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Roslyn Corenzwit Lieb

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CASE NOTES

EQUAL PROTECTION—CITIZENSHIP IS AN IMPERMISSIBLE REQUIREMENT FOR BAR ADMISSION

The United States Supreme Court recently extended alien rights when it held that it was a denial of equal protection for a state to limit the practice of law to United States citizens. The factual setting of the Court's decision began when Fré Le Poole, a citizen of the Netherlands, left her native land in 1965 to visit the United States and decided to remain. Two years later she married John Griffiths, a United States citizen, and moved to Connecticut where she attended Yale Law School. In 1969, Ms. Griffiths received her LL.B. and became a law clerk at the New Haven Legal Aid Bureau. She applied for admission to the Connecticut bar, but her application was denied by the Committee on Recommendations; she fulfilled all the qualifications to take the bar examinations save one—United States citizenship.¹ Although eligible to become a citizen by virtue of her marriage to an American citizen,² Ms. Griffiths chose to remain a citizen of the Netherlands; she had neither filed nor intended to file a declaration of intent to become a citizen of the United States.³

Once her application was denied, Ms. Griffiths petitioned the Superior Court for New Haven County, seeking a decree which would permit her to take the Connecticut bar examinations and which would declare her eligible for admission to the Connecticut bar. Her petition was denied by both the superior court and, on appeal, the Connecticut Supreme Court.⁴ The latter court found that the citizenship requirement was "not simply reasonable but . . . basic to the maintenance of a viable system of dispensing justice under our form of government."⁵ The requirement

1. CONN. SUPER. CT. R. 8(1).

2. 8 U.S.C. § 1430(a) (1970).

3. *Id.* § 1445(f). This fact is significant since several lower courts had ruled for the alien on the basis of declared intention to become a citizen.

4. 162 Conn. 249, 294 A.2d 281 (1972).

5. *Id.* at 263, 294 A.2d at 287.

was also said to be able to withstand the stricter test of a "compelling state interest,"⁶ i.e., that the "unique" status of members of the Connecticut bar as "commissioners of the Superior Court"⁷ justifies the exclusion of aliens from the legal profession. The petitioner's other arguments were dismissed as well.⁸ On appeal, in a 7-2 decision delivered by Justice Powell, the United States Supreme Court held the citizenship requirement to be unconstitutional as a denial of equal protection of the laws to resident aliens and reversed and remanded the case. *In re Griffiths*.⁹

The *Griffiths* decision is a logical one in light of recent cases.¹⁰ This extension of protection of "discrete and insular minorities"¹¹ can and should be viewed as a continuation of earlier developments in relation to the alien in the United States. This Note will briefly trace the legislative and judicial history of the treatment of the alien in the United States to explain why this decision is a logical and important extension of the

6. *Id.* at 262, 294 A.2d at 287. With regard to equal protection of the laws, a suspect classification, such as alienage or race, is subject to strict judicial scrutiny. Only if a "compelling state interest" can be shown will the courts permit the classification to stand. *See, e.g.,* *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race). For further discussion of the "compelling state interest" test, *see Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1132 (1969).

7. "Each attorney at law admitted to practice within the state, while in good standing, shall be a commissioner of the superior court and, in such capacity, may, within the state, sign writs and subpoenas, take recognizances, administer oaths. . . ." CONN. GEN. STAT. 51-85 (1968).

8. Petitioner claimed that Rule 8(1) interfered with the exclusive federal power over immigration. The court felt that the rule "[was] neither inconsistent with nor repugnant to the power over immigration conferred on Congress. . . ." 162 Conn. at 266, 294 A.2d at 289. Ms. Griffiths' claim that the rule violated her first amendment right to determine her own nationality, a right recognized in international law, was also dismissed. *Id.*

9. 413 U.S. 717 (1973). Chief Justice Burger and Justice Rehnquist wrote dissenting opinions, the latter criticizing the inclusion of alienage as a suspect classification, the former criticizing the lack of consideration given to the particular role of the lawyer. *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting; also applies to *In re Griffiths*); *In re Griffiths*, 413 U.S. at 730 (Burger, C.J., dissenting).

