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State Burdens on Resident Aliens: 
A New Preemption Analysis

Throughout American history, legally resident aliens have been subjected to numerous restrictions imposed by Congress and state legislatures. When these burdens have been challenged, most courts have invoked equal protection doctrine to evaluate the validity of the legislation. But that doctrine has been applied with growing inconsistency, due in large part to the problematic status of alienage under

1. A resident alien is a person admitted for permanent residence, entitled to work and live anywhere in the country, and eligible for naturalization after five years of residence. 8 U.S.C. §§ 1101, 1427(a) (1976). Nonresident aliens are those admitted for a time period fixed prior to entry, such as temporary visitors, students, and trainees. About 460,000 immigrant or resident aliens were admitted in 1977, see [1977] IMMIGRATION & NATURALIZATION SERVICE ANN. REP. 2, compared to more than 8 million nonresident aliens, id. at 4. In 1977, more than 4.9 million resident aliens were present in the United States. Id. at 25. In this Note, "aliens" will refer to legally resident aliens unless specifically noted.

2. See, e.g., J. HIGHAM, STRANGERS IN THE LAND 46, 161-62, 183 (1975) (describing history of American statutory restrictions on aliens). Numerous federal statutes disproportionately burden aliens. See, e.g., Appendix to Brief for the Petitioners, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (listing more than 250 statutory provisions drawn from 31 titles of United States Code that make distinctions between citizens and aliens; listing is exclusive of Title 8, "Aliens and Nationality," in which the distinction is made in virtually every provision). State burdens, however, are even more numerous and pose different problems because the federal government is generally acknowledged to have much wider latitude in placing restrictions on aliens. See pp. 945-46 infra.

States often exclude aliens from licensed professions and occupations by limiting employment to citizens or aliens who have declared their intention to become citizens. See, e.g., ILL. ANN. STAT. ch. 111, § 2208 (Smith-Hurd 1978) (dental hygienist must be citizen or have naturalization papers); N.Y. EDUC. LAW § 6803(6) (McKinney 1972) (pharmacist must be citizen or declarant alien); W. VA. CODE § 30-6-5 (1976) (embalmer must be citizen); D. CARLINER, THE RIGHTS OF ALIENS 205-55 (1977) (compiling 388 statutory restrictions based on citizenship affecting 23 specific occupations for the 50 states). In addition to regulating entry into private professions, state employment of aliens also is restricted. See, e.g., N.Y. EDUC. LAW § 3001(3) (McKinney Supp. 1975) (public school teacher must be citizen or declarant alien); S.D. COMPILED LAWS ANN. § 3-1-4 (1974) (no alien except declarant alien may be employed by state with minor discretionary exceptions). States further exclude aliens from use or employment of certain public state resources and benefits, see, e.g., VA. CODE § 28.1-162 (1979) (only citizens may apply to have lands designated as public clamming or scalloping grounds); Wyo. Const. art. 19, § 3 (only citizens and declarant aliens to be employed on public works), and from ownership of property within the state, see, e.g., NEB. REV. STAT. § 76-402 (1976) (aliens cannot acquire title to land for more than five years). The restrictions on aliens are thus far-reaching in subject matter and found in many of the states.


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traditional equal protection. The inadequacy of equal protection doctrine has prompted some scholars to urge the adoption of a federal preemption standard for analyzing state regulations that disproportionately burden aliens. Because of the plenary federal interest in immigration, naturalization, and foreign affairs, federal preemption provides an appropriate framework for the analysis of alienage regulations.

Despite the conceptual appeal of preemption doctrine, the full analytical apparatus needed to reach case-by-case determinations has never been elaborated. This Note develops such a preemption test, proposing a standard under which state laws that disproportionately burden aliens are preempted by the predominant federal interest in alienage, unless the state regulation is expressly authorized by Congress, or alternatively, can be analogized to a federal regulation from which an implicit authorization by Congress can be inferred. The Note then applies the test to the major areas in which the states have attempted to burden aliens. Its application demonstrates that a preemption model better orders alienage jurisprudence than does equal protection analysis, and that the proposed test provides a clear and uniform standard by which courts can determine the limits of permissible state burdens on aliens.

I. The Underpinnings of a Federal Preemption Model

In order for a preemption analysis of state burdens on aliens to supplant an equal protection approach, it is necessary to demonstrate both that federal preemption doctrine is conceptually appropriate to analysis of alienage regulations and that it is less likely to lead to the confusion that has resulted from the equal protection model.

A. The Failure of Equal Protection

In 1971, the Supreme Court announced in Graham v. Richardson that state classifications based on alienage, like those founded on nationality or race, are inherently suspect and subject to “close judicial

5. See pp. 943-44 infra (discussing problems of treating alienage within traditional equal protection framework).


7. See pp. 944-46 infra.

8. See pp. 948-50 infra.

9. 403 U.S. 365 (1971) (invalidating state statutes denying welfare benefits to resident aliens or conditioning those benefits on longtime residency).
For the next seven years, the Court proceeded to mold a new alienage jurisprudence based on this standard, virtually guaranteeing that most state legislative distinctions between citizens and aliens would fall. More recently, however, the Court has applied a looser, rational-relationship test without overruling its prior decisions or announcing a clear basis for its divergence.

The cornerstone of this new approach is a “governmental function” exception which the Court has applied to challenges to alienage regulations. Under this exception, exclusions of aliens from participation in government are not subject to strict scrutiny. The exception is premised on the view that the distinction between citizen and alien, arguably irrelevant in other contexts, is fundamental to the definition and government of a state.

The Court's refusal to apply strict scrutiny to restrictions barring aliens from the political process is paradoxical, however, because the suspect classification device was intended specifically to protect minorities not adequately safeguarded by the political process. Furthermore, the Court's application of the exception has been disingenuous. Posi-

10. Id. at 372.
12. See Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972) (a finding that legislative classification is “suspect” generally fatal to legislation under “new” equal protection). Indeed, in the years following the Graham decision, the Court rejected state statutes that excluded aliens from a state competitive civil service, Sugarman v. Dougall, 413 U.S. 634 (1973), from admission to the practice of law, In re Griffiths, 413 U.S. 717 (1973), from state licensing as civil engineers, Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976), and from financial assistance for higher education, Nyquist v. Mauclet, 432 U.S. 1 (1977). But see Maltz, supra note 11, at 675 (language in Sugarman made clear that strict scrutiny would not apply in some instances involving alienage classifications).
15. Id. The theory underlying the “governmental function” exception is that because a democratic society is ruled by its people, the state can exclude aliens from participation in its political institutions as part of the sovereign's obligation to preserve the fundamental conception of a political community. See, e.g., Foley v. Connellie, 435 U.S. 291, 295-96 (1978).
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tions such as those of a state trooper17 or a public school teacher18 hardly seem equivalent to the policymaking functions envisioned by the governmental function doctrine.10 Yet the Court has expanded the exception to encompass these jobs. In seeming contradiction, the Court has held that alien lawyers may not be excluded from admission to the bar on the basis of alienage,20 even though lawyers are "officers of the court" who frequently bear great influence and responsibility in our society.21

The current confusion in alienage jurisprudence derives from two sources. First, the Court has failed to resolve whether alienage, which possesses only some of the traditional criteria of "suspectness,"22 con-


18. See Ambach v. Norwick, 441 U.S. 68, 80-81 (1979) (nondeclarant aliens—those aliens who have not announced an intention to give up foreign citizenship and become United States citizens pursuant to 8 U.S.C. § 1445(f) (1976)—can be excluded from public school teaching).

