NOTES

ALIENS—EQUAL PROTECTION—CITIZENSHIP REQUIREMENT FOR PRACTICE OF LAW HELD UNCONSTITUTIONAL—*Raffaelli v. Committee of Bar Examiners*, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972).

Paolo Raffaelli, a 36-year old native of Italy, entered the United States as a foreign student in 1961. He resided in California and was graduated from San José State College in 1966 and from the School of Law of the University of Santa Clara in 1969. After passing the California bar exam, he worked as a law clerk for a California firm.[1] He also married an American citizen and was permitted to change his status to "permanent resident alien" in 1971.[2]

When Raffaelli sought admission to the California bar, however, his certification was denied solely because he was not a United States citizen as required by the California Business and Professional Code.[3] He sought a writ of mandamus[4] compelling the Committee of State Bar Examiners to certify him for admission to the Bar. The California Supreme Court held the provision unconstitutional[5] because it offended the equal protection clauses of the California[6] and United States[7] Constitutions. The court found that a permanent resident alien is entitled to admission to the bar if he satisfies the other requirements.[8]

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1 Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 291, 496 P.2d 1264, 1266, 101 Cal. Rptr. 896, 898 (1972).

2 *Id.* 8 C.F.R. §§ 245.1 *et seq.* (1972) refers to the adjustment of an alien to the status of lawful permanent resident alien. The section permits aliens to remain permanently in the United States pursuant to certain procedural requirements set forth therein.

3 CAL. BUS. & PROF. CODE § 6060 (West Supp. 1972) provides in part:

> To be certified to the Supreme Court for admission and a license to practice law, a person . . . shall:
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> (a) Be a citizen of the United States.

4 CAL. R. 56(a) provides in part:

> . . . A petition to a reviewing court for a writ of mandate . . . must be verified and shall set forth the matters required by law to support the petition . . . .

5 7 Cal. 3d at 305, 496 P.2d at 1275, 101 Cal. Rptr. at 907.

6 CAL. CONST. art. 1, § 11 provides that "[a]ll laws of a general nature shall have a uniform operation." Section 21 of that article parallels the federal privileges and immunities clause.

7 U.S. CONST. amend. XIV, § 1 provides in part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

8 7 Cal. 3d at 304, 496 P.2d at 1275, 101 Cal. Rptr. at 907. The other requirements include a mandate that the applicant be of majority age and good moral character, and that he have fulfilled education, registration, and examination qualifications. CAL. BUS. & PROF. CODE § 6060 (West Supp. 1972).

At early American common law, an unhostile alien[9] was afforded all the constitutional rights granted to citizens.[10] Motivated by fear of competition in the industrial labor market, however, states began to discriminate against aliens by enacting legislation restricting their employment.[11] States justified these restrictions (a) as a valid exercise of police power: the state can regulate occupations considered "inherently vicious and harmful;"[12] or (b) as a natural corollary to the proprietary theory: citizens are given priority over aliens since the

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9 Friendly aliens (unhostile) are citizens/subjects of a nation at peace with the United States. During World War II, friendly aliens were accorded due process protection, but enemy aliens were not. Johnson v. Eisentrager, 339 U.S. 763, 769, 771 (1950).

10 *See* M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 180 (1946). For example, during the 19th century 22 states and territories allowed the alien the right to vote, but eventually laws were passed in every state which disenfranchised the alien. James Wilson, Associate Justice of the Supreme Court, native Scotsman, and first professor of the University of Pennsylvania Law School, wrote in 1792:

> In ancient times, every alien was considered as an enemy. The rule, I think, should be reversed. None but an enemy should be considered as an alien—I mean—as to the acquisition and the enjoyment of property. . . .
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> . . . .
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> At the end of two years from the time, at which a foreigner "of good character" . . . sets his foot in this land of generosity as well as freedom, he is entitled to become . . . a citizen of our national government. At the end of seven years, a term not longer than that which is frequently required for an apprenticeship to the plainest trade, the citizen may become legislator . . . .

2 THE WORKS OF JAMES WILSON 288, 294 (J. Andrews ed. 1896) (footnotes omitted).

11 The Chinese Exclusion Case, 130 U.S. 581, 594-97 (1899). The Treaty with China concerning Immigration, Nov. 17, 1880, art. I, para. 1, 22 Stat. 826, T.S. No. 49, (proclaimed Oct. 5, 1881), declared:

> Whenever in the opinion of the Government of the United States, the coming of Chinese laborers to the United States . . . affects or threatens to affect the interests of that country . . . or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence . . . . The limitation . . . shall apply only to Chinese who may go to the United States as laborers . . . .

Congress later implemented the treaty, Act of May 6, 1882, ch. 126, 22 Stat. 58. *See generally* Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012 (1957).

12 Murphy v. California, 225 U.S. 623, 628 (1912). *See also* Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927), where an ordinance of the city of Cincinnati required the licensing of pool and billiard rooms, and prohibited the issuance of licenses to aliens. The solicitor of Cincinnati contended:

> [B]illiard and pool rooms in the City of Cincinnati are meeting places of idle and vicious persons; . . . that numerous crimes and offences have been committed in them and consequently they require strict police surveillance; that non-citizens as a class are less familiar with the laws and customs of this country than native born and naturalized citizens; that the maintenance of billiard and pool rooms by them is a menace to society and to the public welfare, and that the ordinance is a reasonable police regulation . . . .

