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NOTES

Fourteenth Amendment Equal Protection and Alienage-Based Discrimination in the Appointment of State Police Officers: Foley v. Connelie

Mr. Edmund Foley, a lawful and permanent resident of the United States, was an alien who in due course would become eligible for American citizenship. He applied for a job as a New York state trooper, but state authorities refused to permit him to take a competitive examination based on New York Executive Law section 215(3) which restricts the appointment of state police officers to United States citizens.[1] Mr. Foley then instituted a class action[2] in the United States District Court for the Southern District of New York, seeking a declaratory judgment that the citizenship requirement violated the equal protection guarantee of the fourteenth amendment[3] insofar as it excluded aliens from obtaining employment as state law enforcement officers. A three-judge court rendered summary judgment against Mr. Foley, finding that the state's interest in

1. The statute provides: "No person shall be appointed to the New York state police force unless he shall be a citizen of the United States . . . ." N.Y. EXEC. LAW § 215(3) (McKinney Supp. 1972-1977).

Twenty states in addition to New York statutorily limit eligibility for state law enforcement positions to United States citizens. *See* CAL. GOV'T CODE § 1031 (West Supp. 1978); FLA. STAT. ANN. § 943.13 (West Supp. 1978); GA. CODE ANN. § 92A-214 (1978); ILL. ANN. STAT. ch. 121, § 307.9 (Smith-Hurd Supp. 1978); IOWA CODE ANN. § 80.15 (West Supp. 1978-1979); KAN. STAT. § 74-2113 (Supp. 1977); KY. REV. STAT. § 16.040 (1971); MICH. COMP. LAWS ANN. § 28.4 (1967); MISS. CODE ANN. § 45-3-9 (Supp. 1977); MO. ANN. STAT. § 43.060 (Vernon Supp. 1978); MONT. REV. CODES ANN. § 31-105 (Supp. 1977); N.H. REV. STAT. ANN. § 106-B:20 (Supp. 1975); N.J. STAT. ANN. § 53:1-9 (West Supp. 1978-1979); N.M. STAT. ANN. § 39-2-6 (Supp. 1975); N.D. CENT. CODE § 39-03-04 (Supp. 1977); ORE. REV. STAT. § 181.260 (1977); PA. STAT. ANN. tit. 71, § 1193 (Purdon 1962 & Supp. 1978-1979); R.I. GEN. LAWS § 42-28-10 (1969); TEX. REV. CIV. STAT. ANN. art. 4413(9) (Vernon 1976); UTAH CODE ANN. § 27-11-11 (1976). Mississippi, Missouri, and Montana further impose a state citizenship requirement. Two other states impose state citizenship requirements only. *See* ARK. STAT. ANN. § 42-406 (1977); OKLA. STAT. ANN. tit. 47, § 2-105 (West Supp. 1977-1978). Eleven states impose varying citizenship requirements for state officers and employees. *See* ALA. CODE tit. 36, § 2-1 (1975); ARIZ. REV. STAT. ANN. § 38-201 (West 1974); HAWAII REV. STAT. § 78-1 (1976); IDAHO CODE § 59-101 (1976); ME. REV. STAT. ANN. tit. 5, § 556 (West Supp. 1978); MASS. ANN. LAWS ch. 31, § 12 (Michie/Law. Co-op Supp. 1978); NEV. REV. STAT. § 281.060 (1975); OHIO REV. CODE ANN. § 124.22 (Page 1978); TENN. CODE ANN. § 8-1801 (Supp. 1977); VT. STAT. ANN. tit. 3, § 262 (1972); W. VA. CONST. art. 4, § 4. Tennessee also requires that state employees be state citizens. South Dakota requires that all state employees must have at least declared their intention to become a naturalized citizen of the United States. *See* S.D. COMPILED LAWS ANN. § 3-1-4 (1974).

2. In the district court Mr. Foley brought suit individually and as a certified class representative. Foley v. Connelie, 419 F. Supp. 889 (S.D.N.Y. 1976). In the Supreme Court Mr. Foley petitioned individually.

