EXCERPT FROM
NOTE, Aliens and the Civil Service: A Closed Door?

our long-accepted notions of fair procedures," the Court demands a showing of explicit congressional authorization.[27]

Applied to the question of whether resident aliens may constitutionally be barred from the competitive civil service, the *Greene* approach would require a preliminary analysis of whether an across-the-board denial of federal employment opportunities is in conflict with "notions of fair procedures." If there is conflict, the Government then must show that Congress—or the President, whichever has purported to act—constitutionally may act in the area, that it has found the contested policy to be necessary and justified, and that it has specifically authorized the agency to adopt the policy.[28] Clearly, the Government did not meet the specificity requirement in *Jalil*.

THE STATUS OF RESIDENT ALIENS

In assessing the legitimacy of denying federal civil service opportunities to resident aliens[29] in light of "notions of fair procedures," it is significant that the rights, duties, and obligations of resident aliens parallel those of citizens.[30] Like citizens, they are subject to military service,[31] taxes, service of process, and congressional subpoena;[32] they may use the courts[33] and own property;[34] and their children born within the United States are citizens.[35] Constitutionally, the presence of all aliens

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[27] *Id.* at 506-07.

[28] *Id.*

[29] An alien may become a resident alien—"lawfully admitted for permanent residence"—by 1) applying for this adjustment; 2) being eligible to receive an immigration visa and being admissible for permanent residence; and 3) having an immigration visa immediately available to him. 8 U.S.C. § 1255(a) (1970). The decision to confer the status of resident alien is made at the discretion of the Attorney General and under his regulation. *Id.* As defined in this title, "lawfully admitted for permanent residence" means "having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws . . . ." *Id.* § 1101(a)(20) (1970).

[30] Leonard v. Eley, 151 F.2d 409, 410 (10th Cir. 1945). Aliens, as well as citizens, are granted "the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property . . . ." 42 U.S.C. § 1981 (1970); *see* Roberto v. Hartford Fire Ins. Co., 177 F.2d 811, 813-14 (7th Cir. 1949), *cert. denied*, 339 U.S. 920 (1950); Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948). "Once an alien lawfully enters and resides in this country he becomes invested with the rights, except those incidental to citizenship, guaranteed by the Constitution to all people within our borders . . . [and] owes a temporary allegiance to the Government of the United States." *Id.* at 279.

[31] 50 U.S.C. App. § 454(a) (1970); *see* Leonard v. Eley, 151 F.2d 409 (10th Cir. 1945).

[32] Eisler v. United States, 170 F.2d 273, 279 (D.C. Cir. 1948).

[33] 42 U.S.C. § 1981 (1970).

[34] Sei Fujii v. California, 38 Cal. 2d 718, 242 P.2d 617 (1952).

[35] 8 U.S.C. § 1401(a)(1) (1970).

in the United States and the conditions under which they may remain are under the exclusive control of Congress.[36] However, this control does not preclude judicial review of cases and controversies in which the rights of aliens are in dispute.[37]

A strong judicial tradition has accorded aliens the protections of the fifth and fourteenth amendment due process clauses and of the fourteenth amendment equal protection clause.[38] These clauses have been held to

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[36] U.S. CONST. art. I, § 8, cl. 4; *see* Fong Yue Ting v. United States, 149 U.S. 698 (1893). "The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount laws of the Constitution, to intervene." *Id.* at 713. *See also* Glavan v. Press, 347 U.S. 522, 530, *rehearing denied*, 348 U.S. 852 (1954); Harisiades v. Shaugnessy, 342 U.S. 580, 588-89 (1952). The *Jalil* court expressly rejected this argument in view of *Baker v. Carr*, contending the matter was not so political as to preclude judicial determination. 460 F.2d at 925 n.1; *see* Baker v. Carr, 369 U.S. 186, 209-17 (1962).