19. In the Court's most forceful declaration of the doctrine, Sugarman v. Dougall, 413 U.S. 634, 647 (1973), it suggested that aliens may be barred from holding state elective or important nonelective executive, legislative, and judicial positions because occupants of such positions "participate directly in the formulation, execution, or review of broad public policy." But the governmental function doctrine is weakened by the holding of that case, which limited state authority to exclude aliens from participation in a state civil service. Id. at 643. The phrase "execution of broad public policy" must be interpreted to include only actual policymaking or the Sugarman holding becomes unintelligible. See Foley v. Connellie, 435 U.S. 291, 304 (1978) (Marshall, J., dissenting).


21. Id. at 728-29; Sugarman v. Dougall, 413 U.S. 634, 663 (1973) (Rehnquist, J., dissenting). The inconsistency in the Court's position has not gone unnoticed. See Ambach v. Norwick, 441 U.S. 68, 88-89 (1979) (Blackmun, J., dissenting) (incomprehensible why aliens can be barred from public-school teaching if not from practicing law); Equal Treatment, supra note 16, at 1075-79 (demonstrating inconsistencies of Foley and Ambach); Dual Standard, supra note 16, at 1332-33 (same). Although the distinction has been made that lawyers in private practice differ from publicly employed police officers and teachers, see Ambach v. Norwick, 441 U.S. 68, 76 n.6 (1979), the rationale for the governmental function exception is more sensibly based not on the formalistic criterion whether the government is the employer but rather on the public nature of the functions performed by the employee. Even if the former criterion were controlling, the fact that the government is not directly the "employer" should not be dispositive, due to the extent of state regulation of the legal profession. See In re Griffiths, 413 U.S. 717, 725-26 (1973) (describing Connecticut regulation of lawyers and legal practice).

22. Like other suspect classes, aliens are marked by a history of prejudice. See J. HiGHAM, supra note 2, passim. Moreover, the alien's political isolation, the hallmark of a "discrete and insular" minority, is the standard trigger for application of strict scrutiny. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). But cf. Mathews v. Díaz, 426 U.S. 67, 78-79 (1976) (class of aliens is heterogeneous multitude of persons with divergent ties to this country).

Alienage can also be characterized as "an immutable characteristic determined solely by the accident of birth." See, e.g., Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) (gender discrimination case citing immutability as criterion of suspectness). In the five years during which an alien is not eligible for citizenship, see 8
stitutes a suspect class. A second problem arises from the federal structure of American government. Regulations that would be constitutionally unacceptable if adopted by a state may be justified by the overriding national interests underlying federal legislation.

Recognition of the predominant federal interest in alienage suggests the wisdom of measuring state and federal regulations by different standards. It is therefore logical to begin analysis of state alienage classifications by looking to the federal interest in the classification and deciding whether the state interest accords with that federal interest.

B. The Argument for Federal Preemption

Although the Constitution does not mention the power to regulate immigration, various provisions are deemed to vest Congress with the power to regulate the entrance and residence of aliens. These include

U.S.C. § 1427(a) (1976), the status is immutable. See Dual Standard, supra note 16, at 1525. But alienage generally is not immutable over the long term; it is often a phase on the road to citizenship. See, e.g., Nyquist v. Mauclet, 432 U.S. 1, 20-21 (1977) (Rehnquist, J., dissenting) (alienage unlike other suspect classifications due to ability to leave status); Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting) (same). The alien's ability to remove himself voluntarily from alien status complicates any attempt to determine the proper level of equal protection scrutiny.

23. The Court has at different moments viewed alienage as a suspect classification, see Nyquist v. Mauclet, 432 U.S. 1, 7 (1977); Graham v. Richardson, 403 U.S. 365, 372 (1971), as an exception to a suspect classification, see Ambach v. Norwick, 441 U.S. 68, 74-75 (1979), and as a non-suspect classification, see Foley v. Connellie, 435 U.S. 291, 295-96 (1978); cf. Dual Standard, supra note 16, at 1524 (Court's justification for strict scrutiny of certain classifications but not others has been elusive). This confusion evidences the evolution of various levels of scrutiny under equal protection. See Maltz, supra note 11, at 679 (problems of alienage jurisprudence under equal protection are not solved by either two-tiered or evolving multitiered approach).

24. See Hampton v. Mow Sun Wong, 426 U.S. 88, 100, 105 (1976) (Civil Service Commission's exclusion of virtually all noncitizens from employment held to be invalid, but would have been valid if imposed by President or Congress); Mathews v. Diaz, 426 U.S. 67, 86-87 (1976) (Fourteenth Amendment's limits on state powers different from constitutional limits on federal power over immigration and naturalization).

Alienage poses particular problems for an equal protection analysis. Identical equal protection standards are applied to federal and state governments in all areas except alienage, where the plenary federal interest permits wider federal latitude. See Karst, The Fifth Amendment's Guarantee of Equal Protection, 55 N.C.L. Rev. 541, 558 (1977) (class of national interests justifying departure from basic equivalence of Fifth and Fourteenth Amendments is extremely narrow, extending only to regulation of aliens by federal government). Moreover, the national interest in alienage has been held to constitute a political question, subject to narrow judicial review. See, e.g., Mathews v. Diaz, 426 U.S. 67, 81-82 (1976); Galvan v. Press, 347 U.S. 522, 530-31 (1954).

25. See Hines v. Davidowitz, 312 U.S. 52, 66 (1941) (regulation of aliens so intertwined with federal responsibility that state law may be preempted); Equal Treatment, supra note 16, at 1089-90 (Court has recognized federal predominance in its application of tacit preemption standard hidden in its equal protection analysis).

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federal authority over foreign affairs, the power to make a uniform rule of naturalization, and the power to regulate commerce with foreign nations. The Supreme Court also has relied on the sovereign authority of the United States as a nation, an argument independent of constitutional derivation, as an alternative justification for the pre-dominant federal interest in alienage.

