CONSTITUTIONAL LAW—ALIENS—CIVIL SERVICE COMMISSION REGULATION DEMANDING CITIZENSHIP AS A PREREQUISITE TO EMPLOYMENT DEPRIVES RESIDENT ALIENS OF LIBERTY WITHOUT DUE PROCESS OF LAW.

Five resident aliens, who were either denied federal employment or denied an opportunity for such employment because they failed to meet citizenship requirements embodied in applicable regulations[1] brought a class action challenging the employment policies and regulations of the Civil Service Commission and other federal agencies.[2] Plaintiffs argued that (1) the regulation requiring citizenship as a prerequisite to admission to a competitive examination used in hiring employees was inconsistent with certain Executive Orders[3] and that (2) the arbitrary advantage given to citizens over resident aliens offended the due process clause of the fifth amendment.[4] After finding no inconsistencies among the federal provisions, the District Court upheld the constitutionality of the regulation on the grounds that governmental interests existed which were sufficient to justify the exercise of extensive federal power over aliens.[5] The Court of Appeals agreed with the lower court's analysis of the nonconstitutional issues but found the regulation violative of the due process clause of the

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[1] Respondent Kae Chong Lui lost his job with the Postal Service solely because he was not a citizen. Mow Sun Wong, an electrical engineer, was not eligible for a janitor's position for that same reason. Sin Hung Moi, a businessman with 18 years experience in China, could not qualify as a file clerk. A teacher with 15 years experience and a Master's Degree in Education, Francine Lum, was not allowed to take the preparatory steps to become an evaluator of educational programs with HEW. Ann Yu, not joining in the appeal, was not permitted to take a typing exam, a prerequisite for a clerk-typist position. Hampton v. Mow Sun Wong, 426 U.S. 88, 90-92 (1976).

[2] Civil Service Commission regulation, 5 C.F.R. § 338.101 (Supp. 1975) reads:

> (a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.
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> (b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a noncitizen may be given (1) a limited executive assignment under section 305.509 of the chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chapter, unless the appointment is prohibited by statute.

The only persons, other than citizens, who owe permanent allegiance to the United States are noncitizen "nationals." *See* 8 U.S.C. §§ 1101(a)(21), (22), 1408 (1952). The Solicitor General construes this phrase as covering only natives of American Samoa. 426 U.S. at 90 n.1.

[3] Exec. Order No. 11,478, 3 C.F.R. 446 (Supp. 1970), 42 U.S.C.A. § 2000e *note* (1969), forbids discrimination in federal employment on the basis of "national origin." *See also* Public Works Appropriation Act of 1970, 83 Stat. 323, 336-37, (1969), especially section 502. *But see* Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (1976), *infra* note 44. Note that this order was issued after the Supreme Court handed down the *Hampton* decision.

[4] U.S. CONST. amend. V provides: "No person shall be . . . deprived of life, liberty, or property, without the due process of law . . ."

[5] Mow Sun Wong v. Hampton, 333 F. Supp. 527 (N.D. Cal. 1971).

fifth amendment.[6] On *certiorari*, the United States Supreme Court, *held*, affirmed. A Civil Service Commission regulation demanding citizenship as a prerequisite to employment deprives resident aliens of liberty without due process of law and is, therefore, unconstitutional. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

Traditionally the judiciary has taken a deferential attitude toward congressional and executive action where aliens are concerned.[7] This deference stems in large part from a recognition of the broad constitutional grant of authority to Congress to control the naturalization of aliens.[8] Even so, the regulation of aliens is still subject to the limitations on governmental action imposed by the Constitution[9] and *Hampton* is a landmark case in judicial intervention into the federal regulation of aliens to enforce these limitations. The *Hampton* analysis parallels that which is applied by the Court in reviewing cases of state discrimination against aliens, and therefore, warrants a discussion of the reasoning in those cases.

Challenges to state legislation alleging discrimination may be brought under the fourteenth amendment or, more specifically, under the equal protection clause of that amendment.[10] In assessing the validity of such state legislation, the Court in recent cases has employed what has become known as the "new equal protection analysis."[11] Under this approach, the

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[6] Mow Sun Wong v. Hampton, 500 F.2d 1031 (9th Cir. 1971).