State statutes concerning aliens, including state civil service and employment statutes, have been declared void for, among other reasons, operating in a preempted sphere. Courts have struck down statutes of this type as an attempted regulation of alienage as such, as a burden on congressional power to administer an overall plan for aliens, or as an obstacle to the fulfillment of a particular congressional purpose in regard to aliens. Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 572-73, 456 P.2d 645, 650, 79 Cal. Rptr. 77, 82 (1969); *see* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948); Truax v. Raich, 239 U.S. 33, 42 (1915). *Truax v. Raich* over-turned an Arizona statute requiring all employers of five or more persons to hire at least four citizens for every noncitizen. In addition to arguments based on the fourteenth amendment, the Court stated that the legitimate interests of the state cannot be so broadly conceived as to impinge on the exclusive federal power to control immigration. *Id.* at 42. *See generally* note 38 *infra*. By denying aliens an opportunity to earn a living, the state asserts the right to deny "entrance and abode," thus curtailing the congressional privilege conferred when aliens are admitted into the country. 239 U.S. at 42.

In *Takahashi v. Fish & Game Comm'n*, the Court invalidated a California statute barring the issuance of commercial fishing licenses to persons ineligible for citizenship. 334 U.S. 410, 420 (1948). The Court noted that the state had no constitutional power to interfere with congressional conditions concerning immigration. *Id.* at 419.

Nonetheless, some earlier opinions deemed this type of legislation permissible. *See* Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392, 397 (1928); Heim v. McCall, 239 U.S. 175, 189-90 (1915); Patsone v. Pennsylvania, 232 U.S. 138, 144-45 (1914); note 42 *infra*.

[37] *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Nielsen v. Secretary of Treasury, 425 F.2d 833 (1970). *See also* Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931).

[38] *See, e.g.*, Galvan v. Press, 347 U.S. 522, 530, *rehearing denied*, 348 U.S. 852 (1954) (alien is person under due process clause); Truax v. Raich, 239 U.S. 33, 39 (1915) (equal protection under the fourteenth amendment extends to aliens); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (fifth, sixth, and fourteenth amendments apply to aliens); Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (fourteenth amendment applies to aliens); Sei Fujii v. California, 38 Cal. 2d 718, 728-29, 242 P.2d 617, 624-25 (1952) (fourteenth amendment due process clause applies to aliens).

include both the right to work for a living in the common occupations of the community and to secure this right for aliens as well as citizens.[39]

Although these rights have been sanctioned by judicial pronouncement, direct restrictions on the employment of aliens or indirect restrictions through licensing requirements exist in every state[40] and are common in federal public works appropriations legislation.[41] Early decisions by the Supreme Court upheld laws of this type on the theory that the state had proprietary interests which it properly might protect by

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[39] An early statement of this sentiment appears in In re *Parrott*, which held that the right to select and follow a lawful occupation is a liberty and property under the fourteenth amendment. 1 F. 481, 505-06 (C.C.D. Cal. 1880); *see* Truax v. Raich, 239 U.S. 33, 41 (1915). "[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure." There may be no arbitrary deprivation of that right. *Id.* at 41.

[40] *See* Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012 (1957); Note, *National Power to Control State Discrimination Against Foreign Goods and Persons: A Study in Federalism*, 12 STAN. L. REV. 355, 364-70 (1960); Comment, *International Law—Reservations to Commercial Treaties Dealing with Aliens' Rights to Engage in the Professions*, 52 MICH. L. REV. 1184 (1954).

State licensing and employment restriction statutes which discriminate against noncitizens have been criticized as "manifestations of nationalistic and economic forces" protecting work involving some degree of skill or prestige from those felt to be undeserving. Note, *Constitutionality of Legislative Discrimination Against the Alien in His Right to Work*, 83 U. PA. L. REV. 74, 80 (1934). An early approach to the problem of discriminatory licensing statutes was to attack them through most-favored-nation clauses in commercial treaties. This approach was generally unsuccessful, because court decisions rested on finely drawn distinctions between terms such as "commerce" and "trade." A revision of the standard equal treatment clause used in commercial treaties drafted in 1953 effectively eliminated this line of attack. This provision specified that most-favored-nation privileges "shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are State-licensed and reserved by statute or constitution exclusively to the citizens of the country. . . ." 99 CONG. REC. 9313 (1953); *see* Note, *National Power to Control State Discrimination Against Foreign Goods and Persons: A Study in Federalism*, 12 STAN. L. REV. 355, 376 (1960).