Id. at 394.

state as trustee controls the property for its citizens, who are the owners.[13]

Restrictions on immigration, enacted between 1798 and 1882, mirrored America's increasingly xenophobic attitude.[14] In 1882 immigration was closed to moral and physical undesirables,[15] and extensive limitations were placed on the Chinese.[16]

As early as 1886, in *Yick Wo v. Hopkins*,[17] the United States Supreme Court declared that aliens were "persons" within the meaning of the fourteenth amendment's equal protection clause.[18] In *Yick Wo* the Court held unconstitutional a municipal ordinance which allowed a city commission, as a safety measure, to withhold laundry business licenses from those establishments located in wooden buildings. The Court recognized, however, that in fact the law was established to eliminate Chinese from the laundry business.[19] The Court stated:

> The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration

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13 The proprietary interest theory is based on the common property theory. Nonresidents do not stand in the same relationship to state property and the right to employment by states as do state citizens. *See* McCready v. Virginia, 94 U.S. 391, 395 (1877); Martin v. The Lessee of Waddell, 41 U.S. (16 Pet.) 367, 410 (1842). By statute, the theory has been extended to exclude aliens as well as non-resident citizens. DEL. CODE ANN. tit. 7, § 2703 (1953) (excluding aliens and non-residents from participating in lobstering); *see* MASS. ANN. LAWS ch. 130, § 38 (1972) (restricting the grant of licenses for lobstering and crabbing to aliens who have resided in the state and engaged in lobster fishing for five years prior to Dec. 1, 1920).

14 Justice Mosk, speaking for the *Raffaelli* court, 7 Cal. 3d at 291, 496 P.2d at 1266, 101 Cal. Rptr. at 898, characterized the exclusion of aliens from the practice of law as "the lingering vestige of a xenophobic attitude . . . ."

15 Act of August 3, 1882, ch. 376, § 2, 22 Stat. 214, provided in part that

> if . . . there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself . . . such person shall not be permitted to land.

See generally F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 4 (2d ed. 1961); W. VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS 6 (1932).

16 Act of May 6, 1882, ch. 126, 22 Stat. 58, provided in part that

> the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or . . . to remain within the United States.

Id. at 59.

17 118 U.S. 356 (1886).

18 *Id.* at 369.

19 *Id.* at 374.

> which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment . . . .[20]

During the same decade in which *Yick Wo* was decided, there was a marked change in the United States from an agrarian nation to a viable industrial and urban society. Contemporaneous with this national metamorphosis was the substantive change in the composition of immigration.[21] The new arrivals neither spoke English nor understood the Anglo-Saxon cultural traditions. Since most of the farm land was occupied, they were forced to reside in the cities and work in the urban factories. They therefore reduced the economic opportunities of those who had recently become naturalized Americans and threatened the protectionist economic concepts of industrial unionism.[22]

Accordingly, legislation was enacted restricting work opportunities to those who were already citizens. In 1915, the Supreme Court in *Heim v. McCall*[23] sustained the validity of a New York statute[24] which provided that only American citizens could be employed on public works and that preference in hiring for public employment should be given to New York citizens.

The Supreme Court accepted the position, articulated by the New York Court of Appeals, that a state disbursing public funds could afford priority to its own citizens in relation to aliens, since the state was essentially a corporation aggregate of which only its citizens were members.[25]

Rejecting arguments that the statute violated the due process and equal protection guarantees of the Constitution, the Court emphasized that the state as a private employer had a "special power . . . over the

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20 *Id.*

21 Following the Revolutionary War, the number of aliens admitted to the United States generally increased each year until 1905, when over a million immigrants entered the country. At the same time, the national origins of the immigrants changed from 90% Western European from 1820-74 to 17.7% admitted from these countries in 1907. For a statistical analysis of immigration trends, *see* S. KANSAS, U.S. IMMIGRATION EXCLUSION AND DEPORTATION AND CITIZENSHIP OF THE UNITED STATES OF AMERICA 265-66 (3d ed. 1948).

22 Scully, *Is the Door Open Again?—A Survey of Our New Immigration Law*, 13 U.C.L.A.L. REV. 227, 232 (1966). *See generally* S. KANSAS, *supra* note 21, at 264, 265-66; W. VAN VLECK, *supra* note 15, at 6.

23 239 U.S. 175 (1915).

24 Law of Feb. 17, 1909, ch. 36, § 14 [1909] New York Laws 17, *as amended*, Law of March 11, 1915, ch. 51, [1915] New York Laws 101, provided in part:

> Preference in employment of persons upon public works.—In the construction of public works by the state or a municipality . . . preference shall be given to citizens over aliens. Aliens may be employed when citizens are not available.

25 239 U.S. at 188.

subject matter"[26] and was therefore free to control employment on whatever terms it dictated. The Court cited *Atkin v. Kansas*[27] as authority for the proposition that a state has power "to prescribe the conditions upon which it will permit public work to be done on its behalf . . . ."[28]

The same day, the Court, in *Crane v. New York*,[29] sustained a New York statute barring aliens from public works projects, concluding that:

> The specifications of error are the same, though varying in expression, as those in the *Heim Case*, and there considered and declared untenable. There is added the view that a distinction made between aliens and citizens violates the principle of classification. We think this view is also without foundation.[30]

The Court abruptly changed its direction and demonstrated, though briefly, the significance of equal protection. *Truax v. Raich*[31] considered the constitutionality of a vexatious Arizona law that required businesses with more than five employees to insure that at least eighty per cent of their workers were American citizens. The Court struck down the statute as violative of equal protection, noting that the state's power to make reasonable classifications to promote health, safety, morals or welfare

> does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood.[32]

Denial of all work opportunities would be tantamount to denying aliens entrance and abode, which was exclusively within the province of the federal government.[33] The Court emphasized that though the parties were involved in private employment,[34] the right to work was "of the very essence of . . . personal freedom and opportunity . . . ."[35] (At the same time the Supreme Court was striking down this state legislation which effectively denied aliens "entrance and abode" by

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26 *Id.* at 194.

