DISCRIMINATION AGAINST ALIENS IN FEDERAL PUBLIC EMPLOYMENT

In *Wong v. Hampton*[1] the United States Court of Appeals for the Ninth Circuit recently declared that 5 C.F.R. section 338.101 of the United States Civil Service Commission (hereinafter referred to as Commission) unreasonably discriminates against aliens when based solely on their status as aliens.[2] The regulation states:

(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.

(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States.[3]

The regulation thus restricts aliens from taking the civil service qualifying examinations. Because these examinations are a prerequisite to a great majority of civil service jobs,[4] aliens are

1. Decided on January 25, 1974 as OPINION No. 72-1079. *Wong* has been granted *certiorari* to the United States Supreme Court. 42 U.S.L.W. 3678, June 10, 1974. The Supreme Court case is now cited as Hampton v. Wong.

A recent case, Jalil v. Hampton, 460 F.2d 923 (D.C. Cir. 1972), raised similar issues to those in *Wong*. *Jalil* challenged the validity of both the Civil Service Commission's regulations, *see* text accompanying note 3 *infra*, and the statutory prohibition on the use of appropriated funds to pay aliens employed by the Government. The court remanded *Jalil* to decide the non-constitutional questions of whether either the President or the Commission acted without authority. There were no findings of fact concerning the above questions in the trial court's order. On appeal, the Supreme Court *denied certiorari*, 409 U.S. 887 (1972).

2. Unless otherwise specified, the term "alien" is in reference to legal permanent resident aliens, 8 U.S.C. § 1101(a)(20) (1970), who, as the United States Immigration and Naturalization Service has adjudged, are entitled to become United States citizens after a period of five years. The terms "alien" and "noncitizen" will be used interchangeably throughout the article.

With some exceptions, an alien, after receiving his legal permanent resident papers, is required to reside in the United States continuously for five years after lawful entry and for the last six months of that period in the state where naturalization is petitioned for. By continuously, it is meant physical presence in the United States for 2½ years. 8 U.S.C. § 1427(a) (1970). Absences from the United States of more than one year break the continuity of residence. In the case of spouses of American citizens, the required residence is reduced to three years provided that the applicant has been living during the three years with his spouse who has been a citizen during that period. The physical presence required in this case is 1½ years. Once he is naturalized, the alien becomes a citizen and the regulation no longer applies, thus he would qualify on the same terms as all other citizens. Requirements needed for naturalization can be found in the following sections: 8 U.S.C. §§ 1423, 1427, 1429 (1970).

3. It should be noted that the phrase "owes permanent allegiance to the United States" refers only to natives of American Samoa. U.S. Civil Service Commission, FEDERAL PERSONNEL MANUAL, Installment No. 124, ch. 338, subch. 1, 1-1(a) (1969).

4. It is a general rule that all civilian positions in the Executive Branch of

virtually excluded from employment in this area.[5]

At the district court level,[6] Wong sought a declaratory judgment invalidating the regulation and injunctive relief preventing the Commission from enforcing the regulation. Wong alleged on constitutional grounds that the regulation contravened the Due Process Clause of the Fifth Amendment, and on non-constitutional grounds that it violated Executive Order No. 11478,[7] and was in conflict with section 502 of the Public Works Appropriation Act.[8]

The district court held that the regulation does not violate The Executive Order. It reasoned that the term "national origin"[9] as used in the Order does not apply to discrimination toward aliens but refers only to discrimination between United States citizens.[10]

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the Federal Government are in the competitive area of the civil service. Aliens are not, however, excluded from competing for overseas positions, even in the Executive Branch. U.S. Civil Service Commission, FEDERAL PERSONNEL MANUAL, Ch. 212, subch. 1, 1-2(b) (1969). Recent statistics show that total civilian employment in the civil service as of April, 1974, was 2,851,576, and of this number 2,807,405 were employed in the Executive Branch. FEDERAL CIVILIAN MANPOWER STATISTICS, MONTHLY RELEASE, June, 1974. Thus, even including the overseas positions from which aliens are not disqualified from, aliens are excluded from approximately 98% of the available positions in the civil service.

5. In the absence of qualified citizens "a noncitizen may be given a limited executive assignment" for a maximum of 5 continuous years if "the agency establishes an unusual need for urgent staffing," 5 C.F.R. §§ 305.509, 338.101(b) (1974). Moreover, the Commission may authorize an agency to appoint a noncitizen without taking the qualifying competitive examination if "qualified persons are so rare, that in the interest of good civil service administration the position cannot be filled through open competitive examination," if there is no disqualifying statute. 5 C.F.R. §§ 316.601, 338.101(b) (1974). As for civil service positions overseas, noncitizens may be recruited and appointed without regard to the Civil Service Act.

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

7. This Executive Order relates to freedom from job discrimination within the federal government. Executive Order No. 11478, 34 Fed. Reg. 12985 (1969) provides in part:

> EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT
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> It has long been the policy of the United States government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin . . . .

8. This Act refers to compensation of employees of the government. The Public Works Appropriation Act, 1970, Pub. L. No. 91-144, 83 Stat. 323, 336 (Dec. 11, 1969), provides in Part:

> Sec. 502. Unless otherwise specified and during the current fiscal year, no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . whose post of duty is in continental United States unless such person (1) is a citizen of the United States . . . (4) is an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residence. . . . Provided further. . . . This section shall not apply to citizens of the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment of translators, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies.

9. Wong had argued that since the Federal Government could not discriminate on the basis of national origin, the Government was prohibited from discriminating on the basis of citizenship.

10. 333 F. Supp. at 530.

The court also saw no conflict between the Appropriation Act and the regulation because the Act merely sets forth those categories of persons who may be paid for their work as federal employees and does not require that persons in those categories be eligible for competitive civil service positions.[11]

In rejecting Wong's due process arguments,[12] the district court conceded that they were not frivolous, but found them less persuasive than the non-constitutional arguments it also rejected.[13]

On appeal to the Ninth Circuit, Wong argued both constitutional and non-constitutional grounds. The Court of Appeals upheld the district court in regard to the non-constitutional issues but reversed the district court's holding with respect to its constitutional conclusions.

This comment will first consider a brief analysis of the historical development of Supreme Court involvement with the rights of aliens in the field of employment, and then some of the constitutional and non-constitutional issues radiating from the *Wong* decision.