[41] Section 502 of the Public Works Appropriations Act of 1970 is representative of this type of legislation.

> "[N]o part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of the enactment of this Act, who, being eligible for citizenship, had filed a declaration of intention to become a citizen of the United States prior to such date, (3) is a person who owes allegiance to the United States . . . ."

Public Works Appropriations Act of 1970, Pub. L. No. 91-144 § 502, 83 Stat. 323, 336-37 (1969). As noted by Judge Bazelon, the Public Works Appropriations Act of 1970 raises the same constitutional questions as the contested civil service regulation. 460 F.2d at 931-32 (Bazelon, C.J., dissenting).

such restrictions.[42] Rejecting this theory, recent decisions have cited two reasons for invalidating state legislation which prohibits aliens from enjoying public employment opportunities.[43] First, state statutes in this area encroach on the overall federal immigration scheme by, in effect, regulating movement of aliens within the United States.[44] Second, such statutes are repugnant to the fourteenth amendment in that they create discriminatory classifications which cannot be justified by an overriding public interest.[45]

Because decisions prohibiting states from legislating against aliens have relied almost invariably on both the exclusive federal activity argument and the discriminatory classification argument, the principles enunciated by these cases are not wholly applicable to the federal government. Clearly, the Government cannot be accused of interference with a pre-empted federal right; however, without this argument, it may be disputed whether statutory limitations on the activities of aliens can be found invalid solely on the basis of the fifth amendment. The fact that the equal protection clause, unique to the fourteenth amendment, often serves as the constitutional basis for invalidating state statutes points up still another inadequacy in attempting to impose prohibitions on the federal government based on state case law.[46]

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[42] *See, e.g.*, Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392, 397 (1927) (upholding prohibition against issuing poolroom licenses to aliens); Heim v. McCall, 239 U.S. 175, 189-90 (1915) (upholding discriminatory New York labor law); Patsone v. Pennsylvania, 232 U.S. 138, 144-45 (1914) (upholding limitation on possession of rifles to reserve game hunting for citizens). These decisions generally justified such legislation by the state's proprietary interest over the position, as in the case of government work, or the state's police power to control dangerous or antisocial enterprises, or to protect the public health or safety through appropriate classifications. *See* Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012 (1957).

[43] *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948); Dougall v. Sugarman, Civil No. 71-992 (S.D.N.Y. Nov. 9, 1971); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 572-73, 456 P.2d 645, 650, 79 Cal. Rptr. 77, 82 (1969). *See also* Graham v. Richardson, 403 U.S. 365, 370-80 (1971).

[44] *See* note 36 *supra*.

[45] In *Purdy* the proprietary interest was deemed "insufficient on equal protection grounds" to justify the exclusion of aliens from public employment. Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 576, 456 P.2d 645, 652, 79 Cal. Rptr. 77, 84 (1969). The court held that alienage bears no relation to suitability or need for state civil service and that the state may not create an arbitrary classification for the purposes of hiring or firing. *Id.* at 578-86, 456 P.2d at 653-58, 79 Cal. Rptr. at 85-90. Further, the right to protect one's own citizens against alien economic competition is prima facie discriminatory and offensive to equal protection. *Id.* at 581, 456 P.2d at 655, 79 Cal. Rptr. at 87. *See also* Traux v. Raich, 239 U.S. 33, 41-42 (1915).