Plenary federal authority for the conduct of foreign affairs yields a particularly compelling argument for adopting a federal preemption standard to analyze state alienage classifications. In the conduct of foreign policy, the President or Congress have need of the power to exact reciprocal concessions from other nations, or to secure just treatment for Americans living abroad, by manipulating the rights and opportunities of foreign nationals resident in the United States. State

29. U.S. Const. art. I, § 8, cl. 3. In the first hundred years following adoption of the Constitution, the Supreme Court relied primarily on the federal right to supervise foreign commerce to invalidate state regulations that encroached on the exclusive federal interest in immigration. See, e.g., Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 283, 405 (1849) (transportation of immigrants falls under regulation of foreign commerce). When the federal government commenced a program of immigration control in 1882, it again turned to the foreign commerce rationale in its successful defense of the federal statute. See Head Money Cases, 112 U.S. 580, 595-96 (1884) (validating duty on immigrants).
30. Mr. Justice Sutherland made the most authoritative exposition of the theory that the foreign relations power derives not from the Constitution, but from the law of nations, and in fact antedated the Constitution, in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-18 (1936). Cf. Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (right to exclude or expel aliens is inherent right of all nations); 1 C. Hyde, International Law § 59 (2d rev. ed. 1945) (same). The Court continues to view such congressional power as inherent rather than enumerated. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 765-66 (1972) (Court will not look behind executive’s exclusion of alien). But see L. Tribe, American Constitutional Law § 5-16, at 283-84 (1978) (positivist theory of sovereignty, rooted in international law and not the Constitution, is erroneous); Levitan, The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory, 55 Yale L.J. 467, 497 (1946) (no place for theory of “inherent” powers in American constitutional system).
31. See, e.g., Mathews v. Diaz, 426 U.S. 67, 81 (1976) (regulation of aliens may implicate relations with foreign governments); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (alien policy tied to conduct of foreign affairs and to other powers entrusted so exclusively to political branches of government as to be largely immune from judicial inquiry or interference).
32. See, e.g., Hines v. Davidowitz, 312 U.S. 52, 69 (1941) (numerous treaties between the United States and foreign governments pledge not to put discriminatory burdens on aliens in return for reciprocal concessions). The need for federal control over the rights of resident aliens was advanced by petitioners in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), to defend the exclusion of aliens from the federal competitive civil service. That is, a broad exclusion of aliens would enable the President to offer employment opportunities to citizens of a foreign country in exchange for reciprocal concessions, an offer he could not make if those aliens already were eligible for federal employment. Id. at 104.
regulations, however, can frustrate such efforts. Moreover, serious international controversies may arise from real or imagined wrongs to another's subjects inflicted or acquiesced in by a state government.

The general exclusion or preemption of state legislation encroaching upon foreign policy should, therefore, serve as a paradigm for analyzing state regulation of aliens.

States have disputed the exclusivity of federal power by claiming that some regulations that single out aliens or burden them disproportionately fall within the ambit of state police power. Conflict between state and federal purposes often occurs in areas such as the regulation of employment relationships, which states have long regarded as a quintessential police function.

To contend that alien regulation falls within state police power,

The Court assumed that such a purpose for imposing a citizenship requirement would be justified if imposed by the President or Congress. Id. at 105. Such active use of regulations burdening aliens would be permissible because of the need for a "reciprocity lever," except to the extent that those burdens would violate constitutional rights of the aliens. See Reid v. Covert, 354 U.S. 1, 16-17 (1957) (plurality opinion of Black, J.) (protections of Constitution cannot be nullified by treaty or legislation); Galvan v. Press, 347 U.S. 522, 530 (1954) (alien is "person" under due process clause entitled to constitutional protection).

Traditionally, many of the rights of aliens in the United States reflect disparate agreements between the United States and the aliens' respective countries of origin, so that two aliens in the United States may have very different rights and prospects. See, e.g., L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 258 (1972) (discrimination among aliens of different nationality raises no constitutional difficulty if it reflects different agreements between United States and aliens' respective countries of origin, or if its purpose is to secure reciprocal treatment for Americans in those countries).

33. See Zschernig v. Miller, 389 U.S. 429, 440-41 (1968) (state regulation of estates must give way if effective exercise of nation's foreign policy thereby impaired); L. HENKIN, supra note 32, at 238-39, 476 n.51. But see Clark v. Allen, 331 U.S. 503, 517 (1947) (state reciprocity statute as to alien's right to inherit personal property held not to be interference in foreign affairs). Because Zschernig did not overrule Clark, one might conclude that not all state actions with foreign implications are interferences in foreign affairs. However, Zschernig demonstrates that there is a low threshold for establishing interference.


35. State police power has been described as follows: "[C]ertain powers necessary to the administration of their internal affairs are reserved to the States . . . , among these powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases . . . ." Henderson v. Mayor of New York, 92 U.S. 259, 271 (1876). But police power is limited by the provision that whenever a state statute invades the legislative domain belonging exclusively to Congress, the statute is void, no matter how closely linked it may be to powers conceded to belong to the states. Id. at 272.

36. As a consequence of state police power, the states often have attempted to restrict the access of aliens to various forms of employment. See note 2 supra (citing state statutes); DeCanas v. Bica, 424 U.S. 351, 356 (1976) (states possess wide authority under police power to regulate employment relationships). The DeCanas Court said, however, that the state regulation was aimed precisely at the protection of citizens and legally admitted aliens from the harmful economic impact of illegal aliens, id. at 356-57, and as such, the state regulation did not add to the burdens of legally resident aliens, id. at 358 n.6.
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however, obfuscates the uniquely federal character of the alien. Although he resides in a state, the alien is subject to federal supervision until his naturalization. Furthermore, employment is an area in which the federal government has a special prerogative to circumscribe state action. Because an alien cannot live where he cannot work, the authority of the federal government to regulate the residence of aliens must include regulating aliens' rights to employment. State restrictions on the conditions for granting welfare and other public benefits can similarly frustrate federal policy.

Thus, the preferred doctrine to protect the dominant national interest in alienage policy ought to be federal preemption. Use of a preemption standard to review burdens imposed on aliens would justify the Court's differential treatment of state and federal alienage classifications, a difference that is anomalous under equal protection analysis. Moreover, preemption doctrine can be shown to delimit permissible state classifications more successfully than does equal protection.

II. Construction of an Effective Preemption Model

There is ample precedent and convincing rationale for applying a federal preemption standard to state burdens on aliens. The Supreme Court has recognized the possibility of developing such a standard.

