

# The Supreme Court and the Rights of Aliens

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The United States has always been "a nation of immigrants." It is quite striking, therefore, to note how little attention the Founding Fathers gave to the subject when preparing the fundamental law of the new nation in 1787. When the framers met to write a constitution, they saw little reason to restrict the relatively small number of Europeans who arrived periodically and contributed the nation's wealth. Moreover, they could not imagine that in a land as large as the United States immigration would ever constitute a problem or a source of concern. The young republic needed to bring people in, not keep them out.

## ABOUT THE AUTHOR

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Statements regarding immigrants appear in Article I in the Constitution. Section 8, clauses 3 and 4, read, in part, that the Congress shall have the power "to regulate commerce with foreign nations, and . to establish an uniform rule of naturalization." Section 9, clause 1, begins, "the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight." The latter section, now obsolete, served to permit the importation of slaves for twenty years after the adoption of the Constitution.

From these brief statements, and from the Supreme Court's assumption of the power to interpret the meaning of the Constitution in *Marbury v. Madison* (1803), there has developed an elaborate body of immigration law which gives Congress practically unlimited authority to decide who may enter the United States and under what conditions they may remain. In that land that proudly proclaims its immigrant heritage, the Supreme Court, over the years, has consistently allowed Congress and the executive branch of the federal government the right to admit, exclude or banish non-citizens on any basis they chose including race, sex, and ideology. As Justice John Paul Stevens put it in 1976, "in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." (*Matthews v. Diaz* (1976)). Although virtually any regulations in regard to immigrants and aliens have been tolerated if made by the federal government, similar activities by state governments have been carefully scrutinized, and frequently rejected, by different majorities of the Supreme Court.

The two categories of foreigners-immigrants and aliens-are not interchangeable. Immigrants are people who enter the United States legally indicate that they plan to spend a considerable amount of time in this country. They can become citizens through the process of naturalization, a series of steps prescribed by Congress, including residence requirements, examinations, and loyalty oaths. Citizens have rights under the Constitution not accorded to non-citizens. Thus, once immigrants achieve citizenship, they receive additional constitutional protections, although not necessarily the identical safeguards of people born in this country. For example, naturalized immigrants may be stripped of their citizenship and deported to their native country for certain crimes. Aliens include immigrants as well as others who enter the United States legally or otherwise, who work, study, or visit for a specified or indeterminate period of time, or who accompany people so engaged. They are, by definition, not citizens of the United States and therefore do not have the same constitutional protections as citizens. The Supreme Court is often called upon to determine exactly which constitutional protections noncitizens do have. In this article,- we will deal only with the rights of aliens, that is, non-citizens.

The Supreme Court justices handle several categories of immigrants and aliens. They decide whether established federal and state laws and policies are constitutional and within the province of either law-maker or administrator to carry out. Many times, however, the justices refrain from indicating their personal views of the reasonableness or appropriateness of any given action, arguing - that it is not within their purview to do so as long as a constitutional basis exists for the decision and there is a compelling government interest for the action. Although the court has shown great

deference to Congress in this area of law, still citizens and aliens alike have access to a judicial system that tries to keep governmental actions within the bounds of our constitutional framework.

Immigration did not loom as a major constitutional issue during the first century of the federal government. To be sure, laws concerning naturalization were passed in 1790 and 1795, and fear of the "radical" French in our midst led Congress, in 1798, to authorize President John Adams to deport any foreigners found guilty of seditious activities. Adams never used the authority granted to him, which expired in 1800, and the fear of foreigners soon abated. Aside from these bills, however, Congress merely required that accurate statistics of grant arrivals be recorded-and customs officials began doing so in 1820.

In the 1830s and 1840s, a large surge of Irish refugees escaping the potato famine at home descended upon American shores. New York State and Massachusetts tried to limit immigration by passing laws regulating and taxing passenger shipping companies. In both 1849 (the *Passenger Cases*) and 1876 (*Henderson v. New York*) the Supreme Court rejected these attempts. In the latter case, Justice Samuel F. Miller declared that the regulation of immigration was the exclusive right of Congress, and he particularly emphasized that "whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall."