3. U.S. CONST. amend. XIV, § 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

defining and preserving its basic conception of the political community was compelling and justified limiting those eligible for the police force to American citizens. The court also determined that the statutory scheme employed by the state constituted the least drastic means of furthering such interest and that the statute was sufficiently precise in its terms.[4] *Held, affirmed*: Police officers are important nonelective officials who participate directly in the execution of broad public policy. Their occupation is one for which citizenship is a relevant qualification. Under these circumstances strict equal protection scrutiny of citizenship requirements is inappropriate. Since citizenship bears a rational relationship to the demands of this particular governmental role, a state may impose a citizenship requirement without impinging on the equal protection guarantee of the fourteenth amendment. *Foley v. Connelie*, 98 S. Ct. 1067, 55 L. Ed. 2d 287 (1978).

I. THE APPLICATION OF THE FOURTEENTH AMENDMENT TO ALIENAGE-BASED DISCRIMINATION

During the last decade of the Warren era the Supreme Court expanded its use of the fourteenth amendment's equal protection guarantee to invalidate legislation and developed a rigid "two-tiered" method of analysis.[5] Under this method statutory language which employed a suspect classification[6] or which affected a fundamental right[7] was subject to strict judicial scrutiny.[8] To survive the strict scrutiny test, a statutory scheme had to be absolutely necessary to further a compelling state interest; that is, the scheme had to constitute the least drastic means of satisfying that interest and had to be precisely drawn in light of its purpose.[9] In contrast, statu-

4. Foley v. Connelie, 419 F. Supp. 889, 895-99 (S.D.N.Y. 1976).

5. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 947-48 (1975).

6. Suspect classifications include those based on race and national origin. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978); Korematsu v. United States, 323 U.S. 214 (1944). These classifications often involve "discrete and insular minorities," a term first employed in United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). Legislation discriminating against this type of minority is suspect because the group has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). *See also* United States v. Carolene Prods. Co., 304 U.S. at 152-53 n.4.

7. Fundamental rights include: voting (*see, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969)); interstate travel (*see, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969); *but see* Sosna v. Iowa, 419 U.S. 393 (1975) (upholding a one-year residency requirement for obtaining a divorce)); marriage (*see, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967)); procreation (*see, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942)).

8. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1132 (1969).

9. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW

tory language which neither employed a suspect classification nor affected a fundamental right was upheld if it conceivably bore a rational relationship to any constitutionally permissible governmental objective.[10] Legislation rarely withstood the rigors of strict scrutiny, but almost always satisfied the limited criteria of rational basis review.[11]

Although the Burger Court has nominally followed its predecessor's approach in the equal protection field,[12] its decisions indicate increasing discontent with the rigidity of the two-tiered formula.[13] Decisions that have invalidated classifications based on gender[14] and illegitimacy,[15] for example, have prompted leading commentators to suggest that the Justices are actually employing some middle level of review.[16] According to one commentator, this approach has been aimed at producing mildly progressive, egalitarian results while avoiding far-reaching doctrinal commitments.[17] Until the Court's 1977 Term, however, no decision applying intermediate, let alone rational relationship, scrutiny existed to serve as the basis for postulating their employment in the area of fourteenth amendment equal protection against alienage-based discrimination. In five decisions since 1971[18] the Burger Court had consistently used strict scrutiny to invalidate state imposed classifications based on alienage. These cases, nevertheless, established a pattern of mounting dissent among the Justices that ultimately helped produce the *Foley* majority.

In *Graham v. Richardson*[19] the Court[20] held that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny,"[21] regardless of "whether or not a

524 (1978) [hereinafter cited as J. NOWAK]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1001-02 (1978).

10. *See* J. NOWAK, *supra* note 9, at 524; L. TRIBE, *supra* note 9, at 996. *See also Developments in the Law, supra* note 8, at 1077-87. The Court has applied the rational relationship test particularly in the social and economic fields not affecting Bill of Rights guarantees. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976); Dandridge v. Williams, 397 U.S. 471 (1970).

11. *See* Gunther, *supra* note 5, at 8.

12. *See* Wilkinson, *supra* note 5, at 951.

13. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-22 (1970) (Marshall, J., dissenting). Justice Marshall advocates the use of a "sliding scale" form of review involving a balancing of the competing individual and governmental interests. Two-tiered analysis is also criticized in Craig v. Boren, 429 U.S. 190, 210-14 (1976) (Powell & Stevens, JJ., concurring).

14. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977); Reed v. Reed, 404 U.S. 71 (1971).

15. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

16. *See* J. NOWAK, *supra* note 9, at 525-26; L. TRIBE, *supra* note 9, at 1089.

17. *See* Wilkinson, *supra* note 5, at 951, 953-54.

18. Nyquist v. Mauclet, 432 U.S. 1 (1977); Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976); *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

19. 403 U.S. 365 (1971).

20. Chief Justice Burger, and Justices Black, Douglas, Brennan, Stewart, White, Marshall, and Blackmun.

21. 403 U.S. at 372 (footnotes omitted).

fundamental right is impaired."[22] The rationale for making alienage a suspect classification was that "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[23] The Justices then invalidated the Pennsylvania and Arizona laws in question, which had restricted the availability of welfare benefits for aliens, on the grounds that they failed to further compelling state interests.[24]

In *Sugarman v. Dougall*[25] an overwhelming majority of the Court[26] again applied the strict scrutiny test[27] to strike down a New York statute that excluded aliens from certain classified civil service positions.[28] Significantly, the Justices recognized the state's interest in defining who could participate in its political community[29] and acknowledged that citizenship was a relevant factor in arriving at such a definition.[30] Elaborating on this point, the Court noted that the state's power to impose citizenship requirements in order to further this interest was not confined to the area of the voting franchise, but could also be extended to "persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."[31] The Justices then commented: "[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives."[32] In their view this was:

> no more than a recognition of a State's historical power to exclude aliens from participation in its democratic institutions and a recogni-

22. *Id.* at 376.

23. *Id.* at 372 (citation omitted). For a discussion of the significance of the term "discrete and insular minority," see note 6 *supra*. For an excellent discussion of the application of the equal protection guarantee to alienage-based classifications prior to *Graham*, see J. NOWAK, *supra* note 9, at 594-96.

24. 403 U.S. at 374-75. Justice Harlan concurred in the result on alternate grounds advanced by the Court that federal regulation of immigration and naturalization preempts state law in the field, including state law governing the disbursement of federal welfare benefits to aliens. *Id.* at 380, 382.

25. 413 U.S. 634 (1973).

26. Chief Justice Burger, and Justices Douglas, Brennan, Stewart, White, Marshall, Blackmun, and Powell.

27. 413 U.S. at 642.

28. *Id.* at 642-43. Justice Rehnquist, dissenting, advocated the application of the rational basis test and would have upheld the statute as satisfying that test. *Id.* at 658, 661. The civil service positions in question ranged from that of typist to that of administrative assistant. *Id.* at 637-38.

29. *Id.* at 642-43.

30. *Id.* at 649.

31. *Id.* at 647. Mr. Justice Marshall, in his dissent, refers to the *Sugarman* dictum as an "exception" to the general rule that alienage is a suspect classification and is subject to strict scrutiny. Foley v. Connelie, 98 S. Ct. 1067, 1075, 55 L. Ed. 2d 287, 297 (1978) (Marshall, J., dissenting). This writer hereinafter will also refer to the *Sugarman* dictum as the *Sugarman* exception. The *Sugarman* dictum, however, may be more aptly explained as describing an area in which the states, in our federal system, have such a strong interest that a lesser standard of scrutiny is applied.

32. *Id.* at 648.

> tion of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders.[33]

Having indicated their willingness to uphold alienage-based classifications under such circumstances, the majority, nevertheless, used strict scrutiny to invalidate the statute as being imprecise in its reach.[34] The Justices emphasized that in order to withstand strict judicial review the statutory scheme used by the state had to be "precisely drawn in light of the acknowledged purpose."[35]

On the same day that it handed down the *Sugarman* opinion, the Court invalidated another alienage-based classification in the case of *In re Griffiths*.[36] In *Griffiths* a slightly smaller majority[37] reiterated that alienage was a suspect classification and employed strict scrutiny[38] to declare citizenship requirements imposed by Connecticut for admission to the bar unconstitutional.[39] While conceding that a state has a substantial interest in setting qualifications for lawyers, the Justices determined that Connecticut had failed to show that its classification was necessary to further or safeguard that interest.[40] The Court held that the circumstances identified in *Sugarman* that could result in a lessened degree of scrutiny were not present in *Griffiths* because lawyers are not government officials and do not formulate governmental policy merely by virtue of being licensed to practice law.[41] The dissent[42] argued that a state has a fundamental power to regulate the legal profession[43] and that a "reasonable, rational basis" exists for a state to conclude that citizens can better grasp than aliens the common law tradition of the necessity for high ethical standards in a lawyer who acts in the dual role of officer of the court and advocate for a client.[44]

