INTRODUCTION

In Espinoza v. Farah Manufacturing Co., the United States Supreme Court held that a private employer's refusal to hire aliens is not prohibited by the ban on national origin discrimination in Title VII of the Civil Rights Act of 1964. In the context of the Espinoza decision the word "alien" referred to a foreign-born individual who is not a citizen of the United States. The word "citizen" referred to any citizen of the United States, without differentiation between citizens of the individual states.

The holding in Espinoza represented a curious departure from the great solicitude the Court had shown toward non-citizens in recent years. When confronted by instances of discriminatory action, the Court had significantly expanded its protection of alien rights under the fourteenth amendment.

Espinoza presented the Court with a challenge to alienage discrimination in private employment based on the statutory provisions of Title VII. In construing the scope of the statute, the Court examined congressional intent and concluded that alienage discrimination was not meant to be proscribed. Since the Court's interpretation of legislative intent was the foundation for its ruling, an analysis of that interpretation is warranted. Such an investigation raises serious questions as to the soundness of the Court's rationale.

   (a) It shall be unlawful 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.
4. See text at notes 63-98 infra.
5. See text at notes 37-49 infra.
ESPINOZA v. FARAH MANUFACTURING CO.

Cecilia Espinoza was a lawfully admitted resident alien born in Mexico and a citizen thereof. She lived with her husband, a United States citizen, in San Antonio, Texas. In July, 1969, she applied for a seamstress position at the San Antonio plant of Farah Manufacturing Company. Farah's hiring policy, initiated by its founder for private security reasons, required United States citizenship as a prerequisite to employment. Espinoza was accordingly refused employment.

Farah is an employer within the scope of Title VII of the Civil Rights Act of 1964. Thus, upon refusal of her application, Espinoza filed a charge with the Equal Employment Opportunity Commission alleging that Farah had discriminated against her on the basis of her national origin, in violation of Title VII.

The Regional Director of the EEOC upheld Farah's action because no evidence showed that Espinoza was refused employment because she was Spanish-surnamed. In view of the director's decision, no administrative remedy to the complaint was available. However, pursuant to Title VII the EEOC then authorized Espinoza to bring suit in federal court.

6. This casenote discusses only the rights of resident aliens. Non-resident aliens were not encompassed by the Court's decision. Requirements for becoming a resident alien are set out in 8 U.S.C. § 1255 (1970).

7. However, in June, 1971, Farah acquired the Texas Manufacturing Company and agreed to absorb some 300 non-citizen employees who would not be terminated. The company policy is thus applied only with regard to new applications, casting some doubt on the validity of its anxiety over private security.


10. See text of statute at note 2 supra.

11. The Regional Director based his determination on the finding that Farah's San Antonio plant employs 95% Spanish surnamed Americans, that petitioner believed that the persons hired in her stead were Spanish-surnamed citizens of the United States, and the petitioner's sister-in-law, a Spanish-surnamed United States citizen, was employed by Farah. Brief for Appellant (Farah) at 3, Espinoza v. Farah Mfg. Co., 462 F.2d 1331 (5th Cir. 1972).

12. 42 U.S.C. § 2000e-5(f) (1) (1970). In the instant case the EEOC did not participate in the action until it filed an amicus curiae brief in the Supreme Court supporting its employment guidelines. It may be speculated whether the intervention of the EEOC at an earlier stage would have swayed the Court to a different result. Interview with Tommy B. Duke, Nelson, Harding, Marchetti, Leonard, and Tate, Attorneys for Farah Mfg. Co., in Lincoln, Nebraska, Mar. 15, 1974.
The Federal District Court for the Western District of Texas granted summary judgment for Espinoza. It agreed with the EEOC that Farah's discrimination was not based on ancestry or ethnic background. Such a claim of discrimination was clearly negated by the court's finding that Farah employed large numbers of persons of Mexican ancestry: more than 92% of its total employees, 96% of its San Antonio employees, and 97% of those doing the type of work for which Espinoza applied.

The only issue was whether refusal to hire solely because of lack of United States citizenship was prohibited as discrimination on the basis of national origin. The trial court followed the mandate of Graham v. Richardson in giving strict judicial scrutiny to any discrimination against aliens, a suspect classification. It concluded that "citizenship," "nationality," "ancestry," and "heritage" are all encompassed within the broader term "national origin" used in Title VII and that Congress intended to prohibit discrimination on any such basis.

The district court rejected defendant's reference to the federal policy of limiting Civil Service employment only to United States citizens since the federal government was not among the class of employers covered by Title VII. The Act regulated only non-federal employment in interstate commerce and Congress' clear intent to prohibit invidious discrimination on the basis of national origin included citizenship or alienage.

The trial court relied on Griggs v. Duke Power Co. in giving great deference to an employment guideline of the EEOC, the agency charged with enforcement of Title VII. The employment guideline stated that discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin and therefore a lawfully admitted alien may not be discriminated against on the basis of

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14. Id. at 1206.
16. Id. at 372.
18. 343 F. Supp. at 1207.
citizenship.\textsuperscript{20}

The Fifth Circuit Court of Appeals reversed the trial court's decision.\textsuperscript{21} It noted that Farah's policy might be arbitrary and Congress could have prohibited such a practice, but that Congress had not so acted.\textsuperscript{22} The court found the phrase "national origin" to be clear and unambiguous both on its face and in the context of the statute, and to refer only to one's birthplace or ancestry, not to one's citizenship.\textsuperscript{23} It held that Espinoza was refused employment not because of her national origin, but solely for lack of United States citizenship. Such refusal had not been precluded by Congress; it remained only one of the many arbitrary and discriminatory employment practices left unchecked by the Act.\textsuperscript{24}

The Fifth Circuit also rejected Espinoza's reliance on the EEOC guideline proscribing any discrimination against aliens on the basis of citizenship.\textsuperscript{25} The opinion distinguished the Griggs holding that the administrative interpretation of the Act by the enforcing agency is entitled to great deference.\textsuperscript{26} In Griggs, black workers challenged their employer's requirement of passing general intelligence tests as a condition for employment because it resulted in disproportionate exclusion of blacks. Title VII authorized the use of any professionally developed ability test, provided it was not designed, intended or used to discriminate.\textsuperscript{27} An EEOC guideline interpreted "professionally developed ability test" to mean a test that is "predictive of or significantly correlated with important elements of work behaviour which comprise or are relevant to the job or jobs for which candidates are being evaluated."\textsuperscript{28} Since the Act and its legislative

\textsuperscript{20} 29 C.F.R. § 1606.1(d) (1973):

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, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g), to refuse to employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive order of the President respecting the particular position or the particular premises in question.


\textsuperscript{22} 462 F.2d at 1333.

\textsuperscript{23} Id.

\textsuperscript{24} Id. at 1334.

\textsuperscript{25} Id.

\textsuperscript{26} Id.


\textsuperscript{28} 29 C.F.R. § 1607.4(c) (1973).
history supported the EEOC's interpretation, the Supreme Court treated the guideline as expressing the will of Congress. The Court prohibited this employment practice since it operated to exclude blacks for reasons not related to job performance regardless of the employer's lack of intent to discriminate.

