A Constitutional Oddity of Almost Byzantine Complexity: Analyzing the Efficiency of the Political Function Doctrine

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NOTE

A CONSTITUTIONAL ODDITY OF ALMOST BYZANTINE COMPLEXITY: ANALYZING THE EFFICIENCY OF THE POLITICAL FUNCTION DOCTRINE

Gregory A. Scopino†

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Many view the United States as a country that welcomes immigrants to its shores. The country does not, however, always greet immigrants warmly. Throughout history, the United States has viewed new waves of immigrants as "racially different outsiders" and "[a]t different historical moments, German, Irish, Jewish, and Italian immigrants all were deemed to be of different and inferior racial stock." Federal, state, and local governments have enacted laws that discriminated against foreign nationals, many of which were motivated by xenophobia and racism. Some of these discriminatory laws imposed substantial limitations on immigrants, such as prohibiting foreign na-

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1 See Foley v. Connelie, 435 U.S. 291, 294 (1978) (stating that the United States is known as a "nation of immigrants" and that "[a]s a nation we exhibit extraordinary hospitality to those who come to our country"); Kiyoko Kamio Knapp, The Rhetoric of Exclusion: The Art of Drawing a Line Between Aliens and Citizens, 10 GEO. IMMIGR. L.J. 401, 407 (1996) (describing America as an "immigration-driven society"); see also Excerpts From Bush's Address on Allowing Immigrants to Fill Some Jobs, N.Y. TIMES, Jan. 8, 2004, at A28 (quoting President Bush as saying "[a]s a nation that values immigration and depends on immigration, we should have immigration laws that work and make us proud" and "America's a welcoming country"). Furthermore, in July 2003, the U.S. Department of Homeland Security launched a weeklong commemoration of "the importance of legal immigration" entitled, "Celebrating a Nation of Immigrants." Press Release, Dep't of Homeland Security, Department Marks July 4 by 'Celebrating A Nation of Immigrants': 9,500 New Americans to be Welcomed at 50 Ceremonies Nationwide (June 30, 2003), at http://www.dhs.gov/dhspublic/display?content=1052 (last visited Mar. 3, 2005). The activities primarily involved high-level officials attending naturalization ceremonies at different historic locations throughout the country. Id. Secretary of Homeland Security Tom Ridge commented that "[w]elcoming new citizens to the United States is one of the most important things we do as a nation." Id.

2 Kevin R. Johnson, The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium, 49 UCLA L. Rev. 1481, 1486 (2002). For example, the adverse treatment that immigrants currently face in areas like employment has prompted proposals to broaden the legal protection available to immigrants in the workplace. See Ruben J. Garcia, Across the Borders: Immigrant Status and Identity in Law and Latina Theory, 55 FLA. L. Rev. 511, 519 (2003) (arguing that Congress should amend civil rights laws to "include immigration status as a protected category in addition to race, color, ancestry, and national origin").

3 For a case in which a federal statute placed onerous requirements on immigrants, see Mathews v. Diaz, 426 U.S. 67 (1976), which concerned requirements to qualify for Medicare supplemental medical insurance. For cases related to state-level statutes burdening immigrants, see Crano v. New York, 239 U.S. 195 (1915), which involved a state law prohibiting employment of foreign nationals on projects that received public funding, and New York v. Miln, 36 U.S. (11 Pet.) 102 (1837), which upheld a New York City ordinance that required ship masters to provide a list naming foreign nationals seeking entry to the city.


5 See Luis F.B. Plascencia et al., The Decline of Barriers to Immigrant Economic and Political Rights in the American States, 1977-2001, 37 INT'L MIGRATION REV., Spring 2003, at 5, 7. In this article the authors studied state employment restrictions based on citizenship in the six states with the highest immigrant populations and created an extensive list of occupations reserved, at one time or another, for citizens. See id. at 9. The authors conclude that state citizenship requirements have plummeted compared to prior decades, but that states re-
tionals from owning property, running certain types of businesses, and pursuing certain professions. For example, state laws have restricted noncitizens from selling liquor, operating pool halls, and working as landscape architects, embalmers, pharmacists, dentists, and surveyors.

Discrimination against immigrants continues today, although the explicit, state-mandated discrimination prevalent in prior decades has decreased. Despite this trend, citizenship requirements remain for a variety of occupations. For example, some states currently require teachers, peace officers, boiler engineers, tax collectors, private detectives, labor dispute mediators, and firefighters to be citizens. Likewise, in some states, only citizens may establish churches, incorporate limited-profit housing companies, form fraternal benefit societies, and work for sanitary districts and public safety departments.

These discriminatory statutes suggest that many U.S. citizens perceive immigrants as a threat. National security concerns, specifically fear of Muslim terrorists after the attacks on September 11, 2001, increased prejudice against people of Muslim faith and Arab ancestry.

See Terrace v. Thompson, 263 U.S. 197 (1923) (upholding a Washington state law prohibiting land ownership by foreign nationals who did not declare their intention to naturalize); see also Keith Aoki, No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment, 40 B.C. L. Rev. 37 (1998) (discussing the citizenship requirements many states place on land ownership).

See, e.g., Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392, 393 (1927) (upholding a Cincinnati city ordinance that prohibited foreign nationals from running pool halls).


See Plascencia et al., supra note 5, at 9.

See Boyd, supra note 4, at 320–21.

See Plascencia et al., supra note 5, at 9.

See id. at 18.

See id. at 18–19. Several commentators have concluded that "the states have an uninterrupted legacy of excluding noncitizen residents from important economic rights by enacting laws that restrict employment, public benefits, operation of private businesses, ownership of land, and other resources to U.S. citizens." See David Weissbrodt, Immigration Law and Procedure 45 (3d ed. 1992); see also Patrick Healy, L.I. Clash on Immigrants is Gaining Political Force, N.Y. Times, Nov. 29, 2004, at A1 (describing the hostile reaction of Long Island residents to the presence of Hispanic immigrants, a reaction that prompted a proposal to give local law enforcement officers the authority to detain illegal immigrants).

See Johnson, supra note 2, at 1488–89; see also William Kates, Poll: Many Would Limit Some Rights of Muslims, Philadelphia Inquirer, Dec. 19, 2004, at A32. The article described a Cornell University study regarding public fear of terrorism that found that nearly half of the respondents to a national survey supported restrictions on the civil liberties of Muslim Americans. Id. If poll respondents were willing to restrict the rights of citizens in the interest of protection from terrorism, one could surmise that respondents might have supported equal or greater restrictions on noncitizens. See Erik C. Nisbet & James Shanahan, MSRG Special Report: Restrictions on Civil Liberties, Views of Islam, & Muslim Ameri-
Similarly, when the U.S. economy is weak, foreign nationals frequently become scapegoats for the difficult job market.\textsuperscript{16}

To improve the position of foreign nationals in U.S. society, President Bush has recently announced a new federal policy that would allow illegal immigrants to apply for temporary worker status.\textsuperscript{17} Some politicians criticized President Bush’s plan, and it is not yet certain whether Congress will pass his proposals.\textsuperscript{18} Enactment of the President’s immigration proposals would not guarantee better treatment of noncitizens in all regards. The only certainty is that the nation’s treatment of noncitizens—an issue which the President’s announcement pushed to center stage—will remain a prominent topic in the nation’s capital.

\textsuperscript{16} See William R. Tamayo, \textit{When the “Coloreds” Are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration}, 2 \textit{ASIAN L.J.} 1, 15 (1995). Tamayo contends that “the recent economic downturn has heightened animosity toward the new ‘coloreds’—immigrants from Asian, Latin America, the Middle East, and the Caribbean.” \textit{Id.}


\textsuperscript{18} See David Abraham, \textit{American Jobs but Not the American Dream}, \textit{N.Y. TIMES}, Jan. 9, 2004, at A19 (comparing Bush’s proposal to guest worker programs in Europe and contending that those programs have failed); Elisabeth Bumiller, \textit{Politics at the Border}, \textit{N.Y. TIMES}, Jan. 8, 2004, at A1 (quoting Cecilia Munoz, Vice President of the National Council of the Hispanic advocacy group La Raza, as saying “when people learn the details of [President Bush’s] proposal and what it does and doesn’t do, it’s likely to seem less appealing”); Arshad Mohammed, \textit{Powell Sees Better Chance for U.S. Immigration Reform}, \textit{REUTERS}, Nov. 9, 2004 (summarizing Powell’s statements that the atmosphere in the U.S. Congress “may be more favorable to allowing millions of illegal aliens in the United States to obtain legal status”); Murphy, \textit{supra} note 17 (quoting one Harvard economist as stating that “it is hard to imagine a worse immigration reform proposal” than the one proposed by President Bush).
Because foreign nationals\textsuperscript{19} cannot vote,\textsuperscript{20} they are politically powerless to prevent citizens from expressing their xenophobia in the form of discriminatory laws. Muslim and Arab foreign nationals are the victims of hate crimes, including murder, and the U.S. government profiles them as security risks.\textsuperscript{21} State governments also discriminate against other foreign nationals, particularly Latino and Mexican immigrants.\textsuperscript{22} Historically, federal and state governments\textsuperscript{23} used alienage classifications to express "racial animus" and "to subordinate certain racial groups."\textsuperscript{24} State-sponsored discrimination promotes negative stereotypes of foreign nationals as being disloyal and untrustworthy.\textsuperscript{25} Despite the negative effects of state alienage classifications, courts uphold laws designed to define the state's political community and reserve the powers of self-governance to citizens.\textsuperscript{26} Thus, the power of states to use alienage classifications is arguably "exceedingly broad" and leads "to questionable exclusions of noncitizens from important activities."\textsuperscript{27}

Congress, state legislatures, and courts should consider whether or not the laws and legal doctrines relating to noncitizens promote efficiencies in the market that are beneficial to society. This Note addresses the rights of one class of immigrant noncitizens, frequently called legal permanent residents (LPRs). This Note evaluates alienage classifications that limit the right of LPRs to pursue careers in the

\textsuperscript{19} For purposes of this Note, "foreign nationals" will refer to legal permanent residents (LPRs). "Foreign national" is preferable to "immigrant," which merely refers to people who moved into a country, regardless of how long ago they moved. This Note does not address the status of foreign nationals who are in the country illegally.