27 191 U.S. 207 (1903).

28 239 U.S. at 191 (quoting from 191 U.S. at 222-23).

29 239 U.S. 195 (1915). The statute in question is reproduced at note 24 *supra*.

30 239 U.S. at 198.

31 239 U.S. 33 (1915).

32 *Id.* at 41.

33 *Id.* at 42. Thus the state's action would contravene the supremacy clause.

34 239 U.S. at 40. *Heim* and *Crane* had referred only to public work projects, whereas *Truax* involved a quantitative limit on all alien employment.

35 *Id.* at 41.

restricting employment opportunities,[36] Congress enacted severe quantitative[37] and qualitative restrictions[38] on the immigration of aliens.)

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36 Preceding American involvement in World War I, a wave of protectionism and isolation covered the continent. The Rev. M.D. Lichliter, speaking to the Committee on Immigration and Naturalization, House of Representatives, on Saturday, May 21, 1910, noted that:

> The immigration of the present is not the immigration of forty years ago. The problem confronting us in this the opening of the second decade of the twentieth century is entirely different than at that [Abraham Lincoln's] time, because we are receiving, in the main, a different type of immigrant. We have rightly excluded the coolie. While with open arms our order welcomes our kith and kin and blood as that of forty years ago, we do protest against the admission of those who come into this country whose habits and manner of life tear down the standard of American life, of living, and of wages, and whose traits of character, formed under the condition under which they have existed as races for centuries, possessing of life, renders it impossible, even if they had the desire, to maintain the highest ideals of American morality and citizenship.

41 REPORTS OF THE IMMIGRATION COMMISSION 16 (1911).

37 Prior to World War I, legislation was enacted that expanded the grounds for qualitative exclusion and restricted the numerical quotas relating to Asian immigration. Act of February 5, 1917, ch. 29, § 2, 39 Stat. 875, imposed an 8 dollar head tax on every alien. Section 3 excluded, *inter alia*, idiots, insane persons, persons with tuberculosis, criminals, polygamists, anarchists, revolutionaries, vagrants, alcoholics, paupers, prostitutes, procurers, contract laborers, illiterates, and persons from certain Asian districts.

38 The Immigration Act of 1924 further restricted immigration and contained the "national origins system," the quantitative and qualitative controls on immigration, and the exclusion of Asian immigration. Act of May 26, 1924, ch. 190, 43 Stat. 153, provided in part:

> Sec. 6.(a) . . . preference shall be given—
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> (1) To a quota immigrant who is the unmarried child under 21 years of age, the father, the mother, the husband, or the wife, of a citizen of the United States who is 21 years of age or over; and
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> (2) To a quota immigrant who is skilled in agriculture, and his wife, and his dependent children under the age of 16 years, if accompanying or following to join him. The preference . . . shall not apply to immigrants of any nationality the annual quota for which is less than 300.
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> . . . .
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> Sec. 11.(a) The annual quota of any nationality shall be 2 per centum of the number of foreign-born individuals of such nationality resident in continental United States as determined by the United States census of 1890 . . . .
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> . . . .
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> Sec. 25. The provisions . . . are in addition to and not in substitution for the provisions of the immigration laws . . . . An alien . . . shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act . . . .
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> . . . .
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> Sec. 26. Section 9 of the Immigration Act of 1917 is amended to read as follows:
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> "Sec. 9. . . . It shall . . . be unlawful for any . . . person to bring to any port of the United States any alien who is excluded . . . as a native of that portion of the Continent of Asia and the islands adjacent thereto . . . ."

See generally F. AUERBACH, *supra* note 15, at 9-11; S. KANSAS, *supra* note 21, at 12. The Immigration Act of 1924 laid the foundation for the Act of June 27, 1952, 8 U.S.C. §§ 101 *et seq.* (1970) which provides in part:

> Sec. 201. (a) The annual quota of any quota area shall be one-sixth of 1 per

Although legislative interference with all occupations was struck down in *Truax*, the Court did not readily extend the supremacy clause rationale when only a single occupation was prohibited to aliens.

In *Ohio ex rel. Clarke v. Deckebach*,[39] the Court upheld an ordinance which excluded aliens from operating a pool hall because

> non-citizens . . . are less familiar with the laws and customs of this country than native born and naturalized citizens; . . . the maintenance of billiard and pool rooms by them is a menace to society and to the public welfare . . . .[40]

The Court was unable to find the same arbitrariness that it found in *Truax* where aliens had been effectively excluded from *all* occupations, rendering *that* classification "plainly irrational."[41] The Court noted that

> it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification,[42]

and that the ordinance did not preclude the possibility of a rational basis for the legislative judgment.[43]

Surprisingly, it was during the late 1930's, when most Americans were concerned with pressing economic problems and domestic welfare legislation, that Justice Stone of the United States Supreme Court laid the foundation for a special treatment of aliens. In *United States v. Carolene Products Co.*,[44] Stone dealt with the presumption of constitutionality for state regulatory legislation. Although he found that specifications for milk additives were reasonably within the police power,[45] he noted in a famous footnote that in certain situations a different standard of judicial review was necessary:

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centum of the number of inhabitants in the continental United States in 1920 . . . .