In Espinoza the circuit court agreed that there were conceivable situations where discrimination on the basis of citizenship would be a symptom of or a camouflage for a broader scheme of national origin discrimination. In such a case, the EEOC guideline prohibiting citizenship discrimination would be an accurate construction of Title VII. But the parties in Espinoza agreed that Farah's citizenship discrimination was not a cover-up for any other motive. Therefore, the court refused to follow the EEOC regulation to the extent that it declared citizenship discrimination illegal per se. This holding did not violate the Griggs requirement of great deference to the enforcement agency's construction of the Act, because the court determined that the guideline at issue in Espinoza was not reflective of the congressional intent behind Title VII. "While acknowledging deference is due, blind adherence is not."

Finally, the court stated that Graham was not controlling, since that decision dealt only with state action under the fourteenth amendment, not with discrimination by private individuals. Thus, the court concluded that Espinoza had no relief available under Title VII.

THE SUPREME COURT MAJORITY OPINION

To resolve this conflict in statutory construction, the Supreme Court granted certiorari. In an eight-one decision, the Court affirmed the Fifth Circuit decision for Farah. Only Justice Douglas dissented.

Justice Marshall, writing for the majority, first looked to the plain meaning of the statutory language. On its face "national origin" referred to the country where a person was born or from which his

29. 401 U.S. at 434.
30. Id. at 432.
31. 462 F.2d at 1334.
32. Id.
33. Id.
34. Id. at 1334-35.
ancestors came. The Court cited similar interpretations in several state statutes as indicia that the common understanding of national origin did not include citizenship.36

The Court next relied on the legislative history of Title VII, which, it conceded, was quite meager on this point. The only definition of national origin was the comment of Congressman James Roosevelt (D. Cal.) reporting the bill to the House of Representatives: "It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France or any other country."37 The Court also noted that the original bill included a prohibition against discrimination on the basis of ancestry. The deletion of "ancestry" in the final version indicated that Congress considered national origin and ancestry synonymous.38

The Court found the most compelling rationale for its decision in a comparison of Title VII with federal employment policy in the Civil Service. Since 1914 the federal government, through the Civil Service Commission, has demanded United States citizenship as a prerequisite to enter competitive examinations for government employment.39 The Court stated that this categorical rejection of aliens from the Civil Service has never been construed as discrimination because of national origin, even in light of Executive Orders expressly prohibiting national origin discrimination in federal employment.40

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36. 414 U.S. at 88 n.2. The Court cites Minnesota State Act Against Discrimination, Minn. Stat. § 363.01, Subd. 6 (1971), defining "national origin" as "the place of birth of an individual or any of his lineal ancestors." New York not only proscribes discrimination in hiring because of origin, but also forbids an employer to make any pre-employment inquiries which reflect any discrimination as to origin. N.Y. Exec. Law § 296 (McKinney 1972). Yet the New York State Commission Against Discrimination has ruled that an employer may lawfully ask a job applicant whether he is a citizen of the United States. 3 CCH Empl. Prac. Guide ¶ 26,050 at 8897.


38. 414 U.S. at 89.


Title VII itself enunciates the policy of the United States to guarantee equal employment opportunities for federal employees without discrimination by national origin.\(^4\) The legislative history of this section provided no indication that its passage was intended to reverse the longstanding Congressional policy requiring citizenship for federal employment.\(^4\) Justice Marshall concluded Congress apparently assumed that this policy would not be affected by the ban on national origin discrimination in Title VII.\(^4\)

The Court refused to respond to petitioners' challenge that the citizenship requirement for federal employment was a violation of the due process clause of the fifth amendment, since the issue at bar concerned only discrimination in private employment.\(^4\) The Court surmised that Congress would not intentionally establish a double standard, forbidding private employers to require citizenship as a condition of employment, while allowing the government to practice that precise form of discrimination.\(^4\)

Justice Marshall, acknowledging that there could be instances when discrimination by citizenship had the purpose or effect of impermissible discrimination on the basis of national origin, cited Griggs for the principle that the Act proscribed not only overt discrimination, but also practices that were fair in form, but discriminatory in operation. However, like the Fifth Circuit, he rejected the EEOC's premise that citizenship discrimination necessarily had the effect of national origin discrimination.\(^4\) In this case, the extremely high percentage of Mexican-Americans employed by Farah satisfied the Court that the company did not discriminate against persons of Mexican national origin. The company demanded only that its employees be United States citizens, regardless of the country of their birth. The Court resolved that it need not defer to the administrative construction of the statute since application of the guideline would have been inconsistent with congressional intent.\(^7\)

In concluding, the Court agreed with petitioner that aliens are

\(^{42}\) 414 U.S. at 90.
\(^{43}\) Id. at 91.
\(^{44}\) Id.
\(^{45}\) Id. The Court echoes the reasoning of the Fifth Circuit. See text at notes 25-33 supra.
\(^{46}\) 414 U.S. at 92-94.
\(^{47}\) Id. at 94.
protected from illegal discrimination under Title VII. The question was to determine what types of discrimination are illegal. The Court concluded that the Act barred an employer from hiring aliens selectively because of their race, color, religion, sex, or national origin, but it did not preclude the employer from discrimination on the basis of citizenship or alienage. Therefore, an employer could not lawfully hire only Spanish aliens and reject all Mexican applicants, but he could safely elect to employ only United States citizens to the exclusion of all aliens.

JUSTICE DOUGLAS’ DISSENT

In his dissenting opinion, Justice Douglas noted the incongruity of the Espinoza decision with earlier rulings which greatly extended an alien’s right to employment. He pointed out a simple fact not accounted for by the majority: since the only way one becomes an alien is to be born outside the United States, “Farah’s policy of excluding aliens is de facto a policy of preferring those who were born in this country.”

Justice Douglas next asserted that the Court’s reasoning in Griggs would be properly applied to the instant problem. In Griggs the Court held that Title VII prohibited employment practices which appeared neutral on their face, but which in fact created arbitrary barriers to employment on the basis of race or other impermissible classifications. Alienage was held to be an impermissible classification in Graham v. Richardson. As to the majority’s conclusion that Farah’s hiring of many Mexican-Americans negated petitioners’ complaint of national origin discrimination, Justice Douglas intimated that the quantity of discrimination was immaterial. In Griggs not all blacks were excluded, yet the employment practice was still held

48. Id. at 95, citing 29 C.F.R. § 1606.1(c) (1972). The guideline states, “Title VII of the Civil Rights Act of 1964 protects all individuals, both citizens and non-citizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin.”

49. 414 U.S. at 95.

50. Id. at 96.

51. Id. Douglas cited In re Griffiths, 413 U.S. 717 (1973) which holds that a state may not bar otherwise qualified aliens from admission to the bar, and Sugarman v. Dougall, 413 U.S. 634 (1973) which holds that a state may not refuse to hire aliens into the state civil service. See text at notes 97-98 & 88-91 infra.

52. 414 U.S. at 96.


54. 414 U.S. at 97.
CREIGHTON LAW REVIEW

violate of Title VII. Griggs further held that qualifications or conditions for employment must be related to job performance. Farah here conceded the obvious: citizenship or the lack thereof bore no relation to the ability to perform the work Espinoza applied for.

The EEOC construction of the Act supports Justice Douglas' view that "discrimination on the basis of alienage always has the effect of discrimination on the basis of national origin." Discrimination based on birth outside the United States is clearly national origin discrimination, and this interpretation by the Commission charged with enforcement of the Act is entitled to great weight.

