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Recent Developments

ADMIRALTY—THE BROADENING SCOPE OF DAMAGES AWARDABLE FOR WRONGFUL DEATH IN ADMIRALTY

I. INTRODUCTION

In *The Harrisburg*,[1] the United States Supreme Court first held that, in the absence of statute, an action sounding in wrongful death would not lie in maritime law. While *The Harrisburg* remained standing law, therefore, state and federal statutes provided the only source of relief for death arising on navigable waters. As admiralty developed a peculiarly maritime conception of tort liability, however, the statutorily prescribed wrongful death actions prevented a uniform disposition of death cases arising in admiralty, "spawning confusion in an area . . . easily susceptible of more workable solutions."[2] The principal impediment to uniformity was the variance in the standard of liability imposed by the available statutory causes of action.[3] For

1. 119 U.S. 199 (1886). *The Harrisburg* adopted for the maritime law the harsh common law rule first announced in Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808), that a right of action in tort perishes with the victim. This rule was first adopted in the United States in Insurance Co. v. Brame, 95 U.S. 754 (1878). *See generally* Smedley, *Wrongful Death–Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960). The common law rule was abrogated in England with the enactment of the Fatal Accidents Act (Lord Campbell's Act), 9 & 10 Vict., c. 93, § 2 (1846), which gave specified beneficiaries the right to recover for their losses occasioned by decedent's death. By the time *The Harrisburg* was decided, all American states had passed wrongful death statutes of one form or another. For a detailed treatment of these early statutes see F. TIFFANY, DEATH BY WRONGFUL ACT §§ 1-18 (2d ed. 1913).

2. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 404 (1970) (overruling The Harrisburg).

3. Prior to the emergence of the doctrine of unseaworthiness as the principal vehicle for recovery in maritime tort law, *see, e.g.*, Manich v. Southern S.S. Co., 321 U.S. 96 (1944) (shipowner held liable for unseaworthiness caused by operating negligence of ship's officer), state and federal statutes offered very similar remedies in negligence. The primary difference was that the doctrine of comparative negligence was recognized under the federal remedies, while the common law rule of contributory negligence was often an absolute bar to recovery under state statutes.

example, the Death on the High Seas Act (DOHSA),[4] which creates a cause of action in admiralty for death occurring beyond one marine league from shore, recognizes the doctrine of unseaworthiness. That doctrine holds the vessel strictly liable for injuries caused by a shipowner's failure to furnish a seaworthy ship and gear.[5] On the shoreside of the three mile limit, however, the bases of liability and the remedies for wrongful death were diverse and fortuitously applied. Nonseamen found themselves within the exclusive jurisdiction of state law, and courts sitting in admiralty were bound to give exclusive effect to the appropriate state's wrongful death or survival statute.[6] Seamen fatally injured within state waters were exclusively covered by the Jones Act,[7] which provides a Federal Employer's Liability Act (FELA) action in negligence against an employer for injury or death incurred in the course of a seaman's employment. Consequently, the applicable remedy for maritime death depended on whether the fatal injury occurred within or without the three mile limit, whether the

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4. 46 U.S.C. §§ 761-68 (1970). DOHSA applies "whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore." 46 U.S.C. § 761 (1970).

5. The duty to furnish a seaworthy ship requires more than the use of due diligence. "Negligence, as a standard of care, has no real connection with seaworthiness. The duty of the shipowner to maintain a seaworthy vessel is an absolute one and exists regardless of the shipowner's fault." M. NORRIS, MARITIME PERSONAL INJURIES § 32, at 63 (2d ed. 1966). *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6, at 38-44 (1957); Kolmeyer, *The Warranty of Seaworthiness: To Whom is it Owed?,* 7 CALIF. WESTERN L. REV. 109 (1970).

6. The Tungus v. Skovgaard, 358 U.S. 588 (1959). The Court held that state wrongful death statutes cannot be supplemented by admiralty principles but must be implemented as interpreted by state courts in nonmaritime death cases, as an integrated whole. A minority of four reasoned that the acceptance of the state created remedy does not require courts sitting in admiralty to apply the statutory cause of action *in toto,* but should serve as analogy in maritime death actions. Had the Court adopted this view in *The Tungus,* many of the anomalies under *The Harrisburg* would have been resolved. *See* D. ROBERTSON, ADMIRALTY AND FEDERALISM 185-93 (1970).

7. 46 U.S.C. § 688 (1970). The Jones Act incorporates by reference the provisions of the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 (1970). Both DOHSA and the Jones Act remedies existed concurrently beyond the three mile limit. *See* Doyle v. Albatross Tanker Corp., 367 F.2d 465 (2d Cir. 1966). However, within the three mile limit, the Jones Act was construed to supercede state created wrongful death actions against a seaman's employer. Gillespie v. United States Steel Corp., 379 U.S. 148, 154-55 (1964); Lindgren v. United States, 281 U.S. 38 (1930).

decedent was acting as a maritime employee when the incident arose, and on the provisions of the state death statute in the case of a nonseaman killed on state waters.[8]

In *Moragne v. States Marine Lines, Inc.*,[9] the Supreme Court, speaking through Mr. Justice Harlan, unanimously overruled *The Harrisburg* and held that an action "does lie under general maritime law for death caused by violation of maritime duties."[10] In so holding, the Court created a comprehensive maritime cause of action for death caused by unseaworthiness that applies to all navigable waters on both sides of the three mile limit. Significantly, however, the Court deliberately chose not to delimit the precise scope of this newly created cause of action. Accordingly, the Court declined to restrict the elements of the right of action to the provisions of

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8. Ironically, the doctrine of unseaworthiness was applicable in personal injury actions as a matter of general maritime law, but not in fatal injury actions arising on territorial waters unless recognized by the local wrongful death statute. Even more ironic was the fact that at least 12 state statutes had been construed to allow recovery based upon unseaworthiness prior to 1970. This made it possible for the survivors of a nonseaman to receive the benefit of a liberal maritime remedy, while the recovery for the death of a seaman, similarly situated, was restricted to the negligence action provided under the Jones Act. *See* Markiewicz, Case Note, 3 J. MARITIME L. & COMM. 823, 825 & n.20 (1972).

9. 398 U.S. 375 (1970). The facts in this case classically illustrate the problem spawned by *The Harrisburg* and perpetuated by *The Tungus.* Decedent, a longshoreman, was killed while working aboard defendant's vessel on Florida's territorial waters. Decedent's widow sued under Florida's wrongful death statute in a state court alleging negligence and unseaworthiness. After the action was removed to the appropriate federal court by defendant, the count in unseaworthiness was dismissed on the grounds that Florida law did not recognize liability based upon unseaworthiness. On interlocutory appeal, the Court of Appeals for the Fifth Circuit referred the question to the Supreme Court of Florida—a procedure permitted by state law—which confirmed the district court's conclusion of law. However, before ruling on the dismissal, the court heard appellant's argument that recovery under unseaworthiness could be had in this case as a matter of general federal maritime law, notwithstanding the rule of *The Tungus.* The court rejected this argument and affirmed the dismissal of the count in unseaworthiness. 409 F.2d 32 (5th Cir. 1969). The Supreme Court granted certiorari, 396 U.S. 900 (1969), and invited the United States to participate as amicus curiae "to reconsider the important question of remedies under federal maritime law for tortious deaths on state territorial waters." 398 U.S. at 377.

10. 398 U.S. at 409. "[F]or its reasoning, [the *Moragne* decision] is probably the most important wrongful death case holding in the entire history of American jurisprudence—perhaps, in all Anglo-American jurisprudence." S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:6.5 (Supp. 1972).

DOHSA, or to the provisions of any other wrongful death statute, and directed the lower courts to consider both federal and state acts as guidance in fashioning the particulars of this maritime remedy. Specifically, the *Moragne* decision reserved judgment on the questions of who would qualify as a potential beneficiary,[11] what time limitations would be imposed on the right to bring suit,[12] and what constitutes the proper measure of damages in a federal maritime action for wrongful death.[13]

A considerable difference of judicial opinion has developed among the lower federal and state courts with respect to the injuries for which damages are recoverable under the *Moragne*-created cause of action. One line of cases holds to the effect that *Moragne* did not alter the damages traditionally awarded in maritime law under the Jones Act and DOHSA, and that the standard developed under these statutes must be applied to the new cause of action in the interest of uniformity.[14] A growing number of cases, however, have looked

11. "We do not determine this issue now, for we think its final resolution should await further sifting through the lower courts in future litigation." 398 U.S. at 408. To date, the courts have overwhelmingly adopted the schedule of beneficiaries found in DOHSA. *See, e.g.,* Smith v. Allstate Yacht Rentals, Ltd., 293 A.2d 805 (Del. 1972).

12. "We need not decide this question now, because the present case was brought within a few months of the accident and no question of timeliness has been raised." 398 U.S. at 406. Most of the post-*Moragne* cases that have considered the issue of timeliness were commenced prior to *Moragne*. Consequently, the discussion generally concerns the retroactivity of *Moragne* rather than the specific standard to be employed in the future, rendering premature any accurate assessment of this area. *Compare* Epling v. M.T. Epling Co., 435 F.2d 732 (6th Cir. 1970) (petitioner not allowed to amend complaint to include a *Moragne*-type count) *with* Mascuilli v. United States, 343 F. Supp. 439 (E.D. Pa. 1972) (remanded for reconsideration of damages in light of *Moragne* after seven previous adjudications, beginning in 1959) *and* Thomas v. C.J. Langenfelder & Sons, Inc., 324 F. Supp. 325 (D. Md. 1971) (applying three year limitation found in the Jones Act rather than the two year period provided in DOHSA).