[7] *E.g.*, Truax v. Raich, 239 U.S. 33, 42 (1915) finding that "[t]he authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government." *See* Fong Yue Ting v. United States, *infra* note 9.

[8] U.S. CONST. art. I, § 8, cl. 4. "The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization."

[9] *Id. See also* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1892), where the Court held,

> 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* law of the Constitution, to intervene.

Id. (emphasis added).

[10] For example, in Yick Wo v. Hopkins, the Court found the provisions of the fourteenth amendment to be "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . ." 118 U.S. 356, 369 (1885). *See* U.S. CONST. amend. XIV.

[11] *See* Note, *Wandering Between Two Worlds: Employment Discrimination Against Aliens*, 16 VA. J. INT'L L. 355, 361-70 (1976) [hereinafter cited as *Employment Discrimination*].

This note discusses the changing theories behind retricting alien employment, and the constitutional limitation on such restrictions. At first, employment was considered a public resource, and regulations preserving this "special public interest" were subjected to only the most relaxed standards of review under the equal protection clause. The second theory allowed discriminatory statutes on the basis that they were a proper exercise of police power. *See* Sugarman v. Dougall, 413 U.S. 634 (1973) for a discussion and rejection of these theories.

In light of the "equal protection under equal laws" granted to aliens in Yick Wo v. Hopkins,

Court has first inquired whether the enactment involves a "suspect classification"[12] or violates a "fundamental right."[13] If either of these character-

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supra note 10, the Court began to require a showing of a "compelling State interest" to justify the regulation of aliens, rather than supposing a proper legislative purpose to support the enactment as traditionally was done under the minimum rationality test. Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

> This 'more searching judicial inquiry' has become the 'new equal protection' . . . [and] . . . reflects two trends in the Court's jurisprudence under the equal protection clause. First, it evidences the development and expansion of 'fundamental rights' which, when restricted by state action, require 'strict scrutiny' by the Court. Second, the Court will searchingly review state legislation where the statute's classification is constitutionally 'suspect'.

Employment Discrimination, supra at 363. The reviewing court "searches" for a compelling governmental interest which will justify the infringement of the individual's rights. See text accompanying notes 12-13 for further discussion of suspect classifications and fundamental rights.

[12] Justice Stone, in United States v. Carolene Products Co., 304 U.S. 144 n. 4 (1938), gave birth to the heightened review of suspect classifications when he noted: "prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry." Another commentator indicates:

> 'Suspect classification' has never been adequately defined by the Court. It is apparently limited to (1) classes determined solely by birth, and (2) classes which have been historically disadvantaged. Although the Burger Court seems to be retreating from the expansion of suspect classifications of the Warren Court era, the following, at least, seem clearly established: Loving v. Virginia, 388 U.S. 1 (1967) (race); McLaughlin v. Florida, 379 U.S. 184 (1964) (religion and national origin); Graham v. Richardson, 403 U.S. 365 (1971) (alienage).

Employment Discrimination, supra note 11, at 363 n.44. In his dissenting opinion in Sugarman v. Dougall, 413 U.S. 634 (1973), Justice Rehnquist found no support in the Constitution for defining alienage as a suspect classification. He contended that the citizenship clause of the fourteenth amendment was designed to deal with the limited problem of racial questions arising from the *Dred Scott* decision. 413 U.S. at 649 (dissenting opinion).

Commentators have pointed out that aliens may become naturalized citizens and escape blanket discrimination.

Under the new equal protection analysis, a regulation must promote a *compelling governmental interest* in order to justify discrimination by "suspect classification" or the impairment of "fundamental rights." (See note 13 *infra* for a further discussion of fundamental rights.) Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 13 (1972) [hereinafter cited as Gunther].

[13] According to Gunther, *supra* note 12 at 8, "[t]he fundamental interests ingredient of the new equal protection was particularly open-ended." The breadth of the term allowed the courts to avoid the lack of support in the constitutional text and in precedent and to serve the expanding concept of individual rights as the justices were individually inspired.