## Congress and the Rights of Aliens, 1882-1921

The *Henderson* decision came at a time when several states were beginning to show alarm about their alien residents. California, in particular, suffered several years of severe economic depression, which bred resentment on the part of Caucasians about the Chinese in the state who worked for low wages. A working class movement led by Dennis Kearney demanded that "The Chinese Must Go!" and, surprisingly, people from all over the cot enthusiastically endorsed this sentiment. Congress responded with the Chinese Exclusion Act of 1882, which proved to be the first of many laws during the next forty-two years that restricted the opportunities of foreigners who wished to settle in this country.

The United States Supreme Court, an institution not oblivious to the political ramifications of its decisions, responded to the first of the immigration restriction laws in a way agreeable both to the public and the Congress. It upheld Congress' right to decide which aliens might be admitted to the United States and under what conditions they might remain. In a series of cases over the next two decades, Court decisions so strengthened Congress, unlimited powers in admission or exclusion of foreigners that subsequent blocs of justices merely enhanced and reinforced those early judgments. Thus the judicial interpretation of the Exclusion Act has dictated the substance of immigration regulation to the present day.

The justices did not rule on the validity of the Chinese Exclusion Act until 1889. Chae Chan Ping, a Chinese laborer, had lived in San Francisco from 1875 until June, 1887 when he returned to China to visit relatives. Before leaving the United States he had obtained a certificate which guaranteed that he would be readmitted to the country. Yet, when Chae returned on October 8, 1888, the customs officer refused him entry because Congress had passed an amendment to the Chinese Exclusion Act of 1882 (which originally suspended immigration of Chinese laborers to the United States for a ten-year period) annulling reentry certificates after October 1, 1888. Therefore Chae's right to be readmitted had been cancelled seven days before his return. He appealed to the courts and his attorney argued that although Congress could restrict immigration, Chae had a "vested right" to be readmitted. In addition, the lawyer claimed that the amendment barring reentry of laborers who had left the country temporarily constituted an *ex post facto* bill which was *ipso facto* unconstitutional.

Still, after the Court heard the arguments, it deferred to the will of Congress. Justice Stephen Field, stated that the act in question was passed because customs officials had discovered that certificates of reentry had been exchanged and that newly arrived immigrants carried fraudulent documents. He

also affirmed Congress' right to revoke permission for foreigners to remain in this country whenever it wished to do so. Speaking for the Court, Field said:

*That the government of the United States . can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.*

**Chinese Exclusion Cases,  
130 U.S. 581. 603-604 (1889)**

A second case, *Fong Yue Ting v. United States* (1893), confirmed the right of the Congress to treat aliens as it wished. It became the constitutional bedrock for all subsequent questions as to Congress' rights in regard to immigrants and aliens. Fong and two other Chinese men were arrested for violating provisions of the 1892 amendments to the Chinese Exclusion Act. The extension not only continued to bar Chinese laborers from American shores but required those already in the United States to obtain a certificate of residence from an internal revenue officer stating that they were legally entitled to be here. A person of Chinese ancestry caught without such certification was to be deported by a federal judge unless he could prove with the aid of "at least one credible white witness" that he was a resident of the United States at the time of the passage of the law and that he had, for a valid reason, been unable to obtain the required document. Fong Yue Ting, though a permanent resident of New York City since 1879, had never bothered to register and was arrested. Justice Horace Gray, summarizing for the Court, noted that another defendant who tried to get the necessary certificate could not do so because "the witnesses whom he produced to prove that he was entitled to the certificate were persons of the Chinese race and not credible witnesses."

Justice Gray continued:

*Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides.*

**Fong Yue Ting v. United States,  
149 U.S. 698, 714 (1893)**

A 6-3 majority had rejected the petitioners' case. In substance, the majority declared that aliens remained "subject to the power of Congress to expel them, or to order them to be removed and deported from the country whenever in its judgment their removal is necessary or expedient for the public interest."