13. "If still other subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades." 398 U.S. at 408.

14. *See, e.g.,* United States Steel Corp. v. Lamp, 436 F.2d 1256 (6th Cir. 1970); Mascuilli v. United States, 343 F. Supp. 439 (E.D. Pa. 1972); Mungin v. Calmar S.S. Corp., 342 F. Supp. 479 (D. Md. 1972); Petition of Canal Barge Co., 323 F. Supp. 805 (N.D. Miss. 1971); Strickland v. Nutt, 264 So.2d 317 (Ct. App. La. 1972).

beyond the confines of these statutes in order to fashion a more comprehensive cause of action in admiralty. Among these are *Dennis v. Central Gulf Steamship Corp.*,[15] *In re Sincere Navigation Corp.*,[16] *In re Farrell Lines, Inc.*,[17] *Smith v. Allstate Yacht Rentals, Ltd.*,[18] and *Gaudet v. Sea-Land Services, Inc.*[19] This split of authority raises the question of which approach best serves the purposes of admiralty in light of the *Moragne* decision.

II. Maritime Damages for Wrongful Death: The Harrisburg and Moragne

While *The Harrisburg* remained valid precedent, state and federal statutes provided the only remedial machinery for wrongful death incurred on navigable waters. Under this regime, substantive and procedural rights varied from statute to statute. With respect to awardable damages, the Death on the High Seas Act expressly limits recovery to the beneficiaries' pecuniary losses.[20] The Jones Act inherited the pecuniary damage standard from the judicial construction of its predecessor, FELA. In *Michigan Central Railroad Co. v. Vreeland*,[21] the Court first held that damages recoverable under FELA[22] are limited to injuries capable of pecuniary valuation. Damages based upon the pecuniary standard implemented under DOHSA and the Jones Act have been allowed for the loss of

15. 323 F. Supp. 943 (E.D. La. 1971) *rev'd in part,* 453 F.2d 137 (5th Cir. 1972), *cert. denied,* 41 U.S.L.W. 3229 (U.S. Oct. 24, 1972).

16. 329 F. Supp. 652 (E.D. La. 1971).

17. 339 F. Supp. 91 (E.D. La. 1971).

18. 293 A.2d 805 (Del. 1972).

19. 463 F.2d 1331 (5th Cir. 1972).

20. "The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought. . . ." 46 U.S.C. § 762 (1970).

21. 227 U.S. 59 (1913). The Court reversed the trial court for instructing the jury to consider the surviving spouse's loss of care and advice in fixing damages in an FELA action. "This threw the door open to the widest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way." 227 U.S. at 73. In so holding, the Supreme Court adopted the position taken by English courts with regard to Lord Campbell's Act, *supra* note 1, in Blake v. Midland Ry., 118 Eng. Rep. 35 (K.B. 1852). Also, in 1913, the Supreme Court held that the loss of a son's society or companionship "is a deprivation not to be measured by any money standard." American R. R. of Porto Rico v. Didricksen, 227 U.S. 145, 150 (1913).

22. *See generally* DeParcq & Wright, *Damages Under the Federal Employers' Liability Act,* 17 Ohio St. L. J. 430 (1956).

decedent's support,[23] services,[24] nurture and education of children.[25] Similarly, damages for the death of a minor child have been allowed upon proof that future contributions to the beneficiaries were reasonably foreseeable.[26] The principal distinction between damages recoverable under these two statutes is that while the Jones Act allows the personal representative to recover for decedent's pain and suffering as well as the beneficiaries' pecuniary damages,[27] recovery under DOHSA is restricted to the beneficiaries' losses.[28] However, under neither DOHSA nor the Jones Act have the courts allowed damages for loss of comfort, society, consortium,[29] love, affection, grief, wounded feelings,[30] emotional distress or for the economic value of decedent's life to himself.[31] Conversely, many of the elements disallowed under the Jones Act and DOHSA are explicitly or implicitly compensable under state wrongful death statutes. For example, at the time *Moragne* was decided, nearly half the states recognized either loss of love and affection[32] or survivors' grief and

23. *See, e.g.,* National Airlines, Inc. v. Stiles, 268 F.2d 400 (5th Cir. 1959) (DOHSA); Cleveland Tankers, Inc. v. Tierney, 169 F.2d 622 (6th Cir. 1948) (Jones Act).

24. *See, e.g.,* Sabine Towing Co. v. Brennen, 85 F.2d 478 (5th Cir. 1936), *rev'd on other grounds sub nom.* Van Beeck v. Sabine Towing Co., 300 U.S. 342 (1937).

25. *See, e.g.,* Orona v. Isbrandtsen Co., 204 F. Supp. 777 (S.D.N.Y. 1962), *aff'd,* 313 F.2d 241 (2d Cir. 1963).

26. *See, e.g.,* Wade v. Rogala, 270 F.2d 280 (3d Cir. 1959).

27. *See, e.g.,* St. Louis, I.M. & S. Ry. v. Craft, 237 U.S. 648 (1915) (FELA); Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir.), *cert. denied,* 368 U.S. 989 (1962).

28. *See, e.g.,* Brown v. Anderson-Nichols & Co., 203 F. Supp. 489 (D. Mass. 1962).

29. *See* Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963), *cert. denied,* 376 U.S. 949 (1964). Consortium has been referred to variously as "care, comfort, affection, companionship, society and counsel." Simpson v. Knutsen, 296 F. Supp. 1308, 1311 (N.D. Cal. 1969), *aff'd,* 444 F.2d 523 (9th Cir. 1971).

30. *See, e.g.,* Ridgedell v. Olympic Towing Corp., 205 F. Supp. 952 (E.D. La. 1962) (Jones Act).

31. Hickman v. Taylor, 170 F.2d 327 (3d Cir. 1948), *cert. denied,* 336 U.S. 906 (1949). In addition, funeral expenses, when borne by the estate, are not recoverable under either the Jones Act or DOHSA. *See, e.g.,* Cities Service Oil Co. v. Launey, 403 F.2d 537 (5th Cir. 1968); First Nat'l Bank v. National Airlines, 171 F. Supp. 528 (S.D.N.Y. 1958).

32. Alabama, Alaska, Arizona, Georgia, Hawaii, Idaho, Illinois, Iowa, Mississippi, Montana, Nevada, Oregon, Pennsylvania, Tennessee, Wisconsin and Wyoming. *See* Markiewicz, *supra* note 8, at 828 n.51.

mental suffering[33] as compensable injuries. In general, commentators have noted a clear trend away from the strict pecuniary standard of damages originally employed by most states.[34]

Since the *Moragne* decision, a number of cases that have considered the question of what damages are recoverable in a wrongful death action brought in general maritime law have elected to apply the standard developed under the Jones Act and DOHSA. The leading example of this traditional approach is *United States Steel Corp. v. Lamp.*[35] The controversy in *Lamp* arose from the collision of two ships on the territorial waters of Michigan, causing injury and death to crewmen aboard the U.S. Steel vessel.[36] Suits were filed against the victims' employer, U.S. Steel Corporation, under the Jones Act and against the owners of the second vessel, a Norwegian corporation, under Michigan's wrongful death statute. The Court of Appeals for the Sixth Circuit upheld the district court's awards for decedents' pain and suffering under the Jones Act,[37] but reversed the awards for the

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33. Arkansas, Florida, Kansas, Louisiana, Maryland (added since *Moragne*), South Carolina, South Dakota, Virginia and West Virginia. *Id.* at 828 n.52. *See* S. SPEISER, RECOVERY FOR WRONGFUL DEATH App. A (Supp. 1972) (compendium of state wrongful death and survival statutes).

34. *See generally* Page, *Damages for Wrongful Death–Broadening View of Pecuniary Loss,* in DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH CASES 383 (S. Schrieber ed. 1965); Schoone, *Expanding and Limiting Damages for Pecuniary Injury Due to Wrongful Death,* 45 WIS. B. BULL. 45 (1972).

35. 436 F.2d 1256 (6th Cir. 1970).

36. Petitions for exoneration from or limitation of liability were filed in district courts in Illinois and Ohio by defendants. These actions were consolidated in the District Court for the Northern District of Ohio. Thirteen of the personal injury claims were settled before trial, as were three of the wrongful death claims, leaving seven personal injury claims and five wrongful death claims in this action. Pending a preliminary proceeding to determine whether punitive damages should be imposed on U.S. Steel Corporation, the defendants agreed to stipulate liability and submit to a determination of nonpunitive damages by court appointed commissioners. The district court's finding of punitive damages was reversed on appeal. United States Steel Corp. v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969), *cert. denied,* 398 U.S. 958 (1970).