\textsuperscript{20} LPRs cannot vote in state or federal elections, even though the Constitution does not explicitly require that result. See Knapp, supra note 1, at 405.

\textsuperscript{21} See Johnson, supra note 2, at 1488–89.

\textsuperscript{22} See Boyd, supra note 4, at 340; Kevin R. Johnson, The Case Against Race Profiling in Immigration Enforcement, 78 WASH. U. L.Q. 675, 707 (2000) (noting that border patrol authorities use race as one factor in deciding whether to conduct investigatory stops, even though Hispanics constitute a majority of the population in many communities, like those near the California-Mexico border).

\textsuperscript{23} Although this Note will specifically address alienage classifications the states created, some discussion of the federal government's use of citizenship as a classifying tool is necessary for comparative purposes and to provide a full history of the jurisprudence in this area.

\textsuperscript{24} See Boyd, supra note 4, at 339.

\textsuperscript{25} See Victor C. Romero, Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race after September 11, 52 DEPAUL L. REV. 871, 878 (2003) (discussing the "psychological costs" of race and citizenship-based suspicion on the targets of government profiling and laws based on race and national origin). Romero also discusses the use of citizenship requirements and racial profiling, primarily against Muslims and Arabs, since the terrorist attacks of September 11, 2001. Id.

\textsuperscript{26} See Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) (holding that "some state functions are so bound up with the operation of the State as a governmental entity" that reserving those posts for citizens is justified).

\textsuperscript{27} See Plascencia et al., supra note 5, at 5–7.
United States, specifically focusing on the efficiency of citizenship requirements for employment in various jobs and occupations that the states designate as "political functions." The primary question this Note seeks to answer is whether markets function efficiently when states require some employers to deny individuals employment solely based on citizenship. As a result of the overlap between citizenship status and race, and the influence of race on immigration laws and citizenship requirements in the United States, an economic analysis of state citizenship requirements must also consider the effects of racism on markets.

Part I of this Note outlines the political function doctrine, which frames the limits on state and local use of alienage classifications, and then explains the Supreme Court's modern doctrinal framework. Part II summarizes the history of alienage jurisprudence in connection with state and local laws. Part III then analyzes the efficiency of the political function doctrine. Part III finds that citizenship requirements force employers to select employees based on a factor unrelated to job performance and that these requirements ultimately perpetuate racism in the labor market. Part III also contends that the political function doctrine itself is inefficient because it enables citizenship requirements to survive court scrutiny, while also making it easier for states to compel discrimination against foreigners and ethnic groups. Finally, Part IV argues that courts should eliminate the political function doctrine because it insulates state-created market inefficiencies from heightened judicial review. Because courts are unlikely to reject the political function doctrine altogether, Part IV also suggests ways to refine the doctrine to limit the harmful effects citizenship requirements have on the market.

I

THE POLITICAL FUNCTION DOCTRINE

A. The Doctrinal Framework: Confusion and Criticism

The Supreme Court's alienage classification jurisprudence is widely criticized. Some commentators say that the Court is not at its analytical best in this area. Others contend that the Court's deci-

\[\text{See Knapp, supra note 1, at 414-16.}\]

\[\text{See Boyd, supra note 4, at 323; Johnson, supra note 2, at 1485; Knapp, supra note 1, at 418-19.}\]

sions have relied on "legal fictions" and flawed, if not incoherent, reasoning. The main criticism of the Court's alienage jurisprudence is that it applies a myriad of standards in judging alienage classifications—and it strikes down and upholds remarkably similar laws. Unfortunately, although the "almost byzantine complexity" of the Court's alienage jurisprudence has led commentators to call it a "constitutional oddity," the current doctrinal framework seems likely to remain, absent a drastic reshaping of the Court's composition.

The Due Process Clauses of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment protect foreign nationals. The Equal Protection Clause applies to all people in the United States and requires that the government treat similarly situated people similarly. The Fourteenth Amendment applies to state actions, including actions by local governments. Although the original purpose of the Fourteenth Amendment was to prohibit discrimination against African Americans, the Court favors an expansive reading of the Equal Protection Clause to cover other forms of racial and ethnic discrimination.


33 See 3 ROTUNDA & NOWAK, supra note 30, § 18.2 ("The Supreme Court has refused to enunciate a single test to be used when determining the compatibility of alienage classifications with the equal protection guarantee . . ."); see also Liliana M. Garcés, Evolving Notions of Membership: The Significance of Communal Ties in Alienage Jurisprudence, 71 S. CAL. L. REV. 1037, 1038 (1998) (examining the Court's alienage jurisprudence, noting the "disparate approaches and outcomes in alienage cases," and attempting to provide a framework for understanding the divergent results). For example, the Court struck down a state law that required citizenship to practice law, see In re Griffiths, 413 U.S. 717 (1973), but upheld a law requiring citizenship to teach in a public schools, see Ambach v. Norwick, 441 U.S. 68 (1979). It is difficult to understand why lawyers, who are officers of the court, do not need to be citizens while first-grade teachers must be. See also Victor C. Romero, The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425, 426-29 (1997) (describing the different standards of review for federal and state alienage classifications and arguing for "congruence" of standards).


35 See Scaperlanda, supra note 32, at 741.

36 U.S. CONST. amends. V; XIV, § 1.

37 See id. amend. XIV, § 1.

38 See Knapp, supra note 1, at 407-08 (explaining that the Equal Protection Clause governs people within the "territorial jurisdiction" of the country).

39 See 3 ROTUNDA & NOWAK, supra note 30, § 18.5.


41 See Knapp, supra note 1, at 408 ("However, as the nation's population diversified, the reach of the Clause gradually expanded to all ethnic groups."); Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, 101 HARV. L. REV. 1, 5 (1987).
uses several different standards to determine whether alienage classifications are compatible with the Constitution’s equal protection guarantee, ranging from strict scrutiny to the near abandonment of any scrutiny.

Federalism concerns also play a role in many Court decisions relating to state and local alienage classifications. The Supremacy Clause dictates that state actions conflicting with the Constitution are invalid. Therefore, if the Constitution specifically grants the federal government authority over a particular area of the law, the states cannot interfere. The federal concern with state use of alienage classifications derives from the fact that the federal government (and not the states) has the authority to control immigration and naturalization.

The Court defers to federal legislation and executive action that relates to immigration and naturalization because of the foreign affairs power those branches exercise. Because state and local governments are not involved in foreign affairs, “their use of alienage classifications would have to be reasonably justified by a significant local interest.” Therefore, state laws that classify based on alienage are subject to strict judicial scrutiny, unless the classification involves the state’s powers of “self-governance” or other “political functions.” Laws that fall within the political function exception are subject to less-searching scrutiny and must only rationally relate to a legitimate government objective.

42 See Knapp, supra note 1, at 409–11.
44 See Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (treating the alienage classification in a manner similar to a nonjusticiable political question and refusing to subject the government action to any form of meaningful scrutiny).
45 See Maltz, supra note 34, at 1154.
46 See U.S. CONST. art. VI, cl. 2; Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (holding that a state law governing the admission of foreign nationals who arrived by ship was invalid because it conflicted with the Commerce Clause power).
47 See Chy Lung, 92 U.S. at 280–81.
48 See 3 ROTUNDA & NOWAK, supra note 30, § 18.12.
49 See id. (explaining that “[s]o long as a federal alienage classification was not a totally arbitrary means of disfavoring lawfully resident aliens, the classification would be upheld because of the ‘federal interest in international affairs, as well as the federal power over immigration and naturalization’”).
50 Id.
51 See id.
52 See id. (stating that a local “alienage classification . . . which relates to allocating power or positions in the political process will be upheld under the traditional rational basis test”).
53 An example may help illustrate the impact of the political function doctrine. State A passes a law making it illegal for noncitizens to fish in state rivers. State B passes a law making it illegal for noncitizens to become police officers. A court would likely subject State A’s law to strict scrutiny. Fishing in rivers has nothing to do with the “political functions” related to the process of state self-governance. A court would likely subject State B’s
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within the political function exception and receive this lower level of scrutiny.\textsuperscript{54}

Although the federal government can use classifications based on alienage with near impunity from judicial review,\textsuperscript{55} the states receive less deference from the courts. Professor Gerald Neuman suggests that the history of xenophobia in the United States illustrates why the Court should view state alienage classifications with skepticism.\textsuperscript{56}

First, particular immigrant groups tend to settle in the United States in clusters based on ethnicity,\textsuperscript{57} which results in tensions between groups of foreign nationals and local citizens.\textsuperscript{58} This tension often takes the form of "localized anti-alien movements."\textsuperscript{59} Unlike individual states, the federal government is less likely to fall prey to such xenophobic fervor "in part because emotions are not running so high in other states at the moment."\textsuperscript{60} Neuman also argues that aliens "have some virtual representation in Washington by means of the foreign affairs establishment, which knows that the United States will have to answer in the international community for actions taken at home."\textsuperscript{61} Because states cannot control the entry of foreign nationals, states direct "their frustration and resentment about unwelcome federal policies into hostility toward" the foreign nationals who reside within the state's borders.\textsuperscript{62} For this reason, courts view state alienage classifications with more suspicion than federal classifications.