[46] *See* Steward Mach. Co. v. Davis, 301 U.S. 548 (1936). In *Steward*, Justice Cardozo pointed out that the lack of an equal protection clause permitted the Government to exempt and discriminate, but not arbitrarily. *Id.* at 584. In a case involving the commerce clause, the Court said "[t]o hold that Congress in establishing its regulation[s]

Certainly, as the Supreme Court pointed out in *Bolling v. Sharpe*,[47] equal protection is not identical with due process. Although both concepts stem from a common ideal of American government, equal protection of the law is a more explicit safeguard against unfairness than due process. Not co-extensive, the two are not automatically interchangeable.[48] Nevertheless, courts have not hesitated to find due process violations in cases of unjustifiable or discriminatory classifications.[49] Where discrimination is not so irrational as to per se violate due process, those challenging the validity of a federal enactment may be called upon to demonstrate a deprivation of "life, liberty or property" in order to evoke the protection of the fifth amendment. How closely the facts of a given case must approximate the historical concepts of life, liberty and property, or whether the test is applied at all depends in large measure on the predilections of the court[50] and its appraisal of whether the interest in question is worthy of judicial protection.[51]

In addition to possible limitations on the usefulness of the fifth amendment in this area, a strong judicial tradition of according the executive branch broad latitude in filling civil agency positions[52] serves as a further

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is restricted to the making of uniform rules would be to impose a limitation which the Constitution does not prescribe." Currin v. Wallace, 306 U.S. 1, 14 (1939).

[47] 347 U.S. 497 (1954).

[48] *Id.* at 499.

[49] *Id.; accord,* Shapiro v. Thompson, 394 U.S. 618, 642 (1969). A classification may be so baseless as to be beyond the power of Congress, as well as violate due process. *See* Galvan v. Press, 347 U.S. 522, 529-31, *rehearing denied,* 348 U.S. 852 (1954).

[50] The Supreme Court took a particularly broad view of "liberty" in *Bolling v. Sharpe*, a case involving school segregation in the District of Columbia. "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." 347 U.S. 497, 499-500 (1954); *see* Greene v. McElroy, 360 U.S. 474, 492-93 (1959) (right to hold specific private employment comes within liberty and property concepts of fifth amendment). *But see* Bailey v. Richardson, 182 F.2d 46, 57 (D.C. Cir. 1950), *aff'd,* 341 U.S. 918 (1951) (government employment is not life, liberty or property). The *Jalil* opinion cited *Bailey v. Richardson,* but denied its validity in the light of subsequent decisions protecting government employees from the imposition of arbitrary conditions of employment. 460 F.2d at 926 n.8.

[51] *See generally* Bolling v. Sharpe, 347 U.S. 497 (1954).

[52] *See* Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd,* 341 U.S. 918 (1951). This decision, handed down in an era when Communist infiltration was considered an ever-present threat, cautioned that even in normal times, except for statutory limitations, the discharge of employees was at the pleasure of the appointing authority. *Id.* at 65. Alluding to the doctrine of separation of powers, the court concluded that removal from government office did not require due process, and that both notice of dismissal and assignment of reasons were unnecessary. *Id.* at 56-57, 65. *See also* Hargett v. Summerfield, 243 F.2d 29, 32 (D.C. Cir.), *cert. denied,* 353 U.S. 970 (1957) (discretionary removal of postmaster); Jason v. Summerfield, 214 F.2d 273, 277 (D.C. Cir.), *cert. denied,* 348 U.S. 840 (1954) (discretionary dismissal of post office employee for disloyalty); Friedman v. Schwellenbach, 159 F.2d 22, 24 (D.C. Cir. 1946), *cert. denied,*

impediment to invalidating discriminatory federal service regulations. Early courts characterized executive appointment and removal as discretionary acts beyond the supervisory power of the courts.[53] Although the distinction between discretionary and ministerial acts has been eroded greatly by judicial decision, even today some courts have espoused the traditional presumption that employment qualifications sanctioned by Congress are constitutional, provided they are neither racial nor religious,[54] if the regulated area is reasonably capable of affecting public service.[55]

A less extreme judicial view finds jurisdiction to review decisions concerning federal employment only in those cases where there has been substantial departure from applicable procedures, basic error, or legislative misconstruction.[56] Using this approach, courts have been less reluctant to examine specific practices on a case-by-case basis and to require reasonable justification for decisions to discharge employees or for findings of ineligibility of potential candidates.[57]

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330 U.S. 838, *rehearing denied*, 331 U.S. 865 (1947) (discretionary removal from War Manpower Comm'n for disloyalty); Washington v. Clark, 84 F. Supp. 964, 965 (D.D.C. 1949) (executive prescription of loyalty in government service).