In *Examining Board of Engineers v. Flores de Otero*[45] seven Justices[46] again relied on the strict scrutiny test[47] and invalidated a Puerto Rico statute[48] which excluded aliens from private practice as civil engineers.[49] The

33. *Id.* (citations omitted).
34. *Id.* at 642-43.
35. *Id.* at 643.
36. 413 U.S. 717 (1973).
37. Justices Douglas, Brennan, Stewart, White, Marshall, Blackmun, and Powell.
38. 413 U.S. at 721-22.
39. *Id.* at 729.
40. *Id.* at 725.
41. *Id.* at 729.
42. Chief Justice Burger and Justice Rehnquist.
43. 413 U.S. at 730.
44. *Id.* at 733. *See also* Sugarman v. Dougall, 413 U.S. 634, 662-64 (1973) (Rehnquist, J., dissenting). Justice Rehnquist's dissent in *Sugarman* is also applicable to *Griffiths*.
45. 426 U.S. 572 (1976).
46. Chief Justice Burger, and Justices Brennan, Stewart, White, Marshall, Blackmun, and Powell. Justice Stevens took no part in the decision.
47. 426 U.S. at 601-02.
48. Although a Puerto Rico statute was involved, the Court did not resolve the question of whether fifth or fourteenth amendment equal protection was at issue, holding that regardless of which amendment was applicable, the statute was blatantly unconstitutional. *Id.* at 601. An equal protection analysis under the fifth amendment, while similar to one under the fourteenth amendment, may differ from a fourteenth amendment equal protection analysis

majority concluded that the statutory scheme employed was unnecessary and imprecise.[50]

Finally, the case of *Nyquist v. Mauclet*[51] provoked a vigorous dissent when a bare majority of the Court[52] used strict scrutiny[53] to strike down a New York law denying financial assistance for higher education to aliens who had neither applied for not intended to apply for American citizenship.[54] The majority reasserted that classifications based on alienage were inherently suspect and subject to strict scrutiny regardless of whether or not a fundamental right was impaired,[55] and determined that New York's classification was based on alienage since it was aimed solely at aliens and only aliens suffered adversely from it.[56] They then declared the statute unconstitutional on the grounds that it did not further a compelling state interest.[57] The dissent[58] argued, however, that since an alien was free at any time to remove himself from the exclusion by applying for or filing a statement of intent to apply for citizenship, the excluded aliens did not constitute a discrete and insular minority for whom strict scrutiny equal protection was appropriate.[59] In a separate dissenting opinion the Chief Justice further argued that the statute did not deprive aliens of an essential means of economic survival such as the ability to earn a livelihood or eligibility for welfare benefits, thus distinguishing *Nyquist* from previous alienage cases and rendering a rational basis test appropriate.[60]

The line of decisions from *Graham* through *Nyquist* established, albeit in the face of a mounting dissent, the general rule that state imposed classifications based on alienage are suspect and subject to strict scrutiny. Significantly, the Court had not been called upon in these cases to apply the less stringent review which the *Sugarman* opinion indicated would be warranted under certain circumstances. The resolution of the next alienage controversy to come before the Court, however, was to involve the application of the *Sugarman* exception to the general rule.

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because of the different interests of the state and federal governments. *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

49. 426 U.S. at 605-06. Justice Rehnquist, dissenting, would have reached an opposite result on the grounds that neither the fifth nor the fourteenth amendment equal protection guarantees are applicable to Puerto Rico and, alternatively, that the law in question satisfied the criteria of rational basis scrutiny. *Id.* at 606-09.

50. *Id.* at 605-06.

51. 432 U.S. 1 (1977).

52. Justices Blackmun, Brennan, White, Marshall, and Stevens.

53. 432 U.S. at 7-9.

54. *Id.* at 12.

55. *Id.* at 8 n.9.

56. *Id.* at 9.

57. *Id.* at 9-11.