I. SUPREME COURT DECISIONS

The Supreme Court first addressed the question of discrimination against aliens in the field of employment in *Yick Wo v. Hopkins*.[14] The Court in *Yick Wo* invalidated a municipal ordinance regulating the operation of laundries. It did so on the ground that the ordinance was discriminatorily enforced against Chinese operators and thus a violation of Yick Wo's equal protection rights under the Fourteenth Amendment. The Court held that a lawfully admitted resident alien is a "person" within the meaning of the Fourteenth Amendment and that a State must not "deny to any person within its jurisdiction the equal protection of the laws."[15] Subsequent to *Yick Wo*, the Court in *Truax v. Raich*[16] overturned an Arizona statute limiting alien employment. It required all employers of five or more employees to hire not less than 80% qualified electors or native-born citizens. Alien employment was thus held to 20% or less. As stated by Mr. Justice Hughes:

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11. *Id.* at 531.
12. Wong contended that 5 C.F.R. § 338.101 in differentiating between citizens and non-citizens was inherently suspect and thus must be subjected to the strict scrutiny of the "compelling interest" test. The district court concluded that Congress' plenary power over aliens lessens the standard of judicial scrutiny to that of the "rational basis" test.
13. 333 F. Supp. at 531.
14. 118 U.S. 356 (1886).
15. *Id.* at 369.
16. 239 U.S. 33 (1915).

> It requires no argument to show 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). If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.[17]

In reaching its decision in *Traux*, the Court relied on the Fourteenth Amendment and the Federal Government's exclusive authority to control immigration.[18]

Within a month after *Truax*, the Court in *Crane v. New York*[19] upheld a New York statute prohibiting the employment of aliens on public works projects. It cited the state's special public interest in preserving the resources of the state for the advancement and profit of its citizens. The Court accepted Chief Judge Cardozo's reasoning in the lower court opinion that:

> (t)he state in determining what use shall be made of its own money, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike.[20]

Later in *Ohio ex rel. Clarke v. Deckebach*,[21] the Court upheld a city ordinance prohibiting the licensing of aliens to operate pool and billiard rooms. It found that such rooms are frequented by idle and undesirable persons, therefore,

> (i)t was competent for the city to make such a choice, not shown to be irrational, by excluding from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods.[22]

Two decades later, the Court in *Takahashi v. Fish and Game*

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17. *Id.* at 41.

18. U.S. CONST. art. I, § 8, cl. 4; *see* Fong Ting v. United States, 149 U.S. 698 (1893), at 713: "The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount laws of the Constitution, to intervene."

19. 239 U.S. 195 (1915). *See also* Heim v. McCall, 239 U.S. 175 (1915).

20. People v. Crane, 108 N.E. 427, 430, 214 N.Y. 154, 164 (1915). On the same special public interest theory, the Court in the past. has upheld statutes that, in the absence of overriding treaties, limit the right of noncitizens to exploit a State's natural resources, McCready v. Virginia, 94 U.S. 391 (1877), Patsone v. Pennsylvania, 232 U.S. 138 (1914); *to inherit real property*, Hauenstein v. Lynham, 100 U.S. 483 (1880), Blythe v. Hinckley, 180 U.S. 333 (1901); *and to acquire and own land*, Terrace v. Thompson, 263 U.S. 197 (1923), Porterfield v. Webb, 263 U.S. 225 (1923); *but see* Oyama v. California, 332 U.S. 633 (1948).

21. 274 U.S. 392 (1927).

22. *Id.* at 397.

Commission[23] changed the position it had taken in *Crane* and *Clarke* where it had allowed states to discriminate against aliens with respect to employment. It held unconstitutional a California statute that denied issuance of fishing licenses to persons ineligible for citizenship. The Court upheld the rights of aliens by stating:

> The Fourteenth Amendment and the laws adopted under its authority . . . embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws.[24]

It went on to declare "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[25] California had relied on the "special public interest" doctrine to support its statute banning noncitizens from fishing within three miles from its coast. But the Court failed to find support in that doctrine for conserving public fishing.

The special public interest doctrine was not totally repudiated, however, until *Graham v. Richardson*.[26] There the Court held:

> the special public interest doctrine was heavily grounded on the notion that "(w)hatever is a privilege, rather than a right, may be dependent upon citizenship." (Citation omitted). But this Court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a "right" or as a "privilege".[27]

Relying on the Equal Protection Clause of the Fourteenth Amendment and the Federal Government's plenary power over immigration and naturalization, the Court in *Graham* invalidated state statutes that either denied welfare benefits to resident aliens or conditioned welfare benefits on residency in the United States for fifteen years or more. Moreover, the *Takahashi* standard was reaffirmed: States are to apply laws within narrow limits if they pertain exclusively to aliens as a class. The Court saw its prior decisions as having

> established that 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 (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-3, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate.[28]

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23. 334 U.S. 410 (1948).
24. *Id.* at 420.
25. *Id.*
26. 403 U.S. 365 (1971).
27. *Id.* at 374.
28. *Id.* at 372.

In *Sugarman v. Dougall*[29] the Court dealt for the first time with the question of whether or not a state could constitutionally discriminate against aliens in public employment. In that case the Court had before it a New York statute that barred noncitizens from eligibility for appointment to any position in the competitive class of New York's classified civil service. It was held that the statute violated the Fourteenth Amendment's equal protection guarantee. However, the Court did not hold that an alien may not be refused public employment or be discharged from it if the refusal or discharge is based on a specific determination and on a legitimate state interest which can withstand strict judicial scrutiny.[30]

In keeping with *Graham* the Court also rejected the special public interest doctrine raised by the State in *Sugarman*: "(w)e perceive no basis for holding the special-public-interest doctrine inapplicable in *Graham* and yet applicable and controlling here."[31] Thus the Court rejected the special interest doctrine's foundational basis in the rights-privilege distinction and its applicability to the granting of public employment on citizenship considerations.

In Re Griffiths[32] was decided on the same day as *Sugarman*. In that case a Connecticut judicial rule[33] that imposed a citizenship requirement for admission to the state bar was held unconstitutional. In reversing the Connecticut Supreme Court, the Court acknowledged that a state has a constitutionally protected interest in determining whether or not an applicant to the state bar has the requisite characteristics[34] to be an attorney. But the issue of whether or not Griffiths was "fit" to be a lawyer was not in dispute. The sole basis for denying permission to take the state bar examination was lack of citizenship status. The Court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment. It also affirmed the position it had taken in *Graham* that classifications based on alienage are inherently suspect and therefore subject to close judicial scrutiny.[35] The Court noted that the regulatory powers the State possesses in this instance do permit

29. 413 U.S. 634 (1973).
30. *Id.* at 646-7.
31. *Id.* at 645.
32. 413 U.S. 717 (1973).
33. COMM'N ON OFF. LEGAL PUBLICATIONS, CONN. PRACTICE BOOK (1963 Rev. ed). Section 8(1) reads in part:
> To entitle an applicant to admission to the bar, except under § 12 of these rules, he must satisfy the committee: First. That he is a citizen of the United States. The exception under § 12 also requires citizenship.
34. *See* Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117, 124-5 (S.D. New York 1969) for a further clarification of the requisite characteristics.
35. 413 U.S. at 721.

the latitude "to gauge on a case-by-case basis"[36] whether or not an applicant is fit to practice law.[37] *Griffiths* therefore stands for the rejection of a flat prohibition against aliens in the absence of a compelling state interest.