10. *See* discussion in text accompanying notes 28-40 *infra*. Note that several writers have expressed the view that the citizenship requirement for attorneys is unnecessary. *See, e.g.,* Fisher & Nathanson, *Citizenship Requirements in Professional and Occupational Licensing in Illinois*, 45 CHI. B. REC. 391, 397 (1964); M. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 188 (1946) [hereinafter cited as KONVITZ, *THE ALIEN*]; Ohira & Stevens, *Alien Lawyers in the United States and Japan—A Comparative Study*, 39 WASH. L. REV. 412 (1964); Comment, *Aliens' Rights, the Public Interest, and the Practice of Foreign Law*, 10 STAN. L. REV. 777 (1958).

11. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n.4 (1938).

protection accorded our resident aliens, and will comment on the areas in which discrimination against the alien is still permitted.

In the early nineteenth century, aliens and citizens were accorded similar rights.¹² However, as the century progressed with its increased industrialization and immigration, the treatment of the alien changed. Asians were the first to experience this change, i.e., the exclusion of the Chinese¹³ and Japanese, and the ineligibility of the latter for citizenship.¹⁴ Several reasons have been suggested for this change in treatment. These include: a larger number of immigrants; an increased competition for jobs, especially in the western states which experienced the oriental influx; and the end of an available "frontier" which previously had absorbed large numbers of individuals.¹⁵

Notwithstanding the movement toward more restrictive treatment of aliens, the United States Supreme Court had early laid the basis for the protection of aliens. In *Yick Wo v. Hopkins*,¹⁶ an 1886 case, the Court held that the selective enforcement of a municipal ordinance (applied only to *Chinese* laundries) was a denial of equal protection to aliens:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.¹⁷

Ten years later the Court stated that the fifth and sixth amendments also were applicable to aliens.¹⁸ Yet despite these holdings, numerous state restrictions on aliens continued and the courts generally acquiesced.

These restrictions were widespread and varied. Aliens were excluded from employment of public works projects¹⁹ and were refused licenses for occupations which would affect the "public welfare."²⁰ The courts usually viewed these limitations as a reasonable exercise of the police

12. At least twenty-two states and territories permitted aliens to vote. See KONVITZ, *THE ALIEN*, *supra* note 10, at 1.

13. *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893).

14. *Takao Ozawa v. United States*, 260 U.S. 178 (1922) (Japanese held ineligible for citizenship).

15. See KONVITZ, *THE ALIEN*, *supra* note 10, at 172; *Rok v. Legg*, 27 F. Supp. 243, 245 (S.D. Cal. 1939).

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

17. *Id.* at 369.

18. *Wong Wing v. United States*, 163 U.S. 228 (1896).

19. See, e.g., *People v. Crane*, 214 N.Y. 154, 108 N.E. 427, *aff'd*, 239 U.S. 195 (1915).

20. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

power.²¹ Exceptions to this treatment occurred when a treaty with the alien's native land specified otherwise.²² Without such a treaty, a state could deny aliens the right to own, lease or have any title to or interest in land by exercising its police powers²³ and could refuse them licenses for a variety of occupations.

Despite these restrictions, both the federal and state courts have gradually recognized greater rights for aliens. The basis for this recognition has rested primarily upon the equal protection clause of the fourteenth amendment, rather than on the "supremacy" clause or the due process clause.²⁴ The federal supremacy argument was accepted by the Supreme Court in *Truax v. Raich*,²⁵ a case dealing with an Arizona statute which forbade the hiring of aliens for more than twenty percent of the work force on any job. Although the statute was declared unconstitutional primarily as a denial of equal protection, the Court used language indicative of its concern with the clash between state and federal power:

The assertion of an authority to deny aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in the ordinary cases they cannot live where they cannot work. And, if such policy were permissible, the practical result would be that those lawfully admitted to the country under . . . acts of Congress, instead of enjoying . . . the

21. See *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927) (pool and billiards rooms); *People v. Crane*, 214 N.Y. 154, 108 N.E. 427 (1915), *aff'd*, 239 U.S. 195 (1915) (public works projects); *George v. City of Portland*, 114 Ore. 418, 235 P. 681 (1925) (soft-drink business); *Wright v. May*, 127 Minn. 150, 153, 149 N.W. 9 (1914) (auctioneer); *Commonwealth v. Hana*, 195 Mass. 262, 81 N.E. 149 (1907) (pedlar). *But see Templar v. State Bd. of Examiners of Barbers*, 131 Mich. 254, 90 N.W. 1058 (1902) (denial of barber's license held violative of the fourteenth amendment).

