naturalization while the individual states do not. But even the federal government's plenary powers are subject to constitutional limitations and the mere invocation of plenary powers over the subject matter does not end judicial inquiry.[173] The Government attempted to bolster its plenary powers argument on the ground that the states were precluded from making such classifications because of an alleged conflict between the state classification and congressional policy. Such a distinction can be made; however, the Government failed to offer legal or factual support for its position.[174]

Additionally, the Government argues:

> The United States has entered into numerous reciprocal treaties touching upon the employment rights of aliens in this country and of United States citizens in other countries. [citations omitted]. While those treaties typically do not expressly cover employment in the civil service of the respective contracting parties, that *would be* an appropriate subject for such a treaty provision.[175] (emphasis added)

This argument fails scrutiny under substantial means because it relies on judicial hypothecating rather than on a factual showing by the Government. Emphasis is on the supposition that the Government *may be* deprived at some indeterminable point in the future of a "bargaining chip" at a treaty conference. There is no showing that such an occasion has arisen or will arise, and the concept of "using resident aliens as 'pawns' to obtain benefits for American citizens residing in other countries violates the very principles of due process which petitioners are required to satisfy!"[176]

The Government's final argument rests on an unsupported allegation that the federal civil service involves unique responsibilities and relationships which bear a substantial relationship to citizenship.[177] The Government contends that national security requires allegiance

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[171]Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
[172]Brief for the Petitioner at 58, Wong v. Hampton, ___U.S. ___(1975).
[173]*See* note 109 *supra.*
[174]The Government wrongfully cited *Dougall* in support of this proposition. In *Dougall,* the Court explicitly noted that it did not reach the issue of conflict between the state classification and Congress' comprehensive regulation of immigration. Sugarman v. Dougall, 413 U.S. at 646 n.12. *But see* Graham v. Richardson, 403 U.S. 365, 378 (1971).
[175]Brief for the Petitioner at 61, Wong v. Hampton, ___U.S. ___(1975).
[176]Brief for the Respondent at 25 n.30, Wong v. Hampton, ___U.S. ___(1975). *See also* Brief The American Civil Liberties Union, *Amicus Curiae,* at 18 n.3, Wong v. Hampton, ___U.S. ___(1975).
[177] Brief for the Petitioner at 63, Wong v. Hampton, ___U.S. ___(1975).

of all civil servants. The presumption is that a non-citizen necessarily owes an affirmative duty to a foreign nation. But, as Justice Black stated in his concurring opinion in *Oyama v. California:*[178]

> Loyalty and the desire to work for the welfare of the [government], in short, are individual rather than group characteristics. An . . . alien may or may not be loyal; he may or may not wish to work for the success and welfare of the state or nation. But the same can be said of a . . . natural born citizen.[179]

The Government's position that undivided allegiance and loyalty to the United States are personal attributes of citizens is based on an unsupported presumption rather than on facts presented to the Court. Such a position does not withstand scrutiny under substantial means. It is conceded that there are some positions within the civil service which require allegiance to the United States, but it is specious to argue that this is true of all of the nearly three million civil service positions. As the Court of Appeals in *Wong* stated:

> We have no doubt that under certain circumstances our government may, for loyalty or security reasons, properly require citizenship for government positions. But the Commission regulations fail to delineate any specific positions where security, loyalty, and policy making require that the citizenship requirement be essential for employment.[180]

In fact, a similarly indiscriminate citizenship requirement led the *Dougall* Court to invalidate a civil service requirement at the state level.[181] It is doubtful that the Court will uphold such a broad exclusionary regulation based on the unsupported rationale that national security will be endangered if an alien holds any position with the federal competitive civil service.

It is also submitted that the general exclusionary regulation is arbitrary, and not a rational executive decision based on loyalty and security considerations. Other agencies of the executive branch do not maintain similar exclusionary personnel policies even though national security is a prime concern in their operations. For example, the Armed Forces permit permanent resident aliens to enlist during times of peace[182] and employment with The National Aeronautics and Space Administration[183] is open to aliens. In fact, the highest levels of the executive branch and those of a "confidential or policy making character" constitute an "excepted service" which is exempt

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[178]332 U.S. 633 (1948).
[179]*Id.* at 666 (concurring opinion).
[180]500 F.2d at 1040.
[181]413 U.S. at 643.
[182]In time of peace, no person may be accepted for original enlistment in the Army, Air Force, or Reserve unless he is a citizen of the United States or a permanent resident alien. *See* 10 U.S.C. § § 510, 3253, 8253 (1970).
[183]42 U.S.C. § 2473(b)(10) (1970).

from the exclusionary regulation applicable to the federal competitive civil service,[184] and therefore, arguably, is open to aliens.

In addition, it can be argued that the classification is unconstitutional because it creates a permanent irrebutable presumption that aliens, as a class, are not qualified to work at any position in the civil service. This presumption is factually devoid of support; and, as the Court stated in *Vlandis v. Kline:*

> Statutes creating permanent irrebutable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.[185]

The Government also attempted to support the exclusionary regulation on the basis of administrative convenience:

> The problem of differentiating among jobs, among facilities, and, indeed, among different categories of aliens, is so large and intricate, and the risks of an unduly narrow application of citizenship so potentially serious, that the courts ought not to thrust that task on the Executive, or, ultimately, upon themselves, unless the Constitution clearly requires it.[186]

This argument fails for two reasons. First, the Government offers no factual evidence of insurmountable administrative problems, but rather, speculates that such problems will arise. Also, the Government ignores the fact that executive agencies now do exactly what the Government contends is not feasible. For example, the Department of the Navy permits aliens to hold any enlisted position which does not require a security clearance provided that the alien passes a background investigation and states an intent to become a citizen within one year.[187]

Second, the Court has held that administrative convenience is insufficient to validate what is otherwise a violation of due process of the law.[188] Thus, administrative convenience, standing alone, will not support an exclusionary regulation which deprives aliens of their constitutional rights.

VII. CONCLUSION

Federal classifications based on alienage present special equal protection problems not associated with state classifications. A rigid system of review employing only the extreme standards of the rational basis or strict scrutiny tests cannot provide the delicate

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[184]5 C.F.R. § § 213.3101-.3394 (1974).
[185]412 U.S. 441, 446 (1973).
[186]Brief for the Petitioner at 69, Wong v. Hampton, ____U.S. ____(1975).
[187]Letter from Joseph T. McCullen, Jr., Assistant Secretary of the Navy, Manpower and Reserve Affairs, November 4, 1974 to Fredrick I. Miller, on file with the UCD Law Review.
[188]Cleveland Board of Education v. LaFleur, 414 U.S. 632, 647 (1974); *see also* Frontiero v. Richardson, 411 U.S. 677, 690 (1973).

balance necessary to protect aliens within our society while according the government sufficient flexibility to conduct immigration policy. It is not a simple matter of using the standard of rational basis when the classification falls within the ambit of immigration and naturalization and using the standard of strict scrutiny when the classification falls outside this area. The line between immigration and domestic policy is too imprecise to permit such an approach. An intermediate standard which focuses on the means utilized by the government to effectuate legitimate ends can provide this needed flexibility.

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