37. See Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948) (state's power to apply laws exclusively to its alien inhabitants as a class confined within narrow limits); Hines v. Davidowitz, 312 U.S. 52, 73 (1941) ("treatment of aliens, in whatever state they may be located, [is] a matter of national moment").
38. Truax v. Raich, 239 U.S. 33, 42 (1915) (state's denial of aliens' opportunity to earn living tantamount to denial of entrance and abode). This assertion is cut back, however, by Foley v. Connelle, 435 U.S. 291, 295-96 (1978) (distinguishing between exclusions that strike at alien's ability to exist in community, requiring strict scrutiny, and lesser exclusions that are within state's constitutional prerogatives).
39. See Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (federal government has broad constitutional powers to regulate conduct of aliens before naturalization, and state laws imposing discriminatory burdens on entrance or residence of legal aliens conflict with this power).
40. See Graham v. Richardson, 403 U.S. 365, 380 (1971) (state alien residency requirements that either deny welfare benefits to aliens or condition them on longtime residency assert a state right to deny entrance and abode, inconsistent with federal policy).
41. See p. 944 & note 24 supra.
42. As long ago as 1915 the Court recognized the independence of the preemption argument against restrictions on aliens from the equal protection claim. Truax v. Raich, 239 U.S. 33, 39, 42 (1915). The Burger Court has often mentioned preemption as an alternative argument to equal protection in analyzing state restrictions. See, e.g., Nyquist v. Mauclet, 432 U.S. 1, 12 (1977); Examining Bd. v. Flores de Otero, 426 U.S. 572, 602 (1976). In Graham v. Richardson, 403 U.S. 365 (1971), the Court used both doctrines, preemption and equal protection, stating that either was sufficient to invalidate the
and several scholars have argued that federal preemption would provide a conceptually desirable standard for assessing alienage classifications. But no court or critic has yet developed a specific, rigorous test through which federal preemption doctrine might be applied. To establish the practical viability of preemption analysis, an appropriate test must be constructed. Application of the test to a variety of burdens that states have placed on aliens will then demonstrate the ability of federal preemption doctrine to bring order to alienage jurisprudence.

A. Proposed Federal Preemption Standard for Alienage Classifications

To ensure that the superior federal interest in alienage is respected, an appropriate test must look to federal intent as a measure of the legitimacy of state burdens on aliens. A standard that can both discern federal intent and weigh state burdens against those federal objectives will result in a more consistent and coherent ordering of alienage classifications. Because any preemption test for alienage classifications is so closely tied to federal policy regarding aliens, there is no reason to apply a traditional commerce clause preemption standard. More-
over, a federal preemption test for aliens should be both narrowly focused and sufficiently self-executing to overcome the nearly ad hoc approach to alienage categories that has left the jurisprudence in conceptual disarray.

These concerns are satisfied by the following test:

(1) State laws that disproportionately or discriminatorily burden legally resident aliens are presumptively preempted by the plenary federal interest in alienage; (2) a state can, however, rebut the presumption by showing that its regulation (a) has been authorized expressly by Congress, or (b) can be analogized to a federal regulation from which an implicit authorization can be inferred.

There are two exceptions to the state's prerogative to analogize from an implicit federal mandate. First, a state may not place a burden on aliens if the parallel federal burden is a direct regulation of the immigration and naturalization of aliens, or if the federal burden has a significant impact on foreign affairs. Regulation in these areas is entrusted exclusively to the federal government, and thus any state exclusion, registration, deportation, or naturalization proceeding would be impermissible. Second, if the rationale underlying a federal burden on aliens is national security, the states are enjoined from placing a parallel burden on aliens because there is no corollary to national security at the state level.

The proposed test applies only to regulations that burden aliens disproportionately. States are not enjoined from enacting regulations that affect aliens and citizens alike. States are, however, subject to the direction of Congress, because of its plenary authority over alienage. Congress, or presumably the executive, can delegate responsibility for the regulation of aliens, or can authorize the states to regulate aliens or action will occur only if "the nature of the regulated subject matter permits no other conclusion," or if "the Congress has unmistakably so ordained." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). This tendency is not absolute, however, see note 58 infra, and in a more clearly national field such as alien regulation the Court is less likely to tolerate regulatory incursions by the states. L. Tribe, supra note 30, at § 6-25. Moreover, the Court has held that the rights, liberties, and personal freedoms of human beings are in a category entirely different from commodities that move in interstate commerce. See Hines v. Davidowitz, 312 U.S. 52, 68 & n.22 (1941).

46. See, e.g., Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941) (supremacy of national power over foreign affairs, immigration, and naturalization is made clear by the Constitution, and no state can add to or take from the force and effect of a federal treaty or statute in these areas).

47. National security is a by-product of the interplay of national defense and foreign affairs. It reflects the impact inside America of the defense measures adopted for the purposes of foreign policy and is a federal concern. H. Lasswell, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 53-55 (1950).
to override existing regulation, so long as such authorization comports with due process. The analogy branch of the test, which legitimates state regulation by inference from federal policy, rests upon a theory of the parallel functions of federal and state governance. Ordinarily, when Congress places a disproportionate burden on a resident alien, a legislative judgment has been made about the relationship between a particular government interest and alienage status. Regardless of the merit of the federal determination, its rationale should be equally valid at the state level if the state government performs a parallel function. Therefore, if a state chooses to place an identical or analogous burden on an alien, it is acting consistently with implicit federal policy and in no way derogates from a unified national approach.

The concept of a "permissible analogy" demands further explanation. There often will be little controversy about what constitutes an analogous or parallel burden: denial of voting in state elections parallels denial of voting on the federal level; exclusion from state court

48. See L. HENKIN, supra note 32, at 237 (federal-state paradigm in commerce clause area); cf. Leisy v. Hardin, 135 U.S. 100, 108-09 (1890) (Congress can permit states to regulate commerce in ways that could not be upheld were Congress silent). This reasoning can be extended to encompass regulation of aliens, because of the supreme federal interest in immigration and naturalization. Hines v. Davidowitz, 312 U.S. 52, 62, 66 (1941). One rationale for this federal supremacy is that Congress determines the terms upon which an alien is admitted, and also the conditions under which an alien is naturalized. Congress, if it so desired, could transform an alien into a citizen upon entry into the United States, thereby mooting all state distinctions between citizen and alien. Therefore, Congress retains the authority to direct state action singling out aliens. But congressional power is not unlimited. See Graham v. Richardson, 403 U.S. 365, 382 (1971) (Congress does not have power to authorize individual states to violate equal protection clause). There are constitutional limits on federal classifications; at the very least, aliens are entitled to due process if they are deprived of a liberty interest. Hampton v. Mow Sun Wong, 426 U.S. 88, 101-03 (1976).

49. Cf. Rosberg, supra note 26, at 314 (aliens stand in the same position with respect to the federal government as they do with respect to the states).

50. See Perry, supra note 6, at 1063-64 (those state alienage classifications that are upheld can be shown to be consonant with federal policy).

51. Admittedly there may be a fine line between what constitutes a permissible analogous burden and what constitutes an impermissible additional burden. Some cases, such as the voting example at p. 954 infra, are easy to resolve; voting at the state level is identical to voting in federal elections, and the state burden is permissible. Others, such as the state regulation of illegal aliens upheld in DeCanas v. Bica, 424 U.S. 351 (1976) (CAL. LAB. CODE § 2805 (West Supp. 1980), which places sanctions on employers for knowingly employing illegal aliens, upheld as harmonious with federal law), involve judicial line-drawing in order to determine whether the state sanctions are analogous to the federal regime, or additional to it and thereby impermissible. The test respects the predominant federal interest in alienage regulation, and employs that federal interest as the corpus from which states can make alienage classifications. Equal protection doctrine ignores the delicate linkage between state and federal action in the alienage domain. See p. 944 supra.