The decision led to blistering dissents from Justices David J. Brewer and Stephen Field that still make a compelling argument. Brewer denied that there existed any unrestrained constitutional power to banish resident aliens since in the Constitution "the power to remove resident aliens is confessedly not expressed." In addition, the statute of 1892 specifically stipulated the conditions under the Chinese might be "arrested and, without punished by banishment." This, Brewer declared, constituted a deprivation of liberty without due process of law. He also observed:

*It is true this statute is directed against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised tomorrow against other classes a other people?*

**Fong Yue ting v. United States,  
149 U.S. 698, 743 (1893)**

Justice Field developed the constitutional points even further:

*If aliens had no rights under the Constitution, they might not only be banished, but even capitally punished without a jury or the other incidents to a fair trial. But, so far has a contrary principle been carried, in every part of the United States, that, except on charges,*

*of treason, an alien has, besides all the common privileges, the special one of being tried by a jury of which one-half may also be aliens.*

**Fong Yue Ting v. United States,  
149 U.S. 698, 746 (1893)**

Later Courts have consistently reaffirmed the majority viewpoint in *Fong* that Congress has absolute discretion in deciding whom to admit, and whom to ban from, this country. And as if to underscore the confidence that the majority had in its position, three years later Justice George Shiras, Jr., reiterated:

*No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein.*

**Wong Wing v. United States,  
163 U.S. 228, 237 (1896)**

Although some rulings of the Supreme Court seem inhumane, a majority of the justices repeatedly allowed Congress and the executive branch, acting on powers delegated to it by the federal legislature, considerable independent authority. Such complete judicial acceptance is unusual but in this field of litigation the Court has been consistent. No more arbitrary example may be given than *The Japanese Immigrant Case* in which Kaoru Yamataya, who could speak no English, was detained at port because the customs officer thought she might be a pauper with no means of visible support. In what seems like shocking and unethical behavior, the customs officer deceived the helpless woman. Her attorney described her experience in this way:

*Here is a person found dwelling within the United States; she is arrested and imprisoned by a ministerial officer; she is not permitted to see her friends or to consult with her attorneys; she is unable to speak or understand our language, and is ignorant of the cause of her imprisonment, and ignorant of the fact that any investigation is being made concerning her right to liberty. The officer does not give her any notice of the proceedings nor any opportunity to be heard, but goes about secretly collecting evidence against her, considering only such evidence as when unexplained will suit his purpose. He takes advantage of her ignorance of our language and makes her give unintentional answers to questions which she does not understand. He states that he is holding her to appear as a witness in a criminal case against another party, thus deceiving her attorneys as to his intention. As the result of the investigation made by this ministerial officer in his combined capacity of prosecutor, judge and jury, he makes a finding against the appellant.*

**The Japanese Immigrant Case,  
189 U.S. 186, 90-91 (1903)**

Acknowledging the veracity of the attorney's brief, Justice John Marshall Harlan nevertheless declared that "these considerations cannot justify the intervention of the courts."

Harlan's decision not only upheld congressional authority but reflected, as well, the growing American concern with the numbers of aliens arriving in this country. To be sure, in the early twentieth century most of the foreigners came from Southern and Eastern Europe and much of the opposition to immigration centered upon them. Nevertheless, Asians loomed as a major problem in the minds of West Coast and other racists, who were numerous and influential. Thus Congress once again revised its naturalization statutes in 1917 granting the opportunity of applying for citizenship only to free white persons and those of African ancestry. (Most Asians had already been barred by earlier legislation.) Then in two cases, *Ozawa v. U.S.* (1922) and *U.S. v. Bhagat Singh Thind* (1923), the Court ruled that neither Japanese nor Hindus of full Indian blood were caucasians and hence those people were ineligible for citizenship.