United States v. Lovett, however, conceded that permanent proscription from government service is punishment, requiring the safeguards of the sixth amendment. 328 U.S. 303, 316 (1946). An argument based on *Lovett* may be made that the challenged regulation is a bill of attainder punishing a readily identifiable group of persons by disqualifying them from governmental employment. *See* U.S. CONST. art. I, § 9, cl. 3. Traditionally, a bill of attainder is defined as "a legislative act, which inflicts punishment without a judicial trial." Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867). Its vice is "that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction . . . ." United States v. Brown, 381 U.S. 437, 449 n.23 (1965). Although permanent ostracism from the civil service has been deemed to be punishment, it has not been established whether or not an executive or administrative rule is capable of being a bill of attainder. *See* United States v. Lovett, 328 U.S. 303, 315-16 (1946). *Compare* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 143-45 (1951) (Black, J., concurring) *with* Marshall v. Sawyer, 365 F.2d 105, 111 (9th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967).

[53] Eberlein v. United States, 257 U.S. 82, 84 (1921); Keim v. United States, 177 U.S. 290, 292-94 (1900).

[54] *See* United Public Workers of America v. Mitchell, 330 U.S. 75, 101 (1947) (upholding the Hatch Act). A strong dissent by Justice Black in *United Public Workers* pointed out that the Court should consider the possibility of narrower statutes aimed more particularly at the abuse. *Id.* at 114.

[55] *Id.* at 100.

[56] *See* Barger v. United States, 170 Ct. Cl. 207, 214 (1965) (federal employee contesting reduction in force dismissal without acceptable offer of reassignment).

[57] In *Cole v. Young*, in which an employee was suspended from the civil service for association with the Communist Party, the Court placed the burden on the Government to show that the position actually involved the national security. 351 U.S. 536, 551 (1956). *See also* Norton v. Macy, 417 F.2d 1161, 1164 (D.C. Cir. 1969). In *Norton*, "discretionary" removal from the federal civil service of a veteran for alleged homo-

Although civil service employment is not a vested right,[58] there is a constitutional right to be free from unreasonable discriminatory practices with respect to such employment.[59] The fact that federal employment is labeled "privilege," rather than "right" does not license the Government to circumvent questions of constitutionality.[60] Thus, the absolute right to deny public employment is not greater than, but different from, the power to impose conditions on its grant.[61] These conditions must themselves be justified.[62] Even the "privileged" area of federal employment has been subjected to judicial review where infringement of due process was alleged.[63]

SUSPECT CLASSIFICATIONS

In the case of governmental discrimination directed toward certain groups or classifications denominated as "suspect" or involving "funda-

sexuality was held to require an actual finding that the discharge would promote the efficiency of the agency, as required in the applicable legislation.

In his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, Justice Jackson wrote that the establishment of administrative machinery to declare people ineligible for hiring without permitting them a hearing constituted a serious deprivation. "[I]t certainly is no small injury when government employment so dominates the field of opportunity." 341 U.S. 123, 185 (1951) (Jackson, J., concurring) (members of certain organizations prohibited from government employment).

[58] Jason v. Summerfield, 214 F.2d 273, 277 (D.C. Cir.), *cert. denied*, 348 U.S. 840 (1954); Love v. United States, 108 F.2d 43, 46 (8th Cir. 1939), *cert. denied*, 309 U.S. 673 (1940).

[59] Whitner v. Davis, 410 F.2d 24, 30 (9th Cir. 1969); *cf.* Homer v. Richmond, 292 F.2d 719, 724 (D.C. Cir. 1961).