Certain interests, such as the right to earn a livelihood, have long been recognized. Truax v. Raich, 239 U.S. 33, 41 (1915) stated rather succinctly "that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the *Fourteenth* Amendment to secure" [citations omitted], deciding that the equal protection clause would be made meaningless if the right to work could be denied solely on the grounds of nationality or race.

The rejection of the idea that employment was a "public resource", *see* note 11 *supra*, undermined another avenue to exempt the discrimination from constitutional limitations.

istics was found to exist, the Court has abandoned its traditional practice of presuming that a proper legislative purpose exists behind the statute (known as the *minimum rationality* test). Instead the legislation has been subjected to a "strict judicial scrutiny," demanding a showing of "compelling governmental interest" which justifies the discrimination.[14]

The Court has recently applied the *new equal protection* analysis to state regulations in cases factually similar to the present case but involving only state discrimination.[15] In *Sugarman v. Dougall* the Court found a requirement of citizenship as a prerequisite for employment by the New York Civil Service Commission unconstitutional.[16] The government had argued that aliens working in the Civil Service would endanger the execution and formulation of policy, and that the interest in preserving the political community justified the discrimination.[17] Recognizing that alienage is a suspect classification,[18] the *Sugarman* court applied strict judicial scrutiny and rejected the regulation because it was not sufficiently justified[19] by a governmental interest to remain within the bounds of the Constitution. Thus, the *Sugarman* court decided the case under a suspect classification analysis. The Court also emphasized its duty of protection

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The exercise of the police power, protecting the political community, may justify imposing conditions such as citizenship on public employment; but under the new equal protection analysis these conditions must be justified by the claimed governmental interests. *See* note 11 *supra*.

For a more in depth discussion, *see* Comment, *Aliens and the Civil Service: A Closed Door?*, 61 GEO. L.J. 207 (1972) [hereinafter cited as Comment]. *See also* Fong Yue Ting v. United States, 149 U.S. at 732 (1892) (Brewer, Field and Fuller, J.J. dissenting).

[14] *See* note 11 *supra*, and Gunther, *supra* note 12.

Gunther discusses the mounting discontent with the two-tiered equal protection. He points out the courts' tendencies to eliminate the distinction between strict and minimal scrutiny, asking instead the question of whether an appropriate governmental interest is suitably furthered by the discriminating treatment. *Id.* at 19.

This "newer equal protection" set out by Gunther does not necessarily eradicate the old suspect classifications and the judicial inquiry triggered thereby, but will essentially be a specific application of the standards invoked by all equal protection claims. The move toward the newer equal protection analysis is evidenced by the holding in Sugarman v. Dougall, *infra* note 15, where the court stressed that the governmental *means* employed were not *sufficiently related* to the interest protected. *See* text accompanying note 19 *infra*.

[15] *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); In re Griffiths, 413 U.S. 717 (1973). *See generally* Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012 (1957).

[16] 413 U.S. at 646.

[17] *Id.* at 641.

[18] *Id.* at 642.

[19] *Id.* at 646. "The cumulative impact of *Graham*, *Sugarman*, and *Griffiths* is clear: the states will not be permitted to restrict alien employment unless such employment constitutes participation in the 'basic conception of the political community'." *Employment Discrimination*, *supra* note 11, at 365-66 (footnotes omitted). *See also* Travers, *The Constitutional Status of State and Federal Governmental Discrimination Against Resident Aliens*, 16 HARV. INT'L L.J. 113 (1975).

of aliens "who work for a living in the common occupations of the community,"[20] implying that the requirement curtailed the exercise of an individual's *right to work*.[21]

The plaintiffs in *Hampton v. Mow Sun Wong*, though presenting a case in which the facts were quite similar to *Sugarman*, could not invoke the protection of the fourteenth amendment equal protection clause which expressly deals only with state action, because only federal regulations were involved.[22] They alleged instead the denial of due process of law under the fifth amendment, which applies to federal action but contains no express equal protection clause[23] to support the use of a suspect classification analysis. The Court in *Hampton* declines to imply the same fourteenth amendment equal protection limitation as regards the federal government into the fifth amendment or to extend to a federal regulation the *suspect classification* analysis applied to states.[24] Rather, the Court finds that the enforcement of the regulaton would result in the aliens' ineligibility for employment in a major sector of the economy[25] and that this disadvantage is of "sufficient significance to be characterized as a deprivation of an *interest in liberty*,"[26] requiring due process of law.