The decade beginning with American entry into World War I proved particularly harsh for all nonwhite, non-Anglo-Saxon, and non-Protestants in the United States. "Americanism" came to mean

the elimination of foreigners, foreign ideologies, and foreign characteristics and gave rise to, among others, the passage of the Espionage and Sedition Acts in 1917 and 1918, respectively, which made almost any criticism of the war or war effort a crime. The bills were repealed in 1920 but the new statute still allowed for the banishment of undesirable aliens. The Secretary of Labor then ordered the deportation of foreigners convicted of violating the Espionage and Sedition Acts even though the two laws had been discarded. For the Court, Chief Justice William Howard Taft upheld the Secretary of Labor's interpretation of his responsibilities:

*Congress . . . was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society.*

**Mahler v. Eby,  
264 U.S. 32, 39 (1924)**

Anxiety about the number and quality of aliens in the United States had been continually iced since the end of the nineteenth century. Congress responded to these concerns by passing series of restrictive immigration acts depriving entry to anarchists, criminals, people with certain diseases, some Asians, and illiterates. But in 1921 a more stringent bill limited newcomers to 3 percent of their national total in the United States in 1910; subsequent legislation in 1924 narrowed opportunities further by stipulating 2 percent, moving the base year back to 1890 which was before most of the Southern and Eastern Europeans had arrived, and barring the entry of Asians altogether. This legislation gave an unambiguous preference to immigrants of Northern European descent and discriminated particularly against Jews, Slavs, and Italians. With Congress so clear about its intentions, there was no further need for the Court to get involved again with federal policies towards immigrants until the emergence of the "Red Scare" after World War II.

## State Laws and the Rights of Aliens

The Supreme Court, which always went along with Congress' authority to set conditions for entry into the United States or banishment from it, originally prohibited states from putting non-citizens at a legal disadvantage. States often wanted to give greater protection to citizens than to aliens and, at first, the Court was quite definite in proclaiming that they could not do so. Later, it retreated from this position.

In 1880 San Francisco's Board of Supervisors passed a regulation requiring special permission for individuals to operate laundries in the city. At the time 240 of the 320 laundries were owned and operated by people of Chinese ancestry. As additional individuals began applying for these licenses, the Board of Supervisors turned down the petitions of more than two hundred Chinese persons but quickly granted the requisite permission to eighty non-Chinese applicants. Yick Wo, an alien resident in California for 22 years, took legal action to receive one of the licenses, and his case eventually reached the Supreme Court. Justice Stanley Matthews, in what has become the bedrock opinion granting equal protection of the laws to non-citizens, supported Yick Wo and denounced the administration of the San Francisco ordinance. The Supreme Court thereby established the principle that the Fourteenth Amendment to the Constitution requires states to grant equal protection of the laws to all persons "without regard to any differences of race, of color, or of nationality." Matthews asserted:

*Though the law itself be fair on its face and impractical in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances then this constitutes denial of equal justice.*

**Yick Wo v. Hopkins,  
118 U.S. 356, 373-374 (1885)**

Almost thirty years later, an Arizona statute blatantly discriminated against foreigners in their choice of employment and once again the Supreme Court stood firm. The law called for 80 percent of all workers in any company, corporation, or business to be either qualified electors or native born citizens. As a result of this act, Mike Raich, a citizen of Austria employed as a cook in a Bisbee restaurant, lost his job because 70 percent of the employees there were foreigners. He sued his employer, William Truax, for reinstatement and the case went up to the Supreme Court. Justice Charles Evans Hughes, for the majority, declared state might "deny its lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." He then pointed out:

*The authority to control immigration-to admit or exclude aliens-is vested solely in the federal government. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And if such a policy were permissible, the practical result would be that those lawfully admitted to the county under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.*

**Truax v. Reich,  
239 U.S. 33, 42 (1915)**

But the reasoning that guided the Court in *Yick Wo* and *Truax* flickered on an otherwise bleak landscape. In the early twentieth century the Court recognized that some special public interest might exist to modify this broad policy of employment. Thus in *Atkins v. Kansas* (1903), decided a decade before *Truax*, and *Heim v. McCall* (1915), decided a year after the Arizona case, the Justices allowed that states might give preference to citizens for employment in public works.