52. See notes 65 & 66 infra.
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jury service parallels exclusion from federal court jury service. But the analogy will not always be self-evident.

In difficult cases, a two-step analysis should be applied. First, it is necessary to ascertain whether there is a federal burden analogous on its face to the challenged state burden. In the employment area, for example, such a burden might be the denial of alien access to a given job function. In such a case, a direct analogy could be determined by comparison of state and federal job descriptions. This step is functional in that it looks to the function or nature of the burden itself. If there is no facially obvious analogy, the second step is to determine whether there is an arguably parallel federal burden whose rationale is applicable at the state level.

There are two principal ways in which to discern the appropriate rationale at this second step. The preferred method is to look to the legislative or executive intent behind the parallel federal enactments.

53. See note 70 infra.

54. For example, if the question is whether aliens can be denied the right to be custodians in state government buildings, it would be necessary to see if custodians in federal government buildings fall within the blanket federal prohibition against employment of aliens in the competitive civil service. If aliens could be employed in federal government buildings, they could serve as custodians in state government buildings as well. An argument could be made that the states are free from such federal mandates insofar as they exclude aliens from employment with state government. See National League of Cities v. Usery, 426 U.S. 833 (1976) (federal minimum wage and maximum hour provisions impermissibly interfere with functioning of states and their political subdivisions). What was seemingly dispositive in National League of Cities, however, was that the federal requirements, the Fair Labor Standards Act, if applied to the states, could have significantly altered the performance of essential state functions, vitiating the idea of the “separate and independent existence” of the states. Id. at 851.

The concept of impermissible interference with state sovereignty in National League of Cities would be less at issue if the question were whether aliens could be excluded from state government, because a ruling on this subject could hardly impair the independence of state government. Unlike the Federal Labor Standards Act, which affects the employment terms of all employees, the alienage ruling would affect only alien employees. Because state governments function overwhelmingly on the labor of citizens—indeed, aliens traditionally have been excluded from many government positions—it is doubtful that a federal decision ordering the states to employ or exclude aliens from government jobs would rise to the level of an impairment of sovereignty as did the Fair Labor Standards Act. But see Maltz, supra note 11, at 690 (National League of Cities would seem to apply in this context).

55. The second step incorporates the preemption standard developed in Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (test is whether state law in question stands as obstacle to full purposes and objectives of Congress). See note 71 infra.

56. Although the will of Congress would seem to be the most legitimate expression of federal rationale, administrators also frequently determine federal policy. See, e.g., note 77 infra (aliens are excluded from employment in FBI by agency itself). Until such regulations are challenged, they govern federal action and are a legitimate source from which to determine federal intent. But see Hampton v. Mow Sun Wong, 426 U.S. 88, 115-16 (1976) (administrative regulation denying aliens right to civil service job opportunities is impermissible delegation of authority by President or Congress).
The other possibility is to look to judicial decisions, which regularly interpret the intent of the other branches regarding burdens on aliens, in order to determine whether there is a federal rationale that could be applied by the states. If no relevant federal intent can be inferred because no parallel federal burden exists, the state regulation necessarily must fall. Thus, congressional or executive silence or inaction would be interpreted as a bar to state regulation.

A complication arises at the second step of the analysis when there are varied and inconsistent federal policies or rationales from which to draw analogies. In this instance, the appropriate analogy is that which most favors the alien. This conclusion accords with the basic premise that states must not burden aliens unduly. Also in keeping with this premise, there is no lower limit on permissible state regulation; states are free to ignore an implicit federal mandate and to place no burdens

57. See, e.g., Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (states can neither add to nor take from the conditions imposed by Congress upon admission, naturalization and residence of aliens). The test does not mean that the state cannot regulate traditional reserved areas such as education or employment, but that alienage is a federal concern delegated to Congress, and therefore the states are preempted from making unauthorized distinctions on the basis of alienage. Cf. L. Tribe, supra note 30, § 6-23, at 376 (when Congress acts within area delegated to it, preemption of conflicting state or local action flows from substantive source of congressional action plus supremacy clause).

58. A convincing argument can be made that such a negative preemption standard is much better suited to state burdens on aliens than to state restrictions on interstate commerce. Cf. note 45 supra (review of preemption standards). Such a standard might seem controversial in light of the recent Supreme Court tendency to find preemption of state law "'only to the extent necessary to protect the achievement of the aims'" of federal law. Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973) (quoting Silver v. New York Stock Exch., 373 U.S. 341, 361 (1963)); cf. Goldstein v. California, 412 U.S. 546, 553 (1973) (quoting THE FEDERALIST No. 32 (A. Hamilton)) (state copyright law to be preempted only if "'absolutely and totally contradictory and repugnant'" to federal law). Goldstein, however, indicates that federal power is exclusive over matters that are necessarily national in import. 412 U.S. at 554. Few matters are as national in scope as those affecting international relations, Hines v. Davidowitz, 312 U.S. 52, 68 (1941); the treatment of aliens within a state may well affect international relations and therefore be a matter of national moment, id. at 73. Moreover, recent Burger Court decisions have found preemption in areas less federalized than alienage. See, e.g., Jones v. Rath Packing Co., 430 U.S. 519, 540, 543 (1977) (state statute concerning package labeling standards may be found to impair operation of federal statute even if dual compliance is possible). Finally, the Court has recognized that each preemption test turns on "the peculiarities . . . of the federal regulatory scheme in question." City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973).

59. A preemption formula whereby state regulation burdening aliens would be upheld if consonant with federal policy, see Perry, supra note 6, at 1063-64, is inadequate because such a formula would provide no guidance in the case of inconsistent federal policies. Cf. p. 958 infra (federal policy regarding durational residency requirements for receipt of welfare benefits is conflicting).

60. See, e.g., Truax v. Raich, 239 U.S. 33, 42 (1915) (legitimate interests of state cannot be so broadly conceived as to bring them into conflict with exclusive federal power).
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on aliens save those prescribed explicitly by Congress or the President. Finally, federal preemption would supersede any attempts by states to regulate illegal aliens. Although there obviously has been no congressional decision to admit illegal aliens, illegal immigration so profoundly affects American foreign relations that any regulatory approach must yield to the superior federal interest.

B. Application of the Preemption Test

State statutes that classify on the basis of citizenship typically do so in four broad areas: participation in governmental functions, access to particular forms of employment, ownership of real property, and receipt of welfare and other public benefits. The proposed preemption test will yield consistent results in challenges to state statutes in all four categories and will indicate areas of impermissible state regulation.