57 Id.

58 Id.

59 Id. For example, California has enacted laws to prevent Asian immigrants from engaging in activities such as fishing, see, e.g., Takahashi v. Fish & Game Comm'n, 334 U.S., 410 (1948), and operating laundries, see, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886). The most notable modern example of such behavior in California is Proposition 187, which denies undocumented foreign nationals ("illegal immigrants") access to basic government services. See Cal. Welf. & Inst. Code § 10001.5 (West 2001); see also Patrick Healy, L.I. Clash on Immigrants is Gaining Political Force, N.Y. Times, Nov. 29, 2004, at A1 (detailing attempts of Long Island politicians to prevent Hispanic immigrants from living and working in their communities by strictly enforcing ordinances to prevent groups of day laborers from waiting for potential employers on street corners).

60 See Neuman, supra note 56, at 1435–37 (stating that this is why "local anti-foreign movements may have difficulty enlisting the national government in their crusades").

61 Id. at 1436–37.

62 See id. at 1436–39.
Nonetheless, the political function doctrine enables states to classify people based on alienage in ways that federal courts would forbid if it were done according to race or gender. For example, the Supreme Court would not uphold a law that prohibited African Americans from serving as peace officers, but the Supreme Court upheld a California law that banned noncitizens from such jobs. Additionally, although the Court struck down state laws prohibiting foreign nationals from obtaining fishing licenses, working as professional engineers, gaining admission to the state bar, and becoming notaries public, the Court upheld state laws prohibiting foreign nationals from becoming public school teachers, state troopers, and peace officers. Finally, although the Court has held that a blanket prohibition on foreign nationals from state civil service posts violates the Due Process Clause, the most recent Supreme Court decisions favor a broad reading of the political function doctrine.

B. A Comparison to Race and National Origin Classifications

The Court's analysis of the Equal Protection Clause regarding classifications based on race and national origin is relevant because citizens often direct racial animosity toward newcomers to the country. Race and national origin classifications are "suspect," which means that such classifications are unconstitutional "unless they are necessary to promote a 'compelling' or 'overriding' interest of government." Racial classifications "run[ ] counter to the most fundamen-

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63 See Carrasco, supra note 40, at 614-17 (describing the jurisprudential framework for analysis of state and federal alienage classifications).
64 See Cabell v. Chavez-Salido, 454 U.S. 432, 433 (1982) (upholding a state alienage classification that required citizenship of "peace officers"). On the other hand, a racial classification, such as a state law that prohibited Asian Americans from getting jobs as peace officers, would violate the Constitution. See 3 ROTUNDA & NOWAK, supra note 30, § 18.5 (stating that "[c]lassifications based on race or national origin have been held to be "suspect" and therefore courts will subject such classifications to strict scrutiny).
65 See Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 412-22 (1948).
73 For a case involving school teachers as construed to be "policy makers," see Ambach, 441 U.S. at 72-81. For a case upholding a citizenship requirement for toll takers, see Cabell, 454 U.S. at 442.
74 See Johnson, supra note 2, at 1485-86; Boyd, supra note 4, at 341. For the source of the information provided in this brief summary of equal protection jurisprudence, see 3 ROTUNDA & NOWAK, supra note 30, § 18.5.
75 3 ROTUNDA & NOWAK, supra note 30, § 18.5.
76 Id.
tal concept of equal protection."Discrimination based on national origin and ancestry is likewise considered suspect. Thus, classifications based on national origin or ancestry are generally invalid.

A nexus of discriminatory intent often combines racism with xenophobia. If a state described its classification using explicitly racist terms, however, the Supreme Court would likely invalidate the classification as unconstitutional. Courts are more tolerant and apply strict scrutiny far less frequently when states distinguish based on citizenship. Courts should be aware of the "overlap" between alienage and race "[t]o ensure that the law does not invite invidious racial or national origin discrimination through reliance on citizenship status." Thus, a citizenship requirement for a job as a teacher or probation officer might withstand legal scrutiny, even if a court would not uphold a racial requirement for such occupations. Consequently, the overlap between alienage and race in the United States potentially enables states to use citizenship requirements as a proxy for unlawful racial discrimination.

C. Citizenship, Membership, and the Political Community

The debate over whether federal courts should permit states and local governments to use alienage classifications centers on the meaning and value of citizenship. An analysis of the Court's alienage jurisprudence involves a study of the extent to which states and local governments may treat citizens differently from legal permanent residents (LPRs). About one million foreign nationals become LPRs

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77 Id.
78 See id. The distinction between national origin and alienage is important. An alienage classification refers to citizenship, while national origin refers to ethnicity or ancestry.
79 See Rice v. Cayetano, 528 U.S. 495, 514-17 (2000) (holding that the Fourteenth Amendment prohibited Hawaii from allowing only "Native Hawaiians" to vote for members of a board that administered programs to help Native Hawaiians because the law was an improper ancestry classification).
80 See Boyd, supra note 4, at 323.
81 See Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 413 (1948) (invalidating a law that, as written in an earlier version, explicitly banned "alien Japanese" from acquiring fishing licenses).
82 Compare 3 ROTUNDA & NOWAK, supra note 30, § 18.12 (explaining that state—but not federal—alienage classifications receive strict scrutiny unless the classification relates to a political function), with id. § 18.5 (stating that racial classifications uniformly receive strict scrutiny). Therefore, while a court would always subject racial classifications to strict scrutiny, it might subject an alienage classification to rational relationship scrutiny.
83 See Johnson, supra note 2, at 1506-07 (arguing that neglecting to address the overlap between alienage and racial status "has significant practical consequences").
84 See id. at 1505-06 (stating that "[a]lthough the law tolerates discrimination based on citizenship status within limits, it generally prohibits discrimination on the basis of race").
85 See id. at 1506-07.
each year and contribute to American economic and cultural life by, among other things, paying taxes and serving in the U.S. armed forces.

The vast majority of LPRs cannot naturalize immediately and must wait for a period of time, usually five years. The law does not require LPRs to naturalize; the majority of foreign nationals who become LPRs receive that opportunity because they are closely related to U.S. citizens and therefore are "family sponsored." This is not surprising, as family unification is one of the primary goals of the nation's immigration policy. Some LPRs arrive in the United States as children and therefore are "without much touch with their country of citizenship" and have "no reason to feel or to establish firm ties with any place besides the United States."

Citizenship has been called "a universal and distinctive feature of the modern political landscape" that is not "a mere reflex of residence." Indeed, the Supreme Court has stated that "it would be difficult to exaggerate [the] value and importance" of U.S. citizenship. But even if the Constitution permits some difference in treatment be-

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86 The number of new LPRs varies from year to year. U.S. DEP'T OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (2002). In 2000, the United States granted about 850,000 foreign nationals permanent resident status. Id. at 1. Sixty-nine percent of those LPRs were family sponsored. Id. at 2. In 2002, the United States allowed slightly more than one million foreign nationals to become LPRs. U.S. DEP'T OF JUSTICE, 2002 YEARBOOK OF IMMIGRATION STATISTICS 6 (2003) [hereinafter 2002 YEARBOOK OF IMMIGRATION STATISTICS]. Sixty-three percent of these LPRs were family sponsored. Id. In 2001, the United States also allowed slightly more than one million foreign nationals to become LPRs. U.S. DEP'T OF JUSTICE, 2001 STATISTICAL YEARBOOK OF IMMIGRATION AND NATURALIZATION SERVICE 3 (2003). Sixty-four percent of LPRs in 2001 were family sponsored. Id. LPRs who are not family sponsored typically are either admitted under employment preferences or refugees seeking asylum. Id. at 11-15.

87 See Demore v. Kim, 538 U.S. 510, 544 (2003) (Souter, J., dissenting) (noting that male LPRs between the ages of 18 and 26 must register with the Selective Service); Knapp, supra note 1, at 402 (noting that LPRs serve in the military, pay taxes, and benefit the community in many other ways).