Then, in the rabidly anti-alien decade of the 1920s, the justices sanctioned a Cincinnati ordinance barring non-citizens from operating pool rooms and billiard parlors. In presenting the city's case, the Cincinnati attorney's description of these places of recreation was so vile that one wonders why the city government did not outlaw them altogether. The majority opinion summarized his argument:

*Billiard and pool rooms in the City of Cincinnati are meeting places of idle and vicious persons; . . . they are frequented by lawbreakers and other undesirable persons, and contribute to juvenile delinquency; . . . numerous crimes and offenses have been committed in them and consequently they require strict police surveillance; . . . non-citizens as a class 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, and that the ordinance is a police regulation passed in the interest of and for the benefit of the public.*

**Clarke v. Deckenbach,  
274 U.S. 392, 304 (1927)**

Court majority, while acknowledging the Fourth Amendments prohibition against "irrational discrimination against aliens," nonetheless continued:

*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 permanent classification.*

**Clarke v. Deckenbach,  
274 U.S. 392, 396 (1927)**

Since the justices were willing to approve different treatment for citizens and aliens based on classifications affected with a public interest, and since they acknowledged that local authorities knew more about conditions in their own communities than did the justices in Washington, the Supreme Court upheld the Cincinnati pool room ordinance. Reasoning of this kind also allowed

states deny aliens hunting and fishing licenses as well practicing in professions such as law and medicine.

But twenty-one years after *Clarke*, in the more liberal post-World War II atmosphere toward immigrants and minorities, the Court ostensibly put an end to several blatantly prejudicial state statutes. One case concerned the issuance of fishing licenses to "aliens ineligible for citizenship." Prior 1943, California granted fishing licenses to any qualified person; after the Japanese Americans had been relocated inland during World War II, the California Fish and Game Commission adopted a proviso prohibiting the issuance of licenses to "alien Japanese." Two years later, in 1945, the stipulation changed to "persons ineligible for citizenship," although people of Japanese ancestry were obviously the target. When the case reached the Supreme Court, the state argued that the prohibition was basically a fish conservation measure; Justices Frank Murphy and Wiley Rutledge demolished that argument with the observation that the amendment in question came out of a legislative committee concerned with Japanese resettlement problems, not one interested in fish. But Justice Black, for the Court, succinctly argued:

*It does not follow, as California seems to argue, that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living.*

**Takahashi v. Fish and Game Commission,  
334 U.S. 410, 418-419 (1948)**

That decision defeated the last attempt of any state to bar Asians from lawfully engaging in vocations for which they possessed the necessary skills and qualifications.

The only area in which the Supreme Co had consistently upheld state discrimination against immigrants regarded restrictions against foreigners owning land. As early as 1879, the Supreme Court acknowledged that "by common law, an alien cannot acquire real property" (*Phillips v. Moore*), and this dictum was repeated several times thereafter. In 1913 California, in one of its periodic crests of anti-Asian feelings, passed a law forbidding "aliens ineligible for citizenship". (i.e. Asians) from acquiring agricultural lands. Many Japanese immigrants evaded this law by buying property for their American-born children and either acting as custodians themselves or hiring non-Asian Americans to manage their children's holdings.

Fred Oyama was born in California in 1928. His father started buying land for him in the 1930s and during the child's minority the elder Oyama served as guardian. In 1942 the federal government evacuated all Japanese persons and Americans of Japanese descent on the West Coast and shipped them to inland relocation centers. While the Oyamas were in one of these centers, the state of California filed a petition with the courts claiming that the elder Oyama had deliberately tried to evade the state's Alien Land Laws by purchasing agricultural grounds in his son's name. The California courts agreed and allowed the state to confiscate Fred Oyama's property. After the Japanese internment ended, Oyama sued to regain his son's property and the case reached the Supreme Court. Chief Justice Fred Vinson delivered the Court's verdict:

*In our view of the case, the State has discriminated against Fred Oyama; the discrimination is based solely on his parents' country of origin; and there is absent the compelling justification which would be needed to sustain discrimination of that nature.*

He then went on:

*Fred Oyama. faced at the outset the necessity of overcoming a statutory presumption that conveyances financed by his father and recorded in Fred's name were not gifts at all . Fred was assumed to hold title for the benefit of his parent.*

**Oyama v. California,  
332 U.S. 633, 640, 641 (1948)**

Although the majority of the court was not quite willing to overturn the legality of California's Land Law (which Congress made unnecessary in 1952 when it granted people of Japanese ancestry the right to become citizens), Justices Murphy and Rutledge called the statute "nothing more than an outright racial discrimination."