A general inference may be drawn from *Griffiths* that aliens, as a class, cannot be denied access to *any* occupation or profession unless the state demonstrates a substantial interest in the matter.

In contrast to the cases previously discussed which were decided under either the Fourteenth Amendment or federal preemption, *Espinoza v. Farah Manufacturing Co., Inc.*[38] was decided under Title VII of the 1964 Civil Rights Act.[39] It is the first alien employment case decided by the United States Supreme Court under the Civil Rights Act of 1964. It is also the most recent case concerned with alien employment to be acted upon by the Court.

Espinoza was a Mexican citizen lawfully admitted as a resident alien, whose husband was a United States citizen. She was denied employment by Farah because of the firm's long standing policy not to hire aliens. After exhausting her administrative remedies provided through the Equal Employment Opportunity Commission (hereinafter EEOC),[40] she brought suit in federal court[41] alleging that Farah had violated section 703 of Title VII which prohibits discrimination on the basis of national origin.[42] The district court, relying on an EEOC guideline,[43] held that refusal to hire Espinoza because of her lack of citizenship was a violation of Title VII. The Fifth Circuit Court of Appeals reversed the lower court decision,[44] concluding that the statutory phrase "national origin" did not embrace citizenship. The Supreme Court affirmed the decision of the Court of Appeals holding that "(a)liens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage."[45] The Court refused to follow the

36. *Id.* at 725.
37. This is similar to the discretion, albeit narrowly limited, which the *Sugarman* Court recognized the state should have.
38. 414 U.S. 86 (1973).
39. 42 U.S.C. §§ 2000e—2000e-17 (1970).
40. 42 U.S.C. §§ 2000e-4, -5 (Supp. II 1972). The EEOC is composed of five members, one chairman and four commissioners. The Commission maintains headquarters in Washington, D.C., but also maintains regional offices. The EEOC investigates complaints to decide whether a violation of Title VII has occurred.
41. 343 F. Supp. 1205 (W.D. Tex. 1971).
42. Section 703 provides in part: It shall be unlawful employment practice for an employer to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or *national origin*. (emphasis added). 42 U.S.C. § 2000e-2(a)(1) (1970).
43. 29 C.F.R. § 1606.1(d) (1974). *See* note 85 *infra*, for guideline.
44. 462 F.2d 1331 (5th Cir. 1972).
45. 414 U.S. at 95.

EEOC guideline because it felt that the administrative guideline was inconsistent with the congressional intent.[46] The Court determined this despite meager legislative history to back up the decision.[47]

After greatly expanding employment opportunities for aliens in recent years, the Court in *Espinoza* has abruptly reversed that trend in a case where the only issue in question was interpretation of the phrase "national origin" in Title VII.

II. CONSTITUTIONAL ISSUES

The United States Supreme Court has never been confronted with the direct question of whether or not the Federal Government, acting through the Commission and its regulation, can lawfully discriminate against aliens simply because of their status as aliens. *Wong v. Hampton* raises this precise issue by means of a constitutional attack upon the regulation.[48] Whereas the Court has never had occasion to rule directly on the issue it now faces in *Wong*,[49] it has acknowledged that citizenship requirements are imposed in some areas of the federal service. The Court, however, has refused to address the question.[50]

The holdings of *Sugarman* and *Graham* can be distinguished from *Wong* because they deal with the states' power to discrimi-

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46. *Id.* at 94.

47. The Court in referring to the legislative history stated the following on page 89:

> The only direct definition given the phrase "national origin" is the following remark made on the floor of the House of Representatives by Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill: "It means the country from which you or your forebears come from. You may come from Poland, Czechoslovakia, England, France, or any other country." 110 CONG. REC. 2548-49 (1964).

Justice Douglas, in dissenting, argued that discrimination on the basis of alienage always has the effect of discriminating on the basis of national origin because it favors persons born in the United States over those born in foreign countries. He also thought it inconsistent for a Court that holds a state may not bar a noncitizen from the practice of law, In Re Griffiths, 413 U.S. 717 (1973), or deny employment to noncitizens, Sugarman v. Dougall, 413 U.S. 634 (1973), to read Title VII of the 1964 Civil Rights Act to permit discrimination against noncitizens in employment despite the "national origin" language.

48. *See* text accompanying note 3 *supra*, for the regulation in question. In *Jalil*, the court strongly indicated that although the Federal Government has interests different than those applicable to the states, the Government is still required under due process to "demonstrate that its interests justify the discrimination against aliens." 460 F.2d at 929.

49. Wong v. Hampton has been granted *certiorari* to the United States Supreme Court. *See* note 1 *supra*.

50. Sugarman v. Dougall, 413 U.S. 634, 646 (1973), provides at footnote 12:

> In deciding the present case, *we intimate no view* as to whether these federal citizenship requirements are or are not susceptible of constitutional challenge (emphasis added).

Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86, 91 (1973) provides that:

> *We need not address that question here*, for the issue presented in this case is not whether Congress has the power to discriminate against aliens in federal employment, but rather, whether Congress intended to prohibit such discrimination in private employment (emphasis added).

nate against aliens under the Fourteenth Amendment. They are instructive and significant, however, in determining how the Court may rule in *Wong*.[51] *Graham* overruled a state statute that denied aliens welfare benefits. It declared that classifications based on alienage are "subject to close judicial scrutiny."[52] One could attempt to distinguish *Graham* from *Wong* on the basis that it should be restricted to welfare cases; however, *Sugarman* cites *Graham* as authority for imposing a compelling state interest test in the field of public employment.[53] *Sugarman* held that a state statute[54] similar to the regulation being questioned in *Wong* violated the Fourteenth Amendment's equal protection guarantee.[55] The *Sugarman* decision, although involving state employment, cannot be distinguished from the federal employment question raised in *Wong*. The *Sugarman* Court did not reach the question of whether or not the citizenship requirement was in conflict with the federal government's exclusive power over regulation of immigration and naturalization.[56] If the equal protection guarantees, as applied in *Sugarman*, are applicable to the Federal Government by means of the Due Process Clause of the Fifth Amendment, the Commission's regulation must be narrowly drawn if it is to withstand close judicial scrutiny.