[60] *See generally* Sherbert v. Verner, 374 U.S. 398, 404-05 (1963); Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 507, 421 P.2d 409, 413, 55 Cal. Rptr. 401, 405 (1966). If the legislative action infringes constitutional rights, the privilege label tends to distract from the inquiry, rather than further it. French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234, 241 (1961).

[61] *See generally* Van Alstyne, *The Demise of the Right Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[62] *See* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1609 (1960). A series of recent cases concerning loyalty oaths as a qualification for office struck down several statutes on the principle of unjustified restrictions, holding that the enactments were vague, that they damned by association, and that they failed to distinguish between sensitive and insensitive positions, thus infringing without justification on first amendment rights. *See, e.g.*, United States v. Robel, 389 U.S. 258, 265-66 (1967); Whitehill v. Elkins, 389 U.S. 56, 57 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 597-609 (1967); Elfbrandt v. Russell, 384 U.S. 11, 14-19 (1966); Cramp v. Board of Public Instruction, 368 U.S. 278, 285-88 (1961); Stewart v. Washington, 301 F. Supp. 610, 612 (D.D.C. 1969).

[63] *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 185 (1951) (Jackson, J., concurring); *Ex parte* Curtis, 106 U.S. 371, 373 (1882); *cf.* Wieman v. Updegraff, 344 U.S. 183, 192 (1952); Garner v. Board of Public Works, 341 U.S. 716, 723-24, *rehearing denied*, 342 U.S. 843 (1951); Note, *Constitutionality of Restrictions on Aliens' Rights to Work*, 57 COLUM. L. REV. 1012, 1020 (1957). *See also* note 57 *supra*.

mental interests," [64] the Supreme Court does not apply the presumption of constitutionality normally enjoyed by legislative enactments.[65] Instead, Government must demonstrate the relationship between the law and a legitimate governmental interest.[66] Some courts have gone so far as to require a showing that the particular interest cannot be protected by less punitive or more narrowly drawn measures.[67] The standard for determining which classifications are suspect and which interests fundamental is perhaps more intuitive than established. Those classifications most frequently cited are based on race, religion, lineage, and, more recently, alienage.[68] Fundamental interests include at least first amendment activities, voting rights, and interstate movement.[69]

Even if discrimination against persons on the basis of alienage was not judicially suspect for all purposes, this type of classification clearly merits scrutiny when it serves to establish a citizenship qualification for federal employment. As has been shown, the right to due process under

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[64] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage and race); Loving v. Virginia, 388 U.S. 1, 9 (1967) (race); Korematsu v. United States, 323 U.S. 214, 216 (1944), *rehearing denied*, 324 U.S. 885 (1945) (racial discrimination); Sei Fujii v. California, 38 Cal. 2d 718, 730, 242 P.2d 617, 625 (1952) (race). *See also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1132 (1969).

[65] *United States v. Carolene Products Co.* provides the classic statement to this effect. 304 U.S. 144 (1938). "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . ." *Id.* at 152 n.4. Although declining to decide the question, the Court suggested that prejudice "against discrete and insular minorities may be a special condition which . . . may call for a correspondingly more searching judicial inquiry." *Id.* at 153; *cf.* Watkins v. United States, 354 U.S. 178, 198 (1957) (mere semblance of legislative purpose does not justify inequality in the face of the Bill of Rights).

[66] *See* Dougall v. Sugarman, 330 F. Supp. 265, 268 (S.D.N.Y. 1971), *aff'd*, Civil No. 71-992 (S.D.N.Y. Nov. 9, 1971). Under the "stricter" standards of review called into play by the classifications, "the state must show the classification is necessary to a compelling state interest, rather than merely demonstrate a reasonable relation between the restriction and any possible valid state interest." 330 F. Supp. at 268. *See also* Greene v. McElroy, 360 U.S. 474, 506-08 (1959) (less judicial delicacy is required in the case of administrative enactments); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1101 (1969).