1. The Civic Functions Parallel

Underlying the analogy branch of the preemption test is the conception of two distinct governmental entities, federal and state, that often perform parallel functions. This parallelism enables the state government to draw analogies between its treatment of aliens and the treatment accorded by the federal government. Many of the federal burdens on aliens are imposed on civic functions such as voting, holding political office, and performing jury service. These and similar functions that reflect the identity between a government and the members—or citizens—of the polity are particularly well-suited to the preemption test's analogy standard. The federal government has made a determination that the concept of citizenship, which operates at both

61. There are several reasons for not imposing a "lower limit" on state regulation of aliens. First, the major concern is that states will impermissibly add to the burdens on aliens, not that states will not place sufficient burdens on them. In fact, federal policy encourages states not to interfere with aliens once they have been admitted. Second, if the state finds itself disadvantaged by a more lenient alien policy, it can tighten up its policy to the upper limit determined by federal law. Third, if the state benefits because of its more lenient policy, other states are not prevented from following suit. Finally, if Congress is dissatisfied with a state's lenient alien policy, it can give the state an explicit mandate, arguably subject to the constraints of National League of Cities v. Usery, 426 U.S. 833 (1976).


63. See, e.g., U.S. Const. amend. XV, XIX, XXVI (right to vote based on citizenship); notes 67-69 infra (exclusions from federal offices); note 70 infra (exclusion from jury service).
the state and national levels, would be without meaning if not used to limit direct participation in government.  

The burdens in this area tend to be facially parallel. Aliens are not allowed to vote in federal elections, and, similarly, are excluded from the franchise in every state. Likewise, aliens are excluded from holding office as President or as members of the Senate or House of Representatives, and a state bar against aliens holding political office is equally legitimate. If specific federal functions excluding aliens are largely identical to challenged state functions, the existence of the federal burden on aliens would immunize a state's parallel burden from legal challenge. In situations where the specific state function is not directly parallel to the federal function, however, it is necessary to implement the second step of the analysis by identifying the rationale that underlies the federal burden.

64. See Ambach v. Norwick, 441 U.S. 68, 75 (1979) (special significance of citizenship explains why governmental entities, when exercising functions of government, have wide latitude in restricting participation of noncitizens); Sugarman v. Dougall, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting) (in differentiating between citizen and alien, Congress intended to do something important).

The “civic functions parallel” is the supremacy clause equivalent of the “governmental function exception” under equal protection, see note 15 supra; both theories exclude aliens from participation in state government. The civic functions parallel does so by recognizing the federal exclusion as an implicit mandate for parallel exclusion by the states. The logic of the exclusion under equal protection, however, is circular: the exclusion of aliens from the franchise (political powerlessness) triggers strict scrutiny of alienage classifications, but strict scrutiny is abandoned precisely when a court is reviewing burdens such as exclusion from the franchise. See Dual Standard, supra note 16, at 1528, 1533. The civic functions parallel, part of the proposed preemption test, is more logically coherent.

65. See U.S. Const. amend. XV, § 1 (protecting voting rights of citizens only); 42 U.S.C. § 1971(a) (1976) (same); C. Gordon & E. Gordon, supra note 26, at § 1.22 (aliens cannot vote anywhere in United States).


67. U.S. Const. art. II, § 1, cl. 5.

68. U.S. Const. art. I, § 3, cl. 3.


71. An example of the need to resort to the second step of the analogy test is provided by Foley v. Connellie, 435 U.S. 291 (1978), where the exclusion of aliens from state police forces should be premised not on a facially parallel federal exclusion (first step), which does not exist, but on the exclusion of aliens from the FBI by administrative regulation, manifesting the federal rationale. See pp. 955-56 & note 71 infra. Another illustration is Nyquist v. Mauclet, 432 U.S. 1 (1977), where a related—but not facially parallel—federal
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2. *Employment Restrictions*

Aliens are excluded from jobs in the federal competitive civil service by executive order.\(^{72}\) This exclusion should give states the parallel right to exclude aliens from state government employment, a result that would erode the holding of *Sugarman v. Dougall*,\(^{73}\) which overturned a flat prohibition on employment of aliens in a state competitive civil service. Regardless of the merits of the executive order barring aliens from the federal civil service, the federal policy is as valid on the state level as on the federal level, and states should be permitted to restrict state government employment to the same degree.\(^{74}\)

A court implementing the analogy test, however, would allow a state to draw parallels only from the specific functions affected by the executive order. Thus, to decide whether a state can exclude an alien from becoming a police officer, the question presented in *Foley v. Connelle*,\(^{75}\) a court could not rely exclusively on the policy of excluding aliens from the federal competitive civil service, which controls no jobs parallel to police officer.\(^{76}\) A more direct analogy would be to the exclusion of aliens from employment in the Federal Bureau of Investigation,\(^{77}\) which performs many functions analogous to those of state and local police forces. This analogy would justify exclusion of aliens from state and local police forces,\(^{78}\) a conclusion consistent with the

regulation does not exclude aliens from educational assistance. *See* p. 959 & note 102 *infra*. This should be treated as evidence of the federal intention, dictating state choices.


\(^{73}\) 413 U.S. 634 (1973). *Sugarman*, relying on equal protection principles, has created the anomaly that aliens are eligible for employment in a state civil service but are excluded from the federal competitive civil service.

\(^{74}\) *But see* p. 949 *supra* *(states are forbidden to analogize from certain uniquely federal functions).*

\(^{75}\) 435 U.S. 291 (1978) *(state may limit membership in state police force to United States citizens).*

\(^{76}\) Aliens are excluded from the federal competitive civil service by executive order, *see* note 72 *supra*, but there is no facially obvious analogy because all positions in the FBI are excepted from the competitive civil service by 28 U.S.C. § 536 (1976).