Noting the dearth of legislative history on this point, Justice Douglas cited the same definition of national origin as did the majority. However, Douglas asserted that this definition served only to strengthen petitioners' argument that Espinoza could not be discriminated against because she was born in a foreign country. He concluded that the majority's construction contravened congressional intent to guarantee equal employment opportunities by removing all "artificial, arbitrary, and unnecessary barriers to employment."

FOURTEENTH AMENDMENT DEVELOPMENT OF ALIEN EMPLOYMENT RIGHTS

As pointed out by Justice Douglas, the Court's decision in Espinoza is in sharp contrast to the judicial development of alien rights under the fourteenth amendment. Aliens bear the same responsibilities as American citizens to pay taxes, and are equally subject to military service. Yet aliens have not been accorded rights and liberties commensurate with their obligations. It is only within the present generation that the courts have recognized an alien's

55. 401 U.S. at 436. The same conclusion was reached where the employer's conditions for employment reflected discrimination based on sex. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
56. 414 U.S. at 97.
57. See text at note 20 supra.
58. 414 U.S. at 97.
59. Id. at 97-98.
60. 414 U.S. at 98. See Congressman Roosevelt's comment in text at note 37 supra.
61. 414 U.S. at 98 n.3.
right to own land," to be educated in public schools," and to receive welfare benefits." Possibly the greatest restrictions on aliens have been in the area of employment rights." During the last sixty years the Supreme Court has relied on the fourteenth amendment to eliminate virtually any state action impairing the ability of aliens to secure employment."

The foundation for this development was laid initially in *Yick Wo v. Hopkins* when the Court declared that the protection of the fourteenth amendment was not confined to United States citizens alone but extended to all persons within the territorial jurisdiction of the United States, regardless of race, color, or nationality.°

But for some years the cloak of equal protection proved an ineffective shield against restrictive state laws. The courts found justification for limiting alien employment in several theories which together comprise the "special public interest doctrine.""°

Under a common property theory, the natural resources of a state, while owned by its citizens, were entrusted to the state government for administration and conservation. As trustee, the state could limit access to those resources at its discretion.°° Thus, the Court upheld a state statute forbidding aliens to hunt wild birds and game.°°°

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67. A detailed list of state laws restricting employment of aliens is found at Comment, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 Colum. L. Rev. 1012 (1957).


69. Id. at 356 (1886).°

70. Id. at 369.


72. The state's control of its natural resources is fully discussed in McCready v. Virginia, 94 U.S. 391 (1876), upholding a state law permitting only state citizens to plant oysters in state rivers.
A second theory espoused the proprietary interest of the state in certain employment positions. Employment in a state's public works was considered a privilege to be dispensed by the state as it saw fit. The state held the same rights as a private employer and therefore was not subject to the fourteenth amendment. It could elect to provide for the economic security of its citizens in preference to resident aliens by reserving state monies to pay salaries only to United States citizens. The proprietary interest in state employment provided the rationale for the court in upholding a New York statute prohibiting the employment of aliens in the state public works.\textsuperscript{4}

A third theory turned on the policy power of the state to provide for public safety and morals. If the work was of the type that the state could regulate or prohibit together, it followed that the state had the power to deny such employment to aliens or any other group. This approach led the Court to uphold a city ordinance prohibiting the licensing of aliens to operate billiard and pool rooms.\textsuperscript{76}

Even prior to this decision, the judicial tide had begun to turn toward greater protection of alien rights. In the leading case of Truax \textit{v. Raich}\textsuperscript{77} an Arizona statute requiring any business with more than five employees to employ a minimum of 80\% United States citizens was held unconstitutional.\textsuperscript{78} While admitting state authority to legislate for the welfare of its citizens, the Court forbade a state to use that power to deny lawful inhabitants a livelihood.\textsuperscript{79} Justice Hughes declared, "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."\textsuperscript{80} The Court left open the possibility that there may be special public interests which justify discrimination against aliens,\textsuperscript{81} but no such interest was or could be shown to substantiate state-imposed discrimination against aliens in all types of vocations.

The common property theory met its demise in \textit{Takahashi v. Fish and Game Commission}.\textsuperscript{82} California argued that its ownership of fish
within three miles of the coast authorized it to provide for the conservation of those natural resources by forbidding the issuance of commercial fishing licenses to aliens.\textsuperscript{82} Relying on the right to earn a living outlined in \textit{Truax}, the Court concluded that California's interest in the fish were not sufficient to justify the exclusion of aliens from an occupation that all others were allowed to pursue.\textsuperscript{83}

In \textit{Purdy \& Fitzpatrick v. State}\textsuperscript{84} the theory of proprietary state interest in public works employment was repudiated by the California supreme court. The court rejected earlier holdings that a state has all the rights of a private employer and determined that state regulations of public employment must conform to the fourteenth amendment.\textsuperscript{85} The economic security justification was also rejected since an alien could have lived in the state for many years, paid taxes and contributed much to the growth of the state.\textsuperscript{86} Subjecting the statute to strict judicial review, the court concluded that it irrationally and arbitrarily denied to individuals their right to pursue otherwise lawful employment solely on the basis of their status as aliens.\textsuperscript{87}

The Supreme Court applied this line of reasoning in \textit{Sugarman v. Dougall},\textsuperscript{88} one of several important recent decisions which effectively bar all state discrimination against aliens. In that case, the Court invalidated a New York statute prohibiting the employment of aliens in the state civil service.\textsuperscript{89} The state's claim that such an exclusion was necessary to promote stable government was redolent of the special public interest doctrine, long since undermined by \textit{Takahashi} and \textit{Purdy \& Fitzpatrick}. New York argued the necessity for undivided loyalty of state employees, and the likelihood that aliens would return to their native lands, thus disrupting efficient government.\textsuperscript{90} The Court found these arguments insufficient to withstand close judicial scrutiny since the same problems would arise as to United States citizens from states other than New York.\textsuperscript{91} No state interest presented was sufficiently compelling to justify the New York policy and it was declared invalid.

\textsuperscript{82} \textit{Id.} at 417-18.  
\textsuperscript{83} \textit{Id.} at 421.  
\textsuperscript{84} 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).  
\textsuperscript{85} \textit{Id.} at \underline{\textsuperscript{ }, 456 P.2d at 657, 79 Cal. Rptr. at 89.}  
\textsuperscript{86} \textit{Id.} at \underline{\textsuperscript{ }, 456 P.2d at 656, 79 Cal. Rptr. at 88.}  
\textsuperscript{87} \textit{Id.} at \underline{\textsuperscript{ }, 456 P.2d at 658, 79 Cal. Rptr. at 89-90.}  
\textsuperscript{88} 413 U.S. 634 (1973).  
\textsuperscript{89} \textit{Id.} at 646.  
\textsuperscript{90} \textit{Id.} at 643-46.  
\textsuperscript{91} \textit{Id.} at 645.
In a recent alien rights dispute the Court held that a rule permitting only United States citizens to take the state bar examination was a violation of equal protection. While a state had a valid interest in the qualifications of its attorneys, the blanket exclusion of aliens bore no rational relation to qualifications more properly measured by educational requirements, loyalty oaths and post-admission sanctions.