22. See, e.g., *Asakura v. Seattle*, 265 U.S. 332, 343 (1924). "While regulation [of pawnbroking] has been found necessary in the public interest, the business is not on that account to be excluded from the trade and commerce referred to in the treaty." *But see Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927).

23. *Terrace v. Thompson*, 263 U.S. 197, 217 (1923). *But see Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952). For a general discussion of three theories often cited as justification for the denial of the right of aliens to work, see Comment, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012 (1957).

24. Justice Murphy, in a concurring opinion, did state that once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens.

Bridges v. Wixon, 326 U.S. 135, 161 (1945).

25. 239 U.S. 33 (1915).

privileges conferred by the admission, would be segregated in . . . States [which] offer hospitality.²⁶

The same two reasons, denial of equal protection and federal supremacy, were given by the Court in *Takahashi v. Fish and Game Commission*²⁷ as the bases for its holding. California was prohibited from refusing to grant Takahashi, an alien, a fishing license, and thereby barring him "from earning his living as a commercial fisherman in the ocean waters off the coast of California."²⁸ Justice Black, writing for the majority, stated that

[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with [the] constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.²⁹

The Court further emphasized that the fourteenth amendment "embod[ies] a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."³⁰

Takahashi would seem to have indicated that discrimination of aliens would no longer be acceptable. Four years later, in *Harisiades v. Shaughnessy*,³¹ a case dealing with the deportation of legally resident aliens, the Court summed up the rights of aliens by stating that the Constitution does assure the alien "a large measure of equal economic opportunity," the right to invoke the writ of habeas corpus, the "protections of the Fifth and Sixth Amendments" in criminal proceedings, and just compensation for property taken.³² The Court held, however, that the resident alien is *not* legally equal in all respects to the citizen and could be subject to deportation under the Alien Register Act of 1940 for membership in the Communist Party. Justices Douglas and Black argued for reversal on the grounds that the Act denied aliens both equal protection and due process,³³ but because of the federal interest in national security, the majority refused to hold Congress to the same strict standards as it did the state and local legislatures.³⁴

26. *Id.* at 42.

27. 334 U.S. 410 (1948).

28. *Id.* at 412.

29. *Id.* at 419.

30. *Id.* at 420. For further analysis of *Takahashi*, see Note, 1947-48 Term of the Supreme Court: *The Alien's Right to Work*, 49 COLUM. L. REV. 257 (1949).

31. 342 U.S. 580 (1952).

32. *Id.* at 586 n.9.

33. *Id.* at 598.

34. See pp. 1482-84 *infra* for a discussion of the recognition of alien rights in the federal area.

This strict standard for evaluation of alien legislation was explicitly called for in *Graham v. Richardson*³⁵ when alienage was first declared a suspect classification and "therefore subject to strict judicial scrutiny whether or not a fundamental right [was] impaired."³⁶ State statutes which denied welfare benefits to resident aliens or aliens who had not resided in the United States for a specified number of years were declared to violate equal protection of the laws. The Court also accepted federal supremacy in the area of immigration as a valid argument against the statutes.³⁷ State welfare statutes with restrictions on aliens "equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power [over immigration], they are constitutionally impermissible."³⁸

Some recent cases have accepted this additional argument of federal supremacy in relation to the alien,³⁹ but the majority of cases appears to have emphasized the deprivation of equal protection of the laws.⁴⁰ *In re Griffiths* follows this trend by holding that the State had not met its burden of proving a compelling interest. States have a legitimate interest in determining whether an applicant to the bar has the requisite character and professional competence for the practice of law. Connecticut, and other states and territories with similar rules, went beyond a legitimate interest in requiring applicants to be United States citizens or aliens who had made an official declaration of intention to become a citizen.⁴¹ *Griffiths* makes it clear that any legally registered alien may practice a profession as long as he or she has the necessary qualifications, regardless of whether that person is or intends to become a citizen. The Supreme Court rejected the argument that the "special" role of an attorney in Con-

35. 403 U.S. 365 (1971).

36. *Id.* at 376. Note that since the right of interstate travel had already been held to be a "fundamental right," the Court could have chosen to limit its holding in *Graham* by basing it upon violation of that right. See generally *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

37. 403 U.S. at 378.

38. *Id.* at 380.

39. See *Mohamed v. Parks*, 352 F. Supp. 518, 521 (D. Mass. 1973); *Teitscheid v. Leopold*, 342 F. Supp. 299 (D. Vt. 1971); *Chia Chu George Hsien v. Civil Service Comm'n*, 79 Wash. 2d 515, 488 P.2d 515 (1971).