The Court in *Bolling v. Sharpe*[57] was able to demonstrate that

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51. The United States Court of Appeals for the Ninth Circuit has stated at p. 2 of OPINION No. 72-1079:

> The primary issue which confronts us is a constitutional attack . . . upon the regulations of the United States Civil Service Commission . . . which, in effect, excludes . . . aliens from employment in the federal competitive civil service.

52. 403 U.S. at 372. *See* text accompanying notes 26-28 *supra*, for additional information on *Graham*.

53. *Id.* Moreover, in *Jalil*, Chief Judge Bazelon's dissenting opinion stated that "(t)he principles announced in *Graham* apply fully to the federal government . . . and protect an individual's opportunity for public employment as well as his interest in welfare payments." 460 F.2d at 930.

54. The statute in question in *Sugarman*, § 53(1) of the NEW YORK CIVIL SERVICE LAWS, reads:

> Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States.

55. 413 U.S. at 646. *See* text accompanying notes 29-31 *supra*, for additional information on *Sugarman*.

56. Congress' broad powers regarding aliens are derived from U.S. CONST. art. I, § 8 cl. 4, wherein Congress is given the exclusive power "(t)o establish a uniform rule of naturalization" and from art. I, § 8 cl. 18, wherein Congress is empowered to make all laws which are "necessary and proper" for carrying into execution its enumerated powers.

The district court in *Wong* held that because Congressional power is quite broad, almost plenary, with regard to aliens, the Government should not be subject to the rigid scrutiny of the "compelling interest" test. However, the Appeals Court took exception and cited United States v. Thompson, 452 F.2d 1333, 1338 (D.C. Cir. 1971), for "the fact that even Congressional plenary power is subject to Constitutional limits," and it is the duty of the courts to assure that those limits are not infringed upon.

57. 347 U.S. 497 (1954). *Bolling* involved racial segregation in the public schools of the District of Columbia. It was decided on the same day as Brown v. Board of Education, 347 U.S. 483 (1954), which held that the Equal Protec-

the Fifth Amendment due process guarantee includes an equal protection principle. The Court stated at 499:

> The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[58]

Among other cases,[59] *Bolling* has made it clear that the Federal Government will be subject to close judicial scrutiny under the Fifth Amendment's due process guarantee so long as states are held to such scrutiny under the Fourteenth Amendment's equal protection guarantee.[60]

If the regulation in question was narrowly drawn, it would be possible for the regulation to withstand scrutiny by the Court. The Commission's regulation, however, is neither narrowly drawn nor can it be classified as justifiably discriminating against aliens. The regulation is a flat prohibition against aliens securing employment in the civil service because it excludes "*all* aliens from *all* positions requiring the competitive Civil Service examination."[61] The regulation imposes ineligibility on those aliens qualified to be postal workers, typists, office workers, and janitors,[62] among others, as well as on those persons who might otherwise qualify for national security positions if they were not noncitizens. The citizenship requirement which the Commission imposes indiscrim-

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tion Clause of the Fourteenth Amendment prohibits states from maintaining racially segregated public schools. The problem in *Bolling* was different in that the Fourteenth Amendment was not applicable to the District of Columbia. The Court was thus able to remedy the problem in *Bolling* by holding that discrimination may be so unjustifiable as to be violative of the Fifth Amendment's Due Process Clause.

58. *See also* Johnson v. Robison, — U.S. —, 94 S. Ct. 1160 (1974); United States Department of Agriculture v. Moreno, 413 U.S. 528, 532-3 (1973); Frontiero v. Richardson, 411 U.S. 677, 680 (1973); Shapiro v. Thompson, 394 U.S. 618, 642 (1969); Schneider v. Rusk, 377 U.S. 163, 168 (1964).

59. *See* note 58 *supra.*

60. Moreover, in Nielsen v. Secretary of Treasury, 424 F.2d 833, 846 (D.C. Cir. 1970), a case inapposite to alien discrimination in federal employment, the court stated:

> (C)ourts stand ready to safeguard aliens against unreasonable discriminations, and to invoke the equal protection clause of the Fourteenth Amendment as to actions by states, or the due process clause of the Fifth Amendment which provides equivalent safeguards against unreasonable action by the Federal Government.

61. 460 F.2d at 930.

62. The five aliens named in the class are a janitor, file clerk, clerk typist, mail clerk, and an education evaluator. Appellants' Brief, pp. 3-5.

inately[63] excludes aliens from civil service positions. The unconstitutionality of the Commission's regulation should be upheld by the Supreme Court on appeal.[64] The equal protection standards applied in *Sugarman* are applicable to the Government under the Due Process Clause of the Fifth Amendment. The present exclusion of aliens from virtually all positions of federal civil service employment clearly should not withstand "close judicial scrutiny" when the Supreme Court reviews *Wong*.

The Court, however, has been careful to denote that an alien, on the basis of an individual determination, can be refused or discharged from public employment. This may hold true even where the basis is noncitizenship, if a legitimate state interest is found to exist.[65] The Court pointed out that one such case may be employment in an area where national security is involved. In specific cases the Government thus has a legitimate interest which would be compelling enough to withstand strict judicial scrutiny.[66] The regulation in *Wong*, however, creates a different situation. It fails to delineate or define any positions wherein aliens may be justifiably excluded.[67] The regulation is all-encompassing in its exclusion of aliens.[68]

Traux v. Raich[69] is one of many cases[70] that have held that aliens come within the equal protection guarantee of the Fourteenth Amendment. Moreover, in situations where alien employ-

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63. The *Sugarman* Court in addressing itself to the breadth and imprecision of the statute in question stated that "the citizenship restriction sweeps indiscriminately." 413 U.S. at 643.

64. In Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969), plaintiff brought an action because of her dismissal from a Washington state college faculty. In holding for the plaintiff, the Ninth Circuit Court of Appeals stated that "(w)hile there may be no constitutional right to public employment as such, there is a constitutional right to be free from unreasonably discriminatory practice with respect to such employment." *Id.* at 30.

65. 413 U.S. at 646-7.

66. The Court in *Sugarman* made no reference to national security. What it recognized was the states' power

> to preserve the basic conception of a political community . . . . And this power and responsibility of the State applies, not only to the qualifications of voters, but also 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. *Id.* at 647.

67. The Government may be able to justify the exclusion of aliens from certain positions in circumstances where loyalty or national security are absolutely required, however, the Government must be prepared to justify their proposition with a "compelling governmental interest." Even allowing the Government to support their position of excluding aliens in certain circumstances for the above reasons presupposes that aliens generally may be more of a security risk than citizens, an inference which this commentator *deplores*.

68. *See* note 4 *supra*.

69. *See* text accompanying notes 16-18 *supra*.

70. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 420 (1948); Graham v. Richardson, 403 U.S. 365, 371 (1971); Sugarman v. Dougall, 413 U.S. 634, 641 (1973).

ment is restricted, *Truax* declared that aliens have the right to work in "the common occupations of the community" and that the Fourteenth Amendment protects that freedom and opportunity.[71] In *Sugarman* the Court used the "common occupations of the community" theory[72] to hold unconstitutional a statute similar to the one challenged in *Wong*.[73] Thus, one could infer that the Court believes that public employment is a "common occupation of the community."[74] If that inference is correct, then the Court is not apt to hold that the Commission's regulation justifiably discriminate against aliens in their quest for public employment in the federal civil service.

III. NON-CONSTITUTIONAL ISSUES

A. National Origin

Of the non-constitutional issues discussed by the court in *Wong*, only the issue involving Executive Order No. 11478[75] will be treated because the problem emphasized by section 502 of the Public Works Appropriation Act[76] may be discussed in much the same manner as was 5 C.F.R. section 338.101[77] in the constitutional section of this article.[78]

In affirming the district court's ruling that the Commission's regulation does not contravene Executive Order No. 11478,[79] the

71. 239 U.S. at 41.
72. 413 U.S. at 641.
73. *See* text accompanying note 3 and note 54 *supra*.
74. Recent employment data from both the Dept. of Labor and the U.S. Civil Service shows that in many cities and/or areas, civil service positions fall under the rubric of "common occupation of the community" if the standard as used by the Court in *Sugarman* is any indication as to what a "common occupation of the community" is. Statistics show that in 1972 New York's public employment comprised only 2.5% of the state's total labor force, yet the Court thought this was enough to be classified as a common occupation of the community. A sound inference from this is that any city and/or area having at least 2.5% of its total labor force being manned by civil service employees can be said to have public employment as one of the common occupations of its community. This would include such varied cities and/or areas such as Honolulu, 9.5%; Oklahoma City, 15%; Norfolk-Virginia Beach-Portsmouth, Va., 15%; Oxnard-Simi Valley-Ventura, Ca., 10%; Washington, D.C., 25%. The source material for the above is EMPLOYMENT AND EARNINGS, STATES AND AREAS, 1932-72, Bulletin 1370-10, U.S. Dept. of Labor, Bureau of Labor Statistics (1974); FEDERAL CIVILIAN MANPOWER STATISTICS, MONTHLY RELEASE, U.S. Civil Service Commission, May, 1974, Table 15, pp. 26-7.
75. *See* note 7 *supra*.
76. *See* note 8 *supra*.
77. *See* text accompanying note 3 *supra*.
78. Specifically, section 502 provides for the total exclusion of noncitizens from the federal payroll. This legislative measure thus applies the same blanket exclusion of all aliens from all positions in the Federal Government as do the Government's regulations in 5 C.F.R. § 338.101 (1974). The argument that the Government bears a heavy burden to justify its total exclusion of aliens from qualifying examinations "applies with equal force to require 'compelling' interests to justify exclusions of aliens from the entire payroll, and the Government has offered none." Jalil v. Hampton, 460 F.2d 923, 932 (D.C. Cir. 1972).
79. The relevant portion of Executive Order No. 11478, 34 Fed. Reg. 12985 (1969) reads as follows:

Appeals Court held that the term "national origin" is limited to discrimination as between citizens only, and that no distinction ought to be made based on their respective national origins. The Appeals Court cited *Espinoza v. Farah Manufacturing Co., Inc.*,[80] as authority for its holding. *Espinoza*[81] involved the interpretation of the phrase "national origin" in Title VII of the 1964 Civil Rights Act.[82] The Court held that discrimination on the basis of citizenship does not always constitute "national origin" discrimination. Consequently, discrimination based on alienage is not barred by Title VII of the 1964 Civil Rights Act.[83] This conclusion was reached despite the mandate of Title VII that discrimination will no longer be tolerated. Moreover, it is the duty of the courts to assure that the Act works, and that the intentions of Congress not be frustrated by "strict construction of the statute and a battle with semantics."[84] Hence, the courts should have given a liberal reading to Title VII.

Despite the presence of a contrary EEOC guideline,[85] the Court in *Espinoza* held that aliens do not fall within Title VII protections when discriminated against on the basis of alienage.[86] The EEOC took the position that discrimination on the basis of alienage always has the effect of discrimination on the basis of national origin.

The Court in *Espinoza* thus refused to follow the precedence set in *Griggs v. Duke Power Co.*,[87] wherein it stated that adminis-

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It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of . . . national origin . . . .

80. 414 U.S. 86 (1973).

81. *See* text accompanying notes 38-47 *supra.*

82. 42 U.S.C. §§ 2000e—2000e-17 (1970). The Act, at § 2000e-2(a) reads in part:

(a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

83. 414 U.S. at 95. The Court stated that "aliens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage".

84. Culpepper v. Reynolds Metals Company, 421 F.2d 888, 891 (5th Cir. 1970).

85. 29 C.F.R. § 1606.1(d) (1974) provides in part:

Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship. . . .

86. It does not follow that the Federal Government would allow aliens into the country, allow them to receive legal permanent resident status, with a possibility of citizenship in five years, then not allow them to secure employment. *See* note 2 *supra.*

87. 401 U.S. 424 (1971). In *Griggs*, the Court held that where a condition

trative interpretations of the 1964 Civil Rights Act by the EEOC are entitled to "great deference."[88] As Professor Davis has stated:

> The solid proposition here that is fully supported by the case-law is: Courts are to substitute judgment as to the context of interpretive rules, but they . . . give weight or great weight to the views of the agency, sometimes even to the extent of giving force of law to the rules . . . .[89]

Davis goes on to detail various factors that increase the authoritative effect of rules interpreted by the administrative agency. One factor that could apply to the EEOC guideline is what Davis terms "contemporaneous construction." This is deducible from "interpretations at the time of the enactment by administrators who were especially informed of the legislative intent."[90]

Justice Thurgood Marshall, in delivering the *Espinoza* opinion, declared that deference has limits, especially where "application of the guideline would be inconsistent with an obvious congressional intent. . . ."[91] A search of the legislative history of the 1964 Civil Rights Act, however, discloses that Congress expressed no specific opinion on whether citizenship discrimination was part of national origin discrimination.[92] The Court's reasoning that national origin does not refer to one's citizenship, and that this proposition is fully supported by the legislative history, is unsubstantiated by the evidence upon which the Court relies.

Justice Douglas, dissenting in *Espinoza,* agreed with the EEOC guideline.[93] He argued that discrimination on the basis

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of employment leads to *de facto* discrimination on the basis of race, that condition cannot be maintained under Title VII if it is not "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used." *Id.* at 431.