58. Chief Justice Burger and Justices Stewart, Powell, and Rehnquist.

59. 432 U.S. at 19-21. The dissent would have upheld the New York law as satisfying the rational basis test.

60. *Id.* at 12-14. Note the Chief Justice's employment of an "interest" test as opposed to a "classification" test.

II. FOLEY V. CONNELIE

In *Foley v. Connelie* the Court confronted the question of whether a state requirement limiting eligibility for employment as a state trooper to American citizens violated the equal protection guarantee of the fourteenth amendment. The Court divided sharply on the question, with the majority,[61] in an opinion by Mr. Chief Justice Burger, upholding the requirement.[62] The Chief Justice first attempted to distinguish *Foley* from prior cases involving alienage-based classifications by noting that the classifications involved in those earlier decisions had "struck at the non-citizens' ability to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence."[63] In particular, close judicial scrutiny had been exercised when aliens were made ineligible for welfare benefits, excluded from a broad range of public employment and from licensed professions, and denied educational assistance.[64] The Chief Justice stated, however, that the Court had never suggested that legislative restrictions imposed on aliens are "inherently invalid" and that it had never held that "all limitations on aliens are suspect," since the adoption of such a view would have destroyed all distinctions between citizens and aliens.[65]

Elaborating on this statement, the Chief Justice reiterated the principle laid down in *Sugarman* that the states have a constitutional and historic power to preserve their concept of the political community by excluding aliens from participation in their democratic processes.[66] Thus, although the Court extends to aliens "the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens."[67] Accordingly, the Chief

61. Chief Justice Burger and Justices Stewart, White, Powell, and Rehnquist. Justice Blackmun concurred in the result.

62. 98 S. Ct. at 1073, 55 L. Ed. 2d at 295.

63. *Id.* at 1070, 55 L. Ed. 2d at 291. Note the Chief Justice's employment of an interest test as opposed to a classification test, an analysis which he also used in his dissent in *Nyquist*. *See* note 60 *supra* and accompanying text.

64. 98 S. Ct. at 1070, 55 L. Ed. 2d at 291. The Chief Justice's reasoning in this portion of the opinion is questionable. First, the use of an interest analysis focusing, for example, on eligibility for welfare or educational assistance had been rejected by the Court in prior alienage decisions in which it held that classifications based on alienage are inherently suspect and subject to strict scrutiny regardless of whether or not a fundamental right is impaired. *See* Nyquist v. Mauclet, 432 U.S. 1, 8 n.9 (1977); Graham v. Richardson, 403 U.S. 365, 376 (1971). (Eligibility for welfare and educational assistance are not, however, fundamental rights. *See* note 67 *infra*.) Secondly, it is difficult to perceive how Mr. Foley's exclusion from employment as a state trooper struck at his ability to exist in the community any less than the denial of employment to the aliens in *Sugarman, Griffiths,* and *Flores de Otero*. *See* notes 25, 36, 45 *supra* and accompanying text.

65. 98 S. Ct. at 1070, 55 L. Ed. 2d at 291-92. The Court has not, of course, declared restrictions imposed on aliens to be inherently invalid, since a suspect classification occasionally survives the rigors of strict scrutiny. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944). As to whether all alienage-based classifications are or are not suspect, see note 70 *infra*.

66. 98 S. Ct. at 1070, 55 L. Ed. 2d at 292; *see* notes 29, 30 *supra* and accompanying text.

67. 98 S. Ct. at 1071, 55 L. Ed. 2d at 293. The Chief Justice's reference to the "right to education and public welfare" is inconsistent with prior opinions of the Court which have declined to recognize such rights. *See, e.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411

Justice emphasized, "citizenship may be a relevant qualification for fulfilling those 'important nonelective executive, legislative, and judicial positions,' held by 'officers who participate directly in the formulation, execution, or review of broad public policy.' "[68] In establishing citizenship requirements for such positions, a state is acting on matters firmly within its constitutional prerogatives and "need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."[69] To ascertain the appropriateness of this less demanding form of scrutiny in a particular case, the Court would examine the position in question "to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community."[70]

Applying this formula, the Chief Justice found that "[p]olice officers in the ranks do not formulate policy, *per se*, but they are clothed with authority to exercise an almost infinite variety of discretionary powers. The execution of broad powers vested in them affects members of the public significantly and often in the most sensitive areas of daily life."[71] Consequently, he held:

> Police officers very clearly fall within the category of 'important nonelective . . . officers who participate directly in the . . . *execution* . . . of broad public policy.' In the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position. A State may, therefore, consonant with the Constitution, confine the performance of this important public responsibility to citizens of the United

U.S. 1 (1973) (education); Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare). The Court has determined that eligibility for "employment in a major sector of the economy" is an "interest in liberty," the deprivation of which calls for more than minimal scrutiny. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976).