88 See Demore, 538 U.S. at 544-47 (Souter, J., dissenting); 2002 YEARBOOK OF IMMIGRATION STATISTICS, supra note 86, at 1; AUSTIN T. FRACOMEN, JR. ET AL., 2 IMMIGRATION LAW & BUSINESS § 5:14 (2004). The Fragomen treatise explains that an LPR cannot apply for naturalization until meeting the "continuous residence and physical presence requirements" of the immigration laws. Id. Generally, an LPR must "have resided continuously in the United States for five years." Id.

89 See 1 FRACOMEN, JR. ET AL., supra note 88, § 3:1 (stating that LPRs possess "the status of having been lawfully accorded the privilege of residing permanently in the United States" (emphasis added))

90 See 2002 YEARBOOK OF IMMIGRATION STATISTICS, supra note 86, at 4.

91 See id.; see also Demore, 538 U.S. at 544 (Souter, J., dissenting) (stating that "the United States goes out of its way to encourage just such [familial] attachments by creating immigration preferences for those with a citizen as a close relation").

92 Demore, 538 U.S. at 544-45 (Souter, J., dissenting).


tween citizens and foreign nationals, the range and extent of such differences must be delineated. The importance of citizenship "does not answer the . . . important question of how many rights and which ones are reserved strictly for citizens."

Specifying the scope of the political function doctrine is "the art of drawing a line" between citizens and foreign nationals. One could view the political function doctrine as "reflect[ing] the Court's desire to preserve the significance of citizenship as an expression of community." Since the 1970s, a majority of the Justices seem to have believed that subjecting all state alienage classifications to close judicial scrutiny would remove the distinctions between citizens and aliens and thus "depreciate the symbolic values of citizenship." Citizenship is less valuable if the law does not distinguish between foreign nationals and citizens, especially in areas involving self-governance. The primary question concerns the scope of the political function exception—the broader the reach of the doctrine, the more likely it will curtail the access of foreign nationals to specific occupations.

II
THE HISTORY OF STATE ALIENAGE CLASSIFICATIONS

Today, courts subject state alienage classifications to strict judicial scrutiny unless those classifications concern state efforts to define its political community. This approach, however, has not always been dominant; the Court's alienage jurisprudence has evolved since the founding of the nation as jurisprudential paradigms developed and changed.

A. Early Supreme Court Interpretations

Early Supreme Court decisions hinged on federalism concerns regarding the boundaries between state and federal authority over borders and immigration, specifically whether states retained signifi-

95 See Boyd, supra note 4, at 328.
96 Id.
97 See Knapp, supra note 1, at 412.
98 See id.
99 See id.
100 See id.
101 See id. at 411.
102 For informative histories of the Court's alienage jurisprudence, see 3 ROTUNDA & NOWAK, supra note 30, § 18.12, which provides an excellent overview of the Court's alienage jurisprudence throughout history, and Maltz, supra note 34, at 1148-62, which argues in support of the ability of states to classify based on alienage. See also Gerald L. Neuman, The Lost Century of American Immigration Law (1776-1885), 93 COLUM. L. REV. 1833, 1834 (1993) (countering the myth that "the borders of the United States were legally open until the enactment of federal immigration legislation in the 1870s and 1880s").
cant independent authority over their borders. Initially, the Court seemed untroubled by state initiatives to control immigration. For example, in 1837 the Court upheld a New York City ordinance that ordered ship masters to submit a report under oath providing "the name, place of birth, and last legal settlement, age and occupation, of every person . . . brought as a passenger." Later, the Supreme Court removed the ability of the states to regulate immigration because the states were visibly abusing immigration and border control powers through overzealous attempts to curtail immigration. In its effort to rein in the wayward states, the Court invoked the Commerce Clause power to regulate commerce with foreign nations. The Court reversed its earlier permissive attitude and held that the Commerce Clause functions to "exclude the States from regulating commerce in any way" and that regulation of transportation in interstate commerce practically operated as a regulation of commerce itself. The Court also emphasized the need for the federal government to have singular authority over immigration and naturalization. Thus, the general rule was that the federal government controlled immigration and the treatment of aliens, and the states could not meddle. The question remained to what extent states could classify people based on alienage in areas outside of immigration and border control.

B. Yick Wo v. Hopkins and Special Public Interests

In Yick Wo v. Hopkins, the Court explicitly ruled that foreign nationals fell within the term "any person" in the Fourteenth Amendment of the Constitution, meaning that the Constitution afforded foreign nationals equal protection of the law. In Yick Wo, a Chinese

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103 See Maltz, supra note 34, at 1155.
105 See Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 465-66 (1886) (permitting ships in foreign commerce to be subjected to state quarantine regulations); Chy Lung v. Freeman, 92 U.S. 275, 277 (1876) (invalidating a California law that required ship masters to post a bond for foreign female passengers that state officials believed were prostitutes); Neuman, supra note 56, at 1436.
106 See, e.g., Smith v. Turner, 48 U.S. 283, 419 (1849) (relying on the Commerce Clause to strike down immigration control laws).
107 Id. at 417.
108 See id. at 419.
109 See id.
110 See Neuman, supra note 102, at 1890–91 (noting that, even after Smith v. Turner, "[t]he lower courts understood the Supreme Court as approving state police power over certain categories of migrants" and that "[i]n some instances these cases were invoked as suggesting broad state power, while in others they were read as limiting state power to a short list of traditional categories").
111 118 U.S. 356 (1886).
112 See id. at 368–69; see also Maltz, supra note 34, at 1156–57 (providing an informative discussion of Yick Wo and its significance).
foreign national challenged an ordinance that required city approval to operate a laundry in a wooden building. The Court unanimously held that the public supervisors violated the Equal Protection Clause by denying two hundred Chinese individuals approval while permitting eighty non-Chinese individuals to operate "the same business under similar conditions."

Although *Yick Wo* seemed to place foreign nationals on an equal footing with U.S. citizens with respect to Equal Protection Clause rights, other cases decided around the same time did not turn out so favorably. In fact, the Court endorsed state use of alienage classifications as legitimate and proper by upholding several laws that openly discriminated against foreign nationals. The Court permitted states to treat foreign nationals differently than citizens "whenever the alienage classification related to a 'special public interest,'" provided that the states preferred a justification other than "mere hostility toward aliens." For example, in 1914 the Court upheld a Pennsylvania statute that prohibited foreign nationals from hunting game. In 1915, the Court allowed states to prohibit foreign nationals from working on government-funded public works projects.

At the same time, the Court affirmed its protection of foreign nationals against classifications that did not support a special public interest. In *Truax v. Raich*, the Court struck down a provision of the Arizona Constitution that required eighty percent of every employer's workforce to be citizens. The Court held that the right to work was "the very essence of the personal freedom and opportunity" the Equal Protection Clause guarantees.

The Court's decision in *Truax* did not, however, hold that states had to treat foreign nationals and citizens equally. States simply could not use alienage classifications to deprive foreign nationals of

113 See *Yick Wo*, 118 U.S. at 365-66.
114 See id. at 374.
116 See 3 ROTUNDA & NOWAK, supra note 30, § 18.12.
117 See id. ("The restriction on aliens fell into three main categories: use of natural resources, ownership of land, and employment.").
118 *Patsone*, 232 U.S. at 143-46.
120 239 U.S. 33 (1915).
121 See id. at 43.
122 Id. at 41.
123 See Maltz, supra note 34, at 1158 (contending that *Yick Wo* and *Truax* "are about 'equality' only in a very limited sense").
the right to make a living. After Truax, states made sure to justify alienage classifications as legitimately needed to serve a special public interest, such as the preservation of valuable state resources. The difference between "an ordinary means of livelihood" and a resource worthy of "special public interest" was a "value-laden judgment," and the Court usually sided with the state over the foreign national.

In 1948, the Court approached state alienage classifications differently. In Takahashi v. Fish & Game Commission, the Court struck down a California statute that prohibited issuance of a fishing license to any "person ineligible to [sic] citizenship." The California legislature first passed a law that prohibited Japanese nationals from receiving fishing licenses while the United States was at war with Japan, but the state changed the law (to exclude those "ineligible to citizenship") because state officials believed a law explicitly referencing one racial classification would be unconstitutional. California argued that its law fit under the protection of the special public interest doctrine and that the state's interest in the fish allowed a restriction on the ability of foreign nationals to use valuable natural resources. The argument fit well with prior case law involving the special public interest doctrine, but in Takahashi the Court reached a different result. Takahashi represented an important shift in the Court's alienage jurisprudence because it viewed the state law as a racial classification motivated by California's desire to discriminate against Japanese nationals.