88. 401 U.S. at 433-34. *See also* N.L.R.B. v. Boeing Co., 412 U.S. 67, 75 (1973).

89. K. DAVIS, ADMINISTRATIVE LAW TEXT, § 5.03 at 127 (3rd ed. 1972).

90. *Id.*

91. 414 U.S. at 94. Justice Marshall went on to say that "(c)ourts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.' " (citations omitted).

92. The only direct definition given the phrase "national origin" is the remark made on the floor of the House of Representatives by Congressman Roosevelt, Chairman of the House Subcommittee reporting the Bill:

> May I just make very clear that "national origin" means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country. 110 CONG. REC. 2549 (1964).

Thus it may be deduced that Congressman Roosevelt, intentionally or not, impliedly stated that noncitizens come within the term "national origin" because 8 U.S.C. § 1101(a)(21) (1970), states that "the term 'national' means a person owing permanent allegiance to a state." From this one could infer that "national origin" was intended to include within its coverage national, whether they be nationals of the United States, Poland, or wherever.

93. The EEOC submitted an amicus curiae and in its brief argued that:

> Since under the Fourteenth Amendment all persons born in the United States are citizens—a status which is nearly indefeasible—the status of

of alienage always has the effect of discrimination on the basis of national origin because it favors persons born in the United States over those born in foreign countries.[94]

The Appeals Court in *Wong* used *Espinoza* as precedent for concluding that aliens do not come within the protections of "national origin." But there is evidence to show that the *Espinoza* Court may have wrongly interpreted the term "national origin." In *Espinoza* the Court relied heavily on 5 C.F.R. section 338.101 (which gives the Federal Government the right to discriminate against aliens) to reason that aliens are beyond the scope of the 1964 Civil Rights Act's "national origin" protection. If the Supreme Court upholds *Wong*, then it will have undermined one of the principle reasons for its holding in *Espinoza* and re-open the question of whether "national origin" protections apply to aliens. If the Court overturns *Wong* and allows the Federal Government to discriminate against aliens in public employment, then protections afforded to aliens in this area under section 1981 of the 1870 Civil Rights Act are clearly jeopardized.

So the Supreme Court in *Wong* should review the interpretation it gave to "national origin" in *Espinoza*. It is inconsistent for one section of the civil rights laws, section 1981,[95] to *embrace* aliens within its protections while yet another, Title VII, *excludes* aliens from protection when they are discriminated against on the basis of noncitizenship.

B. Section 1981

The availability of section 1981[96] for use in employment discrimination cases involving aliens recently has emerged in *Guerra*

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being an alien arises from the fact that an individual was not born in this country but came from elsewhere. To refuse to hire an individual because such person is an alien is therefore to disadvantage that person because of the country of his birth, i.e. a country other than the United States.

While persons born in this country automatically obtain citizenship at birth, individuals born elsewhere can acquire citizenship only through a long and sometimes difficult process. . . . If this Company's policies were followed generally, lawfully resident aliens would be under an absolute bar to employment for the three year period during which a resident alien is not eligible for naturalization because of the residency requirement. In other words, a group of employees is being deprived of the opportunity for employment for the sole reason that they were born outside the United States and have not yet obtained citizenship. That is discrimination based on birth outside the United States and is thus discrimination based on national origin in violation of Title VII. *Amicus Curiae* at 4-5 (footnotes omitted).

94. 414 U.S. at 97.

95. 42 U.S.C. § 1981 (1970). See section III B for a discussion of § 1981.

96. 42 U.S.C. § 1981 (1970) provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is en-

v. Manchester Terminal Corp.[97] Section 1981[98] has previously been used primarily in cases involving racial discrimination.[99] Moreover, prior to the 1968 Supreme Court decision in *Jones v. Alfred H. Mayer Co.*,[100] the courts had applied section 1981 only in cases involving state action. The district court in *Guerra*, however, having closely scrutinized the legislative history of section 1981,[101] held that despite the omission of a specific reference to the term "alien" in the wording of section 1981, the codifiers undoubtedly intended that aliens be protected under the broad aegis of "all persons", as embodied in section 1981. The court in *Guerra* also said that one of the purposes of the 1870 Civil Rights Act was to broaden the coverage of the 1866 Civil Rights Act to include aliens.[102] Furthermore, a recent case[103] unequivocally

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joyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

97. In Guerra v. Manchester Terminal Corp., 350 F. Supp. 529 (S.D., Texas 1972), plaintiff Guerra sought to enjoin his employer and union from unfair employment practice. The court granted the relief requested because it determined that employment discrimination based on the foreign domicile of an alien's family is barred by 42 U.S.C. § 1981.

98. *See* Roberto v. Hartford Fire Ins. Co., 177 F.2d 811 (7th Cir. 1949), *cert. denied*, 339 U.S. 929 (1950). The court, at 814, in reference to 8 U.S.C. § 41, now 42 U.S.C. § 1981, held that although enacted primarily to ensure equal civil rights for Negroes, the protection of this section extends to aliens as well as citizens.

Although *Guerra* said that aliens come within the protection of § 1981, it has not been used to a great extent for that purpose. Section 1981 is still being used extensively in racial discrimination cases.

99. *See* Civil Rights Cases, 109 U.S. 3 (1883); Hurd v. Hodge, 334 U.S. 24 (1948); Waters v. Wisconsin Steel Works of International Harvester Co., 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970); Sanders v. Dobbs Houses Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); Penn v. Schlesinger, 490 F.2d 700 (5th Cir. 1973).

100. 392 U.S. 409 (1968). *See* note 105 *infra*. In Hodges v. United States, 203 U.S. 1 (1906), the Court specifically noted that private action interfering with the right of Blacks to enter into employment relationships was not within the scope of § 1981.

101. The operative language of § 1981 is traceable to the Civil Rights Act of 1866, § 1, 14 Stat. 27. Hurd v. Hodge, 334 U.S. 24, 30-31 (1948). Section 1 of the 1866 Civil Rights Act reads in part:

> Be it enacted . . . that all persons born in the United States . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white persons. . . .

The Act of 1866, thus, specifically excluded foreign-born persons from its coverage by the reference to "all white persons born in the United States." Compare this to the language of § 1981 as set forth in note 96 *supra*.

The present codification of § 1981 is derived from Revised Statutes Section 1977 (1874) which codified the Act of May 31, 1870, § 16, 16 Stat. 144.

102. 350 F. Supp. at 536. Support for the theory that § 16 of the 1870 Act was enacted solely to ensure that aliens would receive the equal protection of the laws can be found in the codifiers' historical note under § 16 and in study of the congressional debates over § 16. *See* CONG. GLOBE, 41st Cong., 2d Sess. 3871 (1870).