37. Defendants argued that this award was not justified in any of the actions because there was no direct evidence of decedents' pain and suffering. In holding that no eyewitness account was necessary to sustain these awards, the court reasoned that because the collision between the two ships was "soft," the conscious pain and suffering of decedents trapped below the deck and washed overboard unobserved could be inferred. The court upheld awards of $5,000 for this item.

widows' loss of consortium, counsel and guidance, and for the adult emancipated children's loss of love, companionship and guidance, claimed under the Michigan statute against the Norwegian corporation. In striking down these items, the court said the precise issue "is whether the definition of pecuniary loss is to be governed by the principles of general maritime law or by Michigan law interpreting that state's death statute."[38] Noting that the Michigan Supreme Court had recently ruled that loss of love, companionship and guidance are not recoverable damages under the state wrongful death statute, the court disposed of this matter without discussion.[39] As to the awards for loss of consortium, well established under Michigan law, the court reasoned that recovery for this item conflicted with the general maritime law as expounded in the Jones Act and DOHSA. The court held, however, that it was no longer bound to give effect to state law in light of the overriding federal policy of *Moragne.* The court reasoned that *Moragne* had exclusively adopted the pecuniary standard implemented under DOHSA and the Jones Act, and therefore reversed the trial court on this point.[40]

Several decisions have followed *Lamp.* In *Petition of Canal Barge Co.*,[41] the decedent's personal representative was allowed damages for beneficiaries' actual pecuniary losses but denied recovery for beneficiaries' loss of society and companionship. The court cited *Lamp* for the proposition that *Moragne* did not require the adoption of "any different or greater measure of damages"[42] than already existed in

38. 436 F.2d at 1278.

39. At the time this action arose, Michigan courts allowed recovery for loss of love, companionship and affection. *See* Wyco v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960). Before the *Lamp* case was decided on appeal, however, the Supreme Court of Michigan, without overruling *Wyco,* held that pecuniary damages under the state's wrongful death statute do not include emancipated children's loss of love, companionship and guidance. *See* Breckson v. Franklin Fuel Co., 383 Mich. 251, 174 N.W.2d 836 (1970), *reviewed in* 48 J. URBAN L. 1014 (1971). The court offered no authority to support the denial of the children's loss of love and guidance in general federal maritime law other than its general adoption of DOHSA and the Jones Act.

40. "[T]he awards for loss of consortium were improper because the general maritime law does not recognize that as an element of pecuniary loss." 436 F.2d at 1278. The court cited Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963), for this proposition.

41. 323 F. Supp. 805 (N.D. Miss. 1971). This action arose when the tug piloted by deceased struck a piling that supported a bridge spanning the Mississippi River at St. Louis, Missouri, killing him instantly.

42. 323 F. Supp. at 821.

maritime law. The court in *Canal Barge* reasoned that Congress had already established the proper measure of damages in DOHSA and in the Jones Act and that "a national rule in computing damages"[43] required exclusive reliance on these established standards in the interests of uniformity. Any attempt to borrow from state models, the court concluded, would plunge the maritime law back into chaos. Uncertain of its holding, however, the court suggested that if *Moragne* indeed authorized general damages, then nonpecuniary damages in the amount of $60,000 would have been awarded, based upon the court's assessment of survivors' loss of "love and affection, companionship and society."[44]

Both *Lamp* and *Canal Barge* were cited with approval in *Mungin v. Calmar Steamship Corp.*,[45] in which the court applied "the usual measure of actual pecuniary loss" on the grounds that *Moragne* did not require the application of any different standard.[46] Accordingly, decedent's children were limited to the support and contributions they would have received during the remainder of decedent's expected lifetime.

In *Strickland v. Nutt*,[47] the Louisiana Court of Appeals held that the requirement of uniformity in maritime death actions, as expressed in *Moragne*, precludes "loss of love and affection as an element of damages here."[48] Appellants, suing in general maritime law and under the Louisiana wrongful death statute, argued reversible error in the trial court's refusal to consider loss of love and affection as compensable injury in making its award. In rejecting this argument the court noted that *Moragne* "indicated that the details of the new remedy would be jurisprudentially arrived at through analogy to the

43. 323 F. Supp. at 821.

44. "If the applicable law authorized general damages, the court, in such case, would find that the decedent and his wife were happily married for many years, and close and affectionate ties existed between him and his four children. Each member of his surviving family has sustained loss from being deprived of his love and affection, companionship and society. . . ." The court allowed "hypothetical" recovery in the amounts of $20,000 for decedent's wife and $10,000 for each of the four children, including an adult daughter who was estranged from her husband. 323 F. Supp. at 814.

45. 342 F. Supp. 479 (D. Md. 1972).

46. "In the absence of any indication from the Supreme Court that Moragne damages should differ from those generally permissible under existing statutory authority, and in the interest of insuring uniformity in maritime law, the usual measure of damages, actual pecuniary loss, will be awarded." 342 F. Supp. at 482.

47. 264 So. 2d 317 (Ct. App. La. 1972).

48. 264 So. 2d at 322.

federal wrongful death statutes [the Jones Act and DOHSA]. It is to these statutes that we must look to determine the elements of damage."[49] Thus, although Louisiana courts had long recognized the contested injury as compensable under the state's wrongful death statute, the appellate court upheld the trial court's determination because neither DOHSA nor the Jones Act permit recovery for this loss.

One other recent case, *Mascuilli v. United States,*[50] held that damages under *Moragne* are limited to a pecuniary standard. In arriving at this conclusion the court looked both to DOHSA and to the Pennsylvania wrongful death statute. The court reasoned that since both statutes employ a pecuniary damage standard, the pecuniary loss rule governed the instant case.[51] Instead of following DOHSA's refusal to allow recovery for funeral expenses, however, the court applied Pennsylvania precedent and included this item in its award to decedent's widow and children.[52]

III. Expanding Damages Under Moragne

A growing number of cases have approached the question of awardable damages in maritime wrongful death actions with a liberal perspective. In *Dennis v. Central Gulf Steamship Corp.,*[53] decedent's sole surviving relative sued in general maritime law and under Louisiana's wrongful death statute for decedent's pain and suffering, and for her own loss of support, loss of services and mental suffering. The court cited *Lamp* for the proposition that *Moragne* freed admiralty courts from applying state law in maritime wrongful death actions. The court in *Dennis* called for "a single national rule" for maritime damages that was potentially much broader than the

49. 264 So. 2d at 321.

50. 343 F. Supp. 439 (E.D. Pa. 1972).

51. "I believe that both the Pennsylvania Wrongful Death Act and the Death on the High Seas Act must be considered. Both allow recovery for 'pecuniary loss' sustained by decedent's family as a result of his death." 343 F. Supp. at 441.

52. The court noted that the Third Circuit has held that funeral expenses are not awardable under DOHSA, *see* The Culberson, 61 F.2d 194 (3d Cir. 1932), but suggests that "in view of *Moragne* and the majority view of the states, a contrary result might well be reached today." 343 F. Supp. at 442 n.5. For this point, the court cited Dennis v. Central Gulf S.S. Corp., 323 F. Supp. 943, 949 (E.D. La. 1971).

53. 323 F. Supp. 943 (E.D. La. 1971). Decedent, a nonseaman, fell from a hazardously designed ladder while inspecting defendant's ship. He lingered for 8 months, then died from injuries sustained in the fall.

standard borrowed from the Jones Act and DOHSA by the Sixth Circuit Court of Appeals in the *Lamp* decision. In *Dennis*, the court allowed damages for decedent's pain and suffering,[54] for the loss of his support[55] and services, and for funeral expenses.[56] On the grounds that plaintiff had offered no proof of actual mental suffering consequent upon decedent's death,[57] the court refused to grant damages for this item and declined to determine whether recovery for this type of injury should be permitted as a matter of law. The questions before the Court of Appeals for the Fifth Circuit[58] were whether the awards for funeral expenses and for decedent's pain and suffering were proper, and, on cross appeal, whether the refusal to permit recovery for plaintiff's alleged emotional distress was erroneous in light of *Moragne*. The court sustained the awards for damages but reversed the trial court for holding that *Moragne* automatically precluded federal courts from relying on state law. The court explained that the uniformity argument advanced in *Moragne* dealt "not with differing elements of damages"[59] but rather with the need

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54. The court reasoned that it was anomalous for decedent's daughter not to be able to recover what decedent himself could have recovered had he sued while alive. Finding no federal policy against allowing what was available under the Jones Act in general maritime law, the court accepted plaintiff's figure of $20,000 as reasonable compensation for decedent's pain and suffering.

55. The court adjusted the awards for financial support by the amount that would be taxed as decedent's gross income. The court in *Lamp* held that the district court had erred in subtracting projected taxes from financial support on the grounds that the impact of future taxes was too unpredictable to calculate in advance. In *Dennis*, the court allowed interest from the date of death rather than the date of the judgment; an opposite result was reached in *Lamp*. It appears that this matter is within the discretion of the trial court under DOHSA. *See, e.g.*, National Airlines, Inc. v. Stiles, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959).

56. The court reasoned that the overruling of *The Harrisburg* resurrected the case law predating that decision, which allowed recovery for funeral expenses in wrongful death actions. *See, e.g.*, Hollyday v. David Reeves, 12 F. Cas. 386 (No. 6625) (D. Md. 1879).

57. Defendant introduced evidence tending to show that plaintiff suffered from schizophrenia and mild retardation, which prevented her from entering into deep personal relationships.

58. 453 F.2d 137 (5th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3229 (U.S. Oct. 24, 1972). The Court felt it important to note that plaintiff's standing to sue on her own behalf, rather than as decedent's personal representative (as required by DOHSA and the Jones Act), had not been challenged, and was therefore not in issue.

59. 453 F.2d at 140.

to eliminate the various bases of liability fostered by *The Harrisburg*. Thus, the court concluded, federal courts may look to state law "and adopt it as the general maritime law if it is not inimical to the maritime law."[60] Noting that the awards for funeral expenses and decedent's pain and suffering were permitted in most state-created wrongful death actions, the court accepted the analogy and upheld the trial court.[61] The court agreed that this was not an appropriate case to consider whether damages for a survivor's emotional distress are awardable in general maritime law.