\(^{77}\) GOVERNMENT PRINTING OFFICE, FBI CAREER OPPORTUNITIES (1976) *(stating that "[t]o qualify for FBI employment you must be: (l) a citizen of the United States").*

\(^{78}\) Like state and local police forces, the FBI investigates violations of the laws of the United States, does extensive criminal and identification record acquisition and maintenance, and conducts training programs for law enforcement personnel. 28 C.F.R. § 0.85 (1978). Other tasks less readily lend themselves to analogy. *See*, e.g., 28 U.S.C. § 533 (1976) *(FBI aids in protecting President)*; 28 C.F.R. § 0.85(d) (1978) *(investigative work related to espionage, sabotage, and subversive activities)*. However, because the blanket exclusion of aliens from employment is not justified by the federal aspects of these tasks alone, the exclusion from state and local police forces also would be justified.
Supreme Court's decision in Foley. The result, however, is reached in a more direct and internally consistent manner than that obtained by the Court's carving out of a dubious exception to suspect treatment under equal protection doctrine.\(^7\)

Federal preemption analysis also yields an easy answer to the question whether aliens may teach in public schools. Public education is largely a responsibility of state rather than federal government, and there appears to be no implicit federal mandate to exclude aliens from teaching.\(^8\) Therefore, states could not exclude aliens from teaching jobs in state-supported schools. Although this reasoning would reverse Am bach v. Norwich,\(^9\) which held that nondeclarant aliens could be excluded from public-school teaching, such a result seems proper, for citizenship status would occupy a low position on a list of the attributes that correlate with good teaching.\(^8\)

Application of the analogy test to private-school teaching, or indeed to any field in the private sector, would require similar reasoning. Private economic endeavor traditionally has been regulated by state law.\(^3\) When it is separately or concurrently regulated by federal law, as with the federal statutes creating and regulating national banks,\(^4\) the federal determination would govern; whether aliens can be employees in state banks would be determined by the congressional decision on national bank policy.\(^5\) When there is no analogous federal legislation, however, the states would be barred from disproportionately burdening aliens in private sector employment. This result not only is

79. See Foley v. Connelie, 435 U.S. 291, 297 (1978) (Court forced to justify argument that police job is tantamount to public policymaking position and is thus a government function by maintaining that police officers are given broad discretionary powers). But cf. id. at 303-04 (Marshall, J., dissenting) (firefighters and sanitation workers hold positions that also implicate public policy); Equal Treatment, supra note 16, at 1076-77 (portrayal of policemen as officers with broad discretionary authority is disingenuous).

80. In certain instances, such as in the case of dependents of American personnel abroad, the federal government is charged with the task of public education. Such involvement, however, is an auxiliary of the American conduct of foreign policy and not a regulation directed at education. Moreover, the federal government abroad often hires foreign citizens as employees.


82. See id. at 87-88 (Blackmun, J., dissenting) (exclusion irrational because it is better to employ excellent resident-alien teacher than poor citizen teacher and aliens may be better qualified for certain positions such as foreign language teaching).


85. The only burden on aliens occurs at the highest levels of national banking associations: directors of national banks must be citizens. 12 U.S.C. § 72 (1976). Therefore by analogy, only the right to serve as directors could be denied to aliens in state-chartered banks.
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in harmony with the federal decision to admit the alien and to put no impediment in his road toward economic independence and success, but it also accords with the historic judicial tendency to regard private-sector discrimination against the alien with greater hostility than discrimination against him in the public sector.\textsuperscript{86}

3. Land Ownership

State regulation of the ownership of land represents a classic area of state discrimination against aliens.\textsuperscript{87} Although regulation of land has been primarily a function of state government,\textsuperscript{88} there is no paucity of federal legislation to examine to aid in determining the legitimacy of these state restrictions.

The sale or lease of federal public lands to individuals has a direct parallel at state level, namely, the sale of state lands to individuals. Because federal policy often requires that the sale or lease of public lands be restricted to citizens,\textsuperscript{89} the states are permitted to place analogous burdens on aliens.\textsuperscript{90} There is, however, no federal analogue to restrictions on private transfers of land and no indication that Congress intended to interfere with the right of citizens to convey land to aliens. Therefore, no state should be allowed to prohibit aliens from acquiring and holding land through private transfers.\textsuperscript{91}

\textsuperscript{86} See, e.g., \textit{Truax v. Raich}, 239 U.S. 33, 39-40 (1915) (discrimination invalid because imposed on participation in ordinary private enterprise and does not pertain to public sector, participation in which may be limited to citizens of state).

\textsuperscript{87} See \textit{Terrace v. Thompson}, 263 U.S. 197 (1923) (upholding constitutionality of statute restricting alien land ownership); 1 R. Powell, \textit{The Law of Real Property} §§ 101, 105-107 (rev. ed. 1977); Rosberg, \textit{supra} note 26, at 305.


\textsuperscript{89} See, e.g., 43 U.S.C. §§ 1421, 1425(c) (1976) (sales of public lands to individuals may be made only to citizens and declarant aliens); 43 U.S.C. § 329 (1976) (land patents for reclamation of desert lands shall issue only to citizens); 43 U.S.C. § 145 (1976) (federal lands no longer needed for drilling for water may be sold only to citizens).


\textsuperscript{91} The restriction on the sale of public lands to aliens seems justifiable on the basis that public lands are owned by the citizens, as citizens. But any restriction on the transfer of private land to aliens would be seriously under- and over-inclusive as a classification using citizenship as a proxy for loyalty of landowners, see Rosberg, \textit{supra} note 26, at 306, and would make discrimination against aliens an end in itself, see \textit{Truax v. Raich}, 239 U.S. 33, 41 (1915). The preemption test prohibits this burden without reaching the underlying rationale.
4. Welfare and Public Benefits

The critical issue in the area of welfare benefits is whether the state can deny such benefits to aliens. This question triggers the analogy branch of the preemption test because the federal government also is involved in welfare programs. But application of the test in the welfare area can be a complex undertaking. A first-level inquiry—searching for a federal analogy to a state burden—often will be fruitless because the direct federal analogy will not exist. Yet the second-level inquiry—seeking to determine an implicit federal policy—frequently will be equally unsatisfying because there may be numerous sources for such a rationale, and the sources might reflect contradictory intentions.

In *Graham v. Richardson*, the Supreme Court found that no federal policy authorized a durational residency requirement on alien eligibility for disability payments, and held that the state durational residency requirements must fall. In *Mathews v. Diaz*, however, the Court upheld a uniform, nationwide residency requirement on aliens as a condition for receiving federally funded welfare benefits. Contrasting the two cases, it is clear that there is no single federal policy on residency requirements for aliens seeking public welfare payments.

When confronted with more than one federal policy from which to analogize, the preemption test requires the states to choose the policy most favorable to the alien. Thus states must analogize durational residency requirements from the *Graham* and not the *Diaz* standard.

92. The federal government, for example, gives categorical assistance to the states, administered by the states under federal guidelines. See, e.g., 42 U.S.C. §§ 1395-1395qq (1976) (Medicare supplemental medical insurance program granting eligibility to citizens 65 or older).

93. The concept of parallel spheres of federal and state governance, see p. 950 supra, breaks down in the welfare area, where federal funding often supplements state welfare payments, see, e.g., note 92 supra. There are rarely parallel state and federal welfare schemes; the two levels of government are very much intertwined in this area. It is therefore generally necessary to look to the legislation's underlying rationale.

95. Id. at 380-83.
97. Id. at 82-83.
98. This follows from the test's presumption that states should not disproportionately burden the alien once the federal government has made the decision to admit the alien. See, e.g., *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948).

Another significant fact relevant to the welfare issue demonstrates that this is the proper way to analogize. Resident aliens are obligated to pay their full share of the taxes which support welfare programs. It would seem unfair, then, to deny aliens the right to participate in programs to which they contribute on an equal footing with citizens. *See In re Griffiths*, 415 U.S. 717, 722 (1973) (resident aliens, like citizens, pay taxes and support the economy); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (same).