Only two years earlier the Court had decided the landmark case in this progression, *Graham v. Richardson*. It declared unconstitutional state statutes requiring United States citizenship or fifteen years residency as a condition to receiving state welfare benefits. The opinion rested on the pronouncement that alienage was an inherently suspect classification. By so holding, the Court gave aliens the highest measure of constitutional protection, for only a compelling governmental interest will justify a suspect classification. In *Graham*, the fiscal integrity of the state's welfare program was held not sufficiently compelling, especially since aliens contributed tax revenue to welfare funds on an equal basis with United States citizens.

These decisions also commonly recognized Congress' plenary power over immigration and naturalization. A state was granted no power to add to nor take from the conditions Congress had placed

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95. 403 U.S. at 376.
96. *Id.* at 372. The declaration that aliens are a suspect class was grounded in part on the famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938):

... prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

In *Graham* the Court held that "[a]liens as a class are a prime example of a 'discrete and insular minority' . . . for whom such heightened judicial solicitude is appropriate." 403 U.S. at 372.

*Contra*, Note, *Protection of Alien Rights Under the Fourteenth Amendment*, 1971 *Duke L. J.* 583 (1971), concluding that aliens should not be a suspect class and that a "reasonable relation" test is sufficient to protect their rights. *Id.* at 597-99.

98. 403 U.S. at 374-76.
upon the admission and residence of aliens. In Truax the Court stated:

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

While a state is certainly obliged to be concerned for its labor force, it cannot protect its workers by legislation that is at odds with a comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive power over immigration. Since the federal government has preempted the field of regulation of aliens, the supremacy clause of the Constitution proscribes any conflicting legislation by the individual states.

While Graham leaves open the possibility that the special public interest doctrine may retain some vitality in certain contexts, this doctrine has been so widely discredited that it is doubtful that any court would apply the doctrine to justify any state discrimination against aliens. The doctrine was founded primarily on the notion that "whatever is a privilege, rather than a right, may be made dependent upon citizenship." But the Court has rejected the argument that Constitutional rights attach only to state benefits which may be characterized as "rights" rather than "privileges." The differentiation between the two is no longer viable in this context.

100. Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419 (1948).
101. 239 U.S. at 42.
103. 403 U.S. at 374.
Furthermore, the cases agree that states are, in fact, guardians of many public interests: conservation of natural resources, regulation of professions and dangerous occupations, financial security of all residents, stable and efficient state government. But these worthy goals cannot be achieved by methods which invidiously discriminate against certain classes of residents. The burden of protecting public interests must be equally borne by all state inhabitants and cannot be concentrated on the shoulders of any one identifiable group.

In light of this judicial progression of ever-broader protection of aliens it seems unlikely that any state restriction on the employment of aliens would now be upheld. But the same Court which was so openly disposed to extend the protection of alien rights under the fourteenth amendment did not see fit to accord aliens the same protection under a federal statute in Espinoza. One cannot escape the question of whether it was prudent, or even just, for the Court to create such a variance between an individual's statutory rights and his constitutional rights.

If Espinoza had been refused employment as a seamstress by a private clothing manufacturing company under contract with the State of Texas to provide all uniforms needed by the Texas State Police and Highway Patrol, solely on the grounds of her lack of citizenship, she could challenge the refusal under the fourteenth amendment. Assuming for purposes of this example, that the government contract would satisfactorily represent state action, the

106. The Court has indicated that it would authorize the destruction of a state welfare program if necessary to enforce alien rights. In Gonzales v. Shea, 318 F. Supp. 572 (D. Colo. 1970) plaintiff challenged the citizenship requirement for receiving benefits under Colorado's Old Age Pension Program. The trial court upheld the citizenship requirement. On appeal, the Supreme Court remanded for reconsideration in light of Graham, although the trial court had indicated that inclusion of aliens would spell the destruction of the pension program. 318 F. Supp. at 579.

107. The Court's decision in Graham reflects an attitude of judicial solicitude toward aliens. The Court could have based its decision on the rationale of Shapiro v. Thompson, 394 U.S. 618 (1969) which held that residency requirements for welfare recipients violated a fundamental right of free travel among the states. Instead the Court elected to declare aliens a suspect class providing them the same high level of judicial protection required when discrimination is based on race or religion. See 5 N.Y.U. J. OF INTL. L. & POL. 393 (1972).

108. The precise parameters within which private activity is considered state action are uncertain at this time. The Court's most expansive interpretation of state action was in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). In that case a private lessee leased from an agency of the state of Delaware a restaurant located in a public parking facility. Though the restaurant was privately operated, racial discrimination by the lessee was held violative of the equal protection clause of the fourteenth amendment only because the restaurant was physically and financially associated with a public building. This case indicated that the actions of a party contracting with a government agency are within the scope of state action under the fourteenth amendment.
refusal would be a violation of equal protection. The anomaly created by Espinoza is that no similar protection is available to an individual who elects to pursue employment in a private industry, despite clear congressional action to halt private employment discrimination.

ANALYSIS OF THE COURT'S INTERPRETATION OF LEGISLATIVE INTENT

**Griggs Rationale**

The about-face of Espinoza was occasioned by the majority's reliance on legislative intent. In his dissent, Justice Douglas pointed out a rationale that the Court might have used to reach an opposite result without having to struggle with the admittedly ambiguous legislative history of Title VII. The Court might have applied the same reasoning it used in Griggs only months before.108

In Griggs, the Court invalidated an employment policy requiring job applicants to pass certain general intelligence tests on the grounds that the tests were not related to job performance, and tended to discriminate against blacks who generally had weaker educational backgrounds.109 The Court found that the provisions of Title VII authorizing non-discriminatory, job-related testing had been violated.110 Though the procedure appeared fair on its face, it resulted in irrational refusal to hire blacks who were, in fact, well qualified for the positions in question.

The Court followed this same reasoning in regard to sex discrimination by requiring that an adverse effect on job performance be proven to justify any discriminatory hiring practice.111 Farah's policy requiring citizenship operates in the same way to discriminate against a class of people with no rational relation to job performance.

However, in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Court reversed the expansive trend of state action by holding that the issuance of a liquor license to a private club was not sufficient governmental involvement to constitute state action. Consequently, it cannot be predicted at this time whether a contractual relationship with a governmental entity will always bring a private party within state action.

109. 414 U.S. at 96-97.
110. 401 U.S. at 430.
111. Id. at 436.
Justice Douglas correctly stated that the protection outlined in these cases extended to all persons, including aliens. In the absence of any proof of relation between citizenship and job performance as a seamstress — and Farah has actually conceded that there is none — Griggs should have been applied to bar the enforcement of Farah's arbitrary policy.

LEGISLATIVE HISTORY

While the majority agreed that aliens are protected under the Act, it held that citizenship discrimination was not prohibited. Since the basis for the majority's limitation of Title VII was an interpretation of legislative intent it is worthwhile to scrutinize this interpretation carefully.

There was virtually no congressional debate as to the meaning of the words "national origin." Title VII was primarily motivated by the legislator's desire to eliminate discriminatory racial barriers to employment. Congressman Roosevelt's terse definition of national origin is of questionable validity since it was offered only to distinguish national origin from race in the context of employment advertising. The ambiguity of his remarks was reflected in the fact that both the majority and dissent found support for their views in his comment. There is no direct evidence as to whether Congress intended to protect only United States citizens from discrimination on the basis of their ethnic backgrounds, or whether all residents of the United States were to enjoy equal employment opportunity, regardless of the accident of their birth place.