This question was reached and answered in the affirmative in *In re Sincere Navigation Corp.*[62] The court observed that state law undertakes to compensate the survivors' wounded feelings either directly, or by returning large verdicts for decedent's pain and suffering "in circumstances where its existence and intensity can only be conjectured."[63] Refusing to allow recovery for decedents' alleged pain and suffering because the evidence did not prove whether they had been conscious or had suffered appreciably, the court reasoned that it was both more accurate and more equitable to base damages upon the survivors' measurable injuries. In arriving at specific awards for survivors' emotional distress, the court implicitly examined the following factors: (1) the legal quality of the relationship between decedent and the beneficiary; (2) the social quality of the relationship based on evidence of closeness, manifested affection or estrangement, etc.; (3) proof of the survivor's grief and distress; and (4) special circumstances, such as the peculiar nature of the relationship, or the acuity of the emotional distress. Based on these indicia, the court awarded $25,000 to three widows; $5,000 to a widow who had separated from her husband; $25,000 to a widow and

60. 453 F.2d at 140.

61. The court did not rely exclusively on Louisiana law, which clearly allows the contested items, but looked to state law as an aggregate body of analogous law. Green v. Ross, 338 F. Supp. 365 (S.D. Fla. 1972), illustrates an attempt to synthesize *Dennis* and *Lamp*. The court noted that the federal maritime death action is to be liberally fashioned in the Fifth Circuit, but that this theme of liberality must be reconciled with the need to impose a uniform cause of action on maritime death cases. Thus, citing *Lamp*, the recovery sought for damages for loss of consortium and companionship were held to be "inimical to the maritime law." 338 F. Supp. at 367.

62. 329 F. Supp. 652 (E.D. La. 1971), *commented on*, 3 J. MARITIME L. & COMM. 823 (1972), 5 VAND. J. TRANSNAT'L L. 245 (1971).

63. 329 F. Supp. at 659. Decedents in the instant case were killed as a result of a ship collision on the Mississippi River caused by the operational negligence of both vessels.

$5,000 to each of her children; $20,000 to each parent of an unmarried decedent; and $25,000 to a mother who had suffered acutely.

In re Farrell Lines, Inc.,[64] also decided by the District Court for the Eastern District of Louisiana, adopted the reasoning and conclusions of *Dennis* and *Sincere Navigation*, and awarded damages for nonpecuniary injuries. This action arose from the death of an unmarried nineteen-year old midshipman at the Merchant Marine Academy who was killed as a result of a two-ship collision on the Mississippi River. Suit was brought under the general maritime law, the Jones Act and Louisiana's wrongful death statute. Emphasizing that damages depend upon proof of actual loss and injury, the court found no proof of parents' loss of care, advice and guidance.[65] Damages for decedent's conscious pain and suffering were restricted to evidence that he had been badly burned before he drowned; the fact that decedent's corpse was dismembered when recovered was not dispositive evidence of conscious pain and suffering and was therefore disregarded.[66] The court also allowed damages for funeral expenses, loss of financial contributions, and for the parents' loss of love and affection and emotional suffering.[67] In granting these damages, the court compared the decisions of *United States Steel Corp. v. Lamp* and *In re Sincere Navigation*. The *Lamp* court, it noted, had ignored the Supreme Court's dicta in *Moragne* that state wrongful death acts as well as federal statutes would be "persuasive analogy" in fashioning a maritime wrongful death remedy. Conversely, *Sincere Navigation*, which relied on state laws for guidance, permitted damages previously unrecognized in admiralty: "This is a more appealing result, especially when one considers that [nonpecuniary] damages are no less real and no less difficult to appraise than the decedent's pain and suffering prior to death which is allowed under the federal statutes."[68]

64. 339 F. Supp. 91 (E.D. La. 1971).

65. The court held that awarding prejudgment interest was within the court's discretion and allowed it. However, the court did not recognize plaintiffs' claims for the economic value of decedent's life, citing pre-*Moragne* federal and state precedents and suggesting that plaintiffs would be adequately compensated without recovering this item. *See also*, Clinton v. Ingram Corp., 455 F.2d 741 (5th Cir. 1972) (damages not recoverable for economic value of decedent's life).

66. The court allowed $10,000 damages for the burns the deceased had sustained prior to drowning.

67. The court found that the parents would suffer because their son was deceased, and awarded $25,000 to each parent.

68. 339 F. Supp. at 93-94. The court did not rely on Louisiana law, but rather looked to state laws in general to support its decision.

In *Smith v. Allstate Yacht Rentals, Ltd.*,[69] the Superior Court of Delaware recognized survivors' emotional distress as a compensable injury in general maritime law. In a closely reasoned opinion, the court noted that dicta in *Moragne* "indicates that there may be general principles" in state acts "which should be incorporated in a national standard for damages."[70] In this regard, the court criticized the decision of *Canal Barge* because it interpreted *Moragne* to mean that only the law of the adjacent state might be considered, rather than the aggregate trends and better remedies afforded by the states. The court in *Smith* cited *Sincere Navigation* with approval and reasoned that humane, rather than established but restrictive, principles should be adopted in determining the proper measure of damages in admiralty. The court therefore looked to the "national developments in the law regarding recovery for emotional distress"[71] and held that admiralty must compensate this injury, when proved, under its new cause of action.

Dicta in *Gaudet v. Sea-Land Services, Inc.*[72] suggests that the Fifth Circuit will continue to treat *Moragne* as allowing the development of a uniquely maritime cause of action. This case arose when decedent's widow brought a wrongful death action in general maritime law after decedent had recovered in a previous action for his personal injuries prior to his death. Defendant sought dismissal on two theories. First, defendant claimed that plaintiff was attempting to recover twice for the same wrongful act. The court rejected this claim on the ground that personal injury and wrongful death suits assert two distinct claims for two distinct losses. The first, the court explained, is based on the victim's suffering, while the second compensates the beneficiaries for their losses, and includes damages for "loss of support, loss of services . . . , loss of love and affection, grief or mental suffering of the survivors and funeral expenses."[73] Defendant argued secondly that recovery for the wrongful act in a personal injury case releases any further action based on the same wrongful act. The court admitted that merger occurred under a number of state statutes, but these, the court observed, were actually survival-type statutes, rather than true wrongful death statutes. The court declared that even if the rule of

69. 293 A.2d 805 (Del. 1972). This is an opinion on pretrial questions concerning jurisdiction and the applicable measure of damages in general federal maritime law.

70. 293 A.2d at 812.

71. 293 A.2d at 813.

72. 463 F.2d 1331 (5th Cir. 1972).

73. 463 F.2d at 1333.

merger were applied by the majority of states to both types of statutes, the Fifth Circuit would not follow it:

> In establishing a uniform rule for the operation of the wrongful death suit in admiralty, we have both the authority and the responsibility to espouse a minority rule if it better serves the purposes of the action. . . . [*Moragne*] reaffirms the "special solicitude" the admiralty court held for those coming within its jurisdiction.[74]

Accordingly, the *Moragne*-created action permits the courts to compensate victims for their total losses resulting from death.

IV. Toward a Uniform, Progressive Cause of Action

Cases addressing the question of damages recoverable under the *Moragne*-created cause of action fall roughly into two schools of thought. One approach emphasizes the need for uniformity in admiralty and adheres strictly to the pecuniary standard developed under the Jones Act and DOHSA. By equating the damages awardable in general maritime law with the standard already operative under existing federal law, this approach precludes the utilization by analogy of state law in determining damages. A second group of cases attempts to synthesize state law concepts and federal precedent into a uniform body of maritime damages law that is independent of any particular statute. Significantly, this dichotomy does not appear to be grounded in disagreement over the susceptibility of a particular type of injury to judicial assessment. Rather, the split of authority seems to derive from an even more basic disagreement over the scope of the *Moragne* decision itself.[75] Conflict in the area of damages is merely symptomatic of the judicial methodology in handling the cause of action recognized in *Moragne*.

Given this rather fundamental split in methodology, the crucial question is whether *Moragne*, in effect, merely extended the provisions of DOHSA to the shoreside of the three mile limit, or whether the decision in fact created a cause of action independent of federal statutes. Clearly the latter more accurately reflects the intent of

74. 463 F.2d at 1334-36.

75. This is evident in post-*Moragne* cases dealing with issues other than damages. Thus, in Futch v. Midland Enterprises, Inc., 344 F. Supp. 324 (M.D. La. 1972), which concerned plaintiff's standing to sue under general maritime law, the court reasoned that the uniformity mandated in *Moragne* is attainable only by applying federal law, *i.e.* DOHSA and the Jones Act, rather than the varying law of the individual states. 344 F. Supp. at 326.

Moragne. This, however, raises the further question of what policy considerations the courts should observe in administering this independent remedy. It is difficult to determine precisely what was contemplated by the Court in directing the lower courts to rely on the expertise they have developed in applying state and federal wrongful death actions to forge a new maritime remedy. Moreover, regardless of the precise motive that gave rise to the Court's refusal to define with specificity the rights it was carving out for maritime enforcement, the lower courts clearly have been given an opportunity to shape the scope of this remedy according to their best judgment.