. . . .

Sec. 202. (b) With reference to determination of the quota to which shall be chargeable an immigrant who is attributable by as much as one-half of his ancestry to a people or peoples indigenous to the Asia-Pacific triangle . . . .

This plan restricted immigration from all Asian and Pacific countries from India to Japan, and all Pacific Islands north of Australia and New Zealand. Additionally, the system is a comprehensive scheme applicable to any alien.

39 274 U.S. 392 (1927). *See generally* Note, *Federal Supremacy and the Davidowitz Case*, 29 GEO. L.J. 755 (1941).

40 274 U.S. at 394.

41 *Id.* at 396.

42 *Id.*

43 *Id.* at 397.

44 304 U.S. 144 (1938).

45 *Id.* at 152.

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[46]

It was this stricter standard, and the idea of a politically helpless insular minority, that may have guided the Court to its sweeping language in *Takahashi v. Fish & Game Commission*,[47] decided ten years after *Carolene Products*. *Takahashi* established that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[48] *Takahashi* involved a California statute prohibiting aliens from fishing within the three-mile offshore limit. The Court, in holding the statute unconstitutional, noted 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.[49]

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[46] *Id.* at 152-53 n.4 (citations omitted). In this footnote it was further suggested that when legislation, on its face, contravenes the specific proscriptions enumerated in the Bill of Rights, the usual presumption of constitutionality may be curtailed, and that the judiciary has a special burden as defender of those liberties—especially the franchise—which are requisite to the exercise of political influence. The footnote manifests Stone's concern for the welfare of minority groups and constitutional freedoms, and his desire that the Court protect them. In a letter to Judge Lehman of New York, written the day following the *Carolene Products* decision, Stone lamented the increasing religious and racial intolerance of Americans. Mason, *The Core of Free Government, 1938-40: Mr. Justice Stone and "Preferred Freedoms,"* 65 YALE L.J. 597, 599-601 (1956). Footnote Four was a logical implementation of his thought. Stone emphasized his contention in Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940):

> History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities.

Stone warned that if the Justices stood aloof, as the majority seemed to indicate they might, "numerically inconsequential groups might find themselves helpless victims of overpowering prejudice." All acts infringing upon their rights must be subject to "searching judicial inquiry." *See generally* Mason, *supra* at 619. *See* Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571 (1946), where the author suggests that Stone's

> expressed reason . . . was that political processes "can ordinarily be expected to bring about repeal of undesirable legislation," but that minorities such as racial and religious groups are subject to prejudice "which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . ."

Id. at 580.

[47] 334 U.S. 410 (1948).

[48] *Id.* at 420.

[49] *Id.* at 419.

Since the equal protection clause was held in *Yick Wo* to include aliens as well as citizens, all persons lawfully in the country "shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws . . . ."[50] The "special interests" asserted by California in protecting the fish within its waters was therefore

> inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.[51]

Although the *Takahashi* Court relied heavily on the supremacy clause to justify a more stringent equal protection standard, the concurring opinion of Justices Murphy and Rutledge found the statute a "direct outgrowth of antagonism toward persons of Japanese ancestry" and therefore "not entitled to wear the cloak of constitutionality."[52]

Although *Takahashi* said that classifications involving aliens must be subjected to close judicial scrutiny, the opinion did not mention the term "suspect classification," that has been used in the racial context to necessitate the showing of a "compelling state interest."[53] Notably, a compelling state interest is almost never found.[54] The "suspect" category, then, seems to be a judicial mandate that any such classifications are presumed violative of the equal protection clause. Although the "suspect classification" test was not fully developed until the 1960's,[55] so that the absence of the word "suspect" in *Takahashi* might not have indicated a lesser standard than that used in the racial desegregation cases, the Court's heavy reliance on the supremacy clause[56] instead of a pure equal protection argument suggests an inter-

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50 *Id.* at 420.

51 *Id.* at 421.

52 *Id.* at 422.

53 *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); *cf.* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Brown v. Board of Educ., 347 U.S. 483 (1954); Shelley v. Kraemer, 334 U.S. 1 (1948); Strauder v. West Virginia, 100 U.S. 303 (1880); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

54 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 13 (1967) (Stewart, J., concurring); McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart & Douglas, JJ., concurring); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 566 (1947) (Rutledge, J., dissenting). *See generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1088 (1969) [hereinafter cited as *Developments*].

55 Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 198 (1964).