68. 98 S. Ct. at 1071, 55 L. Ed. 2d at 292 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

69. 98 S. Ct. at 1070, 55 L. Ed. 2d at 292.

70. *Id.* at 1071, 55 L. Ed. 2d at 292-93. In this portion of the opinion the Chief Justice relied heavily on Sugarman v. Dougall, 413 U.S. 634, 648 (1973), which stated that the Court's scrutiny would "not be so demanding" when it dealt with "matters resting firmly within a State's constitutional prerogatives." Other language in that opinion, to the effect that statutory schemes excluding aliens from participation in a state's democratic processes "must be precisely drawn in light of the acknowledged purpose," strongly suggests that the *Sugarman* Court had in mind a level of scrutiny which, although reduced, would still be more stringent than the extremely deferential rational basis standard. *Id.* at 643. This suggestion is reinforced by the Court's statement in *Foley* that it intends to examine each position in question to determine whether or not it fits within the *Sugarman* exception. 98 S. Ct. at 1071, 55 L. Ed. 2d at 292-93.

In addition, the *Sugarman* opinion did not expressly state that alienage-based classifications falling within its formula were not suspect. In Justice Marshall's opinion "*Sugarman* may . . . be viewed as defining the circumstances under which laws excluding aliens from state jobs would further a compelling state interest, rather than as defining the circumstances under which lesser scrutiny is applicable." *Id.* at 1074 n.1, 55 L. Ed. 2d at 297 n.1 (Marshall, J., dissenting). The majority in *Foley*, however, rejected this view. *See* note 65 *supra* and accompanying text.

71. 98 S. Ct. at 1071, 55 L. Ed. 2d at 293. To substantiate his finding, the Chief Justice pointed to the police powers of arrest and search. *Id.* at 1071-72, 55 L. Ed. 2d at 293.

States.[72]

Mr. Justice Blackmun, in an opinion concurring in the result, accepted the majority's argument that the lessened degree of scrutiny of the *Sugarman* exception was applicable, and held that "[t]he State may rationally conclude that those who are to execute" the duties of state trooper "should be limited to persons who can be presumed to share in the values of its political community as, for example, those who possess citizenship status."[73] In a brief, candid concurring opinion, Mr. Justice Stewart noted that his agreement with the majority was based on his increasing doubts as to the validity of earlier Burger Court alienage decisions and that it was difficult, if not impossible, to reconcile the holding in *Foley* with those earlier decisions.[74]

Writing for the dissent,[75] Mr. Justice Marshall did not reject the *Sugarman* exception but did reject the majority's finding that the exception is applicable to police officers.[76] In his opinion, Justice Marshall stated: "*Sugarman* cannot be read to mean simply the carrying out of government programs, but rather must be interpreted to include responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature."[77] He argued that "[t]here is a vast difference between the formulation and execution of broad public policy and the application of that policy to specific factual settings," and concluded that police officers, whose conduct is prescribed by the federal and state constitutions, by statutes, and by regulations, perform the latter of the two functions.[78] He further expressed fear that, as applied in *Foley*, the *Sugarman* exception to strict scrutiny of alienage classifications would

72. *Id.* at 1072-73, 55 L. Ed. 2d at 295 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (citation omitted)).

73. 98 S. Ct. at 1073-74, 55 L. Ed. 2d at 295-96. Justice Blackmun wrote the majority opinion in *Sugarman*. *See* note 26 *supra* and accompanying text.

74. 98 S. Ct. at 1073, 55 L. Ed. 2d at 295. Justice Stewart concurred in the majority opinions in *Graham, Sugarman, Griffiths,* and *Flores de Otero*; he dissented in *Nyquist*. *See* notes 20, 26, 37, 46, 58 *supra* and accompanying text.