40. See, e.g., *Lopez v. White Plains Housing Authority*, 355 F. Supp. 1016 (S.D. N.Y. 1973); *Raffaelli v. Committee of Bar Examiners*, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972); *Younus v. Shabat*, 336 F. Supp. 1137 (N.D. Ill. 1971); *Potts v. Honorable Justices of Supreme Court*, 332 F. Supp. 1392 (D. Hawaii 1971); *Purdy & Fitzpatrick v. California*, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

41. V MARTINDALE-HUBBELL LAW DIRECTORY (1974).

necticut as an "officer of the Court" justified a citizenship requirement. "[We] observe that the powers 'to sign writs and subpoenas, take recognizances, [and] administer oaths' hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens."⁴² The State also attempted to justify the exclusion of aliens from the bar as an extension of the general federal and state policy of barring aliens from participating in the machinery of government.⁴³ This justification was also rejected: "[T]he status of holding a license to practice law [does not] place one so close to the core of the political process as to make him a formulator of government policy."⁴⁴ Therefore, Connecticut Superior Court Rule 8(1), which excluded aliens from the Connecticut bar, did not meet any compelling state interest and was declared unconstitutional as a violation of the equal protection clause.⁴⁵

Griffiths makes it apparent that states cannot easily limit the rights of aliens. Aliens take part in most areas of American life. They are subject to the laws of the United States,⁴⁶ are counted in determining congressional representation,⁴⁷ are taxed,⁴⁸ may send their children to public schools,⁴⁹ and may be conscripted into military service.⁵⁰ It is particularly important for the courts to scrutinize any attempt to limit the rights of aliens since the alien has often been discriminated against and is without any political power, i.e., is excluded from voting and holding office.⁵¹

It should be noted that although the recent advances in alien rights have generally been in the area of state-alien relations, problems still exist for the resident alien in two other key areas: private and federal employ-

42. 413 U.S. at 724. In his dissent, Chief Justice Burger was unwilling to accept this "denigration of the posture and role of a lawyer as an 'officer of the court.'" *Id.* at 730.

43. Brief for Appellee at 10-11, *In re Griffiths*, 413 U.S. 717 (1971). See also KONVITZ, *THE ALIEN*, *supra* note 10, at 1.

44. 413 U.S. at 729.

45. *Id.*

46. *Eisler v. United States*, 170 F.2d 273, 279 (D.C. Cir. 1948).

47. *Wesberry v. Sanders*, 376 U.S. 1, 7 n.9 (1964).

48. *Graham v. Richardson*, 403 U.S. 365, 376 (1971); *Sugarman v. Dougall*, 413 U.S. 634, 645 (1973).

49. *Hosier v. Evans*, 314 F. Supp. 316 (D. V.I. 1970). See also *Chapman v. Gerard*, 456 F.2d 577 (3d Cir. 1972) which struck down a statute excluding aliens from a public scholarship program.

50. *Astrup v. Immigration Service*, 402 U.S. 509 (1971); *United States v. Lamothe*, 152 F.2d 340 (2d Cir. 1945); Military Selective Service Act of 1967, 50 U.S.C. §§ 453-54 (Supp. II, 1972).

51. KONVITZ, *THE ALIEN*, *supra* note 10, at 148-89.

ment. *Espinoza v. Farah Manufacturing Co.*⁵² deals with discrimination by a private employer. Mrs. Espinoza alleged that Farah's refusal to hire her on the basis of her Mexican citizenship was a violation of Title VII of the Civil Rights Act of 1964. The Supreme Court held that an employer's refusal to hire an alien may or may not be discrimination based upon "national origin" because Title VII does not deal with "citizenship" requirements. "Aliens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage."⁵³ It appears that until Congress legislates otherwise, private individuals may freely discriminate against aliens in the area of private employment as long as the employers are able to show that alienage, and not a particular national origin, is the basis of the discrimination.⁵⁴

The constitutional aspects of federal discrimination against the employment of aliens have been mentioned but not ruled upon by the Supreme Court.⁵⁵ Two recent district court decisions⁵⁶ do not suggest that the situation is about to change for the alien. Both involved unsuccessful challenges of the federal denial of the opportunity for non-citizens to take the competitive examination for federal civil service employment.