56 334 U.S. at 419. The supremacy clause, U.S. CONST. art. VI, provides in part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

mediate cateogry for review of alienage classifications.[57] On the other hand, the use of the supremacy clause might have been the judicial vehicle for reaching a "suspect clasification" test, just as the enactment of the fourteenth amendment to guarantee former slaves the rights of citizens has been the classic argument for the need for a compelling state interest in race cases.[58]

The reasons for requiring close judicial scrutiny in race cases are: (a) there is the strong presumption that no rational relationship exists between the use of racial classifications and the contribution to a rational state interest since "race is incompatible to any legitimate state interest;"[59] and (b) the use of racial classification is identified as discrimination which establishes second-class members of society.[60] Although it is obvious that alienage and race are not synonymous, both are congenital and relegate the minority to an inferior social status.[61]

Aliens, unlike blacks, have no ability to participate to any significant extent in the political process, since they have been disenfranchised since 1928.[62] Alienage classifications do not only indirectly result in discrimination, but have relegation to an inferior status as their legislative purpose.[63] This is illustrated by the plethora of state statutes restricting the alien's ability to earn a living.[64]

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57 This is the view supported by law reviews appearing after the *Takahashi* decision. *See, e.g.*, Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM L. REV. 1012, 1027-28 (1957); Note, *Protection of Alien Rights Under the Fourteenth Amendment*, 1971 DUKE L.J. 583, 597-99; Note, *California's Prohibition Against Contractors Employing Aliens on Public Works Declared Unconstitutional*, 11 HARV. INT'L L.J. 228, 238-39 (1970); Note, *National Power to Control State Discrimination Against Foreign Goods and Persons: A Study in Federalism*, 12 STAN. L. REV. 355, 365-67 (1960).

58 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) (The equal protection clause was "clearly a provision for that race"). *See also* Loving v. Virginia, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination . . . .").

59 Any classification based on race is presumed to be irrational. *See generally Developments, supra* note 54, at 1088.

60 Brown v. Board of Educ., 347 U.S. 483, 494 (1954). *See generally* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

61 *Developments, supra* note 54, at 1126-27.

62 Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114 (1931).

63 Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 422 (1948) (Murphy, J., concurring); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). Congress has, however, broadly declared as federal policy that lawfully admitted resident aliens are entitled to the full and equal benefit of all state laws for the security of persons and property. Law of May 31, 1870, ch. 114, §§ 16, 17, 16 Stat. 140, 144. *See also* 334 U.S. at 419-20.

64 New Jersey maintains numerous occupational restrictions. *See, e.g.*, N.J. STAT. ANN. § 45:2-5 (1963) (certified public accountants); *Id.* § 45:3-5 (1963) (architects); *Id.* § 45:3-6 (1963) (dentists); *Id.* § 45:8-35 (1963) (professional engineers); *Id.* § 45:9-37.3 (Supp. 1972) (physical therapists); *Id.* § 45:12-5 (Supp. 1972) (optometrists); *Id.*

The recent trend of cases and events[65] seems to have established the foundation for the alien's entry into nearly all non-elected offices without selective restrictions. In *Purdy & Fitzpatrick v. State*,[66] the California Supreme Court overturned a statute that prohibited the employment of aliens in public works projects. The court relied heavily on *Takahashi*, which was interpreted as establishing alienage as a suspect classification and vitiating the proprietary or special interest theory.[67] The court emphasized that the proprietary rationale had partially rested on the doctrine that a state had unequivocal power in extending privileges[68] and that such a right-privilege distinction was without merit.[69] The court further decided that the police power of the state to promote acceptable wages and working conditions in a local industry did not permit the exclusion of aliens from the industry, since the classification bore no rational relationship to any valid use

§ 45:14-7 (1963) (pharmacists); *Id.* § 45:15-9 (Supp. 1972) (real estate brokers); *Id.* § 45:16-7 (Supp. 1972) (veterinarians). *See generally* M. KONVITZ, *supra* note 10, at 190-207.

65 J. KENNEDY, A NATION OF IMMIGRANTS 78-79 (1964). Kennedy noted that:

> In 1948 Congress passed the Displaced Persons Act allowing more than 400,000 people made homeless by the war to come to this country. In 1953 Congress passed the Refugee Relief Act to admit about 200,000 people, most of whom had fled from behind the Iron Curtain. Under this Act and under a clause of the Immigration and Nationality Act of 1952, not originally intended for use in such situations, some thirty thousand Freedom Fighters from Hungary were admitted in 1957. . . .
>
> Following the 1958 earthquakes in the Azores which left so many Portuguese homeless, none of these people could enter the United States as quota immigrants. Persons of Dutch origin in the Netherlands who were displaced from Indonesia were also ineligible to enter the United States as quota immigrants. Both needs were met by the Pastore-Kennedy-Walter Act of 1958 admitting a number of them on a nonquota basis into the United States. In 1962 a special law had to be passed to permit the immigration of several thousand Chinese refugees who had escaped from Communist China to Hong Kong. The same legislative procedure was used as in the 1957 Hungarian program. Each world crisis is met by a new exception to the Immigration and Nationality Act of 1952.

66 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969). *See generally* Note, *Employment on Public Works—California's Prohibition Against Contractors Employing Aliens on Public Works Declared Unconstitutional*, 11 HARV. INT'L L.J. 228 (1970).

The statute in question was Law of 1937, art. 4, ch. 90, § 1850, [1937] Cal. Laws 246 (repealed 1970), which provided:

> No contractor or subcontractor or agent or representative thereof shall knowingly employ or cause or allow to be employed on public work any alien, except in cases of extraordinary emergency caused by fire, flood, or danger to life or property, or except on work upon public military or naval defenses or works in time of war.

67 71 Cal. 2d at 584-85, 456 P.2d at 657-58, 79 Cal. Rptr. at 89-90.

68 People v. Crane, 214 N.Y. 154, 164, 108 N.E. 427, 430, *aff'd*, 239 U.S. 195 (1915). *See also* McCready v. Virginia, 94 U.S. 391 (1877).