124 See Knapp, supra note 1, at 410.
125 See, e.g., Cockrill v. California, 268 U.S. 258, 261 (1925) (upholding a state statute under which land would escheat to the state if the owner attempted to convey it to a noncitizen); Frick v. Webb, 263 U.S. 326, 334 (1923) (supporting a state law that prohibited transfer to noncitizens of shares of a corporation that owned land); Webb v. O'Brien, 263 U.S. 313, 322-23 (1923) (upholding a law that prohibited food crop contracts with noncitizens); Terrace v. Thompson, 263 U.S. 197, 217 (1923) (upholding a state statute prohibiting land ownership by noncitizens because the state had a "special public interest" in the use of its land); Crane v. New York, 239 U.S. 195, 198 (1915) (upholding a state law that required the hiring of citizens for public works projects because of the "public character" of such work); Heim v. McCall, 239 U.S. 175, 192-93 (1915) (same).
126 See Knapp, supra note 1, at 410.
127 334 U.S. 410, 413 (1948).
128 See id.
129 See id. at 419.
131 See Takahashi, 334 U.S. at 420; id. at 422 (Murphy, J., concurring) ("Even the most cursory examination of the background of the statute demonstrates that it was designed solely to discriminate against such persons in a manner inconsistent with the concept of equal protection of the laws. Legislation of that type is not entitled to wear the cloak of constitutionality.").
C. Strict Scrutiny for State Alienage Classifications

In 1971, the Court extended its holding in *Takahashi* and subjected an alienage classification to strict judicial scrutiny, thereby throwing the special public interest line of cases into question. In *Graham v. Richardson*, the Court held that a state violated the Equal Protection Clause if it limited welfare benefits to citizens or individuals who had lived in the country for a period of time. Relying on *Takahashi*, the Court stated that its case law generally considered state alienage classifications to be similar to racial and national origin classifications. The Court bolstered its argument by citing the famous footnote four from *United States v. Carolene Products Co.* in which the Court expressed a willingness to use higher scrutiny on laws that negatively impact "discrete and insular minorities" that have historically been subjected to discrimination and are unable to protect themselves in the political process.

In *Graham*, the Court promised to protect foreign nationals from discriminatory state alienage classifications. In *In re Griffiths* in 1973, the Court struck down a Connecticut statute that allowed only citizens to practice law. The Court rejected Connecticut’s argument that citizenship was relevant to a person’s suitability to be an attorney and held that the justification was not compelling enough to survive strict scrutiny. The Court reasoned that categorically prohibiting foreign nationals from practicing law merely because some were unsuited to become attorneys was overinclusive and not narrowly tailored.

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132 See Maltz, supra note 34, at 1164 (arguing that the Court’s holding in *Graham v. Richardson*, 403 U.S. 365 (1971), went further than the *Takahashi* decision in requiring “affirmative support for certain classes of aliens”).

133 See *Graham*, 403 U.S. at 372. The *Graham* decision scrutinized Arizona and Pennsylvania laws that limited the extent to which LPRs could take advantage of state welfare programs.

134 See id. at 371.

135 See id. at 372.


137 Not everyone has such a positive reading of *Graham*. Professor Maltz believes that *Graham* “threatened to reduce the incidents of citizenship to their barest essentials—the right to remain in the country indefinitely, the right to return after traveling abroad, and the right to claim the protection of the government of the United States while traveling abroad.” Maltz, supra note 34, at 1166.


139 See id. at 729. The Court stated that duties of lawyers did not involve matters of state policy or unique responsibility such that the state could justify entrusting those duties only to citizens. *Id.*

140 See id. at 725. Professor Maltz believes that, based on the reasoning of the *Griffiths* decision, states would almost never be able to use alienage classifications because “Historically, few occupations have been as extensively regulated as the practice of law; thus if states are forbidden to reserve this profession to citizens, it is difficult to see how
The Court never issued another opinion as far-reaching in its protection of foreign nationals from state alienage classifications as *Graham*. In a series of opinions beginning in the 1970s, the Court narrowed the protection against discrimination afforded foreign nationals.\(^\text{141}\) In *Sugarman v. Dougall*, the Court struck down a New York Civil Service Law that mandated that state civil service employees be U.S. citizens.\(^\text{142}\) The law's objective was to ensure that the state hired "loyal" workers.\(^\text{143}\) The Court reasoned that the classification was both overinclusive, because it applied to posts that did not make government policy, and underinclusive, because it did not apply to some jobs that did.\(^\text{144}\)

Although *Sugarman* was positive for foreign nationals, the Court indicated that its holding was narrow.\(^\text{145}\) The decision laid the foundation for what would become the political function exception. Specifically, the Court held that states could constitutionally require citizenship for "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 functions that go to the heart of representative government."\(^\text{146}\)

In dicta, the Court clearly recognized that a state retains the "power to exclude aliens from participation in its democratic political institutions."\(^\text{147}\) The seeds sown in the *Sugarman* dicta did not bear fruit until a few years later. In the meantime, the Court continued to strike down state and local alienage classifications.\(^\text{148}\)

**D. The Political Function Doctrine and the Rational Relationship Test**

*Foley v. Connellie*\(^\text{149}\) marked the first time the Court invoked the political function doctrine enunciated in *Sugarman* to uphold a state
alienage classification—a New York statute that prevented foreign nationals from obtaining jobs as state troopers. The Court held that police officers were important public figures and, based on that finding, did not apply strict scrutiny to the alienage classification. Writing for the Court, Chief Justice Burger stated that strict scrutiny was appropriate where the state was distributing economic benefits on the basis of alienage, but not where the state was defining its political community. In applying the less-stringent rational relationship test, the Foley Court reasoned that the lower standard of review was appropriate for laws relating to self-governance and the qualifications of officials whose duties involved important government functions. The New York law passed the rational relationship test because, among other things, state police officers were "clothed in the authority of the state" and had broad discretion to enforce state laws.

The Court expanded the scope of the political function exception the following year in Ambach v. Norwick. The Court upheld a New York statute that prevented foreign nationals from obtaining permanent teaching certification if they were eligible for citizenship and did not naturalize or if they were not yet eligible to become citizens and would not promise to naturalize as soon as they could. Although the Ambach Court maintained that alienage classifications were still "inherently suspect" and that it was no longer reviving the special public interest doctrine, the Court decided that the less-stringent rational relationship test was appropriate where the alienage classification concerned a function related to "the operation of the State as a governmental entity." Thus, the Court stated that it would use the rational relationship standard if the state alienage classification furthered a "governmental function." The Court concluded that teachers furthered an important governmental function by preparing young people to become active citizens in democratic society—a role important

150 See id. at 299–300.
151 See id.
152 See id. at 297.
153 See id. at 295.
154 See id. at 297–98.
155 Id. at 298–99.
157 See id. at 70 & nn.1–2.
158 See id.
159 See id. at 73–75.
160 Id. at 78–79.
161 See id. at 78–81.
to the country's political community\textsuperscript{162}—and that the state law was rationally related to that function.

In dissent, Justice Blackmun argued that alienage was not a reasonable way to determine who was best-suited to serve as a teacher.\textsuperscript{163} Justice Blackmun argued that secondary school teachers did not create or execute public policy,\textsuperscript{164} and that being a foreign national did not make one less able to be a secondary school teacher.\textsuperscript{165} Noting that the statutory scheme would prefer a less-qualified teacher who was a U.S. citizen over a better-qualified foreign national, the dissent argued that the majority's reasoning was "constitutionally absurd" because the New York law would not allow, for example, a French citizen to teach French.\textsuperscript{166} The dissent also argued that it was "logically impossible" to distinguish the New York statute at issue from other statutes the Court struck down in cases such as \textit{Sugarman}.\textsuperscript{167} Indeed, it seems difficult to comprehend why banning foreign nationals from public teaching posts is acceptable, but banning noncitizens from joining the state bar is improper.

The Court continued its expansive reading of the political function doctrine in \textit{Cabell v. Chavez-Salido}, upholding a California law that excluded foreign nationals from jobs as "peace officers."\textsuperscript{168} The case concerned individuals who sought jobs as Spanish-speaking deputy state probation officers.\textsuperscript{169} The five-Justice majority was untroubled by the law's expansive definition of "peace officers," which covered seventy kinds of jobs including toll service employees, cemetery sextons, and furniture and bedding inspectors.\textsuperscript{170} The alienage classification, the Court concluded, was a legitimate part of "the community's process of political self-definition"\textsuperscript{171} because deputy probation officers "personify the State's sovereign powers."\textsuperscript{172}

The four dissenting Justices argued that California was motivated by "state parochialism and hostility toward foreigners"—precisely the

\begin{itemize}
\item \textsuperscript{162} See id.
\item \textsuperscript{163} See id. at 81 (Blackmun, J., dissenting).
\item \textsuperscript{164} See id. at 84 (Blackmun, J., dissenting). Justice Blackmun began his dissent by agreeing with the majority that the "touchstone" of the political function doctrine was that states could demand citizenship for jobs that formulate "broad public policy." \textit{Id.} at 82-83 (Blackmun, J., dissenting). He then devoted the remainder of his dissent to criticizing the majority's reasoning and ultimate conclusion that teachers fulfill such a role. See id. at 82-90 (Blackmun, J., dissenting).
\item \textsuperscript{165} See id. at 87-88 (Blackmun, J., dissenting).
\item \textsuperscript{166} See id. at 84 (Blackmun, J., dissenting).
\item \textsuperscript{167} See id. (Blackmun, J., dissenting).
\item \textsuperscript{168} 454 U.S. 432, 436 (1982).
\item \textsuperscript{169} See id. at 435.
\item \textsuperscript{170} See id. at 442-43.
\item \textsuperscript{171} \textit{Id.} at 439.
\item \textsuperscript{172} \textit{Id.} at 447.
\end{itemize}
type of state action the Court promised to guard against in *Graham*.\(^{173}\) Interestingly, the dissent noted that while this law prohibited foreign nationals from serving as peace officers, California law permitted foreign nationals to become state judges.\(^{174}\)