In the absence of any explicit recordation of congressional intent, the Court sought to ascertain that intent from collateral sources. It looked to the Roosevelt definition, the deletion of the word "ancestry" in the revised bill, federal hiring policy in the Civil Service and finally rejected the relevant EEOC guideline. From this analysis the Court deduced that Title VII was meant to protect only United States citizens from discrimination based on their national heritage.

113. 414 U.S. at 97 (dissenting opinion).
115. See text at note 37 supra.
However, equally, if not more persuasive sources indicated that Congress' purpose in passing Title VII was to secure employment rights to all residents whether born in the United States or not.

The language of the statute itself indicates that Congress intended to protect non-citizens as well as citizens. Title VII does "not apply to an employer with respect to the employment of aliens outside any State. . . ." The clear implication is that aliens employed within the United States or its territories are protected from invidious discrimination in employment.

In 1964 aliens were foreclosed from employment in federal, as well as many state Civil Service positions. Therefore, in referring to the employment of aliens, Congress necessarily envisioned the employment of non-citizens in private enterprise.

The statute also allows that, in spite of its other provisions, an employer may legally refuse to hire any individual for any position when "the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States. . . ." and the applicant does not fulfill the requirement.

Concern for national security appears to be the only justification for any discrimination against aliens in government employment." The exemption in Title VII permits the same type of discrimination in private employment, regardless of qualifications in those instances when the position has a substantial affect on national security. The obvious inference is that Congress intended equal employment of aliens in the private sector unless the nature of the position demands the additional security of citizenship.

FEDERAL IMMIGRATION POLICY

Virtually all of the fourteenth amendment challenges to discrimination against aliens were sustained in part on the grounds that the state action in question conflicted with Congress' comprehensive


119. For further discussion of national security as a compelling governmental interest, see text at notes 153-54 infra.
regulation of immigration. Clearly Farah’s policy affronts federal law in the same way, and the Court’s holding authorized all private employers to do likewise.

Within the immigration standards, Congress has attempted to ensure the employability of aliens by refusing admission to all aliens who are likely to become public charges. Furthermore, aliens who do become public charges within five years from causes not proved to have arisen after entry are to be deported.

Most significantly, the Immigration and Nationality Act of 1952 provides that no aliens shall be admitted to this country unless the Secretary of Labor first certifies that there is a need for their skill in the labor market and that the employment of such aliens will have no adverse effect on those already employed in a given occupation. This enactment indicates that Congress contemplated the employment of aliens in all spheres of industry and commerce, private as well as state controlled. Surely Congress was aware of these provisions when it passed Title VII.

If the Court’s interpretation of the legislative intent were correct, the resulting incongruity in federal policy is glaring. Can it be that Congress, having admitted only aliens whose labors would enrich the national economy, allowed those same individuals to be denied employment because of the very fact they are aliens? It is hypothetically possible under the Espinoza holding that all jobs in the private sector would be closed to aliens, leaving work available


The following classes of aliens shall be . . . excluded from admission into the United States:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

The Secretary may pass upon applications for certification on an individual basis. Most often, however, certification depends on preexisting determinations that certain occupations are experiencing labor shortages within the United States. From time to time the Secretary publishes lists of such occupations in the Federal Register. See 29 C.F.R. pt. 60 (1973) for the most recent listing.
only in state-regulated occupations. It is further possible that aliens who have worked for private employers for many years could be discharged at the discretion of their employers, regardless of the high quality of their prior job performance. It seems most unlikely that Congress envisioned this result when it passed sweeping civil rights legislation in 1964.

CIVIL SERVICE POLICY

The Court gathered primary support for its holding from the fact that aliens are not permitted to take the competitive examinations for civil service employment in the federal government. The Court deduced that Congress would not prohibit citizenship discrimination in private employment when it permitted the same type of discrimination by the federal government.\(^{123}\) The Court's reliance on this comparison with federal policy is misplaced.

The policies of the Civil Service Commission, whatever they may be, are wholly extraneous to the concerns of Title VII. The Act specifically exempts the federal government from any of its provisions.\(^{124}\) It is possible that Title VII was intended to equalize citizenship discrimination in private employment, where there is no rational reason for it, before attacking the problem in the federal area, where limited discrimination may be justified. It is beyond dispute that Congress may choose to deal with only a portion of a problem at a time.\(^{125}\)

Far greater doubt is cast upon the Court's reasoning however, by the fact that the Civil Service policy on which Justice Marshall relied was itself suspect. At the time Espinoza was decided the Civil Service regulations on which the Court relied had already been challenged in several suits.\(^{126}\)

In *Mow Sun Wong v. Hampton*,\(^{127}\) Chinese residents challenged the Civil Service citizenship requirement in federal district court in California. The court denied plaintiff's request that a compelling interest test be applied and adjudged the traditional equal protection test to be the proper standard, *i.e.*, whether there was a rational basis

123. 414 U.S. at 91.
126. See 61 Geo. L. J. 207, 220-22 (1972), urging repudiation of the citizenship requirement for federal employment.
for the classification.\footnote{128} Applying this test, the alienage classification was deemed a reasonable means to the permissible governmental end of efficiency in government and security in policy formulation.\footnote{128}

While the Wong decision was being appealed, the Supreme Court handed down its opinions in Graham and Dougall. Graham required that any classification based on alienage receive strict judicial scrutiny, by application of a compelling interest test.\footnote{129} Dougall examined the citizenship requirement at the state level and held that no state interest propounded was sufficiently compelling to justify total exclusion of aliens from state civil service employment.\footnote{130} These two cases shattered the foundations of the Wong holding, virtually assuring that it would be reversed on appeal.

In Jalil v. Hampton\footnote{131} a citizen of India challenged his rejection from Civil Service competition. The District of Columbia Court of Appeals recognized that Graham, while not precisely on point, required a compelling interest of the federal government to justify this obvious discrimination against aliens.\footnote{132} However, the majority evaded a decision and remanded for further fact-finding to determine if the governmental interests could be protected by less restrictive regulations.\footnote{133}

Chief Judge Bazelon filed a vigorous dissent.\footnote{134} He saw no reason to remand, since the Civil Service regulation was on its face inconsistent with Graham and should have been promptly struck down.\footnote{135} The federal government raised no different or more compelling interests than those which had already been rejected in Dougall. Bazelon concluded that it was “inconceivable that the Government could establish a compelling state interest . . . to justify the exclusion of all aliens from all positions requiring the competitive Civil Service examination.”\footnote{136}

\begin{footnotes}
\item[128] Id at 532.
\item[129] Id.
\item[130] 403 U.S. at 374-75.
\item[131] 413 U.S. at 641-46.
\item[133] 460 F.2d at 929, “The federal government has interests different from those applicable to the states, but nonetheless it must demonstrate that its interests justify the discrimination against aliens.”
\item[134] Id. at 927-28. See 61 Geo. L. J. 207 (1972), arguing that defenses advanced by the government were clearly insufficient to show a compelling interest.
\item[135] 460 F.2d at 930.
\item[136] Id. at 930-31.
\item[137] Id. at 930.
\end{footnotes}
In addition to this judicial doubt that clouded the citizenship requirement, an examination of the regulations themselves would have revealed to the Court a potpourri of inconsistencies which reflect the lack of any rational basis for the blanket exclusion of aliens. For example, in the event that an agency is confronted by an unusual need for immediate staffing that cannot be met under normal procedures, the Commission may authorize the employment of non-citizens, who may hold the jobs for a maximum of five consecutive years.