69 Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963); *see* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). The congruence of the right and privilege was applied to lawyers in Schware v. Board of Bar Examiners, 353 U.S. 232, 239 n.5 (1957).

of that power.[70] Nevertheless, the court did concede that it is a legitimate, but not a compelling state interest, to favor American citizens over those of other countries.[71]

The case firmly establishing alienage as a suspect criterion is *Graham v. Richardson*,[72] which involved a lawfully admitted alien who lived in Arizona after her immigration to the United States. Although she met all the requirements for welfare benefits except the fifteen year residence required of aliens, her benefits were denied.[73] The Court, without dissent, found the statute to be unconstitutional, holding that whatever may remain of the special public interest doctrine after *Takahashi*, a "State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify . . . Arizona's restricting benefits to citizens and longtime resident aliens."[74] The *Graham* Court relied on *Shapiro v. Thompson*[75] for the proposition that

> "a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification."[76]

Concluding that an alien as well as a citizen is a "person" for equal protection purposes, the Court found that the need for fiscal conservation could not justify the discriminatory classification.[77] Finally, citing *Purdy*, the Court stated that "[t]here can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of the State."[78]

It might be suggested that in *Graham* the Supreme Court was faced with the dilemma of declaring either that welfare was a fundamental right, or that alienage was a suspect classification.[79] Since an

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70 71 Cal. 2d at 581, 456 P.2d at 655, 79 Cal. Rptr. at 87. This was essentially the same statute as *Heim* upheld in 1915. See authorities cited note 23 *supra*.

71 71 Cal. 2d at 585, 456 P.2d at 658, 79 Cal. Rptr. at 90. Justice Tobriner, speaking for the court, asserted:

> The classification within the statutory scheme operates irrationally without reference to any legitimate state interest except that of favoring United States citizens over citizens of other countries. This latter objective does not reflect such a compelling state interest that it would permit us to sustain this kind of discrimination.

72 403 U.S. 365, 376 (1971). *But see* 10 DUQ. L. REV. 280 (1971); *cf.* Note, *Protection of Alien Rights Under the Fourteenth Amendment*, 1971 DUKE L.J. 583.

73 403 U.S. at 367.

74 *Id.* at 374.

75 394 U.S. 618 (1969). *See generally* Note, *Residence Requirements After Shapiro v. Thompson*, 70 COLUM. L. REV. 134 (1970); Note, *The Welfare Residence Requirements*, 44 TULANE L. REV. 363 (1970).

76 403 U.S. at 375 (quoting from 394 U.S. at 633).

77 403 U.S. at 376.

78 *Id.* (referring to *Purdy*, 71 Cal. 2d at 581-82, 456 P.2d at 656, 79 Cal. Rptr. at 88).

79 The basis for requiring aliens to reside for a given length of time was asserted to

asserted constitutional right to welfare would involve far greater implications and expenditures by federal and state governments, the Supreme Court may have decided that declaring alienage "suspect" was the more appropriate choice, as it achieved the necessary effect without incurring the unnecessary burdens. However, the desired result of finding Mrs. Richardson entitled to welfare might have been reached through a simple application of *Takahashi* and the supremacy clause.[80] This was the method chosen by Justice Harlan, who concurred only in Parts III and IV of the majority opinion.[81] The Supreme Court, by choosing the alternative method, demonstrated an enlightened judicial attitude toward aliens, and placed them in the same "strict judicial scrutiny" category as blacks.

Following the holding and reasoning in *Graham*, the Federal District Court for the Southern District of New York held that a statute[82] eliminating aliens from competitive civil service positions violated the equal protection clause.[83] Although the New York City Human Resources Administration had tried to show that the loyalty required for civil servants and necessary for stable government administration gave the state a compelling interest in the classification disqualifying aliens,[84] the district court found that the state neither showed a compelling interest nor proved that such a classification was rationally related to a valid state purpose:[85]

> There is no offer of proof on this issue and defendants would be hard pressed to demonstrate that a permanent resident alien who has resided in New York or the surrounding area for a number of years, as have plaintiffs, and whose family also resides here, would be a poorer risk for a career position in *New York* (vis-a-vis in the United States) than an American citizen who, prior to his

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be the "special public interest" of the state in the welfare of its citizens. *See* 403 U.S. at 371-73.

80 *Takahashi* established the principle of close judicial scrutiny for alienage classifications. Since withholding welfare payments may be tantamount to denying the necessities of life, *see* Goldberg v. Kelly, 397 U.S. 254, 265 (1970), a denial of state largesse might be equivalent to the denial of "entrance and abode" forbidden in *Truax* since it interfered with the plenary power of Congress to legislate with respect to immigration. *See* notes 30-34 *supra* and accompanying text.

81 403 U.S. at 383.

82 N.Y. CIV. SERV. LAW § 53(1) (McKinney 1959) provides:

> 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.

83 Dougall v. Sugarman, 339 F. Supp. 906, 909-11 (S.D.N.Y. 1971), *prob. juris. noted*, — U.S. — (1972).

84 *Id.* at 908.

85 *Id.* at 907-08.

> employment with the City or State, had been residing in another state.[86]

Just as the state's attempt to prohibit aliens from working in civil service positions was found neither valid nor sound, *Raffaelli* has shown that there can be no restrictions on an otherwise qualified alien's admission to practice law.[87] Although a state may

> require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar . . . any qualification must have a rational connection with the applicant's fitness or capacity to practice law.[88]

The *Raffaelli* court, after reviewing the history of aliens' admission to the bar,[89] weighed the state's interests against the compelling state interest rules,[90] and concluded "that the challenged classification does not have 'a rational connection with the applicant's fitness or capacity to practice law.' "[91] The court finally cited *Purdy*:[92]

> The discrimination involved denies arbitrarily to certain persons, merely because of their status as aliens, the right to pursue an otherwise lawful occupation. The classification within the statutory scheme operates irrationally without reference to any legitimate state interest except that of favoring United States citizens over citizens of other countries. This latter objective does not reflect

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86 *Id.* at 909.