In this connection, it is more helpful to consider the policies underlying the Court's disposition of *Moragne* than to analyze the literal meaning of the dicta in the Court's opinion. The legal problem giving rise to the *Moragne* decision was the absence of a uniform standard of liability in maritime death actions. This situation existed because in 1886, in *The Harrisburg*, the judiciary had foreclosed the right to bring a wrongful death action under general maritime law and was subsequently forced to implement diverse state and federal statutory remedies in order to fill this void. Consequently, the decision that a wrongful death action does lie in general maritime law, in the absence of statute, represents a deliberate decision by the Supreme Court to bring wrongful death actions arising on navigable waters completely within a revitalized maritime competence. Implicit in this assertion is the potential for reshaping the traditional federal wrongful death remedy that evolved under *The Harrisburg*. If the Court had been satisfied that DOHSA was the appropriate remedy, it could have incorporated the statutory provisions into the new cause of action and made them exclusive. However, the Court expressly declined to adopt DOHSA or any other statute as the maritime law in wrongful death cases. Although this posture does not imply any particular standard of damages, it does suggest a policy of freeing the courts from legislative restraints in order to fashion a more appropriate maritime remedy. Ultimately, this liberalization of the judicial process would produce a remedy "both simpler and more just," adhering to admiralty's traditional solicitude for seamen and their dependents—a wardship inconsistent with statutorily prescribed death actions.[76] Thus *Moragne* embodies the dual policies of insuring a

76. In criticizing the rationale in *The Harrisburg*, Justice Harlan in *Moragne* stated: "Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common

uniform cause of action in admiralty while providing for a progressive remedy commensurate with the hazards of maritime employment.

In deciding the elements of damages that may be awarded in a "*Moragne* action," the courts should bear in mind that in personal injury cases, admiralty affords the remedy of maintainance and cure. This remedy is considerably more liberal than that applied to injuries sustained in land-based pursuits under workmen's compensation laws. The courts also would do well to remember that by relying exclusively on DOHSA and the Jones Act in forging a substantial remedy in admiralty, they are applying a standard of damages that most states have either modified or rejected. For example, the pecuniary standard written into DOHSA can be traced to the common law construction of Lord Campbell's Act, which emerged while the law of torts was yet in its formative stages. Similarly, the pecuniary standard grafted onto the Jones Act is predicated on a 1913 FELA decision that turned on an instruction to a jury. Thus decisions such as *United States Steel Corp. v. Lamp* adopt as operative maritime law principles that were developed and later widely abrogated by the common law.[77] This does not appear consonant with the underlying purposes of *Moragne*.

Perhaps the reluctance of some courts to depart from the DOHSA and Jones Act standard of pecuniary damages derives from an aversion to offering speculative damages under this novel remedy. Yet, on balance, when one considers that admiralty has consistently awarded damages, even in the absence of direct evidence, for decedent's pain and suffering and mental anguish experienced prior to death, it is difficult to imagine why a survivor's demonstrable mental suffering cannot be approximated with equal accuracy. Moreover, the policy reason that fostered the pecuniary standard at common law was the

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law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." 398 U.S. at 386-87. *See In re* Industrial Corp., 344 F. Supp. 1311 (E.D.N.Y. 1972). In this case, a Jones Act action, the court applied state law to determine the filiation of decedent's allegedly illegitimate children. The court, noting that the Jones Act was silent on this subject, reasoned that remedies providing humanitarian and welfare benefits to seamen and their dependents should be "liberally construed to achieve maximum coverage. Especially after *Moragne* . . . anomalies and lapses in this protective shield must be avoided." 344 F. Supp. at 1317.

77. *See, e.g.,* Silverman v. Travelers Ins. Co., 277 F.2d 257 (5th Cir. 1960); Brooks v. United States, 273 F. Supp. 619 (D.S.C. 1967); Gallart-Mendia *ex rel.* Rosa-Rivera v. United States, 229 F. Supp. 284 (D.P.R. 1964); City of Tucson v. Wondergem, 105 Ariz. 429, 466 P.2d 383 (1970); Mathews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955); Stamper v. Bannister, 146 W. Va. 100, 118 S.E.2d 313 (1961); 48 J. URBAN L. 1014 (1971).

fear of jury extravagance—a consideration not compelling in an admiralty court sittting without a jury. Finally, the civil law,[78] from which admiralty derives many of its concepts, allows recovery for survivors' loss of love and affection and wounded feelings on the theory that these injuries are an integral part of their total loss. The cases that refuse to limit the scope of the maritime wrongful death action to DOHSA or the Jones Act but attempt to compensate fairly a beneficiary's proven total loss, both tangible and intangible, appear to offer a method of reconciling the need for maritime uniformity with the value of providing a liberal remedy to those whose livelihood depends upon the sea.

Stephen W. Ramp

78. *See* 6 M. PLANIOL & G. RIPERT, TRAITE PRACTIQUE DE DROIT CIVIL FRANCAIS § 546, at 753 (2d ed. 1952). Only the allowance of indemnification can assuage the distress resulting from the death of a loved one. *See also* 5 VAND. J. TRANSNAT'L L. 245, 248-50 (1971).

ALIENS—STATE RESTRICTIONS ON ALIEN LAWYERS

I. INTRODUCTION

Resident aliens in the United States traditionally have been protected in the courts from statutory discrimination based on alienage.[1] Both state and federal decisional law have established that state statutes creating classifications on the basis of alienage are constitutional only if the classification serves some compelling state interest and bears a rational relation to the purpose of the statute.[2] Recent decisions of the Supreme Court of Connecticut in *Application of Griffiths*[3] and the Supreme Court of California in *Raffaelli v. Committee of Bar Examiners*,[4] however, concern the power of a state to exclude aliens from the practice of law. Equal protection and supremacy clause[5] restrictions on state action pose a fundamental uncertainty concerning the extent of a state's power to deny aliens access to its bar.

II. EVOLUTION OF ALIENS' CONSTITUTIONAL RIGHTS

A. *The Alien and the Equal Protection Clause*

During the early 19th century resident aliens enjoyed the same privileges, rights and protections possessed by citizens.[6] American

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1. *See, e.g.,* Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

2. Classifications based on alienage, like those based on race or national origin, are inherently suspect. Graham v. Richardson, 403 U.S. 365, 372 (1971).

3. Conn. , 294 A.2d 281 (1972), *prob. juris. noted,* 40 U.S.L.W. 3576 (U.S. June 6, 1972) (No. 71-1336).

4. 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972).

5. The supremacy clause or preemption doctrine means that federal legislation, enacted pursuant to constitutionally derived authority, prevails over conflicting state law. U.S. CONST. art. I, § 8, cl. 4. *See* Graham v. Richardson, 403 U.S. 365, 377-78 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

6. The resident alien enjoyed the rights, privileges and protections possessed by citizens with the exception of some limitations on land ownership. *See* Comment, *Equal Protection and Supremacy Clause Limitations on State Legislation Restricting Aliens,* 1970 UTAH L. REV. 136. During the 19th century most states and territories permitted aliens the right to vote, but by 1928 laws were passed in every state disenfranchising aliens. *See* M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 1 (1946).

statutory generosity toward the alien diminished, however, as the nation became industrialized.[7] Fearing adverse effects from alien competition with domestic workers in the burgeoning labor markets, state legislatures began to restrict alien employment.[8] In 1889 the Supreme Court reacted to these discriminatory statutes by recognizing that aliens are persons entitled to equal protection of the laws guaranteed by the fourteenth amendment.[9] In *Truax v. Raich*[10] the Supreme Court invalidated an Arizona legislative classification that restricted the proportion of aliens employable by any employer to twenty per cent. The Court held that the ability of a state to make reasonable classifications under its police power does not allow the state to deny its lawful inhabitants the right to work in the "common occupations of the community"[11] because of their race or lack of citizenship. Nevertheless, the Court upheld a legislative classification

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7. For an analysis of state restrictions on aliens and the political conditions causing their adoption see M. KONVITZ, *supra* note 6, at 171-211. Representative legislation of the restrictions on aliens includes article XIX of the California Constitution: "The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the State, and the legislature shall discourage their immigration by all means within its power." CAL. CONST. art. XIX, § 4 (1879).

8. Opportunities for employment in the expanding American economy induced immigration, especially from Asia. Mr. Justice Field analyzed the motivation behind the restrictive legislation: "The competition steadily increased as the laborers came in crowds on each steamer that arrived from China .... [T]hey were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases by open conflicts .... In December, 1878, the convention which framed the present constitution of California ... took this subject up ... setting forth, in substance, that the presence of Chinese laborers had a baneful effect upon the material interests of the State, and upon public morals ... and was a menace to our civilization ...." Chinese Exclusion Case, 130 U.S. 581, 594-95 (1889).

9. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The fourteenth amendment to the United States Constitution provides: "... nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

10. 239 U.S. 33 (1915).

11. 239 U.S. at 41. Although the holding in *Truax* was not viewed as severely limiting the state's power to regulate harmful or antisocial occupations, it was the basis for later decisions that included within the category of "common occupations" many types of employment previously denied to aliens. *See* Comment, *supra* note 6, at 138.

based on alienage in *Ohio ex rel. Clarke v. Deckenbach*[12] because there was the "possibility of a rational basis for the legislative judgment."[13]

The Court in *Takahashi v. Fish & Game Commission*[14] resolved the dilemma created by the contradictory holdings of *Truax* and *Clarke.* In *Takahashi* the Court declared unconstitutional a California statute[15] that denied off-shore fishing licenses to noncitizens. The Court held that the classification denied aliens the equal protection of the law because there was no special public interest to justify the statute.[16] More significantly, the Court ruled that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[17] In *Purdy & Fitzpatrick v. State,*[18] moreover, the California Supreme Court declared a statute prohibiting the employment of aliens on public works projects to be unconstitutional. The Court interpreted *Takahashi* to mean that alienage is a suspect classification that requires a compelling state interest to be sustained and concluded that the state's interest in favoring citizens over noncitizens in its public works programs was not "such a compelling state interest that it would permit [the court] to sustain this kind of discrimination."[19] Similarly, the Supreme Court in *Graham v. Richardson*[20] struck down a Pennsylvania

12. 274 U.S. 392 (1927).