[67] *See* Keyishian v. Board of Regents, 385 U.S. 589, 602 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[68] *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (race classification in criminal statute); United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); note 64 *supra*. *See also* Nielsen v. Secretary of Treasury, 424 F.2d 833 (D.C. Cir. 1970). "In effect the burden is on the government to put forward the special reasonableness of and justification for any measure discriminating against aliens." *Id.* at 846. *See also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1132 (1969).

[69] *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (voting); McLaughlin v. Florida, 379 U.S. 184 (1964) (race classification in criminal statute); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

the fifth amendment and the right to work for a living in the common occupations of the community are basic rights of aliens, as well as citizens.[70] Unreasonable discrimination, unwarranted by legislative purpose or interest, is as offensive to due process as it is to equal protection. Further, the executive privilege to staff the civil service is not absolute, but qualified by the Constitution and its specific requirements of due process.[71] Nevertheless, despite judicial sanction of these principles, the Civil Service Commission discriminates against all resident aliens as a class, prohibiting them from qualifying for approximately 2,689,800 government jobs.[72] Under the circumstances, it is appropriate that the Government assume the burden of proving that the classification is necessary or highly desirable in light of a compelling federal interest.[73]

PROPER GOVERNMENTAL OBJECTIVE

Thus, the proper inquiry is whether the prohibition against alien employment in competitive civil service furthers an appropriate governmental end.[74] To this effect, the arguments advanced by the Government in *Jalil* are patently inadequate. First, it is inapposite to charge that noncitizens should not be in a position to exercise national sovereignty;[75] clearly, the large majority of civil service positions involve no such responsibilities.[76] Second, a policy of economic preference for American nationals does not fall within the stated purpose of the Civil Service Act which is to establish an effective bureaucracy, not to provide employment for citizens.[77] A further justification suggested by the Govern-

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70 *See* notes 38-39 *supra* and accompanying text.

71 *See* note 57 *supra*. "[C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

72 U.S. CIVIL SERVICE COMM'N, FEDERAL CIVILIAN MANPOWER STATISTICS, Monthly Release No. SM 13 7110 (Oct. 1971).

73 *See* notes 65, 68 *supra*. Because of the gravity of the issue, it is insufficient to show merely a rational relationship between the regulation and the interest sought to be protected. It is unconstitutional to penalize a constitutional right unless such penalty promotes a compelling governmental interest. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

74 It is clear that due process would permit a reasonable classification of aliens. Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392, 396 (1927). Although such a classification has not been declared per se unconstitutional, few statutes attempting to utilize it have been upheld in recent years.

75 *See* Brief for Appellee at 9, Jalil v. Hampton, 460 F.2d 923 (D.C. Cir. 1972).

76 *See* Brief for Appellant at 21-23, Jalil v. Hampton, 460 F.2d 923 (D.C. Cir. 1972).

77 *See* 5 U.S.C. § 3301 (1970); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 581, 456 P.2d 645, 655, 79 Cal. Rptr. 77, 87 (1969) (right to protect one's own citizens from alien economic competition is prima facie discriminatory). *See also* Brief for Appellant at 20-21, Jalil v. Hampton, 460 F.2d 923 (D.C. Cir. 1972).

ment, and one not wholly rejected by the court is the fact that similar, if not more blatant, discrimination is practiced by other nations. This argument is wholly irrelevant to the question of constitutionality,[78] and by itself constitutes a weak policy argument.

In the case of both citizens and noncitizens, protection against disloyalty in government service is provided by the mandatory loyalty oath and the statutory prohibition against disloyal persons holding office.[79] If the securing of loyal personnel in sensitive federal positions is the sole purpose of the regulation prohibiting noncitizens from employment, the statute is overbroad in view of what it seeks to accomplish. The problem of ensuring loyalty can be handled effectively in a more narrow manner by classifying jobs as to their sensitive or nonsensitive nature, a practice used in determining the necessity for various types of security clearances for those handling certain materials.[80]