The regulations also allow non-citizens employment without a competitive examination and for an indefinite term, when the Commission determines that the position requires such specialized skills that it could not be satisfactorily filled by open examination. Apparently the government is willing to employ aliens with highly developed talents or rare skills, and yet refuse the opportunity for employment to average alien workers who are far more likely to be in economic straits.

Furthermore, as Chief Judge Bazelon pointed out, the highest positions in the executive branch, those of a confidential or policy-making nature, are exempted from Civil Service regulation and could conceivably be filled by aliens. In addition, the entire Department of Defense has been exempted from the citizenship requirement as well as a partial exemption for the Library of Congress. These inherent inconsistencies in the Civil Service regulations, and recent judicial expansion of alien employment rights should have steered the Court away from such heavy reliance upon an unstable Civil Service rationale.

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138. 5 C.F.R. § 338.101 (1973): (a) A person may be admitted to competitive examination only if he is a citizen or owes permanent allegiance to the United States. (b) A person may be given appointment only if he is a citizen or owes permanent allegiance to the United States.

139. 5 C.F.R. § 305.509 (1973).

140. 5 C.F.R. § 316.601 (1973).

141. 460 F.2d at 931 (dissenting opinion).


144. Brief for Petitioner (Espinoza), 414 U.S. 86 (1973), citing Pub. L. No. 91-382 (Aug. 18, 1970). Virtually no change in federal procedure would be required if government employment were opened to aliens under the existing regulations. Even in the employment of United States citizens, security investigations and loyalty oaths are required to insure that no applicant or employee presents a threat to national security. Congress itself has deemed that no one may hold a federal position if he advocates the overthrow of our government or is a member of an organization that
It came as no surprise when, less than two months after the Espinoza decision, the Ninth Circuit reversed the district court holding in Mow Sun Wong. The Court found that the Civil Service citizenship regulation was overly broad and discriminated unjustifiably so as to violate due process. The Espinoza decision involving private employment was distinguished from this challenge to federal employment under Civil Service. This important new case casts further doubt on the Court's rationale in Espinoza.

The Ninth Circuit panel first established that Dougall and Graham imposed a compelling state interest test in the field of public employment. While these cases protected aliens from discrimination on the basis of the fourteenth amendment equal protection, case law made it clear that the fifth amendment due process clause guaranteed the same type of protection against federal action which discriminated to the extent of impairing due process. The court does so, or if he participates in or advocates strikes against the government, 5 U.S.C. § 7311 (1970). By executive order, pursuant to this statute, all agencies and departments must ascertain the complete loyalty of their personnel to the United States, Exec. Order No. 10450, 3 C.F.R. 936-40 (1949-1953 Comp.). An investigation is required of each applicant, commensurate with the nature of his position, to determine whether his employment would endanger national security. The head of each agency or department is authorized to designate certain "sensitive positions" possibly having a material effect on national security and to require more in depth investigations of applicants for those positions. Should suspicions be raised as to the loyalty of one already employed, that person may be automatically suspended and, upon due investigation, may be discharged.

Aliens could also be subject to the statutory requirement that all officers appointed to the Civil Service take an oath of loyalty to the United States and swear to uphold the Constitution, 5 U.S.C. § 3331 (1970). Certain these measures would be as effective in disclosing dangerous disloyalty in alien applicants as in citizens.

145. 7 CCH EMPL. PUB. DECISIONS ¶ 9101, at 6629 (9th Cir. 1974).
146. Id. at 6637.
147. While it is true that the equal protection clause of the fourteenth amendment applies only to state action, the principles of equal protection apply to the federal government as well. It has long been held that aliens are protected by the fifth amendment, Eng v. Trinidad, 271 U.S. 500, 528 (1926); Wing Wong v. United States, 163 U.S. 228, 238 (1896); Nielsen v. Secretary of Treasury, 424 F.2d 833, 846 (D.C. Cir. 1970). While that amendment contains no equal protection clause, discrimination which violates equal protection may be so unjustified as to be a violation of due process as well. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Courts have taken on the duty and function of considering whether discrimination against aliens is unconstitutional:

The court stands 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. . . . In effect the burden is on the government to put forward the special reasonableness of and justification for any measure discriminating against aliens.

determined that "a flat prohibition against aliens obtaining employment in the Civil Service [was] such discrimination to be a denial of due process unless the government [could] show a compelling interest for maintaining its classification."^14

The government set forth various arguments attempting to establish the necessary compelling government reason for citizenship discrimination, but none were adequate to persuade the court. The government resorted to the special public interest doctrine in asserting its right to give priority to the economic security of citizens above aliens."^149 This claim had been rejected in the public employment area in both Dougall and Purdy & Fitzpatrick in view of the many contributions made by aliens to the economic growth of this country.

The government further argued that aliens have no constitutional right to make or carry out national policy nor partake in any of the institutions of government."^150 Recognizing that the vast majority of Civil Service positions involved no exercise of national sovereignty, the court agreed that the Federal Government service was different from an ordinary employment relationship and that the government might, for loyalty and security reasons, properly require citizenship for certain positions."^151 But rather than insuring policy-making to citizens by designating such sensitive positions, the Civil Service Commission had excluded all aliens from all positions, resulting in an unconstitutionally overbroad regulation."^152

The Wong decision reaffirmed what was already apparent: the safeguarding of national security appears to be the only governmental interest sufficiently compelling to justify discrimination against aliens in federal employment. Though the Supreme Court has not yet had occasion to name national security a compelling interest in an equal protection challenge, it would likely do so, given the proper circumstances."^153 An appeal from the Wong decision may provide such an opportunity.

148. 7 CCH EMPL. PRAC. DECISIONS at 6635.
149. Id. at 6636.
150. Id. For a recent case holding that aliens may not be members of a jury, see Perkins v. Smith, 370 F. Supp. 134 (D.Md. 1974).
151. 7 CCH EMPL. PRAC. DIGEST at 6636.
152. Id. at 6636-6637.
153. In a progression of cases the Court has upheld statutes impairing first amendment rights of free speech and press when national security is at stake. See, e.g., Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919); Gitlow v. New York, 268 U.S. 652 (1925); Dennis v. United States, 341 U.S. 494 (1951).
The interest in national security obviously attaches only to those positions which have a material affect on national sovereignty. An alien postal clerk, maintenance man or stenographer poses no threat to security. There are over two and a half million jobs regulated by the Civil Service which have no direct relation to national security and which could be performed as successfully by qualified aliens as by citizens.\textsuperscript{154}

The court in Wong properly left the Civil Service Commission with the duty of determining which positions affected national security sufficiently to support a regulation that all applicants be citizens.\textsuperscript{155} The vast number of remaining non-sensitive positions should be filled by competition open to all residents of the United States on the basis of qualifications alone, regardless of citizenship.

The Wong decision took much of the judicial wind from the sails of the Espinoza holding. If Wong had been decided first, there is no guarantee that Espinoza would have been decided differently. But the Court might well have been deterred from its reliance on the Civil Service as a prime indication of the legislative intent behind Title VII. The Court then would have had to scrutinize legislative history more closely in search of a different rationale.

It was apparent at the time of Espinoza that the Civil Service regulation might soon fall. The proximity of the Wong ruling is evidence that even at the time of Espinoza the Court should have made deeper inquiry into the purposes of Title VII. Not only did the Court wander from the statute in question by exploring federal civil service policy at all, but in so doing it rested upon a rationale replete with inherent weaknesses and inconsistencies.