## Congress and the Rights of Aliens in the Post-War Era

The Oyama case showed how far both the justices and society had come since the 1920s when both the Court and Americans in general were eager to justify circumscribing the rights of aliens. To a certain extent, the changed atmosphere reflected the liberal views of Justices Hugo Black, William O. Douglas, Frank Murphy, and Wiley Rutledge, whom President Franklin D. Roosevelt had appointed to the bench. But Roosevelt's successor, Harry S. Truman, also cared about the welfare of immigrants and aliens- even if his own Court appointees did not always seem equally concerned- and the temper of the United States was undergoing change. The wartime experiences of many adults contributed to the new climate of opinion. The managing editor of *Yank*, a World War II army publication, wrote in 1945 that many the soldiers that he had known, especially those had served overseas, were conscious of the that changes had to take place in, this country, especially "the need for wiping out racial and religious discrimination." Against the rigidity of the restrictive immigration legislation of the 1920s, one contrast the War Brides Act of 1946 and the Displaced Persons Acts of 1948 and 1950 brought more than 400,000 foreigners to this country-before Truman's tenure in the White House ended in 1953. The Truman era also saw the Court void restrictive housing covenants (*Shelley v. Kraemer (1948)*), and whittle away at separate-but-equal educational facilities (*McLaurin v. Oklahoma State Regents (1950)*), and (*Sweat v. Painter (1950)*).

Yet, despite the greater concern for minorities and immigrants, a wave of paranoia enveloped the country as the "Red Scare"-fear of Communist subversion and encroachment-dominated the political atmosphere. And in this context, the Court was once again called upon to adjudicate Congress' right to banish aliens from our, midst with what possibly might have been insufficient justification. Between 1950 and 1952, three cases came before the Supreme Court in which aliens who married United States citizens or lived and sired families in the United States were prohibited entry or re-entry into this country on the basis of secretly-obtained evidence that their presence might be detrimental to the nation's welfare. From the information. that became public, it appears that the fear of communism and its potential influence in this country proved decisive. A majority of the justices, although only a bare majority, maintained that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." (*Knauff v. Shaughnessy (1950)*). All three aliens lost their cases.

Public fear of communism subsided during the next decade but not before Congress passed the McCarran-Walter Immigration Act in 1952. Although the bill continued most of the major restrictions of its 1924 predecessor, it did break new ground by giving all nations of the world minimum immigration quotas of 100 persons per year, by ending the ban against Asians becoming immigrants and citizens, and by permitting aliens already in the country, particularly the Japanese, the opportunity, of applying for citizenship according to established procedures.

During the next decade, under the presidency of Lyndon B. Johnson, Americans witnessed the passage in 1965 of the most liberal immigration bill of the twentieth century. All national quotas were replaced with provisions emphasizing family unification and job needs in the United States; limits of 20,000 emigrants per year from any one country were instituted. The altered stipulations paved the way for more Asians and Southern and Eastern Europeans to enter the United States.

This new spirit of tolerance and welcome pervaded the American scene and once again the Supreme Court seemed to respond to the political atmosphere. Thus when Arizona and Pennsylvania tried to discriminate against aliens in the distribution of welfare benefits, the Court struck those laws from

the books. Justice Harry Blackmun, for the majority, reemphasized that all persons were entitled to, equal protection of the laws under the Fourteenth Amendment. He noted:

*Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority . for whom much heightened judicial solitude is appropriate.*

**Graham v. Richardson,  
403 U.S. 365, 371 (1971)**

Two years later, continuing the emphasis of *Graham*, the Court refused to approve a New York state law which required all civil service positions to be filled by citizens (*Sugarman v. Dougall* (1973)) and threw out a Connecticut statute which barred aliens from practicing law (*In Re Griffiths* (1973)).