87 Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d at 288, 496 P.2d at 1266, 101 Cal. Rptr. at 896.

88 Schware v. Board of Bar Examiners, 353 U.S. at 239. (Former member of Communist Party does not *per se* fail to meet standards of good moral character.). Likewise, residence requirements bear no rational relationship to applicants' fitness to practice law and hence are arbitrary and invidious discriminations. *See, e.g.*, Potts v. Honorable Justices of the Supreme Court of Hawaii, 332 F. Supp. 1392, 1397 (D. Hawaii 1971); Lipman v. Van Zant, 329 F. Supp. 391, 400-01 (N.D. Miss. 1971); Webster v. Wofford, 321 F. Supp. 1259, 1261-62 (N.D. Ga. 1970).

89 7 Cal. 3d at 294-95, 496 P.2d at 1268-69, 101 Cal. Rptr. at 900-01.

90 *Id.* at 297-301, 496 P.2d at 1268-73, 101 Cal. Rptr. at 900-05. The considered state interests were:

1. *"A lawyer must 'appreciate the spirit of American institutions.'"* *Id.* at 297, 496 P.2d at 1269, 101 Cal. Rptr. at 901.

2. *"A lawyer must take an oath to support the Constitutions of the United States and California."* *Id.* at 298, 496 P.2d at 1270, 101 Cal. Rptr. at 902.

3. *"A lawyer must remain accessible to his clients and subject to the control of the bar."* *Id.* at 300, 496 P.2d at 1271, 101 Cal. Rptr. at 903.

4. *"'The practice of law is a privilege, not a right.'"* *Id.* at 300, 496 P.2d at 1272, 101 Cal. Rptr. at 901.

5 *"A lawyer is an 'officer of the court' and therefore 'should be a citizen.'"* *Id.* at 301, 496 P.2d at 1273, 101 Cal. Rptr. at 905.

91 *Id.* at 302, 496 P.2d at 1273, 101 Cal. Rptr. at 905 (citing Schware v. Board of Bar Examiners, 353 U.S. at 239).

92 7 Cal. 3d at 304-05, 496 P.2d at 1275, 101 Cal. Rptr. at 907.

> such a compelling state interest that it would permit us to sustain this kind of discrimination.[93]

Despite the unequivocal language of *Raffaelli*, courts may find a valid restriction on the aliens' right to practice law. In the case of *Application of Griffith*,[94] the Connecticut Supreme Court sustained a state requirement that applicants for admission to the bar be American citizens.[95] Assuming, *arguendo*, that this restriction is constitutional for Connecticut, it is only because in this state a member of the bar has powers over and above those afforded to attorneys in any other state.[96]

When one initially examines the question of permitting aliens to practice law, the immediate reaction is that there should be an advantage to possessing citizenship: that since law is based on American ideals and traditions, lawyers should be citizens. However, the American judicial system is substantially based upon the English archetype. It appears patently unreasonable for America to arbitrarily prohibit aliens from practicing law while Britain has never prohibited non-citizens from practice.[97] Furthermore, the United States Supreme Court has itself asserted that those aliens specially permitted to practice in this country were distinguished lawyers and a credit to the profession.[98]

The ramifications of *Raffaelli* may be as far-reaching as Stone's footnote in *Carolene Products*. In New Jersey, for instance, aliens are presently denied admission to the bar.[99] The *Raffaelli* decision, coupled with express terms of the New Jersey Constitution,[100] indicates that

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93 71 Cal. 2d at 585, 456 P.2d at 658, 79 Cal. Rptr. at 90.

94 — Conn. —, 294 A.2d 281, *prob. juris. noted*, 406 U.S. 966 (1972). Petitioner was a resident and taxpayer of New Haven and except for the fact that she was not an American citizen, she was qualified for admission to the bar examination.

95 *Id.* at 289-90.

96 CONN. GEN. STAT. ANN. § 51-85 (1960) provides:

> 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 and take depositions and acknowledgments of deeds.

97 *Cf.* Solicitors Act of 1957, 5 & 6 Eliz. 2, c.27, §§ 1 *et seq.*

98 In 1872, Justice Miller asserted:

> Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States or of any State.

Bradwell v. State, 83 U.S. (16 Wall.) 130, 139 (1873).

99 N.J.R. 1:24-2 provides:

> No person shall be admitted to the bar examination unless he first presents to the Board, in the manner prescribed by its rules:
>
> (a) Satisfactory evidence that he is more than 21 years of age, a citizen of the United States, and domiciled in New Jersey . . . .

100 N.J. CONST. art. 1, ¶ 5 provides in part:

> No person shall be denied the enjoyment of any civil or military right, nor

this law should be found unconstitutional. Furthermore, as it is irrational to prohibit aliens from practicing law, it is equally irrational to prohibit aliens the unencumbered access to any occupation and the unequivocal enjoyment of any constitutional right.[101]

The right to vote is a fundamental right,[102] since access to the ballot is the key to the necessities and amenities provided for the people.[103] The Framers of the Constitution were anxious to protect every person in the country,[104] and incorporated this desire in article I, section 2[105] and amendment XVII of the Constitution,[106] which provide that Congressmen and Senators shall be elected by the people.