It is likewise difficult to show that public policy requires this type of discrimination. An executive order, entitled Equal Employment Opportunity in Federal Government,[81] and other enactments similar in character[82] prohibit discrimination on the basic of race or national origin.[83] Although these can be viewed as permitting discriminations which

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[78] Brief for Appellant at 23-24, Jalil v. Hampton, 460 F.2d 923 (D.C. Cir. 1972); Brief for Appellee at 12-15, 460 F.2d 923 (D.C. Cir. 1972). Although refusing to validate the exclusion for the sake of international comity, the *Jalil* court noted that "the existence of this universal practice may be relevant to the issue of the reasonableness of the discrimination and whether appellant was denied due process of law." 460 F.2d at 929 n.13.

[79] *See* 5 U.S.C. § 7311 (1970); note 14 *supra*.

[80] *See* Exec. Order No. 10501, 3 C.F.R. 115 (Supp. 1953), 50 U.S.C. § 401 (1970).

[81] The executive order proclaims the policy of the Government to be "to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex or national origin . . . ." Exec. Order No. 11478 § 1, 3 C.F.R. 134 (Comp. 1969), 42 U.S.C. § 2000e (1970). It is questionable whether the second clause was intended to limit the first, or to emphasize some of its implications. If the former reading is correct, the Civil Service regulation prohibiting noncitizens from applying to the competitive civil service is on its face contrary to the order. This interpretation is supported by section six of the order, specifying that it shall not apply "to aliens employed outside the limits of the United States." *Id.* at § 6, 3 C.F.R. 134 (Comp. 1969), 42 U.S.C. § 2000e (1970). The order is silent concerning aliens within the United States.

[82] *See, e.g.*, Exec. Order No. 11246 § 202, 3 C.F.R. 611, 612-13 (1968), 42 U.S.C. 2000e (1970) (prohibiting discrimination in employment by government contractors); Exec. Order No. 10577 § 4.2, 3 C.F.R. 86-87 (Supp. 1954), 5 U.S.C. § 3301 (1970) (prohibiting racial, political or religious discrimination in government service). The most familiar of these is the Equal Employment Opportunity Act, which is not applicable to federal employment. 42 U.S.C. 2000e-2(b) (1970). Section 2(a) of this Act prohibits discrimination because of an individual's race, color, sex, or national origin.

[83] An argument might be made for including discrimination against aliens within the prohibition against discrimination on the basis of national origin. This line of reasoning is usually ignored, probably to circumvent the practical problems of finding

are not specifically prohibited, more reasonably they are indicative of a broader public policy disfavoring arbitrary discrimination against all groups of people under the protection of the United States.

The appropriateness of a judicial examination of the type advocated by the *Jalil* court[84] is at best questionable if its purpose is solely to narrow the scope of the statute. As Judge Bazelon pointed out in dissent, "it is neither proper nor possible for a District Court to undertake to identify those particular positions whose special demands make citizenship a compelling requirement. This is precisely the task which the Civil Service should perform . . . ." [85]

Despite the rationale used by the majority to support its decision to remand,[86] *Jalil* leaves open no questions of fact or underlying policy which might have a bearing on the decision. The primary issue is constitutionality *vel non*: "A regulation which simply excludes *all* aliens from *all* competitive positions on its face sets no standards, reflects no compelling interests and is therefore invalid." [87] Under these circumstances, a decision to withhold judgment serves only to undermine the administration of justice.

Now, unnecessarily, the case has been returned to the district court. On remand, the Government will have one more opportunity at showing why people protected by the Constitution should be subject to a suspect proscription—why the presence of aliens in the government service so imperils the national interest that no lesser sanction would be effective.

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legal justification for the exclusion of aliens in cases when it might be considered necessary or reasonable to do so. *See* Mow Sung Wong v. Hampton, 333 F. Supp. 527, 530 (N.D. Cal. 1971).

84 460 F.2d at 927; *see* note 22 *supra*.

85 460 F.2d at 931.

86 *Id.* at 928; *see* note 22 *supra*.

87 460 F.2d at 931, (Bazelon, C.J., dissenting).