In the 1970s, however, the liberality of the 1960s began to be overtaken by more conservative sentiments as demonstrated by more conservative appointments to the Court (Warren Burger, C. J., Harry Blackmun, Lewis Powell, and William Rehnquist). Thus, looking at the Supreme Court's decisions of the 1970s is like watching a tennis game. Sometimes the justices were at one end of the spectrum, displaying the liberal spirit of the 1960s (as in cases like *Graham v. Richardson* and *Sugarman v. Dugall* above), while at other times the Supreme Court seemed almost like a throwback to the conservative Taft Court of the 1920s.

Both liberal and conservative justices, of course, still allowed Congress and the executive absolute authority to determine who might legally enter the United States and what benefits they were entitled to. Thus a more conservative majority upheld the State Department's right to ban foreign visitors for ideological reasons, sustained Congress' decision to deny federal civil service jobs and coverage under federal Medicare programs to aliens, and refused to disallow a congressional policy which permitted illegitimate children of female, but not male, citizens entry into this country. In supporting this type of sexist discrimination, in *Fiallo v. Bell* (1977), Justice Powell relied on previous Supreme Court decisions which "repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."

On the state level, moreover, the Court decisions also began to reflect the temper of Nixon's appointees. States were told how separate laws regarding citizens and aliens might be sanctioned: "The State need only justify its classifications by a showing of some rational relationship between the interest sought to be protected and the limiting classification." Thus a New York law requiring state troopers to be citizens (*Foley v. Connellie* (1978)) was approved as well as a California statute requiring the same of "peace officers" (*Cabal v. Chavez-Salido* (1982)). Chief Justice Warren Burger explained the rationale for the majority's position in these words:

*The essence of our holdings to date is that although we extend 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.*

**Foley v. Connellie,  
435 U.S. 291, 297 (1978)**

The nature of the most recent decisions in regard to aliens suggests that the Court will still sanction just about anything Congress and the executive choose to do with them. A double standard has been set, however, about how the states may act. On the one hand, they are supposed to grant equal protection to non-citizens; but, if they can show a legitimate public interest for classifying aliens on a different basis, the Court will entertain these categories on a case-by-case basis. In *Plyler v. Doe* (1982), concerning a state's paying to educate children of undocumented aliens, Justice William J. Brennan reiterated for a narrow 5-4 majority the necessity of granting minors equal protection of the laws. But a powerful minority composed of Justices Burger, William Rehnquist, Byron White, and Sandra Day O'Connor dissented. *Plyler* presented several complex issues which limitations of space prevent us from dealing with here, but it is important to note that

any future change in the Court's personnel might be sufficient to erode some established positions concerning the rights of aliens, tilting the Court in a different direction.

The Supreme Court has frequently been criticized for subjecting the rights of citizens to the prevailing political temper of the government and the predilections of the sitting justices. This criticism is even more true of Supreme Court decisions regarding the rights of aliens at the hands of the states. The equal protection clauses of the Fifth and Fourteenth Amendments do not apply to aliens except in those specific areas where Congress and/or the Supreme Court have specified that they do. And, as Peter Schuck wrote in a 1984 *Columbia Law Review* article, in the field of immigration law, "government authority is at the zenith, and individual entitlement is at the nadir."

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### Notes:

The two best articles on immigrants and the Supreme Court are Peter H. Schuck, "The Transformation of Immigration Law," 84 *Columbia Law Review* 1 (1984), and "Developments in the Law-Immigration Policy and the Rights of Aliens," 96 *Harvard Law Review* 1286 (1983). Since 1975, the *San Diego Law Journal* has devoted one issue a year to immigration policy. A brief history of American immigration is Leonard Dinnerstein and David M. Reimers', *Ethnic Americans* (2<sup>nd</sup> edition; New York: Harper and Row, 1982). The most recent analysis of third world immigration to the United States since 1945 is David M. Reimers, *Still The Golden Door* (New York: Columbia University Press, 1985).

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