After *Cabell*, some commentators believed that the Court would soon overrule *Graham* and its progeny.\(^{175}\) That belief, however, proved incorrect. In 1984, over only one dissent,\(^{176}\) the Court struck down a Texas statute that required citizenship for notaries public.\(^{177}\) Texas argued that notaries public played an important political function because they "authenticate written instruments, administer oaths, and take out-of-court depositions."\(^{178}\) Texas also contended that the citizenship requirement furthered the state interest of ensuring that notaries know state law.\(^{179}\) Neither argument impressed the Court. If Texas truly wanted to ensure that notaries public were familiar with state law, the Court stated, then testing all potential applicants was a better way to fulfill that goal than a citizenship classification.\(^{180}\) Likewise, the Court mentioned that states could not require citizenship for admission to the bar\(^{181}\) and that notaries public played less-important roles in the legal system than attorneys and court officials.\(^{182}\) Consequently, the Court concluded that notaries public did not fall within the political function exception because that exception is reserved for "positions intimately related to the process of democratic self-government."\(^{183}\) After determining that the Texas law did not fall within the exception, the Court applied strict scrutiny and struck the law down.\(^{184}\)

As the foregoing discussion illustrates, the current boundaries of the political function doctrine are difficult to map. The Court would likely give states wide latitude to exclude foreign nationals from public employment, as well as from taking part in key governmental func-

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\(^{173}\) See *id.* at 463 (Blackmun, J., dissenting).

\(^{174}\) See *id.* at 459–60 & n.10 (Blackmun, J., dissenting).

\(^{175}\) See *Maltz*, *supra* note 34, at 1187.

\(^{176}\) See *Bernal v. Fainter*, 467 U.S. 216, 228 (1984) (Rehnquist, J., dissenting). In a one-sentence dissent, Justice Rehnquist stated that he dissented for the reasons articulated in his dissent in *Sugarman v. Dougal*, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting). There, Justice Rehnquist argued, among other things, that the Fourteenth Amendment prohibited racial discrimination, but did not prohibit discrimination based on citizenship. See *Sugarman*, 413 U.S. at 649 (Rehnquist, J., dissenting).

\(^{177}\) See *Fainter*, 467 U.S. at 226–27.

\(^{178}\) Id. at 218 (describing the tasks fulfilled by notaries public).

\(^{179}\) See *id.* at 227–28.

\(^{180}\) See *id.*

\(^{181}\) See *id.* at 226 (citing *In re Griffiths*, 413 U.S. 634 (1973)).

\(^{182}\) See *id.* at 226–27.

\(^{183}\) Id. at 220.

\(^{184}\) See *id.* at 228.
tions, but not from a broad category of private occupations. A state probably could not create an expansive ban to prohibit foreign nationals from working in all kinds of public posts, but could likely exclude aliens from many specific governmental jobs, particularly ones involving some degree of discretionary authority.

III
THE POLITICAL FUNCTION DOCTRINE IN PRACTICE

A. Traditional Legal Analysis

Although the purpose of this Note is to examine the efficiency of the political function doctrine, a brief look at how commentators traditionally analyze the doctrine is helpful. The basic framework of the current doctrine is clear, even if predicting the outcome of any particular case analyzed under the doctrine is difficult at best. Courts subject state alienage classifications to strict scrutiny, and the political function doctrine is an exception to strict scrutiny. Commentators thus criticize the political function doctrine as an “exception [that] has swallowed the rule” because the scope of the exception is easy to widen simply by invoking “sweet-sounding rhetoric about the political community, [that enables] courts [to] transform every state employee into a policymaker.” Moreover, the Court broadly construed the term “special public interest” and validated a wide-ranging spectrum of anti-immigrant legislation, thereby removing most meaningful protection for foreign nationals under the Yick Wo and Traux precedents.

The political function exception supposedly applies only to important jobs that involve formulating, reviewing, or executing broad public policy. But determining whether a statute falls within this general classification is often difficult. Indeed, many cases invoking the doctrine to uphold state alienage classifications were five-four decisions with vigorous dissents. The dissenting Justices often contended that the majority misconstrued the key terms, such as “important” and “formulating, reviewing, or executing broad public

185 See 3 ROTUNDA & NOWAK, supra note 30, § 18.12.
186 See id.
187 See Maltz, supra note 34, at 1178–79 (discussing what Maltz calls the “Sugarman exception to the general rule of strict scrutiny,” coined after the case that first mentioned what eventually became the political function doctrine); John E. Richards, Public Employment Rights of Aliens, 34 BAYLOR L. REV. 371, 372–82 (1982).
188 See Richards, supra note 187, at 380.
189 See Knapp, supra note 1, at 412.
190 See id.
In many instances, the dissenting Justices probably had the stronger argument, as the majority seemed to expand the meaning of the phrase "formulating public policy" to "carrying out public policy." Such a broad interpretation, Justice Marshall suggested, would enable states to prohibit foreign nationals from working as firefighters because firefighters technically carry out the public policy of putting out fires. The dissenting Justices in Ambach and Cabell also argued that the majority was irrational in expanding the concept of policy maker to include teachers and voluntary fire wardens.

Two competing values are at play in political function doctrine jurisprudence. The Court attempts to balance the symbolic value of citizenship against the fundamental value of equal treatment under the law. The conservative members of the Court generally extol the virtues of citizenship and praise "a person's relationship to this country as a citizen." Conservative Justices also focus on the mutability of citizenship and emphasize that legal permanent residents (LPRs) can choose to naturalize. Consequently, these Justices believe that prohibiting states from using alienage classifications would erode the value of citizenship.

On the other hand, the more liberal Justices favor a construction of the word "important" that would apply only to a person holding "a high-level job in public administration that affects large groups of the body politic." This seems more logical and more consistent with the notion of preserving important government functions for citizens. As one commentator argued, the result of whether a particular type of employment falls within the political function exception is often decided by which side is able to convince five Justices rather than in...
accordance with any coherent logical framework. Moreover, the Court's more liberal Justices contend that discrimination based on citizenship runs counter to the fundamental value of equal treatment under the law and the belief that one should judge individuals based on qualifications. Alienage classifications that govern employment ensure that the best citizen gets the job, not the best candidate.

B. The Political Function Doctrine and the Employment Market

An efficient legal doctrine provides the most positive results with the fewest negative side effects. This section evaluates whether the political function doctrine is efficient. First, this section assesses whether the political function doctrine coincides with the proper role of regulation in markets. Second, this section outlines the effect of the political function doctrine on the market.

Federal and state governments regulate markets for many goods and services, such as radio communications, utilities, and employment. Markets are generally more efficient with less regulation; government intervention is warranted only where a market cannot operate efficiently on its own because of a market failure caused by monopoly, high information costs, or other externalities.

States did not enact citizenship requirements to correct a market failure and help the market operate more efficiently. Citizenship is not connected to competence or job performance and is therefore

200 See Maltz, supra note 34, at 1180-81 (counting the votes in modern alienage jurisprudence decisions and noting that the justices who held the "swing votes" failed to "articulate[ ] a clear, generally-applicable theory for distinguishing permissible from nonpermissible distinctions between citizens and aliens").

201 See, e.g., Foley v. Connellie, 435 U.S. 291, 307 (1978) (Marshall, J., dissenting) (arguing that the "exclusion of aliens" from state trooper jobs "violates the Equal Protection Clause of the Fourteenth Amendment").

202 See, e.g., Ambach v. Norwick, 441 U.S. 68, 85-86 (1979) (Blackmun, J., dissenting) (contending that it is illogical to judge applicants for teaching posts based on their citizenship status as opposed to their individual qualifications).

203 See id. at 84 (Blackmun, J., dissenting) (noting that an alienage classification would prevent a well-qualified noncitizen Englishwoman from teaching "the grammar of the English language").

204 See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 n.4 (1983); THE ECONOMIC APPROACH TO LAW 9 (Paul Buitows & Cento G. Veljanovski eds., 1981) (stating that "social efficiency is a technical concept of unimprovability" in which everyone benefits).

205 See FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 11-14 (Avery Wiener Katz ed., 1998); Richard A. Posner, Essay, The Efficiency and the Efficacy of Title VII, 136 U. Pa. L. Rev. 513, 515 (1987) (stating that the government should not intervene in a market "not marked by externalities, monopoly... [or] high costs of information, or any other condition that might justify such intervention on economic grounds").
not a rational job requirement.206 State alienage classifications require employers to discriminate on the basis of citizenship when selecting candidates for so-called political jobs, thus reducing the number of eligible candidates for the targeted jobs.207 In such circumstances, employers must choose the best citizen for the job, as opposed to the best candidate.206 In an unrestrained market economy, the merit principle—the principle that the best worker at any given wage rate is hired—is self-enforcing. As one commentator noted, 
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[e]mployers have an obvious financial self-interest in making employment decisions on the basis of merit. And competition, if not greed, requires or leads them to pursue that self-interest with vigor."209 Because alienage classifications prevent employers from hiring employees based only on merit, these classifications harm employers by disqualifying job candidates based on a characteristic wholly irrelevant to work performance.