13. 274 U.S. at 397. Limiting the application of *Yick Wo v. Hopkins* to the proposition that the equal protection clause prohibited only "plainly irrational discrimination against aliens," the Court sustained a municipal ordinance prohibiting aliens from operating billiards halls. 247 U.S. at 396.

14. 334 U.S. 410 (1948).

15. CAL. FISH & GAME CODE § 990 (West 1945), *as amended,* CAL. STATS. 1947, c. 1329 (declared unconstitutional in *Takahashi*).

16. The *Truax* and *Takahashi* decisions imply that neither the state's proprietary interest in its resources nor the police power is sufficient to justify discriminatory regulation. "[D]iscrimatory regulations are now valid only when conforming with the rigid equal protection standards of the fourteenth amendment." *See* Comment, *supra* note 6, at 138.

17. 334 U.S. at 420.

18. 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

19. 71 Cal. 2d at 585, 456 P.2d at 658, 79 Cal. Rptr. at 90. Alienage has often been characterized as a suspect classification. *See, e.g.,* Note, *State Discrimination Against Mexican Aliens,* 38 GEO. WASH. L. REV. 1091, 1102 (1970). The United States Supreme Court in 1969 specifically cited *Takahashi* as an example of an inherently suspect classification. Kramer v. Union Free School Dist., 395 U.S. 621, 628 n.9 (1969).

20. 403 U.S. 365 (1971).

statute[21] that required a welfare recipient to be either a United States citizen or a resident in the United States for fifteen years. The Court conceded that under traditional equal protection principles a state has discretion to classify if its classification has a rational basis. However, the Court held, on the basis of its prior decisions, that classifications based on alienage are inherently suspect and, therefore, subject to strict judicial scrutiny.[22] Noting that aliens as a class represent a "discrete and insular" minority which must receive heightened judicial protection,[23] the Court found that the Pennsylvania statute was not serving a compelling state interest through its restrictive welfare policy.[24] The *Graham* Court first articulated the theory on which it was offering aliens this higher degree of judicial solicitude: alienage

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21. PA. STAT. ANN. tit. 62, § 342(2) (1968).

22. 403 U.S. at 376.

23. The Supreme Court of California explained the necessity for such strict judicial scrutiny. Because of the constant risk of prejudice "a special mandate compels us to guard the interests of aliens . . . . [P]articular alien groups and aliens in general have suffered from such prejudice. Even without such prejudice, aliens in California, denied the right to vote, lack the most basic means of defending themselves in the political processes. Under such circumstances, courts should approach discriminatory legislation with special solicitude." Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 580, 456 P.2d 645, 654, 79 Cal. Rptr. 77, 86 (1969). The courts have extended this constitutional protection to the receipt of governmental social benefits as well as to occupations. *See, e.g.,* Graham v. Richardson, 403 U.S. 365 (1971); Chapman v. Gerard, 456 F.2d 577 (3d Cir. 1972) (exclusion of alien student from a scholarship fund held unconstitutional); Dougall v. Sugarman, 330 F. Supp. 265 (S.D.N.Y. 1971) (statute preventing aliens from applying for civil service positions held to offend the equal protection clause); Hosier v. Evans, 314 F. Supp. 316 (D.V.I. 1970) (refusal to permit the children of alien temporary workers to enroll in the local public school system held violative of the equal protection clause).

24. 403 U.S. at 372. The Court utilized two different tests to examine the constitutionality of a classification in the light of the equal protection clause. The traditional test invalidates classifications only if they have no rational justification and are purely arbitrary. *E.g.,* Dandridge v. Williams, 397 U.S. 471 (1970). *See also* 44 TUL. L. REV. 363, 365 (1970). Under the traditional test a classification is not arbitrary if any set of facts reasonably can be conceived that would justify the classification. The second and more rigorous test requires the state to demonstrate that the classification is necessary by reason of a compelling state interest. The compelling state interest test is applied in two situations: classifications affecting fundamental rights, *e.g.,* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (fundamental right of interstate travel), and classifications that are deemed inherently suspect, *e.g.,* Loving v. Virginia, 388 U.S. 1, 11 (1967) (classification based on race). *See* 10 DUQUESNE L. REV. 280, 281 (1971).

being a suspect classification, the burden of proof is on the state to justify its statutory treatment of aliens; the statute can be justified, moreover, only upon demonstration that it is serving a compelling state interest,[25] as distinguished from the mere rational relationship standard applied to determine the constitutionality of nonsuspect classifications or those not affecting an individual's fundamental rights.[26]

B. *State Restrictions on Aliens and the Supremacy Clause*

State legislation affecting aliens must not conflict with the federal government's exclusive and plenary foreign relations power, including the power to regulate immigration and the power over commerce with foreign nations.[27] Thus the Supreme Court held in *Truax v. Raich* that the Arizona statute involved denied aliens the opportunity to gain employment although they were lawfully admitted to the state.[28] The Court reasoned that because one cannot live where he cannot work, Arizona, in effect, was denying the alien the right to enter and live in the state. The result of such a practice, the Court observed, would be that aliens lawfully admitted to the United States under the authority of acts of Congress could not enjoy the full range of the privileges conferred by the admission, but would be segregated into those states affording hospitality. Similarly, the Supreme Court in *Takahashi* held that a restriction on alien employment was an unconstitutional interference with the federal immigration power.[29] Noting the

25. *See, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944). The Court sustained an exclusion of Japanese resident aliens and Japanese-Americans from certain areas of the country. Although finding the classification suspect and invidiously discriminatory, the Court said that the exclusion was justifiable because of the compelling state interest of protecting the nation in a time of war.

26. *See, e.g.,* Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961); Flemming v. Nestor, 363 U.S. 603 (1960).

27. *See* Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941). The Court struck down a Pennsylvania statute on grounds of federal preemption. "[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." 312 U.S. at 66-67. The federal government has exclusive authority in areas of foreign affairs. U.S. CONST. art. § 8, cl. 4. When California began to harass Japanese aliens early in the 20th century by enacting alien land laws and similar discriminatory measures, a critical international situation developed. *See* M. KONVITZ, *supra* note 6, at 187.

28. *See* notes 10 & 11 *supra* and accompanying text.

29. *See* notes 14-17 *supra* and accompanying text.

breadth[30] of the federal government's foreign relations powers relating to aliens the Court said:

> [T]he states are granted no such powers; they can neither add to nor take away from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.[31]

In 1971 the Supreme Court in *Graham v. Richardson*[32] observed that Congress has enacted a comprehensive statutory plan[33] for the regulation of immigration and naturalization and has granted to aliens lawfully admitted to the United States the full and equal enjoyment of all the nation's laws.[34] Moreover, the Court stressed that aliens lawfully within the United States have a right to enter and live[35] in any state on an equal basis with other citizens of that state under nondiscriminatory laws.[36]

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30. The federal government determines what aliens to admit, how long they may remain, and how to regulate their conduct before naturalization. *See* note 33 *infra* and accompanying text.

31. 334 U.S. at 419.

32. *See* notes 20-26 *supra* and accompanying text.

33. 8 U.S.C. § 1182(a)(14) (1970). Current immigration laws require that before aliens may enter the United States, their employability must be considered as well as the effects of their projected employment upon American labor markets. Aliens seeking entry into the United States will be excluded unless the Secretary of Labor concludes that there are insufficient workers available to perform their trade or skill in the area in which they plan to reside and also that the employment of such aliens will not have an adverse effect on wages and employment in that area.

34. The United States Supreme Court has noted that Congress has declared: " 'All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .' 42 U.S.C. § 1981. The protection of this statute has been held to extend to aliens as well as to citizens." 403 U.S. at 377.

35. The Court declined to decide whether aliens have a fundamental right of interstate travel. *See also* Shapiro v. Thompson, 394 U.S. 618 (1969) (the Court held that citizens have a fundamental right of interstate travel); Truax v. Raich, 239 U.S. 33, 42 (1915) (the Court noted that in order for the alien to be able to live in a state, he must be permitted to work there).

36. 403 U.S. at 378.

C. *The Alien and the Practice of Law*

The Supreme Court of California in *Large v. State Bar of California*[37] held that the citizenship requirement for admission to the bar was not discriminatory, and therefore not violative of the fourteenth amendment, because the citizenship requirement was a reasonable and proper exercise of the state's police power. To support the reasonableness of the discriminatory requirement, the court cited *Ex parte Thompson*[38] for the proposition that the requirements of citizenship were directly related to an effective practice of law, and held that the exclusion of aliens was reasonable and hence constitutionally permissible.[39]

In 1957 the United States Supreme Court, in the companion cases of *Schware v. Board of Bar Examiners*[40] and *Konigsberg v. State Bar*

37. 218 Cal. 334, 23 P.2d 288 (1933).