103. League of Academic Women v. Regents of University of California, 343 F. Supp. 636 (N.D. Cal. 1972).

stated that aliens are included within the scope of section 1981 by providing that:

> Section 1981 was enacted to protect the rights of two groups of people—non-whites and non-citizens who were not afforded equal treatment to white citizens. . . . The change in language to include "all people" was designed to include non-citizens and persons not born in the United States within the coverage of the Act.[104]

Therefore, with respect to private employment, there is authority to support the proposition that aliens come within the protections afforded by section 1981.

The authority that a right of action exists under Section 1981 against a private employer was established in *Sanders v. Dobbs Houses, Inc.*[105] *Penn v Schlesinger*[106] went even further: "(I)t is clear that the rationale of the *Dobbs Houses* decision applies to employment discrimination by federal officials as well as by private employers."[107] With the advent of the *Penn* decision, authority now exists for the use of section 1981 to prohibit discrimination by federal agencies as well as by private employers.[108]

Does section 1981, as part of the Civil Rights Act, require exhaustion of available administrative remedies before seeking judicial relief under its prohibitions?[109] That question was partially

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104. *Id.* at 638-38.

105. 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). The rationale of the *Dobbs Houses* holding was an extention of the holding in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), wherein the Court held that 42 U.S.C. § 1982—a sister section to § 1981 which prohibits discrimination in transaction of property in much the same language as is used in § 1981—prohibited all racial barriers in the acquisition of real and personal property. Subsequent to the *Jones* decision, many cases, including *Dobbs Houses* at 1099, have reasoned that because both § 1981 and § 1982 are derived from § 1 of the 1866 Civil Rights Act, they must be construed consistently and that because § 1982 is enforceable against private employers, § 1981 is similarly enforceable. Waters v. Wisconsin Steel Works of International Harvester Co., 427 F.2d 476, 482 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970); Caldwell v. National Brewing Co., 443 F.2d 1044, 1045 (5th Cir. 1971); Macklin v. Spector Freight Systems Inc., 478 F.2d 979, 993 (D.C. Cir. 1973); Penn v. Schlesinger, 490 F.2d 700, 702-3 (5th Cir. 1973).

106. 490 F.2d 700 (5th Cir. 1973).

107. *Id.* at 702.

108. In District of Columbia v. Carter, 409 U.S. 418, 422 (1973), the Supreme Court held that "§ 1982 is not a 'mere prohibition of State laws establishing or upholding' racial discrimination in the sale or rental of property but, rather, an 'absolute' bar to all such discrimination, private as well as *public, federal* as well as state." (emphasis added). Because § 1981 is a sister section to § 1982, similar enforcement is available to § 1981. *See* note 105 *supra.*

109. It is a general rule of administrative law that one must exhaust available administrative remedies before pursuing judicial relief. The Supreme Court has referred to this doctrine as "the long settled rule of judicial administration that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-1 (1938). However, as the Supreme Court pointed out in McKart v. United States, 395 U.S. 185 (1969), exhaustion of administrative remedies is not a matter of black letter law. *Id.* at 193. Also, Professor Davis has pointed out that "(t)he laws embodied in the holdings clearly is that sometimes exhaustion is required and sometimes not." 3 K. DAVIS, § 20.01.

answered in the negative by the Seventh Circuit Court of Appeals in *Waters v. Wisconsin Steel Works of International Harvester Co.*[110] The court held that specific remedies fashioned by the Congress in Title VII of the 1964 Civil Rights Act[111] could be deliberately bypassed if the aggrieved person pleaded a reasonable excuse for failure to exhaust Title VII remedies[112] by means of the EEOC.[113] The Third Circuit Court of Appeals, in *Young v. International Telephone and Telegraph Co.*,[114] furthered that concept in holding that nothing in Title VII either expressly or impliedly imposed any jurisdictional barrier to a suit brought under section 1981.[115] The court thus held that an aggrieved party under section 1981 can recover damages, as well as be granted injunctive relief, without first exhausting the remedies provided under Title VII.[116] Therefore, the section constitutes a concurrent remedy with the one provided under Title VII.

With regard to federal public employment, however, the question of whether there must be exhaustion of federal administrative remedies[117] before judicial action can be brought under section 1981 is not clear.[118] Two recent cases[119] in the Fifth Circuit examined this question. The court in *Beale v. Blount*,[120]

110. 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970).

111. 42 U.S.C. §§ 2000e—2000e-17 (1970).

112. Under the terms of Title VII of the 1964 Civil Rights Act, suit cannot be brought in district court until there has first been filed a complaint with the EEOC. The statutory enforcement scheme, § 706, 42 U.S.C. § 2000e-5 (Supp. II 1972), embodies a clearly defined policy of deferring action in federal court until a charge has been filed with the agency and an opportunity afforded the agency to attempt private settlement. But once the agency has had at least 60 days in which to make such an attempt and no settlement has been reached, § 706(e), 42 U.S.C. 2000e-5(e) (1972), provides that the "Commission shall so notify the person aggrieved and a civil action may, within 30 days thereafter, be brought against the respondent named in the charge. . . ." This notice given by the EEOC is enough to grant jurisdiction to district courts under Title VII.

113. 427 F.2d at 487. There were two holdings in *Waters*: (1) that § 1981 was not repealed by Title VII, and (2) that a § 1981 plaintiff must first exhaust his Title VII remedies or plead a reasonable excuse for his failure to do so.

114. 438 F.2d 757 (3rd Cir. 1971).

115. *Id.* at 763.

116. 443 F.2d at 1045. The court, at 1046, established that a person may purposely avoid filing with the EEOC and seek a separate remedy for employment discrimination under § 1981. Moreover, at 1045, the court said that Title VII remedies were not intended to preempt the general remedy provided under § 1981. *See also*, Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1100 (5th Cir. 1970); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 996 (D.C. Cir. 1973).

117. *See* 5 C.F.R. §§ 713.211—713.222. (1974).

118. *See* note 109 *supra*. An exception to the general exhaustion doctrine is 42 U.S.C. § 1983 (1970), which provides a federal remedy for discrimination resulting from state action under the color of state law. Because the cases usually arise from the question of exhaustion of state remedies, the emphasis is not on federal administrative remedies. *See e.g.*, Damico v. California, 389 U.S. 416 (1967).