Although the Court looks to the due process clause of the fifth amendment as the plaintiffs' protective umbrella, it determines that "the concept of equal justice under law is served by the fifth amendment's guarantee of due process, as well as by the equal protection clause of the fourteenth amendment."[27] Suggesting that the two amendments require the same

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[20] 413 U.S. at 641, citing Truax v. Raich, *supra* note 13.

[21] *See* note 13 *supra*.

[22] The plaintiffs suing the federal Civil Service Commission could not fall within the "any state" language of the fourteenth amendment. Any attack on federal regulation must be through the fifth amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

For the pertinent text of the fifth amendment *see* note 4 *supra*.

[23] *See* note 4 *supra*.

[24] 426 U.S. at 100. *Compare* the Court of Appeals approach in Mow Sun Wong v. Hampton, *supra* note 6.

[25] 426 U.S. at 102. See notes 13 and 19 concerning the right to work.

[26] *Id.* at 102 (emphasis added). *See* Gunther's discussion, *supra* note 12, regarding the Supreme Court's dissatisfaction with the categorization of "suspect classification" and "fundamental rights" and *compare* the *Hampton* court's evasive language of "interest in liberty."

A comparison of the practical application of the equal protection clause of the fourteenth amendment and the due process clause of the fifth will show that traditionally the equal protection clause has been considered a "more explicit safeguard of prohibited unfairness . . . . [b]ut, . . . discrimination may be so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. at 499 (1954). Expanding concepts of liberty, however, allow the court to employ the fifth amendment more freely. Greene v. McElroy, 360 U.S. 474 (1959). *See also* Gunther *supra* note 11, at 8, 37-39. Generally, federal classifications needed only to be reasonable and not meet the more demanding standards of "compelling governmental interest." *Employment Discrimination*, *supra* note 11, at 367-68. *But see* text accompanying notes 27-32 *infra*.

[27] 426 U.S. at 100. *See* Weinberger v. Wisenfield, 420 U.S. 636, 638 n.2 (1975), holding that

type of analysis,[28] the *Hampton* court refers to the alien plaintiffs with language such as "an identifiable and disadvantaged class of persons,"[29] sounding much like the suspect classification language of the new equal protection analysis.[30] The Court's discussion of the aliens' interest in civil service employment as attaining the heights of an "interest in liberty"[31] is reminiscent of descriptions of "fundamental rights," such as those protected under the second prong of the new equal protection scheme.[32]

Paradoxically, while the Court applies much the same analysis to federal action challenged under the due process clause of the fifth amendment as it would have applied to state action under the equal protection clause of the fourteenth amendment, it refuses to take the final step of proclaiming that equal protection is implied in the due process clause of the fifth amendment.[33] By finding that the two amendments are not coextensive, the Court differentiates between the protection afforded the individual against state action and his protection where only the federal government is involved.[34] The Court believes, for example, that there are "overriding national interests which could justify selective federal legislation which would be unacceptable for the States."[35]

Without explaining the differences between the equal protection right expressed in the fourteenth amendment and the "liberty" rights under the due process clause of the fifth amendment, the Court effectively decides the case on the issue of the delegation of authority to regulate aliens.[36] Examining the history of the Civil Service Act and the accompanying legislation,[37] the Court finds that the various Executive Orders did not

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"[w]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of Due Process'." [citation omitted]. *See also* Washington v. Davis, 426 U.S. 229, 242 (1976) holding that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."

[28] Buckley v. Valeo, 96 S. Ct. 612, 670 (1976), citing Weinberger, *supra* note 27, in holding that the "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."

[29] 426 U.S. at 102.

[30] *See* note 12 *supra*.

[31] 426 U.S. at 102. *See* note 26 *supra*.

[32] *See* note 13 *supra*.

[33] 426 U.S. at 100. The appellate court's same treatment of the constitutional issue, Mow Sun Wong v. Hampton, *supra* note 6, at 1040-41, drew some criticism. *See Employment Discrimination*, *supra* note 11, at 370.