38. 10 N.C. (3 Hawks) 355 (1824). The court in *Ex parte Thompson* was called upon to interpret a statute enacted in 1777 by the North Carolina General Assembly (c. 19 § § 7-8 Acts of 1777). The court considered only whether there was a legislative intent to exclude aliens from the North Carolina bar. There was no constitutional inquiry and, of course, the equal protection clause was not yet in existence. The North Carolina Supreme Court ruled that citizenship was indeed a prerequisite for admission to the bar; the court questioned the ability and the willingness of alien attorneys to comprehend or apply the principles of the common law which may be antithetical to the principles of law upon which they may have been nurtured. The court concluded by explaining that it was difficult to understand "how, on many occasions, the most brilliant forensic talents can be successfully exerted, unless they are sustained and inspired by an ardent patriotism." 10 N.C. (3 Hawks) at 363.

39. The court found support in previous cases that had determined that the right of the state to exclude aliens was premised upon the grounds that the practice of law is a privilege and not a right, and that an aspirant upon his admission to the bar becomes an officer of the court who should certainly be a citizen. *See In re* Hong Yen Chang, 84 Cal. 163, 24 P. 156 (1890); Templar v. State Examiners, 131 Mich. 254, 90 N.W. 1058 (1902); Wright v. May, 127 Minn. 150, 149 N.W. 9 (1914); *In re* Admission to the Bar, 61 Neb. 58, 84 N.W. 611 (1900); *Ex parte* Thompson, 10 N.C. (3 Hawks) 355 (1824).

40. 353 U.S. 232 (1957). In *Schware* the Court held that the Board of Bar Examiners of New Mexico had deprived the petitioner of due process in denying him the opportunity to qualify for the practice of law. The petitioner had disclosed in filing his application with the Board of Bar Examiners that he had used certain aliases from 1934 to 1937, that he had been a member of the Communist Party from 1932 to 1940 and that he had been arrested a number of times during the 1930's. The Board of Bar Examiners rejected his application to take the bar examination on the ground that he lacked the requisite moral character for admission to the bar. The Court held that his aliases, arrests and

of California,[41] established that a person seeking to enter the practice of law "comes clothed with the protections of the Fourteenth Amendment."[42] Acknowledging the state's power to require high qualification standards for admission to the bar, the Court cautioned that the qualification must be reasonably directed toward the candidate's fitness or ability to practice law. The Court emphasized that a state cannot exclude a candidate if there is no rational basis for finding that he fails to meet the standards established or if the state's action is invidiously discriminatory.[43]

Subsequently, in 1971, the Alaska Supreme Court in *Application of Park*[44] held that there is no reasonable relationship between alienage and an attorney's moral fitness or capacity to practice law.

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former membership in the Communist Party did not warrant exclusion of petitioner from the practice of law.

41. 353 U.S. 252 (1957). Petitioner in *Konigsberg* was denied membership in the California bar on the grounds that his alleged Communist Party membership and his allegedly unpatriotic or disruptive editorials, which were critical of United States participation in the Korean War, had raised doubts about the petitioner's good moral character and whether he had not advocated the violent overthrow of the Government. The Court held that the denial of petitioner's application to practice law on such grounds was a violation of the due process and equal protection clauses.

42. 7 Cal. 3d at__, 496 P.2d at 1268, 101 Cal. Rptr. at 900, *citing* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). In *Schware* and *Konigsberg* the Court did not discuss whether the practice of law is a privilege or a right, reasoning that regardless of the state's characterization of the grant of permission to engage in this profession, it is clear that one cannot be prevented from practicing law except for valid reasons. In 1971 the Court decided this question: "The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character." Baird v. State Bar of Arizona, 401 U.S. 1, 8 (1971).

43. Some federal district courts have recently invalidated state statutes requiring that an applicant to the practice of law reside in the state in question for a specified period of time prior to applying for admission. *See* Potts v. Honorable Justices of the Supreme Court, 332 F. Supp. 1392 (D. Hawaii 1971); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970); Keenan v. North Carolina Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970). The courts in each of these cases held that "the residence requirement had no 'rational relationship' to the applicant's fitness to practice law, and hence constituted arbitrary and invidious discrimination in violation of the equal protection clause." 7 Cal. 3d at __, 496 P.2d at 1268, 101 Cal. Rptr. at 900. *Cf.* Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972).

44. 484 P.2d 690 (Alas. 1971). The court noted that the Supreme Court of Alaska, under its state constitutionally derived judicial power, was the proper body to prescribe the standards for admission to the bar. The court struck down

The Alaska court concluded that it would not require that an applicant to the bar be a citizen.[45] The court, however, expressly declined to consider the equal protection attack upon the citizenship requirement. A significant factor in the court's decision was that the alien applicant intended to become a citizen and could, therefore, honestly take the constitutional oath. The Supreme Court of Washington in *In re Chi-Dooh-Li*[46] held that an alien applicant to the bar could not be denied access to the bar solely because of his alienage, basing its decision on the separation of powers doctrine. The court reasoned that the rules governing bar membership were a matter of judicial, and not legislative, competence, and that, therefore, the Washington statute[47] barring alien participation in the legal profession was not controlling. The Washington court also refused, however, to decide the equal protection and supremacy clause issues.

III. Recent Decisions

In *Application of Griffiths*[48] an alien filed a petition for a decree that she be permitted to take the Connecticut bar examination and be declared eligible for admission to the practice of law. She alleged she had complied with all the requirements for admission to the bar except that she was not a United States citizen. Petitioner did not intend to become a citizen.[49] The Superior Court for New Haven County denied the petition, finding that petitioner did not meet the

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the legislative requirement as a violation of the separation of powers concept; the judiciary should choose the standards for attorneys since attorneys are part of the judicial system.

45. The court rejected all of the following arguments purporting to justify the citizenship requirement: the profession requires an appreciation of the spirit of American institutions; the alien cannot take the necessary oath to support the Constitution; war between the United States and the alien's country might necessitate the seizure of the alien with resultant injury to his clients; diversity of citizenship might remove the alien from control of the bar; difficulty of training civil law attorneys in the common law; the practice of law is a privilege and not a right which the alien can claim; the attorney is an officer of the court and, as such, should be a citizen. Application of Park, 484 P.2d at 692.

46. 79 Wash. 2d 561, 488 P.2d 259 (1971).

47. WASH. REV. CODE ANN. § 2.48.190 (1961).

48. ___ Conn. ___, 294 A.2d 281 (1972).

49. 8 U.S.C. §§ 1427(f), 1430(a) (1970). Although she readily could have gained citizenship because of her marriage to a United States citizen, petitioner had chosen to remain a citizen of the Netherlands. She had not filed and did not intend to file a declaration of intent to become a United States citizen.

requisite qualification of being a United States citizen.[50] The Supreme Court of Connecticut affirmed, holding that the rule excluding aliens from admission to the bar was based on a reasonable classification, did not deny the petitioner equal protection of the laws, and did not contravene the exclusive federal power over immigration. The court reasoned that under Connecticut law an attorney is more than a lawyer who conducts law suits for clients, or who advises in matters relating to the law, emphasizing that an attorney in Connecticut is charged with unique duties in the administration of the judicial system.[51] Observing that an alien is a person entitled to the equal protection of the law, the court recognized that absent overt or invidious discrimination against a class in a statute, the test of a statute's constitutional validity was one of reasonableness. The court concluded that the direct nexus between United States citizenship and the administration of justice in Connecticut established the reasonableness of the requirement. The court, however, did consider the petitioner's argument that *Takahashi v. Fish & Game Commission*, *Purdy & Fitzpatrick v. State* and *Graham v. Richardson* had held classifications based on alienage to be inherently suspect, and that such classifications can be sustained only if they serve some compelling state interest. Nonetheless, the court held that even if the citizenship requirement must serve a compelling state interest to be valid, the requirement must be upheld in this case as "basic to the maintenance of a viable system of dispensing justice under [Connecticut's] form of government."[52] The court also analyzed petitioner's claim that the citizenship requirement was unconstitutional as a violation of the supremacy clause. Agreeing that the federal government has exclusive power in the field of immigration and that state laws that impose discriminatory burdens upon the alien's capacity to

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50. Practice Book 1963, § 8, subd. 1. The first requirement of § 8 of the rules of the Superior Court governing admission to the Connecticut bar provides that the applicant must be a United States citizen.

51. The court stressed that in Connecticut a lawyer is also a commissioner of the superior court, is authorized by statute to sign writs, issue subpoenas, administer oaths, and furthermore is privileged to command sheriffs and constables to issue orders "[b]y authority of the state of Connecticut." ___ Conn. at ___, 294 A.2d at 284. The court also observed that newly admitted members of the Connecticut bar are required to take not only the traditional oath demanded of attorneys but also the oath required by the Constitution of Connecticut of state legislators, judicial officers and executive officials.