119. Penn v. Schlesinger, 490 F.2d 700 (5th Cir. 1973); Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972).

120. 461 F.2d 1133 (5th Cir. 1972). In *Beale*, the plaintiff alleged that he had been discharged from his position as a post office employee solely on the basis of his race.

finding that Beale bypassed his full administrative remedies by not raising the issue of racial discrimination in the initial hearing, dismissed the suit for failure to exhaust administrative remedies. In *Penn*,[121] plaintiffs did not deliberately bypass their administrative remedies. After approaching administrative officials charged with authority for processing such complaints, one plaintiff was not informed of his right to file a complaint with an Equal Employment Opportunity Officer; the other plaintiff was told he would have to file suit if he expected to carry his complaint further.[122] The court in *Penn* observed that *Beale* established that section 1981 plaintiffs could not deliberately bypass federal administrative remedies before pursuing judicial relief. However, unlike in *Beale*, the court held in favor of the plaintiffs because they had not been rightfully informed of their right to an administrative remedy.[123] Judge Morgan, concurring with the result, argued that it seemed clear from existing precedent, *Damico v. California*,[124] that exhaustion of administrative remedies is not required in an action under section 1981.[125] He contended that the policies requiring the exhaustion of state administrative remedies are more substantial that those requiring exhaustion of federal remedies because comity considerations are stronger in the state than in the federal government. Judge Morgan concluded that "if state exhaustion is not required, *a fortiori*, exhaustion of federal remedies should not be required."[126] As the issue now stands, this is a rather muddled area of the law.

With respect to aliens, the problem is less confused because they do not have access to federal administrative remedies for two reasons. First, an alien is ineligible for virtually all federal civil service positions.[127] These remedies are accessible only to employees, not applicants for employment as in *Wong v. Hampton*. Second, even if an alien were to attain a federal civil service position, he would be excluded from available federal administrative remedies[128] because the Supreme Court in *Espinoza v. Farah Manufacturing Co., Inc.*,[129] held that aliens are not protected against discrimination on the basis of national origin.[130]

121. 490 F.2d 700 (5th Cir. 1973). In *Penn*, the plaintiffs brought a class action against the Government for allegedly denying promotions to them solely on the basis of their race.
122. *Id.* at 705.
123. *Id.* at 705-6.
124. 389 U.S. 416 (1967). *Damico* involved a failure to exhaust state administrative remedies.
125. 490 F.2d at 707.
126. *Id.*
127. *See* note 4 *supra*.
128. The applicable federal administrative remedy, 5 C.F.R. § 713.211 (1974), governs complaints of discrimination based on race, color, religion, sex, or *national origin* (emphasis added).
129. *See* text accompanying notes 38-47 *supra*.
130. Exhaustion is not required when recourse to the administrative process

Therefore, aliens should have access to judicial relief under section 1981 whether or not available federal administrative remedies have been exhausted. In light of the *Espinoza* interpretation of "national origin", the civil rights of aliens, as far as employment—public and private—is concerned, are governed by the general reference to "all persons within the jurisdiction of the United States" as embodied in section 1981.

The holding in *Espinoza* may place the protections afforded aliens under section 1981 into question. In that case, the Court held that aliens do not come within protections of "national origin" when alienage is the basis for the discrimination. By its holding, the Court may have inadvertently restricted the protections which section 1981 gives to aliens. The legislative history of section 1981 clearly indicates that section 16, the precursor of section 1981, was enacted primarily to include aliens within the equal protections of the law by means of the phrase "all persons within the jurisdiction of the United States."[131] The *Espinoza* holding, however, has excluded aliens from the protections of Title VII when discriminated against because of alienage. *Espinoza* thus places into question a prior Supreme Court decision which has held that the protections of section 1981 extend to aliens.[132] As the matter now stands, there exists a potential conflict between the effect given section 1981 and the restricted meaning given to the "national origin" language of the 1964 Civil Rights Act. The argument that section 1981 might prohibit the exclusion of aliens from "national origin" protections was raised by Espinoza, but the Court refused to intimate a view because the "issue was neither raised before the courts below nor presented in the writ for certiorari."[133]

There is no indication that Congress intended the 1964 Civil Rights Act to narrow the equal protection of laws given to aliens by the 1870 Civil Rights Act, by means of section 1981. If anything, the 1964 Act was meant to broaden the coverage of the 1870 Act because the purpose of the 1964 Act is "designed primarily to protect and provide more effective means to enforce the

would be an exercise in futility. *See e.g.*, McNeese v. Board of Education, 373 U.S. 668, 674-6 (1963); Houghton v. Shafer, 392 U.S. 639, 640 (1968). This is in agreement with the general rule of exhausting available administrative remedies before seeking judicial relief because the rule presupposes that there is a viable administrative remedy in existence. Moreover, 5 C.F.R. § 731.201 (1974) allows the Commission to deny an applicant examination, to deny an eligible applicant appointment, and to instruct an agency to remove an appointee for several reasons, one of which is "reasonable doubt as to the 'loyalty' of the person involved to the Government of the United States." Thus, an agency can deny all noncitizen applicants examinations because of the presumption that they owe permanent allegiance to another country until they become naturalized citizens.

131. *See* note 102 *supra.*

132. Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948). *See also*, Roberto v. Hartford Fire Ins. Co., 177 F.2d 811 (7th Cir. 1949).

133. 414 U.S. 96 n.9.

civil rights of persons within the jurisdiction of the United States."[134]

A possible reason why Wong did not use section 1981 in his suit is that the action was initiated in 1971. Subsequently, in 1973 in *Penn*, claimants were allowed to bring suit under section 1981 without exhausting available administrative remedies. Moreover, use of section 1981 in federal public employment discrimination suits was initiated only after the *Wong* suit had been filed. Whatever the reason for not using section 1981, it is available for future use by noncitizens when their civil rights are abridged.

IV. CONCLUSION

For aliens, finding employment on arrival to this country is a primary concern. Until recently, their status as aliens barred them from many employment opportunities which might otherwise be available if they were citizens. The Supreme Court has recently given aliens many of the same rights in securing employment that citizens have. However, one area where the Court has failed to intimate a view is with respect to federal employment. The Federal Government is, if not the largest, one of the largest employers in the United States. Nearly three million civilians are employed by the Government.[135] With few exceptions, aliens are barred from holding positions in the Federal Government because the Commission's regulation[136] excludes aliens from qualifying for virtually all positions in the Federal Government.

This situation exists despite the recent Supreme Court ruling[137] that states cannot exclude aliens from all State employment in the absence of justifiable interests. The Court in *Wong* should hold the Federal Government to the same standards that states are now expected to follow. It would be inconsistent for the Court to hold the Federal Government to a decreased standard of fairness. If the Court were to hold otherwise, it would be tantamount to the government denying aliens "entrance and abode, for in ordinary cases they cannot live where they cannot work."[138]

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134. *United States Code Congressional and Administrative News*, 88th Cong., 2d Sess. (1964) p. 2391.
135. *See* note 4 *supra.*
136. *See* text accompanying note 3 *supra.*
137. *See* text accompanying notes 29-31 *supra.*
138. 239 U.S. at 42.