99. That this standard is most consistent with federal alienage regulation is demonstrated by the following logic: A uniform durational residency requirement was permitted
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and put no durational residency requirements on aliens seeking public benefits.

Another type of public benefit that states have tried to restrict to citizens is financial assistance for higher education. In *Nyquist v. Mauclet*, the Supreme Court rejected on equal protection grounds New York's exclusion of nondeclarant aliens from participation in the state's educational benefits program. Although in *Mauclet*—as in *Foley*—a preemption analysis yields the same result as the Court's equal protection approach, preemption does so in a more compelling manner. The preemption analysis involves a second-step test; New York's educational assistance program is largely subsidized by the federal government, and the analogous federal standard governing alien eligibility does not exclude resident aliens. This is taken to manifest a federal intention that the states should not exclude resident aliens—or the subgroup of nondeclarant aliens—from educational benefits. To reach this result under equal protection, the Court was forced to rely on strict scrutiny to find that the state could not exclude even aliens with no desire to become citizens from a nonessential benefit, reasoning that barely convinced a majority.

5. Impermissible State Analogies

The preemption standard precludes the states from any exercise of concurrent power in areas entrusted exclusively to the federal government in *Mathews v. Diaz*, 426 U.S. 67, 85-87 (1976), because it was national in scope. There is no way to guarantee that the states, if enabled to choose their own residency requirements for welfare, would all choose the same durational requirement. Therefore, federal policy mandates that the states choose the least common denominator, which is no residency requirement.

This analysis is implicit in *Diaz*, which argues that 1) it is the business of the federal government, but not of the states, to distinguish between citizen and alien, and 2) states are not empowered to restrict travel across their borders, whereas Congress is empowered to exercise such control over national borders. *Id.* at 85-86. Therefore, federal durational residency requirements are acceptable; state requirements are not.


101. This is especially true of the state student loan program, a major facet of New York's educational assistance. *Id.* at 3 n.2.

102. Any alien student who is not in the United States for a temporary purpose and who intends to become a permanent resident is eligible for educational benefits. *Id.* (citing 45 C.F.R. § 177.2(a) (1976)).

103. *Id.* at 7. *But see id.* at 17-21 (Rehnquist, J., dissenting) (strict scrutiny reserved for "discrete and insular" minorities and not for instant example involving reasonable distinction within alien class).

104. *See id.* at 14 (Burger, C.J., dissenting).

105. The 5-to-4 decision written by Mr. Justice Blackmun generated three separate dissenting opinions, by Mr. Chief Justice Burger, Mr. Justice Powell, and Mr. Justice Rehnquist.
ment, even in certain areas for which analogies to federal policy seem to exist.

a. National Sovereignty Exclusion

Certain regulations are by their nature so linked to national sovereignty that the states are precluded from analogous regulation. For example, the Pennsylvania alien registration statute challenged in *Hines v. Davidowitz*\(^{106}\) might seem to exemplify state regulation rendered acceptable by analogy to the federal statute. The registration of aliens, however, lies outside the scope of state police power; it is part of the constitutional duty of Congress “[t]o establish a uniform Rule of Naturalization.”\(^{107}\) Moreover, alien registration is closely linked to the nation’s foreign affairs, which are of exclusive federal concern.\(^{108}\)

Similarly, despite the existence of federal deportation laws,\(^{109}\) any state deportation statute would be preempted. The state is barred from analogizing from the federal legislation because the power to exclude aliens is inherent in national sovereignty,\(^{110}\) and the power to deport is regarded as a corollary of the power to exclude.\(^{111}\)

National security is another field beyond the scope of legitimate state policymaking.\(^{112}\) Although states seldom have the opportunity to burden aliens in areas touching upon national security, when they do analogize from a federal burden that is justified by national security considerations, the state burden must fall. For example, Congress has authorized the Federal Communications Commission to issue licenses to operate radio stations only to qualified citizens or nationals of the United States,\(^{113}\) and Maryland has attempted to bolster this statute by providing that any Maryland corporation operating a radio station pursuant to federal or state authority may restrict or limit the transferability, ownership, and exercise of voting rights by aliens.\(^{114}\) Such a state provision must fail the proffered preemption test.

106. 312 U.S. 52, 59-60 (1941) (state statute required most aliens to register once each year, provide any information sought, pay $1 fee, receive alien identification card to be carried at all times and shown to appropriate authorities on demand, with penalties for noncompliance).
108. See pp. 946, 949 supra.
111. See *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893).
112. See note 47 supra.
113. 47 U.S.C. § 303(f) (1976); see *Comments of the FCC on H.R. 8543, reprinted in [1958] U.S. Code Cong. & Ad. News* 4104-06 (concern of legislation was to ensure that national security would not be jeopardized by those who obtain control of airwaves).
b. Illegal Aliens

Congress has repeatedly tried and failed to enact legislation prohibiting employment of illegal aliens and imposing sanctions on their employers. Because this inaction can be viewed as evidence of an implicit congressional policy opposing such legislation, the proposed test would preempt any state attempt to enforce a regulation barring employers from hiring illegal aliens. The result would overrule DeCanas v. Bica, which upheld a California law prohibiting employers from the knowing employment of illegal aliens. Thus state activity could not hinder the federal government in its efforts to deal with illegal immigration as a major element of foreign relations.

In an area such as public education, the states would be prevented from excluding illegal-alien children from the public schools for want of an analogy to a federal regulation. Again, any policy toward illegal aliens calls for explicit federal guidelines because of the need for national uniformity and the effect of any such regulation on foreign affairs.

In judging the legitimacy of burdens on illegal aliens, equal protection analysis is unsatisfactory because of the uncertainty of its application to illegal immigration. As in other areas of state regulation, the proposed preemption test with its analogy inquiry offers a more coherent and principled basis on which to distinguish between permissible and impermissible state burdens on aliens—both resident and illegal—than does an equal protection analysis.

115. Congress has been unable to enact any legislation penalizing employers for knowingly hiring illegal aliens. Numerous bills are introduced in each Congress, but none has ever reached a vote. See, e.g., [1979-80] 2 Cong. Index (CCH) 28,163 to 28,275 (96th Cong.) (seven bills introduced in House but no action taken).


117. See Doe v. Plyler, 458 F. Supp. 569, 591-92 (E.D. Tex. 1978) (federal law does not authorize states to impose additional penalties on illegal aliens, especially in area of education). Among the criteria cited by the court in favor of schooling for the children of illegal aliens was that “the preponderance of the evidence indicates that illegal aliens do pay taxes.” Id. at 588.

118. See, e.g., id. at 579 n.12 (Supreme Court has never held that illegal aliens are entitled to equal protection of law).