In *Mow Sun Wong v. Hampton*,⁵⁷ the court held that the classification could have a rational basis and was therefore valid; in *Jalil v. Hampton*⁵⁸ the court remanded the case to determine whether the presidential order

52. 414 U.S. 86 (1973).

53. *Id.* at 95.

54. *Id.* at 93. Because the vast majority of Farah's employees are Mexican-Americans, Mrs. Espinoza could not argue that Farah was merely using the "form," alienage, to discriminate against individuals of a particular national origin.

However, it is important to note that Mrs. Espinoza failed to assert a 42 U.S.C. § 1981 claim and relied solely on Title VII. The Supreme Court has clearly indicated that aliens are protected by the statute. *Graham v. Richardson*, 403 U.S. 365 (1971). Recently, the fifth circuit held that § 1981 extends protection against private employment discrimination to "all persons," alien or citizen. *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 653-54 (5th Cir. 1974).

55. We need not address [the] question [of whether "statutes and regulations discriminating against noncitizens in federal employment are unconstitutional under the Due Process Clause of the Fifth Amendment"], for the issue presented in this case is not whether Congress has the power to discriminate against aliens in federal employment, but rather, whether Congress intended to prohibit such discrimination in private employment. *Id.* at 91. *Sugarman v. Dougall*, 413 U.S. 634, 646 n.12 (1973).

56. *Jalil v. Hampton*, 460 F.2d 923 (D.C. Cir.), *cert. denied*, 409 U.S. 887 (1972); *Mow Sun Wong v. Hampton*, 333 F. Supp. 527 (N.D. Cal. 1971).

57. 333 F. Supp. 527, 532 (N.D. Cal. 1971).

58. 460 F.2d 923 (D.C. Cir.), *cert. denied*, 409 U.S. 887 (1972).

authorizing the Federal Civil Service Commission to establish standards exceeded the statutory authorization. Justice Bazelon wrote a strong dissent, stating that a compelling "state" interest should be required to justify the discrimination:

It is . . . inconceivable that the Government could establish a compelling state interest . . . to justify the exclusion of *all* aliens from *all* positions requiring the competitive Civil Service examination.

The only interest which could possibly rise to that level is the perceived necessity for employing persons of undivided loyalty in policy-making positions, or positions involving national security interests. But the weakness of this interest as a justification for the total exclusion of aliens from competitive positions becomes apparent upon examination of the entire text of the Civil Service regulations [which] provide explicit exceptions for the employment of aliens.⁵⁹

It does seem ironic that the federal government can discriminate in employment when a state may not. In *Sugarman v. Dougall*,⁶⁰ a case handed down at the same time as *Griffiths*, the Court held unconstitutional § 53 of the New York Civil Service Law which restricted permanent positions in the competitive class of the state civil service to United States citizens. "[A] flat ban on the employment of aliens in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment."⁶¹

The gains achieved for alien rights by the rulings in *Takahashi*,⁶² *Truax*,⁶³ *Graham*,⁶⁴ and *Griffiths*,⁶⁵ key cases discussed above, have all been based on state action and a denial of equal protection of law under the fourteenth amendment. Given the difficulty of establishing state action⁶⁶ coupled with the rulings of the recent federal cases,⁶⁷ it is apparent

59. 460 F.2d at 930-31.

60. 413 U.S. 634 (1973).

61. *Id.* at 647.

62. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

63. *Truax v. Raich*, 239 U.S. 33 (1915).

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

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

66. In the past the Supreme Court has found state action in what would appear to be completely private conduct, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948), when state action was found in court enforcement of racially restrictive covenants. However, the present Court has indicated that it will not be as "loose" in its requirements for state action, i.e., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), in which no state action was found although the club, with a discriminatory guest policy, had been granted a state liquor license.

67. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973); *Jalil v. Hampton*, 460 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 887 (1972); *Mow Sun Wong v. Hampton*, 333 F. Supp. 527 (N.D. Cal. 1971). But see note 34 *supra*.

that the elimination of discrimination against aliens on the federal and private levels would best be accomplished by specific congressional legislation. If our basic national policy is to extend many constitutionally guaranteed rights to lawfully admitted aliens, and if the right to earn a living is the essence of personal freedom and opportunity in our country,⁶⁸ then aliens should be free to hold employment without being subjected to discrimination.

Roslyn Corenzwit Lieb

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