ALTERNATIVE ATTACKS ON PRIVATE EMPLOYMENT DISCRIMINATION AGAINST ALIENS

CIVIL RIGHTS ACTION UNDER § 1981

Fortunately, in spite of Espinoza, several methods remain available by which non-citizens may secure equal employment opportunities. One of these is a civil action under 42 U.S.C. § 1981: "All persons within the jurisdiction of the United States shall have the

\textsuperscript{154} Discrimination against aliens disqualifies them for some 2,689,680 government jobs. See 61 Geo. L. J. 207 (1972).

\textsuperscript{155} 7 CCH EMPL. PRAC. DECISIONS at 6636.
same right in every State and Territory to make and enforce contracts. . . . as is enjoyed by white citizens. . . ." 15 While the statute does not mention employment as such, the employer-employee relationship has been held to be one type of contractual relationship covered by the Act.16

For many years it was thought that this provision applied only to state action,17 but in Jones v. Alfred H. Mayer Co.,18 the Court examined the Civil Rights Act of 1866 and concluded that it was intended to proscribe all racial discrimination, whether by private or state action.19 This Act was the original formulation of Section 1981. All the courts of appeals that have considered the scope of Section 1981 have agreed that it was designed to prohibit private employment discrimination.20

While it is true that all these decisions have dealt with racial discrimination, it is clear that Section 1981 also protects aliens. The plain language of the statute giving all persons the same right to make contracts as white citizens requires that non-citizens be accorded the same rights as citizens.

In addition, the legislative history of the statute compels the same conclusion. Both Sections 1981 and 1982 were originally combined in Section 1 of the Civil Rights Act of 1866 which provided "[t]hat all persons born in the United States and not subject to any foreign

156. 42 U.S.C. § 1981 (1970). Espinoza alleged a violation of Section 1981 at the Supreme Court level. The issue was neither raised before the lower courts nor in the petition for certiorari. The Court, therefore, refused to express any view thereon. 414 U.S. at 96 n.9.
158. Hodges v. United States, 203 U.S. 1 (1906), holding that Section 1981 did not apply to conspiracies by private individuals to interfere with contracts of employment.
160. Id. at 435. In Jones, petitioners alleged that respondent's refusal to sell them a home for the sole reason that Jones was black was a violation of 42 U.S.C. § 1982. That statute secures to all citizens the same property rights enjoyed by white citizens. Section 1982 is the counterpart of Section 1981 which deals with personal rights. Both sections are derived from a single sentence in the Civil Rights Act of 1866 and are founded on the same legislative history. Consequently, the Court's holding that Section 1982 applies to private action necessarily means that Section 1981 enjoys the same broad scope. For a fuller discussion of the legislative history, see text at notes 162-63 infra.
power . . . shall have the same right . . . to make and enforce contracts . . . to inherit, purchase, lease, sell, hold and convey real and personal property . . . as is enjoyed by white citizens.”

The Act specifically excluded aliens and embraced both personal rights, including the right to make contracts, and property rights.

After the passage of the fourteenth amendment, the Civil Rights Act was amended and modified in 1870. Section 1 was divided into two new sections, one embracing personal rights and the other covering property rights, which later were codified as Sections 1981 and 1982 respectively.

The portion concerning personal rights was modified to protect “all persons within the jurisdiction of the United States,” the current coverage of Section 1981. The purpose for this amendment was explained by its author, Senator William Stewart (R. Nev.):

The original civil rights bill protected all persons born in the United States in the equal protection of the laws. This bill extends it to aliens, so that all persons who are in the United States shall have the equal protection of our laws. It extends the operation of the civil rights bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States. That is all there is in the bill . . . . It has nothing to do with property or descent. We left that part of the law out; but it gives protection to life and property here."

It is clear, therefore, that the personal right to make and enforce contracts was intended by Congress to apply to aliens to the same extent as citizens. It took over seventy years for the courts to extend equal property rights to aliens.

Prior to Jones, Section 1981 was relied on by the Court in Yick Wo and Takahashi to invalidate state action which impaired the employment rights of aliens. Since Jones, lower courts have applied Section 1981 to reach discrimination against aliens in private em-

162. 14 Stat. 27 (1866).
164. See note 64 supra.
165. See text at notes 69-70, 81-83 supra.
employment."\(^\text{16}\) In *League of Academic Women v. Regents of University of California*,\(^\text{17}\) holding that Section 1981 is not a remedy for sex discrimination, the court stated:

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 standard against which the rights of these individuals must be measured is the rights of 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.\(^\text{18}\)

The federal courts first applied Section 1981 to aliens in private employment in *Guerra v. Manchester Terminal Corp.*\(^\text{19}\) In that case an agreement between the union, whose membership was open only to United States citizens or persons who had declared their intent to become citizens, and the employer provided that union job referrals to the employer would give preference to United States citizens. Pursuant to this agreement, Guerra, a Mexican citizen, was transferred from a preferred department to a lower paying position, and proceeded to file an action in federal district court.

The court found that plaintiff’s request for relief under Title VII was barred by the Fifth Circuit holding in *Espinoza* that alienage was not a protected status under that Act.\(^\text{20}\) However, after a thorough review of the legislative history and judicial development of Section 1981 the court concluded that the contractual relationship in private employment was protected from discrimination on the basis of that statute.\(^\text{21}\)

**National Labor Relations Act**

In addition to Section 1981 remedies, aliens may seek redress from certain discriminatory employment procedures under the National Labor Relations Act.

\(^{166}\) See, e.g., *Roberto v. Hartford Fire Ins. Co.*, 177 F.2d 811, 814 (7th Cir. 1949), holding an alien who had been ordered deported could sue on an insurance contract; *Martinez v. Fox Valley Bus Lines*, 17 F.Supp. 576, 577 (E.D. Ill. 1936), holding no law or court rule could prevent an alien from filing suit in tort for a negligent auto collision.


\(^{168}\) Id. at 638-39.


\(^{170}\) Id. at 533.

\(^{171}\) Id. at 538.
In addition to initiating his civil action, Guerra also filed a charge with the National Labor Relations Board. The Board issued an order enjoining further enforcement of the priority agreement. In *NLRB v. International Longshoremen's Association, Local No. 1581, AFL-CIO*, the Board's application for enforcement of that order was affirmed by the Fifth Circuit, the same court which had denied relief to Espinoza under Title VII.

The court held that the referral agreement violated the National Labor Relations Act Section 8(b)(2) and (a)(3) in that it caused an employer to discriminate against an employee so as to encourage membership in a labor organization. The appropriate test for a violation of Section 8(b)(2) is presence of impermissible discrimination by the union which causes or tends to result in the encouragement or discouragement of union membership. The court found that the test had been met in this case since the union discriminated on the basis of an arbitrary and invidious classification when it caused plaintiff's transfer simply because he was an alien. In addition, the union's power to cause an employer to discriminate for arbitrary reasons impermissibly encouraged union membership. The court recognized "that the union's ability to effect this kind of discrimination is likely to have an intimidating effect on workers who might otherwise prefer to refrain from union membership or upon members who might like to refrain from any extensive union activity."