[34] 426 U.S. at 100.

[35] *Id.*

[36] *Id.* at 102-05. *See* Greene v. McElroy, 360 U.S. at 506-07 (1959), looking for explicit authorization where due process violations are claimed.

[37] 426 U.S. at 108-09. The *Hampton* court in reviewing the history of the Civil Service Commission determined that it was established by the Pendleton Civil Service Act of 1883. Civil Service Act, 22 Stat. 403 (1883). While this legislation was being debated in the Senate, that body considered and rejected a bill that would have limited Civil Service appointments

direct the Civil Service Commission to require citizenship as a prerequisite.[38] Since there was no express authorization from a proper governing body, the Court then looks for interests within the Civil Service Commission itself which would be reasonably related to the regulation.[39] Finding no justification for the discrimination the Court holds the regulation unconstitutional.[40]

In this summary disposition of the case, the *Hampton* court not only avoided resolving the differences between the protection offered under the fifth and fourteenth amendments,[41] but also left open the question of whether the national interest identified by the Civil Service Commission as a justification for the rule would support a regulation of this kind if bolstered by authorization from the Congress or the President.[42] Early in the opinion, the *Hampton* court hinted at a double standard of review under the fifth amendment, giving discriminatory Congressional and Executive edicts greater latitude than those of a federal agency.[43] A recent Executive Order,[44] virtually identical to the Civil Service regulation over-

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to citizens. Apparently, many Senators assumed that citizenship would be a requirement for employment in the Civil Service. They believed that a regulation by the Commission would be more appropriate than a legislative enactment.

However, in 1938, Congress tried to indirectly impose the citizenship requirement on the Commission by denying compensation to federal employees unless they were citizens or owed allegiance to the United States, were presently employed by the federal government, or were employed only because of a shortage of qualified citizen applicants. Independent Offices Appropriation Bill, 52 Stat. 410, 435 (1938). This standard was substantially relaxed by a series of subsequent enactments.

[38] 426 U.S. at 109-14.

[39] The Civil Service Act, 5 U.S.C. § 3301 (1966) provides:

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

Arguably, citizenship is a proper objective only in reference to "character, knowledge, or ability" as required for employment. *See also* Comment, *supra* note 14, at 210. Exec. Order No. 10,577, § 2.1 provides in part: "(a) The [Civil Service] Commission is authorized to establish standards with respect to citizenship, age, education, training and experience . . . or other requirements which applicants must meet to be admitted to or rated in examinations." 3 C.F.R. 84 (Supp. 1954); 5 U.S.C. § 3301 (1966).

[40] 426 U.S. at 114-16.

[41] *See* notes 33-35 *supra*.

[42] 426 U.S. at 104-05.

[43] *Id.* at 103, stating "if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption." *Compare* this dictum *with* the minimum rationality test of the old equal protection analysis which *presumed* a set of facts to sustain legislation.

[44] Exec. Order No. 11,935, *supra* note 3. This order states:

turned here, will eventually force the Court to expand its dictum and determine whether the President will have to justify his acts by a showing of compelling governmental interests or merely by meeting the traditional *minimum rationality*.[45] Hopefully, the Court, aware that the two-tiered equal protection analysis under the fourteenth amendment has been less than universally satisfactory,[46] will not establish the same confusing approach to "equal protection" or "liberty" questions under the fifth amendment.

If the Court wishes to impose a single judicial test to these two situations, it should first settle the dispute as to the extent of the protection afforded under the due process clause of the fifth amendment. If the violations under the two amendments require the same analysis, then each government, whether state or federal, should be required to justify its discriminatory regulations on the basis of governmental interest. Pressing national concerns may well override individual rights more often than state interests do, but the federal government's enhanced ability to withstand judicial scrutiny does not mean the fifth amendment's protection of individual rights should be less rigorous than that of the fourteenth amendment.

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(a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.

(b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States.

(c) The Commission may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments.

[45] *See* notes 11 and 14 *supra* for a changing analysis under the equal protection clause and note 43 *supra* hinting at the different standard for executive action.

[46] Note 14 *supra*.