75. Justices Brennan, Marshall, and Stevens.

76. 98 S. Ct. at 1074, 55 L. Ed. 2d at 297.

77. *Id.* at 1075, 55 L. Ed. 2d at 297.

78. *Id.*, 55 L. Ed. 2d at 297-98. Justice Marshall employed three arguments to substantiate his position. First, he pointed out that his contention that police officers are officials who apply broad public policy to specific factual settings as distinguished from those who formulate and execute broad public policy is consistent with the Court's definition of the scope of immunity afforded under 42 U.S.C. § 1983 (1976). 98 S. Ct. at 1075, 55 L. Ed. 2d at 298 (citing Scheuer v. Rhodes, 416 U.S. 232 (1974)). Secondly, he noted that, although the majority considered the powers of arrest and search accorded to police officers to be significant factors in their holding that such officers execute broad public policy, New York law authorizes any person to make an arrest for any offense committed in that person's presence and to make a search incident to that arrest. 98 S. Ct. at 1075-76, 55 L. Ed. 2d at 298-99 (citing N.Y. CRIM. PROC. LAW § 140.30 (McKinney 1971); United States v. Rosse, 418 F.2d 38 (2d Cir. 1969), *cert. denied*, 397 U.S. 998 (1970); United States v. Viale, 312 F.2d 595 (2d Cir.), *cert. denied*, 373 U.S. 903 (1963)). Thirdly, he pointed out that in *Griffiths* the Court had held that a state could not limit the practice of law to citizens even though it recognized the significant political and public role performed by attorneys, a role, in his view, no less significant than that performed by police officers. 98 S. Ct. at 1076, 55 L. Ed. 2d at 299.

swallow the general rule laid down in *Graham*.[79]

In a separate dissenting opinion, Mr. Justice Stevens[80] argued that the Court had failed to identify the group characteristic that justified the exclusion of aliens from employment as police officers.[81] He believed that the unarticulated reason behind the Court's decision was a fear of disloyalty on the part of aliens.[82] If this were so, he concluded, *Foley* and *Griffiths* were irreconcilable, since disloyal alien lawyers are equally as intolerable as disloyal alien police officers.[83] If, on the other hand, the group characteristic upon which the Court based its decision was that aliens do not participate in the American democratic process, such characterization would explain, but not justify, the discrimination, since police officers are nonpolicymaking officials and their eligibility to participate in the democratic process is irrelevant to their duties.[84]

III. CONCLUSION

The alienage decisions since *Graham* have reflected a mounting tension within the Burger Court as it has struggled to arrive at an equal protection formula that safeguards aliens from invidious state discrimination while preserving the basic constitutional distinctions between citizens and noncitizens. This tension has been particularly evident in the *Griffiths, Nyquist,* and *Foley* opinions. *Foley* clearly marks a qualification of the holding in *Graham* that alienage-based classifications are inherently suspect and subject to strict judicial scrutiny. Under *Foley* state imposed restrictions which exclude noncitizens from the right to govern are not suspect and are subject to a less demanding form of review in accordance with the *Sugarman* exception. The exact nature of this less demanding form of review, however, is unclear. On one hand, it is possible to contend that the *Foley* Court applied the rational relationship test, since the majority spoke in terms of rational basis criteria and arguably gave deferential treatment to New York's statutory classification. On the other hand, it is equally possible to contend that the Court applied an intermediate level of scrutiny. Although the majority did articulate the rational basis formula, their opinion, taken as a whole, indicates that they will defer to a state's legislative pronouncement only after they have determined that each state job from which noncitizens are excluded involves the right to govern. This, in turn, strongly suggests that the Justices will, as they noted in *Sugarman*, require legislation denying state employment to aliens to be precisely drawn. Regardless of which view is more persuasive, the Court's finding that police officers are important nonelective officials who participate directly in the execution of broad public policy constitutes an

79. 98 S. Ct. at 1075, 55 L. Ed. 2d at 297.
80. He was joined by Justice Brennan.
81. 98 S. Ct. at 1078-79, 55 L. Ed. 2d at 302.
82. *Id.* at 1077, 55 L. Ed. 2d at 300.
83. *Id.*
84. *Id.* at 1077-79, 55 L. Ed. 2d at 300-02.