To enable aliens to vote in federal elections, the *Graham-Raffaelli* rationale may be extended to challenge the naturalization-duration requirements.[107] Since only restrictions on exclusion[108] of aliens are

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be discriminated against in the exercise of a civil or military right . . . because of religious principles, race, color, ancestry or national origin.

This clause was found equivalent to the fourteenth amendment equal protection clause in Washington Ins. Co. v. Board of Review, 1 N.J. 545, 554, 64 A.2d 443, 447 (1949).

101 Nevertheless New Jersey still maintains 21 statutes prohibiting aliens from pursuing various occupations. See authorities cited note 64 *supra.*

102 Oregon v. Mitchell, 400 U.S. 112 (1970); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Evans v. Cornman, 398 U.S. 419 (1970); Kramer v. Union School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); Carrington v. Rash, 380 U.S. 89 (1965); Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941); Smiley v. Holm, 285 U.S. 355 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

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

104 Wesberry v. Sanders, 376 U.S. 1, 18 (1964); *see* THE FEDERALIST No. 57, at 530, 531 (C. Rossiter ed. 1963) (J. Madison).

> Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished name, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.

105 U.S. CONST. art. I, § 2 provides in part:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .

106 U.S. CONST. amend. XVII provides:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . .

107 8 U.S.C. § 1427(a) (1970) provides in part:

> No person . . . shall be naturalized unless such petitioner, (1) . . . has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years . . . .

108 *See, e.g.*, Kliendienst v. Mandel, 408 U.S. 753 (1972); Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967); Galvan v. Press, 347 U.S. 522 (1954); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 216 (1953); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Lem Moon Sing v. United States, 158 U.S. 538 (1895). *See generally* Comment, *The Alien and the Constitution*, 20 U. CHI. L. REV. 547, 547-55 (1953); Comment, *Role of Congress and the Federal Judiciary in the Exclusion of Aliens*, 23 MO. L. REV. 491 (1958); Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760, 782-89 (1962);

within the plenary power of Congress,[109] the due process clause of the fifth amendment[110] is applicable whenever aliens are lawfully within the country.[111]

Due process under the fifth amendment has traditionally been construed to be procedural due process in alien cases. A line of cases beginning with *Bolling v. Sharpe*[112] has found an equal protection guarantee inherent in the due process clause of the fifth amendment.[113] Thus the due process guarantee might include an equal protection guarantee which would protect the alien against discrimination on the part of the federal government. The most obvious manifestation of this different treatment is the requirement of five years' residence before aliens are accorded citizenship.

When the franchise is threatened, although the court might rely on those amendments specifically granting the power to vote to minorities,[114] women,[115] or to the young,[116] it has turned to the equal protection clause to invalidate provisions abrogating that essential right.[117]

Aliens, who are counted in determining Congressional represen-

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Note, *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1154 (1972); Note, 47 N.D. LAW. 341 (1971).

109 Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Bridges v. Wixon, 326 U.S. 135 (1945); United States *ex rel.* Tisi v. Tod, 264 U.S. 131 (1924); Mahler v. Eby, 264 U.S. 32 (1924); Zakonaite v. Wolf, 226 U.S. 272 (1912); Low Wah Suey v. Backus, 225 U.S. 460 (1912); Yamataya v. Fisher, 189 U.S. 86 (1903).

110 U.S. CONST. amend. V provides in part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .

111 See cases cited note 109 *supra.*

112 347 U.S. 497 (1954).

113 Bolling v. Sharpe, 347 U.S. 497, 499 (1954). *See also* Groundhog v. Keeler, 442 F.2d 674, 681 (10th Cir. 1971); Washington v. United States, 401 F.2d 915, 922 (D.C. Cir. 1968); Taylor v. United States, 320 F.2d 843, 846 (9th Cir. 1963); *In re* Smith, 323 F. Supp. 1082, 1088 (D. Colo. 1971).

114 U.S. CONST. amend. XV, § 1 provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

115 U.S. CONST. amend. XIX provides in part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

116 U.S. CONST. amend. XXVI, § 1 provides:

> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

117 Smith v. Allwright, 321 U.S. 649, 658-60 (1944); Nixon v. Herndon, 273 U.S. 536, 540-41 (1927).

tation,[118] who send their children to American schools,[119] and who are taxed as are citizens,[120] have as "distinct and direct [an] interest"[121] in the outcome of elections as do citizens. Just as non-property owners may vote on general obligation bond elections,[122] and non-parents may vote in school board elections,[123] so, too, should not aliens be permitted to vote whenever they have an interest in the decision?

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118 Wesberry v. Sanders, 376 U.S. 1, 7 n.9 (1964), noted that U.S. CONST. art. I, § 2 specifically provided that representatives be chosen by the People:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years . . . .

119 *E.g.*, N.J. STAT. ANN. § 18A:38-1 (1968) provides in part:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> (a) Any person who is domiciled within the school district . . . .

120 Dougall v. Sugarman, 339 F. Supp. 906, 908 (S.D.N.Y. 1971), *prob. juris. noted*, 407 U.S. 908 (1972).

121 Kramer v. Union School Dist., 395 U.S. 621, 632 (1969).

122 City of Phoenix v. Kolodziejski, 399 U.S. 204, 212 (1970).

123 Kramer v. Union School Dist., 395 U.S. at 633.