Some state alienage classifications prohibit foreign nationals from owning particular kinds of businesses or engaging in certain occupations.210 These citizenship requirements limit entry in those targeted business fields and thereby stifle competition, based on a criterion that is not connected to competence in the given field. Ideally, consumers would select businesses based on price and competence, but citizenship requirements add an additional, irrational factor that impacts market performance.

The primary proponents of state citizenship requirements are practitioners in specific fields and other interest groups who seek to stifle—not encourage—competition.211 Thus, citizenship requirements are a form of protectionism,212 the effect of which is to increase

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206 In fact, a citizenship requirement is in many ways the opposite of a ban on racial-ethnic discrimination. A discrimination prohibition forbids an employer from considering particular characteristics, such as race and ethnicity, when making hiring decisions; a citizenship requirement forces an employer to consider citizenship when hiring employees.


208 See Owen M. Fiss, A Theory of Fair Employment Laws, 38 U. Chi. L. Rev. 295, 241 (1971). Fiss states that "[t]his will tend to maximize the businessman's own wealth, and it will foster society's interest in efficiency—producing the greatest number of goods and services at the lowest cost." Id. at 249–50.

209 Id. at 249–50.

210 See Plascencia et al., supra note 5, at 18–19. Specifically, some current state citizenship requirements prohibit noncitizens from obtaining liquor licenses, becoming bail bondsmen, or forming certain types of organizations.

211 See id. at 8.

212 See id.
the prices for products and services in the protected industry. In this regard, the political function doctrine seems to run counter to the normal goal of regulation: it allows states to pass laws that make the market less efficient.

The overlap between alienage and national origin is significant, a fact that historically enabled states to use alienage classifications to target specific racial and ethnic groups. Laws are expressive and do more than identify prohibited or permissible conduct—laws send messages to the populace. By prohibiting foreign nationals from serving as deputy probation officers or teachers, the state signals to its residents that foreign nationals are considered to be less suitable, less trustworthy, and less competent. Thus, some commentators believe that such laws tacitly encourage discrimination and negative feelings toward foreign nationals. Moreover, discriminatory alienage classifications perpetuate stereotypes about foreign nationals and impose the substantial psychological costs associated with labeling a group of people inferior.

Citizenship requirements create a de facto loophole through which states can not only allow but even require employers to engage in racial discrimination. Alienage classifications—often motivated by racial prejudice—deserve careful scrutiny because this country’s history is replete with examples of racial hostility directed at foreign-

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213 See, e.g., Donohue, supra note 207, at 1412–19 (describing the neoclassical economic model of the labor market and the effect of discrimination on that market). Donohue analyzes racial, as opposed to alienage, discrimination, but the effects on the market would be analogous to a protectionist ban against employing a particular class of people.

214 See, e.g., Takahashi v. Fish & Game Comm’n, 334 U.S. 410 (1948) (invalidating a state law that prohibited noncitizens from obtaining a fishing license with the intention of targeting Japanese individuals).

215 See Deborah Hellman, The Expressive Dimension of Equal Protection, 85 MINN. L. REV. 1, 1–3 (2000) (arguing that in Brown v. Board of Education the Court understood that the “expressive nature” of segregation perpetuated the image of African Americans as being of “lower worth” and that the constitutional harm resulted from the law’s expressive character).

216 See Romero, supra note 25, at 883–85. Romero discusses, inter alia, the constitutional requirement that the U.S. president be a “natural born citizen” and the effect this has on views of what kinds of people are, therefore, the most loyal. Romero argued that the “Presidential Eligibility Clause” is a proxy for loyalty because it “suggests that natural born citizens were more presumptively loyal than naturalized ones.” Id. at 884. Romero also contends that racial and ethnic profiling sends messages to the populace about who is most likely to be disloyal to the country. Id. at 878 (noting studies that found that “the legal measures taken by the federal government reinforce deeply-held negative stereotypes—foreignness and possibly disloyalty—about Arabs and Muslims” (citations omitted)).

217 See id.

218 See id.

219 See id. at 878.
Allowing states and local governments to discriminate based on citizenship encourages the use of covert racial classifications—classifications motivated by racial animus that courts should not tolerate. The United States has, regrettably, embarrassed itself on several occasions in history because of its treatment of foreign nationals and use of racist alienage classifications. Courts should not support a legal doctrine that allows states to pass laws that will later stain the country’s history.

By enacting citizenship requirements for jobs, states can covertly engage in inefficient racial discrimination. Race, like citizenship, is not relevant to a person’s job performance and is therefore an irrational factor to consider in employment decisions. Racial discrimination is also inefficient because it causes the disfavored class to invest less in human capital. Members of a targeted group are less likely to invest in education and training if the employment market will not reward that investment with greater opportunities. The use of race as a criterion for hiring eliminates—for a large class of people—the incentive for self-improvement because race is beyond a person’s control. In such circumstances, it would be rational for minorities to

See Knapp, supra note 1, at 413. Statistical evidence strongly suggests a correlation between race and alienage. See id. at 401–02.

See Boyd, supra note 4, at 338–39.


See Fiss, supra note 208, at 237 (stating that use of race as a factor in hiring “would in any event impair rather than advance productivity and wealth maximization for the individual businessman and for society as a whole”). There is a debate among scholars regarding the efficiency of racial discrimination and prohibitions against racial discrimination, but the complexities of that debate are beyond the scope of this Note. See, e.g., Gary Becker, The Economics of Discrimination 1 (2d ed. 1971); Richard A. Posner, Economic Analysis of Law § 27.1 (3d ed. 1986); Donohue, supra note 207, at 1411; Posner, supra note 205, at 517; Strauss, supra note 207, at 1643; Cass R. Sunstein, The Anticaste Principle, 92 Mich. L. Rev. 2410, 2422 (1994).

See, e.g., Ambach v. Norwick, 441 U.S. 68, 87 (1979) (Blackmun, J., dissenting) (stating that a citizenship requirement for public school teachers was “irrational”); Strauss, supra note 207, at 1642.

See, e.g., Sunstein, supra note 223, at 2418–19. Sunstein provides a thorough analysis of the efficiency of racial discrimination and legal bans on discrimination. See also Strauss, supra note 207, at 1619 (engaging in economic analysis of racial discrimination and covering some of the same concepts as Sunstein).

See Sunstein, supra note 223, at 2419 (describing the “vicious cycle or even a spiral” that could be caused by racial discrimination as minority group members failed to reach their full potential by not investing in training and education).

See Fiss, supra note 208, at 241; Strauss, supra note 207, at 1643; Sunstein, supra note 223, at 2416. For a discussion of the “motivational” effect of discrimination on minorities, see Fiss, supra note 208, at 239.
invest less in education. Underinvestment in training and education by a class of workers prevents those workers from reaching their maximum potential and prevents society from benefiting from those workers' skills. Thus, the political function doctrine is inefficient because it protects state alienage classifications from judicial scrutiny.

The political function doctrine affects a significant number of potential employees. About one million foreign nationals gain permanent resident status every year, and they are typically eligible (but not required) to naturalize after five years. Thus, there are about five million LPRs in the United States who cannot yet naturalize at any given time. An LPR would not rationally invest in training for a profession from which he or she is barred. The five-year delay could cause LPRs to forego certain investments in education and training altogether, or, in the best circumstances, only create an inefficient transition period in which an LPR cannot maximize his or her productivity.

In addition to affecting a significant number of potential employees, the political function doctrine, as currently interpreted by the Court, applies to a wide range of jobs as diverse as public school teachers and peace officers. New York has citizenship requirements for establishing churches and serving as a public library director. In Illinois, only citizens can serve as labor dispute mediators. In Texas and Illinois, noncitizens cannot receive liquor licenses. Texas requires citizenship of bail bondsmen and public safety department employees. New Jersey requires citizenship of firefighters, boiler engineers, tax collectors, pharmacists, physicians, optometrists, and

228 See Sunstein, supra note 223, at 2417.

229 See id. at 2419; Strauss, supra note 207, at 1626-27 (stating that discrimination would cause "inefficient levels of investment in human capital" and mean that "society will not benefit fully from [the minority group's] talents"); see also Donohue, supra note 207, at 1412 (stating that "legislation that prohibits employer discrimination may actually enhance . . . economic efficiency"). Donohue believes laws that prohibit discrimination will run "discriminators . . . from the market more rapidly" and therefore increase overall market efficiency sooner. Id. at 1426.


232 Some state citizenship requirements include exceptions for LPRs who promise to naturalize at the earliest opportunity, but many laws do not include such exceptions. See Plascencia et al., supra note 5, at 19.

233 See, e.g., Cabell v. Chavez-Salido, 454 U.S. 432 (1982); Ambach v. Norwick, 441 U.S. 68 (1979). Almost every town has teachers and police officers. Citizenship requirements for these jobs are thus likely to have a significant effect on the market.

234 See Plascencia et al., supra note 5, at 19.

235 See id.

236 See id.

237 See id.
private detectives.\textsuperscript{238} Thus, the political function doctrine significantly affects market function because it permits state alienage classifications for many occupations.