This case makes it clear that when a union and employer join in citizenship discrimination so as to encourage or discourage union membership, the protection of the National Labor Relations Act may be called into play. If the alien employee's charge withstands preliminary investigation, it will be pursued by the National Labor Relations Board. But for an alien whose employment is not affected by union or organizational activity, a personal action under Section 1981 is his only avenue of challenge to citizenship discrimination in private employment.

In view of the availability of these other remedies, distinct from Title VII, the issue "becomes not whether aliens will be protected but rather how they will be protected. . . ." (Emphasis added).

172. 37 DIGEST OF LABOR REL. D-1 (5th Cir. 1974).
173. Id.
175. 37 DIGEST OF LABOR REL. at D-2.
The Espinoza holding deprived non-citizens of more than just an alternative cause of action for employment protection. The ruling that alienage discrimination is not proscribed by Title VII also deprived aliens of access to the Equal Employment Opportunity Commission. In creating the EEOC Congress provided an agency to which victims of the discrimination proscribed in the Act could turn for professional assistance. The free services of the Commission help to equalize the disparate legal and economic strengths of minority workers and their more powerful employers.

All employers covered by the statute are required to post notice of its provisions, as well as information pertinent to the filing of a complaint. All that the Act requires of an aggrieved employee is that he file a written charge under oath, containing such information as the Committee requires. If the Commission has reason to believe the Act is being violated, it may itself file a charge. If, after due investigation, the Commission reasonably believes the charge to be true, it will endeavor to eliminate the alleged unlawful practice by informal means of conference, conciliation and persuasion. If no acceptable conciliation is achieved within thirty days, the Commission may bring a civil suit against the respondent, in which the person aggrieved may intervene.

If, after 180 days, the Commission has neither filed suit nor reached a resolution, the complainant, or the person alleged to be aggrieved in a charge by the Commission, is authorized to file a civil action. If the circumstances warrant, the court may appoint an attorney for the complainant and authorize the commencement of the action without the payment of fees, costs, or security, and may further permit the EEOC to intervene. If the Commission should determine at the time the charge is filed that prompt judicial action is necessary to protect the employee’s rights, it may sue for temporary or preliminary relief pending the final disposition of the charge.

The statute further provides that during the investigation of a charge the Commission shall have access to examine and copy any evidence of the respondent that is relevant to the alleged unlawful

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182. Id.
183. Id.
practice.\textsuperscript{185} The Commission is authorized to pay for the use of services and employees of state and local agencies administering state fair employment practice laws.\textsuperscript{186} It also has the power to pay witness and mileage fees to witnesses needed for depositions or live testimony,\textsuperscript{187} and it may initiate technical studies as are appropriate to further the purpose of the Act.\textsuperscript{188}

These provisions make it apparent that Congress intended to give every possible assistance to the minorities protected under Title VII who might often be unable to maintain a suit on their own resources. Aliens are a prime example of the educationally, economically and socially disadvantaged minorities that the EEOC may assist. The Commission's protective procedures are perhaps of particular importance to Mexicans like Espinoza for studies have shown that of all alien groups Mexicans are among the slowest to achieve social and economic integration.\textsuperscript{189} Due to language difficulties and fear of reprisals, aliens have filed a significantly lower number of complaints with the EEOC than have other minority groups.\textsuperscript{190} Hence, since Espinoza eliminates the opportunity for a Commission-initiated charge of alienage discrimination, it works a hardship on alien residents of the country not felt by other minorities.

While a Section 1981 remedy is available, many aliens have neither the financial nor professional means to commence the private action required by that statute. As petitioner concluded in her brief:

There is no benefit to anyone — employer, employee, government or the public at large — in forcing an aggrieved employee to pursue a §1981 remedy, except the interest of an employer in depriving the employee, who will ordinarily not be able to afford private counsel, of the assistance of the Equal Employment Opportunity Commission in prosecuting his or her claim. That employer interest is hardly worthy of judicial protection.\textsuperscript{191}

\begin{itemize}
\item \textsuperscript{185} 42 U.S.C. § 2000e-8(a) (1970).
\item \textsuperscript{186} 42 U.S.C. § 2000e-8(b) (1970).
\item \textsuperscript{187} 42 U.S.C. § 2000e-4(g) (2) (1970).
\item \textsuperscript{188} 42 U.S.C. § 2000e-4(g) (5) (1970).
\item \textsuperscript{189} See Comment, State Discrimination Against Mexican Aliens, 38 Geo. Wash. L. Rev. 1091, 1095-98 (1970).
\item \textsuperscript{190} Id. at 1107.
\item \textsuperscript{191} Brief for Petitioner (Espinoza) at 36, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).
\end{itemize}
If it is unlikely that a non-citizen could afford to pay fees to a private attorney, it is even more unlikely that he could personally finance the special studies, unlimited witness fees, and extensive discovery that are provided by the EEOC, and financed by tax dollars collected from citizens and aliens alike.

In summary, therefore, it is true that an alien's right to non-discriminatory employment opportunity remains viable in spite of Espinoza. Procedures remain available under Section 1981 and the National Labor Relations Act to enforce that right. But pragmatic analysis shows that in precluding alienage discrimination from Title VII remedies, the Court has deprived aliens of the procedure designed especially to furnish the kind of assistance that aliens need.

CONCLUSION

Espinoza is a significant departure from the prior trend of decisions expanding the protection of alien rights. In decisions based on the fourteenth amendment, the Court has repeatedly rejected the contentions that special public interests justify state action discriminating against noncitizens. The pinnacle of this progression was the Court's declaration that the classification of alienage was inherently suspect and would be sustained only by a compelling governmental interest.

In Espinoza, the Court measured the rights of aliens according to the statutory guide of Title VII. The sparse and conflicting legislative history of the Act led the Court to glean Congressional intent from collateral sources and resulted in the decision that citizenship discrimination was not proscribed by the statute.

However, the Court failed to recognize persuasive indicia that Congress did intend to eliminate discrimination based on alienage. The language of Title VII as well as federal immigration policy show that Congress contemplated the employment of aliens in private enterprise. Most importantly, the constitutional weaknesses inherent in the Civil Service citizenship requirement, on which the Court so strongly relied, have led the Ninth Circuit Court of Appeals to declare the requirement unconstitutional.

In spite of Espinoza, remedies for alienage discrimination remain available under 42 U.S.C. § 1981 and, in limited circumstances, under the National Labor Relations Act. Thus, the case's impact lies in the fact that it precludes aliens from access to the Equal Employment Opportunity Commission. Absent the financial and professional aid
of the EEOC, it is unlikely that many non-citizens will prosecute alienage discrimination claims under the more burdensome Section 1981 action.

The entire dilemma posed by *Espinoza v. Farah Manufacturing Co.* was caused by Congress' failure to define the terms it used in legislation. In their eagerness to insure employment rights to blacks, the legislators ignored the ambiguity of the phrase "national origin." The fact that the words have often appeared in statutory language and Executive Orders does not necessarily signify that their meaning is commonly understood by those who use and interpret the phrase.

The *Espinoza* holding will hopefully motivate Congress in several directions. The need is obvious for supplemental legislation to be enacted rapidly to guarantee the protection of Title VII to non-citizens. It can further be hoped that this decision will move Congress to be more precise in defining its language and recording its intentions in future legislation. Pending remedial congressional action, however, the Court's ruling in *Espinoza* will stand as a step backward from the goal of equal protection of the laws for all residents of the United States.

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