52. ___ Conn. at ___, 294 A.2d at 287. The implication of the court's statement is that the citizenship requirement is a necessary method of serving the compelling state interest of maintaining Connecticut's judicial system.

enter or reside within the United States are unconstitutional as a violation of the supremacy clause, the court nonetheless sustained the citizenship requirement. It reasoned that the preemption doctrine in this case requires that a state cannot unreasonably interfere with the alien's right to participate in the economic and social benefits of the American community. The reason for the preemption doctrine, according to the court, is that restrictive state statutes, by segregating aliens into states that have not enacted such restrictive policies, thwart the federal regulatory scheme promoting the mobility of aliens within the United States. The court concluded that because the exclusion of alien attorneys from the Connecticut bar would have such a minimal effect on the general balance of the alien population in the United States, there was no conflict with the federal power over immigration.[53]

In *Raffaelli v. Committee of Bar Examiners,*[54] petitioner, a resident alien, had sought admission to the practice of law in California. The Committee of Bar Examiners refused to certify petitioner upon the sole ground that he was not a citizen of the United States.[55] The court found that petitioner was a citizen of Italy, but would become eligible for naturalization in 1974.[56] The California Supreme Court held the statutory exclusion of aliens from the practice of law in California to be unconstitutional because it constituted a denial of equal protection of the law. The court

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53. The court cited Ohira & Stevens, *Alien Lawyers in the United States and Japan—A Comparative Study,* 39 WASH. L. REV. 412, 414-15 (1965). The study cited by the court reports: United States citizenship is a specific prerequisite for admission to the bar in 37 states and the District of Columbia; 6 additional states demand citizenship, although there is apparently no specific requirement; by legislation or court rule, aliens who have declared their intention of becoming citizens are eligible for admission to practice law in five states; and that in only two states, Tennessee and Virginia, is a resident alien admitted to the bar without an indication that he intends to become a United States citizen. The court in *Griffiths* thus concluded that any discouraging effect of the Connecticut citizenship requirement would have little influence on the alien population since aliens desiring to practice law are excluded in all but two states.

54. 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972).

55. CAL. BUS. & PROF. CODE § 6060, subd. (a) (West 1962).

56. Admitted as a foreign student, petitioner was permitted to remain in the United States until his education was completed. Petitioner earned a bachelor's degree from San Jose State College in 1966, and a law degree from the University of Santa Clara School of Law in 1969. In September, 1969, he passed the California bar examination. Since that time petitioner had married a United States citizen and by reason of that marriage he received the status of permanent resident alien in 1971.

observed that an alien is a person entitled to the equal protection of the law,[57] and that classifications based on alienage are suspect.[58] Therefore, the court determined that the statutory exclusion of aliens from the bar would be valid only if the exclusion could be shown to be essential to the accomplishment of a compelling state interest. The court found that the petitioner had acquired a sufficient appreciation of American institutions to practice law: he had resided in the United States for ten years, received his undergraduate and legal education in California, and passed the California bar examination. Conceding that the statutory requirement of an oath to support the Constitutions of the United States and of California is constitutionally permissible,[59] the court rejected the argument that an alien could not in good faith take the oath. The court noted that a resident alien may be conscripted into the armed forces of the United States where he must take an oath swearing to defend the United States against all enemies, foreign and domestic,[60] and that the alien pays taxes to and has his home in the state where he resides. Therefore, the court concluded, an alien has a sufficient interest in the well-being of the United States to pledge sincere support of the Constitution.[61]

IV. Analysis of Griffiths and Raffaelli

The *Griffiths* and *Raffaelli*[62] decisions indicate that the various state considerations concerning admission to the bar depend upon the

57. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

58. Graham v. Richardson, 403 U.S. 365 (1971); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

59. Law Students' Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971).

60. 10 U.S.C. § 311 (1970).

61. The court reasoned further that the alien attorney would be as accessible to his clients as an attorney who was a citizen, that the practice of law is not a privilege but a right to be extended to any one who is qualified by his education and moral fitness, and that the fact that the lawyer is an officer of the court does not mean that an alien attorney could not also be an effective officer of the court. The court expressly distinguished *Griffiths* on the ground that "under Connecticut law a member of the bar is much more than a lawyer in the usual sense of the word." 7 Cal. 3d at ____ , 496 P.2d at 1274 n.10, 101 Cal. Rptr. at 906 n.10.

62. The *Griffiths* and *Raffaelli* decisions reveal the impact on the practice of law of the recent tendency of the courts to subject any legislative classification based on alienage to intense judicial scrutiny. Both cases recognize that *Graham* holds that alienage, like race, is a suspect classification and that such a classification can be sustained only upon a demonstration that it is a necessary means of serving a compelling state interest.

applicant's status as either a citizen, an alien intending to become a citizen, or an alien intending to retain his nationality. Petitioner in *Griffiths* intended to remain a citizen of the Netherlands, while petitioner in *Raffaelli* intended to become a United States citizen. Because of Raffaelli's intention to become a citizen, the California Supreme Court had little difficulty in extending the *Graham* decision to the practice of law. Petitioner in *Raffaelli* possessed fundamentally all of the requisites that the citizenship requirement seeks to insure for membership in the bar.[63] The similarity of petitioner's status to the qualifications of citizenship facilitated the court's decision to eliminate the statutory discrimination. The Connecticut court, however, was confronted with a factual situation that made it difficult to invalidate the court rule excluding aliens from the bar. Another difficulty in the latter case is that the Connecticut lawyer is charged with great responsibilities unique to Connecticut and essential to the practice of law in that state. The court in *Griffiths* stated that "[i]n the case before us not only is the petitioner not a United States citizen but she made it clear that she has no intention of applying for such citizenship."[64] The court implied that alienage, regardless of the applicant's intention to become a citizen, is a justifiable standard upon which to exclude persons from the bar. This sub silentio conclusion contradicts the *Graham* holding. The *Griffiths* court's implication that aliens intending to become citizens must be excluded from the bar is dictum, the precedential value of which is minimal. The court in *Raffaelli* distinguished *Griffiths*, not because the alien applicant to the Connecticut bar did not intend to become a citizen, but upon the premise that the lawyer in Connecticut has unique responsibilities and duties—responsibilities and duties not charged to California attorneys. Also, it is unclear whether the court in *Raffaelli* would have invalidated the citizenship requirement if the alien applicant had intended to remain an alien.

An individual determination by the state of each applicant's capacity and moral fitness to practice law, regardless of his alien or citizenship status, would be a more desirable procedure. The *Raffaelli* court sanctioned this procedure. The court weighed the various characteristics and qualifications of the alien applicant to the bar and properly found them to be consonant with the goals that the citizenship requirement was designed to achieve. The most troublesome case under this procedure would arise when the alien bar applicant intends to remain an alien and seeks to practice law in a

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63. *See* note 56 *supra*.

64. ____Conn. at____, 294 A.2d at 287.

state where a lawyer's role encompasses quasi-governmental duties. The court in *Griffiths* was faced with this situation. The various determinants of the alien's capacity and moral fitness to practice law should include whether he intends to remain in the United States, whether he has demonstrated a basic understanding of the American legal system, and whether the attorney in the state in which the alien seeks to practice law is charged with unique governmental duties.[65] The salient feature of this procedure is the individual examination of each applicant, as contrasted with the automatic exclusion of an entire class. The *Griffiths* court erred in upholding the exclusion of the entire alien population from the bar, and its decision is inconsistent with the state's interest in utilizing the talents of all of its residents in lawful and productive occupations.[66] Under the *Griffiths* rationale, an alien is preemptorily denied the opportunity to practice law even if he has served in the armed forces, has received the finest legal education in the country and has contributed for many years to the Connecticut community. Clearly the exclusion of an alien from the bar under these circumstances is discrimination without purpose or legal justification.

Underlying the discussion of the constitutionality of the exclusion of aliens from the practice of law is the imprecise concept of citizenship. The *Griffiths* court did not establish the relationship between citizenship and professional legal competence; instead, the court stated merely that an alien who did not intend to become a United States citizen was not capable of bearing the unique burdens of public responsibility charged to a Connecticut lawyer. This conclusion fails to examine why an alien is incapable of performing even these unique duties. Once the alien applicant to the bar has demonstrated his good moral character and legal acumen, he should be permitted to practice his profession and to serve his clients and his community.

The supremacy clause may provide a useful instrument for the alien applicant to the bar in his attempt to invalidate the citizenship requirement. The rationale of the court in *Griffiths* was that the exclusion of aliens from the Connecticut bar would not affect a significant proportion of the alien population in the United States. Aliens desiring to practice law are, nevertheless, deterred from entering or residing in Connecticut by the citizenship requirement. Such deterrence is contrary to the *Truax*, *Takahashi* and *Graham* holdings, which prohibit a state from denying aliens employment in lawful occupations of the community, thereby denying them also the

65. *See* note 51 *supra* and accompanying text.

66. *See* Fisher & Nathanson, *Constitutional Requirements in Professional and Occupational Licensing in Illinois*, 45 CHI. BAR REC. 391, 397 (1964).

right to enter and reside in that state. Only the federal government may place limitations upon immigration, and hence, by implication, upon alien residence.

V. Conclusion

The extent to which a state is limited by the equal protection and supremacy clauses in excluding aliens from the practice of law depends on the individual circumstances of the alien applicant and the nature of the state's judicial system. The court in *Raffaelli* found that the petitioner's qualifications were consistent with those that the citizenship requirement sought to insure for membership in the bar. On the other hand, the court in *Griffiths* sustained the court rule excluding aliens from the bar because petitioner did not intend to become a citizen and because the Connecticut attorney assumes a role essential to the administration of Connecticut's judicial system. Unfortunately, the language of the *Griffiths* opinion denies all aliens, even the alien who can make an effective contribution to the practice of law, access to the bar. The *Raffaelli* case, however, invalidates the automatic exclusion of all aliens from the practice of law. *Rafaelli* establishes a sound policy of requiring an assessment by the state, on an individual basis, of each applicant's capacity and moral fitness to practice law, regardless of his status as an alien or as a citizen. Courts deciding the constitutionality of citizenship requirements for bar membership ought to adopt the *Raffaelli* theory. The exclusion of persons from the practice of law solely because of their alienage is unconstitutional. Alienage and the lawyer's duties are merely factors to be considered in the individual determination of each applicant's legal capability and moral character.

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