Fortunately, state citizenship requirements are much less common than in prior decades,\textsuperscript{239} and states no longer enforce all citizenship requirements.\textsuperscript{240} Despite this, the citizenship requirements that states do not enforce are often still listed on agency web pages.\textsuperscript{241} As mentioned earlier, the expressive significance of laws is great—even if the law is not enforced and does not limit access to a particular occupation. Likewise, the lack of routine uniform enforcement could lead to selective enforcement against particular ethnic groups.\textsuperscript{242} Moreover, disseminating information about state alienage restrictions in public documents or on agency websites could discourage noncitizens from applying for jobs because they might not know that the citizenship requirements are not actually enforced in practice.

\section*{IV \hspace{0.5cm} Suggested Refinements to the Current Doctrine}

Although a major shift in the Court's alienage jurisprudence is unlikely and some form of the political function doctrine will probably continue to exist, some refinements could better limit the scope of the doctrine and thereby reduce the inefficiencies introduced into the market. These proposed refinements would protect against racial discrimination and ensure that state laws covered by the political function doctrine truly go to the heart of democratic self-governance. This Note employs the traditional language and tests of the Court's equal protection jurisprudence, as opposed to economic terms, to demonstrate that this more efficient proposal is consistent with standard equal protection concepts. In short, the proposal's justification emanates from the economic analysis of the political function doctrine, but the new framework this Note advocates remains consistent with standard equal protection jurisprudence.

Courts should adopt a new approach when analyzing state laws that purportedly fall within the political function doctrine. Specifically, courts should add another step to the analysis to prevent covert racial classifications, read the political function doctrine more narrowly, and increase the level of scrutiny to intermediate scrutiny for

\textsuperscript{238} See id.
\textsuperscript{239} See id. at 9 (finding that states impose far fewer citizenship requirements than they did twenty years ago).
\textsuperscript{240} See id. at 16. The authors report that state officials informed them that citizenship requirements "were about twice as likely to be ignored as enforced." \textit{Id.}
\textsuperscript{241} \textit{Id.} at 17.
\textsuperscript{242} See, \textit{e.g.}, \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 374 (1886).
classifications that fall within the political function exception to traditional strict scrutiny analysis.

A. Recognize Racial Animus and Covert Classifications

First, courts should carefully scrutinize state laws to ensure that alienage classifications are not actually state attempts to classify covertly based on race. Supreme Court alienage jurisprudence has, regrettably, failed to adequately consider the potential misuse of alienage classifications to target particular racial groups. Racial prejudice was associated with discrimination against immigrants many times during our country’s history, and laws that classify based on race are properly subject to strict scrutiny. Courts should first look for evidence of racial animus when examining a local alienage classification and then explicitly indicate whether such animus exists. Requiring courts to explicitly indicate their findings regarding racial animus will ensure that courts do not perform this in a cursory manner and provide a record for appeal if the lower court is erroneous. Considering the overlap between race and alienage more seriously would help eliminate covert racial classifications.

The Supreme Court already employs methods for detecting the presence of racial animus. In applying the first step of this proposed refinement to the political function doctrine, courts could use the principles the Supreme Court established in equal protection jurisprudence regarding racial classifications to determine if a state alienage classification is actually a covert racial classification. In determining whether a government actor violated the Equal Protection Clause, courts search for signs of discriminatory intent and evidence of disparate impact on the racial group. To support a finding of

243 See Boyd, supra note 4, at 323 (stating that “[a]s racial classifications fall into disfavor with the judiciary, those with improper motives may instead turn to alienage classifications”); see also Johnson, supra note 2, at 1499–1509 (discussing the racial demographics of immigrants and the failure of courts to adequately consider racism when scrutinizing alienage classifications). Boyd notes the extensive history of alienage discrimination in the United States and contends that it was “motivated by racism, xenophobia, irrational stereotypes, [or] a bare desire to harm a politically unpopular group.” Boyd, supra note 4, at 323 (footnote and internal quotation marks omitted).

244 See Knapp, supra note 1, at 413–15.

245 See 3 ROTUNDA & NOWAK, supra note 30, § 18.4 (detailing “basic principles regarding how a court determines the existence of a classification” such as searching for a government actor’s “discriminatory purpose” and noting the “disparate impact” of a law); Charles Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 325 (1987). Lawrence is more critical of the discriminatory intent requirement. Although discriminatory intent is sometimes hard to prove, the principles announced in the Court’s decisions are helpful.

246 See Washington v. Davis, 426 U.S. 229, 242 (1976) (announcing that both disparate impact and discriminatory intent are required components of a prima facie case of racial discrimination). Evidence of disparate impact includes items such as statistics indicating
discriminatory intent, the intent to discriminate need not be the sole motivating factor behind the state’s decision to use a classification as long as the intent to discriminate was one factor.  

Proof of disparate impact, along with other circumstantial evidence regarding the government’s intent, satisfies the burden of establishing a prima facie case of racial animus.

*Yick Wo* indicates that the Court will also infer discriminatory intent from discriminatory application of a rule. In *Yick Wo*, the city ordinance at issue was facially neutral—it required a permit to operate a laundry in a wooden building—but the city only enforced the rule against Chinese individuals. There, the disparate impact was so extreme that “no reason for it exist[ed] except hostility to the race and nationality to which the petitioners belong[ed].”

In some situations, the Court may also presume discriminatory intent if a government actor discriminated either in the past or in another area. Thus, the Court might transfer evil intent from one time period or one area to either the present day or another location.

As the above discussion demonstrates, techniques and principles for detecting racial animus are well-established and lower courts are familiar with their application. Therefore, courts could apply the first step of this proposed refinement to the political function doctrine—searching for racial bias in the state’s use of an alienage classification—without the need to develop a new analytical framework.

**B. Construe “Political Function” Narrowly**

Courts should also construe the political function doctrine more narrowly. Permitting states to read “political function” broadly enables states to discriminate against racial groups and allocate economic benefits based on citizenship. The more broadly courts construe the doctrine, the more inefficiencies the doctrine is likely to cause in the market. In particular, the Court should interpret the terms “important” and “formulating policy” narrowly. Additionally,
courts should not use rhetoric to expand excessively the notion of "policy makers" to include low-level government jobs and thereby avoid subjecting alienage classifications to strict judicial scrutiny under the guise of a purported "political function."

Narrows the construction of "political function" is necessary because increasing the level of scrutiny for political functions from rational relationship to intermediate scrutiny alone might not adequately police judicial misuse of the exception. If the term "political function" becomes all-encompassing, courts would still subject alienage classifications to a lower level of scrutiny (intermediate) than is proper (strict). Because courts routinely use rules of statutory construction to interpret exceptions narrowly, this proposal should not be new to judges.254

C. Subject Political Functions to Intermediate Scrutiny

Finally, even if a state alienage classification truly relates to a political function, courts should apply intermediate scrutiny rather than the rational basis test to the classification.255 Intermediate scrutiny is necessary because the rational basis test fails to adequately police state laws that classify based on alienage. While prohibiting all alienage classifications would arguably be more efficient, intermediate scrutiny is a reasonable compromise and could limit the scope of the political function doctrine and its corresponding negative impact on the market without eliminating the doctrine altogether. Intermediate scrutiny would help prevent the exception from swallowing the rule by invalidating state laws that are not adequately tailored to achieve important government objectives.

The Court currently subjects gender classifications to intermediate scrutiny,256 so this proposal also does not require the development of a new analytical framework. In the gender context, the state must establish an "exceedingly persuasive justification" for the classification to pass intermediate scrutiny.257 Typically, that means the state must seek to fulfill an important government objective and the means must be substantially related to achieving that objective.258 Intermediate scrutiny involves a more searching examination of whether the state

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255 See Boyd, supra note 4, at 345–49.
256 See 3 Rotunda & Nowak, supra note 30, § 18.20 (describing the Court's framework for analyzing gender classifications).
could achieve the same ends through nondiscriminatory means than rational basis review.\textsuperscript{259}

**CONCLUSION**

Regrettably, the United States does not always live up to the fundamental principles of equality embodied in the Constitution. If the United States is a "welcoming country" as President Bush contends, then it is a country that paradoxically welcomes foreign nationals and then resents them for having arrived. State laws that severely constrain the employment opportunities of newcomers illustrate this resentment.

Laws that discriminate against foreign nationals are economically inefficient as well as morally improper and constitutionally questionable. Unfortunately, history shows that state and local governments direct racial animosity toward foreign nationals without considering market efficiencies. In addition to the moral and constitutional arguments against racist treatment of foreign nationals, economic analysis provides an independent justification for limiting the political function doctrine because it perpetuates market inefficiencies.

Consequently, states should not enact broad alienage classifications in the employment context, and federal courts should carefully scrutinize such classifications and limit them to posts involving a state's self-governance. Greater limitations on state use of alienage classifications would protect politically powerless foreign nationals from discrimination and allow labor markets to function efficiently. This Note proposes doctrinal changes that are consistent with traditional equal protection jurisprudence and demonstrates that the political function doctrine remains a Byzantine, constitutional oddity that is not worth its cost.

\textsuperscript{259} See id.